

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672
2063 SCOMM 78: SENATE SPEC. COMM. ON OIL & GAS, 1991-1992

81

Offshore waters	18 hours
Ocean waters	36 hours

COAST GUARD COUNSEL'S COMMENT. Concern has been expressed by one member of the Committee about the need for onboard carriage of submersible pumps. Not all response equipment must be carried aboard the vessel, only that which is practicable. The proposed regulations would require carriage of sorbents, scoops, etc. to remove on-deck spills. It is also proposed that an emergency towing package be carried aboard tankers. Pumps may be carried upon the response vessel and still satisfy the requirement of 4202(a)(6).

Section XXX.04 EMERGENCY TOWING CAPABILITY

- A. Ocean-going and coastal tank barges shall carry an emergency tow wire or line rigged and ready to be used.
- B. The NPRM shall propose two options pertaining to tankers for public comment. The options are listed as OPTION #1 and OPTION #2 as follows:

OPTION #1

- 1. Tankers shall comply with the recommendations of IMO Resolution A.535(13) with regard to provision of strong point, fairlead, chafing chains and fittings to facilitate passing the towing pendant from the rescue vessel using the rescue vessel's power.
 - a. All tankers 50,000 dwt and greater shall be fitted with emergency towing arrangements at the bow and stern within 3 years of the date of this regulation.
 - b. All tankers between 20,000 dwt and 50,000 dwt shall be fitted with emergency towing arrangements on at least one end of the vessel within 3 years of the date of this regulation.

2. The PREAMBLE of the proposed regulation shall include language that promotes the evaluation and eventual (within 2 years) design of an emergency towing package which will facilitate the rescue vessel's taking the tanker under tow with a minimum of crew involvement in deployment. The evaluation is to include considerations for maintenance and the costs and requirements for retrofitting. The language will propose that IMO reissue Resolution A.535(13) with any new requirements that IMO agrees upon.
3. Existing vessels at least 20 years of age shall be exempted from this requirement for 5 years from the effective date of this regulation.

OPTION #2

1. Tankers shall comply with the recommendations of IMO Resolution A.535(13) with regard to provision of strong point, fairlead, chafing chains and fittings to facilitate passing the towing pendant from the rescue vessel using the rescue vessel's power. All tankers 20,000 DWT and above shall comply within 3 years of the date of publication of this regulation.
2. The U.S. Coast Guard, in conjunction with the United States shipping and towing industries, and the international shipping and towing industries undertakes to evaluate arrangements for stowage and deployment of towing pendants, and within 18 months will promulgate a minimum design specification taking into account the following factors:

- a. On at least one end of the vessel, a system to enable storage and deployment of an emergency towing arrangement on a vessel without power.
 - b. With chafing chain pre-rigged, or system designed for deployment of chafing chain without crew physically handling.
 - c. A typical pendant wire of approximately 400 feet (120 meters) of 2½ to 3 inch (64 mm to 76 mm) diameter 6 x 37 to 6 x 41 extra improved plow steel, IWRC, galvanized.
 - d. A 600 foot (183 meter) messenger line with pick-up buoy.
 - e. The design must allow for the chafing chain and pendant wire to be pre-connected.
 - f. System designed so that deployment in an emergency, on a vessel with no power (deadship), requires no more than three individuals.
3. Once the minimum design specification has been promulgated, an approved system is to be fitted to all new tankers of 20,000 tonnes dwt and above. The system should also be fitted to existing tankers of 50,000 tonnes dwt and above within three years.
 4. The Coast Guard, supported by the involved shipping and towing industry, will forward a minimum design specification to the International Maritime Organization with the proposal that IMO Assembly Resolution A.535(13) be updated and re-issued to include the recommendations for pendant wire carriage arrangements.

5. Existing vessels at least 20 years of age shall be exempted from this requirement for 5 years from the effective date of this regulation.
6. Existing arrangements, such as those for TAPS-trade vessels to be "grandfathered".

Section XXX.05 DAMAGE STABILITY CALCULATION PROGRAMS

- A. Owners or operators of tankers, ocean-going tank barges and coastal tank barges shall have prearranged, prompt access to onboard or shore-based damage stability and residual structural strength calculation resources. Vessel baseline strength and stability characteristics must be pre-entered into such programs. Access may be maintained through shoreside communications.

XXX.06 TANK VESSEL-CARRIED SPILL TRACKING DEVICE

- A. The Preamble to the rule will recommend that the USCG R&D Center, Groton, undertake and complete research, development and evaluation, within 2 years of the date of this rule, of a suitable design and use of a simple spill tracking device, acceptable for Coast Guard approval, to facilitate location of the leading edge of an oil spill by a first response vessel, even in darkness and adverse weather. The preamble will recommend the use of OPA funds for this research.
Information provided by the Cook Inlet RCAC relative to a oil spill tracking device will be provided to the U.S. Coast Guard Research and Development Center for evaluation in the research and development process.

27 March 1992

- B. No later than 3 years after the date of this rule, tank ships and ocean-going tank barges shall carry such a Coast Guard approved device for deployment at the time of a spill if such a device is proven reliable. Tank vessels would be required to carry spill tracking device(s) as approved by the Coast Guard.

REGULATORY LANGUAGE

Sec. XXX.00 Contractor Approval

(a) This section defines the process for approval of response contractors.

(b) Contractor approval does not in any way relieve the plan holder of the plan holder's responsibility to carefully evaluate and select competent contractors.

(c) It is recognized that the capability needed in a particular response will vary, involving dozens of factors, some of which cannot be accurately measured or predicted. For evaluation and quantification purposes, assumptions must be made regarding these factors. Many of these assumptions may not prove accurate or valid in any particular spill response. Many assumptions also are beyond the control of a particular responder. Accordingly, this regulation carefully avoids any intimation that various planning assumptions or response values are, or ever should be, viewed as performance standards.

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

(i) **"Approval"** means the process by which the President's designee will verify a contractor's oil spill response services, including the related inventory of available spill response equipment and personnel and its management in order to facilitate the statutory requirement for the President's designee to approve or disapprove tank vessel and facility response plans.

(ii) **"Letter of Approval"** means the final document issued following verification, inspection and final review by the reviewer.

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

(iv) **"President's designee"** means the federal official delegated responsibility by the President under OPA-90 for approval of response plans. Pursuant to the authority delegated in Executive Order 12777 (56 FR 54757) and 49 CFR 1.46.m the authority to review and approve or disapprove tank vessel response plans is assigned to the Commandant of the Coast Guard. The

Commandant has delegated responsibility for approval of response contractors to various reviewers under this rule.

(v) "Response contractor" means any person or persons who provide designated response equipment and services, individually or in combination with subcontractors or associated contractors, under contract or other means approved by the President directly to an owner or operator of a tank vessel or facility required to have a response plan under 33 U.S.C. 1321(j)(3). Response contractors must have the ability to mobilize and deploy their identified resources. Persons solely warehousing or storing equipment are not response contractors.

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

(vii) "Evaluation" means the process whereby the Coast Guard evaluates a response contractor and assigns a value to that contractor's resources for purposes of estimating the response capability which may be credited toward a planholders total response requirement in the Coast Guard review of response plans for approval or disapproval.

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

Sec. XXX.01 Contractor Approval Application Content

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

(i) Contractor's name, mailing address and phone number;

(ii) The specific response services being offered for approval;

(iii) The port area location(s) of all spill response resources, and the areas in which spill response services using each resource is being offered;

- (iv) List the number(s) and type(s) of oil spill removal equipment and trained personnel, including subcontracted resources, for whom the applicant had contractual responsibility during the most significant oil spills (up to ten).
 - (v) List the number(s) and type(s) of oil spill removal equipment and trained personnel, including subcontracted resources, for whom the applicant had contractual responsibility during the most recent oil spill drills (up to five).
 - (vi) An organizational diagram depicting the chain of command;
 - (vii) A call-out list for the contractor's resources, and a description of the call-out procedure;
 - (viii) For each type of service, the types of oil to which the contractor is willing and able to respond;
 - (ix) For each type of service, the planned mobilization time for that resource; and
 - (x) For each type of service, limitations on the circumstances under which that service may be offered.
- (b) **Equipment.** For each type of service, the specific significant equipment available to be applied to that service, including:
- (i) Type, quantity, and port-area location;
 - (ii) Whether the equipment is owned or under contract;
 - (iii) If the equipment is contracted from another party, the application must identify:
 - (A) the equipment's port area location and area of operation; and
 - (B) the contractual terms regarding availability of the equipment to the contractor.
 - (iv) A statement of the maintenance program for such equipment;
 - (v) Confirmation of the availability of operators required to operate the equipment over a sustained response (i.e., 30 days);
 - (vi) For each piece of equipment, a description of: the make, type by design, size by design, and applicable design limits (e.g., suitability for different types of oils and operating environments, as related to adverse weather);

(vii) A description of contractor's communications equipment, including the amount and frequencies and number of certified operators, where applicable;

(viii) For any equipment not located in the COTP zone/Port Area for which approval is sought, attestation that the equipment is transportable and available for use in a response;

(ix) A description of the readiness for mobilization of response resources and whatever further description is necessary to attest to the contractor's ability to mobilize, deliver, and deploy response resources.

Equipment shall be listed only if it is in a fully operable condition. Future equipment, ordered but not yet delivered and fully operable, may be listed, but it must be listed and identified separately with its date of availability indicated.

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

(1) list by job category;

(2) match to the equipment list and the services offered, including the plan for mobilization of personnel;

(3) list training and qualifications, including OSHA Hazardous Operations training, the number of trained supervisors and laborers, and how additional personnel are planned to be trained within what timeframe if they will be required to meet the service listed.

The application shall also list the total personnel available.

(d) **Management.** The application shall identify the management associated with the service(s) offered. This capability should include a discussion of spill response training and experience, regulatory awareness and compliance, and supervision.

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

(i) **Boom control/containment/protective booming services**

- (A) Describe the platforms for deployment (i.e. number/type); and,
- (B) Type and amount of equipment (e.g., 2000' of offshore boom/vessel).

(ii) On-water recovery services

- (A) recovery platform (for owned-vessel and vessel of opportunity recovery systems):
 - (1) name of vessel;
 - (2) size/class;
 - (3) location; and,
 - (4) contract terms of availability.
- (B) skimming (on-water) recovery system:
 - (1) type by design;
 - (2) size by design;
 - (3) manufacturer's nameplate capacity; and
 - (4) applicable design limits (e.g., suitability for different types of oil and different operating environments, as related to adverse weather).
- (C) personnel trained to operate the equipment:
 - (1) position description; and
 - (2) training or experience.

(iii) Shoreline remediation services

- (A) number of persons available for beach cleanup who are currently trained
- (B) the process by which additional people can be trained and the number of people who can be trained in what timeframe
- (C) description of supplies/support for beach cleanup
- (D) Other removal equipment (i.e. shallow water skimmers, beach cleaners, etc.)

(iv) Transfer/storage services

- (A) type and capacity of storage/transfer facilities (MATCH TO SKIMMING CAPACITY)

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

(g) **Agreement for Inspection and Participation in Drills to Validate Approval.** The contractor shall state that the

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

(h) **Self assessment.** A response contractor may submit with the contractor's application any other information which the applicant believes may be of use to the Coast Guard in evaluating the applicant's services. The Coast Guard may assign a value to that contractor's services for purposes of informing response plan preparers of the credit that the Coast Guard expects to give for that contracted service in its review of the response plan.

(i) **Mobilization.** The contractor shall state the time for initial mobilization of its resources.

Section XXX.02 Contractor Approval Application Procedure.

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

(provide filing addresses)

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

Section XXX.03 Contractor Application Review

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

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

(c) **Review for approval.** Following inspection and review of any drills or exercises, or information from other sources as necessary to verify the application and complete a detailed review of the application, the reviewer shall either approve or disapprove an application, in accordance with the standards in paragraph (d). Approval may be denied

if information in the application is false, or if the contractor fails to meet the approval criteria for approval of any services.

(d) Following initial review, or at any time thereafter, including after approval, the reviewer may advise the response contractor in writing of the value of the contractor's service as it relates to response plan requirements. The contractor or the Coast Guard may provide this advice to plan preparers to assist them in assembling sufficient response resources to meet their planning obligation in a particular area. The value assigned will reflect:

- (1) location of the response resources;
- (2) type of service(s) provided;
- (3) the quantity of these service(s); and
- (4) personnel and equipment resources.

(e) **Standards for review.** Letters of approval shall be issued to response contractors subject to the following conditions:

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

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

(f) **Inspections of Certified Equipment.** To ensure that approval standards are maintained, the Coast Guard or its designee shall verify, by site inspection, that equipment and personnel resources are available, operable and maintained. Such inspections may be random but must occur at least once every three years.

Section XXX.04 Appeals and Notices

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

(b) **Notice of Significant Reduction in Contracted Resources.** The reviewer shall identify significant reductions in specific equipment, personnel or management that require notification to the COTP where the equipment or

personnel are located. An approved response contractor must provide notice to the COTP of such reductions in advance, if planned, or within 24 hours of becoming aware of such change, if unplanned. This notice may be oral, followed by writing within a reasonable time, or in writing, by facsimile or letter. The reviewer will maintain and make available to the contractors and plan holders detailed guidance on the types of changes that require notification.

Section XXX.05 Renewal and Revocation

(a) Renewal.

(1) Approval shall be for a period of 5 years. A contractor must file an application for renewal prior to the expiration of the approval. The contractor shall remain approved until the reviewer acts on the application.

(2) Approval may be renewed at the request of the contractor in the event of sustained and significant increase or decrease in response resources.

(b) Revocation. Failure to comply with the requirements of approval may result in revocation or suspension of the letter of approval. Examples of such failure may be fraudulent self-attestation or other failure to comply with the conditions of approval as identified in Sections XXX.00 through XXX.05. (Exact procedure to be added).

DRAFT LANGUAGE TO IMPLEMENT ADVERSE WEATHER/ EQUIPMENT
CAPABILITY FOR PLANNING¹

1. For the purposes of determining the recovery capacity of skimming equipment for response plan credit, the following method will be used. This method takes into account potential limitations in effectiveness due to the daily operating period, weather, sea state, and other variables to determine a daily recovery rate for credit in a vessel response plan or contractor approval. The Coast Guard may assign a lower efficiency factor to particular equipment listed in a plan if it determines that the performance of that equipment warrants such a reduction.

$$R = T \times 24 \text{ hours} \times E$$

R - Effective daily recovery rate
T - Skimmer pump or belt throughput rate in barrels per hour (nameplate capacity)
E - 20% Efficiency factor

2. As an alternative to the above method, the vessel owner/operator or contractor can submit adequate evidence that a higher effective daily recovery rate should be credited for a specified piece of oil recovery equipment. Adequate evidence is actual verified performance data in spill conditions or tests using ASTM Standard F 631-80, F 808-83 (1988), or any other equivalent test procedure that is determined by the Coast Guard as the result of public notice and comment. The following method will be used to calculate the effective daily recovery rate using this alternative:

$$R = D \times U$$

R - Effective daily recovery rate
D - Average Oil Recovery Rate in barrels per hour (Item 26 in F 808-83; Item 13.1.15 in F 631-80; or actual performance data)
U - Hours per day that vessel owner/operator or contractor can document capability to operate equipment in spill conditions.²

¹ This information, would be included either in regulatory text, preamble explanation, or Coast Guard guidance document as appropriate.

² Ten hours per day will be used to calculate the effective daily recovery rate unless a vessel owner/operator can demonstrate that the recovery operation can be sustained for more than 10 hours per day.

3. In addition to submitting information on the make and model and effective daily recovery rate (if applicable) of the equipment, the vessel owner/operator or contractor shall submit information that categorizes the operating environment that the equipment is designed to successfully perform it's mission and be safely operated by personnel. The following criteria will be used for this categorization (extracted largely from Schultz catalog with some modifications).

SKIMMERS

<u>Operating Environment</u>	<u>Significant Wave Height*</u>	<u>Sea State</u>
River	< 1 foot	1
Inland	< 3 feet	2
Ocean	< 6 feet	3-4
Great Lakes	< 4 feet	2-3

*Note: The significant wave height figures above are intended to classify skimmers by distinguishing the range in which they are intended to operate. Thus the skimmers designed to operate in the ocean environment are intended to operate in wave heights ranging from 3-6 ft.

BOOM

<u>Boom Property</u>	<u>Use</u>			
	<u>River</u>	<u>Inland</u>	<u>Great Lakes</u>	<u>Ocean</u>
Significant Wave Height	<1	<3	<4	<6
Sea State	1	2	2-3	3-4
Boom height - in.*** (draft plus freeboard)	10-18	18-42	XX-XX	>42
Reserve Buoyancy to Weight Ratio	2:1	2:1	XX***3:1 to 4:1	
Total Tensile Strength - lbs.	4,500	15-20,000	XX***	>20,000
Skirt Fabric Tensile Strength - lbs.	200**	300**	XX***	500**
Skirt Fabric Tear Strength - lbs.	100**	100	XX***	125

**Note: For rivers (calm water) these values are somewhat arbitrary, however even for general use in rivers (calm water), the skirt material should be relatively strong.

***Note: No Committee recommendation. To be determined by Coast Guard.

4. In addition to the operating environment criteria indicated above, the vessel owner/operator or contractor shall certify that the equipment is designed to operate in the ice, debris, temperature, and weather-related visibility conditions identified as significant by the Area Committee/Area Plan.

5. The term adverse weather must still be defined for the purposes of the regulation. Recommended definition:

"Adverse weather means the weather conditions that will be considered when identifying response systems and equipment in a response plan for the applicable operating environment. Factors to consider include significant wave height as specified in 155.xxx and ice, temperature, weather-related visibility, and currents for the Area that the systems or equipment are intended to function."

6. The definition of the geographic areas are as follows. The definitions apply for Adverse Weather/ Equipment Capability.

(a) *Open ocean* means the area greater than 50 nautical miles from the shoreline. It is recognized that operations in this area will pose a lower risk to the nation's coastline and that an accident occurring within this area will require a greater time for response. Vessels operating at least 50 miles out are given credit for these operations and have lesser requirements for removal equipment capacity.

(b) *Offshore* area means the area 12 to 50 nautical miles from the shoreline. This area would have the next level of requirement for response capability.

(c) *Nearshore* area means the area 0-12 nautical miles from the shoreline. Due to prevailing tides, winds, and currents, this area poses a greater risk of spilled oil coming ashore. For on-water removal to be effective, a quicker response time will be required. Further, because a greater volume of spilled product may hit the shore, lesser amounts of the product are presumed to be lost to the environment, and a greater shoreline capacity must be demonstrated.

(d) *Ocean* means the area >0 miles from the shoreline which includes the open ocean, offshore area, and nearshore area.

(e) *Inland* area means the area shoreward of the boundaries defined by 46 CFR Part 7, except for the boundaries in the Gulf for Mexico which are defined in 33 CFR §§ 80.740 - 80.850. Inland area includes bays, harbors, estuaries, inland lakes, or other protected shoreline environments except for the Great Lakes and rivers and canals.

(f) Rivers and canals means confined bodies of water within³ the inland areas that have a controlling navigable draft of [12] ft. or less, including the Intracoastal Waterway and other waterways artificially created for navigation.

(g) Great Lakes means the Great Lakes and their connecting and tributary waters including the Calumet River as far as the Thomas J. O'Brien Lock and Controlling Works (between mile 326 and 327), the Chicago River as far as the east side of Ashland Avenue Bridge (between mile 321 and 322), and the Saint Lawrence River as far east as the lower exit of Saint Lambert Lock.

7. Vessel owners and operators must identify response equipment that is designed to operate in the operating environment specified for the applicable geographic area that the vessel will operate. The Captain of the Port may reclassify specific water bodies or locations within the COTP zone to a more stringent operating environment if the prevailing wave conditions exceed the significant wave height criteria over [XX%]³ of the year. The Captain of the Port may also reclassify specific water bodies or locations within the COTP zone to a less stringent operating environment if the prevailing wave conditions are less than the significant wave height criteria over [XX%]³ of the year. The preamble will note that the Captain of the Port will identify any waterbodies within the COTP zone that will be reclassified within 3 months of the publication of the final rule. Any such reclassification will also be identified in the applicable Area Contingency Plan. For example, Prince William Sound, although classified as an inland area, could be reclassified by the COTP as an ocean area for the purposes of identifying response equipment if the prevailing significant wave heights exceeded 3 feet over [XX%]³ of the year.

8. The operating environment criteria specified are intended for use solely for identification of appropriate equipment in response plan development and evaluation. These criteria only reflect conditions that would limit the use of certain mechanical response equipment and are not conditions that would necessarily limit response actions or affect normal vessel operations.

³ To be determined by Coast Guard and subject to notice and comment.

FINAL REPORT
APPLICABILITY OF REQUIREMENTS TO VARIOUS TYPE TANK VESSELS
MARCH 18, 1992

Workgroup #5 was established by the Negotiated Rulemaking Committee to address the legal application and scope of response plan requirements for non-petroleum oil carriers and for vessels that are not carrying oil as primary cargo, in bulk. This workgroup assumed its charge in recognition of the fact that the definition of "tank vessel" under 46 U.S.C. § 2101 would be decided ultimately in a legal determination by the Coast Guard.

The final product of the workgroup (Appendix A) is a proposal for preamble language to govern the applicability of vessel response plan requirements to certain types of vessels. The document is based upon and reflects a synthesis of the concepts developed by the workgroup as summarized in the interim reports provided at each meeting. It is important to note, that because there was concern by a number of parties that the workgroup was exceeding the scope of its directive, the workgroup agreed to refrain from addressing any further vessels considered to be primary carriers of oil cargoes (i.e., tankers and tank barges).

Furthermore, it should be noted that the all representatives of state governments and environmental organizations on the Committee have expressed no objection to excluding fishing vessels, tugs, offshore supply vessels and other vessels subject to the provisions of 46 CFR 30.01-5, from the definition of "tank vessel" under OPA-90. However, in keeping with the spirit of OPA-90, it was agreed that technical amendments, consistent with the vessel response plan requirements for secondary carriers of oil set forth in Section XXX. 01 (B) of the proposed preamble language, as attached, should be effected to 33 CFR Part 151 for these vessels.

Items of Consensus¹

Recognition of the importance of vessels, other than tankers and tank barges, not being defined as a "tank vessel"; and recognition that a requirement for certain types of vessels to maintain response plans may be appropriate and that this requirement in and of itself is not in dispute.

Recognition that response plan requirements should be based on the potential for risk to the environment and that such risk can be determined by the type and quantity of oil being carried in bulk as cargo.

¹ See also pages 3 & 4.

All vessel response plans must address the requirements outlined and as mandated by OPA. However, it is recognized that the stringency of these requirements can be varied and should increase with risk posed to the environment.

The concept of vessels carrying oil as primary cargo versus vessels carrying oil as secondary cargo.

The concept that a vessel constructed or adapted to carry oil should not be required to maintain a response plan unless that vessel is actually carrying oil as cargo by virtue of an endorsement or otherwise.

Vessel types identified for potential reduced plan requirements/exclusion: fishing vessels, fishing tenders and processors, cargo ships, tugs, response vessels, offshore supply vessels, passenger vessels, ready reserve fleet.

Vessels of opportunity, dedicated response vessels when operating in the response area, and public vessels should not be required to maintain response plans.

Other Considerations

In the full Committee meeting of January 9-10, 1992, the Coast Guard gave a brief overview of Annex I, Chapter IV, Regulation 26 of the International Convention for the Prevention of Pollution From Ships (1973), as modified by the Protocol of 1978 (MARPOL). At that time, it was indicated that the Coast Guard would like compliance with "Regulation 26" to signify compliance with a part of OPA 90. This idea was not addressed by the Workgroup.

STRINGENCY OF PLAN ELEMENTS
FOR VESSELS NOT CARRYING OIL AS PRIMARY CARGO, IN BULK

Key

A=Category of vessel (< 100 bbls)
B=Category of vessel (101-1,000 bbls)
C=Category of vessel (1,001-5000 bbls)
N=Operator required to give notice of change
X=Coast Guard approval of change required

1. Notification List

A-Notify the National Response Center/State/EPA
B-Notify the National Response Center/State/EPA
C-Notify the National Response Center/State/EPA

2. Qualified Individual

A-Must name
B-Must name
C-Must name

3. Drills

Vessel Personnel

A-annually
B-quarterly
C-quarterly

Company Drills

A-biannually
B-annually
C-annually

4. Training

A-Initial training when assigned & drills as specified
B-Initial training when assigned & drills as specified
C-Initial training when assigned & drills as specified

5. Testing of Equipment (covered by other workgroup)

6. Resource Available

A-Formal contract not required
B-No agreement
C-No agreement
Agreed no contract required for offshore and ocean areas

7. Response Management
(Levels of readiness)
 - A-Responsible party or contractor (local resources only)
 - B-Responsible party or contractor (local resources only)
 - C-Regional response effort
8. Procedures
 - A-Notification and basic emergency action checklist
 - B-Description of damage control, cargo control, actions to mitigate
 - C-Detailed description of damage control, cargo control, actions to mitigate
9. Consistency with NCP/ACP
 - Applies to all vessels equally
10. Periodic Update
 - A-Vessel certificate renewal
 - B-Vessel certificate renewal
 - C-Vessel certificate renewal
11. Resubmit
 - Every five years or when significant changes occur requiring C.G. approval
 - Major changes include:
 - Vessel configuration for vessels A-C
 - Major cargo system (N)
 - Cargo capacity or layout (X)
 - Capabilities (X)
 - Operating area
 - A & B vessels (N)
 - C vessels (N)
 - Qualified individual
 - A-C vessels (N)
 - Response resources
 - A - C vessels (N)
 - Emergency response procedures
 - A - C vessels (N)
 - Nature of vessel's operations for vessels A-C
 - If change in category then X
 - If no change in category then N

PREAMBLE LANGUAGE

The following is being proposed by Workgroup #5 of the Negotiated Rulemaking Committee as preamble language regarding the applicability of vessel response plan requirements to certain types of vessels. It is important to note that this proposal is based solely upon the Coast Guard's preliminary interpretation of the definition of a "tank vessel" for purposes of response plan requirements only and in no way reflects an endorsement of the Coast Guard's interpretation by any member of the Committee. Furthermore, any numbers contained within this document are for illustrative purposes only and should not be construed otherwise.

General Applicability of Vessel Response Plan Requirements

1. Primary and Secondary Carriers of Oil

At the outset, it should be noted that these regulations relate to oil only and do not include requirements relative to hazardous substances. Thus, for purposes of defining response plan requirements for tank vessels as defined under 46 U.S.C. § 2101, it is appropriate to establish levels of response plan requirements based upon the potential for harm to the environment caused by discharges of a vessel's oil cargo. This potential for harm to the environment is determined by the type and quantity of oil being carried in bulk as cargo by the tank vessel. For vessels carrying oil as their primary cargo, it is appropriate to require a more comprehensive response plan than for vessels carrying oil as secondary cargoes. The rationale for different response plan levels for tank vessels includes the following:

(A) **Volume of oil** - Vessels constructed or adapted to carry oil, or that are carrying oil, as a primary cargo are tankers or tank barges. These vessels carry much larger cargo quantities than vessels that may carry oil as secondary cargoes. The majority of vessels² that may carry oil as secondary cargoes include tugs, offshore supply vessels, and fishing vessels. The oil that is carried by these vessels is a small quantity of fuel oil for transfer to offshore platforms or barge-mounted engines or other vessels.

(B) **Type of oil** - Nearly all marine transportation of persistent oil is on vessels carrying oil as a primary cargo. Conversely, the oil carried on vessels carrying oil as a secondary cargo is nearly always non-persistent oil in the form of refined products and distillate fuels that dissipate rapidly from the environment through evaporation and natural dispersion. Insufficient information exists to determine an approach to non-petroleum oils, however, the concept of classifying these oils as

² Needs to be quantified.

persistent or non-persistent may also be applicable.

(C) **Cost/benefit** - The Oil Pollution Act of 1990 requires response plans for tank vessels. It is, however, recognized that there is another class of vessels that in the spirit of OPA, should be required, because they do carry some oil, to maintain response plans reflective of the level of threat posed to the environment. It is further recognized, that in spite of carrying this oil, some vessels do so in such small volumes and on such an infrequent basis that they present a level of risk that is so low that there is little benefit in requiring response plans of them, and therefore, an exclusion from the requirement for response plans may be appropriate. This is also in keeping with the belief that the priority for the review of response plans can be most effectively and efficiently employed by maximum attention to vessels which present the greatest threat of significant oil spills--primary carriers of oil.

Oil spill incidents involving vessels such as tugs, oil field supply vessels, and fishing vessels which do not carry oil as a primary cargo historically have not produced spills that have created as significant or extensive damage as the large spills that occur from tank vessels which are primary carriers of oil. The population of vessels that may carry some oil as a convenience for the customer of the primary service is estimated at up to 5,228 tugs, 1,800 oil field supply vessels, 30,000 documented and 100,000 undocumented fishing vessels, and 150 passenger vessels. It is recognized that there is also an undetermined and changing number of cargo ships that from time to time carry oil as secondary cargo.

There is concern, therefore, that the requirement for tank vessel response plans under OPA-90 potentially creates onerous and unintended requirements for these vessels which are not primary carriers of oil in bulk. These unintended requirements could include, but are not limited to, those that would increase levels of financial responsibility and liability; and impose manning, inspection and construction standards inappropriate to this group of vessels.

In any event, it should be made clear that it is not the intent of these regulations that the inclusion of these vessels for purposes of response plan requirements, whether or not under the authority of OPA-90 § 4202, should have any effect on the applicability of any other requirements. Therefore, it is recognized that if such requirements are necessary, they are to be established in regulation on their own authority and are not invoked through the requirement for tank vessel response plans pursuant to OPA-90.

II. Applicability to Response Vessels

In general, this proposed response plan rule does not apply to oil spill response vessels. Response vessels are vessels

engaged in oil spill response activities and response related escorting. Such vessels include vessels which are normally involved in other trade/usage (i.e., vessels of opportunity) and dedicated response vessels including escort vessels. The rule does apply, however, to dedicated response vessels that are involved in the transportation of the recovered oil outside the response area.

OPA spill response planning requirements apply to a "tank vessel" as defined under 46 U.S.C. § 2101, which is a vessel that is "constructed or adapted to carry, or that carries oil or hazardous material in bulk as cargo or cargo residue, and that is a vessel of the United States, or operates on the navigable waters of the United States, or transfers oil or hazardous material in a port or place subject to the jurisdiction of the United States."

The Coast Guard has not previously interpreted the § 2101 definition with respect to response vessels. The essence of the tank vessel definition is the "carriage of oil in bulk as cargo." Carriage of oil as cargo connotes transportation of goods or merchandise. Recovery of oil, on the other hand, is essentially distinct and separate from the transportation of goods or merchandise. Once oil is spilled into the water it temporarily loses the characteristics of cargo until such time as it is recovered, consolidated and transported outside the response area. Response vessels are compensated not for transporting oil or oil residue, but rather for collecting oil from the water as a pollution control activity. They therefore do not carry oil in bulk as cargo. However, if response vessels go beyond the pollution control function to engage in transportation outside the response area and consolidation efforts, then the vessel may be subject to response plan and certification requirements.

The Coast Guard believes this interpretation is reasonable and consistent with the purposes of OPA. First, there is no need for dedicated response vessels or vessels of opportunity, operating within the response area to prepare response plans. The vessel or facility responsible for the spill for which a response vessel will respond already must have a comprehensive response plan described in these proposed rules. This plan must, among other things, address various contingencies or response activities within the area of the response effort. Any recovered oil spilled during the cleanup effort in the response area would be managed as part of the overall spill recovery response for the initial spill.

Second, the primary purpose of these response plan requirements is to ensure that adequate personnel and equipment will in fact be available to respond to an oil spill from a tank vessel. However, application of these response plan requirements to response vessels involved only in spill response within the response area serves no significant purpose. The resources available to respond to a spill from a particular response vessel

would be small in comparison to the resources that would already have to be present and active in response to the initial spill. So no additional response resources are likely to be needed to mount an adequate and effective response.

Third, if a responder must prepare a plan that names some other responder, then that other responder would likewise need a plan naming yet another responder, and so on in an endless loop of overlapping response plans. Such an approach is not logical or useful. The planned-for contingency becomes too remote and speculative.

Finally, many potential response vessels, particularly vessels of opportunity which otherwise may not be subject to response plan requirements under OPA-90, would simply not be available for use in response activities if by so doing these vessel owners would be designated a tank vessel and required to have their own response plans under OPA-90. If so, fewer response resources would be available for large spills. This would be contrary to the purpose and intent of Congress to use response plan requirements to increase available response resources. The fact that a vessel of opportunity is involved in spill response will not affect its applicability with respect to any requirements under this rule, except as otherwise specifically required by law.

Consequently, unless oil transportation is being conducted outside the response area, there is no carriage or transportation of oil as cargo and the rule is inapplicable. However, if a dedicated response vessel transports oil outside this response area, the activity shifts from "response" to "transportation," and the response vessel becomes subject to this rule.

Section XXX.00 - Definitions for Purposes of This Subpart

- (A) "Vessels Carrying Oil as Primary Cargo" means tank vessels carrying oil as cargo in bulk commercially as the primary mission of the vessel. This would include tankers, tank barges, bunker ships, chemical carriers when they are carrying an oil cargo, and other vessels subject to 46 U.S.C. § 3702 and having certificates of inspection as tank vessels under 46 CFR Subchapter D (except for dedicated response vessels), Letters of Compliance, or Tank Vessel Examination for foreign vessels.
- (B) "Vessels Carrying Oil as a Secondary Cargo" means vessels, other than tank vessels, that carry oil as a secondary cargo as a convenience for the customer of the primary service of the vessel or pursuant to an endorsement to the vessel's certificate of inspection under 46 CFR Subchapter D (30.01-5).
- (C) "Bulk definition" [To be defined by Coast Guard]
- (D) "Cargo definition" [To be defined by Coast Guard]
- (E) "Response Activities" means the containment and removal of oil from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the environment.
- (F) "Response Area" means the COTP zone or a sector of the COTP zone, whichever is smaller, in which the spill response is occurring or, for the State of Alaska, the sector areas designated by the COTP.
- (G) "Dedicated Response Vessel" means a vessel whose service is limited to oil and hazardous substance spill response-related activities, including spill recovery and transport, deployment of spill response equipment, supplies and personnel, and spill response-related training, testing, drills, and research.
- (H) "Vessel of Opportunity" means a vessel that is normally and substantially involved in activities other than spill response and not involved in carriage of oil in bulk as a primary cargo, such as a fishing vessel or offshore supply vessel.

Section XXX.01 - Application of Response Plan Requirements

³ Must be modified to include all proper citations, including those pertaining to nonpetroleum oils such as 33 CFR 151.47 and 46 CFR 153.900.

- (A) Vessels carrying oil as primary cargo are required to submit response plans which meet the requirements of this part:

[To be provided by the USCG]

- (B) Vessels carrying oil as secondary cargo are required to submit a response plan which will meet the requirements of this part (including and in accordance with requirements agreed to in previous sessions of the workgroup):
- (1) Notification
 - (2) Consistency with the area contingency plan and national contingency plan.
 - (3) Identification of a qualified individual as described in § 4202a(5)(C)(ii) of OPA.
 - (4) Identification of qualified spill response resources and/or contractors.
 - (5) Emergency response procedures for vessel personnel:
 - a) For vessel carrying 100 bbls. or less - notification and basic emergency action checklist.
 - b) For vessels carrying between 100 and 1,000 bbls. - description of damage control, cargo control, actions to mitigate.
 - c) For vessels carrying over 1,000 bbls. - detailed description of damage control, cargo control, actions to mitigate.
 - (6) A training program to instruct the vessel crew and qualified individual on the vessel response plan including:
 - a) Initial training when assigned; and
 - b) Drills as specified below.
 - (7) Conduct of drills with the vessel crew and identified qualified individual as follows:
 - a) Vessel personnel -- Quarterly for vessels carrying more than 100 barrels of oil as cargo in bulk or cargo residue; Annually for vessels carrying 100 barrels or less.
 - b) Company drills -- Annually for vessels carrying more than 100 barrels of oil as cargo in bulk or cargo residue; Biannually for vessels carrying 100 barrels or less.
 - (8) A revised response plan will be submitted every five

years or when significant changes occur which require U.S. Coast Guard approval. Significant changes are:

- a) a change in cargo capacity or layout; or
- b) a change in vessel configuration affecting capabilities.

Notification only is required when changes occur relative to the following:

- a) cargo system;
- b) operating area;
- c) qualified individual;
- d) response resources;
- e) emergency response procedures; or
- f) nature of vessel's operations.

- (C) This rule applies to a dedicated response vessel only when such vessel transports oil in bulk outside a response area, in which case the dedicated response vessel shall be considered a vessel carrying oil as secondary cargo under paragraph (B), above. The involvement of a vessel of opportunity in a spill response will not affect its applicability with respect to any requirement under this rule.



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

March 20, 1992

The Honorable Sam Cotten
Alaska State Legislature
P. O. Box V
Juneau, Alaska 99811

Dear Senator Cotten:

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

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

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

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

Cook Inlet Regional Citizens Advisory Council

11355 Frontage Rd. • Suite 228 • Kenai, Alaska 99611 • (907) 283-7222 • FAX (907) 283-6102

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

Sincerely,

A handwritten signature in cursive script that reads "Ken Castner".

Ken Castner
Cook Inlet RCAC
Board of Directors

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

Summary of

ALYESKA PIPELINE SERVICE COMPANY
COMMENTS

ON

IMPROVING LIMITED RESPONDER
IMMUNITY

**ALYESKA PIPELINE SERVICE COMPANY
COMMENTS
IMPROVING LIMITED RESPONDER IMMUNITY**

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

LDW56/cas

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

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

Comments:

- This COC recommendation relies upon an erroneous legal opinion. Under federal law, Alyeska and the holders of the grant of right-of-way across Alaska for pipeline construction and operation are not liable for spills from tank vessels. In any event, limited responder immunity is not available for those who are responsible parties.
- Under the comprehensive liability framework created by Congress, vessel owners and operators carrying oil transported through the pipeline are strictly liable, along with the Trans Alaska Liability Fund, for damages, including cleanup costs, resulting from discharges of oil from their vessel.
- None of the seven pipeline companies that own TAPS, or Alyeska which operates it on their behalf, own, operate, or charter tankers; nor do they manage or control them. In addition to the numerous legal and constitutional challenges this recommendation invites, it makes no practical sense: Congress has already imposed liability and financial responsibility for tanker discharges upon owners/operators/charterers; so has the State of Alaska.
- In COC's public meeting on January 31, ADEC testified that there is no confusion regarding who bears this responsibility in Prince William Sound: "we know who the plan holders are, we know who the responsible parties are, we know who the response action contractor is." Moreover, "we have evaluated the capabilities of the response action contractors to respond and evaluated the transition management plan."

- Alyeska has, in fact, accepted a contractual duty to provide prevention and initial response services to planholders. ADEC would not have accepted and approved contingency plans without insuring that Alyeska had accepted that obligation.
- Although it owns royalty oil, the state is not an equity owner of Alyeska's prevention and initial response equipment to appropriate for its use as a regulator. Like any other transportation-related expense, the cost of oil spill preparedness is equitably distributed amongst TAPS shippers.

February 5, 1992

Alyeska Financial Responsibility Requirement

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

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

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

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

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

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

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

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

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

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

VIA U.S. MAIL AND FACSIMILE

February 4, 1992

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

Re: Limited Responder Immunity in Alaska

Dear Chairman Bader:

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

1. Time Limit for Response Immunity

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

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

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

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

2. Classification of Responders

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

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

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

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

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

3. Response to ADEC Orders

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

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

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

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

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

February 4, 1991

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

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

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

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

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

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

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

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

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

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

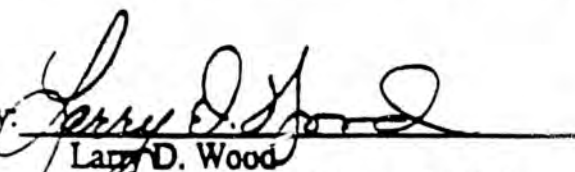
Thus, using either the federal liability limitation, or the federal and state financial responsibility requirements, as a guide to establish financial responsibility requirements contained in response services agreements is unhelpful and inappropriate. It would leave a responder unprotected.

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

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

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY

By: 
Larry D. Wood
Senior Attorney - External Affairs

cc: COC Members
Michele D. Brown, Esq.

January 31, 1992

Michele D. Brown, Esq.
Executive Director
Citizens' Oversight Council on Oil and Other Hazardous Substances
3111 C Street, Suite 150
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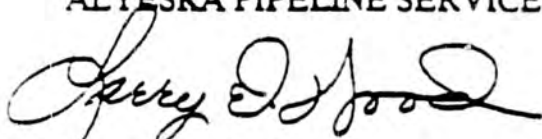
Re: Alyeska Comments Regarding Reports Submitted to the Citizens'
Oversight Council on Oil and Other Hazardous Substances

Dear Ms. Brown:

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

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY



Larry D. Wood
Senior Attorney - External Affairs

Attachments

January 31, 1992

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

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

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

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

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

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

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

LDW:vogt/cas

January 31, 1992

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. The same exemption for RACs should be available.

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

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

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

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

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

January 30, 1992

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

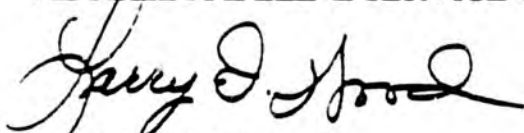
Re: Alyeska's Comments Related to Trans Alaska Pipeline Authorization Act
Memorandum

Dear Ms. Brown:

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

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY



Larry D. Wood
Senior Attorney-External Affairs

LDW42/cas

Attachments

January 30, 1992

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

Summary

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

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

LDW43/cas

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

Introduction

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

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

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

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

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

2. Liability for Vessel Spills Under TAPAA

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

Under the comprehensive liability framework created by Congressional

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

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

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

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

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

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

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

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

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

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

Subsection (b) of Section 1653 provides that the holder of the right-of-way is liable to control and remove pollutants where "any area within or without the right-of-way or permit area granted under this chapter is polluted by any activities conducted by or on behalf of the holder. . . ." (emphasis added). This subsection is inapplicable to vessel spills absent evidence that the spill occurred as a result of activities conducted by or on behalf of the holder of the right-of-way. Of course, as previously indicated, in a literal sense every vessel spill of ANS crude is in some way connected to activities conducted by the holders of the right-of-way in that, but for the transportation of oil through the pipeline, the vessel never would have been loaded with ANS crude. When subsection (b) is read in context with subsection (c), however, it is apparent that Congress could not have intended this "but for" connection to be sufficient to invoke subsection (b). Mr. Frank's theory would produce the anomalous result that the owner and operator of the vessel would be strictly liable under subsection (c) only for \$14 million, while the holders of the right-of-way would be strictly liable without any limits. Given the monetary limits elsewhere in TAPAA, including both subsections (a) and (c), one should not impute to Congress such a bizarre result. See Mr. 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 Alaska 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.



Citizens' Oversight Council
on Oil and Other Hazardous Substances

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SUMMARY

of

RESEARCH PROJECTS REPORTS

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

Council Members

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RESEARCH PROJECTS REPORTS SUMMARY

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

Research Project: Response action contractor activity in Alaska

Prepared by: Department of Environmental Conservation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Research Project: Insurance coverage availability

Prepared By: Tesoro Alaska, Inc.

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

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

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

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

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

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

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

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

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

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

Research Project: Other state's response action contractor provisions

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

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

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

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

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

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

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

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

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

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

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

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

Other States' Response Action Contractor Liability Laws

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

ALYESKA PIPELINE SERVICE COMPANY
COMMENTS

ON

IMPROVING LIMITED RESPONDER
IMMUNITY

**ALYESKA PIPELINE SERVICE COMPANY
COMMENTS
IMPROVING LIMITED RESPONDER IMMUNITY**

DATE	DESCRIPTION OF COMMENTS	TAB
02/10/92	<u>Citizens' Oversight Council Report</u> (Responder Immunity; State Orders; Tanker Spill Responsibility)	A
02/05/92	<u>Changes to Alyeska/Tesoro Agreement After HB 196</u>	B
02/05/92	<u>Alyeska Financial Responsibility Requirement</u>	C
02/04/92	<u>Responses to COC Issues</u> (Time Periods for Response Immunity; ADEC Orders; Tanker Spill Responsibility; Financial Responsibility)	D
01/30/92	<u>Improving Good Samaritan Immunity for Oil Spill Response in Alaska</u> (OPA '90 v. HB 196)	E
01/31/92	<u>Oral Presentation to Citizens' Oversight Council</u>	F
01/31/92	<u>PWS Contingency Plan Arrangements Prior to 03/89</u>	G
01/31/92	<u>Vogt Report</u> (Costs of Alyeska's Prevention & Initial Response Services)	H
01/31/92	<u>Straube Report</u> (Imposing Spill Liabilities on RAC's)	I
01/31/92	<u>ADEC Report</u> (Alyeska as a Response Action Contractor)	J
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February 10, 1992

Comments Regarding "Oil Spill Response Action Contractors"

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

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

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

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

Comments:

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

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

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

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

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

Comments:

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

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

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

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

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

Comments:

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

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

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

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

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

Comments:

- This COC recommendation relies upon an erroneous legal opinion. Under federal law, Alyeska and the holders of the grant of right-of-way across Alaska for pipeline construction and operation are not liable for spills from tank vessels. In any event, limited responder immunity is not available for those who are responsible parties.
- Under the comprehensive liability framework created by Congress, vessel owners and operators carrying oil transported through the pipeline are strictly liable, along with the Trans Alaska Liability Fund, for damages, including cleanup costs, resulting from discharges of oil from their vessel.
- None of the seven pipeline companies that own TAPS, or Alyeska which operates it on their behalf, own, operate, or charter tankers; nor do they manage or control them. In addition to the numerous legal and constitutional challenges this recommendation invites, it makes no practical sense: Congress has already imposed liability and financial responsibility for tanker discharges upon owners/operators/charterers; so has the State of Alaska.
- In COC's public meeting on January 31, ADEC testified that there is no confusion regarding who bears this responsibility in Prince William Sound: "we know who the plan holders are, we know who the responsible parties are, we know who the response action contractor is." Moreover, "we have evaluated the capabilities of the response action contractors to respond and evaluated the transition management plan."

- Alyeska has, in fact, accepted a contractual duty to provide prevention and initial response services to planholders. ADEC would not have accepted and approved contingency plans without insuring that Alyeska had accepted that obligation.
- Although it owns royalty oil, the state is not an equity owner of Alyeska's prevention and initial response equipment to appropriate for its use as a regulator. Like any other transportation-related expense, the cost of oil spill preparedness is equitably distributed amongst TAPS shippers.
