ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
6986 HOUSE JUDICIARY

of the identified "downside effects" for the public that have resulted from the passage of AS 46.03.825 as it is currently worded and any recommendations that Mr. Mertz has to offer. In this regard, I hope our comments to the legislature in 1991 may be of some service.

UCIDA appreciates the opportunity to comment. The DRAF represents a good initial effort effort and I hope my comments can be of some use to your Committee.

Sincerely,

Theo Matthews
Administrative Assistant

cjd
cc: Senator Lloyd Jones, Chair, Senate Resource Committee
Senator Paul Fischer
Rep. Cliff Davidson, Chair, House Resource Committee
Rep. Mike Navarre, Co-chair, House Finance Committee
Rep. Gail Phillips
Rep. Jim Zawacki
Kenai Borough Assembly
Gene Burden, Tesoro
Oil Reform Alliance
UFA

UCIDA
UNITED COOK INLET DRIFT ASSOCIATION
P.O. Box 389 • Kenai, Alaska 99611 - 0389
(907) 283-3600 • FAX (907) 283-3306

April 23, 1991

Representative Dave Donley
House Judiciary Chair

Dear Rep. Donley,

United Cook Inlet Drift Association (UCIDA) represents some 400 of the 585 Cook Inlet salmon drift permit holders. UCIDA would like to express our continued opposition to CS for House Bill No. 196 which was reported out of House Resources.

You have already received two presentations we made to House Resources on April 10 and April 16, 1991. Rather than repeat our positions we will try and breifly summarize:

1) **Current liability statutes for RACs in fact do comprise Good Samaritan concepts.** In 1989 and again in 1990, the legislature limited RAC liability. RACs are currently liable only for their own acts or omissions which cause damages if those acts or omissions "were not in accordance with generally accepted professional standards and practices at the time their response action services were performed. "(AS 46.03.823(a)).

2) **Current liability statutes constitute good public policy in balancing the public's interests and the legitimate concern of RACs.** Under current legislation, damaged parties are not covered under all possible scenarios. This fact is outweighed, in part, by the public good that is served by a prompt response by RACs doing their best - i.e. "performing in accordance with generally accepted professional standards ... etc."

3) **CS for HB 196 does not address the issue that is driving this legislation - bonding requirements by Alyeska - the "Seven Sisters" (B.P., Exxon, ARCO, Unocal, Mobil, Amarada, Hess, & Phillips) - that Tesoro cannot meet.** No one should be under any illusion that this is anything other than strong arm tactics by Alyeska aimed at lowering its own liability standards.

Recently, RACs other than Alyeska have jumped on the band wagon. It is only natural for any private enterprise to seek to insulate itself as much as possible from any liability for its actions. We would remind the committee that there has never been a spill in Alaska for which a RAC could not be found. Indeed, RACs fell all over themselves to get a piece of the action after

the Exxon Valdez spill. Finally, in this regard, to the best of our knowledge the only RAC alleged to have acted negligently during the Exxon Valdez was Alyeska.

Alyeska has made statements referring to the "simple negligence" standard and how if it responds according to its plan with the state, but loses some oil from a boom, it could be held liable (Clarion 4/18/91, enclosed). This leads us to conclude that Alyeska either has not read AS 46.03.823(a) or that they are not prepared to fully inform the public about current state statutes.

It is obvious who stands to benefit from the lowering of RAC liability standards. The other side of the coin is that the cost of damages will shift to someone else.

Who may suffer? Since "strict liability" for an RAC's own acts or omissions has been already removed by current legislation for most instances, injured parties currently must show negligence - i.e. currently litigation is necessary to show that the RAC did not act "in accordance with generally accepted professional standards ...etc."

CS for HB 196 purports to place liability for the acts or omissions of a RAC for which the RAC is not liable under AS 46.03.823 (gross negligence) on the party strictly liable for the spill as defined in AS 46.03.823(a).

UCIDA has some doubt about the responsible party being forced to assume liability for damages caused by a RAC not directly under its control, let alone the actions of 2nd & 3rd party RACs or volunteers. Indeed, it is somewhat surprising that attorneys for those owners who might be held strictly liable for the release are not very actively opposing this shift of liability on to their clients.

However, if we concede that it may be possible to shift this legal liability to "responsible parties strictly liable" for the release, UCIDA contends that for negligent acts by RACs, victims will often have no practicle or legal resource for compensation for the following reasons:

A) The responsible party may be unknown.
B) The responsible party may have few if any assets.
C) Under AS 46.03.758 3(h), the responsible party is not liable for civil penalties if the discharge occurred solely as a result of:
   1) An act of God,
   2) An act of a third party with whom the person charged has not been made jointly & severally liable,
   3) A negligent or intentional act of the state of Alaska or the United States, or
   4) An act of war

Finally, UCIDA understands the provisions found in the Federal Oil

Pollution Act of 1990 (Sec. 4201) are being cited as precedents for the present legislation. Federal legislation of this type represents the lowest common denominator in terms of liability standards. Alaska and many of its fishing organizations, including UCIDA, fought long and hard to maintain the state's rights to craft legislation and set liability standards higher than the federal standards. The House Senate Conference Committee which drafted this legislation was not receptive to input from the public with repect to limiting industry liability.

In conclusion:

1) Tesoro has a legitimate concern with its bonding requirements, and UCIDA requests that to the extent possible this legislation be recrafted to address the bonding issue.

2) Legislation probably cannot be expected to resolve this dispute between members of the private sector.

3) Current liability standards represent good public policy and does not cover damages for all instances.

4) By using the gross negligence standard, the State will greatly increase the instances where damages from negligence cannot be recovered. Further, 2nd and 3rd party RACs subject only to a gross negligence standard pose a great risk to the public.

5) CS for HB 196 will add another layer of legal protection for RACS and reponsible parties and added expense for victims. Even if liablility can be legally shifted from RACs, victims will first have to go to court to attempt to show that the RAC was grossly negligent. Failing this, no responsible party would accept that liability.

UCIDA appreciates this opportunity to address your committee.

Sincerely,

Theo Matthews

Theo Matthews, Administrative Assistant

cc: Senator Lloyd Jones, Chairman, Senate Resource Committee
Senator Paul Fischer
Rep. Gail Phillips
Rep. Mike Navarre
Rep. Jim Zawacki
Kenai Borough Assembly
Mayor Don Gillman
Gene Burden, Tesoro
Oil Reform Alliance
UFA

Pe arion

UCIDA
PO BOX
KENAI AK 9961

Vol. 21, Issue 142 THURSDAY, APRIL 18, 1991 Kenai, Alaska 50 Cents

Kenai's Merit Inn scheduled to reopen
Page 8

Alyeska blasted for billion-dollar bond

CATHY BROWN
Peninsula Clarion

Borough Mayor Don Gilman Wednesday ...ted Alyeska Pipeline Service Co. for ...t he calls an "unreasonable" demand ... threatens to shut down Tesoro-Alaska ...oleum Corp.'s Nikiski refinery. ..

...lyeska is requiring Tesoro to come up ... a $1 billion bond to continue shipping ... from the Alyeska pipeline terminal in ...dez to Cook Inlet.

Tesoro officials say they can't possibly meet the requirement. And since they get 90 percent of the crude oil for their Nikiski refinery from Valdez, the refinery would be in serious trouble if it was no longer able to ship from there, said Tesoro vice president Gene Burden.

Gilman said the major member companies of Alyeska — Exxon, British Petroleum and ARCO — are using Tesoro as a pawn in order to pressure the Legislature to pass a bill restricting Alyeska's liability in the event of a spill.

"They're using Tesoro," Gilman said. "They're being unreasonable."

But Alyeska spokesperson Marnie Isaacs said the $1 billion requirement is necessary because of the liability Alyeska could be subject to if it responds to a spill from Tesoro or another shipper in Prince William Sound.

"Alyeska serves as the initial response action contractor for those vessels calling at the terminal in Valdez," she said. "Because of the state's liability requirements, Alyeska ... asked the owner-operator or charter of the vessels to pledge a billion dollar bond, which, simply put, indicates they would have access to funds to manage the claims arising from a spill."

The other five companies operating vessels in Prince William Sound — Exxon, BP, ARCO, Shell and Chevron— have been able to comply with the $1 billion requirement, mainly by pledging $1 billion in

See ALYESKA, back page

Alyeska: Company says state's liability laws are to blame

Continued from page 1

corporate assets.

But Tesoro can't do that, Burden said.

"All five of those other companies are very, very large companies," he said. "Our whole company's only worth $200 million. To come up with a bond of a billion dollars is just not possible."

He thinks Tesoro should not be required to put up as large an amount as the other companies because Tesoro transports only a small percentage of the oil coming from the terminal, its tanker loads are much smaller, and it has taken many preventive measures, including the recent introduction of a double-bottomed tanker.

Alyeska and Tesoro have worked out a temporary agreement that allows Tesoro to continue operating in the Sound until June 1 with $1 billion in insurance, rather than a bond.

Alyeska says it may lower its requirements if the Legislature passes a bill limiting Alyeska's liability in case problems occur when it responds to a spill.

"The core of the problem rests with the state's current liability laws," Isaacs said.

The way the law stands now, the standard of liability is "simple negligence," which Isaacs said could mean if Alyeska responds according to its plan with the state, but inadvertently loses some oil from a boom, it could be held liable.

Alyeska wants the standard of liability for a spill responder to be "gross negligence," which is harder to prove in court than simple negligence.

Tesoro also favors such a bill because it would limit the liability for the Cook Inlet spill response cooperative of which Tesoro is a member.

But fishing and environmental groups are opposed to the idea because they believe it would lessen the incentive for spill responders to be prepared.

A compromise bill, which sought to limits liability but only for the first 15 days after a spill and only if a company does not "substantially deviate" from its contingency plan, was passed out of the House Resources Committee Tuesday.

But Alyeska is not satisfied with the language in the bill, Isaacs said. "The bill is helpful, but it doesn't go quite far enough," she said. "We feel present language does not allow us to relax our liability standards."

Mayor Gilman also favors legislation limiting spill responders' liability because the Kenai Peninsula Borough is a member of the Cook Inlet response cooperative and taxpayers could also be held liable for problems resulting from the cooperative's response to a spill.

But Gilman, a former state senator, does not believe the legislation will pass. He says the bill has to get through two more House committees and the full House and the Senate, and he doesn't believe that will happen in the remaining 34 days of the legislative session.

He believes Alyeska is being inflexible about the bill.

"They don't want anything less than gross negligence," he said. "What I think is happening is Alyeska is trying to get the gross negligence standard, and they're doing it on the backs of Tesoro."

"The big three (Exxon, BP and ARCO) are using this thing unmercifully and unnecessarily," Gilman said.

Isaacs says that Alyeska is "very sympathetic to Tesoro's situation."

"We would like to find a way to accommodate Tesoro's needs and still protect the company's (Alyeska's) liability," she said.

Some of Tesoro's supporters in borough and state government have suggested the Alyeska owner companies are trying to put Tesoro out of business, but Isaacs denies that and Gilman says he does not believe that's the case, either.

"But if that's the fallout, they could care less," he said. "The big guys just don't care. They could care less if this refinery closed down."

The Kenai Peninsula Borough Assembly cares a great deal, however.

Tesoro employs about 150 people on the borough, according to Burden. The company provides a good chunk of borough tax revenues.

The Borough Assembly unanimously passed a resolution Tuesday night, which was supported even by fishing groups, urging the Legislature to intervene on Tesoro's behalf.

Burden says if Tesoro and Alyeska can't come to an agreement, Tesoro will file suit against the pipeline company, which would include seeking an injunction to allow the company to continue shipping out of Prince William Sound after June 1.

UCIDA

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April 16, 1991

Representative Cliff Davidson
Chairman, House Resource Committee

Dear Representative Davidson,

UCIDA would like to follow-up on our comments of April 10, 1991 on CS for HB No. 196. UCIDA continues to oppose this legislation since we feel it represents bad public policy and does not address or resolve the very issue that appears to be driving it - bonding requirements imposed by one sector of private industry (Alyeska) on another sector of private industry (Tesoro).

UCIDA doubts that public legislation will ever be able to resolve disputes between members of the private sector. To attempt to help one - in this case Tesoro - merely leaves the state vulnerable to open ended demands by the other - in this case Alyeska.

As we remarked on April 10, 1991, even if this legislation were to pass, what would prevent Alyeska from requiring $5 billion in directly actionable insurance next year?

Even though UCIDA does not support this legislation, we feel compelled to comment on a few points:

1) Sec 46.03.825 (a)

Speaks to an act or omission "not contrary to an order of the federal or state on-scene coordinator". The obvious defense in court of a RAC will be that if "we weren't told not to do it, we are not liable".

The point should be that when a RAC is acting under the direction of the federal or state coordinator, then some changes in liability rules might be expected.

2) Sec. 46.03.825 (a)(2)

Gross negligence is not defined by AS 46.03.823(a). However, "negligence" is defined by AS 46.09.823(a), therefore, whatever the definition of "gross negligence" may come to be, we know that the result of this seciton will be that a RAC whose acts or omissions under the response action contract was not in accordance with generally accepted professional standards and practices at the time their response action services were performed, will not be liable in many instances.

3) Sec. 46.03.825(a)(3)

Two points should be made:

a) "Substantially deviated" is not defined and we believe the standard should in any event be "deviated". We understand that industry would like a definition agreed to for the phrase "substantially deviated" and would propose that if industry would give us their defintion of "gross negligence" then perhaps an agreed definition of "substantially deviated" would be appropriate.

b) The and portion of 46.03.825(a)(3) seems clearly designed as another loophole designed for the use of 2nd and 3rd party RAC's who have not "previously agreed to comply with the terms of that plan". Further, it is often the case that a RAC will not be working for the parties responsible for the release. In this event, it appears you revert back to the "gross negligence" standards as a claimants' only grounds for action. If a RAC does not agree to comply with the oil contingency plan, they clearly should be afforded no relaxation in liability standards. The and portion of AS 46.03.825(a)(3) should be deleted.

In conclusion, UCIDA will continue to oppose the relaxation of liablility standards for RACs as a means of trying to resolve a dispute between members of private industry. If, however, the committee passes out this bill, a 1 year "sunset provision" would be appropriate. With such a provision, the committee could at least determine if the goal of affording Tesoro some relief was met and perhaps by then the legislature will be prepared to address the issue of bonding requirements.

Sincerely,

Theo Matthews

Theo Matthews
Administrative Assistant

cc: Senator Lloyd Jones, Chairman, Senate Resource Committee
Senator Paul Fischer
Rep. Gail Phillips
Rep. Mike Navarre
Rep. Jim Zawacki
Kenai Borough Assembly
Mayor Don Gillman
Gene Burden, Tesoro
Oil Reform Alliance
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April 10, 1991

Representative Cliff Davidson
Chairman, House Resource Committee

Dear Representative Davidson,

UCIDA OPPOSES CS for HB 196 & ITS OBJECTIVE OF FURTHER LOWERING LIABILITY STANDARDS FOR RAC'S.

In both 1989 & 1990, the Alaska legislature lowered the standard of liability for RAC's from the normal standard of "strict liability", i.e. liable for whatever injuries the person caused, whether he was negligent or not.

Presently

1. RAC's are ONLY liable if they are negligent or engaged in intentional misconduct.

2. RAC's are ONLY liable when his or her own acts or omissions cause injuries.

3. In 1989, legislature stated that:
"To show negligence by a response action contractor, a claimant must show that the acts or ommissions of the contractor under the response action contract were not in accordance with generally accepted professional standards and practives at the time their response action services were performed.

4. Negligence is found ONLY when it would be unreasonable to act as the liable party did, in the circumstances surrounding the response action.

Current standards are sufficient to cover the liability exposure of all RAC's - including fishermen and local communities. Ucida feels that no change is needed.

UCIDA would, however, like to comment on the actual issue that appears to us to be driving this legislation. Alyeska has imposed on Tesoro financial requirements in a format that is directly actionalble. To the best of our knowledge such coverage that exceeds the $20 million ball park is impossible to get. Alyeska then requires $1 billion of such coverage of Tesoro. Tesoro then feels obliged out of self preservation to promote

legislation that will reduce Alyeska's liability exposure to incidents of gross negligence in the hope that, if successful, Alyeska will impose requirements that Tesoro can meet.

UCIDA regards the above scenario as little less than blackmail on the part of Alyeska. What will prevent them from requiring $5 billion in directly actionable insurance next year? UCIDA does recognize, however,that Tesoro has a legitimate problem with this bonding requirement - it literally has been placed by Alyeska between the proverbial rock and a hard spot. UCIDA has expressed both of these sentiments to our local Borough Assembly and to Tesoro representatives.

UCIDA respectfully requests that the legislature consider replacing this legislation - which is not needed- with language that addresses the real issue - bonding requirements that are reasonable but that can be capped in some manner to prevent industry from using them as a lever to undermine good public policy.

We would like to suggest two possible options:

1) Legislation that would limit a RAC's ability to require proof of financial responsibility to a level no greater than that required by the state in AS 46.04.040. UCIDA understands that the level set in AS 46.04.040 should not be static - it clearly will be adjusted from time to time by the legislature to conform to good public policy.

2) If an RAC requires bonding requirements above those set in AS 46.04.040, then the RAC should be required to accept oil pollution insurance syndicate coverage.

In conclusion, UCIDA does not support changing current state liability statues. Even the concept of a sunset provision and a 30 day window is poor public policy. Alyeska and other similarilly situated RACs will turn over spill resonse to any spiller well within the 30 day window. Legislation is needed to address Tesoro's immediate dilemma and the general issue of bonding requirements in the future.

Sincerely,

Theo Matthews

Theo Matthews, Administrative Assistant
UCIDA

cc: Senator Lloyd Jones, Chairman, Senate Resource Committee
Senator Paul Fischer
Rep. Gail Phillips
Rep. Mike Navarre
Rep. Jim Zawacki
Kenai Borough Assembly
Mayor Don Gillman
Gene Burden, Tesoro
Oil Reform Alliance
UFA

COOK INLET
RCAC

"The mission of the Council is to ensure the safe operation of the oil terminals, tankers, and facilities in Cook Inlet so that environmental impacts associated with the oil industry are minimized."

March 20, 1992

The Honorable Cliff Davidson
Alaska State Legislature
P. O. Box V
Juneau, Alaska 99811

Dear Representative Davidson:

The Cook Inlet Regional Citizens Advisory Council (Cook Inlet RCAC) is a non-profit corporation organized exclusively for charitable, scientific, literary or educational purposes, within the meaning of *Section 501 (C)(3)* of the *Internal Revenue Code of 1986* as amended, including without limitation the oversight, monitoring, assessing and evaluation of oil spill prevention, safety and response plans, terminal and oil tanker operations, and environmental impacts of oil tanker and oil terminal operations in Cook Inlet under the provisions of *Section 5002* of the *Oil Pollution Act of 1990.*

On March 14, 1992, the Board of Directors voted to endorse a statutory simple negligence standard for response action contractors and expressed support for the introduction of legislation which provides for limited statutory immunity for "vessels of opportunity" that are not provided with indemnification pursuant to a contractual agreement. It is the position of Cook Inlet RCAC that the State of Alaska should do all within its powers to protect the environment and natural resources of this state, including its people. The Board believes enactment of a statutory simple negligence standard will provide the state with the necessary protection and ensure rapid response to an oil spill.

In addition to taking action on this issue the Board also took action in expressing opposition to the enactment of sponsor substitute for House Bill 540 (SSHB 540). Since the Council meeting of March 13-14, 1992 further modifications have been made to this proposed legislation. Cook Inlet RCAC respectfully requests the Council be kept informed of hearings and provided copies of any new language or legislation which are introduced and/or acted upon prior to the end of the legislative session.

In considering these issues Cook Inlet RCAC also discussed HB 196 which was enacted during the 1991 legislative session. The Board of Directors voted in favor of allowing HB 196 to sunset in June 1992.

Cook Inlet Regional Citizens Advisory Council
11355 Frontage Rd. • Suite 228 • Kenai, Alaska 99611 • (907) 283-7222 • FAX (907) 283-6102

As mentioned, Cook Inlet RCAC would appreciate being kept informed on these issues. Should you have any questions regarding the Council's position please do not hesitate to contact me either through our office (283-7222) or home (235-8252).

Sincerely,

Ken Castner

Ken Castner
Cook Inlet RCAC
Board of Directors

cc: Cook Inlet RCAC Directors
Prince William Sound RCAC
Citizens Oversight Council on Oil
and Other Hazardous Substances

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

March 6, 1992

Representative Kay Brown
P.O. Box V
Juneau, AK 99811

Dear Representative Brown;

While Mr. Hudson is correct that the United States Coast Guard is developing a certification system for response resources, it is my opinion that the State of Alaska would be wise to pursue a parallel course by making response action contractor certification a condition to the relief of liability immunity. If an industry is to be given an immunity to promote an increased response capability then that industry should be required to demonstrate that response capability does exist, is available, and is reasonably capable of mounting a credible performance in any future oil spills.

The following are answers to your questions.

1. What is the status of the federal RAC certification program?
Response action contractor certification is an issue being considered by the negotiated rulemaking committee for vessel response plan regulations. This is a supplement to the normal rulemaking process. While the Reg Neg committee may issue a recommendation for response action contractor certification, the final decision will not be made by the United States Coast Guard until the proposed rule undergoes a 45-day public review and a review by the Office of Management and Budget and the President's Council on Competitiveness. There are those that do not want response action contractor certification and they will have opportunity to be heard before the rule is published.

Has a decision definitely been made to proceed with a federal certification? No.

2. To what kind of RACs would a federal certification program apply? The envisioned program would apply to RACs desiring to be listed as a primary response resource in a vessel response plan.

Would the federal certification process being discussed fully address the concerns about competency and preparedness of RACs responding to oil and hazardous substance spills other than those by vessels? The proposed program would not apply to hazardous substance spills. The EPA has been charged with writing regulations for facility response plans, and MMS is charged with writing response plan regulations for offshore platforms. I understand both agencies are watching the USCG process closely, but they have not yet developed regulations.

3. Has the regulatory negotiating committee examined the possibility of complementary state and federal certification programs? Yes, it is part of the concept. The Reg Neg working group recognized the fact that states may want to have RAC certification programs for any number of reasons. There was participation from the states of Washington and California, which both have forms of RAC certification. We should strive for a program which is compatible with the proposed federal program.

4. In your view is the federal certification process that is under consideration by the committee fully responsive to Alaska's needs or do you feel that the state should develop a complementary certification program of its own? The federal program is designed to meet the needs of OPA 90. As you know the state has its own needs under the stronger statutes our legislature has passed. My personal advice is that you should require those RACs listed as responders in a state contingency plan to attest to the resources they offer, allow inspection of those resources, participate in drills necessary to assess the capability of the contractor, and submit that they are willing to work for the state under the same terms and conditions for which they are willing to offer themselves to contingency plan holders. I believe that it is time for the state to assure its citizens that the resources listed in contingency plans are actually available and can be employed rapidly by a trained crew. I think the state on-scene coordinator needs access to those resources when he or she finds themselves incident commander at a spill. I think the state deserves verification of the response capability they are trying a achieve by giving liability immunity.

Thank you for considering my views on this matter. If I can answer any question please call me at 277-7222.

Sincerely,

Tim Robertson by WB
Tim Robertson
Regional Citizens' Advisory Council

cc: Scott Sterling/PWS RCAC
Michele Brown/Citizens' Oversight Council

going discussions at the federal level concerning the question of RAC certification I would appreciate your comment on the following questions:

1. What is the status of the federal RAC certification program? Has a decision definitely been made to proceed with a federal certification program?

2. In Representative Hudson's letter he notes that the proposed federal certification process "will apply to all tank vessels" (emphasis added) defined under section 2101 of Title 46 USC, operating in navigable waters if the United States. To what kind of RACs would a federal certification program apply? Would the federal certification process being discussed fully address the concerns about competency and preparedness of RACs responding to oil or hazardous substance spills other than those by vessels (ie, a refinery or terminal spill not directly a result of vessel activities)?

3. Has the regulation negotiation committee examined the possibility of complementary state and federal certification programs?

4. It is my understanding that the regulation negotiation committee has been operating on the basis of consensus and that industry representatives make up a large majority of the committee. In your view is the federal certification process that is under consideration by the committee fully responsive to Alaska's needs or do you feel that the state should develop a complementary certification program of its own?

As you are probably aware, the House Oil and Gas Committee will be holding a hearing on House Bill 540 on Monday, March 9, at 3:00. This hearing will be teleconferenced. Any comment you could provide prior to that meeting would be of particular value.

Sincerely,

Representative Kay Brown

cc: Scott Sterling/PWS RCAC
Michelle Brown/Citizens' Oversight Council

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

FAX COVER SHEET

DELIVER TO: Representative Bill Hudson

FROM: Tim Robertson

REGARDING: _____

DESCRIPTION

_____

_____

_____

DATE: 3/5/92 TIME: 11:00 # OF PAGES: 16
(including this cover sheet)

THESE ITEMS ARE BEING SENT:

_____ FOR YOUR IMMEDIATE ACTION, KEEP US ADVISED OF ACTION.
_____ FOR YOU TO PROCESS.
_____ FOR YOUR REVIEW AND APPROVAL
_____ FOR YOUR GENERAL INFORMATION
_____ FOR YOUR APPROVAL AND CORRECTION.
_____ FOR YOUR SIGNATURE.

REMARKS:

_____

_____

_____

DRAFT February 27, 1992

[Preamble Language]

Contractor Certification Program

a. Purpose and Scope

This regulation establishes a response contractor certification program. It has two major purposes.

First, many spill responders are expected to be named in multiple vessel and facility response plans, and the preparers of those plans need a common basis by which the responders will be measured and credited. Spill contractors' response services must be matched to the plan holder's requirements. Certification allows plan preparers to know in advance the value the plan reviewer will give for a particular contractor's capabilities. Plan preparers must assemble a sufficient number and mix of contractors to satisfy their response planning responsibilities. In addition, certification will allow contractors to know what credit their capabilities will be given, so they can better present or market their services. Contractor certification also will allow the contractor's capabilities to be evaluated and credited on a fair, consistent and efficient basis.

A second major purpose of certification is to verify that response resources do in fact exist and are available from that contractor. The plan holder has a responsibility to verify a contractor's capability and claims, because the plan holder is responsible for performance under the response plan. The public purpose of certification is to better assure that the increased response capability required by OPA to help protect the environment from the threat of oil spills does, in fact, come about.

Contractor certification does not in any way relieve the plan holder of the plan holder's responsibility to carefully evaluate and select competent contractors. Certification is not a generalized "seal of approval" or guarantee of performance. Contractor certification is not intended to establish professional standards or provide a judgment of the many important but unquantifiable factors that would be necessary to establish an overall evaluation of a contractor's competence and skill.

Certification is simply a process by which the President's designee (e.g., the Coast Guard) will verify the existence of certain "facts" -- i.e., management structure, personnel, and the inventory of response equipment, -- and, where possible, assign a particular "quantitative value" to that inventory for purposes of relating specific contractor's response services to a plan holder's particular spill size. Certification must be based whenever possible on objective and quantifiable measures. However, certain important subjective factors must be identified by the contractor in the contractor's application to provide a clearer understanding of a contractor's capabilities.

The proposed regulation reflects this intent in the definition of the term "certification". One key element of that definition is that certification is a process. Response contractors, to be cited in vessel response plans, must first file an application with the Coast Guard, identifying the service being offered, the type, quantity and location of equipment, number, training and qualifications of personnel, including corporate and individual spill response experience, management structure and certain other information about associated support. This information is factual in nature, and therefore subject to straightforward verification.

The certification definition also recognizes that certification is fundamentally the responsibility of the President under OPA-90. The President has delegated this responsibility to the Coast Guard. The Coast Guard may use other organizations to assist it in the certification process. However, the responsibility for certification remains a governmental one, because certification derives from the President's responsibility to review and approve vessel and facility response plans.

The definition of "certification" refers to the assignment of one or more "Response Values," where possible, for each of the contractor's designated response services. The translation of the type, location and quantity of equipment and personnel into a quantified capability for response is inherently a matter of judgment, particularly given the recognized limitations in spill response technology and variability in the types and conditions of any particular spill.

Each oil spill, particularly any large spill, is unique. The capability needed in a particular response will vary, involving dozens of factors, some of which cannot be accurately measured or predicted. For evaluation and quantification purposes, assumptions must be made regarding these factors. Many of these assumptions may not prove accurate or valid in any particular spill response. Many assumptions also are beyond the control of a particular responder, just as in the analogous case of response to a fire. Accordingly, this proposed regulation carefully avoids any intimation that various planning assumptions are or ever should be viewed as performance standards.

Although a contractor's capabilities must be related to a certain size spill, the assignment of individual Response Values is necessarily artificial and somewhat arbitrary. The term "Response Value" is used in this proposed rule to reflect this reality.

Although a contractor may wish to suggest a "Response Value" for each of a contractor's designated response services, the federal government retains the ultimate responsibility for the assignment of that factor.

b. Application for Certification

To obtain certification, a response contractor must first submit a certification application. The application must identify basic information about the contractor, as well as specific details regarding the contractor's available equipment, personnel, management structure and support. The type of information required, and the detail of that information, depends on the level and type of service that the contractor intends to offer. The application is intended to provided sufficient specific factual information to permit the application reviewer to assign one or more "Response Values" to each of the contractor's response services.

In addition to this quantifiable factual information, the response contractor also must provide descriptive information on certain important factors that bear on whether the contractor should be allowed to be cited in a spill response plan. For example, the application must list all notices of violation issued by the Occupational Safety and Health Administration (OSHA), Environmental Protection Agency (EPA) and the Coast Guard related to oil spill response operations for the last five years, and a description of the disposition of those notices. In addition, the contractor may, as supplemental information, submit information that describes the contractor's experience.

The contractor must attest that the required factual information is true and correct to the best of the contractor's information and belief as of the date of attestation. Because the application is made to a federal agency for purposes of obtaining a governmental approval, knowing false statements would be subject to enforcement action under federal law. The contractor also is obligated to notify the COTP of significant changes in response capability (see below).

As a supplement to these factual matters, the response contractor may apply for and propose one or more "Response Values" to be assigned to the contractor's capabilities, by designated geographic area for each specific type of response service. (see below). The response contractor can supply supporting analysis or argument to support its proposal. The contractor may also submit supplemental information describing the contractor's experience, regulatory awareness or other factors which the contractor believes may be relevant to an understanding of the contractor's response capabilities.

The contractor may submit the application to the reviewer any time after the rule goes into effect. [*note: the Coast Guard will need to define who will act as reviewer of contractor applications. If the Coast Guard does not want to centralize all review of contractors, then it is recommended that a teired approach such as follows be used:*] The reviewer, in the case of a contractor who requests certification only in a single Captain of the Port (COTP) zone, will be the COTP. If the contractor requests certification in more than one COTP zone, but not more than

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one Coast Guard District, then the reviewer will be the District Commander. In the case of a contractor seeking certification in more than one District, the review shall be the Chief, Office of Marine Safety, Security and Environmental Protection.

c. Certification Process

Once a certification application is received, the reviewer must make an initial review of the application to determine if it is complete. If not, the application should be immediately returned to the applicant with an explanation of the additional information needed to process the application. Once a complete application is filed, the reviewer has 45 days to assign an initial "Response Value" to the contractor, based on the representations in the application. This determination is only interim, because it is subject to subsequent verification of the factual information in the application, as well as a more refined evaluation once the agency has the opportunity for in-depth review.

The process described above is expected to result in an "interim status letter." The "Response Value" in the interim status letter may be used by plan preparers until final review and certification is complete. It is expected, given the workload of contractor and plan reviewers, that the Response Values contained in interim status letters likely will be the basis for the initial submission of response plans that are required by February of 1993. If the Response Value established by certification varies from the value used in the interim status letter, plan holders relying on that interim status will be allowed a reasonable time to supplement their resources. This may be accomplished through upgrade of the contractor capabilities or by supplementing or replacing that contractor's resources with other certified contractors.

d. Certification Criteria

The reviewer must certify any contractor who submits a true and complete application demonstrating response resources that satisfy the approval criteria. Certification may be denied if information in the application is false, or if the contractor fails to meet the approval criteria for certification of any services. An important part of contractor certification is the assignment of a Response Value or Values to the contractor's response resources for purposes of preparation of vessel or facility response plans. The reviewer will assign Response Values based on a best judgment basis, as informed by certain presumptive planning criteria. These planning criteria will be made available to contractors to allow them to suggest appropriate Response Values. A contractor whose capability does not match these presumptive norms may submit information demonstrating the equivalency of its own resources. Planning assumptions used to arrive at the Response Value may also be adjusted based upon a demonstration that other planning assumptions are more accurate for the contractor's specific equipment or personnel.

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The certification of a contractor also includes the concept of the credit due a contractor given the contractor's combination of mobilization time and location. Contractors, for a given response service for a given Port Area, would be assigned a classification. Class I for a given service for a given contractor requires a mobilization time of less than [2] hours and location of the resources associated with the service within the COTP Port Area. A Class II contractor service would be located within the Port Area, and mobilization within [12] hours, or a contractor with a combination of mobilization time and location that would allow the resource to be moving within the Port Area within the [12-hour] period. Similarly, Class III would be within [24] hours, Class IV within [48] hours, and Class V within [72] hours.

The Response Value would therefore be specific to a certain geographic area for a specific class of service. For example, XYZ Response Contractor could be certified for Class II on-water oil removal services for the offshore environment in a specified COTP port area in an amount of 10,000 barrels. The same contractor also may be certified for Class II on-water removal service for the nearshore harbor environment of 15,000 barrels.

Part of the certification process requires that contractors define their mobilization time. The primary goal is that equipment and/or personnel will be available and ready to deploy, upon notice, with prompt dispatch. The intent of this requirement is to ensure that first crews are dispatched and someone is working to fill any special requirements.

c. Denial of Approval and Appeals

If the reviewer finds that the contractor does not qualify, the contractor can be denied approval. The letter of denial must state why approval was denied, and explain any deficiencies, and explain the process for appeals and resubmittal. The reviewer also may approve a different Response Value for some or all of the contractor's designated services.

If the reviewer denies certification, or selects a "Response Value" less than what the contractor applied for, the contractor may appeal the decision to ... *[note: appeal process to be specified by the USCG, but with the recommendation of at least one level of internal appeal, and with at least one appeal to Washington before going to the courts].*

f. Notification of Significant Changes in Response Capability

Once a contractor has been certified, certification is valid for a period of [5] years. However, contractors are required to notify the COTP of a significant reduction of capability, as specifically identified in the certification. The proposed regulation requires this notification to be in advance, if the significant reduction is

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planned, or no later than 24 hours after the contractor becomes aware of the significant change, if unplanned. The COTP can then determine whether to require plan holders to secure additional capability, or make other practicable arrangements to compensate for the reduced capability.

g. Effect on State Certification

The contractor certification established in this rule is designed to implement the requirements of OPA. Some states may have similar contractor certification requirements under individual state laws. Nothing in this rule is intended to preclude reliance on these certification rules or the federal certification process by states where it is appropriate to do so. In fact, States are encouraged to rely on the federal certification process, to the maximum extent practicable, taking into account any differences in the purposes and value of the federal certification process and the specific requirements of state law.

[REGULATORY LANGUAGE]

[NOTE: The regulations describing the contents of vessel and facility response plans will establish the types of services for which the response plan holder must rely only on certified primary response contractors]

Sec. XXX.00 Contractor Approval

(a) This section defines the process for certification of response contractor services to be cited in individual response plans.

(b) *Definitions.* For purposes of sections XXX.01-.05, the terms below shall have the following meanings:

(i) *"Certification"* is the process by which the President's designee will verify a primary oil spill response contractor's inventory of available spill response equipment, personnel, management structure, and support, and assign a Response Value for those resources within a standardized classification of designated response services, for a specific geographic area, for purposes of preparation of spill response plans.

(ii) *"Certificate"* is the final document issued following verification, inspection and final review by the reviewer.

(iii) *"Interim status letter"* means the letter sent by the reviewer to the contractor describing the initial Response Value assigned to the contractor pending verification of the factual information contained in the application and an in-depth review of the contractor's application for purposes of certification.

(iv) *President's designee"* means the federal official delegated responsibility by the President under OPA-90 for approval of response plans. Pursuant to Executive Order 12777 the President has delegated responsibility for approval of vessel response plans and transportation-related onshore facilities to the Commandant of the Coast Guard. The Commandant has delegated responsibility for certification of primary response contractors to various "reviewers" under this rule.

(v) *"Response contractor"* is any person who provides designated response equipment or services under contract or other means approved by the President directly to an owner or operator of a tank vessel or facility required to have a response plan under 33 U.S.C. 1321(j)(5), which designated equipment or services are required to be available and identified in such plan.

(vi) *"Reviewer"* means: (1) in the case of a response contractor seeking certification in a single COTP zone, the COTP; (2) in the case of a response contractor seeking certification in more than one COTP zone, but only one Coast Guard District, the District Commander; and (3) in the case of a response contractor seeking certification in more than one Coast Guard District, the Chief of the Office of Marine Safety, Security and Environmental Protection.

(vii) *"Response Value"* means the value, in terms of barrels of oil for a particular defined service in a defined geographic area, that is assigned to a primary response contractor for purposes of being identified as response capability in a vessel or facility response plan.

(viii) *"Mobilization time"* means the time in which initial personnel are able to begin movement of response resources to the spill scene.

Sec. XXX.01 Contractor Certification Application Content

(a) *Required Information.* A person desiring to be a primary response contractor must file an application that contains at least the following information:

(i) Contractor's name, mailing address and phone number;
(ii) The specific response services being offered for certification;
(iii) The specific location of all spill response resources, and the areas in which spill response services using each resource is being offered;
(v) A list of all Occupation Safety and Health Administration (OSHA), Environmental Protection Agency (EPA) and U.S. Coast Guard (USCG) notices of violation related to oil spill response operations and disposition of those notices for the last five years. Any applicant with less than five years under their current business name or organization shall provide the same information for any oil spill activities or businesses participated in by the principals in the new company within the last five years;
(vi) an organizational diagram depicting the chain of command;
(vii) a call-out list for the contractor's resources, and a description of the call-out procedure;
(viii) For each type of service, the types of oil to which the contractor is willing and able to respond;
(ix) For each type of service, the planned mobilization time for that resource.

(b) *Equipment.* For each type of service, the specific significant equipment available to be applied to that service, including:

(i) type, quantity, age, and location;

(ii) whether the equipment is owned or under contract;
(iii) If the equipment is contracted from another party, the application must identify:
(A) the name, address and telephone number of the owner of the equipment;
(B) the equipment's storage location and area of operation;
(C) the contractual terms regarding availability of the equipment to the contractor;
(iv) a statement of the maintenance program for such equipment, together with a description of records of such maintenance;
(v) identification of the number of operators necessary to operate the equipment over a sustained response (i.e., 30 days);
(vi) for each piece of equipment, a description of: the make, model, type, and applicable design limits (e.g., suitability for different types of oils and operating environments, as related to adverse weather);
(vii) a description of contractor's communications equipment, including the amount and frequencies, and identification of certified operators;
(viii) for any equipment not located in the COTP zone for which certification is sought, a description of the transportation capabilities available for use in a response;
(ix) a description of the readiness for mobilization of response resources and the means of mobilization.

Equipment shall be listed only if it is in a fully operable condition. Future equipment, ordered but not yet delivered and fully operable, may be listed, but it must be listed separately and so identified.

(c) *Personnel.* For each category of personnel identified as a spill response resource, the application shall, for each location:
(1) list by job category;
(2) match to the equipment list and scope of service, including the plan for how the equipment and people necessary to provide the service will be brought to bear in an incident from what source; and
(3) list training and qualifications, including OSHA Hazardous Operations training and how additional personnel are planned to be trained within what timeframe if they will be required to meet the service listed.

The application shall also list the total personnel available.

(d) *Management Structure.* The application shall identify the management structure associated with the service(s) offered.

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(c) *Service-specific information.* In addition to the general information described above, the applicant must submit the following service-specific information, as applicable to the service offered:

(i) *Boom control/containment/protective booming services*
(A) Describe the platforms for deployment (number/type); and,
(B) Amount and condition (e.g., 2000' of offshore boom/vessel).

(ii) *On-water recovery services*
(A) recovery platform (for owned vessel and vessel of opportunity recovery systems):
(1) name of vessel;
(2) size/class;
(3) location; and,
(4) contract terms of availability.
(B) skimming system:
(1) make;
(2) model;
(3) manufacturer's nameplate capacity; and
(4) applicable design limits (e.g., suitability for different types of oil and different operating environments, as related to adverse weather).
(C) personnel trained to operate the equipment:
(1) name;
(2) position description; and,
(3) training or experience.

(iii) *Shoreline remediation services*
(A) number of persons available for beach cleanup
(B) description of supplies/support for beach cleanup

(iv) *Transfer/storage services*
(A) type and capacity of storage/transfer facilities

[Services considered for certification but not included at this time are source control, non-mechanical removal, wildlife treatment, lightering, salvage, fire fighting, logistic support, disposal, analysis and testing]

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See proposal for
Spill Response
management

(f) *Attestation.* A responsible corporate official of the contractor shall sign the application, affirming that the factual information contained in the application regarding the capabilities described in paragraphs (a)-(e) is, to the best of his knowledge and belief, true and accurate as of the time of signing.

(g) *Agreement for Inspection and Participation in Drills.* The contractor shall state that the contractor agrees to submit to inspection and verification

of the designated capability cited in the application. The contractor also agrees to make itself available to participate in drills as reasonably necessary to verify the contractor's application.

(h) *Self assessment.* A primary response contractor may submit with the contractor's application a suggested Response Value for each of the contractor's response services for each geographic area to be served. The applicant should provide an explanation and analysis to support the suggested Response Value, based on standardized planning factors identified by the reviewer, or such other planning factors as the contractor shall demonstrate more accurately reflects the contractor's response capabilities. The applicant may also include other information that may bear on an applicant's capabilities, including a description of the applicant's experience and regulatory awareness and compliance.

(i) *Mobilization.* The contractor shall state the time for initial mobilization of its resources. Equipment readiness shall include being available and able to be promptly dispatched to a spill site, not counting normal maintenance and repairs.

Section XXX.02 Contractor Certification Application Procedure.

(a) *Filing address.* Applications must be filed with the appropriate reviewer. The addresses are as follows:

[provide filing addresses]

(b) *Time for Filing.* Applications may be submitted at any time after adoption of this paragraph.

Section XXX.03 Contractor Application Review

(a) *Review for completeness.* Upon receipt of a response contractor certification application, the reviewer shall promptly evaluate the application for completeness. If the application is not complete, the reviewer shall return the application promptly, identifying the deficiencies in the application.

(b) *Review for interim status.* An application shall be reviewed within 45 days of receipt of a complete application. The reviewer shall send an interim status letter within 5 days of completion of a review. If, at a later time, the reviewing agency determines that the terms of the interim status letter should be limited, it shall so notify the contractor, who shall be given a reasonable time to provide acceptable numbers or types of response resources.

(c) *Review for certification.* Following inspection and review of any drills or exercises, or information from other sources as necessary to verify the application and complete a detailed review of the application, the reviewer shall either issue or deny a certificate, in accordance with the standards in paragraph (d). A certificate may be denied if information in the application is false, or if the contractor fails to meet the approval criteria for certification of any services.

(d) *Standards for review.* Certificates shall be issued to primary response contractors subject to the following conditions:

(1) Equipment, equipment maintenance, and equipment and personnel deployment readiness must be verifiable by inspection by the office. Any resources not on site at the time of an inspection must be accounted for by company records;

(2) Response personnel must comply with all appropriate safety and training requirements of OSHA Hazardous Operations. Training records may be audited for verification;

(3) Determination of an acceptable safety history by review of pertinent records on a case-by-case, best-professional-judgment basis. Lack of a safety history will not be grounds for denying approval;

(4) For each COTP zone, the reviewer will assign a Response Value for each Response Service for each response area (e.g., offshore, nearshore, inland) on a best engineering judgment basis, as informed by certain presumptive planning criteria. These planning criteria will be made available to contractors to allow them to suggest appropriate Response Values.

[note: a policy issue is whether the presumptive planning criteria are described in the rule, incorporated by reference in the rule, or left to guidance. We also need to decide what the criteria is and how it would be applied.]

Section XXX.04 Appeals and Notices

(a) *Appeals.* If the reviewer denies certification, or assigns a Response Value less than the amount requested in the application, the applicant may appeal the decision:

[some appeal to centralized authority recommended].

[note: some favor a review in Headquarters of all appeals]

(b) *Notice of Significant Reduction in Capability.* The reviewer shall identify specific reductions in equipment personnel, or management structure that require notification to the COTP where the equipment or personnel are located. A certified response contractor must provide notice to the COTP of such reductions in advance, if planned, or within 24 hours of becoming aware of such change, if unplanned. This notice may be oral, followed by writing within a reasonable time, or in writing, by facsimile or letter. The reviewer will maintain and make available to the contractors and plan holders detailed guidance on the types of changes that require notification.

Section XXX.05 Renewal and Recovation

(a) *Renewal.* Certification shall be for a period of [5] years. A contractor must file an application for renewal prior to the expiration of the certificate. The contractor shall remain certified until the reviewer acts on the application.

(b) *Revocation.* [note: Coast Guard will establish some process for revocation or adjustment of certification for cause.]

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

MEMORANDUM: Regional Citizens' Advisory Council
Oil Spill Prevention and Response Committee

92-1

TO: Representative Bill Hudson
ATTN: Landa Holton
RE: Review of Draft ACCC Study
DATE: 1/14/92

The RCAC's OSPR Committee is requesting final comments on this draft Alaska Coastal Comunities Cooperative Study (ACCC) by February 15, 1992.

Pursuant to a request from the Nearshore Working Group, RCAC undertook a feasibility study of the concept of a coastal communities oil spill cooperative. This co-op would provide the means for local involvement in spill response, with particular focus on shoreline protection and nearshore response, which are the major remaining gaps in the spill protection scheme for Prince William Sound and other coastal areas.

The OSPR Committee has already gone through one phase of soliciting comments on the concept; and these comments have been addressed in this draft of the study. We are forwarding a copy of this most recent draft of the feasibility study for your comments.

The RCAC endorsed the concept of a coastal communities cooperative at its December 1991 meeting. We will continue to refine the technical issues involved in creating such an organization. From those of you who cannot support this co-op concept, we invite suggestions for alternative methods to achieve our common goal.

DRAFT

A COASTAL COMMUNITIES OIL SPILL COOPERATIVE FOR ALASKA

A F E A S I B I L I T Y S T U D Y

Oil Spill Response
By Alaskans, for Alaska.

X

13. Environmental Organizations. Naturally enough, groups concerned about natural resources, wildlife and pollution have been and continue to be interested in assuring compliance with state and federal requirements for oil spill response. In addition to the enhancement of response capability that the ACCC would provide, these groups are likely to see the consolidation of response activities with ACCC as a plus from another standpoint: consolidation of local involvement in one organization will decrease the complexity of overseeing that local resources are being fully incorporated into contingency plans.

14. The Fishing Industry. Fishermen are concerned about protecting the fishing resources and the effective use of the fishing fleet's ability to protect those resources. The fishing industry is also the source of a significant number of small spills, and as such may find itself in need of the ACCC's services.

15. Local residents, businesses, charter vessel operators, and contractors. Many of these people depend on coastal resources for their livelihoods and recreation, and thus have a heightened interest in participating in the activities of the ACCC. Moreover, spill response is a growth industry in Alaska, and it is not unreasonable for those communities that suffer the most from oil spills to be able to offset their risk of loss somewhat by participating in a professional response organization.

16. Recreational Users and Providers. Tourism and recreation is an increasingly important part of the Alaskan economy. Indeed, many small businesses in coastal Alaska depend for their survival on income from recreational users. The interests and concerns of both the tourist industry and individual recreational users must be considered when making decisions about protection of coastal resources.

17. Academic and Research Institutions. These entities are potential participants in the planning, engineering and scientific support of the ACCC.

These groups fall into four basic categories: government, sponsoring and user entities, potential participants in the ACCC's planning and response activities, and interested parties. Some groups may belong in more than one category, for instance Native corporations may be participants and are obviously interested parties. The ACCC will be successful if:

1. The state is willing to assign the state agency depots and response corps role to the ACCC for coastal spills.

2. The coastal spill response needs of the entire state are met by the ACCC.

3. The state accepts the feasibility of creating a joint industry/government solution to the identified needs. The Corpus Christi Area Spill Control Association demonstrates that such a joint effort can succeed. It is a modest sized and simply organized cooperative compared to the large West Coast cooperatives. Nevertheless, it is highly successful in its geographic and environmental setting. Local government rather than industry provides its personnel reserve. Its local government orientation has led to very low response costs, even when contractors are used. Exorbitant rates are not tolerated by the cooperative's manager, who doubles as the City of Corpus Christi's Petroleum Director.

4. The Legislature is able to craft an acceptable, long-term solution to the issue of responder immunity from tort liability during the 1992 session.

SPACE RESOURCES

Space, particularly near the shoreline, will be of considerable importance to the ACCC. Shoreline operating space appears to be at a premium in Alaska. The ACCC will need one or more bases of operation with substantial indoor space (on the order of 50,000 to 80,000 square feet). This indoor space will be used for offices, response centers, classroom training, hands-on equipment training, communications, warehousing of materials and equipment, parts inventory and repair operations.

The ACCC will need substantial dock footage to service and equip barges, contract vessels, and first strike vessels. The large number of small barges and vessels will likely necessitate the availability of its own small dry-dock capability. Cranes, forklifts and other equipment will be needed for deployment and loading of vessels.

Tankage and flat storage areas will be necessary for interim storage of recovered oil. Open storage will be needed for bulky items and Conex storage units.

Similar but smaller scale space needs will exist at remote storage depots. Consideration is being given to deploying and docking self-contained, barge-based response depots at remote locations. These could periodically be rotated back to ACCC bases for maintenance and repair.

The availability of space is unknown at this time and would be the subject of a detailed search in subsequent studies or during early stages of the cooperative's implementation. Special leasing terms or donation of state, local, native corporation or industrial sites may well influence base location.

LEGAL FEASIBILITY

The first issue is the proper form of charter. MSRC has chosen to pursue the status of a not-for-profit corporation. Other cooperatives have chosen to remain partnerships of member companies.

The ultimate solution for the ACCC will likely hinge on issues such as state participation in a non-profit entity, the extent of tort liability, borrowing and purchasing policies, and whether a quasi-state entity has the flexibility to respond effectively under the pressure and timetables required by response scenarios.

The primary question appears to be whether to seek tax-exempt status. Doing so would severely restrict the cooperative from having a separate pricing structure for members and non-members. A not-for-profit corporation could be implemented as a quasi-government entity like the Alaska Housing Authority. This approach could make state participation easier.

Responder immunity is necessary for the ACCC to avoid tremendous liability exposure. It is anticipated that the state legislature will take up the issue of immunity for spill responders again during the upcoming session.

If the not-for-profit form is implemented, the most important contract will be to implement state funding. Discussion of a possible format will await agency decisions and specific legal advice. A contract covering professional service and placement of major equipment items could be negotiated with comparative fiscal and legal ease.

A host of other contracts would be needed with industrial members, other users of ACCC services, support vessel

and operators, as well as for facility acquisition and response contractors employed by the ACCC.

The issue of insurance will require much attention in this age of litigation. Six major areas are identified for later attention. The insurance topic has been subdivided into routine operations and spill response periods. Separate rates and perhaps even policies will apply. Indemnification clauses in contracts must also be considered.

In its contingency plan, Alyeska listed some 152 permits considered necessary to respond to an oil spill. The ACCC will need to proceed carefully to ensure that all regulatory obligations are met.

Discussions with the Clean Coastal Waters and Clean Sound Cooperatives indicate legal and insurance issues are significant, current problems; but these problems can be overcome for a reasonable cost.

Thus, although not without obstacles, the ACCC is legally feasible. (N.B. The overall concept of legal feasibility is being addressed by a professional maritime lawyer, and will be discussed in a separate document.)

TABLE 4: MAJOR LEGAL ISSUES FOR THE ACCC

1. Form of charter and management structure.
   - A. Not for profit
   - B. Not for profit - tax exempt
   - C. Quasi-government entity (similar to Alaska Housing Authority)
   - D. For profit corporation

2. Responder immunity: Extension of HB 196

3. Contracts with:
   - A. State of Alaska
   - B. Organizations contracting with the ACCC for its services
   - C. Vessel operators
   - D. Facility acquisition
   - E. Contractors and suppliers

4. Insurance during non-spill periods:
   - A. Director liability
   - B. Business liability
   - C. Payroll, including Jones Act
   - D. Vessel
   - E. Equipment and facilities
   - F. Employee health, life and disability

5. Insurance during spill response

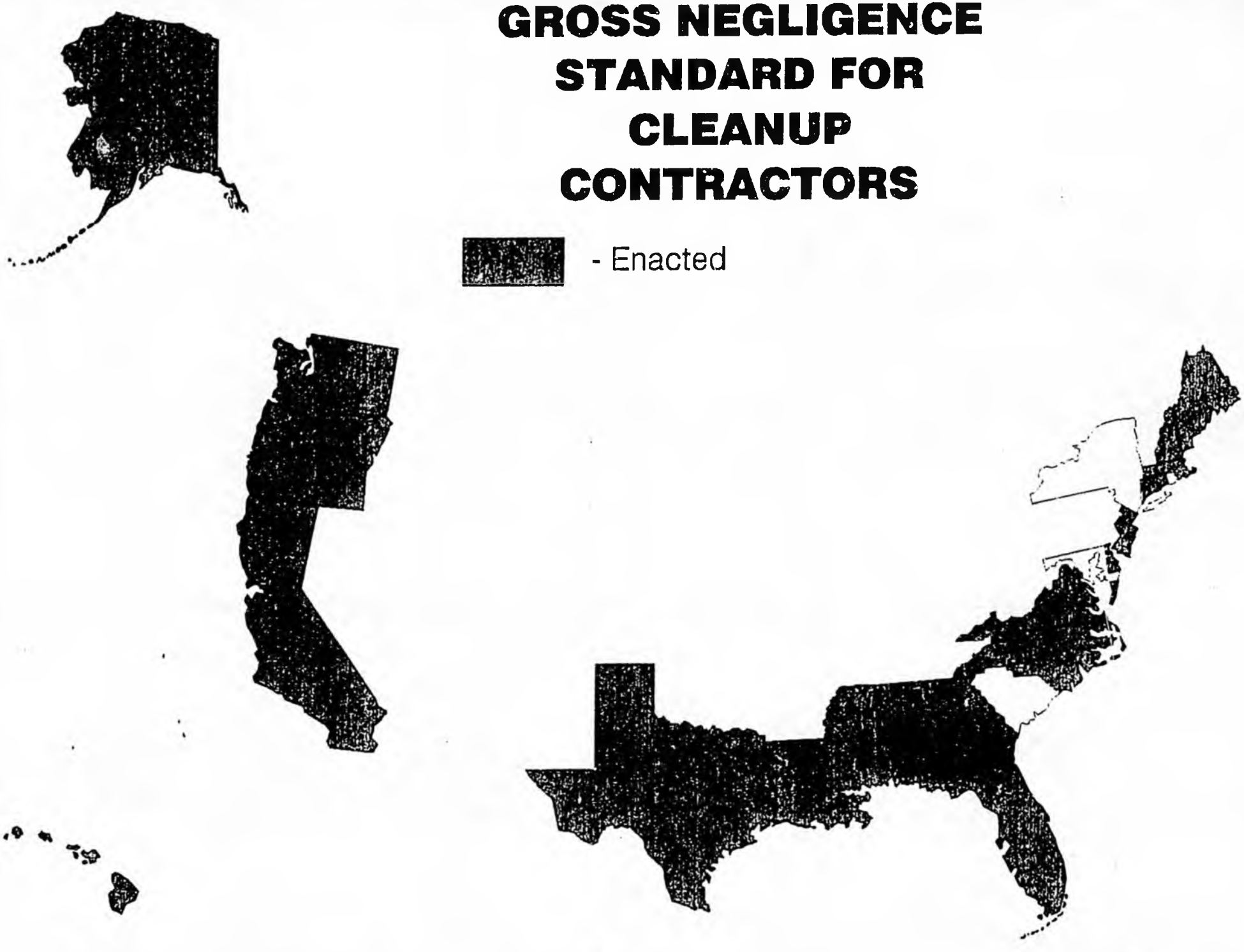
6. Indemnity agreements

7. Permits

8. Funding guarantees for expenses during spill response operations

GROSS NEGLIGENCE STANDARD FOR CLEANUP CONTRACTORS

- Enacted



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MEMORANDUM

TO: Senate and House Oil and Gas Committees

DATE: February 10, 1992

FROM: Ray Gillespie, for **Crowley Maritime, Delta Western** and **Petro Marine**

RE: Marine Pollution Insurance Problems

This will outline three problems non-crude carriers and operators are experiencing in obtaining marine pollution insurance to satisfy the financial responsibility and "direct action" provisions of Alaska law.

Briefly, these problems are:

1. Confusion created by apparent inconsistencies between statute and regulations concerning insurer liability/exposure when issuing a policy meeting the specific requirements of financial responsibilities statutes.

2. P&I club and insurance coverage with "direct action" endorsement is virtually unavailable to most Alaska operators in the present commercial insurance or P&I club market.

3. Whether D.E.C. has statutory authority to grant conditional operating permits to operators who have met the financial responsibility requirement dollar amounts, but can not satisfy the "direct action" endorsement due to its unavailability.

I.

LIABILITY LIMIT/EXPOSURE OF INSURERS OR GUARANTORS.

Environmental Conservation Regulation, 18 AAC 75.230 (b), requires a policy of insurance certificate or binder to carry an endorsement which reads in part as follows:

> "Any other provision of this policy notwithstanding: (1) this policy insures against any liability the insured may incur under Alaska Statute 46.04.040 (i), or any provision cited in it as a result of an unlawful discharge of oil within or affecting Alaska lands or waters within the territorial jurisdiction of the State of Alaska; however, the insurer's liability does not exceed the limits of coverage set out in Section_____ of this policy...." (emphasis added)

Alaska Statute 46.04.040 (i) reads as follows:

> "Financial responsibility under this section extends to loss compensable under AS 46.03.760 (e) or 46.03.822 and an assessment under AS 46.03.758, 46.03.759, 46.03.760 (a) or 46.04.030 (g)."

This statute in combination with 18 AAC 75.230 (b) has led P&I clubs and insurance underwriters to conclude that their exposure under a policy may not be limited to the face amount of the policy even though it meets the other monetary requirements for financial responsibility (AS 46.04.030 (k)). In other words, because statutes generally supersede any inconsistent regulation, insurers have advised operators that the potential for unlimited liability and the uncertainty of a judicial interpretation of these statutes and regulations prevents insurance underwriters and P&I clubs from writing the insurance with the required endorsement.

II.

"DIRECT ACTION" PROBLEM

AS 46.04.040 (e) reads in part as follows:

> "An action brought under AS 46.03.758, 46.03.759, 46.03.760 (a) or (e), 46.03.822, or AS 46.04.030 (g) may be brought in a state court directly against the insurer, the group, or any person providing evidence of financial responsibility. The applicant, and insurer, surety, guarantor, person furnishing an approved letter of credit, or other group or person providing proof of financial responsibility approved by the department shall appoint an agent or service of process in the state...." (emphasis added)

This provision requires that any insurer or P&I club submit directly to the Alaska jurisdiction and be subject directly to legal action against it in Alaska courts without first proceeding against the spilling operator. The State of Alaska or private party can, under this provision, proceed directly in Alaska courts against the insurer. Typically, P&I club coverage is an indemnity policy, which first requires a provable loss against the operator before the P&I club pays that loss. This is the so-called "direct action" provision which prevents many operators from securing coverage meeting the requirements of Alaska Statutes.

In the States of Washington and California recently enacted financial responsibility statutes do not require the "direct action" endorsement. In essence, California and Washington simply allow for P&I club and insurance coverage which meets the monetary financial responsibility requirements and requires no other showing of a "direct action" endorsement.

III.

UNCERTAINTY OF D.E.C. AUTHORITY TO ISSUE CONDITIONAL OPERATING PERMITS WHERE DIRECT ACTION ENDORSEMENTS ARE NOT AVAILABLE.

AS 46.04.040 (l) provides that under certain circumstances DEC may issue permits to an operator who has proof of financial

responsibility without the "direct action" endorsement. This provision has been interpreted as authority to issue conditional permits only upon proof of at least $50 million in insurance or other financial responsibility which has the direct action endorsement. Since the maximum financial responsibility coverage for a non-crude operator (tank vessel and barges) is $35 million under AS 46.04.040 (c) (2), the waiver or conditional permit provisions of subsection (1) is not available to them.

The D.E.C. has, however, been issuing conditional permits to non-crude operators which have complied with the monetary financial responsibility requirements, but are unable to get such coverage with the "direct action" endorsement. The "direct action" endorsement is unavailable in the market place to some, if not most, non-crude operators. Due to the commercial unavailability of financial responsibility with the required endorsement, the DEC is in the unpleasant predicament of denying operating permits to established responsible carriers who have been doing business in Alaska for years. Denial of such operating permits because of commercial unavailability of "direct action" endorsement is potentially devastating and would likely eliminate most non-crude refined product delivery to many Alaskan communities.

This provision should be revisited by the Legislature to reflect the realities of the insurance market and availability of coverage. As of last week, D.E.C. has suspended any Conditional Permits.

IV.

SUGGESTED SOLUTIONS

Legislation which:

1. Places explicit language in statute which limits the exposure of an insurer or P&I club to the face amount of the policy;

2. Eliminates the "direct action" requirement;

3. Provides a substitute mechanism to "direct action" which satisfies the State of Alaska and yet recognizes the realities of the available insurance or P&I club coverage;

4. Clarifies D.E.C. authority to grant conditional operating permits to non-crude operators who have otherwise complied with the monetary requirements for financial responsibility; or

5. Combination of the above.

W. Gene Burden
Vice President
Environmental Affairs & Government Relations

February 6, 1992

Representative Bill Hudson
Alaska State Capital
Room 114
P.O. Box V
Juneau, Alaska 99801

Subject: Response Action Contractor Liability

Dear Representative Hudson:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Gene Burden

BEFORE THE JOINT HOUSE RESOURCES COMMITTEE
AND HOUSE SPECIAL SUBCOMMITTEE
ON OIL AND GAS

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:
Jim Meitner
Spill Prevention & Response Coordinator
Tesoro Alaska Petroleum Company

February 12, 1992

On behalf of Tesoro Alaska, I want to thank the staff and Board members of the Citizens' Oversight Commission ("COC") for the effort and consideration that went into their recently released report and recommendations. Tesoro and its 575 plus Alaska employees were pleased to see that the Citizen's Oversight Commission's first recommendation favorably recognizes the concept of limited immunity for response action contractors that Tesoro sought during the last legislative session.

Tesoro's interest in this matter was discussed in detail last year; and in summary relates to 1) our interest in the Cook Inlet Spill Prevention and Response, Inc. ("CISPRI"); and 2) our reliance on continued access to Alyeska's spill response services in order to pick up our crude oil which is essential to our ability to stay in business. Tesoro is presently responsible for over 50% of the funding of CISPRI and has great reservations about CISPRI's deployment to a spill from a 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. This need is reflected in the COC study and in recommendation number 1.

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 575 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. Last year's 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.

Tesoro is willing to work with the Citizen's Oversight Council, other interested groups, and the legislature to address the other recommendations contained in the Council's report. 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 legislation that includes limited immunity for response action contractors in Alaska. Thank you for the opportunity to comment.

EVALUATION, PREQUALIFICATION AND CERTIFICATION OF OIL SPILL RESPONSE CONTRACTORS

NEGOTIATED RULEMAKING ISSUES: The following issues are submitted for discussion and/or resolution by the Negotiated Rulemaking Committee:

* why oil spill response contractor certification is being considered;

* the provisions of OPA 90 which provide for certification of prequalified response contractors;

* the criteria and factors to be used in evaluating a response contractor's overall capability to respond;

* the standard(s) to which contractors can be prequalified and the mechanisms for certification, inspection, validation and enforcement; and,

* the benefits and costs expected from prequalification and certification of oil spill response contractors.

BACKGROUND DISCUSSION:

A requirement of the Oil Pollution Act of 1990 (OPA 90) amendments to the Federal Water Pollution Control Act (§311(j)(5)), is that the owner or operator of a tank vessel prepare and submit a comprehensive, spill response plan for U.S. Coast Guard approval. Paragraph (C)(iii) of that section, requires that owners/operators "identify, and ensure by contract or other means approved by the President the availability of private personnel and equipment necessary to remove...a worst case discharge" from the environment. For a tank vessel, "worst case discharge" is defined as a total loss of cargo in adverse weather. For the purposes of this rulemaking, and in accordance with the provisions of Section 311(C)(2), the USCG will address all spills in U.S. waters, not just those of "worst case" volume.

The intent of these requirements is to compel forward planning and to ensure that necessary <u>existing</u> resources - trained personnel, vital equipment, communications, finances, etc. - are available, operable and adequate for a <u>future</u> incident.

Developing response plans to meet regulatory requirements and to facilitate the rapid and effective cleanup of a major oil spill requires that there be some established standards of performance for equipment and contractor selection. <u>Without such standards, and some means of certifying those contractors who meet them, there is no way for a tank vessel owner or operator to identify appropriate resources, or to select those contractual resources with whom he is required, by OPA 90, to establish a contractual relationship.</u>

From a regulatory point of view, Coast Guard authority to approve or disapprove response plans carries a great responsibility to make that determination objectively. Establishing response requirements and defining standards of adequacy must be consistent throughout the United States. It cannot be determined locally. In the current regulatory and contractual environment, neither the USCG, nor the vessel owners can meet the intent of the law.

The provisions of Section 311(j)(5)(C)(iii), when implemented, can have important benefits to oil transportation interests and to the contracting industry. First, requiring owners/operators to have contractual relationships with oil spill response resources creates a demand for qualified contractors and provides an incentive to vessel owners to contract with the best value. It may involve both the vessel owners and the response industry in a symbiotic pursuit of better response capabilities. Second, by requiring contractual relationships with prequalified resources only for response plan approval the regulations can effectively limit the supply of acceptable contractors. While it is not necessary for there to be financial consideration in a contractual relationship, altering the supply-demand relationship makes it likely and may provide a means of funding contractor capitalization of response resources in exchange for guaranteed response to an oil spill.

Congress statutorily required that adequate resources reside in the private sector, not the public sector. Existing private resources in the United States include contractors ranging from small, established, waste-oil contractors and waterfront services to major hazardous waste contractors, marine spill contractors and OPA 90-inspired ventures such as NRC and a major industry cooperative, MSRC. Funding for private resources comes from subsidies by member organizations, as is the case with oil spill cooperatives, or from for-profit business activity. Ultimately, all funding comes from revenues and profits.

The existing state of the response industry (generally pre-OPA-90) is one that has developed to take advantage of profitable, routine-spill opportunities without risking the financial future of the enterprise by capitalizing for the unpredictable anomaly of a large spill. Without the requirements for (1) contractual relationships between owners and response contractors or cooperatives, (2) identifying means (i.e. certification) for selecting adequate resources and (3) a mechanism for profiting from response capability improvement there is no incentive for the private sector to improve beyond its existing status. If there were it would have already have done so.

The two most important resources in a contractor/cooperative's inventory are response equipment and trained people. Standardization of response equipment has been undertaken by Committee F20 of the American Society of Testing and Materials (ASTM). ASTM's charter includes the standardization of services, as well as products, and may include contractor performance standards. Because ASTM is a voluntary, consensus organization, however, it works slowly and will require 1-3 years to publish final standards for reference by the regulations. Any standards which develop in response to OPA 90 initiatives have scant chance of adoption in time to assist owners/operators or the USCG in meeting the response plan deadlines.

ISSUES FOR DISCUSSION/RESOLUTION:

Issue 3 - Contractor Prequalification and Certification

* Standards. The most useful standards for contractor/cooperative selection and reliability are performance related - i.e. how much oil recovery/dispersal/disposal/etc. capacity does the organization have.

  Which contractor/cooperative capabilities can be measured and standardized?

  On what should those standards be based?

  How can they be developed in time to meet the statutory deadline, particularly given the time required by ASTM, or any other consensus organization, to issue standards?

* Certification or licensing. Licensing of marine spill response contractors requires a bureaucratic organization to set standards, monitor compliance and enforce regulations. It requires direct government action to prequalify and approve contractors. Of necessity, it establishes a new bureaucratic process to accept applications and fees, amend rules, and process and enforce the conditions of the license. A disadvantage of licensing is that once bureaucracy establishes licensing standards they may become inflexible and fail to keep pace with the development of technology. Eventually, inflexible licensing standards could serve to inhibit the industry whose very development we wish to stimulate.

Certification to consensus standards, on the other hand, is encouraged by the Federal Government (OMB Circular 119 and USCG instructions) and provides flexibility by involving already existing, private sector organizations with charters which call for mandatory, periodic review of standards to maintain currency.

Issue questions include:

Who should certify contractual resources?

Should there be several levels of certification to address different spill volumes and requirements and to consider the variety of contractors and cooperatives already in existence? If so, how many certification levels should there be and on what capabilities/requirements should they be based?

How should the following be weighted in certifying contractors: spill and exercise performance, inventory ownership, financial capacity, managerial skills, previous history of operational performance, (others?)?

Must a contractor/cooperative own necessary equipment in order to be certified or may an enforceable, contractual guarantee of resource availability suffice for certification?

Given that certification is not instantaneous, what can be done to facilitate prequalification and identification of appropriate and acceptable response resources until there is a workable certification system?

If certification of contractors is partially based on standardized equipment how can existing, non-standardized resources be "grandfathered" to consider its existing and continued value and usefulness but also promote the adoption of better, more capable equipment?

* Certification validation and enforcement: OFFICE OF MERCHANT MARINE SAFETY INSTRUCTION 16703.1 provides guidance on self-certification/attestation and other innovative regulatory techniques. Underwriters Laboratories and American Bureau of Shipping are both pursuing registration as "agents" of the International Standards Organization and provide quality and reliability services for a fee.

Either of the two bodies above, Federal and state agencies or a combination could be used for inspection, verification of inspection and/or validation of continued certification. The least expensive and most effective means is probably one which requires government oversight but not routine inspection by the Coast Guard at the contractor level.

Should the response industry be permitted or encouraged to measure itself with regular oversight and enforcement?

If not, how should the inspection, verification and validation process be managed?

Who should be responsible for what portions?

Given the requirement for a national standard, what role should State governments play?

What should the contractor/cooperative community's role be?

If we allow self inspection/attestation how should the Federal government manage quality assurance?

How should the process be funded?

Issue 2G - Overall capabilities of response resources identified in response plan

- OPA 90 amendments require the vessel owner to identify, and ensure by contract or other means approved by the Coast Guard, the availability of private personnel and equipment sufficient to respond to a worst case discharge to the maximum extent practicable.

- Meeting this will require either:

  - a written contractual agreement with a response contractor guaranteeing personnel and equipment availability and stipulating response times within specified geographic areas;

  - certification that the required personnel and equipment resources are owned and/or operated by the vessel owner/operator and are available within stipulated response times within specified geographic areas; or

  - active membership in a local or regional oil spill removal organization that has identified personnel and equipment available within stipulated response times over specified geographic areas.

- The contractor's overall capability to respond, both existing and projected, must be considered when setting the "maximum extent practicable" planning standard.

- Equipment and personnel availability varies between for-profit contractors, not-for-profit cooperatives, or other organizations such as Marine Spill Response Corporation or the National Response Corporation. No one organization has the capability to respond on their own to a worst case discharge.

- Response resource capability assessment needs to account for relationships between commercial resources. These relationships need to be contractual to be acceptable for inclusion in a response plan.

- Contractor/co-op response overall capability is based on a number of factors. These include the availability of containment and recovery equipment, both in inventory and through cooperative or contracting arrangements; required support services such as aircraft, temporary oil storage devices, vehicles, boats, etc; and the availability of personnel trained to OSHA HAZWOPER standards in 29 CFR 1910.120.

Each factor has to taken into account when evaluating resource capability.

- Issue 3 related to contractor certification discusses this in more detail.

Statement

of

Mr. G. Stephen Duca

Vice President

Readiness and External Affairs

Marine Spill Response Corporation

before the

State of Alaska

Joint Hearing of the

House Special Committee on Oil and Gas

and

House Committee on Resources

February 12, 1992

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and effective whole.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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12350 Industry Way, Suite 200
P O Box 196010
Anchorage, Alaska 99519-6010

March 9, 1992

Alaska State Legislature
House Special Committee on Oil & Gas

Re: **Position Statement - House Bill 540**

Thank you for the opportunity to provide written comments to the House Special Committee on Oil & Gas regarding an Act to limit the liability for oil spill response action contractors. Alaska Clean Seas supports House Bill 540 and believes this legislation is urgently needed to maintain the high level of response capability presently available within Alaska.

A key element for success in any spill action is swift and effective response. It is imperative that the response not be inhibited or delayed by the issue of liability. To ensure that additional manpower and equipment can be brought to bear quickly on a spill response, ACS and CISPRI have implemented a mutual aid agreement for assisting one another in the event of a spill. This agreement incorporates indemnity provisions to transfer all liability arising out of a response to the spilling party, regardless of fault. The agreement was tested during the recent East Forelands spill. Upon receipt of a request for assistance from CISPRI, Alaska Clean Seas had personnel on site within four hours and fourteen responders on site with a complement of equipment within eight hours of notification of the spill. Without an effective indemnity agreement, such immediate mutual aid would not have occurred.

Oil spill cooperatives within the State (ACS, CISPRI and SERVS) represent the bulk of spill equipment available within Alaska. Collectively this is the largest supply of spill equipment in the world. By organization, these cooperatives are not for profit. They have no interest in weighing risk vs reward. If these cooperatives are not provided protection from liability they will <u>not</u> respond to spills outside of their membership or geographic area of coverage. It would be a tragedy to have the resources of the cooperatives made unavailable because of issues of liability. Equally important, this would have implications for the availability of personnel and equipment from other sources both nationally and internationally.

Under OPA 90, liability is clearly placed in the hands of the spiller. The notable exceptions are for the case of gross negligence, willful misconduct or violation of the law. House Bill 540 is consistent with this federal standard. Alaska has the right to differences to the federal standard. However, these differences should be

improvements and not detractions. Alaska Clean Seas views this Bill as making those improvements.

Alaska is presently in the fortunate position to have a cadre of well trained, experienced and professional spill response contractors operating within the State. This capability was obviously increased significantly as a result of the Exxon Valdez response and these organizations are now recognized throughout the United States and the world. They are actively involved in spill response, contingency planning, prevention and training. Without the provision of protection from liability it is questionable if this capability would continue to operate within the State of Alaska

In summary, the largest supply of spill equipment in the world is located in Alaska. Additionally some of the best trained and most experienced responders are located within the State, working either in the oil spill cooperatives or the private response contracting community. Unless House Bill 540 is made law, a significant portion of the personnel and equipment within the cooperatives would be unavailable for response to spills outside their defined jurisdiction. Additionally, a significant percentage of the expertise and equipment presently in existence through the contracting community will be lost from the State. The effort and work that has been expended over the last 3 years by the State of Alaska, the oil industry, citizens groups and the private contractor community to provide the best spill response capability in the world will have been for naught.

Sincerely,

Per Norman Ingram
General Manager

North Peninsula Chamber of Commerce

P.O. Box 8053 Nikiski, Alaska 99635 (907) 776-8369

NORTH PENINSULA CHAMBER OF COMMERCE
A RESOLUTIOON SUPPORTING HB 540 AND TESORO ALASKA

WHEREAS, HB 540 provides Response Action Contractors (RACs) limited liability unless the RACs acts with gross negligence, willful misconduct, causes personal injury, wrongful death or acts contrary to the direction of the state or federal on scene coordination; and

WHEREAS, it is imperative to have uniform liability standards to attract RACs to establish in Alaska; and

WHEREAS, not to provide limited liability for RACs will result in the failure of RACs to establish in Alaska. Shippers will then either be unable to ship heating fuel, gas, diesel fuel for electrical generation and other hazardous materials, or to keep home heating fuel, gasoline and crude and noncrude delivery, waivers will need to be granted to shippers, owners and handlers; and

WHEREAS, eighteen other coastal states have passed similar limited liability RAC laws; and

WHEREAS, Tesoro Alaska's ability to operate would be greatly jeopardized without the passage of HB 540 and the subsequent sunset of HB 196, and

WHEREAS, Tesoro Alaska contributes substantially to the economy and tax base of the Kenai Peninsual and Alaska; and

North Peninsula Chamber of Commerce

P.O. Box 8053 Nikiski, Alaska 99635 (907) 776-8369

NOW THEREFORE, BE IT RESOLVED BY THE BOARD OF DIRECTORS of the NORTH PENINSULA CHAMBER of COMMERCE;

Section 1: That the North Peninsula Chamber of Commerce Board of Directors urges the Alaska State Legislature to pass HB 540.

Section 2: That copies of this resolution be distributed to Governor Walter Hickel, the Alaska State Legislature, and Tesoro Alaska.

ADOPTED BY THE BOARD OF DIRECTORS OF THE NORTH PENINSULA CHAMBER OF COMMERCE ON THIS 26th DAY fo MARCH, 1992

Marie Becker

Marie Becker, President

ATTEST:

Audrey Hodgins

Secretary

COOK INLET SPILL PREVENTION & RESPONSE INC.

CISPRI POSITION PAPER

OIL SPILL RESPONSE ACTION CONTRACTOR LIABILITY

MARCH 6, 1992

CISPRI supports the liability relief language in OPA'90. We believe the Response Action Contractor should be relieved of liability except for gross negligence.

Currently, CISPRI By-Laws allow CISPRI to respond to any spill in Cook Inlet, whether or not the responsible party is a member of the cooperative or not. Without contractor liability relief, CISPRI members are reluctant to respond if there is not a clearly identified responsible party. Delays will occur while a contract is negotiated.

OPA '90 grants the Response Action Contractor relief but transfers that relief to the responsible party. If there were an orphan spill, no Response Action Contractor would ever respond for fear of being made liable for simply trying to correct someone else's responsibility.

The Kenai Peninsula Borough sits on CISPRI's Board of Directors. If there is not liability relief for CISPRI as a Response Action Contractor, they (Kenai Peninsula Borough) have been legally advised to withdraw from CISPRI.

CISPRI uses the Incident Command System and CISPRI responds to all decisions made as a result of the Unified Command meetings. If liability relief is not granted, are all members of the Unified Command responsible for CISPRI actions?

If the Response Action Contractor is made liable for damages, what happens to the lower level response contractors? Are the fishing vessels, vessels of opportunity and other response contractors liable?

The argument has been made that no Response Action Contractor has been sued. That is completely untrue. Cook Inlet Resource Organization (CIRO), is still involved in legal proceedings of the Glacier Bay Spill.

The 15 day liability relief granted in HB196 bill is not enough. During the small East Forelands Spill CISPRI had used nine days before all equipment was demobilized.

CISPRI supports HB 540 and requests that the legislature enact this legislation so CISPRI can continue rapid response to any spill in Cook Inlet.

P.O. Box 49 • Kenai, Alaska 99611 • (907)283-5129 • FAX 283-2087 • Emergency 283-SPIL (7745)

seapro

Southeast Alaska Petroleum Resource Organization
540 Water Street Suite 202
(907) 225-7002
Ketchikan, Alaska 99901
Fax (907) 247-1117

February 27, 1992

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

Dear Representative Hudson,

In support of your bill HB 540, which limits response action contractor liability, I am enclosing our recently approved position paper on this subject. Also, since our organization is still rather new and little known, I have included a map which shows the major locations of our network, and a map which shows the eligible facilities which have chosen not to join our network.

As you will note in our position paper, we do not believe that all of the recommendations of the Citizen's Oversight Council on this subject are in the best interest of our region. We do believe, however, that HB 540 provides exactly the conditions we think will provide the best climate for further developing environmental protection capabilities in our region.

I will, of course, provide you with any information or other assistance you may need relative to environmental protection in Southeast, the remainder of the state, and the North Pacific region.

Respectfully,

R. M. Mullen
Manager

seapro

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(907) 225-7002
Ketchikan, Alaska 99901
Fax (907) 247-1117

POSITION PAPER

OIL SPILL RESPONSE ACTION CONTRACTOR LIABILITY

February 25, 1992

SEAPRO and its nineteen member companies wish to record our observations and concerns about response action contractor liability, and its likely impacts on the current and future state of environmental response capability in Southeast Alaska. We are particularly concerned by the failure of the Citizen's Oversight Council to adequately investigate the state of environmental response in rural Alaska generally, and Southeast Alaska specifically, in reaching the conclusions and recommendations contained in their report to the legislature on this subject.

Overview of Response Action Contractors in Southeast Alaska

There is only one business in the Southeast Alaska region which holds itself out as a response action contractor. That firm has very minimal capabilities which are almost totally restricted to the immediate areas around Juneau. Our region has always had to rely on existing business organizations within the region to provide response to pollution incidents and other emergencies. In addition to oil transporters and terminals, these businesses have included logging companies, construction companies, float plane and helicopter operators, tug and barge companies, fishing vessels, and many others. All of these are therefore "Response Action Contractors" as defined by state law when they enter into agreements to help respond to spills.

The services of companies like VRCA, VECO, Burlington Environmental, Foss Environmental, etc., have rarely if ever been used to respond to environmental emergencies in our region. The reason for this is the typical small size of spills, the nature of the products involved, and the logistic difficulties of deploying to the region in time to be effective. One of the primary motivations our members felt for formation of SEAPRO was the lack of response action contractors within the region.

SEAPRO is not currently a response action contractor. We are a cooperative sharing organization of predominantly local small businesses who make up the fuel and lubricating oil transportation and distribution network for all of Southeast Alaska. We also include several local companies who consume or handle large quantities of oil in support of their business activities, but who are not in the "oil business". Our organization was originally formed to act as a sharing network only in Ketchikan, but rapidly expanded to cover the entire region. We have now reached the point in our evolution where we must consider purchasing pollution response equipment in the near future and becoming some form of response entity.

All of our collective experience, along with our judgment of operating conditions within the region, forces us to conclude that there will likely never be a response action contractor of any significant ability in Southeast. We have no expectation that this situation will change any time soon because there is insufficient financial justification for bona-fide environmental or emergency contractors to capitalize a response capability which would only be profitably employed on our historical average of once a decade.

Potential Impact of Liability to Southeast Alaska Spill Response Capability

With the exception of SEAPRO member companies, almost none of the companies who have previously participated in environmental response activities in this region are aware of their potential liabilities when current state law sunsets in a few months. Additionally, since none of these companies consider themselves to be "response action contractors", it is unlikely that they will make themselves aware of their liability exposures in advance of being asked to respond to an environmental emergency. It is equally unlikely that they would submit to a "certification" process recommended by the Citizen's Oversight Council, or to the verification/inspection process which would be necessitated by such certification.

If these companies were to discover the potential extent of their liability exposure for participating in a clean up action after the current limitations sunset, it is unlikely that they will respond in a timely manner, if at all, when they are needed. The worse possible situation will be for one or more of these companies to become the target of an opportunistic law suit allowed by a lack of liability limitation. Such a situation would guarantee that it would be difficult, if not impossible, to convince local companies to respond to future emergencies, even if action were subsequently taken to limit liabilities. Given the ever increasing propensity for opportunistic law suits in our nation, and the sensitivity of regional businesses to this phenomenon, we believe that merely the possibility of such a situation will have a chilling effect on the regions environmental response capability.

Any reasonable person responding to an oil spill assumes that all liability for damages and costs resulting from the clean up will flow to the responsible party. This is as it should be. It makes no sense to imperil a contractor acting in good faith, and within the boundaries of state or federally approved contingency plans, to bear any responsibility for damages which could result from someone else's spill. Except for gross negligence, willful misconduct, or violation of law by a contractor, all damages from a hazardous substance release are the rightful responsibility of the spiller, not the third party people cleaning it up. This principle has been codified in federal law and the laws of at least 18 other coastal states. Acceptance of this principle is a condition of membership in SEAPRO and most other cooperatives.

As stated earlier, SEAPRO has evolved to the point that it must consider becoming a response entity in some form. Currently, Southeast is the only region of the state, outside the crude oil producing regions, which has taken any tangible steps to improve its environmental response capability. The steps that have been taken to date, have been entirely on the initiative of the regions businesses. In spite of some initial skepticism on the part of state and federal agencies, we have forged ahead with investment in our organization, greatly enhancing the effectiveness of the response equipment, material, and personnel in the region. We have proposed to both the state and federal agencies, cooperative steps which can be taken to provide our region and the rest of the state with marked improvement in our mutual ability to combat environmental emergencies. We want to begin taking these steps this year with or without agency participation.

However, the prospect of facing clean up costs and other damages for actions the co-op may take to mitigate environmental damage will surely weigh heavily on our decision making when considering how we may use SEAPRO to further improve the regions total response capability.

Response Action Contractor Certification in Southeast Alaska

The Citizen's Oversight Council has recommended that response action contractor liability limitation be linked to an, as yet undeveloped, certification program. While SEAPRO does not object to compliance standards for environmental response organizations, whether private companies, cooperatives or some other form, we fail to see the practicality or necessity of "certifying" entities in Southeast Alaska which meet the definition of response action under current law.

The current legal definition of response action contractor is:

(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) to provide services to the response action contract; and

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

Looking at the history of spill response in Southeast, and the probable future response actions in the region, certifying the response action contractors defined above would mean establishing the standards and processes for certifying virtually every business, and many individuals in our region. This is a monumental task by any standards, and in our view, a nonsensical one.

The Citizen's Oversight Council made some very narrow assumptions of what constitutes a response action contractor, and even what constitutes a cooperative. It is our opinion that the Council did not consider the broad range of response actions that have taken place throughout this state, nor did they evaluate the complex mix of organizations and individuals who have participated, and are likely to be asked to participate in environmental response actions.

There could be some benefit to establishing certification criteria for certain categories of response action contractors, were those categories to be properly defined in the broader context of the entire state. But in any context, some agency will have to develop professional standards to measure contractor capability; will have to apply these standards through some sort of an inspection or verification process; will have to verify the continuity of certification levels, will have to measure actual contractor performance against certification standards; and will have to administer this entire process. In our view, the cost of the simplest of such a bureaucracy would be excessive for the benefit gained, especially in Southeast and other areas outside the crude oil producing regions. The time necessary to create such a system would be extreme, with no possibility that such a system could be in place before the current liability limitations sunset. And finally, it makes no sense to us to waste scarce state resources on creating such a system and supporting bureaucracy when the federal government is already in the process of doing exactly the same thing.

Summary

At no time prior to publishing its report did the Citizen's Oversight Council seek information about conditions in Southeast Alaska from either SEAPRO, its member companies, nonmember companies, or other organizations with whom we network. During their teleconferenced meetings on this subject, our representatives noted that Southeast Alaska was never discussed or even mentioned by the Council members. Additionally, it was our observation that the Council focused almost all of their attention on operations in the crude oil producing regions of the state, on one or two companies who are in the business of environmental response, on Alyeska Pipeline Company, on the Cook Inlet cooperative CISPRI, and infrequently on the Alaska Clean Seas cooperative.

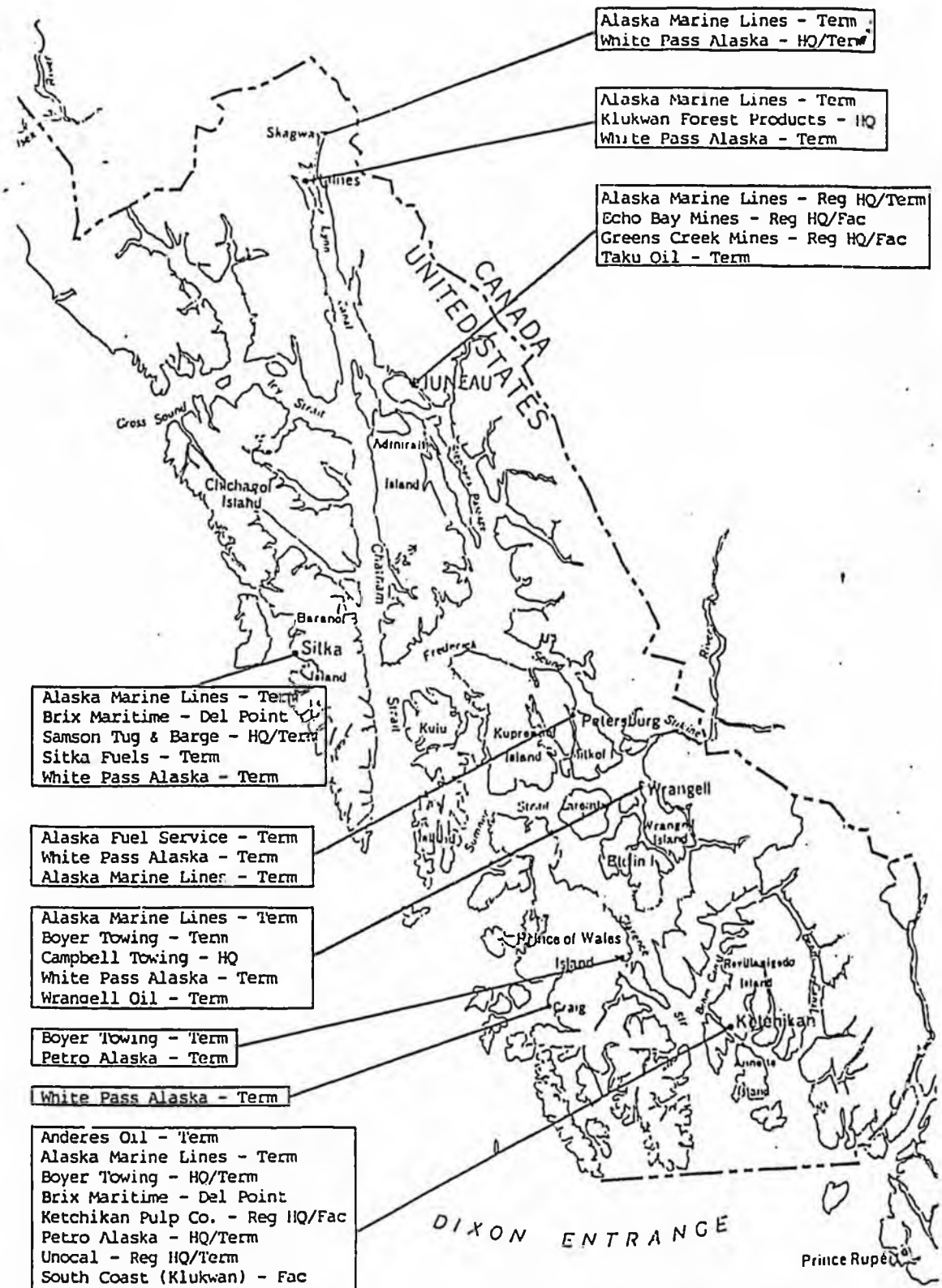
We find that their report seems to be strictly and narrowly aimed at perceived conditions in Prince William Sound, and to a lesser degree, Cook Inlet. It certainly does not accurately reflect environmental response conditions in our region, and we suspect that it does not accurately reflect conditions in other regions of the state. Consequently, this basic flaw places us in the position of not concurring with much of their rationale or their proposed solutions.

We believe that the state, like the federal government, should fix all obligations for clean up costs and damages resulting from a hazardous substance release on the responsible party, where it rightfully belongs.

We are concerned that failure to adopt liability limitations for environmental emergency responders, other than the responsible party, would negatively impact our regions ability to seek rapid and effective response actions from service providers outside the SEAPRO response network. Additionally, failure to provide this type of liability limitation would seriously threaten SEAPRO's ability to continue making further improvements in the total response capability of the region.

We cannot see substantial value to be gained within our region by creating a response action contractor certification process independent of that which will be created by the federal government. We also see no value in either waiting until a certification process is developed before granting liability limitation, or in tying liability limitations to any condition other than performance in accordance with federal and state contingency plans.

We believe that limiting the potential liability of responders, whether environmental contractors, cooperatives, other commercial entities, or volunteers is essential to improving the response capabilities of our region. This limitation should be similar, if not identical to that contained in the federal Oil Pollution Act of 1990.



IMPORTANT EXTERNAL OPERATIONS

Alaska Marine Lines - Seattle
Boyer Towing - Seattle
Brix Maritime - Seattle/Portland
Foss Maritime - Seattle
Klukwan Forest Products - Seattle
Samson Tug & Barge - Seattle
West Coast Shipping - Los Angeles
White Pass Transportation - Vancouver BC