

SCOMM

78:33

Response Action Contractor Liability Limitation Sponsor Substitute for SB 270 Sectional Analysis

Section One. Findings. Twenty-five percent of the country's crude oil supply is transported through Alaska state waters and approximately 650 million barrels of crude oil move through Prince William Sound annually. Oil discharged into the environment causes considerable damage to fish, wildlife, and other natural resources of the state and impacts the commercial and subsistence livelihoods of state residents. Because of this potential damage, it is imperative that oil spills be responded to as quickly, aggressively, and competently as possible. In addition, under the provisions of the state Trans-Alaska Pipeline System Right-of-Way Agreement, the lessees, the holders, and their common operating agent are required to contain and clean up crude oil spills in Prince William Sound.

Section Two. Actionable Claims Against the State. Limits the liability of the state of Alaska for the registration of response action contractors (RACs) under AS 46.03.815 and approval of an oil spill contingency plan under 46.04.030. An action may not be brought against the state under AS 09.05.250 for claims arising from either of these approval processes. A suit cannot be filed for an act or omission of the state, or an employee or contractor of the state in responding to or directing a response action to a release or threatened release of oil unless the act or omission resulted from gross negligence or intentional misconduct.

Section Three. Registration of Oil Spill Response Action Contractors. This section establishes a voluntary RAC registration and approval process and directs the Alaska Department of Environmental Conservation to adopt regulations. Regulation must include:

- 1) minimum training standards for personnel,
- 2) verification requirements for personnel, equipment, services, and an adequate deployment plan; and
- 3) minimum professional response action standards and practices.

The state registration and approval program may be substituted by a U.S. Coast Guard approval when a federal program is developed and implemented.

The department shall establish fee applicable for the registration program as necessary to cover the costs of the program.

The department shall provide a list of registered and approved RAC to be made available to interested parties. In addition, registered RACs shall annually provide to DEC a list of contingency plans on which they have agreed to be listed.

Defines response action contractor as those who enter into a contract to respond to a release or threatened release of oil, as well as volunteers.

Section Four. This section amends AS 46.03.822, relating to financial responsibility for oil spill damages and clean-up costs, to include a response action contractor who agrees to be listed in a contingency plan approved under AS 46.04.030 but fails to respond to a release or threatened release of oil. The paragraph does not apply if the RAC is engaged in a concurrent response under another approved contingency plan in which the RAC is the primary responder.

Section Five. Amendment required to cross-reference AS 46.03.822 (b), that relieves financial liability for responsible parties for oil spill damages and clean-up costs; a responsible parties liability is not reduced as a result of an act or omission of a RAC.

Section Six. Amends AS 46.03.822(k), the definition of "damages" to cross reference AS 46.03.824.

Section Seven. Establishes that a RAC who responds to a release or threatened release of oil is not civilly liable for damages or clean-up costs if the RAC's act or omission was consistent with an approved vessel or facility contingency plan or a prepared state or national contingency plan, or if the act or omission was otherwise directed by the state or federal on-scene coordinator.

Section Eight. Establishes the limitations on liability contained above as follows (situations in which a RAC would not automatically have limited liability):

- 1) an action for personal injury or death;
- 2) an action for damages to tangible property not caused by oil;
- 3) an act or omission that occurs more than 60 days after the oil spill occurs, this can be extended for an additional 60 days with the approval of the state on-scene coordinator;

- 4) a RAC would otherwise be liable for the release or threatened release under AS 46.03.822, eg., the RAC was the responsible party that cause the spill; the RAC acts with gross negligence or intentional misconduct; or a RAC who is the primary responder listed and agreed to be listed on an approved vessel or facility contingency plan is not registered with DEC as required.

Section Nine. Establishes that the limitation of liability for RACs is not extended to RACS who do not respond or who caused the release or threaten release of oil.

Section Ten. Defines "registered" as defined under AS 46.03.815 established in this bill.

Section Eleven. This section clarifies that the liability of a potentially responsible party for oil spill damages and clean-up costs is not reduced as a result of acts or omissions of a RAC conducting a response action. In addition, limiting RAC liability does not affect the liability under AS 46.03 or under any other state law of a person other than a response action contractor.

Section Twelve. Reordering of AS 46.04.020 (a) (1) - (2) to (h) (1) -(2) in section thirteen.

Section Thirteen. Amends AS 46.04.020 to clarify that the common operating agent for the holders and lessees of the right-of-way agreement for the trans-Alaska pipeline system (TAPS) shall immediately contain and clean up a discharge of crude oil transported by or due to the operation of the pipeline system or due to related activities, including operation of a tank vessel berthed or travelling in state waters to or from a marine terminal.

This section also establishes that a proof of financial responsibility requirement for vessels engaged in intrastate voyages for crude oil from TAPS is subject to the review of the Alaska Public Utilities Commission (APUC).

Section Fourteen. Amends AS 46.04.030(e) to establish that DEC may not approve a vessel or facility contingency plan that relies on a RAC to be a primary responder if the RAC is not registered by DEC or the U.S. Coast Guard. This section is not effective until July 1, 1993.

Section Fifteen. Allows DEC until January 1, 1993 to develop RAC registration regulations.

Section Sixteen. Requires DEC to report to the legislature by March 31, 1993, on progress of the department in the development of the state to respond to oil spill of unknown origin and enhance regional response and coastline protection.

Section Seventeen. Repeals the section of HB 196 enacted in 1991 that are to sunset June 30, 1992.

Section Eighteen. If this act takes effect after June 30, 1992, section 17 is retroactive to June 30, 1992.

Section Nineteen. Establishes that the applicability of sections 4 - 11 apply only to causes of action accruing on or after the effective dates of sections 4 - 11.

Section Twenty. Delays the effective date of AS 46.03.825(b)(4)(C), added by section 8, and section 14 until July 1, 1993.

Section Twenty-one. Except for the delayed effective dates of sections 8 and 14, the act becomes effective immediately.

Recurring Issues Regarding Response Action Contractor Liability

If a response action contractor (RAC) is indemnified (released of liability) by the financially responsible party (usually the contingency plan holder), is it sound public policy to also limit RAC liability in statute?

Theoretically, RAC indemnification by the contingency plan (c-plan) holder/responsible party should be sufficient to limit the liability of RACs. However, given the potentially high costs responsible parties may face as a result of an oil spill and our litigious society, many RACs fear lawsuits from responsible parties for any "errors" occurring in emergency situations.

Probably of even greater concern, is RAC fear of third-party lawsuits if the responsible party is financially insolvent. In addition, limiting liability reduces the disincentives for vessels of opportunity and volunteers to respond to releases or threatened releases of oil. In summary, limiting liability should encourage prompt, aggressive, and sustained response to oil spills, thereby reducing the potential damages and costs of spills.

If liability is limited can the public be assured that a response action contractor will respond?

Limiting response action contractor (RAC) liability does not in and of itself ensure response. However, limiting liability does create a climate that encourages response. For example, despite reduced liability, Crowley Maritime testified at a Citizens' Oversight Council's (COC) public hearing that they probably would not respond to an oil spill if they thought the C-plan holder was not financially solvent. With or without immunity, there is currently no legal obligation on a response action contractor to respond. Just as RACs require assurance that they will not face liability exposure, the public needs assurance that a RAC will perform in a bold, aggressive manner if their liability is limited.

Does the Alaska Department of Environmental Conservation (DEC) presently have the authority and the ability to review response action contractor response capability?

DEC may have the ability under current statutes to assure performance by key response action contractors, but it currently has no actual or proposed regulatory

program to do so. If DEC has authority under present law and regulations, it is not using it. Currently, DEC only has authority over RACs through individual vessel and terminal contingency plans. To help ensure response, it is important for DEC to assert direct authority over RACs. Only with direct authority can DEC assess whether RACs are being appropriately listed on contingency plans submitted to DEC for approval.

More importantly, DEC does not currently inspect professional independent contractors (VRCA, Martech, Chempro) relied upon in contingency plans. DEC does not drill those independent contractors or verify their equipment either. Although it can be argued that DEC has the authority to drill or inspect a RAC's equipment and response capability when they drill a contingency plan holder, it is rarely if ever done.

For cooperatives, DEC has participated in drills that use the cooperative's equipment. For example, in Cook Inlet CISPRI has initiated drills, including equipment deployment drills, and invited DEC to participate.

In Prince William Sound, industry-initiated drills have also been conducted. However, only Alyeska's equipment has been drilled. After the first 72 hours of Alyeska's response, a management transition occurs. The secondary responder's capability to get equipment to Prince William Sound to replace Alyeska's equipment has not been tested. The drills to date have only drilled personnel management transitions and not equipment transitions. It should also be noted that Alaska is the only state in which industry oil spill response drills are conducted because of their high cost. Given declining oil production, drills may not indefinitely be an economically practicable way to ensure equipment and training capabilities.

Is state certification necessary if the Coast Guard is also considering certification?

Although the negotiated rulemaking committee for vessel response plan regulations is considering certification, the final decision will not be made by the Coast Guard until the proposed rule undergoes a 45-day public review and comment period, and reviews by the federal Office of Management and Budget and the Council on competitiveness. Even if certification is adopted, it will take a minimum of one to two years before a program implemented. In addition, only RACs that provide spill response for vessels are being considered certification under the Coast Guard negotiated rulemaking. The Coast Guard is not currently developing a program for facilities.

In addition, RAC certification must be designed to integrate with the contingency plan program for which RACs are used. The federal government will have its

own contingency plan program, and any federal RAC certification will be constructed to reflect that program. A contingency plan program is already in place in Alaska. The RAC certification program adopted for Alaska must be crafted to meet the needs of Alaska's oil program. The state has its own needs under the state's stronger oil spill statutes. Since it is very likely that the Coast Guard will adopt weaker standards for response requirements than Alaska's, it is important that any certification program accommodates our stronger statutes.

Washington, Texas, New Jersey and California all require RAC certification or pre-approval.

Is a requirement that a response action contractor comply with the the State Contingency Plan (under 46.04.200-210) adequate to assure responsiveness by the response action contractor?

In Alaska, our oil spill program is based on individual industry contingency plans approved by DEC under 46.04.030. These plans describe what actions industry will take in the event of a spill. Contingency plans address issues such as equipment, personnel and resources, expected response times, and critical habitat areas to be protected. These individual vessel contingency plans reflect the response planning standards required in HB 567.

The State Master Oil and Hazardous Substance Discharge Prevention and Contingency Plan developed under 46.04.200 describes state agency response, including 1) state notification procedures, 2) the state Incident Command System, 3) roles of each state agency, and 4) interaction with local and federal government. The state contingency plan does not describe specific requirements for industry response to oil spills. These requirement are only described in the state approved industry contingency plans under 46.04.030. Therefore, it is more important to assure that the RAC act in accordance with the state approved industry contingency plan under 46.04.030 than the State Master Contingency Plan under 46.04.200.

Is there a likelihood of a spill occurring from a vessel with no assets other than the vessel itself?

This has happened and could occur again, particularly where contingency plans are held by single vessel owners. It is argued that the worst case scenario of a vessel owner becoming insolvent and failing to respond or pay damages will never happen. It is further asserted that federal and state funds are available to pay costs attributable to oil spills. The first use of the government funding is to pay for the spill response and clean-up costs.

Using the federal and state funds as a safety net in a small number of spills is probably inevitable, but it should not be relied on as justification for reducing requirements for a high level of protection and assuredness for vessels and facilities that are operating in Alaska. In addition, Alaska and the national system of spill response is industry based; it is not intended to be a government response process.

The second use of the federal fund is to pay third-party damages. Historically, that fund has not compensated injured parties fairly or quickly. Indeed, that fund recently refused to honor lost subsistence claims from the *Exxon Valdez* oil spill. Moreover, the fund does not provide any assurance that the equipment necessary to be on scene immediately to respond to a spill will, in fact, be available.

The ownership structure of vessels in Prince William Sound which allows companies such as First, Second and Third Shipmor to be created to carry a major oil company's oil should be considered when making the assumption that the federal financial responsibility requirements will prevent a worst case scenario from taking place.

In addition, the federal financial responsibility rules have not yet been set by the Coast Guard. Will the vessel or facility be able to use P&I clubs? Will they be able to self insure? What kind of insurance will they be required to obtain? These questions are still unanswered.

In Prince William Sound, with whom does Alyeska sign response action contracts?

An Alyeska spokesperson has stated that Alyeska signs contracts with the contingency plan holder. However, this is not true in all cases, specifically regarding British Petroleum (BP) and Amerada Hess. British Petroleum, Amerada Hess and Tesoro all sign private contracts, as the vessel charterer, with the vessel owner or operator. The vessel charterers, in turn, sign a response action contract with Alyeska for initial response services. The contingency plan holder is the owner or operator of the vessel in the cases described above. The state has no direct authority over anyone except the contingency plan holder which is often the least well capitalized of these parties.

What is the contractual relationship between the major oil companies that are chartering vessels and the contingency plan holder? Is this information located in the contingency plans that DEC approves?

The only place that the relationship between BP, Amerada Hess, Arco, Exxon, Chevron, and Tesoro and Alyeska is discussed is in the contracts that are

submitted as part of the contingency plan. DEC has no authority over the contracts and is not a party to them. In the case of Keystone Shipping or First Shipmor company, the only place that BP states their intent to respond is also through the contract. BP's intention is not stated anywhere as a legal obligation to the state.

Although these contracts may be binding among these private parties, because these relationships are not required by law or regulation, there is no assurance that the contract terms will continue. The parties can restructure their contracts at any time. In addition, the complicated network of relationships between shippers, charterers, vessel owners and contingency plans holders is extremely difficult for DEC to oversee. This is especially true since DEC has only one technical reviewer actually conducting the reviews on the contingency plans in Prince William Sound.

What is the process for submitting the vessel contingency plans in Prince William Sound?

Without doing a detailed analysis of an individual plan, such as First Shipmor's plan or others like it, this is the process that has been explained by DEC staff: First Shipmor submits a plan to DEC which includes a signed contract with BP to respond to oil spills. BP signs a contract with Alyeska for Alyeska to respond for the first 72 hours. Both contracts are included in the submission of the contingency plan.

But there is no obligation or legal assurance that either BP or Alyeska will respond, although there may be strong incentives because of BP's potential legal responsibility for damages (strict liability) and public perception issue. However, there is nothing stopping the arrangements from changing because they are not presently required by law.

Does DEC approve the 72-hour management transition in Prince William Sound?

The 72-hour management transition is, at best, a difficult thing for DEC to oversee. Although Alyeska states that the state has to approve the transition, it is not written in any plan and is not in the regulations. Industry adamantly opposed a formal approval requirement when it was requested by DEC. The transition approval process has been practiced in drills. However, where the responder is required to bring in additional equipment, the drills do not actually test the secondary responder's equipment. They test only Alyeska's equipment.

Will Alyeska respond to a TAPS trade tanker oil spills?

When asked this question, Alyeska has responded that DEC would not have approved vessel contingency plans if there was concern regarding Alyeska's performance. However, Alyeska's contract language with a number of c-plan holders excuses Alyeska from performance in a number of circumstances. In recent years, Alyeska also identifies itself as a "volunteer" RAC. This results in uncertainty as to whether Alyeska will respond in all situations. Alyeska's unwillingness to commit to responding to all TAPS related spills in Prince William Sound is of great concern to many of the residents and fishermen in the area.

How does DEC presently review the response action contracts submitted as part of contingency plans?

With the exception of Prince William Sound, in most cases the contracts between RACs and c-plan holders primarily provide an equipment and a price list. In general, these contracts provide no guarantee that the RAC will respond or if it is capable of responding to the type of spill (nearshore or offshore, facility or vessel) or the substance spilled (persistent or non-persistent oil). *Under current law there is no requirement nor any incentive for RACs to be conversant with the contingency plan on which they are listed.*

DEC currently reviews response action contracts by reviewing the equipment list and making a determination as to whether the equipment is adequate to respond to an oil spill of the c-plan holder. DEC does not examine contractual terms and obligations between contingency plan holders and RACs. DEC does not review whether there are contractual provisions that relieve the RAC from performance. In addition, while DEC may have the authority to inspect the equipment of independent professional response action contractors, this is not done as part of the c-plan approval process.

In addition, there is no requirement that the contingency plan holder periodically review the RAC's capability or even determine if it is still in business. DEC has testified that it discovered in reviewing contingency plans that some RACs listed on the plans were no longer in business. Although DEC's work plan allows for one inspection per facility or vessel a year, the inspectors rarely if ever inspect the equipment that will be brought in by an independent professional RAC in the event of an actual spill. They solely inspect the equipment on the vessel or at the facility that rely upon the independent professional RACs.* This is not the case with regard to regional cooperatives and Alyeska's SERVS.

Is there any limit to the number of contingency plans a RAC can be listed on?

Several RACs are listed on contingency plans statewide and there is no limit to the number of contingency plans that can list a particular contractor.

*Independent professional response Action Contractors are those like VRCA, VECO, Martech, VRCA, Chempro. They are usually an independent third party and provide response in many different areas of the state. They are different from regional spill cooperatives like Seapro, CISPRI, and Alaska Clean Seas and SERVS.

PROPOSED AMENDMENT #1 TO SSSB 270

Delete Sections 3 and 8 of the legislation.

Add another exclusion to limited liability by inserting the following additional subparagraph to Sec. 7, page 6, between lines 10 and 11:

(D) has agreed in writing to be listed and who is listed in a contingency plan approved under AS 46.04.030 who fails to respond to a release or threatened release of oil that the response action contractor was required to respond to under its contract with the applicable contingency plan holder; this subparagraph does not apply to a response action contractor if the failure to respond to a release or threatened release of oil results from a concurrent response under another contingency plan approved under AS 46.04.030 in which the response action contractor has the primary duty to respond.

1
2 EXPLANATION OF PROPOSED AMENDMENT

3 NO. 1 TO SSSB 270
4

5 Contingency plan holders, such as tanker owners, must
6 contract with response action contractors ("RACs") in order
7 to obtain cleanup services necessary to meet ADEC
8 requirements. RACs will agree to provide cleanup services
9 only under contractual terms that they believe are
sufficient to protect their interests. Like any private
business, these contracts are essential to the RACs,
because they define the limits of the obligations that the
RAC is willing to take on.

10 As presently written, however, SSSB 270 would make
11 these RAC contracts meaningless. The bill provides, in
12 Sections 3 and 8, that if a RAC contracts to be part of a
13 tanker's contingency plan, the RAC is then unconditionally
14 obligated to respond to an actual spill, whether or not the
15 RAC's contract requires a response. The RAC will not be
entitled to rely on the contract provisions that it
carefully negotiated. The result of this will be that RACs
will simply refuse to be part of any contingency plans--a
result contrary to the purpose of the legislation, which is
to encourage RACs to more freely participate in spill
cleanup.

16 Moreover, under Sections 3 and 8, if the RAC violates
17 this involuntary unconditional obligation to respond, it is
18 subject to an extremely harsh penalty. Not only will it
19 lose its limited liability, but it will be subject to
strict liability for its "failure" to respond, even though
the "failure" wasn't a "failure" at all, but was actually
anticipated and allowed in the RAC's contract.

20 Certainly, if a RAC breaches a cleanup contract on
21 which the state has relied in approving a contingency plan,
22 the RAC should not have limited liability for that wrongful
23 failure to respond. The proposed amendment, by adding an
additional exclusion to limited liability for this
situation, adequately protects the public against breaches
of a RAC contract.

24 However, a RAC should never be subject to strict
25 liability--unless, of course, the RAC is also the one who
26 spilled the oil. And, attempting to coerce RACs into
ignoring their own contracts with threats of strict
liability will do little to encourage RACs to aggressively
participate in Alaska oil spill cleanup.

1
2 PROPOSED AMENDMENT NO. 2 TO SSSB 270
3

4 Add an additional new subsection under Section 10 of the
5 bill (at p. 7, between lines 1 and 2) to read:

6 (g) No response action contractor shall be liable for
7 any removal costs or damages solely as a result of that
8 contractor's decision to terminate its response efforts
9 because of the expiration of the limited liability provided
10 by this section. A response action contractor's decision
11 to terminate response efforts because of the expiration of
12 the limited liability conferred by this section shall not
13 in any manner impair, curtail, limit, or otherwise affect
14 the limited liability conferred on the contractor with
15 regard to the contractor's response efforts undertaken
16 during the period of time the limited liability applied to
17 those response efforts.
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1
2 EXPLANATION OF PROPOSED AMENDMENT

3 NO. 2 TO SSSB 270
4

5 SSSB 270 would limit the legislation's limited
6 liability for response action contractors (RACs) to 60 days
7 following the spill, with the opportunity for an additional
8 60 day extension. See Sec. 7, p. 5, ls. 29-31.

9 This time limit is patterned after California's law,
10 which is the only other state to put a time limit on RAC
11 limited liability. SSSB 270, however, lacks an important
12 component of California's approach. The California
13 legislature understood that the time limit for limited
14 liability might cause RACs to refuse to participate in
15 spill cleanup even during the initial 60 day period. This
16 is because some RACs may choose to leave the scene after
17 the immunity period expires, and might be sued for making
18 that choice. To prevent themselves from being "squeezed"
19 on day 61 (that is, being forced to choose between
20 unlimited liability for continuing with cleanup, on the one
21 hand, and liability for ceasing cleanup on the other), the
22 RAC would simply choose to not become involved.

23 California avoided this problem by promising RACs that
24 they would not incur liability for abandoning cleanup on
25 day 61. That promise was part-and-parcel of California's
26 "limited time" approach, and it needs to be inserted in
27 SSSB 270. Otherwise, the 60-day limitation will present
28 the same deterrent to any cleanup that the California
29 legislature found unacceptable.

30 Proposed amendment no. 2 is virtually identical to
31 California Government Code §8670.56.6(k)(4).

DEPARTMENT OF ENVIRONMENTAL CONSERVATION

AMENDMENTS/QUESTIONS

SSSB 270

Section 3, Subparagraph (6).

This would make response action contractors strictly liable for "failing to respond" to a release or threatened release if the RAC was listed in the contingency plan. The Department has a few concerns with this. 1) "Failing to respond" is not defined, and while the sponsor has explained this means not showing up, it can also be interpreted to mean "failing to respond" as directed by the contingency plan. 2) The law provides a strict liability standard in very specific instances, and we are concerned that the specter of strict liability will simply lead to RACs not willing to be listed in a contingency plan. With the other provisions of this legislation, the effects of RACs not willing to be listed will be profound.

Section 6, amend to read:

(a) The following persons are not civilly liable for removal costs or damages that result from an act or omission in the course of providing care, assistance, or advice that is consistent with an approved contingency plan or as otherwise directed by the federal or state on-scene coordinator

- 1) A response action contractor;
- 2) A person hired or retained and under control of a response action contractor; and
- 3) A person who acts as a volunteer and is engaged in the response action.

This, coupled with our recommended changes to Section 14 make it clear that the Department is not being directed to register every business or individual associated with the cleanup of a release; i.e. the garbage company, the transportation providers, etc.

Section 7.

Delete (b)(3). Direction is provided by the on-scene coordinator for spill response. The time limit creates the possibility of conflict between the on-scene coordinator's direction and the response action contractor's desire to shield itself from liability after the time limit expires. So long as

the response action contractor is following the direction of the on-scene coordinator, the limitation should apply.

Section 7 (b)(4)(c): clarification needed

The intent of this section is that all 5 conditions be met before the limitation would not apply. The 5 conditions are

- 1) not registered with Department
- 2) agrees in writing to be listed
- 3) is in fact listed
- 4) the contingency plan the response action contractor is listed in is the contingency plan implemented, and
- 5) there is a written agreement between the response action contractor and the contingency plan holder.

This conflicts with Section 13 wherein DEC may not approve a contingency plan unless the response action contractor listed is registered. Thus, the holder of a contingency plan that meets all five of the conditions set out above would not have an approved contingency plan.

This section, (b)(4)(c), should be deleted.

Section 14.

(a)(4), line 29 change "performance" to "planning"

(g)(3) amend to read: "Response Action Contractor" means a person who enters into a contract to provide direct containment, control and clean-up services with respect to a release or threatened release of oil.

(g) delete (3)(B) and (C).

Section 15. Change January 1, 1993 to December 31, 1993.

JA/das (04/13/92)

DIVISION OF SPILL PREVENTION AND RESPONSE

RESPONSE ACTION CONTRACTORS

LIST # 1

Alaska Clean Seas
12350 Industry Way, #200
Anchorage, AK 99519-6010

4/7/92 4pm
FAX: 345-2435

Alaska Clean Seas
Pouch 34022
Prudhoe Bay, AK 99734

sent to
Anch

Alyeska Pipeline Service Co.
Alyeska Terminal
Valdez, AK 99686

- Juneau Rep

Chempro Environmental Services
P.O. Box 230147
Anchorage, AK 99523

4:26pm

FAX: 5221963

Cook Inlet Spill Prevention
& Response, Inc.
130 N. Willow Street, #1
Kenai, AK 99611

Lisa Parker
Fax: 283-6102
4/7/92 3:55pm

Harding-Lawson & Asso.
601 E. 56th Place
Anchorage, AK 99518

4:35pm

563-8102

FAX: 561-4574

Hartec Management Consultants
8220 Briarwood Street
Anchorage, AK 99518

4/7/92 4:06pm
522-3031 phone
FAX: 522-3494

Martech U.S.A., Inc.
300 E. 54th Avenue
Anchorage, AK 99518

4:28pm

45
561-1970

FAX: 563-0830

Northwest EnviroService, Inc.
1813 1st East Ave.
Anchorage, AK 99501

4/7/92
4:15pm
FAX: 272-6805

Shannon & Wilson, Inc.
5621 Arctic Blvd.
Anchorage, AK 99518

4:50
4:07pm

561-2120

FAX: 561-4483

Unitech of Alaska, Inc.
7348 Abbott Loop Road
Anchorage, AK 99507

4:20pm
349-5142
FAX: 349-2733

VECO, Inc.
813 W. Northern Lights Blvd
Anchorage, AK 99503-2495

5:00pm

FAX: 264-8181

VRCA Environmental Services
1315 Queen's Way
Fairbanks, AK 99706

sent to
Anch

VRCA Environmental Services
6700 Arctic Spur Road
Anchorage, AK 99518

5:05pm

548-3100
349-4827

FAX: 267-3190

VRCA Environmental Services
Pouch 34
Prudhoe Bay, AK 99734

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Co.	Sen. Cotten	
Dept.	Phone # 465-3711	
Fax #	267-3190	
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SPONSOR SUBSTITUTE FOR SENATE BILL NO. 270
IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE SPECIAL COMMITTEE ON OIL AND GAS

Introduced:

Referred:

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the liability of the state for certain registration, planning, and
2 response activities related to oil spills; relating to the liability of an oil spill response
3 action contractor, to registration of response action contractors, and to oil discharge and
4 contingency plans; relating to liability for release of a hazardous substance; relating to the
5 duty of, and charges or financial responsibility requirements related to that duty imposed
6 by, the common operating agent for the holders and lessees of the right-of-way agreement
7 for the trans-Alaska pipeline system to control and contain oil discharges; and providing
8 for an effective date."

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

10 * Section 1. FINDINGS. The legislature finds that

11 (1) 25 percent of the country's crude oil supply moves through Alaska state waters; in
12 particular, 650,000,000 barrels of crude oil move through Prince William Sound each year;

1 (2) crude oil, once discharged into the environment, is highly damaging to the
2 environment, to the resources of the state, to wildlife, and to the commercial and subsistence livelihoods
3 of state residents; crude oil is also persistent in the environment and becomes increasingly difficult to
4 remove the longer it remains in the environment;

5 (3) experience from oil spill response in the state and throughout the world has
6 demonstrated that response activities must occur as aggressively as possible in the first few days
7 following a spill in order to be effective; experience has also shown that the critical initial response has
8 the best chance of success when it is conducted by trained personnel using a previously prepared, well-
9 practiced, and site-specific contingency plan;

10 (4) following the oil spill from the tanker vessel Exxon Valdez, there was a confusing
11 and time consuming transfer of spill response management from the oil spill contingency plan holder
12 and one of the parties responsible for the oil spill; this transfer of management delayed efficient and
13 effective response efforts in the critical period of initial response;

14 (5) under the provisions of the state Trans-Alaska Pipeline System Right-of-Way
15 Agreement, the lessees, the holders, and their common operating agent are required to contain and clean
16 up crude oil spills within state waters, in particular, in Prince William Sound;

17 (6) it is very important that initial oil spill response efforts be immediate, well-trained,
18 well-drilled, and certain; the response should not be subject to successive management transfers or to
19 the risk of interruption due to disagreements or disputes among contingency plan holders, parties
20 responsible for oil spills, and private responders relied upon for oil spill response.

21 * Sec. 2. AS 09.50.250 is amended to read:

22 Sec. 09.50.250. ACTIONABLE CLAIMS AGAINST THE STATE. A person or
23 corporation having a contract, quasi-contract, or tort claim against the state may bring an action
24 against the state in the superior court. A person who may present the claim under AS 44.77 may
25 not bring an action under this section except as set out in AS 44.77.040(c). A person who may
26 bring an action under AS 36.30.560 - 36.30.695 may not bring an action under this section except
27 as set out in AS 36.30.685. However, an action may not be brought under this section if the
28 claim

29 (1) is an action for tort, and is based upon an act or omission of an employee of
30 the state, exercising due care, in the execution of a statute or regulation, whether or not the
31 statute or regulation is valid; or is an action for tort, and based upon the exercise or performance

1 or the failure to exercise or perform a discretionary function or duty on the part of a state agency
2 or an employee of the state, whether or not the discretion involved is abused;

3 (2) is for damages caused by the imposition or establishment of a quarantine by
4 the state;

5 (3) arises out of assault, battery, false imprisonment, false arrest, malicious
6 prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with
7 contract rights; [OR]

8 (4) arises out of the use of an ignition interlock device certified under
9 AS 33.05.020(c); or

10 (5) arises out of

11 (A) registration and approval of an oil spill response action contractor
12 under AS 46.04.035;

13 (B) approval of an oil spill contingency plan under AS 46.04.030; or

14 (C) an act or omission of the state, an employee of the state, or a
15 person who contracts with the state in responding to or directing a response to a
16 release or threatened release of oil, unless the act or omission resulted from gross
17 negligence or intentional misconduct; in this subparagraph, "oil" has the meaning
18 given in AS 46.03.826.

19 * Sec. 3. AS 46.03.822(a) is amended to read:

20 (a) Notwithstanding any other provision or rule of law and subject only to the defenses
21 set out in (b) of this section and the exception set out in (i) of this section, the following persons
22 are strictly liable, jointly and severally, for damages, for the costs of response, containment,
23 removal, or remedial action incurred by the state, a municipality, or a village, and for the
24 additional costs of a function or service, including administrative expenses for the incremental
25 costs of providing the function or service, that are incurred by the state, a municipality, or a
26 village, and the costs of projects or activities that are delayed or lost because of the efforts of the
27 state, the municipality, or the village, resulting from an unpermitted release of a hazardous
28 substance or, with respect to response costs, the substantial threat of an unpermitted release of
29 a hazardous substance:

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

1 in consumer use;

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

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

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

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

19 (6) a response action contractor who has agreed in writing to be listed and
20 who is listed in a contingency plan approved under AS 46.04.030 who fails to respond to a
21 release or threatened release of oil that the response action contractor was required to
22 respond to under the contingency plan; this paragraph does not apply to a response action
23 contractor if the failure to respond to a release or threatened release of oil results from a
24 concurrent response under another contingency plan approved under AS 46.04.030 in which
25 the response action contractor has the primary duty to respond.

26 * Sec. 4. AS 46.03.822(b) is amended to read:

27 (b) In an action to recover damages or costs, a person otherwise liable under this section
28 is relieved from liability under this section if the person proves

29 (1) that the release or threatened release of the hazardous substance to which the
30 damages relate occurred solely as a result of

31 (A) an act of war;

1 (B) except as provided under AS 46.03.823(c) and 46.03.825(e), an
2 intentional or negligent act or omission of a third party, other than a party or its agents
3 in privity of contract with, or employed by, the person, and that the person

4 (i) exercised due care with respect to the hazardous substance; and

5 (ii) took reasonable precautions against the act or omission of the
6 third party and against the consequences of the act or omission; or

7 (C) an act of God; and

8 (2) in relation to (1)(B) or (C) of this subsection, that the person, within a
9 reasonable period of time after the act occurred,

10 (A) discovered the release or threatened release of the hazardous
11 substance; and

12 (B) began operations to contain and clean up the hazardous substance.

13 * Sec. 5. AS 46.03.822(k) is amended to read:

14 (k) In this section, "damages" has the meaning given in AS 46.03.824 and includes

15 [INCLUDE] damage to persons or to public or private property, damage to the natural resources
16 of the state or a municipality, and damage caused by acts or omissions of a response action
17 contractor for which the response action contractor is not liable under AS 46.03.823 or 46.03.825.

18 * Sec. 6. AS 46.03.825(a) is repealed and reenacted to read:

19 (a) A response action contractor who responds to a release or threatened release of oil
20 is not civilly liable for removal costs or damages that result from an act or omission in the course
21 of providing care, assistance, or advice

22 (1) consistent with a contingency plan approved under AS 46.04.030 or prepared
23 under AS 46.04.200, 46.04.210, or 33 U.S.C. 1321(d); or

24 (2) as otherwise directed by the federal or state on-scene coordinator.

25 * Sec. 7. AS 46.03.825(b) is amended to read:

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

27 (1) an action for personal injury or death;

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

29 (3) an act or omission that occurs more than 60 [15] days after the release;
30 provided, however, that the period of time described in this paragraph may be extended for
31 not more than 60 days by a written order of the state on-scene coordinator issued on or

1 before the 60th day after the release;

2 (4) a response action contractor who

3 (A) would otherwise have been liable for the release or threatened
4 release under AS 46.03.822;

5 (B) acts with gross negligence or intentional misconduct; or

6 (C) is not registered by the department, who agrees in writing to be
7 listed and who is listed as a response action contractor in a contingency plan
8 approved under AS 46.04.030, that is being implemented to respond to a release or
9 threatened release of oil, and who has executed a written agreement with the
10 contingency plan holder.

11 * Sec. 8. AS 46.03.825(c) is amended to read:

12 (c) If the liability of an oil spill response action contractor is not limited under (a) of this
13 section or if the provisions of (a) of this section do not apply because of (b) of this section, the
14 oil spill response action contractor is not civilly liable for injuries, costs, damages, expenses, or
15 other liability that results from the response action contractor's act or omission with respect to
16 a release or threatened release of oil unless the act or omission of the oil spill response action
17 contractor is negligent, grossly negligent, or constitutes intentional misconduct. This subsection
18 does not apply to an oil spill response action contractor who is liable under AS 46.03.822(a)(6)
19 or who would have been liable for the initial release or threatened release of oil under
20 AS 46.03.822 even if that contractor had not carried out a response action.

21 * Sec. 9. AS 46.03.825(d) is amended to read:

22 (d) In this section,

23 (1) "registered" means registered under AS 46.04.035;

24 (2) "response action" means an action taken to respond to a release or threatened
25 release of oil, including [BUT NOT LIMITED TO] mitigation, clean up, or removal of a release
26 or threatened release of oil.

27 * Sec. 10. AS 46.03.825 is amended by adding new subsections to read:

28 (e) The defense provided in AS 46.03.822(b)(1)(B) is not available to a potentially liable
29 person with respect to costs or damages caused by an act or omission of a response action
30 contractor.

31 (f) Except as provided in (e) of this section, this section does not affect the liability under

1 this chapter or under any other state law of a person other than a response action contractor.

2 * Sec. 11. AS 46.04.020(a) is amended to read:

3 (a) A person causing or permitting the discharge of oil shall immediately contain and
4 clean up the discharge. [THE DEPARTMENT MAY WAIVE THIS REQUIREMENT

5 (1) IF IT DETERMINES, IN CONSULTATION WITH THE UNITED STATES
6 COAST GUARD OR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
7 AS APPROPRIATE, THAT CONTAINMENT OR CLEANUP IS TECHNICALLY NOT
8 FEASIBLE; OR

9 (2) IF THE CLEANUP OR CONTAINMENT ACTIVITIES WOULD RESULT
10 IN GREATER ENVIRONMENTAL DAMAGE THAN THE DISCHARGE ITSELF.]

11 * Sec. 12. AS 46.04.020 is amended by adding new subsections to read:

12 (g) The common operating agent for the holders and lessees of the right-of-way
13 agreement for the trans-Alaska pipeline shall immediately contain and clean up a discharge of
14 crude oil transported by or due to the operation of the trans-Alaska pipeline system or due to
15 related activities, including operation of a tank vessel while berthed at a marine terminal or while
16 traveling within state waters to or from a marine terminal. A charge or financial responsibility
17 requirement imposed by the common operating agent for holders and lessees of the right-of-way
18 agreement for the trans-Alaska pipeline system on a tank vessel traveling on an intrastate voyage
19 from a marine terminal for the purpose of containing and cleaning up a discharge of crude oil
20 is subject to review by the Alaska Public Utilities Commission under AS 42.05.361 - 42.05.441.
21 Review of a charge or financial responsibility requirement allowed under this subsection may
22 occur at the request of a tank vessel owner, operator, or lessee, or as allowed by the Alaska
23 Public Utilities Commission.

24 (h) The department may waive an oil discharge containment and cleanup requirement
25 imposed under (a) or (g) of this section if

26 (1) the department determines, in consultation with the United States Coast Guard
27 or the United States Environmental Protection Agency, as appropriate, that containment or
28 cleanup is technically not feasible; or

29 (2) the cleanup or containment activities would result in greater environmental
30 damage than the discharge itself.

31 * Sec. 13. AS 46.04.030(e) is amended to read:

(e) The department may attach reasonable terms and conditions to its approval or modification of a contingency plan that the department determines are necessary to ensure that the applicant for a contingency plan has access to sufficient resources to protect environmentally sensitive areas and to contain, clean up, and mitigate potential oil discharges from the facility or vessel as provided in (k) of this section, and to ensure that the applicant complies with the contingency plan. If a contingency plan submitted to the department for approval relies on the services of an oil spill response action contractor, the department may not approve the contingency plan unless the response action contractor is registered and approved under AS 46.04.035. The contingency plan must provide for the use by the applicant of the best technology that was available at the time the contingency plan was submitted or renewed. The department may require an applicant or holder of an approved contingency plan to take steps necessary to demonstrate its ability to carry out the contingency plan, including

- (1) periodic training;
- (2) response team exercises; and
- (3) verifying access to inventories of equipment, supplies, and personnel identified

as available in the approved contingency plan.

* Sec. 14. AS 46.04 is amended by adding a new section to read:

Sec. 46.04.035. REGISTRATION OF OIL SPILL RESPONSE ACTION CONTRACTORS. (a) A person may apply to the department for registration as an oil spill response action contractor. The department shall adopt regulations governing the registration and approval of oil spill response action contractors. Regulations adopted by the department under this section must include

- (1) minimum training standards for personnel;
- (2) verification requirements that ensure the existence of resources, including personnel, equipment, services, and an adequate deployment plan necessary to a response action or as required by a contingency plan in which the contractor has agreed in writing to be listed and is listed;
- (3) minimum professional response action standards and practices; and
- (4) minimum performance standards for oil spill response action contractors listed in an oil spill contingency plan approved under AS 46.04.030.

(b) Notwithstanding (a) of this section, the department may substitute a response action

1 contractor approval program, and a subsequent process to approve response action contractors
2 who agree to be listed in a contingency plan approved under AS 46.04.030, for regulations
3 required under (a)(1) - (3) of this section if the approval program and subsequent process are
4 developed by the United States Coast Guard.

5 (c) The department shall establish fees applicable to registration under this section in an
6 amount necessary to cover the costs of the registration program. The fees shall be collected by
7 the department.

8 (d) The Administrative Procedure Act (AS 44.62) applies to regulations and registrations
9 under this section.

10 (e) The department shall develop and maintain a list of oil spill response action
11 contractors registered under this section. The department shall provide the list on request to
12 interested persons.

13 (f) A response action contractor registered under this section shall annually provide to
14 the department a list of all contingency plans approved under AS 46.04.030 in which the response
15 action contractor has agreed in writing to be listed as a responder.

16 (g) In this section,

17 (1) "oil" has the meaning given in AS 46.03.826;

18 (2) "response action" has the meaning given in AS 46.03.825;

19 (3) "response action contractor" means

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

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

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

28 * Sec. 15. TRANSITION. The Department of Environmental Conservation shall adopt regulations
29 to implement AS 46.04.035(a), enacted in sec. 14 of this Act, on or before January 1, 1993.

30 * Sec. 16. REPORT. The Department of Environmental Conservation shall report to the legislature
31 by March 31, 1993, on the progress of the department in developing the ability of the state to respond

1 to oil spills of an unknown origin and enhance regional response and coastline protection.

2 * Sec. 17. Sections 2, 5, 7, 10, and 12 of ch. 92, SLA 1991, are repealed.

3 * Sec. 18. If this Act takes effect after June 30, 1992, sec. 17 of this Act is retroactive to June 30,
4 1992.

5 * Sec. 19. APPLICABILITY. (a) Except as provided in (b) of this section, the amendments
6 AS 46.03.822 and 46.03.825, made by secs. 3 - 10 of this Act, apply only to causes of action accruing
7 on or after the effective date of secs. 3 - 10 of this Act.

8 (b) The provisions of AS 46.03.825(b)(4)(C) apply only to causes of action accruing on or after
9 the effective date of that paragraph under sec. 20 of this Act.

10 * Sec. 20. AS 46.03.825(b)(4)(C), added by sec. 7 of this Act, and sec. 13 of this Act take effect
1 July 1, 1993.

12 * Sec. 21. Except as provided in sec. 20 of this Act, this Act takes effect immediately under
13 AS 01.10.070(c).



Alaska State Legislature

REPRESENTATIVE BILL HUDSON

April 2, 1992

State Capitol
Juneau, Alaska
99801-1182
(907) 586-2400

MEMORANDUM

TO: Cliff Davidson, Chair
House Resources Committee

FROM: Bill Hudson *Bill*

SUBJECT: Backup materials relating work group meeting on HB 540

I have compiled materials relating to certification, the subject of the HB 540 working group meeting this evening at 7:00 p.m.

The contents include:

CSSSHB 540(O&G)

Excerpts from the Citizens Oversight Council Report
pages 30 and 31, "C. Response Action Contractor
Certification"

Negotiated Regulation (REG NEG) work group (March 13, 1992)
Contractor Certification Program

Alaska Department of Environmental Conservation letter
relating to certification

Alyeska Pipeline Service Company letter to Representative
Hudson relating to 72 hour spill management in Prince
William Sound

Alyeska Pipeline Service Company letter to Rear Admiral
Ciancaglini relating to spill management in Prince
William Sound

Prince William Sound Regional Citizens Oversight Council
letter relating to certification





Citizens' Oversight Council
on Oil and Other Hazardous Substances

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

**OIL SPILL RESPONSE ACTION
CONTRACTORS**

A REPORT
To The
ALASKA STATE LEGISLATURE
SEVENTEENTH LEGISLATURE - SECOND SESSION
1992

Prepared By

The Citizens' Oversight Council
On Oil and Other Hazardous Substances
Pursuant to Section 11 of HB 196 (Ch. 92 SLA 1991)

Council Members

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

pay off liability claims than expend the costs for cleanup. Since the contingency plan holder is responsible for directing the services of the independent operators, the state lacks effective authority to direct a cleanup in a timely fashion. Even for those contingency plans where the initial response is conducted by a cooperative responder, the contingency plan holder is a member of that cooperative's decisionmaking and could at any time call off the response effort. That result is clearly not in the state's interest.

C. RESPONSE ACTION CONTRACTOR CERTIFICATION

Consequently, the Citizens' Oversight Council believes that the current laws authorizing contingency plan holders to contract with response action contractors to carry out contingency plans are not adequate to protect the public when a spill occurs because the response action contractors who, in many cases, are indispensable for the complete implementation of a contingency plan have not been made a full participant in response preparedness requirements. Limiting the liability of a response action contractor, therefore, without fixing this other system weakness, renders the entire contingency plan a mere formality rather than a "living" document.

The Council still believes that public policy is best served by limiting the liability of response action contractors, but simultaneously the system needs to be improved to ensure the performance of both contingency plan holders and the response action contractors these holders rely upon. The Council recommends that this be done through a response action contractor certification program to be developed and implemented by the Department of Environmental Conservation. The certification program will accomplish the same purpose as the "substantial deviation" provision did in the current version of HB 196.

It is worth noting that the federal government and some coastal states are simultaneously grappling with the issue of response action contractor accountability. In those forums, the liability limitation laws passed, but now regulations are being promulgated in order to ensure that those limitations do provide assurance of a bold response. For instance, the Coast Guard has announced that it will require certification of response action contractors. California requires that the state's spill prevention and response administrator must certify that there is maximum coastal protection through pooled response efforts before response action contractors may enjoy the benefits of limited liability. Alaska's proposed oil spill prevention and planning regulations were promulgated before final responder immunity legislation was addressed. Now, it is advisable for the legislature to establish the basic standard for response action contractor accountability in law to enable DEC to promulgate the best program to achieve that standard.

The Council believes that a certification program for professional response action contractors should include the following elements:

1. No contingency plan holder may rely on a contingency plan submitted for approval upon a response action contractor unless that response action contractor is certified;

2. DEC will certify response action contractors for minimum standards of personnel training and to verify the equipment and services the response action contractor offers and to ensure that response action contractors employ generally accepted professional standards and practices;

3. Once a certified response action contractor is listed, with its consent, upon a contingency plan approved by DEC, that response action contractor subjects itself to the orders of the state on-scene coordinator for performance under that particular contingency plan, regardless of the terms of the private contract between the response action contractor and the contingency plan holder that might provide otherwise. Only response efforts meeting this duty will obtain the limited liability benefits;

4. A certified response action contractor must respond, at state direction, to a spill of unknown origin or for which there is no responsible party (with state guarantee of reimbursement to the response action contractor), except that a regional cooperative will not be required to respond outside their region of operation;

5. Unpaid volunteer responders will not be subject to the certification process;

6. DEC will develop the certification program to maximize coastal protection and to enhance regional response capabilities.

NOTE: Bold type identifies unresolved issues; highlighted text is new language; and strike out indicates language to be removed.

[Preamble Language]

Contractor Certification Program

a. Purpose and Scope

This regulation establishes a response contractor certification program. It has two major purposes.

First, many spill responders are expected to be named in multiple vessel and facility response plans, and the preparers of those plans need a common basis by which the responders will be measured and credited. Spill contractors' response services must be matched to the plan holder's requirements. Certification allows plan preparers to know in advance the value the plan reviewer will give for a particular contractor's ~~capabilities~~. Plan preparers must assemble a sufficient number and mix of contracted resources ~~contractors~~ to satisfy their response planning responsibilities. The response plan must also meet the contractual requirements of 4202(a)(5) and identify certified contractor resources or demonstrate that non-certified or un-certified resources (private personnel and equipment) have equivalent capability for response/removal operations.

~~In addition,~~ Certification will allow contractors to know what credit they ~~their capabilities~~ will be given for their resources, so they can better present or market their services. Contractor certification also will allow the contractor's ~~capabilities~~ to be evaluated and credited on a fair, consistent and efficient basis.

A second major purpose of certification is to verify that response resources do in fact exist and are available from that contractor. /The plan holder has a responsibility to verify a contractor's ~~capability~~ and claims. ~~because the plan holder is responsible for performance under the response plan.~~ The public purpose of certification is to better assure that the increased response capability required by OPA to help protect the environment from the threat of oil spills does, in fact, come about.

Contractor certification does not in any way relieve the plan holder of the plan holder's responsibility to carefully evaluate and select competent contractors. Certification is not a generalized "seal of approval" or a guarantee of performance. Contractor certification is not intended to establish professional standards or provide a judgment of the many important but unquantifiable factors that would be necessary to establish an overall evaluation of a contractor's competence and skill.

Certification is simply a process by which the President's designee (e.g., the Coast Guard) will verify the existence of certain "facts," (i.e., ~~management structure, the inventory of personnel and response equipment~~) and where possible, assign a particular "quantitative value" to that inventory for purposes of relating specific contractor's response services to a plan holder's particular spill size. Certification must be based whenever possible on objective and quantifiable measures. However, certain important subjective factors must be identified by the contractor in the contractor's application to provide a clearer understanding of a contractor's ~~capabilities~~.

The proposed regulation reflects this intent in the definition of the term "certification." One key element of that definition is that certification is a process. Response contractors, to be cited in vessel response plans, must first file an application with the Coast Guard, identifying the service being offered, the type, quantity and location of equipment, number, training and qualifications of personnel, including corporate and individual spill response experience, ~~management structure~~ and certain other information about associated support. This information is factual in nature, and therefore subject to straightforward verification.

The certification definition also recognizes that certification is fundamentally the responsibility of the President under OPA-90. The President has delegated this responsibility to the Coast Guard. The Coast Guard may use other organizations to assist it in the certification process. However, the responsibility for certification remains a governmental one, because certification derives from the President's responsibility to review and approve vessel and facility response plans.

The definition of "certification" refers to the assignment of one or more "Response Values," where possible, for each of the contractor's designated response services. The translation of the type, location and quantity of equipment and personnel into a quantified capability for response is inherently a matter of judgment, particularly given the recognized limitations in spill response technology and variability in the types and conditions of any particular spill.

Each oil spill, particularly any large spill, is unique. The capability needed in a particular response will vary, involving dozens of factors, some of which cannot be accurately measured or predicted. For evaluation and quantification purposes, assumptions must be made regarding these factors. Many of these assumptions may not prove accurate or valid in any particular spill response. Many assumptions also are beyond the control of a particular responder, just as in the analogous case of response to a fire. Accordingly, this proposed regulation carefully avoids any intimation that various planning assumptions are or ever should be viewed as performance standards.

Although a contractor's capabilities may be related to a certain size spill, the assignment of individual Response Values is necessarily artificial and somewhat arbitrary. The term "Response Value" is used in this proposed rule to reflect this reality.

Although a contractor may wish to suggest a "Response Value" for each of a contractor's designated response services, the federal government retains the ultimate responsibility for the assignment of that factor.

b. Application for Certification

To obtain certification, a response contractor must first submit a certification application. The application must identify basic information about the contractor, as well as specific details regarding the contractor's available equipment and personnel, ~~management structure and support~~. The type of information required, and the detail of that information, depends on the level and type of service that the contractor intends to offer. The application is intended to provide sufficient and specific factual information to permit the application reviewer to assign one or more "Response Values" to each of the contractor's response services.

Included as required information in the application is the contractor's experience related to oil spills and drills. Experience is an important quality which is difficult to objectively measure. The purpose of this application requirement is to gather concise information about a contractor's oil spill response or drill experience. Rather than solicit general information which encourages lengthy resumes and "boilerplate," it is intended that the information be provided in a manner which is easily read and understood.

Finally, the application requests specific information about booming, on-water recovery, shoreline remediation, and transfer/storage services. To enable the Coast Guard to better evaluate shoreline remediation services, the Commandant will request that OSHA clarify its Hazardous Waste Operations and Emergency Response requirements to consider the emergency nature of oil spill removal operations, the lower health and safety risk associated with recovery of weathered oil and identify only those necessary training requirements which are appropriate to the risk.

~~In addition to this quantifiable factual information, the response contractor also must provide descriptive information on certain important factors that bear on whether the contractor should be allowed to be cited in a spill response plan. {For example, the application must list all notices of violation issued by the Occupational Safety and Health Administration (OSHA), Environmental Protection Agency (EPA) and the Coast Guard~~

~~related to oil spill response operations for the last five years, and a description of the disposition of those notices. In addition, the contractor may, as supplemental information, submit information that describes the contractor's experience.]~~

The contractor must attest that the required factual information is true and correct to the best of the contractor's information and belief as of the date of attestation. Because the application is made to a federal agency for purposes of obtaining governmental approval, knowing false statements would be subject to enforcement action under federal law and revocation of the certification. The contractor also is obligated to notify the COTP of significant changes in response capability (see below).

As a supplement to these factual matters, the response contractor may apply for and propose one or more "Response Values" to be assigned to the contractor's capabilities, by designated geographic area for each specific type of response service. (see below). The response contractor can supply supporting analysis or argument to support its proposal. ~~{The contractor may also submit supplemental information describing the contractor's experience, regulatory awareness or other factors which the contractor believes may be relevant to an understanding of the contractor's response capabilities.}~~

The contractor may submit the application to the reviewer any time after the rule goes into effect. [Note: the Coast Guard will need to define who will act as reviewer of contractor applications. If the Coast Guard does not want to centralize all review of contractors, then it is recommended that a tiered approach such as follows be used: The reviewer, in the case of a contractor who requests certification only in a single Captain of the Port (COTP) zone, will be the COTP. If the contractor requests certification in more than one COTP zone, but not more than one Coast Guard District, then the reviewer will be the District Commander. In the case of a contractor seeking certification in more than one District, the review shall be the Chief, Office of Marine Safety, Security and Environmental Protection.]

c. Certification Process

Once a certification application is received, the reviewer must make an initial review of the application to determine if it is complete. If not, the application should be immediately returned to the applicant with an explanation of the additional information needed to process the application. Once a complete application is filed, the reviewer has 45 days to assign an initial "Response Value" to the contractor, based on the representations in the application. This determination is only interim, because it is subject to subsequent verification of the factual information in the application, as well as a more refined evaluation once the agency has the opportunity for in-depth review.

The process described above is expected to result in an "interim status letter." The "Response Value" in the interim status letter may be used by plan preparers until final review and certification is complete. It is expected, given the workload of contractor and plan reviewers, that the Response Values contained in interim status letters likely will be the basis for the initial submission of response plans that are required by February of 1993. If the Response Value established by certification varies from the value used in the interim status letter, plan holders relying on that interim status will be allowed a reasonable time to supplement their resources. This may be accomplished through upgrade of the contractor's resources capabilities or by supplementing or replacing that contractor's resources with other certified contractors.

d. Certification Criteria

The reviewer must certify any contractor who submits a true and complete application demonstrating response resources that satisfy the approval criteria. Certification may be denied if information in the application is false, or if the contractor fails to meet the approval criteria for certification of any services. An important part of contractor certification is the assignment of a Response Value or Values to the contractor's response resources for purposes of preparation of vessel or facility response plans. The reviewer will assign Response Values based on a best judgment basis, as informed by certain presumptive planning criteria. These planning criteria will be made available to contractors to allow them to suggest appropriate Response Values. A contractor whose resources capability does not match these presumptive norms may submit information demonstrating the equivalency of its own resources. Planning assumptions used to arrive at the Response Value may also be adjusted based upon a demonstration that other planning assumptions are more accurate for the contractor's specific equipment or personnel.

[The certification of a contractor also includes the concept of the credit due a contractor given the contractor's combination of mobilization time and location. Contractors, for a given response service for a given Port Area, would be assigned a classification. Class I for a given service for a given contractor requires a mobilization time of [2] hours or less and location of the resources associated with the service within the COTP Port Area. A Class II contractor service would be located within the Port Area, and mobilization within [12] hours, or a contractor with any combination of mobilization time and location that would allow the resource to be moving within the Port Area within the [12-hour] period. Similarly, Class III would be within [24] hours, Class IV within [48] hours, and Class V within [72] hours.]

[The Response Value would therefore be specific to a certain geographic area for a specific class of service. For example, XYZ Response Contractor could be certified for Class II on-water oil removal services for the offshore environment in a specified COTP port area in an amount of 10,000 barrels per hour. The same contractor also may be certified for Class II on-water removal service for the nearshore harbor environment of 15,000 barrels per hour.]

Part of the certification process requires that contractors define their mobilization time. The primary goal is that equipment and/or personnel will be available and ready to deploy, upon notice, with prompt dispatch. The intent of this requirement is to ensure that first crews are dispatched and someone is working to fill any special requirements.

e. Denial of Approval and Appeals

If the reviewer finds that the contractor does not qualify, the contractor can be denied approval. The letter of denial must state why approval was denied, and explain any deficiencies, and explain the process for appeals and resubmittal. The reviewer also may approve a different Response Value for some or all of the contractor's designated services.

If the reviewer denies certification, or selects a "Response Value" less than what the contractor applied for, the contractor may appeal the decision to ... [note: appeal process to be specified by the USCG, but with the recommendation of at least one level of internal appeal, and with at least one appeal to Washington before going to the courts].

f. Notification of Significant Changes in Contracted Resources ~~Response Capability~~

Once a contractor has been certified, certification is valid for a period of [5] years. However, contractors are required to notify the COTP of a significant reduction in contracted resources ~~of capability~~, as specifically identified in the certification. The proposed regulation requires this notification to be in advance, if the significant reduction is planned, or no later than 24 hours after the contractor becomes aware of the significant change, if unplanned. The COTP can then determine whether to require plan holders to secure additional resources ~~capability~~, or make other practicable arrangements to compensate for the reduction in resources ~~capability~~.

g. Effect on State Certification

The contractor certification established in this rule is designed to implement the requirements of OPA. Some states may have similar contractor certification requirements under individual state laws. Nothing in this rule is intended to preclude reliance on these certification rules or the federal certification process by states where it is appropriate to do so. In fact, States are encouraged to rely on the federal certification process, to the maximum extent practicable, taking into account any differences in the purposes and value of the federal certification process and the specific requirements of state law. States are not prevented from requiring response resources in addition to the response resources required by the federal program (e.g., by assigning different response values for purposes of state contingency plans), or taking other actions not in conflict with federal law. (see House Conf. Rep. No. 101-653, p. 799; and section 311(0)(2) of the Federal Water Pollution Control Act, as amended by section 4202(c) of OPA 90).

[REGULATORY LANGUAGE]

[NOTE: The regulations describing the contents of vessel and facility response plans will establish the types of services for which the response plan holder must rely on certified response contractors]

Sec. XXX.00 Contractor Approval

(a) This section defines the process for certification of response contractor services to be cited in individual response plans.

(b) Contractor certification does not in any way relieve the plan holder of the plan holder's responsibility to carefully evaluate and select competent contractors. Certification is not a generalized "seal of approval" or a guarantee of performance. Contractor certification is not intended to establish professional standards or provide a judgment of the many important but unquantifiable factors that would be necessary to establish an overall evaluation of a contractor's competence and skill.

(c) The capability needed in a particular response will vary, involving dozens of factors, some of which cannot be accurately measured or predicted. For evaluation and quantification purposes, assumptions must be made regarding these factors. Many of these assumptions may not prove accurate or valid in any particular spill response. Many assumptions also are beyond the control of a particular responder. The various planning assumptions are not and should not be viewed as performance standards.

(d) Definitions. For purposes of sections XXX.01-.05, the terms below shall have the following meanings:

(i) "Certification" is the process by which the President's designee will verify a primary oil spill response contractor's inventory of available spill response equipment and personnel, ~~management structure and support~~, and assign a Response Value for those resources within a standardized classification of designated response services, for a specific geographic area, for purposes of preparation of spill response plans.

(ii) "Certificate" is the final document issued following verification, inspection and final review by the reviewer.

(iii) "Interim status letter" means the letter sent by the reviewer to the contractor describing the initial Response Value assigned to the contractor

pending verification of the factual information contained in the application and an in-depth review of the contractor's application for purposes of certification.

(iv) "President's designee" means the federal official delegated responsibility by the President under OPA-90 for approval of response plans. Pursuant to Executive Order 12777 the President has delegated responsibility for approval of vessel response plans and transportation-related onshore facilities to the Commandant of the Coast Guard. The Commandant has delegated responsibility for certification of response contractors to various "reviewers" under this rule.

(v) "Response contractor" is any for-profit or not-for-profit corporation ~~person who~~ that provides designated response equipment ~~or~~ ~~and~~ services under contract or other means approved by the President directly to an owner or operator of a tank vessel or facility required to have a response plan under 33 U.S.C. 1321(j)(5), which designated equipment or services are required to be available and identified in such plan. Response contractors must have the ability to mobilize and deploy their identified resources. Individuals or organizations warehousing or storing equipment are not response contractors.

(vi) "Reviewer" means: (1) in the case of a response contractor seeking certification in a single COTP zone, the COTP; (2) in the case of a response contractor seeking certification in more than one COTP zone, but only one Coast Guard District, the District Commander; and (3) in the case of a response contractor seeking certification in more than one Coast Guard District, the Chief of the Office of Marine Safety, Security and Environmental Protection.

(vii) "Response Value" means the value for a particular defined service in a defined geographic area, that is assigned to a response contractor for purposes of being identified as response capability in a vessel or facility response plan.

(viii) "Mobilization time" means the time in which initial personnel are able to begin movement of response resources to the spill scene.

Sec. XXX.01 Contractor Certification Application Content

(a) **Required Information.** A person desiring to be a response contractor must file an application that contains at least the following information:

(i) Contractor's name, mailing address and phone number;

(ii) The specific response services being offered for certification;

(iii) The specific location of all spill response resources, and the areas in which spill response services using each resource is being offered;

(iv) List the oil spill removal equipment and trained personnel, including subcontracted resources for whom you had contractual responsibility, during the most recent 10 oil spills.

(v) List the oil spill removal equipment and trained personnel, including subcontracted resources for whom you had contractual responsibility, during the most recent 10 oil spill drills.

~~A description of the training and experience of the contractor (both corporate and individual) relative to oil spills and a description of any oil spill drills in which the contractor has participated.~~

~~{(v) A list of all Occupation Safety and Health Administration (OSHA), Environmental Protection Agency (EPA) and U.S. Coast Guard (USCG) notices of violation related to oil spill response operations and disposition of those notices for the last five years. Any applicant with less than five years under their current business name or organization shall provide the same information for any oil spill activities or businesses participated in by the principals in the new company within the last five years;}~~

(vi) An organizational diagram depicting the chain of command;

(vii) A call-out list for the contractor's resources, and a description of the call-out procedure;

(viii) For each type of service, the types of oil to which the contractor is willing and able to respond;

(ix) For each type of service, the planned mobilization time for that resource.

(b) **Equipment.** For each type of service, the specific significant equipment available to be applied to that service, including:

(i) Type, quantity, age, and location;

- (ii) Whether the equipment is owned or under contract;
- (iii) If the equipment is contracted from another party, the application must identify:
 - (A) the name, address and telephone number of the owner of the equipment;
 - (B) the equipment's storage location and area of operation; and
 - (C) the contractual terms regarding availability of the equipment to the contractor.
- (iv) A statement of the maintenance program for such equipment, together with a description of records of such maintenance;
- (v) Identification of the number of operators necessary to operate the equipment over a sustained response (i.e., 30 days);
- (vi) For each piece of equipment, a description of: the make, model, type, and applicable design limits (e.g., suitability for different types of oils and operating environments, as related to adverse weather);
- (vii) A description of contractor's communications equipment, including the amount and frequencies, and identification of certified operators;
- (viii) For any equipment not located in the COTP zone for which certification is sought, a description of the transportation capabilities available for use in a response;
- (ix) A description of the readiness for mobilization of response resources and the means of mobilization.

Equipment shall be listed only if it is in a fully operable condition. Future equipment, ordered but not yet delivered and fully operable, may be listed, but it must be listed separately and so identified.

(c) **Personnel.** For each category of personnel identified as a spill response resource, the application shall, for each location:

- (1) list by job category;
- (2) match to the equipment list and scope of service, including the plan for how the equipment and people necessary to provide the service will be brought to bear in an incident from what source; and

- (3) list training and qualifications, including OSHA Hazardous Operations training, and how additional personnel are planned to be trained within what timeframe if they will be required to meet the service listed.

The application shall also list the total personnel available.

~~(d) Management Structure. The application shall identify the management structure associated with the service(s) offered. [This capability should include a discussion of spill response training and experience, regulatory awareness and compliance, and supervision.]~~

(d) Service-specific information. In addition to the general information described above, the applicant must submit the following service-specific information, as applicable to the service offered:

(i) Boom control/containment/protective booming services

- (A) Describe the platforms for deployment (number/type); and,
- (B) Type, amount and condition (e.g., 2000' of offshore boom/vessel).

(ii) On-water recovery services

- (A) recovery platform (for owned vessel and vessel of opportunity recovery systems):
 - (1) name of vessel;
 - (2) size/class;
 - (3) location; and,
 - (4) contract terms of availability.
- (B) skimming system:
 - (1) make;
 - (2) model;
 - (3) manufacturer's nameplate capacity; and
 - (4) applicable design limits (e.g., suitability for different types of oil and different operating environments, as related to adverse weather).
- (C) personnel trained to operate the equipment:
 - ~~(1) name;~~
 - (1) position description; and
 - (2) training or experience.

(iii) Shoreline remediation services

- (A) number of persons available for beach cleanup (training to be addressed)

- (B) description of supplies/support for beach cleanup
- (C) *description of supplies/support for facility cleanup*
- (iv) **Transfer/storage services**
 - (A) type and capacity of storage/transfer facilities

[Services considered for certification but not included at this time are source control, non-mechanical removal, wildlife treatment, lightering, salvage, fire fighting, logistic support, disposal, analysis and testing, spill response management]

(e) **Attestation.** A responsible corporate official of the contractor shall sign the application, affirming that the factual information contained in the application regarding the capabilities described in paragraphs (a)-(e) is, to the best of his knowledge and belief, true and accurate as of the time of signing.

(g) **Agreement for Inspection and Participation in Drills.** The contractor shall state that the contractor agrees to submit to inspection and verification of the designated capability cited in the application. The contractor also agrees to make itself available to participate in drills as reasonably necessary to verify the contractor's application.

(h) **Self assessment.** A response contractor may submit with the contractor's application a suggested Response Value for each of the contractor's response services for each geographic area to be served. The applicant should provide an explanation and analysis to support the suggested Response Value, based on standardized planning factors identified by the reviewer, or such other planning factors as the contractor shall demonstrate more accurately reflects the contractor's response capabilities. [The applicant may also include other information that may bear on an applicant's capabilities, including a description of the applicant's experience and regulatory awareness and compliance.]

(i) **Mobilization.** The contractor shall state the time for initial mobilization of its resources. Equipment readiness shall include being available and able to be promptly dispatched to a spill site, not counting normal maintenance and repairs.

Section XXX.02 Contractor Certification Application Procedure.

(a) **Filing address.** Applications must be filed with the appropriate reviewer. The addresses are as follows:

[provide filing addresses]

(b) **Time for Filing.** Applications may be submitted at any time after adoption of this paragraph.

Section XXX.03 Contractor Application Review

(a) **Review for completeness.** Upon receipt of a response contractor certification application, the reviewer shall promptly evaluate the application for completeness. If the application is not complete, the reviewer shall return the application promptly, identifying the deficiencies in the application.

(b) **Review for interim status.** An application shall be reviewed within 45 days of receipt of a complete application. The reviewer shall send an interim status letter within 5 days of completion of a review. If, at a later time, the reviewing agency determines that the terms of the interim status letter should be limited, it shall so notify the contractor, who shall be given a reasonable time to provide acceptable numbers or types of response resources.

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

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

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

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

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

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

(e) **Inspections of Certified Equipment.** To ensure that certification standards are maintained, the Coast Guard or its designee shall verify, by site inspection, that equipment and personnel resources are available, operable and maintained. Such inspections may be random but must occur at least once every three years.

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

Section XXX.04 Appeals and Notices

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

[some appeal to centralized authority recommended].

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

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

Section XXX.05 Renewal and Revocation

(a) **Renewal.**

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

(2) Certification may be renewed at the request of the contractor in the event of sustained and significant increase or decrease in response resources.

(b) **Revocation.** Failure to comply with the requirements of certification may result in revocation or suspension of the Certificate. Examples of such failure may be fraudulent self-attestation or other failure to comply with the conditions of certification as identified in Sections XXX.00 through XXX.05. (Exact procedure to be added).

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

OFFICE OF THE COMMISSIONER
410 Willoughby Avenue, Suite 105
Juneau, AK 99801-1795

Telephone: 465-5050
FAX: 465-5070

February 25, 1992

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

Dear Representative Hudson:

Thank you for the copy of the Citizen's Oversight Council's report on Oil Spill Response Liability. We have reviewed the issues raised in your February 18, 1992 letter concerning response action contractor certification and liability limitation in Alaska. We have also completed a preliminary review of HB 540.

I preface my comments at this point by saying that we are currently reviewing the Council's Report and developing our position on this subject and the associated legislation that is being developed. We are very interested in the input that will undoubtedly be provided during future committee hearings. The information and testimony given will assist in the development of our position. With that in mind I would like to offer our preliminary views on the issues you have raised.

The Department supports legislation limiting liability for response action contractors that is carefully crafted. We believe that it is in the state's best interest to ensure there will be a quick and ready response in the event of another catastrophic spill, as well as for those releases that are significantly smaller but just as important to contain and cleanup in the shortest possible time.

Beyond the contractual arrangement, there are no other legal assurances that response action contractors who have a pre-existing agreement with a contingency plan holder will respond and perform when a spill occurs. The Department does not legally review or pass judgement on the validity of these contracts and is not a party to them. However, the Department is developing emergency response contracts to provide the capability for responding to orphan spills (i.e., no responsible party) and spills where it may be necessary to take over or augment cleanup. Additional assurances are appropriate to increase the certainty of response by contractors who have contracted to provide a response with a contingency plan holder. In that regard we would support inclusion of language in Section 1 of HB 540 which would require response action contractors who have previously agreed to comply with the terms of a facility or vessel contingency plan to also comply and act pursuant with the terms of those plans unless otherwise directed by the SOSC or FOSC. This would provide an additional incentive for assuring response.

Representative Bill Hudson

February 25, 1992

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Certification of response action contractors is, in our view, a separate issue. Certification is currently being debated at the federal level. Some of the elements being considered include verification of equipment and personnel, validation of resources through inspections, certification of response capability, notification of down status and validity of response contracts, among others. The Department performs many of these functions already in the industry contingency plan review process. We participate in numerous spill drills, which are an excellent means for demonstrating response readiness and authenticating the capability of contingency plan holders.

Notwithstanding what might be done at the federal level, the elements of a certification program could be accomplished under existing authority by including appropriate parameters in the Department's oil and hazardous substances (commonly referred to as HB 567) regulations. A certification program in this case would only apply to response action contractors who have a contract with a contingency plan holder and the certification would occur in conjunction with the existing contingency plan review process. A separate certification review process would not be necessary. The program being contemplated at the federal level would likely require a separate review and approval process.

Regarding Recommendation #7 of the Council's report, we defer to the recent opinion from the Department of Law and we offer no further comments at this time.

I believe the "task force" referenced in your letter is the "Negotiated Rulemaking Committee" (REGNEG) that was formed by the Coast Guard to assist in drafting tank vessel regulations to implement the mandate of the Oil Pollution Act of 1990 (OPA 90). The State of Alaska was not selected to formally participate on this advisory committee (see enclosed letter from Admiral Henn). The State of California was selected as a member of the REGNEG Committee and has agreed to informally represent Alaska's and Washington's views as per our agreement under the States/British Columbia Oil Spill Task Force. However, Alaska is not bound in any way to a consensus that may be reached by the REGNEG Committee.

Other states selected for membership on the REGNEG Committee include Louisiana, Maryland and Wisconsin. Both of Alaska's Regional Citizen's Advisory Councils are on the committee. The majority of the committee membership is comprised of oil and shipping industry representatives. There is only one member from the environmental interest groups. The REGNEG Committee has been set up by the Coast Guard under the authority of the "Negotiated Rulemaking Act of 1990".

Since January, staff from this Department have attended two of the last three meetings in an observer status. The committee has been attempting to reach consensus on the issues of "adverse weather", "maximum extent practicable", "on board carriage of equipment", "plan contents", "vessel applicability", and "contractor certification". The most difficult issues seem to be defining response standards for "adverse weather" and "maximum extent practicable". These definitions have the potential to become substantially different than the counterpart provisions found in Alaska's laws, specifically the response planning standards given in AS. 46.04.030(k)(3-4).

Representative Bill Hudson

February 25, 1992

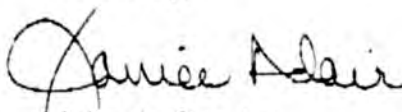
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Discussions at the REGNEG Committee on the subject of "contractor certification" have touched on the issues of type of services, capacity/quantity of service, location, self-assessment, and Coast Guard inspection/certification. Issues still under discussion include exactly how verification is to be achieved, frequency of verification/certification, the possibility of funding verifications, spill drills from the federal Oil Spill Liability Trust Fund, and contract validity. Enclosed is a copy of the Working Group Issue paper concerning this matter.

We have a DEC staff member at REGNEG meetings this week. The next committee meeting is scheduled for the week of March 9 through 13 in Washington D.C. The Coast Guard plans to publish the "Notice of Proposed Rulemaking" in the Federal Register on or about May 1. The goal is to have an adopted rule in place, which may include RAC certification, by August, 1992 and in effect by February, 1993.

I hope these comments are responsive to your request and we look forward to working with you in the development of appropriate legislation.

Sincerely,


for John A. Sandor
Commissioner

CJP/MAC/JA/tls

Enclosure: January 7, 1992 letter from A. E. Henn

cc: Janice Adair, Special Assistant, Commissioner's Office
Mike Conway, Director, Division Spill Prevention and Response
Lynn Tomich Kent, Section Chief, SPPM

bcc: Chris Pace
Tracy Sherrer

Alyeska pipeline

SERVICE COMPANY

415 SOUTH BRADAW STREET ANCHORAGE ALASKA 99501 TELEPHONE 837-1715 FAX TELEPHONE 837-1716

March 2, 1992

Letter No. 92-9411-G

David E. Ciancaglini
Rear Admiral
U.S. Coast Guard
P.O. Box 25517
Juneau, Alaska 99802

Re: Coast Guard Directed Oil Spill Responses
in Prince William Sound

Dear Admiral Ciancaglini:

Alyeska Pipeline Service Company ("Alyeska") is an oil spill response action contractor for spills from TAPS trade tankers in Prince William Sound. To provide this service, Alyeska has entered into Oil Spill Response Services Agreements with five companies that either own, charter or operate tank vessels that call at Valdez. Those companies, which we refer to as Contracting Vessels, are ARCO Marine, Inc., BP Oil Shipping Company, U.S.A., Chevron U.S.A., Inc., Exxon Shipping Company, and Tesoro Alaska Petroleum Company. Exhibit A of each Agreement lists the tank vessels covered by the Agreement.

In the Agreements, Alyeska promises to manage the initial response to an oil spill for as long as 72 hours following a spill, in accordance with the Prince William Sound Tanker Spill Prevention and Response Plan. The Contracting Vessels agree to assume management of the spill response within 72 hours after notification by Alyeska. Under this arrangement, Alyeska will continue to assist the Contracting Vessel's on water response until the Alyeska resources are not needed or can be replaced. For small spills, under 1,000 barrels, Alyeska may elect to complete the entire response on behalf of the contracting vessel.

We believe that each of these companies is prepared to respond to a spill from the vessels it utilizes in Prince William Sound. The Alaska Department of Environmental Conservation has arrived at the same conclusion and has approved the contingency plans for the tank vessels covered by these Agreements. Alyeska has held major response drills with ARCO, BP, Exxon Shipping and Chevron and plan a similar exercise with Tesoro. Moreover, the Agreements and the PWS Plan anticipate that if the Contracting Vessel or other acceptable representative of the responsible party does not assume management of the spill

Name
March 2, 1992
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response as required, Alyeska will ask the Coast Guard to federalize the response and assist in whatever way is appropriate, at the direction of the Federal On Scene Coordinator.

Based on discussions with Commander Ed Thompson, Captain of the Port in Valdez, there is an understanding between Alyeska and the Coast Guard that Alyeska will assist the Coast Guard if a spill response is federalized. We believe that it would be useful to have a formal procedure in place to guide transition from Alyeska management of spill response to federal control in the event such transition becomes necessary. Preparation for this contingency might be enhanced if there is a contract or Memorandum of Understanding between Alyeska and the Coast Guard describing the Coast Guard's expectations of Alyeska and establishing a management and reimbursement procedure.

It is our understanding that the Oil Pollution Act of 1990 and the National Contingency Plan (NCP) provide the Coast Guard with the authority and mission to direct a spill response when the responsible party does not take proper removal action or is unknown and the spill poses a substantial threat to the public health or welfare. 33 U.S.C. 1321(c) and National Contingency Plan 300.300. Section 300 of the NCP and Subpart H also describe how the Coast Guard can use private resources to fulfill this responsibility.

I would like to meet with you to discuss these issues and if you agree, begin the process of developing a procedure and an agreement tailored to meet the unique circumstances found in Prince William Sound.

There are two other issues we should address. Alyeska will respond to a discovery of crude oil on the waters of Prince William Sound even if the origin is not known. Under those circumstances, if the spiller is not quickly identified, we believe the response should be federalized.

Concerned citizens have asked about Alyeska's role in responding to phantom spills of refined petroleum products in Prince William Sound. In the past, Alyeska has responded voluntarily to such spills at the request of the Coast Guard, without seeking compensation. We will continue to be available to voluntarily assist the Coast Guard under these circumstances, with no actual duty to respond. These limitations are necessary because our resources cannot be dedicated to any effort other than our primary responsibilities to the TAPS trade vessels. We would be willing to discuss Alyeska's role in assisting the Coast

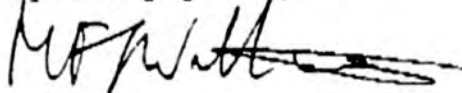
NAME
March 2, 1992
Page 3

Letter No. 92-9411-G

Guard's response to phantom spills. In the case of potential spills from cruise ships, fishing support vessels or fuel barges, Alyeska should only have a voluntary support role to assist the primary plan of the spiller. The responsible parties and the Coast Guard should enter into binding contracts with other Response Action Contractors to provide response capability for these types of spills.

I will contact you soon to discuss these issues.

Very truly yours,



M.F.G Williams
Vice-President
Environment & Contingencies

cc: Representative Bill Hudson
Senator Sam Cotten

March 6, 1992

The Honorable Bill Hudson
Chairman, House Special Committee on Oil and Gas
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

RE: Prince William Sound Oil Spill Response Services

Dear Chairman Hudson:

Alyeska Pipeline Service Company ("Alyeska") is an oil spill response action contractor for spills in Prince William Sound on behalf of companies that own, operate or charter tank vessels in the TAPS trade. We refer to those companies as "Contracting Vessels." The scope of services to be provided by Alyeska to those companies is described in Oil Spill Response Services Agreements between Alyeska and the Contracting Vessels. The Agreements incorporate the Prince William Sound Tanker Spill Prevention and Response Plan to describe Alyeska's response plans. Exhibit A of each Agreement lists the vessels covered by that Agreement.

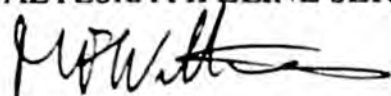
Under these arrangements, for large spills, Alyeska is obligated to respond for up to 72 hours to spills in Prince William Sound, while the Contracting Vessel is mobilizing its resources to take over management of the spill response. The Plan and the Agreements describe how the management transition from Alyeska to the appropriate Contracting Vessel should occur. After the transition, Alyeska's resources, including the on-water-response equipment, will be available for use by the Contracting Vessel for as long as needed and until they can be replaced by other equipment. The Contracting Vessel is contractually obligated to replace Alyeska's core equipment as rapidly as possible so that normal terminal operations may resume as soon as the Coast Guard allows it.

If the Contracting Vessel fails to assume management of the spill response in the 72 hour period, Alyeska anticipates that the Coast Guard will federalize the response, directing and paying for the effort. Alyeska has recently reiterated its verbal understanding with the Valdez Captain of the Port that Alyeska will make its resources available to the Coast Guard under a federalized response. We have written to Admiral Ciancaglini asking for an opportunity to describe this arrangement in writing.

Please contact me if you would like any other information on these matters.

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY



M. F. G. Williams
Vice President-Environment & Contingencies

MFGW/RIS/md



Regional Citizens' Advisory Council / 601 West Fifth Avenue, Suite 500 / Anchorage, Alaska 99501-2254 / (907) 277-7222 / FAX (907) 277-4523

March 6, 1992

Representative Kay Brown
P.O. Box V
Juneau, AK 99811

Dear Representative Brown;

While Mr. Hudson is correct that the United States Coast Guard is developing a certification system for response resources, it is my opinion that the State of Alaska would be wise to pursue a parallel course by making response action contractor certification a condition to the relief of liability immunity. If an industry is to be given an immunity to promote an increased response capability then that industry should be required to demonstrate that response capability does exist, is available, and is reasonably capable of mounting a credible performance in any future oil spills.

The following are answers to your questions.

1. What is the status of the federal RAC certification program?

Response action contractor certification is an issue being considered by the negotiated rulemaking committee for vessel response plan regulations. This is a supplement to the normal rulemaking process. While the Reg Neg committee may issue a recommendation for response action contractor certification, the final decision will not be made by the United States Coast Guard until the proposed rule undergoes a 45-day public review and a review by the Office of Management and Budget and the President's Council on Competitiveness. There are those that do not want response action contractor certification and they will have opportunity to be heard before the rule is published.

Has a decision definitely been made to proceed with a federal certification? No.

2. To what kind of RACs would a federal certification program apply? The envisioned program would apply to RACs desiring to be listed as a primary response resource in a vessel response plan.

Would the federal certification process being discussed fully address the concerns about competency and preparedness of RACs responding to oil and hazardous substance spills other than those by vessels? The proposed program would not apply to hazardous substance spills. The EPA has been charged with writing regulations for facility response plans, and MMS is charged with writing response plan regulations for offshore platforms. I understand both agencies are watching the USCG process closely, but they have not yet developed regulations.

3. Has the regulatory negotiating committee examined the possibility of complementary state and federal certification programs? Yes, it is part of the concept. The Reg Neg working group recognized the fact that states may want to have RAC certification programs for any number of reasons. There was participation from the states of Washington and California, which both have forms of RAC certification. We should strive for a program which is compatible with the proposed federal program.

4. In your view is the federal certification process that is under consideration by the committee fully responsive to Alaska's needs or do you feel that the state should develop a complementary certification program of its own? The federal program is designed to meet the needs of OPA 90. As you know the state has its own needs under the stronger statutes our legislature has passed. My personal advice is that you should require those RACs listed as responders in a state contingency plan to attest to the resources they offer, allow inspection of those resources, participate in drills necessary to assess the capability of the contractor, and submit that they are willing to work for the state under the same terms and conditions for which they are willing to offer themselves to contingency plan holders. I believe that it is time for the state to assure its citizens that the resources listed in contingency plans are actually available and can be employed rapidly by a trained crew. I think the state on-scene coordinator needs access to those resources when he or she finds themselves incident commander at a spill. I think the state deserves verification of the response capability they are trying to achieve by giving liability immunity.

Thank you for considering my views on this matter. If I can answer any question please call me at 277-7222.

Sincerely,

Tim Robertson by jwf

Tim Robertson, Member USCG Negotiated Rulemaking Committee
Representing the Regional Citizens' Advisory Council

cc: Scott Sterling/PWS RCAC
Michele Brown/Citizens' Oversight Council
Representative Bill Hudson

**UNITED STATES COAST GUARD
OIL SPILL RESPONSE PLAN NEGOTIATED RULEMAKING COMMITTEE**

AGREEMENT

The Oil Spill Response Plan Negotiated Rulemaking Committee considered the technical and policy issues involved in tank vessel response plans to implement that portion of Section 4202 of the Oil Pollution Act of 1990 that amends the Federal Water Pollution Control Act by requiring Tank Vessel Response Plans.

The parties whose signatures appear on this document, agree that:

1. The individual signing this agreement is authorized to commit the party to its terms.
2. The party concurs in the attached written statement, dated 27 March 1992, and attached hereto as exhibit (1), (the "Statement"), when considered as a whole.
3. The Coast Guard agrees to draft preambles and proposed rules consistent with the attached statement and will publish them as a Notice of Proposed Rulemaking.
4. The Coast Guard will send the members of the Committee the proposed rule for their review and comment prior to the signature of the Commandant on the Notice of Proposed Rulemaking.
5. Each party agrees not to file negative comments on the proposed rule or the preamble concerning tank vessel response plans to the extent the proposed rule and its preamble have the same substance and effect as the Committee Statement. However, signature by an organization which is a member of the Negotiated Rulemaking Committee does not preclude its constituent members from filing negative comments on the proposed rule or the preamble concerning tank vessel response plans regardless of whether the proposed rule or the preamble have the same substance and effect as the Committee Statement.
6. Each party may comment on those portions of the proposed rule and its preamble that explain the Coast Guard's position on issues that were not the subject of negotiations. In addition, each party may comment on the portions of the proposed rule where two options are presented, expressing their preference for whichever option, and on any specific aspects of the proposed rule, such as numerical values, that were not subject to the consensus.

7. The Coast Guard will consider all relevant comments submitted concerning the Notice of Proposed Rulemaking and in response to such comments will make such modifications in the proposed rule and the preamble as are necessary when issuing a final rule. After the close of the comment period, the Committee will reconvene as it deems necessary to consider those comments in reaching a recommended final rule.
8. The Coast Guard will provide copies of the final rule and its preamble to members of the Committee prior to their signature by the Commandant.
9. Each party agrees not to take any action to inhibit the adoption of the final rule to the extent the final rule and its preamble have the same substance and effect as the Committee Statement.
10. Each party agrees not to challenge the rule in court to the extent that the final rule and its preamble have the same substance and effect as the Committee Statement.
11. No party is bound under Articles 9 and 10 with respect to matters not agreed to by the committee.
12. Each party agrees to submit a memorandum to the relevant docket that it participated in the negotiations and that it concurred in the Committee Statement when considered as a whole if --
 - (a) adverse comments are filed with the agency or the rule is challenged in court, and
 - (b) the preamble and rule have the same substance and effect as the recommended preamble and proposed rule concurred in by the Committee.

NAME:

ORGANIZATION:

SIGNATURE:

Mr. Erik Stromberg

American Association of Port Authorities

Erik Stromberg

Mr. Joseph J. Cox

American Institute of Merchant Shipping

Joseph J. Cox

Mr. V. K. Leonard

American Petroleum Institute

V. K. Leonard

Mr. Howard B. Hile

American Waterways Operators

Howard B. Hile

Capt. Oliver F. Williams ARCO Marine Inc.

Oliver F. Williams

NAME:ORGANIZATION:SIGNATURE:

Mr. John Prokop

Independent Liquid Terminals
Association

Mr. Joe A. Nichols

International Tanker Owners
Pollution Federation Limited

Mr. William Gray

INTERTANKO

Mr. William Jennings

Louisiana Offshore Oil Port

Vice Admiral John
Costello, USCG Ret.

Marine Spill Response Corp.

Mr. Rick Morrill

District One
Pacific Coast District, MEBA

Mr. Mark Miller

National Response Corp.

Ms. Nina Sankovitch

Natural Resources Defense
Council, Inc.

Mr. T. S. Wyman

Oil Companies International
Marine Forum

Mr. Tim Robertson

Regional Citizens Advisory
Council Prince William Sound
Oil Spill Prevention/Response
Committee

Ms. Lisa Parker

Regional Citizens Advisory
Council Cook Inlet
Oil Spill Prevention/Response
Committee

Mr. Joseph Smith

Remedial Contractors Inst.

Mr. Dave Usher

Spill Control Association of
America

Mr. Pete Bontadelli

State of California
Office of Oil Spill Prevention
and Response

Mr. Roland Guidry

State of Louisiana
Louisiana Oil Spill
Commission
Office of the Governor

Mr. John K. Chlada

State of Maryland
Department of the Environment

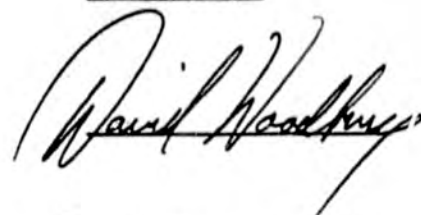
NAME:

ORGANIZATION:

SIGNATURE

Mr. David Woodbury

State of Wisconsin
Wisconsin Department of
Natural Resources



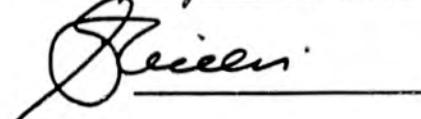
Ms. Liz Sigel Bouchard

Transportation Institute



Capt. Gerald Willis

U.S. Coast Guard



Dated 27 March 1992

[COMMITTEE PRINT]

MARCH 31, 1992

102D CONGRESS
2D SESSION

H. R. _____

IN THE HOUSE OF REPRESENTATIVESMr. _____ introduced the following bill; which was referred to the
Committee on _____

A BILL

To establish a national program and policy for the production
of energy and the protection and preservation of the
natural environment.

- 1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **TITLE VII—ALASKA RESOURCES**
2 **Subtitle A—Alaska Outer**
3 **Continental Shelf**

4 **SEC. 701. ALASKA LEASING AND DRILLING MORATORIA**
5 **AND CANCELLATION.**

6 The Outer Continental Shelf Lands Act (43 U.S.C.
7 1301 et seq.) is amended by adding at the end thereof
8 the following:

9 “SEC. 31. ALASKA LEASING AND DRILLING MORA-
10 TORIA AND LEASE CANCELLATION.—(a) The Secretary
11 shall not prepare for or conduct any preleasing or leasing
12 activity and shall not approve or permit any drilling or
13 other exploration activity under this Act on lands within
14 the North Aleutian Basin planning area in the Alaska re-
15 gion until after January 1, 2002.

16 “(b) Congress finds that the requirements pertaining
17 to cancellation of leases in section 5(a)(2) of this Act have
18 been met with regard to the North Aleutian Basin plan-
19 ning area in the Alaska region. The Secretary shall initiate
20 cancellation of such leases within 90 days after the date
21 of enactment of this section in accordance with this Act.”.

22 **SEC. 702. ALASKA OCS SUBSISTENCE REVIEW.**

23 The Outer Continental Shelf Lands Act (43 U.S.C.
24 1301 et seq.), as amended by section 701 of this Act, is

1 further amended by adding at the end thereof the fol-
2 lowing:

3 "SEC. 32. ALASKA OCS SUBSISTENCE REVIEW.—

4 Prior to issuing any five-year program under section 18
5 of this Act, conducting any lease sale, or approving any
6 plan or permit for exploration, development, or production
7 activities in the Alaska region authorized by this Act, the
8 Secretary shall comply with section 810 of the Alaska Na-
9 tional Interest Lands Conservation Act (16 U.S.C. 3120).
10 In addition to other requirements, at the lease sale stage
11 the Secretary shall fully consider the effects of exploration,
12 development, and production upon subsistence uses."

13 **Subtitle B—Trans-Alaska Pipeline**

14 **SEC. 711. RESPONSIBILITY OF RIGHT-OF-WAY HOLDER.**

15 Title II of the Trans-Alaska Pipeline Authorization
16 Act (43 U.S.C. 1651 et seq.) is amended by adding at
17 the end thereof the following:

18 "RESPONSIBILITY OF RIGHT-OF-WAY HOLDER

19 "SEC. 208. In addition to the existing duties to re-
20 spond to, contain, and clean up oil spills within the State
21 of Alaska, including Prince William Sound, under section
22 204(b) of this Act and other laws and requirements, the
23 holder of the right-of-way shall file an Oil Spill Contin-
24 gency Plan for Prince William Sound with the Secretary
25 of the Interior and other appropriate authorities."

1 SEC. 712. EXXON VALDEZ SETTLEMENT FUND LAND ACQUI-
2 SITION.

3 Title II of the Trans-Alaska Pipeline Authorization
4 Act (43 U.S.C. 1651 et seq.), as amended by section 711
5 of this Act, is amended by adding at the end thereof the
6 following:

7 "PUBLIC LAND ACQUISITION

8 "SEC. 209. Notwithstanding any other provision of
9 law, no less than 80 percent of any amounts received by
10 the United States pursuant to section 207 of Public Law
11 102-229 shall be utilized to acquire land and conservation
12 easements, including timber rights, within the Chugach
13 National Forest in the Prince William Sound region and
14 in other Gulf of Alaska areas, including Kenai Fjords Na-
15 tional Park, Afognak Island, and Kodiak National Wildlife
16 Refuge."

17 SEC. 713. SUBSISTENCE CLAIMS AGAINST TRANS-ALASKA
18 PIPELINE LIABILITY FUND.

19 Section 204(c)(13) of the Trans-Alaska Pipeline Au-
20 thorization Act (43 U.S.C. 1653(c)(13)) is amended—

21 (1) by striking out "and" at the end of sub-
22 paragraph (A);

23 (2) by striking out the period at the end of sub-
24 paragraph (B) and inserting in lieu thereof "; and";
25 and

1 (3) by adding after subparagraph (B) the fol-
 2 lowing:

3 "(C) all injuries suffered by individuals or enti-
 4 ties due to the impact of a discharge on people en-
 5 gaging in subsistence.

6 "In order to expedite compensation, the Fund shall certify
 7 a class action claim with respect to subparagraph (C).".

8 **TITLE VIII—COAL, OIL, AND GAS**

Subtitle A—Coal Development

- Sec. 801. Coal remining.
- Sec. 802. Metallurgical coal development.
- Sec. 803. Utilization of coal wastes.
- Sec. 804. Coalbed methane development.
- Sec. 805. Surface mining act implementation.

Subtitle B—Coal, Oil, and Gas Leasing

- Sec. 811. Federal coal leasing considerations.
- Sec. 812. Federal coal royalty study.
- Sec. 813. Acquired Federal land mineral receipts management.
- Sec. 814. Reserved oil and gas.
- Sec. 815. Outstanding oil and gas.
- Sec. 816. Oil and gas leasing on oil shale lands.
- Sec. 817. Federal onshore oil and gas leasing.
- Sec. 818. Oil placer claims.
- Sec. 819. Prohibition on lease issuance.
- Sec. 820. Advanced secondary and enhanced oil recovery.

SUBTITLE C—ABANDONED MINE RECLAMATION FUND

- Sec. 821. Amendments to Surface Mining Act.

SUBTITLE D—HEALTH, SAFETY, AND MINING TECHNOLOGY RESEARCH

- Sec. 831. Health, safety, and mining technology research program.

9 **Subtitle A—Coal Development**

10 **SEC. 801. COAL REMINING.**

11 (a) **MODIFICATION OF PROHIBITION.**—Section 510 of
 12 the Surface Mining Control and Reclamation Act of 1977

1 **TITLE VII—ALASKA RESOURCES**
2 **Subtitle A—Alaska Outer**
3 **Continental Shelf**

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 7 activities in the Alaska region authorized by this Act, the
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14 **SEC. 711. RESPONSIBILITY OF RIGHT-OF-WAY HOLDER.**

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 6 following:

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8 "SEC. 209. Notwithstanding any other provision of
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 7 a class action claim with respect to subparagraph (C).".

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Subtitle A—Coal Development

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- Sec. 803. Utilization of coal wastes.
- Sec. 804. Coalbed methane development.
- Sec. 805. Surface mining act implementation.

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- Sec. 814. Reserved oil and gas.
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- Sec. 817. Federal onshore oil and gas leasing.
- Sec. 818. Oil placer claims.
- Sec. 819. Prohibition on lease issuance.
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- Sec. 821. Amendments to Surface Mining Act.

SUBTITLE D—HEALTH, SAFETY, AND MINING TECHNOLOGY RESEARCH

- Sec. 831. Health, safety, and mining technology research program.

9 Subtitle A—Coal Development

10 SEC. 801. COAL REMINING.

11 (a) MODIFICATION OF PROHIBITION.—Section 510 of
 12 the Surface Mining Control and Reclamation Act of 1977

Energy Development and Environmental Protection Act

Section-by-Section Summary

Title I—Nuclear Plant Licensing

Subtitle A—Hearing and One Step Licensing

Section 101 amends section 189a of the Atomic Energy Act by adding a new paragraph (3) which clarifies that for licensing of power reactors, proceedings to grant, suspend, revoke, renew, or amend any license or construction permit must be "on the record" formal adjudicatory proceedings under the Administrative Procedure Act. This has been the traditional interpretation of the Atomic Energy Act, and rejects a recent NRC interpretation that informal hearings are adequate under section 189.

Section 102 governs a pre-operation hearing under a combined construction permit and operating license pursuant to NRC's new one-step licensing rule, 10 CFR Part 52. It adds a new section 189c to the Atomic Energy Act. Paragraph (1) provides for Federal Register notice of the expected date of fuel loading and criticality of a power reactor under a previously issued combined license. Paragraph (2) provides a 60-day period for any member of the public to request an "on-the-record" hearing on operation of the plant under the combined license. Paragraph (3) limits the scope of any pre-operation hearing to consideration of: (A) whether the facility will operate in conformity with the Atomic Energy Act and the rules and regulations of the Commission; and (B) whether the facility has been constructed and will operate in conformity with the terms of its combined license. Paragraph (4) places a further limitation on consideration of issues under subparagraph (3)(A). It provides that litigation of issues not encompassed by the terms of the license—i.e., issues of compliance with the Atomic Energy Act or the Commission's regulations—is permitted at the pre-operation hearing only if the person requesting such hearing presents *significant, new* information that was not considered by the Commission in any earlier proceeding. The intent of this section is to codify the result of a 1990 three-judge panel decision of the U.S. Court of Appeals for the D.C. Circuit invalidating the severe restrictions on pre-operation hearings in the NRC rule.

Section 103 adds a new section 185b to the Atomic Energy Act to provide explicit statutory authority for the Commission to issue combined construction permits and operating licenses (one-step licenses), provided that prior to operation, the Commission finds that the facility has been constructed and will operate in conformity with the Atomic Energy Act, the Commission's regulations, and the terms of the combined license.

Subtitle B—License Renewal

Section 111 amends section 103c of the Atomic Energy Act by adding two new paragraphs. New paragraph (2) would provide that licenses for power reactors may be renewed for a period not to exceed 20 years. New paragraph (3) provides that both the adequacy of and compliance with the terms of a power reactor license (the plant's "current licensing basis") are within the scope of any license renewal proceeding. This provision responds to a 1991 NRC rule on license renewal, 10 CFR Part 54, which declares the adequacy of and compliance with the current licensing basis for a plant to be outside the scope of a renewal proceeding.

Section 112 further amends section 103c of the Atomic Energy Act by adding a new paragraph (4). This paragraph provides that in any license renewal proceeding for a power reactor, the state in which the plant is located has the automatic right to participate as a full party. If the state takes the position that the license should not be renewed, NRC may not renew the license. If the state takes the position that the renewal should be for only a specified period, NRC may not renew the license for longer than that period.

Subtitle C—Judicial Review of Enforcement Petitions

Section 121 further amends section 189 of the Atomic Energy Act by adding a new subsection d, pertaining to citizen enforcement petitions and judicial review. New paragraph (d)(1) provides that any person may petition the Commission to institute a proceeding to modify, suspend, or revoke a license, or for other appropriate action. This provision simply codifies NRC's existing regulations governing citizen enforcement petitions at 10 CFR §§ 2.202 and 2.206.

Paragraph (2) provides that NRC shall grant such petition if there is material evidence to suggest that the licensee is in significant noncompliance with the terms of its license, Commission regulations, or the Atomic Energy Act, or that conditions at the facility may present undue risk to public health and safety or common defense and security. This provision provides the standard for the Commission to use in granting or denying enforcement petitions, and provides law for a court to apply in the context of judicial review of NRC disposition of such petitions.

Paragraph (3) provides that Commission orders denying enforcement petitions are subject to judicial review. This section simply restores the status quo prior to 1989, when denials of 2.206 petitions were always considered judicially reviewable. In 1989, U.S. Courts of Appeals first held that 2.206 petition denials were presumptively unreviewable under the 1985 Supreme Court case, *Heckler v. Chaney*, because there is "no law for a court to apply" in judging them. This

section corrects that deficiency by providing law for a court to apply.

Subtitle D—Licensing Fees

Section 131(a) adds a new paragraph (4) to section 6101(c) of the Omnibus Budget Reconciliation Act of 1990 to exempt certain federally owned research and educational licenses of the Nuclear Regulatory Commission from annual licensing fees. Specifically, fees are waived for federally owned research reactors used primarily for educational training and academic research purposes. "Research reactor" is defined as one licensed by the Nuclear Regulatory Commission under section 104a of the Atomic Energy Act to operate at a thermal power level of 10 megawatts or less, and if the power level is greater than 1 megawatt, certain other limitations must be met. According to NRC, this provision would waive fees for four reactors nationwide.

Section 131(b) specifies that this section shall apply to annual fees assessed for fiscal year 1992 or any succeeding fiscal year.

Title II—Radiation Protection

Subtitle A—Below Regulatory Concern

Section 201(a) adds a new section 276 to the Atomic Energy Act of 1954. New subsection 276(a) would give states authority to regulate, on the basis of radiological hazard, the management or disposal of low-level radioactive waste, or other practices, materials, or emissions involving radioactivity, if the Nuclear Regulatory Commission, after January 1, 1990, either deregulates or relaxes regulation of such waste disposal or practices. Specifically, the state authority to regulate would be activated if NRC, after the specified date, either "(1) exempts such waste, practices or materials from regulation" or "(2) issues a regulation governing such waste, practices, materials, or emissions that reduces protection of the public health and safety (as determined by any State seeking to regulate under this subsection)." New subsection 276(b) of the Atomic Energy Act incorporates definitions of terms from section 2 of the Low Level Radioactive Waste Policy Act. Section 201(b) makes a conforming amendment to the Table of Contents of the Atomic Energy Act.

Section 202 revokes the NRC's 1986 and 1990 policy statements on "Below Regulatory Concern." Because this legislation does not repeal the statutory requirement (in the Low Level Radioactive Waste Policy Amendments Act of 1985) for the NRC to have a policy and procedures for considering BRC petitions, NRC will be required to promulgate a new policy statement.

Subtitle B—Standards for Cleanup of Contaminated Sites

Subsection 211(a) requires the Environmental Agency to conduct a review of available information on federally owned or licensed sites contaminated with radioactivity as a result of human activity, in consultation with the Department of Energy and the Nuclear Regulatory Commission, and to report to Congress within 9 months.

Subsection 211(b) requires EPA to issue regulations establishing generally applicable standards for decontamination of radiologically contaminated sites that are owned or operated by the federal government or licensed by the NRC or an agreement state under the Atomic Energy Act. Proposed standards must be issued within 9 months, and final standards within 18 months of enactment.

Subsection 211(c) requires the EPA Administrator to establish and chair an interagency committee to provide information and advice to the agency. Subsection 211(d) defines terms used in the section.

Title III—High-Level Radioactive Waste

Subtitle A—Standards for High-Level Radioactive Waste Disposal

Section 301 would amend section 121 of the Nuclear Waste Policy Act of 1982 by adding a new subsection (d). Paragraph (1) would reinstate the EPA's generally applicable environmental standards for the disposal of high-level radioactive waste, spent nuclear fuel, and transuranic waste, as in effect on July 1, 1987, except for two provisions in the standards which were found unlawful by the U.S. Court of Appeals for the First Circuit in 1987.

Paragraph (2) would require the EPA Administrator to propose revisions to the standards within 3 months of passage that would address the matters struck down by the court and any other revisions the Administrator deems appropriate. The Administrator would be required to issue final revisions to the standards within 9 months of the date of enactment. This provision is intended to break the inter-agency logjam which has for several years prevented reinstatement of the EPA standards.

Subtitle B—Federal Interim Storage

Section 311(a) resurrects the Federal Interim storage provisions in sections 135 and 136 of the Nuclear Waste Policy Act of 1982 by deleting the 1990 sunset provision in

that Act and specifying that DOE may not enter into interim storage contracts after a repository or monitored retrievable storage facility is available.

Subsection 311(b) amends section 135(e) of the NWA by providing that any spent nuclear fuel must be removed from an interim storage site within one year of the date of availability of a repository or monitored retrievable storage facility, instead of three years.

Subsection 311(c) strengthens the state and tribal participation provisions of the NWA with respect to federal interim storage. It removes the NWA's 300 metric ton floor on a host state's authority to disapprove federal interim storage at a facility within the state, and deletes the NWA provisions providing for Congressional override of a state's notice of disapproval. A potential host state has an absolute veto over any federal interim storage within its borders.

Title IV—Uranium Enrichment Corporation

Section 401 creates new chapters under the new Title II of the Atomic Energy Act and a Table of Contents for that Chapter, as follows:

Section 1201 defines terms used in this title.

Section 1202 lists key purposes of the Corporation including providing enrichment services in a business-like fashion, maximizing economic return to the Treasury, seeking to commercialize the AVLIS technology, and helping to maintain a reliable, domestic source of enriched uranium.

New Chapter 23 of the Atomic Energy Act, Establishment, Powers and Organization of Corporation, provides as follows:

Section 1301 establishes the Uranium Enrichment Corporation.

Section 1302 concerns corporate offices.

Section 1303 concerns authority and flexibility of the corporation.

Section 1304 empowers the Corporation to act in general as if it were a private corporation. Specifically, the Corporation is authorized to enrich uranium, acquire enriched uranium, or provide uranium to be enriched by others.

Section 1305 directs the President to appoint a Board of Directors that will select a Chairman. Under this section, the Board is responsible for management of the Corporation and must be free of conflicts of interest.

Section 1306 specifies that employees and officers of the Corporation shall not be officers or employees of the United States.

Section 1307 requires the Corporation to prepare professional financial statements with an audit by an independent CPA. In addition, the Corporation will be subject to reviews and audits by the Comptroller General.

Section 1308 provides for annual reports.

Section 1309 requires the Corporation to maintain its own revolving fund that would not require annual appropriations or be subject to Gramm-Rudman apportionments.

Section 1310 allows the Corporation to issue bonds for debt, subject to certain conditions, but may not issue bonds for the purpose of constructing a new enrichment plant.

Section 1311 exempts the Corporation from Federal, State and local taxes, but requires an annual payment in lieu of taxes to state and local tax jurisdictions that the Corporation judges to be fair and reasonable using specified criteria.

Section 1312 authorizes the Corporation to receive assistance from Federal agencies on a reimbursable basis.

Section 1313 requires that Corporation actions shall be consistent with antitrust laws, and makes the Corporation subject to OSHA to the same extent as a private corporation. Furthermore, the section requires the Corporation to be subject to and comply with environmental laws and requirements to same extent and manner as a private corporation.

Section 1314 authorizes the Corporation to provide security for its facilities in the same manner that the DOE could.

Section 1315 subjects the Corporation to the Freedom of Information Act. Corporation employees shall be obligated to protect proprietary information in the same manner as Federal employees.

Section 1316 authorizes DOE to detail, on a reimbursable basis, personnel to run the Corporation until the Corporation's Board of Directors can hire top officers.

Section 1401 makes the Corporation the exclusive marketing agent on behalf of the Federal government for uranium enrichment services. Current contracts and commitments of the DOE, except the TVA settlement agreement, shall be transferred to the Corporation under this section.

Section 1402 specifies that the Corporation shall charge prices that recover costs plus a reasonable profit for uranium enrichment services it provides to the DOE. Otherwise, the Corporation is freed from restrictions on prices it charges its

customers. Instead, it is the expectation of this legislation that the Corporation will operate according to the principle of profit maximization.

Section 1403 grants the Corporation an exclusive option to lease the gaseous diffusion plants of the DOE, subject to a leasing agreement to be negotiated. The section directs DOE to negotiate leasing terms that maximize payments to the Treasury consistent with the economic viability of the Corporation. The section also bars the Corporation from leasing DOE facilities for producing highly-enriched uranium.

Section 1404 provides that the Corporation shall have the exclusive rights to commercial AVLIS, subject to a royalty payment to be negotiated. In addition, the DOE shall transfer to the Corporation property related to enrichment of uranium through the AVLIS process. Such property may transfer only if it is directly related to and materially useful to the commercialization of AVLIS. The Corporation may not construct an AVLIS plant until it is fully privatized.

Section 1405 gives the Corporation \$364 million in the form of a loan for initial working capital, known as Initial Debt, from the Uranium Enrichment Special Fund. The Corporation may not receive any additional financial assistance from the Federal government except as provided in this legislation.

Revenue received by the Treasury from leasing of the DOE gaseous diffusion plants, AVLIS royalty payments, unused balances in the Uranium Enrichment Special Fund, repayment of Initial Debt, and accounts receivable would constitute the full extent of recovery under subsection 161(v) of past direct costs of production under DOE's uranium enrichment program.

This section grants the Corporation an exclusive option to lease the gaseous diffusion plants of the DOE.

Section 1406 authorizes the Corporation to apply to the DOE for patent licenses.

Section 1407 stipulates that liabilities arising from the operation of the uranium enrichment enterprise by DOE prior to enactment of this legislation shall be considered judgments against DOE.

Section 931 adds a new chapter to Title II of the Atomic Energy Act providing for privatization of the Uranium Enrichment Corporation. Chapter 25, Licensing and Regulation of Uranium Enrichment Facilities, provides as follows:

Section 1501 states that NRC, in consultation with DOE and EPA, shall issue safety regulations for the gaseous diffu-

sion plants in lieu of a license. The Corporation must maintain a certificate of compliance in order to lease the facilities.

Section 1502 states that facilities using technologies other than AVLIS would be licensed under the applicable provisions of current law.

Section 1503 provides that the Corporation shall be subject to the regulation of the DOE regarding use of or access to restricted data.

Chapter 26, Privatization of the Corporation, provides as follows:

Section 1601 directs the Corporation to prepare a strategic plan for privatization, including a market evaluation, an assessment of technology options, and a detailed approach for offering stock for sale to the private sector.

Section 1602 directs the Corporation to undertake certain post-demonstration activities necessary to prepare AVLIS for commercialization.

Section 1603 provides that the Corporation may sell stock to the private sector as an equity investment in the assets of the Corporation. Once the Corporation sells more than \$364 million worth of stock, it would be converted to a private corporation, provided that an agreement has been reached on leasing the GDPs and on royalty payments for AVLIS.

Section 1604 directs the Corporation, once privatized, to elect a new Board of Directors, select a new Chief Executive Officer, and propose changes to its corporate charter. This section also repeals powers under Chapter 23, but allows other rights and regulations to remain in effect.

Chapter 27, Deterioration and Decommissioning, provides as follows:

Section 1701 establishes a dedicated Fund for the decontamination and decommissioning of DOE's gaseous diffusion plants in the Treasury and makes it available to the DOE. Under this section, interest and other proceeds from the Fund shall be retained by the Fund.

Section 1702 states that the Fund shall consist of deposits of \$500 million a year, indexed to inflation. Under this section, contributions from the Government shall be made out of revenues that is being recovered by the Corporation from several sources: (1) payments under the leasing agreement for the DOE's gaseous diffusion plants; (2) transfer of unused balances from the Uranium Enrichment Special Fund; (3) royalties from AVLIS; (4) repayment of Initial Debt; and, (5) accounts receivable transferred from the DOE.

The President is authorized to negotiate contributions to the Fund from foreign customers or their governments.

If the sum of contributions to the Fund from Government sources, foreign customers, and interest on balances, is less than the annual deposit requirement, the section states that a special backup assessment on domestic nuclear utilities would make up the difference. Under this section, the amount of the difference that an individual utility would pay would be proportional to the amount of fuel that utility had purchased from the DOE in the past.

This section requires deposits to continue to be made into the Fund until balances in the Fund are adequate to complete decontamination and decommissioning.

Section 1703 directs the National Academy of Sciences to conduct a study to determine cleanup needs, identify alternative cleanup methods, estimate costs of cleanup, and provide recommendations for reducing costs of cleanup in the way that complies with all relevant environmental laws and requirements.

Section 1704 states that the Corporation shall be responsible separately for the decontamination and decommissioning at its own facilities and shall report annually to Congress.

Section 402 contains amendments to laws that are necessary for conformance to the new Title II that this legislation adds to the Atomic Energy Act.

In addition, this section amends section 161(v) of the Atomic Energy Act by removing restrictions on pricing policy in order to allow the Corporation the flexibility it needs to maximize profits. However, this section retains the cost recovery requirement for total costs contained in the current section 161(v).

Section 403 contains a standard severability clause.

Section 404 grants standing for citizens or an organization that represents them to bring actions in Federal court to enforce provisions of this title.

Title V—Whistleblower Protection

Section 501(a) amends the whistleblower protection provisions of section 210(a) of the Energy Reorganization Act of 1974 to explicitly provide whistleblower protection for employees: 1) notifying the employer of an alleged violation rather than a federal regulator; 2) opposing a practice that would be a violation of the Atomic Energy Act; or 3) testify-

ing before Congress or any Federal or State agency regarding an alleged violation of this Act or the Atomic Energy Act.

Subsection 501(a)(5) adds a new paragraph (2) to Energy Reorganization Act section 210(a) which defines the term "employer" to include a Commission licensee, an applicant for a Commission license, a contractor or subcontractor of a Commission licensee or of an applicant for a Commission license, the Department of Energy, a contractor or subcontractor at a Department of Energy Nuclear facility, or any other employer engaged in any activity under the Energy Reorganization Act or the Atomic Energy Act of 1954.

Section 501(b) amends section 210(b)(1) of the Energy Reorganization Act to extend the statute of limitations for the filing of written complaints with the Department of Labor from thirty days to one year.

Section 501(c) adds a new clause to section 210(b)(2)(A) of the Energy Reorganization Act which provides that in the event that the Secretary of Labor does not issue an order on a complaint within the 120 days prescribed, the complainant shall be entitled to *de novo* review of the complaint in any United States District Court.

Section 501(d) adds a new paragraph (3) to section 210(b) of the Energy Reorganization Act which provides that the Secretary of Labor may determine that a violation of the Act has occurred only if the reporting of the alleged violation was a contributing factor. Relief may not be ordered if the employer is able to demonstrate by clear and convincing evidence that the employer would have taken the same unfavorable personnel action against the employee in the absence of the "whistleblowing activity."

Section 501(e) adds a new subsection (b) to section 210 of the Energy Reorganization Act. It waives preemption by providing that complainants are not precluded from pursuing any other available right or remedy: 1) contemporaneously with pursuit of relief under this section; 2) subsequent to issuance of a final order by the Secretary of Labor; or 3) subsequent to judicial review.

Section 501(f) adds a new subsection (i) to section 210 of the Energy Reorganization Act which provides that the rights and requirements under this title must be prominently posted in the workplace.

Section 501(g) adds a new subsection (j) to section 210 of the Energy Reorganization Act which provides that the Secretary of Labor or, on appeal, the U.S. District Court have authority to grant all appropriate relief, including injunctive relief and compensatory and exemplary damages. It allows

for additional monetary damages for serious and repeated intimidation and harassment of whistleblowers.

Section 501(h) adds a new subsection (k) to section 210 of the Energy Reorganization Act which provides that the Nuclear Regulatory Commission may not delay any investigation of an alleged violation on the basis of a whistleblower complaint being filed or an investigation by the Secretary being initiated. A determination that a violation has not occurred shall not be considered by the Commission in its determination of whether any violation of the Act or the Atomic Energy Act of 1954 has occurred.

Section 501(i) redefines "Secretary" and corrects a mistaken section designation in the Energy Reorganization Act.

Section 501(j) provides that the amendments enacted by this section will apply to claims filed under section 211(b)(1) of the Energy Reorganization Act of 1974 on or after the date of enactment.

Title VI—Outer Continental Shelf

Subtitle A—Prohibition of Leasing and Preleasing Activity

Section 601 bars any preleasing after January 1, 2002 in the Onnia, North Atlantic, Mid-Atlantic Florida and North Aleutian Plan

It also establishes environmental planning areas with responsibility the oceanographic, ecological and socioeconomic information available, obtain additional information that might be necessary and subject it to peer review, and identify potential impacts of oil and gas activity in the region.

The secretary must certify adequacy of information before proceeding to lease in any area subject to a moratorium; in making leasing decisions in moratorium areas the Secretary must consider information developed and must give equal weight to the environment and oil and gas development.

Subtitle B—Buyback of Certain Leases

Section 602 amends section 5(2)(a) of OCSLA to require the Secretary to cancel leases upon a determination that it has resulted in or poses a serious threat of damage to wildlife, property, minerals, the national security or the environment. It also reduces from five years to one year the lease suspension period that must precede cancellation. Finally, section

602 authorizes the use of credits against future rents, royalties or bonuses as compensation to owners of canceled leases.

Title VII—Alaska

Subtitle A—Alaska Outer Continental Shelf

Section 701 provides that the Secretary of the Interior is prohibited from permitting any drilling or other exploration activity on existing leases and also prohibited from conducting additional lease sales in Bristol Bay Alaska [North Aleutian Basin Planning Area] until after January 1, 2002.

Alaska's Bristol Bay is one of the world richest fishing grounds and productive marine environments. Accordingly, the Secretary is directed to cancel the existing leases in Bristol Bay in conformance with the new criteria set forth in section 602 of this bill.

Section 702 provides that in conducting OCS leasing and related activities in Alaska, the Secretary is required to evaluate and minimize adverse impacts on subsistence pursuant to Section 810 of the Alaska National Interest Lands Conservation Act.

Subtitle B—Trans-Alaska Pipeline

Section 711 provides that Alyeska file an Oil Spill Contingency Plan for Prince William Sound with the Secretary of the Interior. Under existing law, Alyeska Pipeline Service Company, as agent for the seven companies which were granted the right-of-way for the Trans-Alaska pipeline, has a duty to respond to oil spills in Prince William Sound.

Section 712 provides that funds received by the United States from settlement of claims related to the Exxon Valdez oil spill be deposited in a Natural Resource Damage Assessment and Restoration Fund in the Department of the Interior. The Federal Trustees for the oil spill restoration (Interior, Forest Service and NOAA) are also required by section 207 of the FY-92 dire emergency supplemental appropriations act (P.L. 102-229) to submit their proposed use of such funds in the President's budget for Congressional review.

The President's FY 93 Budget estimates that over \$400 million will eventually be received by the United States as its share of the Exxon Valdez civil settlement. In addition, \$50 million in criminal restitutionary payments have already been deposited in the Fund. Consistent with the Committee's Views and Estimates on the President's Budget, section 712 requires that no less than 80 percent of the money received from the Exxon Valdez settlement shall be used to acquire or otherwise protect key fish and wildlife habitat in Prince Wil-

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Ilam Sound and the Gulf of Alaska areas damaged by the Exxon Valdez oil spill. The intent is for the Federal Trusts to acquire, on a willing seller basis, Alaska Native corporation property, including timber rights, within the Chugach National Forest, Kenai Fjords National Park, Afognak Island, and Kodiak National Wildlife Refuge.

Section 713 fulfills the original intent of Congress that Alaska Natives be fully and fairly compensated for damages from a spill of TAPS oil by specifically authorizing subsistence claims to be brought against the Liability Fund. The section also directs the Fund to certify a class action in order to expedite compensation. The \$100 million Liability Fund established by the 1973 Trans-Alaska Pipeline Authorization Act was intended by Congress to provide quick compensation for Alaska Natives and other persons injured by spills of TAPS oil. Congress amended the TAPS Act in 1990 with the intent to facilitate full and fair compensation for spill victims. Yet three years after the Exxon Valdez spill, the administrators of the Liability Fund have failed to provide adequate compensation. In January 1992, the Liability Fund rejected several thousand Alaska Native subsistence claims.

Title VIII—Coal, Oil and Gas

Subtitle A—Coal Development

Section 801 in subsection (a) would amend the Surface Mining Control and Reclamation Act of 1977 to provide that the prohibition of section 510(c) of the Act would not apply to a permit application due to any violation resulting from an unanticipated event or condition at a surface coal mining operation on lands eligible for remining under a permit held by the person making such application. The term 'violation' would have the same meaning as such term has under section 510(c).

Subsection (b) would amend the Surface Mining Control and Reclamation Act of 1977 to provide that on lands eligible for remining the period for assuming responsibility for successful revegetation would be two full years after the last year of augmented seeding, fertilizing, irrigation, or other required work; except in those areas or regions of the country where the annual average precipitation is twenty-six inches or less, the period would be five years.

Subsection (c) would amend the Surface Mining Control and Reclamation Act of 1977 to define the term 'unanticipated event or condition' as an event or condition encountered in a remining operation that was not contemplated by the applicable surface coal mining and reclamation permit, and the term 'lands eligible for remining' as those lands that would other-

wise be eligible for expenditures under the Abandoned Mine Reclamation Program.

Subsection (d) would amend the Surface Mining Control and Reclamation Act of 1977 to provide that surface coal mining operations on lands eligible for remining would not affect the eligibility of such lands for reclamation and restoration under the Abandoned Mine Reclamation Program.

Subsection (e) authorizes the Secretary of the Interior to undertake a rulemaking to establish environmental protection performance and reclamation standards, and a separate permit system, for operations for the on-site reprocessing of abandoned coal refuse piles, and operations for the removal of these piles on lands that would otherwise be eligible under the Abandoned Mine Reclamation Program.

Section 802 in subsection (a) would establish a metallurgical coal mining experimental program within the Bureau of Mines for the purpose of developing techniques that will lead to the greater and more efficient utilization of the Nation's metallurgical coal resources. Under the program techniques and demonstration projects would be undertaken to facilitate the use of metallurgical coal as a boiler fuel for the purpose of generating steam to produce electricity, including blending metallurgical coal with other coals in order to enhance its efficient application as a boiler fuel; as an ingredient in the manufacturing of steel; and as a source of pipeline quality coalbed methane.

Subsection (b) would establish a Metallurgical Coal Development Advisory Committee to advise the Interior Secretary on the metallurgical coal mining experimental program. The Committee would be composed of 3 members representing producers of metallurgical coal; 2 members representing transporters of coal, including representatives of rail and barge carriers; 2 members representing steel producers; 3 members representing the electric utility industry; 2 members representing boiler manufacturers; and 2 members representing natural gas distributors and carriers.

Section 803 would establish a coal waste utilization experimental program with the Bureau of Mines for the purpose of developing techniques that will lead to the greater and more efficient utilization of coal from mining and processing wastes. Under the program techniques and demonstration projects would be undertaken to facilitate the use of coal from mining and processing wastes as a boiler fuel for the purpose of generating steam to produce electricity.

Section 804 would amend section 32 of the Mineral Leasing Act by adding a new subsection (b). Subsection (b) would require that 180 days after this section is enacted, the Interior Secretary would publish in the Federal Register a list of states where the Secretary determines that disputes, uncertainty, or

litigation exist regarding the ownership of the methane; development of significant deposits of coalbed methane is being impeded by existing disputes, uncertainty, or litigation regarding ownership of methane; a statutory or regulatory procedure or existing case law is not in effect permitting and encouraging the development of coalbed methane; and no extensive development of methane is taking place. States that are listed would be considered "Affected States".

The Secretary would have the authority to revise the list by either adding or deleting states. Affected states would have the authority to petition the Secretary to be delisted once the state has either enacted coalbed methane development legislation or case law has been established in that state.

The states of West Virginia, Pennsylvania, Kentucky, Ohio, Tennessee, Indiana, and Illinois would be considered Affected States upon enactment of this section. These are states where the ownership question is impeding development of coalbed methane. The states of Colorado, Montana, New Mexico, Wyoming, Utah, Washington, Mississippi, Virginia and Alabama would not be included in this list. These states have either already passed legislation to address the ownership question or are not experiencing an ownership problem.

Once a state becomes an Affected State, it would have 360 days to establish a State Board to administer the provisions of this subsection in order to provide for the expeditious and economical development of coalbed methane. The State Board would have authority to promulgate regulations for coalbed methane development. A person concerned with preserving the integrity of workable seams who is knowledgeable in underground coal mining methods and a person knowledgeable in oil and gas development activities must be appointed to the State Board.

The Secretary would act in lieu of a State Board if a state does not meet the 360-day requirement. In implementing a coalbed methane program, the State Board or the Secretary must take into consideration existing and future coal mining plans, preserve the mineability of coal seams and provide for the prevention of waste and maximization of recovery of the methane in a manner which will protect the rights of all entities owning an interest in the methane when administering the coalbed methane development program.

The State Board would have the authority to establish spacing requirements for the minimum distance between coalbed methane wells, and the minimum distance of a coalbed methane well from a property line, if a state did not already have existing spacing requirements in place. Spacing requirements would be established within 90 days after the State Board is created.

An entity claiming a coalbed methane ownership interest and planning to drill and operate a coalbed methane well can

apply for a spacing unit from the State Board. Once the application is received and approved by the State Board, an order would be issued establishing the boundaries of the spacing unit. Spacing units must generally be uniform in size.

Once a spacing order has been issued, and once an application for pooling has been filed by an entity claiming a coalbed methane ownership interest and proposing to drill a coalbed methane well, the State Board would hold a hearing for purposes of reviewing the pooling application. If the State Board determines that all applicable criteria have been met, the State Board would issue a pooling order. A pooling order could not be issued until notice has been provided, or a reasonable and diligent effort to provide notice has been made, to each entity which may claim an interest in the coalbed methane gas, within the unit, and each entity has been offered an opportunity to appear at the hearing. Once a pooling order has been issued, each entity would be given an opportunity to either: sell or lease its coalbed methane ownership interest to the unit operator at a royalty rate determined by the State Board and set forth in the pooling order; become a participating working interest owner by bearing a share of the risks in the drilling operation; or, share in the operation of the well as a nonparticipating working interest owner by relinquishing its working interest to the participating working interest owner until the proceeds allocable to its share equal 300 percent of the share of such costs allocable to its interest. Thereafter, the nonparticipating working interest owner would become a participating working interest owner.

The pooling order would designate a unit operator to drill and operate in the unit. The order would provide that any entity claiming an interest in the coalbed methane within the unit which does not make an election under the pooling order would be deemed to have leased its coalbed methane interest to the unit operator under the same terms and conditions of the pooling order. If all entities claiming an ownership of the coalbed methane enter into a voluntary agreement for drilling and operating the methane gas well, a pooling order could not be issued.

Each pooling order would provide for the establishment of an escrow account into which the payment of costs and proceeds attributable to the conflicting interests would be deposited and held for the interest of the claimants. Each participating working interest owner, except for the unit operator, would be required to deposit into the escrow account a proportionate share of the costs allocable to the ownership interest claimed by each participating working interest owner. The unit operator would be required to deposit into the escrow account all proceeds associated with the conflicting interests of lessees, plus all proceeds in excess of ongoing operational expenses related to the conflicting interests.

Once the State Board has been notified of a final legal determination on the methane ownership or, when and if, an agreement among all entities claiming an interest in the methane has been reached, the State Board would order the payment of principal and accrued interest from the escrow account to all entities legally entitled to the funds within 30 days of receipt of this notification or agreement. Each participating working interest owner would receive a proportionate share of the proceeds attributable to the conflicting interest. Each nonparticipating working interest owner would receive a proportionate share of the proceeds attributable to the conflicting interest, less the cost of being carried as a nonparticipating working interest owner. Each entity leasing, or deemed to have leased, its coalbed methane ownership interest would receive a share of the royalty proceeds, as set forth in the pooling order. The State Board would be required to issue rules and regulations in order to provide for the protection of funds deposited into the escrow account.

No methane well could be drilled unless the State Board has approved the drilling.

A unit operator would be prohibited from stimulating a coal seam or known coal bearing geologic strata without the written consent of each entity which is operating, or at the time of application for a spacing unit, has by virtue of ownership or a coal lease, the right to operate, a coal mine in a coal seam that is situated within a certain horizontal or vertical distance, as determined by the State Board, of the well. Any methane lease that would be in existence as of the effective date of this subsection would not be affected.

The State Board would not be able to approve the drilling of a methane well unless the unit operator has notified each entity which is operating, or has the right to operate, a coal mine within the horizontal and vertical distances determined by the State Board. Any entity that receives a notice would be able to object to the drilling within 30 days of receipt of the notice. The State Board would be able to refuse the drilling of a methane well based on any of the following: the proposed activity, due to its proximity to any coal mine opening, shaft, underground workings, or to any proposed extension of the coal mine, would adversely affect any operating, inactive or abandoned coal mine, including any coal mine already surveyed and planned but not yet in operation; the proposed activity would not conform with a coal operator's mine development plan for an existing or proposed activity; there would be an unreasonable interference from the proposed activity with present or future coal mining operations, including the ability to comply with other applicable laws and regulations; the presence of evidence indicating that the proposed drilling activities would be unsafe, taking into consideration the dangers from creeps, squeezes or other disturbances due to the extraction of coal; the proposed activity would

unreasonably interfere with the safe recovery of coal, oil and gas.

If the State Board does not approve the drilling of a well, the State Board would be required to consider whether other options were available to promote the development of the methane. The State Board would be required to consider whether the unit operator could modify its proposed operation in order that the proposed activity could instead be reasonably done through an existing or planned pillar of coal, or in close proximity to an existing well or such pillar of coal, taking into consideration surface topography; the proposed activity could be moved to a mined-out area, below the coal outcrop or some other feasible area; the unit operator agrees to a drilling moratorium of not more than two years to permit completion of coal mining operations; or, the practicality of locating the proposed spacing unit or well on a uniform pattern with other spacing units or wells.

Wells that are drilled after enactment of this legislation which penetrate coal seams with remaining reserves would be required to provide for subsequent safe mining through the well in accordance with standards prescribed by the State Board for the State in which the well would be located, in consultation with any Federal and State agencies having authority over coal mine safety.

The State Board would not be able to approve the drilling of a coalbed methane well unless the well complied with the State Board's spacing and other requirements and the operator has notified, or made a reasonable and diligent effort to notify, all entities claiming ownership of the methane and they were provided an opportunity to object in accordance with requirements established by the State Board; a pooling order has been issued if an ownership conflict existed. These conditions would be in addition to the notification required for coal operators, or future coal operators, where the well would be drilled within a specific horizontal or vertical distance of the coal seam. The State Board would be required to establish conditions under which entities claiming ownership of coalbed methane may object to the drilling of a coalbed methane well.

The legislation would not prevent or inhibit the entity which has the right to develop and mine coal in any mine from venting coalbed methane gas to ensure safe mining operations.

Section 805 in subsection (a)(1) would amend section 717(b) of the Surface Mining Control and Reclamation Act of 1977 to clarify the terminology used under that subsection. Paragraph (2) would require the Interior Secretary to promulgate regulations requiring the repair, or compensation for, material damage resulting from subsidence caused to any structure or facility, and the replacement of adversely affected water supplies.

Subsection (b) would amend the Surface Mining Control and Reclamation Act of 1977 to define the term 'valid existing rights' as used under section 522(e) of the Act.

Subsection (c) would require the Interior Secretary to comply with the Settlement Agreement the Secretary entered into for the implementation of the Applicant-Violator System.

Subsection (d) would amend the Surface Mining Control and Reclamation Act of 1977 to clarify the Interior Department's research authorities under the Act.

Subsection (e) provides for cooperative agreements to be entered into between the Interior Secretary and states with approved abandoned mine reclamation programs for the purpose of undertaking activities under the coal outcrop fire program.

Subtitle B—Coal, Oil and Gas Leasing

Section 811 would amend the Mineral Leasing Act to require the Interior Secretary, prior to the issuance of any federal coal lease, to consider the effects which mining of the proposed lease might have on competition in the coal industry, and the market demand for coal from the proposed lease. This requirement would not apply to the issuance of a coal lease which would in the reasonably foreseeable future prevent the bypass of federal coal deposits, or which would provide for the expansion of existing mining operations.

Section 812 would require the Secretary of the Interior to conduct a study of current Federal coal royalty rates for surface mined and underground mined coal, and the valuation methodology of such coal, for the purposes of assessing whether the current Federal coal royalty system creates competitive inequities among the Federal coal producing regions and States, suppresses coal production in certain Federal coal producing regions and States, results in a loss of mineral receipts to the Federal Government and to State governments, or causes inefficiencies in Federal valuation, audit and collection activities.

Under the study, the Secretary would make findings on whether an alternative royalty system would mitigate any competitive inequities among the Federal coal producing regions and States, increase coal production in certain Federal coal producing regions and States, result in an increase in mineral receipts to the Federal government and to State governments or provide for a more efficient valuation, audit and collection program. The alternative coal royalty systems considered would be based on the value of coal measured in cents per million British thermal units, a flat cents-per-ton rate and any other methodology the Secretary deems appropriate for the purpose of the study. The Secretary would also examine the justification for establishing a separate royalty rate for

lignite coal and a separate valuation methodology for lignite coal.

Within 60 days after the date of enactment of this Act, the Secretary would publish in the Federal Register a notice detailing the scope and methodology proposed to be used in the study, and after opportunity for public comment, publish a final notice on the scope and methodology that will be used in the study. Within 2 years after the date of enactment of this Act, the Secretary would report the findings of the study, and recommendations on alternative Federal royalty systems, to the President and the Congress.

Section 813 in subsection (a) would amend section 6 of the Mineral Leasing Act for Acquired Lands to require that the disbursement of the state share of mineral receipts be made by the Secretary of the Interior on a monthly basis in the same manner as is the state-share of mineral receipts collected and disbursed from public domain lands.

Subsection (b) would amend the Mineral Leasing Act for Acquired Lands to clarify that the Secretary of the Interior has the authority to administer mineral leases located on acquired federal lands.

Subsection (c) provides for an explicit definition of the term "money" in section 7 of the Act of August 13, 1941, as including bonuses, royalties and rentals, as well as any late interest payments.

Section 814 in subsection (a) would amend section 17(b) of the Mineral Leasing Act to authorize the Secretary of the Interior to issue a non-competitive lease under subsection (c)(1) to the holder of a private lease for oil and gas to which the United States held a vested future interest if the lease was producing or was capable of producing oil or gas in paying quantities at an annual average production volume of 15 b/d of oil or condensate or less, or 60 mcf or less of gas at the time ownership to the oil and gas vests with the United States. The time frames for which an individual would be required to meet in order to elect to enter into a non-competitive lease are set forth. In addition, all terms and conditions of leases issued under section 17(c)(1) of the Mineral Leasing Act would apply to non-competitive leases issued pursuant to the amendments made by this Act.

Subsection (b) provides that the amendments made by subsection (a) apply to mineral estates which vested with the United States after January 1, 1990.

Section 815 in subsection (a) would amend section 17(g) of the Mineral Leasing Act to require that before any surface disturbing activities relating to oil and gas development take place on lands where the oil and gas rights are considered outstanding, the Secretary of Agriculture would be required to

issue reasonable regulations as may be necessary to protect the interests of the United States. These regulations would prevent or minimize damage to the environment and other resource values. Lands that would be affected by these requirements would be those lands under the administration of the Secretary of Agriculture where the United States has acquired an interest in the lands, but does not have an interest in oil and gas deposits that may be present under these lands. Lands where the United States has not, but will in the future, acquire the interest in the oil and gas that may be present under these lands are not affected.

Subsection (b) provides for the promulgation of regulations to implement the amendment made by subsection (a).

Section 816 in subsection (a) would amend Section 17 of the Mineral Leasing Act to authorize the Secretary of Interior to make available, subject to valid existing rights, lands within Naval Oil Shale Reserves 1 and 3 for oil and gas leasing.

Subsection (b) would authorize the Secretary of Interior, acting through the Bureau of Land Management, to manage the surface estate of the lands referred to in subsection (a) pursuant to the Federal Land Policy Management Act and other applicable laws.

Section 817 would amend Section 17(c)(1) of the Mineral Leasing Act to prohibit the Secretary of the Interior from issuing a noncompetitive lease if more than one qualified person applies for a noncompetitive lease under this paragraph for any unit on the first day after a competitive lease sale. The Secretary shall instead make such unit available for competitive leasing under subsection (b) at the next quarterly competitive oil and gas lease sale held by the Secretary.

Section 818 would cure a technical title problem relating to certain claims under the Act of February 11, 1897, commonly referred to as the Oil Placer Act.

Section 819 would amend the Mineral Leasing Act to prohibit the issuance of federal coal leases to any entity engaged in the production of coal in a foreign country if the coal is imported into the United States. This provision would not apply to the issuance of a coal lease which would in the reasonably foreseeable future prevent the bypass of federal coal deposits, or which would provide for the expansion of existing mining operations.

Section 820 would require the Department of Interior, acting through the Bureau of Land Management, to establish a cooperative government-private sector program to research, develop and demonstrate advanced secondary and enhanced oil recovery technologies in producing fields on public lands in order to extend the production life of a well, reduce the rate of well abandonments, and allow for the recovery of oil that is

left behind after conventional technologies have been utilized. Technologies to be included in the program would identify, select and classify reservoirs that have the highest potential for oil recovery and are on the verge of abandonment; improve reservoir characterization and management; improve waterflooding techniques to improve oil recovery; extend the economic life of the reservoir; improve analysis and field verification; demonstrate and field test advanced secondary and enhanced oil recovery processes determined by the Secretary to be high priority reservoirs; improve techniques for meeting environmental requirements, including temporary well-plugging techniques; and maximize the economically recoverable oil in a reservoir in order to prevent abandonment.

The Secretary of Interior, acting through the Bureau of Land Management, would have the authority to enter into cooperative government-private sector programs with any entity to carry out a project on non-public lands if that project was determined by the Secretary to have potential application on public lands.

The Secretary of Interior would be required to solicit proposals for the cooperative program within one year after enactment of this section.

Private sector entities would be required to cost-share all project costs on a 50/50 basis with the federal government. There would be authorized such sums as are necessary to carry out this section.

Subtitle C—Abandoned Mine Reclamation Fund

Section 821 would amend the Surface Mining Control and Reclamation Act of 1977 to extend the authority to collect reclamation fees to the year 2010 and authorize the deposit of a certain amount of reclamation fees into a Coal Industry Retiree Benefit Fund.

Subtitle D—Health, Safety and Mining Technology Research

Section 831 would direct the Bureau of Mines to develop a plan to identify the goals and objectives of the Health, Safety and Mining Technology program of the Bureau of Mines, and to guide research and technology development under the program, over each 5-year period. In preparing the plan, the Director of the Bureau of Mines shall prepare a list of all health, safety and mining technology proposals and submit them to a Health, Safety and Mining Technology Research Advisory Committee for review and recommendations. The Committee would be composed of a representative from the Mine Safety and Health Administration; a representative from the National Institute for Occupational Safety and Health; two representatives from the coal mining industry, one with exper-

disc is surface mining techniques and one with expertise in underground mining techniques; two representatives from the metal, non-metal mining industry, one with expertise in surface mining techniques and one with expertise in underground mining techniques; six representatives from unions representing miners, of which two shall have expertise in metal, non-metal mining; a representative from a school of mines with expertise in coal mining research located in the eastern portion of the United States; and a representative from a school of mines with expertise in metal, non-metal mining research located in the western portion of the United States.

Title IX—Federal Power Marketing Administrations

Section 901 amends Title II of the Hoover Power Plant Act of 1984 (42 U.S.C. 7275-76, P.L. 98-381) as follows:

Section 201 defines terms used in this title. "Integrated resource planning" means a comparison of all practicable energy efficiency and energy supply options to identify the least-cost option for providing electric service. "Least-cost option" means an option for providing electric service which will minimize life-cycle system costs, including environmental costs, of providing such service.

Section 202 requires promulgation of regulations to require integrated resource planning. Requires that WAPA amend, by regulation, its current energy conservation and renewable energy program to require purchasers of firm power under long-term contracts to implement integrated resource planning within three years of enactment. This section also requires that WAPA, within 12 months after enactment, prescribe a value, or a range of values, for the environmental costs of energy supply and energy efficiency resources to be used by WAPA firm power customers for the purposes of complying with this title.

Section 203 provides that WAPA shall provide technical assistance to utilities to conduct integrated resource planning and comply with the requirements of this title, including developing demand-side management pilot programs.

Section 204 mandates integrated resource plans. Subsection (a) provides that each purchaser shall submit an integrated resource plan to WAPA 12 months after regulations are issued. A revision of such plan shall be submitted every 3 years.

Subsection (b) provides that WAPA shall approve an integrated resource plan if it accurately compares life-cycle system costs and environmental costs for energy supply options; designates that the least-cost supply option is acquired;

and, to the maximum extent practicable, minimizes adverse environmental effects of energy supply acquisitions.

Subsection (c) provides that where a purchaser is implementing integrated resource planning under a program responding to Federal, State, or other initiatives, WAPA shall make due allowance for the incorporation of such elements within the least-cost plan required by this title.

Subsection (d) provides that each purchaser shall fully comply with its least-cost plan. WAPA shall review each purchaser's implementation of its least-cost plan at least once every 2 years to determine if the purchaser is in compliance with the plan. If WAPA finds the purchaser out-of-compliance, the Administrator shall impose either a surcharge on all power purchased from WAPA by the purchaser or a reduction in power allocation.

Subsection (e) specified enforcement provisions. Paragraph (1) provides that if an integrated resource plan for any purchaser is disapproved by the Administrator and a revised plan not resubmitted within 9 months the Administrator shall impose a surcharge of 20 percent of the purchase price on all power obtained by that purchaser. The surcharge shall remain in effect until the plan is approved. If the plan is not approved for more than one year, the surcharge shall increase to 30 percent for the second year, and to 40 percent thereafter until the plan is approved.

Paragraph (2) provides that identical surcharges shall be imposed whenever the Administrator determines that a purchaser's activities are not consistent with its integrated resource plan.

Paragraph (3) provides that in lieu of imposing a surcharge under paragraphs (1) or (2) the Administrator may reduce a utility's power allocation. If the reduction is for the first year of a violation, the reduction shall be 10 percent of the power allocation otherwise available, for the second year the reduction shall be 20 percent and for each year thereafter the reduction shall be 30 percent.

Paragraph (4) provides that any person who may be affected by the integrated resource plan of any utility may bring an action against the Administrator in federal District Court to require the Administrator to immediately approve or disapprove a plan; or impose a surcharge or power allocation whenever such surcharge is mandated in accordance with paragraphs (1), (2), and (3).

Paragraph (5) provides that any person subject to a surcharge or reduction in power allocation may appeal the imposition of such penalty within 30 days.

Subsection (f) provides that with the approval of WAPA, purchasers may form integrated resource planning cooperatives for the purposes of complying with this title.

Section 205 establishes the Central Valley Project Energy Efficiency Pilot Program. Subsection (a) provides that the Secretary of Energy, in cooperation with the Secretary of Interior, is directed to promulgate regulations whereby any entity with a long-term power service CVP contract may propose energy efficiency and conservation improvements in the CVP water delivery, power generation, transmission systems, and associated irrigation and water systems, provide all financing for such improvements, and receive 80 percent of the energy savings produced from such improvements.

Subsection (b) provides that WAPA shall receive 20 percent of any power saved from efficiency improvements.

Subsection (c) provides for energy efficiency savings. Subsection (d) specifies criteria for approval.

Subsection (e) provides that a 25-percent set-aside shall be made available to the Secretary of Interior to restore the fish and wildlife resources of the CVP.

Subsection (f) provides that the authority of this section shall expire 5 years after final regulations are issued. Contracts in place pursuant to this section shall continue in effect through the term of the contract.

Subsection (g) provides that GAO shall evaluate and audit this program not less than once every 2 years. One year prior to expiration of this authority GAO shall provide recommendations regarding whether the authority should be continued or modified in any way.

Section 206 contains miscellaneous provisions concerning environmental impact statements, regulations, annual reports, funding, and prohibition on bleeding of power prices. With respect to funding, the Administrator is required to adjust WAPA rates for the sale of electric energy to the extent necessary to cover all costs incurred under this title.

Title X—Federal Power Marketing Administration Transmission

Section 1001 contains definitions used in this title.

Section 1002 concerns application to Federal Power Marketing Administrations. Subsection (a) provides that the provisions of Federal law applicable to transmitting utilities under which such utilities may be required to provide transmission access shall be applicable to Federal power marketing

administrations in the same manner and to the same extent as such provisions are applicable to transmitting utilities except as provided in subsection (b).

Subsection (b) specifies laws applicable to the federal Columbia River Transmission System.

Section 1003 concerns state authorities.

Title XI—Energy Development on Indian Lands

Section 1101 names this title as the "Indian Energy Amendments of 1992".

Section 1102 defines the terms "Indian tribe", "Indian reservation", and "Secretary" for purposes of this title.

Section 1103(a) stipulates that while implementing the various provisions of this Act the Secretary of Energy must include Indian tribes to the maximum extent possible consistent with the Federal trust responsibilities to Indian tribes.

Subsection (b) provides that the Secretary of Energy may treat an Indian tribe the same as a state wherever appropriate under the provisions of this Act.

Section 1104(a) provides that the Secretary of Energy shall consult with the Secretary of the Interior to establish a demonstration grant program for tribes and Alaska Native Organizations. The grant program shall assist tribes and Alaska Native Organizations in becoming energy self-sufficient and in developing vertically integrated enterprises on reservations. Vertically integrated enterprises may include the exploration, extraction, preparation, and transportation of resources. Grants shall be used by tribes to develop managerial and technical expertise. Grants may be awarded to tribes or joint ventures where tribes control at least 51% of the joint venture.

Paragraph (2) of this subsection provides that the Secretary shall provide matching grants not to exceed 50% of the cost of a vertical integration project. Projects may include solar and wind energy, oil refineries, cogeneration, generation and transmission of electricity, and clean, innovative uses of coal.

Paragraph (3) of this subsection provides that the Secretary of Energy will make technical assistance available to tribes and Alaska Native Organizations.

Subsection (b) provides that the Secretary of Energy shall establish a low interest loan program for tribes and Alaska

Native Organizations to assist in energy resource exploitation, development, and vertical integration.

Subsection (c) authorizes that \$10 million be appropriated for each of the grant programs established in subsection (a)(1) and subsection (a)(2) of this section for fiscal years 1994, 1995, and 1996. It further authorizes such sums as may be necessary to carry out subsection (b).

Section 1105(a) authorizes the Secretary of Energy to make annual grants to tribes and Alaska Native Organizations to assist them in the development and implementation of tribal laws and regulations regarding the development of energy resources on reservations.

Subsection (b) provides that development grants may be used for training and education of employees, tribal resource inventories, and the monitoring and enforcement of laws and regulations.

Subsection (c) stipulates that the Secretary of Energy shall assist tribes and Alaska Native Organizations with energy development, administrative, and enforcement projects including training and technical assistance including the preparation and maintenance of a tribal energy resource inventory.

Subsection (d) authorizes \$10 million to be appropriated for the purposes of this section for fiscal years 1994, 1995, and 1996.

Section 1106 amends Section 710 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1300) to provide that the Secretary of Interior make grants available to the Navajo, Hopi, and Crow tribes in order to establish a tribal office of surface mining regulation. Each office shall develop regulations, assist the Office of Surface Mining Reclamation and Enforcement in its activities related to tribal lands, and provide employment training.

Section 1107(a) establishes the Indian Energy Taxation and Royalty Management Commission.

Subsection (b) stipulates the membership of the 15 member Commission.

Subsection (c) provides that members to the Commission shall be appointed within 60 days of enactment of this title.

Subsection (d) sets out the process for filling a vacancy on the Commission.

Subsection (e) provides that the members shall elect a Chairperson from the membership.

Subsection (f) provides that 7 members shall constitute a quorum.

Subsection (g) provides that the Commission shall hold an organizational hearing within 30 days after all the members have been appointed.

Subsection (h) sets out the compensation for members of the Commission.

Subsection (i) provides that Commission members shall be allowed travel expenses including per diem when in the performance of the duties of the Commission.

Subsection (j) provides that the Commission shall appoint an Executive Director, who may hire additional personnel within the approval of the Commission. In addition, the Chairperson of the Commission may hire experts and consultants on a temporary basis.

Subsection (k) specifies the duties of the Commission which are to develop proposals to address dual taxation issues, to recommend improvements to the management and administration of royalties, and to generate new proposals for the collection and distribution of royalties.

Subsection (l) sets out the powers of the Commission including its ability to take and receive testimony.

Subsection (m) provides that a report is to be submitted to the President, the House Committee on Interior and Insular Affairs, the Senate Select Committee on Indian Affairs and the Senate Committee on Energy and Natural Resources within 12 months.

Subsection (n) authorizes \$2 million be appropriated to fund the Commission and allows that these funds be available until expended regardless of fiscal year limitations.

Subsection (o) provides that the Commission shall terminate within 30 days after submitting the final report.

Title XII—Insular Areas Energy Security

Section 1201 would amend an authorization contained in a 1980 omnibus insular areas act to provide for appropriations of \$1,000,000 annually for grants to all insular area governments for projects that would reduce dependence on imported fuels. It would expand the current authorization (which relates to projects identified in a 1982 Energy Department report) to cover any projects deemed to be worthwhile by the Secretary of Energy. This provision is identical to a provision

passed by the House on October 27, 1990 and June 20, 1991 except that this authorization would be for \$1 million annually rather than \$300,000 a year.

Section 1202 would remove the insular areas associated with the United States from those "states" with which the Nuclear Waste Negotiator may negotiate when seeking a site to which nuclear wastes may be shipped.

Section 1203 would recognize the insular areas' special vulnerability to disruptions in the nation's oil supply, and addresses this by ensuring that:

(i) If an insular area's competitive bid for a supply of oil fails, that insular area would be able to obtain the required quantity of oil at the average price of the competitive bids that were successful;

(ii) When an insular chief executive certifies that there is a critical shortage of oil in the insular area, that area's vessel will, unless the Secretary of Energy disagrees, be loaded ahead of other vessels at the delivery line of the Strategic Petroleum Reserve.

(iii) Insular areas may decline to accept an offer from the Strategic Petroleum Reserve if the oil offered is less than half a tankerful because it would be too expensive to ship. Similarly, if the amount offered is more than half a tankerful, the insular area has the right to request a full tankerful since this would minimize the shipping cost; and

(iv) the Secretary has the right to limit the quantity of oil shipped to any insular area to 1/12 of the total oil imports (not including exports) of that insular area during the previous year.

Section 1204 would require a plan from the Secretary of the Interior, outlining how the electricity needs of Palau will be met, and how any debt for Palau's IPSECO power plant will be eliminated.

Title XIII—Federal and State Lands

Section 1301 is similar to a 1988 bill approved by the Interior Committee that died in the 100th Congress. It would amend FLPMA to clarify that BLM and the Forest Service are responsible for issuing and conditioning any necessary rights-of-way related to hydroelectric or other electric power projects involving public or National Forest lands, to make clear which agency is to have lead responsibility in cases involving lands managed by more than one agency, and to encourage coordination among agencies with regard to the timing of review of aspects of projects involving more than one agency.

Section 1302 would prohibit new dams in National Park System units or that would inundate lands in that System. This prohibition is similar to provisions passed by the House in 1987 on which the Senate did not complete action. It would prohibit any new dams that would be located on or that would flood any lands within the National Park System, except National Park Service projects necessary for park purposes. Subsection (c) would resolve a current dispute concerning possible relicensing of existing dams involving National Park System units by making it clear that any such relicensing could occur only with the concurrence of the Secretary of the Interior.

Section 1303 provides that Federal agencies are required to obtain permission from State and/or local government entities prior to authorizing the transfer out of State and/or local government ownership any property to be used for a new hydroelectric project without the approval of the state or local government involved.

Section 1304 provides that Federal agencies are prohibited from licensing new hydroelectric power projects on any river segment in a State which: 1) has enacted a statutory provision prohibiting the development of new hydroelectric projects on such river segment; and, 2) has described the protection of such river segment in the State Comprehensive Outdoor Recreation Plan.

TANK VESSEL CARRIED EQUIPMENT (WG#1)

PROPOSED TERMS OF REGULATIONS

Section XXX.00 CARRIAGE OF DISCHARGE REMOVAL EQUIPMENT AND OTHER
EMERGENCY CAPABILITIES

Section XXX.01 CONTAINMENT AND CLEANUP OF ON-DECK SPILLS

A. Tankers, [ocean-going and coastal tank barges] shall be fitted with a deck-edge coaming suitable and sufficient to contain small spills of cargo on deck. The height and location of the coaming and barrier shall be sufficient to contain a small spill (as identified in paragraphs B.1 & B.2 below) with the vessel on an even keel.

B. Tankers, ocean-going tank barges and coastal tank barges shall carry equipment and supplies for the containment and removal of on-deck oil cargo spills.

- 1) For vessels whose overall length is equal to or greater than 400 feet, such equipment and supplies shall be sufficient to contain and remove oil cargo spills of at least 12 barrels.
- 2) For vessels whose overall length is less than 400 feet, such equipment and supplies shall be sufficient to contain and remove oil cargo spills of at least 7 barrels.

- C. The equipment and supplies set forth in Section B above shall include, as a minimum, the following items:
- 1) Sorbents
 - 2) Non-sparking hand scoops, shovels, and buckets
 - 3) Containers suitable for holding recovered waste,
 - 4) Emulsifiers for deck cleaning and
 - 5) Appropriate protective clothing.
- D. Tankers, ocean-going tank barges, and coastal tank barges shall carry non-sparking portable pump(s) and hoses suitable for pumping spilled cargo from the deck of the vessel. The pump(s) shall be rigged before any cargo transfer operations begin and remain ready for immediate use during transfer operations.
- E. Inland river tank barges shall have resources in place before and during cargo transfer operations to control and remove on-deck oil cargo spills of at least one barrel. Such equipment and supplies need not be carried on the barge but must be immediately available during any cargo transfers.

Section XXX.02 INTERNAL CARGO TRANSFER CAPABILITY

- A. Tankers, ocean-going tank barges, and coastal tank barges shall carry suitable hoses and reducers for internal transfer of cargo to tanks or other spaces within the cargo block, unless the vessel's installed cargo piping system is sufficient for such purposes.
- B. Inland river tank barges are not required to carry such equipment.

Section XXX.OX EMERGENCY LIGHTERING PLAN (to be included in the VRP regulations as opposed to the tank vessel carried equipment regulations).

- A. Every tanker shall have a Lightering Plan. The format and content of the plan shall be consistent with the Ship to Ship Transfer Guide published jointly by the International Chamber of Shipping (ICS) and Oil Companies International Marine Forum (OCIMF). The plan shall also include the recommended operational check lists, and a station bill clearly identifying the responsibilities and duties of all involved personnel.
- B. The Lightering Plan shall identify the availability and location, and include the appropriate telephone or telefax contact numbers, of the following:
1. Suitable fendering equipment,
 2. Transfer hoses and connection equipment,
 3. Portable pumps and ancillary equipment,
 4. Lightering and Mooring Masters,
 5. Vessel and barge brokers.
- C. Planned equipment availability should not be confused with actual mobilization performance. Planning for mobilization of necessary lightering resources, however, should consider foreseeable constraints which might delay mobilization. Vessel owners must plan for on-scene arrival of lightering resources as identified in (B)(1) to (B)(3) within the following requirements:

Inland and nearshore waters	12 hours
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Offshore waters	18 hours
Ocean waters	36 hours

COAST GUARD COUNSEL'S COMMENT. Concern has been expressed by one member of the Committee about the need for onboard carriage of submersible pumps. Not all response equipment must be carried aboard the vessel, only that which is practicable. The proposed regulations would require carriage of sorbents, scoops, etc. to remove on-deck spills. It is also proposed that an emergency towing package be carried aboard tankers. Pumps may be carried upon the response vessel and still satisfy the requirement of 4202(a)(6).

Section XXX.04 EMERGENCY TOWING CAPABILITY

- A. Ocean-going and coastal tank barges shall carry an emergency tow wire or line rigged and ready to be used.
- B. The NPRM shall propose two options pertaining to tankers for public comment. The options are listed as OPTION #1 and OPTION #2 as follows:

OPTION #1

- 1. Tankers shall comply with the recommendations of IMO Resolution A.535(13) with regard to provision of strong point, fairlead, chafing chains and fittings to facilitate passing the towing pendant from the rescue vessel using the rescue vessel's power.
 - a. All tankers 50,000 dwt and greater shall be fitted with emergency towing arrangements at the bow and stern within 3 years of the date of this regulation.
 - b. All tankers between 20,000 dwt and 50,000 dwt shall be fitted with emergency towing arrangements on at least one end of the vessel within 3 years of the date of this regulation.

2. The PREAMBLE of the proposed regulation shall include language that promotes the evaluation and eventual (within 2 years) design of an emergency towing package which will facilitate the rescue vessel's taking the tanker under tow with a minimum of crew involvement in deployment. The evaluation is to include considerations for maintenance and the costs and requirements for retrofitting. The language will propose that IMO reissue Resolution A.535(13) with any new requirements that IMO agrees upon.
3. Existing vessels at least 20 years of age shall be exempted from this requirement for 5 years from the effective date of this regulation.

OPTION #2

1. Tankers shall comply with the recommendations of IMO Resolution A.535(13) with regard to provision of strong point, fairlead, chafing chains and fittings to facilitate passing the towing pendant from the rescue vessel using the rescue vessel's power. All tankers 20,000 DWT and above shall comply within 3 years of the date of publication of this regulation.
2. The U.S. Coast Guard, in conjunction with the United States shipping and towing industries, and the international shipping and towing industries undertakes to evaluate arrangements for stowage and deployment of towing pendants, and within 18 months will promulgate a minimum design specification taking into account the following factors:

- a. On at least one end of the vessel, a system to enable storage and deployment of an emergency towing arrangement on a vessel without power.
 - b. With chafing chain pre-rigged, or system designed for deployment of chafing chain without crew physically handling.
 - c. A typical pendant wire of approximately 400 feet (120 meters) of 2½ to 3 inch (64 mm to 76 mm) diameter 6 x 37 to 6 x 41 extra improved plow steel, IWRC, galvanized.
 - d. A 600 foot (183 meter) messenger line with pick-up buoy.
 - e. The design must allow for the chafing chain and pendant wire to be pre-connected.
 - f. System designed so that deployment in an emergency, on a vessel with no power (deadship), requires no more than three individuals.
3. Once the minimum design specification has been promulgated, an approved system is to be fitted to all new tankers of 20,000 tonnes dwt and above. The system should also be fitted to existing tankers of 50,000 tonnes dwt and above within three years.
 4. The Coast Guard, supported by the involved shipping and towing industry, will forward a minimum design specification to the International Maritime Organization with the proposal that IMO Assembly Resolution A.535(13) be updated and re-issued to include the recommendations for pendant wire carriage arrangements.

5. Existing vessels at least 20 years of age shall be exempted from this requirement for 5 years from the effective date of this regulation.
6. Existing arrangements, such as those for TAPS-trade vessels to be "grandfathered".

Section XXX.05 DAMAGE STABILITY CALCULATION PROGRAMS

- A. Owners or operators of tankers, ocean-going tank barges and coastal tank barges shall have prearranged, prompt access to onboard or shore-based damage stability and residual structural strength calculation resources. Vessel baseline strength and stability characteristics must be pre-entered into such programs. Access may be maintained through shoreside communications.

XXX.06 TANK VESSEL-CARRIED SPILL TRACKING DEVICE

- A. The Preamble to the rule will recommend that the USCG R&D Center, Groton, undertake and complete research, development and evaluation, within 2 years of the date of this rule, of a suitable design and use of a simple spill tracking device, acceptable for Coast Guard approval, to facilitate location of the leading edge of an oil spill by a first response vessel, even in darkness and adverse weather. The preamble will recommend the use of OPA funds for this research.
Information provided by the Cook Inlet RCAC relative to a oil spill tracking device will be provided to the U.S. Coast Guard Research and Development Center for evaluation in the research and development process.

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- B. No later than 3 years after the date of this rule, tank ships and ocean-going tank barges shall carry such a Coast Guard approved device for deployment at the time of a spill if such a device is proven reliable. Tank vessels would be required to carry spill tracking device(s) as approved by the Coast Guard.

REGULATORY LANGUAGE

Sec. XXX.00 Contractor Approval

(a) This section defines the process for approval of response contractors.

(b) Contractor approval does not in any way relieve the plan holder of the plan holder's responsibility to carefully evaluate and select competent contractors.

(c) It is recognized that the capability needed in a particular response will vary, involving dozens of factors, some of which cannot be accurately measured or predicted. For evaluation and quantification purposes, assumptions must be made regarding these factors. Many of these assumptions may not prove accurate or valid in any particular spill response. Many assumptions also are beyond the control of a particular responder. Accordingly, this regulation carefully avoids any intimation that various planning assumptions or response values are, or ever should be, viewed as performance standards.

(d) **Definitions.** For purposes of sections XXX.01-.05, the terms below shall have the following meanings:

(i) **"Approval"** means the process by which the President's designee will verify a contractor's oil spill response services, including the related inventory of available spill response equipment and personnel and its management in order to facilitate the statutory requirement for the President's designee to approve or disapprove tank vessel and facility response plans.

(ii) **"Letter of Approval"** means the final document issued following verification, inspection and final review by the reviewer.

(iii) **"Interim status letter"** means the letter sent by the reviewer to the contractor pending verification of the factual information contained in the application and an in-depth review of the contractor's application for purposes of approval.

(iv) **"President's designee"** means the federal official delegated responsibility by the President under OPA-90 for approval of response plans. Pursuant to the authority delegated in Executive Order 12777 (56 FR 54757) and 49 CFR 1.46.m the authority to review and approve or disapprove tank vessel response plans is assigned to the Commandant of the Coast Guard. The

Commandant has delegated responsibility for approval of response contractors to various reviewers under this rule.

(v) "Response contractor" means any person or persons who provide designated response equipment and services, individually or in combination with subcontractors or associated contractors, under contract or other means approved by the President directly to an owner or operator of a tank vessel or facility required to have a response plan under 33 U.S.C. 1321(j)(3). Response contractors must have the ability to mobilize and deploy their identified resources. Persons solely warehousing or storing equipment are not response contractors.

(vi) "Reviewer" means: (1) in the case of a response contractor seeking approval in a single COTP zone, the COTP; (2) in the case of a response contractor seeking approval in more than one COTP zone, but only one Coast Guard District, the District Commander; and (3) in the case of a response contractor seeking approval in more than one Coast Guard District, the Chief of the Office of Marine Safety, Security and Environmental Protection.

(vii) "Evaluation" means the process whereby the Coast Guard evaluates a response contractor and assigns a value to that contractor's resources for purposes of estimating the response capability which may be credited toward a planholders total response requirement in the Coast Guard review of response plans for approval or disapproval.

(viii) "Mobilization time" means the time in which initial personnel are able to begin movement of response resources to the spill scene.

Sec. XXX.01 Contractor Approval Application Content

(a) **Required Information.** A person desiring to be a response contractor must file an application that contains at least the following information:

(i) Contractor's name, mailing address and phone number;

(ii) The specific response services being offered for approval;

(iii) The port area location(s) of all spill response resources, and the areas in which spill response services using each resource is being offered;

- (iv) List the number(s) and type(s) of oil spill removal equipment and trained personnel, including subcontracted resources, for whom the applicant had contractual responsibility during the most significant oil spills (up to ten).
 - (v) List the number(s) and type(s) of oil spill removal equipment and trained personnel, including subcontracted resources, for whom the applicant had contractual responsibility during the most recent oil spill drills (up to five).
 - (vi) An organizational diagram depicting the chain of command;
 - (vii) A call-out list for the contractor's resources, and a description of the call-out procedure;
 - (viii) For each type of service, the types of oil to which the contractor is willing and able to respond;
 - (ix) For each type of service, the planned mobilization time for that resource; and
 - (x) For each type of service, limitations on the circumstances under which that service may be offered.
- (b) **Equipment.** For each type of service, the specific significant equipment available to be applied to that service, including:
- (i) Type, quantity, and port-area location;
 - (ii) Whether the equipment is owned or under contract;
 - (iii) If the equipment is contracted from another party, the application must identify:
 - (A) the equipment's port area location and area of operation; and
 - (B) the contractual terms regarding availability of the equipment to the contractor.
 - (iv) A statement of the maintenance program for such equipment;
 - (v) Confirmation of the availability of operators required to operate the equipment over a sustained response (i.e., 30 days);
 - (vi) For each piece of equipment, a description of: the make, type by design, size by design, and applicable design limits (e.g., suitability for different types of oils and operating environments, as related to adverse weather);

(vii) A description of contractor's communications equipment, including the amount and frequencies and number of certified operators, where applicable;

(viii) For any equipment not located in the COTP zone/Port Area for which approval is sought, attestation that the equipment is transportable and available for use in a response;

(ix) A description of the readiness for mobilization of response resources and whatever further description is necessary to attest to the contractor's ability to mobilize, deliver, and deploy response resources.

Equipment shall be listed only if it is in a fully operable condition. Future equipment, ordered but not yet delivered and fully operable, may be listed, but it must be listed and identified separately with its date of availability indicated.

(c) **Personnel.** For each category of personnel identified as a spill response resource, the application shall, for each location:

(1) list by job category;

(2) match to the equipment list and the services offered, including the plan for mobilization of personnel;

(3) list training and qualifications, including OSHA Hazardous Operations training, the number of trained supervisors and laborers, and how additional personnel are planned to be trained within what timeframe if they will be required to meet the service listed.

The application shall also list the total personnel available.

(d) **Management.** The application shall identify the management associated with the service(s) offered. This capability should include a discussion of spill response training and experience, regulatory awareness and compliance, and supervision.

(e) **Service-specific information.** In addition to the general information described above, the applicant must submit the following service-specific information, as applicable to the service offered:

(i) **Boom control/containment/protective booming services**

- (A) Describe the platforms for deployment (i.e. number/type); and,
- (B) Type and amount of equipment (e.g., 2000' of offshore boom/vessel).

(ii) On-water recovery services

- (A) recovery platform (for owned-vessel and vessel of opportunity recovery systems):
 - (1) name of vessel;
 - (2) size/class;
 - (3) location; and,
 - (4) contract terms of availability.
- (B) skimming (on-water) recovery system:
 - (1) type by design;
 - (2) size by design;
 - (3) manufacturer's nameplate capacity; and
 - (4) applicable design limits (e.g., suitability for different types of oil and different operating environments, as related to adverse weather).
- (C) personnel trained to operate the equipment:
 - (1) position description; and
 - (2) training or experience.

(iii) Shoreline remediation services

- (A) number of persons available for beach cleanup who are currently trained
- (B) the process by which additional people can be trained and the number of people who can be trained in what timeframe
- (C) description of supplies/support for beach cleanup
- (D) Other removal equipment (i.e. shallow water skimmers, beach cleaners, etc.)

(iv) Transfer/storage services

- (A) type and capacity of storage/transfer facilities (MATCH TO SKIMMING CAPACITY)

(f) **Attestation.** A responsible corporate official of the contractor shall sign the application, affirming that the factual information contained in the application regarding the capabilities described in paragraphs (a)-(e) is, to the best of his knowledge and belief, true and accurate as of the time of signing.

(g) **Agreement for Inspection and Participation in Drills to Validate Approval.** The contractor shall state that the

contractor agrees to submit to inspection and verification of the designated capability cited in the application. The contractor also agrees to make itself available to participate in drills as reasonably necessary to verify the contractor's application.

(h) **Self assessment.** A response contractor may submit with the contractor's application any other information which the applicant believes may be of use to the Coast Guard in evaluating the applicant's services. The Coast Guard may assign a value to that contractor's services for purposes of informing response plan preparers of the credit that the Coast Guard expects to give for that contracted service in its review of the response plan.

(i) **Mobilization.** The contractor shall state the time for initial mobilization of its resources.

Section XXX.02 Contractor Approval Application Procedure.

(a) **Filing address.** Applications must be filed with the appropriate reviewer. The addresses are as follows:

(provide filing addresses)

(b) **Time for Filing.** Applications may be submitted at any time after adoption of this paragraph.

Section XXX.03 Contractor Application Review

(a) **Review for completeness.** Upon receipt of a response contractor approval application, the reviewer shall promptly evaluate the application for completeness. If the application is not complete, the reviewer shall return the application promptly, identifying the deficiencies in the application.

(b) **Review for interim status.** An application shall be reviewed within 45 days of receipt of a complete application. The reviewer shall send an interim status letter within 5 days of completion of a review. If, at a later time, the reviewing agency determines that the terms of the interim status letter should be limited, it shall so notify the contractor, who shall be given a reasonable time to provide acceptable numbers or types of response resources.

(c) **Review for approval.** Following inspection and review of any drills or exercises, or information from other sources as necessary to verify the application and complete a detailed review of the application, the reviewer shall either approve or disapprove an application, in accordance with the standards in paragraph (d). Approval may be denied

if information in the application is false, or if the contractor fails to meet the approval criteria for approval of any services.

(d) Following initial review, or at any time thereafter, including after approval, the reviewer may advise the response contractor in writing of the value of the contractor's service as it relates to response plan requirements. The contractor or the Coast Guard may provide this advice to plan preparers to assist them in assembling sufficient response resources to meet their planning obligation in a particular area. The value assigned will reflect:

- (1) location of the response resources;
- (2) type of service(s) provided;
- (3) the quantity of these service(s); and
- (4) personnel and equipment resources.

(e) **Standards for review.** Letters of approval shall be issued to response contractors subject to the following conditions:

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

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

(f) **Inspections of Certified Equipment.** To ensure that approval standards are maintained, the Coast Guard or its designee shall verify, by site inspection, that equipment and personnel resources are available, operable and maintained. Such inspections may be random but must occur at least once every three years.

Section XXX.04 Appeals and Notices

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

(b) **Notice of Significant Reduction in Contracted Resources.** The reviewer shall identify significant reductions in specific equipment, personnel or management that require notification to the COTP where the equipment or

personnel are located. An approved response contractor must provide notice to the COTP of such reductions in advance, if planned, or within 24 hours of becoming aware of such change, if unplanned. This notice may be oral, followed by writing within a reasonable time, or in writing, by facsimile or letter. The reviewer will maintain and make available to the contractors and plan holders detailed guidance on the types of changes that require notification.

Section XXX.05 Renewal and Revocation

(a) Renewal.

(1) Approval shall be for a period of 5 years. A contractor must file an application for renewal prior to the expiration of the approval. The contractor shall remain approved until the reviewer acts on the application.

(2) Approval may be renewed at the request of the contractor in the event of sustained and significant increase or decrease in response resources.

(b) Revocation. Failure to comply with the requirements of approval may result in revocation or suspension of the letter of approval. Examples of such failure may be fraudulent self-attestation or other failure to comply with the conditions of approval as identified in Sections XXX.00 through XXX.05. (Exact procedure to be added).

DRAFT LANGUAGE TO IMPLEMENT ADVERSE WEATHER/ EQUIPMENT
CAPABILITY FOR PLANNING¹

1. For the purposes of determining the recovery capacity of skimming equipment for response plan credit, the following method will be used. This method takes into account potential limitations in effectiveness due to the daily operating period, weather, sea state, and other variables to determine a daily recovery rate for credit in a vessel response plan or contractor approval. The Coast Guard may assign a lower efficiency factor to particular equipment listed in a plan if it determines that the performance of that equipment warrants such a reduction.

$$R = T \times 24 \text{ hours} \times E$$

R - Effective daily recovery rate
T - Skimmer pump or belt throughput rate in barrels per hour (nameplate capacity)
E - 20% Efficiency factor

2. As an alternative to the above method, the vessel owner/operator or contractor can submit adequate evidence that a higher effective daily recovery rate should be credited for a specified piece of oil recovery equipment. Adequate evidence is actual verified performance data in spill conditions or tests using ASTM Standard F 631-80, F 808-83 (1988), or any other equivalent test procedure that is determined by the Coast Guard as the result of public notice and comment. The following method will be used to calculate the effective daily recovery rate using this alternative:

$$R = D \times U$$

R - Effective daily recovery rate
D - Average Oil Recovery Rate in barrels per hour (Item 26 in F 808-83; Item 13.1.15 in F 631-80; or actual performance data)
U - Hours per day that vessel owner/operator or contractor can document capability to operate equipment in spill conditions.²

¹ This information, would be included either in regulatory text, preamble explanation, or Coast Guard guidance document as appropriate.

² Ten hours per day will be used to calculate the effective daily recovery rate unless a vessel owner/operator can demonstrate that the recovery operation can be sustained for more than 10 hours per day.

3. In addition to submitting information on the make and model and effective daily recovery rate (if applicable) of the equipment, the vessel owner/operator or contractor shall submit information that categorizes the operating environment that the equipment is designed to successfully perform it's mission and be safely operated by personnel. The following criteria will be used for this categorization (extracted largely from Schultz catalog with some modifications).

SKIMMERS

<u>Operating Environment</u>	<u>Significant Wave Height*</u>	<u>Sea State</u>
River	< 1 foot	1
Inland	< 3 feet	2
Ocean	< 6 feet	3-4
Great Lakes	< 4 feet	2-3

*Note: The significant wave height figures above are intended to classify skimmers by distinguishing the range in which they are intended to operate. Thus the skimmers designed to operate in the ocean environment are intended to operate in wave heights ranging from 3-6 ft.

BOOM

<u>Boom Property</u>	<u>Use</u>			
	<u>River</u>	<u>Inland</u>	<u>Great Lakes</u>	<u>Ocean</u>
Significant Wave Height	<1	<3	<4	<6
Sea State	1	2	2-3	3-4
Boom height - in.*** (draft plus freeboard)	10-18	18-42	XX-XX	>42
Reserve Buoyancy to Weight Ratio	2:1	2:1	XX***3:1 to 4:1	
Total Tensile Strength - lbs.	4,500	15-20,000	XX***	>20,000
Skirt Fabric Tensile Strength - lbs.	200**	300**	XX***	500**
Skirt Fabric Tear Strength - lbs.	100**	100	XX***	125

**Note: For rivers (calm water) these values are somewhat arbitrary, however even for general use in rivers (calm water), the skirt material should be relatively strong.

***Note: No Committee recommendation. To be determined by Coast Guard.

4. In addition to the operating environment criteria indicated above, the vessel owner/operator or contractor shall certify that the equipment is designed to operate in the ice, debris, temperature, and weather-related visibility conditions identified as significant by the Area Committee/Area Plan.

5. The term adverse weather must still be defined for the purposes of the regulation. Recommended definition:

"Adverse weather means the weather conditions that will be considered when identifying response systems and equipment in a response plan for the applicable operating environment. Factors to consider include significant wave height as specified in 155.xxx and ice, temperature, weather-related visibility, and currents for the Area that the systems or equipment are intended to function."

6. The definition of the geographic areas are as follows. The definitions apply for Adverse Weather/ Equipment Capability.

(a) *Open ocean* means the area greater than 50 nautical miles from the shoreline. It is recognized that operations in this area will pose a lower risk to the nation's coastline and that an accident occurring within this area will require a greater time for response. Vessels operating at least 50 miles out are given credit for these operations and have lesser requirements for removal equipment capacity.

(b) *Offshore* area means the area 12 to 50 nautical miles from the shoreline. This area would have the next level of requirement for response capability.

(c) *Nearshore* area means the area 0-12 nautical miles from the shoreline. Due to prevailing tides, winds, and currents, this area poses a greater risk of spilled oil coming ashore. For on-water removal to be effective, a quicker response time will be required. Further, because a greater volume of spilled product may hit the shore, lesser amounts of the product are presumed to be lost to the environment, and a greater shoreline capacity must be demonstrated.

(d) *Ocean* means the area >0 miles from the shoreline which includes the open ocean, offshore area, and nearshore area.

(e) *Inland* area means the area shoreward of the boundaries defined by 46 CFR Part 7, except for the boundaries in the Gulf for Mexico which are defined in 33 CFR §§ 80.740 - 80.850. Inland area includes bays, harbors, estuaries, inland lakes, or other protected shoreline environments except for the Great Lakes and rivers and canals.

(f) Rivers and canals means confined bodies of water within³ the inland areas that have a controlling navigable draft of [12] ft. or less, including the Intracoastal Waterway and other waterways artificially created for navigation.

(g) Great Lakes means the Great Lakes and their connecting and tributary waters including the Calumet River as far as the Thomas J. O'Brien Lock and Controlling Works (between mile 326 and 327), the Chicago River as far as the east side of Ashland Avenue Bridge (between mile 321 and 322), and the Saint Lawrence River as far east as the lower exit of Saint Lambert Lock.

7. Vessel owners and operators must identify response equipment that is designed to operate in the operating environment specified for the applicable geographic area that the vessel will operate. The Captain of the Port may reclassify specific water bodies or locations within the COTP zone to a more stringent operating environment if the prevailing wave conditions exceed the significant wave height criteria over [XX%]³ of the year. The Captain of the Port may also reclassify specific water bodies or locations within the COTP zone to a less stringent operating environment if the prevailing wave conditions are less than the significant wave height criteria over [XX%]³ of the year. The preamble will note that the Captain of the Port will identify any waterbodies within the COTP zone that will be reclassified within 3 months of the publication of the final rule. Any such reclassification will also be identified in the applicable Area Contingency Plan. For example, Prince William Sound, although classified as an inland area, could be reclassified by the COTP as an ocean area for the purposes of identifying response equipment if the prevailing significant wave heights exceeded 3 feet over [XX%]³ of the year.

8. The operating environment criteria specified are intended for use solely for identification of appropriate equipment in response plan development and evaluation. These criteria only reflect conditions that would limit the use of certain mechanical response equipment and are not conditions that would necessarily limit response actions or affect normal vessel operations.

³ To be determined by Coast Guard and subject to notice and comment.

FINAL REPORT
APPLICABILITY OF REQUIREMENTS TO VARIOUS TYPE TANK VESSELS
MARCH 18, 1992

Workgroup #5 was established by the Negotiated Rulemaking Committee to address the legal application and scope of response plan requirements for non-petroleum oil carriers and for vessels that are not carrying oil as primary cargo, in bulk. This workgroup assumed its charge in recognition of the fact that the definition of "tank vessel" under 46 U.S.C. § 2101 would be decided ultimately in a legal determination by the Coast Guard.

The final product of the workgroup (Appendix A) is a proposal for preamble language to govern the applicability of vessel response plan requirements to certain types of vessels. The document is based upon and reflects a synthesis of the concepts developed by the workgroup as summarized in the interim reports provided at each meeting. It is important to note, that because there was concern by a number of parties that the workgroup was exceeding the scope of its directive, the workgroup agreed to refrain from addressing any further vessels considered to be primary carriers of oil cargoes (i.e., tankers and tank barges).

Furthermore, it should be noted that the all representatives of state governments and environmental organizations on the Committee have expressed no objection to excluding fishing vessels, tugs, offshore supply vessels and other vessels subject to the provisions of 46 CFR 30.01-5, from the definition of "tank vessel" under OPA-90. However, in keeping with the spirit of OPA-90, it was agreed that technical amendments, consistent with the vessel response plan requirements for secondary carriers of oil set forth in Section XXX. 01 (B) of the proposed preamble language, as attached, should be effected to 33 CFR Part 151 for these vessels.

Items of Consensus¹

Recognition of the importance of vessels, other than tankers and tank barges, not being defined as a "tank vessel"; and recognition that a requirement for certain types of vessels to maintain response plans may be appropriate and that this requirement in and of itself is not in dispute.

Recognition that response plan requirements should be based on the potential for risk to the environment and that such risk can be determined by the type and quantity of oil being carried in bulk as cargo.

¹ See also pages 3 & 4.

All vessel response plans must address the requirements outlined and as mandated by OPA. However, it is recognized that the stringency of these requirements can be varied and should increase with risk posed to the environment.

The concept of vessels carrying oil as primary cargo versus vessels carrying oil as secondary cargo.

The concept that a vessel constructed or adapted to carry oil should not be required to maintain a response plan unless that vessel is actually carrying oil as cargo by virtue of an endorsement or otherwise.

Vessel types identified for potential reduced plan requirements/exclusion: fishing vessels, fishing tenders and processors, cargo ships, tugs, response vessels, offshore supply vessels, passenger vessels, ready reserve fleet.

Vessels of opportunity, dedicated response vessels when operating in the response area, and public vessels should not be required to maintain response plans.

Other Considerations

In the full Committee meeting of January 9-10, 1992, the Coast Guard gave a brief overview of Annex I, Chapter IV, Regulation 26 of the International Convention for the Prevention of Pollution From Ships (1973), as modified by the Protocol of 1978 (MARPOL). At that time, it was indicated that the Coast Guard would like compliance with "Regulation 26" to signify compliance with a part of OPA 90. This idea was not addressed by the Workgroup.

STRINGENCY OF PLAN ELEMENTS
FOR VESSELS NOT CARRYING OIL AS PRIMARY CARGO, IN BULK

Key

A=Category of vessel (< 100 bbls)
B=Category of vessel (101-1,000 bbls)
C=Category of vessel (1,001-5000 bbls)
N=Operator required to give notice of change
X=Coast Guard approval of change required

1. Notification List

A-Notify the National Response Center/State/EPA
B-Notify the National Response Center/State/EPA
C-Notify the National Response Center/State/EPA

2. Qualified Individual

A-Must name
B-Must name
C-Must name

3. Drills

Vessel Personnel

A-annually
B-quarterly
C-quarterly

Company Drills

A-biannually
B-annually
C-annually

4. Training

A-Initial training when assigned & drills as specified
B-Initial training when assigned & drills as specified
C-Initial training when assigned & drills as specified

5. Testing of Equipment (covered by other workgroup)

6. Resource Available

A-Formal contract not required
B-No agreement
C-No agreement
Agreed no contract required for offshore and ocean areas

7. Response Management
(Levels of readiness)
 - A-Responsible party or contractor (local resources only)
 - B-Responsible party or contractor (local resources only)
 - C-Regional response effort
8. Procedures
 - A-Notification and basic emergency action checklist
 - B-Description of damage control, cargo control, actions to mitigate
 - C-Detailed description of damage control, cargo control, actions to mitigate
9. Consistency with NCP/ACP
 - Applies to all vessels equally
10. Periodic Update
 - A-Vessel certificate renewal
 - B-Vessel certificate renewal
 - C-Vessel certificate renewal
11. Resubmit
 - Every five years or when significant changes occur requiring C.G. approval
 - Major changes include:
 - Vessel configuration for vessels A-C
 - Major cargo system (N)
 - Cargo capacity or layout (X)
 - Capabilities (X)
 - Operating area
 - A & B vessels (N)
 - C vessels (N)
 - Qualified individual
 - A-C vessels (N)
 - Response resources
 - A - C vessels (N)
 - Emergency response procedures
 - A - C vessels (N)
 - Nature of vessel's operations for vessels A-C
 - If change in category then X
 - If no change in category then N

PREAMBLE LANGUAGE

The following is being proposed by Workgroup #5 of the Negotiated Rulemaking Committee as preamble language regarding the applicability of vessel response plan requirements to certain types of vessels. It is important to note that this proposal is based solely upon the Coast Guard's preliminary interpretation of the definition of a "tank vessel" for purposes of response plan requirements only and in no way reflects an endorsement of the Coast Guard's interpretation by any member of the Committee. Furthermore, any numbers contained within this document are for illustrative purposes only and should not be construed otherwise.

General Applicability of Vessel Response Plan Requirements

1. Primary and Secondary Carriers of Oil

At the outset, it should be noted that these regulations relate to oil only and do not include requirements relative to hazardous substances. Thus, for purposes of defining response plan requirements for tank vessels as defined under 46 U.S.C. § 2101, it is appropriate to establish levels of response plan requirements based upon the potential for harm to the environment caused by discharges of a vessel's oil cargo. This potential for harm to the environment is determined by the type and quantity of oil being carried in bulk as cargo by the tank vessel. For vessels carrying oil as their primary cargo, it is appropriate to require a more comprehensive response plan than for vessels carrying oil as secondary cargoes. The rationale for different response plan levels for tank vessels includes the following:

(A) **Volume of oil** - Vessels constructed or adapted to carry oil, or that are carrying oil, as a primary cargo are tankers or tank barges. These vessels carry much larger cargo quantities than vessels that may carry oil as secondary cargoes. The majority of vessels² that may carry oil as secondary cargoes include tugs, offshore supply vessels, and fishing vessels. The oil that is carried by these vessels is a small quantity of fuel oil for transfer to offshore platforms or barge-mounted engines or other vessels.

(B) **Type of oil** - Nearly all marine transportation of persistent oil is on vessels carrying oil as a primary cargo. Conversely, the oil carried on vessels carrying oil as a secondary cargo is nearly always non-persistent oil in the form of refined products and distillate fuels that dissipate rapidly from the environment through evaporation and natural dispersion. Insufficient information exists to determine an approach to non-petroleum oils, however, the concept of classifying these oils as

² Needs to be quantified.

persistent or non-persistent may also be applicable.

(C) **Cost/benefit** - The Oil Pollution Act of 1990 requires response plans for tank vessels. It is, however, recognized that there is another class of vessels that in the spirit of OPA, should be required, because they do carry some oil, to maintain response plans reflective of the level of threat posed to the environment. It is further recognized, that in spite of carrying this oil, some vessels do so in such small volumes and on such an infrequent basis that they present a level of risk that is so low that there is little benefit in requiring response plans of them, and therefore, an exclusion from the requirement for response plans may be appropriate. This is also in keeping with the belief that the priority for the review of response plans can be most effectively and efficiently employed by maximum attention to vessels which present the greatest threat of significant oil spills--primary carriers of oil.

Oil spill incidents involving vessels such as tugs, oil field supply vessels, and fishing vessels which do not carry oil as a primary cargo historically have not produced spills that have created as significant or extensive damage as the large spills that occur from tank vessels which are primary carriers of oil. The population of vessels that may carry some oil as a convenience for the customer of the primary service is estimated at up to 5,228 tugs, 1,800 oil field supply vessels, 30,000 documented and 100,000 undocumented fishing vessels, and 150 passenger vessels. It is recognized that there is also an undetermined and changing number of cargo ships that from time to time carry oil as secondary cargo.

There is concern, therefore, that the requirement for tank vessel response plans under OPA-90 potentially creates onerous and unintended requirements for these vessels which are not primary carriers of oil in bulk. These unintended requirements could include, but are not limited to, those that would increase levels of financial responsibility and liability; and impose manning, inspection and construction standards inappropriate to this group of vessels.

In any event, it should be made clear that it is not the intent of these regulations that the inclusion of these vessels for purposes of response plan requirements, whether or not under the authority of OPA-90 § 4202, should have any effect on the applicability of any other requirements. Therefore, it is recognized that if such requirements are necessary, they are to be established in regulation on their own authority and are not invoked through the requirement for tank vessel response plans pursuant to OPA-90.

II. Applicability to Response Vessels

In general, this proposed response plan rule does not apply to oil spill response vessels. Response vessels are vessels

engaged in oil spill response activities and response related escorting. Such vessels include vessels which are normally involved in other trade/usage (i.e., vessels of opportunity) and dedicated response vessels including escort vessels. The rule does apply, however, to dedicated response vessels that are involved in the transportation of the recovered oil outside the response area.

OPA spill response planning requirements apply to a "tank vessel" as defined under 46 U.S.C. § 2101, which is a vessel that is "constructed or adapted to carry, or that carries oil or hazardous material in bulk as cargo or cargo residue, and that is a vessel of the United States, or operates on the navigable waters of the United States, or transfers oil or hazardous material in a port or place subject to the jurisdiction of the United States."

The Coast Guard has not previously interpreted the § 2101 definition with respect to response vessels. The essence of the tank vessel definition is the "carriage of oil in bulk as cargo." Carriage of oil as cargo connotes transportation of goods or merchandise. Recovery of oil, on the other hand, is essentially distinct and separate from the transportation of goods or merchandise. Once oil is spilled into the water it temporarily loses the characteristics of cargo until such time as it is recovered, consolidated and transported outside the response area. Response vessels are compensated not for transporting oil or oil residue, but rather for collecting oil from the water as a pollution control activity. They therefore do not carry oil in bulk as cargo. However, if response vessels go beyond the pollution control function to engage in transportation outside the response area and consolidation efforts, then the vessel may be subject to response plan and certification requirements.

The Coast Guard believes this interpretation is reasonable and consistent with the purposes of OPA. First, there is no need for dedicated response vessels or vessels of opportunity, operating within the response area to prepare response plans. The vessel or facility responsible for the spill for which a response vessel will respond already must have a comprehensive response plan described in these proposed rules. This plan must, among other things, address various contingencies or response activities within the area of the response effort. Any recovered oil spilled during the cleanup effort in the response area would be managed as part of the overall spill recovery response for the initial spill.

Second, the primary purpose of these response plan requirements is to ensure that adequate personnel and equipment will in fact be available to respond to an oil spill from a tank vessel. However, application of these response plan requirements to response vessels involved only in spill response within the response area serves no significant purpose. The resources available to respond to a spill from a particular response vessel

would be small in comparison to the resources that would already have to be present and active in response to the initial spill. So no additional response resources are likely to be needed to mount an adequate and effective response.

Third, if a responder must prepare a plan that names some other responder, then that other responder would likewise need a plan naming yet another responder, and so on in an endless loop of overlapping response plans. Such an approach is not logical or useful. The planned-for contingency becomes too remote and speculative.

Finally, many potential response vessels, particularly vessels of opportunity which otherwise may not be subject to response plan requirements under OPA-90, would simply not be available for use in response activities if by so doing these vessel owners would be designated a tank vessel and required to have their own response plans under OPA-90. If so, fewer response resources would be available for large spills. This would be contrary to the purpose and intent of Congress to use response plan requirements to increase available response resources. The fact that a vessel of opportunity is involved in spill response will not affect its applicability with respect to any requirements under this rule, except as otherwise specifically required by law.

Consequently, unless oil transportation is being conducted outside the response area, there is no carriage or transportation of oil as cargo and the rule is inapplicable. However, if a dedicated response vessel transports oil outside this response area, the activity shifts from "response" to "transportation," and the response vessel becomes subject to this rule.

Section XXX.00 - Definitions for Purposes of This Subpart

- (A) "Vessels Carrying Oil as Primary Cargo" means tank vessels carrying oil as cargo in bulk commercially as the primary mission of the vessel. This would include tankers, tank barges, bunker ships, chemical carriers when they are carrying an oil cargo, and other vessels subject to 46 U.S.C. § 3702 and having certificates of inspection as tank vessels under 46 CFR Subchapter D (except for dedicated response vessels), Letters of Compliance, or Tank Vessel Examination for foreign vessels.
- (B) "Vessels Carrying Oil as a Secondary Cargo" means vessels, other than tank vessels, that carry oil as a secondary cargo as a convenience for the customer of the primary service of the vessel or pursuant to an endorsement to the vessel's certificate of inspection under 46 CFR Subchapter D (30.01-5).
- (C) "Bulk definition" [To be defined by Coast Guard]
- (D) "Cargo definition" [To be defined by Coast Guard]
- (E) "Response Activities" means the containment and removal of oil from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the environment.
- (F) "Response Area" means the COTP zone or a sector of the COTP zone, whichever is smaller, in which the spill response is occurring or, for the State of Alaska, the sector areas designated by the COTP.
- (G) "Dedicated Response Vessel" means a vessel whose service is limited to oil and hazardous substance spill response-related activities, including spill recovery and transport, deployment of spill response equipment, supplies and personnel, and spill response-related training, testing, drills, and research.
- (H) "Vessel of Opportunity" means a vessel that is normally and substantially involved in activities other than spill response and not involved in carriage of oil in bulk as a primary cargo, such as a fishing vessel or offshore supply vessel.

Section XXX.01 - Application of Response Plan Requirements

³ Must be modified to include all proper citations, including those pertaining to nonpetroleum oils such as 33 CFR 151.47 and 46 CFR 153.900.

- (A) Vessels carrying oil as primary cargo are required to submit response plans which meet the requirements of this part:

[To be provided by the USCG]

- (B) Vessels carrying oil as secondary cargo are required to submit a response plan which will meet the requirements of this part (including and in accordance with requirements agreed to in previous sessions of the workgroup):
- (1) Notification
 - (2) Consistency with the area contingency plan and national contingency plan.
 - (3) Identification of a qualified individual as described in § 4202a(5)(C)(ii) of OPA.
 - (4) Identification of qualified spill response resources and/or contractors.
 - (5) Emergency response procedures for vessel personnel:
 - a) For vessel carrying 100 bbls. or less - notification and basic emergency action checklist.
 - b) For vessels carrying between 100 and 1,000 bbls. - description of damage control, cargo control, actions to mitigate.
 - c) For vessels carrying over 1,000 bbls. - detailed description of damage control, cargo control, actions to mitigate.
 - (6) A training program to instruct the vessel crew and qualified individual on the vessel response plan including:
 - a) Initial training when assigned; and
 - b) Drills as specified below.
 - (7) Conduct of drills with the vessel crew and identified qualified individual as follows:
 - a) Vessel personnel -- Quarterly for vessels carrying more than 100 barrels of oil as cargo in bulk or cargo residue; Annually for vessels carrying 100 barrels or less.
 - b) Company drills -- Annually for vessels carrying more than 100 barrels of oil as cargo in bulk or cargo residue; Biannually for vessels carrying 100 barrels or less.
 - (8) A revised response plan will be submitted every five

years or when significant changes occur which require U.S. Coast Guard approval. Significant changes are:

- a) a change in cargo capacity or layout; or
- b) a change in vessel configuration affecting capabilities.

Notification only is required when changes occur relative to the following:

- a) cargo system;
- b) operating area;
- c) qualified individual;
- d) response resources;
- e) emergency response procedures; or
- f) nature of vessel's operations.

- (C) This rule applies to a dedicated response vessel only when such vessel transports oil in bulk outside a response area, in which case the dedicated response vessel shall be considered a vessel carrying oil as secondary cargo under paragraph (B), above. The involvement of a vessel of opportunity in a spill response will not affect its applicability with respect to any requirement under this rule.



"The mission of the Council is to ensure the safe operation of the oil terminals, tankers, and facilities in Cook Inlet so that environmental impacts associated with the oil industry are minimized."

March 20, 1992

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

Dear Senator Cotten:

The Cook Inlet Regional Citizens Advisory Council (Cook Inlet RCAC) is a non-profit corporation organized exclusively for charitable, scientific, literary or educational purposes, within the meaning of *Section 501 (C)(3)* of the *Internal Revenue Code of 1986* as amended, including without limitation the oversight, monitoring, assessing and evaluation of oil spill prevention, safety and response plans, terminal and oil tanker operations, and environmental impacts of oil tanker and oil terminal operations in Cook Inlet under the provisions of *Section 5002* of the *Oil Pollution Act of 1990*.

On March 14, 1992, the Board of Directors voted to endorse a statutory simple negligence standard for response action contractors and expressed support for the introduction of legislation which provides for limited statutory immunity for "vessels of opportunity" that are not provided with indemnification pursuant to a contractual agreement. It is the position of Cook Inlet RCAC that the State of Alaska should do all within its powers to protect the environment and natural resources of this state, including its people. The Board believes enactment of a statutory simple negligence standard will provide the state with the necessary protection and ensure rapid response to an oil spill.

In addition to taking action on this issue the Board also took action in expressing opposition to the enactment of sponsor substitute for House Bill 540 (SSHB 540). Since the Council meeting of March 13-14, 1992 further modifications have been made to this proposed legislation. Cook Inlet RCAC respectfully requests the Council be kept informed of hearings and provided copies of any new language or legislation which are introduced and/or acted upon prior to the end of the legislative session.

In considering these issues Cook Inlet RCAC also discussed HB 196 which was enacted during the 1991 legislative session. The Board of Directors voted in favor of allowing HB 196 to sunset in June 1992.

Cook Inlet Regional Citizens Advisory Council

11355 Frontage Rd. • Suite 228 • Kenai, Alaska 99611 • (907) 283-7222 • FAX (907) 283-6102

As mentioned, Cook Inlet RCAC would appreciate being kept informed on these issues. Should you have any questions regarding the Council's position please do not hesitate to contact me either through our office (283-7222) or home (235-8252).

Sincerely,

A handwritten signature in cursive script that reads "Ken Castner".

Ken Castner
Cook Inlet RCAC
Board of Directors

cc: Cook Inlet RCAC Directors
Prince William Sound RCAC
Citizens Oversight Council on Oil
and Other Hazardous Substances

Summary of

ALYESKA PIPELINE SERVICE COMPANY
COMMENTS

ON

IMPROVING LIMITED RESPONDER
IMMUNITY

**ALYESKA PIPELINE SERVICE COMPANY
COMMENTS
IMPROVING LIMITED RESPONDER IMMUNITY**

DATE	DESCRIPTION OF COMMENTS	TAB
* 02/10/92	<u>Citizens' Oversight Council Report</u> (Responder Immunity; State Orders; Tanker Spill Responsibility)	A
02/05/92	<u>Changes to Alyeska/Tesoro Agreement After HB 196</u>	B
* 02/05/92	<u>Alyeska Financial Responsibility Requirement</u>	C
* 02/04/92	<u>Responses to COC Issues</u> (Time Periods for Response Immunity; ADEC Orders; Tanker Spill Responsibility; Financial Responsibility)	D
01/30/92	<u>Improving Good Samaritan Immunity for Oil Spill Response in Alaska</u> (OPA '90 v. HB 196)	E
01/31/92	<u>Oral Presentation to Citizens' Oversight Council</u>	F
01/31/92	<u>PWS Contingency Plan Arrangements Prior to 03/89</u>	G
* 01/31/92	<u>Vogt Report</u> (Costs of Alyeska's Prevention & Initial Response Services)	H
01/31/92	<u>Straube Report</u> (Imposing Spill Liabilities on RAC's)	I
01/31/92	<u>ADEC Report</u> (Alyeska as a Response Action Contractor)	J
* 01/31/92	<u>Mertz Report</u> (Responder Immunity Does Not Reduce Spiller Liability; Purpose of Oil Response Funds; Financial Responsibility Requirements; Changes to Tesoro/Alyeska Agreement After HB 196)	K
* 01/30/92	<u>Frank Report</u> (TAPAA Does Not Require Alyeska to Respond to Vessel Spills)	L

LDW56/cas

- No state requires that response action contractors individually agree, in advance, to accept direct state control and to handle mystery or orphan spills as additional conditions to limited immunity. These conditions will eliminate any hope of general uniformity of liability regimes amongst the various states to better encourage RACs to cross state lines, especially to join in efforts to contain and cleanup major spills.

 **RECOMMENDATION #7:** *The Trans-Alaska Pipeline System ("TAPS") agent should clearly maintain the duty to control and remove pollution within state boundaries related to the transportation of TAPS crude oil.*

Comments:

- This COC recommendation relies upon an erroneous legal opinion. Under federal law, Alyeska and the holders of the grant of right-of-way across Alaska for pipeline construction and operation are not liable for spills from tank vessels. In any event, limited responder immunity is not available for those who are responsible parties.
- Under the comprehensive liability framework created by Congress, vessel owners and operators carrying oil transported through the pipeline are strictly liable, along with the Trans Alaska Liability Fund, for damages, including cleanup costs, resulting from discharges of oil from their vessel.
- None of the seven pipeline companies that own TAPS, or Alyeska which operates it on their behalf, own, operate, or charter tankers; nor do they manage or control them. In addition to the numerous legal and constitutional challenges this recommendation invites, it makes no practical sense: Congress has already imposed liability and financial responsibility for tanker discharges upon owners/operators/charterers; so has the State of Alaska.
- In COC's public meeting on January 31, ADEC testified that there is no confusion regarding who bears this responsibility in Prince William Sound: "we know who the plan holders are, we know who the responsible parties are, we know who the response action contractor is." Moreover, "we have evaluated the capabilities of the response action contractors to respond and evaluated the transition management plan."

- Alyeska has, in fact, accepted a contractual duty to provide prevention and initial response services to planholders. ADEC would not have accepted and approved contingency plans without insuring that Alyeska had accepted that obligation.
- Although it owns royalty oil, the state is not an equity owner of Alyeska's prevention and initial response equipment to appropriate for its use as a regulator. Like any other transportation-related expense, the cost of oil spill preparedness is equitably distributed amongst TAPS shippers.

February 5, 1992

Alyeska Financial Responsibility Requirement

Alyeska operates the Trans Alaska Pipeline System on behalf of seven owner companies. Although none of these pipeline companies own, operate, or charter tankers, Alyeska has contracted to provide prevention and initial response services to tank vessel owners/operators/charterers ("shippers") in Prince William Sound. Shippers are required by state and federal laws to provide for personnel and equipment to escort vessels and to respond to tanker spills in Prince William Sound. Alyeska's prevention and initial response services are ancillary services provided to shippers so that they may continue to handle Alaska North Slope crude oil. Up to this point in time, only Alyeska has offered to provide these services. Nothing prevents others from doing so.

ADEC has approved the shippers' vessel contingency plans which incorporate Alyeska's Prince William Sound Tanker Spill Prevention and Response Plan ("Plan"). The Plan describes Alyeska's prevention and initial response services. Shippers have also signed an oil spill response services agreement for provision of these services by Alyeska. As a contractual matter, shippers must demonstrate financial responsibility to support their contractual commitments, including indemnifying Alyeska against liabilities it faces as a response action contractor. Alyeska must ensure that any shipper with whom it contracts to provide initial response services can provide indemnity for any liability to which Alyeska could be exposed in responding to a spill. Without financial responsibility such promises would, of course, be hollow. Financial responsibility (self worth) must be demonstrated in the amount of \$1 billion, but an insurance alternative in the amount of \$1.2 billion is also provided.

The financial responsibility and alternate insurance levels reflect a careful weighing of the risks which Alyeska faces as a responder, even after HB 196 and limited responder immunity passed last year. As you know, the limits of liability, and, importantly, the categories of types of damages which can be paid following an oil spill have increased substantially since 1989.

For example, in addition to removal costs, damages listed in the Oil Pollution Act of 1990 include damages to natural resources, real or personal property, subsistence use, lost government revenues, loss of profits and earning capacity, and the cost of additional public services. State law likewise imposes liability for removal and

containment costs, civil penalties, damages related to injury to persons, damage to public and private property, and natural resources, and loss of income and economic benefits.

In addition, recall that Exxon has expended roughly \$4 billion in the costs of containing and cleaning up oil, and resolving federal and state claims associated with the EXXON VALDEZ oil spill. Additional third party claims faced by it, and Alyeska exceed \$50 billion. Ironically, those who would suggest that Alyeska's financial responsibility requirement is "unreasonable," must also agree that it is remarkably low in comparison to Exxon's expenditures to date, and in light of the allegations still facing the defendants in federal and state courts.

Under the Oil Pollution Act, there are certain maximum monetary limits on a spiller for liability related to oil discharges. Financial responsibility must be demonstrated to meet this liability. For example, in the case of a tanker in excess of 3,000 gross tons, the liability limit is \$1,200 per gross ton, or \$10,000,000, whichever is greater. A tanker weighing 200,000 gross tons would have a limit of liability of \$240 million under this federal law. However, the liability limit will not apply in the case of violation of an applicable federal safety, construction, or operating regulation, gross negligence, willful misconduct, or failure or refusal to report an incident, provide reasonable cooperation and assistance, or to refuse to comply with a federal order without sufficient cause. An obvious concern is that, to avoid this limitation, plaintiffs will simply allege that "gross negligence" or the violation of a regulation has occurred as a result of every spill. If the limitation on liability is compromised every time even a minor safety regulation is remotely connected to a spill, the limitation will have little meaning.

Limited exemptions for responders liability for certain damages exist under both federal and state laws. But, there are no limitations for other responder liabilities under federal law. And, under state law, there are no limits on the amount of damages that may be assessed against either a spiller or a response action contractor. Financial responsibility requirements, therefore, are set at arbitrary amounts, in the case of a tank vessel, \$300, per incident, for each barrel of crude oil storage capacity, or \$100,000,000, whichever is greater. Importantly, the financial responsibility apparently extends only to claims asserted by public authorities attributable to cleanup and restoration costs, property damage, assessment of civil penalties, etc.

Thus, using either the federal liability limitation, or the federal and state financial responsibility requirements, as a guide for private parties to establish financial

responsibility requirements in response services agreements would be unhelpful and inappropriate. It would leave a responder unprotected. On the other hand, to promote more certainty when responders and shippers are negotiating the terms of financial responsibility provisions, the legislature may wish to adopt meaningful limitations of liability under state law.

VIA U.S. MAIL AND FACSIMILE

February 4, 1992

Harry R. Bader, Ph.D, Chairman
Citizens' Oversight Council on Oil and Other Hazardous Substances
3111 C Street, Suite 150
Anchorage, Alaska 99508

Re: Limited Responder Immunity in Alaska

Dear Chairman Bader:

We appreciate the opportunity to provide additional information to you and the Council prior to your final deliberations regarding the important issue of responder immunity.

1. Time Limit for Response Immunity

You asked for a recommendation on an appropriate time limit for responder immunity during a response to a spill or threat of a spill. The appropriate duration of the limited responder immunity should extend through the entire response as established by the U.S. government and 17 of 24 coastal states plus the Virgin Islands that have considered the issue. The notion of a time limit is unrealistic given the nature of oil spill response operations; so long as spilled oil remains on water or land, ongoing, expeditious action should be encouraged to remove it. No matter how remote, an "emergency" certainly exists for any community threatened by the impact of oil. In addition, the uncertainty when a time limit begins and ends following any particular "release," may deter prompt and continuous response action for a spill or a threat of spill.

For example, when will an arbitrary time limit begin and end for a mystery or orphan spill? What is the liability of a responder who responds to the report of a threatened spill only to discover a slow leak with no objective indication of when it started? As the arbitrary time limit draws to a close, won't responders be encouraged to withdraw? Will other responders be encouraged to enter the response at that time to insure continuity of personnel and equipment? What is the justification for an artificial barrier if the responder's immunity is only limited and

the original spiller is still financially responsible for any liability which a responder is relieved from?

Mr. Mertz also describes HB 196's time limit as "arbitrary." Indeed, crisis will certainly reign "far fewer days in some cases and far more in others." Page 34, Mertz report. Even California, which is the only other state to consider an arbitrary time limitation, recognizes that the initial 60 day period may have to be extended. In short, we urge the Council to avoid endorsing unnecessary and troublesome limitations upon federal and state efforts to ensure the availability of ample response resources when spills occur.

2. Classification of Responders

We understand that the Council may recommend that responders be classified according to how they are organized and funded: immunity would evidently be limited for some, more limited for others, and perhaps entirely unavailable in one case. As you know, discrimination amongst citizens, be they private or corporate, always calls for constitutional and other legal reviews to insure that principles of equal protection and fundamental fairness are not lost in government's efforts to regulate society.

Before legal analyses would even be undertaken, however, it seems clear that this responder classification proposal, if accepted by the legislature, would virtually insure that entire groups of responders may be unnecessarily driven out of the business. Again, the challenge we face is to support, not destroy or deter, the federal and state comprehensive oil spill response schemes by encouraging effective, prompt response efforts no matter who provides any type of care, assistance, or advice, so long as it is consistent with those schemes or government orders.

Dr. Bader, there is no rational basis for treating responders differently, particularly because response action should be encouraged from any source at any time throughout a release. Again, the spiller and his insurance will still be responsible for responder liabilities that are shielded by the proposed statute. Even under the exigencies of a spill response, a responder will only enjoy limited immunity; therefore, we can be assured that his actions will reflect that concern.

Finally, our materials also stress that Alaska should join with other states to adopt uniform laws in this area for the additional reason to promote uniformity of implementation and interpretation amongst the federal government and coastal states. This will, of course, encourage responders to cross state lines, and to loan

February 4, 1991

equipment and personnel, without suffering delays and uncertainties caused by an unwarranted, restrictive, and, possibly, oppressive limited responder immunity provision in Alaska.

3. Response to ADEC Orders

We understand that, as an apparent price to be paid for limited immunity, the Council may recommend that some response organizations be required, in advance, to agree to accept ADEC orders to respond to mystery or orphan spills in their area of operation.

As you may know, the United States and the State of Alaska have already been granted the authority to take over and arrange for the removal of spilled oil when circumstances call for it. This, of course, is one of the purposes to be served by industry-funded oil spill response funds. We are aware of no situation in Alaska where responders have purposefully failed or refused to provide services for the federal or state governments when requested to undertake or complete a spill response. Consequently, what justification is driving this proposal? Is it so important, and the prospects for the "worst case scenario" erroneously described in some reports to COC so imminent, as to require further limitation of responder immunity in our state? What responder will be in a position, in advance, to agree to provide services to the federal or state governments without also having a specific contract which establishes the type and nature of response, location, equipment and personnel needs, costs and billing arrangements, etc.? If a need for them exists, nothing prevents the state or federal government from negotiating those contracts now.

In short, requiring this and additional requirements as part of the price to be paid by responders for limited immunity promises instead to create confusion, uncertainty, and a reluctance to take action when oil spills occur.

4. The Pipeline Owner Companies Are Not Liable for Tanker Spills

We understand that COC may further recommend that the pipeline owner companies, as holders of the federal right of way permit, and Alyeska, as their operating agent, be directed under state law to respond to any tanker spill in Prince William Sound. We have already explained at some length that Mr. Frank's view that TAPAA already imposes such liability is flatly wrong, but we understand that special legislation may be recommended to "clarify" the matter and adopt Mr. Frank's view as a matter of state law.

February 4, 1991

Our materials explain that Alyeska operates the Trans Alaska Pipeline System on behalf of seven pipeline companies which own it. None of these own, operate, or charter tankers. Under federal and state law, tanker owners/operators/charterers are responsible for tanker operations, and Alyeska cannot and does not manage or control them. Provision has been made by tanker operators to provide contingency plans and to demonstrate financial responsibility for those operations. In addition to the constitutional and legal issues presented by this proposal, we urge that the Council also recognize that it entirely ignores the comprehensive liability, response, and financial responsibility regime established by Congress and the legislature for tanker operations in our state and elsewhere.

As we have also explained, Alyeska does provide initial response services to tanker owners/operators/charterers, and that this service is described in a plan and in response services agreements. As a contractual matter, tanker owners/operators/charterers must demonstrate financial responsibility to support their contractual commitments, including indemnifying Alyeska against liabilities it faces as a response action contractor. Alyeska must ensure that a shipper with whom it contracts to provide initial response services can provide indemnity for any liability to which Alyeska could be exposed in responding to a spill. Without financial responsibility such promises would, of course, be hollow. Financial responsibility (self worth) must be demonstrated in the amount of \$1 billion, and Tesoro has been permitted to support its contractual capabilities with a combination of insurance and a corporate guarantee in the total amount of \$1.2 billion.

We explained that, after enactment of HB 196 last year, Alyeska created this alternative to its \$1 billion financial responsibility requirement. The insurance may consist of \$700 million P&I marine insurance coverage for the vessel and \$500 million comprehensive general liability coverage that names Alyeska as an additional insured. There is no way that Tesoro could provide a corporate guarantee, bond, or letter of credit, as originally required by Alyeska's financial responsibility standards, for either \$1 billion or \$1.2 billion. Because of uncertainties associated with coverage of contractor claims against vessel marine insurance, and the added potential difficulty of enforcing insurance coverage generally, the quality of Alyeska's financial protection has diminished substantially. Yet, the parties reached this practical solution to a difficult problem after and because HB 196 passed last year. This insurance alternative will expire when HB 196 sunsets at the end of June, 1992.

Nonetheless, the Council has indicated that it may view this arrangement as "unreasonable," and is concerned that Alyeska may use limited responder immunity to drive this and other TAPS trade tanker operations "out of business." Nothing could be farther from the truth. Alyeska worked diligently with Tesoro to reach a solution to keep it in business, and we need legislative assistance to keep that solution in place.

Although certainly adjusted in Tesoro case because of a perceived reduction in the risks faced by Alyeska when HB 196 passed, the financial responsibility level reflects a careful weighing of the risks which remain. As you know, the limits of liability, and, importantly, the categories of types of damages which can be paid following an oil spill have increased substantially since 1989.

For example, in addition to removal costs, damages listed in the Oil Pollution Act of 1990 include damages to natural resources, real or personal property, subsistence use, lost government revenues, loss of profits and earning capacity, and additional public services. State law likewise includes removal and containment costs, civil penalties, and damages related to damage or injury to persons and to public and private property, natural resources, and loss of income and economic benefits. Limited exemptions for responders liability for certain damages exist under both federal and state laws.

In addition, recall that Exxon has expended roughly \$4 billion in the costs of containing and cleaning up oil, and resolving federal and state claims associated with the EXXON VALDEZ spill. Additional third party claims faced by it, and Alyeska exceed \$50 billion. Ironically, those who suggest that Alyeska's financial responsibility requirement is "unreasonable," must also agree that it is remarkably low in comparison to Exxon's expenditures to date, and in light of the allegations still facing the defendants in federal and state courts.

Under the Oil Pollution Act, there are certain maximum monetary limits on a spiller for liability related to oil discharges. Financial responsibility must be demonstrated to meet this liability. For example, in the case of a tanker in excess of 3,000 gross tons, the liability limit is \$1,200 per gross ton, or \$10,000,000, whichever is greater. A tanker weighing 200,000 gross tons would have a limit of liability of \$240 million under this federal law. However, the liability limit will not apply in the case of violation of an applicable federal safety, construction, or operating regulation, gross negligence, willful misconduct, or failure or refusal to report an incident, provide reasonable cooperation and assistance, or to refuse to comply with a federal order without sufficient cause. An obvious concern is that, to avoid this limitation,

plaintiffs will simply allege that "gross negligence" or the violation of a regulation has occurred as a result of every spill. If the limitation on liability is compromised every time even a minor safety regulation is remotely connected to a spill, the limitation will have little meaning.

And, under state law, there are no limits on the amount of damages that may be assessed against either a spiller or a response action contractor. Financial responsibility requirements, therefore, are set at arbitrary amounts, in the case of a tank vessel, \$300, per incident, for each barrel of crude oil storage capacity, or \$100,000,000, whichever is greater. Importantly, the financial responsibility apparently extends only to claims asserted by public authorities attributable to cleanup and restoration costs, property damage, assessment of civil penalties, etc.

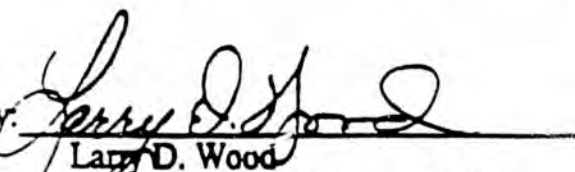
Thus, using either the federal liability limitation, or the federal and state financial responsibility requirements, as a guide to establish financial responsibility requirements contained in response services agreements is unhelpful and inappropriate. It would leave a responder unprotected.

On the other hand, to promote more certainty when responders and responsible parties are negotiating the terms of financial responsibility provisions, COC may wish to recommend that the legislature adopt meaningful limitations of liability under state law. If enacted, those limitations would be reflected in Alyeska's financial responsibility requirements.

We trust that this information will be useful as the Council considers what recommendations it will present to the legislature. Please let us know if there is additional information which we can provide to assist those efforts.

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY

By: 
Larry D. Wood
Senior Attorney - External Affairs

cc: COC Members
Michele D. Brown, Esq.

January 31, 1992

Michele D. Brown, Esq.
Executive Director
Citizens' Oversight Council on Oil and Other Hazardous Substances
3111 C Street, Suite 150
Anchorage, Alaska 99508

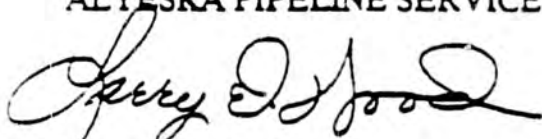
Re: Alyeska Comments Regarding Reports Submitted to the Citizens'
Oversight Council on Oil and Other Hazardous Substances

Dear Ms. Brown:

Enclosed please find comments respectfully submitted by Alyeska Pipeline Service Company ("Alyeska") to the Citizens' Oversight Council on Oil and Other Hazardous Substances. The comments relate to reports which have been submitted to the Council. Thank you for the opportunity to participate in the Council's consideration of the important matter of limited responder immunity.

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY



Larry D. Wood
Senior Attorney - External Affairs

Attachments

January 31, 1992

Response to Memorandum Relating to the State of Alaska's Participation in Spill Response and Preparedness in the State Prepared by Deborah Vogt**Summary**

This report, as well as several pages of the TAPAA report prepared by Michael J. Frank (pages 34 - 36), is committed in large part to debating whether Alyeska's prevention and initial response services provided to contracting vessel owners/operators/charterers in Prince William Sound are best handled as tariff charges for oil delivered to Valdez or as direct charges to vessels which contract for those services. In addition, the Vogt report contains a considerable amount of mathematical analysis which has not been reviewed for accuracy in the short time available.

Alyeska's November 20, 1991, letter which is attached to the Vogt report, explains at some length how and why the TAPS carriers include the costs of Alyeska's Prince William Sound effort in tariff charges for oil delivered to Valdez. However, these services are not being provided pursuant to any common carrier obligations of the TAPS carriers or their agent, Alyeska. Personnel and equipment to escort vessels and to respond to spills in Prince William Sound are required by state and federal laws. In the spring of 1989, using a series of emergency orders and Consent Agreements, the State of Alaska compelled Alyeska to develop and provide a tanker escort system and to greatly increase response equipment and personnel beyond what had been approved in 1987. On November 1, 1990 Alyeska's Prince William Sound contingency plan and the 1989 emergency orders and Consent Agreements expired when the state approved vessel contingency plans, held by the owners or operators of those vessels, as required by AS 46.04.030(c). Those approved vessel contingency plans incorporated Alyeska's Prince William Sound Tanker Spill Prevention and Response Plan, whereby Alyeska, as a response action contractor, is committed to provide certain prevention and initial response services to tankers that have a Response Agreement with Alyeska. Up to this point in time, only Alyeska has offered to provide these services. Nothing prevents others from doing so.

These services are ancillary services provided to shippers so that they may continue to handle Alaska North Slope ("ANS") crude oil. As a result, the pipeline may continue to carry ANS crude oil, and provide revenues for state services. The practice of including the costs of those services in tariff charges for oil delivered to Valdez is, in fact, an equitable distribution of the costs of those services amongst those who receive them. Finally, the owners of the Trans Alaska Pipeline System are not vessel owners (i.e., shippers). The shipping companies are separate and distinct from the carriers.

Despite Ms. Vogt's suggestion, none of this detracts from Alyeska's status as an initial response action contractor in Prince William Sound, nor does it create some sort of state equity interest in the prevention and response equipment, so as to justify its uncompensated use for a mystery or orphan tanker spill. Alyeska's prevention and response resources are available only for vessels in the TAPS trade that have Oil Spill

Response Services Agreements with Alyeska. Under the terms of the vessels' approved contingency plans, those resources must be available in Prince William Sound, ready to respond. There are only a few exceptions to this requirement; for example a small percentage of the response resources may be sent to other areas for oil spill response with prior DEC approval. AS 46.04.030(o). Moreover, the premise that Alyeska, as agent for the holders of the federal pipeline right-of-way, is liable for tanker spills is flatly wrong as explained in Alyeska's comments to the Frank report.

The Federal Energy Regulatory Commission ("FERC") is authorized to determine whether costs that the carriers record should be included in their cost of service and whether those services are reasonable. However, it does not follow that FERC has the authority to decide whether financial responsibility and insurance requirements are appropriate. We are aware of no basis for Ms. Vogt's statement, at page 18, that FERC has such authority.

LDW:vogt/cas

January 31, 1992

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

Alyeska Pipeline Service Company (Alyeska) agrees with Mr. Mertz and Mr. Koester that in imposing liability on oil spill response action contractors (RAC): "The bottom line must involve balancing the need for fair and full compensation for all spill injuries with the need for a liability scheme that does not discourage response action contractors from acting to prevent spill damage." Mertz and Koester report (Report) at page 34. Generally, any public interest in expanding the number of parties who might provide compensation for damages does not outweigh the stronger public interest in encouraging rapid, aggressive response to oil spills. The Citizens' Oversight Council should balance all public interests in making its recommendations to the Legislature regarding whether and to what extent Alyeska should reduce the present limitation on liability for RACs. It should consider that (1) limiting the liability of response action contractors does not reduce the liability of the spiller; (2) financial responsibility requirements reduce the likelihood that the spiller will be insolvent; (3) federal and state oil spill funds provide a safety net; and (4) damages can be reduced most effectively if RACs respond boldly, quickly, and efficiently under the emergency conditions that arise in an oil spill.

Mr. Mertz and Mr. Koester discuss a number of basic legal principles: common law negligence, with special rules for "abnormally dangerous" activities; indemnification and the public duty exception; nondelegable duty; respondeat superior. The Report incorrectly implies that crude oil is a hazardous substance and that the carriage and release of crude oil is an "ultrahazardous" activity. Report at pages 3-6. Only a few activities that involve a risk of serious harm that cannot be eliminated by the exercise of "utmost care" by the parties involved are considered

"ultrahazardous" under Alaska common law. Matomco Oil Company, Inc. v. Arctic Mechanical, Inc., 796 P.2d 1336 (Alaska 1990).

Furthermore, common law legal principles have been developed by federal and state courts through decisions allocating the rights and responsibilities of the parties before them. The obvious conclusion to be drawn from the Report is that it is very difficult to predict what a party's liability may be for any act or failure to act. Legislatures have recognized their duty and responsibility to express public policies by adjusting these principles for categories of potential liability. For example, in response to concerns about rising medical and insurance costs, the Alaska Legislature and other legislatures set limits on liability and reallocated responsibilities for tort damages by eliminating joint and several liability. Similarly and appropriately, the Alaska Legislature correctly limited the liability of RACs.

Alaska responds to comments and recommendations made in the Report as follows:

1. The limitation on liability for RACs will not prevent the recovery of damages by injured parties. The Report erroneously states that contract provisions and statutory exemptions for RACs reduce the overall liability to such an extent that parties who have been damaged may not be compensated. Report at pages 17, 33 and 34. This simply is not true. First, both the Alaska Legislature and Congress have created funds to reimburse parties damaged by oil spills. Second, under both federal and state law, the spiller is strictly liable for damages caused by spills. In fact, the Report acknowledges this by stating that even the common law has placed "a heavy burden, including strict liability, on parties responsible for the safe storage and transportation of oil, and often makes them liable for the acts of employees and contractors." Report at page 9.

Under Alaska law, the spiller's strict liability extends to any damage caused by an act or omission of an RAC responding to a spill. AS 46.03.822(k). The Report states, correctly, that the legislature intended to lay the burden for paying for any damages caused by the RAC on the party responsible for the spill. Report at page 14. As a result of this provision, the responder exemption cannot "lessen" the overall liability burden as the Report asserts at page 18. The exemption is hardly "generous," as characterized by the Report.

The exemption encourages responders to act by assuring them that certain acts will not create liability. Conversely, potential liability would discourage effective response. The Report acknowledges this by stating, "Almost all [RACs] considered the potential for claims to be a concern." Report at page 21.

Similarly, indemnity agreements do not allow parties who are strictly liable to "escape" liability, as the Report asserts at page 18. Under Alaska law, indemnification agreements are "not effective to transfer liability" from a person who might be strictly liable. AS 46.03.822(g).

The Report states that "it is possible" that limitations on liability may prevent recovery of damages by parties injured where there is no other financially solvent responsible parties. Report at page 17. Importantly, such a possibility would depend upon state and federal errors in approving evidence of a spiller's financial responsibility to begin with and in administering state and federal funds which exist in part to clean up and to pay for "mystery" and "orphan" spills. Yet, this remote possibility fuels the reports' central premise that RACs should agree to adhere to the state's orders should a spiller and his insurers become simultaneously insolvent. Ironically, the report recognizes that the proposal would probably discourage response action and amount to an unlawful taking of private property. The Report acknowledges the taking issue in its statement at page 33 that requiring RACs to have a direct contractual relationship with the State "would probably be been as an illegal taking and could require compensation to the RAC itself."

Indeed, elevating RACs to the same level of liability as the spiller directly contradicts and defeats the comprehensive framework of state and federal oil spill response laws to, on the one hand, promote quick, effective action, and on the other, rely on spiller liability, financial responsibility, and federal and state industry-supported funds to pay for it. Instead of encouraging response action by imposing limited liability, the report proposal would largely deter or eliminate it by imposing spiller liability on responders in direct defiance of congressional and legislative intent. Remote possibilities should not likewise support the Council's recommendations; we urge that they be supported instead by a careful and realistic weighing of public interests and goals.

The Report also states that "obtaining compensation (from state and federal funds) may be too costly or complicated for the small injured party." Report at page 33. Taking away the limited immunity now provided to RACs will not provide direct compensation to an injured party seeking compensation. Liability would probably only be decided through costly and complicated litigation. A primary goal of the federal fund is to provide people faster, more efficient, compensation than can be gained through litigation.

2. Alveska agrees with the statement at page 34 of the Report that the 15-day limit on the immunity provided is arbitrary. HB 196's time limit is unrealistic given the nature of oil spill response operations; every spill will be different. So long as

spilled oil remains on water or land, ongoing, expeditious action should be encouraged to remove it.

3. As a matter of public policy, the liability of an RAC should be limited. An RAC is responding if, and only if, there already has been a spill. Thus, an emergency exists. Under exigent circumstances, all parties, including RACs and governments, should react and respond quickly and efficiently. Principles of negligence do not make sense, and it is difficult for anyone to determine, especially after the fact in a courtroom, what was "reasonable under the circumstances," as the Report implies at page 34.

On March 26, 1991, in addressing the House Resources Committee prior to adoption of House Bill 196, Representative Hudson noted that this bill would shift the liability for simple negligence from an innocent spill response action contractor to the party responsible for the spill. He correctly noted that under this exemption, in responding to a spill, an RAC assumes liability for any damage caused by its own recklessness or gross negligence. The committee also heard testimony from Jon Tillinghast on behalf of Tesoro and Conoco, that Pacific Fisheries Legislative Task Force, the U. S. Coast Guard, the California Sierra Club, the International Bird Rescue Research Center, and the Ventura County Commercial Fishermen's Association have supported RAC exemption provisions. To date, the Virgin Islands and 18 of 24 coastal states (75%) have adopted virtually identical laws, that provide greater RAC immunity from liability than HB 196.

Later, on April 23, 1991, Representative Hudson commented to the House Judiciary Committee that by being more consistent with the laws of other states and federal law, national and regional RACs would be more inclined to respond to spills in Alaska.

4. The level of competence of an RAC and how it and the plan holder will respond can best be evaluated in advance of a spill by review of the oil discharge prevention and response plan and through DEC's authority to require training programs and spill drills.

5. Parties must be allowed to define their relative rights and responsibilities through contract. The Legislature has authorized limited state review of response action contracts. Regulations drafted by the Alaska Department of Environmental Conservation to implement House Bill 567 will require a plan holder who proposes to use the services of any RACs to (1) identify those RACs, (2) summarize each agreement or contract, and (3) describe the equipment and services to be provided by the RAC. However, the scope of indemnity provisions and the degree of control retained by the spiller are basic provisions that must be negotiated by the contingency plan holder and the RAC, based on circumstances and needs unique to the contracting parties, such as oil spill response

needs; whether the RAC is a full time, private response organization, an oil spill cooperative or a fisherman; and, certainly, the potential liability to which the plan holder is exposed by its operations.

The Report expresses surprise at the diversity among such contracts. Report at page 19. Of course the terms will vary from contract to contract. The contracts must reflect the needs of each party. However, the parties allocate their responsibilities for damages, they cannot avoid their liabilities to third parties and to the State and federal government, as stated in law.

Furthermore, the discussion of contracts, at least insofar as it relates to the two industry co-ops, (Report at page 19) wholly ignores the distinction between industry co-ops and private contractors. Industry co-ops are voluntary organizations of companies that have banded together to amass oil spill response equipment and response capabilities for their mutual benefit and, in the case of one of them, for social welfare purposes.

These co-ops are operated on a non-profit basis, and little attempt is made to recover even the indirect costs of response activities, such as overhead and staff time. The co-ops are not intended to, and do not, operate in a way that would enable them to accumulate loss reserves or to purchase expensive insurance for their protection. The response action contracts they have adopted are established in their charters or bylaws and cannot be negotiated, at least with respect to indemnity. The terms of the indemnity agreements reflect not so much the business acumen or negotiation strengths of the co-ops as their status as voluntary, non-profit organizations.

In particular, the Report discusses the Alyeska response services agreements and implies that it is inappropriate for Alyeska to require one billion dollars in financial responsibility. Report at page 25. Alyeska must ensure that a shipper with whom it contracts to provide initial response services can provide indemnity for any liability to which Alyeska could be exposed in responding to a spill. Alyeska is not an insurer which could otherwise spread the financial burden of a loss amongst a number of insureds; each spiller must demonstrate the wherewithal to pay for all the costs associated with its spill. Particularly, in light of recent changes in the types of claims and variety of damages which can be associated with federal and state oil spill litigation, this financial responsibility requirement is reasonable. In light of the magnitude of claims filed after recent oil spill incidents, this figure is reasonable.

Additionally the Report states that Alyeska has "raised rather than lowered" the financial responsibility requirements for Tesoro. Report at page 25, n. 25. After the legislature limited the liability of RACs, thus reducing the perceived risks associated

with spill response, Alyeska carefully considered the matter and changed the manner in which Tesoro could demonstrate its capability to meet its contractual obligations to Alyeska. After enactment of HB 196, Alyeska created an alternative to its \$1 billion financial responsibility requirement. This alternative allows any company to utilize insurance rather than a corporate guarantee. The insurance may consist of \$700 million P&I coverage for the vessel and \$500 million comprehensive general liability coverage that names Alyeska as an additional insured. Alyeska agreed to allow Tesoro to use the insurance alternative through a combination of marine insurance, comprehensive general liability insurance, and corporate guarantees, as opposed to a pre-existing requirement that it provide a corporate guarantee purely by the availability of cash and other self-worth. There is no way that Tesoro could provide a corporate guarantee, bond or letter of credit, as originally required by Alyeska's financial responsibility standards, for either one or \$1 or \$1.2 billion. Because of uncertainties associated with coverage of contractor claims against vessel marine insurance, and added potential difficulty of enforcing insurance coverage generally, the quality of Alyeska's financial protection has diminished substantially. Yet, the parties reached this practical solution to a difficult problem after and because HB 196 passed last year -- despite the Report's implications to the contrary. This insurance alternative will expire when HB 196 sunsets at the end of June, 1992.

6. The same exemption for RACs should be available.

Alyeska's concerns regarding limited immunity for RACs are identical to those expressed in the Report regarding the potential liability of the State or of a municipality for managing a spill response. Report at page 28. The Report acknowledges that the State, municipalities, and villages enjoy limited responder immunity. AS 46.03.822(h). In its discussion of the State's interest in shifting to the another party any potential liability, the Report notes that the State may "attempt to fend off liability from below by requiring RACs it employs to indemnify it for their misdeeds, and it could require indemnification for its own misdeeds." Report at page 28. But private industry has the same concerns. An RAC responding on behalf of industry must be treated the same as a public RAC. The public policy is the same: to encourage responders to respond quickly, aggressively and most effectively under the circumstances.

7. The State should not attempt to exercise direct control over RACs. Through the contingency plan holder the State has sufficient ability to oversee RAC capabilities on behalf of the plan holder. The Report notes that the State's direct authority over plan holders does not extend to authority over RACs. Report at page 31. However, it encourages the State to expand its authority over RACs. Report at page 32. This will not provide more effective spill response. The Report correctly notes that

while the State may have an interest in directing an RAC response to a spill, increases in the regulatory burden will discourage RACs altogether and "State restrictions on RAC contracts could simply result in fewer RACs willing to engage in response action." Report at pages 5, 26.

The Report recommends that RACs be subjected to the same governmental oversight as plan holders. Report at page 35. Such a system would eliminate the incentive of a party to enter into a response action contract, unless the state became a party to the contract and agreed to pay the response costs. This would be a dramatic change in spill response practices.

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

January 30, 1992

Michele D. Brown, Esq.
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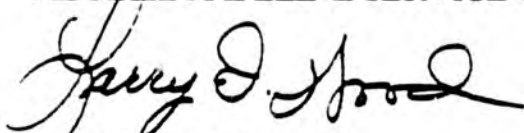
Re: Alyeska's Comments Related to Trans Alaska Pipeline Authorization Act
Memorandum

Dear Ms. Brown:

Enclosed please find comments respectfully submitted by Alyeska Pipeline Service Company ("Alyeska") to the Citizens' Oversight Council on Oil and Other Hazardous Substances. The comments relate to a memorandum by Mr. Michael J. Frank entitled "HB 196 Research Project: Trans Alaska Pipeline Authorization Act." A summary accompanies our remarks. Thank you for the opportunity to participate in the Council's consideration of the important matter of limited responder immunity.

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY



Larry D. Wood
Senior Attorney-External Affairs

LDW42/cas

Attachments

January 30, 1992

**Response to Memorandum
Regarding the Trans Alaska Pipeline Authorization Act
Prepared By Michael J. Frank**

Summary

The Trans Alaska Pipeline Authorization Act ("TAPAA"), 43 USC 1651 et. seq., makes the owner/operator of a vessel, not Alyeska or the holders of the right-of-way, strictly liable for any oil spill from that vessel in Prince William Sound. This statutory allocation of liability is consistent with other state and federal laws that make the owner/operator of a vessel responsible for responding to and cleaning up oil spills from the vessel.

TAPAA does not require Alyeska to respond to vessel spills, nor does it make Alyeska or the holders of the right-of-way strictly liable for damages caused by such spills. Indeed, the legislative history of TAPAA demonstrates that Congress rejected proposed statutory language that would have made the holders of the right-of-way strictly liable for vessel spills.

LDW43/cas

**Memorandum Of Alyeska Pipeline
Service Company Regarding Liability
Under Trans Alaska Pipeline Authorization
Act for Oil Spills From Vessels**

Introduction

Alyeska Pipeline Service Company ("Alyeska") has reviewed the January 13, 1992, research project memorandum Michael J. Frank regarding the Trans Alaska Pipeline Authorization Act ("TAPAA"). 43 U.S.C. § 1651 et seq. Alyeska believes that the memorandum incorrectly states Alyeska's position with respect to spills from vessels in Prince William Sound, and that it reaches erroneous legal conclusions regarding Alyeska's liability for vessel spills under TAPAA. Accordingly, Alyeska is submitting this memorandum to the Citizens Oversight Council on Oil and Other Hazardous Substances to correctly state Alyeska's position.

1. Alyeska's Legal Posture Since the T/V EXXON VALDEZ Oil Spill.

Mr. Frank's memorandum asserts, at page 28, that "Since the T/V EXXON VALDEZ oil spill, Alyeska has publicly denied that it has ever been required to respond to a tanker spill of TAPS oil." This is not a correct statement of Alyeska's position.

Alyeska has acknowledged and continues to acknowledge (1) that at the time of the T/V EXXON VALDEZ oil spill, Alyeska had in effect an Oil Spill Contingency Plan that provided that Alyeska would respond to spills of TAPS oil from vessels within Prince William Sound; (2) that Alyeska was obligated to respond in accordance with its Contingency Plan; and (3) that, in light of federal and Alaska law

imposing responsibility for oil spills from vessels on the owner-operator of the vessel, Alyeska was obligated to provide an initial response to a vessel spill until such time as the owner/operator of the vessel arrived on scene and was in a position to assume responsibility for the response. Alyeska's intention to provide an initial response and then hand-off the response effort to the owner/operator of the vessel was approved by the State of Alaska, both in spill drills held before the T/V EXXON VALDEZ incident, and during the response to the T/V EXXON VALDEZ oil spill itself. At the time of the T/V EXXON VALDEZ spill, the ultimate responsibility of the owner/operator of the vessel to respond to vessel spills, to pay for the cleanup of such spills, and to compensate those public and private entities damaged by such spills was well established under both federal and state law. See, e.g., AS 46.03.822 (owner/operator of vessel liable for all public and private damages from oil spills); Clean Water Act, 33 U.S.C. 1321 (owner/operator liable for cleanup of oil spills, including cleanup costs and natural resource damages); TAPAA, 43 U.S.C. § 1653(c) (owner/operator of vessel and Trans Alaska Liability Fund liable for damages caused by vessel spills).

2. Liability for Vessel Spills Under TAPAA

Mr. Frank's memorandum erroneously suggests that Alyeska and the holders of the right-of-way are strictly liable for vessel spills under TAPAA. As noted above, TAPAA makes the owner/operator of a vessel, rather than Alyeska or the holders of the right-of-way, strictly liable for vessel spills in Prince William Sound. 43 U.S.C. § 1653(c).

Under the comprehensive liability framework created by Congressional

authorization (TAPAA) of a federal grant of rights-of-way across federal land in Alaska for pipeline construction and operation:

1. The right-of-way holders are strictly liable for environmental damages occurring from their activities along or in the vicinity of the pipeline right-of-way.
2. The right-of-way holders must control and remove pollution along or adjacent to the pipeline right-of-way as a result of their activities.
3. Vessel owners and operators carrying oil transported through the pipeline are jointly and severally strictly liable, along with the Trans Alaska Liability Fund, for damages, including cleanup costs, resulting from discharges of oil from their vessel.
4. Under TAPAA, Alyeska and the right-of-way holders are not strictly liable for spills from vessels. The right-of-way holders and Alyeska are not required by TAPAA to cleanup oil spilled from vessels in Prince William Sound.

In oil spill litigation pending in Alaska federal court, Judge Holland has already ruled that, under TAPAA, only the owner or operator of the vessel and the Trans Alaska Pipeline Liability Fund are liable for vessel spills. "Those people strictly liable under TAPAA are the vessel owner and operator, and the Fund." In re Glacier Bay, No. A88-115 Civil (Order Filed July 26, 1991), at 20.

Mr. Frank nevertheless attempts to argue that Alyeska and the holders of the right-of-way are liable for vessel spills under subsections (a) or (b) of Section 1653. His analysis is seriously flawed. Both of these subsections are inapplicable to the discharge of oil from tankers in transit to and from the Valdez terminal.

Subsection (a) imposes strict liability on the holder of the pipeline right-of-way for "damages in connection with or resulting from activities along or in the vicinity of" the right-of-way. Of course, one could argue that, in a literal sense, every vessel spill from a tanker transporting Alaska North Slope crude oil is "in connection with" activities along the right-of-way. But for the activities along the pipeline right-of-way, the vessel could not have been loaded with ANS crude oil. But as the Ninth Circuit has made clear, common sense rather than a literal or mechanical approach must govern interpretation of 1653(a). See Heppner v. Alyeska Pipeline Service Co., 665 F.2d 868, 873 (9th Cir. 1981). The Court held that although 43 U.S.C. § 1653(a) refers to "damages" generally and appears to be "clear and unambiguous," Congress' clear intent was to cover only environmental damages.

In Heppner, the Court noted that, were the statute construed literally and mechanically, damages from slanders, fights and automobile accidents along the right-of-way would all be encompassed by subsection (a). The Court stated this "raises serious questions whether we should read the strict liability language literally and should give it its broadest possible sweep." 665 F.2d at 873. The Court concluded it should not interpret 43 U.S.C. § 1653 (a) to give it its broadest possible sweep.

The same principles of statutory interpretation apply to determine whether 43 U.S.C. § 1653(a) imposes strict liability on the permit holders for spills from vessels. If vessel spills are "in connection with" activities along the pipeline right-of-way simply because the vessel contained ANS crude that had been transported along the right-of-way, then every vessel spill of ANS crude would be covered by subsection (a) whether it occurred in Prince William Sound, along the coast of British Columbia, or in Puget Sound. Indeed, spills of gasoline from vehicles in Los Angeles might be covered if the gasoline was refined from ANS crude. This was not intended by Congress.

Finally, and perhaps most important, it is an accepted canon of statutory construction that a court should not read the words of one subsection in isolation, but must consider them in context with the rest of the statute. "One provision of a comprehensive statute must be read in the context of the other provisions of the statute and in light of the general legislative scheme." Yamaguchi v. State Farm Mutual Auto Ins. Co., 706 F.2d 940, 948 n.11 (9th Cir. 1983). "The words of a statute must be construed in context and the statutes must be harmonized, both internally and with each other, to the extent possible." Pacific Mutual Life Ins. Co. v. American Guaranty Life Ins. Co., 722 F.2d 1498, 1501 (9th Cir. 1984).

When subsection (a) is read in context with subsection (c), it is apparent that Congress intended subsection (c) to cover vessel spills while subsection (a) was intended to cover environmental damage in and along the right-of-way caused by construction and operation of the pipeline. See Mt. Graham Red Squirrel v. Madigan, F.2d (9th Cir. Jan. 21, 1992) (since Congress dealt with two phases of construction project in two separate sections of statute, Congress clearly intended the two phases to

be treated differently; each section cannot be read in isolation; rather interpretation of each depends on "a reading of the statute as a whole . . .").

Subsection (b) of Section 1653 provides that the holder of the right-of-way is liable to control and remove pollutants where "any area within or without the right-of-way or permit area granted under this chapter is polluted by any activities conducted by or on behalf of the holder. . . ." (emphasis added). This subsection is inapplicable to vessel spills absent evidence that the spill occurred as a result of activities conducted by or on behalf of the holder of the right-of-way. Of course, as previously indicated, in a literal sense every vessel spill of ANS crude is in some way connected to activities conducted by the holders of the right-of-way in that, but for the transportation of oil through the pipeline, the vessel never would have been loaded with ANS crude. When subsection (b) is read in context with subsection (c), however, it is apparent that Congress could not have intended this "but for" connection to be sufficient to invoke subsection (b). Mr. Frank's theory would produce the anomalous result that the owner and operator of the vessel would be strictly liable under subsection (c) only for \$14 million, while the holders of the right-of-way would be strictly liable without any limits. Given the monetary limits elsewhere in TAPAA, including both subsections (a) and (c), one should not impute to Congress such a bizarre result. See Mr. Graham Red Squirrel v. Madigan, *supra* (court should not interpret statute in a manner that "makes no sense either practically or as a matter of linguistics").

Mr. Frank's reliance on Alaska Pipeline Service Co. v. United States, 649 F.2d 831 (U.S.Ct.Cl.), cert. denied, 454 U.S. 964 (1981), is misplaced. That case

held that, under 1653(b), the owners and operator of the Trans-Alaska Pipeline are strictly liable for spills from the pipeline itself, since such spills constitute "pollution resulting from any activities conducted by or on behalf of them." 649 F.2d at 833-34. The holders' agent, Alyeska, operates the pipeline. All pipeline spills thus result from "activities conducted by or on behalf of" the holders, as those words are used in 1653(b). With respect to vessel spills, in contrast, neither the holders nor Alyeska operate the vessels. Spills from vessels thus do not result from activities conducted by or on behalf of the holders.

Finally, Mr. Frank erroneously interprets the legislative history of TAPAA. As he notes, Congress had before it a House Bill, H.R. 9130, Section 207(b)(1) of which would have expressly provided that the holder of the right-of-way is strictly liable for all damages resulting from spills from any vessel owned by the holder or by any "affiliate" of the holder. As Mr. Frank notes, see his memorandum at p. 14, the term "affiliate" was broadly defined. Thus, had Section 207(b)(1) been adopted, there is little doubt that the holders of the right-of-way would be liable for damages caused by the **EXXON VALDEZ** oil spill, as the **EXXON VALDEZ** was owned by an affiliate of one of the holders of the right-of-way. The flaw in Mr. Frank's analysis, however, is that Section 207 was rejected by the Conference Committee. The bill that came out of the Conference, which Congress ultimately enacted, contains nothing comparable to Section 207. Congress clearly made the vessel owner/operator, rather than the holders or any affiliates of the owner/operator, liable for vessel spills. 1653(c). Congress' rejection of a specific provisions before it that would have made the holders liable for vessel spills is relevant to interpretation of 1653 and shows that the statute as adopted was not intended to make the holders liable for vessel spills. See Fox

v. Standard Oil Co. of New Jersey, 294 U.S. 87, 96, 294 S.Ct. 333, 337 (1934); Fleming v. Hawkeye Pearl Button Co., 113 F.2d 52, 58 (8th Cir. 1940).

LDW44/cas

January 30, 1992

¹ As successors to the original holders of the federal right-of-way for TAPS, Amerada Hess Pipeline Corporation, ARCO Transportation Alaska, Inc., BP Pipelines (Alaska), Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Company, Phillips Alaska Pipeline Corporation, and Unocal Pipeline Company, are the present holders of the right-of-way grant. These common carrier pipeline companies own the pipeline and have chosen Alyeska to be their common operating agent.



Citizens' Oversight Council
on Oil and Other Hazardous Substances

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SUMMARY

of

RESEARCH PROJECTS REPORTS

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

Council Members

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

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RESEARCH PROJECTS REPORTS SUMMARY

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

Research Project: Response action contractor activity in Alaska

Prepared by: Department of Environmental Conservation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Research Project: Insurance coverage availability

Prepared By: Tesoro Alaska, Inc.

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

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

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

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

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

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

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

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

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

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

Research Project: Other state's response action contractor provisions

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

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

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

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

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

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

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

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

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

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

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

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

Other States' Response Action Contractor Liability Laws

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

ALYESKA PIPELINE SERVICE COMPANY
COMMENTS

ON

IMPROVING LIMITED RESPONDER
IMMUNITY

**ALYESKA PIPELINE SERVICE COMPANY
COMMENTS
IMPROVING LIMITED RESPONDER IMMUNITY**

DATE	DESCRIPTION OF COMMENTS	TAB
02/10/92	<u>Citizens' Oversight Council Report</u> (Responder Immunity; State Orders; Tanker Spill Responsibility)	A
02/05/92	<u>Changes to Alyeska/Tesoro Agreement After HB 196</u>	B
02/05/92	<u>Alyeska Financial Responsibility Requirement</u>	C
02/04/92	<u>Responses to COC Issues</u> (Time Periods for Response Immunity; ADEC Orders; Tanker Spill Responsibility; Financial Responsibility)	D
01/30/92	<u>Improving Good Samaritan Immunity for Oil Spill Response in Alaska</u> (OPA '90 v. HB 196)	E
01/31/92	<u>Oral Presentation to Citizens' Oversight Council</u>	F
01/31/92	<u>PWS Contingency Plan Arrangements Prior to 03/89</u>	G
01/31/92	<u>Vogt Report</u> (Costs of Alyeska's Prevention & Initial Response Services)	H
01/31/92	<u>Straube Report</u> (Imposing Spill Liabilities on RAC's)	I
01/31/92	<u>ADEC Report</u> (Alyeska as a Response Action Contractor)	J
01/31/92	<u>Mertz Report</u> (Responder Immunity Does Not Reduce Spiller Liability; Purpose of Oil Response Funds; Financial Responsibility Requirements; Changes to Tesoro/Alyeska Agreement After HB 196)	K
01/30/92	<u>Frank Report</u> (TAPAA Does Not Require Alyeska to Respond to Vessel Spills)	L

A

February 10, 1992

Comments Regarding "Oil Spill Response Action Contractors"

A Report by the Citizens' Oversight Council on Oil and Other Hazardous Substances

Alyeska Pipeline Service Company ("Alyeska") is pleased to provide these comments regarding a report recently submitted to the Alaska State Legislature by the Citizens' Oversight Council on Oil and Other Hazardous Substances ("COC"). The report is entitled "Oil Spill Response Action Contractors."

COC has developed seven recommendations. Alyeska's comments follow each one.

RECOMMENDATION #1: *The liability standard for oil spill response action contractors may be limited to gross negligence or intentional misconduct, with certain conditions that ensure a reliable response.*

Comments:

- We strongly agree. Even though responders are not liable for spills, without limited immunity, the financial risk, and liability exposures associated with oil spill response would deter cleanup contractors, cooperatives, and others from joining into prompt, aggressive action.
- To date, the Virgin Islands and 18 of the 24 coastal states (75%) have adopted responder immunity laws which are substantially similar to the federal model provided in the Oil Pollution Act of 1990.
- The immunity is limited and subject to several conditions. The response action must be consistent with the National Contingency Plan, or federal or state orders. Responders are liable for personal injuries and wrongful deaths, or if they are grossly negligent or engage in willful misconduct. Importantly, the responsible vessel owner, operator, or charterer is liable for any removal costs or damages that responders are relieved of.

- We also strongly agree that this limited immunity ought to be available throughout the response action, and that it not be confined by an arbitrary time limit.

RECOMMENDATION #2: *Professional response action contractors should be certified by the state.*

RECOMMENDATION #3: *A certification program should contain minimum professional standards for response action contractors and direct DEC to establish the criteria by which it can readily assess a response action contractor's capability to perform as stated in a contingency plan.*

RECOMMENDATION #4: *A certification program should authorize DEC to maximize coastal protection and to enhance regional response capabilities through response action contractor certification.*

Comments:

- For the sake of national uniformity, and to avoid inconsistencies (and possible preemption), the state may wish to examine this proposal in greater detail after ongoing U.S. Coast Guard rulemaking on the same subject is completed. If supplemental state standards appear necessary, they may be considered at that time.
- Additionally, pre-certification of response action contractors should not be an additional condition for one group of responders to qualify for limited liability. We must encourage effective, prompt response efforts no matter who provides any type of care, assistance, or advice during an oil spill response, so long as it is consistent with the nation's comprehensive scheme for oil spill response or government orders.
- In addition to the legal and constitutional issues raised by this proposed disparity, an incongruity is immediately apparent. Volunteers who may need the most supervision during a response for their own safety would meet no prequalification requirement. Likewise, state, municipal, and village responders currently enjoy limited immunity for response action without any certification under a separate statute.
- The state's comprehensive contingency planning process already empowers ADEC to insure that response action contractors demonstrate their obligation and availability to respond to a discharge and discharge exercises,

and the readiness and compatibility of their equipment and other spill response resources. These oil spill response personnel must be trained, and demonstrate through drills and inspections their competency to provide immediate, effective response.

- A certification program may even be less effective as an oversight mechanism than spill exercises. ADEC can assure that a RAC is adequately prepared by comparing its response to the role described for it in a response plan. This can be done best through drills.

RECOMMENDATION #5: *Certified response action contractors must be subject to all orders of the state on-scene coordinator during an actual or threatened spill response.*

RECOMMENDATION #6: *Certified response action contractors should respond, when directed by the state on-scene coordinator, to mystery or orphan spills, except that regional cooperatives will not be required to respond outside their region of operation.*

Comments:

- Under the state and federal comprehensive oil spill prevention and response programs, sufficient controls already exist to assure effective response action without direct government control of a planholder's contractors. Moreover, ADEC is authorized to enter into contracts with private organizations to provide the personnel, equipment, or other services or supplies that may be required to respond to mystery or orphan spills. When private contracting is not feasible, it may establish and maintain the cleanup personnel and equipment which are needed at locations in the state.
- State law requires that tank vessel owners, operators, or charterers hold approved oil discharge prevention and contingency plans in order to do business in Alaska. The planholder must demonstrate the ready availability of sufficient personnel, training, equipment, and other resources to prevent, contain, cleanup, and dispose of spilled oil within the parameters of the state's planning standards.
- To augment its own prevention and response resources, a planholder will necessarily sign agreements with response action contractors. The contractors must be identified and their capabilities described. ADEC may test their proficiency and training during drills and inspections. ADEC will

insure that contractors are contractually obligated to respond as part of its plan approval process.

- A planholder must also demonstrate financial responsibility to assure the adequacy of his response and to pay damages. Possible criminal and civil penalties may also be assessed for an inadequate response.
- A planholder is liable for his negligent acts and omissions in directing a spill response. Likewise, by prematurely demanding that it also control a planholder's contractors, the state will share that liability. It must also be prepared to indemnify or immunize planholders and contractors from liabilities they may face by following state orders. Moreover, during the time that the state issues orders, it should suspend imposition of penalties upon the planholder for failure to implement its plan.
- The United States and the State of Alaska have already been granted the authority to take over and arrange for the removal of spilled oil when circumstances call for it. This is one of the purposes to be served by industry-financed oil spill response funds.
- Under the Oil Pollution Act of 1990, the U.S. Coast Guard by delegation is authorized to direct all federal, state, and private actions to remove an oil discharge. State control of response action contractors promises uncertainty and conflict during spill responses.
- Being generally required to respond to mystery and orphan spills would greatly increase the liabilities and risks to which RACs would be exposed. What responder will be in a position, in advance, as an additional price to be paid for limited immunity, to agree to provide services to state government without also having a specific contract which establishes the type and nature of response, types of hazardous substances, location, equipment, personnel needs, performance expectations, costs and billing arrangements, and indemnification? If a need for them currently exists, nothing prevents the state or federal government from negotiating "stand by" contracts now.
- Indeed, the State Oil and Hazardous Substance Discharge Prevention and Contingency Plan discusses mystery and orphan spills. It provides that whenever a spiller is unknown or a response is inadequate, the state or federal agency having jurisdiction has the authority to "take over the response and recover expenses from the spiller." Para. 411 at 400-14 (May 1991). This is consistent with federal and state law.

- No state requires that response action contractors individually agree, in advance, to accept direct state control and to handle mystery or orphan spills as additional conditions to limited immunity. These conditions will eliminate any hope of general uniformity of liability regimes amongst the various states to better encourage RACs to cross state lines, especially to join in efforts to contain and cleanup major spills.

RECOMMENDATION #7: *The Trans-Alaska Pipeline System ("TAPS") agent should clearly maintain the duty to control and remove pollution within state boundaries related to the transportation of TAPS crude oil.*

Comments:

- This COC recommendation relies upon an erroneous legal opinion. Under federal law, Alyeska and the holders of the grant of right-of-way across Alaska for pipeline construction and operation are not liable for spills from tank vessels. In any event, limited responder immunity is not available for those who are responsible parties.
- Under the comprehensive liability framework created by Congress, vessel owners and operators carrying oil transported through the pipeline are strictly liable, along with the Trans Alaska Liability Fund, for damages, including cleanup costs, resulting from discharges of oil from their vessel.
- None of the seven pipeline companies that own TAPS, or Alyeska which operates it on their behalf, own, operate, or charter tankers; nor do they manage or control them. In addition to the numerous legal and constitutional challenges this recommendation invites, it makes no practical sense: Congress has already imposed liability and financial responsibility for tanker discharges upon owners/operators/charterers; so has the State of Alaska.
- In COC's public meeting on January 31, ADEC testified that there is no confusion regarding who bears this responsibility in Prince William Sound: "we know who the plan holders are, we know who the responsible parties are, we know who the response action contractor is." Moreover, "we have evaluated the capabilities of the response action contractors to respond and evaluated the transition management plan."

- Alyeska has, in fact, accepted a contractual duty to provide prevention and initial response services to planholders. ADEC would not have accepted and approved contingency plans without insuring that Alyeska had accepted that obligation.
- Although it owns royalty oil, the state is not an equity owner of Alyeska's prevention and initial response equipment to appropriate for its use as a regulator. Like any other transportation-related expense, the cost of oil spill preparedness is equitably distributed amongst TAPS shippers.

B

VIA U.S. MAIL AND FACSIMILE

February 5, 1992

The Honorable Bill Hudson, Chairman
House Committee on Oil and Gas
Alaska State Legislature
State Capitol
Juneau, Alaska 99801

**Re: HB 196 Impact on Financial Responsibility Requirements for the
Alyeska/Tesoro Oil Spill Response Services Agreement**

Dear Chairman Hudson:

You requested further explanation of the important change made to Alyeska's Oil Spill Response Services Agreement for Prince William Sound ("Agreement") after the legislature enacted HB 196, and adopted limited responder immunity, last year. The amendment created an alternative to the Agreement's \$1 billion financial responsibility requirement that Tesoro was not able to meet. The new alternative to financial responsibility allows companies to enter into an Agreement with Alyeska if there is \$700 million Protection and Indemnity Club ("P&I Club") coverage for a tanker and \$500 million comprehensive general liability ("CGL") insurance coverage for the company itself. Tesoro has been able to utilize this alternative to enter into an Agreement that will expire on June 30, 1992, which is the date the provisions of HB 196 will sunset, unless further action is taken by the legislature.

As you know, Alyeska operates the Trans Alaska Pipeline System on behalf of seven owner companies. Although none of these pipeline companies own, operate, or charter tankers, Alyeska has contracted to provide prevention and initial response services to tank vessel owners/operators/charterers ("shippers") in Prince William Sound. Shippers are required by state and federal laws to provide for personnel and equipment to escort vessels and to respond to tanker spills in Prince William Sound. Alyeska's prevention and initial response services are ancillary services provided to shippers so that they may continue to handle Alaska North Slope crude oil. Up to this point in time, only Alyeska has offered to provide these services. Nothing prevents others from doing so.

ADEC has approved the shippers' vessel contingency plans which incorporate Alyeska's Prince William Sound Tanker Spill Prevention and Response Plan ("Plan"). The Plan describes Alyeska's prevention and initial response services. As noted above, shippers have also signed an Agreement for provision of these services by Alyeska. As a contractual matter, shippers must demonstrate financial responsibility to support their contractual commitments, including indemnifying Alyeska against liabilities it faces as a response action contractor. Alyeska must ensure that any shipper with whom it contracts to provide initial response services can provide indemnity for any liability to which Alyeska could be exposed in responding to a spill. Without financial responsibility (self-worth), such promises would, of course, be hollow.

We are aware that there is some concern because the insurance alternative to this financial responsibility requirement totals \$1.2 billion, which is a number that is obviously greater than the original \$1 billion. We believe this concern is based on a misunderstanding of the nature of the insurance alternative. To clarify this matter, we offer two important points. First, Tesoro was not able to meet the original requirement and is able to meet the new alternative. Obviously, the bill served an immediate purpose -- as a result of its enactment, Alyeska and Tesoro avoided the disruptive consequences of a disqualification of Tesoro to receive oil spill response services from Alyeska.

Second, the new alternative does not provide Alyeska the same amount or quality of protection that the original financial responsibility requirement provided. Alyeska decided that this reduction to accommodate Tesoro and others similarly situated was an appropriate risk to take in light of the partial limitation of response action contractor liability achieved through HB 196. Under the original financial responsibility requirement, four companies entered into agreements with Alyeska by demonstrating that they had available net assets in excess of \$1 billion. In order to gain the benefit of these companies' contractual promises to Alyeska, Alyeska only has to establish that the obligation exists. The funds are then available to satisfy the obligation.

Under the new insurance alternative, there are two important differences that illustrate the decreased protection offered to Alyeska by insurance. P&I Club coverage applies to the tanker itself, for the benefit of the tanker owner. P&I Clubs have made efforts to prevent Alyeska from making claims against that coverage for third party liability claims against Alyeska arising out of an oil spill response. In the case of Tesoro, Alyeska has done what it could to create a legal basis to achieve coverage for such claims under the P&I Club policies. The ultimate resolution of

Page 3
Letter to Representative Hudson
February 5, 1991

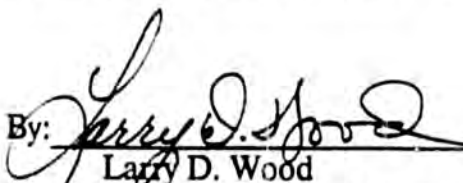
coverage would only occur after years of expensive litigation. It is possible the courts would determine that the P&I Club coverage provided no or only severely limited benefit to Alyeska. What remains then to provide coverage to Alyeska against third party liability claims is the \$500 million CGL insurance policy, which is one half the original amount of financial responsibility. Unlike financial responsibility, Alyeska's receipt of payment from the individual insurance underwriters that make up the \$500 million total is likely to face the additional hurdle of forcing these underwriters to pay, which involves overcoming defenses to coverage raised by the insurers.

Tesoro elected not to procure the full amount of \$500 million CGL insurance. Instead, Tesoro made up part of that total by a corporate guarantee. As a result, Alyeska's Agreement with Tesoro is even more complicated than what I have described.

Indeed, this is a complicated subject. If you would like more detailed information or the opportunity to discuss this, please contact Paul Richards or myself at your convenience.

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY

By: 
Larry D. Wood
Senior Attorney - External Affairs

cc: Mr. Paul M. Richards

C

February 5, 1992

Alyeska Financial Responsibility Requirement

Alyeska operates the Trans Alaska Pipeline System on behalf of seven owner companies. Although none of these pipeline companies own, operate, or charter tankers, Alyeska has contracted to provide prevention and initial response services to tank vessel owners/operators/charterers ("shippers") in Prince William Sound. Shippers are required by state and federal laws to provide for personnel and equipment to escort vessels and to respond to tanker spills in Prince William Sound. Alyeska's prevention and initial response services are ancillary services provided to shippers so that they may continue to handle Alaska North Slope crude oil. Up to this point in time, only Alyeska has offered to provide these services. Nothing prevents others from doing so.

ADEC has approved the shippers' vessel contingency plans which incorporate Alyeska's Prince William Sound Tanker Spill Prevention and Response Plan ("Plan"). The Plan describes Alyeska's prevention and initial response services. Shippers have also signed an oil spill response services agreement for provision of these services by Alyeska. As a contractual matter, shippers must demonstrate financial responsibility to support their contractual commitments, including indemnifying Alyeska against liabilities it faces as a response action contractor. Alyeska must ensure that any shipper with whom it contracts to provide initial response services can provide indemnity for any liability to which Alyeska could be exposed in responding to a spill. Without financial responsibility such promises would, of course, be hollow. Financial responsibility (self worth) must be demonstrated in the amount of \$1 billion, but an insurance alternative in the amount of \$1.2 billion is also provided.

The financial responsibility and alternate insurance levels reflect a careful weighing of the risks which Alyeska faces as a responder, even after HB 196 and limited responder immunity passed last year. As you know, the limits of liability, and, importantly, the categories of types of damages which can be paid following an oil spill have increased substantially since 1989.

For example, in addition to removal costs, damages listed in the Oil Pollution Act of 1990 include damages to natural resources, real or personal property, subsistence use, lost government revenues, loss of profits and earning capacity, and the cost of additional public services. State law likewise imposes liability for removal and

containment costs, civil penalties, damages related to injury to persons, damage to public and private property, and natural resources, and loss of income and economic benefits.

In addition, recall that Exxon has expended roughly \$4 billion in the costs of containing and cleaning up oil, and resolving federal and state claims associated with the EXXON VALDEZ oil spill. Additional third party claims faced by it, and Alyeska exceed \$50 billion. Ironically, those who would suggest that Alyeska's financial responsibility requirement is "unreasonable," must also agree that it is remarkably low in comparison to Exxon's expenditures to date, and in light of the allegations still facing the defendants in federal and state courts.

Under the Oil Pollution Act, there are certain maximum monetary limits on a spiller for liability related to oil discharges. Financial responsibility must be demonstrated to meet this liability. For example, in the case of a tanker in excess of 3,000 gross tons, the liability limit is \$1,200 per gross ton, or \$10,000,000, whichever is greater. A tanker weighing 200,000 gross tons would have a limit of liability of \$240 million under this federal law. However, the liability limit will not apply in the case of violation of an applicable federal safety, construction, or operating regulation, gross negligence, willful misconduct, or failure or refusal to report an incident, provide reasonable cooperation and assistance, or to refuse to comply with a federal order without sufficient cause. An obvious concern is that, to avoid this limitation, plaintiffs will simply allege that "gross negligence" or the violation of a regulation has occurred as a result of every spill. If the limitation on liability is compromised every time even a minor safety regulation is remotely connected to a spill, the limitation will have little meaning.

Limited exemptions for responders liability for certain damages exist under both federal and state laws. But, there are no limitations for other responder liabilities under federal law. And, under state law, there are no limits on the amount of damages that may be assessed against either a spiller or a response action contractor. Financial responsibility requirements, therefore, are set at arbitrary amounts, in the case of a tank vessel, \$300, per incident, for each barrel of crude oil storage capacity, or \$100,000,000, whichever is greater. Importantly, the financial responsibility apparently extends only to claims asserted by public authorities attributable to cleanup and restoration costs, property damage, assessment of civil penalties, etc.

Thus, using either the federal liability limitation, or the federal and state financial responsibility requirements, as a guide for private parties to establish financial

responsibility requirements in response services agreements would be unhelpful and inappropriate. It would leave a responder unprotected. On the other hand, to promote more certainty when responders and shippers are negotiating the terms of financial responsibility provisions, the legislature may wish to adopt meaningful limitations of liability under state law.

D

VIA U.S. MAIL AND FACSIMILE

February 4, 1992

Harry R. Bader, Ph.D, Chairman
Citizens' Oversight Council on Oil and Other Hazardous Substances
3111 C Street, Suite 150
Anchorage, Alaska 99508

Re: **Limited Responder Immunity in Alaska**

Dear Chairman Bader:

We appreciate the opportunity to provide additional information to you and the Council prior to your final deliberations regarding the important issue of responder immunity.

1. Time Limit for Response Immunity

You asked for a recommendation on an appropriate time limit for responder immunity during a response to a spill or threat of a spill. The appropriate duration of the limited responder immunity should extend through the entire response as established by the U.S. government and 17 of 24 coastal states plus the Virgin Islands that have considered the issue. The notion of a time limit is unrealistic given the nature of oil spill response operations; so long as spilled oil remains on water or land, ongoing, expeditious action should be encouraged to remove it. No matter how remote, an "emergency" certainly exists for any community threatened by the impact of oil. In addition, the uncertainty when a time limit begins and ends following any particular "release," may deter prompt and continuous response action for a spill or a threat of spill.

For example, when will an arbitrary time limit begin and end for a mystery or orphan spill? What is the liability of a responder who responds to the report of a threatened spill only to discover a slow leak with no objective indication of when it started? As the arbitrary time limit draws to a close, won't responders be encouraged to withdraw? Will other responders be encouraged to enter the response at that time to insure continuity of personnel and equipment? What is the justification for an artificial barrier if the responder's immunity is only limited and

the original spiller is still financially responsible for any liability which a responder is relieved from?

Mr. Mertz also describes HB 196's time limit as "arbitrary." Indeed, crisis will certainly reign "far fewer days in some cases and far more in others." Page 34, Mertz report. Even California, which is the only other state to consider an arbitrary time limitation, recognizes that the initial 60 day period may have to be extended. In short, we urge the Council to avoid endorsing unnecessary and troublesome limitations upon federal and state efforts to ensure the availability of ample response resources when spills occur.

2. Classification of Responders

We understand that the Council may recommend that responders be classified according to how they are organized and funded: immunity would evidently be limited for some, more limited for others, and perhaps entirely unavailable in one case. As you know, discrimination amongst citizens, be they private or corporate, always calls for constitutional and other legal reviews to insure that principles of equal protection and fundamental fairness are not lost in government's efforts to regulate society.

Before legal analyses would even be undertaken, however, it seems clear that this responder classification proposal, if accepted by the legislature, would virtually insure that entire groups of responders may be unnecessarily driven out of the business. Again, the challenge we face is to support, not destroy or deter, the federal and state comprehensive oil spill response schemes by encouraging effective, prompt response efforts no matter who provides any type of care, assistance, or advice, so long as it is consistent with those schemes or government orders.

Dr. Bader, there is no rational basis for treating responders differently, particularly because response action should be encouraged from any source at any time throughout a release. Again, the spiller and his insurance will still be responsible for responder liabilities that are shielded by the proposed statute. Even under the exigencies of a spill response, a responder will only enjoy limited immunity; therefore, we can be assured that his actions will reflect that concern.

Finally, our materials also stress that Alaska should join with other states to adopt uniform laws in this area for the additional reason to promote uniformity of implementation and interpretation amongst the federal government and coastal states. This will, of course, encourage responders to cross state lines, and to loan

equipment and personnel, without suffering delays and uncertainties caused by an unwarranted, restrictive, and, possibly, oppressive limited responder immunity provision in Alaska.

3. Response to ADEC Orders

We understand that, as an apparent price to be paid for limited immunity, the Council may recommend that some response organizations be required, in advance, to agree to accept ADEC orders to respond to mystery or orphan spills in their area of operation.

As you may know, the United States and the State of Alaska have already been granted the authority to take over and arrange for the removal of spilled oil when circumstances call for it. This, of course, is one of the purposes to be served by industry-funded oil spill response funds. We are aware of no situation in Alaska where responders have purposefully failed or refused to provide services for the federal or state governments when requested to undertake or complete a spill response. Consequently, what justification is driving this proposal? Is it so important, and the prospects for the "worst case scenario" erroneously described in some reports to COC so imminent, as to require further limitation of responder immunity in our state? What responder will be in a position, in advance, to agree to provide services to the federal or state governments without also having a specific contract which establishes the type and nature of response, location, equipment and personnel needs, costs and billing arrangements, etc.? If a need for them exists, nothing prevents the state or federal government from negotiating those contracts now.

In short, requiring this and additional requirements as part of the price to be paid by responders for limited immunity promises instead to create confusion, uncertainty, and a reluctance to take action when oil spills occur.

4. The Pipeline Owner Companies Are Not Liable for Tanker Spills

We understand that COC may further recommend that the pipeline owner companies, as holders of the federal right of way permit, and Alyeska, as their operating agent, be directed under state law to respond to any tanker spill in Prince William Sound. We have already explained at some length that Mr. Frank's view that TAPAA already imposes such liability is flatly wrong, but we understand that special legislation may be recommended to "clarify" the matter and adopt Mr. Frank's view as a matter of state law.

Our materials explain that Alyeska operates the Trans Alaska Pipeline System on behalf of seven pipeline companies which own it. None of these own, operate, or charter tankers. Under federal and state law, tanker owners/operators/charterers are responsible for tanker operations, and Alyeska cannot and does not manage or control them. Provision has been made by tanker operators to provide contingency plans and to demonstrate financial responsibility for those operations. In addition to the constitutional and legal issues presented by this proposal, we urge that the Council also recognize that it entirely ignores the comprehensive liability, response, and financial responsibility regime established by Congress and the legislature for tanker operations in our state and elsewhere.

As we have also explained, Alyeska does provide initial response services to tanker owners/operators/charterers, and that this service is described in a plan and in response services agreements. As a contractual matter, tanker owners/operators/charterers must demonstrate financial responsibility to support their contractual commitments, including indemnifying Alyeska against liabilities it faces as a response action contractor. Alyeska must ensure that a shipper with whom it contracts to provide initial response services can provide indemnity for any liability to which Alyeska could be exposed in responding to a spill. Without financial responsibility such promises would, of course, be hollow. Financial responsibility (self worth) must be demonstrated in the amount of \$1 billion, and Tesoro has been permitted to support its contractual capabilities with a combination of insurance and a corporate guarantee in the total amount of \$1.2 billion.

We explained that, after enactment of HB 196 last year, Alyeska created this alternative to its \$1 billion financial responsibility requirement. The insurance may consist of \$700 million P&I marine insurance coverage for the vessel and \$500 million comprehensive general liability coverage that names Alyeska as an additional insured. There is no way that Tesoro could provide a corporate guarantee, bond, or letter of credit, as originally required by Alyeska's financial responsibility standards, for either \$1 billion or \$1.2 billion. Because of uncertainties associated with coverage of contractor claims against vessel marine insurance, and the added potential difficulty of enforcing insurance coverage generally, the quality of Alyeska's financial protection has diminished substantially. Yet, the parties reached this practical solution to a difficult problem after and because HB 196 passed last year. This insurance alternative will expire when HB 196 sunsets at the end of June, 1992.

Nonetheless, the Council has indicated that it may view this arrangement as "unreasonable," and is concerned that Alyeska may use limited responder immunity to drive this and other TAPS trade tanker operations "out of business." Nothing could be farther from the truth. Alyeska worked diligently with Tesoro to reach a solution to keep it in business, and we need legislative assistance to keep that solution in place.

Although certainly adjusted in Tesoro case because of a perceived reduction in the risks faced by Alyeska when HB 196 passed, the financial responsibility level reflects a careful weighing of the risks which remain. As you know, the limits of liability, and, importantly, the categories of types of damages which can be paid following an oil spill have increased substantially since 1989.

For example, in addition to removal costs, damages listed in the Oil Pollution Act of 1990 include damages to natural resources, real or personal property, subsistence use, lost government revenues, loss of profits and earning capacity, and additional public services. State law likewise includes removal and containment costs, civil penalties, and damages related to damage or injury to persons and to public and private property, natural resources, and loss of income and economic benefits. Limited exemptions for responders liability for certain damages exist under both federal and state laws.

In addition, recall that Exxon has expended roughly \$4 billion in the costs of containing and cleaning up oil, and resolving federal and state claims associated with the EXXON VALDEZ spill. Additional third party claims faced by it, and Alyeska exceed \$50 billion. Ironically, those who suggest that Alyeska's financial responsibility requirement is "unreasonable," must also agree that it is remarkably low in comparison to Exxon's expenditures to date, and in light of the allegations still facing the defendants in federal and state courts.

Under the Oil Pollution Act, there are certain maximum monetary limits on a spiller for liability related to oil discharges. Financial responsibility must be demonstrated to meet this liability. For example, in the case of a tanker in excess of 3,000 gross tons, the liability limit is \$1,200 per gross ton, or \$10,000,000, whichever is greater. A tanker weighing 200,000 gross tons would have a limit of liability of \$240 million under this federal law. However, the liability limit will not apply in the case of violation of an applicable federal safety, construction, or operating regulation, gross negligence, willful misconduct, or failure or refusal to report an incident, provide reasonable cooperation and assistance, or to refuse to comply with a federal order without sufficient cause. An obvious concern is that, to avoid this limitation,

plaintiffs will simply allege that "gross negligence" or the violation of a regulation has occurred as a result of every spill. If the limitation on liability is compromised every time even a minor safety regulation is remotely connected to a spill, the limitation will have little meaning.

And, under state law, there are no limits on the amount of damages that may be assessed against either a spiller or a response action contractor. Financial responsibility requirements, therefore, are set at arbitrary amounts, in the case of a tank vessel, \$300, per incident, for each barrel of crude oil storage capacity, or \$100,000,000, whichever is greater. Importantly, the financial responsibility apparently extends only to claims asserted by public authorities attributable to cleanup and restoration costs, property damage, assessment of civil penalties, etc.

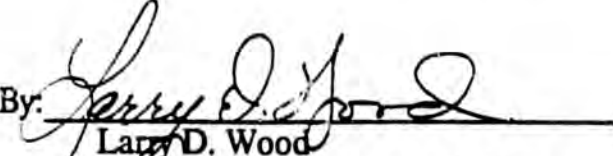
Thus, using either the federal liability limitation, or the federal and state financial responsibility requirements, as a guide to establish financial responsibility requirements contained in response services agreements is unhelpful and inappropriate. It would leave a responder unprotected.

On the other hand, to promote more certainty when responders and responsible parties are negotiating the terms of financial responsibility provisions, COC may wish to recommend that the legislature adopt meaningful limitations of liability under state law. If enacted, those limitations would be reflected in Alyeska's financial responsibility requirements.

We trust that this information will be useful as the Council considers what recommendations it will present to the legislature. Please let us know if there is additional information which we can provide to assist those efforts.

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY

By: 
Larry D. Wood
Senior Attorney - External Affairs

cc: COC Members
Michele D. Brown, Esq.

E

January 30, 1992

Improving Good Samaritan Immunity for Oil Spill Response in Alaska

Good Samaritan laws encourage action to save lives and property during emergencies.

Alaska laws limit liability of individuals or organizations who provide emergency assistance. Examples include:

- Rendering care at accident scenes.
- Providing equipment or services requested by a police agency, fire department, or other governmental agency during a state of emergency.

Similarly, the federal Oil Pollution Act of 1990 ("OPA '90") and Alaska's HB 196 adopted responder immunity laws to encourage "immediate and effective" oil spill response action.

Without liability immunity, financial risks and liability exposures would deter cleanup contractors and cooperatives from prompt, aggressive action.

However, without legislative action this session, HB 196's provision for limited immunity against certain claims under state law will "sunset" in July 1992.

To help insure that effective and substantial resources are readily available to contain and cleanup oil spills, the state's responder immunity law should be improved and made permanent.

Although its scope is also limited, the federal response action immunity provision in OPA '90 (33 USC § 1321(b)(11)(c)(4)) is the best model.

To date, the Virgin Islands and 18 of the 24 coastal states (75%) have adopted virtually identical laws.

OPA '90 limits liability under federal law for response action in federal waters if it is consistent with the National Contingency Plan or federal directions. Responders are still liable for personal injuries and wrongful deaths, or if they are grossly negligent or engage in willful misconduct. Importantly, the responsible vessel owner, operator, or charterer is liable for any removal costs or damages that responders are relieved of.

In comparison, last session's HB 196 is the most restrictive responder immunity law in the country.

There is limited liability for response action contractors under state law if such action is not contrary to federal or state directions. *But, the action must not "substantially deviate" from an applicable contingency plan.* The liability limitation does not bar claims for personal injuries and death, *personal property damage not caused by oil*, or gross negligence or intentional misconduct. *The response immunity only applies to an act or omission that occurs within 15 days after a release.*

The OPA '90 Good Samaritan provision will encourage oil spill response organizations to quickly provide personnel and resources when spills are threatened or occur.

- A. **There is no 15-day or other immunity time limit in the OPA '90 Good Samaritan provision.**

HB 196's time limit is unrealistic given the nature of oil spill response operations; so long as spilled oil remains on water or land, ongoing, expeditious action should be encouraged to remove it. In addition, the uncertainty when a time limit begins and ends following a particular "release," may deter prompt and continuous response action for a spill or threat of a spill.

- B. **All persons who render "care, assistance, or advice" have limited liability under OPA '90.**

Although "response action contractors" in HB 196 includes "volunteers," nonvolunteers must be "carrying out [a response action] contract" or under the control of a response action contractor who is. But written contracts cannot describe all actions taken during a response. This unnecessary restriction will foster uncertainty regarding the scope of those persons and actions entitled to limited immunity under HB 196.

- C. **Under OPA '90, the response action needs to be "consistent with" the National Contingency Plan ("NCP").**

The NCP covers a broad array of actions "to minimize damage from oil . . . discharges." All actions within "the overall objectives of the NCP" fall within the immunity. In comparison, for response action contractors who have prepared or agreed to individual contingency plans, response action must not "substantially deviate" from such plans to claim limited immunity under HB 196.

Individual contingency plans cannot describe all necessary response actions, yet "substantial" deviations from those plans will not fall within the scope of limited immunity. Delays may result where plan amendments are required. Moreover, uncertainty about "substantial deviation" will foster controversy and litigation.

- D. Damages to personal property need not be caused by oil to claim limited immunity under OPA '90.

Oil spills generate emergency actions other than those related to containing and cleaning up oil. HB 196's requirement that damage to tangible personal property be caused by oil to fall within the scope of the limited immunity is inappropriate and may have a chilling impact on responses.

- E. OPA '90 responder immunity, or similar laws, have been adopted by the states which have considered the federal standard.

Unlike HB 196, the federal standard will be applied in many jurisdictions. Uniformity of interpretations is anticipated. This uniformity will encourage response organizations to cross state borders in the event or in anticipation of oil spills.

The best course is to replace HB 196 responder immunity with the federal Good Samaritan standard; however, Alaska's limited immunity law can be improved.

- ② "SUBSTANTIALLY DEVIATED" MUST BE DEFINED TO DESCRIBE ONLY MANAGEMENT, NOT OPERATIONAL, LEVEL DECISIONS.

No contingency plan can anticipate every development, including weather, location, time of day, and season. The response must adapt to the event. Thus, errors by operations personnel reacting to exigencies is expected; this is a key reason for limited responder immunity.

Responders should not incur liability for good faith, but negligent, decisions by response personnel in the field. Without a definition, this language offers no predictable liability exposure and will encourage litigation. In the letter of intent which accompanied HB 196, the legislature recognized this uncertainty and asked that the matter of a definition be studied.

January 30, 1992

- **ALASKA'S RESPONDER IMMUNITY LAW MUST NOT CHANGE RESPONSE PLANNING STANDARDS INTO CLEANUP STANDARDS.**

HB 567, Alaska's 1989 ~~contingency~~ oil spill prevention, contingency planning, and response legislation, states that its response planning standards do not constitute cleanup standards which must be met by a contingency plan holder. However, since response actions must not "substantially deviate" from a contingency plan to fall within the scope of HB 196 responder immunity, this analysis is inconsistent with HB 567. Clarifying language is needed.

- **THE HB 196 15-DAY IMMUNITY TIME LIMIT MUST BE ELIMINATED.**

This time limit is unrealistic given the nature of oil spill response operations; it is a major disincentive for responders to get involved and stay involved. Distant responders may be discouraged to send equipment, personnel, and other assistance because a short immunity period will largely expire during travel time. No time limit will encourage continuity of services and loaning of equipment in a massive spill response, and minimize turnover of experienced, skilled personnel.

- **THE LIMITED IMMUNITY SHOULD BE EXTENDED TO ACTIONS TAKEN TO PREVENT AN OIL SPILL.**

Prevention of an oil spill is, of course, the best course to protect our environment. Accordingly, the responder immunity laws in several states also offer limited protection to those who take actions to prevent such releases.

- **DAMAGES TO TANGIBLE PERSONAL PROPERTY SHOULD NOT NEED TO BE CAUSED BY OIL TO FALL WITHIN THE SCOPE OF LIMITED RESPONDER IMMUNITY.**

Oil spill responses will generate many other emergency actions other than those related to containing and cleaning up oil. Personal property may be damaged other than by oil. To avoid a chilling effect on response efforts, HB 196's requirement that only oil-damaged personal property falls within the scope of limited responder immunity should be deleted.

- **A TECHNICAL AMENDMENT SHOULD CLARIFY THAT THE STRICT LIABILITY STATUTE, AS 46.03.822(A), IS SUBJECT TO HB 196'S LIMITED RESPONDER IMMUNITY PROVISIONS.**

AS 46.03.822(a) imposes strict liability for damages and for response costs on certain persons should a release of a hazardous substance occur. For example, the owner

January 30, 1992

of, and the person having control over, the hazardous substance are included. Also included are those persons who arrange for and transport a hazardous substance which is released. Last year, HB 196 provided for limited responder immunity from this and other laws, but, as a technical matter, this intention should be clarified by an amendment to AS 46.03.822(a).

Proposed Amendments to HB 196, Alaska's Responder Immunity Law

1. Add to AS 46.03.822(a), after "... (i) of this section," the following:

", and the provisions of AS 46.03.825,".
2. Add to AS 46.03.825(a) two new subsections as follows:

"(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.

(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."
3. Delete AS 46.03.825(b)(2), and AS 46.03.825(b)(3).
4. Add to AS 46.03.825(d), after "but not limited to", the following:

"prevention,".

F

Oral Presentation to Citizens' Oversight Council, January 31, 1992
Prepared by Alyeska Pipeline Service Company

- Thank you for the opportunity to provide comment regarding the important issue of improving responder immunity in Alaska.
- We were also pleased to provide research materials regarding the laws of other states and trust that it was useful to the Council's work. We have also provided written comments relating to five reports submitted to as research and thank you for your consideration of them.
- Alyeska Pipeline Service Company ("Alyeska") operates and maintains Trans Alaska Pipeline Service Company ("TAPS") on behalf of seven owner companies.
- The System stretches from Prudhoe Bay on Alaska's North Slope to Valdez where its 1,000 acre marine terminal loads southbound tankers with crude oil.
- Although neither Alyeska nor the pipeline owner companies own or operate tankers, it has contracted with tanker owners/operators/charterers to provide an initial response to an oil spill from their vessels in PWS.
- The State requires that crude oil tankers transiting PWS have oil spill contingency plans. Alyeska developed an initial response plan (the PWS Tanker Spill Prevention and Response Plan) which describes the services it offers to tank vessels as an initial response contractor.
- Other response action contractors could also provide these services.
- Under the terms of the initial response plan and the Oil Spill Response Service Agreements signed with tanker owners/operators/charterers, Alyeska provides the necessary response vessels, equipment, personnel and training to respond to an oil spill for as long as the first 72 hours following a release.
- During this time, management of the response will transfer from Alyeska to the contracting spiller or to the federal On Scene Coordinator.
- To provide these services, Alyeska has chartered escort response vessels, tugs, barges, and an oil spill recovery vessel. It has ocean and rapid deployment boom, seaskimmers, and related response equipment.
- Alyeska has also developed area response centers, placed fishing vessels on contract to supplement response efforts, and prestaged equipment to protect hatcheries and other sensitive areas.

- Escort/response vessels are used for day-to-day escort of loaded tankers as a prevention measure. Vessel crews are drilled in responding to large spills and in employing multi-vessel and multi-boom configurations.
- Several reports express opinions that response action contractor ("RAC") liabilities ought actually to be increased, not limited, when it comes to response action.
- For example, the Mertz and Straube reports suggest that RAC's ought to be subject to direct state control in the event that an insolvent or recalcitrant spiller refuses to finance.
- Imposing spiller liability on RACs to pay for the cost of oil spill response will deter or eliminate spill response, not promote it.
- This notion flies in the face of the comprehensive federal and state schemes to, on the one hand, encourage prompt, bold response action, and, on the other, require that spiller, his insurance, or, in some cases, industry-financed funds pay for it.
- In addition, this possibility described as a worst case scenario in the Mertz, Straube, and Frank reports is admittedly remote. It would depend for example on the simultaneous insolvency of a spiller, his financial responsibility, and federal and state oil spill response funds. Yet, it this possibility which in these individuals opinion ought to fuel a step toward closing out response action by imposing new liabilities.
- A fundamental reason spill funds exist is to provide a safety net for just the dark scenario which is described. But this point seems to have been lost.
- In an interesting paradox, the Mertz report indicates the justification for these new RAC duties and liabilities would be the possibility of all these insolvencies, yet, in the case where a mystery or orphan spill is most likely require a third party response, and the state moves in to do so, it will enjoy limited responder immunity under a separate statute. Why are there different rules for private RACs?
- The Frank report evidently recommends that Alyeska not be entitled to even limited responder immunity because, in this attorney's opinion, the holders of the federal pipeline right-of-way permit are liable for any tanker spills involved Alaska North Slope crude oil. For the reasons explained in Alyeska's written response, this is incorrect.

- Judge Holland in the *Exxon Valdez* litigation has already ruled that the people strictly liable under the Trans Alaska Pipeline Authorization Act are the vessel owner and operator, and the Trans Alaska Pipeline Liability Fund.
- In any event, the terms of most responder immunity laws state quite clearly that a RAC which is otherwise a responsible party for a spill is not entitled to assert limited immunity.
- In our response to the Vogt report, we point out that personnel and equipment to escort vessels and to respond to spills in PWS are required by state laws, and Alyeska has offered to provide those services in the absence of anyone else. The costs of Alyeska's initial response services for tanker owners/operators/charters are included by the TAPS carriers in the tariff charges for oil delivered to Valdez. This is an equitable distribution of the costs of those services amongst those who receive them.
- None of this detracts from Alyeska's status as an initial response action contractor in Prince William Sound, nor does it create some sort of state equity in the prevention and response equipment, so as to justify its uncompensated use for a mystery or orphan tanker spill. Interestingly, if the state owned and used that equipment, the Mertz report explains that it would enjoy limited responder immunity in the event of a response.
- Lastly, the Mertz report is incorrect. Following the passage of limited responder immunity law year, Alyeska agreed to make changes in how Tesoro demonstrates its capacity to pay for initial response services. Instead of requiring financial responsibility, that is a demonstration of self-worth, Tesoro now provides this evidence through insurance. Because of the perceived reduction in risk, Alyeska has accepted less in the overall quality of Tesoro's demonstration of that capacity as explained in our written remarks.
- For the balance of our remarks, we will refer to the attached position paper regarding improving responder immunity.

G

To: Mike Abbott

January 31, 1992

From: R.I. Shoaf *M Shoaf*

Immediately prior to March 1989, Alyeska Pipeline had unilateral contracts with vessels calling at Valdez, through the Port Information Manual, whereby Alyeska would provide oil spill response for TAPS trade vessels. Under the terms of the Port Information manual, a contract was created between a vessel, and its operator, owner and charterer, and Alyeska each time a vessel lifted oil at Valdez. The contract required Alyeska to respond to a spill from the vessel according to Alyeska's oil spill contingency plan for Prince William Sound, which was approved by the state in 1987. The contract required a vessel to reimburse all of Alyeska's costs in responding to a spill and to indemnify Alyeska from third party claims. The contract did not require the vessels to demonstrate an ability to indemnify Alyeska. When the Oil Spill Response Services Agreements went into effect on November 1, 1990, bilateral contracts were formed that were similar to the unilateral contracts created under the Port Information Manual, but added the requirement that vessels demonstrate their ability to indemnify Alyeska. This requirement was added in direct response to the magnitude of claims asserted against Alyeska after the Exxon Valdez accident.

January 31, 1992

Michele D. Brown, Esq.
Executive Director
Citizens' Oversight Council on Oil and Other Hazardous Substances
3111 C Street, Suite 150
Anchorage, Alaska 99508

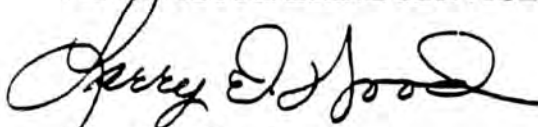
Re: Alyeska Comments Regarding Reports Submitted to the Citizens'
Oversight Council on Oil and Other Hazardous Substances

Dear Ms. Brown:

Enclosed please find comments respectfully submitted by Alyeska Pipeline Service Company ("Alyeska") to the Citizens' Oversight Council on Oil and Other Hazardous Substances. The comments relate to reports which have been submitted to the Council. Thank you for the opportunity to participate in the Council's consideration of the important matter of limited responder immunity.

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY



Larry D. Wood
Senior Attorney - External Affairs

Attachments

H

January 31, 1992

Response to Memorandum Relating to the State of Alaska's Participation in Spill Response and Preparedness in the State Prepared by Deborah Vogt**Summary**

This report, as well as several pages of the TAPAA report prepared by Michael J. Frank (pages 34 - 36), is committed in large part to debating whether Alyeska's prevention and initial response services provided to contracting vessel owners/operators/charterers in Prince William Sound are best handled as tariff charges for oil delivered to Valdez or as direct charges to vessels which contract for those services. In addition, the Vogt report contains a considerable amount of mathematical analysis which has not been reviewed for accuracy in the short time available.

Alyeska's November 20, 1991, letter which is attached to the Vogt report, explains at some length how and why the TAPS carriers include the costs of Alyeska's Prince William Sound effort in tariff charges for oil delivered to Valdez. However, these services are not being provided pursuant to any common carrier obligations of the TAPS carriers or their agent, Alyeska. Personnel and equipment to escort vessels and to respond to spills in Prince William Sound are required by state and federal laws. In the spring of 1989, using a series of emergency orders and Consent Agreements, the State of Alaska compelled Alyeska to develop and provide a tanker escort system and to greatly increase response equipment and personnel beyond what had been approved in 1987. On November 1, 1990 Alyeska's Prince William Sound contingency plan and the 1989 emergency orders and Consent Agreements expired when the state approved vessel contingency plans, held by the owners or operators of those vessels, as required by AS 46.04.030(c). Those approved vessel contingency plans incorporated Alyeska's Prince William Sound Tanker Spill Prevention and Response Plan, whereby Alyeska, as a response action contractor, is committed to provide certain prevention and initial response services to tankers that have a Response Agreement with Alyeska. Up to this point in time, only Alyeska has offered to provide these services. Nothing prevents others from doing so.

These services are ancillary services provided to shippers so that they may continue to handle Alaska North Slope ("ANS") crude oil. As a result, the pipeline may continue to carry ANS crude oil, and provide revenues for state services. The practice of including the costs of those services in tariff charges for oil delivered to Valdez is, in fact, an equitable distribution of the costs of those services amongst those who receive them. Finally, the owners of the Trans Alaska Pipeline System are not vessel owners (i.e., shippers). The shipping companies are separate and distinct from the carriers.

Despite Ms. Vogt's suggestion, none of this detracts from Alyeska's status as an initial response action contractor in Prince William Sound, nor does it create some sort of state equity interest in the prevention and response equipment, so as to justify its uncompensated use for a mystery or orphan tanker spill. Alyeska's prevention and response resources are available only for vessels in the TAPS trade that have Oil Spill

Response Services Agreements with Alyeska. Under the terms of the vessels' approved contingency plans, those resources must be available in Prince William Sound, ready to respond. There are only a few exceptions to this requirement; for example a small percentage of the response resources may be sent to other areas for oil spill response with prior DEC approval. AS 46.04.030(o). Moreover, the premise that Alyeska, as agent for the holders of the federal pipeline right-of-way, is liable for tanker spills is flatly wrong as explained in Alyeska's comments to the Frank report.

The Federal Energy Regulatory Commission ("FERC") is authorized to determine whether costs that the carriers record should be included in their cost of service and whether those services are reasonable. However, it does not follow that FERC has the authority to decide whether financial responsibility and insurance requirements are appropriate. We are aware of no basis for Ms. Vogt's statement, at page 18, that FERC has such authority.

LDW:vogt/cas

I

January 31, 1992

**Response to Memorandum Relating to Contingency Plan Requirements Under
OPA '90 Prepared by Michele Straube****Summary**

The U.S. Coast Guard's disinclination to force a "... RAC [response action contractor] to respond if the Holder [of a contingency plan] did not concur" encourages prompt and aggressive response action, despite suggestions in this memorandum to the contrary. Page 10, footnote 29. If an RAC is aware that the state or federal governments will essentially impose spiller liability for response action if an RAC contracts to provide services to a spiller, the RAC will obviously refuse to offer those services. As noted by the Coast Guard, all of OPA '90's statutory requirements -- strict liability, treble damages, contingency planning, periodic drills -- illustrate the point that it is in the responsible party's best interest to respond to spills and to proceed expeditiously, without objection. *Id.* OPA '90 and state financial responsibility requirements and the safety net of industry-financed state and federal response funds make the "worst case scenario" (the apparent and simultaneous insolvency of a shipper, its insurance, and state and federal response funds darkly described on page 11) an extremely remote possibility.

Nonetheless, and fueled by this speculation, the memorandum implies that the state should move ahead, despite the recognized uncertainty of federal preemption and constitutional limitations, "by imposing liability on RACs [to bear the costs and liabilities of spill response should a spiller fail to]." Page 15. This step would most certainly defeat the comprehensive approach taken by federal and state governments to, on the one hand, insure prompt, effective response to oil spills, and, on the other, require that costs be borne by the spiller, his evidence of financial responsibility, and, in some cases, oil spill response funds. Unfortunately, the Coast Guards' answer to the "worst case scenario" question seems to have been largely ignored: "... the OSC could direct the RAC to implement the approved contingency plan and reimburse the RAC's costs from the Fund." Page 10. In addition, the memorandum fails to consider that the Coast Guard has urged the states to adopt the federal responder immunity standard to insure "the availability of a viable private sector capability to respond to oil spills and their threats ... [as] an absolutely essential element of a national oil pollution response system." Contractor Immunity Provision: State Oil Spill Laws, Commandant, U.S.C.G. (May 31, 1991).

LDW:straubi/cas

J

January 31, 1992

**Response to HB 196 Report on Response Action Contractors Prepared by the
Alaska Department of Environmental Conservation****Summary**

This memorandum incorrectly states that "[n]one of the RACs have had experience with claims for damages due to spills or to alleged negligence***." Page 5. Alyeska Pipeline Service Company ("Alyeska") reported that such claims had been asserted in the Exxon Valdez litigation. It is our understanding that Exxon Shipping Company's long term response action contractor, VECO, has also been named as a defendant in virtually all of the spill litigation. Potential liabilities associated with such claims are, therefore, not an imagined concern.

The memorandum also incorrectly asserts that "[o]ther industry response organizations not so structured [to function independently] may not have a relationship similar to RACs. In some cases the owner companies may own and operate an oil terminal, tankers and the response organization." Page 9. However, Alyeska is an initial response action contractor which has agreed to provide initial response services to tanker owners/operators/charterers. Although Alyeska is the common operating agent for the seven holders of the federal and state rights-of-way for TAPS who own the pipeline, terminal, and related properties, none of these companies own tank vessels or consequently hold vessel oil spill prevention and response plans. To answer the agency's rhetorical questions on page 10, Alyeska, as agent for the pipeline owner companies, is under the same contractual obligations to provide initial response services to these tanker owners/operators/charterers as would be any other RAC that signed a response services agreement. The terms of that agreement call for Alyeska to assume responsibility for spill response operations for as long as the first 72 hours following the spill during which time the contracting tanker owner/operator/charterer will assume spill management responsibilities. Hence, during this time, and to the extent it provides continuing response services, Alyeska faces the same risks as other RACs and is entitled to the same immunity from liability available to RACs generally.

LDW:ADEC/cas

K

January 31, 1992

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

Summary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

January 31, 1992

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

Alyeska Pipeline Service Company (Alyeska) agrees with Mr. Mertz and Mr. Koester that in imposing liability on oil spill response action contractors (RAC): "The bottom line must involve balancing the need for fair and full compensation for all spill injuries with the need for a liability scheme that does not discourage response action contractors from acting to prevent spill damage." Mertz and Koester report (Report) at page 34. Generally, any public interest in expanding the number of parties who might provide compensation for damages does not outweigh the stronger public interest in encouraging rapid, aggressive response to oil spills. The Citizens' Oversight Council should balance all public interests in making its recommendations to the Legislature regarding whether and to what extent Alyeska should reduce the present limitation on liability for RACs. It should consider that (1) limiting the liability of response action contractors does not reduce the liability of the spiller; (2) financial responsibility requirements reduce the likelihood that the spiller will be insolvent; (3) federal and state oil spill funds provide a safety net; and (4) damages can be reduced most effectively if RACs respond boldly, quickly, and efficiently under the emergency conditions that arise in an oil spill.

Mr. Mertz and Mr. Koester discuss a number of basic legal principles: common law negligence, with special rules for "abnormally dangerous" activities; indemnification and the public duty exception; nondelegable duty; respondeat superior. The Report incorrectly implies that crude oil is a hazardous substance and that the carriage and release of crude oil is an "ultrahazardous" activity. Report at pages 3-6. Only a few activities that involve a risk of serious harm that cannot be eliminated by the exercise of "utmost care" by the parties involved are considered

"ultrahazardous" under Alaska common law. Matomco Oil Company, Inc. v. Arctic Mechanical, Inc., 796 P.2d 1336 (Alaska 1990).

Furthermore, common law legal principles have been developed by federal and state courts through decisions allocating the rights and responsibilities of the parties before them. The obvious conclusion to be drawn from the Report is that it is very difficult to predict what a party's liability may be for any act or failure to act. Legislatures have recognized their duty and responsibility to express public policies by adjusting these principles for categories of potential liability. For example, in response to concerns about rising medical and insurance costs, the Alaska Legislature and other legislatures set limits on liability and reallocated responsibilities for tort damages by eliminating joint and several liability. Similarly and appropriately, the Alaska Legislature correctly limited the liability of RACs.

Alaska responds to comments and recommendations made in the Report as follows:

1. The limitation on liability for RACs will not prevent the recovery of damages by injured parties. The Report erroneously states that contract provisions and statutory exemptions for RACs reduce the overall liability to such an extent that parties who have been damaged may not be compensated. Report at pages 17, 33 and 34. This simply is not true. First, both the Alaska Legislature and Congress have created funds to reimburse parties damaged by oil spills. Second, under both federal and state law, the spiller is strictly liable for damages caused by spills. In fact, the Report acknowledges this by stating that even the common law has placed "a heavy burden, including strict liability, on parties responsible for the safe storage and transportation of oil, and often makes them liable for the acts of employees and contractors." Report at page 9.

Under Alaska law, the spiller's strict liability extends to any damage caused by an act or omission of an RAC responding to a spill. AS 46.03.822(k). The Report states, correctly, that the legislature intended to lay the burden for paying for any damages caused by the RAC on the party responsible for the spill. Report at page 14. As a result of this provision, the responder exemption cannot "lessen" the overall liability burden as the Report asserts at page 18. The exemption is hardly "generous," as characterized by the Report.

The exemption encourages responders to act by assuring them that certain acts will not create liability. Conversely, potential liability would discourage effective response. The Report acknowledges this by stating, "Almost all [RACs] considered the potential for claims to be a concern." Report at page 21.

Similarly, indemnity agreements do not allow parties who are strictly liable to "escape" liability, as the Report asserts at page 18. Under Alaska law, indemnification agreements are "not effective to transfer liability" from a person who might be strictly liable. AS 46.03.822(g).

The Report states that "it is possible" that limitations on liability may prevent recovery of damages by parties injured where there is no other financially solvent responsible parties. Report at page 17. Importantly, such a possibility would depend upon state and federal errors in approving evidence of a spiller's financial responsibility to begin with and in administering state and federal funds which exist in part to clean up and to pay for "mystery" and "orphan" spills. Yet, this remote possibility fuels the reports' central premise that RACs should agree to adhere to the state's orders should a spiller and his insurers become simultaneously insolvent. Ironically, the report recognizes that the proposal would probably discourage response action and amount to an unlawful taking of private property. The Report acknowledges the taking issue in its statement at page 33 that requiring RACs to have a direct contractual relationship with the State "would probably be been as an illegal taking and could require compensation to the RAC itself."

Indeed, elevating RACs to the same level of liability as the spiller directly contradicts and defeats the comprehensive framework of state and federal oil spill response laws to, on the one hand, promote quick, effective action, and on the other, rely on spiller liability, financial responsibility, and federal and state industry-supported funds to pay for it. Instead of encouraging response action by imposing limited liability, the report proposal would largely deter or eliminate it by imposing spiller liability on responders in direct defiance of congressional and legislative intent. Remote possibilities should not likewise support the Council's recommendations; we urge that they be supported instead by a careful and realistic weighing of public interests and goals.

The Report also states that "obtaining compensation (from state and federal funds) may be too costly or complicated for the small injured party." Report at page 33. Taking away the limited immunity now provided to RACs will not provide direct compensation to an injured party seeking compensation. Liability would probably only be decided through costly and complicated litigation. A primary goal of the federal fund is to provide people faster, more efficient, compensation than can be gained through litigation.

2. Alaska agrees with the statement at page 34 of the Report that the 15-day limit on the immunity provided is arbitrary. HB 196's time limit is unrealistic given the nature of oil spill response operations; every spill will be different. So long as

spilled oil remains on water or land, ongoing, expeditious action should be encouraged to remove it.

3. As a matter of public policy, the liability of an RAC should be limited. An RAC is responding if, and only if, there already has been a spill. Thus, an emergency exists. Under exigent circumstances, all parties, including RACs and governments, should react and respond quickly and efficiently. Principles of negligence do not make sense, and it is difficult for anyone to determine, especially after the fact in a courtroom, what was "reasonable under the circumstances," as the Report implies at page 34.

On March 26, 1991, in addressing the House Resources Committee prior to adoption of House Bill 196, Representative Hudson noted that this bill would shift the liability for simple negligence from an innocent spill response action contractor to the party responsible for the spill. He correctly noted that under this exemption, in responding to a spill, an RAC assumes liability for any damage caused by its own recklessness or gross negligence. The committee also heard testimony from Jon Tillinghast on behalf of Tesoro and Conoco, that Pacific Fisheries Legislative Task Force, the U. S. Coast Guard, the California Sierra Club, the International Bird Rescue Research Center, and the Ventura County Commercial Fishermen's Association have supported RAC exemption provisions. To date, the Virgin Islands and 18 of 24 coastal states (75%) have adopted virtually identical laws, that provide greater RAC immunity from liability than HB 196.

Later, on April 23, 1991, Representative Hudson commented to the House Judiciary Committee that by being more consistent with the laws of other states and federal law, national and regional RACs would be more inclined to respond to spills in Alaska.

4. The level of competence of an RAC and how it and the plan holder will respond can best be evaluated in advance of a spill by review of the oil discharge prevention and response plan and through DEC's authority to require training programs and spill drills.

5. Parties must be allowed to define their relative rights and responsibilities through contract. The Legislature has authorized limited state review of response action contracts. Regulations drafted by the Alaska Department of Environmental Conservation to implement House Bill 567 will require a plan holder who proposes to use the services of any RACs to (1) identify those RACs, (2) summarize each agreement or contract, and (3) describe the equipment and services to be provided by the RAC. However, the scope of indemnity provisions and the degree of control retained by the spiller are basic provisions that must be negotiated by the contingency plan holder and the RAC, based on circumstances and needs unique to the contracting parties, such as oil spill response

needs; whether the RAC is a full time, private response organization, an oil spill cooperative or a fisherman; and, certainly, the potential liability to which the plan holder is exposed by its operations.

The Report expresses surprise at the diversity among such contracts. Report at page 19. Of course the terms will vary from contract to contract. The contracts must reflect the needs of each party. However, the parties allocate their responsibilities for damages, they cannot avoid their liabilities to third parties and to the State and federal government, as stated in law.

Furthermore, the discussion of contracts, at least insofar as it relates to the two industry co-ops, (Report at page 19) wholly ignores the distinction between industry co-ops and private contractors. Industry co-ops are voluntary organizations of companies that have banded together to amass oil spill response equipment and response capabilities for their mutual benefit and, in the case of one of them, for social welfare purposes.

These co-ops are operated on a non-profit basis, and little attempt is made to recover even the indirect costs of response activities, such as overhead and staff time. The co-ops are not intended to, and do not, operate in a way that would enable them to accumulate loss reserves or to purchase expensive insurance for their protection. The response action contracts they have adopted are established in their charters or bylaws and cannot be negotiated, at least with respect to indemnity. The terms of the indemnity agreements reflect not so much the business acumen or negotiation strengths of the co-ops as their status as voluntary, non-profit organizations.

In particular, the Report discusses the Alyeska response services agreements and implies that it is inappropriate for Alyeska to require one billion dollars in financial responsibility. Report at page 25. Alyeska must ensure that a shipper with whom it contracts to provide initial response services can provide indemnity for any liability to which Alyeska could be exposed in responding to a spill. Alyeska is not an insurer which could otherwise spread the financial burden of a loss amongst a number of insureds; each spiller must demonstrate the wherewithal to pay for all the costs associated with its spill. Particularly, in light of recent changes in the types of claims and variety of damages which can be associated with federal and state oil spill litigation, this financial responsibility requirement is reasonable. In light of the magnitude of claims filed after recent oil spill incidents, this figure is reasonable.

Additionally the Report states that Alyeska has "raised rather than lowered" the financial responsibility requirements for Tesoro. Report at page 25, n. 25. After the legislature limited the liability of RACs, thus reducing the perceived risks associated

with spill response, Alyeska carefully considered the matter and changed the manner in which Tesoro could demonstrate its capability to meet its contractual obligations to Alyeska. After enactment of HB 196, Alyeska created an alternative to its \$1 billion financial responsibility requirement. This alternative allows any company to utilize insurance rather than a corporate guarantee. The insurance may consist of \$700 million P&I coverage for the vessel and \$500 million comprehensive general liability coverage that names Alyeska as an additional insured. Alyeska agreed to allow Tesoro to use the insurance alternative through a combination of marine insurance, comprehensive general liability insurance, and corporate guarantees, as opposed to a pre-existing requirement that it provide a corporate guarantee purely by the availability of cash and other self-worth. There is no way that Tesoro could provide a corporate guarantee, bond or letter of credit, as originally required by Alyeska's financial responsibility standards, for either one or \$1 or \$1.2 billion. Because of uncertainties associated with coverage of contractor claims against vessel marine insurance, and added potential difficulty of enforcing insurance coverage generally, the quality of Alyeska's financial protection has diminished substantially. Yet, the parties reached this practical solution to a difficult problem after and because HB 196 passed last year -- despite the Report's implications to the contrary. This insurance alternative will expire when HB 196 sunsets at the end of June, 1992.

6. The same exemption for RACs should be available.

Alyeska's concerns regarding limited immunity for RACs are identical to those expressed in the Report regarding the potential liability of the State or of a municipality for managing a spill response. Report at page 28. The Report acknowledges that the State, municipalities, and villages enjoy limited responder immunity. AS 46.03.822(h). In its discussion of the State's interest in shifting to the another party any potential liability, the Report notes that the State may "attempt to fend off liability from below by requiring RACs it employs to indemnify it for their misdeeds, and it could require indemnification for its own misdeeds." Report at page 28. But private industry has the same concerns. An RAC responding on behalf of industry must be treated the same as a public RAC. The public policy is the same: to encourage responders to respond quickly, aggressively and most effectively under the circumstances.

7. The State should not attempt to exercise direct control over RACs. Through the contingency plan holder the State has sufficient ability to oversee RAC capabilities on behalf of the plan holder. The Report notes that the State's direct authority over plan holders does not extend to authority over RACs. Report at page 31. However, it encourages the State to expand its authority over RACs. Report at page 32. This will not provide more effective spill response. The Report correctly notes that

while the State may have an interest in directing an RAC response to a spill, increases in the regulatory burden will discourage RACs altogether and "State restrictions on RAC contracts could simply result in fewer RACs willing to engage in response action." Report at pages 5, 26.

The Report recommends that RACs be subjected to the same governmental oversight as plan holders. Report at page 35. Such a system would eliminate the incentive of a party to enter into a response action contract, unless the state became a party to the contract and agreed to pay the response costs. This would be a dramatic change in spill response practices.

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

L

January 30, 1992

Michele D. Brown, Esq.
Executive Director
Citizens' Oversight Council
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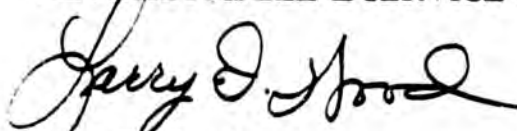
Re: Alyeska's Comments Related to Trans Alaska Pipeline Authorization Act
Memorandum

Dear Ms. Brown:

Enclosed please find comments respectfully submitted by Alyeska Pipeline Service Company ("Alyeska") to the Citizens' Oversight Council on Oil and Other Hazardous Substances. The comments relate to a memorandum by Mr. Michael J. Frank entitled "HB 196 Research Project: Trans Alaska Pipeline Authorization Act." A summary accompanies our remarks. Thank you for the opportunity to participate in the Council's consideration of the important matter of limited responder immunity.

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY



Larry D. Wood
Senior Attorney-External Affairs

LDW42/cas

Attachments

January 30, 1992

**Response to Memorandum
Regarding the Trans Alaska Pipeline Authorization Act
Prepared By Michael J. Frank**

Summary

The Trans Alaska Pipeline Authorization Act ("TAPAA"), 43 USC 1651 et. seq., makes the owner/operator of a vessel, not Alyeska or the holders of the right-of-way, strictly liable for any oil spill from that vessel in Prince William Sound. This statutory allocation of liability is consistent with other state and federal laws that make the owner/operator of a vessel responsible for responding to and cleaning up oil spills from the vessel.

TAPAA does not require Alyeska to respond to vessel spills, nor does it make Alyeska or the holders of the right-of-way strictly liable for damages caused by such spills. Indeed, the legislative history of TAPAA demonstrates that Congress rejected proposed statutory language that would have made the holders of the right-of-way strictly liable for vessel spills.

LDW43/cas

**Memorandum Of Alyeska Pipeline
Service Company Regarding Liability
Under Trans Alaska Pipeline Authorization
Act for Oil Spills From Vessels**

Introduction

Alyeska Pipeline Service Company ("Alyeska") has reviewed the January 13, 1992, research project memorandum Michael J. Frank regarding the Trans Alaska Pipeline Authorization Act ("TAPAA"). 43 U.S.C. § 1651 et seq. Alyeska believes that the memorandum incorrectly states Alyeska's position with respect to spills from vessels in Prince William Sound, and that it reaches erroneous legal conclusions regarding Alyeska's liability for vessel spills under TAPAA. Accordingly, Alyeska is submitting this memorandum to the Citizens Oversight Council on Oil and Other Hazardous Substances to correctly state Alyeska's position.

1. Alyeska's Legal Posture Since the T/V EXXON VALDEZ Oil Spill.

Mr. Frank's memorandum asserts, at page 28, that "Since the T/V EXXON VALDEZ oil spill, Alyeska has publicly denied that it has ever been required to respond to a tanker spill of TAPS oil." This is not a correct statement of Alyeska's position.

Alyeska has acknowledged and continues to acknowledge (1) that at the time of the T/V EXXON VALDEZ oil spill, Alyeska had in effect an Oil Spill Contingency Plan that provided that Alyeska would respond to spills of TAPS oil from vessels within Prince William Sound; (2) that Alyeska was obligated to respond in accordance with its Contingency Plan; and (3) that, in light of federal and Alaska law

imposing responsibility for oil spills from vessels on the owner-operator of the vessel, Alyeska was obligated to provide an initial response to a vessel spill until such time as the owner/operator of the vessel arrived on scene and was in a position to assume responsibility for the response. Alyeska's intention to provide an initial response and then hand-off the response effort to the owner/operator of the vessel was approved by the State of Alaska, both in spill drills held before the T/V EXXON VALDEZ incident, and during the response to the T/V EXXON VALDEZ oil spill itself. At the time of the T/V EXXON VALDEZ spill, the ultimate responsibility of the owner/operator of the vessel to respond to vessel spills, to pay for the cleanup of such spills, and to compensate those public and private entities damaged by such spills was well established under both federal and state law. See, e.g., AS 46.03.822 (owner/operator of vessel liable for all public and private damages from oil spills); Clean Water Act, 33 U.S.C. 1321 (owner/operator liable for cleanup of oil spills, including cleanup costs and natural resource damages); TAPAA, 43 U.S.C. § 1653(c) (owner/operator of vessel and Trans Alaska Liability Fund liable for damages caused by vessel spills).

2. Liability for Vessel Spills Under TAPAA

Mr. Frank's memorandum erroneously suggests that Alyeska and the holders of the right-of-way are strictly liable for vessel spills under TAPAA. As noted above, TAPAA makes the owner/operator of a vessel, rather than Alyeska or the holders of the right-of-way, strictly liable for vessel spills in Prince William Sound. 43 U.S.C. § 1653(c).

Under the comprehensive liability framework created by Congressional

authorization (TAPAA) of a federal grant of rights-of-way across federal land in Alaska for pipeline construction and operation:

1. The right-of-way holders are strictly liable for environmental damages occurring from their activities along or in the vicinity of the pipeline right-of-way.
2. The right-of-way holders must control and remove pollution along or adjacent to the pipeline right-of-way as a result of their activities.
3. Vessel owners and operators carrying oil transported through the pipeline are jointly and severally strictly liable, along with the Trans Alaska Liability Fund, for damages, including cleanup costs, resulting from discharges of oil from their vessel.
4. Under TAPAA, Alyeska and the right-of-way holders are not strictly liable for spills from vessels. The right-of-way holders and Alyeska are not required by TAPAA to cleanup oil spilled from vessels in Prince William Sound.

In oil spill litigation pending in Alaska federal court, Judge Holland has already ruled that, under TAPAA, only the owner or operator of the vessel and the Trans Alaska Pipeline Liability Fund are liable for vessel spills. "Those people strictly liable under TAPAA are the vessel owner and operator, and the Fund." In re Glacier Bay, No. A88-115 Civil (Order Filed July 26, 1991), at 20.

Mr. Frank nevertheless attempts to argue that Alyeska and the holders of the right-of-way are liable for vessel spills under subsections (a) or (b) of Section 1653. His analysis is seriously flawed. Both of these subsections are inapplicable to the discharge of oil from tankers in transit to and from the Valdez terminal.

Subsection (a) imposes strict liability on the holder of the pipeline right-of-way for "damages in connection with or resulting from activities along or in the vicinity of" the right-of-way. Of course, one could argue that, in a literal sense, every vessel spill from a tanker transporting Alaska North Slope crude oil is "in connection with" activities along the right-of-way. But for the activities along the pipeline right-of-way, the vessel could not have been loaded with ANS crude oil. But as the Ninth Circuit has made clear, common sense rather than a literal or mechanical approach must govern interpretation of 1653(a). See Heppner v. Alyeska Pipeline Service Co., 665 F.2d 868, 873 (9th Cir. 1981). The Court held that although 43 U.S.C. § 1653(a) refers to "damages" generally and appears to be "clear and unambiguous," Congress' clear intent was to cover only environmental damages.

In Heppner, the Court noted that, were the statute construed literally and mechanically, damages from slanders, fights and automobile accidents along the right-of-way would all be encompassed by subsection (a). The Court stated this "raises serious questions whether we should read the strict liability language literally and should give it its broadest possible sweep." 665 F.2d at 873. The Court concluded it should not interpret 43 U.S.C. § 1653 (a) to give it its broadest possible sweep.

The same principles of statutory interpretation apply to determine whether 43 U.S.C. § 1653(a) imposes strict liability on the permit holders for spills from vessels. If vessel spills are "in connection with" activities along the pipeline right-of-way simply because the vessel contained ANS crude that had been transported along the right-of-way, then every vessel spill of ANS crude would be covered by subsection (a) whether it occurred in Prince William Sound, along the coast of British Columbia, or in Puget Sound. Indeed, spills of gasoline from vehicles in Los Angeles might be covered if the gasoline was refined from ANS crude. This was not intended by Congress.

Finally, and perhaps most important, it is an accepted canon of statutory construction that a court should not read the words of one subsection in isolation, but must consider them in context with the rest of the statute. "One provision of a comprehensive statute must be read in the context of the other provisions of the statute and in light of the general legislative scheme." Yamaguchi v. State Farm Mutual Auto Ins. Co., 706 F.2d 940, 948 n.11 (9th Cir. 1983). "The words of a statute must be construed in context and the statutes must be harmonized, both internally and with each other, to the extent possible." Pacific Mutual Life Ins. Co. v. American Guaranty Life Ins. Co., 722 F.2d 1498, 1501 (9th Cir. 1984).

When subsection (a) is read in context with subsection (c), it is apparent that Congress intended subsection (c) to cover vessel spills while subsection (a) was intended to cover environmental damage in and along the right-of-way caused by construction and operation of the pipeline. See Mt. Graham Red Squirrel v. Madigan, F.2d (9th Cir. Jan. 21, 1992) (since Congress dealt with two phases of construction project in two separate sections of statute, Congress clearly intended the two phases to

be treated differently; each section cannot be read in isolation; rather interpretation of each depends on "a reading of the statute as a whole . . .").

Subsection (b) of Section 1653 provides that the holder of the right-of-way is liable to control and remove pollutants where "any area within or without the right-of-way or permit area granted under this chapter is polluted by any activities conducted by or on behalf of the holder. . . ." (emphasis added). This subsection is inapplicable to vessel spills absent evidence that the spill occurred as a result of activities conducted by or on behalf of the holder of the right-of-way. Of course, as previously indicated, in a literal sense every vessel spill of ANS crude is in some way connected to activities conducted by the holders of the right-of-way in that, but for the transportation of oil through the pipeline, the vessel never would have been loaded with ANS crude. When subsection (b) is read in context with subsection (c), however, it is apparent that Congress could not have intended this "but for" connection to be sufficient to invoke subsection (b). Mr. Frank's theory would produce the anomalous result that the owner and operator of the vessel would be strictly liable under subsection (c) only for \$14 million, while the holders of the right-of-way would be strictly liable without any limits. Given the monetary limits elsewhere in TAPAA, including both subsections (a) and (c), one should not impute to Congress such a bizarre result. See Mt. Graham Red Squirrel v. Madigan, supra (court should not interpret statute in a manner that "makes no sense either practically or as a matter of linguistics").

Mr. Frank's reliance on Alyeska Pipeline Service Co. v. United States, 649 F.2d 831 (U.S.Ct.Cl.), cert. denied, 454 U.S. 964 (1981), is misplaced. That case

held that, under 1653(b), the owners and operator of the Trans-Alaska Pipeline are strictly liable for spills from the pipeline itself, since such spills constitute "pollution resulting from 'any activities conducted by or on behalf of them.'" 649 F.2d at 833-34. The holders' agent, Alyeska, operates the pipeline. All pipeline spills thus result from "activities conducted by or on behalf of" the holders, as those words are used in 1653(b). With respect to vessel spills, in contrast, neither the holders nor Alyeska operate the vessels. Spills from vessels thus do not result from activities conducted by or on behalf of the holders.

Finally, Mr. Frank erroneously interprets the legislative history of TAPAA. As he notes, Congress had before it a House Bill, H.R. 9130, Section 207(b)(1) of which would have expressly provided that the holder of the right-of-way is strictly liable for all damages resulting from spills from any vessel owned by the holder or by any "affiliate" of the holder. As Mr. Frank notes, see his memorandum at p. 14, the term "affiliate" was broadly defined. Thus, had Section 207(b)(1) been adopted, there is little doubt that the holders of the right-of-way would be liable for damages caused by the **EXXON VALDEZ** oil spill, as the **EXXON VALDEZ** was owned by an affiliate of one of the holders of the right-of-way. The flaw in Mr. Frank's analysis, however, is that Section 207 was rejected by the Conference Committee. The bill that came out of the Conference, which Congress ultimately enacted, contains nothing comparable to Section 207. Congress clearly made the vessel owner/operator, rather than the holders or any affiliates of the owner/operator, liable for vessel spills. 1653(c). Congress' rejection of a specific provisions before it that would have made the holders liable for vessel spills is relevant to interpretation of 1653 and shows that the statute as adopted was not intended to make the holders liable for vessel spills. See Fox

v. Standard Oil Co. of New Jersey, 294 U.S. 87, 96, 294 S.Ct. 333, 337 (1934); Fleming v. Hawkeye Pearl Button Co., 113 F.2d 52, 58 (8th Cir. 1940).

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January 30, 1992

¹ As successors to the original holders of the federal right-of-way for TAPS, Amerada Hess Pipeline Corporation, ARCO Transportation Alaska, Inc., BP Pipelines (Alaska), Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Company, Phillips Alaska Pipeline Corporation, and Unocal Pipeline Company, are the present holders of the right-of-way grant. These common carrier pipeline companies own the pipeline and have chosen Alyeska to be their common operating agent.

gion, here is the group's on:

Northeast reflects "an un-strength" despite "a wor-short-term performance."

Industrial Midwest "is the and region. Hammered by recession, it has worked on

and created an economy healthier today."

• The Plains has "a split person-ality . . . Iowa, Nebraska and Kan-sas have rallied since the farm crisis." But "the Dakotas and Oklahoma are less robust."

• The South "continues to lan-guish in the lower reaches of the

... (and) is less pre-pared than other regions to take advantage of an upturn."

• The mountain West is the "most uneven" region. Utah, Colo-rado and Nevada are "outstanding performers," but their neighbors lag.

The Pacific has "more . . . poten-tial for greatness" than other

It awards grades in three broad areas: economic performance, busi-ness vitality and development ca-pacity. Economic performance cov-ers how well a state is doing, business vitality is determined by the competitiveness and diversity of its businesses and development capacity is gauged by its potential for growth.

ADN 4/9/92

Bristol Bay buyback gains ground

By DAVID WHITNEY

Daily News reporter

WASHINGTON — Two House panels moved closer to agreement Wednesday on blocking oil development in Alaska's fisheries-rich Bristol Bay.

The only remaining differ-ence is whether to have Con-gress immediately cancel \$95 million worth of leases or to authorize the Interior De-partment to cancel them or negotiate buybacks with the oil industry.

Wednesday's progress re-flects a dramatic election-year turnaround for Alaska Rep. Don Young, a pro-de-velopment Republican who only recently concluded that Bristol Bay should not be drilled.

Just a few years ago Young resisted a one-year moratorium on drilling in the bay. This year, he spon-sored an amendment that would block oil activity in the bay until the year 2000 and authorize the lease can-celation.

It was a switch to which

Young didn't come easily, as reflected in comments sug-gesting he still isn't fully at ease with his decision. John Devens, Young's Democratic opponent who nearly beat him in 1990, is a strong advocate of an immediate buyback of the leases and has made that an issue in his campaign.

"This is a festering sore," Young said of the leases.

"Apparently the public is not interested in developing energy and so let's protect the resources while there is still time to do so," Young said.

The House Merchant Ma-rine and Fisheries Commit-tee approved the Young-sponsored amendments without debate Wednesday.

The amendments autho-rize the Interior Department to cancel the leases on its own or to negotiate with the oil companies and the state over a lease buyback plan within three years.

Young also backed a tougher buyback provision in the House Interior Com-

mittee. It was sponsored by that panel's chairman, Rep. George Miller, D-Calif.

Miller's version calls for the leases to be canceled immediately and the lease-holders to be compensated by issuing them credits against future development rights or royalty payments.

The House will later de-cide which of the two provi-sions it likes best, unless some deal is worked out in the interim.

Other provisions ap-proved by the Interior Com-mittee on Wednesday would:

• Make clear that Alyeska Pipeline Service Co. has a duty to respond to all oil spills in Prince William Sound and must file an oil-spill contingency plan with the Interior Department.

• Require that 80 percent of the federal government's share of proceeds from the \$1 billion Exxon Valdez oil spill settlement be spent to buy Native timber land around Prince William Sound and the Gulf of Alas-ka.

• Require that Alaska Na-tives be compensated out of the Trans-Alaska Pipeline Liability Fund for subsis-tence claims arising from the March 1989 tanker spill.

The Senate's energy bill doesn't contain any of the Alaska provisions and Sen. J. Bennett Johnston, D-La., chairman of the Energy Committee, sent letters to some House Democrats this week signaling that the Bris-tol Bay buyback may be headed for a fight.

That will put the pressure on Alaska Sen. Frank Mur-kowski, a Republican on the Energy Committee, to fight in the Senate.

Murkowski said Wednes-day he supports a "responsi-ble buyback proposal 'f it is reasonable."

Commercial fishermen, environmentalists and the state said they hope that the House adopts the tougher Interior Committee provi-sion so that the federal gov-ernment has no room to wig-gle out from under a federally financed buyback.