XI. PROPOSED LETTER OF INTENT

Letter of Intent
For _____ Bill No. _____

"An Act requiring oil discharge prevention and contingency plans for all self-propelled nontank vessels exceeding 400 gross registered tonnage and for railroad tank cars and providing for an effective date."

It is the intent of the Legislature that the report of the Task Force on Motorized Oil Transport, the documents the Task Force used in preparing its report, and the transcripts of the Task Force meetings, be used by the Department of Environmental Conservation as the guidelines for drafting regulations to implement this legislation.

XII. DEPARTMENT OF LAW MEMORANDUM

MEMORANDUM

State Of Alaska

Department of Law

To: Larry Dietrick
Director, Div. Spill Prevention & Response
Dept. of Environmental Conservation

Date: November 15, 2000

File No.: 661-00-0597

Tel. No.: 269-5274

From: Breck C. Tostevin
Assistant Attorney General
Environmental Section – Anchorage

Subject: Task Force on Motorized Oil Transportation Legal Questions

You asked that I prepare responses to the following legal questions posed by various workgroups of the Task Force on Motorized Oil Transport for possible inclusion in the Task Force's Final Report to the Legislature mandated by Senate Concurrent Resolution No. 1 and SB 273 from the 21st Alaska Legislature.

Below are the questions posed by the various work groups. I have addressed the questions as concisely as possible in a question and answer format. These responses are not exhaustive or definitive legal analyses but rather present my interpretation of existing legal authorities.[1] The courts, in particular the Alaska Supreme Court, have not yet been called upon to interpret many of these liability provisions and how the courts may interpret them in the future is an open question.

1. Question: If the State of Alaska adopts a requirement set out under a current federal regulation as a mandatory requirement under a new State regulation, will the vessel owner or operator (whomever is the subject of the regulation) be subject to penalties by both the State and the Federal Government for failure to meet the terms of the regulation?

   Answer: Generally, yes. However, as a practical matter, State and federal regulators do not usually duplicate each other's enforcement actions.

[1] This is not intended to be, and should not be considered to be, an Attorney General's Opinion, informal or otherwise.

2. Question: If the State adopts an oil pollution prevention requirement as part of a prevention credit program, but does not make it mandatory under State regulations, will there be penalties assessed by the State for failure to meet the requirement?

   Answer: A recommended practice would not ordinarily form the basis for civil assessments (AS 46.03.760) for failure to meet the requirement. However, if adoption of a recommended practice was structured so that it relieved a person of meeting another regulatory requirement, then failure to meet the recommended practice would result in a violation of the other regulatory requirement and subject the person to penalties.

3. Question: If the Task Force develops a list of prevention measures and adopts a prevention program whereby a vessel owner or operator who performs a certain number of measures (non-mandatory) gets an award or some recognition for doing so, will this create a "standard of care" such that the vessel owner or operator who does not perform any measures will automatically be seen as negligent when that owner or operator has an oil spill even though that owner or operator was fully in compliance with the law?

   Answer: No. The standard of care for purposes of determining negligence is not established by such voluntary practices but by consideration of industry-wide practices, national standards and regulatory requirements -- among other factors -- in determining the standard of care of a reasonable person under the circumstances of the case. *See, e.g., Ward v. Lutheran Hospital & Homes Soc. of America*, 963 P.2d 1031, 1036-37 (Alaska 1998); *In re Bankers Trust Co*, 651 F.2d 160, 173-175 (3rd Cir. 1981). Moreover, the Alaska Supreme Court in *Doyle v. Peabody*, 781 P.2d 957, 959 (Alaska 1989) indicated that under AS 46.03.870 a private right of action does not exist to enforce DEC regulations in a negligence action seeking to use a DEC regulation as a standard of care. Finally, this liability concern about a negligence standard relating to oil pollution prevention practices does not take into account that vessel owners and operators are already strictly liable without fault for both public and private oil spill damages under both State and Federal law.

4. Question: If a vessel owner, for instance, joins a cooperative response action contractor organization, will that owner be subject to liability for the negligence or spill-clean up costs of another member of the cooperative who either cannot or will not clean up the spill? (Is there likely to be a successful "deep pocket" action against a member of the co-op with deep pockets?) If there is any such potential liability, can this be addressed by the by-laws or contracts within the cooperative?

Answer: Most cooperative response action contractor organizations are set up as corporations. As a separate corporation a cooperative is a separate legal entity from its members or shareholders as long as the corporation is adequately capitalized and not a shell used to defraud. *See, e.g. Uchitel Co. v. Telephone Co.*, 646 P.2d 229, 235 (Alaska 1982). Alaska Corporation law already protects shareholders (members) from direct liability. AS 10.06.438; *Elliot v. Brown*, 569 P.2d 1323 (Alaska 1977) (50% owner not individually liable simply because of mere control of corporation); *Croxton v. Crowley Maritime Corporation*, 817 P.2d 460, 465 (Alaska 1991) (functional analysis is not enough to void legal distinction between parent corporation and subsidiary corporation). Potential liabilities between the cooperative and its members (as well as financial responsibility issues) can be addressed both in the corporation's by laws and in contracts for membership. AS 45.45.900.

5. Question: If a shore-side facility that does not hold a c-plan for vessel operations (i.e. a lumber yard) contracts with a vessel owner or operator to haul the product from the shore-side facility to some other location, will the shore-side facility be liable for a spill from the fuel tanks of the vessel (the product owned by the shore-side facility is not fuel), absent any separate contractual arrangement between the vessel and the shore-side facility?

   Answer: Under the facts presented, the shore-side facility would not be liable under Alaska Statute. The shore-side facility would not be liable under AS 46.03.822 / AS 46.03.758, unless it owned or operated the vessel from which the fuel spilled or unless the shore-side facility owned the fuel in the vessel at the time of the spill. Unless the shore-side facility caused the oil spill, for example through a mechanical failure at the facility's dock, the shore-side facility would not be responsible for oil spill cleanup from the vessel under AS 46.04.020.

6. Question. Would the limitations of liability in AS 46.03.825 for oil spill response action contractors extend to a co-op or other organization established to hold a generic or fleet nontank vessel c-plan and which contracts to provide oil spill response services on behalf of a vessel owner or operator (hereinafter "c-plan co-op")? (The co-op under this scenario would be the c-plan holder under AS 46.04.030 and be issued the formal contingency plan approval certificate by DEC).

   Short Answer: A response action contractor (RAC) and a c-plan holder have two separate and distinct set of liabilities. Under current law, c-plan holders are also responsible parties under AS 46.03.822 because they are the owner or operator of the vessel or own the oil being transported by the vessel. AS 46.03.822(a)(1) & (2); 18 AAC 75.400(a). In such a case, a c-plan holder who is a responsible party under

AS 46.03.822 does not have RAC immunity under AS 46.03.825. *See* AS 46.03.825(b)(2)(A); AS 46.03.822(m) (1999).

The immunities provided in AS 46.03.825 to RACs do not extend to the duties owed by a c-plan holder under AS 46.04.030. In essence, AS 46.03.825 and AS 46.04.030 address different duties and different liabilities. RAC immunity addresses liability for "removal costs and damages" and the c-plan statute address liability for injunctions, civil assessments, and criminal violations. RAC immunity with respect to civil liability for removal costs and damages applies to actions brought by the State and third parties, while the c-plan statute liabilities apply to actions brought by the State.

Immunity under AS 46.03.825 was not intended to reach obligations held by a c-plan holder under AS 46.04.030(g). I reach this conclusion in part by considering AS 46.03.825(b)(2)(C) which describes the immunities of "primary response action contractors" (PRACs). A primary response action contractor is a RAC listed in a c-plan approved under AS 46.04.030 who contracts "with the applicable contingency plan holder" to provide response action services. Obviously a PRAC, which is a c-plan holder, cannot contract with itself.

Liabilities Arising Out Of Status As A C-Plan Holder. AS 46.04.030 imposes obligations due to the State of Alaska by a c-plan holder. These liabilities attach to the person who is issued the formal c-plan approval certificate; not to a person who prepares all or part of a contingency.

Specifically, AS 46.04.030(g) makes a c-plan holder subject to a court order to implement its c-plan, liability to the State for civil assessments under AS 46.03.760(a) and misdemeanor liability for criminal negligence for the failure to meet the following duties:

1) A c-plan holder must "comply with the plan." Compliance with the plan means to:

> (A) establish and carry out procedures identified in the plan as being the responsibility of the holder of the plan;
> (B) have access to and have on hand the quantity and quality of equipment, personnel, and other resources identified as being accessible or on hand in the plan;
> (C) fulfill the assurances espoused in the plan in the manner described in the plan;
> (D) comply with terms and conditions attached to the plan by the department under the authority of (e) of this section; and

(E) successfully demonstrate the ability to carry out the plan when required by the department under (e) of this section."

AS 46.04.030(r)(2)

2) A c-plan holder must have access to the quality and quantity of resources identified in the plan; and

3) A c-plan holder must respond with the quality and quantity of resources identified in the plan within the shortest possible time in the event of a spill.

AS 46.04.030(l) provides an additional clarification on the scope of subsection (g). Subsection (l) explains that the response planning standards in AS 46.04.030(k) "do not constitute cleanup standards to be met by the holder of a contingency plan" and that notwithstanding that subsection "failure to remove a discharge within the time period set out in (k) of this section does not constitute failure to comply with the contingency plan for purposes of (g) of this section or for the purpose of imposing administrative, civil, or criminal penalties under any other law."

Liabilities As A RAC. In contrast, a response action contractor under AS 46.03.825(a):

> who responds to a release or threatened release of oil is not civilly liable for removal costs and damages that result from an act or omission in the course of providing care, assistance, or advice
>
> (1) consistent with a contingency plan
>
> (A) approved under AS 46.03.040 if the response action contractor is listed in the contingency plan; or
>
> (B) prepared under AS 46.04.200, 46.04.210, or 33 U.S.C. § 1321(d) if the response action contractor is not listed in the contingency plan; or
>
> (2) as otherwise directed by the federal or state on-scene coordinator.

Consistent with a contingency plan "means in substantial compliance with a contingency plan." AS 46.03.825(g)(1).

Thus, a RAC for purposes of immunity under AS 46.03.825 and a c-plan holder for purposes of liability under AS 46.04.030(g) are held to different standards with respect to compliance with the contingency plan. A RAC must act in substantial

compliance, while a contingency plan holder must comply with the plan on the basis of the higher standards set forth in AS 46.04.030(g) and (r)(2).

With respect to primary response action contractors, ("PRAC," see definitions in AS 46.04.035 and 18 AAC 75.500) the RAC immunity in AS 46.03.825(a) does not apply to:

> a response action contractor who . . . (C) has agreed in writing to be listed as a primary response action contractor, who is listed as a response action contractor in a contingency plan approved under AS 46.04.030, and who fails to respond to a release or threatened release of oil that the primary response action contractor was required to respond to under its contract with the applicable contingency plan holder. (Emphasis added)

A c-plan co-op could not be considered a PRAC because it would be listed in the c-plan but could not contract with itself as the "applicable contingency plan holder." *See* AS 46.03.825(b)(2)(C).

In sum, the current statutory scheme in AS 46.03.825 does not appear to envision a response action contractor as also being a c-plan holder. Nor do I interpret RAC immunities under AS 46.03.825 as extending to the duties owed by a c-plan holder under AS 46.04.030(g).

7. Question. Would a third-party such as a ship agent/broker who prepared all or part of a contingency plan for the vessel owner or operator incur any new or additional liabilities under AS 46 by providing such a service? (The vessel owner/operator would be the contingency plan applicant and plan holder).

   Answer: No. The ship agent in this situation would not be a responsible party under AS 46.04.020, AS 46.03.758 or AS 46.03.822 by assisting with preparation of a c-plan. Nor would the ship agent be acting as a c-plan applicant or a c-plan holder within the meaning of AS 46.04.030. As a result, the ship agent/third party in this situation would not incur any new or additional liability under AS 46 for providing such a service to a vessel c-plan holder.

8. Question: If a non-profit organization is created to perform "incident command functions" associated with overseeing the responsible party's response to an oil spill, will that non-profit organization receive the same protection from civil liability under AS 46.03.825 as an oil spill response action contractor?

Answer: Yes. An organization providing incident command functions under contract to a responsible party would fall within the definition of an oil spill response action contract under AS 46.03.825 and be able to avail itself of the civil liability protections under that statute. It does not matter whether the contractor is a for-profit or non-profit business in order to be an oil spill response action contractor under AS 46.03.825.

9. What types of services are included within the oil spill RAC immunity under AS 46.03.825? Who must register with DEC as a PRAC and who may voluntarily register?

Answer: RAC immunity under AS 46.03.825 applies to "a response action contractor who responds to a release or threatened release of oil . . . for removal costs and damages that result from an act or omission in the course of providing care, assistance, or advice (1) consistent with a [relevant] contingency plan . . . or otherwise directed by the federal or on-scene coordinator." AS 46.03.825(a).

"Response action" is broadly defined by that statute "as an action taken to respond to a release or threatened release of oil, including mitigation, clean up, marine salvage, or removal of a release or threaten release of oil." AS 46.03.825(g)(2).

A "response action contractor" is:

> (A) a person who enters into a response action contract with respect to a release or threatened release of a hazardous substance and who is carrying out the contract, including a cooperative organization formed to maintain and supply response equipment and materials that enters into a response action contract relating to a release or threatened release;
> (B) a person who is retained or hired by and is under the control of a person described in (A) of this paragraph to provide services related to the response action contract; and
> (C) a person who acts as a volunteer and is engaged in a response action."

AS 46.03.826(11).

Finally, a response action contract is defined as:

> a written contract or agreement to provide response action with respect to a release or threatened release of a hazardous substance entered into by a person with
> (A) the department;

> (B) another person who has entered into an agreement with the department that provides for response action subject to the department's oversight and control;
> (C) a federal agency with jurisdiction over the release or threatened release; or
> (D) another person potentially liable for the release or threatened release under state or federal law;

AS 46.03.826(10).

In sum, a RAC is a person involved in providing services or equipment related to an actual release or threatened release of oil "who responds to a release or threatened release of oil." These services could include spill response notification, coordinating spill response for the responsible party, incident management team services, coordinating with response action contractors to initiate spill response and similar activities.

Pre-spill planning or drafting of c-plans would not be considered response action services for purposes of AS 46.03.825 because the contractor would not be "responding to a release or threatened release of oil." The term "threatened release," while not specifically defined in AS 46.03, has been generally interpreted to involve a substantial threat of an actual release of oil in a specific incident and not the general threat posed by the normal operations of a vessel. *Cf.* AS 46.08.900(15).

However, as noted above, a person's assistance with the drafting or development of a c-plan does not render that person a c-plan holder under AS 46.04.030 or a responsible party under AS 46.03.822 or AS 46.03.758. Given that their services do not actually involve physical oil spill cleanup, contingency planning contractors are not generally exposed to liability for the "removal costs or damages" which are the subject of the immunity in AS 46.03.825. I am not aware of any court cases addressing third party liability relating to the drafting of c-plans. Regardless of the speculative nature of uch liability, it could be addressed contractually between the vessel owner/c-plan holder and the contractor providing these contingency planning services and through professional liability insurance. AS 45.45.900.

PRAC Status and Registration. A PRAC is a response action contractor (RAC) who is 1) listed in a responsible party's c-plan as providing resources or equipment to contain, control or cleanup an oil discharge and 2) who is directly obligated under contract to the c-plan holder to provide those services. AS 46.04.035; 18 AAC 75.500. A PRAC must be registered with DEC in order for its resources to be listed in a c-plan and for DEC to approve the c-plan. AS 46.04.030(e);

AS 46.04.035. Even if not listed in a c-plan or directly obligated to a c-plan holder, any person may apply to DEC for registration and approval as a PRAC. 18 AAC 75.500(d). If a vessel agent, for example, agrees to provide "response action" services to a non-tank vessel owner/operator, then in addition to statutory status as a RAC, vessel agents could also voluntarily apply for PRAC status under 18 AAC 75.500(d). However, registration as a PRAC is not a prerequisite for RAC immunity if the contractor otherwise satisfies the requirements of AS 46.03.825.

10. Question: Can DEC inspect a vessel for compliance with federal requirements and can the USCG inspect a vessel for compliance with State requirements?

Answer: If within the general scope of the respective agency's inspection author /, one agency can, as a general proposition, inspect for the other agency's requirements. Under AS 46.04.060 and AS 46.03.020, DEC may inspect vessels to ensure compliance with DEC statutes and regulations. If a DEC statute or regulation adopts a federal regulation as a State requirement then DEC can inspect a vessel for compliance with that requirements. *See, e.g.,* 18 AAC 75.007. In addition, DEC may participate in an examination of the structural integrity and the operating and mechanical systems of regulated vessels, barges, pipelines, and facilities by Federal and State agencies with jurisdiction. If other Federal or State agencies with jurisdiction of a regulated vessel are performing timely and adequate inspections, DEC may perform its own inspection of the structural integrity and operating and mechanical systems of a regulated vessel by using personnel with qualifications in the areas being inspected. If DEC personnel identify violations of federal requirements during an inspection, DEC has agreed to share such information with the U.S. Coast Guard under its Memorandum of Agreement with the Commander of the 17th Coast Guard District. VI(B)(1), (3) & (7).

The United States Coast Guard is empowered to conduct inspection programs for the purpose of enforcing both international agreements and domestic law aboard United States and foreign-flagged vessels. Pursuant to its Memorandum of Agreement with DEC, the 17th Coast Guard District has also agreed to make its inspection records available to DEC and share all applicable information obtained from its vessel inspections with DEC. Consequently, if a Coast Guard inspector noted facts or circumstances which constituted a violation of State requirements that information would be shared with DEC. Under this inspection information sharing, DEC and the Coast Guard have agreed to work together to avoid inconsistent requirements, undue disruption to industry and to avoid unnecessary duplication. V1(B). DEC and the Coast Guard have also agreed to "endeavor to exchange information and conduct joint inspections or may pursue agreements under which a single inspection may fulfill both

State and Federal requirements. VI(B)(1). A copy of the relevant sections of the 1999 State-Coast Guard Memorandum Of Understanding on vessel inspections is attached.

11. AS 46.04.055(a) states that "a person may not cause or permit the operation of a nontank vessel" without approved proof of financial responsibility. In contrast, AS 46.04.030(c) (tank vessels) states that "a person may not operate a tank vessel or an oil barge within the waters of the state." The Spot Charter Group has expressed concern in a letter dated October 13, 2000 that the difference in language creates ambiguity as to the persons subject to the duties under AS 46.04.055. Is the "cause or permit the operation" language used in AS 46.04.055 intended to be different in scope than the "operate" language in AS 46.04.030(c)?

Answer: No. The cause or permit language in AS 46.04.055(a) was used to mirror similar language in AS 46.04.030(a) ("a person may not cause or permit the operation of an oil terminal facility") and .030(b) ("a person may not cause or permit the operation of a pipeline or an exploration or production facility"). The coverage of the "operate" language in AS 46.04.030(c) is the same as the "cause or permit" language in AS 46.04.055(a) because "cause or permit the operation" should be interpreted in light of the statutory definitions in AS 46.04.900. AS 46.04.900 defines "operator" as "the person who, through contract, lease, sublease, or otherwise, exerts general supervision and control of activities at the facility; the term includes, by way of example and not limitation, prime or general contractor, the master of a vessel and the master's employer, or any other person, who personally or through an agent or contractor, undertakes the general functioning of the facility."

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XIV. APPENDICES AND SUPPORTING DATA

Company affiliation for Task Force members

Eric Britten, Container Ship Industry – CSX Lines, LLC
Co-Chair Michele Brown, Commissioner, Department of Environmental Conservation
Gene Burden, Noncrude Industry – Tesoro Petroleum Companies, Inc.
Jim Carter, Regional Citizens' Advisory Council
Scott Carter, Spot Charter – Agrium, Inc.
Larry Dietrick, Director, Division of Spill Prevention and Response, DEC
Lee Egland, Alaska Petroleum Distributors & Transporters – Crowley Maritime Services
John Hansen, Cruise Ship Industry – Northwest Cruise Ship Association
Rick Harris, Spot Charter – Sealaska, Inc.
Bob Heavilin, Oil Spill Response Cooperative – Alaska Chadux Corporation
Co-Chair Pete Kott, Alaska State Representative
Lurilla Lee, Fishing Industry – Trident Seafoods
Doug Lentsch, Oil Spill Response Cooperative – Cook Inlet Spill Prevention & Response Inc.
Simon Lisiecki, Crude Industry – BP Amoco Shipping USA
Charlotte MacCay, Spot Charter – Cominco Alaska Incorporated
Stephanie Madsen, Seafood Processing Industry – Pacific Seafood Processors Association
Heather McCarty, Fishing Industry – At Sea Catcher Processors Association
Mike O'Hara, Marine Pilots – Southwest Alaska Pilots Association
David Owings, Oil Spill Response Cooperative – Southeast Alaska Petroleum Resource Organization
Ed Page, United States Coast Guard, Seventeenth District
Co-Chair Drue Pearce, Alaska State Senator
Ernie Piper, Alaska Railroad Corporation
Jeff Thompson, Shipping Agent, Alaska Maritime Agencies

Largest vessel by region

	Region	Largest non-tank vessels operating in the region	Fuel capacity	15 percent RPS	Predominant fuel type
1	Southeast	77,500 gross ton cruise ship	21,400 bbls and 1,541 bbls	3,210 bbls and 231 bbls	non-persistent and persistent
2	Prince William Sound	77,500 gross ton cruise ship	21,400 bbls and 1,541 bbls	3,210 bbls and 231 bbls	non-persistent and persistent
3	Cook Inlet	77,500 gross ton bulk carrier 34,600 gross ton liquid gas	30,300 bbls 32,700 bbls and 5,032 bbls	4,695 bbls 4,905 bbls and 755 bbls	persistent persistent and non-persistent
4	Kodiak	21,000 gross ton container vessel	18,200 bbls and 3,800 bbls	2,730 bbls and 570 bbls	persistent and non-persistent
5	Aleutian (excluding Dutch Harbor)	12,500 gross ton refrigerated tramper	21,700 bbls and 10,800 bbls	3,255 bbls and 1,620 bbls	persistent and non-persistent
5a	Aleutian (Dutch Harbor)	65,000 gross ton container vessel	52,000 bbls	2,600 bbls	persistent
6	Bristol Bay	12,500 gross ton refrigerated tramper	21,700 bbls and 10,800 bbls	3,255 bbls and 1,620 bbls	persistent and non-persistent
7	Western Alaska	12,500 gross ton refrigerated tramper	21,700 bbls and 10,800 bbls	3,255 bbls and 1,620 bbls	persistent and non-persistent
8	Northwest Arctic	6,500 gross ton refrigerated tramper	9,500 bbls	1,425 bbls	persistent
9	North Slope	drillship	8,000 bbls (estimated)	1,200 bbls (estimated)	persistent
10	Interior	not known	none		

Alaska Railroad RPS and Prevention Measures Recap

I. ARRC Response Planning Standard Volume Determination

Non-persistent: Maximum capacity per train is 41,250 barrels
Maximum train for non-persistent product is 75 cars
Tank car (23,000 gallons = 550 bbls.)
Total load = 1,725,000 gallons or 41,072 bbls. (rounded to 41,250 bbls.)
RPS: 15% is 258,750 gallons or 6188 bbls. (rounded up to 6200 bbls.)

Persistent: Maximum capacity per train is 3300 bbls
Maximum train for persistent product is six cars
Tank car (23,000 gallons = 550 bbls.)
Total load = 138,000 gallons or 3286 bbls. (rounded up to 3300 bbls.)
RPS: 15% is 20,700 gallons or 493 bbls. (rounded up to 495 bbls.)

II. RPS and Prevention Measures

Response Measures Currently in Place

1. ARRC Emergency Response Plan. ARRC will continue to maintain and update it.
2. Maintain, inventory, and replenish emergency response equipment in caches (connexs)
3. Review locations for response equipment caches.
4. Maintain trained ARRC emergency response staff and increase training in Incident Command System.
5. Maintain spill response term contracts.

Prevention Measures Proposed

The ARRC deems the greatest threat for an unpermitted discharge of petroleum is from a derailment. Thus, the primary prevention strategy is to reduce risk of derailment. The premise for implementing this strategy is:

1. Determine the areas of greatest risk[1] for derailment along the rail line.
2. Where risk is identified, develop preventative measures to reduce the risk to the lowest realistic level.
3. Where necessary and appropriate, supplement the preventative measures with strategically placed response equipment.

A major step in implementing this strategy is completion of the ARRC System Risk Assessment, being performed by ARRC and Rail Sciences, Inc. This risk assessment, to be completed by the end of December 2000, will provide a comprehensive analysis of the railroad's operating and mechanical systems, plus the track maintenance and engineering programs. As the operational and systematic risks are better understood and more clearly defined, more effective prevention and response measures can be implemented. These, in turn, can be incorporated into the ARRC Emergency Response Plan.

[1] For purpose of response planning and prevention measures "risk" includes not only the physical threat of derailment but also a determination of resources at risk, i.e., identification of environmental sensitive areas subject to a greater level of protection.

USCG – DEC memorandum of agreement

Following are excerpts from the memorandum of agreement between the U.S. Coast Guard and the Department of Environmental Conservation regarding oil spill prevention.

MEMORANDUM OF AGREEMENT
ON
OIL AND HAZARDOUS SUBSTANCE POLLUTION PREVENTION AND RESPONSE
BETWEEN
THE COMMANDER, SEVENTEENTH COAST GUARD DISTRICT
AND
THE ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION

WHEREAS, the United States Coast Guard and the State of Alaska share a common interest and responsibility for protecting the waters of Alaska and have determined that their cooperative response to large oil spills such as the EXXON VALDEZ oil spill has permitted the State and the Coast Guard to leverage available resources, which in turn has led to better protection of our environment; and

WHEREAS, the United States Coast Guard and the State of Alaska find efficiency in government is important to the public they serve and that entering into a Memorandum of Agreement that builds upon present close working relationships and identifies areas for expanded interaction will lead to increased protection of Alaska's marine environment at greater efficiency; and

WHEREAS, the authority for the USCG to enter into this Agreement can be found in 14 U.S.C. § 141.

WHEREAS, Congress enacted the Oil Pollution Act of 1990 (OPA 90) to protect the waters of the United States from oil pollution and to plan for the effective and immediate response in the event of an oil spill, and the President subsequently designated the Coast Guard as the Federal On-Scene Coordinator (FOSC) within the Alaska coastal zone; and

WHEREAS, Congress explicitly provided the provisions of OPA 90 do not: (1) preempt or affect the authority of any state to impose additional liability or requirements regarding oil discharges or other oil pollution within such a state or removal activities in connection with such a discharge; (2) affect the authority of any state to establish a fund to pay for oil pollution or the substantial threat of oil pollution costs or damages, or to require any person to contribute to such a fund; or (3) affect the authority of any state to impose any fine or penalty for violation of law relating to a discharge; and

. . .

VI

PREVENTION OF OIL SPILLS

A. **Cooperative Implementation**: The Parties are coordinating their efforts to prevent oil spills in the marine environment.

To the extent permitted under applicable laws, the Parties agree to cooperate in the execution of their respective regulatory responsibilities to minimize duplication of effort. The Parties will also seek to identify opportunities for innovative implementation of vessel and facility prevention plans. Both Parties recognize the importance of encouraging cross training in each other's regulations and rules including the areas of inspection and response.

B. **Vessel Inspections**: Each Party recognizes they may elect to independently exercise their respective examination responsibilities in accordance with applicable law, regulations and policies. The Cost Guard conducts inspection programs for the purpose of enforcing both international agreements and domestic law aboard United States and foreign-flagged vessels. The State has authority to conduct inspections for the purpose of ensuring compliance with state laws and regulations and can participate in joint examinations with federal agencies. Further, either Party may evaluate the inspection process and make recommendations for improvement or perform its own inspections in accordance with applicable laws.

1. The Parties agree to work together to avoid inconsistent requirements and to find ways to conduct vessel inspections in such a way that disruption to the industry is minimized and efficiency and safety maximized. To this end, the Parties will endeavor to exchange information and conduct joint inspections or may pursue agreements under which a single inspection may fulfill both state and federal requirements.
2. In implementing a State examination programs, the State agrees to avoid conflicts and unnecessary duplication in reviewing Federal inspection programs by on-going consultation with the Coast Guard.
3. Review of inspection records: The Parties each agree to make inspection records available to the other and to cooperatively review inspection results, subject to applicable laws, regulations, and procedures.
4. The State shall report recognized discrepancies in meeting the requirements of international agreements believed to exist aboard United Sates foreign-flagged vessels to the responsible Officer in Charge, Marine Inspection (OCMI).
5. Requirements in State Waters: The Parties will cooperate to establish consistent pollution prevention requirements, and to cooperatively monitor, examine and exchange information relative to those requirements, for vessels to operate in State waters.
6. The State will promptly inform the cognizant OCMI and the Coast Guard will promptly inform the ADEC Industry Preparedness and Pipeline Program's Marine Vessel Section Manager of any situation or circumstance relative to a vessel whose condition or equipment may significantly increase the potential for an unauthorized discharge or create an unusual or an unacceptable risk to public health and safety, or the safety of navigation. Both Parties also agree to ensure joint notification when an

initial report is received from Alyeska SERVS regarding any irregularity or indication of a problem which threatens a tanker or its cargo (including ballast water) as well as situations where a tanker leaves both the U.S. Coast Guard designated Prince William Sound and Valdez Arm traffic lanes (except when an outbound tanker leaved the lanes at the Hinchinbrook Entrance terminus).

7. Both Parties agree to share all applicable information obtained from their respective vessel inspections.

C. **Vessel Screening**: The Coast Guard, under federal law, through the District Commander and the Captain of the Port (COTP), has the authority to regulate the entry of vessels into the COTP zone, including those determined to be a threat to the environment. The State may establish the means by which it can determine whether tank vessels entering the waters of the State pose a substantial risk of harm to the public health and safety and the environment.

When the State determined that a particular vessel or vessels pose a substantial risk, that determination will be forwarded to the cognizant Captain of the Port (COTP). The COTP shall consider that information in making a determination under federal law as to appropriate action to be taken, if any, including the possibility of denial of entry.

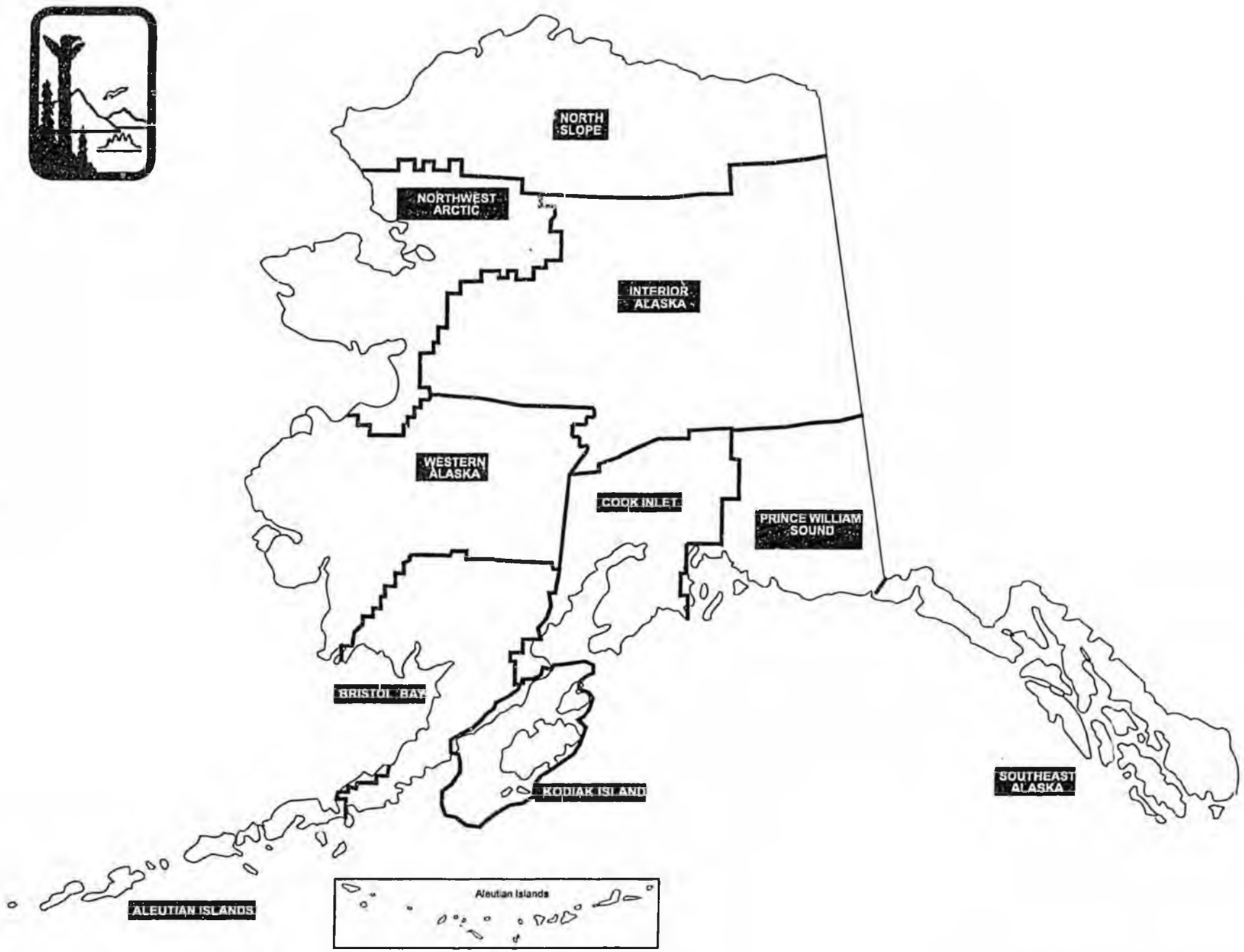
D. **Tank Vessel Crewing**: The Coast Guard establishes and enforces requirements for crewing, competence, and documentation of personnel aboard vessels.

1. The Coast Guard will consult with the State, to the extent practicable, in its evaluation and implementation of additional requirements for crewing, training, and qualification requirements through the crewing standards process.

2. The parties agree to actively promote and coordinate research projects to identify human factors, which need to be regulated to prevent pollution incidents.

E. **Tank Vessel Transfer Operations**: Monitoring tank vessel transfer operations have been identified as an effective pollution prevention action.

The Parties will cooperate to monitor transfer operations involving tank vessels (as well as cruise ships, fish processors, fishing vessels, etc.), including, but not limited to, dockside transfer at facilities, lightering and bunkering operations. Each party will advise the other of violations observed.



Map of DEC Oil Spill Regions

Equipment cost tables

I. Cleanup starter kit

Skimmer types	Fuel-water ratio	Liquid recovered to skim 300 bbls spilled fuel per day	Storage capacity needed to meet daily recovery	Cost of skimmer	Cost of storage capacity	Cost of cleanup starter kit
Weir	20% fuel, 80% water	1500 bbls	1500 bpd	$50,000	$ 300,000	$ 350,000
Lori or Lamor	80% fuel, 20% water	360 bbls	360 bpd	$60,000	$ 100,000	$ 160,000

II. Cleanup kit for RPS of 1500 bbls (Vessel capacity of 10,000 bbls)

Skimmer	No. of Skimmers	No. of 500 bbl Storage		Cost of skimmer	Cost of storage capacity	Cost of cleanup starter kit
Weir	1	3		$50,000	$ 300,000	$ 350,000
Lori or Lamor	1	1		$60,000	$ 100,000	$ 160,000

III. Cleanup kit for RPS of 3000 bbls (Vessel capacity of 20,000 bbls)

Skimmer	No. of Skimmers	No. of 500 bbl Storage		Cost of skimmers	Cost of storage capacity	Cost of cleanup starter kit
Weir	1	6		$ 50,000	$ 600,000	$ 650,000
Lori or Lamor	1	2		$ 60,000	$ 200,000	$ 260,000

IV. Cleanup kit for RPS of 6000 bbls (Vessel capacity of 30,000 bbls)

Skimmer	No. of Skimmers	No. of 500 bbl Storage		Cost of skimmers	Cost of storage capacity	Cost of cleanup starter kit
Weir	1	12		$ 50,000	$1,200,000	$1,250,000
Lori or Lamor	1	3		$ 60,000	$ 300,000	$ 360,000

Authorizing Legislation

Senate Bill 273

Senate Concurrent Resolution 1

HOUSE CS FOR CS FOR SENATE BILL NO. 273(W/TR)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY THE HOUSE SPECIAL COMMITTEE ON WORLD TRADE AND STATE/FEDERAL RELATIONS

Offered: 4/26/00
Referred: Finance

Sponsor(s): SENATOR PEARCE

A BILL

FOR AN ACT ENTITLED

"An Act regarding oil discharge prevention, and relating to contingency plans and proof of financial responsibility for all self-propelled nontank vessels exceeding 400 gross registered tonnage and for railroad tank cars; and providing for an effective date."

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

* **Section 1.** AS 46.04 is amended by adding a new section to read:

Sec. 46.04.055. Nontank vessels and railroad tank cars. (a) A person may not cause or permit the operation of a nontank vessel within the waters of the state or cause or permit the transfer of oil to or from a nontank vessel unless the person has furnished to the department and the department has approved proof of financial ability to respond to damages meeting the requirements of AS 46.04.040. Proof of financial responsibility required under this subsection is subject to adjustment of dollar amounts under AS 46.04.045 and is established, for a nontank vessel that carries

(1) predominantly persistent product, at $300 per incident for each

barrel of oil storage capacity on the vessel or $5,000,000, whichever is greater; and

(2) predominantly nonpersistent product, at $100 per incident for each barrel of oil storage capacity on the vessel or $1,000,000, whichever is greater.

(b) A person may not transport oil by railroad tank car or cause or permit the transfer of oil to or from a railroad tank car unless the person has furnished to the department and the department has approved proof of financial ability to respond to damages meeting the requirements of AS 46.04.040. Proof of financial responsibility required under this subsection is subject to adjustment of dollar amounts under AS 46.04.045 and is established at

(1) $300 per incident for each barrel of persistent product based on the maximum amount of persistent product storage capacity of any train on the railroad; and

(2) $100 per incident for each barrel of nonpersistent product based upon the maximum amount of nonpersistent product storage capacity of any train on the railroad or $1,000,000, whichever is greater.

(c) For purposes of AS 46.04.030(k), response planning standards apply to nontank vessels and railroad tank cars as follows:

(1) for a nontank vessel,

(A) containment and control of 15 percent of the maximum oil capacity of the nontank vessel within 48 hours; and

(B) cleanup of the discharge within the shortest possible time consistent with minimizing damage to the environment; and

(2) for a railroad tank car,

(A) containment and control of 15 percent of the maximum oil capacity of a train on the railroad within 48 hours; and

(B) cleanup of the discharge within the shortest possible time consistent with minimizing damage to the environment.

(d) Notwithstanding the requirements of AS 46.04.040(e) and (l) and 46.04.047, for purposes of (a) of this section, an applicant may provide evidence of financial responsibility by proof of entry of the nontank vessel in a protection and indemnity association or proof of coverage with another insurer that

(1) is financially solvent and has a favorable history of claim handling;

(2) provides coverage against pollution risks in at least the amount of the financial responsibility required under (a) of this section without any requirement for a special endorsement;

(3) does not agree to be subject to direct action in court or to appointment of an agent for service of process; and

(4) in the case of a protection and indemnity association or group of insureds, is not authorized by the Department of Community and Economic Development to sell insurance in the state so long as it is not listed by the Department of Community and Economic Development as being disapproved for use in the state.

(e) The requirements of (a) - (d) of this section do not apply to a nontank vessel operating in the waters of the state if the nontank vessel

(1) is engaged in innocent passage; for purposes of this paragraph, a nontank vessel is engaged in innocent passage if its operation in state waters, irrespective of whether it is a United States or foreign-flag vessel, would constitute innocent passage under the Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 U.S.T. 1606, or the United Nations Convention on the Law of the Sea 1982, December 10, 1982, U.N. Publication No. E 83.V.5, 21 I.L.M. 1261 (1982), were the vessel a foreign-flag vessel;

(2) enters state waters because of imminent danger to the crew, or in an effort to prevent an oil spill or other harm to public safety or the environment, and are inapplicable only until the vessel is able to leave state waters as soon as it may do so without imminent risk of harm to the crew, public safety, or the environment; or

(3) enters state waters after the United States Coast Guard has determined that the vessel is in distress, and are inapplicable only until the vessel is able to leave state waters as soon as it may do so without imminent risk of harm to the crew, public safety, or the environment.

* **Sec. 2.** AS 46.04.900(12) is amended to read:

(12) "oil terminal facility" means an onshore or offshore facility of any kind, and related appurtenances, including but not limited to a deepwater port, bulk storage facility, or marina, located in, on, or under the surface of the land or waters

of the state, including tide and submerged land, **that** [WHICH] is used for the purpose of transferring, processing, refining, or storing oil; a vessel**, other than a nontank vessel,** is considered an oil terminal facility only when it is used to make a ship-to-ship transfer of oil, and when it is traveling between the place of the ship-to-ship transfer of oil and an oil terminal facility;

*** Sec. 3.** AS 46.04.900(21) is amended to read:

(21) "vessel" includes tank vessels, [AND] oil barges**, and nontank vessels**;

*** Sec. 4.** AS 46.04.900 is amended to add new paragraphs to read:

(24) "nonpersistent product" has the meaning given to "non-persistent or Group I oil" in 33 C.F.R. 155.1020;

(25) "nontank vessel" means a self-propelled watercraft of more than 400 gross registered tons; in this paragraph, "watercraft" includes commercial fishing vessels, commercial fish processor vessels, passenger vessels, and cargo vessels, but does not include a tank vessel, oil barge, or public vessel;

(26) "persistent product" has the meaning given to "persistent oil" in 33 C.F.R. 155.1020;

(27) "public vessel" means a vessel that is operated by and is either owned or bareboat chartered by the United States, a state or a political subdivision of that state, or a foreign nation, except when the vessel is engaged in commerce;

(28) "railroad tank car" means rolling stock used to transport oil in bulk as cargo by rail;

(29) "train" means connected rolling stock operated as a single moving vehicle on rails; for purposes of this paragraph, "connected rolling stock" includes railroad tank cars.

*** Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to read:

TASK FORCE ON MOTORIZED OIL TRANSPORT. (a) There is established a Task Force on Motorized Oil Transport within the Department of Environmental Conservation.

(b) The Task Force on Motorized Oil Transport shall

(1) determine how to implement the response planning standards set out in

AS 46.04.055(c), added by sec. 1 of this Act, for nontank vessel and railroad tank car contingency plans; and

(2) deliver a report to the Twenty-Second Alaska State Legislature on or before the first day the legislature convenes that contains its recommendations with respect to implementation of the response planning standards set out in AS 46.04.055.

* **Sec. 6.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REGULATIONS. The Department of Environmental Conservation shall proceed to adopt regulations necessary to implement the changes made by this Act. The regulations take effect under AS 44.62 (Administrative Procedure Act), but not before the effective date of secs. 1 - 4 of this Act.

* **Sec. 7.** Sections 5 and 6 of this Act take effect immediately under AS 01.10.070(c).

* **Sec. 8.** Except as provided in sec. 7 of this Act, this Act takes effect September 1, 2000.

CONFERENCE CS FOR SENATE CONCURRENT RESOLUTION NO. 1

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - SECOND SESSION

BY THE CONFERENCE COMMITTEE

Offered: 4/27/00

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE SENATE COMMITTEE ON COMMITTEES

A RESOLUTION

Relating to the Task Force on Motorized Oil Transport.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS concern has developed among the people of Alaska about potential petroleum product spills from the Alaska Railroad and nontank vessels operating in Alaska waters; and

WHEREAS there are many complexities in applying oil spill prevention and response rules to the Alaska Railroad and to the various classes and categories of nontank vessels operating in the waters in different areas of Alaska; and

WHEREAS it is the intent of the legislature to establish reasonable oil spill prevention and response rules for the Alaska Railroad and for nontank vessels taking into account the different classes of vessels and different operating conditions in Alaska and the costs associated with the rules; and

WHEREAS it appears that several months of work by interested parties and the Department of Environmental Conservation will be needed to draft the rules for consideration by the legislature;

BE IT RESOLVED that the Alaska State Legislature establishes the Task Force on Motorized Oil Transport, composed of a number of members as follows:

(1) one member appointed by the President of the Senate from among the members of the Senate;

(2) one member appointed by the Speaker of the House of Representatives from among the members of the House of Representatives;

(3) one member to serve as a representative of the United States Coast Guard, appointed by the commanding officer of the 17th Coast Guard District;

(4) one member from a response action co-op in Alaska appointed by the Governor with the advice and consent of the Senate and House members of the task force;

(5) one member from the Alaska Railroad appointed by the Governor with the advice and consent of the Senate and House members of the task force;

(6) one member who is a maritime shipping agent in Alaska appointed by the Governor with the advice and consent of the Senate and House members of the task force;

(7) one member from the Alaska Steamship Association appointed by the Governor with the advice and consent of the Senate and House members of the task force;

(8) one member from the container ship industry operating in Alaska appointed by the Governor with the advice and consent of the Senate and House members of the task force;

(9) two members from the spot charter vessel industry in Alaska appointed by the Governor with the advice and consent of the Senate and House members of the task force;

(10) the director of the division of spill prevention and response in the Department of Environmental Conservation;

(11) the commissioner and deputy commissioner of the Department of Environmental Conservation; and

(12) other participants as may be agreed to by the commissioner of environmental conservation and the Senate and House members of the task force; and be it

FURTHER RESOLVED that the commissioner of environmental conservation, or the deputy commissioner, shall serve as chair of the task force, and that the Department of Environmental Conservation shall provide staff support to the task force; and be it

FURTHER RESOLVED that the task force may meet as frequently as its members determine necessary to perform the work; and be it

FURTHER RESOLVED that the task force shall determine how to achieve response

planning standards for a railroad tank car contingency plan and for a nontank vessel contingency plan as set out in a version of an Act of the Twenty-First Alaska Legislature regarding oil discharge prevention, and relating to contingency plans and proof of financial responsibility for all self-propelled nontank vessels exceeding 400 gross registered tonnage and for railroad tank cars; and authorizing inspection of nontank vessels and trains; and be it

FURTHER RESOLVED that the task force shall consider only the following motorized oil transport:

(1) self-propelled watercraft of more than 400 gross registered tons, except when the watercraft are tank vessels, oil barges, or public vessels operated by and owned or bareboat chartered by the United States, a state, a political subdivision of a state, or a foreign nation; and

(2) railroad tank cars that are rolling stock used to transport oil in bulk as cargo by rail; and be it

FURTHER RESOLVED that the task force shall deliver a report to the Twenty-Second Alaska State Legislature on or before the day the legislature first convenes that contains recommendations by the task force concerning

(1) Alaska statutes and regulations not subject to preemption by federal law that are calculated to achieve the response planning standard for motorized oil transport in a practical and cost-efficient manner; the Department of Environmental Conservation has the burden of showing why the response planning standard cannot be implemented using containment equipment that is readily available for purchase in the market;

(2) practical measures to implement the response planning standard as are necessary to take into account the special conditions within waters of the state west of 157 degrees West Longitude or north of 62 degrees North Latitude;

(3) use of fleet plans, vessel agents, generic contingency plan contents established by regulations, streamlined contingency plans with membership in a nonprofit corporation that is a primary response action contractor, and spill prevention measures as means of achieving the response planning standard; and

(4) inspection measures to be included in the regulations; and be it

FURTHER RESOLVED that the task force is terminated on the first day of the Twenty-Second Alaska State Legislature.

The Boat Company
1730 M Street, N.W., Suite 204
Washington, D.C. 20036

Phone: (202) 338-8055
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To: The Honorable Vic Kohring

From: Michael A. McIntosh

Date: February 12, 2001

FAX #: (907) 465-3818

Number of Pages
Including Cover Sheet: 3

THE BOAT COMPANY

1730 M Street, NW, Suite 204
Washington, DC 20036
Phone (202) 338-8055 Fax (202) 234-0745

February 12, 2001

The Honorable Pete Kott
Chairman, Rules Committee
State of Alaska

Transmitted via FAX

Dear Representative Kott:

This letter addresses concerns we have re: HB 55.

First a note on ourselves. The Boat Company operates three small passenger vessels (carrying capacity 12, 20 and 24 passengers) which run tours in Southeast Alaska during the summer season. I should add, we are an Alaskan corporation, have recently signed a lease to occupy a portion of the old pulp mill site in Sitka and are building warehouse and dock facilities which will enable us to move our boats plus maintenance and operations departments there (hopefully by the end of the summer).

Two of our vessels are wooden-hulled, ex U.S. Navy minesweeps, the third a new aluminum-hulled vessel that is a look-alike for the first two.

The Task Force on Motorized Oil Transport outlines in its report to the legislature (Pg. 54) vessels which range in size from 6,500 to 77,500 gross tons and which carry 9,500 to 52,000 barrels of oil (400,000 to almost 2,200,000 gallons).

Tonnage, as you are no doubt aware, is a measure of volume not of weight. Specifically, 100 cubic feet of enclosed space equals 1 ton (has nothing to do with weight, displacement of water, etc., etc.).

Further, in the most simple terms, there are two forms of tonnage measurement, i.e., registered gross tons (International) and regulatory gross tons (U.S.A.).

Our vessels, several of which may be swept up in HB 55 (SB 16) carry 70 (in the smallest) to 280 (in the largest) barrels of oil (3,000 to 12,000 gallons) divided between anywhere from 4-to-6 separate tanks. This is a small amount compared to the figures mentioned in the study/report.

We have attempted but, to-date, have been unable to learn the specific concern the legislature has regarding the size of potential spills it wanted (intended) to address, i.e., 5,000, 10,000, 20,000 barrels, etc.

However, if it was not the intent of the legislature to reach down to "the little guys", we would hope the legislature would consider adding to its current legislation something like "....400 registered gross tons carrying at least 500 barrels...." (or some other figure the legislature finds appropriate).

West Coast Corporate and Sales Office: 811 First Avenue, #466, Seattle, Washington 98104 Tel (206) 624-4142 Fax (206) 624-4141
Operations Office: 19625 Viking Avenue NW, Poulsbo, Washington 98370 Tel (360) 697-5454 Fax (360) 697-4213

In closing I would add that we believe Senator Murkowski, in his Federal legislation addressing problems of gray/black water discharges, recognized the inherent difficulties of using tonnage as a criteria and as a result, rather directed his attention to the number of passengers it carried, i.e., the cause of the size of the effluent discharged.

There are large vessels which carry small amounts of oil and small that carry large, so the issue is really what is the size of a potential spill the legislature wishes to address. Our suggested change is merely a reflection of the same, i.e., specifying the size of the potential discharge rather than the size (tonnage) of the vessel.

Thanks for your consideration.

Sincerely,

Michael A. McIntosh

MAM:osk

cc: The Honorable Vic Kohring, Chairman
Transportation Committee
The Honorable Beverly Masek, Co-Chairwoman
Resources Committee
The Honorable Eldon Mulder, Co-Chairman
Finance Committee
The Honorable Drew Scalzi, Co-Chairman
Resources Committee
The Honorable Bill Williams, Co-Chairman
Finance Committee

DEC FACT SHEET

Alaska Department of Environmental Conservation
555 Cordova St., Anchorage, AK 99501
Phone: (907) 269-3784 Fax 269-3783
December 11, 2000

Task Force on Motorized Oil Transport, Recommendations

Legislation signed into law earlier this year (SB 273) required the Alaska Railroad and sea-going vessels of 400 or more gross tons to show they have the financial means necessary to respond to and clean up an oil spill.

The bill set a response planning standard requiring sea-going vessels of 400 or grosser tons and the railroad to demonstrate the ability to contain and control 15 percent of their maximum oil capacity within 48 hours of a spill and cleanup in the minimum time possible.

The bill did not specify how vessels and the railroad could achieve this response planning standard. Instead, the bill established a task force (list of members attached) to determine how to implement it. On December 11th from 9:30 AM to noon at the Anchorage Legislative Information office, the task force steering committee will meet to review and approve recommendations for the Legislature's adoption. In its report, the task force states that the process to implement the standard should be realistic, effective, economically feasible, and flexible.

The draft plan has the following requirements:

- Vessels and the railroad must have DEC-approved contingency plans. Flexibility in meeting the contingency plan requirements is provided by allowing streamlined, generic, fleet, individual or alternative plans.

- Each vessel and the railroad must designate a qualified person with appropriate spending authority to activate the response and commit resources in the event of a spill.

- Each contingency plan holder must have staff trained in incident management or equivalent resources available to meet the response planning standard.

- Each contingency plan holder must either (1) have a contract in place with a primary response action organization, such as SEAPRO, Chadux, or CISPRI; or (2) have the equipment, personnel, and experience to cleanup a spill.

- Regular oil spill cleanup drills and inspection.

- Contingency plan filings must be electronically posted for public access.

The draft report of the recommendations is available for public review at http://www.state.ak.us/dec/nontank/home.htm.

The recommendations are based on Alaska's existing response infrastructure and provide maximum flexibility for meeting the requirements. Use of the existing response infrastructure and the addition of vessel agents acting as "response plan facilitators" will significantly strengthen Alaska's spill safety net. Alaska is the only state on the West Coast that has not extended its contingency plan laws to include these vessels.

Members, Task force on Motorized Oil Transport

Steering Committee
Senator Drue Pearce (R-Anchorage)
DEC Commissioner Michele Brown
Rep. Pete Kott (R-Eagle River)

Task Force
Rick Harris
Eric Britten
Lurilla Lee
Lee Egland
Gene Burden
John Hansen
Michael O'Hara
Dave Owings
Ernie Piper
Charlotte MacCay
Bob Heavilin
Jim Carter
Ed Page
Jeff Thompson
Simon Lisiecki,
Heather McCarty
Stephanie Madsen
Doug Lentsch
Scott Carter

Ex Officio
Joe Green
Andrew Halcro
Beth Kerttula
Eldon Mulder

DEC
Larry Dietrick
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Steve Provant
Breck Tostevin
Claire Fishwick

Facilitators
Judy Erickson
Brian Rogers

TASK FORCE ON MOTORIZED OIL TRANSPORT

STEERING COMMITTEE

Commissioner Michele Brown, Chair
Representative Pete Kott
Senator Drue Pearce

TASK FORCE MEMBERS

Eric Britten, Container Ship Industry
Gene Burden, Noncrude Industry
Jim Carter, Regional Citizens' Advisory Council
Scott Carter, Spot Charter
Larry Dietrick, Director, Division of Spill Prevention and Response, DEC
Lee Egland, Alaska Petroleum Distributors & Transporters
John Hansen, Cruise Ship Industry
Rick Harris, Spot Charter
Bob Heavilin, Oil Spill Response Cooperative
Lurilla Lee, Fishing Industry
Doug Lentsch, Oil Spill Response Cooperative
Simon Lisiecki, Crude Industry
Charlotte MacCay, Spot Charter
Stephanie Madsen, Seafood Processing Industry
Heather McCarty, Fishing Industry
Mike O'Hara, Marine Pilots
David Owings, Oil Spill Response Cooperative
Ed Page, United States Coast Guard
Ernie Piper, Alaska Railroad Corporation
Jeff Thompson, Shipping Agent

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PREVENTION WORK GROUP CO-CHAIRS

Eric Britten, Heather McCarty, Mike O'Hara

CONTINGENCY PLANNING WORK GROUP CO-CHAIRS

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Pat Carter, Sen. Drue Pearce
Judy Erickson, Capital Information Group
Breck Tostevin, Department of Law
Denise Henderson, Rep. Pete Kott

Alaska Department of Environmental Conservation

Alaska's Oil Spill Safety Net

Task Force on Motorized Oil Transport

FINAL
REPORT
December 15, 2000

information insights

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TASK FORCE ON MOTORIZED OIL TRANSPORT

STEERING COMMITTEE

Commissioner Michele Brown, Chair
Representative Pete Kott
Senator Drue Pearce

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TASK FORCE ON MOTORIZED OIL TRANSPORT FINAL REPORT
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I. EXECUTIVE SUMMARY

Financial responsibility and oil spill response planning requirements have been in place since 1990 for tank vessels carrying petroleum as their principal cargo. Senate Bill 273, enacted by the 2000 Alaska Legislature, established similar requirements for nontank vessels of more than 400 gross tons, and for railroad tank cars.

The new law establishes a response planning standard (RPS) for "containment and control of 15 percent of the maximum oil capacity" of the nontank vessel or railroad train within 48 hours. Cleanup is required "within the shortest possible time consistent with minimizing damage to the environment."

The bill established the Task Force on Motorized Oil Transport and charged the Task Force with determining how to implement the response planning standard. The Legislature also passed Senate Concurrent Resolution 1, setting the membership of the Task Force as well as the requirements for the Task Force report. The resolution asked the Task Force to recommend Alaska statutes and regulations to achieve the response planning standard in a practical and cost-efficient manner, use of fleet plans, vessel agents, generic contingency plans, streamlined contingency plans and spill prevention measures, and inspection measures. This report completes the Task Force work under SB 273 and SCR 1.

The Task Force recommends implementing the standard with measures that are:

- **Realistic**, capable of being implemented with available technology and expertise;
- **Effective,** providing real protection to the environment;
- **Economically feasible,** capable of being implemented without unreasonable costs; and
- **Flexible,** providing a wide variety of options and choices for vessel owners and shippers to meet the requirements of the law.

The Task Force made recommendations regarding the response planning standard in recognition of federal pre-emption issues. The recommendations provide a means of implementing the response planning standard that includes fleet plans, vessel agents, a streamlined contingency planning process, and voluntary spill prevention measures.

The recommendations recognize the existing framework of response planning requirements for tank vessels while providing opportunities for vessel owners and operators to determine their most efficient means of meeting the standard. The Task Force envisions that market forces will yield several alternative compliance choices for most vessel owners.

The requirements of these recommendations apply only to vessels in state waters, generally within three miles of shore.

Summary - Response Planning Standard

The Task Force recommends the response planning standard be based on an assumed sea state of a maximum three foot wave height.

Control and containment equipment, including sufficient boom to extend three times the length of the vessel, must be stationed within a vessel's area of operation. Skimming equipment for cleanup must be able to clean up 15 percent of the maximum oil capacity of the vessel within five days and appropriate storage must be available, or be able to reach the area within 24 hours. The Task Force recommends that vessels have an opportunity to demonstrate to the department that they carry less fuel in Alaska waters than the maximum tankage of the vessel, and when the actual fuel volume is demonstrated to be less than the maximum tankage and approved by DEC, the response planning standard will be based on the lesser volume.

Summary - Contingency Plans

Contingency planning to meet the response planning standard should be a streamlined process that includes demonstration that the vessel

- meets the financial responsibility requirements of state law (COFR);
- has designated an individual who is qualified to make decisions about a spill on behalf of the vessel owner (QI),
- has a response action plan that includes
    1. initial notification procedures such as those contained in the shipboard oil pollution emergency plan (SOPEP);
    2. a contract with a primary response action contractor or use of equivalent resources, to contain and control 15 percent of the maximum oil capacity of the vessel; and
    3. a contract with an incident management team or equivalent resources and
- meets applicable federal and International Maritime Organization requirements

A vessel owner can demonstrate a vessel plan through three options:

I. By contracting with primary response action contractors for containment and control, cleanup and incident management;

II. By demonstrating to the department equivalent resources for containment, control, cleanup and incident management; or

III. By a combination of A and B.

A vessel fleet, operated by a single owner or by a group of independent owners, can prepare a plan for a group of vessels, demonstrating to the department the fleet plan meets the requirements of the law using any of the three options. Vessels can be added to a fleet through a simple fleet plan amendment process. Vessel agents, acting as response plan facilitators, can prepare generic contingency plans, designed to be activated by vessels entering state waters on short notice.

The Task Force recommends that the Department of Environmental Conservation act upon contingency plans under tight timeframes. The department advised the Task Force that additional staff will be needed to meet the recommended timelines, which will require additional funding. Public review opportunities continue to exist through review of primary response action contractor plans and by electronic posting of a listing of contingency plan filings.

The Task Force recommends a simple schedule of tabletop drills for vessels contracting with primary response action contractors and full deployment drills for vessels using alternative resources.

The Task Force recommends standardizing oil spill incident command using the NIIMS ICS system as modified for oil spills.

Summary - Prevention

The Task Force recommends that all affected nontank vessels comply with applicable federal and international requirements.

The Task Force recommends a prevention credit program for voluntary measures taken by vessels to prevent or reduce the likelihood of oil spills. The program would give recognition to vessels in the form of extended contingency plan review cycles and a vessel award program. The program is designed to accommodate differences in vessel types and potential for undertaking prevention measures. The Task Force does not recommend any reduction in the response planning standard be part of a prevention credit program.

Summary - Alaska Railroad

The Task Force endorses the Alaska Railroad Risk Assessment process, and recommends the process be followed through to completion. The Alaska Railroad should undergo a Contingency and Prevention Plan review under the rigor of existing law for currently regulated industry.

Conclusion

The Task Force on Motorized Oil Transport unanimously adopted this report and believes its recommendations meet the Alaska Legislature's request for implementation

of the Response Planning Standard set forth in SB 273 and SCR 1, providing increased protection of the environment at a reasonable cost to affected vessel owners and operators.

The Task Force recommendations were reached through a consensus process in response to its obligations under the provisions of SB 273 and SCR 1. The recommendations have implications for both state law and regulations. In an effort to meet its obligations and assist the legislature, the Task Force has incorporated recommendations requiring legislative action formatted as draft legislation. The Task Force also reached consensus that any legislation in response to Senate Bill 273 avoid changes to oil spill laws beyond those described in this report.

The Task Force has prepared the appended draft legislation, developed by the Task Force, that we believe reflects the balance of interests envisioned by the Task Force. The Task Force recommends legislation be adopted to fully implement SB 273 without substantive legislative amendment to the recommendations. The Task Force recommends the Legislature adopt a Letter of Intent with this draft legislation, incorporating by reference this report, the documents the Task Force used in preparing the report, and the transcripts of the Task Force meetings, to serve as a record of the legislative intent for any future interpretation of the legislation and to be used by the Department of Environmental Conservation as a guideline for drafting regulations to implement the legislation.

II. TASK FORCE AND WORK GROUP PROCESS

Financial responsibility and oil spill response planning requirements have been in place since 1990 for tank vessels carrying petroleum as their principal cargo. Senate Bill 273 enacted by the 2000 Alaska Legislature established similar requirements for nontank vessels of more than 400 gross tons, and for railroad tank cars.

The new law establishes a response planning standard (RPS) for "containment and control of 15 percent of the maximum oil capacity" of the nontank vessel or railroad train within 48 hours. Cleanup is required "within the shortest possible time consistent with minimizing damage to the environment."

The bill established the Task Force on Motorized Oil Transport and charged the Task Force with determining how to implement the response planning standard. The Task Force is to report its recommendations to the Legislature on or before the first day of the 2001 session. The Task Force decided to finalize its report by December 1, 2000.

Also approved by the 2000 Legislature was SCR 1, a resolution directing the Task Force to address several specific issues in its report. SB 273 and SCR 1 are found in Section XIV.

At its first meeting, on July 11, 2000, the Task Force decided to accomplish its work by establishing several work groups, including the Response Planning Work Group, Prevention Work Group and Contingency Plan Work Group. The Task Force hired contractors to facilitate the process and to provide specialized expertise to the Task Force and work groups. DEC established a project website to provide public information about the Task Force and notice of Task Force and work group meetings (http://www.state.ak.us/dec/nontank).

The three work groups held a series of public meetings, using expertise from the Task Force membership, the facilitators and contractors, and members of the public. The meeting agendas and summaries of actions were posted to the project website.

Recommendations of the work groups were forwarded to the Task Force, which decided on recommendations to the Legislature.

At its second meeting, the Task Force reached consensus that it would task itself to recommend *realistic*, *effective*, *economically feasible* and *flexible* response strategies to achieve the response planning standard required by SB 273.

1. *Realistic* means capable of being implemented with available technology and expertise within a reasonable timeframe.
2. *Effective* means providing real protection to the environment at the level required by the law, not just the appearance of protection.
3. *Economically feasible* means capable of being implemented without imposing unreasonable cost increases on vessel owners or operators or on their customers.
4. *Flexible* means providing for improvements and changes in methods and requirements to reflect changes in technology, the volume of vessel or Railroad tankcar trade, expertise, and other parameters.

At its second meeting, the Task Force heard reports from the work groups, adopted initial recommendations guiding completion of the work group efforts, determined the structure of the Task Force report to the Legislature, and set a timetable for project completion.

In the third meeting, the Task Force decided on recommendations forwarded from the work groups, and dealt with recommendations for which the work groups had not reached consensus.

At its final meeting in December, the Task Force unanimously approved this report, the draft legislation and letter of intent, and the summary of statutory and regulatory changes.

III. TASK FORCE RECOMMENDATIONS

The Task Force unanimously adopted thirty-one recommendations relating to how nontank vessels exceeding 400 gross registered tons will meet the requirements enacted in SB 273. These recommendations are organized by the work group area:

- Response Planning Standard
- Contingency Plan
- Prevention
- Alaska Railroad

Certain recommendations will require statutory changes, while others can be accomplished by regulation or in administrative procedures. Section IX of the report shows how the recommendations are intended to be adopted – by specific statutory change, by broad statutory authority, by regulation, or otherwise.

IV. RESPONSE PLANNING STANDARD RECOMMENDATIONS

The Response Planning Standard Work Group dealt with issues relating to achievement of the response planning star ard. The group developed background information on

- the existing oil spill response equipment obtained by the spill response cooperatives under the tank vessel prevention and response program,
- the schedule for deployment of new equipment under the agreement between DEC and the Alaska Petroleum Distributors and Transporters (APD&T),
- the vessels traveling in Alaska waters that use marine pilots, and
- the vessels filing financial responsibility forms with the State of Alaska.

The recommendations set out below deal with the conditions under which the response planning standard will be met, the equipment necessary to meet the requirement to contain and control an oil spill within 48 hours of a spill, and spill cleanup requirements.

General recommendations

1. **<u>Wave height planning standard</u>. The Task Force recommends the response planning standard be based on an assumed sea state of a maximum three foot wave height.**

The state of the sea is an important variable in the technical feasibility of containment, control and recovery operations. As wave heights increase, recovery becomes problematic, and eventually impossible. The 3-foot-or-less wave height planning standard adopted by the Task Force is the same standard as was approved by DEC for tank vessel oil spill response planning by the Alaska Petroleum Distributors and Transporters (APD&T), a group formed by the major Alaska barge transporters of non-persistent fuel oil.

2. **<u>Schedule for acquiring new equipment</u>. The Task Force recommends that the schedule established under the tank vessel program for the APD&T group to acquire new equipment and place it in service is sufficiently rapid for the additional equipment required to implement the non-tank program.**

The Task Force reviewed the schedules established by the U.S. Coast Guard (USCG) and the Department of Environmental Conservation (DEC) for the acquisition of new equipment by APD&T under the federal Oil Pollution Act of 1990. The potential spill volumes under the APD&T agreement are generally larger than the likely spill amounts under the non-tank program. Moreover, it would be manifestly unfair to require non-tank vessels brought under regulation only this year to meet schedules faster than those approved for vessels that have been regulated since 1990. Under the agreement with APD&T, additional equipment must be sited at Dillingham by July 2001, Bethel by July 2002, Nome by July 2002, and the North Slope by July 2003.

3. **<u>Vessel operation.</u> The Task Force recommends the language in SB 273 be amended to change "may not cause or permit the operation of a vessel" to "may not operate a vessel."**

The language in SB 273 is confusing and causes concern in the nontank vessel community. This language could, if interpreted incorrectly, cause prospective contractors working on contingency plans or on spill response to withdraw from participation due to concerns about liability issues. The Task Force recommends this technical amendment be the only change to AS 46.04.055(a) considered by the Legislature.

Control and containment recommendations

4. **<u>Required control and containment equipment</u>. The control and containment equipment required for a nontank vessel to meet its response planning standard (RPS) is containment boom sufficient to extend three times the length of the vessel and an appropriate means for deploying the containment boom.**

The Task Force determined that the immediate response requirements of containment and control of an oil spill within 48 hours can be met with containment boom sufficient to extend three times the length of a regulated vessel, together with an appropriate means for deploying the containment boom.

5. **Stationing of control and containment equipment. Control and containment equipment required for a nontank vessel to meet its response planning standard (RPS) must be stationed within the subarea of the vessel's operation.**

A map showing the ten Alaska subareas is found in Section XIV. The schedule for control and containment equipment will be either immediate or, at the latest, on the APDT schedule. Control and containment equipment, including the required containment boom and an appropriate means for deploying it, must be available when contingency plans are filed.

Cleanup recommendations

6. **Required cleanup equipment. The cleanup equipment required for a nontank vessels to meet its RPS includes skimming capacity capable of cleaning up 15 percent of the maximum oil capacity of the vessel within five days and storage capacity that equals one day's recovery capacity of the chosen skimmer. The skimmer chosen must be appropriate for the predominant type of oil carried by the vessel.**

For example, if the nontank vessel carries 10,000 barrels of fuel, the RPS quantity is 1500 barrels. To meet the RPS, a nontank vessel must have skimming capacity capable of cleaning up 300 barrels of spilled fuel in a day. With a skimmer that recovers 80 percent fuel and 20 percent water, temporary storage capacity must be provided that will hold 360 barrels of liquid in a day (300 barrels of fuel and 60 barrels of water). Storage capacity may be demonstrated by a variety of means.

Acquisition of additional persistent and non-persistent skimming capacity, and additional storage will likely be necessary to meet the Task Force recommendation on required cleanup equipment. Decisions about what equipment, and who will purchase the equipment, are dependent upon vessel owner or operator decisions and will be left to market forces.

7. **Maximum Oil Capacity. The "maximum oil capacity" of a vessel is the total fuel tankage of the vessel, or the demonstrated actual fuel volume that the vessel will not exceed in Alaska waters, as certified by the vessel owner or operator and approved by the Department of Environmental Conservation.**

This recommendation is designed to accommodate the fact that some vessels are currently unable to refuel in Alaska, or may operate with less fuel than their total tankage, and spend all of their time in Alaska waters with less than their total fuel capacity. The Task Force recognizes that there are safety considerations that require vessels in Alaska waters to travel with more than the minimum fuel required for a vessel journey. The Task Force further recognizes that the DEC process for approval of lower actual fuel volumes for marine vessels will not be able to accommodate vessels that enter Alaska waters on short notice.

8. **Stationing of cleanup equipment. To meet the RPS requirement of "cleanup of the discharge within the shortest possible time consistent with minimizing**

damage to the environment," a nontank vessel must either (a) position the required skimming and storage capacity within its subarea of operation; or (b) reasonably demonstrate to DEC the ability to position equipment in its subarea of operation within 24 hours.

Placement of skimming and storage capacity within a subarea ensures that the equipment will be readily available for response. Exceptions to this requirement may be granted if it can be demonstrated that the equipment can be available in the subarea within 24 hours.

The Task Force expects that efficiency and cost factors will influence the non-tank vessel regulated community to move toward centralized positioning of the required skimming and storage capacity. These resources would then be cascaded to the site of a spill as needed.

9. **Schedule for acquiring new cleanup equipment. Nontank vessels shall be allowed two years from the adoption of regulations implementing SB 273 to have in place the skimmer(s) and associated storage capacity described in their contingency plan.**

This implementation schedule compares favorably with the APD&T schedule described above (see discussion following recommendation 2). It gives the regulated vessels time to amortize a portion of the costs of containment and control equipment and phase in the acquisition of new cleanup equipment.

V. CONTINGENCY PLANNING RECOMMENDATIONS

The Contingency Plan Work Group dealt with development of alternative processes for contingency planning. The group determined that contingency plans would be required only for vessels in state waters, excluding innocent passage. The contingency plans required of nontank vessels would be streamlined from those required for tank vessels, would have several options for development to allow for differences in the vessels, ownership and timing of vessels in Alaska waters, and would have timeframes for action that recognize the needs of the affected industries.

10. **Vessel operation outside of state waters. Nontank vessel contingency plans (C-plans) shall only be required for vessel operations in "waters of the state" (generally within three miles of shore).**

The exemption is expected to induce some vessels to remain outside of state waters. In this recommendation, the Task Force uses the statutory definition of "waters of the state" in AS 46.04.900. The Task Force concurs with DEC officials who have concluded that keeping vessels outside state waters will substantially reduce the risks of spills, and contribute to protecting the state's environment. For example, some vessels that call at Dutch Harbor and file a C-plan for that region may choose to remain outside state waters when transiting or working in other subareas, thus avoiding the need to file C-plans

covering operations in those areas. State regulations should ensure that the subarea boundaries extend only to the limit of waters of the state (generally three miles) for purposes of determining whether a nontank vessel traffics in a subarea.

11. **Streamlined Contingency Plan process. DEC shall establish a streamlined process for submission and approval of contingency plans for nontank vessels. Under the streamlined process a contingency plan submission shall consist of:**

    i) **vessel-specific information,**

    ii) **a response action plan consisting of**

        a) **initial notification procedures such as those contained in the shipboard oil pollution emergency plan (SOPEP),**

        b) **certification that the applicant is a member of or has a contract with a spill response organization that is a primary response action contractor (PRAC) with a response action plan approved by DEC under requirements similar to that currently required for existing plan holders, and**

        c) **certification that the applicant has contracted with an incident management team (IMT) approved as a primary response action contractor under 18 AAC 75.500-580.**

        Evidence demonstrating equivalent capability may be submitted in lieu of (b) and/or (c) to meet the vessel response planning standard.

    iii) **a prevention plan certification stating that the applicant vessel complies with applicable federal and International Maritime Organization requirements.**

Much of the vessel-specific information is already contained in the financial responsibility application required to be filed by regulated vessels. This vessel-specific information may be critical to oil spill responders in making decisions regarding vessel salvage, fire fighting, or preventing additional oil from being discharged from the vessel. The Task Force understands prevention plan certification as self-certification, a statement by the applicant attesting the vessel complies with the applicable federal and IMO requirements. There are existing provisions in Alaska law establishing criminal penalties for false affidavits, including both fines and jail time for a person convicted of filing a false claim or affidavit.

12. **Alternative Contingency Plan options. DEC shall establish three alternative options for nontank vessel contingency plans (C-plans):**

    a) **C-Plan Option I: Contract out all duties to PRACs,**

    b) **C-Plan Option II: developing equivalent response resources, or**

c) **C-Plan Option III: using a combination of equivalent resources and primary response action contractors.**

Under C-Plan Option I, a responsible party (RP) contracts with a primary response action contractor with a response action plan approved by DEC, and contracts with an incident management team (IMT) that is an approved PRAC under 18 AAC 75.500-580. Under C-Plan Option II, an RP elects to meet its RPS by providing equivalent spill response resources as those provided by a spill response organization and IMT. RPs could choose a hybrid approach C-Plan Option III, using PRACs for some services while providing some services themselves. Applicants will be allowed to choose from among the three options, provided they meet the requirements of the chosen option. Each of the three options can be used for plans covering single vessels or fleets.

13. <u>Action on Contingency Plans</u>. **DEC will complete its review of applications for the addition of a vessel to an already approved fleet plan or generic contingency plan within 5 days. DEC will review an initial full application submitted under C-plan Option I within 15 days of receiving the application; in the event of extenuating circumstances the review may be completed within 5 days. Initial full applications submitted under C-plan Options II or III will be reviewed by DEC within 45 to 90 days. DEC will establish these timeframes for review of contingency plans in regulation.**

Because the timeframes for DEC review of nontank vessel contingency plans are critical to the regulated community, the Task Force decided to address this issue in a specific recommendation. DEC will require adequate funding for staff to effect this recommendation. Further, this process is contingent on expedited Alaska Coastal Management Plan (ACMP) review under 6 AAC 50.050.

14. <u>Response plan facilitator</u>. **A response plan facilitator (RPF), acting as an agent for a vessel or vessels, may develop a generic contingency plan that is activated by signature of an RP. The RPF will submit a generic plan for a specified area of operation to DEC for approval. This plan will contain all the elements of a contingency plan, except the vessel-specific information, the initial notification procedures or the SOPEP, and the prevention certification stating that the applicant vessel complies with applicable federal and IMO requirements.**

A vessel may not enter into Alaska waters until the vessel-specific information, initial notification procedures and prevention certification is added to the plan, the plan is signed by the RP, and DEC has approved it.

An RPF could be a maritime agent, co-op, or specialized agent. An RPF could prepare geographic generic C-plans covering operations in specified areas, coordinate associated paperwork, communicate necessary documents back and forth between vessels and DEC, and assist the vessel in arranging a contract for the initial response of a response action contractor in the event of a spill. No plan certification is issued to the RPF, only to the planholder.

15. Response Action Contractors. **For purposes of the laws covering nontank vessels, incident management teams and response planning facilitators who are not responsible parties shall be considered primary response action contractors.**

The Task Force is concerned that potential response planning facilitators and incident management teams may be concerned about possible legal liability for acts they perform unless they receive the same immunity from liability provided to other primary response action contractors. Response planning facilitators and incident management services will be defined by statute and regulation as primary response action contractors, receiving the same immunities as other PRACs. The regulations will need to include development of a registration application appropriate for response action contractors who plan to provide only incident management team services, and to create minimum standards for response action contractors providing incident management services.

16. Incident management team. **The NIIMS Incident Command System (ICS), as modified for oil spills, will be used to standardize incident command positions and/or functions by C-plan applicants. At a minimum, a contingency plan shall identify the Qualified Individual (QI) and Incident Commander (IC) by name. The QI and IC may be the same person. The C-plan applicant shall be prepared to staff the ICS organization.**

Use of an Incident Management Team contractor is anticipated for many vessel owners under the recommendations adopted by the Task Force.

It is assumed that all the command staff positions, including the Finance Section Chief, Planning Section Chief, Operations Section Chief, Logistics Section Chief, and the other command staff positions such as the safety officer, public information officer, etc., and supporting ICS positions would be accessible and available as needed to meet the requirements of the incident in a timely manner. The state should use the same definition for Qualified Individual (QI) that the U.S. Coast Guard uses, which is defined currently at 33 CFR 155.1026.

17. Training programs. **The Department of Environmental Conservation should ensure availability in Alaska of training programs on contingency planning and Incident Command System for nontank vessels.**

The Task Force believes it is important that the owners and crew of vessels subject to the new contingency planning requirements have access to adequate opportunities for training on oil spill contingency planning and on the NIIMS Incident Command System. The Task Force believes that training programs should be provided by the private sector, and does not expect DEC to provide funding for the programs. The Task Force believes that training in basic issues of contingency planning and incident command procedures will be required for many of the newly-regulated vessels.

18. Application timeframes. **Nontank vessel contingency plans shall be due to DEC within 180 days of adoption of the contingency plan regulations. DEC will give conditional approval to all plans submitted on time. Conditional approval will remain in effect until DEC has completed review of a plan. Nontank vessel**

contingency plans will be reviewed by DEC every three years. DEC will stagger the initial review process so that all nontank vessel contingency plans do not come up for review in the same year.

In choosing a 180-day timeframe, the Task Force considered the need for appropriate evaluation of C-plan alternatives, implementation planning, and the coordination within the regulated community that will be necessary to establish efficient and cost-effective control, containment and cleanup mechanisms. Regulated entities will be required to state in the C-plan their plans for the ordering and taking delivery of required new equipment.

19. <u>Spot charter vessels</u>. **Should the term "spot charter" need to be defined in future regulations or legislation, the Task Force recommends that the state adopt the definition proposed by the Task Force members representing the spot charter industry, i.e., a "vessel contracted to lift a specific cargo on a one-time, periodic, non-scheduled or tramp basis."**

There is no definition of "spot charter" in current regulations or legislation. If a definition is required, the Task Force recommends this definition.

20. <u>C-plan electronic postings</u>. **The Task Force recommends that DEC electronically post a listing of nontank vessel contingency plan applications and review schedules.**

Under the streamlined C-Plan process, public notice is recommended for new contingency plans that do not use co-ops, or for generic contingency plans. Applications for adding vessels to existing approved plans, for activating generic contingency plans, or for vessels that use co-ops will be acted upon in short timeframes. Electronic posting provides an opportunity for the public to know what vessels are activating C-plans. DEC will require adequate funding for staff to effect this recommendation.

21. <u>Public review process</u>. **The Task Force endorses the public review process in DEC's review process for tank vessel contingency plans found in 18 AAC 75.415 and 75.455.**

Section 415 describes routine amendments to C-plans and provides that such amendments will be reviewed within 30 days of submission, unless there is an addition to a pre-existing C-plan in which case the review period is five days. Section 455 provides the procedures to be followed in processing new applications and non-routine amendments.

22. <u>DEC authority to verify</u>. **The Task Force recommends legislation to give DEC statutory authority to verify nontank vessel C-plan compliance.**

In the case of a contingency plan under C-plan Option I, the department would verify quantity of fuel, a contract with a spill response cooperative and with an IMT, and that a SOPEP and certificate of financial responsibility (COFR) are onboard the vessel. For C-plan Options II and III, the department would also verify contracts and equipment listed in the plan.

23. **<u>Drills</u>. The Task Force recommends that the frequency and type of contingency plan spill drills required of nontank vessels be based on the nontank vessel contingency plan option. Under C-Plan Option I, a maximum of one tabletop spill drill may be required annually. Under C-Plan Options II and III, a maximum of one full deployment drill and one tabletop drill may be required during a three-year C-plan review cycle. The Task Force recommends that a primary response action contractor that provides services exclusively to nontank vessels be drilled a maximum of two times a year by DEC.**

Spill drills are currently conducted in the tank vessel regulated community for contingency plan holders. The current tank vessel drill program must be modified to fit the circumstances of the nontank vessels. The Task Force recommends a schedule that gives DEC an opportunity to conduct drills at a frequency similar to that of tank vessels for nontank vessels not using co-ops, and less intensive tabletop drills for nontank vessels using coops.

VI. PREVENTION RECOMMENDATIONS

The Prevention Work Group focused its work on methods to prevent oil spills. The recommendations recognize that federal and international law currently specify mandatory prevention measures to be taken by affected vessels. Under the recommendations, any measures above and beyond compliance with federal and international law would be voluntary, but a vessel owner would receive credit for these voluntary measures.

The Task Force's recommendations related to prevention and prevention credit programs were restricted to how those programs relate to non-tank vessels. Prevention credit programs for tank vessels are outside the purview of the Task Force on Motorized Oil Transport.

24. **<u>Periodic Review</u>. The Task Force recommends that the Department of Environmental Conservation periodically review all recommendations with the regulated community.**

This recommendation is intended to apply to all other recommendations of the Task Force, including response planning standard, contingency plan, prevention and Alaska Railroad issues.

25. **<u>Mandatory prevention measures</u>. All affected nontank vessels must comply with applicable federal and international requirements.**

The Task Force discussed whether federal vessel requirements should be adopted as state law and, after discussion and legal input from the Alaska Attorney General's office, opted to agree that all affected nontank vessels must comply with applicable federal and international requirements and certify their compliance in their contingency plan applications. The state's attorney explained that if the state adopts the federal requirements, they could be enforced under state law as well as federal law. Alternatively, he advised that the state could require vessel owners to simply self-certify that they meet

the federal requirements. Under this second proposal, if the state found a vessel owner in violation of federal requirements, the violation could be forwarded to the U.S. Coast Guard for applicable enforcement action(s).

26. **Reduction in the response planning standard. The Task Force does not recommend reduction of the response planning standard in any nontank vessel prevention credit program.**

It is possible that prevention credit issues affecting the response planning standard could evolve over the years. The affected industries and DEC should be prepared to review these issues periodically, as needed.

27. **Prevention credit program. The Task Force recommends a prevention credit program that awards vessels credit for measures taken to prevent oil spills. The Task Force recommends the program be based on a list of potential prevention measures by vessel type as stated in the following table. A vessel would become eligible for the prevention credit by achieving 50% of the points available to its vessel category. A vessel eligible for the prevention credit would receive an extended contingency plan review cycle (5 years instead of 3 years), with a corresponding reduction in the frequency of spill drills, and would receive a "Blue Star" vessel award for measures Above and Beyond Compliance with state requirements.**

A vessel seeking a prevention credit from the state would consent to state verification of the prevention measures associated with the vessel. The table below is intended as a starting point; as suggested in the last item and in the final recommendation of the Task Force, the Department should work with the industry to update measures on a periodic basis. The Task Force considered other possible prevention credit programs, including tax credits for affected vessels. The Department and the affected industries should review the effectiveness of the proposed prevention credit program on a periodic basis, and recommend any changes to that program. Other suggestions for prevention credits are included in the background documents contained in section XIII of this report.

A vessel could lose a prevention credit or Blue Star award if it failed to meet mandatory and IMP regulations, or if it is found not to have the prevention measures onboard that have been claimed for the credit. There are also penalties under existing Alaska law for filing false statements on state applications, including criminal penalties involving fines and jail time.

Prevention Measures - Weight and Applicability

		Relative Weight	Fishing Vessels		Fish Processors & Tenders		General Cargo		Cruise Ships		Container Ships	
			Applicable?	Weight	Applicable?	Weight	Applicable?	Weight	Applicable?	Weight	Applicable?	Weight
1	Emergency towline or dedicated mooring line with on-board means for deployment	2	Yes	2	Yes	2	Yes	2	Yes	2	Yes	2
2	Emergency on-board dewatering or petroleum pumps	2	Yes	2	Yes	2	Yes	2	Yes	2	Yes	2
3	On-board storage bladder or dedicated tank	2	Yes	2	Yes	2	Yes	2	Yes	2	Yes	2
4	Non-contiguous tank location on vessel	3	No	0	No	0	Yes	3	Yes	3	Yes	3
5	Redundant propulsion systems	3	Yes	3	Yes	3	Yes	3	Yes	3	Yes	3
6	Redundant/integrated navigation systems	1	Yes	1	Yes	1	Yes	1	Yes	1	Yes	1
7	Use of an Alaska marine pilot when not otherwise required by law	2	No	0	No	0	Yes	2	Yes	2	Yes	2
8	Maintaining a transponder, AIDS or other vessel location/ident. technology onboard	2	Yes	2	No	0	Yes	2	Yes	2	Yes	2
9	Use of advanced anchoring systems or placement of mooring buoys	1	No	0	Yes	1	Yes	1	Yes	1	Yes	1
10	Comply with bridge safety management practices; meet ISMC requirements before 7/02; licensing, certification, training beyond fed/intl. requirements	1	No	0	No	0	Yes	1	Yes	1	Yes	1
11	Participation in risk assessment process for operations	2	Yes	2	Yes	2	Yes	2	Yes	2	Yes	2
12	Membership in a marine safety organization	1	Yes	1	Yes	1	Yes	1	Yes	1	Yes	1
13	Tugboats staged/on standby	2	No	0	No	0	No	0	Yes	2	Yes	2
14	Additional staged equipment onshore to improve RPS	1	Yes	1	Yes	1	Yes	1	Yes	1	Yes	1
15	Weather/oceanographic equipment and systems	1	No	0	No	0	Yes	1	Yes	1	Yes	1
16	Enhanced maintenance	1	Yes	1	Yes	1	Yes	1	Yes	1	Yes	1
17	Ice classification	2	No	0	No	0	Yes	2	Yes	2	Yes	2
18	Specialized onboard training programs in prevention and response	2	Yes	2	Yes	2	Yes	2	Yes	2	Yes	2
19	Mooring plan	1	No	0	Yes	1	Yes	1	Yes	1	Yes	1
20	Others as proposed by operators	1	Yes	1	Yes	1	Yes	1	Yes	1	Yes	1
	Total possible score for category	33		20		20		31		33		33

VII. ALASKA RAILROAD RECOMMENDATIONS

The Task Force recognized that oil spill prevention and response issues and methods for the Alaska Railroad are in many ways different from those for the marine vessel community. The recommendations below recognize the effect of the response planning standard of 15% of fuel carried, and require contingency planning and prevention measures similar to those for the currently regulated tank vessel industry.

28. <u>ARR review under rigor of existing law</u>. The Task Force recommends the Alaska Railroad undergo a contingency and prevention plan review under the rigor of existing law for currently regulated industry.

The Alaska Railroad is different from other nontank vessels covered by SB 273 in that it hauls fuel as cargo rather than for propulsion. For this reason, the Task Force is recommending the Alaska Railroad be treated under existing law for currently regulated industry that is engaged in the transportation of oil and oil products, rather than a new regime similar to the nontank marine vessels under SB 273. Existing regulations, including 18 AAC 75.425, set forth the required components of a contingency plan and are recommended for the Alaska Railroad. All currently regulated facilities are required to file a C-plan consisting of four elements: a response action plan, prevention plan, supplemental information, and a best-available-technology review. Details of what is required in each of these elements differ depending on the kind of facility—pipeline, refinery, etc. Railroads are not currently included in this list; from the standpoint of applying the existing regulation, the railroad probably bears the closest affinity to pipelines. Not all of the facilities where the railroad loads and unloads petroleum are currently required to file C-plans.

29. <u>ARR risk assessment process</u>. The Task Force endorses the Alaska Railroad risk assessment process, and recommends the process be followed through to completion.

The Alaska Railroad's risk assessment process is expected to provide the railroad and the State of Alaska with substantial information about the line risks that could lead to oil spills from railroad tank cars. As such, this process, once concluded, can be a strong oil spill prevention program if all recommendations are implemented. This effort is expected to include coverage of track/engineering issues, mechanical issues, operating issues, determination of critical track segments for possible adverse train dynamics, identification of possible adverse track geometry locations, reviews highway crossing protection issues, derailment and operating safety incidents, rule and efficiency testing data, and evaluates susceptibility to L/V derailments.

30. <u>Railroad RPS</u>. The Task Force recommends the Alaska Railroad follow the response planning standard methodology developed by the Task Force, designed to meet an RPS of 15 percent of maximum fuel carried.

The Alaska Railroad operates within two separate subareas. The railroad's RPS standard of 15 percent in 48 hours was established in SB 273. This differs from the standards for other upland facilities such as pipelines.

VIII. FUNDING RECOMMENDATION

31. **Funding of nontank program. The Department of Environmental Conservation will prepare a fiscal note for the nontank legislation. The Task Force recommends the nontank community should not be charged user fees to support the nontank program, and that the program should be funded from the oil and hazardous substance release prevention and response fund and/or state general funds.**

The Department of Environmental Conservation will be responsible for preparation of the fiscal note on the draft legislation. The Task Force believes the nontank community should not be charged additional fees to support the nontank program and that it should be funded with these so-called "470 funds" and state general funds.

IX. SUMMARY OF STATUTES AND REGULATIONS

This table shows the Task Force recommendations, with a listing of which ones are included in the draft legislation and which ones are to be included in regulations adopted pursuant to the law.

The legislation will be accompanied by a Letter of Intent to incorporate the report of the Task Force into legislative intent. In this way, a somewhat formal mechanism would exist to provide guidance to the Department of Environmental Conservation when drafting regulations.

MARINE VESSEL RECOMMENDATIONS

Response Planning Standard Recommendations

General Recommendations

SA=Broad Statutory Authority

Recommendation	Reg	Stat	Comment
1. Wave height planning standard. The Task Force recommends the response planning standard be based on an assumed sea state of a maximum three foot wave height.	Y	SA	General statutory authority contained in draft legislation, Section 2, ¶(m).
2. Schedule for acquiring new equipment. The Task Force recommends that the schedule established under the tank vessel program for the APD&T group to acquire new equipment and place it in service is sufficiently rapid for the additional equipment required to implement the non-tank program.	N	N	

Control and containment recommendations

SA=Broad Statutory Authority

Recommendation	Reg	Stat	Comment
3. Vessel operation. The Task Force recommends the language in SB 273 be amended to change "may not cause or permit the operation of a vessel" to "may not operate a vessel."	N	Y	Statutory change included in draft legislation, Section 1.
4. Required control and containment equipment. The control and containment equipment required for a nontank vessel to meet its response planning standard (RPS) is containment boom sufficient to extend three times the length of the vessel and an appropriate means for deploying the containment boom.	Y	SA	General statutory authority contained in draft legislation, Section 2, ¶(m).
5. Stationing of control and containment equipment. Control and containment equipment required for a nontank vessel to meet its response planning standard (RPS) must be stationed within the subarea of the vessel's operation.	Y	N	

Cleanup Recommendations

Recommendation	Reg	Stat	Comment
6. Required cleanup equipment. The cleanup equipment required for a nontank vessel to meet its RPS includes skimming capacity capable of cleaning up 15 percent of the maximum oil capacity of the vessel within five days and storage capacity that equals the one day's recovery capacity of the chosen skimmer. The skimmer chosen must be appropriate for the predominant type of oil carried by the vessel.	Y	SA	General statutory authority contained in draft legislation, Section 2, ¶(m).

SA=Broad Statutory Authority

Recommendation	Reg	Stat	Comment
7. Maximum oil capacity. The "maximum oil capacity" of a vessel is the total fuel tankage of the vessel, or the demonstrated actual fuel volume that the vessel will not exceed in Alaska waters, as certified by the vessel owner or operator and approved by the Department of Environmental Conservation.	Y	SA	General statutory authority contained in draft legislation, Section 2, ¶(m).
8. Stationing of cleanup equipment. To meet the RPS requirement of "cleanup of the discharge within the shortest possible time consistent with minimizing damage to the environment," a nontank vessel must either (a) position the required skimming and storage capacity within its subarea of operation; or (b) reasonably demonstrate to DEC the ability to position equipment in its subarea of operation within 24 hours.	Y	SA	General statutory authority contained in draft legislation, Section 2, ¶(m).
9. Schedule for acquiring new cleanup equipment. Nontank vessels shall be allowed two years from the adoption of regulations implementing SB 273 to have in place the skimmer(s) and associated storage capacity described in their contingency plan.	Y	SA	General statutory authority contained in draft legislation, Section 2, ¶ (m).

Contingency planning recommendations

Recommendation	Reg	Stat	Comment
10. Vessel operation outside of state waters. Nontank vessel contingency plans (C-plans) shall only be required for vessel operations in "waters of the state" (generally within three miles of shore).	Y	N	State law applies only to vessels in state waters.

SA=Broad Statutory Authority

Recommendation	Reg	Stat	Comment
11. Streamlined Contingency Plan process. DEC shall establish a streamlined process for submission and approval of contingency plans for nontank vessels. Under the streamlined process a contingency plan submission shall consist of: i) vessel-specific information, ii) a response action plan consisting of a) initial notification procedures such as those contained in the shipboard oil pollution emergency plan (SOPEP), b) certification that the applicant is a member of a spill response cooperative that is a primary response action contractor (PRAC) with a response action plan approved by DEC under requirements similar to that currently required for existing plan holders, and c) certification that the applicant has contracted with an incident management team (IMT) approved as a primary response action contractor under 18 AAC 75.550-580. Evidence demonstrating equivalent capability may be submitted in lieu of (b) or (c). iii) a prevention plan certification stating that the applicant vessel complies with applicable federal and International Maritime Organization requirements.	Y	Y	Statutory authority contained in draft legislation, Section 2 ¶(f)-(k).

SA=Broad Statutory Authority

Recommendation	Reg	Stat	Comment
12. Alternative Contingency Plan options. DEC shall establish three alternative options for nontank vessel contingency plans (C-plans): a) C-Plan Option I: contract out all duties to PRACs, b) C-Plan Option II: developing equivalent response resources, or c) C-Plan Option III: using a combination of equivalent resources and primary response action contractors.	Y	SA	Statutory authority contained in draft legislation, Section 2, ¶(f)-(k).
13. Action on Contingency Plans. DEC will complete its review of applications for the addition of a vessel to an already approved fleet plan or generic contingency plan within 5 days. DEC will review an initial full application submitted under C-plan Option I within 15 days of receiving the application; in the event of extenuating circumstances the review may be completed within 5 days. Initial full applications submitted under C-plan Options II or III will be reviewed by DEC within 45 to 90 days. DEC will establish these timeframes for review of contingency plans in regulation.	Y	SA	General statutory authority contained in draft legislation, Section 2, ¶ (m). The timelines are contingent upon favorable ACMP review procedures.
14. Response plan facilitator. A response plan facilitator (RPF), acting as an agent for a vessel or vessels, may develop a generic contingency plan that is activated by signature of an RP. The RPF will submit a generic plan for a specified area of operation to DEC for approval. This plan will contain all the elements of a contingency plan, except the vessel-specific information, the initial notification procedures or the SOPEP, and the prevention certification stating that the applicant vessel complies with applicable federal and IMO requirements.	Y	SA	General statutory authority contained in draft legislation, Section 2, ¶ (m).

SA=Broad Statutory Authority

Recommendation	Reg	Stat	Comment
15. Response Action Contractors. For purposes of the laws covering nontank vessels, incident management teams and response planning facilitators who are not responsible parties shall be considered primary response action contractors.	Y	Y	Statutory authority contained in draft legislation, Sections 5-8. Regulations will explicitly list response planning facilitators and incident management teams as PRACs.
16. Incident management team. The NIIMS Incident Command System (ICS) as modified for oil spills will be used to standardize incident command positions and/or functions by C-plan applicants. At a minimum, a contingency plan shall identify the Qualified Individual (QI) and Incident Commander (IC) by name. The QI and IC may be the same person. The C-plan applicant shall be prepared to staff the ICS organization.	Y	SA	Statutory authority contained in draft legislation, Section 2, ¶(f) – (k) and (m).
17. Training programs. The Department of Environmental Conservation should ensure availability in Alaska of training programs on contingency planning and Incident Command System for nontank vessels.	N	N	
18. Application timeframes. Nontank vessel contingency plans shall be due to DEC within 180 days of adoption of the contingency plan regulations. DEC will give conditional approval to all plans submitted on time. Conditional approval will remain in effect until DEC has completed review of a plan. Nontank vessel contingency plans will be reviewed by DEC every three years. DEC will stagger the initial review process so that all nontank vessel contingency plans do not come up for review in the same year.	Y	SA	Statutory authority contained in draft legislation, Section 2, ¶(k).

SA=Broad Statutory Authority

Recommendation	Reg	Stat	Comment
19. Spot charter vessels. Should the term "spot charter" need to be defined in future regulations or legislation, the Task Force recommends that the state adopt the definition of proposed by the Task Force members representing the spot charter industry, i.e., a "vessel contracted to lift a specific cargo on a one-time, periodic, non-scheduled or tramp basis."	Y	N	
20. C-plan electronic postings. The Task Force recommends that DEC electronically post a listing of nontank vessel contingency plan applications and review schedules.	N	N	
21. Public review process. The Task Force endorses the public review process in DEC's review process for contingency plans found in 18 AAC 75.415 and 75.455.	Y	N	DEC will need to draft similar, but slightly different, regulations to carry out this recommendation
22. DEC authority to verify. The Task Force recommends legislation to give DEC statutory authority to verify nontank vessels for C-plan compliance.	Y	Y	Contained in Section 4 of the draft legislation.
23. Drills. The Task Force recommends that the frequency and type of contingency plan spill drills required of nontank vessels be based on the nontank vessel contingency plan option. Under C-Plan Option I, a maximum of one tabletop spill drill may be required annually. Under C-Plan Options II and III, a maximum of one full deployment drill and one tabletop drill may be required during a three-year C-plan review cycle. The Task Force recommends that a primary response action contractor that provides services exclusively to nontank vessels be drilled a maximum of two times a year by DEC.	Y	SA	General statutory authority contained in draft legislation, Section 2, ¶ (m).

Prevention recommendations

SA=Broad Statutory Authority

Recommendation	Reg	Stat	Comment
24. Periodic review. The Task Force recommends that the Department of Environmental Conservation periodically review all recommendations with the regulated community.	Y	N	Based on the review, additional statutory changes may be possible in the future.
25. Mandatory prevention measures. All affected nontank vessels must comply with applicable federal and international requirements.	Y	N	General statutory authority contained in draft legislation, Section 2, ¶(m).
26. Reduction in the response planning standard. The Task Force does not recommend reduction of the response planning standard in any nontank vessel prevention credit program.	N	N	
27. Prevention credit program. The Task Force recommends a prevention credit program that awards vessels credit for measures taken to prevent oil spills. The Task Force recommends the program be based on a list of recommended prevention measures by vessel type as stated in the prevention credit table. A vessel would become eligible for the prevention credit by achieving 50% of the points available to the vessel category. A vessel eligible for the prevention credit would receive an extended contingency plan review cycle (5 years instead of 3 years), with a corresponding reduction in the frequency of spill drills, and would receive a "Blue Star" vessel award for measures Above and Beyond Compliance with state requirements.	Y	N	

ALASKA RAILROAD RECOMMENDATIONS

SA=Broad Statutory Authority

Recommendation	Reg	Stat	Comment
28. ARR review under rigor of existing law. The Task Force recommends the Alaska Railroad undergo a contingency and prevention plan review under the rigor of existing law for currently regulated industry.	Y	Y	Statutory authority contained in draft legislation, Section 2, ¶ (k)- (l).
29. ARR risk assessment process. The Task Force endorses the Alaska Railroad risk assessment process, and recommends the process be followed through to completion.	N	N	
30. Railroad RPS. The Task Force recommends the Alaska Railroad follow the response planning standard methodology developed by the Task Force, designed to meet an RPS of 15 percent of maximum fuel carried.	Y	Y	General statutory authority contained in draft legislation, Section 2, ¶ (k) – (l).

FUNDING RECOMMENDATIONS

Recommendation	Reg	Stat	Comment
31. Funding of nontank program. The Department of Environmental Conservation will prepare a fiscal note for the nontank legislation. The Task Force recommends the nontank community should not be charged user fees to support the nontank program, and that the program should be funded from the oil and hazardous substance release prevention and response fund and/or state general funds.	N	N	

X. PROPOSED LEGISLATION

_____ BILL NO. ____

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE – FIRST SESSION

BY THE _____ RULES COMMITTEE BY REQUEST OF THE TASK FORCE ON MOTORIZED OIL TRANSPORT

Introduced:
Referred:

A BILL

FOR AN ACT ENTITLED

"An Act requiring oil discharge prevention and contingency plans for all self-propelled nontank vessels exceeding 400 gross registered tonnage and for railroad tank cars and providing for an effective date."

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

*** Section 1.** AS 46.04.055(a) is amended to read:

(a) A person may not [CAUSE OR PERMIT THE OPERATION OF] **operate** a nontank vessel within the waters of the state or cause or permit the transfer of oil to or from a nontank vessel unless the person has furnished to the department and the department has approved proof of financial ability to respond to damages meeting the requirements of AS 46.04.040. Proof of financial responsibility required under this section is subject to adjustment of dollar amounts under AS 46.04.045 and is established, for a nontank vessel that carries

(1) predominantly persistent product, at $300 per incident for each barrel of oil storage capacity on the vessel or $5,000,000, whichever is greater; and

(2) predominantly nonpersistent product, at $100 per incident for each barrel of oil storage capability on the vessel or $1,000,000, whichever is greater.

*** Sec. 2.** AS 46.04.055 is amended by adding new subsections to read:

(f) Effective 180 days after the adoption of regulations under (m) of this section addressing nontank vessels, a person may not operate a nontank vessel within the waters of the state or cause or permit the transfer of oil to or from a nontank vessel unless an oil discharge prevention and contingency plan covering that nontank vessel has been approved by the department and the person is in compliance with the plan.

(g) Nontank vessels, nontank vessel contingency plans required by this section, and applicants for and holders of nontank vessel plan contingency plans are subject to the provisions of AS 46.04.030(d)-(l), (n)-(o) and (r).

(h) A nontank vessel contingency plan shall consist of

(1) vessel-specific information;

(2) a response plan consisting of

(A) initial notification procedures;

(B) a certification that the nontank vessel applicant is a member of, or has a contract with, an oil spill response organization

that is an oil spill primary response action contractor with a response action plan approved by the department as meeting the response planning standards of (c)(1) of this section for the maximum oil capacity of the nontank vessel; and

(C) a certification that the nontank vessel applicant has contracted with an oil spill primary response action contractor providing incident management team services; and

(3) a prevention plan certification stating that the applicant vessel complies with applicable federal and International Maritime Organization requirements.

(i) In lieu of satisfying the requirement of (h)(2)(B) of this section through a primary response action contractor, an applicant may demonstrate that it maintains its own oil spill response plan and equivalent equipment, personnel and resources to meet the requirements of this section.

(j) In lieu of satisfying the requirement of (h)(2)(C) of this section through a primary response action contractor, an applicant may demonstrate that it maintains its own incident management team in order to implement a planned response to a release or threatened release of oil from its nontank vessel.

(k) Effective 180 days after the adoption of regulations under (m) of this section addressing railroad tank cars, a person may not transport oil by railroad

tank car or cause or permit the transfer of oil to or from a railroad tank car unless an oil discharge prevention and contingency plan has been approved by the department and the person is in compliance with the plan.

(l) Railroad tank cars, railroad tank car contingency plans required by this section, and applicants for and holders of railroad tank car contingency plans are subject to the provisions of AS 46.04.030(d)-(l), (n)-(o), and (r).

(m) The department shall adopt regulations to implement the requirements of (c) and (f)-(l) of this section.

*Sec. 3. AS 46.04.055(e) is amended to read:

(e) The requirements of [(A)-(D) OF] this section do not apply to a nontank vessel operating in the waters of the state if the nontank vessel

(1) is engaged in innocent passage: for purposes of this paragraph, a nontank vessel is engaged in innocent passage of its operation in state waters, irrespective of whether it is a United States or foreign-flag vessel, would constitute innocent passage under the Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 U.S.T. 1606, or the United Nations Convention on the Law of the Sea 1982, December 10, 1982, U.N. Publication No. E 83.V.5, 21 I.L.M. 1261 (1982), were the vessel a foreign-flag vessel;

(2) enters state waters because of imminent danger to the crew, or in an effort to prevent an oil spill or other harm to public safety or the environment, and are inapplicable only until the vessel is able to leave state waters as soon as it may do so without imminent risk of harm to the crew, public safety, or the environment, or

(3) enters state waters after the United States Coast Guard has determined that the vessel is in distress, and are inapplicable only until the vessel is able to leave state waters as soon as it may do so without imminent risk of harm to the crew, public safety, or the environment.

*Sec. 4. AS 46.04 is amended by adding a new section to read:

Sec. 46.04.065. Compliance verification for nontank vessels and trains. (a) In addition to other rights of access or examination conferred upon the department by law or otherwise, the department may at reasonable times and in a safe manner enter and examine nontank vessels and trains in order to ensure compliance with the provisions of this chapter.

(b) For purposes of this section, "train" includes tracks, associated facilities, and operations.

*Sec. 5. AS 46.03.825(a) is amended to read:

(a) A response action contractor who responds to a release or threatened release of oil is not civilly liable for removal costs or damages that result from an act or omission in the course of providing care, assistance, or advice

(1) consistent with a contingency plan

(A) approved under AS 46.04.030 **or 46.04.055** if the response action contractor is listed in the contingency plan; or

(B) prepared under AS 46.04.200, 46.04.210, or 33 U.S.C. 1321(d) if the response action contractor is not listed in the contingency plan; or

(2) as otherwise directed by the federal or state on-scene coordinator.

***Sec. 6.** AS 46.03.825(b) is amended to read:

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

(1) an action for personal injury or death or;

(2) a response action contractor who

(A) would otherwise have been liable for the release or threatened release under AS 46.03.822;

(B) acts with gross negligence or intentional misconduct; or

(C) has agreed in writing to be listed as a primary response action contractor, who is listed as a primary response action contractor in a contingency

plan approved under AS 46.04.030 **or 46.04.055**, and who fails to respond to a release or threatened release of oil that the primary response action contractor was required to respond to under its contract with the applicable contingency plan holder; this subparagraph does not apply to a primary response action contractor if the failure to respond to a release or threatened release of oil results from a prior and ongoing response under another contingency plan approved under AS 46.04.030 **or 46.04.055** in which the primary response action contractor has the primary duty to respond and a significant portion of the response action contractor's oil spill cleanup equipment listed in the contingency plan approved under AS 46.04.030 **or 46.04.055** is in use.

*Sec. 7. AS 46.03.825(f) is amended to read:

(f) Nothing in this section is intended to amend AS 46.04.030(l), **46.04.055,** or to create a cleanup or performance standard that must be met by a holder of a contingency plan or by a primary response action contractor.

*Sec. 8. AS 46.03.825(g) is amended to read:

(g) In this section,

(1) "consistent" means in substantial compliance with a contingency plan;

(2) "primary response action contractor" has the meaning given in AS 46.04.035;

(3) "response action" means an action taken to respond to a release or threatened release of oil, including mitigation, clean up, marine salvage, **incident management team services, response plan facilitator services,** or removal of a release or threatened release of oil.

***Sec. 9.** This Act takes effect immediately under AS 01.10.070(c).

XI. PROPOSED LETTER OF INTENT

Letter of Intent
For _____ Bill No. _____

"An Act requiring oil discharge prevention and contingency plans for all self-propelled nontank vessels exceeding 400 gross registered tonnage and for railroad tank cars and providing for an effective date."

It is the intent of the Legislature that the report of the Task Force on Motorized Oil Transport, the documents the Task Force used in preparing its report, and the transcripts of the Task Force meetings, be used by the Department of Environmental Conservation as the guidelines for drafting regulations to implement this legislation.

XII. DEPARTMENT OF LAW MEMORANDUM

MEMORANDUM

State Of Alaska

Department of Law

To: Larry Dietrick
Director, Div. Spill Prevention & Response
Dept. of Environmental Conservation

Date: November 15, 2000

File No.: 661-00-0597

Tel. No.: 269-5274

From: Breck C. Tostevin
Assistant Attorney General
Environmental Section – Anchorage

Subject: Task Force on Motorized Oil Transportation Legal Questions

You asked that I prepare responses to the following legal questions posed by various workgroups of the Task Force on Motorized Oil Transport for possible inclusion in the Task Force's Final Report to the Legislature mandated by Senate Concurrent Resolution No. 1 and SB 273 from the 21st Alaska Legislature.

Below are the questions posed by the various work groups. I have addressed the questions as concisely as possible in a question and answer format. These responses are not exhaustive or definitive legal analyses but rather present my interpretation of existing legal authorities.[1] The courts, in particular the Alaska Supreme Court, have not yet been called upon to interpret many of these liability provisions and how the courts may interpret them in the future is an open question.

1. Question: If the State of Alaska adopts a requirement set out under a current federal regulation as a mandatory requirement under a new State regulation, will the vessel owner or operator (whomever is the subject of the regulation) be subject to penalties by both the State and the Federal Government for failure to meet the terms of the regulation?

   Answer: Generally, yes. However, as a practical matter, State and federal regulators do not usually duplicate each other's enforcement actions.

[1] This is not intended to be, and should not be considered to be, an Attorney General's Opinion, informal or otherwise.

2. Question: If the State adopts an oil pollution prevention requirement as part of a prevention credit program, but does not make it mandatory under State regulations, will there be penalties assessed by the State for failure to meet the requirement?

   Answer: A recommended practice would not ordinarily form the basis for civil assessments (AS 46.03.760) for failure to meet the requirement. However, if adoption of a recommended practice was structured so that it relieved a person of meeting another regulatory requirement, then failure to meet the recommended practice would result in a violation of the other regulatory requirement and subject the person to penalties.

3. Question: If the Task Force develops a list of prevention measures and adopts a prevention program whereby a vessel owner or operator who performs a certain number of measures (non-mandatory) gets an award or some recognition for doing so, will this create a "standard of care" such that the vessel owner or operator who does not perform any measures will automatically be seen as negligent when that owner or operator has an oil spill even though that owner or operator was fully in compliance with the law?

   Answer: No. The standard of care for purposes of determining negligence is not established by such voluntary practices but by consideration of industry-wide practices, national standards and regulatory requirements -- among other factors -- in determining the standard of care of a reasonable person under the circumstances of the case. *See, e.g., Ward v. Lutheran Hospital & Homes Soc. of America*, 963 P.2d 1031, 1036-37 (Alaska 1998); *In re Bankers Trust Co*, 651 F.2d 160, 173-175 (3rd Cir. 1981). Moreover, the Alaska Supreme Court in *Doyle v. Peabody*, 781 P.2d 957, 959 (Alaska 1989) indicated that under AS 46.03.870 a private right of action does not exist to enforce DEC regulations in a negligence action seeking to use a DEC regulation as a standard of care. Finally, this liability concern about a negligence standard relating to oil pollution prevention practices does not take into account that vessel owners and operators are already strictly liable without fault for both public and private oil spill damages under both State and Federal law.

4. Question: If a vessel owner, for instance, joins a cooperative response action contractor organization, will that owner be subject to liability for the negligence or spill-clean up costs of another member of the cooperative who either cannot or will not clean up the spill? (Is there likely to be a successful "deep pocket" action against a member of the co-op with deep pockets?) If there is any such potential liability, can this be addressed by the by-laws or contracts within the cooperative?

Answer: Most cooperative response action contractor organizations are set up as corporations. As a separate corporation a cooperative is a separate legal entity from its members or shareholders as long as the corporation is adequately capitalized and not a shell used to defraud. *See, e.g. Uchitel Co. v. Telephone Co.*, 646 P.2d 229, 235 (Alaska 1982). Alaska Corporation law already protects shareholders (members) from direct liability. AS 10.06.438; *Elliot v. Brown*, 569 P.2d 1323 (Alaska 1977) (50% owner not individually liable simply because of mere control of corporation); *Croxton v. Crowley Maritime Corporation*, 817 P.2d 460, 465 (Alaska 1991) (functional analysis is not enough to void legal distinction between parent corporation and subsidiary corporation). Potential liabilities between the cooperative and its members (as well as financial responsibility issues) can be addressed both in the corporation's by-laws and in contracts for membership. AS 45.45.900.

5. Question: If a shore-side facility that does not hold a c-plan for vessel operations (i.e. a lumber yard) contracts with a vessel owner or operator to haul the product from the shore-side facility to some other location, will the shore-side facility be liable for a spill from the fuel tanks of the vessel (the product owned by the shore-side facility is not fuel), absent any separate contractual arrangement between the vessel and the shore-side facility?

   Answer: Under the facts presented, the shore-side facility would not be liable under Alaska Statute. The shore-side facility would not be liable under AS 46.03.822 / AS 46.03.758, unless it owned or operated the vessel from which the fuel spilled or unless the shore-side facility owned the fuel in the vessel at the time of the spill. Unless the shore-side facility caused the oil spill, for example through a mechanical failure at the facility's dock, the shore-side facility would not be responsible for oil spill cleanup from the vessel under AS 46.04.020.

6. Question. Would the limitations of liability in AS 46.03.825 for oil spill response action contractors extend to a co-op or other organization established to hold a generic or fleet nontank vessel c-plan and which contracts to provide oil spill response services on behalf of a vessel owner or operator (hereinafter "c-plan co-op")? (The co-op under this scenario would be the c-plan holder under AS 46.04.030 and be issued the formal contingency plan approval certificate by DEC).

   Short Answer: A response action contractor (RAC) and a c-plan holder have two separate and distinct set of liabilities. Under current law, c-plan holders are also responsible parties under AS 46.03.822 because they are the owner or operator of the vessel or own the oil being transported by the vessel. AS 46.03.822(a)(1) & (2); 18 AAC 75.400(a). In such a case, a c-plan holder who is a responsible party under

AS 46.03.822 does not have RAC immunity under AS 46.03.825. *See* AS 46.03.825(b)(2)(A); AS 46.03.822(m) (1999).

The immunities provided in AS 46.03.825 to RACs do not extend to the duties owed by a c-plan holder under AS 46.04.030. In essence, AS 46.03.825 and AS 46.04.030 address different duties and different liabilities. RAC immunity addresses liability for "removal costs and damages" and the c-plan statute address liability for injunctions, civil assessments, and criminal violations. RAC immunity with respect to civil liability for removal costs and damages applies to actions brought by the State and third parties, while the c-plan statute liabilities apply to actions brought by the State.

Immunity under AS 46.03.825 was not intended to reach obligations held by a c-plan holder under AS 46.04.030(g). I reach this conclusion in part by considering AS 46.03.825(b)(2)(C) which describes the immunities of "primary response action contractors" (PRACs). A primary response action contractor is a RAC listed in a c-plan approved under AS 46.04.030 who contracts "with the applicable contingency plan holder" to provide response action services. Obviously a PRAC, which is a c-plan holder, cannot contract with itself.

Liabilities Arising Out Of Status As A C-Plan Holder. AS 46.04.030 imposes obligations due to the State of Alaska by a c-plan holder. These liabilities attach to the person who is issued the formal c-plan approval certificate; not to a person who prepares all or part of a contingency.

Specifically, AS 46.04.030(g) makes a c-plan holder subject to a court order to implement its c-plan, liability to the State for civil assessments under AS 46.03.760(a) and misdemeanor liability for criminal negligence for the failure to meet the following duties:

1) A c-plan holder must "comply with the plan." Compliance with the plan means to:

> (A) establish and carry out procedures identified in the plan as being the responsibility of the holder of the plan;
> (B) have access to and have on hand the quantity and quality of equipment, personnel, and other resources identified as being accessible or on hand in the plan;
> (C) fulfill the assurances espoused in the plan in the manner described in the plan;
> (D) comply with terms and conditions attached to the plan by the department under the authority of (e) of this section; and

(E) successfully demonstrate the ability to carry out the plan when required by the department under (e) of this section."

AS 46.04.030(r)(2)

2) A c-plan holder must have access to the quality and quantity of resources identified in the plan; and

3) A c-plan holder must respond with the quality and quantity of resources identified in the plan within the shortest possible time in the event of a spill.

AS 46.04.030(l) provides an additional clarification on the scope of subsection (g). Subsection (l) explains that the response planning standards in AS 46.04.030(k) "do not constitute cleanup standards to be met by the holder of a contingency plan" and that notwithstanding that subsection "failure to remove a discharge within the time periods set out in (k) of this section does not constitute failure to comply with the contingency plan for purposes of (g) of this section or for the purpose of imposing administrative, civil, or criminal penalties under any other law."

Liabilities As A RAC. In contrast, a response action contractor under AS 46.03.825(a):

> who responds to a release or threatened release of oil is not civilly liable for removal costs and damages that result from an act or omission in the course of providing care, assistance, or advice
>
> (1) consistent with a contingency plan
>
> (A) approved under AS 46.03.040 if the response action contractor is listed in the contingency plan; or
>
> (B) prepared under AS 46.04.200, 46.04.210, or 33 U.S.C. § 1321(d) if the response action contractor is not listed in the contingency plan; or
>
> (2) as otherwise directed by the federal or state on-scene coordinator.

Consistent with a contingency plan "means in substantial compliance with a contingency plan." AS 46.03.825(g)(1).

Thus, a RAC for purposes of immunity under AS 46.03.825 and a c-plan holder for purposes of liability under AS 46.04.030(g) are held to different standards with respect to compliance with the contingency plan. A RAC must act in substantial

compliance, while a contingency plan holder must comply with the plan on the basis of the higher standards set forth in AS 46.04.030(g) and (r)(2).

With respect to primary response action contractors, ("PRAC," see definitions in AS 46.04.035 and 18 AAC 75.500) the RAC immunity in AS 46.03.825(a) does not apply to:

> a response action contractor who . . . (C) has agreed in writing to be listed as a primary response action contractor, who is listed as a response action contractor in a contingency plan approved under AS 46.04.030, and who fails to respond to a release or threatened release of oil that the primary response action contractor was required to respond to under its contract with the applicable contingency plan holder. (Emphasis added)

A c-plan co-op could not be considered a PRAC because it would be listed in the c-plan but could not contract with itself as the "applicable contingency plan holder." *See* AS 46.03.825(b)(2)(C).

In sum, the current statutory scheme in AS 46.03.825 does not appear to envision a response action contractor as also being a c-plan holder. Nor do I interpret RAC immunities under AS 46.03.825 as extending to the duties owed by a c-plan holder under AS 46.04.030(g).

7. Question. Would a third-party such as a ship agent/broker who prepared all or part of a contingency plan for the vessel owner or operator incur any new or additional liabilities under AS 46 by providing such a service? (The vessel owner/operator would be the contingency plan applicant and plan holder).

   Answer: No. The ship agent in this situation would not be a responsible party under AS 46.04.020, AS 46.03.758 or AS 46.03.822 by assisting with preparation of a c-plan. Nor would the ship agent be acting as a c-plan applicant or a c-plan holder within the meaning of AS 46.04.030. As a result, the ship agent/third party in this situation would not incur any new or additional liability under AS 46 for providing such a service to a vessel c-plan holder.

8. Question: If a non-profit organization is created to perform "incident command functions" associated with overseeing the responsible party's response to an oil spill, will that non-profit organization receive the same protection from civil liability under AS 46.03.825 as an oil spill response action contractor?

Answer: Yes. An organization providing incident command functions under contract to a responsible party would fall within the definition of an oil spill response action contract under AS 46.03.825 and be able to avail itself of the civil liability protections under that statute. It does not matter whether the contractor is a for-profit or non-profit business in order to be an oil spill response action contractor under AS 46.03.825.

9. What types of services are included within the oil spill RAC immunity under AS 46.03.825? Who must register with DEC as a PRAC and who may voluntarily register?

Answer: RAC immunity under AS 46.03.825 applies to "a response action contractor who responds to a release or threatened release of oil . . . for removal costs and damages that result from an act or omission in the course of providing care, assistance, or advice (1) consistent with a [relevant] contingency plan . . . or otherwise directed by the federal or on-scene coordinator." AS 46.03.825(a).

"Response action" is broadly defined by that statute "as an action taken to respond to a release or threatened release of oil, including mitigation, clean up, marine salvage, or removal of a release or threaten release of oil." AS 46.03.825(g)(2).

A "response action contractor" is:

> (A) a person who enters into a response action contract with respect to a release or threatened release of a hazardous substance and who is carrying out the contract, including a cooperative organization formed to maintain and supply response equipment and materials that enters into a response action contract relating to a release or threatened release;
> (B) a person who is retained or hired by and is under the control of a person described in (A) of this paragraph to provide services related to the response action contract; and
> (C) a person who acts as a volunteer and is engaged in a response action."

AS 46.03.826(11).

Finally, a response action contract is defined as:

> a written contract or agreement to provide response action with respect to a release or threatened release of a hazardous substance entered into by a person with
> (A) the department;

> (B) another person who has entered into an agreement with the department that provides for response action subject to the department's oversight and control;
> (C) a federal agency with jurisdiction over the release or threatened release; or
> (D) another person potentially liable for the release or threatened release under state or federal law;

AS 46.03.826(10).

In sum, a RAC is a person involved in providing services or equipment related to an actual release or threatened release of oil "who responds to a release or threatened release of oil." These services could include spill response notification, coordinating spill response for the responsible party, incident management team services, coordinating with response action contractors to initiate spill response and similar activities.

Pre-spill planning or drafting of c-plans would not be considered response action services for purposes of AS 46.03.825 because the contractor would not be "responding to a release or threatened release of oil." The term "threatened release," while not specifically defined in AS 46.03, has been generally interpreted to involve a substantial threat of an actual release of oil in a specific incident and not the general threat posed by the normal operations of a vessel. *Cf.* AS 46.08.900(15).

However, as noted above, a person's assistance with the drafting or development of a c-plan does not render that person a c-plan holder under AS 46.04.030 or a responsible party under AS 46.03.822 or AS 46.03.758. Given that their services do not actually involve physical oil spill cleanup, contingency planning contractors are not generally exposed to liability for the "removal costs or damages" which are the subject of the immunity in AS 46.03.825. I am not aware of any court cases addressing third party liability relating to the drafting of c-plans. Regardless of the speculative nature of such liability, it could be addressed contractually between the vessel owner/c-plan holder and the contractor providing these contingency planning services and through professional liability insurance. AS 45.45.900.

PRAC Status and Registration. A PRAC is a response action contractor (RAC) who is 1) listed in a responsible party's c-plan as providing resources or equipment to contain, control or cleanup an oil discharge and 2) who is directly obligated under contract to the c-plan holder to provide those services. AS 46.04.035; 18 AAC 75.500. A PRAC must be registered with DEC in order for its resources to be listed in a c-plan and for DEC to approve the c-plan. AS 46.04.030(e);