

ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
7187 HOUSE RESOURCES

DRAFT February 27, 1992

(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]

DRAFT February 27, 1992

(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 Revocation

(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.]

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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

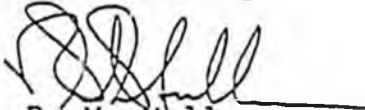
Dear Representative Hudson,

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



Southeast Alaska Petroleum Resource Organization

540 Water Street Suite 202
(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.

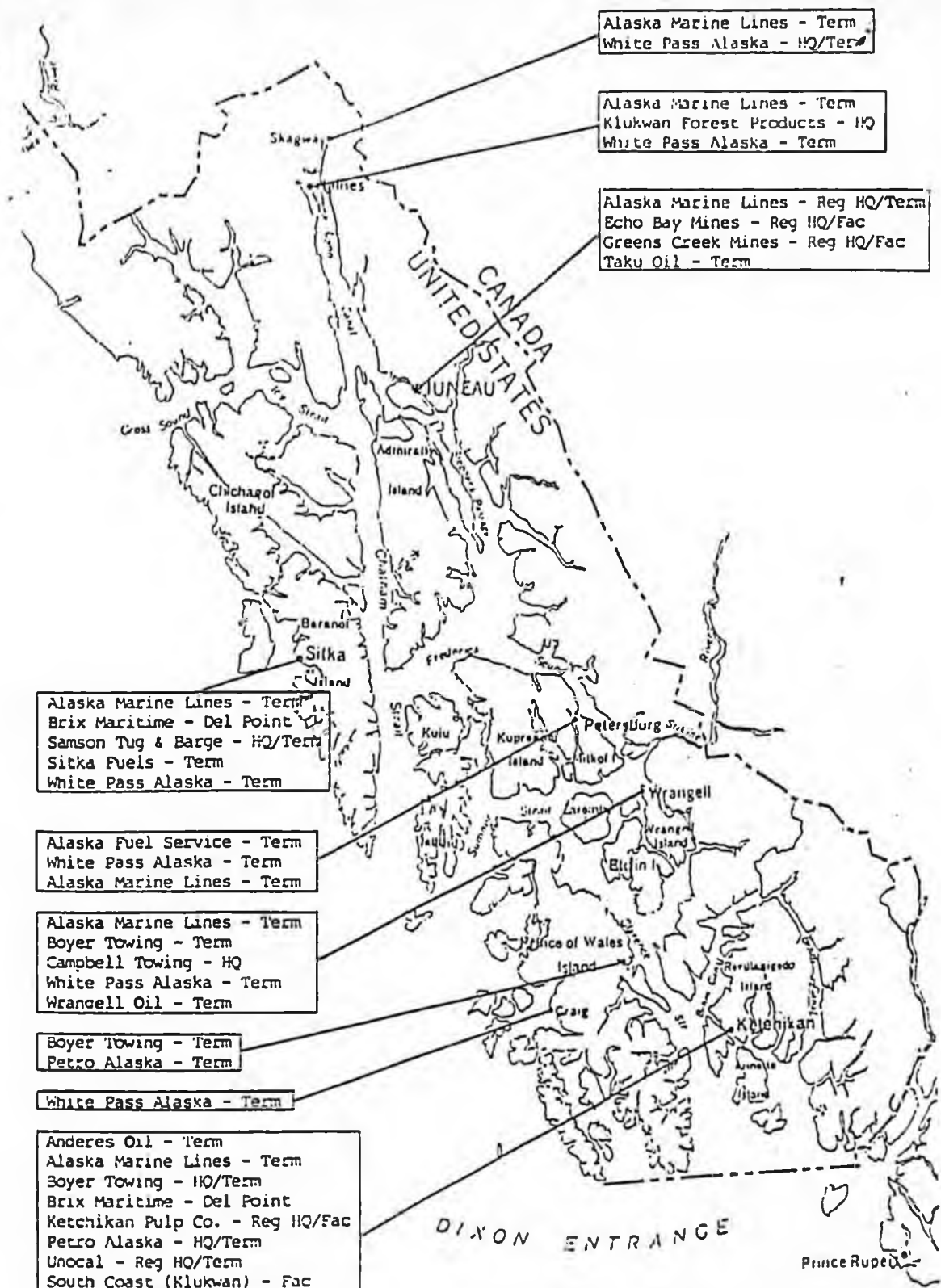
We find that their report seems to be strictly and narrowly aimed at perceived conditions in Prince William Sound, and to a lesser degree, Cook Inlet. It certainly does not accurately reflect environmental response conditions in our region, and we suspect that it does not accurately reflect conditions 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.



Alaska Marine Lines - Term
White Pass Alaska - HQ/Term

Alaska Marine Lines - Term
Klukwan Forest Products - HQ
White Pass Alaska - Term

Alaska Marine Lines - Reg HQ/Term
Echo Bay Mines - Reg HQ/Fac
Greens Creek Mines - Reg HQ/Fac
Taku Oil - Term

Alaska Marine Lines - Term
Brix Maritime - Del Point
Samson Tug & Barge - HQ/Term
Sitka Fuels - Term
White Pass Alaska - Term

Alaska Fuel Service - Term
White Pass Alaska - Term
Alaska Marine Lines - Term

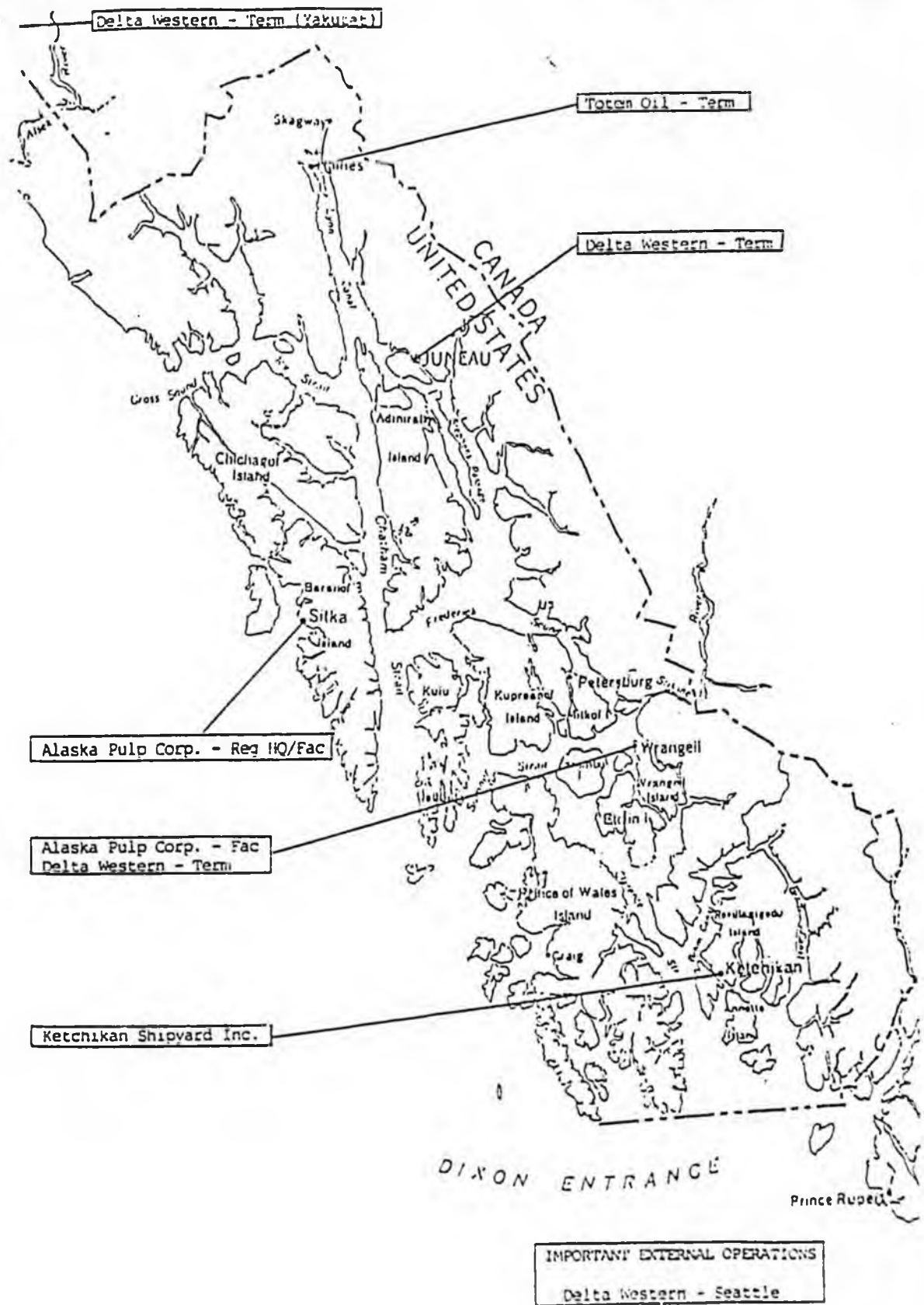
Alaska Marine Lines - Term
Boyer Towing - Term
Campbell Towing - HQ
White Pass Alaska - Term
Wrangell Oil - Term

Boyer Towing - Term
Petco Alaska - Term

White Pass Alaska - Term

Anderes Oil - Term
Alaska Marine Lines - Term
Boyer Towing - HQ/Term
Brix Maritime - Del Point
Ketchikan Pulp Co. - Reg HQ/Fac
Petro Alaska - HQ/Term
Unocal - Reg HQ/Term
South Coast (Klukwan) - Fac
Foss Maritime - Base
West Coast Shipping - Del Point
White Pass Alaska - Term

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



IMPORTANT EXTERNAL OPERATIONS
Delta Western - Seattle

Significant Facilities Which Have Declined Membership
February 1992

MORE ENDORSEMENTS OF CLEANUP CONTRACTORS LIMITED LIABILITY

Cleanup firms are willing to accept legal responsibility for willful misconduct, personal injury or wrongful death. They need protection from simple negligence because they must make quick decisions under difficult circumstances. Sometimes they may guess wrong. In most cases, they are not acting on their own, but under Coast Guard authority. The federal government, however, is protected in such circumstances from those seeking targets from which to recoup losses. Cleanup groups are not.

...The San Francisco Examiner, June 10, 1990

Right now, oil spill teams can be sued just for showing up to fight the damage. for events that occur in the chaos of a recovery effort. For the land that is damaged as a result. And the price tag can run into the billions...

We urgently need your help to pass Good Samaritan liability protection for our efforts. We believe our work deserves the same immunity from lawsuits as a doctor who stops to help a heart attack victim on the street. Indeed, we stop everything to help an injured Earth when she needs it.

...International Bird Rescue Research Center, et al., August 1990

Should qualified immunity not be granted to responder as outlined in the bill, FORT has no chance of succeeding. I cannot ask the men and women who have voluntarily trained and been certified in oil spill recovery to participate if the possibility of a lawsuit hangs over their heads when they are cleaning up someone else's spill.

...Ventura County Commercial Fishermen's Association, May 4, 1990

IF SHE'S NOT A GOOD SAMARITAN, JUST WHO IS?

The men and women who respond to an oil spill crisis are willing to accept many dangers. Good Samaritans in every sense of the word, they risk uncertain seas, fire and exposure.

But there's one risk that's truly unacceptable. A crippling lawsuit against the recovery team itself. Yet, because of an odd quirk in the law, that's a real possibility.

Right now, oil spill teams can be sued just for showing up to fight the damage. For events that occur in the chaos of a recovery effort. For the land that is damaged as a result. And the price tag can run into the billions.

Is this reasonable? The Congress of the United States doesn't think so. The California State Senate doesn't think so. In fact, only one group wants to be able to make the people fighting the oil spill pay for the spill itself. The California Trial Lawyers Association.

This powerful special interest group has managed to block the final steps in enacting Good Samaritan protection for oil recovery teams. Why? For the oldest reason of all—they want the focus.

Senator Barry Keene and Assemblyman Ted Leupert are working overtime to protect California's coastline. And we have a major interest in their efforts. We are the people who fight oil spills. Some of us do so to protect our fishing grounds. Some to save innocents: wildlife. Others, as part of a responsible petroleum industry. We believe that whoever spills the oil should be liable for the cost—~~not~~ the people who clean it up.



We urgently need your help to pass Good Samaritan Liability protection for our efforts. We believe our work deserves the same immunity from lawsuits as a doctor who stops to help a heart attack victim on the street. In God, we stop everything to help an injured Earth when she needs it.

Please send in the coupons below and tell the California State Assembly to pass SB 2040 authored by Senator Barry Keene. It's the only way to keep some very Good Samaritans on the job.

Join Us In Saying NO To The Trial Lawyers, Yes on SB 2040.

CALL US

We will send a FREE envelope to your state in your next Assembly packet.

CALL TOLL FREE

1-800-325-6000

Ask for Operator 9722

This is not the Voters' Union Service.

WRITE US

Fill out this coupon and send it to us:

YES! I support Senator Bill 2040 (Keene) and Assemblyman Ted Leupert for California oil spill recovery teams. Please add my name to the list of people who want to say NO to the trial lawyers.

NAME _____

ADDRESS _____

CITY _____

Letters to: International Bird Rescue Research Center, 223 1st Street, Suite 201, Berkeley, CA 94701

OR, TELL 'EM YOURSELF

Please fill in: _____

Don't let this issue become dead oil floating around off the coast. Please join the I.B.R.C. and help us get the California State Senate to strike legislation SB 2040 (Keene).

NAME _____

ADDRESS _____

CITY _____

STATE _____

Send to: Ken White, L. Brown, J.L. Reed, Center, Berkeley, CA 94701

SPONSORED BY
International Bird Rescue Research Center
Clean Bay • Clean Coastal Waters • Clean Seas

Ventura County Commercial Fishermen's Association
SERVING COMMERCIAL FISHERMEN SINCE 1987

V.C.C.F.A. • 1567 SPINNAKER DRIVE • STE. 203-199 • VENTURA, CALIF. 93001
(805) 985-9705

Honorable George Deukmejian
Governor of California
State Capital First Floor
Sacramento, CA. 95814

May 4, 1990

Dear Governor Deukmejian,

Ventura County Commercial Fishermen's Association (VCCFA) has developed the Fishermen's Oil Response Team (FORT). As you are aware this resource of certified commercial fishermen is designed to be called upon by clean up coordinators during an emergency. FORT would provide additional manpower, vessels, and aircraft as needed to respond within the first hours of an oil spill emergency not days later.

I have received information that California Trial Lawyers Association wishes to change the wording of SB-2040. Instead of providing qualified immunity for spill respondents, they prefer to negotiate indemnification of said respondents.

Please let me know your viewpoint on this important issue. Should qualified immunity not be granted to responders as outline in the bill, FORT has no chance of succeeding. I cannot ask the men and women who have voluntarily trained and been certified in oil spill recovery to participate if the possibility of a lawsuit hangs over their heads when they are cleaning up someone else's spill.

Because of the sensitive Channel Islands and nearby coastal region our association supports FORT's defensive capabilities towards oil spill recovery. I shudder at the thought of a "VALDEZ" type spill encircling the islands while bureaucrats negotiate indemnity clauses.

Your support is welcome. Enclosed is our newsletter and I would appreciate your subscription.

Sincerely,

Brian Jonison



COOK INLET SPILL PREVENTION & RESPONSE INC.

CISPRI POSITION PAPER

OIL SPILL RESPONSE ACTION CONTRACTOR LIABILITY

MARCH 8, 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.

ENDORSEMENTS OF CLEANUP CONTRACTOR LIMITED LIABILITY

Be it further resolved, that the Pacific Fisheries Legislative Task Force supports and encourages state and federal legislation which grants any person who responds to an oil spill, caused by another, immunity from liability from all costs and damages except in cases where the responder acts with gross negligence or willful misconduct, or causes personal injury or wrongful death.

...Pacific Fisheries Legislative Task Force, June 16, 1990 (Sitka)
Alaska Delegates: Sen. Eliason
Sen. Zharoff
Rep. Davidson
Rep. Navarra

In particular, I support the need for limited immunity for all oil spill responders other than liable parties, to the extent that it may be necessary to encourage such persons to take action promptly. Prompt action after a spill is essential to protect the marine environment of California from oil pollution.

As you know, the Oil Pollution Act of 1990 (P.L. 101-380) was signed by the President on August 18th. That Act provides limited federal immunity for all oil spill responders.

A law that does not address responder's concern about liability exposure, causing them to hesitate in responding to spills, would be counterproductive.

Oil spill response is not an exact science. Decisions often must be made with incomplete and sometimes conflicting information. Moreover, the operational environment is unpredictable. Liability standards must take those factors into account if effective programs are to be put in place.

...United States Coast Guard, August 28, 1990

Because unnecessary impediments to expeditious oil spill response should be minimized, we support the concept of immunizing spill responders by passing through their liability to the spiller, under the following conditions: none of the spiller's original liability is in anyway reduced, and there are adequate assurances that all damages will be paid, and that the injured parties can be made whole.

...The California Sierra Club, April 21, 1990

VIA U.S. MAIL AND FACSIMILE

February 5, 1992

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

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

Dear Chairman Hudson:

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

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

February 5, 1991

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

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

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

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

Page 3
Letter to Representative Hudson
February 5, 1991

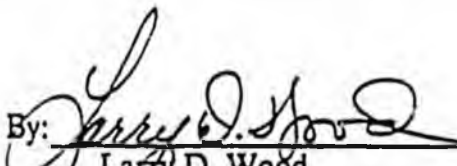
coverage would only occur after years of expensive litigation. It is possible the courts would determine that the P&I Club coverage provided no or only severely limited benefit to Alyeska. What remains then to provide coverage to Alyeska against third party liability claims is the \$500 million CGL insurance policy, which is one half the original amount of financial responsibility. Unlike financial responsibility, Alyeska's receipt of payment from the individual insurance underwriters that make up the \$500 million total is likely to face the additional hurdle of forcing these underwriters to pay, which involves overcoming defenses to coverage raised by the insurers.

Tesoro elected not to procure the full amount of \$500 million CGL insurance. Instead, Tesoro made up part of that total by a corporate guarantee. As a result, Alyeska's Agreement with Tesoro is even more complicated than what I have described.

Indeed, this is a complicated subject. If you would like more detailed information or the opportunity to discuss this, please contact Paul Richards or myself at your convenience.

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY

By: 
Larry D. Wood
Senior Attorney - External Affairs

cc: Mr. Paul M. Richards

February 5, 1992

Alyeska Financial Responsibility Requirement

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

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

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

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

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

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

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

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

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

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

VIA U.S. MAIL AND FACSIMILE

February 4, 1992

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

Re: Limited Responder Immunity in Alaska

Dear Chairman Bader:

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

1. Time Limit for Response Immunity

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

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

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

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

2. Classification of Responders

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

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

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

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

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

3. Response to ADEC Orders

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

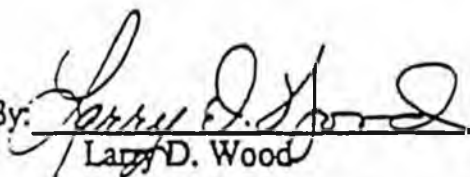
Thus, using either the federal liability limitation, or the federal and state financial responsibility requirements, as a guide to establish financial responsibility requirements contained in response services agreements is unhelpful and inappropriate. It would leave a responder unprotected.

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

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

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY

By: 
Larry D. Wood
Senior Attorney - External Affairs

cc: COC Members
Michele D. Brown, Esq.

January 30, 1992

Improving Good Samaritan Immunity for Oil Spill Response in Alaska

Good Samaritan laws encourage action to save lives and property during emergencies.

Alaska laws limit liability of individuals or organizations who provide emergency assistance. Examples include:

- Rendering care at accident scenes.
- Providing equipment or services requested by a police agency, fire department, or other governmental agency during a state of emergency.

Similarly, the federal Oil Pollution Act of 1990 ("OPA '90") and Alaska's HB 196 adopted responder immunity laws to encourage "immediate and effective" oil spill response action.

Without liability immunity, financial risks and liability exposures would deter cleanup contractors and cooperatives from prompt, aggressive action.

However, without legislative action this session, HB 196's provision for limited immunity against certain claims under state law will "sunset" in July 1992.

To help insure that effective and substantial resources are readily available to contain and cleanup oil spills, the state's responder immunity law should be improved and made permanent.

Although its scope is also limited, the federal response action immunity provision in OPA '90 (33 USC § 1321(b)(11)(c)(4)) is the best model.

To date, the Virgin Islands and 18 of the 24 coastal states (75%) have adopted virtually identical laws.

OPA '90 limits liability under federal law for response action in federal waters if it is consistent with the National Contingency Plan or federal directions. Responders are still liable for personal injuries and wrongful deaths, or if they are grossly negligent or engage in willful misconduct. Importantly, the responsible vessel owner, operator, or charterer is liable for any removal costs or damages that responders are relieved of.

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In comparison, last session's HB 196 is the most restrictive responder immunity law in the country.

There is limited liability for response action contractors under state law if such action is not contrary to federal or state directions. *But, the action must not "substantially deviate" from an applicable contingency plan.* The liability limitation does not bar claims for personal injuries and death, *personal property damage not caused by oil*, or gross negligence or intentional misconduct. *The response immunity only applies to an act or omission that occurs within 15 days after a release.*

The OPA '90 Good Samaritan provision will encourage oil spill response organizations to quickly provide personnel and resources when spills are threatened or occur.

- A. There is no 15-day or other immunity time limit in the OPA '90 Good Samaritan provision.

HB 196's time limit is unrealistic given the nature of oil spill response operations; so long as spilled oil remains on water or land, ongoing, expeditious action should be encouraged to remove it. In addition, the uncertainty when a time limit begins and ends following a particular "release," may deter prompt and continuous response action for a spill or threat of a spill.

- B. All persons who render "care, assistance, or advice" have limited liability under OPA '90.

Although "response action contractors" in HB 196 includes "volunteers," nonvolunteers must be "carrying out [a response action] contract" or under the control of a response action contractor who is. But written contracts cannot describe all actions taken during a response. This unnecessary restriction will foster uncertainty regarding the scope of those persons and actions entitled to limited immunity under HB 196.

- C. Under OPA '90, the response action needs to be "consistent with" the National Contingency Plan ("NCP").

The NCP covers a broad array of actions "to minimize *oil . . . discharges.*" All actions within "the overall objectives of the NCP" fall within the immunity. In comparison, for response action contractors who have prepared or agreed to individual contingency plans, response action must not "substantially deviate" from such plans to claim limited immunity under HB 196.

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Individual contingency plans cannot describe all necessary response actions, yet "substantial" deviations from those plans will not fall within the scope of limited immunity. Delays may result where plan amendments are required. Moreover, uncertainty about "substantial deviation" will foster controversy and litigation.

- D. Damages to personal property need not be caused by oil to claim limited immunity under OPA '90.

Oil spills generate emergency actions other than those related to containing and cleaning up oil. HB 196's requirement that damage to tangible personal property be caused by oil to fall within the scope of the limited immunity is inappropriate and may have a chilling impact on responses.

- E. OPA '90 responder immunity, or similar laws, have been adopted by the states which have considered the federal standard.

Unlike HB 196, the federal standard will be applied in many jurisdictions. Uniformity of interpretations is anticipated. This uniformity will encourage response organizations to cross state borders in the event or in anticipation of oil spills.

The best course is to replace HB 196 responder immunity with the federal Good Samaritan standard; however, Alaska's limited immunity law can be improved.

- "SUBSTANTIALLY DEVIATED" MUST BE DEFINED TO DESCRIBE ONLY MANAGEMENT, NOT OPERATIONAL, LEVEL DECISIONS.

No contingency plan can anticipate every development, including weather, location, time of day, and season. The response must adapt to the event. Thus, errors by operations personnel reacting to exigencies is expected; this is a key reason for limited responder immunity.

Responders should not incur liability for good faith, but negligent, decisions by response personnel in the field. Without a definition, this language offers no predictable liability exposure and will encourage litigation. In the letter of intent which accompanied HB 196, the legislature recognized this uncertainty and asked that the matter of a definition be studied.

- ALASKA'S RESPONDER IMMUNITY LAW MUST NOT CHANGE RESPONSE PLANNING STANDARDS INTO CLEANUP STANDARDS.

HB 567, Alaska's 1989 comprehensive oil spill prevention, contingency planning, and response legislation, states that its response planning standards do not constitute cleanup standards which must be met by a contingency plan holder. However, since response actions must not "substantially deviate" from a contingency plan to fall within the scope of HB 196 responder immunity, this analysis is inconsistent with HB 567. Clarifying language is needed.

- THE HB 196 15-DAY IMMUNITY TIME LIMIT MUST BE ELIMINATED.

This time limit is unrealistic given the nature of oil spill response operations; it is a major disincentive for responders to get involved and stay involved. Distant responders may be discouraged to send equipment, personnel, and other assistance because a short immunity period will largely expire during travel time. No time limit will encourage continuity of services and loaning of equipment in a massive spill response, and minimize turnover of experienced, skilled personnel.

- THE LIMITED IMMUNITY SHOULD BE EXTENDED TO ACTIONS TAKEN TO PREVENT AN OIL SPILL.

Prevention of an oil spill is, of course, the best course to protect our environment. Accordingly, the responder immunity laws in several states also offer limited protection to those who take actions to prevent such releases.

- DAMAGES TO TANGIBLE PERSONAL PROPERTY SHOULD NOT NEED TO BE CAUSED BY OIL TO FALL WITHIN THE SCOPE OF LIMITED RESPONDER IMMUNITY.

Oil spill responses will generate many other emergency actions other than those related to containing and cleaning up oil. Personal property may be damaged other than by oil. To avoid a chilling effect on response efforts, HB 196's requirement that only oil-damaged personal property falls within the scope of limited responder immunity should be deleted.

- A TECHNICAL AMENDMENT SHOULD CLARIFY THAT THE STRICT LIABILITY STATUTE, AS 46.03.822(A), IS SUBJECT TO HB 196'S LIMITED RESPONDER IMMUNITY PROVISIONS.

AS 46.03.822(a) imposes strict liability for damages and for response costs on certain persons should a release of a hazardous substance occur. For example, the owner

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of, and the person having control over, the hazardous substance are included. Also included are those persons who arrange for and transport a hazardous substance which is released. Last year, HB 196 provided for limited responder immunity from this and other laws, but, as a technical matter, this intention should be clarified by an amendment to AS 46.03.822(a).

Proposed Amendments to HB 196, Alaska's Responder Immunity Law

1. Add to AS 46.03.822(a), after "... (i) of this section," the following:

" , and the provisions of AS 46.03.825, "

2. Add to AS 46.03.825(a) two new subsections as follows:

"(4) In this section, "substantially deviated" means significant, unjustifiable, and unauthorized departures from the fundamental requirements of a plan by the executives, managers, and incident commanders of a response action contractor.

(5) Nothing in this section is intended to amend AS 46.04.030(1) or to create a cleanup standard that must be met by a holder of a contingency plan or a response action contractor."

3. Delete AS 46.03.825(b)(2), and AS 46.03.825(b)(3).

4. Add to AS 46.03.825(d), after "but not limited to", the following:

"prevention, "

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

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

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

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

To: Mike Abbott

January 31, 1992

From: R.I. Shoaf *R.I. Shoaf*

Immediately prior to March 1989, Alyeska Pipeline had unilateral contracts with vessels calling at Valdez, through the Port Information Manual, whereby Alyeska would provide oil spill response for TAPS trade vessels. Under the terms of the Port Information manual, a contract was created between a vessel, and its operator, owner and charterer, and Alyeska each time a vessel lifted oil at Valdez. The contract required Alyeska to respond to a spill from the vessel according to Alyeska's oil spill contingency plan for Prince William Sound, which was approved by the state in 1987. The contract required a vessel to reimburse all of Alyeska's costs in responding to a spill and to indemnify Alyeska from third party claims. The contract did not require the vessels to demonstrate an ability to indemnify Alyeska. When the Oil Spill Response Services Agreements went into effect on November 1, 1990, bilateral contracts were formed that were similar to the unilateral contracts created under the Port Information Manual, but added the requirement that vessels demonstrate their ability to indemnify Alyeska. This requirement was added in direct response to the magnitude of claims asserted against Alyeska after the Exxon Valdez accident.

January 31, 1992

Michele D. Brown, Esq.
Executive Director
Citizens' Oversight Council on Oil and Other Hazardous Substances
3111 C Street, Suite 150
Anchorage, Alaska 99508

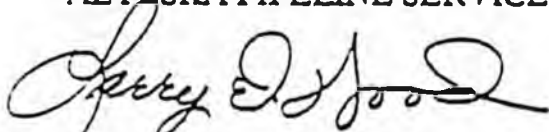
Re: Alyeska Comments Regarding Reports Submitted to the Citizens'
Oversight Council on Oil and Other Hazardous Substances

Dear Ms. Brown:

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

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY



Larry D. Wood
Senior Attorney - External Affairs

Attachments

January 31, 1992

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

Summary

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

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

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

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

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

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

LDW~vogt/cas

January 31, 1992

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

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

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

LDW:straubi/cml

January 31, 1992

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

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

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

LDW/ADEC/cms

January 31, 1992

ALYESKA PIPELINE SERVICE COMPANY'S
RESPONSE TO MEMORANDUM
REGARDING THE LEGAL RELATIONSHIP BETWEEN
OIL SPILL RESPONSE ACTION CONTRACTORS
AND OTHER PARTIES TO AN OIL SPILL

Summary

The Citizens' Oversight Council should make its recommendations to the legislature regarding whether and to what extent it should reduce the limitation on liability for RACs after considering that: (1) limiting the liability of response action contractors does not reduce the liability of the spiller; (2) financial responsibility requirements reduce the likelihood that the spiller will be insolvent; (3) federal and state oil spill funds provide a safety net; and (4) potential damages can be reduced most effectively if RACs respond boldly, quickly, and efficiently under the emergency conditions that arise in an oil spill.

Carriage of crude oil is not an "ultrahazardous" activity.

Limitation on liability for RACs will not prevent recovery of damages by injured parties.

The Alaska Legislature and Congress have created funds to reimburse parties damaged by oil spills.

The spiller is strictly liable for damages caused by oil spills. Under Alaska law, the spiller's strict liability extends to any damage caused by an act or omission of an RAC responding to a spill. AS 46.03.822(k). Exemption cannot "lessen" its overall liability. The spiller will already have demonstrated financial responsibility to pay for response costs and damages.

Indemnity agreements do not allow parties who are strictly liable to "escape" liability. Indemnification agreements are "not effective to transfer liability" from a person who might be strictly liable. AS 46.03.822(g).

The 15-day time limit on limited responder immunity is arbitrary and should be eliminated.

Competence of RACs can best be evaluated in advance of a spill by agency review of contingency plans and through DEC's authority to require training programs and spill drills.

Tanker owners/operators and response action contractors must define relative rights and responsibilities through contract. There is a distinction between industry co-ops and private contractors. Industry co-ops are voluntary, non-profit, and little attempt is made to recover even the indirect costs of response activities, such as overhead and staff time.

Regarding Alyeska's \$1 billion dollar in financial responsibility, Alyeska must ensure that a shipper with whom it contracts can indemnify for liability to which Alyeska could be exposed in responding to a spill. In light of present liabilities, particularly in light of revisions to state and federal laws, this figure is reasonable.

Following passage of HB 196 last year and in light of a perceived reduction in the risks associated with spill response, Alyeska and Tesoro reached a practical solution to a difficult financial responsibility problem. Alyeska agreed to accept a substantial reduction in the overall quality of Tesoro's evidence of financial responsibility.

The State should not attempt to directly oversee RACs, unless the State becomes party to the contracts assumes spill management responsibilities, and agrees to pay the response costs.

Private RACs are entitled to the same limited responder immunity as presently enjoyed by the State and municipalities.

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

January 31, 1992

MEMORANDUM OF ALYESKA PIPELINE
SERVICES COMPANY REGARDING

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. The same exemption for RACs should be available.

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

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

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

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

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

January 30, 1992

Michele D. Brown, Esq.
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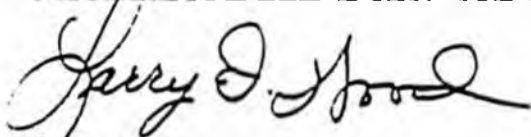
Re: Alyeska's Comments Related to Trans Alaska Pipeline Authorization Act
Memorandum

Dear Ms. Brown:

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

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY



Larry D. Wood
Senior Attorney-External Affairs

LDW42/cas

Attachments . . .

January 30, 1992

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

Summary

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

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

LDW43/cas

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

Introduction

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

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

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

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

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

2. Liability for Vessel Spills Under TAPAA

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

Under the comprehensive liability framework created by Congressional

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

LDW44/cas

January 30, 1992

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



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 Communities 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.*



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.

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 timeables 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





Resource Development Council

for Alaska, Inc.

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Resource Development Council Position Paper - HB 540 2/21/92

The Resource Development Council for Alaska, Inc., strongly supports HB 540 and urges the Alaska Legislature to carefully review and approve this legislation. RDC is a non-profit, pro-economic and resource development organization with a statewide board and membership.

RDC's primary concern with HB 540 is that it corrects prior legislation which wrongly placed the emphasis on preserving an avenue for future litigation that could result from an oil spill, as opposed to placing the emphasis on a good faith response. RDC believes the response action contractor (RAC) provisions contained in the Oil Pollution Act of 1990, which provide for simple negligence, are the appropriate approach in Alaska.

To increase the negligence standard to levels higher than those required by the federal government is not only unnecessary, but has threatened to shut down at least one major employer on the Kenai Peninsula, involving hundreds of jobs in that region. HB 540 addresses several concerns expressed by response action contractors, as well as those involved in the business of shipping oil.

RDC notes that 19 other coastal states have enacted legislation as protective as OPA-90 over the last 18 months, pointing to the integrity of the federal policy.

RDC firmly believes that response action contractors involved in controlling the release or threatened release of a substance should be held to the federal standard of simple negligence as outlined under OPA 90 and urges passage of HB 540.

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 540 (O&G)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE SPECIAL COMMITTEE ON OIL AND GAS

Offered:

Referred:

Sponsor(s): REPRESENTATIVES HUDSON, Navarre, G.Phillips, Taylor, Zawacki, Grussendorf, C.Davis, Carney, Parnell, Foster, Baker, Choquette, Gonzales, Hanley, Leman, Martin, M.A.Miller, M.W.Miller, R.Phillips, Sharp

A BILL

FOR AN ACT ENTITLED

1 "An Act limiting the liability of an oil spill response action contractor for release or
2 threatened release of a hazardous substance and for an act or omission that is not
3 contrary to a state or national oil spill contingency plan or, notwithstanding the state or
4 national plan, that is not contrary to an order of an on-scene coordinator; repealing the
5 requirements that liability is not limited in an action for damages to personal property
6 not caused by oil and is only limited if the act or omission occurs within 15 days after
7 the release of oil; repealing secs. 2, 5, 7, 10, and 12 of ch. 92, SLA 1991; and providing
8 for an effective date."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

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

11 (a) Notwithstanding any other provision or rule of law and subject only to the defenses
12 set out in (b) of this section, [AND] the exception set out in (i) of this section, and the

1 limitation on liability provided under AS 46.03.825, the following persons are strictly liable,
2 jointly and severally, for damages, for the costs of response, containment, removal, or remedial
3 action incurred by the state, a municipality, or a village, and for the additional costs of a function
4 or service, including administrative expenses for the incremental costs of providing the function
5 or service, that are incurred by the state, a municipality, or a village, and the costs of projects
6 or activities that are delayed or lost because of the efforts of the state, the municipality, or the
7 village, resulting from an unpermitted release of a hazardous substance or, with respect to
8 response costs, the substantial threat of an unpermitted release of a hazardous substance:

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

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

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

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

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

29 * Sec. 2. AS 46.03.825(a) is amended to read:

30 (a) A person who is a response action contractor with respect to a release or threatened
31 release of oil [WHOSE ACT OR OM'SSION IS NOT CONTRARY TO AN ORDER OF THE

1 FEDERAL OR STATE ON-SCENE COORDINATOR] is not civilly liable for injuries, costs,
2 damages, expenses, or other liability that results from the release or threatened release, or from
3 the response action contractor's act or omission in response to the release or threatened release,
4 unless the person bringing a claim against the response action contractor proves by a
5 preponderance of the evidence that

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

9 (2) the response action contractor acted with gross negligence or intentional
10 misconduct; [OR]

11 (3) the act or omission of the response action contractor was contrary to an
12 order of the federal on-scene coordinator, or to the extent that the federal on-scene
13 coordinator has not otherwise ordered, to an order of the state on-scene coordinator; or

14 (4) the act or omission of the response action contractor

15 (A) was contrary in a material or substantial respect to the national
16 contingency plan prepared under 33 U.S.C. 1321(d), or to the extent that the national
17 contingency plan has not otherwise provided, to the state contingency plan prepared
18 under AS 46.04.200 or 46.04.210; and

19 (B) did not result from an order of the federal on-scene coordinator,
20 or to the extent that the federal on-scene coordinator has not otherwise ordered,
21 from an order of the state on-scene coordinator [THE RESPONSE ACTION
22 CONTRACTOR, WITHOUT APPROVAL BY THE FEDERAL OR STATE ON-SCENE
23 COORDINATOR, SUBSTANTIALLY DEVIATED FROM AN OIL SPILL
24 CONTINGENCY PLAN PREVIOUSLY APPROVED UNDER AS 46.04.030, AND THE
25 PLAN WAS EITHER PREPARED BY THAT CONTRACTOR FOR A PARTY
26 RESPONSIBLE FOR THE RELEASE UNDER AS 46.03.822 OR THAT CONTRACTOR
27 PREVIOUSLY AGREED TO COMPLY WITH THE TERMS OF THAT PLAN UNDER
28 A CONTRACT WITH PARTIES RESPONSIBLE FOR THE RELEASE UNDER
29 AS 46.03.822].

30 * Sec. 3. AS 46.03.825(b) is amended to read:

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

1 [[1)] an action for personal injury or death [;
2 (2) AN ACTION FOR DAMAGES TO TANGIBLE PERSONAL PROPERTY
3 NOT CAUSED BY OIL; OR
4 (3) AN ACT OR OMISSION THAT OCCURS MORE THAN 15 DAYS AFTER
5 THE RELEASE].

6 * Sec. 4. Sections 2, 5, 7, 10, and 12 of ch. 92, SLA 1991, are repealed.

7 * Sec. 5. If this Act takes effect after June 30, 1992, sec. 4 of this Act is retroactive to June 30, 1992.

8 * Sec. 6. This Act takes effect immediately under AS 01.10.070(c).



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: 10
(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:

[The work group agreed to leave off management, pending a proposal on how it would be handled. Below is a proposal of information that would be requested if response management is certified:

- (ix) *Spill response management services for large spills:*
 - (A) Names, experience, and background of management team
 - (B) Description of the training and experience of management team, including a description of familiarity with:
 - (1) clients' response plan(s)
 - (2) area contingency plans in area of service
 - (3) national contingency plan
 - (4) state requirements in area of service
 - (C) Description of communications system for command and control, including:
 - (1) number and type of equipment
 - (2) frequencies available
 - (3) mobility of equipment
 - (4) description of communications redundancy
 - (D) Description of logistic management system, including:
 - (1) transportation coordination
 - (2) material maintenance and support
 - (3) security
 - (4) inventory control
 - (5) resource management
 - (E) Description of operational management system, including:
 - (1) spill trajectory interpretation
 - (2) boom and skimmer tactical direction
 - (3) temporary containment direction
 - (4) natural and economic resource sensitivity
 - (5) nonmechanical removal direction
 - (6) manpower supervisory capacity
 - (F) Administrative management system, including:
 - (1) procurement system
 - (2) accounting system
 - (3) claims processing system
 - (G) Description of public information and dissemination system.]

(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



Citizens' Oversight Council
on Oil and Other Hazardous Substances

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(907)561-2101 • 561-7538 (FAX)

Jay Nelson

**OIL SPILL RESPONSE ACTION
CONTRACTORS**

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

Prepared By

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

Council Members

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



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

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

RECOMMENDATIONS

OBJECTIVE

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

EVALUATION CRITERIA

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

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

Council Members

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

**HB 196, SECTION 11, REPORT
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RECOMMENDATIONS, continued
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RECOMMENDATION #3: A certification program should contain minimum professional standards for response action contractors and direct DEC to establish the criteria by which it can readily assess a response action contractor's capability to perform as stated in a contingency plan.

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

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

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

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

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

CORRECTION

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



Citizens' Oversight Council

on Oil and Other Hazardous Substances

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

RECOMMENDATIONS

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**HB 196, SECTION 11, REPORT
OIL SPILL RESPONSE ACTION CONTRACTORS
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RECOMMENDATION #1: The liability standard for oil spill response action contractors may be limited to gross negligence or intentional misconduct, with certain conditions that ensure a reliable response.

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

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

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

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

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

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

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

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

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

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

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