

ALASKA LEGISLATURE COMMITTEES

1991-1992

86/2

6982 HOUSE JUDICIARY

22

ANNUAL REPORTS.—The Chairman of the Interagency Committee shall submit to Congress every 2 years on October 30 a report on the activities carried out under this section in the preceding 2 fiscal years, and on activities proposed to be carried out under this section in the current 2 fiscal year period.

(f) FUNDING.—Not to exceed \$21,250,000 of amounts in the Fund shall be available annually to carry out this section except for subsection (c)(8). Of such sums—

(1) funds authorized to be appropriated to carry out the activities under subsection (c)(4) shall not exceed \$5,000,000 for fiscal year 1991 or \$3,500,000 for any subsequent fiscal year; and

(2) not less than \$2,250,000 shall be available for carrying out the activities in subsection (c)(6) for fiscal years 1992, 1993, 1994, and 1995.

All activities authorized in this section, including subsection (c)(8), are subject to appropriations.

TITLE VIII—TRANS-ALASKA PIPELINE SYSTEM

SEC. 8091. SHORT TITLE.

This title may be cited as the "Trans-Alaska Pipeline System Reform Act of 1990".

Subtitle A—Improvements to Trans-Alaska Pipeline System

SEC. 8101. LIABILITY WITHIN THE STATE OF ALASKA AND CLEANUP EFFORTS.

(a) CAUSE OF ACCIDENT.—Section 204(a)(1) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(a)(1)) is amended by striking out "caused by" in the first sentence and inserting in lieu thereof "caused solely by".

(b) LIMITATION OF LIABILITY.—Section 204(a)(2) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(a)(2)) is amended by striking "\$50,000,000" each place it occurs and inserting in lieu thereof "\$350,000,000".

(c) CLEANUP EFFORTS.—Section 204(b) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(b)) is amended in the first sentence—

(1) by inserting after "any area" the following: "in the State of Alaska";

(2) by inserting after "any activities" the following: "related to the Trans-Alaska Pipeline System, including operation of the terminal,"; and

(3) by inserting after "other Federal" the first place it appears the following: "or State".

SEC. 8102. TRANS-ALASKA PIPELINE LIABILITY FUND.

(a) TERMINATION OF CERTAIN PROVISIONS.—

(1) REPEAL.—Section 204(c) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(c)) is repealed, effective as provided in paragraph (5).

(2) DISPOSITION OF FUND BALANCE.—

(A) RESERVATION OF AMOUNTS.—The trustees of the Trans-Alaska Pipeline Liability Fund (hereafter in this subsection referred to as the "TAPS Fund") shall reserve the following amounts in the TAPS Fund—

(i) necessary to pay claims arising under section 204(c) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(c)); and

(ii) administrative expenses reasonably necessary for and incidental to the implementation of section 204(c) of that Act.

(B) DISPOSITION OF THE BALANCE.—After the Comptroller General of the United States certifies that the requirements of subparagraph (A) have been met, the trustees of the TAPS Fund shall dispose of the balance in the TAPS Fund after the reservation of amounts are made under subparagraph (A) by—

(i) rebating the pro rata share of the balance to the State of Alaska for its contributions as an owner of oil; and then

(ii) transferring and depositing the remainder of the balance into the Oil Spill Liability Trust Fund established under section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509).

(C) DISPOSITION OF THE RESERVED AMOUNTS.—After payment of all claims arising from an incident for which funds are reserved under subparagraph (A) and certification by the Comptroller General of the United States that the claims arising from that incident have been paid, the excess amounts, if any, for that incident shall be disposed of as set forth under subparagraphs (A) and (B).

(D) AUTHORIZATION.—The amounts transferred and deposited in the Fund shall be available for the purposes of section 1012 of the Oil Pollution Act of 1990 after funding sections 5001 and 8103 to the extent that funds have not otherwise been provided for the purposes of such sections.

(3) SAVINGS CLAUSE.—The repeal made by paragraph (1) shall have no effect on any right to recover or responsibility that arises from incidents subject to section 204(c) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(c)) occurring prior to the date of enactment of this Act.

(4) TAPS COLLECTION.—Paragraph (5) of section 204(c) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(c)) is amended by striking the period at the end of the second sentence and adding at the end the following: ", except that after the date of enactment of the Oil Pollution Act of 1990, the amount to be accumulated shall be \$100,000,000 or the amount determined by the trustees and certified to the Congress by the Comptroller General as necessary to pay claims arising from incidents occurring prior to the date of enactment of that Act and administrative costs, whichever is less."

101ST CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
101-653

OIL POLLUTION ACT OF 1990

AUGUST 1, 1990.—Ordered to be printed

Mr. JONES of North Carolina, from the committee of conference,
submitted the following

CONFERENCE REPORT

[To accompany H.R. 1465]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 1465) to establish limitations on liability for damages resulting from oil pollution, to establish a fund for the payment of compensation for such damages, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Oil Pollution Act of 1990".

SEC. 2. TABLE OF CONTENTS.

The contents of this Act are as follows:

TITLE I—OIL POLLUTION LIABILITY AND COMPENSATION

Sec. 1001. Definitions.

Sec. 1002. Elements of liability.

Sec. 1003. Defenses to liability.

Sec. 1004. Limits on liability.

Sec. 1005. Interest.

Sec. 1006. Natural resources.

Sec. 1007. Recovery by foreign claimants.

Sec. 1008. Recovery by responsible party.

Sec. 1009. Contribution.

Sec. 1010. Indemnification agreements.

Sec. 1011. Consultation on removal actions.

Sec. 1012. Uses of the Fund.

Sec. 1013. Claims procedure.

program unless the grant has first been recommended by the Interagency Committee.

In making grant recommendations, the Interagency Committee is required to balance the merits of the particular proposed project and the need to provide an appropriate balance within a region among the various aspects of regional oil pollution research needs. In addition, the Interagency Committee must consider the individual merits of the proposal, as well as the criteria set out in section 7001(c)(8)(D).

To encourage stable, long-term research funding, the Conference substitute encourages grants to be made for up to three years, subject to appropriate annual reviews by the granting Agency to determine that the project supported by the grant is being properly carried out. Grants may not provide more than 80 percent of the costs of the research activities carried out in connection with the grant. The Conference substitute also makes it clear that grants cannot be used for land acquisition or building construction.

The Conferees have added language to make it clear that section 7001 is not intended to alter the existing authorities of Agencies represented on the Interagency Committee to make research grants using funds other than those authorized in this section.

The Conference substitute authorizes \$6,000,000 for five fiscal years beginning in 1991 for the regional research program, to be allocated equally among the ten regions. Should the granting agencies determine that additional grant funding is required, the substitute permits the granting Agencies to use their authority under section 7001(c)(10) to make grants from funds authorized in section 7001(f).

Section 7001(d) of the Conference substitute accepts the provision in the House bill requiring the Interagency Committee to coordinate and cooperate with other nations and foreign research entities in conducting oil pollution research activities.

Section 7001(e) of the Conference substitute incorporates the regular reporting requirements in the House bill, but requires the report to be filed every two years instead of annually.

The Conferees agreed to a total funding level of \$27,250,000 per fiscal year, of which \$6,000,000 is authorized for the regional research program, and not less than \$2,250,000 are authorized for the demonstration projects beginning in fiscal year 1992. Funding of \$5,000,000 is authorized for environmental effects research for fiscal year 1991, which is decreased to \$3,500,000 for fiscal years 1992 through 1995. Finally, this subsection states that all activities authorized under section 7001 are subject to appropriations.

It is the strong opinion of the Conferees that the Administration, in its budget request, should consider the oil pollution research and development program established in this Act as the basis for an agency budget cross-cut. Moreover, in conducting such a cross-cut, the Office of Management and Budget should seek the advice of the Interagency Committee established in this Act.

TITLE VIII—TRANS-ALASKA PIPELINE SYSTEM

SEC. 8001. SHORT TITLE

The Senate amendment has no comparable provision.

The Conference substitute provides that this title may be cited as the "Trans-Alaska Pipeline System Reform Act of 1990." The Conference substitute accepts the House provision.

SEC. 8002. REFERENCES TO TRANS-ALASKA PIPELINE AUTHORIZATION ACT

The Senate amendment has no comparable provision.

Section 8002 of the House bill states that, except as otherwise expressly provided, any references in this title to "the Act" shall be considered to be made to a section or other provision of the Trans-Alaska Pipeline Authorization (TAPS) Act (43 U.S.C. 1651-1655).

The Conference substitute accepts the Senate provision.

Subtitle A—Improvements to Trans-Alaska Pipeline System

SEC. 8101. LIABILITY WITHIN THE STATE OF ALASKA AND CLEANUP EFFORTS

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.

SEC. 8102. TRANS-ALASKA PIPELINE LIABILITY FUND

Section 401(b)(1) of the Senate amendment repeals section 204(c) of the TAPS Act and transfers both claims against the Trans-Alaska Pipeline Liability Fund (TAPS Fund) and the balance of the TAPS Fund to the Oil Spill Compensation Fund upon date of enactment. Section 401(b)(2) provides that the owners of the oil who were assessed a five cent fee at the time it was loaded on vessels from the pipeline, pursuant to section 204(c)(5) of the TAPS Act, shall re-

OIL SPILL CONTINGENCY PLAN

PRINCE WILLIAM SOUND

JANUARY 1987

*Lower - Small AOC
revisited - but it's ok
or maybe even better
this way*



Alyeska pipeline
SERVICE COMPANY

© Copyright Alyeska Pipeline Service Company 1976, 1978, 1980, 1987

PRINCE WILLIAM SOUND

100 INTRODUCTION

101 PURPOSE

The Oil Spill Contingency Plan for Prince William Sound has been prepared for Alyeska and contractor personnel located at Valdez Terminal. This Contingency Plan defines specific Immediate Response Actions to be taken as a result of a spill to:

- (1) Alert specific Alyeska and contractor personnel located at Valdez Terminal.
- (2) Initiate reconnaissance actions to determine the exact location, nature and extent of the spill.
- (3) Initiate control actions to minimize the spread of oil, prevent oil from reaching sensitive areas and to clean up the oil spill.

The Oil Spill Contingency Plan is designed to fully comply with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), the State of Alaska Regulations (Title 18) and stipulations of both the Federal and State Right-of-Way agreements. Alyeska Pipeline Service Company will ensure the Plan is followed during any spill event. Therefore, this Contingency Plan includes provisions for oil spill control, prompt notification of government agencies and other requirements spelled out in detail in the General Provisions.

102 CONCEPT

is Contingency Plan covers the entire Prince William Sound from Middle Rock in Valdez Narrows to the southern limit of Hinchinbrook Entrance off Cape Hinchinbrook as shown on Figure 102-1. This Contingency Plan has been developed specifically for rapid and effective response to possible oil spills due to marine vessels in trade with Alyeska's Valdez Terminal.

Preplanned responses have been delineated to ensure that Immediate Response Actions are taken upon detection of an oil spill. Figure 103-2 in the General Provisions is a functional flow diagram of the actions taken for a spill incident. Upon detection of a spill, the Terminal Controller will notify the Shift Supervisor, the Terminal Superintendent, the U.S. Coast Guard and the State Department of Environmental Conservation. Following the above notification, the Terminal Controller will send an initial notification message on the message processor, which is preaddressed to the Alyeska Oil Spill Coordinator and other government agencies.

In subsequent paragraphs of this Contingency Plan, the Contingency Response Organization is outlined and details of the Response Actions are presented. The Contingency Plan also covers cleanup actions and presents support annexes covering Prince William Sound.

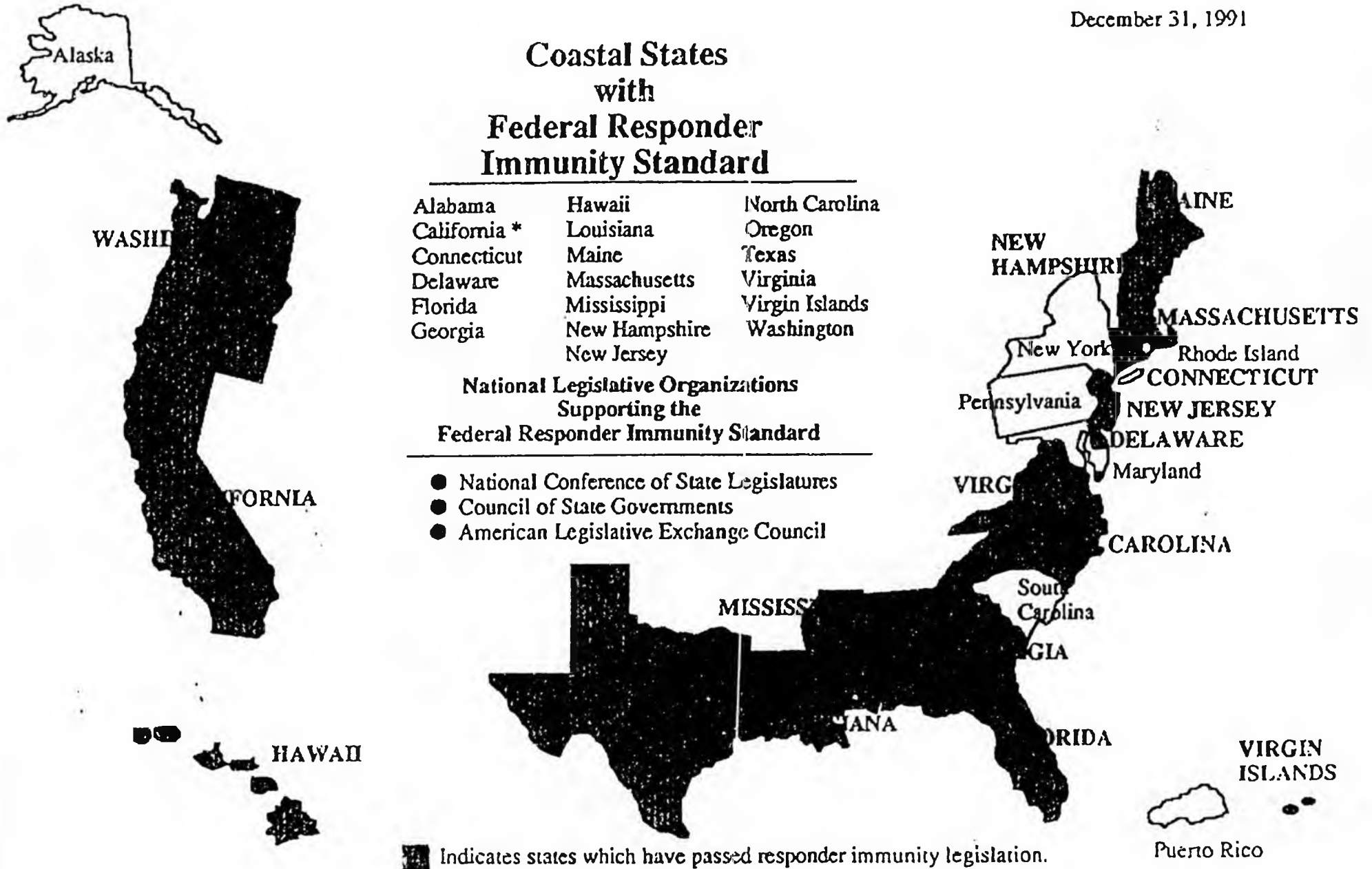
December 31, 1991

Coastal States with Federal Responder Immunity Standard

Alabama	Hawaii	North Carolina
California *	Louisiana	Oregon
Connecticut	Maine	Texas
Delaware	Massachusetts	Virginia
Florida	Mississippi	Virgin Islands
Georgia	New Hampshire	Washington
	New Jersey	

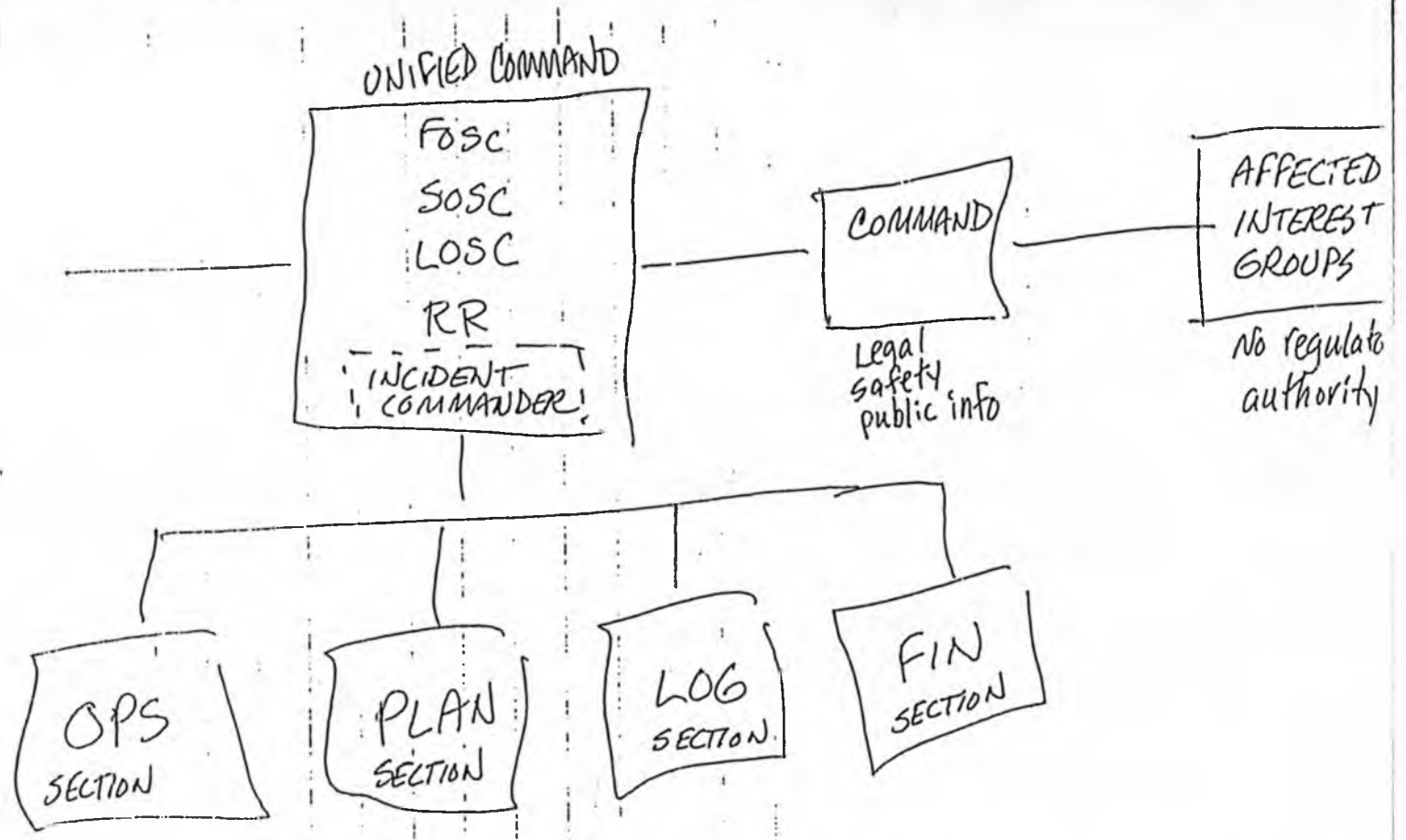
National Legislative Organizations Supporting the Federal Responder Immunity Standard

- National Conference of State Legislatures
- Council of State Governments
- American Legislative Exchange Council



■ Indicates states which have passed responder immunity legislation.

* Federal standard was adopted but only for a maximum of 90 days.



STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

February 25, 1992

Hon. Bill Hudson
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Representative Hudson:

This letter is in response to your inquiry of February 25, 1992 regarding Alyeska's cleanup responsibilities.

We do not believe that legislation "clarifying and reaffirming" Alyeska's cleanup obligations under the existing right-of-way agreement and the TAPAA would improve the state's litigation position in the Exxon Valdez litigation with respect to those obligations.

If you have any further questions on this matter, please do not hesitate to contact me at your convenience.

Sincerely yours,

CHARLES H. COLE
ATTORNEY GENERAL

BY: *Craig J. Tillery*
Craig J. Tillery
Assistant Attorney General

CJT:tg

REPLY TO:

1031 W 4th AVENUE SUITE 200
ANCHORAGE, ALASKA 99501-1886
PHONE: (907) 276-3800
FAX: (907) 276-3887

KEY BANK BUILDING
100 CURRYMAN ST. SUITE 400
FAIRBANKS, ALASKA 99701-4879
PHONE: (907) 452-1568
FAX: (907) 406-1317

P.O. BOX K - STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 452-3800
FAX: (907) 463-0299

Alaska State Legislature

REPRESENTATIVE BILL HUDSON

State Capitol
Juneau, Alaska
99801-1182
(907)465-3744 or 4991

February 19, 1992

COMMITTEES

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House Special Committee
on Oil & Gas
MEMBER
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Transportation
International Trade & Tourism

FINANCE SUBCOMMITTEE:
Department of Transportation
and Public Facilities

Mr. Charles E. Cole,
Attorney General
Department of Law
Capitol Building
Juneau, Alaska

Dear Mr. Attorney General:


Enclosed you will find a sponsor substitute for HB 540, relating to limited liability for response action contractors.

The original bill, HB 540, referenced AS 46.04.030. The sponsor substitute correctly references AS 46.04.200 and AS 46.04.210 on line 12 of page 1 and line 1 of page 2.

SSHB 540 is scheduled for a hearing in the House Special Committee on Oil and Gas on Monday, February 24, 1992 in Room 124 of the Capitol Building.

Accordingly, your earliest possible response to the joint letter by myself and Representative Mike Navarre of February 18, will be very much appreciated.

Respectfully,


Bill Hudson

Enclosure



U.S. Department
of Transportation
**United States
Coast Guard**



Commander
Seventeenth
Coast Guard District

P.O. Box 25517
Juneau, AK
99802-5517
Staff Symbol: d
(907)463-2025

16450
February 24, 1992

The Honorable Bill Hudson
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

Dear Mr. Hudson:

Bill

I'm responding to your letter of 19 February 1992 in which you requested information on the Coast Guard's current efforts taken towards implementing various aspects of the Oil Pollution Act of 1990 (OPA-90). I have addressed each of these issues below.

You mention that it is your understanding the Coast Guard is in the process of developing national standards to certify response action contractors. There is no provision in OPA-90 to specifically certify response action contractors. However, Section 4202 of OPA-90 does require periodic inspection of containment booms, skimmers, vessels and other major equipment used by petroleum transporters to remove discharges. OPA-90 also requires the conduct of periodic drills to assess removal capabilities. A negotiated rulemaking committee is presently developing "Vessel Response Plans and Carriage and Inspection of Discharge-Removal Equipment" regulations. These regulations will address the spill response equipment and arrangements required of petroleum transporters to ensure that potential spills can be adequately addressed. In instances where petroleum transporters elect to have a response action contractor meet their spill response capabilities it is envisioned the Coast Guard will inspect the response action contractor's equipment. The Coast Guard is also in the process of working to develop performance standards for spill response equipment, i.e. skimmer effectiveness.

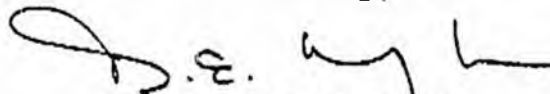
With respect to your comments on the Marine Spill Response Corporation (MSRC), neither the National Contingency Plan nor OPA-90 has a requirement for this organization to exist or to maintain a presence in Alaska. MSRC has been developed by the oil industry as a cooperative means of helping address the added spill response capabilities that will be required by the regulations developing from OPA-90. From the Coast Guard's perspective we simply require oil transporters to have equipment, resources and commitments available to respond to oil spills as required by the previously mentioned regulations. Whether they meet these requirements through use of MSRC or other companies is not an issue.

16450
February 24, 1992

You further question the National Contingency Plan's (NCP) requirements for Ship Escort Response Vessels (SERVS) and how they would be dispatched to respond to spills outside Prince William Sound. There is no requirement in the NCP for SERV's to respond to spills in or out of Prince William Sound, nor are there presently spill response requirements for spills emanating from tankers transiting offshore from Alaska to the "lower 48". OPA-90 does, however, require issuance of regulations that will require escort of oil laden tankers in specified areas of Prince William Sound. These regulations have not yet been developed. The previously mentioned "Vessel Response Plans and Carriage and Inspection of Discharge-Removal Equipment" regulations will prescribe how oil transporters will be required to respond to the above oil spill scenarios.

In summary, many of the regulations which will implement OPA-90 are still being developed. Should you require additional information on these issues please feel free to call me or Commander Ed Page, Chief of the Seventeenth District's Marine Environmental Protection Branch, PH: (907) 463-2210.

Sincerely,



D. E. CIANCAGLINI
Rear Admiral, U. S. Coast Guard
Commander, Seventeenth Coast Guard District

Alaska State Legislature

REPRESENTATIVE BILL HUDSON

State Capitol
Juneau, Alaska
99801-1182
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on Oil & Gas
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FINANCE SUBCOMMITTEE:

Department of Transportation
and Public Facilities

February 18, 1992

D. E. Ciancaglini,
Rear Admiral, U.S. Coast Guard
Commander, Seventeenth Coast
Guard District
Box 25517
Juneau, Alaska 99811

Dear Admiral Ciancaglini:

The Alaska State Legislature currently has before it the issue of limiting the liability of response action contractors who respond to marine oil spills. I am enclosing a copy of legislation introduced this morning.

It is my understanding that the U.S. Coast Guard, under provisions set forth in the Oil Pollution Act of 1990, is currently in the process of developing national standards to certify response action contractors.

Please discuss in detail the current efforts by the Coast Guard to establish such a certification program.

Additionally, I would appreciate your discussing in detail, the national contingency plan's requirements of the Marine Spill Response Corporation and how MSRC would be dispatched to respond to an oil spill in Alaska. As you know, MSRC has not placed one of the regional response centers in Alaska, and I am deeply concerned about the hundreds of miles of unprotected coast lines in Southeast Alaska and Western Alaska.

Additionally, I would appreciate your discussing in detail, the national contingency plan's requirements of the Ship Escort Response Vessels (SERV) and how SERV would be dispatched to respond to an oil spill by a tanker carrying TAPS crude from Prince William Sound to Cook Inlet as well as how the national contingency plan treats an offshore tanker spill on the down track followed by these crude oil laden tankers enroute to Lower 48 terminals.



I will be scheduling this legislation for a hearing in the House Special Committee on Oil and Gas as soon as possible. Accordingly, your written response at your earliest possible convenience will be very much appreciated.

Respectfully,

A handwritten signature in dark ink, appearing to be 'B. Hudson', written in a cursive style.

Bill Hudson, Chair

Enclosures

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

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

Telephone: 465-5050
FAX: 465-5070

February 25, 1992

HB 540

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

Dear Representative Hudson:

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

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

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

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

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

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

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

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

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

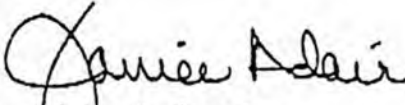
Since January, staff from this Department have attended two of the last three meetings in an observer status. The committee has been attempting to reach consensus on the issues of "adverse weather", "maximum extent practicable", "on board carriage of equipment", "plan contents", "vessel applicability",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

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

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

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

Sincerely,


for John A. Sandor
Commissioner

CJP/MAC/JA/tls

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

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

bcc: Chris Pace
Tracy Sherrer

NEW STANDARDS FOR CONTINGENCY PLANS

OIL TERMINAL FACILITIES must plan to contain, control and clean up a discharge equal to the capacity of the largest tank at the facility within 72 hours.

CRUDE OIL TANK VESSELS OR BARGES:

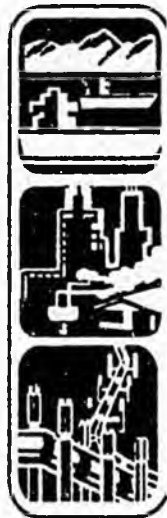
- vessels smaller than 500,000 barrels of storage capacity must plan to contain, control and clean up a 50,000 barrel discharge.
- Vessels with more than 500,000 barrel capacity must plan to contain, control and clean up a 300,000 barrel discharge.
- All crude oil tank vessels or barges must demonstrate access to other equipment outside the region of operation to clean up a realistic maximum discharge and the ability to have that equipment deployed and operating at the discharge site within 72 hours.

NON-CRUDE TANK VESSELS OR BARGES—

- must plan to contain, control the greater portion of the total oil storage capacity of the vessel.
- must clean up a discharge within the shortest possible time consistent with minimizing damage to the environment.

OIL SPILL PREVENTION, RESPONSE AND FINANCIAL RESPONSIBILITY

The Regulations Say:



Regulations written to implement HB 567 tackle spill preparedness through the spill prevention and response plans that oil facilities and vessels are required to submit for State approval. The regulation now requires plans from onshore exploration and production facilities and pipelines in addition to oil tanks, tank vessels and oil barges. Plus, higher standards are required of *all* plans in three major ways:

Planning Standards — "Response Planning Standards" are one of the cornerstones of the new regulations, specifying the size of spill each vessel or facility operator must be prepared to clean up within 48 hours or 72 hours. The Response Planning Standard varies by amount of oil stored or transported, while response time depends upon type of facility.

Response Planning Standards directly affect the amounts—and thus costs—of equipment, supplies and personnel that companies must keep ready at all times in case of a spill.

Prevention — While vessels and facility operators have always been expected to prevent spills, the State now requires prevention plans and specific prevention measures that must be taken. The state will also consider the reduced risks of companies that incorporate significant voluntary prevention measures. This means that companies employing preventative techniques such as double hulls, for example, may have their required Response Planning Standard adjusted downward according to formulae written into regulations.

Financial Responsibility — Operators of vessels and facilities handling oil must give proof that they possess the financial resources to pay for cleanup and damages from potential spills. The regulations have been revised to broaden the acceptable forms of proof to include letters of credit and protection and indemnity clubs.

HB567 requires vessels and facilities to comply by June 1, 1992. Regulations are projected for adoption in December, 1991. Plan holders are required to upgrade their contingency plans as may be necessary to meet their new requirements and submit any amendments in time to receive approval by June 1, 1992.



Alaska
Department of
Environmental
Conservation

DEVELOPMENT OF ALASKA'S OIL SPILL REGULATIONS



Alaska
Department of
Environmental
Conservation

1989 MARCH 24
Exxon-Valdez oil spill

1990 JUNE 27, 1990
House Bill 567 takes effect

1991 MARCH 4, 1991
Mail out working draft of regulations
for C-plan standards and workshop
schedule

MARCH 15
Distribute working draft of regulations
for financial responsibility

MARCH 19
First meeting of HB 567 work group

MAR. 20 - MAY 2
Hold informational workshops at 18
locations

JUNE 1
incorporate public comments
Amendments to response plans due

JULY 8
Complete draft prevention regulations
issue public notice for all regulations

JULY 8-AUGUST 21
Hold public hearings on all
regulations

AUGUST 21-OCTOBER 10
Incorporate final revisions

OCTOBER 10
Department of Law review begins

NOVEMBER
Lt. Governor review

DECEMBER
Final adoption of regulations on or
about Dec. 1. Effective date 30 days
later.

1992 FEBRUARY 1, 1992
Owners/operators complete amend-
ments to response plans

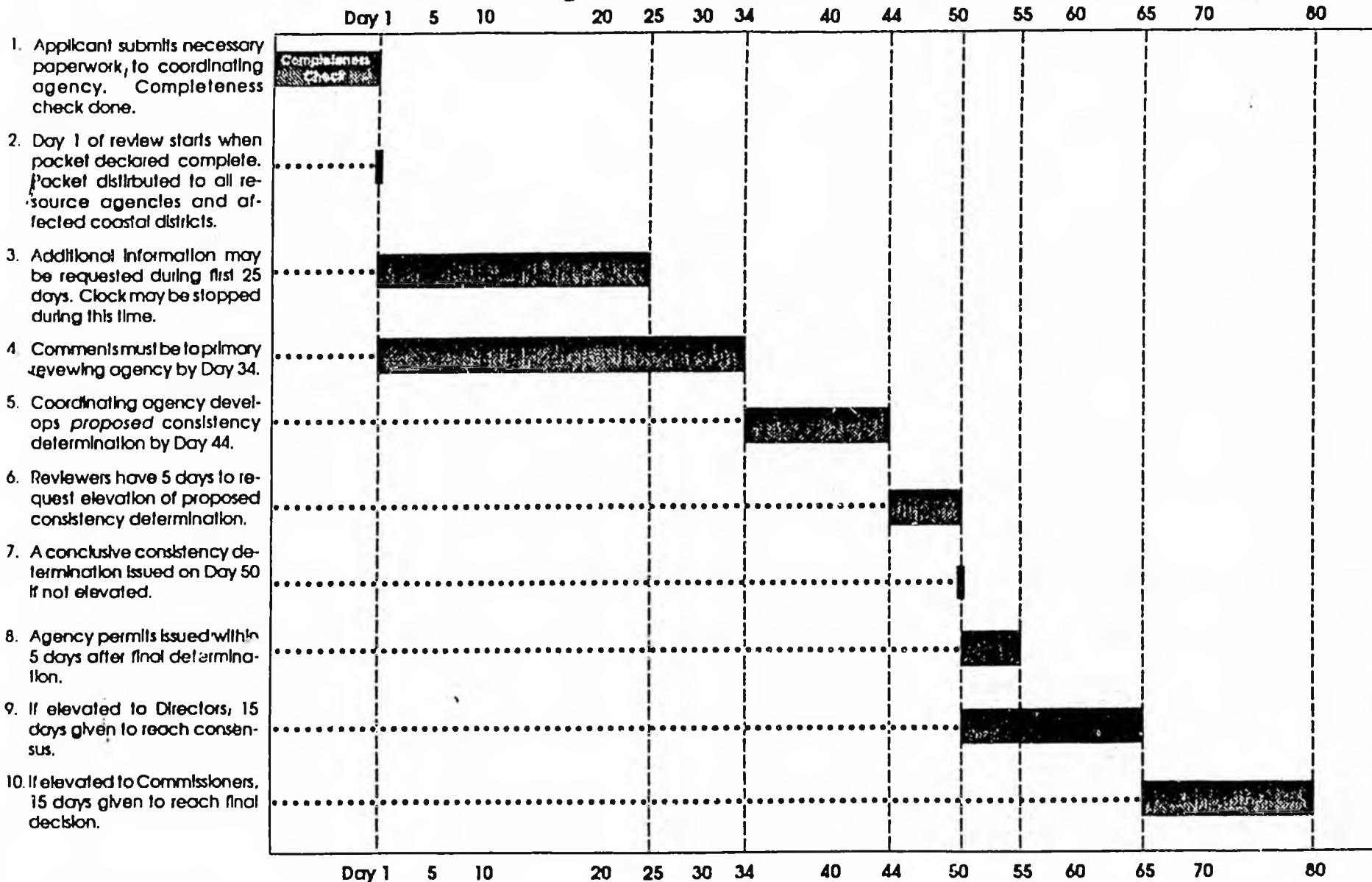
PROOF OF FINANCIAL RESPONSIBILITY

Type of Facility	Before June 1, 1991	After June 1, 1991
OIL TERMINALS		
Oil Terminals/Crude (5,000 barrel (bbl.) and up)	\$10 per bbl. of storage capacity or \$1,000,000, whichever is greater, \$50,000,000 maximum	\$50,000,000 per incident
Oil Terminals/Non-Crude (10,000 bbl. and up)	Same as above	\$25 per bbl. of storage capacity or \$1,000,000, whichever is greater, \$50,000,000 maximum
Oil Terminals/Crude and Non-Crude combined	Same as above	If mostly crude - \$50,000,000 per incident. If mostly non-crude - \$25 per bbl. of total capacity
PIPELINES & EXPLORATION FACILITIES		
Pipelines and Offshore Exploration or Production	\$35,000,000 per incident	\$50,000,000 per incident
Onshore Production	EXEMPT	\$20,000,000 per incident
Onshore Exploration	EXEMPT	\$5,000,000 per incident
VESSELS & BARGES		
Tank Vessel & Oil Barge/Crude	Trans-Alaska Pipeline related: \$14,000,000. Other tankers: per Clean Water Act or \$20,000,000, whichever is greater. Other barges: per CWA or \$1,000,000.	\$300 per bbl. per incident storage capacity or \$100,000,000, whichever is greater
Tank Vessel & Barge/Non-Crude	Same as above	\$100 per bbl. storage capacity per incident or \$1,000,000, whichever is greater, \$35,000,000 maximum

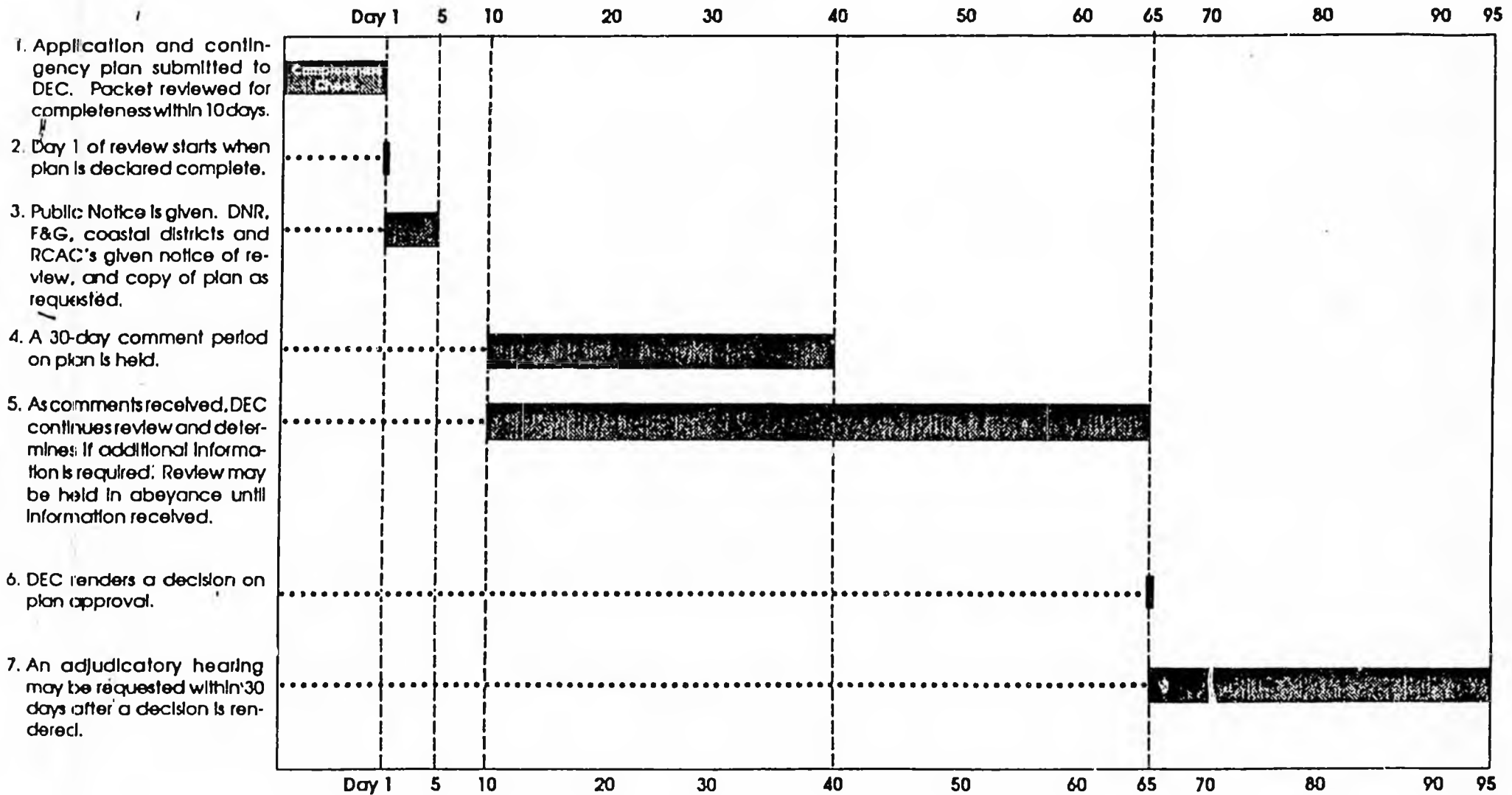


Alaska
Department of
Environmental
Conservation

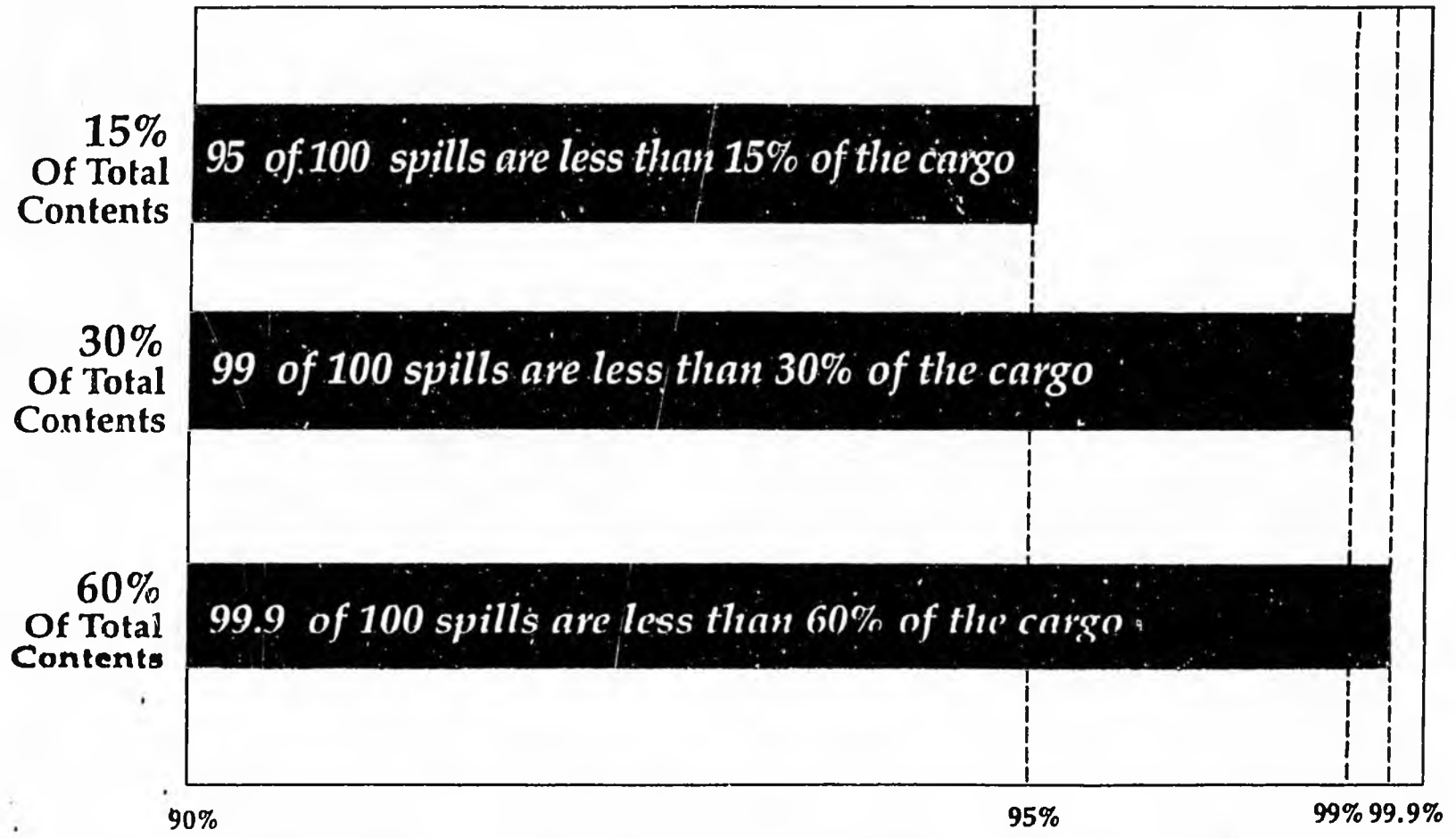
Alaska Coastal Management Program 50-Day Review Schedule



Oil Spill Contingency Plan Review Schedule Under HB567 Regulations

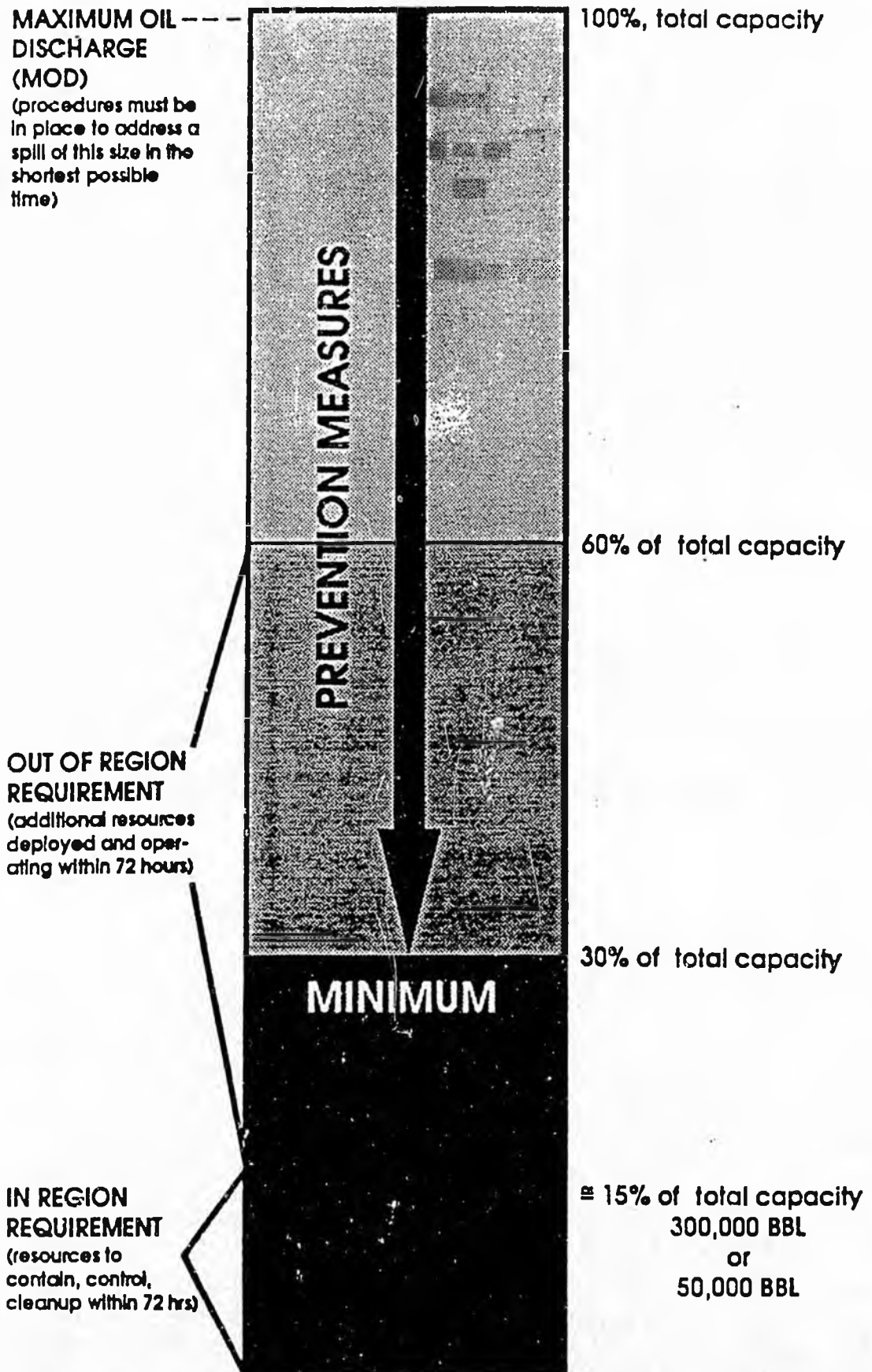


Vessel Response Planning Standards (RPS) vs Risk



Percentage of Potential Spills Smaller than RPS

Crude Oil Tank Vessel Response Planning Standards*



*Response planning standards do not constitute cleanup standards that must be met by the holder of a response plan



Alaska Department of
**Environmental
Conservation**

P.O. Box 0
Juneau, Alaska 99811-1800

Release

Walter J. Hickel, Governor

John A. Sandor, Commissioner

Contact: Debby Bloom, 563-6529
L.J. Evans, 563-1126

DEC COMMISSIONER SANDOR SIGNS NEW OIL SPILL REGULATIONS AFTER EXTENSIVE PUBLIC PROCESS

October 26, 1991. Anchorage... DEC Commissioner John Sandor has signed oil spill regulations which raise spill prevention and response standards for approximately 300 tankers, barges, terminals, and on-shore exploration and production facilities operating in Alaska, as well as the Trans-Alaska Pipeline System, after 16 months of drafting and public review.

The regulations, which Sandor said are "the toughest in the nation--if not the world," set new standards for spill prevention and readiness on the part of companies handling oil; establish the amount of oil that a company must be prepared to control and contain in the first hours of a spill; and broaden the range of options for meeting financial responsibility requirements.

Alaska will require crude oil tankers to have enough equipment and personnel in the region within 72 hours of the onset of a spill to control or cleanup 60% of a vessel's total cargo capacity; operators must plan to clean up 100% of a spill as soon as practicable. In contrast, federal law does not set a minimum time period.

"With the help of the public, environmental and industry groups, citizens' organizations, and an outstanding working group, we have reached a key milestone in Alaska's effort to develop the regulations called for by the Legislature in 1990 in House Bill 567," said Commissioner Sandor. "These new rules will put Alaska out front in effective spill prevention and response. For that, and for their countless hours of good work, we sincerely thank all those who attended our many public meetings, and especially the citizens' working group that assisted the department in resolving several key controversies about how this law should be implemented."

- More -

"Our job now is to make sure equipment is in place and readiness is maintained," Sandor said. "All the equipment on earth will do no good unless people are trained to use it." The Commissioner said that DEC will enforce the law with frequent drills, including surprise drills, to test and maintain readiness and the effectiveness of plans and equipment.

The HB 567 Working Group was established in 1990 by DEC with representatives from state and federal agencies, citizen oversight groups, industry, and environmental organizations. The public participation process for the regulations included 18 public meetings last winter and spring throughout Alaska in addition to formal public hearings held last summer. The working group met many additional times throughout the process to advise the department on development of the regulations. DEC staff reviewed and considered 800 pages of comments on the draft regulations from members of the public.

"The response to the Exxon Valdez spill involved nearly all Alaskans, either in actual response activities or in terms of their concerns. We felt it necessary to likewise involve as many Alaskans as we could in developing a system to prevent future spills or to respond effectively if they ever happened. Now we need continued participation of Alaskans to implement the system and make sure it works," said Sandor. The Commissioner said that he has invited the Working Group to continue to advise DEC on implementation of the new regulations.

If the regulations are filed by Lt. Governor Jack Coghill following a review by the Department of Law, crude oil facilities will be asked to amend their current plans to conform with the new regulations by February 1, 1992.

Sandor said that Alaskans can already have more confidence in spill preparedness within the state. In most cases, the large companies have in place the necessary response equipment, personnel, and prevention measures. Alyeska Pipeline Company's SERVS system of escort vessels for tankers in Prince William Sound is an example.

The Commissioner indicated that the department will work with small companies covered by the law to form spill response co-ops throughout the state. The regulations encourage cost-sharing for increased prevention and response capabilities. Non-crude operators come under the law effective June 1, 1992.

The final step in developing the regulations was a set of decisions reached by the department on several key policy issues that remained unresolved at the conclusion of the public participation process.

DEC Deputy Commissioner Mead Treadwell said, "One of our toughest calls was the decision on the planning standard for crude oil carriers. In the public comments and working group there was no consensus on how much of a vessel's cargo the operator

should have to plan to clean up beyond the first 72 hours of a spill. HB 567 requires the department to set this standard, and operators must design their response plans accordingly. In the end we relied on statistical studies of spill situations and what we could expect to happen during an actual spill. It turned out that a 60% planning standard, the ability to clean up 60% of the cargo capacity, was the right answer in this case." Two DEC consultants independently reached this conclusion and made the recommendation to the department, Treadwell explained.

Under this requirement a plan holder must plan to clean up a total spill, but must demonstrate the availability of sufficient equipment and personnel deployed and operating within the region within the first 72 hours to clean up 60% of a vessel's cargo. The planning standard can be lowered through "prevention credits," but only for hydrostatic loading, double hulls or bottoms, or escort vessels. In no case will the planning standard be less than 30% of a vessel's cargo capacity.

"Another critical decision was whether to specifically enable DEC to require a facility or tanker to restrict operations, if conditions arise that would make it impossible for a plan holder to employ the methods outlined in this plan," said Treadwell.

He explained that this concern was for situations where conditions such as earthquakes, volcanoes, storms or other situations make an operator's proposed response methods ineffective. The regulations require a plan holder to describe scenarios when weather or environmental conditions would exceed maximum response limitations. Shutting down a facility is a decision limited to the DEC Commissioner, either through an emergency order or by seeking a court injunction.

The department also decided:

- To adopt the majority of the proposed prevention provisions now and make a commitment to continue to work on unresolved issues with the HB 567 Working Group, rather than delay the entire "prevention" package.
- To retain language to guard against company employee substance abuse or medical problems diminishing abilities to perform tasks that could prevent or reduce the size of a spill. The language has been reviewed by the Departments of Law and Health and Social Services.
- For non-crude carriers, to adopt a current planning standard that requires the operator to plan to contain or control 15% of the capacity of the vessel or barge within a 48-hour time limit, and clean up the full amount of any size spill within the shortest feasible time.
- To maintain provisions for drilling relief wells in the event of a blowout. The department was concerned about the possibility of a sustained major discharge from an oil formation occurring during adverse winter conditions that could make it impossible to regain control of the well until the following season. Language was

- More -

added to include plans for other methods of well control in addition to relief wells.

-- To modify the review procedures for oil spill contingency plans related to the Alaska Coastal Management Program (ACMP). DEC regulations do not require a plan holder to go through full ACMP review, but during the decision-making process DEC will itself respond to the comments of coastal districts, regional citizens' advisory councils, and the Departments of Natural Resources and Fish and Game. DEC decisions can still be appealed by coastal districts through administrative procedures.

-- To follow the lead of the U.S. Coast Guard not to allow companies to use foreign assets as proof of their ability to self-insure against losses and damages resulting from oil spills. A provision is being added to the regulations to allow waiving working capital requirements for operators who conclusively show their financial strength through other means such as bond ratings.

For further information, or a copy of the regulations package, contact Lynn Kent, DEC Spill Prevention, Planning and Management, in Juneau at 465-2630.

#

OCTOBER 26, 1991 DRAFT REGULATIONS

18 AAC 75.425. OIL DISCHARGE PREVENTION AND CONTINGENCY PLAN CONTENTS.

PART 2 -- PREVENTION PLAN

(H) RESPONSE CONTRACTOR INFORMATION - if a plan holder proposes to use the services of a response action contractor to meet a requirement of AS 46.04.030 or this chapter, the plan holder shall include a true, correct, and complete list of each contractor, with name, address, telephone number, and affiliation by company, a summary of each agreement or contract, and the response equipment and services provided; the use of a contractor does not relieve the plan holder's responsibility to provide the information required by this subsection, and to meet all other applicable requirements of this chapter;

18 AAC 75.445. APPROVAL CRITERIA.

(i) RESPONSE CONTRACTOR INFORMATION. If a plan holder proposes to use the services of a response action contractor to meet a requirement of AS 46.04.030 or this chapter, the plan holder shall include a true, correct, and complete list of all contractors, with names, addresses, telephone numbers, and affiliation by company, and a copy of the contract or a summary which clearly demonstrates

(1) the contractor's obligation to respond if a discharge occurs, and the contractor's liability to the plan holder for the contractor's failure to respond or for an inadequate response;

(2) the contractor's availability to respond to a department-conducted discharge exercise as well as an actual discharge; and

(3) that equipment and other spill response resources to be provided by the contractor are maintained in a state of readiness and are compatible with the type of facility or operation and the oil product handled by the plan holder.

(G:\SPPM\CLERICAL\HB567\cplanrvw.ltr)

OIL DISCHARGE PREVENTION
AND CONTINGENCY PLAN APPROVAL

Name of plan holder
Address

Dear:

Re: (Name of facility) Oil Discharge Prevention and Contingency Plan

The Alaska Department of Environmental Conservation (ADEC) has completed review of the (date of application) application for approval of the following oil spill contingency plan:

Plan Title: _____, consisting of ____ volumes
Supporting Documents, if any (list): _____
Plan Holder: _____
[Be specific, as in "ABC Oil Co., A Delaware Corporation."]
Covered Vessels or Facilities: _____
[If vessel, U.S. Official Number: _____]

PLAN APPROVAL: The (name of plan) plan is hereby approved, effective [_____, 199_].

A certificate of approval stating that the contingency plan has been approved by the department is enclosed. This approval is subject to the following terms and conditions:

TERMS AND CONDITIONS:

1. Revisions to contingency plans demonstrating full compliance with the implementing regulations for HB 567 must be submitted to the Department within 90 days of their effective date. The Department's implementation schedule for demonstrating compliance with the new regulations is contained in the enclosed January 7, 1992 letter from the Commissioner.
2. Notice of Changed Relationship with Response Contractor [DELETE THIS PARAGRAPH IF NO RESPONSE CONTRACTOR INVOLVED IN THE PLAN].
Because the plan relies on the use of response contractor(s) for its

Implementation, the plan holder must immediately notify the Department in writing of any change in the contractual relationship with the plan holder's response contractor(s), and of any event including but not limited to any breach by either party to the response contract that may excuse a response contractor from performing, that indicates a response contractor may fail or refuse to perform, or that may otherwise affect the response, prevention, or preparedness capabilities described in the approved plan.

This condition is reasonably necessary because there are certain risks associated with allowing a plan holder to rely in part or total upon a response contractor instead of obtaining its own response capability. The risks arise, in part, because the certainty of the contractor's response is dependent upon the continuation of the legal relationship between it and the plan holder. Given this risk, the Department must be promptly informed of any change of the contractual relationship between the plan holder and the response contractor, and of any other event that may arguably excuse the response contractor from performing or that would otherwise affect the response, prevention, or preparedness capabilities described in the approved plan. The Department may seek appropriate modifications to the plan or take other steps to ensure that the plan holder has continuous access to sufficient resources to protect the environment and to contain, cleanup, and mitigate potential oil spills.

3. (Additional facility specific conditions and their basis should be included here)

EXPIRATION: This approval expires _____, 199_. After the approval expires, operation of the facility/vessel is prohibited by Alaska law until an approved plan is once again in effect.

RENEWAL: To renew the approval, the plan holder must submit a complete renewal application to this office on or before _____, 199_.

REVOCATION, SUSPENSION, OR MODIFICATION: This approval is effective only while the plan holder is in "compliance with the plan" and with all of the terms and conditions described above. The Department may, after notice and opportunity for a hearing, revoke, suspend, or require the modification of an approved plan if the plan holder is not in compliance with it, or for any other reason stated in AS 46.04.030(f). In addition, Alaska law provides that a vessel or facility that is not in "compliance with the plan" may not operate (AS 46.04.030). The department may terminate approval prior to the expiration date if deficiencies are identified that would adversely affect spill prevention, response or preparedness capabilities.

DUTY TO RESPOND: Notwithstanding any other provisions or requirements of this contingency plan a person causing or permitting the discharge of oil is required by law to immediately contain and cleanup the discharge regardless of the adequacy or inadequacy of a contingency plan (AS 46.04.020).

BEST AVAILABLE TECHNOLOGY: The contingency plan must provide for use by the applicant of the best available technology at the time it is submitted or renewed (AS 46.04.030 (e)).

NOTIFICATION OF NON-READINESS: Within three days after any significant response equipment specified in the plan becomes nonoperational or is removed from its designated storage location the plan holder must notify the department in writing and provide a schedule for the equipments substitution, repair, or return to service (18AAC 75.375).

CIVIL AND CRIMINAL SANCTIONS: Failure to comply with the plan may subject the plan holder to civil liability for damages and to civil and criminal penalties. Civil and criminal sanctions may also be imposed for any violation of AS 46.04, any regulation issued thereunder, or any violation of a lawful order of the Department.

INSPECTIONS, DRILLS, RIGHTS TO ACCESS AND VERIFICATION OF EQUIPMENT, SUPPLIES AND PERSONNEL: The Department has the right to verify the ability of the plan holder to carry out the provisions of its contingency plan and access to inventories of equipment, supplies and personnel through such means as inspections and discharge exercises, without prior notice to the plan holder. The Department has the right to enter and inspect the covered vessel or facility in a safe manner at any reasonable time for these purposes and to otherwise ensure compliance with the plan and the terms and conditions (AS 46.04.030(e) and AS 46.04.060). The plan holder shall conduct exercises for the purpose of testing the adequacy of the contingency plan and its implementation (18 AAC 75.385).

FAILURE TO PERFORM: In granting approval of the plan, the Department has determined that the plan, as represented to it by the applicant in the plan and application for approval, satisfies the minimum planning standards and other requirements established by applicable statutes and regulations, taking as true all information provided by the applicant. The Department does not warrant to the applicant, the plan holder, or any other person or entity: (1) the accuracy or validity of the information or assurances relied upon; (2) that the plan is or will be implemented; or (3) that even full compliance and implementation with the plan will result in complete containment, control, or clean-up of any given oil spill, including a spill specifically described in the planning standards. The plan holder is encouraged to take any additional precautions and obtain any additional response capability it deems appropriate to further guard against the risk of oil spills and to enhance its ability to comply with its duty under AS 46.04.020(a) to immediately contain and clean up an oil discharge.

COMPLIANCE WITH APPLICABLE LAWS: If amendments to the approved plan are necessary to meet the requirements of any new laws or regulations, the plan holder must submit an application for amendment to the Department at the above address. The plan holder must adhere to all applicable state statutes and regulations as they may be amended from time to time. Copies of those currently in effect are enclosed. The department is currently developing regulations to implement Ch. 191, SLA 1990.

Amendments to comply with the regulations will be necessary upon promulgation.

ADJUDICATORY HEARING: Any person who disagrees with the decision may request an adjudicatory hearing by serving upon the Commissioner a request for hearing that complies with the requirements of 18 AAC 15.200-310. The hearing request must be received by the Commissioner within 30 days from the date of this letter. Hearing requests must be delivered to the Commissioner of the Department of Environmental Conservation at 3220 Hospital Drive, P.O. Box 0, Juneau, AK 99811-1800 within 30 days of receipt of this letter. If a hearing is not requested within 30 days, the right to a hearing is waived and the decision becomes final.

If you have any questions, please do not hesitate to contact _____ of this office.

Sincerely,

Regional Administrator
or
Regional Environmental Supervisor

Enclosures:

1. Certificate of Approval
2. Alaska Statutes 46.03, 46.04, 46.08 and 46.09 (white statute book)
3. 18 AAC 75, Article 4
4. October 26 Draft Regulations
5. Commissioner's January 7, 1992 letter

cc: (To be completed by the regions. Standard distribution should include one copy to Central Office SPPM c/o Larry Dietrick)



Alaska State Legislature

7

REPRESENTATIVE BILL HUDSON

State Capitol
Juneau, Alaska
99801-1182
(907)465-3744 or 4991

COMMITTEES

CHAIR
House Special Committee
on Oil & Gas
MEMBER
Resources
Transportation
International Trade & Tourism

FINANCE SUBCOMMITTEE:
Department of Transportation
and Public Facilities

February 18, 1992

Mr. John Sandor, Commissioner
Alaska Department of Environmental
Conservation
410 Willoughby Avenue, Suite 105
Juneau, Alaska

Dear Commissioner Sandor:

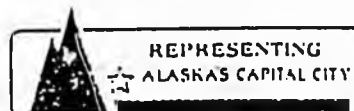
The Citizen's Oversight Council on Oil and Other Hazardous Substances recently presented their report as required by Section 11 of HB 196, Chapter 92 SLA 1991. I am enclosing for your convenient reference a copy of that report.

There are several recommendations set forth specifically addressing the issue of the state of Alaska's providing for certification of response action contractors. Specifically, recommendations two through six discuss response action contractor certification and the Council has set forth rationales for each of those recommendations.

I would appreciate your review of the issue of certification of response action contractors by the state of Alaska.


Please discuss the current efforts now underway by the task force comprised of coastal states, the public, the U.S. Coast Guard, and the oil industry to implement a national standard for certification of response action contractors, as required by the Oil Pollution Act of 1990. Specifically, I would like to know how far along the process is, and by when will the task force have in place certification standards?

It would be very much appreciated if you would provide in detail the task force, how it was organized, what states participate, the missions and goals, and any other aspects you feel will be beneficial to the Legislature as we consider pending legislation to limit the liability of response action contractors.



I am also enclosing a copy of legislation introduced this morning. I anticipate this legislation will be heard as soon as possible. Accordingly, your written response at your earliest possible convenience will be very much appreciated.

Respectfully,

A handwritten signature in cursive script that reads "Bill".

Bill Hudson

Enclosures

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

REPLY TO:

1031 W 4th AVENUE SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550
FAX: (907) 276-3697

KEY BANK BUILDING
100 CUSHMAN ST. SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1568
FAX: (907) 456-1317

P.O. BOX K— STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

February 24, 1992

Hon. Bill Hudson
House of Representatives
Alaska State Legislature
P. O. Box V
Juneau, AK 99811

Dear Rep. Hudson:

We are responding to your inquiry of February 18, 1992, concerning several of the issues raised in the recommendations of the Citizens' Advisory Council on Oil and Other Hazardous Substances concerning response action contractors.

With regard to the Council's recommendation number 7, you asked our opinion of whether Alyeska Pipeline Service Company has a duty to control and remove pollution within state boundaries related to the transportation of TAPS crude oil. As you know, this issue is the subject of litigation in the Exxon Valdez case. The State has taken the position that under the provisions of the State Right-of-Way Lease Alyeska is required to contain and cleanup crude oil spills within state waters, in particular in Prince William Sound. State of Alaska v. Exxon Corp., et. al., Case No. 3AN-89-06852 CI, ¶¶ 36, 96-102 at 13, 31-32. The United States has taken a similar position with respect to the federal right-of-way lease. The State has also alleged that Alyeska's oil spill contingency plan in effect at the time of the spill required them to respond to spills in Prince William Sound. Id. ¶¶ 36, 96-102, 132. The issue of Alyeska's duty to respond to vessel spills in the Sound pursuant to the Trans Alaska Pipeline Authorization Act (TAPAA), 43 U.S.C. § 1653(a) & (b), is not an issue in the state court litigation. This section is, however, at issue in the United States' Exxon Valdez lawsuit. United States of America v. Exxon Corp., et. al., Case No. A91-082 Civ., ¶¶ 41-43, at 10. Since Alyeska disputes any obligation to respond to tanker spills under TAPAA, this obligation, like those described above, would likely be the source of future litigation. See Response of Alyeska Pipeline Service Company to Memorandum Regarding the Trans Alaska Pipeline Authorization Act Prepared by Michael J. Frank, at 4. While we believe that our litigation positions are sound, there is no way to reliably predict how a court will rule.

Secondly, you asked whether legislation clarifying Alyeska's duty to respond to vessel spills would affect existing contractual arrangements between Alyeska and the State of Alaska or the federal government. Given the Governments' positions that under these contractual agreements Alyeska is under an existing duty to control and remove oil spills from tankers, legislation clarifying and reaffirming this obligation would not pose a problem to the state.

With regard to which type of response action contractors ("RACs") deserve a grant of limited immunity to encourage response actions, we would defer to the Governor's Office for a policy statement. It is our understanding that the Department of Environmental Conservation is in the process of developing a position on various response action contractor liability issues.

As to your equal protection question, an intelligent response requires scrutiny of the various distinctions made between classes of RACs and the nature of the justifications for making those distinctions. Therefore without a specific proposal in hand it is difficult to make specific judgments. In general, the equal protection test employed under the Alaska Constitution by our State Supreme Court requires a three-step analysis. State v. Anthony, 810 P.2d 155, 157 (Alaska 1991). This "flexible 'sliding scale' test" is as follows:

First, it must be determined . . . what weight should be afforded the constitutional interest impaired by the challenged enactment. The nature of this interest is the most important variable in fixing the appropriate level of review

Second, an examination must be undertaken of the purposes served by a challenged statute. Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest.

Third, an evaluation of the state's interest in the particular means employed to further its goals must be undertaken At the low end of the sliding scale, we have held that a substantial relationship between means and ends is constitutionally adequate. At the higher end of the scale, the fit between the means and ends must be closer. If the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated.

Hon. Bill Hudson
House of Representatives

February 24, 1992
Page 3

Id. (citing Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269-70 (Alaska 1984)). Given that response action contractor immunity is essentially an economic interest, a court is more likely to apply a minimal scrutiny test. Under such a test, the state's purposes must be legitimate and any distinctions drawn by the statute must bear a fair and substantial relationship to the statute's purpose.

We trust that this response is of assistance. Please contact us if we be of further assistance.

Sincerely,

CHARLES E. COLE
Attorney General

By: *Craig J. Tillery*
Breck C. Tostevin
Breck C. Tostevin
Assistant Attorney General

BCT:tg

cc: Hon. Sam Cotten
Alaska Senate

Paul Fuhs
Senior Legislative Liaison
Office of the Governor

Deborah Behr, Assistant Attorney General
Legislation and Regulations Section - Juneau

Craig Tillery, Assistant Attorney General
Environmental Section - Anchorage



Alaska State Legislature

HOUSE OF REPRESENTATIVES

Official Business

State Capitol
Juneau, AK 99801-1182

February 18, 1982

Mr. Charles E. Cole,
Attorney General
Department of Law
State of Alaska
Room 412 Capitol Building
Juneau, Alaska

Dear Mr. Attorney General:

The Citizens' Oversight Council on Oil and Other Hazardous Substances recently presented their report as required by Section 11 of HB 196, Chapter 92 SLA 1991. I am enclosing for your convenient reference a copy of that report.

Recommendation number seven, on page 11 states: "The Trans-Alaska Pipeline System ("TAPS") agent should clearly maintain the duty to control and remove pollution within state boundaries related to the transportation of TAPS crude oil."

It will be very much appreciated if you would review this recommendation, as well as the Council's rationale.

It is our understanding that there are contracts between Alyeska Pipeline Service Company and the state of Alaska for the state right-of-way agreements, between Alyeska Pipeline Service Company and the federal government for the federal right-of-way agreements, and between Alyeska Pipeline Service Company and the federal government for the Trans-Alaska Pipeline Authorization Act.

After your review of the report and the various state and federal contractual agreements, it would be very much appreciated if you would prepare a legal opinion discussing Alyeska's duty to control and remove pollution within state boundaries related to the transportation of TAPS crude.

We are also enclosing a copy of a document entitled "Memorandum of Alyeska Pipeline Service Company Regarding Liability Under Trans Alaska Pipeline Authorization Act for Oil Spills From Vessels." We believe your review of this memorandum will be necessary as you prepare your response to the questions we have posed.

Further, we would appreciate your discussion of the Legislature's passage of a statute to address Alyeska's duty to respond, and how it would affect the existing contractual agreements between Alyeska and the state of Alaska and the federal government.

Additionally, for the purposes of limiting liability for actions they take in spill response efforts, it has been suggested that response action contractors be categorized as 1. volunteers, 2. professional independent operators, 3. industry spill response cooperative organizations, and 4. industries' own spill response operations, specifically Alyeska Pipeline Service Company.

We would like your review of this recommendation. Is there an equal protection problem? Since the spiller is held strictly liable, is it in the state's best interest to delineate who is acting as a volunteer, especially given the fact that Alyeska Pipeline Service Company considers itself a volunteer response action contractor?

Finally, we am enclosing a copy of legislation introduced this morning, which we anticipate will be scheduled for committee deliberation as soon as possible. Accordingly, your written response at your earliest possible convenience will be very much appreciated.

Respectfully,



Bill Hudson



Mike Navarre

Enclosures

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

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

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

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

Title VI—Outer Continental Shelf

Subtitle A—Prohibition of Leasing and Preleasing Activity

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

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

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

Subtitle B—Buyback of Certain Leases

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

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

Title VII—Alaska

Subtitle A—Alaska Outer Continental Shelf

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

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

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

Subtitle B—Trans-Alaska Pipeline

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

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

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

PROPOSED
FEDERAL
LEGISLATION
* —————>

[COMMITTEE PRINT]

MARCH 31, 1992

102D CONGRESS
2D SESSION

H. R. _____

IN THE HOUSE OF REPRESENTATIVES

Mr. _____ introduced the following bill; which was referred to the
Committee on _____

A BILL

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

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

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

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

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

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

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

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

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

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

3 “SEC. 32. ALASKA OCS SUBSISTENCE REVIEW.—
4 Prior to issuing any five-year program under section 18
5 of this Act, conducting any lease sale, or approving any
6 plan or permit for exploration, development, or production
7 activities in the Alaska region authorized by this Act, the
8 Secretary shall comply with section 810 of the Alaska Na-
9 tional Interest Lands Conservation Act (16 U.S.C. 3120).
10 In addition to other requirements, at the lease sale stage
11 the Secretary shall fully consider the effects of exploration,
12 development, and production upon subsistence uses.”.

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

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

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

18 “RESPONSIBILITY OF RIGHT-OF-WAY HOLDER

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

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

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

7 "PUBLIC LAND ACQUISITION

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

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

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

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

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

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

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

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

8 **TITLE VIII—COAL, OIL, AND GAS**

Subtitle A—Coal Development

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

Subtitle B—Coal, Oil, and Gas Leasing

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

SUBTITLE C—ABANDONED MINE RECLAMATION FUND

- Sec. 821. Amendments to Surface Mining Act.

SUBTITLE D—HEALTH, SAFETY, AND MINING TECHNOLOGY RESEARCH

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

9 **Subtitle A—Coal Development**

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

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



Citizens' Oversight Council
on Oil and Other Hazardous Substances

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SUMMARY

of

RESEARCH PROJECTS REPORTS

PREPARED BY THE CITIZENS' OVERSIGHT COUNCIL
AS PART OF THE COUNCIL'S REPORT TO THE LEGISLATURE UNDER
SECTION 11 OF HB 196 (Ch. 92 SLA 1991)

Council Members

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

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RESEARCH PROJECTS REPORTS SUMMARY

Each research project report originated from an initial identification of subjects to be addressed to gain a full understanding of response action contractor immunity issues. The following is a summary of the findings of each report. The full text of each research project report is available upon request.

Research Project: Response action contractor activity in Alaska

Prepared by: Department of Environmental Conservation

Purpose: To identify the types of response action contractors operating in Alaska and to describe their areas of operation, their interactions and relationships with spillers and other responsible parties, their experiences with claims, and their field response structure.

Summary: There are essentially two types of response action contractors in Alaska -- independent operators and industry spill response organizations. Independent operators supply equipment, materials, and personnel through contractual arrangements with the spiller, governmental agencies, or other responsible parties. The independent operators do not control or direct the field response and have no other contractual, lease, or corporate relationship with the spiller or responsible party.

Industry spill response organizations are formed to pool resources to enable contingency plan holders to most economically comply with the state spill response requirements. The members of the organizations are generally contingency plan holders and may own or operate an oil terminal or tankers, as well as the response organization. The operations of the industry response organizations are to varying degrees controlled by the members. Industry response organizations generally control the field response to a spill for some period of time. Within industry spill response organizations, there are two types: the first are basically cooperatives with a management structure separate from its members (ACS, CISPRI, and SEAPRO), and the second is an operational unit of the industries' agent (Alyeska's SERVS). Only CISPRI is separately incorporated.

The independent operators tend to work throughout the state and handle spills of petroleum products and hazardous substances. The industry response organizations respond to petroleum product spills, predominantly crude oil, within the geographic area of operation of their members.

In a survey of response action contractors, none noted any experience with claims for damages due to spills or alleged negligence of the contractor. The majority of the contractors expressed concern that the potential for claims could deter their operations. All but one contractor required indemnification before services would be provided.

The report concludes that the independent operators are the class of responders most suitable for liability limits. The report asks whether it is appropriate for a response organization created by those with a duty to respond, (i.e., oil terminal and tanker owners) to be afforded that same degree of immunity. The report states that granting such immunity causes confusion for the governmental regulators over who, in fact, controls the field response and provides no assurance that a response will be sustained.

Research Project: Risk of litigation and liability exposure for response action contractors

Prepared By: Attorney General's Office, at the request of the Department of Environmental Conservation

Purpose: To analyze the situations where response action contractors have been sued or held liable for damages from oil spills.

Summary: Research indicated that there were no cases in the U.S. where response action contractors were sued or held liable for damages from an oil spill by virtue of their response activities. However, in some maritime casualty cases (not oil spills) a good Samaritan has been held liable for grossly negligent conduct, intentional misconduct, and occasionally negligence. The report raises the possibility that there is some risk of liability, albeit untested, which could cause uncertainty.

Research Project: Contractual relationships among response action contractors, contingency plan holders, and the state.

Prepared By: Douglas K. Mertz and G. Thomas Koester, Attorneys at Law, on contract to the Cook Inlet Regional Citizens' Advisory Council

Purpose: To evaluate and analyze the contractual and legal relationships between response action contractors and others in order to determine how liability for damages will be allocated and whether the private contractual relationships affect field response to an oil spill.

Summary: The report first discusses the development of liability laws in Alaska for oil spill damages. The spiller and other statutorily designated responsible parties face strict liability for damages, including those damages caused by the activities of a response action contractor. However, under a good Samaritan law (AS 09.65.091), a person who responds at the request of the government to a declared emergency is immune from strict liability and negligence. HB 196 (AS 46.03.825), passed last year and in effect until July 1, 1992, expands that immunity to responders to an oil spill without the necessity of a governmental

X {

order. The result is that private parties may be unable to recover damages for harms caused by response action contractors if there is no other financially solvent responsible party.

Response action contractors and contingency plan holders also allocate liability for damages between each other through private contractual relationships. There are significant variations in the contracts used by response action contractors and the contingency plan holders for whom they work. Some contracts are extremely complex, while others are relatively simple. Some are specific in the services to be provided; others merely recite that services will be performed as soon as possible. Indemnification provisions were generally in all contracts. Alyeska, CISPRI, and ACS required indemnification for any potential liability. Other response action contractors only required indemnification for their non-negligent activities. Alyeska was the only contractor who also required its subcontractor response action contractors to indemnify Alyeska. Some of the response action contractors require their clients to carry insurance. Only CISPRI and Alyeska specified the amount of insurance -- CISPRI requires \$10 million; Alyeska requires \$1.2 billion.

The most notable point in reviewing the contracts between response action contractors and contingency plan holders is the lack of uniformity in the terms establishing the performance obligations, the services provided, the scope of indemnification (including insurance provisions), the grounds for contract termination, the degree of control in the field over cleanup operations, and the requirements for consideration.

This wide variation in private contract terms is significant. As the state's requirements for spill preparedness have increased, reliance upon response action contractors to achieve that state of readiness has also increased. Yet, the state's control over cleanup activities is directed to the contingency plan holder or the spiller rather than the response action contractor, who may be actually performing the work in the field.

The state is not a party or third party beneficiary to any of the private contracts. Although the state approves the contingency plans which recite reliance upon response action contractors, the state lacks direct authority over the response action contractor who, in fact, implements the plan. This means that the state has no way to force a response action contractor to comply with its contractual obligations. The report concludes that the state should take some action to ensure state control over response action contractors to avoid the risk that the response action contractor designated in a contingency plan could fail to perform.

The report also concludes that because the legal standard for negligence includes full consideration of the emergency atmosphere in which response action contractors operate, response action contractors are protected from the consequences of crisis decisionmaking and do not face an undue burden by being held to a standard of reasonable care under the circumstances. On the

other hand, the only way to ensure that injured parties will be compensated is to require that response action contractors exercise due care or face liability.

* { **Research Project:** Trans-Alaska Pipeline Authorization Act (TAPAA)

Prepared By: Michael J. Frank, Attorney at Law, on contract to the Citizens' Oversight Council

Purpose: To analyze TAPAA to determine whether Congress described the role of Alyeska Pipeline Service Company as a response action contractor for tanker spills in Prince William Sound or as the statutorily obligated responder for spills from tankers operating in the TAPS trade.

Summary: Under the terms of the Trans-Alaska Pipeline Authorization Act of 1973, the holder of the pipeline right-of-way must control and remove any pollution attributable to the activity of the holder, whether the pollution is within or without the right-of-way. 43 U.S.C. 1653 (b). This statutory duty is mirrored in provisions of the U.S. Department of the Interior *Agreement and Grant of Right-of-Way for Trans-Alaska Pipeline* with the holders. The holders, all pipeline companies which are subsidiaries of parent oil companies, have made Alyeska Pipeline Service Company their agent under the agreement.

The report describes considerable Congressional discussion preceding the enactment of TAPAA that recites the right-of-way holder's obligation to respond to pollution, related to the TAPS oil trade, including marine spills. Damages for such spills had to be borne by all responsible parties, but the duty to control and remove the pollution remained with the right-of-way holder. A court construing the language imposing the duty to remove pollution held Alyeska responsible for cleaning up a pipeline spill caused by a saboteur, even though Alyeska argued that the spill was not caused by activities conducted by or on behalf of the right-of-way holder. The report also describes the legislative debate during passage of the Oil Pollution Act of 1990, which discussion ratifies the TAPAA-imposed obligation on Alyeska (as agent for the right-of-way holders) to abate pollution in Alaska related to TAPS.

The right-of-way agreement requires Alyeska to have an approved oil spill contingency plan. After the flow of oil began through the Trans-Alaska pipeline, Alyeska submitted and received governmental approval of contingency plans covering spills that might occur from tankers berthed at the Valdez Marine Terminal, or elsewhere in Port Valdez and in Prince William Sound. Alyeska's 1978 plan stated that Alyeska, as required by the state and federal agreements, would direct cleanup operations resulting from tankers carrying Trans-Alaska Pipeline Service crude. Subsequent contingency plans reiterated Alyeska's obligation to respond to tanker spills. Following the T/V Exxon Valdez oil spill, Alyeska denied that it was required to respond to tanker spills in Prince William Sound. Alyeska now states that it is a "volunteer" response action contractor for

tanker spill response and cleanup. This issue is important in both the state and federal governments' lawsuits against Alyeska, and as yet is unresolved.

In Alyeska's current position as a volunteer response action contractor, it no longer formally submits a Prince William Sound contingency plan for approval with Alyeska as the contingency plan holder. Alyeska now even states in its Valdez Marine Terminal plan that Alyeska is not responsible for spills of tankers berthed at the terminal. Today, as distinct from years prior to the T/V Exxon Valdez oil spill, tanker owners or operators, rather than Alyeska, submit contingency plans relying upon Alyeska as the principal response action contractor which will direct the field response for the first 72 hours. Alyeska charges no initial fee to the tanker owners, operators or charterers with which it enters into response action contracts, but does require \$1.2 billion in bonding as part of an indemnification agreement. Alyeska also enters into response action contracts with, among others, corporations such as BP America, Inc., which, in turn, acts as a response action contractor for vessels chartered to carry oil belonging to BP's shipping company. The report raises concerns that immunizing Alyeska or BP from damages as response action contractors may insulate Alyeska, its pipeline owner companies and, in turn, their owners, from tanker oil spill cleanup responsibilities.

Moreover, the report notes that Alyeska, under TAPAA, is unlike an independent response action contractor, because the pipeline companies include the entire costs of the spill response operation in their tariff expenses. The vast majority of those costs relate to the prevention and cleanup of marine tanker spills which might occur at the Valdez Marine Terminal, elsewhere in Port Valdez, and in Prince William Sound. The report questions how costs described as discretionary, i.e., volunteered, can simultaneously be treated as ordinary common carrier expenses entitled to be included in the calculation of the tariffs charged for transporting oil through the TAPS. Furthermore, the report notes that while the State of Alaska indirectly pays for about 25% of these costs, as long as Alyeska is solely a volunteer in response efforts, the state has no legal assurance that Alyeska will respond the next time a spill of TAPS oil occurs from a tanker in Alaska waters. Instead, the public will have to rely on Alyeska's volunteerism and good faith in responding.

- * { **Research Project:** State of Alaska's participation in spill response preparedness through indirect expenditures
- * { **Prepared By:** Deborah Vogt, Attorney at Law, on contract with the Citizens' Oversight Council
- * { **Purpose:** To evaluate the state's role and status as an owner of oil in terms of the state's indirect contributions to oil spill response preparedness.

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

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

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

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

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

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

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

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

Research Project: The relationship between a response action contractor and a contingency plan holder under the Oil Pollution Act of 1990



Prepared By: Michele Straube, Attorney at Law, on contract to the Prince William Sound Regional Citizens' Advisory Council

Purpose: To determine whether the regulations implementing the Oil Pollution Act will address the issue of response action contractor accountability in adhering to the terms of a contingency plan.

Summary: Under the Oil Pollution Act, a response action contractor faces no statutory liability for its actions, as long as the actions are consistent with the National Contingency Plan. The exceptions are if the contractor is also an owner or operator of the facility or vessel causing the spill, or if the contractor causes response costs or damages due to gross negligence or willful misconduct, or if the contractor causes personal injury or wrongful death.

The federal government will require a contingency plan holder to demonstrate that it has a contract with a response action contractor, but it is as yet unclear what the precise requirements will be. The federal government is considering certifying response action contractors in order to guarantee a minimum level of capability and expertise.

The federal government will address what it means for the President to "direct" a response action in the proposed changes to the National Contingency Plan. Currently, the Oil Pollution Act does not grant the federal government any direct authority over response action contractor activities; the government's only leverage is to give directives to the contingency plan holder who, in turn, presumably would direct the response action contractor to implement the federal order. If the federal government decides to certify response action

contractors, it may gain authority over response action contractors through regulation.

The report raises concern over the following potential scenario: A tanker vessel is owned by a poorly capitalized or shell corporation. The vessel owner's contingency plan shows a contract with a response action contractor. In that contract, the response action contractor reserves the ability to refuse to perform if the spiller is insolvent. If a spill occurs and the response action contractor refuses to respond, the Coast Guard has no way to force a response short of hiring the response action contractor directly. There could be a critical delay in response because the Coast Guard has no direct authority over the response action contractor.

The Oil Pollution Act does not prevent the state from imposing any type of liability on response action contractors. Neither is the state preempted from adopting standards for the relationship between response action contractors and contingency plan holders. However, state standards must not contradict federal requirements.

Research Project: Insurance coverage availability

Prepared By: Tesoro Alaska, Inc.

Purpose: To identify the types and costs of insurance coverage available for response action contractors.

Summary: There is substantial variability in the availability and costs of insurance coverage for a response action contractor. Costs are based upon the following factors: (1) revenues and/or payroll size; (2) historical loss experience; (3) contractual indemnities and their value; (4) statutory immunities; and (5) the general state of the insurance market. Coverage is generally for: (1) hull and machinery; (2) protection and indemnity risks; (3) real and personal property; (4) comprehensive general liability; and (5) excess liabilities.

Coverage for a spill cooperative, such as CISPRI, with 15 employees and \$10 million in capital equipment is estimated at \$245,000. Coverage for a general environmental services company offering a variety of response services would be less expensive due to less capital investment.

The report also compares Tesoro's experience with contractual indemnity provisions in its contracts with response action contractors. Tesoro found that the spill cooperatives have much stronger indemnification requirements.

Research Project: Response action contractor provision in the Oil Pollution Act of 1990

Prepared By: Gross & Burke, Attorneys at Law, on contract to the Prince William Sound Regional Citizens' Advisory Council

Purpose: To examine the response action contractors provision in the Oil Pollution Act of 1990 and its intent, legislative history, and statutory context.

Summary: The Oil Pollution Act provides that a person is not liable for removal costs or damages in the course of rendering assistance consistent with the National Contingency Plan or as directed by the President. This exemption from liability does not apply to: (1) a responsible party; (2) a response under CERCLA; (3) cases involving personal injury or wrongful death; and (4) gross negligence or willful misconduct.

The version of the Oil Pollution Act which passed the Senate did not include an immunity provision. The House Committee on Merchant Marine and Fisheries was the first to consider the issue of response action contractor liability. It added a provision limiting liability for a person retained or directed by the President, except for a responsible party, cases of personal injury or wrongful death, gross negligence, or willful misconduct. The committee expressed the hope that this provision would encourage individuals to assist in cleanup operations. The version of the bill which passed the House retained this limited liability provision.

During the conference committee negotiations to reconcile the Senate and House versions of the bills, a Senate conferee proposed language to limit liability for all persons (not just at the direction of the President) who render assistance consistent with the National Contingency Plan. Subsequently the conferees agreed to that concept in the language which ultimately became part of the Act. The conference committee explained that it wanted to avoid possible deterrence of prompt spill response because of liability fears. There was no debate or further discussion of this issue.

Research Project: Other state's response action contractor provisions

Prepared By: Pat Kingcade, legal intern, on behalf of the Prince William Sound Regional Citizens' Advisory Council and the National Wildlife Federation; Alyeska Pipeline Service Company

Purpose: To examine the language of provisions related to response action contractors in other states' laws and the provisions' legislative history and relationships to other oil spill prevention and response laws.

Summary: Connecticut -- Any person who directly or indirectly causes a spill is liable for all costs. No person, firm or corporation which renders assistance in the clean up of a discharge of oil or hazardous substance is liable for civil

damages unless grossly negligent. Immunity does not apply to responsible persons, or persons under a duty to mitigate the effects of a discharge.

California -- Responsible parties are strictly and jointly and severally liable for all damages. Persons, cooperatives and response action contractors are immune from liability for costs, damages or other claims in the course of rendering assistance in accordance with the National Contingency Plan, the state contingency plan, or orders of a state or federal on-scene coordinator, except for gross negligence or willful misconduct, personal injury or wrongful death. This immunity extends only to response personnel whose contracts have been approved by the state and is limited to 60 days but may be extended to a total of 90 days if: (a) the spill is expanding to uncontaminated marine or land resources; (b) it is in the public interest because of dangerous conditions; or (c) no other qualified response action contractor will complete the response effort.

Texas -- A responsible party is liable for response costs and natural resources damages. No person or discharge cleanup organization that voluntarily or pursuant to the National Contingency Plan or the state coastal discharge plan renders assistance is liable for response costs, damages or civil penalties except for gross negligence or willful misconduct. Discharge cleanup operations must be certified by the state.

Washington -- Responsible parties are strictly liable for damages. A person is not liable for removal costs or damages in the course of rendering assistance consistent with the National Contingency Plan or as otherwise directed by the federal or state on-scene coordinator. This immunity does not apply to a responsible party, for personal injury or death or for gross negligence or willful misconduct.

Hawaii -- No person is liable for damages, costs, or penalties in the course of rendering assistance in accordance with state law or at the direction of the on-scene coordinator except for gross negligence or intentional misconduct. An additional good Samaritan law provides that any person who in good faith, without remuneration, renders assistance at the scene of a vessel collision, accident or other casualty shall not be liable for any damages resulting from providing or arranging towage or other assistance, except for gross negligence or wanton acts or omissions.

Florida -- Any person, authorized by the state or federal government or by the responsible party, who renders assistance in containing or removing pollutants is not liable for costs, expenses, and damages except for gross negligence or willful misconduct or if the responsible party does not report the spill or does not cooperate with the federal on-scene coordinator. A local discharge cleanup organization shall, upon state request, immediately contain and remove a discharge of unknown origin.

New Jersey -- Persons responsible for a discharge are strictly and jointly and severally liable. Response action contractors are liable upon a showing of

negligence. If the cleanup contractor demonstrates that its actions were in accordance with generally accepted practices and state of the art scientific knowledge and that it utilized the best technology reasonably available, there is a rebuttable presumption that the actions were not negligent. The state may contractually indemnify a discharge cleanup contractor against claims if the state determines that adequate environmental liability insurance is not available or unreasonably priced. Discharge cleanup organizations must register with the state and submit lists of qualified personnel and available equipment.

Maine -- Any person operating an oil terminal facility must obtain a license. Licenses issued to a terminal include any vessels under the control of that facility and vessels that are used to transport oil to and from that facility and that travel within state waters. Any vessel not under the direction or control of a fixed facility must obtain its own license. The licensee must demonstrate satisfactory evidence that it is implementing state and federal plans for control of oil discharges. Licensees are strictly liable for discharges occurring at facilities under their control or from vessels transporting oil to or from that facility within state waters. Responders are not liable in the course of rendering assistance consistent with the National Contingency Plan, a federal or state contingency plan, or as directed by the federal on-scene coordinator, except for personal injury or wrongful death, gross negligence or willful misconduct, or if the responder is the responsible party.

Other States' Response Action Contractor Liability Laws

	CONNECTICUT	CALIFORNIA	TEXAS	WASHINGTON	HAWAII	FLORIDA	NEW JERSEY	MAINE
Spiller obligated to pay damages caused by Response Action Contractors (RAC)	✓	✓	✓	✓	✓	✓	✓	✓
RAC liability limited except for gross negligence and intentional misconduct	✓		✓					
RAC liability limited except for gross negligence and intentional misconduct or failure to cooperate with the Federal On-Scene Coordinator (FOSC)						✓		
RAC liability limited except for gross negligence and intentional misconduct if actions are consistent with the National Contingency plan (NCP), the state contingency plan or the FOSC		✓		✓	✓			✓
RAC liability limited except for negligence (defined as use of best of available technology)							✓	
RAC liability limited in duration (60 days)		✓						
Certification of RACs required			✓					
State approval required for RAC's equipment and personnel resources		✓					✓	



Citizens' Oversight Council
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**OIL SPILL RESPONSE ACTION
CONTRACTORS**

Summary of

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

Prepared By


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

Council Members

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

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**HB 196, SECTION 11, REPORT
OIL SPILL RESPONSE ACTION CONTRACTORS
RECOMMENDATIONS, continued
page 5**

 **RECOMMENDATION #7:** The Trans-Alaska Pipeline System ("TAPS") agent should clearly maintain the duty to control and remove pollution within state boundaries related to the transportation of TAPS crude oil.

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

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

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



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

D. INDUSTRIES' OWN SPILL RESPONSE OPERATIONS

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

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

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

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

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

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

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

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

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

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

A. RESPONSE ACTION CONTRACTOR FEAR OF LIABILITY

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

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

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

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

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

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

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

D. ALYESKA PIPELINE SERVICE COMPANY

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

First, under the terms of the Trans-Alaska Pipeline Authorization Act of 1973, the holder of the pipeline right-of-way must control and remove any pollution attributable to the activity of the holder, whether the pollution is within or outside the right-of-way corridor. 43 U.S.C. 1653 (b). The holders, all pipeline companies which are subsidiaries of parent oil companies, have made Alyeska their agent. Other sections of that Act impose liability for the damages caused from that pollution. By separately addressing the duties to pay damages and to remove pollution, it appears that Congress was looking for a single entity to oversee pollution control without that entity simultaneously acquiring all the liability for damages. The pollution removal duty is mirrored in provisions of the U.S. Department of the Interior *Agreement and Grant of Right-of-Way for Trans-Alaska Pipeline* with the holders.

The legislative history of these provisions is not conclusive but generally recites the right-of-way holder's obligation to respond to pollution related to the TAPS oil trade, including marine spills. Damages for such spills had to be borne by all responsible parties, but the duty to control and remove the pollution remained with the right-of-way holder. A court construing the language which imposed the duty to remove pollution held Alyeska responsible for cleaning up a pipeline spill caused by a saboteur, even though the spill was not caused by activities conducted by or on behalf of the right-of-way holder. The court found that Congress clearly established the cleanup requirements without regard to fault.

Second, the right-of-way agreement requires Alyeska to have an approved oil spill contingency plan. After the flow of oil began through the Trans-Alaska pipeline, Alyeska submitted and received governmental approval of contingency plans covering spills that might occur from tankers berthed at the Valdez Marine Terminal, or elsewhere in Port Valdez, and in Prince William Sound. Alyeska's 1978 plan stated that Alyeska, as required by the state and federal agreements, would direct cleanup operations resulting from tankers carrying TAPS crude. Subsequent contingency plans reiterated Alyeska's obligation to respond to tanker spills. Following the Exxon Valdez oil spill, Alyeska denied that it was required to respond to tanker spills in Prince William Sound. Alyeska now states that it is a "volunteer" response action contractor for tanker spill response. This issue is important in both the state and federal governments' lawsuits against Alyeska, and as yet is unresolved.

In Alyeska's current position as a "volunteer" response action contractor, it no longer formally submits a Prince William Sound contingency plan for approval with Alyeska as the contingency plan holder. Today, as distinct from years prior to the Exxon Valdez oil spill, tanker owners or operators, rather than Alyeska, submit contingency plans relying upon Alyeska as the principal response action contractor to direct the field response for the first 72 hours. Alyeska's performance is governed by the private response action contracts with the companies which ship oil, most of whom are also members of the TAPS consortium. Some of Alyeska's response action contracts are with contingency plan holders. Others are with intermediaries, such as BP Oil Shipping Company, U.S.A. for vessels it charters. Alyeska does still submit a plan for the pipeline and the Valdez Marine Terminal. However, unlike previous terminal plans, Alyeska now states that it is not responsible for spills of tankers berthed at the terminal.

Third, Alyeska is unlike other response action contractors, because the pipeline companies include the entire costs of spill response in their tariff expenses. 25% of these expenditures are paid by the state through reduced tax revenues. No other category of response action contractor has state financial participation. Furthermore, the vast majority of those response costs relate to the prevention and cleanup of marine tanker spills which might occur at the Valdez Marine Terminal, elsewhere in Port Valdez, and in Prince William Sound rather than on-shore pipeline spills. If Alyeska is solely a volunteer in marine response efforts, the state, despite its 25% share of response costs, has no legal assurance that Alyeska will respond the next time a spill of TAPS oil occurs from

a tanker in Alaska waters. Instead, the public has to rely solely on Alyeska's volunteerism and good faith.

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

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

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

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

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

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

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

VIII. CONCLUSION

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

Summary of

ALYESKA PIPELINE SERVICE COMPANY
COMMENTS

ON

IMPROVING LIMITED RESPONDER
IMMUNITY

ALYESKA PIPELINE SERVICE COMPANY
 COMMENTS
 IMPROVING LIMITED RESPONDER IMMUNITY

DATE	DESCRIPTION OF COMMENTS	TAB
* 02/10/92	<u>Citizens' Oversight Council Report</u> (Responder Immunity; State Orders; Tanker Spill Responsibility)	A
02/05/92	<u>Changes to Alyeska/Tesoro Agreement After HB 196</u>	B
* 02/05/92	<u>Alyeska Financial Responsibility Requirement</u>	C
* 02/04/92	<u>Responses to COC Issues</u> (Time Periods for Response Immunity; ADFC Orders; Tanker Spill Responsibility; Financial Responsibility)	D
01/30/92	<u>Improving Good Samaritan Immunity for Oil Spill Response in Alaska</u> (OPA '90 v. HB 196)	E
01/31/92	<u>Oral Presentation to Citizens' Oversight Council</u>	F
01/31/92	<u>PWS Contingency Plan Arrangements Prior to 03/89</u>	G
* 01/31/92	<u>Vogt Report</u> (Costs of Alyeska's Prevention & Initial Response Services)	H
01/31/92	<u>Straube Report</u> (Imposing Spill Liabilities on RAC's)	I
01/31/92	<u>ADEC Report</u> (Alyeska as a Response Action Contractor)	J
* 01/31/92	<u>Mertz Report</u> (Responder Immunity Does Not Reduce Spiller Liability; Purpose of Oil Response Funds; Financial Responsibility Requirements; Changes to Tesoro/Alyeska Agreement After HB 196)	K
* 01/30/92	<u>Frank Report</u> (TAPAA Does Not Require Alyeska to Respond to Vessel Spills)	L

- No state requires that response action contractors individually agree, in advance, to accept direct state control and to handle mystery or orphan spills as additional conditions to limited immunity. These conditions will eliminate any hope of general uniformity of liability regimes amongst the various states to better encourage RACs to cross state lines, especially to join in efforts to contain and cleanup major spills.

X
RECOMMENDATION #7: *The Trans-Alaska Pipeline System ("TAPS") agent should clearly maintain the duty to control and remove pollution within state boundaries related to the transportation of TAPS crude oil.*

Comments:

- This COC recommendation relies upon an erroneous legal opinion. Under federal law, Alyeska and the holders of the grant of right-of-way across Alaska for pipeline construction and operation are not liable for spills from tank vessels. In any event, limited responder immunity is not available for those who are responsible parties.
- Under the comprehensive liability framework created by Congress, vessel owners and operators carrying oil transported through the pipeline are strictly liable, along with the Trans Alaska Liability Fund, for damages, including cleanup costs, resulting from discharges of oil from their vessel.
- None of the seven pipeline companies that own TAPS, or Alyeska which operates it on their behalf, own, operate, or charter tankers; nor do they manage or control them. In addition to the numerous legal and constitutional challenges this recommendation invites, it makes no practical sense: Congress has already imposed liability and financial responsibility for tanker discharges upon owners/operators/charterers; so has the State of Alaska.
- In COC's public meeting on January 31, ADEC testified that there is no confusion regarding who bears this responsibility in Prince William Sound: "we know who the plan holders are, we know who the responsible parties are, we know who the response action contractor is." Moreover, "we have evaluated the capabilities of the response action contractors to respond and evaluated the transition management plan."

- Alyeska has, in fact, accepted a contractual duty to provide prevention and initial response services to planholders. ADEC would not have accepted and approved contingency plans without insuring that Alyeska had accepted that obligation.
- Although it owns royalty oil, the state is not an equity owner of Alyeska's prevention and initial response equipment to appropriate for its use as a regulator. Like any other transportation-related expense, the cost of oil spill preparedness is equitably distributed amongst TAPS shippers.

February 5, 1992

Alyeska Financial Responsibility Requirement

Alyeska operates the Trans Alaska Pipeline System on behalf of seven owner companies. Although none of these pipeline companies own, operate, or charter tankers, Alyeska has contracted to provide prevention and initial response services to tank vessel owners/operators/charterers ("shippers") in Prince William Sound. Shippers are required by state and federal laws to provide for personnel and equipment to escort vessels and to respond to tanker spills in Prince William Sound. Alyeska's prevention and initial response services are ancillary services provided to shippers so that they may continue to handle Alaska North Slope crude oil. Up to this point in time, only Alyeska has offered to provide these services. Nothing prevents others from doing so.

ADEC has approved the shippers' vessel contingency plans which incorporate Alyeska's Prince William Sound Tanker Spill Prevention and Response Plan ("Plan"). The Plan describes Alyeska's prevention and initial response services. Shippers have also signed an oil spill response services agreement for provision of these services by Alyeska. As a contractual matter, shippers must demonstrate financial responsibility to support their contractual commitments, including indemnifying Alyeska against liabilities it faces as a response action contractor. Alyeska must ensure that any shipper with whom it contracts to provide initial response services can provide indemnity for any liability to which Alyeska could be exposed in responding to a spill. Without financial responsibility such promises would, of course, be hollow. Financial responsibility (self worth) must be demonstrated in the amount of \$1 billion, but an insurance alternative in the amount of \$1.2 billion is also provided.

The financial responsibility and alternate insurance levels reflect a careful weighing of the risks which Alyeska faces as a responder, even after HB 196 and limited responder immunity passed last year. As you know, the limits of liability, and, importantly, the categories of types of damages which can be paid following an oil spill have increased substantially since 1989.

For example, in addition to removal costs, damages listed in the Oil Pollution Act of 1990 include damages to natural resources, real or personal property, subsistence use, lost government revenues, loss of profits and earning capacity, and the cost of additional public services. State law likewise imposes liability for removal and

containment costs, civil penalties, damages related to injury to persons, damage to public and private property, and natural resources, and loss of income and economic benefits.

In addition, recall that Exxon has expended roughly \$4 billion in the costs of containing and cleaning up oil, and resolving federal and state claims associated with the EXXON VALDEZ oil spill. Additional third party claims faced by it, and Alyeska exceed \$50 billion. Ironically, those who would suggest that Alyeska's financial responsibility requirement is "unreasonable," must also agree that it is remarkably low in comparison to Exxon's expenditures to date, and in light of the allegations still facing the defendants in federal and state courts.

Under the Oil Pollution Act, there are certain maximum monetary limits on a spiller for liability related to oil discharges. Financial responsibility must be demonstrated to meet this liability. For example, in the case of a tanker in excess of 3,000 gross tons, the liability limit is \$1,200 per gross ton, or \$10,000,000, whichever is greater. A tanker weighing 200,000 gross tons would have a limit of liability of \$240 million under this federal law. However, the liability limit will not apply in the case of violation of an applicable federal safety, construction, or operating regulation, gross negligence, willful misconduct, or failure or refusal to report an incident, provide reasonable cooperation and assistance, or to refuse to comply with a federal order without sufficient cause. An obvious concern is that to avoid this limitation, plaintiffs will simply allege that "gross negligence" or the violation of a regulation has occurred as a result of every spill. If the limitation on liability is compromised every time even a minor safety regulation is remotely connected to a spill, the limitation will have little meaning.

Limited exemptions for responders liability for certain damages exist under both federal and state laws. But, there are no limitations for other responder liabilities under federal law. And, under state law, there are no limits on the amount of damages that may be assessed against either a spiller or a response action contractor. Financial responsibility requirements, therefore, are set at arbitrary amounts, in the case of a tank vessel, \$300, per incident, for each barrel of crude oil storage capacity, or \$100,000,000, whichever is greater. Importantly, the financial responsibility apparently extends only to claims asserted by public authorities attributable to cleanup and restoration costs, property damage, assessment of civil penalties, etc.

Thus, using either the federal liability limitation, or the federal and state financial responsibility requirements, as a guide for private parties to establish financial

responsibility requirements in response services agreements would be unhelpful and inappropriate. It would leave a responder unprotected. On the other hand, to promote more certainty when responders and shippers are negotiating the terms of financial responsibility provisions, the legislature may wish to adopt meaningful limitations of liability under state law.

VIA U.S. MAIL AND FACSIMILE

February 4, 1992

Harry R. Bader, Ph.D, Chairman
Citizens' Oversight Council on Oil and Other Hazardous Substances
3111 C Street, Suite 150
Anchorage, Alaska 99508

Re: Limited Responder Immunity in Alaska

Dear Chairman Bader:

We appreciate the opportunity to provide additional information to you and the Council prior to your final deliberations regarding the important issue of responder immunity.

1. Time Limit for Response Immunity

You asked for a recommendation on an appropriate time limit for responder immunity during a response to a spill or threat of a spill. The appropriate duration of the limited responder immunity should extend through the entire response as established by the U.S. government and 17 of 24 coastal states plus the Virgin Islands that have considered the issue. The notion of a time limit is unrealistic given the nature of oil spill response operations; so long as spilled oil remains on water or land, ongoing, expeditious action should be encouraged to remove it. No matter how remote, an "emergency" certainly exists for any community threatened by the impact of oil. In addition, the uncertainty when a time limit begins and ends following any particular "release," may deter prompt and continuous response action for a spill or a threat of spill.

For example, when will an arbitrary time limit begin and end for a mystery or orphan spill? What is the liability of a responder who responds to the report of a threatened spill only to discover a slow leak with no objective indication of when it started? As the arbitrary time limit draws to a close, won't responders be encouraged to withdraw? Will other responders be encouraged to enter the response at that time to insure continuity of personnel and equipment? What is the justification for an artificial barrier if the responder's immunity is only limited and

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the original spiller is still financially responsible for any liability which a responder is relieved from?

Mr. Mertz also describes HB 196's time limit as "arbitrary." Indeed, crisis will certainly reign "far fewer days in some cases and far more in others." Page 34, Mertz report. Even California, which is the only other state to consider an arbitrary time limitation, recognizes that the initial 60 day period may have to be extended. In short, we urge the Council to avoid endorsing unnecessary and troublesome limitations upon federal and state efforts to ensure the availability of ample response resources when spills occur.

2. Classification of Responders

We understand that the Council may recommend that responders be classified according to how they are organized and funded: immunity would evidently be limited for some, more limited for others, and perhaps entirely unavailable in one case. As you know, discrimination amongst citizens, be they private or corporate, always calls for constitutional and other legal reviews to insure that principles of equal protection and fundamental fairness are not lost in government's efforts to regulate society.

Before legal analyses would even be undertaken, however, it seems clear that this responder classification proposal, if accepted by the legislature, would virtually insure that entire groups of responders may be unnecessarily driven out of the business. Again, the challenge we face is to support, not destroy or deter, the federal and state comprehensive oil spill response schemes by encouraging effective, prompt response efforts no matter who provides any type of care, assistance, or advice, so long as it is consistent with those schemes or government orders.

Dr Bader, there is no rational basis for treating responders differently, particularly because response action should be encouraged from any source at any time throughout a release. Again, the spiller and his insurance will still be responsible for responder liabilities that are shielded by the proposed statute. Even under the exigencies of a spill response, a responder will only enjoy limited immunity; therefore, we can be assured that his actions will reflect that concern.

Finally, our materials also stress that Alaska should join with other states to adopt uniform laws in this area for the additional reason to promote uniformity of implementation and interpretation amongst the federal government and coastal states. This will, of course, encourage responders to cross state lines, and to loan