

ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672

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January 31, 1992

**Response to HB 196 Report on Response Action Contractors Prepared by the
Alaska Department of Environmental Conservation****Summary**

This memorandum incorrectly states that "[n]one of the RACs have had experience with claims for damages due to spills or to alleged negligence***." Page 5. Alyeska Pipeline Service Company ("Alyeska") reported that such claims had been asserted in the Exxon Valdez litigation. It is our understanding that Exxon Shipping Company's long term response action contractor, VECO, has also been named as a defendant in virtually all of the spill litigation. Potential liabilities associated with such claims are, therefore, not an imagined concern.

The memorandum also incorrectly asserts that "[o]ther industry response organizations not so structured [to function independently] may not have a relationship similar to RACs. In some cases the owner companies may own and operate an oil terminal, tankers and the response organization." Page 9. However, Alyeska is an initial response action contractor which has agreed to provide initial response services to tanker owners/operators/charterers. Although Alyeska is the common operating agent for the seven holders of the federal and state rights-of-way for TAPS who own the pipeline, terminal, and related properties, none of these companies own tank vessels or consequently hold vessel oil spill prevention and response plans. To answer the agency's rhetorical questions on page 10, Alyeska, as agent for the pipeline owner companies, is under the same contractual obligations to provide initial response services to these tanker owners/operators/charterers as would be any other RAC that signed a response services agreement. The terms of that agreement call for Alyeska to assume responsibility for spill response operations for as long as the first 72 hours following the spill during which time the contracting tanker owner/operator/charterer will assume spill management responsibilities. Hence, during this time, and to the extent it provides continuing response services, Alyeska faces the same risks as other RACs and is entitled to the same immunity from liability available to RACs generally.

LDW:ADEC/cas

January 31, 1992

**Response to Memorandum Relating to Contingency Plan Requirements Under
OPA '90 Prepared by Michele Straube****Summary**

The U.S. Coast Guard's disinclination to force a ". . . RAC [response action contractor] to respond if the Holder [of a contingency plan] did not concur" encourages prompt and aggressive response action, despite suggestions in this memorandum to the contrary. Page 10, footnote 29. If an RAC is aware that the state or federal governments will essentially impose spiller liability for response action if an RAC contracts to provide services to a spiller, the RAC will obviously refuse to offer those services. As noted by the Coast Guard, all of OPA '90's statutory requirements -- strict liability, treble damages, contingency planning, periodic drills -- illustrate the point that it is in the responsible party's best interest to respond to spills and to proceed expeditiously, without objection. *Id.* OPA '90 and state financial responsibility requirements and the safety net of industry-financed state and federal response funds make the "worst case scenario" (the apparent and simultaneous insolvency of a shipper, its insurance, and state and federal response funds darkly described on page 11) an extremely remote possibility.

Nonetheless, and fueled by this speculation, the memorandum implies that the state should move ahead, despite the recognized uncertainty of federal preemption and constitutional limitations, "by imposing liability on RACs [to bear the costs and liabilities of spill response should a spiller fail to]." Page 15. This step would most certainly defeat the comprehensive approach taken by federal and state governments to, on the one hand, insure prompt, effective response to oil spills, and, on the other, require that costs be borne by the spiller, his evidence of financial responsibility, and, in some cases, oil spill response funds. Unfortunately, the Coast Guards' answer to the "worst case scenario" question seems to have been largely ignored: ". . . the OSC could direct the RAC to implement the approved contingency plan and reimburse the RAC's costs from the Fund." Page 10. In addition, the memorandum fails to consider that the Coast Guard has urged the states to adopt the federal responder immunity standard to insure "the availability of a viable private sector capability to respond to oil spills and their threats . . . [as] an absolutely essential element of a national oil pollution response system." Contractor Immunity Provision: State Oil Spill Laws, Commandant, U.S.C.G. (May 31, 1991).

LDW:straubi/cas

January 31, 1992

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

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

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

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

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

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

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

LDW:vogt/cas



Citizens' Oversight Council
on Oil and Other Hazardous Substances

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

APPENDIX D

Text of 196
(set out pre and post sunset)

Council Members

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

HOUSE BILL 196

AN ACT LIMITING

LIABILITY

FOR

OIL SPILL

RESPONSE

ACTION

CONTRACTORS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DEFINITION OF RESPONSE ACTION (SECTION 6)

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

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

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

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

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

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

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

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

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

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

(1) an action for personal injury or death;

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

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

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

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

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

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

• Sec. 9. AS 46.03.82b is amended by adding new paragraphs to read:

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

(A) the department;

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

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

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

(15) "response action contractor" means

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

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

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

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

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

• Sec. 11. REPORT. The Citizens Oversight Council on Oil and Other Hazardous Substances (AS 24.20.601) shall review the entire subject of response action contractor civil liability and the status of oil spill contingency plan holders. The review of both subjects shall be completed and a report submitted to the legislature before January 15, 1992. The report must address whether further modifications are necessary to state laws on response action contractor civil liability, and include an analysis of whether the present state laws that require shippers and owners to hold contingency plans and that enable shippers and owners to contract with response action contractors to carry out contingency plans are adequate to protect the public in the event of an oil spill.

EFFECTIVE UPON PASSAGE OF HB 196

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

• Sec. 2. AS 46.03.022(a) is repealed and reenacted to read:

(a) Notwithstanding any other provision or rule of law and subject only to the defenses set out in (b) of this section and the exception set out in (1) of this section, the following persons are strictly liable, jointly and severally, for damages to persons or property, whether public or private, including damage to the natural resources of the state or a municipality, and for the costs of response, containment, removal, or remedial action incurred by the state or a municipality, resulting from an unpermitted release of a hazardous substance or, with respect to response costs, the substantial threat of an unpermitted release of a hazardous substance:

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

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

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

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

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

TAKES EFFECT ON JULY 1, 1992

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

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

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

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

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

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

(g) In this section,

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

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

(A) the department;

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

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

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

(3) "response action contractor" means

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

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

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

**REPEALS THE FOLLOWING SECTIONS:
SECTION 10**

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

TAKES EFFECT ON JULY 1, 1992



Citizens' Oversight Council

on Oil and Other Hazardous Substances

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

APPENDIX E

PRINCE WILLIAM SOUND TANKER CONTINGENCY PLAN COVERAGE CHART

Council Members

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

POSITION PAPERS OF SUPPORT FOR HB 540

City of Kodiak

City of Kenai

Homer Electric Association, Inc.

Kenai Chamber of Commerce

Resource Development Council

Alaska Clean Seas

Cook Inlet Spill Prevention and Response, Inc.

SEAPRO Southeast Alaska Petroleum Resource Organization

Tesoro Alaska Petroleum Company

North Peninsula Chamber of Commerce

Municipality of Anchorage

Victoria Askin, Individual

Cheryle Kent, Individual

Linda White, Individual

Georgia Poyner, Individual

Jackie Ansotegui, Individual

Susan Caswell, Individual

Carolyn Prince, Individual

Sharon Loosli, Individual

Susan Lacey, Individual

Micheal and Claudia Ussery, Individuals

Tiny Schasteen, Individual

Walter L. Gearing, Individual

John W. Lewis, Individual

Curt Rudd, Individual

Dale Greth, Individual

Bill Fallacaro, Individual



Citizens' Oversight Council

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

PRINCE WILLIAM SOUND TANKER CONTINGENCY PLAN COVERAGE CHART

CAVEAT:

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

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

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

APPENDIX E

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

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

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

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

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

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

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

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

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

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Citizens' Oversight Council
on Oil and Other Hazardous Substances

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

APPENDIX F

Summary of Meeting Comments

Council Members

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



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Citizens' Oversight Council Meeting January 31, 1992

Summary of Public Comments

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

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

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

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

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

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

Council Members

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

Steve Ducca, Marine Spill Response Corporation (MSRC)

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

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

Other concerns with the studies include the following:

Page two of the summary, states that "...granting immunity causes confusion for the governmental regulators over who, in fact, controls the field response and provides no assurance that a response will be sustained." MSRC feels that granting such limited immunity encourages a bolder response rather than a potential delay. Under OPA 90 the spiller submits a contingency plan. The responder is controlled through the spiller. If a responsible party (RP) refuses to cooperate there are serious penalties, the responders liability cap is removed and civil penalties up to 25,000 per day.

A second concern is the Straube report summary that states "A tanker vessel is owned by a poorly capitalized or shell corporation. The vessel owner's contingency plan shows a contract with a response action contractor. In that contract, the response action contractor reserves the ability to refuse to perform if the spiller is insolvent." MSRC feels this cannot occur because the federal government requires a certificate of financial responsibility and a \$1 billion per incident trust fund has been established when a spiller's liability limits are reached.

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

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

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

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

Steve Peterson, Crowley Maritime

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

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

Crowley welcomes certification.

Mike O'Meara, Homer

Response action contractor liability is a complicated issue.

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

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

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

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

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

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

1. NWF is interested in establishing a state and federal regulatory atmosphere that facilitates immediate response to oil spills.
2. In the initial hours of a spill we want to ensure that responder utilizes the most effective system of management and the best available technology.
3. Responders should be held accountable for their actions. Workers should be adequately trained, equipment properly maintained and drills should be held regularly and equipment and manpower described in an approved contingency plan should be immediately available in the event of a spill. We want to ensure that oil spill contingency plans are the central guide for response, not just documents written to meet legal requirements.
4. We want to assure, that in the event of insolvency, that the on-scene coordinator has the ability to direct the contractor that has committed to initial response.
5. We are interested in establishing a regulatory regime that uses local knowledge, resources and volunteers in the event of an oil spill. By not providing immunity to volunteers, it might create a disincentive for residents and volunteers to become actively involved in a spill.
6. We want to ensure that contractors can perform in the manner they indicate and that they have the equipment and resources to respond as indicated in their contracts and that these resources are unencumbered and available for use. We support state and/or federal certification for response action contractors.
7. We want to ensure that any resource damages are adequately compensated and that these resources are fully restored.

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

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

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

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

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

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

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

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

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

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

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

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

Larry Wood, Alyeska Pipeline Service Company

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

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

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

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

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

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

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

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

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

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

Under OPA 90 anyone who provides response receives immunity.

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

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

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

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

Wood responded that the Holland decision answered that question.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Bill Stillings General Manager CISPRI -Cook Inlet

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

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

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

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

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

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

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

Steve Provant, Department of Environmental Conservation

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

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

Gene Burden, Tesoro Alaska

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

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

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

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

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

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

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

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

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

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

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

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

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

Burden responded that that is correct.

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

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

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

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

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

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

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

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

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

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

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

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

Written Comments submitted:

Ken Castner, Homer

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

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

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

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

From: ROBERTSONT Tim Robertson
To: SLAJER BCSB Research & Marketing
cc: OSPRC Joe Banta
COPELANDT Tom Copeland
GOTTEHRERS Sheila K. Gottehrer
ROBERTSONT Tim Robertson
ROTHEANN Ann Rothe
SAUNDERSP Patti Saunders, RCAC
STERLINGS Scott Sterling

Subj: COC Testimony

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

JANUARY 31, 1992

MR. CHAIRMAN AND COMMITTEE MEMBERS;

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

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

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

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

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

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

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

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

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

TIM ROBERTSON
BOX 194, SELDOVIA, AK 99663.

Marine Spill Response Corporation
Comments to

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

OIL SPILL RESPONSE CONTRACTOR LIABILITY REPORT

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

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

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

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

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

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

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

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

Statement: "The report states that granting such immunity causes confusion for the governmental regulators over who, in fact, controls the field response and provides no assurance that a response will be sustained."

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

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

Statement: "The report raises concern over the following potential scenario: A tanker vessel is owned by a poorly capitalized or shell corporation. The vessel owner's contingency plan shows a contract with a response action contractor. In that contract, the response action contractor reserves the ability to refuse to perform if the spiller is insolvent.

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

that what is submitted can be executed.

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



NATIONAL WILDLIFE FEDERATION

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

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

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

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

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

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

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

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

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

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

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

Oral Presentation to Citizens' Oversight Council, January 31, 1992
Prepared by Alyeska Pipeline Service Company

- Thank you for the opportunity to provide comment regarding the important issue of improving responder immunity in Alaska.
- We were also pleased to provide research materials regarding the laws of other states and trust that it was useful to the Council's work. We have also provided written comments relating to five reports submitted to as research and thank you for your consideration of them.
- Alyeska Pipeline Service Company ("Alyeska") operates and maintains the Trans Alaska Pipeline Service Company ("TAPS") on behalf of seven owner companies.
- The System stretches from Prudhoe Bay on Alaska's North Slope to Valdez where its 1,000 acre marine terminal loads southbound tankers with crude oil.
- Although neither Alyeska nor the pipeline owner companies own or operate tankers, it has contracted with tanker owners/operators/charterers to provide an initial response to an oil spill from their vessels in PWS.
- The State requires that crude oil tankers transiting PWS have oil spill contingency plans. Alyeska developed an initial response plan (the PWS Tanker Spill Prevention and Response Plan) which describes the services it offers to tank vessels as an initial response contractor.
- Other response action contractors could also provide these services.
- Under the terms of the initial response plan and the Oil Spill Response Service Agreements signed with tanker owners/operators/charterers, Alyeska provides the necessary response vessels, equipment, personnel and training to respond to an oil spill for as long as the first 72 hours following a release.
- During this time, management of the response will transfer from Alyeska to the contracting spiller or to the federal On Scene Coordinator.
- To provide these services, Alyeska has chartered escort response vessels, tugs, barges, and an oil spill recovery vessel. It has ocean and rapid deployment boom, seaskimmers, and related response equipment.
- Alyeska has also developed area response centers, placed fishing vessels on contract to supplement response efforts, and prestaged equipment to protect hatcheries and other sensitive areas.

- Escort/response vessels are used for day-to-day escort of loaded tankers as a prevention measure. Vessel crews are drilled in responding to large spills and in employing multi-vessel and multi-boom configurations.
- Several reports express opinions that response action contractor ("RAC") liabilities ought actually to be increased, not limited, when it comes to response action.
- For example, the Mertz and Straube reports suggest that RAC's ought to be subject to direct state control in the event that an insolvent or recalcitrant spiller refuses to finance.
- Imposing spiller liability on RACs to pay for the cost of oil spill response will deter or eliminate spill response, not promote it.
- This notion flies in the face of the comprehensive federal and state schemes to, on the one hand, encourage prompt, bold response action, and, on the other, require that spiller, his insurance, or, in some cases, industry-financed funds pay for it.
- In addition, this possibility described as a worst case scenario in the Mertz, Straube, and Frank reports is admittedly remote. It would depend for example on the simultaneous insolvency of a spiller, his financial responsibility, and federal and state oil spill response funds. Yet, it this possibility which in these individuals opinion ought to fuel a step toward closing out response action by imposing new liabilities.
- A fundamental reason spill funds exist is to provide a safety net for just the dark scenario which is described. But this point seems to have been lost.
- In an interesting paradox, the Mertz report indicates the justification for these new RAC duties and liabilities would be the possibility of all these insolvencies, yet, in the case where a mystery or orphan spill is most likely require a third party response, and the state moves in to do so, it will enjoy limited responder immunity under a separate statute. Why are there different rules for private RACs?
- The Frank report evidently recommends that Alyeska not be entitled to even limited responder immunity because, in this attorney's opinion, the holders of the federal pipeline right-of-way permit are liable for any tanker spills involved Alaska North Slope crude oil. For the reasons explained in Alyeska's written response, this is incorrect.

- Judge Holland in the Exxon Valdez litigation has already ruled that the people strictly liable under the Trans Alaska Pipeline Authorization Act are the vessel owner and operator, and the Trans Alaska Pipeline Liability Fund.
- In any event, the terms of most responder immunity laws state quite clearly that a RAC which is otherwise a responsible party for a spill is not entitled to assert limited immunity.
- In our response to the Vogt report, we point out that personnel and equipment to escort vessels and to respond to spills in PWS are required by state laws, and Alyeska has offered to provide those services in the absence of anyone else. The costs of Alyeska's initial response services for tanker owners/operators/charters are included by the TAPS carriers in the tariff charges for oil delivered to Valdez. This is an equitable distribution of the costs of those services amongst those who receive them.
- None of this detracts from Alyeska's status as an initial response action contractor in Prince William Sound, nor does it create some sort of state equity in the prevention and response equipment, so as to justify its uncompensated use for a mystery or orphan tanker spill. Interestingly, if the state owned and used that equipment, the Mertz report explains that it would enjoy limited responder immunity in the event of a response.
- Lastly, the Mertz report is incorrect. Following the passage of limited responder immunity law year, Alyeska agreed to make changes in how Tesoro demonstrates its capacity to pay for initial response services. Instead of requiring financial responsibility, that is a demonstration of self-worth, Tesoro now provides this evidence through insurance. Because of the perceived reduction in risk, Alyeska has accepted less in the overall quality of Tesoro's demonstration of that capacity as explained in our written remarks.
- For the balance of our remarks, we will refer to the attached position paper regarding improving responder immunity.

January 31, 1992

Comments on Summary of Research Project Reports
Prepared by the Citizens' Oversight Council
As Part of the Council's Report to the Legislature Under
Section 11 of HB 196 (Ch. 92 SLA 1991)

Presented by:
Gene Burden
Tesoro Alaska Petroleum Company

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

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

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

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

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

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

Enclosure

OTHER STATES' RESPONSE ACTION CONTRACTOR LIABILITY LAWS

FEATURE COMPARED	C O N N E C T I C U T	C A L I F O R N I A	T E X A S	W A S H I N G T O N	H A W A I I	F L O R I D A	N E W J E R S E Y	M A I N E
1. Spiller obligated to pay damages caused by Response Action Contractors (RAC)	X	X	X	X	X	X	X	X
2. RAC liability limited except for gross negligence and intentional misconduct	X	X ¹	X	X ²	X ³	X ⁴		X ⁵
3. RAC liability limited except for negligence (defined as use of best of available technology)							X	
4. RAC liability limited in duration		X ⁶						
5. Certification of RACs required.			X					
6. State approval required for RAC's equipment and personnel resources		X					X	

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

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

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

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

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

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

February 3, 1992

Mr. Harry Bader
Chairman
Citizens Oversight Council

Via Telefax

Dear Council Members:

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

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

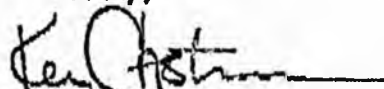
The second issue is in what constitutes a RAC. Is the RAC an independent company, the sole purpose of which is to attempt to obtain contracts and provide services in responding to oil spills? Is the RAC controlled, beyond the parameters of the contract, directly or indirectly, by the C Plan holders?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

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

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

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

Sincerely,



Ken Castner
P.O. Box 558
Homer, Alaska

VIA U.S. MAIL AND FACSIMILE

February 4, 1992

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

Re: **Limited Responder Immunity in Alaska**

Dear Chairman Bader:

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

1. Time Limit for Response Immunity

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

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

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

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

2. Classification of Responders

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

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

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

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

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

3. Response to ADEC Orders

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

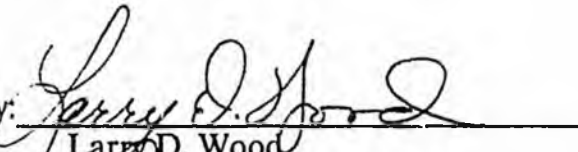
Thus, using either the federal liability limitation, or the federal and state financial responsibility requirements, as a guide to establish financial responsibility requirements contained in response services agreements is unhelpful and inappropriate. It would leave a responder unprotected.

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

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

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY

By: 
Larry D. Wood
Senior Attorney - External Affairs

cc: COC Members
Michele D. Brown, Esq.



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

February 5, 1992

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

Dear Mr. Bader:

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

(1) Limited Time Period For Immunity

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

(2) RAC Certification

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

(3) Prince William Sound Trade Relationships

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

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

Mr. Harry Bader, Chair
February 5, 1992
Page 2

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

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

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

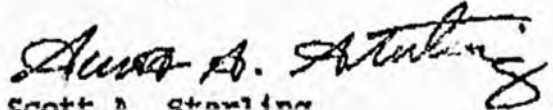
It would seem grossly premature to immunize Alyeska from liability as a response action contractor unless and until adequate legal assurances exist to protect the Sound and its residents from another Exxon Valdez. If, as the industry proponents of immunity argue, the purpose of immunity is to encourage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

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

Mr. Harry Bader, Chair
February 5, 1992
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If you have any questions regarding our comments, please feel free to call me at 277-3533.

Sincerely,



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

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



Citizens' Oversight Council
on Oil and Other Hazardous Substances

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

APPENDIX G
U.S. COAST GUARD POSITION

Council Members

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

U.S. Department
of Transportation

United States
Coast Guard



Commandant
U.S. Coast Guard

m. JFB
2100 Second Street S.W. 20593-0001
Washington, DC 20593-0001
Staff Symbol: G-MEP
Phone: (202) 267-0518

16460

MAY 31 1991

From: Commandant
To: All Flag Officers

Subj: CONTRACTOR IMMUNITY PROVISION; STATE OIL SPILL LAWS

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

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


- The availability of a viable private sector capability to respond to oil spills and their threats is an absolutely essential element of a national oil pollution response system.
- During the course of Congressional deliberations associated with the enactment of the Oil Pollution Act of 1990, the oil spill response industry stressed the importance of limited immunity to its viability.
- As a result of the industry's presentation of these views Congress provided a limited immunity respecting liability "for removal costs and damages which result from actions taken or omitted to be taken in the course of rendering care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed by the President."
- The Coast Guard supports the principle of limited immunity under State law respecting liability for removal costs and damages to the extent that such immunity is necessary to assure a broad-based private sector response capability. The Coast Guard urges that State law immunity provisions be as consistent as possible with the federal immunity provision.

Subj: CONTRACTOR IMMUNITY PROVISION; STATE OIL SPILL LAWS

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

- Person entitled to immunity - Person, other than a responsible party, providing care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed by the Federal On-Scene Coordinator.
- Liability for which immunity is provided - Liability for removal costs and damages, other than with respect to personal injury or wrongful death.
- When immunity is not available - (1) When the response is under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 et seq.), or (2) when the person is grossly negligent or engages in willful misconduct.
- Person liable when the immunity provision applies - A responsible party, as that term is defined under section 1001(32) Oil Pollution Act (33 U.S.C. 2701(32)).

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



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

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

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

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

(B) Subparagraph (A) does not apply -

(i) to a responsible party;

(ii) to a response under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.);

(iii) with respect to personal injury or wrongful death; or

(iv) if the person is grossly negligent or engages in willful misconduct.

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

...

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

ENCLOSURE(1)

ALYESKA PIPELINE SERVICE COMPANY
COMMENTS

ON

IMPROVING LIMITED RESPONDER
IMMUNITY

**ALYESKA PIPELINE SERVICE COMPANY
COMMENTS
IMPROVING LIMITED RESPONDER IMMUNITY**

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

LDW56/cas

February 10, 1992

Comments Regarding "Oil Spill Response Action Contractors"

A Report by the Citizens' Oversight Council on Oil and Other Hazardous Substances

Alyeska Pipeline Service Company ("Alyeska") is pleased to provide these comments regarding a report recently submitted to the Alaska State Legislature by the Citizens' Oversight Council on Oil and Other Hazardous Substances ("COC"). The report is entitled "Oil Spill Response Action Contractors."

COC has developed seven recommendations. Alyeska's comments follow each one.

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

Comments:

- We strongly agree. Even though responders are not liable for spills, without limited immunity, the financial risks and liability exposures associated with oil spill response would deter cleanup contractors, cooperatives, and others from joining into prompt, aggressive action.
- To date, the Virgin Islands and 18 of the 24 coastal states (75%) have adopted responder immunity laws which are substantially similar to the federal model provided in the Oil Pollution Act of 1990.
- The immunity is limited and subject to several conditions. The response action must be consistent with the National Contingency Plan, or federal or state orders. Responders are liable for personal injuries and wrongful deaths, or if they are grossly negligent or engage in willful misconduct. Importantly, the responsible vessel owner, operator, or charterer is liable for any removal costs or damages that responders are relieved of.

- We also strongly agree that this limited immunity ought to be available throughout the response action, and that it not be confined by an arbitrary time limit.

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

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

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

Comments:

- For the sake of national uniformity, and to avoid inconsistencies (and possible preemption), the state may wish to examine this proposal in greater detail after ongoing U.S. Coast Guard rulemaking on the same subject is completed. If supplemental state standards appear necessary, they may be considered at that time.
- Additionally, pre-certification of response action contractors should not be an additional condition for one group of responders to qualify for limited liability. We must encourage effective, prompt response efforts no matter who provides any type of care, assistance, or advice during an oil spill response, so long as it is consistent with the nation's comprehensive scheme for oil spill response or government orders.
- In addition to the legal and constitutional issues raised by this proposed disparity, an incongruity is immediately apparent. Volunteers who may need the most supervision during a response for their own safety would meet no prequalification requirement. Likewise, state, municipal, and village responders currently enjoy limited immunity for response action without any certification under a separate statute.
- The state's comprehensive contingency planning process already empowers ADEC to insure that response action contractors demonstrate their obligation and availability to respond to a discharge and discharge exercises,

and the readiness and compatibility of their equipment and other spill response resources. These oil spill response personnel must be trained, and demonstrate through drills and inspections their competency to provide immediate, effective response.

- A certification program may even be less effective as an oversight mechanism than spill exercises. ADEC can assure that a RAC is adequately prepared by comparing its response to the role described for it in a response plan. This can be done best through drills.

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

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

Comments:

- Under the state and federal comprehensive oil spill prevention and response programs, sufficient controls already exist to assure effective response action without direct government control of a planholder's contractors. Moreover, ADEC is authorized to enter into contracts with private organizations to provide the personnel, equipment, or other services or supplies that may be required to respond to mystery or orphan spills. When private contracting is not feasible, it may establish and maintain the cleanup personnel and equipment which are needed at locations in the state.
- State law requires that tank vessel owners, operators, or charterers hold approved oil discharge prevention and contingency plans in order to do business in Alaska. The planholder must demonstrate the ready availability of sufficient personnel, training, equipment, and other resources to prevent, contain, cleanup, and dispose of spilled oil within the parameters of the state's planning standards.
- To augment its own prevention and response resources, a planholder will necessarily sign agreements with response action contractors. The contractors must be identified and their capabilities described. ADEC may test their proficiency and training during drills and inspections. ADEC will

insure that contractors are contractually obligated to respond as part of its plan approval process.

- A planholder must also demonstrate financial responsibility to assure the adequacy of his response and to pay damages. Possible criminal and civil penalties may also be assessed for an inadequate response.
- A planholder is liable for his negligent acts and omissions in directing a spill response. Likewise, by prematurely demanding that it also control a planholder's contractors, the state will share that liability. It must also be prepared to indemnify or immunize planholders and contractors from liabilities they may face by following state orders. Moreover, during the time that the state issues orders, it should suspend imposition of penalties upon the planholder for failure to implement its plan.
- The United States and the State of Alaska have already been granted the authority to take over and arrange for the removal of spilled oil when circumstances call for it. This is one of the purposes to be served by industry-financed oil spill response funds.
- Under the Oil Pollution Act of 1990, the U.S. Coast Guard by delegation is authorized to direct all federal, state, and private actions to remove an oil discharge. State control of response action contractors promises uncertainty and conflict during spill responses.
- Being generally required to respond to mystery and orphan spills would greatly increase the liabilities and risks to which RACs would be exposed. What responder will be in a position, in advance, as an additional price to be paid for limited immunity, to agree to provide services to state government without also having a specific contract which establishes the type and nature of response, types of hazardous substances, location, equipment, personnel needs, performance expectations, costs and billing arrangements, and indemnification? If a need for them currently exists, nothing prevents the state or federal government from negotiating "stand by" contracts now.
- Indeed, the State Oil and Hazardous Substance Discharge Prevention and Contingency Plan discusses mystery and orphan spills. It provides that whenever a spiller is unknown or a response is inadequate, the state or federal agency having jurisdiction has the authority to "take over the response and recover expenses from the spiller." Para. 411 at 400-14 (May 1991). This is consistent with federal and state law.

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

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

Comments:

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

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

VIA U.S. MAIL AND FACSIMILE

February 5, 1992

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

Re: **HB 196 Impact on Financial Responsibility Requirements for the
Alyeska/Tesoro Oil Spill Response Services Agreement**

Dear Chairman Hudson:

You requested further explanation of the important change made to Alyeska's Oil Spill Response Services Agreement for Prince William Sound ("Agreement") after the legislature enacted HB 196, and adopted limited responder immunity, last year. The amendment created an alternative to the Agreement's \$1 billion financial responsibility requirement that Tesoro was not able to meet. The new alternative to financial responsibility allows companies to enter into an Agreement with Alyeska if there is \$700 million Protection and Indemnity Club ("P&I Club") coverage for a tanker and \$500 million comprehensive general liability ("CGL") insurance coverage for the company itself. Tesoro has been able to utilize this alternative to enter into an Agreement that will expire on June 30, 1992, which is the date the provisions of HB 196 will sunset, unless further action is taken by the legislature.

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

February 5, 1991

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

We are aware that there is some concern because the insurance alternative to this financial responsibility requirement totals \$1.2 billion, which is a number that is obviously greater than the original \$1 billion. We believe this concern is based on a misunderstanding of the nature of the insurance alternative. To clarify this matter, we offer two important points. First, Tesoro was not able to meet the original requirement and is able to meet the new alternative. Obviously, the bill served an immediate purpose -- as a result of its enactment, Alyeska and Tesoro avoided the disruptive consequences of a disqualification of Tesoro to receive oil spill response services from Alyeska.

Second, the new alternative does not provide Alyeska the same amount or quality of protection that the original financial responsibility requirement provided. Alyeska decided that this reduction to accommodate Tesoro and others similarly situated was an appropriate risk to take in light of the partial limitation of response action contractor liability achieved through HB 196. Under the original financial responsibility requirement, four companies entered into agreements with Alyeska by demonstrating that they had available net assets in excess of \$1 billion. In order to gain the benefit of these companies' contractual promises to Alyeska, Alyeska only has to establish that the obligation exists. The funds are then available to satisfy the obligation.

Under the new insurance alternative, there are two important differences that illustrate the decreased protection offered to Alyeska by insurance. P&I Club coverage applies to the tanker itself, for the benefit of the tanker owner. P&I Clubs have made efforts to prevent Alyeska from making claims against that coverage for third party liability claims against Alyeska arising out of an oil spill response. In the case of Tesoro, Alyeska has done what it could to create a legal basis to achieve coverage for such claims under the P&I Club policies. The ultimate resolution of