

ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 00/2

6983 HOUSE JUDICIARY

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February 4, 1991

equipment and personnel, without suffering delays and uncertainties caused by an unwarranted, restrictive, and, possibly, oppressive limited responder immunity provision in Alaska.

### 3. Response to ADEC Orders

We understand that, as an apparent price to be paid for limited immunity, the Council may recommend that some response organizations be required, in advance, to agree to accept ADEC orders to respond to mystery or orphan spills in their area of operation.

As you may know, the United States and the State of Alaska have already been granted the authority to take over and arrange for the removal of spilled oil when circumstances call for it. This, of course, is one of the purposes to be served by industry-funded oil spill response funds. We are aware of no situation in Alaska where responders have purposefully failed or refused to provide services for the federal or state governments when requested to undertake or complete a spill response. Consequently, what justification is driving this proposal? Is it so important, and the prospects for the "worst case scenario" erroneously described in some reports to COC so imminent, as to require further limitation of responder immunity in our state? What responder will be in a position, in advance, to agree to provide services to the federal or state governments without also having a specific contract which establishes the type and nature of response, location, equipment and personnel needs, costs and billing arrangements, etc.? If a need for them exists, nothing prevents the state or federal government from negotiating those contracts now.

In short, requiring this and additional requirements as part of the price to be paid by responders for limited immunity promises instead to create confusion, uncertainty, and a reluctance to take action when oil spills occur.

### 4. The Pipeline Owner Companies Are Not Liable for Tanker Spills

We understand that COC may further recommend that the pipeline owner companies, as holders of the federal right of way permit, and Alyeska, as their operating agent, be directed under state law to respond to any tanker spill in Prince William Sound. We have already explained at some length that Mr. Frank's view that TAPAA already imposes such liability is flatly wrong, but we understand that special legislation may be recommended to "clarify" the matter and adopt Mr. Frank's view as a matter of state law.

Our materials explain that Alyeska operates the Trans Alaska Pipeline System on behalf of seven pipeline companies which own it. None of these own, operate, or charter tankers. Under federal and state law, tanker owners/operators/charterers are responsible for tanker operations, and Alyeska cannot and does not manage or control them. Provision has been made by tanker operators to provide contingency plans and to demonstrate financial responsibility for those operations. In addition to the constitutional and legal issues presented by this proposal, we urge that the Council also recognize that it entirely ignores the comprehensive liability, response, and financial responsibility regime established by Congress and the legislature for tanker operations in our state and elsewhere.

As we have also explained, Alyeska does provide initial response services to tanker owners/operators/charterers, and that this service is described in a plan and in response services agreements. As a contractual matter, tanker owners/operators/charterers must demonstrate financial responsibility to support their contractual commitments, including indemnifying Alyeska against liabilities it faces as a response action contractor. Alyeska must ensure that a shipper with whom it contracts to provide initial response services can provide indemnity for any liability to which Alyeska could be exposed in responding to a spill. Without financial responsibility such promises would, of course, be hollow. Financial responsibility (self worth) must be demonstrated in the amount of \$1 billion, and Tesoro has been permitted to support its contractual capabilities with a combination of insurance and a corporate guarantee in the total amount of \$1.2 billion.

We explained that, after enactment of HB 196 last year, Alyeska created this alternative to its \$1 billion financial responsibility requirement. The insurance may consist of \$700 million P&I marine insurance coverage for the vessel and \$500 million comprehensive general liability coverage that names Alyeska as an additional insured. There is no way that Tesoro could provide a corporate guarantee, bond, or letter of credit, as originally required by Alyeska's financial responsibility standards, for either \$1 billion or \$1.2 billion. Because of uncertainties associated with coverage of contractor claims against vessel marine insurance, and the added potential difficulty of enforcing insurance coverage generally, the quality of Alyeska's financial protection has diminished substantially. Yet, the parties reached this practical solution to a difficult problem after and because HB 196 passed last year. This insurance alternative will expire when HB 196 sunsets at the end of June, 1992.

Nonetheless, the Council has indicated that it may view this arrangement as "unreasonable," and is concerned that Alyeska may use limited responder immunity to drive this and other TAPS trade tanker operations "out of business." Nothing could be farther from the truth. Alyeska worked diligently with Tesoro to reach a solution to keep it in business, and we need legislative assistance to keep that solution in place.

Although certainly adjusted in Tesoro case because of a perceived reduction in the risks faced by Alyeska when HB 196 passed, the financial responsibility level reflects a careful weighing of the risks which remain. As you know, the limits of liability, and, importantly, the categories of types of damages which can be paid following an oil spill have increased substantially since 1989.

For example, in addition to removal costs, damages listed in the Oil Pollution Act of 1990 include damages to natural resources, real or personal property, subsistence use, lost government revenues, loss of profits and earning capacity, and additional public services. State law likewise includes removal and containment costs, civil penalties, and damages related to damage or injury to persons and to public and private property, natural resources, and loss of income and economic benefits. Limited exemptions for responders liability for certain damages exist under both federal and state laws.

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

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

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plaintiffs will simply allege that "gross negligence" or the violation of a regulation has occurred as a result of every spill. If the limitation on liability is compromised every time even a minor safety regulation is remotely connected to a spill, the limitation will have little meaning.

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

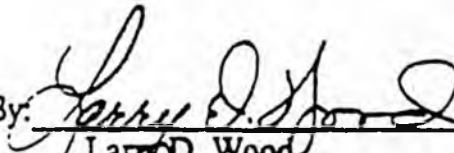
Thus, using either the federal liability limitation, or the federal and state financial responsibility requirements, as a guide to establish financial responsibility requirements contained in response services agreements is unhelpful and inappropriate. It would leave a responder unprotected.

On the other hand, to promote more certainty when responders and responsible parties are negotiating the terms of financial responsibility provisions, COC may wish to recommend that the legislature adopt meaningful limitations of liability under state law. If enacted, those limitations would be reflected in Alyeska's financial responsibility requirements.

We trust that this information will be useful as the Council considers what recommendations it will present to the legislature. Please let us know if there is additional information which we can provide to assist those efforts.

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY

By:   
Larry D. Wood  
Senior Attorney - External Affairs

cc: COC Members  
Michele D. Brown, Esq.

January 31, 1992

Michele D. Brown, Esq.  
Executive Director  
Citizens' Oversight Council on Oil and Other Hazardous Substances  
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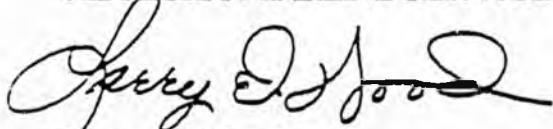
Re: Alyeska Comments Regarding Reports Submitted to the Citizens'  
Oversight Council on Oil and Other Hazardous Substances

Dear Ms. Brown:

Enclosed please find comments respectfully submitted by Alyeska Pipeline Service Company ("Alyeska") to the Citizens' Oversight Council on Oil and Other Hazardous Substances. The comments relate to reports which have been submitted to the Council. Thank you for the opportunity to participate in the Council's consideration of the important matter of limited responder immunity.

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY



Larry D. Wood  
Senior Attorney - External Affairs

Attachments

January 31, 1992

**Response to Memorandum Relating to the State of Alaska's Participation in Spill Response and Preparedness in the State Prepared by Deborah Vogt****Summary**

This report, as well as several pages of the TAPAA report prepared by Michael J. Frank (pages 34 - 36), is committed in large part to debating whether Alyeska's prevention and initial response services provided to contracting vessel owners/operators/charterers in Prince William Sound are best handled as tariff charges for oil delivered to Valdez or as direct charges to vessels which contract for those services. In addition, the Vogt report contains a considerable amount of mathematical analysis which has not been reviewed for accuracy in the short time available.

Alyeska's November 20, 1991, letter which is attached to the Vogt report, explains at some length how and why the TAPS carriers include the costs of Alyeska's Prince William Sound effort in tariff charges for oil delivered to Valdez. However, these services are not being provided pursuant to any common carrier obligations of the TAPS carriers or their agent, Alyeska. Personnel and equipment to escort vessels and to respond to spills in Prince William Sound are required by state and federal laws. In the spring of 1989, using a series of emergency orders and Consent Agreements, the State of Alaska compelled Alyeska to develop and provide a tanker escort system and to greatly increase response equipment and personnel beyond what had been approved in 1987. On November 1, 1990 Alyeska's Prince William Sound contingency plan and the 1989 emergency orders and Consent Agreements expired when the state approved vessel contingency plans, held by the owners or operators of those vessels, as required by AS 46.04.030(c). Those approved vessel contingency plans incorporated Alyeska's Prince William Sound Tanker Spill Prevention and Response Plan, whereby Alyeska, as a response action contractor, is committed to provide certain prevention and initial response services to tankers that have a Response Agreement with Alyeska. Up to this point in time, only Alyeska has offered to provide these services. Nothing prevents others from doing so.

These services are ancillary services provided to shippers so that they may continue to handle Alaska North Slope ("ANS") crude oil. As a result, the pipeline may continue to carry ANS crude oil, and provide revenues for state services. The practice of including the costs of those services in tariff charges for oil delivered to Valdez is, in fact, an equitable distribution of the costs of those services amongst those who receive them. Finally, the owners of the Trans Alaska Pipeline System are not vessel owners (i.e., shippers). The shipping companies are separate and distinct from the carriers.

Despite Ms. Vogt's suggestion, none of this detracts from Alyeska's status as an initial response action contractor in Prince William Sound, nor does it create some sort of state equity interest in the prevention and response equipment, so as to justify its uncompensated use for a mystery or orphan tanker spill. Alyeska's prevention and response resources are available only for vessels in the TAPS trade that have Oil Spill

Response Services Agreements with Alyeska. Under the terms of the vessels' approved contingency plans, those resources must be available in Prince William Sound, ready to respond. There are only a few exceptions to this requirement; for example a small percentage of the response resources may be sent to other areas for oil spill response with prior DEC approval. AS 46.04.030(o). Moreover, the premise that Alyeska, as agent for the holders of the federal pipeline right-of-way, is liable for tanker spills is flatly wrong as explained in Alyeska's comments to the Frank report.

The Federal Energy Regulatory Commission ("FERC") is authorized to determine whether costs that the carriers record should be included in their cost of service and whether those services are reasonable. However, it does not follow that FERC has the authority to decide whether financial responsibility and insurance requirements are appropriate. We are aware of no basis for Ms. Vogt's statement, at page 18, that FERC has such authority.

LDW:vogt/cas

January 31, 1992

**MEMORANDUM OF ALYESKA PIPELINE  
SERVICES COMPANY REGARDING**

**THE LEGAL RELATIONSHIP  
BETWEEN  
OIL SPILL RESPONSE ACTION CONTRACTORS  
AND  
OTHER PARTIES TO AN OIL SPILL**

Alyeska Pipeline Service Company (Alyeska) agrees with Mr. Mertz and Mr. Koester that in imposing liability on oil spill response action contractors (RAC): "The bottom line must involve balancing the need for fair and full compensation for all spill injuries with the need for a liability scheme that does not discourage response action contractors from acting to prevent spill damage." Mertz and Koester report (Report) at page 34. Generally, any public interest in expanding the number of parties who might provide compensation for damages does not outweigh the stronger public interest in encouraging rapid, aggressive response to oil spills. The Citizens' Oversight Council should balance all public interests in making its recommendations to the Legislature regarding whether and to what extent Alyeska should reduce the present limitation on liability for RACs. It should consider that (1) limiting the liability of response action contractors does not reduce the liability of the spiller; (2) financial responsibility requirements reduce the likelihood that the spiller will be insolvent; (3) federal and state oil spill funds provide a safety net; and (4) damages can be reduced most effectively if RACs respond boldly, quickly, and efficiently under the emergency conditions that arise in an oil spill.

Mr. Mertz and Mr. Koester discuss a number of basic legal principles: common law negligence, with special rules for "abnormally dangerous" activities; indemnification and the public duty exception; nondelegable duty; respondeat superior. The Report incorrectly implies that crude oil is a hazardous substance and that the carriage and release of crude oil is an "ultrahazardous" activity. Report at pages 3-6. Only a few activities that involve a risk of serious harm that cannot be eliminated by the exercise of "utmost care" by the parties involved are considered

"ultrahazardous" under Alaska common law. Matomco Oil Company, Inc. v. Arctic Mechanical, Inc., 796 P.2d 1336 (Alaska 1990).

Furthermore, common law legal principles have been developed by federal and state courts through decisions allocating the rights and responsibilities of the parties before them. The obvious conclusion to be drawn from the Report is that it is very difficult to predict what a party's liability may be for any act or failure to act. Legislatures have recognized their duty and responsibility to express public policies by adjusting these principles for categories of potential liability. For example, in response to concerns about rising medical and insurance costs, the Alaska Legislature and other legislatures set limits on liability and reallocated responsibilities for tort damages by eliminating joint and several liability. Similarly and appropriately, the Alaska Legislature correctly limited the liability of RACs.

Alaska responds to comments and recommendations made in the Report as follows:

1. The limitation on liability for RACs will not prevent the recovery of damages by injured parties. The Report erroneously states that contract provisions and statutory exemptions for RACs reduce the overall liability to such an extent that parties who have been damaged may not be compensated. Report at pages 17, 33 and 34. This simply is not true. First, both the Alaska Legislature and Congress have created funds to reimburse parties damaged by oil spills. Second, under both federal and state law, the spiller is strictly liable for damages caused by spills. In fact, the Report acknowledges this by stating that even the common law has placed "a heavy burden, including strict liability, on parties responsible for the safe storage and transportation of oil, and often makes them liable for the acts of employees and contractors." Report at page 9.

Under Alaska law, the spiller's strict liability extends to any damage caused by an act or omission of an RAC responding to a spill. AS 46.03.822(k). The Report states, correctly, that the legislature intended to lay the burden for paying for any damages caused by the RAC on the party responsible for the spill. Report at page 14. As a result of this provision, the responder exemption cannot "lessen" the overall liability burden as the Report asserts at page 18. The exemption is hardly "generous," as characterized by the Report.

The exemption encourages responders to act by assuring them that certain acts will not create liability. Conversely, potential liability would discourage effective response. The Report acknowledges this by stating, "Almost all [RACs] considered the potential for claims to be a concern." Report at page 21.

Similarly, indemnity agreements do not allow parties who are strictly liable to "escape" liability, as the Report asserts at page 18. Under Alaska law, indemnification agreements are "not effective to transfer liability" from a person who might be strictly liable. AS 46.03.822(g).

The Report states that "it is possible" that limitations on liability may prevent recovery of damages by parties injured where there is no other financially solvent responsible parties. Report at page 17. Importantly, such a possibility would depend upon state and federal errors in approving evidence of a spiller's financial responsibility to begin with and in administering state and federal funds which exist in part to clean up and to pay for "mystery" and "orphan" spills. Yet, this remote possibility fuels the reports' central premise that RACs should agree to adhere to the state's orders should a spiller and his insurers become simultaneously insolvent. Ironically, the report recognizes that the proposal would probably discourage response action and amount to an unlawful taking of private property. The Report acknowledges the taking issue in its statement at page 33 that requiring RACs to have a direct contractual relationship with the State "would probably be been as an illegal taking and could require compensation to the RAC itself."

Indeed, elevating RACs to the same level of liability as the spiller directly contradicts and defeats the comprehensive framework of state and federal oil spill response laws to, on the one hand, promote quick, effective action, and on the other, rely on spiller liability, financial responsibility, and federal and state industry-supported funds to pay for it. Instead of encouraging response action by imposing limited liability, the report proposal would largely deter or eliminate it by imposing spiller liability on responders in direct defiance of congressional and legislative intent. Remote possibilities should not likewise support the Council's recommendations; we urge that they be supported instead by a careful and realistic weighing of public interests and goals.

The Report also states that "obtaining compensation (from state and federal funds) may be too costly or complicated for the small injured party." Report at page 33. Taking away the limited immunity now provided to RACs will not provide direct compensation to an injured party seeking compensation. Liability would probably only be decided through costly and complicated litigation. A primary goal of the federal fund is to provide people faster, more efficient, compensation than can be gained through litigation.

2. Alaska agrees with the statement at page 34 of the Report that the 15-day limit on the immunity provided is arbitrary. HB 196's time limit is unrealistic given the nature of oil spill response operations; every spill will be different. So long as

spilled oil remains on water or land, ongoing, expeditious action should be encouraged to remove it.

3. As a matter of public policy, the liability of an RAC should be limited. An RAC is responding if, and only if, there already has been a spill. Thus, an emergency exists. Under exigent circumstances, all parties, including RACs and governments, should react and respond quickly and efficiently. Principles of negligence do not make sense, and it is difficult for anyone to determine, especially after the fact in a courtroom, what was "reasonable under the circumstances," as the Report implies at page 34.

On March 26, 1991, in addressing the House Resources Committee prior to adoption of House Bill 196, Representative Hudson noted that this bill would shift the liability for simple negligence from an innocent spill response action contractor to the party responsible for the spill. He correctly noted that under this exemption, in responding to a spill, an RAC assumes liability for any damage caused by its own recklessness or gross negligence. The committee also heard testimony from Jon Tillinghast on behalf of Tesoro and Conoco, that Pacific Fisheries Legislative Task Force, the U. S. Coast Guard, the California Sierra Club, the International Bird Rescue Research Center, and the Ventura County Commercial Fishermen's Association have supported RAC exemption provisions. To date, the Virgin Islands and 18 of 24 coastal states (75%) have adopted virtually identical laws, that provide greater RAC immunity from liability than HB 196.

Later, on April 23, 1991, Representative Hudson commented to the House Judiciary Committee that by being more consistent with the laws of other states and federal law, national and regional RACs would be more inclined to respond to spills in Alaska.

4. The level of competence of an RAC and how it and the plan holder will respond can best be evaluated in advance of a spill by review of the oil discharge prevention and response plan and through DEC's authority to require training programs and spill drills.

5. Parties must be allowed to define their relative rights and responsibilities through contract. The Legislature has authorized limited state review of response action contracts. Regulations drafted by the Alaska Department of Environmental Conservation to implement House Bill 567 will require a plan holder who proposes to use the services of any RACs to (1) identify those RACs, (2) summarize each agreement or contract, and (3) describe the equipment and services to be provided by the RAC. However, the scope of indemnity provisions and the degree of control retained by the spiller are basic provisions that must be negotiated by the contingency plan holder and the RAC, based on circumstances and needs unique to the contracting parties, such as oil spill response

needs; whether the RAC is a full time, private response organization, an oil spill cooperative or a fisherman; and, certainly, the potential liability to which the plan holder is exposed by its operations.

The Report expresses surprise at the diversity among such contracts. Report at page 19. Of course the terms will vary from contract to contract. The contracts must reflect the needs of each party. However, the parties allocate their responsibilities for damages, they cannot avoid their liabilities to third parties and to the State and federal government, as stated in law.

Furthermore, the discussion of contracts, at least insofar as it relates to the two industry co-ops, (Report at page 19) wholly ignores the distinction between industry co-ops and private contractors. Industry co-ops are voluntary organizations of companies that have banded together to amass oil spill response equipment and response capabilities for their mutual benefit and, in the case of one of them, for social welfare purposes.

These co-ops are operated on a non-profit basis, and little attempt is made to recover even the indirect costs of response activities, such as overhead and staff time. The co-ops are not intended to, and do not, operate in a way that would enable them to accumulate loss reserves or to purchase expensive insurance for their protection. The response action contracts they have adopted are established in their charters or bylaws and cannot be negotiated, at least with respect to indemnity. The terms of the indemnity agreements reflect not so much the business acumen or negotiation strengths of the co-ops as their status as voluntary, non-profit organizations.

In particular, the Report discusses the Alyeska response services agreements and implies that it is inappropriate for Alyeska to require one billion dollars in financial responsibility. Report at page 25. Alyeska must ensure that a shipper with whom it contracts to provide initial response services can provide indemnity for any liability to which Alyeska could be exposed in responding to a spill. Alyeska is not an insurer which could otherwise spread the financial burden of a loss amongst a number of insureds; each spiller must demonstrate the wherewithal to pay for all the costs associated with its spill. Particularly, in light of recent changes in the types of claims and variety of damages which can be associated with federal and state oil spill litigation, this financial responsibility requirement is reasonable. In light of the magnitude of claims filed after recent oil spill incidents, this figure is reasonable.

Additionally the Report states that Alyeska has "raised rather than lowered" the financial responsibility requirements for Tesoro. Report at page 25, n. 25. After the legislature limited the liability of RACs, thus reducing the perceived risks associated

with spill response, Alyeska carefully considered the matter and changed the manner in which Tesoro could demonstrate its capability to meet its contractual obligations to Alyeska. After enactment of HB 196, Alyeska created an alternative to its \$1 billion financial responsibility requirement. This alternative allows any company to utilize insurance rather than a corporate guarantee. The insurance may consist of \$700 million F&I coverage for the vessel and \$500 million comprehensive general liability coverage that names Alyeska as an additional insured. Alyeska agreed to allow Tesoro to use the insurance alternative through a combination of marine insurance, comprehensive general liability insurance, and corporate guaranties, as opposed to a pre-existing requirement that it provide a corporate guarantee purely by the availability of cash and other self-worth. There is no way that Tesoro could provide a corporate guarantee, bond or letter of credit, as originally required by Alyeska's financial responsibility standards, for either one or \$1 or \$1.2 billion. Because of uncertainties associated with coverage of contractor claims against vessel marine insurance, and added potential difficulty of enforcing insurance coverage generally, the quality of Alyeska's financial protection has diminished substantially. Yet, the parties reached this practical solution to a difficult problem after and because HB 196 passed last year -- despite the Report's implications to the contrary. This insurance alternative will expire when HB 196 sunsets at the end of June, 1992.

6. The same exemption for RACs should be available.

Alyeska's concerns regarding limited immunity for RACs are identical to those expressed in the Report regarding the potential liability of the State or of a municipality for managing a spill response. Report at page 28. The Report acknowledges that the State, municipalities, and villages enjoy limited responder immunity. AS 46.03.822(h). In its discussion of the State's interest in shifting to the another party any potential liability, the Report notes that the State may "attempt to fend off liability from below by requiring RACs it employs to indemnify it for their misdeeds, and it could require indemnification for its own misdeeds." Report at page 28. But private industry has the same concerns. An RAC responding on behalf of industry must be treated the same as a public RAC. The public policy is the same: to encourage responders to respond quickly, aggressively and most effectively under the circumstances.

7. The State should not attempt to exercise direct control over RACs. Through the contingency plan holder the State has sufficient ability to oversee RAC capabilities on behalf of the plan holder. The Report notes that the State's direct authority over plan holders does not extend to authority over RACs. Report at page 31. However, it encourages the State to expand its authority over RACs. Report at page 32. This will not provide more effective spill response. The Report correctly notes that

while the State may have an interest in directing an RAC response to a spill, increases in the regulatory burden will discourage RACs altogether and "State restrictions on RAC contracts could simply result in fewer RACs willing to engage in response action." Report at pages 5, 26.

The Report recommends that RACs be subjected to the same governmental oversight as plan holders. Report at page 35. Such a system would eliminate the incentive of a party to enter into a response action contract, unless the state became a party to the contract and agreed to pay the response costs. This would be a dramatic change in spill response practices.

In conclusion, it is good public policy to encourage those who have the capacity and the skills to help in an emergency to do so. Private parties at risk from oil spill damage are better protected from insolvent spillers by financial responsibility requirements and by federal and state liability funds than by imposing liability on RACs. Reducing incentives to enter into RACs or to form spill cooperatives will only reduce the number of entities willing and able to respond to spills.

January 30, 1992

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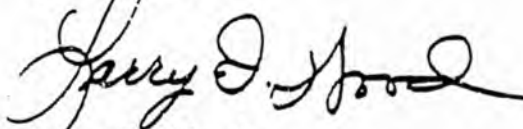
Re: Alyeska's Comments Related to Trans Alaska Pipeline Authorization Act  
Memorandum

Dear Ms. Brown:

Enclosed please find comments respectfully submitted by Alyeska Pipeline Service Company ("Alyeska") to the Citizens' Oversight Council on Oil and Other Hazardous Substances. The comments relate to a memorandum by Mr. Michael J. Frank entitled "HB 196 Research Project: Trans Alaska Pipeline Authorization Act." A summary accompanies our remarks. Thank you for the opportunity to participate in the Council's consideration of the important matter of limited responder immunity.

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY



Larry D. Wood  
Senior Attorney-External Affairs

LDW42/cas

Attachments

January 30, 1992

**Response to Memorandum  
Regarding the Trans Alaska Pipeline Authorization Act  
Prepared By Michael J. Frank**

**Summary**

The Trans Alaska Pipeline Authorization Act ("TAPAA"), 43 USC 1651 et. seq., makes the owner/operator of a vessel, not Alyeska or the holders of the right-of-way, strictly liable for any oil spill from that vessel in Prince William Sound. This statutory allocation of liability is consistent with other state and federal laws that make the owner/operator of a vessel responsible for responding to and cleaning up oil spills from the vessel.

TAPAA does not require Alyeska to respond to vessel spills, nor does it make Alyeska or the holders of the right-of-way strictly liable for damages caused by such spills. Indeed, the legislative history of TAPAA demonstrates that Congress rejected proposed statutory language that would have made the holders of the right-of-way strictly liable for vessel spills.

LDW43/cas

**Memorandum Of Alyeska Pipeline  
Service Company Regarding Liability  
Under Trans Alaska Pipeline Authorization  
Act for Oil Spills From Vessels**

Introduction

Alyeska Pipeline Service Company ("Alyeska") has reviewed the January 13, 1992, research project memorandum Michael J. Frank regarding the Trans Alaska Pipeline Authorization Act ("TAPAA"). 43 U.S.C. § 1651 et seq., Alyeska believes that the memorandum incorrectly states Alyeska's position with respect to spills from vessels in Prince William Sound, and that it reaches erroneous legal conclusions regarding Alyeska's liability for vessel spills under TAPAA. Accordingly, Alyeska is submitting this memorandum to the Citizens Oversight Council on Oil and Other Hazardous Substances to correctly state Alyeska's position.

1. Alyeska's Legal Posture Since the T/V EXXON VALDEZ Oil Spill.

Mr. Frank's memorandum asserts, at page 28, that "Since the T/V EXXON VALDEZ oil spill, Alyeska has publicly denied that it has ever been required to respond to a tanker spill of TAPS oil." This is not a correct statement of Alyeska's position.

Alyeska has acknowledged and continues to acknowledge (1) that at the time of the T/V EXXON VALDEZ oil spill, Alyeska had in effect an Oil Spill Contingency Plan that provided that Alyeska would respond to spills of TAPS oil from vessels within Prince William Sound; (2) that Alyeska was obligated to respond in accordance with its Contingency Plan; and (3) that, in light of federal and Alaska law

imposing responsibility for oil spills from vessels on the owner-operator of the vessel, Alyeska was obligated to provide an initial response to a vessel spill until such time as the owner/operator of the vessel arrived on scene and was in a position to assume responsibility for the response. Alyeska's intention to provide an initial response and then hand-off the response effort to the owner/operator of the vessel was approved by the State of Alaska, both in spill drills held before the T/V EXXON VALDEZ incident, and during the response to the T/V EXXON VALDEZ oil spill itself. At the time of the T/V EXXON VALDEZ spill, the ultimate responsibility of the owner/operator of the vessel to respond to vessel spills, to pay for the cleanup of such spills, and to compensate those public and private entities damaged by such spills was well established under both federal and state law. See, e.g., AS 46.03.822 (owner/operator of vessel liable for all public and private damages from oil spills); Clean Water Act, 33 U.S.C. 1321 (owner/operator liable for cleanup of oil spills, including cleanup costs and natural resource damages); TAPAA, 43 U.S.C. § 1653(c) (owner/operator of vessel and Trans Alaska Liability Fund liable for damages caused by vessel spills).

## 2. Liability for Vessel Spills Under TAPAA

Mr. Frank's memorandum erroneously suggests that Alyeska and the holders of the right-of-way are strictly liable for vessel spills under TAPAA. As noted above, TAPAA makes the owner/operator of a vessel, rather than Alyeska or the holders of the right-of-way, strictly liable for vessel spills in Prince William Sound. 43 U.S.C. § 1653(c).

Under the comprehensive liability framework created by Congressional

authorization (TAPAA) of a federal grant of rights-of-way across federal land in Alaska for pipeline construction and operation:

1. The right-of-way holders are strictly liable for environmental damages occurring from their activities along or in the vicinity of the pipeline right-of-way.
2. The right-of-way holders must control and remove pollution along or adjacent to the pipeline right-of-way as a result of their activities.
3. Vessel owners and operators carrying oil transported through the pipeline are jointly and severally strictly liable, along with the Trans Alaska Liability Fund, for damages, including cleanup costs, resulting from discharges of oil from their vessel.
4. Under TAPAA, Alyeska and the right-of-way holders are not strictly liable for spills from vessels. The right-of-way holders and Alyeska are not required by TAPAA to cleanup oil spilled from vessels in Prince William Sound.

In oil spill litigation pending in Alaska federal court, Judge Holland has already ruled that, under TAPAA, only the owner or operator of the vessel and the Trans Alaska Pipeline Liability Fund are liable for vessel spills. "Those people strictly liable under TAPAA are the vessel owner and operator, and the Fund." In re Glacier Bay, No. A88-115 Civil (Order Filed July 26, 1991), at 20.

Mr. Frank nevertheless attempts to argue that Alyeska and the holders of the right-of-way are liable for vessel spills under subsections (a) or (b) of Section 1653. His analysis is seriously flawed. Both of these subsections are inapplicable to the discharge of oil from tankers in transit to and from the Valdez terminal.

Subsection (a) imposes strict liability on the holder of the pipeline right-of-way for "damages in connection with or resulting from activities along or in the vicinity of" the right-of-way. Of course, one could argue that, in a literal sense, every vessel spill from a tanker transporting Alaska North Slope crude oil is "in connection with" activities along the right-of-way. But for the activities along the pipeline right-of-way, the vessel could not have been loaded with ANS crude oil. But as the Ninth Circuit has made clear, common sense rather than a literal or mechanical approach must govern interpretation of 1653(a). See Heppner v. Alyeska Pipeline Service Co., 665 F.2d 868, 873 (9th Cir. 1981). The Court held that although 43 U.S.C. § 1653(a) refers to "damages" generally and appears to be "clear and unambiguous," Congress' clear intent was to cover only environmental damages.

In Heppner, the Court noted that, were the statute construed literally and mechanically, damages from slanders, fights and automobile accidents along the right-of-way would all be encompassed by subsection (a). The Court stated this "raises serious questions whether we should read the strict liability language literally and should give it its broadest possible sweep." 665 F.2d at 873. The Court concluded it should not interpret 43 U.S.C. § 1653 (a) to give it its broadest possible sweep.

The same principles of statutory interpretation apply to determine whether 43 U.S.C. § 1653(a) imposes strict liability on the permit holders for spills from vessels. If vessel spills are "in connection with" activities along the pipeline right-of-way simply because the vessel contained ANS crude that had been transported along the right-of-way, then every vessel spill of ANS crude would be covered by subsection (a) whether it occurred in Prince William Sound, along the coast of British Columbia, or in Puget Sound. Indeed, spills of gasoline from vehicles in Los Angeles might be covered if the gasoline was refined from ANS crude. This was not intended by Congress.

Finally, and perhaps most important, it is an accepted canon of statutory construction that a court should not read the words of one subsection in isolation, but must consider them in context with the rest of the statute. "One provision of a comprehensive statute must be read in the context of the other provisions of the statute and in light of the general legislative scheme." Yamaguchi v. State Farm Mutual Auto Ins. Co., 706 F.2d 940, 948 n.11 (9th Cir. 1983). "The words of a statute must be construed in context and the statutes must be harmonized, both internally and with each other, to the extent possible." Pacific Mutual Life Ins. Co. v. American Guaranty Life Ins. Co., 722 F.2d 1498, 1501 (9th Cir. 1984).

When subsection (a) is read in context with subsection (c), it is apparent that Congress intended subsection (c) to cover vessel spills while subsection (a) was intended to cover environmental damage in and along the right-of-way caused by construction and operation of the pipeline. See Mt. Graham Red Squirrel v. Madigan, F.2d (9th Cir. Jan. 21, 1992) (since Congress dealt with two phases of construction project in two separate sections of statute, Congress clearly intended the two phases to

be treated differently; each section cannot be read in isolation; rather interpretation of each depends on "a reading of the statute as a whole . . .").

Subsection (b) of Section 1653 provides that the holder of the right-of-way is liable to control and remove pollutants where "any area within or without the right-of-way or permit area granted under this chapter is polluted by any activities conducted by or on behalf of the holder. . ." (emphasis added). This subsection is inapplicable to vessel spills absent evidence that the spill occurred as a result of activities conducted by or on behalf of the holder of the right-of-way. Of course, as previously indicated, in a literal sense every vessel spill of ANS crude is in some way connected to activities conducted by the holders of the right-of-way in that, but for the transportation of oil through the pipeline, the vessel never would have been loaded with ANS crude. When subsection (b) is read in context with subsection (c), however, it is apparent that Congress could not have intended this "but for" connection to be sufficient to invoke subsection (b). Mr. Frank's theory would produce the anomalous result that the owner and operator of the vessel would be strictly liable under subsection (c) only for \$14 million, while the holders of the right-of-way would be strictly liable without any limits. Given the monetary limits elsewhere in TAPAA, including both subsections (a) and (c), one should not impute to Congress such a bizarre result. See Mt. Graham Red Squirrel v. Madigan, supra (court should not interpret statute in a manner that "makes no sense either practically or as a matter of linguistics").

Mr. Frank's reliance on Alveska Pipeline Service Co. v. United States, 649 F.2d 831 (U.S.Ct.Cl.), cert. denied, 454 U.S. 964 (1981), is misplaced. That case

held that, under 1653(b), the owners and operator of the Trans-Alaska Pipeline are strictly liable for spills from the pipeline itself, since such spills constitute "pollution resulting from any activities conducted by or on behalf of them." 649 F.2d at 833-34. The holders' agent, Alyeska, operates the pipeline. All pipeline spills thus result from "activities conducted by or on behalf of" the holders, as those words are used in 1653(b). With respect to vessel spills, in contrast, neither the holders nor Alyeska operate the vessels. Spills from vessels thus do not result from activities conducted by or on behalf of the holders.

Finally, Mr. Frank erroneously interprets the legislative history of TAPAA. As he notes, Congress had before it a House Bill, H.R. 9130, Section 207(b)(1) of which would have expressly provided that the holder of the right-of-way is strictly liable for all damages resulting from spills from any vessel owned by the holder or by any "affiliate" of the holder. As Mr. Frank notes, see his memorandum at p. 14, the term "affiliate" was broadly defined. Thus, had Section 207(b)(1) been adopted, there is little doubt that the holders of the right-of-way would be liable for damages caused by the **EXXON VALDEZ** oil spill, as the **EXXON VALDEZ** was owned by an affiliate of one of the holders of the right-of-way. The flaw in Mr. Frank's analysis, however, is that Section 207 was rejected by the Conference Committee. The bill that came out of the Conference, which Congress ultimately enacted, contains nothing comparable to Section 207. Congress clearly made the vessel owner/operator, rather than the holders or any affiliates of the owner/operator, liable for vessel spills. 1653(c). Congress' rejection of a specific provisions before it that would have made the holders liable for vessel spills is relevant to interpretation of 1653 and shows that the statute as adopted was not intended to make the holders liable for vessel spills. See Fox

v. Standard Oil Co. of New Jersey, 294 U.S. 87, 96, 294 S.Ct. 333, 337 (1934); Fleming v. Hawkeye Pearl Button Co., 113 F.2d 52, 58 (8th Cir. 1940).

LDW44/cas

January 30, 1992

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<sup>1</sup> As successors to the original holders of the federal right-of-way for TAPS, Amerada Hess Pipeline Corporation, ARCO Transportation Alaska, Inc., BP Pipelines (Alaska), Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Company, Phillips Alaska Pipeline Corporation, and Unocal Pipeline Company, are the present holders of the right-of-way grant. These common carrier pipeline companies own the pipeline and have chosen Alyeska to be their common operating agent.

**Congress and the State of Alaska Impose Liability and Financial Responsibility for Tanker Discharges Upon Vessel Owners and Operators, Not Upon the TAPS Owners and Operator**

\* The COC recommendation that "[t]he 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" relies upon an erroneous legal opinion.

\* The responsibility of the owner/operator of a vessel to respond to vessel spills, and to pay for the cleanup and damages related to such spills, is well established under federal and state law:

\*\* AS 46.03.822 (owner/operator of vessel liable for all public and private property damaged from oil spills);

\*\* Clean Water Act, 33 USC 1321 (owner/operator liable for cleanup of oil spills, including cleanup costs and natural resource damages); and

\*\* Trans-Alaska Pipeline Authorization Act, 43 USC 1653(c) (owner/operator of vessel and Trans Alaska Liability Fund liable for damages caused by vessel spills).

\* Under federal law, the holder of the pipeline right-of-way for TAPS is only liable to control and remove pollutants where "any area within or without the right-of-way or permit area granted under this chapter is polluted by any activities conducted by or on behalf of the holder...." This subsection is inapplicable to vessel spills absent evidence that the spill occurred as a result of activities conducted by or on behalf of the holder of the right-of-way.

\* None of the seven pipeline companies that own TAPS, or Alyeska which operates it on their behalf, 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; so has the State of Alaska.

\* Also, the state and federal Right of Way Agreements, executed in 1974, did not alter this scheme and did not impose upon the holders of the right of way the responsibility to clean up oil spills from tankers in trade with the Valdez Terminal. Rather, both the contingency planning and oil spill response provisions of those agreements impose obligations on the holders only with

respect to spills from the pipeline or from the Marine Terminal facilities.

\* An internal State of Alaska memorandum written prior to pipeline start-up acknowledged that "[t]here is no legal or stipulative requirement for Alyeska to clean up oil in Prince William Sound. Their Contingency Plan for the Sound (i.e., beyond Middle Rock) has been volunteered...." Memorandum from R. Bayliss to J. Reinwand (January 13, 1977).

\* The issue of whether Alyeska has a duty to contain and cleanup crude oil spills within state waters has been raised in the Exxon Valdez litigation where it will be resolved. The very fact that a request has been made to "clarify" this alleged responsibility reveals the proponents' uncertainty in their own arguments.

\* In COC's public meeting on January 31, ADEC testified that there is no confusion regarding who truly bears this responsibility in Prince William Sound: "we know who the plan holders are, we know who the responsible parties are...." An attempt to inexplicably shift that responsibility to pipeline owners who neither own nor operate crude oil tankers would be unlawful and fundamentally unnecessary. Congress' and Alaska's comprehensive oil spill response laws already place responsibility for tanker spills upon vessel owners/operators.



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*Jay Nelson*

**OIL SPILL RESPONSE ACTION  
CONTRACTORS**

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

**Prepared By**

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

**Council Members**

**Harry R. Bader, Fairbanks • Leo J. Hannan, Anchorage • Kathryn L. Kinnear, Kodiak  
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## HB 196, SECTION 11, REPORT OIL SPILL RESPONSE ACTION CONTRACTORS

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

**COUNCIL'S RECOMMENDATIONS**

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

### RECOMMENDATIONS

#### OBJECTIVE

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

#### EVALUATION CRITERIA

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

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

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**HB 196, SECTION 11, REPORT  
OIL SPILL RESPONSE ACTION CONTRACTORS  
RECOMMENDATIONS, continued  
page 3**

**RECOMMENDATION #3:** A certification program should contain minimum professional standards for response action contractors and direct DEC to establish the criteria by which it can readily assess a response action contractor's capability to perform as stated in a contingency plan.

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

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

\*\*\*\*\*

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

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

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

# **CORRECTION**

**THIS DOCUMENT  
HAS BEEN REPHOTOGRAPHED  
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**HB 196, SECTION 11, REPORT  
OIL SPILL RESPONSE ACTION CONTRACTORS  
RECOMMENDATIONS, continued  
page 2**

**RECOMMENDATION #1:** The liability standard for oil spill response action contractors may be limited to gross negligence or intentional misconduct, with certain conditions that ensure a reliable response.

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

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

\*\*\*\*\*

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

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

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

\*\*\*\*\*

**HB 196, SECTION 11, REPORT  
OIL SPILL RESPONSE ACTION CONTRACTORS  
RECOMMENDATIONS, continued  
page 3**

**RECOMMENDATION #3:** A certification program should contain minimum professional standards for response action contractors and direct DEC to establish the criteria by which it can readily assess a response action contractor's capability to perform as stated in a contingency plan.

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

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

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

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

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

**HB 196, SECTION 11, REPORT  
OIL SPILL RESPONSE ACTION CONTRACTORS  
RECOMMENDATIONS, continued  
page 4**

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**RECOMMENDATION #5:** Certified response action contractors must be subject to all orders of the state on-scene coordinator during an actual or threatened spill response.

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

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

\*\*\*\*\*

**RECOMMENDATION #6:** Certified response action contractors should respond, when directed by the state on-scene coordinator, to mystery or orphan spills, except that regional cooperatives will not be required to respond outside their region of operation.

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

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

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

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

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

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

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

\*\*\*\*\*



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

### **I. INTRODUCTION**

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

### **II. REPORT METHODOLOGY**

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

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

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

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

### **III. LEGAL FRAMEWORK**

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

#### **A. STATUTORY LIABILITY FOR DAMAGES FROM OIL SPILLS**

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

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

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

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

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

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

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

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

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

## **B. STATUTORY DUTY TO RESPOND TO AN OIL SPILL**

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

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

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

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

#### **IV. CONGRESSIONAL AND OTHER STATE ACTIONS**

Much of the discussion about limiting response action contractor liability stems from the language set out in the Oil Pollution Act of 1990. The Oil Pollution Act provides that a person is not liable for removal costs or damages in the course of rendering assistance consistent with the National Contingency Plan or as directed by the President. This exemption from liability does not apply to: (1) a responsible party; (2) a response under CERCLA; (3) cases involving personal injury or wrongful death; and (4) gross negligence or willful misconduct.

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

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

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

regional response centers, but has stated that it currently has plans to locate in Alaska.

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

## **V. RESPONSE ACTION CONTRACTORS OPERATING IN ALASKA**

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

### **A. VOLUNTEERS**

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

### **B. PROFESSIONAL INDEPENDENT OPERATORS**

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

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

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

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

### **C. INDUSTRY SPILL RESPONSE COOPERATIVE ORGANIZATIONS**

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

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

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

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

#### **D. INDUSTRIES' OWN SPILL RESPONSE OPERATIONS**

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

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

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

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

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

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

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

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

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

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

### **A. RESPONSE ACTION CONTRACTOR FEAR OF LIABILITY**

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

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

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

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

## **B. RISK OF REDUCED COMPENSATION TO SPILL VICTIMS**

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

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

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

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

### **C. BALANCING LIABILITY AND COMPENSATION CONCERNS**

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

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

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

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

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

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

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

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

### **A. RELIANCE UPON RESPONSE ACTION CONTRACTORS**

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

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

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

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

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

## **B. STATE REVIEW OF RESPONSE ACTION CONTRACTORS**

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

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

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

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

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

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

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

### **C. RESPONSE ACTION CONTRACTOR CERTIFICATION**

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

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

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

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

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

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

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

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

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

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

#### **D. ALYESKA PIPELINE SERVICE COMPANY**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **VIII. CONCLUSION**

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



**Citizens' Oversight Council**  
on Oil and Other Hazardous Substances

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**APPENDIX A**

**Issues List**

**Council Members**

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



## Citizens' Oversight Council

on Oil and Other Hazardous Substances

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### **HB 196, SECTION 11, REPORT RESEARCH PROJECTS**

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

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

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

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

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

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

The Citizens' Oversight Council will conduct the research.

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

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

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

DEC staff will assemble this data.

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

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

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

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

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

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

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

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



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**APPENDIX B**  
**Research Reports Summary**

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**SUMMARY**  
  
**of**  
  
**RESEARCH PROJECTS REPORTS**

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

**Council Members**

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

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## RESEARCH PROJECTS REPORTS SUMMARY

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

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**Research Project:** Response action contractor activity in Alaska

**Prepared by:** Department of Environmental Conservation

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

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

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

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

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

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

\*\*\*\*\*

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

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

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

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

\*\*\*\*\*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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**Research Project:** Insurance coverage availability

**Prepared By:** Tesoro Alaska, Inc.

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

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

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

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

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

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

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

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

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

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

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**Research Project:** Other state's response action contractor provisions

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

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

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

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

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

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

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

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

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

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

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

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

# Other States' Response Action Contractor Liability Laws

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



## Citizens' Oversight Council

on Oil and Other Hazardous Substances

3111 C Street, Suite 150 • Anchorage, Alaska 99503

(907)561-2101 • 561-7538 (FAX)

## APPENDIX C

### List of Rebuttals / Supplemental Information

#### Council Members

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



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## Rebuttals or Supplemental Information

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

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

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

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

**Commenting on Report:** All research projects

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

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

**Summary:** The Trans-Alaska Pipeline Authorization Act ("TAPAA"), 43 USC 1651 et. seq., makes the owner/operator of a vessel, not Alyeska or the holders of the right-of-way, strictly liable for any oil spill from that vessel in Prince William Sound. This statutory allocation of liability is consistent with other state and federal laws that make the owner/operator of a vessel responsible for responding to and cleaning up oil spills from the vessel.

TAPAA does not require Alyeska to respond to vessel spills, nor does it make Alyeska or the holders of the right-of-way strictly liable for damages caused by such spills. Indeed, the legislative history of TAPAA demonstrates that Congress rejected proposed statutory language that would have made the holders of the right-of-way strictly liable for vessel spills.

### Council Members

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

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

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

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

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

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

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

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

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

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

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