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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)

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HB 196, SECTION 11, REPORT
OIL SPILL RESPONSE ACTION CONTRACTORS

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RECOMMENDATIONS

OBJECTIVE

The Citizens' Oversight Council, as required by the Legislature, has reviewed the entire subject of response action contractor civil liability and the status of oil spill contingency plan holders. The Council's objective in formulating recommendations is to assess the adequacy of the current laws limiting liability for oil spill response action contractors and to propose, where appropriate, alternatives that further the public's interest in a timely and reliable response to an oil spill.

EVALUATION CRITERIA

The Council first analyzed the liability laws and the realities of spill response in Alaska. Whenever the Council identified a risk that there might not be a timely and reliable response to an oil spill, the Council considered various options to ameliorate that risk. The Council was guided by the following criteria in making its final recommendations:

* minimizing interference with private choices
* providing incentives for maximum best effort in response
* allowing for adaptability for regional and unique circumstances
* achieving maximum shoreline protection
* offering administrative efficiency
* assuring clarity and consistency in standards
* assuring reliability and responsibility in performance

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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.

Problem identified: There is a fear among response action contractors that they face serious potential liability for their actions taken in response to an oil spill and, consequently, they will not respond.

Rationale: The Council found that there is a public benefit in avoiding any deterrence of spill response due to fears of potential liability. The Council also believes that there is a public benefit in encouraging more cooperatively based, pooled response efforts. These goals can be furthered, in part, through limited liability provisions, provided there are conditions in place that do not allow this limit to reduce the quality of an oil spill response. These conditions are set forth below.

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RECOMMENDATION #2: Professional response action contractors should be certified by the state.

Problem identified: Response action contractors serve a vital function in oil spill response. Yet, the state currently has no means to verify the capability and the capacity of these contractors to perform.

Rationale: As the requirements for oil spill preparedness have increased, contingency plan holders have accordingly increased their reliance upon response action contractors to demonstrate to the state that the contingency plan holders have access to equipment and personnel to respond to a spill. There must be a means for the agency evaluating contingency plans to verify that the response action contractors relied upon in contingency plans are able to respond during the implementation of any particular contingency plan. The Department of Environmental Conservation should be authorized to promulgate regulations to develop a certification program for response action contractors. Response action contractors relied upon by contingency plan holders to demonstrate compliance with equipment and personnel preparedness requirements must be certified in order for the contingency plan to be approved. Professional response action contractors must be in compliance with certification provisions in order to be afforded liability limits.

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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.

Problem identified: There is currently no professional standard set out in the law for the actions of oil spill response action contractors. Normally, that standard would be provided by the basic negligence standard for evaluating conduct that leads to injury. If response action contractors are relieved of the liability that attaches to a failure to exercise reasonable care, there is concern that there will be no incentive for the contractor to take the precautions and the care that it normally would.

Rationale: The Council believes that a professional standard should be incorporated into the certification program in order to provide an incentive that contractors maintain the quality of their performance. DEC should establish the criteria by which to certify response action contractors for minimum standards of personnel training and to verify the equipment, services, and response organization that the response action contractor offers. This will result in: a level playing field for standards; a means to assure that response action contractors will be able to perform as set out in a contingency plan; and a baseline of generally accepted professional standards and practices.

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RECOMMENDATION #4: A certification program should authorize DEC to maximize coastal protection and to enhance regional response capabilities through response action contractor certification.

Problem identified: There are substantial regional disparities in spill response capabilities, limiting effective response in parts of the state.

Rationale: If limiting liability is to have the benefits of encouraging improved response, there should be a more proactive approach to using those provisions well. Through the response action contractor certification program and DEC's contingency plan approval program, DEC could approach response in a broader, regional approach rather than piecemeal, individual contingency plan basis. This would enhance the most efficient use of response resources and reduce the agency's administrative burdens, as well as assure that regional differences in response needs will be fully addressed.

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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.

Problem identified: The state currently has no means to ensure performance of a critical response action contractor. Currently, performance requirements are the subject of private contractual agreements between contingency plan holders and response action contractors. The state is neither a party to nor reviews those terms. Therefore, while the contingency plan may on its face offer sufficient equipment and personnel to handle a spill, there is no means to ensure that the equipment and personnel will indeed be deployed. This problem could be exacerbated if liability limits are granted.

Rationale: In order for a contingency plan to be a reliable document rather than merely a regulatory formality, there must be a duty to perform by all the key participants of a contingency plan. It is appropriate that there be private contractual arrangements between contingency plan holders and response action contractors to maximize the choices and to allow private operators to allocate duties and responsibilities privately among themselves. However, there must simultaneously be a means for the state to direct actual field performance of a response action contractor relied upon in an approved contingency plan to prevent dangerous response delays or failures to perform. Only response efforts meeting this duty should obtain the limited liability benefits.

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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.

Problem identified: There are frequently spills where the responsible party cannot be readily identified or forced to respond.

Rationale: Once the state has certified a cadre of professional oil spill responders and provided them limited liability, those responders should be available to respond to spills when it is in the public interest. The state would guarantee reimbursement for reasonable operational expenses.

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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.

Problem identified: There has been a substantial increase in spill response preparedness for the TAPS tanker traffic in Prince William Sound since the Exxon Valdez spill. However, for reasons which appear to relate to fear of liability for potential damages due to spills, there has been a confusing juggling of the parties who actually bear the legal responsibility for spill response efforts. The result is a commendable supply of equipment and personnel but very little, if any, clear duty to deploy it.

Rationale: The Trans-Alaska Pipeline Authorization Act provided that parties responsible for a spill related to TAPS are strictly liable for damages. However, Congress separately imposed upon the pipeline right-of-way holders the duty to respond to pollution. Congress' goal was to eliminate uncertainty in critical initial response without necessarily forcing the responder to simultaneously acquire all liability for the damages resulting from that pollution. Alyeska Pipeline Service Company is the operator of the TAPS and has also been designated by the pipeline right-of-way holders as their agent. Accordingly, Alyeska submitted for years contingency plans for spills throughout the pipeline, including in Prince William Sound.

After the Exxon Valdez spill, Alyeska has taken the position that it will not submit or hold a contingency plan, but rather is a volunteer response action contractor for spills from the tankers. For many reasons recited to the Council in public comment, Alyeska is significantly different from other response action contractors. Alyeska's self-denomination as a response action contractor has resulted in the anomaly that the central figure for response, Alyeska, which has all the response equipment (indirectly paid in part by the state) has no legal obligation to respond to a spill. However well-intentioned Alyeska may be in its plans to respond, there is insufficient assurance for the public that a response will occur and that there will be no confusion generated from Alyeska's mandatory 72 hour hand-off of the response to the spiller or contingency plan holder. Therefore, in order to maximize effective response in a region of grave risk, the Council believes that Alyeska, as the operator of TAPS, should have a clear duty to control and remove pollution related to TAPS crude in Prince William Sound.

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I. INTRODUCTION

The 1991 legislature passed Ch 92 SLA (known as HB 196) which limits civil liability for acts and omissions of oil spill response action contractors. The terms of the legislation expire June 30, 1992. In order to determine the best policy for long-term legislation on this issue, the Legislature directed the Citizens' Oversight Council to prepare a report on whether further modifications to the laws are necessary. The Legislature also directed the Council to include in the report an analysis of whether the present state laws that authorize contingency plan holders to contract with response action contractors to carry out contingency plans are adequate to protect the public when an oil spill occurs.

II. REPORT METHODOLOGY

The Citizens' Oversight Council's role in preparing this report is to assemble and provide the Legislature with the information it needs to fully consider and balance the substantial interests on all sides of this issue. Shortly after the Governor signed HB 196 into law, the Council identified the core research issues. Those issues are set out in Appendix A. Those issues were reviewed for completeness and accuracy prior to the commencement of research by many of the groups and individuals which participated in the discussions of HB 196 during the 1991 legislative session.

Originally, HB 196 carried a fiscal note to cover the costs of the research and report preparation. The fiscal note was vetoed. Consequently, the Council requested assistance from others to prepare the research database. Assistance was generously provided by the Prince William Sound Regional Citizens' Advisory Council, Cook Inlet Regional Citizens' Advisory Council, Department of Environmental Conservation, Tesoro Alaska, Alyeska Pipeline Service Company, National Wildlife Federation, and various legislative staff members. All groups participating in the studies agreed upon the methodology for each report to ensure consistency and objectivity in preparation of the research database. After the research projects reports were submitted to the Council, the Council prepared a summary of each report (set out in Appendix B). The full text of each report is available upon request.

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Originally, the Council had planned to assemble an advisory panel to assist it in analyzing the information and developing recommendations. Unfortunately, due to the extra time it took to assemble all of the requisite background material, it was not realistic to undertake a panel analysis. Instead, the Council conducted a public meeting, teleconferenced to 9 sites, and took public comment on the issues. In preparation for this meeting, the Council provided full copies of all the research projects reports to all groups which had to date participated in the research. The Council also sent a direct mailing to approximately 100 groups or individuals who may have an interest in this subject. The mailing included notice of the public meeting and a copy of the summary of each of the research projects reports. A summary of the comments made at the Council's meeting is attached as Appendix F.

Although many groups and individuals participated in the preparation of the research projects, the views expressed in this report represent solely the views of the Citizens' Oversight Council. By widely disseminating the research material, the Council hopes that other groups will similarly express their views to the Legislature and that a fully informed policy discussion will ensue.

III. LEGAL FRAMEWORK

This section will briefly describe how Alaska law allocates liability for damages caused by an oil spill. It will also address who bears the duty to respond to an oil spill. This is an important distinction because the duty to respond to and abate an oil spill does not necessarily fall solely on the same parties responsible for paying damages for injuries caused by an oil spill. The federal government, throughout its various acts, also makes a distinction among parties with a duty to remove pollution and parties with a duty to pay for the damages caused by that pollution.

A. STATUTORY LIABILITY FOR DAMAGES FROM OIL SPILLS

Alaska law imposes strict liability for the release of hazardous substances under AS 46.03.822. Strict liability means that the persons designated as responsible for the spill have a duty to compensate those damaged by the spill without proving that the spiller failed to use reasonable care. The rationale is that those who participate in the handling of oil owe a duty to the public to exercise exceptional care because the risk of harm from a release is so high.

Under AS 46.03.822, those liable for damages include most parties connected with the ownership, storage, transportation, or disposal of the oil. For instance, the parties responsible for damages following an oil spill from a tanker could include the owner of the oil, the owner of the tanker, and the operator of the tanker. In theory, a response action contractor could be strictly liable, although AS 46.03.822(b) provides that the responsible parties are also liable for damages caused by a response action contractor responding to the spill. AS 46.03.822 (g) further states that, although liable parties may allocate the duty to pay damages among themselves, indemnification agreements will not relieve a liable party from liability or provide a defense to a damages claim.

In 1989, the legislature enacted AS 46.03.823, which provided that a response action contractor responding to hazardous substance spills (including oil) is only liable for damages caused by the response action contractor's negligence, gross negligence, or intentional misconduct if the response action contractor acts in accordance with generally accepted professional standards. This relieved the response action contractor from the burden of strict liability.

In 1991, the legislature passed HB 196 further limiting the liability for response action contractors involved in oil spill response. These provisions, found at AS 46.03.825, provide that a response action contractor is not liable for civil damages unless:

(a) the response action contractor would have been liable for the initial release under AS 46.03.822, even if the contractor had not been carrying out a response action (in other words, a party cannot be responsible for a spill and then claim response action contractor immunity);

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

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

The limitations on liability also do not apply to actions for personal injury or death and for damages to tangible personal property not caused by oil. The limitations only apply within the first 15 days of the release. The parties responsible for the spill will be liable for damage caused by acts or omissions of a response action contractor for which the response action contractor is not liable. HB 196 sunsets June 30, 1992 and the provisions of AS 46.03.823 will again apply. The full text of HB 196, including the provisions applicable after the sunset, is set out in Appendix D.

An additional possible limit on the liability of responders is found at AS 09.65.091. This provides that, during a declared emergency, a person (paid or volunteer) who responds at the request of a government agency (but not at the request of a private party) is not liable for damages unless the responder's actions were intentional, reckless, or grossly negligent. This limitation is not subject to the same exceptions as exist in AS 46.03.825, such as not being contrary to orders of the on-scene coordinators and not involving personal injury or death. Good Samaritan laws such as this are generally premised upon the fact that the good Samaritan has no obligation to act.

B. STATUTORY DUTY TO RESPOND TO AN OIL SPILL

Generally, there are three principal interests or roles involved on behalf of industry when an oil spill occurs: the discharger and/or others responsible for the spill, the contingency plan holder, and the response action contractors who

respond in the field. In some instances, these interests could involve multiple parties; in other instances, one party could serve all roles.

AS 46.04.020 requires that a person causing or permitting an oil spill must immediately contain and cleanup the spill. In addition, AS 46.04.030 requires that oil terminal facility operators and tank vessel owners must have oil spill contingency plans. Those contingency plans form the very heart of the spill prevention and response in Alaska. A contingency plan holder is required to implement the contingency plan. AS 46.04.030 (g).

The duty to respond to an oil spill falls upon the discharger and all other parties responsible for the consequences of a spill. The primary duty, however, to plan and to prepare for a spill response, and to ensure that the response is indeed implemented, belongs to the contingency plan holder.

IV. CONGRESSIONAL AND OTHER STATE ACTIONS

Much of the discussion about limiting response action contractor liability stems from the language set out in the Oil Pollution Act of 1990. 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.

This provision has little legislative history and was added into the Act late in the process. There is a written explanation that expresses the hope that this language would avoid possible deterrence of spill response due to fears of liability. Congress authorized states to adopt their own standards for contractor liability.

The Coast Guard has only just begun considering regulations to implement OPA '90, including the response action contractor provisions. In meetings to discuss the issues, the Coast Guard has stated that it will require a contingency plan holder to demonstrate that it has a contract for performance with any response action contractor the holder intends to rely upon. In order to further provide sufficient assurance that the contractor will indeed perform, the Coast Guard is considering how to define in regulations what it means for the President to "direct" a response and how that "direction" will provide authority over the response action contractor. The Coast Guard has also stated that it will certify response action contractors to guarantee a minimum level of capability and expertise.

Since the federal language was passed, several states have also considered the issue, largely due to the lobbying efforts of the Marine Spill Response Corporation (MSRC), a nationwide catastrophic spill response organization established by the Marine Preservation Association (MPA). The MPA members are oil industry participants who pay dues based upon the amount of oil they ship. MPA, in turn, funds the operations of MSRC. MSRC is establishing 5

regional response centers, but has stated that it currently has no plans to locate in Alaska.

Generally, the coastal states considering this issue have limited the liability of response action contractors to gross negligence or intentional misconduct. These states usually put some conditions on that liability limit, such as requiring that the response action contractor's activities be consistent with the national or state contingency plans or with orders of the state or federal on-scene coordinator. Four states (California, Texas, Washington, and New Jersey) require that response action contractors be certified or pre-approved by the state. Three states (Florida, Louisiana, and South Carolina) focus the liability limit on volunteers or those acting at the request of government. Only California limits the duration of the liability limit (60 days with a possible extension to 90 days). None of the states limiting liability allow that limit to be used if the contractor is otherwise a responsible party or has a duty to mitigate the effects of a spill.

V. RESPONSE ACTION CONTRACTORS OPERATING IN ALASKA

As Alaska's requirements for spill preparedness have increased, contingency plan holders have had to increase their reliance upon response action contractors to achieve a state of readiness. Contingency plan holders include the anticipated services of response action contractors in the contingency plans they submit for approval. In order to assess the duties owed by those response action contractors and the pros and cons of limiting their liability for the actions they take in responding to a spill, it is important that the different kinds of responders currently operating in Alaska be explored.

A. VOLUNTEERS

Volunteer responders are unpaid individuals or groups which assist during spill response. They are otherwise unconnected with the business of transporting oil or providing response services. Their role in response is very limited and generally task-specific.

B. PROFESSIONAL INDEPENDENT OPERATORS

Professional independent operators operate entirely independently from the parties for whom they provide services. They supply equipment, materials, personnel, and services through contractual arrangements with contingency plan holders or responsible parties. The contracts are either prearranged in the contingency plan or entered "on the spot". The independent operators may be business interests (in various forms, such as corporations, partnerships, sole proprietorships) or "paid volunteers": examples are VECO, Inc.; VRCA Environmental Services, Inc.; Martech USA, Inc.; and Chempro.

The independent operators have no common ownership or management with their clients, the contingency plan holders and responsible parties. They are not otherwise engaged in oil industry activities (eg., production, transportation, etc.).

They are not contingency plan holders in their own capacities nor are they potential responsible parties. When these operators participate in the field response to an oil spill, they do not control or direct the entire field response.

Generally, the professional independent operators will provide services in all areas of the state for spills of both petroleum products and hazardous substances. Their participation in response is governed through their private contractual arrangements with their clients. There is substantial diversity in the terms of these contracts. There may even be substantial differences in the terms one response action contractor negotiates with different clients. Most of the contracts require indemnification (i.e., the client must bear liability for response action contractor conduct causing damages); some for the response action contractor's negligence, others for the response action contractor's gross negligence. Most contracts do not specify the precise services to be performed, but rather recite an agreement to provide generic services when invoked by order of the client.

C. INDUSTRY SPILL RESPONSE COOPERATIVE ORGANIZATIONS

This category consists of organizations formed and financed primarily by contingency plan holders and potential oil spill responsible parties, such as oil terminal facility operators. The organizations -- Alaska Clean Seas ("ACS" - serving onshore and offshore North Slope oil and gas development), Cook Inlet Spill Prevention and Response, Inc. ("CISPRI" - serving Cook Inlet), and Southeast Alaska Petroleum Response Organization ("SEAPRO" - serving southeast Alaska) -- are formed to pool resources to enable contingency plan holders to more economically comply with the state spill response requirements.

These industry spill response organizations take different forms, but whatever their structure, their decisionmaking is controlled by their members. CISPRI is incorporated and its members (not all of whom are oil industry related) vote on management decisions through a Board of Directors. CISPRI's employees, including its management, work directly for CISPRI rather than CISPRI's members. ACS is an unincorporated partnership or joint venture of North Slope oil industry operators. ACS has its own management employees who work for ACS rather than for the industry members of ACS. Except for spill response, neither CISPRI nor ACS engage in any other oil related activities (eg., production, transportation).

These organizations respond predominantly within the geographic area of operation of their members for spills of the types of products handled by their members. ACS and CISPRI, depending upon who the spiller is, sometimes control and sometimes assist in the field response actions for some period of time. SEAPRO assists more in assembling response equipment. The contractual arrangements these organizations have with their members are generally detailed and sophisticated. Contract terms with members include provisions for indemnification of the response action organization for any liability it acquires and a requirement that the client maintain insurance

sufficient to cover some portion of the response action contractor's liability. CISPRI, for instance, requires its members to show at least $10 million in insurance.

D. INDUSTRIES' OWN SPILL RESPONSE OPERATIONS

This category of response action contractors is comprised of the oil industries' own efforts to provide spill response for its own or related activities which could result in oil spills. The chief example is Alyeska Pipeline Service Company.

Alyeska was formed by seven pipeline companies, all subsidiaries of parent oil companies, to be the agent for these companies in operating the Trans-Alaska Pipeline System (TAPS). In 1974, Congress passed the Trans-Alaska Pipeline Authorization Act (TAPAA) which set out the terms and requirements for the construction and operation of the TAPS. The TAPS operators also developed right-of-way agreements with both the state and federal governments. The Act and the agreements set out the terms and conditions upon which the TAPS right-of-way holders may operate.

Although Alyeska calls itself a response action contractor or a "volunteer" (see Alyeska letter of November 20, 1991) in providing spill response services in Prince William Sound and Port Valdez, Alyeska differs from the other categories of response action contractors in many respects. Alyeska, unlike the independent operators or industry spill response organizations, is not a separate entity established to conduct or perform some facet of spill response. Alyeska is fully engaged in other aspects of oil industry activity, as well as operating its response services activities (called "Ship Escort / Response Vessel System" or "SERVS"). Alyeska, also unlike the other types of responders, is a contingency plan holder itself for its own activities along the pipeline and at the Valdez Marine Terminal. Because of these activities, Alyeska is also (again, unlike the other categories of responders) a potential oil spiller.

In its current arrangement with the oil tanker owners and operators calling on the Valdez Marine Terminal, Alyeska has required detailed, complex, and sophisticated contracts before Alyeska will respond to a spill. Once a contract is signed, Alyeska will respond as a contractor, within the designated contract limits, to a spill in Prince William Sound (to Hinchinbrook Entrance) or to a spill in Port Valdez or at the terminal. Alyeska's response in the Sound is limited to the initial 72 hours, after which Alyeska hands over the spill response to the spiller. At the Valdez Marine Terminal, Alyeska holds an oil spill contingency plan for response. However, in that current plan, Alyeska states that "a spill from a tanker is not the responsibility of Alyeska," but that Alyeska will provide response services solely as a response action contractor.

Alyeska's contract to provide spill response services for tankers transiting Prince William Sound include several noteworthy provisions not found in the contracts of other types of response action contractors. First, Alyeska's contract is the only one to explicitly limit response services to an expressed time (the first

72 hours). Second, Alyeska's contract may be terminated on short notice (i.e., no services may be provided) for several listed reasons. Third, Alyeska requires a bond in excess of $1 billion from the tankers for which it provides services. And fourth, Alyeska is the only response action contractor to require complete indemnification from liability for its own actions from the tanker owners and operators, including from its own failure to perform.

As of January, 1992, six companies have response action contracts with Alyeska for tankers operating in Prince William Sound: Arco Marine, Inc., Exxon Shipping Company, BP Oil Shipping Company, U.S.A., Chevron U.S.A., Amerada Hess Corporation, and Tesoro Alaska Petroleum Company. Each of these companies, in turn, has agreements for spill response with tanker owners or operators. Approximately 51 tankers visit the Valdez Marine Terminal on a routine basis. 21 tanker contingency plans to cover these 51 tankers have been conditionally approved by the Department of Environmental Conservation.

Exxon Shipping Company, Arco Marine, Inc., and Chevron U.S.A. hold the contingency plans for tankers they own or operate. The remaining contingency plans are held by tanker owners or operators. All of these plans rely on Alyeska as the initial response action contractor by virtue of Alyeska's response action contracts with the six companies listed above. For example, BP Oil Shipping Company, U.S.A., enters into a contract with Alyeska for Alyeska to be a response action contractor for tankers chartered by BP Oil Shipping. BP Oil Shipping simultaneously enters into a contract with the tank vessel owner or operator in which BP Oil Shipping agrees to handle spill response for that tank vessel. The tank vessel owner or operator submits a contingency plan for state approval that designates Alyeska (through Alyeska's response action contract with BP Oil Shipping) as its principal response action contractor for the first 72 hours following a spill. After 72 hours, either BP Oil Shipping or a combination of BP Oil Shipping and the tanker owner or operator assumes control of the spill response. A chart setting out the Prince William Sound tanker contingency plan coverage is attached as Appendix E.

VI. THE EFFECTS ON DAMAGES RECOVERY IF RESPONSE ACTION CONTRACTOR LIABILITY IS LIMITED

In order to determine whether limiting response action contractor liability is good policy, it is necessary to look at the effects such a limitation would have on the ability of injured parties to recover damages and on the public's ability to count on an effective and timely field response. This section of the report will analyze the effects on damages recoveries from each category of responder. The next section will address the effects on the field response. The Council will discuss the benefits and detriments to limiting liability and suggest solutions to address the detriments identified.

A. RESPONSE ACTION CONTRACTOR FEAR OF LIABILITY

All categories of responders have the same theoretical exposure to liability. Under the common law, response contractors have a duty to exercise

reasonable care so as not to cause injury to another through the contractor's own actions. If the contractor does not exercise the level of reasonable care that a reasonable person would under the circumstances, and if the contractor's actions cause foreseeable injury, the contractor is liable for the damages it causes. This is the basic negligence standard in law. There is some speculation that the contractor could even, under some circumstances, have a duty to compensate injured parties without regard to fault (strict liability), but to date no court has held that to be the case.

Under AS 46.03.823 (the liability limit law in place before HB 196 and which will again be in effect on July 1, 1992 unless new legislation is passed), the contractor will be liable for any negligence, gross negligence (generally thought of as recklessness), or intentional misconduct. A person claiming negligence by the contractor would have to show that the contractor did not act in accordance with generally accepted professional standards and practices. A contractor who does not follow a response plan or a governmental order could be held strictly liable for damages resulting from the contractor's activities, even if there were no showing of negligence.

Under HB 196 (AS 46.03.825), the contractors would be relieved of even the duty to act with reasonable care during the first 15 days of the spill because they would only face liability for gross negligence or intentional misconduct, unless the contractor substantially deviated from an approved contingency plan that the contractor prepared or agreed to adhere to under a contract with a responsible party.

B. RISK OF REDUCED COMPENSATION TO SPILL VICTIMS

Under all of the three provisions of law just described, the parties responsible for the spill retain liability for all damages caused by the spill, including those caused by the response action contractors. However, it is conceivable that injured parties could be left uncompensated by limiting liability of response action contractors. There could be a scenario where the responsible parties could be unknown or insolvent and the negligence of a response action contractor could cause damage for which there would be no one to provide compensation. Although the federally created liability funds offer some measure of relief for injured parties, those proceedings are cumbersome, lengthy, and may not provide full compensation because of the need to spread out the available funds to all those injured.

On the other hand, both sides of this argument tend to have predominantly speculative fears. The contractors fear extensive liability exposure by virtue of merely touching spilled oil. Victims fear that no one will be around to compensate them if some parties have their liability limited. Neither fear has been realized in actual court actions.

Response action contractors have not been held liable for their routine response actions. For victims, the circumstances are few when the response action contractor's negligent conduct will cause demonstrable damages

separate and distinct from those damages caused by the spill itself, and when there are no other responsible parties to pay for the damages. The lack of compensation to victims historically stems from the responsible parties' manipulation of the courts to avoid payment rather than from limiting the liability of response action contractors.

C. BALANCING LIABILITY AND COMPENSATION CONCERNS

Since both liability and damage fears are based upon hypothetical situations, it may be more instructive to look at the type of liability limit provided in law for other persons engaged in similar "emergency" operations. For instance, although the law is not entirely clear on this subject, firefighters and police officers retain liability for their conduct in implementing critical decisions. While there may be immunity from liability arising from a decision to undertake a certain response exercise, the actual implementation of that decision must be undertaken with reasonable care or liability could attach. If response action contractors are not held to the same degree of care as others in implementing their response activities, there is the risk that there will be less incentive to maintain equipment and drill personnel than there might be if there were a consequence for that behavior.

The question then becomes whether there is a sufficient public policy gain from providing an increased protection from liability to justify treating oil spill responders in a manner different from other emergency responders. For the volunteers and independent operators, there is no compelling reason to have them face, even hypothetically, a risk of acquiring liability for the damages caused by a spill because they are otherwise unconnected with the transactions that led up to a spill. However, there is good reason to expect them to perform the services they offer with a degree of care so as not to exacerbate the situation and because they hold themselves out as professionals.

Many of the objections raised to limiting the liability of responders really center on the nature of the particular responder. For instance, responders that are connected through commingled management or finances with contingency plan holders or responsible parties often raise the most concerns. There is a fear that there is a "corporate shell game" being played to hide assets. This is a concern with the industry cooperative organizations and with the industries' own response efforts. The cooperative organizations are generally a collection of shared response assets rather than another realistic "pocket" from which to draw damages. Although the cooperatives' liability fears may be speculative, those fears could deter them from entering into response operations. The broader public benefit may come, therefore, from encouraging the more cooperatively based response efforts, centralizing spill response, setting performance standards to assure a certain level of professionalism, and also requiring the cooperative organizations to respond to "mystery" spills in their geographic areas of operation at the direction of the federal or state on-scene coordinator. This is a particularly useful goal in those areas of the state where spill response preparedness is lowest but spill risks are high, such as Southeast and the Aleutian chain.

These types of joint efforts could amass more equipment and respond more thoroughly than the current system of relying upon individual spillers or contingency plan holders to acquire sufficient response equipment and trained personnel to respond effectively. Providing some relief from the fear of liability could have the benefit of encouraging the formation of pooled response efforts, particularly for spills of unknown origin, in areas currently not well protected. It could also perhaps reduce the insurance rates for such operations and thereby reallocate funds for equipment and personnel.

The industries' own response efforts cause the most concern in the discussion over limiting responder liability. Unlike the cooperatives which have some autonomy (in different degrees) from the responsible parties, this type of responder is virtually indistinguishable to the public from the responsible party. The corporations law allows members of a unified activity, such as producing and transporting oil down a single pipeline, to divide the responsibilities of that activity. Limiting responsibility for breaches of the safe handling of oil along the corporate lines drawn among those participating in that common activity concerns many people, particularly those potentially harmed by a breach of safe handling. Nonetheless, that unified interest in the common activity conducted by the various industry participants does not, in and of itself, negatively affect the ability of an injured party to recover damages in a manner different from the other classes of response action contractors.

In summary, the Citizens' Oversight Council believes that there is at least potentially a public benefit in avoiding any deterrence of spill response due to fears of potential liability and in encouraging pooled response efforts. These goals can be furthered, in part, through limited liability provisions without a particular designated time limit. However, in order to provide assurance that such a limitation does not reduce the incentive to maintain high response standards, there must be a performance requirement written into the law. The Council will address that issue in the next section.

VII. THE EFFECTS ON TIMELY FIELD RESPONSE IF RESPONSE ACTION CONTRACTOR LIABILITY IS LIMITED

The most significant potential effects from limiting the liability of response action contractors arise in the area of ensuring an effective and timely field response to a spill. Response action contractors state that they need limits on their potential liability to encourage them to take response steps. The state and the public likewise need some degree of assurance that, in fact, these response steps will occur.

A. RELIANCE UPON RESPONSE ACTION CONTRACTORS

Alaska's spill response system places the primary duty to prepare for and to respond to an oil spill on a contingency plan holder. Contingency plans set out the precise steps that the contingency plan holder will take in response to a spill. The state approves individual contingency plans, inspects the plan holder's operations to ensure that it is indeed capable of responding as

represented in the plan, and drills the plan holder in implementing the plan. The spiller has an obligation to cleanup the spill, but it is the contingency plan which forms the heart of the response operations and assures the public that there is a score for a well-orchestrated response.

After the Exxon Valdez spill, the Legislature substantially increased the requirements for the amount of equipment and personnel a contingency plan holder had to have access to in order to show an acceptable level of preparedness for a spill. Because it would be too expensive for every contingency plan holder to individually acquire all the requisite equipment, contingency plan holders have elected to rely on equipment/personnel suppliers or to form cooperative ventures to demonstrate, in their contingency plans, compliance with the preparedness planning standard. The arrangements for services between contingency plan holders and response action contractors are set out in private contracts to which the state is not a party. The state also exercises no regulatory supervision over the terms of the contracts.

The increased reliance by contingency plan holders upon response action contractors has created a problem for the state in assuring performance under the contingency plans approved by the state. The state's authority to compel implementation of the contingency plan is directed to the contingency plan holder and the spiller (if different from the contingency plan holder). Yet, the key actor to provide the equipment, personnel, and sometimes the expertise to the response is the response action contractor. If that contractor fails to perform for any reason, the entire premise upon which the response rests (ie., implementation of the contingency plan) fails. The state has no authority to direct the response action contractor to perform. The state in that case also lacks any meaningful ability to direct the contingency plan holder to perform because the holder's performance is linked to the response action contractor. Arranging for alternative equipment and supplies would consume the critical initial time for effective spill response.

For example, the state believed that Alyeska Pipeline Service Company was the contingency plan holder for vessels carrying TAPS crude in Prince William Sound at the time of the Exxon Valdez spill. The state looked to Alyeska, therefore, to conduct the response in accordance with its approved contingency plan. Alyeska, on the other hand, states that its initial response efforts were conducted on behalf of the spiller who, in Alyeska's view, should be solely responsible for the cleanup. Accordingly, Alyeska almost immediately turned over responsibility for the response activities to Exxon, even though the state objected to that "hand off." Exxon took over the field response approximately 24 hours after the spill. Exxon response officials did not use the Alyeska-prepared Prince William Sound site-specific contingency plan to direct their response activities. Instead, Exxon officials used their own generic spill plan with which the state was unfamiliar. The result was a loss of considerable valuable time in confusion and "reinvention of the wheel."

B. STATE REVIEW OF RESPONSE ACTION CONTRACTORS

In short, the heightened reliance upon response action contractors to implement contingency plans, when coupled with provisions to limit the liability for those contractors, could lead to serious confusion in the field, or worse, to a lack of response. In order to ascertain the impact a liability limit might have on this issue, it is necessary first to determine what, if any, duty to respond each of the categories of response action contractors owes.

The volunteers and independent operators, have no statutory duty to respond to an oil spill. They are neither in the class of responsible parties or contingency plan holders. They respond solely at the request and direction of the responsible party, the contingency plan holder, or a governmental entity which separately contracts with them. Whatever duties to assure performance these operators have are found solely in their private contracts and do not accrue to the benefit of the public.

The spill response organizations also have no independent statutory duty to respond to a spill or to implement a contingency plan. However, these organizations are comprised of members who do have that duty and who can control and direct the activities of the response organization. Again, the duties of these organizations are solely delineated in private contracts.

The actual contractual terms among these two types of responders and the contingency plan holders are significantly diverse. The terms and conditions differ dramatically. The Department of Environmental Conservation, when it reviews contingency plans, performs essentially a technical review of the plan's equipment list and deployment plan. DEC does not analyze all the contractual terms to determine if there will indeed be response action contractor performance. DEC staff is not trained to conduct legal reviews and it would be a monumental task to review the detailed response action contracts supporting every contingency plan.

Neither does DEC provide by regulation for response action contractors named in any particular contingency plan to be bound to perform. Provisions in DEC's new oil spill planning and response proposed regulations ask for a demonstration from the contingency plan holder that the contractor will perform and will maintain a state of readiness with all the equipment at its disposal. Yet, DEC does not verify what equipment or skills the response action contractor has and instead relies upon private contracts which the state does not have the ability to review and enforce. The result is that the state lacks control over those who have become the central actors in spill response. If the contractors liability is also limited, there is no provision in law to ensure that even minimum professional standards are maintained. This leads to the conclusion that the state must take some action to enable it : (a) to have criteria by which to readily assess the capability of a proposed response action contractor to perform; and (b) to direct performance in the event of a confused or inadequate response.

This is particularly true because the state's interests in response efforts may differ substantially from the the spiller's or the contingency plan holder's. For instance, a spiller/contingency plan holder could determine that it would rather

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.

D. ALYESKA PIPELINE SERVICE COMPANY

Finally, the Council believes that Alyeska differs significantly from other responders because it is at least arguable, for several reasons, that Alyeska has a duty to respond to and abate pollution relating to the operation of the Trans-Alaska Pipeline and, therefore, is not a response action contractor at all. The Council considered the following factors in reaching this conclusion.

First, 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 outside the right-of-way corridor. 43 U.S.C. 1653 (b). The holders, all pipeline companies which are subsidiaries of parent oil companies, have made Alyeska their agent. Other sections of that Act impose liability for the damages caused from that pollution. By separately addressing the duties to pay damages and to remove pollution, it appears that Congress was looking for a single entity to oversee pollution control without that entity simultaneously acquiring all the liability for damages. The pollution removal 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 legislative history of these provisions is not conclusive but generally 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 which imposed the duty to remove pollution held Alyeska responsible for cleaning up a pipeline spill caused by a saboteur, even though the spill was not caused by activities conducted by or on behalf of the right-of-way holder. The court found that Congress clearly established the cleanup requirements without regard to fault.

Second, 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 TAPS crude. Subsequent contingency plans reiterated Alyeska's obligation to respond to tanker spills. Following the 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. 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. Today, as distinct from years prior to the Exxon Valdez oil spill, tanker owners or operators, rather than Alyeska, submit contingency plans relying upon Alyeska as the principal response action contractor to direct the field response for the first 72 hours. Alyeska's performance is governed by the private response action contracts with the companies which ship oil, most of whom are also members of the TAPS consortium. Some of Alyeska's response action contracts are with contingency plan holders. Others are with intermediaries, such as BP Oil Shipping Company, U.S.A. for vessels it charters. Alyeska does still submit a plan for the pipeline and the Valdez Marine Terminal. However, unlike previous terminal plans, Alyeska now states that it is not responsible for spills of tankers berthed at the terminal.

Third, Alyeska is unlike other response action contractors, because the pipeline companies include the entire costs of spill response in their tariff expenses. 25% of these expenditures are paid by the state through reduced tax revenues. No other category of response action contractor has state financial participation. Furthermore, the vast majority of those response 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 rather than on-shore pipeline spills. If Alyeska is solely a volunteer in marine response efforts, the state, despite its 25% share of response costs, 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 has to rely solely on Alyeska's volunteerism and good faith.

Fourth, Alyeska is physically the hub of all pipeline related activities, unlike other responders which engage in no activities other than response in other regions of the state. Alyeska prescribes tanker operations in its Port Information Manual as the conditions under which tankers may call at the terminal. A tanker's breach of the Manual even excuses Alyeska from performance as a response action contractor.

Fifth, Alyeska essentially occupies a monopoly position in spill response for Prince William Sound. Alyeska has amassed an exemplary spill response operation for which each shipper has paid and continues to pay through tariff costs. Yet, Alyeska unilaterally establishes the terms under which it will provide the service. It would be virtually impossible for these shippers to finance a separate cooperative organization in which they might have a voice on operations, since they would still have to be paying for Alyeska's SERVS operation through tariff rates.

Sixth, Alyeska differs from other responders in the terms of its limited 72 hour response and mandated transition provisions. During the most critical period of response, key personnel will be preoccupied with bringing in and transferring duties to new people.

And finally, as a practical matter, there is considerable confusion about who prepares, submits, and implements contingency plans for the Trans-Alaska Pipeline tankers transiting Prince William Sound. In some cases, there are successive response action contractors and agents (like Alyeska and BP) directing the response, but the only entity the state can actually direct is a distant tanker company (see Appendix E). At best, this system is confusing and lacks a clear line of authority in response. At worst, this system provides no legal assurance that the entity with the spill response equipment (i.e., Alyeska) has a duty to or will indeed respond.

For all of these reasons, the Council recommends that there should be a clear response entity for crude oil traffic in Prince William Sound. This will reduce administrative burdens, clarify field response, reduce confusion in transition requirements, and offer legal assurance, rather than a hope and a promise, that response will occur. The parties responsible for the spill will remain strictly liable for all the damages caused by the spill, but the duty to respond to and to remove the oil will not be spread out confusingly among all those potentially also liable for damages.

Although it is beyond the scope of this report to fully address this topic, the Prince William Sound situation highlights the need to consider whether the state might be better served by a more regionalized approach to spill response. Rather than a system of multiple contingency plans implemented individually, there could be regional cooperatives which would handle all spills in their regions. That cooperative could hold the general contingency plan for spills in

that region, with only individual facility or tanker differences treated separately. The cooperative's only obligation is to the state to adhere to the cooperative's contingency plan. It would not be liable for the damages caused by the spill. DEC would have significantly fewer plans to review and would not have to get involved in checking private contractual arrangements to see if response performance is assured. DEC could also inspect and drill in a far more efficient and focussed manner.

VIII. CONCLUSION

The Council concludes that, on balance, there is a public benefit to granting response action contractors limited liability in order to encourage aggressive spill response. However, just as the response action contractors desire an assurance that they will not face damages liability exposure, the public deserves the assurance that, indeed, an aggressive response will occur, as promised. The current system rests in large part on "volunteerism" and private contracts. Without disputing the good faith of that "volunteerism", there must be more certainty in spill response.

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APPENDIX A

Issues List

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Gary P. Kompkoff, Tatitlek • John H. Lucking, Jr., Unalaska

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HB 196, SECTION 11, REPORT
RESEARCH PROJECTS

1. OTHER STATE LAWS. This task will compile and examine response action contractor immunity/liability laws in other states. This project will go far beyond merely compiling the statutory language from those states. This project will extensively research the legislative history behind the promulgation of other states' legislation, and will evaluate the immunity provisions in the entire context of any particular state's oil spill prevention and response regulatory structure.

Last session, the legislature did have before it several examples from other states. However, the lack of knowledge into how the particular immunity section fit into the state's overall regulatory structure handicapped the legislature. For instance, California does have a response action contractor immunity provision (60 days) and, therefore, the argument was made that there is no reason for Alaska to be any more strict. What the legislature did not have before it, though, was the fact that California simultaneously created a taxing mechanism with unlimited borrowing authority to enable the state to both respond to a spill and to have access to a fund for damages.

The National Wildlife Federation (which is a member of the Prince William Sound Regional Citizens' Advisory Council) has a legal intern, Pat Kingcade, who is available to begin work on this project this summer. When Pat returns to law school, the PWS RCAC Legislative Affairs Committee will see if it can pickup incidental expenses (telephone, mileage, etc.) to enable Pat to continue research. Also, Pat will prepare a proposal for the Vermont Law School to receive classroom credits and grant funds, since the compilation will be a useful addition to the school's environmental law library. Pat will begin the study with the states of California, Oregon, Washington, Texas, and New Jersey.

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2. OIL POLLUTION ACT OF 1990 PROVISIONS. This project will examine the response action contractor provision in OPA '90 and its intent, legislative history, and statutory context.

The PWS RCAC will consider funding a research contract through its OSPR Committee because it is information that the RCAC needs for other issues as well.

3. TAPS AUTHORIZATION ACT. This project will research the act and the legislative history to determine whether there was any discussion of Alyeska as a response action contractor or as a responder for tankers operating in the TAPS trade.

The Citizens' Oversight Council will conduct the research.

4. CONTINGENCY PLAN REQUIREMENTS UNDER OPA '90. The implementation of the provisions of OPA '90 for contingency plan response standards may have a major impact on both contractor liability and contingency plan holder status. The role of response action contractors in adhering to contingency plan requirements will be a key issue in the Coast Guard's implementation rules and may have the effect of superseding or rendering moot the state requirements.

The PWS RCAC will consider, through its OSPR Committee, a research contract for this project.

5. RESPONSE ACTION CONTRACTOR ACTIVITY IN STATE. This project will examine who the response action contractors are in Alaska and will identify the geographic areas in which the contractors work, the type of services they provide, their interaction with potential responsible parties and volunteers, etc. This project will describe precisely how oil spill response is happening in the state and what geographical regions may be lacking in response capability.

DEC staff will assemble this data.

6. CONTRACTUAL RELATIONSHIPS BETWEEN CONTINGENCY PLAN HOLDER AND RESPONSE ACTION CONTRACTOR. This project would look at the various contracts currently used in the state that describe the legal relationships between the contingency plan holder, a response action contractor, and possibly the state.

The COC will analyze these contracts and their historical evolution, if funding can be acquired.

7. LITIGATION THREAT TO RESPONSE ACTION CONTRACTORS. This will be a brief analysis of whether response action contractors have, in fact, been found liable or sued in Alaska or in other key states for damages for oil spills, when there was no other cause for liability. This will examine both government and private causes of action against entities that operate as response action contractors. This project is important to get a sense of whether the litigation threat is real or speculative.

DEC will request the assistance of the Attorney General's Office for this project.

8. LOCAL GOVERNMENT LIABILITY AS A MEMBER OF A RESPONSE CO-OP. This issue was raised during the legislative hearings last session. If a municipality or other governmental entity, which has sovereign immunity, joins a co-op formed to be a response action contractor, will the municipality retain its immunity against liability?

DEC will request the assistance of the Attorney General's Office for this project.

9. INSURANCE. This project will identify the different types of insurance coverage available for response action contractors, for contingency plan holders, and for oil spill responsible parties in the state. This will help establish the context in which all key players are operating and provide for realistic solutions.

10. STATE OF ALASKA'S POTENTIAL LIABILITY. Many people have questioned whether the state does or should bear some responsibility for spill response as an owner and shipper of crude oil. This project will look into the state's role and status as an owner of oil and its potential liability in order for those public policy questions to be fully examined.

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APPENDIX B

Research Reports Summary

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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.

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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 SERVS). 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.

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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.

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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.

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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.

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

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

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

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

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

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

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

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

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

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

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

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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.

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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.

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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.

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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		✔					✔	

Citizens' Oversight Council
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APPENDIX C

List of Rebuttals / Supplemental Information

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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Rebuttals or Supplemental Information

The following is a list of materials provided to the Citizens' Oversight Council as a response to or comments on the research projects described in the "Summary of Research Projects Reports." Please contact the Citizens' Oversight Council for copies of any of this material.

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Document: Letter from Tesoro Alaska to the Cook Inlet Regional Citizens' Advisory Council dated November 13, 1991

Commenting on Report: "The Legal Relationship Between Response Action Contractors And Other Parties"

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Document: Marine Spill Response Corporation comments on Oil Spill Response Contractor Liability Report, dated 1/31/92

Commenting on Report: All research projects

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Document: Letter from Alyeska to the Citizens' Oversight Council dated 1/30/92 and "Response to Memorandum regarding Trans-Alaska Pipeline Authorization Act"

Commenting on Report: "Trans-Alaska Pipeline Authorization Act (TAPAA)"

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.

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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Document: "Study of State Laws On Good Samaritan Or Responder Immunity Provisions For Oil Spills", by LeBoeuf, Lamb, Leiby, & MacRae, provided to the Citizens' Oversight Council by Alyeska Pipeline Service Company on 1/30/92

Commenting on Report: Other States' Laws On Response Action Contractor Liability

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Document: Memorandum on "The Legal Relationship Between Oil Spill Response Action Contractors And Other Parties To An Oil Spill", provided to the Citizens' Oversight Council on 1/31/92 by Alyeska Pipeline Services Company

Commenting on Report: "The Legal Relationship Between Oil Spill Response Action Contractors And Other Parties To An Oil Spill"

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Document: "Response to HB 196 Report on Response Action Contractors Prepared by the Alaska Department of Environmental Conservation", provided to the Citizens' Oversight Council by Alyeska Pipeline Service Company on 1/31/92

Commenting on Report: "HB 196 Report on Response Action Contractors", by Alaska Department of Environmental Conservation - Spill Prevention and Response

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Document: "Response to Memorandum Relating to Contingency Plan Requirements Under OPA '90", provided to the Citizens' Oversight Council by Alyeska Pipeline Service Company on 1/31/92

Commenting on Report: "Contingency Plan Requirements Under OPA '90"

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Document: "Response to Memorandum Relating to the State of Alaska's Participation in Spill Response and Preparedness in the State", provided to the Citizens' Oversight Council by Alyeska Pipeline Service Company on 1/31/92

Commenting on Report: "The State Of Alaska's Participation In Spill Response And Preparedness In The State"

Alyeska pipeline SERVICE COMPANY

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

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

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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

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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

Citizens' Oversight Council
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APPENDIX D

Text of 196
(set out pre and post sunset)

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

HOUSE BILL 196

AN ACT LIMITING LIABILITY FOR OIL SPILL RESPONSE ACTION CONTRACTORS

STRICT, JOINT AND SEVERAL LIABILITY FOR DAMAGES CAUSED BY AN OIL OR HAZARDOUS SUBSTANCE SPILLS (SECTION 1 & 3)

* **Section 1.** AS 46.03.822(a) is amended to read:

(a) Notwithstanding any other provision or rule of law and subject only to the defenses set out in (b) of this section and the exception set out in (i) of this section, the following persons are strictly liable, jointly and severally, for damages [TO PERSONS OR PROPERTY, WHETHER PUBLIC OR PRIVATE, INCLUDING DAMAGE TO THE NATURAL RESOURCES OF THE STATE OR A MUNICIPALITY,] and for the costs of response, containment, removal, or remedial action incurred by the state or a municipality, resulting from an unpermitted release of a hazardous substance or, with respect to response costs, the substantial threat of an unpermitted release of a hazardous substance:

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

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

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

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

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

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

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

EFFECTIVE UPON PASSAGE OF HB 196 AND UNTIL JUNE 30, 1992

NEGLIGENCE STANDARD FOR HAZARDOUS SUBSTANCE RESPONSE ACTION CONTRACTORS IF ACTIONS ARE NOT CONTRARY TO A RESPONSE PLAN OR ORDER OF THE STATE OR FEDERAL GOVERNMENT AND THE RESPONDER USED ACCEPTED PROFESSIONAL STANDARDS AND PRACTICES (SECTION 4)

* **Sec. 4.** AS 46.03.823(a) is amended to read:

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

DEFINITION OF RESPONSE ACTION (SECTION 6)

* Sec. 6. AS 46.03.823(g) is repealed and reenacted to read:

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

EFFECTIVE UPON PASSAGE OF HB 196 AND UNTIL JUNE 30, 1992

GROSS NEGLIGENCE STANDARD FOR OIL SPILL RESPONSE ACTION CONTRACTORS (SECTION 8)

• Sec. 8. AS 46.03 is amended by adding a new section to read:

Sec. 46.03.825. OIL SPILL RESPONSE ACTION CONTRACTORS. (a) A person who is a response action contractor with respect to a release or threatened release of oil whose act or omission is not contrary to an order of the federal or state on-scene coordinator is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the release or threatened release, or from the response action contractor's act or omission in response to the release or threatened release, unless the person bringing a claim against the response action contractor proves by a preponderance of the evidence that

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

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

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

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

(1) an action for personal injury or death;

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

(3) an act or omission that occurs more than 15 days after the release.

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

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

EFFECTIVE UPON PASSAGE OF HB 196 AND UNTIL JUNE 30, 1992

DEFINES RESPONSE ACTION CONTRACT AND RESPONSE ACTION CONTRACTOR (SECTION 9)

* Sec. 9. AS 46.03.826 is amended by adding new paragraphs to read:

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

(A) the department;

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

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

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

(15) "response action contractor" means

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

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

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

EFFECTIVE UPON PASSAGE OF HB 196 AND UNTIL JUNE 30, 1992

REPORT REQUIRED BY THE CITIZENS' OVERSIGHT COUNCIL (SECTION 11)

• **Sec. 11.** REPORT. The Citizens Oversight Council on Oil and Other Hazardous Substances (AS 24.20.600) shall review the entire subject of response action contractor civil liability and the status of oil spill contingency plan holders. The review of both subjects shall be completed and a report submitted to the legislature before January 15, 1992. The report must address whether further modifications are necessary to state laws on response action contractor civil liability, and include an analysis of whether the present state laws that require shippers and owners to hold contingency plans and that enable shippers and owners to contract with response action contractors to carry out contingency plans are adequate to protect the public in the event of an oil spill.

EFFECTIVE UPON PASSAGE OF HB 196

STRICT, JOINT AND SEVERAL LIABILITY FOR DAMAGES CAUSED BY AN OIL OR HAZARDOUS SUBSTANCE SPILL (SECTION 2)

* Sec. 2. AS 46.03.822(a) is repealed and reenacted to read:

(a) Notwithstanding any other provision or rule of law and subject only to the defenses set out in (b) of this section and the exception set out in (i) of this section, the following persons are strictly liable, jointly and severally, for damages to persons or property, whether public or private, including damage to the natural resources of the state or a municipality, and for the costs of response, containment, removal, or remedial action incurred by the state or a municipality, resulting from an unpermitted release of a hazardous substance or, with respect to response costs, the substantial threat of an unpermitted release of a hazardous substance:

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

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

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

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

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

TAKES EFFECT ON JULY 1, 1992

NEGLIGENCE STANDARD FOR ALL RESPONSE ACTION CONTRACTORS IF THE RESPONDER USED ACCEPTED PROFESSIONAL STANDARDS (SECTION 5)

• **Sec. 5.** AS 46.03.823(a) is repealed and reenacted to read:

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

TAKES EFFECT ON JULY 1, 1992 (UNLESS NEW LEGISLATION IS ENACTED)

DEFINITION OF RESPONSE ACTION AND RESPONSE ACTION CONTRACTOR FOR OIL AND HAZARDOUS SUBSTANCE RELEASES (SECTION 7)

* **Sec. 7.** AS 46.03.823(g) is repealed and reenacted to read:

(g) In this section,

(1) "response action" means an action taken in connection with the mitigation or cleanup of a hazardous substance release or threatened release, including investigation, evaluation, plan development, mapping and surveying, engineering, design and construction, removal, and equipment provision;

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

(A) the department;

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

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

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

(3) "response action contractor" means

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

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

TAKES EFFECT ON JULY 1, 1992 (UNLESS NEW LEGISLATION IS ENACTED)

REPEALS THE FOLLOWING SECTIONS:
SECTION 10

• Sec. 10. AS 46.03.822(k), 46.03.825, 46.03.826(14), and 46.03.826(15) are repealed.

TAKES EFFECT ON JULY 1, 1992

Citizens' Oversight Council
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APPENDIX E

PRINCE WILLIAM SOUND
TANKER CONTINGENCY PLAN COVERAGE CHART

Council Members
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Gary P. Kompkoff, Tatitlek • John H. Lucking, Jr., Unalaska

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PRINCE WILLIAM SOUND
TANKER CONTINGENCY PLAN COVERAGE CHART

CAVEAT:

The Citizens' Oversight Council prepared these charts as of January 30, 1992. However, there is no easily available, central source to ascertain who has the legal obligation to respond for any particular tanker. The Council cautions that there may still be some unanswered questions regarding which companies serve certain roles.

The information in these charts was obtained through interviews with: Department of Environmental Conservation (Kevin O'Shea), Tesoro (Damon King), Chevron Shipping (Charlie Lambert), Exxon (R.G. Dragnich), Arco (Jay Kitchener), Atlantis Agency, Inc., (Bill Williams, Joseph Gehegan), BP America (Tom Mullen, Joe Broderich), Keystone Shipping (Ralph Hill, Bruce Benn), Maritime Overseas (George Blake, Mark Lowe), Penn-Attransco (Captain Gilbert). Draft charts were reviewed by these people as well.

The files of the Department of Environmental Conservation were also researched. The Department does not have this information readily available. Instead, it is necessary to research through several files and contingency plans to determine the roles and responsibilities of the various operators and responders. Even then, unfortunately, the information supplied by the Department and by industry differed in many respects. Whenever there was conflicting information, the Council relied upon the information supplied by industry.

APPENDIX E

Council Members
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VESSEL CHARTERER	VESSEL NAME	VESSEL OPERATOR	VESSEL OWNER	C-PLAN HOLDER	AGENT	INITIAL RESPONSE	SECONDARY RESPONSE
BP Oil Shipping Co., USA	Prince William Sound	Keystone Shipping	Shipco 667	Keystone Shipping	BP Oil Shipping Co., USA	Alyeska	BP joint w/ Keystone Shipping*
BP Oil Shipping Co., USA	OMI Columbia	OMI Corp.	OMI Challenger Transport Co.	OMI Challenger Transport Co.	Ocean Mgt., Inc.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Overseas Alaska	Maritime Overseas Corp.	Intercontinental Bulktank Corp.	Intercontinental Bulktank Corp.	Maritime Overseas Corp.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Overseas Boston	Maritime Overseas Corp.	Cambridge Tankers, Inc.	Cambridge Tankers, Inc.	Maritime Overseas Corp.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Overseas Chicago	Maritime Overseas Corp.	First Shipmor Assoc.	First Shipmor Assoc.	Maritime Overseas Corp.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Overseas Juneau	Maritime Overseas Corp	Juneau Tanker Corp.	Juneau Tanker Corp.	Maritime Overseas Corp.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Overseas New York	Maritime Overseas Corp.	Third Shipmor Assoc.	Third Shipmor Assoc.	Maritime Overseas Corp.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Overseas Ohio	Maritime Overseas Corp.	Second Shipmor Assoc.	Second Shipmor Assoc.	Maritime Overseas Corp.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Keystone Canyon	Keystone Shipping Co.	Shipco 2296, Inc.	Keystone Shipping	BP Oil Shipping Co., USA	Alyeska	BP joint w/ Keystone Shipping
BP Oil Shipping Co., USA	Thompson Pass	Interocean Mgt. Corp.	Shipco 2298, Inc.	Interocean Mgt. Corp.	Interocean Mgt. Corp.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Tonsina	Keystone Shipping Co.	Shipco 668, Inc.	Keystone Shipping Co.	BP Oil Shipping Co., USA	Alyeska	BP joint w/ Keystone Shipping
BP Oil Shipping Co., USA	BT Alaska	Marine Transport Line, Inc.	Bankers Trust Company	Marine Transport Line, Inc.	Marine Transport Line, Inc.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	BT San Diego (no longer calling)	Marine Transport Line, Inc.	Bankers Trust Company	Marine Transport Line, Inc.	Marine Transport Line, Inc.	Alyeska	BP Oil Shipping Co., USA

VESSEL CHARTERER	VESSEL NAME	VESSEL OPERATOR	VESSEL OWNER	C-PLAN HOLDER	AGENT	INITIAL RESPONSE	SECONDARY RESPONSE
BP Oil Shipping Co., USA	Brooks Range	Interocean Mgt. Corp.	Shipco 2297, Inc.	Interocean Mgt. Corp.	Interocean Mgt. Corp.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Aspen	Trinidad Corp.	653 Leasing Co.	Trinidad Corp.	Trinidad Corp.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Atigun Pass	Keystone Shipping Co.	Shipco. 6695, Inc.	Keystone Shipping Co.	BP Oil Shipping Co., USA	Alyeska	BP joint w/ Keystone Shipping
BP Oil Shipping Co., USA	Glacier Bay	Trinidad Corp.	GNP Barge & Tanker Co.	Trinidad Corp.	Trinidad Corp.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Kenai	Keystone Shipping Co.	Connecticut National Bank	Keystone Shipping Co.	BP Oil Shipping Co., USA	Alyeska	BP joint w/ Keystone Shipping
BP Oil Shipping Co., USA	Overseas Arctic	Maritime Overseas Corp.	Overseas Bulktank Corp.	Overseas Bulktank Corp.	Maritime Overseas Corp.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Admiralty Bay	Trinidad Corp.	652 Leasing Co.	Trinidad Corp.	Trinidad Corp.	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	American Trader	Penn-Attransco Corporation	Penn-Attransco Corporation	Penn-Attransco Corporation	Penn-Attransco Corporation	Alyeska	BP Oil Shipping Co., USA
BP Oil Shipping Co., USA	Chesapeake Trader (no longer calling in Alaska)	Penn-Attransco Corporation	Attransco, Inc.	Penn-Attransco Corporation	Penn-Attransco Corporation	Alyeska	BP Oil Shipping Co., USA

* Keystone Shipping provided COC with this information, however, BP said they alone, would provide secondary response.

VESSEL CHARTERER	VESSEL NAME	VESSEL OPERATOR	VESSEL OWNER	C-PLAN HOLDER	AGENT	INITIAL RESPONSE CONTRACT	SECONDARY RESPONSE
N/A	ARCO Alaska	Arco Marine Inc.	Arco Marine Inc.	Arco Marine Inc.	Arco Marine Inc.	Alyeska	Arco Marine Inc.
N/A	ARCO Anchorage	Arco Marine Inc.	Northern Trust Co.	Arco Marine Inc.	Arco Marine Inc.	Alyeska	Arco Marine Inc.
N/A	ARCO California	Arco Marine Inc.	Arco Marine Inc.	Arco Marine Inc.	Arco Marine Inc.	Alyeska	Arco Marine Inc.
N/A	ARCO Fairbanks	Arco Marine Inc.	Bank of America National Trust Savings Assn.	Arco Marine Inc.	Arco Marine Inc.	Alyeska	Arco Marine Inc.
N/A	ARCO Independence	Arco Marine Inc.	Arco Marine Inc.	Arco Marine Inc.	Arco Marine Inc.	Alyeska	Arco Marine Inc.
N/A	ARCO Juneau	Arco Marine Inc.	Bankers Trust Co.	Arco Marine Inc.	Arco Marine Inc.	Alyeska	Arco Marine Inc.
Arco Marine Inc.	M/V Overseas Philadelphia	Maritime Overseas Corp.	Philadelphia Tanker Corp.	Philadelphia Tanker Corp.	Arco Marine Inc.	Alyeska	Arco Marine Inc.
N/A	ARCO Sag River	Arco Marine Inc.	Oil Tankers Leasing Corp.	Arco Marine Inc.	Arco Marine Inc.	Alyeska	Arco Marine Inc.
N/A	ARCO Spirit	Arco Marine Inc.	Arco Marine Inc.	Arco Marine Inc.	Arco Marine Inc.	Alyeska	Arco Marine Inc
N/A	ARCO Texas	Arco Marine Inc.	Arco Marine Inc.	Arco Marine Inc.	Arco Marine Inc.	Alyeska	Arco Marine Inc.

VESSEL CHARTERER	VESSEL NAME	VESSEL OPERATOR	VESSEL OWNER	C-PLAN HOLDER	AGENT	INITIAL RESPONSE	SECONDARY RESPONSE
N/A	EXXON San Francisco	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	Alyeska	EXXON Shipping Co.
N/A	EXXON Baton Rouge	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co	EXXON Shipping Co.	Alyeska	EXXON Shipping Co.
N/A	EXXON North Slope	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	Alyeska	EXXON Shipping Co.
N/A	EXXON New Orleans	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	Alyeska	EXXON Shipping Co.
N/A	EXXON Long Beach	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	Alyeska	EXXON Shipping Co.
N/A	EXXON Benicia	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	Alyeska	EXXON Shipping Co.
N/A	EXXON Baytown	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	Alyeska	EXXON Shipping Co.
N/A	EXXON Philadelphia	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	EXXON Shipping Co.	Alyeska	EXXON Shipping Co.

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VESSEL CHARTERER	VESSEL NAME	VESSEL OPERATOR	VESSEL OWNER	C-PLAN HOLDER	AGENT	INITIAL RESPONSE	SECONDARY RESPONSE
Amerada Hess Corporation	Southern Lion	Maritime Overseas Corp.	Interocean Tanker Corp.	Interocean Tanker Corp.	Maritime Overseas Corp.	Alyeska	BP Oil Shipping Co., USA
Amerada Hess Corporation	Northern Lion	Maritime Overseas Corp.	Second United Shipping Corp.	Second United Shipping Corp.	Maritime Overseas Corp.	Alyeska	BP Oil Shipping Co., USA
Amerada Hess Corporation	Western Lion	Maritime Overseas Corp.	First United Shipping Corp.	First United Shipping Corp.	Maritime Overseas Corp.	Alyeska	BP Oil Shipping Co., USA
Amerada Hess Corporation	Eastern Lion	Maritime Overseas Corp.	Third United Shipping Corp.	Third United Shipping Corp.	Maritime Overseas Corp.	Alyeska	BP Oil Shipping Co., USA
Amerada Hess Corporation	Mt. Cabrite	Atlantis Agency Corporation	Serpentsea Corporation	Amerada Hess Corporation	Atlantis Agency Corp.	Alyeska	BP Oil Shipping Co., USA
Amerada Hess Corporation	Saint Lucia	Atlantis Agency Corporation	Swansea Corporation	Amerada Hess Corporation	Atlantis Agency Corp.	Alyeska	BP Oil Shipping Co., USA
Amerada Hess Corporation	Seal Island	Atlantis Agency Corporation	Seal Island Shipping Corporation	Amerada Hess Corporation	Atlantis Agency Corp.	Alyeska	BP Oil Shipping Co., USA

VESSEL CHARTERER	VESSEL NAME	VESSEL OPERATOR	VESSEL OWNER	C-PLAN HOLDER	AGENT	INITIAL RESPONSE	SECONDARY RESPONSE
Chevron USA	Chevron Washington	Chevron USA	First Interstate Bank of CA	Chevron USA	Chevron Shipping Co.	Alyeska	Chevron Shipping for Chevron USA
Chevron USA	Chevron Oregon	Chevron USA	First Interstate Bank of CA	Chevron USA	Chevron Shipping Co.	Alyeska	Chevron Shipping for Chevron USA
Chevron USA	Chevron Mississippi	Chevron USA	First Interstate Bank of CA	Chevron USA	Chevron Shipping Co.	Alyeska	Chevron Shipping for Chevron USA
Chevron USA	Chevron Louisiana	Chevron USA	Connecticut National Bank	Chevron USA	Chevron Shipping Co.	Alyeska	Chevron Shipping for Chevron USA
Chevron USA	Chevron California	Chevron USA	First Interstate Bank of CA	Chevron USA	Chevron Shipping Co.	Alyeska	Chevron Shipping for Chevron USA

VESSEL CHARTERER	VESSEL NAME	VESSEL OPERATOR	VESSEL OWNER	C-PLAN HOLDER	AGENT	INITIAL RESPONSE	SECONDARY RESPONSE
Tesoro Alaska Petroleum Company	Overseas Washington	Maritime Overseas Corp.	Fourth Shipmor Assoc.	Fourth Shipmor Assoc.	Maritime Overseas Corp.	Alyeska	Tesoro Alaska Petroleum Company

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APPENDIX F

Summary of Meeting Comments

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

Citizens' Oversight Council
on Oil and Other Hazardous Substances
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Citizens' Oversight Council Meeting
January 31, 1992

Summary of Public Comments

The Citizens' Oversight Council met on January 31, 1992 to take public testimony regarding liability for oil spill response action contractors. The following is a summary of the comments that were received by the Council.

Tim Robertson, Prince William Sound Regional Citizens' Advisory Council (RCAC)

Tim Robertson testified, as the RCAC representative in the Coast Guard's negotiated rule making for the Oil Pollution Act of 1990, that certification of response action contractors will be part of the federal regulations.

Robertson also noted that California law ties response action contractor liability immunity to achieving maximum protection of the California coast. The administrator in California must certify that this protection has been achieved before response action contractors may receive immunity. The California approach has encouraged response action contractors, co-ops, tankers, and the oil transportation industry to cooperatively design and fund the best system for protection. Liability immunity has not yet been granted to any response action contractors in California. (see attached testimony for detail)

Tim Robertson was asked what type of certification the Coast Guard is considering. He answered that the Coast Guard was presently considering a broad range of options with little agreement at this time. The Working group on certification met for the first time 3 days ago and there is no consensus yet. Robertson listed possible criteria to be used in the certification process: scope of services, type of organization, experience, equipment and maintenance programs, personnel and training, mobilization time and response time and mandatory participation in drills.

It will take some time for certification to be implemented across the United States. At this time the Coast Guard is not making any determinations of the different types of response action contractors for purposes of certification.

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Steve Ducca, Marine Spill Response Corporation (MSRC)

Several of the summaries present conclusions with which MSRC does not fully agree. Two of the studies were of particular concern to MSRC because the full effect of OPA 90's many provisions were not stated in the studies: (1) response action contractor provisions in the Oil Pollution Act of 1990; (2) and the summary of other states. The first summary is incomplete. There is no mention of assumption of liability by the responsible party. The second summary is incomplete because it lists only 8 states. In fact, 19 Coastal States have enacted legislation as protective as OPA 90 over the last 18 months.

The purpose of immunity is to promote the public welfare by ensuring that responders will not be inhibited from acting boldly and decisively when confronted with an oil spill. OPA 90 distributes risk between the responders and the spiller making the spiller assume liability for good faith errors made by a responder so long as the responder's acts are consistent with the national contingency plan or at the direction of the Federal On-scene coordinator and the acts do not rise to the level of gross negligence or willful misconduct. There is no responder immunity provided for cases of personal injury or wrongful death. These provisions ensure that the responders act with due care.

Other concerns with the studies include the following:

Page two of the summary, states that "...granting 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." MSRC feels that granting such limited immunity encourages a bolder response rather than a potential delay. Under OPA 90 the spiller submits a contingency plan. The responder is controlled through the spiller. If a responsible party (RP) refuses to cooperate there are serious penalties, the responders liability cap is removed and civil penalties up to 25,000 per day.

A second concern is the Straube report summary that states "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." MSRC feels this cannot occur because the federal government requires a certificate of financial responsibility and a $1 billion per incident trust fund has been established when a spiller's liability limits are reached.

MSRC believes the Oversight Council needs to fully consider the federal liability regime that exists three miles off Alaska's coast today as it makes recommendations that might adopt differing standards. MSRC further believes that Alaska should enact the same limited responder immunity provision as OPA 90.

The Council asked if passage of responder immunity would encourage MSRC to come to Alaska. MSRC said it is unrelated. The Council asked if MSRC was

willing to operate in all 8 states outlined in the report. They said yes however they felt California's law has a time limit that they don't think is useful. There was some confusion over the New Jersey law. The Council seemed to have different information than MSRC.

MSRC stated that they felt certification and the demonstration of capability is an indispensable part of the way this nation has to clean up oil.

Steve Peterson, Crowley Maritime

Crowley, believes that the 15 day time limit in HB 196 should be eliminated because of distances response action contractors have to travel and because of the possible delay in responding in remote areas due to distance and weather. It is not reasonable to have a time limit in this state. The Mertz report discusses the worst case scenario where a spiller becomes insolvent. This scenario is precisely the reason why response action contractors need protection. If a spiller becomes insolvent the response action contractors could face financial ruin because they would be liable for simple acts of negligence. Crowley probably would not have responded to the Hyundai spill in October with these types of time limitations.

A member of the Council asked if a contingency plan holder's only asset is the barge and the financial responsibility certification is not valid or the tanker was insolvent, would the response action contractor still respond? Crowley answered that it would probably not risk exposure.

Crowley welcomes certification.

Mike O'Meara, Homer

Response action contractor liability is a complicated issue.

1) A responsible party should not be indirectly shielded by granting liability relief to a response action contractor that is that party's surrogate.

2) Private parties' right to recover damages by harms done by a response action contractor should be protected.

3) State and federal governments must have direct control over all parties in spill response including response action contractors. Indirect control is inadequate.

There is a serious question whether there is real need for HB 196 at all. There is no record of claims against response action contractors. They appear to already be protected.

If legislation stands and relief is granted it should be limited to those contractors that are truly independent.

Ann Rothe, Alaska Regional Representative of the National Wildlife Federation (NWF)

1. NWF is interested in establishing a state and federal regulatory atmosphere that facilitates immediate response to oil spills.

2. In the initial hours of a spill we want to ensure that responder utilizes the most effective system of management and the best available technology.

3. Responders should be held accountable for their actions. Workers should be adequately trained, equipment properly maintained and drills should be held regularly and equipment and manpower described in an approved contingency plan should be immediately available in the event of a spill. We want to ensure that oil spill contingency plans are the central guide for response, not just documents written to meet legal requirements.

4. We want to assure, that in the event of insolvency, that the on-scene coordinator has the ability to direct the contractor that has committed to initial response.

5. We are interested in establishing a regulatory regime that uses local knowledge, resources and volunteers in the event of an oil spill. By not providing immunity to volunteers, it might create a disincentive for residents and volunteers to become actively involved in a spill.

6. We want to ensure that contractors can perform in the manner they indicate and that they have the equipment and resources to respond as indicated in their contracts and that these resources are unencumbered and available for use. We support state and/or federal certification for response action contractors.

7. We want to ensure that any resource damages are adequately compensated and that these resources are fully restored.

The National Wildlife Federation will support immunity if along with immunity there is increased protections provided as outlined above. However, if immunity would result in a less rigorous standard of response with inadequate compensation for resource damages NWF will oppose any legislation that grants immunity.

Capt. Ducca of MSRC says insolvency is very remote. I think you should be aware that the regulations regarding financial responsibility have not yet been finalized.

A member of the Council asked NWF's view on the substantial deviation language? Rothe replied that once a plan is approved the responsible party should be held accountable to the plan; otherwise why involve the public in the review process.

A Council member asked if best available technology should be defined as boiler plate capacity or rather capacity under certain conditions. Rothe responded it should be the latter and the Coast Guard is not interested in looking at boiler plate either.

Scott Sterling, Prince William Sound Regional Citizens' Advisory Council (RCAC)

Sterling is the City of Cordova's representative on RCAC. RCAC is still reviewing all reports.

RCAC will submit comments in writing later, but its main concerns are:

1. A decision must be made whether immunity is necessary at all. There have been no claims experienced resulting from response action contractors responding to spills. Secondly, any cause of action will require that the jury account for the fact that the responder was working in emergency circumstances. The totality of the circumstances would have to be considered before anyone would be held liable. It should not be taken as a given that immunity is desirable.

2. Certification is being given serious consideration by the Coast Guard. RCAC believes certification deserves close scrutiny. Certification provides incentives for better response and improves statewide capability. Devising statewide solutions is appropriate, like the Statewide Coastal Community Co-op. We may have good response capabilities in Prince William Sound, but we don't necessarily have it elsewhere in the state.

3. State and/or Federal government should have direct control over a response action contractor. DEC may or may not be able to ascertain whether a response action contractor is able to respond as set forth in a contingency plan. We need to either (1) budget enough money for regulatory verification or (2) set up certification process as a condition of contingency plan approval so that the response action contractor will provide the services they say they will.

The reports do state realistic scenarios. Crowley's testimony shows that the potential worst case scenario outlined in Michele Straube's report can occur. If the contingency plan holders only asset is the vessel, will the response action contractor have any reason to respond. This should be addressed.

A Council member asked what RCAC thought different types of contractors should have different levels of immunity. Sterling responded that volunteers are trying to protect their livelihood. Immunity should probably granted to a Coastal Communities Cooperative type organization.

Larry Wood, Alyeska Pipeline Service Company

Wood distributed a brochure describing Alyeska's response capabilities, written comments, a position paper on HB 196, and specific comments on the reports done for the Council.

Alyeska is a response action contractor although they do operate the pipeline and the terminal. Neither Alyeska nor the seven owner companies own or operate tankers. Pipeline companies and the shippers are different corporations. Alyeska contracts with tanker owners/operators/charterers to provide initial response to an oil spill. Other response action contractors could provide these services. Alyeska transfers management of a spill response to the responsible party after 72 hours.

Several reports express opinions that response action contractor liabilities ought actually to be increased, not decreased. For example, Mertz and Straube suggest that response action contractors ought to be subject to direct state control in the event of an insolvent spiller. Alyeska feels this will deter response and flies in the face of the scheme to promote quick response and assure that there is someone to pay.

In addition, the worst case scenario described in the Mertz, Straube and Frank reports is remote. It would require the simultaneous insolvency of the spiller, his financial responsibility and the state and federal response funds. These spill funds, financed by the industry, exist to provide a safety net.

There is paradox in the Mertz report. In an orphan spill the state, federal government or a municipality would take over a spill. Why does the state enjoy limited immunity when they respond to a spill but not a private response action contractor? The very occasion you want the response action contractor to respond is where there is no responsible party.

The Frank report recommends that Alyeska not have immunity because the holders of the federal pipeline right-of-way permit are liable for tanker spills in Prince William Sound. Alyeska believes this is incorrect and explains why in their written response.

Judge Holland in the *Exxon Valdez* litigation ruled that people strictly liable under the Trans Alaska Pipeline Authorization Act (TAPAA) are the vessel owner and operator and the Trans Alaska Pipeline Liability Fund. Either way, under the terms of most responder laws the responsible party for the spill is not entitled to assert limited immunity as a response action contractor.

In response to the Vogt report, personnel and equipment such as escort vessels are required by state laws and Alyeska has offered to provide these services in absence of anyone else. Alyeska believes that costs for response being included by the TAPS carriers in the tariff charges is an equitable distribution of the costs of those services among those who receive them.

None of this detracts from Alyeska's status as a response action contractor. As the Mertz report points out, if the state owned and used the equipment it would enjoy responder immunity.

The Mertz report is incorrect. Following the passage of HB 196, Alyeska agreed to make changes in how Tesoro demonstrates its capacity to pay for initial response services. Instead of showing financial responsibility through self worth, Alyeska is allowing them to show it through insurance.

Under OPA 90 anyone who provides response receives immunity.

Alyeska believes that a time limit for immunity will not encourage prompt response. This time limit will not encourage prompt response. When there is oil spilled the emergency could exist for some time.

As far as substantial deviation language in HB 196, Alyeska feels that the difficulty with the language is that it is difficult to put everything in writing. The legislature requested that this language be reviewed by the Council.

Alyeska disagrees that immunity should be granted only with adoption of certification. DEC already has authority to oversee what a response action contractor is doing. The state has the capability of reviewing plans and reviewing what a response action contractor can provide, as well as require drills. I have not heard any opinions expressed by the department that there is a need for changes in the law. It is better to wait and see what happens at the federal level on certification.

Harry Bader asked, whether Alyeska is required under the right of way agreement to respond.

Wood responded that the Holland decision answered that question.

A Council member requested a copy of the opinion of Judge Holland.

Bader the asked, who is the contingency plan holder? Is it the owner of the cargo, is it the shipper, is it the owner of the ship? We had difficulty finding out this information. Michele Brown added that was difficult to pin down who is obligated to conduct the response. It was hard to track who fit into what categories and who was accountable and who is legally obligated.

Wood responded that the tanker owners and shippers have the responsibility to have a contingency plan. They have contracted with Alyeska. Alyeska stepped forward in the absence of anyone else. After 72 hours the response is transferred to the responsible party. The contracts and the contingency plan are very specific.

Bader then asked, why if Alyeska is a volunteer, during the 15 year period after the right of way agreements were signed, did Alyeska assert that they were obligated to respond and what motivated the change?

Wood replied that after the *Exxon Valdez* spill the state issued the Emergency Order that required Alyeska to develop response capability. However, the order is no longer in effect. DEC has adopted the new arrangement described above.

Bader than asked why, prior to the spill, did Alyeska consider itself obligated as shown in their contingency plan and now they do not?

Wood replied that Alyeska does not believe their position has ever changed. We do not perceive an obligation to respond to tanker spills. There is in TAPAA an indication of who does have that responsibility. How could Alyeska be responsible for a tanker it does not own.

Bader then asked why Alyeska planned to respond to spills without contracts before the spill.

Wood replied that nothing in Alyeska's position has changed. These issues are still in litigation. Alyeska believes that these issues have been resolved by Judge Holland's decision.

Wood added that Alyeska should not be cut out for special consideration for responder immunity.

Kathryn Kinnear stated concern about whether Alyeska being a volunteer response action contractor gives any assurance to the citizens of Alaska? You say those worst case scenarios never happen. But some scenarios are bound to happen that we have not even thought of.

Alyeska responded that the plan holders have to submit a contingency plan, and demonstrate that they have a responsible party to carry it out. DEC has already approved the arrangement in PWS. The spiller has had to demonstrate financial responsibility. Finally, the state and federal funds provide for that worst case scenario. We shouldn't predicate our decisions on remote possibilities.

Sue Libensen, Executive Director Alaska Center for the Environment (ACE)

Legal liability affects response capability. The best response capability available doesn't assure we can pick up much oil. The record around the world is that it is difficult to pick up oil. ACE supports doing anything to increase preventative measures.

If we can trade immunity for protective measures, ACE would perhaps support immunity. She encouraged the Council to look at the techniques used in California.

Response action contractors should not be used as a corporate veil for responsible parties and spillers.

ACE supports certification because we need to ensure that the proposed response in the contingency plans actually exist. DEC needs authority to certify

response action contractors. You should consider the reality of DEC'S ability to certify contractors or oversee response action contractors and contingency plans because of the limitations of the state budget.

ACE questions the ability of the state to oversee 15 or so contingency plans for one facility. ACE supports required memberships in regional co-ops so DEC has the capability to oversee them.

There has been progress at Alyeska. Immunity hangs heavy over industry and it seems to have forced some cooperation in the goal of relieving industry of liability. ACE supports techniques to encourage cooperation and prevention.

Bill Stillings General Manager CISPRI -Cook Inlet

CISPRI supports the immunity standard in OPA 90. It would give the type of protection CISPRI needs to provide response to oil spills in Cook Inlet. The original by-laws provide for CISPRI to respond to any and all spills without regard to ownership. Industry pledged a $1 million fund for orphan spills. However, with uncertainty in response action contractor law we have some concerns about whether it is advisable for CISPRI to respond to mystery spills. Everyone agrees that rapid immediate response is the way to handle an oil spill.

CISPRI does not have a contingency plan. We respond under our member companies contingency plans. We are a key part of their plan. Do we have to wait for the state or feds to assume responsibility of a spill before we can respond?

In the recent Kenai Pipeline spill, under the Incident Command System every decision was a joint state, federal, response action contractor, responsible party and RCAC decision. Are those parties going to be held responsible for actions taken? The Kenai Peninsula Borough has stated that they will have to resign from CISPRI if responder immunity is not passed.

In the KPL spill CISPRI's equipment was on the water for 9 days. So even in a small spill you could pass your 15 days. There was no shoreline impact in this spill.

In the Glacier Bay spill, the general manager of CIRO was sued individually. He was removed from the suit later. To say that response action contractors are not at risk is incorrect.

Kathryn Kinnear asked if CISPRI represents all of the operators in Cook Inlet that are required to have a contingency plan.

Stillings replied that CISPRI only represents 10 member companies that are the major crude oil operators and some clean product operators. There are operators who do not feel it is in their best interest to join CISPRI.

Steve Provant, Department of Environmental Conservation

There is no misunderstanding of our knowledge of the contingency plan holders. We know who the plan holders are, we know who the responsible parties are, we know who the response action contractor is. There is no confusion with DEC. The present contingency plan was conditionally approved first in 1990 and again in June of 1991. During this time, we have worked with and gained experience with both responsible parties and response action contractors. We have evaluated the capabilities of the response action contractors to respond and evaluated the transition management plan. We have gone through that exercise with Exxon, BP, and ARCO and we are doing an exercise with Chevron this March.

There is no confusion with the hierarchy with regard to who ends up being the responsible party.

Gene Burden, Tesoro Alaska

Tesoro is responsible for over 50% of funding of CISPRI and has reservations on responding to mystery spills from non-members in the absence of a state responders immunity law because of the risk of litigation over damages from negligence.

Our position is that responder immunity is good for the state of Alaska. The 8 coastal states in the study have laws similar to the federal immunity in the Oil Pollution Act of 1990. 7 of the 8 states have limited immunity; there are some slight variations in 5 of the states.

Tesoro is one of the companies that transports oil from Prince William Sound. Tesoro is a small company. We made a conscious effort to protect the environment. We ship oil in a hydrostatically loaded vessels, we increased crews,and improved satellite and navigational systems.

Tesoro was faced with demonstrating a $1 billion direct action bond. Tesoro reached a temporary resolution with Alyeska. Passage of HB 196 contributed to our ability to resolve our situation with Alyeska. If the legislature does not pass limited immunity legislation, we may enter into litigation with Alyeska. At this time we have $1.2 billion financial responsibility through insurance.

Insolvency of a tanker is unlikely with the state financial responsibility requirements. Tesoro does not have a choice of response capability in PWS.

Bader asked that why if the state and Federal Financial Responsibility of $212 million is adequate to protect the public, does a Alyeska as a response action contractor require 5 times that amount?

Gene Burden responded that from Tesoro's perspective there have been amiable discussions with Alyeska but they are diametrically opposed as to the appropriateness of the bonding requirement. Alyeska requires a $1 billion

bond if it is provided through self insurance; however, if it is provided through an insurance combination, they require $1.2 billion. $1.2 billion is the maximum insurance available. Alyeska does not take into consideration the type of vessel or the vessel configuration when requiring the financial responsibility. There are indications that the coverage provided by the protection and indemnity clubs may be reduced after their anniversary date. Tesoro is going to continue to try to meet the requirements required by Alyeska but if they are unable to, they may have to litigate.

Leo Hannan asked for clarification of who the contingency plan holder and the vessel owner are.

Burden responded that Tesoro is the charterer. The owner of the vessel is First Shipmor Company who is also the contingency plan holder.

Harry Bader asked why Tesoro is not the contingency plan holder?

Burden responded that the contingency plan holder is the owner of the vessel. Tesoro provides, via contract with Alyeska, a means to allow the contingency plan holder to demonstrate adequate clean up capability.

Bader asked further, if the vessel owner is the contingency plan holder and it has no contractual relationship with Alyeska, does Tesoro, by virtue of chartering the vessel have an arrangement with the contingency plan holder that Tesoro will make an arrangement with Alyeska to be the response action contractor.

Burden responded that that is correct.

Bader asked, if there is a spill, who would DEC go to for response?

Burden replied that an Incident Command System would be set up. Tesoro would be acting on behalf of the ship owner.

Bader asked, if a vessel violates Alyeska's contract by going out of the shipping lanes, for example, can Alyeska terminate the contract?

Burden responded that there are a number of provisions that allow Alyeska to unilaterally discontinue the contract. However, if there is a spill, then Alyeska is contractually committed unless the contract was terminated before the spill. Under the contract, Alyeska will respond for at least 72 hours and give Tesoro 72 hours notice of the termination. The way Tesoro sees it, if the contract is in effect at the time of the spill, response will occur.

Bader asked whether the contract is terminated at the point of violation or terminated by mutual agreement of the two parties? Are the provisions for termination of the contract at the time of the violation or at the time of the spill?

Larry Wood from Alyeska responded, that there is a notice requirement prior to termination of the contract.

Bader asked Alyeska whether it can guarantee that if there is a violation of the response action contract and there is a spill that Alyeska will respond, no matter what?

Wood responded that it was a pretty awesome question. He stated that his understanding was the same as Tesoro's and that he would have to refer to what the contracts say.

Wood stated that the Mertz report was critical of the reasonableness of the $1 billion bonding requirement. He continued to explain that Alyeska has to look at the risks involved. The claims from the Exxon Valdez oil spill are in excess of $50 billion and concern Alyeska as a response action contractor.

Bader asked why the Oil Pollution Act of 1990 financial responsibility requirements are adequate to protect the state, but do not adequately protect the shareholders of Alyeska?

Wood explained the difference between self insurance and shoring up an obligation through a protection and indemnity club. He said that it is unclear to what extent Alyeska is covered by a protection and indemnity club.

Gene Burden added as the final comment that a number of coastal states have been willing to accept protection and indemnity club protection to meet financial responsibility requirements.

Written Comments submitted:

Ken Castner, Homer

The insurance provisions of OPA 90 are not yet in effect. He urged the council to review the provisions of OPA 90 specifically, sections 1002, 1003, 1004 and 1005.

If a response action contractor is controlled by the contingency plan holders, then the response action contractor is merely the response division of a company or consortium of companies.

If granted immunity, would Alyeska have any liability if an *Exxon Valdez* spill occured again. Did Alyeska's conduct constitute gross negligence or willful misconduct?

Date: January 31, 1992 6:58 am PT Item: 500DVWC

From: ROBERTSONT Tim Robertson

To: SLAJER BCSB Research & Marketing

cc: OSPRC Joe Banta
COPELANDT Tom Copeland
GOTTEHRERS Sheila K. Gottehrer
ROBERTSONT Tim Robertson
ROTHEANN Ann Rothe
SAUNDERSP Patti Saunders, RCAC
STERLINGS Scott Sterling

Subj: COC Testimony

Can you please give this to Michele Brown and tell her I would like to testify at the COC hearing today. One thirty your time would be best for me, but I can be available later than that if necessary. Thanks. --TR

JANUARY 31, 1992

MR. CHAIRMAN AND COMMITTEE MEMBERS;

THANK YOU FOR THE OPPORTUNITY TO TESTIFY TO THE CITIZENS OVERSIGHT COUNCIL. I HAVE READ THE SUMMARY OF YOUR REPORT AND SOME OF THE INDIVIDUAL CHAPTERS AND FOUND THEM TO BE VERY INTERESTING. I VERY MUCH APPRECIATE THE WORK YOU ARE DOING AND I LOOK FORWARD TO YOUR RECOMMENDATIONS.

I'M IN WASHINGTON, D.C. TODAY REPRESENTING THE REGIONAL CITIZENS ADVISORY COUNCIL FOR PWS AT THE NEGOTIATED RULEMAKING (REG NEG) FOR VESSEL RESPONSE PLANS. MY PURPOSE FOR SPEAKING WITH YOU TODAY IS ONLY TO PASS ON INFORMATION. I AM NOT HERE TO REPRESENT ANY POSITIONS OF RCAC.

YOU MAY KNOW THAT THE USCG HAS DETERMINED THAT RESPONSE ACTION CONTRACTORS WILL BE REQUIRED TO BE CERTIFIED AS PART OF THE OPA 90 MANDATED UPDATES TO RESPONSE PLAN REGULATIONS. THE FORM AND DETAILS OF CERTIFICATION ARE BEING DEBATED NOW IN A WORKING GROUP AT THE REG. NEG.

MR. PETE BONTADELLI IS THE ADMINISTRATOR OF THE STATE OF CALIFORNIA OFFICE OF OIL SPILL PREVENTION AND RESPONSE. PETE IS SERVING WITH ME ON THE RAC CERTIFICATION WORKING GROUP. HE HAS TOLD ME SOME THINGS ABOUT CALIFORNIA'S APPROACH TO RAC LIABILITY RELIEF THAT I DID NOT KNOW AND THOUGH YOU MIGHT BE OF INTEREST TO YOU.

CALIFORNIA LAW TIES RAC LIABILITY IMMUNITY TO ACHIEVING MAXIMUM PROTECTION OF THE COAST. THE LAW GIVES THE AUTHORITY TO THE ADMINISTRATOR TO CERTIFY THAT THIS PROTECTION HAS BEEN ACHIEVED AND ONLY THEN DOES THE IMMUNITY EXIST FOR RACS. AS OF TODAY NO RAC IN CALIFORNIA HAS LIABILITY IMMUNITY BECAUSE THE CERTIFICATION OF MAXIMUM ACHIEVABLE PROTECTION HAS NOT BEEN GIVEN. HOWEVER, THE CERTIFICATION MAY BE GIVEN SOON BECAUSE THIS STRATEGY HAS CAUSED THE RAC COMMUNITY TO WORK TOGETHER TO ACHIEVE COAST WIDE PROTECTION. NO ONE GETS IMMUNITY UNTIL THEY ALL WORK TOGETHER TO GIVE THE STATE MAXIMUM ACHIEVABLE PROTECTION.

THUS THEY HAVE CONVINCED THE SMALL PRIVATE RACS TO WORK WITH THE CO-OPS. THEY HAVE CONVINCED THE FOUR MAJOR CO-OPS TO EXPAND THEIR SCOPE OF COVERAGE TO RESPOND ALONG

THE ENTIRE COAST. THEY HAVE CONVINCED THE CO-OPS TO SIGN MUTUAL AID AGREEMENTS WITH EACH OTHER AND CONTRACTS WITH THE STATE. THEY HAVE CONVINCED THE OIL SHIPPERS TO CHANGE SOME SHIPPING ROUTES TO REDUCE THE RISK OF SPILLS IN AREAS WHICH DO NOT HAVE ADEQUATE LEVELS OF RESPONSE CAPABILITY. FINALLY, THEY HAVE CONVINCED THE OIL INDUSTRY TO ADEQUATELY FUND THE RAC CO-OPS.

SEEMS TO ME THAT CALIFORNIA REALLY GOT SOMETHING IN RETURN FOR GRANTING RAC LIABILITY RELIEF. I'D ENCOURAGE YOU TO CONTACT MR. BONTADELLI FOR CLARIFICATION OF THIS REPORT. HIS PHONE NUMBER IS (916)445-9326.

I'D BE HAPPY TO ANSWER ANY QUESTIONS YOU MIGHT HAVE.

TIM ROBERTSON
BOX 194, SELDOVIA, AK 99663.

Marine Spill Response Corporation
Comments to

The Citizens' Oversight Council on Oil and Other Hazardous Substances
1/31/92

OIL SPILL RESPONSE CONTRACTOR LIABILITY REPORT

Thank you for the opportunity to be part of the process that will determine Alaska's law concerning a limited immunity for oil spill responders. I'd like to commend the Citizen's Oversight Council and the state for taking the initiative to thoroughly study such a complex matter.

The written specific comments that have been provided separately are linked to the material available to us: The Summary of Research Projects. While several of the summaries present conclusions that MSRC does not agree with, two of the summaries are of principal concern because we feel they may be indicative of a general condition, and that is that the full effect of OPA-90's many inter-linked provisions may not be clearly stated in the Research Summaries. This is important because we believe that the question of a limited responder immunity for Alaska should be addressed in a framework of full understanding of OPA-90.

The two research projects I will comment on are: (1) Response Action Contractor Provisions in the Oil Pollution Act of 1990 and (2) other state's response action contractor provisions. The first summary is incomplete in that there is no mention of an absolutely critical element: the assumption of any responder liability (given that certain conditions are met) by the responsible party. The second summary is also incomplete as it lists eight states that have enacted such a statute. The fact is 19 coastal states have enacted

legislation as protective as OPA-90 over the last 18 months. The majority of the six remaining jurisdictions have old "Good Samaritan" legislation that is not in conformance with OPA-90. Furthermore, three national state legislative associations (NCSL, CSG and ALEC) support the federal standard. The point here is that MSRC believes those facts are a powerful testimony of the soundness of OPA-90's provisions as public policy -- yet the full story of how other coastal legislatures have acted is not fully exposed in the research report.

Several statements/conclusions reached in the Research Report Summaries are inaccurate principally because they do not fully recognize the new responsibilities and relationships established for removal (§4201) and planning (§4202) of OPA-90. Understood in context of all of the provisions of OPA-90, it is clear that the purpose of the immunity is to promote the public welfare by insuring that responders -- no matter who they are or how they are paid, etc.-- will not be inhibited from acting boldly and decisively when confronted with the emergency conditions and potential liability surrounding marine oil spills. I say respectfully, that these provisions do not unreasonably protect responders from negligence. Rather as a matter of sound public policy, OPA-90 distributes risk between responders and the spiller, making the spiller assume liability for good faith errors made by a responder so long as the responder's acts are consistent with the National Contingency Plan, or the acts are at the direction of the federal (or in the case of state law, the Alaska) on-scene coordinator and the acts do not rise to the level of gross negligence or willful misconduct. There is no responder immunity provided in cases of personal injury or wrongful death.

We believe that these provisions go to the heart of the matter of responder performance. They insure that responders act with due care because they are not protected if their acts rise

to gross negligence or willful misconduct. Additional protection is provided to insure that responders will not negligently perform, since only acts consistent with the National Contingency Plan or directed by government officials receive immunity. Since the responsible party is liable for any removal costs and damages that another person is relieved of; and since the provisions of OPA-90 raise limits of liability and make available a $1 billion per incident trust fund as a source of monies for injured parties; there is now a strong incentive for spillers to act immediately with a bold response and not attempt to deflect liability to those whose purpose is to remove oil from Alaskan waters.

In the specific comments provided you will see that we feel that other research projects do not fully explain the important new relationships and responsibilities established in other sections of OPA-90. In the time I have left I would like to mention just two of these because they demonstrate the importance of considering all aspects of OPA-90 before making your recommendations on Alaskan law.

Statement: "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."

Rebuttal: This statement is not factually correct. Granting such limited immunity encourages a bolder response rather than a potential delay, while lawyers of responders attempt to determine who may be liable for a spill. Under OPA-90, the spiller executes the response in accordance with a previously approved plan; the state is a part of the plan approval process, while state and federal

coordinators control the responder through the spiller. Response and cleanup is sustained until the U.S. Coast Guard, after consultation with the state, determines a site is clean. Federal and/or state on-scene coordinators are directors of the response if they so choose, and response plans now must state how and with what private resources the spiller will respond. If a responsible party refuses to cooperate with directed removal actions there are new, serious penalties available to force compliance; i.e., the responsible party's liability cap is removed and becomes unlimited. Also, failure to comply with a removal order can result in civil penalties of up to $25,000 per day or three times the costs incurred by the federal Oil Spill Liability Trust Fund.

Statement: "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.

Rebuttal: This speculative scenario cannot take place. Under OPA-90 a shipper must provide a Certificate of Financial Responsibility (COFR) to the U.S. Coast Guard up to his limits of liability before being permitted to transport oil in U.S. waters. A $1 billion per incident trust fund has been established when a spiller's liability limits are reached. Moreover, a response plan must be submitted to the U.S. Coast Guard that identifies responders and their capabilities. This plan is subject to unannounced drills and inspections insure

that what is submitted can be executed.

MSRC believes the Citizen's Oversight Council needs to fully consider the federal liability regime that exists three miles off its coast today as it makes recommendations that might adopt differing standards. MSRC further believes that Alaska should enact the same limited responder immunity provision as OPA-90. We look forward to receiving your final full report and to seeing many of you at the legislative hearings in Juneau on February 11 and 12.

Working for the Nature of Tomorrow®

NATIONAL WILDLIFE FEDERATION

750 W. Second Ave., Suite 200, Anchorage, AK 99501 (907) 258-4800

COMMENTS OF ANN L. ROTHE
REGARDING RESPONSE ACTION CONTRACTOR LIABILITY
PRESENTED ON BEHALF OF
THE NATIONAL WILDLIFE FEDERATION
TO THE
CITIZENS OVERSIGHT COUNCIL ON OIL & OTHER HAZARDOUS SUBSTANCES
January 31, 1991

My name is Ann Rothe and I am the Alaska Regional Representative of the National Wildlife Federation. The National Wildlife Federation is the nation's largest conservation education organization. Founded in 1936, the Federation, its 5.4 million members and supporters, and 51 affiliated organizations, work to educate, empower and inspire individuals and organizations to conserve fish, wildlife and other natural resources, to protect the environment, and to build a globally sustainable future. I am here today to present the comments of the Federation in response to the Citizens Oversight Council's request for public input on the question of response action contractor immunity from liability for acts of simple negligence while responding to a oil spill.

I have received copies of the segments of the report on this subject prepared under the auspices of the Council. I have not had the opportunity to thoroughly evaluate these documents, but will be doing so in the next several days. I would like to compliment the Council for compiling a very comprehensive and thought-provoking body of information--a particularly laudable accomplishment considering the lack of funding and time constraints that you faced.

I would like to take this opportunity to present to the Council the interests and concerns of the National Wildlife Federation with regard to oil spill response that precipitates our involvement in the issue of response action contractor liability. While our interests have been very well represented by the Regional Citizens Advisory Council for Prince William Sound, of which we are a member, I thought it important to restate them in this forum.

1) We are interested in a establishing a state and federal regulatory atmosphere that facilitates immediate response to oil spills. As time passes from the moment of initial discharge, the likelihood of successful recovery diminishes exponentially. We want to see a regulatory regime that encourages rapid and effective initial response.

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6) We want to insure that response action contractors can perform in the manner they indicate, that they have available the equipment and facilities to respond as indicated in their contracts with responsible parties, that these resources are unencumbered and available for use, and that adequate manpower is trained and available as indicated. To this end, we support state and/or federal certification of response action contractors.

7) We want to insure that any damages to natural resources as a result of an oil spill are adequately compensated, and that these resources are fully restored or replaced.

If the interests and concerns I have articulated can be adequately addressed or even enhanced in a regulatory regime that provides for response action contractor immunity for acts of simple negligence, then we will not oppose legislation that provides such immunity. If, on the other hand, such immunity would result in a less rigorous standard of response with inadequate compensation for lost or damaged resources in the event of a spill, we will oppose any legislation that grants such immunity.

We look forward to working with the Citizens' Oversight Council and other interested parties on this issue. Thank you for the opportunity to express our concerns.

cc: Nancy Hemming, Wildlife Federation of Alaska
Sheila Gottehrer, Regional Citizens Advisory Council
Scott Sterling, RCAC Legislative Affairs Committee

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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 the 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 <u>will</u> 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.

January 31, 1992

Comments on Summary of Research Project 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)

Presented by:
Gene Burden
Tesoro Alaska Petroleum Company

The Citizens' Oversight Commission ("COC") Report represents the contribution of many interested parties and provides evaluations of the laws of 8 other coastal states as well as the development of the current immunity language under federal law. My comments are limited to these two areas as Tesoro's objective remains very simple.

Tesoro is responsible for over 50% of the funding of the Cook Inlet Spill Prevention and Response, Inc. ("CISPRI") and has great reservations about the deployment of CISPRI for non-CISPRI members in the absence of a state spill responder immunity law. The exposure to risk of costly litigation over alleged damages arising from simple negligence is viewed as a significant detractor from making CISPRI available beyond its own members needs. The COC study results provide no mitigation to this concern and in fact illustrate sufficient bases for pursuing a continuation of limited immunity for responders.

The 8 coastal states evaluated serves to illustrate the preponderance of state actions that have implemented immunity similar to the federal immunity in the Oil Pollution Act of 1990. California, Washington, Hawaii, and Maine all have virtually the same language which provides immunity for simple negligence

provided the actions are consistent with the National Contingency Plan (NCP), the state contingency plan or the federal on-scene coordinator. Connecticut and Texas provide virtually the same immunity with less restriction. Florida's law is also similar and is extended subject to the Response Action Contractor (RAC) cooperating with the federal on-scene coordinator. It is possible to extend this comparison to other coastal states that have addressed this issue and have have adopted the federal standard. I understand that 19 coastal states now have the federal standard.

Tesoro also has an interest in having a final resolution of this matter due to our need to access the Port of Valdez in order to stay in business and continue employment of over 550 Alaskans. Alyeska has the only available initial spill response service in Prince William Sound and has placed a very high level of demonstrated financial responsibility on parties wanting access to that service. The passage of HB 196 prevented a possible interruption to our ability to transport feedstock crude oil since we were unable to meet the Alyeska financial responsibility requirements in effect before the passage of HB 196.

In conclusion, we believe the report provides the legislature with sufficient information to meet the COC responsibilities under HB 196, and in so doing, should facilitate the legislature's prompt resolution of this matter by passing a permanent limited immunity law for response action contractors in Alaska.

Enclosure

OTHER STATES' RESPONSE ACTION CONTRACTOR LIABILITY LAWS

FEATURE COMPARED	CONNECTICUT	CALIFORNIA	TEXAS	WASHINGTON	HAWAII	FLORIDA	NEW JERSEY	MAINE
1. Spiller obligated to pay damages caused by Response Action Contractors (RAC)	X	X	X	X	X	X	X	X
2. RAC liability limited except for gross negligence and intentional misconduct	X	X[1]	X	X[2]	X[3]	X[4]		X[5]
3. RAC liability limited except for negligence (defined as use of best of available technology)							X	
4. RAC liability limited in duration		X[6]						
5. Certification of RACs required.			X					
6. State approval required for RAC's equipment and personnel resources		X					X	

1Provided actions are consistent with the National Contingency Plan (NCP), the state contingency plan or the Federal On-Scene Coordinator (FOSC).

2Subject to the same condition as described in Footnote Number 1 above.

3Subject to same limitation as California and Washington (footnotes 1 and 2 above).

4Provided RAC does not fail to cooperate with the Federal On-Scene Coordinator (FOSC).

5Subject to the same limitation as California, Washington, and Hawaii (as described in Footnotes 1,2 and 3 above).

6Duration limited to 60 days following spill with option available to State to extend an additional 30 days.

February 3, 1992

Mr. Harry Bader
Chairman
Citizens Oversight Council

Via Telefax

Dear Council Members:

I would like to offer some comments concerning your review of HB 196.

The first issue concerns the provisions contained in OPA 90, which many of those testifying last Friday wanted the council to embrace. The Council should read carefully the liability provisions in sections 1002, 1003, 1004 and 1005. Section 1003, subsection (b) should be of particular pertinence to the matter you have before you. I'd also mention that the insurance provisions are not yet in effect, and there is some doubt concerning the ability of many shippers finding a willing underwriter.

The second issue is in what constitutes a RAC. Is the RAC an independent company, the sole purpose of which is to attempt to obtain contracts and provide services in responding to oil spills? Is the RAC controlled, beyond the parameters of the contract, directly or indirectly, by the C Plan holders? If it is the latter, I would think that the RAC is merely the response division of a company or consortium of companies, and that the liability of the parent would be all-encompassing.

The third issue, and the question that I haven't seen answered, is whether or not Alyeska would have any liability given the <u>same</u> circumstances as occured following the wreck of the *Exxon Valdez*. Did Alyeska's conduct and response reach the legal presumption of "gross negligence or willful misconduct"?

And, lastly, will the issue even be argued in state court?

I will be available in Homer, via teleconference, today and would be happy to answer any questions you may have.

Sincerely,

Ken Castner

Ken Castner
P.O. Box 558
Homer, Alaska

Alyeska pipeline SERVICE COMPANY
1835 SOUTH BRAGAW STREET, ANCHORAGE, ALASKA 99512, TELEPHONE (907) 278 1611, TELEX 090 25 127

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 <u>after</u> and <u>because</u> 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
Larry D. Wood
Senior Attorney - External Affairs

cc: COC Members
Michele D. Brown, Esq.

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

February 5, 1992

Mr. Harry Bader, Chair
Citizens Oversight Council on Oil
and Other Hazardous Substances
3111 C Street, Suite 150
Anchorage, Alaska 99503

Dear Mr. Bader:

At your request, the Legislative Affairs Committee of the Prince William Sound Regional Citizens' Advisory Council (RCAC) offers the following comments on the issue of oil spill response action contractor (RAC) liability and immunity as that subjects relates to Alaska law. We caution that our comments are tentative in nature and have not been reviewed or approved by the full RCAC Board of Directors. The RCAC will issue a detailed report containing our official position on all issues under review per House Bill 196 as soon as possible. Nonetheless, we appreciate this opportunity to have our limited comments placed on the record.

(1) Limited Time Period For Immunity

In 1991 the RCAC suggested, along the lines of the California statute, that a thirty day limitation on immunity protection be imposed. We continue to stand by that recommendation.

(2) RAC Certification

Certification by the authorities of RAC capabilities and availability is a reasonable approach to insuring that response plan holders utilize RACs of demonstrable competence. RCAC supports the concept of RAC certification.

(3) Prince William Sound Trade Relationships

RCAC is seriously concerned about the present response structure in Prince William Sound. The attached chart illustrates the confusing and complicated legal relationships between contingency plan holders, the responsible parties and their response action contractors. RCAC also has long-standing, documented concerns about Alyeska's plan to hand off spill response management to the spiller 72 hours after Alyeska's initial response.

While it may be true that the owners of the trans-Alaska pipeline, which are also the owners of Alyeska, do not directly

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engage in the business of shipping oil from the Valdez Terminal, the attached chart demonstrates that some of the pipeline owner companies and some of the shipping companies are both owned or controlled by the same corporate parent, e.g., BP.

This complex of parent, subsidiary and sister corporations may or may not be able to work with and through Alyeska to effectively combat a major spill in Prince William Sound - but the fact that the actual contingency plan holder is, in many cases, an entity different from the parent company causes concern over which entity will ultimately respond to spills and be responsible for spill damages.

For its part Alyeska has done a commendable job in assembling a response action force, i.e., SERVS, and worked very hard over the past three years to develop response plans and good working relationships with tanker owners, Alyeska and local residents. Nonetheless, since Alyeska takes the legal position that it is nothing more than a "volunteer" response action contractor for the Prince William Sound tanker trade, there can be no legal assurance that the present arrangement will endure. If for any reason Alyeska's owners decide to relieve themselves from their volunteer obligation, then who will respond when another major spill occurs in the Sound?

It would seem grossly premature to immunize Alyeska from liability as a response action contractor unless and until adequate legal assurances exist to protect the Sound and its residents from another Exxon Valdez. If, as the industry proponents of immunity argue, the purpose of immunity is to encourage prompt and bold response to spills, then it would seem logical to protect the environment and the public interest to legally require the beneficiaries of immunity to respond.

The RCAC is still in the process of studying the reports submitted to the Citizens Oversight Council and we will continue to be active in the development of legislation this year.

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If you have any questions regarding our comments, please feel free to call me at 277-3533.

Sincerely,

Scott A. Sterling
Chair, Legislative Affairs Committee
Prince William Sound RCAC

cc: Christopher Gates, RCAC President
Sheila Gottehrer, RCAC Executive Director
Gary Bader, Alyeska Civic Group Liaison

FEB 05 '92 13:37 JENSEN HARRIS & ROTH P.4/11

Citizens' Oversight Council
on Oil and Other Hazardous Substances
3111 C Street, Suite 150 • Anchorage, Alaska 99503
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APPENDIX G

U.S. COAST GUARD POSITION

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

U.S. Department of Transportation
United States Coast Guard

Commandant
U.S. Coast Guard

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16460

MAY 31 1991

From: Commandant
To: All Flag Officers

Subj: CONTRACTOR IMMUNITY PROVISION; STATE OIL SPILL LAWS

1. Within the past few months a number of State legislatures have considered measures designed to provide limited immunity from certain types of liability for certain persons undertaking oil spill removal actions. In some instances local Coast Guard offices have been requested to provide agency views in either written or oral form to State legislatures or individual legislators.

2. In order to assure consistency in the position expressed in response to such requests, the points outlined below should be used in providing Coast Guard views on legislative measures pertaining to limited immunity for oil spill removal activities.

- The availability of a viable private sector capability to respond to oil spills and their threats is an absolutely essential element of a national oil pollution response system.

- During the course of Congressional deliberations associated with the enactment of the Oil Pollution Act of 1990, the oil spill response industry stressed the importance of limited immunity to its viability.

- As a result of the industry's presentation of these views Congress provided a limited immunity respecting liability "for removal costs and damages which result from actions taken or omitted to be taken in the course of rendering care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed by the President."

- The Coast Guard supports the principle of limited immunity under State law respecting liability for removal costs and damages to the extent that such immunity is necessary to assure a broad-based private sector response capability. The Coast Guard urges that State law immunity provisions be as consistent as possible with the federal immunity provision.

Subj: CONTRACTOR IMMUNITY PROVISION; STATE OIL SPILL LAWS

3. The federal immunity provision is set out at section 311(c)(4) Federal Water Pollution Control Act (33 U.S.C. 1321(c)(4)), as amended by section 4201(a) Oil Pollution Act. Its terms are set out in Enclosure (1). The elements of that provision are:

- Person entitled to immunity - Person, other than a responsible party, providing care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed by the Federal On-Scene Coordinator.

- Liability for which immunity is provided - Liability for removal costs and damages, other than with respect to personal injury or wrongful death.

- When immunity is not available - (1) When the response is under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 et seq.), or (2) when the person is grossly negligent or engages in willful misconduct.

- Person liable when the immunity provision applies - A responsible party, as that term is defined under section 1001(32) Oil Pollution Act (33 U.S.C. 2701(32)).

4. District Commanders are requested to continue their monitoring of state activities within their districts and to apprise program offices of appropriate issues.

J. D. SIPES
Chief, Office of Marine Safety,
Security and Environmental Protection

Encl: (1) Section 311(c)(4) and (6) Federal Water Pollution Control Act

SECTION 311(c)(4) and (6)
FEDERAL WATER POLLUTION CONTROL ACT

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

(B) Subparagraph (A) does not apply -
(i) to a responsible party;
(ii) to a response under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.);
(iii) with respect to personal injury or wrongful death; or
(iv) if the person is grossly negligent or engages in willful misconduct.

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

...

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

ENCLOSURE(1)

Citizens' Oversight Council
on Oil and Other Hazardous Substances
3111 C Street, Suite 150 • Anchorage, Alaska 99503
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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.

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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 SERVS). 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.

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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.

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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.

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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.

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

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

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

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

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

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

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

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

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

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

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

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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.

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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.

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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.

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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		✔					✔	

Testimony of Jon K. Tillinghast

ON BEHALF OF CONOCO INC. AND TESORO ALASKA PETROLEUM CORP.

House Resources and Oil and Gas Committees

February 12, 1992

As you know, Congress and the legislatures of 18 other coastal states have passed legislation limiting the liability of oil spill response action contractors ("RACs"). While Alaska joined that consensus last session with the enactment of HB 196, that bill was significantly more restrictive than the laws of any of these other jurisdictions. First, it limited liability only for the first 15 days following the spill. Second, it tied limited liability to the contingency plans of shippers and other large oil handlers.

The HB 196 sunset clause gave all of us an opportunity to reflect on whether the state's best interests are served by this kind of restrictive limited liability legislation. In the interim, here's what we found:

- Several additional states passed more complete limited liability laws. Since the legislature adjourned, Alabama, Connecticut, Maine, Massachusetts, New Jersey, North Carolina and Oregon have adopted laws essentially mirroring the federal standard--that is, a gross negligence standard without time limitations, and a requirement that RACs comply with the National Contingency Plan. As a result, Alaska, with its more restrictive law, finds itself at an even greater competitive disadvantage in attracting cleanup resources to the state;

- State officials have looked closely at the state

Jurisdictions With Gross Negligence Standard for RACS

- Federal Government
- Alabama
- California
- Connecticut
- Deleware
- Florida
- Georgia
- Hawaii
- Louisiana
- Maine
- Massachusetts
- Mississippi
- New Hampshire
- New Jersey
- North Carolina
- Oregon
- Texas
- Virginia
- Virgin Islands
- Washington

of cleanup readiness in areas of the state that don't get the attention of Prince William Sound, the North Slope and Cook Inlet, and have found that cleanup resources in some of these regions, such as Southeast Alaska, range from disturbingly inadequate to nonexistent. As they looked further, these officials found that unless Alaska creates a permanent legal environment that encourages the creation and expansion of cleanup services, this alarming inadequacy will probably continue;

- Proposals have been generated for new statewide and regional oil spill coops. However, participants in those proposals have cautioned that effective limited liability legislation is critical for those undertakings to succeed; and

- We have all been able to take a long look at the public policy justifications for limited liability legislation in the calm of the off-session, and have recognized that it's a good idea. Last year, HB 196 was passed in something of a crisis. Alaska's then-existing RAC liability laws, which if anything exposed RACS to more legal hazards than under common law, threatened to cutoff Tesoro and Conoco's access to necessary cleanup services in Prince William Sound, which in turn threatened the continued operation of the Tesoro refinery. Advocates of the legislation stressed that the Tesoro situation was only a symptom of a much larger public policy problem, but it was hard, as time was running out, to focus attention on those larger issues.

HB 196 did cure the problem in Prince William Sound. Alyeska dropped its demand for direct action insurance. To be sure, if HB 196 is allowed to lapse, Tesoro and Conoco will face precisely the same difficulties this summer, because the state's legal environment will have reverted to one of hostility. However, even though the legislature therefore faces the same time constraints that it did last session, the off-session has given us precious time to pause and reflect.

I hope that this time has convinced us all that limited liability for RACs is not a reckless, revolutionary fix for a private contract dispute. It is the national norm, the national custom, and it exists because, in its absence, RACs face an unreasonable risk of

becoming embroiled in spill litigation even when they had no involvement whatsover in the spill itself.

And, please, remember that term--"embroiled." It is almost beside the point whether a jury might ultimately decide that the RAC acted reasonably. Oil spill cases almost never go to trial, usually because the cost of oil spill litigation is so unusually high, and its duration so unusually long. Consider the doctor who drives past an automobile accident in a state without a Good Samaritan law. The fear the keeps him from stopping to help is not just the fear of ultimately being judged negligent, but the fear being sued. And while no existing limited liability law will ever wholly remove the risk of litigation, limited liability laws do minimize that risk, and may provide the means to extricate oneself from that litigation early in the process.

Limited liability laws with a gross negligence standard for emergency responders are not a recent invention. Alaska has long limited the liability of people who respond to other types of emergencies. Unfortunately, before 1989 those laws applied only to limited number of oil spill situations, and after the 1989 enactment of AS 46.03.823 may not apply to RACs at all. The existence of these other laws is thus not a reason to let HB 196 lapse; rather, those laws provide added assurance that in making HB 196 permanent, and in conforming it to the laws of our sister states, the legislature would be acting in the mainstream.

While limited liability for emergency responders is nothing new, state oil spill RAC liability laws followed the recent enactment of the federal Oil Pollution Act ("OPA"). There's a reason for that--one that goes beyond these states' desire to catch up with the federal standard. OPA, as you know, established a $1 billion per incident oil spill damage payment fund. That fund, piled on top of stringent strict liability laws on the spiller, and high proof of financial responsibility requirements, so minimized the risk of uncompensated spill damages that there was no longer any sound justification for exposing RACs to unlimited liability. Remember, to enjoy limited liability, the RAC must have had no

involvement in the spill itself. Even before OPA, the only motivation for involving the RAC in litigation was the search for another deep pocket--even though this particular deep pocket was blameless. Suing innocent deep pockets is bad policy to begin with. Now, with the enactment of OPA, even the economic justification for that unpleasant practice has been removed.

I know that any advocate, particularly in this state, can get only limited mileage by pointing to the practice of other jurisdictions. Here, however, the overwhelming legislative judgment of our sister coastal states is doubly important. First, it provides considerable comfort to anyone still hesitant about the propriety of limited liability. Second, it underscores the need for permanent legislation in Alaska. Nationwide, cleanup resources are limited. If Alaska choses an isolationist path by perpetuating a hostile legal environment towards oil spill RACs, the state will find itself unable to compete for those resources.

It's my hope, and my clients hope, that the basic issues are now behind us, and that the question this year will be whether Alaska should conform as closely as possible to the national norm, or whether there is some overriding local concern that requires Alaska, and Alaska alone, to bear the cost of uniquely restrictive legislation. Why, for example, should Alaska offer 15 days of limited immunity, when even California offers a minimum of 60, and 17 other coastal states place no time limit whatsoever? Why, too, can't Alaska adequately protect itself by tying the RACs' immunity to the National Contingency Plan, as our sister states have done? Last year, the issue was "why the bill?" This year, we believe the issue should be "why the restrictions?"--remembering, as we must, that every bell and whistle that we hang on an otherwise straightforward liability law makes the law more complicated, more conducive to the intervention of lawyers, and thus less attractive to cleanup services who will be deciding whether to locate here, in Alaska, or in other more secure legal environments.

GROSS NEGLIGENCE STANDARD FOR CLEANUP CONTRACTORS



any action brought by the state, a county, city, or district.

(h) Except as provided in Section 1431.2 of the Civil Code, liability under this section shall be joint and several. However, this section does not bar a cause of action that a responsible party has or would have, by reason of subrogation or otherwise, against any person.

(i) This section does not apply to claims for damages for personal injury or wrongful death, and does not limit the right of any person to bring an action for personal injury or wrongful death under any provision or principle of law.

(j) Any payments made by a responsible party to cover liabilities arising from a discharge of oil, whether under this division or any other provision of federal, state, or local law, shall not be charged against any royalties, rents, or net profits owed to the United States, the state, or any other public entity.

(k) Any action which a private or public individual or entity may have against a responsible party under this section may be brought directly by the individual or entity or by the state on behalf of the individual or entity. However, the state shall not pursue any action on behalf of a private individual or entity which requests the state not to pursue that action.

(*l*) For the purposes of this section, "vessels" means vessels as defined in Section 21 of the Harbors and Navigation Code.

8670.56.6. (a) (1) Except as provided in subdivisions (b) and (d), and subject to subdivision (c), no person, including, but not limited to, an oil spill cooperative, its agents, subcontractors, or employees, shall be liable under this chapter or the laws of the state to any person for costs, damages, or other claims or expenses as a result of actions taken or omitted in good faith in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan, the state oil spill contingency plan, or at the direction of the administrator, onsite coordinator, or the Coast Guard in response to a spill or threatened spill of oil.

(2) The qualified immunity under this section shall

not apply to any oil spill response action which is inconsistent with the directions of the Coast Guard, the director, or, in the absence of overriding directions of the Coast Guard or the director, is inconsistent with applicable contingency plans implemented under this division.

(3) Nothing in this section shall, in any manner or respect, affect or impair any cause of action against or any liability of any person or persons responsible for the spill, for the discharged oil, or for the tanker, barge, terminal, pipeline, or facility from which the oil was discharged. The responsible person or persons shall remain liable for any and all damages arising from the discharge, including damages arising from improperly carried out response efforts, as otherwise provided by law.

~~(4) The qualified immunity under this section shall only apply to response activity during the first 60 days after the spill for persons whose primary purpose is the business of responding to oil spills and who are regularly engaged in the business of responding to oil spills. No immunity shall attach to response activity after expiration of the first 60 days for the parties described herein.~~

~~(5) The qualified immunity under this section shall attach, without the limitation described in paragraph (4), to those responding parties that do not "regularly engage" in the oil spill response business and to persons and entities who are primarily dedicated to the preservation and rehabilitation of wildlife. There shall be no limitation on the duration of the immunity.~~

(b) Nothing in this section shall, in any manner or respect, affect or impair any cause of action against or any liability of any party or parties responsible for the spill, ~~or the responsible party's agents, employees, and subcontractors,~~ for the discharged oil, or for the tanker, terminal, pipeline, or marine facility from which the oil was discharged.

(c) The responsible party or parties shall:

(1) Notwithstanding subdivision (b) or (h) of Section 8670.56.5, or any other provision of law, be strictly and

jointly and severally liable for all damages arising pursuant to subdivision (g) of Section 8670.56.5 from the response efforts of its agents, employees, subcontractors, or an oil spill cooperative of which it is a member or with which it has a contract or other arrangement for cleanup of its oil spills, unless it would have a defense to the original spill.

(2) Remain strictly liable for any and all damages arising from the response efforts of a person other than a person specified in paragraph (1).

(d) Nothing in this section shall immunize a cooperative or any other person from liability for acts of gross negligence or willful misconduct in connection with the cleanup of a spill.

(e) This section shall not apply to any action for personal injury or wrongful death.

(f) As used in this section, a "cooperative" means an organization of private persons which is established for the primary purpose and activity of preventing or rendering care, assistance, or advice in response to a spill or threatened spills of oil.

(g) Except for the responsible party, membership in a cooperative shall not, in and of itself, be grounds for liability resulting from cleanup activities of the cooperative.

(h) For purposes of this section, there shall be a rebuttable presumption that an act or omission described in subdivision (a) was taken in good faith.

(i) In any situation in which immunity is granted pursuant to subdivision (a) and a responsible party is not liable, is not liable for noneconomic damages caused by another, or is partially or totally insolvent, the fund provided for in Article 7 (commencing with Section 8670.46) shall, in accordance with its terms, reimburse claims of any injured party for which a person who is granted immunity pursuant to this section would otherwise be liable.

~~(j) The immunity granted pursuant to subdivision (a) shall apply to a cooperative only if that cooperative has contracted with the administrator to respond to oil spills in accordance with the state oil spill contingency plan and this chapter. The administrator shall enter into contract with any cooperative that is qualified and that offers to contract, on mutually acceptable terms, in accordance with the state oil spill contingency plan and this chapter.~~

(j) (1) The immunity granted by this section shall only apply to response efforts that are undertaken after the administrator certifies that contracts with qualified and responsible persons are in place to ensure an adequate and expeditious response to any foreseeable oil spill that may occur in marine waters for which the responsible party (A) cannot be identified or (B) is unable or unwilling to respond, contain, and cleanup the oil spill in an adequate and timely manner. In negotiating these contracts, the administrator shall, to the maximum extent practicable, procure the services of persons who are willing to respond to oil spills with no, or lesser, immunity than that conferred by this section, but, in no event, a greater immunity. The administrator shall make the certification required by this subdivision on an annual basis. Upon certification, the immunity conferred by this section shall apply to all response efforts undertaken during the calendar year to which the certification applies. In the absence of the certification required by this subdivision, the immunity conferred by this section shall not attach to any response efforts undertaken by any person in marine waters.

(2) In addition to the authority to negotiate contracts described in (1) above, the administrator shall also be authorized to negotiate and enter into indemnification agreements with qualified and financially responsible persons to respond to oil spills that may occur in marine waters for which the responsible party (A) cannot be identified or (B) is unable or unwilling to respond, contain, and cleanup the oil spill in an adequate and timely manner.

(3) The administrator may indemnify response contractors for (A) all damages payable by means of settlement or judgment that arise from response efforts

to which the immunity conferred by this section would otherwise apply, and (B) reasonably related legal costs and expenses incurred by the responder, provided that indemnification shall only apply to response efforts undertaken after the expiration of any immunity that may exist as the result of the contract negotiations authorized in this subdivision. In negotiating these contracts, the administrator shall, to the maximum extent practicable, procure the services of persons who are willing to respond to oil spills with no, or as little, right to indemnification as possible. All indemnification shall be paid by the administrator from the Oil Spill Response Trust Fund.

(k) (1) With regard to a person who is regularly engaged in the business of responding to oil spills, the immunity conferred by this section shall not apply to any response efforts by that person that occur later than 60 days after the first day the person's response efforts commence.

(2) Notwithstanding the limitation contained in paragraph (1), the administrator may, upon making all the following findings, extend the period of time, not to exceed 30 days, during which the immunity conferred by this section applies to response efforts:

(A) Due to inadequate or incomplete containment and stabilization, there exists a substantial probability that the size of the spill will significantly expand and (i) threaten previously uncontaminated marine or land resources, (ii) threaten already contaminated marine or land resources with substantial additional contamination, or (iii) otherwise endanger the public safety or welfare.

(B) The remaining work is of such a difficult or perilous nature that extension of the immunity is clearly in the public interest.

(C) No other qualified and financially responsible contractor is prepared and willing to complete the response effort in the absence of the immunity, or a lesser immunity, as negotiated by contract.

(3) The administrator shall provide five days' notice of his or her proposed decision to either extend, or not extend, the immunity conferred by this section. Interested parties shall be given an opportunity to present oral and written evidence at an informal hearing. In making his or her proposed decision, the administrator shall specifically seek and consider the advice of the relevant Coast Guard representative. The administrator's decision to not extend the immunity shall be announced at least 10 working days before the expiration of the immunity to provide persons an opportunity to terminate their response efforts as contemplated by paragraph (4).

(4) No person or their agents, subcontractors, or employees shall incur any liability under this chapter or any other provision of law solely as a result of that person's decision to terminate their response efforts because of the expiration of the immunity conferred by this section. A person's decision to terminate response efforts because of the expiration of the immunity conferred by this section shall not in any manner impair, curtail, limit, or otherwise affect the immunity conferred on the person with regard to the person's response efforts undertaken during the period of time the immunity applied to such response efforts.

(5) The immunity granted under this section shall attach, without the limitation contained in this subdivision, to the response efforts of persons who are not regularly engaged in the business of responding to oil spills. Persons who are not regularly engaged in the business of responding to oil spills includes, but is not limited to, (A) persons who are primarily dedicated to the preservation and rehabilitation of wildlife and (B) persons who derive their livelihood primarily from fishing.

(l) As used in this section, "response efforts" means rendering care, assistance, or advice in accordance with the National Contingency Plan, the state oil spill contingency plan, or at the direction of the administrator, onsite coordinator, or the Coast Guard in response to a spill or threatened spill of oil.

Statement

of

Mr. G. Stephen Duca

Vice President

Readiness and External Affairs

Marine Spill Response Corporation

before the

State of Alaska

Joint Hearing of the

House Special Committee on Oil and Gas

and

House Committee on Resources

February 12, 1992

Good morning Mr. Chairmen and members of the Committee. My name is G. Stephen Duca, I am the Vice President for Readiness and External Affairs at the Marine Spill Response Corporation. I welcome the opportunity to comment on the Citizens' Oversight Council recommendations and responder immunity.

Mr. Chairmen, MSRC is pleased to have been asked to participate in the public debate on Section 11 of H.B. 196 (Ch.92 SLA 1991). We have been part of this dialogue for some time, beginning with an appearance before Alaska's distinguished Oil Spill Commission in 1989 chaired by Mr. Parker and ending just last week with a statement via teleconference

presented to the Citizens' Oversight Council on Oil and Other Hazardous Substances. Our position on the issue of Responder Immunity in Alaska is therefore a matter of long public record. Attached is pertinent correspondence which specifically addresses our concerns with H.B. 196 -- a statute which places liability on a responder rather than the responsible party where it belongs. Such a condition violates a fundamental principle of the Oil Pollution Act of 1990 (OPA-90) -- "the polluter pays". I will not comment further on the particulars of H.B. 196 since our previous remarks and letters are available for your review.

However, I would like to underscore a couple of key points for the Committees' consideration. At the end of all the discussion related to H.B. 196, Alaska needs to enact a responder immunity provision at least as protective for a responder as Section 4201 of OPA-90. This is sound public policy -- which nineteen other coastal states have enacted as law. It is plain common sense that Alaskan law should be consistent with the federal liability regime that exists three miles off its coast. Oil moves swiftly from jurisdiction to jurisdiction and a responder should not be slowed in his cleanup by having to take valuable time to consider the legalities and risks associated with each action taken in Alaska's jurisdiction.

Please remember that the overarching purpose of this limited immunity is to insure a bold and vigorous response during uncertain and/or emergency operating conditions. Some would have you believe that this standard was trying to get someone "off-the-hook." This is not the case, rather it places the liability on the spiller, again in accordance with the maxim of: "the polluter pays". Working in concert with the other provisions of the Oil Pollution Act of 1990, this limited responder immunity if enacted in Alaska would:

1) Promote a bold and vigorous response by persons whose sole purpose is to remove as much oil from the environment as is possible, since responders (all categories of responders) are protected from liability for good faith errors (simple negligence) under very limited circumstances.

2) By riveting liability to the responsible party it doubly insures a bold response by encouraging his prompt action. Since any liability another person (responder) is relieved of is passed on to the responsible party, there is little incentive for the responsible party to attempt to deflect liability to a responder in the first place. His best course of action is to get as much response and cleanup capability to the scene and begin operations as soon as possible.

Mr. Chairmen, one cannot be part of this debate without soon confronting the central argument made against providing this limited immunity. The issue has, unfortunately taken on the mantle of a canard. The story goes like this -- 'the only way to insure that responders will act responsibly is to make sure they are punished (incur liability) if they don't act in a prescribed way (by a contract)'. This approach to providing emergency response services of any kind, not just oil spills, is absolutely wrongheaded. It defeats the main purpose of the immunity -- the encouragement of a bold and vigorous response -- in several ways. First, the contract would have to cover all of the circumstances likely to be faced in a spill. The larger the spill the larger the number of circumstances and the larger the contract. Can you imagine a bold and vigorous response to an oil spill occurring under a contract the dimension of an encyclopedia? Can Alaska's fishermen (who proved to be so vital a force during the Valdez spill) reasonably be expected to perform in every circumstance in a way prescribed by a

contract? What about tug and barge owners, operators and lessors? Every action they took could be subject to a lawsuit to determine if their actions were in accordance with the contract and therefore, was in fact covered or not covered by the immunity. Fishermen, tug and barge owners and other responders would need to rush to their lawyers to determine risk/exposure before rushing to the scene of a spill to begin the cleanup. It would be a lawyer's playground and have a chilling if not killing affect on a response effort.

Furthermore, such a condition defeats the cardinal rule of OPA-90 that "the polluter pays". Any liability that can be transferred from the spiller to other parties will be seen as an opportunity to defeat the responsibility for performance that a spiller should be held liable for. Having immunity flow to responders by way of a contract would shift the responsibility for response and cleanup performance during a spill to responders, not the spiller. OPA-90 lays the requirement for the execution of response plans on the spiller. The spiller must use private resources to cleanup, to the maximum extent practicable, a worst case spill. To enact a provision laying the responsibility for cleanup on responders would be a serious mistake, especially since there are already many protective provisions of OPA-90 that insure satisfactory performance of responders.

In your letter to MSRC President, Admiral Jack Costello you requested that I address two specific issues today: 1) MSRC's decision not to locate any of our corporation's national centers in Alaska and 2) Any disagreements that we may have with the report of the Citizen's Oversight Council.

As to the first Mr. Chairmen, I must take you back to the days just after the Valdez

spill. The industry recommended the creation of what it determined the nation did not have -- the capability to make a best effort response to catastrophic spills of persistent oils in the offshore environment. Most agree that the capability of the existing oil spill response infrastructure is sufficient to deal with the thousands of small releases that occur in the nation each year. What Valdez demonstrated was a lack of capability to deal with the catastrophic spill. MSRC closely analyzed the oil transportation patterns of persistent oils and made decisions on its operating sites based upon the threat posed by these patterns. Our analysis indicated that Alaska had two areas of likely threat - Cook Inlet and the TAPS terminus. When we reviewed the capability at these locations we found that Valdez had (and at the time was programmed to increase) a large capability to a considerable degree.

In fact, due in large measure to the work of the Alaska Legislature and Executive and Regional Citizens' Advisory Councils, Alyeska has a capability that would exceed one of MSRC's Regions and the capability of the Cook Inlet Cooperative is being upgraded. This led MSRC to conclude that there was not a need for MSRC capability in Alaska.

Although we had not received the full Citizens' Oversight Council Report by the time we had to depart for Juneau, the recommendations appear to be an outstanding example of good government at work. MSRC is pleased that the Council, in recommendation # 1, has acknowledged the essential need for the "gross negligence and willful misconduct" standard. Because with it comes the real foundation for assuring a bold and vigorous response to oil spills in Alaska, since responders will not unreasonably fear responding in the face of the risks and uncertainties surrounding oil spill response and cleanup. Adoption of this standard will create comity between the state and federal government. This is one of the things MSRC

has advocated for some time. MSRC wishes to commend the Council for its insight into recognizing the heart of a very complex problem. MSRC strongly urges this committee to enact this standard into any revision of H.B. 196.

The Council's recommendations then focused on conditions to assure response action contractor performance. We will speak to this below, but I want to underscore some key points with respect to the implementation of this limited immunity standard to ensure consistency with the federal standard.

1. It should apply to all responders, regardless of the category; i.e. volunteer, not-for-profit organization or for-profit organization,

2. It should only apply to acts or omissions taken in the course of rendering care, assistance or advice that are consistent with the NCP, or as otherwise directed by the President (USCG) or appropriate state officials,

3. It should <u>not</u> apply to the responsible party, or for acts under CERCLA,

4. It should <u>not</u> apply to acts that cause personal injury or wrongful death

5. And of ***critical importance***, a responsible party should be held liable for any removal costs or damages that another person is relieved of.

We noted that the Council was silent about a time limit to accompany any immunity.

We take this lack of a positive statement on this critical issue as a recommendation to eliminate this feature from future Alaskan law. We concur with this position.

Council recommendations two (2) through six (6) focus on the need for, and how, the state should assure that response action contractors satisfactorily perform. MSRC has no disagreement with the basic goal or the need for response action contractors to do a good job. We also do not object to a reasonable certification program and have supported certification in the Coast Guard's process to establish vessel response plan rules under OPA-90. We do however, believe that some of the recommendations may go too far. If certification establishes standards and requirements that are too burdensome, certification could severely limit the number of persons willing or able to be responders. These types of requirements also can serve to shift responsibility away from the spiller and on to the responder or even the state. Certification should not serve to advertently or inadvertently undermine or even negate the responder's immunity. The imposition of performance standards is problematical and any certification program must be implemented so that federal/state and local requirements are integrated into an effective and efficient whole consistent with OPA-90.

Recommendation two (2) asserts that the state "...currently has no (underlining supplied) means to verify the capability and the capacity of these contractors to perform...." While we do not believe this statement is technically accurate, the ability to verify the capability and capacity of responders certainly exists under OPA-90. Section 4202 of OPA-90 requires that the President, "...shall require- (A) periodic inspection of containment booms, skimmers, vessels, and other major equipment used to remove discharges and ... periodically conduct drills of removal capability, without prior notice, in areas for which Area Contingency

Plans are required...The drills may include participation by Federal, State and local agencies, the owners and operators of vessels and facilities in the area, and private industry. The President may publish annual reports on these drill, including assessments of the effectiveness of the plans and a list of amendments made to improve plans...."(Underlining supplied.) We believe that OPA-90 provides an excellent starting point to implement this recommendation and we urge the legislature to carefully consider if additional state requirements are really needed. We do not believe that tieing responder immunity to responder certification is good public policy. MSRC believes that all responders require the limited immunity of OPA-90, and so long as they act consistent with the NCP or as directed by federal and state officials that their limited immunity should be left intact. We urge the legislature not to adopt this portion of the recommendation.

Recommendation three (3) would provide for the design of "minimum professional standards" for responders. In theory this is laudable, but MSRC believes there are major hurdles to be overcome, not the least which is the creation of a bureaucratic nightmare. The Council's recommendation itself recognizes that such standards do not presently exist. Unless the program was very basic in its construct, identifying operational and logistics support performance standards and then attempting to come to some agreement on how to measure performance to these standards, while a worthy goal, will be an exceedingly arduous task for the state. One needs to ask the question, "and to what real benefit?", since there are existing provisions for the state (as well as federal and local agencies) to be a party to drills and exercises where shortfalls in performance will be identified and action plans generated to eliminate discrepancies. Returning back to our original statement - a certification program should only be implemented if federal/state and local requirements are integrated into a single

and effective whole.

We have no disagreement with the purpose of Recommendation four (4). We believe however, that this purpose can be achieved through the federally mandated Local Area Planning process found in Section 4202 of OPA-90. ADEC will be a full and active participant, among other interests in the state, in this process and therefore we urge that the need for any legislation in this area be the result of a complete review of the protection provided by the federal planning process.

Recommendation five (5) is problematical. It is assumed that the financial implication of giving direct orders to a responder, such as in the case of a mystery spill, can be worked out, but that notwithstanding, given the overarching structure of OPA-90 it is difficult to identify a real problem that needs to be solved. MSRC believes that implementation of this recommendation will create serious problems.

Section 4201 of OPA-90 states that the President "... shall ...ensure (underlining supplied) effective and immediate removal of a discharge...." It further states that in those cases where there is a substantial threat to public health or welfare that he "...shall direct all (underlining supplied) Federal, State, and private actions to remove the discharge or to mitigate or prevent the threat of the discharge...." All now agree that decision-making during a spill response cannot be diffused but must attach to a single professional. The citations above demonstrate that the President will be in charge. We believe that this responsibility is being taken very seriously by the federal government. The state is a partner in the direction of these response efforts as a member of the federal Regional Response Team and Area

Committees that will be developed. The way that OPA-90 insures response and cleanup performance is by placing the burden where it belongs - on the spiller. The spiller must demonstrate to government that his plan is a reasonable one to remove, to the maximum extent practicable, a worst case spill. We see no clear and present danger that equipment and personnel will not, in the words of Recommendation five (5),"... indeed be deployed...." Please also consider that under OPA-90:

A. The state is intimately involved with the planning for the resources needed for a worst case spill; the federal government assures that response resources are inspected and

B. That unannounced drills are conducted to assure that what has been written in the plans, (1) actually exists and (2) will perform as agreed upon in the plans and

C. That Title V provides for the establishment of Regional Citizens Advisory Councils for special areas that have among their many advisory roles ones to:

1. provide advice and recommendations...on the policies...and regulations relating to operation of...terminal facilities and tankers which may affect the environment

2. monitor...the environmental impacts of the operation of the terminal facilities and crude oil tankers

3. review...the adequacy of oil spill prevention and contingency plans for the terminal facilities and the adequacy of oil spill prevention and contingency plans for crude oil tankers...

There are considerably more of these types of advisory duties, but the sum of (A) (B) and (C) above is a very high level of inspection and verification of response capability by a variety of organizations. This appears to be adequate to insure that if Alaska wants to get

something done during a response that it has a more than reasonable assurance that the resources will be there to execute the orders.

There is one more important point to consider. The recommendation speaks to a responders duty to perform. We believe that this inadvertently may deflect duty to cleanup the spill from polluters to responders. As stated above, we believe that responder performance will be demonstrated in a variety of ways; through drills and exercises - some to be unannounced, because acts must be consistent with the NCP, etc.. Likewise, inspections and inventories of equipment are part of federal law, enacted precisely for the purpose of insuring that what has been warranted in a plan can actually be delivered by the responsible party.

We believe that practically speaking, a problem does not exist in terms of the state gaining assurance that what is in a plan will be delivered and a limited responder immunity must not be held hostage to the orders of state on-scene coordinators.

Recommendation six (6) provides that certified response action contractors respond when directed by the state. Private responders have a tradition of responding if needed, however, they are not governmental resources. If the state wants to hire a contractor to perform response services it should do so as a matter of negotiated contract irrespective of responder immunity or certification.

In closing Mr. Chairmen, I want to again thank this committee for the opportunity to comment on the Citizens' Oversight Council recommendations and responder immunity in

Alaska. You know our reasons for asking you to enact legislation at least as protective as Section 4202 of OPA-90. We are encouraged by our discussions with many members of the legislature and the administration. We are encouraged by the report of your Citizens' Oversight Council. We urge you to join with the 19 other states and adopt Section 4201 of OPA-90. It is sound public policy. I would be happy to answer any questions which you may have.

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D. N. LAKIN

MSRC
Marine Spill Response Corporation

Mr. G. Stephen Duca
Vice President
Readiness and External Affairs

August 28, 1991

John A. Sandor
Commissioner
Department of Environmental Conservation
P.O. Box O
Juneau, AK 99811-1800

RE: Alaska State Department of Environmental Conservation Proposed Oil and Hazardous Substances Pollution Control Regulations

Dear Commissioner Sandor:

Our letter to you of July 26, 1991 dealt with issues prompted by our review of your oil pollution statute. We recently learned that your office has embarked on a new round of rulemaking regarding contingency planning. We share a mutual concern with the State of Alaska on creating a legal regime that is conducive to the most effective oil spill response. Since we will soon be meeting with you and other interests in Alaska we wanted to offer these comments on the draft rules in a spirit of cooperation.

The fundamental problem with this rule is that it establishes unrealistic planning standards. Alaska's response planning standards for crude oil tank vessels and barges (18 AAC 75.438) sets response planning standards that provide that a 300,000 barrels discharge must be controlled, contained, and cleaned up within 72 hours. It also requires that all equipment, personnel, or other resources must be accessible to the plan holder and will be deployed and operating at the discharge site within 72 hours. In addition, 18 AAC 75.440 requires that resources in a contingency plan for non-crude oil tank vessel or barge must be adequate to contain and control 100 percent of the total cargo capacity within 48 hours. Even if these are just "planning" standards from a responder's perspective, they are unrealistic given the present state of technology. We know of no professional and experienced responder who can honestly claim the capability to meet those standards in practice.

1350 I Street, NW Suite 300 Washington, DC 20005 Telephone 202 408 5700 Fax 202 371 0401

The planning factors are unrealistic because they ignore the large number of variables, many of them interrelated but uncontrollable, that affect a responder's ability and the time it takes to clean up a particular spill. For example, the biggest variable is weather. In adverse weather, it is often impossible or too dangerous to allow equipment and personnel to leave the shoreline even when the equipment is locally staged and ready to begin the response. Other factors include the following:

- the type of accident
- the remoteness of the location
- the rate of discharge
- the time of day
- the season
- currents and tides
- oil characteristics
- regulatory approvals
- inherent equipment limitations
- equipment mechanical difficulties
- the presence of debris
- health and safety considerations
- legal constraints
- political disputes
- inefficient decision-making processes
- accidents

Does the state have any evidence that anyone can perform to this planning standard, even under the best of conditions? We believe the state would be better served by focusing on how to develop a realistic and useful plan for the sustained effort it will take in the face of the inevitable uncertainties, difficulties and surprises. We think it does a real disservice to the public, and to the professionals in the spill response business, to require a plan for unachievable results. In fact, an unachievable planning standard is counterproductive: It encourages planners to depart from the hard realism that it takes to produce a plan that is effective in the real world.

Equally important, unrealistic planning standards encourage unrealistic public expectations. Such expectations ensure that, no matter how good the response, it will still be viewed as a failure. This result demoralizes and discourages good responders. It also creates serious legal risks to them, as it encourages plaintiffs to sue and courts to judge the reasonableness of responder's performance harshly. This hostile legal and public environment strongly discourages responders from getting involved at all.

We realize that Alaska's statutes may constrain what the agency can do to adjust this planning standard. However, we believe that we owe you an explanation of our strong opposition to this type of regulatory approach.

Mr. Commissioner, we share the basic goal of assuring adequate response capability and readiness. We support and recommend for your consideration what we believe is a realistic and useful approach to this matter. We believe that regulators should specify a presumptively acceptable equipment list. The equipment list would vary with the size of the hypothetical spill. Individual response plans that use the specified equipment list would be acceptable to the agency. If the plan holder has good reason to believe that different equipment is more appropriate, then the plan holder can make its case to the Department. This alternative approach can be analogized to specifying the equipment necessary for a fire house rather than requiring each fire station to show how it will put out any large building fire in "x" minutes (without a complete description of all the facts related to the fire). No plan or regulation can anticipate all the variables in any particular emergency response, and no two large oil spills (or fires) are exactly alike. We understand that the U.S. Coast Guard is currently considering this methodology and working on such a list, and we urge the department to consider such a unified approach.

There are also other requirements in the proposed rules that appear to be unrealistic. For example, the plan holder must demonstrate the availability of adequate temporary storage and removal capacity for recovered oil and oily wastes "at or near the site of the spill" to keep up with skimming and recovery operations. We agree that storage capacity for skimmed oily wastes is an essential element to consider in each response plan. Given the size of Alaska, however, the requirements for and number of approved sites, and the remote areas through which vessels travel, this appears to be of doubtful achievability.

We well understand the importance in Alaska of taking a very strong approach to oil spill response. However, we all know that legislative decrees cannot repeal the laws of nature -- simply declaring it so does not make it so. Laws and regulations will be most effective when they are built on a solid scientific foundation that recognizes the art of the possible. We believe in high standards, but a requirement to develop a plan for unachievable standards is counterproductive.

We offer this candid appraisal in a spirit of cooperation as helpful suggestions for our mutual goal of improving spill response. We look forward to our meeting on September 10.

Sincerely,

MSRC
Marine Spill Response Corporation
David N. Lakin
Director of Government Affairs

August 19, 1991

Representative Ronald L. Larson
Alaska State
House of Representatives
P.O. Box 53
Palmer, Alaska 99645

Dear Representative Larson:

I enjoyed meeting you at the National Conference of State Legislatures meeting in Orlando and discussing the Marine Spill Response Corporation (MSRC). I am enclosing brochures on MSRC and a map representing the states which have passed the federal responder immunity standard for oil spill response.

I wanted to take this opportunity to discuss with you the recently enacted H.B. 196 which would grant a limited immunity in certain instances for those acts that relate to an oil spill response. Unlike seventeen other coastal states, including its neighbors on the west coast (Washington, Oregon, Alaska, and Hawaii), Alaska has enacted a standard of limited immunity other than the federal standard. As responders, MSRC finds the standard enacted in Alaska insufficient to encourage bold and aggressive responses to a major oil spill. The main difficulties that MSRC has with this law are addressed below and are enclosed in a recent letter to Department of Environmental Conservation Commissioner John Sandor:

- Fifteen Day Liability Limit. This arbitrary limit is unrealistic given the nature of oil spill response operations. The statute does not provide a liability-free opportunity to exit the scene. These provisions are a major disincentive for responders to get involved in remedial actions in the first place.

- "Backdoor" Liability. Joint and several liability is a real disincentive for any person involved in response activities who by contract arranged for disposal or treatment of hazardous substances possessed by such person, or who accepts hazardous substances for transport to a vessel from which a release occurs.

- Limits on Immunity when Conflicting Orders are Received from Officials. This provision places the responder in a quandary if conflicting orders are received from the state and federal governments.

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◆ Response Action Contract Requirements and Substantial Deviation from Oil Spill Contingency Plans. Written contracts cannot contain all the actions that should be taken during a response, yet these are the only ones that would carry immunity (except for volunteers). This will discourage expedient actions while written agreement issues are sorted out. Moreover, these provisions will energize the impulse to litigate so that every factual element of response action may be scrutinized to determine if "substantial deviation" from a plan actually took place.

◆ Damages to Property not caused by Oil. Given that oil spills generate emergency operations, sometimes under adverse operating conditions, good faith accidents are sure to result. Thus, this limitation on responder immunity will have a chilling affect on response actions. As with OPA-90, the spiller -- not the responder -- should remain liable for these damages.

I hope you will find this summary and the enclosed information useful. I do, however, feel the need to point out that changes to the Alaska responder immunity statute will not be the determining factor of MSRC's participation in response efforts in Alaska waters. More importantly, consistency with the federal statute will allow responders of all kinds to make a best effort response to protect the pristine coast of Alaska. Again, it was a pleasure meeting you and should you have any questions please feel free to contact me at (202) 408-5795.

Sincerely,

Enclosure

MSRC
Marine Spill Response Corporation

John D. Costello
President

July 26, 1991

Mr. John A. Sandor
Commissioner
Department of Environmental Conservation
P.O. Box O
Juneau, AK 99811-1800

Dear Commissioner Sandor:

Thank you for your letter of July 2, 1991. As you know and reference in your correspondence, I wrote to your predecessor in March of 1990 requesting a meeting with appropriate state officials to discuss what role, if any, our organization might have in Alaska. We welcome the opportunity to begin this direct dialog and I have asked our Vice President for Readiness and External Affairs, Mr. G. Stephen Duca, to make the necessary arrangements.

Your letter indicated that the impediment for MSRC establishing a presence in Alaska was the nature of the state's responder liability statutes. This is really only one of our concerns. Several events have occurred in the intervening time since our letter to you that directly bear on answering the question of what role is an appropriate one for MSRC in Alaska. Since our last correspondence we have been incorporated as MSRC with a charter and by-laws that specifies our response and cleanup activities. It states in part, that we are to establish programs to render a best effort response to contain and cleanup catastrophic oil spills in coastal zone or tidal waters of the U. S., in particular open sea spills estimated to be in excess of 25,000 barrels and protected water spills estimated to be in excess of 40,000 barrels. We are specifically precluded from responding to spills of less than 1200 barrels unless certain conditions are met. This limitation was inserted into our by-laws for several reasons, one of which was to insure that we do not compete with the existing oil spill response and cleanup infrastructure. The existing infrastructure is generally recognized as having the capability to respond to the vast majority of the nations spills; i.e., small spills under 1200 barrels. In addition, you may recall that PIRO (now MSRC) was created to specifically fill a national response/cleanup capability void at the high end of the spill spectrum; i.e., the catastrophic spill.

In the aftermath of the Valdez spill and due in large part to the leadership of the Legislature and other state officials, Alyeska spill response capabilities have significantly increased in size and scope. My understanding is that current Alyeska capability is probably

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equal or greater to the size of a planned MSRC regional response center. A similar response and cleanup improvement process is underway in Cook Inlet and, presumably, will result in a capability there to meet the requirements of OPA-90; i.e., the capability to respond to a "worst case discharge". It is our understanding that between the resources of Prince William Sound and Cook Inlet well over 95% of the persistent oil transported in Alaska's marine environment will be covered. In the light of this considerable capability the question must be asked "Is there really any role or indeed need for MSRC in Alaska?".

As a responder, we have carefully followed the development of Alaska's comprehensive oil spill legislation. We fully support state legislation that enhances oil spill response and clean up capability, however you should know that here are certain portions of your existing statutes that we feel could be improved. For example, requiring a capability to remove 300,000 barrels of oil in 72 hours is an unrealistic planning standard given today's technology and the average weather conditions responders must face in your state. Although the statute attempts to provide for technical relief from this standard, we believe that a very false expectation of capability has been created. Moreover, such a standard invites litigation -- a chief element in discouraging prompt responder action.

We are of course, vitally concerned with state responder immunity legislation. We were happy to see that HB 196 recognized this as a critical element in promoting an effective oil spill response system. We note however, that it falls significantly short of the national standard of immunity provided for responders in OPA-90. Some of the major concerns we have with this law include:

o **Fifteen Day Liability Limit.** This arbitrary limit is unrealistic given the nature of oil spill response operations. The statute does not provide a liability-free opportunity to exit the scene. These provisions are a major disincentive for responders to get involved in remedial actions in the first place. Moreover, there is less likelihood for prompt responder action in cases where there is only the threat of a spill.

o **"Backdoor" Liability.** Joint and several liability is a real disincentive for any person involved in response activities who by contract arranged for disposal or treatment of hazardous substances possessed by such person, or who accepts hazardous substances for transport to a vessel from which a release occurs.

o **Limits on Immunity when Conflicting Orders are Received from Officials.** This provision places the responder in a quandary if conflicting orders are received from the state and federal governments.

o **Response Action Contract Requirements and Substantial Deviation from Oil Spill Contingency Plans.** Written contracts cannot contain all the actions that should be taken during a response, yet these are the only ones that would carry immunity (except for volunteers). This will discourage expedient actions while written agreement issues are

sorted out. Moreover, these provisions will energize the impulse to litigate so that every factual element of response action may be scrutinized to determine if "substantial deviation" from a plan actually took place.

o **Damages to Property not Caused by Oil.** Given that oil spills generate emergency operations, sometimes under adverse operating conditions, good faith accidents are sure to result. Thus, this limitation on responder immunity will have a chilling affect on response actions. As with OPA-90, the spiller -- not the responder -- should remain liable for these damages.

These are some of the issues we feel need improvement in the current statute. We believe, and parenthetically so do the legislatures of 17 other states that have enacted the federal standard over the past 18 months, that the provisions of Section 4202 of OPA-90 are sound public policy. It balances the issues of how to provide incentives for bold and decisive action with assuring that appropriate damages are allocated to the appropriate parties. The gross negligence willful misconduct standard of responder conduct is appropriate for emergency operations. Responder actions that cause personal injury and wrong death are not specially protected. Only acts that are consistent with the NCP or the directions of appropriate federal and state officials are protected. Enacting a statute that provides an immunity at least as protective as the federal standard would eliminate a major disincentive for responders in Alaska. Since the responder immunity law is subject to review including a report to the Legislature, MSRC would welcome the opportunity to work closely with you. Our role in Alaska notwithstanding, we want to ensure that your responder immunity legislation provides reasonable protection for responders. By doing so it will simultaneously facilitate a swift and effective response to help mitigate harm to your environment.

The foregoing provides you the major issues we see in Alaska in advance of our meeting so that you can have some insight into our perspective. We look forward to working up an agenda and meeting with you in the very near future,

Sincerely,

John D. Costello
President

MSRC
Marine Spill Response Corporation

Joseph E. Lees
Vice President &
General Counsel

May 13, 1991

Hon. Drue Pearce
Alaska State Senate
Box V
Juneau, Alaska 99811

Dear Senator Pearce:

Thank you for your telecopy of today regarding H.B. 196, the pending responder immunity bill, as well as certain proposed modifications of that bill. You asked me to provide you with comments on the bill and the modifications, and I am happy to do so. We previously provided comments on earlier versions of H.B. 196, which I enclose for your reference. Please note that my comments represent an analysis of the responder immunity provision only, and do not reflect any type of definitive list of MSRC concerns with Alaska law. They also do not represent the preconditions that would define MSRC's plans or willingness to respond in Alaska. In other words, inadequate responder immunity is one very significant barrier to MSRC involvement in Alaska, but it is not the only such barrier.

I will not repeat the detailed comments in our prior letter. Most of these comments are still applicable. Instead, I want to focus on the major issues that make the current provisions inadequate. I will take them in the order of importance.

First, the limitation on the time frame for responder immunity in H.B. 196 (15 days) is so tight as to make the responder immunity provision essentially useless for most responders. For very large spills, it is simply unrealistic to expect that a 15-day immunity period will be adequate to cover the time period when oil is still on the water. Such a limitation will not encourage spill responders to become involved in spill response or to act promptly and decisively when oil is on the water and time is of the essence. Further, it is an impractical standard -- if a release occurs over several days (e.g., an offshore facility or a sunken vessel) how is the time limit to be judged? Would each part of the oil slick have to be traced back to the date is was originally released?

MSRC's position is that there should not be a time limit on responder immunity. Any time limit is arbitrary, since one cannot predict ahead of time the specific circumstances of a spill. The larger the spill, the more difficult it will be to control within a short period of time, while the greater the potential damage and hence the potential liability will be. The proposed modification of the bill to extend the time limit to 60 days is a step in the right direction, but is still inadequate. The note suggests that the time frame is commensurate with the new California statute, but it differs from the California provisions in important ways. First, the

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California statute allows for administrative extensions of the immunity provision beyond 60 days by the State oil spill coordinator. Second, the California provisions explicitly protects from liability a responder who withdraws from the spill response before the expiration of the responder immunity provision. Without such protection, the responder could be subject to liability based on grounds that once the duty of cleanup is assumed, then the responder cannot abandon that duty. Even with these protections, which are not provided in the Alaska bill, we believe the California bill still is unsatisfactory because of its arbitrary time restrictions.

Another major concern with H.B. 196 is that responder immunity provision is limited to response action contractors who, without approval by the federal or state onscene coordinator, substantially deviated from an oil spill contingency plan previously approved under AS 46.04.030, and the contractor previously agreed to comply with the terms of that plan under a contract with parties responsible for the release under AS 46.03.822. We have always maintained that the appropriate linkage for spill response should be to the National Contingency Plan, not to a local plan. The National Contingency Plan provides the basic framework for an appropriate response; the local plan establishes one way of achieving those overall goals. Unfortunately, no single plan can anticipate every eventuality. A plan provides the starting point for response, but responses inevitably must adapt to the circumstances of the actual event. Responders should not be subject to loss of immunity for deviations from the individual plan.

The proposed modifications of H.B. 196, which defines when action has "substantially deviated" from a plan, is, again, a step in the right direction. It defines a substantial deviation in terms of a significant, unjustifiable and unauthorized departure from the fundamental requirements of a plan. But it still links responder immunity to an individual plan rather than the National Contingency Plan.

Another major problem with H.B. 196 is that responder immunity does not apply to actions for damages to tangible personal property not caused by oil. MSRC's position is that responder immunity should apply to all removal costs or damages related to a response action, other than personal injury or wrongful death. It is not clear what "tangible" personal property is, or the degree of "causation" required. This appears to preclude immunity for claims, such as for damages resulting from the application of dispersants, or personal property damage from the placement of boom or local storage sites, etc. There is no justification for limiting responder immunity only to direct oil damage, when the response action will necessarily involve the movement of much machinery and equipment, etc. that is an integral part of the spill response. Limiting responder immunity to actions or omissions "consistent with the National Contingency Plan" provides a sufficient nexus between the type of damage and the spill response.

Finally, the proposed addition to Section 8 clarifying that nothing in this section is intended to create a cleanup standard is another positive and helpful provision. MSRC strongly opposes the setting of performance standards for oil spill cleanup as unrealistic and misleading. One cannot control an emergency situation, nor the circumstances of the spill, or the weather and other conditions of a spill response. One can only make one's best efforts with the equipment and personnel available. It is important that people realize that one cannot prevent damage in a major oil spill under all circumstances anymore than one can promise a certain damage level in a large fire.

Our other comments are contained in the attached materials. We hope this analysis is helpful to you. We encourage your efforts to amend H.B. 196 to make it less objectionable. Please let us know if you need anything further.

Sincerely,

Joseph E. Lees
Vice-President &
General Counsel

RECEIVED FEB 10 1992

TESORO ALASKA

W. Gene Burden
Vice President
Environmental Affairs & Government Relations

February 6, 1992

Representative Cliff Davidson
Alaska State Capital
Room 108
P.O. Box V
Juneau, Alaska 99801

Subject: Response Action Contractor Liability

Dear Representative Davidson:

The legislature passed HB 196 last year (Ch. 92, SLA 1991) which provided limited immunity to oil spill response action contractors (RACs) while maintaining liability in cases involving gross negligence, intentional misconduct, and where the RAC was involved in the spill itself. This bill has a one-year sunset and will expire on June 30, 1992 unless action is taken during this session. As you are aware, Tesoro Alaska put a lot of effort in the bill's passage as we viewed it as necessary to encourage RACs to provide immediate needed cleanup services following an oil spill.

The legislation was particularly critical to Tesoro as our continued operation was actually dependent on the bill's passage. The legislation was necessary to assure our continued access to spill response services provided by Alyeska in Prince William Sound. As a result of the bill's enactment, Tesoro was able to reach an interim agreement for obtaining these services following last year's legislature with the agreement's expiration coinciding with the present expiration of HB 196 on June 30, 1992. Unfortunately, unless the legislation is made permanent, Tesoro will again face the prospects of a loss of Alaska North Slope crude oil which threatens our ability to continue operations. This is of obvious concern to each of the 575 Tesoro employees in Alaska as well as their families. It also represents a potential significant negative to the economy of Southcentral Alaska, and particularly to the Kenai Peninsula.

During last year's debates on HB 196, we sought to communicate that while Tesoro's situation may have been the catalyst for the legislation, the bill also represents good public policy. The possibility of becoming embroiled in negligence litigation is a strong deterrent to agreeing to assist in any emergency situation - including the chaotic and time consuming circumstances of an oil spill response. The fact is that the threat of becoming involved in very costly litigation is, in and of itself, a powerful disincentive whether or not the lawsuit might be won. These facts have now been recognized in 19 coastal states where RAC immunity

legislation has been enacted that coincides closely with the legislation passed in the federal Oil Pollution Act of 1990. In each case the immunity granted by these states is broader than the limited immunity provided by Alaska's HB 196. Those states and the dates of passage of their immunity laws are as follows:

Alabama.....7/29/91	Louisiana.....4/23/91	Texas.....3/28/91
California..9/22/90	Maine.....6/20/91	Virginia....4/18/90
Connecticut.6/24/91	Mississippi....4/12/91	Virgin Is...12/9/90
Delaware....1/31/91	New Hampshire..5/13/91	Washington...5/15/91
Florida.....6/11/90	New Jersey.....8/13/91	
Georgia.....4/17/91	North Carolina.6/27/91	
Hawaii.....6/90	Oregon.....7/17/91	

*Source:Oil Spill U.S.Law Report, Vol.2, No. 1, 1/92, p.15

The recognition of the need for responder immunity in Alaska is reflected in the recently released draft proposal by the Prince William Sound Regional Citizen's Advisory Council's entitled "A Coastal Communities Oil Spill Cooperative for Alaska", January 1992 prepared by International Spill Technology Corporation, College Station, Texas. The proposal introduces an organizational structure and concept that is intended to improve the response against a major oil spill in the areas of shoreline protection, nearshore response, training, coordination of fishing vessels, and protection against non-crude spills. On page 19 of their proposal a number of conditions are described as required if the co-op is to be successful. Item No. 4 is for

> "[T]he Legislature is able to craft an acceptable, long-term solution to the issue of responder immunity from tort liability during the 1992 session."

This position is further clarified on page 24 of the same report under the heading "LEGAL FEASIBILITY" as

> "[R]esponder immunity is necessary for the ACCC to avoid tremendous liability exposure (emphasis added). It is anticipated that the state legislature will take up the issue of immunity for spill responders again during the upcoming session."

This is also identified as a "Major Legal Issue for the ACCC" in Table 4 on page 25 of the proposal.

Alaska has shared other states' recognition of the value of responder immunity for many years, as evidenced by AS 9.65.091 which shields people who respond to declared disaster emergencies from negligence liability. Unfortunately, that statute may not

apply to RACs, since before the enactment of HB 196 the legislature had passed a statute extending liability to RACs for simple negligence (See AS 46.03.823). Moreover, AS 9.65.091 applies only to declared disasters, and only those persons whose services are requested by the state which would exclude most oil spill situations as well as many volunteer responders.

We all spent a lot of time on HB 196 last year due in part because the issue was new to Alaska. Now, it is clear that the issue is not particularly controversial in the United States and is certainly not a revolutionary concept. As illustrated above it has become settled national and state policy that:

1. A negligence standard threatens to unfairly embroil RACs in costly post-spill litigation. The crisis atmosphere and potential consequences of oil spills combined with the unacceptably high risk and cost of litigation is not offset at all by the promise of limiting jury instructions;

2. The threat of litigation deters RACs from freely entering a jurisdiction without limited liability which interferes with the formation of effective spill co-ops;

3. The enactment of the new federal liability fund as well as the State clean-up fund; unlimited strict liability on the discharger (including strict liability for any damages caused by the RAC); and federal and state requirements for proof of financial responsibility combine to make the possibility of leaving victims uncompensated for damages caused by the simple negligence of a RAC very, very remote.

Tesoro suggests that in view of the above that the legislature's debate on this issue can be considerably shorter than last year and that the legislature should act to implement a continuation of HB 196 which will address the needs of spill responders in this state, improve our capabilities to respond, and solve a critical issue for our company. Thank you for your interest in this issue. If we may be of any assistance please contact me.

Sincerely,

Gene Burden

RECEIVED JAN 2 3 1992

Citizens' Oversight Council
on Oil and Other Hazardous Substances
3111 C Street, Suite 150 • Anchorage, Alaska 99503
(907)561-2101 • 561-7538 (FAX)

January 17, 1992

Representative Cliff Davidson
State Capitol
Juneau AK 99801-1182

Dear Representative Davidson:

The Citizens' Oversight Council On Oil and other Hazardous Substances is in the process of completing its report and recommendations to the legislature on liability standards for response action contractors.

In Section 11 of HB 196, the Citizens' Oversight Council was required to review the entire subject of response action contractor civil liability and the status of oil spill contingency plan holders. In order to meet this requirement, several groups and individuals prepared research project reports for the Council. The Citizens' Oversight Council will base its recommendations to the legislature on the information provided in these research project reports.

The Council will be presenting its report and recommendations to the House and Senate in early February.

Attached is a summary of the research project reports and the public meeting notice for the Council's upcoming meetings.

If you have any questions or suggestions regarding this subject and process, please contact me at 561-2101.

Sincerely,

Michele Brown
Executive Director

enclosures

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

PUBLIC NOTICE



The Citizens' Oversight Council
on Oil and Other Hazardous Substances

Invites you to a public meeting on the Council's

OIL SPILL RESPONSE CONTRACTOR LIABILITY REPORT

FRIDAY, JANUARY 31 • 1:00 TO 4:00 PM

ANCHORAGE LEGISLATIVE INFORMATION OFFICE

3111 C STREET, 5TH FLOOR CONFERENCE ROOM

PUBLIC COMMENTS ENCOURAGED

The public meeting will be teleconferenced statewide —
At the State Capitol, Room 124, in Juneau, and at the Legislative Information Offices in Cordova, Homer, Kenai, Ketchikan, Kodiak, Sitka, Valdez and Whittier.

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

For more detailed information contact COC 561-2101.

Citizens' Oversight Council
on Oil and Other Hazardous Substances
3111 C Street, Suite 150 • Anchorage, Alaska 99503
(907)561-2101 • 562-4376(FAX)

HB 196, SECTION 11, REPORT
RESEARCH PROJECTS

1. OTHER STATE LAWS. This task will compile and examine response action contractor immunity/liability laws in other states. This project will go far beyond merely compiling the statutory language from those states. This project will extensively research the legislative history behind the promulgation of other states' legislation, and will evaluate the immunity provisions in the entire context of any particular state's oil spill prevention and response regulatory structure.

Last session, the legislature did have before it several examples from other states. However, the lack of knowledge into how the particular immunity section fit into the state's overall regulatory structure handicapped the legislature. For instance, California does have a response action contractor immunity provision (60 days) and, therefore, the argument was made that there is no reason for Alaska to be any more strict. What the legislature did not have before it, though, was the fact that California simultaneously created a taxing mechanism with unlimited borrowing authority to enable the state to both respond to a spill and to have access to a fund for damages.

The National Wildlife Federation (which is a member of the Prince William Sound Regional Citizens' Advisory Council) has a legal intern, Pat Kingcade, who is available to begin work on this project this summer. When Pat returns to law school, the PWS RCAC Legislative Affairs Committee will see if it can pickup incidental expenses (telephone, mileage, etc.) to enable Pat to continue research. Also, Pat will prepare a proposal for the Vermont Law School to receive classroom credits and grant funds, since the compilation will be a useful addition to the school's environmental law library. Pat will begin the study with the states of California, Oregon, Washington, Texas, and New Jersey.

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

2. OIL POLLUTION ACT OF 1990 PROVISIONS. This project will examine the response action contractor provision in OPA '90 and its intent, legislative history, and statutory context.

The PWS RCAC will consider funding a research contract through its OSPR Committee because it is information that the RCAC needs for other issues as well.

3. TAPS AUTHORIZATION ACT. This project will research the act and the legislative history to determine whether there was any discussion of Alyeska as a response action contractor or as a responder for tankers operating in the TAPS trade.

The Citizens' Oversight Council will conduct the research.

4. CONTINGENCY PLAN REQUIREMENTS UNDER OPA '90. The implementation of the provisions of OPA '90 for contingency plan response standards may have a major impact on both contractor liability and contingency plan holder status. The role of response action contractors in adhering to contingency plan requirements will be a key issue in the Coast Guard's implementation rules and may have the effect of superseding or rendering moot the state requirements.

The PWS RCAC will consider, through its OSPR Committee, a research contract for this project.

5. RESPONSE ACTION CONTRACTOR ACTIVITY IN STATE. This project will examine who the response action contractors are in Alaska and will identify the geographic areas in which the contractors work, the type of services they provide, their interaction with potential responsible parties and volunteers, etc. This project will describe precisely how oil spill response is happening in the state and what geographical regions may be lacking in response capability.

DEC staff will assemble this data.

6. CONTRACTUAL RELATIONSHIPS BETWEEN CONTINGENCY PLAN HOLDER AND RESPONSE ACTION CONTRACTOR. This project would look at the various contracts currently used in the state that describe the legal relationships between the contingency plan holder, a response action contractor, and possibly the state.

The COC will analyze these contracts and their historical evolution, if funding can be acquired.

7. LITIGATION THREAT TO RESPONSE ACTION CONTRACTORS. This will be a brief analysis of whether response action contractors have, in fact, been found liable or sued in Alaska or in other key states for damages for oil spills, when there was no other cause for liability. This will examine both government and private causes of action against entities that operate as response action contractors. This project is important to get a sense of whether the litigation threat is real or speculative.

DEC will request the assistance of the Attorney General's Office for this project.

8. LOCAL GOVERNMENT LIABILITY AS A MEMBER OF A RESPONSE CO-OP. This issue was raised during the legislative hearings last session. If a municipality or other governmental entity, which has sovereign immunity, joins a co-op formed to be a response action contractor, will the municipality retain its immunity against liability?

DEC will request the assistance of the Attorney General's Office for this project.

9. INSURANCE. This project will identify the different types of insurance coverage available for response action contractors, for contingency plan holders, and for oil spill responsible parties in the state. This will help establish the context in which all key players are operating and provide for realistic solutions.

10. STATE OF ALASKA'S POTENTIAL LIABILITY. Many people have questioned whether the state does or should bear some responsibility for spill response as an owner and shipper of crude oil. This project will look into the state's role and status as an owner of oil and its potential liability in order for those public policy questions to be fully examined.

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

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

FROM: Michael J. Frank

DATE: January 13, 1992

SUMMARY OF MEMORANDUM

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

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

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

MEMORANDUM

I. INTRODUCTION.

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

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

A. Definitions.

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

> (A) a person who enters into a response action contract with respect to a release or threatened release of a hazardous substance and who is carrying out the contract, including a cooperative organization formed to maintain and supply response equipment and materials that enters into a response action contract relating to a release or threatened release; and
>
> (B) a person who is retained or hired by and is under the control of a person described in (A) of this paragraph to provide services related to the response action contract; and
>
> (c) a person who acts as a volunteer and is engaged in a response action.

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

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

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

B. Important Considerations.

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

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

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

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

governmental orders, such as from the Department of Environmental Conservation[1] or from federal agencies. It also may be subject to civil and criminal liabilities. AS 46.03.760 and 46.03.790. During a spill response if a holder's RAC decides to quit working because, for example, the RAC claims that the plan holder has breached their contract, State and federal agencies have no immediate legal recourse against the RAC.[2] Under State and federal laws the agencies' only clear remedy, short of taking over the spill response, is against the plan holder. Even so, if the plan holder has no labor or equipment at the ready to replace the RAC's, then disaster may result.

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

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

C. Balance Of This Memorandum.

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

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

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

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

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

II. TAPAA HISTORY.

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

A. General Background 1967 - 1972.

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

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

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

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

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

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

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

corporation on September 1, 1970.[4] As of February 1990, Alyeska's principal owner companies were ARCO Pipe Line Co., 21.4%; Exxon Pipeline Co., 20.3%; and BP Pipelines Alaska Inc., 50.0%.[5]

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

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

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

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

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

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

B. 1973 Congressional Deliberations.

(1) Senate.

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

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

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

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

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

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

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

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

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

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

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

Senate Interior Committee markup of S. 1081 began in April, 1973. 119 *Congressional Record - Daily Digest*, at D208, 114, 221 - 222, 228, 269, 274, 281 and 336 (1973). The Committee ordered the bill reported out favorably to the full Senate on May 29, 1973. Id. Deliberations over S. 1081 began on the floor of the Senate in late June and ended in July, 1973.[8] For the purposes of this memorandum, the deliberations were largely uneventful, with a few exceptions.

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

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

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

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

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

> Much has been said about the danger of oil spills on the Alaska route, particularly on the sea leg. Regarding marine oil spills, again very careful study has been given to this and I am convinced that stringent requirements for deballasting ships at Valdez, new ships built with the latest structural design, and stringent operational procedures to avoid collisions and groundings will all contribute to virtually eliminating oil losses at sea.
>
> Opponents of the trans-Alaska pipeline know that every safeguard is being taken to protect the environmental quality of our waterways....
>
> Some of the operational procedures to be enforced are as follows.... All tankers will take aboard a State pilot in Prince William Sound and all pilotage laws will be observed. Alyeska will provide tugs at Port Valdez and all docking and undocking will be tug assisted.

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

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

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

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

On July 17, 1973 S. 1081 as amended passed the full Senate by a 77 to 20 margin. Id. at 24294 - 97, 24330.

2. House of Representatives.

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

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

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

At the House hearings, Representative Dellenback inquired of Alyeska officials about the company's position concerning common carrier status for the TAPS. This status, among other things, would require the owner companies of the TAPS to receive approval from the Interstate Commerce Commission[10] for charges imposed on any shipper using the TAPS. Alyeska, as agent for its pipeline owner companies, indicated that it did not oppose common carrier status. *House Hearings*, Part 1, at 537.

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

> Mr. Dellenback: May I ask about the nature of the legal responsibility that any of the 7 petroleum companies might have which make up your pipeline service company? Would there be any legal responsibility in the event damage were extreme? Would any of the basic 7 organizing petroleum companies have any responsibility to carry any portion of that burden?
>
> Mr. Knodell: They would have full responsibility, Mr. Dellenback. Alyeska Pipeline Service Co. acts as an agent for them, and only as an agent for them. So, our actions are their actions; yes, sir.
>
> Mr. Dellenback: Normal corporate shield of responsibility so far as liability is concerned would not pertain in this instance?
>
> Mr. Knodell: That is correct, Mr. Dellenback.

Id. at 538 - 39.

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

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

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

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

> Section 207. (a) Except when the holder of a permit or right-of-way granted pursuant to this title can prove that damages caused by the holder's activities conducted at any point along the route of the proposed Alaskan pipeline were caused by an act of war or by negligence of the United States or other government, such holder shall be strictly liable to all damaged parties...without regard to fault for such damages.
>
> (b)(1) The Secretary shall direct as a term or condition of any permit or right-of-way...that except when the holder...can prove that damages resulting from discharges of oil in violation of section 11(b)(2) of the Federal Water Pollution Control Act... were caused by an act of war or by the negligence of the United States or other government such holder shall be strictly liable without regard to fault to all parties...for all damages resulting from such discharges of oil from, or involving vessels owned, chartered, operated, or leased by or for such holder, affiliate of such holder, shareholder, partner, or other constituent part of the holder, or affiliate of such shareholder, partner, or other constituent part of the holder, where the cargo of such vessel is oil transported by the trans-Alaskan pipeline....

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

Representative Dellenback claimed responsibility for section 207, saying:

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

> legs of the trans-Alaskan route. Their effect will be to impose strict liability, regardless of fault, on pipeline permit holders for damages resulting from activities related to the pipeline itself or to the marine leg of the route.
>
> We have received assurances from Alyeska and other commercial interests involved in the pipeline that they are convinced the trans-Alaska route can be constructed as to be environmentally safe. The strict liability clauses put the burden on them to prove that their assurances are completely valid....

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

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

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

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

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

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

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

(Emphasis supplied.) Id. at 27054.

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

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

3. House/Senate Conference.

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

agreement on the TAPAA was reached.[11] On November 11, 1973, the Senate agreed by a vote of 80 to 5 to the Conference Committee substitute for S. 1081.[12]

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

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

MARINE LEG LIABILITY

> Subsection (c) imposes on the owner or operator of a vessel that is loaded with oil from the trans-Alaska pipeline strict liability without regard to fault for damages sustained by any person as the result of discharges of oil from such vessel ....[13]

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

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

[12] Id. at 28477 - 79, 28875, 36808 - 23.

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

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

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

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

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

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

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

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

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

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

The United States denied liability. It asserted that the TAPAA, not the Water Pollution Control Act, governed spills from the TAPS. It argued that under TAPAA's section 204(b), the right-of-way holders and their agent, Alyeska, were responsible for spill cleanup. Alyeska Pipeline Service Co. v. United States, 649 F2d 831, 227 Ct. Cl. 297 (U.S.Ct.Cl.) cert. denied 454 U.S. 964 (1981).[16]

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

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

D. OPA 1990 Changes To The TAPAA.

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16 This was not the first time that Alyeska sued the United States in the Court of Claims over the TAPAA. It also sued seeking a refund of fees paid to the Department of the Interior for the government's expenses incurred in processing the permits granted to Alyeska to build and operate the TAPS. Alyeska Pipeline Service Company v. U.S., 624 F2d 1005 (Ct. Cl. 1980).

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

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

43 U.S.C. § 1653(b).

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

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

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

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

> The Senate report to accompany S. 686 said of section 201:
>
> Section 201 makes clarifying amendments to the Trans-Alaska Pipeline Authorization Act(43 U.S.C. § 1653). The amendments in this Act make it clear that the removal liability of the permit holder extends only to activities relating directly to the Trans-Alaska Pipeline. Additional language makes the Trans-Alaska Pipeline Act removal liability provisions inapplicable in those situations where this Act applies. In all other instances, those provisions in the Trans-Alaska Pipeline Authorization Act relating to removal costs and liability remain in effect.

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

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

> Section 401 of the Senate amendment limits the application of section 204(b) of the TAPS Act to removal costs in the State of Alaska which would not otherwise be covered by the regime established by the Senate amendment.
>
> Section 8101 of the House bill exempts the Trans-Alaska Pipeline System (TAPS) (pipeline, terminal and related onshore facilities) from the liability regime established by the Oil Pollution Act of 1990 for similar facilities. Pursuant to section 204(a) of the TAPS Act, the holder of the pipeline right-of-way is strictly liable for all removal costs and strictly liable for up to $50 million for damages in connection with activities in the vicinity of the right-of-way. Section 8101 of the House bill amends the TAPS Act to remove the cap on strict liability for

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

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

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

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

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

IV. THE 1974 AGREEMENTS.

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

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

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

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

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

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

> Lessees shall prevent or, if the...condition already exists... abate...any physical...condition, existing or occurring at any time...
> * * * *
> (2) that arises out of, or could affect adversely, the... operation...of all or any part of the Pipeline; and
> (3) that causes or threatens to cause...
> * * * *
> (b) serious harm or damage to the environment....

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

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

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

A. The Initial Contingency Plans.

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

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

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

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

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

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

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

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

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

> Alyeska Pipeline Service Company and the Owner Companies recognize and assume the liabilities imposed upon them under various Federal and State statutes and regulations, Federal Right-of-way, the State Right-of-Way Lease and the applicable Stipulations incorporated therein. It is to be noted that clean-up operations within the areas of liability and responsibility so imposed be conducted by Alyeska as Agent for the Owner Companies and will be conducted in such a manner to not require assumption of control of such cleanup operations by federal or State officials under applicable statutes, regulations, agreements or stipulations.
>
> Summarily, Alyeska will direct cleanup operations resulting from:
>
> > Trans-Alaska Pipeline operations, including spills within the Right-of-Way or related facilities under the ownership or control of Alyeska or the owners.
> >
> > Marine Terminal at Valdez
> >
> > Operation, involving tankers carrying or destined to carry crude oil transported through the Trans-Alaska Pipeline System, occurring at the Valdez Terminal, in Port Valdez, Valdez Arm or Prince William Sound.

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

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

B. Later Contingency Plans.

Subsequent contingency plans, until the T/V Exxon Valdez oil spill, also had response components for spills from tankers berthed at the VMT and from tankers in Port Valdez and Prince William Sound. Alaska Oil Spill Commission *Final Report*, supra, at 37 - 61.[21]

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

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

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

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

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

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

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

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

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

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

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

Significant claims in the State's lawsuit against Alyeska and its owner companies are still pending. While the State's *Complaint* alleges that Alyeska has a duty to respond to tanker spills in Prince William Sound by virtue of the State agreement[24], Alyeska's *Answer* makes it apparent that unless and until there is a final judicial ruling or settlement of the issue in the case, a public change in Alyeska's current legal position, determinative federal or State administrative action against Alyeska or a change in existing law, there will remain uncertainty as to Alyeska's status.

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

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

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

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

1. VMT plan.

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

> The *Valdez Terminal Oil Spill Contingency Plan* addresses Alyeska's spill response on both land and water for spills originating from Terminal facilities, or small spills from tankers.
>
> * * * *
>
> Response to spills from tankers berthed at the Terminal is described in the Valdez Terminal Oil Spill Contingency Plan. Although a spill from a tanker is not the responsibility of Alyeska, Alyeska will provide oil spill response for a discharge from the tanker while it is berthed. Costs incurred in providing this response and cleanup are billed to the spiller.

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

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

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

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

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

2. Port Valdez and Prince William Sound Plan.

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

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

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

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

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

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

have entered into a response action contract[29] with Alyeska. According to Alyeska, the vessel owner, operator or charterer-by-demise is the contingency plan holder, not Alyeska. It asserts:

> This...Plan for Prince William Sound has been designed and developed to be included as part of the statutorily required vessel oil spill contingency plans. Alyeska offers to provide initial oil spill response services as described in this plan as a spill response contractor to owners, operators or charterers of vessels picking up North Slope crude at the Valdez Marine Terminal to assist them in meeting their contingency plan obligations under the new State law (AS 46.04.030).
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> * * * * *
>
> Alyeska developed, in response to the State of Alaska's emergency order in 1989, a "Prince William Sound Tanker Spill Prevention and Response Plan." This plan has been utilized by ship owners to obtain their conditionally approved Oil Spill Contingency Plan.
>
> State and federal law place liability and clean-up responsibility for an oil discharge on the spiller--in this case a tanker owner/operator. As operator of the pipeline, Alyeska does not own or operate tankers. However, to centralize prevention and initial response efforts on behalf of those tankers, Alyeska has developed the Prince William Sound plan. Alyeska will contract with vessels to provide the initial oil spill response service. Those contracts and the vessel plans will provide for an orderly transition of spill response management from Alyeska to the vessel in the event of a large spill.

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

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

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

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

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

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

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

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

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

VII. CONCLUSION.

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

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

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

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

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

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

Moreover, once spent the costs of the arrangement are not forever lost to the pipeline owner companies. In fact, that Alyeska is unlike a truly independent RAC is readily apparent in how the owner companies treat the costs of Alyeska's spill preparedness. As the tariff report to the Citizens' Oversight Council explains, the companies include in their tariff expenses[33] filed with the FERC and the APUC the entire costs of SERVS. See the tariff report. The vast majority of those costs, however, relate to the prevention and cleanup of marine tanker spills which might occur at the VMT, elsewhere in Port Valdez and in Prince William Sound; these costs have nothing to do with spills which may occur from a segment of the pipeline or on the grounds of the VMT. Thus, on the one hand the costs are described as discretionary, i.e., volunteered, but on the other hand they are treated as ordinary common carrier expenses entitled to be included in the calculation of the tariffs charged for transporting oil through the TAPS. The irony is that while the State of Alaska indirectly pays for about 25% these costs,[34] as long as Alyeska claims RAC or volunteer status, the State has no real assurance that Alyeska will respond the next time a spill of TAPS oil occurs from a tanker in Alaska waters.

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

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

[34] Id.

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

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

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

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

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NOV 7 RECD

TO: Prince William Sound Regional Citizens Advisory Council
Citizens Oversight Council on Oil and Other Hazardous Substances
DATE: October 31, 1991
RE: HB 196, Section 11, Report - Research Project Task 4
Contingency Plan Requirements Under OPA 90

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1. Problem Definition

Task 4 describes the following research:

> The implementation of the provisions of OPA 90 for contingency plan response standards may have a major impact on both contractor liability and contingency plan holder status. The role of response action contractors in adhering to contingency plan requirements should be a key issue in the National Contingency Plan and may have the effect of superseding or rendering moot the state requirements.
>
> ... (1) research OPA 90 legislative history, and (2) investigate the current status and approach of Coast Guard and EPA OPA 90 implementation with respect to the following issues:
>
> - relationship between response action contractor and contingency plan holder status
> - whether OPA 90 has or will address this issue, and if so, whether it has or will effectively preempt different state standards
> - whether the federal government can "enforce" the contract between response action contractor and an unwilling or incapable c-plan holder
>
> - state contingency plans (whether OPA 90 has or will effectively preempt state contingency planning requirements).

Upon review of various documents bearing on the Task 4 issue,[1] and discussions with RCAC and Citizens Oversight Council representatives,[2] my approach to this research task was to focus on the relationship between the contingency plan holder ("Holder")[3] and the response action contractor ("RAC"),[4] with specific emphasis on RAC accountability in the event of a spill.

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[1] 9-23-91 letter from Mike Frank to Sheila Gottehrer; 10-1-91 memo in response from Ann Rothe to Sheila Gottehrer; HB 196.

[2] Patti Saunders (9-19-91); Michele Brown (9-19-91); Ann Rothe (10-3-91).

[3] Referred to by the federal agencies in OPA 90 lingo as the "responsible party".

[4] Referred to by the federal agencies in OPA 90 lingo as the "cleanup contractor".

My research (and the analysis in this memo) attempt to answer the following questions:

1. What is RAC statutory liability under OPA 90?

2. To what extent will federal contingency plan ("c-plan")[5] review focus on the Holder-RAC relationship?

3. Does the President have the authority, or will he exercise the authority, to force RAC action in conformance with an approved c-plan in the event of an oil spill?

4. Is the State preempted from imposing RAC liability that differs from OPA 90?

5. Is the State preempted from adopting c-plan requirements, specifically with respect to Holder-RAC relations, that differ from those ultimately adopted under OPA 90?

2. Short Answer[6]

A. What is RAC statutory liability under OPA 90?

Under most circumstances, none. The RAC may be held liable if it is also the owner/operator of the facility or vessel causing the spill, or if the RAC response action causes response costs or damages due to gross negligence or wilful misconduct, or causes personal injury or wrongful death.

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[5] Referred to by the federal agencies in OPA 90 lingo as "response plans".

[6] The reader should be aware that the analysis in this memo, and therefore these short answers, reflect the current status of OPA 90 implementation as of 10-31-91. Since no c-plan regulations have even been drafted, and the agency working groups are still only at the stage of discussing possible issues for inclusion in proposed regulations, there is no certainty that the current status will reflect the federal government's approach to these issues next month or six months from now.

This does create the opportunity for RCAC and other interests from Alaska to raise their concerns directly with federal agency staff in the hopes of having them addressed when federal regulations are ultimately proposed. Responses to Advanced Notices of Proposed Rulemaking and informal contacts with agency staff should emphasize the importance of these issues, with factual or hypothetical examples of potential problems in the event of another spill in Prince William Sound.

B. To what extent will federal contingency plan ("c-plan") review focus on the Holder-RAC relationship?

While the federal government will require the Holder to demonstrate that it has a contract with a RAC, the level of scrutiny is unclear. The federal government is considering certifying RACs, in order to guarantee a minimum level of capability and expertise among RACs. It is unclear whether a Holder will have to notify the federal government (or receive new approval) if the Holder-RAC relationship changes.

C. Does the President have the authority, or will he exercise the authority, to force RAC action in conformance with an approved c-plan in the event of an oil spill?

The federal government will address what it means for the President to "direct" a response action in the proposed changes to the National Contingency Plan ("NCP"). The current thinking is that OPA 90 does not grant the federal government any authority over RAC activities; the only leverage is to order the Holder to take appropriate actions, who in turn presumably would direct the RAC to implement the federal order. If the federal government decides to certify RACs, its position on this issue may change.

D. Is the State preempted from imposing RAC liability that differs from OPA 90?

Definitely not, since imposing any liability on RACs would expand the existing federal scheme.

E. Is the State preempted from adopting c-plan requirements, specifically with respect to Holder-RAC relations, that differ from those ultimately adopted under OPA 90?

No, but care should be taken to develop additional requirements which supplement federal c-plan regulations, rather than directly contradicting them. Lack of preemption will be more difficult to support in the situation where the Holder cannot comply with both federal and state c-plan requirements.

3. Analysis

A. Impact of OPA 90 on Oil Spill Response[7]

(1) Private Sector Responsibility

The primary purpose of OPA 90 was to place the financial onus of cleanup on the private sector. It increased liability limits for each oil spill, and clearly identified that the "responsible party" -- namely the owner or operator of onshore facilities and pipelines, or the owner, operator or demise charterer of vessels -- was liable for all removal costs and damages (natural resource and economic) caused by oil discharged into or upon navigable waters from such source.[8]

(2) Liability Provisions and Exemptions

All existing oil spill trust funds were combined into the Oil Spill Liability Trust Fund ("Fund"). Funds expended for oil spill response from the Fund are recoverable from the responsible party, unless limited defenses to liability apply.[9]

Non-owner/ operator RACs are exempt from liability for removal costs and damages resulting from response actions, provided such actions are consistent with the NCP or as directed by the President (delegated to the Coast Guard). The RAC liability exemption does not apply for costs or damages caused by gross negligence or wilful misconduct, or for personal injury or wrongful death.[10] All costs and damages covered by the RAC exemption must be paid by the responsible party.[11]

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[7] This brief discussion of OPA 90 is included to provide a context for the Task 4 research questions. It is not intended to be a comprehensive summary of the legislation.

[8] §§ 1002(a) and 1001(32), OPA.

[9] In addition to acts of God and acts of war, responsible parties can escape liability by proving that the discharge and all resulting costs and damages were caused solely by an act or omission of a third party, and that the responsible party exercised due care and took precautions against all foreseeable acts. §§ 1002(d)(1)(A) and 1003(a)(3), OPA.

[10] §§ 4201(c)(4)(A) and (B), OPA.

[11] § 4201(c)(4)(C), OPA.

(3) Contingency Planning

In order to improve government and industry response to oil spills, a variety of contingency plans must be prepared. EPA and the Coast Guard must revise the National Contingency Plan to specify the federal response to any given oil spill. This includes designating On-Scene Coordinators ("OSCs") for all regions of the country, and establishing criteria and procedures for federal involvement in the oil spill response.[12] In particular, the revised NCP should amplify the OPA 90 requirement that the President be prepared to "direct" response activities for oil spills that present a "substantial threat to the public health or welfare of the United States."[13]

A second layer of government-prepared contingency plans is the area contingency plan. The Coast Guard has announced its intent to designate the areas covered by such c-plans; the State of Alaska is one of the areas suggested.[14] The area contingency plans, when drafted, should provide area-specific details for implementing the NCP's general criteria for federal oil spill response. In particular, the area c-plan should identify equipment and personnel available for a federal response in the event of an oil spill within the area c-plan's jurisdiction.

The final layer of contingency planning imposed by OPA 90 is the tank vessel and facility response plans. The owner/operator of each tank vessel or a facility whose location creates a reasonable expectation that an oil spill may occur must prepare a contingency plan and submit it to the federal government for approval.[15] These vessel- or facility-specific plans must identify equipment and personnel available to respond to oil spills. OPA 90 anticipates that much of the equipment or personnel will be provided by RACs, and specifically requires the owner/operator to "ensure by contract or other means acceptable to the President" that oil spill response capability is available to "remove to the maximum extent practicable a worst case discharge."[16] The President must review the vessel- and facility-specific response plans, require amendments where necessary to meet all requirements, approve them, and review the plans periodically for continued feasibility.

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[12] § 4201((b), OPA.

[13] § 4201(b)(2)(I), OPA.

[14] 56 Fed. Register 33481 (7-22-91).

[15] § 4202(a)(5), OPA.

[16] § 4202(a)(5)(C)(iii), OPA.

Finally, OPA 90 directs the federal government to conduct periodic surprise drills (hypothetical spill scenarios) to confirm the effectiveness of the area and vessel tanker or facility c-plans, and the owner/operator's preparedness for oil spill response.[17]

(4) Oil Spill Response

OPA 90 gives the President broad authority to determine the extent of federal involvement in response to any oil spill, and to order responsible party participation in the response. It is nevertheless anticipated that the responsible parties will respond in the first instance in accordance with the approved tanker vessel or facility c-plan.[18]

In cases where the discharge poses a substantial threat to public health and welfare, however, the President has a mandatory duty to "direct all Federal, State and private actions" in response to the oil spill.[19] This authority is designed to minimize confusion and hesitation in cases where immediate response is required.[20]

B. Federal Attention to Holder-RAC Relationship or RAC Performance

The Holder-RAC relationship is an issue at multiple stages of the OPA 90 process. First, it is a contingency planning issue. What scrutiny will the federal government give the Holder-RAC relationship when reviewing (and approving) tanker vessel or facility contingency plans?

Second, it is an implementation issue. Will the federal government enforce the Holder-RAC relationship in the event of a spill? Although related to implementation, this issue will probably be dealt with in the NCP revision context.

(1) Federal Approval of the Holder-RAC Relationship

Although OPA 90 requires the Holder to identify, and ensure by contract or otherwise, availability of adequate equipment and personnel for oil spill response, the detail required for

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[17] § 4202(a)(7), OPA.

[18] *Conference Report*, House Report No. 101-652 (8-1-90), at 144-146.

[19] § 4201((a)(2), OPA.

[20] *Conference Report, supra*, at 144-146.

approval of a c-plan remains in the government's discretion. Likewise the government's continued oversight of the Holder-RAC relationship after initial c-plan approval is not specified by statute. Since the private party contingency planning requirement has been divided into at least three efforts, shared between two agencies, it is possible that the requirements for vessels and facilities may differ.

The Coast Guard has recently filed an Advance Notice of Proposed Rulemaking for vessel response plans, in which it asked for public comment on various issues before proceeding with developing a proposed regulation.[21] I have suggested to the Oil Spill Prevention/Response Committee of RCAC that they identify these Holder-RAC Relationship issues in their response to the Advance Notice, and believe that has been accomplished.[22] RCAC and other interested Alaska parties should continue to track this rulemaking to ensure that the concerns about RAC accountability for oil spills from tanker vessels are adequately addressed.

EPA is working on regulations for fixed facility c-plans, which should be proposed as a part of revised regulations implementing the Spill Prevention and Pollution Control provisions of the Clean Water Act.[23] These proposed regulations have finished the work group process, and should go to "red border review"[24] soon; it is impossible to predict a date by which they will be proposed. Although a current draft of the regulations could not be obtained, I have been told that they will address the circumstances under which a c-plan will have to be updated (e.g., change in amounts of material stored, change in type of product),

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[21] 56 Fed. Register 43535 (8-30-91); Coast Guard contact, Lieutenant Commander Glenn Wiltshire, 202-267-6740.

[22] In particular, I suggested the proposed vessel response plan regulations should address:
- frequency of EPA/Coast Guard periodic review of c-plan, including Holder-RAC contractual arrangements
- requirement that Holder notify EPA/Coast Guard whenever there is a change in RAC or contract with the RAC, to obtain approval of the changed condition
- consider adopting Mike Frank's suggestion that the federal government require RACs to agree to respond at the OSC's request.

[23] EPA contact, Bobbie Lively-Diebold, 703-356-8774.

[24] Red border review involves circulation among all EPA offices for sign-off. The next stages include EPA Administrator review and sign-off, Office of Management and Budget review and sign-off, revisions after OMB review if necessary and repeat of the whole cycle, proposal in the Federal Register.

and that they will require annual review and updating of c-plans. It was my impression that the regulations will not focus extensively on the Holder-RAC contract, because EPA will rely on Holder liability to provide the needed incentive for prompt oil spill response.

Another office in EPA is allegedly preparing regulations for pipeline c-plans.[25] Despite multiple attempts, I have been unable to speak with them.

(2) Federal Enforcement of the Holder-RAC Relationship

A perfect c-plan and a model Holder-RAC contract do not guarantee a smooth oil spill response. There are multiple conditions under which the RAC may refuse to perform its responsibilities under the approved c-plan, or the Holder may refuse to pay for or direct the RAC to conduct the required activities. If the oil spill in question poses a "substantial threat" to public health and welfare, the President must "direct" the response activities. If it is a spill of lesser consequence, the President has the authority to "direct" the response activities.

What does the statutory term "direct" mean? The legislative history repeatedly refers to "federalizing" a spill, which means having the federal government use its contractors and Fund money to provide oil spill response. By contrast, the term "direct" appears to provide the On-Scene Coordinator with authority to require other parties (including responsible parties) to conduct response activities at their expense.[26]

Clarification of the term "direct" should be included in the revisions to the NCP, which are being jointly drafted by EPA and the Coast Guard. The Coast Guard appears to have responsibility for this particular issue, however.[27] Work group discussions have discussed the definition of the term "direct", and the current thinking is to provide a range of alternatives for the OSC. These would range from simply monitoring the private parties' response actions, to directing them to get another contractor or more equipment, to taking over the entire cleanup.

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[25] EPA contact, Caesar DeLeon, 202-366-1640.

[26] *House Report 101-402, Part 2*: Committee on Merchant Marine and Fisheries (9-18-89) at 38 describes a 3-tiered removal authority -- federalize, direct and oversee.

[27] Coast Guard contact, Lieutenant Commander Harry Schultz, 202-267-2616.

The current approach is to provide the OSC with maximum flexibility in the revised NCP regulations, while imposing more specific requirements in policy documents.[28]

My discussion with the Coast Guard reflected a strong disinclination to enforce the Holder-RAC contract, or to force the RAC to respond if the Holder (responsible party) did not concur.[29] The Coast Guard apparently intends to direct its enforcement efforts (and all orders to act) against the responsible party only, since it does not have clear legal authority to impose liability on the RAC. The Coast Guard representative did opine, however, that if a RAC certification program were adopted, this might provide authority to order RAC action directly.

In addition, the Coast Guard representative did not feel that the concerns I expressed about the Holder-RAC relationship were significant, and opined that most responsible parties will and do respond. He cited to all the statutory provisions we are familiar with -- strict liability, treble damages, contingency planning, periodic drills -- to support his contention that it is in the responsible party's best interest to respond without objection. He did confirm that in a worst case scenario, the OSC could direct the RAC to implement the approved contingency plan and reimburse the RAC's costs from the Fund.

Finally, it is worth noting that the Holder-RAC relationship is not discussed in the OPA 90 legislative history, except with respect to the RAC exemption from liability.

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[28] The reason for this is that the regulatory process is cumbersome and time-consuming. Detailed requirements in the NCP will likely take years to change, whereas policy is iterative. Note that policy is also not subject to the Administrative Procedure Act, therefore not open for public comment and review, nor judicially reviewable.

[29] In my judgment, this position is directly contrary to the RAC exemption from liability, which is intended to encourage prompt and aggressive response action. *House Report 101-402, Part 2, supra*, at 84.

C. Practical Implications for Oil Spill Response

We will consider a worst-case scenario to explore the possible limitations of the federal approach to the Holder-RAC relationship.[30] In this hypothetical situation, a tanker vessel owned and operated by its own shell corporation (only asset is the vessel) has contracted with a RAC, and the RAC contract has been reviewed and approved by the Coast Guard as part of the tanker vessel c-plan. The RAC contract reflects that the RAC is excused from performance if the Holder is bankrupt or insolvent. The tanker has a spill in Prince William Sound.

Assuming the entire tanker contents were spilled, this would undoubtedly qualify as a spill posing a "substantial threat", which the OSC must take control of. Assume further that the RAC determines the Holder to be insolvent because the tanker itself was severely damaged, and refuses to perform under the c-plan. The OSC has the following options:

(1) The OSC could order the Holder to provide response, but the Holder could not comply without the cooperation of the RAC. Further, the tanker owner might simply declare bankruptcy in an attempt to protect itself from liability.

(2) The OSC could consider ordering the RAC to respond, notwithstanding its interpretation of the contract. It is open to question whether the OSC has legal authority to order action from a party not legally liable to the government to provide such action.[31] Any third party contract theories (direct enforcement of the Holder-RAC contract by the contract's beneficiary) would have to be litigated in court before RAC response action would be required.

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[30] Many of these hypothetical facts were taken from Mike Frank's letter to Sheila Gottehrer.

[31] I have not researched this issue under federal law. Based on my experience as a state government enforcement lawyer, however, the authority to issue orders is directly proportional to the order recipient's liability for some violation of law. See, also, § 4201(a)(3)(A), OPA, which directs federal agencies, states, the owner/operator and any other person participating in a removal action to act in accordance with the OSC's direction. Is the RAC covered by this section if it does not choose voluntarily to participate in the response action? Can this section of the statute be used to force a RAC to participate in the response action? I suspect that to force them to participate without reimbursement could be considered a taking of property without due process of law.

(3) The OSC could order the RAC to respond and reimburse the RAC's costs from the Fund, thus making the RAC an OSC contractor. This may be the only practical solution for a federal response, if no other federal response equipment and personnel is available for timely use in Alaska. It is assumed the OSC's willingness to federalize the response would not be influenced by the likelihood of an unsuccessful cost recovery for the Fund (since the tanker owner lost its only asset).

The OSC options do not change significantly if we assume that some lesser quantity was spilled which did not qualify as a "substantial threat" scenario, and the RAC refused to perform for whatever reason (including the Holder's cancellation of the contract). The major difference is that a viable owner/operator would still exist from whom the OSC could successfully cost recover. The potential delay in response action remains while the broken Holder-RAC relationship is discovered and addressed.

D. State Options

It appears that the federal government will not, and to some extent cannot, address the Holder-RAC relationship in a manner which satisfies RCAC and others' concerns. The state can address its concerns in three ways: (1) influence federal c-planning regulatory developments to incorporate Alaska concerns on this issue to the greatest extent possible; (2) adopt state legislation to impose RAC liability for response in the event of a spill; (3) develop state contingency planning requirements that incorporate the Holder-RAC relationship.

The first option -- influencing federal regulations -- is easy and has already been initiated. Proposed and developing proposals for the NCP, area c-plans, vessel c-plans, and fixed facility c-plans should be monitored, and informal and formal comments submitted at every opportunity.

The last two options -- liability legislation and state c-planning changes -- cannot be evaluated without an analysis of OPA 90 preemption issues. Although OPA 90 purports not to preempt state law, the nature of overlapping jurisdictions, OPA 90 legislative history and the common law of preemption suggest that duplication of requirements should be undertaken cautiously.

As the following discussion of preemption supports, imposing liability on RACs under state statute is not preempted. Contingency planning efforts should, however, be tailored to supplement (rather than contradict) federal c-planning requirements. To the extent that a void currently exists in federal requirements for c-plans under OPA 90, however, there may be a window of opportunity for quick action.

Preemption[32]

OPA 90 provides that there is no preemption of

> the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to --
>
> (A) the discharge of oil or other pollution by oil within such State; or
>
> (B) any removal activities in connection with such a discharge.[33]

Similarly, OPA 90 does not

> affect the authority of any State or political subdivision thereof --
>
> (1) to impose additional liability or additional requirements; or
>
> (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law
>
> relating to the discharge, or substantial threat of discharge, of oil.[34]

The statutory language is extremely broad -- no preemption of additional liability or additional requirements with respect to oil spills and their removal. The legislative history, however, is not as clear about the breadth of preemption. The committee reports specifically address preemption (or non-preemption) of state liability schemes, state oil spill funds (uses and sources of funding), and state penalties.[35]

There is only one instance in which state contingency plans are referred to. HR 1465, which was the basis for the conference committee report and the legislation as enacted, apparently

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[32] I have not exhaustively researched the law of preemption. This analysis is based on a review of the OPA 90 statute, its legislative history and selected preemption case law in oil spills preceding OPA 90 enactment.

[33] § 1018(a)(1), OPA.

[34] § 1018(c), OPA.

[35] See, e.g., *Conference Report, supra*, at 121; *House Report 101-402, Part 1*: Committee on Public Works and Transportation (9-18-89) at 38; *Senate Report 101-94*: Committee on Environment and Public Works (7-28-89) at 6, 17 and 18.

originally included a section stating that there was no preemption of "any authority that the State of Alaska may have to regulate oil tankers or provide for oil spill contingency plans in State waters."[36] This language is not found in OPA 90, nor does the legislative history clarify why it was dropped. It is possible that the conference committee decided that the broad preemption language of Section 1018 encompassed these concepts. Alternatively, it is possible that preemption of contingency planning was not intended.

The statements made in both the House and Senate for adoption of the conference report reflect that the Congresspersons were under the impression that the preemption issue was limited to liability and state oil spill funds.[37] Rep. Craig's statement reflects that the intent may have been to preempt state contingency planning in an effort to promote coordination and consistency.

Assuming, *arguendo*, that OPA 90 does not preempt state c-planning requirements, how will federal and state c-planning requirements work together as a practical matter? If there are contradictory requirements, whose requirements will be enforced? These types of questions are likely to be answered in the context of an industry challenge to state regulations, asserting preemption by OPA 90.

In order to avoid such a challenge, or to avoid federal support for such a challenge, it may be wise to design any state c-planning requirements to supplement, rather than contradict, federal requirements. This is difficult, however, when the federal requirements are not yet known.

If Alaska c-planning requirements can be developed before the federal NCP, area c-planning, or vessel/facility c-plan regulations are promulgated, it is possible that preemption arguments may be decided in the state's favor since contradictions will not yet be able to be determined.[38] In addition, the state's requirements may provide a minimum standard (floor) for the federal requirements to build from.

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[36] *House Report 101-402, Part 2*: Committee on Merchant Marine and Fisheries (9-18-89) at 92.

[37] I have attached my notes from these Congressperson statements on the issue of preemption at the end of this memo.

[38] The common law of preemption is that a state can act in the absence of federal regulations in a particular area. See, e.g., *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 8 E.L.R. 20255 (1978). The application of this general rule in the case of anticipated federal regulation is unknown.

4. Conclusion

The Holder-RAC relationship is not directly addressed in OPA 90, and does not appear to be addressed comprehensively in the federal government's OPA 90 implementation. The State is not precluded from addressing this issue by imposing liability on RACs or developing c-plan requirements to document or explore the relationship.

Senate Adoption of Conference Report - 136 Cong.,Rec. S11536-S11548 - 8-2-90

Sen. Kerry (Mass.): "Lastly, I want to applaud the fact that the legislation preserves the right of States to require stricter standards of liability than current international protocol standards. I believe this is a key provision in the legislation in that it preserves Massachusetts' tougher standards of liability for anyone responsible for polluting our coastline."

Sen. Stevens (Alaska) Exhibit 1 - summary of OPA 90:
A good samaritan provision protects persons (other than the spiller) acting under the direction of the President or in compliance with the NCP from liability, with the exception of gross negligence or willful misconduct

Sen. Gorton (Wash) - ... I take great pride in seeing that the Senate's insistence against preempting State unlimited liability laws prevailed in the conference. This provision was essential to preserve our right in Washington State to require unlimited liability."

Sen. Lautenberg (NJ) - The conference report also protects the right of States to impose their own standards of liability on oil operations. ... The rights of States to have tough oil spill laws are protected.

Sen. Bentsen (Texas) - The bill also preserves the right of States to have oilspill [sic] liability laws

Sen. Levin (Mich) - It also preserves the right of individual States to enact even tougher spill response and prevention measures

Sen. Moynihan (NY) - ... we did something of large importance to our Federal System and to the majority leader. We did not preempt State law in the handling of these matters.

House Adoption of Conference Report - 136 Cong. Rec. H6933-H6949 - 8-3-90

Mrs. Lowey (NY) - ... preserves the rights of States to impose liability for spills as they judge appropriate. ... The conferees wisely agreed to preserve the right of States to establish their own liability and compensation systems. States like New York, whose waters and coastlines are threatened by heavy tanker traffic, should have the freedom to impose standards that reflect the importance of the resources at risk. This legislation rightly protects those essential rights from encroachment by Federal law or international convention.

Jones (NC) - In addition, the Federal law does not preempt States, so they can impose even stricter requirements if they choose. [in paragraph discussing liability]

Conte (Mass) - Second, the legislation does not preempt State liability laws, therefore allowing States to pass even tougher standards, if they so desire.

Hammerschmidt (Ark) - This bill will ensure that we have a uniform Federal approach to liability even though it is not a national or an international approach without preemption and without the protocols.

Stangeland (Minn) - We've also included a limited immunity clause for certain public or private response efforts. This important provisions [sic] is meant to help foster greater use of cleanup contractors and cooperatives by meeting their concerns about financial risks and liability exposures.

Shumway (Cal) - And finally, this bill purports to be a comprehensive domestic regime but it is not. For 14 years, this house has strongly supported an oilspill bill which replaces the existing patchwork of State and Federal laws with one singe, clear-cut regime. Despite this longstanding, principled position, we have now bowed to the rhetoric and misperceptions of the environmental lobby and eliminated the guts of the liability section of the bill by removing the preemption provision. This bill, then, only perpetuates much of the existing confusion in liability and compensation that follows an oilspill -- the very type of confusion which originally was one of the driving forces behind the bill.

Lagomarsino (Cal) - Also, by expressly preserving States' authority to impose additional liability or requirements, and preserving the States' authority to establish their own spill funds and to impose fines and penalties, the conference report recognizes the need for States to protect their shores and lands.

Miller (Wash) - States like Washington will be able to keep their

unlimited liability laws. And Washington will be allowed to determine cleanup standards to ensure that we can protect our waters and beaches.

Ms. Snow (Maine) - In particular, I am pleased that the conferees have retained the right of the States to set their own oil spill liability limits and cleanup funds.
I say that because the State of Maine has consistently been recognized as a leader in the adoption of effective oil spill prevention, cleanup, and liability laws. Maine has more stringent safety standards than Federal law and many other States. ... I applaud the decision of the conferees to recognize that State laws, like those of Maine, should augment and not be replaced by Federal standards. ... In addition, we have taken the important step ensuring that the States also have the opportunity to enact laws that will protect their coasts. This is a vital provision that will allow States to take the necessary actions to ensure that specific needs of their marine environment are addressed.

***** Craig (Idaho) Public Works & Transpo Committee (on conference committee for S 405 and H 2004)- During conference committee consideration, I was concerned that the legislation might preempt a considerable amount of State authority, making it the sole responsibility of the Federal Government to deal with spills. This would not be acceptable -- I believe that States need to be assured an adequate role in these situations.
However, I also understand the need of the Federal Government to coordinate contingency planning and response efforts for major spills. There is no doubt that this was a difficult balance to strike, but one I believe had to be reached. As a result, I was glad that we were able to arrive at a compromise, settling upon workable Federal-State balance.

Pelosi (Cal) - Additionally, this legislation will maintain the right of States to develop their individual liability and compensation standards.

ALA[illegible]DEPARTMENT[illegible]
ENVIR[illegible]AL CONSERV[illegible]ION

SPIL[illegible]TION AND [illegible]

[illegible]6 REPOR[illegible]

[illegible]ON

R[illegible]ON CONT[illegible]TORS

HB 196 REPORT

on

RESPONSE ACTION CONTRACTORS

SUMMARY

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

INTRODUCTION

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

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

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

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

FINDINGS

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

Independent Response Action Contractors (RAC's)

Northwest EnviroService Inc.

Shannon and Wilson Inc.

Martech USA Inc.

VECO Inc.

Chempro Environmental Services (not incorporated)

Unitech of Alaska Inc.

VRCA Environmental Services Inc.

Industry Spill Response Organizations

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

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

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

Other Spill Response Organizations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RACs

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

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

INDUSTRY SPILL RESPONSE ORGANIZATIONS

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

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

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

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

Prepared by the Department of Environmental Conservation

This report was accompanied by the following attachments:

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

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

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

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

Douglas K. Mertz
G. Thomas Koester

December 6, 1991

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INTRODUCTION: PURPOSE OF THE REPORT

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

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

SUMMARY

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

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

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

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

BACKGROUND

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

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

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

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

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

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[1] Alaska Statute 46.03.822. See p. 10 infra.

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

COMMON LAW LIABILITY FOR OIL SPILLS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATUTORY LIABILITY FOR OIL SPILLS

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

AS 46.03.822: Basic oil spill liability

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

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

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

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

Subsection g) states that

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

This confused language[6] was intended to say that, while a party can contract with another party to have part or all of its liability paid for by the second party, such an agreement does not itself relieve the first party of liability or provide a defense to a damages claim. In other words, the first party remains strictly liable for the damages, but it may be able to require a second party to pay the damages under their contract. The importance of this provision is that the first party cannot escape liability by contracting with another party; it can give itself the right to have the second party cover the liability. If the second party is unable to do so, the first party must pay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

release.[9]

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

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

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

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

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

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

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

Good Samaritan statute

At AS 09.65.091, the legislature provided:

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

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

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

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

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

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

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

CONTRACTUAL MODIFICATIONS OF OIL SPILL LIABILITY

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

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

The Contracts: A Brief Summary

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

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

provisions found in the contracts.

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

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

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

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

Obligations of Parties

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

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

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

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

Concern regarding claims

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

Indemnification provisions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Insurance requirements

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

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

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

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

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

i.e., it would permit an injured party to bring its claim directly against the insurer instead of having to sue the insured party first. This requirement presented a major problem for Alyeska's clients since direct action insurance is currently not available in the maritime insurance market. Starting in October 1991 Alyeska requires that if a combination of insurance and other means of demonstrating financial responsibility is used, the total which the client must show is $1.2 billion. That amount must be made up of a combination of general business liability coverage, P&I insurance[23], and excess pollution coverage. However, according to Tesoro Alaska, Alyeska has dropped the requirement that insurance be directly actionable.

Alyeska officials have told us that the amount it now requires, $1.2 billion, was arrived at by calculating the maximum amounts for which Alyeska could be held liable in responding to a spill. The amount certainly exceeds any figure that anyone has proposed for the State to require as financial responsibility for the same activities, or which, to our knowledge, any other response organization has required of a potential client. The requirement has caused a considerable amount of difficulty for some of Alyeska's clients[24] and was the prime motivating factor behind passage of the bill which became AS 46.03.825, limiting RAC liability.[25] Currently, there is no legal limitation on the extent to which a RAC may require insurance or other concessions before it enters into a

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

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

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

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

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

Control of Cleanup and Independent Contractor Status

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

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

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

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

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

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

THE STATE'S RELATIONSHIP TO RACS

The State and liability

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

The State, as a sovereign, enjoys sovereign immunity, that is, immunity from liability because of its status as a sovereign government. Sovereign immunity, however, is more often than not a hollow protection because of the many exceptions to the doctrine. In a nutshell, although the state probably does not have a duty to others to respond to spills[30], when it does respond (as it inevitably will with large spills), it has a duty to do so with at least some degree of care. Its own actions in the field which cause injuries are likely to give rise to liability just as they would with a private RAC. But, as with private RACs, the state is not liable except for grossly negligent and intentional misconduct, as long as its actions are taken in response to an emergency. (This limited immunity, given at AS 46.03.822(h), is in addition to whatever immunity the state obtains with other RACs under AS 46.03.825.)

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

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

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

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

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

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

The State and control of response activities

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

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

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

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

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

or hourly field tasks actually performed during a response.

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

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

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

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

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

IN THE ABSENCE OF A RESPONSIBLE PARTY

Attempts to shift the burden of liability away from RACs may cause public policy concerns, but the concerns are considerably alleviated in the majority of large spills because under AS 46.03.822 and .825, liabilities will merely be shifted to the original responsible party. There will still be a party from whom injured persons can secure redress. But what happens when there is no solvent responsible party? This situation can occur because the original spiller is unknown; because the original spiller is insolvent; because the original spiller has insufficient assets or has, through complex corporate ownership structures, successfully hidden its assets; because the original spiller has successfully limited the extent of its liability under federal admiralty law or other laws[32]; or for other reasons. Can there be a situation in which a person is injured by a RAC's actions but finds himself unable to proceed against either the RAC (because it has statutory immunity) or the original responsible party (because it is missing or insolvent)?

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

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

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

CONCLUSIONS AND RECOMMENDATIONS

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

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

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

INSURANCE ISSUES RELATED TO RESPONSE ACTION CONTRACTORS

Prepared by Gene Burden
Tesoro Alaska Petroleum Company
October 30, 1991

The work plan established by the Citizen's Oversight Committee on Oil and Other Hazardous Substances (hereinafter the "COC") in response to the legislature's directives under H.B. 196 included a section on the status of insurance as it relates to the Response Action Contractor (hereinafter "RAC") as defined under AS 46.03.822. Tesoro Alaska agreed to provide input on this topic with the initial objective of determining to what extent insurance is available for RACs; the costs of such coverage; and the affects on coverage based on the existence of state responder immunity law.

INTRODUCTION

The availability and cost of insurance coverage for a RAC is subject to the same factors as other insurance applicants and can vary substantially between geographic areas based on the applicant's experience, local and state laws/regulations, and the perceived risks of a particular operation. The variability in these ratings makes concise cost comparisons between jurisdictions difficult; and based on our review, precludes offering definitive conclusions as to the specific effects of RACs liability immunity

on actual expected premiums.

The RAC liability concerns arise from damages caused by their negligence in the clean-up operations and in the disposal of the contaminating substances. The availability of public liability insurance for emergency response contractors including oil spill response contractors is typically available in the London market and is rated based on the following factors:[1]

1) Revenues and/or payroll size;
2) Historical loss experience;
3) Contractual indemnities and their value;
4) Statutory immunities; and
5) The general state of the insurance market.[2]

INSURANCE SCENARIO FOR A RAC

A recommended package of coverage for a RAC was developed by a Soriero & Seffens broker to include the following:[3]

1. Hull & Machinery: covering equipment, barges, service boats/tugs, and crew/miscellaneous boats;

   The Hull & Machinery coverage would provide

[1]Source: Mark R. Mozell, Commercial Broker, Soriero & Seffens, Inc., 1300 Post Oak Boulevard, Suite 1800, Houston, Texas 77056-3013 (713)993-9913 in letter dated August 20, 1991.

[2]Mr. Mozell reports that the London insurance market is currently suffering through its worst results in years which has prompted rises in rates and additional underwriting restrictions.

[3]Recommendations provided by Soriero & Seffens in letter dated September 20, 1991.

physical damage coverage on an "all risks" basis subject to a rate of approximately 1.25% of value. Coverage would be the usual required for vessels subject to a deductible of $25,000 each occurrence.

2. Protection and Indemnity Risks;

Protection and Indemnity covers liabilities over water arising out of the owned vessels. This can include injuries to the crew. The costs for coverage provided by Soriero and Seffens were as follows:

- Barges.....$ 7,500 each
- Crewed Boats.....$10,000 each
- Crew coverage.....$ 7,500 - $10,000 per crew member
- Pollution coverage...$25,000

The above premiums would obtain $1,000,000 coverage subject to a $25,000 deductible.

3. Real and personal property;

This would cover the office and contents, miscellaneous property and inventory, materials and equipment. The expected premium would be based on a rate of 1.0% of coverage with a $10,000

deductible for each loss.

4. Comprehensive General Liability; and

   The General Liability insurance provides the "land based" liability coverage. It is expected that the limits would be $1,000,000 with this coverage placed as underlying to an Excess Liabilities section.

5. Excess Liabilities.

   The Excess Liabilities coverage would augment the underlying placements described above. Limits for excess can presently be obtained at a pricing of approximately $2,000 per million of coverage. A $25 million limit would cost $50,000. The coverage would include Pollution liabilities on a "sudden and accidental" basis.

Our inquiry into insurance rates for RACs focused on two different RAC scenarios:

1) **SPILL CO-OP:** The model spill co-op for insurance underwriter evaluation was described as located in Alaska with approximately $10 Million in capital equipment; 15 employees; one 30,000 bbl barge; four response assist boats (24' - 40' each); 1 larger service boat (50'+); and most likely responding to small

fuel spills of less than 100 barrels. The planning standard required for crude oil response by this co-op is to remove 50,000 barrels within 72 hours after a spill.

The above description illustrates that a co-op such as described above would expect to incur annual insurance costs in excess of $245,000 as illustrated below:

> Hull and Machinery (rate 1.25% of value)...$ 12,500
> Protection & Indemnity.....$ 132,500
> Real & Personal Property.....$ 10,000
> Comprehensive general liability.....$ 40,000
> Excess Liability of $25 Million.....$ 50,000

ESTIMATED TOTAL FOR A CISPRI SIZED RAC $ 245,000

2) **GENERAL ENVIRONMENTAL SERVICE COMPANIES:** This type of firm may offer a variety of services to a wide range of clients. This could include refineries, processing plants, etc. for operations and maintenance work and for land based environmental clean-ups. In addition this firm may maintain a cadre of trained response personnel and support equipment to assist in response to a spill that is managed by another party such as a Responsible Party, a Spill Response Co-op, or a governmental entity.

Soriero & Seffens views this type of organization much differently than a pure spill response co-op. Such an organization would probably not have as much spill response equipment and as high a capital investment to insure. In addition these firms were expected to rely more heavily on limited indemnity provisions in their agreements.

A review of RAC indemnifications was attempted via a survey conducted by the Alaska Department of Environmental Conservation. The survey information solicited included questions about the level of general liability coverage maintained and its cost. In addition information regarding the RAC's requirements for indemnification was requested. The ADEC will report the results of their survey to the Citizens Oversight Council.

Tesoro Alaska has response agreements with five different response action contractors: Cook Inlet Spill Prevention & Response, Inc. (CISPRI); Alyeska Pipeline Service Company (Alyeska); VECO; Martech; and VRCRA. A summary of the relevant indemnity language in each of these contracts is provided on the following page.

SUMMARY OF TESORO ALASKA CONTRACTS WITH SPILL RESPONSE CONTRACTORS AND EXISTING INDEMNITY PROVISIONS

R A C	DATE OF CONTRACT	GENERAL DESCRIPTION OF SERVICES	INDEMNIFICATION LANGUAGE
CISPRI	5/29/91	Spill response services in Cook Inlet, Alaska	Article 7 of the Agreement is enclosed as Attachment 1 to this report.
ALYESKA	10/1/91	Spill response services (minimum of 72 hours after a spill) in Prince William Sound	Article 5 of the Agreement is enclosed as Attachment 2 to this report.

VECO	8/14/90	Back up manpower and clean up assistance in Cook Inlet	"Any damage or loss of equipment, tools or consumable, etc., utilized in the course of any response efforts will be considered part of the cost of the response effort and repair and/or replacement cost will be the responsibility of the Client. If, however, gross negligence on the part of VECO's employees is determined to be reason for said damage or loss, then VECO would stand responsible for said additional cost, but only to the extent of repair or replacement cost that were a direct result of VECO's negligence."
MARTEC	8/14/90	Back up manpower and clean up assistance in Cook Inlet and Prince William Sound	"In no event shall Contractor be liable to Client for any direct damages, other than failure of the Contractor to exercise reasonable care, nor indirect damages, such as loss of profits or loss of use of property."

VRCA	8/15/90	Back up manpower and clean up assistance in Cook Inlet and Prince William Sound	"In no event shall Contractor be liable to Client for any direct damages, other than failure of the Contractor to exercise reasonable care, nor indirect damages, such as loss of profit or loss of use of property."

CONCLUSION

There is insurance available to Response Action Contractors to cover potential damage claims arising from their activities in response to a spill. The cost of the insurance is dependent on numerous variables including the existence of indemnities and state provided immunities. The spill response co-ops such as CISPRI and Alyeska have broad indemnity provisions in their response action contracts while the contracts examined that have been executed by the General Environmental Service Companies are more limited.

ATTACHMENT I

CISPRI

RESPONSE ACTION CONTRACTOR

May 15, 1991

Article 7. Indemnification

4.2. any applicable remedial action plan approved by the Alaska Department of Environmental Conservation,

4.3. any applicable contingency plan held by CISPRI and approved by the Alaska Department of Environmental Conservation, and

4.4. any applicable order by a State or Federal agency asserting jurisdiction over the actual or threatened release.

5. Spill Notification. User shall provide, and confirm to CISPRI the receipt of, all notifications of any release or threatened release of liquid hydrocarbons to the Alaska Department of Environmental Conservation in the manner prescribed by law.

6. User Warranty. User warrants that all directions and mandates given by User to CISPRI in connection with any release or threatened release of liquid hydrocarbons will be consistent with the plans and orders described in Paragraph 4, above. In the event CISPRI believes that a direction or mandate given by User to CISPRI is not consistent with such plans and orders, CISPRI may suspend or discontinue all or any part of the services being provided, or to be provided, by CISPRI under this agreement.

7. Indemnification.

7.1. Special Recitals. User acknowledges that:

7.1.1. Neither this agreement nor any other instrument requires User to use the services of CISPRI or its contractor(s), or to use equipment or materials acquired by CISPRI in connection with any spill control or clean up activities;

7.1.2. User is solely responsible for all planning, preparation, equipment acquisition, contracting and operations in connection with spill control or clean up necessitated by a spill originating from User's equipment or facilities;

7.1.3. For the purposes of any dispute related to the enforceability of these indemnification provisions, User waives any claim that:

7.1.3.1. it did not have adequate opportunity to participate in decisions made by or on behalf of CISPRI with regard to planning, equipment and materials acquisition and maintenance, operations, and other functions;

7.1.3.2. it did not have adequate opportunity to inspect the equipment, materials and supplies that have been acquired by CISPRI and to evaluate their condition and usefulness to the member in the event of a spill;

7.1.3.3. it did not have adequate opportunity to evaluate the ability of contractor(s) engaged by CISPRI to be of assistance to User in the event of a spill;

7.1.4. Any and all equipment, supplies, materials, and services provided by CISPRI to User are provided "as is, where is," and neither CISPRI nor any member of CISPRI makes any representation as to the merchantability or fitness for any particular purpose of the same.

7.1.5. If these indemnification provisions were not included in this agreement, CISPRI would be unwilling to enter into this agreement.

7.2. Indemnification. It is the intent of the parties that User shall assume all indemnification responsibilities provided herein. User hereby agrees to indemnify, defend, and

hold harmless CISPRI, its members, directors, officers, managers, executive committee, contractors and employees, together with all officers, directors, employees and affiliates of each of the members of CISPRI, and each of them, from and against any and all claims, demands, causes of action, damages, costs, fees (including reasonable attorneys' fees), expenses, penalties, losses or liabilities, in law or in equity, of every kind and nature whatsoever, arising out of or in any way connected with:

7.2.1. Any and all actions, or failures to act, on the part of CISPRI, its members, staff and contractor(s), carried on under or in connection with materials, equipment, supplies or services (hereinafter, collectively, "assistance") requested or received by User, including, without limitation, the activities of members of CISPRI as participants in business entities providing vessels, equipment and material to CISPRI;

7.2.2. Any and all penalties, fines or other liability imposed on account of the violation of any law or regulation, compliance with which is left by these bylaws to User, if such penalties, fines or other liability arise out of or are in any way connected with assistance requested or received by User; and

7.2.3. Any and all liens, claims, assessments, levies and stop notices of labor, and any other liens or claims on account of overdue or other deficient handling of charges for labor or materials, if such liens, claims, assessments, levies, and stop notices of labor, or other liens or claims arise out of or are in any way connected with assistance requested or received by User.

7.3. Extent of Indemnification. The indemnification obligations of User are fully effective even if such claims, demands, causes of action, damages, costs, expenses, penalties, losses or liabilities were caused or contributed to, in whole or in part, by:

7.3.1. The active or passive negligence or other fault (including gross negligence) of CISPRI, its members, staff or contractor(s), or their agents, representatives or employees;

7.3.2. Any equipment or materials supplied to User by CISPRI, howsoever caused, whether by failure, malfunction or defect, latent or otherwise, in said equipment or materials, or by the maintenance thereof; or

7.3.3. The liability without fault of CISPRI, its members or contractor(s), or their agents, representatives or employees.

The obligations of indemnification are not limited, restricted, or in any way affected by the amount of insurance carried by User, or by any terms or conditions of any insurance policies. The obligations of indemnification shall survive the termination of this agreement, the dissolution of CISPRI and the withdrawal of any member from CISPRI.

7.4. Indemnification Duties. User assumes, without limitation, the following obligations:

7.4.1. At its own cost, expense and risk, to accept and conduct the defense of any and all suits, actions and other legal proceedings that may be brought or instituted against the indemnitees, or any of them, and prosecute any appeals;

7.4.2. To pay and satisfy any and all settlements, final judgments and decrees that may be paid by, or enforceable against, the indemnitees, or any of them;

7.4.3. To reimburse the indemnitees, and each of them, for any and all reasonable attorneys' fees, costs and expenses incurred by the indemnitees, or any of them, in order to enforce the indemnification provisions of these bylaws; and

7.4.4. To reimburse the indemnitees, and each of them, for any and all reasonable attorneys' fees, costs and expenses incurred by the indemnitees, or any of them, prior to the assumption of indemnification responsibilities by User in connection with any and all suits, actions and other legal proceedings described above.

7.4.5. After User has assumed such responsibility, any and all indemnitees are entitled to participate at its or their sole cost and expense in the defense of any suit, action, or other legal proceeding without affecting the indemnity obligations of this agreement.

7.5. Administration.

7.5.1. In requesting that CISPRI furnish assistance, and in utilizing and receiving the benefits of assistance, User reaffirms thereby its commitment to perform its indemnification obligations as provided herein.

7.5.2. CISPRI may, if it so elects, pay and discharge any liens or overdue charges for labor, equipment, or materials incurred by User as may be reasonably necessary to protect the interests of CISPRI. Any and all such payments shall be for the account of User.

7.5.3. The provision of assistance by CISPRI to User does not constitute or affect any construction contract under AS 45.45.900.

8. Insurance. At all times during the term of this agreement, User shall carry and maintain in force with carriers satisfactory to CISPRI, Workers' Compensation (including adjustments for marine service) and Employers' Liability Insurance in accordance with the law that may be applicable to its employees, and Comprehensive General Liability and Automobile Liability Insurance covering injury or death of persons and property damage in an amount not less than ten million dollars. User shall provide certificates of insurance for each of these policies at the request of CISPRI. No such insurance will be materially changed during the term of this agreement without at least thirty days' written notice to CISPRI. Nothing contained in this clause shall limit or waive User's legal or contractual responsibilities to CISPRI or others.

8.1. User agrees to have its insurers add CISPRI as an additional insured or loss payee under any policies of insurance applicable to this agreement, and to obtain a waiver of its insurers' rights of subrogation against CISPRI and CISPRI's members and their employees.

8.2. In the event User elects to self-insure, CISPRI reserves the right to approve such self-insurance and to request and receive such information as CISPRI deems necessary to evaluate the self-insurance provided by User. In any case, if User elects to self-insure, User shall treat CISPRI as an additional insured or loss payee and hereby waives any rights of subrogation against CISPRI and CISPRI's members and their employees.

9. Accounting and Audit.

9.1. CISPRI agrees that all financial settlements, billings, and reports rendered to User, as provided for in this agreement, and/or any amendments to it, will reflect properly the facts about all activities and transactions handled for the account of User, which data may be relied upon as being complete and accurate in any further recording and reporting made by User for any purpose.

ATTACHMENT II

ALYESKA

RESPONSE ACTION CONTRACTOR

October 1991

Article V. Indemnify

Alyeska shall use its best efforts to include in any contracts with its subcontractors a provision similar to the foregoing so that Contracting Vessel shall have access to pertinent records of such subcontractors for the purpose of verifying the accuracy of Alyeska's costs in performing services under this Agreement.

ARTICLE V

INDEMNITY

5.1 Alyeska and Contracting Vessel recognize that, in connection with the performance of this Agreement: (i) AS 46.03.826(15) defines a response action contractor as a person who is retained by a person potentially liable for a release or threatened release of a hazardous substance to provide response actions to such release; (ii) AS 46.03.825(a) provides that a person who is a response action contractor with respect to a release or threatened release of oil (defined to mean a derivative of a liquid hydrocarbon and includes crude oil, lubricating oil, sludge, oil refuse or another petroleum-related product or by-product) whose act or omission is not contrary to an order of the federal or state on-scene coordinator is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the release or threatened release or from the response action contractor's act or omission in response to the release or threatened release, unless the person bringing a claim against the response action contractor proves by a preponderance of the evidence that the response action contractor (1) would have been liable for the initial release or threatened

release under AS 46.03.822, (2) acted with gross negligence or intentional misconduct, or (3) without the approval by the federal or state on-scene coordinator, substantially deviated from an oil spill contingency plan previously approved under AS 46.04.030, and the plan was either prepared by that contractor for a party responsible for the release under AS 46.03.822 or that contractor previously agreed to comply with the terms of that plan under a contract with parties responsible for the release under AS 46.03.822; provided, however, the above limitations of liability do not apply to (1) an action for personal injury or death, (2) an action for damages to tangible personal property not caused by oil, or (3) an act or omission that occurs more than 15 days after the release; (iii) the Services to be performed by Alyeska are in the public interest to protect the environment and are in the best interests of Contacting Vessel to attempt to minimize its exposure to liabilities; (iv) accidents and events may occur that result in the damage to or loss of property, in the injury to or death of persons, in spillage, or pollution, or environmental damage; (v) the extraordinary nature of the Services may require actions by Alyeska, its Owner Companies or their respective subcontractors that can give rise to fines, penalties, and claims, including but not limited to claims based on negligence; (vi) Alyeska has based the charges for its Services on the understanding that Contracting Vessel, or anyone asserting rights on its behalf, will not challenge Alyeska's right to be indemnified as provided in this Article V and that without such assurances Alyeska

considers its potential risks and liabilities to be too substantial to provide the Services for the charges set forth herein; and (vii) certain risks and liabilities may be covered by Financial Responsibility, Insurance, or other means not addressed in this Agreement. Notwithstanding any such Financial Responsibility, Insurance, or other means that Alyeska or Contracting Vessel may have or acquire to cover such risks and liabilities, and notwithstanding that certain legal authorities may have questioned the concept of one party contractually agreeing to indemnify another party for its sole negligence, Alyeska and Contracting Vessel fully understand and recognize that the nature of the Services to be provided under the terms set forth in this Agreement make it appropriate and equitable to allocate the risks and liabilities as set forth in this Article V. Therefore Alyeska and the Contracting Vessel agree that responsibility for risks and liabilities arising out of the performance of (or the failure to perform) the Services by Alyeska shall be allocated to Contracting Vessel in the manner set forth in Sections 5.2 and 5.3, regardless of who may be at fault or otherwise responsible under any statute, rule, or theory of law, even if the subject damage, loss, injury or death is wholly or partially attributable to the active or passive negligence of Alyeska or its Owner Companies or Alyeska's subcontractors or the unseaworthiness of any vessel.

5.2 The following risks and liabilities that may occur as a result of or in connection with the Services performed by Alyeska are allocated solely to the Contracting Vessel:

(a) Any damage to or loss of: barges, lighters, tugs and other vessels owned, chartered or used by Alyeska or third-parties, specifically including but not limited to all items set forth in Sections 4.1 (e),(f) and (g) of this Agreement; docks, berths, wharfs, shoreside facilities and installations; and navigation aids, and any other property that may be damaged or lost.

(b) Bodily injury including but not limited to physical injury, death, sickness, disease or any other type of injury to: employees of Alyeska, its Owner Companies or the Contracting Vessel; employees of subcontractors of Alyeska, its Owner Companies or Contracting Vessel; and all other persons.

(c) Any fines, penalties, or other charges or costs imposed by any federal, state or local authority.

(d) Any claims for environmental damage to, or loss of, natural resources, wildlife, or public and private property; any other claims concerning the environment; any claims by fishermen, boat owners, or any other party or interest asserting any claim.

5.3 For the risks and liabilities set forth in Section 5.2, Contracting Vessel shall indemnify, defend and hold harmless Alyeska, its Owner Companies, their affiliates (including any person or entity controlling, controlled by, or under common control with Alyeska or any of its Owner Companies), subcontractors of Alyeska who assert claims against Alyeska, and each of their respective directors, officers, employees, agents, successors, and assigns (collectively, the "Indemnified Parties")

against all claims, liabilities, obligations, demands, losses, deficiencies, or damages in personam and/or in rem (including but not limited to compensatory, incidental or consequential damages, to the fullest extent permitted by law) that may be asserted against the Indemnified Parties by any party. The obligations undertaken by Contracting Vessel in this Article V are in addition to the reimbursement of expenses provided in Article IV.

5.4 The Contracting Vessel shall, at its sole expense, investigate, respond to, and provide defense for, any claim, demand or suit for which it gives an indemnity herein. Nothing in this Article V is intended to, or shall be construed to, constitute an admission of liability on the part of either Alyeska, its Owner Companies or Contracting Vessel with respect to third parties, and Alyeska and Contracting Vessel expressly disclaim any intention that any third party (other than the Indemnified Parties and third parties providing evidence of Financial Responsibility) shall be a third party beneficiary of the provisions of this Article V.

5.5 Contracting Vessel shall reimburse the Indemnified Parties for all legal expenses (including but not limited to actual attorneys' fees, costs and allocated expenses for in-house legal services) related directly or indirectly to (i) the Spill Prevention Services that are in addition to the regular vessel escort services and Oil Spill Response Services provided by Alyeska, (ii) any claim against the Indemnified Parties for which liability is allocated to Contracting Vessel, or (iii) any action

or proceeding to enforce the rights provided the Indemnified Parties under this Article.

5.6 Notwithstanding any of the provisions of this Article V, Alyeska and Contracting Vessel agree that the Contracting Vessel's responsibility to Alyeska to indemnify, defend, and hold harmless does not include risks and liabilities arising out of Alyeska's gross negligence, willful misconduct and/or criminal misconduct.

ARTICLE VI

FINANCIAL RESPONSIBILITY

6.1 Contracting Vessel, prior to the effective date of this Agreement, shall provide written evidence to Alyeska of Financial Responsibility, Insurance or a combination thereof.

6.2 The minimum amount of Financial Responsibility that Contracting Vessel shall provide to cover Contracting Vessel's obligations under this Agreement shall be in an amount equal to one billion dollars ($1,000,000,000); provided, however, if Contracting Vessel uses a combination of Financial Responsibility and Insurance, or solely Insurance, to underwrite its obligations under this Agreement, the amount shall be One Billion Two Hundred Million Dollars ($1,200,000,000). In the event Alyeska agrees to a lesser amount of financial responsibility and/or insurance during the term of this Agreement, the lesser amount will also be available to Contracting Vessel by a mutually agreed to amendment to this Agreement.

LAW OFFICES
GROSS & BURKE
A PROFESSIONAL CORPORATION
424 NORTH FRANKLIN STREET
JUNEAU, ALASKA 99801

AVRUM M. GROSS
SUSAN A. BURKE

907 586-2777

October 10, 1991

To: Sheila Gottehrer

From: Av Gross

Re: Legislative History of Immunity for Response Action Contractors under Oil Pollution Act of 1990

Section 4201(a) of OPA 90 amends 311(c) of the Federal Water Pollution Control Act to create a limited liability for certain persons who assist in the clean up of an oil spill. The relevant portion of Sec. 4201 reads as follows:

SEC. 4201. FEDERAL REMOVAL AUTHORITY.

(a) IN GENERAL. -- Subsection (c) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321(c)) is amended to read as follows:

"(c) FEDERAL REMOVAL AUTHORITY. --

* * * * * * * *

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

(B) Subparagraph (A) does not apply --
(i) to a responsible party;
(ii) to a response under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.';
(iii) with respect to personal injury or wrongful death; or

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

* * * * * * * *

You have asked that we provide you with a brief history of how this limited exemption from liability became a part of OPA 90 and, in addition, an analysis of what was intended by the Congress that included the provision in the Act. Toward that end, we have reviewed the complete legislative history of OPA 90, including all committee reports and the floor debate. That review has produced a fairly clear picture of both the history of and intent behind the limited liability provision.

OPA 90 is the result of an amalgamation of two separate proposals; S.686, which was introduced in the Senate on April 4, 1989 and HR 1465, which was introduced in the House on March 16, 1989. Neither of the bills as initially introduced included any provision limiting the liability of parties who assisted in cleaning up an oil spill. The Senate bill went through limited committee hearings and passed the Senate on August 15, 1989· without any provisions relating to the liability of response action contractors.

The House of Representatives held extensive hearings on HR 1465 as well as on HR 3027, a similar measure. The early mark ups in the Public Works and Transportation Committee and the Science, Space and Technology Committee did not deal with the issues of liability for those who assist in spill

clean-up activities. The first committee to focus on that problem was the Committee on Merchant Marine and Fisheries. The committee added a new section to HR 1465 to deal with clean up activities directed by the President. The new section (Sec. 431 of HR 1465) amended section 311(c) of the Federal Water Pollution Control Act to read in part as follows:

Sec. 431. FEDERAL REMOVAL AUTHORITY

(a) REMOVAL. -- Paragraph (1) of section 311(c) of the Federal Water Pollution Control Act (33 U.S.C. 1321(c)(1) is amended to read as follows"

(c)(1)(A) The President shall ensure an effective and immediate removal of a discharge of oil or hazardous substance --

(i) into or on the navigable waters; or

(ii) on the adjoining shoreline to these navigable waters; or

(iii) on the waters of the exclusive economic zone or

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

in accordance with the National Contingency Plan, any other contingency plans prepared under subsection (j) of this section, and applicable state law.

(B) The President many remove or arrange for the removal of a discharge, or the threat of a discharge, of oil or a hazardous substance at any time.

(C) The President may direct all Federal, state, responsible party and private actions to remove a discharge, or the threat of a discharge, of oil for a hazardous substance.

(D) <u>When the President retains or directs a person (other than a responsible party) under the authority of subparagraph (B) or (C) of this paragraph, that person is not liable for removal costs or damages other than personal injury or wrongful death arising from his or her removal activities conducted in</u>

> accordance with the direction of the President, except in the case of gross negligence or willful misconduct.
> (E) Each responsible party shall act in accordance with the National Contingency Plan, the applicable contingency plans required under subsection (j) of this section, and as otherwise directed by the President.
> (F) Nothing in this paragraph affects the liability of a responsible party under the Oil Pollution Prevention, Removal, Liability and Compensation Act of 1989 (emphasis supplied).

The Committee explained the meaning of the limitation on liability at page 84 of its September 18, 1989 report in these terms:

> Under section 311(a)(1)(D) the Committee allocated the primary risk of liability arising from removal and cleanup activities to the responsible party rather than to those persons responding to the spill under the direction of or retained by the Federal government. The Committee intends to ensure immediate response to oil and hazardous substance spills and believes this provision is necessary in light of the substantial financial risks and liability exposure which would otherwise deter vessel operators, spill cooperatives, and spill contractors from providing active assistance. To avoid paralysis of remedial action to spills, this paragraph provides that those persons -- other than responsible parties -- who are retained or directed by the President to participate in a cleanup action will not be liable for removal costs or damages as defined in this legislation, except in the case of gross negligence or willful misconduct. This limitation of liability does not affect liability for wrongful death or personal injury. Nor does it diminish the liability of those responsible for the spill nor the amount of compensation available to claimants. This limited protection will encourage individuals to assist in cleanup

> operations without fear of collateral attacks from responsible parties. The Committee expects that all who take part in removal actions will act responsibly and believes that the elimination of the liability except for gross negligence or willful misconduct will serve as sufficient protection.
>
> Section 311(c)(1)(E) requires the responsible party to act in accordance with the National Contingency Plan, other applicable contingency plans, and as otherwise directed by the President. This provision is also intended to underscore the fundamental obligation that the responsible party has to be prepared at all times and to take immediate and effective action in the event of a discharge. Report of the Committee on Merchant Marine and Fisheries on the Oil Pollution Prevention, Removal, Liability and Compensation Act of 1989, September 18, 1989 - Part 2.

The limitation on liability for simple negligence drafted by the Committee of Merchant Marine and Fisheries differs significantly from the language that eventually became part of OPA 90. The proposed limitation as only applicable to a person who was retained or directed by the President to clean up the spill. It had no application to volunteers or to contractors retained by responsible parties to clean up spills or to anyone else except those directed or retained by the Federal government.

The House debated and subsequently passed HR 1465 on November 9, 1989. The provision for limited liability drafted by the Merchant Marine and Fisheries Committee was included in the final bill without amendment.

Since different versions of the bill had passed the House and the Senate, the two measures were sent to a conference committee. Through the Washington D.C. office of Birch, Horton, Bittner and Cherot, I have obtained a copy of an undated memo that purports to set out the status of negotiations between the Senate and House conferees as of March 13, 1990. I have no way of independently verifying the accuracy of the contents of the memo. Assuming the memo is accurate, during the course of the negotiations the Senate conferees offered a new section to replace the section on limited liability, which had passed the House. The proposed section would have read as follows:

> [A]mend proposed CWA Sec. 311(c)(1)(C)(1) as follows:
>
> "No person shall be liable for removal costs or damages under this Act or the Oil Pollution Act of 1990 as a result of actions taken or omitted in the course of rendering care, assistance, or advice consistent with the National Contingency Plan or at the direction of an on-scene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any discharge of oil or the substantial threat thereof."

If the memo is accurate, the Senate proposal is the first instance in which a broader immunity was proposed for those who respond to a spill. The Senate proposal apparently sought to immunize those who responded to a spill so long as their activities were consistent with the National Contingency Plan or occurred at the direction of an

on scene coordinator. The language of the proposal is not crystal clear, was never explained in detail and did not appear in the final act; but it does represent the first effort to expand immunity beyond those working at Presidential direction.

The language that ultimately was adopted as a part of OPA 90 first appears in the tentative agreement of the conference committee contained in its report on HR 1465, issued on July 26, 1990. Section 4201 of the bill proposed by the conference committee contains the language that ultimately became section 4201 of OPA 90. Because the language was new, the conference committee included a specific explanation as to the meaning of the provision. That explanation is contained at page 146 of the conference report accompanying HR 1465 issued on August 1, 1990, to the House of Representatives. The report states:

> The Conference substitute establishes a new paragraph (4) of FWPCA section 311(c) to provide limited immunity for persons involved in oil spill cleanup. The provision is similar to that contained in section 420(a) of the House bill except that the limited immunity is extended not only to those persons retained or directed by the Federal On-Scene Coordinator but also to those persons rendering care, assistance or advice consistent with the NCP. The substitute's provision also clarifies that it does not apply to a response under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.
>
> This subsection provides immunity from liability established under the substitute for those taking action in response to an oil

> spill or the threat of a spill whether that action is performed under the aegis of the National Contingency Plan or under the direction of the President. This takes into account the fact that the NCP and Presidential orders may not cover every detail or eventuality of a spill response and that actions that are in keeping with the overall objectives of the NCP or Presidential order are deemed to be within the scope of this provision. This section reflects the Conferees' intention that responses to oil spills be immediate and effective. Without such a provision the substantial financial risks and liability exposures associated with spill response could deter vessel operators, cleanup contractors, and cleanup cooperatives from prompt, aggressive response.

There was no specific debate on the section of the conference committee report limiting immunity for response action contractors. Therefore, we can assume that the conference committee report will be taken as the definitive source of legislative intent on response action liability, particularly since the report specifically discussed the section in question. Two points bear mention in reference to the final provision. First, what started as an idea to protect those who were retained by Federal authorities to clean up a spill grew into a Congressional effort to insure "that responses to oil spills be immediate and effective." Congress apparently was convinced that if the risk of exposure to liability was not limited to gross negligence or intentional conduct, it "could deter vessel operators, cleanup contractors, and cleanup cooperatives from prompt, aggressive response." Disputes over the meaning of the act,

then, will be resolved with this Congressional intent in mind -- a deliberate relaxation of liability to encourage more aggressive spill response efforts. However, even though Congress clearly intended to take some risks to encourage spill response actions, it did not extend immunity to all situations in which a party participated in cleaning up a spill. Even in the expanded version, Congressional immunity only applies to actions "consistent with the National Contingency Plan or as otherwise directed by the President." The Federal Act does not go as far as Alaska's present law, which specifically permits deviations from a contingency plan so long as they are not "material." While it is possible that a court would permit parties seeking immunity under Federal law to show that Congress meant to allow some deviation from the National Contingency Plans so long as that deviation was not material, the words of the act, at least, do not permit any deviation.

Hopefully, this analysis of the federal immunity provision will prove of some benefit in formulating an overall strategy concerning HB 196. Please make this memorandum available to all appropriate parties and advise them to contact us directly if they desire any further information.

MEMORANDUM

NOV 04 1991

State of Alaska
Department of Law

TO: Citizen's Oversight Council on Oil and Other Hazardous Substances

DATE: October 30, 1991

FILE NO.: 663-92-0026(c)

TEL. NO: 465-3600

THRU: Janice Adair, Special Asst. Dep't Envtl. Conservation

SUBJECT: Litigation Threat to Response Action Contractors

FROM: Robert K. Reges Jr.
Assistant Attorney General
Natural Resources Section - Juneau

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

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

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

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

GOOD SAMARITAN CASES

Introduction

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

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

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

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

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

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

Reported Cases

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

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

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

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

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

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

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

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

> . . . [I]f the Coast Guard undertook responsibility for stemming the flow of the oil from the TAMANO and for the cleanup operation, and the Coast Guard negligently discharged such assumed responsibilities, it is clear, as the United States concedes, that the United States may be found liable for any resulting damage on *Indian Towing* principles.
>
> * * *
>
> . . . [I]ndeed, those cases which have applied *Indian Towing* principles in an admiralty context make clear that the United States, in undertaking any "good Samaritan" task such as buoyage or pollution abatement, is liable in tort for the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This argument was rejected by the court. It said:

> In addition we are also of the opinion that the facts fully meet the requirements of the good Samaritan doctrine. The only element of any doubt is that of "worsening" the plight of the crew members of the Donald Ray. We think that adequately established.
>
> The members of the families of the crew of the Donald Ray and . . . fishermen on the other fishing vessels in Mayport were greatly exercised. They were maintaining a very close contact with the Coast Guard. The Coast Guard was likewise anxious to keep in contact with them. Had these persons known the true facts, steps could have been taken to reach the Donald Ray in the time remaining up to 7:00 p.m. when darkness set in and visual contact was lost. As we pointed out, the SS Henry M. Dawes was in the vicinity -- not over five or six miles and 30 minutes away -- and ready to respond to a search. And the other fishing vessels in Mayport were available to go out as one did later that night and as several did during the succeeding days.
>
> All of these interested persons were standing by, as they properly might, while the extensive, experienced facilities of the Coast Guard-directed search went on. But they were ignorant of several critical facts [namely, that the Coast Guard operation had gone awry.] Ignorance of these facts and continued reliance upon the Coast Guard's celebrated skill made independent action unnecessary. But it kept them from taking action which, in all probability, would have been successful.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. The Coast Guard has no affirmative duty to render aid to a vessel or person in distress;

2. If the Coast Guard does respond, it is not required to provide any particular kind of equipment;

3. The Coast Guard is not held to any higher standard of care in its rescue operations than a private person;

4. The standard of care exhibited by rescuers is measured by the unique circumstances of the rescue.

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

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

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

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

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

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

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

> "Of all branches of jurisprudence, the admiralty must be the one most hospitable to the impulses of man and law to save life and limb and property . . . .
>
> [T]o eliminate a deterrent to voluntary, impulsive response to need as the forces of nature or man, or both, imperil ship or seamen, the law accords a considerable latitude in the standard of performance of the salvage service."

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

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

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

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

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

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

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

5/ 614 F. Supp. at 954. Citations omitted.

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

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

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

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

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

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

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

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

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

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

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

LEGISLATIVE HISTORIES

The Oil Pollution Act of 1990

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

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

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

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

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

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

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

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

8/ 136 Cong. Rec H6273 (August 1, 1990).

The Comprehensive Environmental Response Compensation and Liability Act

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

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

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

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

to self insure. This, in turn, drove up the costs of clean-up as monopolistic opportunists were able to increase their rates. 11/ To ensure a competitive marketplace of insured contractors, RACs were exempted from liability.

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

CONCLUSION

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

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

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

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

THE STATE OF ALASKA'S PARTICIPATION IN SPILL RESPONSE AND PREPAREDNESS IN THE STATE

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This report summarizes the indirect expenditures that the State of Alaska is currently making for oil spill response and preparedness in the state. The primary expenditure that the state makes is the loss in wellhead value -- and therefore in state royalties and severance taxes -- incurred when spill response expenditures are included in the transportation costs used to arrive at wellhead value. The summary does NOT include direct budget expenditures such as those incurred by the Department of Environmental Conservation for contingency plan development and review.

I. THE STATE'S ROLE IN CRUDE OIL PRODUCTION AND TRANSPORTATION IN ALASKA

The State of Alaska occupies two distinct roles with respect to oil production. On the one hand, the state is unique among oil producing states in that it is the owner of almost all of the land from which oil currently is produced. The state's role as landowner is a proprietary role. The state is in the same position as would be any private entity that owned the land. It is through this proprietary interest that the state retains a royalty interest in oil produced from leases on state land.

On the other hand, Alaska, like every other oil producing state, exercises sovereign power over activity within the borders of the state. It is through this sovereign power that the state levies taxes, like the severance tax, and exercises regulatory control, like requiring contingency plans, over activities.

Because almost all oil production in Alaska has been from state leases, the state's sovereign interest and its proprietary interest are often considered together and, as a result, confused. But the powers, rights and responsibilities flowing from these two roles are very different. If oil development occurs on federal lands, such as in the Arctic National Wildlife Refuge, Alaska may see the first significant production within its borders in which the state does not have a proprietary interest.[1] Thus, it is important to understand and consider the differences between the two roles.

A. The State's Proprietary Interest in Oil Production.

Oil and gas leases on state lands -- like virtually all oil leases in the United States on public or private land -- are written to include a royalty obligation to compensate the landowner for its ownership. Royalty obligations vary on different leases; the state has generally offered its leases on a straight percentage of the oil produced, but has occasionally leased oil on a net

[1]The land in the Refuge is federally owned. Under current law, the federal government would be required to share royalties from production on federal leases within the Refuge with 90% going to Alaska and the federal government retaining 10%. Thus, if the federal leases provide for a 12.5% royalty, the state's share would be 11.25%. However, Congressional proposals to open the Refuge to leasing have considered changing or eliminating this split.

profit share basis. Table I sets out the royalty obligation for the oil fields in Alaska, and the amount of production from each field. As can be seen from the table, almost of the oil currently being produced in Alaska carries a 12.5% royalty obligation. Two producing fields in Cook Inlet are on federal leases; federal law provides that the state receive 90% of the 12.5% royalty on these leases. At Milne Point, on the North Slope, most of the leases carry a 20% royalty, as do some leases at Endicott.[2]

The state's role as landowner on state leases is exactly the same as it would be if the state were a private party. The state enjoys no particular advantage over private parties in the same position. Thus, when the state litigates over royalty obligations, it is a contractual dispute in which the state enjoys no presumptions in its favor.

Table I shows that the total annual production of oil in Alaska in 1990 was 647.3 million barrels. The state's average royalty percentage of this oil is 12.7%. Thus, 82.21 million barrels produced in 1990 belonged to the state as royalty owner. The state may take its royalty oil "in kind" or "in value". That is, the state may take possession of the actual barrels of oil and dispose of them itself, or it may require the producer to pay the state the value of the royalty oil. The state takes almost all of its oil in value, but does take some in kind, which it sells to

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[2]Approximately 80% of the oil produced at Milne Point carries a 20% royalty obligation. The remainder carries a 12.5% obligation. The average royalty at Milne Point is 18.3%. At Endicott, about 25% of the oil carries a 20% royalty, with the remainder at 12.5%; the average royalty is 14.4%.

local refineries. When the state does take its royalty in kind, its actual physical possession of the barrels exists for only an instant. When oil is produced, it is assumed that the royalty obligation will be satisfied in value. Thus, if a producer produces 100 barrels, theoretically all of the 100 barrels "belong" to the producer, but each barrel is encumbered by a 12.5% value obligation to the state. If the state then notifies the producer that it will take certain of its royalty barrels in kind, it does so only after having arranged for the disposal of those barrels. The state takes possession of the barrels at the lease automatic custody transfer (LACT) meter; it simultaneously transfers the oil to the royalty purchaser at that moment. Thus, the state is never in actual physical possession of the oil, so as to expose the state to liability if the oil spilled.

Even though the state never actually physically possesses royalty oil, the state's royalty interest places it in substantially the same position as any other producer of oil. Policy makers may want to consider the state's ownership of this oil when reviewing the impacts on state revenue of spill prevention expenses. It may be seen as appropriate that the state absorb the costs associated with spill preparedness commensurate with its ownership interest.

B. The State's Sovereign Interest in Oil Production.

The state is exercising its sovereign powers when it taxes and regulates oil production and transportation activities in the state. This power extends to the borders of the state,

regardless of the status of land ownership. Thus, oil produced from federal or private lands within the state is taxed the same as oil produced from state lands.[3] Similarly, the state may exercise its police power to regulate all oil activities within the state, regardless of ownership. However, offshore oil produced outside the three mile limit is not subject to the state's sovereign power to tax or to regulate, except as offshore activities have near shore or onshore impacts.

The taxes applicable to oil activities in the state are: 1) the Oil and Gas Properties Production Tax (AS 43.55)(the severance tax) which includes the Conservation Surcharge; 2) the Oil and Gas Conservation Tax (AS 43.57); 3) the Corporate Income Tax (AS 43.20); and 4) the Oil and Gas Properties and Pipeline Transportation Property Tax (AS 43.56).

1. The Oil and Gas Properties Production Tax (AS 43.55). Alaska's production tax, or severance tax, is levied on value at the point of production.[4] For most fields, the nominal tax is 15% of value.[5] This nominal rate is reduced by the Economic Limit Factor (ELF), which is a formula that is sensitive to well and

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[3] On federal leases, the state taxes the oil produced by the private leaseholder. It may not, of course, tax the federal royalty.

[4] The severance tax has a cents-per-barrel "floor" that becomes the tax if it exceeds the percent of value amount. The cents-per-barrel tax is also subject to the ELF. However, prices have never fallen to the point that the cents-per-barrel alternative was used, although they approached the point in 1986.

[5] The nominal rate is 12.5% in a new field for the first five years.

field productivity. The higher the field productivity the closer the severance tax approaches the nominal rate of 15%. The actual severance tax rate for oil producing fields in Alaska is set out in Table I. This rate is levied against the non-royalty production in the field. In 1990, oil and gas producers paid $972.3 million in severance taxes. State Department of Revenue, "Revenue Sources Book" Spring 1991, p. 50 (hereafter, Revenue Sources Book).

The severance tax includes a "conservation surcharge" of $.05 cents per barrel on the same barrels taxed by the severance tax. AS 43.55.200. The legislature may appropriate the proceeds of the surcharge to the Oil and Hazardous Substance Release Fund; if the amount in the fund exceeds $50 million, the surcharge is suspended. AS 43.55.210-240. Since its inception in 1989, the surcharge has not been suspended. In 1990, oil and gas producers paid $26.9 million under this tax. Id.

2. The Oil and Gas Conservation Tax (AS 43.57). The conservation tax is 4 mills ($.004/bbl) on the same production taxed under the severance tax. Conceptually, the tax pays for the Alaska Oil and Gas Conservation Commission. In 1990, $2.4 million was collected under this tax from oil and gas producers. Id.

3. The Corporate Income Tax (AS 43.20). The corporate income tax rate is 9.4% for income above the threshold level of $90,000. Every corporation organized for profit in the state is subject to the tax. Corporations that do business in more than one taxing jurisdiction apportion their income to Alaska for tax purposes by use of the apportionment formula set out in AS 43.19 (the

Multistate Tax Compact). An apportionment formula estimates in-state income by starting with the entity's overall income, and then apportioning a part of that income to the state through the use of formula indicators of business activity (such as payroll, property and sales). Overall income is multiplied by the average percentage of the factors in the state to arrive at taxable state income. Corporations engaged in the production or pipeline transportation of oil use a special formula set out in AS 43.20.072.

Spill prevention and response expenditures are deducted from gross income by every entity that incurs them, if that entity is organized for profit. However, calculating the impact of these deductions on state revenue cannot be done without access to the confidential tax returns of the taxpayers. This is because the use of apportionment formulas makes the relationship between expenditures and impact indirect. If a corporation does business only in Alaska, and deducts a spill related expense, then the revenue impact is simply 9.4% times the amount of the deduction. But most corporations, especially oil companies, do business in many jurisdictions. The spill expense is then deducted from worldwide income, and a fraction of that income is apportioned to Alaska.[6] Depending upon the magnitude of the corporation's out-of-state activities, the impact of the deduction is diluted to a greater or lesser degree. (At the same time, spill related expenditures in other jurisdictions reduce income tax collections

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[6] In 1991, the legislature repealed "worldwide unitary" apportionment for most taxpayers. HB 12. However, it retained the worldwide unitary approach for oil and gas taxpayers.

in Alaska.) An accurate analysis, or even a rough estimate, of impact cannot be done without access to tax returns.

For this reason, income tax impacts are not analyzed in this report. However, unlike the wellhead value reductions in severance taxes and royalties which reflect only spill expenditures in certain areas of the state, income tax deductions are taken everywhere that they occur. Thus, while Alyeska's expenditures impact severance taxes and royalties and Tesoro's expenditures do not, the expenditures of both Alyeska and Tesoro impact income taxes. Corporate income taxes collected from oil and gas taxpayers in 1990 were $117.2 million. Revenue Sources Book at 50.

4. The Oil and Gas Production and Pipeline Transportation Property Tax (AS 43.56). The oil and gas property tax is a 20 mill tax levied on the "hardware" associated with oil and gas production and pipeline transportation. Although the tax is a state tax, municipalities are permitted, with certain restrictions, to levy property taxes on the same property. Taxpayer payments to a municipality are a credit against the state tax.

Oil spill equipment that is associated with production or pipeline transportation activities is taxed under this law. Thus, Alyeska's expenditures for pipeline and terminal spill protection are presumable taxed, as are the North Slope producers' expenditures, including those of Alaska Clean Seas. However, because of the set-off provision for municipal taxes, the state receives only a small portion of the revenue produced by this tax. While it would appear at first glance that the state should see

increased revenue as a result of a property tax on pollution equipment, in fact, as described below, the revenue effects can be negative. The state collected $89.8 million from this tax in 1990. Id.

II. THE NET-BACK METHODOLOGY AND STATE REVENUES

An Alaska oil producer's liability for both the state's severance tax (the Oil and Gas Properties Production Tax (AS 43.55) and the state's royalty is based on the value of the oil at the point of production. Because most Alaska oil is not sold at the point of production, a "net-back" methodology is used to establish this value. Sales in the lower 48 states are netted back to the wellhead by deducting the costs of transporting the oil between Alaska and the market. This calculation generates a value at the point of production. Those sales that are made at the wellhead or elsewhere in Alaska are generally valued by reference to the price received for the oil sold in the lower 48 states.

Use of this methodology means that there is a direct relationship between transportation expenditures (including spill prevention and response expenses) and wellhead value. The revenue effect of transportation expenditures for Alaska North Slope crude (ANS) is approximately 25%. That is, for every $1.00 deducted by a producer as a transportation cost, state revenues from severance taxes and royalties are reduced by $.25.[7] Thus, if spill response equipment and operating expenses are included in the costs of transporting oil, state revenues are reduced accordingly, and the

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[7] Horst (see note 9, post), Table 2, line 36.

state is, in effect, paying 25% of these costs.

A. What goes into the net-back.

Several categories of spill-related expenditures affect well-head value. These include:

1. Conservation Surcharge payments by producers. Department of Natural Resources and industry sources indicate that at least some producers deduct the $.05/barrel tax in calculating royalty and severance tax liability. If this deduction is uniformly claimed throughout the industry, then the net surcharge is really only $.0375 per barrel instead of $.05. Since collections under this tax in 1990 were $26.9 million, the wellhead revenue impact could be as high as $6.7 million. It is not clear why this tax is viewed as a transportation charge to be used in the net-back.

2. MPA/MSRC. The Marine Preservation Association (MPA) is a voluntary association of oil companies that assesses dues based on oil transported in the United States. The MPA makes grants to the Marine Spill Response Corporation (MSRC), which intends to provide depots of spill response equipment throughout the United States.

According to Bob Aldag, President of the MPA, the association members pay dues to the association based on the amount of oil shipped. The association looks first to the recipient of the oil -- that is, the entity receiving the oil at a dock or terminal -- for payment. If that entity is an association member, it pays dues on that shipment. If that entity is not a member, the

association next looks to the owner of the receiving terminal for payment. If neither the recipient nor the terminal owner is a member, the association then looks to the shipper.

Theoretically, it would seem that if the charge is paid by the recipient, then it is not a transportation charge and should not be included in the net-back. Much Alaska production is shipped by a producer to the producer's own refinery, so that the same entity is both the shipper and the recipient. Oil company and state sources indicate various treatments of these expenditures -- some say they deduct $.05/barrel, others $.005/barrel from wellhead value. Some may not deduct the charge at all. Without access to confidential information, it is impossible to estimate the magnitude of deductions for this charge, and their total impact on wellhead value. Depending upon the treatment of these payments by producers, the wellhead revenue impact could be as high as $8 million in a year.

3. TAPS tariff charges. The most significant spill-related element in the net-back methodology is the tariff effect of expenditures made by Alyeska. Alyeska's expenditures for spill prevention and clean-up equipment and operation are rolled into the TAPS tariff, and have the effect of reducing wellhead value for both severance tax and royalty purposes.[8] Alyeska has provided a summary of its spill-related expenditures, which is attached as

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[8]Alyeska has provided summaries of its expenditures. Alyeska, of course, does not set the TAPS tariffs; rather, each owner company of the pipeline files its own rate with FERC. For the purpose of this report, it is assumed that all Alyeska expenditures make their way into the tariff of one owner company or another.

Exhibit 1. The summary shows expenditures from 1989 to the present, and projects expenditures through 1997. Total actual costs to date have been $208.3 million; an additional $400 million is projected through 1997, for a total of $608.3. Assuming a 25% state revenue effect, the state's share of these expenditures would be $152.1 million.

However, capital expenditures are not simply included in the tariff in the year in which they are incurred, but rather are depreciated over time. Using the numbers provided by Alyeska, the Washington, D.C. firm of Horst and Frisch has performed an analysis of the impact on the tariff of these expenditures, and the resulting reduction in state severance tax and royalty revenues.[9] Their analysis is attached as Exhibit 2 (hereafter, "Horst"). They calculated the net present value of the revenue impact of these expenditures, through 2011, to be $154.1 million, a number very close to simply taking one quarter of the expenditures.

It should be noted that this number is the net present value of expenditures <u>through 1997</u>, calculated out to 2011. Their Table 2, lines 1 and 2, shows operating expenditures and capital expenditures for each year. Because the summary provided by Alyeska did not project costs beyond 1997, these two lines show no additional expenditures after that year. It is to be expected that there will be operating and capital expenditures in these years; an

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[9]Horst and Frisch, on contract with the State, performs tariff analyses of TAPS. The Department of Environmental Conservation agreed to pay for their time to perform the analysis included in this report.

analysis that included estimates of these expenditures would, of course, show a higher net present value.

The annual revenue impact of Alyeska's expenditures is between $16.1 and $19.2 million from 1991 through 1997. Horst, first bar chart and Table 2, line 37. This represents 25% of the $65 to $78 million that the TAPS owners will be including in the tariffs each year for Alyeska's expenditures. Horst Table 2, line 35. Thus, the state is, in effect, paying about $18 million a year for spill response capabilities along the pipeline and in Prince William Sound.

4. AS 43.56 property taxes. Property taxes levied on pipeline and terminal activities -- including spill prevention expenditures -- are incorporated into the tariff. Thus, for every $1 of property tax collected, the state loses $.25 in severance taxes and royalties, for a net tax of $.75. However, because of the set-off provision for municipal taxes (described above) the state does not actually collect the $1 in property tax that is levied. Rather, the municipality in which the property is located collects the lion's share of the tax. When the municipality's share exceeds 75% (as it does, for example, in Valdez) and when the tax can be included in the tariff, the state actually loses revenue by levying the tax. According to the Department of Revenue, Valdez's share of the proceeds of AS 43.56 is now 81%. Thus, if the state collects $1.00 in property tax, $.81 goes to Valdez. But wellhead revenues go down by $.25 because the tax is incorporated into the tariff. Thus, the state loses $.06 for every dollar of

tax paid.

According to Alyeska and the Department of Revenue, spill equipment associated with marine transportation is not taxed under AS 43.56. (Municipalities may in some instances tax this property.) Alyeska's figures indicate that it has spent $23 million in capital expenditures for the pipeline and terminal spill prevention equipment. If this property is assessed at this amount under AS 43.56, then the tax on it would be $460,000 ($23 million X 20 mills). At $.06/$1.00, the state is losing about $27,600 a year because of the property tax on spill equipment.[10]

B. Marine Transportation or Pipeline Costs?

The expenditure summary that Alyeska provided breaks out expenditures to date into three categories: pipeline, terminal and Prince William Sound. (Projected expenditures were not broken out into categories.) The third category accounts for three fourths of Alyeska's expenditures ($157.9 million of $208.3 million, and presumably includes escort vessels, skimmers, barges and the like, as well as the costs to operate those services.

The theoretical basis for including pipeline and terminal costs in the tariff seems clear. It is not so clear that the costs of providing protection in Prince William Sound are theoretically a tariff item as opposed to a marine transportation expense. There are two ramifications of this distinction that should be

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[10]Some of the pipeline expenditures are no doubt outside the Valdez municipality. Depending upon the municipal tax rate in other municipalities, this number may be reduced. However, the average municipal share of AS 43.56 taxes is 75%.

considered.

1. In a net-back calculation, it is largely irrelevant whether a transportation expense is allocated to pipeline tariff or marine transportation. The cost reduces wellhead value either way. There is, however, one exception to this. Some producers, such as Arco, have settled their dispute with the state over royalty obligations not only for past years but for the present and for future years as well. These settlements use a formula that incorporates, and thereafter ignores, marine transportation costs. That is, the settlements agree upon a Valdez price at a certain point in time: a price that is net of marine transportation costs. This price is then indexed to a market-basket of oils for which there is a known market value. If the index goes up, the royalty value at Valdez goes up by the same degree. Marine transportation costs no longer need be considered. The Valdez price is then netted back to the wellhead using the average actual TAPS tariff.[11] In this situation it <u>does</u> make a difference whether the expense is allocated to the tariff or to marine transportation. If it is allocated to the tariff, it will further reduce wellhead value. If it is allocated to marine transportation, it will not. At this

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[11]This methodology has been criticized by some because as the price of oil fluctuates, the presumed transportation costs also fluctuate, in a way that may not reflect reality. For example, suppose the starting price at Valdez were $10 per barrel, calculated using average marine transportation costs of $1 per barrel. If the index then raises the Valdez price to $20, implied transportation costs have theoretically risen to $2 per barrel, whenever no actual increase in costs may have occurred. Defenders of the settlements have pointed out that if the index falls, implied transportation costs also can fall below actual transportation costs.

point in time, Arco is the only major producer to have made such a settlement; however, such settlements are being pursued by the state and other producers, for both tax and royalty obligations.

In this situation, if costs that are properly considered marine transportation expenses instead go into the tariff, state revenues are being inappropriately impacted. Arco currently produces about 28% of the state's production, with a royalty obligation of 12.5% on that production. Of the $154.1 million in lost revenue that Horst & Frisch calculate as the net present value of spill costs, about half is royalty and half is tax. Arco's royalty share of that amount (28% X $154.1 million x .5) is $21.6 million. If three quarters of that amount was incurred for marine transportation expenses in Prince William Sound, Arco's royalty payments will have been inappropriately reduced. The net present value of that reduction would be $16.2 million. If all producers settled using similar formulas, for both tax and royalty, the state would be losing $115.6 in wellhead reductions that should have been allocated to marine transportation.

2. The second consideration relates top Alyeska's unique and somewhat perplexing role as a response action contractor in Prince William Sound. Alyeska is a consortium of regulated pipeline companies, each of which is a common carrier whose rates are subject to review by the Federal Energy Regulatory Commission (FERC).

When Congress passed the Trans-Alaska Pipeline authorization act in 1973, it included language imposing a strict

liability standard -- up to $50 million -- for pollution caused by the permit-holder's (Alyeska's) activities. The language establishing this liability was extremely broad:

> If any area within or without the right-of-way or permit area granted under this title is polluted by any activities conducted by or on behalf of the holder to whom such right-of-way or permit was granted, ...

In 1990, as part of the Oil Pollution Act (P.L. 101-380, 104 Stat. 484, this language was amended as follows:

> If any area in the State of Alaska within or without the right-of-way or permit area granted under this title is polluted by any activities related to the Trans-Alaska Pipeline System, including operation of the terminal, conducted by or on behalf of the holder to whom such right-of-way or permit was granted,...

According to Rob Shoaf of Alyeska, the "in the State of Alaska" language was added to limit liability to waters within three miles of shore -- the state boundary. The implication that might be drawn from that amendment is that Congress intended for the permit-holder to be strictly liable for spills out to the three mile limit. If this is so, then Alyeska's role as a response action contractor for spills in Prince William Sound is truly unique; other response action contractors, such as CISPRI, have no such statutory liability.

Alyeska states that it believes its role in Prince William Sound is that of a volunteer -- that its provision of response services there is "strictly a matter of commercial contract" between Alyeska -- and not the TAPS carriers -- and shippers. Letter dated November 20, 1991, attached as Exhibit 3,

at 2. As such, it believes it needs no authority to require financial responsibility or insurance in connection with these services. Presumably, then, it believes its insurance requirements of shippers are not subject to review by FERC. If this is true, then it is difficult to understand why it is appropriate for the TAPS carriers to include the cost of these services in their tariff filings. If the enterprise is strictly Alyeska's, then logically Alyeska should charge for the services; they should not be paid for through the tariff.

Alyeska states that including the costs in the tariff "equitably distributes the costs of those services among their beneficiaries." Id. However, this is not precisely true; while most of the oil shipped out of Valdez does indeed belong to the same companies that are the TAPS carriers, some oil is shipped by non-owner companies. There is no theoretical connection between carrying the oil on TAPS and shipping out of Valdez; theoretically, all of the oil leaving Valdez could be shipped by non-owners companies. If this were the case, then including the costs for Prince William Sound protection in the tariff would not "equitably distribute" the costs among the beneficiaries. Alyeska states that the Prince William Sound "capabilities" are available in the event of a terminal spill at Valdez; in their view, this connection provides some justification for including the costs in the tariff.

Alyeska's approach seems theoretically inconsistent. On the one hand, if the response services are truly an enterprise taken on by Alyeska in which the owner companies are not involved,

then the costs of the services should not be borne by the owner companies, or passed on to the pipeline shippers through the tariff. Alyeska should probably charge shippers for the service (including those shippers who are also owner companies). Alyeska's position that its bonding (insurance) requirement does not require authority or regulatory review is consistent with this approach.

On the other hand, if the costs of marine spill rotection in Prince William Sound appropriately belong in the tariff, then the costs are the owner companies' costs. In this case, all of the costs and requirements, including Alyeska's insurance (bonding) requirements would require regulatory authority and would be subject to review by the FERC. Its requirements then must be reasonably necessary and non-discriminatory.

III. COMPARATIVE SPILL COSTS: COOK INLET AND PRINCE WILLIAM SOUND

This section compares expenditures for spill response and preparedness in Cook Inlet (CISPRI) and Prince William Sound (Alyeska), and analyzes state participation in those expenditures. The comparison should be viewed with caution for a number of reasons. First, capital expenditures should be compared, but they are lump sum expenses, providing the basis for response for a number of years. Thus, they cannot readily be analyzed on a per barrel or other volume basis. Second, a per barrel analysis is only one way to look at the risk of a spill. Some would argue that the risk of a spill is more related to the number of voyages than barrels. Finally, while activities in Prince William Sound are limited to the transportation of crude oil, CISPRI provides

response capabilities for transportation of crude, transportation of refined product, and onshore and offshore production.

CISPRI assesses its members based upon a weighting of those activities; offshore production and tanker and barge transportation are given full volume weight while onshore production, pipelines and dock transfers are weighted at one tenth of their volume. See, CISPRI's Quarterly Cost Participation Percentages for 4th quarter 1990 and 1st quarter 1991, attached as Exhibit 4. Since their total costs cover all of these activities, and since CISPRI has apparently incorporated some view of the relative risk of each of these activities into its assessment methodology, it seems reasonable for the purpose of this analysis to use the volumes as weighted by CISPRI.

With these limitations in mind, the following analysis can provide an order-of-magnitude comparison.

	Cook Inlet	PWS
Equipment Expenses (total)[12]	$14	$48.1
Operating Expenses (annual)[13]	$6	$42.5
Volumes (mmbbl) [14]	74.4	654.6

[12] Alyeska's "total" expenditures are those submitted by them for the period March 1989 through September, 1991. CISPRI's total was calculated by adding the total value of the equipment that is used as the basis for determining CISPRI's rental rates to members.

[13] Alyeska's annual operating costs were determined by averaging the monthly cost for the period covered by their submission, and annualizing. CISPRI's monthly costs were estimated to be $500,000 by Gene Burden of Tesoro, and by Linda White of CISPRI.

[14] CISPRI's fourth quarter 1990 and first quarter 1990 weighted total volumes, annualized; TAPS throughput (DNR report).

Comparing operating expenses with volumes, it can be seen that CISPRI spends $.081 per weighted barrel in operating costs while Alyeska spends about $.065 per barrel. On a volume basis, CISPRI's operating costs are 125% of those of Alyeska. When total equipment costs are compared to annual volume, CISPRI'S ratio is $.188 per barrel, while Alyeska's ratio is $.073 per barrel. CISPRI's ratio is 275% that of Alyeska.

As set out above, the state effectively pays one quarter of Alyeska's expenditures, since all (100%) of Alyeska's expenditures go into TAPS tariffs. In Cook Inlet, only part of the activity covered by CISPRI affects wellhead value calculations. Further, the severance tax rate is reduced to zero by the Economic Limit Factor in all Cook Inlet fields. Thus, only royalties are affected by spill response expenditures in Cook Inlet. The average per barrel royalty in Cook Inlet is 12.3%. Table I.

Total production in Cook Inlet is about 11.2 million barrels annually. Table I. Since CISPRI's activities cover both production and tanker transportation, we can assume that each barrel is counted twice in CISPRI's assessment methodology, once when it is produced and again when it is transported. Thus, of the 74.4 million weighted barrels, 22.4 -- or about 30% -- would be production or crude transportation barrels, the spill-protection costs of which would be deducted in arriving at wellhead value for royalty purposes.

We can adjust the costs for Cook Inlet and Prince William Sound to reflect these costs net of state participation. Thus,

Alyeska's costs are reduced by 25% (100% X 25%), while CISPRI's costs are reduced by 30% of the average royalty of 12.3%, or 3.7%. Reducing the costs in the table above by these percentages produces the following table:

	Cook Inlet	PWS
Equipment Expenses (total)	$13.5	$36.1
Operating Expenses (annual)	$5.8	$31.9
Volumes (mmbbl)	74.4	654.6

Now, comparing operating expenses net of state participation, CISPRI spends $.078 per barrel, while Alyeska spends $.049. The ratio of equipment costs to volume is $.181 for CISPRI and $.055 for Alyeska. When state participation is netted out, CISPRI's operating expenses are 159% of those of Alyeska, and its equipment-to-volume ratio is 329% that of Alyeska.

Two conclusions can be drawn from this analysis. First, CISPRI, presumably because of its lower volume, spends significantly more on a volume basis for spill protection in Cook Inlet than does Alyeska in Prince William Sound. Second, when the state's participation in these expenditures is factored in, the difference becomes much greater.

TABLE I

SUMMARY OF ROYALTY INTERESTS AND TAX RATES BY FIELD
OIL

	Royalty	Average Severance Tax Rate	Production (MM Barrels) 1990
NORTH SLOPE			
Endicott	25.9% @ 20.0% 74.1% @ 12.5%	9.5%	37.7
Kuparuk	12.5%	13.2%	107.2
Lisburne	12.5%	0.1%	14.5
Milne Point	78.4% @ 20.0% 21.6% @ 12.5%	0.0%	6.6
Prudhoe Bay	12.5%	14.9%	470.1
Total North Slope			636.1
Average North Slope	12.7%	12.1%*	
COOK INLET			
Beaver Creek	11.25%**	0.0%	.2
Granite Point	12.5%	0.0%	1.5
McArthur River	12.5%	0.0%	4.3
Middle Ground Shoal	12.5%	0.0%	2.7
Swanson River	11.25%**	0.0%	1.9
Trading Bay	12.5%	0.0%	.6
Total Cook Inlet			11.1
Average Cook Inlet	12.3%	0.0%	
TOTAL STATE			647.3
AVERAGE STATE	12.7%	11.9%*	

* The tax rates shown for each field are the nominal rate reduced by the Economic Limit Factor. The tax does not apply to royalty barrels. The average rate shows the effective rate for all production, including royalty.

** Beaver Creek and Swanson River are federal leases, carrying a royalty obligation of 12.5%. The State receives 90% of this royalty, or 11.25%.

Sources: Department of Natural Resources, "Historical and Projected Oil and Gas Consumption", June, 1991; Department of Revenue, Dr. Charles Logsdon.

OIL SPILL RELATED EXPENSES*
(IN MILLIONS)
MARCH 1989 THROUGH SEPTEMBER 1991

	PROJECTS	O & M EXPENSE	TOTAL
TERMINAL			
1989	0	14.6	14.6
1990	1.1	6.1	7.2
1991 YEAR TO DATE	1.7	2.5	4.2
TOTAL TERMINAL	2.8	23.2	26
PRINCE WM SOUND			
1989	17.7	29.8	47.5
1990	17.8	48.1	65.9
1991 YEAR TO DATE	12.6	31.9	44.5
TOTAL PWS	48.1	109.8	157.9
PIPELINE			
1989	0	0	0
1990	1.4	0.6	2
1991 YEAR TO DATE	18.8	3.6	22.4
TOTAL PIPELINE	20.2	4.2	24.4
TOTAL ACTUAL	71.1	137.2	208.3

*NOTE: Does not include legal expenses.

SUMMARY BY YEAR			
1989	17.7	44.4	62.1
1990	20.3	54.8	75.1
1991 YEAR TO DATE	33.1	38	71.1
TOTAL ACTUAL	71.1	137.2	208.3
EST. FUTURE COST 10/91 - 12/97	90	310	400
TOTAL ACTUAL & EST	161.1	447.2	608.3

Exh. 1-1

OIL SPILL RELATED EXPENSES
(IN MILLIONS)
FUTURE YEARS PROJECTION

	PROJECTS	O & M EXPENSE	TOTAL
EST. REMAINING 1991	14.3	13.2	27.5
1992	23.9		23.9
1993–1997	51.8		51.8
EST PER LONG RANGE PLAN:			
1992		56.3	56.3
1993–1997		240.5	240.5
TOTAL EST. COST	90	310	400

Exh. 1-2

HORST & FRISCH

1101 CONNECTICUT AVENUE NW, SUITE 400
WASHINGTON, DC 20036

TELEPHONE 202/296-4005 FAX 202/296-4008

November 5, 1991

Ms. Deborah Vogt
P.O. Box 1065
Juneau, AK 99802

Dear Deborah:

Enclosed please find an analysis of the State revenue impact of actual (March 1989 through September 1991) and projected (October 1991 through December 1997) oil spill related capital and operating expenditures. The net present value of this impact, computed as of January 1, 1992, is $154.1 million.

Oil spill related operating expenditures directly affect tariff rates in the year in which they are incurred. On the other hand, oil spill related capital expenditures affect tariff rates over time through the following cost of service elements: (1) depreciation, (2) recovery of deferred return, (3) after-tax margin, and (4) income tax allowance.

The enclosed bar charts reflect (1) the actual State revenue impact of these expenditures through 2011 and (2) the net present value of these amounts through 2011 computed as of January 1, 1992.

Please let me know if you have any questions concerning the methodology employed or the assumptions utilized in this analysis.

Sincerely,

Kenneth A. Timbers

Kenneth A. Timbers

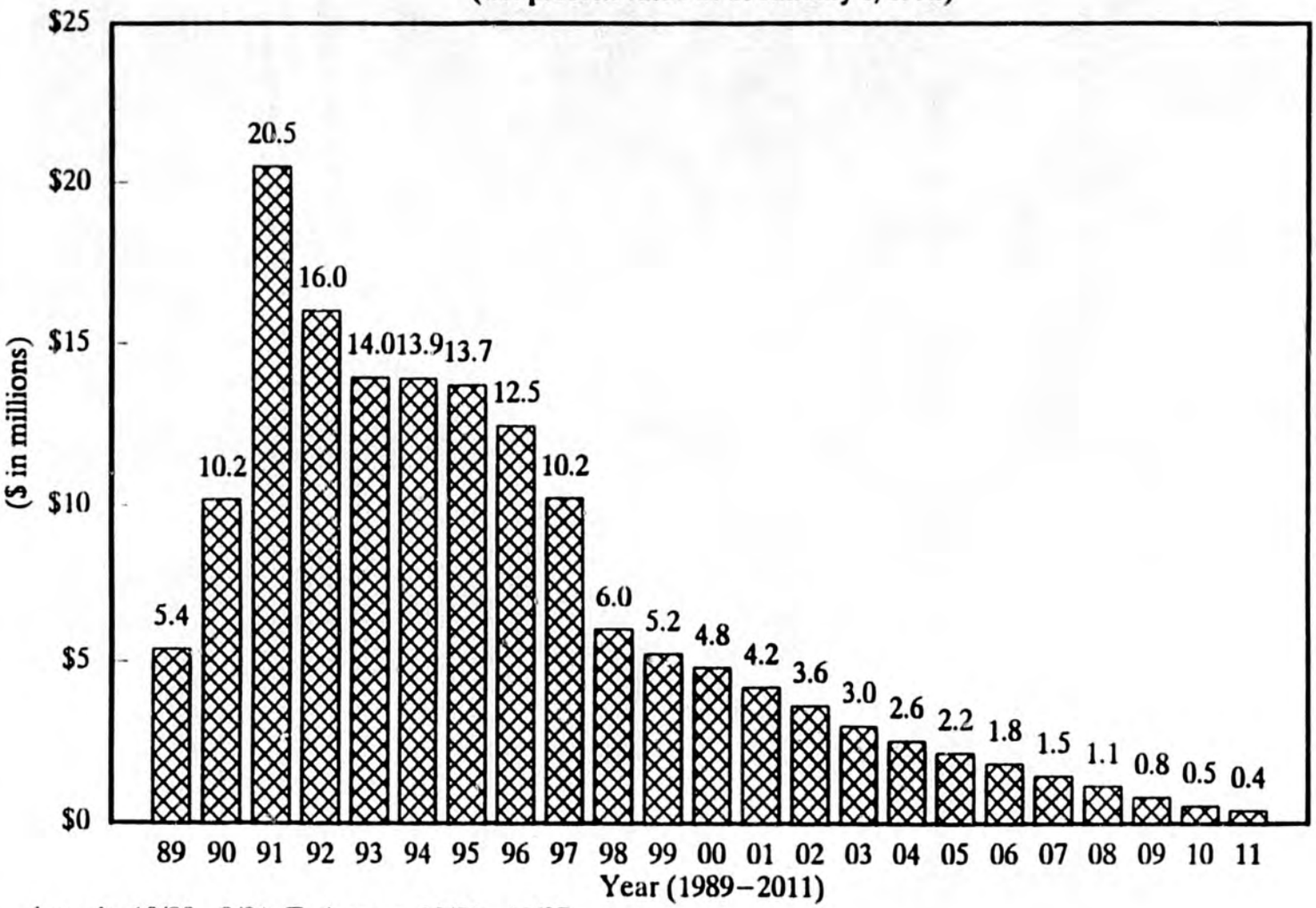
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cc: Robert Loeffler, Morrison & Foerster

Exh 2

STATE REVENUE IMPACT OF OIL SPILL RELATED EXPENDITURES FOR 1989–1997

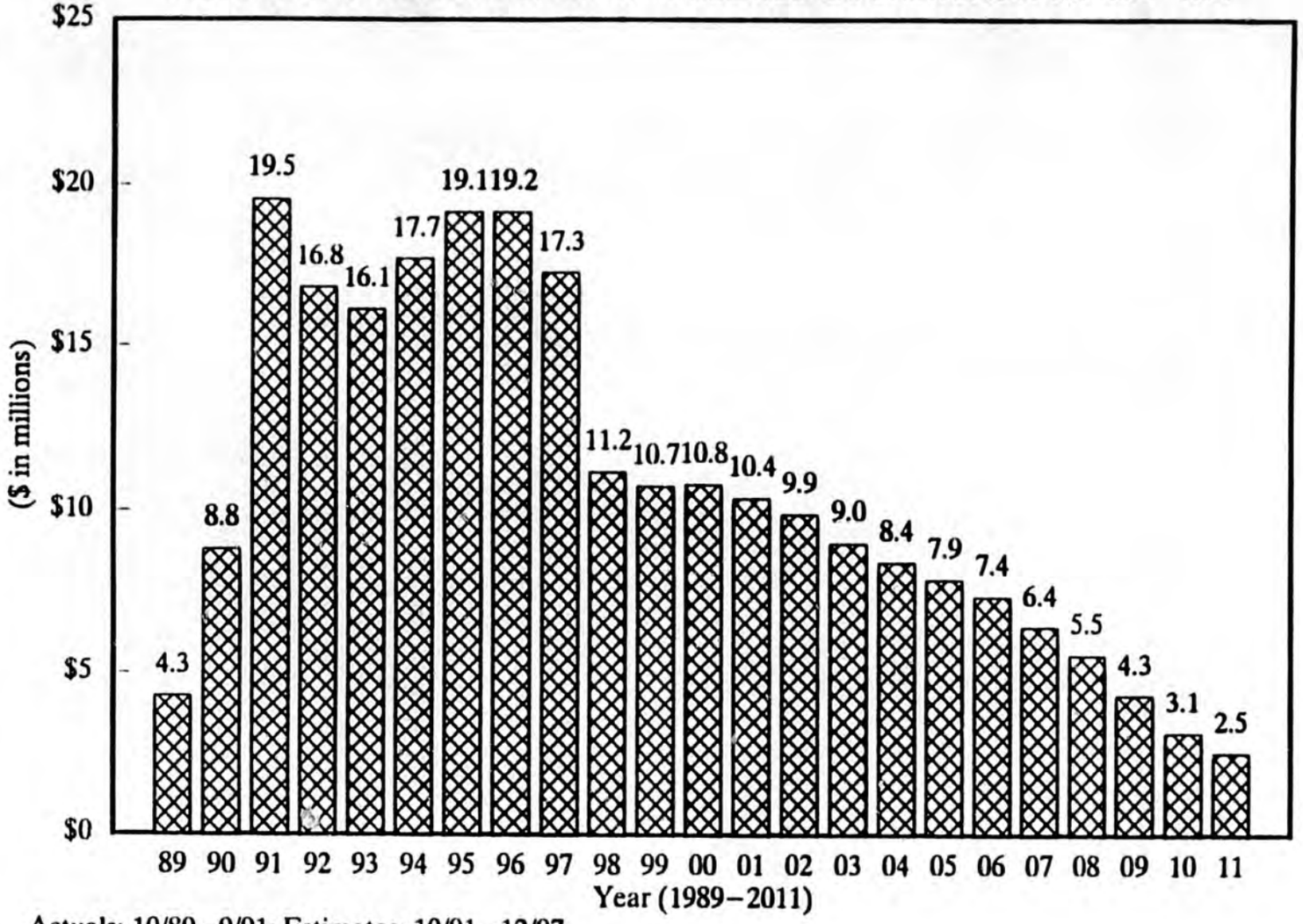
(net present value as of January 1, 1992)



Actuals: 10/89–9/91; Estimates: 10/91–12/97

Horst & Frisch, November 4, 1991

STATE REVENUE IMPACT OF OIL SPILL RELATED EXPENDITURES FOR 1989–1997



Actuals: 10/89–9/91; Estimates: 10/91–12/97
Horst & Frisch, November 4, 1991

TABLE 1: OIL SPILL RELATED EXPENDITURES (1989-1997) ($M)

Horst & Frisch
11/04/91

	1989	1990	1991	1992	1993	1994	1995	1996	1997
ACTUALS (3/89-9/91)									
Terminal Expenditures									
Projects	$0.0	$1.1	$1.7						
Operations & Maintenance	14.6	6.1	2.5						
Prince William Sound Expenditures									
Projects	17.7	17.8	12.6						
Operations & Maintenance	29.8	48.1	31.9						
Pipeline Expenditures									
Projects	0.0	1.4	18.8						
Operations & Maintenance	0.0	0.6	3.6						
ESTIMATES (10/91-12/97)									
Projects	0.0	0.0	14.3	23.9	10.36	10.36	10.36	10.36	10.36
Operations & Maintenance	0.0	0.0	13.2	56.3	48.1	48.1	48.1	48.1	48.1
TOTAL PROJECTS	17.7	20.3	47.4	23.9	10.4	10.4	10.4	10.4	10.4
TOTAL OPERATIONS & MAINTENANCE	44.4	54.8	51.2	56.3	48.1	48.1	48.1	48.1	48.1
TOTAL EXPENDITURES	62.1	75.1	98.6	80.2	58.5	58.5	58.5	58.5	58.5

Source: Alyeska figures per 10/30/91 fax from Tina Kobayashi

TABLE 2: STATE REVENUE IMPACT OF OIL SPILL RELATED EXPENDITURES ($M)

Horst & Frisch
11/04/91

	1989	1990	1991	1992	1993	1994	1995	1996	1997
1 Oil Spill Related Operating Expenditures	$17.7	$20.3	$47.4	$23.9	$10.4	$10.4	$10.4	$10.4	$10.4
2 Oil Spill Related Capital Expenditures	44.4	54.8	51.2	56.3	48.1	48.1	48.1	48.1	48.1
DEPRECIATION									
3 Additions to Depreciable Property	44.4	54.8	51.2	56.3	48.1	48.1	48.1	48.1	48.1
4 Depreciation Factors		21.46%	22.61%	23.45%	23.69%	24.28%	25.36%	24.31%	19.56%
5 Depreciation Base		44.4	89.7	120.6	148.6	161.5	170.4	175.3	180.8
6 Depreciation		9.5	20.3	28.3	35.2	39.2	43.2	42.6	35.4
7 Depreciable Property Balance at Year End	44.4	89.7	120.6	148.6	161.5	170.4	175.3	180.8	193.5
ACCUMULATED DEFERRED INCOME TAX									
8 State ADIT - EoY	(0.2)	(0.1)	0.6	1.5	2.7	3.9	5.2	6.1	6.0
9 Federal ADIT - EoY	(0.7)	0.1	2.9	6.8	11.8	17.1	22.9	27.6	30.1
10 Total ADIT - EoY	(0.9)	0.1	3.5	8.3	14.5	21.0	28.0	33.7	36.1
RECOVERY OF DEFERRED RETURN									
11 Deferred Return Base		0.0	1.9	4.9	7.6	10.6	13.2	15.3	17.4
12 Deferred Return Factors		21.46%	22.61%	23.45%	23.69%	24.28%	25.36%	24.31%	19.56%
13 Recovery of Deferred Return		0.0	0.4	1.1	1.8	2.6	3.3	3.7	3.4
14 Inflation Adjustment Base		34.9	70.8	96.1	119.2	130.3	137.0	144.3	159.4
15 Inflation Rate		5.34%	4.88%	4.00%	4.00%	4.00%	4.00%	4.00%	4.00%
16 Inflation Adjustment		1.9	3.5	3.8	4.8	5.2	5.5	5.8	6.4
17 Deferred Return at Year End	0.0	1.9	4.9	7.6	10.6	13.2	15.3	17.4	20.4
AFTER-TAX MARGIN									
18 Depreciable Property Balance at Year End	44.4	89.7	120.6	148.6	161.5	170.4	175.3	180.8	193.5
19 Deferred Return at Year End	0.0	1.9	4.9	7.6	10.6	13.2	15.3	17.4	20.4
20 Total ADIT - EoY	(0.9)	0.1	3.5	8.3	14.5	21.0	28.0	33.7	36.1
21 Rate Base at Year End	45.3	91.5	122.0	147.9	157.6	162.6	162.6	164.5	177.8
22 Rate of Return on Rate Base		6.4%	6.4%	6.4%	6.4%	6.4%	6.4%	6.4%	6.4%
23 After-Tax Margin		2.9	5.9	7.8	9.5	10.1	10.4	10.4	10.5
INCOME TAX ALLOWANCE									
24 Income Tax Base		2.9	6.3	9.0	11.3	12.6	13.8	14.1	13.9
25 State Income Tax Rate		9.4%	9.4%	9.4%	9.4%	9.4%	9.4%	9.4%	9.4%
26 Federal Income Tax Rate		34%	34%	34%	34%	34%	34%	34%	34%
27 Combined Rate of Tax		40.2%	40.2%	40.2%	40.2%	40.2%	40.2%	40.2%	40.2%
28 Income Tax Allowance Factor		0.672	0.672	0.672	0.672	0.672	0.672	0.672	0.672
29 Income Tax Allowance		1.9	4.2	6.0	7.6	8.5	9.2	9.5	9.4
COST OF SERVICE									
30 Operating Expenditures	17.7	20.3	47.4	23.9	10.4	10.4	10.4	10.4	10.4
31 Depreciation		9.5	20.3	28.3	35.2	39.2	43.2	42.6	35.4
32 Recovery of Deferred Return		0.0	0.4	1.1	1.8	2.6	3.3	3.7	3.4
33 After-Tax Margin		2.9	5.9	7.8	9.5	10.1	10.4	10.4	10.5
34 Income Tax Allowance		1.9	4.2	6.0	7.6	8.5	9.2	9.5	9.4
35 Total Cost of Service Effect	17.7	34.7	78.2	67.2	64.4	70.7	76.6	76.6	69.0
36 State Revenue Impact - % [1]	24.03%	25.44%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%
37 State Revenue Impact	4.3	8.8	19.5	16.8	16.1	17.7	19.1	19.2	17.3
38 Interest Rate	10%	10%	10%	10%	10%	10%	10%	10%	10%
39 Discount Period	-2.5	-1.5	-0.5	0.5	1.5	2.5	3.5	4.5	5.5
40 Net Present Value Factor	1.27	1.15	1.05	0.95	0.87	0.79	0.72	0.65	0.59
41 Net Present Value (1/1/92)	5.4	10.2	20.5	16.0	14.0	13.9	13.7	12.5	10.2
42 NPV of State Revenue Impact	$154.1								

[1] Weighted average production and royalty rates for all crudes for 1989 and 1990; 1991-2011 set equal to 25 percent.

TABLE 2: STATE REVENUE IMPACT OF OIL SPILL RELATED EXPENDITURES ($M)

Horst & Frisch
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	1998	1999	2000	2001	2002	2003	2004	2005	2006
1 Oil Spill Related Operating Expenditures	$0.0	$0.0	$0.0	$0.0	$0.0	$0.0	$0.0	$0.0	$0.0
2 Oil Spill Related Capital Expenditures	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
DEPRECIATION									
3 Additions to Depreciable Property	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
4 Depreciation Factors	11.26%	11.82%	13.49%	14.74%	16.19%	17.06%	18.82%	21.41%	25.25%
5 Depreciation Base	193.5	171.7	151.4	131.0	111.7	93.6	77.6	63.0	49.5
6 Depreciation	21.8	20.3	20.4	19.3	18.1	16.0	14.6	13.5	12.5
7 Depreciable Property Balance at Year End	171.7	151.4	131.0	111.7	93.6	77.6	63.0	49.5	37.0
ACCUMULATED DEFERRED INCOME TAX									
8 State ADIT - EoY	4.7	3.5	2.6	1.8	1.2	0.7	0.3	(0.0)	(0.1)
9 Federal ADIT - EoY	29.0	27.8	26.8	25.6	23.9	21.5	19.1	17.2	16.0
10 Total ADIT - EoY	33.7	31.3	29.4	27.4	25.2	22.2	19.3	17.2	15.8
RECOVERY OF DEFERRED RETURN									
11 Deferred Return Base	20.4	25.7	29.6	31.9	32.7	32.3	30.9	28.6	25.4
12 Deferred Return Factors	11.26%	11.82%	13.49%	14.74%	16.19%	17.06%	18.82%	21.41%	25.25%
13 Recovery of Deferred Return	2.3	3.0	4.0	4.7	5.3	5.5	5.8	6.1	6.4
14 Inflation Adjustment Base	189.8	174.1	156.6	138.8	121.0	104.4	88.1	72.0	56.0
15 Inflation Rate	4.00%	4.00%	4.00%	4.00%	4.00%	4.00%	4.00%	4.00%	4.00%
16 Inflation Adjustment	7.6	7.0	6.3	5.6	4.8	4.2	3.5	2.9	2.2
17 Deferred Return at Year End	25.7	29.6	31.9	32.7	32.3	30.9	28.6	25.4	21.2
AFTER-TAX MARGIN									
18 Depreciable Property Balance at Year End	171.7	151.4	131.0	111.7	93.6	77.6	63.0	49.5	37.0
19 Deferred Return at Year End	25.7	29.6	31.9	32.7	32.3	30.9	28.6	25.4	21.2
20 Total ADIT - EoY	33.7	31.3	29.4	27.4	25.2	22.2	19.3	17.2	15.8
21 Rate Base at Year End	163.7	149.7	133.4	117.0	100.7	86.4	72.3	57.7	42.4
22 Rate of Return on Rate Base	6.4%	6.4%	6.4%	6.4%	6.4%	6.4%	6.4%	6.4%	6.4%
23 After-Tax Margin	11.4	10.5	9.6	8.5	7.5	6.4	5.5	4.6	3.7
INCOME TAX ALLOWANCE									
24 Income Tax Base	13.7	13.5	13.6	13.2	12.8	12.0	11.3	10.8	10.1
25 State Income Tax Rate	9.4%	9.4%	9.4%	9.4%	9.4%	9.4%	9.4%	9.4%	9.4%
26 Federal Income Tax Rate	34%	34%	34%	34%	34%	34%	34%	34%	34%
27 Combined Rate of Tax	40.2%	40.2%	40.2%	40.2%	40.2%	40.2%	40.2%	40.2%	40.2%
28 Income Tax Allowance Factor	0.672	0.672	0.672	0.672	0.672	0.672	0.672	0.672	0.672
29 Income Tax Allowance	9.2	9.1	9.1	8.9	8.6	8.0	7.6	7.2	6.8
COST OF SERVICE									
30 Operating Expenditures	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
31 Depreciation	21.8	20.3	20.4	19.3	18.1	16.0	14.6	13.5	12.5
32 Recovery of Deferred Return	2.3	3.0	4.0	4.7	5.3	5.5	5.8	6.1	6.4
33 After-Tax Margin	11.4	10.5	9.6	8.5	7.5	6.4	5.5	4.6	3.7
34 Income Tax Allowance	9.2	9.1	9.1	8.9	8.6	8.0	7.6	7.2	6.8
35 Total Cost of Service Effect	44.7	42.9	43.1	41.5	39.5	36.0	33.6	31.5	29.4
36 State Revenue Impact - % [1]	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%	25.00%
37 State Revenue Impact	11.2	10.7	10.8	10.4	9.9	9.0	8.4	7.9	7.4
38 Interest Rate	10%	10%	10%	10%	10%	10%	10%	10%	10%
39 Discount Period	6.5	7.5	8.5	9.5	10.5	11.5	12.5	13.5	14.5
40 Net Present Value Factor	0.54	0.49	0.44	0.40	0.37	0.33	0.30	0.28	0.25
41 Net Present Value (1/1/92)	6.0	5.2	4.8	4.2	3.6	3.0	2.6	2.2	1.8
42 NPV of State Revenue Impact $154.1									

[1] Weighted average production and royalty rates for all crudes for 1989 and 1990; 1991-2011 set equal to 25 percent.

TABLE 2: STATE REVENUE IMPACT OF OIL SPILL RELATED EXPENDITURES ($M)

Horst & Frisch
11/04/91

		2007	2008	2009	2010	2011	Explanation
1	Oil Spill Related Operating Expenditures	$0.0	$0.0	$0.0	$0.0	$0.0	See Table 1
2	Oil Spill Related Capital Expenditures	0.0	0.0	0.0	0.0	0.0	See Table 1
	DEPRECIATION						
3	Additions to Depreciable Property	0.0	0.0	0.0	0.0	0.0	Line 2
4	Depreciation Factors	29.10%	35.38%	42.34%	54.43%	100.00%	Per TSM
5	Depreciation Base	37.0	26.2	17.0	9.8	4.5	Previous Line 7
6	Depreciation	10.8	9.3	7.2	5.3	4.5	Line 4 x Line 5
7	Depreciable Property Balance at Year End	26.2	17.0	9.8	4.5	0.0	Line 3 + Line 5 - Line 6
	ACCUMULATED DEFERRED INCOME TAX						
8	State ADIT - EoY	(0.1)	(0.0)	0.1	0.1	0.0	TABLE 3: Line 28
9	Federal ADIT - EoY	15.2	14.9	14.9	15.3	(0.0)	TABLE 3: Line 57
10	Total ADIT - EoY	15.1	14.9	15.0	15.4	(0.0)	Line 8 + Line 9
	RECOVERY OF DEFERRED RETURN						
11	Deferred Return Base	21.2	16.7	11.9	7.5	3.7	Previous Line 17
12	Deferred Return Factors	29.10%	35.38%	42.34%	54.43%	100.00%	Line 4
13	Recovery of Deferred Return	6.2	5.9	5.0	4.1	3.7	Line 11 x Line 12
14	Inflation Adjustment Base	41.3	27.8	16.6	7.9	0.0	Pr.Line 17+Pr.Line 7-Line 13-Line 6
15	Inflation Rate	4.00%	4.00%	4.00%	4.00%	4.00%	Inflation Rate
16	Inflation Adjustment	1.7	1.1	0.7	0.3	0.0	Line 14 x Line 15
17	Deferred Return at Year End	16.7	11.9	7.5	3.7	0.0	Prev. Line 17 - Line 13 + Line 16
	AFTER-TAX MARGIN						
18	Depreciable Property Balance at Year End	26.2	17.0	9.8	4.5	0.0	Line 7
19	Deferred Return at Year End	16.7	11.9	7.5	3.7	0.0	Line 17
20	Total ADIT - EoY	15.1	14.9	15.0	15.4	(0.0)	Line 10
21	Rate Base at Year End	27.9	14.0	2.3	-7.2	0.0	Line 18 + Line 19 - Line 20
22	Rate of Return on Rate Base	6.4%	6.4%	6.4%	6.4%	6.4%	Per TSM
23	After-Tax Margin	2.7	1.8	0.9	0.1	(0.5)	Previous Line 21 x Line 22
	INCOME TAX ALLOWANCE						
24	Income Tax Base	8.9	7.7	5.9	4.2	3.3	Line 23 + Line 13
25	State Income Tax Rate	9.4%	9.4%	9.4%	9.4%	9.4%	State Income Tax Rate
26	Federal Income Tax Rate	34%	34%	34%	34%	34%	Federal Income Tax Rate
27	Combined Rate of Tax	40.2%	40.2%	40.2%	40.2%	40.2%	Line 25 + Line 26 x (1 - Line 25)
28	Income Tax Allowance Factor	0.672	0.672	0.672	0.672	0.672	Line 27/(1 - Line 27)
29	Income Tax Allowance	6.0	5.2	4.0	2.9	2.2	Line 24 x Line 28
	COST OF SERVICE						
30	Operating Expenditures	0.0	0.0	0.0	0.0	0.0	Line 1
31	Depreciation	10.8	9.3	7.2	5.3	4.5	Line 6
32	Recovery of Deferred Return	6.2	5.9	5.0	4.1	3.7	Line 13
33	After-Tax Margin	2.7	1.8	0.9	0.1	(0.5)	Line 23
34	Income Tax Allowance	6.0	5.2	4.0	2.9	2.2	Line 29
35	Total Cost of Service Effect	25.6	22.1	17.1	12.4	9.9	Sum of Lines 30 thru 34
36	State Revenue Impact - % [1]	25.00%	25.00%	25.00%	25.00%	25.00%	Assumption
37	State Revenue Impact	6.4	5.5	4.3	3.1	2.5	Line 35 x Line 36
38	Interest Rate	10%	10%	10%	10%	10%	Assumption
39	Discount Period	15.5	16.5	17.5	18.5	19.5	Discounting to 1/1/92
40	Net Present Value Factor	0.23	0.21	0.19	0.17	0.16	Previous Line 40/(1 - Line 38)
41	Net Present Value (1/1/92)	1.5	1.1	0.8	0.5	0.4	Line 37 x Line 40
42	NPV of State Revenue Impact $154.1						Sum of Line 41

[1] Weighted average production and royalty rates for all crudes for 1989 and 1990; 1991-2011 set equal to 25 percent.

TABLE 3: ADIT CALCULATION

			FACTORS	1989	1990	1991	1992	1993	1994	1995	1996	1997
	STATE ADIT											
1	Additions to Depreciable Property			44.4	54.8	51.2	56.3	48.1	48.1	48.1	48.1	48.1
2		1989	5.7143%	2.5								
3		1990	10.7755%	4.8	3.1							
4		1991	9.8247%	4.4	5.9	2.9						
5		1992	9.2107%	4.1	5.4	5.5	3.2					
6		1993	8.5966%	3.8	5.0	5.0	6.1	2.7				
7		1994	7.9826%	3.5	4.7	4.7	5.5	5.2	2.7			
8		1995	7.3685%	3.3	4.4	4.4	5.2	4.7	5.2	2.7		
9		1996	6.7545%	3.0	4.0	4.1	4.8	4.4	4.7	5.2	2.7	
10		1997	6.1405%	2.7	3.7	3.8	4.5	4.1	4.4	4.7	5.2	2.7
11		1998	5.5264%	2.5	3.4	3.5	4.1	3.8	4.1	4.4	4.7	5.2
12		1999	4.9124%	2.2	3.0	3.1	3.8	3.5	3.8	4.1	4.4	4.7
13		2000	4.2983%	1.9	2.7	2.8	3.5	3.2	3.5	3.8	4.1	4.4
14		2001	3.6843%	1.6	2.4	2.5	3.1	3.0	3.2	3.5	3.8	4.1
15		2002	3.0702%	1.4	2.0	2.2	2.8	2.7	3.0	3.2	3.5	3.8
16		2003	2.4562%	1.1	1.7	1.9	2.4	2.4	2.7	3.0	3.2	3.5
17		2004	1.8421%	0.8	1.3	1.6	2.1	2.1	2.4	2.7	3.0	3.2
18		2005	1.2281%	0.5	1.0	1.3	1.7	1.8	2.1	2.4	2.7	3.0
19		2006	0.6141%	0.3	0.7	0.9	1.4	1.5	1.8	2.1	2.4	2.7
20		2007			0.3	0.6	1.0	1.2	1.5	1.8	2.1	2.4
21		2008				0.3	0.7	0.9	1.2	1.5	1.8	2.1
22		2009					0.3	0.6	0.9	1.2	1.5	1.8
23		2010						0.3	0.6	0.9	1.2	1.5
				1989	1990	1991	1992	1993	1994	1995	1996	1997
24	State Tax Depreciation			2.5	7.9	13.2	18.2	22.7	26.4	29.9	33.1	35.9
25	Depreciation			0.0	9.5	20.3	28.3	35.2	39.2	43.2	42.6	35.4
26	State Timing Difference			(2.5)	1.6	7.1	10.1	12.5	12.8	13.3	9.6	(0.6)
27	Cumulative Timing Difference			(2.5)	(0.9)	6.2	16.2	28.7	41.5	54.8	64.4	63.8
28	State ADIT - EoY		9.4%	(0.2)	(0.1)	0.6	1.5	2.7	3.9	5.2	6.1	6.0
	FEDERAL ADIT											
29	Additions to Depreciable Property			44.4	54.8	51.2	56.3	48.1	48.1	48.1	48.1	48.1
30		1989	5.0000%	2.2								
31		1990	9.5000%	4.2	2.7							
32		1991	8.5500%	3.8	5.2	2.6						
33		1992	7.6950%	3.4	4.7	4.9	2.8					
34		1993	6.9255%	3.1	4.2	4.4	5.3	2.4				
35		1994	6.2330%	2.8	3.8	3.9	4.8	4.6	2.4			
36		1995	5.9049%	2.6	3.4	3.5	4.3	4.1	4.6	2.4		
37		1996	5.9049%	2.6	3.2	3.2	3.9	3.7	4.1	4.6	2.4	
38		1997	5.9049%	2.6	3.2	3.0	3.5	3.3	3.7	4.1	4.6	2.4
39		1998	5.9049%	2.6	3.2	3.0	3.3	3.0	3.3	3.7	4.1	4.6
40		1999	5.9049%	2.6	3.2	3.0	3.3	2.8	3.0	3.3	3.7	4.1
41		2000	5.9049%	2.6	3.2	3.0	3.3	2.8	2.8	3.0	3.3	3.7
42		2001	5.9049%	2.6	3.2	3.0	3.3	2.8	2.8	2.8	3.0	3.3
43		2002	5.9049%	2.6	3.2	3.0	3.3	2.8	2.8	2.8	2.8	3.0
44		2003	5.9049%	2.6	3.2	3.0	3.3	2.8	2.8	2.8	2.8	2.8
45		2004	2.9525%	1.3	3.2	3.0	3.3	2.8	2.8	2.8	2.8	2.8
46		2005		0.0	1.6	3.0	3.3	2.8	2.8	2.8	2.8	2.8
47		2006		0.0	0.0	1.5	3.3	2.8	2.8	2.8	2.8	2.8
48		2007			0.0	0.0	1.7	2.8	2.8	2.8	2.8	2.8
49		2008				0.0	0.0	1.4	2.8	2.8	2.8	2.8
50		2009					0.0	0.0	1.4	2.8	2.8	2.8
51		2010						0.0	0.0	1.4	2.8	2.8
				1989	1990	1991	1992	1993	1994	1995	1996	1997
52	Federal Tax Depreciation			2.2	7.0	11.6	15.8	19.4	22.3	25.0	27.7	28.1
53	Depreciation			0.0	9.5	20.3	28.3	35.2	39.2	43.2	42.6	35.4
54	Federal Timing Difference			(2.2)	2.6	8.7	12.5	15.8	16.9	18.2	14.9	7.3
55	State Tax Effect		9.4%	0.2	(0.2)	(0.7)	(0.9)	(1.2)	(1.2)	(1.3)	(0.9)	0.1
56	Cumulative Timing Difference			(2.0)	0.4	8.5	20.0	34.7	50.4	67.3	81.3	88.6
57	Federal ADIT - EoY		34%	(0.7)	0.1	2.9	6.8	11.8	17.1	22.9	27.6	30.1
58	Total ADIT - EoY			(0.9)	0.1	3.5	8.3	14.5	21.0	28.0	33.7	36.1

TABLE 3: ADIT CALCULATION

			FACTORS	Total	1998	1999	2000	2001	2002	2003	2004	2005	2006
	STATE ADIT												
1	Additions to Depreciable Property			447.2									
2		1989	5.7143%	2.5									
3		1990	10.7755%	7.9									
4		1991	9.8247%	13.2									
5		1992	9.2107%	18.2									
6		1993	8.5966%	22.7									
7		1994	7.9826%	26.4									
8		1995	7.3685%	29.9									
9		1996	6.7545%	33.1									
10		1997	6.1405%	35.9									
11		1998	5.5264%	35.7									
12		1999	4.9124%	32.8									
13		2000	4.2983%	30.1									
14		2001	3.6843%	27.3									
15		2002	3.0702%	24.6									
16		2003	2.4562%	21.8									
17		2004	1.8421%	19.1									
18		2005	1.2281%	16.4									
19		2006	0.6141%	13.6									
20		2007		10.9									
21		2008		8.4									
22		2009		6.3									
23		2010		4.4									
					1998	1999	2000	2001	2002	2003	2004	2005	2006
24	State Tax Depreciation				35.7	32.8	30.1	27.3	24.6	21.8	19.1	16.4	13.6
25	Depreciation				21.8	20.3	20.4	19.3	18.1	16.0	14.6	13.5	12.5
26	State Timing Difference				(13.9)	(12.5)	(9.7)	(8.0)	(6.5)	(5.9)	(4.5)	(2.9)	(1.1)
27	Cumulative Timing Difference				49.9	37.3	27.7	19.7	13.2	7.3	2.8	(0.1)	(1.2)
28	State ADIT - EoY		9.4%		4.7	3.5	2.6	1.8	1.2	0.7	0.3	(0.0)	(0.1)
	FEDERAL ADIT												
29	Additions to Depreciable Property			399.1									
30		1989	5.0000%	2.2									
31		1990	9.5000%	7.0									
32		1991	8.5500%	11.6									
33		1992	7.6950%	15.8									
34		1993	6.9255%	19.4									
35		1994	6.2330%	22.3									
36		1995	5.9049%	25.0									
37		1996	5.9049%	27.7									
38		1997	5.9049%	28.1									
39		1998	5.9049%	26.3									
40		1999	5.9049%	25.1									
41		2000	5.9049%	24.2									
42		2001	5.9049%	23.7									
43		2002	5.9049%	23.6									
44		2003	5.9049%	23.6									
45		2004	2.9525%	22.3									
46		2005		19.3									
47		2006		16.2									
48		2007		13.0									
49		2008		9.9									
50		2009		7.1									
51		2010		4.3									
					1998	1999	2000	2001	2002	2003	2004	2005	2006
52	Federal Tax Depreciation				26.3	25.1	24.2	23.7	23.6	23.6	22.3	19.3	16.2
53	Depreciation				21.8	20.3	20.4	19.3	18.1	16.0	14.6	13.5	12.5
54	Federal Timing Difference				(4.6)	(4.8)	(3.8)	(4.4)	(5.5)	(7.6)	(7.6)	(5.8)	(3.7)
55	State Tax Effect		9.4%		1.3	1.2	0.9	0.8	0.6	0.6	0.4	0.3	0.1
56	Cumulative Timing Difference				85.4	81.8	78.9	75.2	70.4	63.3	56.1	50.5	46.9
57	Federal ADIT - EoY		34%		29.0	27.8	26.8	25.6	23.9	21.5	19.1	17.2	16.0
58	Total ADIT - EoY				33.7	31.3	29.4	27.4	25.2	22.2	19.3	17.2	15.8

TABLE 3: ADIT CALCULATION

			FACTORS
	STATE ADIT		
1	Additions to Depreciable Property		
2		1989	5.7143%
3		1990	10.7755%
4		1991	9.8247%
5		1992	9.2107%
6		1993	8.5966%
7		1994	7.9826%
8		1995	7.3685%
9		1996	6.7545%
10		1997	6.1405%
11		1998	5.5264%
12		1999	4.9124%
13		2000	4.2983%
14		2001	3.6843%
15		2002	3.0702%
16		2003	2.4562%
17		2004	1.8421%
18		2005	1.2281%
19		2006	0.6141%
20		2007	
21		2008	
22		2009	
23		2010	

			2007	2008	2009	2010	2011
24	State Tax Depreciation		10.9	8.4	6.3	4.4	5.9
25	Depreciation		10.8	9.3	7.2	5.3	4.5
26	State Timing Difference		(0.1)	0.9	0.9	0.9	(1.4)
27	Cumulative Timing Difference		(1.3)	(0.4)	0.6	1.4	0.0
28	State ADIT - EoY	9.4%	(0.1)	(0.0)	0.1	0.1	0.0

	FEDERAL ADIT		
29	Additions to Depreciable Property		
30		1989	5.0000%
31		1990	9.5000%
32		1991	8.5500%
33		1992	7.6950%
34		1993	6.9255%
35		1994	6.2330%
36		1995	5.9049%
37		1996	5.9049%
38		1997	5.9049%
39		1998	5.9049%
40		1999	5.9049%
41		2000	5.9049%
42		2001	5.9049%
43		2002	5.9049%
44		2003	5.9049%
45		2004	2.9525%
46		2005	
47		2006	
48		2007	
49		2008	
50		2009	
51		2010	

			2007	2008	2009	2010	2011
52	Federal Tax Depreciation		13.0	9.9	7.1	4.3	49.5
53	Depreciation		10.8	9.3	7.2	5.3	4.5
54	Federal Timing Difference		(2.3)	(0.7)	0.1	1.1	(45.1)
55	State Tax Effect	9.4%	0.0	(0.1)	(0.1)	(0.1)	0.1
56	Cumulative Timing Difference		44.7	44.0	43.9	44.9	(0.0)
57	Federal ADIT - EoY	34%	15.2	14.9	14.9	15.3	(0.0)
58	Total ADIT - EoY		15.1	14.9	15.0	15.4	(0.0)

Alyeska pipeline SERVICE COMPANY

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

November 20, 1991 BY FACSIMILE

Deborah Vogt, Esq.
P.O. Box 1065
Juneau, Alaska 99802

Re: Alyeska Oil Spill Response Services in Prince William Sound

Dear Ms. Vogt:

Mike Williams has asked me to reply to your October 30, 1991 inquiry about Alyeska's authority to require "contracting vessels" to demonstrate its capability to hold Alyeska harmless from certain potential liabilities associated with initial oil spill response in Prince William Sound. You also have asked whether Alyeska pays oil and gas property tax on its oil spill response equipment.

Alyeska Oil Spill Response Services Agreement: Requirements for Financial Responsibility or Insurance

As a Response Action Contractor, Alyeska provides oil spill prevention and initial response services to TAPS trade vessels in Prince William Sound. To establish a contract for these services, Alyeska uses an Oil Spill Response Services Agreement with entities ("Contracting Vessels") that either own, charter or operate those vessels. Those Agreements require Contracting Vessels to demonstrate their capability to meet contractual obligations by meeting financial responsibility or insurance requirements described in the Agreements. You have asked what authority allows Alyeska to impose those requirements on Contracting Vessels.

The Trans Alaska Pipeline System is owned by seven common carrier oil pipeline companies. Interstate transportation of petroleum by the carriers is regulated by the Federal Energy Regulatory Commission, and intrastate transportation of petroleum by the Alaska Public Utilities Commission. Alyeska Pipeline Service Company operates TAPS as the carriers' agent. Each TAPS carrier through its tariffs offers to transport a shipper's (i.e. a customer's) petroleum from origins on TAPS to destinations on TAPS, and if the destination is Valdez, to load it on board vessels furnished by the shipper.

Exh. 3

No carrier ever owns the petroleum carried in its space on TAPS. It merely provides transportation service for petroleum owned by others. All shipments on a carrier's space in TAPS are upon the terms and conditions and for the prices set out in the carrier's tariffs. A shipper accepts a carrier's offer by tendering petroleum to the carrier in accordance with the carrier's tariff requirements. A contract then exists between the shipper and the carrier for the carriage of petroleum from an origin on TAPS to a destination on TAPS. The carrier undertakes no obligation in its tariffs for the transportation of petroleum after it leaves TAPS.

Thus, under each TAPS carrier's tariffs, the shipper is responsible for its petroleum after it is loaded on board a vessel at Valdez and has the responsibility to furnish a vessel to carry the petroleum by water from Valdez to the petroleum's next destination.

The State of Alaska requires each vessel furnished by the shipper to have an oil spill response contingency plan, which must provide, among other things, for personnel and equipment to escort the shipper's vessels and to respond to a spill in Prince William Sound within a short period of time. Since no one else has stepped forward to offer vessel escort service and initial spill response in Prince William Sound, Alyeska has done so. Nothing prevents others from competing with Alyeska to provide these services. While there has been some debate as to whether, with respect to furnishing these services, Alyeska (a) is obligated under Alaska statute or the federal and state right-of-way grants, or (b) has volunteered (Alyeska believes it is a volunteer), there has never been any suggestion that the services are being furnished pursuant to any common carrier obligations of the TAPS carriers or their agent Alyeska. Thus the Agreement requirements, like all aspects of the response action contract, are strictly a matter of commercial contract. Alyeska needs no authority from any regulatory statute or regulatory agency to require financial responsibility or insurance in conjunction with the provision of response action contractor services.

As we discussed yesterday, the TAPS carriers include the costs of Alyeska's Prince William Sound effort in tariff charges for oil delivered to Valdez. This equitably distributes the costs of those services among their beneficiaries.

I also described to you Alyeska's reliance on its Prince William Sound capabilities to meet oil spill response planning standards imposed by AS 46.03.040 on the Valdez

Marine Terminal. Meeting those requirements is a part of the TAPS Owners' common carrier obligations.

Oil and Gas Property Tax

Alyeska owns a large amount of oil spill response equipment, intended for use in Prince William Sound, at the Valdez Marine Terminal and along the pipeline. Alyeska pays the state's oil and gas property tax levied on that equipment.

Alyeska does not pay the state tax on marine vessels that it charters from various companies to assist spill prevention and response in Prince William Sound and Port Valdez.

Please call me at (907) 265-8565 if I can be of further assistance.

Sincerely yours,

Robert I. Shoaf
Assistant General Counsel

smk

cc: M.F.G. Williams

TAPS Quality Cost Participation Percentages

Updated 2/18/1991

(Thousands barrels per quarter)

COMPANY	OFFSHORE OIL PRODUCTION MB/Qtr (A)	x 1.0 (B)	REGULATED PIPELINES MB/Qtr (A)	x 0.1 (B)	DOCK TRANSFERS MB/Qtr (A)	x 0.1 (B)	TANKERS & BARGES MB/Qtr (A)	x 1.0 (B)	4th Qtr. 1990 Volumes TOTALS Actual MB/Qtr (A)	Weighted MB/Qtr (B)	% Participation (B)
ARCO	440.2	440.2		0.0		0.0		0.0	440.2	440.2	2.4%
Onshore (x .1)	510.0	51.0							510.0	51.0	8.3%
CHEVRON		0.0		0.0	0.0	0.0	2,438.8	2,438.8	2,438.8	2,438.8	13.5%
C.I.P.L		0.0	2,610.6	261.1	2,452.9	245.3		0.0	5,063.5	506.3	2.8%
KPL		0.0	1,216.9	121.7	9,898.8	989.9		0.0	11,115.7	1,111.6	6.2%
MAPCO		0.0		0.0	511.1	51.1	511.1	511.1	1,022.2	562.2	3.1%
MOCO	824.1	824.1		0.0		0.0	0.0	0.0	824.1	824.1	4.6%
MOBIL		0.0		0.0		0.0		0.0	0.0	0.0	0.0%
PHILLIPS		0.0		0.0		0.0		0.0	0.0	0.0	0.0%
SHELL	552.4	552.4	0.8	0.0		0.0		0.0	552.4	552.4	3.1%
TESORO		0.0	2,066.3	206.6	0.8	0.0	7,303.2	7,303.2	9,369.5	7,509.8	41.7%
					Rig Tenders						
TEXACO		0.0		0.0		0.0		0.0	0.0	0.0	0.0%
UNOCAL	1,461.3	1,461.3		0.0		0.0	2,554.4	2,554.4	4,015.8	4,015.8	22.3%
OTHER **		0.0		0.0	0.0	0.0	0.0	0.0	0.0	0.0	
							0.0				
TOTALS	3,788.0	3,329.1	5,893.8	589.4	12,862.9	1,286.3	12,807.5	12,807.5	35,352.2	18,012.3	100.0%
%		18.5%		3.3%		7.1%		71.1%		100.0%	

** Excluded from participation % calculation.

CISPRI Quarterly Cost Participation Percentages

Revised 5/23/91

(Thousands barrels per quarter)

COMPANY	OFFSHORE OIL PRODUCTION MB/Qtr (A)	OFFSHORE OIL PRODUCTION x 1.0 (B)	REGULATED PIPELINES MB/Qtr (A)	REGULATED PIPELINES x 0.1 (B)	DOCK TRANSFERS MB/Qtr (A)	DOCK TRANSFERS x 0.1 (B)	TANKERS & BARGES MB/Qtr (A)	TANKERS & BARGES x 1.0 (B)	1st Qtr. 1991 Volumes TOTALS Actual MB/Qtr (A)	1st Qtr. 1991 Volumes TOTALS Weighted MB/Qtr (B)	% Participation (B)
ARCO	441.2	441.2		0.0		0.0		0.0	441.2	441.2	2.30%
Onshore (x .1)	461.7	46.2							461.7	46.2	0.24%
CHEVRON		0.0	70.0	7.0	0.0	0.0	2,608.5	2,608.5	2,678.5	2,615.5	13.63%
C.I.P.L		0.0	2,569.4	256.9	2,694.8	269.5		0.0	5,264.2	526.4	2.74%
KPL		0.0	1,133.5	113.4	8,230.3	823.0		0.0	9,363.8	936.4	4.88%
MAPCO		0.0		0.0	715.8	71.6	715.8	715.8	1,431.6	787.4	4.10%
MOCO	774.3	774.3		0.0		0.0	0.0	0.0	774.3	774.3	4.03%
MOBIL		0.0		0.0		0.0		0.0	0.0	0.0	0.00%
PHILLIPS		0.0		0.0		0.0		0.0	0.0	0.0	0.00%
SHELL	511.1	511.1	511.1	51.1		0.0		0.0	1,022.2	562.2	2.93%
TESORO		0.0	1,554.7	155.5	474.0	47.4	8,156.4	8,156.4	10,185.1	8,359.2	43.56%
					Rig Tenders						
TEXACO		0.0		0.0		0.0		0.0	0.0	0.0	0.00%
UNOCAL	1,448.4	1,448.4		0.0		0.0	2,694.8	2,694.8	4,143.2	4,143.2	21.59%
OTHER **		0.0		0.0	0.0	0.0	0.0	0.0	0.0	0.0	
							0.0				
TOTALS	3,636.7	3,221.2	5,838.7	583.9	12,114.9	1,211.5	14,175.5	14,175.5	35,765.8	19,192.1	100.0%
%		16.8%		3.0%		6.3%		73.9%		100.0%	

** Excluded from participation % calculation.

CONTACTS

The following people were kind enough to provide information for this report:

Department of Revenue
- Chuck Logsdon
- Roger Marks

Department of Natural Resources
- Bill VanDyke

British Petroleum
- Bob Van Hook
- Paul Quesnel
- Tom Williams

Arco
- Steve Mahoney

Tesoro
- Gene Burden

Alyeska
- Mike Williams
- Rob Shoaf

Marine Preservation Association
- Bob Aldag

CISPRI
- Linda White

Alaska Clean Seas
- Norm Ingram

Horst & Frisch
- Ken Timbers