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327

STATE OF ALASKA

DEPT. OF ENVIRONMENTAL CONSERVATION

STEVE COWPER, GOVERNOR

OFFICE OF THE COMMISSIONER
P.O. BOX 0, JUNEAU, ALASKA 99811-1800

(907) 465-2600

POSITION PAPER SB 327

Title

An Act Relating to Oil Discharge Contingency Plans

Effect of the Bill


The bill would require that holders of oil discharge contingency plans maintain the capability to carry out their approved plans. The bill would also establish penalties for failure to maintain this capability.

Department Position

The Department supports the bill.

Fiscal Effect

The Department has provided a zero fiscal note on the bill.


Dennis D. Kelso
Commissioner

March 25, 1988
Date

STEVE COWPER
GOVERNOR



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 11, 1988

The Honorable Jan Faiks
President of the Senate
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Senator Faiks:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the requirements for oil discharge contingency plans.

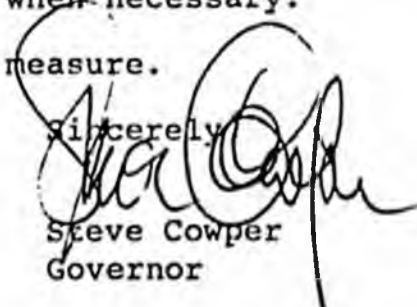
Under AS 46.04.030, the operators of large oil terminal facilities, offshore exploration or production facilities, tank vessels, and oil barges must submit oil spill contingency plans to the Department of Environmental Conservation. The purpose of the contingency plans is to demonstrate the operator's ability to contain, clean up, and mitigate the effects of oil spills into the environment. Recent spills have shown that the contingency plan requirement may be inadequate if the operators do not in fact have the capability of carrying out their own contingency plans. This bill would clarify that the department may require operators to show that they are actually capable of implementing their contingency plans, and that filing a plan without having the capability of carrying it out is a violation of state law.

Section 1 of the bill amends AS 46.04.030(e) to make explicit that the department may require an operator to demonstrate its ability to carry out the plan, by requiring training, spill exercises, and inventories of equipment and personnel that would actually be available in the case of a spill.

Section 2 makes explicit that the operator is actually required to have the capability to carry out its plan, and that the existing sanctions for violations of the chapter would apply if the operator failed to maintain that capability and failed to use it when necessary.

I urge your support of this measure.

Sincerely,


Steve Cowper
Governor

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Oil Discharge Contingency Plans
Sponsor: Rules Committee
Requestor: Governor

Agency Affected: DEC
BRU: Environmental Quality
Components: All

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

The proposal will have no fiscal impact.

Prepared by: Amv Kyle *alk* Phone: 465-2600
 Division: Commissioner's Office Date: 3 Dec 87
 Approved by Commissioner: *[Signature]* Date: 9 Dec 87
 Agency: DEC

Distribution (by preparer):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

Telephone: (907)
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P.O. BOX O, JUNEAU, ALASKA 99811-1800

(907) 465-2600

January 29, 1988

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The Honorable Mitch Abood
Chairman
State Affairs Committee
Alaska State Senate
P.O. Box V
Juneau, AK 99811

Dear Senator Abood:

~~I am writing to request that you schedule SB 327 for hearing before the Senate State Affairs committee.~~

This bill, introduced by Governor Cowper, would improve the state's existing law governing prevention and response to oil spills. The bill will address deficiencies identified in part as a result of the oil spill in Cook Inlet from the tanker Glacier Bay last summer.

The state's oil pollution control program requires that oil terminals and tankers over a certain size prepare plans to respond to oil spills. These are referred to as oil spill contingency plans.

The bill would do two things. First, it would establish penalties for facilities that fail to maintain the capability to implement their approved oil spill contingency plans. This is important so that we can ensure that the contingency planning process is not just a paper exercise, but results in actual readiness.

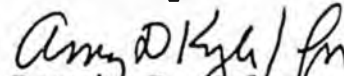
The second purpose of the bill is to give the Department the clear authority to require drills or other specific steps needed

January 29, 1988

to ensure that plans are capable of being carried out in the field.

I believe that this legislation is very important to the state's oil pollution control program and would very much appreciate an early hearing on this subject. Thank you very much for your consideration.

Sincerely,


Dennis D. Kelso
Commissioner

cc: Senator Rick Uehling
Senator Willie Hensley
Senator Joe P. Josephson
Senator Ken Fanning

(8) "vessel" means any form or manner of watercraft, whether or not capable of self-propulsion, except offshore platforms. (§ 1 ch 129 SLA 1977; am §§ 1-3 ch 128 SLA 1978; am § 110 ch 59 SLA 1982; am § 19 ch 59 SLA 1986)

Revisor's notes. — In 1987, a reference in paragraph (b)(1) to "(3) of this subsection" was changed to "(2) of this subsection" to correct a manifest error.

Cross references. — For provision that actions brought under this section may be brought directly against insurers or other persons providing evidence of financial responsibility, see AS 46.04.040(e).

For schedule of civil penalties under (b) of this section, see 18 AAC 75.510 — 18 AAC 75.600.

Effect of amendments. — The 1986 amendment repealed subsection (k), concerning the "oil spill mitigation account."

Editor's notes. — The effective date (referred to in (e) of this section) of the regulation adopting the schedules is April 19, 1978.

Sec. 46.03.760. Civil action for pollution; damages. (a) A person who violates or causes or permits to be violated a provision of this chapter other than AS 46.03.250 — 46.03.314, or a provision of AS 46.04 or AS 46.09, or a regulation, a lawful order of the department, or a permit, approval, or acceptance, or term or condition of a permit, approval, or acceptance issued under this chapter or AS 46.04 or AS 46.09 is liable, in a civil action, to the state for a sum to be assessed by the court of not less than \$500 nor more than \$100,000 for the initial violation, nor more than \$5,000 for each day after that on which the violation continues, and that shall reflect, when applicable,

(1) reasonable compensation in the nature of liquidated damages for any adverse environmental effects caused by the violation, which shall be determined by the court according to the toxicity, degradability and dispersal characteristics of the substance discharged, the sensitivity of the receiving environment, and the degree to which the discharge degrades existing environmental quality;

(2) reasonable costs incurred by the state in detection, investigation, and attempted correction of the violation;

(3) the economic savings realized by the person in not complying with the requirement for which a violation is charged.

(b) Except as determined by the court under (f)(4) of this section, actions under this section may not be used for punitive purposes, and sums assessed by the court must be compensatory and remedial in nature.

(c) The court, upon motion of the department or upon its own motion, may defer assessment of all or part of that portion of the sum imposed upon a person under (a)(3) of this section conditioned upon the person complying, within the shortest feasible time, with the requirement for which a violation is shown.

(d) As used in this section, "economic savings" means that sum which a person would be required to expend for the planning, acquisi-

tion, siting, construction, installation and operation of facilities necessary to effect compliance with the standard violated.

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

(f) A person who violates or causes or permits to be violated a provision of AS 46.03.250 — 46.03.314, or a regulation, a lawful order of the department, or a permit, approval, or acceptance, or term or condition of a permit, approval, or acceptance issued under AS 46.03.250 — 46.03.314 is liable, in a civil action, to the state for a sum to be assessed by the court of not less than \$500 nor more than \$100,000 for the initial violation, nor more than \$10,000 for each day after that on which the violation continues, and that shall reflect, when applicable,

(1) reasonable compensation in the nature of liquidated damages for any adverse environmental effects caused by the violation, that shall be determined by the court according to the toxicity, degradability and dispersal characteristics of the substance discharged, the sensitivity of the receiving environment, and the degree to which the discharge degrades existing environmental quality;

(2) reasonable costs incurred by the state in detection, investigation, and attempted correction of the violation;

(3) the economic savings realized by the person in not complying with the requirement for which a violation is charged; and

(4) the need for an enhanced civil penalty to deter future noncompliance. (§ 3 ch 120 SLA 1971; am § 9 ch 220 SLA 1976; am § 5 ch 266 SLA 1976; am §§ 5, 6 ch 116 SLA 1980; am §§ 5 — 7 ch 77 SLA 1984; am § 9 ch 59 SLA 1986)

Cross references. — For oil pollution control, see AS 46.04. For provision that actions brought under (a) and (e) of this section may be brought directly against insurers or other persons providing evidence of financial security, see AS 46.04.040(e).

Effect of amendments. — The 1984 amendment substituted "other than AS 46.03.250 — 46.03.314, or a provision of"

for "or" in the introductory language of subsection (a) and made a series of technical changes through the rest of this subsection, added "Except as determined by the court under (f)(4) of this section" at the beginning of subsection (b), and added subsection (f).

The 1986 amendment in the introductory language of subsection (a) inserted "or AS 46.09" in two places.

NOTES TO DECISIONS

This section and AS 46.03.790 hold not unconstitutional. — See *Stock v. State*, Sup. Ct. Op. No. 1076 (File No. 2007), 526 P.2d 3 (1974) decided prior to the 1976 amendment of those sections.

Quoted in *State v. Alaska Int'l Air, Inc.*, Sup. Ct. Op. No. 1409 (File No. 2808), 562 P.2d 1064 (1977).

Collateral references. — Injunction against pollution of stream by private persons or corporations. 46 ALR 8.

When statute of limitations commences to run as to action against municipality for damages to riparian premises by pollution of stream by discharge of sewage. 122 ALR 1509.

Tenant's remedy against stranger for wrongful pollution of waters. 12 ALR2d 1234.

Measure and elements of damages for pollution of well, cistern, or spring. 19 ALR2d 769.

Measure and elements of damages for pollution of stream. 49 ALR2d 253.

Landowner's right to relief against pollution of his water supply by industrial or commercial waste. 39 ALR3d 910.

Maintainability in state court of class action for relief against air and water pollution. 47 ALR3d 769.

Preliminary mandatory injunction to prevent, correct, or reduce effects of polluting practices. 49 ALR3d 1239.

Liability of water supplier for damages resulting from furnishing impure water. 54 ALR3d 936.

Validity of state statutory provision permitting administrative agency to impose monetary penalties for violation of environmental pollution statute, 81 ALR3d 1258.

Recovery in trespass for injury to land caused by airborne pollutants. 2 ALR4th 1054.

Sec. 46.03.765. Injunctions. The superior court has jurisdiction to enjoin a violation of this chapter, AS 46.04, or AS 46.09 or of a regulation, a lawful order of the department, or permit, approval, or acceptance, or term or condition of a permit, approval, or acceptance issued under this chapter, AS 46.04, or AS 46.09. In actions brought under this section, temporary or preliminary relief may be obtained upon a showing of an imminent threat of continued violation, and probable success on the merits, without the necessity of demonstrating physical irreparable harm. The balance of equities in actions under this section may affect the timing of compliance, but not the necessity of compliance within a reasonable period of time. (§ 10 ch 220 SLA 1976; am § 6 ch 266 SLA 1976; am § 7 ch 116 SLA 1980; am § 10 ch 59 SLA 1986)

Effect of amendments. — The 1986 amendment in the first sentence inserted "or AS 46.09" in two places and substi-

tuted a comma for "or" following "this chapter" in two places in the first sentence.

Sec. 46.03.770. Detention of vessel without warrant as security for damages. A vessel that is used in or in aid of a violation of AS 46.03.740 — 46.03.750 may be detained after a valid search by the department, an agent of the department, a peace officer of the state, or an authorized protection officer of the Department of Fish and Game.

Revisor's notes. — In 1982, three references in (a) of this section were changed from "AS 43.04" to "AS 46.04" to correct a manifest error.

Effect of amendments. — The 1986

amendment in subsection (a) inserted "or AS 46.09," in three places and substituted a comma for "or" following "this chapter" in three places.

Sec. 46.03.790. Criminal penalties. (a) Except as provided in (d) — (f) of this section, a person who negligently violates a provision of this chapter, AS 46.04, or AS 46.09, or of a regulation, lawful order of the department, or permit, approval, or acceptance, or term or condition of a permit, approval, or acceptance issued under this chapter, AS 46.04, or AS 46.09 is guilty of a class B misdemeanor.

(b) Except as provided in (d) — (f) of this section, a person who knowingly violates a provision of this chapter, AS 46.04, or AS 46.09, or of a regulation, lawful order of the department, or permit, approval, or acceptance, or term or condition of a permit, approval, or acceptance issued under this chapter, AS 46.04, or AS 46.09 is guilty of a class A misdemeanor.

(c) Each day on which a violation described in this section occurs is considered a separate violation.

(d) Notwithstanding (a) and (b) of this section, a person who fails to provide or falsely states information required under AS 46.03.755, AS 46.04, or AS 46.09 is guilty of a misdemeanor and, upon conviction, is punishable by a fine of not more than \$25,000, or by imprisonment for not more than one year, or by both. Each unlawful act constitutes a separate offense.

(e) Notwithstanding (a) and (b) of this section, a person who knowingly (1) transports any hazardous waste to a facility without a permit required under AS 46.03.250 — 46.03.314; (2) treats, stores, or disposes of hazardous waste without a permit required under AS 46.03.250 — 46.03.314; or (3) makes a false statement or representation in an application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with the hazardous waste provisions of AS 46.03.250 — 46.03.314 or regulations adopted under those provisions, is punishable by a fine of not more than \$10,000 per day or by imprisonment for not more than one year, or both.

(f) Notwithstanding the penalty provisions of (a) — (e) of this section, a defendant that is an organization is, upon conviction of a violation of any of the provisions listed in this section, subject to the penalties set out in AS 12.55.035 (c). (§ 3 ch 120 SLA 1971; am § 11 ch 220 SLA 1976; am § 8 ch 266 SLA 1976; am §§ 8, 9 ch 116 SLA 1980; am §§ 11, 12 ch 93 SLA 1981; am § 112 ch 59 SLA 1982; am § 8 ch 77 SLA 1984; am §§ 12 — 14 ch 59 SLA 1986)

Cross references. — For sentences for misdemeanors, see AS 12.55.035 and 12.55.135.

Effect of amendments. — The 1984 amendment substituted "Except as provided in (d) -- (f) of this section, a person who negligently violates" for "A person who violates or who causes or permits a violation of" in subsection (a) and "Except as provided in (d) — (f) of this section, a person who knowingly violates a provision of this chapter or AS 46.04" for "A person who wilfully violates a provision of this chapter" in subsection (b), deleted "(a) or (b) of" preceding "this section" in subsection (c), added "Notwithstanding (a) and (b) of this section" at the beginning of the first sentence in subsection (d), and added subsections (e) and (f).

The 1986 amendment inserted "or AS 46.09" in subsection (a) in two places, in subsection (b) in two places and in subsection (d) and made related word and punctuation changes.

Opinions of attorney general. — Proposed regulation establishing compliance with management practice under AS 41.17 and regulations as an affirmative defense to prosecution for alleged water quality violations for the forestry industry alone would cause an equal protection problem; executive agency cannot, by regulation, create an affirmative defense to what the legislature has determined should be prosecuted. 1980 Op. Att'y Gen. No. 10.

NOTES TO DECISIONS

This section and AS 46.03.780 held not unconstitutional. — See *Stock v. State*, Sup. Ct. Op. No. 1076 (File No.

2007), 526 P.2d 3 (1974) decided prior to the 1976 amendment of those sections.

Collateral references. — Necessity of showing scienter, knowledge, or intent, in prosecution for violation of air pollution or

smoke control statute or ordinance. 46 ALR3d 758.

Sec. 46.03.800. Water nuisances. (a) A person is guilty of creating or maintaining a nuisance if the person puts a dead animal carcass, or part of one, excrement, or a putrid, nauseous, noisome, decaying, deleterious, or offensive substance into, or in any other manner befoils, pollutes, or impairs the quality of, a spring, brook, creek, branch, well, or pond of water which is or may be used for domestic purposes.

(b) A person who neglects or refuses to abate the nuisance upon order of the department is guilty of a misdemeanor and is punishable as provided in AS 46.03.790. In addition to this punishment, the court shall assess damages against the defendant for the expenses of abating the nuisance. (§ 3 ch 120 SLA 1971)

Collateral references. — Balance of convenience or social utility: modern status of rules as to balance of convenience or social utility as affecting relief from nuisance. 40 ALR3d 601.

Pollution control agency: right to maintain action to enjoin public nuisance as affected by existence of pollution control agency. 60 ALR3d 665.

Cross references. — For civil penalties for discharges of oil, see AS 46.03.758. For civil actions for pollution, see AS 46.03.760. For provisions imposing strict liability for discharge of hazardous substances, see AS 46.03.822.

Editor's notes. — Section 311 of the Clean Water Act, referred to in subsections (b) and (c), may be found in 33 U.S.C. § 1321.

Sec. 46.04.025. Confidential information. The department may maintain the confidentiality of a manufacturer's proprietary technical information relating to chemical and biological agents used to control or mitigate the effects of an oil discharge. The department may refuse to release the information unless the manufacturer authorizes its release or unless a court orders its release. The department may provide the information to the Department of Fish and Game and other state and federal agencies if the department or other agency requesting the information agrees to maintain its confidentiality. (§ 2 ch 116 SLA 1980)

Sec. 46.04.030. Oil discharge contingency plans. (a) A person may not cause or permit the operation of an oil terminal facility in the state unless an oil discharge contingency plan for the facility has been approved by the department. The department is the only state agency which has the power to approve an oil discharge contingency plan for the purposes of this section.

(b) After January 1, 1981, a person may not cause or permit the operation of an offshore exploration or production facility in the state unless an oil discharge contingency plan for the facility has been approved by the department.

(c) A person may not cause or permit the transfer of oil to or from a tank vessel, or, after January 1, 1981, to or from an oil barge, unless an oil discharge contingency plan for the tank vessel or oil barge has been approved by the department. Except for prosecutions under AS 46.03.790(b), it is not a defense to an action brought for violation of this subsection that the person charged believed that a current oil discharge contingency plan for the tank vessel or oil barge had been approved by the department.

(d) An oil discharge contingency plan must be renewed at least every three years.

(e) The department may attach reasonable terms and conditions to its approval of an oil discharge contingency plan which it determines are necessary to insure that the applicant for an oil discharge contingency plan has access to sufficient resources to protect environmentally sensitive areas and to contain, clean up, and mitigate potential oil discharges from the facility or vessel within the shortest feasible time. The oil discharge contingency plan must provide for the use of the best available technology by the applicant. The department may require an applicant to undertake discharge exercises.

(f) The department, after notice and opportunity for hearing, may modify its approval of an oil discharge contingency plan if it determines that a change has occurred in the operation of a facility, marina or vessel necessitating an amended or supplemented plan, or the operator's discharge experience demonstrates a necessity for modification. The department, after notice and opportunity for hearing, may revoke its approval of an oil discharge contingency plan if it determines that

- (1) approval was obtained by fraud or misrepresentation;
- (2) the operator does not have access to the quality or quantity of resources identified in the plan; or
- (3) a term or condition of approval has been violated. (§ 2 ch 116 SLA 1980)

Cross references. — For status and renewal of oil and spill contingency plans approved during fiscal year 1980 under AS 30.25, see § 13(a), ch. 116, SLA 1980, in the Temporary and Special Acts and Resolves.

Sec. 46.04.040. Proof of financial responsibility. (a) A person may not cause or permit the operation of an oil terminal facility in the state unless the person has furnished proof of financial ability to respond in damages which has been accepted by the department. Ability to respond in damages need not exceed \$50,000,000 but must be in an amount (1) not less than \$10, per incident, for each barrel of storage capacity at the oil terminal facility; or (2) \$1,000,000, whichever is greater.

(b) After July 1, 1981, a person may not cause or permit the operation of an offshore exploration or production facility in the state unless proof of financial ability to respond in damages has been accepted by the department. Proof of financial responsibility may not be less than \$35,000,000 per incident.

(c) A person may not cause or permit the transfer of oil to or from a tank vessel, or, after January 1, 1981, to or from an oil barge, unless proof of financial responsibility for the tank vessel or barge has been accepted by the department. Financial responsibility under this subsection shall be in the following amounts:

(1) for a tank vessel or oil barge involved in the transportation of trans-Alaska pipeline oil, the amount required by the Federal Maritime Commission under 43 U.S.C. 1653(c)(3) (sec. 204 (c)(3), Trans-Alaska Pipeline Authorization Act);

(2) for any other oil barge, the amount required by § 311(p)(1) of the Clean Water Act, or \$1,000,000, whichever is greater;

(3) for any other tank vessels, the amount required by § 311(p)(1) of the Clean Water Act, or \$20,000,000, whichever is greater.

(d) Except for prosecutions under AS 46.03.790(b), it is not a defense to an action brought for violation of (c) of this section that the person charged believed in good faith that the vessel operator possessed proof of financial responsibility accepted by the department.