

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 540 (JUDICIARY) am
IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Amended: 5/8/92

Offered: 5/6/92

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

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to liability for release or threatened release of a hazardous substance;
2 relating to the liability of an oil spill response action contractor for release or threatened
3 release of a hazardous substance; relating to contracts by the common operating agent for
4 the holders and lessees of the right-of-way agreement for the Trans Alaska Pipeline System
5 to provide initial response services to tank vessels; relating to financial responsibility and
6 insurance provisions imposed on vessels; relating to oil discharge and contingency plans;
7 relating to registration of an oil spill response action contractor; repealing secs. 2, 5, 7,
8 10, and 12 of ch. 92, SLA 1991; amending Alaska Rule of Civil Procedure 65; and
9 providing for an effective date."

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

11 * Section 1. PURPOSE. It is not the purpose of this Act to affect duties and
12 responsibilities of Alyeska Pipeline Service Company and its owners arising under federal or

1 state law or the state and federal Trans Alaska Pipeline System agreements.

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

3 (a) Notwithstanding any other provision or rule of law and subject only to the defenses
4 set out in (b) of this section, [AND] the exception set out in (i) of this section, and the
5 limitation on liability provided under AS 46.03.825, the following persons are strictly liable,
6 jointly and severally, for damages, for the costs of response, containment, removal, or remedial
7 action incurred by the state, a municipality, or a village, and for the additional costs of a function
8 or service, including administrative expenses for the incremental costs of providing the function
9 or service, that are incurred by the state, a municipality, or a village, and the costs of projects
10 or activities that are delayed or lost because of the efforts of the state, the municipality, or the
11 village, resulting from an unpermitted release of a hazardous substance or, with respect to
12 response costs, the substantial threat of an unpermitted release of a hazardous substance:

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

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

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

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

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

1 of a hazardous substance.

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

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

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

7 (A) an act of war;

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

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

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

14 (C) an act of God; and

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

17 (A) discovered the release or threatened release of the hazardous
18 substance; and

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

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

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

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

30 (k) In this section, "damages" has the meaning given in AS 46.03.824 and includes
31 [INCLUDE] damage to persons or to public or private property, damage to the natural resources

1 of the state or a municipality, and damage caused by acts or omissions of a response action
2 contractor for which the response action contractor is not liable under AS 46.03.823 or 46.03.825.

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

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

7 (1) consistent with a contingency plan

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

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

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

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

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

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

16 (2) a response action contractor who

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

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

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

1 OR

2 (3) AN ACT OR OMISSION THAT OCCURS MORE THAN 15 DAYS AFTER
3 THE RELEASE].

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

5 (d) In this section,

6 (1) "consistent with a contingency plan" means action that, when evaluated
7 as a whole, is in substantial compliance with a contingency plan, and includes action that
8 is a deviation from a contingency plan if the deviation is immaterial or insubstantial;

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

11 (3) "registered" means registered under AS 46.04.035;

12 (4) "response action" means an action taken to respond to a release or threatened
13 release of oil, including [BUT NOT LIMITED TO] mitigation, clean up, marine salvage, or
14 removal of a release or threatened release of oil.

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

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

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

21 (g) Nothing in this section is intended to amend AS 46.04.030(1) or to create a cleanup
22 or performance standard that must be met by a holder of a contingency plan or by a primary
23 response action contractor.

24 * Sec. 10. AS 46.04.020 is amended by adding new subsections to read:

25 (g) In addition to existing obligations under state and federal law, and the provisions of
26 the state and federal trans-Alaska pipeline agreements, the common operating agent for the holder
27 and lessees of the right-of-way agreement for the Trans Alaska Pipeline System shall make initial
28 response action services available under contract terms as provided under AS 46.04.030(r). The
29 obligations imposed under this subsection do not affect the response action duties of any other
30 person or the liability of any other person for a discharge.

31 (h) A financial responsibility or insurance provision imposed on a tank vessel by the

1 holders and lessees of the right-of-way agreement for the Trans Alaska Pipeline System, or their
2 common operating agent, (1) must be fair, reasonable, and nondiscriminatory; and (2) with
3 respect to any financial responsibility requirement in excess of \$10,000,000, (A) may not exceed
4 the potential cost of containment and cleanup that the operating agent may reasonably be
5 expected to incur under its contract with the owner, operator, or charterer of the tank vessel
6 before the transfer of cleanup and containment management and control to the responsible party;
7 in establishing the financial responsibility requirement, the common operating agent shall assume
8 that transfer of management and control will occur at the earliest practicable time following a
9 discharge or a threat of discharge; and (B) must vary among each tank vessel in proportion to
10 the volume of oil carried by each tank vessel per voyage from the marine terminal serving the
11 Trans Alaska Pipeline System; for purposes of this subparagraph, the volume of oil carried by
12 the vessel must be reduced by the percentage of spill reduction credits granted that vessel under
13 regulations adopted by the department.

14 (i) The superior court and, with respect to intrastate voyages, the Alaska Public Utilities
15 Commission, under AS 42.05.361 - 42.05.431, have concurrent jurisdiction to review and enjoin
16 a financial responsibility or insurance provision described in this section at the request of a tank
17 vessel owner, operator, or lessee. Except as provided in this subsection, nothing in this section
18 affects the jurisdiction of the Alaska Public Utilities Commission.

19 (j) If an injunction is sought in a court under (i) of this section for a violation of (h) of
20 this section, the court shall grant a temporary restraining order or preliminary injunction if the
21 tank vessel owner, operator, or lessee demonstrates that the financial responsibility or insurance
22 provision probably violates (h) of this section, even if other requirements for a temporary
23 restraining order or preliminary injunction are not met. However, the court may require security
24 before issuing an injunction or temporary restraining order under this subsection.

25 * Sec. 11. AS 46.04.030(e) is amended to read:

26 (e) The department may attach reasonable terms and conditions to its approval or
27 modification of a contingency plan that the department determines are necessary to ensure that
28 the applicant for a contingency plan has access to sufficient resources to protect environmentally
29 sensitive areas and to contain, clean up, and mitigate potential oil discharges from the facility or
30 vessel as provided in (k) of this section, and to ensure that the applicant complies with the
31 contingency plan. If a contingency plan submitted to the department for approval relies on

1 the services of an oil spill primary response action contractor, the department may not
2 approve the contingency plan unless the primary response action contractor is registered
3 and approved under AS 46.04.035. The contingency plan must provide for the use by the
4 applicant of the best technology that was available at the time the contingency plan was
5 submitted or renewed. The department may require an applicant or holder of an approved
6 contingency plan to take steps necessary to demonstrate its ability to carry out the contingency
7 plan, including

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

12 * Sec. 12. AS 46.04.030 is amended by adding new subsections to read:

13 (r) Except as provided in (n) of this section and in order to receive approval from the
14 department for an oil discharge prevention and contingency plan submitted under this section,
15 the owner, operator, or charterer of a tank vessel that intends to carry crude oil that has been
16 transported by the Trans Alaska Pipeline System shall obtain by contract the initial response
17 action services of the common operating agent for the holders and lessees of the right-of-way
18 agreement for the Trans Alaska Pipeline System. The contract must contain the following
19 provisions: (1) the common operating agent, as a primary response action contractor shall, unless
20 response services are transferred as provided in (2) of this subsection, provide initial response
21 services to the owner, operator, or charterer of the tank vessel for a discharge or a threatened
22 discharge of crude oil from a tank vessel while the vessel is berthed at the Trans Alaska Pipeline
23 System marine terminal or while the vessel is within 72 tanker lane miles to or from the marine
24 terminal; (2) that its coverage for any particular vessel may not be terminated by the common
25 operating agent while that vessel is within 72 tanker lane miles to or from the marine terminal;
26 this provision may not be interpreted to limit the department's authority to revoke approval under
27 this section for an oil discharge prevention and contingency plan submitted by the owner,
28 operator, or charterer of a tank vessel; and (3) if the contract provides for a transfer of the
29 management and control of the response action to a discharge or threatened discharge either to
30 an owner, operator, or charterer of the tank vessel or to the federal government following a
31 discharge or threatened discharge, the contract must provide for not less than 72 hours notice to

1 the owner, operator, or charterer of the tank vessel that transfer of management and control will
2 be required and must stipulate that any transfer of the management and control of the response
3 action must first be approved by the federal and state coordinators on-scene coordinator after
4 consultation with the state on-scene coordinator. In addition to the requirements of this
5 subsection, the department may require individual vessels to submit additional contingency plans
6 to cover specific vessel response, prevention equipment, and procedures. Nothing in this
7 subsection is intended to preclude the federal or state government from assuming management
8 and control of an oil spill response to a discharge or threatened discharge from a tank vessel
9 under appropriate circumstances.

10 * Sec. 13. AS 46.04 is amended by adding a new section to read:

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

16 (1) minimum training standards for personnel;

17 (2) verification requirements that ensure the existence of resources, including
18 personnel, equipment, services, and an adequate deployment plan necessary to a response action
19 or as required by a contingency plan in which the contractor has agreed in writing to be listed
20 and is listed;

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

22 (4) minimum planning standards for oil spill primary response action contractors
23 listed in an oil spill contingency plan approved under AS 46.04.030.

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

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

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

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

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

9 (g) Nothing in this section is intended to amend AS 46.04.030(l) or to create a cleanup
10 or performance standard that must be met by a holder of a contingency plan or a response action
11 contractor.

12 (h) In this section,

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

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

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

20 * Sec. 14. Sections 2, 5, 7, 10, and 12 of ch. 92, SLA 1991, are repealed.

21 * Sec. 15. COURT RULE CHANGE. (a) AS 46.04.020(j), added by sec. 10 of this Act, has the
22 effect of amending Alaska Rule of Civil Procedure 65 by changing the requirements for issuance of a
23 temporary restraining order or preliminary injunction in certain cases.

24 (b) AS 46.04.020(j), added by sec. 10 of this Act, takes effect only if (a) of this section receives
25 the two-thirds majority vote of each house required by art. IV, sec. 16, Constitution of the State of
26 Alaska.

27 * Sec. 16. TRANSITION. The Department of Environmental Conservation shall adopt regulations
28 to implement AS 46.04.035(a), enacted in sec. 13 of this Act, on or before January 1, 1993.

29 * Sec. 17. If sec. 14 of this Act takes effect after June 30, 1992, sec. 14 of this Act is retroactive to
30 June 30, 1992.

31 * Sec. 18. APPLICABILITY. (a) The amendments to AS 46.03.822 and 46.03.825, made by secs.

1 2 - 9 of this Act, apply only to causes of action accruing on or after the effective date of secs. 2 - 9 of
2 this Act.

3 * **Sec. 19.** Section 11 of this Act takes effect July 1, 1993.

4 * **Sec. 20.** Except as provided in sec. 19 of this Act, this Act takes effect immediately under
5 AS 01.10.070(c).