ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
7189 HOUSE RESOURCES

Marine Spill Response Corporation
Comments to

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

OIL SPILL RESPONSE CONTRACTOR LIABILITY REPORT

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

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

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

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

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

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

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

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

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

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

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

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

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

that what is submitted can be executed.

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

Working for the Nature of Tomorrow®

NATIONAL WILDLIFE FEDERATION

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

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

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

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

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

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

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

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

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

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

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

- Thank you for the opportunity to provide comment regarding the important issue of improving responder immunity in Alaska.

- We were also pleased to provide research materials regarding the laws of other states and trust that it was useful to the Council's work. We have also provided written comments relating to five reports submitted to as research and thank you for your consideration of them.

- Alyeska Pipeline Service Company ("Alyeska") operates and maintains the Trans Alaska Pipeline Service Company ("TAPS") on behalf of seven owner companies.

- The System stretches from Prudhoe Bay on Alaska's North Slope to Valdez where its 1,000 acre marine terminal loads southbound tankers with crude oil.

- Although neither Alyeska nor the pipeline owner companies own or operate tankers, it has contracted with tanker owners/operators/charterers to provide an initial response to an oil spill from their vessels in PWS.

- The State requires that crude oil tankers transiting PWS have oil spill contingency plans. Alyeska developed an initial response plan (the PWS Tanker Spill Prevention and Response Plan) which describes the services it offers to tank vessels as an initial response contractor.

- Other response action contractors could also provide these services.

- Under the terms of the initial response plan and the Oil Spill Response Service Agreements signed with tanker owners/operators/charterers, Alyeska provides the necessary response vessels, equipment, personnel and training to respond to an oil spill for as long as the first 72 hours following a release.

- During this time, management of the response will transfer from Alyeska to the contracting spiller or to the federal On Scene Coordinator.

- To provide these services, Alyeska has chartered escort response vessels, tugs, barges, and an oil spill recovery vessel. It has ocean and rapid deployment boom, seaskimmers, and related response equipment.

- Alyeska has also developed area response centers, placed fishing vessels on contract to supplement response efforts, and prestaged equipment to protect hatcheries and other sensitive areas.

- Escort/response vessels are used for day-to-day escort of loaded tankers as a prevention measure. Vessel crews are drilled in responding to large spills and in employing multi-vessel and multi-boom configurations.

- Several reports express opinions that response action contractor ("RAC") liabilities ought actually to be increased, not limited, when it comes to response action.

- For example, the Mertz and Straube reports suggest that RAC's ought to be subject to direct state control in the event that an insolvent or recalcitrant spiller refuses to finance.

- Imposing spiller liability on RACs to pay for the cost of oil spill response will deter or eliminate spill response, not promote it.

- This notion flies in the face of the comprehensive federal and state schemes to, on the one hand, encourage prompt, bold response action, and, on the other, require that spiller, his insurance, or, in some cases, industry-financed funds pay for it.

- In addition, this possibility described as a worst case scenario in the Mertz, Straube, and Frank reports is admittedly remote. It would depend for example on the simultaneous insolvency of a spiller, his financial responsibility, and federal and state oil spill response funds. Yet, it this possibility which in these individuals opinion ought to fuel a step toward closing out response action by imposing new liabilities.

- A fundamental reason spill funds exist is to provide a safety net for just the dark scenario which is described. But this point seems to have been lost.

- In an interesting paradox, the Mertz report indicates the justification for these new RAC duties and liabilities would be the possibility of all these insolvencies, yet, in the case where a mystery or orphan spill is most likely require a third party response, and the state moves in to do so, it will enjoy limited responder immunity under a separate statute. Why are there different rules for private RACs?

- The Frank report evidently recommends that Alyeska not be entitled to even limited responder immunity because, in this attorney's opinion, the holders of the federal pipeline right-of-way permit are liable for any tanker spills involved Alaska North Slope crude oil. For the reasons explained in Alyeska's written response, this is incorrect.

- Judge Holland in the Exxon Valdez litigation has already ruled that the people strictly liable under the Trans Alaska Pipeline Authorization Act are the vessel owner and operator, and the Trans Alaska Pipeline Liability Fund.

- In any event, the terms of most responder immunity laws state quite clearly that a RAC which is otherwise a responsible party for a spill is not entitled to assert limited immunity.

- In our response to the Vogt report, we point out that personnel and equipment to escort vessels and to respond to spills in PWS are required by state laws, and Alyeska has offered to provide those services in the absence of anyone else. The costs of Alyeska's initial response services for tanker owners/operators/charters are included by the TAPS carriers in the tariff charges for oil delivered to Valdez. This is an equitable distribution of the costs of those services amongst those who receive them.

- None of this detracts from Alyeska's status as an initial response action contractor in Prince William Sound, nor does it create some sort of state equity in the prevention and response equipment, so as to justify its uncompensated use for a mystery or orphan tanker spill. Interestingly, if the state owned and used that equipment, the Mertz report explains that it would enjoy limited responder immunity in the event of a response.

- Lastly, the Mertz report is incorrect. Following the passage of limited responder immunity law year, Alyeska agreed to make changes in how Tesoro demonstrates its capacity to pay for initial response services. Instead of requiring financial responsibility, that is a demonstration of self-worth, Tesoro now provides this evidence through insurance. Because of the perceived reduction in risk, Alyeska has accepted less in the overall quality of Tesoro's demonstration of that capacity as explained in our written remarks.

- For the balance of our remarks, we will refer to the attached position paper regarding improving responder immunity.

January 31, 1992

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

Presented by:
Gene Burden
Tesoro Alaska Petroleum Company

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

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

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

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

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

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

Enclosure

OTHER STATES' RESPONSE ACTION CONTRACTOR LIABILITY LAWS

FEATURE COMPARED	CONNECTICUT	CALIFORNIA	TEXAS	WASHINGTON	HAWAII	FLORIDA	NEW JERSEY	MAINE
1. Spiller obligated to pay damages caused by Response Action Contractors (RAC)	X	X	X	X	X	X	X	X
2. RAC liability limited except for gross negligence and intentional misconduct	X	X[1]	X	X[2]	X[3]	X[4]		X[5]
3. RAC liability limited except for negligence (defined as use of best of available technology)							X	
4. RAC liability limited in duration		X[6]						
5. Certification of RACs required.			X					
6. State approval required for RAC's equipment and personnel resources		X					X	

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

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

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

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

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

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

February 3, 1992

Mr. Harry Bader
Chairman
Citizens Oversight Council

Via Telefax

Dear Council Members:

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

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

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

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

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

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

Sincerely,

Ken Castner

Ken Castner
P.O. Box 558
Homer, Alaska

Alyeska pipeline SERVICE COMPANY

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VIA U.S. MAIL AND FACSIMILE

February 4, 1992

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

Re: **Limited Responder Immunity in Alaska**

Dear Chairman Bader:

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

1. Time Limit for Response Immunity

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

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

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

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

2. Classification of Responders

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

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

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

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

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

3. Response to ADEC Orders

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY

By: Larry D. Wood
Larry D. Wood
Senior Attorney - External Affairs

cc: COC Members
Michele D. Brown, Esq.

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February 5, 1992

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

Dear Mr. Bader:

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

(1) Limited Time Period For Immunity

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

(2) RAC Certification

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

(3) Prince William Sound Trade Relationships

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

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

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

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

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

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

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

If you have any questions regarding our comments, please feel free to call me at 277-3533.

Sincerely,

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

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

Citizens' Oversight Council
on Oil and Other Hazardous Substances
3111 C Street, Suite 150 • Anchorage, Alaska 99503
(907)561-2101 • 561-7538 (FAX)

APPENDIX G

U.S. COAST GUARD POSITION

U.S. Department of Transportation
United States Coast Guard

Commandant
U.S. Coast Guard

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

16460

MAY 31 1991

From: Commandant
To: All Flag Officers

Subj: CONTRACTOR IMMUNITY PROVISION; STATE OIL SPILL LAWS

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

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

- The availability of a viable private sector capability to respond to oil spills and their threats is an absolutely essential element of a national oil pollution response system.

- During the course of Congressional deliberations associated with the enactment of the Oil Pollution Act of 1990, the oil spill response industry stressed the importance of limited immunity to its viability.

- As a result of the industry's presentation of these views Congress provided a limited immunity respecting liability "for removal costs and damages which result from actions taken or omitted to be taken in the course of rendering care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed by the President."

- The Coast Guard supports the principle of limited immunity under State law respecting liability for removal costs and damages to the extent that such immunity is necessary to assure a broad-based private sector response capability. The Coast Guard urges that State law immunity provisions be as consistent as possible with the federal immunity provision.

Subj: CONTRACTOR IMMUNITY PROVISION; STATE OIL SPILL LAWS

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

- Person entitled to immunity - Person, other than a responsible party, providing care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed by the Federal On-Scene Coordinator.

- Liability for which immunity is provided - Liability for removal costs and damages, other than with respect to personal injury or wrongful death.

- When immunity is not available - (1) When the response is under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 et seq.), or (2) when the person is grossly negligent or engages in willful misconduct.

- Person liable when the immunity provision applies - A responsible party, as that term is defined under section 1001(32) Oil Pollution Act (33 U.S.C. 2701(32)).

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

J. D. SIPLE

Chief, Office of Marine Safety, Security and Environmental Protection

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

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

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

(B) Subparagraph (A) does not apply -
(i.) to a responsible party;
(ii) to a response under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.);
(iii) with respect to personal injury or wrongful death; or
(iv) if the person is grossly negligent or engages in willful misconduct.

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

...

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

ENCLOSURE(1)

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

REPLY TO:

☒ *1031 W 4th AVENUE SUITE 200*
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550
FAX: (907) 276-3697

☐ *KEY BANK BUILDING*
100 CUSHMAN ST. SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1568
FAX: (907) 456-1317

☒ *P.O. BOX K— STATE CAPITOL*
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

February 24, 1992

Hon. Bill Hudson
House of Representatives
Alaska State Legislature
P. O. Box V
Juneau, AK 99811

Dear Rep. Hudson:

We are responding to your inquiry of February 18, 1992, concerning several of the issues raised in the recommendations of the Citizens' Advisory Council on Oil and Other Hazardous Substances concerning response action contractors.

With regard to the Council's recommendation number 7, you asked our opinion of whether Alyeska Pipeline Service Company has a duty to control and remove pollution within state boundaries related to the transportation of TAPS crude oil. As you know, this issue is the subject of litigation in the Exxon Valdez case. The State has taken the position that under the provisions of the State Right-of-Way Lease Alyeska is required to contain and cleanup crude oil spills within state waters, in particular in Prince William Sound. State of Alaska v. Exxon Corp., et. al., Case No. 3AN-89-06852 CI, ¶¶ 36, 96-102 at 13, 31-32. The United States has taken a similar position with respect to the federal right-of-way lease. The State has also alleged that Alyeska's oil spill contingency plan in effect at the time of the spill required them to respond to spills in Prince William Sound. Id. ¶¶ 36, 96-102, 132. The issue of Alyeska's duty to respond to vessel spills in the Sound pursuant to the Trans Alaska Pipeline Authorization Act (TAPAA), 43 U.S.C. § 1653(a) & (b), is not an issue in the state court litigation. This section is, however, at issue in the United States' Exxon Valdez lawsuit. United States of America v. Exxon Corp., et. al., Case No. A91-082 Civ., ¶¶ 41-43, at 10. Since Alyeska disputes any obligation to respond to tanker spills under TAPAA, this obligation, like those described above, would likely be the source of future litigation. See Response of Alyeska Pipeline Service Company to Memorandum Regarding the Trans Alaska Pipeline Authorization Act Prepared by Michael J. Frank, at 4. While we believe that our litigation positions are sound, there is no way to reliably predict how a court will rule.

Secondly, you asked whether legislation clarifying Alyeska's duty to respond to vessel spills would affect existing contractual arrangements between Alyeska and the State of Alaska or the federal government. Given the Governments' positions that under these contractual agreements Alyeska is under an existing duty to control and remove oil spills from tankers, legislation clarifying and reaffirming this obligation would not pose a problem to the state.

With regard to which type of response action contractors ("RACs") deserve a grant of limited immunity to encourage response actions, we would defer to the Governor's Office for a policy statement. It is our understanding that the Department of Environmental Conservation is in the process of developing a position on various response action contractor liability issues.

As to your equal protection question, an intelligent response requires scrutiny of the various distinctions made between classes of RACs and the nature of the justifications for making those distinctions. Therefore without a specific proposal in hand it is difficult to make specific judgments. In general, the equal protection test employed under the Alaska Constitution by our State Supreme Court requires a three-step analysis. State v. Anthony, 810 P.2d 155, 157 (Alaska 1991). This "flexible 'sliding scale' test" is as follows:

> First, it must be determined . . . what weight should be afforded the constitutional interest impaired by the challenged enactment. The nature of this interest is the most important variable in fixing the appropriate level of review . . . .
>
> Second, an examination must be undertaken of the purposes served by a challenged statute. Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest.
>
> Third, an evaluation of the state's interest in the particular means employed to further its goals must be undertaken . . . . At the low end of the sliding scale, we have held that a substantial relationship between means and ends is constitutionally adequate. At the higher end of the scale, the fit between the means and ends must be closer. If the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated.

Id. (citing Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269-70 (Alaska 1984)). Given that response action contractor immunity is essentially an economic interest, a court is more likely to apply a minimal scrutiny test. Under such a test, the state's purposes must be legitimate and any distinctions drawn by the statute must bear a fair and substantial relationship to the statute's purpose.

We trust that this response is of assistance. Please contact us if we be of further assistance.

Sincerely,

CHARLES E. COLE
Attorney General

By: Craig J Tillery
for Breck C. Tostevin
Assistant Attorney General

BCT:tg

cc: Hon. Sam Cotten
Alaska Senate

Paul Fuhs
Senior Legislative Liaison
Office of the Governor

Deborah Behr, Assistant Attorney General
Legislation and Regulations Section - Juneau

Craig Tillery, Assistant Attorney General
Environmental Section - Anchorage

Alyeska pipeline
SERVICE COMPANY

240 MAIN STREET, SUITE 800, JUNEAU, ALASKA 99801, TELEPHONE (907) 586-3340 TELEX 090-25-127

March 9, 1992

The Honorable Bill Hudson
Chairman, House Special Committee on Oil and Gas
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

RE: CSHB 540 Providing for Limited Responder Immunity

Dear Chairman Hudson:

Alyeska Pipeline Service Company ("Alyeska"), strongly supports Good Samaritan immunity for oil spill response in Alaska. Without limited liability, financial risks and liability exposures will deter cleanup contractors and others from prompt, aggressive action when spills occur.

As you know, the federal Oil Pollution Act of 1990 ("OPA '90"), and Alaska's HB 196 last session adopted responder immunity laws to encourage immediate and effective oil spill response action. However, without legislative action this session, HB 196's provision for limited immunity against certain claims under state law will "sunset" in July. To help insure that effective and substantial resources are readily available to contain and cleanup oil spills, the state's response action contractor immunity law should be improved and made permanent.

Although its scope is also limited, the response action immunity provision in OPA '90 [33 USC & 1321 (b) (11) (c) (4)] is the best model. To date, the Virgin Islands and 18 of 24 coastal states (75%) have adopted substantially similar laws.

OPA '90 limits liability under federal law for response action if it is consistent with the National Contingency Plan or directions of federal officials. Responders are still liable for personal injuries and wrongful deaths, or if they are grossly negligent or engage in willful misconduct. Importantly, the responsible vessel owner or operator is liable for any removal costs or damages that response contractors are relieved of. We believe that the federal law draws the right balance between encouraging prompt, aggressive action by all potential response contractors, and

providing for recovery of property damages from the spiller if a response contractor has negligently caused them.

The United States Coast Guard has best described the important contribution limited immunity for response contractors made to the nation's comprehensive scheme for oil spill response and recovery under OPA '90. All response contractors must be encouraged to take action when spills occur, and to stay involved until an oil spill response is completed.

We urge the Committee's consideration of this important proposal to supplement the state's oil spill response laws. Alyeska Pipeline Service Company supports the adoption of Good Samaritan immunity for oil spill response action contractors on a state level, as presently stated in CSHB 540.

Very truly yours,

ALYESKA PIPELINE SERVICE COMPANY

By: Paul M. Richards
Paul M. Richards
Manager, Government Relations

PMR:ph

Alyeska pipeline
SERVICE COMPANY

1835 SOUTH BRAGAW STREET ANCHORAGE ALASKA 99512 TELEPHONE (907) 278 1611 TELEX 090 25 127

March 6, 1992

The Honorable Bill Hudson
Chairman, House Special Committee on Oil and Gas
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

RE: **Prince William Sound Oil Spill Response Services**

Dear Chairman Hudson:

Alyeska Pipeline Service Company ("Alyeska") is an oil spill response action contractor for spills in Prince William Sound on behalf of companies that own, operate or charter tank vessels in the TAPS trade. We refer to those companies as "Contracting Vessels." The scope of services to be provided by Alyeska to those companies is described in Oil Spill Response Services Agreements between Alyeska and the Contracting Vessels. The Agreements incorporate the Prince William Sound Tanker Spill Prevention and Response Plan to describe Alyeska's response plans. Exhibit A of each Agreement lists the vessels covered by that Agreement.

Under these arrangements, for large spills, Alyeska is obligated to respond for up to 72 hours to spills in Prince William Sound, while the Contracting Vessel is mobilizing its resources to take over management of the spill response. The Plan and the Agreements describe how the management transition from Alyeska to the appropriate Contracting Vessel should occur. After the transition, Alyeska's resources, including the on-water-response equipment, will be available for use by the Contracting Vessel for as long as needed and until they can be replaced by other equipment. The Contracting Vessel is contractually obligated to replace Alyeska's core equipment as rapidly as possible so that normal terminal operations may resume as soon as the Coast Guard allows it.

If the Contracting Vessel fails to assume management of the spill response in the 72 hour period, Alyeska anticipates that the Coast Guard will federalize the response, directing and paying for the effort. Alyeska has recently reiterated its verbal understanding with the Valdez Captain of the Port that Alyeska will make its resources available to the Coast Guard under a federalized response. We have written to Admiral Ciancaglini asking for an opportunity to describe this arrangement in writing.

Please contact me if you would like any other information on these matters.

Sincerely yours,

ALYESKA PIPELINE SERVICE COMPANY

M. F. G. Williams
Vice President-Environment & Contingencies

MFGW/RIS/md

Alyeska pipeline
SERVICE COMPANY
1835 SOUTH BRADAW STREET ANCHORAGE ALASKA 99512 TELEPHONE (907) 278-1611 TELEX 090 25 127

March 2, 1992 Letter No. 92-9411-G

David E. Ciancaglini
Rear Admiral
U.S. Coast Guard
P.O. Box 25517
Juneau, Alaska 99802

Re: Coast Guard Directed Oil Spill Responses
in Prince William Sound

Dear Admiral Ciancaglini:

Alyeska Pipeline Service Company ("Alyeska") is an oil spill response action contractor for spills from TAPS trade tankers in Prince William Sound. To provide this service, Alyeska has entered into Oil Spill Response Services Agreements with five companies that either own, charter or operate tank vessels that call at Valdez. Those companies, which we refer to as Contracting Vessels, are ARCO Marine, Inc., BP Oil Shipping Company, U.S.A., Chevron U.S.A., Inc., Exxon Shipping Company, and Tesoro Alaska Petroleum Company. Exhibit A of each Agreement lists the tank vessels covered by the Agreement.

In the Agreements, Alyeska promises to manage the initial response to an oil spill for as long as 72 hours following a spill, in accordance with the Prince William Sound Tanker Spill Prevention and Response Plan. The Contracting Vessels agree to assume management of the spill response within 72 hours after notification by Alyeska. Under this arrangement, Alyeska will continue to assist the Contracting Vessel's on water response until the Alyeska resources are not needed or can be replaced. For small spills, under 1,000 barrels, Alyeska may elect to complete the entire response on behalf of the contracting vessel.

We believe that each of these companies is prepared to respond to a spill from the vessels it utilizes in Prince William Sound. The Alaska Department of Environmental Conservation has arrived at the same conclusion and has approved the contingency plans for the tank vessels covered by these Agreements. Alyeska has held major response drills with ARCO, BP, Exxon Shipping and Chevron and plan a similar exercise with Tesoro. Moreover, the Agreements and the PWS Plan anticipate that if the Contracting Vessel or other acceptable representative of the responsible party does not assume management of the spill

response as required, Alyeska will ask the Coast Guard to federalize the response and assist in whatever way is appropriate, at the direction of the Federal On Scene Coordinator.

Based on discussions with Commander Ed Thompson, Captain of the Port in Valdez, there is an understanding between Alyeska and the Coast Guard that Alyeska will assist the Coast Guard if a spill response is federalized. We believe that it would useful to have a formal procedure in place to guide transition from Alyeska management of spill response to federal control in the event such transition becomes necessary. Preparation for this contingency might be enhanced if there is a contract or Memorandum of Understanding between Alyeska and the Coast Guard describing the Coast Guard's expectations of Alyeska and establishing a management and reimbursement procedure.

It is our understanding that the Oil Pollution Act of 1990 and the National Contingency Plan (NCP) provide the Coast Guard with the authority and mission to direct a spill response when the responsible party does not take proper removal action or is unknown and the spill poses a substantial threat to the public health or welfare. 33 U.S.C. 1321(c) and National Contingency Plan 300.300. Section 300 of the NCP and Subpart H also describe how the Coast Guard can use private resources to fulfill this responsibility.

I would like to meet with you to discuss these issues and if you agree, begin the process of developing a procedure and an agreement tailored to meet the unique circumstances found in Prince William Sound.

There are two other issues we should address. Alyeska will respond to a discovery of crude oil on the waters of Prince William Sound even if the origin is not known. Under those circumstances, if the spiller is not quickly identified, we believe the response should be federalized.

Concerned citizens have asked about Alyeska's role in responding to phantom spills of refined petroleum products in Prince William Sound. In the past, Alyeska has responded voluntarily to such spills at the request of the Coast Guard, without seeking compensation. We will continue to be available to voluntarily assist the Coast Guard under these circumstances, with no actual duty to respond. These limitations are necessary because our resources cannot be dedicated to any effort other than our primary responsibilities to the TAPS trade vessels. We would be willing to discuss Alyeska's role in assisting the Coast

Guard's response to phantom spills. In the case of potential spills from cruise ships, fishing support vessels or fuel barges, Alyeska should only have a voluntary support role to assist the primary plan of the spiller. The responsible parties and the Coast Guard should enter into binding contracts with other Response Action Contractors to provide response capability for these types of spills.

I will contact you soon to discuss these issues.

Very truly yours,

M.F.G Williams
Vice-President
Environment & Contingencies

cc: Representative Bill Hudson
Senator Sam Cotten

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

OFFICE OF THE COMMISSIONER
410 Willoughby Avenue, Suite 105
Juneau, AK 99801-1795

Telephone: 465-5050
FAX: 465-5070

February 25, 1992 HB 540

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

Dear Representative Hudson:

Thank you for the copy of the Citizen's Oversight Council's report on Oil Spill Response Liability. We have reviewed the issues raised in your February 18, 1992 letter concerning response action contractor certification and liability limitation in Alaska. We have also completed a preliminary review of HB 540.

I preface my comments at this point by saying that we are currently reviewing the Council's Report and developing our position on this subject and the associated legislation that is being developed. We are very interested in the input that will undoubtedly be provided during future committee hearings. The information and testimony given will assist in the development of our position. With that in mind I would like to offer our preliminary views on the issues you have raised.

The Department supports legislation limiting liability for response action contractors that is carefully crafted. We believe that it is in the state's best interest to ensure there will be a quick and ready response in the event of another catastrophic spill, as well as for those releases that are significantly smaller but just as important to contain and cleanup in the shortest possible time.

Beyond the contractual arrangement, there are no other legal assurances that response action contractors who have a pre-existing agreement with a contingency plan holder will respond and perform when a spill occurs. The Department does not legally review or pass judgement on the validity of the these contracts and is not a party to them. However, the Department is developing emergency response contracts to provide the capability for responding to orphan spills (i.e., no responsible party) and spills where it may be necessary to take over or augment cleanup. Additional assurances are appropriate to increase the certainty of response by contractors who have contracted to provide a response with a contingency plan holder. In that regard we would support inclusion of language in Section 1 of HB 540 which would require response action contractors who have previously agreed to comply with the terms of a facility or vessel contingency plan to also comply and act pursuant with the terms of those plans unless otherwise directed by the SOSC or FOSC. This would provide an additional incentive for assuring response.

Certification of response action contractors is, in our view, a separate issue. Certification is currently being debated at the federal level. Some of the elements being considered include verification of equipment and personnel, validation of resources through inspections, certification of response capability, notification of down status and validity of response contracts, among others. The Department performs many of these functions already in the industry contingency plan review process. We participate in numerous spill drills, which are an excellent means for demonstrating response readiness and authenticating the capability of contingency plan holders.

Notwithstanding what might be done at the federal level, the elements of a certification program could be accomplished under existing authority by including appropriate parameters in the Department's oil and hazardous substances (commonly referred to as HB 567) regulations. A certification program in this case would only apply to response action contractors who have a contract with a contingency plan holder and the certification would occur in conjunction with the existing contingency plan review process. A separate certification review process would not be necessary. The program being contemplated at the federal level would likely require a separate review and approval process.

Regarding Recommendation #7 of the Council's report, we defer to the recent opinion from the Department of Law and we offer no further comments at this time.

I believe the "task force" referenced in your letter is the "Negotiated Rulemaking Committee" (REGNEG) that was formed by the Coast Guard to assist in drafting tank vessel regulations to implement the mandate of the Oil Pollution Act of 1990 (OPA 90). The State of Alaska was not selected to formally participate on this advisory committee (see enclosed letter from Admiral Henn). The State of California was selected as a member of the REGNEG Committee and has agreed to informally represent Alaska's and Washington's views as per our agreement under the States/British Columbia Oil Spill Task Force. However, Alaska is not bound in any way to a consensus that may be reached by the REGNEG Committee.

Other states selected for membership on the REGNEG Committee include Louisiana, Maryland and Wisconsin. Both of Alaska's Regional Citizen's Advisory Councils are on the committee. The majority of the committee membership is comprised of oil and shipping industry representatives. There is only one member from the environmental interest groups. The REGNEG Committee has been set up by the Coast Guard under the authority of the "Negotiated Rulemaking Act of 1990".

Since January, staff from this Department have attended two of the last three meetings in an observer status. The committee has been attempting to reach consensus on the issues of "adverse weather", "maximum extent practicable", "on board carriage of equipment", "plan contents", "vessel applicability", and "contractor certification". The most difficult issues seem to be defining response standards for "adverse weather" and "maximum extent practicable". These definitions have the potential to become substantially different than the counterpart provisions found in Alaska's laws, specifically the response planning standards given in AS. 46.04.030(k)(3-4).

Discussions at the REGNEG Committee on the subject of "contractor certification" have touched on the issues of type of services, capacity/quantity of service, location, self-assessment, and Coast Guard inspection/certification. Issues still under discussion include exactly how verification is to be achieved, frequency of verification/certification, the possibility of funding verifications, spill drills from the federal Oil Spill Liability Trust Fund, and contract validity. Enclosed is a copy of the Working Group issue paper concerning this matter.

We have a DEC staff member at REGNEG meetings this week. The next committee meeting is scheduled for the week of March 9 through 13 in Washington D.C. The Coast Guard plans to publish the "Notice of Proposed Rulemaking" in the Federal Register on or about May 1. The goal is to have an adopted rule in place, which may include RAC certification, by August, 1992 and in effect by February, 1993.

I hope these comments are responsive to your request and we look forward to working with you in the development of appropriate legislation.

Sincerely,

Janice Adair

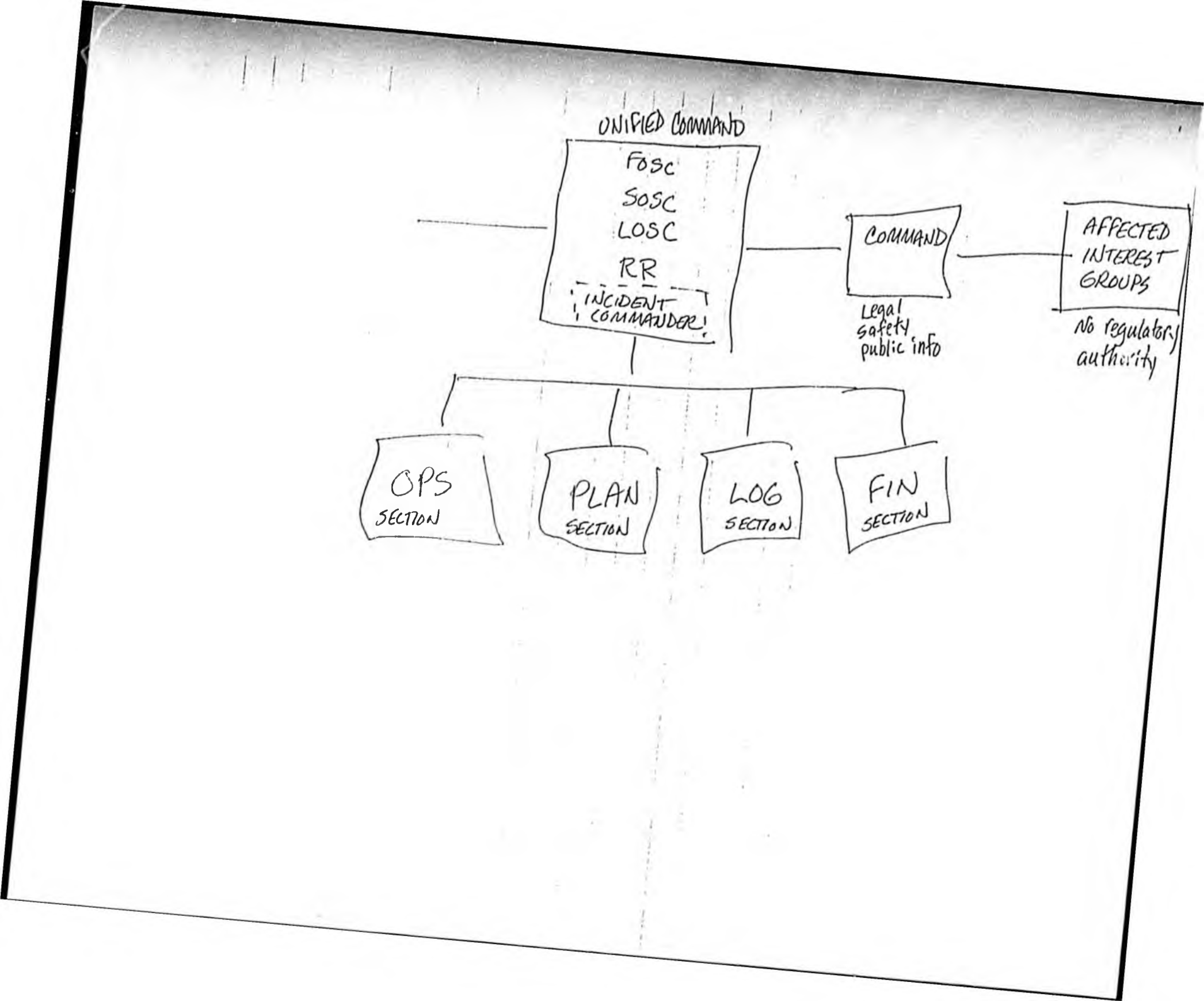
for John A. Sandor
Commissioner

CJP/MAC/JA/tls

Enclosure: January 7, 1992 letter from A. E. Henn

cc: Janice Adair, Special Assistant, Commissioner's Office
Mike Conway, Director, Division Spill Prevention and Response
Lynn Tomich Kent, Section Chief, SPPM

bcc: Chris Pace
Tracy Sherrer


UNIFIED COMMAND
FOSC
SOSC
LOSC
RR
INCIDENT COMMANDER!
COMMAND
Legal
safety
public info
AFFECTED INTEREST GROUPS
No regulatory authority
OPS SECTION
PLAN SECTION
LOG SECTION
FIN SECTION

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

March 26, 1992 Sent by telefax - hard copy to follow

Rep. Cliff Davidson
Chair, House Resources Committee

Subject: CS FOR SPONSOR SUBSTITUTE FOR HB 540 (O & G)

Dear Rep. Davidson,

United Cook Inlet Drift Association (UCIDA) represents the 585 salmon drift permit holders in Upper Cook Inlet. Some 350 permit holders are current members of our association. UCIDA is also active at the state and federal levels as a member of the Executive Committee of United Fishermen of Alaska (UFA).

UCIDA opposed HB 196 which was passed with a one year sunset provision last year. CS for HB 540 is even a lesser standard of liability than HB 196 and, arguably, even a lesser standard than that found in Federal law. Both HB 196 and CS for HB 540 represent poor public policy. I've enclosed our comments from last year on HB 196. These comments are fully applicable to CS for HB 540.

HB 196 should be allowed to sunset and we should return to the standard of "negligence".

As an active member of the Oil Reform Alliance (ORA), UCIDA is in agreement with the stand ORA has taken on this issue. It could be inferred from some of our comments on HB 196 that UCIDA feels that Alyeska is a RAC. We feel that studies undertaken by the Citizens Oversight Council, make it clear that Alyeska is required to respond to TAPS spills and that Alyeska is NOT a "voluntary" RAC. Furthermore, UCIDA feels that if Alyeska continues to claim to be a RAC and that, therefore, it is not required to respond to all TAPS spills, then the legislature must protect the public interest and require the Pipeline operators to create a response organization that will respond.

UCIDA represents fishermen who were severely impacted by two TAPS spills in three years - Glacier Bay (1987) and Exxon Valdez (1989).The issues of responce and liability, therefore, are of vital interest to our members.

As a final comment, I would like to note that the Cook Inlet Regional

Citizens Advisory Council created by OPA 90 is also opposed to this legislation.

I would appreciate it if you would distribute a copy of this letter and our comments on HB 196 to the members of your committee.

Sincerely,

Theo Matthews
Administrative Assistant

cc: House Sponsors, CS FOR HB 540
Senate Special Committee on Oil and Gas
Citizens Oversight Council
CIRCAC
Oil Reform Allianace
UFA

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

April 10, 1991

Representative Cliff Davidson
Chairman, House Resource Committee

Dear Representative Davidson,

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

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

Presently

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

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

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

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

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

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

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

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

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

We would like to suggest two possible options:

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

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

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

Sincerely,

Theo Matthews

Theo Matthews, Administrative Assistant
UCIDA

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

UCIDA
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April 23, 1991

Representative Dave Donley
House Judiciary Chair

Dear Rep. Donley,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Finally, UCIDA understands the provisions found in the Federal Oil

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

In conclusion:

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

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

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

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

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

UCIDA appreciates this opportunity to address your committee.

Sincerely,

Theo Matthews

Theo Matthews, Administrative Assistant

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

Pe arion

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

Kenai's Municipal ... scheduled to reopen ... Page 8

lyeska blasted for billion-dollar bond

ATHY BROWN
nsula Clarion

ough Mayor Don Gilman Wednesday ted Alyeska Pipeline Service Co. for it he calls an "unreasonable" demand threatens to shut down Tesoro-Alaska oleum Corp.'s Nikiski refinery.

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

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

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

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

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

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

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

See ALYESKA, back page

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

Continued from page 1

corporate assets.

But Tesoro can't do that, Burden said.

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

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

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

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

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

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

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

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

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

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

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

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

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

He believes Alyeska is being inflexible about the bill.

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

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

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

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

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

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

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

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

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

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

UCIDA
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November 14, 1991

Mr. Larry Smith, Chair
CIRCAC PROPS Committee
Kenai, Alaska 99611

Dear Mr. Smith,

I have reviewed the 10/28/91 DRAFT Report prepared for your committee by Mr. Mertz.

This report and others currently underway are a result of the passage last legislative session of HB 196 which effectively reduced the standard of liability from simple to gross negligence for RACs. UCIDA continues to oppose this reduced standard as bad public policy. Rather than detail our concerns in this letter, I have attached our comments to the 1990-91 Legislature for your Committee's information.

As noted in our letter of April 10, 1991, to Rep. Davidson, UCIDA feels that the passage of HB 196 relates not to good public policy but to what we feel was a temporarily successful attempt by Alyeska to blackmail Tesoro into spearheading a drive to reduce Alyeska's liability exposure as a RAC. Further, UCIDA recognizes the economic importance of Tesoro to the residents of Kenai Peninsula.

Two major issues drove and continue to drive the Alyeska/Tesoro issue:

1) The "direct action" bond originally demanded, i.e. the type of bond required, and the dollar amount of the bond required by Alyeska, and

2) Tesoro's natural desire to continue operations and the hope that passage of HB 196 would lead Alyeska to change its demands.

In the Specific Proposal Analysis of the RFP for the Mertz study:

- #1(b) addresses bonding requirements.

- #4 asks for an analysis of the effect of granting limited or complete immunity to RAC's.

It is with respect ot these two requests that I would like to address the majority of my comments.

Bonding Requirements: Type and Amount

Type

The **Draft** discusses the amount of "financial responsibility" requirements in several places but does not mention the various "forms or types" these requirements may take. Given the importance of this issue to Tesoro and Kenai Peninsula residents, I recommend that Mr. Mertz:

1) Analyze the difference between a "direct action bond" and "a combination of general business liability coverage" found in the Draft on p. 19.

2) Analyze whether or not a "direct action" demand by an RAC is even "reasonable" in light of the fact that all claims must be adjudicated and no insurance monies will be distributed to anyone prior to some final judgement.

3) Investigate the maximum amount of "direct action" coverage that is currently available.

4) Analyze what, if any, options are available for the State to require in statute that RAC's accept "a combination of general business liability coverage, ..." as noted in the Draft on p. 19.

5) Analzye whether or not a demand for a "direct action" bond in amounts that a RAC is aware are not available would constitute a criminal or civil offense - e.g. anti-trust or similiar statutes.

Amount

As noted above, we feel that Tesoro clearly hoped that the passage of HB 196 would lead to Alyeska changing both the type - direct action- and amount - $1 billion - of financial responsibility required of Tesoro. Apparently, Alyeska did drop the direct action requirement but, as noted by Mr. Mertz on p. 19, **Alyeska raised rather than lowered it financial responsibility requirements for Tesoro.**

In his Summary of Insurance Requirements on p. 19, Mr. Mertz merely notes **that "the amount of financial responsibility required by Alyeska, however, appears unique."** Mr. Mertz noted on p. 19 that "this requirement has caused a considerable amount of difficulty... and was the prime motivating factor behind passage of the bill which became AS 46.03.825, limiting RAC liability". Therefore, I feel that the public - whose interests CIRCAC should represent - should expect an in depth analysis of this requirement.

As noted in our correspondence with the legislature, given the current state of affairs, UCIDA can see nothing to theoretically prevent Alyeska next year from raising its financial responsibility requirements for Tesoro to $10

billion unless the legislature passes a bill exempting Alyeska from liability even in cases of gross negligence.

I would suggest the following be investigated by Mr. Mertz:

1) Can the state legally limit the demands place by one sector of private industry on another sector of private industry. If so, for what reasons?

2) Can the State require that an RAC adjust its financial responsibility requirements based on the capacity of a tanker - e.g. If Exxon must provide $1 billion for a super-tanker could the maximum demand for "1/2 a super-tanker" be limited to $500 million?

3) How have other states addressed this issue?

4) Are anti-trust or other civil offenses issues potentially at play?

The Draft by Mr. Mertz, covers a wide range of issues very well - but in broad strokes. UCIDA hopes there is time and adequate funding available for Mr. Mertz to provide a more in depth analysis of the two bonding issues we have raised. Further, UCIDA is aware of Mr. Mertz's past work in this field as Assistant Attorney General and would therefore hope that recommendations accompany his analysis.

Effects of Granting Limited Immunity to RACs

As noted in my introduction, UCIDA feels that the current statute AS 46.03.825 was not necessary and represents a bad public policy that resulted from the demands of one sector of private industry on another sector of private industry. The ultimate irony of the situation is that this further limitation of RAC liability did not even really produce the desired results for Tesoro.

Section #4 of the Specific Proposal Analysis ask "What is or would be the effect of granting limited or complete immunity to response action contractors?" Throughout the Draft Mr. Mertz makes references to concerns the public should note. I would reccomend:

1) A more detailed analysis of the changes made by the legislature in 1989 and 1990 and the resulting status of RAC liability prior to the passage of AS 46.03.825 in 1991.

2) The "upside" benefits from the passage of AS 46.03.825 from the perspective of a RAC is clear in the DRAFT. Mr. Mertz lists some questions which clearly require answers on p. 11 and also discusses the concerns the public should have **IN THE ABSENCE OF A RESPONSIBLE PARTY**, p.22-23. I would suggest the FINAL MANUSCRIPT should include a section listing all

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

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

Sincerely,

Theo Matthews
Administrative Assistant

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

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

March 6, 1992

Representative Kay Brown
P.O. Box V
Juneau, AK 998'1

Dear Representative Brown;

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

The following are answers to your questions.

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

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

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

Sincerely,

Tim Robertson by JWS

Tim Robertson, Member USCG Negotiated Rulemaking Committee
Representing the Regional Citizens' Advisory Council

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

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

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

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

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

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March 9, 1992

Alaska State Legislature
House Special Committee on Oil & Gas

Re: Position Statement - House Bill 540

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

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

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

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

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

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

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

Sincerely,

Per Norman Ingram
General Manager

Citizens' Oversight Council
on Oil and Other Hazardous Substances
3111 C Street, Suite 150 • Anchorage, Alaska 99503
(907)561-2101 • 561-7538 (FAX)

March 9, 1992

Representative Kay Brown
State Capitol
Juneau, Alaska 99801-1182

Dear Representative Brown:

The Citizens' Oversight Council has received your letter of March 4, 1992. Specifically, you asked the Council whether it had considered the issue of potential state liability if the state conducts a certification program for oil spill response action contractors, and whether the state could protect itself from liability.

In general, the potential for state liability through certifying oil spill response action contractors is speculative and not substantiated in court decisions. However, if the legislature wants to further minimize that speculative risk, it could specifically limit the state's potential liability in any legislation the legislature chooses to enact on this subject.

State liability is established by AS 9.50.250 and as that provision has been interpreted by courts. The general rule is that the state is not liable in tort when a state employee exercises due care in the execution of a statute or regulation, or performs or fails to perform a discretionary act.

This rule is known as "sovereign immunity". This rule is intended to prevent another branch of government (i.e., the judicial) from interfering with the policy decisions of the executive branch. This rule protects the discretionary decisionmaking of an agency. However, once a decision is made, that decision must be implemented using due care. In the context of emergency response, this means that the agency's decision whether and how to respond may be protected from tort liability, but once the decision to respond is made, it must be carried out with reasonable care or liability could

result. This distinction is why it is not entirely accurate, as continuously represented during the debate on this topic, that all other types of emergency responders are automatically fully immunized.

In any case, there does not appear to be precedent in state court caselaw finding the state liable for its actions in certifying, licensing, approving, or otherwise regulating conduct by professionals. Considering the considerable number of professions and individuals that the state licenses and certifies, that fact is significant in itself. However, there have been lawsuits brought on the the theory that if the state licenses someone, the state is somehow "in the loop" for liability if the licensee causes compensable damage.

The state does not guarantee performance or even a certain level of performance by virtue of the state merely certifying or licensing someone. In order to find state liability, the claimant would have to prove that the state employee acted negligently in licensing or certifying the person causing the harm. In the case of oil spill response action contractors, this would mean that the state employee certifying the response action contractor did not use reasonable care in determining that the response action contractor met the standards for certification. The state should not face exposure for wrongful actions or the failure to perform by a response action contractor.

In summary, the potential for state liability is not significant. However, lawsuits could be brought. Therefore, the legislature could provide for additional protection against state liability by specifically including language that the state or state employee is not liable for acts or omissions related to the review of oil spill contingency plans and the certification of oil spill response action contractors.

The Council hopes that this information is helpful to you. Please contact us if we can be of any further assistance.

Sincerely,

Michele Brown
Executive Director

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

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

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

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

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

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

Sincerely,

Representative Kay Brown

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

U.S. Department of Transportation
United States Coast Guard

Commander
Seventeenth
Coast Guard District

P.O. Box 25517
Juneau, AK
99802-5517
Staff Symbol: d
(907)463-2025

16450
February 24, 1992

The Honorable Bill Hudson
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

Dear Mr. ~~Hudson~~ Bill:

I'm responding to your letter of 19 February 1992 in which you requested information on the Coast Guard's current efforts taken towards implementing various aspects of the Oil Pollution Act of 1990 (OPA-90). I have addressed each of these issues below.

You mention that it is your understanding the Coast Guard is in the process of developing national standards to certify response action contractors. There is no provision in OPA-90 to specifically certify response action contractors. However, Section 4202 of OPA-90 does require periodic inspection of containment booms, skimmers, vessels and other major equipment used by petroleum transporters to remove discharges. OPA-90 also requires the conduct of periodic drills to assess removal capabilities. A negotiated rulemaking committee is presently developing "Vessel Response Plans and Carriage and Inspection of Discharge-Removal Equipment" regulations. These regulations will address the spill response equipment and arrangements required of petroleum transporters to ensure that potential spills can be adequately addressed. In instances where petroleum transporters elect to have a response action contractor meet their spill response capabilities it is envisioned the Coast Guard will inspect the response action contractor's equipment. The Coast Guard is also in the process of working to develop performance standards for spill response equipment, i.e. skimmer effectiveness.

With respect to your comments on the Marine Spill Response Corporation (MSRC), neither the National Contingency Plan nor OPA-90 has a requirement for this organization to exist or to maintain a presence in Alaska. MSRC has been developed by the oil industry as a cooperative means of helping address the added spill response capabilities that will be required by the regulations developing from OPA-90. From the Coast Guard's perspective we simply require oil transporters to have equipment, resources and commitments available to respond to oil spills as required by the previously mentioned regulations. Whether they meet these requirements through use of MSRC or other companies is not an issue.

16450
February 24, 1992

You further question the National Contingency Plan's (NCP) requirements for Ship Escort Response Vessels (SERVS) and how they would be dispatched to respond to spills outside Prince William Sound. There is no requirement in the NCP for SERV's to respond to spills in or out of Prince William Sound, nor are there presently spill response requirements for spills emanating from tankers transiting offshore from Alaska to the "lower 48". OPA-90 does, however, require issuance of regulations that will require escort of oil laden tankers in specified areas of Prince William Sound. These regulations have not yet been developed. The previously mentioned "Vessel Response Plans and Carriage and Inspection of Discharge-Removal Equipment" regulations will prescribe how oil transporters will be required to respond to the above oil spill scenarios.

In summary, many of the regulations which will implement OPA-90 are still being developed. Should you require additional information on these issues please feel free to call me or Commander Ed Page, Chief of the Seventeenth District's Marine Environmental Protection Branch, PH: (907) 463-2210.

Sincerely,

D. E. CIANCAGLINI
Rear Admiral, U. S. Coast Guard
Commander, Seventeenth Coast Guard District

COOK INLET RCAC

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

March 20, 1992

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

Dear Representative Davidson:

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

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

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

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

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

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

Sincerely,

Ken Castner

Ken Castner - Chair
Cook Inlet RCAC
Board of Directors

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

Oil Reform Alliance

3/17/92

A BRIEFING PAPER ON

RESPONSE CONTRACTOR IMMUNITY (HB 540) & RELATED ISSUES

by Riki Ott

Response contractor immunity is no longer an issue which, as in 1991, can be considered in and of itself as HB 540 attempts to do. The Citizens' Oversight Council ("Council") report on oil spill response contractors to the legislature in 1992 opened everyone's eyes to all the issues at stake over immunity. The following attempts to identify, clarify and summarize these issues for those of you who do not have time to read the Council's excellent 133-page report.

Issue: Legislative History of Response Contractor Immunity

Last year, the legislature passed HB 196 which limited liability for response contractors for the first 15 days of a cleanup. The new law was effective for one year. The primary advocate *in public* for HB 196 was Tesoro, the primary advocate *in private* was Alyeska: in seeking to reduce its own exposure to spill cleanup liability, Alyeska required a $1 billion direct action bond from Tesoro. The big oil companies loading in Valdez (Exxon, Arco, BP, and Amerada Hess) could pledge their assets, however the bond was more than Tesoro was worth and the requirement threatened to put the small independent out of business.

Faced with going out of business, or at a minimum a lawsuit with Alyeska, Tesoro asked the legislature to limit liability so Alyeska would reduce the bonding requirement. HB 196 was commonly known as the "Blackmail Bill." While public interest groups including the Oil Reform Alliance lobbied against HB 196 on the grounds that reducing the state's liability standard was bad public policy, the legislature felt compelled to do *something* for Tesoro. The legislature passed a compromise bill that limited liability for 15 days with a one year sunset clause and requested the Council to look into all the issues and report back to the legislature.

This year Tesoro is again taking a lead advocacy role (with Alyeska and its owner companies not far behind the scenes) for HB 540 which seeks to set the state's liability standard much lower

than the federal standard under the Oil Pollution Act of 1990 (OPA90). As many of you recall, Oil Reform Alliance member groups actively (and successfully) lobbied to preserve the right of states to set stricter standards than the federal government during the passage of OPA90. The oil industry lost this battle in Congress and has now lobbied in every coastal state to achieve "consistency with the federal legislation." Unfortunately, nineteen other coastal states have caved in to the oil industry's lobby and have provided immunity--with some noteworthy stipulations--for response contractors (p. 53-56). (*Note:* all citations are pages from the Council's report mentioned above.)

Issue: Negligence versus Gross Negligence

The basic negligence standard in law holds response contractors to 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" (p. 24-25.)

HB 196 reduced the liability standard from "basic" to "gross" negligence for response contractors for the first 15 days of a cleanup; HB 540 would reduce it to gross negligence, period. The Council recommended a liability standard of gross negligence **ONLY IF** a complete package for improving response was adopted including their other recommendations discussed below (Rec. #1, p. 8).

Issue: Compensation for Damages

It is misleading for proponents of HB 540 to imply that the spiller will always be held liable for the contractor's negligent actions. In many instances, such as an act of God, war or simple negligence by the State of Alaska or the U.S. government, the liability of spill cleanup and compensation for acts of negligence by response contractors has been shifted to the public. Further, in the case of an orphan spill or an insolvent spiller, extending immunity to contractors will most likely result in private parties being unable to recover damages for harms caused by the contractors (p. 47).

Under Alaska law pre-dating passage of HB 196, the spiller and the response contractor were held "jointly liable" for damages caused by the response contractor. HB 540, by holding only the spiller liable, leaves the public nowhere to go for damages from response contractors in the cases mentioned above.

But the issue here is not simply a matter of compensating the public for damages. It is obvious the public doesn't care who pays for damages. It is vastly more important to prevent additional damages to natural resources from happening in the first place from no or poor response.

Removing the threat of liability provided by the basic negligence standard eliminates the strongest motivation for contractors to exercise reasonable care, that is, there will be no incentive for the contractor to take the precautions and the care that it normally would.

The Council recognized this problem and recommended that a certification program containing "minimum professional standards" for response contractors be implemented *in conjunction with* the reduced liability standard (Rec. # 3, p. 9). **The Council expressed concern that if liability limits were granted without a corresponding certification program, damages to natural resources could increase** (p. 10).

Issue: A Guaranteed Response

There is a problem with existing law in that the state currently has no way to order a contractor to respond to a spill. The law mandates contingency (c-) plan holders to respond and be subject to all orders of the state or federal on-scene coordinator. However, c-plan holders have become increasingly reliant upon response contractors to conduct the actual response. There is no way under the state's current approval process for c-plans to ensure that the contractors listed in the plans will actually respond.

Proponents of HB 540 argue that granting "immunity" (i.e., gross negligence) will ensure a "bold and decisive" response, because contractors, freed of worries from liability risks, will rush to respond to spills. Interestingly, several service contractors have testified this year that they will not respond unless they have immunity (gross negligence), yet DEC is approving c-plans which list these very same contractors as the responders. HB 540 does not set up a mechanism to clearly mandate in law that contractors listed in c-plans will indeed respond and will be subject to all orders of the on-scene coordinator. (HB 540 has been nicknamed the "Field of Dreams Bill": give them immunity and they will come.)

The Council recommended that the certification process include requirements for (1) a guaranteed response (duty to perform) including to orphan spills, and (2) language that subjects contractors to all orders of the on-scene coordinator (Rec. #2, #5, #6, p. 8-10).

Issue: Alternative Ways to Provide Immunity in Special Cases

The Council argues that providing immunity to contractors and requiring a response (as opposed to just requiring a response) is the only "fair" way to get contractors to respond to orphan spills.

There is an alternative approach not discussed in the Council report. The state could offer its responder immunity to a contractor it orders to cleanup a spill. For instance, the Coast Guard granted immunity to CISPRI when it ordered the contractor to respond to the Shumagin Islands barge spill cleanup.

Under existing law, if the spiller is unknown or not responding, the state assumes control of the cleanup and reimburses the contractors for reasonable expenses. However, also under existing law, the State of Alaska has immunity as a response contractor for itself, municipalities and villages. By providing case-specific indemnification through the state, liability relief would not have to be granted to all contractors as under HB 540.

This alternative approach would also gain immunity for the coastal community cooperative concept sponsored by the Regional Citizens' Advisory Council. The RCAC has requested funding for the co-op from the state's 470 Fund. It is possible that, should this be the funding source, the coastal co-op would receive immunity as a state-sanctioned contractor. (A letter requesting clarification on this point has been sent to the RCAC.)

Issue: Certification of Response Contractors

Proponents of HB 540 ignore the Council's recommendations and instead argue that the certification process should be left up to the Coast Guard who is in the midst of a negotiated rulemaking (reg neg) process to develop regulations for OPA90, including the certification issue.

The Oil Reform Alliance fought long and hard for Alaska's own contingency plan system (HB 567 in 1990). We need our own certification system to insure implementation of our own c-plan system. So far, the only people who advocate the Coast Guard position seem to be HB 540 sponsor (Hudson) and the oil industry including their service contractors.

The Regional Citizens' Advisory Council, which is participating actively in the Coast Guard reg neg process, reports the process is extremely biased in the oil industry's favour and strongly urges the state to develop its own certification process.

Issue: Categories of Response Contractors

HB 540 treats all response contractors equally and so distributes immunity (gross negligence) equally to all parties.

The Council, however, went to great lengths in its report to distinguish among types of response contractors such as volunteers, "paid volunteers" (like fishermen), service contractors (VECO), industry cooperatives (CISPRI), and lastly, industry operations (Alyeska). This distinction is important when making arguments which types of contractors should, or shouldn't, have liability limits.

These five types of contractors fall into two categories: primary and secondary. The primary contractors are those listed in contingency plans and who, therefore, are providing assurance to the state that they will respond. Primary contractors include only service contractors and industry cooperatives: these were the only types of contractors covered by the recommendations in the Council's report.

In a similar attempt to distinguish among types of contractors and their corresponding liability limits, "response contractor" was defined in California regulation as people who are regularly involved in oil spill cleanup; i.e., primary contractors. This eliminated liability concerns of fishermen and volunteers. Immunity for the latter two groups is covered by private contractual agreement and good Samaritan laws, respectively, in much the same way these groups were covered in Alaska prior to enactment of HB 196. (Under good Samaritan law in Alaska, "a person who responds at the request of the government to a declared emergency is immune from strict liability and negligence" p. 46).

Strong arguments can be made that response contractors who are in the business of oil spill cleanup like service contractors and industry cooperatives should be held responsible for their actions (basic negligence). It is unfortunate that proponents of HB 540 have tried to drag in all classes of potential contractors, such as volunteers, fishermen and even Alyeska, to argue the need for this bill when these classes are covered adequately by other laws.

Issue: Alyeska's Spill Response Operations

Although the case for volunteers and fishermen was discussed earlier, Alyeska is another issue entirely. The Council found Alyeska is bound by federal law (Trans-Alaska Pipeline Authorization Act) to respond to pollution caused by TAPS operations including tankers (Sec. V.D., VII. D., p. 48-49) and that Congress was clearly looking for a single entity to oversee pollution control. Since the Exxon Valdez spill, Alyeska is now claiming to be a "volunteer" responder to TAPS tanker spills and Alyeska has required individual contingency plans from nearly 30 companies.

Both of these actions by Alyeska compound matters for the state. Instead of one responder to tanker spills, there are dozens with dozens of contingency plans and multiple spill drills. Alyeska has created a management nightmare (p. 24). Further, the state is paying a 25% share of response costs with no legal assurance that Alyeska will respond to a TAPS tanker spill in Alaska waters (p. 33). This is bad business. The Council recommended that state legislation should mirror federal legislation in terms of requiring Alyeska to respond to all TAPS oil spills (Rec. #7 p. 11).

It is not clear whether the Council recommends immunizing Alyeska or not. We believe, arguably, that it does not because the Council states "that Alyeska has a duty to respond to and abate

pollution relating to the operation of the TAPS and, therefore, is not a response action contractor at all" (emphasis added p. 31). The Council recommends immunity (gross negligence) for response action contractors only (p. 8).

The Prince William Sound RCAC Legislative Committee seems to have interpreted that the Council does recommend immunizing Alyeska though, because the committee stated tentatively that "it would seem grossly premature to immunize Alyeska from liability as a response action contractor unless and until adequate legal assurances exist to protect the Sound and its residents from another Exxon Valdez" (p. 126). The RCAC is expected to take a formal position on response contractor immunity issues at the board meeting on March 19-21.

The more pressing concern, however, for both the RCAC and the Council is the issue of Alyeska as a "volunteer" responder to TAPS tanker spills. Both are clearly of the opinion that Alyeska has a duty to respond and that this should be reflected in state law. HB 540 makes no attempt to clarify the "volunteer" response issue.

For the time being, the ORA is resisting immunization for Alyeska under any legislative scenario out of concern that immunizing Alyeska from damages as response contractors may insulate Alyeska, its pipeline owner companies and, in turn, their owners, from tanker oil spill cleanup responsibilities (p. 49).

Issue: Tesoro's Bonding Requirement

Unfortunately, HB 540 does not solve the problem of Tesoro's bonding requirement. After the passage of HB 196 last session, Alyeska increased Tesoro's bond by 20% to $1.2 billion instead of relieving Tesoro of the $1 billion requirement as legislators had hoped. (Alyeska did allow Tesoro to meet the bond through an insurance combination instead of direct action which did provide marginal relief.)

The Council, however, found that the bonding requirement by Alyeska falls in the category of tariff costs which should be subject to review by either FERC (Federal Energy Regulatory commission) (p. 51) or, as we found by further investigation, APUC (Alaska Public Utilities Commission) as being reasonably necessary and nondiscriminatory.

In other words, a simple request for such a review from the Legislature could resolve this critical issue for Tesoro as an alternative to HB 540.

Issue: Maximum Coastal Protection

The really major problem with HB 540 is that it gives response contractors immunity with nothing in return for the public. The Council recommended achieving maximum coastal protection for

Alaska in "trade" for immunity (Rec. #4 p.9) similar to the achievements in California.

In California, the promise of immunity in return for maximum coastal protection convinced the small private response contractors to work with the large co-ops; the four major cleanup co-ops to expand their scope of coverage; the co-ops to sign mutual aid agreements with each other and contracts with the state; 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; and the oil industry to adequately fund the co-ops (p. 103).

This creative and cooperative atmosphere in California sharply contrasts with the hostile working relations among contractors in Alaska. Alyeska has attempted to essentially blackmail Tesoro by an unreasonable bonding requirement; Tesoro funds over 50% of CISPRI, but not all operators in Cook Inlet are members of CISPRI because some "feel it is not in their best interest to join CISPRI" (pg. 99); CISPRI "pledged a $1 million fund for orphan spills" that could presumably include spills from non-members, but Tesoro has reservations about responding to orphan spills because of risk of litigation over damages...Further, large regions of our coastline remain at risk from spills like Southeast and Unimak Pass. The oil industry, including contractors, should be encouraged to look beyond their own region of operation and work together with the state and public to address these areas.

As the ORA has repeatedly testified, the public interest groups and volunteer responders from California endorsed the concept of immunity for contractors **ONLY as a trade for maximum coastal protection**. (A letter to this effect is being prepared by the California legislator who spearheaded the California bill as proponents of HB 540 repeatedly fail to make this distinction).

Also, significantly, at present, "liability immunity has not yet been granted to any response contractor in California" because "no one gets immunity until they all work together to give the state maximum achievable protection" (emphasis added pg. 91, 103). Further, the California immunity is only for 60 days, with a possible extension of 30 more days as opposed to HB 540 which does not put a time limit on the immunity.

And the really remarkable thing is that California achieved all this without an 11 million gallon spill. Alaska deserves at least the same.

The Oil Reform Alliance's Recommendations

1) Response contractor immunity is no longer an issue which should be considered separately from other inter-related issues: HB 540 is not a realistic approach to improving response and solving issues addressed in the Citizens' Oversight Council ("Council") report.

EITHER

2) Draft new legislation that includes, as a package, all the Council's recommendations EXCEPT immunity for response contractors. Note: The Cook Inlet RCAC voted to oppose HB 540, let HB 196 sunset and pass away, and endorse a liability standard of simple negligence except for vessels of opportunity which do not have contractual indemnification, for a limited time only.

OR

3) Adopt the Council's recommendations as a legislative package as follows:

a) certification for maximum coastal protection must be achieved prior to immunity being granted as per California

b) a time limit is put on the immunity as per California (as opposed to unlimited immunity as the Council recommends)

c) a STATE certification process must be in place and implemented prior to immunity being granted, and

d) Alyeska is not granted immunity as a responder.

FAX MEMO

TO: House of Representatives Resource Committee
Cliff Davidson, Georgianna Lincoln, Pat Carney, David Finkelstein, Bill Hudson, Ivan Ivan and Tom Moyer
FAX (907)465-3444

FROM: Tiny Schasteen
Unalaska, Alaska

DATE: March 27, 1992

SUBJECT: House Bill 540

The purpose of this memo is to request your help in protecting the environment of Unalaska and the entire State.

As I understand HB 540 it's goal is to prevent a spill responder who responds to an oil spill from being held liable for the entire spill.

Currently if You or I attempt to cleanup a spill we will be held responsible for that spill even if we had nothing to do causing the spill. This makes it impossible for anyone, including a "Good Samaritan", from cleaning up any oil spill not caused by them.

Three months ago there was a 12,000 gallon spill in Unalaska to which I dispatched men and equipment. The company I manage has born all the costs for this cleanup even we had nothing to do with causing the spill. In fact the spill was all the way across town, in a different bay. The owners of my company didn't have a problem with the costs incurred, however due to the fact that when we responded to this spill we accepted FULL RESPONSIBILITY for this spill, I have been instructed not to respond to any spill not caused by our company.

This is totally unacceptable! If HB 540 does not pass, it will prevent people with good intent, like myself, from trying to clean up spills they are not responsible for.

IF HB 540 DOES NOT PASS IT WILL BE AN ENVIRONMENTAL DISASTER TO RIVAL THE EXXON VALDEZ!

PRELIMINARY COMMENTS RELATING TO CS for SSHB 540

Section 1.

- Page 2, lines 15 - 24:

  Delete proposed sovereign immunity for the acts and omissions of state employees who register and approve response action contractors, approve contingency plans, and direct spill response activities.

  COMMENT: Granting immunity to the state for the acts and omissions of state employees who carry out their responsibilities always triggers important public policy considerations. For example, what will motivate state employees to carry out their tasks responsibly if, by virtue of this proposal, they will not be judged by the same standard of care applicable to other public employees and private employees? With respect to limited responder immunity, the spiller remains liable for damages in those instances where a responder is immune, but what fund will pay an injured party under this proposal if a state employee negligently approves a response action contractor or a contingency plan? If the state improperly takes over a spill response and misdirects it, from whom will the contingency plan holders, responders, and injured residents and others seek relief? Will the work of parole officers, fire marshalls, building inspectors, sanitation workers, etc., be similarly protected? The state has willingly and aggressively demanded a more active and responsible role in oil spill response activities and in prevention and contingency planning efforts. With that authority also comes a responsibility to carefully perform regulatory tasks and to stand ready to compensate those who are injured through the negligent acts and omissions of state employees.

Section 4.

- Page 4, line 13:

  Delete this section.

  COMMENT: This section cross references a definition of "damages" in the strict liability statute to an older 1972 definition appearing in AS 46.03.824. Yet, the current definition was apparently added during the HB 567 process. There is no explanation as to why this definition is needing any amendment, nor how such an amendment relates to limited responder immunity in this year's legislation.

Section 5.

- Page 4, line 22:

  Insert "or" after the semicolon.

  COMMENT: This appears to be an oversight.

Section 7.

- Page 5, lines 19:

  Remove the proposed deletion of "but not limited to."

  COMMENT: For an unexplained reason, the phrase "but not limited to" has been deleted from the definition of "response action." It is unclear whether this proposal reflects an attempt to place restrictions on the types of response subject to the limited immunity. Whether mitigation, clean up, removal, or some other response action is taken, it should be subject to the limited immunity. The language is purposefully general because of the difficulty in describing every conceivable response action.

Section 10.

- Page 6, lines 24 - 26:

  Insert "contractor" after "action" on line 24. Delete subsection (a)(4) on lines 25 and 26. On line 24, replace the semicolon with a period; move "and" on line 24 to follow the semicolon on line 23. Add subsection (h) on page 7, line 24, to read: "Nothing in this section is intended to amend AS 46.04.030(l) or to create a cleanup or performance standard that must be met by a holder of a contingency plan or a response action contractor."

  COMMENT: HB 567, Alaska's 1989 comprehensive oil spill prevention, contingency planning, and response legislation, states that its response planning standards do not constitute cleanup standards which must be met by a contingency plan holder. Likewise, language is necessary as stated above which will make it clear that nothing stated in this section concerning registration and approval of response action contractors will directly or indirectly erode that important provision. Moreover, circumstances related to spill response are variable depending upon weather, geography, remoteness, etc. Response efforts will require flexibility. To establish performance standards for response action contractors is unrealistic, and will not only invite controversy and litigation, it will chill immediate, bold and effective response efforts.

Page 7, line 2:

Insert "reasonably" before "necessary" on line 2.

COMMENT: Of course, fees to cover the costs of the registration program should be established and administered reasonably.

Alaska State Legislature

Please enter into the record my testimony to the House Resources
committee name

committee on HB540 , dated 4-15-92 .
bill/subject

VESSALS or Vessal leaving port with a certain amount of Oil or hazardous substance; Select a Broker company or special Insureance to deal with aa a possable accedant of a oil spill and Both Vessal owner and operator are insured going from Port to Port with the product in transport and in case that there is a accedant that Coast Gaurd be notifyed immediatly and order a Response if neccessary also that the State get information from Coast Gaurd and Dept. of Conservation to evaluate the situation and set up a committee to respond immediatly to the oil spill.

Also the Insureance Company be liabil to the State and Federal Dept. of Conservation and Coast Gaurd also Oil Company that the Oil Belongs to are liabil for damnages caused by it Accedant of a spill in question and pax Claims to Both private, and State and Federal Depts caused by spill

Insureance Company and order of Product and Vessal or Vessals owner and operators are Governed by state, Fed. laws when leaving port and arrives at port

Signed: Raymond N. Rice
Testifier

Myself personal option and Remark

Representing (Optional)

Gen Del Kodiak Ak 99615

Address

mess-907-486-5464

Phone No

L.I.O. Office
2 pgs total

APRIL 16, 1992

TO: REPRESENTATIVE CLIFF DAVIDSON
HOUSE RESOURCE COMMITTEE

I AM TESTIFING AS AN INDIVIDUAL NOT AS A MEMBER OF CIRCAC.
I DO SUPPORT HB 540 IN ITS ORIGINAL FORM FROM HOUSE OIL AND GAS.

SINCERELY
Marie Becker
MARIE BECKER

REFORM ALLIANCE 4/15/92

offered by Riki Ott - not adopted

CONTINGENCY PLANS

NATIONAL GENERIC LEVEL OF COVERAGE
NO SPECIFICITY

STATE MODERATE LEVEL OF COVERAGE

INDUSTRY HB567/AS 46.04.030 (SLA 90)
TAILORED TO ALASKA AREAS

ADVANTAGES TO INDUSTRY C-PLANS (AS 46.04.030)

PROVIDES MOST DETAILED PLANNING & RESPONSE STANDARD

(Establishing Alaska's own contingency plan system was a direct result of the Exxon Valdez oil spill and enormous effort by legislators, the public, and the oil industry. It is unconscionable to waive the requirements to meet this standard only 3 years after the Exxon Valdez spill.)

PROVIDES MOST COST EFFECTIVE SPILL RESPONSE PLANNING

(If ADEC does their job in reviewing industry's c-plans, ADEC will ensure the primary responder is professional & able. Another level of bureacracy, i.e., certification, shifts the focus off c-plans, costs money, and is totally unnecessary.)

PROVIDES MOST COST EFFECTIVE SPILL RESPONSE

(Certification of response contractors will not lead to a better response. Implementing industry c-plans as intended under existing law will provide adequate response to oil spills.)

OIL REFORM ALLIANCE 4/15/92

EXAMPLES OF ANCILLARY DAMAGE UNDER

BASIC NEGLIGENCE STANDARD

- **REFUSAL OF PRIMARY RESPONDER TO RESPOND**

(Spiller responsible under OPA 90 4301 (b)(7).)

- **RESPONSE EQUIPMENT NOT READY TO GO**

(Responder responsible. After the wreck of the Exxon Valdez, the response vessel was loaded with response equipment and buried under snow. Basic negligence provides incentive to have response equipment ready to go. Gross negligence is such a high standard that it would be almost impossible to prove since Alyeska did have a response vessel and equipment on site.)

- **BOOM FAILS BECAUSE IT'S POORLY MAINTAINED**

(Responder responsible. Basic negligence provides incentive to have response equipment ready to go.)

- **BOOM FAILS BECAUSE OF BAD WEATHER**

(Spiller responsible.)

- **BAY DAMAGED BECAUSE IT'S USED AS OIL CATCHMENT AREA**

(Spiller responsible, assuming bay is damaged because the responder was following the orders of a FOSC or SOSC.

THE LEVEL OF CARE PROVIDED BY A STANDARD OF BASIC NEGLIGENCE CANNOT BE IMITATED THROUGH A CERTIFICATION PROCESS.

ACTUAL DAMAGES

SPILLER	Responder

"SIMPLE NEGLIGENCE"

WHY IT WORKS FOR RESPONSE CONTRACTORS

HIGH RISK AREAS

The VEILED THREAT or FEAR that industry c-plan holders will loose their primary response contractors on June 1, 1992, and will not pump oil are UNGROUNDED. In many cases, industry owns the primary responder--they won't shut themselves down. Further, primary responders (SERVS, CISPRI) have contractual obligations to c-plan holders with reopener clauses of set time periods (90 days, 6 months).

Contractors are INDEMNIFIED from liability CONTRACTUALLY in agreements with c-plan holders. Indemnification in most cases is limited to acts that are strictly liable or simple negligence. If this level of care is acceptable to industry, why should the state be willing to indemnify these same contractors to a level of gross negligence?

LOW RISK AREAS

Ensuring response to spills in rural or isolated areas can be covered by competitive contractual agreements between the primary responder and the local municipality or villages. Contractors entering into an agreement with municipalities and villages receive limited immunity under AS 46.03.822.

SPECIAL CIRCUMSTANCES

Response to orphan spills is guaranteed when the state (municipality or village) orders a contractor to clean up a spill, because the state's immunity (AS 46.03.822) would extend to its responder.

Response to insolvent spillers is guaranteed when the federal or state government orders a contractor to clean up a spill, because the responder can apply to be reimbursed through the federal or state response fund.

Coastal community cooperatives, designed for nearshore response, can receive limited immunity by entering into agreements with the state, municipalities, or villages or by accessing the 470 Funds, such as requested by the Regional Citizens' Advisory Council in Prince William Sound.