

SCOMM

78:49

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO: CSHB 196(JUD)

Revision Date: _____
Title: "An act limiting civil liability for acts or omissions of an oil spill response action contractor..."
Sponsor: House Special Committee on Oil & Gas
Requestor: House Judiciary

Department Affected: Legislative Affairs Agency
BRU: Legislative Council
Component: Council & Subcommittees

..COMPONENT SERIAL NO: 783

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	32.0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	32.0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
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REVENUE	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	32.0	0	0	0	0	0
TOTAL	32.0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary)

CSHB 196(JUD) proposes a study be prepared to assess the oil spill response action contractor civil liability and oil spill contingency plan holder status. Funding would be from the Oil and Hazardous Release Response Fund. To perform this study, the Citizens' Oversight Council would need funds for contractual services for legal and other research.

see attached page

Prepared By: Pamela A. Sloops, Director
Division: Administrative Services

Michele Brown
Michele Brown, Exec. Director
Citizens' Oversight Council

465-3850
Phone: 561-2101
Date: 4/23/91

Approved By: Warren W. Endicott, Executive Director
Agency: Legislative Affairs Agency

Date: 4/23/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

CONTINUATION OF FISCAL NOTE: CSHB 196(JUD)

CSHB 196(Jud) limits liability for civil damages for oil spill response action contractors who respond to a release or a threatened release of oil, unless the contractor acts with gross negligence or intentional misconduct. The limited liability is intended to encourage aggressive oil spill response.

In analyzing this bill, the legislature found that there were good public reasons to address the issue of oil spill response action contractor liability. However, the legislature also found that the subject is extremely complex because of the varying public interests and the variations in the types of response action contractors currently operating in Alaska. The legislature wants the study to identify the types of contractors responding to different oil spill discharges so that the legislature could finely tune which response action contractors operating in which scenarios ought to have limited liability for civil damages.

The legislature also intended the study to address the relationships between different response action contractors and the holders of contingency plans. In order to have a strengthened and cohesive oil spill response, it is critical that the contingency plan holder and the response action contractor adhere to a single plan with direction and oversight by state and federal agencies. In analyzing current law, the legislature found that confusion in response may still exist. Accordingly, the legislature has requested that the study include an assessment of whether the present state laws that require oil shippers and owners to hold contingency plans, and that enable oil 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.

CONTRACTUAL

Estimate approximately 2 months or 320 hours of research and report preparation.

Estimate contracting at approximately \$100 per hour on the assumption that the contractor would assume all expenses for the project, including travel, supplies, postage, copying, computer services, etc.

$$\text{\$100} \times 320 \text{ hours} = \text{\$32,000}$$

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 196

Revision Date: _____ Department Affected: DEC
Title: Limited Liability for oil spill BRU: Environmental Quality
response action contractors Component: SPPM
Sponsor: House Oil & Gas
Requestor: House Oil & Gas COMPONENT SERIAL NO.

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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
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REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Janice Adair Phone: 2600
Division: Commissioner's Office Date: March 11, 1991
Approved by Commissioner: *Janice Adair*
Agency: ADFC Date: 3/11/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Final

SENATE SPECIAL COMMITTEE ON OIL AND GAS

LETTER OF INTENT -- CSHB 196 (Finance)

The Senate Special Committee on Oil and Gas has considered CSHB 196 (Finance), and submits this letter of intent to clarify two issues presented by that bill.

First, under section 8 of the bill, a response action contractor loses its limited immunity if, without approval by the federal or state on-scene coordinator, it "substantially deviated" from an approved oil spill contingency plan that it either authored or agreed by contract to follow. The committee considered defining "substantially deviated" along the lines suggested by Alyeska, set out at the end of this letter. The committee did not have the time to fully explore defining the term. The industry felt that the term "unjustifiable" should be included in the definition because they wanted to have the opportunity, in reviewing a deviation from a plan, to argue to a court that the action resulting in the deviation was the right action in the circumstances. However, others were concerned that "unjustifiable" might mean that any action for which there is any justification (in any person's mind) would not result in a substantial deviation, and thus could be read to render the contingency plan requirements of the bill ineffective. The committee believes that, under the bill, de minimus or technical violations of the contingency would not result in a "substantial deviation" finding, and that a "substantial deviation" will only occur when important, or material, requirements of the plan are violated. The committee determined not to attempt to define "substantially deviated" but rather to ask that the issue be included in the interim study.

The second issue concerns the relationship of HB 196 to the amendments to AS 46.04.030 made by last year's HB 567. AS 46.04.030(k) sets out contingency plan response planning standards. At the same time, AS 46.04.030(l) provides that the benchmarks articulated in subsection (k) "do not constitute cleanup standards that must be met by the holder of a contingency plan." Nothing in HB 196 is intended to amend AS 46.04.030(l) or to create a cleanup standard that must be met by a holder of a contingency plan or a response action contractor. Similarly, since the requirements of subsection (k) do not constitute cleanup standards "substantial deviation" is determined by the terms of an approved

contingency plan and not subsection (k), except to the extent that a provision of subsection (k) has been incorporated into the contingency plan.

Under section 11 of the bill, the Citizens' Oversight Council on Oil and Hazardous Substances will review the issues presented by the legislation. It is this committee's expectation that the Council will review the 15-day time limit for limited immunity provided by this legislation, and assess whether that period ought to be extended. The committee also expects the Council to study the issue of whether the phrase "substantially deviated" should be further defined, and whether the acts of employees of a response action contractor should be excluded from the acts that could lead to a substantial deviation. Among the options presented to the Legislature, but not incorporated in the bill, was the following proposed language suggested by Alyeska:

In this section, "substantially deviated" means significant, unjustifiable and unauthorized departure from the fundamental requirements of a plan by the executives, managers and incident commanders of a response action contractor.

SENATE SPECIAL COMMITTEE ON OIL AND GAS

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In this section, "substantially deviated" means significant, unjustifiable and unauthorized departure from the fundamental requirements of a plan by the executives, managers and incident commanders of a response action contractor.

editorial

SENATE SPECIAL COMMITTEE ON OIL AND GAS

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The Senate Special Committee on Oil and Gas has considered CSHB 196 (Finance), and submits this letter of intent to clarify two issues presented by that bill.

First, under section 8 of the bill, a response action contractor loses its limited immunity [LIABILITY] if, without approval by the federal or state on-scene coordinator, it "substantially deviated" from an approved oil spill contingency plan that it either authored or agreed by contract to follow. "Substantially deviated" means a significant departure from a material requirement of an approved contingency plan. [BY THE EXECUTIVES, MANAGERS, INCIDENT COMMANDERS AND (should be OR) EMPLOYEES OF A RESPONSE ACTION CONTRACTOR].

The legislation does not change the general common law rule that a person is ordinarily not responsible for the negligence of its independent contractors. Thus, if a response action contractor sub-contracts a portion of the cleanup work to another party, and that other party "substantially deviates" from the approved plan, the common law regarding vicarious liability for the acts of independent contractors will determine whether that other party's "substantial deviation" will be imputed to the response action contractor.

Finally, under section 8, a "substantial deviation" will not result in a loss of limited immunity [LIABILITY] if the deviation was previously authorized by the federal or state on-scene coordinator, or that coordinator's designee. [If you put the on-scene coordinator language in the second paragraph, you might take it out here.]

The second issue concerns the relationship of HB 196 to the amendments to AS 46.04.030 made by last year's HB 567. AS 46.04.030(k) sets out contingency plan response planning standards. [UNDER AS 46.04.030(k)(3)(C), A CONTINGENCY PLAN HOLDER MUST DEMONSTRATE THAT THE EQUIPMENT, PERSONNEL AND OTHER RESOURCES MAINTAINED OUTSIDE OF THE PLAN HOLDER'S REGION OF OPERATION WILL BE DEPLOYED AND OPERATING AT THE DISCHARGE SITE WITHIN 72 HOURS.] [The planning standards are the whole of (k), not just (k)(3)(C). This language should be more general.] At the same time, AS 46.04.030(1) provides that the

benchmarks articulated in subsection (k) "do not constitute cleanup standards that must be met by the holder of a contingency plan." Nothing in HB 196 is intended to amend AS 46.04.030(1) or to create a cleanup standard that must be met by a holder of a contingency plan or a response action contractor. Similarly, since the requirements of subsection (k) do not constitute cleanup standards [THE DETERMINATION OF] "substantial deviation" is determined by [IS KEYED TO] the terms of an approved contingency plan and not subsection (k), except to the extent that a provision of subsection (k) has been incorporated into the contingency plan.

Under section 11 of the bill, the Citizens' Oversight Council on Oil and Hazardous Substances will review the issues presented by the legislation. It is this committee's expectation that the Council will review the 15-day time limit for limited immunity provided by this legislation, and assess whether that period ought to be extended. The committee also expects the Council to study the issue of whether the phrase "substantially deviated" should be further defined. Among the options presented to the Legislature, but not incorporated in the bill, was the following proposed definition suggested by Alyeska:

In this section, "substantially deviated" means significant, unjustifiable and unauthorized departure from the fundamental requirements of a plan by the executives, managers and incident commanders of a response action contractor.

TESORO DRAFT

SENATE OIL & GAS COMMITTEE LETTER OF INTENT FOR CSHB 196 (Finance) May 14, 1991

The Senate Oil & Gas Committee has considered CSHB 196 (Finance). The purpose of this letter of intent is to clarify two issues presented by that bill.

First, under Section 8 of the bill, a response action contractor loses its limited liability if it "substantially deviated" from an approved oil spill contingency plan that it either authored or agreed by contract to follow. "Substantially deviated" means a significant departure from the requirements of an approved plan by the executives, managers, incident commanders and employees of a response action contractor.

Under Section 8, the "substantial deviation" must be by the response action contractor in order for that response action contractor to lose its immunity. The legislation does not change the general common law rule that a person is ordinarily not responsible for the negligence of its independent contractors. Thus, if a response action contractor sub-contracts a portion of the cleanup work to another party, and that other party "substantially deviates" from the approved plan, the common law regarding vicarious liability for the acts of independent contractors will determine whether that other party's "substantial deviation" will be imputed to the response action contractor.

Not necessarily true

Finally, under Section 8 a "substantial deviation" will not result in a loss of limited liability if the deviation was previously authorized by the federal or state on-scene coordinator, or that coordinator's designee.

The second issue concerns the relationship of HB 196 to the amendments to AS 46.04.030 made by last year's HB 567. Under AS 46.04.030(k)(3)(C), a contingency plan holder must demonstrate that the equipment, personnel and other resources maintained outside of the plan holder's region of operation will be deployed and operating at the discharge site within 72 hours. At the same time, AS 46.04.030(1) provides that the benchmarks articulated in subsection (k) "do not constitute cleanup standards that must be met by the holder of a contingency plan." Nothing in HB 196 is intended to amend AS 46.04.030(1) or to create a cleanup standard that must be met by a holder of a contingency plan or a response action contractor. Similarly, since the requirements of subsection (k) do not constitute cleanup standards, the failure to meet a provision of subsection (k) would not be a "substantial deviation" under HB 196 resulting in a loss of limited immunity.

Under Section 11 of the bill, the Citizens Oversight Council on Oil and Hazardous Substances will review the issues presented by

c-plan response planning standards.

TESORO DRAFT

SENATE OIL & GAS COMMITTEE
LETTER OF INTENT
FOR CSHB 196 (Finance)
May 14, 1991

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Not rules + true

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Under Section 11 of the bill, the Citizens Oversight Council on Oil and Hazardous Substances will review the issues presented by

the legislation. It is this committee's expectation that the Council will review the 15-day time limit for limited immunity provided by this legislation, and assess whether that period ought to be extended to 60 days (as is the case in California), or whether any limit is appropriate. This committee also expects that the Council will assess whether the following definition of "substantially deviated" is a more appropriate definition of the term:

"In this section, "substantially deviated" means significant, unjustifiable and unauthorized departures from the fundamental requirements of a plan by the executives, managers and incident commanders of a response action contractor."

Committee also expects the
study the issue of whether the term
"sub. dev." should be further defined.
Among the def's considered by the
legisl. but not incorporated into HB 196 is the
following defin. suggested by Alyeska:

since the require. of .03D(LK) do not const.
cl-up std, the failure to meet
a require of that subs. wd not
const. a subst. devia. unless a
portion of p's is incorporated into
an approved L-plan

TESORO/LDNDCD DRAFT

SENATE OIL & GAS COMMITTEE
LETTER OF INTENT
FOR CSHB 196 (Finance)
May 14, 1991

The Senate Oil & Gas Committee has considered CSHB 196 (Finance). The purpose of this letter of intent is to clarify two issues presented by that bill.

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Under Section 11 of the bill, the Citizens Oversight Council on Oil and Hazardous Substances will review the issues presented by

Senate Oil & Gas Committee
Letter of Intent for CSHB 196 (Finance)
May 14, 1991

Page 2

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"In this section, "substantially deviated" means significant, unjustifiable and unauthorized departures from the fundamental requirements of a plan by the executives, managers and incident commanders of a response action contractor."

TESORD / RCLAL / CITIZENS

SENATE OIL & GAS COMMITTEE LETTER OF INTENT FOR CSNB 196 (Finance) May 14, 1991

DRAFT

The Senate Oil & Gas Committee has considered CSNB 196 (Finance). The purpose of this letter of intent is to clarify two issues presented by that bill.

First, under Section 8 of the bill, a response action contractor loses its limited liability if it "substantially deviated" from an approved oil spill contingency plan that it either authored or agreed by contract to follow. "Substantially deviated" means a significant departure from a material requirement of an approved contingency plan, by the executives, managers, incident commanders and employees of a response action contractor.

<Sentence deleted here>

The legislation does not change the general common law rule that a person is ordinarily not responsible for the negligence of its independent contractors. Thus, if a response action contractor sub-contracts a portion of the cleanup work to another party, and that other party "substantially deviates" from the approved plan, the common law regarding vicarious liability for the acts of independent contractors will determine whether that other party's "substantial deviation" will be imputed to the response action contractor.

*① think
end
Sentence
at "plan."
... as per
suggested.*

Finally, under Section 8 a "substantial deviation" will not result in a loss of limited liability if the deviation was previously authorized by the federal or state on-scene coordinator, or that coordinator's designee.

The second issue concerns the relationship of HB 196 to the amendments to AS 46.04.030 made by last year's HB 567. Under AS 46.04.030(K)(3)(C), a contingency plan holder must demonstrate that the equipment, personnel and other resources maintained outside of the plan holder's region of operation will be deployed and operating at the discharge site within 72 hours. At the same time, AS 46.04.030(1) provides that the benchmarks articulated in subsection (k) "do not constitute cleanup standards that must be met by the holder of a contingency plan." Nothing in HB 196 is intended to amend AS 46.04.030(1) or to create a cleanup standard that must be met by a holder of a contingency plan or a response action contractor. Similarly, since the requirements of subsection (k) do not constitute cleanup standards, the determination of a "substantial deviation" is keyed to the terms of an approved contingency plan and not subsection (k), except to the extent that a provision in the subsection has been incorporated into the contingency plan.

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Senate Oil & Gas Committee
Letter of Intent for CSMS 196 (Finance)
May 14, 1991

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deletes "to 60 days (as Calif.) or whether any limit appropriate"

Post-It™ brand fax transmittal memo 7671		# of pages > 2
To Deborah Vogt	Vice	JOHN TILLINGHAST
Co. Cotton's Office	Cn.	BIRCH HORTON
Dept. 401, 546.6	Phone #	586-2890
Fax # 465-4979	Fax #	

Sam Otten

P.S. - I'll check
w/ the office at
6:00 - if you need
me to come back
this evening, leave
a message there
(on the recorder if
no body there).

DB

SENATE OIL & GAS COMMITTEE
LETTER OF INTENT
FOR CSHB 196 (Finance)
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Letter of Intent for CSHB 196 (Finance)
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Under Section 8, the "substantial deviation" must be by the response action contractor in order for that response action contractor to lose its immunity. The legislation does not change the general common law rule that a person is ordinarily not responsible for the negligence of its independent contractors. Thus, if a response action contractor sub-contracts a portion of the cleanup work to another party, and that other party "substantially deviates" from the approved plan, the common law regarding vicarious liability for the acts of independent contractors will determine whether that other party's "substantial deviation" will be imputed to the response action contractor.

Finally, under Section 8 a "substantial deviation" will not result in a loss of limited liability if the deviation was previously authorized by the federal or state on-scene coordinator, or that coordinator's designee.

The second issue concerns the relationship of HB 196 to the amendments to AS 46.04.030 made by last year's HB 567. Under AS 46.04.030(k)(3)(C), a contingency plan holder must demonstrate that the equipment, personnel and other resources maintained outside of the plan holder's region of operation will be deployed and operating at the discharge site within 72 hours. At the same time, AS 46.04.030(1) provides that the benchmarks articulated in subsection (k) "do not constitute cleanup standards that must be met by the holder of a contingency plan." Nothing in HB 196 is intended to amend AS 46.04.030(1) or to create a cleanup standard that must be met by a holder of a contingency plan or a response action contractor. Similarly, since the requirements of subsection (k) do not constitute cleanup standards, the failure to meet a provision of subsection (k) would not be a "substantial deviation" under HB 196 resulting in a loss of limited immunity.

Under Section 11 of the bill, the Citizens Oversight Council on Oil and Hazardous Substances will review the issues presented by

the legislation. It is this committee's expectation that the Council will review the 15-day time limit for limited immunity provided by this legislation, and assess whether that period ought to be extended to 60 days (as is the case in California), or whether any limit is appropriate. This committee also expects that the Council will assess whether the following definition of "substantially deviated" is a more appropriate definition of the term:

"In this section, "substantially deviated" means significant, unjustifiable and unauthorized departures from the fundamental requirements of a plan by the executives, managers and incident commanders of a response action contractor."

SENATE SPECIAL COMMITTEE ON OIL AND GAS

LETTER OF INTENT -- CSHB 196 (Finance)

The Senate Special Committee on Oil and Gas has considered CSHB 196 (Finance), and submits this letter of intent to clarify two issues presented by that bill.

First, under section 8 of the bill, a response action contractor loses its limited immunity if, without approval by the federal or state on-scene coordinator, it "substantially deviated" from an approved oil spill contingency plan that it either authored or agreed by contract to follow. The committee considered defining "substantially deviated" along the lines suggested by Alyeska, set out at the end of this letter. The committee did not have the time to fully explore defining the term. The ~~reason that~~ the industry felt that the term "unjustifiable" should be included in the definition ^{because} ~~was that~~ they wanted to have the opportunity, in reviewing a deviation from a plan, to argue to a court that the action resulting in the deviation was the right action in the circumstances. However, others were concerned that "unjustifiable" might mean that any action for which there is any justification (in any person's mind) would not result in a substantial deviation, and thus could be read to render the contingency plan requirements of the bill ineffective. The committee believes that, under the bill, de minimus or ~~technical violations of the contingency~~ ^{would} ~~ought~~ not result in a "substantial deviation" finding, and that a "substantial deviation" will only occur when important, or material, requirements of the plan are violated. The committee determined not to attempt to define "substantially deviated" but rather to ask that the issue be included in the interim study.

The legislation does not change the general common law rule that a person is ordinarily not responsible for the negligence of its independent contractors. Thus, if a response action contractor sub-contracts a portion of the cleanup work to another party, and that other party "substantially deviates" from the approved plan, the common law regarding vicarious liability for the acts of independent contractors will determine whether that other party's "substantial deviation" will be imputed to the response action contractor.

This paragraph is somewhat superfluous since the whole issue of "employees" was taken out. Should it stay or go?

The second issue concerns the relationship of HB 196 to the amendments to AS 46.04.030 made by last year's HB 567. AS 46.04.030(k) sets out contingency plan response planning standards. At the same time, AS 46.04.030(l) provides that the benchmarks articulated in subsection (k) "do not constitute cleanup standards that must be met by the holder of a contingency plan." Nothing in HB 196 is intended to amend AS 46.04.030(l) or to create a cleanup standard that must be met by a holder of a contingency plan or a response action contractor. Similarly, since the requirements of subsection (k) do not constitute cleanup standards "substantial deviation" is determined by the terms of an approved contingency plan and not subsection (k), except to the extent that a provision of subsection (k) has been incorporated into the contingency plan.

Under section 11 of the bill, the Citizens' Oversight Council on Oil and Hazardous Substances will review the issues presented by the legislation. It is this committee's expectation that the Council will review the 15-day time limit for limited immunity provided by this legislation, and assess whether that period ought to be extended. The committee also expects the Council to study the issue of whether the phrase "substantially deviated" should be further defined. Among the options presented to the Legislature, but not incorporated in the bill, was the following proposed definition suggested by Alyeska:

In this section, "substantially deviated" means significant, unjustifiable and unauthorized departure from the fundamental requirements of a plan by the executives, managers and incident commanders of a response action contractor.

We might want to say:

~~"The committee"~~ "This language, if adopted, would have the effect of excluding the acts of employees of a response action contractor from acts that could lead to a substantial deviation. The committee expects that this issue will be addressed in the interim study."

Letter of intent

I. Definition of "substantially deviated"

A. Alyeska's magic language:

"substantially deviated" means a significant and unjustifiable departure from the fundamental requirements of a contingency plan.

B. Citizens' Oversight: Michelle said these words, plus "unauthorized", set a standard as high as or higher than criminal recklessness.

1. Counter offer on intent language by RCAC and Citizens' Oversight:

"substantially deviated" means a significant departure from the material requirements of an approved contingency plan.

C. Obviously, Tesoro would like Alyeska's language if indeed it solves the problem.

D. "Material" versus "fundamental" -- These words mean sort of the same -- but "material" has the advantage of being a word that courts are used to interpreting. A "material" term of a contract is one that the parties bargained for, and was necessary to their meeting of minds. "Fundamental" is probably stronger -- but (1) we don't really know what it means and (2)

E. "Unjustifiable" -- the citizens' groups are very much opposed to this word -- they argue that almost any act can be "justified", at least post-hoc. They tried -- with T'hast -- all kinds of substitutes, like "unwarranted" but were unable to come up with anything satisfactory.

F. My advice ("The advice of your attorney"): I think the RCAC/Citizens/Tesoro language is just fine. The only real "omission" from Alyeska's perspective is "unjustifiable" and I think it is well omitted.

- II. Employees/independent contractors:
- A. Alyeska: Has apparently given up on excluding field operations employees from people who can "substantially deviate". Thus, you should omit any reference to "executives, managers, incident commanders & employees"
 - B. The third paragraph of the draft intent letter -- dealing with the common law re vicarious liability -- is, in my view, expendable, since this is apparently no longer an issue. There is a fair amount of "legislative history" embodied in the testimony at yesterday's hearing.
- III. "Authorization of on-scene coordinator:
- A. The fourth paragraph of the draft simply restates what the bill says: the on-scene coordinator can override the C-plan requirements. I don't think its necessary to put anything in the letter on this subject, but it doesn't hurt anything.
- IV. Planning standards versus clean-up standards:
- A. The paragraph is OK, except for the original last sentence, which said that failure to meet the planning standards of 46.04.030(k) could not constitute "substantial deviation"
 - 1. The issue here is that sometimes the planning standards ARE ACTUALLY INCORPORATED INTO THE C-PLAN AS REQUIREMENTS, so folks didn't want to say that just because it is in (k), it can never result in substantial deviation.
 - 2. Solution: either:
 - a) Leave off entirely the last sentence in paragraph 5 (beginning "Similarly") or
 - b) Say: Similarly, since the requirements of subsection (k) do not constitute cleanup standards, "substantial deviation" is determined by the terms of the approved contingency plan and not subsection (k), except to the extent that the requirements of subsection (k) have been incorporated into the plan."
- V. Interim study:
- A. If you want to ask the Council to also study defining "substantially deviate", the citizens' groups did not want to imply that the definition proposed by Alyeska was a proposal of the committee.

VI Study issue of 15/30/60 drugs?

primary responder RACs or contingency plan holders to supply equipment and personnel.

- A. VECO
- B. VCRA
- C. Martech

Each of these firms are independent contractors with a RAC or a contingency plan holder to provide additional response resources. Frequently, pre-spill contractual arrangements are made for those supplies and services. For instance, Alyeska and CISPRI contract with VECO for resources. Contracts can also be entered into on the spot during a spill response. These firms neither control the response nor direct contingency plan compliance.

IV. Pinch Hitters - "Minor" players performing specific tasks during response activities.

- A. Contractual Services - These are individuals or groups which have a contractual arrangement in advance or on the spot to perform a discrete task as assigned. The contract can be with any of the other types of RACs or with the contingency plan holder or spiller. For example, Alyeska has contractual arrangements with fishing vessels to deploy boom and conduct oil containment activities during a spill response.
- B. Volunteers - These are individuals or groups who assist on their own initiative or on request by some spill response participant.

Alaska State Legislature

Senate Committee on Oil and Gas

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



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

May 13, 1991

To: Members, Senate Oil and Gas Committee

From: Sam Cotten, Chair

Re: Change of Meeting Time

Because of the floor session tomorrow (Tuesday, May 14), the Senate Oil and Gas Committee will be meeting at NOON rather than at 10:30, as previously announced. The meeting will be in the Beltz Room, and we will take up H.B. 196 (Response Action Contractor Liability) and SJR 28 (Presidential Task Force on TAPS).

Alaska State Legislature

Senate Committee on Oil and Gas

Senator Sam Cotten, Chairman
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Senator Dick Shultz



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

April 24, 1991

To: Members of the Senate Oil and Gas Committee

From: Sam Cotten, Chair

NOTICE OF MEETINGS

1. The Oil and Gas Committee will be meeting on Friday at 9:30 in the Beltz Room to consider S.B. 263 (five day notice waived). The legislation would defer for one year compliance with last session's H.B. 567 for non-crude operations.

2. The confirmation of Lonnie Smith, commissioner of the Alaska Oil and Gas Conservation Commission, was referred to both the Senate Oil and Gas Committee and the Senate Resources Committee. As a result, our committee will be meeting jointly with the Senate Resources Committee on Monday, April 29, 1991 at 1:30 to consider that confirmation. The meeting will be in the Butrovich Room.

3. The Oil and Gas Committee will meet Tuesday, April 30 at 11:00 in the Beltz Room to consider S.J.R. 28, relating to the Presidential Task Force on the APS.

cc: Senate Secretary
Senate Records
Commissioner Lonnie Smith
Senator Lyman Hoffman
Senator Jay Kerttula

Alaska State Legislature

Senate Committee on Oil and Gas

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Senator Dick Shultz



P. O. Box V, State Capital

Juneau, AK 99811

(907) 465-3711

April 8, 1991

To: Members, Senate Oil and Gas Committee

From: Sam Cotten, Chair

Attached is a draft bill on the subject of response action contractor liability that the committee will be reviewing on Thursday morning. The draft was put together by the proponents of the legislation (specifically, Tesoro and Conoco) with input from the Regional Citizen's Advisory Council.

The last section of the bill sets up a procedure for interim review of the issue, with a report to the legislature at the beginning of the next session. The structure of this review is left open, for the legislature to set up.

Alaska State Legislature

Senate Committee on Oil and Gas

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



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

April 8, 1991

Paul M. Richards
Alyeska Pipeline Service Company
240 Main Street, Suite 800
Juneau, Alaska 99801

Dear Mr. Richards,

This Thursday, April 11, at 10:30, the Senate Oil and Gas Committee will be resuming its discussion of the issue of response action contractor liability. A new draft bill has been drafted by representatives of Tesoro, working with the Regional Citizens Advisory Council. It is attached for your review.

The committee will be reviewing this draft, and determining whether or not to submit a bill on this subject as a committee bill. Proponents of the legislation (Tesoro and Conoco) raise the issue of Alyeska's requirement of a \$1 billion direct action bond as one of the reasons for enacting legislation in this area. We will appreciate your company's comments in several areas.

First, please be prepared to address the rationale for Alyeska's bonding requirement. What went into the determination to set the bond requirement at its current level? What sorts of damages actions does Alyeska see that it might be liable for without bonding or legislative protection? Why did Alyeska determine that direct action bonding was required?

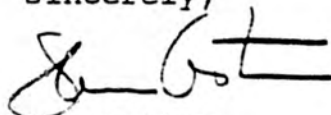
Second, please be prepared to address the draft legislation. Obviously, the committee will be interested in whether, if the bill were passed, Alyeska could reduce its bonding requirements to a level that Tesoro could meet. If the bill in its current form would not allow Alyeska to

substantially reduce its requirements, please comment on what changes in the legislation would, in your view, be necessary.

Finally, I understand that several shippers have dropped out of the TAPS trade in recent months. Please be prepared to address this issue: how the TAPS trade has changed in recent months, and what Alyeska perceives to be the reason or reasons for this change.

I appreciate your willingness to work with the committee on this issue.

Sincerely,

A handwritten signature in dark ink, appearing to be 'S. Cotten', with a stylized flourish at the end.

Sam Cotten
Chair

SC/dv

cc: Mary Nordale

Sam

UPDATE: Proposed letter of intent (no one looking for definition in statute any more)

Alyeska's magic language:

"substantially deviated" means a significant and unjustifiable departure from the fundamental requirements of a contingency plan.

Obviously, Tesoro would like the language if indeed it solves Alyeska's problem.

Counter offer on intent language by RCAC and Citizens' Oversight:

"substantially deviated" means a significant departure from the material requirements of an approved contingency plan.

Attached is a new draft of the intent letter, which is the product of the Tesoro folks working with the Citizens' and RCAC folks. New or changed parts are highlighted.

Alyeska has ~~not~~ responded to these changes
(to me, anyway)

D

Sam -

Status check:

H.B. 196: Rob Shoaf(?) of Alyeska just told Burden (and me) that if we put the words "unjustifiable" and "fundamental" into the definition, "that would go a long ways toward meeting our concerns, and we believe we'd be able to reduce the liability requirements". Those are, however, some of the words that Michelle said set a standard as high as or higher than criminal recklessness.

SJR 28: The DEC amendments: Kathy and I both feel that Mead's first proposed amendment

WHEREAS the economy of Alaska and the United States depend, in large part, on the continued safe production of hydrocarbon reserves already known to exist on Alaska's North Slope; and

broadens the scope of the resolution beyond its intended purpose -- maybe its an ANWR support section? -- and that it probably should not go in the resolution.

The other amendments look fine, but neither Kathy nor I have any idea if they are accurate -- that is, if the representations about the OPA etc. are true.

Kerttula is happy if you decide to do something and do it; or won't be upset if it just dies.

Deb

S B 163

-- We are meeting with BP tomorrow at 9:00.

-- Paul Quesnel thinks we should ask Sandor to be there -- that the story from Treadwell is not the same as the story we would get from Sandor. However, when Paul is pressed, he says Sandor's position is that he doesn't care if crude is included. As of today, that's what I hear from Mead. Anyway, I told Paul I would tell you he thinks Sandor should be there. Paul sez that Lyman is basically willing to follow your lead -- and defer to Cliff Davidson -- on including crude.

-- Environmental groups (RCAC, Citizen's, ACE) have all told me that they DO NO WANT CRUDE INCLUDED. They all seem to say that they could live with a non-crude deferral.

-- I finally found where the statute and regs set standards from non-crude terminal facilities. They are treated exactly the same. (Crude vessels are very different from non-crude)

-- Paul (without authority from his company) is floating out the idea of deferring the date (for all) until January 1. That way, (1) the regs would (maybe) be done; and (2) folks would be assured that this wasn't an attempt to get further legislative changes next session, since compliance would be before session started.

-- Molly is wondering what to do with all the amendments; it has crossed her mind to put all the DEC studies etc. in HB 196. I told her Gene Burden would LOVE that!

-- Several staffers have complained that they feel Drue is inappropriately claiming to state legislative intent on HB 567.

Don't let them keep passing the buck!

A better idea would be to turn this situation around and fix some responsibility. Reducing the complex, fragmented chain of responsibility and liability to something that can be understood by ordinary people might help.

One approach could be to mandate that Aleyska, as a common carrier engaged in the business of transporting an inherently dangerous substance, be charged with responsibility for the safe transport of oil to international waters. The costs of the insurance, equipment, procedures, and planning would become part of the tariff, and ratably charged to all buyers of oil through that mechanism.

Another, and more limited approach, would be to mandate a joint insurance agreement for the liability coverage, with the coverage and the premiums, reserves, and other requirements subject to the approval of the state director of insurance. This would at least provide a way to make sure that the insurance is really in force. It would also allow the director to examine the effect of the rates on the different carriers, to see if they are proportional, or fair, in a useful way.

In addition the recommendations of the Oil Spill Commission should be reviewed, preferably with the help of the chairman or some other active member or the commission.

Heresy as a mechanism for change-

Finally, it would be a break from tradition, and maybe heresy, but getting information on "how they do it outside" might free us from the sameness of always being the dummy in the game. Alaska has less information on how the oil business is conducted elsewhere in the world than any other producing jurisdiction on the globe.

Inviting in some knowledgeable people, say from the San Francisco port authority, or from the the North Sea Brent port of Sullom Voe, would no doubt give us some information and some backbone. Sending Alaska officials to those places is an even better idea, if they are not so timorous as to be afraid of the label "junket". That would change things, for the better!

OIL ON THE WATER AND LIABILITY

Who's in charge? A confusing situation:

The Exxon Valdez spill reminded everyone that there was no organization or agency with clear responsibility for anything, much less the job of prevention, containment, and clean-up. Unfortunately, this is still true today.

There is no government agency that has authority and responsibility to deal with the issues of marine transportation of oil in Prince William Sound, Cook Inlet, or Gastineau Channel. There is the federal government, with incomplete jurisdiction by the Coast Guard, the EPA, and the Department of Transportation. There is the state, with inadequate laws and enforcement mechanisms scattered among diverse agencies. There is the local government option, hardly if ever able to muster the will to exercise local zoning and police powers, and even then, usually cut off from the where-with-all to do so (Valdez's special tax zone was a case in point).

The responsibility for the hauling of oil is fragmented as well in the private sector. One company produces the oil, another moves it to tidewater, another ships it to its next port. At Valdez, Aleyska is almost a corporate fiction, being totally dominated by the major producers who own it, and who use it effectively as a screen for liability; Aleyska represents fragmentation of responsibility within the same "company". The various shippers represent a way to diffuse liability, and this is sometimes even diffused further to the crew, etc.

Financial liability is further fragmented by the bonding and insurance companies and arrangements. Insurance is not regulated at all in the federal level, and is a hodge-podge of conflicting and inadequate laws at the state level. Smaller states, like Alaska, get coerced by the large companies into weakening their laws on liability, and what regulation there is usually dominated by insurance industry groups and councils set up to "help" the insurance consumers (!).

These issues were all addressed in recommendations of the Oil Spill Commission established by the legislature and appointed by Governor Cowper. Unfortunately, these recommendations were either ignored or so diluted that the commission's time was just about wasted.

Give us relief!! ... a common plea...

Now we are faced with the prospect that the state is asked to further weaken their laws on liability because the Aleyska consortium is placing very large insurance requirements on very small companies, which are too costly and burdensome. Did we learn nothing from the industry negligence in the Exxon spill?

April 26, 1991

To: Sam
From: Ginny
RE.: Potential \$1 Billion Financial Liability Pool

This memorandum briefly summarizes my April 24 conversation with Steve Van Dyke, chairman of Maritram, an east coast tug and barge company (he also chairs about a half dozen other committees and corporations). As you know, Jerry Aspland, president of Arco Marine, suggested that we contact Mr. Van Dyke for information regarding a potential \$1 billion oil industry financial liability pool to satisfy the financial responsibility requirements of the federal Oil Pollution Act of 1990 (OPA 90).

Background

The Oil Pollution Act of 1990 requires proof of financial responsibility for the oil transportation industry to cover liability for spills. Specifically, OPA 90 requires \$1,200 per gross-weight tonnage (gwt) for tankers and \$600 per gwt for dry weight cargo. For large tanker vessels in the realm of 70,000 gwt such as the Exxon Valdez, this requirement translates to about \$80 million of liability coverage. The OPA 90 \$1,200 per gwt is considered the "first level" of proof of financial responsibility to directly satisfy the federal legislation.

However, as a result of large oil spill damage claims assessed in recent years against oil and tanker companies, most companies believe they need \$1 billion in insurance coverage to enable them to operate--this is considered the second level of coverage. Van Dyke specifically cites the Glacier Bay spill in Cook Inlet as justification for this belief. The Glacier Bay claims paid to date exceed \$30 million with claims still outstanding--and this is considered a "small" spill, 40,000 gallons. Van Dyke also states that an unrigorous analysis of 20 spills in the four to five years preceding OPA 90 indicates that oil spills cost industry in the realm of \$250-\$300 per gallon spilled in claim payments.

Status of \$1 Billion Pool

According to Van Dyke, the P & I pools that cover about 95 percent of the world's tanker fleet's liability insurance will not provide

coverage for the \$1,200 per gwt OPA 90 requirement let alone the \$1 billion pool. Van Dyke is actively meeting with other industry representatives this week attempting to find a solution to the \$1,200 per gwt problem. He is not at all optimistic about the \$1 billion pool. He is going to give me a status report on this week's meetings early next week.

The primary problem with insurance availability is that the increased level of oil spill liability exceeds the level affordable by the tanker transportation industry. According to Mr. Van Dyke, the annual total revenue of this industry is approximately \$1.3 billion. Van Dyke estimates that the cost of the OPA 90 financial responsibility standards is about \$0.20 per gallon of gasoline at the pump.

Relationship to Response Contractor Liability

After the passage of OPA 90, most states anticipated that the federal financial responsibility requirements would satisfy similar state requirements. The level of difficulty obtaining liability insurance for tanker vessels was not fully anticipated. While it is only indirectly related, response action contractor liability influences the availability of oil spill insurance coverage.

Theoretically, the increased number and competency of oil spill response contractors reduces the potential damage from oil spill--especially the amount of oil to hit beaches. However, if oil spill response contractors, or other good samaritans, are held liable for actions done in good faith, the number of responders will decrease while the cost of responding will increase.

Mr. Van Dyke uses an example from his own company to illustrate. One Maritram's tugs responded to a call of distress from a barge run on the rocks. The tug captain followed exactly the barge skipper's directions for moving the barge--which was not leaking while on the rocks. After moving off the rocks, the barge began to leak oil. Ultimately, the barge company tried to sue Maritram for \$15 million to cover the cost of the spill. As a result, Maritram's vessel in distress response policy is to rescue only endangered crew.

According to Van Dyke, good samaritan laws that reduce response contract liability to reasonable levels will ultimately increase the availability of liability insurance. In the meantime, the lack of insurance coverage as a result of legislated increases in oil spill damage liabilities, is likely to result in most of the large oil and tanker companies becoming self-insured while smaller tanker companies will go out of business.

AGENDA

STAFF WORKSHOP

RESPONSE ACTION CONTRACTOR LIABILITY

- ✓ I. Should we define "substantial deviation?"
- ✓ II. Strict liability if RAC is original spiller.
- ✓ III. Liability for secondary spill.
- ✓ IV. Definition of "response action."

V.

SENATE OIL AND GAS COMMITTEE

MAY 14, 1991

COMPARISON

H.B. 196 -- S.B. 270

HIGHLIGHTS

The differences between H.B. 196 and S.B. 270 are summarized as follows:

	S.B. 270	H.B. 196
1. Interim Report:	Legislative Review	Citizens' Oversight Council Review
2. Length of Immunity	30 days	15 days
3. Sunset	None	1 year

SENATE OIL AND GAS COMMITTEE

MAY 14, 1991

COMPARISON

H.B. 196 -- S.B. 270

Interim study

S.B. 270: Sec. 1

H.B. 196: Sec. 11

The Senate bill includes an intent section, contemplating interim review by the legislature, with a report back to the legislature by January 15, 1992. The study would encompass "the entire subject of response action contractor liability" as well as "an analysis of whether the present state [contingency plan] laws ... are adequate to protect the public in the event of an oil spill."

The House bill directs the Citizens' Oversight Council to conduct the same study, and adds a review of "the status of oil spill contingency plan holders" to the scope.

Strict liability for spillers

S.B. 270: Sec. 2

H.B. 196: Sec. 1

These sections are nearly identical; both delete the "damages" language from the section (in both, it is reenacted more broadly later). The House bill amends paragraphs 4 & 5 of the section to exclude response action contractors from the persons who would be strictly liable for damages resulting from transporting hazardous substances for disposal, or from accepting those substances for disposal.

Strict liability damages

S.B. 270: Sec. 3

H.B. 196: Sec. 3.

These sections are identical, and define damages under the strict liability section to include damage cause by a

response action contractor for which the RAC is immune under the bill.

Sever oil from hazardous substance RAC section

S.B. 270: Sec. 4

H.B. 196: Sec. 4

These identical sections remove "oil" from the current statutory section dealing with response action contractors, leaving the section applicable only to hazardous substances other than oil.

Sever oil from "response action" definition

S.B. 270: Sec. 5

H.B. 196: Sec. 6

These identical sections remove "oil" from the current definition of "response action," leaving the definition only applicable to hazardous substances other than oil.

New section for "oil" response action contractors

S.B. 270: Sec. 6

H.B. 196: Sec. 8

These sections are the heart of the bill, setting liability standards for oil spill response action contractors.

The sole difference between the two is that the House bill provides limited immunity for 15 days, while the Senate bill provides that immunity for 30 days.

Both bills limit immunity to actions not contrary to the state or federal on-scene coordinator; to spills for which the RAC was not originally responsible; to situations in which the RAC does not substantially deviate from a C-plan that the RAC either wrote or agreed to abide by; and to actions other than for personal injury, death, or damages to personal property not caused by oil. Both provide that -- except when the RAC was the original spiller -- the RAC is subject to an ordinary negligence standard when the immunity does not apply. (If the RAC was the originally spiller, the RAC is subject to strict liability.)

Reorganization of definitions for "response action contract" and "response action contractor"

S.B. 270: Sec. 7

H.B. 196: Sec. 9

These identical sections move the definitions of these two terms to the definitions section of the chapter, so that they will apply to provisions for both non-oil and oil. Both sections add volunteers to the definition of RAC.

Sunset provisions

S.B. 270: None

H.B. 196: Sec's. 2,5,7,10,12

The Senate bill does not contain a sunset provision. The House bill repeals the newly enacted sections (sec. 10) and reenacts the old (current) provisions (sec's. 2,5 and 7), effective July 1, 1992 (sec. 12). These together provide for a sunset of the legislation on July 1, 1992.

Effective date

S.B. 270: Sec. 8

H.B. 196: Sec. 13

Both bills take effect immediately.

SPONSOR STATEMENT IN SUPPORT OF CSHB 196 (FINANCE)
Bill Hudson Chairman, House Special Committee on Oil and Gas

May 3, 1991

The need for strong and prompt oil spill cleanup capability is well recognized by the public. Spills from the *Torrey Canyon*, the Santa Barbara oil well incident, the IXTOC #1 blowout, the grounding of the *Arco Merchant*, the *Amoco Cadiz* and finally the *Exxon Valdez* incidents all gravely punctuated the need for new laws.

With the advent of Alaska's legislation requiring strict liability for spill damages (Ch. 112, SLA 1972), oil spill response action cleanup contractors (RAC's) became exposed to unlimited strict liability. This created a difficult situation for RACs and legislative efforts were then made to reduce the threat of such law suits (Ch. 39, SLA 1989 & Ch. 191, SLA 1990). Nevertheless, current Alaska law does not provide the same emergency response immunity to RACs as it does for other emergency responders.

CSHB 196 amends AS 46.03.822 and .823 and adds section .825 which proposes to shift the liability for certain acts of simple negligence during the first 15 days following the spill, so long as the RAC's act or omission is not contrary to the order of the state or federal On Scene Coordinator (OSC), or substantially deviates from the applicable oil spill contingency plan. "Substantial deviation" does not include minor departures from a plan that are inevitable in a crisis situation. Instead the phrase refers to a significant, and/or unjustifiable departure of a RAC from the fundamental requirements of an applicable plan.

CSHB 196 also calls for a complete study of the issues of RAC liability to be made by the legislature's Citizen's Oversight Council by January 15, 1992. To ensure that this will be done, the bill also contains a sunset provision of one year.

The benefits of this bill extend beyond encouragement of rapid initial response. The implementation of HB 567 in June of this year will require the demonstration of significant oil spill cleanup capabilities by the industry. Statewide, oil facilities and operations without the financial resources to have their own cleanup capability, will have to turn to spill cleanup cooperatives and cleanup RACs for the cleanup services required by law. At this time these operators have been reluctant to join cleanup co-ops partly because of their exposure to unlimited liability. In addition, cleanup contractors have become sensitized to the liability issue and are now reconsidering offering their services. This bill is intended to reduce some of the initial impediments to start-up of potential cleanup businesses and the formation of co-ops.

This bill also is expected to assist in the successful resolution of response action contracts in Prince William Sound that will assure uninterrupted supply and distribution of ANS crude to a wide array of companies that have been negatively impacted by Alyeska's requirements for \$1 Billion in financial responsibility from shippers. This bond requirement was established in response to Alyeska's interpretation of RAC liability under existing Alaska law. As a result some companies have already been excluded from the maritime transport of ANS crude (Cove Shipping, U. S. Refining); others have withdrawn from the trade (Mobil and reportedly Shell this summer); while others have had their supply and/or distribution threatened (Tesoro and Conoco).

In addition, by being more consistent with other states and the federal law, large RACs such as the Marine Response Corporation (MSRC) should be more inclined to respond to spills in Alaska and perhaps even locate here. This bill has no effect on the responsibilities for cleanup or on the planning standards enacted by the legislature in 1990.

In summary, CSHB 196

1. Shifts the liability for damages caused a RAC's simple negligence during the first 15 days of oil spill cleanup to the spiller so long as the RAC.

- a. Does not cause personal injury.

- b. Does not violate an order of the On Scene Coordinator.

- c. Does not substantially deviate from the applicable oil spill contingency plan.

2. Calls for a study of the state's liability laws to be done by next legislative session.

3. Sunsets these provisions in one year so this legislature will be able to reconsider the issue.

CSHB 196 has seen extensive hearings in four committees and has changed as all parties were heard and concerns addressed. I ask for your support in passing CSHB 196 out of the House and over to the Senate.

SECTION-BY-SECTION ANALYSIS OF CSHB 196 (FINANCE)

The 13 sections of CSHB 196 (Finance) fall into three categories:

1. Substantive sections: that is, those sections that either define the liability of oil spill response action contractors (RACs) or transfer that liability to the spiller;
2. conforming amendments to existing law; and
3. sections which merely set out existing law -- which will be "restored" after this legislation sunsets.

1. The Substantive Sections:

Section 8. This is the most significant section of the bill. It provides that oil spill RACs are responsible for damages caused by their cleanup activities if they were grossly negligent or acted with intentional misconduct. This limited liability, however, applies only during the first 15 days following the spill, and only if the oil spill RAC was not responsible for the spill itself. Nor is the oil spill RAC's liability limited if it substantially deviates from an approved oil spill contingency plan that was either prepared by that RAC, or which the RAC agreed to follow in a cleanup contract with the spiller.

Subsection (b) provides, in addition, that limited liability does not apply to actions for personal injury or death, or for actions for damages to tangible personal property not caused by the oil.

Subsection (c) provides that if, for any of the reasons stated above, the oil spill RAC's liability is not limited to "gross

negligence," the injured party will have to prove simple negligence in order to hold the oil spill RAC liable. However, if the oil spill RAC also caused the spill, the RAC will still be strictly liable.

Subsection (d) limits those "response actions" for which liability is limited only to activities undertaken in response to an actual or imminently threatened spill.

Section 3. This section provides that, if an oil spill RAC's liability is limited under Section 8, the spiller is strictly liable for those damages.

Section 9. This section sets out the type of people who are covered by the limitation of liability in Section 8. It uses existing law's definitions of "response action contract" and "response action contractors," with one important addition -- volunteers are now covered by the limitation of liability. See p. 7, l. 8.

Section 11. This section provides that the Citizens' Oversight Council on Oil and Hazardous Substances will prepare and submit a report to the legislature by January 15, 1992 on the liability issues covered by this bill. Since this legislation will "sunset" on July 1, 1992 (see below), the report is intended to aid the legislature in considering this issue next year.

2. The Conforming Amendments.

Section 1. Section 3, as we have seen, transfers certain liabilities from the oil spill RAC to the spiller. It does so by adding a definition of "damages" for which the spiller is

responsible to Alaska's basic strict liability law (AS 46.03.822). Since Section 3 now sets out the damages for which the spiller is liable, there is no longer any need to repeat the now-redundant list in Section 822(a). Section 1 therefore deletes this now-surplus language (p. 1, ls. 11-13); otherwise, it makes no change in the liability statute. Except for the bracketed and capitalized language on page 1, all of Section 1 merely sets out existing law.

Section 4 and Section 6. Section 8 creates limitations on liability specific to oil spill response action contractors. AS 46.03.823 is an existing liability statute dealing with all hazardous waste cleanup contractors (including oil spill RACs). Section 4 and Section 6 remove oil spill RACs from the coverage of Section 823 by inserting the words "other than oil" on p. 3, l. 28 and p. 4, l. 19. Except for these words, the remainder of these sections simply set out existing law, which will still be applicable to people involved in other types of hazardous substances cleanup.

Section 13. This section provides an immediate effective date.

3. "Sunset" Provisions.

Section 10 repeals the substantive provisions of this bill, and Section 12 makes that repeal effective July 1, 1992. Once the new law is repealed, it is necessary to restore the law as it exists today. Section 2, Section 5 and Section 7 of the bill accomplish this by setting out presently existing law, while Section 12 then provides that these existing laws will be "restored" on July 1, 1992.

SECTIONAL ANALYSIS

PROPOSED RESPONSE ACTION CONTRACTOR LEGISLATION

(Draft dated 4/25/91)

- Section 1. Finds that the issue of response action contractor liability needs further study, and states that the legislature intends to review the subject and complete a report by the beginning of the next session.
- Section 2. Amends current law establishing strict liability for certain persons (persons who own or control oil or other hazardous substances) for damages to persons or property or natural resources. The amendments (1) clarify that the subsequent sections of the bill (secs. 3 and 4) take precedence over the "notwithstanding" language in current law; and (2) delete the definition of "damage," which definition is revised and reinstated in section 3 of the bill.
- Section 3. Adds a new subsection to the strict liability section (above), defining damages. The term is expanded to include damages for which a response action contractor (RAC) is immunized from liability by subsequent sections of the bill. Has the effect of clarifying that if a RAC is immunized from liability for an action by the bill, the liability for that action flows back to the spiller or owner of the oil.
- Section 4. Amends current law dealing with hazardous substance RAC's to limit the applicability of the section to substances other than oil. Has the effect of retaining simple negligence as the standard for those responding to releases of hazardous substances other than oil. (Note that a RAC responding to a non-oil release may be strictly liable for damages in certain circumstances; for example, if the RAC's acts are "contrary to a response plan or order by a state or federal agency having jurisdiction over the release...")
- Section 5. Amends the definitions portion of the (current) section dealing with response action contractors to (1) limit the definition of "response action" in this section to actions not involving oil; and (2) deletes the

definitions of "response action contract" and "response action contractor". These last two definitions are moved (Section 7, below) to a general definitions section.

Section 6. Creates a new section dealing with the liability of RAC's responding to the release of oil. Limits liability to acts of gross negligence or intentional misconduct, with certain exceptions. The exceptions are:

- (1) The RAC is the spiller or owner of the oil;
- (2) The RAC substantially deviated from a contingency plan that that RAC either prepared the C-plan or agreed to comply with the terms of it, unless the federal or state on-scene coordinator ordered the deviation;
- (3) The RAC's act or omission caused personal injury or death;
- (4) The RAC's act or omission caused damage to personal property; or
- (5) The RAC's act or omission occurred more than 30 days after the release.

States that if an RAC's liability is not limited (that is, if the act or omission falls within one of the exceptions above), the RAC is liable for acts of simple negligence. This simple negligence standard does not apply if the RAC is also the spiller.

Defines "response action" to include only actions taken during mitigation and clean-up. Current law, applicable to both oil and other hazardous wastes, includes a broad spectrum of other activities such as planning, mapping and engineering in the definition. The bill would leave this definition unamended for hazardous substances other than oil, but limit the definition for oil.

Sections 7. Moves the definitions of "response action contract" and "response action contractor" from AS 46.03.823 (dealing, after amendment, only with response actions for hazardous substances other than oil) to the general definition section. Thus, the definitions would apply to both response action contractor sections.

Section 8. Immediate effective date.

SECTIONAL ANALYSIS

PROPOSED RESPONSE ACTION CONTRACTOR LEGISLATION

Section 1. Amends current law establishing strict liability for certain persons (persons who own or control oil or other hazardous substances) for damages to persons or property or natural resources. The amendments (1) clarify that the subsequent sections of the bill (secs. 3 and 4) take precedence over the "notwithstanding" language in current law; and (2) delete the definition of "damage," which definition is revised and reinstated in section 2 of the bill.

Section 2. Adds a new subsection to the strict liability section (above), defining damages. The term is expanded to include damages for which a response action contractor (RAC) is immunized from liability by subsequent sections of the bill. Has the effect of clarifying that if a RAC is immunized from liability for an action by the bill, the liability for that action flows back to the spiller or owner of the oil.

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Section 4. Creates a new section dealing with the liability of RAC's responding to the release of oil. Limits liability to acts of gross negligence or intentional misconduct, with certain exceptions. The exceptions are:

- (1) The RAC is the spiller or owner of the oil;
- (2) The RAC substantially deviated from a contingency plan that that RAC either prepared the C-plan or agreed to comply with the terms

- of it, unless the federal or state on-scene coordinator ordered the deviation;
- (3) The RAC's act or omission caused personal injury or death;
 - (4) The RAC's act or omission caused damage to personal property; or
 - (5) The RAC's act or omission occurred more than 30 days after the release.

States that if an RAC's liability is not limited (that is, if the act or omission falls within one of the exceptions above), the RAC is liable for acts of simple negligence. PROBLEM: This language may have an unintended effect: When the RAC is also the spiller, the language could be interpreted to set the liability standard at simple negligence instead of strict liability.

Defines "response action" to include only actions taken during mitigation and clean-up. Current law, applicable to both oil and other hazardous wastes, includes a broad spectrum of other activities such as planning, mapping and engineering in the definition. The bill would leave this definition unamended for hazardous substances other than oil, but limit the definition for oil.

Sections 5 and 6. Moves the definitions of "response action contract" and "response action contractor" from AS 46.03.823 (dealing, after amendment, only with response actions for hazardous substances other than oil) to the general definition section. Thus, the definitions would apply to both response action contractor sections.

Section 7. Sets up an interim review of response action contractor liability, with a report to the legislature by January 15, 1992. The structure of the review is left open for the committee/legislature to fill in as appropriate.

Section 8. Immediate effective date.

CLASSES OF RESPONSE ACTION CONTRACTORS

I. Response Group - RAC actually controls the response for some period of time.

A. Alyeska Pipeline Service Company

Alyeska prepared an initial (72 hour) spill response plan and gave it to shippers with which Alyeska contracts for response. The initial response plan was to be incorporated into the shipper's contingency plan as ultimately approved by the state. Alyeska, by contract with the shipper, responds immediately, even without a request by the contingency plan holder. Alyeska remains as the lead responder and controls the response until the spiller takes over or the spill response is federalized. Alyeska only performs this function in Prince William Sound for TAPS traffic to and from the Valdez terminal.

II. Response/Resource Group - Cooperative organizations responding as a resource on behalf of members.

A. Cook Inlet Spill Prevention Response, Inc.

CISPRI is currently a 10-member cooperative providing spill response resources for its members. CISPRI is preparing a technical reference manual for use by its members. The co-op members are contingency plan holders who contract with CISPRI for response services that the spiller or plan holder directs. CISPRI operates in Cook Inlet.

B. Alaska Clean Seas

ACS is a cooperative similar to CISPRI. It currently has 13 members, most of whom are contingency plan holders. ACS developed a manual of services or response strategies that each member could incorporate into a contingency plan, such as procedures for in-situ burning or preparation of an equipment database. ACS provides response services on behalf of its members at the request of a member. ACS works as part of the unified response team which includes ACS employees, independent suppliers' employees, and village response teams. ACS operates in the North Slope.

III. Resource Suppliers - Companies which contract with

QUESTIONS AND ANSWERS REGARDING CSHB 196 (JUDICIARY)

1. DOESN'T EXISTING LAW ALREADY LIMIT THE LIABILITY OF CLEANUP CONTRACTORS?

AS 46.03.823 adopts the common law liability rule of simple negligence. For RACs who had no involvement in the spill itself, that is not a limitation on liability. Additionally, AS 46.03.823 provides that, under a number of poorly defined circumstances, the innocent RAC may be strictly liable for any damage caused during spill cleanup.

2. WHY SHOULD WE LIMIT THE LIABILITY OF OIL SPILL RACS?

Oil spill RACs are responding to an emergency in a crisis atmosphere. As a result, they are particularly vulnerable to lawsuits. Alaska has recognized this by limiting liability to "gross negligence" for people who respond to other kinds of emergencies -- including medical emergencies and disaster emergencies. AS 09.65.090-091.

The threat of lawsuits can deter people from becoming oil spill cleanup contractors, and can cause unnecessary delays by existing contractors in implementing spill response.

3. BUT DOESN'T ALASKA HAVE PLENTY OF OIL SPILL CLEANUP CAPABILITY EVEN UNDER EXISTING LAW?

Yes, a lot of people came forward to help cleanup the Exxon Valdez spill. However, this was after Exxon, one of the largest companies in the world, acknowledged responsibility for cleanup. This is not always the case.

Moreover, there are many areas of the State that do not have

spill cleanup capability. Last year, the legislature significantly increased oil spill cleanup capability requirements. The new law takes effect this June, and in most places in the state, oil terminals and shippers -- particularly small ones -- are expected to be unable to meet those requirements.

We have already seen Alaska's cleanup liability laws threatening the availability of necessary oil spill cleanup services in Prince William Sound. People have been reluctant to join the new Cook Inlet spill coop (CISPRI) because of potential liability. A Juneau contractor testified in the House Resources Committee that it was reconsidering its entry into the field because of liability concerns. The oil industry's new nationwide cleanup corporation -- MSRC -- has made it clear that it is uninterested in locating assets in any state that does not limit oil spill cleanup contractor liability.

Aggravating the problem is the fact that the United States Congress, and the legislatures of California, Hawaii, Washington, Texas, Florida, Virginia and Delaware have already adopted a "gross negligence" standard for oil spill cleanup contractors. A number of other states will be following suit shortly. Being among a shrinking minority of states with unlimited cleanup contractor liability, Alaska will find itself at an even greater competitive disadvantage in attracting necessary resources.

4. ISN'T HB 196 A SPECIAL-INTEREST BAIL-OUT BILL TO HELP TESORO OBTAIN CLEANUP COVERAGE FROM ALYESKA?

As a result of existing law, Alyeska has conditioned the availability of cleanup services for Tesoro's transportation of

crude oil through Prince William Sound on financial responsibility terms that Tesoro can't meet. Whether or not Alyeska's demands are reasonable or constitute an overreaction to the problem, the existing liability problem that prompted Alyeska's decision is real. The Alyeska situation presents the most current, dramatic illustration of this larger problem. It is, however, only a symptom of Alaska's unreasonable liability rules for oil spill cleanup contractors -- one that has already spread to other areas of the state, and will spread further as Alaska's new cleanup requirements take effect.

5. ALYESKA HAS INDICATED THAT IT IS UNSATISFIED WITH CSHB 196 (JUDICIARY). WHY PASS THIS BILL IF IT WON'T FIX THE TESORO/CONOCO/ALYESKA PROBLEM?

The goal of this legislation is not to "fix" a private dispute. However, the Alyeska/Tesoro situation was precipitated, in substantial part, by an unreasonable liability environment. That is a legitimate legislative concern. CSHB 196 (Judiciary) would define an oil spill RAC's liability in essentially the same way as new federal law, and the laws of our sister coastal states. Whether a particular RAC -- be it Alyeska or anyone else -- chooses to remain unreasonable is not something that should influence this basic public policy decision.

6. CAN'T WE JUST PROVIDE THAT OIL SPILL RACS CAN BE INDEMNIFIED FOR THEIR SIMPLE NEGLIGENCE?

Congress, and other states, have considered, and rejected, indemnification as an alternative approach to limited liability. Indemnification has three different problems:

1. When a crisis occurs, there will be no time to negotiate

an indemnification agreement. Indemnification has been used to limit the liability of hazardous chemicals cleanup contractors, since that type of cleanup is normally preceded by months of study and negotiation. However, since oil spill cleanup RACs operate in a different environment, the federal government and other states have realized that the indemnification approach doesn't work here;

2. Indemnification does not prevent a person from being sued. It merely promises that someone might pick up the bill for the lawsuit later. The point of limited liability legislation is to remove the threat of litigation itself; and

3. Under HB 196, the liability for the cleanup contractor's negligence is transferred to the spiller. However, since oil spill cleanup is often done under contract with the state, an indemnification approach would transfer that liability from the RAC to the public. The spiller, rather than the people of Alaska, should pay for the consequences of good faith cleanup actions.

7. DOES THIS BILL "WEAKEN" ALASKA'S LIABILITY LAWS?

With respect to the spiller, the bill strengthens Alaska law by making it clear that the spiller is responsible for damages caused by cleanup contractors.

With respect to the cleanup contractor, the legislation strengthens existing law by attaching consequences to the cleanup contractor's failure to substantially comply with a contingency plan which it authored, or which it agreed to follow by contract. Remember that, under existing law, the RAC is neither the holder

of, nor legally responsible for, the contents of the contingency plan. That responsibility falls on the spiller (i.e. the tanker operator). This positive aspect of the legislation was a principal reason why the Prince William Sound Regional Citizens Advisory Committee, and the Citizens Oversight Council, withdrew any objections to the legislation.

8. TRANSFERRING THE LIABILITY TO THE SPILLER IS FINE, BUT WHAT HAPPENS IF THE SPILLER IS INSOLVENT, OR CAN'T BE FOUND?

As a result of recent state and federal legislation, the possibility of inadequate compensation from the spiller has been minimized.

First, with respect to tankers, Alaska law subjects both the tanker owner/operator and the owner of the oil to unlimited strict liability for all damages. This will often result in two "deep pockets" in the event of a spill.

Moreover, all major oil handling activities in the state must post substantial financial responsibility under both federal and state law. These financial guarantees are accessible by any injured party, irrespective of the spiller's financial solvency.

Finally, there now exists a state fund to insure the adequacy of state cleanup funds. More importantly, Congress has now created a \$1 billion/incident federal fund which is available to anyone who cannot obtain satisfaction from the responsible parties themselves.

SPONSOR STATEMENT IN SUPPORT OF SB _____

("An Act Relating to Civil Liability for Actions
of a Response Action Contractor")

Over the past two years, this legislature has substantially increased the requirements for both public and private oil spill cleanup capability. Unfortunately, Alaska's existing laws both deter new businesses from entering the oil spill cleanup field, and burden existing cleanup contractors with unnecessary legal uncertainties.

An oil spill cleanup contractor works in a crisis atmosphere, where immediate judgments must often be made with incomplete information. As a result, cleanup contractors become an easy target for post-spill lawsuits -- even if the contractor had absolutely no involvement in the spill itself, and even if the contractor acted in good faith.

This legal environment has prompted new cleanup businesses like the Marine Spill Response Corporation to defer entry into Alaska. During the initial critical moments following a spill, existing contractors will be calling their attorneys, rather than promptly and unhesitantly responding to the spill.

This is not just an Alaska problem. In the wake of the EXXON VALDEZ, both the federal government and many sister states have acted to demand additional cleanup capability. In doing so, however, these other jurisdictions have recognized the need to limit the liability of innocent oil spill cleanup contractors. As

a result, Congress (in the 1990 Oil Pollution Act), and states such as Hawaii, Virginia, Florida, Pennsylvania, Delaware and California, have passed legislation protecting innocent cleanup contractors from ordinary negligence claims. Similar legislation has been unanimously passed just this month by both the Mississippi and Georgia senates.

SB_____ would function just like these other laws. Innocent oil spill cleanup contractors could not be sued for ordinary negligence; rather, that liability would be expressly transferred to the spiller, where it belongs. The oil spill response contractor would remain liable where it acts with gross negligence or intentional misconduct; caused personal injury or death; or violated an order by the on-scene coordinator, or a provision of the Alaska state or regional master plan.

Although this bill is fast becoming the general rule among coastal states, it is nothing new for Alaska where our law already protects those who respond to other kinds of disasters from simple negligence claims. It is ironic that current Alaska law singles out those who respond to oil spill disasters as warranting less protection, and therefore less encouragement, than those who respond to other types of disasters.

The failure to enact this legislation this session will have immediate consequences. Generally speaking, as the state begins implementing its new cleanup requirements, marine oil delivery operations throughout the state will find either that cleanup

contractors are unavailable, or that they are available only under unbearable insurance and indemnification terms.

This problem has already surfaced for several Alaska companies. Tesoro obtains its crude supply from Prince William Sound, and its contract tanker must rely on Alyeska to provide necessary spill response services to maintain contingency plan coverage. Even though neither Alyeska nor its owner companies would have any involvement in a tanker spill caused by a Tesoro chartered tanker, existing liability laws would probably envelop Alyeska in any spill litigation. This has prompted Alyeska to condition the availability of cleanup services on Tesoro providing \$1 billion in direct action insurance coverage -- a condition that Tesoro cannot meet.

If we fail to resolve this issue, Tesoro could lose its crude supply, and its refinery operations at Nikiski would be jeopardized. And, while Alyeska has provided Tesoro a grace period, that period expires this June.

Failure to enact this legislation will also directly result in state revenue losses. Conoco, for example, finds itself in a situation comparable to Tesoro. If Alyeska's insurance demands are implemented, Conoco estimates that the resultant increased costs will decrease the wellhead value of its North Slope production by up to \$4.00 to \$5.00/barrel. Particularly since the state takes its royalties from Conoco in kind, this could result in a \$400,000/month drop in state oil revenues.

SB_____ is very simple. It merely transfers liabilities arising from simple negligence from the innocent cleanup contractor to the spiller who will be strictly liable for the damages. Second, it is backed by substantial precedent from Congress, and a growing number of our sister states. Third, it is critically and immediately necessary in order to assure that Alaska commerce can continue to operate in a reasonable legal and commercial environment, without impairing the public's interests.

FACT SHEET ON OIL SPILL
CLEANUP CONTRACTOR LIABILITY LEGISLATION

1. What the legislation does.

When a cleanup contractor responds to an oil spill emergency, it must make snap judgments in a crisis atmosphere. Under current Alaska law, the contractor is held to a much higher standard than responders under the federal Oil Pollution Act of 1990 and the laws of other large coastal states. The result is that the Alaska responder is an easy target for lawsuits, which makes some cleanup organizations reluctant to enter Alaska. Moreover, this liability exposure causes even existing cleanup contractors to spend inordinate time and resources in obtaining legal advice and clearances from state and federal authorities before responding to a spill.

This bill would partially limit the liability of innocent oil spill cleanup contractors. Cleanup contractors would continue to be liable for gross negligence, willful misconduct, personal injuries and death; however, they would be excused from the prospect of strict liability and simple negligence claims, as long as the contractor acts in good faith.

2. Who does this bill apply to?

The bill applies only to innocent cleanup contractors -- that is, those who had no involvement in the spill itself.

3. Is this concept something new or untried?

This bill merely conforms Alaska law to recent federal law, and the laws of a growing number of coastal states (such as Virginia, Florida, Hawaii and California). The concept of limiting liability is not new in Alaska law, as evidenced by similar statutory limits on the liability of people responding to other kinds of emergencies and disasters in the state.

4. Does the bill somehow lessen the spiller's liability?

No. To the contrary, the bill makes it absolutely clear that the spiller's liability for damages includes those damages caused by those cleanup contractor's actions for which liability is limited under the bill.

5. Does the bill somehow affect a contingency plan holder's responsibility to maintain cleanup equipment?

Absolutely not. Alaska law is very tough for oil spill contingency plan approval, and the plan holder is liable for penalties and damages if it does not respond to a spill in accordance with the promises made in that plan. This bill does nothing to change that.

6. Doesn't Alaska law already provide some protection for cleanup contractors?

Unfortunately, Alaska law actually encourages litigation against the cleanup contractor. Not only does it provide no limitation for negligence suites, it leaves open the possibility that a cleanup contractor could be strictly liable -- that is, without any fault on its part whatsoever - for any damage that results from its cleanup actions. Imagine how firemen would react if they were liable for any damage caused by their firefighting, even if they did nothing wrong?

7. Isn't this a complicated problem that needs more study?

No. The question, in fact, is very simple:

WHO SHOULD PAY FOR SPILL DAMAGES:

THE SPILLER, OR THE CLEANUP CONTRACTOR?

THIS BILL
MAKES IT CLEAR THAT THE SPILLER IS RESPONSIBLE FOR ANY LIABILITY
EXCUSED FROM THE CLEANUP CONTRACTOR.

Moreover, this bill does nothing that hasn't already been done, in the same way, by Congress and other coastal states.

EXAMPLES OF RESPONSE ACTION CONTRACTOR (RAC) LIABILITY
UNDER CURRENT LAW AND PROPOSED BILL
SENATE OIL AND GAS COMMITTEE, APRIL 11, 1991

<u>Type of Incident</u>	<u>Example of Damage</u>	<u>Standard for Liability</u>		<u>Who Pays for Damage</u>	
		<u>Current Law</u>	<u>Proposed</u>	<u>Current Law</u>	<u>Proposed Law</u>
Major RAC (Alyeska; CISPRI; Clean Seas) substantially deviates from C-plan by not having proper equipment; hatchery oiled.	Hatchery ruined	Simple negligence (Possibly strict liability).	Simple negligence (RAC immune if substantially deviates from C-plan).	Tanker owner; Owner of oil; RAC	Tanker owner; Owner of oil; RAC
RAC accidentally looses boom in high seas (assume there is some negligence).	Hatchery ruined	Simple negligence	Gross negligence	Tanker owner; Owner of oil; RAC	Tanker owner; Owner of oil.
RAC, authorized under C-plan to use dispersants in Area A but not B, decides to use in Area B anyway.	Natural resources damage	Simple negligence (Possibly strict liability)	Simple negligence (RAC not immune if substantially deviates from C-plan)	Tanker owner; Owner of oil; RAC	Tanker owner; Owner of oil; RAC
Above facts, but dispersant accidentally blows into Area B.	Natural resources damage	Simple negligence	Gross negligence	Tanker owner; Owner of oil; Possibly RAC	Tanker owner; Owner of oil.
Above facts, on-scene coordinator orders RAC to use dispersant in Area B.	Natural resources damage	Simple negligence (Possibly strict liability)	Gross negligence (immunity not lost if orders of OSC).	Tanker owner; Owner of oil; Possibly RAC	Tanker owner; Owner of oil.

<u>Type of Incident</u>	<u>Example of Damage</u>	<u>Standard for Liability</u>		<u>Who Pays for Damage</u>	
		<u>Current Law</u>	<u>Proposed Law</u>	<u>Current Law</u>	<u>Proposed Law</u>
Volunteer mistakenly turns off power in bird drying facility.	Birds die	Simple negligence	Gross negligence	Tanker owner; Owner of oil; Volunteer.	Tanker owner; Owner of oil.
RAC employee rams fishing vessel.	Fishing vessel sinks	Simple negligence	Simple negligence (RAC not immune when property damage not caused by oil.)	RAC Spiller/owner if "foreseeable consequence" of spill/response.	RAC Spiller/owner if "foreseeable consequence" of spill/response.
Skipper of fishing boat (above) goes down with boat.	Skipper killed	Simple negligence	Simple negligence (RAC not immune if personal injury or death)	RAC Spiller/owner if "foreseeable consequence" of spill/response.	RAC Spiller/owner if "foreseeable consequence" of spill/response.

CAVEAT: This table is intended only to give a sense of how the liability provisions of current law and the proposed law would probably work in certain circumstances. Actual litigation in many of the above examples would depend on the particular facts, and might include legal arguments not dealt with here.

DIVISION OF LEGAL SERVICES

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MEMORANDUM

May 10, 1991

SUBJECT: Civil liability of response action contractors (CSHB 196(Fin))

TO: Representative Bill Hudson

FROM: Michael F. Ford *M.F.*
Legislative Counsel

You have asked for my comments on three amendments offered to CSHB 196(Fin). Each amendment will be addressed in turn.

1. Adding a definition of "substantially deviated" - The suggested definition is an effort to narrow the potential liability of a response action contractor by limiting responsibility for deviations to departures by "executives, managers and incident commanders". The definition, in my opinion, simply shifts the focus of argument to what is meant by "significant, unjustifiable, and unauthorized departures." The problem of defining a term such as "substantially deviated" is underscored by this type of amendment. Again, my advice is to not attempt to define the term.
2. Changing the period of limited liability to 60 days - This amendment is a policy question, and does not in itself pose any legal problems.
3. Include language regarding amendment of AS 46.03.030(1) and creating a cleanup standard - This amendment does not appear to make any substantive changes. If the language has to be included, I would advise placing this in an intent section of the bill and not within Sec. 46.03.825(a).

Please contact me if you have further questions.

MFF:lmb
91-181.lmb

DIVISION OF LEGAL SERVICES

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MEMORANDUM

April 29, 1991

SUBJECT: Proposed amendment to CSHB 196 (Judiciary)
(Work Order No. 7LS0797J.2, 4-24-91)

TO: Representative Johnny Ellis

FROM: Michael F. Ford *MF*
Legislative Counsel

You have asked whether there are any constitutional problems with the above-referenced amendment to CSHB 196 (JUD). This amendment allows a person who contracts with an oil spill response action contractor to show financial responsibility using any of the forms allowed by AS 46.04.040(e). The amendment does not apply to existing contracts.

SHORT ANSWER. While the amendment requires examination under due process provisions, it does not appear to be unconstitutional under those or other provisions of the federal or state constitutions.

DISCUSSION. Art. I, sec. 7, of the state Constitution and art. 14, sec. 1, of the United States Constitution prohibit the state from depriving a person of life, liberty, or property without due process of law. Under the proposed amendment, the property or liberty being affected is the response contractor's right to require a specific form of demonstrated financial responsibility.

In Alaska substantive due process would be denied in this case if the amendment does not bear a reasonable relationship to a legitimate governmental purpose. Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough, 527 P.2d 447, 452 (Alaska 1975).

There is a legitimate governmental purpose behind the amendment. That purpose is to prevent a response contractor from setting a contractual indemnification term that is too onerous for the smaller user. This amendment arguably helps to equalize their respective contracting positions and make response contractors available to the smaller service users.

Representative Johnny Ellis
April 29, 1991
Page 2

On its face this amendment appears to bear a reasonable relationship to a legitimate state goal. Therefore, the amendment does not appear to violate the due process provisions of the state or federal constitutions. There does not appear to be any significant basis to believe that the amendment would violate other constitutional provisions.

If I may be of further assistance, please advise.

MFF:pl:gc
91-310.plm

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MEMORANDUM

April 18, 1991

SUBJECT: Response Action Contractors
(CSHB 196 (Res))

TO: Representative Bill Hudson

FROM: Michael M. Ford *MM - F*
Legislative Counsel

Enclosed is an amendment requested by Andy Spear. It limits the extent to which an oil spill response action contractor can shift to an oil spiller the contractor's liability for damages caused by the contractor during cleanup of a spill.

As I understand it, the public policies behind this limitation are at least twofold: (1) to help keep oil industry companies in business (by prohibiting contractors from setting terms that are too onerous); and (2) to keep some incentive in place for the contractor to act with care when performing its response action duties.

However, I have one caveat to mention: inherent in any approach that limits agreements between parties where one party provides services to another is that the limit can simply cause the services to become unavailable. If enough response action contractors do not "like" the limitation of the enclosed amendment, the contractors can simply refuse to contract.

Please let me know if I can be of further assistance.

MFF:pl:gc
91-274.plm

Enclosure

DIVISION OF LEGAL SERVICES

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MEMORANDUM

January 28, 1991

SUBJECT: Response action contractor liability (Work Order 7LS-0552)

TO: Representative Bill Hudson

FROM: Michael F. Ford *M.F.*
Legislative Counsel

You have asked for our opinion on legislation proposed by Tesoro Alaska Petroleum Company, regarding the liability of oil spill response action contractors. The proposed legislation would narrow the potential liability of a response action contractor with respect to a release or threatened release of oil, by eliminating liability for negligence in most instances.

Under AS 46.03.823, the potential liability of a response action contractor is generally limited to negligence, gross negligence and acts of intentional misconduct. This section also establishes a negligence standard that a claimant must show was violated in order to prove liability, and contains several exceptions to the general rule of liability. The exceptions are specific instances in which the legislature has decided that the general rule on liability should not apply.

The proposed legislation would narrow the liability of a response action contractor who responds to a release or threatened release of oil by limiting the liability to (1) gross negligence, (2) intentional misconduct, and (3) acts or omissions that would result in liability, even if the contractor had not carried out a response action. Therefore acts of negligence would not result in liability, unless the act or omission would be negligent even if the contractor had not carried out a response action. Finally, you should note that the proposed new section on oil spill response action contractors does not contain the exceptions to the general rule of liability written into law as AS 46.03.823(b)(2), (c), (d), (e), and (f).

The proposed legislation also raises a constitutional equal protection issue. If the exception for oil spill response contractors was enacted, there would be two different rules of liability, one for oil spill response contractors and one for all other response contractors. While this type of distinction does not always offend the constitutional equal protection clause, there must be a rational reason to distinguish between similar

Representative Bill Hudson
January 28, 1991
Page 2

groups in this manner. This may be the kind of distinction that would not survive a court challenge based on the equal protection clause. See Turner Construction Co. v. Scales, 752 P.2d 467 (Alaska 1988).

Please contact me if you have further questions.

MFF:gc
91-039.glc

STATE OF ALASKA

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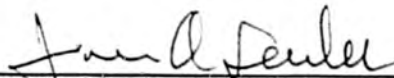
March 11, 1991

POSITION PAPER

HB 196

House Bill 196 proposes to shift the liability for simple negligence from an innocent oil spill response action contractor (RAC) to the party responsible for the spill so long as the RAC's act or omission is not contrary to a response plan or an order of the Federal or State on-scene coordinator.

The Department of Environmental Conservation supports HB 196 for the reasons set out in Section One of the Legislation, Findings and Purpose.



John A. Sandor
Commissioner



SENATE SPECIAL COMMITTEE ON
OIL AND GAS

DATE: 4/2/91

Limited liability of oil spill contractors

SIGN - IN

NAME**ADDRESS**

(MAILING) & (ZIP)

PHONE

REPRESENTING

**DO YOU WANT
TO TESTIFY?**

[illegible]