

ALASKA LEGISLATURE SPECIAL COMMITTEE / SUBJECT FILE 8672

2106 SCOMM 79: HOUSE SPEC. COMM. ON OIL & GAS, 1991-1992

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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.

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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 Conservation¹ 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)

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.

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.

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.

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.

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 Commission¹⁰ 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

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

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

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.

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.

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.

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

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

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

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.

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 agreement²⁴, 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.

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

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

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 contract²⁹ 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).

* * * * *

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.

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

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 SERVVS. 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 SERVVS 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

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 expenses³³ 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,

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.

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 7 REC'D

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
2. Short Answer
3. Analysis
 - A. Impact of OPA 90 on Oil Spill Response
 - (1) Private Sector Responsibility
 - (2) Liability Provisions and Exemptions
 - (3) Contingency Planning
 - (4) Oil Spill Response
 - B. Federal Attention to Holder-RAC Relationship or RAC Performance
 - (1) Federal Approval of the Holder-RAC Relationship
 - (2) Federal Enforcement of the Holder-RAC Relationship
 - C. Practical Implications for Oil Spill Response
 - D. State Options
Preemption
4. Conclusion

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 Answer⁶

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.

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.

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

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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.

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?
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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 Response⁷

(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

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.

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

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),

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.

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.

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.

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.

Preemption³²

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

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.

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 single, 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.

**ALASKA DEPARTMENT OF
ENVIRONMENTAL CONSERVATION**

SPILL PREVENTION AND RESPONSE

1986 REPORT

ON

REGULATORY AND CONTROL MEASURES

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 SERVVS 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 its 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.

DEC 12 1991

received
12/19/91

**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

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

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.

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 language⁶ 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

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

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 an 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

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