ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
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RECOMMENDATION #7: The Trans-Alaska Pipeline System ("TAPS") agent should clearly maintain the duty to control and remove pollution within state boundaries related to the transportation of TAPS crude oil.

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

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

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

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

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

I. INTRODUCTION

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

II. REPORT METHODOLOGY

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

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

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

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

III. LEGAL FRAMEWORK

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

A. STATUTORY LIABILITY FOR DAMAGES FROM OIL SPILLS

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

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

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

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

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

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

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

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

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

B. STATUTORY DUTY TO RESPOND TO AN OIL SPILL

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

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

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

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

IV. CONGRESSIONAL AND OTHER STATE ACTIONS

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

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

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

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

regional response centers, but has stated that it currently has no plans to locate in Alaska.

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

V. RESPONSE ACTION CONTRACTORS OPERATING IN ALASKA

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

A. VOLUNTEERS

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

B. PROFESSIONAL INDEPENDENT OPERATORS

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

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

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

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

C. INDUSTRY SPILL RESPONSE COOPERATIVE ORGANIZATIONS

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

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

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

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

D. INDUSTRIES' OWN SPILL RESPONSE OPERATIONS

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

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

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

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

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

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

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

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

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

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

A. RESPONSE ACTION CONTRACTOR FEAR OF LIABILITY

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

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

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

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

B. RISK OF REDUCED COMPENSATION TO SPILL VICTIMS

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

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

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

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

C. BALANCING LIABILITY AND COMPENSATION CONCERNS

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

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

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

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

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

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

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

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

A. RELIANCE UPON RESPONSE ACTION CONTRACTORS

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

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

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

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

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

B. STATE REVIEW OF RESPONSE ACTION CONTRACTORS

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

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

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

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

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

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

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

C. RESPONSE ACTION CONTRACTOR CERTIFICATION

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

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

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

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

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

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

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

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

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

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

D. ALYESKA PIPELINE SERVICE COMPANY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VIII. CONCLUSION

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

Citizens' Oversight Council
on Oil and Other Hazardous Substances
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APPENDIX A

Issues List

Citizens' Oversight Council
on Oil and Other Hazardous Substances
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HB 196, SECTION 11, REPORT
RESEARCH PROJECTS

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

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

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

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

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

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

The Citizens' Oversight Council will conduct the research.

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

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

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

DEC staff will assemble this data.

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

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

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

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

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

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

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

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

Citizens' Oversight Council
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APPENDIX B

Research Reports Summary

Citizens' Oversight Council
on Oil and Other Hazardous Substances
3111 C Street, Suite 150 • Anchorage, Alaska 99503
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SUMMARY

of

RESEARCH PROJECTS REPORTS

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

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RESEARCH PROJECTS REPORTS SUMMARY

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

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Research Proje Response action contractor activity in Alaska

Prepared by: Department of Environmental Conservation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Research Project: Insurance coverage availability

Prepared By: Tesoro Alaska, Inc.

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

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

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

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

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

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

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

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

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

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

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Research Project: Other state's response action contractor provisions

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

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

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

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

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

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

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

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

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

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

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

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

Other States' Response Action Contractor Liability Laws

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

Citizens' Oversight Council
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APPENDIX C

List of Rebuttals / Supplemental Information

Citizens' Oversight Council
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Rebuttals or Supplemental Information

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

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

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

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

Commenting on Report: All research projects

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Alyeska pipeline
SERVICE COMPANY

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January 31, 1992

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

Summary

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

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

LDW:ADEC/cas

Alyeska pipeline SERVICE COMPANY

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January 31, 1992

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

Summary

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

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

LDW:straubi/cas

Alyeska pipeline SERVICE COMPANY

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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

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APPENDIX D

Text of 196
(set out pre and post sunset)

HOUSE BILL 196

AN ACT LIMITING LIABILITY FOR OIL SPILL RESPONSE ACTION CONTRACTORS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DEFINITION OF RESPONSE ACTION (SECTION 6)

* Sec. 6. AS 46.03.826(g) is repealed and reenacted to read:

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

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

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

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

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

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

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

(3) the response action contractor, without approval by the federal or state on-scene coordinator, substantially deviated from an oil spill contingency plan previously approved under AS 46.04.040, and the plan was either prepared by that contractor for a party responsible for the release under AS 46.03.822 or that contractor previously agreed to comply with the terms of that plan under a contract with parties responsible for the release under AS 46.03.822.

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

(1) an action for personal injury or death;

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

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

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

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

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

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

* Sec. 9. AS 46.03.820 is amended by adding new paragraphs to read:

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

(A) the department,

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

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

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

(15) "response action contractor" means

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

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

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

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

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

• Sec. 11. REPORT. The Citizens Oversight Council on Oil and Other Hazardous Substances (AS 24.20.010) shall review the entire subject of response action contractor civil liability and the status of oil spill contingency plan holders. The review of both subjects shall be completed and a report submitted to the legislature before January 15, 1992. The report must address whether further modifications are necessary to state laws on response action contractor civil liability, and include an analysis of whether the present state laws that require shippers and owners to have contingency plans and that enable shippers and owners to contract with response action contractors to carry out contingency plans are adequate to protect the public in the event of an oil spill.

EFFECTIVE UPON PASSAGE OF HB 196

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

* Sec. 2. AS 46.03.822(a) is repealed and reenacted to read:

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

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

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

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

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

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

TAKES EFFECT ON JULY 1, 1992

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

* Sec. 5. AS 46.03.822(a) is repealed and reenacted to read:

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

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

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

* Sec. 7. AS 46.03.822(g) is repealed and reenacted to read

(g) In this section,

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

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

(A) the department,

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

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

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

(3) "response action contractor" means

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

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

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

REPEALS THE FOLLOWING SECTIONS:
SECTION 10

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

TAKES EFFECT ON JULY 1, 1992

Citizens' Oversight Council
on Oil and Other Hazardous Substances
3111 C Street, Suite 150 • Anchorage, Alaska 99503
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APPENDIX E

PRINCE WILLIAM SOUND
TANKER CONTINGENCY PLAN COVERAGE CHART

Citizens' Oversight Council
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PRINCE WILLIAM SOUND
TANKER CONTINGENCY PLAN COVERAGE CHART

CAVEAT:

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

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

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

APPENDIX E

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

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

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

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

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

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

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

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

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APPENDIX F

Summary of Meeting Comments

Citizens' Oversight Council
on Oil and Other Hazardous Substances
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Citizens' Oversight Council Meeting
January 31, 1992

Summary of Public Comments

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

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

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

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

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

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

Steve Ducca, Marine Spill Response Corporation (MSRC)

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

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

Other concerns with the studies include the following:

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

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

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

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

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

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

Steve Peterson, Crowley Maritime

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

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

Crowley welcomes certification.

Mike O'Meara, Homer

Response action contractor liability is a complicated issue.

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

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

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

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

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

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

1. NWF is interested in establishing a state and federal regulatory atmosphere that facilitates immediate response to oil spills.

2. In the initial hours of a spill we want to ensure that responder utilizes the most effective system of management and the best available technology.

3. Responders should be held accountable for their actions. Workers should be adequately trained, equipment properly maintained and drills should be held regularly and equipment and manpower described in an approved contingency plan should be immediately available in the event of a spill. We want to ensure that oil spill contingency plans are the central guide for response, not just documents written to meet legal requirements.

4. We want to assure, that in the event of insolvency, that the on-scene coordinator has the ability to direct the contractor that has committed to initial response.

5. We are interested in establishing a regulatory regime that uses local knowledge, resources and volunteers in the event of an oil spill. By not providing immunity to volunteers, it might create a disincentive for residents and volunteers to become actively involved in a spill.

6. We want to ensure that contractors can perform in the manner they indicate and that they have the equipment and resources to respond as indicated in their contracts and that these resources are unencumbered and available for use. We support state and/or federal certification for response action contractors.

7. We want to ensure that any resource damages are adequately compensated and that these resources are fully restored.

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

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

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

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

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

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

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

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

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

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

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

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

Larry Wood, Alyeska Pipeline Service Company

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

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

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

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

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

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

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

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

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

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

Under OPA 90 anyone who provides response receives immunity.

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

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

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

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

Wood responded that the Holland decision answered that question.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Bill Stillings General Manager CISPRI -Cook Inlet

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

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

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

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

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

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

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

Steve Provant, Department of Environmental Conservation

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

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

Gene Burden, Tesoro Alaska

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

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

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

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

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

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

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

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

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

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

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

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

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

Burden responded that that is correct.

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

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

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

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

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

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

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

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

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

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

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

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

Written Comments submitted:

Ken Castner, Homer

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

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

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

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

From: ROBERTSONT Tim Robertson

To: SLAJER BCSB Research & Marketing

cc: OSPRC Joe Banta
COPELANDT Tom Copeland
GOTTEHRERS Sheila K. Gottehrer
ROBERTSONT Tim Robertson
ROTHEANN Ann Rothe
SAUNDERSP Patti Saunders, RCAC
STERLINGS Scott Sterling

Subj: COC Testimony

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

JANUARY 31, 1992

MR. CHAIRMAN AND COMMITTEE MEMBERS;

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

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

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

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

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

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

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

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

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

TIM ROBERTSON
BOX 194, SELDOVIA, AK 99663.