

HOUSE BILL NO. 338

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVE BROWN

Introduced: 5/17/91

Referred: Resources, Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to strengthening the civil penalty and damage provisions concerning the
2 discharge of oil and other environmental violations; authorizing administrative penalties for
3 environmental violations; strengthening the Department of Environmental Conservation's
4 authority regarding administrative compliance orders; amending Rule 82, Alaska Rules of
5 Civil Procedure; and providing for an effective date."

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

7 * Section 1. AS 46.03.758(a) is amended to read:

8 (a) The legislature finds that

9 (1) recent information discloses that the discharge of oil may cause significant
10 short and long-term damage to the state's environment; even [. EVEN] minute quantities of oil
11 released to the environment may cause high mortalities among larval and juvenile forms of
12 important commercial species, may affect salmon migration patterns, and may otherwise degrade
13 and diminish the renewable resources of the state;

1 (2) the exact nature and extent of oil pollution can be neither documented with
2 certainty nor precisely quantified on a spill-by-spill basis; however, in light of the magnitude of
3 harm ~~that~~ [WHICH] may be caused by oil discharges, and the vital importance of commercial,
4 sport and subsistence fishing, tourism, and Alaska's natural abundance and beauty to the
5 economic future of the state and its quality of life, it is the judgment of the legislature that
6 substantial civil penalties should be imposed for the discharge of oil in order to provide a
7 meaningful incentive for the safe handling of oil and to ensure [INSURE] that the public does
8 not bear substantial losses from oil pollution for which, because of its subtle, long-term or
9 unquantifiable nature, compensation would not otherwise be received; and

10 (3) the handling of oil in large quantities is a hazardous undertaking ~~that~~
11 [WHICH] poses a significant threat to the economy and environment of the state, which can be
12 substantially reduced only by the taking of rigorous safety precautions involving considerable
13 expense; conversely, persons handling oil in smaller amounts might pose a correspondingly lower
14 risk to the economy and environment of the state [,] and might be [ARE] capable of safe oil
15 handling practices at correspondingly lower costs [; IN ORDER TO PROVIDE AN INCENTIVE
16 WHICH IS EFFECTIVE, BUT NOT PUNITIVE, IT IS NECESSARY AND APPROPRIATE
17 THAT THE ASSESSMENT OF CIVIL PENALTIES FOR DISCHARGES OF SMALL
18 QUANTITIES OF OIL BE LEFT FOR CASE-BY-CASE JUDICIAL DETERMINATION,
19 WHILE INSURING, THROUGH THE PENALTY PROVISIONS OF THIS SECTION, THAT
20 THE HANDLING OF OIL IN LARGE QUANTITIES OCCURS IN A MANNER WHICH WILL
21 NOT IMPAIR THE RENEWABLE RESOURCES OF THE STATE].

22 * Sec. 2. AS 46.03.758(e) is amended to read:

23 (e) If a discharge of oil in excess of 500 [18,000] gallons not permitted under applicable
24 state and federal law occurs within the territorial jurisdiction of the state, or into or upon the
25 adjacent outer continental shelf of the state, the following persons, in addition to the person
26 causing or permitting the discharge, are jointly and severally liable to the state, in a civil action,
27 for the full amount of penalties established under this section and in the regulations adopted
28 under this section:

- 29 (1) if the discharge occurs from a [ANY] commercial or industrial facility other
30 than a vessel or offshore platform, the owner, lessee or permittee, and operator of the facility;
31 (2) if the discharge occurs from a vessel,

1 (A) the owner and operator of the vessel; and
2 (B) the owner of the oil carried as cargo on the vessel at the time the
3 vessel was loaded, if the loading occurred within the territorial jurisdiction of the state,
4 or at a deep-water port or other offshore storage facility adjacent to the state; however,
5 if the owner of the oil temporarily transfers ownership of the oil to another person [,] and
6 the transfer has the purpose or effect of evading the vicarious liability imposed by this
7 section, the transferor will be considered the owner of the oil for the purposes of this
8 subsection; and

9 (3) if the discharge occurs from an offshore platform, the lessee or permittee of
10 the tract or acreage upon which the platform is situated, and the operator of the platform.

11 * Sec. 3. AS 46.03.758(i) is repealed and reenacted to read:

12 (i) The imposition of a civil penalty under this section does not limit or otherwise affect
13 the authority of the department to enforce a provision of this chapter, AS 46.04, or AS 46.09, or
14 to recover damages, restoration expenses, investigation costs, court costs, and attorney fees. A
15 person who pays a civil penalty imposed under this section is entitled to set off the penalty
16 amount paid against a civil penalty awarded by a court against the person for the same discharge
17 under AS 46.03.760(a).

18 * Sec. 4. AS 46.03.758 is amended by adding a new subsection to read:

19 (m) The penalty that would otherwise be assessed under (b) of this section shall be
20 multiplied by a factor of five if a court determines that

21 (1) the discharge was caused by the gross negligence or intentional act of the
22 discharger;

23 (2) the discharger did not take reasonable measures to contain and clean up the
24 discharged oil; or

25 (3) the defendant did not respond in accordance with an approved oil discharge
26 contingency plan.

27 * Sec. 5. AS 46.03.759(a) is amended to read:

28 (a) A person who is found to be liable under any other state law for an unpermitted
29 discharge of crude oil [IN EXCESS OF 18,000 GALLONS] is, in addition to liability for any
30 other penalties or for damages or the cost of containment and cleanup, liable to the state in a
31 civil action for a civil penalty, up to a maximum of \$500,000,000, in the amount of

- 1 (1) \$8 per gallon of crude oil discharged for the first 420,000 gallons discharged;
2 and
3 (2) \$12.50 per gallon of crude oil discharged for amounts discharged in excess
4 of 420,000 gallons.

5 * Sec. 6. AS 46.03.759(d) is repealed and reenacted to read:

6 (d) The imposition of a civil penalty under this section does not affect the authority of
7 the department to enforce a provision of this chapter, AS 46.04, or AS 46.09, or to recover
8 damages, restoration expenses, investigation costs, court costs, and attorney fees. A person who
9 pays a civil penalty imposed under this section is entitled to set off the penalty amount paid
10 against a civil penalty awarded by a court against the person for the same discharge under
11 AS 46.03.760(a).

12 * Sec. 7. AS 46.03.760(a) is repealed and reenacted to read:

13 (a) A person who violates or causes or permits to be violated a provision of this chapter,
14 AS 46.04, AS 46.09, or a regulation, order of the department, permit, approval, or certificate
15 issued under this chapter, AS 46.04, or AS 46.09 is liable to the state in a civil action for a sum
16 to be assessed by the court of not less than \$2,500 nor more than \$100,000 a day for each
17 violation. Each violation is a separate and distinct offense, and where a violation continues from
18 day to day each day constitutes a separate violation. The amount assessed by the court under this
19 subsection must reflect, as applicable,

- 20 (1) reasonable compensation for adverse environmental effects of the violation;
21 (2) reasonable costs incurred by the state in the detection, investigation, and
22 attempted correction of the violation;
23 (3) the economic savings realized by the person in not complying with the
24 requirement for which the violation is charged;
25 (4) the prior history of violations committed by the person;
26 (5) the need for an enhanced civil penalty to deter future violations;
27 (6) the extent and seriousness of the violation;
28 (7) the person's attainment of compliance, within the shortest feasible time, with
29 the requirement for which the violation is shown;
30 (8) the person's ability to pay; and
31 (9) other factors that the court determines are in the interest of justice.

1 * **Sec. 8.** AS 46.03.760(e) is amended to read:

2 (e) In addition to liability under (a) [(a) - (d)] of this section, a person who violates or
3 causes or permits to be violated a provision of AS 46.03.740 - 46.03.750 is liable to the state,
4 in a civil action brought under AS 46.03.822, for the full amount of actual damages caused to
5 the state by the violation, including direct and indirect costs associated with the abatement,
6 containment, and [OR] removal of the pollutant, restoration of the environment to its former
7 state, and all incidental administrative costs.

8 * **Sec. 9.** AS 46.03 is amended by adding a new section to read:

9 Sec. 46.03.761. **ADMINISTRATIVE PENALTIES FOR POLLUTION.** (a) The
10 department may assess an administrative penalty against a person who violates or causes or
11 permits to be violated a provision of this chapter, AS 46.04, or AS 46.09, or a regulation, order
12 of the department, permit, approval, or certificate issued under this chapter, AS 46.04, or
13 AS 46.09.

14 (b) The Administrative Procedure Act (AS 44.62) does not apply to administrative
15 proceedings conducted or judicial review sought under this section.

16 (c) An administrative penalty assessed under this section may not exceed \$25,000 a day
17 for each violation. Each violation is a separate and distinct offense and where the violation
18 continues from day to day, each day constitutes a separate violation. In determining the amount
19 of a penalty assessed under this section, the department shall consider the effect of the violation
20 on the public health or the environment, a prior history of violations, deterrence of future
21 violations, and other factors that the department considers relevant.

22 (d) The assessment notice shall be personally served on or sent by certified mail, return
23 receipt requested, to the person affected. An administrative penalty assessed under this section
24 becomes final 30 days after receipt of the assessment notice unless an administrative hearing is
25 requested. Failure to request an administrative hearing within 30 days after receipt of the
26 assessment notice constitutes a waiver of the right to an administrative hearing and to judicial
27 review.

28 (e) After the conclusion of the administrative hearing, the department may modify,
29 rescind, or affirm the administrative penalty. A person against whom an administrative penalty
30 is assessed may obtain judicial review of the administrative penalty by filing a notice of appeal
31 in the superior court within 30 days after the department's issuance of the administrative hearing

1 decision. The court may set aside the administrative penalty only if the administrative record,
2 taken as a whole, does not contain a reasonable basis to support the finding of violation or the
3 amount of penalty assessed by the department. Except as provided in this section, the validity,
4 amount, and appropriateness of the administrative penalty are not subject to judicial or
5 administrative review.

6 (f) Action by the department under this section does not limit or otherwise affect the
7 authority of the department to enforce this chapter, AS 46.04, or AS 46.09, or to recover
8 damages, restoration expenses, investigation costs, court costs, and attorney fees. The court shall
9 set off the administrative penalty amount paid under this section against a civil penalty
10 subsequently awarded by a court against the person for the same violation under AS 46.03.760.

11 (g) The assessment of an administrative penalty under this section does not affect the
12 obligation of a person to comply with this chapter, AS 46.04, AS 46.09, or with a regulation,
13 order of the department, permit, approval, or certificate issued under this chapter, AS 46.04, or
14 AS 46.09.

15 (h) If a person fails or refuses to pay an administrative penalty assessed under this
16 section after the penalty has become final, the attorney general may bring an action to collect the
17 penalty and the defendant is liable for

18 (1) the amount of the administrative penalty assessed;

19 (2) interest from the date the department issued the assessment notice under (d)
20 of this section; and

21 (3) full reasonable attorney fees and costs incurred by the state in the collection
22 action.

23 * Sec. 10. AS 46.03.850 is repealed and reenacted to read:

24 Sec. 46.03.850. COMPLIANCE ORDER. (a) When, in the opinion of the department,
25 a person is violating or is about to violate a provision of AS 03.05, this chapter, AS 46.04, or
26 AS 46.09, or is otherwise endangering or creating the potential of pollution of the surface or
27 subsurface air, land, or water within the jurisdiction of the state, the department may issue a
28 compliance order.

29 (b) The compliance order shall be personally served on or sent by certified mail, return
30 receipt requested, to the person affected. Service is complete on a corporation upon receipt by
31 an officer of the corporation or by its registered agent and on a partnership on receipt by a

1 partner. The compliance order is effective on receipt. A request for an administrative hearing
2 under (c) of this section does not stay the provisions or deadlines set out in the compliance order.

3 (c) The person affected may request an administrative hearing within 30 days after
4 receipt of the compliance order. Failure to request a hearing within 30 days after receipt of the
5 compliance order constitutes a waiver by the person of the right to an administrative hearing and
6 to judicial review.

7 (d) After the conclusion of the administrative hearing, the department may modify,
8 rescind, or affirm the compliance order. The affected person may obtain judicial review of the
9 compliance order by filing a notice of appeal in the superior court within 30 days after the
10 department's issuance of the administrative hearing decision. The court may set aside the
11 compliance order only if the administrative record, taken as a whole, does not contain a
12 reasonable basis to support the provisions of the compliance order or the department's decision
13 to issue the compliance order. Except as provided in this section, the compliance order is not
14 subject to judicial or administrative review.

15 (e) The Administrative Procedure Act (AS 44.62) does not apply to administrative
16 proceedings conducted or judicial review sought under this section.

17 (f) A compliance order issued under this section is an order of the department for
18 purposes of AS 03.05, this chapter, AS 46.04, and AS 46.09.

19 (g) The attorney general may seek enforcement of a compliance order by bringing an
20 action in superior court. In an action to enforce a compliance order, the attorney general may
21 recover full reasonable attorney fees and costs incurred by the state in maintaining the action.

22 * Sec. 11. AS 46.04.040(e) is amended to read:

23 (e) Financial responsibility may be demonstrated by (1) self-insurance, (2) insurance, (3)
24 surety, (4) guarantee, (5) letter of credit approved by the department, or (6) other proof of
25 financial responsibility approved by the department, including proof of financial responsibility
26 provided by a group of insureds who have agreed to cover pollution risks of members of the
27 group under terms the department may prescribe. An action brought under AS 46.03.758,
28 46.03.759, 46.03.760(a) [OR (e)], 46.03.822, or AS 46.04.030(g) may be brought in a state court
29 directly against the insurer, the group, or another person providing evidence of financial
30 responsibility. The applicant [,] and an insurer, surety, guarantor, person furnishing an approved
31 letter of credit, or other group or person providing proof of financial responsibility approved by

1 the department shall appoint an agent for service of process in the state. For purposes of this
2 subsection, an insurer, other than a group of insureds whose agreement has been approved by the
3 department, must either be authorized by the Department of Commerce and Economic
4 Development to sell insurance in the state or be an unauthorized insurer listed by the Department
5 of Commerce and Economic Development as not disapproved for use in the state.

6 * Sec. 12. AS 46.04.040(i) is amended to read:

7 (i) Financial responsibility under this section extends to a loss compensable under
8 AS 46.03.760(e) or 46.03.822 and an assessment under AS 46.03.758, 46.03.759, [46.03.760(a),]
9 or AS 46.04.030(g).

10 * Sec. 13. The provisions of AS 46.03.761(h)(3), as added by sec. 9 of this Act, have the effect of
11 amending Alaska Rule of Civil Procedure 82 by allowing the recovery of full reasonable attorney fees
12 and costs in certain actions.

13 * Sec. 14. AS 46.03.761(h)(3), as added by sec. 9 of this Act, takes effect only if sec. 13 of this Act
14 receives the two-thirds majority vote of each house of the legislature required by art. IV, sec. 15,
15 Constitution of the State of Alaska.

16 * Sec. 15. The provisions of AS 46.03.850(g), as added by sec. 10 of this Act, have the effect of
17 amending Alaska Rule of Civil Procedure 82 by allowing the recovery of full reasonable attorney fees
18 and costs in certain actions.

19 * Sec. 16. AS 46.03.850(g), as added by sec. 10 of this Act, takes effect only if sec. 15 of this Act
20 receives the two-thirds majority vote of each house of the legislature required by art. IV, sec. 15,
21 Constitution of the State of Alaska.

22 * Sec. 17. AS 46.03.758(b)(2), 46.03.758(c), 46.03.758(g), 46.03.760(b), 46.03.760(c), and
23 46.03.760(f) are repealed.

24 * Sec. 18. This Act takes effect immediately under AS 01.10.070(c).