

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 540 (JUDICIARY)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered: 5/6/92

Referred: Today's calendar

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

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the liability of the state for certain registration, planning, and
2 response activities related to oil spills; relating to liability for release or threatened release
3 of a hazardous substance; relating to the liability of an oil spill response action contractor
4 for release or threatened release of a hazardous substance; relating to the duty of the
5 common operating agent for the holders and lessees of the right-of-way agreement for the
6 Trans Alaska Pipeline System to control and contain oil discharges; relating to charges and
7 contractual provisions imposed on vessels; relating to oil discharge and contingency plans;
8 relating to registration of an oil spill response action contractor; repealing secs. 2, 5, 7,
9 10, and 12 of ch. 92, SLA 1991; amending Alaska Rule of Civil Procedure 65; and
10 providing for an effective date."

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

12 * Section 1. AS 09.50.250 is amended to read:

1 **Sec. 09.50.250. ACTIONABLE CLAIMS AGAINST THE STATE.** A person or
2 corporation having a contract, quasi-contract, or tort claim against the state may bring an action
3 against the state in the superior court. A person who may present the claim under AS 44.77 may
4 not bring an action under this section except as set out in AS 44.77.040(c). A person who may
5 bring an action under AS 36.30.560 - 36.30.695 may not bring an action under this section except
6 as set out in AS 36.30.685. However, an action may not be brought under this section if the
7 claim

8 (1) is an action for tort, and is based upon an act or omission of an employee of
9 the state, exercising due care, in the execution of a statute or regulation, whether or not the
10 statute or regulation is valid; or is an action for tort, and based upon the exercise or performance
11 or the failure to exercise or perform a discretionary function or duty on the part of a state agency
12 or an employee of the state, whether or not the discretion involved is abused;

13 (2) is for damages caused by the imposition or establishment of a quarantine by
14 the state;

15 (3) arises out of assault, battery, false imprisonment, false arrest, malicious
16 prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with
17 contract rights; [OR]

18 (4) arises out of the use of an ignition interlock device certified under
19 AS 33.05.020(c); or

20 (5) arises out of

21 (A) registration and approval of an oil spill primary response action
22 contractor under AS 46.04.035;

23 (B) approval of an oil spill contingency plan under AS 46.04.030; or

24 (C) an act or omission of the state, an employee of the state, or a
25 person who contracts with the state in responding to or directing a response to a
26 release or threatened release of oil, unless the act or omission resulted from gross
27 negligence or intentional misconduct not listed in (3) of this section; in this
28 subparagraph, "oil" has the meaning given in AS 46.03.826.

29 * Sec. 2. AS 46.03.822(a) is amended to read:

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

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

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

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

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

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

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

29 * Sec. 3. AS 46.03.822(b) is amended to read:

30 (b) In an action to recover damages or costs, a person otherwise liable under this section
31 is relieved from liability under this section if the person proves

1 (1) that the release or threatened release of the hazardous substance to which the
2 damages relate occurred solely as a result of

3 (A) an act of war;

4 (B) except as provided under AS 46.03.823(c) and 46.03.825(e), an
5 intentional or negligent act or omission of a third party, other than a party or its agents
6 in privity of contract with, or employed by, the person, and that the person

7 (i) exercised due care with respect to the hazardous substance; and

8 (ii) took reasonable precautions against the act or omission of the
9 third party and against the consequences of the act or omission; or

10 (C) an act of God; and

11 (2) in relation to (1)(B) or (C) of this subsection, that the person, within a
12 reasonable period of time after the act occurred,

13 (A) discovered the release or threatened release of the hazardous
14 substance; and

15 (B) began operations to contain and clean up the hazardous substance.

16 * Sec. 4. AS 46.03.822(h) is amended to read:

17 (h) The state, a municipality, [OR] a village, a person who acts as a volunteer and is
18 engaged in a response action under the direction of the federal or state on-scene
19 coordinator, and a vessel of opportunity engaged in a response action under the direction
20 of the federal or state on-scene coordinator [IS] not liable under this section for costs or
21 damages as a result of actions taken in response to an emergency created by a release or
22 threatened release of a hazardous substance generated by or from a facility or vessel owned by
23 another person unless the actions taken by the state, the municipality, [OR] the village, the
24 volunteer, or the vessel constitute gross negligence or intentional misconduct.

25 * Sec. 5. AS 46.03.822(k) is amended to read:

26 (k) In this section, "damages" has the meaning given in AS 46.03.824 and includes
27 [INCLUDE] damage to persons or to public or private property, damage to the natural resources
28 of the state or a municipality, and damage caused by acts or omissions of a response action
29 contractor for which the response action contractor is not liable under AS 46.03.823 or 46.03.825.

30 * Sec. 6. AS 46.03.825(a) is repealed and reenacted to read:

31 (a) A response action contractor who responds to a release or threatened release of oil

1 is not civilly liable for removal costs or damages that result from an act or omission in the course
2 of providing care, assistance, or advice

3 (1) consistent with a contingency plan

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

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

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

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

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

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

12 (2) a response action contractor who

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

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

16 (C) is not registered with the department under AS 46.04.035; or

17 (D) has agreed in writing to be listed as a primary response action
18 contractor, who is listed as a primary response action contractor in a contingency
19 plan approved under AS 46.04.030, and who fails to respond to a release or
20 threatened release of oil that the primary response action contractor was required
21 to respond to under its contract with the applicable contingency plan holder; this
22 subparagraph does not apply to a primary response action contractor if the failure
23 to respond to a release or threatened release of oil results from a prior and ongoing
24 response under another contingency plan approved under AS 46.04.030 in which the
25 primary response action contractor has the primary duty to respond and a
26 significant portion of the response action contractor's oil spill cleanup equipment
27 listed in the contingency plan approved under AS 46.04.030 is in use [AN ACTION
28 FOR DAMAGES TO TANGIBLE PERSONAL PROPERTY NOT CAUSED BY OIL];
29 or

30 (3) an act or omission that occurs more than 30 [15] days after the release;

31 (4) an action based on contractual duties arising out of the state and federal

1 **Trans Alaska Pipeline System right-of-way agreements.**

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

3 (d) In this section,

4 (1) **"primary response action contractor" has the meaning given in**
5 **AS 46.04.035:**

6 (2) **"registered" means registered under AS 46.04.035:**

7 (3) **"response action" means an action taken to respond to a release or threatened**
8 **release of oil, including [BUT NOT LIMITED TO] mitigation, clean up, marine salvage, or**
9 **removal of a release or threatened release of oil.**

10 * **Sec. 9.** AS 46.03.825 is amended by adding new subsections to read:

11 (e) The defense provided in AS 46.03.822(b)(1)(B) is not available to a potentially liable
12 person with respect to costs or damages caused by an act or omission of a response action
13 contractor.

14 (f) Except as provided in (e) of this section, this section does not affect the liability under
15 this chapter or under any other state law of a person other than a response action contractor.

16 (g) A response action contractor is not civilly liable for removal costs or damages
17 resulting solely from the response action contractor's decision to terminate its response efforts
18 because of the expiration of the limited liability provided under this section. A response action
19 contractor's decision to terminate response efforts because of the expiration of the limited liability
20 provided under this section does not in any manner impair, curtail, limit, or otherwise affect the
21 limited liability conferred on the contractor with regard to the contractor's response efforts
22 undertaken during the period of time that limited liability under this section applied to those
23 response efforts.

24 * **Sec. 10.** AS 46.03.826(11) is amended to read:

25 (11) "response action contractor" means **a person who**

26 (A) [A PERSON WHO] enters into a response action contract with respect
27 to a release or threatened release of a hazardous substance and who is carrying out the
28 contract, including a cooperative organization formed to maintain and supply response
29 equipment and materials that enters into a response action contract relating to a release
30 or threatened release;

31 (B) [A PERSON WHO] is retained or hired by and is under the control

1 of a person described in (A) of this paragraph to provide services related to the response
2 action contract; [AND]

3 (C) [A PERSON WHO] acts as a volunteer and is engaged in a response
4 action; or

5 (D) is required to respond under AS 46.04.020(g).

6 * Sec. 11. AS 46.04.020(a) is amended to read:

7 (a) A person causing or permitting the discharge of oil shall immediately contain and
8 clean up the discharge. [THE DEPARTMENT MAY WAIVE THIS REQUIREMENT

9 (1) IF IT DETERMINES, IN CONSULTATION WITH THE UNITED STATES
10 COAST GUARD OR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
11 AS APPROPRIATE, THAT CONTAINMENT OR CLEANUP IS TECHNICALLY NOT
12 FEASIBLE; OR

13 (2) IF THE CLEANUP OR CONTAINMENT ACTIVITIES WOULD RESULT
14 IN GREATER ENVIRONMENTAL DAMAGE THAN THE DISCHARGE ITSELF.]

15 * Sec. 12. AS 46.04.020 is amended by adding new subsections to read:

16 (g) In addition to its existing obligations under state and federal law, and the provisions
17 of the state and federal Trans Alaska Pipeline System right-of-way agreements, the common
18 operating agent for the holders and lessees of the right-of-way agreement for the Trans Alaska
19 pipeline shall (1) immediately provide for the containment and clean up of a discharge or
20 threatened discharge of oil transported by or due to the operation of the Trans Alaska Pipeline
21 System or due to related activities, including operation of a tank vessel while berthed at the Trans
22 Alaska pipeline marine terminal or while traveling within 72 tanker lane miles to or from the
23 marine terminal; and (2) make response action services available under contract terms as required
24 by AS 46.04.030(r). The duty to respond imposed under this subsection does not affect the duty
25 of any other person.

26 (h) A charge or contractual provision imposed on a tank vessel by the holders and lessees
27 of the right-of-way agreement for the Trans Alaska Pipeline System, or their common operating
28 agent, (1) must be fair, reasonable, and nondiscriminatory; and (2) with respect to any financial
29 responsibility requirement in excess of \$10,000,000, (A) may not exceed the potential cost of
30 containment and cleanup that the operating agent may reasonably be expected to incur under its
31 contract with the owner, operator, or charterer of the tank vessel; and (B) must vary among each

1 tank vessel in proportion to the volume of oil carried by each tank vessel from the marine
2 terminal serving the Trans Alaska Pipeline System.

3 (i) The superior court has jurisdiction to review and enjoin a charge or contractual
4 provision described in this section at the request of a tank vessel owner, operator, or lessee.

5 (j) If an injunction is sought under (i) of this section for a violation of (h) of this section,
6 the court shall grant a temporary restraining order or preliminary injunction if the tank vessel
7 owner, operator, or lessee demonstrates that the charge or contractual provision probably violates
8 (h) of this section, even if other requirements for a temporary restraining order or preliminary
9 injunction are not met. However, the court may require security before issuing an injunction or
10 temporary restraining order under this subsection.

11 (k) The department may waive an oil discharge containment and cleanup requirement
12 imposed under (a) or (g) of this section if

13 (1) the department determines, in consultation with the United States Coast Guard
14 or the United States Environmental Protection Agency, as appropriate, that containment or
15 cleanup is technically not feasible; or

16 (2) the cleanup or containment activities would result in greater environmental
17 damage than the discharge itself.

18 * Sec. 13. AS 46.04.030(e) is amended to read:

19 (e) The department may attach reasonable terms and conditions to its approval or
20 modification of a contingency plan that the department determines are necessary to ensure that
21 the applicant for a contingency plan has access to sufficient resources to protect environmentally
22 sensitive areas and to contain, clean up, and mitigate potential oil discharges from the facility or
23 vessel as provided in (k) of this section, and to ensure that the applicant complies with the
24 contingency plan. If a contingency plan submitted to the department for approval relies on
25 the services of an oil spill primary response action contractor, the department may not
26 approve the contingency plan unless the primary response action contractor is registered
27 and approved under AS 46.04.035. The contingency plan must provide for the use by the
28 applicant of the best technology that was available at the time the contingency plan was
29 submitted or renewed. The department may require an applicant or holder of an approved
30 contingency plan to take steps necessary to demonstrate its ability to carry out the contingency
31 plan, including

- 1 (1) periodic training;
2 (2) response team exercises; and
3 (3) verifying access to inventories of equipment, supplies, and personnel identified
4 as available in the approved contingency plan.

5 * Sec. 14. AS 46.04.030 is amended by adding new subsections to read:

6 (r) Except as provided in (n) of this section and in order to receive approval from the
7 department for an oil discharge prevention and contingency plan submitted under this section,
8 the owner, operator, or charterer of a tank vessel that intends to carry crude oil that has been
9 transported by the Trans Alaska Pipeline System shall obtain by contract the initial response
10 action services of the common operating agent for the holders and lessees of the right-of-way
11 agreement for the Trans Alaska Pipeline System. If the contract provides for a transfer of the
12 management and control of the response action to a discharge or threatened discharge either to
13 the tank vessel or to the federal government following a discharge or threatened discharge, the
14 contract must provide for not less than 72 hours notice to the tank vessel if transfer of
15 management and control occurs and must stipulate that any transfer of the management and
16 control of the response action must first be approved by the federal and state on-scene
17 coordinators. In addition to the requirements of this subsection, the department may require
18 individual vessels to submit additional contingency plans to cover specific vessel response,
19 prevention equipment, and procedures. Nothing in this subsection is intended to preclude the
20 federal or state government from assuming management and control of an oil spill response to
21 a discharge or threatened discharge from a tank vessel under appropriate circumstances.

22 (s) A contract required under this section between a contingency plan holder and a
23 response action contractor must provide that the state is a third-party beneficiary of the contract.

24 * Sec. 15. AS 46.04 is amended by adding a new section to read:

25 Sec. 46.04.035. REGISTRATION OF OIL SPILL RESPONSE ACTION
26 CONTRACTORS. (a) A person may apply to the department for registration as an oil spill
27 primary response action contractor. The department shall adopt regulations governing the
28 registration and approval of oil spill primary response action contractors. Regulations adopted
29 by the department under this section must include

- 30 (1) minimum training standards for personnel;
31 (2) verification requirements that ensure the existence of resources, including

1 personnel, equipment, services, and an adequate deployment plan necessary to a response action
2 or as required by a contingency plan in which the contractor has agreed in writing to be listed
3 and is listed;

4 (3) minimum professional response action standards and practices; and

5 (4) minimum performance standards for oil spill primary response action
6 contractors listed in an oil spill contingency plan approved under AS 46.04.030.

7 (b) Notwithstanding (a) of this section, the department may substitute a primary response
8 action contractor approval program, and a subsequent process to approve primary response action
9 contractors who agree to be listed in a contingency plan approved under AS 46.04.030, for
10 regulations required under (a)(1) - (3) of this section if the approval program and subsequent
11 process are developed by the United States Coast Guard.

12 (c) The department shall establish fees applicable to registration under this section in an
13 amount necessary to cover the costs of the registration program. The fees shall be collected by
14 the department.

15 (d) The Administrative Procedure Act (AS 44.62) applies to regulations and registrations
16 under this section.

17 (e) The department shall develop and maintain a list of oil spill primary response action
18 contractors registered under this section. The department shall provide the list on request to
19 interested persons.

20 (f) A primary response action contractor registered under this section shall annually
21 provide to the department a list of all contingency plans approved under AS 46.04.030 in which
22 the primary response action contractor has agreed in writing to be listed as a responder.

23 (g) A response action contractor may not be registered as an oil spill primary response
24 action contractor under this section unless the response action contractor agrees in writing with
25 the department to

26 (1) be subject to the direction of the federal or state on-scene coordinator during
27 implementation of a contingency plan in which the contractor is listed; and

28 (2) respond under the direction of, and in return for payment by, the federal or
29 state on-scene coordinator to an oil spill in which the responsible party is unknown or insolvent;
30 this paragraph does not apply to an oil spill primary response action contractor who is already
31 engaged in a response to a prior release or threatened release and the response requires a

1 significant portion of the response action contractor's oil spill equipment.

2 (h) In this section,

3 (1) "oil" has the meaning given in AS 46.03.826;

4 (2) "primary response action contractor" means a person who enters into a
5 response action contract with respect to a release or threatened release of oil and who is carrying
6 out the contract, including a cooperative organization formed to maintain and supply response
7 equipment and materials that enters into a response action contract relating to a release or
8 threatened release of oil;

9 (3) "response action" has the meaning given in AS 46.03.825.

10 * Sec. 16. Sections 2, 5, 7, 10, and 12 of ch. 92, SLA 1991, are repealed.

11 * Sec. 17. COURT RULE CHANGE. (a) AS 46.04.020(j), added by sec. 12 of this Act, has the
12 effect of amending Alaska Rule of Civil Procedure 65 by changing the requirements for issuance of a
13 temporary restraining order or preliminary injunction in certain cases.

14 (b) AS 46.04.020(j), added by sec. 12 of this Act, takes effect only if (a) of this section receives
15 the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of
16 Alaska.

17 * Sec. 18. TRANSITION. The Department of Environmental Conservation shall adopt regulations
18 to implement AS 46.04.035(a), enacted in sec. 15 of this Act, on or before January 1, 1993.

19 * Sec. 19. If sec. 16 of this Act takes effect after June 30, 1992, sec. 16 of this Act is retroactive to
20 June 30, 1992.

21 * Sec. 20. APPLICABILITY. (a) Except as provided in (b) of this section, the amendments to
22 AS 46.03.822 and 46.03.825, made by secs. 2 - 9 of this Act, apply only to causes of action accruing
23 on or after the effective date of secs. 2 - 9 of this Act.

24 (b) The provisions of AS 46.03.825(b)(2)(C) apply only to causes of action accruing on or after
25 the effective date of that paragraph under sec. 21 of this Act.

26 * Sec. 21. AS 46.03.825(b)(2)(C), added by sec. 7 of this Act, and sec. 13 of this Act take effect
27 July 1, 1993.

28 * Sec. 22. Except as provided in sec. 21 of this Act, this Act takes effect immediately under
29 AS 01.10.070(c).