

SCOMM

78:5



Citizens' Oversight Council

on Oil and Other Hazardous Substances

3111 C Street, Suite 150 • Anchorage, Alaska 99503
(907)561-2101 • 561-7538 (FAX)

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

From: Michele Brown, Executive Director

Date: January 15, 1992

Re: HB 196 Report

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

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

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

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

Council Members

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

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



The Citizens' Oversight Council on Oil and Other Hazardous Substances

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

FRIDAY, JANUARY 31 • 1:00 TO 4:00 PM

ANCHORAGE LEGISLATIVE INFORMATION OFFICE

3111 C STREET, 5TH FLOOR CONFERENCE ROOM

PUBLIC COMMENTS ENCOURAGED

The public meeting will be teleconferenced statewide —

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

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

For more detailed information contact COC 561-2101.



Citizens' Oversight Council
on Oil and Other Hazardous Substances

3111 C Street, Suite 150 • Anchorage, Alaska 99503
(907)561-2101 • 561-7538 (FAX)

SUMMARY

of

RESEARCH PROJECTS REPORTS

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

Council Members

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

TABLE OF CONTENTS FOR SUMMARY

REPORT ON RESPONSE ACTION CONTRACTORS	
Department of Environmental Conservation	1
LITIGATION THREAT TO RESPONSE ACTION CONTRACTORS	
Department of Law	2
THE LEGAL RELATIONSHIP BETWEEN RESPONSE ACTION CONTRACTORS AND OTHER PARTIES	
Cook Inlet Regional Citizens' Advisory Council	2
TRANS-ALASKA PIPELINE AUTHORIZATION ACT	
Citizens' Oversight Council	4
THE STATE OF ALASKA'S PARTICIPATION IN SPILL RESPONSE AND PREPAREDNESS IN THE STATE	
Citizens' Oversight Council	5
CONTINGENCY PLAN REQUIREMENTS UNDER THE OIL POLLUTION ACT OF 1990	
Prince William Sound Regional Citizens' Advisory Council	7
INSURANCE ISSUES RELATED TO SPILL RESPONSE CONTRACTORS	
Tesoro Alaska, Inc.	8
LEGISLATIVE HISTORY OF IMMUNITY FOR RESPONSE ACTION CONTRACTORS UNDER THE OIL POLLUTION ACT OF 1990	
Prince William Sound Regional Citizens' Advisory Council	8
OTHER STATES' LAWS ON RESPONSE ACTION CONTRACTOR LIABILITY	
Prince William Sound Regional Citizens' Advisory Council; National Wildlife Federation; Alyeska Pipeline Service Company	9

RESEARCH PROJECTS REPORTS SUMMARY

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

Research Project: Response action contractor activity in Alaska

Prepared by: Department of Environmental Conservation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Research Project: Insurance coverage availability

Prepared By: Tesoro Alaska, Inc.

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

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

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

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

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

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

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

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

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

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

Research Project: Other state's response action contractor provisions

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

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

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

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

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

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

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

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

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

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

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

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

Other States' Response Action Contractor Liability Laws

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

REPORT ON
RESPONSE
ACTION
CONTRACTORS

**ALASKA DEPARTMENT
ENVIRONMENTAL CONSERVATION**

SOIL PREVENTION AND REHABILITATION

196 REPORT

ON

ACTION CONTAMINATION

HB 196 REPORT
on
RESPONSE ACTION CONTRACTORS

SUMMARY

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

INTRODUCTION

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

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

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

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

FINDINGS

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

Independent Response Action Contractors (RAC's)

Northwest EnviroService Inc.

Shannon and Wilson Inc.

Martech USA Inc.

VECO Inc.

Chempac Environmental Services (not incorporated)

Unitech of Alaska Inc.

VRCA Environmental Services Inc.

Industry Spill Response Organizations

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

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

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

Other Spill Response Organizations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RACs

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

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

INDUSTRY SPILL RESPONSE ORGANIZATIONS

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

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

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

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

Prepared by the Department of Environmental Conservation

This report was accompanied by the following attachments:

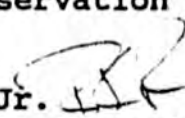
- Questionnaire responses by response action contractors,
independent contractors, and spill response organizations
- Sample response action contractor contracts
- Certificate of Incorporation for Cook Inlet Spill Prevention
and Response Incorporated

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

LITIGATION
THREAT TO
RESPONSE
ACTION
CONTRACTORS

MEMORANDUM

NOV 04 1991
State of Alaska
Department of Law

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

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

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

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

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

GOOD SAMARITAN CASES

Introduction

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

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

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

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

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

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

Reported Cases

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This argument was rejected by the court. It said:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

LEGISLATIVE HISTORIES

The Oil Pollution Act of 1990

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

Exemption from liability -- (A) A person is not liable for removal costs or damages which result from actions taken or omitted to be taken in the course of rendering care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed by the President.

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

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

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

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

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

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

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

The Comprehensive Environmental Response Compensation and Liability
Act

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

LEGAL
RELATIONSHIP
BETWEEN
RESPONSE
ACTION
CONTRACTORS +
OTHER PARTIES

DEC 12 1991

received
12/19/91

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

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

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

December 6, 1991

Table of Contents

<i>Introduction: Purpose of the Report</i>	3
<i>Summary</i>	4
<i>Background</i>	5
<i>Common Law Liability for Oil Spills</i>	7
<i>Statutory Liability for Oil Spills</i>	10
<i>AS 46.03.822: Basic Oil Spill Liability</i>	10
<i>AS 46.03.823 and .825: Response Action Contractor Provisions</i>	12
<i>AS 09.65.091: Good Samaritan Statute</i>	15
<i>Contractual Modifications of Oil Spill Liability</i>	18
<i>The Contracts: A Brief Summary</i>	18
<i>Obligations of the Parties</i>	20
<i>Concern regarding claims</i>	21
<i>Indemnification provisions</i>	21
<i>Insurance requirements</i>	24
<i>Control of cleanup and independent contractor status</i>	28

<i>The State's Relationship to RACs</i>	28
<i>The State and liability</i>	28
<i>The State and control of response action contractors</i>	29
<i>In the Absence of a Responsible Party</i>	33
<i>Conclusions and Recommendations</i>	34

INTRODUCTION: PURPOSE OF THE REPORT

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

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

SUMMARY

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

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

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

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

BACKGROUND

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

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

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

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

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

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

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

COMMON LAW LIABILITY FOR OIL SPILLS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATUTORY LIABILITY FOR OIL SPILLS

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

AS 46.03.822: Basic oil spill liability

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

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

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

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

Subsection g) states that

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

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

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

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

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

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

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

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

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

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

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

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

a) The RAC would have been liable for the initial release under AS 46.03.822 even if the contractor had not been carrying out a response action (in short, a party cannot cause a spill and then claim RAC immunity while carrying out its own response action);

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

c) the RAC, without approval from the federal or state on-scene coordinator, "substantially deviated" from an oil spill contingency plan previously approved by the state and the plan was either prepared by that contractor for the responsible party or the contractor previously agreed to comply with the terms of that plan under a contract with the parties responsible for the release.⁸

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

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

release.⁹

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

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

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

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

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

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

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

Good Samaritan statute

At AS 09.65.091, the legislature provided:

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

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

of a private party), the RAC enjoys immunity from liability for damages unless the RAC's actions were intentional, reckless, or grossly negligent. This limitation is not subject to the same exceptions as exist in AS 46.03.825, such as not being contrary to orders of the persons in charge and not involving personal injury or death. It does apply to the efforts of governments themselves, acting as emergency responders.¹¹

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

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

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

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

CONTRACTUAL MODIFICATIONS OF OIL SPILL LIABILITY

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

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

The Contracts: A Brief Summary

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

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

provisions found in the contracts.

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

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

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

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

Obligations of Parties

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

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

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

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

Concern regarding claims

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

Indemnification provisions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Insurance requirements

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

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

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

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

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

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

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

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

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

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

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

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

Control of Cleanup and Independent Contractor Status

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

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

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

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

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

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

THE STATE'S RELATIONSHIP TO RACS

The State and liability

The first point to realize regarding the state's relationship to RACs is that it is itself both a RAC and an employer of RACs. Every time the state sends personnel to respond to a spill, it is a RAC; every time it engages others to respond, whether for pay or as volunteers, it is employing a RAC. So the State encounters most of the same problems as other RACs and other RAC employers.

The State, as a sovereign, enjoys sovereign immunity, that is, immunity from liability because of its status as a sovereign government. Sovereign immunity, however, is more often than not a hollow protection because of the many exceptions to the doctrine. In a nutshell, although the state probably does not have a duty to others to respond to spills³⁰, when it does respond (as it inevitably will with large spills), it has a duty to do so with at least some degree of care. Its own actions in the field which cause injuries are likely to give rise to liability just as they would with a private RAC. But, as with private RACs, the state is not liable except for grossly negligent and intentional misconduct, as long as its actions are taken in response to an emergency. (This limited immunity, given at AS 46.03.822(h), is in addition to whatever immunity the state obtains with other RACs under AS 46.03.825.)

Likewise, a contractor acting as a RAC for the State can cause the state to incur liability, subject to the same rules as for private employers as to respondeat superior and non-delegable duties. The State may attempt to fend off liability from below by requiring RACs it employs to indemnify it for their misdeeds, and it could attempt to require indemnification for its own misdeeds, but it would face the same difficulties mentioned above regarding non-delegable duties of care and with the public policy concern over insulating itself from liability for damages it causes.

As to restricting its liability when it acts as a RAC for another responsible party, the state's quandary is that it becomes most active in field

³⁰ The exception is when the state itself causes a spill, in which case the state is obligated to contain and clean it up like anyone else under AS 46.04.020.

response when there is no clear responsible party and when it takes on a spill response on its own initiative. In such cases there is obviously no way to shift liability for response mishaps to another party.

One other aspect of state involvement deserves mention. When a responsible party engages a RAC, there is usually a provision requiring the client to indemnify the RAC from liability arising from carrying out the orders of an authorized state or federal official. But what of the liability of that official or that government? The likelihood is that the RAC or its client will attempt to shift the ultimate burden of liability onto the government by proving that the government action was itself the cause of the damage. There is no protection or meaningful limitation on such suits, unless the government can convince the court that as a RAC, within the broad meaning of that term in AS 46.03.825, the government comes within the protections of that statute. To our knowledge this possibility was never considered during any of the legislative debate on that statute. Further, it is an open question whether the terms of the statute would be interpreted to apply to the governmental oversight function as well as to actual fieldwork. But neither is there any clear exclusion of the government as RAC from the provisions of Section 825.

In summary, the State is not in any clear way different from any other RAC or employer of a RAC, and would likely share the same legal burdens. It is an open question whether the state can limit its own liability under the terms of AS 46.03.825.

The State and control of response activities

Since holders of contingency plans and other potentially liable spillers of oil have moved toward greater use of independent RACs to perform spill response, there is an obvious concern. Does the State have the same control over a RAC as it would over the RAC's client? In other words, how can the State ensure that a RAC which is an essential element of a cleanup actually takes the field and performs according to an approved plan and under the direction of government authorities? Under existing law most of the State's authority over RACs is indirect and exercise of the authority could be cumbersome if it were resisted. Reexamination of that authority is warranted.

As noted above, the current RAC contracts we have examined are

two-party documents with no participation by the State and few references to either the State or any other governmental authority. The only common reference to governmental oversight -- and it exists in only the more sophisticated contracts -- is a provision requiring the client to indemnify the RAC for liability incurred while carrying out the orders of a governmental authority. This provision may be an implicit recognition that in the field, during the heat of initial response, the RAC will effectively be under the control of whatever governmental official has jurisdiction. But we do not believe it can be taken as a legal concession of that authority, enforceable by the government agency. We perceive no intent in any RAC contract to place the State (or any other government) in the position of a third-party beneficiary, that is, to empower the State to require the parties to the contract to abide by it.³¹ In any case, even if the State were an implied third-party beneficiary, it would require litigation over that point to require a balking RAC to perform, so would not be of benefit in ensuring immediate field response.

Under existing law, the State's authority over a RAC comes from two sources, both problematic. First, the State has authority over the person causing the spill, who has a legal obligation to contain and remove it. AS 46.04.020. This legal requirement would support an injunctive action by the State, i.e., a request for a court order requiring that person to conduct a response. If the spill created an emergency situation there would also be legal authority to require the spiller to take immediate action to abate it. AS 46.03.865. It is arguable that the emergency order authority also permits the State to order a RAC to participate in the response, since AS 46.03.865 does not limit emergency orders to actual spillers, but such an extension of the statutory authority has never been tested and could be found to be lacking as to a person with no preexisting legal obligation regarding the spill. A stronger argument can be made for emergency orders directing RAC participation when the RAC has committed itself by contract to the spiller to perform a response, but the outcome of a legal challenge is far from certain. In any case both injunctive actions and administrative emergency orders have a significant drawback in that they are time-consuming, especially the injunctive action, when a crisis does not permit waste of time. Moreover, although they may be useful in getting a RAC into the field in the first place, they are far too cumbersome to use in directing the daily

³¹ In one of the contracts examined, CISPRI's contract with Chevron U.S.A., the contract explicitly disavows the existence of any third party beneficiaries, both private and governmental.

or hourly field tasks actually performed during a response.

The second existing avenue for State authority over RAC participation in a spill response comes from the contingency plan requirements of AS 46.04.030. That statute puts a clear burden on a potential spiller to have, and to demonstrate upon request of the State, minimum capabilities for responding to a spill. The regulations implementing the statute require, at 18 AAC 75.425(e)(3)(H), that the plan holder who uses the services of a RAC provide detailed information on the RAC, its equipment and services, and its contract. The regulations do not prescribe particular provisions which must be put in the RAC contract, but do state that reliance on a RAC does not relieve the plan holder of its responsibilities. This combination of requirements gives a plan holder a firm incentive to require, in its RAC contract, that the RAC provide the services required of the holder in the manner required of the holder. If the RAC fails to perform the plan holder assumes the significant liability that would attach if the plan holder itself failed to perform a response according to the contingency plan. (We note, however, that none of the RAC contracts we reviewed has any specific provision both tying RAC performance to the specific duties in the contingency plan and putting the RAC in jeopardy of bearing the plan holder's liability for not performing according to the plan, though, as a matter of contract law, the plan holder might be able to shift the liability to the RAC if the RAC failed to perform under the contract without legal justification.) In any case the State now has the authority to require the plan holder to demonstrate, on a regular basis, the ability and willingness of its RACs to perform their role under the contingency plan, and to revoke plan approval if the RAC is unwilling or unable to perform. If properly exercised, this authority places the burden -- and the penalty for failure -- on the plan holder to ensure RAC performance, and it should eliminate most problems regarding RAC ability to perform. However, it does leave a narrow but critical gap as to unforeseen inability or refusal of the RAC to perform after a spill actually occurs. The State's direct authority under the contingency plan laws is over the plan holder, not the RACs, so there is little legal basis for directly controlling RAC performance rather than plan holder performance.

There are several ways in which State authority over field actions by RACs could be strengthened. On the regulation level, the State could require that any contractual component of a contingency plan, such as a RAC, agree in writing that it will accept State authority over its field actions to the same degree

that such authority exists over the plan holder. The regulations could also require that RACs which are components of a contingency plan also agree in writing to be bound by the same requirements put on the plan holder to give immediate notification to the State of inability or unavailability to perform. This requirement could be supplemented by requiring a RAC wishing to terminate a contract to give prior notice, sufficient to permit substitute services to be secured, to both the plan holder and the State. It may also be possible to require that a RAC performing as part of a contingency plan agree in writing to accept joint liability with the plan holder for damages which result from failure to carry out its part of the contingency plan.

There is an obvious danger to imposing such requirements on RACS, namely that the contractors perceive them as so onerous that they simply choose not to enter into the contracts in the first place. While the plan holder would then be obligated to provide the mandated services in some other way, the absence of specialized response contractors could significantly decrease the efficacy of the response.

One other possibility for increasing State control over RACs would be to require RACs -- or at least those RACs which are component parts of contingency plans -- to have a direct contractual relationship with the State before its role in the contingency plan were approved. This option offers little advantage. Although couched in terms of a voluntary contract, such a requirement would in reality be a mandated burden, and to the extent that the burden exceeded the State's direct regulatory authority, would probably be seen as an illegal taking and would require compensation to the RAC itself. The more direct approach of requiring a contingency plan holder to obtain written agreement from the RAC that it accepts the same State authority as exists over the plan holder, would accomplish the same goal in a more direct and more clearly legal way.

IN THE ABSENCE OF A RESPONSIBLE PARTY

Attempts to shift the burden of liability away from RACs may cause public policy concerns, but the concerns are considerably alleviated in the majority of large spills because under AS 46.03.822 and .825, liabilities will merely be shifted to the original responsible party. There will still be a party from whom injured persons can secure redress. But what happens when there is no solvent responsible party? This situation can occur because the original spiller is unknown; because the original spiller is insolvent; because the original spiller has insufficient assets or has, through complex corporate ownership structures, successfully hidden its assets; because the original spiller has successfully limited the extent of its liability under federal admiralty law or other laws³²; or for other reasons. Can there be a situation in which a person is injured by a RAC's actions but finds himself unable to proceed against either the RAC (because it has statutory immunity) or the original responsible party (because it is missing or insolvent)?

At the present time the answer appears to be that such situations will occur, although hopefully not frequently. Just as RACs have the incentive to reduce their exposure, so do the corporations which are likely to be responsible parties, and their insurers. It is openly acknowledged in the field that each of these groups is actively searching for ways to deflect or minimize liability. It may also be, as several of the corporations have suggested, that the answer to the conundrum of injured parties with no one to sue is to rely on compensation funds, such as that created by the Oil Pollution Act of 1990. Such funds -- financed by the industry -- may or not be an adequate answer, since obtaining compensation may be too costly or complicated for the small injured party, and with large spills the total claims may exhaust the funds. Overreliance on compensation funds may also reduce incentives of individual operators to maximize their preventive and safety measures, particularly if combined with immunity provisions or corporate structures that reduce direct liability of responsible parties. The point is simply that anytime consideration is given to further immunities for segments of the oil

³² See the Limitation of Liability Act of 1851, 46 U.S.C. §§181 et seq. This Act, which puts a cap on the amount of liability which can be placed on owners and operators of vessels causing damages in most circumstances, was made inapplicable to vessels subject to the liability scheme of the Oil Pollution Act of 1990. It still applies to maritime traffic in general, however, and could conceivably apply to RAC-owned vessels which cause damage through means other than oil.

transportation or spill cleanup industries, one of the prime considerations must be whether there is an adequate substitute source of compensation for injured parties, and whether securing compensation from that source is so difficult or costly that legitimate claims will in fact go uncompensated. There is a potential, due to the combination of statutory immunities and contractual liability shifting, that some damage claims will not be compensated.

CONCLUSIONS AND RECOMMENDATIONS

Response action contractors are now a necessary part of oil spill response. With advances in technology and continued change in the oil production and transportation fields, specialized response action contractors will become even more important. It is natural and understandable for RACs to want to reduce the potential liability they face for their actions during a spill, just as it is to be expected that the responsible parties will attempt to minimize their own exposure. Compensation schemes for oil spill victims can be expected to evolve in the future, as various parties attempt to use legislation, contractual agreements, and internal restructuring to reallocate the burden of oil spill liabilities. Protection of the public interest requires careful observation and understanding of these adjustments and skillfully working with the segments of the industry to minimize the disadvantage to injured parties from such reallocations. The bottom line must involve balancing the need for fair and full compensation for all spill injuries with the need for a liability scheme that does not discourage response action contractors from acting to prevent spill damages. Achieving that balance will require constant monitoring of both the legalities and practicalities of oil spill liability and compensation.

Beyond those general recommendations, we believe that requiring RACs to exercise due care, i.e., to act without negligence in their response activities, does not place an undue burden on them. The negligence standard includes the recognition that reasonableness must be viewed in light of the circumstances, including whether a crisis atmosphere exists. If the Legislature retains a broader immunity (for all actions not grossly negligent or intentional), it should reconsider the 15 day period now prescribed for immunity. A more rational scheme would replace that arbitrary period with a system that reflects the fact that the initial crisis may last for far fewer days in some cases and far more in others.

Finally, we recommend that the Department of Environmental Conservation revise its contingency plan regulations to require that RAC contracts which are an integral part of an approved contingency plan include an agreement subjecting the contractor to the same degree of governmental authority as the plan holder. ADEC should also prohibit by regulation a RAC from terminating or refusing to carry out its duties under a contract and contingency plan, without substantial prior notice to both the plan holder and the State.

TRANS-ALASKA
PIPELINE
AUTHORIZATION
ACT

TO: Michele Brown
Executive Director, Citizens' Oversight Council on Oil and Other
Hazardous Substances

RE: HB 196 research project: Trans Alaska Pipeline
Authorization Act

FROM: Michael J. Frank *Michael J. Frank*

DATE: January 13, 1992

SUMMARY OF MEMORANDUM

Under the federal Trans-Alaska Pipeline Authorization Act of 1973, a holder of the pipeline right-of-way must control and remove any pollution attributable to the activity of the holder, whether the pollution is within or without the right-of-way. This statutory duty is mirrored in provisions of the U.S. Department of the Interior *Agreement and Grant of Right-of-Way for Trans-Alaska Pipeline* with the holders. The holders, all pipeline companies which are subsidiaries of parent oil companies, have made Alyeska Pipeline Service Company their agent under the agreement. The agreement requires Alyeska to have an approved oil spill contingency plan.

After the flow of oil began through the trans-Alaska pipeline, Alyeska received governmental approval of contingency plans covering spills that might occur from tankers berthed at the Valdez Marine Terminal, or elsewhere in Port Valdez and in Prince William Sound. Alyeska now claims it is a mere "volunteer" when it comes to tanker spill response and spill cleanup, a claim Alyeska first made after the T/V Exxon Valdez oil spill.

Alyeska's current position is inconsistent with previously approved Alyeska contingency plans, with federal law and with the federal *Agreement and Grant of Right-of-Way for Trans-Alaska Pipeline*. It is also inconsistent with the State of Alaska *Right-Of-Way Lease For Trans-Alaska Pipeline*. As long as Alyeska holds to its position, however, there may be grave dangers in relying on Alyeska for an effective spill response and cleanup.

MEMORANDUM

I. INTRODUCTION.

Section 11 of ch. 92 SLA 1991 (HB 196) requires the Citizens' Oversight Council "to review the entire subject of response action contractor civil liability and the status of oil spill contingency plan holders". The purpose of the review is to help the Legislature determine whether "the present State laws that require shippers and owners to hold contingency plans and that enable shippers and owners to contract with response action contractors to carry out contingency plans are adequate to protect the public in the event of an oil spill."

Among the research projects the Citizens' Oversight Council authorized for the HB 196 report was that of reviewing the history of the federal Trans-Alaska Pipeline Authorization Act of 1973 (TAPAA). The purpose of the TAPAA review is to determine if there was any discussion of Alyeska as a "response action contractor" or "responder" for tankers operating in the trans-Alaska pipeline system (TAPS) trade. Before this memorandum begins that review, it will be helpful to set out some definitions and to identify some important considerations.

A. Definitions.

"Response action contractor" is defined in HB 196 [sec. 7, ch. 92 SLA 1991, now codified at AS 46.03.826(15)] as:

(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; and

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

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

(Emphasis supplied.) As used in the above quote, the word "person" is defined in AS 1.10.060 to include a natural person, a corporation, such as a cooperative corporation formed under AS 10.15.005 - .360, a firm, company, association, organization or partnership.

"Response action contract" is defined in AS 46.03.826(14) to mean a written contract or agreement with respect to a release or threatened release of a hazardous substance; among others, the agreement may be with "another person potentially liable for the release or threatened release under State or federal law." AS 46.03.826(14)(D).

Finally, AS 46.03.828(5) defines a "hazardous substance" to include oil.

B. Important Considerations.

Given those definitions, two facts about response action contractors (RACs) are important to note.

First, what type of legal entity the RAC is may play a crucial role in determining what assets it places at risk in the event it breaches a contract or commits a tort and is sued by an injured party. For example, a RAC partnership and/or its partners can be sued for the acts of the partnership; the same is true of an unincorporated cooperative, which normally can be sued as a separate entity along with its members. In contrast, ordinarily only corporate assets are at risk in a lawsuit against a corporation; the assets of corporate shareholders, members of the Board of Directors or incorporators are rarely at risk.

Second, unless the RAC has entered into a contract directly with the State of Alaska, during a spill response a RAC is normally not subject to State orders. As of this writing, under Alaska law RACs owe the State no special statutory or regulatory duties. Instead, a RAC's actions are governed by the terms of the RAC's response action contract with whomever it contracts.

In sharp contrast, the holder of a contingency plan must satisfy various duties owed to the State which are imposed by statute and regulation. AS 46.04.030; 18 AAC 75. If the plan holder fails to fulfill statutory or regulatory duties, however, it may be subject to

governmental orders, such as from the Department of Environmental Conservation¹ or from federal agencies. It also may be subject to civil and criminal liabilities. AS 46.03.760 and 46.03.790. During a spill response if a holder's RAC decides to quit working because, for example, the RAC claims that the plan holder has breached their contract, State and federal agencies have no immediate legal recourse against the RAC.² Under State and federal laws the agencies' only clear remedy, short of taking over the spill response, is against the plan holder. Even so, if the plan holder has no labor or equipment at the ready to replace the RAC's, then disaster may result.

Thus, what Alyeska is (a RAC or the holder of a contingency plan or mere volunteer responder) in a particular context determines to whom Alyeska may owe a response duty. It also determines what statutory and regulatory duties Alyeska may have and therefore whether it is subject to governmental orders and enforcement actions. Finally, it determines whether Alyeska's actions are immune from damages liability under AS 46.03.825.

If the TAPAA requires Alyeska to respond to oil spills from tankers at the Valdez Marine Terminal, elsewhere in Port Valdez and in Prince William Sound, the State will obviously benefit, assuming federal enforcement of the TAPAA's requirements.³ Moreover, if it is not deemed a RAC but instead deemed the holder of a contingency plan, Alyeska will be subject to State orders and civil and criminal enforcement actions. And, Alyeska will not be entitled to immunity from damages liability under AS 46.03.825.

C. Balance Of This Memorandum.

The balance of this memorandum will be devoted to an analysis of the TAPAA's history. This first requires a brief review of events that preceded the TAPAA's enactment in 1973. Thereafter this memorandum will (1) review TAPAA's Congressional history, (2)

¹ See, e.g., AS 46.03.850 (compliance orders) and 46.03.865 (emergency orders).

² The governments might be able to claim that they are third party beneficiaries of the contract between the RAC and the holder, and therefore able to enforce it for their own benefit. However, this would undoubtedly call for a judicial determination if the RAC refused to follow governmental orders to stay on the spill.

³ Whether the State of Alaska or a private citizen would have standing to sue Alyeska and a private cause of action against Alyeska under the TAPAA is beyond the scope of this memorandum.

describe how the aforementioned federal *Agreement and Grant of Right-of-Way for Trans-Alaska Pipeline* (hereafter, federal agreement) and state *Right-of-Way Lease For Trans-Alaska Pipeline* (hereafter, State agreement) treated the subject of oil spills, (3) review Alyeska contingency plans and certain other Alyeska documents with respect to the Valdez Marine Terminal, Port Valdez and Prince William Sound, and (4) describe Alyeska's legal posture since the T/V Exxon Valdez oil spill.

II. TAPAA HISTORY.

The TAPAA's pre-enactment, enactment and post enactment history combine to show that Alyeska is required to respond to tanker spills of TAPS oil in Alaska waters.

A. General Background 1967 - 1972.

In late 1967, Atlantic Richfield Co. made its first significant oil discovery at Prudhoe Bay. Oil industry lessees of Prudhoe Bay fields almost immediately began planning for a trans-Alaskan pipeline to Valdez. In 1968, Atlantic Richfield Co., Humble Oil & Refining Co. and British Petroleum Corp. formed the then so-called "Trans-Alaska Pipeline System". It was this entity that first applied for permission to construct an all Alaskan pipeline. *Federal Task Force on Alaskan Oil Development: A Preliminary Report to the President* (1969). In May 1969, the involved companies met with the Department of the Interior and submitted route plans. The companies also made a presentation to the United States Senate's Committee on Interior and Insular Affairs.

On June 16, 1969, formal application for the pipeline right-of-way was filed with the Department of the Interior. In August 1969, the Department of the Interior held public hearings in Fairbanks to determine the adequacy of proposed Stipulations to be imposed with respect to the right-of-way grant. On September 9 and 11, 1969, the pipeline companies made another presentation, this time to the full Interior Committees of the United States Senate and the House of Representatives. 119 *Congressional Record - House*, at 27638 (August 2, 1973, remarks of Representative Martin concerning the history preceding the TAPAA's enactment).

In the fall of 1969, the State held its fourth Prudhoe Bay oil and gas lease sale, netting over \$900 million dollars in lease bonus money. In the meantime, the Secretary of the Interior had proposed to lift the Alaska land freeze (Public Land Order 4582) to allow construction of the pipeline across federal lands. On October 16, 1969 the United States Senate Interior Committee held a public hearing on the Secretary's proposal. Public hearings were also held by the corresponding House committee, on Oct. 21 and 28, and November 11, 1969. Eventually both committees approved the Department of the Interior's proposal to modify the land freeze so that the department could proceed with plans to grant the rights-of-way and permits. Id.

At roughly the same time, Congress began consideration of and eventually passed the National Environmental Policy Act of 1970 (NEPA). The act requires federal agencies to prepare an environmental impact statement (EIS) before taking any major federal action that might significantly affect the environment.

Although industry and governmental planning had begun for an all Alaskan pipeline, some citizens and groups firmly opposed the pipeline's construction, because they favored a Canadian route, because of the TAPS environmental effects, or because of unsettled Alaska Native land claims. (The latter claims were not resolved until the Congress' passage of the Alaska Native Claims Settlement Act of 1971.)

In May 1970, environmental organizations sued the Secretary of the Interior to enjoin his attempt to process the permits and rights-of-way for a trans-Alaska pipeline. Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir.)(en banc), cert. denied, 411 U.S. 917 (1973). On the basis of the Mineral Leasing Act of 1920 and NEPA, the District of Columbia District Court granted a preliminary injunction against the issuance of any permits or rights-of-way. After the District Court's injunction was issued, the Secretary of the Interior set out to satisfy NEPA by preparing an EIS.

In the meantime, on August 14, 1970 Alyeska Pipeline Service Company was incorporated in Delaware by its pipeline owner companies. It filed to do business in Alaska as a non-resident

corporation on September 1, 1970.⁴ As of February 1990, Alyeska's principal owner companies were ARCO Pipe Line Co., 21.4%; Exxon Pipeline Co., 20.3%; and BP Pipelines Alaska Inc., 50.0%.⁵

The Department of the Interior's draft EIS was completed in January 1971. After extensive hearings, the final EIS was issued in March 1972. In May 1972, the Secretary of the Interior announced his decision to grant the necessary permits and rights-of-way to Alyeska for a trans-Alaska pipeline. Subsequently, the District Court in Wilderness Society, supra, dissolved its injunction and dismissed the case against the Secretary of the Interior, setting the stage for an appeal to the District of Columbia Court of Appeals. Id., 479 F2d at 851.

⁴ This information comes from the State Department of Commerce and Economic Development, Corporations Section.

Alyeska was formed by seven pipeline companies, all being subsidiaries of parent oil companies. In 1973 these companies, and their percentage ownership shares in Alyeska, were as follows: Atlantic Pipeline Co., a subsidiary of Atlantic-Richfield, 28.08%; Sohio Pipe Line Co., a subsidiary of Standard Oil Co., 28.08%; Humble Pipeline Co., a subsidiary of Exxon Co., 25.52%; Mobil Pipe Line Co., 8.68%; Phillips Petroleum Co., 3.32%; Union Oil Co. of California, 3.32%; and Amerada Hess Corp., 3%. *Hearings Before the Subcommittee on Public Lands of the Interior and Insular Affairs, House of Representatives*, 93d Cong., 1st Sess., on H.R. 9130, Apr. 11, 18, 19, and 30, May 1 and 2, 1973 (Part 1) (hereafter, *House Hearings*), at 554 (testimony of Mr. Spahr from Sohio Pipeline Co.); *Hearings Before The Committee On Interior And Insular Affairs, U.S. Senate*, 93d Cong., 1st Sess., on S. 1081 et al., Mar. 9 and 27 (Part 1), May 3, 1973 (Part 4) (hereafter, *Senate Hearings*), at 202 (testimony of Alyeska President E. L. Patton). According to December 31, 1990 Federal Energy Regulatory Commission (FERC) Annual Reports, Form 6, for each of the foregoing pipeline owner companies, Atlantic Pipeline Co. has been replaced by ARCO Pipe Line Co., a wholly owned subsidiary of Atlantic Richfield Co.; Sohio Pipe Line Co. has been replaced by BP Pipelines (Alaska) Inc., a wholly owned subsidiary of The Standard Oil Company; Humble Pipeline Co. has been replaced by Exxon Pipeline Co.; Mobil Pipe Line Co. has been replaced by Mobil Alaska Pipeline Co., a wholly owned subsidiary of Mobil Oil Corp.; Phillips Petroleum Co. has been replaced by its wholly owned subsidiary Phillips Alaska Pipeline Corp.; Union Oil Co. of California has been replaced by its wholly owned subsidiary UNOCAL Pipeline Co.; and Amerada Hess Corp. has been replaced by its wholly owned subsidiary Amerada Hess Pipeline Corp. In its Form 6, Exxon Pipeline Co. did not identify its parent company.

⁵ See preceding footnote. The information provided by the Corporations Section was as submitted in a required annual report and was current as of February 5, 1990. Because the ownership of only 5% or more shares in Alyeska has to be identified, the other owner companies were not listed in the annual report.

On appeal, the Court of Appeals reversed and reinstated the injunction. The court held that the Mineral Leasing Act of 1920 gave the Department of the Interior authority to grant a pipeline easement only 25 feet in width instead of the 50 feet needed. The court expressly declined to rule at that time on the adequacy of the final EIS under NEPA. *Id.*, 479 F2d at 884 - 87. Reinstatement of the injunction and concern that later legal challenges to the final EIS would further delay construction of the pipeline prompted the introduction of corrective legislation in Congress.

While the above events occupied federal decision makers, in 1972 the Alaska Legislature passed right-of-way legislation governing State owned lands. The oil industry found the legislation objectionable and sued to overturn it. At the same time, the oil industry threatened to hold up pipeline construction until the State legislation was revised to its satisfaction.⁶

B. 1973 Congressional Deliberations.

(1) Senate.

In 1973, the U.S. Senate saw the introduction of numerous bills dealing with the trans-Alaska pipeline controversy. Four of the bills (S. 1040, 1041, 1056 and 1081) dealt generically with pipeline rights-of-way across federal lands.⁷ S. 1081 was Senator Henry Jackson's proposal, and it became the principal focus of Senate deliberations. While it did not deal directly with the TAPS, it was apparent that the Secretary of the Interior would use the bill, if passed, as authority for granting the appropriate rights-of-way and permits for construction of the TAPS.

While there was much testimony and debate in the Senate hearings about the Canadian vs. Alaska route and about the impact of further delays due to NEPA challenges, there was surprisingly little discussion devoted to the marine transportation of oil.

⁶ The foregoing synopsis of State events is from the Alaska Oil Commission's *Final Report, SPILL - The Wreck of the Exxon Valdez*, at 31 - 35 (February 1990).

⁷ S. 970, introduced by Alaska Senators Stevens and Gravel, would have specifically authorized the Alaska route. S. 991, introduced by Senator Walter Mondale, in effect would have required further consideration of a trans-Canadian pipeline to the midwestern United States. *Senate Hearings*, Part 1, at 2.

Environmental matters were discussed in generalities, usually in the context of pointing out the extensive time and effort the Department of the Interior undertook in preparing the EIS.

Through the EIS process, the Department of the Interior had analyzed the proposed pipeline routes and their possible environmental effects. The final EIS cited heavily to Alyeska-generated documents describing the TAPS. See excerpts from Volume 6 of the final EIS at Exhibit A attached. Included within those documents was Alyeska's *Summary - Project Description of the Trans Alaska Pipeline System, August 1971*, excerpts of which are at Exhibit B attached. Of disasters like the T/V Exxon Valdez oil spill, Alyeska's *Project Description* said that

The probability of a major oil spill is remote. It is recognized, however, that the possibility of any accident will always exist to some small degree. Accordingly, a contingency plan is being developed for coping with any oil spill which might occur at any point along the line or in the waters of Port Valdez or Prince William Sound.

(Emphasis supplied.) *Id.* at 5. See also, *id.* at 59 - 60.

There was one mention of the marine segment of the TAPS in the *Senate Hearings* which is noteworthy. In an April 19, 1973 *Detailed Report On Matters Related To A Trans-Alaska Or Trans-Canada Pipeline* to the Senate Committee, The Standard Oil Company (owner of one of the pipeline owner companies) claimed that "the marine segment of TAPS will have a minimal impact on the environment." Report at 18, reprinted in Part 4 of the *Senate Hearings*, at 190 *et seq.* With reference to contingency plans in particular, the company was succinct: "Newly developed oil spill booms and skimming equipment will be readily available to put contingency clean-up plans immediately into effect in the event of an oil spill." *Id.*

While The Standard Oil Company report made no express reference to Alyeska's responsibility for contingency planning, one must bear in mind that the EIS refers to the above noted Alyeska *Project Description* documents in its analysis of the environmental concerns related to the marine segment of the TAPS oil trade. With reference to oil spills, the EIS declared that "Alyeska (citation to Alyeska document omitted) would attempt to prevent these spills...."

Final EIS, Volume 1, at 65, at Exhibit C attached. The EIS then goes on to describe what Alyeska would have in the way of equipment for a marine spill response (including 10,000 feet of floating containment boom), and how Alyeska would have the use of tugs and launches for spill response. *Id.* at 66. Therefore, it does not appear that anyone doubted but that Alyeska would be responsible for contingency planning with respect to the marine segment of the TAPS oil trade.

Senate Interior Committee markup of S. 1081 began in April, 1973. 119 *Congressional Record - Daily Digest*, at D208, 114, 221 - 222, 228, 269, 274, 281 and 336 (1973). The Committee ordered the bill reported out favorably to the full Senate on May 29, 1973. *Id.* Deliberations over S. 1081 began on the floor of the Senate in late June and ended in July, 1973.⁸ For the purposes of this memorandum, the deliberations were largely uneventful, with a few exceptions.

First, Senator Jackson introduced an amendment (No. 328) to S. 1081 that would have made the TAPS permittees liable, without regard to fault, for any damage suffered by Alaska Natives caused by use of the right-of-way. In doing so, he angrily rejected the Department of the Interior's claim, made in a letter to him, that proposed right-of-way Stipulations would adequately protect Alaska Natives. *Id.* at 23859 - 60. What is interesting about this bit of controversy is the department's assertion that, while it thought Senator Jackson's amending language unnecessary,

(a)t the same time, we are determined to prevent the pipeline from causing harm to any person or to any person's property in Alaska. We are equally determined to prevent harm to the environment of Alaska, including its land and water and its vegetation and wildlife. Should any harm nonetheless occur, we want to insure that the harm will be cured so far as is possible. We intend to impose those obligations on the pipeline owners and those who work for them, and we have drafted proposed permit provisions to this end.

⁸ 119 *Congressional Record - Senate*, at 19133 (S. 1081 reported out June 12 from Interior Committee with S. 93-207), 22611 - 14, 22794 - 810, 22798, 23312, 233543 - 54, 23778 - 79, 23859, 23763 - 64, 23777, 23746 - 83, 23854, 23858 - 64, 23880, 23882 - 83, 23887, 23873 - 90, 23909 -10, 23954 - 55 (June 12 - July 17, 1973).

(Emphasis supplied) Id. Thereafter, the department's letter to Senator Jackson sets out what the department asserted were very broad Stipulations that would require the pipeline owners to abate and repair any damage to the environment "arising out of or connected in any way with the construction, operation, maintenance or termination of all or any part of the Pipeline System...." Id. Senator Jackson's amendment was nonetheless agreed to by the full Senate. Id. at 23859.

Second, Alaska's Senator Ted Stevens made the following comments with respect to the marine segment of the TAPS oil trade:

Much has been said about the danger of oil spills on the Alaska route, particularly on the sea leg. Regarding marine oil spills, again very careful study has been given to this and I am convinced that stringent requirements for deballasting ships at Valdez, new ships built with the latest structural design, and stringent operational procedures to avoid collisions and groundings will all contribute to virtually eliminating oil losses at sea.

Opponents of the trans-Alaska pipeline know that every safeguard is being taken to protect the environmental quality of our waterways....

Some of the operational procedures to be enforced are as follows.... All tankers will take aboard a State pilot in Prince William Sound and all pilotage laws will be observed. Alyeska will provide tugs at Port Valdez and all docking and undocking will be tug assisted.

119 Congressional Record - Senate, at 23782 (July 13, 1973). Senator Stevens went on to quote from a June 1972 statement of the Secretary of the Interior that "Contingency plans for cleaning up oil spills must be continually reviewed and proven to minimize the damage in the event any accidents occur. These will be kept current in light of new technology to assure their maximum effectiveness...." Id.

Third, Maine's Senator Hathaway introduced an amendment (No. 348) which provided for absolute liability of the holder of a right-of-way, or the owner or operator of an oil terminal or vessel, for damages irrespective of fault. Id. at 24294 - 95. Senator Jackson

pointed out, however, that the Senate Interior Committee had considered such language but rejected it in favor of section 104(g) of S. 1081. Section 104(g) authorized the Secretary of the Interior to write regulations designed to protect the United States, but it left other liability questions to State law. Senator Stevens, citing proposed Interior Department TAPS Stipulations from the final EIS, asserted that Stipulation 1.7.1 already required that if "through no fault of the pipeline owners or operators damage were to be inflicted in connection with the construction, operation, maintenance, or termination of the pipeline, the owners and operators will be required to repair the damage." *Id.* at 24296. Senator Stevens, therefore, strongly opposed the Hathaway amendment. In apparent response to Senator Stevens' comments, Senator Hathaway eventually withdrew his proposed amendment. *Id.* at 24297.

Finally, there was a lengthy discussion of a proposed amendment to S. 1081 to exempt the final EIS for the TAPS from further court challenge under NEPA, a proposal that passed by a 49 to 48 vote. *Id.* at 24298 - 316.

On July 17, 1973 S. 1081 as amended passed the full Senate by a 77 to 22 margin. *Id.* at 24294 - 97, 24330.

2. House of Representatives.

When the House Hearings began before the House Interior and Insular Affairs Subcommittee on Public Lands, the subcommittee had no less than twelve bills before it dealing with rights-of-way and other public lands issues. Hearings began April 11, 1973 and ended after a series of full Committee markup sessions in late July, 1973. Subsequently H.R. 9130 was reported out favorably to the House for further deliberations.⁹

As in the Senate hearings, the House hearings focused on the choice between a Canadian versus an all Alaskan route, and on the potential impact of further NEPA-related delays.

⁹ 119 *Congressional Record - Daily Digest*, at D217, 243 - 45, 249, 253, 260, 313, 319, 324, 338, 407, 410, 494, 499, 519, 523 - 24, and 529 (April 11, 1973 - July 24, 1973).

At the House hearings, Representative Dellenback inquired of Alyeska officials about the company's position concerning common carrier status for the TAPS. This status, among other things, would require the owner companies of the TAPS to receive approval from the Interstate Commerce Commission¹⁰ for charges imposed on any shipper using the TAPS. Alyeska, as agent for its pipeline owner companies, indicated that it did not oppose common carrier status. *House Hearings*, Part 1, at 537.

Moreover, in the following exchange with Representative Dellenback, Alyeska's general counsel, John Knodell, explained how the owner companies viewed their legal responsibilities:

Mr. Dellenback: May I ask about the nature of the legal responsibility that any of the 7 petroleum companies might have which make up your pipeline service company? Would there be any legal responsibility in the event damage were extreme? Would any of the basic 7 organizing petroleum companies have any responsibility to carry any portion of that burden?

Mr. Knodell: They would have full responsibility, Mr. Dellenback. Alyeska Pipeline Service Co. acts as an agent for them, and only as an agent for them. So, our actions are their actions; yes, sir.

Mr. Dellenback: Normal corporate shield of responsibility so far as liability is concerned would not pertain in this instance?

Mr. Knodell: That is correct, Mr. Dellenback.

Id. at 538 - 39.

As reported out to the House, sections 201 - 209 of title II of H.R. 9130 dealt specifically with the TAPS. See 119 *Congressional Record - House*, at 27680 - 81 (Aug. 2, 1973), Exhibit D attached. Among other things, title II effectively put an end to any further court challenge under either the Mineral Leasing Act of 1920 or

¹⁰ Interstate Commerce Commission tariff approval functions for pipeline common carriers on federal lands are now performed by the FERC. The State of Alaska Public Utilities Commission (APUC) regulates the carriers' intrastate activities.

NEPA; authorized the Secretary of the Interior to grant the appropriate rights-of-way and permits with terms and conditions to protect Alaska Natives from damages; placed restrictions on the export of the TAPS oil overseas; and defined the TAPS by reference to the final EIS definition.

Section 207 of title II is the most important section, because it dealt specifically with discharges of oil from vessels. Pertinent parts of section 207 follow:

Section 207. (a) Except when the holder of a permit or right-of-way granted pursuant to this title can prove that damages caused by the holder's activities conducted at any point along the route of the proposed Alaskan pipeline were caused by an act of war or by negligence of the United States or other government, such holder shall be strictly liable to all damaged parties...without regard to fault for such damages.

(b)(1) The Secretary shall direct as a term or condition of any permit or right-of-way...that except when the holder...can prove that damages resulting from discharges of oil in violation of section 11(b)(2) of the Federal Water Pollution Control Act...were caused by an act of war or by the negligence of the United States or other government such holder shall be strictly liable without regard to fault to all parties...for all damages resulting from such discharges of oil from, or involving vessels owned, chartered, operated, or leased by or for such holder, affiliate of such holder, shareholder, partner, or other constituent part of the holder, or affiliate of such shareholder, partner, or other constituent part of the holder, where the cargo of such vessel is oil transported by the trans-Alaskan pipeline....

Id. at 27681 at Exhibit D attached. "Affiliate" also was defined in section 207 and was all encompassing. Id.

Representative Dellenback claimed responsibility for section 207, saying:

In order to strengthen H.R. 9130 in this regard, I offered two amendments...which I was pleased to have accepted.... These provisions, which are in the bill before us as section 207, are very tough liability clauses covering both the land and marine

legs of the trans-Alaskan route. Their effect will be to impose strict liability, regardless of fault, on pipeline permit holders for damages resulting from activities related to the pipeline itself or to the marine leg of the route.

We have received assurances from Alyeska and other commercial interests involved in the pipeline that they are convinced the trans-Alaska route can be constructed as to be environmentally safe. The strict liability clauses put the burden on them to prove that their assurances are completely valid....

119 *Congressional Record - House*, at 27644 (August 2, 1973, remarks of Representative Dellenback).

Representative Don Clausen similarly described the impact of section 207, saying

This section imposes similar no-fault liability for damages resulting from discharges of oil...if the oil is discharged from a vessel owned, chartered, operated, or leased by the holder of a right-of-way or permit for the trans-Alaskan pipeline, or its affiliate, or if the cargo of the vessel is oil transported through the pipeline. The word "affiliate" is broadly defined to include, among others, parent and subsidiary companies, the purpose being to bring within the scope of the section the oil companies that own the oil being transported....

Id. at 27635 (August 2, 1973, remarks of Representative Clausen). See also, id. at 27650 (remarks of Representative Saylor) ["Sections 207(b) and 207(c) deal with unlimited liability of the oil companies on the marine leg of the TAPS system."]

Although section 207's language was broad, Representative John Dingell was unsatisfied with it. While he agreed with the foregoing descriptions of the strict liability impact of section 207 on the holders for any marine discharge of TAPS oil, he was concerned that the United States might not be reimbursed for cleanup costs. He said this was because the "the Federal Water Pollution Control Act, which never envisaged spills from the trans-Alaska pipeline...imposes an \$8 million limitation on the liability of an on-shore facility for the cost of cleaning up its oil spill." Id. at 27503

(July 31, 1973, remarks of Representative Dingell). He thus proposed a new subsection (d) for section 207. His amendment read:

(d) If any area within or without the right-of-way granted by this Title is polluted by any operations conducted by or on behalf of the person granted such right-of-way, and such pollution damages aquatic life, wildlife, or public or private property, the control and total removal of the pollutant, whatsoever found, proximately resulting therefrom shall be at the expense of such person including any administrative and other costs incurred by the Secretary or any other Federal agency. Upon the failure of such person to control and recover said pollutant adequately the Secretary, in cooperation with other Federal, State, and local agencies, or in cooperation with such person, or both, shall have the right to accomplish the control and removal at the expense of such person.

(Emphasis supplied.) Id. at 27054.

Representative Dingell's amendment was debated on the floor of the House on August 2, 1973. Representative Dingell pointed out that the language of his amendment was drawn from 43 Code of Federal Regulations § 250.43, the Department of the Interior's regulations governing oil operations on the Outer Continental Shelf(OCS). The OCS was not subject to the Federal Water Pollution Control Act. Representative Dingell explained that the amendment's purpose was to remove the dollar limitation for damages and to provide for reimbursement for the cost of government cleanup. Id. at 27717 (August 2, 1973, remarks of Representative Dingell). There was no comparable language in the Senate bill. Id. (remarks of Representative Dellenback).

Representative Dingell's amendment passed by a vote of 174 to 2. H.R. 9130 as amended then passed the full House by a vote of 356 to 60. Id.

3. House/Senate Conference.

Thereafter the House and Senate appointed conferees to iron out the differences between H.R. 9130 and S. 1081. The House and Senate conferees met in September and October, 1973 before final

agreement on the TAPAA was reached.¹¹ On November 11, 1973, the Senate agreed by a vote of 80 to 5 to the Conference Committee substitute for S. 1081.¹²

The result with respect to section 207 of H.R. 9130 was section 204(a) - (c) of tit. II of Pub.L. 93-153 (TAPAA). In highlighting the conferees' agreement with respect to section 204, Senator Jackson said, in pertinent part:

Subsection (a) imposes on the holder of the right-of-way or permit strict liability without regard to fault, and without regard to ownership of the land or resource involved if the land or resource is relied upon for subsistence or economic purposes, for damages or injury in connection with or resulting from activities along or in the vicinity of the pipeline right-of-way. Strict liability is limited to \$50,000,000 for any one incident, and liability for damages in excess of that amount will be determined in accordance with ordinary rules of negligence.

Subsection (b) imposes on the holder of the right-of-way or permit liability for the full cost of control and removal of the pollutant of any area that is polluted by operations of the holder.

MARINE LEG LIABILITY

Subsection (c) imposes on the owner or operator of a vessel that is loaded with oil from the trans-Alaska pipeline strict liability without regard to fault for damages sustained by any person as the result of discharges of oil from such vessel¹³

(Emphasis supplied.) 119 *Congressional Record - Senate*, at 36809 (Nov. 12, 1973, remarks of Sen. Jackson). Virtually identical language was used in the *Conference Report No. 93-924* to describe section 204 of TAPAA.¹⁴

¹¹ 119 *Congressional Record - Daily Digest*, at D610, 621, 631, 652, 657, 684, 692, 698, 703, 714, 729, 745, 747.

¹² *Id.* at 28477 - 79, 28875, 36808 - 23.

¹³ Senator Jackson went on to describe the TAPS Liability Fund and how it would work.

¹⁴ See a reprint of *Conference Report No. 93-924* in 2 *U.S. Code, Cong. & Admin. News*, *supra*, at 2523 - 2525 (1974).

As enacted in 1973, subsection (b) of section 204 of the TAPAA read:

If any area within or without the right-of-way or permit area granted under this title is polluted by any activities conducted by or on behalf of the holder to whom such right-of-way or permit was granted, and such pollution damages or threatens to damage aquatic life, wildlife, or public or private property, the control and total removal of the pollutant shall be at the expense of such holder, including any administrative and other costs incurred by the Secretary or any other Federal officer or agency. Upon failure of such holder to adequately control and remove such pollutant, the Secretary, in cooperation with other Federal, State, or local agencies, or in cooperation with such holder, or both, shall have the right to accomplish the control and removal at the expense of such holder.

43 U.S.C. 1653(b). The thrust of this language is not much different than that proposed by Representative Dingell as a new section 207(d) for H.R. 9130, quoted above, and adopted as part of H.R. 9130 as it passed the House.¹⁵ What appears to have happened in Conference Committee was a foreshortening of bill language, but no change in the Congressional goal of the imposition of strict liability for damages and of containment and cleanup responsibility on the holders.

C. Litigation Over The Meaning Of The TAPAA's Section 204(b).

At this point, a short digression from Congressional history to the U.S. Court of Claims informs the analysis of the TAPAA.

In February 1978, a saboteur detonated an explosive charge which breached the pipeline and caused an oil spill. Alyeska cleaned up the spill at a cost of well over \$1 million. Alyeska eventually sued the United States to recover its cleanup costs under a provision of the federal Water Pollution Control Act, 33 U.S.C. § 1321. The act allowed costs recovery from the United States when the organization

¹⁵ However, unlike section 207(d) of H.R. 9130, the TAPAA's section 204(b) did not use the "affiliate" language. Nor was, for that matter, the TAPS defined in the TAPAA as it had been in H.R. 9130's section 210.

cleaning up the spill could prove the spill was caused by the act of a third party.

The United States denied liability. It asserted that the TAPAA, not the Water Pollution Control Act, governed spills from the TAPS. It argued that under TAPAA's section 204(b), the right-of-way holders and their agent, Alyeska, were responsible for spill cleanup. Alyeska Pipeline Service Co. v. United States, 649 F.2d 831, 227 Ct. Cl. 297 (U.S.Ct.Cl.) cert. denied 454 U.S. 964 (1981).¹⁶

Among other arguments, Alyeska and its owners argued that section 204(b) did not apply because the oil discharge did not result from "any activities conducted by or on behalf" [language from section 204(b)] of them, but resulted from the acts of a saboteur. The court rejected Alyeska's argument, holding that the "cause of the breach is immaterial in determining whether the discharge was attributable to the plaintiffs' 'activities.'" 649 F.2d at 832. While the court agreed with Alyeska that Representative Dingell's narrow purpose in his amendment to H.R. 9130 was to remove the Water Pollution Control Act's cap on the amount of cleanup costs the United States could seek reimbursement for, the court found that the "language, intent, and effect of the provision were not so limited." Id. at 833. Instead, the court held that section 204(b) "added to the Pipeline Act a new provision making the pipeline owners and operators responsible for the total clean-up costs without regard to whether they or the United States did the work." Id.

While not in the context of an oil spill occurring in Port Valdez or Prince William Sound, the Court of Claims' broad reading of section 204(b) of the TAPAA is entirely consistent with the thesis that in TAPAA Congress intended the TAPS holders to be responsible for tanker spills. In fact, from the inception of the TAPS until just after the T/V Exxon Valdez oil spill Alyeska undertook the duty to respond to tanker spills, as is explored more fully in sections IV et seq. of this memorandum.

D. OPA 1990 Changes To The TAPAA.

¹⁶ This was not the first time that Alyeska sued the United States in the Court of Claims over the TAPAA. It also sued seeking a refund of fees paid to the Department of the Interior for the government's expenses incurred in processing the permits granted to Alyeska to build and operate the TAPS. Alyeska Pipeline Service Company v. U.S., 624 F.2d 1005 (Ct. Cl. 1980).

In the Oil Pollution Act of 1990 (OPA), Congress altered the TAPAA in various ways. See tit. VIII, § 8001 of Pub. L. 101-380, August 18, 1990, 104 Stat. 564. Of importance here are the alterations to section 204(b) shown in the following quote (additions underlined and deletions bracketed):

If [any area] any area in the State of Alaska within or without the right-of-way or permit area granted under this title is polluted by any activities related to the Trans-Alaska Pipeline System, including operation of the terminal, conducted by or on behalf of the holder to whom such right-of-way or permit was granted, and such pollution damages or threatens to damage aquatic life, wildlife, or public or private property, the control and total removal of the pollutant shall be at the expense of such holder, including any administrative and other costs incurred by the Secretary or any other Federal or State officer or agency. Upon failure of such holder to adequately control and remove such pollutant, the Secretary, in cooperation with other Federal, State, or local agencies, or in cooperation with such holder, or both, shall have the right to accomplish the control and removal at the expense of such holder.

43 U.S.C. § 1653(b).

The amendments to section 204(b) derive from title II, section 201(a) of both S. 686 and H.R. 1465 as introduced. The H.R. 1465 provision eventually became section 401 of the House-passed bill. The House report accompanying H.R. 1465 says of the amending language:

This section amends the liability provisions of the Trans-Alaska Pipeline Authorization Act to reflect that oil spilled into or upon the navigable waters of the United States will be covered by the provisions of the new Oil Pollution, Prevention, Response, Liability, and Compensation Act of 1989. The section restricts coverage of the Trans-Alaska Pipeline Authorization Act liability provisions to spills in the State of Alaska for spills occurring from the pipeline. It also repeals the liability provisions for spilling of oil into the navigable waters in order to conform with the new liability provisions in the bill. The Trans-Alaska Pipeline Liability Fund is retained for the payment of claims which arise prior to the date of enactment of this Act.

The Trans-Alaska Pipeline Authorization Act established liability for damages from activities along or in the vicinity of the Alaskan pipeline right-of-way and for discharges of oil from vessels loaded at terminals for the Trans-Alaska pipeline....

H. Rep. No. 101-241 to accompany H.R. 1465, Part 1, 101st Cong., 2d Sess., at 50(1990).

The Senate report to accompany S. 686 said of section 201:

Section 201 makes clarifying amendments to the Trans-Alaska Pipeline Authorization Act(43 U.S.C. § 1653). The amendments in this Act make it clear that the removal liability of the permit holder extends only to activities relating directly to the Trans-Alaska Pipeline. Additional language makes the Trans-Alaska Pipeline Act removal liability provisions inapplicable in those situations where this Act applies. In all other instances, those provisions in the Trans-Alaska Pipeline Authorization Act relating to removal costs and liability remain in effect.

Senate Report No. 101-94, 101st Cong., 2d Sess. at 24 (1990).

The differences between the Senate and House versions of OPA were ironed out in Conference Committee. The resulting Conference Report describes the amendments to section 204(b) of the TAPAA as follows:

Section 401 of the Senate amendment limits the application of section 204(b) of the TAPS Act to removal costs in the State of Alaska which would not otherwise be covered by the regime established by the Senate amendment.

Section 8101 of the House bill exempts the Trans-Alaska Pipeline System (TAPS) (pipeline, terminal and related onshore facilities) from the liability regime established by the Oil Pollution Act of 1990 for similar facilities. Pursuant to section 204(a) of the TAPS Act, the holder of the pipeline right-of-way is strictly liable for all removal costs and strictly liable for up to \$50 million for damages in connection with activities in the vicinity of the right-of-way. Section 8101 of the House bill amends the TAPS Act to remove the cap on strict liability for

damages, to provide that damages must be caused solely by government negligence to provide a defense to strict liability, and to clarify that section 204(b) of the TAPS Act applies to damages caused by activities which are related to TAPS including operation of the terminal.

The Conference substitute accepts the House provision with the exception that section 204(a)(2) of the TAPS Act is amended to hold the right-of-way holder strictly liable for \$350 million in damages. Liability standards under sections 204(a) and (b) of the TAPS Act, as amended, will apply until TAPS oil is loaded aboard a vessel. TAPS Act liability shall apply if oil is spilled during the loading process at the terminal. Any subsequent discharge from the vessel shall be governed by the liability regime established by the Oil Pollution Act of 1990.

(Emphasis supplied.) *H.R. Conference Report No. 653*, 101st Cong. 2d Sess., at 171 (1990).

Liability has been emphasized in the above quote because liability for damages caused by a spill is conceptually different than the allocation of the duty to respond to a spill.¹⁷ Although Alyeska's liability for damages for spills of TAPS oil in marine waters was somewhat limited by the OPA amendments to the TAPAA, the holders' basic responsibility to contain and cleanup a marine spill of TAPS oil was not eliminated. In that regard section 204(b) of the TAPAA was left unchanged, except that now response duties of the holders are restricted to spills of TAPS oil which affect the state of Alaska. The restricted duty presumably extends to any TAPS oil spilled within the jurisdictional limit of Alaska's waters, or which is carried into Alaska waters after its initial discharge.

Thus, for the purpose of Alaska coverage, section 204(b) of the TAPAA is not much different today than it was when enacted in 1973.

¹⁷ For example, while AS 46.04.020 makes the person who discharges the oil responsible for cleaning it up, AS 46.03.822 makes the owner of the same oil strictly liable for the damages the oil causes and potentially liable for civil penalties under AS 46.03.758. Thus, even though the owner of the oil may not have caused the spill or be required by statute to clean it up, the owner may still incur financial liabilities.

IV. THE 1974 AGREEMENTS.

Within months after the TAPAA's passage in 1973, both State and federal governments entered into agreements with Alyeska's owner companies granting rights-of-way across State and federal lands.¹⁸

The federal agreement was executed on January 23, 1974. The very opening paragraphs of the federal agreement declare that the parties to it were "taking into consideration the national authorizations, directives, and policies expressed in applicable legislation, including Section 202 of the Trans-Alaska Pipeline Authorization Act, 87 Stat. 584, *et seq.* (1973)." Federal agreement, at 1. In interpreting the language of the federal agreement, therefore, Congressional intentions in the TAPAA are of great importance.

As the Department of the Interior promised in the final EIS and to Congress, the federal agreement contains express provisions in its Stipulations governing oil spill contingency plans. Stipulation 2.14, at D-45 - 46, Exhibit E attached. Stipulation 2.14 in effect requires Alyeska to submit a contingency plan to the Department of the Interior's Alaska Pipeline Office for its approval; the Stipulation's subsection 2.14.4 requires the total removal and cleaning up of any discharge of oil from "the Pipeline System". *Id.* "Pipeline System" is broadly defined in Stipulation 1.1.1.22 at D-8 with, however, no express mention of vessels. See Exhibit E attached.

The State's agreement was executed May 3, 1974. Like the federal agreement, it also contains Stipulations. Stipulation 2.14 at A-45 requires Alyeska to submit a contingency plan to the Department of Natural Resources for its approval. Exhibit E attached. Like the federal agreement, the State agreement's Stipulation 2.14.4 requires cleanup of any oil discharged "from the Pipeline, the Valdez terminal facility, or any storage or refueling facility or equipment". "Pipeline" is broadly defined at Stipulation 1.1.1.33, again without expressly mentioning vessels. *Id.* at A-8.

¹⁸ As of 1974 the companies were: Amerada Hess Corp., ARCO Pipe Line Co., Exxon Pipeline Co., Mobil Alaska Pipeline Co., Phillips Petroleum Co., Sohio Pipe Line Co., and Union Alaska Pipeline Co. Alyeska became the companies' common agent as was required by the agreements.

Nonetheless, the State and federal agreements contain broad language about the responsibility of the pipeline owner companies to abate pollution. For example, section 22 of the State agreement, at 16, requires that:

Lessees shall prevent or, if the...condition already exists...
abate...any physical...condition, existing or occurring at any
time...

* * * *

(2) that arises out of, or could affect adversely, the...
operation...of all or any part of the Pipeline; and

(3) that causes or threatens to cause...

* * * *

(b) serious harm or damage to the environment....

(Emphasis supplied.) Virtually identical language is in the federal agreement. Federal agreement, section 24A at 17. Although the definition of Pipeline (and Pipeline System) does not expressly mention vessels, clearly marine oil spills might "affect adversely, the operation" of the TAPS.¹⁹

V. CONTINGENCY PLANS BEFORE THE T/V EXXON VALDEZ SPILL.

Under the first and all subsequent Alyeska contingency plans approved before the T/V Exxon Valdez oil spill, Alyeska was required to respond to tanker spills of TAPS oil in Port Valdez and Prince William Sound.

A. The Initial Contingency Plans.

Construction of TAPS started in 1974. With construction startup Alyeska updated its 1971 *Summary - Project Description Of The Trans Alaska Pipeline System* with a new one in September 1974. See Exhibit F attached. The document describes, at 20, planned response to a marine spill "connected with ship loading activities at Valdez." To some extent the updated 1974 *Project Description* varies from the 1971 *Project Description* in that spills from tankers in Port Valdez or Prince William Sound proper are not

¹⁹ To cite one obvious and recent example, the Coast Guard closed the Port of Valdez for a time immediately after the T/V Exxon Valdez oil spill; a slow down of tanker traffic and crude oil flow followed for a number of weeks.

discussed in the 1974 version. In fact, however, Alyeska's first oil spill contingency plans contained components for coverage of spills arising out of tanker loading operations at the Valdez Marine Terminal (VMT) and tanker spills enroute to and from the VMT.

The lengthy history of the submission and approval of Alyeska's first and second contingency plans is set out in the Alaska Oil Spill Commission's *SPILL - The Wreck of the Exxon Valdez, Final Report*, at 37 - 40 (February 1990).²⁰ The Commission's *Final Report* indicates that the submission and approval process was lengthy, and apparently unsatisfactory and confusing to many governmental personnel involved. A few things stand out in this history.

First, Alyeska's "Preliminary Draft" of *Oil Spill Contingency Plan Prince William Sound, March 1977* contemplated tankers "owned, operated or contracted" by Alyeska. See attached Exhibit G. The document asserts in part:

Alyeska Pipeline Service Company and the Owner Companies recognize and assume the liabilities imposed upon them under various Federal and State statutes and regulations, Federal Right-of-way, the State Right-of-Way Lease and the applicable Stipulations incorporated therein. It is to be noted that clean-up operations within the areas of liability and responsibility so imposed be conducted by Alyeska as Agent for the Owner Companies and will be conducted in such a manner to not require assumption of control of such cleanup operations by federal or State officials under applicable statutes, regulations, agreements or stipulations Trans-Alaska Pipeline operations, including spills within the right-of-way or related facilities under the ownership or control of Alyeska or the Owners.

Summarily, Alyeska will direct cleanup operations of spills resulting from:

Marine Terminal at Valdez

²⁰ The Alaska Pipeline Office within the Department of the Interior recently retrieved TAPS related documents from the 1970s which had been stored in the Federal Archives & Records Center in Seattle. It has been beyond the scope of work for this project to review these voluminous documents and others held by State and federal agencies that may be pertinent to the first and later contingency plans.

Operation, involving Alyeska owned, operated, or chartered tankers carrying or destined to carry crude oil transported through the Trans-Alaska Pipeline System, occurring at the Valdez Terminal in Port Valdez, within Valdez Arm, or within Prince William Sound

(Emphasis supplied.) *Id.* at 100-5 - 100-6, Exhibit G attached. Alyeska's 1978 plan as approved, however, read quite differently with respect to contingency plan coverage for tankers:

Alyeska Pipeline Service Company and the Owner Companies recognize and assume the liabilities imposed upon them under various Federal and State statutes and regulations, Federal Right-of-way, the State Right-of-Way Lease and the applicable Stipulations incorporated therein. It is to be noted that clean-up operations within the areas of liability and responsibility so imposed be conducted by Alyeska as Agent for the Owner Companies and will be conducted in such a manner to not require assumption of control of such cleanup operations by federal or State officials under applicable statutes, regulations, agreements or stipulations.

Summarily, Alyeska will direct cleanup operations resulting from:

Trans-Alaska Pipeline operations, including spills within the Right-of-Way or related facilities under the ownership or control of Alyeska or the owners.

Marine Terminal at Valdez

Operation, involving tankers carrying or destined to carry crude oil transported through the Trans-Alaska Pipeline System, occurring at the Valdez Terminal, in Port Valdez, Valdez Arm or Prince William Sound.

(Emphasis supplied.) Alyeska *Oil Spill Contingency Plan General Provisions August 1978*. See Exhibit H at 1-3 attached. Thus, the plan required Alyeska to provide spill response for tanker spills at the VMT, in Port Valdez and in Prince William Sound. Moreover, Alyeska openly construed the State and federal agreements and

applicable laws as requiring it to provide such spill response coverage.

B. Later Contingency Plans.

Subsequent contingency plans, until the T/V Exxon Valdez oil spill, also had response components for spills from tankers berthed at the VMT and from tankers in Port Valdez and Prince William Sound. Alaska Oil Spill Commission *Final Report*, supra, at 37 - 61.²¹

Indeed, Alyeska routinely notified tankers visiting the VMT of that fact. For example, Alyeska's January 1979 *Trans Alaska Pipeline Port Information Manual Valdez Alaska*²² told visiting tankers that "The Terminal has a Contingency Plan for oil spills that occur in Port Valdez and Prince William Sound. This plan will go into effect immediately when a spill occurs." Exhibit I attached, at 19-5, section 19.4. Alyeska's October 1988 *Valdez Port Information Manual (Second Edition)* and its accompanying *Tanker Handbook* indicate the same. Exhibit J attached.

It is significant that for twelve years (1977 - 1989) Alyeska openly shouldered the legal obligation to respond to tanker spills at the VMT, in Port Valdez and in Prince William Sound. This is so because how the parties actually operated in implementation of the federal and State agreements would ordinarily be given great weight

²¹ In 1980, the Alaska Legislature enacted AS 46.04.030. The statute forbids operation in the state of Alaska of an oil terminal or tank vessel (whether or not part of the TAPS trade) unless the owner or operator first secures approval of a oil spill contingency plan from the Department of Environmental Conservation. The statute gave the Department of Environmental Conservation a clearly defined role in the response planning for oil spills, a role that varies slightly from that of the Department of Natural Resources, which enforces the State agreement. The 1980 statute did not say that it was intended to relieve the pipeline owner companies from the contingency planning duties they undertook in the State agreement. Moreover, it could not and did not purport to alter the federal agreement or the TAPAA.

²² The *Port Information Manual*, according to Alyeska, "establishes contractual terms and conditions that vessels accept by calling at the Valdez Marine Terminal." Letter from Alyeska's C.F. O'Donnell, Alyeska Terminal Superintendent, amending the 1988 *Manual*, at Exhibit J attached. While Alyeska imposes contractual conditions on tankers visiting the VMT, it is apparently arguing that tankers at berth are nonetheless not within its operational control and therefore tanker spills at berth are not within its contingency planning responsibility.

by a court in determining their meaning no matter any alleged ambiguities in language used in the agreements.

VI. ALYESKA'S NEW LEGAL STANCE AFTER THE T/V EXXON VALDEZ OIL SPILL.

Since the T/V Exxon Valdez oil spill, Alyeska has publicly denied that it has ever been required to respond to a tanker spill of TAPS oil. Today Alyeska asserts that it will respond to a tanker spill only as a "volunteer".

A. Litigation Between The State And Alyeska And Its Owners Over The State Agreement.

The State sued both Alyeska and its owner companies for damages arising out of the T/V Exxon Valdez oil spill. State of Alaska vs. Exxon Corp., Alyeska Pipeline Service Company et al. Alaska Sup. Ct., 3rd Jud. Dist., 3AN 89 06 852 CIV. The State's *Complaint For Compensatory And Punitive Damages, Civil Penalties and Injunctive Relief* alleges, among other things, that Alyeska and the companies "submitted to the Alaska Department of Natural Resources contingency plans for the prevention, containment and clean up of oil spills, including contingency plans applicable to tanker spills in Prince William Sound" and that they breached their duty under the State agreement in their inadequate response to the spill. *Complaint*, paras. 98 - 100, at 31.

Alyeska and the companies' *Answer* to the *Complaint* admits submitting a contingency plan, but only to the Department of Environmental Conservation.²³ Alyeska denies a breach of any duty in its response to the spill. *Answer*, para. 36 at 7, para. 98 at 13, and paras. 99 - 100 at 13.

²³ Again, it is important to emphasize that under AS 46.04.030(a) (see footnote 21 above), as the operator of an oil terminal facility Alyeska's statutory duty to have a Department of Environmental Conservation approved contingency plan for the VMT is not necessarily coextensive with the contingency planning and cleanup duties Alyeska may have under the State agreement administered by the Department of Natural Resources, under the federal agreement or under the TAPAA.

Significant claims in the State's lawsuit against Alyeska and its owner companies are still pending. While the State's *Complaint* alleges that Alyeska has a duty to respond to tanker spills in Prince William Sound by virtue of the State agreement²⁴, Alyeska's *Answer* makes it apparent that unless and until there is a final judicial ruling or settlement of the issue in the case, a public change in Alyeska's current legal position, determinative federal or State administrative action against Alyeska or a change in existing law, there will remain uncertainty as to Alyeska's status.

B. Alyeska's Current Stance - Only A Volunteer Responder For Tanker Spills.

While in years past Alyeska undertook the duty of spill response for tanker spills, it now takes the position that it is at best a "volunteer" responder when spills from tankers occur, even if a spill occurs from a tanker while it is at berth at the Valdez Marine Terminal. The word "volunteer" is Alyeska's. It is Alyeska's way of claiming that it owes the public no legal duty to respond to tanker spills of TAPS oil.

To understand Alyeska's new legal position, one needs first look at the language of the current contingency plans.

²⁴ The federal government has sued Alyeska and its owner companies in a civil action for events arising out of the T/V Exxon Valdez oil spill and alleges that the companies violated sections 204(a) - (c) of the TAPAA and the federal agreement. *U.S. v. Alyeska Pipeline Service Company et al.*, U.S. Dist. Ct. Alaska, A91-082 Civil. Alyeska has not yet filed its *Answer* to the United States' *Complaint*. It should be noted that recently the U. S. General Accounting Office (GAO) was very critical of the Bureau of Land Management's (BLM) administration of the federal agreement, particularly with respect to the review of contingency plans. *GAO Report to the Chairman, Subcommittee on Water, Power, and Offshore Energy Resources, Committee on Interior and Insular Affairs, House of Representatives, Trans-Alaska Pipeline Regulators Have Not Ensured That Government Requirements Are Being Met*, at 40 (July 19, 1991). As far as is known, since the T/V Exxon Valdez oil spill the BLM has taken no action under the federal agreement to require Alyeska to be prepared to respond to tanker spills of TAPS oil while tankers are in Port Valdez or in Prince William Sound. Since the land on which the VMT sits became State-owned land, BLM also has not concerned itself with a contingency plan for the VMT. On the other hand, while initially the State leased the VMT uplands and tidelands to Alyeska, eventually Alyeska purchased them. Because of this purchase, Alyeska claims that the State agreement no longer applies to the VMT.

1. VMT plan.

Alyeska's current contingency plan for the VMT was approved in the early summer of 1991 by the Department of Environmental Conservation.²⁵ The plan clearly states that Alyeska does not believe it owes a duty to the State (or, presumably, to the federal government) to respond to spills from tankers while at berth or while in transit in Port Valdez. Alyeska states that it will only respond to "small" tanker spills at the VMT, but in any event such spills are not its "responsibility":

The *Valdez Terminal Oil Spill Contingency Plan* addresses Alyeska's spill response on both land and water for spills originating from Terminal facilities, or small spills from tankers.

* * * *

Response to spills from tankers berthed at the Terminal is described in the Valdez Terminal Oil Spill Contingency Plan. Although a spill from a tanker is not the responsibility of Alyeska, Alyeska will provide oil spill response for a discharge from the tanker while it is berthed. Costs incurred in providing this response and cleanup are billed to the spiller.

(Emphasis supplied.) Exhibit K, at 6 attached. Thus, Alyeska does not perceive that it owes any legal duty to the public to undertake cleanup of a tanker spill while the tanker is at berth.²⁶

Alyeska's present denial of cleanup responsibility for VMT tanker spills is inconsistent with the coverage provided by the

²⁵ According to Kevin O'Shea, the department's oil spill contingency plan representative in the State's Pipeline Coordinator's Office, the Department of Environmental Conservation approved the plan after receiving no comments from the Department of Natural Resources. Recently, the TAPS-related functions of the two departments and that of the Department of Fish & Game have been administratively combined within the State's Pipeline Coordinator's Office. That Office now occupies space in downtown Anchorage across the hall from the BLM's Alaska Pipeline Office.

²⁶ For spills that Alyeska calls "significant", Alyeska says that the "personnel, equipment, and organization described in the Tanker Spill Prevention and Response Plan for Prince William Sound will join in the response." *Prince William Sound Tanker Spill Prevention And Response Plan*, section 102.4 at 100-4. More about this plan in the text that follows.

previous contingency plans. It is also inconsistent with TAPAA's section 204(b) and with the federal and State agreements.²⁷

2. Port Valdez and Prince William Sound Plan.

After the T/V Exxon Valdez oil spill and in response to an Emergency Order issued by former Department of Environmental Conservation Commissioner Dennis Kelso, Alyeska established the Ship Escort/Response Vessel System (SERVS) to support and escort tanker traffic in and out of Port Valdez.²⁸

Later in 1989, Alyeska created the *Prince William Sound Tanker Spill Prevention & Response Plan* with SERVS as its core. According to Alyeska, this plan is not its contingency plan for marine spills in Port Valdez or Prince William Sound and it is not the holder of the plan under AS 46.04.030(a) or, presumably, under the State or federal agreements. Instead

(T)his Plan covers oil discharges from vessels calling at the Terminal (hereinafter "spills") whose owners, operators or charterers have entered into a contract with Alyeska to provide oil spill response services in accordance with this Plan ("contracting vessel").

Id. section 101 at 100-1. In other words, for such spills Alyeska claims that it serves only as a RAC and only for those tankers which

²⁷ It is also inconsistent with a reasonable construction of AS 46.04.030(a). Under AS 46.04.030, the Department of Environmental Conservation may not approve an oil terminal facility's oil spill contingency plan unless the applicant proves that it has "access to sufficient resources to...contain, clean up, and mitigate potential oil discharges from the facility...." AS 46.04.030(e). "Oil terminal facility" is defined in AS 46.04.900(11) to include an onshore facility and its "related appurtenances". Presumably Alyeska's argument under AS 46.04.030 is that a vessel tethered to a VMT berth and either deballasting oily water or taking on oil is not a "related appurtenance", and thus the VMT's contingency plan need not include coverage for spills from the tanker. Even if this argument has merit, it would not negate claims under the State and federal agreements and the TAPAA that Alyeska has a legal duty to respond to spills from tankers while they are at the VMT.

²⁸ SERVS is just a name Alyeska uses to describe the assets and labor Alyeska devotes (according to Alyeska, as a volunteer or RAC) to spill prevention and response within Port Valdez and Prince William Sound. SERVS is not a separate formal legal entity, corporation, or cooperative apart from Alyeska itself.

have entered into a response action contract²⁹ with Alyeska. According to Alyeska, the vessel owner, operator or charterer-by-demise is the contingency plan holder, not Alyeska. It asserts:

This...Plan for Prince William Sound has been designed and developed to be included as part of the statutorily required vessel oil spill contingency plans. Alyeska offers to provide initial oil spill response services as described in this plan as a spill response contractor to owners, operators or charterers of vessels picking up North Slope crude at the Valdez Marine Terminal to assist them in meeting their contingency plan obligations under the new State law (AS 46.04.030).

* * * * *

Alyeska developed, in response to the State of Alaska's emergency order in 1989, a "Prince William Sound Tanker Spill Prevention and Response Plan." This plan has been utilized by ship owners to obtain their conditionally approved Oil Spill Contingency Plan.

State and federal law place liability and clean-up responsibility for an oil discharge on the spiller--in this case a tanker owner/operator. As operator of the pipeline, Alyeska does not own or operate tankers. However, to centralize prevention and initial response efforts on behalf of those tankers, Alyeska has developed the Prince William Sound plan. Alyeska will contract with vessels to provide the initial oil spill response service. Those contracts and the vessel plans will provide for an orderly transition of spill response management from Alyeska to the vessel in the event of a large spill.

²⁹ It is very important to note that under Article II of the typical Alyeska *Agreement For Oil Spill Response Services*, Alyeska agrees to provide only "initial" oil spill response services and may withdraw its resources from an ongoing spill response on 72 hours notice to the contracting vessel. Moreover, under the standard language of its Article VII, the *Agreement For Oil Spill Response* may be terminated "immediately" by Alyeska for a multitude of reasons, including but not limited to a violation of Alyeska's *Port Information Manual* or a violation of any of a number of listed conditions that might demonstrate to Alyeska the contracting vessel's financial instability. Alyeska asserts that the terms of these agreements with contracting vessels are "strictly a matter of commercial contract" outside governmental control. See the Exhibit and text accompanying footnote 30 below.

Statement of Michael F.G. Williams, Vice President, Environment & Contingencies, Alyeska Pipeline Service Company, Before the Citizens' Oversight Council, January 17, 1991, at 2-3.

Alyeska's position, as set out in Mr. Williams' *Statement*, is bottomed on this non sequitur: because AS 46.04.030 requires a tanker to have a contingency plan in order to operate in the state of Alaska, Alyeska owes no legal duty to respond to a tanker spill of TAPS oil in Alaska waters. Alyeska's position can only be correct if the federal and State agreements and the TAPAA, which were not expressly altered by AS 46.04.030, impose no response duty on Alyeska and AS 46.04.030 does not require an oil terminal facility to respond to a tanker spill while the tanker is at berth.

Very recently, Alyeska's Assistant General Counsel, Robert I. Shoaf, reiterated Alyeska's position that Alyeska owes no legal duty to the public to contain and clean up spills from tankers wherever such spills might occur:

The State of Alaska requires each vessel...to have an oil spill response contingency plan.... Since no one else has stepped forward to offer vessel escort service and initial spill response in Prince William Sound, Alyeska has done so. Nothing prevents others from competing with Alyeska to provide these services. While there has been some debate as to whether, with respect to furnishing these services, Alyeska (a) is obligated under Alaska statute or the federal and State right-of-way grants, or (b) has volunteered (Alyeska believes it is a volunteer), there has never been any suggestion that the services are being furnished pursuant to any common carrier obligations of the TAPS carriers or their agent Alyeska. Thus the Agreement requirements, like all aspects of the response action contract, are strictly a matter of commercial contract.

(Emphasis supplied.) Letter dated November 20, 1991 from Mr. Robert I. Shoaf, Esq., to Ms. Deborah Vogt, Esq.³⁰ at 2, Exhibit L

³⁰ Under contract with the Citizens' Oversight Council, Ms. Vogt analyzed the costs to the State of Alaska in reduced royalties and taxes when Alyeska's pipeline owner companies include in their tariff charges for shipping TAPS oil the costs of spill response. Such costs include tens of millions of dollars spent on SERVS. In his letter, Mr. Shoaf was responding to an inquiry from Ms. Vogt concerning Alyeska's authority to require contracting vessels to

attached. Mr. Shoaf's assertion that "(s)ince no one else has stepped forward to offer vessel escort service and initial spill response in Prince William Sound, Alyeska has done so" is plainly at odds with Mr. Williams' concession, quoted in his *Statement* above, that Alyeska created SERVVS in response to the State's Emergency Order.

In any event, at the time of Mr. Williams' *Statement* to the Citizens' Oversight Council, 54 tankers had plans conditionally approved by the Department of Environmental Conservation under AS 46.04.030 and, according to Mr. Williams, six companies had signed response action contracts with Alyeska for it to provide initial oil spill response services. The companies were: "Arco, Exxon, BP, Chevron, Shell, Tesoro". Williams' *Statement*, supra, at 2. (Recall that "ARCO", "Exxon" and "BP" pipeline companies own over 90% of Alyeska. See text accompanying footnotes 4 - 5 above.) According to the Department of Environmental Conservation's Kevin O'Shea, in early December, 1991 about the same number of tankers were visiting the VMT on a routine basis, but there were 23 tanker contingency plans approved by the department, all on an interim basis. All the plans relied on Alyeska as the principal RAC for initial spill response.

VII. CONCLUSION.

When Alyeska purports to act as a RAC it charges no initial fee to the tanker owners, operators or charterers with which it enters into response action contracts.³¹ Because tankers must have contingency plans under AS 46.04.030(c).³² Alyeska is, at least initially, an inexpensive, convenient and well-positioned responder.

These attributes may not, however, entirely explain Alyeska's possible motivation in seeking to be a RAC. Today, as distinct from years prior to the T/V Exxon Valdez oil spill, Alyeska enters into response action contracts with, among others, corporations such as BP

demonstrate their financial capability to hold Alyeska harmless from spill liabilities.

³¹ Alyeska insists on insurance (bonding) as part of an indemnification agreement with a contracting vessel. See also the tariff report, at 19 (analysis of the need for Alyeska to seek FERC approval of its bonding requirement).

³² OPA also forces tankers to have contingency plans as a matter of federal law. The Coast Guard is required to adopt regulations for such plans. The regulations are now in the works.

America, Inc., which in turn have ownership ties with its pipeline owner companies. Even while Alyeska charges third party corporations no fee for being ready to provide spill response services, it spends hundreds of millions of dollars of the pipeline owner companies' money on response preparedness. At first blush, this might seem like a costly and awkward arrangement. It may, however, be attractive because a successful claim of RAC status may insulate Alyeska, its pipeline owner companies and, in turn, their owners from more costly tanker oil spill cleanup responsibilities, which responsibilities might otherwise flow to the owner companies as holders under the TAPAA and as parties to the federal and State agreements.

Moreover, once spent the costs of the arrangement are not forever lost to the pipeline owner companies. In fact, that Alyeska is unlike a truly independent RAC is readily apparent in how the owner companies treat the costs of Alyeska's spill preparedness. As the tariff report to the Citizens' Oversight Council explains, the companies include in their tariff expenses³³ filed with the FERC and the APUC the entire costs of SERVS. See the tariff report. The vast majority of those costs, however, relate to the prevention and cleanup of marine tanker spills which might occur at the VMT, elsewhere in Port Valdez and in Prince William Sound; these costs have nothing to do with spills which may occur from a segment of the pipeline or on the grounds of the VMT. Thus, on the one hand the costs are described as discretionary, i.e., volunteered, but on the other hand they are treated as ordinary common carrier expenses entitled to be included in the calculation of the tariffs charged for transporting oil through the TAPS. The irony is that while the State of Alaska indirectly pays for about 25% these costs,³⁴ as long as Alyeska claims RAC or volunteer status, the State has no real assurance that Alyeska will respond the next time a spill of TAPS oil occurs from a tanker in Alaska waters.

On the other hand, if one assumes that Alyeska's legal position is correct, then under existing statutes and regulations it may be that neither the State nor the federal government can force Alyeska,

³³ According to the tariff report, every dollar Alyeska spends on TAPS spill prevention and response operations reduces the State's receipt of lease royalties and taxes about 25 cents. In effect, therefore, the State pays for about 25% of the costs of the TAPS spill prevention and response program. Tariff report, at 13.

³⁴ Id.

acting as the designated agent of the TAPAA holders, to respond to a tanker spill of TAPS oil in Alaska marine waters.³⁵ Instead, the public will have to rely on Alyeska's volunteerism and good faith in responding.

And that may be a dangerous course to follow in the wake of the T/V Exxon Valdez.

³⁵ Both the State and federal government have various statutory authorities to seize private property for use in the event of a disaster emergency. See, e.g., OPA, § 4201 (authorizing the President to direct and monitor state, local or private removal actions). Even were Alyeska a RAC, therefore, the governments might take over and use Alyeska's SERVS equipment in a spill response. Principles of constitutional law, oftentimes codified in such statutes, would ordinarily require the governments to compensate Alyeska for the seizure if it was not otherwise responsible for cleanup or liable for the spill.

Also, legal arguments can be made that Alyeska's expressed intent to respond could form the basis of a duty to respond. But when a spill response is needed, it is hardly the time to test the merit of such arguments.

***Final Environmental Impact Statement
Proposed Trans-Alaska Pipeline***

VOLUME 6

- **CONSULTATION AND COORDINATION
WITH OTHERS**
- **DISCUSSION OF POINTS RAISED DURING
REVIEW AND PUBLIC HEARING PROCESS**
- **ATTACHMENTS**



**PREPARED BY A SPECIAL INTERAGENCY
TASK FORCE FOR THE FEDERAL TASK
FORCE ON ALASKAN OIL DEVELOPMENT**

**United States Department of the Interior
1972**

EXHIBIT A

Alyeska Pipeline Service Company (APSC), 1971a, Description of marine transportation system--Valdez to West Coast ports: Submission to U. S. Dept. of the Interior, July 21, 1971, 65 p., 15 tables, 11 addenda.

Alyeska Pipeline Service Company (APSC), 1971b, Supplement to description of marine transportation system--Valdez to West Coast ports: Submission to U. S. Dept. of the Interior, Sept. 24, 1971, in response to Dept. of Interior Sept. 9, 1971, letter requesting additional information; 4 p., 6 attachments.

Alyeska Pipeline Service Company (APSC), 1971c, Project description of the trans-Alaska pipeline system: Submission to U. S. Dept. of the Interior, August 8, 1971, 3 v. plus 26 v. appendices.

Alyeska Pipeline Service Company (APSC), 1971d, Summary of the project description of the trans-Alaska pipeline system: Submission to U. S. Dept. of the Interior, Sept. 24, 1971, 64 p.

Alyeska Pipeline Service Company (APSC), 1971e, Supplements to project description and summary of the project description of the trans-Alaska pipeline system: Submissions to U. S. Dept. of the Interior, Oct. 15, 1971; Nov. 1, 1971; Nov. 10, 1971; Nov. 15, 1971; Nov. 19, 1971; in response to Dept. of Interior Oct. 7, 1971, letter requesting additional information.

LIST OF REPORTS SOLICITED FROM GOVERNMENT AGENCIES
AND OTHER SOURCES FOR USE IN PREPARING FINAL STATEMENT 1/

Alaska, State of, 1971, Comments on the proposed trans-Alaska pipeline;

Submission to U. S. Dept. of the Interior, July 30, 1971, 192 p.,

12 fig., 19 tables, 42 exhibits, 26 appendices, Juneau, Alaska

(available from Governor's Office, State of Alaska, Juneau, Alaska).

APSC (Alyeska Pipeline Service Company), 1971a, Description of marine

transportation system--Valdez to West Coast ports: Submission to

U. S. Dept. of the Interior, July 21, 1971, 65 p., 15 tables,

11 addenda.

____ 1971b, Supplement to description of marine transportation system--

Valdez to West Coast ports: Submission to U.S. Dept. of the Interior

Sept. 24, 1971, in response to Dept. of the Interior Sept. 9, 1971,

letter requesting additional information; 4 p., 6 attachments.

____ 1971c, Project description of the trans-Alaska pipeline system:

Submission to U.S. Dept. of the Interior, Aug. 8, 1971, 3 v. plus

26 v. appendices.

____ 1971d, Summary of the project description of the trans-Alaska pipe-

line system: Submission to U.S. Dept. of the Interior, Sept. 24,

1971, 64 p.

____ 1971e, Supplements to project description and summary of the project

description of the trans-Alaska pipeline system: Submission to U.S.

Dept. of the Interior, Oct. 15, 1971; Nov. 1, 1971; Nov. 10, 1971;

Nov. 15, 1971; Nov. 19, 1971; Dec. 17, 1971; in response to Dept. of

Interior Oct. 7, 1971, letter requesting additional information.

1/ In addition to the sources listed, all of these reports are available for public inspection, Department of the Interior Library, Interior Building, Washington, D. C.

PROPERTY OF ANCH. COMM. COLLEGE LIBRARY

Summary

Project Description of the Trans Alaska Pipeline System

August 1971

REF
ALAS
TN
879.5
.A6

EXHIBIT B

ALASKA
TN
879.5
.A46
COPY 2

UNIVERSITY OF ALASKA

Alyeska pipeline
SERVICE COMPANY

Planning for the trans Alaska pipeline system has been described in a three-volume "Project Description," accompanied by 26 volumes of appendices, filed with the Department of Interior in July of 1971. This booklet is intended to summarize the principal facts set out in the complete Project Description; for further detail the reader is referred to that document.*

General Description

The proposed 48-inch trans Alaska pipeline is intended ultimately to transport approximately two million barrels of crude oil per day from the Alaskan North Slope along a 789 mile route to Valdez, an ice-free port located on an arm of Prince William Sound. At Valdez, oil will be transferred to ocean going tankers. The Alyeska Pipeline Service Company** is responsible for design, construction, operation and maintenance of the system, which includes the pipeline itself, pumping stations, terminal facilities, and communications and control systems.

North Slope producers will transport crude oil through their own feeder pipelines to the northern terminus of the trans Alaska pipeline near Prudhoe Bay. Here the oil will pass through the first of twelve pump stations and enter the pipeline.

The pipeline system will be continuously monitored and controlled from a control center at the Valdez terminal. Local control can also be exercised from pump stations. A combination of automatic and manual control will assure efficient operation of the system and optimum response to all conditions.

*Throughout the Summary, cross-references will be given to appropriate sections of the Project Description. For example, PD-1.4 refers to Section 1.4 of the Project Description; PD-App. B-1.3400 refers to Appendix B-1.3400 of the Project Description.

**Alyeska is owned by Amerada Hess Corporation, ARCO Pipe Line Company, Humble Pipe Line Company, Mobil Pipe Line Company, Phillips Petroleum Company, Sohio Pipe Line Company, and Union Oil Company of California.

Pipeline Design

Three basic construction modes will be used along different portions of the pipeline route: buried in the conventional mode of pipeline construction, buried with special systems which reduce or prevent heat transfer to the ground, or placed aboveground on gravel berms or pile bents.

The pipeline is being designed to withstand the combined stresses from internal pressure and from thermal, bending, and seismic forces. At river crossings and in certain flood plains, it will be concrete coated or anchored to prevent flotation. Buried sections of the pipeline will be coated and cathodically protected to prevent corrosion. Aboveground segments will be thermally insulated to slow the drop in oil temperature during a pipeline shutdown, and thereby facilitate restarting of oil flow.

The pipeline will not be the longest ever constructed, nor will it be the only line in an area which is subject to severe climatic conditions. But it will be a major project, encountering arctic phenomena and crossing three mountain ranges, many rivers and streams, and a known active seismic fault. Intensive special studies of these factors by Alyeska, the owner companies, arctic consultants, and Federal and State agencies have been in progress for several years. These, in turn, have utilized more general knowledge accumulated over a much longer period of time.

None of the special arctic problems is mysterious. Permafrost*, for example, is an everyday fact in many parts of Alaska, and buildings, roads, airfields, pipelines and other facilities have been built on permafrost for many years. The pipeline will be designed with due regard to the behavior of permafrost and the need for preserving the integrity of the warm pipeline. Where permafrost conditions exist which could be detrimental, the line will either be elevated or a special burial technique will be used to reduce thawing.

*Permafrost is ground which remains below 32°F for at least two consecutive years. Permafrost material may range from solid rock to pure ice.

Other special problems are those resulting from the possibility of earthquakes. The system must be designed to withstand direct earthquake effects, including shaking of the pipeline by seismic waves and movement of the earth where the line crosses a known active fault. It must also withstand indirect effects resulting from slumping of the earth supporting the line, liquefaction of the supporting soil, and landslides. However, construction in seismically active areas, including construction of pipelines, is common, and careful planning and sophisticated analysis techniques have been and are being applied, in order to locate and design the pipeline to protect against risks from earthquakes. By careful selection of alignment, the possibility of earthquake damage from seismically induced soil movements or liquefaction will be minimized. In addition, the stress criteria which the pipeline must meet are based in part on earthquake-induced stresses. At the one crossing of a known active fault, the Denali Fault, special design techniques will be employed and remotely operable block valves will be located on both sides of the fault crossing to facilitate isolation of that section of the line if it ever becomes necessary to do so.

The Valdez Terminal

At the southern terminal, the harbor area (Port Valdez) is approximately two and one half miles wide and 12 miles long and offers good protection from winds and the open sea. It is deeper than required to accommodate all tankers for which the loading system is designed. The entrance to Port Valdez is from Prince William Sound through Valdez Arm and Valdez Narrows. At its narrowest point, at Middle Rock, the channel is 3000 feet wide, which is several times wider than the ship channels at New York, Philadelphia, and Houston.

The terminal will extend over approximately 800 acres at a site south of the city of Valdez. The terminal facilities will include a tank farm, docks and the connecting pipeline, valves and controls necessary to transfer oil from tanks to the approximately 20 ships which are ultimately expected to be loaded each week.

The
de:
sol
are
an
acc
ma
Th
lan
fir
fir
qu
im

En
Th
co
co
pe
ce
the
re
of
pe
TI
w
in
pe
et

The storage tanks and connecting pipelines will be designed so as to be virtually immune to the three possible sources of significant damage—tidal waves, earthquakes and fires. The tanks will be built on competent bedrock and will be designed to withstand, without loss of oil, ground accelerations which might be expected from a Richter magnitude 8.5 earthquake occurring at or near the site. The tank farm elevation will be beyond the reach of the largest tidal waves which might occur in Port Valdez. A fire fighting system will be able to deliver water or foam to fires in any of the terminal facilities or ships in port. To guard against ship accidents, navigational aids will be improved and special operating procedures instituted.

Environmental Protection

The environmental problems are of two kinds—those which could affect the integrity of the pipeline and could therefore conceivably cause oil spills (e.g., permafrost, erosion, possible seismic action, river scour) and those which concern the disturbance of fish, wildlife and vegetation by the construction, or mere presence, of the line. It is essential to deal with both types of problems to assure efficient operation of the line and to fulfill the objective of preserving fish, wildlife, and other environmental resources. The economics of pipeline operation require great concern with oil spills. Any damage to the line which would result in a shutdown of operations and require maintenance procedures would be costly. In this respect, good engineering and good conservation practice coincide.

The amount of technical replanning and the extent of environmental studies undertaken in preparation for this project are unprecedented. The studies made, the materials used, the designs for fabrication into a continuous line, the protective corrosion coating and cathodic protection, the provisions for monitoring and inspection and the intensity of direction and supervision by Federal and State officials exceed all past experience. The result will be a safe line—one which reduces risks to the lowest order and which still brings the North Slope oil to consumers.

The probability of a major oil spill is remote. It is recognized, however, that the possibility of an accident will always exist to some small degree. Accordingly, a contingency plan is being developed for coping with any oil spill which might occur at any point along the line or in the waters of Port Valdez or Prince William Sound. Contingency planning includes: assurance of fast, accurate and sensitive detection of leaks or spills; measures to minimize spill volumes, including placement of valves, studies of drainage, adoption of prompt shutdown procedures, and immediate dispatching of maintenance crews; availability of adequate equipment and personnel for containment and prompt recovery of marine or terrestrial spills; and provision for rehabilitation and restoration of all affected areas.

Throughout this Summary and the Project Description itself, the reader will note that soil analyses and other studies are continuing. Studies and refinement of design will continue until construction is completed. This is the normal construction process; it is not possible—in the arctic or elsewhere—to know in advance the conditions at every location over the length of the line. However, adequate studies have been made to identify the range of soil conditions and other problems which will be encountered and to establish the procedures for applying the proper solution. The work accomplished to date permits accurate assessment at this time of the effects of the proposed project, even though design work is not complete in all details.

Similarly, with respect to potential terrestrial or marine oil spills, contingency planning will continue to and beyond construction. Illustrations of the planning in progress permit assessment of the nature and extent of precautions which will be taken. But, particularly with respect to marine spills, equipment, materials and procedures are being developed and improved so rapidly that contingency planning must not be frozen at this point.

Summary Topics

The following sections contain more detailed descriptions of (I) the pipeline route and criteria for its selection; (II) pipeline design; (III) roads and airfields; (IV) pump stations; (V) the Valdez terminal facilities; (VI) telecommunications; (VII) operations and control; (VIII) construction; (IX) testing, start-up and phases of operation; (X) inspection and maintenance; and (XI) contingency planning.

Section XI Contingency Planning

As indicated throughout this Summary, a principal concern has been to design a secure and virtually leak-proof pipeline system. Special attention has been directed toward the design problems of the Alaskan environment. Examples are: routing to avoid geologic hazards wherever feasible; special design to withstand a variety of earthquake effects, including a substantial movement of the Denali Fault where it intersects the pipeline; special construction techniques in locations where permafrost thaw might result in additional stress on the pipe; burial and concrete coating at river crossings; and provision of special surge pressure relief systems. Provision is also being made for monitoring all essential data and for alarming dangerous conditions or, in some cases, automatically shutting down the line.

Similarly, in designing the marine terminal and related facilities, care has been taken to identify sources of potential oil spills and to incorporate features which either provide an additional margin of safety or facilitate minimization of spillage in the event an accident should occur. For example: design of storage tanks to withstand earthquake action or fire and further provision of concrete-cored, earthquake-proof dikes around the tanks; use of all-metal articulated loading arms to minimize the risk of damage to or leakage from the connection between the dock and a ship; placement of valves at each dock which can be closed either from the dock or the operations control center in the event of an emergency; provision of a closed drainage system on each dock for controlled disposal of loading arm drainage, gasket or packing leaks, drippage, wash down and rainfall in the area surrounding the loading arms and valve manifolds; and provision of a treatment system for oily ballast water. Further, a variety of navigational aids to prevent marine accidents will be established, as described in Section V.

In addition to these measures, at least one year before pumping operations commence, a detailed contingency plan will be submitted, covering specific procedures for response to a leak or spill at any location. This plan will be prepared in consultation and cooperation with governmental agencies, and will incorporate the latest equipment, techniques and know-how. The plan will be continually updated throughout the operational life of the pipeline system. Procedures and equipment for containment and cleanup of oil spills are undergoing rapid development. As a result, the contingency plan in effect at commencement of operations will embrace features not now proven; continuous updating will provide constantly increasing environmental protection. Although details of the contingency plan cannot be given at this time, specific examples of the necessary approach to contingency planning with respect to both terrestrial and marine oil spills, based on existing knowledge and equipment, are included in the Project Description. (PD-9)

The total oil spill control plan for the pipeline system will have the following basic objectives: prevention of oil leaks and spills; fast, accurate and sensitive detection of leaks; minimization of spill volume; containment of spill; maximum recovery of oil; rehabilitation and restoration of affected area; and public safety and prompt notification procedures. (PD-9.1)

Contingency Planning for Spills Along Pipeline Route

Leak detection capability has been discussed under Section VII. As pointed out there, designs and plans include four separate automatic alarming methods based upon pressure deviation, flow deviation, flow balance deviation, and line volume balance. Regular aerial and ground patrols will be made. In addition, investigations are being conducted into other leak detection methods which could further increase leak detection capability.

Actions which would be taken if a leak is detected depend to a large extent on what system data indicate with respect to the size and location of the leak. Generally, however, if an alarm is signalled indicating that a leak may have occurred and the location of the leak is apparent from the data displays, the dispatcher will shut down all stations north of the indicated leak position (see PD-3.5.5.6).

Downstream stations will usually be shut down only when they lose suction pressure, in order to reduce back drainage. When all pump stations are shut down, the dispatcher will isolate the leak between the two adjacent station sites, using the station block valves. He will also close any remotely controlled valves in the area of the leak. The maximum time for pump station shutdown and the valve closures required to stop oil flow will be six minutes. In approximately four more minutes, other remotely controlled valves can be shut. Aircraft will be used to pinpoint the leak and crews will be dispatched immediately to close locally operated valves in the area, stop the leak, contain the spill to the smallest area possible, and begin recovery and repair operations. (PD-9.2.3)

Studies have been made to determine the maximum quantity of oil which could drain out of the line at any point along the pipeline route, and locations of valves have been chosen so as to limit this potential maximum exposure. Location and description of the different types of valves are contained in PD-1.2 and 1.4.4. A table showing valve locations appears in PD-9.2.3. Charts showing maximum drainage potentials (following pipeline shutdown and remote control valve closure) also appear in PD-9.2.3. Maximum drainage at any point on the line due to gravity would be less than 90,000 barrels. Only about two percent of the line would have a drainage exposure in excess of 70,000 barrels, less than 10 percent would have a potential exposure in excess of 55,000 barrels, and more than half of the line would have a potential ranging between zero and 30,000 barrels. The maximums shown on the charts would be reached only in the event of a complete rupture or a leak of such magnitude that drainage would be completed before emergency action could be taken to minimize loss. (PD-9.2.3)

As is for contingency planning, detailed studies will be made of all drainage basins. Determination of the area an oil spill might cover will dictate plans for containment, cleanup and rehabilitation. Studies will include basin delineation, development of estimates of quantities and velocities of surface water runoff for each significant drainage course and tributary stream which the pipeline crosses, and development of estimated quantities and velocities of major stream flow (under various seasonal conditions), to permit analyses of movement of any spillage that might reach such streams. A list of the 38 rivers and major streams for which such analyses are expected to be conducted appears in PD-9.2.4.

Sample drainage studies have already been initiated. A preliminary report has been prepared which discusses drainage from leaks near the Lowe River, Willow Lake and the Koyukuk River. (PD-App. E-3.9002) Another study has been initiated for the Paxson-Summit Lake area. See PD-App. E-3.9011. Some of the methods under consideration for containment and recovery of oil spills are described in PD-App. E-3.9010.

One of the first steps taken by crews arriving at a spill will be to create dikes, pits or other containment structures. Permanent containment dikes may be required at key locations along the route. In general, oil on the ground would either be drained into temporary storage pits or pumped into temporary storage tanks; subsequently, it would be pumped into tank trucks and hauled to the nearest pump station. Oil which cannot be picked up otherwise would be recovered by absorbent materials. In certain circumstances, the line would be tapped so that contained oil could be pumped back into the line. Burning as a disposal method of unrecoverable residual oil may be used under some circumstances if prior approval by the appropriate governmental authority is obtained. (PD-9.2.5)

Oil on surface waters of lakes or rivers may involve confinement by fixed or floating booms and removal by skimming devices, floating absorbents and/or burning. Examples have been prepared of specific suggested containment and recovery methods at five locations along the pipeline route, including estimates of personnel and equipment which would be required. (PD-App. E-3.9002, A-3.1001 and A-3.1002) These locations were selected as being representative of the problems which the contingency plan will be designed to cover. (PD-9.2.5)

Soil rehabilitation activities, which will start as soon as possible, will include aeration, dilution, fertilization and revegetation. Rehabilitation measures will also include the restocking of fish resources in streams or lakes in the event a spill should result in significant damage to those resources. (PD-9.2.6, App. E-3.9000)

Contingency Planning with Respect to Marine Terminal and Tanker Operations

Developing an oil spill contingency plan for a marine terminal requires consideration of many factors. Of major significance are: geographical and topographical elements (for example, slope of shoreline, type of terrain, accessibility of spill site, depth of water); environmental elements (such as temperature of water and air, winds, surface currents, wave action); ecological elements (existence and location of sensitive areas in terms of plants, fish, birds and other life forms); oil elements (characteristics of the oil and changes it undergoes in water); and available equipment and technology (boats, booms, skimmers, absorbents, dispersants, combustion agents, surface tension modifiers, and storage containers). (PD-9.3.2)

1. Port Valdez

The physical characteristics of Port Valdez will facilitate containment of oil spills and minimization of consequent damage. The harbor is about 12 miles long and two and one half miles wide. Average water depth in the harbor and Valdez Narrows is in excess of 750 feet. Sheer cliffs and steep, rocky beaches account for 56 percent of the Port Valdez shoreline; mud or shale tidal flats cover about 19 percent of the shoreline, and sand and gravel beaches, approximately 13 percent. Low to medium profile shingle or shale account for the remainder. (PD-9.3.3.1)

Approximately 50 streams and other waterways discharge into Port Valdez, with major contributions from the Lowe and Robe Rivers and the Shoup Glacier. (The motion of these discharges may be of some assistance in terms of repelling oil from sensitive areas; for example, a current of two to three knots has been observed in proximity to the entrance of the Robe River.) Winds appear to be below seven knots more than 90 percent of the time. Current velocity is generally less than 0.5 knot off Jackson Point; in Valdez Narrows and Valdez Arm, currents are reported to be too weak to be predicted. Wave action does not exceed one to two feet in height most of the time; waves of two to three feet in height have been observed in storm conditions. Temperatures are mild for this latitude. (PD-9.3.3.1)

Taking known geographical, environmental, and ecological factors into account, a list of equipment has been selected which would be expected to provide effective control of an accidental oil spill in Valdez harbor. Included are 10,000 feet of floating containment boom, approximately 25 drums of an acceptable dispersant, 50 drums of an acceptable surface tension modifier, six chemical deployment units, approximately 2,000 bales of straw absorbent, polyurethane in either bulk or liquid form for use as an absorbent, absorbent deployment units and recovery equipment, approximately 1,000 feet of an oil-selective recovery system similar to "oil mop," two types of skimming barges (one of the gravity separating type typified by the "Union-Huskey" skimmer, the other an oil-selective recovery barge for surface skimming), six small floating skimmers, one large floating skimmer similar to the "Medusa," 12 bird repellent guns, one large storage barge with pumps and hoses, one vacuum truck, two fire trucks with high pressure pumps, two high pressure water pumping systems which can be operated from shore, truck or boat deck, one two-ton flatbed truck, one bulldozer, one front end loader, two pickup trucks, two jugs and two mooring launches, and 24 high intensity light sources to permit oil recovery operation in darkness. (PD-9.3.3.3)

Since the oil containment and recovery field is a rapidly developing area of technology, the equipment items listed are not intended to be final or definitive; the most advanced and effective devices will be selected at the time of equipment acquisition. (PD-9.3.3.3)

To provide indication of the manner in which the above equipment would be used in response to a spill, several hypothetical spill situations have been postulated. (See PD-9.3.5) For example, in the unlikely event that during tanker loading operations one or more of the steel articulated loading arms were somehow to break away from the ship, oil could be spilled in the brief period before emergency shutoff valves could be closed and the flow stopped. (PD-9.3.5.2)

Assuming availability of the equipment mentioned above, probable response procedures would consist of: deployment of floating boom around the vessel and floating oil; deployment of floating skimmers within the contained slick to recover the oil and transfer it to a barge or other facilities; dispatch of skimming barges to remove windrows, slicks or other oil that escaped the containment boom. If shoreline areas were threatened by uncontained oil, surface tension modifiers would be spread between the slick and shoreline if use of such chemicals is approved; if not, absorbents could be spread along the shoreline where topography permits. Other booms could be deployed to protect threatened areas, especially those which are ecologically sensitive. After bulk oil has been recovered, surface oil recovery devices (such as the "oil mop") would be used to remove remaining sheen or iridescence. Rocky shoreline areas contaminated with oil would be cleansed by high pressure water jets. Absorbents would be removed. All contaminated water which was recovered would be discharged into the ballast treating system. (PD-9.3.5.2)

A larger spill than the one just described might occur if, for example, there were a collision of some other vessel with a tanker. In such a case, action would be similarly directed toward: containment of oil; protection of shoreline by dispersants, absorbents or booms; recovery of the oil; treatment of oily water recovered; and cleanup of surface waters and shoreline areas. (PD-9.3.5.3)

If necessary to prevent the passage of oil through the Valdez Narrows, through Valdez Arm and into Prince William Sound, Port Valdez could be sealed off. This could be accomplished by use of the two sea-going tugs which operate out of the terminal. The tugs would gather up a minimum of 7,000 feet of boom and tow these to the Narrows. The boom would be deployed across the Narrows, using the banks and Middle Rock as anchor points.

Depending on what further study reveals to be the best strategy, the boom would be anchored in the flats close to the shore, or to special fittings previously affixed for this purpose. (PD-9.3.5.3)

2. Prince William Sound

Prince William Sound is an irregular body of water with an area of about 2,500 square miles. Much of it is quite deep, and the Sound is surrounded by islands of all sizes. Available wind data indicate a median wind velocity of about 12 knots. Winds exceed 30 knots about 10 percent of the time and wind direction is variable. In the track proposed for tanker routes, winds blow in a westerly direction about half the time, which would tend to blow floating oil away from close land masses. Winds blow in an easterly direction about one fourth of the time. Wave heights are six feet or less about 70 percent of the time. Currents are very weak, being measurable only in narrow passages between islands. Temperatures are not severe; however, fog and precipitation frequently impair visibility. (PD-9.3.4)

Due primarily to more severe wind and wave action, recovery and cleanup in Prince William Sound would be more difficult than in Port Valdez. However, most of the equipment described above for use in Port Valdez would be available and effective in the Sound. In the event of a large spill, additional resources from the Coast Guard, oil spill cleanup services or other port cooperatives along the Pacific coast might be required. All available resources will be identified in the final contingency plan. (PD-9.3.4.3)

Anticipated response in a hypothetical example involving a leaking tanker in Prince William Sound is described in PD-9.3.5.4. Essentially, it would involve using seagoing tugs to transport equipment from Port Valdez and air-dropping major equipment items from other sources at the spill site.

Cleanup techniques would be similar to those indicated for Port Valdez. Sea conditions permitting, a large circular boom would be deployed around the leaking tanker and kept in position by a number of boats. Floating skimmers of the heavier duty variety would be deployed to recover as much oil as feasible. Recovered liquid would be transferred to available storage equipment, including barges, other tankers, and collapsible floating containers. Oil would be removed from the tanker to the extent possible. If sea conditions permit, skimming barges would be mustered at the spill site and fitted with sweeping booms. Sweeping operations would be conducted as long as necessary to remove floating oil from the surface of the water. Aerial-spotting would be used to detect and track floating slicks and windrows. Other oil removal systems based on absorption would also be used—straw and foamed polyurethane in calm seas, or a continuous recovery unit such as the "oil mop" in heavier seas. If oil remains on the surface of the water long enough to become tarry, means of recovery such as rakes, shovels, nets and scoops would be employed. Final polishing of the water surface could be accomplished by use of skimming barges, absorbents, surface oil recovery equipment and/or oleophilic materials, depending on prevailing sea conditions. Dispersants could be used if permission is granted. Shoreline protection or restoration, as well as rehabilitation of contaminated birds, would be undertaken to the extent appropriate. (PD-9.3.5.4)

3. Training

Effective response to oil spill emergencies requires advance training. An intensive training program would be involved in final contingency planning, including drills under harsh conditions. Oil spills follow no set plan or pattern, each one being a unique occurrence posing a unique series of circumstances and problems. However, it is possible to provide training in the available procedures; to familiarize personnel with the operation of available equipment; to develop expertise in personnel who might be faced with dealing with such emergencies; and especially to develop experience with the environments presented, which can have a strong influence on the equipment selected and the operations conducted. The result of such a program would be that the most effective response can be mounted in the least amount of time. This is the prime objective of any contingency plan. (PD-9.3.5.4)

Selected Subject Index

	Project Description	Summary	Project Description	Summary	Project Description	Su
Airfields			Communications (see Telecommunications)		Corrosion Protection (see Pipe)	
Construction sequence	2 7 3	51			Earthquakes	
Permanent	2 2 3.1, 2 4.4, 2 5.4, App. A-3 2001, A-3 2008, Road Drawing D-150 C1, D-151-C1, D-152-C1	28	Construction		Fault crossings (see heading)	
Temporary	2 2 3.2, 2 4.4, 2 5.4	28	Gravel (see heading)		General	1 2 4.9, 1 5.2.16, 8 2.2.1, App. A-3 1002, A-3 1022, A-3.1051
Aboveground Pipeline			Field camps	6 2.1.2		
Construction	1 7.2, 6 2.1	51	Pipeline	1 2 4.16		
Criteria	1 4 2.3	20	Road	2 6		
Description and basic philosophy	1 4 2.1	17	Mobilization and support			
Design	1 5.2	18, 20	Airfields	2 7.3		
Insulation	1 4 2.1	17, 19	Field camps	6 4, 6 5		
Location along pipeline	1 4 2.2, Pipeline Drawing AL-00-G6, Sheets 1-138	8-15	Pipeline	6 2.1		
Supports (piles and berms)	1 4 2.3, 1 5.2.7, 1 5.2.8, 1 5.2.9, App. A-2 1006, A-2.1007, A-3.1004, A-3 1015, Drawings D-00-C55, D-00-C70, D-00-C71, D-00-C130	17, 18	Road	6 2.2		
			Stations	6 2.3		
			Telecommunications	6 2.5		
			Terminal	6 2.4		
			Waste disposal	6 3.3		
			Wildlife	6 3.2		
			Modes	1 4, 1 5		
			Procedures			
			Pipeline	1 7.1, 1 7.2, 1 7.3, App. A-1.1001		
			River crossings	1 7.5, App. A-1.1001		
			Road	2 7, App. A-3.2006		
			Stations	3 7.2, 3 7.3, 3 7.4		
			Telecommunications	5 7.1, 5 7.2, 6 2.5		
			Terminal	4 7.1, 4 7.2, 4 7.3, 4 7.4		
			Schedule	3 1.5, 3 7, 6 1, 6 2.3		
			Zone			
			Above ground pipeline	1 4 2.3, 1 5.2.13, Pipeline Drawing C-00-C108		
			Buried pipeline	1 4 1.3, 1 5.1.12, 1 5.3.7, Pipeline Drawing D 00 C3		
			River crossings	1 5.5.7, Pipeline Drawing D-00 C37 (Rev. 1)		
			Road	2 5.1		
Air Quality			Contingency Planning (also see Spills)			
Pump stations	3 3.7, 3 4.2.4, 3 5.3.16		Pipeline	9 2		
Terminal	4 3.2, 4 4.5.10, 4 5.3.11	43	Terminal and marine operations	9 3		
Archaeological Surveys	1 2 4.15		Control System			
Auleis	1 2 4.12, App. A-3.1007		Operations control center	3 4.8.3, 4 5.5.4, App. B-1.3400, C-1.3017		
Buried Pipeline (Conventional)			Pipeline and pump stations	3 4.8.1, 3 4.8.2, 3 4.8.3, 3 5.1.7, 3 5.5.1-3 5.5.10, 8 1.1, 8 1.2.1, 8 1.4.1, 8 1.5.1, 8 1.6.1, 8 1.6.2, App. B-1.3400, B-3.3002, B-3.3003, B-3.3004		
Construction	1 7.1, 6 2.1	50				
Criteria	1 4.1.3	17				
Description and basic philosophy	1 4.1.1	17				
Design	1 5.1, App. A-3.1004, A-3.1015	17, 20				
Location along pipeline	1 4.1.2, Pipeline Drawing AL-00-G6, Sheets 1-138	8-15				
Buried Pipeline (Special)						
Construction	1 7.1, 6 2.1	51				
Criteria	1 4.3.3	20				
Description and basic philosophy	1 4.3.1	20				
Design	1 5.3	18, 20				
Location along pipeline	1 4.3.2, Pipeline Drawing AL-00-G6, Sheets 1-138					
Thermal considerations	1 5.3.9, App. A-3.1010	20				
Thermal insulation	1 6.5, App. A-1.1003	18, 20				
Cathodic Protection (see Pipe)			Terminal and marine operations	4 2.3.6, 4 4.7.1-4 4.7.6, 8 1.1, 8 1.2.2, 8 1.4.2, 8 1.5.2, 8 1.6.1, App. B-1.3400, Terminal Drawings D-50-E2C	49	
Climatological Data	1 2 4.7, 3 4.2.1, App. C-3.1010, C-3.1011, C-3.1012					

Project Description			Summary			Project Description			Summary			Project Description			Summary		
Culverts						Buried pipeline (conventional and special)			1.4.1.3, 1.4.3.3, 1.5.1.8, 1.5.3.6, 1.5.2.6			Leased common carrier data circuits			5.2.1.2, 5.4.1.2, 5.7.1.2, Telecommunications Drawings - D-60-E33		
Criteria	2.4.6, App. A-3.2002	28				General			1.2.4.11, App. A-2.1009, A-3.1009	26		Marine radio system			5.2.1.6, 5.4.1.6, 5.5.1.6, 5.7.1.6	41	
Design	2.5.6											Mobile radio system			5.2.1.5, 5.4.1.5, 5.5.1.5, 5.7.1.5	47	
Erosion control	2.3.2.3, 2.4.7, 2.5.7											Private microwave system			5.2.1.1, 5.4.1.1, 5.5.1.1, 5.7.1.1, Telecommunications Drawings D-60-G41, D-60-E1, D-60-L32, D-60-L11	41	
Yukon River to Prudhoe Bay																	
Construction	2.3.5.1, 2.7.1, 2.7.2, 2.7.3, 6.2.2, App. A-3.2006	51	Soils			Investigation program			1.2.4.5, App. A-3.1024, A-3.1025, A-3.1027, A-3.1028, A-3.1029, A-3.1030, A-3.1031, A-3.1035, A-3.1044, A-3.1046, A-3.1049, A-3.2005, A-3.3000 to A-3.3013, A-3.3022	6, 9		Telephone system			5.2.1.3, 5.4.1.3, 5.5.1.3, 5.7.1.3	47	
Criteria	2.2.1, 2.4.1, App. A-3.2001, A-3.2002	28										Temporary system					
Design	2.5.1, App. A-1.2002, A-1.2003	28										Leased telephone circuits			5.2.2.4	41	
Erosion control	2.3.1-2.3.3.4, 2.3.4.1, 2.4.7, 2.5.7	28										Microwave system			5.2.2.1, 5.4.2.1, 5.7.2.1	45	
General	2.1	28	Laboratory tests						1.2.4.6, App. A-3.1027, A-3.1032, A-3.1033, A-3.1034, A-3.1035, A-3.1036	9		Mobile radio system			5.2.2.2, 5.4.2.2, 5.5.2.2, 5.7.2.2	45	
Gravel (see heading)																	
Location and description	2.2.1, App. A-1.2001, Map Atlas, Livengood to Prudhoe Bay (Road Drawings)	28	Solid Waste Disposal									Terminal					
River crossings (see heading, Roads, Bridges)			Field camps						6.3.3, 3.5.2.7	53		Air quality (see heading)					
			Pump stations						3.4.6.7, 3.5.2.7, App. A-3.3017	35		Ballast treatment facility			4.2.3.4, 4.4.5.5, 4.5.3.9, App. C-3.4002	41	
			Terminal						4.4.5.9, 4.5.3.10, App. C-1.4004	44		Berthing and mooring facilities			4.4.3.2, 4.4.3.6, 4.4.3.7, 4.5.1.3, 4.5.1.4, App. A-1.4014, A-1.4015, A-2.4002, Terminal Drawings S-01-001, S-04-001, S-05-001, S-04-018	39	
Road Crossings	1.4.6, 1.5.6, 1.7.6, App. A-1.1001, Pipeline Drawing C-00-C59, D-00-C86	27	Solidification (see Slope Stability)									Buildings			App. A-1.4026	36	
Route Selection	1.1, 1.2.1, 1.2.3.1, 1.2.3.2, Pipeline Drawing AL-00-G6	6-15	Spills			Detection			3.5.5.7, 3.5.5.9, 8.1.5.1, 8.1.6.1, 9.2.2	49		Climate			4.2.2, 9.3.3.1	36	
			Maximum drainage volumes						9.2.3, App. E-3.9002	58		Construction			4.7, 6.2.4	52	
Scour (see River Crossings, Pipeline)			Pipeline and pump stations						9.2.1-9.2.6, App. E-3.9000, E-3.9001, E-3.9002, E-3.9009, E-3.9010, E-3.9011, E-3.9012	58		Control system			4.2.3.6, 4.4.7.1-4.4.7.6, 4.5.5.1-4.5.5.5, App. B-1.4000, B-1.4200, B-1.4201	49	
Seismic Design			Terminal and marine operations						9.3, App. E-3.9005, E-3.9006, E-3.9007, E-3.9008, E-3.9009, E-3.9010	59		Criteria			4.2.3, 4.4	36	
Above ground pipeline	1.4.2.3, 1.5.2.1, 1.5.2.2, 1.5.2.4, App. A-3.1050	25										Design			4.5	36	
Buried pipeline (conventional)	1.4.1.3, 1.5.1.1, 1.5.1.6	25	Start-up									Dock facilities					
Buried pipeline (special)	1.4.3.3, 1.5.3.1, 1.5.3.4		Initial Restart						7.2.2.1, 7.2.2.2	55		Fixed docks			4.4.3.4, 4.5.1.1, App. A-2.4001, Terminal Drawings S-04-001, S-05-001, S-05-002 through S-05-017	39	
Earthquakes (see heading)			(see Control System)									Floating dock			4.4.3.5, 4.5.1.2, Terminal Drawings S-01-001, S-01-003	39	
Fault crossings (see heading)												Drainage			App. C-1.4007, C-1.4010	44	
General	1.2.4.9, App. A-3.1051, A-3.3020	4, 25	Stress (Pipe)									Fire protection (see heading)					
Pump stations	3.4.5, 3.5.3.8, App. A-3.3020	35	Above ground pipeline						1.4.2.3, 1.5.2.2	25		Loading facilities			4.1.1, 4.2.3.3, 4.4.3.2, 4.4.5.13, 4.5.3.5, App. C-1.4003	36	
Terminal	4.4.2.3, 4.5.3.3, App. A-3.1051	43	Buried pipeline (conventional and special)						1.4.1.3, 1.5.1.2, 1.4.5.3, App. A-2.1014	25		Location and description			4.2.1, 4.2.2, Terminal Drawing C-10-000	36	
			Valves (main line block and check)						1.4.4.3, 1.5.4.1	22		Sea conditions (see heading)			4.4.2.5, 9.3.3.1, 9.3.4.1	59	
Settlement												Seismic design					
Above ground pipeline (settlement of pipe supports)	1.4.2.3, 1.5.2.2	25	Telecommunications									Tank farm					
Buried pipeline (conventional and special)	1.4.1.3, 1.4.3.3, 1.5.1.3, 1.5.3.2, App. A-3.1012, A-3.1017, A-3.1018	25	Construction						5.7, 6.2.5	53		Containment dikes			4.4.4, 4.5.2.5, App. A-2.4004, Terminal Drawings C-10-004, C-10-007, C-10-009, C-10-019, C-10-023, C-10-026	36	
Pump stations	3.5.2.4, App. A-3.3023		Criteria						5.4	45		Tanks			4.2.3.1, 4.4.5.3, 4.5.3.3, App. C-1.3014, C-3.4001	36	
			Design						5.5	45							
			Location and description						5.2, Telecommunications Drawing D-60-G41	45							
			Permanent system														
Slope Stability			Aircraft navigation aids						5.2.1.7	47		Tsunami (see heading)					
Above ground pipeline	1.4.2.3, 1.5.2.6		In-plant radio system						5.2.1.4, 5.4.1.4, 5.5.1.4, 5.7.1.4	47		Water quality (see heading)					

Final Environmental Impact Statement Proposed Trans-Alaska Pipeline

Report In Six Volumes

1. Introduction and Summary
2. Environmental Setting of the Proposed Trans-Alaska Pipeline
3. Environmental Setting Between Port Valdez, Alaska, and West Coast Ports
4. Evaluation of Environmental Impact
5. Alternatives to the Proposed Action
6. Other Sections and Attachments

Responsible Official:

Rogers C.B. Morton

Rogers C.B. Morton
Secretary of the Interior



PREPARED BY A SPECIAL INTERAGENCY
TASK FORCE FOR THE FEDERAL TASK
FORCE ON ALASKAN OIL DEVELOPMENT

United States Department of the Interior
1972

EXHIBIT C

UNITED STATES DEPARTMENT OF THE INTERIOR

FINAL

ENVIRONMENTAL IMPACT STATEMENT
PROPOSED TRANS-ALASKA PIPELINE

VOLUME 1 OF 6

INTRODUCTION AND SUMMARY

PREPARED BY A SPECIAL INTERAGENCY TASK FORCE
FOR THE
FEDERAL TASK FORCE ON ALASKAN OIL DEVELOPMENT
IN
FULFILLMENT OF SECTION 102(2)C
OF THE
NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

REF
ALASKA
TN
879.5

1F56
Vol. 1
copy 1

1972
REFERENCE
NOT TO LEAVE LIBRARY
CONSORTIUM LIBRARY, ANCHORAGE, AK.

an ice-free port, very deep waters, easy accessibility, and ample maneuvering room.

At least 2 tugs, each of 3,500 horsepower, would be available at Port Valdez to assist in the berthing and unberthing of vessels. These tugs would be equipped with fire-fighting facilities capable of pumping foam onto the decks of the largest tankers that would be used. All Coast Guard requirements would be met for loading and discharge operations as prescribed in "Rules and Regulations for Tank Vessels, Subchapter D, Subpart 35.35" (APSC, 1971a, Addendum No. 1.) and in the new U.S. Coast Guard regulations (33CFR parts 154, 155, and 156) dealing with pollution prevention for vessels and oil transfer facilities. Ships would carry 6-inch hoses, but all handling of cargo and ballast would be by steel loading-arms on the dock.

Oil Spill Contingency Plans at Port Valdez

Oil spills may arise from failure of storage tanks caused by earthquakes or fires, failure of the loading system between dock and ship, accidental spillage from docks or ships alongside, leaky valve-fittings, the discharge of oily water from ships, and marine accidents.

Alaska (APSC, 1971a,c,d) would attempt to prevent these spills but some are bound to occur in several years of operation. The section of volume 3 of this statement titled "Marine Transportation" analyzes the available record of oil spills in relation to tankers. Major factors in developing contingency plans are: geography and

and topography (shoreline, terrain, accessibility of spill site, depth of water); environment (wind, and water conditions); ecology; oil properties; and available technology and manpower.

From the contingency planning point of view, Port Valdez has the following favorable features: low winds most of the time, waves rarely above 2 feet in height, weak currents, mild temperatures, and no ice cover. Contingency plans are being developed, based on model studies and assumed situations.

Oil spill control includes containment, oil removal, shoreline protection, shoreline cleanup and restoration.

Containment is usually by floating booms of which many kinds are now available. A boom is a surface dam preventing the spread of oil over the water surface.

Floating skimmers have been most successful for picking up and removing oil contained by booms. They generally employ suction pumps to draw in the oil at a rate of up to several hundred gallons a minute, as they move, or are towed, over the water surface. They cannot operate effectively on thin oil films, however, and other devices, some still in the research stage, are used. They usually involve wiping the oil onto the surface of a disk or a belt moved through the film. The present preferred method of recovering oil is by absorption on straw or other materials that have been spread. Recovery of the oil absorbent materials remains the chief problem. Oil removal by dispersion or by sinking is in the research stage but

these methods have drawbacks. Removal by burning is difficult because the water keeps the oil temperature too low for combustion. Here, too, research is going on with wick systems, etc. Various kinds of containers are available for temporary storage of oil and absorbents removed from the water.

Shoreline protection is an important phase from an ecological point of view. The normal defense is a boom placed between the floating oil slick and the shore. The usual method to accomplish shoreline cleanup and restoration is to spread and retrieve absorbents on beaches, and to use high pressure water or steam jets on rock and concrete.

The following equipment is the contingency plans for Port Valdez:

- 10,000 feet of floating containment boom with positive flotation, superstructure and below-water skirt
- Boom handling gear
- 25 drums of dispersant for final cleanup
- 50 drums of surface-tension modifier
- 6 chemical deployment units
- 2,000 bales of absorbent material; deployment and recovery equipment
- 1,000 feet of oil recovery system
- 2 kinds of skimming barges
- 12 bird-repelling guns
- 1 large storage tank
- 24 high intensity light sources
- Various trucks, fire-fighting equipment, a bulldozer, front-end loader and use of tugs and launches

If necessary to prevent the passage of oil through Valdez Narrows, Port Valdez could be sealed off by tugs deploying 7,000 feet of boom across the Narrows. The Port Valdez equipment and manpower would be available for cleanups in Prince William Sound where the

problem is more difficult, and help could be required from the spill cleanup services of the U.S. Coast Guard integrated system for the Pacific Coast (APSC, 1971a, Addendum No. 2).

Voyage

The State of Alaska is currently evaluating tanker operations in Prince William Sound, and devising a detailed plan for control. The State's plan is based on shore-control radar and a radio net. As noted earlier, Alyeska has also made recommendations.

From Hinchinbrook, the route goes 60 miles toward Middleton Island in the Gulf of Alaska and thence to west coast ports under normal sea operation. Navigation would be assisted by radar and radio contacts with the shore.

There is sufficient depth of water over the route just described but because of uplift in the 1964 earthquake and lack of up-to-date charts, wire-dragging would be desirable so that all possible hazards to tankers of 65 feet draft could be located.

For vessel movements in Valdez Arm, Valdez Narrows and Port Valdez all vessels would take on board a State-licensed pilot at the pilot station just north of Busby Island.

On leaving the dock on the outbound voyage, ships would navigate 8 miles of Port Valdez with visual range of both shores and good radar targets on land. Alyeska has proposed traffic control rules prohibiting two-way traffic through the Narrows (which is about one mile wide). Middle Rock would have a radar marker, fog signals and

APPENDIX
STIPULATIONS
for proposed
TRANS-ALASKA PIPELINE

Stipulations to be made a part of any
permit which may be issued by the
Department of the Interior in connection
with the proposed Trans-Alaska Pipeline

Prepared by:
DEPARTMENT OF THE INTERIOR
and the
FEDERAL TASK FORCE ON ALASKAN OIL DEVELOPMENT
February 1972

the Federal Water Pollution Control Act, as amended in (33 U.S.C. sec. 1161(b)) and the regulations issued thereunder, or in violation of applicable laws of the State of Alaska and regulations issued thereunder is prohibited. Permittee shall give immediate notice of any such discharge to: (1) the Authorized Officer, and (2) such other Federal and State officials as are required by law to be given such notice.

- 2.13.2 Permittee shall give immediate notice of any spill or leakage of oil or other pollutant from the Pipeline, the Valdez terminal facility, or any storage facility to: (1) the Authorized Officer; and (2) such other Federal and State officials as are required by law to be given such notice. Any oral notice shall be confirmed in writing as soon as possible.

2.14 Contingency Plans

- 2.14.1 It is the policy of the Department of the Interior that there should be no discharge of oil or other pollutant into or upon lands or waters. Permittee must therefore recognize its prime responsibility for the protection of the public and environment from the effects of spillage.

2.14.2

Permittee shall submit its contingency plans to the Authorized Officer at least one-hundred and eighty (180) days prior to scheduled start-up. The plans shall conform to this Stipulation and the National Oil Hazardous Substances Pollution Contingency Plan, 36 FR 16215, August 20, 1971 and shall: (1) include provisions for oil spill control 1/; (2) specify that the action agencies responsible for contingency plans in Alaska shall be among the first to be notified in the event of any Pipeline System failure resulting in an oil spill; (3) provide for immediate corrective action including oil spill control and restoration of the affected resource; and (4) provide that the Authorized Officer shall approve any materials or devices used for oil spill control and shall approve any disposal sites or techniques selected to handle oily matter; and (5) include separate and specific techniques and schedules for clean-up of oil spills on land, lakes, rivers and streams, sea, and estuaries.

1/ As used in this Stipulation 2.14.2, oil spill control is defined as (1) detection of the spill, (2) location of the spill, (3) confinement of the spill, and (4) cleanup of the spill.

30)
-
S
2.14.3

Prior to Pipeline start-up, such plans shall be approved in writing by the Authorized Officer and Permittee shall demonstrate its capability and readiness to execute the plans. Permittee shall update as appropriate the plans and methods of implementation thereof, which shall be submitted annually to the Authorized Officer for his written approval.

2.14.4

re;
If during any phase of the construction, operation, maintenance or termination of the Pipeline, any oil or other pollutant should be discharged from the Pipeline System, the control and total removal, disposal and cleaning up of such oil or other pollutant, wherever found, shall be the responsibility of Permittee, regardless of fault. Upon failure of Permittee to control, dispose of, or clean up such discharge, or to repair all damages resulting therefrom, the Authorized Officer may take such measures as he deems necessary to control and clean up the discharge and restore the area, including, where appropriate, the aquatic environment and fish and wildlife habitats, at the full expense of Permittee. Such action by the Authorized Officer shall not relieve Permittee of any responsibility as provided herein.

proceeding shall be heard by a three-judge court appointed in the same manner as a three-judge district court appointed under section 2284 of title 28 of the United States Code. Any such action or proceeding shall be assigned for hearing at the earliest practicable date, shall take precedence over all other matters pending on the docket of the district court at that time, and shall be expedited in every way by such three-judge district court. Any review of an interlocutory or final judgment, decree, or order of such three-judge district court by any party to such action or proceeding may be had only upon direct appeal to the Supreme Court of the United States.

Sec. 204. A right-of-way or permit granted under this title II for a road or airport as a related facility of the trans-Alaskan pipeline may provide for the construction of a public road or airport.

Sec. 205. The grant of a right-of-way or permit pursuant to this title II shall grant no immunity from the operation of the Federal antitrust laws.

Sec. 206. Any crude oil transported over rights-of-way granted pursuant to section 28 of the Mineral Leasing Act of 1920 shall be subject to all of the limitations and licensing requirements, and penalty and enforcement provisions, of the Export Administration Act of 1969 (Act of December 30, 1960; 83 Stat. 841) and, in addition, before any crude oil subject to this section may be exported under the limitations and licensing requirements of the Export Administration Act of 1969 the President must make and publish an express finding that such exports are in the national interest: *Provided*, That the President shall submit reports to the Congress containing findings made under this section, and after the date of receipt of such reports Congress shall have a period of sixty calendar days, thirty days of which Congress must have been in session, to consider whether exports under the terms of this section are in the national interest. If the Congress within that time limit passes a concurrent resolution of disapproval stating disagreement with the President's finding concerning the national interest, further exports made pursuant to the aforementioned Presidential findings shall cease.

Sec. 207. (a) Except when the holder of a permit or right-of-way granted pursuant to this title can prove that damages caused by the holder's activities conducted at any point along the route of the proposed trans-Alaskan pipeline were caused by an act of war or by negligence of the United States or other government, such holder shall be strictly liable to all damaged parties, including but not limited to private persons, Alaska Natives, Native organizations, and Federal and State governments, without regard to fault for such damages.

(b)(1) The Secretary shall direct as a term or condition of any permit or right-of-way issued pursuant to this title that, except when the holder of such permit or right-of-way can prove that damages resulting from discharges of oil in violation of section 11(b)(2) of the Federal Water Pollution Control Act (33 U.S.C. 1161(b)(2)) were caused by an act of war or by negligence of the United States or other government such holder shall be strictly liable without regard to fault to all parties, including but not limited to private persons and the Federal and State governments, for all damages resulting from such discharges of oil from, or involving vessels owned, chartered, operated, or leased by or for such holder, affiliate of such holder, shareholder, partner, or other constituent part of the holder, or affiliate of such shareholder, partner, or other constituent part of the holder, where the cargo of such vessel is oil transported by the proposed trans-Alaskan pipeline. Any action taken pursuant to this subsection shall be brought in the appropriate United States district court.

(2) For the purposes of this subsection, the term "affiliate" includes—

(A) any person or corporation owned or controlled by the permit holder or by a shareholder, partner, or other constituent part of the permit holder; or

(B) any person or corporation which owns a substantial interest in or controls the permit holder by—

(i) stock interest, or
(ii) representation on a board of directors or similar body, or
(iii) contract or other agreement with other stockholders, or
(iv) otherwise; or

(C) any person or corporation which is under common ownership or control with the permit holder.

(c) The Secretary is directed to require from the holder a bond that shall at all times be maintained and in force and effect in the full principal amount during construction, operation, and termination of the proposed trans-Alaskan pipeline. The amount of said bond shall be adequate to insure the payment of any final judgment recovered against the holder for loss or damage in actions arising under this section.

Sec. 208. (a) The Secretary of the Interior is directed to report at least semiannually to the House and Senate Committees on Interior and Insular Affairs on the progress of construction of the proposed trans-Alaskan pipeline and related facilities and on the implementation of environmental stipulations attached to any permits or rights-of-way for the proposed trans-Alaskan pipeline. The first report shall be made no later than six months from the date of any permit or right-of-way granted pursuant to this title. Further reports shall be made at no greater than six-month intervals from the last prior report made.

(b) The Secretary shall issue a cease-and-desist order to halt construction of the proposed trans-Alaskan pipeline and related facilities at any time whenever he finds that the stipulations attached to permits or rights-of-way issued pursuant to this title are not being implemented or that significant damage to the environment, unforeseen at the time at which permits or rights-of-way were issued for the proposed trans-Alaskan pipeline, may occur if construction is not halted.

Sec. 209. (a) The Secretary of the Interior is authorized and directed to investigate the feasibility of one or more oil or gas pipelines from the North Slope of Alaska to connect with a pipeline through Canada that will deliver oil or gas to United States markets. The cost of making the investigation shall be charged to any future applicant who is granted a right-of-way for one of the routes studied. The Secretary shall submit to the Congress periodic reports of his investigation, and the final report of the Secretary shall be submitted to the Congress within two years from the date of this Act.

(b) The President is authorized and requested to enter into negotiations with the Government of Canada to determine (1) the terms and conditions under which pipelines or other transportation systems could be constructed across Canadian territory for the transport of oil and gas from Alaska's North Slope to markets in the United States, and (2) the feasibility, consistent with the needs of other sections of the United States, of acquiring additional oil export commitments from the Government of Canada that would make unnecessary the shipment of oil from the Alaskan pipeline by tanker into the Puget Sound area. The President shall report to the Congress the actions taken, the progress achieved, the areas of disagreement, and the matters about which more information is needed, together with his recommendation for further action.

(c) Nothing in this section shall limit the authority of the Secretary of the Interior, or

any other Federal official, to grant a gas pipeline right-of-way or permit which he is otherwise authorized by law to grant.

Sec. 210. The words "trans-Alaskan pipeline", wherever used in this title, mean that pipeline system, including related facilities, described in the "Final Environmental Impact Statement, Proposed Trans-Alaskan Pipeline".

Mr. MELCHER (during the reading). Mr. Chairman, I ask unanimous consent that title II be considered as read, printed in the Record, and open to amendment at any point.

The CHAIRMAN. Is there objection to the request of the gentleman from Montana?

Mr. DINGELL. Mr. Chairman, I reserve the right to object, and I will not object.

I make this reservation solely to inquire of the chairman of the subcommittee whether it is his intention at any point to limit debate with respect to title II of the bill? Perhaps I might repeat I have reserved the objection solely to ask my friend, the gentleman from Montana, whether or not it is the intention of him or members of the committee at any time in any way to attempt to limit debate or offering of amendments to title II?

Mr. MELCHER. Mr. Chairman, will the gentleman yield?

Mr. DINGELL. I yield to the gentleman from Montana.

Mr. MELCHER. I thank the gentleman for yielding.

Subject to the will of the House it is my intent to proceed with the amendments, any and all, that will be offered by any Member on the floor today.

Mr. DINGELL. Mr. Chairman, I do not object, and I withdraw my reservation of objection with that understanding from the chairman of the subcommittee that it is not his intention to limit debate.

The CHAIRMAN. Is there objection to the request of the gentleman from Montana?

There was no objection.

AMENDMENT OFFERED BY MR. DELLENBACK

Mr. DELLENBACK. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. DELLENBACK: Page 13, line 5. Strike out all of subparagraph (d), insert a new section 203 to read as follows, and renumber the subsequent sections:

"Sec. 203. Proceedings in any United States federal court with respect to any action taken by the Secretary of the Interior in accordance with provisions of the National Environmental Policy Act of 1969 or relating to any right of way to construct the proposed Trans-Alaskan pipeline or to any permit in relation thereto shall be given precedence over all other cases pending therein, and shall be assigned for hearing and determined at the earliest practicable date, and all courts involved shall cause the case to be in every way expedited."

(By unanimous consent, Mr. DELLENBACK was allowed to proceed for 5 additional minutes.)

Mr. DELLENBACK. Mr. Chairman, I will try not to be complex in this, but we are at the heart of what is the major crucial question about the bill which is before us. We have here an amendment which was proposed in the full Committee on the Interior, and in the full Com-

**Federal & State
Stipulations
Governing the
trans Alaska
Pipeline System**

Alyeska pipeline
SERVICE COMPANY

EXHIBIT E

Table of Contents

Section	Page
Exhibit A	
Alaska State Stipulations for the Right-of-Way Lease for the Trans-Alaska Pipeline	A-1
Exhibit B	
Requirements of the Department of Defense Relating to Military Installations.....	B-1
Exhibit C	
Requirements of the Federal Power Commission Relating to Power Sites.....	C-1
Exhibit D	
Federal Stipulations for the Agreement and Grant of Right-of-Way for the Trans-Alaska Pipeline	D-1
Exhibit E	
Cooperative Agreement Between United States Department of the Interior and State of Alaska Regarding the Proposed Trans-Alaska Pipeline System.....	E-1

EXHIBIT A

Alaska State Stipulations for the Right-of-Way Lease for the Trans-Alaska Pipeline

1.1.1.23. "Notices to Proceed" means more than one Notice to Proceed.

1.1.1.24. "Oil" means unrefined liquid hydrocarbons, including gas liquids.

1.1.1.25. "Operation" means all activities connected with the transportation of Oil through the Pipeline including maintenance of the Pipeline.

1.1.1.26. "Original Lessee" means any one of the Original Lessees.

1.1.1.27. "Owner" means any one of the Lessees.

1.1.1.28. "Owners" means more than one Owner.

1.1.1.29. "Parent" means a Person or Business Entity whose direct or indirect legal or beneficial ownership interest in, or with respect to, a Transferee or Lessee enables that Person or Business Entity to control the Transferee's or the Lessee's management or policies.

1.1.1.30. "Parents" means more than one Parent.

1.1.1.31. "Person" means a natural person.

1.1.1.32. "Persons" means more than one Person.

1.1.1.33. "Pipeline" means all the facilities including Related Facilities of a total system of pipe (whether owned or operated under a contract, agreement, or lease) used by a carrier for transportation of crude oil, natural gas, or products for delivery, for storage, or for further transportation, and including all pipe, pump

or compressor station, tanks, valve airfields, terminal including docks and facilities, operations of the upstream part of the terminal, tanker facilities, and fire protection system used or necessary pipe, taken as a whole for transportation, its enlargement of the

1.1.1.34. "Pipeline" means the authorized representative of the authority and administering a project in accordance with the provisions of this Lease. The Commissioner has no responsibility, or act as the Pipeline

1.1.1.35. "Preliminary" means the establishment of construction, including conceptual design of the project to be constructed. It includes minimum criteria and project of field data used as criteria; drawings technical requirements data compiled data and preliminary drawings (if any) to support structural each typical facility proposed Construct

2.13. Reporting of Oil Discharges or Other Pollution

2.13.1. A discharge of Oil or other pollutant by Lessees in violation of applicable laws of the State of Alaska and regulations issued thereunder, is prohibited. Lessees shall give immediate notice of any such discharge to: (1) the Pipeline Coordinator; and (2) such other State officials as are required by law to be given such notice.

2.13.2. Lessees shall give immediate notice of any spill or leakage of Oil or other pollutant from the Pipeline, the Valdez terminal facility, or any storage or refueling facility or equipment to: (1) the Pipeline Coordinator; and (2) such State and Federal officials as are required by law to be given such notice. Any oral notice shall be confirmed in writing as soon as possible.

2.14. Contingency Plans

2.14.1. It is the policy of the Department of Natural Resources that there should be no discharge of Oil or other pollutant into or upon lands or waters of the State. Lessees must therefore recognize their prime responsibility for the protection of the public and environment from the effects of spillage.

2.14.2. Lessees shall submit their contingency plans to the Pipeline Coordinator at least one hundred eighty (180) days prior to scheduled start-up. The plans shall conform to this Stipulation and shall: (1) include provisions for Oil

Spill Control¹; (2) specify that the action agencies responsible for contingency plans in Alaska shall be among the first to be notified in the event of any Pipeline failure resulting in an Oil spill; (3) provide for immediate corrective action including Oil Spill Control and restoration of the affected resource; (4) provide that the Pipeline Coordinator shall approve any materials or devices used for Oil Spill Control and shall approve any disposal sites or techniques selected to handle oily matter; and (5) include separate and specific techniques and schedules for cleanup of Oil spills on land, lakes, rivers and streams, sea, and estuaries.

2.14.3. Prior to Pipeline start-up, such plans shall be approved in writing by the Pipeline Coordinator, and Lessees shall demonstrate their capability and readiness to execute the plans. Lessees shall update as appropriate the plans and methods of implementation thereof, which shall be submitted annually to the Pipeline Coordinator for his written approval.

2.14.4. If during any phase of the construction, operation, maintenance or Termination of the Pipeline, any Oil or other pollutant should be discharged from the Pipeline, the Valdez terminal facility, or any storage

or refueling facility or equipment, the control and total removal, disposal and cleaning up of such Oil or other pollutant, wherever found, shall be the responsibility of Lessees, regardless of fault. Upon failure of Lessees to control, dispose of, or clean up such discharge, the Pipeline Coordinator may take measures as he deems necessary to control and clean up the discharge at the full expense of Lessees. Such action by the Pipeline Coordinator shall not relieve Lessees of any responsibility as provided herein.

¹Oil Spill Control is defined as (1) detection of the spill, (2) location of the spill, (3) confinement of the spill, and (4) cleanup of the spill.

to any Federal Lands that
thdrawn or reserved for
the grant of the Right-of-
dance with the findings of
er Commission (Docket
aska, U.S. Department
ssued on December 6,
o:

ion of prior rights for
ver development, and sub-
ition that in the event the
ired for such purposes,
nts or structures placed
hall be found to interfere
opment shall be removed
may be necessary to elimi-
ce with reservoir or power
no cost to the United
mittees or licensees.

ees herein shall not be
"permittees or licensees"
ning of the aforesaid find-
eral Power Commission.

EXHIBIT D

Federal Stipulations for the Agreement
and Grant of Right-of-Way for the
Trans-Alaska Pipeline

ction Segment" means
ipeline System that
plete physical entity or
elf, which can be con-
tently of any other por-
e Pipeline System, in a
tween two given geo-
asably proximate to
ot to be construed as
irety of the Pipeline or
tem.

ction Subdivision"
pproximately six (6)
s of the route of the
ned by the Authorized
ting with Permittees.

ent" means the De-
erior of the United
ssor department

ign" comprises com-
ents. It shall include
pecifications; pro-
Modes; operational re-
; to justify designs;
alysis (including sam-
ach particular design
al and engineering
f tests conducted and
or considerations
nd project life

y Passage of Title"
is made by the exer-
; primarily for the
; accordance
del or decree of a

court in bankruptcy, eminent domain or
other similar proceedings, or pursuant to
any act or resolution of a sovereign legis-
lative body directing a lawful taking of
property.

1.1.1.14. "Mapping Segment" means a
Construction Subdivision, or any part
thereof, as determined by the Authorized
Officer; *provided, however*, that with re-
spect to a pump station, basic communi-
cation site, remote control valve site, me-
chanical refrigeration equipment site and
any other like Related Facility, a Mapping
Segment means the entire site.

1.1.1.15. "Notice to Proceed" means a
permission to initiate Pipeline System
construction that is issued in accordance
with Stipulation 1.7.

1.1.1.16. "Oil" means unrefined liquid
hydrocarbons, including gas liquids.

1.1.1.17. "Parent" means a Person or
Business Entity whose direct or indirect
legal or beneficial ownership interest in,
or with respect to, a Transferee or Permit-
tee enables that Person or Business Entity
to control the Transferee's or the Permit-
tee's management or policies.

1.1.1.18. "Permittee" means any one of
the Permittees.

1.1.1.19. "Permittees" means the Original
Permittees, or their respective succes-
sors or assigns holding an undivided owner-
ship interest in the Right-of-Way to the
extent sanctioned by the Secretary in
accordance with the provisions of this
Agreement.

1.1.1.20. "Person" means a natural person.

1.1.1.21. "Persons" means more than one Person.

1.1.1.22. "Pipeline System" means all facilities located in Alaska used by Permittees in connection with the construction, operation, maintenance or termination of the Pipeline. This includes, but is not limited to, the Pipeline, storage tanks, Access Roads, communications sites, airfields, construction camps, materials sites, bridges, construction equipment and facilities at the origin station and at the Valdez terminal. This does not include facilities used in connection with production of oil or gathering systems, nor does it include such things as urban administrative offices and similar facilities which are only indirectly involved.

1.1.1.23. "Preliminary Design" means the establishment of project criteria (i.e., construction, including design, and operational concepts) necessary to delineate the project to be constructed. As a minimum it includes the following: design criteria and project concepts; evaluation of field data used to establish the design criteria; drawings showing functional and technical requirements; reports of all test data compiled during the data collection and preliminary design evaluation; standard drawings (if applicable) or drawings to support structural design concepts of each typical facility or structure; proposed Construction Modes; outline project speci-

fications, the design siting.

1.1.1.24. those structures and sites of which maintenance pipeline,

(1) line p

(2) pump buildings and fence

(3) valve structure

(4) monitoring devices, and

(5) surge containment

(6) bridge

(7) terminals, heliports and fence

(8) a gas line necessary

(9) retaining cuts and control structures

(10) storage and area equipment

(11) administrative

(12) catwalks

2. ENVIRONMENTAL

2.1. Environmental Briefing

2.1.1. Prior to, and during, construction of the Pipeline System, Permittees shall provide for environmental and other pertinent briefings for construction and other personnel by such Federal employees as may be designated by the Authorized Officer. Permittees shall arrange the time, place and attendance for such briefings upon request by the Authorized Officer. Permittees shall bear all costs of such briefings other than salary, per diem, subsistence, and travel costs of Federal employees. In addition, Permittees shall separately arrange with the State of Alaska for such similar briefings as the State may desire.

2.2. Pollution Control

2.2.1. General

2.2.1.1. Permittees shall conduct all activities associated with the Pipeline System in a manner that will avoid or minimize degradation of air, land and water quality. In the construction, operation, maintenance and termination of the Pipeline System, Permittees shall perform their activities in accordance with applicable air and water quality standards, related facility siting standards, and related plans of implementation, including but not limited to standards adopted pursuant to the Clean Air Act, as amended, 42 U.S.C. § 1857 *et seq.*, and the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1321 *et seq.*

United States, adjoining shorelines, or into or upon the waters of the contiguous zone in violation of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1321 *et seq.* and the regulations issued thereunder, or in violation of applicable laws of the State of Alaska and regulations issued thereunder, is prohibited. Permittees shall give immediate notice of any such discharge to: (1) the Authorized Officer; and (2) such other Federal and State officials as are required by law to be given such notice.

2.13.2. Permittees shall give immediate notice of any spill or leakage of Oil or other pollutant from the Pipeline, the Valdez terminal facility, or any storage facility to: (1) the Authorized Officer; and (2) such other Federal and State officials as are required by law to be given such notice. Any oral notice shall be confirmed in writing as soon as possible.

2.14. Contingency Plans

2.14.1. It is the policy of the Department of the Interior that there should be no discharge of Oil or other pollutant into or upon lands or waters. Permittees must therefore recognize their prime responsibility for the protection of the public and environment from the effects of spillage.

2.14.2. Permittees shall submit their contingency plans to the Authorized Officer at least one hundred and eighty (180) days prior to scheduled start-up. The plans shall conform to this Stipulation and the National Oil Hazardous Substances Pollution Contingency Plan, 36 F.R. 16215,

August 20, 1971, and shall: (1) include provisions for Oil Spill Control¹; (2) specify that the action agencies responsible for contingency plans in Alaska shall be among the first to be notified in the event of any Pipeline System failure resulting in an Oil spill; (3) provide for immediate corrective action including Oil Spill Control and restoration of the affected resource; (4) provide that the Authorized Officer shall approve any materials or devices used for Oil Spill Control and shall approve any disposal sites or techniques selected to handle oily matter; and (5) include separate and specific techniques and schedules for cleanup of Oil spills on land, lakes, rivers and streams, sea, and estuaries.

2.14.3. Prior to Pipeline start-up, such plans shall be approved in writing by the Authorized Officer, and Permittees shall demonstrate their capability and readiness to execute the plans. Permittees shall update as appropriate the plans and methods of implementation thereof, which shall be submitted annually to the Authorized Officer for his written approval.

2.14.4. If during any phase of the construction, operation, maintenance or termination of the Pipeline, any Oil or other

pollutant should be discharged from the Pipeline System, the control and total removal, disposal and cleaning up of such Oil or other pollutant, wherever found, shall be the responsibility of Permittees, regardless of fault. Upon failure of Permittees to control, dispose of, or clean up such discharge, the Authorized Officer may take such measures as he deems necessary to control and clean up the discharge at the full expense of Permittees. Such action by the Authorized Officer shall not relieve Permittees of any responsibility as provided herein.

¹As used in this Stipulation 2.14.2., Oil Spill Control is defined as: (1) detection of the spill; (2) location of the spill; (3) confinement of the spill; and (4) cleanup of the spill.

Summary
Project Description
Of The Trans Alaska
Pipeline System
September 1974

TN
879.51
A532

Alyeska pipeline
SERVICE COMPANY

EXHIBIT F

This description of the project spells out in detail how Alyeska plans to reach those goals — how the growing oil needs of a nation can be met through development of the great resources of Alaska while still protecting the environment.

E. L. Patton

President
Alyeska Pipeline
Service Company

DATE DUE

~~25 MAY 1997~~

18 DEC 1987

~~NO~~

HIGHSMITH 45 220

Legend

Pipeline

Pump Stations

Cities



A principal concern of both design and construction has been development of a secure and, as nearly as possible, leak-proof system for the pipeline, pump stations, terminal and all ship-loading facilities.

However, in case of an accident, detailed contingency plans have been prepared for every portion of the system. The plans have seven basic objectives: (1) prevention of oil leaks and spills, (2) fast, accurate and sensitive detection of any leaks, (3) minimization of spill volume, (4) containment of spills, (5) recovery of oil, (6) rehabilitation and restoration of affected areas, and (7) public safety and prompt notification.

To implement the plans, specific response procedures have been developed for spills or leaks on every part of the pipeline system. The procedures will be stored in a computer. And when a spill or leak is identified, the computer will print out a pre-planned response for the area involved, identifying not only crews and equipment required but also the step-by-step procedures to be followed in meeting the emergency.

Pipeline Contingencies

Nature of action taken if a leak is detected in the pipeline will depend largely upon the size and location of the leak, as indicated by the pipeline data system. Typically, however, if an alarm signals a leak and the location of the leak is apparent from the control center data display, the dispatcher will take steps to shut down all stations north (upstream) of the leak position. Downstream stations will then be shut down. When all necessary pump stations are shut down, the dispatcher will then isolate the leak between two adjacent station sites by closing station block valves. He will also close any remotely controlled valves in the area of the leak.

Pump stations can be closed down in six minutes. Other remotely controlled valves can be closed in four minutes more.

Aircraft or ground patrols will then be used to pinpoint the leak. And crews will be dispatched immediately to close locally operated valves, stop the leak, contain the spill in the smallest possible area and begin recovery and repair operations.

One of the first steps taken by crews arriving at a spill will be to create dikes, pits and other containment structures. Where practical in environmentally sensitive sites, permanent dikes may be installed, during construction, to prevent any future possible spill from reaching the sensitive site.

In general, spilled oil will either be drained into temporary storage pits or pumped into temporary tanks for later movement by truck to the nearest pump station or other suitable location for return to the line.

Oil which cannot be picked up will be recovered by sorbent materials. Burning of unrecoverable residual oil may be used in some circumstances but only with prior approval of appropriate government authorities.

If surface waters of lakes or rivers are involved, spilled oil will be confined by fixed or floating booms and removed by skimming devices, floating sorbents and or burned.

Soil rehabilitation including aeration, dilution, fertilization and revegetation will start as soon as possible.

Terminal Contingencies

Prompt action is also planned in dealing with any spills connected with ship loading activities at Valdez.

The physical characteristics of Port Valdez will facilitate containment of oil spills and minimize consequent damage. The harbor is long but narrow. Sheer cliffs and steep rocky beaches account for 56 per cent of the shoreline. Mud or shale tidal flats cover about 19 per cent and sand and gravel beaches account for another 13 per cent. Coarse gravel and shale beaches account for the rest. Average water depth in the harbor is in excess of 750 feet.

Wind speed is below seven knots more than 90 per cent of the time.

Current velocity is generally less than 0.5 knots off Jackson Point. In Valdez Narrows and Valdez Arm, currents are reported at less than a knot. Wave action most of the time does not exceed one to two feet in height. Waves of two to three feet have been observed in storms.

Temperatures are mild for this latitude.

The motion of water discharged from about 50 streams, including the Lowe and Robe Rivers and Shoup Glacier, may be of some assistance in terms of repelling oil from those areas. For instance, a two to three knot current has been observed near the entrance of the Robe River.

However, in event of a spill near a tanker, the contingency response would include deployment of floating booms around the vessel and surface oil; deployment of floating skimmers within the contained slick to recover the oil and transfer it to a barge or other facilities; dispatch of skimming barges to remove slicks and other oil that may escape from the containment booms. In shoreline areas booms could be deployed to protect threatened areas, especially those which are ecologically sensitive.

When work is completed, all containment water which had been recovered would be discharged into the terminal ballast treatment system. Surface oil recovery devices and sorbents would be used to remove remaining sheen or iridescence on the water surface.

If necessary to prevent passage of oil from Valdez Narrows into Prince William Sound, Port Valdez could be closed by diversion booms. Sea-going tugs would tow booms into place.

A large amount of special equipment will be kept at the terminal site to meet contingencies. Included will be floating containment booms, sorbents, sorbent deployment units and recovery equipment, oil skimmers, bird repelling devices, one large storage barge with pumps and hoses, vacuum trucks, fire trucks with high pressure pumps, high pressure water pumping systems which can be operated from shore, truck or boat deck, trucks, bulldozers, a front end loader, tugs and mooring launches and high intensity lights which will permit oil recovery in darkness.

● EXHIBIT G

It is the policy of the eight owner companies, constituting the Permittees under the Federal Right-of-Way Grant and the Lessees under the State Right-of-Way Lease and represented by their Agent, Alyeska Pipeline Service Company, to take every reasonable action to prevent oil spills and if they occur, to minimize environmental damage. Alyeska will comply with relevant pollution laws for the protection and conservation of environmental resources.

Alyeska policy shall comply with State of Alaska Regulations and the National Oil and Hazardous Substances Pollution Contingency Plan, as revised on February 10, 1975, as issued by the Council on Environmental Quality (CEQ) under the authority of the Federal Water Control Act, as amended (Public Law 92-500). Alyeska policy and these plans are intended to be written and executed so as to comply with the Grant and Agreement of Right-of-Way and the Right-of-Way Lease with the United States of America and the State of Alaska, respectively.

Alyeska employees and contractor personnel are expected to take all precautions to prevent oil spills and are to report immediately to their supervisors if they observe any oil spill regardless of size. Failure to report spills and acts of negligence which result in oil spills by employees or contractors will be cause for disciplinary action or discharge.

Alyeska will maintain an Environmental Protection Department to support the Terminal Superintendent and to advise, coordinate, and implement resources protection and conservation activities. This department is also responsible for ensuring that training is effectively conducted and that the updated plans include the most recent information available.

Every effort shall be made to enhance communication and understanding with civic groups, conservation organizations, universities, and the general public through publications, speakers, exhibits, technical demonstrations, and the news media.

The Oil Spill Contingency Plan for Prince William Sound has been developed specifically for rapid and effective response to an oil spill from Alyeska owned, operated, or contracted tankers using the Prince William Sound Vessel Traffic Service operated by the United States Coast Guard from the Marine Safety Office in Valdez. To provide oil spill response, this Contingency Plan has been prepared to:

- Ensure rapid and accurate detection, location, and movement prediction of an oil spill
- Detail specific procedures to minimize spill volume, spill spreading, and shoreline contamination
- Outline steps for maximum oil recovery
- Provide assistance as requested by U.S. Coast Guard to tanker personnel and stricken tanker, if a tanker accident has occurred
- Provide for exclusion procedures to protect environmentally sensitive areas
- Outline effective cleanup, rehabilitation, and restoration procedures for affected areas
- Furnish public safety and notification procedures
- Specify procedures for notification of and cooperation with applicable government authorities

Containment and Cleanup

The containment and cleanup of oil spills on the waters of Prince William Sound will be given highest priority in order to prevent oil from and/or minimize the volume of oil reaching shoreline areas. Exclusion procedures will be utilized to assist in preventing oil slicks from affecting sensitive shoreline areas.

Chemical Treatment

Dispersants will not be used without prior consultation with the appropriate federal and state agencies. Alyeska's policy will be to follow the restrictions on the use of dispersants for oil spill control as given in the *National Oil and Hazardous Substances Pollution Contingency Plan* (January 1973). Specifically, dispersants will be utilized only when their use will:

- Prevent or substantially reduce hazard to human life or limb or substantial hazard of fire to property
- Prevent or substantially reduce hazard to major elements of the populations of vulnerable species of waterfowl, wildlife, and vegetation

- Result in the least overall environmental damage or interference with designated uses

Personnel Training, Emergency Drills, and Field Exercises

Regularly scheduled training programs will be conducted to ensure that all personnel assigned to the Oil Spill Task Force are thoroughly familiar with their duties and the operation of oil spill contingency equipment.

Training and instruction of Oil Spill Task Force personnel, including frequent drills, will be carried out within Prince William Sound to maintain maximum familiarity with all aspects of the Oil Spill Contingency Plan. The objectives of this training program are:

- To ensure that Alyeska Personnel are ready for effective handling of foreseeable oil spill emergencies
- To maintain the Plan as fully operable working documents
- To inform Task Force Team members of their respective duties and communications procedures
- To ensure familiarity with the use of all equipment
- To update the Plan to reflect state of the art in oil spill technology
- To modify the Plan in the light of information gained from the field exercises and actual experiences

Full scale, company wide field exercises will be held at least once per year to ensure overall readiness for response to large scale oil spills and to ensure that communications will be rapid and effective.

Liability, Authority, and Responsibility

Alyeska Pipeline Service Company and the Owner Companies recognize and assume the liabilities and responsibilities imposed upon them under the various federal and state statutes and regulations, the Federal Right-of-Way Lease and the applicable stipulations incorporated therein. It is to be noted that cleanup operations within the areas of liability and responsibility so imposed will be conducted by Alyeska as Agent for the Owner Companies and will be conducted in such a manner as to not require assumption of control of such cleanup operations by federal or state officials under the applicable statutes, regulations, agreements or stipulations.

Summarily, Alyeska will direct cleanup operations of spills resulting from:

- Trans-Alaska Pipeline operations, including spills within the right-of-way or related facilities under the ownership or control of Alyeska or the Owners
- Marine Terminal at Valdez
- Operation, involving Alyeska owned, operated, or chartered tankers carrying or destined to carry crude oil transported through the Trans-Alaska Pipeline System, occurring at the Valdez Terminal in Port Valdez, within Valdez Arm, or within Prince William Sound

Alyeska Pipeline Service Company will not assume direction of cleanup operations of oil spills occurring at or from facilities operated by parties not directly involved with the Trans-Alaska Pipeline System, or spills of unknown origin. However, upon becoming aware of such spill(s), Alyeska will promptly notify the proper government agencies of the spill and promptly enter into cleanup operations of spill(s) of other parties or those of unknown origin if the person or agency responsible a) requests assistance in the undertaking of the cleanup operation, b) guarantees payment of all costs, and c) retains direction of the cleanup operations.

Regardless of the source of the spill, however, none of the above instructions will be understood to preclude Alyeska personnel from taking any containment actions necessary to prevent oil from entering a stream, an environmentally sensitive area or a potentially hazardous area when, in the opinion of the supervisor on the scene, such action is necessary to protect the public interest.

Notifying Government Agencies

All oil spills will be reported to the following federal and state agencies:

- United States Coast Guard
- Environmental Protection Agency
- Alaska State Department of Environmental Conservation
- Alaska Pipeline Office (Federal)
- Alaska Pipeline Coordinator's Office (State)

Participation and Assistance

Alyeska Pipeline Service Company will encourage and participate in efforts to form cooperatives to which the proper government agency may direct requests for assistance in cleaning up oil spills of unidentified origin or those declared to be inadequately handled. This assistance may take the form of research and development, advisory and training activities, furnishing of equipment and materials, and actual cleanup of spills.

103 CONCEPT OF PLAN

The Alyeska Oil Spill Contingency Plans consist of the Pipeline Plan, Valdez Marine Terminal Plan, and Prince William Sound Plan. The Pipeline Plan includes the General Provisions and 12 Section Plans. These Section Plans delineate specific response actions for spills detected between pump stations, including Contingency Area Plans within each section which give response actions for pipeline spills within specific drainages. The Valdez Marine Terminal Plan delineates specific response actions for spills detected at the Valdez Marine Terminal and/or Port Valdez. The Prince William Sound Plan delineates specific response actions for spills in Prince William Sound including Valdez Arm.

This manual contains the Oil Spill Contingency Plan for Prince William Sound. This Plan has been developed specifically for rapid and effective response to possible oil spills within Prince William Sound, including Valdez Arm, from Alyeska owned, operated, or chartered tankers carrying or destined to carry crude oil transported through the Trans-Alaska Pipeline System. This Plan covers the entire Prince William Sound from Middle Rock in Valdez Narrows to the southern limit of Hinchinbrook Entrance off Cape Hinchinbrook, as shown on Figure 103-1.

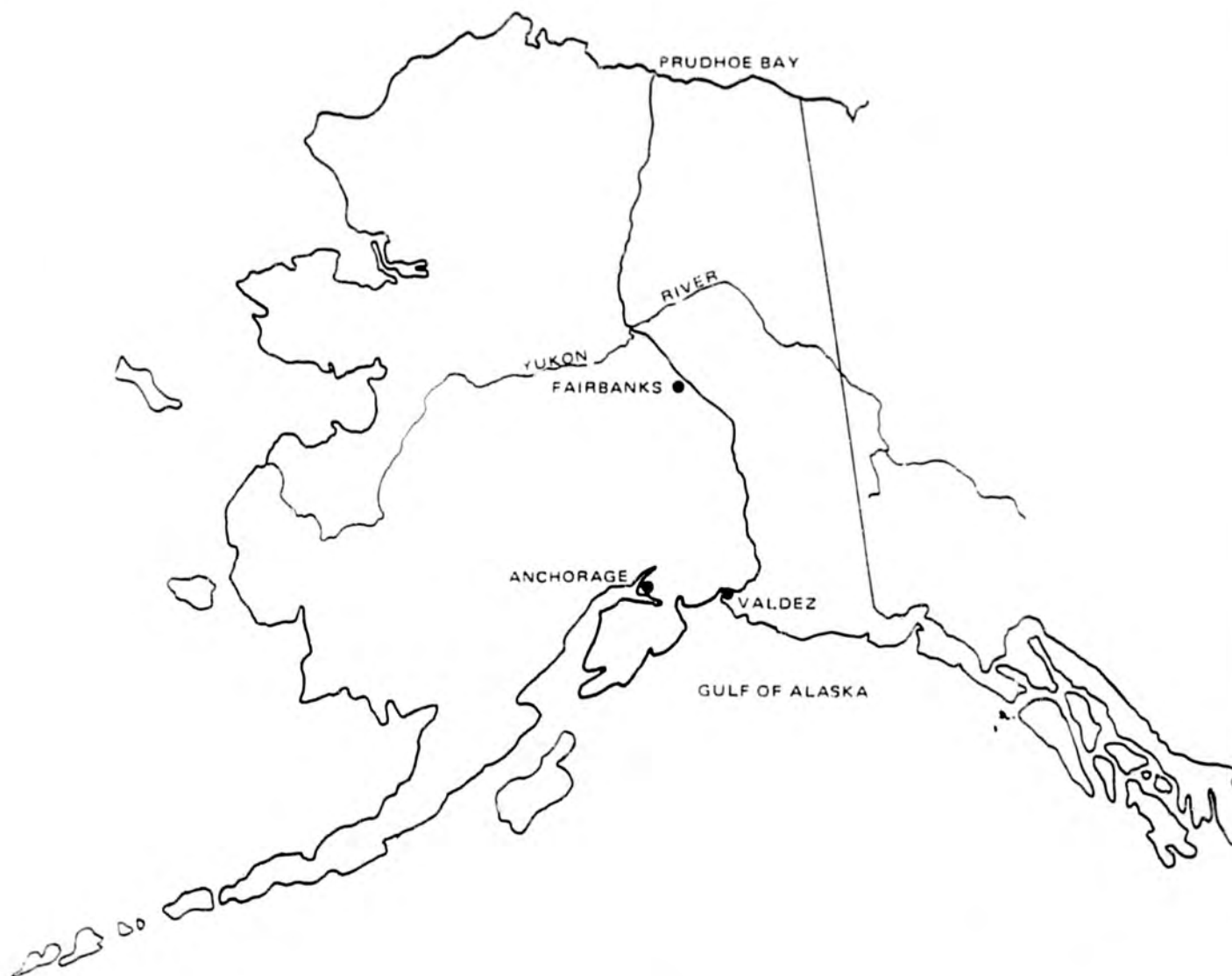
Alyeska's Oil Spill Contingency Plans have been prepared for distribution to supervisory and operating personnel located at the Valdez Marine Terminal. This Plan defines, as clearly as possible, specific immediate response actions to:

- Alert specific Alyeska supervisory personnel located at the Marine Terminal who are assigned specific Oil Spill Task Force responsibilities
- Initiate assessment and reconnaissance actions to determine the exact location and nature of the spill within Prince William Sound

OIL SPILL CONTINGENCY PLAN

GENERAL PROVISIONS

AUGUST 1978



Alyeska pipeline
SERVICE COMPANY

Alaska Pipeline Service Company, 1976

EXHIBIT H

**ALYESKA PIPELINE SERVICE COMPANY
OIL SPILL CONTINGENCY PLAN
GENERAL PROVISIONS**

100 INTRODUCTION

The Alyeska Pipeline Service Company has prepared Oil Spill Contingency Plans which include:

48-inch pipeline from Pump Station 1 to the Valdez Terminal, including associated mainline pump stations and facilities.

Crude Oil Storage and other terminal facilities at Port Valdez.

Prince William Sound including Valdez Arm.

A training program for personnel will be carried out including periodic practice drills. The Plan will be reviewed at least annually to consider improvements developed during training and practice sessions as well as to incorporate new techniques and equipment proven to be worthwhile in the industry.

101 PURPOSE

The objective of the Alyeska Oil Spill Contingency Plans is to minimize damage to environment and assure the safety of the public and employees in the event of an oil spill from company facilities. To accomplish these objectives, the resources of Alyeska Pipeline Service Company are organized in a preplanned manner to ensure rapid and effective response to any oil spill emergency. This manual outlines the techniques which will be in accordance with state-of-the-art oil spill clean-up technology.

102 ALYESKA POLICY

It is the policy of the eight owner companies, constituting the Permittees under the Federal Right-of-Way Grant and the Lessees under the State Right-of-Way Lease and represented by their Agent, Alyeska Pipeline Service Company, to take every reasonable action to prevent oil spills and if they occur, to minimize environmental damage. Alyeska will comply with relevant pollution laws for the protection and conservation of environmental resources.

Alyeska policy shall comply with Alaska Statute Title 46, and 18 AAC75, and the National Oil and Hazardous Substances Pollution Contingency Plan, as revised on February 10, 1975, as issued by the Council on Environmental Quality (CEQ) under the authority of the Federal Water Control Act, as amended (Public Law 92-500). Alyeska Policy and these plans are intended to be written and executed so as to comply with the Grant and Agreement of Right-of-Way and the Right-of-Way lease with the United States of America and the State of Alaska, respectively.

Alyeska employees and contractor personnel are expected to take all precautions to prevent oil spills and are to report immediately to their supervisors if they observe any oil spill regardless of size. Failure to report spills and acts of negligence which result in oil spills by employees or contractors will be cause for disciplinary action or discharge.

Alyeska District and Terminal Superintendents will be directly responsible for adopting every reasonable measure for the protection and conservation of land, vegetation, wildlife, air and water resources along the Pipeline corridor and impacted areas. Alyeska will maintain full responsibility and control in the event of an oil spill unless a government agency specifically notifies Alyeska they have assumed responsibility and control. Mutual coordination will be maintained at all levels.

Alyeska will maintain an Environmental Protection Department to support the District and Terminal Superintendents and to advise, coordinate and implement resources protection and conservation activities. That Department is also responsible for ensuring that training is effectively conducted and that the updated plans include the most recent information available.

Every effort shall be made to enhance communication and understanding with civic groups, conservation organizations, universities, and the general public through publications, speakers, exhibits, technical demonstrations, and the news media.

Alyeska Pipeline Service Company has designed the Trans-Alaska Pipeline System for zero spill. However, in order to be prepared for rapid and effective response should any spillage occur, the General Provisions, the Valdez Terminal, Prince William Sound and the Pipeline Section Plans have been prepared to:

- Ensure rapid and accurate detection and location of oil spillage.
- Detail specific operational procedures to minimize spill volume.
- Provide for containment and cleanup procedures to minimize spread of spill.
- Outline effective cleanup, rehabilitation and restoration procedures for affected areas.
- Furnish public safety and notification procedures.
- Specify procedures for notification and cooperation with applicable government authorities.

Containment and Cleanup

The containment and cleanup of oil spills along the Trans-Alaska Pipeline System, at Port Valdez and Prince William Sound will be given priority to prevent and/or minimize the amount of oil reaching sensitive areas.

Chemical Treatment

Dispersants will not be used without prior consultation and approval from the State of Alaska Department of Environmental Conservation and appropriate federal agencies. Alyeska's policy will be to follow restrictions on the use of dispersants for oil spill control as given in the National Oil and Hazardous Substances Pollution Contingency Plan (January 1973). Specifically, dispersants will be utilized when their use will:

- Prevent or substantially reduce hazard to human life or substantial hazard of fire to property.
- Prevent or substantially reduce hazards to major element of the populations of vulnerable species: waterfowl, wildlife, and vegetation.
- Result in the least overall environmental damage by expediting cleanup.

Personnel Training, Emergency Drills and Field Exercises

Regularly scheduled training programs will be conducted to ensure that all personnel assigned to the Spill Task Force are thoroughly familiar with their duties and the operation of oil spill contingency equipment.

Training and instruction of Oil Spill Task Force personnel, including frequent drills, will be carried out at the Anchorage Headquarters, various District Headquarters, Pump Stations, and Valdez Terminal. Personnel will maintain maximum familiarity with all aspects of the Oil Spill Contingency Plans. The objectives of the training program are:

- To assure that Alyeska personnel are ready for effective handling of foreseeable oil spill emergencies.
- To maintain the Plans as fully operable working documents.
- To inform Task Force team members of their respective duties and communications procedures.
- To ensure familiarity with the use of all equipment.
- To update the Plans to reflect state-of-the-art capability.
- To modify Plans in the light of information gained from the field exercises and actual experience.

Full scale, companywide field exercises will be held at least once per year to insure overall readiness for response to large-scale oil spills and to assure that communications will be rapid and effective.

Liability, Authority and Responsibility

Alyeska Pipeline Service Company and the Owner Companies recognize and assume the liabilities and responsibilities imposed upon them under the various Federal and State statutes and regulations. Federal Right-of-way, the State Right-of-Way Lease and the applicable Stipulations incorporated therein. It is to be noted that clean-up operations within the areas of liability and responsibility so imposed will be conducted by Alyeska as Agent for the Owner Companies and will be conducted in such a manner as to not require assumption of control of such clean-up operations by federal or state officials under applicable statutes, regulations, agreements or stipulations.

no spillage.
the general
en prepared

Summarily, Alyeska will direct cleanup operations of spills resulting from:

Trans-Alaska Pipeline operations, including spills within the Right-of-Way or related facilities under the ownership or control of Alyeska or the Owners.

Marine Terminal at Valdez.

Operation, involving tankers carrying or destined to carry crude oil transported through the Trans-Alaska Pipeline System, occurring at the Valdez Terminal, in Port Valdez, Valdez Arm or Prince William Sound.

Alyeska Pipeline Service Company will not assume direction of clean-up operations of oil spills occurring at or from facilities operated by parties not directly involved with the Trans-Alaska Pipeline System, or spills of unknown origin. However, upon becoming aware of such spill(s), Alyeska will promptly notify the proper governmental agencies of the spill and promptly enter into clean-up operations of spill(s) of other parties or those of unknown origin if the person or agency responsible: a) requests assistance in the undertaking of the clean-up operation, b) guarantees all costs, and c) retains direction of the clean-up operations.

Regardless of the source of the spill, however, none of the above instruction will be understood to preclude Alyeska personnel from taking any containment actions necessary to prevent oil from entering a stream, an environmentally sensitive area or a potential hazardous area when, in the opinion of the Supervisor on the scene, such action is necessary to protect the public interest.

Notifying Government Agencies

All oil spills will be reported to the following federal and state agencies:

Alaska State Department of Environmental Conservation
Alaska Pipeline Office (Federal)
Alaska Pipeline Coordinator's Office (State)
United States Coast Guard (Tidewater only)

Spills of 50 barrels or more from the pipeline and pipeline accidents will also be reported to the United States Department of Transportation, Office of Pipeline Safety.

Paragraph 400 gives details of reporting procedure.

Participation and Assistance

Alyeska Pipeline Service Company will encourage and participate in efforts to form cooperatives to which the proper government agency may direct requests for assistance in cleaning up oil spills of unidentified origin or those declared to be inadequately handled. This assistance may take the form of research and development, advisory and training activities, furnishing of equipment and materials, and actual cleanup of such spills.

Oil Spill Prevention

Prevention of oil spills is a prime objective in the design and operation of the Trans-Alaska Pipeline System. To assist in accomplishing this objective Alyeska personnel will periodically:

Review Operating Procedures—All pipeline-operating procedures will be critically reviewed with respect to the prevention of oil spills.

Conduct Inspection of Pipeline Facilities—All pipeline facilities will be inspected periodically to determine potential sources of oil spills and remedial measures to be taken when necessary.

Train Personnel—Pipeline and Terminal operating personnel will participate in formal training sessions to ensure complete familiarity with pipeline facilities, operating procedures, and contingency response procedures and equipment.

Design of New Facilities—Implementation of new facilities and improvement of existing facilities will be examined from an oil spill viewpoint.

103 CONCEPT OF PLAN

The Alyeska Oil Spill Contingency Plan consists of the General Provisions, Valdez Terminal Plan, Prince William Sound Plan and 12 Section Plans. These Section Plans delineate specific response actions for

spills detected between pump stations including Contingency Area Plans within each section which give response actions for pipeline spills within specific drainages. The Valdez Marine Terminal Plan delineates specific response actions for spills detected at the Valdez Terminal and/or Port Valdez. The Prince William Sound Plan delineates specific response actions for spills in Prince William Sound including Valdez Arm.

This manual covers the General Provisions common to each Section Plan, the Valdez Terminal Plan and the Prince William Sound Plan. The Section Plans contain specific information relevant to the individual Sections. A Section may contain one or more Contingency Area further divided into segments representative of specific drainage characteristics within the Contingency Area. The pump stations and any other permanently connected facility to the pipeline are also covered in the Section Plans. The Valdez Terminal Plan and Prince William Sound Plan contain specific information relevant to the areas covered in the individual plans.

Alyeska's Oil Spill Contingency Plan has been prepared for distribution to supervisory, operating, contractor and agency personnel. The Plan defines, as clearly as possible, specific immediate response actions to:

- Alert specific supervisory personnel assigned responsibility for actions.

- Initiate reconnaissance actions to determine the exact location and extent of the spill.

- Initiate control actions to minimize the spread of oil and to prevent oil from reaching sensitive areas.

- Initiate cleanup actions for recovery of oil in conjunction with containment action as required.

Preplanned responses covering certain reconnaissance, operational, control and support actions have been delineated in the individual plans to ensure immediate response to an oil spill. Figure 103-1 diagrams these actions and subsequent actions relative to a spill situation under the Section Plans. Figure 103-2 diagrams similar actions relative to a spill situation under the Valdez Terminal Plan and the Prince William Sound Plan. Although the immediate response actions are preplanned, they will always be subject to review and modification by the Senior on-scene person at the time of an actual oil spill. All actions taken, after the immediate response actions, are controlled by the judgment of the Senior on-scene person.

The spill situations involving the activation of Alyeska's Oil Spill Contingency Plan include:

- A report by Alyeska or contractor personnel of a visual sighting while conducting routine surveillance and/or maintenance.

- A confirmed visual sighting reported by third parties.

- A monitored indication of a loss of oil by the Valdez Operations Control Center.

- A monitored indication of a loss of oil by Alyeska operating personnel.

Specific containment instructions have been prepared for each plan. These are actions which will be taken by response personnel depending on the spill situation.

The Alyeska Oil Spill Coordinator and the field Superintendent involved will initiate additional assessment procedures, if necessary, to assist in determining the appropriate degree of response. The Alyeska Oil Spill Coordinator will call out additional Response, Advisory and Support Oil Spill Task Force members as needed to implement the various response actions. Field Superintendents are responsible for handling all Alyeska spills in their jurisdiction. All spills whether from the crude oil manifold piping, terminal, tankers or other sources (including fuel oil storage) will be handled under the appropriate Contingency Plan. For example, Alyeska spills along the construction pad or highway from other sources besides the pipeline will be handled under the appropriate Section Plan. In subsequent parts of this Plan, detailed procedures have been outlined for each of the response actions to be taken.

PI-25

TRANS ALASKA PIPELINE
PORT INFORMATION MANUAL

VALDEZ, ALASKA

ALYESKA PIPELINE SERVICE COMPANY
1835 South Bragaw Street
ANCHORAGE, ALASKA 99512

Acting as Agent for:
AMERADA HESS PIPELINE CORPORATION
ARCO PIPE LINE COMPANY
BP PIPELINES INC.
EXXON PIPELINE COMPANY

MOBIL ALASKA PIPELINE COMPANY
PHILLIPS PETROLEUM COMPANY
SHELL PIPE LINE COMPANY
UNION ALASKA PIPELINE COMPANY

NOTICE:

THIS DRAWING/DOCUMENT IS THE PROPERTY
OF THE OWNERS OF THE TRANS ALASKA
PIPELINE SYSTEM AND THE DRAWING/DOCU-
MENT AND INFORMATION CONTAINED SHALL
NOT BE DUPLICATED, USED OR DISCLOSED,
EXCEPT AS AUTHORIZED BY THE AGENT.
ALYESKA PIPELINE SERVICE COMPANY

EXHIBIT I

19.3 LOCAL POLLUTION LAWS VALDEZ CITY CODE

Chapter 11, Article II, Section 16 of the Valdez City Code contains the following prohibition:

"No owner, master or managing agent, or other person in charge of the operation of a boat or other vessel using the facilities of the Valdez Harbor, shall throw or otherwise cause to be deposited gasoline, oil, trash, garbage or refuse on any float or into the waters of the boat harbor." The penalty provisions for violation of the Valdez City Code include a fine of \$300 and/or imprisonment up to 30 days.

19.4 OIL SPILL NOTIFICATION

In the event of an oil spill, the procedure for notification as described in Section XVIII shall be followed. The Terminal has a Contingency Plan for oil spills that occur in Port Valdez and Prince William Sound. This plan will go into effect immediately when a spill occurs. A copy of the Port Valdez Plan is located in the berth operator's control room on each berth. An emergency procedures booklet will be issued by the Marine Supervisor when the vessel first calls at the Terminal.

19.5 TRANS-ALASKA PIPELINE LIABILITY FUND

For convenience a copy of Federal Statute (43 U.S.C. 1653(c)) creating the Trans-Alaska Liability Fund is set forth in Section 19.5.3.

19.5.1 Notice to Fund of Discharge

In addition to the other notices required in the event of an oil spill, in the event of a discharge of oil from a vessel which has been loaded at the Terminal with oil transported through the Trans-Alaska Pipeline, the vessel operator shall

Owners and Operators of Vessels Calling at Alyeska's Marine Terminal:

Enclosed with this letter is a copy of the Trans-Alaska Pipeline Port Information Manual (PI-25), second edition. Procedures and rules contained therein are effective November 1, 1988.

This manual is intended to acquaint Owners and Masters of vessels which may call at the Valdez Marine Terminal with general port conditions, terminal facilities, terminal rules and regulations, and some of the applicable laws and regulations which pertain to the Trans-Alaska Pipeline system and the Port of Valdez. The procedures and rules contained in this manual do not relieve the owners or masters of vessels from any other legal obligations.

Listed below is a summary of significant additions or revisions to the old manual. This summary is provided for your convenience, but is not intended to modify or amend actual language in the Port Information Manual.

Operational Requirements: Pg. 7

Vessels shall provide to Alyeska's Marine Superintendent a copy of their oil spill contingency plans for Port Valdez, Valdez Arm and Prince William Sound.

Berthing and Unberthing: Pg. 23

Mooring requirements have been modified to allow vessels capable of an all wire mooring, of at least 12 winch mounted wires, to use this alternative.

Vessels with less than 12 winch mounted wires, are required to moor with a minimum of 16 lines. "Mixed" moorings shall be avoided.

Oil Spill Responsibility: Pg. 53; Appendix C and D (pgs. 71 & 73)

The Port Information Manual clarifies the responsibility of vessels for oil spills:

- As stated in the Preface, the Port Information Manual establishes contractual terms and conditions that vessels accept by calling at the Valdez Marine Terminal.
- Except to the extent a spill is caused by Alyeska, vessels are strictly liable to Alyeska for their spills.
- Vessels must indemnify Alyeska for all cleanup costs of spills from vessels, except those costs caused by Alyeska's gross negligence or willful misconduct during cleanup.
- Vessels agree to arbitrate disputed claims.

Comments concerning this manual are welcomed and may be directed to:

Alyeska Pipeline Service Company
P.O. Box 300
Valdez, Alaska 99686
ATTN: Marine Manager

This manual will be updated as necessary to reflect changes in Terminal practices and rules.

Sincerely,

C. F. O'Donnell

C. F. O'Donnell
Alyeska Terminal Superintendent

EXHIBIT J

Pollution Discharges

Reference in this section of the Valdez Port Information Manual to "pollution discharges" applies to all pollution discharges from any vessel in the TAPS trade in the waters of Port Valdez, the Valdez Arm, and Prince William Sound, including, but not limited to oil and other hydrocarbon spills, from, or caused by, such vessel.

Alyeska's Oil Spill Contingency Plan describes how Alyeska will respond to pollution discharges. Copies of the plan are located in the Emergency Center of the Valdez Marine Terminal.

A Tanker Handbook For Vessels In Trade With Alyeska Pipeline Service Company describing emergency procedures is provided in Appendix C on page 71.

This section of the Valdez Port Information Manual describes in general terms Alyeska's response to pollution discharges and a vessel's responsibility to cooperate with, and pay for, Alyeska's efforts.

Notification

Whenever there is a pollution discharge, the vessel shall take all steps necessary to stop the discharge and shall immediately notify Alyeska of the discharge. The vessel shall follow the notification procedure in the Tanker Handbook For Vessels In Trade With Alyeska Pipeline Service Company found in Appendix C.

If Alyeska detects a discharge before a vessel discovers it, Alyeska shall notify the vessel of the incident.

Cleanup of Discharge

In response to a discharge, Alyeska shall immediately act to:

- Stop the discharge.
- Contain the pollutants.
- Remove the pollutants from the environment.
- Dispose of the pollutants.

The vessel shall fully cooperate with Alyeska's efforts and shall comply with all reasonable requests by Alyeska for purposes of responding to the discharge. Vessels calling at the terminal will use all possible measures to prevent pollution discharges, and in the event a discharge does occur, shall make every effort to contain the discharge on or in the vessel and prevent its entry into the waters of Port Valdez, Valdez Arm and Prince William Sound.

Discharge of Pollutants: Liability

A vessel discharging pollutants, or causing the discharge of pollutants from another source, shall be strictly liable, without regard to fault, to Alyeska for all damages to Alyeska caused by the discharge, including, but not limited to, Alyeska's costs to clean up the discharge. If the vessel can show that a discharge of pollutants was caused by Alyeska's negligence or willful

misconduct, the vessel's liability to Alyeska shall be reduced to the extent of Alyeska's percentage of fault in causing the discharge.

Cleanup Costs: Indemnity

Subject to the preceding limitation on liability, to the extent a vessel discharges pollutants, or causes the discharge of pollutants from another source, the vessel shall:

- Indemnify and hold Alyeska harmless from all claims, damages and costs of defending or recovering claims, and
- Reimburse Alyeska for all costs incurred in response to the discharge, except those costs that result from Alyeska's wanton or wilful misconduct during its cleanup response. "Costs" shall include pre and post award interest at an annual rate equal to the prime rate of interest announced by the First National Bank of Anchorage, which is based on New York prime interest rate, plus one percent, adjusted as changes are announced in that prime rate, unless modified by an arbitration award consistent with sections 6 or 10 of the Rules Of Arbitration For Vessels In Trade With Alyeska Pipeline Service Company, a copy of which is provided in Appendix D on Page 73.

Payment of Costs

After Alyeska has determined the costs resulting from a pollution discharge, Alyeska shall submit a Claim for Payment to the vessel causing the

discharge. At its option, Alyeska may make interim Claims for Payment. The vessel shall make payment within sixty (60) days of receipt of Alyeska's Claim for Payment.

Failure to Pay - Refusal to Dock

If the vessel fails to pay a Claim for Payment within sixty (60) days after its receipt, Alyeska shall notify the vessel that it may not call again at the Valdez Marine Terminal until:

- Full payment is made or
- Arbitration is initiated and the vessel has paid the undisputed amount of the claim and has posted either a bond or an acceptable letter of undertaking in twice the amount of the disputed claim.

Arbitration Procedure

Alyeska and each vessel calling at the Valdez Marine Terminal agree that their sole remedy to resolve their respective liabilities arising out of a pollution discharge shall be binding arbitration pursuant to the Federal Arbitration Act, 9 USC § 1 *et seq.* and as set forth herein.

Any controversy or claim between Alyeska and such vessel arising out of or relating to a pollution discharge shall be resolved by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, as modified in the Rules Of Arbitration For Vessels In Trade with Alyeska Pipeline Service Company, published by Alyeska and provided to all vessels. See Appendix D, Page 73.

Judgment the award may be District other courts are four Marine to the panel a United such vessel withdra Marine

Further refuse the Val Alyeska initiate being circum

ie. At its option, Alyeska may
erim Claims for Payment. The
hall make payment within sixty
s of receipt of Alyeska's Claim
ment.

to Pay - Refusal to Dock

essel fails to pay a Claim for
t within sixty (60) days after its
Alyeska shall notify the vessel
ay not call again at the Valdez
Terminal until:

payment is made or

tration is initiated and the vessel
paid the undisputed amount of
claim and has posted either a
d of an acceptable letter of
ertaking in twice the amount of
disputed claim.

ation Procedure

and each vessel calling at the
Marine Terminal agree that their
medy to resolve their respective
es arising out of a pollution
ge shall be binding arbitration
ent to the Federal Arbitration Act, 9
1 *et seq.* and as set forth herein.

ontroversy or claim between
a and such vessel arising out of
ting to a pollution discharge shall
olved by arbitration in accordance
ie Commercial Arbitration Rules of
merican Arbitration Association, as
ed in the Rules Of Arbitration
essels In Trade with Alyeska
ne Service Company, published
eska and provided to all vessels.
ppendix D, Page 73.

Judgment, including maritime liens, on
the award rendered by the arbitrator(s)
may be entered in the United States
District Court, District of Alaska, or any
other court where the vessel or parties
are found. By calling at the Valdez
Marine Terminal, each vessel consents
to the jurisdiction of an arbitration
panel as described herein, and of the
United States District Court, even if
such vessel subsequently is barred or
withdraws from calling at the Valdez
Marine Terminal.

Further, Alyeska reserves the right to
refuse the vessel permission to call at
the Valdez Marine Terminal if, in
Alyeska's sole judgment, any arbitration
initiated pursuant to this section is not
being conducted as expeditiously as
circumstances permit.

Right to Initiate Arbitration

If a vessel wishes to contest Alyeska's
Claim for Payment, within 60 days of
receipt of the claim, it shall notify
Alyeska of the reasons it disputes the
claim, pay the undisputed amount of the
claim, post either a bond or an
acceptable letter of undertaking in twice
the amount of the disputed claim and
initiate an arbitration proceeding to
resolve the dispute. If the vessel fails to
satisfy each of these requirements,
Alyeska may initiate arbitration to
recover its Claim for Payment. If the
vessel fails to pay the undisputed
amount of the claim and to post a bond
or an acceptable letter of undertaking in
twice the amount of the disputed claim,
Alyeska may apply for arrest of the
vessel in any jurisdiction where it is
found, and may bar the vessel from
calling at the Valdez Marine Terminal
until the matter is resolved.

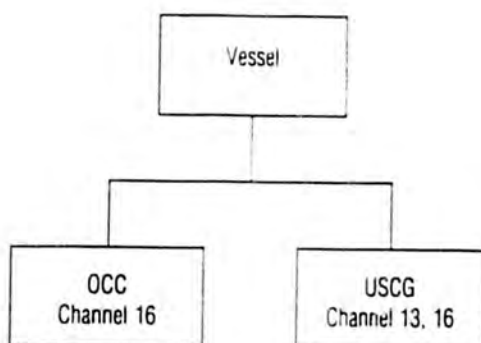
*NOTE: A copy of Alyeska's Rules Of
Arbitration For Vessels In Trade With
Alyeska Pipeline Service Company is
provided in Appendix D on page 73.*

Tanker Handbook

For Vessels in
Trade with
Alyeska Pipeline
Service Company

• Alyeska pipeline

Emergency Contact



Introduction

Alyeska Pipeline Service Company has prepared an Oil Spill Contingency Plan for response to crude oil discharges in the Prince William Sound and Port Valdez. This plan is designed to fully comply with the National Oil and Hazardous Substance Pollution Contingency Plan, and the State of Alaska Regulations. Copies of this plan are maintained at the Emergency Center at the Valdez Terminal.

The intent of this handbook is to provide a mechanism, for vessels in trade with Alyeska's Valdez Terminal, to activate Alyeska's Oil Spill Contingency Plan.

The response organization for Prince William Sound and Port Valdez is staffed by Alyeska operations and maintenance personnel assigned to the Valdez Terminal.

The US Coast Guard and the Alaska Department of Environmental Conservation are to be allowed access to vessels and berths at all times.

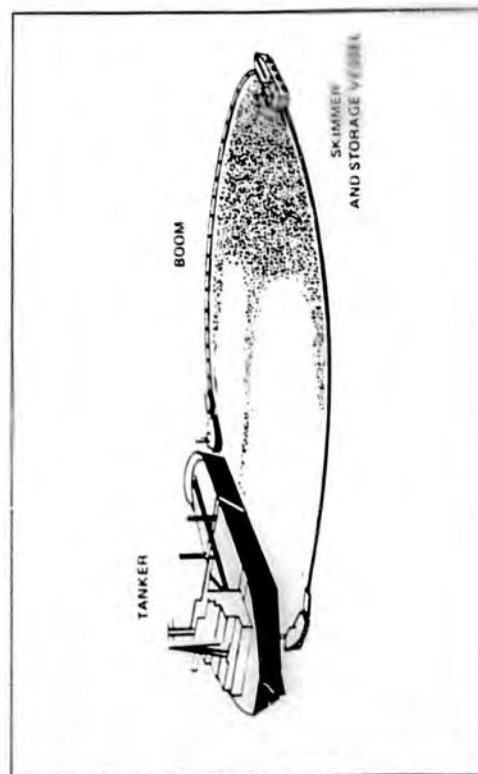
The Alyeska Terminal Superintendent is in charge of all emergencies.

Response Actions

The Alyeska Marine Terminal Superintendent is in charge of all emergencies. In his absence, during normal working hours, the designated superintendent-in-charge will be responsible for all emergencies. At night, on weekends and holidays, the marine shift supervisor will be in charge and responsible for all emergencies.

Upon notification and advice of the spill details, the Alyeska Director of Marine Operations and the Terminal Superintendent (or their delegates) will decide what response equipment will be dispatched. The particular conditions will dictate method of deployment of this equipment. Alyeska maintains an inventory of oil spill containment and recovery equipment at the terminal site. A permanently assigned oil spill cleanup crew is available for immediate response. The vessel should be prepared to assist with lines, hoses, or any other equipment that may be utilized.

Cleanup operations will continue until Federal, State, and Alyeska personnel agree that the effort is complete.



Skimming Contained Oil At Tanker

Tanker Lightering

Lightering may be necessary as part of terminal operations or in response to a spill from a distressed tanker. When a lightering operation is necessary, follow these guidelines:

- In Prince William Sound, the Terminal Superintendent will direct the ship to a US Coast Guard designated anchorage after discussions with the Federal on-scene coordinator (Primary designated anchorage is Knowles Head, however the Coast Guard may designate an alternate area during an emergency).
- The ship to be lightered will install fenders before the lighter ties alongside.
- The Alyeska Director of Marine Operations, US Coast Guard, Alaska Department of Environmental Conservation, and the ship's officers will hold a meeting to discuss the cargo transfer.
- The same precautions and safety regulations that apply to cargo transfer at a berth will be followed.
- The transfer rate will be regulated by the lightering vessel.

- The Alyeska Director of Marine Operations will observe all lightering operations.
- Boom and skimming equipment will be deployed at the lightering vessel and maintained.

Two portable lightering systems, dunlop fenders and a 5300 barrel barge are available at the terminal for emergency lightering operations. Another tanker may be used as the lightering vessel.

In Port Valdez

When a tanker experiences a spill within Port Valdez, lightering may be necessary to minimize the spill size. If the lightering is necessary, the guidelines previously mentioned for lightering in Prince William Sound (with the exception of designated anchorage area) will be followed. Under certain circumstances, it may not be desirable to proceed to a loading berth. The vessel should not move unless directed to by the US Coast Guard and the Terminal Superintendent. Their decision will be discussed with the Alaska Department of Environmental Conservation.

**Trans-Alaska Pipeline System
Valdez Terminal
Oil Spill Contingency Plan**

Document Number CP-35-2 - Second Edition

June 1, 1991

Alyeska Pipeline Service Company
1835 South Bragaw Street
Anchorage, Alaska 99512

Acting as agent for:

Amerada Hess Pipeline Corporation	Mobil Alaska Pipeline Company
ARCO Transportation Alaska, Inc.	Phillips Alaska Pipeline Corporation
BP Pipelines (Alaska) Inc.	Unocal Pipeline Company
Exxon Pipeline Company	

Notice:

This drawing/document is the property of the owners of the Trans-Alaska Pipeline System and the drawing/document and information contained shall not be duplicated, used, or disclosed, except as authorized by the agent, Alyeska Pipeline Service Company.

EXHIBIT K

Second Edition - Revision 0

© Copyright Alyeska Pipeline Service Company 1991

Contents

Valdez Terminal Oil Spill Contingency Plan	1
1.0 Introduction	3
1.1 Purpose and Scope	3
1.2 Summary	3
1.3 Relationship of The Valdez Terminal Oil Spill Contingency Plan to The Pipeline Oil Spill Contingency Plan	4
1.4 Relationship of The Valdez Terminal Oil Spill Contingency Plan to the Prince William Sound Tanker Spill Prevention and Response Plan	6
1.5 Acronyms	6
2.0 Spill Prevention	9
2.1 Introduction	9
2.2 Secondary Containment and Drainage	9
2.3 Additional Oil Spill Prevention Equipment and Procedures	13
2.4 Tank Design Descriptions	14
2.4.1 Crude Oil and Product Tanks	14
2.4.2 Biological Treatment Tanks (BWT)	14
2.5 Pipe Integrity	15
2.6 Spill Prevention at Berths	16
2.7 Personnel Training and Procedures	16
2.8 Security	16
2.9 Radio Communications	17
2.10 Tanker Emergency Towing Equipment	17
2.11 Drug and Alcohol Screening	17
3.0 Response Organization	19
3.1 Introduction	19
3.2 Pre-Spill Planning Organization	19
3.3 Crisis Management Team (CMT)	20
3.4 Examples of CMT Organization	20
3.4.1 CMT for Initial Response	21
3.4.2 CMT for a Land or Marine Spill, Level I	21
3.4.3 CMT for a Controversial Land or Marine Spill, Level II	21
3.5 CMT Responsibilities	21
3.5.1 Incident Commander	25
3.5.2 Terminal Oil Spill Coordinator	26
3.5.3 Legal Officer	27
3.5.4 Safety Officer	27
3.5.5 Public Information Officer	28
3.5.6 Liaison Officer	29
3.5.7 Security Officer	31
3.5.8 Operations Section Chief	32
3.5.9 Planning Section Chief	37
3.5.10 Logistics Section Chief	43
3.5.11 Finance Section Chief	51
4.0 Notification	57
4.1 General	57
4.2 Initial Spill Reporting	57

4.3	Terminal Controller	57
4.4	Terminal Manager	58
4.5	SERVS Manager	58
4.6	Emergency Notification Methods	58
4.7	Valdez Terminal Emergency Center	58
4.8	Notification of Government Agencies	58
4.9	Oil Spill Notification and Reporting Procedure	59
4.9.1	Oil Discharges On Land Only of Less Than 10 Gallons	59
4.9.2	Oil Discharges On Land of 10 Gallons or Greater, Any Oil Discharges On Water, and Hazardous Substance Discharges of Any Quantity on Land or Water	59
5.0	Response Strategies	61
5.1	Introduction	61
5.2	Assessment Actions	61
5.2.1	STEP 1 - Account for All Personnel and Ensure Their Safety	61
5.2.2	STEP 2 - Determine and Control the Source of the Spill	62
5.2.3	STEP 3 - Determine the Quantity of Oil Spilled and the Location(s) of the Impacted Area(s)	63
5.3	Response Resources and Strategies	63
5.3.1	Marine Oil Spills	65
5.3.2	Land Oil Spills	73
6.0	Equipment	83
6.1	Introduction	83
6.2	Vessel List	83
6.3	Self Propelled Skimmer List	83
6.4	Equipment List	84
6.5	Storage Locations	86
6.6	Equipment Specifications	86
7.0	Communications	87
7.1	Introduction	87
7.2	Description of Communications Systems and Equipment	87
7.3	Radio Communications Capabilities	91
7.3.1	Communications Consoles	91
7.3.2	Base Station Facilities	93
7.3.3	Mobile Facilities	95
7.3.4	Telephone Communications Capabilities	95
7.3.5	Data Communications Networks	98
7.3.6	Video Communications Capabilities	98
7.3.7	Supplementary Communications for Sustained Response	98
7.3.8	Logistics	98
8.0	Safety and Health Plan	99
8.1	Purpose	99
8.2	Scope	99
8.3	Implementation	99
8.4	Site Characterization	100
8.5	Safety and Health Considerations	100
8.6	Personnel Training	103
8.7	Hazard Communication	103
8.8	Emergency Contingency Planning	103
8.9	Industrial Hygiene and Monitoring Program	104

needed for a Terminal spill may be brought in as an On-land Division or Marine Group, reporting to the Terminal Operations Section Chief.

1.4 Relationship of The Valdez Terminal Oil Spill Contingency Plan to the Prince William Sound Tanker Spill Prevention and Response Plan

The *Valdez Terminal Oil Spill Contingency Plan* addresses Alyeska's spill response on both land and water for spills originating from Terminal facilities, or small spills from tankers.

Alyeska has also established the Ship Escort/Response Vessel System (SERVS) to support and escort tanker traffic in and out of Port Valdez. The SERVS base was established as a part of the *Prince William Sound Tanker Spill Prevention and Response Plan* (PWS Plan). SERVS resources are dedicated to Alyeska's role as an initial response contractor in responding to tanker spills in Prince William Sound. The response organization for marine spills from tankers in the Sound is described and discussed in the PWS Plan. The PWS Plan also covers spills from tankers transiting Port Valdez.

Response to spills from tankers berthed at the Terminal is described in the *Valdez Terminal Oil Spill Contingency Plan*. Although a spill from a tanker is not the responsibility of Alyeska, Alyeska will provide oil spill response for a discharge from the tanker while it is berthed. Costs incurred in providing this response and cleanup are billed to the spiller.

Alyeska's spill response organization (CMT) for both the PWS Plan and VMT Plan is based on ICS principles. For a Terminal spill, the Terminal Operations Section Chief directs the response operation, and any SERVS resources needed are brought in as a Marine Group, supervised by SERVS personnel, reporting to the Terminal Operations Section Chief.

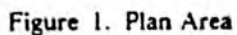
Similarly, for a spill in Port Valdez (not at the berth) that is under the scope of the PWS Plan, the Operations Section Chief is the SERVS Manager. If specialized equipment from the Terminal is required, these Terminal resources would be brought in as Marine Group, supervised by Terminal personnel, reporting to the SERVS (PWS) Operations Section Chief.

Under certain circumstances SERVS will provide initial response to major discharges from tankers berthed at the Terminal, in accordance with the PWS Plan. The PWS Plan covers such discharges that threaten to progress into Prince William Sound. If the Incident Commander determines that a spill from a tanker berthed at the Terminal is so large or that other conditions are so adverse that the spill threatens Prince William Sound, response activities will fall within the scope of the Prince William Sound Plan. In that event, SERVS will act as a spill response contractor to the vessel's owners/operators/charterers, and provide the response services described in the PWS Plan.

1.5 Acronyms

The following acronyms are used throughout this Plan:

- ADEC - Alaska Department of Environmental Conservation
- ADNR - Alaska Department of Natural Resources
- AEC - Anchorage Emergency Center
- ARTS - Alyeska Radio Telephone System



Alyeska pipeline
SERVICE COMPANY

1635 SOUTH BRADAW STREET, ANCHORAGE, ALASKA 99512. TELEPHONE (907) 278-1811. TELEX 200 25

November 20, 1991

BY FACSIMILE

Deborah Vogt, Esq.
P.O. Box 1065
Juneau, Alaska 99802

Re: Alyeska Oil Spill Response Services in
Prince William Sound

Dear Ms. Vogt:

Mike Williams has asked me to reply to your October 30, 1991 inquiry about Alyeska's authority to require "contracting vessels" to demonstrate its capability to hold Alyeska harmless from certain potential liabilities associated with initial oil spill response in Prince William Sound. You also have asked whether Alyeska pays oil and gas property tax on its oil spill response equipment.

**Alyeska Oil Spill Response Services Agreement:
Requirements for Financial Responsibility or Insurance**

As a Response Action Contractor, Alyeska provides oil spill prevention and initial response services to TAPS trade vessels in Prince William Sound. To establish a contract for these services, Alyeska uses an Oil Spill Response Services Agreement with entities ("Contracting Vessels") that either own, charter or operate those vessels. Those Agreements require Contracting Vessels to demonstrate their capability to meet contractual obligations by meeting financial responsibility or insurance requirements described in the Agreements. You have asked what authority allows Alyeska to impose those requirements on Contracting Vessels.

The Trans Alaska Pipeline System is owned by seven common carrier oil pipeline companies. Interstate transportation of petroleum by the carriers is regulated by the Federal Energy Regulatory Commission, and intrastate transportation of petroleum by the Alaska Public Utilities Commission. Alyeska Pipeline Service Company operates TAPS as the carriers' agent. Each TAPS carrier through its tariffs offers to transport a shipper's (i.e. a customer's) petroleum from origins on TAPS to destinations on TAPS, and if the destination is Valdez, to load it on board vessels furnished by the shipper.

EXHIBIT L

Deborah Vogt, Esq.
November 20, 1991
Page 2

No carrier ever owns the petroleum carried in its space on TAPS. It merely provides transportation service for petroleum owned by others. All shipments on a carrier's space in TAPS are upon the terms and conditions and for the prices set out in the carrier's tariffs. A shipper accepts a carrier's offer by tendering petroleum to the carrier in accordance with the carrier's tariff requirements. A contract then exists between the shipper and the carrier for the carriage of petroleum from an origin on TAPS to a destination on TAPS. The carrier undertakes no obligation in its tariffs for the transportation of petroleum after it leaves TAPS.

Thus, under each TAPS carrier's tariffs, the shipper is responsible for its petroleum after it is loaded on board a vessel at Valdez and has the responsibility to furnish a vessel to carry the petroleum by water from Valdez to the petroleum's next destination.

The State of Alaska requires each vessel furnished by the shipper to have an oil spill response contingency plan, which must provide, among other things, for personnel and equipment to escort the shipper's vessels and to respond to a spill in Prince William Sound within a short period of time. Since no one else has stepped forward to offer vessel escort service and initial spill response in Prince William Sound, Alyeska has done so. Nothing prevents others from competing with Alyeska to provide these services. While there has been some debate as to whether, with respect to furnishing these services, Alyeska (a) is obligated under Alaska statute or the federal and state right-of-way grants, or (b) has volunteered (Alyeska believes it is a volunteer), there has never been any suggestion that the services are being furnished pursuant to any common carrier obligations of the TAPS carriers or their agent Alyeska. Thus the Agreement requirements, like all aspects of the response action contract, are strictly a matter of commercial contract. Alyeska needs no authority from any regulatory statute or regulatory agency to require financial responsibility or insurance in conjunction with the provision of response action contractor services.

As we discussed yesterday, the TAPS carriers include the costs of Alyeska's Prince William Sound effort in tariff charges for oil delivered to Valdez. This equitably distributes the costs of those services among their beneficiaries.

I also described to you Alyeska's reliance on its Prince William Sound capabilities to meet oil spill response planning standards imposed by AS 46.03.040 on the Valdez

Deborah Vogt, Esq.
November 20, 1991
Page 3

Marine Terminal. Meeting these requirements is a part of the TAPS Owners' common carrier obligations.

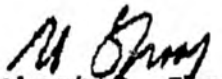
Oil and Gas Property Tax

Alyeska owns a large amount of oil spill response equipment, intended for use in Prince William Sound, at the Valdez Marine Terminal and along the pipeline. Alyeska pays the state's oil and gas property tax levied on that equipment.

Alyeska does not pay the state tax on marine vessels that it charters from various companies to assist spill prevention and response in Prince William Sound and Port Valdez.

Please call me at (907) 265-8565 if I can be of further assistance.

Sincerely yours,


Robert I. Shoaf
Assistant General Counsel

smk

cc: M.F.G. Williams

STATE OF ALASKA'S
PARTICIPATION IN
SPILL RESPONSE

AND PREPAREDNESS
IN THE STATE

THE STATE OF ALASKA'S PARTICIPATION
IN SPILL RESPONSE AND PREPAREDNESS IN THE STATE

Prepared by:
Deborah Vogt
Attorney at Law
Juneau, Alaska

Prepared for:
Citizens Oversight Council
on Oil and Other Hazardous
Wastes

This report summarizes the indirect expenditures that the State of Alaska is currently making for oil spill response and preparedness in the state. The primary expenditure that the state makes is the loss in wellhead value -- and therefore in state royalties and severance taxes -- incurred when spill response expenditures are included in the transportation costs used to arrive at wellhead value. The summary does NOT include direct budget expenditures such as those incurred by the Department of Environmental Conservation for contingency plan development and review.

I. THE STATE'S ROLE IN CRUDE OIL PRODUCTION AND TRANSPORTATION IN ALASKA

The State of Alaska occupies two distinct roles with respect to oil production. On the one hand, the state is unique among oil producing states in that it is the owner of almost all of the land from which oil currently is produced. The state's role as landowner is a proprietary role. The state is in the same position as would be any private entity that owned the land. It is through this proprietary interest that the state retains a royalty interest in oil produced from leases on state land.

On the other hand, Alaska, like every other oil producing state, exercises sovereign power over activity within the borders of the state. It is through this sovereign power that the state levies taxes, like the severance tax, and exercises regulatory control, like requiring contingency plans, over activities.

Because almost all oil production in Alaska has been from state leases, the state's sovereign interest and its proprietary interest are often considered together and, as a result, confused. But the powers, rights and responsibilities flowing from these two roles are very different. If oil development occurs on federal lands, such as in the Arctic National Wildlife Refuge, Alaska may see the first significant production within its borders in which the state does not have a proprietary interest.¹ Thus, it is important to understand and consider the differences between the two roles.

A. The State's Proprietary Interest in Oil Production.

Oil and gas leases on state lands -- like virtually all oil leases in the United States on public or private land -- are written to include a royalty obligation to compensate the landowner for its ownership. Royalty obligations vary on different leases; the state has generally offered its leases on a straight percentage of the oil produced, but has occasionally leased oil on a net

¹The land in the Refuge is federally owned. Under current law, the federal government would be required to share royalties from production on federal leases within the Refuge with 90% going to Alaska and the federal government retaining 10%. Thus, if the federal leases provide for a 12.5% royalty, the state's share would be 11.25%. However, Congressional proposals to open the Refuge to leasing have considered changing or eliminating this split.

profit share basis. Table I sets out the royalty obligation for the oil fields in Alaska, and the amount of production from each field. As can be seen from the table, almost of the oil currently being produced in Alaska carries a 12.5% royalty obligation. Two producing fields in Cook Inlet are on federal leases; federal law provides that the state receive 90% of the 12.5% royalty on these leases. At Milne Point, on the North Slope, most of the leases carry a 20% royalty, as do some leases at Endicott.²

The state's role as landowner on state leases is exactly the same as it would be if the state were a private party. The state enjoys no particular advantage over private parties in the same position. Thus, when the state litigates over royalty obligations, it is a contractual dispute in which the state enjoys no presumptions in its favor.

Table I shows that the total annual production of oil in Alaska in 1990 was 647.3 million barrels. The state's average royalty percentage of this oil is 12.7%. Thus, 82.21 million barrels produced in 1990 belonged to the state as royalty owner. The state may take its royalty oil "in kind" or "in value". That is, the state may take possession of the actual barrels of oil and dispose of them itself, or it may require the producer to pay the state the value of the royalty oil. The state takes almost all of its oil in value, but does take some in kind, which it sells to

²Approximately 80% of the oil produced at Milne Point carries a 20% royalty obligation. The remainder carries a 12.5% obligation. The average royalty at Milne Point is 18.3%. At Endicott, about 25% of the oil carries a 20% royalty, with the remainder at 12.5%; the average royalty is 14.4%.

local refineries. When the state does take its royalty in kind, its actual physical possession of the barrels exists for only an instant. When oil is produced, it is assumed that the royalty obligation will be satisfied in value. Thus, if a producer produces 100 barrels, theoretically all of the 100 barrels "belong" to the producer, but each barrel is encumbered by a 12.5% value obligation to the state. If the state then notifies the producer that it will take certain of its royalty barrels in kind, it does so only after having arranged for the disposal of those barrels. The state takes possession of the barrels at the lease automatic custody transfer (LACT) meter; it simultaneously transfers the oil to the royalty purchaser at that moment. Thus, the state is never in actual physical possession of the oil, so as to expose the state to liability if the oil spilled.

Even though the state never actually physically possesses royalty oil, the state's royalty interest places it in substantially the same position as any other producer of oil. Policy makers may want to consider the state's ownership of this oil when reviewing the impacts on state revenue of spill prevention expenses. It may be seen as appropriate that the state absorb the costs associated with spill preparedness commensurate with its ownership interest.

B. The State's Sovereign Interest in Oil Production.

The state is exercising its sovereign powers when it taxes and regulates oil production and transportation activities in the state. This power extends to the borders of the state,

regardless of the status of land ownership. Thus, oil produced from federal or private lands within the state is taxed the same as oil produced from state lands.³ Similarly, the state may exercise its police power to regulate all oil activities within the state, regardless of ownership. However, offshore oil produced outside the three mile limit is not subject to the state's sovereign power to tax or to regulate, except as offshore activities have near shore or onshore impacts.

The taxes applicable to oil activities in the state are:

1) the Oil and Gas Properties Production Tax (AS 43.55) (the severance tax) which includes the Conservation Surcharge; 2) the Oil and Gas Conservation Tax (AS 43.57); 3) the Corporate Income Tax (AS 43.20); and 4) the Oil and Gas Properties and Pipeline Transportation Property Tax (AS 43.56).

1. The Oil and Gas Properties Production Tax (AS 43.55).

Alaska's production tax, or severance tax, is levied on value at the point of production.⁴ For most fields, the nominal tax is 15% of value.⁵ This nominal rate is reduced by the Economic Limit Factor (ELF), which is a formula that is sensitive to well and

³On federal leases, the state taxes the oil produced by the private leaseholder. It may not, of course, tax the federal royalty.

⁴ The severance tax has a cents-per-barrel "floor" that becomes the tax if it exceeds the percent of value amount. The cents-per-barrel tax is also subject to the ELF. However, prices have never fallen to the point that the cents-per-barrel alternative was used, although they approached the point in 1986.

⁵ The nominal rate is 12.5% in a new field for the first five years.

field productivity. The higher the field productivity the closer the severance tax approaches the nominal rate of 15%. The actual severance tax rate for oil producing fields in Alaska is set out in Table I. This rate is levied against the non-royalty production in the field. In 1990, oil and gas producers paid \$972.3 million in severance taxes. State Department of Revenue, "Revenue Sources Book" Spring 1991, p. 50 (hereafter, Revenue Sources Book).

The severance tax includes a "conservation surcharge" of \$.05 cents per barrel on the same barrels taxed by the severance tax. AS 43.55.200. The legislature may appropriate the proceeds of the surcharge to the Oil and Hazardous Substance Release Fund; if the amount in the fund exceeds \$50 million, the surcharge is suspended. AS 43.55.210-240. Since its inception in 1989, the surcharge has not been suspended. In 1990, oil and gas producers paid \$26.9 million under this tax. Id.

2. The Oil and Gas Conservation Tax (AS 43.57). The conservation tax is 4 mills (\$.004/bbl) on the same production taxed under the severance tax. Conceptually, the tax pays for the Alaska Oil and Gas Conservation Commission. In 1990, \$2.4 million was collected under this tax from oil and gas producers. Id.

3. The Corporate Income Tax (AS 43.20). The corporate income tax rate is 9.4% for income above the threshold level of \$90,000. Every corporation organized for profit in the state is subject to the tax. Corporations that do business in more than one taxing jurisdiction apportion their income to Alaska for tax purposes by use of the apportionment formula set out in AS 43.19 (the

Multistate Tax Compact). An apportionment formula estimates in-state income by starting with the entity's overall income, and then apportioning a part of that income to the state through the use of formula indicators of business activity (such as payroll, property and sales). Overall income is multiplied by the average percentage of the factors in the state to arrive at taxable state income. Corporations engaged in the production or pipeline transportation of oil use a special formula set out in AS 43.20.072.

Spill prevention and response expenditures are deducted from gross income by every entity that incurs them, if that entity is organized for profit. However, calculating the impact of these deductions on state revenue cannot be done without access to the confidential tax returns of the taxpayers. This is because the use of apportionment formulas makes the relationship between expenditures and impact indirect. If a corporation does business only in Alaska, and deducts a spill related expense, then the revenue impact is simply 9.4% times the amount of the deduction. But most corporations, especially oil companies, do business in many jurisdictions. The spill expense is then deducted from worldwide income, and a fraction of that income is apportioned to Alaska.⁶ Depending upon the magnitude of the corporation's out-of-state activities, the impact of the deduction is diluted to a greater or lesser degree. (At the same time, spill related expenditures in other jurisdictions reduce income tax collections

⁶ In 1991, the legislature repealed "worldwide unitary" apportionment for most taxpayers. HB 12. However, it retained the worldwide unitary approach for oil and gas taxpayers.

in Alaska.) An accurate analysis, or even a rough estimate, of impact cannot be done without access to tax returns.

For this reason, income tax impacts are not analyzed in this report. However, unlike the wellhead value reductions in severance taxes and royalties which reflect only spill expenditures in certain areas of the state, income tax deductions are taken everywhere that they occur. Thus, while Alyeska's expenditures impact severance taxes and royalties and Tesoro's expenditures do not, the expenditures of both Alyeska and Tesoro impact income taxes. Corporate income taxes collected from oil and gas taxpayers in 1990 were \$117.2 million. Revenue Sources Book at 50.

4. The Oil and Gas Production and Pipeline Transportation Property Tax (AS 43.56). The oil and gas property tax is a 20 mill tax levied on the "hardware" associated with oil and gas production and pipeline transportation. Although the tax is a state tax, municipalities are permitted, with certain restrictions, to levy property taxes on the same property. Taxpayer payments to a municipality are a credit against the state tax.

Oil spill equipment that is associated with production or pipeline transportation activities is taxed under this law. Thus, Alyeska's expenditures for pipeline and terminal spill protection are presumable taxed, as are the North Slope producers' expenditures, including those of Alaska Clean Seas. However, because of the set-off provision for municipal taxes, the state receives only a small portion of the revenue produced by this tax. While it would appear at first glance that the state should see

increased revenue as a result of a property tax on pollution equipment, in fact, as described below, the revenue effects can be negative. The state collected \$89.8 million from this tax in 1990. Id.

II. THE NET-BACK METHODOLOGY AND STATE REVENUES

An Alaska oil producer's liability for both the state's severance tax (the Oil and Gas Properties Production Tax (AS 43.55) and the state's royalty is based on the value of the oil at the point of production. Because most Alaska oil is not sold at the point of production, a "net-back" methodology is used to establish this value. Sales in the lower 48 states are netted back to the wellhead by deducting the costs of transporting the oil between Alaska and the market. This calculation generates a value at the point of production. Those sales that are made at the wellhead or elsewhere in Alaska are generally valued by reference to the price received for the oil sold in the lower 48 states.

Use of this methodology means that there is a direct relationship between transportation expenditures (including spill prevention and response expenses) and wellhead value. The revenue effect of transportation expenditures for Alaska North Slope crude (ANS) is approximately 25%. That is, for every \$1.00 deducted by a producer as a transportation cost, state revenues from severance taxes and royalties are reduced by \$.25.⁷ Thus, if spill response equipment and operating expenses are included in the costs of transporting oil, state revenues are reduced accordingly, and the

⁷ Horst (see note 9, post), Table 2, line 36.

state is, in effect, paying 25% of these costs.

A. What goes into the net-back.

Several categories of spill-related expenditures affect well-head value. These include:

1. Conservation Surcharge payments by producers. Department of Natural Resources and industry sources indicate that at least some producers deduct the \$.05/barrel tax in calculating royalty and severance tax liability. If this deduction is uniformly claimed throughout the industry, then the net surcharge is really only \$.0375 per barrel instead of \$.05. Since collections under this tax in 1990 were \$26.9 million, the wellhead revenue impact could be as high as \$6.7 million. It is not clear why this tax is viewed as a transportation charge to be used in the net-back.

2. MPA/MSRC. The Marine Preservation Association (MPA) is a voluntary association of oil companies that assesses dues based on oil transported in the United States. The MPA makes grants to the Marine Spill Response Corporation (MSRC), which intends to provide depots of spill response equipment throughout the United States.

According to Bob Aldag, President of the MPA, the association members pay dues to the association based on the amount of oil shipped. The association looks first to the recipient of the oil -- that is, the entity receiving the oil at a dock or terminal -- for payment. If that entity is an association member, it pays dues on that shipment. If that entity is not a member, the

association next looks to the owner of the receiving terminal for payment. If neither the recipient nor the terminal owner is a member, the association then looks to the shipper.

Theoretically, it would seem that if the charge is paid by the recipient, then it is not a transportation charge and should not be included in the net-back. Much Alaska production is shipped by a producer to the producer's own refinery, so that the same entity is both the shipper and the recipient. Oil company and state sources indicate various treatments of these expenditures -- some say they deduct \$.05/barrel, others \$.005/barrel from wellhead value. Some may not deduct the charge at all. Without access to confidential information, it is impossible to estimate the magnitude of deductions for this charge, and their total impact on wellhead value. Depending upon the treatment of these payments by producers, the wellhead revenue impact could be as high as \$8 million in a year.

3. TAPS tariff charges. The most significant spill-related element in the net-back methodology is the tariff effect of expenditures made by Alyeska. Alyeska's expenditures for spill prevention and clean-up equipment and operation are rolled into the TAPS tariff, and have the effect of reducing wellhead value for both severance tax and royalty purposes.^a Alyeska has provided a summary of its spill-related expenditures, which is attached as

^aAlyeska has provided summaries of its expenditures. Alyeska, of course, does not set the TAPS tariffs; rather, each owner company of the pipeline files its own rate with FERC. For the purpose of this report, it is assumed that all Alyeska expenditures make their way into the tariff of one owner company or another.

Exhibit 1. The summary shows expenditures from 1989 to the present, and projects expenditures through 1997. Total actual costs to date have been \$208.3 million; an additional \$400 million is projected through 1997, for a total of \$608.3. Assuming a 25% state revenue effect, the state's share of these expenditures would be \$152.1 million.

However, capital expenditures are not simply included in the tariff in the year in which they are incurred, but rather are depreciated over time. Using the numbers provided by Alyeska, the Washington, D.C. firm of Horst and Frisch has performed an analysis of the impact on the tariff of these expenditures, and the resulting reduction in state severance tax and royalty revenues.* Their analysis is attached as Exhibit 2 (hereafter, "Horst"). They calculated the net present value of the revenue impact of these expenditures, through 2011, to be \$154.1 million, a number very close to simply taking one quarter of the expenditures.

It should be noted that this number is the net present value of expenditures through 1997, calculated out to 2011. Their Table 2, lines 1 and 2, shows operating expenditures and capital expenditures for each year. Because the summary provided by Alyeska did not project costs beyond 1997, these two lines show no additional expenditures after that year. It is to be expected that there will be operating and capital expenditures in these years; an

*Horst and Frisch, on contract with the State, performs tariff analyses of TAPS. The Department of Environmental Conservation agreed to pay for their time to perform the analysis included in this report.

analysis that included estimates of these expenditures would, of course, show a higher net present value.

The annual revenue impact of Alyeska's expenditures is between \$16.1 and \$19.2 million from 1991 through 1997. Horst, first bar chart and Table 2, line 37. This represents 25% of the \$65 to \$78 million that the TAPS owners will be including in the tariffs each year for Alyeska's expenditures. Horst Table 2, line 35. Thus, the state is, in effect, paying about \$18 million a year for spill response capabilities along the pipeline and in Prince William Sound.

4. AS 43.56 property taxes. Property taxes levied on pipeline and terminal activities -- including spill prevention expenditures -- are incorporated into the tariff. Thus, for every \$1 of property tax collected, the state loses \$.25 in severance taxes and royalties, for a net tax of \$.75. However, because of the set-off provision for municipal taxes (described above) the state does not actually collect the \$1 in property tax that is levied. Rather, the municipality in which the property is located collects the lion's share of the tax. When the municipality's share exceeds 75% (as it does, for example, in Valdez) and when the tax can be included in the tariff, the state actually loses revenue by levying the tax. According to the Department of Revenue, Valdez's share of the proceeds of AS 43.56 is now 81%. Thus, if the state collects \$1.00 in property tax, \$.81 goes to Valdez. But wellhead revenues go down by \$.25 because the tax is incorporated into the tariff. Thus, the state loses \$.06 for every dollar of

tax paid.

According to Alyeska and the Department of Revenue, spill equipment associated with marine transportation is not taxed under AS 43.56. (Municipalities may in some instances tax this property.) Alyeska's figures indicate that it has spent \$23 million in capital expenditures for the pipeline and terminal spill prevention equipment. If this property is assessed at this amount under AS 43.56, then the tax on it would be \$460,000 (\$23 million X 20 mills). At \$.06/\$1.00, the state is losing about \$27,600 a year because of the property tax on spill equipment.¹⁰

B. Marine Transportation or Pipeline Costs?

The expenditure summary that Alyeska provided breaks out expenditures to date into three categories: pipeline, terminal and Prince William Sound. (Projected expenditures were not broken out into categories.) The third category accounts for three fourths of Alyeska's expenditures (\$157.9 million of \$208.3 million, and presumably includes escort vessels, skimmers, barges and the like, as well as the costs to operate those services.

The theoretical basis for including pipeline and terminal costs in the tariff seems clear. It is not so clear that the costs of providing protection in Prince William Sound are theoretically a tariff item as opposed to a marine transportation expense. There are two ramifications of this distinction that should be

¹⁰Some of the pipeline expenditures are no doubt outside the Valdez municipality. Depending upon the municipal tax rate in other municipalities, this number may be reduced. However, the average municipal share of AS 43.56 taxes is 75%.

considered.

1. In a net-back calculation, it is largely irrelevant whether a transportation expense is allocated to pipeline tariff or marine transportation. The cost reduces wellhead value either way. There is, however, one exception to this. Some producers, such as Arco, have settled their dispute with the state over royalty obligations not only for past years but for the present and for future years as well. These settlements use a formula that incorporates, and thereafter ignores, marine transportation costs. That is, the settlements agree upon a Valdez price at a certain point in time: a price that is net of marine transportation costs. This price is then indexed to a market-basket of oils for which there is a known market value. If the index goes up, the royalty value at Valdez goes up by the same degree. Marine transportation costs no longer need be considered. The Valdez price is then netted back to the wellhead using the average actual TAPS tariff.¹¹ In this situation it does make a difference whether the expense is allocated to the tariff or to marine transportation. If it is allocated to the tariff, it will further reduce wellhead value. If it is allocated to marine transportation, it will not. At this

¹¹This methodology has been criticized by some because as the price of oil fluctuates, the presumed transportation costs also fluctuate, in a way that may not reflect reality. For example, suppose the starting price at Valdez were \$10 per barrel, calculated using average marine transportation costs of \$1 per barrel. If the index then raises the Valdez price to \$20, implied transportation costs have theoretically risen to \$2 per barrel, whenever no actual increase in costs may have occurred. Defenders of the settlements have pointed out that if the index falls, implied transportation costs also can fall below actual transportation costs.

point in time, Arco is the only major producer to have made such a settlement; however, such settlements are being pursued by the state and other producers, for both tax and royalty obligations.

In this situation, if costs that are properly considered marine transportation expenses instead go into the tariff, state revenues are being inappropriately impacted. Arco currently produces about 28% of the state's production, with a royalty obligation of 12.5% on that production. Of the \$154.1 million in lost revenue that Horst & Frisch calculate as the net present value of spill costs, about half is royalty and half is tax. Arco's royalty share of that amount ($28\% \times \$154.1 \text{ million} \times .5$) is \$21.6 million. If three quarters of that amount was incurred for marine transportation expenses in Prince William Sound, Arco's royalty payments will have been inappropriately reduced. The net present value of that reduction would be \$16.2 million. If all producers settled using similar formulas, for both tax and royalty, the state would be losing \$115.6 in wellhead reductions that should have been allocated to marine transportation.

2. The second consideration relates to Alyeska's unique and somewhat perplexing role as a response action contractor in Prince William Sound. Alyeska is a consortium of regulated pipeline companies, each of which is a common carrier whose rates are subject to review by the Federal Energy Regulatory Commission (FERC).

When Congress passed the Trans-Alaska Pipeline authorization act in 1973, it included language imposing a strict

liability standard -- up to \$50 million -- for pollution caused by the permit-holder's (Alyeska's) activities. The language establishing this liability was extremely broad:

If any area within or without the right-of-way or permit area granted under this title is polluted by any activities conducted by or on behalf of the holder to whom such right-of-way or permit was granted, ...

In 1990, as part of the Oil Pollution Act (P.L. 101-380, 104 Stat. 484, this language was amended as follows:

If any area in the State of Alaska within or without the right-of-way or permit area granted under this title is polluted by any activities related to the Trans-Alaska Pipeline System, including operation of the terminal, conducted by or on behalf of the holder to whom such right-of-way or permit was granted,...

According to Rob Shoaf of Alyeska, the "in the State of Alaska" language was added to limit liability to waters within three miles of shore -- the state boundary. The implication that might be drawn from that amendment is that Congress intended for the permit-holder to be strictly liable for spills out to the three mile limit. If this is so, then Alyeska's role as a response action contractor for spills in Prince William Sound is truly unique; other response action contractors, such as CISPRI, have no such statutory liability.

Alyeska states that it believes its role in Prince William Sound is that of a volunteer -- that its provision of response services there is "strictly a matter of commercial contract" between Alyeska -- and not the TAPS carriers -- and shippers. Letter dated November 20, 1991, attached as Exhibit 3,

at 2. As such, it believes it needs no authority to require financial responsibility or insurance in connection with these services. Presumably, then, it believes its insurance requirements of shippers are not subject to review by FERC. If this is true, then it is difficult to understand why it is appropriate for the TAPS carriers to include the cost of these services in their tariff filings. If the enterprise is strictly Alyeska's, then logically Alyeska should charge for the services; they should not be paid for through the tariff.

Alyeska states that including the costs in the tariff "equitably distributes the costs of those services among their beneficiaries." Id. However, this is not precisely true; while most of the oil shipped out of Valdez does indeed belong to the same companies that are the TAPS carriers, some oil is shipped by non-owner companies. There is no theoretical connection between carrying the oil on TAPS and shipping out of Valdez; theoretically, all of the oil leaving Valdez could be shipped by non-owners companies. If this were the case, then including the costs for Prince William Sound protection in the tariff would not "equitably distribute" the costs among the beneficiaries. Alyeska states that the Prince William Sound "capabilities" are available in the event of a terminal spill at Valdez; in their view, this connection provides some justification for including the costs in the tariff.

Alyeska's approach seems theoretically inconsistent. On the one hand, if the response services are truly an enterprise taken on by Alyeska in which the owner companies are not involved,

then the costs of the services should not be borne by the owner companies, or passed on to the pipeline shippers through the tariff. Alyeska should probably charge shippers for the service (including those shippers who are also owner companies). Alyeska's position that its bonding (insurance) requirement does not require authority or regulatory review is consistent with this approach.

On the other hand, if the costs of marine spill protection in Prince William Sound appropriately belong in the tariff, then the costs are the owner companies' costs. In this case, all of the costs and requirements, including Alyeska's insurance (bonding) requirements would require regulatory authority and would be subject to review by the FERC. Its requirements then must be reasonably necessary and non-discriminatory.

III. COMPARATIVE SPILL COSTS: COOK INLET AND PRINCE WILLIAM SOUND

This section compares expenditures for spill response and preparedness in Cook Inlet (CISPRI) and Prince William Sound (Alyeska), and analyzes state participation in those expenditures. The comparison should be viewed with caution for a number of reasons. First, capital expenditures should be compared, but they are lump sum expenses, providing the basis for response for a number of years. Thus, they cannot readily be analyzed on a per barrel or other volume basis. Second, a per barrel analysis is only one way to look at the risk of a spill. Some would argue that the risk of a spill is more related to the number of voyages than barrels. Finally, while activities in Prince William Sound are limited to the transportation of crude oil, CISPRI provides

response capabilities for transportation of crude, transportation of refined product, and onshore and offshore production.

CISPRI assesses its members based upon a weighting of those activities; offshore production and tanker and barge transportation are given full volume weight while onshore production, pipelines and dock transfers are weighted at one tenth of their volume. See, CISPRI's Quarterly Cost Participation Percentages for 4th quarter 1990 and 1st quarter 1991, attached as Exhibit 4. Since their total costs cover all of these activities, and since CISPRI has apparently incorporated some view of the relative risk of each of these activities into its assessment methodology, it seems reasonable for the purpose of this analysis to use the volumes as weighted by CISPRI.

With these limitations in mind, the following analysis can provide an order-of-magnitude comparison.

	Cook Inlet	PWS
Equipment Expenses (total) ¹²	\$14	\$48.1
Operating Expenses (annual) ¹³	\$6	\$42.5
Volumes (mmbbl) ¹⁴	74.4	654.6

¹² Alyeska's "total" expenditures are those submitted by them for the period March 1989 through September, 1991. CISPRI's total was calculated by adding the total value of the equipment that is used as the basis for determining CISPRI's rental rates to members.

¹³ Alyeska's annual operating costs were determined by averaging the monthly cost for the period covered by their submission, and annualizing. CISPRI's monthly costs were estimated to be \$500,000 by Gene Burden of Tesoro, and by Linda White of CISPRI.

¹⁴ CISPRI's fourth quarter 1990 and first quarter 1990 weighted total volumes, annualized; TAPS throughput (DNR report).

Comparing operating expenses with volumes, it can be seen that CISPRI spends \$.081 per weighted barrel in operating costs while Alyeska spends about \$.065 per barrel. On a volume basis, CISPRI's operating costs are 125% of those of Alyeska. When total equipment costs are compared to annual volume, CISPRI'S ratio is \$.188 per barrel, while Alyeska's ratio is \$.073 per barrel. CISPRI's ratio is 275% that of Alyeska.

As set out above, the state effectively pays one quarter of Alyeska's expenditures, since all (100%) of Alyeska's expenditures go into TAPS tariffs. In Cook Inlet, only part of the activity covered by CISPRI affects wellhead value calculations. Further, the severance tax rate is reduced to zero by the Economic Limit Factor in all Cook Inlet fields. Thus, only royalties are affected by spill response expenditures in Cook Inlet. The average per barrel royalty in Cook Inlet is 12.3%. Table I.

Total production in Cook Inlet is about 11.2 million barrels annually. Table I. Since CISPRI's activities cover both production and tanker transportation, we can assume that each barrel is counted twice in CISPRI's assessment methodology, once when it is produced and again when it is transported. Thus, of the 74.4 million weighted barrels, 22.4 -- or about 30% -- would be production or crude transportation barrels, the spill-protection costs of which would be deducted in arriving at wellhead value for royalty purposes.

We can adjust the costs for Cook Inlet and Prince William Sound to reflect these costs net of state participation. Thus,

Alyeska's costs are reduced by 25% ($100\% \times 25\%$), while CISPRI's costs are reduced by 30% of the average royalty of 12.3%, or 3.7%. Reducing the costs in the table above by these percentages produces the following table:

	Cook Inlet	PWS
Equipment Expenses (total)	\$13.5	\$36.1
Operating Expenses (annual)	\$5.8	\$31.9
Volumes (mmbbl)	74.4	654.6

Now, comparing operating expenses net of state participation, CISPRI spends \$.078 per barrel, while Alyeska spends \$.049. The ratio of equipment costs to volume is \$.181 for CISPRI and \$.055 for Alyeska. When state participation is netted out, CISPRI's operating expenses are 159% of those of Alyeska, and its equipment-to-volume ratio is 329% that of Alyeska.

Two conclusions can be drawn from this analysis. First, CISPRI, presumably because of its lower volume, spends significantly more on a volume basis for spill protection in Cook Inlet than does Alyeska in Prince William Sound. Second, when the state's participation in these expenditures is factored in, the difference becomes much greater.

TABLE I

SUMMARY OF ROYALTY INTERESTS AND TAX RATES BY FIELD
OIL

	<u>Royalty</u>	<u>Average Severance Tax Rate</u>	<u>Production (MM Barrels) 1990</u>
NORTH SLOPE			
Endicott	25.9% @ 20.0%	9.5%	37.7
	74.1% @ 12.5%		
Kuparuk	12.5%	13.2%	107.2
Lisburne	12.5%	0.1%	14.5
Milne Point	78.4% @ 20.0%	0.0%	6.6
	21.6% @ 12.5%		
Prudhoe Bay	12.5%	14.9%	<u>470.1</u>
Total North Slope			636.1
Average North Slope	12.7%	12.1%*	
COOK INLET			
Beaver Creek	11.25%**	0.0%	.2
Granite Point	12.5%	0.0%	1.5
McArthur River	12.5%	0.0%	4.3
Middle Ground Shoal	12.5%	0.0%	2.7
Swanson River	11.25%**	0.0%	1.9
Trading Bay	12.5%	0.0%	<u>.6</u>
Total Cook Inlet			11.1
Average Cook Inlet	12.3%	0.0%	
TOTAL STATE			647.3
AVERAGE STATE	12.7%	11.9%*	

* The tax rates shown for each field are the nominal rate reduced by the Economic Limit Factor. The tax does not apply to royalty barrels. The average rate shows the effective rate for all production, including royalty.

** Beaver Creek and Swanson River are federal leases, carrying a royalty obligation of 12.5%. The State receives 90% of this royalty, or 11.25%.

Sources: Department of Natural Resources, "Historical and Projected Oil and Gas Consumption", June, 1991; Department of Revenue, Dr. Charles Logsdon.

OIL SPILL RELATED EXPENSES*
(IN MILLIONS)
MARCH 1989 THROUGH SEPTEMBER 1991

	<u>PROJECTS</u>	<u>O & M EXPENSE</u>	<u>TOTAL</u>
TERMINAL			
1989	0	14.6	14.6
1990	1.1	6.1	7.2
1991 YEAR TO DATE	1.7	2.5	4.2
TOTAL TERMINAL	<u>2.8</u>	<u>23.2</u>	<u>26</u>
PRINCE WM SOUND			
1989	17.7	29.8	47.5
1990	17.8	48.1	65.9
1991 YEAR TO DATE	12.6	31.9	44.5
TOTAL PWS	<u>48.1</u>	<u>109.8</u>	<u>157.9</u>
PIPELINE			
1989	0	0	0
1990	1.4	0.6	2
1991 YEAR TO DATE	18.8	3.6	22.4
TOTAL PIPELINE	<u>20.2</u>	<u>4.2</u>	<u>24.4</u>
TOTAL ACTUAL	<u>71.1</u>	<u>137.2</u>	<u>208.3</u>
*NOTE: Does not include legal expenses.			
SUMMARY BY YEAR			
1989	17.7	44.4	62.1
1990	20.3	54.8	75.1
1991 YEAR TO DATE	33.1	38	71.1
TOTAL ACTUAL	<u>71.1</u>	<u>137.2</u>	<u>208.3</u>
EST. FUTURE COST			
10/91 - 12/97	90	310	400
TOTAL ACTUAL & EST	<u>161.1</u>	<u>447.2</u>	<u>608.3</u>

Exh. 1-1

**OIL SPILL RELATED EXPENSES
(IN MILLIONS)
FUTURE YEARS PROJECTION**

	<u>PROJECTS</u>	<u>O & M EXPENSE</u>	<u>TOTAL</u>
EST. REMAINING 1991	14.3	13.2	27.5
1992	23.9		23.9
1993-1997	51.8		51.8
EST PER LONG RANGE PLAN:			
1992		56.3	56.3
1993-1997		240.5	240.5
TOTAL EST. COST	<u>90</u>	<u>310</u>	<u>400</u>

Exh. 1-2

HORST & FRISCH

1133 CONNECTICUT AVENUE NW, SUITE 900
WASHINGTON, DC 20036

TELEPHONE 202/296-4005 FAX 202/296-4008

November 5, 1991

Ms. Deborah Vogt
P.O. Box 1065
Juneau, AK 99802

Dear Deborah:

Enclosed please find an analysis of the State revenue impact of actual (March 1989 through September 1991) and projected (October 1991 through December 1997) oil spill related capital and operating expenditures. The net present value of this impact, computed as of January 1, 1992, is \$154.1 million.

Oil spill related operating expenditures directly affect tariff rates in the year in which they are incurred. On the other hand, oil spill related capital expenditures affect tariff rates over time through the following cost of service elements: (1) depreciation, (2) recovery of deferred return, (3) after-tax margin, and (4) income tax allowance.

The enclosed bar charts reflect (1) the actual State revenue impact of these expenditures through 2011 and (2) the net present value of these amounts through 2011 computed as of January 1, 1992.

Please let me know if you have any questions concerning the methodology employed or the assumptions utilized in this analysis.

Sincerely,

Kenneth A. Timbers

Kenneth A. Timbers

encl.

cc: Robert Loeffler, Morrison & Foerster

Exh 2

TABLE 1: OIL SPILL RELATED EXPENDITURES (1989-1997) (\$M)

Horst & Frisch
11/04/91

	1989	1990	1991	1992	1993	1994	1995	1996	1997
ACTUALS (3/89-9/91)									
Terminal Expenditures									
Projects	\$0.0	\$1.1	\$1.7						
Operations & Maintenance	14.6	6.1	2.5						
Prince William Sound Expenditures									
Projects	17.7	17.8	12.6						
Operations & Maintenance	29.8	48.1	31.9						
Pipeline Expenditures									
Projects	0.0	1.4	18.8						
Operations & Maintenance	0.0	0.6	3.6						
ESTIMATES (10/91-12/97)									
Projects	0.0	0.0	14.3	23.9	10.36	10.36	10.36	10.36	10.36
Operations & Maintenance	0.0	0.0	13.2	56.3	48.1	48.1	48.1	48.1	48.1
TOTAL PROJECTS	17.7	20.3	47.4	23.9	10.4	10.4	10.4	10.4	10.4
TOTAL OPERATIONS & MAINTENANCE	44.4	54.8	51.2	56.3	48.1	48.1	48.1	48.1	48.1
TOTAL EXPENDITURES	62.1	75.1	98.6	80.2	58.5	58.5	58.5	58.5	58.5

Source: Alyeska figures per 10/30/91 fax from Tina Kobayashi

TABLE 2: STATE REVENUE IMPACT OF OIL SPILL
RELATED EXPENDITURES (\$M)

Horst & Frisch
11/04/91

	1989	1990	1991	1992	1993	1994	1995	1996	1997
1 Oil Spill Related Operating Expenditures	\$17.7	\$20.3	\$47.4	\$23.9	\$10.4	\$10.4	\$10.4	\$10.4	\$10.4
2 Oil Spill Related Capital Expenditures	44.4	54.8	51.2	56.3	48.1	48.1	48.1	48.1	48.1
DEPRECIATION									
3 Additions to Depreciable Property	44.4	54.8	51.2	56.3	48.1	48.1	48.1	48.1	48.1
4 Depreciation Factors		21.46%	22.61%	23.45%	23.69%	24.28%	25.36%	24.31%	19.56%
5 Depreciation Base		44.4	89.7	120.6	148.6	161.5	170.4	175.3	180.8
6 Depreciation		9.5	20.3	28.3	35.2	39.2	43.2	42.6	35.4
7 Depreciable Property Balance at Year End	44.4	89.7	120.6	148.6	161.5	170.4	175.3	180.8	193.5
ACCUMULATED DEFERRED INCOME TAX									
8 State ADIT - EoY	(0.2)	(0.1)	0.6	1.5	2.7	3.9	5.2	6.1	6.0
9 Federal ADIT - EoY	(0.7)	0.1	2.9	6.8	11.8	17.1	22.9	27.6	30.1
10 Total ADIT - EoY	(0.9)	0.1	3.5	8.3	14.5	21.0	28.0	33.7	36.1
RECOVERY OF DEFERRED RETURN									
11 Deferred Return Base		0.0	1.9	4.9	7.6	10.6	13.2	15.3	17.4
12 Deferred Return Factors		21.46%	22.61%	23.45%	23.69%	24.28%	25.36%	24.31%	19.56%
13 Recovery of Deferred Return		0.0	0.4	1.1	1.8	2.6	3.3	3.7	3.4
14 Inflation Adjustment Base		34.9	70.8	96.1	119.2	130.3	137.0	144.3	159.4
15 Inflation Rate		5.34%	4.88%	4.00%	4.00%	4.00%	4.00%	4.00%	4.00%
16 Inflation Adjustment		1.9	3.5	3.8	4.8	5.2	5.5	5.8	6.4
17 Deferred Return at Year End	0.0	1.9	4.9	7.6	10.6	13.2	15.3	17.4	20.4
AFTER-TAX MARGIN									
18 Depreciable Property Balance at Year End	44.4	89.7	120.6	148.6	161.5	170.4	175.3	180.8	193.5
19 Deferred Return at Year End	0.0	1.9	4.9	7.6	10.6	13.2	15.3	17.4	20.4
20 Total ADIT - EoY	(0.9)	0.1	3.5	8.3	14.5	21.0	28.0	33.7	36.1
21 Rate Base at Year End	45.3	91.5	122.0	147.9	157.6	162.6	162.6	164.5	177.8
22 Rate of Return on Rate Base		6.4%	6.4%	6.4%	6.4%	6.4%	6.4%	6.4%	6.4%
23 After-Tax Margin		2.9	5.9	7.8	9.5	10.1	10.4	10.4	10.5
INCOME TAX ALLOWANCE									
24 Income Tax Base		2.9	6.3	9.0	11.3	12.6	13.8	14.1	13.9
25 State Income Tax Rate		9.4%	9.4%	9.4%	9.4%	9.4%	9.4%	9.4%	9.4%
26 Federal Income Tax Rate		34%	34%	34%	34%	34%	34%	34%	34%
27 Combined Rate of Tax		40.2%	40.2%	40.2%	40.2%	40.2%	40.2%	40.2%	40.2%
28 Income Tax Allowance Factor		0.672	0.672	0.672	0.672	0.672	0.672	0.672	0.672
29 Income Tax Allowance		1.9	4.2	6.0	7.6	8.5	9.2	9.5	9.4
COST OF SERVICE									
30 Operating Expenditures	17.7	20.3	47.4	23.9	10.4	10.4	10.4	10.4	10.4
31 Depreciation		9.5	20.3	28.3	35.2	39.2	43.2	42.6	35.4
32 Recovery of Deferred Return		0.0	0.4	1.1	1.8	2.6	3.3	3.7	3.4
33 After-Tax Margin		2.9	5.9	7.8	9.5	10.1	10.4	10.4	10.5
34 Income Tax Allowance		1.9	4.2	6.0	7.6	8.5	9.2	9.5	9.4
35 Total Cost of Service Effect	17.7	34.7	78.2	67.2	64.4	70.7	76.6	76.6	69.0
36 State Revenue Impact - % [1]	24.03%	25.44%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%
37 State Revenue Impact	4.3	8.8	19.5	16.8	16.1	17.7	19.1	19.2	17.3
38 Interest Rate	10%	10%	10%	10%	10%	10%	10%	10%	10%
39 Discount Period	-2.5	-1.5	-0.5	0.5	1.5	2.5	3.5	4.5	5.5
40 Net Present Value Factor	1.27	1.15	1.05	0.95	0.87	0.79	0.72	0.65	0.59
41 Net Present Value (1/1/92)	5.4	10.2	20.5	16.0	14.0	13.9	13.7	12.5	10.2
42 NPV of State Revenue Impact	\$154.1 =====								

[1] Weighted average production and royalty rates for all crudes for 1989 and 1990; 1991-2011 set equal to 25 percent.

TABLE 2: STATE REVENUE IMPACT OF OIL SPILL
RELATED EXPENDITURES (\$M)

Horst & Frisch
11/04/91

	1998	1999	2000	2001	2002	2003	2004	2005	2006
1 Oil Spill Related Operating Expenditures	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0
2 Oil Spill Related Capital Expenditures	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
DEPRECIATION									
3 Additions to Depreciable Property	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
4 Depreciation Factors	11.26%	11.82%	13.49%	14.74%	16.19%	17.06%	18.82%	21.41%	25.25%
5 Depreciation Base	193.5	171.7	151.4	131.0	111.7	93.6	77.6	63.0	49.5
6 Depreciation	21.8	20.3	20.4	19.3	18.1	16.0	14.6	13.5	12.5
7 Depreciable Property Balance at Year End	171.7	151.4	131.0	111.7	93.6	77.6	63.0	49.5	37.0
ACCUMULATED DEFERRED INCOME TAX									
8 State ADIT - EoY	4.7	3.5	2.6	1.8	1.2	0.7	0.3	(0.0)	(0.1)
9 Federal ADIT - EoY	29.0	27.8	26.8	25.6	23.9	21.5	19.1	17.2	16.0
10 Total ADIT - EoY	33.7	31.3	29.4	27.4	25.2	22.2	19.3	17.2	15.8
RECOVERY OF DEFERRED RETURN									
11 Deferred Return Base	20.4	25.7	29.6	31.9	32.7	32.3	30.9	28.6	25.4
12 Deferred Return Factors	11.26%	11.82%	13.49%	14.74%	16.19%	17.06%	18.82%	21.41%	25.25%
13 Recovery of Deferred Return	2.3	3.0	4.0	4.7	5.3	5.5	5.8	6.1	6.4
14 Inflation Adjustment Base	189.8	174.1	156.6	138.8	121.0	104.4	88.1	72.0	56.0
15 Inflation Rate	4.00%	4.00%	4.00%	4.00%	4.00%	4.00%	4.00%	4.00%	4.00%
16 Inflation Adjustment	7.6	7.0	6.3	5.6	4.8	4.2	3.5	2.9	2.2
17 Deferred Return at Year End	25.7	29.6	31.9	32.7	32.3	30.9	28.6	25.4	21.2
AFTER-TAX MARGIN									
18 Depreciable Property Balance at Year End	171.7	151.4	131.0	111.7	93.6	77.6	63.0	49.5	37.0
19 Deferred Return at Year End	25.7	29.6	31.9	32.7	32.3	30.9	28.6	25.4	21.2
20 Total ADIT - EoY	33.7	31.3	29.4	27.4	25.2	22.2	19.3	17.2	15.8
21 Rate Base at Year End	163.7	149.7	133.4	117.0	100.7	86.4	72.3	57.7	42.4
22 Rate of Return on Rate Base	6.4%	6.4%	6.4%	6.4%	6.4%	6.4%	6.4%	6.4%	6.4%
23 After-Tax Margin	11.4	10.5	9.6	8.5	7.5	6.4	5.5	4.6	3.7
INCOME TAX ALLOWANCE									
24 Income Tax Base	13.7	13.5	13.6	13.2	12.8	12.0	11.3	10.8	10.1
25 State Income Tax Rate	9.4%	9.4%	9.4%	9.4%	9.4%	9.4%	9.4%	9.4%	9.4%
26 Federal Income Tax Rate	34%	34%	34%	34%	34%	34%	34%	34%	34%
27 Combined Rate of Tax	40.2%	40.2%	40.2%	40.2%	40.2%	40.2%	40.2%	40.2%	40.2%
28 Income Tax Allowance Factor	0.672	0.672	0.672	0.672	0.672	0.672	0.672	0.672	0.672
29 Income Tax Allowance	9.2	9.1	9.1	8.9	8.6	8.0	7.6	7.2	6.8
COST OF SERVICE									
30 Operating Expenditures	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
31 Depreciation	21.8	20.3	20.4	19.3	18.1	16.0	14.6	13.5	12.5
32 Recovery of Deferred Return	2.3	3.0	4.0	4.7	5.3	5.5	5.8	6.1	6.4
33 After-Tax Margin	11.4	10.5	9.6	8.5	7.5	6.4	5.5	4.6	3.7
34 Income Tax Allowance	9.2	9.1	9.1	8.9	8.6	8.0	7.6	7.2	6.8
35 Total Cost of Service Effect	44.7	42.9	43.1	41.5	39.5	36.0	33.6	31.5	29.4
36 State Revenue Impact - % [1]	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%
37 State Revenue Impact	11.2	10.7	10.8	10.4	9.9	9.0	8.4	7.9	7.4
38 Interest Rate	10%	10%	10%	10%	10%	10%	10%	10%	10%
39 Discount Period	6.5	7.5	8.5	9.5	10.5	11.5	12.5	13.5	14.5
40 Net Present Value Factor	0.54	0.49	0.44	0.40	0.37	0.33	0.30	0.23	0.25
41 Net Present Value (1/1/92)	6.0	5.2	4.8	4.2	3.6	3.0	2.6	2.2	1.8
42 NPV of State Revenue Impact	\$154.1 =====								

[1] Weighted average production and royalty rates for all crudes for 1989 and 1990; 1991-2011 set equal to 25 percent.

TABLE 2: STATE REVENUE IMPACT OF OIL SPILL
RELATED EXPENDITURES (\$M)Horst & Frisch
11/04/91

	2007	2008	2009	2010	2011	Explanation
1 Oil Spill Related Operating Expenditures	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	See Table 1
2 Oil Spill Related Capital Expenditures	0.0	0.0	0.0	0.0	0.0	See Table 1
DEPRECIATION						
3 Additions to Depreciable Property	0.0	0.0	0.0	0.0	0.0	Line 2
4 Depreciation Factors	29.10%	35.38%	42.34%	54.43%	100.00%	Per TSM
5 Depreciation Base	37.0	26.2	17.0	9.8	4.5	Previous Line 7
6 Depreciation	10.8	9.3	7.2	5.3	4.5	Line 4 x Line 5
7 Depreciable Property Balance at Year End	26.2	17.0	9.8	4.5	0.0	Line 3 + Line 5 - Line 6
ACCUMULATED DEFERRED INCOME TAX						
8 State ADIT - EoY	(0.1)	(0.0)	0.1	0.1	0.0	TABLE 3: Line 28
9 Federal ADIT - EoY	15.2	14.9	14.9	15.3	(0.0)	TABLE 3: Line 57
10 Total ADIT - EoY	15.1	14.9	15.0	15.4	(0.0)	Line 8 + Line 9
RECOVERY OF DEFERRED RETURN						
11 Deferred Return Base	21.2	16.7	11.9	7.5	3.7	Previous Line 17
12 Deferred Return Factors	29.10%	35.38%	42.34%	54.43%	100.00%	Line 4
13 Recovery of Deferred Return	6.2	5.9	5.0	4.1	3.7	Line 11 x Line 12
14 Inflation Adjustment Base	41.3	27.8	16.6	7.9	0.0	Pr.Line 17+Pr.Line 7-Line 13-Line 6
15 Inflation Rate	4.00%	4.00%	4.00%	4.00%	4.00%	Inflation Rate
16 Inflation Adjustment	1.7	1.1	0.7	0.3	0.0	Line 14 x Line 15
17 Deferred Return at Year End	16.7	11.9	7.5	3.7	0.0	Prev. Line 17 - Line 13 + Line 16
AFTER-TAX MARGIN						
18 Depreciable Property Balance at Year End	26.2	17.0	9.8	4.5	0.0	Line 7
19 Deferred Return at Year End	16.7	11.9	7.5	3.7	0.0	Line 17
20 Total ADIT - EoY	15.1	14.9	15.0	15.4	(0.0)	Line 10
21 Rate Base at Year End	27.9	14.0	2.3	-7.2	0.0	Line 18 + Line 19 - Line 20
22 Rate of Return on Rate Base	6.4%	6.4%	6.4%	6.4%	6.4%	Per TSM
23 After-Tax Margin	2.7	1.8	0.9	0.1	(0.5)	Previous Line 21 x Line 22
INCOME TAX ALLOWANCE						
24 Income Tax Base	8.9	7.7	5.9	4.2	3.3	Line 23 + Line 13
25 State Income Tax Rate	9.4%	9.4%	9.4%	9.4%	9.4%	State Income Tax Rate
26 Federal Income Tax Rate	34%	34%	34%	34%	34%	Federal Income Tax Rate
27 Combined Rate of Tax	40.2%	40.2%	40.2%	40.2%	40.2%	Line 25 + Line 26 x (1 - Line 25)
28 Income Tax Allowance Factor	0.672	0.672	0.672	0.672	0.672	Line 27/(1 - Line 27)
29 Income Tax Allowance	6.0	5.2	4.0	2.9	2.2	Line 24 x Line 28
COST OF SERVICE						
30 Operating Expenditures	0.0	0.0	0.0	0.0	0.0	Line 1
31 Depreciation	10.8	9.3	7.2	5.3	4.5	Line 6
32 Recovery of Deferred Return	6.2	5.9	5.0	4.1	3.7	Line 13
33 After-Tax Margin	2.7	1.8	0.9	0.1	(0.5)	Line 23
34 Income Tax Allowance	6.0	5.2	4.0	2.9	2.2	Line 29
35 Total Cost of Service Effect	25.6	22.1	17.1	12.4	9.9	Sum of Lines 30 thru 34
36 State Revenue Impact - % [1]	25.00%	25.00%	25.00%	25.00%	25.00%	Assumption
37 State Revenue Impact	6.4	5.5	4.3	3.1	2.5	Line 35 x Line 36
38 Interest Rate	10%	10%	10%	10%	10%	Assumption
39 Discount Period	15.5	16.5	17.5	18.5	19.5	Discounting to 1/1/92
40 Net Present Value Factor	0.23	0.21	0.19	0.17	0.16	Previous Line 40/(1 - Line 38)
41 Net Present Value (1/1/92)	1.5	1.1	0.8	0.5	0.4	Line 37 x Line 40
42 NPV of State Revenue Impact	\$154.1					Sum of Line 41

=====

[1] Weighted average production and royalty
rates for all crudes for 1989 and 1990;
1991-2011 set equal to 25 percent.

TABLE 3: ADIT CALCULATION

			FACTORS	1989	1990	1991	1992	1993	1994	1995	1996	1997
STATE ADIT												
1	Additions to Depreciable Property			44.4	54.8	51.2	56.3	48.1	48.1	48.1	48.1	48.1
2		1989	5.7143%	2.5								
3		1990	10.7755%	4.8	3.1							
4		1991	9.8247%	4.4	5.9	2.9						
5		1992	9.2107%	4.1	5.4	5.5	3.2					
6		1993	8.5966%	3.8	5.0	5.0	6.1	2.7				
7		1994	7.9826%	3.5	4.7	4.7	5.5	5.2	2.7			
8		1995	7.3685%	3.3	4.4	4.4	5.2	4.7	5.2	2.7		
9		1996	6.7545%	3.0	4.0	4.1	4.8	4.4	4.7	5.2	2.7	
10		1997	6.1405%	2.7	3.7	3.8	4.5	4.1	4.4	4.7	5.2	2.7
11		1998	5.5264%	2.5	3.4	3.5	4.1	3.8	4.1	4.4	4.7	5.2
12		1999	4.9124%	2.2	3.0	3.1	3.8	3.5	3.8	4.1	4.4	4.7
13		2000	4.2983%	1.9	2.7	2.8	3.5	3.2	3.5	3.8	4.1	4.4
14		2001	3.6843%	1.6	2.4	2.5	3.1	3.0	3.2	3.5	3.8	4.1
15		2002	3.0702%	1.4	2.0	2.2	2.8	2.7	3.0	3.2	3.5	3.8
16		2003	2.4562%	1.1	1.7	1.9	2.4	2.4	2.7	3.0	3.2	3.5
17		2004	1.8421%	0.8	1.3	1.6	2.1	2.1	2.4	2.7	3.0	3.2
18		2005	1.2281%	0.5	1.0	1.3	1.7	1.8	2.1	2.4	2.7	3.0
19		2006	0.6141%	0.3	0.7	0.9	1.4	1.5	1.8	2.1	2.4	2.7
20		2007			0.3	0.6	1.0	1.2	1.5	1.8	2.1	2.4
21		2008				0.3	0.7	0.9	1.2	1.5	1.8	2.1
22		2009					0.3	0.6	0.9	1.2	1.5	1.8
23		2010						0.3	0.6	0.9	1.2	1.5
				1989	1990	1991	1992	1993	1994	1995	1996	1997
24	State Tax Depreciation			2.5	7.9	13.2	18.2	22.7	26.4	29.9	33.1	35.9
25	Depreciation			0.0	9.5	20.3	28.3	35.2	39.2	43.2	42.6	35.4
26	State Timing Difference			(2.5)	1.6	7.1	10.1	12.5	12.8	13.3	9.6	(0.6)
27	Cumulative Timing Difference			(2.5)	(0.9)	6.2	16.2	28.7	41.5	54.8	64.4	63.8
28	State ADIT - EoY	9.4%		(0.2)	(0.1)	0.6	1.5	2.7	3.9	5.2	6.1	6.0
FEDERAL ADIT												
29	Additions to Depreciable Property			44.4	54.8	51.2	56.3	48.1	48.1	48.1	48.1	48.1
30		1989	5.0000%	2.2								
31		1990	9.5000%	4.2	2.7							
32		1991	8.5500%	3.8	5.2	2.6						
33		1992	7.6950%	3.4	4.7	4.9	2.8					
34		1993	6.9255%	3.1	4.2	4.4	5.3	2.4				
35		1994	6.2330%	2.8	3.8	3.9	4.8	4.6	2.4			
36		1995	5.9049%	2.6	3.4	3.5	4.3	4.1	4.6	2.4		
37		1996	5.9049%	2.6	3.2	3.2	3.9	3.7	4.1	4.6	2.4	
38		1997	5.9049%	2.6	3.2	3.0	3.5	3.3	3.7	4.1	4.6	2.4
39		1998	5.9049%	2.6	3.2	3.0	3.3	3.0	3.3	3.7	4.1	4.6
40		1999	5.9049%	2.6	3.2	3.0	3.3	2.8	3.0	3.3	3.7	4.1
41		2000	5.9049%	2.6	3.2	3.0	3.3	2.8	2.8	3.0	3.3	3.7
42		2001	5.9049%	2.6	3.2	3.0	3.3	2.8	2.8	2.8	3.0	3.3
43		2002	5.9049%	2.6	3.2	3.0	3.3	2.8	2.8	2.8	2.8	3.0
44		2003	5.9049%	2.6	3.2	3.0	3.3	2.8	2.8	2.8	2.8	2.8
45		2004	2.9525%	1.3	3.2	3.0	3.3	2.8	2.8	2.8	2.8	2.8
46		2005		0.0	1.6	3.0	3.3	2.8	2.8	2.8	2.8	2.8
47		2006		0.0	0.0	1.5	3.3	2.8	2.8	2.8	2.8	2.8
48		2007			0.0	0.0	1.7	2.8	2.8	2.8	2.8	2.8
49		2008				0.0	0.0	1.4	2.8	2.8	2.8	2.8
50		2009					0.0	0.0	1.4	2.8	2.8	2.8
51		2010						0.0	0.0	1.4	2.8	2.8
				1989	1990	1991	1992	1993	1994	1995	1996	1997
52	Federal Tax Depreciation			2.2	7.0	11.6	15.8	19.4	22.3	25.0	27.7	28.1
53	Depreciation			0.0	9.5	20.3	28.3	35.2	39.2	43.2	42.6	35.4
54	Federal Timing Difference			(2.2)	2.6	8.7	12.5	15.8	16.9	18.2	14.9	7.3
55	State Tax Effect	9.4%		0.2	(0.2)	(0.7)	(0.9)	(1.2)	(1.2)	(1.3)	(0.9)	0.1
56	Cumulative Timing Difference			(2.0)	0.4	8.5	20.0	34.7	50.4	67.3	81.3	88.6
57	Federal ADIT - EoY	34%		(0.7)	0.1	2.9	6.8	11.8	17.1	22.9	27.6	30.1
58	Total ADIT - EoY			(0.9)	0.1	3.5	8.3	14.5	21.0	28.0	33.7	36.1

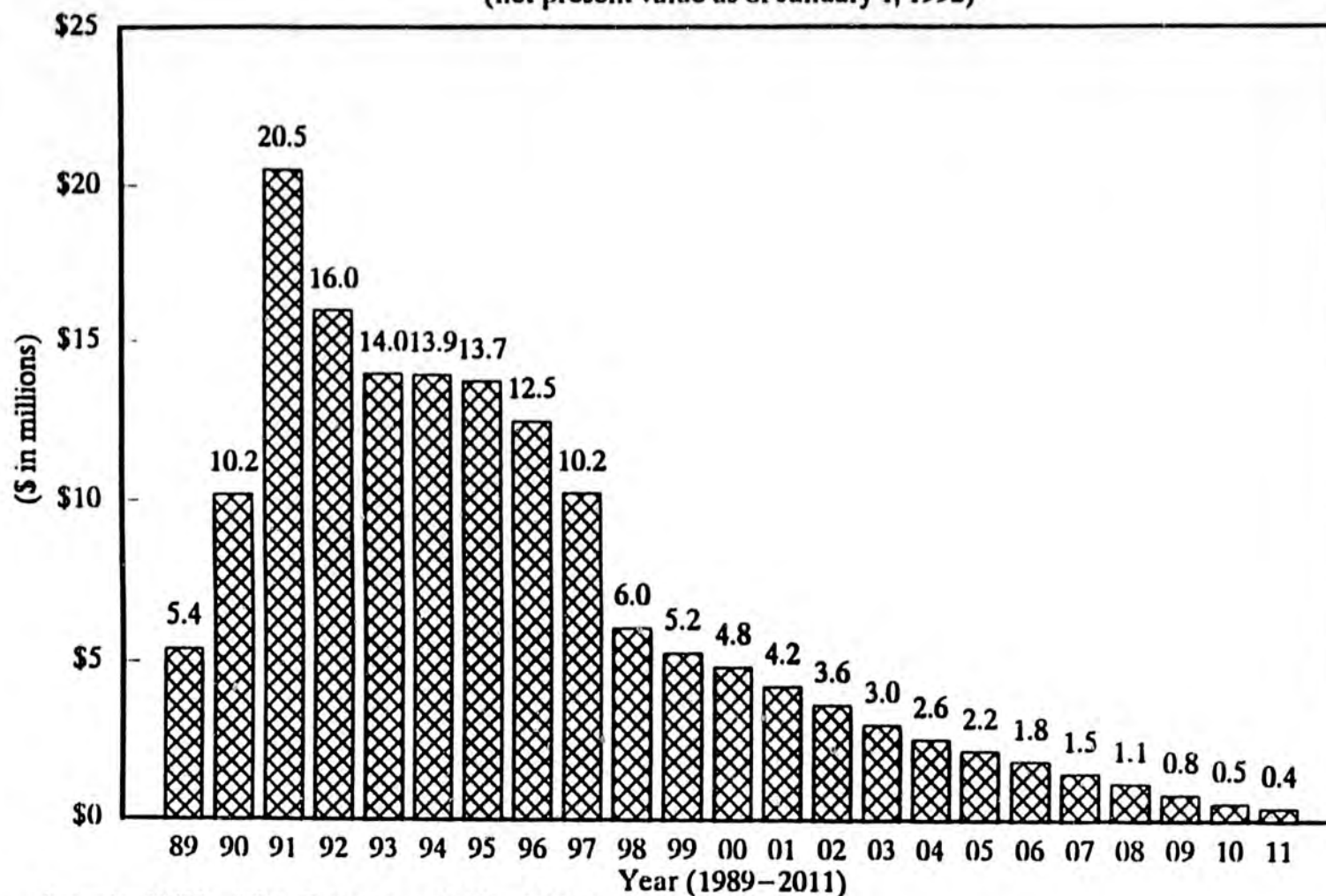
TABLE 3: ADIT CALCULATION

				FACTORS									
STATE ADIT				Total									
1	Additions to Depreciable Property		447.2										
2		1989	5.7143%	2.5									
3		1990	10.7755%	7.9									
4		1991	9.8247%	13.2									
5		1992	9.2107%	18.2									
6		1993	8.5966%	22.7									
7		1994	7.9826%	26.4									
8		1995	7.3685%	29.9									
9		1996	6.7545%	33.1									
10		1997	6.1405%	35.9									
11		1998	5.5264%	35.7									
12		1999	4.9124%	32.8									
13		2000	4.2983%	30.1									
14		2001	3.6843%	27.3									
15		2002	3.0702%	24.6									
16		2003	2.4562%	21.8									
17		2004	1.8421%	19.1									
18		2005	1.2281%	16.4									
19		2006	0.6141%	13.6									
20		2007		10.9									
21		2008		8.4									
22		2009		6.3									
23		2010		4.4									
				1998	1999	2000	2001	2002	2003	2004	2005	2006	
24	State Tax Depreciation		35.7	32.8	30.1	27.3	24.6	21.8	19.1	16.4	13.6		
25	Depreciation		21.8	20.3	20.4	19.3	18.1	16.0	14.6	13.5	12.5		
26	State Timing Difference		(13.9)	(12.5)	(9.7)	(8.0)	(6.5)	(5.9)	(4.5)	(2.9)	(1.1)		
27	Cumulative Timing Difference		49.9	37.3	27.7	19.7	13.2	7.3	2.8	(0.1)	(1.2)		
28	State ADIT - EoY	9.4%	4.7	3.5	2.6	1.8	1.2	0.7	0.3	(0.0)	(0.1)		
FEDERAL ADIT													
29	Additions to Depreciable Property		399.1										
30		1989	5.0000%	2.2									
31		1990	9.5000%	7.0									
32		1991	8.5500%	11.6									
33		1992	7.6950%	15.8									
34		1993	6.9255%	19.4									
35		1994	6.2330%	22.3									
36		1995	5.9049%	25.0									
37		1996	5.9049%	27.7									
38		1997	5.9049%	28.1									
39		1998	5.9049%	26.3									
40		1999	5.9049%	25.1									
41		2000	5.9049%	24.2									
42		2001	5.9049%	23.7									
43		2002	5.9049%	23.6									
44		2003	5.9049%	23.6									
45		2004	2.9525%	22.3									
46		2005		19.3									
47		2006		16.2									
48		2007		13.0									
49		2008		9.9									
50		2009		7.1									
51		2010		4.3									
				1998	1999	2000	2001	2002	2003	2004	2005	2006	
52	Federal Tax Depreciation		26.3	25.1	24.2	23.7	23.6	23.6	22.3	19.3	16.2		
53	Depreciation		21.8	20.3	20.4	19.3	18.1	16.0	14.6	13.5	12.5		
54	Federal Timing Difference		(4.6)	(4.8)	(3.8)	(4.4)	(5.5)	(7.6)	(7.6)	(5.8)	(3.7)		
55	State Tax Effect	9.4%	1.3	1.2	0.9	0.8	0.6	0.6	0.4	0.3	0.1		
56	Cumulative Timing Difference		85.4	81.8	78.9	75.2	70.4	63.3	56.1	50.5	46.9		
57	Federal ADIT - EoY	34%	29.0	27.8	26.8	25.6	23.9	21.5	19.1	17.2	16.0		
58	Total ADIT - EoY		33.7	31.3	29.4	27.4	25.2	22.2	19.3	17.2	15.8		

TABLE 3: ADIT CALCULATION

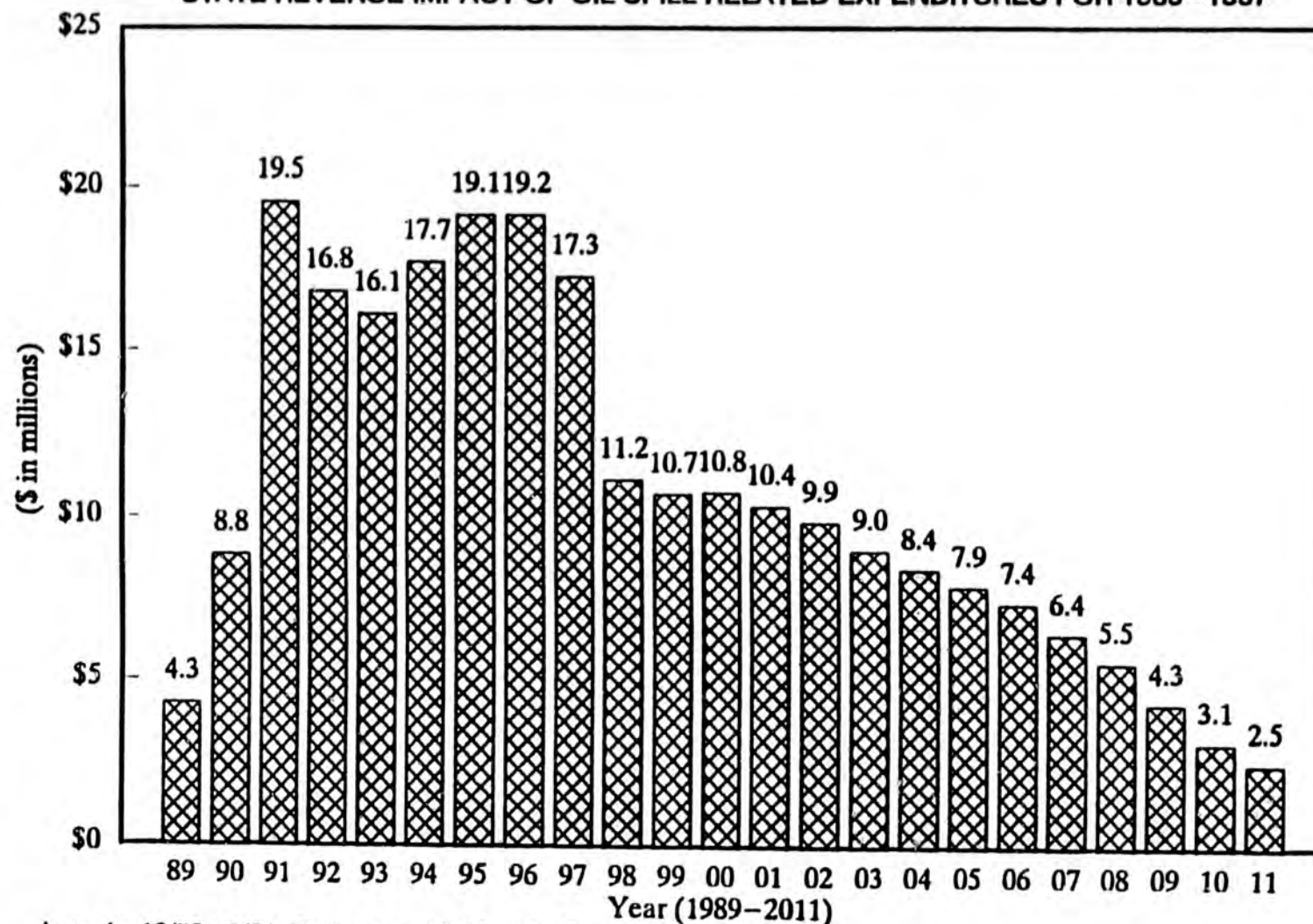
STATE ADIT		FACTORS				
1 Additions to Depreciable Property						
2	1989	5.7143%				
3	1990	10.7755%				
4	1991	9.8247%				
5	1992	9.2107%				
6	1993	8.5966%				
7	1994	7.9826%				
8	1995	7.3685%				
9	1996	6.7545%				
10	1997	6.1405%				
11	1998	5.5264%				
12	1999	4.9124%				
13	2000	4.2983%				
14	2001	3.6843%				
15	2002	3.0702%				
16	2003	2.4562%				
17	2004	1.8421%				
18	2005	1.2281%				
19	2006	0.6141%				
20	2007					
21	2008					
22	2009					
23	2010					
			2007	2008	2009	2010
24 State Tax Depreciation			10.9	8.4	6.3	4.4
25 Depreciation			10.8	9.3	7.2	5.3
26 State Timing Difference			(0.1)	0.9	0.9	(1.4)
27 Cumulative Timing Difference			(1.3)	(0.4)	0.6	1.4
28 State ADIT - EoY	9.4%		(0.1)	(0.0)	0.1	0.1
FEDERAL ADIT						
29 Additions to Depreciable Property						
30	1989	5.0000%				
31	1990	9.5000%				
32	1991	8.5500%				
33	1992	7.6950%				
34	1993	6.9255%				
35	1994	6.2330%				
36	1995	5.9049%				
37	1996	5.9049%				
38	1997	5.9049%				
39	1998	5.9049%				
40	1999	5.9049%				
41	2000	5.9049%				
42	2001	5.9049%				
43	2002	5.9049%				
44	2003	5.9049%				
45	2004	2.9525%				
46	2005					
47	2006					
48	2007					
49	2008					
50	2009					
51	2010					
			2007	2008	2009	2010
52 Federal Tax Depreciation			13.0	9.9	7.1	4.3
53 Depreciation			10.8	9.3	7.2	5.3
54 Federal Timing Difference			(2.3)	(0.7)	0.1	1.1
55 State Tax Effect	9.4%		0.0	(0.1)	(0.1)	(0.1)
56 Cumulative Timing Difference			44.7	44.0	43.9	44.9
57 Federal ADIT - EoY	34%		15.2	14.9	14.9	15.3
58 Total ADIT - EoY			15.1	14.9	15.0	15.4

STATE REVENUE IMPACT OF OIL SPILL RELATED EXPENDITURES FOR 1989-1997
 (net present value as of January 1, 1992)



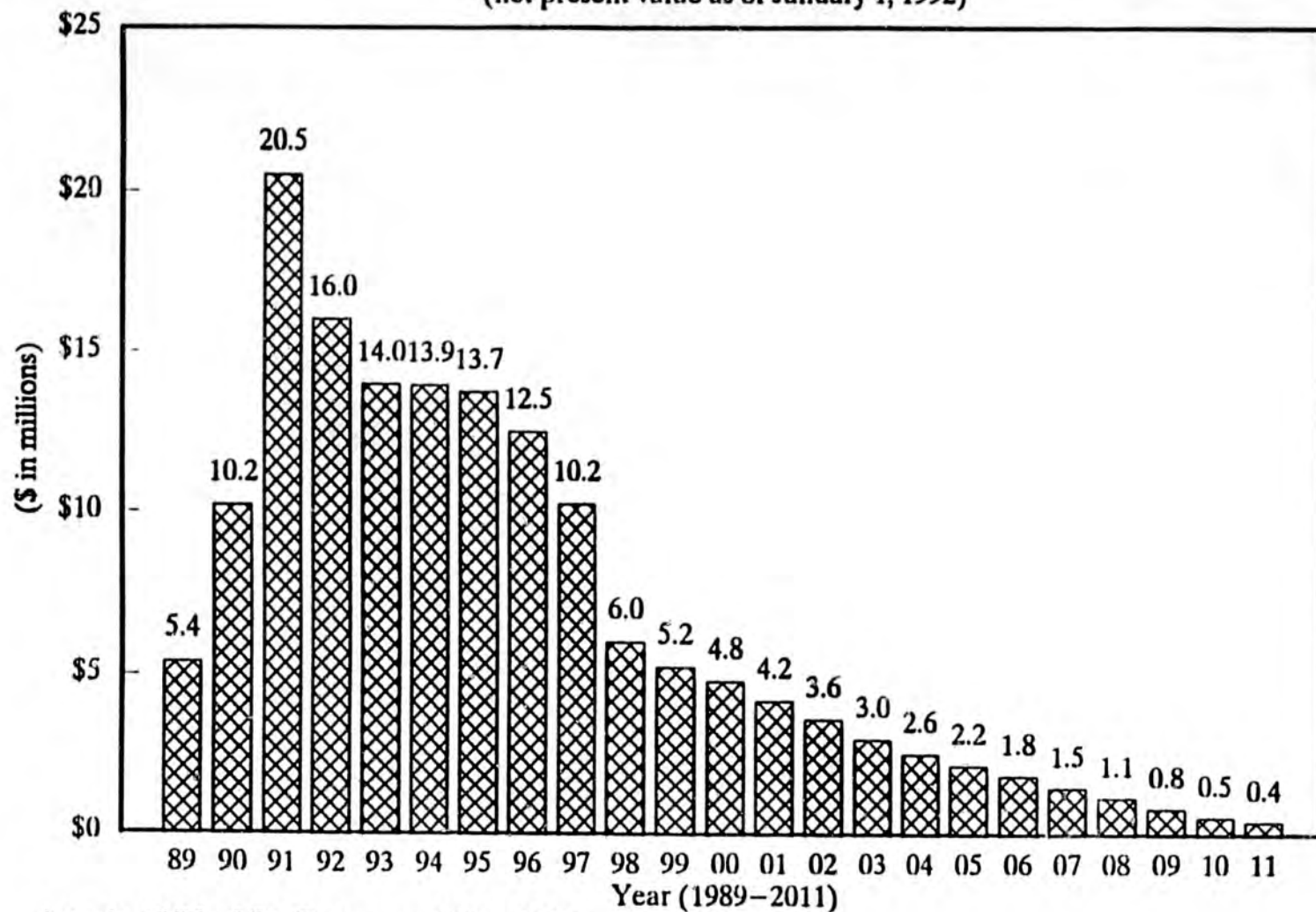
Actuals: 10/89-9/91; Estimates: 10/91-12/97
 Horst & Frisch, November 4, 1991

STATE REVENUE IMPACT OF OIL SPILL RELATED EXPENDITURES FOR 1989-1997



Actuals: 10/89-9/91; Estimates: 10/91-12/97
 Horst & Frisch, November 4, 1991

STATE REVENUE IMPACT OF OIL SPILL RELATED EXPENDITURES FOR 1989-1997
(net present value as of January 1, 1992)



Actuals: 10/89-9/91; Estimates: 10/91-12/97

Horst & Frisch, November 4, 1991

November 20, 1991

BY FACSIMILE

Deborah Vogt, Esq.
P.O. Box 1065
Juneau, Alaska 99802

Re: Alyeska Oil Spill Response Services in
Prince William Sound

Dear Ms. Vogt:

Mike Williams has asked me to reply to your October 30, 1991 inquiry about Alyeska's authority to require "contracting vessels" to demonstrate its capability to hold Alyeska harmless from certain potential liabilities associated with initial oil spill response in Prince William Sound. You also have asked whether Alyeska pays oil and gas property tax on its oil spill response equipment.

**Alyeska Oil Spill Response Services Agreement:
Requirements for Financial Responsibility or Insurance**

As a Response Action Contractor, Alyeska provides oil spill prevention and initial response services to TAPS trade vessels in Prince William Sound. To establish a contract for these services, Alyeska uses an Oil Spill Response Services Agreement with entities ("Contracting Vessels") that either own, charter or operate those vessels. Those Agreements require Contracting Vessels to demonstrate their capability to meet contractual obligations by meeting financial responsibility or insurance requirements described in the Agreements. You have asked what authority allows Alyeska to impose those requirements on Contracting Vessels.

The Trans Alaska Pipeline System is owned by seven common carrier oil pipeline companies. Interstate transportation of petroleum by the carriers is regulated by the Federal Energy Regulatory Commission, and intrastate transportation of petroleum by the Alaska Public Utilities Commission. Alyeska Pipeline Service Company operates TAPS as the carriers' agent. Each TAPS carrier through its tariffs offers to transport a shipper's (i.e. a customer's) petroleum from origins on TAPS to destinations on TAPS, and if the destination is Valdez, to load it on board vessels furnished by the shipper.

Exh. 3

No carrier ever owns the petroleum carried in its space on TAPS. It merely provides transportation service for petroleum owned by others. All shipments on a carrier's space in TAPS are upon the terms and conditions and for the prices set out in the carrier's tariffs. A shipper accepts a carrier's offer by tendering petroleum to the carrier in accordance with the carrier's tariff requirements. A contract then exists between the shipper and the carrier for the carriage of petroleum from an origin on TAPS to a destination on TAPS. The carrier undertakes no obligation in its tariffs for the transportation of petroleum after it leaves TAPS.

Thus, under each TAPS carrier's tariffs, the shipper is responsible for its petroleum after it is loaded on board a vessel at Valdez and has the responsibility to furnish a vessel to carry the petroleum by water from Valdez to the petroleum's next destination.

The State of Alaska requires each vessel furnished by the shipper to have an oil spill response contingency plan, which must provide, among other things, for personnel and equipment to escort the shipper's vessels and to respond to a spill in Prince William Sound within a short period of time. Since no one else has stepped forward to offer vessel escort service and initial spill response in Prince William Sound, Alyeska has done so. Nothing prevents others from competing with Alyeska to provide these services. While there has been some debate as to whether, with respect to furnishing these services, Alyeska (a) is obligated under Alaska statute or the federal and state right-of-way grants, or (b) has volunteered (Alyeska believes it is a volunteer), there has never been any suggestion that the services are being furnished pursuant to any common carrier obligations of the TAPS carriers or their agent Alyeska. Thus the Agreement requirements, like all aspects of the response action contract, are strictly a matter of commercial contract. Alyeska needs no authority from any regulatory statute or regulatory agency to require financial responsibility or insurance in conjunction with the provision of response action contractor services.

As we discussed yesterday, the TAPS carriers include the costs of Alyeska's Prince William Sound effort in tariff charges for oil delivered to Valdez. This equitably distributes the costs of those services among their beneficiaries.

I also described to you Alyeska's reliance on its Prince William Sound capabilities to meet oil spill response planning standards imposed by AS 46.03.040 on the Valdez

Deborah Vogt, Esq.
November 20, 1991
Page 3

Marine Terminal. Meeting those requirements is a part of the TAPS Owners' common carrier obligations.

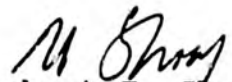
Oil and Gas Property Tax

Alyeska owns a large amount of oil spill response equipment, intended for use in Prince William Sound, at the Valdez Marine Terminal and along the pipeline. Alyeska pays the state's oil and gas property tax levied on that equipment.

Alyeska does not pay the state tax on marine vessels that it charters from various companies to assist spill prevention and response in Prince William Sound and Port Valdez.

Please call me at (907) 265-8565 if I can be of further assistance.

Sincerely yours,


Robert I. Shoaf
Assistant General Counsel

smk

cc: M.F.G. Williams

DISPRI Quarterly Cost Participation Percentages

Updated 2/18/1991

Updated 2/18/1991		(Thousands barrels per quarter)						4th Qtr. 1990 Volumes			
COMPANY	OFFSHORE OIL PRODUCTION		REGULATED PIPELINES		DOCK TRANSFERS		TANKERS & BARGES		TOTALS		%
	MB/Qt	x 1.0	MB/Qt	x 0.1	MB/Qt	x 0.1	MB/Qt	x 1.0	Actual MB/Qt	Weighted MB/Qt	Participation
	(A)	(B)	(A)	(B)	(A)	(B)	(A)	(B)	(A)	(B)	(B)
ARCO	440.2	440.2		0.0		0.0		0.0	440.2	440.2	2.4%
Onshore (x .1)	510.0	51.0							510.0	51.0	0.3%
CHEVRON		0.0		0.0	0.0	0.0	2,438.8	2,438.8	2,438.8	2,438.8	13.5%
C.I.P.L.		0.0	2,510.6	261.1	2,452.9	245.3		0.0	5,063.5	506.3	2.8%
KPL		0.0	1,216.9	121.7	9,999.8	999.9		0.0	11,115.7	1,111.5	6.2%
MAPCO		0.0		0.0	511.1	51.1	511.1	511.1	1,022.2	562.2	3.1%
MOCO	824.1	824.1		0.0		0.0	0.0	0.0	824.1	824.1	4.6%
MOBIL		0.0		0.0		0.0		0.0	0.0	0.0	0.0%
PHILLIPS		0.0		0.0		0.0		0.0	0.0	0.0	0.0%
SHELL	552.4	552.4	0.0	0.0		0.0		0.0	552.4	552.4	3.1%
TESORO		0.0	2,066.3	206.6	0.0	0.0	7,303.2	7,303.2	9,369.5	7,509.6	41.7%
TEXACO		0.0		0.0	Rig Tenders	0.0		0.0	0.0	0.0	0.0%
UNOCAL	1,461.3	1,461.3		0.0		0.0	2,554.4	2,554.4	4,015.8	4,015.8	22.3%
OTHER **		0.0		0.0	0.0	0.0	0.0	0.0	0.0	0.0	
TOTALS	3,788.0	3,329.1	5,893.8	589.4	12,882.9	1,286.3	12,807.5	12,807.5	35,352.2	18,012.3	100.0%
%		18.5%		3.3%		7.1%		71.1%		100.0%	
** Excluded from participation % calculation.											

** Excluded from participation % calculation.

Exh. 4

CISPRIL Quarterly Cost Participation Percentages

Revised 5/23/91			(Thousands barrels per quarter)						1st Qtr. 1991 Volumes		
COMPANY	OFFSHORE OIL PRODUCTION		REGULATED PIPELINES		DOCK TRANSFERS		TANKERS & BARGES		TOTALS		Participation %
	MB/Qt	x 1.0	MB/Qt	x 0.1	MB/Qt	x 0.1	MB/Qt	x 1.0	Actual MB/Qt	Weighted MB/Qt	
	(A)	(B)	(A)	(B)	(A)	(B)	(A)	(B)	(A)	(B)	
ARCO	441.2	441.2		0.0		0.0		0.0	441.2	441.2	2.30%
Onshore (x .1)	461.7	46.2							461.7	46.2	0.24%
CHEVRON		0.0	70.0	7.0	0.0	0.0	2,608.5	2,608.5	2,678.5	2,615.5	13.63%
C.I.P.L.		0.0	2,569.4	256.9	2,694.8	269.5		0.0	5,264.2	526.4	2.74%
KPL		0.0	1,133.5	113.4	8,230.3	823.0		0.0	9,363.8	936.4	4.88%
MAPCO		0.0		0.0	715.8	71.6	715.8	715.8	1,431.6	787.4	4.10%
MOCO	774.3	774.3		0.0		0.0	0.0	0.0	774.3	774.3	4.03%
MOBIL		0.0		0.0		0.0		0.0	0.0	0.0	0.00%
PHILLIPS		0.0		0.0		0.0		0.0	0.0	0.0	0.00%
SHELL	511.1	511.1	511.1	51.1		0.0		0.0	1,022.2	562.2	2.93%
TESORO		0.0	1,554.7	155.5	474.0	47.4	8,158.4	8,158.4	10,185.1	8,359.2	43.56%
TEXACO		0.0		0.0	Rtg Tenders	0.0		0.0	0.0	0.0	0.00%
UNOCAL	1,448.4	1,448.4		0.0		0.0	2,694.8	2,694.8	4,143.2	4,143.2	21.59%
OTHER **		0.0		0.0	0.0	0.0	0.0	0.0	0.0	0.0	
TOTALS	3,636.7	3,221.2	5,838.7	583.9	12,114.9	1,211.5	14,175.5	14,175.5	35,765.8	19,192.1	100.0%
%		16.8%		3.0%		6.3%		73.9%		100.0%	

** Excluded from participation % calculation.

CONTACTS

The following people were kind enough to provide information for this report:

Department of Revenue
Chuck Logsdon
Roger Marks

Department of Natural Resources
Bill VanDyke

British Petroleum
Bob Van Hook
Paul Quesnel
Tom Williams

Arco
Steve Mahoney

Tesoro
Gene Burden

Alyeska
Mike Williams
Rob Shoaf

Marine Preservation Association
Bob Aldag

CISPRI
Linda White

Alaska Clean Seas
Norm Ingram

Horst & Frisch
Ken Timbers

CONTINGENCY
PLAN

REQUIREMENTS
UNDER THE
OIL POLLUTION
ACT OF 1990

MICHELE STRAUBE

*Attorney
Environmental Consultant*

239 Dale Drive
Silver Spring, MD 20910

301-589-9247
301-585-2976 (Fax)
380-1114 (MCI mail)

NOV 7 1991

TO: Prince William Sound Regional Citizens Advisory Council
Citizens Oversight Council on Oil and Other Hazardous
Substances
DATE: October 31, 1991
RE: HE 196, Section 11, Report -- Research Project Task 4
Contingency Plan Requirements Under OPA 90

TABLE OF CONTENTS

1. Problem Definition
2. Short Answer
3. Analysis
 - A. Impact of OPA 90 on Oil Spill Response
 - (1) Private Sector Responsibility
 - (2) Liability Provisions and Exemptions
 - (3) Contingency Planning
 - (4) Oil Spill Response
 - B. Federal Attention to Holder-RAC Relationship or RAC Performance
 - (1) Federal Approval of the Holder-RAC Relationship
 - (2) Federal Enforcement of the Holder-RAC Relationship
 - C. Practical Implications for Oil Spill Response
 - D. State Options
Preemption
4. Conclusion

1. Problem Definition

Task 4 describes the following research:

The implementation of the provisions of OPA 90 for contingency plan response standards may have a major impact on both contractor liability and contingency plan holder status. The role of response action contractors in adhering to contingency plan requirements should be a key issue in the National Contingency Plan and may have the effect of superseding or rendering moot the state requirements.

... (1) research OPA 90 legislative history, and (2) investigate the current status and approach of Coast Guard and EPA OPA 90 implementation with respect to the following issues:

- relationship between response action contractor and contingency plan holder status
 - whether OPA 90 has or will address this issue, and if so, whether it has or will effectively preempt different state standards
 - whether the federal government can "enforce" the contract between response action contractor and an unwilling or incapable c-plan holder
- state contingency plans (whether OPA 90 has or will effectively preempt state contingency planning requirements).

Upon review of various documents bearing on the Task 4 issue,¹ and discussions with RCAC and Citizens Oversight Council representatives,² my approach to this research task was to focus on the relationship between the contingency plan holder ("Holder")³ and the response action contractor ("RAC"),⁴ with specific emphasis on RAC accountability in the event of a spill.

¹ 9-23-91 letter from Mike Frank to Sheila Gottehrer; 10-1-91 memo in response from Ann Rothe to Sheila Gottehrer; HB 196.

² Patti Saunders (9-19-91); Michele Brown (9-19-91); Ann Rothe (10-3-91).

³ Referred to by the federal agencies in OPA 90 lingo as the "responsible party".

⁴ Referred to by the federal agencies in OPA 90 lingo as the "cleanup contractor".

My research (and the analysis in this memo) attempt to answer the following questions:

1. What is RAC statutory liability under OPA 90?
2. To what extent will federal contingency plan ("c-plan")⁵ review focus on the Holder-RAC relationship?
3. Does the President have the authority, or will he exercise the authority, to force RAC action in conformance with an approved c-plan in the event of an oil spill?
4. Is the State preempted from imposing RAC liability that differs from OPA 90?
5. Is the State preempted from adopting c-plan requirements, specifically with respect to Holder-RAC relations, that differ from those ultimately adopted under OPA 90?

2. Short Answer⁶

A. What is RAC statutory liability under OPA 90?

Under most circumstances, none. The RAC may be held liable if it is also the owner/operator of the facility or vessel causing the spill, or if the RAC response action causes response costs or damages due to gross negligence or wilful misconduct, or causes personal injury or wrongful death.

⁵ Referred to by the federal agencies in OPA 90 lingo as "response plans".

⁶ The reader should be aware that the analysis in this memo, and therefore these short answers, reflect the current status of OPA 90 implementation as of 10-31-91. Since no c-plan regulations have even been drafted, and the agency working groups are still only at the stage of discussing possible issues for inclusion in proposed regulations, there is no certainty that the current status will reflect the federal government's approach to these issues next month or six months from now.

This does create the opportunity for RCAC and other interests from Alaska to raise their concerns directly with federal agency staff in the hopes of having them addressed when federal regulations are ultimately proposed. Responses to Advanced Notices of Proposed Rulemaking and informal contacts with agency staff should emphasize the importance of these issues, with factual or hypothetical examples of potential problems in the event of another spill in Prince William Sound.

- B. To what extent will federal contingency plan ("c-plan") review focus on the Holder-RAC relationship?

While the federal government will require the Holder to demonstrate that it has a contract with a RAC, the level of scrutiny is unclear. The federal government is considering certifying RACs, in order to guarantee a minimum level of capability and expertise among RACs. It is unclear whether a Holder will have to notify the federal government (or receive new approval) if the Holder-RAC relationship changes.

- C. Does the President have the authority, or will he exercise the authority, to force RAC action in conformance with an approved c-plan in the event of an oil spill?

The federal government will address what it means for the President to "direct" a response action in the proposed changes to the National Contingency Plan ("NCP"). The current thinking is that OPA 90 does not grant the federal government any authority over RAC activities; the only leverage is to order the Holder to take appropriate actions, who in turn presumably would direct the RAC to implement the federal order. If the federal government decides to certify RACs, its position on this issue may change.

- D. Is the State preempted from imposing RAC liability that differs from OPA 90?

Definitely not, since imposing any liability on RACs would expand the existing federal scheme.

- E. Is the State preempted from adopting c-plan requirements, specifically with respect to Holder-RAC relations, that differ from those ultimately adopted under OPA 90?

No, but care should be taken to develop additional requirements which supplement federal c-plan regulations, rather than directly contradicting them. Lack of preemption will be more difficult to support in the situation where the Holder cannot comply with both federal and state c-plan requirements.

2. Analysis

A. Impact of OPA 90 on Oil Spill Response⁷

(1) Private Sector Responsibility

The primary purpose of OPA 90 was to place the financial onus of cleanup on the private sector. It increased liability limits for each oil spill, and clearly identified that the "responsible party" -- namely the owner or operator of onshore facilities and pipelines, or the owner, operator or demise charterer of vessels -- was liable for all removal costs and damages (natural resource and economic) caused by oil discharged into or upon navigable waters from such source.⁸

(2) Liability Provisions and Exemptions

All existing oil spill trust funds were combined into the Oil Spill Liability Trust Fund ("Fund"). Funds expended for oil spill response from the Fund are recoverable from the responsible party, unless limited defenses to liability apply.⁹

Non-owner/ operator RACs are exempt from liability for removal costs and damages resulting from response actions, provided such actions are consistent with the NCP or as directed by the President (delegated to the Coast Guard). The RAC liability exemption does not apply for costs or damages caused by gross negligence or wilful misconduct, or for personal injury or wrongful death.¹⁰ All costs and damages covered by the RAC exemption must be paid by the responsible party.¹¹

⁷ This brief discussion of OPA 90 is included to provide a context for the Task 4 research questions. It is not intended to be a comprehensive summary of the legislation.

⁸ §§ 1002(a) and 1001(32), OPA.

⁹ In addition to acts of God and acts of war, responsible parties can escape liability by proving that the discharge and all resulting costs and damages were caused solely by an act or omission of a third party, and that the responsible party exercised due care and took precautions against all foreseeable acts. §§ 1002(d)(1)(A) and 1003(a)(3), OPA.

¹⁰ §§ 4201(c)(4)(A) and (B), OPA.

¹¹ § 4201(c)(4)(C), OPA.

(3) Contingency Planning

In order to improve government and industry response to oil spills, a variety of contingency plans must be prepared. EPA and the Coast Guard must revise the National Contingency Plan to specify the federal response to any given oil spill. This includes designating On-Scene Coordinators ("OSCs") for all regions of the country, and establishing criteria and procedures for federal involvement in the oil spill response.¹² In particular, the revised NCP should amplify the OPA 90 requirement that the President be prepared to "direct" response activities for oil spills that present a "substantial threat to the public health or welfare of the United States."¹³

A second layer of government-prepared contingency plans is the area contingency plan. The Coast Guard has announced its intent to designate the areas covered by such c-plans; the State of Alaska is one of the areas suggested.¹⁴ The area contingency plans, when drafted, should provide area-specific details for implementing the NCP's general criteria for federal oil spill response. In particular, the area c-plan should identify equipment and personnel available for a federal response in the event of an oil spill within the area c-plan's jurisdiction.

The final layer of contingency planning imposed by OPA 90 is the tank vessel and facility response plans. The owner/operator of each tank vessel or a facility whose location creates a reasonable expectation that an oil spill may occur must prepare a contingency plan and submit it to the federal government for approval.¹⁵ These vessel- or facility-specific plans must identify equipment and personnel available to respond to oil spills. OPA 90 anticipates that much of the equipment or personnel will be provided by RACs, and specifically requires the owner/operator to "ensure by contract or other means acceptable to the President" that oil spill response capability is available to "remove to the maximum extent practicable a worst case discharge."¹⁶ The President must review the vessel- and facility-specific response plans, require amendments where necessary to meet all requirements, approve them, and review the plans periodically for continued feasibility.

¹² § 4201((b), OPA.

¹³ § 4201(b)(2)(I), OPA.

¹⁴ 56 Fed. Register 33481 (7-22-91).

¹⁵ § 4202(a)(5), OPA.

¹⁶ § 4202(a)(5)(C)(iii), OPA.

Finally, OPA 90 directs the federal government to conduct periodic surprise drills (hypothetical spill scenarios) to confirm the effectiveness of the area and vessel tanker or facility c-plans, and the owner/operator's preparedness for oil spill response.¹⁷

(4) Oil Spill Response

OPA 90 gives the President broad authority to determine the extent of federal involvement in response to any oil spill, and to order responsible party participation in the response. It is nevertheless anticipated that the responsible parties will respond in the first instance in accordance with the approved tanker vessel or facility c-plan.¹⁸

In cases where the discharge poses a substantial threat to public health and welfare, however, the President has a mandatory duty to "direct all Federal, State and private actions" in response to the oil spill.¹⁹ This authority is designed to minimize confusion and hesitation in cases where immediate response is required.²⁰

B. Federal Attention to Holder-RAC Relationship or RAC Performance

The Holder-RAC relationship is an issue at multiple stages of the OPA 90 process. First, it is a contingency planning issue. What scrutiny will the federal government give the Holder-RAC relationship when reviewing (and approving) tanker vessel or facility contingency plans?

Second, it is an implementation issue. Will the federal government enforce the Holder-RAC relationship in the event of a spill? Although related to implementation, this issue will probably be dealt with in the NCP revision context.

(1) Federal Approval of the Holder-RAC Relationship

Although OPA 90 requires the Holder to identify, and ensure by contract or otherwise, availability of adequate equipment and personnel for oil spill response, the detail required for

¹⁷ § 4202(a)(7), OPA.

¹⁸ Conference Report, House Report No. 101-652 (8-1-90), at 144-146.

¹⁹ § 4201((a)(2), OPA.

²⁰ Conference Report, *supra*, at 144-146.

approval of a c-plan remains in the government's discretion. Likewise the government's continued oversight of the Holder-RAC relationship after initial c-plan approval is not specified by statute. Since the private party contingency planning requirement has been divided into at least three efforts, shared between two agencies, it is possible that the requirements for vessels and facilities may differ.

The Coast Guard has recently filed an Advance Notice of Proposed Rulemaking for vessel response plans, in which it asked for public comment on various issues before proceeding with developing a proposed regulation.²¹ I have suggested to the Oil Spill Prevention/Response Committee of RCAC that they identify these Holder-RAC Relationship issues in their response to the Advance Notice, and believe that has been accomplished.²² RCAC and other interested Alaska parties should continue to track this rulemaking to ensure that the concerns about RAC accountability for oil spills from tanker vessels are adequately addressed.

EPA is working on regulations for fixed facility c-plans, which should be proposed as a part of revised regulations implementing the Spill Prevention and Pollution Control provisions of the Clean Water Act.²³ These proposed regulations have finished the work group process, and should go to "red border review"²⁴ soon; it is impossible to predict a date by which they will be proposed. Although a current draft of the regulations could not be obtained, I have been told that they will address the circumstances under which a c-plan will have to be updated (e.g., change in amounts of material stored, change in type of product),

²¹ 56 Fed. Register 43535 (8-30-91); Coast Guard contact, Lieutenant Commander Glenn Wiltshire, 202-267-6740.

²² In particular, I suggested the proposed vessel response plan regulations should address:

- frequency of EPA/Coast Guard periodic review of c-plan, including Holder-RAC contractual arrangements
- requirement that Holder notify EPA/Coast Guard whenever there is a change in RAC or contract with the RAC, to obtain approval of the changed condition
- consider adopting Mike Frank's suggestion that the federal government require RACs to agree to respond at the OSC's request.

²³ EPA contact, Bobbie Lively-Diebold, 703-356-8774.

²⁴ Red border review involves circulation among all EPA offices for sign-off. The next stages include EPA Administrator review and sign-off, Office of Management and Budget review and sign-off, revisions after OMB review if necessary and repeat of the whole cycle, proposal in the Federal Register.

and that they will require annual review and updating of c-plans. It was my impression that the regulations will not focus extensively on the Holder-RAC contract, because EPA will rely on Holder liability to provide the needed incentive for prompt oil spill response.

Another office in EPA is allegedly preparing regulations for pipeline c-plans.²⁵ Despite multiple attempts, I have been unable to speak with them.

(2) Federal Enforcement of the Holder-RAC Relationship

A perfect c-plan and a model Holder-RAC contract do not guarantee a smooth oil spill response. There are multiple conditions under which the RAC may refuse to perform its responsibilities under the approved c-plan, or the Holder may refuse to pay for or direct the RAC to conduct the required activities. If the oil spill in question poses a "substantial threat" to public health and welfare, the President must "direct" the response activities.

If it is a spill of lesser consequence, the President has the authority to "direct" the response activities.

What does the statutory term "direct" mean? The legislative history repeatedly refers to "federalizing" a spill, which means having the federal government use its contractors and Fund money to provide oil spill response. By contrast, the term "direct" appears to provide the On-Scene Coordinator with authority to require other parties (including responsible parties) to conduct response activities at their expense.²⁶

Clarification of the term "direct" should be included in the revisions to the NCP, which are being jointly drafted by EPA and the Coast Guard. The Coast Guard appears to have responsibility for this particular issue, however.²⁷ Work group discussions have discussed the definition of the term "direct", and the current thinking is to provide a range of alternatives for the OSC. These would range from simply monitoring the private parties' response actions, to directing them to get another contractor or more equipment, to taking over the entire cleanup.

²⁵ EPA contact, Caesar DeLeon, 202-366-1640.

²⁶ House Report 101-402, Part 2: Committee on Merchant Marine and Fisheries (9-18-89) at 38 describes a 3-tiered removal authority -- federalize, direct and oversee.

²⁷ Coast Guard contact, Lieutenant Commander Harry Schultz, 202-267-2616.

The current approach is to provide the OSC with maximum flexibility in the revised NCP regulations,²⁸ while imposing more specific requirements in policy documents.

My discussion with the Coast Guard reflected a strong disinclination to enforce the Holder-RAC contract, or to force the RAC to respond if the Holder (responsible party) did not concur.²⁹ The Coast Guard apparently intends to direct its enforcement efforts (and all orders to act) against the responsible party only, since it does not have clear legal authority to impose liability on the RAC. The Coast Guard representative did opine, however, that if a RAC certification program were adopted, this might provide authority to order RAC action directly.

In addition, the Coast Guard representative did not feel that the concerns I expressed about the Holder-RAC relationship were significant, and opined that most responsible parties will and do respond. He cited to all the statutory provisions we are familiar with -- strict liability, treble damages, contingency planning, periodic drills -- to support his contention that it is in the responsible party's best interest to respond without objection. He did confirm that in a worst case scenario, the OSC could direct the RAC to implement the approved contingency plan and reimburse the RAC's costs from the Fund.

Finally, it is worth noting that the Holder-RAC relationship is not discussed in the OPA 90 legislative history, except with respect to the RAC exemption from liability.

²⁸ The reason for this is that the regulatory process is cumbersome and time-consuming. Detailed requirements in the NCP will likely take years to change, whereas policy is iterative. Note that policy is also not subject to the Administrative Procedure Act, therefore not open for public comment and review, nor judicially reviewable.

²⁹ In my judgment, this position is directly contrary to the RAC exemption from liability, which is intended to encourage prompt and aggressive response action. House Report 101-402, Part 2, *supra*, at 84.

C. Practical Implications for Oil Spill Response

We will consider a worst-case scenario to explore the possible limitations of the federal approach to the Holder-RAC relationship.³⁰ In this hypothetical situation, a tanker vessel owned and operated by its own shell corporation (only asset is the vessel) has contracted with a RAC, and the RAC contract has been reviewed and approved by the Coast Guard as part of the tanker vessel c-plan. The RAC contract reflects that the RAC is excused from performance if the Holder is bankrupt or insolvent. The tanker has a spill in Prince William Sound.

Assuming the entire tanker contents were spilled, this would undoubtedly qualify as a spill posing a "substantial threat", which the OSC must take control of. Assume further that the RAC determines the Holder to be insolvent because the tanker itself was severely damaged, and refuses to perform under the c-plan. The OSC has the following options:

(1) The OSC could order the Holder to provide response, but the Holder could not comply without the cooperation of the RAC. Further, the tanker owner might simply declare bankruptcy in an attempt to protect itself from liability.

(2) The OSC could consider ordering the RAC to respond, notwithstanding its interpretation of the contract. It is open to question whether the OSC has legal authority to order action from a party not legally liable to the government to provide such action.³¹ Any third party contract theories (direct enforcement of the Holder-RAC contract by the contract's beneficiary) would have to be litigated in court before RAC response action would be required.

³⁰ Many of these hypothetical facts were taken from Mike Frank's letter to Sheila Gottehrer.

³¹ I have not researched this issue under federal law. Based on my experience as a state government enforcement lawyer, however, the authority to issue orders is directly proportional to the order recipient's liability for some violation of law. See, also, § 4201(a)(3)(A), OPA, which directs federal agencies, states, the owner/operator and any other person participating in a removal action to act in accordance with the OSC's direction. Is the RAC covered by this section if it does not choose voluntarily to participate in the response action? Can this section of the statute be used to force a RAC to participate in the response action? I suspect that to force them to participate without reimbursement could be considered a taking of property without due process of law.

(3) The OSC could order the RAC to respond and reimburse the RAC's costs from the Fund, thus making the RAC an OSC contractor. This may be the only practical solution for a federal response, if no other federal response equipment and personnel is available for timely use in Alaska. It is assumed the OSC's willingness to federalize the response would not be influenced by the likelihood of an unsuccessful cost recovery for the Fund (since the tanker owner lost its only asset).

The OSC options do not change significantly if we assume that some lesser quantity was spilled which did not qualify as a "substantial threat" scenario, and the RAC refused to perform for whatever reason (including the Holder's cancellation of the contract). The major difference is that a viable owner/operator would still exist from whom the OSC could successfully cost recover. The potential delay in response action remains while the broken Holder-RAC relationship is discovered and addressed.

D. State Options

It appears that the federal government will not, and to some extent cannot, address the Holder-RAC relationship in a manner which satisfies RCAC and others' concerns. The state can address its concerns in three ways: (1) influence federal c-planning regulatory developments to incorporate Alaska concerns on this issue to the greatest extent possible; (2) adopt state legislation to impose RAC liability for response in the event of a spill; (3) develop state contingency planning requirements that incorporate the Holder-RAC relationship.

The first option -- influencing federal regulations -- is easy and has already been initiated. Proposed and developing proposals for the NCP, area c-plans, vessel c-plans, and fixed facility c-plans should be monitored, and informal and formal comments submitted at every opportunity.

The last two options -- liability legislation and state c-planning changes -- cannot be evaluated without an analysis of OPA 90 preemption issues. Although OPA 90 purports not to preempt state law, the nature of overlapping jurisdictions, OPA 90 legislative history and the common law of preemption suggest that duplication of requirements should be undertaken cautiously.

As the following discussion of preemption supports, imposing liability on RACs under state statute is not preempted. Contingency planning efforts should, however, be tailored to supplement (rather than contradict) federal c-planning requirements. To the extent that a void currently exists in federal requirements for c-plans under OPA 90, however, there may be a window of opportunity for quick action.

Preemption³²

OPA 90 provides that there is no preemption of

the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to --

(A) the discharge of oil or other pollution by oil within such State; or

(B) any removal activities in connection with such a discharge.³³

Similarly, OPA 90 does not

affect the authority of any State or political subdivision thereof --

(1) to impose additional liability or additional requirements; or

(2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law

relating to the discharge, or substantial threat of discharge, of oil.³⁴

The statutory language is extremely broad -- no preemption of additional liability or additional requirements with respect to oil spills and their removal. The legislative history, however, is not as clear about the breadth of preemption. The committee reports specifically address preemption (or non-preemption) of state liability schemes, state oil spill funds (uses and sources of funding), and state penalties.³⁵

There is only one instance in which state contingency plans are referred to. HR 1465, which was the basis for the conference committee report and the legislation as enacted, apparently

³² I have not exhaustively researched the law of preemption. This analysis is based on a review of the OPA 90 statute, its legislative history and selected preemption case law in oil spills preceding OPA 90 enactment.

³³ § 1018(a)(1), OPA.

³⁴ § 1018(c), OPA.

³⁵ See, e.g., *Conference Report, supra*, at 121; *House Report 101-402, Part 1: Committee on Public Works and Transportation (9-18-89)* at 38; *Senate Report 101-94: Committee on Environment and Public Works (7-28-89)* at 6, 17 and 18.

originally included a section stating that there was no preemption of "any authority that the State of Alaska may have to regulate oil tankers or provide for oil spill contingency plans in State waters."³⁶ This language is not found in OPA 90, nor does the legislative history clarify why it was dropped. It is possible that the conference committee decided that the broad preemption language of Section 1018 encompassed these concepts. Alternatively, it is possible that preemption of contingency planning was not intended.

The statements made in both the House and Senate for adoption of the conference report reflect that the Congresspersons were under the impression that the preemption issue was limited to liability and state oil spill funds.³⁷ Rep. Craig's statement reflects that the intent may have been to preempt state contingency planning in an effort to promote coordination and consistency.

Assuming, *arguendo*, that OPA 90 does not preempt state c-planning requirements, how will federal and state c-planning requirements work together as a practical matter? If there are contradictory requirements, whose requirements will be enforced? These types of questions are likely to be answered in the context of an industry challenge to state regulations, asserting preemption by OPA 90.

In order to avoid such a challenge, or to avoid federal support for such a challenge, it may be wise to design any state c-planning requirements to supplement, rather than contradict, federal requirements. This is difficult, however, when the federal requirements are not yet known.

If Alaska c-planning requirements can be developed before the federal NCP, area c-planning, or vessel/facility c-plan regulations are promulgated, it is possible that preemption arguments may be decided in the state's favor since contradictions will not yet be able to be determined.³⁸ In addition, the state's requirements may provide a minimum standard (floor) for the federal requirements to build from.

³⁶ House Report 101-402, Part 2: Committee on Merchant Marine and Fisheries (9-18-89) at 92.

³⁷ I have attached my notes from these Congressperson statements on the issue of preemption at the end of this memo.

³⁸ The common law of preemption is that a state can act in the absence of federal regulations in a particular area. See, e.g., *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 8 E.L.R. 20255 (1978). The application of this general rule in the case of anticipated federal regulation is unknown.

4. Conclusion

The Holder-RAC relationship is not directly addressed in OPA 90, and does not appear to be addressed comprehensively in the federal government's OPA 90 implementation. The State is not precluded from addressing this issue by imposing liability on RACs or developing c-plan requirements to document or explore the relationship.

Senate Adoption of Conference Report - 136 Cong., Rec. S11536-
S11548 - 8-2-90

Sen. Kerry (Mass.): "Lastly, I want to applaud the fact that the legislation preserves the right of States to require stricter standards of liability than current international protocol standards. I believe this is a key provision in the legislation in that it preserves Massachusetts' tougher standards of liability for anyone responsible for polluting our coastline."

Sen. Stevens (Alaska) Exhibit 1 - summary of OPA 90:
A good samaritan provision protects persons (other than the spiller) acting under the direction of the President or in compliance with the NCP from liability, with the exception of gross negligence or willful misconduct

Sen. Gorton (Wash) - ... I take great pride in seeing that the Senate's insistence against preempting State unlimited liability laws prevailed in the conference. This provision was essential to preserve our right in Washington State to require unlimited liability."

Sen. Lautenberg (NJ) - The conference report also protects the right of States to impose their own standards of liability on oil operations. ... The rights of States to have tough oil spill laws are protected.

Sen. Bentsen (Texas) - The bill also preserves the right of States to have oilspill [sic] liability laws

Sen. Levin (Mich) - It also preserves the right of individual States to enact even tougher spill response and prevention measures

Sen. Moynihan (NY) - ... we did something of large importance to our Federal System and to the majority leader. We did not preempt State law in the handling of these matters.

House Adoption of Conference Report - 136 Cong. Rec. H6933-H6949
- 8-3-90

Mrs. Lowey (NY) - ... preserves the rights of States to impose liability for spills as they judge appropriate. ... The conferees wisely agreed to preserve the right of States to establish their own liability and compensation systems. States like New York, whose waters and coastlines are threatened by heavy tanker traffic, should have the freedom to impose standards that reflect the importance of the resources at risk. This legislation rightly protects those essential rights from encroachment by Federal law or international convention.

Jones (NC) - In addition, the Federal law does not preempt States, so they can impose even stricter requirements if they choose. [in paragraph discussing liability]

Conte (Mass) - Second, the legislation does not preempt State liability laws, therefore allowing States to pass even tougher standards, if they so desire.

Hammerschmidt (Ark) - This bill will ensure that we have a uniform Federal approach to liability even though it is not a national or an international approach without preemption and without the protocols.

Stangeland (Minn) - We've also included a limited immunity clause for certain public or private response efforts. This important provisions [sic] is meant to help foster greater use of cleanup contractors and cooperatives by meeting their concerns about financial risks and liability exposures.

Shumway (Cal) - And finally, this bill purports to be a comprehensive domestic regime but it is not. For 14 years, this house has strongly supported an oilspill bill which replaces the existing patchwork of State and Federal laws with one single, clear-cut regime. Despite this longstanding, principled position, we have now bowed to the rhetoric and misperceptions of the environmental lobby and eliminated the guts of the liability section of the bill by removing the preemption provision. This bill, then, only perpetuates much of the existing confusion in liability and compensation that follows an oilspill -- the very type of confusion which originally was one of the driving forces behind the bill.

Lagomarsino (Cal) - Also, by expressly preserving States' authority to impose additional liability or requirements, and preserving the States' authority to establish their own spill funds and to impose fines and penalties, the conference report recognizes the need for States to protect their shores and lands.

Miller (Wash) - States like Washington will be able to keep their

unlimited liability laws. And Washington will be allowed to determine cleanup standards to ensure that we can protect our waters and beaches.

Ms. Snow (Maine) - In particular, I am pleased that the conferees have retained the right of the States to set their own oil spill liability limits and cleanup funds.

I say that because the State of Maine has consistently been recognized as a leader in the adoption of effective oil spill prevention, cleanup, and liability laws. Maine has more stringent safety standards than Federal law and many other States. ... I applaud the decision of the conferees to recognize that State laws, like those of Maine, should augment and not be replaced by Federal standards. ... In addition, we have taken the important step ensuring that the States also have the opportunity to enact laws that will protect their coasts. This is a vital provision that will allow States to take the necessary actions to ensure that specific needs of their marine environment are addressed.

***** Craig (Idaho) Public Works & Transpo Committee (on conference committee for S 405 and H 2004)- During conference committee consideration, I was concerned that the legislation might preempt a considerable amount of State authority, making it the sole responsibility of the Federal Government to deal with spills. This would not be acceptable -- I believe that States need to be assured an adequate role in these situations. However, I also understand the need of the Federal Government to coordinate contingency planning and response efforts for major spills. There is no doubt that this was a difficult balance to strike, but one I believe had to be reached. As a result, I was glad that we were able to arrive at a compromise, settling upon workable Federal-State balance.

Pelosi (Cal) - Additionally, this legislation will maintain the right of States to develop their individual liability and compensation standards.

INSURANCE
ISSUES RELATED
TO SPILL RESPONSE
CONTRACTORS

**INSURANCE ISSUES RELATED TO
RESPONSE ACTION
CONTRACTORS**

Prepared by Gene Burden
Tesoro Alaska Petroleum Company
October 30, 1991

The work plan established by the Citizen's Oversight Committee on Oil and Other Hazardous Substances (hereinafter the "COC") in response to the legislature's directives under H.B. 196 included a section on the status of insurance as it relates to the Response Action Contractor (hereinafter "RAC") as defined under AS 46.03.822. Tesoro Alaska agreed to provide input on this topic with the initial objective of determining to what extent insurance is available for RACs; the costs of such coverage; and the affects on coverage based on the existence of state responder immunity law.

INTRODUCTION

The availability and cost of insurance coverage for a RAC is subject to the same factors as other insurance applicants and can vary substantially between geographic areas based on the applicant's experience, local and state laws/regulations, and the perceived risks of a particular operation. The variability in these ratings makes concise cost comparisons between jurisdictions difficult; and based on our review, precludes offering definitive conclusions as to the specific effects of RACs liability immunity

**RESPONSE ACTION CONTRACTOR'S
INSURANCE CONSIDERATION - ALASKA
October 30, 1991**

on actual expected premiums.

The RAC liability concerns arise from damages caused by their negligence in the clean-up operations and in the disposal of the contaminating substances. The availability of public liability insurance for emergency response contractors including oil spill response contractors is typically available in the London market and is rated based on the following factors:¹

- 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.²

INSURANCE SCENARIO FOR A RAC

A recommended package of coverage for a RAC was developed by a Soriero & Seffens broker to include the following:³

1. Hull & Machinery: covering equipment, barges, service boats/tugs, and crew/miscellaneous boats;

The Hull & Machinery coverage would provide

¹Source: Mark R. Mozell, Commercial Broker, Soriero & Seffens, Inc., 1300 Post Oak Boulevard, Suite 1800, Houston, Texas 77056-3013 (713)993-9913 in letter dated August 20, 1991.

²Mr. Mozell reports that the London insurance market is currently suffering through its worst results in years which has prompted rises in rates and additional underwriting restrictions.

³Recommendations provided by Soriero & Seffens in letter dated September 20, 1991.

RESPONSE ACTION CONTRACTOR'S
INSURANCE CONSIDERATION - ALASKA
October 30, 1991

physical damage coverage on an "all risks" basis subject to a rate of approximately 1.25% of value. Coverage would be the usual required for vessels subject to a deductible of \$25,000 each occurrence.

2. Protection and Indemnity Risks;

Protection and Indemnity covers liabilities over water arising out of the owned vessels. This can include injuries to the crew. The costs for coverage provided by Soriero and Seffens were as follows:

- Barges.....\$ 7,500 each
- Crewed Boats.....\$10,000 each
- Crew coverage.....\$ 7,500 - \$10,000 per crew member
- Pollution coverage...\$25,000

The above premiums would obtain \$1,000,000 coverage subject to a \$25,000 deductible.

3. Real and personal property;

This would cover the office and contents, miscellaneous property and inventory, materials and equipment. The expected premium would be based on a rate of 1.0% of coverage with a \$10,000

**RESPONSE ACTION CONTRACTOR'S
INSURANCE CONSIDERATION - ALASKA
October 30, 1991**

deductible for each loss.

4. Comprehensive General Liability; and

The General Liability insurance provides the "land based" liability coverage. It is expected that the limits would be \$1,000,000 with this coverage placed as underlying to an Excess Liabilities section.

5. Excess Liabilities.

The Excess Liabilities coverage would augment the underlying placements described above. Limits for excess can presently be obtained at a pricing of approximately \$2,000 per million of coverage. A \$25 million limit would cost \$50,000. The coverage would include Pollution liabilities on a "sudden and accidental" basis.

Our inquiry into insurance rates for RACs focused on two different RAC scenarios:

1) **SPILL CO-OP:** The model spill co-op for insurance underwriter evaluation was described as located in Alaska with approximately \$10 Million in capital equipment; 15 employees; one 30,000 bbl barge; four response assist boats (24' - 40' each); 1 larger service boat (50'+); and most likely responding to small

**RESPONSE ACTION CONTRACTOR'S
INSURANCE CONSIDERATION - ALASKA
October 30, 1991**

fuel spills of less than 100 barrels. The planning standard required for crude oil response by this co-op is to remove 50,000 barrels within 72 hours after a spill.

The above description illustrates that a co-op such as described above would expect to incur annual insurance costs in excess of \$245,000 as illustrated below:

> Hull and Machinery (rate 1.25% of value)...	\$ 12,500
> Protection & Indemnity.....	\$ 132,500
> Real & Personal Property.....	\$ 10,000
> Comprehensive general liability.....	\$ 40,000
> Excess Liability of \$25 Million.....	\$ 50,000

=====

ESTIMATED TOTAL FOR A CISPRI SIZED RAC \$ 245,000

2) **GENERAL ENVIRONMENTAL SERVICE COMPANIES:** This type of firm may offer a variety of services to a wide range of clients. This could include refineries, processing plants, etc. for operations and maintenance work and for land based environmental clean-ups. In addition this firm may maintain a cadre of trained response personnel and support equipment to assist in response to a spill that is managed by another party such as a Responsible Party, a Spill Response Co-op, or a governmental entity.

**RESPONSE ACTION CONTRACTOR'S
INSURANCE CONSIDERATION - ALASKA
October 30, 1991**

Soriero & Seffens views this type of organization much differently than a pure spill response co-op. Such an organization would probably not have as much spill response equipment and as high a capital investment to insure. In addition these firms were expected to rely more heavily on limited indemnity provisions in their agreements.

A review of RAC indemnifications was attempted via a survey conducted by the Alaska Department of Environmental Conservation. The survey information solicited included questions about the level of general liability coverage maintained and its cost. In addition information regarding the RAC's requirements for indemnification was requested. The ADEC will report the results of their survey to the Citizens Oversight Council.

Tesoro Alaska has response agreements with five different response action contractors: Cook Inlet Spill Prevention & Response, Inc. (CISPRI); Alyeska Pipeline Service Company (Alyeska); VECO; Martech; and VRCRA. A summary of the relevant indemnity language in each of these contracts is provided on the following page.

**RESPONSE ACTION CONTRACTOR'S
INSURANCE CONSIDERATION - ALASKA
October 30, 1991**

**SUMMARY OF TESCRO ALASKA CONTRACTS WITH
SPILL RESPONSE CONTRACTORS AND
EXISTING INDEMNITY PROVISIONS**

R A C	DATE OF CONTRACT	GENERAL DESCRIPTION OF SERVICES	INDEMNIFICATION LANGUAGE
CISPRI	5/29/91	Spill response services in Cook Inlet, Alaska	Article 7 of the Agreement is enclosed as Attachment 1 to this report.
ALYESKA	10/1/91	Spill response services (minimum of 72 hours after a spill) in Prince William Sound	Article 5 of the Agreement is enclosed as Attachment 2 to this report.

**RESPONSE ACTION CONTRACTOR'S
INSURANCE CONSIDERATION - ALASKA
October 30, 1991**

VECO	8/14/90	Back up manpower and clean up assistance in Cook Inlet	"Any damage or loss of equipment, tools or consumable, etc., utilized in the course of any response efforts will be considered part of the cost of the response effort and repair and/or replacement cost will be the responsibility of the Client. If, however, gross negligence on the part of VECO's employees is determined to be reason for said damage or loss, then VECO would stand responsible for said additional cost, but only to the extent of repair or replacement cost that were a direct result of VECO's negligence."
MARTEC	8/14/90	Back up manpower and clean up assistance in Cook Inlet and Prince William Sound	"In no event shall Contractor be liable to Client for any direct damages, other than failure of the Contractor to exercise reasonable care, nor indirect damages, such as loss of profits or loss of use of property."

**RESPONSE ACTION CONTRACTOR'S
INSURANCE CONSIDERATION - ALASKA
October 30, 1991**

VRCA	8/15/90	Back up manpower and clean up assistance in Cook Inlet and Prince William Sound	"In no event shall Contractor be liable to Client for any direct damages, other than failure of the Contractor to exercise reasonable care, nor indirect damages, such as loss of profit or loss of use of property."
------	---------	---	---

CONCLUSION

There is insurance available to Response Action Contractors to cover potential damage claims arising from their activities in response to a spill. The cost of the insurance is dependent on numerous variables including the existence of indemnities and state provided immunities. The spill response co-ops such as CISPRI and Alyeska have broad indemnity provisions in their response action contracts while the contracts examined that have been executed by the General Environmental Service Companies are more limited.

ATTACHMENT I

**CISPRI
RESPONSE ACTION CONTRACTOR**

May 15, 1991

Article 7. Indemnification

4.2. any applicable remedial action plan approved by the Alaska Department of Environmental Conservation,

4.3. any applicable contingency plan held by CISPRI and approved by the Alaska Department of Environmental Conservation, and

4.4. any applicable order by a State or Federal agency asserting jurisdiction over the actual or threatened release.

5. Spill Notification. User shall provide, and confirm to CISPRI the receipt of, all notifications of any release or threatened release of liquid hydrocarbons to the Alaska Department of Environmental Conservation in the manner prescribed by law.

6. User Warranty. User warrants that all directions and mandates given by User to CISPRI in connection with any release or threatened release of liquid hydrocarbons will be consistent with the plans and orders described in Paragraph 4, above. In the event CISPRI believes that a direction or mandate given by User to CISPRI is not consistent with such plans and orders, CISPRI may suspend or discontinue all or any part of the services being provided, or to be provided, by CISPRI under this agreement.

7. Indemnification.

7.1. Special Recitals. User acknowledges that:

7.1.1. Neither this agreement nor any other instrument requires User to use the services of CISPRI or its contractor(s), or to use equipment or materials acquired by CISPRI in connection with any spill control or clean up activities;

7.1.2. User is solely responsible for all planning, preparation, equipment acquisition, contracting and operations in connection with spill control or clean up necessitated by a spill originating from User's equipment or facilities;

7.1.3. For the purposes of any dispute related to the enforceability of these indemnification provisions, User waives any claim that:

7.1.3.1. it did not have adequate opportunity to participate in decisions made by or on behalf of CISPRI with regard to planning, equipment and materials acquisition and maintenance, operations, and other functions;

7.1.3.2. it did not have adequate opportunity to inspect the equipment, materials and supplies that have been acquired by CISPRI and to evaluate their condition and usefulness to the member in the event of a spill;

7.1.3.3. it did not have adequate opportunity to evaluate the ability of contractor(s) engaged by CISPRI to be of assistance to User in the event of a spill;

7.1.4. Any and all equipment, supplies, materials, and services provided by CISPRI to User are provided "as is, where is," and neither CISPRI nor any member of CISPRI makes any representation as to the merchantability or fitness for any particular purpose of the same.

7.1.5. If these indemnification provisions were not included in this agreement, CISPRI would be unwilling to enter into this agreement.

7.2. Indemnification. It is the intent of the parties that User shall assume all indemnification responsibilities provided herein. User hereby agrees to indemnify, defend, and

hold harmless CISPRI, its members, directors, officers, managers, executive committee, contractors and employees, together with all officers, directors, employees and affiliates of each of the members of CISPRI, and each of them, from and against any and all claims, demands, causes of action, damages, costs, fees (including reasonable attorneys' fees), expenses, penalties, losses or liabilities, in law or in equity, of every kind and nature whatsoever, arising out of or in any way connected with:

7.2.1. Any and all actions, or failures to act, on the part of CISPRI, its members, staff and contractor(s), carried on under or in connection with materials, equipment, supplies or services (hereinafter, collectively, "assistance") requested or received by User, including, without limitation, the activities of members of CISPRI as participants in business entities providing vessels, equipment and material to CISPRI;

7.2.2. Any and all penalties, fines or other liability imposed on account of the violation of any law or regulation, compliance with which is left by these bylaws to User, if such penalties, fines or other liability arise out of or are in any way connected with assistance requested or received by User; and

7.2.3. Any and all liens, claims, assessments, levies and stop notices of labor, and any other liens or claims on account of overdue or other deficient handling of charges for labor or materials, if such liens, claims, assessments, levies, and stop notices of labor, or other liens or claims arise out of or are in any way connected with assistance requested or received by User.

7.3. Extent of Indemnification. The indemnification obligations of User are fully effective even if such claims, demands, causes of action, damages, costs, expenses, penalties, losses or liabilities were caused or contributed to, in whole or in part, by:

7.3.1. The active or passive negligence or other fault (including gross negligence) of CISPRI, its members, staff or contractor(s), or their agents, representatives or employees;

7.3.2. Any equipment or materials supplied to User by CISPRI, howsoever caused, whether by failure, malfunction or defect, latent or otherwise, in said equipment or materials, or by the maintenance thereof; or

7.3.3. The liability without fault of CISPRI, its members or contractor(s), or their agents, representatives or employees.

The obligations of indemnification are not limited, restricted, or in any way affected by the amount of insurance carried by User, or by any terms or conditions of any insurance policies. The obligations of indemnification shall survive the termination of this agreement, the dissolution of CISPRI and the withdrawal of any member from CISPRI.

7.4. Indemnification Duties. User assumes, without limitation, the following obligations:

7.4.1. At its own cost, expense and risk, to accept and conduct the defense of any and all suits, actions and other legal proceedings that may be brought or instituted against the indemnitees, or any of them, and prosecute any appeals;

7.4.2. To pay and satisfy any and all settlements, final judgments and decrees that may be paid by, or enforceable against, the indemnitees, or any of them;

7.4.3. To reimburse the indemnitees, and each of them, for any and all reasonable attorneys' fees, costs and expenses incurred by the indemnitees, or any of them, in order to enforce the indemnification provisions of these bylaws; and

7.4.4. To reimburse the indemnitees, and each of them, for any and all reasonable attorneys' fees, costs and expenses incurred by the indemnitees, or any of them, prior to the assumption of indemnification responsibilities by User in connection with any and all suits, actions and other legal proceedings described above.

7.4.5. After User has assumed such responsibility, any and all indemnitees are entitled to participate at its or their sole cost and expense in the defense of any suit, action, or other legal proceeding without affecting the indemnity obligations of this agreement.

7.5. Administration.

7.5.1. In requesting that CISPRI furnish assistance, and in utilizing and receiving the benefits of assistance, User reaffirms thereby its commitment to perform its indemnification obligations as provided herein.

7.5.2. CISPRI may, if it so elects, pay and discharge any liens or overdue charges for labor, equipment, or materials incurred by User as may be reasonably necessary to protect the interests of CISPRI. Any and all such payments shall be for the account of User.

7.5.3. The provision of assistance by CISPRI to User does not constitute or affect any construction contract under AS 45.45.900.

8. Insurance. At all times during the term of this agreement, User shall carry and maintain in force with carriers satisfactory to CISPRI, Workers' Compensation (including adjustments for marine service) and Employers' Liability Insurance in accordance with the law that may be applicable to its employees, and Comprehensive General Liability and Automobile Liability Insurance covering injury or death of persons and property damage in an amount not less than ten million dollars. User shall provide certificates of insurance for each of these policies at the request of CISPRI. No such insurance will be materially changed during the term of this agreement without at least thirty days' written notice to CISPRI. Nothing contained in this clause shall limit or waive User's legal or contractual responsibilities to CISPRI or others.

8.1. User agrees to have its insurers add CISPRI as an additional insured or loss payee under any policies of insurance applicable to this agreement, and to obtain a waiver of its insurers' rights of subrogation against CISPRI and CISPRI's members and their employees.

8.2. In the event User elects to self-insure, CISPRI reserves the right to approve such self-insurance and to request and receive such information as CISPRI deems necessary to evaluate the self-insurance provided by User. In any case, if User elects to self-insure, User shall treat CISPRI as an additional insured or loss payee and hereby waives any rights of subrogation against CISPRI and CISPRI's members and their employees.

9. Accounting and Audit.

9.1. CISPRI agrees that all financial settlements, billings, and reports rendered to User, as provided for in this agreement, and/or any amendments to it, will reflect properly the facts about all activities and transactions handled for the account of User, which data may be relied upon as being complete and accurate in any further recording and reporting made by User for any purpose.

ATTACHMENT II

**ALYESKA
RESPONSE ACTION CONTRACTOR**

October 1991

Article V. Indemnify

Alyeska shall use its best efforts to include in any contracts with its subcontractors a provision similar to the foregoing so that Contracting Vessel shall have access to pertinent records of such subcontractors for the purpose of verifying the accuracy of Alyeska's costs in performing services under this Agreement.

ARTICLE V

INDEMNITY

5.1 Alyeska and Contracting Vessel recognize that, in connection with the performance of this Agreement: (i) AS 46.03.826(15) defines a response action contractor as a person who is retained by a person potentially liable for a release or threatened release of a hazardous substance to provide response actions to such release; (ii) AS 46.03.825(a) provides that a person who is a response action contractor with respect to a release or threatened release of oil (defined to mean a derivative of a liquid hydrocarbon and includes crude oil, lubricating oil, sludge, oil refuse or another petroleum-related product or by-product) whose act or omission is not contrary to an order of the federal or state on-scene coordinator is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the release or threatened release or from the response action contractor's act or omission in response to the release or threatened release, unless the person bringing a claim against the response action contractor proves by a preponderance of the evidence that the response action contractor (1) would have been liable for the initial release or threatened

release under AS 46.03.822, (2) acted with gross negligence or intentional misconduct, or (3) without the approval by the federal or state on-scene coordinator, substantially deviated from an oil spill contingency plan previously approved under AS 46.04.030, and the plan was either prepared by that contractor for a party responsible for the release under AS 46.03.822 or that contractor previously agreed to comply with the terms of that plan under a contract with parties responsible for the release under AS 46.03.822; provided, however, the above limitations of liability do not apply to (1) an action for personal injury or death, (2) an action for damages to tangible personal property not caused by oil, or (3) an act or omission that occurs more than 15 days after the release; (iii) the Services to be performed by Alyeska are in the public interest to protect the environment and are in the best interests of Contracting Vessel to attempt to minimize its exposure to liabilities; (iv) accidents and events may occur that result in the damage to or loss of property, in the injury to or death of persons, in spillage, or pollution, or environmental damage; (v) the extraordinary nature of the Services may require actions by Alyeska, its Owner Companies or their respective subcontractors that can give rise to fines, penalties, and claims, including but not limited to claims based on negligence; (vi) Alyeska has based the charges for its Services on the understanding that Contracting Vessel, or anyone asserting rights on its behalf, will not challenge Alyeska's right to be indemnified as provided in this Article V and that without such assurances Alyeska

considers its potential risks and liabilities to be too substantial to provide the Services for the charges set forth herein; and (vii) certain risks and liabilities may be covered by Financial Responsibility, Insurance, or other means not addressed in this Agreement. Notwithstanding any such Financial Responsibility, Insurance, or other means that Alyeska or Contracting Vessel may have or acquire to cover such risks and liabilities, and notwithstanding that certain legal authorities may have questioned the concept of one party contractually agreeing to indemnify another party for its sole negligence, Alyeska and Contracting Vessel fully understand and recognize that the nature of the Services to be provided under the terms set forth in this Agreement make it appropriate and equitable to allocate the risks and liabilities as set forth in this Article V. Therefore Alyeska and the Contracting Vessel agree that responsibility for risks and liabilities arising out of the performance of (or the failure to perform) the Services by Alyeska shall be allocated to Contracting Vessel in the manner set forth in Sections 5.2 and 5.3, regardless of who may be at fault or otherwise responsible under any statute, rule, or theory of law, even if the subject damage, loss, injury or death is wholly or partially attributable to the active or passive negligence of Alyeska or its Owner Companies or Alyeska's subcontractors or the unseaworthiness of any vessel.

5.2 The following risks and liabilities that may occur as a result of or in connection with the Services performed by Alyeska are allocated solely to the Contracting Vessel:

(a) Any damage to or loss of: barges, lighters, tugs and other vessels owned, chartered or used by Alyeska or third-parties, specifically including but not limited to all items set forth in Sections 4.1 (e), (f) and (g) of this Agreement; docks, berths, wharfs, shoreside facilities and installations; and navigation aids, and any other property that may be damaged or lost.

(b) Bodily injury including but not limited to physical injury, death, sickness, disease or any other type of injury to: employees of Alyeska, its Owner Companies or the Contracting Vessel; employees of subcontractors of Alyeska, its Owner Companies or Contracting Vessel; and all other persons.

(c) Any fines, penalties, or other charges or costs imposed by any federal, state or local authority.

(d) Any claims for environmental damage to, or loss of, natural resources, wildlife, or public and private property; any other claims concerning the environment; any claims by fishermen, boat owners, or any other party or interest asserting any claim.

5.3 For the risks and liabilities set forth in Section 5.2, Contracting Vessel shall indemnify, defend and hold harmless Alyeska, its Owner Companies, their affiliates (including any person or entity controlling, controlled by, or under common control with Alyeska or any of its Owner Companies), subcontractors of Alyeska who assert claims against Alyeska, and each of their respective directors, officers, employees, agents, successors, and assigns (collectively, the "Indemnified Parties")

against all claims, liabilities, obligations, demands, losses, deficiencies, or damages in personam and/or in rem (including but not limited to compensatory, incidental or consequential damages, to the fullest extent permitted by law) that may be asserted against the Indemnified Parties by any party. The obligations undertaken by Contracting Vessel in this Article V are in addition to the reimbursement of expenses provided in Article IV.

5.4 The Contracting Vessel shall, at its sole expense, investigate, respond to, and provide defense for, any claim, demand or suit for which it gives an indemnity herein. Nothing in this Article V is intended to, or shall be construed to, constitute an admission of liability on the part of either Alyeska, its Owner Companies or Contracting Vessel with respect to third parties, and Alyeska and Contracting Vessel expressly disclaim any intention that any third party (other than the Indemnified Parties and third parties providing evidence of Financial Responsibility) shall be a third party beneficiary of the provisions of this Article V.

5.5 Contracting Vessel shall reimburse the Indemnified Parties for all legal expenses (including but not limited to actual attorneys' fees, costs and allocated expenses for in-house legal services) related directly or indirectly to (i) the Spill Prevention Services that are in addition to the regular vessel escort services and Oil Spill Response Services provided by Alyeska, (ii) any claim against the Indemnified Parties for which liability is allocated to Contracting Vessel, or (iii) any action

or proceeding to enforce the rights provided the Indemnified Parties under this Article.

5.6 Notwithstanding any of the provisions of this Article V, Alyeska and Contracting Vessel agree that the Contracting Vessel's responsibility to Alyeska to indemnify, defend, and hold harmless does not include risks and liabilities arising out of Alyeska's gross negligence, willful misconduct and/or criminal misconduct.

ARTICLE VI

FINANCIAL RESPONSIBILITY

6.1 Contracting Vessel, prior to the effective date of this Agreement, shall provide written evidence to Alyeska of Financial Responsibility, Insurance or a combination thereof.

6.2 The minimum amount of Financial Responsibility that Contracting Vessel shall provide to cover Contracting Vessel's obligations under this Agreement shall be in an amount equal to one billion dollars (\$1,000,000,000); provided, however, if Contracting Vessel uses a combination of Financial Responsibility and Insurance, or solely Insurance, to underwrite its obligations under this Agreement, the amount shall be One Billion Two Hundred Million Dollars (\$1,200,000,000). In the event Alyeska agrees to a lesser amount of financial responsibility and/or insurance during the term of this Agreement, the lesser amount will also be available to Contracting Vessel by a mutually agreed to amendment to this Agreement.

- LEGISLATIVE
HISTORY OF
IMMUNITY FOR
RESPONSE ACTION
- CONTRACTORS UNDER
THE OIL POLLUTION
ACT OF 1990

LAW OFFICES
GROSS & BURKE
A PROFESSIONAL CORPORATION
424 NORTH FRANKLIN STREET
JUNEAU, ALASKA 99801

1

AVRUM M. GROSS
SUSAN A. BURKE

(907) 586-2777

October 10, 1991

To: Sheila Gottehrer

From: AV Gross

Re: Legislative History of Immunity
for Response Action Contractors
under Oil Pollution Act of 1990

Section 4201(a) of OPA 90 amends 311(c) of the Federal Water Pollution Control Act to create a limited liability for certain persons who assist in the clean up of an oil spill. The relevant portion of Sec. 4201 reads as follows:

SEC. 4201. FEDERAL REMOVAL AUTHORITY.

(a) IN GENERAL. -- Subsection (c) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321(c)) is amended to read as follows:

"(c) FEDERAL REMOVAL AUTHORITY. --

* * * * *

(4) EXEMPTION FROM LIABILITY. -- (A) A person is not liable for removal costs or damages which result from actions taken or omitted to be taken in the course of rendering care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed by the President.

(B) Subparagraph (A) does not apply --
(i) to a responsible party;
(ii) to a response under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.);
(iii) with respect to personal injury or wrongful death; or

(iv) if the person is grossly negligent or engages in willful misconduct.

* * * * *

You have asked that we provide you with a brief history of how this limited exemption from liability became a part of OPA 90 and, in addition, an analysis of what was intended by the Congress that included the provision in the Act. Toward that end, we have reviewed the complete legislative history of OPA 90, including all committee reports and the floor debate. That review has produced a fairly clear picture of both the history of and intent behind the limited liability provision.

OPA 90 is the result of an amalgamation of two separate proposals; S.686, which was introduced in the Senate on April 4, 1989 and HR 1465, which was introduced in the House on March 16, 1989. Neither of the bills as initially introduced included any provision limiting the liability of parties who assisted in cleaning up an oil spill. The Senate bill went through limited committee hearings and passed the Senate on August 15, 1989 without any provisions relating to the liability of response action contractors.

The House of Representatives held extensive hearings on HR 1465 as well as on HR 3027, a similar measure. The early mark ups in the Public Works and Transportation Committee and the Science, Space and Technology Committee did not deal with the issues of liability for those who assist in spill

clean-up activities. The first committee to focus on that problem was the Committee on Merchant Marine and Fisheries. The committee added a new section to HR 1465 to deal with clean up activities directed by the President. The new section (Sec. 431 of HR 1465) amended section 311(c) of the Federal Water Pollution Control Act to read in part as follows:

Sec. 431. FEDERAL REMOVAL AUTHORITY

(a) REMOVAL. -- Paragraph (1) of section 311(c) of the Federal Water Pollution Control Act (33 U.S.C. 1321(c)(1)) is amended to read as follows"

(c)(1)(A) The President shall ensure an effective and immediate removal of a discharge of oil or hazardous substance --

(i) into or on the navigable waters; or
(ii) on the adjoining shoreline to these navigable waters; or

(iii) on the waters of the exclusive economic zone or

(iv) that may affect a natural resources belonging to, appertaining to, or under the exclusive management authority of the United States;

in accordance with the National Contingency Plan, any other contingency plans prepared under subsection (j) of this section, and applicable state law.

(B) The President may remove or arrange for the removal of a discharge, or the threat of a discharge, of oil or a hazardous substance at any time.

(C) The President may direct all Federal, state, responsible party and private actions to remove a discharge, or the threat of a discharge, of oil for a hazardous substance.

(D) When the President retains or directs a person (other than a responsible party) under the authority of subparagraph (B) or (C) of this paragraph, that person is not liable for removal costs or damages other than personal injury or wrongful death arising from his or her removal activities conducted in

accordance with the direction of the President, except in the case of gross negligence or willful misconduct.

(E) Each responsible party shall act in accordance with the National Contingency Plan, the applicable contingency plans required under subsection (j) of this section, and as otherwise directed by the President.

(F) Nothing in this paragraph affects the liability of a responsible party under the Oil Pollution Prevention, Removal, Liability and Compensation Act of 1989 (emphasis supplied).

The Committee explained the meaning of the limitation on liability at page 84 of its September 18, 1989 report in these terms:

Under section 311(a)(1)(D) the Committee allocated the primary risk of liability arising from removal and cleanup activities to the responsible party rather than to those persons responding to the spill under the direction of or retained by the Federal government. The Committee intends to ensure immediate response to oil and hazardous substance spills and believes this provision is necessary in light of the substantial financial risks and liability exposure which would otherwise deter vessel operators, spill cooperatives, and spill contractors from providing active assistance. To avoid paralysis of remedial action to spills, this paragraph provides that those persons -- other than responsible parties -- who are retained or directed by the President to participate in a cleanup action will not be liable for removal costs or damages as defined in this legislation, except in the case of gross negligence or willful misconduct. This limitation of liability does not affect liability for wrongful death or personal injury. Nor does it diminish the liability of those responsible for the spill nor the amount of compensation available to claimants. This limited protection will encourage individuals to assist in cleanup

operations without fear of collateral attacks from responsible parties. The Committee expects that all who take part in removal actions will act responsibly and believes that the elimination of the liability except for gross negligence or willful misconduct will serve as sufficient protection.

Section 311(c)(1)(E) requires the responsible party to act in accordance with the National Contingency Plan, other applicable contingency plans, and as otherwise directed by the President. This provision is also intended to underscore the fundamental obligation that the responsible party has to be prepared at all times and to take immediate and effective action in the event of a discharge. Report of the Committee on Merchant Marine and Fisheries on the Oil Pollution Prevention, Removal, Liability and Compensation Act of 1989, September 18, 1989 - Part 2.

The limitation on liability for simple negligence drafted by the Committee of Merchant Marine and Fisheries differs significantly from the language that eventually became part of OPA 90. The proposed limitation as only applicable to a person who was retained or directed by the President to clean up the spill. It had no application to volunteers or to contractors retained by responsible parties to clean up spills or to anyone else except those directed or retained by the Federal government.

The House debated and subsequently passed HR 1465 on November 9, 1989. The provision for limited liability drafted by the Merchant Marine and Fisheries Committee was included in the final bill without amendment.

Since different versions of the bill had passed the House and the Senate, the two measures were sent to a conference committee. Through the Washington D.C. office of Birch, Horton, Bittner and Cherot, I have obtained a copy of an undated memo that purports to set out the status of negotiations between the Senate and House conferees as of March 13, 1990. I have no way of independently verifying the accuracy of the contents of the memo. Assuming the memo is accurate, during the course of the negotiations the Senate conferees offered a new section to replace the section on limited liability, which had passed the House. The proposed section would have read as follows:

[A]mend proposed CWA Sec. 311(c)(1)(C)(1) as follows:

"No person shall be liable for removal costs or damages under this Act or the Oil Pollution Act of 1990 as a result of actions taken or omitted in the course of rendering care, assistance, or advice consistent with the National Contingency Plan or at the direction of an on-scene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any discharge of oil or the substantial threat thereof."

If the memo is accurate, the Senate proposal is the first instance in which a broader immunity was proposed for those who respond to a spill. The Senate proposal apparently sought to immunize those who responded to a spill so long as their activities were consistent with the National Contingency Plan or occurred at the direction of an

on scene coordinator. The language of the proposal is not crystal clear, was never explained in detail and did not appear in the final act; but it does represent the first effort to expand immunity beyond those working at Presidential direction.

The language that ultimately was adopted as a part of OPA 90 first appears in the tentative agreement of the conference committee contained in its report on HR 1465, issued on July 26, 1990. Section 4201 of the bill proposed by the conference committee contains the language that ultimately became section 4201 of OPA 90. Because the language was new, the conference committee included a specific explanation as to the meaning of the provision. That explanation is contained at page 146 of the conference report accompanying HR 1465 issued on August 1, 1990, to the House of Representatives. The report states:

The Conference substitute establishes a new paragraph (4) of FWPCA section 311(c) to provide limited immunity for persons involved in oil spill cleanup. The provision is similar to that contained in section 420(a) of the House bill except that the limited immunity is extended not only to those persons retained or directed by the Federal On-Scene Coordinator but also to those persons rendering care, assistance or advice consistent with the NCP. The substitute's provision also clarifies that it does not apply to a response under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

This subsection provides immunity from liability established under the substitute for those taking action in response to an oil

spill or the threat of a spill whether that action is performed under the aegis of the National Contingency Plan or under the direction of the President. This takes into account the fact that the NCP and Presidential orders may not cover every detail or eventuality of a spill response and that actions that are in keeping with the overall objectives of the NCP or Presidential order are deemed to be within the scope of this provision. This section reflects the Conferees' intention that responses to oil spills be immediate and effective. Without such a provision the substantial financial risks and liability exposures associated with spill response could deter vessel operators, cleanup contractors, and cleanup cooperatives from prompt, aggressive response.

There was no specific debate on the section of the conference committee report limiting immunity for response action contractors. Therefore, we can assume that the conference committee report will be taken as the definitive source of legislative intent on response action liability, particularly since the report specifically discussed the section in question. Two points bear mention in reference to the final provision. First, what started as an idea to protect those who were retained by Federal authorities to clean up a spill grew into a Congressional effort to insure "that responses to oil spills be immediate and effective." Congress apparently was convinced that if the risk of exposure to liability was not limited to gross negligence or intentional conduct, it "could deter vessel operators, cleanup contractors, and cleanup cooperatives from prompt, aggressive response." Disputes over the meaning of the act,

then, will be resolved with this Congressional intent in mind -- a deliberate relaxation of liability to encourage more aggressive spill response efforts. However, even though Congress clearly intended to take some risks to encourage spill response actions, it did not extend immunity to all situations in which a party participated in cleaning up a spill. Even in the expanded version, Congressional immunity only applies to actions "consistent with the National Contingency Plan or as otherwise directed by the President." The Federal Act does not go as far as Alaska's present law, which specifically permits deviations from a contingency plan so long as they are not "material." While it is possible that a court would permit parties seeking immunity under Federal law to show that Congress meant to allow some deviation from the National Contingency Plans so long as that deviation was not material, the words of the act, at least, do not permit any deviation.

Hopefully, this analysis of the federal immunity provision will prove of some benefit in formulating an overall strategy concerning HB 196. Please make this memorandum available to all appropriate parties and advise them to contact us directly if they desire any further information.

OTHER STATES'
LAWS ON RESPONSE
ACTION CONTRACTOR
LIABILITY

Master

SB 2040
STATE OF CALIFORNIA

TABLE OF CONTENTS

Synopsis.....	1
Background Information and Structure.....	8
Responsibility of the governor.....	8
Administrator for oil spill response.....	8
State Interagency Oil Spill Agency.....	11
Harbor Safety Committees.....	12
Oil Spill Technical Advisory Committee.....	12
State Lands Commission.....	13
Environmental Enhancement Committee.....	14
Liability for response action contractors.....	14
Indemnification of RACs.....	15
Limits on liability of responsible parties.....	16
Financial responsibility.....	17
Contingency plans.....	18
State oil spill contingency plan.....	19
Private c-plans.....	20
Interim plans.....	20
C-plans.....	21
Area contingency plans.....	22
Enforcement.....	22
Civil penalties.....	23
Criminal penalties.....	24
Administrative penalties.....	24
State response mechanisms.....	25
Oil Spill Prevention & Administrative Fund.....	25
Oil Spill Response Trust Fund.....	27
Borrowing Authority.....	29
Drills and inspections.....	30
Drills.....	30
Inspections.....	31
State procedures for oil spill response.....	32

California Code

SB 2040

SYNOPSIS

The California oil spill law, called the Lempert-Keene Oil Spill Prevention and Response Act, was passed in September 1990. Regulations have not been finalized.

The lead agency for oil spills is the Department of Fish and Game. The governor is responsible for the establishment of the state contingency plan and the response to oil spills. He appoints, subject to the advise and consent of the state senate, an administrator who becomes a chief deputy director of that department.

The administrator's primary responsibilities are to direct prevention and response, promulgate all necessary regulations, to represent the state in major oil spills and to act as a coordinator with the Coast Guard and federal agencies in the event of a spill. He must be on site for any spill that is greater than 100,000 gallons. Additionally, the administrator shall establish rescue and rehabilitation stations for wildlife and mammals and he shall administer the oil spill funds. He also has the authority to assess administrative penalties for violations of the Act.

The new law establishes harbor safety committees responsible for developing safety plans for their respective harbors. The law also establishes the Oil Spill Technology Advisory Committee to oversee the administrator's actions and the activities of the

State Interagency Oil Spill Committee. It shall provide public input and independent judgment of the administrator's actions. This committee shall provide recommendations to any state agency and on any provision of this act. Additionally, the committee may attend any drills or spills.

Under this law the State Lands Commission, which has jurisdiction over submerged lands offshore, has added responsibilities as to the regulation of existing and new marine terminals.

Persons and response action contractors are immune from liability for costs, damages or other claims that are incurred as a result of any actions taken or omitted in the course of rendering assistance or advice in accordance with the national contingency plan, state c-plan or any onscene coordinator, the administrator or the Coast Guard. Immunity from liability does not extend to acts of gross negligence or wilful misconduct nor for acts that result in personal injury or wrongful death. This immunity is limited to response personnel whose contracts with potentially responsible parties have been approved by the administrator and for response actions for which the responsible party cannot be identified or a responsible party who will not or is unable to provide the cleanup.

Further, the liability is limited to 60 days for response personnel that are regularly engaged in cleanup activities. The administrator may extend the liability for an additional 30 days upon specific findings: (1) due to inadequate or incomplete

containment the size of the spill will specifically expand and threaten uncontaminated marine or land resources; (2) the remaining work is of such a difficult and perilous nature that extension of the immunity period is clearly in the public interest; and (3) no other qualified and financially responsible contractor is prepared and willing to complete the response effort in the absence of the extended immunity. This limitation is not applicable to those response efforts by commercial fishermen or persons who dedicate their lives to the preservation and rehabilitation of wildlife.

The administrator may enter into indemnification agreements with qualified and financially responsible response action contractors. The indemnification can include payment of any damages for response costs covered under the immunity and for reasonably-related legal fees and costs.

Responsible parties are strictly, jointly and severally liable for any damages incurred by any party which are caused by the discharge of oil into or onto the marine waters of the state. Defenses are similar to those provided under OPA 90; however, the defenses shall not apply if the responsible party fails to immediately begin cleanup in accordance with his plan or if he fails to report the spill.

Damages include all costs of response, containment, cleanup and removal of pollution, injury to and economic losses to personal or real property, injury to or destruction of natural resources and the costs of assessing that damage. Damage also

includes loss of subsistence use and loss of taxes, royalties or profits or earning capacity for persons who derive at least 25% of their income from the activity.

Vessels must demonstrate an ability to pay at least \$500 million for any damages that arise from an unauthorized spill. This amount shall increase to \$750 million in July 1995 and to \$1 billion in 2000. The administrator may require smaller limits for barges.

Marine facilities must demonstrate financial ability to pay for damages that arise from a reasonable worst case oil spill. The administrator shall determine the financial ability based on the amount of oil that could be spilled from a facility, the frequency of operations at the facility and any other criteria that he determines to be relevant.

The state must develop a contingency plan that sets out the hierarchy and responsibilities of the state and local agencies that will respond to a spill. It must show environmentally-sensitive areas and state how the coastline will be protected.

Both marine terminals and vessels must submit interim c-plans by July 31, 1991, to the administrator for his approval. These interim plans must establish a chain of command for response and reporting a spill to the proper federal or state authorities. The plans shall also provide information as to actual response activities and any contracts with response action contractors.

The administrator must promulgate regulations for permanent

c-plans by December 31, 1991. The regulations must be discussed at public hearings prior to formal acceptance. C-plans shall be submitted by vessels and marine facilities within 90 days after regulations have been established by the administrator.

The administrator shall draft guidelines and standards for area c-plans required pursuant to the Health and Safety Code. Any local government within the jurisdiction of the applicable area may apply for a grant to update or revise any element of the area plan.

The new law provides for civil, criminal and administrative penalties. A person who knowingly fails to follow the directions of the administrator during an oil spill, if convicted, may be sentenced up to one year in prison and from \$5,000 to \$500,000 in fines. A person who knowingly fails to notify the Coast Guard of a disabled tanker, and that tanker subsequently discharges oil into the waters or a person who knowingly causes a spill may be subject to a jail sentence up to one year.

Persons who knowingly fail to notify the state of a discharge or who knowingly operate a vessel or marine facility without an approved c-plan or who fail to follow a c-plan may be liable for fines from \$2,500 to \$250,000 or imprisonment up to one year. Negligent actions are punishable by fines from \$25,000 to \$500,000 for each violation.

The new law provides for the creation of both an oil spill prevention/administrative fund and an oil spill response fund. Both funds are administered by the administrator and he shall

determine the amount of fees annually required to carry out the Act and to provide for response activities.

The administrative fund is a permanent fund that shall only be used to finance prevention programs, research and administrative costs. This fund has no cap or upper limit. The administrator shall determine the assessment for each marine facility based on the risks and potential size of the spills that could occur at that facility. The assessment cannot exceed four cents per barrel.

The owner of the crude oil is liable for the fee which is based on the number of barrels of crude delivered through the terminal. Owners of petroleum products are liable for the fees on products received at the terminal only if the products are imported from outside the state of California. Also, the fee will be assessed to pipeline owners who transport crude oil originating at an offshore production facility and travelling through a pipeline.

The oil spill response fund shall be limited to \$100 million, adjusted for inflation after January 1, 1991. \$50 million of the fund shall be cash; the other \$50 million must be accessible in the form of financial security. The law provides that if the fund reaches its \$50 million limit and there are no outstanding claims or costs for spills the administrator shall provide for refunds. The fund reached its limit in February 1991 and the fees lapsed in March 1991. Approximately \$8-\$10 million has been refunded to pipeline owners and owners of crude on a pro

rata basis.

Cargo owners are assessed 25 cents per barrel of crude and products delivered through a marine facility. The fee is not assessed on crude exports unless the total volume of crude exported from the state is more than 6% of the total volume of crude oil and products on which the fee was paid during the preceding year.

The administrator may raise the fees to a maximum of \$1 per barrel upon the following: (1) a calamitous event or series of events has severely depleted the fund; (2) the governor has requested the treasurer to borrow funds and the treasurer finds that the fee is insufficient for him to borrow enough money to meet the reasonably anticipated demands on the fund to pay for all costs, rehabilitation and other authorized expenditures; and (3) failure to raise the fee will result in unmet or unpaid authorized expenditures.

The governor has the authority to request the state treasurer to borrow and deposit in the fund any amount by which the estimated response costs exceed the designated amount of the fund.

The law provides for specific notification of any spill through a chain of command and it further provides that the responsible party shall immediately carry out activities according to its respective c-plan as to containment and cleanup. It further provides that any vessel docked at a marine facility at the time of a spill shall carry out its c-plan and follow any

directions given by either the administrator or the Coast Guard.

I. BACKGROUND INFORMATION AND STRUCTURE

Senate Bill 2040 was passed by the California Legislature and signed by the governor in September 1990. The bill took effect immediately. It has subsequently been amended as to the collection of fees for the oil spill funds and the liability of crude oil refiners for those fees. Both the original law and the amendments will be discussed below.

This law makes the governor fully responsible for oil spill prevention and response. It creates harbor safety committees, an oil spill technical advisory committee and an environmental enhancement committee. Additionally, it enhances the role of an existing interagency oil spill committee and expands the authority of the State Lands Commission over marine terminals.

RESPONSIBILITY OF THE GOVERNOR. Pursuant to this act the governor of California is responsible for the establishment of a state oil spill contingency plan. § 8574.1. He shall ensure that the state fully and adequately responds to all oil spills in marine waters. § 8670.5.

ADMINISTRATOR FOR OIL SPILL RESPONSE. The governor shall appoint an administrator who, at the governor's direction, shall implement activities relating to oil spill prevention and response. The administrator shall be a chief deputy director of the Department of Fish and Game; his appointment shall be subject to the advice and consent of the state Senate. § 8670.4.

The administrator is the primary authority to direct

prevention and response to marine spills. He shall represent the state in any coordinated response efforts with the federal government. § 8670.5. He shall coordinate and cooperate with all federal response efforts and the federal onscene coordinator. § 8670.7.

The administrator shall be present at all spills of more than 100,000 gallons of oil as soon as possible after notification of discharge. § 8670.7(b)(1). He must ensure that persons trained in cleanup and response efforts are onsite; he shall keep local governments affected by the spill apprised of response efforts and he shall, with the federal onscene coordinator, determine the amount of the discharge. § 8670.7(2).

The administrator is required to amend the existing state oil spill contingency plan by adding a marine oil spill c-plan which provides for the best achievable protection of the coast and marine waters. § 8574.7. He is responsible for the implementation of the state plan. § 8670.7(b). Also, he must carry out programs that will provide training for persons who will respond to oil spills. § 8670.8. These programs may also include volunteers and commercial fisherman who might help in response efforts.

The administrator shall carry out announced and unannounced drills and shall establish standards for such drills. § 8670.10. He shall conduct studies necessary for improving oil spill response and wildlife rehabilitation. § 8770.12(a). These studies shall include the use of dispersants, bioremediation and

incineration and their effects on the environment and public health. § 8670.12(b). Also, he shall study the feasibility of requiring new technologies, such as vessel traffic systems, electronic devices and other emerging technologies. § 8670.13.

The administrator shall develop and implement regulations and guidelines for c-plans. § 8670.28(a). He shall hold public hearings as to the regulations. Within one year after he establishes these regulations he shall review all c-plans. § 8670.19(a). He shall segment the state coastline into areas and determine if the coastline is adequately protected. If deficiencies exist in equipment, personnel or training he shall remand the c-plans to the originating parties for modification or amendment. § 8670.19(b).

The administrator shall establish rescue and rehabilitation stations for seabirds, otters and other marine mammals. § 8670.37.5. He shall consult with the U.S. Fish and Wildlife Service, the National Marine Fisheries Service and the California Coast Commission as to the design and maintenance of these facilities; there shall be public hearings prior to the construction and operation of the facilities. § 8670.37.5(a) and (b).

The administrator shall administer the oil spill funds and he shall promulgate regulations for maintenance of the funds. § 8670.38. He shall determine the annual assessments. The administrator is also empowered to assess administrative penalties for violations of the act. § 8670.67.

Finally, he shall actively promote the adoption of federal regulations and statutes such as bridge alarms on tankers, bridge-to-bridge radio telephones, collision avoidance radar devices and other safety systems. § 8670.16. He shall also promote studies and research regarding new vessel technologies, such as electronic vessel location charts, advanced shipboard oil and water separation systems. § 8670.12 and 13. He shall negotiate with the Coast Guard by December 31, 1991, regarding a vessel traffic service system to protect the state's harbors. § 8670.21.

STATE INTERAGENCY OIL SPILL AGENCY. The existing State Interagency Oil Spill Agency has enhanced duties under this new law. The agency shall consist of the administrator, who shall serve as chairman, and the chairpersons of the State Lands Commission and the California Coastal Commission. § 8574.9 (a)(1)-(2). It shall have representatives from the Office of Emergency Services, Water Resources Board, Department of Transportation, Highway Patrol, National Guard and several water and environmental agencies. § 8574.9(3)(A)-(P).

A Review Subcommittee of this agency is established under the new law. § 8574.10. All regulations and guidelines adopted pursuant to this act shall, prior to adoption, be submitted to the subcommittee for review and comment. § 8574.10(b). The comments and recommendations made by the subcommittee are not binding but any agency that departs from the subcommittee's findings and recommendations must submit a written response as to

why its own action is more effective. § 8574.10(d).

HARBOR SAFETY COMMITTEES. The administrator shall create harbor safety committees for the harbors of San Diego, Los Angeles/Long Beach, Port Hueneme, San Francisco, San Pablo, Suisan Bays and Humbolt Bay. § 8670.23(a). The administrator shall appoint the following persons to each committee: (1) a designee of the applicable port authority and a representative of the organizations of: tanker operators, pilots' organization, commercial fishermen, a recognized labor organization involved with the operation of vessels, dry cargo vessel operators and a recognized nonprofit environmental organization whose purpose is to protect marine resources. § 8670.23(b)(2)-(10).

Each harbor safety committee shall be responsible for a safety plan that ensures the safe navigation and operation of tankers, barges and other vessels in its harbor. § 8670.23(c). The safety plan shall be submitted to the administrator for review and approval. § 8670.23(e) and (f). The administrator shall adopt any regulations necessary to implement the plans. § 8670.23(f).

OIL SPILL TECHNICAL ADVISORY COMMITTEE. The Oil Spill Technical Advisory Committee is established by this new law. Its responsibility is to provide public input and independent judgment of the actions of the administrator and the State Interagency Oil Spill Committee. § 8670.54(a). The nine-member committee shall have five of its members appointed by the governor, two by the Speaker of the Assembly and two by the

Senate Rules Committee. § 8670.54(a). Each member shall have an area of expertise, such as marine transportation, environmental protection or the petroleum industry. § 8670.54(a)(1)-(7).

The committee shall provide recommendations to the administrator, the State Lands Commission, the California Coastal Commission and the State Interagency Oil Spill Committee on any provision of this act. § 8670.55(a). The committee may, at its discretion, study, comment on, or evaluate any aspect of the oil spill prevention and response in the state. § 8670.55(b). It may also attend any drills or any oil spills. § 8670.55(c).

STATE LANDS COMMISSION. The State Lands Commission is part of the Resources Agency. It has jurisdiction over submerged lands and ungranted tidal areas in the state. Public Resources § 6101. Under the new law the administrator and executive officer of the State Lands Commission shall confer and propose, and the commission shall adopt rules, regulations, guidelines and commission leasing policies for reviewing the location, type, character, performance standards, size and operation of all existing and proposed marine terminals within the state to minimize the possibility of discharge of oil. § 8755(a).

This commission shall consult with the administrator, the State Interagency Oil Spill Committee and other federal, state and local agencies with respect to these rules, regulations and guidelines. § 8755(c). Also, the commission shall inspect or cause to be inspected, on a regular basis, all marine facilities and the associated equipment. It shall monitor their operations

and the effects of the operations on public health and safety and the environment. § 8757(a).

ENVIRONMENTAL ENHANCEMENT COMMITTEE. The law establishes an environmental enhancement fund that shall be used only for environmental enhancement projects. § 8670.70. An Environmental Enhancement Committee, consisting of the administrator, the executive officer of the State Coastal Conservancy and a public member appointed by the administrator, is established. § 8670.72. Only environmental enhancement projects approved by this committee shall be funded from the enhancement fund. § 8670.71.

II. LIABILITY FOR RESPONSE ACTION CONTRACTORS

LIABILITY. Except as otherwise provided, no person, including, but not limited to, an oil spill cooperative, its agents, subcontractors, or employees, shall be liable under this chapter or the laws of the state to any person for costs, damage, or other claims or expenses as a result of actions taken or omitted in good faith in the course of rendering care, assistance or advice in accordance with the national contingency plan, the state contingency plan or at the direction of the administrator, the onscene coordinator or the Coast Guard. § 8670.56.6(a)(1). Cooperatives and other persons are not immunized from liability for acts of gross negligence or wilful misconduct in connection with response to a spill; neither is there immunization from actions that result in personal injury or wrongful death. § 8670.56.6(d) and (e). For purposes of this section, there is a rebuttable presumption that the act or omission was taken in good

faith. § 8670.56.6(h).

This immunity shall only apply to those response personnel operating under contracts approved by the administrator and for response actions taken for spills for which the responsible party cannot be identified or is unwilling or unable to respond, contain, or cleanup the spill. § 8670.56(j)(1). The immunity from liability is limited to 60 days for response personnel who are regularly engaged in the business of response activities. § 8670.56(k)(1). This period may be extended for an additional 30 days if the administrator finds all of the following: (1) that due to inadequate or incomplete containment, the size of the spill will significantly expand and threaten previously uncontaminated marine or land resources and endanger the public safety or welfare; (2) the remaining work is of such a difficult and perilous nature that extension of the immunity is clearly in the public interest and (3) no other qualified and financially responsible contractor is prepared and willing to complete the response effort in the absence of immunity. § 8670.56.6(k)(2)(A)-(C). This limitation on liability does not apply to those response efforts by persons not regularly engaged in response activities such as commercial fishermen and those who dedicate their lives to the preservation and rehabilitation of wildlife. § 8670.56.6(k)(5).

INDEMNIFICATION OF RESPONSE ACTION CONTRACTORS. The administrator is authorized to negotiate and enter into indemnification agreements with qualified and financially

responsible contractors who respond to spills where the responsible party either cannot be found or cannot or will not respond to the spill. § 8670.56.6(j)(2). The indemnification may be payment of all damages for response costs covered under the immunity and for the reasonably-related legal fees and costs. § 8670.56.6(j)(3).

III. LIMITS ON LIABILITY FOR RESPONSIBLE PARTIES

STRICT LIABILITY. Any responsible party shall be strictly, jointly and severally liable for any damages incurred by any injured party which arise out of, or are caused by, the discharge or leaking of oil into or onto marine waters of the state. § 8670.56.5(a) and (h).

DEFENSES. A responsible party is not liable to an injured party if the damages, other than costs of removal incurred by the state or local government, were caused solely by an act of God or of an exceptional, inevitable and irresistible character, any act of war, hostilities, civil war or insurrection, or by an unanticipated grave natural disaster, which could not have been prevented or avoided by the exercise of due care or foresight. § 8670.56.5(b)(1). Also, a responsible party is not liable for damages caused solely by the negligence of intentional malfeasance of the injured party or damages caused solely by the criminal act of a third party other than the defendant or an agent or employee of the defendant. § 8670.56.5(b)(2)-(3).

These defenses are not available to responsible persons who fail to immediately begin cleanup in accordance with the

applicable c-plan or who fail to report the spill.

§ 8670.56.5(b).

DAMAGES. A responsible party is liable for the following damages: (1) all costs of response, containment, cleanup, removal and treatment incurred pursuant to the state c-plan or actions taken pursuant to the directions of the administrator; (2) injury to or economic losses resulting from destruction of or injury to real or personal property; (3) injury to, destruction or loss of natural resources, including but not limited to rehabilitating wildlife, habitat and other resources, and the costs of assessing that destruction or loss; (4) loss of subsistence use of natural resources which shall be recoverable by any claimant who uses the resource; (5) loss of taxes, royalties, rents or profits caused by the injury or destruction; (6) loss of profits or impairment of earning capacity due to the injury, destruction or loss of real or personal property or natural resources for persons who derive at least 25% of their earnings from the activity; (7) loss of enjoyment of natural resources, public beaches or facilities.

§ 8670.56.5(g)(1)-(7).

IV. FINANCIAL RESPONSIBILITY

PROVISIONS. No vessel may be used to transport oil across marine waters of the state unless the operator has obtained a certificate of financial responsibility issued by the administrator for either the vessel or the owner of all the oil contained in and being transferred to or from the vessel.

§ 8670.37.51(a). Nor can the operator of a marine terminal

transfer oil to or from a vessel or from one vessel to a second vessel unless he has received a copy of the vessel's or vessels' certificates from the administrator. § 8670.37.51(b) and (c).

No person may operate a marine facility unless the owner or operator has first obtained a certificate of financial responsibility from the administrator for the facility. § 8670.37.51(d).

FINANCIAL REQUIREMENTS. In order to obtain a certificate of financial responsibility a vessel's applicant must demonstrate the financial ability to pay at least \$500 million for any damages which may arise during the term of the certificate. § 8670.37.53(a). The level of financial responsibility shall be increased to \$750 million in July 1995 and to \$1 billion in 2000. The administrator may require lower limits for small barges.

To receive a certificate for a marine facility, the applicant must demonstrate the financial ability to pay for any damages which might arise during a reasonable worst case oil spill into marine waters that results from the operations of the marine facility. § 8670.37.53(b). The administrator shall determine the financial responsibility and he shall consider such criteria as the amount of oil that could be spilled into the marine waters, the cost of cleaning up spilled oil, the frequency of operations at the facility and the damages that could result from the spill. Id.

IV. CONTINGENCY PLANS

STATE OIL SPILL CONTINGENCY PLAN. The marine oil spill

contingency plan shall contain all of the following elements:

- (1) the hierarchy of state and local agency response to an oil spill. This includes the necessary tasks for oversight and control of cleanup and removal activities and each agency's specific responsibilities. It should also include an organizational chart of the state marine oil spill response organization and a definition of the resources, capabilities and response assignments of each agency involved in the cleanup and removal of the oil;
- (2) the framework for the involvement of local and regional agencies in the response. It should include traffic and crowd control, firefighting, boating and traffic control and radio and communications control, equipment and resources available for cleanup, identification of private and volunteer resources or personnel with special capabilities related to oil spill cleanup and provisions for emergency medical services;
- (3) a statement that establishes the state standard for coastline protection. This shall include appropriate shipping lanes and navigational aids for vessels, ship position reporting and communications requirements, required predeployment of protective equipment for sensitive environmental areas, required emergency response vessels which are capable of preventing disabled tankers from running aground, an expedited decisionmaking process for dispersant use in coastal waters, required rehabilitation facilities for injured wildlife, and
- (4) regional maps depicting environmentally-sensitive areas in marine waters or along the coastline.

§ 8574.7(a)-(e).

PRIVATE C-PLANS.

1. Provisions. The administrator shall adopt and implement regulations and guidelines governing the adequacy of plans for vessels and marine terminals. He shall consult with the State Interagency Oil Spill Committee and the Oil Spill Technology Advisory Committee. The administrator shall hold a public hearing on the regulations. These regulations and

guidelines shall provide for the best achievable protection of coastal and marine resources. The regulations shall also allow the development of blanket contingency plans for similar vessels, terminals and facilities within a single company and across companies or organizations. § 8670.28.

The regulations shall, at a minimum ensure:

- (1) that all areas of the marine waters of the state are at all times protected by prevention, response, containment and cleanup equipment and operations;
- (2) that all standards set for response and cleanup are maintained and regularly improved to protect the natural resources;
- (3) all appropriate personnel employed by operators receive training in response and cleanup equipment usage and operations;
- (4) each c-plan for vessels and marine facilities demonstrates that plans are in place, including all financial and contractual arrangements for equipment and response activities;
- (5) that each plan identifies the types of equipment that can be used, the location of the equipment and the time needed to deliver the equipment;
- (6) that each marine facility identifies hazards associated with its operations;
- (7) that each c-plan contains a list of contacts to call in case of a discharge of oil;
- (8) that each marine facility, in its plan, identifies the measures that will be taken to protect the recreational and environmentally-sensitive areas.

§ 8670.28(a)(1)-(11).

The administrator shall ensure that the rules, regulations and guidelines are in effect not later than December 31, 1991.

§ 8670.28(d).

2. Interim plans.

Marine Facilities. Every operator of a marine facility shall, by July 31, 1991, prepare a written interim c-plan that establishes a chain of command and describes the responsibilities

of facility personnel, details the procedures for reporting spills to federal, state and local agencies, details the lines of communications between the facility and on-scene commanders and response teams, provides for site security and control and emergency medical services and provides for personnel training. The interim plan should also provide detailed procedures for responding to a spill and undertaking removal actions for different size oil spills and procedures that will be taken to protect environmentally-sensitive areas. § 8670.29(a)(1)-(11).

Vessels. On or before July 31, 1991, every vessel operating in the marine waters of the state shall submit an interim vessel c-plan which shall include the following: a demonstration that the operator is capable of providing timely and effective spill response and removal directly or through membership in, or contract with, cleanup organizations; it shall also show proof of financial responsibility. It shall detail its procedures for reporting oil spills to state and federal agencies. § 8670.30(a)(1)-(3).

These interim c-plans shall be reviewed by the administrator and if they are deficient, the plan shall be returned to the operator for modifications or alternatives. § 8670.30.5(a) and (b).

3. C-plans. In accordance with the regulations established by the administrator each vessel operator and marine operator shall prepare and implement a contingency plan within 90 days after the effective date of the rules, regulations and policies

required under § 8670.28. The administrator shall review each plan and each plan shall be approved or disapproved within 180 days after receipt by the administrator. § 8670.31(a)-(d). Before he approves a c-plan the administrator may, at his discretion, make an onsite inspection and require a drill of any contingency plan. After the plan has been approved it shall be resubmitted at least once every two years. The administrator may require more frequent submissions. § 8670.31(f) and (g).

4. Area contingency plans. Prior to January 1, 1992, the administrator shall draft guidelines, standards and formats regarding the adequacy of area c-plans that are required pursuant to § 25503 of the Health and Safety Code. § 8670.35(a). Any local government with jurisdiction over marine waters or located adjacent to marine waters may apply for a grant to complete, update or revise an element of an area c-plan. Each element prepared under this section must provide provisions for training fire and police personnel in oil spill response and cleanup equipment and use. It must also be consistent with the local government's local coastal program as certified under § 30500 of the Public Resources Code, the state c-plan and the national contingency plan. § 8670.35(b)-(d).

V. ENFORCEMENT

INJUNCTIVE RELIEF. When the administrator determines that any person is engaged in, or threatens to engage in activities that violate any provisions of this act, the district attorney in the applicable county may make application for an order enjoining

that activity. Upon a showing that the person has engaged in such activity a permanent or preliminary injunction, restraining order or other order may be granted. § 8670.57(a).

CIVIL PENALTIES. Any person who commits any of the following shall, upon conviction, be punished by imprisonment in the county jail for not more than one year or the state prison: (1) knowingly fails to follow the directions of the administrator in connection with an oil spill; (2) knowingly fails to notify the Coast Guard that a tanker is disabled within one hour of the disability and the tanker, while disabled, discharges oil which enters marine waters; (3) knowingly engages in or causes the discharge of oil into marine waters; (4) knowingly fails to begin cleanup, abatement or removal of spilled oil. § 8670.64(a)(1)-(4). A person convicted of violating (1) above shall also be fined not less than \$5,000 and not more than \$500,000 for each violation. § 8670.64(b).

A person who knowingly does any of the following acts shall, upon conviction, be punished by a fine of not less than \$2,500 and not more than \$250,000, or by imprisonment in the county jail for not more than one year or by both fine and imprisonment: (1) failing to notify the Office of Emergency Services of a discharge of oil into marine waters; (2) operating a vessel or marine facility without an approved c-plan, or knowingly failing to follow the material provisions in the c-plan. § 8670.64(c)(1)-(3).

A person who intentionally or negligently does any of the

following acts shall be subject to a civil penalty of not less than \$25,000 and not more than \$500,000 for each violation: (1) failing to follow the directions of the administrator during the response activities of a spill; (2) failing to notify the U.S. Coast Guard that a tanker is disabled and the tanker, while disabled, discharges oil into marine waters; (3) discharging or spilling oil into marine waters, (4) or failing to begin cleanup, abatement or removal of spilled oil. § 8670.66(a)(1)-(3).

Any person who negligently or intentionally violates any provision, regulation, standard or requirement of this act shall be liable for a civil penalty not to exceed \$250,000 for each violation of a separate provision, or for continuing violations, for each day that the violation continues. § 8670.66(b).

CRIMINAL PENALTIES. A person who knowingly violates any provision of this chapter or any permit, rule, regulation, standard or requirement is, upon conviction, guilty of a misdemeanor, punishable by a fine of not more than \$50,000 or by imprisonment in the county jail for not more than one year or by both fine and imprisonment. § 8670.65.

ADMINISTRATIVE PENALTIES. Any person who intentionally or negligently does any of the following acts shall be subject to an administrative penalty not to exceed \$100,000 for each violation: (1) failing to follow an applicable c-plan or the directions of the administrator in connection with an oil spill; (2) failing to notify the Coast Guard that a tanker is disabled within one hour of the disability and the tanker, while disabled discharges oil

into marine waters; (3) discharging or spilling oil into marine waters; (4) failing to begin cleanup, abatement or removal of spilled oil. § 8670.67(a)(1)-(4).

Any person who intentionally or negligently violates any provision of this act or any permit, rule, regulation, standard or requirement shall be liable for an administrative penalty imposed by the administrator not to exceed \$100,000 for each violation, or, for continuing violations, for each day that the violation occurs. § 8670.67(b). No person shall be liable for a civil penalty under this section for the same act. § 8670.67(c).

A penalty may be administratively imposed for the discharge of oil that enters marine waters in an amount not to exceed \$10 per gallon of discharged. The amount of the penalty shall be decreased for every gallon of discharged oil that is recovered and properly disposed of in accordance with applicable law. § 8670.67.5(1) and (2). Whenever the discharge of oil resulted from gross negligence or reckless conduct, the administrator shall impose a penalty in the amount of \$30 per gallon discharged but the penalty shall be decreased for every gallon of discharged oil that is recovered and properly disposed of in accordance with the applicable law. § 8670.67.5(c).

VI. STATE RESPONSE MECHANISMS

FUNDING. This law creates two oil spill trust funds.

1. Oil Spill Prevention and Administration Fund. This fund was established to fund the implementation of oil spill prevention programs and research for prevention and control

technology, to fund environmental and economic studies relating to the effects of oil spills and to implement, install and maintain emergency programs and equipment and facilities to respond to oil spills. § 8670.40(e)(1)-(5).

The administrator shall administer the fund; he shall collect annually a fee he determines will be sufficient to carry out the purposes set forth above and to maintain a reasonable reserve for contingencies. § 8670.40(a). He shall determine the amount of fees that will be paid by owners based on each marine facility and the risks and the potential size of the spills that could occur at that facility. § 8670.40(b). The assessment cannot exceed 4 cents per barrel of oil. § 8670.40(a).

Under the original law the marine terminal operator was responsible for paying the determined assessment for each barrel of crude oil and petroleum products that was delivered through his terminal; the pipeline operator was responsible for each barrel of crude and products transported through the state via his pipeline. § 8670.40(b).

Under the present amendment the owner of the crude oil received at a marine terminal is liable for the fee assessment. Also, only those petroleum products imported from outside the State are subject to the assessment. The marine facility operator collects the fees from the owners.

Under the amendment fees assessed on pipeline owners is limited to crude oil originating from offshore production facilities in California waters and does not apply to crude oil

shipped into the state.

Money in this fund shall not be used for responding to an oil spill. § 8670.40(f). This is a permanent assessment and the fund has no cap or upper limit. The administrator may establish regulations and rules necessary to carry out this provision.

§ 8670.39(b).

2. Oil Spill Response Trust Fund. This fund is created to: (1) provide funds to cover promptly the costs of response, including damage assessment costs and wildlife rehabilitation, (2) provide emergency loans and to cover response costs and other damages suffered by the state or other persons or entities from oil spills which cannot otherwise be compensated by responsible parties or the federal government, and (3) pay claims for damages. § 8670.48(j)(1)-(3). Additionally, money in this fund shall be used to arrange for the \$50 million of financial security and for indemnity and related costs and expenses related to response action contractors. § 8670.48(j)(5) and (6).

The administrator shall administer this fund and develop rules and regulations necessary to carry out this provision. § 8670.47(a) and (b). The following moneys shall go into this fund:

- (1) federal funds received to pay for response costs
- (2) funds borrowed to pay for cleanup
- (3) fees assessed pursuant to § 8670.48 (see below)
- (4) interest earned on the fund
- (5) costs recovered from responsible parties

§ 8670.47.5

The designated amount of the fund shall be \$100 million adjusted for inflation after January 1, 1991, subject to the

following: \$50 million shall be retained in the fund as cash, adjusted for inflation and \$50 million shall be immediately accessible in the form of financial security. § 8670.48(g)(1) and (2). During any period when the total amount in the fund exceeds the designated amount and the moneys in the fund are not needed to pay for costs resulting from an oil spill into marine waters or to retire any debt, the administrator shall provide refunds to each owner proportionate to the amounts he paid into the fund. § 8670.48(h).

Under the original law each marine terminal operator paid 25 cents per barrel of petroleum products received at his terminal via vessel from a point outside the state; pipeline owners paid 25 cents per barrel of products transported into the state via their pipeline. § 8670.48(a) and (b). Marine operators and pipeline owners also paid 25 cents per barrel of crude oil transported from within the state via vessel, barge or pipeline to points outside the state. § 8670.48(d) and (e).

Also under the original law only refiners were assessed the fee on crude oil imported into the state by either pipeline or vessel. § 8670.48(c). No fees were imposed on crude oil produced by independent crude oil producers who performed no refining and did not possess or own retail gasoline marketing facilities. § 8670.48(c)(2).

Under the amendment the cargo owner, rather than the marine terminal owner, is liable for the fees; the facility operator only collects the fees. Also, fees are not collected on exports

of crude oil until the total volume of crude oil exported from California during a year exceeds 6% of the total volume of crude oil and products on which the 25 cents response fees were paid in the prior calendar year.

The administrator may raise the fees to a maximum of \$1.00 per barrel upon the following findings: (1) a calamitous event or series of events has severely depleted the fund; (2) the governor has requested the treasurer to borrow the funds and the treasurer finds that the fee is insufficient for him to borrow enough money to meet the reasonably anticipated demands on the fund for all authorized expenditures, response costs, wildlife rehabilitation, emergency loans and damage claims; and (3) failure to raise the fee in the amount proposed will result in unmet, or unpaid, authorized expenditures. § 8670.48.5(a)(1)-(3).

This increase may be raised by maximum increments of 25 cents not more frequently than once every three months. § 8670.48.5(a). No single incremental increase shall be effective for more than one year unless renewed by the director before the expiration of the year upon making the findings required in subsection (a) above. § 8670.48.5(c).

BORROWING AUTHORITY. At any time that an oil spill into marine waters has occurred and the administrator determines that the costs of responding to the spill are likely to exceed the designated amount in the Oil Spill Response Trust Fund and the costs exceed the financial ability of the responsible party or there is no responsible party, the administrator shall notify the

governor. The governor, upon notification, shall request that the federal government pay the response costs, wildlife rehabilitation costs and damages. If federal funds are not available he shall make a written request to the treasurer to borrow and deposit in the fund the amount by which the estimated response costs exceed the designated amount. § 8670.53.15(a).

The treasurer shall make the necessary financial arrangements to obtain the needed moneys. These arrangements may take the following forms, or any combination thereof: (1) line of credit, letter of credit or other standby arrangement with one or financial institutions; (2) sale of bonds or notes of the state; (3) borrowing from the Pooled Money Investment Account, or (4) any other financial arrangement the treasurer determines to be appropriate and cost-effective. § 8670.53.3(a)(1)-(4).

Any financial arrangements made pursuant to this article and repayment of any obligation shall be special obligations of the state secured solely by the moneys in the fund. The obligation shall not become a lien or liability against the State nor shall the taxing power of the state be pledged to its repayment.

§ 8670.53.5.

VII. DRILLS AND INSPECTIONS

DRILLS. The administrator shall periodically carry out announced and unannounced drills to test response and cleanup operations, equipment, c-plans and procedures implemented by this chapter. All state and local entities and all operators of marine facilities and vessels shall cooperate with the

administrator in carrying out these drills. § 8670.10(a).

INSPECTIONS.

1. Vessels. The administrator may inspect or cause to be inspected on a regular basis all vessels. He shall evaluate the adequacy of vessel inspection programs conducted by the Coast Guard and any other federal, state or local agency and he may establish a state inspection program if he determines that the existing programs are deficient. § 8670.13.

2. Marine facilities. The State Lands Commission shall inspect or cause to be inspected on a regular basis all marine facilities, along with associated equipment. The commission shall monitor the operations and the effects on public health, safety and the environment. § 8657(a).

VIII. STATE PROCEDURES FOR OIL SPILL RESPONSE

Any person responsible for the discharge or threatened discharge of oil in marine waters shall report the discharge to the Office of Emergency Services within one hour of the disability if the disability occurs within 12 miles of the shore.

§ 8670.20. Immediately upon notification, the Office of Emergency Services shall notify the administrator, the designated representatives of the State Lands Commission, the California Coastal Commission, the regional water quality board having jurisdiction over the location of the discharged oil and any public agency which may be affected by the spill.

§ 8670.25.5(a) and (b). Spills of more than one barrel must be reported through these channels. § 8670.25.5(d).

All parties responsible or potentially responsible for the discharged oil, the tanker, barge or marine facility from which the oil was discharged, all of their agents and employees, the operators of all vessels docked at a marine facility which is a source of a discharge, and all state and local agencies shall carry out response and cleanup operations in accordance with applicable c-plans, unless directed otherwise by the administrator or the Coast Guard. § 8670.27(a).

If a responsible party reasonably, and in good faith, believes that the directions or orders given will substantially endanger the public safety or the environment, the party may refuse to act in compliance with the orders. He shall state, at the time of the refusal, the reason for refusing and shall give the administrator written notice of the reasons for his refusal within 48 hours. § 8670.27(b).

NOV 18 1991

Alyeska pipeline
SERVICE COMPANY

1835 SOUTH BRAGAW STREET, ANCHORAGE, ALASKA 99512. TELEPHONE (907) 273-1611. TELEX 090-25-127

VIA U. S. MAIL AND FACSIMILE

November 14, 1991

Michele Brown, Esq.
Executive Director
Citizens' Oversight Council on Oil and Other Hazardous Substances
3111 C Street, Suite 150
Anchorage, Alaska 99503

Re: Responder Immunity Research

Dear Michele:

Please find attached the summary of Florida. I'm in Washington, D. C., this week and part of next. As soon as I return, I'll send you a copy of the actual laws of Florida.

I'm still working on the Louisiana summary and hope to get it to you soon. Thank you for being so patient.

Yours very truly,

ALYESKA PIPELINE SERVICE COMPANY

Coyet Selman
for Larry D. Wood
Senior Attorney-External Affairs

LDW42/cas

Enclosure

cc w/summary: Ms. Pat Kincaid
Mr. Paul M. Richards
Mr. Michael K. Abbott
Ms. Karen L. Kilty

FLORIDA

Responder Immunity: "No person who, voluntarily or at the request of the department [of Natural Resources] or its designee, renders assistance in containing or removing pollutants shall be liable for any civil damages to third parties resulting solely from acts or omissions of such person in rendering such assistance, except for acts or omissions amounting to gross negligence or willful misconduct." Florida Statutes Annotated § 376.09(4).

"Notwithstanding the provisions and subsection (4) [FSA § 376.09(4)], any person who is authorized by the department or the federal government or the person alleged to be responsible for the discharge or by designee thereof, to render assistance in containing or removing pollutants shall not be liable for costs, expenses, and damages, unless such cost, expenses, and damages are an approximate result of acts or omissions caused by gross negligence or willful misconduct of such authorized person." FSA § 376.09(5). Nothing in the Pollutant Spill Prevention and Control Act shall affect the right of any person to render assistance in containing or removing any pollutant, or any rights which that person may have against any third-party who acts or omissions in any way have caused or contributed to the discharge of a pollutant. FSA § 376.09(6).

State Contingency Plan Requirements: As a condition precedent to the issuance of a registration certificate for the operation of a terminal facility, the Department of Natural Resources shall require satisfactory evidence that the terminal facility has implemented, or is in the process of implementing state and federal plans for prevention, control, and abatement of pollution when a discharge occurs. FSA § 376.06(3). The department must require a showing that the applicant can provide all required equipment to prevent, contain, and remove discharges of pollutants. FSA § 376.06(6). A terminal facility registration certificate application must include a description of all prevention, containment, and removal equipment to which the facilities has access whether by direct ownership or by membership in an approved discharge cleanup organization. FSA § 376.06(7). Every owner or operator of a terminal facility shall also obtain a spill prevention and response certificate issued by the department. FSA § 376.065(1). The application for this certificate must include the capacity of the terminal facility, all prevention, containment, and removal equipment to which the facility has access whether through direct ownership or by membership in an approved discharge cleanup organization. FSA § 376.065(1)(b). No person may operate a terminal facility without access to minimum containment equipment measuring five times the length of the largest vessel docking at or the largest vessel providing service from the terminal facility whichever is larger. FSA § 376.065(3). The containment equipment shall be available to begin deployment on the water within one hour after discovery of a spill. Within a reasonable time, additional cleanup equipment must be available to reasonably cleanup 10,000 gals of pollutants, unless the terminal facility does not store or service vessels having the capacity to carry that quantity as fuel or cargo. Id.

The Department of Natural Resources may not require vessels to maintain spill prevention gear, holding tanks of any kind, and containment gear in excess of federal requirements. FSA § 376.07(2)(a). However, a terminal facility transferring heavy oil to or from a vessel with a heavy oil storage capacity greater than 10,000 gals shall be required to adequately boom or seal off the area between the vessels, or the area between the vessel and the dock during a transfer or bunkering operation.

Any vessel operating in state waters with a storage capacity to carry 10,000 gals or more of pollutants (including oil) as fuel and cargo shall maintain an adequate written ship-specific spill prevention and control contingency plan. Any such vessel shall have on-board a "spill officer," designated by the contingency plan who is responsible for training crew members to carry out spill response efforts. An adequate plan must include provisions for on-board response, including notification, pollutant incident assessment, vessel stabilization, discharge mitigation, and on-board discharge containment. FSA § 376.071. A plan in compliance with the federal requirements for a ship-specific spill contingency plan shall satisfy the requirements of this section. Id.

Regulations for the safety and operation of vessels shall be accordance with the prevailing rules of the U. S. Coast Guard. 16 Florida Administrative Rule 16N-16.013.

Civil Liabilities: The discharge of pollutants into or upon any coastal waters, beaches, and lands is prohibited. FSA § 376.041. Any person discharging pollutants (including oil) shall immediately undertake to contain, remove, and abate the discharge. FSA § 376.09(1).

With respect to individual causes of action or damage, no person is prohibited from bringing a cause of action for all damages resulting from a discharge. In any such suit, it shall not be necessary for the person to plead or prove negligence in any form or manner. FSA § 376.205. The person need only plead and prove the fact of the prohibited discharge or other pollutive condition and that it occurred. Defenses are specified in FSA § 376.12(3).

The owner of a pollutant transported as cargo on any vessel suffering a discharge shall be liable for all cleanup costs within the applicable liability limits which are not paid for by the owner or operator of the vessel. FSA § 376.12(4). However, the cargo owner is not liable if the vessel owner or operator was in compliance with the vessel financial security requirements. Id.

Any person who renders assistance in containing or removing any pollutant (including oil) may be eligible for reimbursement of the cost of containment or removal, provided prior approval for such reimbursement is granted by the Department of Natural Resources. However, the department may waive the prior-approval prerequisite. FSA § 376.09(7).

The Department of Natural Resources may recover on behalf of the Florida Coastal Protection Trust Fund from the person or persons causing the discharge, jointly and severally, all sums expended from the fund in response to a pollutant discharge. FSA § 376.11(6). Any vessel, or its agents or servants, who permits or suffers a prohibited discharge shall be liable to the fund for all cost of cleanup or abatement up to an amount not to exceed \$50 million, or \$625 per gross registered ton of such vessel whichever is the lesser. FSA § 376.11(1). When the Department of Natural Resources can show that the discharge was the result of willful or gross negligence or willful misconduct on the part of the vessel owner or operator, such owner or operator shall be liable to the fund for the full amount of fund sums expended. Id. When a discharge of pollutants occurs from a terminal facility, recovery of costs of abatement and cleanup shall be limited to an amount not to exceed \$25 million, except that when the department can show that the discharge was the result of willful or gross negligence or willful misconduct by the owner or operator, such owner or operator shall be liable to the fund for the full amount of fund monies expended. The limits on liability of owners and operators of vessels and terminal facilities does not apply if the responsible party fails or refuses to report the incident,

having reason to know of the incident, or the responsible party fails or refuses to provide reasonable cooperation and assistance as requested by a state or federal on-scene coordinator. FSA § 376.12(1)(b).

In any suit to enforce claims of the Florida Coastal Protection Trust Fund, or any other state claims, it is not necessary for the Department of Natural Resources to prove negligence in any form or manner. The department need only plead and prove that the prohibited discharge occurred. FSA § 376.12(6). The defenses of a person alleged to be responsible for discharge will be unavailable if the responsible party failed to report the discharge, having had reason to know of the discharge, or failed to provide reasonable cooperation and assistance requested by state or federal authorities in connection with cleanup activities. FSA § 376.12(b).

After reporting a discharge, a vessel shall remain in the jurisdiction of the department for a sufficient time to prove financial responsibility for the damages resulting from the discharge. FSA § 376.12(11).

Whoever violates the prohibition of FSA § 376.041 prohibiting the discharge of pollutants into or upon state waters and lands shall be liable to the state and shall pay the state sums necessary to restore any injured or destroyed natural resource to its condition prior to a spill, to the extent technically feasible. FSA § 376.121(1)(a). Restoration shall include the cost to restock waters and coastal areas, replenish or replace natural resources, and otherwise restore coastal waters, estuaries, tidal flats, beaches, and submerged lands to their condition prior to a spill. *Id.* Compensation will also be paid for damages to nonrestorable natural resources in accordance with a compensation schedule established by the Department of Natural Resources. FSA § 376.121(1)(b). The state shall also establish guidelines for determining the restoration value of injured or destroyed natural resources using generally accepted and cost-effective resource evaluation methods. The compensation schedule for accessing damages to nonrestorable natural resources will include standards for determining the cost of any lost ecological, consumptive, intrinsic, recreational, scientific, economic, aesthetic, and educational values of injured or destroyed resources. FSA § 376.121(b). The amount of compensation shall not be less than \$1 per gallon of pollutant spilled or per square foot of habitat impacted, and no greater than \$1,000 per gallon of pollutant spill or per square foot of habitat impacted.

Liability limits only apply to cleanup costs; liability is unlimited for natural resource damages and third-party damages; "nothing contained herein shall be construed to limit the liability of vessels, terminal facilities, or the fund for the damages." FSA § 376.12(10).

The Department of Legal Affairs, any political subdivision of municipality of the state, or a citizen of the state may maintain an action for injunctive relief against any person, natural or corporate, or governmental agency to enjoin such persons, agencies, or authorities from violating any laws, rules, or regulations for the protection of the air, water, and other natural resources of the state. FSA § 403.412(2)(a). However, the complaining party shall first file with the appropriate governmental agency a verified complaint setting forth the facts upon which the complaint is based. The agency receiving the complaint has 30 days within which to take appropriate action. FSA § 403.412(1)(c).

Criminal Liabilities: If a vessel transporting pollutants as cargo within the state's waters is operating in violation of the financial security provisions and suffers a moderate discharge, the master of the vessel shall be charged with a felony of the third degree.

FSA § 376.12(3). The pilot and master of any vessel or person in charge of any terminal facility who fails to give immediate notification of a discharge to the department or to the nearest Coast Guard station commits a felony in the third degree. FSA § 376.12(11).

The pilot and master of a vessel which fails to remain in the department's jurisdiction for a reasonable time after notice of a discharge shall be guilty of a felony in the third degree. FSA § 376.12(11).

It is unlawful for any person to violate any provision of the Pollutant Spill Prevention and Control Act or any regulation or order of the Department of Natural Resources made pursuant to it. Violations shall be punishable by a criminal penalty of up to \$50,000 per violation per day. FSA § 376.16(1). Penalties assessed for a discharge under this section shall be the only penalties assessed by the state, and the assessed person will be excused from paying any additional penalty for water pollution under the Florida Air and Water Pollution Control Act for the same occurrence. FSA § 376.16. But, the penalty provisions do not apply to any discharge which is promptly reported and removed by a facility or vessel in accordance with the regulations and orders of the Department of Natural Resources. Id.

Financial Responsibility Requirements: The owner or operator of any vessel transporting pollutants (including oil) as cargo within state waters must have financial security equal to or greater than the amount of liability for cleanup cost applicable to the vessel pursuant to FSA § 376.12 (in an amount not to exceed \$50 million or \$625 per gross registered ton). The financial security may be in the form of a cash deposit, self insurance, insurance, guarantee, or surety, or any combination which is payable to the Florida Coastal Protection Trust Fund. Id.

Each owner or operator of a terminal facility or vessel using any port in Florida is required to establish and maintain evidence of financial responsibility pursuant to federal laws and regulations. FSA § 376.14(1).

State Response Capability: Whenever it becomes necessary for the state to protect the public interest, the Department of Natural Resources is to keep an accurate record of costs and expenses incurred and thereafter diligently to pursue the recovery of any sums so incurred from the responsible persons. FSA § 376.051(4). The Department may bring an action on behalf of the state to enforce the cleanup liabilities imposed by FSA § 376.12. If a person causing a discharge fails to act, the Department of Natural Resources may arrange for the removal of the pollutant. If the pollutant was discharged onto federal waters, the department shall act in accordance with the National Contingency Plan. Id. Federal funds provided under the Federal Water Pollution Control Act shall be used to the maximum extent possible prior to the expenditure of state funds. In the event of a discharge where the source is unknown, any local discharge cleanup organization shall, upon the department's request, immediately contain and remove the discharge. FSA § 376.09(3).

The Department of Natural Resources is authorized to establish and maintain equipment and personnel at such ports within the state and other places as in its judgment may be necessary to carry out its responsibilities under the Pollutant Discharge Prevention and Removal Chapter. FSA § 376.10. The salaries of the employees and the cost of equipment is paid from the Florida Coastal Protection Trust Fund. Id.

Monies recovered by the Department of Natural Resources for damages to restorable natural resources shall be used for their restoration. FSA § 376.121(4)(a). Compensation recovered by the state for damages to none restorable natural resources shall be used for developing restoration and enhancement techniques for natural resources, investigating methods for improving techniques for containment and removal of pollutants from the environment, investigating the long-term effects of pollutant spills on natural resources, developing an adequate wildlife rescue and rehabilitation program, expanding the state's pollution and control education program, restoring natural resources, and funding special projects. FSA § 376.121(4)(b).

With regard to pollutant discharge prevention and removal, the powers and duties of the Department of Environmental Regulation extend to the land mass of the state not described in the Pollutant Spill Prevention and Control Act. FSA § 376.303(2). The act relates generally to terminal facilities and coastal waters.

State Funding Mechanisms for Response and Cleanup: The Florida Coastal Protection Trust Fund was established to be used by the Department of Natural Resources as a revolving fund for carrying out the purposes of the Pollutant Discharge Prevention and Removal Act. FSA § 376.11(2). This fund is financed by terminal facility registration fees, penalties, judgments, and damages recovered by the state from responsible persons, and excise tax revenues. *Id.* Monies in the fund may be dispersed to provide for the department's administrative, personnel, and equipment expenses related to enforcement of the Pollutant Discharge Prevention and Removal Act and all costs involved in the prevention and abatement of pollution generally. The fund may also be used to pay for costs and expenses of the cleanup, restoration, and rehabilitation of waterfowl, wildlife, and all other natural resources damaged by the discharge of pollutants. FSA § 376.11(4)(c). The Department of Natural Resources may spend up to \$1 million per year from the principal of the fund to acquire, design, train, and maintain emergency cleanup response teams located at appropriate ports throughout the state for the purpose of cleaning oil and other toxic materials from coastal waters. FSA § 376.11(4)(h).

Any person claiming to have suffered damages as a result of a discharge of pollutants may apply for reimbursement from the Florida Coastal Protection Trust Fund. FSA § 376.12(5). If reimbursement is made, the fund shall be subrogated to any cause of action that the claimant may have had. FSA § 376.12(5)(d). The fund is absolutely liable for all proven damages against the fund. FSA § 376.12(5)(e). The fund must diligently pursue the reimbursement to the fund of any sum expended from the fund for cleanup, abatement, and damages. FSA § 376.12(6).

There is also a Port Trust Fund administered by the Department of Natural Resources as a condition of a permit or other form of approval for environmental mitigation required as a condition of a state, federal, or local environmental permit, and for the acquisition of spoil disposal sites and improvements to existing and future spoil sites in several listed ports. FSA § 376.22(1).

Preventive Audit and Inspection Provisions: Every owner or operator of a terminal facility must obtain a spill prevention and response certificate issued by the Department of Natural Resources. FSA § 376.065(1). The certificate shall describe the barrel capacity of the terminal facility, all prevention, containment, and removal equipment to which the facility has access, and the terms of agreement and operation plan of any discharge cleanup organization to which the owner or the operator of the terminal facility belongs.

FSA § 376.065(3). The Department of Natural Resources is required to adopt requirements that any terminal facility required to possess a valid registration certificate which is also causing or permitting the discharge of a pollutant (including oil) at reasonable time be subject to a complete and thorough inspection. FSA § 376.07(h). If the Department determines there are unsatisfactory preventive measures or containment and cleanup capabilities, it shall, following notice in hearing suspend the registration until compliance. Id.

Response Drill Requirements: The Department of Natural Resources must create a state response team which shall be responsible for creating and maintaining a contingency plan of response, organization, and equipment for handling emergency cleanup operations and wildlife rescue and rehabilitation operations. FSA § 376.07(e). The state plans shall include detailed emergency operating procedures for the state as a whole, and the team must from time-to-time conduct practice alerts. Id.

November 1991

HAWAII

Responder Immunity: "No person shall be liable under this chapter or otherwise under the laws of the State or any of the counties, including the common law to any government or private parties for costs, damages, or penalties as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with this chapter or at the direction of an on-scene coordinator, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or pollutant or contaminant or the threat thereof. This subsection shall not preclude liability for costs, damages, or penalties as the result of gross negligence or intentional misconduct on the part of such person." Hawaii Revised Statutes § 128D-6(e).

Although not specifically related to oil spill response and cleanup, there is another provision which provides that any person who in good faith without remuneration or expectation of remuneration renders assistance at the scene of a vessel collision, accident or other casualty (without objection of any person assisted) shall not be liable for any civil damages resulting from the person's acts or omissions in providing or arranging towage or other assistance, except for damages as may result from the person's gross negligence or wanton acts or omissions. HRS § 267-8(b).

State Contingency Plan Requirements: The Health Department shall adopt by rules a Hawaii state contingency plan which, as appropriate and practicable, shall comport with the National Contingency Plan. In preparing the plan, the department shall consider and take into account regionally and locally developed contingency plans. HRS § 128D-7. According to Ms. Claire Hong of the Hazardous Evaluation and Emergency Response Office, rules implementing recent legislation will be completed in mid-1992. Senate Bill 1756 amended the Environmental Response Law in 1991.

Civil Liabilities: No person, including any public body shall discharge any water pollutant into State waters except as authorized. HRS § 342D-50(a)p. In case of an injury to or loss of natural resources, liability shall be to the State for natural resources within the State. HRS § 128D-6(h). Any party who has incurred removal or remedial action costs in accordance with the Environmental Response Law may seek contribution or indemnity from any person who is liable. HRS § 128D-___(d). Any person may commence a civil action on the person's behalf against any person who has alleged to be in violation of any requirement under the Environmental Response Law or against the Director of Health where there is an alleged failure to perform any state act or duty. HRS § 128D-___(a)(2). No action may be commenced if the Director has issued a notice letter to the violator concerning the violation or has undertaken a response action. *Id.*, (c)(2).

If the Director of Health determines that any person is violating the Water Pollution Chapter, or any rule adopted pursuant to the Chapter, he may issue an order specifying a reasonable time during which that person shall be required to take necessary measures to correct the violation. HRS § 342D-9(a). He may also require the alleged violator to appear for a hearing and may impose penalties. *Id.* He may issue a cease and desist order against any activities that violate the Water Pollution Chapter or any rule adopted pursuant to the Chapter. *Id.*, (b)(3).

Any person who violates the Water Pollution Chapter shall be fined no more than \$10,000 for each separate offense. Each day of violation constitutes a separate offense. HRS § 342D-30(a)b. The Director is authorized to impose the penalties and factors to be considered include the nature and history of the violation and of any prior violations, and the opportunity, difficulty, and history of corrective action. HRS § 342D-31. Any costs incurred by the Environment Response Revolving Fund shall also be recovered by the attorney general from the liable person or persons including legal interest. HRS § 128D-5(a). Any person who is liable for a release of hazardous substances (including oil) and who fails, without sufficient cause, to properly provide removal or remedial action pursuant to an state administrative order may be liable to the state for punitive damages up to three time amount of any cost incurred by the Environmental Response Revolving Fund. In addition to liability for costs incurred by the State for the investigation, assessment, containment, and removal of a release, any person who willfully, knowingly, or recklessly violates the Environmental Response Law Chapter or any rule of order issues pursuant to it, shall be subject to a civil penalty not to exceed \$50,000 for each separate violation. Each day a violation continues shall constitute a separate violation. The court is directed to take into account the nature, circumstances, and gravity of the violation and with respect to the violator ability to pay, prior history, the degree of culpability, economic benefit of savings, if any, resulting from the violation. HRS § 128D-8(e).

Criminal Liabilities: Any person who negligently violates the Water Pollution Chapter or related rules shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than one (1) year, or by both. HRS § 342D-32. Any person who knowingly violates the Water Pollution Chapter or any Department rule adopted under the Chapter shall be punished by a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than three (3) years or by both. HRS § 342D-33. Any person who knowingly violates the Water Pollution Chapter or a Department rule adopted pursuant to the Chapter, and who knows at that time that the violation places another person in imminent danger of death or serious bodily injury, shall be subject to a fine of not more than \$250,000 or imprisonment of not more than fifteen (15) years, or both. HRS § 342D-34(a). A person which is an organization, upon conviction shall be subject to a fine of not more than \$1,000,000. HRS § 342D-34(b). Any person who knowingly releases a hazardous substance (including oil) into the environment in amount above the reportable quantity established in administrative rules shall be subject to prosecution for a Class C Felony or shall be punished by a civil penalty of not more than \$100,000 per day of violation. No criminal penalties shall be imposed under the Environmental Response Law Chapter upon any person for action taken in the course and scope of his or her employment if the person does not possess managerial or supervisory authority. HRS § 128D-15. (The criminal penalties set forth in HRS § 128D-3 & 128D-10 shall not take effect until the State Contingency Plan has been adopted. HRS § 128D-7(e)).

Financial Responsibility Requirements: None.

State Response Capability: The Director of Health shall prevent, control, and abate water pollution in the State. HRS § 342D-4.

Whenever any hazardous substance (including oil) is released or there is a substantial threat of such a release, the Director of Health is authorized to act consistent with the State Contingency Plan to remove or arrange for the removal of such hazardous substance,

pollutant, or contaminant at any time, including its removal from any contaminated natural resources. HRS § 128D-4(a). The Director may issue such orders as may be necessary to protect the public health, welfare, and the environment upon determining that there is an imminent and substantial endangerment to the public health, welfare, or environment. Id., (a)(2). He may solicit the cooperation of responsible parties to encourage voluntary cleanup efforts and undertake investigations, monitoring and other information gathering to identify the existence, source, nature, and extent of the hazardous substances or pollutants or contaminants involved. He may perform any necessary removal or remedial actions so as to abate any immediate danger to the public health or welfare or to the environment. Id., HRS § (a)(4). He may also contract the services of appropriate organizations to perform the actions

State Funding Mechanisms for Response and Cleanup: There is an Environmental Response Revolving Fund within the Department of Health consisting of appropriated monies and court-ordered awards or judgments, and other funds, which may be expended by the Department for emergency response actions under the Environmental Response Law Chapter. HRS § 128D-2. Monies in the fund may be expended by the Director to pay for all removal costs or remedial actions incurred by the State or the counties in response to a release, and payment of all State costs in the restoration, rehabilitation, or replacement of natural resources injured or destroyed of a result of a release. HRS § 128D-4(c).

Preventive Audit and Inspection Provisions: For the purposes of determining or investigating an actual release or a suspected release, or enforcing the Environmental Response Law Chapter, the Department of Health may issue reasonable and necessary information requests and obtain reasonable access to any facility, vessel, or location to inspect, review, and copy all pertinent documents and records. HRS § 128D-4(b).

The Director of Health may enter and inspect any building or place to investigate an actual or suspected source of water pollution, and to ascertain compliance with the Water Pollution Chapter, or any rule or standard adopted by the Department. HRS § 342D-8(a).

Response Drill Requirements: None.

November 1991

VIA U. S. MAIL AND FACSIMILE

November 7, 1991

Michele Brown, Esq.
Executive Director
Citizens' Oversight Council on Oil and Other Hazardous Substances
3111 C Street, Suite 150
Anchorage, Alaska 99503

Re: Responder Immunity Research

Dear Michele:

I have enclosed two of the four summaries which have been prepared thus far. I want to apologize again for being late in the delivery of these. We have already compiled the laws of Florida and Louisiana, and I will send on the summaries just as soon I finish preparing them. I have also enclosed copies of the actual laws from Connecticut and Hawaii to place in your file.

In preparing the summaries, I endeavored to follow the format suggested in your August letter which discusses the "Other State Laws" assignment. Thank you for your patience. Best wishes.

Yours very truly,

ALYESKA PIPELINE SERVICE COMPANY



Larry D. Wood
Senior Attorney-External Affairs

LDW41/cas

Enclosures

cc w/summaries: Ms. Pat Kincaid
Mr. Paul M. Richards
Mr. Michael K. Abbott
Ms. Karen L. Kilty

CONNECTICUT

Responder Immunity: "No person, firm or corporation which renders assistance or advice in mitigating or attempting to mitigate the effects of an actual or threatened discharge of oil or petroleum or chemical liquids or solid, liquid, or gaseous products, or hazardous materials or which assists in preventing, cleaning-up or disposing of any such discharge shall be held liable, notwithstanding any other provision of law, for civil damages as a result of any act or omission by him in rendering such assistance or advice, except acts or omissions amounting to gross negligence or wilful or wanton misconduct, unless he is compensated for such assistance or advice for more than actual expenses." Sec. 22a-452(b). Immunity does not apply to responsible persons, or to persons under a duty to mitigate effects of a discharge or spill. Sec. 22a-452(c).

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

State Contingency Plan Requirements: The commissioner of environmental protection must develop and implement a program and adopt regulations for oil spill contingency planning and coordination with local officials. Sec. 22a-453a. The commissioner is given the authority to adopt regulations to implement this section. *Id.* According to Charles Szmenski of the Bureau of Waste Management, Oil and Chemical Spills, the regulations have not yet been promulgated.

Civil Liabilities: Any person, firm, or corporation which directly or indirectly causes pollution and contamination of any land or waters of the state or causes an emergency through a discharge or spill of oil or petroleum is liable for all costs and expenses incurred in containing, removing, or mitigating such pollution or contamination. Sec. 22a-451. In addition, if the pollution or contamination was negligently caused, such person, firm, or corporation may be assessed damages equal to one and one-half times the incurred costs and expenses. If the pollution or contamination was willfully caused, such person, firm, or corporation may be assessed damages equal to two times the incurred costs and expenses. *Id.*

Any person who knowingly or negligently violates these provisions shall also be liable to the state for the reasonable costs and expenses of the state in detecting, controlling, and abating such violation, and the reasonable costs and expenses of the state in restoring the air, waters, lands and other natural resources, including plant, wild animal and aquatic life, or, if restoration is not practicable or reasonable, for any damage caused by such violation. Sec. 22a-6(a). The commissioner of environmental protection is authorized to adopt a schedule establishing the amounts of the civil penalties which may be assessed, but not to exceed statutory limitations. Sec. 22a-6(b). Civil penalties may be imposed for a violation up to \$25,000 per day. Sec. 22a-438(a). In assessing the amount of any penalty, the court may consider the nature, circumstances, the economic benefit resulting to the person from the violation, and other appropriate factors.

Criminal Liabilities: A willful or criminally negligent violation is punishable by a fine of not more than \$25,000 per day or one year imprisonment, or both. Sec. 22a-438(a).

Financial Responsibility Requirements: None in statutes and regulations not yet adopted.

State Response Capability: If a person, firm, or corporation which causes any discharge or spill does not act immediately to contain and remove or mitigate the effects of the discharge or spill to the commissioner's satisfaction, or if the responsible party is unknown, and the discharge or spill is not being contained, removed, or mitigated by the federal government, a state agency, a municipality, or a regional or interstate authority, the state may contract with an authorized person to contain and remove or mitigate the effects of the discharge or spill. Sec. 22a-451(b). The commissioner shall request the attorney general to recover the costs and expenses of such contractual obligations.

State Funding Mechanisms for Response and Cleanup: The state maintains a revolving fund known as the Emergency Spill Response Fund which is used, in part, for containment and removal or mitigation of oil or petroleum discharges or spills, but is not established solely to respond to oil spills. Sec. 22a-451(d). The fund is financed in part through damages collected from dischargers and is unlimited for purposes of oil spill cleanup.

Preventive Audit and Inspection Provisions: The commissioner of environmental protection may require the construction, modification, extension, or alteration of pollution abatement facilities or monitoring systems, or adopt other remedial measures as are necessary to prevent, control, or abate pollution. Sec. 22a-424(f). He may provide by regulations for the establishment and maintenance in operating condition and position of suitable equipment to contain as far as possible the discharge and spillage of any oil or petroleum. Sec. 22a-449(b). He may inspect hoses, pipelines and other equipment used in connection with the transfer and transportation of oil or petroleum to make certain that they are in good operating condition, and order the renewal of any such equipment found unfit for further use. Id. Regulations have not been adopted.

Each tank ship and tank barge from which and to which oil or petroleum liquids are being transferred shall be protected by a floating boom retention device which shall enclose the vessel. Sec. 22a-457(a). Exemptions to the use of floating boom retention devices may be adopted through regulations. Id.

Response Drill Requirements: None in statutes. Regulations have not been adopted.

November 1991

HAWAII

Responder Immunity: "No person shall be liable under this chapter or otherwise under the laws of the State or any of the counties, including the common law to any government or private parties for costs, damages, or penalties as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with this chapter or at the direction of an on-scene coordinator, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or pollutant or contaminant or the threat thereof. This subsection shall not preclude liability for costs, damages, or penalties as the result of gross negligence or intentional misconduct on the part of such person." Hawaii Revised Statutes § 128D-6(e).

Although not specifically related to oil spill response and cleanup, there is another provision which provides that any person who in good faith without remuneration or expectation of remuneration renders assistance at the scene of a vessel collision, accident or other casualty (without objection of any person assisted) shall not be liable for any civil damages resulting from the person's acts or omissions in providing or arranging towage or other assistance, except for damages as may result from the person's gross negligence or wanton acts or omissions. HRS § 267-8(b).

State Contingency Plan Requirements: The Health Department shall adopt by rules a Hawaii state contingency plan which, as appropriate and practicable, shall comport with the National Contingency Plan. In preparing the plan, the department shall consider and take into account regionally and locally developed contingency plans. HRS § 128D-7. According to Ms. Claire Hong of the Hazardous Evaluation and Emergency Response Office, rules implementing recent legislation will be completed in mid-1992. Senate Bill 1756 amended the Environmental Response Law in 1991.

Civil Liabilities: No person, including any public body shall discharge any water pollutant into State waters except as authorized. HRS § 342D-50(a)p. In case of an injury to or loss of natural resources, liability shall be to the State for natural resources within the State. HRS § 128D-6(h). Any party who has incurred removal or remedial action costs in

accordance with the Environmental Response Law may seek contribution or indemnity from any person who is liable. HRS § 128D-___(d). Any person may commence a civil action on the person's behalf against any person who has alleged to be in violation of any requirement under the Environmental Response Law or against the Director of Health where there is an alleged failure to perform any state act or duty. HRS § 128D-___(a)(2). No action may be commenced if the Director has issued a notice letter to the violator concerning the violation or has undertaken a response action. Id., (c)(2).

If the Director of Health determines that any person is violating the Water Pollution Chapter, or any rule adopted pursuant to the Chapter, he may issue an order specifying a reasonable time during which that person shall be required to take necessary measures to correct the violation. HRS § 342D-9(a). He may also require the alleged violator to appear for a hearing and may impose penalties. Id. He may issue a cease and desist order against any activities that violate the Water Pollution Chapter or any rule adopted pursuant to the Chapter. Id., (b)(3).

Any person who violates the Water Pollution Chapter shall be fined no more than \$10,000 for each separate offense. Each day of violation constitutes a separate offense. HRS § 342D-30(a)b. The Director is authorized to impose the penalties and factors to be considered include the nature and history of the violation and of any prior violations, and the opportunity, difficulty, and history of corrective action. HRS § 342D-31. Any costs incurred by the Environment Response Revolving Fund shall also be recovered by the attorney general from the liable person or persons including legal interest. HRS § 128D-5(a). Any person who is liable for a release of hazardous substances (including oil) and who fails, without sufficient cause, to properly provide removal or remedial action pursuant to an state administrative order may be liable to the state for punitive damages up to three time amount of any cost incurred by the Environmental Response Revolving Fund. In addition to liability for costs incurred by the State for the investigation, assessment, containment, and removal of a release, any person who willfully, knowingly, or recklessly violates the Environmental Response Law Chapter or any rule of order issues pursuant to it, shall be subject to a civil penalty not to exceed \$50,000 for each separate violation. Each day a violation continues shall constitute a separate violation. The court is directed to take into account the nature, circumstances, and gravity of the violation and with respect to the violator ability to pay, prior history, the degree of

culpability, economic benefit of savings, if any, resulting from the violation. HRS § 128D-8(e).

Criminal Liabilities: Any person who negligently violates the Water Pollution Chapter or related rules shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than one (1) year, or by both. HRS § 342D-32. Any person who knowingly violates the Water Pollution Chapter or any Department rule adopted under the Chapter shall be punished by a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than three (3) years or by both. HRS § 342D-33. Any person who knowingly violates the Water Pollution Chapter or a Department rule adopted pursuant to the Chapter, and who knows at that time that the violation places another person in imminent danger of death or serious bodily injury, shall be subject to a fine of not more than \$250,000 or imprisonment of not more than fifteen (15) years, or both. HRS § 342D-34(a). A person which is an organization, upon conviction shall be subject to a fine of not more than \$1,000,000. HRS § 342D-34(b). Any person who knowingly releases a hazardous substance (including oil) into the environment in amount above the reportable quantity established in administrative rules shall be subject to prosecution for a Class C Felony or shall be punished by a civil penalty of not more than \$100,000 per day of violation. No criminal penalties shall be imposed under the Environmental Response Law Chapter upon any person for action taken in the course and scope of his or her employment if the person does not possess managerial or supervisory authority. HRS § 128D-15. (The criminal penalties set forth in HRS § 128D-3 & 128D-10 shall not take effect until the State Contingency Plan has been adopted. HRS § 128D-7(e)).

Financial Responsibility Requirements: None.

State Response Capability: The Director of Health shall prevent, control, and abate water pollution in the State. HRS § 342D-4.

Whenever any hazardous substance (including oil) is released or there is a substantial threat of such a release, the Director of Health is authorized to act consistent with the State Contingency Plan to remove or arrange for the removal of such hazardous substance, pollutant, or contaminant at any time, including its removal from any contaminated natural

resources. HRS § 128D-4(a). The Director may issue such orders as may be necessary to protect the public health, welfare, and the environment upon determining that there is an imminent and substantial endangerment to the public health, welfare, or environment. Id., (a)(2). He may solicit the cooperation of responsible parties to encourage voluntary cleanup efforts and undertake investigations, monitoring and other information gathering to identify the existence, source, nature, and extent of the hazardous substances or pollutants or contaminants involved. He may perform any necessary removal or remedial actions so as to abate any immediate danger to the public health or welfare or to the environment. Id., HRS § (a)(4). He may also contract the services of appropriate organizations to perform the actions

State Funding Mechanisms for Response and Cleanup: There is an Environmental Response Revolving Fund within the Department of Health consisting of appropriated monies and court-ordered awards or judgments, and other funds, which may be expended by the Department for emergency response actions under the Environmental Response Law Chapter. HRS § 128D-2. Monies in the fund may be expended by the Director to pay for all removal costs or remedial actions incurred by the State or the counties in response to a release, and payment of all State costs in the restoration, rehabilitation, or replacement of natural resources injured or destroyed of a result of a release. HRS § 128D-4(c).

Preventive Audit and Inspection Provisions: For the purposes of determining or investigating an actual release or a suspected release, or enforcing the Environmental Response Law Chapter, the Department of Health may issue reasonable and necessary information requests and obtain reasonable access to any facility, vessel, or location to inspect, review, and copy all pertinent documents and records. HRS § 128D-4(b).

The Director of Health may enter and inspect any building or place to investigate an actual or suspected source of water pollution, and to ascertain compliance with the Water Pollution Chapter, or any rule or standard adopted by the Department. HRS § 342D-8(a).

Response Drill Requirements: None.

November 1991

LOUISIANA

Responder Immunity: "Notwithstanding any other provisions of law, except for the responsible person, no person, including any discharge cleanup organization, that voluntarily, pursuant to or consistent with the national contingency plan or the state oil spill contingency plan, or pursuant to or consistent with any response plan required under this chapter, or pursuant to or consistent with the request or the direction of an authorized federal or state official, or pursuant to or consistent with the request of the potentially responsible person, renders care, assistance, or advice in abating, containing, removing, cleaning up, or otherwise responding to pollution from an unauthorized discharge of threat of discharge of oil or refined petroleum products is liable for removal costs, damages, or civil penalties, whether under this chapter or other laws of this state resulting from acts or omissions committed in rendering such care, assistance, or advice. This section shall not apply to actions for personal injury or wrongful death or for acts or omissions of gross negligence or willful misconduct. A party responsible for the initial discharge is liable for any removal cost or damages for which another person is relieved under this subsection." LRS 30:2466(B).

No action or omission taken by any person to abate, contain, remove, cleanup, or otherwise respond to pollution shall be construed as an admission of responsibility or liability for the discharge. LRS 30:2466(A).

State Contingency Plan Requirements: The Louisiana oil spill coordinator ("coordinator") will develop a statewide oil spill prevention and response plan, taking into account the rules being developed by the federal government in accordance with the federal Oil Pollution Act of 1990. LRS 30:2456(A)(1). The coordinator will also adopt reasonable regulations for discharge prevention programs and response capabilities of terminal facilities and vessels. He will develop and implement criteria and plans of response to unauthorized discharges of various degrees and kinds, including realistically foreseeable worst-case scenarios consistent with federal regulations. LRS 30:2457(A)(2), (4).

Louisiana is currently developing oil spill regulations to implement the state's oil spill prevention and response act which was adopted in April in 1991.

As mentioned above, coordinator shall adopt a state oil spill contingency plan of response for actual or threatened unauthorized discharges of oil and cleanup of pollution from such discharges. LRS 30:2459(A). The plan shall include detailed emergency operating procedures, a response command structure and state response team, inventory of public and private equipment and its location, a list of available response supplies, a table of response organizations, plans for practice drills, plans for volunteer coordination and training, etc. LRS 30:2460(A).

A person may not operate a terminal facility without a discharge prevention and response certificate. The oil spill coordinator will require satisfactory evidence before issuing or renewing a certificate that an applicant has implemented a discharge prevention and response plan consistent with state and federal plans and regulations for prevention of unauthorized discharge of oil and abatement, containment, and removal of pollution. The applicant must demonstrate that it can provide directly, or through membership or contract with a discharge cleanup organization, all required equipment and personnel to prevent, abate, contain, and

remove pollution from an unauthorized discharge of oil as provided in the plan. LRS 30:2470(B)(1). Each applicant for a discharge prevention and response certificate must submit information related to implementation of the applicants' discharge and prevention response plan, including: all response equipment, personnel available to deploy and operate the equipment, as well as the estimated time required to deploy the personnel after the discharge, the measures employed to prevent unauthorized discharges, the terms of agreement and operation plan of any discharge cleanup organization to which the owner or operator of a terminal facility belongs, financial responsibility for removal costs and damages, and any other appropriate information. LRS 30:2472(5).

Every owner or operator of a vessel or facility must provide to the oil spill coordinator the tank vessel and facility response plans as provided in § 4202(A)(5) of the Oil Pollution Act of 1990 (PL 101-380).

In conjunction with the U. S. Coast Guard and prior to being granted entry to any port in Louisiana, the person in charge of a vessel subject to the provisions of this chapter may be required to report or show to the coordinator that the vessel has a discharge prevention and response plan and the personnel and equipment to implement it and that the vessel has evidence of financial responsibility. LRS 30:246(4)(5).

Civil Liabilities: Any person responsible for an unauthorized discharge of oil shall immediately notify the hotline of the discharge, and undertake all reasonable actions to abate, contain, and remove pollution. LRS 30:2463(A).

A person may not leave, abandon, or maintain any structure or vessel involved in an actual or threatened of unauthorized discharge of oil in coastal waters or on public or private lands or at a public or private port or dock, in a wrecked, derelict, or substantially dismantled condition, without the consent of the oil spill coordinator. LRS 30:2469(A).

Any responsible person may be liable for a civil penalty of not more than \$1 Million or the cost of any cleanup made necessary by such violation of law and a penalty of not more than \$25,000 for each day of violation. LRS 30:2025(E)(1). Any person to whom a compliance order or a cease and desist order is issued who fails to take corrective action within the time specified shall be liable for a civil penalty of not more than \$50,000 for each day of continued violation or noncompliance. *Id.*, Subsection (2). In determining whether or not a civil penalty is to be assessed and in determining the amount of the penalty, the following factor shall be considered; the history of previous violations for repeated noncompliance, the nature and gravity of the violation, the gross revenues generated by the respondent, the degree of culpability, recalcitrance, defiance, or indifference to regulations or orders, the monetary benefits realized through noncompliance, and the degree of risk to human health or property caused by violation, etc. *Id.*, Subsection (3)(a).

The total of the liability of a responsible party for all damages and removal costs shall not exceed for a tank vessel, the greater of \$1,200 per gross ton; or, in the case of a vessel greater than 3,000 gross tons, \$10 Million. In the case of a vessel 3,000 gross tons or less, \$2 Million. For any other vessel, \$600 per gross ton or \$500,000, whichever is greater. For an offshore facility, except a deepwater port, the total of all removal costs plus \$75 Million. For any onshore facility or deep water port, \$350 Million, provided that, for onshore facilities, the limitation of liability shall be the limitation of liability established by the President of the United States under the Oil

Pollution Act of 1990 (PL 101-380). LRS 30:2479(A). The limits of liability do not apply if an incident is primarily caused by gross negligence or willful misconduct, or the violation of an applicable federal, state, or local safety, construction, or operating regulation by a responsible party, or agent or employee of the responsible party. LRS 30:2479(C). The limits of liability do not apply if a responsible party fails to report a incident as required by law, and knows or has reason to know of the incident; or to provide all reasonable cooperation and assistance requested by the responsible state or federal official in connection with removal activities.

A person is not liable if a discharge resulted solely from an act of God, war, or terrorism; an act of government, either state, federal, or local; an unforeseeable occurrence exclusively occasioned by the violence of nature without the interference of any human act of omission; or the willful misconduct or negligence act or omission of a third-party other than an employee or agent of the person responsible for a third-party whose conduct occurs in connection with a contractual relationship with a responsible person, unless the responsible person fails to exercise due care and take precautions against foreseeable conduct of the third person. LRS 30:2481.

The Department of Wildlife and Fisheries may bring a civil suit to recover penalties for the value of each fish, wild bird, wild quadruped, and other wildlife and aquatic life unlawfully killed, caught, taken, possessed, or injured. LRS 30:2491(B).

Criminal Liabilities: Any person who willfully or knowingly discharges any substance in contravention of any subtitle or of the regulations when the substance is one that endangers or could endanger human life or health is guilty of a felony and may be fined not more than \$1 Million or the cost of the cleanup made necessary of such violation and shall be fined not more than \$100,000 per day of violation and costs of prosecution or imprisonment at hard labor for not more than ten (10) years, or both. LRS 30:2025(F)(1). Any person who willfully or knowing discharges or disposes of any substance in contravention of any provision of the subtitle or of the regulations when the substance does not endanger or could not endanger human life or health, is guilty of a misdemeanor and may be fined not more than \$25,000 per day of violation and costs of prosecution, or imprisonment for not more than one year, or both. LRS 30:2025(F)(2).

Financial Responsibility Requirements: Each owner or operator of a tank vessel with a capacity to carry 10,000 gallons or more as fuel or cargo operating within coastal waters or a terminal facility must maintain and furnish evidence of their financial responsibility for costs and damages from an unauthorized discharge of oil in accordance with the Oil Pollution Act of 1990 (PL 101-380). After an unauthorized discharge of oil, a vessel must remain in the coordinator's jurisdiction until the owner, operator, or person in charge has shown the coordinator evidence of financial responsibility. LRS 30:2478(B)(C).

State Response Capability: The Louisiana oil spill coordinator (within the Governor's office) is required to provided a coordinated response effort from all appropriate state agencies in the event of an unauthorized or threatened discharge of oil affecting or potentially affecting the land, coastal waters, or any other waters of Louisiana. LRS 30:246(A)(2).

On notification of an actual or threatened unauthorized discharge of oil, the coordinator must take immediate action to assess the discharge and prevent, abate, or contain any pollution. LRS 30:2461. He is authorized to direct all state

discharge response and cleanup operations from unauthorized discharges of oil in coastal waters, as directed by the governor. LRS 30:2462(A). The Department of Environmental Quality, under the direction and control of the coordinator, is lead technical agency of the state for response to actual or threatened unauthorized oil discharges, and for cleanup of pollution from unauthorized discharges of oil. LRS 30:2462(A).

If the persons responsible for a discharge are unwilling or unable to abate, contain, and remove pollution in an adequate manner, the coordinator may abate, contain, and remove pollution from the discharge and may contract with and appoint agents to operate under his direction. LRS 30:2463(B).

The coordinator may contract with any private person or entity for the use of equipment and personnel at places the coordinator determines may be necessary for response and prevention operations, in accordance with the state oil spill contingency plan. The coordinator may contract with any public agency by inter-agency transfer of funds to conduct baseline environmental, wetlands, water quality, habitat, wildlife, and natural resources assessments, or for any other matter deemed necessary to comply with the state and national oil spill contingency plans. LRS 30:2467.

State Funding Mechanisms for Response and Cleanup: Any person or discharge cleanup organization that renders assistance in abating, containing, or removing pollution from any unauthorized discharge may receive compensation from the fund for removal costs, provided the oil spill coordinator approves compensation prior to the assistance being rendered. The coordinator, on petition and for good cause shown, may waive the prior approval prerequisite. LRS 30:2465(B).

The coordinator may use monies in the fund up to \$1 Million in any fiscal year for the removal of any wrecked, derelict, or substantially dismantled vessel or structure involved in an actual or threatened unauthorized discharge of oil in coastal waters or on public or private lands, if its owner or operator cannot be located.

The oil spill contingency fund was created to immediately provide available funds for response to all threatened or actual unauthorized discharges of oil, or cleanup of pollution from unauthorized discharges of oil, natural resources damages, damages sustained by any state agency or political subdivision, and removal costs from threatened, unauthorized discharges of oil. LRS 30:2483(C). All fees, taxes, penalties, judgments, reimbursements, charges, and federal funds collected pursuant to the state's Oil Spill Prevention and Response Act shall be deposited immediately upon receipt into the state treasury. Money in the fund may be dispersed for the following purposes and no others: administrative and personnel expenses of the office of the oil spill coordinator (not to exceed \$250,000 in any fiscal year); removal costs related to abatement and containment of actual or threatened unauthorized discharges of oil, protection, assessment, restoration, or mitigation of damages to natural resources, and operating costs in contracts for response and prevention not to exceed \$500,000 in any fiscal year. LRS 30:2484. An oil spill contingency fee is imposed on every person owning crude oil in a vessel at the time such crude oil transferred to or from a vessel at a marine terminal within the state of Louisiana. The operator of the marine terminal collects the fee from the owner of the crude oil and remits it to the Secretary of the Department of Revenue and Taxation. The fee is imposed only once on the same crude oil. For expenses of collecting the fee, the operator is authorized to withhold 1 1/2% percent of the fees collected during each quarter provided that the amount due was not delinquent at the time of payment.

LRS 30:2485. The rate of the fee is \$.02 per barrel of crude oil until the state treasurer certifies that the balance in the fund has reached \$50 Million. If the balance in the fund falls below \$8 Million, the treasurer shall certify that fact to the secretary of the Department of Revenue and Taxation. On receiving the state treasurer's certification, the secretary shall resume collecting the fee. LRS 30:2486. The fee shall be levied at the rate of \$.04 per barrel under some circumstances. LRS 30:2486(C).

The coordinator must prescribe appropriate forms and requirements and by rule establish procedures for filing claims for compensation from the fund and for removal cost reimbursements to other state agencies from the fund. LRS 30:2488(A). The fund shall be liable for removal costs and damages, provided that such are not recoverable under the federal Oil Pollution Act and the claimant has exhausted all federal remedies. The damages include all proven, reasonable damages and removal costs incurred by state agencies or local government authorities, and all natural resources damages from an unauthorized discharge of oil. The coordinator must diligently pursue reimbursement to the fund of any sum expended or paid from the fund in accordance with the state and national oil spill contingency plans. The coordinator will recover for the use of the fund, either from persons responsible for the unauthorized discharge or otherwise liable, or from the federal oil spill liability trust fund, all sums owed to or expended from the fund. LRS 30:2489(B).

Preventive Audit and Inspection Provisions: The Louisiana oil spill coordinator is authorized to enter property when he finds it necessary to conduct a vessel or terminal-facility audit, inspection, or drill, or to respond to an actual or threatened unauthorized discharge. The coordinator may enter the property after making a reasonable effort to obtain consent. LRS 30:2456(E). The coordinator shall adopt reasonable regulations which establish requirements for complete and thorough inspections of terminal facilities. LRS 30:2457(A)(6).

The coordinator will adopt regulations for complete and thorough audits of vessel contingency and response plans. LRS 30:2457(A)(5).

The coordinator, in conjunction with U. S. Coast Guard, may subject a vessel covered by the state's Oil Spill Prevention and Response Act, as a condition to being granted entry into any port in the state, or a terminal facility to an announced or unannounced audit, inspection, or drill to determine the discharge prevention and response capabilities of the terminal facility or vessels. LRS 30:2477.

Response Drill Requirements: The state contingency plan must include plans for practice drills for the response command structure and state response team. LRS 30:2460(A)(5).

The coordinator, in conjunction with U. S. Coast Guard, may subject a vessel covered by the state's Oil Spill Prevention and Response Act, as a condition to being granted entry into any port in the state, or a terminal facility to an announced or unannounced audit, inspection, or drill to determine the discharge prevention and response capabilities of the terminal facility or vessels. LRS 30:2477.

January 1992

DEC 20 1991

OIL DISCHARGE PREVENTION AND POLLUTION CONTROL
State of Maine

TABLE OF CONTENTS

Synopsis.....	1
Background and agency structure.....	4
Governor's role.....	4
Lead agency.....	4
Commissioner, Department of Environmental Protection.....	6
Department of Inland Fisheries & Wildlife..	7
Boards of arbitration.....	7
Responders.....	7
Licensing of facilities.....	8
Limits on liability for responsible parties.....	9
Financial responsibility.....	9
Contingency plans.....	10
State c-plans.....	10
Facility plans.....	11
Vessels plans.....	11
Enforcement.....	11
State response mechanisms.....	12
Funding.....	12
License fees.....	12
Registration fees.....	13
Disbursements from the Fund.....	13
Reimbursements to the Fund.....	14

Maine Statutes

OIL DISCHARGE PREVENTION AND POLLUTION CONTROL

SYNOPSIS

The Department of Environmental Protection is the lead agency for cleanup and removal of oil discharges. When a spill occurs in coastal waters the Commissioner of the department shall represent the governor in all abatement, cleanup and resource protection; he shall cooperate with federal, industry and other states that are responding to the spill.

Any person responsible for the spill shall begin immediate cleanup and removal of the pollution. The department may undertake the cleanup or retain agents to do so. The department is also empowered to replenish water supplies contaminated by the oil spill.

The Department of Environmental Regulation shall promulgate all rules and regulations to carry out this subchapter. It shall establish and maintain personnel and equipment at any ports it deems necessary.

The department has exclusive power to deal with the hazards of oil tankers that anchor in Maine ports. The department shall adopt necessary regulation to protect the coastal waters, tidal flats and beaches from any anchorage of oil-carrying vessels.

The commissioner of the Department of Environmental Protection shall review all c-plans. He shall, with other state agencies, assess all sensitive areas and resources in marine

waters that could be threatened by a spill. The department shall then develop policies and determine priorities for the protection of these areas.

The Department of Inland Fisheries and Wildlife, in cooperation with other state agencies, shall prepare a rehabilitation plan for wildlife damaged by an oil spill.

Responders are not liable for their actions unless those actions are grossly negligent and the actions are not consistent with the national contingency plan or any state plan. Responders are not immune from acts or omissions caused by willful misconduct or from claims for personal injury or wrongful death.

Any vessel or fixed terminal that handles petroleum and petroleum products must obtain a license from the department. As a condition for obtaining a license the facility or vessel must show that it has, or is in the process of, implementing state and federal plans for controlling oil pollution and abating the pollution when a discharge occurs.

Any person operating an oil terminal facility must obtain a license from the department. Licenses issued to a terminal include any vessels under the control of that facility and vessels that are used to transport oil to or from that facility and that travel within State waters.

Any vessel not under the direction or control of a fixed facility must obtain its own license. Any vessel at anchorage in Maine waters for more than seven days must also obtain a license.

Maine laws make no provisions for financial requirements; however, each facility and vessel subject to the state licensing requirements shall file with the department a copy of its c-plan submitted to the President of the United States pursuant to UPA 90 requirements.

The commissioner must develop a state c-plan by December 31, 1991. He shall hold public hearings during the development of the plan. Along with the identification of a oil spill coordinator and a state structure for handling a spill, the plan must address a range of possible scenarios, including spills of 100,000 gallons, one million gallons and six million gallons. The plan also must address worst-case scenarios in designated ports.

The Maine law does not subject dischargers to penalties if they report the discharge within two hours, promptly remove the pollution in accord with rules and regulations and pay any costs within 30 days of demand. The department shall, however retain a vessel until it has paid any fines or penalties imposed upon it.

The Maine Coastal and Inland Surface Oil Cleanup-Fund, limited to \$6 million, is funded with license fees for facilities and vessels. The assessment is 4 cents per barrel of petroleum or petroleum products transferred by a licensee. Additionally, any person who transports by highway or rail more than 25 barrels of petroleum or petroleum products at any one time must register with the department and pay the same fee of 4 cents per barrel.

The assessment will decrease to 3 cents per barrel after

July 1, 1994. Additionally, when the balance in the Fund reaches \$6 million, the license and registration fees shall be decreased proportionately to cover only administrative costs.

Disbursements from the Fund may only be used for cleanup, abatement and removal, payment of third party claims, payment for arbitration and arbitrators, personnel and equipment located at designated ports and costs for environmental impact studies.

I. BACKGROUND AND AGENCY STRUCTURE

Maine's laws on oil discharge and prevention are found in subchapter II, 38 M.R.S.A. § 541-560. The legislature was concerned about the impact of oil pollution on the recreation and commercial fishing industries when it passed the laws in 1969.

The laws have been amended several times since their original passage. In 1990 the cap on the spill fund was increased to \$6 million. At the same time the licensing fees that support the fund were also increased. In 1991 the state, facilities and vessels were required to establish c-plans. In 1991 the legislature also passed a law regarding responder liability.

GOVERNOR. When a spill occurs the governor shall proclaim an emergency and shall cooperate with federal and other agencies involved in the cleanup and removal. He shall also announce when the emergency is ended. 38 M.R.S.A. § 547.

LEAD AGENCY. Maine's Department of Environmental Protection is responsible for the response to oil spills. 38 M.R.S.A. § 544. In the event of a spill in coastal waters the

Commissioner of Environmental Protection shall directly represent the governor in all abatement, cleanup and resource protection in cooperation with federal, industry and other states' response teams. 38 M.R.S.A. § 547.

Any person discharging oil shall immediately begin removal of the pollution. The cleanup shall be under the direction of the department and it must meet the satisfaction of the department. The department may undertake the removal and cleanup and may retain agents and contracts to do so under its direction. 38 M.R.S.A. § 548.

The department may implement remedies to restore or replace water supplies contaminated by a discharge, using the most cost efficient, technologically feasible and effective alternative. 38 M.R.S.A. § 548.

The department shall promulgate rules and regulations to carry out this subchapter. Matters which shall be regulated by the department include:

- (1) operation and inspection requirements for facilities, vessels, personnel and other matters relating to licensee operations;
- (2) procedures for reporting discharges;
- (3) procedures, methods and equipment to be used in the removal of oil and petroleum products;
- (4) establishment of a state contingency plan; and
- (5) safety requirements for vessels and other motorized equipment used in the transport of oil and petroleum products.

38 M.R.S.A. § 546.

The department shall establish and maintain at such ports within the state and other places it determines, employees and

equipment it believes necessary to carry out this subchapter. Salaries of such employees and equipment shall be paid from the Fund. 38 M.R.S.A. § 549.

Finally, the department has the exclusive power to deal with the hazards and threats of danger caused by the anchorage of oil carrying vessels in State waters. It shall adopt regulations to protect the coastal waters, tidal flats, beaches and lands adjoining the waters. When promulgating regulations the department shall consider the following:

- (1) the location, duration and type of anchorage;
- (2) the type and capacity of vessels permitted anchorage;
- (3) the systems and precautions necessary for safety on each vessel;
- (4) the training, number of availability of crew members aboard each vessel;
- (5) a requirement for c-plans in case of fire, accident, storm or other unforeseen acts;
- (6) the protection of the natural environment, aesthetic and recreational use of State waters; and
- (7) the protection of fisheries and the fishing industry of the State.

38 M.R.S.A. § 560.

COMMISSIONER OF DEPARTMENT OF ENVIRONMENTAL PROTECTION. The commissioner shall annual review all c-plans and make recommendations to revise the plans. 38 M.R.S.A. § 546-A.

He shall also, in consultation with the Department of Marine Resources, the Department of Inland Fisheries and Wildlife, the Department of Conservation, the State Planning Office, the U.S. Fish and Wildlife Service and other appropriate agencies and organizations, assess the nature and extent of sensitive areas

and resources in marine waters that may be threatened by oil spills. The department shall then develop policies and guidelines to set priorities for protection of sensitive areas. 38 M.R.S.A. § 546-B(1)-(2).

DEPARTMENT OF INLAND FISHERIES AND WILDLIFE. This department, in cooperation with other state agencies and organizations, shall prepare a rehabilitation plan for wildlife resources damaged by oil spills. The plan must include:

- (1) policies, priorities and guidelines to address rehabilitation activities;
- (2) an analysis of the cost-effectiveness of wildlife rehabilitation efforts;
- (3) a mechanism for the use of volunteers;
- (4) identification of needed resources and facilities for rehabilitation efforts and an inventory of those available;
- (5) preliminary agreements with treatment centers or facilities; and
- (6) recommendations on implementation of the plan and any required training efforts.

38 M.R.S.A. § 546-C.

BOARDS OF ARBITRATION. Boards of arbitration shall be used to hear and determine all claims arising from or related to a common single discharge. The hearings shall be informal; determinations made by a majority of the board shall be final. Determinations of the board may be subject to review by the Superior Court by only as to matters relating to abuse of discretion by the board. 38 M.R.S.A. § 551(3).

II. RESPONDERS

Responders are not liable for removal costs, damages, civil liabilities or penalties that result from actions taken or

omitted in the course of rendering assistance or advice consistent with the national contingency plan, a federal or state contingency plan or as otherwise directed by the federal onscene coordinator. This immunity does not apply to personal injury or wrongful death or if a responder is grossly negligent or engages in willful misconduct or if the responder is the responsible party. 38 M.R.S.A. § 552, sub-§ 4.

III. LICENSING OF FACILITIES

No person shall operate or cause to be operated an oil terminal facility without a license. 38 M.R.S.A. § 545. Licenses issued to any fixed or permanent oil terminal facility shall include vessels under the direction or control of such facility and used to transport oil between such facility and vessels within State waters. 38 M.R.S.A. § 545, sub-§ 4.

Any person operating or causing to be operated a vessel not subject to the direction or control of a fixed and permanent terminal facility shall obtain a license. 38 M.R.S.A. § 545, sub-§ 4.

Any vessel at anchorage in Maine waters for more than seven days must have a current license from the department. 38 M.R.S.A. § 560, sub-§ 6.

Licenses shall be issued upon application and shall be subject to terms and conditions as the department determines as necessary to carry out the purposes of this subchapter. 38 M.R.S.A. § 545, sub-§ 1. As a condition precedent to the issuance or renewal of a license the department shall require

satisfactory evidence that the applicant has or is in the process of implementing state and federal plans and regulations for control of pollution related to oil, petroleum products and their by-products and the abatement of such pollution when a discharge occurs. 38 M.R.S.A. § 545, sub-§ 2.

IV. LIMITS ON LIABILITY FOR RESPONSIBLE PARTIES

Licensees are strictly liable for discharges occurring at facilities under their control or for discharges attributable to carriers or others for whom the licensee is responsible. Persons owning or controlling real property, structures, equipment or conveyances are strictly liable for causing a discharge from their property. 38 M.R.S.A. § 552, sub-§2.

A licensee shall be liable for all acts and omissions of its servants and agents and carriers destined for the licensee's facilities from the time such carrier shall enter State waters until such time as the carrier leaves State waters. 38 M.R.S.A. § 552, sub-§ 1.

Defenses to liability are: (1) an act of war; (2) an act of state, federal or municipal government; (3) an act of God, which shall mean an unforeseeable act exclusively occasioned by the violence of nature without the interference of any human agency. 38 M.R.S.A. § 551, sub-§ 7.

VI. FINANCIAL RESPONSIBILITY

The Maine statutes have no requirements for financial responsibility.

VII. CONTINGENCY PLANS

STATE C-PLAN. The commissioner shall develop by December 31, 1991, a preliminary marine oil spill contingency plan. He shall hold a public hearing process of developing the plan. 38 M.R.S.A. § 546-A, sub-§ 1. The plan shall contain the following:

- (1) designation of a state oil spill coordinator;
- (2) a clear definition of the roles of the department, the oil industry and the U.S. Coast Guard in various circumstances as well as other state agency roles;
- (3) a clear definition of the State's role under the joint agreement between the U.S. and Canada known as CANUSLANT;
- (4) an inventory of oil spill response equipment available in the State;
- (5) a listing of sources for qualified, trained spill responders with the state;
- (6) preapproved criteria for the use of dispersants, bioremediation and in situ burning developed with the U.S. Coast Guard and other agencies and the names of persons authorized to make the final decision for the State in their use;
- (7) identification of sensitive areas and resources and management strategies for protecting them;
- (8) identification of resources for wildlife rehabilitation; and
- (9) identification of facilities for disposal of oily debris and for separation, transport and storage of recovered oil.

38 M.R.S.A. § 546-A, sub-§ 3(a)-(i)

The plan must include provisions for annual drills, sometimes unannounced, to determine the adequacy of response plans and the preparedness of response teams. 38 M.R.S.A. § 546, sub-§ 4. When developing the plan, the need for prepositioned response teams and additional equipment shall be considered. 38 M.R.S.A. § 546-A, sub-§ 4.

The plan must address a range of scenarios, including spills of 100,000 gallons, one million gallons and six million gallons

and the worst-case scenario in each major port area in both favorable and adverse conditions. The worst-case scenario in each major port area is the loss of an entire vessel of the following capacities:

- (1) Portland: 30 million gallons;
- (2) Penobscot Bay and Penobscot River: 13 million gallons;
- (3) Portsmouth, N.H.: 13 million gallons;
- (4) St. John, New Brunswick: 90 million gallons;
- (5) Eastport: 100,000 gallons; and
- (6) Elsewhere on the coast: 30,000 gallons.

38 M.R.S.A. § 546-A, sub-§ 2(A)-(F).

FACILITY PLANS. Each facility subject to licensing requirements shall file with the department a copy of any oil discharge response plan submitted to the President under OPA 90 or a statement that a plan is not required by that licensee under federal law. 38 M.R.S.A. § 546, sub-§ 5.

VESSELS PLANS. Each vessel entering State waters and subject to licensing requirements shall file with the department a copy of any oil discharge response plan submitted to the President of the United States under OPA 90 or a statement that a plan is not required by that licensee under federal law. 38 M.R.S.A. § 546, sub-§ 6.

VIII. ENFORCEMENT

Any person causing or responsible for a discharge in violation of § 543 shall not be subject to fines or penalties if he reports the discharge within two hours, if he promptly removes the discharge in accord with the rules, regulations and directions of the department and if he pays to the Fund within 30

days of demand all costs expended for cleanup and removal. 38 M.R.S.A. § 550.

Whenever the department has probable cause to believe a vessel violated this subchapter, that vessel shall be detained until payment of any fine or penalty has been received. 38 M.R.S.A. § 552-A.

IX. STATE RESPONSE MECHANISMS

The Maine Coastal and Inland Surface Oil Clean-up Fund is established to be used by the department as a nonlapsing, revolving fund for carrying out the purposes of this subchapter. It shall be limited to \$6 million. When the balance in the Fund reaches \$6 million the fees shall be reduced proportionately to cover only administrative costs. 38 M.R.S.A. § 551, sub-§ 4(B).

To this Fund shall be credited all license fees, penalties, reimbursements and other fees and charges related to this subchapter. The money in this Fund may be invested as provided by statute. 38 M.R.S.A. § 551.

FUNDING. The Fund shall receive its moneys from licensing fees and registration fees.

LICENSE FEES. License fees shall be determined on the basis of 4 cents per barrel until July 1, 1994, and 3 cents per barrel after July 1, 1994, of unrefined crude oil and all other refined oil including #6 fuel oil, or #2 fuel oil, kerosene, gasoline, jet fuel and diesel fuel transferred by the licensee during the licensing period. Fees must be paid monthly by the licensee on the basis of records certified to the commissioner.

38 M.R.S.A. § 551, sub-§ 4A.

REGISTRATION FEES. Any person who transports by rail or highway more than 25 barrels of oil into Maine at any one time shall register annually with the department. 38 M.R.S.A. § 545-B.

Any person required to register with the commissioner pursuant to § 545-A and who first transports oil in Maine shall pay fees determined on the basis of 4 cents per barrel until July 1, 1994, and 3 cents per barrel after July 1, 1994, for all refined oil including #6 fuel oil, #2 fuel oil, kerosene, gasoline, jet fuel, diesel fuel and liquid asphalt transported by the registrant during the period of registration.

This provision does not apply to waste oil transported into Maine by any motor vehicle with a valid license issued by the department for the transportation of waste oil. These vehicles are subject to fees established under § 1319-D. 38 M.R.S.A. § 551, sub-§ 4(D).

DISBURSEMENTS FROM THE FUND. Money in the Fund shall be disbursed for the following purposes only:

- (1) Administrative expenses, personnel expenses and equipment costs of the commission related to the enforcement of this subchapter;
- (2) All costs, including, without limitation, personnel and equipment costs, involved in the removal of oil, abatement of pollution and the implementation of remedial measures including restoration of water supplies related to the discharge of oil or petroleum products and by-products;
- (3) Research and development sums;
- (4) Payment of third party claims awarded in accordance with this section;
- (5) Payment of arbitration and arbitrators;
- (6) Payment of costs of insurance by the State to extend or implement the benefits of the Fund;

(7) Sums, up to \$50,000 each year, which have been allocated by the Legislature on a contingency basis in accordance with § 555 for payment of costs for studies of environmental impacts of discharges which may have adverse economic effects and which occur subsequent to such allocation and which are deemed necessary by the commissioner;

(8) Payment of costs for the collection of overdue reimbursements.

38 M.R.S.A. § 551, sub-§ 5(A)-(H).

REIMBURSEMENTS TO THE FUND. The department shall seek recovery to the use of the Fund all sums expended therefrom, including overdrafts, for the following purposes:

- (1) All disbursements made by the Fund for cleanup, abatement and removal costs related to the discharge of oil, petroleum products and by-products;
- (2) All disbursements for payment of third party claims awarded;
- (3) All disbursements for payment of arbitration and arbitrators;
- (4) All disbursements made for environmental impact studies.

DEC 20 1991

SPILL COMPENSATION AND CONTROL ACT
State of New Jersey

TABLE OF CONTENTS

Synopsis.....	1
Background information and agency structure.....	3
Department of Environmental Protection.....	4
Arbitration boards.....	5
Liability of discharge cleanup organizations.....	6
Liability.....	6
Indemnification.....	6
Registration of organizations.....	7
Liability of responsible persons.....	8
Liability.....	8
Defenses.....	8
Financial responsibility.....	8
Contingency plans.....	9
Discharge prevention plans (DPCC).....	9
Discharge response plans (DCR).....	11
General provisions.....	12
Enforcement.....	13
Provisions.....	13
Administrative penalties.....	13
Civil penalties.....	14
Forfeiture.....	15
State response mechanisms.....	15
Funding.....	15
Costs to be paid from the Fund.....	16
Drills and inspections.....	17
Procedures for notification of discharges and discharge response.....	18
Safety and prevention provisions.....	19

SPILL COMPENSATION AND CONTROL ACT

SYNOPSIS.

The New Jersey Department of Environmental Protection is the lead agency for cleanup of hazardous substances discharges (including crude oil and petroleum products). Whenever notified of a discharge, the department either arranges for the removal of the pollution or requires the discharger to remove it. The department may be present at any discharge cleanup operation.

The department is responsible for promulgating regulations to implement the Act. It reviews and approves or disapproves all contingency plans.

Arbitration boards are used to settle disputes over the validity or amount of damages or cleanup and removal costs. The decisions of the boards are reviewable by the court.

Discharge cleanup organizations are immune from liability, unless their actions are shown to have been negligent. Activities and services in accordance with state-of-the-art knowledge and the utilization of the best technology reasonably available create a rebuttable presumption that the actions were not negligent.

The department may indemnify a discharge cleanup contractor against claims if the department determines that adequate environmental liability insurance is either not available or not available at a reasonable cost. Discharge cleanup organizations

must register with the department and submit a list of their qualified personnel who will respond to a discharge. The organization must also submit a list of its available equipment.

Persons responsible for a discharge are strictly, jointly, and severally liable for all cleanup and removal costs. Defenses are identical to the defenses provided under CPA 90.

The owner of a major facility or transmission pipeline (storage capacity of more than 200,000 gallons) shall have on file with the department evidence of financial responsibility. A facility, with a storage capacity of more than 200,000 gallons of a hazardous substance shall demonstrate financial ability in the minimum amount of \$1 million per occurrence and \$2 million aggregate. A vessel is considered a major facility only when hazardous substances are transferred between vessels.

Owners and operators must submit both discharge prevention, control and countermeasure plans and discharge, cleanup and removal plans to the department for approval. The prevention plans must be reviewed and certified by a licensed engineer who must attest that the plan complies with all applicable departmental requirements and has been prepared in accord with sound engineering practices. All plans must be kept on file at the department.

The department may assess civil administrative penalties up to \$10 million for discharges of more than 100,000 gallons of a hazardous substance. The department may also assess penalties for any violations of the Act and may assess higher penalties for

second and third violations.

The New Jersey Spill Compensation Fund is a revolving fund in the Department of Environmental Protection. All taxes and penalties related to this Act are deposited in the Fund. In 1990 the legislature increased the tax to \$0.0175 per barrel of hazardous substance transferred to a major storage facility in the state.

In the case of a major discharge or series of discharges of crude oil or petroleum products that results in reasonable claims against the Fund, the tax shall be levied at the rate of \$0.04 per barrel of petroleum or petroleum product transferred until the revenue produced by the increase is 150% of the pending claims.

I. BACKGROUND INFORMATION AND AGENCY STRUCTURE

The Spill Compensation and Control Act was originally passed by the New Jersey Legislature in 1976. The legislature intended that the Act would both control the transfer and storage of hazardous substances and provide liability for damage sustained as the result of any discharge of such substance. The Act required prompt containment and removal of the pollution and it provided a fund for swift and adequate compensation to resort businesses and other persons damaged by discharges.

The Act, for the most part, does not differentiate between crude oil or petroleum products and hazardous substances. Crude oil and petroleum products are included in the definition of "hazardous substances." 55:10-23.1(b)(1); N.J. Reg. 7:15-

1.7(a)(1).

Some sections of the Act have been amended since its passage in 1976. In July 1990, the governor signed a six-bill oil spill package that provided for: (1) amendment of the existing Spill Fund by the imposition of a \$10 million fine for catastrophic spills of 100,000 gallons or more of oil and authorization of the Department of Environmental Protection to recover damages and administrative penalties; (2) the placement of containment devices around sites where a hazardous substance is being transferred or alternatively, devices and crews on standby during the transfers; (3) the implementation of certain pipeline safety measures; (4) illumination around transfer sites during nighttime transfers of hazardous substances; (5) added requirements for c-plans and prevention control plans and an increase in the fees assessed to fund the Spill Fund; and (6) no tax deductions for penalties, fines and treble damages assessed subsequent to discharges of hazardous substances.

DEPARTMENT OF ENVIRONMENTAL PROTECTION. The New Jersey Department of Environmental Protection is the lead agency for responding to discharges of hazardous substances. § 58:10-23.11f(a). After notification of a discharge the department may either arrange for the removal of the discharge or require the discharger to remove it or arrange for its removal. Id. If the spill occurs at a major facility, the department has the authority to order the facility closed.

Pursuant to the Act the department established regulations

to implement the Act. § 58:10-23.11f6. The department also adopted standards and requirements for retrofitting existing structures, pipelines, monitoring systems. § 58:10-23.11d11. The department prescribed the size of storage tanks that must be tested and the nature and frequency of the testing. § 58:10-23.11(b)(2).

The department must review all submitted c-plans; it approves or disapproves them. § 58:10-23.d9. Copies of all preventions plans and contingency plans must be kept on file with the department. § 58:10-23.11d9(b).

Notice of new construction or substantial modification of existing above- or below-ground storage facilities, storage space, transmission pipelines or monitoring devices shall be reported to the department at least 60 days prior to the construction or modification. § 58:10-23.11d11.

The department shall develop base maps, including but not limited to, waterways, wetlands, coastal areas, water supply areas, shellfish growing areas and endangered and threatened species areas in order to provide comprehensive, contiguous coverage of land and water areas. § 58:10-23.11d3(c).

ARBITRATION BOARDS. The administrator of the New Jersey Spill Compensation Fund shall convene boards of arbitration when persons alleged to have caused a discharge, the administrator or other persons contest the validity or amount of damage claims or cleanup and removal costs presented to the fund for payment. § 58:10-23.11n. At the discretion of the administrator a board

of arbitration may have three members or a single neutral person.

Decisions of the arbitration boards shall be final; any action for judicial review shall be filed in the appellate division of the Superior Court within 30 days of filing of the decision. § 58:10-23.11n(g). In any case where the discharger seeks judicial review reasonable attorney fees and costs shall be awarded to the claimant if the decision of the board is affirmed. § 58:10-23.11n(h).

II. LIABILITY OF DISCHARGE CLEANUP ORGANIZATIONS.

LIABILITY. The liability of persons performing cleanup or mitigation services in accordance with state or federal procedures or law is limited to acts or omissions of the person which can be shown, based on a preponderance of the evidence, to have been negligent. For the purpose of this section, a demonstration that the actions and services were in accordance with generally accepted practice and state-of-the-art scientific knowledge, and that the cleanup organization utilized the best technology reasonably available at the time of its services shall create a rebuttable presumption that the actions were not negligent. § 58:10-23.g1.

INDEMNIFICATION. The department may contract to secure prospective removal services. It may also agree to defend and indemnify a contractor against claims or court suits that arise as a direct result of the contractor's cleanup or mitigation services pursuant to his contract with the department if the department determines that adequate environmental liability

insurance is not available or not available at a reasonable cost to the contractor. § 58:10-23.11f(a).

Legal defense and indemnification shall not apply to claims and actions which are proven to have arisen from gross negligence, willful misconduct, fraud, intentional tort, bad faith or criminal misconduct or to claims for exemplary or punitive damages. Id.

Nothing in this section precludes removal or mitigation services performed by any person threatened by such discharges provided that such persons coordinate and obtain approval for his services with ongoing State or federal operations. Id. These persons shall not be liable for any civil damages to third parties resulting solely from acts or omissions except for acts or omissions of gross negligence or willful misconduct. Id.

REGISTRATION OF DISCHARGE CLEANUP ORGANIZATIONS. Discharge cleanup and removal organizations, other than owners or operators of major facilities covered by DCR plans who intend to clean up only discharges from their own facilities, shall submit the following information to the department:

- (1) name and mailing address of the organization;
- (2) form of the organization, i.e. corporation, cooperative or association;
- (3) name, address and telephone number of the manager in each office maintained by the organization;
- (4) a list of the containment and removal equipment owned, leased, contracted or otherwise available for immediate response by the organization (includes chemicals, sorbents, tools and communications devices) and the location of the equipment;
- (5) names of the trained personnel available to operate the equipment and a brief description of their qualifications;
- (6) areas of the State where the organization will

respond to discharges;
(7) a brief two-year record of the organization's response history in New Jersey and other states, including the magnitude of the discharges and the types of hazardous substances handled.

N.J. Reg. 7:1E-3.3.

III. LIABILITY OF RESPONSIBLE PERSONS

LIABILITY. Any person who has discharged a hazardous substance or is in any way responsible for the hazardous substance which the department has removed pursuant to this Act is strictly, jointly and severally liable for all cleanup and removal costs. § 58:10-23.11g(c).

DEFENSES. An act or omission caused solely by war, sabotage, or God or a combination thereof, shall be the only defenses which may be raised by any owner or operator of a major facility or vessel responsible for a discharge in any action arising under the provisions of this Act. § 58:10-23.11g(d).

IV. FINANCIAL RESPONSIBILITY

The owner of a major facility or a transmission pipeline shall, at all times, have on file with the department evidence of financial responsibility for cleaning up and removing pollution from a discharge or release of a hazardous substance and for the removal of any abandoned structure owned or operated by the owner or operator of the facility or transmission pipeline.

A major facility has a total combined storage capacity of (1) 20,000 gallons or more for hazardous substances other than petroleum products, or (2) 200,000 gallons or more for hazardous substances of all kinds. A vessel may be considered a major

facility only when hazardous substances are transferred between vessels. N.J. Reg. 7:1E-1.6.

The amount, nature, terms and conditions of financial responsibility shall be determined by the department. § 58:10-23.11d5. The owner or operator of a major facility shall demonstrate financial responsibility in the minimum amount of \$1 million per occurrence and \$2 million annual aggregate. N.J. Reg. 7:1E-3.6(b).

MECHANISMS. Financial responsibility may be established by any one or a combination of the following: (1) financial test of self-insurance; (2) guarantee; (3) insurance or risk retention group coverage; (4) surety bond; or (5) letter of credit. N.J. Reg. 7:1E-3.6(d)(1)-(5). The N.J. regulations set out specific requirements for each of the five mechanisms and also provide suggested forms to be used to establish the proof. N.J. Reg. 7:1E-3.6 et seq.

V. CONTINGENCY PLANS

DISCHARGE PREVENTION, CONTROL AND COUNTERMEASURE PLANS. Each owner or operator of a major facility or a transmission pipeline shall submit to the department a discharge prevention, control and countermeasure (DPCC) plan reviewed and certified by a professional engineer licensed in the state of New Jersey. The engineer shall attest that the plan complies with all applicable departmental requirements and has been prepared in accordance with sound engineering practices. The DPCC plan shall contain the following information:

- (1) name and address of the facility or pipeline and the name and address of its owner or operator;
- (2) a description and site plan for the facility or pipeline showing above- and below-ground storage structures or flow diagrams of the pipe systems;
- (3) the number of barrels or storage capacity of the facility or the transportation capacity of the pipeline and the type of hazardous materials either stored at the facility or transmitted through the pipeline;
- (4) topographic and other maps of the facility's or pipeline's site and offsite land and water areas in proximity to the facility or pipeline that could be affected by a discharge, any residential or environmentally-sensitive areas;
- (5) drainage and diversion plans, location of major sewers, storm sewers and other surface runoff patterns;
- (6) identification of safety systems, devices, monitoring systems or equipment;
- (7) testing procedures and schedules and inspection procedures;
- (8) qualifications of personnel specifically charged with implementing the DPCC plan and the authority delegated to them, and
- (9) a summary of emergency response training programs and requirements for personnel.

§ 58:10-23.11d2(b)(1)-(10); N.J. Reg. 7:1E-3.4(a).

The plan must employ state of the art technology and shall appoint a response coordinator for each site who shall be responsible for insuring compliance with the DPCC plan, the Act and this chapter. The response coordinator shall be responsible for submitting all reports to the department. N.J. Reg. 7:1E-3.4(a).

State of the art technology is defined as up-to-date technology which will result in a significant reduction in the probability of a discharge. The technology represents an advancement in reduction of spills and discharges and shall have been demonstrated at a similar facility to be reliable in

commercial operations or in a pilot operation. It shall be in the public domain at reasonable cost commensurate with the reduction of probability of spills or discharges achieved. N.J. Reg. 7:1E-1.6.

DISCHARGE RESPONSE, CLEANUP AND REMOVAL CONTINGENCY PLANS.

Each owner or operator of a major facility or transmission pipeline shall submit to the department a discharge response, cleanup and removal contingency plan (DCR), attested by the owner or operator, who shall certify:

- (1) the maximum emergency response capability at the facility or pipeline,
- (2) that the trained personnel and response equipment as specified in the c-plan are available or at the disposal of the facility or pipeline,
- (3) that the equipment is in good repair and
- (4) that the plan is consistent with the applicable local, regional and State emergency response plans.

§ 58:10-23.11d3(a).

The plan shall contain the following information:

- (1) a description of its action plan, discharge cleanup contractors, if applicable, chain of command and deployment of employees and equipment;
- (2) provisions for annual simulated emergency response drills;
- (3) identification of all personnel and equipment available for cleanup and the amount of time required to mobilize and deploy the personnel and equipment;
- (4) names, addresses and qualifications of all emergency response personnel trained and required to respond to a discharge or emergency and who will operate containment, cleanup and removal equipment;
- (5) a plan identifying priorities for off-site deployment of personnel and equipment to protect residential and environmentally-sensitive areas;
- (6) an environmentally-sensitive areas and

habitat protection plan, reviewed and certified by a marine biologist and an ornithologist, that shall identify the sensitive areas or habitats and any seasonal sensitivities. These persons shall also provide for the protection against and mitigation of any impact of the discharge of hazardous substances, and
(7) a copy of an agreement with a local emergency planning committee that coordinates the emergency responses of the parties to the agreement.

§ 58:10-23.11d3(b)(1)-(7); N.J. Reg. 7:1E-3.5(a).

GENERAL PROVISIONS.

1. If the department disapproves a plan or requests amendments or modifications and the party responsible for the plan does not make the corrections, additions or modifications within 30 days, the plan shall be deemed to have been disapproved. § 58:10-23.11d9(b).

2. Each DPCC plan and contingency shall be renewed every five years unless the department requires more frequent submissions. § 58:10-23.11d4.

3. Copies of DPCC and contingency plans, plan renewals, modifications and amendments shall be filed by the owner or operator of the major facility or transmission pipeline with the local emergency prevention or local emergency planning committee or committees. § 58:10-23.11d7.

4. The department may, at any time after an onsite inspection of the major facility or transmission pipeline, or after a discharge or emergency, direct the owner or operator of the facility or pipeline to submit amendments to a DPCC plan or contingency plan or to submit additional documentation or

information in conjunction with a filed plan. § 58:10-23.11d9(b).

5. DPCC and DCR plans shall be submitted by deadlines provided in the regulations. Major facilities with storage capacity of 300,000 to 1 million gallons shall submit their plans by January 1, 1992; facilities with storage facility from one million to three million gallons must be submitted by July 1, 1992 and those from four million or more shall be submitted by January 1, 1993. Facilities with less than 300,000 gallons of storage capacity must submit their plans from July 1993 to July 1994. N.J. Reg. 7:1E-3.7(b)(1)-(6).

6. The department may inspect major facilities prior to approving that facility's DPCC or DCR plan. N.J. Reg. 7:1E-3.8(d).

VI. ENFORCEMENT

PROVISIONS. Whenever, on the basis of available information, the department determines that a person is in violation of any provision of this Act or that a person has knowingly given false information, testimony or documents to the department, the department may (1) bring a civil action seeking injunctive relief or payment of the cleanup and removal costs, restoration and replacement costs of real or personal property or natural resources damage; (2) levy an administrative penalty, or (3) bring a civil action for a civil penalty. § 58:10-23.11u(a) and (b).

ADMINISTRATIVE PENALTIES. The department may assess a civil administrative penalty of not more than \$50,000 per violation of

the Act. (Each day of violation shall constitute a separate, distinct and additional violation.) Violations include the submission of false or inaccurate information and failure to allow lawful entry and inspection of a facility. N.J. Reg. 7:1E-5.6 and 5.7.

Penalties may be increased if the violations are for second or third offenses. N.J. Reg. 7:1E-5.5 to 5-8. The department may also assess administrative penalties of not more than \$50,000 for any discharge of less than 100,000 gallons and not more than \$10 million for any discharge of 100,000 gallons or more. N.J. Reg. 7:1E-5.2(a).

A civil administrative penalty shall not be levied until the violator has been notified by certified mail or personal service. § 58:10-23.d11u(c).

CIVIL PENALTIES. Any person who violates any provision of this Act or who fails to pay a civil administrative penalty shall be subject to a civil penalty not to exceed \$50,000 per day for each violation and each day's continuance of the violation shall constitute a separate violation. § 58:10-23.d11u(d).

Any person whose intentional or unintentional acts or omissions proximately result in the unauthorized releasing, spilling, pumping, pouring, emitting, emptying or dumping of 100,000 gallons or more of a hazardous substance or combination of hazardous substances into the waters or onto the lands of the State, or entering the lands or waters of the State, is liable to a civil administrative penalty or a civil penalty of not more

than \$10 million. § 58:10-23.d11u1. This penalty is in addition to assessments for costs incurred for cleanup and removal or compensation or damages recoverable for the loss of wildlife or destruction of the environment. Id.

In assessing this penalty the department shall take into account the circumstances of the discharge, the conduct and culpability of the violator, or both, prior to, during and after the discharge, the extent of the harm to persons, property, wildlife or natural resources. Id. This provision shall not apply to any discharge which is contained in a containment area or areas approved by, or otherwise meeting the requirements of the department or which containment area is designed to and is reasonably capable of preventing the hazardous substance from entering the waters of the State or entering the lands of the State, except when 100,000 gallons or more of the hazardous substance escapes beyond the containment area. Id.

FORFEITURE. All conveyances used or intended to be used in the willful discharge of any hazardous substance are subject to forfeiture to the State pursuant to the provisions of § 13:1K-1 et seq.

VII. STATE RESPONSE MECHANISMS

FUNDING. The New Jersey Spill Compensation Fund is established as a nonlapsing, revolving fund in the Department of Environmental Protection to carry out the purposes of this Act. All taxes and penalties related to this Act and all interest received on moneys in the Fund shall be credited to the Fund.

§ 58:10-23.11i.

Each owner or operator of a hazardous substance transferred to a major facility which operates as a public storage terminal for hazardous substances shall be responsible for the tax.

§ 58:10-23.11h(a). The tax shall be \$0.0175 per barrel transferred. § 58:10-23.11h(b).

In the event of a major discharge or series of discharges of petroleum or petroleum products that results in reasonable claims against the fund exceeding the existing balance of the fund, the tax shall be levied at the rate of \$0.04 per barrel of petroleum or petroleum products transferred until the revenue produced by the increase is 150% of the total dollar amount of all pending reasonable claims. The rate may be set at less than \$0.04 per barrel if the administrator of the fund determines that the revenue produced by the lower rate will be sufficient to pay all outstanding claims against the fund within one year of such levy.
Id.

An amount of \$0.0025 of the tax levied shall be deposited in the compensation fund and dedicated for the purpose of preventing the discharge of hazardous substances. § 58:10-23.11h(b)(2).

COSTS WHICH SHALL BE PAID FROM THE FUND. The fund shall be liable for the following costs and direct and indirect damages:

- (1) costs of restoring, repairing or replacing real or personal property damaged or destroyed by the discharge, any income lost from the time of the discharge to the time of restoration and any reduction in value of such property caused by the discharge;
- (2) cost of restoration and replacement of any natural resources damaged or destroyed by the

discharge;

(3) loss of income or impairment of earning capacity due to damage to real or personal property, including natural resources destroyed or damaged provided that such loss or impairment is more than 10% of the amount which the claimant derives from activities related to the property or natural resources;

(4) loss of tax revenue by the State or local governments for a period of one year due to damage to real or personal property proximately resulting from a discharge;

(5) interest on loans or other obligations incurred by a claimant for the purpose of ameliorating the adverse effects of a discharge pending the payment of the claim in full.

§ 58:10-23.11g(a).

The damages which may be recovered by the fund, without regard to fault, subject to allowable defenses against an owner or operator of a major facility or vessel, shall not exceed \$50 million for each major facility or \$150 per gross ton for each vessel. However, these limits shall not apply if it can be shown that the discharge was the result of gross negligence or willful misconduct, within the knowledge and privity of the owner, operator or person in charge or a gross or willful violation of applicable safety, construction or operating standards or regulations. § 58:10-23.11g(b).

VIII. DRILLS AND INSPECTIONS

INSPECTIONS.

1. The department shall have right to inspect any facility, vessel, building or equipment in order to ascertain compliance or noncompliance with the Act. This right includes the right to test or sample materials, copy or photograph documents

and equipment and to interview employees. N.J. Reg. 7:1E-1.8.

2. All equipment and portions of a major facility shall be visually inspected by a schedule provided in the regulations. Some equipment shall be inspected daily; other equipment must be inspected on a weekly, monthly or quarterly basis. Records must be kept for all inspections. N.J. Reg. 7:1E-2.11(a) and (b).

DRILLS. The owner or operator of a transmission pipeline shall conduct annual practice drills of emergency leak response procedures. The department shall be notified 30 days prior to the drill to afford the department an opportunity to observe or participate in the drill. N.J. Reg. 7:1E-2.4(g).

IX. PROCEDURES FOR NOTIFICATION OF DISCHARGES & DISCHARGE RESPONSE PROVISIONS.

1. Any person responsible for reporting a discharge shall immediately notify the department. Notification within 15 minutes of the time that the person responsible for the notification knew, or should have known, of the discharge shall be considered immediate. It is presumed that more than 15 minutes is not immediate. N.J. Reg. 7:1E-4.2

2. The department may determine, after receipt of evidence from the person responsible for notification, that a period of time longer than 15 may be considered immediate. The department will consider the essential immediate response activities, the circumstances under which the discharge occurred and under which the discharge was first discovered and any other

valid cause or reason. N.J. Reg. 7:1E-4.7(a).

3. The department, upon notification of a discharge, shall orally notify the contact person for the governing body of the municipality and the local board of health in which the discharge occurred. N.J. Reg. 7:1E-4.8(a). The department shall take appropriate action to certify that a discharge has occurred and shall authorize the agent or officer of the municipality or local board of health to investigate the site of the discharge. The investigation shall include a visual assessment of the site of the discharge. The department shall also contact the party potentially responsible for the discharge. N.J. Reg. 7:1E-4.8(d).

4. The department may, in its discretion, observe, supervise or participate in any aspect of the containment or cleanup and removal activities. The department may also order any person to cease cleanup activities and other response activities if it determines that the person is not capable of properly containing, cleaning up or removing a discharge or if that person fails to do so in a proper and expeditious manner. N.J. Reg. 7:1E-4.5(d).

X. SAFETY AND PREVENTION PROVISIONS

PROVISIONS.

1. If oil or other nonmiscible lighter-than-water hazardous substances are transferred at a marine transfer facility there shall be kept available a length of flotation boom or other containment device sufficient to totally enclose a vessel engaged in the transfer of the hazardous substances from a

vessel to the facility or from the facility to a vessel or between vessels at the facility. N.J. Reg. 7:1E-2.8(b).

2. Major facilities which transfer hazardous substances to or from vessels between the hours of sunset and sunrise shall perform all such transfers using fixed lighting that adequately illuminates each transfer connecting point in use at the facility or on the vessel and each hazardous substances transfer work area on the vessel or facility. N.J. Reg. 7:1E-2.9(a).

3. The owner or operator of a major facility or transmission pipeline shall immediately notify the department of any malfunction of a leak detection or other discharge monitoring, prevention or safety system or device. Notification within 15 minutes of the time that the owner or operator knew, or reasonably should have known, of the occurrence shall be considered immediate. N.J. Reg. 7:1E-4.4(a) and (b). Within two hours of the initial notification the owner or operator shall notify the department that one of the following situations exists: (1) the malfunction has been repaired; (2) an alternate system has been activated; or (3) the equipment protected by the system has been shut down. N.J. Reg. 7:1E-4.4(c).

HOUSE BILL 1027
State of Washington

TABLE OF CONTENTS

Synopsis.....	1
Background and general information.....	3
Office of Marine Safety.....	5
Marine Safety Committees.....	5
Maritime Commission.....	6
Board of Pilotage Commissioners.....	7
Liability for response action contractors.....	8
Limits on liability.....	8
Financial responsibility.....	11
Prevention and contingency plans.....	12
Penalties for noncompliance.....	15
State response mechanisms.....	15
Funding.....	15
Allowable response costs.....	16
Drills and inspections.....	17

HOUSE BILL 1027

SYNOPSIS

H.B. 1027 is a comprehensive oil spill prevention and response bill that establishes an interim Office of Marine Safety that will oversee, administer and coordinate all aspects of the new law. The new law also establishes several new commissions and boards that will help in this process.

Under the law response action contractors are immune from liability unless they are the responsible party or unless their actions are wilful misconduct or grossly negligent. Also, they are responsible for personal injury or death that results from their actions during response activities.

Persons who are responsible for unauthorized discharges of oil into state waters are strictly liable without regard to fault, for damages to persons, property, public or private. Responsible parties shall be liable for damages in one of two ways. (1) The responsible party may be liable for the costs to restore the damaged resource to its condition prior to injury to the extent technically feasible and compensation for lost value incurred during the period between injury and restoration; or (2) if the Department of Ecology determines that costs for restoration are not technically feasible or not quantifiable at a reasonable cost or the restoration and enhancement are insufficient to adequately compensate the people of the State for

damages, damages shall be assessed under a compensation schedule. This compensation schedule ranges from \$1 to \$50 per gallon of oil spilled and is determined by factors set forth in § 812.

Proof of financial responsibility for cargo ships carrying bulk oil is much higher than the limits on liability set by OPA 90. Vessels carrying oil as bulk cargo must show an ability to pay at least \$500 million. Financial responsibility for other vessels mirrors the limits on liability set by federal law. Inland barges carrying hazardous substances must establish financial responsibility in the amount of \$150/gross ton or \$1 million, whichever is larger. Cargo vessels or passengers vessels carrying oil as fuel must demonstrate financial ability to pay at least \$600/gross ton or \$500,000, whichever is larger. Financial responsibility for offshore and onshore facilities will be determined by the Director of the Department of Ecology.

The Director of Ecology is responsible for preparing and annually updating a state-wide master oil and hazardous spill prevention and contingency plan. He is head of the state incident command system and is primarily responsible for the spill response. He must coordinate the state agencies and local emergency personnel during a spill response.

Under this law environmentally-sensitive areas are given special attention. The Director of Ecology must locate and map the sensitive areas of the state. The Office of Marine Safety must establish regional marine committees for these areas. The committees are responsible for preparing safety plans to protect

the area. The Board of Marine Pilotage must have two licensed pilots from two districts that contain sensitive environments, Puget Sound and Grays Harbor.

The vessel c-plans must describe environmentally-sensitive areas and fish and wildlife habitats found in the district in which the vessel will travel. State environmental agencies must help provide data for this part of the c-plan. The plan must also include measures of protection and mitigation that will be used in case of a spill. The Office of Marine Safety will consider the environmentally-sensitive areas and the means of protection when it approves or disproves the vessel c-plan.

I. BACKGROUND AND GENERAL INFORMATION

House Bill 1027 was passed by the Washington house on March 15, 1991, and by its senate on April 19, 1991. This bill amends RCW 90.48.315 et seq., the existing chapter concerning Water Pollution Control. It specifically addresses the discharge of oil and other hazardous substances into the waters of the state. The bill easily passed both the state house and senate.

The goal of this act is to establish state agency expertise in marine safety and to centralize prevention and cleanup of marine oil spills. The legislature intended for this act to support and complement the federal law and to provide broad powers of regulation to the Department of Ecology. § 101.

ESTABLISHMENT OF AGENCIES TO OVERSEE THE NEW LAW. Under the old law the Department of Ecology regulated and administered oil

spill response and cleanup but there was no state agency responsible for marine safety. Under the new law the Department of Ecology is responsible for preparing a state prevention and spill contingency plan and for the coordination of the spill response. §§ 107 and 103. But an interim office, the Office of Marine Safety, is created to administer the new law and to promote marine safety. In July 1997 the Office of Marine Safety will be merged back into the Department of Ecology. §§ 430-436.

Under H.B. 1027 the Office of Marine Safety is carved from the Department of Ecology. § 401. Staff, equipment and records related to marine safety are transferred to the jurisdiction of the new office. §§ 408-411. The Office has broad powers. § 402.

The executive head of the Office is an administrator who is appointed by the governor. § 404. This administrator also sits on a newly-created marine oversight board and newly-created maritime commission. §§ 500 & 900. This structure offers continuity within the whole spectrum of state spill prevention and response.

The administrator of the Office of Marine Safety is an executive state officer position. In this position he has the powers and weight of other executive state officers. The administrator can develop rules to carry out the provisions of the new law, appoint advisory committees, enter into contracts, undertake research, etc. § 405. He also has administrative powers and may assess civil penalties up to \$100,000 per violation for vessels or facilities that operate without an

approved contingency plan. §§ 407 and 422.

OFFICE OF MARINE SAFETY. This office shall review federal and Coast Guard vessel inspection programs. The office has the discretion of either using those programs or developing a Washington program. The office, in either event, shall develop rules that provide for annual inspections of vessels that enter state waters. § 416. Additionally, the office may adopt rules that will determine standards for oil spill response equipment that must be maintained on each tank vessel. § 425.

The office shall establish standards for oil spill prevention plans and contingency plans. §§ 417 & 418. It shall approve or disapprove the plans. § 417. Under the new law vessels and facilities that transfer oil and lighter vessels shall have containment and cleanup equipment available. The office shall adopt rules regarding the standards of equipment that must be available and the standards under which the equipment will be deployed.

MARINE SAFETY COMMITTEES. The Office of Marine Safety shall establish regional marine safety committees for environmentally-sensitive areas. § 424. Each committee shall prepare a regional safety plan for vessel traffic within its jurisdiction. These plans must consider any variables that could impact the safety of water traffic and the environment. They shall include tug escort requirements, speed limits, communications systems and the placement of navigational aids. § 424. The regional plans must be submitted to the Administrator for approval.

1. The new law also establishes a marine oversight board that oversees the actions of the federal government, industry, the Department of Ecology, the Office of Marine Safety and other state agencies involved in oil spill prevention and response. § 501. This board shall recommend to the legislature changes in the law it believes to be necessary; it shall annually report to the governor regarding programs which have been established or should be established. § 501(c). Its five-member board, appointed by the governor, shall have a demonstrable knowledge of environmental protection and the study of marine ecosystems or familiarity with marine transportation systems. § 501(c)(3).

MARITIME COMMISSION. The new law also creates a Maritime Commission. This commission will be the chief enforcer of the new law. The commission consists of nine voting members. § 903. Seven of the nine members, all appointed by the governor, shall represent specific business classes: steamship liner companies, towboat companies, fishing vessels, protection and indemnity clubs or insurance brokers. Two of the members must represent steamship liner companies; one must represent an American flag company and the other must represent a foreign flag. § 903. One member shall have marine labor or spill cleanup experience and the final member shall be from the environmental community. § 903. The administrator of the Office of Marine Safety shall be a nonvoting member of the commission. § 903.

The commission shall establish an oil spill first response

...and network for commercial vessels travelling in state waters. § 902(10). In the event of a spill or threat of a spill this first response system shall be responsible for the first 24 hours of response activities. § 902(10).

The commission enters into contracts with cleanup contractors and other organizations (such as communications companies) needed for spill response. § 902(11). It also recovers oil spill first response system costs from the responsible vessel owner or operator. It holds response readiness drills with state and federal agencies. §§ 902(11-13). Finally, the commission may increase the assessments that fund the oil spill fund if it finds that the moneys collected are insufficient. § 906.

BOARD OF PILOTAGE COMMISSIONERS. The new law also establishes a Board of Pilotage Commissioners. The administrator of the Office of Marine Safety is a member of this commission, along with seven members appointed by the governor. § 1001. The commission is chaired by the Assistant Secretary of Marine Transportation. § 1001(1). Members of the commission must be licensed pilots, two of whom must be pilots from the Puget Sound and Grays Harbor pilotage districts. Two other members must be actively engaged in the ownership, operation or management of vessels; one member must represent an environmental organization concerned with marine waters.

The Board of Pilotage Commissioners shall develop the

pilotage test for each district and establish minimum health standards for its licensed pilots. § 1001(6). The board has the discretion to require simulator training and shall prescribe rules to govern the size of vessels a newly-licensed pilot may be assigned to pilot. § 1003.

II. LIABILITY OF RESPONSE ACTION CONTRACTORS

A person is not liable for removal costs or damages that result from omissions or actions taken in the course of rendering care, assistance or advice consistent with the national contingency plan or as otherwise directed by the federal on-scene coordinator or by the official within the Department of Ecology who has the responsibility for oil spill response. This section does not apply:

- (1) to a responsible party
- (2) with respect to personal injury or wrongful death;
or
- (3) if a person is grossly negligent or engages in willful misconduct.

§ 304.

III. LIMITS ON LIABILITY

Strict liability of responsible persons. Persons responsible for unauthorized discharges of oil into state waters are strictly liable without regard to fault, for damages to persons, property, public or private. § 90.48.366(1). Defenses for relief from strict liability are: (1) an act of war or sabotage; (2) an act of God; (3) negligence on the part of the federal government; or (d) negligence on the part of the state of Washington. The defenses must be the sole cause of the

discharge. § 90.486.366(2) and (4). Strict liability does not affect the rights the owner may have against any party who contributed to the discharge. § 90.48.336(3).

Provisions. Any person who violates this chapter or chapter 90.56 or who fails to perform duties imposed by this chapter or chapter 90.56 or who causes a reduction in the quality of state waters or causes the death of or injury to fish, animals, vegetation or other natural resources of the state shall be liable to pay the state and affected counties and cities damages in the amount determined by chapter 90.48.367. § 810.

Assessment of Damages. The Department of Ecology, in consultation with other state agencies, shall adopt rules to establish a compensation schedule for the discharge of oil in violation of this chapter and chapter 90.56. § 812.

Under the schedule the assessment shall be at least \$1 per gallon of oil spilled and no greater than \$50 per gallon spilled. § 812. The schedule shall reflect adequate compensation for unquantifiable damages or for damages not quantifiable at reasonable cost for any adverse environmental, recreational, aesthetic or other effects caused by the spill and shall consider:

- (1) characteristics of the spill, i.e., toxicity, dispersibility, solubility and persistence, that might affect the severity of the effects on the environment;
- (2) sensibility of the affected area;
- (3) actions of the responsible party that demonstrate acceptance of responsibility for the spill, immediate response to and cleanup and removal of the oil.

§ 812(1) - (3).

Preassessment Screening. After a spill the Department of Ecology shall conduct a formal preassessment screening and use the compensation schedule to determine the amount of damages if the screening determines that restoration or enhancement of the injured resources is not technically feasible, damages are not quantifiable at a reasonable cost and the restoration and enhancement are insufficient to adequately compensate the people of the State for the damages. § 813(1) and (2). If the prescreening committee determines that the compensation schedule should not be used, the compensation shall be the amount of money necessary to restore any damaged resource to its condition prior to the spill, to the extent technically feasible, and compensation for the lost value incurred during the period between injury and restoration. § 813(3).

Restoration shall include costs to restock the waters, replenish or replace the resources and to restore the water, shoreline, banks and other lands adjoining the water to its condition prior to the injury. § 813(4). The lost value of a damaged resource shall be equal to the sum of consumptive, nonconsumptive and indirect use values as well as lost taxation and other revenues. § 813(4).

Compensation assessed under this section shall be recoverable in an action brought by the attorney general on behalf of the people of Washington and affected counties and cities. Moneys recovered shall be deposited in the coastal protection fund. Compensation assessed under this section shall

preclude claims under this chapter by local governments for damages to publicly owned resources resulting from the incident. § 813(5)-(6).

For the purposes of this chapter "technically feasible" means that given available technology, a restoration or enhancement project can be successfully completed at a cost that is not disproportionate to the value of the resource before the injury.

IV. FINANCIAL RESPONSIBILITY

REQUIREMENTS. Requirements vary for the size and purpose of the vessel:

1. Inland barges that carry hazardous substances in bulk as cargo using any Washington port or travelling the waters of Washington shall establish financial responsibility in the amount of \$1 million or \$150/gross ton, whichever is larger. § 703(1).

2. The Administrator may set lesser standards of financial responsibility for barges of 300 gross tons or less but the standard must be determined on the quantity of cargo the barge is capable of carrying. § 703(2)(b).

3. A tank vessel that carries oil as cargo in bulk must establish financial responsibility to pay at least \$500 million. The owner or operator of a tank vessel who is a member of an international protection and indemnity mutual organization and is covered for oil pollution risks up to the amounts required by this section is not required to demonstrate financial

responsibility under this chapter. §§ 703(2)(a) and (c). The Office of Marine Safety may set lesser amounts of financial responsibility for a tank vessel that meets standards for construction, propulsion, equipment and personnel established by the Office. § 703(5).

4. A cargo vessel or passenger vessel that carries oil as fuel shall demonstrate financial responsibility to pay the greater of at least \$600 per gross ton or \$500,000. § 703(3).

5. An onshore or offshore facility shall demonstrate financial responsibility in an amount determined by the Department of Ecology as necessary to compensate the state and affected counties and cities for damages that might occur during a reasonable worst case spill of oil from that facility into the navigable waters of the state. § 704.

V. PREVENTION AND CONTINGENCY PLANS

SPILL PREVENTION PLANS. The owner or operator for each tank vessel must prepare both a prevention and spill contingency plan. He shall prepare and submit an oil spill prevention plan to the Office of Marine Safety by January 1, 1993. § 417(1). The spill prevention plan must:

1. Establish compliance with OPA 90 and both federal and state financial responsibility requirements. It must also establish compliance with federal drug and alcohol programs.
2. State all discharges of oil within the prior five-year period that were more than 25 barrels and the measures taken to prevent another occurrence. It must also state all groundings, near misses, accidents and collisions that occurred during the past five years.
3. Describe vessel operations as to staffing, vessel inspection programs and training programs.

4. Describe oil spill technology that has been incorporated into the vessel and relevant prevention measures incorporated into any plan which the vessel has not adopted. It must also describe the procedures used to ensure that at least one bridge officer on the vessel is proficient in the English language.

§ 417(2)(a)-(k).

The prevention plan will not be approved unless it provides the best achievable protection from damages caused by the discharge of oil into state waters. § 417(3). "Best achievable protection" means the highest level of protection that can be achieved through the use of the best achievable technology and those staffing levels, training procedures and operational methods that provide the greatest degree of protection achievable. § 414(2).

CONTINGENCY PLANS. Each covered vessel shall have a contingency plan for the containment and cleanup of oil spills from the vessel into the waters of the state and for the protection of fisheries and wildlife, natural resources and public and private property from such spills. § 419. Plans must be submitted within 18 months after the Office of Marine Safety has adopted rules and standards for the plans. § 419(2)(b).

The vessel's c-plan may be submitted by either the owner or operator of the tank vessel or the owner or operator of the facilities where the vessel will unload its cargo. § 419(3)(a).

The c-plan may also be submitted by the person who has contracted with the vessel to provide containment and cleanup services. § 419(3)(c).

At a minimum, the C-plans must meet the following standards:

1. Include full details of the method of response to spills of various sizes from any vessel covered by the plan.
2. Be designed, in terms of personnel, materials and equipment, to promptly and properly remove oil and minimize any damage to the environment resulting from a worst case spill. § 419(l)(b).
3. Provide a clear and detailed description of how the plan relates to and is integrated into relevant c-plans prepared by cooperatives, ports, regional entities, the state and federal governments.
4. Provide procedures for early detection of spills and timely notification of spills. Also state the number, training and fitness of the personnel assigned to direct and implement the plan.
5. Incorporate training and drill programs to evaluate readiness for a spill.
6. Describe important features of the environment, including fish and wildlife habitat, public facilities and environmentally-sensitive areas. State environmental agencies shall provide information for this requirement. The plan must also state the means of protecting and mitigating effects on the wildlife and the environment to ensure that implementation of the plan does not pose unacceptable risks to the public or the environment.
7. Establish guidelines for use of response equipment to minimize vessel damage, stop or reduce the oil spill and when vessel safety is assured, to contain and cleanup the spill. It must provide arrangements for prepositioning of spill containment and cleanup equipment and trained personnel at strategic locations from which they can be deployed to the spill site.
8. Provide arrangements for enlisting the use of qualified and trained cleanup personnel to implement the plan. Also, provide for disposal of the recovered spilled oil.
9. Describe the circumstances and manner, if any, for application of dispersants.

§ 419(a)-(o).

STATUTORY CONSIDERATIONS FOR APPROVAL OF C-PLANS. The Office of Marine Safety shall consider the following factors when approving a c-plan: (1) adequacy of the containment and cleanup

communications equipment, notification procedures and logistical arrangements for coordination and implementation of response efforts; (2) nature and amount of vessel traffic within the area covered by the plan; (3) navigational hazards within the area covered by the plan and history and circumstances of prior spills in the area and (4) sensitivity of wildlife, fisheries and other natural resources in the area. § 419(5)(a)-(h).

PENALTIES FOR NONCOMPLIANCE WITH PLAN REQUIREMENTS. It is unlawful for owners and operators to knowingly and intentionally operate in the state or on the waters of the state without an approved c-plan, an approved prevention plan and compliance with financial responsibility requirements. § 421(1). The first conviction under this section shall be a gross misdemeanor and punishable by not more than one year in the county jail or \$5,000 fine or both. A second conviction shall be a class C felony and is punishable by not more than five years in a state correctional institution or not more \$10,000 in fine or both. § 421(1).

The Administrator may also assess penalties for noncompliance with this section of up to \$100,000 for each violation. Each day that the owner or operator is in violation of the law shall be considered as a separate violation. § 422(3).

VI. STATE RESPONSE MECHANISMS

Funding. Two taxes will be imposed on the owner of crude oil or petroleum products that are off-loaded at a marine

terminal within the state from a vessel or barge that operates on the navigable waters of the state.

Oil Spill Response Tax. An oil spill response tax is levied upon the owner of the crude oil or petroleum product. The tax is 2 cents/barrel. § 802(1).

Oil Spill Administration Tax. An oil spill administration tax is levied upon the owner of the crude oil or petroleum product. § 802(2). This tax is 3 cents/barrel. § 802(2).

CAP ON THE FUND. Tax assessments will cease when the balance in the fund exceeds \$25 million and will not again be imposed until the balance in the fund is less than \$15 million. § 802(10).

PROVISIONS. The tax will only be imposed on the first off-loading at a marine terminal. § 803.

Credit shall be allowed against the taxes imposed for any crude oil or petroleum product off-loaded at a marine terminal and subsequently exported from or sold for export from the state. § 804.

Payment of costs from this fund shall be limited to spills which the director has determined to be more than \$50,000. § 805. Moneys in the fund shall be spent only after appropriation. § 805.

ALLOWABLE RESPONSE COSTS. The following response costs may be paid from the fund:

1. Natural resource damage assessment and related activities:

2. Spill-related response, containment, wildlife rescue, cleanup, disposal and associated costs;
3. Interagency coordination and public information related to a response; and
4. Appropriate travel, goods and services, contracts and equipment.

§ 805.

VII. DRILLS AND INSPECTIONS

1. The administrator of the Office of Marine Safety has the discretion to use federal and Coast Guard inspection programs or to develop a state program; however, the program that he chooses must ensure that all vessels will be inspected at least annually.

§ 416.

2. The Maritime Commission shall hold response readiness drills with state and federal agencies. § 902 (13).

SENATE BILL 14

Texas Oil Spill Prevention and Response Act of 1991

TABLE OF CONTENTS

Synopsis.....	1
Background and general information.....	6
Commissioner of General Land Office.....	7
Oil Spill Oversight Council.....	8
Liability for discharge cleanup organizations.....	9
Limits on liability.....	10
Response costs.....	11
Damages.....	12
Natural resources damage.....	13
Financial responsibility.....	13
Contingency plans.....	13
State contingency plan.....	13
Registration of terminal facilities.....	15
Contingency plans for vessels.....	16
State response mechanisms.....	16
Funding.....	16
Use of the fund.....	17
Liability of the fund.....	18
Enforcement and penalties.....	19
Class A misdemeanors.....	19
Other penalties.....	20
Administrative penalties.....	20
Drills and inspections.....	21

Senate Bill SB 14
Texas Oil Spill Prevention and Response Act of 1991

SYNOPSIS

Spill response to unauthorized discharges of hazardous materials and oil is handled by different agencies in Texas. Under the old law the Water Commission was responsible for discharges of hazardous materials and oil into state waters; the Railroad Commission had jurisdiction over oil spills occurring during drilling and production operations and the transportation of crude oil through pipelines.

Under the new law the General Land Office has jurisdiction over unauthorized discharges of oil into the state coastal waters. The Water Commission will continue to handle spills of hazardous spills into state waters and the Railroad Commission will continue to handle spills that occur during drilling, production and transportation through pipelines. The new law mandates that all three agencies cooperate and work to prevent any duplication within the state system. It also mandates that the General Land Office will supplement the Water Commission response to discharges of hazardous substances.

The General Land Office is the lead agency for the response to both actual and threatened oil spills. The commissioner of the General Land Office, upon notification of an oil spill, shall assess the discharge. He shall also initiate the response for abatement, cleanup and removal of the pollution.

The new law establishes an oil spill oversight council whose primary task is to provide advice and recommendations to the governor and the commissioner of the General Land Office on various issues and problems. The council is large and political. Members include heads of various governmental agencies, judges and 12 members appointed by the governor. These appointed members must have knowledge in the fields of environmental protection, marine ecosystems, terminal operations or marine transportation experience.

No person or discharge cleanup organization is liable for acts or omissions when he renders assistance or advice in abating, containing or removing pollution pursuant to the national contingency plan or plan required under this chapter except for acts or omissions of gross negligence or wilful misconduct. Discharge cleanup organizations may be incorporated, unincorporated or cooperatives; they are loosely governed by the commissioner. The organizations may be compensated for their response activities if they have approval prior to the action. They may refuse to comply with directions or orders given to them if they reasonably believe that the order may cause harm and if they give written notice as to why they refused within 48 hours of the refusal.

Responsible parties are liable for response costs, damages and natural resources damage. The only defenses are acts of war or terrorism, acts of government, unforeseen occurrences caused by violent acts of nature and the gross negligence or wilful

misconduct of third persons.

The limits on liability for persons responsible for the discharge of oil from vessels vary as to the size of the vessel from which the oil is discharged. For vessels of 300 gross tons or less the limit is \$1 million. Vessels of 8,000 gross tons or less are liable for \$5 million and vessels larger than 8,000 gross tons shall be liable for \$600 per gross ton or the aggregate amount of the coastal protection fund (\$50 million).

Persons responsible for discharge from a terminal are liable for up to \$5 million. Persons responsible for discharges from offshore drilling or production facilities are liable for all response costs.

In addition, responsible persons are liable for damages caused by the discharge of oil. The limits on liability are the same as listed in the previous paragraph. Finally, responsible parties are responsible for all natural resources damages. The natural resources damages amounts are determined by the commissioner. The commissioner's determination of damages creates a rebuttable presumption of the damage amount.

Owners and operators of vessels and terminal facilities must show evidence of financial responsibility equal to that required by federal law.

Under the new law the commissioner shall promulgate a state contingency plan which will identify environmentally-sensitive areas and provide for detailed emergency response procedures. The plan will also provide for drills and wildlife recovery teams.

The plan shall be filed with all state agencies that will be involved in spill response.

Terminal facilities will be registered after they submit a contingency plan to the commissioner. They must also show evidence that they can provide the services of a discharge cleanup organization through membership or contract. Terminals must also provide information as to the storage capacity of the facility, the vessels that use the facility and the response equipment and supplies which will be readily available for use during a spill.

Vessels must provide a contingency plan and evidence that they will be able to provide the services of a discharge cleanup organization. They must also detail their response procedures and mitigation procedures to protect the environment.

The new law creates a coastal protection fund. Every person owning crude oil that is transferred to or from a terminal is taxed at the rate of 2 cents per barrel. The tax will continue until the fund reaches \$25 million and then will cease until the balance in the fund falls below \$14 million. All penalties, judgments, reimbursements shall be credited to this fund. The total amount in the fund shall not exceed \$50 million.

The commissioner may increase the tax on transferring oil to 4 cents per barrel under all of the following circumstances: (1) if the balance in the fund is less than \$25 million; (2) if there has been a spill of more than 100,000 gallons of oil in the last 30 days, and (3) it is expected that the expenditure for cleanup

will substantially deplete the fund.

The fund may only be used for administrative and training costs pursuant to this act, response costs for discharges of both oil and hazardous substances, and the assessment, restoration, rehabilitation, restoration, replacement or mitigation of damages to natural resources. The fund is absolutely liable for all reasonable response costs, all natural resources damage and all proven damages.

Under the new law it is a Class A misdemeanor: (1) to operate a vessel or facility without an approved c-plan; (2) to operate a vessel or facility without proof of financial responsibility; (3) to remove a vessel which has discharged oil from the jurisdiction without showing proof of financial responsibility to the commissioner, or (4) to cause, permit or allow an unauthorized discharge of oil.

Additionally, a person responsible for a discharge who does not notify the commissioner of the discharge is liable for a fine from \$500 to \$250,000 for an individual or up to \$500,000 if the responsible person is a corporation. There are additional penalties for a person responsible for a discharge and for a responsible person who fails to abate, contain and remove the pollution caused by a discharge. The penalties range from \$250 to \$25,000 per day or up to \$1,000 per barrel discharged. A responsible person who fails to abate, contain, or remove pollution can be fined up to \$25,000 per day and up to three times the cost incurred by the fund. Also, any person who

violates a rule or order during response can be fined from \$100 to \$10,000 per day. The commissioner has the power to assess any of the above penalties in an administrative hearing.

The commissioner may inspect any vessel that is required to file a c-plan. Prior to entry into port the commissioner may require a vessel to report any discharges from the vessel during the voyage, any mechanical or operational problems, show proof of financial responsibility and to show his contingency plan.

I. BACKGROUND AND GENERAL INFORMATION

SB 14 is a comprehensive oil spill prevention and response act that unanimously passed both the House and Senate of Texas on March 21, 1991. This Act becomes Chapter 40 of Subtitle C, Title II, Natural Resources Code of the Texas Revised Statutes. The legislative intent was to complement the federal Oil Pollution Act of 1990 and to specifically pass provisions relating to the responsibilities of the state agencies that are designated as natural resources trustees.

The response to threatened and actual spills of oil and other hazardous substances is under the jurisdiction of various state agencies. The General Land Office is the lead agency for response to threatened or actual oil spills in coastal waters, § 40.004. Threatened or actual discharges of other hazardous substances are under the jurisdiction of the Texas Water Commission; the Railroad Commission of Texas shall continue to exercise authority over the pollution of surface and subsurface waters caused by oil exploration, production and transportation

by pipeline. §§ 40.005 and 40.008.

COMMISSIONER OF GENERAL LAND OFFICE. The General Land Office has jurisdiction over the public lands of the state and the coastal lands which extend from the coastline to the Three Marine League line. V.T.C.A. §§ 31.051; 31.063. The General Land Office, under the direction and control of the commissioner, is the lead agency for initiating response to oil spills and for cleanup of the pollution caused by the spill. § 40.004. The commissioner of the General Land Office is elected at a general election every four years. Tex. Nat. Res. Code Ann. § 31.012.

The commissioner shall direct all state discharge response and cleanup operations. § 40.004. He shall initiate the response to threatened or actual discharges. § 40.005. When responding to a discharge he may appoint a state-designated onscene coordinator to act in his place. § 40.102. When notified of an unauthorized discharge, he shall act to assess the discharge and prevent, abate or contain any pollution that results. § 40.051. The commissioner shall determine when a harmful quantity of oil has been discharged into the coastal waters. § 40.003(11). The commissioner has the discretion to abate, contain and remove pollution resulting from discharges if the responsible party is either unknown or unwilling to respond to the spill. § 40.101(b).

The commissioner shall administer this chapter. § 40.004. Under the new law the Commissioner of the General Land Office has the authority to develop a state coastal contingency plan, to prevent spills and discharges of oil and to provide for prompt

response to abate and contain spills. § 40.002. He shall promulgate rules to administer this chapter and establish procedures under the Texas Administrative Procedure and Texas Register Act. § 40.007(a) and (b).

He has the discretion to promulgate regulations as to standards and requirements for discharge prevention for terminal facilities and vessels, standards and requirements for procedures and equipment used in the abatement, containment and removal of pollution. § 40.117(a)(1)-(3). He also has the discretion to develop criteria and plans of response for discharges of various degrees, including worst case scenarios. § 40.117(4).

OIL SPILL OVERSIGHT COUNCIL. The new law establishes an oversight council which shall provide advice and recommendations to the commissioner on various issues. § 40.303(j). The council shall also attend drills and advise the governor and commissioner on the identification of environmentally-sensitive areas that may require special protection. § 40.303(j)(4) and (7). Staff and funding up to \$200,000 will be appropriated annually for the council. § 40.303(k).

The council consists of the governor, the commissioner, the executive director of the Parks and Wildlife Department and a representative of the Railroad Commission of Texas. § 40.303(b). It also includes directors of other state agencies, county judges and members of local governments located on the coasts of Texas. § 40.303(b) and (c).

Additionally, the governor shall appoint 12 council members

who have demonstrable knowledge in the areas of discharge cleanup, crude tanker operations, commercial fishing, environmental, conservation and sportsmen's groups, the oil industry and terminal facility and port operations. § 40.303(e).

II. LIABILITY FOR DISCHARGE CLEANUP ORGANIZATIONS

DEFINITION. Discharge cleanup organizations include incorporated or unincorporated groups, cooperatives, owners or operators of vessels or terminal facilities organized for the purpose of abating, containing, removing or cleaning up pollution from discharges of oil. Groups organized for rescuing and rehabilitating wildlife or other natural resources through cooperative efforts and shared equipment are also included in this definition. § 40.003(8). The commissioner shall, from time to time, adopt and enforce reasonable regulations regarding the certification of discharge cleanup organizations. § 40.117(a)(6).

PROVISIONS. Any person or discharge cleanup organization may assist in abating, containing or removing pollution from any unauthorized discharge of oil. § 40.103(a). They may be compensated from the fund provided the commissioner approves the compensation prior to the assistance being rendered. § 40.103(b).

Any discharge cleanup organization, other than the Marine Spill Response Corporation and any discharge cleanup organization operated for profit, shall maintain on its governing body a minimum of two ex officio representatives from the local government within the area served by the organization. § 40.117(b).

LIABILITY. No person or discharge cleanup organization that voluntarily, or pursuant to the national contingency plan or state coastal discharge contingency plan, or pursuant to the request of an authorized federal or state official or a responsible party, renders assistance or advice in abating, containing, or removing pollution from an unauthorized discharge of oil is liable for response costs, damages or civil penalties resulting from acts or omissions committed excepts for acts or omissions of gross negligence or wilful misconduct. § 40.104(b).

A discharge cleanup organization under the control of a responsible person, participating in operations to abate, contain and remove pollution from a discharge, if it reasonably believes that any directions or orders given by the commissioner will unreasonably endanger public safety or natural resources or conflict with directions or orders of the federal on-scene coordinator, may refuse to comply with the direction or orders. § 40.106(a). The organization must state, at the time of refusal, the reason why it refuses to comply and shall give written notice of the refusal to the commissioner within 48 hours. § 40.106(b).

III. LIMITS ON LIABILITY

PROVISIONS. A responsible party shall be liable for response costs, damages and natural resources damages. The only defense of a person responsible for an actual or threatened unauthorized discharge of oil shall be to plead and prove that the discharge resulted solely from any of the following or any

combination of the following:

- (1) an act of war or terrorism;
- (2) an act of government, either state, federal or local;
- (3) an unforeseeable occurrence exclusively occasioned by the violence of nature without the interference of any human act or omission; or
- (4) the wilful misconduct or negligent act or omission of a third party, other than an employee or agent of the person responsible or a third party whose conduct occurs in connection with a contractual relationship with the responsible person, unless the responsible person failed to exercise due care and take precautions against unforeseeable conduct of the third party.

§ 40.204

Response costs. Any person responsible for unauthorized discharges of oil from a vessel is liable for all response costs from actual or threatened discharges not to exceed \$1 million for vessels of 300 gross tons or less that do not carry oil as cargo; for vessels of 8,000 gross tons or less the liability shall not exceed \$5 million. If the vessel is greater than 8,000 gross tons the liability shall equal \$600 per gross ton but shall not exceed the aggregate amount of the fund established under § 40.151(b).

§ 40.202(a).

Any person responsible for an actual or threatened discharge from a terminal facility shall be liable for all response costs up to \$5 million. § 40.202(b). Any person responsible for an actual or threatened discharge of oil from an offshore drilling or production facility is liable for all response costs.

§ 40.202(b)(1).

Damages. In addition to the response costs, a responsible person shall be liable for all damages other than natural resources damages in an amount not to exceed \$1 million for vessels of 300 gross tons or less that do not carry oil as cargo. For vessels of 8,000 gross tons or less the liability shall not exceed \$5 million. If the vessel is greater than 8,000 gross tons the liability shall be \$600 per gross ton but shall not exceed the aggregate amount of the fund established under § 40.151(b). § 40.202(b).

In addition to the response costs a person responsible for an actual or threatened discharge of oil from a terminal facility shall be liable for all damages other than natural resources damages in an amount not to exceed the aggregate amount of the fund established under § 40.151(b). A person responsible for an unauthorized discharge from an offshore drilling or production facility is liable for all damages. § 40.202(b)(2).

Natural resources damages. In addition to liability for response costs and damages, a responsible party is liable for all natural resources damages attributable to the discharge. § 40.203. In any action to recover natural resources damage, the amount of damages established by the commissioner, in conjunction with state-designated natural resources trustees and according to the procedures and plans contained in the state coastal discharge contingency plan, shall create a rebuttable presumption of the amount of the damages. § 40.107(a) and (b).

GROSS NEGLIGENCE AND WILFUL MISCONDUCT. A responsible person

is liable for the full amount of all damages and response costs if the actual or threatened discharge of oil was the result of gross negligence or wilful misconduct. § 40.202(c)(1).

FAILURE TO COOPERATE. If the responsible party fails to cooperate with discharge response and cleanup operations he shall be responsible for the full amount of all response costs and damages. § 40.202(c)(4).

EXCLUSIONS FROM LIABILITY LIMITS. Liability limits under this section do not include interest or attorney fees to which the state is entitled. § 40.202(d).

IV. FINANCIAL RESPONSIBILITY

The owner or operator of any vessel who must file a prevention and contingency plan and who operates within the coastal waters or waters adjoining and accessible from coastal waters or any terminal shall establish and maintain evidence of financial responsibility equal to that required by federal law or in a lesser amount as provided in this chapter. § 40.201(a). If a vessel or terminal is not required under federal law to establish and maintain evidence of financial responsibility, the owner or operator shall establish and maintain evidence as prescribed by rules promulgated under this code. § 40.201(b).

V. CONTINGENCY PLANS

STATE CONTINGENCY PLAN. The commissioner shall promulgate a state coastal discharge contingency plan of response for actual or threatened discharges and the cleanup of pollution resulting from that discharge. Additionally, in cooperation with the

commissioner, the Texas Water Commission shall promulgate provisions that relate to the discharge of hazardous substances and the Parks and Wildlife Department shall promulgate provisions relating to the rescue and rehabilitation of aquatic life and wildlife and their habitats. The commissioner shall cooperate with the Railroad Commission of Texas as to provisions that would relate to that commission's jurisdiction for response.

§ 40.053(a).

The plan shall include the designation of environmental and sensitive zones and a procedure for incident-specific response recommendations, evaluation of industry and federal government response capabilities and temporary storage locations for removed oil or hazardous substances. It shall also include detailed emergency operating procedures for initiating response actions, a list of persons on a response command structure and state response team and an inventory of public and private equipment, its location and a list of available sources of supplies necessary for response. Additionally, the plan must provide for practice drills and a hotline for notification of discharges of hazardous substances and oil. It must also provide for wildlife recovery teams. § 40.053(d) and (e).

The plan shall also describe the circumstances under which a discharge reaches catastrophic proportions and may be declared a disaster. § 40.053(e)(10). It shall provide procedures for disposal of removed oil and for the assessment of natural resources damage and plans for mitigation of damage to and

restoration, rehabilitation or replacement of damaged natural resources. § 40.053(e)(13) and (14).

Finally, the plan shall be filed with all state agencies participating in response operations and federal officials responsible for federal discharge response within coastal waters. § 40.053(g).

Regional response capabilities. When promulgating the plan the commissioner shall develop response capabilities on a regional basis for all coastal areas and he shall establish regional response committees to advise and provide input in the development of site-specific discharge c-plans. § 40.053(c) and (d).

REGISTRATION OF TERMINAL FACILITIES. A person may not operate a terminal facility without a discharge prevention and response certificate issued by the commissioner. The following evidence must be presented:

- (1) the applicant has implemented a discharge prevention and response plan consistent with state and federal plans; and
- (2) the applicant can directly provide, through membership or contract with a discharge cleanup organization, all required equipment and trained personnel to prevent, abate, contain and remove pollution as provided in his plan.

§ 40.109(a)-(b).

A certificate will not be issued by the commissioner until the following information has been submitted by the applicant:

- (1) the barrel capacity of the terminal facility;
- (2) the dimensions and barrel capacity of the largest vessel docking at the facility;
- (3) the storage and transfer capabilities and the average daily throughput of the facility;

- (4) the types of oil stored, handled or transferred at the facility;
- (5) information related to the implementation of the applicant's c-plan (i.e., all the response equipment, vehicles, pumps, skimmers, bioremediation supplies to which the facility has access, trained personnel, measures employed to prevent discharges, agreements with discharge cleanup organizations and information as to its financial responsibility.)

§ 40.111

CONTINGENCY PLANS FOR VESSELS. Any vessel operating in state coastal waters or waters adjoining and accessible from coastal waters and with a capacity to carry 10,000 gallons or more of oil as fuel or cargo that operates in the coastal waters or waters adjoining and accessible from coastal waters shall maintain a written vessel-specific discharge prevention and response plan.

This plan must:

- (1) provide for notification to the commissioner, verification of the spill, identification of the pollutant, assessment of the discharge, vessel stabilization and discharge abatement and mitigation;
- (2) designate an on-board spill officer who meets the training criteria in § 40.003 and who shall train the vessel's crew in response operations; and
- (3) contain any other provisions the commissioner reasonably requires by rule.

§ 40.114(a)-(c).

The owner or operator of the vessel must be able to directly provide, through membership or contract with a discharge cleanup organization, all required equipment and trained personnel to prevent, abate, contain and remove pollution caused by a discharge of oil. § 40.114(d).

VI. STATE RESPONSE MECHANISMS

FUNDING. Every person owning crude oil in a vessel at the

time that the oil is transferred to or from a marine terminal shall pay a fee of 2 cents per barrel of oil. § 40.154(a). The collected fees shall be placed in the coastal protection fund. The fee shall be levied until the balance in the fund reaches \$25 million. § 40.155. At that time the levy shall cease and shall not be reinstated until the fund's balance is less than \$14 million. § 40.155(b).

To this coastal fund shall be credited all penalties, judgments, reimbursements and charges provided for in this chapter. The fund shall not exceed \$50 million. § 40.151(b).

Notwithstanding the provisions of § 40.154(a) or (b) of this section, the fee shall be levied at the rate of 4 cents per barrel if the commissioner certifies to the comptroller a written finding of the following facts:

- (1) the balance in the fund is less than \$25 million;
- (2) an unauthorized discharge of oil in excess of 100,000 gallons has occurred within the previous 30 days; and
- (3) expenditures from the fund for response costs and damages are expected to deplete the fund substantially.

The fee shall be collected at the rate of 4 cents per barrel until the balance in the fund reaches \$25 million or any lesser amount that the commissioner determines is necessary to pay response costs and damages without substantially depleting the fund. § 40.155(c).

USE OF THE FUND. Money in the fund may be disbursed for the following purposes and no others:

- (1) administrative expenses, personnel and training expenses, equipment maintenance and operating

costs related to implementation and enforcement of this chapter;

(2) response costs related to abatement and containment of actual or threatened discharges of oil incidental to discharges of hazardous substances;

(3) response costs and damages related to actual or threatened discharges of discharges of oil;

(4) assessment, restoration, rehabilitation or replacement of or mitigation of damage to natural resources damaged by a discharge of oil;

(5) interagency contracts with state colleges and universities for research, testing and development in an amount not to exceed \$1.25 million;

(6) purchase of response equipment within two years of the effective date of this chapter in an amount not to exceed \$4 million; thereafter, for the purchase of replacement equipment; and

(7) other costs and damages authorized by this chapter.

§ 40.152(a).

LIABILITY OF THE FUND. Except for persons responsible for an unauthorized discharge of oil, the fund is absolutely liable for:

(1) all proven, reasonable response costs approved by the commissioner under § 40.103;

(2) all natural resources damage from a discharge of oil; and

(3) except for damages proportionately attributable to the negligence or wilful misconduct of the claimant, all other proven damages from the discharge of oil.

§ 40.158(a).

All persons who incur response costs or who are entitled to damages as a result of a discharge of oil may receive compensation from the fund. § 40.157(a). If the claim is more than \$50,000 the claimant shall first submit the claim to the responsible party. If there is no reasonable response within 90 days the claimant shall submit the claim to the federal fund. If there is no reasonable response within 60 days, the claimant may

submit the claim to the state fund. § 40.159(b)(1).

If the claim is less than \$50,000 the claimant shall first submit the claim to the responsible party. If there is no reasonable response within 30 days, the claimant may submit the claim to the state fund. § 40.159(b)(2).

VII. ENFORCEMENT AND PENALTIES

PROVISIONS. The act provides for penalties for operating a vessel or facility without a c-plan and for failure to immediately notify the commissioner of a discharge. There are also penalties for discharge of the oil and failure to abate, contain and remove the pollution.

Class A misdemeanors. A person who intentionally commits any of the following acts shall be guilty of a Class A misdemeanor:

- (1) intentionally operating a terminal facility or vessel without a discharge prevention and response plan;
- (2) operating a terminal facility or vessel without establishing and maintaining financial responsibility;
- (3) causing, allowing or permitting an unauthorized discharge of oil;
- (4) making a material false statement with a fraudulent intent in an application or report; or
- (5) with respect to the person in charge of a vessel from which there is a discharge of oil, taking the vessel from the jurisdiction of the commissioner prior to proving financial responsibility.

§ 40. 251(a)(1)-(5).

A Class A misdemeanor is punishable by not more than \$2,000, confinement in jail for not more than one year or both. V.T.C.A. § 12.02.

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

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

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

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

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

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

VIII. DRILLS AND INSPECTIONS

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

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

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

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

§ 40.115.