

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672
2065 SCOMM 78: SENATE SPEC. COMM. ON OIL & GAS, 1991-1992

83

- 1 (A) an act of war,
2 (B) except as provided under AS 46.03.823(c) and 46.03.825(e), an
3 intentional or negligent act or omission of a third party, other than a party or its agents
4 in privity of contract with, or employed by, the person, and that the person
5 (i) exercised due care with respect to the hazardous substance; and
6 (ii) took reasonable precautions against the act or omission of the
7 third party and against the consequences of the act or omission; or

8 (C) an act of God; and

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

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

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

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

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

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 AS 46.03.825(a) is repealed and reenacted to read:

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

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

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

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

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

28 (1) an action for personal injury or death;

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

30 (3) a response action contractor who

31 (A) would otherwise have been liable for the release or threatened

1 release under AS 46.03.822;

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

3 (C) is not registered by the department, who agrees in writing to be
4 listed and who is listed as a primary response action contractor in a contingency
5 plan approved under AS 46.04.030, that is being implemented to respond to a release
6 or threatened release of oil, and who has executed a written agreement with the
7 contingency plan holder [AN ACT OR OMISSION THAT OCCURS MORE THAN 15
8 DAYS AFTER THE RELEASE].

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

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

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

20 (d) In this section,

21 (1) "primary response action contractor" has the meaning given in
22 AS 46.04.035;

23 (2) "registered" means registered under AS 46.04.035;

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

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

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

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

1 this chapter or under any other state law of a person other than a response action contractor.

2 * Sec. 11. AS 46.04.020(a) is amended to read:

3 (a) A person causing or permitting the discharge of oil shall immediately contain and
4 clean up the discharge. [THE DEPARTMENT MAY WAIVE THIS REQUIREMENT

5 (1) IF IT DETERMINES, IN CONSULTATION WITH THE UNITED STATES
6 COAST GUARD OR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
7 AS APPROPRIATE, THAT CONTAINMENT OR CLEANUP IS TECHNICALLY NOT
8 FEASIBLE; OR

9 (2) IF THE CLEANUP OR CONTAINMENT ACTIVITIES WOULD RESULT
10 IN GREATER ENVIRONMENTAL DAMAGE THAN THE DISCHARGE ITSELF.]

11 * Sec. 12. AS 46.04.020 is amended by adding new subsections to read:

12 (g) In addition to existing obligations under state and federal law, and the provisions of
13 the state and federal Trans Alaska Pipeline System right-of-way agreements, the common
14 operating agent for the holder and lessees of the right-of-way agreement for the trans Alaska
15 pipeline shall immediately contain and clean up a discharge or threatened discharge of oil
16 transported by or due to the operation of the Trans Alaska Pipeline System or due to related
17 activities, including activities related to a tank vessel en route to, berthed, or transiting from the
18 Trans Alaska Pipeline System marine terminal or while traveling on waters lying within Prince
19 William Sound. The obligations imposed under this subsection do not affect the response action
20 duties of another person or the liability of another person for a discharge. In this subsection,
21 "Prince William Sound" has the meaning given in 33 C.F.R. 3.85-20.

22 (h) A charge or financial responsibility requirement imposed by the holders and lessees
23 of the right-of-way agreement for the Trans Alaska Pipeline System, or the holders and lessees'
24 common operating agent, on or for a tank vessel traveling from a marine terminal and related to
25 containing and cleaning up a discharge of crude oil or the obligations imposed under (g) of this
26 section

27 (1) must be fair, reasonable, and nondiscriminatory; and

28 (2) with respect to a financial responsibility requirement in excess of \$10,000,000,

29 must

30 (A) not exceed the potential cost of containment and cleanup as provided

31 in the applicable contingency plan under AS 46.04.030 that the agent may reasonably be

1 expected to incur from a discharge of crude oil from that tank vessel; and

2 (B) vary among each tank vessel in proportion to the volume of crude oil
3 carried by each tank vessel from a marine terminal; for purposes of this subparagraph, the
4 volume of crude oil carried by the tank vessel must be reduced by the percentage of spill
5 reduction credits granted that tank vessel under regulations adopted by the department.

6 (i) The superior court and, with respect to intrastate tanker voyages, the Alaska Public
7 Utilities Commission, under AS 42.05.361 - 42.05.431, have concurrent jurisdiction to review a
8 charge or financial responsibility requirement described under (h) of this section. An action to
9 enforce this subsection may be brought in either forum at the election of a tank vessel owner,
10 operator, or lessee, or the owner of crude oil carried as cargo on the tank vessel.

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

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

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

18 * Sec. 13. AS 46.04.030(e) is amended to read:

19 (e) The department may attach reasonable terms and conditions to its approval or
20 modification of a contingency plan that the department determines are necessary to ensure that
21 the applicant for a contingency plan has access to sufficient resources to protect environmentally
22 sensitive areas and to contain, clean up, and mitigate potential oil discharges from the facility or
23 vessel as provided in (k) of this section, and to ensure that the applicant complies with the
24 contingency plan. If a contingency plan submitted to the department for approval relies on
25 the services of an oil spill primary response action contractor, the department may not
26 approve the contingency plan unless the primary response action contractor is registered
27 and approved under AS 46.04.035. The contingency plan must provide for the use by the
28 applicant of the best technology that was available at the time the contingency plan was
29 submitted or renewed. The department may require an applicant or holder of an approved
30 contingency plan to take steps necessary to demonstrate its ability to carry out the contingency
31 plan, including

- 1 (1) periodic training;
2 (2) response team exercises; and
3 (3) verifying access to inventories of equipment, supplies, and personnel identified
4 as available in the approved contingency plan.

5 * Sec. 14. AS 46.04.030(a) is amended to read:

6 (a) A person may not cause or permit the operation of an oil terminal facility in the state
7 unless an oil discharge prevention and contingency plan for the facility has been approved by the
8 department and the person is in compliance with the plan. In addition to the existing
9 obligations under state and federal law, and provisions of the state and federal Trans
10 Alaska Pipeline System right-of-way agreements, the common operating agent for the
11 holders and lessees of the right-of-way agreement for the Trans Alaska Pipeline System
12 must include in its oil discharge prevention and contingency plan coverage for a tank vessel
13 en route to, berthed at, or transiting from the Trans Alaska Pipeline System marine
14 terminal or while traveling on waters lying within Prince William Sound. In addition to
15 the contingency plan requirement of this subsection, the department may require an
16 individual tank vessel to submit an individual plan to cover specific vessel response,
17 prevention equipment, and procedures. In this subsection, "Prince William Sound" has the
18 meaning given in 33 C.F.R. 3.85-20.

19 * Sec. 15. AS 46.04.030(d) is amended to read:

20 (d) Upon approval of a contingency plan, the department shall issue to the plan holder
21 a certificate stating that the contingency plan has been approved by the department. The
22 certificate must include the name of the facility, pipeline, tank vessel, or oil barge for which it
23 is issued, the effective date of the contingency plan, and the date by which the contingency plan
24 must be submitted for renewal. A contingency plan must be submitted for renewal every three
25 years. Except as otherwise provided in this section, a contingency plan may be held by a
26 person other than the tank vessel operator or the terminal operator, including a
27 cooperative, a joint venture response organization, or other holder.

28 * Sec. 16. AS 46.04 is amended by adding a new section to read:

29 Sec. 46.04.035. REGISTRATION OF OIL SPILL RESPONSE ACTION
30 CONTRACTORS. (a) A person may apply to the department for registration as an oil spill
31 primary response action contractor. The department shall adopt regulations governing the

1 registration and approval of oil spill primary response action contractors. Regulations adopted
2 by the department under this section must include

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

8 (3) minimum professional response action standards and practices; and
9 (4) minimum performance standards for oil spill primary response action
10 contractors listed in an oil spill contingency plan approved under AS 46.04.030.

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

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

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

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

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

27 (g) In this section,
28 (1) "oil" has the meaning given in AS 46.03.826;
29 (2) "primary response action contractor" means a person who enters into a
30 response action contract with respect to a release or threatened release of oil and who is carrying
31 out the contract, including a cooperative organization formed to maintain and supply response

1 equipment and materials that enters into a response action contract relating to a release or
2 threatened release of oil;

3 (3) "response action" has the meaning given in AS 46.03.825.

4 * Sec. 17. TRANSITION. The Department of Environmental Conservation shall adopt regulations
5 to implement AS 46.04.035(a), enacted in sec. 16 of this Act, on or before January 1, 1993.

6 * Sec. 18. REPORT. The Department of Environmental Conservation shall report to the legislature
7 by March 31, 1993, on the progress of the department in developing the ability of the state to respond
8 to oil spills of an unknown origin and enhance regional response and coastline protection.

9 * Sec. 19. Sections 2, 5, 7, 10, and 12 of ch. 92, SLA 1991, are repealed.

10 * Sec. 20. If this Act takes effect after June 30, 1992, sec. 19 of this Act is retroactive to June 30,
11 1992.

12 * Sec. 21. APPLICABILITY. (a) Except as provided in (b) of this section, the amendments to
13 AS 46.03.822 and 46.03.825, made by secs. 3 - 10 of this Act, apply only to causes of action accruing
14 on or after the effective date of secs. 3 - 10 of this Act.

15 (b) The provisions of AS 46.03.825(b)(3)(C) apply only to causes of action accruing on or after
16 the effective date of that paragraph under sec. 22 of this Act.

17 * Sec. 22. AS 46.03.825(b)(3)(C), added by sec. 7 of this Act, and sec. 13 of this Act take effect
18 July 1, 1993.

19 * Sec. 23. Except as provided in sec. 22 of this Act, this Act takes effect immediately under
20 AS 01.10.070(c).

Proposed Amendment No. 1 to CSSB 270 (5/1)

On Page 7, l. 19, insert the following after the word "Sound.":

The obligations imposed by this subsection continue until the responsible party requests a transfer of containment and cleanup management and control and the federal or state onscene coordinator approves that transfer.

On Page 7, l. 30, change proposed (h)(2)(A) to read:

(A) not exceed the potential cost of containment and cleanup as provided in the applicable contingency plan under AS 46.04.030 that the agent may reasonably be expected to incur from a discharge of crude oil from that tank vessel prior to the transfer of cleanup and containment management and control to the responsible party. In establishing the financial responsibility requirement, the agent shall presume that transfer of management and control will occur at the earliest practicable time following the discharge.

Page 9, l. 17. Insert the following after the word "procedures.":

However, except as may be required by the department under this subsection, tanks owners, operators and charterers are not required to submit individual contingency plans for the transport of crude oil from the marine terminal serving the Trans Alaska Pipeline System through Prince William Sound.

Proposed Amendment No. 2 to CSSB 270 (5/1)

Page 3, l. 21. Amend line 21 to read:

set out in (b) of this section, [AND] the exception set out in (i) of this section, and the
limitation of liability provided under AS 46.03.825, the following persons

Proposed Amendment No. 3 to CSSB 270 (5/1)

1. Delete the language on p. 4, ls. 19-26.

2. Insert the following as a new (C) on p. 6, between ls. 2 and 3:

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

3. Delete Section 8 of the legislation (P. 6, ls. 9-18).



Oil Reform Alliance



S.B. 270 Proposed Amendments
4/30/92

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

(6) a response action contractor who is registered with the department under AS 46.04.035 and who fails to respond to a release or threatened release of oil that the response action contractor was required to respond to under the contingency plan; this paragraph does not apply to a response action contractor if the failure to respond to a release or threatened release of oil results from a prior and on-going response under another contingency plan approved under AS 46.04.030 in which the response action contractor has the duty to respond and a significant portion of the response action contractor's assets are tied up.



Oil Reform Alliance



S.B. 270 Proposed Amendments
4/30/92

Add a new Section 5 and renumber other sections.

Section 5. AS 46.03.822(h) is amended by adding new language at end of the subsection to read:

AS.46.03.822(h): "The immunity granted under this section shall attach without limitation to the response efforts of:

(A) a person who acts as a volunteer and is engaged in a response action under the direction of the federal or state on-scene coordinator; and

(B) a vessel of opportunity engaged in a response action under the direction of the federal or state on-scene coordinator.



Oil Reform Alliance



S.B. 270 Proposed Amendments
5/1/92

Section 6. AS 46.03.825 is repealed.



Oil Reform Alliance



S.B. 270 Proposed Amendments
4/30/92

Sec.12. AS 46.01.020 is amended by adding new subsections to read:

(g) (1) In addition to its existing obligations under state and federal law, and the provisions of the state and federal Trans Alaska Pipeline System right-of-way agreements, the common operating agent for the holders and lessees of the right-of-way agreement for the trans-Alaska pipeline shall immediately contain and clean up a discharge of crude oil transported by or due to the operation of the trans-Alaska pipeline system or due to related activities, including operation of a tank vessel while berthed at a marine terminal or while traveling [within state waters] to or from a marine terminal located within the state if the discharge occurs within state waters, or if the state or federal on-scene coordinator has reasonable cause to believe that state waters will be impacted by the discharge.

(g) (2) A charge or financial responsibility requirement imposed by the common operating agent for holders and lessees of the right-of-way agreement for the trans-Alaska pipeline system on a tank vessel traveling on an intra-state voyage from a marine terminal for the purpose of containing and cleaning up a discharge of crude oil is subject to review by the Alaska Public Utilities Commission under AS 42.05.361 - 42.05.441. Review of a charge or financial responsibility requirement allowed under this subsection may occur at the request of a tank vessel owner, operator, or lessee, or as allowed by the Alaska Public Utilities Commission.

Note: These two provisions are separated in order to remove concerns about the severability of the APUC requirement from Alyeska's duty to respond which may be challenged.



Oil Reform Alliance



S.B. 270 Proposed Amendments
4/30/92

Add another "Alyeska" amendment

Add a new Section 13 and renumber the remaining sections.

Section 13. Amend AS 46.04.030(a) to add in a new sentence of text at the end of the existing text as follows:

The oil discharge prevention and contingency plan submitted for the trans-Alaska pipeline system terminal facility shall include provisions for an oil discharge from a tank vessel while berthed at the terminal facility or while traveling to or from a marine terminal located within the state if the discharge occurs within state waters, or if the state or federal on-scene coordinator has reasonable cause to believe that state waters will be impacted by the discharge.



Oil Reform Alliance



S.B. 270 Proposed Amendments
4/30/92

Section 14. AS 46.04 is amended by adding a new section to read:

Section 46.04.035(a). REGISTRATION OF OIL SPILL RESPONSE ACTION CONTRACTORS. (a) A response action contractor listed in an oil spill contingency plan approved under AS 46.04.030 and whose services are deemed necessary by the department for the approval of the contingency plan may apply to the department for registration as an oil spill response action contractor if the response action contractor:

(1) agrees in writing to be subject to the direction of the federal or state on-scene coordinator during implementation of the contingency plan under which the contractor is listed; and

(2) agrees in writing to respond under the direction of and reimbursement by the federal or state on-scene coordinator to spills in which the responsible party is unknown or insolvent unless the response action contractor is already engaged in a response to a prior release or threatened release and a significant portion of the response action contractor's assets are tied up.

The department shall adopt regulations governing the registration and approval of oil spill response action contractors listed in oil spill contingency plans approved under AS 46.04.030 and whose services are deemed necessary by the department for the approval of the contingency plans.



Oil Reform Alliance



S.B. 270 Proposed Amendments
4/30/92

Section 14. AS 46.04.035 (g) is amended to read:

Section 46.04.035(g) In this section,

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

(2) "response action" means an action taken to respond to a release or threatened release of oil, including but not limited to mitigation, clean up, or removal or a release or threatened release of oil;

(3) "response action contractor" has the meaning given in AS 46.03.826 (11).

Add a New section

Amend AS 46.03.826(11) to read:

"response action contractor" means

(A) a person who voluntarily enters into a response action contract under AS 46.04.030 with respect to a release or threatened release of oil and who is carrying out the contract, including a cooperative organization formed to maintain and supply response equipment and materials that enters into a response action contract under AS 46.04.030 relating to a release or threatened release of oil; or

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

(C) A PERSON WHO ACTS AS A VOLUNTEER AND IS ENGAGED IN A RESPONSE ACTION.]

Revised Section 9

Strike (1) and insert:

Amend AS 46.04.020 to read

(g)(1) In addition to the existing obligations under state and federal law, and the provisions of the state and federal Trans-Alaska pipeline agreements, the common operating agent for the holder and lessees of the right-of-way agreement for the Trans-Alaska pipeline shall immediately contain and cleanup a discharge or threatened discharge of oil transported by or due to the operations of the Trans-Alaska pipeline system or due to related activities, including vessels enroute to, berthed at, or transiting from the Trans-Alaska pipeline terminal on waters lying inside the boundary established in section 3.85-20 Prince William Sound Marine Inspection Zone, 42 FR 36252 (July 14, 1977), as amended by 44 FR 10963 (February 25, 1979) and 44 FR 70720 (December 10, 1979). The obligations imposed under this subsection do not affect the response duties of any other person or the liability of any other person for the discharge.

[strike first sentence of (2)] then continue with rest of the section:

A charge or financial . . .

Amend AS 46.04.030 to add:

In addition to the existing obligations under state and federal law, and the provisions of the state and federal Trans-Alaska pipeline agreements, the common operating agent for the

holder and lessees of the right-of-way agreement for the Trans-Alaska pipeline must include in its oil discharge prevention and contingency plan coverage for vessels enroute to, berthed at, or transiting from the Trans-Alaska pipeline terminal in all waters lying within the boundary established in section 3.85-20 Prince William Sound Marine Inspection Zone, 42 FR 36252 (July 14, 1977), as amended by 44 FR 10963 (February 25, 1979) and 44 FR 70720 (December 10, 1979). In addition to this contingency plan requirement, the department may require individual vessels to submit individual plans to cover specific vessel response and prevention equipment and procedures.

Amend AS 46.04.030(d) to include:

Except as otherwise provided, a contingency plan may be held by a person other than the vessel operator or the oil terminal facility operator, including a cooperative, joint venture response organization, or other holder.

Page 6, Line 26

Delete "."

Insert after "oil":

"an action taken to effect marine salvage which is accompanied by a release of oil or a threatened release of oil."

OR

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**AMENDMENT TO 5/1/92 WORK DRAFT "7-LS1290\J" OF
CS FOR SS FOR SB 270 (O&G)**

Page 1, lines 2-8: Replace all material with the following:

response activities related to oil spills; relating to liability for release or threatened release of a hazardous substance; relating to the liability of an oil spill response action contractor for release or threatened release of a hazardous substance; relating to the duty of the common operating agent for the holders and lessees of the right-of-way agreement for the Trans Alaska Pipeline system to control and contain oil discharges; relating to oil discharge and contingency plans; relating to registration of an oil spill response action contractor; repealing secs. 2, 5, 7, 10, and 12 of ch. 92, SLA 1991; and providing for an effective date."

Page 2, lines 10-16: Delete all material and renumber remaining paragraph in the section accordingly.

Page 3, line 21: Insert a comma immediately after the first "section" appearing in the line, and insert before "the following persons" the following material:

and the limitation on liability provided under AS 46.03.825.

Page 4, lines 18-26: Replace the semicolon at the end of line 18 with a period, and delete all material on lines 19-26.

Page 5, lines 23-24: Replace all material with the following:

(1) consistent with a contingency plan

(A) approved under AS 46.04.030 if the response action contractor is listed in the contingency plan as a primary response action contractor; or

(B) prepared under AS 46.04.200, 46.04.210, or 33 U.S.C. 1321(d) if the response action contractor is not listed in the contingency plan as a primary response action contractor; or

Page 6, line 2: Delete "or" at the end of line 2.

Page 6, lines 7-8: Replace existing material with the following:

contingency plan holder:

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

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

AMENDMENT TO 5/1/92 WORK DRAFT OF CSSSSB 270 (O&G)

Page 6, lines 9-18: Delete all material and renumber following bill sections accordingly.

Page 6, line 21: Insert a new paragraph (1) and renumber present paragraphs accordingly; the new paragraph (1) reads as follows:

(1) "consistent with a contingency plan" means action that, when evaluated as a whole, is in substantial compliance with a contingency plan, and includes action that is a deviation from a contingency plan if the deviation is immaterial or insubstantial;

Page 6, line 1: At the end of sec. 10 of the bill, insert the following:

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

Page 7, lines 2-10: Delete all material and renumber following bill sections accordingly.

Page 7, line 14 - p.8, line 17: Replace all material with the following:

operating agent for the holders and lessees of the right-of-way agreement for the Trans Alaska Pipeline System shall make initial response action services available under contract terms as provided under AS 46.04.030(r). The obligations imposed under this subsection do not affect the response action duties of any other person or the liability of any other person for a discharge.

(h) A contractual financial responsibility and insurance requirement imposed on a tank vessel by the common operating agent for the holders and lessees of the right-of-way agreement for the Trans Alaska Pipeline System must be fair and reasonable, and may not be on terms less favorable than those offered to any owner of the Trans Alaska Pipeline System or any affiliate of such an owner. A court may review a financial responsibility and insurance requirement described in this subsection at the suit of a tank vessel owner, operator, or a charterer.

Page 9, lines 5-27: Delete all material, insert the following new bill section, and renumber the following bill sections accordingly.

* **Sec. 11.** AS 46.04.030(e) is amended to read:

(r) Except as provided in (n) of this section and in order to receive approval from the department for an oil discharge prevention and contingency plan submitted under this section, the owner, operator, or charterer of a tank vessel that intends to carry crude oil that has been transported by the Trans Alaska Pipeline System shall obtain by contract the initial response action services of the common operating agent for the holders and lessees of the right-of-way agreement for the Trans Alaska Pipeline System. The contract must contain the following provisions: (1) the common operating agent, as a primary response action contractor shall, unless response services are transferred as provided in (2) of this subsection, provide initial response services for a discharge or threatened discharge of crude oil from a tanker vessel for up to 72 hours after notification to the owner, operator, or charterer of the vessel, while the vessel is berthed at or transiting from the Trans Alaska Pipeline System marine terminal or while traveling within the waters of Prince William Sound; (2) that its coverage for any particular vessel may not be

AMENDMENT TO 5/1/92 WORK DRAFT OF CSSSSB 270 (O&G)

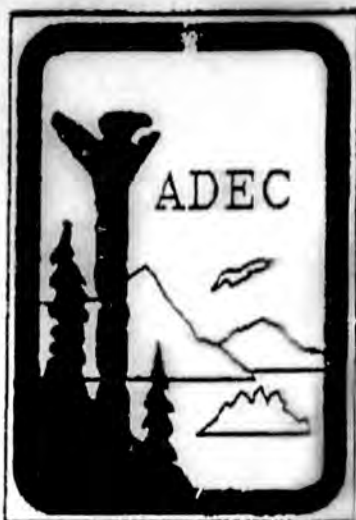
terminated by the common operating agent while that vessel is traveling within the waters of Prince William Sound; this provision may not be interpreted to limit the department's authority to revoke approval under this section for a tank vessel's oil discharge and contingency plan; and (3) if the contract provides for a transfer of the management and control of the response action to a discharge or a threatened discharge either to the owner, operator, or charterer of the tank vessel or to the federal government following a discharge or threatened discharge, the contract must provide for not less than 72 hours notice to the owner, operator, or charterer of the tank vessel if the transfer of management and control occurs and must stipulate that any transfer of the management and control of the response action must first be approved by the federal on-scene coordinator, after consultation with the state on-scene coordinator. In addition to the requirements of this subsection, the department may require individual vessels to submit additional contingency plans to cover specific vessel response, prevention equipment, and procedures. Nothing in this subsection is intended to preclude the federal or state government from assuming management and control of an oil spill response to a discharge or threatened discharge from a tank vessel under appropriate circumstances.

Page 10, line 8: Replace "performance" with "planning"

Page 10, line 27: Insert the following subsection (g) and reletter the present subsection (g) as (h):

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

Page 11, lines 4-20: Conform section cross-references to reflect the renumbering of the bill sections as a result of the prior portions of this amendment.



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ALASKA DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

TO: GINNY FAYE

Sen. Cotten's

FAX#: -4979

FROM: LYNN KENT

NUMBER OF PAGES INCLUDING COVER SHEET: _____

COMMENTS: (I've talked w/ Tilley to better
define our questions. Tostevin returns tonight
so we're hoping to have his input by early tomorrow).

L.

MEMORANDUM

STATE OF ALASKA Department of Environmental Conservation

TO: Attorney General Charles E. Cole DATE: May 1, 1992
Department of Law
THRU: FILE NO:
TELEPHONE NO: 465-5050
FROM: John A. Sandor SUBJECT: Attorney General's
Commissioner Opinion request

The Department has been working with Senator Cotten on changes to SB 270, a bill relating to the liability of response action contractors, and the duties of the common operating agent for the holders and lessees of the right-of-way agreement for the trans-Alaska pipeline system, to control and contain oil discharges.

The administration supports provisions in the Senate Substitute that will require the common operating agent to be the holder of the response plan for the Alyeska terminal and vessels carrying TAPS crude. With a few minor regulation changes to 18 AAC 75, the Department will have no difficulty allocating the various parts of the "Oil Discharge Prevention and Contingency Plan" between Alyeska and the vessel owner/operators.

However, the Department has several questions that are likely to come up in discussions relating to this Legislation.

1. Would establishing Alyeska as a Response Action Contractor (RAC) affect the ability of the State to recover **Removal Costs** from Alyeska, the holders or lessees (i.e. any of the seven parent companies) or any other responsible parties?
2. Would establishing Alyeska as a RAC affect the ability of the State or an injured party to recover **Natural Resources Damages** from Alyeska, the holders or lessees (i.e. the seven parent companies) or any other responsible parties?
3. Can you suggest language amendments to the Legislation that would provide the same limited immunity to Alyeska afforded to other Response Action Contractors that would still allow the State, or another injured party, to recover removal costs or damages?

In preparing for discussions on this legislation the Administration must be prepared to answer the following question: In the event of a catastrophic oil spill, do we want the ability to recover damages from a vessel owner/operator, a parent company, and/or Alyeska?

Your prompt response to these questions will be appreciated.

LTK/tls

cc: Michael A. Conway, Director, Division
of Spill Prevention and Response
Lynn J. Tomich Kent, Chief, Spill
Prevention, Planning & Management Section

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

April 8, 1992

The Honorable Cliff Davidson
Chairman, House Resources Committee
Alaska State Legislature
State Capitol
Juneau, AK 99811

Dear Chairman Davidson:

You requested an opinion from the Department of Law concerning House Bill 540, a bill involving the liability of oil spill response action contractors.

You inquired whether or not an oil spill response action contractor, under HB 540 (O&G), retains its immunity if the contractor breaches the terms of its contract with the spiller or the contingency plan holder. In particular, you asked whether a response action contractor's failure to respond to a spill as provided in its contract with the spiller would deprive it of immunity. It is our understanding that the Committee is interested in the question because of its bearing on whether this potential liability will act as some assurance that a response action contractor listed on a oil spill contingency plan will actually respond to the spill.

I. Immunity of a RAC Under HB 540 Should Its Failure to Respond.

Short Answer: Establishing a RAC's liability for damages under a "gross negligence or intentional misconduct" theory, while not impossible, would be very difficult. The reasoning of such a theory is very circuitous and fact specific, and, as a result, would be expensive for a claimant to litigate. If the Committee's goal is to create liability incentives or other assurances that RACs will respond, then clearer, more direct language is advisable.

Analysis: HB 540 (O&G) contains a general grant of immunity from civil liabilities for oil spill response action contractors ("RAC"). This immunity disappears, however, if any of the following are proven by a claimant:

- (a) The RAC would have been liable for the initial release under AS 46.03.822 even if the contractor had not

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been carrying out a response action (in other words, a party cannot cause a spill and then claim RAC immunity while carrying out its own response action);

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

(c) the RAC's act or omission was contrary to an order of the federal or state on-scene coordinator, or

(d) the RAC's act or omission was contrary "in a material and substantial respect" with the national contingency plan or the state contingency plan under AS 46.04.200 or AS 46.04.210 and was not the result of an order of the federal or state on-scene coordinator.

The scenario as posed by the Committee involves a contractor listed on an oil spill contingency plan simply not responding as provided in its contract with the spiller. The only potential exception to immunity in this situation is the gross negligence or intentional misconduct exception.¹

1 Unless an emergency is declared under AS 46.03.865, the Department may not directly order an Response Action Contractor to respond to a spill. The only other exceptions are when a RAC agrees to be subject to state direction as part of its listing on an individual contingency plan or when the RAC directly contracts with the State to provide response services.

Under AS 46.03.825 as presently in force, a RAC is stripped of its immunity if

without the approval of the federal or state on-scene coordinator, [the RAC] substantially deviated from an [individual industry] oil spill contingency plan previously approved under AS 46.04.030, and the plan was prepared by that contractor for a party responsible for the release under AS 46.03.822 or that contractor previously agreed to comply with that plan under a contract with parties responsible for the release under AS 46.03.822.

This language has been removed in HB 570⁵⁴⁰ (O&G) and thereby casts further doubt on whether compliance with response action contract is a prerequisite for immunity. Deletion of this language clearly removes the requirement that a response action contractor act in substantial compliance with an individual oil

Under such a theory, the claimant would first have to demonstrate a breach of the private contract between the spiller and the contractor. If the claimant established this first element, it would then be required to show that the RAC's breach constitutes "gross negligence or intentional misconduct."

With regard to the first element -- proving a breach of the private contract -- it is important to note that the Department of Environmental Conservation does not legally review or pass judgment on the validity of these contracts and the State (or other potentially injured persons) is not a party to them. As a result, these private contracts may contain preconditions and other requirements to a RAC's response which might arguably justify a RAC's inaction in the face of a spill situation.² In addition, as a matter of contract law, the prospective inability of the spiller to pay the contractor may be asserted in an effort to justify the contractor's inaction. Given recent attempts by some companies to structure their financial affairs in order to avoid liability (e.g. the so called "one-ship corporations") the financial solvency of some companies in the face of a major spill could be open to question by a RAC.

Should a claimant demonstrate an unjustified breach of contract by the RAC, the next element to be established by the claimant is whether the breach constitutes "gross negligence or intentional misconduct." While there is no Alaska case law directly on point, Alaska Supreme Court cases discussing gross negligence in other contexts as well as the "wilful misconduct" standard found in the federal Clean Water Act provides some guidance on an Alaska court's likely application of these terms.

In the context of common law punitive damages, the Alaska Supreme Court has characterized "gross negligence" in terms of recklessness under the Restatement (Second) of Torts Sec. 500. Storrs v. Lutheran Hosp. & Homes Soc. of Am., 661 P.2d 632, 634 (Alaska 1983); Leavitt v. Gillaspie, 443 P.2d 61 (Alaska 1968). As the Restatement of Torts explains, "reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of

1 (cont) spill contingency plan that it prepared or contracted to respond under.

2 These preconditions include notices to proceed, receipt of work orders, bid proposals and other technical requirements that must be fulfilled before a response is undertaken by the RAC.

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Chairman, House Resources Committee

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facts which would disclose this danger to any reasonable man." Restatement (Second) of Torts Sec. 500 comment g (1966).

Wilful misconduct as used in the federal Clean Water Act's oil spill provisions, while perhaps setting a more difficult test, has been similarly construed. See Stewart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 614 (4th Cir. 1979); Tug Ocean Prince, Inc. v. United States, 584 F.2d 1151 (2d Cir. 1978). The Second Circuit defined "wilful misconduct" as an "act, intentionally done, with knowledge that the performance will probably result in injury, or done in such a way to allow an inference of a reckless disregard for the probable consequences." Tug Ocean Prince, 584 F.2d at 1163. The court stated that if the harm results from an omission, the omission must be intentional, and the actor must know the omission will result in damage or the circumstances surrounding the failure to act must allow a reckless disregard of the probable consequences. Id. See also Korean Air Lines v. State, 779 P.2d 333, 337 (Alaska 1989) (jury finding of wilful misconduct under Warsaw Convention).

Thus, in order for the breach of the contract to constitute "gross negligence or intentional misconduct" the breach would have to either be "a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man" or alternatively, an intentional omission that the contractor knows will result in damage or with a reckless disregard of the probable consequences." This is a very high standard of proof. Anytime a claimant must demonstrate intentional or knowing acts (as is common in the criminal context) the burden of proof increases considerably.

It is important to note that these cases and tests were formulated in the context of the spiller's act or omissions in causing the oil spill or other harm. The scenario presented here is one step removed from that of the actor who causes a spill. In this situation recovery is sought against a third party for not stepping in to reduce or control the damage caused by another actor. Thus, the claimant would have to demonstrate that the RAC had some duty to act on its behalf in order to prevent damage to that third-party claimant. Without statutory³ or contractual⁴

3 As noted elsewhere in this memorandum, by not responding a RAC would not come within the reach of the state's strict liability statute. See AS 46.03.822. Similarly, the RAC would not have a statutory duty to "remove" the discharge unless it "caused or permitted the discharge." See AS 46.04.020. Finally, as discussed in note 1 above, the state cannot directly order a RAC to

duties for a RAC to act in order to protect a claimant, the claimant would have to rely on general tort law principles to find a duty to act on the part of the RAC.

Our state Supreme Court has relied on the principle set forth in the Restatement (Second) of Torts Section 323 to impose liability on a defendant that negligently performs an undertaking to render services. See Alaskan Village, Inc. v. Smalley, 720 P.2d 945, 947 (Alaska 1987). The Restatement provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts, §323. The Supreme Court has adopted a seven part test in determining whether such a duty exists: 1) the foreseeability of harm to the plaintiff, 2) the degree of certainty that the plaintiff suffered injury, 3) the connection between defendant's conduct and plaintiff's injury, 4) the moral blame attached to the defendant's conduct, 5) the policy of preventing future harm, 6) the burden and consequences to the community of imposing the duty, and (7) the availability, cost and prevalence of insurance for the risk. Alaskan Village, 720 P.2d at 947-58. See also Mattingly v. Sheldon Jackson College, 743 P.2d 356 (Alaska 1987); Busby v. Municipality of Anchorage, 741 P.2d 230 (Alaska 1987).

3 (cont) respond unless an emergency is declared pursuant to AS 46.03.865 or other authority.

4 A private claimant could argue that it is a third party beneficiary of the RAC's contract with the spill and therefore should be able to sue under the contract for damages. Such a theory would require the injured private claimant to demonstrate that at least one purpose of the contract was to benefit them as third parties. See Stewart-Smith Haidinger, Inc. v. Avi-Truck, Inc., 682 P.2d 1108, 1112 (Alaska 1984).

Establishing such liability would be a difficult and expensive proposition for claimants. Not only would the claimant need to demonstrate a duty by the RAC to act but then would have to show that the failure to act constituted gross negligence or wilful misconduct as discussed above.

An additional issue under a common law tort theory against a RAC is the problem of who caused what damages. For example, by not responding, the RAC does not become one of the responsible parties set out in the state's statutory joint and several liability scheme. See AS 46.03.822. Under that scheme each party is responsible for the entire harm even if they in fact only contributed to a small portion of the problem. However, once outside the joint and several liability scheme a claimant may be required to demonstrate which portion of their oil spill damages were attributable to the RAC. This is a serious concern and, in fact, Alyeska has raised a similar defense in the Exxon Valdez litigation. The uncertainty over what portion of damages a non-responding RAC might be responsible throws additional uncertainty on the entire obligation to respond issue.

In conclusion, establishing a RAC's liability for damages under a "gross negligence or intentional misconduct" theory, while not impossible, would be very difficult. The reasoning of such a theory is very circuitous and fact specific, and, as a result, would be expensive for a injured claimant to litigate. Similarly, if it is the Committee's goal is to create liability incentives or other assurances that ensure RACs will respond, then clearer, more direct language is advisable.

II. Spiller Liability for RAC Caused Damages.

Second, you inquired whether or not, under H.B. 540 (O&G), a spiller would always be liable for additional damages caused by an immunized RAC. Your concern was that there not be any inadvertent "gaps" in the liability net.

The present version of AS 46.03.822, Strict Liability for the Release of Hazardous Substances, includes in its definition of "damages" the following language:

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

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AS 46.03.822(k) (emphasis added). The intent of this language clearly seems to be to address your concern that the spiller remain liable for the immunized actions of its response action contractor. There are, however, two technical corrections to HB 540 that would ensure this intent is fully realized.

The first correction is to ensure that the definition of damages in AS 46.03.824 is cross-referenced in AS 46.03.822(k). This would clarify that both definitions are applicable to determining the scope of damages recoverable in AS 46.03.822.

The second correction would be to include in .825 the language in AS 46.03.823(b)-(f) involving hazardous substance response action contractors. This language clarifies the "scope" of the immunity provided to a RAC. This language originally covered both oil spill and hazardous substance RACs but seems to have been inadvertently omitted when the sections were separated and a new oil spill section in .825 created in the last session of the Legislature. Inclusion of the language in .823(c) is important to ensure that the "third party" defense in .822(b)(1)(B) does not apply to a spiller's relationship with its RAC and thereby absolve the spiller of the additional damages cause by its RAC. By incorporating these provisions into .825, it would be clear that the Legislature intended that the scope of the immunity to be identical.

We appreciate this opportunity to be of assistance. If we can be of further assistance, please let us know.

CHARLES E. COLE
ATTORNEY GENERAL

By:



Breck Tostevin
Assistant Attorney General

BCT:bkn

cc: Deborah Behr
Paul Fuhs
Janice Adair
Senator Sam Cotten
Representative Bill Hudson

PRELIMINARY COMMENTS RELATING TO SSSB 270

Section 1. FINDINGS

- Page 1, line 11:

"Supply" should be changed to "production."

COMMENT: Twenty-five percent (25%) of the country's crude oil production, not supply, moves through Alaska waters.

- Page 2, line 7:

Insert "more" before "effective."

COMMENT: Without this change, the implication is that on-going spill response efforts after an initial response are not effective. This is not correct.

- Page 2, lines 10 - 20:

Delete subparagraphs (4) and (5).

COMMENT: These allegations, which assert that "the lessees, the holders, and their common operating agent are required to contain and clean up crude oil spills within state waters...", and that confusion regarding spill response management following the Exxon Valdez oil spill delayed "efficient and effective response efforts," are disputed in federal district court where they will be resolved. Their presence in this bill seems unnecessarily confrontational and will help erode the consensus which has been building for limited responder immunity this session.

Section 2.

- Page 3, lines 9 - 18:

Delete proposed sovereign immunity for the acts and omissions of state employees who register and approve response action contractors, approve contingency plans, and direct spill response activities.

COMMENT: Granting immunity to the state for the acts and omissions of state employees who carry out their responsibilities always triggers

important public policy considerations. For example, what will motivate state employees to carry out their tasks responsibly if, by virtue of this proposal, they will not be judged by the same standard of care applicable to other public employees and private employees? With respect to limited responder immunity, the spiller remains liable for damages in those instances where a responder is immune, but what fund will pay an injured party under this proposal if a state employee is negligent? If the state improperly takes over a spill response and misdirects it, from whom will the contingency plan holders, responders, and injured residents and others seek relief? Will the work of parole officers, fire marshalls, building inspectors, sanitation workers, etc., be similarly protected? The state has willingly and aggressively demanded a more active and responsible role in oil spill response activities and in prevention and contingency planning efforts. With that authority also comes a responsibility to carefully perform regulatory tasks and to stand ready to compensate those who are injured through the negligent acts and omissions of state employees.

- Page 4, lines 19 - 25:

Delete lines 19 through 25.

COMMENT: This section will impose strict liability for clean up costs and other damages upon a response action contractor who, rightly or wrongly, fails to respond as required by a contingency plan. This grave liability will effectively eliminate response action contractors in Alaska. Recall that tanker owners/operators and others are already strictly liable for spill damages, even if a response contractor named in a contingency plan does not respond for any reason. Whether a contingency plan holder uses its own resources or contracts with a professional responder to provide for effective spill containment and cleanup, the assurance of immediate response is developed through spill liability provisions, imposition of penalties for an ineffective response, contingency plan approval, and adequate personnel and equipment capabilities as demonstrated in training, inspections, and drills.

Section 5.

- Page 5, line 14:

Delete this section.

COMMENT: This section cross references a definition of "damages" in the strict liability statute to an older 1972 definition appearing in AS 46.03.824. Yet, the current definition was apparently added during the HB 567 process. There is no explanation as to why this definition is needing any amendment, nor how such an amendment relates to limited responder immunity in this year's legislation.

Section 7.

- Page 5, line 28:

Delete "an action for damages to tangible personal property not caused by oil" which appears in AS 46.03.825(b).

COMMENT: Without this important change, and unless damage to tangible personal property is caused by oil, a responder will have no limited liability. For example, damages to a fishing net severed by a responder's boat or to a pleasure craft marred by a responder's vessel as it pulls from a dock will not be covered by the limited immunity. If this requirement was removed, the spiller, of course, would pay for these damages, but without the unrealistic and unnecessary chilling effect of this subsection. No other Good Samaritan provision for oil spill responders in other jurisdictions has this troublesome limitation.

- Page 5, lines 30 - 31, and Page 6, line 1:

Delete subsection AS 46.03.825(b)(3) placing a time limitation on the duration of the immunity period.

COMMENT: Given the nature of oil spill response operations, any time limit is unrealistic. It is a major disincentive for responders to get involved and stay involved. 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. 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 a 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 this 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? Finally, the COC also studied this issue at some length, and recommended against any such arbitrary time period.

Section 8.

- Page 6, line 18:

Delete this section.

COMMENT: For the reasons explained in conjunction with Section 3, this section should also be deleted.

Section 9.

- Page 6, lines 24 - 25:

Delete this proposed limitation to the definition of "response action."

COMMENT: For an unexplained reason, the phrase "but not limited to" has been deleted from the definition of "response action." It is unclear whether this proposal reflects an attempt to place restrictions on the types of response subject to the limited immunity. Whether mitigation, clean up, removal, or some other response action is taken, it should be subject to the limited immunity. The language is purposefully general because of the difficulty in describing every conceivable action worthy of limited responder immunity.

Section 12.

- Page 7, lines 11 - 30:

Delete this section.

COMMENT: The issue concerning any alleged duty of the holders of the pipeline right-of-way to respond to and cleanup discharges of TAPS crude oil from tankers in state waters is currently being litigated in federal district court. The very fact that a request has been made to "clarify" this alleged responsibility reveals the proponent's uncertainty in their arguments. Importantly, even if the proposal inexplicably survived legal challenges, there has been no showing that it will somehow help resolve difficult issues related to tanker financial responsibility in Prince William Sound.

In addition, current federal and state laws place responsibility for response to and cleanup of such discharges on tanker owner/operators. How will their current responsibility to contain and cleanup tanker spills be affected by this proposal to shift that same duty to a particular initial response action contractor? Under federal law, the U.S. Coast Guard will continue to look to the spiller to manage its corporate and contractual resources during a spill response, what conflicts are anticipated with federal oversight of

private activities during that response? A spiller should be expected to fulfill its responsibilities under federal law pursuant to a tank vessel response plan approved by the U.S. Guard; will Alyeska be relieved of responsibility under this proposed state legislation should that occur? If conflicts arise during the spill response between the spiller and Alyeska (who are proposed to have concurrent responsibilities), how will they be resolved? Won't the State of Alaska be required by the Supremacy Clause to accede to federal requirements for the response which places containment and cleanup responsibilities on the spiller? Will Alyeska face state claims if the spiller honors its OPA '90 obligations and assumes complete management of the spill response?

What additional costs and financial responsibility requirements should be anticipated by the holders of the pipeline right-of-way to insure that sufficient resources can be mustered to provide for the complete response in all state waters described in this proposal? What will this mean for the owners and producers of oil in the state if the responsibility for tanker spill response costs is inexplicably shifted from tanker owners/operators to pipeline companies? Even if this statutory obligation is limited to an initial response period, how will Alyeska obtain immediate access to state and federal oil spill pollution funds in the event management of a spill response is never assumed by the spiller? Will the spill response qualify for access to these pollution funds despite the proposed imposition of a concurrent obligation on a single response action contractor to complete an initial response or to continue an ongoing response? If such access cannot be assured, will this require imposition of increased financial responsibility requirements and/or development of a sinking fund in the event of such an exigency? In turn, will additional transportation of oil costs needlessly be incurred by oil purchasers and owners since federal and state laws already provide for financial responsibility and pollution fund safety nets?

What are the implications for restarting pipeline terminal operations following a spill if core Alyeska personnel and equipment are committed to an indeterminate response effort inside and outside Prince William Sound? What additional costs and delays related to oil production will be needlessly incurred as this new responsibility is imposed? How will such costs be borne, and by whom?

It has been said that the most effective method to combat oil spills is to prevent them. What impact will this proposal have on tanker owners/operators' legal incentive to conduct their operations safely? Subject, of course, to state and federal oversight as a part of the contingency planning process, contingency plan holders may determine to provide for adequate oil spill prevention and response with their own resources, or they may contract with others to provide for it. What are the practical and public policy ramifications of directing that contingency plan holders may only use the services of one entity for oil spill response and clean up in Prince William Sound? What chilling impact will this step have on other cleanup contractors/cooperatives who wish to compete with or to replace current

response action contractors in tanker contingency plans? How does this proposal square with notions of freedom of contract and business relations?

Won't ADEC approval of contingency plans, potentially including a proposed registration/approval program, provide adequate assurance of the capability and reliability of other response service contractors/cooperatives who desire to involve themselves in response activities in Prince William Sound and elsewhere? Why should the state direct, in advance, how contingency plan holders will contract for spill response services in Prince William Sound? What is the shortcoming of the comprehensive oil spill response scheme developed by Congress and this legislature to justify the imposition of a concurrent and conflicting response obligation on a particular initial response services contractor?

Section 14.

- Page 8, lines 28 - 30:

Insert "contractor" after "action" on line 28. Delete subsection (a)(4) on lines 29 and 30. Add subsection (h) on page 9, line 28, to read: "Nothing in this section is intended to amend AS 46.04.030(1) or to create a cleanup or performance standard that must be met by a holder of a contingency plan or a response action contractor."

COMMENT: HB 567, Alaska's 1989 comprehensive oil spill prevention, contingency planning, and response legislation, states that its response planning standards do not constitute cleanup standards which must be met by a contingency plan holder. Likewise, language is necessary as stated above which will make it clear that nothing stated in this section concerning registration and approval of response action contractors will directly or indirectly erode that important provision. Moreover, circumstances related to spill response are variable depending upon weather, geography, remoteness, etc. Response efforts will require flexibility. To establish performance standards for response action contractors is unrealistic, and will not only invite controversy and litigation, it will chill immediate, bold and effective response efforts.

- Page 8, line 28 - 30:

Insert "reasonably" before "necessary" on line 6.

COMENT: Of course, fees to cover the costs of the registration program should be established and administered reasonably.

PRELIMINARY COMMENTS RELATING TO CS for SSHB 540

Section 1.

- Page 2, lines 15 - 24:

Delete proposed sovereign immunity for the acts and omissions of state employees who register and approve response action contractors, approve contingency plans, and direct spill response activities.

COMMENT: Granting immunity to the state for the acts and omissions of state employees who carry out their responsibilities always triggers important public policy considerations. For example, what will motivate state employees to carry out their tasks responsibly if, by virtue of this proposal, they will not be judged by the same standard of care applicable to other public employees and private employees? With respect to limited responder immunity, the spiller remains liable for damages in those instances where a responder is immune, but what fund will pay an injured party under this proposal if a state employee is negligent? If the state improperly takes over a spill response and misdirects it, from whom will the contingency plan holders, responders, and injured residents and others seek relief? Will the work of parole officers, fire marshalls, building inspectors, sanitation workers, etc., be similarly protected? The state has willingly and aggressively demanded a more active and responsible role in oil spill response activities and in prevention and contingency planning efforts. With that authority also comes a responsibility to carefully perform regulatory tasks and to stand ready to compensate those who are injured through the negligent acts and omissions of state employees.

Section 4.

- Page 4, line 13:

Delete this section.

COMMENT: This section cross references a definition of "damages" in the strict liability statute to an older 1972 definition appearing in AS 46.03.824. Yet, the current definition was apparently added during the HB 567 process. There is no explanation as to why this definition is needing any amendment, nor how such an amendment relates to limited responder immunity in this year's legislation.

Section 5.

- Page 4, line 22:

Insert "or" after the semicolon.

COMMENT: This appears to be an oversight.

Section 7.

- Page 5, lines 19:

Remove the proposed deletion of "but not limited to."

COMMENT: For an unexplained reason, the phrase "but not limited to" has been deleted from the definition of "response action." It is unclear whether this proposal reflects an attempt to place restrictions on the types of response subject to the limited immunity. Whether mitigation, clean up, removal, or some other response action is taken, it should be subject to the limited immunity. The language is purposefully general because of the difficulty in describing every conceivable response action.

Section 10.

- Page 6, lines 24 - 26:

Insert "contractor" after "action" on line 24. Delete subsection (a)(4) on lines 25 and 26. On line 24, replace the semicolon with a period; move "and" on line 24 to follow the semicolon on line 23. Add subsection (h) on page 7, line 24, to read: "Nothing in this section is intended to amend AS 46.04.030(l) or to create a cleanup or performance standard that must be met by a holder of a contingency plan or a response action contractor."

COMMENT: HB 567, Alaska's 1989 comprehensive oil spill prevention, contingency planning, and response legislation, states that its response planning standards do not constitute cleanup standards which must be met by a contingency plan holder. Likewise, language is necessary as stated above which will make it clear that nothing stated in this section concerning registration and approval of response action contractors will directly or indirectly erode that important provision. Moreover, circumstances related to spill response are variable depending upon weather, geography, remoteness, etc. Response efforts will require flexibility. To establish performance standards for response action contractors is unrealistic, and will not only invite controversy and litigation, it will chill immediate, bold and effective response efforts.

* Page 7, line 2:

Insert "reasonably" before "necessary" on line 2.

COMMENT: Of course, fees to cover the costs of the registration program should be established and administered reasonably.

Alyeska pipeline

SERVICE COMPANY

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

May 1, 1992

Letters to the Editor
Anchorage Daily News
P. O. Box 149001
Anchorage, AK 99514-9001

Dear Editor:

The April 30 Forum column authored by Walt Parker, Esther Wunnicke, and Ernie Piper is based on faulty premises. It mischaracterizes Alyeska's position and the applicable statutes -- both today and in the past. It is unfortunate that the article misleads the public in this fashion. It is even more unfortunate that the authors have chosen to advocate legislation which would eliminate a tanker owner's responsibility to clean up oil it spills in Prince William Sound.

Consider the facts. First, Alyeska transports oil from the North Slope to the Valdez Terminal. During this 800-mile journey, when the oil is under Alyeska's control, Alyeska is responsible to clean up any oil it spills. This is as it should be, because Alyeska is in the best position to take precautions to prevent and to clean up oil spills from the pipeline.

Second, when the oil leaves the Valdez Terminal, it passes from Alyeska's control into the control of various tanker owners and charterers. These tanker operators become responsible for that oil and are required by federal law to clean up any oil they spill. Again, this is as it should be. The tanker operators are in the best position to prevent oil from spilling -- it is, after all, their crews that are charged with operating the tanker safely to its destination -- and for preparing to clean up any oil that might be spilled.

Anchorage Daily News Editor

May 1, 1992

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Third, effective November 1, 1990, the State of Alaska approved a vessel contingency plan for each tanker in the TAPS trade. Without an approved plan, a tanker cannot operate in Alaska. Each of these plans describes a start-to-finish response to an oil spill. The plans describe how the vessel operator will rely on Alyeska to provide an initial response to the spill from a vessel, and how, over a period of days, Alyeska will be replaced by the personnel and equipment needed to complete removal of the spilled oil.

Contrary to the assertions of the Forum column, Alyeska is contractually obligated to every TAPS tanker that enters Prince William Sound to provide this initial response. Alyeska will fulfill these commitments. Indeed, in order to provide additional assurance, Alyeska has advised the Legislature of its willingness to support legislation that requires Alyeska to offer this support to every qualified tanker in the TAPS trade on terms that prohibit cancellation of a vessel contract while that vessel is in Prince William Sound. Even the most unforgiving skeptic would have to agree that, if this legislation is enacted, Alyeska's obligation will be confirmed.

The dramatic introduction to the Forum column misquotes Alyeska's officials and misrepresents our position by asserting that Alyeska is only a volunteer, free to ignore an accident in the Sound. Nothing could be further from the truth. Alyeska has elected to bind itself contractually to provide initial response services to the TAPS tanker trade. The Department of Environmental Conservation has reviewed and approved these contracts. Alyeska has a clear obligation to respond and is committed to meet it. We have demonstrated our commitment by creating a world class spill response organization to meet tough initial response standards enacted in 1990.

The premise of the Forum column is that Alyeska is obligated for reasons other than its contracts to respond to tanker spills in the Sound. This premise is at odds with the Trans-Alaska Pipeline Authorization Act (TAPAA), enacted in 1973:

Anchorage Daily News Editor
May 1, 1992
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Notwithstanding the provisions of any other law, if oil that has been transported through the trans-Alaska pipeline is loaded on a vessel at the terminal facilities of the pipeline, the owner and operator of the vessel (jointly and severally) and the Trans-Alaska Pipeline Liability Fund ... shall be strictly liable without regard to fault ... for all damages, including clean-up costs, sustained by any person or entity, public or private, including residents of Canada, as the result of discharges of oil from such vessel.

Recent federal legislation, the Oil Pollution Act of 1990 (OPA '90), which amended TAPAA, imposed a similar responsibility on crude oil transport. The language defines the "responsible party" with respect to a vessel spill as "any person owning, operating or demise chartering the vessel" and provides that tanker owners and operators are liable for the costs of cleaning up their spills. Marine terminals that load tankers, including Alyeska's Valdez Terminal, do not have responsibility to clean up spills from the tankers they have loaded. As the Congressional Conference Committee wrote:

Liability standards under sections 204(a) and (b) of the TAPS Act, as amended, will apply until TAPS oil is loaded aboard a vessel. TAPS Act liability shall apply if oil is spilled during the loading process at the Terminal. Any subsequent discharge from the vessel shall be governed by the liability regime established by the Oil Pollution Act of 1990.

1990 U.S. Code Cong. & Admin. News 850.

Contrary to the assertions in the Forum column, Congressional authorization of the federal right of way for the pipeline did not make Alyeska or its owners liable for damages caused by tanker spills in Prince William Sound. As Representative Morris Udall described Congress' intent in authorizing construction of TAPS:

Anchorage Daily News Editor
May 1, 1992
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For the marine leg, from Valdez to the ports in the lower 48 states, the conferees agreed that there should be strict liability for any spills. The first \$14 million for clean up and damages is to be assessed against the ship owner and the rest - up to \$100 million per incident -- is to be paid out of a fund created by a 5 cents per barrel levy on all oil transported through the pipeline.

Comments of Rep. Udall, 119 Cong. Rec. 36606 (November 12, 1973)

State law also imposes liability on the party transporting the oil at the time it is spilled. Thus, Alyeska's obligation under state and federal law has been, and is, to clean up oil it spills, and tanker operators are responsible for the oil they spill.

We especially regret that the authors chose to advocate that the entire responsibility for responding to a tanker spill should be placed on Alyeska. This argument ignores the historic and current state of the law. Their argument also ignores good public policy, which is to impose the legal duty on the party in the best position to prevent the spill from occurring: in Prince William Sound, the tanker operator.

Yes, "a deal is a deal," as the Forum headline announced, and Alyeska remains committed to upholding its part of the bargain.

Very truly yours,


Paul M. Richards
Manager
Government Relations

FORUM / LETTERS

Alyeska has got to know: A deal is a deal

By WALTER B. PARKER,
ESTHER WUNNICKE and ERNIE PIPER

If a supertanker hits Bligh Reef tonight, we're going to need more than a volunteer response organization that's willing to work for a few days.

Yet that's exactly what Alyeska Pipeline Service Company and its oil company parents are proposing. Despite more than two decades of legal precedent and company promises, Alyeska now says that it is only a "volunteer" spill responder, and that it will serve as a Good Samaritan for no more than 72 hours.

This claim is contrary to what Congress agreed to when it approved pipeline construction, contrary to what Alyeska promised, and an insult to Alaskans who lived through and worked on the Exxon Valdez oil spill.

The state and federal governments have a chance to clear up this confusing and potentially disastrous claim with separate measures now before the Alaska Legislature and the U.S. House of Representatives. The state measures, HB540 and SB270, contain lan-



guage that would spell out in law Alyeska's responsibilities to respond. Good as that effort is, even the state bill falls into Alyeska's claim that it is responsible for no more than the "initial" response.

A quick look at the record should prompt our legislators to pass HB540 and SB270 — without letting Alyeska off the hook by limiting its responsibility to 72 hours. There are three good reasons why we shouldn't buy into Alyeska's claim.

First, that's not what the U.S. Congress said when it approved the construction of the pipeline. Throughout the entire debate about construction of the pipeline — and then again in the Oil Pollution Act of 1990 — the Congress made its intent clear: The people who hold the permits to operate the pipeline are responsible for controlling and

cleaning up oil spills, from start to finish. There was no time limit, no 72-hour clock.

Second, Alyeska's new claim ignores its own promises. In 1973, under congressional questioning that was directed at just the kind of "who's in charge" confusion Alyeska is now proposing, an Alyeska lawyer said his company was the agent of the owners and that Alyeska would accept "full responsibility" on behalf of the owners.

"Our actions are their actions," said Alyeska general counsel John Knodell. So, said an inquisitive congressman, Alyeska won't be used by an owner company as some kind of corporate shield from liability? "That is correct," said the Alyeska lawyer.

Of course, that's exactly the opposite of what Alyeska is claiming two decades later. Instead of a one-stop response headquarters — Alyeska — now there could be many, increasing the potential for confusion and finger-pointing when oil is on the water.

Here's the third reason why Alaskans should hold Alyeska to the terms of the deal: We're paying for it. Through a variety of complex formulas, the owner companies deduct part of their spill prevention and

response costs from what they pay us in royalties on the money they make from the North Slope oilfields we own.

It's not an insignificant sum. The state is foregoing as much as \$150 million in potential royalty payments through the end of the decade in exchange for better Alyeska preparedness in Prince William Sound.

We're not paying Alyeska millions of dollars a year to volunteer on terms they dictate to us. We're paying them to protect us — and not just for 72 hours. That's been the deal since the pipeline was built, and the deal should stick.

We should spell this deal out in law, right now, before people in Cordova and Chenega are watching oil wash up on their beaches, and wondering where the heck the responders are.

□ Walter Parker was chairman of the Alaska oil spill commission; Esther Wunnicke was vice chair of the oil spill commission; Ernie Piper was state oil spill co-ordinator during much of the cleanup.

What took so long?

I've just seen a brochure put out by the ANWR coordinator's office, titled "Alaska, Keystone of a National Energy Policy." Printed here in Alaska, this 16-page handy-sized brochure is informative and easy to understand. I wonder why it wasn't printed and distributed years ago?

The Big Bang theory explained:



IN THE BEGINNING.

A A

RANCE II

given. When the vertical rise is calculated, the elevation of Mount Alyeska is used and 3,125 feet is calculated. If, as illustrated, 3,939 feet is the elevation of the peak, it is not correct to use that figure to calculate the vertical. The elevation of the highest lift, the Spirit Quad, should be the basis for

U.S. Department
of Transportation
United States
Coast Guard



Commander
Seventeenth
Coast Guard District

P.O. Box 25517
Juneau, AK
99802-5517
Staff Symbol: dcs
(907)463-2025

16450
March 20, 1992

Mr. M.F.G. Williams
Vice-President
Environment and Contingencies
Alyeska Pipeline
1335 South Bragaw Street
Anchorage, AK 99512

Dear Mr. Williams:

This is in response to your letter of 2 March 1992 to Admiral Ciancaglini which proposed formalizing relationships with the Coast Guard under various spill response scenarios. As Admiral Ciancaglini is out of the state, I am responding on his behalf.

We are generally amenable to your proposed relationships with the Coast Guard and your intentions to respond to spills in Prince William Sound from other than TAPS sources. While we are receptive to meeting with you on these subjects, we think these matters are more appropriately addressed with the Federal On Scene Coordinator and Captain of the Port for Prince William Sound, Commander Ed Thompson.

We see no need to formalize Coast Guard/Alyeska relationships or the transition of response roles for federalized spills through a Memorandum of Understanding. Present federal law clearly outlines the Coast Guard's duties in taking over spill responses. Furthermore, our interpretation of the Trans Alaska Pipeline Act (TAPA) indicates Alyeska is responsible for all TAPS related spills in Prince William Sound. Therefore the transition scenario you mentioned should never develop.

In the remote event a transition of spill response operations from Alyeska to the Coast Guard should be necessary, the joint exercises and close liaison which presently exist should serve us well. However, we urge Alyeska to enter into a Basic Ordering Agreement (BOA) with the Coast Guard to outline the cost and terms of your services. I've attached a BOA submission package for your review and completion. By establishing a BOA, your concerns with reimbursement will be addressed in advance, thus avoiding financial complications during an Alyeska/Coast Guard spill response transition.

We are also pleased to see your willingness to provide spill response assistance to non TAPS related spills in Prince William

16450
March 20, 1992

Sound and appreciate the need for you to limit your involvement so as not to interfere with your TAPS response obligations. Should we request your services in a federal response a pre-existing BOA would, again, serve this end well. As you suggest, in some cases binding contracts with response action contractors will be required of other potential spillers who transport petroleum products. This will be mandated by regulations that develop from the Oil Pollution Act of 1990 (OPA-90). In addition, we are in the process of increasing the number of BOA's we have with response action contractors to provide other commercial response alternatives.

We feel the integrated approach towards pollution response efforts developed in Alyeska/USCG/State/RCAC drills and exercises have provided good communications with all parties at the local level. I prefer to take advantage of these relationships and have the aforementioned issues worked out with our representatives in Valdez who have a first hand knowledge of the problems, gaps and solutions.

In closing, I applaud your efforts to "fine tune" our pollution response options and am confident that this will come to fruition through expanded liaison with the local Captain of the Port's staff. This approach towards addressing these issues, however, does not preclude our discussing these matters further should you desire.

Sincerely,



B. C. MILLER

Captain, U. S. Coast Guard
Commander, Seventeenth Coast Guard District
Acting

Encl: (1) Basic Ordering Agreement Submission Package

Copy: CDR Ed Thompson, CO, MSO Valdez

March 2, 1992

Letter No. 92-9411-G

David E. Ciancaglini
Rear Admiral
U.S. Coast Guard
P.O. Box 25517
Juneau, Alaska 99802

Re: Coast Guard Directed Oil Spill Responses
in Prince William Sound

Dear Admiral Ciancaglini:

Alyeska Pipeline Service Company ("Alyeska") is an oil spill response action contractor for spills from TAPS trade tankers in Prince William Sound. To provide this service, Alyeska has entered into Oil Spill Response Services Agreements with five companies that either own, charter or operate tank vessels that call at Valdez. Those companies, which we refer to as Contracting Vessels, are ARCO Marine, Inc., BP Oil Shipping Company, U.S.A., Chevron U.S.A., Inc., Exxon Shipping Company, and Tesoro Alaska Petroleum Company. Exhibit A of each Agreement lists the tank vessels covered by the Agreement.

In the Agreements, Alyeska promises to manage the initial response to an oil spill for as long as 72 hours following a spill, in accordance with the Prince William Sound Tanker Spill Prevention and Response Plan. The Contracting Vessels agree to assume management of the spill response within 72 hours after notification by Alyeska. Under this arrangement, Alyeska will continue to assist the Contracting Vessel's on water response until the Alyeska resources are not needed or can be replaced. For small spills, under 1,000 barrels, Alyeska may elect to complete the entire response on behalf of the contracting vessel.

We believe that each of these companies is prepared to respond to a spill from the vessels it utilizes in Prince William Sound. The Alaska Department of Environmental Conservation has arrived at the same conclusion and has approved the contingency plans for the tank vessels covered by these Agreements. Alyeska has held major response drills with ARCO, BP, Exxon Shipping and Chevron and plan a similar exercise with Tesoro. Moreover, the Agreements and the PWS Plan anticipate that if the Contracting Vessel or other acceptable representative of the responsible party does not assume management of the spill

response as required, Alyeska will ask the Coast Guard to federalize the response and assist in whatever way is appropriate, at the direction of the Federal On Scene Coordinator.

Based on discussions with Commander Ed Thompson, Captain of the Port in Valdez, there is an understanding between Alyeska and the Coast Guard that Alyeska will assist the Coast Guard if a spill response is federalized. We believe that it would be useful to have a formal procedure in place to guide transition from Alyeska management of spill response to federal control in the event such transition becomes necessary. Preparation for this contingency might be enhanced if there is a contract or Memorandum of Understanding between Alyeska and the Coast Guard describing the Coast Guard's expectations of Alyeska and establishing a management and reimbursement procedure.

It is our understanding that the Oil Pollution Act of 1990 and the National Contingency Plan (NCP) provide the Coast Guard with the authority and mission to direct a spill response when the responsible party does not take proper removal action or is unknown and the spill poses a substantial threat to the public health or welfare. 33 U.S.C. 1321(c) and National Contingency Plan 300.300. Section 300 of the NCP and Subpart H also describe how the Coast Guard can use private resources to fulfill this responsibility.

I would like to meet with you to discuss these issues and if you agree, begin the process of developing a procedure and an agreement tailored to meet the unique circumstances found in Prince William Sound.

There are two other issues we should address. Alyeska will respond to a discovery of crude oil on the waters of Prince William Sound even if the origin is not known. Under those circumstances, if the spiller is not quickly identified, we believe the response should be federalized.

Concerned citizens have asked about Alyeska's role in responding to phantom spills of refined petroleum products in Prince William Sound. In the past, Alyeska has responded voluntarily to such spills at the request of the Coast Guard, without seeking compensation. We will continue to be available to voluntarily assist the Coast Guard under these circumstances, with no actual duty to respond. These limitations are necessary because our resources cannot be dedicated to any effort other than our primary responsibilities to the TAPS trade vessels. We would be willing to discuss Alyeska's role in assisting the Coast

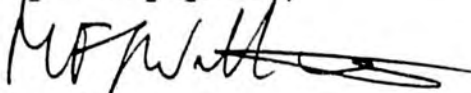
Name
March 2, 1992
Page 3

Letter No. 92-9411-G

Guard's response to phantom spills. In the case of potential spills from cruise ships, fishing support vessels or fuel barges, Alyeska should only have a voluntary support role to assist the primary plan of the spiller. The responsible parties and the Coast Guard should enter into binding contracts with other Response Action Contractors to provide response capability for these types of spills.

I will contact you soon to discuss these issues.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'M.F.G. Williams', with a horizontal line drawn through the end of the signature.

M.F.G Williams
Vice-President
Environment & Contingencies

cc: Representative Bill Hudson
Senator Sam Cotten



"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."

April 30, 1992

The Honorable Dave Donley
Chair, House Judiciary Committee
Alaska State Legislature
P. O. Box V
Juneau, Alaska 99811

Dear Representative Donley:

Cook Inlet Regional Citizens Advisory Committee (Cook Inlet RCAC) has had the opportunity to review the bill passed out of the House Resources Committee relating to liability of on oil spill response action contractor. In 1991 and again this legislative session, Cook Inlet RCAC has taken an active interest in this legislation and believes it imperative the State of Alaska adopt legislation which ensures the responsible party, through the approved contingency plan, has the resources to respond to a spill.

In consideration of the bill passed out of the House Resources Committee, Cook Inlet RCAC support sthis legislation with the following amendments:

*Include language which ensures individuals, including vessels of opportunity, are protected and not held liable for voluntarily assisting in spill response efforts.

*Include language which would add the State of Alaska as a third party beneficiary to contracts between the contingency plan holder and designated response action contractors.

Cook Inlet RCAC has taken the liberty to "mark up" CSSSHB 540 including proposed language to include in the bill which addresses the two issues identified above. Having been a member of the United States Coast Guard Negotiated Rulemaking Process for Tank Vessel Response Plans, these positions are consistent with those advocated by Cook Inlet RCAC during this process.

Cook Inlet Regional Citizens Advisory Council

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

Over the past six weeks Cook Inlet RCAC has been working with interest groups throughout Cook Inlet to develop this consensus position on this extremely vital issue. Should you have any questions on this issue or any of the other projects of Cook Inlet RCAC please do not hesitate to contact me.

Sincerely yours,



Lisa M. Parker
Executive Director

cc: ✓House Judiciary Committee Members
✓House Resources Committee Members
✓House Special Committee on Oil and Gas
✓Senate Special Committee on Oil and Gas
✓Senate Judiciary Committee
Mr. Gene Burden, Tesoro Alaska Petroleum
Mr. Al Hastings, Conoco
Cook Inlet RCAC Board of Directors

7-LS2045\V

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

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE RESOURCES COMMITTEE

Offered: 4/21/92

Referred: Judiciary

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

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the liability of the state for certain registration planning, and
2 response activities related to oil spills; relating to liability for release or threatened release
3 of a hazardous substance; relating to the liability of an oil spill response action contractor
4 for release or threatened release of a hazardous substance; relating to the duty of, and
5 charges or financial responsibility requirements related to that duty imposed by, the
6 common operating agent for the holders and lessees of the right-of-way agreement for the
7 Trans Alaska Pipeline System to control and contain oil discharges; relating to oil
8 discharge and contingency plans; ~~relating to registration of an oil spill response action~~
9 ~~contractor~~ repealing secs. 2, 5, 7, 10, and 12 of ch. 92, SLA 1991; and providing for
10 an effective date."

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

12 ~~*Section 1 AS 00 50 250 is amended to read*~~

HB0540d

-1-

CSSSHB 540(RES)

New Text Underlined ~~DELETED TEXT BRACKETED~~

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

8 (1) is an action for tort, and is based upon an act or omission of an employee of
9 the state, exercising due care, in the execution of a statute or regulation, whether or not the
10 statute or regulation is valid; or is an action for tort, and based upon the exercise or performance
11 or the failure to exercise or perform a discretionary function or duty on the part of a state agency
12 or an employee of the state, whether or not the discretion involved is abused;

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

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

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

20 (5) arises out of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) an act of war;

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

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

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

(C) an act of God; and

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

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

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

270
Sec 5
* Sec. 4. AS 46.03.822(k) is amended to read:

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

270
Sec 6
* Sec. 5. AS 46.03.825(a) is repealed and reenacted to read:

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

(1) consistent with a contingency plan

(A) approved under AS 46.04.030 if the response action contractor is listed in the contingency plan; or

(B) prepared under AS 46.04.200, 46.04.210, or 33 U.S.C. 1321(d) if the response action contractor is not listed in the contingency plan; or

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

* Sec. 6. AS 46.03.825(b) is amended to read:

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

(1) an action for personal injury or death;

(2) a response action contractor who

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

(B) acts with gross negligence or intentional misconduct;

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

~~(D) has agreed in writing to be listed as a primary response action contractor, who is listed as a primary response action contractor in a contingency plan approved under AS 46.04.030, and who fails to respond to a release or threatened release of oil that the primary response action contractor was required to respond to under its contract with the applicable contingency plan holder; this subparagraph does not apply to a primary response action contractor if the failure to respond to a release or threatened release of oil results from a concurrent response under another contingency plan approved under AS 46.04.030 in which the primary response action contractor has the primary duty to respond [AN ACTION FOR DAMAGES TO TANGIBLE PERSONAL PROPERTY NOT CAUSED BY OIL];~~

or

(3) an act or omission that occurs more than 30 [15] days after the release.

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

(d) In this section,

(1) "primary response action contractor" has the meaning given in AS 46.04.035;

~~(2) "registered" means registered under AS 46.04.035;~~

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

* Sec. 8. AS 46.03.825 is amended by adding new subsections to read:

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

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

6 → (g) A response action contractor is not civilly liable for removal costs or damages
7 resulting solely from the response action contractor's decision to terminate its response efforts
8 because of the expiration of the limited liability provided under this section. A response action
9 contractor's decision to terminate response efforts because of the expiration of the limited liability
10 provided under this section does not in any manner impair, curtail, limit, or otherwise affect the
11 limited liability conferred on the contractor with regard to the contractor's response efforts
12 undertaken during the period of time that limited liability under this section applied to those
13 response efforts.

14 * Sec. 9. AS 46.04.020(a) is amended to read:

15 (a) A person causing or permitting the discharge of oil shall immediately contain and
16 clean up the discharge. [THE DEPARTMENT MAY WAIVE THIS REQUIREMENT

17 (1) IF IT DETERMINES, IN CONSULTATION WITH THE UNITED STATES
18 COAST GUARD OR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
19 AS APPROPRIATE, THAT CONTAINMENT OR CLEANUP IS TECHNICALLY NOT
20 FEASIBLE; OR

21 (2) IF THE CLEANUP OR CONTAINMENT ACTIVITIES WOULD RESULT
22 IN GREATER ENVIRONMENTAL DAMAGE THAN THE DISCHARGE ITSELF.]

23 * Sec. 10. AS 46.04.020 is amended by adding new subsections to read:

24 (g) In addition to its existing obligations under state and federal law, and the provisions
25 of the state and federal Trans Alaska Pipeline System right-of-way agreements, the common
26 operating agent for the holders and lessees of the right-of-way agreement for the Trans Alaska
27 pipeline shall immediately provide for the initial containment and clean up of a discharge or
28 threatened discharge of crude oil transported by or due to the operation of the Trans Alaska
29 Pipeline System or due to related activities, including operation of a tank vessel while berthed
30 at the Trans Alaska pipeline marine terminal or while traveling within 72 tanker lane miles to
31 or from the marine terminal. The duty to respond imposed under this subsection does not affect

1 the duty of any other person. A charge or financial responsibility requirement imposed by the
2 common operating agent for holders and lessees of the right-of-way agreement for the Trans
3 Alaska Pipeline System on a tank vessel traveling on an intrastate voyage from a marine terminal
4 for the purpose of containing and cleaning up a discharge of crude oil is subject to review by the
5 Alaska Public Utilities Commission under AS 42.05.361 - 42.05.441. Review of a charge or
6 financial responsibility requirement allowed under this subsection may occur at the request of a
7 tank vessel owner, operator, or lessee, or as allowed by the Alaska Public Utilities Commission.

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

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

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

15 * ~~Sec. 11. AS 46.04.030(e) is amended to read:~~

16 (e) The department may attach reasonable terms and conditions to its approval or
17 modification of a contingency plan that the department determines are necessary to ensure that
18 the applicant for a contingency plan has access to sufficient resources to protect environmentally
19 sensitive areas and to contain, clean up, and mitigate potential oil discharges from the facility or
20 vessel as provided in (k) of this section, and to ensure that the applicant complies with the
21 contingency plan. If a contingency plan submitted to the department for approval relies on
22 the services of an oil spill primary response action contractor, the department may not
23 approve the contingency plan unless the primary response action contractor is registered
24 and approved under AS 46.04.035. The contingency plan must provide for the use by the
25 applicant of the best technology that was available at the time the contingency plan was
26 submitted or renewed. The department may require an applicant or holder of an approved
27 contingency plan to take steps necessary to demonstrate its ability to carry out the contingency
28 plan, including

- 29 (1) periodic training;
30 (2) response team exercises; and
31 (3) verifying access to inventories of equipment, supplies, and personnel identified.

as available in the approved contingency plan.

* Sec. 12. AS 46.04 is amended by adding a new section to read:

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

(1) minimum training standards for personnel;

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

(3) minimum professional response action standards and practices; and

(4) minimum performance standards for oil spill primary response action contractors listed in an oil spill contingency plan approved under AS 46.04.030.

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

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

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

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

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

1 (g) In this section,

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

3 (2) "primary response action contractor" means a person who enters into a
4 response action contract with respect to a release or threatened release of oil and who is carrying
5 out the contract, including a cooperative organization formed to maintain and supply response
6 equipment and materials that enters into a response action contract relating to a release or
7 threatened release of oil;

8 (3) "response action" has the meaning given in AS 46.03.825.

9 * Sec. 13. Sections 2, 5, 7, 10, and 12 of ch. 92, SLA 1991, are repealed.

10 ~~* Sec. 14. TRANSITION. The Department of Environmental Conservation shall adopt regulations~~
11 ~~to implement AS 46.04.035(a), enacted in sec. 12 of this Act, on or before January 1, 1993.~~

12 * Sec. 15. If this Act takes effect after June 30, 1992, sec. 13 of this Act is retroactive to June 30,
13 1992.

14 * Sec. 16. APPLICABILITY. ~~[(a) Except as provided in (b) of this section]~~ the amendments to
15 AS 46.03.822 and 46.03.825, made by secs. 2 - 8 of this Act, apply only to causes of action accruing
16 on or after the effective date of secs. 2 - 8 of this Act.

17 ~~[(b) The provisions of AS 46.03.825(b)(2)(C) apply only to causes of action accruing on or after~~
18 ~~the effective date of that paragraph under sec. 17 of this Act.]~~

19 ~~* Sec. 17. AS 46.03.825(b)(2)(C), added by sec. 6 of this Act [and sec. 11 of this Act] takes effect~~
20 ~~July 1, 1993.]~~

21 * Sec. 18. Except as provided in sec. 17 of this Act, this Act takes effect immediately under
22 AS 01.10.070(c).

Page 1, line 12. Delete Section 1 in its entirety and replace with the following:

Sec. 2. AS 09.65.091(a) is amended to read:

"A person who voluntarily provides equipment or services on the request of a police agency, fire department, rescue or emergency squad, or other governmental agency during a state of emergency declared by an authorized representative of the state or local government, or the authorized agent or a contingency plan holder described in AS 46.04.030. is not liable for the death of or injury to any person or damage to any property caused by that person's actions, except when the trier of facts finds that the person acted intentionally, recklessly, or with gross negligence."

Rationale: This would ensure that individuals, including vessels of opportunity, are protected and not held liable for responding voluntarily to assist in cleaning up activities.

Page 7, line 15. Delete Section 11 and Section 12 in their entirety and replace with the following:

Sec. 4. AS 46.04.030 is amended by adding a new subsection:

"(q) Contracts between contingency plan holders and response action contractors, necessary to satisfy the requirements of this section, shall name the State of Alaska as a third party beneficiary."

Rationale: There is concern that the State of Alaska does not have the ability to implement or call out a response action contractor in the event the responsible party fails to implement the contingency plan. This would allow the State to implement the responsible party's plan and use the resources, including contractors, identified in the plan. There has been concern expressed that the State would then have to be looking at all the contracts contained in contingency plans to ensure adequate protection. This is a function the State of Alaska should be currently performing and would add no additional burden to the Alaska Department of Environmental Conservation. Including the State of Alaska as a third party beneficiary in contingency plans provides for the same level of care as would be achieved through an expensive registration program.

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WALTER J. HICKEL
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
WASHINGTON, D.C.

FROM: *Larry Osmovsky*
OFFICE OF THE GOVERNOR OF ALASKA
44 North Capitol St., N.W., Suite 526
Washington, D.C. 20001-1512
202) 624-5858

XEROX TELECOPIER 7020
AUTOMATIC (202) 624-5857

TELECOPIER TRANSMITTAL INFORMATION SHEET

PHONE # SENT TO: *Sen. Corbett 469-4979*

DELIVER TO,
OLD FOR PICK UP: *Sam - Per your discussion with*

COMMENTS: *John, here's our material on*
Alaska liability. If we get
anything else, I'll send it on to you.

Larry

SUBJECT: _____

DATE: _____

TIME: _____ AM/PM EASTERN DAYLIGHT TIME

NUMBER OF PAGES: _____ (including transmittal sheet)

OPERATING SPEED: AUTOMATIC

OPERATOR: _____

IF TELECOPY DOES NOT COME THROUGH PROPERLY,
PLEASE CONTACT THIS OFFICE IMMEDIATELY.

THANK YOU!!!

Subtitle B--Trans-Alaska Pipeline

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

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

"RESPONSIBILITY OF RIGHT-OF-WAY HOLDER

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

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STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

February 24, 1992

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

Dear Rep. Navarre:

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

With regard to the council's recommendation number 7, you asked our opinion of whether Alyeska Pipeline Service Company has a duty to control and remove pollution within state boundaries related to the transportation of TAPS crude oil. As you know, this issue is the subject of litigation in the Exxon Valdez case. The State has taken the position that under the provisions of the State Right-of-Way Lease Alyeska is required to contain and cleanup crude oil spills within state waters, in particular in Prince William Sound. State of Alaska v. Exxon Corp., et al., Case No. 11N-89-06882 CI, §§ 36, 96-102 at 12, 31-32. The United States has taken a similar position with respect to the federal right-of-way lease. The State has also alleged that Alyeska's oil spill contingency plan in effect at the time of the spill required them to respond to spills in Prince William Sound. Id. §§ 36, 96-102, 132. The issue of Alyeska's duty to respond to vessel spills in the Sound pursuant to the Trans Alaska Pipeline Authorization Act (TAPAA), 43 U.S.C. § 1653(a) & (b), is not an issue in the state court litigation. This section is, however, at issue in the United States' Exxon Valdez lawsuit. United States of America v. Exxon Corp., et al., Case No. A91-082 Civ., §§ 41-43, at 10. Since Alyeska disputes any obligation to respond to tanker spills under TAPAA, this obligation, like those described above, would likely be the source of future litigation. See Response of Alyeska Pipeline Service Company to Memorandum Regarding the Trans Alaska Pipeline Authorization Act Prepared by Michael J. Frank, at 4. While we believe that our litigation positions are sound, there is no way to reliably predict how a court will rule.

WALTER J. HICKEL, GOVERNOR

REPLY TO:

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ANCHORAGE, ALASKA 99501-1904
PHONE (907) 276-3660
FAX (907) 276-3687

KEY BANK BUILDING
100 CUSHMAN ST. SUITE 400
FAIRBANKS, ALASKA 99701-4878
PHONE (907) 452-1508
FAX (907) 452-1377

AG BOK K - STATE CAPITOL
JUNEAU, ALASKA 99811-0001
PHONE (907) 456-3600
FAX (907) 463-5295

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Hon. Mike Navarre
House of Representatives

February 24, 1992
Page 2

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

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

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

First, it must be determined . . . what weight should be afforded the constitutional interest impaired by the challenged enactment. The nature of this interest is the most important variable in fixing the appropriate level of review

Second, an examination must be undertaken of the purposes served by a challenged statute. Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest.

Third, an evaluation of the state's interest in the particular means employed to further its goals must be undertaken At the low end of the sliding scale, we have held that a substantial relationship between means and ends is constitutionally adequate. At the higher end of the scale, the fit between the means and ends must be closer. If the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated.

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Hon. Mike Mavayve
House of Representatives

February 24, 1992
Page 3

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

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

Sincerely,

CHARLES E. COLE
Attorney General

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

BCT:tg

cc: Hon. Sam Cottan
Alaska Senate

Paul Fuhs
Senior Legislative Liaison
Office of the Governor

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

✓ Craig Tillery, Assistant Attorney General
Environmental Section - Anchorage

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

OIL SPILL RESPONSE ACTION CONTRACTORS

**A REPORT
To The
ALASKA STATE LEGISLATURE
SEVENTEENTH LEGISLATURE • SECOND SESSION
1992**

Prepared By

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

Council Members

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

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

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

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

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

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

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

D. ALYESKA PIPELINE SERVICE COMPANY

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

First, under the terms of the Trans-Alaska Pipeline Authorization Act of 1973, the holder of the pipeline right-of-way must control and remove any pollution attributable to the activity of the holder, whether the pollution is within or outside the right-of-way corridor. 43 U.S.C. 1653 (b). The holders, all pipeline companies which are subsidiaries of parent oil companies, have made Alyeska their agent. Other sections of that Act impose liability for the damages caused from that pollution. By separately addressing the duties to pay damages and to remove pollution, it appears that Congress was looking for a single entity to oversee pollution control without that entity simultaneously acquiring all the liability for damages. The pollution removal duty is mirrored in provisions of the U.S. Department of the Interior *Agreement and Grant of Right-of-Way for Trans-Alaska Pipeline* with the holders.

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The legislative history of these provisions is not conclusive but generally recites the right-of-way holder's obligation to respond to pollution related to the TAPS oil trade, including marine spills. Damages for such spills had to be borne by all responsible parties, but the duty to control and remove the pollution remained with the right-of-way holder. A court construing the language which imposed the duty to remove pollution held Alyeska responsible for cleaning up a pipeline spill caused by a saboteur, even though the spill was not caused by activities conducted by or on behalf of the right-of-way holder. The court found that Congress clearly established the cleanup requirements without regard to fault.

Second, the right-of-way agreement requires Alyeska to have an approved oil spill contingency plan. After the flow of oil began through the Trans-Alaska pipeline, Alyeska submitted and received governmental approval of contingency plans covering spills that might occur from tankers berthed at the Valdez Marine Terminal, or elsewhere in Port Valdez, and in Prince William Sound. Alyeska's 1978 plan stated that Alyeska, as required by the state and federal agreements, would direct cleanup operations resulting from tankers carrying TAPS crude. Subsequent contingency plans reiterated Alyeska's obligation to respond to tanker spills. Following the Exxon Valdez oil spill, Alyeska denied that it was required to respond to tanker spills in Prince William Sound. Alyeska now states that it is a "volunteer" response action contractor for tanker spill response. This issue is important in both the state and federal governments' lawsuits against Alyeska, and as yet is unresolved.

In Alyeska's current position as a "volunteer" response action contractor, it no longer formally submits a Prince William Sound contingency plan for approval with Alyeska as the contingency plan holder. Today, as distinct from years prior to the Exxon Valdez oil spill, tanker owners or operators, rather than Alyeska, submit contingency plans relying upon Alyeska as the principal response action contractor to direct the field response for the first 72 hours. Alyeska's performance is governed by the private response action contracts with the companies which ship oil, most of whom are also members of the TAPS consortium. Some of Alyeska's response action contracts are with contingency plan holders. Others are with intermediaries, such as BP Oil Shipping Company, U.S.A. for vessels it charts. Alyeska does still submit a plan for the pipeline and the Valdez Marine Terminal. However, unlike previous terminal plans, Alyeska now states that it is not responsible for spills of tankers berthed at the terminal.

Third, Alyeska is unlike other response action contractors, because the pipeline companies include the entire costs of spill response in their tariff expenses. 25% of these expenditures are paid by the state through reduced tax revenues. No other category of response action contractor has state financial participation. Furthermore, the vast majority of these response costs relate to the prevention and cleanup of marine tanker spills which might occur at the Valdez Marine Terminal, elsewhere in Port Valdez, and in Prince William Sound rather than on-shore pipeline spills. If Alyeska is solely a volunteer in marine response efforts, the state, despite its 25% share of response costs, has no legal assurance that Alyeska will respond the next time a spill of TAPS oil occurs from

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a tanker in Alaska waters. Instead, the public has to rely solely on Alyeska's volunteerism and good faith.

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

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

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

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

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

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

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

VIII. CONCLUSION

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

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U.S. Department
of Transportation

United States
Coast Guard

Commander
Seventeenth
Coast Guard District

P.O. Box 25517
Juneau, AK
99802-5517
Staff Symbol: dcs
(907)463-2025

16450
March 20, 1992

Mr. M.F.G. Williams
Vice-President
Environment and Contingencies
Alaska Pipeline
1335 South Bragav Street
Anchorage, AK 99512

Dear Mr. Williams:

This is in response to your letter of 2 March 1992 to Admiral Ciancaglini which proposed formalizing relationships with the Coast Guard under various spill response scenarios. As Admiral Ciancaglini is out of the state, I am responding on his behalf.

We are generally amenable to your proposed relationships with the Coast Guard and your intentions to respond to spills in Prince William Sound from other than TAPS sources. While we are receptive to meeting with you on these subjects, we think these matters are more appropriately addressed with the Federal On Scene Coordinator and Captain of the Port for Prince William Sound, Commander Ed Thompson.

We see no need to formalize Coast Guard/Alaska relationships or the transition of response roles for federalized spills through a Memorandum of Understanding. Present federal law clearly outlines the Coast Guard's duties in taking over spill responses. Furthermore, our interpretation of the Trans Alaska Pipeline Act (TAPA) indicates Alaska is responsible for all TAPS related spills in Prince William Sound. Therefore the transition scenario you mentioned should never develop.

In the remote event a transition of spill response operations from Alaska to the Coast Guard should be necessary, the joint exercises and close liaison which presently exist should serve us well. However, we urge Alaska to enter into a Basic Ordering Agreement (BOA) with the Coast Guard to outline the cost and terms of your services. I've attached a BOA submission package for your review and completion. By establishing a BOA, your concerns with reimbursement will be addressed in advance, thus avoiding financial complications during an Alaska/Coast Guard spill response transition.

We are also pleased to see your willingness to provide spill response assistance to non TAPS related spills in Prince William

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March 20, 1992

Sound and appreciate the need for you to limit your involvement so as not to interfere with your TAPS response obligations. Should we request your services in a federal response a pre-existing SOA would, again, serve this end well. As you suggest, in some cases binding contracts with response action contractors will be required of other potential spillers who transport petroleum products. This will be mandated by regulations that develop from the Oil Pollution Act of 1990 (OPA-90). In addition, we are in the process of increasing the number of SOA's we have with response action contractors to provide other commercial response alternatives.

We feel the integrated approach towards pollution response efforts developed in Alaska/USCG/State/NEAC drills and exercises have provided good communications with all parties at the local level. I prefer to take advantage of these relationships and have the aforementioned issues worked out with our representatives in Valdez who have a first hand knowledge of the problems, gaps and solutions.

In closing, I applaud your efforts to "fine tune" our pollution response options and am confident that this will come to fruition through expanded liaison with the local Captain of the Port's staff. This approach towards addressing these issues, however, does not preclude our discussing these matters further should you desire.

Sincerely,

BC Miller
B. C. MILLER

Captain, U. S. Coast Guard
Commander, Seventeenth Coast Guard District
Acting

Encl: (1) Basic Ordering Agreement Submission Package

Copy: CDR Ed Thompson, CG, MEO Valdez

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Alyeska pipeline

1001 SOUTH GALEWAY STREET ANCHORAGE, ALASKA 99512 TELEPHONE (907) 261-1611, 261-1612, 261-1613

March 2, 1992

Letter No. 92-9411-G

David B. Ciancaglini
Rear Admiral
U.S. Coast Guard
P.O. Box 15517
Juneau, Alaska 99807

Re: Coast Guard Directed Oil Spill Responses
in Prince William Sound

Dear Admiral Ciancaglini:

Alyeska Pipeline Service Company ("Alyeska") is an oil spill response action contractor for spills from TAPS trade tankers in Prince William Sound. To provide this service, Alyeska has entered into Oil Spill Response Services Agreements with five companies that either own, charter or operate tank vessels that call at Valdez. Those companies, which we refer to as Contracting Vessels, are ARCO Marine, Inc., BP Oil Shipping Company, U.S.A., Chevron U.S.A., Inc., Exxon Shipping Company, and Tesoro Alaska Petroleum Company. Exhibit A of each Agreement lists the tank vessels covered by the Agreement.

In the Agreements, Alyeska promises to manage the initial response to an oil spill for as long as 72 hours following a spill, in accordance with the Prince William Sound Tanker Spill Prevention and Response Plan. The Contracting Vessels agree to assume management of the spill response within 72 hours after notification by Alyeska. Under this arrangement, Alyeska will continue to assist the Contracting Vessel's on water response until the Alyeska resources are not needed or can be replaced. For small spills, under 1,000 barrels, Alyeska may elect to complete the entire response on behalf of the contracting vessel.

We believe that each of these companies is prepared to respond to a spill from the vessels it utilizes in Prince William Sound. The Alaska Department of Environmental Conservation has arrived at the same conclusion and has approved the contingency plans for the tank vessels covered by these Agreements. Alyeska has held major response drills with ARCO, BP, Exxon Shipping and Chevron and plan a similar exercise with Tesoro. Moreover, the Agreements and the PWS Plan anticipate that if the Contracting Vessel or other acceptable representative of the responsible party does not assume management of the spill

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response as required, Alyeska will ask the Coast Guard to federalize the response and assist in whatever way is appropriate, at the direction of the Federal On Scene Coordinator.

Based on discussions with Commander Ed Thompson, Captain of the Port in Valdez, there is an understanding between Alyeska and the Coast Guard that Alyeska will assist the Coast Guard if a spill response is federalized. We believe that it would be useful to have a formal procedure in place to guide transition from Alyeska management of spill response to federal control in the event such transition becomes necessary. Preparation for this contingency might be enhanced if there is a contract or Memorandum of Understanding between Alyeska and the Coast Guard describing the Coast Guard's expectations of Alyeska and establishing a management and ~~contingency plan~~.

It is our understanding that the Oil Pollution Act of 1990 and the National Contingency Plan (NCP) provide the Coast Guard with the authority and mission to direct a spill response when the responsible party does not take proper removal action or is unknown and the spill poses a substantial threat to the public health or welfare. 33 U.S.C. 1901(e) and National Contingency Plan 300.300. Section 300 of the NCP and Subpart H also describe how the Coast Guard can use private resources to fulfill this responsibility.

I would like to meet with you to discuss these issues and if you agree, begin the process of developing a procedure and an agreement tailored to meet the unique circumstances found in Prince William Sound.

There are two other issues we should address. Alyeska will respond to a discovery of crude oil on the waters of Prince William Sound even if the origin is not known. Under these circumstances, if the spiller is not quickly identified, we believe the response should be federalized.

Concerned citizens have asked about Alyeska's role in responding to phantom spills of refined petroleum products in Prince William Sound. In the past, Alyeska has responded voluntarily to such spills at the request of the Coast Guard, without seeking compensation. We will continue to be available to voluntarily assist the Coast Guard under these circumstances, with no actual duty to respond. These limitations are necessary because our resources cannot be dedicated to any effort other than our primary responsibilities to the TAPS trade vessels. We would be willing to discuss Alyeska's role in assisting the Coast

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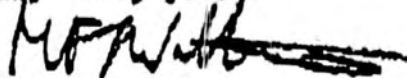
March 2, 1992

Page 3

Guard's response to phantom spills. In the case of potential spills from cruise ships, fishing support vessels or fuel barges, Alaska should only have a voluntary support role to assist the primary plan of the spiller. The responsible parties and the Coast Guard should enter into binding contracts with other Response Action Contractors to provide response capability for these types of spills.

I will contact you soon to discuss these issues.

Very truly yours,



M.P.O. Williams
Vice-President
Environment & Contingencies

cc: Representative Bill Hudson
Senator Dan Claitor

SCOMM

78:35

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

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE RULES COMMITTEE

Offered: 5/12/92

Referred: Today's Calendar

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

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to liability for release or threatened release of a hazardous substance;
2 relating to the liability of an oil spill response action contractor for release or threatened
3 release of a hazardous substance; relating to contracts by the common operating agent for
4 the holders and lessees of the right-of-way agreement for the Trans Alaska Pipeline System
5 to provide initial response services to tank vessels; relating to financial responsibility and
6 insurance provisions imposed on vessels; relating to oil discharge and contingency plans;
7 relating to registration of an oil spill response action contractor; repealing secs. 2, 5, 7,
8 10, and 12 of ch. 92, SLA 1991; and providing for an effective date."

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

10 * Section 1. PURPOSE. It is not the purpose of this Act to affect duties and responsibilities of
11 Alyeska Pipeline Service Company and its owners arising under the state and federal Trans Alaska
12 Pipeline System agreements.

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

2 (a) Notwithstanding any other provision or rule of law and subject only to the defenses
3 set out in (b) of this section, [AND] the exception set out in (i) of this section, and the
4 limitation on liability provided under AS 46.03.825, the following persons are strictly liable,
5 jointly and severally, for damages, for the costs of response, containment, removal, or remedial
6 action incurred by the state, a municipality, or a village, and for the additional costs of a function
7 or service, including administrative expenses for the incremental costs of providing the function
8 or service, that are incurred by the state, a municipality, or a village, and the costs of projects
9 or activities that are delayed or lost because of the efforts of the state, the municipality, or the
10 village, resulting from an unpermitted release of a hazardous substance or, with respect to
11 response costs, the substantial threat of an unpermitted release of a hazardous substance:

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

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

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

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

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

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

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

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

6 (A) an act of war;

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

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

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

13 (C) an act of God; and

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

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

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

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

20 (h) The state, a municipality, [OR] a village, a person who acts as a volunteer and is
21 engaged in a response action under the direction of the federal or state on-scene
22 coordinator, and a vessel of opportunity engaged in a response action under the direction
23 of the federal or state on-scene coordinator are [IS] not liable under this section for costs or
24 damages as a result of actions taken in response to an emergency created by a release or
25 threatened release of a hazardous substance generated by or from a facility or vessel owned by
26 another person unless the actions taken by the state, the municipality, [OR] the village, the
27 volunteer, or the vessel constitute gross negligence or intentional misconduct.

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

29 (k) In this section, "damages" has the meaning given in AS 46.03.824 and includes
30 [INCLUDE] damage to persons or to public or private property, damage to the natural resources
31 of the state or a municipality, and damage caused by acts or omissions of a response action