

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672
2098 SCOMM 78: SENATE SPEC. COMM. ON OIL & GAS, 1991-1992

DRAFT February 27, 1992

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

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

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

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

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

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

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

Section XXX.04 Appeals and Notices

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

[some appeal to centralized authority recommended]

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

DRAFT February 27, 1992

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

Section XXX.05 Renewal and Revocation

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

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

(1

5/11/92

6:15 P.M.

TO: SAM COTTEN
CHAIRMAN, SENATE OIL & GAS

FROM: WALT PARKER 333-5189

RE: CS FOR HB 540

IT WAS GOOD TO HEAR A STRONG
ADMINISTRATION POSITION FROM THE A/G.

RE LARRY WOODS. HE SAID, "WHAT HAPPENS
IF ALYESKA AND THE SHIPPER DISAGRE
ON THE RESPONSE?" THEY DO WHATEVER
THE FEDERAL OR STATE OSC TELLS THEM
TO DO. THEY ARE SIMPLY TOOLS OF
EXECUTION IN AN OVERALL PLAN. THEY
ARE NOT ANYTHING MORE. THAT
IS WHAT WE DID IN 1990, FED AND
STATE, AND HAVEN'T CHANGED YET.
THIS WHOLE THING IS JUST AN
EFFORT TO OVERTURN EVERYTHING
WE DID THEN.

SCRAP THE BILL. YOU HAVE
AS MUCH FOR TESORO AS POSSIBLE.

seapro

Southeast Alaska Petroleum Resource Organization

540 Water Street Suite 202
(907) 225-7002

Ketchikan, Alaska 99901
Fax (907) 247-1117

February 27, 1992

Representative Bill Hudson
P.O. Box V
Juneau, AK 99811

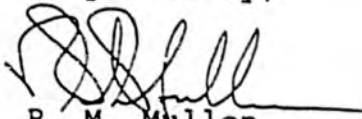
Dear Representative Hudson,

In support of your bill HB 540, which limits response action contractor liability, I am enclosing our recently approved position paper on this subject. Also, since our organization is still rather new and little known, I have included a map which shows the major locations of our network, and a map which shows the eligible facilities which have chosen not to join our network.

As you will note in our position paper, we do not believe that all of the recommendations of the Citizen's Oversight Council on this subject are in the best interest of our region. We do believe, however, that HB 540 provides exactly the conditions we think will provide the best climate for further developing environmental protection capabilities in our region.

I will, of course, provide you with any information or other assistance you may need relative to environmental protection in Southeast, the remainder of the state, and the North Pacific region.

Respectfully,



R. M. Mullen
Manager

POSITION PAPER

OIL SPILL RESPONSE ACTION CONTRACTOR LIABILITY

February 25, 1992

SEAPRO and its nineteen member companies wish to record our observations and concerns about response action contractor liability, and its likely impacts on the current and future state of environmental response capability in Southeast Alaska. We are particularly concerned by the failure of the Citizen's Oversight Council to adequately investigate the state of environmental response in rural Alaska generally, and Southeast Alaska specifically, in reaching the conclusions and recommendations contained in their report to the legislature on this subject.

Overview of Response Action Contractors in Southeast Alaska

There is only one business in the Southeast Alaska region which holds itself out as a response action contractor. That firm has very minimal capabilities which are almost totally restricted to the immediate areas around Juneau. Our region has always had to rely on existing business organizations within the region to provide response to pollution incidents and other emergencies. In addition to oil transporters and terminals, these businesses have included logging companies, construction companies, float plane and helicopter operators, tug and barge companies, fishing vessels, and many others. All of these are therefore "Response Action Contractors" as defined by state law when they enter into agreements to help respond to spills.

The services of companies like VRCA, VECO, Burlington Environmental, Foss Environmental, etc., have rarely if ever been used to respond to environmental emergencies in our region. The reason for this is the typical small size of spill, the nature of the products involved, and the logistic difficulties of deploying to the region in time to be effective. One of the primary motivations our members felt for formation of SEAPRO was the lack of response action contractors within the region.

SEAPRO is not currently a response action contractor. We are a cooperative sharing organization of predominantly local small businesses who make up the fuel and lubricating oil transportation and distribution network for all of Southeast Alaska. We also include several local companies who consume or handle large quantities of oil in support of their business activities, but who are not in the "oil business". Our organization was originally formed to act as a sharing network only in Ketchikan, but rapidly expanded to cover the entire region. We have now reached the point in our evolution where we must consider purchasing pollution response equipment in the near future and becoming some form of response entity.

All of our collective experience, along with our judgment of operating conditions within the region, forces us to conclude that there will likely never be a response action contractor of any significant ability in Southeast. We have no expectation that this situation will change any time soon because there is insufficient financial justification for bona-fide environmental or emergency contractors to capitalize a response capability which would only be profitably employed on our historical average of once a decade.

Potential Impact of Liability to Southeast Alaska Spill Response Capability

With the exception of SEAPRO member companies, almost none of the companies who have previously participated in environmental response activities in this region are aware of their potential liabilities when current state law sunsets in a few months. Additionally, since none of these companies consider themselves to be "response action contractors", it is unlikely that they will make themselves aware of their liability exposures in advance of being asked to respond to an environmental emergency. It is equally unlikely that they would submit to a "certification" process recommended by the Citizen's Oversight Council, or to the verification/inspection process which would be necessitated by such certification.

If these companies were to discover the potential extent of their liability exposure for participating in a clean up action after the current limitations sunset, it is unlikely that they will respond in a timely manner, if at all, when they are needed. The worse possible situation will be for one or more of these companies to become the target of an opportunistic law suit allowed by a lack of liability limitation. Such a situation would guarantee that it would be difficult, if not impossible, to convince local companies to respond to future emergencies, even if action were subsequently taken to limit liabilities. Given the ever increasing propensity for opportunistic law suits in our nation, and the sensitivity of regional businesses to this phenomenon, we believe that merely the possibility of such a situation will have a chilling effect on the regions environmental response capability.

Any reasonable person responding to an oil spill assumes that all liability for damages and costs resulting from the clean up will flow to the responsible party. This is as it should be. It makes no sense to imperil a contractor acting in good faith, and within the boundaries of state or federally approved contingency plans, to bear any responsibility for damages which could result from someone else's spill. Except for gross negligence, willful misconduct, or violation of law by a contractor, all damages from a hazardous substance release are the rightful responsibility of the spiller, not the third party people cleaning it up. This principle has been codified in federal law and the laws of at least 18 other coastal states. Acceptance of this principle is a condition of membership in SEAPRO and most other cooperatives.

As stated earlier, SEAPRO has evolved to the point that it must consider becoming a response entity in some form. Currently, Southeast is the only region of the state, outside the crude oil producing regions, which has taken any tangible steps to improve its environmental response capability. The steps that have been taken to date, have been entirely on the initiative of the regions businesses. In spite of some initial skepticism on the part of state and federal agencies, we have forged ahead with investment in our organization, greatly enhancing the effectiveness of the response equipment, material, and personnel in the region. We have proposed to both the state and federal agencies, cooperative steps which can be taken to provide our region and the rest of the state with marked improvement in our mutual ability to combat environmental emergencies. We want to begin taking these steps this year with or without agency participation.

However, the prospect of facing clean up costs and other damages for actions the co-op may take to mitigate environmental damage will surely weigh heavily on our decision making when considering how we may use SEAPRO to further improve the regions total response capability.

Response Action Contractor Certification in Southeast Alaska

The Citizen's Oversight Council has recommended that response action contractor liability limitation be linked to an, as yet undeveloped, certification program. While SEAPRO does not object to compliance standards for environmental response organizations, whether private companies, cooperatives or some other form, we fail to see the practicality or necessity of "certifying" entities in Southeast Alaska which meet the definition of response action under current law.

The current legal definition of response action contractor is:

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

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

(C) a person who acts as a volunteer and is engaged in a response action.

Looking at the history of spill response in Southeast, and the probable future response actions in the region, certifying the response action contractors defined above would mean establishing the standards and processes for certifying virtually every business, and many individuals in our region. This is a monumental task by any standards, and in our view, a nonsensical one.

The Citizen's Oversight Council made some very narrow assumptions of what constitutes a response action contractor, and even what constitutes a cooperative. It is our opinion that the Council did not consider the broad range of response actions that have taken place throughout this state, nor did they evaluate the complex mix of organizations and individuals who have participated, and are likely to be asked to participate in environmental response actions.

There could be some benefit to establishing certification criteria for certain categories of response action contractors, were those categories to be properly defined in the broader context of the entire state. But in any context, some agency will have to develop professional standards to measure contractor capability; will have to apply these standards through some sort of an inspection or verification process; will have to verify the continuity of certification levels, will have to measure actual contractor performance against certification standards; and will have to administer this entire process. In our view, the cost of the simplest of such a bureaucracy would be excessive for the benefit gained, especially in Southeast and other areas outside the crude oil producing regions. The time necessary to create such a system would be extreme, with no possibility that such a system could be in place before the current liability limitations sunset. And finally, it makes no sense to us to waste scarce state resources on creating such a system and supporting bureaucracy when the federal government is already in the process of doing exactly the same thing.

Summary

At no time prior to publishing its report did the Citizen's Oversight Council seek information about conditions in Southeast Alaska from either SEAPRO, its member companies, nonmember companies, or other organizations with whom we network. During their teleconferenced meetings on this subject, our representatives noted that Southeast Alaska was never discussed or even mentioned by the Council members. Additionally, it was our observation that the Council focused almost all of their attention on operations in the crude oil producing regions of the state, on one or two companies who are in the business of environmental response, on Alyeska Pipeline Company, on the Cook Inlet cooperative CISPRI, and infrequently on the Alaska Clean Seas cooperative.

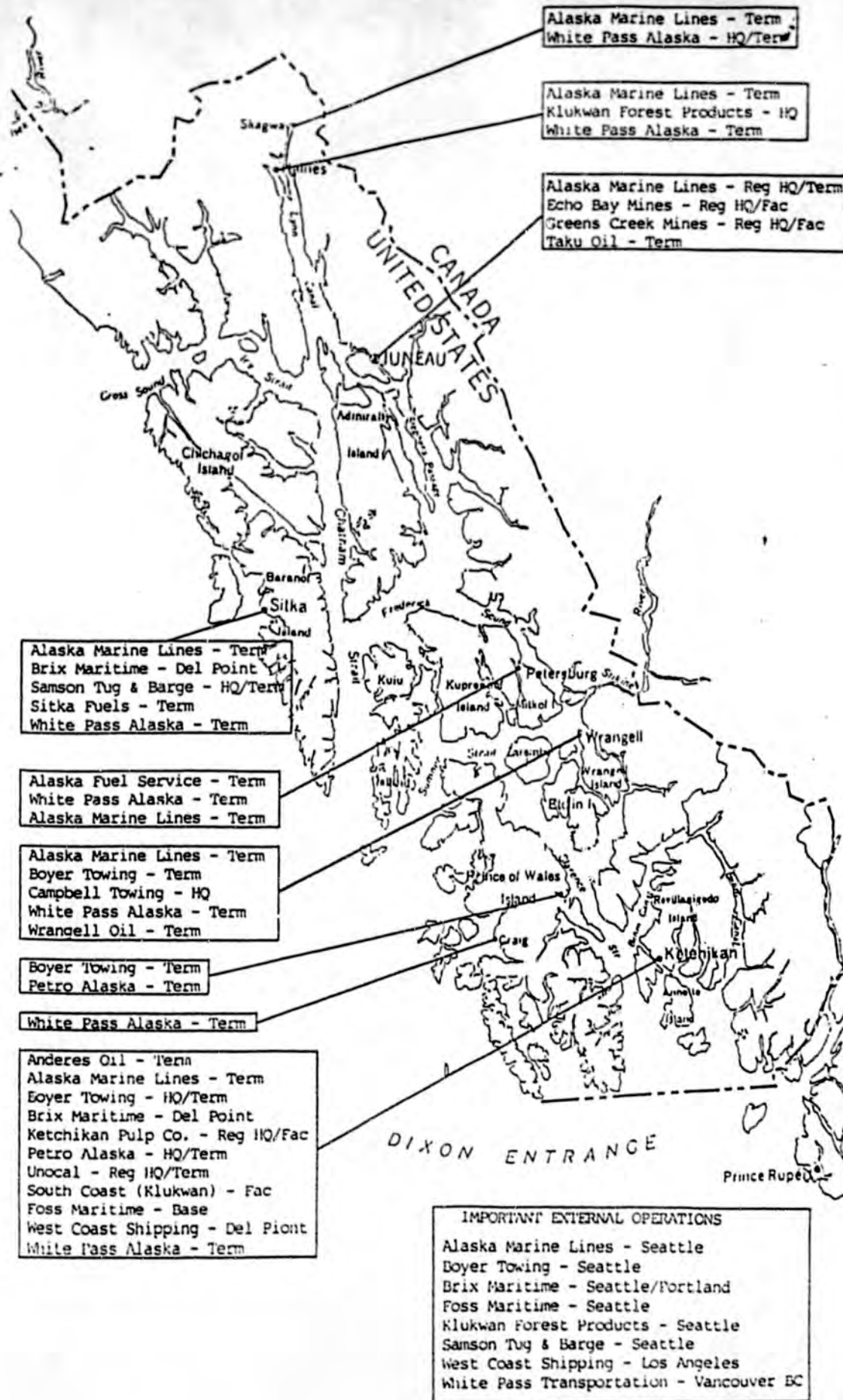
We find that their report seems to be strictly and narrowly aimed at perceived conditions in Prince William Sound, and to a lesser degree, Cook Inlet. It certainly does not accurately reflect environmental response conditions in our region, and we suspect that it does not accurately reflect conditions in other regions of the state. Consequently, this basic flaw places us in the position of not concurring with much of their rationale or their proposed solutions.

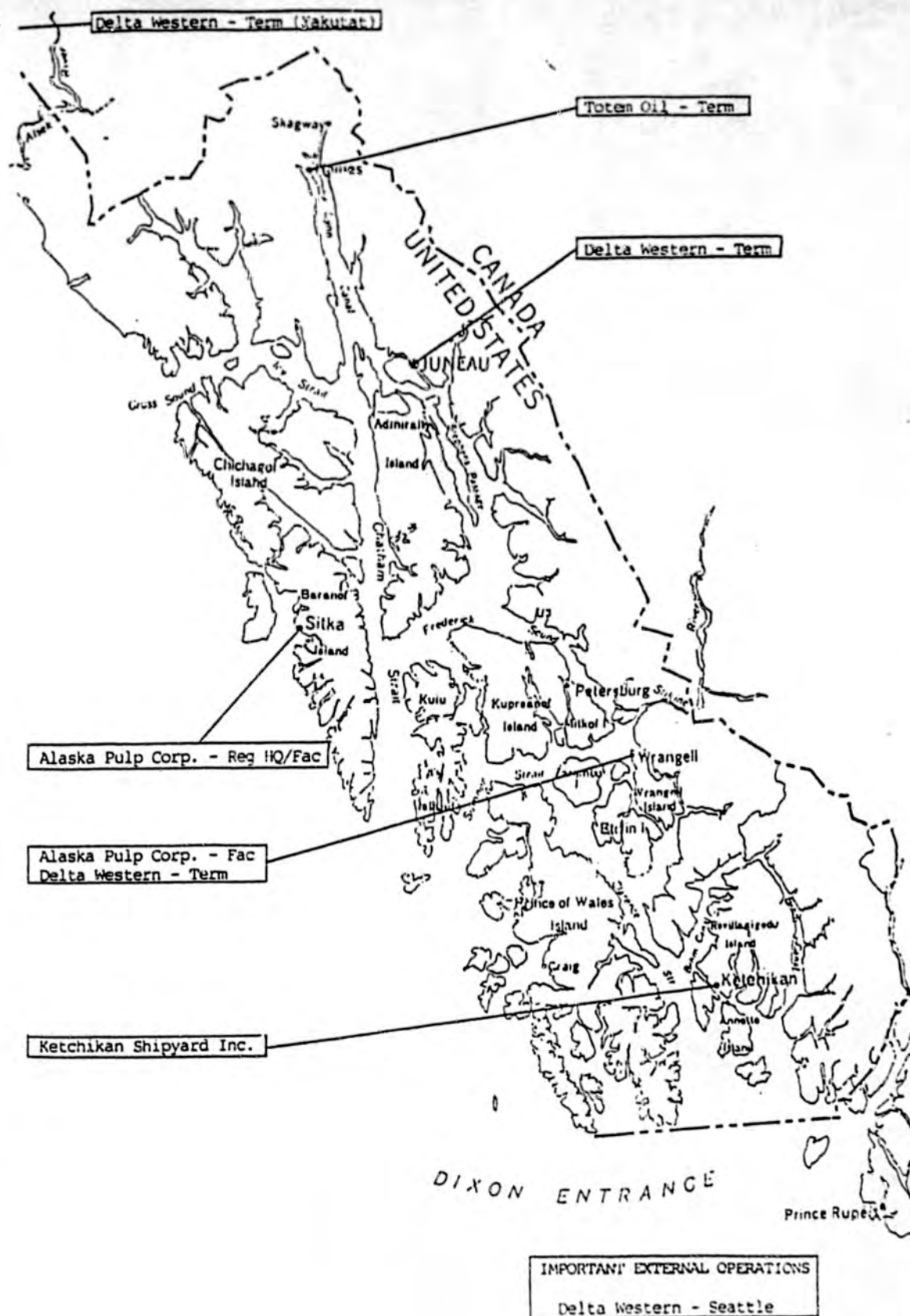
We believe that the state, like the federal government, should fix all obligations for clean up costs and damages resulting from a hazardous substance release on the responsible party, where it rightfully belongs.

We are concerned that failure to adopt liability limitations for environmental emergency responders, other than the responsible party, would negatively impact our regions ability to seek rapid and effective response actions from service providers outside the SEAPRO response network. Additionally, failure to provide this type of liability limitation would seriously threaten SEAPRO's ability to continue making further improvements in the total response capability of the region.

We cannot see substantial value to be gained within our region by creating a response action contractor certification process independent of that which will be created by the federal government. We also see no value in either waiting until a certification process is developed before granting liability limitation, or in tying liability limitations to any condition other than performance in accordance with federal and state contingency plans.

We believe that limiting the potential liability of responders, whether environmental contractors, cooperatives, other commercial entities, or volunteers is essential to improving the response capabilities of our region. This limitation should be similar, if not identical to that contained in the federal Oil Pollution Act of 1990.





[illegible]

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

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

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

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

MORE ENDORSEMENTS OF CLEANUP CONTRACTORS LIMITED LIABILITY

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

CALL US

We will send a FREE postcard in your state to your State Assembly member.

CALL TOLL FREE

1-800-325-6000

Ask for Operator 9732.

This is not the Voters Union survey.

WRITE US

Fill out this coupon and send it to us:

YES! I support Senate Bill 2040 (Keene) and pressure my California oil spill recovery bills. Please add my name to the list of people who want to say yes to the bill.

NAME _____

ADDRESS _____

CITY _____

STATE _____

ZIP _____

Return this coupon to Bird Rescue Research Center, 1025 1st Street, Suite 200, San Francisco, CA 94104.

OR, TELL 'EM YOURSELF

Please tell Senator _____

Don't let the trial lawyers block all recovery money off the beach. Please join the U.S. Congress and the California State Senate in enacting Senate Bill 2040 (Keene).

NAME _____

ADDRESS _____

CITY _____

STATE _____

ZIP _____

Send to: Hon. Willie L. Brown, Jr., Senate Counsel, Sacramento, CA 95833.

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

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

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

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

May 4, 1990

Dear Governor Deukmejian,

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

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

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

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

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

Sincerely,

Brian Janison



COOK INLET SPILL PREVENTION & RESPONSE INC.

CISPRI POSITION PAPER

OIL SPILL RESPONSE ACTION CONTRACTOR LIABILITY

MARCH 6, 1992

CISPRI supports the liability relief language in OPA'90. We believe the Response Action Contractor should be relieved of liability except for gross negligence.

Currently, CISPRI By-Laws allow CISPRI to respond to any spill in Cook Inlet, whether or not the responsible party is a member of the cooperative or not. Without contractor liability relief, CISPRI members are reluctant to respond if there is not a clearly identified responsible party. Delays will occur while a contract is negotiated.

OPA '90 grants the Response Action Contractor relief but transfers that relief to the responsible party. If there were an orphan spill, no Response Action Contractor would ever respond for fear of being made liable for simply trying to correct someone else's responsibility.

The Kenai Peninsula Borough sits on CISPRI's Board of Directors. If there is not liability relief for CISPRI as a Response Action Contractor, they (Kenai Peninsula Borough) have been legally advised to withdraw from CISPRI.

CISPRI uses the Incident Command System and CISPRI responds to all decisions made as a result of the Unified Command meetings. If liability relief is not granted, are all members of the Unified Command responsible for CISPRI actions?

If the Response Action Contractor is made liable for damages, what happens to the lower level response contractors? Are the fishing vessels, vessels of opportunity and other response contractors liable?

The argument has been made that no Response Action Contractor has been sued. That is completely untrue. Cook Inlet Resource Organization (CIRO), is still involved in legal proceedings of the Glacier Bay Spill.

The 15 day liability relief granted in HB196 bill is not enough. During the small East Forelands Spill CISPRI had used nine days before all equipment was demobilized.

CISPRI supports HB 540 and requests that the legislature enact this legislation so CISPRI can continue rapid response to any spill in Cook Inlet.

ENDORSEMENTS OF CLEANUP CONTRACTOR LIMITED LIABILITY

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

...Pacific Fisheries Legislative Task Force, June 16, 1990 (Sitka)
Alaska Delegates: Sen. Eliason
Sen. Zharoff
Rep. Davidson
Rep. Navarra

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

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

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

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

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

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

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



Resource Development Council

for Alaska, Inc.

121 West Fireweed Lane, Suite 250, Anchorage, Alaska 99503-2035

Phone 907/276-0700 Fax 276-3887

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Resource Development Council

Position Paper - HB 540

2/21/92

The Resource Development Council for Alaska, Inc., strongly supports HB 540 and urges the Alaska Legislature to carefully review and approve this legislation. RDC is a non-profit, pro-economic and resource development organization with a statewide board and membership.

RDC's primary concern with HB 540 is that it corrects prior legislation which wrongly placed the emphasis on preserving an avenue for future litigation that could result from an oil spill, as opposed to placing the emphasis on a good faith response. RDC believes the response action contractor (RAC) provisions contained in the Oil Pollution Act of 1990, which provide for simple negligence, are the appropriate approach in Alaska.

To increase the negligence standard to levels higher than those required by the federal government is not only unnecessary, but has threatened to shut down at least one major employer on the Kenai Peninsula, involving hundreds of jobs in that region. HB 540 addresses several concerns expressed by response action contractors, as well as those involved in the business of shipping oil.

RDC notes that 19 other coastal states have enacted legislation as protective as OPA-90 over the last 18 months, pointing to the integrity of the federal policy.

RDC firmly believes that response action contractors involved in controlling the release or threatened release of a substance should be held to the federal standard of simple negligence as outlined under OPA 90 and urges passage of HB 540.

EX-OFFICIO MEMBERS

Senator Ted Stevens

Senator Frank Murkowski

Congressman Don Young



MEMORANDUM

TO: Ray Gillespie

DATE: April 13, 1992

FROM: Charlie Nalen *CN*

SUBJECT: HB-540/Limited Liability Response Action Contractors

In reading the April 6th edition of Oil Spill and Environmental Issues/Alaska Legislative Report, I noticed that Rep. Hudson offered a second amendment to HB-540 that sets up a contractor registration program. We have some concerns with this proposal which are outlined below:

1. Only a RAC listed in a C-plan as a responder would be registered with DEC. In a major spill emergency, as many responders as possible in the immediate location will be utilized. In the case of Crowley Maritime, we have tugs, barges, and personnel throughout the state that can provide response contractor services. The Exxon Valdez spill response is an example. We would recommend that a RAC could be registered with DEC and not be listed in any C-plan.
2. Another concern is in salvage operations. During a salvage operation there is the risk of an oil spill from the distressed vessel. Our company is an experienced salvor and recognizes that many times the extent of damage to the distressed vessel and risk of an oil release are unknown. A critical issue in our salvage response is indemnification for oil-spill liability. This unfortunately can result in delays in the actual salvage operation. We again recommend that DEC have a registration program for RAC's that provide salvage and/or oil spill emergency response services. Any registered RAC should be granted limited liability.
3. Limited liability should not be only granted to a RAC that is listed as the primary RAC in an approved C-plan. Again, in a major spill situation in Alaska, our company could charter tugs and barges to the spiller/responsible party or a RAC. This legislation would force us to only work for the registered primary RAC as opposed to the spiller/responsible party in order to have the benefit of limited liability. We believe that the state is best served by having a RAC registration program to verify equipment, personnel and response capability. As a registered RAC you would then be granted limited liability.

Let me know if you have any questions.

Regards.

cc: G. Brooks
L. Eglund
T. Martin
B. Stenecker

Ray Gillespie
Gillespie & Associates
Lobbying & Governmental Affairs



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

MEMORANDUM

TO: Senate and House Oil and Gas Committees

DATE: February 10, 1992

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

RE: Marine Pollution Insurance Problems

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

Briefly, these problems are:

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

I.

LIABILITY LIMIT/EXPOSURE OF INSURERS OR GUARANTORS.

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

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

Alaska Statute 46.04.040 (i) reads as follows:

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

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

II.

"DIRECT ACTION" PROBLEM

AS 46.04.040 (e) reads in part as follows:

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

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

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

III.

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

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

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

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

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

IV.

SUGGESTED SOLUTIONS

Legislation which:

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

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

5. Combination of the above.



W. Gene Burden
Vice President
Environmental Affairs & Government Relations

February 6, 1992

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

Subject: Response Action Contractor Liability

Dear Representative Hudson:

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

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

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

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

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

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

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

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

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

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

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

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

Representative Bill Hudson
February 6, 1992
Page 3

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

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

1. A negligence standard threatens to unfairly embroil RACs in costly post-spill litigation. The crisis atmosphere and potential consequences of oil spills combined with the unacceptably high risk and cost of litigation is not offset at all by the promise of limiting jury instructions;

2. The threat of litigation deters RACs from freely entering a jurisdiction without limited liability which interferes with the formation of effective spill co-ops;

3. The enactment of the new federal liability fund as well as the State clean-up fund; unlimited strict liability on the discharger (including strict liability for any damages caused by the RAC); and federal and state requirements for proof of financial responsibility combine to make the possibility of leaving victims uncompensated for damages caused by the simple negligence of a RAC very, very remote.

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

Sincerely,


Gene Burden

BEFORE THE JOINT HOUSE RESOURCES COMMITTEE
AND HOUSE SPECIAL SUBCOMMITTEE
ON OIL AND GAS

Comments on Summary of Research Project Reports
Prepared by the Citizens' Oversight Council
As Part of the Council's Report to the Legislature Under
Section 11 of HB 196 (Ch. 92 SLA 1991)

Presented by:
Jim Meitner
Spill Prevention & Response Coordinator
Tesoro Alaska Petroleum Company

February 12, 1992

On behalf of Tesoro Alaska, I want to thank the staff and Board members of the Citizens' Oversight Commission ("COC") for the effort and consideration that went into their recently released report and recommendations. Tesoro and its 575 plus Alaska employees were pleased to see that the Citizen's Oversight Commission's first recommendation favorably recognizes the concept of limited immunity for response action contractors that Tesoro sought during the last legislative session.

Tesoro's interest in this matter was discussed in detail last year; and in summary relates to 1) our interest in the Cook Inlet Spill Prevention and Response, Inc. ("CISPRI"); and 2) our reliance on continued access to Alyeska's spill response services in order to pick up our crude oil which is essential to our ability to stay in business. Tesoro is presently responsible for over 50% of the funding of CISPRI and has great reservations about CISPRI's deployment to a spill from a non-CISPRI members in the absence of

a state spill responder immunity law. The exposure to risk of costly litigation over alleged damages arising from simple negligence is viewed as a significant detractor from making CISPRI available beyond its own members needs. This need is reflected in the COC study and in recommendation number 1.

Tesoro also has an interest in having a final resolution of this matter due to our need to access the Port of Valdez in order to stay in business and continue employment of over 575 Alaskans. Alyeska has the only available initial spill response service in Prince William Sound and has placed a very high level of demonstrated financial responsibility on parties wanting access to that service. Last year's passage of HB 196 prevented a possible interruption to our ability to transport feedstock crude oil since we were unable to meet the Alyeska financial responsibility requirements in effect before the passage of HB 196.

Tesoro is willing to work with the Citizen's Oversight Council, other interested groups, and the legislature to address the other recommendations contained in the Council's report. We believe the report provides the legislature with sufficient information to meet the COC responsibilities under HB 196, and in so doing, should facilitate the legislature's prompt resolution of this matter by passing legislation that includes limited immunity for response action contractors in Alaska. Thank you for the opportunity to comment.

ALASKA RAINFOREST TOURS

WILDERNESS, ADVENTURE, AND CULTURAL TOURS
FOR THE INDEPENDENT TRAVELLER SEEKING QUALITY,
KNOWLEDGE, AND THE UNUSUAL IN ALASKA'S
RAINFOREST.

369 S. FRANKLIN STREET, SUITE 200
JUNEAU, ALASKA 99801
(907) 463-3466
FAX (907) 463-4453

May 11, 1992

The Honorable Sam Cotten
Alaska State Senate
FAX: 465-4979

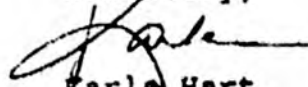
Dear Senator Cotten:

My tourism colleagues in the Exxon Valdez spill-impacted area have asked me to ask you to kill HB 540 unless the four points mentioned in Nancy Lethcoe's May 9 memo to you are included in the bill. Tourism businesses, especially those that are small and locally-owned, are still suffering from the impacts of the 1989 spill. I feel fortunate that the Inside Passage, where my tours are conducted, has not yet suffered such environmental tragedy.

Tourism is a resource-based industry with incredible potential to provide Alaskans with jobs now and in the future--if we don't destroy the beauty, wilderness and wildlife tourists pay to experience. Please support the tourism industry by not passing HB 540.

Thank you.

Sincerely,


Karla Hart
Partner

*P.S. Please support only if
Simple negligence is standard.*

465-4779



Alaskan Wilderness Sailing Safaris

The Quiet of Wilderness Deserves the Silence of Sail

Since 1974

TO: Senator S. Cotten
From: R. James Lethcoe
Date: May 9, 1992

RE:HB 540

Alaska Wilderness Sailing Safaris thanks you for your efforts on HB 540. PLEASE HOLD SPILLER/RESPONDER RESPONSIBLE FOR A STANDARD OF SIMPLE NEGLIGENCE.

The standard of simple negligence will be a greater incentive to spiller/responders to be prepared and willing to respond to a spill than gross negligence. Prevention and spill response are the only protection against economic losses resulting from an oil spill available to businesses such as ours.

PLEASE DO NOT PASS THIS BILL OUT OF COMMITTEE ~~IF~~ A STANDARD OF SIMPLE NEGLIGENCE IS NOT MET.

James Lethcoe

Robinson, Beiswenger & Ehrhardt
Lawyers
35401 Kenai Spur Highway
Soldotna, Alaska 99669

David E. Gabert . Associate

Telephone: (907) 262-9164

Telecopier: (907) 262-7034

1(800)770-9164

May 5, 1992

Sent via FAX: 465-2299

Representative Dave Donley
Alaska House of Representatives
State Capital Building
Juneau, Alaska 99801-1182

Re: House Bill 540 - Liability of Spill Response Contractors

Dear Rep. Donley:

Our small Soldotna law firm was lead Alaska counsel for the Plaintiffs in the Glacier Bay litigation. In that case we represented approximately 800 fishermen who were damaged as a result of the Glacier Bay oil spill and improper cleanup in 1987. We currently represent approximately 1,000 fishermen in the Exxon litigation. We have several comments on pending House Bill 540.

1. The shippers of oil are frequently undercapitalized Corporations. If spill response contractors are held to a gross liability standard and only the spiller assumes liability for negligent acts, we will be removing an entity from liability who may be able to contribute towards damages. We will be placing a great deal of reliance on the shippers, who may or may not have the ability to pay for damages. For example, in the Glacier Bay litigation APEX Oil, the owner of the Glacier Bay, was bankrupt.

2. Any trade off in liability must be viewed in light of all other applicable statutes and acts. For example, the Transalaska Pipeline Liability Fund Act arguably makes the shipper strictly liable already for the spill. Therefore, the oil spill contractor is released from the negligence standard for nothing.

3. While we do not want to discourage oil spill contractors, on the other hand, we do not want to encourage them to engage in experimentation or slipshod methods. In the Exxon Valdez case, a great deal of damage can be done by the clean-up itself. In the Glacier Bay case, the responsible parties refused to initiate cleanup for several days, believing they could get the oil when it "hit the beaches". It did not, and the result was over 40 million dollars in damages. There is no good reason to release a party responsible for clean up in such a situation.

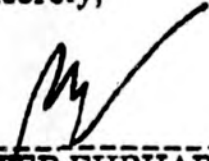
Arthur S. Robinson • Allan Beiswenger • Peter Ehrhardt

Representative Dave Donley
May 5, 1992
Page 2

4. Lastly, as a general rule in most legislation when liability exposure is reduced other trade-offs are made. For example, in the Workmen's Compensation arena the employer's liability is limited but in turn he is strictly liable. As I understand House Bill 540 an oil spill contractor's liability would be substantially reduced without any similar trade-off giving protection of our fisheries and coastline to individuals and companies.

Under House Bill 540 the Glacier Bay "clean up" which was a furu, would probably not give rise to any liability at all. The statute as proposed, is a bad idea.

Sincerely,



PETER EHRHARDT
Attorney at Law

PE/rm



UCIDA

UNITED COOK INLET DRIFT ASSOCIATION

P.O. Box 389 • Kenai, Alaska 99611 - 0389

(907) 283-3600 • FAX (907) 283-3306

May 5, 1992

Please fax testimony against the "gross liability" standard for response action contractors found in Both SB 270 and HB 540.

Sen. Dick Eliason, Senate President (907) 465-4928
Sen. Sam Cotten, Senate Special Oil & Gas Comm. (907) 465-4979
Rep. Dave Donley, Chair, House Judiciary Comm. (907) 465-2299
Rep. Max Gruenberg, Vice Chair, House Judiciary Comm. (907) 465-4565
Rep. Johnny Ellis, Chair, House Rules Comm. (907) 465-3445
Rep. Cliff Davidson, Chair, House Resources Comm. (907) 465-3444
Rep. Ben Grussendorf, House Speaker (907) 465-4565
Sen. Rick Halford, Chair, Senate Judiciary Comm. (907) 465-3805
Sen. Patrick Rodey, Vice Chair, Senate Judiciary Comm. (907) 463-3144

Thanks,

Theo Matthews
Administrative Assistant

Kristin L. Stahl-Johnson
Regional Citizens' Advisory Council
City of Kodiak Representative
P.O. Box 2661
Kodiak, AK 99615

Phone: (907) 486-4684
Fax: (907) 486-7651

May 8, 1992

Senator Sam Cotten
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Senator Cotten,

As the City of Kodiak's representative on the Regional Citizens' Advisory Council for Prince William Sound I am compelled to write to you to request your support of the coastal communities of Alaska, particularly those outside the sound. The RCAC has consistently maintained the position that Alyeska has a duty to respond to all TAPS oil spills in Alaskan waters by virtue of the pipeline right-of-way agreement and the legislation authorizing the pipeline development in the early 70's. The original crafters of the TransAlaska Pipeline Authorization Act recognized that it is not possible for the state to control the private contractual agreements among oil companies common to the pipeline. Therefore, their common operating agent, Alyeska, would be held responsible to protect the Alaskan environment from potential oil pollution.

Alyeska's assertion that they are a volunteer responder is illogical not only because of the original authorization mandate, but also because they are using \$150 million of state funds to build their response capability.

The communities of the Kodiak Archipelago are in double jeopardy from the oil industry in both Cook Inlet and Valdez. Please support these communities and all of coastal Alaska by holding Alyeska responsible to the original pipeline agreement.

Please pass a strong legislation that requires Alyeska to have a duty to respond to all oil spills caused by TAPS trade tankers in state waters. Alyeska should be the Contingency Plan holder in Prince William Sound. Their spill response should continue until the state and federal On-Scene-Coordinator approves any transition.

Thank you for your support for coastal Alaska.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Kristin L. Stahl-Johnson', with a long horizontal flourish extending to the right.

KODIAK ENVIRONMENTAL NETWORK

Information, Direction, Education, Action

P.O. Box 2661, Kodiak, Alaska 99615
Phone: (907)486-4684 Fax: (907)486-7651

May 8, 1992

Senator Sam Cotten
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Senator Cotten,

The Kodiak Environmental Network supports SB270. We feel that it is necessary to firmly restate the statutory requirement that the common agent of the TransAlaska Pipeline companies, i.e. Alyeska, has a duty to respond to TAPS oil spills in state waters. The original authorization by the state and federal governments stipulated that duty when creating the pipeline. Allowing Alyeska to back out of the agreement they made 20 years ago, and the law passed to solidify that agreement, would be an abomination. The oil industry makes billions of dollars a year from our resources, but they are unwilling to face the responsibility to protect our environment and our communities from the "side effects" of their wealth.

The conduct of the State House of Representatives over the last three days is an OUTRAGE! It is clearly transparent that the House Minority and the others with vested oil interests are willing to let the oil industry write the laws of our state. This kind of activity deeply undermines the people's confidence in the will of our elected officials' to protect state interests.

Alyeska should, by law, be the Contingency Plan holder for Prince William Sound and any transition of their control and management of a TAPS oil spill to the spiller should only occur at the direction of the State and Federal On-Scene-Coordinator.

Limited liability for RAC's must be linked to responsiveness to the local industry contingency plan and a RAC's ability to respond must be verified and approved by ADEC. Immunity to simple negligence should not, however, continue indefinitely, but be limited to the initial stages of oil spill clean-up.

We applaud your continued efforts to insure the integrity of past legislation and to make the oil interest in the state responsible for their actions. Please do not let the vested interests in the House prevail.

Thank you for your effort.

Sincerely,



Kristin L. Stahl-Johnson
Regional Citizens' Advisory Council
City of Kodiak Representative
P.O. Box 2661
Kodiak, AK 99615

Phone: (907) 486-4684
Fax: (907) 486-7651

May 11, 1992

Senator Fred Zharoff
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

FyI


Dear Senator Zharoff,

The following organizations would like to urge you to support Senator Sam Cotten in his review of HB540. HB540, as it left the House floor, leaves the coastal communities of Alaska, especially those outside Prince William Sound, orphaned in the case of a major oil spill more than 72 miles from the Valdez terminal or if a spiller declares bankruptcy. Alyeska is trying to hold Tesoro hostage and the State liable, when in actuality they don't want to be held accountable for their past agreements or their present actions.

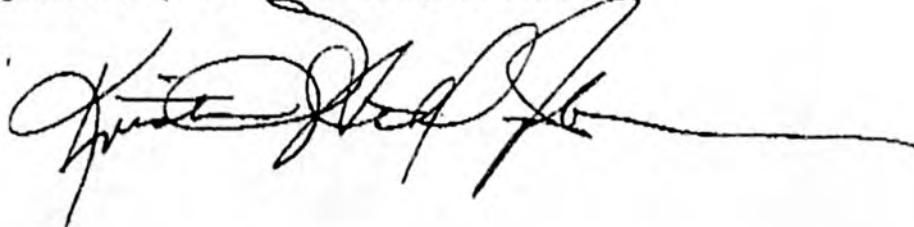
Please demand that Alyeska is held to a duty to respond to all TAPS tanker trade oil spills in state waters.

This position is endorsed by the following groups:

Regional Citizens' Advisory Council of Prince William Sound;
Alaska Dragers Association
Area K Seiners Association
Kodiak Longline Vessel Owners Association
Alaska Responsible Resource Management
Kodiak Environmental Network
Kodiak Audubon Society
United Fishermen's Marketing Association

Thank you for your help on this critical issue.

Sincerely,



REVENUE EFFECTS OF OIL SPILL EXPENDITURES
(\$ IN MILLIONS)

Year	TAPS Revenue Effect	State Revenue Loss	Cumulative State Revenue Loss
1989	\$17.7	\$4.3	\$4.3
1990	34.7	8.8	13.1
1991	78.2	19.5	32.6
1992	67.2	16.8	49.4
1993	64.4	16.1	65.5
1994	70.7	17.7	83.2
1995	76.6	19.1	102.3
1996	76.6	19.2	121.5
1997	69.0	17.3	138.7
1998	44.7	11.2	149.9
1999	42.9	10.7	160.6
2000	43.1	10.8	171.4
2001	41.5	10.4	181.8
2002	39.5	9.9	191.6
2003	36.0	9.0	200.6
2004	33.6	8.4	209.0
2005	31.5	7.9	216.9
2006	29.4	7.4	224.2
2007	25.6	6.4	230.7
2008	22.1	5.5	236.2
2009	17.1	4.3	240.5
2010	12.4	3.1	243.6
2011	9.9	2.5	246.1

Horst & Frisch Incorporated
05/11/92

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

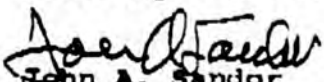
OFFICE OF THE COMMISSIONER
410 WILLOUGHBY AVENUE, SUITE 105
JUNEAU, AK 99801-1795

Phone: (907) 465-5000
Fax: (907) 465-5070

May 10, 1992

MEMORANDUM

TO: Charles E. Cole
Attorney General

FROM: 
John A. Sandor
Commissioner

SUBJECT: Alyeska Pipeline Service Company's Duty to Respond
to Oil Spills from TAPS tankers in Prince William Sound

This is in follow-up to our Departments' continuing, joint efforts to ensure that Alyeska, the only entity with pre-positioned spill response equipment in Prince William Sound, responds to spills. Apparently, Alyeska only acknowledges a private contractual obligation to respond to tanker spills. Because the State of Alaska is not a party to these contractual agreements, we cannot adequately ensure that these agreements provide iron-clad response guarantees to the public.

It is absolutely essential that a full, prompt response be made to a spill. With questions raised about Alyeska's statutory obligation to respond, Alyeska's contractual agreements must be scrutinized to make certain the necessary response guarantees are in place. I would, therefore, propose an immediate legal review of contracts between Alyeska Pipeline Service Company and tanker owners operating in Prince William Sound.

The Department of Environmental Conservation's approval of Alyeska's contingency plans are based on the assurance that Alyeska will respond without fail. If in the course of the legal review of Alyeska's contracts with tanker owners, it is revealed that the contracts can be breached by either party without the consent of the State of Alaska, this and any other deficiencies noted in the course of this review must be corrected. When such deficiencies are noted, I would suggest a process that would give Alyeska and tanker owners ten (10) days to revise contracts to make certain the necessary response capability is assured. In the absence of such assurance DEC would be prepared to suspend approval of the required contingency plans.

Your consideration of this request will be appreciated.



UNITED FISHERMEN OF ALASKA

211 4th Street, Suit 112
Juneau, AK 99801
907-586-2820
Fax# 907-463-2545

May 4, 1992

MEMBER ASSOCIATIONS

Alaska Crab Coalition
Alaska Independent Fishermen's
Marketing Association
Alaska Longline Fisherman's
Association
Alaska Trollers Association
Bering Sea Fishermen's Association
Bristol Bay Driftnetters Association
Concerned Area 'M' Fishermen
Cook Inlet Aquaculture Association
Copper River Fishermen's Cooperative
Cordova District Fishermen United
Kenai Peninsula Fishermen's Association
North Pacific Fisheries Association
Northern Southeast Regional
Aquaculture Association
Peninsula Marketing Association
Petersburg Vessel Owners Association
Prince William Sound
Aquaculture Association
Prince William Sound Seiners Association
Seafood Producers Cooperative
Southeast Alaska Seiners
Southern Southeast Regional
Aquaculture Association
United Cook Inlet Drift Association
United Southeast Alaska Gillnetters
Western Alaska Cooperative
Marketing Association
Area K Seiners Association

The Honorable Sam Cotten
Chair, Senate Special Committee on Oil & Gas
Post Office Box V
Juneau, Alaska 99811

RE: Senate Bill 270

Dear Senator Cotten:

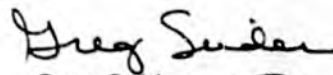
As you are aware, the United Fishermen of Alaska (UFA) represents commercial fishing groups from throughout the state of Alaska.

UFA asks that the Senate Special Committee on Oil & Gas incorporate the following four points into SB 270.

1. A liability standard of simple negligence for response action contractors.
2. Requirement that response action contractors listed in the State Contingency Plans must register with the Department of Environmental Conservation and agree 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.
3. Registered response action contractors must also agree 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.
4. Alyeska must have a statutory duty to respond to TAPS tanker spills within the state of Alaska including state waters as clarified by Congress in the Oil Pollution Act of 1990.

Thank you for the opportunity to comment on this legislation.

Sincerely,


Greg Seider
Executive Director

907-486-3910
Box 991



Kodiak, Alaska
99615

May 8, 1992

Senate Oil and Gas Committee
Alaska State Legislature
Box V
Juneau, Alaska 99801

Please pass a bill that requires Alyeska to have a duty to respond to ALL oil spills caused by TAPS trade tankers in Alaska State waters as embodied in the original promises made on the pipeline right-of-way agreement and the TransAlaska Pipeline Authorization Act. The response should continue until the state and federal on-scene-coordinator approves any transitions. The legislation should not rely on Alyeska's contracts with the spillers to assure response because the state has no authority over private contracts.

We also support Senator Cotten's bill SB270 which covers the same issues but protects the state's interests.

Sincerely,

Alvin R. Burch
Executive Director

Harvesting Alaskan Shrimp and Whitefish



Stanley F. Stephens
Owner

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Senator Sam Cotten
Alaska Senate
Juneau, AK

Dear Senator Cotten,

Thank you for your work on HB 540AM. I would like to see this bill killed if it does not contain the following four amendments.

1. Professional contractors must be held to a standard of simple negligence. For my business, this is the most important provision to include in the bill. The courts and TAPFL do not support tourism claims for economic damages resulting from an oil spill. We must have the best available prevention and spill response.
2. Alyeska must have a statutory duty to respond to TAPS spills anywhere in the state including all state waters.
3. Registered contractors listed in the contingency plan must have a statutory duty to respond to mystery and orphan spills.
4. Strong provisions must be included to protect smaller, independent oil shippers from unfair billing by Alyeska.

Respectfully yours,


Stan Stephens



Alaska State Legislature

Please enter into the record my testimony to the Senate oil & gas
committee name
committee on HB 540 AM, dated May 11, 1992
bill/subject

The tourism & recreation industry cannot claim economic losses in federal courts or TAPPL. We are the victims of the 1989 oil spill.

We need strong prevention & spill clean up. Liability relief will decrease the incentive to be prepared and to respond responsibly. The Alaska Wilderness Recreation & Tourism Association asks that spill responders be held to a standard of strict liability.

Bill should cover all Alaskan waters, NOT JUST ^{state} Prince William Sound. A spill washing ashore at Glacier Bay & Sitka would adversely affect tourism. Who's in charge needs to be clarified. We heard 3 different interpretations during the teleconference (2 from wood, 1 from Tesoro). Alaska should have statutory responsibility to respond for as long as necessary.

Signed:

Nancy R. Tetter
Testifier

Alaska Wilderness Recreation & Tourism Association

Representing (Optional)

P.O. Box 1353, Valdez, AK 99686

Address

835-5175

Phone No.

Alaska Wilderness Recreation and Tourism Association

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Hiking

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Fishing & Flying

TO: Senator S. Cotten
From: Nancy R. Lethcoe, President
Date: May 9, 1992

RE: HB 540am

PLEASE HOLD SPILLER/RESPONDER RESPONSIBLE FOR A STANDARD OF SIMPLE NEGLIGENCE.

The standard of simple negligence will be a greater incentive to spiller/responders to be prepared and willing to respond to a spill than gross negligence. Prevention and spill response are the only protection against economic losses resulting from an oil spill available to recreation and tourism industry.

PLEASE DO NOT PASS THIS BILL OUT OF COMMITTEE IF A STANDARD OF SIMPLE NEGLIGENCE IS NOT MET.



May 9, 1992

Testimony of Ken Castner
SB 270 / HB 540

My name is Ken Castner. I am a commercial fisherman residing in Homer.

I have three points that I would like to briefly make today concerning the legislation you have before you.

1) This legislation should not codify behavior that most Alaskans found to be unacceptable. In 1989, Alyeska removed their spill response equipment from the barge and allowed it to become buried under several feet of snow. The response to the spill caused by the wreck of the *Exxon Valdez* was delayed significantly because of this. Alyeska was, at that time, strictly liable for those actions. This bill, as it is currently written, allows Alyeska and other response action contractors to escape that liability. We need provisions that assure the proper care, maintenance, deployment and operation of oil spill containment and recovery equipment.

2) Some have suggested that the registration provisions will achieve the higher level of care. DEC, the agency responsible for administering the registration regime, is the same agency that administers the state's 470 fund. DEC failed to respond to 3 separate orphan spills in upper Cook Inlet in just the last two weeks. DEC has yet to provide coastal storage of spill equipment or spill response training that were required by laws that were passed in 1989. DEC has placed a zero fiscal note for the implementation of the registration program.

Fishermen are not confident that registration will drive the level of care to anywhere other than just below provable gross negligence.

3) Alyeska can not have it both ways. If they want to just operate the pipeline and not be responsible for spill response, they should abandon the response fee collected as part of the transportation tariff and turn SERVs into a cooperative funded by the contingency plan holders... as CISPRI is in Cook Inlet. But if Alyeska insists on collecting the response fee through the tariff, Alyeska must assume responsibility for the cleanup of all TAPs oil in state water.

Thank you for taking my testimony.



Prince William Sound Conservation Alliance

P.O. Box 1697
Valdez, Alaska 99686
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Administrative
Assistant

Nancy Phelps

To: Senator Sam Cotten
From: Vince Kelly

RE: CSSHB540

It is the position of the Prince William Sound Conservation Alliance that HB540 as amended and passed by the House on May 7 is not legislation that adequately protects the natural resource interests of Alaskans. We respectfully request that you work toward the defeat of this legislation unless it can be amended to provide the following provisions:

A. Alyeska should have a statutory obligation to respond to TAPS spill within the state of Alaska.

B. In order to best protect the environment and resources of Alaska, professional response contractors should be held to a standard of simple negligence for damages resulting from their actions during a spill response.

We have been appalled in the last week by the amount of influence exercised by the oil companies over the actions of the legislature. We ask that you act in the best interests of all Alaskans and the Alaskan environment in seeing that this bill is either amended to reflect, at a minimum, the two provisions stated above, or not passed out of the Senate.

Sincerely,

Vince Kelly
Vince Kelly/President

Sen. Sam Cotten

FAX 465-4979

Dear Sam.

You Asked For it. You said you would read it.

I fear despite all of your good intentions Halford will gut it.

The Senate Floor Will get the rest. Thus you will have a bill that is worst than no bill. As a matter of fact I can't see how you can get a bill out of your committee that is better than no bill .

What we have now is common law plus what they told congress. Sam, there is no way in the world you can get a bill as strong as that .

There are other ways to take care of Tesoro . Just go thru the motions , keep it from the next committee and let it die.

Good luck



Testimony before the Senate Oil & Gas Committee re:
CSSSHB 540(JUD)am / SB270 (Response Action Contractor Liability)

Richard A. Fineberg

May 11, 1992

Synopsis: The major North Slope oil producers and Alyeska Pipeline Service Co. have structured for themselves a win-win situation that can seriously undermine Alaska's ability to respond to another major oil spill. Unless this bill will strengthen safeguards to guarantee spill response for coastal community people, it should be rejected.

My name is Richard Fineberg. I am representing the nineteen environmental groups of the Alaska Environmental Lobby. As a long-time observer of oil and gas affairs and oil spill responses, I am angry that the major North Slope producers and their wholly-owned subsidiary, the Alyeska Pipeline Service Co. have engineered, through a strategy that looks like blackmail, a win-win situation for themselves. In one outcome, the owners of Alyeska get reduced liability for spill response — in violation of their pledge to Congress 20 years ago that Alyeska would not serve as a corporate shield for the owners. If the producers don't get reduced liability for their wholly-owned subsidiary, they claim they will drive an independent oil company out of business. There are always winners and losers, and in this case the losers are the public and / or independent oil companies who have the misfortune of having to deal with companies who give full meaning to the term "Big Oil." Unless this bill places in statute Alyeska's duty to guarantee immediate response to all TAPS spills in state waters, HB 196 (Ch. 12, SLA 91) should be allowed to sunset.

Coastal people who have thought about these matters seem clear: Following the miserable responses to the T/V Glacier Bay in 1987 and the T/V Exxon Valdez in 1989, they want the duty of a shipper of oil and its response action contractor to respond codified in state law. But in the clamor of debate over this issue, the House has passed a bill that trades statutory duty to respond for a Rube Goldberg contractual scheme that Attorney General Cole and attorneys on the House Judiciary Committee have said is liable to create a whole new playing field for lawyers with as many loopholes as a sieve. Yesterday a Homer fisherman described the situation you are facing this way: a salesman comes to your door and says, "Buy this or I'll shoot your dog."

The Alaska Environmental Lobby also objects to the apparent muzzling of watchdog groups. The Citizens' Oversight Council (COC) prepared a lengthy report, packed with research reports that covered the waterfront on this issue. If one reads the report from cover to cover, it seems clear that the liability standard for a response action contractor cannot be reduced without great risk. But the reader has to draw this conclusion. Why didn't the COS make its findings clear? The answer is simple: Because the COC, by the nature of its job, steps on toes, its executive director tries to tread lightly. In fact, with its very life hanging on the six votes of the Conference Committee on the operating budget this very day, the COC is publicly silent on this important issue.

What about the Prince William Sound Regional Citizens' Advisory Council (RCAC)? During the two years that this issue has been before the Legislature, RCAC has been all over the map. Then, in February, Alyeska enjoined RCAC from lobbying. How can Alyeska make this demand? Simple: Alyeska funds RCAC. The second of three public oversight groups has been silent.

The Cook Inlet Regional Citizens' Advisory Council spoke out clearly against reducing the standards of liability for a response action contractor. The industry cut its budget.

One measure of chilled information is that until public testimony was received last Sunday and Monday, legislators in Juneau were unaware that Congressional committees were working on Alyeska duty to respond during the past week. It appears that HB 540, as passed by the House, by not setting out a statutory duty to respond, might have the unintended effect of inducing a weakening of Federal legislation in this regard.

Fortunately, the combined lobbying and clamping by the industry has not obscured the fundamental issues altogether. On review of those issues, the fundamental question is whether you, as public representatives, will accede to blatant blackmail and broken promises.¹

In sum, to give in to the blatant pressure of Big Oil on this issue by adopting the House version of HB 540 would be an unconscionable dereliction of public trust. Thank you for your efforts on this bill, Mr. Chairman, and for the opportunity to testify.

¹ Referring to the chair of this committee, Tom Williams of BP told the Anchorage Daily News Friday, "He can put Tesoro out of business if he doesn't want to move the bill." If there is a threat to Tesoro, Mr. Chairman, the threat issues from the owners of Alyeska, not from the Legislature. This bill derives from Alyeska's demand that Tesoro indemnify the North Slope producers' wholly-owned agent from response liability. I submit that North Slope producers have directly broken their promises to Congress (1) that Alyeska would not function as a corporate shield and (2) that the producers would be unstinting in their efforts to prevent and mitigate oil spills.

**EVALUATION, PREQUALIFICATION AND CERTIFICATION
OF OIL SPILL RESPONSE CONTRACTORS**

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

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

BACKGROUND DISCUSSION:

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

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

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

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

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

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

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

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

ISSUES FOR DISCUSSION/RESOLUTION:

Issue 3 - Contractor Prequalification and Certification

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

Which contractor/cooperative capabilities can be measured and standardized?

On what should those standards be based?

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

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

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

Issue questions include:

Who should certify contractual resources?

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

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

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

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

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

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

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

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

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

Who should be responsible for what portions?

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

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

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

How should the process be funded?

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

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

WORKGROUP # 2

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

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

January 31, 1992

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

Summary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

U.S. Department
of Transportation

United States
Coast Guard



Commandant
U.S. Coast Guard

From: Commandant
To: All Flag Officers

Subj: CONTRACTOR IMMUNITY PROVISION; STATE OIL SPILL

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

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

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

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

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

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

Marine Spill Response Corporation
Comments to

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

OIL SPILL RESPONSE CONTRACTOR LIABILITY REPORT

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

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

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

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

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

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

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

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

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

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

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

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

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

that what is submitted can be executed.

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

Marine Spill Response Corporation
Comments to

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

OIL SPILL RESPONSE CONTRACTOR LIABILITY REPORT

Research Project: Response Action Contractor Activity in Alaska

Pg. 2 Statement: "The report concludes that the independent operators are the class of responders most suitable for liability limits."

Rebuttal: It is not clear why independent operators are "most suitable"? For that purpose, OPA-90 does not differentiate between responders -- all responders are covered.

Pg. 2 Statement: "The report asks whether it is appropriate for a response organization created by those with a duty to respond, (i.e., oil terminal and tanker owners) to be afforded that same degree of immunity."

Rebuttal: We believe that different degrees of immunity for different categories of responders would be counter productive. Such action misses the fundamental reason for providing the limited immunity for responders: To promote the most bold and aggressive response for the protection of the environment. OPA-90 requires that a responsible party cite private spill response resources in their contingency plans to respond to a worst case discharge in adverse weather conditions. Industry and other business interests have responded by upgrading existing spill response organizations. All responders (co-ops, for-profit and not-for profit contractors, fisherman, volunteers) work for the spiller during a spill. One type of responder should not be afforded certain privileges that others are denied. The spiller is still responsible for all removal costs and damages regardless of the actions of a fisherman, their own response organization, etc. unless of course the conditions for immunity are not present.

Pg. 2 Statement: "The report states that granting such immunity causes confusion for the governmental regulators over who, in fact, controls the field response and provides no assurance that a response will be sustained."

Rebuttal: This statement is not factually correct. Granting such limited immunity encourages bolder response rather than a potential delay while lawyers of responders attempt to determine who may be liable for a spill and the risks to be assessed by responders under the current conditions and for every action

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

what the precise requirements will be."

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

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

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

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

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

Research Project: Insurance coverage availability:

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

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

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

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

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



John D. Costello
President

July 26, 1991

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

Dear Commissioner Sandor:

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

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

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

Mr. John A. Sandor
July 26, 1991
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equal or greater to the size of a planned MSRC regional response center. A similar response and cleanup improvement process is underway in Cook Inlet and, presumably, will result in a capability there to meet the requirements of OPA-90; i.e., the capability to respond to a "worst case discharge". It is our understanding that between the resources of Prince William Sound and Cook Inlet well over 95% of the persistent oil transported in Alaska's marine environment will be covered. In the light of this considerable capability the question must be asked "Is there really any role or indeed need for MSRC in Alaska?"

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

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

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

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

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

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

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

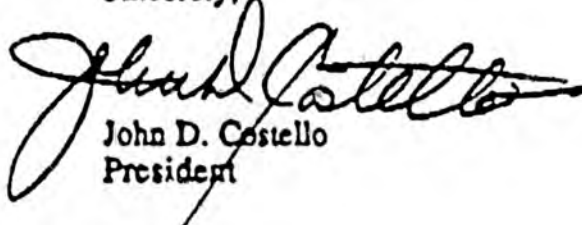
sorted out. Moreover, these provisions will energize the impulse to litigate so that every factual element of response action may be scrutinized to determine if "substantial deviation" from a plan actually took place.

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

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

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

Sincerely,



John D. Costello
President

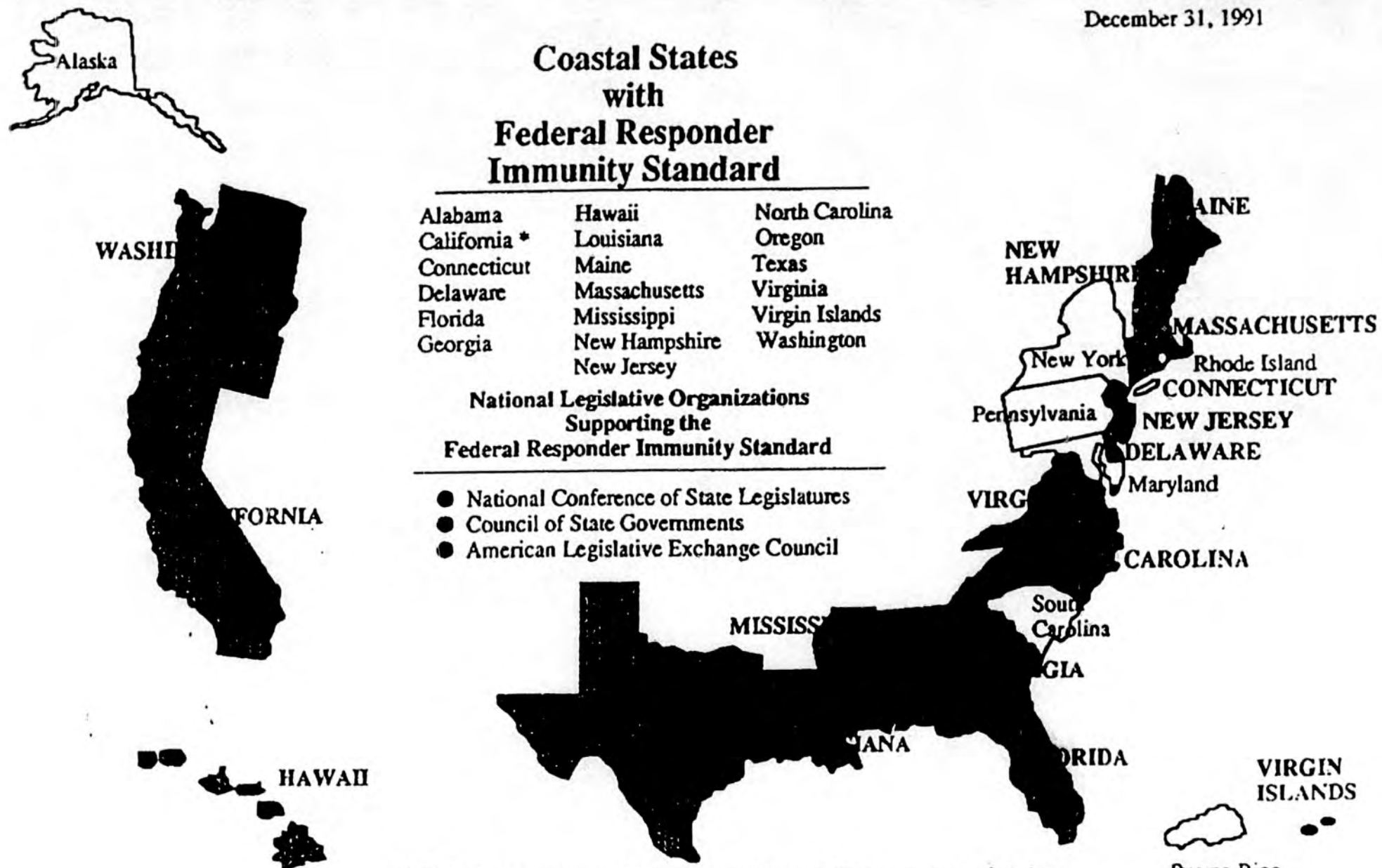
December 31, 1991

Coastal States with Federal Responder Immunity Standard

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

National Legislative Organizations Supporting the Federal Responder Immunity Standard

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



■ Indicates states which have passed responder immunity legislation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

• and effective whole.

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

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

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

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

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

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