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PROPOSED

BILL

7-LS1290\A
Ford
4/25/91

SENATE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE SENATE SPECIAL COMMITTEE ON OIL AND GAS

Introduced:
Referred:

A BILL

FOR AN ACT ENTITLED

"An Act limiting civil liability for acts or omissions of an oil spill response action contractor and establishing strict liability on responsible parties for certain acts or omissions of a response action contractor; amending the definitions of 'response action' and 'response action contractor'; and providing for an effective date."

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

*** Section 1.** FINDING AND INTENT. The legislature finds that the entire subject of response action contractor civil liability is in need of review. The legislature intends to review the subject of response action contractor civil liability and to complete a report on this subject before January 15, 1992. The legislature also intends to include in the report modifications necessary to state laws on response action contractor civil liability, and an analysis of whether the present state laws that require shippers and owners to file contingency plans and to provide response action are adequate to protect the public in the event of an oil spill.

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

(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,] 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) **<u>except for a response action contractor,</u>** 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) **<u>except for a response action contractor,</u>** 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.

* **Sec. 3.** AS 46.03.822 is amended by adding a new subsection to read:

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

*** Sec. 4.** 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 **<u>other than oil</u>** 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. 5.** AS 46.03.823(g) is repealed and reenacted to read:

(g) In this section, "response action" means an action taken in connection with the mitigation or cleanup of a release or threatened release of a hazardous substance other than oil, including investigation, evaluation, plan development, mapping and surveying, engineering, design and construction, removal, and equipment provision.

*** Sec. 6.** 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 whose act or omission is not contrary to an order of the federal or state on-scene coordinator is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the release or threatened release, or from the response action contractor's act or omission in response to the release or threatened release, unless the person bringing a claim against the response action contractor proves by a preponderance of the evidence that

(1) the response action contractor would have been liable for the initial release or threatened release under AS 46.03.822 even if that contractor had not carried out a response action;

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

(3) the response action contractor, without approval by the federal or state on-scene coordinator, substantially deviated from an oil spill contingency plan previously approved under AS 46.04.030, and the plan was either prepared by that contractor for a party responsible for the release under AS 46.03.822 or that contractor previously agreed to comply with the terms of that plan under a contract with parties responsible for the release under AS 46.03.822.

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

(1) an action for personal injury or death;

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

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

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

(d) In this section, "response action" means an action taken to respond to a release or threatened release of oil, including but not limited to mitigation, cleanup, or removal of a release or threatened release of oil.

* **Sec. 7.** AS 46.03.826 is amended by adding new paragraphs to read:

(14) "response action contract" means a written contract or agreement to provide response action with respect to a release or threatened release of a hazardous substance entered into by a person with

(A) the department;

(B) another person who has entered into an agreement with the department that provides for response action subject to the department's oversight and control;

(C) a federal agency with jurisdiction over the release or threatened release; or

(D) another person potentially liable for the release or threatened release under state or federal law;

(15) "response action contractor" means

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

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

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

*** Sec. 8.** This Act takes effect immediately under AS 01.10.070(c).

SECTIONAL ANALYSIS

PROPOSED RESPONSE ACTION CONTRACTOR LEGISLATION

(Draft dated 4/25/91)

Section 1. Finds that the issue of response action contractor liability needs further study, and states that the legislature intends to review the subject and complete a report by the beginning of the next session.

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

Section 3. Adds a new subsection to the strict liability section (above), defining damages. The term is expanded to include damages for which a response action contractor (RAC) is immunized from liability by subsequent sections of the bill. Has the effect of clarifying that if a RAC is immunized from liability for an action by the bill, the liability for that action flows back to the spiller or owner of the oil.

Section 4. Amends current law dealing with hazardous substance RAC's to limit the applicability of the section to substances other than oil. Has the effect of retaining simple negligence as the standard for those responding to releases of hazardous substances other than oil. (Note that a RAC responding to a non-oil release may be strictly liable for damages in certain circumstances; for example, if the RAC's acts are "contrary to a response plan or order by a state or federal agency having jurisdiction over the release..."

Section 5. Amends the definitions portion of the (current) section dealing with response action contractors to (1) limit the definition of "response action" in this section to actions not involving oil; and (2) deletes the definitions of "response action contract" and "response action contractor". These last two definitions are moved (Section 7, below) to a general definitions section.

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

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

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

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

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

Section 8. Immediate effective date.

CLASSES OF RESPONSE ACTION CONTRACTORS

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

A. Alyeska Pipeline Service Company

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

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

A. Cook Inlet Spill Prevention Response, Inc.

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

B. Alaska Clean Seas

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

III. Resource Suppliers - Companies which contract with primary responder RACs or contingency plan holders to supply equipment and personnel.

A. VECO
B. VCRA
C. Martech

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

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

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

B. Volunteers - These are individuals or groups who assist on their own initiative or on request by some spill response participant.

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

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

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

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

OTHER STATES

A Review of the

Oil Pollution Act of 1990

With Examples of Related State Oil Pollution Legislation

The Coastal States Organization

MARCH 1991

F. "Good Samaritan" Removal and Response

Oil Pollution Act of 1990

Under the OPA, any person taking response action to a spill, if the action is consistent with the National Contingency Plan or in compliance with presidential order, is immune from liability. This immunity of liability extends to vessel operators, cleanup contractors and cleanup cooperatives, or any person "rendering care, assistance, or advice consistent" with the NCP or presidential order. At the same time, responders are not immune from liability in the event of their gross negligence or willful misconduct, or in the event of personal injury or death. 4201.

State authority to impose requirements or standards for persons other than the responsible party responding to an oil spill are expressly preserved. 4202(c).

State "Good Samaritan" Provisions

Hawaii: Persons "rendering care, assistance, or advice" in accordance with the State law or at the direction of the on-scene coordinator are immune from liability. Immunity is not available in the event of "gross negligence or intentional misconduct on the part of such person." See Hawaii Environmental Response Law, sec. 128D-6.

California: Persons, including "oil spill cooperatives," that act "in good faith" in the course of "rendering care, assistance, or advice" in accordance with the National Contingency Plan, the state contingency plan, or orders from the on-scene coordinator or the Coast Guard, are immune from liability. Immunity is not available in the event of "gross negligence or willful misconduct" on the part of the responder, or in the event of personal injury or wrongful death. See Oil Spill Prevention and Response Act, Title 2, sec. 8670.56.6.

In the event of oil spill cooperatives or others that are "regularly engaged in the business of responding to oil spills" the immunity is only available for 60 days after the commencement of the response effort. The 60 day time period can be extended 30 more days if certain requirements are met. For persons not regularly engaged in oil spill response, there is no time limitation on the immunity from liability. See Oil Spill Prevention and Response Act, Title 2, sec. 8670.56.6.

Florida: Persons who are officially authorized to respond to oil spills are not liable for damages except for gross negligence or willful misconduct. 1990 Fla. Laws Ch. 90-54, sec. 16 (1990).

Alaska State Legislature

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February 26, 1991

MEMORANDUM

TO: Representative Bill Hudson

FROM: Glenn T. Gray GTG
Legislative Analyst

RE: **Oil Spill Response Contractor Liability Laws in Other States**
Research Request 91.144

You asked about liability laws in other states concerning oil spill response contractors. Specifically, you requested information about states which have limited liability for contractors and their reasons for doing it. You also asked about states that have considered but rejected such legislation.

We contacted staff attorneys, resource agency officials or legislative staff in 16 states to obtain the information for this memorandum. An attempt was made to contact more than one person from each state to confirm information. For some states it was difficult to locate anyone who had a thorough understanding of the implications of response contractor liability statutes. We also contacted staff from several national organizations: the Coastal States Organization, the National Conference of State Legislatures, and the Marine Spill Response Corporation (MSRC).

This memorandum begins with background information about the effort to limit the liability of response action contractors. A brief description of how various states have dealt with contractor liability follows. The memorandum concludes with a summary of national trends regarding liability regimes for oil spill clean up contractors.

Background

Since the federal Oil Pollution Act of 1990 passed in August, many states report that the Marine Spill Response Corporation (formerly the Petroleum Institute Response Organization) and oil spill response contractors have lobbied them to limit the liability of response action contractors. The federal law limits liability for persons who respond to an oil spill in federal waters as long as they act consistently with the National Contingency Plan [33 U.S.C. 1321 (c)(4)]. Responders are still liable, however, for personal injury and wrongful death, and if they are grossly negligent or engage in wilful misconduct. The act does not preempt states from enacting more stringent liability regimes [33 U.S.C. 1321(o)(2)].[1]

Laws which limit liability for persons who respond to spills of oil or hazardous materials are commonly referred to as good samaritan laws. While some states exempt only people who are not compensated, other states have changed their laws to be consistent with federal law. Rather than holding contractors strictly liable, or liable for simple negligence, such states limit contractor liability to gross negligence, wilful misconduct, personal injury or wrongful death. Definitions of these different standards of liability may be found in Attachment A.

The federal Oil Pollution Act of 1990 requires that owners or operators of tank vessels and oil facilities develop response plans. These plans must show that owners or operators have personnel and equipment to "remove to the maximum extent practicable a worst case discharge . . ." [33 USC 321(j)(5)]. For many facilities and tankers, the MSRC provides the only feasible means to comply with this provision. The MSRC is a nonprofit organization funded by the Marine Preservation Association (MPA), a group of oil industry companies. According to David Larkin, director of government affairs for the MSRC, the organization operates independently from the MPA. The MSRC plans to have five regional response centers and 23 pre-staging areas where equipment will be stored. Mr. Larkin says that because an oil spill can spread across the jurisdictions of many states, it is important to have consistent liability standards. Otherwise, in the event of a spill, contractors would have to respond to different rules in each state. Mr. Larkin also says that insurance costs for unlimited liability are prohibitive, and if a state does not have adequate immunity for the responders, the MSRC will have to consider what its role will be in that state.

The MSRC's involvement in Alaska is unclear. According to Mr. Larkin, the MSRC has no plans to locate a pre-staging area in Alaska, and current liability standards do not provide an incentive to consider this option. The MSRC document in Attachment B does, however, refer to a planned pre-staging area in Alaska. Alyeska Pipeline Service Company currently provides spill response assistance for tankers transporting oil from the TransAlaska Pipeline. According to Gene Burden, a vice-president for Tesoro, Alyeska requires Tesoro to obtain one billion dollars of direct action insurance for it to transport oil in Prince William Sound. Such insurance is difficult, if not impossible to obtain (see Attachment C, Legislative Research Memorandum 90.200). Mr. Burden says that coverage through a Protection and Indemnity (P&I) club would

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[1]After an oil spill, state and federal authorities may bring separate actions against a contractor based on their individual standards.

not provide direct action and would be cost prohibitive for Tesoro.[2] Mr. Burden believes that insurance requirements would be reduced if Alaska limits the liability for response action contractors. He also says that frivolous litigation would be reduced by changing the current law.

Arkansas

According to Steve Weaver, chief legal council for the Department of Pollution Control and Ecology, Arkansas holds oil spill response contractors responsible for simple negligence. He says that in 1985 legislation was passed that held contractors responsible for gross negligence, but that the oil industry supported a law passed in 1989 making contractors liable for simple negligence. Mr. Weaver said that Arkansas wants to keep response contractors to as high a standard as possible.

California

The California General Assembly passed a bill last year that includes a provision to limit liability for people who respond to oil spills (other than for gross negligence, wilful misconduct, personal injury, or wrongful death). The law limits liability for people who act in good faith and in accordance with the National Contingency Plan, the state oil spill contingency plan, or at the direction of the on-site coordinator or the United States Coast Guard. The act restricts the limitation of liability for response action contractors for 60 days after they begin cleanup with a possible extension of 30 days.

According to Dr. Jim Rote, principal consultant for the California General Assembly Office of Research, the provision limiting a response contractor's liability to 60 days resulted from a compromise between lobbying efforts of the California trial lawyers and response contractors. Dr. Rote believes that the limitation of liability for response contractors is justified because they respond to emergencies and may be compared to other emergency responders such as ambulance drivers and fire fighters. The 60-day limit encourages contractors not to become careless.

Connecticut

According to Charles Zieminski, principal emergency response coordinator for the Department of Environmental Protection, Connecticut has no cap on liability for negligence. Other than during a few oil spills in the early 1970s, Connecticut has not had much recent experience with response contractors. Mr.

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[2] Direct action means that a claimant could recover costs directly from the insurer without going through Tesoro.

Zieminski says that he is not aware of efforts to change current liability laws for oil spill clean up contractors.

Delaware

The Delaware General Assembly recently passed legislation consistent with federal law concerning liability of response contractors. The legislation is awaiting the governor's signature. According to Shari Wilson, staff attorney for the Attorney General's Office, contractors may be liable for simple negligence if they significantly increase the damage resulting from an oil spill. Contractors may get around this provision if they subcontract with a party who does not receive compensation for spill clean up, such as the MSRC.

Florida

Legislation passed last year by the Florida legislature limits the liability of persons responding to an oil spill as long as they are not grossly negligent (FS 376.09). This provision appears to include response action contractors, although a separate provision (FS 376.319) provides indemnification for response contractors for simple negligence if they have a written contract with the state. Several state officials with whom we spoke were unable to explain why the state would need to indemnify a contractor for simple negligence if the contractor were only liable for gross negligence and wilful misconduct.

Hawaii

The Hawaii legislature passed legislation during 1990 that apparently limits the liability of response action contractors. The law states that no person shall be liable "as a result of actions taken or omitted in the course of rendering care, assistance or advice in accordance with this chapter or at the direction of an on-scene coordinator," unless the actions resulted from gross negligence or intentional misconduct. There is a question whether the legislature intended to limit the liability of contractors because the language modifies section 107(d) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) instead of section 119 of that act (section 119 exempts response action contractors from strict liability for the clean up of hazardous substances).

Louisiana

Louisiana law currently holds response contractors strictly liable for their clean up efforts. MSRC has reportedly said that if Louisiana does not limit liability for response action contractors, the MSRC would reconsider its plans to locate one of its five regional centers in Louisiana.

Maine

Maine's good samaritan law currently limits the liability of people who respond to oil spills as long as they do not receive compensation. Response contractors receiving payment are liable for simple negligence. According to Barbara Foster of the National Conference of State Legislatures, the MSRC said that it would not provide an office in Maine if liability for response action contractors was not limited. The legislature is currently considering a bill to limit liability to gross negligence. Perry Cogburn, an oil and hazardous materials specialist for the Maine Department of Environmental Protection, says that there has not been a problem with response contractors and if the laws are too strict contractors may not respond to spills.

Maryland

Maryland currently does not limit the liability of response action contractors. The legislature is expected to consider a bill this session that has provisions similar to those of the federal government.

Last week during a regional response team drill in Chesapeake Bay, contractors refused to respond to the spill because of Maryland's liability regime.[3] The drill proceeded under the assumption that an oil tanker had collided with a container ship carrying hazardous waste. The United States Coast Guard (USCG) took control of the "spill" but could not convince the contractors to respond. The USCG received verbal approval from the Governor of Maryland and written approval from the state's director of the Department of Environment to exempt contractors from liability during the drill. There were, however, concerns about the legality of such an exemption. According to Lt. Commander Shultz, coordinator for the National Response Team, the USCG considered towing the boats into Virginia waters much to the alarm of Virginia authorities. The drill will continue on March 12, with the beginning of the second day of the imaginary spill.

Mississippi

Mr. Charles Chism, director of the Office of Pollution Control, says that Mississippi does not limit the liability for response action contractors. A bill currently being considered by the state legislature would limit contractor liability. Mr Chism says he does not object to such a liability limitation.

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[3]Although there was actually no accident or oil spill, authorities proceeded throughout the drill as if it was real.

New York

Sherry Chrimes, assistant counsel for the Department of Environmental Conservation, says that New York has resisted attempts by the oil industry to limit the liability of response action contractors. The current law holds contractors liable for simple negligence. Ms. Chrimes said that the state often uses response contractors and that the current law is adequate. She says that response contractors should be held to the same standard of liability as other contractors.

North Carolina

Ed Gavin, of the Office of General Council for the Department of Natural Resources and Community Development, says that North Carolina has no limitation for liability for contractors who clean up oil spills. He says that there has not been much effort to change the current law, and that North Carolina has only a few oil terminals, a pipeline and a small oil refinery.

Oregon

Contractors responding to an oil spill currently have unlimited liability. The legislature, however, is considering limiting the liability of response contractors. Bruce Southerland, of the Department of Environmental Quality, said that because Oregon borders the Columbia River with Washington, the states usually try to have compatible oil spill legislation. (Washington currently limits the liability of contractors.)

Pennsylvania

Fred Osman, director of Environmental Emergency Response, says that the Pennsylvania legislature passed an act during November 1990 limiting response action contractor liability to wilful misconduct or gross negligence. He thinks that simple negligence is not a good standard for response action contractors because they respond to emergencies in an effort to prevent damage to the environment and property.

Virginia

David Orms, an environmental program manager for the Department of Environment, says that Virginia has patterned its contractor liability law after the federal Oil Pollution Act of 1990. He does not think that limiting contractor liability to gross negligence poses a problem.

Mr. Orms says that during a regional response team drill he attended last week in Chesapeake Bay, response action contractors refused to respond to the oil spill in Maryland waters because that state does not limit liability for contractors. The contractors, however, said they would respond to the imaginary spill when it reached Virginia waters.

Washington

Washington limits the liability of response action contractors to a standard of gross negligence and wilful misconduct. The state is currently developing contractor standards for uncompleted work. According to Don Reif of the Department of Ecology, contractors will have to prove that they have a certain amount of insurance to pay for clean up work that they have not completed. Harry Reinart, legislative counsel for the House Environment Committee, says that because spillers have strict liability, it is not necessary to hold contractors to such a high standard. Mr. Reinart believes that it may be difficult to obtain contractors if they are held to too high of a standard.

Conclusion

Opinions differ concerning the extent a response contractor should be held liable for damage resulting from its actions. Some officials from other states believe that contractors should be held accountable for their actions during an oil spill clean up. They are concerned that a contractor may use cheaper, less efficient equipment if their liability is limited. They also express concern that a contractor may not be as careful when their liability is limited. One state official thought that in cases where the identity of a spiller cannot be determined or if a spiller were to go bankrupt, there would be no way to recover costs for damages resulting from the actions of a contractor if that contractor, was not liable and insured for simple negligence.

Several states have passed legislation that resembles liability standards found in the Oil Pollution Act of 1990, and additional state legislatures are considering such legislation. Some states have modified the federal legislation to require contractors to comply with state oil spill contingency plans or the direction of an on-scene coordinator. California limits the liability of contractors for 60 days with a possible 30-day extension while providing no time limit for volunteers. Officials from these states feel that response contracts should have limited liability similar to other emergency response personnel such as policemen and fire fighters. Many of these officials express concern that contractors would not be available if liability standards were too rigid.[4] The high cost of insurance for simple negligence

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[4]Lt. Commander Shultz, coordinator for the National Response Team, is not aware of any instances where contractors have refused to respond to a spill other than the regional response drill which occurred in Maryland waters last week.

was also cited as a reason for limited liability. The MSRC supports state legislation resembling federal law so that there will be consistency during oil spills that reach the waters of more than one state.

The Federal Oil Pollution Act of 1990, however, permits states to require higher standards. David Slade, general council for the Coastal States Organization, says that while his organization does not recommend how states should respond to the liability question, one option available would be to keep the simple negligence liability standard but to place a cap on the amount of liability. This option would reduce the liability of response action contractors and give them some incentive to operate carefully. The Coastal States Organization expects to release a white paper next month about how states have responded to a number of issues relating to the Federal Oil Pollution Control Act of 1990. A copy of this paper will be forwarded to your office as soon as we receive it.

I hope this information is helpful. Please contact this office if we may be of additional assistance.

Attachments

Entwé

7 Arri 6

Direct Action

AVAILABLE

FEDERAL LAW

"(iii) into or on the waters of the exclusive economic zone; or

"(iv) that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States.

"(B) In carrying out this paragraph, the President may—

"(i) remove or arrange for the removal of a discharge, and mitigate or prevent a substantial threat of a discharge, at any time;

"(ii) direct or monitor all Federal, State, and private actions to remove a discharge; and

"(iii) remove and, if necessary, destroy a vessel discharging, or threatening to discharge, by whatever means are available.

"(2) DISCHARGE POSING SUBSTANTIAL THREAT TO PUBLIC HEALTH OR WELFARE.—(A) If a discharge, or a substantial threat of a discharge, of oil or a hazardous substance from a vessel, offshore facility, or onshore facility is of such a size or character as to be a substantial threat to the public health or welfare of the United States (including but not limited to fish, shellfish, wildlife, other natural resources, and the public and private beaches and shorelines of the United States), the President shall direct all Federal, State, and private actions to remove the discharge or to mitigate or prevent the threat of the discharge.

"(B) In carrying out this paragraph, the President may, without regard to any other provision of law governing contracting procedures or employment of personnel by the Federal Government—

"(i) remove or arrange for the removal of the discharge, or mitigate or prevent the substantial threat of the discharge; and

"(ii) remove and, if necessary, destroy a vessel discharging, or threatening to discharge, by whatever means are available.

"(3) ACTIONS IN ACCORDANCE WITH NATIONAL CONTINGENCY PLAN.—(A) Each Federal agency, State, owner or operator, or other person participating in efforts under this subsection shall act in accordance with the National Contingency Plan or as directed by the President.

"(B) An owner or operator participating in efforts under this subsection shall act in accordance with the National Contingency Plan and the applicable response plan required under subsection (j), or as directed by the President.

"(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.

"(C) A responsible party is liable for any removal costs and damages that another person is relieved of under subparagraph (A).

"(5) OBLIGATION AND LIABILITY OF OWNER OR OPERATOR NOT AFFECTED.—Nothing in this subsection affects—

"(A) the obligation of an owner or operator to respond immediately to a discharge, or the threat of a discharge, of oil; or

"(B) the liability of a responsible party under the Oil Pollution Act of 1990.

"(6) RESPONSIBLE PARTY DEFINED.—For purposes of this subsection, the term 'responsible party' has the meaning given that term under section 1001 of the Oil Pollution Act of 1990.".

(b) NATIONAL CONTINGENCY PLAN.—Subsection (d) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321(d)) is amended to read as follows:

"(d) NATIONAL CONTINGENCY PLAN.—

"(1) PREPARATION BY PRESIDENT.—The President shall prepare and publish a National Contingency Plan for removal of oil and hazardous substances pursuant to this section.

"(2) CONTENTS.—The National Contingency Plan shall provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances, and shall include, but not be limited to, the following:

"(A) Assignment of duties and responsibilities among Federal departments and agencies in coordination with State and local agencies and port authorities including, but not limited to, water pollution control and conservation and trusteeship of natural resources (including conservation of fish and wildlife).

"(B) Identification, procurement, maintenance, and storage of equipment and supplies.

"(C) Establishment or designation of Coast Guard strike teams, consisting of—

"(i) personnel who shall be trained, prepared, and available to provide necessary services to carry out the National Contingency Plan;

"(ii) adequate oil and hazardous substance pollution control equipment and material; and

"(iii) a detailed oil and hazardous substance pollution and prevention plan, including measures to protect fisheries and wildlife.

"(D) A system of surveillance and notice designed to safeguard against as well as ensure earliest possible notice of discharges of oil and hazardous substances and imminent threats of such discharges to the appropriate State and Federal agencies.

"(E) Establishment of a national center to provide coordination and direction for operations in carrying out the Plan.

"(F) Procedures and techniques to be employed in identifying, containing, dispersing, and removing oil and hazardous substances.

"(G) A schedule, prepared in cooperation with the States, identifying—

MISC.

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.

700 H Street, #4 Anchorage, Alaska 99501 • (907) 274-3621

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 <u>only</u> 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 Seider
Executive Director

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Juneau, AK 99801

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Within Alaska: 1-800-478-FISH
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September 1990

THE ROLE OF THE STATES UNDER THE FEDERAL OIL SPILL LAW

American Petroleum Institute
Office of General Counsel

insurance, surety bonds, guarantees, letters of credit, and self-insurance.

These federal financial responsibility requirements are extremely high and the sanctions for non-compliance are strict and punitive. The States should find that the federal requirements for financial responsibility provide a satisfactory guarantee of compensation for the states, their citizens, and natural resources. The States should aggressively undertake the enforcement prerogatives regarding financial responsibility which are offered the under the new federal law.

IV. GOOD SAMARITAN PROTECTION FOR OIL SPILL RESPONDERS

With the emergence of a new federal oil spill liability law, and recent costs for oil spill damages reaching the multi-billion dollar level, the viability and effectiveness of organizations designed to respond to oil spills is threatened. Such organizations, many of which are non-profit, simply can not afford exposure to the "brave new world" of oil spill liabilities -- and why should they?

The law must recognize the significant differences between the spill response organizations and the original spillers of oil -- allocating their respective liability risks accordingly. Specifically, federal and state laws should extend to spill response cooperatives and contractors the protection from liability -- except in cases of gross negligence or willful misconduct -- which is afforded other emergency entities in our society, including ambulance services and firefighters. In the case of damages allegedly caused by the negligence of oil spill responders, it is the original spiller of oil, whose conduct necessitates the response, who should pay those damages.

The new federal law therefore contains a provision which extends such limited immunity protection for oil spill response organizations -- but only for the liabilities they face under the federal law. This provision will not succeed if spill responders continue to face duplicate, (and in some case unlimited), liabilities under individual state laws. At present, the majority of existing Good Samaritan state laws applicable to oil spill responders contain a host of impractical and unrealistic condition on the immunity. For example, under many of these state laws, an oil spill responder loses its immunity if it charges any fee for its services. Such conditions on liability exposure only undermine the goal of ensuring emergency response capability. The States should instead legislate for the promotion of the best possible response to spill emergencies by enacting straightforward limited responder immunity provisions such as the new national standard.

V. FEDERAL PRIMACY IN SPILL RESPONSE AND CONTINGENCY PLANNING.

A. Response Chain of Command

A most important lesson learned from recent, publicized spill incidents is that immediate and decisive response to oil spills is essential to a successful containment and cleanup. The new federal law fundamentally amends the Clean Water Act's provisions in this

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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.

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

paw/0169

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 E Brown

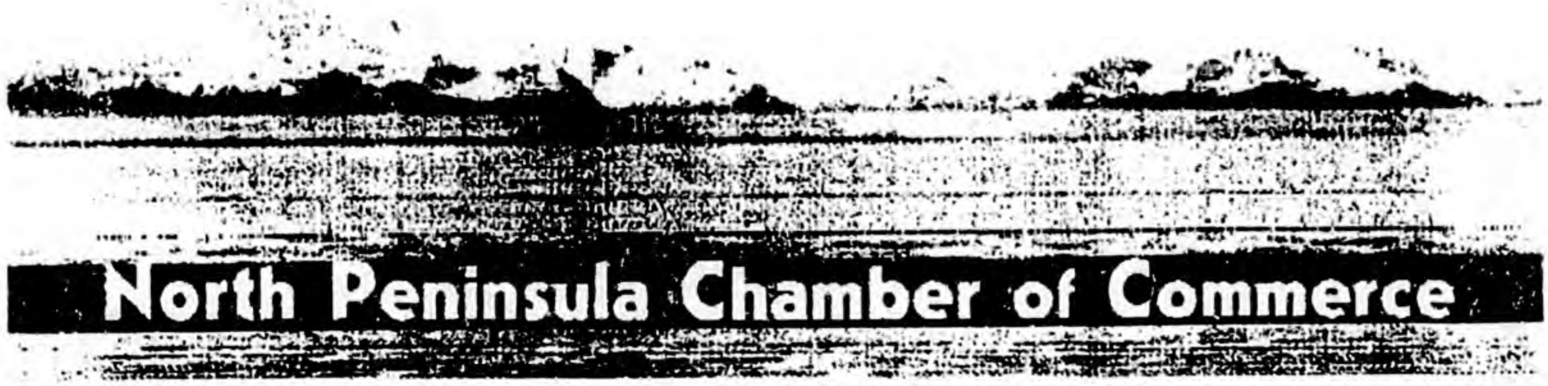
Jack Brown, President

ATTEST:

John J. Williams

John J. Williams, Secretary

(3/8/91)



P.O. Box 8053 Nikiski, Alaska 99635 (907) 776-8369

NORTH PENINSULA CHAMBER OF COMMERCE

RESOLUTION

A RESOLUTION SUPPORTING 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 BOARD OF THE NORTH PENINSULA CHAMBER OF COMMERCE:

Section 1: That the spill response contractors, including fishermen, subcontractors and part-time professionals and specialists, who perform in response to an oil spill to the 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

Section 2: That the North Peninsula Chamber of Commerce 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

North Peninsula Chamber of Commerce

P.O. Box 8053 Nikiski, Alaska 99635 (907) 776-8369

Section 3: That 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.

ADOPTED BY THE NORTH PENINSULA CHAMBER OF COMMERCE ON THIS 21st DAY OF March, 1991.

Marie Becker

Marie Becker, President of THE
NORTH PENINSULA CHAMBER OF COMMERCE

UCIDA

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 ommissions of the contractor under the response action contract were not in accordance with generally accepted professional standards and practives 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 actionalble. 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 then 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 statues. Even the concept of a sunset provision and a 30 day window is poor public policy. Alyeska and other similarilly situated RACs will turn over spill resonse 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

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

WALTER J. HICKEL
GOVERNOR

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.

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,

Bruce Kendall Sr

Bruce B. Kendall, Sr.
Legislative Liaison

alaska clean seas

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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

1791 ★ 1991
KENAI
ALASKA
Kenai
BICENTENNIAL
Village with a Past- City with a Future!

CITY OF KENAI
"Oil Capital of Alaska"
210 Fidalgo Avenue
Kenai, Alaska 99611
TELEPHONE 283-7535
FAX 907-283-3014

April 10, 1991

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

RE: [redacted] *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 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

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

James W. Skogstad, Assembly President

ATTEST:

Teresa Hudson

Acting Borough Clerk

ALYESKA

Alaska State Legislature

Senate Committee on Oil and Gas

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

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

April 8, 1991

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

Dear Mr. Richards,

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

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

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

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

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

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

Sincerely,

Sam Cotten
Chair

SC/dv

cc: Mary Nordale

Peninsula Clarion

Alyeska blasted for billion-dollar bond

By CATHY BROWN
Peninsula Clarion

Borough Mayor Don Gilman Wednesday blasted Alyeska Pipeline Service Co. for what he calls an "unreasonable" demand that threatens to shut down Tesoro-Alaska Petroleum Corp.'s Nikiski refinery.

Alyeska is requiring Tesoro to come up with a $1 billion bond to continue shipping oil from the Alyeska pipeline terminal in Valdez to Cook Inlet.

Tesoro officials say they can't possibly meet the requirement. And since they get 90 percent of the crude oil for their Nikiski refinery from Valdez, the refinery would be in serious trouble if it was no longer able to ship from there, said Tesoro vice president Gene Burden.

Gilman said the major member companies of Alyeska — Exxon, British Petroleum and ARCO — are using Tesoro as a pawn in order to pressure the Legislature to pass a bill restricting Alyeska's liability in the event of a spill.

"They're using Tesoro," Gilman said. "They're being unreasonable."

But Alyeska spokesperson Marnie Isaacs said the $1 billion requirement is necessary because of the liability Alyeska could be subject to if it responds to a spill from Tesoro or another shipper in Prince William Sound.

"Alyeska serves as the initial response action contractor for those vessels calling at the terminal in Valdez," she said. "Because of the state's liability requirements, Alyeska ... asked the owner-operator or charter of the vessels to pledge a billion dollar bond, which, simply put, indicates they would have access to funds to manage the claims arising from a spill."

The other five companies operating vessels in Prince William Sound — Exxon, BP, ARCO, Shell and Chevron— have been able to comply with the $1 billion requirement, mainly by pledging $1 billion in

See ALYESKA, back page

Alyeska: Company says state's liability laws are to blame

Continued from page 1

corporate assets.

But Tesoro can't do that, Burden said.

"All five of those other companies are very, very large companies," he said. "Our whole company's only worth $200 million. To come up with a bond of a billion dollars is just not possible."

He thinks Tesoro should not be required to put up as large an amount as the other companies because Tesoro transports only a small percentage of the oil coming from the terminal, its tanker loads are much smaller, and it has taken many preventive measures, including the recent introduction of a double-bottomed tanker.

Alyeska and Tesoro have worked out a temporary agreement that allows Tesoro to continue operating in the Sound until June 1 with $1 billion in insurance, rather than a bond.

Alyeska says it may lower its requirements if the Legislature passes a bill limiting Alyeska's liability in case problems occur when it responds to a spill.

"T[illegible] core of the problem rests with [illegible] state's current liability laws," [illegible] said.

The w[illegible]y the law stands now, the standard of liability is "simple negligence," which Isaacs said could mean if Alyeska responds according to its plan with the state, but inadvertently loses some oil from a boom, it could be held liable.

Alyeska wants the standard of liability for a spill responder to be "gross negligence," which is harder to prove in court than simple negligence.

Tesoro also favors such a bill because it would limit the liability for the Cook Inlet spill response cooperative of which Tesoro is a member.

But fishing and environmental groups are opposed to the idea because they believe it would lessen the incentive for spill responders to be prepared.

A compromise bill, which sought to limits liability but only for the first 15 days after a spill and only if a company does not "substantially deviate" from its contingency plan, was passed out of the House Resources Committee Tuesday.

But Alyeska is not satisfied with the language in the bill, Isaacs said. "The bill is helpful, but it doesn't go quite far enough," she said. "We feel present language does not allow us to relax our liability standards."

Mayor Gilman also favors legislation limiting spill responders' liability because the Kenai Peninsula Borough is a member of the Cook Inlet response cooperative and taxpayers could also be held liable for problems resulting from the cooperative's response to a spill.

But Gilman, a former state senator, does not believe the legislation will pass. He says the bill has to get through two more House committees and the full House and the Senate, and he doesn't believe that will happen in the remaining 34 days of the legislative session.

He believes Alyeska is being inflexible about the bill.

"They don't want anything less than gross negligence," he said. "What I think is happening is Alyeska is trying to get the gross negligence standard, and they're doing it on the backs of Tesoro."

"The big three (Exxon, BP and ARCO) are using this thing unmercifully and unnecessarily," Gilman said.

Isaacs says that Alyeska is "very sympathetic to Tesoro's situation."

"We would like to find a way to accommodate Tesoro's needs and still protect the company's (Alyeska's) liability," she said.

Some of Tesoro's supporters in borough and state government have suggested the Alyeska owner companies are trying to put Tesoro out of business, but Isaacs denies that and Gilman says he does not believe that's the case, either.

"But if that's the fallout, they could care less," he said. "The big guys just don't care. They could care less if this refinery closed down."

The Kenai Peninsula Borough Assembly cares a great deal, however.

Tesoro employs about 150 people on the borough, according to Burden. The company provides a good chunk of borough tax revenues.

The Borough Assembly unanimously passed a resolution Tuesday night, which was supported even by fishing groups, urging the Legislature to intervene on Tesoro's behalf.

Burden says if Tesoro and Alyeska can't come to an agreement, Tesoro will file suit against the pipeline company, which would include seeking an injunction to allow the company to continue shipping out of Prince William Sound after June 1.

P.03

Alyeska pipeline
SERVICE COMPANY

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

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

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