

SCOMM

78:51



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

April 11, 1991

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

Greetings:

It has come to my attention that some of the major transporters of bulk petroleum products are in the process of reviewing their responsibilities under Ch. 191, SLA 1990, to prepare contingency plans and to clean up spills of oil and other hazardous substances by June 1, 1991. It is my understanding that the cost of preparedness, because of the lack of response action contractors willing to operate in Alaska, among other aspects of the Act, is so high that these transporters are reconsidering the economics of serving Alaska distributors.

We must quit the overall belief that spill responsibilities are limited to the multinational corporations (the worst possible event while ANWR and other national events towards wetlands and coastal exploration are on the Congressional minds would be a airlift or river barge loaded with fuel would cause a major spill and no clean up contractor available). The Juneau boat harbor is a situation that did happen and is documented in the following paragraph.

Last weekend the group here in Juneau that is organized to respond to oil spills was called out by the Coast Guard to clean up a spill caused by the sinking of a vessel in the small boat harbor. The group responded, but the next day they met to consider whether or not they would respond in the future because of the liability imposed on response action contractors under Ch. 191. I do not know what their decision was, or if they have reached a decision, but their concern may be an indicator that cooperatives organized to respond to spills either may refuse to respond to spills by persons who are not members of the cooperatives or that cooperatives may be forced to disband, leaving no organization available to respond to spills.

April 11, 1991

Emergencies could even cause a special session, which may be required if amendment cannot be achieved in this session and fuel supplies, especially for those areas of the state that are not equipped to clean up spills, are disputed or not delivered to those communities dependent upon bulk shipments, including the communities on the Interior river systems.

I am also concerned that even if the bulk transporters of petroleum products continue in the Alaska trade, the price of fuel may rise severely because of the necessity to cover the increased costs of spill response. This could have a major impact on the prices of home heating fuel, automobile gasoline and diesel fuel and fuel for electrical generation equipment throughout Alaska, but especially in the small, rural communities. If fuel deliveries are disrupted, the fishing season could be seriously affected.

I hope that you will look carefully at this problem to make sure that we are able to maintain fuel shipments and provide adequate spill response capability throughout the state at the same time.

Respectfully,

A handwritten signature in cursive script that reads "Bruce Kendall Sr".

Bruce B. Kendall, Sr.
Legislative Liaison

THE DISCUSSIONS



...Tesoro

...ADEC

...Citizens Oversight Council

...PWS Regional Citizens Advisory Council

...Conoco

COMPARISON OF...
CSHB 196 and PROPOSED SUBSTITUTE

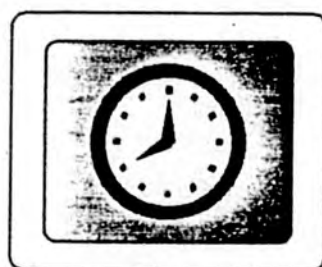
Basic Standard of Care

Gross negligence

Gross negligence

Time Limit on Limited Liability

None



30 days

Violation of Contingency Plans

Grossly negligent violation

Negligent and substantial
violation

Non-oil property damage

Gross negligence

Negligence

If not protected by gross negligence standard, then...

Ambiguous

Negligence

Three Types of
Cleanup Contractors



No involvement w/plan

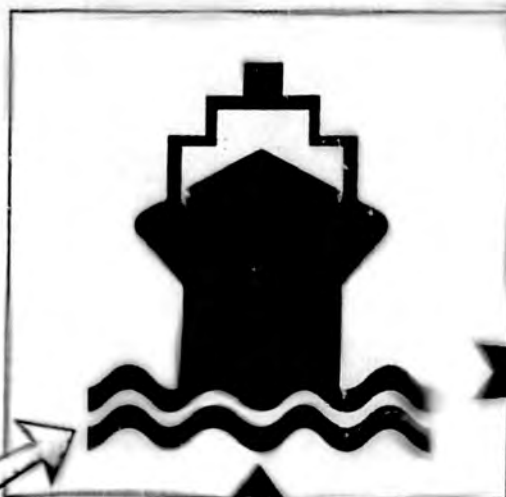


Contracted to
follow plan



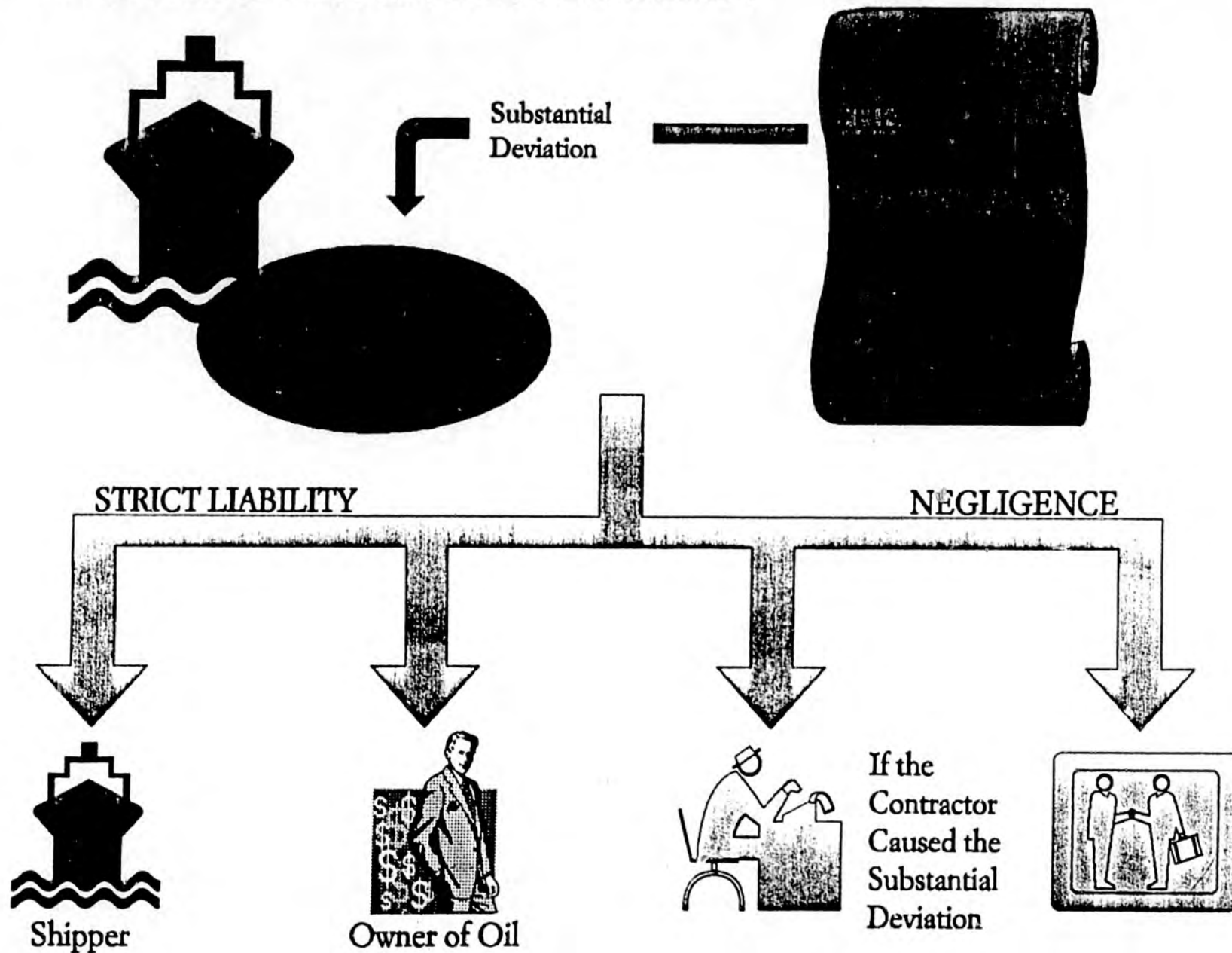
Authored plan

THE SHIPPER



ADEC

LIABILITY TREE FOR 'SUBSTANTIAL DEVIATION' FROM A CONTINGENCY PLAN





Interoffice Communication

To D. L. Bowler
 From J. S. Haley
 Date February 26, 1991
 Subject Increased Cost to Milne Point Unit due to Alyeska's Oil Spill Response Service Agreement

Pursuant to a request from your office we have attempted to develop the additional costs to Conoco, the Overriding Royalty Interest Owners and the State of Alaska for Milne Point Unit production as a result of Alyeska's Oil Spill Response Agreement. The weighted average additional costs (which reduces the net-back value by an equal amount) are estimated as follows:

	Increased costs/ (Reduced Net Back to Unit)
February 1991	\$3.69/Bbl
March 1991	\$0.39/Bbl
April 1991	\$0.10/Bbl*

*This number is not expected to continue in the future as it reflects a cycle in the markets that may not often be repeated. We expect this number to be higher in May and thereafter even under existing sales arrangements.

The above figures represent the volume weighted increased costs. These numbers represent our best estimate of the increased costs based on current contracts, some of which are tenuous at best, given the circumstances. We have been fortunate in selling our March and April production under terms that closely approximate pre-November 1990 sales. However, if we lost our best surviving market the cost per barrel could increase \$4.00 to \$5.00 per barrel or more over pre-November sales contracts. Our current market is very precarious and may be viewed as only a 30 day arrangement. Thus, it is imperative that we get some relief from the Alaska legislature to have any assurances that net-backs for Milne Point Unit crude are not significantly reduced because of implementation of Alyeska's Oil Spill Response Service Agreement.

The State of Alaska stands to share improved net-backs by the passage of the "Good Samaritan" law for companies shipping oil through Prince William Sound.

J. S. Haley
 JSH:tt
 cc: J. R. Sverfoid
 D. F. Heinzer



SIERRA CLUB

CALIFORNIA

August 31, 1990

Contact: Gordon E. Hart (916 444-6906)

FOR IMMEDIATE RELEASE

SIERRA CLUB APPLAUDS OIL SPILL AGREEMENT

Sierra Club California announced today its strong support for the final agreement on the Lempert-Keene Oil Spill Prevention and Response Act. The historic agreement, supported by the legislative leadership, the oil industry, and environmentalists, is expected to be passed in final form by the legislature today.

"California's precious coastline deserves protection from the devastation of oil spills. This legislation provides it," said Sierra Club legislative representative Gordon E. Hart. "Californians can be proud that they will now have the most stringent and comprehensive law of its kind in the country."

"Assembly Member Lempert, Senator Keene, and the leadership of both houses deserve much credit for putting together this very difficult agreement," Hart continued. "We are also very pleased that, despite our serious differences, the oil industry and the environmental community were able to agree on such a strong coastal protection measure."

-30-

A 18 Sunday, June 10, 1990 ★ ★ ★

San Francisco Examiner



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Oil spill groups need legal assist

CONSIDER WHAT might occur if a fire department responding to a blaze could be sued for damages resulting from its firefighting. A lawyer might ride on every truck. And a no-fault contract might have to be negotiated before a hose was unrolled.

Of course this would be silly, not to mention counterproductive. Yet such is the problem being confronted by organizations formed to respond to oil spills. Cleanup consortiums such as Clean Bay in the Bay Area and Clean Seas in Southern California remain under the threat of lawsuits. In Sacramento, legislators now are debating proposals that would add so-called Good Samaritan language to protect oil-cleanup groups from litigation except in situations of overt misconduct or negligence.

This dispute pits the oil industry, and environmental groups such as the International Bird Research and Rescue Center and the Coast Guard, against the California Trial Lawyers Association. There are two major oil spill bills now moving toward passage, AB 2603 authored by Assemblyman Ted Lempert, D-San Mateo, and SB 2040 by State Senator Barry Keene, D-Mendocino. Neither addresses this issue. It is essential that "Good Samaritan" sections be added.

The trial lawyers contend that the distinction between spillers and responders is not as clean as portrayed, since the responding organizations often are nonprofit entities created by the oil shippers. It has

been charged that laxness on the part of Alyeska, an oil company-owned cleanup company, contributed to damage caused by the grounding of the Exxon Valdez in Alaska.

That may sound legally sensible, but it is not a practical argument from the public's point of view. Rapid response is one of the keys to successful responses. Time will cause the spill to worsen. Yet the threat of lawsuits may cause delay by cleanup crews until responsibility is made clear.

But while some are oil company-owned, other groups are not. The Ventura County Commercial Fishermen's Association created FORT — the Fisherman's Oil Response Team — to protect the sensitive Channel Islands and nearby coastal communities. Through FORT, fishermen on their own boats can be called upon by clean-up coordinators during an emergency. And they can be on the scene immediately, not days later. But FORT and its fisherman cannot place themselves in a position to accept unlimited liability.

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

SPILL RESPONSE CONTRACTOR LIMITED LIABILITY PROPOSAL

RESPONSE ACTION CONTRACTOR CURRENT LIABILITY EXPOSURE	PROPOSED LEGISLATION EFFECT
--	--

GROSS NEGLIGENCE

INTENTIONAL ACTS

SIMPLE NEGLIGENCE

PERSONAL INJURY

DEATH

REMOVES:

SIMPLE NEGLIGENCE

And clarifies
that the spiller
is **STRICTLY LIABLE**
for damages that
are the result of
the limited immunity
granted the
response action
contractor

**STATES WITH ACTION SINCE
1990**

**LIMITING THE SPILL RESPONDER
FROM SIMPLE NEGLIGENCE
LIABILITY**



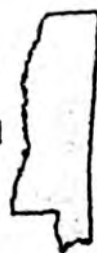
California:
Provides immunity for
first 60, 90 days
after the spill.
"Lempert-Keene Oil Spill
Prevention & Response Act"
of 1990 (Cal. Code 8670.56.6)

Virginia:
Sec.62.1-44.34:18 D.
1990



Delaware:
Senate Bill 6
Enacted 2/91

Mississippi:
Bill passed
Senate 2/91



Georgia:
Passed
Senate
61-0
2/91



Hawaii:
Act 298, 1990



Florida:
Chapter 90-54
1990



**OIL SPILL RESPONSE
ACTION CONTRACTOR
PROPOSED LEGISLATION**

**DOES THE BILL AFFECT A CONTINGENCY PLAN
HOLDER'S RESPONSIBILITIES TO MAINTAIN
CLEANUP EQUIPMENT?**

**No. Alaska law on spill contingency plans is unaffected.
The plan holder remains liable for penalties and damages
if it does not respond to a spill in accordance with the
promises made in that plan.**

**OIL SPILL RESPONSE
ACTION CONTRACTOR
PROPOSED LEGISLATION**

WHO DOES THE BILL APPLY TO?

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

**OIL SPILL RESPONSE
ACTION CONTRACTOR
PROPOSED LEGISLATION**

DOES THE BILL SOMEHOW LESSEN THE SPILLER'S LIABILITY?

No! The bill makes it absolutely clear that the spiller's liability for damages includes any damages caused by the cleanup contractor's action for which liability is limited under the bill.

GROSS NEGLIGENCE STANDARD FOR CLEANUP CONTRACTORS



- Enacted



- Passed Both Houses

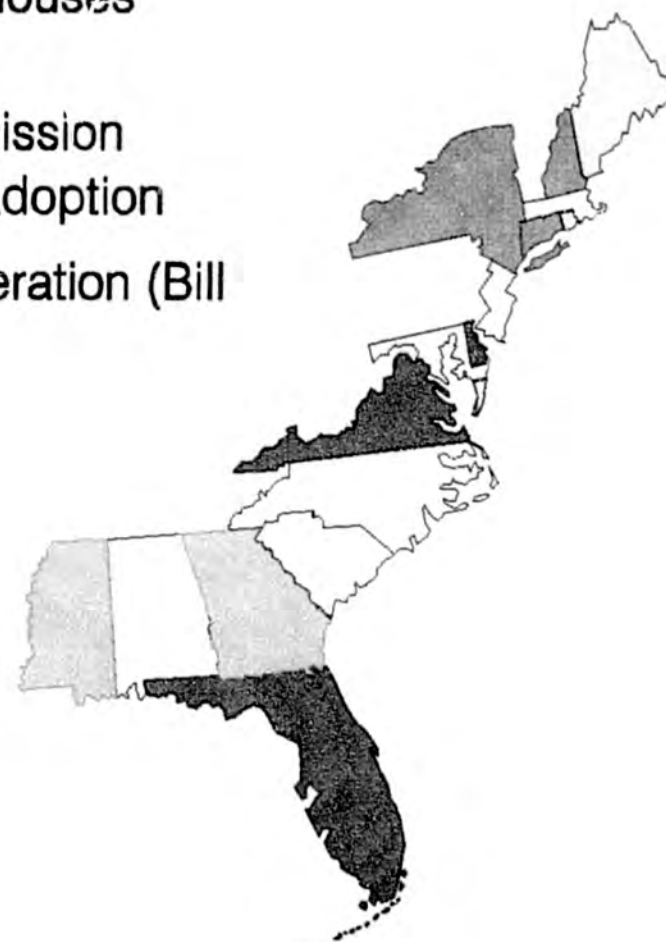
- Special Commission
Recommends Adoption



- Active Consideration (Bill
Introduced)



- No Activity



ALASKA'S POLICY ON EMERGENCY RESPONDERS:

AS 09.65.090...A person at a hospital or any other location **WHO RENDERS EMERGENCY CARE OR EMERGENCY COUNSELING TO AN INJURED, ILL, OR EMOTIONALLY DISTRAUGHT PERSON** who reasonably appears to the person rendering the aid to be in immediate need of emergency aid in order to avoid serious harm or death is not liable for civil damages as a result of an act or omission in rendering emergency aid.

...This section does not preclude liability for civil damages as a result of **GROSS NEGLIGENCE OR RECKLESS OR INTENTIONAL MISCONDUCT.**

AS 09.65.091...A person who provides equipment or services on the request of a police agency, fire department, rescue or emergency squad, or other governmental agency **DURING A STATE OF EMERGENCY DECLARED BY AN AUTHORIZED REPRESENTATIVE OF THE STATE OR LOCAL GOVERNMENT** is not liable for the death of or injury to any person or damage to any property caused by that person's actions, except when the trier of facts finds that the person acted **INTENTIONALLY, RECKLESSLY, OR WITH GROSS NEGLIGENCE.**

CLEANUP CONTRACTOR LIABILITY FOR DAMAGES CAUSED BY CLEANUP OPERATIONS

CSHB 196 (Resources) and Federal Law vs. Existing Alaska Law

Liability Under Existing Alaska Law and
CSHB 196(R) After 15/30 Days

Liability Under CSHB(R) 196 for First 15/30
Days and Federal Law

Not
Even
Simply
Negligent

Simply
Negligent

Grossly
Negligent

Substantial
Violation
Of
Contingency
Plan

Violated
OSC
Order

Intentionally
Caused
Harm

Caused
Personal
Injury
or
Death

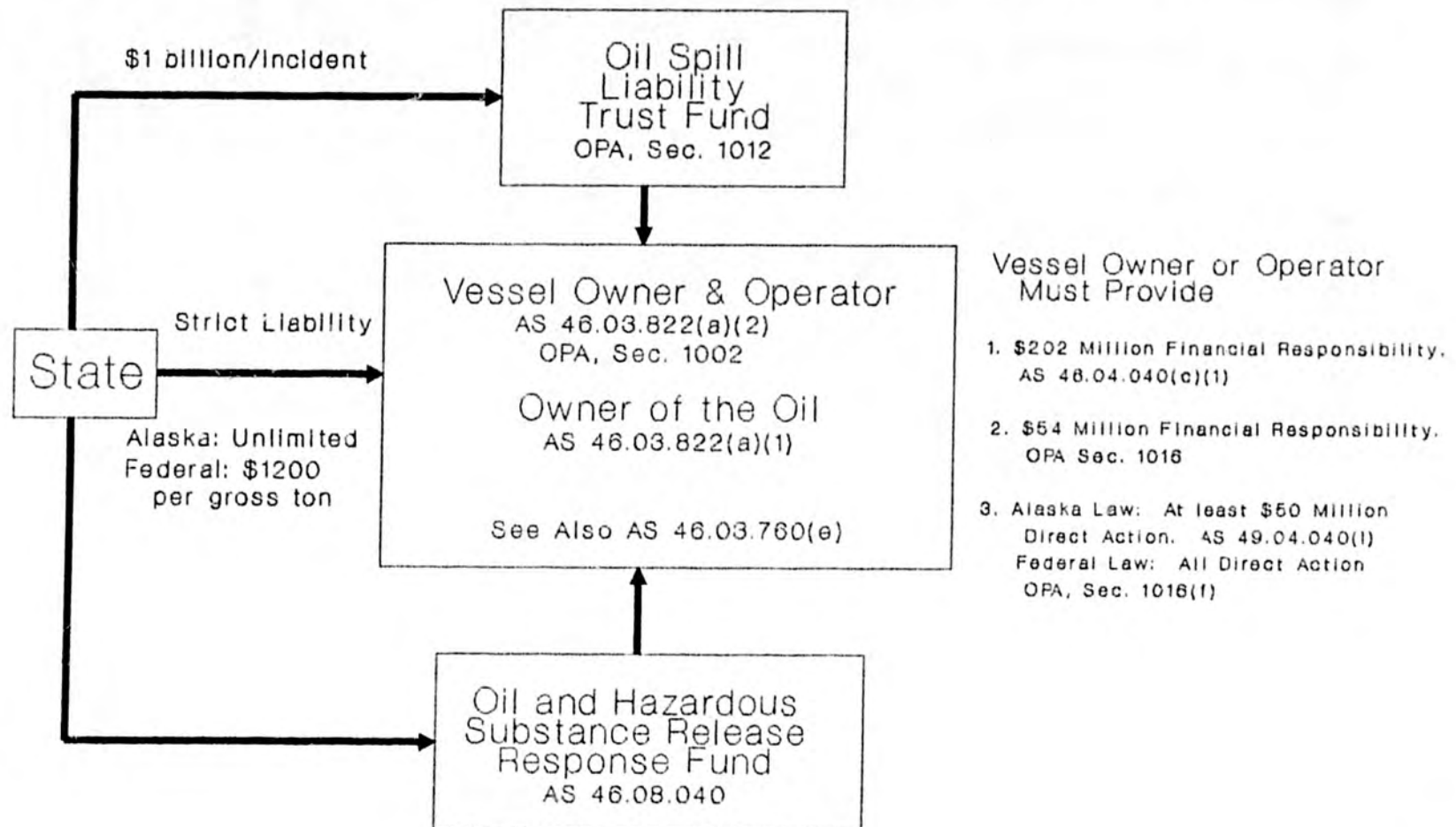
Note:
Arguable
Liability
Here Under
Existing Law

Note: Vessel and Oil Owner Both Expressly Liable
for Simple Negligence of Cleanup Contractor
Under CSHB 196, Sec. 3.

Vessel Owner and Operator Expressly Liable for
Simple Negligence of Cleanup Contract Under
Sec. 4201(a)(c)(4)(C) of OPA

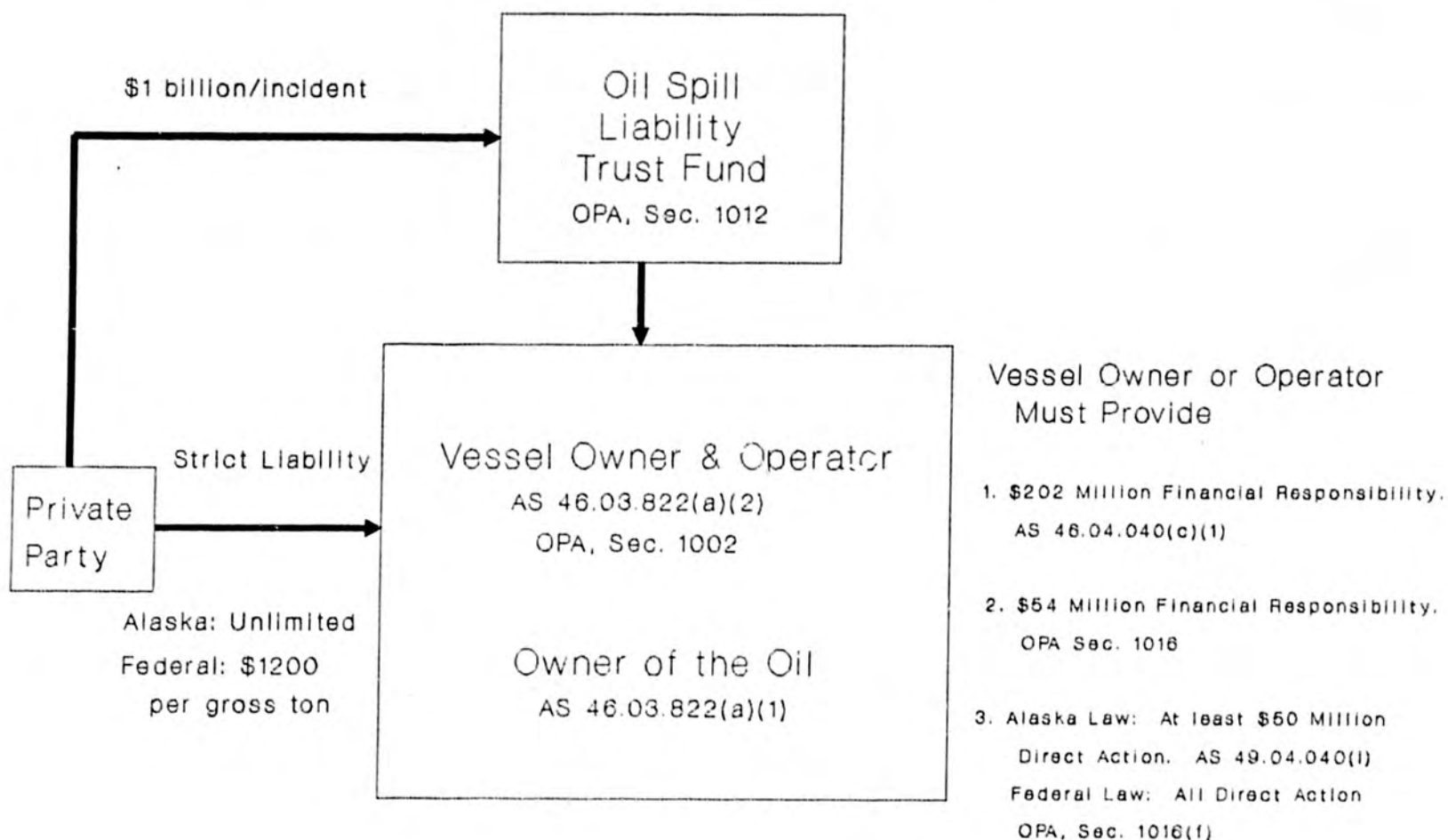
RECOVERY OF CLEANUP COSTS CRUDE SPILL FROM 90,000 DWT OIL TANKER

Under Both Existing Law and CSHB 196



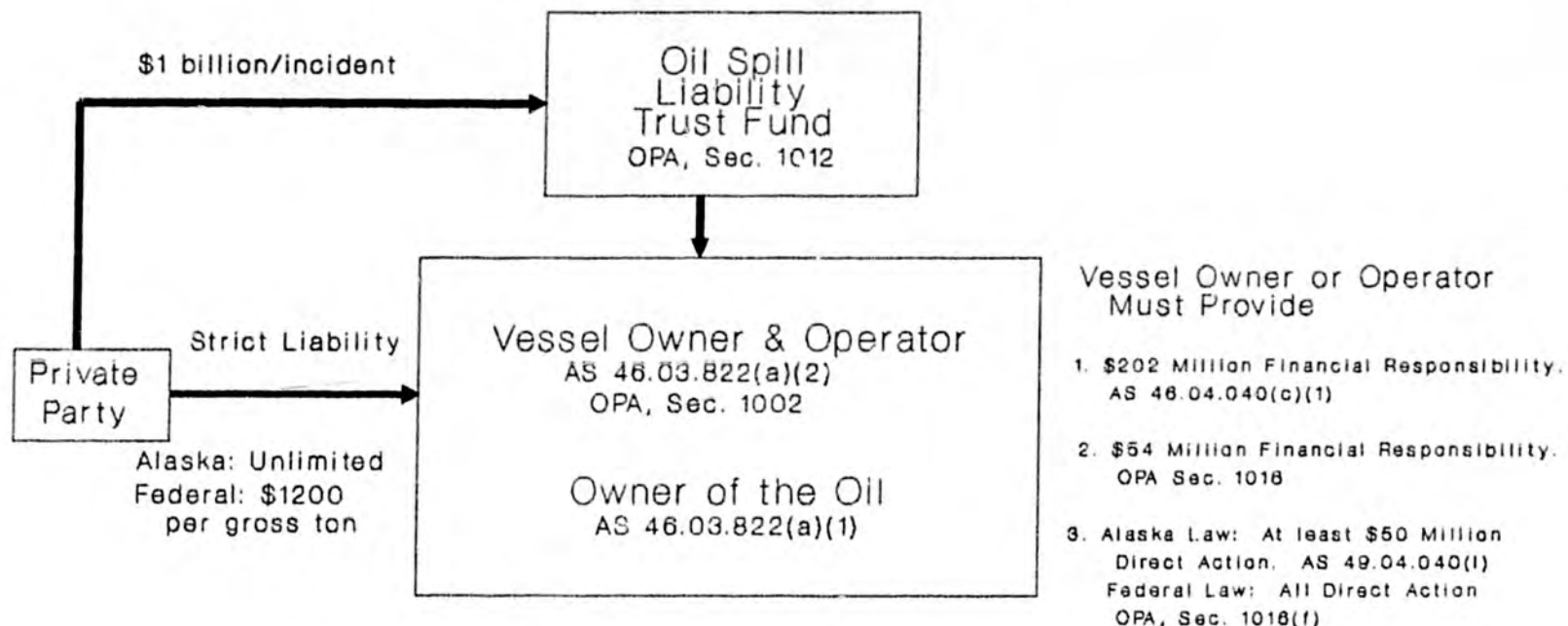
DAMAGE RECOVERY CRUDE SPILL FROM 90,000 DWT OIL TANKER

Under Both Existing Law and CSHB 196



DAMAGE RECOVERY FOR CLEANUP CONTRACTOR'S SIMPLE NEGLIGENCE*

Under CSHB 196



Note: Vessel and Oil Owner Both Expressly Liable
for Simple Negligence of Cleanup Contractor
Under CSHB 196, Sec. 3.

Vessel Owner and Operator Expressly Liable for
Simple Negligence of Cleanup Contractor Under
Sec. 4201(a)(c)(4)(C) of OPA.

•Based on a Crude Spill From 90,000 DWT Oil Tanker

RAC Liability: Summary of Recent Legislation

State	No Liability for Negligence	Time Limit for Limited Liability	Liability for Gross Negligence	Liability for Intentional Misconduct	Liability for Personal Injury or Wrongful Death	Liability for Not Following Nat. Contingency Plan or Lawful Authority	Responsible Party Liable for RAC Negligence
HB 199	X		X	X	X	X	X
Federal	X		X§	X	X	X	X
California	X†	X	X	X	X	X	X
Delaware	X		X	X	X		X
Florida	X		X	X	X#	X	X
Georgia	X		X	X	X	X	X
Hawaii	X		X	X	X#	X	
Miss.	X		X	X	X	X	X
Texas	X		X	X	X#	X	
Virginia	X		X§	X	X	X	X
Wash.	X†		X	X	X#		

† Good faith requirement.

§ Act of God, act of war, and act of third party are defenses.

* Must be certified by State.

Personal injury and wrongful death not specifically mentioned.

Simple Negligence:

"A person is negligent if he does not use reasonable care. Negligence may result from action or inaction. A person is negligent if he does not act as a reasonably careful person would act under similar circumstances. In this case you [the jury] must decide whether or not defendant used reasonable care under the circumstances."

...Wilson v. State, 669 P.2d 1292, 1295 (Alaska 1983)

Gross Negligence:

"[M]ost courts consider that 'gross negligence' falls short of a reckless disregard of consequences, and differs from ordinary negligence only in degree, and not in kind...[i]t signifies more than ordinary inadvertence or inattention, but less than conscious indifference to consequences; and that it is, in other words, merely an extreme departure from the ordinary standard of care."

...Storrs v. Lutheran Hospitals, 661 P.2d 632, 634, n. 1, (Alaska 1983)

MEMORANDUM

State of Alaska

Depart

to Messrs. Treadwell
Deputy Commissioner
Department of Environmental Conservation

DATE February 5, 1981

D. Vogt
From L. Smith

663-91-0255

TEL NO:

465-3600

SUBJECT:

Tesoro's materials on
response action
contractors

FROM:

Douglas K. Vertz
Assistant Attorney General
Juneau

As you requested, I have reviewed the materials circulated by Jon Tillinghast on behalf of Tesoro, relating to oil spill response action contractors. In their present form, Tillinghast's suggestions raise serious problems.

Background. Ordinarily any person is liable for his or her own conduct that injures others, and the standard for establishing liability is whether the conduct is negligence. The common law has for centuries recognized a higher standard for conduct involving ultrahazardous activities, namely that the person is "strictly" liable for the injuries, i.e., liable for whatever injuries that person caused, whether he was negligent or not. In Alaska law this principle is codified at AS 46.03.822, which makes a variety of persons strictly liable for oil spill injuries.

In 1989 representatives of response action contractors (RACs) persuaded the legislature to modify this strict liability so that they would be liable for injuries caused by their own actions only if they were negligent (or engaged in intentional misconduct). In 1990 the RACs again persuaded the legislature to make it more difficult for injured parties to gain damages from RACs. Now, through Mr. Tillinghast, they appear to want to limit their liability even more thoroughly by limiting it to instances of gross negligence or willful misconduct, so that even ordinary negligence would not apply to them.

The need for further change. Tillinghast's analysis is flawed in some important respects. Its first basis for justifying yet more dilution of RAC liability for their own actions is premised on the assertion that insurance may not be available for response action contractors, and so RACs may be unwilling to respond to spills in Alaska. But in fact there has never been a spill in Alaska for which RACs were unavailable to respond. The cost of insurance always varies with the extent of the risk; that is the nature of the business, and it is to be expected that the party contracting with a RAC will pay higher fees when the risk is greater. There is nothing novel in that situation. But until there is concrete proof that RACs are not available for response to

Mead Treadwell
Deputy Commissioner
663-91-0255

February 5, 1991
Page 2

Alaskan spills, this justification is not substantial.

The second justification is that "there is no sound reason for ever holding an innocent RAC strictly liable for damages from an oil spill." But innocent RACs are already immune from liability; a person is only liable, under current law, when his or her own acts or omissions cause injuries. Moreover, the suggested remedy is not to go from strict liability to an ordinary negligence standard (strict liability was already removed in most circumstances in 1989), but to remove liability even when the RAC is actively negligent.

The third justification is that RACs often operate in a crisis atmosphere where decisions must be made and carried out quickly, so, the theory goes, it is not appropriate to make the RACs liable for their own negligence. But the fact that cleanup operations are conducted in a crisis atmosphere part of the time (much of a cleanup is conducted long after the initial spill) is already taken into consideration when the negligence standard is applied. Negligence is found only when it would be unreasonable to act as the liable party did, in the circumstances, so the fact of a crisis atmosphere would inevitably be part of the calculation. Moreover, at the request of the RACs, the 1989 legislature explicitly stated,

To show negligence by a response action contractor, a claimant must show that the acts or omissions of the contractor under the response action contract were not in accordance with generally accepted professional standards and practices at the time these response action services were performed. (AS 46.03.823(a).)

Thus the RACs must only perform up to the standards of their own industry in the circumstances of a spill, not to some other higher definition of reasonability.

In short Mr. Tillinghast's materials don't show any real justification for further immunity of RACs from liability for their own acts, except the natural desire to reduce one's own exposure.

The downside for the public. The obvious flip-side to immunizing a RAC from liability for its own actions is that the cost of the injury must be born by someone else. The someone else is most likely to be the injured party himself, e.g., a fisherman, small tourist operator, or subsistence harvester. Mr. Tillinghast skirts this problem by the disingenuous declaration that the original spiller would still be liable for all damages, including those caused by contractors responding to the spill. We believe

Mead Treadwell
Deputy Commissioner
663-91-0255

February 5, 1991
Page 3

this is flat wrong. It is standard law that a principal is not responsible for injuries committed by an independent contractor unless the principal actively directs the contractor's actions. That leaves ample room for the responsible party to argue that it has no derivative liability for injuries caused by its response contractor. It also ignores that fact that many times the RAC will not be the contractor of the party responsible for the original spill, but will be engaged by a third party, usually a government; and that when the responsible party cannot be found or refuses to cooperate, the response contractor will always be engaged by someone else. In short, because the responsible party will frequently have grounds to deny liability for injuries caused by a RAC, there exists a substantial possibility that those injuries will not be compensated for at all if the RAC is given immunity from them.

The downside for the State and federal governments. One of Mr. Tillinghast's complaints is the part of the 1990 law that grants RAC's immunity from strict liability only if their actions are not contrary to a response plan or order by the state or federal agency with jurisdiction. Contrary to Mr. Tillinghast's assertion, this provision was carefully crafted by the legislature with the participation of both his clients and the State, and was itself a significant compromise from what the State originally wanted. The provision is necessary to insure that a RAC cannot ignore or violate the unified command structure set up for a spill. Like unauthorized actions which cause injuries, and then escape liability for its rogue acts. A similar provision was built into the recent federal legislation. The requirement recognizes that if one party, of all those participating in a spill response, is to be immunized from ordinary liability rules, that party should be required to act with maximum responsibility by being subject to the orders of the spill response command as are all the other parties to the spill response. If this requirement for receiving immunity were to be deleted, the state and federal on-scene commanders would have lost their ability to insure that the RACs work with and not contrary to the overall effort.

The federal law. Mr. Tillinghast lays great stress on the fact that the new federal Oil Pollution Act grants RAC's immunity from liability for damages caused by their own actions unless they were grossly negligent or engaged in wilful misconduct. But he fails to point out that this decision is ameliorated by a) requiring that the RAC act consistently with the National Contingency Plan and any applicable response plan; and b) requiring that the responsible party (most often the original spiller) be liable for any costs or damages for which the RAC is immunized. (§4201(a).) Without these features the federal law would have been grossly unfair to injured parties, and yet his proposal does not include them.

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The need for further change: Tillinghast's analysis is flawed in some important respects. Its first basis for justifying yet more dilution of RAC liability for their own actions is premised on the assertion that insurance may not be available for response action contractors, and so RAC's may be unwilling to respond to spills in Alaska. But in fact there has never been a spill in Alaska for which RAC's were unavailable to respond. The cost of insurance always varies with the extent of the risk; that is the nature of the business, and it is to be expected that the party contracting with a RAC will pay higher fees when the risk is greater. There is nothing novel in that

situation. But until there is concrete proof that RAC's are not available for response to Alaskan spills, this justification is not substantial.

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caused by its response contractor. It also ignores that fact that many times the RAC will not be the contractor of the party responsible for the original spill, but will be engaged by a third party, usually a government; and that when the responsible party cannot be found or refuses to cooperate, the response contractor will always be engaged by someone else. In short, because the responsible party will frequently have grounds to deny liability for injuries caused by a RAC, there exists a substantial possibility that those injuries will not be compensated for at all if the RAC is given immunity from them.

The downside for the State and federal governments. One of Mr. Tillinghast's complaints is the part of the 1990 law that grants RAC's immunity from strict liability only if their actions are not contrary to a response plan or order by the state or federal agency with jurisdiction. Contrary to Mr. Tillinghast's assertion, this provision was carefully crafted by the legislature with the participation of both his clients and the State, and was itself a significant compromise from what the State originally wanted. The provision is necessary to insure that a RAC cannot ignore or violate the unified command structure set up for a spill, take unauthorized actions which cause injuries, and then escape liability for its rogue acts. A similar provision was built into the recent federal legislation. The requirement recognizes that if one party, of all those participating in a spill response, is to be immunized from ordinary liability rules, that party should be required to act with maximum responsibility by being subject to the orders of the spill response command as are all the other parties to the spill response. If this requirement for receiving immunity were to be deleted, the state and federal on-scene commanders would have lost their ability to insure that the RAC's work with and not contrary to the overall effort.

The federal law. Mr. Tillinghast lays great stress on the fact that the new federal Oil Pollution Act grants RAC's immunity from liability for damages caused by their own actions unless they were grossly negligent or wilful misconduct. But he fails to point out that this decision is ameliorated by a) requiring that the RAC act consistently with the National Contingency Plan and any applicable response plan; and b) requiring that the responsible party (most often the original spiller) be liable for any costs or damages for which the RAC is immunized. (§4201(a).) Without these features the federal law would have been grossly unfair to injured parties, and yet his proposal does not include them.

Other states' laws. We are aware of no other state which has granted RAC's the scope reduced liability proposed here, without also adding ameliorating features. We also point out that Mr. Tillinghast's statement that a majority of states have taken steps to avoid placing strict liability on RAC's is simply wrong; most states follow the commonlaw rule for ultrahazardous activities, that a person is strictly liable for

injuries he or she causes.

The proposed amendments. The RAC's proposed amendment are faulty for a number of reasons, some outlined above. They do not provide that the liability for which the RAC would be immunized would fall on the party responsible for the initial spill, as does federal law, so that ultimately the injured person could find the damage uncompensated by anyone. The RAC would be immunized from liability for rogue actions taken contrary to applicable plans and orders of the agency with control of the situation. It takes the normal starting point for injuries from hazardous activities -- strict liability -- and goes beyond the dilution already enacted into law, holding the RAC's liable only when they are shown to be negligent, and instead holding them liable only when they are grossly negligent or engage in wilful misconduct. Moreover, the standard for gross negligence is "criminal negligence," so a RAC could be required to pay for the damage it causes to others only when it had in fact committed a criminal act. (That standard raises yet another problem, since insurance policies will not pay claims arising out of criminal or intentional acts, so under the proposal there would never be a RAC liability which an insurer would pay.)

In summary, there may be some policy reasons to relieve some classes of persons from strict liability and impose a negligence standard instead, as the legislature has already done. But there does not appear to be any real justification for diluting RAC liability even farther so that they are liable for only criminal conduct. If a policy decision to do so were to be made, it would only make sense if a) the RAC's were required to follow orders of response plans, contingency plans, and onscene commanders; and b) the party responsible for the original spill were made liable for the damages for which the RAC is immune. But the RAC's should be given the heavy burden of showing why they need yet a further break, beyond what they received in 1989 and 1990, when it may come at the expense of individual Alaskans who are injured by the RAC's actions.



Citizens' Oversight Council on Oil and Other Hazardous Substances

3111 C Street, Suite 150 • Anchorage, Alaska 99503
(907) 561-2101 • 562-4376 (FAX)

Andy: Here are some questions to get answers on the record to. - M.B.

1. Why is this necessary in addition to last year's change?
2. What change in circulation prompted a change over last year's version?
3. Can they give some history or examples to support the findings?
- i.e. Where have there been unreasonable lawsuits; what judgements have been obtained against RCACs that would have been immunized under this bill; where have RCACs been discouraged from responsibility?
4. Who controls the RCACs in their field response?
5. What plan does the RCAC follow?
6. Who does RCAC answer to?
7. Why should immunity last beyond the immediate response phase?
8. Why should a spiller bear the risk of a RCAC unreasonably fulfilling a directive?
9. Won't there be substantially higher insurance for potential spillers if they have to cover acts of the RCAC?
10. How do you sort out liability for damages when a RCAC is also a responsible party? Shouldn't RCACs be independent third party responders like MSRC groups?
11. How do you define "gross negligence?" Give an example of gross negligence vs. simple negligence.

Council Members

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

THE ALLIANCE
4220 "B" Street, Suite 200
Anchorage, Alaska 99503
(907) 563-2226

RE: HB196 and SB270

Limited Immunity for Spill Response Contractors

Dear Legislator:

The Exxon Valdez spill hopefully has taught all Alaskans important lessons. Our first lesson learned, we hope, is that quick, decisive and effective response to spills by all qualified and available responders is essential.

As House Bill 196 and/or Senate Bill 270 comes before you this session; ~~we encourage you to support these bills~~ we encourage good samaritan early response by qualified spill responders...rather than legions of attorneys advising potential responders of their potential liabilities.

Alaska benefits by having access to all available qualified assistance during the critical early stages of a spill as well as reasonable liability requirements that will allow a healthy oil and gas industry with small company opportunities in place.

WE ENCOURAGE YOUR SUPPORT FOR THESE BILLS.

Sincerely,

Bill Webb
General Manager



UNITED COOK INLET DRIFT ASSOCIATION

P.O. Box 4649 KENAI, ALASKA 99611

(907) 283-3600

FAX (907) 283-3306

April 10, 1991

Representative Cliff Davidson
Chairman, House Resource Committee

Dear Representative Davidson,

**UCIDA OPPOSES CS for HB 196 & ITS OBJECTIVE OF FURTHER
LOWERING LIABILITY STANDARDS FOR RAC'S.**

In both 1989 & 1990, the Alaska legislature lowered the standard of liability for RAC's from the normal standard of "strict liability", i.e. liable for whatever injuries the person caused, whether he was negligent or not.

Presently

1. RAC's are ONLY liable if they are negligent or engaged in intentional misconduct.

2. RAC's are ONLY liable when his or her own acts or omissions cause injuries.

3. In 1989, legislature stated that:

"To show negligence by a response action contractor, a claimant must show that the acts or omissions of the contractor under the response action contract were not in accordance with generally accepted professional standards and practices at the time their response action services were performed.

4. Negligence is found ONLY when it would be unreasonable to act as the liable party did, in the circumstances surrounding the response action.

Current standards are sufficient to cover the liability exposure of all RAC's - including fishermen and local communities. Ucida feels that no change is needed.

UCIDA would, however, like to comment on the actual issue that appears to us to be driving this legislation. Alyeska has imposed on Tesoro financial requirements in a format that is directly actionable. To the best of our knowledge such coverage that exceeds the \$20 million ball park is impossible to get. Alyeska then requires \$1 billion of such coverage of Tesoro. Tesoro then feels obliged out of self preservation to promote legislation that will reduce Alyeska's liability exposure to incidents of gross negligence in the hope that, if successful, Alyeska will impose requirements that Tesoro can meet.

UCIDA regards the above scenario as little less than blackmail on the part of Alyeska. What will prevent them from requiring \$5 billion in directly actionable insurance next year? UCIDA does recognize, however, that Tesoro has a legitimate problem with this bonding requirement - it literally has been placed by Alyeska between the proverbial rock and a hard spot. UCIDA has expressed both of these sentiments to our local Borough Assembly and to Tesoro representatives.

UCIDA respectfully requests that the legislature consider replacing this legislation - which is not needed - with language that addresses the real issue - bonding requirements that are reasonable but that can be capped in some manner to prevent industry from using them as a lever to undermine good public policy.

We would like to suggest two possible options:

1) Legislation that would limit a RAC's ability to require proof of financial responsibility to a level no greater than that required by the state in AS 46.04.040. UCIDA understands that the level set in AS 46.04.040 should not be static - it clearly will be adjusted from time to time by the legislature to conform to good public policy.

2) If an RAC requires bonding requirements above those set in AS 46.04.040, then the RAC should be required to accept oil pollution insurance syndicate coverage.

In conclusion, UCIDA does not support changing current state liability statutes. Even the concept of a sunset provision and a 30 day window is poor public policy. Alyeska and other similarly situated RACs will turn over spill response to any spiller well within the 30 day window. Legislation is needed to address Tesoro's immediate dilemma and the general issue of bonding requirements in the future.

Sincerely,



Theo Matthews, Administrative Assistant
UCIDA

cc: Senator Lloyd Jones, Chairman, Senate Resource Committee
Senator Paul Fischer
Rep. Gail Phillips
Rep. Mike Navarre
Rep. Jim Zawacki
Kenai Borough Assembly
Mayor Don Gillman
Gene Burden, Tesoro
Oil Reform Alliance
UFA



(907) 345-3142
Fax (907) 345-2435
12350 Industry Way, Suite 200
P O Box 196010
Anchorage, Alaska 99519-6010

April 14, 1991

Alaska State Legislature
Senate Committee on Oil & Gas

Re: Liability Limitation for Response Action Contractors

Senators:

Thank you for the opportunity to provide written comments to the Senate Special Committee on Oil & Gas regarding an Act to limit civil liability for oil spill response action contractors. As you know, this is a matter of great importance to Alaska Clean Seas, and we appreciate the serious consideration it is receiving from your committee. We believe the bill to be a move in the right direction to allow oil spill cooperatives like Alaska Clean Seas to work effectively to limit the effects of a spill.

Alaska Clean Seas is a non-profit oil spill response cooperative established by the companies that carry on exploration and production on the North Slope and in the Bering, Chukchi and Beaufort Seas. We have invested a great deal of time and effort, not to mention money, to assist our members in preventing spills and to become prepared to carry on an effective response to an oil spill within our area of interest. These efforts have included extensive training, spill response drills, preparation of contingency planning documents, equipment acquisition, and establishment of significant auxiliary support services through Auxiliary Contractor Teams and Village Response Teams to assist in responding to and cleaning up a spill.

Despite these efforts, the fact remains that if a spill occurs, the response will be conducted under emergency conditions and most likely in remote areas. Information available to the responders about the nature and amount of the spill will almost certainly be incomplete. Variations in environmental conditions, locations, resources at risk, oil characteristics, and other factors inherent in remote operations will combine to make for a very dynamic situation, changing on a daily basis. Despite our dedicated efforts to be prepared for all eventualities, we must assume that a spill response will involve events that simply cannot be accurately predicted. An effective response, therefore, will rely in large part on the experience, training and judgement of the responders. These responders will operate under a chain of command utilizing the Incident Command System (I.C.S.). At each supervisory level it is important that the individuals involved are able to execute their role based on their experience, training and judgement without hesitating to analyze or seek counsel regarding legal/liability consequences of their actions.

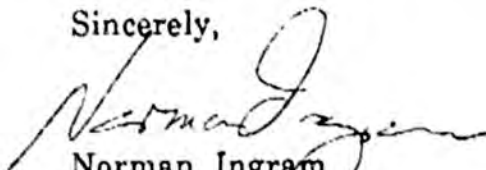
With legislation enacted in 1990, the State of Alaska has undertaken what is probably the most stringent oil spill response, containment and clean-up goals anywhere in the world. To ensure that legislation such as is being considered with this Act, is complementary to rather than at cross purposes with those goals, we respectfully recommend deletion of sub-part (3) of the proposed Sec. 46.03.825.

In addition to the general rationale outlined above for its total deletion, there are a number of detailed aspects of the proposed draft which are flawed or which could be improved. An example of this is the premise that a response action contractor will take direction from a Federal or State on-scene coordinator. While this may be the case for a spill on which the Federal or State governments have taken control, the more accurate and appropriate statement is that the response action contractor will take direction from the Incident Commander. This individual may be the Federal, State, Local or Responsible Party on-scene coordinator and most likely will be the latter for oil spills relating to the oil industry working, in a Unified Command set-up, with counterpart on-scene coordinators. Another concern is the underlying inference from the language of the proposed section (3) that the objective in a spill is to implement a contingency plan and that consequently liability for actions will be measured against implementation of that plan. The real objective is to carry out an **EFFECTIVE RESPONSE**. Ideally, well thought out plans will, when implemented, result in effective response. However, history has shown that this is not always the case. The language as written would tend to encourage a responder to expend resources and effort in mindless obedience of a plan rather than using training, experience and best judgement to follow a different deployment if actual circumstances warrant.

We recognize the interest of the state in making sure that available equipment inventory, supplies and human resources are accurately described in contingency planning documents. If the intent of subpart (3) is to help ensure the accuracy of the plans in that regard, we would be more than happy to assist in redrafting subpart (3) to accomplish that purpose without imposing obstacles to effective response.

If you require further information or comment, please do not hesitate to contact me, and I will do all that I can to assist your committee in this effort.

Sincerely,



Norman Ingram
General Manager

cc: Alaska Clean Seas Owners Representatives

Introduced by: Brown, Superman
Date: April 16, 1991
Action: ADOPTED
Vote: UNANIMOUS

KENAI PENINSULA BOROUGH
RESOLUTION 91-37 (SUBSTITUTE)

A RESOLUTION SUPPORTING TESORO ALASKA

WHEREAS, the continued operation of the Tesoro Refinery is being threatened by an unreasonable demand by Alyeska management; and

WHEREAS, Alyeska is demanding Tesoro to secure a billion dollars insurance bond; and

WHEREAS, Tesoro Alaska has in good faith attempted to secure this bond; and

WHEREAS, Tesoro Alaska can provide a billion dollars of P and I insurance and Alyeska rejected this offer; and

WHEREAS, Tesoro Alaska contributes substantially to the tax base of the Kenai Peninsula Borough:

NOW THEREFORE, BE IT RESOLVED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH:

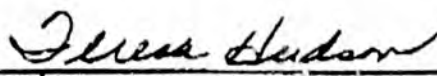
Section 1: That the Kenai Peninsula Borough Assembly urges the Alaska State Legislature to intervene on Tesoro's behalf and resolve this situation.

Section 2: That copies of this resolution be distributed to Governor Walter Hickel, the Alaska State Legislature, Tesoro Alaska and Alyeska.

ADOPTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH ON THIS 16th DAY OF April, 1991.


James W. Skogstad, Assembly President

ATTEST:

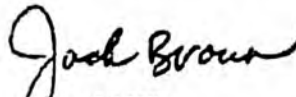

Acting Borough Clerk

Kenai Peninsula Borough
Resolution 91-37 (Substitute)
Page 1 of 1 Pages

The Kenai Peninsula Caucus on March 8, 1991 unanimously passed a resolution concerning "OIL SPILL RESPONDER'S LIMITED IMMUNITY".

The Kenai Peninsula Caucus supports and encourages Alaska State legislation which grants any person who responds to an oil spill caused by another, immunity from liability from all costs and damages except in cases where the responder acts with gross negligence or willfull misconduct, or causes personal injury or wrongful death.

It is my understanding that the City of Kenai and North Peninsula Chamber of Commerce have passed similar resolutions.


JACK BROWN
PRESIDENT

As a private citizen I am deeply concerned about Alyeska's position on the \$1,000,000,000 insurance requirement that they have placed on TESORO. I see this requirement as being unreasonable. As you are aware, Chevron has announced they are terminating the operation of their Nikiski refinery. If the legislature, through its inaction allows Tesoro to go out of business, the citizens of the state and the Kenai Peninsula Borough will be ADVERSELY AFFECTED.

Tesoro directly contributes over 1.4 million to our local tax base, has an annual payroll of 11 million dollars and pays for 20-25% of Homer Electric. The loss of the Tesoro refinery would, in my opinion, have an adverse effect on the Borough's ability to fund our schools, senior programs, roads, emergency services, hospitals, etc.

In my opinion, this is the most important issue facing the citizens of the Kenai Peninsula Borough in 1991.

Introduced by: Brown

KENAI PENINSULA CAUCUS

RESOLUTION NO. 91-5

A RESOLUTION OF THE KENAI PENINSULA CAUCUS CONCERNING "OIL SPILL RESPONDER'S LIMITED IMMUNITY."

WHEREAS, it is in the interest of the citizens of the State of Alaska and the Kenai Peninsula Borough to ensure that qualified, highly trained oil spill response organizations are in place and ready to respond to all spills; and,

WHEREAS, the success of a spill response organization depends upon spill response contractors as well as countless fishermen, subcontractors, and other part-time professionals and specialists who must be prepared on an emergency basis to act swiftly and unhesitantly in the face of adverse circumstances and often with far less than complete information; and,

WHEREAS, these responders will be deterred from performing clean-up activities on behalf of the person or persons actually responsible for the spill if they are unduly exposed to unlimited liability in the course of their response activities.

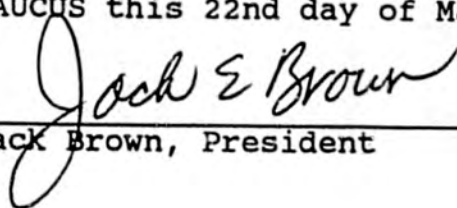
NOW, THEREFORE BE IT RESOLVED by the Kenai Peninsula Caucus that the spill response contractors, including fishermen, subcontractors and part-time professionals and specialists, who perform in response to an oil spill to be best of their abilities and following the directions of recognized state and federal authorities, should be afforded limited immunity from lawsuits arising as a consequence of their response activities; and,

BE IT FURTHER RESOLVED, that the Kenai Peninsula Caucus supports and encourages Alaska State legislation which grants any person who responds to an oil spill, caused by another, immunity from liability from all costs and damages except in cases where the responder acts with gross negligence or willful misconduct, or causes personal injury or wrongful death; and,

FURTHER BE IT RESOLVED, where limitations on immunity are granted to responders, it is important that victims be fully protected and compensated for damages, and the party responsible for the spill in the first instance shall be liable for any damages caused by responder's simple negligence.

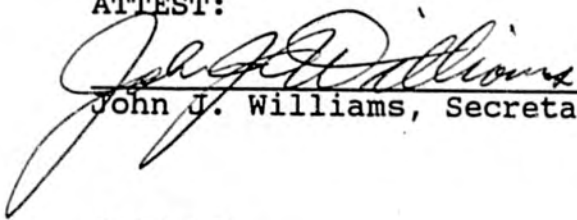
COPIES of this Resolution shall be transmitted to the Honorable Walter Hickel, Governor of the State of Alaska; and members of the Alaska House and Senate Resource Committees and Special Committees on Oil and Gas.

PASSED BY THE KENAI PENINSULA CAUCUS this 22nd day of March, 1991.



Jack Brown, President

ATTEST:



John J. Williams, Secretary

(3/8/91)



April 10, 1991

CITY OF KENAI

"Oil Capital of Alaska"

210 Fidalgo Avenue
Kenai, Alaska 99611

TELEPHONE 283-7535
FAX 907-283-3014

Representative Bill Hudson, Chairman
House Oil and Gas Committee
State of Alaska
P.O. Box V
Juneau, AK 99811

RE: **HOUSE BILL 196 - LIABILITY LIMITS FOR OIL CLEAN-UP
CONTRACTORS**

The City Council of the City of Kenai, at their meeting of April 3, 1991 unanimously stated their support of House Bill 196. The bill, as you are aware, is designed to afford limited immunity from lawsuits to citizenry groups responding to oil spills caused by another, unless the responder acts with gross negligence or willful misconduct, or causes personal injury or wrongful death.

These groups consist of spill response contractors, countless fishermen, subcontractors, and other part-time professionals and specialists who must be prepared, on an emergency basis, to act swiftly and unhesitantly in the face of adverse circumstances and often with far less than complete information.

Exposure to unlimited liability in the course of response activities may deter responders from performing clean-up activities on behalf of the person or persons actually responsible for the spill.

The City Council of the City of Kenai supports House Bill 196 and encourages the Alaska State Legislature to pass this legislation. Where limitations on immunity are granted to responders, it is

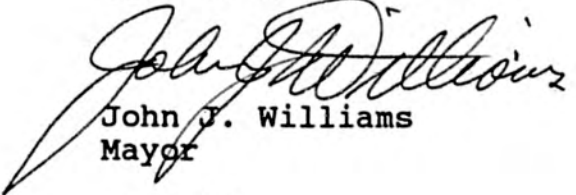
Representative Bill Hudson
April 10, 1991
Page 2

important that victims be fully protected and compensated for damages. The party responsible for the spill in the first instance should be liable for any damages caused by the responders' simple negligence.

Again, the City Council of the City of Kenai supports this legislation.

Sincerely,

CITY OF KENAI



John J. Williams
Mayor

JJW/clf



Oil Reform Alliance



ORA/UFA JOINT POSITION PAPER

ON HB196

by Riki Ott

The Oil Reform Alliance and United Fishermen of Alaska are strongly opposed to the intent of HB196. We think a bill that reduces the state's liability standards for response action contractors (RACs) is both unnecessary and undesirable.

Our biggest concern with HB196 is that it weakens laws passed only last year, laws designed to strengthen oil spill prevention and response incentives. Alaska's current liability standard offers more protection to the public than the federal government's standard of gross negligence. The right of states to set higher standards than the federal government is a key provision of the Oil Pollution Act of 1990 (OPA90) and this right should not be dismissed lightly.

If HB196 is viewed from the perspective of fishermen and communities as victims, the inadequacies of this bill become apparent. HB196 effectively places another hurdle across the path of victims trying to get compensation for damages caused by a catastrophic oil spill. Further, it shifts the liability of spill response from RACs to taxpayers.

It is questionable whether someone can assume another's liability. The spiller retains the right to argue that they are not liable. The burden of proof, under HB196, lies with the "person bringing a claim against the RAC" (CS HB196 pg. 6, lines 19-20). Until the case is settled in a court of law, the victim remains uncompensated.

Arguments in favor of this bill state that Alaska's legal atmosphere and liability exposures that discourage new cleanup contractors from entering the state. But factually, the number of RACs has increased significantly since Exxon Valdez spill. In Alaska, RACs could also get the same cover of protection that they seek in HB196 by indemnification through contingency plans.

Tesoro's plea for immunity from Alaska's liability standards does not stem from a problem with existing law; rather, it stems from Alyeska's requirement of a one billion dollar direct action bond from all parties regardless of size. Last session countless hours were spent tailoring HB567 for both large and small operators. If Alyeska restructured its bonding requirement, Tesoro's problems evaporate.

Conoco's testimony of their recent response to a spill with an unknown responsible party is misleading. Conoco implied that "volunteer" response, in cases where the spiller is either unknown or insolvent, would be limited in the future unless RACs were immunized.

However under existing law, if the spiller is unknown or insolvent, the state assumes control of the cleanup - and reimburses RACs for reasonable expenses. It is important to realize that Conoco did respond to a spill with an unknown responsible party under existing law with existing liability standards.

Liability protection for small RACs, such as fishermen or communities, can be achieved through contractual indemnification. The problem with strict liability as perceived by Tesoro, Conoco, and even the community RACs simply does not exist.

Alaska's strict liability standard was watered down in 1989 by the legislature so RACs would be liable for injuries caused by their own response actions only if they were negligent or engaged in intentional misconduct. Under existing law, to show negligence by a RAC, a claimant must show that the acts or omissions of the contractor under the response action contract was not in accordance with generally accepted professional standard and practices at the time their response action services were performed (AS 46.09.823(a)).

Existing law provides ample protection for RACs and marginal protection for the public. To further weaken the state's liability standard would be a grave and regrettable step away from the lessons learned from the Exxon Valdez spill.



UNITED FISHERMEN OF ALASKA

Greg Selder
Executive Director

211 4th Street, Suite 112
Juneau, AK 99801

(907) 586-2820
Within Alaska: 1-800-478-FISH
Fax# (907) 463 2545

CMS, INC.

P.O. Box 21849
Juneau, AK 99802-1849

April 12, 1991

Senator Sam Cotton, Chairman
Senate Special Committee On Oil
and Gas
PO Box V
Juneau, AK 99811

Dear ^{Sam} Senator Cotton:

I am writing you in relation to the work of your committee on the matter of liability related to spill cleanup contractors. While I would ordinarily be corresponding with you on behalf of the Alaska State Chamber of Commerce, my interest is more direct in that it relates to my business and the business of one of my associates. Our perspective on the need for limitations on liability is from the standpoint of two very small businesses involved in spilled oil and used oil. We represent the other end of the spectrum when compared to the heavy duty players in the Prince William Sound. One of my associates in CMS is the owner of Douglas Oil Heat (DOH), a typical small town business primarily involved in the distribution of heating fuel. CMS works with DOH in offering another much needed service, the collection and transfer of waste oil to NW recyclers. This is an activity which is heavily regulated by the Feds.

Several years ago, DOH made an investment in training and materials so that they would be able to respond to the usual amount of small spills both terrestrial and marine, that occur in an area such as this. He thoroughly enjoyed this dimension of his business because, in his words, "the best business in the world is one that you can make a profit in and do some real good at the same time". He is considerably less enthusiastic since the passage of the spill bills in the 16th Legislature. Just last week a boat sunk in the Juneau harbor and he was requested by the Coast Guard to contain and cleanup about 200 gallons of oily bilge, #2 diesel and lube oil. The money to be made in an operation like that is fairly trivial. Despite the fact that he already has a significant exposure to lawsuits, his reluctance to close down this portion of his business and his desire to be a good neighbor prompted him to respond to the request. If legislation such as that which is under consideration is not adopted, I can assure you that in June there is an excellent chance that my associate will terminate his cleanup and containment services. The notion that he might be liable for the effects of the spill itself is a financial threat that cannot be ignored. Again, in his words, "I'll be darned if I'm going to be

CHATHAM MATERIAL & SERVICES, INC.

Phone (907) 780-6545

Fax (907) 780-6336

Senator Sam Cotton
April 12, 1991
Page 2

punished or wiped out for trying to be responsive to an environmental problem".

I realize that your intent of the moment is to seek an immediate remedy to the problem of disincentives for spill cleanup, but I would ask, as time permits, that you trace this chain of massive financial intimidation back up the line to where state law makes the source of hazardous material clearly responsible for actions which occur when the material is in the hands of second and third parties. I am speaking in specific reference to sub paragraph four on page two of your draft bill (re AS 46.03.822(a)). I realize that the existing legislation meant to focus on the high rollers. But when companies like Aleyeska and Tesoro have a problem, imagine the impact on minuscule outfits like ours when we try to find affordable insurance to cover a shipment of waste oil to a recycler in Seattle or cleanup somebody else's spill.

If I had to provide one general recommendation it would be to devise positive incentives for the proper handling of waste oil, for spill cleanup, or for any other environmental concern. It has been stated that these are matters that simply need to be rolled into the cost of doing business and cost to the customer. I wish it was that simple because what has been created is a situation where neither the customer or the business can afford the cost. In an attempt to deal with certain forms of environmental pollution, we have created an environment of fear and great financial risk.

Thank you for taking the time to read all of this. If you wish, you are free to share these thoughts with other members of your committee.

Very truly,



Ernest E. Polley
President

EEP/jak
cc: file

Testimony of Robert I. Shoaf
Alyeska Pipeline Service Company
to the
Alaska Senate
Special Committee on Oil and Gas
Tuesday, May 14, 1991

Thank you for the opportunity to testify on CSHB 196. I am employed by Alyeska Pipeline Service Company. Over the past several weeks, Alyeska has been working with various House Committees and with this Committee to express our views on liability of response action contractors under federal and state law. Today we ask this Committee to modify the bill passed by the House so that as a response action contractor on behalf of tankers in Prince William Sound, we will have clear, well-defined standards of liability. Clarification in the manner we request will allow us to resolve the financial responsibility problems that otherwise will preclude Tesoro from lifting oil from Valdez after June 30, 1991.

In a March 15, 1991 letter to the sponsor of this legislation, Representative Bill Hudson, we stated that if the Alaska legislature enacts the response action contractor liability provisions enacted by Congress in the Oil Pollution Act of 1990, then:

"[based on] Tesoro's current financial condition, available insurance coverage, and existing insurance coverage of owners of the vessel that Tesoro is using to transport its oil, Alyeska is confident that Tesoro will have no difficulty in arranging to meet such revised financial responsibility requirements."

See Attachment 1.

At this point in the legislative process it is unlikely the CSHB 196 will be enacted using the Oil Pollution Act Standard. Nonetheless, as written, the bill is a significant step towards creating a comprehensive liability scheme for response action contractors that will protect the public by reemphasizing a spiller's liability for damages it causes and by encouraging well-funded response action contractors to provide response services in Alaska.

As a result, Alyeska is prepared to reduce the level of financial responsibility required from "contracting vessels" in the Oil Spill Prevention and Response Agreement if the changes described below are made to CSHB 196. The requirement will be reduced to such a level that with the cooperation of Tesoro Alaska, an acceptable arrangement may be reached to provide oil spill response services to Tesoro vessels.

For Tesoro, this reduction would remain in effect only during the time that the amendments to existing law are in effect and so long as the Overseas Washington maintains a safe, accident-free record in Prince William Sound.

If the sunset provision remains in the bill, we urge the legislature to study the issue to satisfy itself that Congress and many coastal states have acted wisely in adopting the liability standard found in the Oil Pollution Act.

The changes in the CSHB 196 we are seeking are:

1. Add to Sec. 8 (Sec. 46.03.825(a)):

- * (4) 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.

does not include activities of field operators.

2. Change the 15 days in Sec. 8 (Sec. 46.03.825(b)(3)) to 60 days.
3. Add to Sec. 8 (Sec. 46.03.825(a)):
 - (5) Nothing in this section 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.

We believe these changes are consistent with the intent of the bill.

It is essential that the phrase "substantial deviation" in 46.03.825(a)(3) be defined. Otherwise, this legislation offers no predictable liability exposure to response action contractors and leaves definition of the term to the courts through a series of court cases. It would be better for the legislature to express its intent by defining this important term.

Alyeska proposes a definition for "substantial deviation" that creates liability for management decisions to deviate from a plan, even where those decisions are a result of simple negligence. Because of the difficulties of gathering, communicating and assessing information in an emergency, we would prefer that this liability only be based on gross negligence or intentional misconduct. Nonetheless, we offer this approach, which includes simple negligence, in the spirit of compromise. Alyeska's proposal would preclude response action contractor liability based on the simple negligence of field responders that causes substantial deviations from a contingency plan. Of course, the spiller would be strictly liable for damages caused by activities falling into that category. The potential for error by operations personnel in an emergency is the fundamental issue this bill addresses. Alyeska's proposal limits a response action contractor's liability for operational errors but requires management to follow response plans.

If a response action contractor is liable for its management's simple negligence substantial deviations from a response plan it has written, it must be clear that the response action contractor is not held to a clean up standard rather than a response planning standard. Last year in writing HB 567, the legislature acknowledged that it is impossible for anyone to guarantee that large volumes of oil will be removed from the environment regardless of the circumstances under which it was spilled. As a result, the new oil spill statute reads:

"(l) The provisions of (k) of this section do not constitute clean up standards that must be met by the holder of a contingency plan. Notwithstanding (k) of this section, failure to remove a discharge within the time periods set out in (k) of this section does not constitute failure to comply with a contingency plan for purposes of (g) of this section or for the purpose of imposing administrative, civil or criminal penalties under any other law."

A.S. 46.04.020(l).

The legislature also adopted a letter of intent that expressed this same concept. (Attachment 2)

Alyeska requests that CSHB 196 reiterate the approach adopted by HB 567. We have not heard anyone urge that HB 567 should be amended by CSHB 196 to create a clean up standard. As a result, we believe this amendment should be acceptable.

Finally, Alyeska joins the group of response action contractors who believe the limitation on liability for response action contractors, and the related strict liability of spillers, should last longer than 15 days. Sixty days is more appropriate. A longer period is necessary to provide for continuity

of services in a massive, emergency response to a spill. That is a laudable goal for this legislature. We believe that a 60-day period will encourage outside responders, like MSRC, to be available in Alaska. Also, it would allow Alyeska to make its equipment available to a spiller for longer periods of time after a spill.

We urge you to amend CSHB 196 as we have requested.

Letter of Intent for Senate CS for CS for HB 567 (Oil and Gas)

Subsection (k) (3) (C) of HB 567 provides that 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.

Like all other provisions in Section (k), subsection (k) (3) (C) is subject to Section (l) which provides that the Section (k) provisions are not clean up or performance standards for the discharge response. Rather, the Section (k) requirements, including those in subsection (k) (3) (C), are planning requirements for determining what will be in any particular contingency plan.

The subsection (k) (3) (C) planning provisions require a demonstrated plan for moving equipment, personnel, and other resources necessary to deploy and operate that equipment and personnel to the discharge site. The provision includes deployment and operation of the equipment and personnel to ensure that there are systems and plans to actually use the additional equipment in a manner that is well orchestrated to supplement and enhance the equipment and personnel from the plan holder's region of operation.

However, both segments of the contingency plan -- the deployment of the in-region equipment and the transportation and deployment of the out-of-region equipment -- are subject to Section (l). Neither segment creates a performance standard under the terms of HB 567. So, if a contingency plan has been approved, based upon a demonstrated plan of action to get equipment, personnel, and other resources to the site, it would not be a violation of the terms of A.S. 46.04.030 if unforeseeable circumstances result in a failure to actually deploy and operate all equipment within 72 hours.



David N. Lakin
Director of Government Affairs

March 1, 1991

Patrick J. Malone, Aide
Representative Mike Navarre
Alaska State Legislature
P.O. Box V
Juneau, Alaska, 99811

Dear Mr. Malone:

MSRC indeed supports efforts to amend Alaska's current responder immunity law.

Basically, we believe oil spill responders should receive limited immunity to encourage them to become involved and act boldly in the chaotic and risky business of oil spill response. We are attempting to have responder immunity provisions at least as protective as those contained in the Oil Pollution Act of 1990 (Section 4201), adopted by coastal states and certain other jurisdictions of the U.S. The federal statute provides immunity from removal costs or damages to anyone rendering care, assistance or advice consistent with the National Contingency Plan (NCP) or as otherwise directed by the federal on-scene coordinator. We also believe that responder actions in accordance with the directions given by appropriate state officials should be immune. This limited immunity would not pertain to acts of gross negligence or willful misconduct or to cases of personnel injury or wrongful death. Furthermore, the responsible party (i.e., the owner or operator of the vessel or facility) would be made liable for any damages for which immunity is provided to responders.

Below are the answers to the questions submitted in your letter of February 22, 1991. If you need any additional information regarding this or related spill response issues involving MSRC or responder immunity, please contact me.

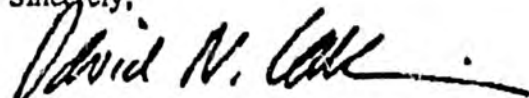
1. While no final decision has been made about whether MSRC will operate in Alaska, we consider the current state law to be a substantial disincentive to MSRC involvement. (We note however, that Alaska's statute predates the federal act). You should know that by resolution, our Board of Directors has reaffirmed the importance of state responder immunity provisions to the role MSRC could eventually play in a given state. As a national mutual benefit (not-for-profit) corporation, we consider our total liability exposure so as not to jeopardize the entire national response system because of the laws of any particular state.

Mr. Patrick J. Malone
March 1, 1991
Page Two

2. Yes, four coastal states to date have adopted the federal immunity standard. In 1990, Florida, Virginia and Hawaii enacted such legislation. On January 31, 1991 the Governor of Delaware signed a similar law. Commissions and task forces in Alabama, Louisiana, Maine and Texas, which have closely examined the oil spill issue on a comprehensive basis, have all recommended the adoption of the federal responder immunity standard. So far this year, responder immunity legislation which tracks the federal law, has passed the state senates in Georgia and Mississippi. Our current information indicates the Oregon House Committee on Environment and Energy agreed to introduce the federal language as a committee bill on February 18.
3. California's comprehensive oil spill legislation contains the federal responder immunity provision. Unfortunately, it limits its time to a maximum of 90 days. Furthermore, there are several other provisions which we feel make it unsuitable for use as model state legislation.

I hope this information is helpful and provides with the background you need for Mr. Navarre to introduce his bill. As I stated before, if I can be of further assistance to you, please do not hesitate to contact me.

Sincerely,



David N. Lakin
Director of Government Affairs

GSD/jlh



Key Questions About Limited Liability for Oil Spill Responders

1. Who are oil spill responders?

- The resources required to respond to a serious oil spill include a broad cross section of fishermen, barge operators, bird and animal rescue centers, spill response contractors and spill cooperatives. Each of these organizations and subcontractors need limited immunity if they are to be expected to respond unhesitantly to oil spills.

2. Why do spill responders need limited immunity?

- Without reasonable protection from liability, the countless private persons and organizations necessary to respond to a major oil spill will not be willing to participate unhesitantly in spill clean-up activities.

- Instead, like doctors intimidated by malpractice insurance costs, they will become inordinately concerned with the need for advice from their lawyers and the desire to have state or federal authorities clear every decision before proceeding. For many, the risk will simply be too great and they will decline to participate at all.

3. Why do spill responders need immunity now when they have been responding to spills for years without immunity?

- Since the Exxon Valdez spill, the costs and litigation exposure flowing from oil spills have escalated dramatically.

- Exxon and its responder Alyeska, for example, have spent nearly \$2 billion already and they face another \$3 to 5 billion in liability claims. With unlimited liability and uninsurable levels of exposure, the risks have become too high.

4. What is the "good samaritan" immunity provision being proposed?

- Under federal legislation and under the laws of the states of Florida, Virginia, and Hawaii spill response organizations (as distinct from those who are responsible for the spill) are not liable for removal costs or damages arising from their response activities, unless they act with gross negligence or willful misconduct, or cause personal injury or death.

- MSRC and the existing spill response organizations seek this same limited immunity for responders in the oil spill legislation before other state legislatures.

5. Are there precedents for this form of immunity?

- Yes. There are other examples of good samaritan immunity covering organizations like fire and police departments, emergency paramedics, medical personnel and others.

- In nearly every instance, the public policy justification for granting limited immunity is the same: the need to insure that highly trained personnel remain willing to respond unhesitantly despite adverse and sometimes dangerous circumstances, and to ensure that they remain willing to make difficult decisions with less than complete information.

6. Doesn't granting limited immunity to the responder simply let the spiller off the hook thereby pushing the cost onto the innocent victim?

- To the contrary, where the responder is immune, the proposed amendment would expressly make the spiller liable both for its own spill related action and for the responder's acts or omissions as well.

- Moreover, where the spiller cannot compensate the injured party for its damages (e.g., where the spiller has been rendered bankrupt by the spill), the victim is compensated by the federal fund which is paid for entirely by the oil industry.

- Thus, the immunity provision works to allocate risk only as between the spiller and the responder; it does not deny the innocent victim full compensation.

7. Why should oil spill response organizations be granted limited immunity when those who handle hazardous waste disposal on land continue to operate without immunity?

- In the on-land hazardous waste response, the clean-up entity ordinarily has several weeks, if not months, to test, analyze and review appropriate response procedures before beginning clean-up operations.

- By contrast, in any major spill, the response organization literally has only a few hours to marshal its initial resources at the scene and to begin making outcome determinative decisions.

- These critical, time-sensitive decisions often must be made in the midst of nearly total chaos, adverse weather, fast moving currents, high seas and far less than complete information. Time is of the essence and there is no opportunity for the studied review available to the on-land hazardous waste response organization.

8. Why wouldn't the responders' concerns be satisfied by indemnification from the spiller?

- The concept of indemnification requires the defendant (responder) to exhaust all administrative and judicial remedies before the right to indemnification from the spiller arises. Given the high probability that negligence allegations will arise in nearly every catastrophic response, the responder's management would routinely be tied up in

years of time consuming and costly depositions, trial preparation and actual litigation before becoming eligible for consideration for indemnification.

- Moreover, a system which exposes the responder to these highly disruptive transaction costs will have an inherent chilling effect on responder's willingness to act boldly and decisively in future spills. Instead of rushing into the fray, responders will rush to their lawyers and await every opportunity to have some state or federal authority direct, and thereby insulate, their every move.

- Again, time is of the essence and responders must be encouraged to make difficult decisions under inordinately adverse conditions and with far less than complete information.

9. Won't limited immunity enable responders to be sloppy in the performance of their work?

- No. A sloppy or casual responder will quickly find that it has crossed the line between simple negligence, for which it is immune, and gross or willful negligence, for which it has no immunity.

- Oil spill response is fast becoming one of the most intensely monitored and regulated activities anyone can undertake. Federal, state and local authorities, not to mention the press, television, environmentalists, local fishermen and the public at large, monitor the responder's every move.

10. Isn't immunity just a special interest measure sought by the the oil companies that support the large spill cooperatives?

- No. While it is correct that some of the largest spill response organizations are funded by oil companies, the immunity is broadly supported by nearly everyone who wants to participate in the clean-up of spills caused by someone else.

- Throughout the country, local groups like fishermen bird rescue personnel are actively urging legislatures to grant immunity to those who respond to oil spills. Without immunity, they too cannot participate actively in oil spills without inviting unlimited and unacceptable liability exposure.

- Moreover, the U.S. Coast Guard and some environmental groups support responder immunity in recognition of the fact that without this provision, they will not have the resources needed to deal with oil spills.

- This growing call for responder immunity has been strongly and expressly endorsed by editorials in The San Francisco Examiner, the Wall Street Journal, and other newspapers all urging immunity be granted to oil spill responders.

A Model State Act Regarding Limited Immunity for Persons Responding to Oil Spills

proposed by the
Marine Spill Response Corporation

This model State Act makes State law consistent with new federal oil spill legislation that provides limited immunity from liability for removal costs and damages for those persons responding to an oil spill or the threat of an oil spill. The immunity applies if those activities are performed in a manner consistent with the Federal National Contingency Plan (NCP), or under the direction of the Federal On-Scene Coordinator (OSC) or the appropriate State official. Because the plans and orders may not cover every detail or eventuality of a spill response, actions that are in keeping with the overall objectives of the plans or Coordinator's orders are deemed to be within the scope of this Act.

Just as with response to fire, response to an oil spill must be immediate and decisive. Like firemen, oil spill responders cannot control the timing or location of their work. Both types of responders must take immediate action based on very limited information, attacking the problem quickly if there is to be any realistic chance of mitigating the worst harm. Limited immunity for firefighters has been long recognized because of these circumstances, and this bill extends similar protection to oil spill responders.

Without similar immunity, the enormous financial risks and liability exposures associated with spill response will deter those persons who are not responsible for the initial spill, such as cleanup contractors, fishermen, and barge owners, from prompt, aggressive cleanup, or even from any response at all. The United States Congress recognized the need to provide limited immunity to oil spill responders in the Oil Pollution Act of 1990. However, Congress did not preempt State oil spill liability laws, so a similar provision is needed in State law. Federal and State responder liability laws should be uniform. To respond decisively, responders must be able to act without being forced to consider the boundaries or interaction of varying liability regimes.

The liability for damages resulting from the oil spill cleanup efforts falls on the party responsible for the initial discharge, not on persons trying to help clean up or mitigate the damage. Under this bill, victims of oil spill damage will have a means of compensation. They may recover from the person responsible for the initial discharge or, where the responsible party is unidentified or unable to pay, from the federal Oil Pollution Fund (and, perhaps a State fund, if provided by State law). In addition, immunity for responders is limited. It does not extend to actions for personal injury or wrongful death, or for actions that rise to the level of gross negligence or willful misconduct.

Some States provide immunity only to those persons who do not charge for their services. Refusing immunity to persons who charge for their services in the context of catastrophic oil spills works to deny the public the benefit of cooperatives and subcontractors who have the expensive oil spill response equipment and trained personnel that are the key to mitigating damage from the spill, but who must be able to charge for their services in order to maintain their readiness. Volunteer responders have a role, too, but professional responders equipped with their equipment and training have the greatest likelihood of making a significant difference in the spill response. Thus, this act covers all responders, whether they volunteer or work for pay.

This draft State legislation was developed by the Marine Spill Response Corporation (MSRC), a nonprofit mutual benefit corporation organized exclusively to promote the welfare of the public by mitigating environmental damage to the coastal and certain upstream waters of the United States. This newly created organization seeks to establish a program to render its best efforts to contain and cleanup certain large oil spills beyond local response capabilities. It will use funds provided by the oil and shipping industries to build, staff and equip five regional response centers and numerous prepositioned equipment sites. Together with a host of other responders, MSRC hopes to dramatically improve this nation's ability to respond to large oil spills in coastal and tidal areas, in part through bold and decisive response to a spill event. Responder immunity is a critical requirement for that type of rapid response.

1 Section 1. [Short Title.] This act may be cited as the [State] Act Regarding Liability for
2 Persons Responding to Oil Spills.

1 Section 2. [Definitions.] For the purposes of this Act the term:

2 (1) "damages" means damages of any kind for which liability may exist under the laws
3 of this State resulting from, arising out of, or related to the discharge or threatened discharge
4 of oil.

5 (2) "discharge" means any emission (other than natural seepage), intentional or
6 unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting,
7 emptying, or dumping;

8 (3) "Federal On-Scene Coordinator" means the federal official predesignated by the U.S.
9 Environmental Protection Agency or the U.S. Coast Guard to coordinate and direct federal
10 responses under subpart D, or the official designated by the lead agency to coordinate and direct
11 removal under subpart E, of the National Contingency Plan;

12 (4) "National Contingency Plan" means the National Contingency Plan prepared and
13 published under section 311(d) of the Federal Water Pollution Control Act (33 U.S.C. 1321(d)),
14 as amended by the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990);

15 (5) "oil" means oil of any kind or in any form, including, but not limited to, petroleum;
16 fuel oil, sludge, oil refuse, and oil mixed with waste, other than dredged spoil;

17 (6) "person" means an individual, corporation, partnership, association, State,
18 municipality, commission, or political subdivision of a State, or any interstate body.

19 (7) "removal costs" means the costs of removal that are incurred after a discharge or
20 oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the
21 costs to prevent, minimize, or mitigate oil pollution from such an incident;

22 (8) "responsible party" means a responsible party as defined under § 1001 of the Oil
23 Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990).

1 Section 3. [Exemption From Liability.]

2 (a) Notwithstanding any other provision of law, a person is not liable for removal costs
3 or damages which result from actions taken or omitted to be taken in the course of rendering
4 care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed

5 by the Federal On-Scene Coordinator [or by the State official with responsibility for oil spill oil
6 response].

7 (b) Subparagraph (a) does not apply--

8 (1) to a responsible party;

9 (2) with respect to personal injury or wrongful death; or

10 (3) if the person is grossly negligent or engages in willful misconduct.

11 (c) A responsible party is liable for any removal costs and damages that another person
12 is relieved of under subparagraph (a).

13 (d) Nothing in this section affects the liability of a responsible party for oil spill
14 response under State law.

Major Unacceptable Provisions of Responder Liability Legislation

Voluntary Response:

Liability protection that accrues to responders only if they act on a voluntary basis is unacceptable. Response to spills of any magnitude requires trained personnel and expensive equipment. There is no reasonable way for persons to provide cleanup services that are effective - especially in large spills - through voluntary efforts. (At the height of the Valdez cleanup over 10,000 persons, 150 boats and 80 aircraft, costing about \$50 million a week were needed to limit environmental damage and cleanup the discharge.) Limiting liability to volunteers effectively robs the state of the professionals who alone are the core group needed to cleanup large spills. In addition, most responders will be acting under a contract with the spiller as required by federal legislation.

Standard of Liability/Joint Liability:

Some state statutes limit liability protection to acts performed solely by the responder. This is an unacceptable liability environment because responders frequently must act jointly with others, particularly their own subcontractors and the original spiller. All response acts must be covered by immunity except for those which are grossly negligent or constitute willful misconduct or result in personal injury or wrongful death.

Costs:

Statutes that limit liability on the basis of the kind of costs charged by the responder are unacceptable. If out-of-pocket costs are allowed, then only organizations like MSRC, a not-for-profit corporation would have liability protection. But MSRC will respond under a contract and have to discharge its contractual cleanup obligations through many subcontractors. No other mechanism to accomplish this task exists today and is likely to be in the foreseeable future. They would not have liability protection since they must have a profit line in their costs to stay in business. All responders (profit and not-for-profit) must have liability protection based upon their response actions, not on the basis of their payment for services.

State Permission to Act:

Some states provide immunity if the responder has first been designated by state officials to respond. This limitation on liability is unacceptable because the nature of oil spills. Spills occur on a random basis, often in remote locations and cleanup actions to be most effective, must begin within the first few hours of a spill. Literally a few hours lost at the beginning of a spill can dramatically affect the outcome of the cleanup. It is unreasonable to have responders ready to act but wait while state officials must first be located and then decide whether responder services are required. Moreover, large spills will most probably affect federal waters and the waters of other states. Liability protection for responders must cover all jurisdictions.



Interoffice Communication

To D. L. Bowler
 From J. S. Haley
 Date February 26, 1991
 Subject Increased Cost to Milne Point Unit due to Alyeska's Oil Spill Response Service Agreement

Pursuant to a request from your office we have attempted to develop the additional costs to Conoco, the Overriding Royalty Interest Owners and the State of Alaska for Milne Point Unit production as a result of Alyeska's Oil Spill Response Agreement. The weighted average additional costs (which reduces the net-back value by an equal amount) are estimated as follows:

	Increased costs/ (Reduced Net Back to Unit)
February 1991	\$3.69/Bbl
March 1991	\$0.39/Bbl
April 1991	\$0.10/Bbl*

*This number is not expected to continue in the future as it reflects a cycle in the markets that may not often be repeated. We expect this number to be higher in May and thereafter even under existing sales arrangements.

The above figures represent the volume weighted increased costs. These numbers represent our best estimate of the increased costs based on current contracts, some of which are tenuous at best, given the circumstances. We have been fortunate in selling our March and April production under terms that closely approximate pre-November 1990 sales. However, if we lost our best surviving market the cost per barrel could increase \$4.00 to \$5.00 per barrel or more over pre-November sales contracts. Our current market is very precarious and may be viewed as only a 30 day arrangement. Thus, it is imperative that we get some relief from the Alaska legislature to have any assurances that net-backs for Milne Point Unit crude are not significantly reduced because of implementation of Alyeska's Oil Spill Response Service Agreement.

The State of Alaska stands to share improved net-backs by the passage of the "Good Samaritan" law for companies shipping oil through Prince William Sound.

J. S. Haley
 JSH:tt

cc: J. R. Svenvold
 D. R. Heinzer



SIERRA CLUB

CALIFORNIA

April 21, 1990

To: The Honorable Members of the Senate Judiciary Committee

From: Gordon E. Hart

Re: SB 2040 (Keene)

Although the Sierra Club does not yet have a position on SB 2040, we have been participating fully in negotiations with the author and the affected industries for over three months. Because of the substantial progress which has been made in these negotiations, we support the bill's passage out of the Judiciary Committee at this time, in order to further the negotiations.

The principal controversial issues in the negotiations which are before the Judiciary Committee relate to immunity for responders, and criminal penalties for spillers. With respect to criminal penalties for spillers, we strongly support the bill's current inclusion of criminal sanctions for spillers who reasonably should have known that they were discharging or spilling oil. We have, in the spirit of compromise, supported a variety of relaxations in the penalty section of the bill. This last relaxation sought by industry and resisted by the author would be unacceptable. Criminal sanctions are constitutional even if triggered to a strict liability standard. Although we would prefer a strict liability approach, we can accept the "reasonably should have known" standard, which imposes upon operators an appropriate, and critical, duty to regularly and diligently inspect their operations.

Because unnecessary impediments to expeditious oil spill response should be minimized, we support the concept of immunizing spill responders by passing through their liability to the spiller, under the following conditions: none of the spiller's original liability is in anyway reduced, and there are adequate assurances that all damages will be paid, and that the injured parties can be made whole. We are convinced that it is possible to draft language which meets these conditions, and we would support the inclusion of such language in SB 2040.

The issue of ensuring that injured parties can be made whole is intimately linked to the issue of the size of the oil spill response fund, which will be considered in the Appropriations Committee. In all of the various immunity proposals we have reviewed, there are a certain number of scenarios where damages must be paid from the oil spill response fund in order for the injured party to be made whole. We do not have a difficulty with

SB 2040, p.2

the limited use of the fund for this purpose, but we are very concerned that the fund is not large enough in the current language of the bill to assure that all damages can be paid. SB 2040 limits total payments, from the "upfront" fund, or the additional borrowing authority, to 500 million dollars. Since, in certain cases, the administrator will be assuming the obligations and liability of unknown or insolvent responsible parties, the 500 million dollar fund limitation imposes a de facto liability cap on these types of spills.

Since economically deprived fishermen and merchants, injured wildlife and obliterated habitat do not disappear simply because the spiller happens to be unknown or insolvent, we believe that the borrowing authority which supplements the 150 million dollar fund must be unlimited. In all potential oil spill scenarios, we must ensure that all injured parties can be made whole. The inclusion of responder immunity language therefore makes it doubly important to keep the borrowing authority unlimited.

We greatly appreciate Senator Keane's willingness to include us in these negotiations, and we look forward to continuing in the effort to provide the California Coast with the type of protection it deserves.

U.S. Department
of Transportation
United States
Coast Guard



Commander
Eleventh Coast Guard District

Union Bank Bldg.
400 Colanassa
Long Beach, CA 90822-5300
Slack Symbol: (d)
Ph: (213) 499-5201

5090

AUG 28 1990

The Honorable Willie L. Brown Jr.
Speaker, California State Assembly
State Capitol
Sacramento, California 95814

Dear Mr. Brown:

I am writing to you to express concern about legislation that is important to the interests of the United States Coast Guard and the State of California. The legislation, currently being debated in the Assembly, is Senate Bill 2040.

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

As you know, the Oil Pollution Act of 1990 (P.L. 101-280) was signed by the President on August 18th. That Act provides limited federal immunity for all oil spill responders. The Coast Guard did not object to that provision because we believe that the issue is related to the national interest in promoting quick, effective responses to oil spills and their threats. Effective response requires resources from both the public and private sectors.

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

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

I urge you to give full consideration to limited immunity provisions for all oil spill responders other than liable parties in your deliberations on SB 2040.

Sincerely,

M. E. GILBERT
Rear Admiral, U.S. Coast Guard
Commander, Eleventh Coast Guard District

PACIFIC FISHERIES LEGISLATIVE TASK FORCE



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EXECUTIVE DIRECTOR
Mary Morgan

PACIFIC FISHERIES LEGISLATIVE TASK FORCE RESOLUTION Concerning "Oil Spill Responder's Limited Immunity"

WHEREAS, it is in the interests of the citizens and resources of California, Oregon, Washington, Alaska, and Idaho to ensure that qualified, highly trained oil spill response organizations are in place and ready to respond to oil spills anywhere along our coastlines; and

WHEREAS, the success of the modern-day spill response organization depends upon countless fishermen, subcontractors, veterinarians, and other part-time specialists who must be prepared on an emergency basis to act swiftly and unhesitantly in the face of adverse circumstances and often with far less than complete information; and

WHEREAS, these responders will be deterred from performing clean-up activities on behalf of the person or persons actually responsible for the spill if they are unduly exposed to unlimited liability in the course of their response activities;

NOW, THEREFORE, BE IT RESOLVED by the Pacific Fisheries Legislative Task Force that the fishermen and other spill responders, who perform under adverse conditions to the best of their trained abilities and following the directions of recognized state and federal authorities, should be afforded limited immunity from lawsuits arising as a consequence of their response activities; and

BE IT FURTHER RESOLVED, that the Pacific Fisheries Legislative Task Force supports and encourages state and federal legislation which grants any person who responds to an oil spill, caused by another, immunity from liability from all costs and damages except in

cases where the responder acts with gross negligence or willful misconduct, or causes personal injury or wrongful death; and

FURTHER BE IT RESOLVED, where limitations on immunity are granted to responders, it is important that victims be fully protected and compensated for damages, and the party responsible for the spill in the first instance shall be liable for any damage caused by responder's simple negligence.

COPIES of this Resolution shall be transmitted to the Honorable George Bush, President of the United States; and Members of the United States Senate and the House of Representatives of Alaska, Washington, Oregon, California, and Idaho.

ADOPTED JUNE 16, 1990,
IN SITKA, ALASKA

March 20, 1991

Senator Lloyd Jones
Chair, Senate Resources Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Subject: Your Letter of Inquiry dated March 18, 1991
regarding CSHB 196

Dear Senator Jones:

Thank you for your interest in the potential impacts of CSHB 196 on our operations. Tesoro views the benefits from this bill to fall into two categories:

1. Broad Public Benefits

HB 196 will actually enhance the effectiveness of spill responders and will bring Alaska up to standards comparable with that adopted by many coastal states during the past year. Many of the general benefits of the bill have been communicated in previous correspondence and meetings. The major effect will be to make emergency spill response services available with terms that operations such as Tesoro can meet.

2. Specific Benefits to Tesoro

Tesoro operates a 80,000 bpd refinery at Kenai which relies on Alaska North Slope Crude Oil (ANS) for 90% of its feedstock. Approximately 45,000 bpd of this oil is purchased directly from the State. This oil is transported from Valdez to Kenai on the "Overseas Washington", a double bottom tanker chartered by Tesoro. In order to operate in Alaska waters the vessel must have a Oil Spill Contingency Plan. The availability of resources necessary to obtain approval of the Plan in Prince William Sound means that Tesoro must contract with Alyeska for the initial response services. Alyeska, as a Response Action Contractor, has established a requirement for \$1 Billion in directly actionable financial responsibility as a condition for making the necessary response services available. Tesoro has an estimated value of \$200 Million and is not able to provide this level of financial responsibility. Passage of HB 196 is expected to make it possible for Tesoro to reach a long term agreement for these vital spill response services.

The negative impact of failing to get this legislation passed is expected to include costly, and time consuming litigation between Tesoro and Alyeska with no guarantees to Tesoro that the outcome will result in a requirement Tesoro could meet. Tesoro's ability to maintain uninterrupted operations is threatened in the

Senator Lloyd Jones
March 20, 1991
Page 2 of 3

absence of an agreement with (or successful legal action to compel) Alyeska to provide the spill response services. There are no alternative crude oil supplies available to Tesoro. An interruption in operations could have significant impacts on the Company as well as the State of Alaska in the areas of PEOPLE, TAX BASE LOSS, and FUEL SUPPLY INTERRUPTIONS.

PEOPLE

Tesoro employees 222 people in the state with annual payroll of approximately \$11.6 Million. In addition Tesoro is the majority owner of Interior Fuels in Fairbanks with 26 employees and is a joint venture partner in Northstores Ventures which operates 7-11's in Alaska with 325 employees. The combined payroll of these 573 employees is approximately \$17.5 Million.

TAX BASE COST

Tesoro is also a major component of the Kenai Peninsula tax base with the most recent year's tax payment for Ad Valorem taxes of \$1.383 Million. The company is a major contributor to numerous civic and social organizations in the state and our employees are very active contributors of time and resources in the communities in which we operate.

FUEL SUPPLY INTERRUPTIONS

An interruption in Tesoro's operations would have immediate impacts on a large segment of Alaska. Tesoro is one of the largest suppliers of home heating oil; jet fuel, and gasoline. The enclosed charts illustrate the percentage of the Alaska market that is supplied by Tesoro products.

Gasoline Supplies

Tesoro supplied approximately 63% of the gasoline consumed in the State of Alaska during 1990. The gasoline is marketed by Tesoro's 120+ stations (including 7-11's), Chevron, and Texaco in South Central Alaska and the Interior.

Jet Fuel

Approximately 29.6% of 1990's Jet Fuel delivered in Alaska was manufactured by Tesoro. The international cargo operations, as well as passenger traffic of Anchorage International, would be threatened until alternative fuel supplies could be arranged for shipment via tanker to Anchorage. This product presently is

Senator Lloyd Jones
March 20, 1991
Page 3 of 3

delivered to Anchorage via Tesoro's pipeline between the Refinery and Anchorage. The availability of an uninterrupted supply of jet fuel has contributed to the development of Anchorage as an international hub for cargo traffic.

Diesel

The Alaska fishing industry and home heating customers rely heavily on diesel fuel manufactured by Tesoro. During 1990 approximately 22.3% of the diesel fuel sold/distributed in Alaska was Tesoro's. The diesel and home heating fuel is distributed from Western Alaska to North Western Alaska including many interior locations.

The passage of CSHB 196 will contribute to the resolution of a difficult problem for our company that has significant implications to the State of Alaska. Again, I appreciate your interest and will be available to discuss these matters at your convenience.

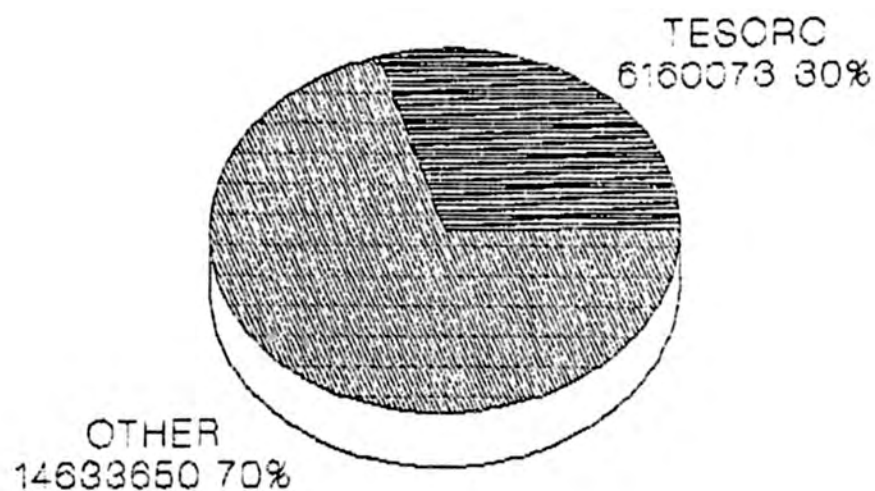
Sincerely,



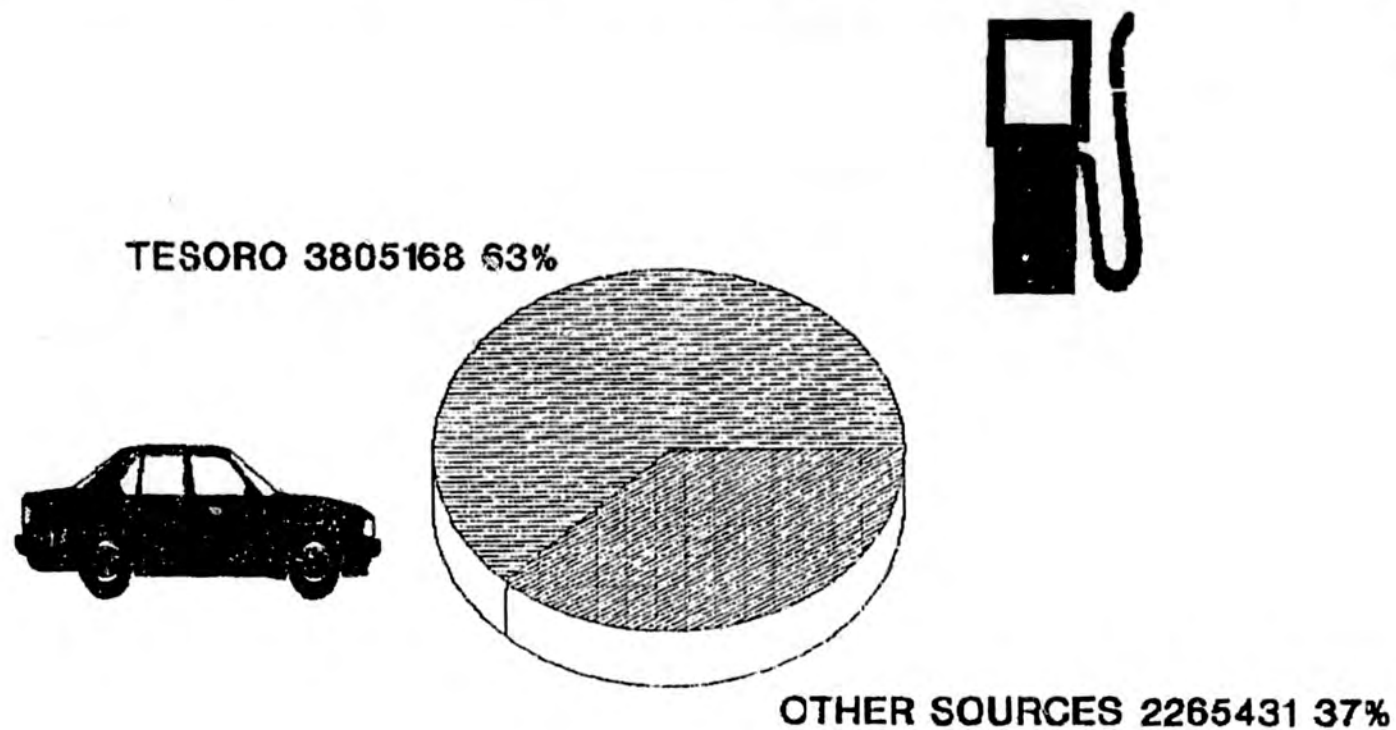
Gene Burden
Vice President -
Environmental &
Government Affairs

Enclosures

JET FUEL SALES CY 1990 (BBLs)



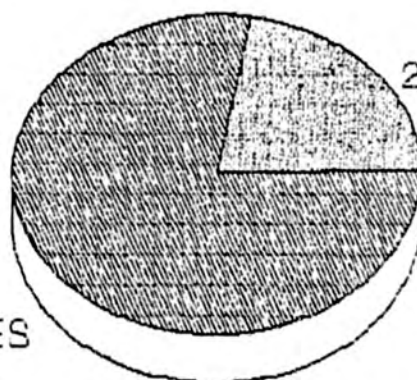
GASOLINE FUEL SOLD IN ALASKA (BBLs) CY 1990



DIESEL SALES IN ALASKA (BBLs) CY 1990



HOME HEATING OIL



OTHER SOURCES
9254077 78%

TESORO
2660325 22%

MARINE & FISHING FLEETS





THE PBN COMPANY
1225 Eighth Street
Suite 600
Sacramento, CA 95814
(916) 444-2671

FOR IMMEDIATE RELEASE:
August 21, 1990

NEWS

CONTACT:
Carri Cummings
916/444-2671
or
Peter Necarsulmer and
Peter Bartelme
415/989-0536

STATEWIDE ADS HIT TRIAL LAWYERS FOR BLOCKING OIL SPILL CLEANUP BILL

SACRAMENTO — Multi-million dollar lawsuits are not among the hazards Good Samaritans should face when they rush to help clean up an oil spill off the California coast, the state's residents are being told this week by a full-page advertisement running in 11 major newspapers.

Appearing today and Wednesday, the ad states that legislation California urgently needs to arm itself against the ravages of offshore oil spills is being blocked by the powerful California Trial Lawyers Association "for the oldest reason of all — they want the fees."

Readers are urged in the ad to call a toll free number (1-800-325-6000, operator 9752), to send free mailgrams to their state legislators and express support for language providing limited immunity from lawsuits for oil spill cleanup teams.

The ad, sponsored by the International Bird Rescue Research Center, Ventura County Commercial Fishermen's Association, Clean Bay, Clean Coastal Waters and Clean Seas, was paid for by the non-profit Petroleum Industry Response Organization (PIRO), which is in the process of changing its name to the Marine Spill Response Corporation.

The California Trial Lawyers Association recently used its lobbying influence to remove the "Good Samaritan" language from the bill, SB 2040 by Sen. Barry Keene, D-Benicia. The Good Samaritan provisions give individuals and organizations trying to clean up an oil spill limited immunity from liability lawsuits. No change would be made in the liability faced by the spiller, and the immunity for cleanup teams would not extend to acts of willful misconduct or gross carelessness.

Similar Good Samaritan language was recently approved unanimously by Congress in the federal oil spill cleanup bill.

Keene's measure, which has broad support, creates a \$150 million oil spill emergency response mechanism funded by a 25-cents-per-barrel tax on all crude oil, either produced in California or imported into the state. The California State Senate approved SB 2040 by a 34-3 vote June 21.

However, Keene said, in the State Assembly, trial lawyers have thrown "a political roadblock" around SB 2040 in their battle to remove the Good Samaritan language. They succeeded in substantially watering down the language in the bill's first Assembly committee hearing and the response organizations have joined in a massive effort to have the protections restored.

-mc-

San Francisco Office: Two Embarcadero Center • Suite 2530 • San Francisco, CA 94111 • (415) 989-0536

PN

Good Samaritan Ad
August 21, 1990
Page 2

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

"But there's one risk that's truly unacceptable. A crippling lawsuit against the recovery team itself.

"We believe our work deserves the same immunity from lawsuits as a doctor who stops to help a heart attack victim on the street," the ad contends. "Indeed, we stop everything to help an injured Earth when she needs it.

"Only one group wants to be able to make the people fighting the oil spill pay for the spill itself. The California Trial Lawyers Association."

Millicent Wood, of the International Bird Rescue Research Center, said in a separate statement that speedy action is necessary after an oil spill if the destruction of wildlife is to be minimized. But, she said, "we can't ask our people to expose themselves to lawsuits when all they're trying to do is be helpful. That's just not fair."

The Center was the lead wildlife rescue response group in both the Prince William Sound spill in Alaska and the Huntington Beach spill in Southern California.

Although California law provides many examples of Good Samaritans being shielded from lawsuits when they attempt to render aid in emergencies, current law provides no similar protection for Good Samaritans trying to clean up an oil spill, putting them in the same legal jeopardy as the persons responsible for the spill.

"That's why organizations such as the International Bird Rescue Research Center and the Ventura Commercial Fishermen's Association have joined with the U.S. Coast Guard to support the limited immunity language," explained Retired U.S. Coast Guard Admiral Jack Costello, president of PIRO.

"Without immunity, should these groups respond to an oil spill emergency immediately or first get on the phone and talk to their lawyers and insurance companies?

"The broad coalition supporting retention of the Good Samaritan language knows what the answer should be. We want to get out and go to work right away, and SB 2040, as it passed the Senate, would let us do that. It would be tragic if the trial lawyers succeed in sidetracking an absolutely essential oil spill response program simply to assure themselves of fatter fees.

"There are less than two weeks remaining in the current legislative session. If Sen. Keene's bill is killed by the trial lawyers, it might be months before the California coastline and the wildlife there receives the protection we all know must be provided. We are not going to let that happen, and the newspaper advertisement is just one way of bringing the trial lawyers' self-serving activity to the attention of the public. Sponsors of the Good Samaritan language are making phone calls, writing letters, and joining us in lobbying the Legislature to do the right thing," Admiral Costello concluded.

"We're confident the right thing will be done."

The ad contains a toll-free 800 number (1-800-325-6000, operator 9752) for people to call to voice their support for the Good Samaritan language, and a coupon that can be filled out and mailed to one of the sponsors of the language, the International Bird Rescue Research Center.

ENDORSEMENTS OF CLEANUP CONTRACTOR LIMITED LIABILITY

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

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

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

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

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

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

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

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

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

MORE ENDORSEMENTS OF CLEANUP CONTRACTORS LIMITED LIABILITY

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

CALL US.

We will send a FREE mailgram in your name to your State Assembly member.

CALL TOLL FREE.

1-800-325-6000.

Ask for Operator 9752.

This is a toll free Western Union Service.

WRITE US.

Fill out this coupon and send it to us:

YES! I support Senate Bill 2040 (Keene) and protection for California's oil spill recovery teams. Please add my name to the list of people who want to say yes to the environment.

NAME _____

ADDRESS _____

CITY _____

STATE _____

ZIP _____

Return to: International Bird Rescue Research Center, 1225 9th Street, Suite 300, Sacramento, CA 95814

OR, TELL 'EM YOURSELF.

Please Mr. Speaker: Don't let the trial lawyers keep oil recovery teams off the beach. Please join the U.S. Congress and the California State Senate by enacting Senate Bill 2040 (Keene).

NAME _____

NAME _____

ADDRESS _____

CITY _____

STATE _____

ZIP _____

Send to: Hon. Willie L. Brown, Jr., State Capitol, Sacramento, CA 95814

SPONSORED BY
International Bird Rescue Research Center
Clean Bay • Clean Coastal Waters • Clean Seas
Ventura County Commercial Fishermen's Association
Marine Spill Response Corporation

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

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

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

May 4, 1990

Dear Governor Deukmejian,

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

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

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

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

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

Sincerely,

Brian Janison

Alyeska pipeline

SERVICE COMPANY

1884 SOUTH BRADAW STREET, ANCHORAGE, ALASKA 99518. TELEPHONE (907) 276-1511. TELEX 236-25-127

March 15, 1991

Representative Bill Hudson
Capitol Room 111, MS 3100
Box V
Juneau, Alaska 99811

Re: H.B. 196

Dear Representative Hudson:

You recently asked Paul Richards to comment on H.B. 196 on behalf of Alyeska Pipeline Service Company. We have reviewed the issue of potential legislative changes to response action contractor liability in the context of the financial responsibility requirements in our Oil Spill Response Service Agreements. As a result of this review, we have developed the following statement of our position:

"Alyeska Pipeline Service Company, which operates the trans Alaska pipeline system, is an initial oil spill response action contractor for tank vessels in Prince William Sound. The vessels have incorporated Alyeska's initial response plan into their contingency plans. Under the terms of contracts between Alyeska and the owners, operators or charterers of these vessels, Alyeska is indemnified for costs and certain liabilities that might arise out of Alyeska's response on behalf of a vessel. The contracts also require that the party contracting on behalf of a vessel demonstrate financial responsibility to perform its indemnity obligations. Tesoro has been unable to demonstrate compliance with the financial responsibility provisions of the standard contract and is presently operating under a temporary agreement that expires on June 30, 1991. Alyeska has advised Tesoro that the temporary agreement will not be extended.

"Alyeska supports enactment of Alaska legislation that a response action contractor can be liable for simple negligence in its oil spill response activities ONLY when its acts are inconsistent with the National Contingency Plan or directives of the President or when its actions cause personal injury or death. Congress enacted this standard in section 4201(a) of the Oil Pollution Act of 1990. If such legislation becomes law in Alaska, Alyeska will reduce the financial responsibility requirements for all tank vessels contracting for its initial oil spill response

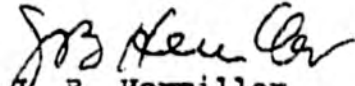
Representative Bill Hudson
March 15, 1991
Page 2

services. The amounts of such reduced requirements have not been determined. However, on the basis of Tesoro's current financial condition and available insurance coverage, and existing insurance coverage of owners of the vessel that Tesoro is using to transport its oil, Alyeska is confident that Tesoro will have no difficulty in arranging to meet such revised financial responsibility requirements.

"If the Alaska law ultimately adopted has a narrower exemption from liability for simple negligence than that provided by federal law, Alyeska will review the financial responsibility requirements of its contracts for initial oil spill response in light of the exposure to liability that remains under the new law. If substantial exposure to liability for simple negligence remains, Alyeska may not be able to reduce the financial responsibility requirements to a level that Tesoro can meet."

Please contact me or Mr. Richards if we may be of further assistance.

Sincerely yours,


J. B. Hermiller
President

smk

cc: Gene Burden
Paul Richards

February 27, 1991

Senator Sam Cotten
Chairman of Senate Oil and Gas Committee
P. O. Box V
Juneau, Alaska 99801

Dear Senator Cotten:

Mary Nordale has referred your February 8, 1991 letter to me for response. You have asked whether Alyeska's Owners have explored creating a sliding scale of financial responsibility that would establish a lower standard of financial responsibility based on tanker capacity, monthly loadings or some other scaling method to apply to companies that use Alyeska as a response action contractor for initial response to oil spills from tankers in Prince William Sound. This approach has been evaluated, but we do not believe it offers a feasible alternative to the present uniform requirement.

As you know, Alaska law requires each tank vessel loading at the Valdez Marine Terminal to have an oil spill contingency plan approved by the Alaska Department of Environmental Conservation. Each plan must meet planning standards for initial and long term response. As a service to the vessels desiring to engage in the TAPS trade, Alyeska has offered to act, on a cost of response reimbursement basis, as an oil spill response contractor to provide initial response.

Because substantial costs and liabilities are inherent in the extremely difficult work of attempting to recover oil after a marine spill, Alyeska concluded that it should not undertake to provide the service unless vessel interests indemnified it from such costs and liabilities, including claims of third parties based on simple negligence. To make such indemnities meaningful, Alyeska also required a minimum demonstrated financial responsibility from the vessel interests giving the indemnities.

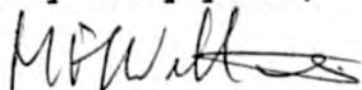
For the most part, Alyeska's exposure to costs and liabilities in responding to a spill is governed by the size of the spill. Analysis indicates that in the unlikely event that a substantial spill should occur, the most likely size of the spill would be a moderately serious spill, in the range of 30,000 to 100,000 barrels. The risks connected with responding to such a spill require a minimum demonstrated financial responsibility of one billion dollars.

Senator Sam Cotten
February 27, 1991
Page 2

Every tank vessel carrying ANS crude through Prince William Sound is capable of causing a spill that is significantly larger than a moderately serious spill. It would not be reasonable to "scale down" the financial responsibility requirement as to any tank vessel that was capable of creating a spill of that magnitude. Therefore the one billion dollars of demonstrated financial responsibility must be applicable to every tank vessel.

If you desire further information, we will be pleased to respond.

Very truly yours,



M. F. G. Williams
Vice President
Environment and Contingencies

smk

cc: W. Gene Burden

ANCHORAGE OFFICE

THE ENSERCH CENTER
550 WEST SEVENTH AVENUE, SUITE 1200
ANCHORAGE, ALASKA 99501
PHONE: (907) 277-6693
TELEX: 090-26-486
FACSIMILE: (907) 279-1959

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*L.G. BERRY
HAROLD E. SNOW, JR.
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WASHINGTON OFFICE

1050 THOMAS JEFFERSON STREET, N.W.
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WASHINGTON, D.C. 20007
PHONE: (202) 333-4400
FACSIMILE: (202) 337-0940

**STEVEN W. SILVER
**BRADLEY D. GILMAN

ROBERTSON, MONAGLE & EASTAUGH

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
JUNEAU, ALASKA 99802

January 29, 1991

JUNEAU OFFICE

COURT PLAZA BUILDING, SUITE 800
240 MAIN STREET
PO. BOX 21211
JUNEAU, ALASKA 99802
PHONE: (907) 586-3340
FACSIMILE: (907) 586-6818

ROYAL ARCH GUNNISON (1873-1918)
R.E. ROBERTSON (1885-1961)
M.E. MONAGLE (1902-1985)

FO. EASTAUGH (RETIRED)

JAMES F. CLARK
PAUL M. HOFFMAN
D. ELIZABETH CUADRA**
MARY A. NORDALE
ROBERT P. BLASCO
ELIZABETH A. ZEIGLER

ADMITTED IN WASHINGTON, D.C.**
AND ALASKA

ALL OTHERS ADMITTED
IN ALASKA

Senator Sam Cotten
Alaska State Senate
P. O. Box V
Juneau, Alaska 99811

Dear Sam:

Last Friday when Paul Richards and I were visiting you, you requested comment from Alyeska Pipeline Service Company on the proposal now being circulated by Tesoro regarding the showing of financial responsibility that must be made in order to load at the Valdez Terminal. After our conversation, I sought out a copy of the proposal and have had a chance to review it.

Because the potential liability imposed by the state on Alyeska as a response action contractor is that of simple negligence, Alyeska requires that any vessels loading at the Valdez Terminal be able to show \$1 billion in financial responsibility. Unless a company possesses that degree of financial strength, it must look to insurance. Consequently, companies lacking assets in excess of \$1 billion cannot satisfactorily demonstrate their ability to cover Alyeska's exposure to liability as a response action contractor on behalf of a tanker or cargo owner.

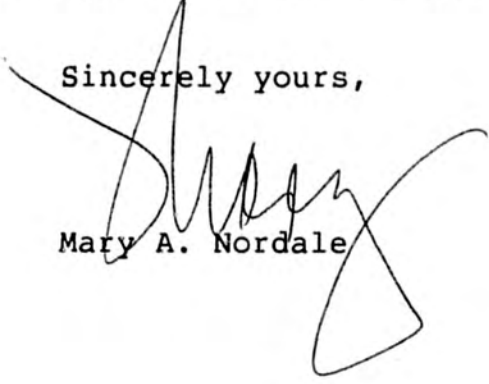
Alyeska is sympathetic to the difficulties faced by Tesoro, but must maintain its requirements. Alyeska has no objection to a change in state law which would, in effect, lower the limits of liability for response action contractors, but continue the existing liability of spillers. Alyeska would support such a change if necessary to permit Tesoro to continue to load at Valdez and to continue to purchase and refine Alaska's royalty oil.

It is my understanding that the bill Tesoro is urging would raise the standard of liability for response action contractors responding to an oil spill from simple negligence to gross negligence or intentional misconduct. If that is done, such

Senator Cotton
January 29, 1991
Page Two

a change would permit Alyeska to lower the requirements for financial responsibility of ships loading at Valdez. It is very likely that if the financial responsibility requirements are lowered, Tesoro would be able to meet them and, thereby, be able to continue to procure Alaska's royalty oil for its refinery.

Sincerely yours,



Mary A. Nordale

U.S. OIL & REFINING CO.

5150 Wilshire Boulevard • Los Angeles, CA 90036
PO Box 38913 • (213) 938-7158 • TWX 9103213573

8 April 1991

Ms. Debra Vogt
Senator Sam Cotten's Office
Juneau, Alaska

Fax No. (907) 465-4979

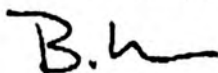
Dear Debra:

I hope the attached will help to clarify the functions of the TOVALOP and CRISTAL associations. TOVALOP is an acronym for Tanker Owners Voluntary Agreement relating to Liability for Oil Pollution. Likewise, CRISTAL is Contract Regarding an Interim Supplement to Tanker owners Agreement concerning Liability.

I have also attached an internal memo from our risk management group explaining the general history of the two associations. This is for your information, and I would prefer that you keep it in confidence.

Please call if you have any additional questions. I would be interested to know the results of your committee meeting on Thursday.

Sincerely,



W.C. Kitto

Attachments

U.S. OIL & REFINING CO.
5150 Wilshire Boulevard • Los Angeles, CA 90036
P.O. Box 36913 • (213) 938-7156 • TWX: 9103213973

WILLIAM C. KITTO
Vice President
Crude Oil Supply

18 March 1991

Senator Sam Cotten
P.O. Box V
Juneau, Alaska 99811

Dear Senator Cotten:

U.S. Oil & Refining Co. and its wholly owned subsidiary, U.S. Oil Supply Co., have been involved in the business of transporting ANS crude oil from Valdez to the State of Washington and to other Alaskan ports by tankers for several years. This activity was necessary to supply U.S. Oil & Refining Co.'s refinery in Tacoma, Washington with crude oil as well as to supply other refineries such as Tesoro, Texaco, and Shell.

Alyeska had agreed to provide clean-up services to shippers of crude oil from Valdez in case such shippers spilled crude in Prince William Sound. When Alyeska decided, however, that its legal liability resulting from these services was unlimited even though it had not caused the spill, Alyeska demanded indemnity from such shippers in the amount of \$1 billion. Such a requirement could not be satisfied through insurance by the shippers or tanker owners and thus prevented U.S. Oil & Refining Co. and others from continuing to transport ANS crude. Of course, for the owners of Alyeska and other very large oil companies, the requirement was not impossible to meet. They just indemnify Alyeska by contract. This is not an option open to smaller companies such as ourselves.

We believe in taking responsibility for our own actions and insuring these activities to the extent possible. Ships which we used were members of TOVALCP and always provided \$700 million of P&I insurance; and we as shippers always met the financial responsibility requirements of the State of Alaska and are members of CRISTAL. However, to be required to indemnify others such as Alyeska for their negligence and in such a substantial sum as \$1 billion not only seems unreasonable but is in fact impossible. The result was our being prevented from continuing to transport ANS to our refinery in Tacoma. The economic impact of not buying barrels delivered on U.S. Oil vessels is estimated to be over \$5 million per year.

Senator Sam Cotten
18 March 1991
Page 2

The proposed House Bill No. 196 would limit the liability of the spill responders such as Alyeska. Since it would apparently satisfy Alyeska that its potential liability would be covered by insurance available to shippers, we are hopeful that companies such as ours would be able to transport ANS as they have done in the past. It does not avoid or limit the liability of anyone who spills oil nor do we believe it should. However, the oil spill responder who did not create the spill is then permitted to quickly respond to the clean-up need without taking on unreasonable responsibility for the spill created by others.

Your help in advancing the proposed legislation will be greatly appreciated.

Very truly yours,

U.S. OIL & REFINING CO.

W.C. Kitto

W.C. Kitto
Vice President

MEMO

To: Bill Kitto

May 2, 1989

From: Jeff Kissel

Re: Pollution Liability Insurance

This memo will describe the various forms of pollution liability insurance which would protect us from the consequences of an in transit oil spill.

As I understand our situation, U. S. Oil or an affiliated company ships oil on the Trans Alaska Pipeline, several common carrier Canadian pipelines (though on an infrequent basis) its own refinery pipelines and on tank vessels and barges.

Liability for oil pollution is usually well defined in a common carrier's pipeline tariff. I have not examined recent copies of the pipeline tariffs for the systems we use, although I will soon. In general, however, the direct liability for oil pollution usually rests with the pipeline company, not the owner of the oil. It is another matter entirely for vessels.

After the Torrey Canyon disaster practices and the rules relating to oil spills from vessels changed dramatically. In order to forestall punitive legislation, the tanker owners formed an "insurance pool" to provide cleanup costs for oil spills on a voluntary basis. This pool remains in existence today and is called TOVALOP, Tanker Owners Voluntary Agreement relating to Liability for Oil Pollution.

TOVALOP provides the "first dollar" coverage for cleanup costs relating to spills from tankers which are owned by members of the Association and are entered in the TOVALOP agreement. It is important to note that in order for coverage to apply, each vessel must be entered into this agreement. This is why the TOVALOP clause is an essential part of any charter party.

TOVALOP coverage originally provided only \$125.00 per DWT to clean oil spills. Clearly, this amount would be sufficient only to handle small scale events. Therefore, there were continued calls for restrictive legislation in nearly every Western nation. When several states adopted legislation attaching strict liability to the owners of oil cargos another insurance pool was formed; this one is called CRISTAL, Contract Regarding an Interim Supplement to Tanker owners Agreement concerning Liability for oil pollution. Today, CRISTAL and TOVALOP combine to provide to provide up to \$125 million in coverage to pay the cost to clean oil spills.

It is important to note that neither CRISTAL nor TOVALOP are insurance in the traditional sense. They are associations made up of dues paying members. Each member is subject to assessment, based upon the expenses of the association during the prior year. U. S. Oil, as a member of CRISTAL will be billed for its share of the cleanup cost for the Exxon Valdez spill. At present, CRISTAL's share of the costs is estimated at \$54 million.

There is a final source for coverage for tanker owners; this is through their P & I Club. P & I stands for Protection and Indemnity, which is a way of saying Liability Insurance in marine terms. There are many P & I Clubs, some more than 150 years old. Like the pollution pools mentioned earlier, these clubs are associations of members, not insurance companies, hence the members are fully liable for all of the losses and costs associated with their operation.

Most P & I policies provide unlimited liability coverage. This is because a ship owner's liability is usually limited by statute, convention or treaty to the value of the vessel plus the value of the cargo. There are, however, cases where this limitation is not applicable, pollution is one of those cases. Therefore, in addition to TOVALOP and CRISTAL, there is pollution coverage, for the benefit of the ship owner only, through the P & I Club. A charterer can, under certain circumstances, avail himself of the protection afforded by the P & I Club if the proper indemnities are included in the charter party and then acknowledged by the Club.

As a charterer, U. S. Oil would have one additional exposure to the vessel owner (and through him to third parties). This emanates from the "safe berth" clause which is included in every charter party. The clause says that the charterer will only direct the vessel to and from safe ports. If there is an accident in any port, an owner's first move will be to claim that the berth was unsafe, no matter what the circumstances. I have had experience in a number of cases where owners were successful with this allegation. The Charterer's Liability policy in these circumstances would provide another source for pollution coverage for U. S. Oil. From recent discussions with Tacoma, however, I understand that pollution is, at present, not part of the Charterers Liability program, but that there is an effort underway to secure a quotation for the coverage under a more comprehensive program.

While I am not fully familiar with the details, I am aware that there is also some coastal barge traffic. Barges have the option of obtaining traditional insurance or joining the kinds of associations mentioned above to protect their interests. There is also an American equivalent to CRISTAL and TOVALOP for vessels trading in coastal and inland waterways. It is called WQIS, the Water Quality Insurance Syndicate. Its workings are very complex and designed to dovetail with federal regulations.

The only other marine related exposure to U. S. Oil from vessels emanates from the dock and I assume that there is a wharfinger's liability policy or other similar coverage in force for this area.

In summary, vessels which present a serious pollution exposure to U. S. Oil or its affiliates are usually covered by TOVALOP and a P & I Club. Coverage is verified by the U. S. government as a requirement for entry into any U. S. port, also some State governments have additional restrictions. Coverage for the cargo owner is provided by CRISTAL, and coverage for the charterer by the charterer's liability program or some alternate approach, when the pollution coverage is obtained.

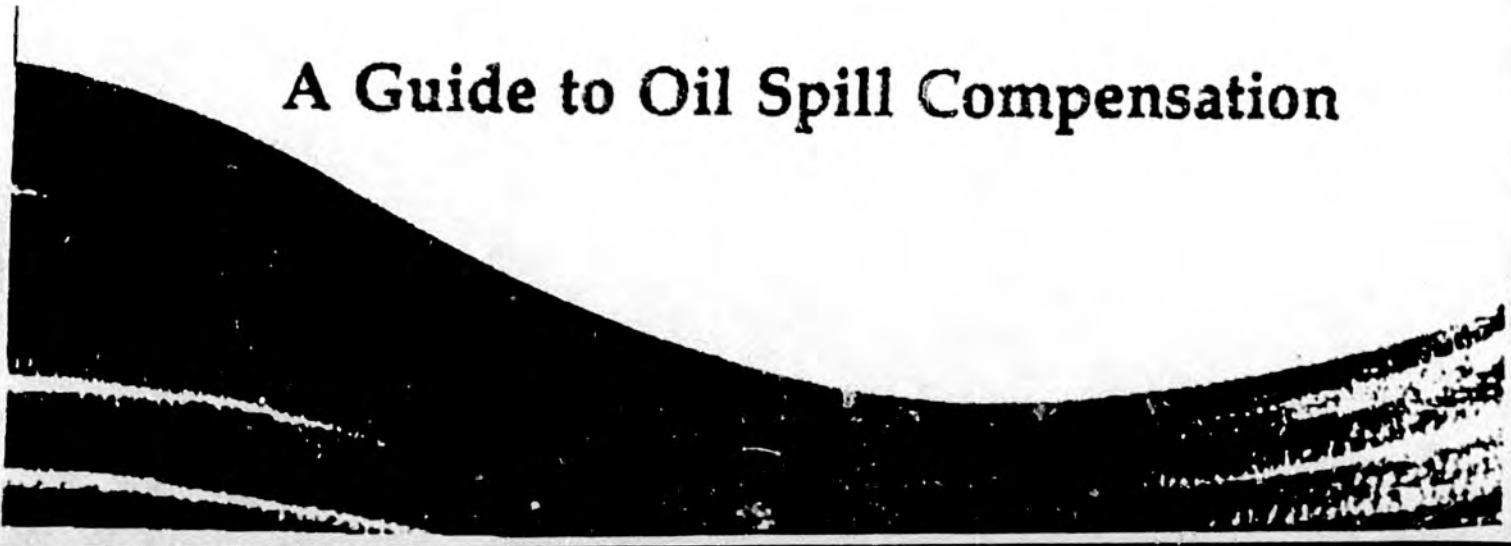


cc: R. E. Kokesh

J.D. Russell

TOVALOP & CRISTAL

A Guide to Oil Spill Compensation



Produced by

**The International Tanker Owners Pollution Federation Limited
and
Cristal Limited**

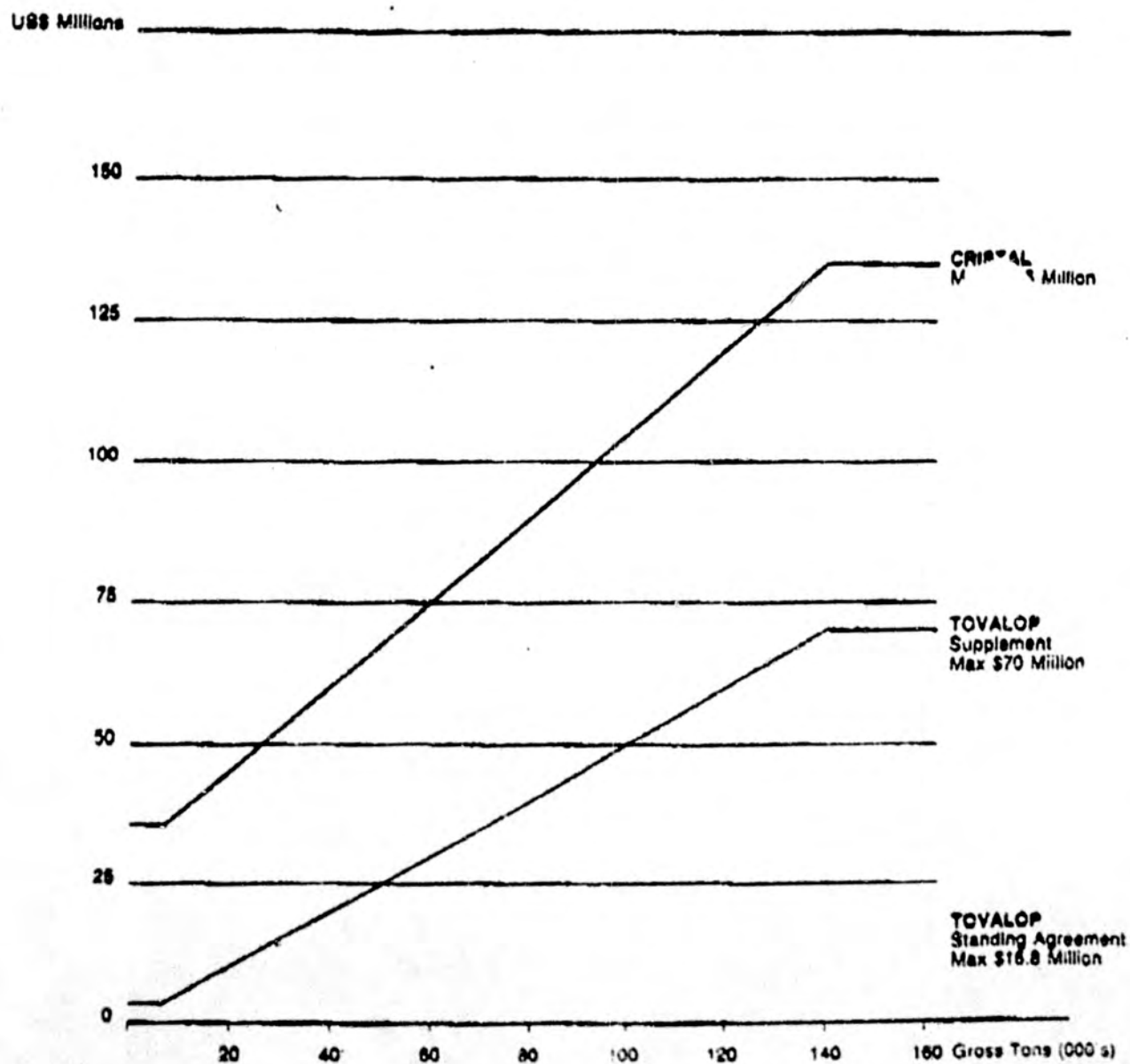
LIMITS OF LIABILITY (see figure 1)

Under the terms of the CRISTAL Contract, the following maximum limits of liability, determined by the gross tonnage of the tanker, can apply. In all cases, the stated amounts *include* compensation that would be payable by the tanker owner, as determined by the limits of liability in the TOVALOP Supplement.

- for all tankers up to 5,000 gross tons, a set maximum of US\$36 million
- for vessels over 5,000 gross tons, US\$36 million, plus US\$733 for each gross ton in excess of 5,000 gross tons up to a maximum of US\$135 million which corresponds to a tanker of about 140,000 gross tons.

Anyone with a claim under the Contract must notify Cristal Limited in writing within two years of the incident. The detailed claims procedure is set forth in the Rules of Cristal Limited.

FIGURE 1: LIMITS OF LIABILITY UNDER TOVALOP & CRISTAL



LIMITS OF LIABILITY (see figure 1)

Under the Standing Agreement, the maximum compensation for all claims arising out of any one incident is US\$160 per limitation ton (about US\$147 per gross ton) or US\$16.8 million, whichever is the less.

Under the terms of the TOVALOP Supplement the maximum limits of liability are:

- for all tankers up to 5,000 gross tons, a set maximum of US\$3.5 million
- for vessels over 5,000 gross tons, US\$3.5 million, plus US\$493 for each gross ton in excess of 5,000 gross tons, up to a maximum of US\$70 million which corresponds to a tanker of about 140,000 gross tons.

Anyone with a claim under the Agreement must notify the participating owner in writing within two years of the date of the incident.

FIGURE 2: LIMITS OF LIABILITY UNDER TOVALOP, CRISTAL, CLC & FUND CONVENTION

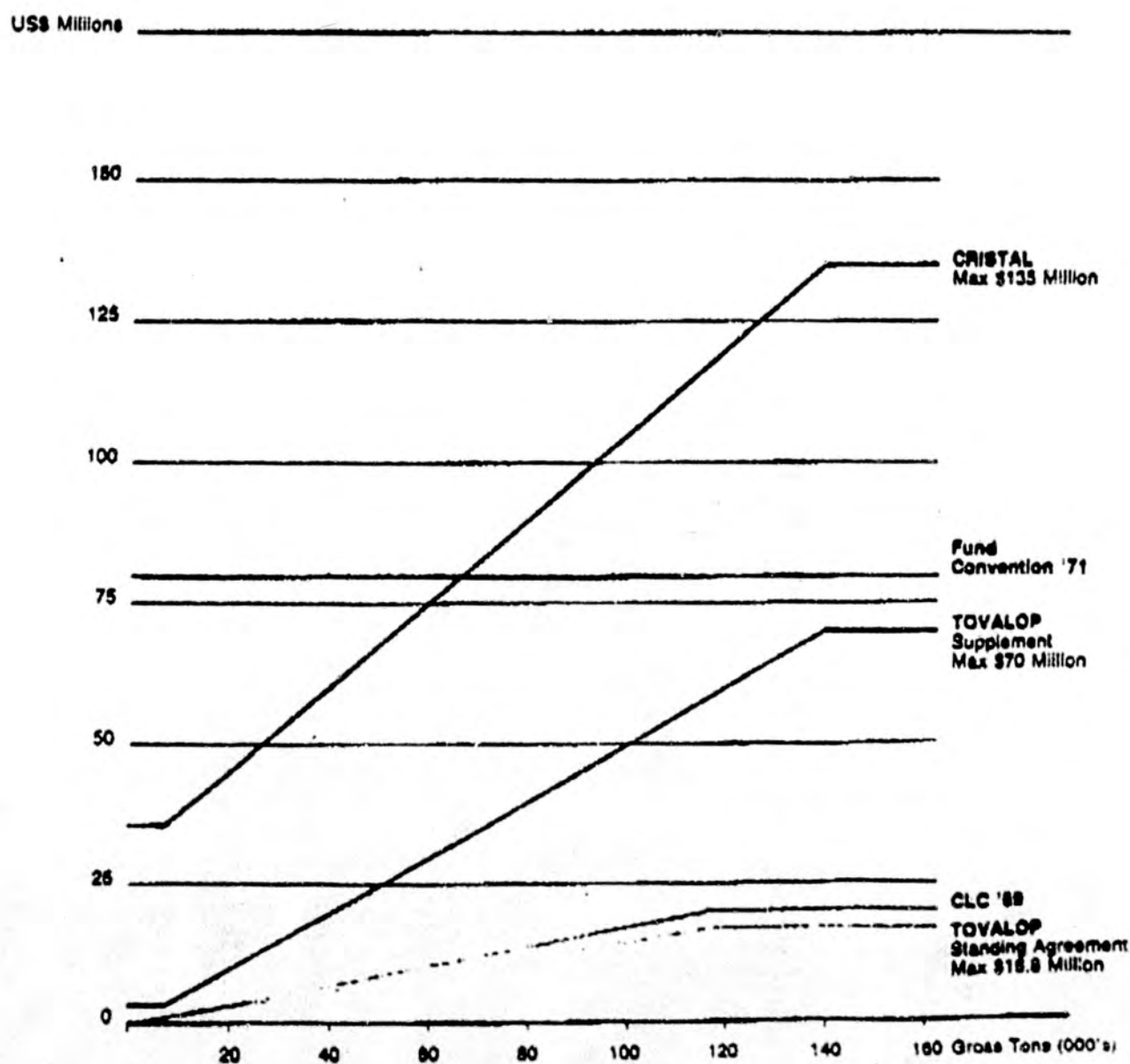
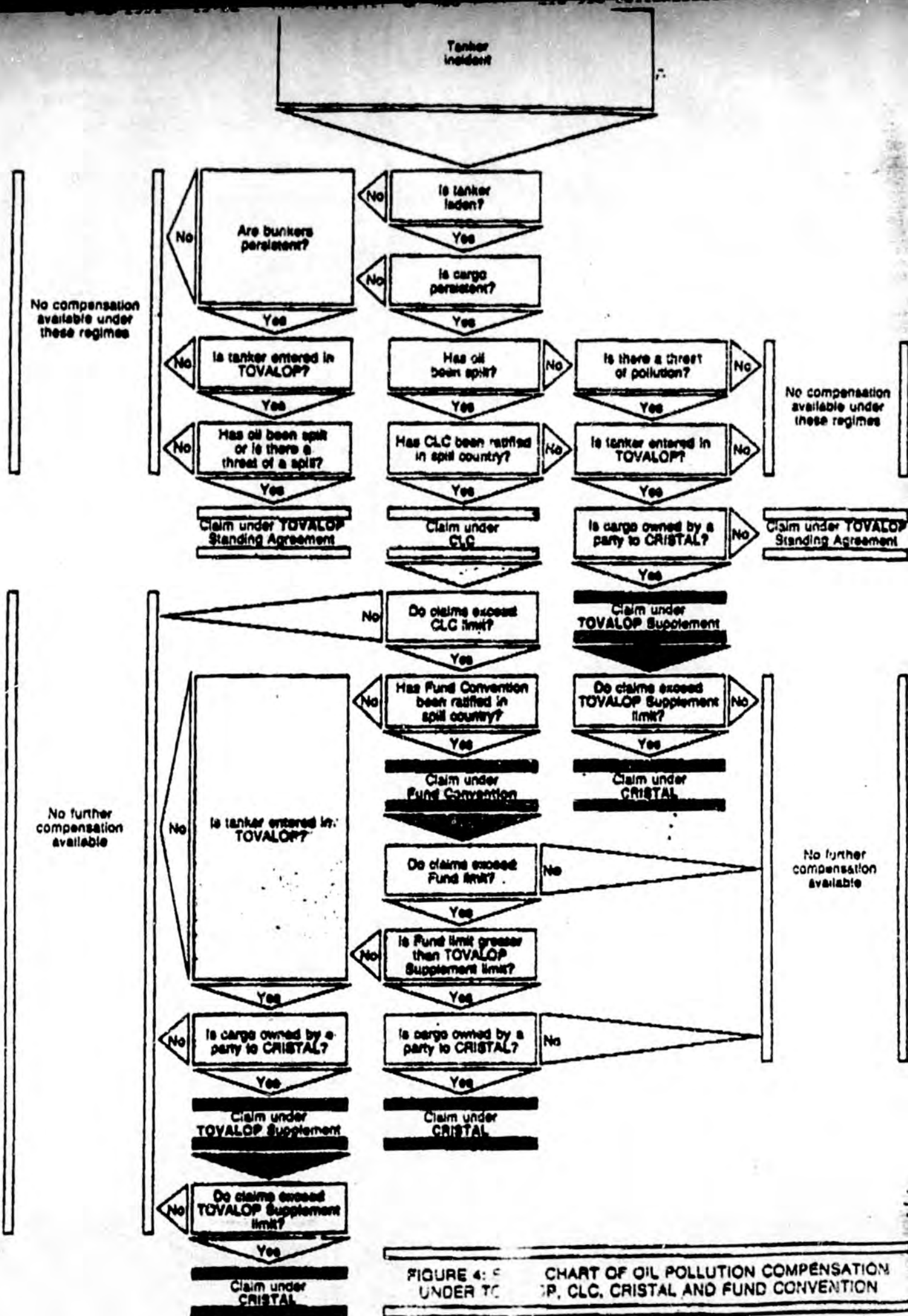


FIGURE 3: COMPENSATION FOR OIL SPILLS FROM TANKERS

	Primary Compensation provided by Shipowners			Supplementary Compensation provided by Cargo Owners	
	TOVALOP Standing Agreement	TOVALOP Supplement	CLC, 1969	CRISTAL	Fund Convention, 1971
Nature of regime	Voluntary plan	Voluntary plan	International convention	Voluntary plan	International convention
When does each apply?	When persistent oil threatens to escape or does escape from a participating tanker Tanker is not required to be loaded with cargo and no spill need occur	When persistent oil threatens to escape or does escape from a participating tanker Tanker must be loaded with CRISTAL-owned cargo although no spill of cargo need occur	When persistent oil escapes from a laden tanker No liability if tanker is unladen or if no oil is actually split	When persistent oil threatens to escape or does escape from a tanker Tanker must be loaded with CRISTAL-owned cargo and compensation paid by tanker owner up to TOVALOP Supplement limit	When persistent oil escapes from a laden tanker No liability if tanker is unladen or if no oil is actually split. Ownership of cargo irrelevant
Where can each apply?	Only when CLC, 1969 does not apply	Worldwide	In States party to CLC, 1969	Worldwide	In States party to CLC, 1969 and Fund Convention, 1971
Limits of Liability	US\$100 per limitation ton up to maximum of US\$16.8 million	US\$3.5 million for tankers up to 5,000 gross tons, rising to maximum of US\$70 million	US\$181 per limitation ton up to maximum of US\$19.1 million (see note 1)	US\$33 million for tankers up to 5,000 gross tons, rising to maximum of US\$135 million, including compensation paid by tanker owner	Total made up to US\$81.8 million, including any compensation paid by tanker owner under CLC, 1969 (see note 1)

Footnote 1: The limits of liability under the CLC, 1969 are specified in units of account the US\$ equivalents of which are shown above have been converted, to the nearest round figure, to US\$1.354

ention, 1971 are based on upon exchange rates. Those rates of conversion applying as at



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May 14, 1991

Senator Sam Cotten
Chair
Senate Oil & Gas Committee
P. O. Box V
Juneau, Alaska 99811

Re: CSHB 196 (Finance)
Our File No.: 401,513.7

Dear Senator Cotten:

I am writing on behalf of Tesoro and Conoco regarding the status of the subject bill and modifications recommended May 10, 1991 by Alyeska (copy enclosed). We understand that Alyeska has committed to reduce the bonding requirements for Tesoro in Prince William Sound if these amendments are adopted.

As you are aware, extensive work has been done on the legislation both in the House, and in work sessions that your committee has already held. All of the work that has been done on this legislation was performed in close consultation with interested senate offices, including your staff and you.

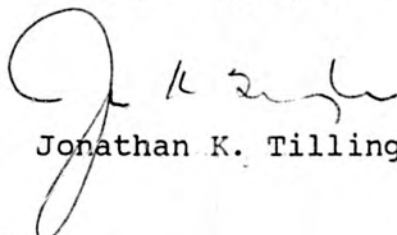
The bill before your committee reflects the efforts to strike a balance between a number of different interests. Although neither Tesoro nor Conoco have problems with the substance of the Alyeska proposals, we are concerned about the prospects of these amendments jeopardizing the bill's passage. Over the interim, all interested parties will have the opportunity to debate whether the long-term solution ought to differ from the terms of the House Finance Committee bill. In the absence of these amendments the House Finance legislation does create a gross negligence standard

Senator Sam Cotten
May 14, 1991
Page 2

that removes any possible justification for excessive indemnification demands from response action contractors.

Sincerely,

BIRCH, HORTON, BITTNER & CHEROT



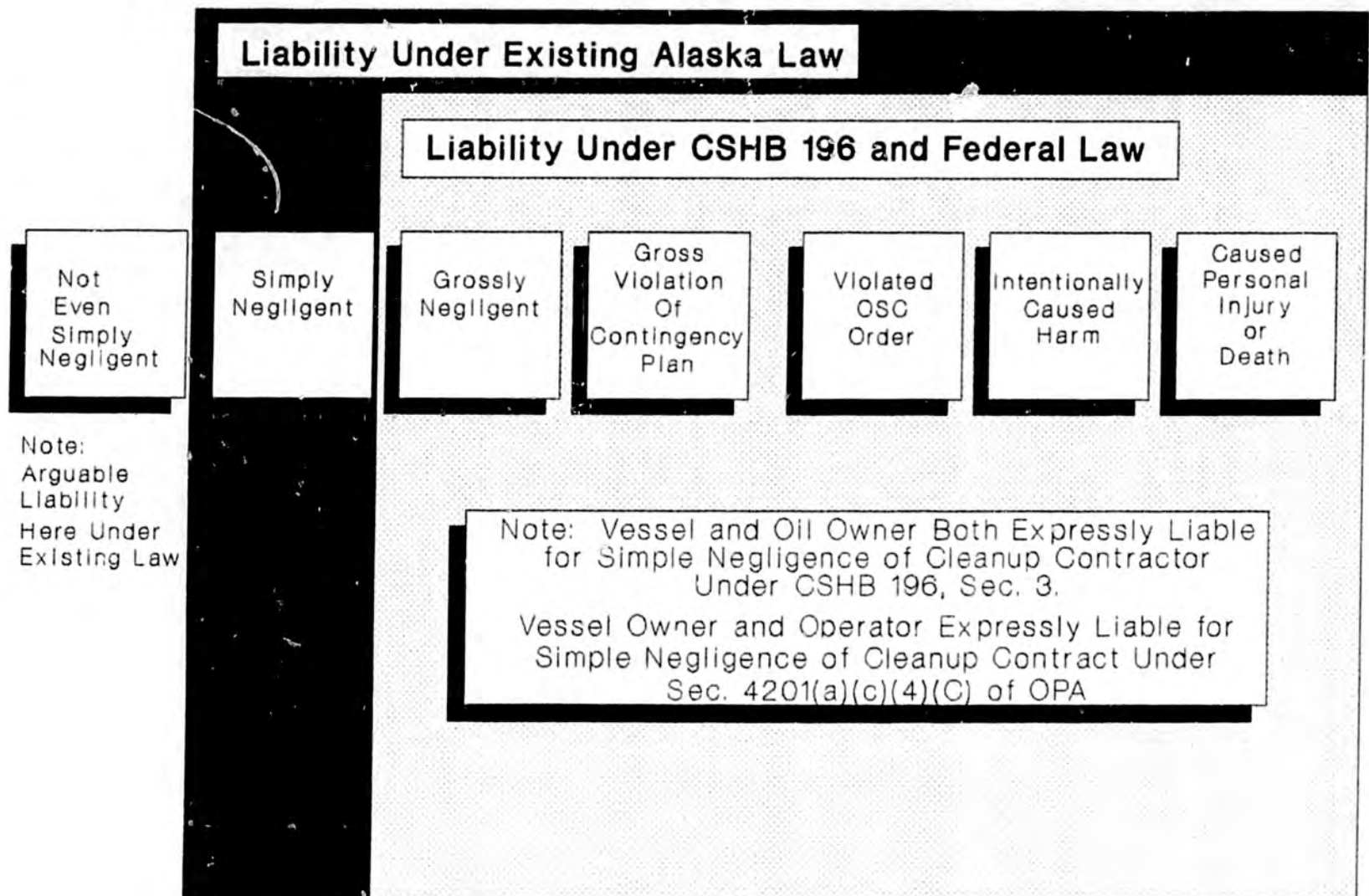
Jonathan K. Tillinghast

JKT/amw

cc: Representative Bill Hudson
Members Senate Oil & Gas Committee
Members Senate Finance Committee
Gene Burden
Al Hastings

CLEANUP CONTRACTOR LIABILITY FOR DAMAGES CAUSED BY CLEANUP OPERATIONS

CSHB 196 and Federal Law vs. Existing Alaska Law

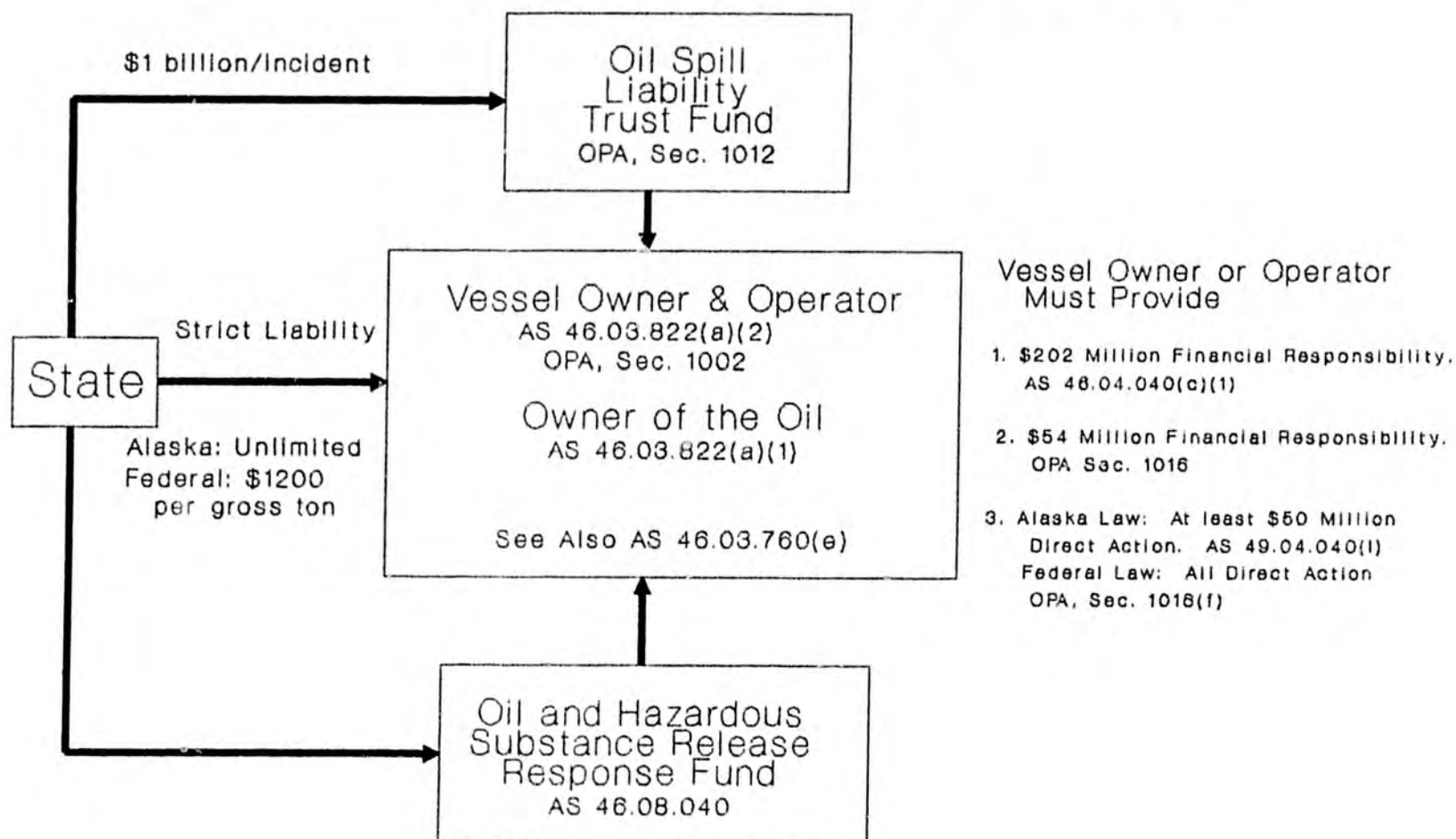


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Revised

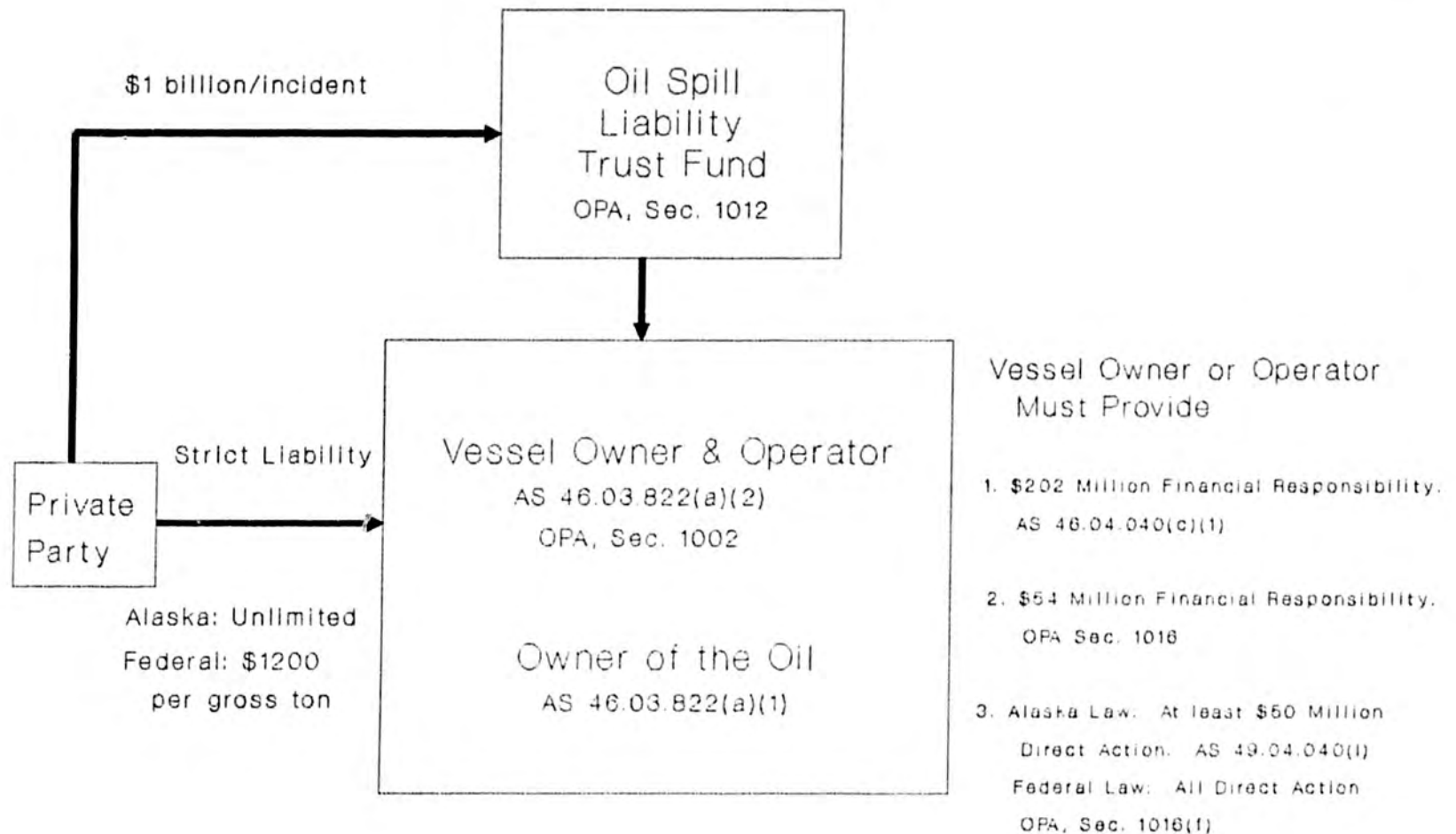
RECOVERY OF CLEANUP COSTS CRUDE SPILL FROM 90,000 DWT OIL TANKER

Under Both Existing Law and CSHB 196



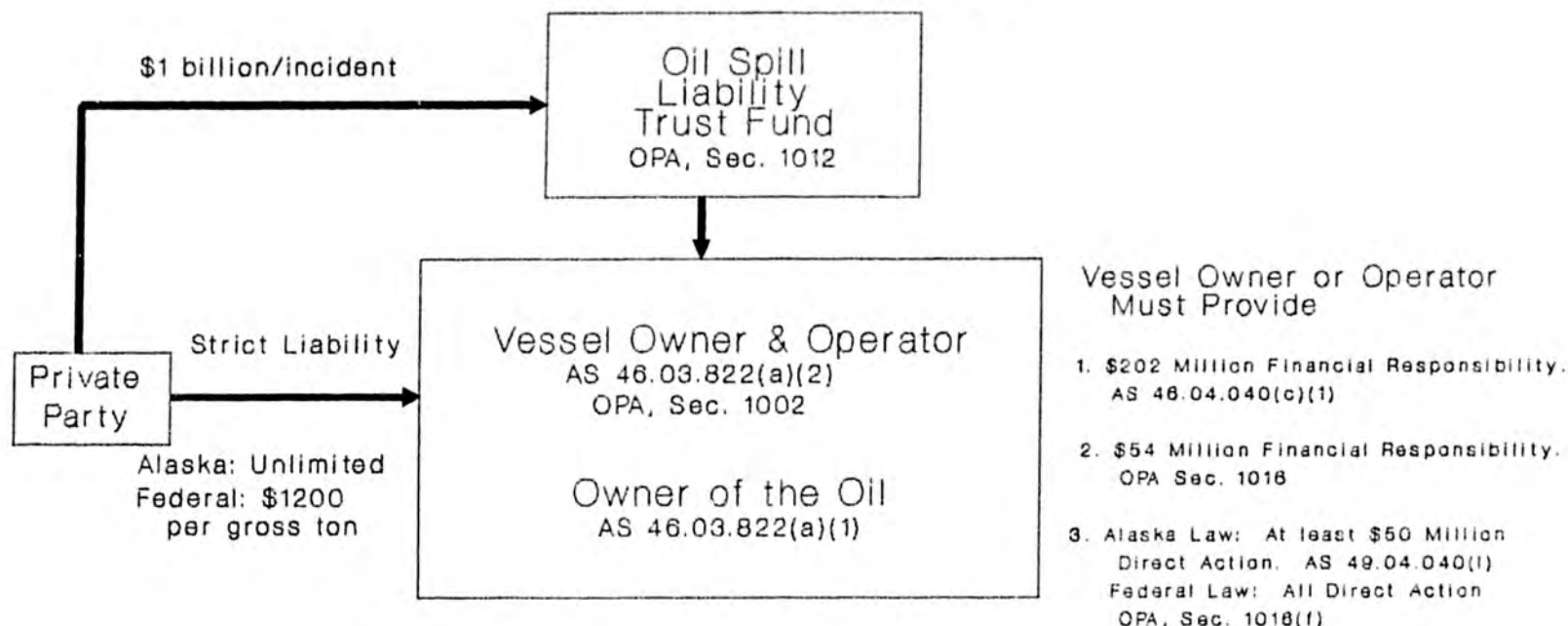
DAMAGE RECOVERY CRUDE SPILL FROM 90,000 DWT OIL TANKER

Under Both Existing Law and CSHB 196



DAMAGE RECOVERY FOR CLEANUP CONTRACTOR'S SIMPLE NEGLIGENCE*

Under CSHB 196



Note: Vessel and Oil Owner Both Expressly Liable for Simple Negligence of Cleanup Contractor Under CSHB 196, Sec. 3.

Vessel Owner and Operator Expressly Liable for Simple Negligence of Cleanup Contractor Under Sec. 4201(a)(c)(4)(C) of OPA.

•Based on a Crude Spill From 90,000 DWT Oil Tanker

THE CASE FOR LIMITED LIABILITY FOR OIL SPILL RESPONSE ACTION CONTRACTORS

TESORO ALASKA PETROLEUM COMPANY

October 24, 1990

For Further Information Contact:

Tesoro Alaska Petroleum Company
Government Affairs
Attn: Gene Burden
P. O. Box 3690
Kenai, Alaska 99611
(907)776-8191

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EXECUTIVE SUMMARY

Since the Good Friday, 1989 grounding of the EXXON VALDEZ, the State of Alaska has enacted a number of statutes intended to increase both public and private oil spill cleanup capabilities. 1989 legislation, for example, required the Department of Environmental Conservation ("ADEC") to prepare both state and regional master oil spill contingency plans. Ch. 90, SLA 1989. 1990 legislation established stringent new requirements for private oil spill contingency plans, including the capability to contain a major oil discharge within 72 hours. Ch. 191, SLA 1990.

Unfortunately, the goals of the 1989 and 90 legislation may be unachievable. Current oil spill containment and cleanup assets in Alaska are insufficient to meet the demands of the new legislation. Accordingly, the public and private sectors need to encourage the creation and maintenance of new oil spill cleanup depots and services in the state.

Industry is attempting to respond to both Alaska's new demands, and those of Congress. After the EXXON VALDEZ spill, a group of oil producers, marketers, and transporters formed the Petroleum Institute Response Organization ("PIRO") with the goal of providing state-of-the-art response capability for any spill in United States waters. PIRO, in turn, led to the creation of the Marine Spill Response Corporation ("MSRC") -- a nonprofit corporation privately financed for the purpose of responding to catastrophic oil spills. Funding for MSRC will come through the separate Marine Preservation Association, whose initial membership is composed of owners, shippers and receivers of crude oil and petroleum products. MSRC organizers estimate that \$800 million in

industry funds will be invested in equipment, maintenance, research and personnel over the first five years of operations. The goal of Alaska state government, and Alaska industry, has been to attract a regional PIRO (or MSRC) depot to the state.

In oil spill legislative jargon, the people who provide oil spill cleanup services, such as MSRC, are called "response action contractors" ("RAC"). Unfortunately, Alaska's current legal environment discourages the presence of MSRC and other RACs within the state. Alaska law creates a substantial risk that a RAC will become embroiled in litigation arising from an oil spill -- even if the RAC had no involvement whatsoever in causing the spill. Whether the RAC ultimately extricates itself from that litigation is beside the point. Defense costs alone are enough to make the threat of litigation unacceptably high. That threat, in fact, is so great that it has resulted in the absence of sufficient, affordable insurance for RACs. A June 6, 1990 PIRO Board of Directors resolution made it clear that the possibility of innocent RAC liability would be a major factor in evaluating the organization's presence in any state. According to that resolution:

In the absence of qualified state immunity of the type provided in the pending federal legislation, PIRO will be forced to reconsider the role and vision of PIRO in each affected state.

In 1989 Alaska attempted to provide some protection from RAC liability. Ch 39, SLA 1989 (AS 46.03.823); amended §§3-7, Ch. 191, SLA 1990. The new law, however, is of little practical value, and may actually aggravate the situation. There is no sound public policy reason for ever holding an innocent RAC strictly liable for damages from an oil spill. Where a RAC's only involvement stems from its willingness to provide necessary aid, forcing liability on it without regard to fault is foolish. And, before enactment of

Alaska's 1989 legislation, it was at worst uncertain whether an innocent RAC would ever be held strictly liable for damages occasioned by cleanup activities. The 1989-90 legislation, however, implies that unless certain vague and cumbersome conditions are met, innocent RACs will be strictly liable for any damages caused by their cleanup activities. Moreover, the conditions for avoiding strict liability are so unclear and poorly worded that the statute provides virtually no assurance that strict liability will not attach in all cases.

In contrast to Alaska's legislation, Congress has recently enacted the Oil Pollution Act of 1990. Like the flurry of Alaska legislation arising from the EXXON VALDEZ, the federal law seeks to enhance the nation's oil spill cleanup capability. Unlike Alaska law, however, the 1990 legislation effectively furthers that goal by providing a straightforward limitation on RAC liability for oil spill cleanup activities. The new federal law not only unequivocally exempts oil spill RACs from strict liability, it also limits oil spill RACs' liability for negligence. It does so for three reasons. First, oil spill RACs are uniquely vulnerable to negligence claims because they must operate in a crisis atmosphere, making immediate decisions that are always subject to second guessing. As MSRC has observed:

[A]n oil spill responder must act decisively, in a dynamic environment over which he has very limited control, frequently with less than perfect information.¹

1. Marine Spill Response Corporation, The World's Largest Oil Spill Response Organization, undated at 2. Attachment 1. All of the attachments to this summary and the report are included in a separate binder.

Second, protection from negligence liability is necessary if insurance is to become available for oil spill RACs. Third and finally, Congress recognizes that if there is damage caused by the good faith cleanup efforts of an oil spill RAC, the liability should fall on the person causing the spill.

The federal legislation, however, does not affect state oil spill liability laws. Alaska's RAC liability law therefore remains in effect. With the passage of the new federal legislation, and similar legislation in Washington, Hawaii, Florida, Virginia, and (with certain conditions) California, Alaska now finds itself at a severe competitive disadvantage in attracting adequate oil spill cleanup technology and expertise to the state.

Alaska's disadvantage has threatened its goal of encouraging a direct MSRC presence in the state. MSRC currently plans five regional response depots in New York/New Jersey, south Florida, Louisiana, Southern California and Seattle. While "the petroleum industry and Alaska are currently discussing how to provide an adequate spill response capability for the state,"² it is apparent that the unfavorable legal environment in a declining number of states -- unfortunately including Alaska -- will continue to deter necessary cleanup capabilities:

To insure the most prompt and effective response, the [new federal] legislation provides limited immunity for oil spill responders -- but not for spillers. This national immunity standard insures that responders will not delay response and cleanup actions while having to wait for advice about the liability exposure they might face. It also protects them from post-spill lawsuits by parties alleging damages, unless the responder acted with gross negligence or willful misconduct. . . .

2. Questions and Answers: Marine Spill Response Corporation, undated at 4. Attachment 2.

However, the legislation allows states to preempt federal law in this regard. This means that an uneven playing field may face the responder -- on one side of the state line he may have reasonable limited immunity, while on the other side he may face possible uninsurable risks. This may pose a serious problem in the future.

"Marine Spill Response Corporation: A New Weapon For Cleaning Up Oil Spills," undated at 2. Attachment 3.

As MSRC's president, retired Coast Guard Vice Admiral John D. Costello, observed:

The new federal law also allows states to enact responder liability standards different from the federal standard. In some states, existing standards can make responders hesitant to act and inadvertently deter the prompt aggressive action needed in oil spill catastrophes. As a result, MSRC will be working hard with states to get them to adopt the federal responder liability standard. Much remains to be done in this area.³

To remove a substantial deterrent to the presence of MSRC and other RACs in the state, Alaska should conform its laws to recently enacted federal standards, and provide certain and sufficient protection from the unjustifiable inclusion of RACs in oil spill litigation. Legislation accomplishing that goal is Attachment 5 to this report.

3. Statement of Vice Admiral John D. Costello, September 6, 1990, at 2-3. Attachment 4.

I. THE PROBLEM OF POTENTIAL RAC LIABILITY

A. The RAC's Unique Exposure to Litigation.

Effective response to a major oil spill requires the immediate mobilization of personnel and equipment to the spill site. As Alaska's experience with the EXXON VALDEZ spill illustrates, there is a direct connection between the time it takes to respond to a spill and the amount of environmental damage that may ultimately result.

RACs are called to disaster scenes in the same crisis atmosphere as firefighters and paramedics, and are asked to make rapid assessments and formulate appropriate responses on the spot. There is little opportunity for planning and reflection. While all oil spill response will be subject to some advance contingency planning, the adequacy of that response will ultimately turn on snap decisions made in response to the unique dynamics of the particular spill.

The emergency environment in which an oil spill RAC must operate makes the company an easy target for negligence claims. As noted recently in the Tort and Insurance Law Journal, "in this day and age, when injury occurs, negligence is almost always found among one or more of the acting parties. The concept of an accident without fault is virtually unknown in modern tort law."¹ Even if a RAC had absolutely no involvement in the spill itself, plaintiffs' lawyers will have little trouble inventing theories for why the RAC should have acted differently.

1. "Hazardous Waste Liability and the Surety," Tort and Insurance Law Journal, Spring 1990, at 684. Attachment 6.

The crisis atmosphere in which an oil spill RAC must operate sets it apart from a RAC engaged in the long-term cleanup of hazardous waste sites. The hazardous waste RAC has weeks or months to investigate, review and analyze both the site and possible responses. The oil spill RAC, conversely, must make critical, time sensitive decisions often in an atmosphere of near total chaos, adverse weather, fast moving currents, high seas and far less than complete information. A RAC assisting in the long-term cleanup of a hazardous waste site will have the time to review carefully each step of its response with public regulators and its own attorneys. An oil spill RAC will not.

This distinction is important because, as we shall see, Alaska law lumps oil spill and hazardous waste site RAC liability together, using legislation that is patterned after federal law applicable only to hazardous waste site RACs.

At the height of the response to the EXXON VALDEZ spill, 10,000 people and over 75 vessels were engaged in containment and cleanup efforts. With this level of activity, and in today's litigious atmosphere, any responder who steps into the chaos of a major spill may quickly find itself exposed to high risk lawsuits designed to tie the responder's cleanup action or inaction to the negligence of the spiller. The RAC's principal risk is not in losing a lawsuit; rather, it is becoming enmeshed in complex oil spill litigation. Attorneys' fees, and the time demands that a lawsuit places on the RAC itself, are severe enough to dissuade a RAC from entering an uncertain legal environment, irrespective of the chances of ultimate potential liability.

There is no reported study on the defense costs associated with oil spill or environmental damage litigation in particular. However, a number of studies have been

performed with respect to other factually complex tort litigation such as medical malpractice and general liability. Those studies show that defense costs are at least a significant factor, and at times the primary factor, in the burdens of litigation. For example, in a 1987 study commissioned for the RAND Corporation, researchers found that of the total expenses for tort litigation (other than automobile accident cases), 57 per cent of those costs were attributable to attorneys' fees, the parties' time, and court fees. Only 43 per cent were attributable to compensation paid.²

Insurance Services Office, Inc., found similar results in a 1988 study. Defense attorneys' fees alone, the 1988 study found, equaled 34.3 per cent of compensation paid for general liability claims, and 36.6 per cent of indemnity costs for medical malpractice.³

Substantial defense costs are inevitable irrespective of the merits of the claim. For example, the 1988 ISO study found that fully 34 per cent of the total defense costs paid by insurers were for claims in which no payment whatsoever was made to the claimant. Id. at 8.⁴

In 1986, the RAND Corporation estimated that nationwide defense costs in tort litigation ranged between \$8 and \$10 billion. Id. at vii. The ISO's 1988 study found that

2. RAND Corp., "Costs and Compensation Paid in Tort Litigation," Kakalik and Pace at xiii (1986). Attachment 7.

3. Insurance Services Office, Inc., "Legal Defense: A Large and Growing Insurance Cost," at 3 (1988). Attachment 8.

4. In Alaska, a prevailing party is theoretically entitled to recover its attorneys' fees under Alaska Rule of Civil Procedure 82. However, that rule generally allows only partial recovery of attorneys' fees. See Malvo v. J.C. Penney, Inc. 512 P.2d 575 (Alaska 1973). Moreover, defendants often find that the plaintiff is impecunious, and that an attorneys' fee judgment is practically worthless. Finally, most environmental litigation ultimately settles, under terms that require each party to bear their own attorneys' fees.

"legal defense cost for the casualty lines of insurance amounted to \$12 billion" in attorneys' fees alone. Id. at 1. With this kind of exposure, not only RACs themselves, but their potential insurers as well, will look carefully at any legal environment that threatens to entwine oil spill RACs in prolonged litigation.

B. The Unavailability of Liability Insurance for RAC Contractors.

The potential liability of innocent RACs could be offset by affordable liability insurance. However, precisely because of that potential liability, insurance for RACs at reasonable rates, and with reasonable limits, is unavailable. As a practical matter, then, no responsible RAC may be willing to enter the market.

The unavailability of RAC insurance has been a driving force behind congressional limitations on RAC liability. In 1986, Congress reauthorized the federal "Superfund" program through the Superfund Amendments and Authorization Act of 1986 ("SARA") (P.L. 99-499). In §119 of that act (42 U.S.C. §9619), Congress authorized the U.S. Environmental Protection Agency ("EPA") to indemnify RACs from negligence liability for the cleanup of hazardous waste other than oil. See §III, post. That action was motivated principally by a concern over the unavailability of RAC insurance:

Throughout the 1986 Superfund reauthorization process which culminated in the enactment of SARA, EPA officials agreed with contractor testimony that adequate insurance coverage at a reasonable price was not available to them and was unlikely to be available in the near future. In fact, the lack of such insurance coverage was the underlying justification for the establishment of a federal negligence standard and indemnification program for superfund cleanup contractors.

Attachment 6 at 679.

Following enactment of SARA, the U.S. General Accounting Office ("GAO") issued a report entitled "Hazardous Waste, Issues Surrounding Insurance Availability" (GAO/RCED-88-2) (1987). The GAO found that:

Only one insurance organization is actively marketing pollution insurance. A few hundred companies are insured under its policies. The maximum annual coverage that can be purchased is \$12.5 million. Several other insurance organizations provide limited coverage pollution risk insurance.

Id. at 3; Attachment 9.

The GAO report explored the reason for the lack of insurance at meaningful policy limits, and concluded that the situation was unlikely to improve in the near term:

Few insurance companies are currently offering pollution insurance. According to insurance industry officials, the uncertainties created by potentially enormous claim payments and unfavorable legal trends have led most of the insurance industry to perceive pollution as an uninsurable risk. The near-term outlook for increased availability of pollution insurance does not appear favorable, and many insurers indicate that they may never offer pollution insurance. The insurance industry wrote about \$154.3 billion in direct premiums in 1985 for property/casualty insurance. We estimate that less than one-half of one percent (about \$65 million) of those premiums were written for EIL [Environmental Impairment Liability] insurance.⁵

Under SARA, EPA was required to establish guidelines for indemnifying RACs for negligence liability. In the 1989 Supporting Background Document accompanying the proposed final guidelines for SARA indemnification, EPA stated:

During the reenactment of CERCLA, the commercial insurance industry was recovering from the worst financial performance in its history. Insurance coverage for RACs was extremely restricted and, if available, very expensive. Commercial insurers asserted that it was extremely difficult to provide coverage for RAC loss events resulting from current operations that may not cause a loss until far into the future and may not result in a claim until even further into the future.

5. Id. at 17.

As a result of record underwriting losses in 1984 and 1985, by 1986 only two U.S. insurers remained in the market for pollution liability insurance. Even these two insurers scaled back considerably their pollution insurance programs after 1985.⁶

Moreover, the two remaining insurers referred to in the 1989 background document hardly provided adequate or affordable coverage:

On the more specific subject of pollution liability insurance for response action contractors, EPA itself concluded that only two U.S. property and casualty insurers, as of April, 1988, were offering specialized pollution liability insurance programs to response action contractors active in the superfund program....

The coverage offered by the two insurance companies was in the form of claims made policies, each carrying maximum limits of \$1 million per occurrence and \$2 to \$5 million annual aggregate, respectively. Each carried a minimum premium of \$25,000, one with a \$25,000 self insured retention and the other with a \$50,000 self insured retention.⁷

A \$1 million/occurrence limit, of course, is hardly adequate to protect a RAC from potential oil spill liability. And, for reasons discussed in §III, post, the publication of EPA's indemnification guidelines did little to improve the insurance market. According to recent telephone contacts with RACs operating in Alaska, PIRO and the American Insurance Association, adequate pollution liability insurance is still unavailable to RACs. Presently, just two companies are actively involved in the market. The American International Group/National Union Fire Insurance Company (AIG) and Reliance National/Planet Insurance Company, through Environmental Compliance Services (ECS), write most of the pollution liability insurance available in the country. AIG's policy limits are \$5,000,000

6. EPA, Supporting Background Document for Proposed Response Action Contractor Indemnification, at 4-86, 8-51, 8-52 (1989).

7. Attachment 6 at 679.

each claim and \$5,000,000 aggregate. ECS's policy limits are \$2,000,000 each claim and \$2,000,000 aggregate for blanket coverage, and \$3,000,000 each claim and \$6,000,000 aggregate for coverage on a project basis.⁸

The reason most often cited by the insurance industry for the continuing pollution insurance crisis, in addition to the cyclical nature of the industry, is the lack of a preemptive federal limitation on RAC liability and the resulting vague and conflicting nature of state liability laws. It remains unclear in many states, for example, whether RACs are subject not just to negligence liability, but to strict liability. This uncertainty causes many insurers to avoid the market altogether.

In sum, the uniquely high litigation risk faced by RACs has driven the insurance industry from the market. What little coverage is available today is absurdly inadequate to protect the RAC. On July 18, 1985, in a statement prepared for the Subcommittee on Administrative Law and Governmental Relations, House Committee on the Judiciary, the National Constructors Association described the RAC liability insurance situation in terms as fitting then as they are today:

The unpredictable liabilities facing cleanup contractors are compounded by and intertwined with the present insurance crisis in the environmental/pollution field. As the Wall Street Journal recently reported, "the pollution-liability insurance field has virtually collapsed." As a result of

8. Contractors Pollution Liability Coverage, American Insurance Association (undated); Attachment 10.

the tremendous liability risks and the unavailability of insurance coverage, a number of highly-qualified NCA member companies have declined to bid on toxic waste cleanup projects.⁹

9. Superfund Reauthorization: Judicial and Legal Issues, Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 99th Cong., 1st Sess., Serial No. 19 (1985), Testimony of National Constructors Association at 7. Attachment 11.

II. CURRENT ALASKA LAW

In 1989, the Alaska legislature enacted AS 46.03.823. Section 823 was patterned after §119 of CERCLA. There are, however, three important differences:

1. While both CERCLA and §823 are intended to protect an innocent RAC from strict liability for damages caused by the spill and cleanup, CERCLA also allows EPA to indemnify RACs from negligence liability. See §III, post. Section 823 contains no indemnification provision. As a result, §823's sole impact is on an innocent RAC's possible strict liability;

2. Section 119 of CERCLA applies only to the cleanup of hazardous substances other than oil. Alaska law, on the other hand, defines "hazardous substance" to include both substances governed by CERCLA, and oil. See AS 46.03.826(4). Congress has now recognized that different liability limitations are warranted for hazardous waste site cleanup on the one hand, and oil spill RACs on the other. See §IV, post. Alaska has not; and

3. Section 823 contains vague exceptions to even the strict liability limitations of the law -- limitations that deny the Alaska statute necessary certainty in defining the extent of RAC liability.

The basic premise of Alaska's law is flawed. In no event should a RAC be subject to strict liability for damages caused by an oil spill in which the RAC itself had no involvement. Alaska law recognizes that the handling of oil in large quantities is a hazardous undertaking, and that those who stand to make substantial profits from the

production, refining and transportation of petroleum ought to serve as guarantors against damage arising from its discharge. See AS 46.03.758-759; AS 46.03.822. These laws thus make the discharger liable for any damage caused by the spill (including damage caused by subsequent cleanup) even if the spill wasn't due to the discharger's negligence. That liability is an exception to the normal rule that fault is required to assess damages. It is premised on two assumptions: (1) that the discharger is engaged in an ultrahazardous business for which special care is needed to protect the public; and (2) the cost of imposing strict liability can be passed on to the consumer who benefits from its imposition.

On the other hand, there is no basis in common sense, equity or law for making an oil spill cleanup contractor (who was totally uninvolved in the discharge itself) strictly liable for damage occasioned by the cleanup. The result that "strict liability" was intended to prevent -- the discharge itself -- has already occurred, and the innocent RAC is simply trying to clean things up. Moreover, the risk presented by oil spill cleanup activities is inconsequential compared to the risk of not cleaning up the spill. Nor, particularly in light of the unavailability of insurance, is the RAC uniquely capable of absorbing the added costs of strict liability.

The case against strict liability for RACs was made by the National Constructors Association during 1985 Superfund oversight hearings before the House Judiciary Committee:

The courts of many states have imposed strict liability upon a variety of activities that are considered to be 'abnormally dangerous.' Although the traditional premises for the imposition of strict liability do not apply to

Superfund cleanup work, there is no certainty that remedial contractors will not be swept into the chain of strict liability that may be applied to those persons associated with the creation of the particular hazard that is the subject of cleanup activity. The premise of strict liability is to impose liability upon those persons who 'introduced into the community an abnormal risk of a serious character.' In essence, the imposition of strict liability requires a characterization of the activity itself as abnormally dangerous and a public policy decision that one is not free to conduct the particular activity without becoming subject to absolute liability for all harm that ensues regardless of fault.

The principal reasons for the application of strict liability are to assure that the costs of harm resulting from risks inherent in an abnormally hazardous activity be borne by the persons who create such risks and, in some cases, to deter abnormally dangerous activities. Neither of these principles apply to Superfund cleanup work. The firms which are hired to develop cleanup plans or do the physical work necessary to accomplish cleanup did not create the risk in the first place. . . . The remedial contractor's role is to alleviate a risk that was created and introduced to the community by others. . . There simply is no justification for placing a remedial contractor under the burden of strict liability that applies to those who created the risk. . . .

Furthermore, the national policy promoted by Congress in the Superfund legislation is to strongly encourage rather than to deter responsible cleanup of hazardous waste

It is also clear that Superfund cleanup work is not 'an abnormally dangerous activity' as that term has traditionally been defined for purposes of strict liability. The Restatement of Torts sets forth six factors to be considered in determining if an activity is 'abnormally dangerous' [including] . . . (5) the inappropriateness of the activity to the place where it is carried on; and (6) the extent to which the value to the community is outweighed by its dangerous attributes. Application of the fifth and sixth factors demonstrates that strict liability should not be applied to Superfund cleanup activity. Clearly, Superfund cleanup activity is appropriate. . . . Similarly, there is no question that the value which the community receives from Superfund cleanup work outweighs any dangerous attributes of the cleanup work.

Attachment 11.

Absent the 1989 enactment of §823, it is doubtful whether a RAC would be "strictly liable" for damages occasioned by its participation in cleanup activities. Alaska's strict

liability pollution law, AS 46.03.822(a), lists the persons liable for a hazardous substance spill. Section 822(a)(5) includes as a "responsible party":

Any person who accepts or accepted any hazardous substances, other than refined oil, for transport or disposal to treatment facilities, vessels or sites selected by the person, from which there is a release...

That language is also borrowed from CERCLA, 42 U.S.C. §9607(a)(4), and is meant to include those involved in hauling hazardous waste for dumping. See Prudential Insurance Co. of America v. U.S. Gypsum, 711 F. Supp. 1244, 1253-56 (D.N.J. 1989). Section 822(5) comes the closest to including an oil spill RAC; even here, however, it is unlikely that the term would include an entity who first becomes involved after the spill occurs, and whose sole participation is its attempt to clean it up. Section 822(a)(5), like all of §822's subsections, requires some status or conduct of the responsible party before the release occurs, while a RAC will have no relationship to the discharge until after that fact.

Section 823, on the other hand, first establishes a negligence standard in subsection (a), then in subsection (b) calls that standard a "limitation" on liability that will apply only in certain circumstances. Section 823 thus suggests that innocent RACs will be strictly liable in those circumstances where "limited" negligence liability will not govern. Alaska's new legislation may therefore be making matters worse.

The case for ever imposing strict liability on an innocent RAC is weaker in the case of an oil spill RAC than a hazardous waste RAC. Congress has sensibly distinguished between the two types of RACs in its statutory liability limitations. See §§III-IV, post. Alaska should do the same.

Section 823's failure to distinguish between these two types of RACs manifests itself in §823(e). That subsection provides:

This section does not affect the liability of a response action contractor that may arise from the response action contractor's failure to comply with the terms or conditions of a:

- (1) response action contract or remedial action plan if one has been approved by the department; or
- (2) contingency plan approved by the department whether response action contractor is the plan holder.

In the case of a hazardous waste RAC, there will invariably be a detailed "remedial action plan" setting out each approved step of the hazardous waste cleanup. As a result, it will generally be easy for the contractor to determine whether its particular action is "in compliance" with the remedial action plan.

On the other hand, in the emergency atmosphere under which an oil spill RAC must operate, the RAC will be acting under only basic written instructions (if any), and hurried and incomplete oral advice from EPA, the Coast Guard and/or ADEC. Further, the oil spill RAC will often need to take its own initiative, responding to site-specific conditions that were not anticipated in its discussions and/or "contract" with the agencies. It would be easy for the agency, or a third-party plaintiff, to allege after the fact that the RAC did not operate "in compliance" with the agency's general and probably incomplete directives. As a result, an oil spill RAC can have no confidence whatsoever that the statute protects it from even strict liability.

This particular condition highlights the third fundamental problem with Alaska's law -- its uncertainty. As the Hazardous Waste Action Coalition¹⁰ has said:

Express statements of the extent of liability...are crucial...Every point of discretion or ambiguity represents a risk of litigation.¹¹

The point of limited liability is to avoid not only ultimate liability, but the cost of litigation itself. If state law simply exempted innocent RACs from liability, period, the innocent RAC would probably not be sued. Or if it were sued, it could extricate itself from the proceedings. Or, the other hand, every "if, and, and but" provides the plaintiff's lawyer with an opportunity to argue that the exemption does not apply, thus defeating the very purpose of the limitation.

The vague requirement that the RAC "comply" with the terms of a "response action contract" was part of 1989's original §823. In 1990, matters got worse. In the Senate Oil and Gas Committee, industry suggested alternative wording that would narrow the vague "compliance" condition. Specifically, industry suggested that the law require instead that:

1. the RAC comply with any specific contingency plan approved by the Department; and
2. the RAC not act "contrary" to any provision of a response plan. Compare Cal. Gov't. Code § 8670.56.6(a)(2).

10. The Hazardous Waste Action Coalition is a coalition of the American Consulting Engineers Council. It is comprised of RACs that operate throughout the United States.

11. Hazardous Waste Action Coalition, 1989 Review of State Laws Related to Response Action Contractors at 6 (1989).

A contingency plan contains relatively objective requirements for equipment and supplies. Whether the RAC has met its contingency plan obligations can thus be determined with relative certainty. Similarly, limiting liability except where the RAC acted "contrary" to a response action contract is narrower, and more objectively determinable, than whether it "complied" with that contract. This is particularly true in those common situations where the RAC was required, in an emergency atmosphere, to take unilateral action that was not contemplated by the contract. That kind of initiative would not be "contrary" to the RAC's contract, but it is uncertain whether it would be in "compliance" therewith.

Unfortunately, the Senate Oil and Gas Committee accepted industry's alternative conditions¹² and retained the more vague "in compliance with" proviso that the industry language was intended to replace. As a result, there are now not one, but three related provisos to the statute:

1. the RAC must not act "contrary" to a response action plan;
2. the RAC must act in "compliance" with the response action plan; and
3. the RAC must be in compliance with a "contingency plan approved by the department."

The effect of this, of course, is to render Alaska's law so cumbersome and riddled with overlapping conditions that it has become virtually useless.

12. Those provisions now appear in §823(e)(2) (contingency plan) and §823(a) (acting "contrary" to a response plan). See Ch. 191, SLA 1990 at 2-4. Attachment 12.

III. ONE ALTERNATIVE APPROACH TO LIMITING RAC LIABILITY:

INDEMNIFICATION

As part of SARA in 1986, Congress added §119 in response to the RAC industry's concern that sufficient commercial insurance for pollution liability was unavailable and unaffordable, and therefore RAC participation in Superfund cleanups was threatened. The issue of responder liability was taken up late in the legislative process. The resulting indemnification approach taken by Congress in §119 is viewed widely as the product of hurried compromise.

In addition to sensibly exempting RACs from strict liability under CERCLA, §119 provided EPA with the discretionary authority to indemnify RACs from negligent cleanup. Indemnity, however, is not automatic. It must be granted on a case-by-case basis within the terms of the response action contract. The indemnification agreement is available only when EPA determines that insurance is not available to the response action contractor at a fair and reasonable price. If indemnity is given in connection with a private party's cleanup, a claim may not be paid by the government unless the contractor has exhausted all administrative, judicial and common law claims for indemnification against all potentially responsible parties participating in the cleanup.

On October 6, 1987, EPA released its "Interim Guidance on Indemnification of Superfund Response Action Contractors Under §119 of SARA." These interim guidelines are still in effect. On October 31, 1989, EPA's proposed Final Guidelines were published. The indemnity amount under these guidelines is limited to \$50,000,000. That limit will

often be seriously inadequate. A study commissioned for EPA's Indemnification Task Force and performed by Tillinghast, Nelson & Warren, Inc., recommends limits of \$200,000,000.¹³

Beyond the inadequacy of the indemnity amount, the American Insurance Association (AIA) and the National Constructors Association (NCA) have identified six major shortcomings in EPA's indemnification approach. First, the proposed indemnification does not specifically run to contractor sureties; therefore, the surety loses any benefit of the indemnification if the contractor defaults. Secondly, on fixed price contracts the "costs" of indemnification are added to a RAC's bid. The "costs" are tied to the requested limit of indemnification and the amount of deductible. In other words, a contractor is penalized in the bidding process by requesting indemnification. Third, on negotiated contracts, the deductible amount is to be adjusted according to the limit of indemnification requested by the RAC. For example, there would be a \$3.5 million deductible for \$50 million indemnification. The AIA argues that this virtually eliminates participation by small contractors. Fourth, indemnification will cover only claims arising during the contract and for 10 years after completion. The NCA argues that 30-40 year protection is needed. Fifth, RACs must document that diligent efforts have been made to obtain adequate insurance at fair and reasonable prices. According to the AIA, "the EPA proposes to use this requirement to retroactively refuse to indemnify the RAC if the EPA determines that at the beginning of the contract the RAC failed to adequately document its diligent search for insurance." Finally, EPA proposes not to indemnify the

13. Attachment 6 at 676.

RAC if the RAC is found to be both strictly liable (presumably under one of the state laws that may impose a strict liability standard on RACs) and negligent and the cause of action is inseverable.¹⁴

In summary, the insurance and RAC industries believe that the interim indemnification offered by EPA have proven virtually useless. The requirements are cumbersome and virtually impossible to satisfy, and indemnification is entirely discretionary.

In addition to §119, six states currently have statutes authorizing some form of indemnification for RACs.¹⁵ The statutes vary greatly. For example, Massachusetts limits the amount of indemnification and requires evidence that insurance is not otherwise available.¹⁶ California offers case-by-case indemnity after that state's 60-90 day limited liability period has expired (see §V, post).¹⁷ Of the states surveyed, none has ever used its indemnification statute. In a survey of state laws related to Response Action Contractors, the Hazardous Waste Action Coalition concluded that "the net result of the

14. See American Insurance Association, Comments on Superfund Response Action Contractor Indemnification Guidelines, February 27, 1990 (Attachment 13); National Constructors Association, Comments on EPA's Proposed Guidelines on RAC Indemnification Published on October 31, 1989. Attachment 14.

15. The six include: California, Florida, Illinois, Louisiana, Massachusetts and Missouri. New Jersey's indemnification statute recently expired, and Washington's was replaced with a law similar to the new federal statute.

16. Mass. Gen. Laws Ann. Ch. 21E, §17 (West 1990).

17. Cal. Gov't. Code §8670.56.6(j)(3) (1990).

restrictions and qualifications on these [indemnification] laws is to render many of them not useful."¹⁸

Indemnification is an inherently unworkable approach. First, it fails to provide the certainty of limited liability that is necessary for RACs, and their insurers, to do business within the jurisdiction. Second, it is bad public policy. Indemnification by the government means that, as a practical matter, a portion of the damages caused by an oil spill may be paid by the government itself. On the other hand, by simply limiting the RAC's liability, the amount of damages that the RAC could otherwise be obligated to pay will be directly transferred to the responsible party. Since damages occasioned by good faith cleanup activities lie within the range of foreseeable harm flowing from the discharge itself, the discharger will be liable for those damages -- unless a poorly-conceived state law takes the discharger off the hook.

Finally, since government funds are directly involved in an indemnification scheme, legislatures and state agencies will inevitably insist on so many conditions and limitations - including those described above -- that, as a practical matter, the indemnification allowance will become useless.

As the next section of the paper will show, these deficiencies in the indemnification approach led Congress, in 1990, to abandon the approach for oil spill RACs in favor of a certain and straightforward limitation on liability.

18. 1989 Review of State Laws Related to Response Action Contractors, *supra* n. 16 at 43 (1989).

IV. 1990 FEDERAL OIL SPILL LEGISLATION

After the EXXON VALDEZ, several oil spill bills were introduced in Congress. First, the Senate passed S. 686, the "Oil Pollution Liability and Compensation Act of 1989," on August 4, 1989. It did not address the issue of oil spill RAC liability. Next, the House of Representatives passed H.R. 1465, the "Oil Pollution Prevention, Removal, Liability, and Compensation Act of 1989," on November 9, 1989. §311(a)(1)(D) of the House legislation provided that "those persons, other than responsible parties, who are retained or directed by the President to participate in a cleanup action will not be held liable for removal costs or damages as defined in the legislation, except in the case of gross negligence or willful misconduct."

On November 19, 1989, the Senate amended the House bill with the text of the Senate's bill -- S. 686. A conference committee was appointed. The conferees agreed to the following language regarding RAC liability, which became §4201(a) of the "Oil Pollution Act of 1990":

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

(B) Subparagraph (A) does not apply --

(i) to a responsible party;

(ii) to a response under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.);

(iii) with respect to personal injury or wrongful death; or

- (iv) if the person is grossly negligent or engages in willful misconduct.

The President signed the "Oil Pollution Act of 1990" on August 18, 1990. P.L. 101-380; Attachment 15. Consequently, RACs will be subject to two different standards of federal liability depending on whether they are responding to an oil spill or engaged in remediation of a hazardous waste site under CERCLA.

Under the 1990 Act, the contractor will be liable only for its gross negligence or intentional misconduct in responding to an oil spill. It will not be liable for simple negligence. Under CERCLA, however, the contractor will be liable for negligence, subject to EPA's discretionary authority to indemnify.

The 1990 federal legislation has two fundamental virtues. First, it sensibly recognizes the distinction between oil spill RACs and those involved in long-term hazardous waste site cleanup. It also recognizes that the indemnification approach is uniquely ill-suited for oil spill RACs, since:

1. The mere possibility of case-by-case indemnification does not provide sufficient encouragement for oil spill RACs to locate and maintain necessary cleanup supplies and personnel; and
2. Given the emergency atmosphere attendant an oil spill, time will not permit the negotiations and fact-finding necessary for case-by-case indemnification.

Second, §4201(a) is simple and certain. It is a straight-forward limitation on liability, the application of which leaves little room for doubt. As a result, an innocent RAC will be relatively certain that it will avoid entanglement in litigation; or, if joined in a lawsuit, will be able to extricate itself quickly.

V. THE APPROACH OF OTHER STATES

Currently, Washington, Hawaii, Florida and Virginia mirror the 1990 federal legislation by limiting RAC liability to cases of gross negligence or intentional misconduct.¹⁹ As part of its September, 1990 comprehensive oil spill legislation (SB 2040), California has also adopted a "gross negligence or intentional misconduct" standard for RACs. Cal. Gov't. Code §8670.56.6; Attachment 20. That limited liability, however, continues for only 60 days after the spill if the responding party "is regularly engaged in the business of responding to oil spills." *Id.* at subsections (K)-(M). There is no time limit on limited immunity for those "not regularly engaged" in the business, and even the 60-day limitation can be extended for an additional 30 days. *Id.* at (K)-(2). The limitation of liability applies only to those responding to a spill under contract with a public agency. *Id.* at (a)(1); (j)(1).

Massachusetts essentially follows the approach of §119 of CERCLA -- exempting RACs from strict liability, and authorizing indemnification for negligence.²⁰ The statutory language in other states varies a great deal, subjecting RACs to different, uncertain liabilities depending on the statute's terms and its subsequent interpretation. However, a majority of states have taken some statutory action to at least avoid the imposition of

19. See 1990 Hawaii Sess. Laws 298, §17 at 41 (Attachment 16); Section 16, CS for CS for SB 1068, amending Fla. Stat. §376.09 adding new subsection (5) (Attachment 17); Va. Code Ann. §62.1-44.34:18D (Attachment 18); Wash., HB2494, §25 (1990) (Attachment 19).

20. Mass. Gen. Laws Ann. Ch. 21E, §§ 16, 17 (West 1990).

strict liability on RACs. Eleven states, including Alaska, have codified some form of a negligence standard for RACs.²¹ Missouri has a \$3 million per occurrence statutory cap on RAC liability.²² States employing the indemnification approach are discussed in §III, ante.

PIRO has identified four areas where either pending state legislation or current statutes inadequately protect RACs. The first is liability protection that accrues to responders only if they act on a voluntary basis. New York law currently limits RAC protection in this way. Second, some state statutes limit liability protection to acts performed solely by the responder. PIRO argues that all response acts, including those performed by subcontractors and the original spiller, should be exempt from liability unless grossly negligent or intentional. Third are statutes that limit liability on the basis of the kind of costs charged by the responder. If only out-of-pocket costs are allowed, then only organizations like PIRO, a not-for-profit corporation, would have liability protection. Finally, some states provide immunity only if the responder has first been designated by state officials to respond. PIRO argues that it is unreasonable to have responders ready to act, but wait while state officials are located to decide whether responder services are required.

21. The twelve states that had adopted a negligence standard for RACs, as of 1989, include Alabama, Alaska, Arkansas, Louisiana, Massachusetts, Michigan, New Jersey, New York, Oregon, Pennsylvania and Texas. See "1989 Review of State Laws Related to Response Action Contractors," supra n. 16 at 40.

22. See Mo. Rev. Stat. §260.552.

In sum, most states have recognized the need to protect innocent RACs from the possible imposition of strict liability. State legislation has tended to follow federal leadership. After the enactment of §119 of CERCLA, a number of states enacted their own indemnification laws. With the shortcomings of indemnification becoming more apparent, and with the passage of the 1990 federal oil spill legislation, one would expect a number of additional states to revisit their laws on RAC liability.

VI. CONCLUSION

An innocent RAC -- that is, one that had no involvement in causing the oil spill -- should never be subject to strict liability for engaging in cleanup activities. That result -- a result probably not required by Alaska liability laws other than §823 -- would be akin to holding doctors strictly liable for emergency room treatment, or firefighters strictly liable for damage caused in combating a blaze. The result of laws like those would be the quick disappearance of emergency room doctors and firefighters. The same is true of RACs. The possibility of strict liability threatens to drive RACs from the oil spill cleanup market, and already has driven away the pollution insurance industry.

Alaska's RAC liability law (AS 46.03.823) merely provides a conditional limitation on strict liability. The necessary implication of Alaska's law, of course, is that under some circumstances an innocent RAC will be strictly liable. As a result, §823 aggravates rather than alleviates the problem.

Moreover, whatever value §823 may have for RACs engaged in the long-term cleanup of hazardous waste sites, that "value" is not transferrable to RACs engaged in oil spill cleanup under emergency conditions. RACs operating in that atmosphere are uniquely vulnerable to negligence claims, and may end up paying part of the price for an oil spill that they did not cause.

As with tort law generally, the damages caused by good faith efforts to contain and cleanup an oil spill should be borne by the person causing the spill. To encourage the

kind of cleanup capability that Alaska has demanded in recent legislation, it is imperative that the state provide a clear limitation on liability for oil spill RACs.

An indemnification approach will not work. The approach is inherently flawed, and because of its shortcomings will inevitably be burdened with a host of conditions and limitations that will make it virtually useless. The United States, Washington, Hawaii, Florida, and Illinois are right -- what is needed is a simple, express limitation on innocent RAC liability to cases of gross negligence and intentional misconduct. A separate Alaska statute, modeled after the 1990 federal oil spill legislation and applicable only to oil spill RACs, will accomplish that goal.

Suggested legislation is Attachment 5 to this report.

THE CASE FOR LIMITED LIABILITY FOR OIL SPILL RESPONSE ACTION CONTRACTORS

EXECUTIVE SUMMARY

TESORO ALASKA PETROLEUM COMPANY

October 24, 1990

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EXECUTIVE SUMMARY

Since the Good Friday, 1989 grounding of the EXXON VALDEZ, the State of Alaska has enacted a number of statutes intended to increase both public and private oil spill cleanup capabilities. 1989 legislation, for example, required the Department of Environmental Conservation ("ADEC") to prepare both state and regional master oil spill contingency plans. Ch. 90, SLA 1989. 1990 legislation established stringent new requirements for private oil spill contingency plans, including the capability to contain a major oil discharge within 72 hours. Ch. 191, SLA 1990.

Unfortunately, the goals of the 1989 and 90 legislation may be unachievable. Current oil spill containment and cleanup assets in Alaska are insufficient to meet the demands of the new legislation. Accordingly, the public and private sectors need to encourage the creation and maintenance of new oil spill cleanup depots and services in the state.

Industry is attempting to respond to both Alaska's new demands, and those of Congress. After the EXXON VALDEZ spill, a group of oil producers, marketers, and transporters formed the Petroleum Institute Response Organization ("PIRO") with the goal of providing state-of-the-art response capability for any spill in United States waters. PIRO, in turn, led to the creation of the Marine Spill Response Corporation ("MSRC") -- a nonprofit corporation privately financed for the purpose of responding to catastrophic oil spills. Funding for MSRC will come through the separate Marine Preservation Association, whose initial membership is composed of owners, shippers and receivers of crude oil and petroleum products. MSRC organizers estimate that \$800 million in

industry funds will be invested in equipment, maintenance, research and personnel over the first five years of operations. The goal of Alaska state government, and Alaska industry, has been to attract a regional PIRO (or MSRC) depot to the state.

In oil spill legislative jargon, the people who provide oil spill cleanup services, such as MSRC, are called "response action contractors" ("RAC"). Unfortunately, Alaska's current legal environment discourages the presence of MSRC and other RACs within the state. Alaska law creates a substantial risk that a RAC will become embroiled in litigation arising from an oil spill -- even if the RAC had no involvement whatsoever in causing the spill. Whether the RAC ultimately extricates itself from that litigation is beside the point. Defense costs alone are enough to make the threat of litigation unacceptably high. That threat, in fact, is so great that it has resulted in the absence of sufficient, affordable insurance for RACs. A June 6, 1990 PIRO Board of Directors resolution made it clear that the possibility of innocent RAC liability would be a major factor in evaluating the organization's presence in any state. According to that resolution:

In the absence of qualified state immunity of the type provided in the pending federal legislation, PIRO will be forced to reconsider the role and vision of PIRO in each affected state.

In 1989 Alaska attempted to provide some protection from RAC liability. Ch 39, SLA 1989 (AS 46.03.823); amended §§3-7, Ch. 191, SLA 1990. The new law, however, is of little practical value, and may actually aggravate the situation. There is no sound public policy reason for ever holding an innocent RAC strictly liable for damages from an oil spill. Where a RAC's only involvement stems from its willingness to provide necessary aid, forcing liability on it without regard to fault is foolish. And, before enactment of

Alaska's 1989 legislation, it was at worst uncertain whether an innocent RAC would ever be held strictly liable for damages occasioned by cleanup activities. The 1989-90 legislation, however, implies that unless certain vague and cumbersome conditions are met, innocent RACs will be strictly liable for any damages caused by their cleanup activities. Moreover, the conditions for avoiding strict liability are so unclear and poorly worded that the statute provides virtually no assurance that strict liability will not attach in all cases.

In contrast to Alaska's legislation, Congress has recently enacted the Oil Pollution Act of 1990. Like the flurry of Alaska legislation arising from the EXXON VALDEZ, the federal law seeks to enhance the nation's oil spill cleanup capability. Unlike Alaska law, however, the 1990 legislation effectively furthers that goal by providing a straightforward limitation on RAC liability for oil spill cleanup activities. The new federal law not only unequivocally exempts oil spill RACs from strict liability, it also limits oil spill RACs' liability for negligence. It does so for three reasons. First, oil spill RACs are uniquely vulnerable to negligence claims because they must operate in a crisis atmosphere, making immediate decisions that are always subject to second guessing. As MSRC has observed:

[A]n oil spill responder must act decisively, in a dynamic environment over which he has very limited control, frequently with less than perfect information.¹

1. Marine Spill Response Corporation, The World's Largest Oil Spill Response Organization, undated at 2. Attachment 1.

Second, protection from negligence liability is necessary if insurance is to become available for oil spill RACs. Third and finally, Congress recognizes that if there is damage caused by the good faith cleanup efforts of an oil spill RAC, the liability should fall on the person causing the spill.

The federal legislation, however, does not affect state oil spill liability laws. Alaska's RAC liability law therefore remains intact. With the passage of the new federal legislation, and similar legislation in Washington, Hawaii, Florida, Virginia, and (with certain conditions) California, Alaska now finds itself at a severe competitive disadvantage in attracting adequate oil spill cleanup technology and expertise to the state.

Alaska's disadvantage has threatened its goal of encouraging a direct MSRC presence in the state. MSRC currently plans five regional response depots in New York/New Jersey, south Florida, Louisiana, Southern California and Seattle. While "the petroleum industry and Alaska are currently discussing how to provide an adequate spill response capability for the state,"² it is apparent that the unfavorable legal environment in a declining number of states -- unfortunately including Alaska -- will continue to deter necessary cleanup capabilities:

To insure the most prompt and effective response, the [new federal] legislation provides limited immunity for oil spill responders -- but not for spillers. This national immunity standard insures that responders will not delay response and cleanup actions while having to wait for advice about the liability exposure they might face. It also protects them from post-spill lawsuits by parties alleging damages, unless the responder acted with gross negligence or willful misconduct. . . .

2. Questions and Answers: Marine Spill Response Corporation, undated at 4. Attachment 2.

However, the legislation allows states to preempt federal law in this regard. This means that an uneven playing field may face the responder -- on one side of the state line he may have reasonable limited immunity, while on the other side he may face possible uninsurable risks. This may pose a serious problem in the future.

"Marine Spill Response Corporation: A New Weapon For Cleaning Up Oil Spills," undated at 2. Attachment 3.

As MSRC's president, retired Coast Guard Vice Admiral John D. Costello, observed:

The new federal law also allows states to enact responder liability standards different from the federal standard. In some states, existing standards can make responders hesitant to act and inadvertently deter the prompt aggressive action needed in oil spill catastrophes. As a result, MSRC will be working hard with states to get them to adopt the federal responder liability standard. Much remains to be done in this area.³

To remove a substantial deterrent to the presence of MSRC and other RACs in the state, Alaska should conform its laws to recently enacted federal standards, and provide certain and sufficient protection from the unjustifiable inclusion of RACs in oil spill litigation. Legislation accomplishing that goal is included as Attachment 5 to this paper.

3. Statement of Vice Admiral John D. Costello, September 6, 1990, at 2-3. Attachment 4.

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Marine Spill Response Corporation

The World's Largest Oil Spill Response Organization

On March 24, 1989, an oil tanker struck a reef in Alaska's Prince William Sound, causing the biggest oil spill in the history of the United States. While thousands worked to clean up the spill, a small task force organized under the auspices of the American Petroleum Institute, began taking a hard look at the existing resources for responding to catastrophic oil spills. In June of 1989, the task force reported its sobering conclusion: The capability did not exist, either in industry or government, to successfully contain and remove a spill of the magnitude of the one in Alaska.

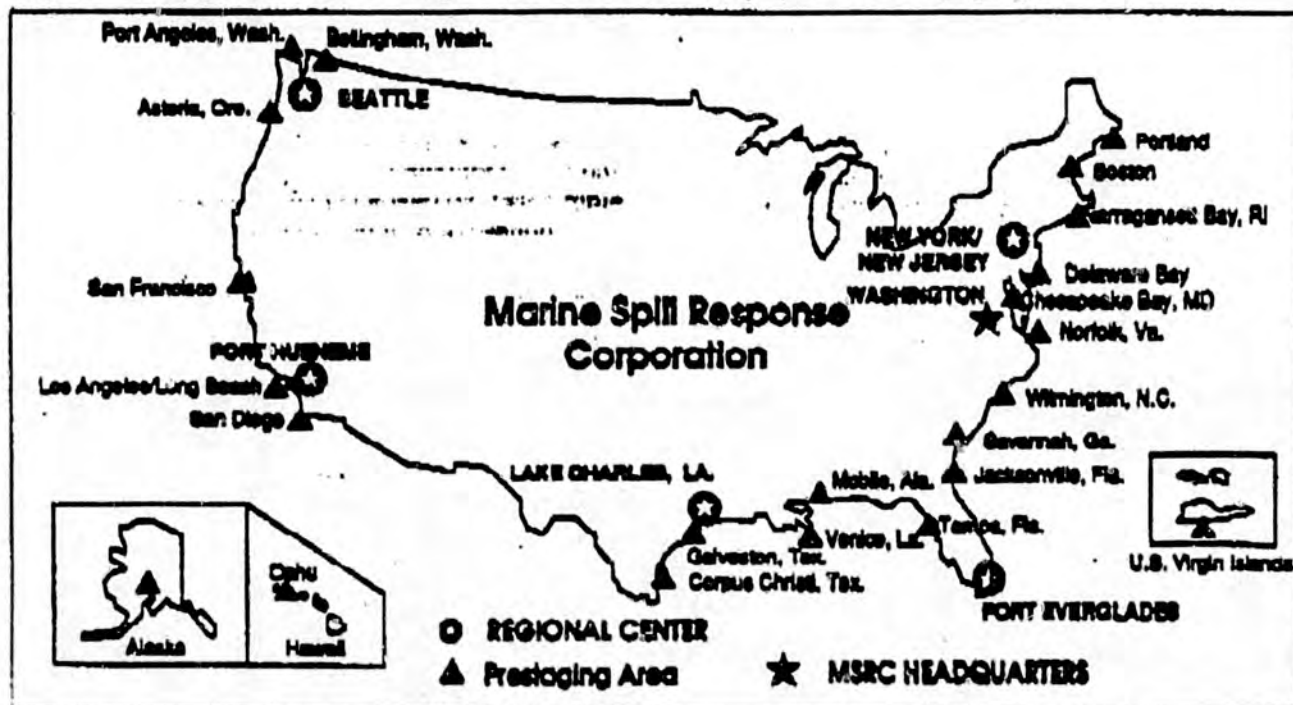
As a result of task force recommendations, 20 oil companies began the process of creating the Petroleum Industry Response Organization (PIRO) to manage catastrophic spills. In August 1990, the oil companies created two new organizations: the Marine

Spill Response Corporation (MSRC) and the Marine Preservation Association (MPA). MSRC, which succeeds PIRO, is an independent oil spill response organization. It will operate out of five regional response centers, each supported by several strategically placed equipment sites. MPA, an organization including oil companies and shippers and receivers of oil, will fund MSRC but will have no control over operations.

The following are some of the key elements of what is intended to be the largest spill response organization in the world:

□ **Geographic Coverage.** MSRC will have its headquarters in Washington, D.C., and will have five regional response centers in the New York-New Jersey

Figure 1: Proposed MSRC Regional Centers and Equipment Prestaging Areas



metropolitan area; Port Everglades, Florida, north of Miami; Lake Charles, Louisiana, near the Texas border; Port Hueneme, California, north of Los Angeles; and Seattle, Washington. Each region will have four to six prestaging areas (a total of 23 for all five regions) where equipment and sometimes vessels and personnel will be located. The proposed regional centers and prestaging areas have been picked to enable an initial quick response to a large spill wherever it might occur along the coast. (See Figure 1.)

Q Spill Cleanup. MSRC will provide a best-effort response to cleaning up spills of persistent oil (i.e., oils that do not evaporate or degrade quickly in U.S. coastal and tidal waters that are beyond the capacity of local response organizations. Each of the five regional centers are being designed to provide a best-effort response with the state-of-the-art technology to clean up an oil spill the size of the Alaskan spill—216,000 barrels. In the event of an even larger spill, the resources of two or more regional centers will be combined.

Q Relation to MPA. MPA members will pay annual dues, based on the number of barrels of oil they transported in the previous year. MSRC will use these funds to pay its annual operating, capital, and research and development costs. If an MPA member should become a spiller, MSRC will execute the spiller's response plan. The spiller—not MSRC—will pay for the actual clean-up.

Q Relation to Coast Guard. MSRC will execute the spiller's response plan under the direction of the Coast Guard, which has a presence around the nation's coasts and an effective military command control and communications structure. Coast Guard jurisdiction will not relieve oil spillers of their responsibility for the clean-up. It will, however, provide clear direction and coordination of cleanup operations when needed because the Coast Guard, by law, will have the ultimate authority in dealing with spills. In the event of a spill, Coast Guard supervision will cut through interagency red tape to eliminate delays during the crucial early hours.

Q Relation to Local Response Organizations. MSRC is not intended to replace existing oil spill cooperatives and independent response contractors. These entities have done a good job handling smaller spills. MSRC will act when this infrastructure does not have sufficient resources to handle a large spill. MSRC will use co-ops and independent responders as subcontractors, training and drilling them at its own expense.

Q Liability of the Responder. Under federal law, the responder to an oil spill has limited immunity. He is liable only for damages that result from acts of gross negligence or willful misconduct. Responders are liable for acts of simple negligence resulting in personal injury or wrongful death. Under some state laws, however, the responder is not provided this limited immunity. Since

federal authority will not preempt state law in this regard, MSRC is seeking state liability standards that are the same as the federal standard. This standard is appropriate because an oil spill responder must act decisively, in a dynamic environment over which he has very limited control, frequently with less than perfect information.

Q Research and Development. MSRC will administer a comprehensive research and development program to improve the knowledge and technology used to respond to and clean up spills. This program will complement other programs in government, academia and industry. MSRC studies will include those on preventing loss of oil from ships, on-water oil recovery and treatment, preventing and mitigating shoreline impacts, fate and effects of spilled crude oil and products, mitigating impact on wildlife, and health and safety.

Q Standards. MSRC will develop standards for oil spill response equipment, techniques and training.

Q Cost. MSRC's five-year costs for operations, capital equipment and research and development are estimated at about \$800 million.

Q Remaining Implementation Tasks. A detailed implementation plan has been developed for MSRC, but most of the plan must still be implemented. Equipment and vessels must be constructed and purchased. Personnel—including subcontractors, who will actually do much of the work of transporting equipment to spill sites and operating it—must be hired and trained. Each region will have to be surveyed to ensure that specific sites meeting MSRC operational requirements actually are available. Land and buildings must be purchased or leased for the regional centers and warehouses. Insurance must be procured. The research program must be launched.

Q Implementation Dates. MSRC must be fully operational within 30 months of enactment of the Comprehensive Oil Pollution Act of 1990. This act will require shippers and others responsible for oil transported on offshore and tidal waters to show that they can contain and clean up a worst-case oil spill they might cause. Many will want to rely on MSRC rather than maintain their own cleanup capability.

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Questions and Answers: Marine Spill Response Corporation

MSRC: Organization and Implementation

Q: What is the Marine Spill Response Corporation (MSRC)? What is the Marine Preservation Association (MPA)?

A: MSRC is an independent, non-profit corporation dedicated to providing a best-effort response to help cleanup large spills of persistent oil in United States offshore and tidal waters, including bays, harbors, and the mouths of rivers. It will also respond to spills further up river when oil has been spilled from ocean-going tankers heading up river. The U.S. Coast Guard will direct MSRC to respond to a spill if it is too big for local response organizations to handle.

MSRC succeeds Petroleum Industry Response Organization Implementation, Inc. (PIRO Implementation), which was incorporated in September 1989 to plan and organize an oil spill response program. The president of PIRO Implementation, retired U.S. Coast Guard Vice Admiral John D. Costello, is now president of MSRC. MSRC is an independent corporation with a self-perpetuating board of directors.

MPA is a non-profit corporation, whose members—oil companies, shippers, receivers of oil and others—will pay dues based on the amount of oil they transport. The dues will finance MSRC and MPA. However, MPA will have no management involvement with MSRC.

MSRC will use the funds to pay for personnel, equipment, vessels and other facilities needed to be prepared to clean up oil spills. In the event of a spill,

the spiller—not MSRC—will pay for the actual cleanup.

MSRC will have nearly 400 full-time employees, most of whom will be located at the organization's five regional response centers. MSRC's estimated cost for its first five years is about \$600 million. MSRC will be supported by hundreds of subcontractor workers in its response to big spills.

Q: When will MSRC be ready to clean up oil spills?

A: MSRC must be fully operational within 30 months of enactment of the Oil Pollution Act of 1990. That's when the act will require shippers and others responsible for oil transported on offshore and tidal waters to show that they can contain and clean up a worst-case oil spill they might cause.

This timetable is dictated by the myriad steps that must be taken to move a complex, large, wholly new organization from the drawing board to reality. A detailed plan has been developed for MSRC, but most of the plan still must be implemented. Equipment and vessels must be constructed or purchased. Personnel—including subcontractors who will actually do much of the work of transporting equipment to spill sites as well as operating it—must be hired and trained. Land and buildings for regional centers and equipment prelagging areas must be purchased or leased. Insurance must be procured. A \$35 million, five-year research and development program must be launched.

Q: Why didn't PIRO Implementation implement a spill response program sooner?

A: PIRO Implementation has been carefully planning how this response organization would work before

¹ Persistent oil—for example, crude oil—lingers in the environment. Products like gasoline are not persistent because they evaporate or degrade quickly.

taking any action to implement one. As this planning was progressing, Congress was considering the Oil Pollution Act of 1990. Several key provisions in this legislation needed to be resolved before operational planning and corporate organization could be fully developed.

For example, PIRO implementation needed to be sure that a duplicative federal response capability was not going to be included in the legislation. If the federal government had created such a capability, there would have been no need for MSRC.

Also, it was important that a single agency be clearly designated as the federal decisionmaker in oil spills.

Finally, PIRO implementation needed to be sure that the new law would recognize the unique risks faced in responding to spills. The new federal law does this by limiting responder liability damage owing to its own gross negligence or willful misconduct. MSRC will have to make difficult, quick decisions at a spill under chaotic conditions. If the law did not recognize the extra risks involved in spill response, it might have been impossible for MSRC to go forward.

The provisions of the bill, which became law in August 1990, satisfactorily resolve each of these concerns.

Q: How many oil companies have joined MPA?

A: As of today, 20 companies have joined MPA, the funding corporation. The volumes of oil these firms transport represent the large bulk of the oil transported into and out of American waters. There are other firms who have shown interest in joining, including utility and pipeline companies. We believe that as the regulations for submitting contingency plans are promulgated, additional companies will need MSRC services and that our clientele will grow accordingly.

Q: Will the MSRC organizational structure function efficiently? Won't control by MPA member companies still be present since they control MSRC's budget?

A: We believe the MSRC organizational structure will prove to be highly efficient. It provides for an independent board of directors, which insures that companies that pay dues to MPA do not manage MSRC.

MSRC: Response Capability

Q: Where and how fast will MSRC be able to respond to a spill—and to what size spill will it respond?

A: MSRC is designed to respond to large, catastrophic oil spills but will respond whenever a spill of any size exceeds the local capability to clean it up.

MSRC will immediately respond to catastrophic spills in U.S. tidal waters out to the limits of our 200-mile Exclusive Economic Zone. The quickest possible response will be made under whatever circumstances. Prepositioning equipment in warehouses at strategically placed prestaging areas and using equipment that can be flown in will reduce response times.

Each of five regional centers will be able to provide a best-effort response to contain and clean up an oil spill totaling 216,000 barrels—in other words, one about the size of the Valdez spill in Alaska in 1989. Combining the resources of more than one regional center will enable combatting even larger spills. Such a capability will exist nowhere else in the world.

Q: The Alyeska Corporation wasn't ready for the Valdez spill. How do we know MSRC will be ready for spills that may occur in the future?

A: MSRC will be ready because it will have sufficient quantities of the best available equipment and well-trained spill response personnel. MSRC will regularly maintain its spill cleanup equipment and will conduct frequent training for its spill response workers including simulation exercises. The new federal legislation requires periodic readiness exercises. On top of this, a rigorous operational audit program will be part of MSRC's normal way of doing business. Frequent announced and unannounced drills will be held to ensure maximum response and cleanup readiness.

Moreover, MSRC will operate in a completely open environment. It will have an independent, self-perpetuating board of directors to answer to, directors who are not affiliated with the petroleum industry. MSRC will operate with many different subcontractors around the nation. It will be impossible to keep MSRC activities—or lack thereof—from public scrutiny.

Q: Will MSRC have all the equipment it needs?

A: Yes. MSRC will buy approximately \$300 million worth of equipment—including vessels and barges, trucks, skimmers, booms, dispersants, wildlife and shoreline rehabilitation equipment, and lightering equipment (to remove oil from disabled vessels). This will provide a best-effort response capability with state-of-the-art equipment.

MSRC believes, however, that current oil spill containment and cleanup equipment needs to be vastly improved—as could methods for protecting and rehabilitating shorelines and wildlife. That is why it will conduct an extensive research program to explore new technologies and approaches. The program will research improvements in booms, dispersants, skimmers, the burning of oil, bioremediation, debris and waste disposal, and spill tracking and surveillance. It will look at techniques for rehabilitating wildlife and shoreline. And it will examine how oil affects environments over the long-term.

MSRC: Regional Centers and Coverage

Q: Where will the regional centers and prestaging areas be located?

A: The regional centers will be (1) in the New York-New Jersey metropolitan area (Northeast region), (2) in Port Everglades in South Florida, north of Miami (Southeast region), (3) in Lake Charles, Louisiana, near the Texas border (Gulf region), (4) in the Port Hueneme area of California, north of Los Angeles (Southwest region), and (5) in Seattle, Washington (Northwest region).

Each regional center will have four to six prestaging areas (a total of 23 for all five regions) where equipment and sometimes vessels and personnel will be located. The prestaging areas have been tentatively selected to enable an initial quick response to a large spill wherever it might occur along the Pacific, Gulf and Atlantic coasts or in Hawaii, Alaska, Puerto Rico and the Virgin Islands. Each location will have to be surveyed to ensure that specific sites meeting MSRC operational requirements actually are available. The general locations of prestaging areas for each region are:

□ Northeast Region:

Portland, Maine; Boston, Massachusetts; Narragansett Bay, Rhode Island; Chesapeake Bay, Maryland; Delaware Bay; Norfolk, Virginia.

□ Southeast Region:

Wilmington, North Carolina; Savannah, Georgia; Jacksonville, Florida; Tampa, Florida; U.S. Virgin Islands.

□ Gulf Region:

Mobile, Alabama; Venice, Louisiana; Galveston, Texas; Corpus Christi, Texas.

□ Southwest Region:

San Diego, California; Los Angeles/Long Beach, California; San Francisco, California; Oahu, Hawaii.

□ Northwest Region:

Astoria, Oregon; Bellingham, Washington; Port Angeles, Washington; Alaska.

MSRC plans to have an appropriate response and cleanup role in Alaska. That role is not yet defined. It must consider already existing or planned primary response capabilities before settling on what other may be required. Discussions with industry and Alaskan state officials have not yet arrived at a point that allow complete description of the corporation's role.

Q: A year ago, a petroleum industry task force said regional centers would be in Norfolk and New Orleans. Now Norfolk is just the site of a prestaging area and there is nothing specifically in New Orleans. Why?

A: The task force made many assumptions about where regional centers and prestaging areas needed to be to ensure quick response. The task force's report stated that locations were tentative and would be subject to further analysis. Subsequent analysis identified a more effective mix of centers and prestaging areas. The changes take into account the volumes of oil that are shipped in various areas and the logistical problems of moving equipment from particular locations to a spill. Location of highways, airports, piers and open water figured into the decisions.

Q: Are all of the regional centers the same size?

A: Almost. Any differences reflect differences in the transportation patterns in each region. Also, the capability of the existing oil spill response infrastructure has been factored into the equation. Despite

differences in size, the regional centers will possess equivalent response capabilities.

Q: Why won't MSRC respond to spills in the Great Lakes and in Alaskan waters?

A: The nature of tanker traffic in the Great Lakes and other non-tidal waters is different from the coast-line traffic that MSRC is being created to deal with. Spills are likely to be smaller and to involve "non-persistent" oil (that is, petroleum products that are more volatile than crude oil and that largely evaporate before they can be cleaned up). Therefore, MSRC's charter does not envision operations in such waters.

However, that does not mean that a spill in the Great Lakes would not be quickly contained and cleaned up. Once enacted, the Oil Pollution Act of 1990 will require oil shippers on the Great Lakes to show how they could contain and clean up a worst-case spill. The result of this requirement is that some other private oil spill cleanup organization will be responsible for dealing with such spills.

The petroleum industry and Alaska are currently discussing how to provide an adequate spill response capability for the state. Meanwhile, Alyeska's existing spill response capability is being expanded so that it will be bigger than one of the MSRC regional centers.

MSRC: Liability, Research and Cost

Q: Doesn't the law in some states still allow Good Samaritan oil spill responders to be held responsible for damage caused by their simple judgment mistakes during a spill cleanup?

A: Yes, that is correct. MSRC is now discussing the issue of limited responder immunity with several states. MSRC hopes that these states will recognize the importance and fairness of establishing the same limited liability standard (gross negligence or willful misconduct) the federal government will apply to responders nationwide.

Q: The original five-year cost estimate for PIRO was \$275 million. Why have costs increased so much?

A: The original costs were an approximation of capital, operating and research and development

costs. As we gathered more detailed program data and refined it, additional requirements were identified. Costs have increased threefold because we have recognized additional capital requirements—principally ships and barges. We have also included additional prestaging sites to ensure adequate response coverage.

Q: Federal legislation has authorized a substantial government R&D program. Will MSRC reduce its program as a result?

A: We have no plans to reduce the size of the program. However, because a substantial increase in oil spill research by government has been authorized in the new law, we will need to monitor our program carefully to insure no duplication.

Q: Why are the results of MSRC's research program to be contributed to the public domain?

A: This arrangement is entirely in keeping with the not-for-profit nature of the corporation which has been created. From the outset, MSRC was never intended to be money-making. It was created because the petroleum industry found a void in the capability of both government and industry to protect the marine environment from catastrophic oil spills.

Q: Will MSRC really earn no profits and simply serve the public welfare?

A: Yes. MSRC will not have a profit line on its balance sheets. It will only recover its costs. Moreover, MSRC's charter requires that all discoveries and inventions from its R&D programs to improve cleanup technology be made available to anyone interested at no cost.

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Marine Spill Response Corporation: A New Weapon for Cleaning Up Oil Spills

On September 8, 1990, PIRO (Petroleum Industry Response Organization) Implementation Inc., an oil-spill response planning group created after the 1989 spill in Prince William Sound in Alaska, announced the formation of the Marine Spill Response Corporation (MSRC). When it is fully operational, MSRC will have a response capability larger than any other response organization in the world. The MSRC will be funded by oil companies and others involved in the shipment or receipt of oil by tanker through another newly created organization, the Marine Preservation Association (MPA). However, MSRC will operate completely independently of the MPA and its members. The MSRC will consist of a Washington, D.C., headquarters and five response regions with regional centers located in the New York-New Jersey metropolitan area (Northeast region), Port Everglades in South Florida (Southeast region), Lake Charles, Louisiana (Gulf region), Port Hueneme, California (Southwest region), and Seattle, Washington (Northwest region).

Background on the New Spill Response Organization

On March 24, 1989, an oil tanker struck a reef in Alaska's Prince William Sound and caused the largest oil spill in U.S. history. Up to 10,000 workers, scores of vessels

and aircraft and tons of equipment were employed in cleanup efforts through the spring and summer, until the onset of prohibitive weather conditions. Those efforts were resumed in the spring of 1990. Within several weeks of the spill, eight major oil companies, under the auspices of the American Petroleum Institute, created a task force to examine questions and issues raised by such catastrophic tanker spills. The task force studied and evaluated existing prevention and response programs. It concluded that neither the government nor the industry had the equipment or personnel ready to deal with catastrophic spills. It also identified a need for further spill prevention efforts.

Consequently, in June 1989 the task force recommended that the industry undertake a broad new program to expand its ability to prevent, contain and clean up major oil spills. The task force recommended that a response program be operated by a new, independent organization, originally called the Petroleum Industry Response Organization (PIRO), which would be funded voluntarily by participating oil companies.

PIRO was envisioned as a response company capable of providing a best-effort response to a catastrophic spill from a tanker in, or posing a threat to, U.S. coastal waters (out to the 200-mile Exclusive

Economic Zone), harbors and river mouths. Since the seriousness of a spill depends on the type of oil spilled, the specific environmental risks involved and the prevailing weather and tidal conditions—in addition to the actual amount of oil spilled—the task force defined "catastrophic spill" simply as one beyond the capability of local response resources, as determined by the U.S. Coast Guard.

The task force recommended that PIRO have five regional response centers on the East, West and Gulf Coasts, each with several permanent staging areas along its coastline. Each region was to be capable of responding to a spill of up to 218,000 barrels. It envisioned the use of personnel, equipment and supplies from more than one region to respond to larger spills.

The task force also proposed new spill prevention initiatives and improvements in existing tanker safeguards and operating procedures. It also recommended broad-based research and development (R&D) and readiness auditing roles for PIRO.

The task force estimated PIRO's five-year operating, capital and R&D costs at \$275 million.

One month later, in July, 1989 the original eight companies that joined in the task force's initial effort were

joined by a dozen more in forming a PIRO implementation group and steering committee to begin examining in detail what would be required to fulfill the task force's goals and recommendations.

Retired Vice Admiral John D. Costello, former commander of the U.S. Coast Guard's Pacific Area, was named to direct these efforts.

The detailed work of the steering committee was reflected in the names of its eight working subcommittees: finance and procurement, communications, operations, staff activities, facilities acquisition, legal, insurance and research. Some 75 executives from participating companies looked into the many conceptual, procedural, legal and organizational questions that had to be addressed in the actual formation of the new response organization.

As their detailed study and planning progressed, the original five-year cost estimates were revised upward substantially—initially to \$400 million for the first five years and, most recently, to about \$800 million.

As work proceeded, additional companies became interested in affiliating with PIRO, including non-oil companies such as shippers and facilities that handle oil. Ultimately, this broader interest led to renaming of the new oil spill response organization to the Marine Spill Response Corporation (MSRC).

Legislative Developments

Planning and development of MSRC were influenced by the oil spill legislation that evolved in Congress through the fall and winter of 1989 and the spring and summer of 1990—and was signed into law by President Bush on August 18, 1990.

This legislation contains several provisions of critical importance to

MSRC. To ensure the most prompt and effective response, the legislation provides limited immunity for oil spill responders—but not for spillers. This national immunity standard ensures that responders will not delay response and cleanup actions while having to wait for advice about the liability exposure they might face. It also protects them from post-spill lawsuits by parties alleging damages, unless the responder acted with gross negligence or willful misconduct. Liability on a simple negligence basis would be assumed in cases of personal injury or wrongful death.

However, the legislation allows states to preempt federal law in this regard. This means that an uneven playing field may face the responder—on one side of a state line he may have reasonable limited immunity, while on the other side he may face possible uninsurable risks. This may pose serious problems in the future.

An additional provision of this legislation makes the President, through the U.S. Coast Guard, responsible for seeing that a spill is promptly cleaned up. Recent history has demonstrated that large-scale operations to clean up oil spills require a single decision-maker to resolve issues expeditiously. The legislation, while clearly putting the responsibility for cleanup on the spiller, also clearly makes the private sector the main source for the nation's cleanup capability, under the watchful, supervising eye of the Coast Guard.

Organization of MSRC

To assure the independence of MSRC, a second non-profit corporation was created—the Marine Preservation Association (MPA). The companies that participated in PIRO and in the development of MSRC are members of this associa-

tion. MSRC has neither members nor shareholders. Its board of directors is self-perpetuating and wholly independent of MPA or its member companies. MPA will not be involved in the management of MSRC.

Initial capital contributions and dues paid to MPA are based on the quantities of oil handled in the waters in which MSRC will operate. MPA contributions and fees are being used to finance creation of MSRC and to fund its ongoing operations. However, they will not be used to cover expenses that MSRC incurs in responding to spills.

MSRC will maintain a contractual relationship with the members of MPA, obligating MSRC to make its services, manpower and equipment available in the event of a major spill involving a member's vessel or facility. The expenses incurred by MSRC in responding to a spill will be recovered directly from either the member-spiller or his insurer. If costs exceed this compensation, or if a spiller cannot be identified, then cleanup costs will be borne by the newly established Federal Oil Spill Compensation Fund.

All MPA members must meet the spill response capability certification requirements of the new federal law. These requirements could be satisfied by a member's contractual relationship with MSRC.

MSRC's Response Role

Spills to Which MSRC Will Respond.

MSRC is designed primarily to provide a best-effort response to catastrophic spills of persistent oil in United States offshore and tidal waters, including bays, harbors, and the mouths of rivers. (Persistent oil—for example, crude oil—lingers in the environment. Non-persistent oil

Products like gasoline tend to evaporate or degrade quickly.)

Each of MSRC's five regional response centers (and its associated prepositioned equipment sites within the region) is being designed to manage a spill of up to 216,000 barrels, as originally proposed. If the resources of all five MSRC regions were combined, its capability would be nearly 1.1 million. MSRC is being designed primarily for catastrophic spills of the size of the accident at Prince William Sound, but it will respond to smaller spills when they are beyond the capability of the local spill response infrastructure. The Coast Guard will judge when local response efforts are not sufficient to satisfactorily contain and cleanup the spill.

MSRC Headquarters, Regional Centers and Prestaging Areas.

MSRC headquarters will be located in Washington, D.C. and is expected to have 43 employees when fully staffed. These personnel will establish operating policy and provide normal staff support. In addition, the corporation's operational audit and R&D programs will be directed from headquarters.

The regional centers will be in (1) the New York-New Jersey metropolitan area (Northeast region), (2) Port Everglades in South Florida (Southeast region), (3) Lake Charles, Louisiana, near the Texas border (Gulf region), (4) Port Hueneme, California, north of Los Angeles and (5) Seattle, Washington (Northwest region).

The regional centers will be nearly equal in size. Variations will reflect differences in the territory each regional center will be responsible for and in the amount and location of oil tanker traffic and lightering.

Despite small differences in size, the regional centers will possess equivalent response capabilities. Together, they will have approximately 350 employees.

Each regional center will have four to six prestaging areas (a total of 23 for all five regions) where equipment and sometimes vessels and personnel will be located.

The general locations of prestaging areas for each region are:

□ Northeast Region: Portland, Maine; Boston, Massachusetts; Narragansett Bay, Rhode Island; Delaware Bay; Chesapeake Bay, Maryland; and Norfolk, Virginia.

□ Southeast Region: Wilmington, North Carolina; Savannah, Georgia; Jacksonville, Florida; Tampa, Florida; and in the U.S. Virgin Islands.

□ Gulf Region: Mobile, Alabama; Venice, Louisiana; Galveston, Texas; and Corpus Christi, Texas.

□ Southwest Region: San Diego, Los Angeles/Long Beach, California; San Francisco, California; and Oahu, Hawaii.

□ Northwest Region: Astoria, Oregon; Bellingham, Washington; Port Angeles, Washington; and Alaska.

The locations of the regional response centers and prestaging areas were selected to ensure the quickest, most effective response to possible spills, taking into account the volumes of oil that are shipped in various areas and the logistical problems of moving equipment from regional centers to a spill. Location of highways, airports, piers, navigable waterways and the availability of office and warehouse space were all factors considered in site-selection.

tion. Each location will have to be surveyed to assure that specific sites meeting MSRC operational requirements actually are available.

According to the API task force report, MSRC should play an appropriate response and cleanup role in Alaska. The definition of this role is not yet resolved. Primary response capabilities already in existence must be evaluated before it can be determined what else might be required. Discussions with industry and the state have not yet proceeded to the point where MSRC's role can be completely described.

The MSRC will not operate in the Great Lakes and other non-tidal waters. Historically, spills in the Great Lakes have been comparatively smaller and have involved "non-persistent" oil. The Oil Pollution Act of 1990 will require oil shippers on the Great Lakes to show how they could contain and cleanup a worst-case spill, most often through reliance on existing cooperatives and subcontractors.

Relationship of MSRC with Existing Co-ops and Subcontractors.

MSRC will coordinate its efforts with an estimated 150 existing oil-spill cooperatives and subcontractors. Over the years, such cooperatives and subcontractors have compiled a solid record of handling non-catastrophic, inshore spills—which account for some 99.9 percent of all spills. MSRC is designed to complement this existing capability—that is, to handle the infrequent, yet potentially devastating, catastrophic spills. Existing cooperatives and subcontractors would continue to handle smaller spills, except in instances in which MSRC's assistance might be required or when the Coast Guard requests MSRC's aid.

MSRC will employ about 350 people in the five regions. Existing cooperatives and subcontractors will also be called on or retained to provide additional manpower and equipment needed to deal with spills.

Identifying qualified subcontractors, arranging contractual agreements, reviewing contractor capabilities and training will be an ongoing function of MSRC's permanent staff.

The synergistic relationship between MSRC and existing, smaller responders is expected to result in joint training exercises, coordinated research, development and sharing of new oil spill response techniques and equipment and frequent exchanges of information and ideas.

MSRC Equipment.

MSRC will buy approximately \$300 million worth of equipment. All MSRC equipment will be prepackaged to permit easy movement by air, truck, vessel or rail. This equipment will include vessels and barges, trucks, skimmers, booms, communications equipment, dispersants, wildlife and shoreline rehabilitation equipment and lightering equipment to remove oil from disabled vessels.

Booms are floating mechanical barriers that extend above and below the water surface to contain spilled oil for recovery and to move spilled oil into areas where recovery is easier. Since booms do not work well if currents are too swift and waves too high, deployment in rough weather can be a problem.

Skimmers are vessels that collect spilled oil from the surface of the water. Like booms, skimmers have trouble operating where currents are swift and waves high.

Chemical dispersants sprayed on oil can break it into small droplets, accelerating the removal of volatile hydrocarbons, facilitating the natural "decay" of the oil's components, and minimizing movement of the oil to shorelines. Dispersants can be rapidly and broadly applied by air over large areas and volumes of oil, even in adverse sea conditions.

MSRC's Research Program.

MSRC will conduct a five-year, \$35 million research and development program to improve oil spill response technology. This program will be a key element in attempting to improve the corporation's effective future response to oil spills. Proposed research will cover techniques for minimizing oil losses in the event of a spill and keeping them close to the vessel; recovering and treating oil after it begins to spread but before it reaches shore; preventing and reducing shoreline impact, which includes studies on bioremediation; the fate and effects of oil in the environment; reducing the impact of a spill on wildlife; and investigating the health and safety of persons exposed to spills.

Timetable for MSRC to Become Operational.

MSRC must be fully operational within 30 months of enactment of the

Oil Pollution Act of 1990, when the act will require shippers and others responsible for oil transportation and handling on offshore and tidal waters to show that they can contain and clean up an oil spill they might cause.

This federal timetable fits MSRC's schedule for implementation. There are myriad steps that must be taken to make a complex, large, wholly new organization operational. A detailed plan has been developed for MSRC, but most of the plan still must be implemented.

Equipment and vessels must be constructed and purchased. Personnel—including (subcontractors) who will actually do much of the work transporting equipment to spill sites, as well as operating it—must be hired and trained. Land and buildings must be purchased or leased to create the regional centers and equipment prestaging areas. Insurance must be procured.

*For more information, contact:
Steve Duca, Vice President
Readiness and External Affairs
Marine Spill Response Corp.
1220 L Street, N.W., 8th Floor
Washington, D.C. 20005
(202) 682-8574*

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Statement of Vice Admiral John D. Costello, USCG (Ret)
President, Marine Spill Response Corporation
September 6, 1990

Good morning. I take great pleasure today in announcing the formation of the Marine Spill Response Corporation and the Marine Preservation Association.

Marine Spill Response Corporation is the new name for the Petroleum Industry Response Organization (PIRO) -- an oil spill cleanup organization that we have been working to create since June of last year, when plans for it were first announced. Funding for this corporation will be provided by the Marine Preservation Association, which is a separate organization of owners, shippers and receivers of oil. Both companies are not-for-profit entities. Each is independent of the other.

We have changed the name of the response corporation to reflect the expansion of its clientele, which now extends well beyond the conventional understanding of the term "oil industry." MSRC will serve others including independent tanker operators, public utilities -- in fact, any company that handles petroleum and petroleum products over coastal waters is now a prospective client. We have not, however changed the original objectives. MSRC will provide America:

- o A best-effort response capability to catastrophic offshore spills in coastal and tidal waters -- which consists of on-water as well as beach cleanup capability;
- o A program to audit, on an ongoing basis, the readiness of our spill response forces to meet their mission; and
- o A robust research and development program, intended to improve basic information about spills and the technology of oil spill response and cleanup.

Each of the corporation's five regional response centers is designed to manage a spill as large as the 1989 accident in Prince William Sound. They are to be located in the New York/New Jersey metropolitan area; Fort Lauderdale, north of Miami; Lake Charles, Louisiana, near the Texas border; the Port of Los Angeles area, north of Los Angeles; and Seattle. By combining the resources of different centers, we will have the capacity to respond to even larger spills.

We will put the response centers and their associated equipment prestaging areas in optimum locations for spill response. These locations reflect several critical factors, including oil transportation patterns, the volumes of oil being moved, sensitivity to the environment and ready access to highways and airports. That means we'll be able to promptly get the people and equipment to spills wherever they occur -- in the Atlantic, in the Gulf and in the

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Pacific. Heightened protection will also be given to the waters around Hawaii, Puerto Rico and the U.S. Virgin Islands.

As the original API task force report indicated, we intend to have an appropriate response and cleanup role in Alaska. The roles of industry, state government and the federal government have not yet been sufficiently defined at this time to permit NSRC to adopt an appropriate role. This notwithstanding, it should be noted that great improvements have already been made in Prince William Sound. The spill response capability there will be greater than the capability to be found in one of NSRC's regional response centers. A dialogue with appropriate industry, state and federal officials will be held to resolve NSRC's role in Alaska.

We're excited by the prospect of creating the world's largest, best equipped and best trained oil spill cleanup organization. I know of no other occasion when an industry has reacted on such a massive scale to help meet an urgent national need. What is being announced today is truly precedent-setting.

We estimate that the total spending over five years for the new response corporation will amount to over \$800 million, including capital, operational expenses and research and development funding. We think the organization is worth every dollar of that huge sum, which, I must underline, is three times the figure that was estimated a year ago.

The increase is the result of months of honing and refining the concept. The revised estimates include the staff, materials and equipment we feel will be necessary to do the job.

Even so, we recognize that present spill recovery and cleanup technology is inefficient. There can be weather and sea conditions that make response or cleanup operations impossible or too dangerous. Oil spill responders need better equipment and techniques. So the response corporation will support a significant expansion of research and development on oil spills. Neither the new response corporation nor any of the companies that join the funding association will benefit financially from any patents emerging from the research program. All will be donated to the public domain -- a measure intended to guarantee that any new inventions result in maximum protection of the marine environment.

The recently enacted Oil Pollution Act of 1990 recognizes that those who spill oil have the primary responsibility for cleaning up spills. But it gives a single government agency -- the U.S. Coast Guard -- the responsibility for initiating and directing action on spill cleanups. The law also grants "Good Samaritan" recognition to spill responders. Responders like NSRC are not responsible for spills. But they are essential to their cleanup. The new federal law insures recognition of the unique risks faced by these responders.

However, the new federal law also allows states to enact responder liability standards different from the federal standard. In some

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states, existing standards could make responders hesitant to act and inadvertently deter the prompt aggressive action needed in oil spill catastrophes. As a result, NSRC will be working hard with states to get them to adopt the federal responder liability standard. Much remains to be done in this area.

Companies who join the funding company -- the Marine Preservation Association -- will have the right to report the response corporation as their designated cleanup organization. Dues will be paid to the association based on a per barrel fee for oil that is transported during the year. These fees will fund the buildup and day-to-day operations of the response corporation. However, when the NSRC responds to a spill, the spiller will have to pay for actual cleanup expenses incurred, whether or not it is a dues paying member.

NSRC should be fully operational in early 1993 -- as the new law requires -- but will be capable of providing some limited response before then.

The challenge of creating this urgently needed national capability is not taken lightly. We look forward to it eagerly but realistically. The NSRC team is confident that we will meet the challenge and are pleased to be a part of the solution to a national need.

At this time, we'll be happy to respond to any questions you have.

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AS 46.03.823(a) is amended to read:

(a) A person who is a response action contractor with respect to a release or threatened release of a hazardous substance other than oil whose acts or omissions are not contrary to a response plan or order by a state or federal agency having jurisdiction over the release or threatened release is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the release or threatened release unless the release or threatened release is caused by an act or omission of the response action contractor that is negligent or grossly negligent or constitutes intentional misconduct. To show negligence by a response action contractor, a claimant must show that the acts or omissions of the contractor under the response action contract were not in accordance with generally accepted professional standards and practices at the time the response action services were performed.

AS 46.03 is amended by adding a new section to read:

Sec. 46.03.825. OIL SPILL RESPONSE ACTION CONTRACTORS. (a)

A person who is a response action contractor with respect to a release or threatened release of oil is not liable for injuries, costs, damages, expenses or other liability that results from the release or threatened release, or from the response action contractor's acts or omissions in response to the release or threatened release, unless the person bringing a claim against the response action contractor proves by a preponderance of the evidence that:

(1) the response action contractor would have been liable for the release or threatened release under state or federal law even if that contractor had not carried out a response action with respect to the release or threatened release; or

(2) the response action contractor acted with gross negligence or intentional misconduct.

(b) The liability limitation of (a) of this section does not apply to an action for personal injury or death.

(c) As used in this section:

(1) "gross negligence" means criminal negligence as defined in AS 11.81.900(a)(4);

(2) "response action contractor" has the same meaning as in AS 46.03.823(g)(2); and

(3) "response action contractor" has the same meaning as in AS 46.03.823(g)(3).

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

February 8, 1991

Mary Nordale
Robertson, Monagle & Estaugh
Court Plaza Building, Suite 800
240 Main Street
Juneau, Alaska 99802

Dear Mary,

I've had a chance to explore a little bit further the legislative proposal submitted by Tesoro to raise the standard of negligence that would apply to response contractors from simple negligence to gross negligence. I appreciate your taking the time to review the proposal and give me your comments.

The financial responsibility requirements for tankers under state law are based on capacity. Has Alyeska explored basing its financial responsibility requirements on either the capacity of the tankers loading or on the amount of oil an owner loads on a monthly basis? It would seem that a "scaling" of your requirements tailored to the actual risk presented by a company might obviate the perceived need for a legislative solution.

Thanks for taking the time to review this.

Sincerely,

A handwritten signature in dark ink, appearing to read "Sam Cotten".

Sam Cotten
Chair

cc: Gene Burden, Tesoro

January 3, 1991

Senator-Elect Sam Cotten
11940 Business Blvd
Eagle River, Alaska 99577

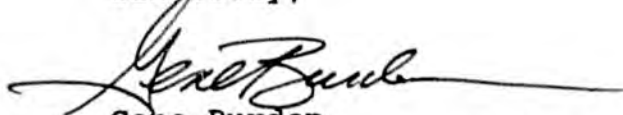
Dear Mr. Cotten:

Mike Navarre requested that I send the enclosed materials to you for your review. The Summary and supporting materials describe Tesoro's primary legislative objective for the coming session. We seek a modification of Alaska law on liability of spill response contractors to one similar to that contained in the Federal Oil Spill Bill of 1990. Such a change would remove the prospect of strict liability and liability for simple negligence for a response action contractor for its actions in response to a spill clean-up.

Tesoro's Kenai refinery has been in business since 1969 and was modified in the mid-80's to handle ANS crude oil. Our supply is shipped from Valdez to Kenai. In order for our ship to operate in Prince William Sound it must have spill response coverage which is currently only available through Alyeska. The current liability exposure to the response contractor has contributed to Alyeska imposing a requirement for \$1 Billion in financial security for these services in a format that we cannot meet. We have a short term agreement for Alyeska coverage and believe passage of the proposed legislation would substantially reduce the financial responsibility requirements and contribute to a long term solution to this problem.

We appreciate your review of these materials and will be available at your convenience to discuss any questions you have, as well as suggestions regarding the successful introduction and passage of this bill.

Sincerely,



Gene Burden
Vice President - Administration
& Government Relations

cc: Rep. Mike Navarre

W. Gene Burden
Vice President
Administration & Government Relations

February 22, 1991

Members of the Senate Oil & Gas Committee

Senators:

Sam Cotten, Chair
Drue Pearce, Vice-Chairman
Bettye M. Fahrenkamp
Lyman Hoffman
Dick Shultz

Dear Senators:

The enclosed draft legislation concerning the liability of innocent oil spill clean up contractors is Tesoro Alaska's principal legislative priority this year. Tesoro Alaska respectfully requests that the legislation be introduced as a Senate Oil and Gas Committee bill, and considered by the committee at its very earliest convenience. Enactment of this legislation is critical for two reasons:

1. Alaska's current liability laws threaten to embroil oil spill cleanup contractors in litigation arising from an oil spill, even though that contractor had no involvement in the spill itself. This creates a strong disincentive for businesses to enter the oil spill cleanup business. Compounding Alaska's problem in attracting new cleanup capability is the fact that the United States Congress and the legislatures of numerous coastal states, have already enacted legislation curing this liability problem; and

2. Alaska's unreasonable liability laws have caused Tesoro and others particular problems arising from the difficulties in obtaining standby oil spill cleanup services under terms that Tesoro and others can meet. Unless this legislation is enacted this session, the liability issue may affect Tesoro's ability to obtain ANS crude oil from Prince William Sound, and interrupt its ability to provide supply of refined products to Alaska.

The threat of becoming embroiled in prolonged and costly litigation is a major concern and impediment to marshalling all the organizations we would like to see available to assist in response to a major spill. This is true whether the organization is large (like the Marine Spill Response Corporation), small (co-ops, subcontractors and suppliers) or new (i.e., the recently-formed Cook Inlet Spill Prevention and Response, Inc. ("CISPRI")). Existing Alaska cleanup organizations presently face the prospect

of delays in response time caused by the inordinate time and resources lost in obtaining legal advice and clearances from state and federal authorities before responding to even minor spills.

The proposed legislation is similar to that now found in Florida, Virginia, Hawaii, and in the Federal Oil Pollution Act of 1990. California's 1990 legislation is similar, providing a limitation of liability for 60, and in some cases 90 days after a spill. In the past week, the State of Delaware enacted similar legislation, and the Senates of Georgia and Mississippi unanimously passed similar bills. Under these laws, the responder is not liable for damages arising from their cleanup actions unless they act with gross negligence or willful misconduct, or cause personal injury or death. The proposed Alaska legislation expressly confers liability to the responsible parties for any damages resulting from the oil spill cleanup efforts that are not subject to liability to the response action contractor. And like these other laws, limited liability would attach only to contractors that had no involvement in the spill itself.

The public policy reasons for granting such limited immunity are similar to those that prompted other good samaritan immunity for organizations like fire and police departments, medical personnel, and others. There is a need to insure that highly trained personnel remain willing to respond without hesitation despite adverse, or even dangerous circumstances and that they promptly make the difficult decisions such a response demands.

The importance of this legislation also directly relates to Tesoro's ability to maintain response action contractor services in Prince William Sound and uninterrupted manufacturing operations at our Kenai refinery. Tesoro manufactures a full range of petroleum products and relies almost exclusively on ANS as a feed stock (approximately 85-90% of our crude oil is ANS). There are no known viable crude oil supply options available to Tesoro at this time should we no longer be able to transport ANS to our refinery.

Alyeska is the only entity with the spill response capabilities necessary for our tanker to maintain the required contingency plan for operation in Prince William Sound. However, because of Alyeska's potential liability for a spill from an unrelated Tesoro-chartered tanker, Alyeska proposes to make cleanup services available only under terms that Tesoro cannot meet. Alyeska is requiring \$1 billion in "direct action" financial responsibility as a condition for a term agreement that provides these services. The direct action requirement means that the financial responsibility provided must be of a nature that would enable Alyeska to seek reimbursement directly from the source of the financial responsibility without having to initiate a claim, or action against Tesoro.

Tesoro has a net worth of approximately \$200 million. Although we have put together \$1 billion of insurance in coordination with our vessel's operator, the insurance is comprised of Protection & Indemnity Club (P & I Club) insurance that does not extend direct action to a potential claimant. There is no such "direct action" insurance to be found at these levels, and we are unable to otherwise meet Alyeska's condition. We have obtained an agreement good until June 30, 1991 with Alyeska for response services and are seeking a means to resolve this problem before that date.

If the proposed legislation is enacted, we believe we will be able to achieve a negotiated arrangement for spill response services that Alyeska and Tesoro can accept. If we do not obtain such an agreement, or if we fail to obtain legislative action on this matter, we face, at best, long and expensive litigation with Alyeska over their requirements with uncertain results, and at worst an interruption of our ability to operate the Kenai Refinery.

Tesoro appreciates your review of the proposed bill and encourages you to introduce the legislation as a Senate Oil and Gas Committee bill. We will make personnel and counsel available at your convenience to discuss any issues or questions.

Thank you,



Gene Burden
Vice President - Administration
& Government Affairs

Enclosures

EXISTING OIL SPILL LIABILITIES AND PROPOSED LEGISLATION

H.B. _____

"An act relating to civil liability for the good faith response actions of a response action contractor for oil spills that were not caused by the contractor..."

1. Does proposed bill relieve a response action contractor from liabilities associated with its obligations contained in its contingency plan?

NO. See AS 46.04.030(g)

"Failure of a holder of an approved or modified contingency plan to comply with the plan, or to have access to the quality or quantity of resources identified in the plan or to respond with those resources within the shortest possible time in the event of a spill is a violation of this chapter for purposes of AS 46.03.760(a), 46.03.765, 46.03.790, and any other applicable law. If the holder of an approved or modified contingency plan fails to respond to and conduct cleanup operations of an unpermitted discharge of crude oil with the quality and quantity of resources identified in the plan and in a manner required under the plan, the holder is strictly liable, jointly and severally, for the civil penalty assessed under AS 46.03.758, 46.03.759, or 46.03.760 against any other person for that discharge."

2. Does proposed bill relieve a response action contractor for liabilities associated with its own spill?

NO. See AS 46.03.823(b)(1)

"...does not apply to a response action contractor who would otherwise be liable for the release or threatened release under state or federal law even if that person had not carried out a response action with respect to the release or threatened release;"

3. Does the proposed bill affect the oil owner's or transporters liabilities for a spill?

NO. The owner and operator are still subject to joint and several liability for all damages resulting from a spill. AS 46.03.822 is unaffected and extends strict liability for release of hazardous substances to:

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

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

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

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

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

IN THE HOUSE

BY

HOUSE BILL NO. ____

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An act relating to civil liability for the good faith response actions of a response action contractor for oil spills that were not caused by that contractor, and providing an effective date."

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

* Section 1. AS 46.03.823(a) is amended to read:

(a) A person who is a response action contractor with respect to a release or threatened release of a hazardous substance other than oil whose acts or omissions are not contrary to a response plan or order by a state or federal agency having jurisdiction over the release or threatened release is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the release or threatened release unless the release or threatened release is caused by an act or omission of the response action contractor that is negligent or grossly negligent or constitutes intentional misconduct. To show negligence by a response action contractor, a claimant must show that the acts or omissions of the contractor under the response action contract were not in accordance with generally accepted professional standards and practices at the time the response action services were performed.

* Sec. 2. AS 46.03 is amended by adding a new section to read:

Sec. AS 46.03.825. OIL SPILL RESPONSE ACTION CONTRACTORS. (a) A person who is a response action contractor with respect to a release or threatened release of oil is not liable for injuries, costs, damages, expenses or other liability that results from the release or threatened release, or from the response action contractor's acts or omissions in response to the release or

threatened release, unless the person bringing a claim against the response action contractor proves by a preponderance of the evidence that:

(1) the response action contractor would have been liable for the release or threatened release under state or federal law even if that contractor had not carried out a response action with respect to the release or threatened release; or

(2) the response action contractor acted with gross negligence or intentional misconduct.

(b) The liability limitation of (a) of this section does not apply to an action for personal injury or death.

(c) As used in this section:

(1) "gross negligence" means criminal negligence as defined in AS 11.81.900(a)(4);

(2) "response action contract" has the same meaning as in AS 46.03.823(g)(2);
and

(3) "response action contractor" has the same meaning as in AS 46.03.823(g)(3).

* Sec. 3. This Act taken effect immediately in accordance with AS 01.10.070(a).

IN THE HOUSE

BY

HOUSE BILL NO. ____

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An act relating to civil liability for the good faith response actions of a response action contractor for oil spills that were not caused by that contractor, and providing an effective date."

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

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

Sec. 46.03.822. STRICT LIABILITY FOR THE RELEASE OF HAZARDOUS SUBSTANCES. (a) Notwithstanding any other provision or rule of law and subject only to the defenses set out in (b) of this section and the exception set out in (i) of this section, the following persons are strictly liable, jointly and severally, for damages to persons or property, whether public or private, including damage to the natural resources of the state or a municipality[,] damage caused by a response action contractor for which the response action contractor is not liable under AS 46.03.823 or AS 46.03.825; and for the costs of response, containment, removal, or remedial action incurred by the state or a municipality, resulting from an unpermitted release of a hazardous substance or, with respect to response costs, the substantial threat of an unpermitted release of a hazardous substance:

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

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

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

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

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

* Section 2. AS 46.03.823(a) is amended to read:

(a) A person who is a response action contractor with respect to a release or threatened release of a hazardous substance other than oil whose acts or omissions are not contrary to a response plan or order by a state or federal agency having jurisdiction over the release or threatened release is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the release or threatened release unless the release or threatened release is caused by an act or omission of the response action contractor that is negligent or grossly negligent or constitutes intentional misconduct. To show negligence by a response action contractor, a claimant must show that the acts or omissions of the contractor under the response action contract were not in accordance with generally accepted professional standards and practices at the time the response action services were performed.

*** Sec. 3. AS 46.03 is amended by adding a new section to read:**

Sec. AS 46.03.825. OIL SPILL RESPONSE ACTION CONTRACTORS. (a) A person who is a response action contractor with respect to a release or threatened release of oil is not liable for injuries, costs, damages, expenses or other liability that results from the release or threatened release, or from the response action contractor's acts or omissions in response to the release or threatened release, unless the person bringing a claim against the response action contractor proves by a preponderance of the evidence that:

(1) the response action contractor would have been liable for the release or threatened release under state or federal law even if that contractor had not carried out a response action with respect to the release or threatened release; or

(2) the response action contractor acted with gross negligence or intentional misconduct.

(b) The liability limitation of (a) of this section does not apply to an action for personal injury or death.

(c) As used in this section:

(1) "response action contract" has the same meaning as in AS 46.03.823(g)(2);
and

(2) "response action contractor" has the same meaning as in AS 46.03.823(g)(3).

*** Sec. 3. This Act taken effect immediately in accordance with AS 01.10.070(a).**

¹IN THE HOUSE

BY

HOUSE BILL NO. ____

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

For an Act entitled:

"AN ACT RELATING TO CIVIL LIABILITY FOR THE GOOD FAITH RESPONSE ACTIONS OF A RESPONSE ACTION CONTRACTOR FOR OIL SPILLS THAT WERE NOT CAUSED BY THAT CONTRACTOR, AND PROVIDING AN EFFECTIVE DATE"

SECTIONAL ANALYSIS

Introduction:

This legislation will provide limited immunity to "response action contractors" for damages arising from their response activities, unless they act with gross negligence or willful misconduct, or cause personal injury or death. The legislation expressly makes the spiller liable for the response action contractor's acts or omissions exempted under the law.

Section 1:

A.S. 46.03.822 is amended to expressly clarify that the persons designated as strictly liable, jointly and severally, for damages resulting from the release of hazardous substances, the costs of response, containment, removal, and remediation are also liable for any "...damages caused by a response action contractor for which the response action contractor is not liable under A.S. 46.03.823 or A.S. 46.03.825..."[Sections 2 and 3 of this Bill].

Section 2:

A.S. 46.03.823(a) currently describes the liability of response action contractors engaged in any type of hazardous substance clean up including land based clean up. The proposed legislation does not seek modification of the standard of liability of non-oil clean up. The non oil clean ups are expected to be land based where the response action contractors are not faced with the same critical, time-sensitive decisions that must often be made in response to an oil spill where adverse weather conditions, fast moving currents, high seas, and with less than ideal information are confronted. The proposed modification removes oil from the requirements of A.S. 46.03.823(a) in favor of the requirements of a new section A.S. 46.03.825 described below in Section 3.

Section 3:

A.S. 46.03 is amended by adding a new section (A.S. 46.03.825) which grants a limitation to liability to a response action

contractor unless the response action contractor:

1) would have been liable for the release even if it had not carried out a response action with respect to the release. This means that if a response action contractor would be otherwise liable for the release under State or Federal law that the limitation provided under the proposed legislation would not serve to enable the contractor to avoid that liability, or

2) acted with gross negligence or intentional misconduct.

The limitation does not extend to any action for personal injury or death as specified in A.S. 46.03.825 (b). The proposed legislation does not modify the existing definitions of "response action contract" or "response action contractor."

Section 4:

The proposed Act would become effective immediately in accordance with A.S. 01.10.070(a).

Draft Sectional
February 11, 1991

SPILL RESPONSE CONTRACTOR
LIMITED LIABILITY PROPOSAL

RESPONSE ACTION CONTRACTOR CURRENT LIABILITY EXPOSURE	PROPOSED LEGISLATION EFFECT
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GROSS NEGLIGENCE

INTENTIONAL ACTS

SIMPLE NEGLIGENCE

PERSONAL INJURY

DEATH

REMOVES:

SIMPLE NEGLIGENCE

And clarifies
that the spiller
is **STRICTLY LIABLE**
for damages that
are the result of
the limited immunity
granted the
response action
contractor