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Final Report

**Oil Spill Liability and Compensation:
A Review and Evaluation of Alaska's
Civil Penalty Scheme**

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INTRODUCTION

Annual estimates of the amount of oil discharged into the seas, either deliberately or accidentally, by both ships and offshore installations, range from one to two million tons per year.¹ Operational discharges by vessels, including deballasting, tank washings, and bilge pumping account for approximately 80% of this total.² Conversely, accidental discharges from ships and offshore installations account for only about 15% and 5% respectively.³ While these amounts tend to belie the popular belief that ships (most specifically tankers) and/or offshore installations account for the majority of oil discharged into the seas, these accidental spills often release large quantities of oil at once, frequently taking place in or drifting into the most sensitive of marine environments.

Liability for the unlawful discharge of oil into public waters and the public's right to be compensated for the resulting environmental and natural resources damage has been addressed in statute at both the federal and state levels.⁴ Typically these statutes rest on the premise that compensable environmental and natural resource damage can in fact be established through a damage assessment process, with the monetary value of the loss being determined through the use of various economic valuation techniques.⁵ The responsible parties are then held strictly liable to an unlimited maximum amount or to some stated maximum amount for the damage as determined through these procedures.⁶

An exception to this more traditional approach can be found in the oil spill liability and compensation scheme presently in place in the State of Alaska. Statutes holding responsible parties strictly liable for environmental and natural resource damages as determined through a damage assessment process remain on the books.⁷ However, Alaska rarely attempts to establish actual damages or to pursue compensation for them through a damage assessment process. Instead, while maintaining the strict liability component, Alaska pursues compensation for all natural resource and environmental damage through civil penalties which are assessed on each

1. David W. Abecassis, The Law and Practice Relating to Oil Pollution From Ships, Butterworth & Co. Ltd., 1978.

2. *Id.* at p. 4.

3. *Id.* at p. 4.

4. See, for example, Federal Water Pollution Control Act Section 1321(f), 33 USC Section 1251 et. seq.; Outer Continental Shelf Lands Act Amendments of 1978 Sections 303, 304, 43 USC Section 1331 et. seq.; Deep Water Port Act of 1974, 33 USC Section 1501 et. seq.; Florida Statutes Section 403.165; Washington Revised Code Sections 90.48.142, 90.48.144, 90.48.320, 90.48.336; California Navigational Code Section 293.

5. For example, recreational value, willingness to pay, and market valuation techniques. See Yang, Edward J., Dower, Roger C., Menefee, Mark; "The Use of Economic Analysis in Valuing Natural Resource Damages," Environmental Law Institute, Washington DC, June, 1984.

6. For example, Washington State has no ceiling on liability, while the Federal Water Pollution Control Act sets the maximum liability for damages for an inland barge at \$125 per gross ton or \$125,000, whichever is greater; for other vessels, \$150 per gross ton (or, for a vessel carrying oil or hazardous substances as cargo, \$250,000), whichever is greater; and for on and offshore facilities, \$50,000,000. 33 USC 1321(f).

7. Alaska Statutes 46.03.780 Liability for Restoration, and 46.03.822 Strict Liability for the Discharge of Hazardous Substances.

gallon of oil spilled.⁸ The amount of the fine varies depending upon the type of oil spilled and the sensitivity of the receiving environment.⁹

The premises upon which this civil penalty system is based, as well as its intent, differ to some extent from the more traditional damage assessment approach. Yet this method does provide a viable alternative response to the issues of liability and public compensation in relation to oil pollution damage, and as such it is worthy of consideration. It is the intent of this paper to examine 'The Alaska Method' in some detail in an effort to determine its effectiveness as a response to these issues. In Chapter 1 I will first review the oil spill liability and compensation scheme that Alaska had in place prior to the implementation of the civil penalty approach. I will then discuss what led to the enactment of the civil penalty statute. In Chapter 2 I will examine the civil penalty statute and an effort will be made to delineate the intent or goals of this relatively innovative approach. In Chapter 3 I will examine the implementation of this system and an attempt will be made to establish how successfully the intent or goals of the law have been met in practice. It is concluded that several features of this civil penalty statute weaken its effectiveness as a response to the oil spill liability and compensation issues. Chapter 4 will then suggest how Alaska's oil spill liability and compensation scheme in general, and the civil penalty statute in particular, might be modified to more effectively address these issues.

8. Alaska Statutes 46.03.758(b).

9. Alaska Statutes 46.03.758(d).

CHAPTER 1.. Alaska's pre-1977 Oil Spill Liability Scheme and the Impetus for Change

1.1 The pre-1977 Regime

Like many other states, in the early 1970's Alaska enacted legislation imposing strict liability without regard to fault, subject to limited defenses,¹ for environmental and natural resource damages resulting from the unlawful discharge of oil into public waters or onto public lands.²

Under Alaska Statutes (hereinafter AS) 46.03.740 Oil Pollution, an unlawful discharge of oil is defined to include any discharge not specifically permitted by Alaska Department of Environmental Conservation (hereinafter ADEC) regulation, or not permitted under article IV of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended.³

AS 46.03.780 Liability For Restoration, provides that an unlawful discharge causing the death of fish, animals, or vegetation or otherwise injuring or degrading the environment of the state is liable to the state for damages. In the vein of the more traditional damage assessment approach, liability for these damages are defined to include an amount equal to the sum of money required to restock injured waters, to replenish a damaged or degraded resource, or to otherwise restore the environment of the state to its condition before the injury. These damages are to be recovered by the attorney general on behalf of the citizens of the state.

In addition, AS 46.03.760(a) holds a person who causes or permits an unlawful discharge of oil 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..."⁴ The penalties assessed under this provision are to reflect, when applicable,

1). reasonable compensation in the nature of liquidated damages⁵ for any adverse environmental effects caused by the discharge, to be determined by the court according to the toxicity, degradability and dispersal characteristics of the oil, 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; and

1. AS 46.03.822, Strict Liability, provides that in an action to recover damages, the person owning or having control over a hazardous substance which enters into or upon the waters, surface or subsurface lands of the state is relieved from strict liability if the person can prove that the release occurred solely as a result of an act of war; an intentional or negligent act of a third party, other than a party or its employees in privity of contract with, or employed by, the person; negligence on the part of the United States or the State of Alaska; or an act of God.

2. Alaska Statute Title 46.

3. 12 U.S. Treaties, V. 3, pp. 2989-3027; 17 U.S. Treaties, V. 2, pp. 1523-1551.

4. By Alaska Statute 46.03.758(i) the court may impose a penalty of less than \$500 for the discharge if deemed appropriate.

5. The concept of 'liquidated damages' is commonly used in contracts. The monetary valuation of the loss as determined through the use of this concept is not intended to equate directly to the actual loss, rather, it is intended to reflect a reasonable estimation of what the damages are.

3). the economic savings⁶ realized by the person in not complying with the requirement for which a violation is charged.

By AS 46.03.760(b), the penalties assessed under AS 46.03.760(a) may not be for punitive purposes, and must be compensatory and remedial in nature.

Finally, in addition to liability under AS 46.03.760(a), AS 46.03.760(e) holds a person causing or permitting an unlawful discharge of oil strictly liable, to the state, in a civil action "...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 (oil), restoration of the environment to its former state, and all incidental administrative costs."

In summary, Alaska's pre-1977 oil spill liability and compensation statutes provided for recovery of cleanup costs, restoration, replenishment and restocking costs, incidental administrative costs, and civil penalties in the nature of liquidated damages of between \$500 and \$100,000 for the initial violation, and up to \$5,000 per day for each additional day that the violation continues.

1.2 The Impetus for Change

With Prudhoe Bay oil production scheduled to begin in July, 1977, the State of Alaska was prompted to review its existing oil spill liability and compensation scheme in 1975-1976. Two issues were of primary concern. The first was whether the State would be able to recover adequate compensation for actual damages under AS 46.03.780 or AS 46.03.760(e), or in the alternative an amount reasonably related to that damage under the 'liquidated damages' provisions of AS 46.03.760(a), if a disastrous spill should occur in state waters. The second was whether the civil penalties imposed by AS 46.03.760(a) provided the oil industry with an adequate incentive to perform its oil handling activities in as safe a manner as possible.

In its evaluation Alaska took the position that oil pollution

...can and does cause a wide range of harm to renewable resources, and the environment in general. Many types of harm, which can have devastating long-term effects on important marine resources, cannot be quantified. Included within this category are mortality of fish and shellfish larvae, food chain contamination, carcinogenic effects, and chronic toxicity.⁷

6. By AS 46.03.760(d) 'economic savings' as used in this section means "...that sum which a person would be required to expend for the planning, acquisition, siting, construction, installation and operation of facilities necessary to effect compliance with the standard violated." AS 46.03.760(e) allows the court to defer all or part of that portion of the sum imposed upon a person under this 'economic savings' provision conditioned upon the person complying, within the shortest feasible time, with the requirement for which a violation is shown.

7. Sponsor Analysis of House Bill 137, An Act Relating to Civil Penalties for Discharges of Oil, by Jonathan K. Tillinghast, Assistant Attorney General for the State of Alaska, 1977, p. 1 (hereinafter Sponsor Analysis)

Further, the State held that even for damages which are readily identifiable, quantification of the loss may still be very difficult. Determining the monetary value of non-commercial species, lost recreational opportunities, and decreased tourism were offered as examples of this situation.⁸

Based on these premises the State asserted that even with the imposition of strict liability for the damages "...the fact of the matter is that traditional concepts of burden of proof (i.e. proving actual loss and causation) will normally pose an insurmountable barrier to effective redress for the great bulk of harm caused by oil pollution."⁹

Next, the State reasoned that given the problems associated with proving and recovering for actual damages, in many situations recovery would only be possible under the 'liquidated damages' provision of AS 46.03.760(a). This provision was "primarily designed to address the problem of the continuing discharger, by denying him the economic savings (of continuing to violate state environmental law, (e.g. the economic savings realized by not installing a septic tank)",¹⁰ and was considered to work very well in this regard.¹¹ However, with regard to one time discharges of oil, it was determined to be ineffective and inefficient in protecting the public interest for several reasons.

First of all, in the event of a major spill the penalties imposed by AS 46.03.760(a) would not adequately compensate the public for the resulting environmental harm. The maximum \$100,000 fine was referred to as 'ludicrous' in this context.¹²

Secondly, even with the presence of the oil characteristics and receiving environment criteria, AS 46.03.760(a) is still difficult to apply to a given oil spill. The court is given wide discretion in assessing the amount of the penalty anywhere between the lower and upper limits as stated in the statute, and thus the "cases under the law languish for years, while the private and public bar argue across the negotiating table as to whether the spill in question is a \$500, or \$50,000 discharge."¹³

Finally, in addition to compensating for harm done, the State reasoned that civil penalties should also be high enough to effectively encourage the regulated industry to comply with the laws which they enforce. The maximum \$100,000 fine under AS 46.03.760(a) was considered unreasonably low to meet this second goal. The State contended that this amount "...no doubt fails to even register in the cost-benefit analysis of oil handling operations."¹⁴

8. Id. at p. 3.

9. Id. at p. 1.

10. Statement by Jonathan Tillinghast, Assistant Attorney General for the State of Alaska at the House Judiciary Committee Meeting discussing HB 137, An Act Relating to Civil Penalties for Discharges of Oil, 4/12/77 Meeting Minutes.

11. See Statement by Jonathan Tillinghast, Alaska Assistant AG, at the House Resources Committee Meeting discussing HB 137, An Act Relating to Civil Penalties for Discharges of Oil, 2/17/77 Meeting Minutes.

12. Sponsor Analysis at p. 4.

13. Id. at p. 5.

14. Id. at p. 4.

These findings led the State to conclude that the existing oil spill liability and compensation scheme had failed in both its compensatory and regulatory roles.¹⁵ The State then suggested that the problems with the existing scheme might be solved by enacting a new law which would impose civil penalties on each gallon of oil spilled. The amount of the fine would vary depending on the characteristics of the oil and the sensitivity of the receiving environment. Several legislative hearings were held, and the civil penalty bill as originally introduced was modified substantially. AS 46.03.758 'Civil Penalties for Discharges of Oil,' was then enacted into law in May, 1977.

In the next chapter I will examine Alaska's present oil spill liability scheme. An effort will be made to draw out its underlying premises and its most pertinent intent or goals. This analysis is based primarily on a review of the statute, the legislative history, and interviews with several of those who work or worked for the state and either helped write the legislation or presently work with the law.

15. Id.

CHAPTER 2. The Present Alaska Oil Spill Liability Scheme

As discussed above, Alaska already had a civil penalty scheme, in the nature of liquidated damages, in place at the time that the legislation for AS 46.03.758 was introduced. Thus, this new scheme "...does not break any new conceptual ground"¹ It is, rather, a further refinement of the previous scheme, which attempts to correct its perceived shortcomings.

2.1 Why a Civil Penalty Scheme?

2.1.1 The Statute

The legislative findings of AS 46.03.758 assert that,

(1)...the discharge of oil may cause significant short and long-term damage to the state's environment. Even minute quantities...may cause high mortalities among larval and juvenile forms of important commercial species, may affect salmon migration patterns, and may otherwise degrade and diminish the renewable resources of the state;

(2) the exact nature and extent of oil pollution can be neither documented with certainty nor precisely quantified on a spill-by-spill basis; however, in light of the magnitude of harm which may be caused..., and the vital importance of (the natural resources) to the economic future of the state and its quality of life,...substantial civil penalties should be imposed for the discharge of oil in order to provide a meaningful incentive for the safe handling of oil and to insure that the public does not bear substantial losses from oil pollution for which, because of its subtle, long-term or unquantifiable nature, compensation would not otherwise be received...²

A review of the legislative history of the act will help to identify the justification for the position taken in these legislative findings as well as to clarify the intent of the civil penalty approach.

2.1.2 The Legislative History—Civil Penalties as Compensation

House Bill 137, An Act Relating to Civil Penalties for Discharges of Oil, was introduced into the Alaska Legislature by Alaska Governor Jay S. Hammond in January, 1977, at the behest of the ADEC and the Alaska Department of Law. These two state agencies have primary responsibility for responding to and prosecuting oil pollution cases in the State of Alaska.

In his correspondence to Hugh Malone, Speaker of the House, which accompanied his transmittal of the Bill, Governor Hammond states that

(o)il pollution harms the public in many ways. Some are identifiable and quantifiable--and existing law provides adequate means for recovering damages in this regard. Yet much of the damage caused by oil pollution is difficult to detect immediately, and even when the damage can be documented, it is incapable of objective translation into dollars and cents. As a result, in Alaska as elsewhere,

1. Statement by Jonathan C. Myhr, Alaska Assistant Attorney General, at the House Judiciary Committee Meeting considering HB 137, An Act Relating to Civil Penalties for Discharges of Oil, 4/12/77 Meeting Minutes.

2. AS 46.03.758(a).

these damages, though quite real and potentially quite devastating to the economy and environment, must be borne by the public.³

Similarly, in discussing the need for this legislation in the Sponsor Analysis, the Alaska Attorney General asserts that the devastating long-term effects of oil pollution on marine resources (e.g., future declines in fishery catches, food chain contamination, larval mortality) cannot be conclusively proven to have been caused by the oil spill, nor quantified in monetary terms, because the effects are 'too subtle.'⁴ For example, if there were a decline in a salmon run two years after a major spill, other intervening variables would make it impossible to prove that the oil spill caused the decline. Also, it would be impossible to collect all fish and shellfish larvae killed by a spill, yet this result could have an enormous long-term impact on the productivity of the whole environment. Even if these effects could be proven with certainty to have been caused by the spill, what monetary value should they be given?

Testimony as to the State's position that oil pollution causes a great deal of environmental harm which cannot be determined with certainty, and/or cannot be precisely quantified in monetary terms was offered by then Assistant Attorney General Jonathan Tillinghast, and then ADEC Commissioner Ernest Mueller at the several House and Senate Committee hearings addressing this bill.⁵

The State's position on this issue rests first and foremost on the assumption that a discharge of oil will cause environmental and natural resource damage in every case.⁶ However, because of the burden of proof on the State to establish a causal link between the discharge and the more subtle or long-term damage, and the difficulties associated with establishing the monetary value of this loss as well as that of non-commercial species, compensation for all but the most visible and quantifiable damage will not be achieved.⁷ The problem from the State's perspective is not that

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3. Hammond, Jay S., Correspondence from Alaska Governor Jay S. Hammond to Hugh Malone, Speaker of the House, Alaska State Legislature, Juneau Alaska, January 27, 1977, from the House Resources Committee File on HB 137.
 4. See Sponsor Analysis of HB 137 by J. Tillinghast, Alaska Assistant Attorney General, 1977, contained in the House Resources Committee File on HB 137 (hereinafter Sponsor Analysis). See also statement by J. Tillinghast at the House Judiciary Committee Meeting discussing HB 137, 3/28/77, Meeting Minutes.
 5. At the legislative hearings industry lobbyists asserted that it was a contradiction in terms to say first that an oil discharge causes significant harm, and next, that the harm is incapable of quantification and difficult to detect. As stated by Monty Claver, Exxon lobbyist, at the 3/4/77 House Judiciary Committee Meeting, "...it is self evident that the significant harm is not an appropriate finding if it is incapable of quantification and difficult to detect." See Meeting Minutes.
 6. See, for example, statement by Jonathan Tillinghast as contained in the 3/4/77 House Judiciary Committee Meeting Minutes. As used in this statute, 'discharge of oil' means 'the entry of oil into or upon the water or public land of the state (except oil discharges into an enclosed and impervious containment area), regardless of causation.' AS 46.03.758(1)(3).
 7. The State of Alaska offered the following reports in support of its contention that oil pollution causes long-term and unquantifiable damage: Evans, Dale K., and Stanley D. Rice, "Effects of Oil on Marine Ecosystems: A Review for Administrators and Policy Makers," *Fishery Bulletin*, Vol. 72, No. 3, 1974; Mecklenburg, T. A., Rice, S. D., and J. F. Karinen, "Molting and Survival of King Crab...and Coonstripe Shrimp...Larvae Exposed to Cook Inlet

the damages are difficult to prove, but that they are impossible to prove.⁸ Conversely, the relative toxicity of the oil and the relative sensitivity of the receiving environment can be determined.⁹ The burden of proof on the State to then establish the amount of oil spilled is manageable. It is "...an event which can be empirically found out, objectively found out as a transaction that occurred."¹⁰ Thus, to insure that the public is compensated for damages which cannot be determined with certainty or precisely quantified, "...as a practical matter, it may be easier to...pre-determine that loss (as opposed to the actual damages)"¹¹ with a schedule of fixed civil penalties based on the objective criteria of the characteristics of the oil and the sensitivity of the receiving environment.

In offering justification for the enactment of the civil penalty statute, the State asserts that "(u)tilizing civil penalties as a means for compensating for general harm is nothing new."¹² As discussed in Chapter 1, Alaska already had a civil penalty scheme as a means of compensating for environmental harm, in the nature of liquidated damages, in place at the time that HB 137 was introduced. Further, the State offers a quote from a U. S. District Court for the District of New Jersey opinion which interprets the purpose and intent behind federal civil penalty oil spill laws: "More importantly, the statute can rationally be viewed as a remedial measure designed to compensate the government for harm to the marine and shoreline environment caused by the discharge of harmful quantities of oil."¹³

Finally, the State asserts that the concept of assessing penalties on a per unit measurement basis is also not new to American jurisprudence. Specifically, the Federal Water Pollution Control Act Amendments of 1972, which HB 137 was largely patterned after, authorized the Federal EPA to "...establish civil penalties by regulation on a unit of measurement basis for hazardous substances (of) not more than \$1,000 nor less than \$100 per unit, the per unit penalty to vary based on the

Crude Oil Water-Soluble Fraction," in: Proceedings, NOAA-EPA Symposium on Fate and Effects of Petroleum Hydrocarbons, Pergamon Press, Oxford, 1977; and Rice, S. D., Short, J. W., and J. F. Karison, "A Review of Comparative Oil Toxicity and Comparative Animal Sensitivity," Northwest and Alaska Fisheries Center Auke Bay Laboratory, National Marine Fisheries Service, NOAA, Auke Bay, Alaska, 1977. (All of these reports are contained in the Alaska Legislature's House Resources Committee File on HB 137, 1977). However, these studies provide information on the effects of oil pollution on marine animals primarily under laboratory conditions, and industry lobbyists offered their own evidence that the long-term and unquantifiable damages noted under laboratory conditions were not supported by studies conducted in the field. See, for example, the quite detailed statement by Waco Shelly, lobbyist for Mobil Oil Corporation, as contained in the House Judiciary Committee Meeting Minutes of 3/10/77.

8. See Statements by Jonathan Tillinghast at the House Resources Committee Meeting on 2/17/77 and the House Judiciary Committee Meeting on 3/4/77 as contained in the Meeting Minutes.
9. Sponsor Analysis, at p. 6.
10. Statement by Jonathan Tillinghast as contained in the House Resources Committee Meeting Minutes of 2/17/77.
11. Statement by Ernest Mueller, Commissioner of the Alaska Department of Environmental Conservation, as contained in the House Judiciary Committee Meeting Minutes of 3/4/77.
12. Statement by Jonathan Tillinghast as contained in the House Judiciary Committee Meeting Minutes of 4/12/77.
13. Statement by Jonathan Tillinghast quoting the Court in U. S. v. Contractors, as contained in the House Judiciary Committee Meeting Minutes of 4/12/77. Mr. Tillinghast does not state which Federal laws he is referring to.

toxicity, degradability, and dispersal characteristics of the substance.¹⁴ Thus, the per unit measurement approach for civil penalties in the event of an unlawful discharge of a hazardous substance has been endorsed by the United States Congress.¹⁵

In summary, in the first instance Alaska's civil penalty scheme is intended to be compensatory in nature. More specifically, it is intended to compensate the public for that portion of environmental and natural resource damage which, because of its unquantifiable nature and the resulting excessive burden on the state in proving the existence of such damages as well as a causal link, compensation would not otherwise be received.

2.1.3 The Legislative History—Civil Penalties as an 'Incentive to Safe Operations'

In the process of formulating this civil penalty bill, the State considered three ways of assuring that oil transportation activities on a massive scale would not occur at the expense of other segments of the state's economy: Direct regulation (of tanker design, including the requirement of various safety features); setting the consequences of misbehavior so high that in fact safe conduct is assured; and self policing.¹⁶

At the time that this legislation was being considered, the individual state's right to directly regulate the design of tanker structures was being reviewed by the United States Supreme Court and was soon determined to be pre-empted by federal law.¹⁷ Further, past conduct by the industry led the State to conclude that self policing was not a feasible option.¹⁸ Thus, Alaska concluded that this issue should be addressed in this civil penalty statute. In particular, the State argued that in order to protect the environment of the state, the civil penalties imposed by this statute should be set high enough to induce those potentially subject to them to perform their oil

14. Statement by Jonathan Tillinghast as contained in the House Judiciary Committee Meeting Minutes of 4/12/77, referring to Section 311 of the Federal Water Pollution Control Act Amendments of 1972. It may be worth noting that the EPA never established the regulations as authorized by this section, and the language authorizing the promulgation of regulations on a per unit basis has since been removed from this Federal statute. However, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by SARA of 1986, does contain similar language. Specifically, Section 301 (c)(2) authorized the Department of Interior to promulgate regulations to establish damages "...based on units of discharge or release or units of affected area." 42 USC 9651 (c)(2)

15. See statement by J. Tillinghast as contained in the House Judiciary Committee Meeting Minutes of 4/12/77.

16. See statement by J. Tillinghast as contained in the Administrative Regulation Review Committee Meeting Minutes of 3/9/78.

17. See Ray v. Atlantic Richfield Co., 435 U. S. 151 (1978) which struck down a Washington State statutory provision requiring specific safety features on oil tankers of between 40,000 and 125,000 DWT entering state waters. A similar statute in Alaska attempted to charge tankers varying 'risk avoidance' charges to fund an oil spill cleanup fund depending on the safety features present on the tanker, such that if a tanker did not possess a particular safety feature that the state deemed appropriate, that tanker's risk avoidance charge would be increased by the amount it would cost to install that piece of equipment. This provision was also struck down. See Chevron v. Hammond, U. S. District Court for the District of Alaska, No. A-77-195, Memorandum of Decision by Judge James M. Fitzgerald, June 30, 1978.

18. See Supra note 16.

handling operations in as safe a manner as possible.¹⁹ The State went on to stress that these civil penalties are not intended to be punitive.²⁰

In summary, in the second instance, the intent of this scheme is to deter spills before they occur by identifying the consequences in advance, in the hopes of providing the oil industry with a 'meaningful incentive to safe operations.'²¹

2.1.4 Premises and Intent of the Civil Penalty Scheme

The above discussion indicates that Alaska's civil penalty approach is based upon the following premises and intent:

1. All oil discharges will cause natural resource and environmental harm.
2. For that portion of the damage which is readily identifiable and quantifiable, existing legal remedies do provide an adequate means of recovery.
3. A substantial portion of the damage caused by oil pollution cannot be determined with certainty. Further, some visible damage is not readily amenable to monetary valuation. Damages such as these cannot be effectively compensated for under existing law due to the excessive burden of proof on the State.
4. The public should be compensated for those damages which are not readily identifiable and quantifiable.
5. The scheme does not attempt to rigidly pre-establish actual damages. It is intended to pre-determine the loss from oil pollution which is not readily identifiable and/or quantifiable through the use of civil penalties based on the objective criteria of the characteristics of the oil and the sensitivity of the receiving environment.
6. The scheme is intended to provide a meaningful incentive to safe operations by setting out the consequences of the unlawful act in advance in an effort to prevent the discharge of oil before it occurs.
7. The scheme is intended to both compensate the public for damages and to provide an incentive to safe operations.

19. Sponsor Analysis at p. 4. See also Supra note 16.

20. See statement by J. Tillinghast as contained in the House Judiciary Committee Meeting Minutes of 3/4/77, and Sponsor Analysis at p. 5. During the 1978 legislative review of the regulations promulgated by the ADEC, Tillinghast asserted that the maximum \$10, \$2.50 and \$1 penalty amounts were inserted into the penalty schedule by the legislature to assure that the assessed penalty would not be punitive. See the Administrative Regulation Review Committee Meeting Minutes of 2/28/78.

21. At the legislative hearings considering HB 137, oil industry lobbyists adamantly asserted that there were already sufficient state and federal statutes covering liability for oil pollution damage such that this law simply was not needed; that these existing laws and their own economic considerations (not wanting to lose their oil, damage their tankers, or injure those on board their tankers) already provided the oil industry with sufficient incentive to prevent oil spills; and that this civil penalty scheme is indeed punitive in nature. See for example the statement by Monty Claver, Alaska Operations Manager, Exxon Corporation, USA, as contained in the House Judiciary Committee Meeting Minutes of 3/4/77, and statements by Gene Wilco, lobbyist for Chevron, USA as contained in the House Judiciary Committee Meeting Minutes of 3/10/77 and 3/28/77.

8. The scheme is not intended to be punitive.

2.2 The Amount of the Penalty

2.2.1 The Statute

The language of AS 46.03.758 establishes the following schedule of fixed civil penalties for discharges of oil:

...the penalties for the following categories of receiving environments may not exceed

- a. \$10 per gallon of oil which enters an anadromous stream or other freshwater environment with significant aquatic resources;
- b. \$250 per gallon of oil which enters an estuarine, intertidal or confined saltwater environment; and
- c. \$1 per gallon of oil which enters an unconfined saltwater environment, public land or freshwater environment without significant aquatic resources.²²

The ADEC is then directed to establish regulations implementing this schedule. The regulations are to set forth a range of penalties varying in relation to these maximum amounts according to the toxicity, degradability and dispersal characteristics of the oil, and the sensitivity and productivity of the receiving environment. The maximum penalties are to be imposed only for spills of the most harmful types of oil into the most sensitive and productive of receiving environments.²³ The statute further provides that the assessed penalty may be multiplied by a factor of 5 if the discharge is caused by gross negligence or an intentional act by the discharger, or if the court finds that the discharger did not take reasonable measures to contain and clean up the discharged oil.²⁴

A review of the legislative history will help to establish how the penalty amounts were determined and what goals the penalty schedule is intended to achieve.

2.2.2 The Legislative History

In establishing the civil penalty schedule, the State held discussions with several biologists to assure that the receiving environment categories are 'rational' in relation to one another.²⁵ In determining what the maximum amounts of the penalties should be, the State first considered compensation.²⁶ A worst case scenario for an oil spill in a marine environment was established: A tanker spill into Prince William Sound, the State's most sensitive and productive estuary, during a salmon run. This is an enclosed and protected area where flushing through tidal or current action

22. AS 46.03.758(b)(1)(A), (B), and (C), emphasis added.

23. AS 46.03.758(d). See also the statement by J. Tillinghast as contained in the House Judiciary Committee Meeting Minutes of 4/12/77. The legislative record makes it clear that if a discharge of oil enters more than one receiving environment with different penalty amounts, only that portion which enters the most sensitive environment would be assessed the higher rate. See discussion in this regard as contained in the Administrative Regulation Review Committee Meeting Minutes of 2/23/78. See also Section 3.1.5 below.

24. AS 46.03.758(b)(2).

25. See statement by J. Tillinghast as contained in the House Judiciary Committee Meeting Minutes of 3/10/77.

26. See statement by J. Tillinghast as contained in the House Judiciary Committee Meeting Minutes of 3/10/77. Also, this issue was discussed during a personal interview with J. Tillinghast on 4/18/88.

is significantly reduced. Then, similar to a criminal sentence, the State decided what it would take 'for justice to be done.' The next step was to work backward from the worst case to determine the appropriate amount of the penalty for less sensitive marine environments. Finally, a higher base penalty was assigned to freshwater environments with significant aquatic resources. A spill into these particularly sensitive areas would generally be substantially smaller than those in the marine environment (no supertankers), and a penalty assessed at the level assigned to the worst case marine spill would thus not adequately approximate the harm done.²⁷

The State next considered the 'incentive to safe operations' aspect of the legislation. Here the State took the position that the penalties need to be 'commensurate with the kind of cost-benefit analysis' that those involved in oil handling, transport and production would undertake.²⁸ Further, the State reasoned that "...you want the consequences of not being as safe as possible to be very high. Conversely, you don't want to ruin somebody."²⁹

While the State concedes that this civil penalty scheme in some measure attempts to pre-determine the loss resulting from the discharge of oil,³⁰ it stresses that the schedule of penalties does not attempt to rigidly pre-establish actual damages.³¹ There is nothing magical about any particular figure in the civil penalty schedule, "(a)ny more than, for example, a \$10,000 civil penalty for consumer fraud would be any more magical than a \$5,000 assessment."³² If the imposition of a civil penalty for the discharge of oil required actual damages to be rigidly pre-established, the burden of achieving that standard would be impossible to meet. The standard for the propriety of establishing civil penalties is rather "...that the penalties bear a reasonable relationship to the gravity of the incident and the purposes of the legislation."³³ In other words, the amount of the penalties should be reasonably related to the degree of public harm caused by a spill,³⁴ as well as the public compensation and incentive purposes of the bill. As stated by Av Gross, Alaska Attorney General, in a letter to Alaska Governor Hammond "...we believe the penalties are...reasonably related to the level of incentive necessary to induce safe operations, and the

27. *Id.* personal interview. See also statement by J. Tillinghast as contained in the House Judiciary Committee Meeting Minutes of 3/28/77.

28. See statement by J. Tillinghast as contained in the House Resources Committee Meeting Minutes of 2/17/77.

29. Statement by J. Tillinghast as contained in the House Judiciary Committee Meeting Minutes of 3/10/77.

30. See *Supra* note 11.

31. Statement by J. Tillinghast as contained in the House Judiciary Committee Meeting Minutes of 4/12/77.

32. *Id.*

33. *Id.* Emphasis added.

34. Sponsor Analysis at p. 7.

gravity of harm caused by oil pollution.³⁵ The result of these considerations was the \$10, \$2.50, and \$1 per gallon penalty schedule as enacted into law.³⁶

2.2.3 The Intent

From the above discussion, the following conclusions as to the amount of the penalties in the penalty schedule can be drawn:

1. The civil penalty schedule does not attempt to directly equate the penalty amounts to the actual damage caused by an oil discharge. The variation in the maximum penalty amounts is intended to reflect the relative sensitivity of the receiving environment.
2. The penalties are intended to be high enough to induce those potentially subject to them to perform their oil handling operations as safely as possible.
3. Combining these two considerations, the dollar amounts in the civil penalty schedule are intended to bear a reasonable relationship to the gravity of the incident (the degree of public harm) and the purposes of the legislation (compensation and incentive).

2.3 Vicarious Liability

2.3.1 The Statute

For an unlawful oil discharge within the territorial jurisdiction of the state, or into or upon the adjacent outer continental shelf of the state,³⁷ AS 46.03.758 holds the following persons, in addition to the person causing or permitting the discharge, jointly and severally liable for the penalties to the state, in a civil action:

1. if the discharge occurs from any commercial or industrial facility other than a vessel or offshore platform, the owner, lessee or permittee, and operator of the facility;

35. Gross, Avrum M., Correspondence from Alaska Attorney General Av Gross to Jay S. Hammond, Governor for the State of Alaska, Juneau Alaska, June 10, 1977, as contained in the Attorney General's Bill Review File of HB 137.

36. HB 137 as originally introduced directed the ADEC to adopt regulations establishing a schedule of fixed penalties for oil discharges of not less than \$5 nor more than \$50 per gallon. Many at the legislative hearings expressed concern that this wording allowed too much discretion to an administrative agency, with several expressing fear that all spills would be determined to be in the \$50 range. Partially in response to these concerns the state offered an amendment which divided the receiving environments into three categories substantially like those enacted in the legislation, with a maximum per gallon penalty for the three categories set at \$50, \$25, and \$10. Later these maximum amounts were reduced to \$10, \$2.50 and \$1 and a 'magnitude factor' was introduced (see section 2.7 below). The available legislative record offers no insight as to why, but at some point the magnitude factor was dropped, while the lower maximum penalties were maintained and subsequently enacted into law.

37. With regard to extending liability for the unlawful discharge of oil to include the outer continental shelf adjacent to the state, J. Tillinghast asserted at the legislative hearings considering HB 137 that "(1) (there is) a substantial state interest in what happens on the OCS, and the person charged with the act out there has contact with the state itself, you can regulate activities on the OCS if not otherwise pre-empted by federal law." (See statement by J. Tillinghast as contained in the House Judiciary Committee Meeting Minutes of 3/28/77). To date no suits have been brought under this provision, and thus it has not yet been subjected to interpretation by either the state court or the U. S. Supreme Court. (Personal interview with Doug Mertz, Assistant Attorney General for the State of Alaska, Juneau Alaska, 4/20/88).

2. if the discharge occurs from a vessel,
 - A. the owner and operator of the vessel; and
 - B. the owner of the oil carried as cargo on the vessel at the time the vessel was loaded, if the loading occurred within the territorial jurisdiction of the state, or at a deepwater port or other offshore storage facility adjacent to the state; however, if the owner of the oil temporarily transfers ownership of the oil to another person, and the transfer has the purpose or effect of evading the vicarious liability imposed by this section, the transferor will be considered the owner of the oil for the purposes of this subsection; and
3. if the discharge occurs from an offshore platform, the lessee or permittee of the tract or acreage upon which the platform is situated, and the operator of the platform.³⁸

2.3.2 The Legislative History

At the time that the Alaska legislature was considering HB 137, the existing state liquidated damages statute held "a person who violates or causes or permits..."³⁹ a violation of the oil pollution statute⁴⁰ liable for the assessed penalty. Similarly, the statute imposing liability for actual damages held "a person who violates or causes or permits..."⁴¹ a violation of the oil pollution statute⁴² liable to the state, in a civil action brought under the strict liability statute⁴³ for the full amount of actual damages....⁴⁴

At the legislative hearings discussing the new bill, the State asserted that these existing provisions with regard to who would be held responsible for the fines or damages were inadequate for several reasons. First of all, a large portion of the work in relation to oil production, for example pipeline construction, the handling of oil terminal and offshore platform operations, and the transport of the oil by tanker was or would be performed not by the oil companies, but by independent contractors. Under existing law, if one of these independent contractors caused an oil spill, the oil owner might be able to evade liability for the resulting harm through what was referred to as the 'independent contractor' defense.⁴⁵ Under this theory an oil company would argue that it was not responsible for the actions of a contractor working for it. The State stressed that the independent contractor defense "has generally caused severe problems in oil spill enforcement. For example, the dogged insistence of Alyeska Pipeline Service Company that it is

38. AS 46.03.758(e).

39. AS 46.03.758(a). See Chapter 1 of this paper for a more detailed discussion on this liquidated damages statute.

40. AS 46.03.740, Oil Pollution. See Chapter 1 of this paper for a more detailed discussion of this provision.

41. AS 46.03.760(e).

42. See *Supra* note 40.

43. Somewhat inconsistent with the provisions cited here, AS 46.03.822, Strict Liability for the Discharge of Hazardous Substances, holds "a person owning or having control over" the oil which is unlawfully discharged into or upon state waters or land strictly liable for the resulting damages. However, since the state rarely attempted to recover for actual damages, relying instead on the 'liquidated damages' provision of AS 46.03.760(a) to achieve compensation for damages resulting from an unlawful discharge of oil, the ambiguity in these provisions as to who would be held responsible in the event of a spill is not of particular consequence to the purposes of this paper.

44. AS 46.03.760(e).

45. See Sponsor Analysis at p. 9.

not responsible for oil spills caused by independent contractors engaged in Trans-Alaska Pipeline work has frustrated state enforcement efforts in that regard.⁴⁶

Secondly, with regard to the transport of oil by tanker the State argued an oil owner could also evade liability by deeding the oil to another company with no assets while in transit, and then deeding it back to the original owner when the oil arrived at its destination.⁴⁷

Next, it was argued that litigation against the vessel owner would often be fruitless because of the Federal Limited Liability Act.⁴⁸ Under this statute, the vessel owner or bareboat charterer is allowed to petition to limit his liability for the damages resulting from a maritime incident to the value of the vessel and freight on board after the incident.⁴⁹ Thus, in the event of a tanker grounding or sinking, that value could be very small.⁵⁰

The State also urged that federal precedent provided support with regard to the applicability of vicarious liability to oil spill incidents. Specifically, the Federal Trans-Alaska Pipeline Authorization Act (46 USC Section 1653(c)) holds the owner of the Trans-Alaska Pipeline oil, through the Trans-Alaska Pipeline Liability Fund, vicariously liable for damages (above the \$14 million in the Fund) caused by oil spills from vessels which service the terminal. Further, a similar vicarious liability provision implemented by the State of Maine had also been upheld by that state's Supreme Court.⁵¹

Also, in keeping with the 'incentive to safe operations' intent of the civil penalty bill, the State stressed that "(b)oth as a matter of equity, and practical necessity, we believe it is imperative that those who induce, and profit from oil handling activities, and who in fact have the ability to control the integrity of those activities if they so desire, be impressed with a non-delegable duty to see that those operations are conducted in as safe as possible a manner."⁵² In other words, those who own the oil or lease the offshore tracts can choose who to hire or contract with to construct

46. Sponsor Analysis at pp. 8-9.

47. See statement by J. Tillinghast at the House Judiciary Committee Meeting of 3/10/77 as contained in the Meeting Minutes.

48. 46 USC Sections 183, 186. See also Supra note 46 at p. 10.

49. Limited Liability Act (LLA), 46 USC Sections 183, 186. In the Sponsor Analysis the state took the position that since HB 137 imposed liability for penalties, and not damages, that the LLA would be inapplicable. However, it was acknowledged that "(i)t is...far from certain how the federal courts will treat this hybrid regulatory approach vis-a-vis that act." (Sponsor Analysis at p. 10).

50. The state offers the Torrey Canyon case as an example. On March 18, 1967 that vessel ran aground off the coast of England spilling approximately 100,000 tons of crude oil. Pursuant to the LLA, the owner of the Torrey Canyon (Barracuda Tanker Corp.) sued to limit its liability. The federal court allowed this, limiting the owner's liability to \$50, the value of one lifeboat which survived the bombing of the vessel by England. See Sponsor Analysis at pp. 10-11. See also In Re Barracuda Tanker Corp., 281 F. Supp. 228, 232 (S.D.N.Y. 1968).

51. Sponsor Analysis, at p. 9.

52. Id. at p. 11. The oil industry adamantly opposed this provision, their primary argument against it being that it is difficult to actually exert any control over an independent contractor, because the contractor is not an employee directly under the control of the oil company. See, e.g., the statement by John Reader, Attorney for BP Alaska, as contained in the House Judiciary Committee Meeting Minutes of 3/4/77.

their facilities, to handle their oil production operations, and/or to transport their oil. By holding them liable for the independent contractor's actions and not allowing them to evade liability by temporarily transferring ownership of the oil while in transit, this provision might induce the oil industry to hire the most dependable and conscientious of contractors, as opposed to those who are less trustworthy. Referring to oil transport, Representative Gardner stated:

...the point is you're the one that made the decision to use the Liberian rust bucket, or to use a good tanker that was built in the United States or some other country that had a lot of safety features in it. You're the one that made that decision, and that's why you are held liable for that. And that's the theory behind it.⁵³

Finally, the State stressed that those subject to the vicarious liability provision are not without recourse in the event that a penalty is assessed against them. Citing the Maine Supreme Court holding in Portland Pipeline Corporation v. Environmental Improvement Commission, 307 A 2nd 1 (1973), the State indicated that this situation involves a "mutually beneficial relationship (i.e. between terminal and vessels, and owners and operators) where there is, in the relationship, adequate opportunity to locate, among the business associates, the primary liability."⁵⁴

2.3.3 The Intent

The above discussion reveals that the primary purpose of the vicarious liability provision is to further the 'incentive to safe operations' intent of the law by holding those who induce and profit from oil production liable for the actions of those that they contract with. Secondly, it may be inferred that a further purpose of this provision is to increase the likelihood that the State would be able to recover for the environmental harm caused by an unlawful discharge of oil, than would otherwise be possible without it.

HB 137 as introduced was quite controversial. If the Alaska Administration could have had its way, the law would have been enacted in the form discussed up to this point. However, as is typical with most controversial legislation, some compromise was necessary in order to get the law passed. The provisions of AS 46.03.758 as discussed in the remainder of this chapter are the result of such agreements.

2.4 \$100 Million Ceiling on Liability

2.4.1 The Statute

AS 46.03.758(e) provides that those persons who cause, permit, or are vicariously liable for an unlawful discharge of oil, are jointly and severally liable to the state, in a civil action, for the full amount of penalties established in the regulations to be promulgated by the DEC (See Chapter 3), or \$100,000,000, whichever is less.

53. Statement by Representative Gardner as contained in the Minutes of the House Floor Session of 4/22/77.

54. See Sponsor Analysis at p. 12.

2.4.2 The Legislative History

HB 137 as originally drafted had no absolute ceiling on liability. The State asserted that in a sense there was a ceiling on liability--the \$10 per gallon amount. The total limit on liability would thus depend on the amount of oil spilled.⁵⁵

The amount of exposure that this type of liability ceiling would impose caused the oil industry in particular a great deal of concern. For example, Exxon's lobbyist urged that

the penalty limits in this bill are so excessively high that they threaten the viability of the oil business in the State of Alaska. The risks of spilling all of the oil in a large tanker are very minimal. But...for example, a 250,000 dead weight ton tanker carries 250,000 tons or approximately 1.7 million barrels of oil. At 42 gallons/barrel, that's 73,500,000 gallons. At \$50/gallon, that's \$3.5 billion (even at the reduced maximum penalty of \$10, the penalty would be \$735 million)⁵⁶

Similar comments were made by others such as the Sohio lobbyist who asserted that the "penalties could be astronomical..." and that "even a very large company could be thrown into bankruptcy by penalties of \$200-\$650 million."⁵⁷

The State responded that if an oil tanker did spill all of its cargo, that would result in enormous environmental harm.⁵⁸ The legislative record is somewhat scanty in this regard, however, it appears that the State did relinquish to industry pressure in this instance. As stated by Tillinghast,

(t)he ceiling was added in response to rather wide spread feelings communicated to us that while substantial civil penalties for oil pollution should be extremely high,...they should not be open ended. Now the Administration has not been and is not now happy with the idea of a ceiling on liability. But if a ceiling is going to be imposed, we believe the \$100 million ceiling is appropriate. It retains the high potential exposure necessary to induce safe operations, (and) assures the public will still obtain substantial liquidated damages as it were...(T)here is nothing magical about the figure \$100 million any more than there is anything magical about the sum of \$2.50 per gallon for confined salt water discharges. (We) believe, however, that both the penalties and the ceiling are reasonably related to the gravity of oil pollution purposes of this bill.⁵⁹

55. See Sponsor Analysis at pp. 7-8. As originally introduced, the maximum penalty under HB 137 was \$50 per gallon.

See Supra note 36 and section 2.2 of this chapter for further discussions in this regard.

56. Statement by Monty Claver, lobbyist for Exxon Company, as contained in the House Judiciary Committee Meeting Minutes of 3/4/77. In the civil penalty schedule as enacted into law, the maximum \$10 per gallon fine applies only to spills into freshwater environments with significant aquatic resources. Thus, since it is extremely unlikely that a tanker would ever be in such an area, it is equally unlikely that a tanker spill would ever be assessed a penalty at this maximum rate.

57. See statements by Ken Schovakder, lobbyist for Sohio, as contained in the House Judiciary Committee Meeting Minutes of 3/4/77 and 3/28/77.

58. See statement by Ernest Mueller as contained in the House Judiciary Committee Meeting Minutes of 3/4/77.

59. Statement by J. Tillinghast as contained in the House Judiciary Committee Meeting Minutes of 4/12/77.

2.4.3 The Intent

In the Sponsor Analysis discussing HB 137 as originally drafted, the Alaska Attorney General states that "(t)o place a dollar limit on the total amount that may be assessed would represent a policy judgment that, at a given point, the harm caused by oil pollution should be borne by the public, rather than the discharger. The Administration is not prepared to make that judgment."⁶⁰ The legislative history indicates that industry pressure eventually forced the Administration to make this decision. The above discussion reveals that the intent of the ceiling is to provide industry with the advanced knowledge of their maximum potential exposure. The amount of the ceiling reflects a policy judgment made by the Administration, and is intended to reasonably relate to the incentive to safe operations and damage compensation purposes of the law.

2.5 Deduction for the Gallons Cleaned Up

2.5.1 The Statute

AS 46.03.758(f) provides that

(t)he court shall deduct from the penalties for which the person charged is liable under (e) (the vicarious liability provision) of this section that amount of oil which was removed from the environment as a result of a cleanup operation undertaken in conformity with applicable state and federal law, unless the oil was removed by an agency of the state, local or federal government. The dispersal of oil through the use of chemical agents or other means is not considered removal for the purposes of this subsection. The court may estimate the amount of oil removed.

2.5.2 The Legislative History

HB 137 as originally introduced did not allow for a deduction in the penalty based on the amount of oil cleaned up. In fact, section (d) of the original bill stated "(t)he entire penalty specified in the regulations shall be imposed, and no portion of the penalty for which a person is liable under this section may be suspended or deferred."⁶¹

Industry lobbyists were quick to point out that

...this bill apparently fines a person per volume spilled and subsequently cleaned up or recovered. It therefor provides a disincentive for speedy and efficient action to limit the impact of the discharge and to recover the spilled oil...(I)f the risks are this large, are people going to report the spills? There is going to be a very big incentive to cover it up and hope it goes away. It may be cover up instead of cleanup.⁶²

In keeping with its original position that the discharge of oil causes damage in every case, the State indicated that even if cleanup efforts were successful in removing some portion of the spilled oil, cleanup efforts take time and thus some natural resource and environmental harm

60. See Sponsor Analysis at pp. 7-8.

61. Original version of HB 137, An Act Relating to Civil Penalties for Discharges of Oil, as contained in the Alaska Attorney General's Bill Review File on HB 137, 1977.

62. Statement by Monty Clever, Exxon Company lobbyist, at the House Judiciary Committee Meeting on 3/4/77 as contained in the Meeting Minutes.

would still result.⁶³ Further, cleanup was considered more or less an academic matter in Alaska anyway. Existing cleanup equipment could not be used successfully in waters with wave heights as large as those typical in Alaska.⁶⁴ However, the State and legislature were swayed by industry's arguments that the bill as introduced did not provide a cleanup incentive since the spiller would be fined the same amount whether cleanup was attempted/accomplished or not. The bill was thus amended to allow the penalty to be reduced by the assessed per gallon rate for each gallon of oil cleaned up. The burden remained on the spiller to prove how much was removed. As stated by Tillinghast,

(this amendment) came out of recommendations...that there's no incentive to cleanup, so we provided an incentive to cleanup. I checked again to make sure that it can be demonstrated how much oil was picked up, I'm fairly confident that it can. That information is in the custody and control of industry. They're the ones that know how much oil they got out, they're the ones that can get the records out, and so we put the burden of proof on them, as a matter of judicial convenience.⁶⁵

Also,

(the cleanup amendment) is now in there allowing a defendant to deduct from his liability the amount of oil cleaned up. One of the main purposes of that is to remove a substantial disincentive to clean up oil which state law currently has...So we inserted that (a) because it was equitable, and (b) because we think it will supply a missing incentive to clean up the oil.⁶⁶

No sooner had HB 137 been amended in this manner than the industry pointed out the difficulties inherent in its burden of proving the amount of oil cleaned up. For example, when using skimmers, absorbant materials, or burning of the oil in cleanup operations, determining the actual amount cleaned up would be next to impossible.⁶⁷ Also, cleanup operations would tend to be done in a hurry and proper meters may not be available to establish how much is removed. Finally, it may not be possible to determine the amount spilled to begin with as would be the case when a tank is being filled up simultaneously with oil discharging out.⁶⁸

63. See Statement by J. Tillinghast as contained in the House Judiciary Committee Meeting Minutes of 3/4/77.

64. Id. It was asserted that current state of the art cleanup equipment functions successfully in maximum 3-4 foot waves, while waves in Alaskan waters typically reach heights of 6-8 feet.

65. Statement by J. Tillinghast as contained in the House Judiciary Committee Meeting Minutes of 3/10/77. Amending the statute to allow the penalty to be reduced by the amount of money spent in cleanup efforts instead of reducing the penalty by the assessed per gallon rate for each gallon removed was also considered. However, this alternative was later dropped when it was realized that this option might not further the incentive to clean up as much oil as possible in some cases. For example, if a spiller was assessed a fine of \$200,000, and he spent \$200,000 cleaning up half of the oil, then half of the oil would still remain in the water, and the spiller would not be subjected to any fine at all. See the Minutes of the House Floor Session on 4/25/77 for a more detailed discussion in this regard.

66. Statement by J. Tillinghast as contained in the House Judiciary Committee Meeting Minutes of 3/28/77.

67. See statement by Ken Schovakder, lobbyist for Sobio, as contained in the House Judiciary Committee Meeting Minutes of 3/28/77.

68. Id.

The State and legislature conceded that determining the amount of oil cleaned up may in fact be very difficult and asked one industry lobbyist how this problem might be rectified. He responded, 'I'd give the court some discretion in the penalty.'⁶⁹ This provision was then amended to give the court discretion in estimating the amount of oil removed.⁷⁰

2.5.3 The Intent

From the above discussion it is clear that the deduction in the penalty based on the amount of oil cleaned up is intended to provide spillers with incentive to clean up as much spilled oil as possible.⁷¹

2.6 The Mitigation Clause

2.6.1 The Statute

AS 46.03.758(g) provides that

Except as provided in (f) (deduction based on the amount of oil cleaned up) and (j) (third party negligence) of this section, the entire penalty specified in the regulations shall be imposed, except that a person who discharges oil... may demonstrate, by a preponderance of evidence, that mitigating circumstances relating to the effects of the discharge would make imposition of the full penalty inappropriate. In determining whether mitigating circumstances exist, the court shall recognize that scientific knowledge pertaining to oil spills is very limited and if there is insufficient knowledge either to predict a base case or to show mitigating circumstances varying from that base case, the administratively established schedule of penalties shall apply. If mitigating circumstances are proven by a preponderance of the evidence, the court may reduce or totally eliminate the penalty, in accordance with the purposes of this section.

2.6.2 The Legislative History

As discussed above, HB 137 as originally introduced did not allow for a reduction in the assessed penalty for any reason. At the legislative hearings considering HB 137 lobbyists voiced significant concern over the fact that not only did the bill fail to take into consideration actual damages caused by a spill, but that it also allowed for no recognition of the circumstances surrounding the spill.⁷²

Several legislators also voiced similar concerns during the House Floor Session debate of the bill.⁷³

69. Id.

70. As indicated by the Meeting Minutes, this amendment was offered to the legislature and added to the legislation by J. Tillinghast at the House Judiciary Committee Meeting of 4/12/77.

71. It should be noted that the economic incentive to clean up the oil will cease at the point where the cost of cleaning up the next gallon of oil exceeds the per gallon cost incurred by the penalty.

72. See, for example, *Supra* note 57.

73. See, for example, statement by Representative Hougan as contained in the Minutes of the House Floor Session of 4/22/77.

In response to these concerns the drafters of the bill amended HB 137 to allow the court to reduce the assessed penalty if so warranted by 'unusual' circumstances. In explaining the amendment to the legislature Alaska Attorney General Av Gross offered this statement:

What we tried to do was to write in a section to the bill which would remove the total rigidity of the penalty provision...The reason the bill was rigid in the first place and set up a schedule of administrative penalties which did not deviate, was because our level of knowledge on oil spills was so low. We know damage is caused, but we don't know how to measure it...And that's why we set, initially, arbitrary and fairly rigid standards, as an incentive not to pollute...So, since our level of scientific knowledge was insufficient to relate the specific damage figures, we had a real problem in giving discretion to a court to vary penalties from a damage figure, if we couldn't really prove with certainty what the original damages...would be. If you assume that you are going to allow somebody to prove a deviation from the normal case, you gotta assume that you've got a level of knowledge sufficient to prove a normal case, or to show a deviation from it...Therefore, rather than relate to damages, we relate a provision to allow the bill not to be so rigid to unique circumstances, unusual circumstances, rather than damages. For instance a fire burned off the oil, an unusual tidal situation, something which would create a situation which was different than what normally would be expected. We can't show damages with certainty, but we probably can show events with certainty...and a court could take that into consideration in trying to say that...under these circumstances we feel that the penalty should not be anything, or it should be (reduced). At the same time, we wanted to stress that this would be the unusual case. That in most situations because the level of knowledge was so low, that if the events were normal...then the administrative penalties would apply.⁷⁴

Further, in his letter explaining this amendment to Governor Hammond, Mr. Gross states:

A provision was inserted allowing the court to reduce the penalty if unusual circumstances relating to the effects of the discharge make imposition of the full penalty inappropriate. This provision will see extremely limited application. It may be utilized, for example, if a spill occurs in a sensitive receiving environment with a high "per gallon" penalty, but a strong wind or tide immediately transports the entire spillage to a less sensitive environment. The provision does not contemplate that the courts will again become mired in a "battle of experts" over the effects of oil pollution. It merely recognizes that, in certain rare instances, peculiar circumstances surrounding the discharge may justify a lower assessment.⁷⁵

During the Senate Floor debate the word 'unusual' was changed to 'mitigating.' The only explanation in the available legislative record for this change was offered by an un-named senator who stated that "there seems to be a great deal of confusion as to what 'unusual circumstances' were, and 'mitigating' seems to fit better."⁷⁶

74. Statement by Av Gross as contained in the Senate Resources Committee Meeting Minutes of 5/24/77. Emphasis added.

75. Gross, Avrum M., Correspondence from Alaska Attorney General Av Gross to Alaska Governor Jay S. Hammond, Juneau Alaska, June 10, 1977, from the Attorney General's Bill Review File on HB 137, 1977.

76. Statement by an unidentified Senator as contained in the Minutes of the Senate Floor Session considering HB 137, 5/28/77.

2.6.3 The Intent

The above discussion indicates that the mitigation clause was added to the statute by the bill sponsors because of industry pressure and the concerns of some legislators that in some cases imposition of the total assessed penalty would be inappropriate. Bearing this in mind, the intent of this provision is to allow the court some discretion in imposing the assessed fine when mitigating circumstances relating to the effects of the discharge, based on events surrounding the spill, would make imposition of the full penalty inappropriate.⁷⁷

2.7 The 13,000 Gallon Exemption

2.7.1 The Statute

The legislative findings of AS 46.03.758 assert in part that

the handling of oil in large quantities is a hazardous undertaking which poses a significant threat to the economy and environment of the state, which can be substantially reduced only by the taking of rigorous safety precautions involving considerable expense; conversely, persons handling oil in smaller amounts pose a correspondingly lower risk to the economy and environment of the state, and are capable of safe oil handling practices at correspondingly lower costs; in order to provide an incentive which is effective, but not punitive, it is necessary and appropriate that the assessment of civil penalties for discharges of small quantities of oil be left for case-by-case judicial determination, while insuring, through the penalty provisions of this section, that the handling of oil in large quantities occurs in a manner which will not impair the renewable resources of the state.⁷⁸

Pursuant to this premise, AS 46.03.758(e) exempts unlawful oil discharges of 18,000 gallons or less from the provisions of this statute. By section (i), liability for these spills arises under the liquidated damages provisions of AS 46.03.760(a) which were discussed in Chapter One of this paper.

2.7.2 The Legislative History

AS 46.03.758 as originally enacted imposed liability for civil penalties on all unlawful oil discharges regardless of where they originated (including oil entrained in ballast or production water discharges), or the quantity of oil discharged. However, many of those testifying at the

77. In the opinion of one Assistant Attorney General who currently works with this law, this mitigation provision is the biggest weakness in the statute in that it could cause the whole question of actual damages to be re-opened. However, whether this would occur is unknown because this provision has not yet been utilized by a defendant to the point of being interpreted by the court. Personal interview with Alaska Assistant Attorney General Doug Mertz, Juneau Alaska, 4/20/88. The interpretation that this provision has received in practice is actually somewhat in conflict with the legislative intent as set forth here. See section 3.2 below for a discussion in this regard.

AS 46.03.758 is a strict liability, as opposed to an absolute liability statute. As such, in addition to allowing relief from the assessed penalty based on the number of gallons cleaned up and/or mitigating circumstances, a defendant is relieved of liability if it is proven by a preponderance of the evidence that the discharge occurred solely as a result of an act of God; an act of a third person intending to cause the discharge (if the third person is not liable under the vicarious liability provision); a negligent or intentional act by the State of Alaska or the U. S.; or an act of war (AS 46.03.758(h)). Further, the penalty may be reduced if it is proven by a preponderance of the evidence that the spill was caused solely by a negligent act of a third person (if that person is not liable under the vicarious liability provision, AS 46.03.758(j)).

78. AS 46.03.758(a)(3).

legislative hearings, as well as several legislators, expressed serious concern over what effect the potential exposure of HB 137 would have on carriers of small quantities of oil and fishermen. In particular, it was asserted that the potential liability that these individuals faced was grossly excessive to what was needed to provide a meaningful incentive to safe operations.⁷⁹ For example, lobbyists urged that the potential financial impact of the bill might force small fuel distributors to either raise prices or withdraw from service.⁸⁰ Also, the higher fines of (at that time) \$50 and \$25.00 were considered to be directly aimed at small operators because supertankers would not be in the areas to which these rates apply.⁸¹

The State responded that the equal protection clause of the State Constitution would not allow the bill to discriminate based on who spilled the oil. But it was agreed that the amount of liability necessary to provide a meaningful incentive to safe operations would vary depending upon the amount of oil handled. In other words, the maximum amount of liability which would provide the maximum incentive to safe operations would be small for one with less ability to pay when compared to the maximum amount of liability that could be placed on another with more ability to pay to provide him with the maximum incentive to operate safely.⁸² The State thus offered an amendment in the form of an algebraic formula to be used when determining the penalty amount which attempted to resolve this issue, while not being discriminatory against any particular class of oil handlers.

Under the proposed amendment, the base penalties of \$50, \$25, and \$10 were reduced to \$10, \$2.50, and \$1 respectively, and a magnitude factor of between 1 and 5 was introduced. When using the formula to determine the penalty to be imposed "as the amount of oil you spill increases, you have a geometric progression towards higher dollars per gallon."⁸³

Lobbyists acknowledged that the magnitude factor did significantly reduce penalties in some cases. However, they stressed that there was "...still the magnitude that could be devastating to large as well as small concerns."⁸⁴ Further, during the House Floor debate of the bill, several representatives argued that even with the reduction in the penalty amounts the

79. See statement by J. Tillinghast responding to these concerns, as contained in the House Judiciary Committee Meeting Minutes of 3/28/77.

80. Statement by Tim Bradner, lobbyist for BP Alaska, as contained in the House Judiciary Committee Meeting Minutes of 3/4/77.

81. See statement by Roger Lang, lobbyist for Bristol Bay Native Corporation, as contained in the House Judiciary Committee Meeting Minutes of 3/10/77.

82. See the House Judiciary Committee Meeting Minutes of 3/10/77 and 3/28/77 for discussions in this regard.

83. Statement by J. Tillinghast as contained in the House Judiciary Committee Meeting Minutes of 3/28/77. Industry lobbyists, rather predictably, argued that damages caused by oil discharges do not increase at a geometric rate with the amount spilled. The 'magnitude factor' discussed here was later dropped and thus does not appear in the law as enacted. See Chapter 3 below for a discussion on how the penalty is assessed in practice.

84. Id. House Judiciary Committee Meeting Minutes. Statement by Ken Schovalder, Sohio lobbyist.

potential exposure under the bill would be financially devastating to some of their constituents.⁸⁵ While not all House members accepted this argument, these representatives were successful in persuading the House to amend the legislation to exempt spills of 10,000 gallons or less from this civil penalty scheme.⁸⁶ However, when the bill was considered by the Senate, this exemption was removed and AS 46.03.758 as enacted applied to all unlawful discharges of oil.⁸⁷

AS 46.03.758(c) required the regulations promulgated by the ADEC pursuant to the act to be reviewed by the Administrative Regulation Review Committee prior to adoption. Thus, in 1978 this act was again before the legislature. The available records makes it clear that after a year's time, sentiment toward the civil penalty scheme within the legislature had shifted rather markedly. In particular, while swayed by the Administration's assertions in 1977 that all oil spills would cause significant unquantifiable and long-term damage and thus that substantial civil penalties were needed to assure adequate compensation,⁸⁸ several legislators no longer accepted this argument. For example, with regard to the existence of long-term damages, one legislator stated,

...I was one of the people who were lobbied last year by the Administration in terms of how difficult it was to prove the damages, and I understood the problem when I only listened to one side of it. And then when I have asked the question-- What is long term damage? Where has it occurred? Show us where it has happened, and I can't find it.⁸⁹

Similarly, Senator Sumner expressed significant concern with regard to imposing substantial civil penalties for damages which cannot be established with certainty,

...we're not talking about whether to have the law or damages or a fine. The question is...presumptive damage, that's one of the concerns I have. (If) the oil spill occurred at the time when larva was there, that would have one impact and nobody argues that yes, that is damage, and I think that that's provable damage...I have no problem with that. But my concern is if it occurred at a time when there was no provable damage...Simply because it spills, I'm making the assumption that it's...not intentional, then to further penalize somebody solely on the basis that it happened has some problem with me...I still want to be convinced that there is some damage done, significant damage done, or permanent damage, or short-term damage, some way to categorize (it) so...I can...be prepared to say OK, if there's an oil spill, and it's 100 gallons, and it's spilled in this environment, we can presume that there's going to be so much damage and allow a fine for it. But

85. These statements were made primarily by legislators who represented large constituencies of fishermen or small villages or communities in the interior of Alaska which store large quantities of oil for winter use. See in particular statements by Representatives Swanson, Lethine and Bennett as contained in the House Floor Session Minutes of 4/22/77.

86. Some were not happy with this amendment, asserting that the amount was still too low because some communities store much more than 10,000 gallons for winter use. See in particular the statements by Representatives Swanson and Bennett as contained in the House Floor Session Minutes of 4/22/77.

87. See Minutes of the Senate Floor Session of 5/28/77. There is no discussion as to why this exemption was removed.

88. Senator Sumner considered long-term to be some amount over 5 years. See his statement in the 3/9/78 Administrative Regulation Review Committee (hereinafter ARRC) Meeting Minutes.

89. Statement by unidentified legislator as contained in the ARRC Meeting Minutes of 3/9/78.

absent that information, it's an absolutely totally subjective argument. And that's why it's hard for me to buy it.⁹⁰

Further, rather than dissipating, concerns over the potential exposure of small oil handlers under the act had increased significantly in the interim. As expressed by Representative Freeman,

...there are a number of people who I know personally...who make a living transporting fuel oil and that kind of thing. A guy can haul X number of thousand gallons and has his life's work tied up in a truck. And as I read the regulations and the statute, and incidentally I am one of those who think the statute stinks but that's beside the point, I agree...it's on the books. But if I have to make a choice, as I understand the statute and the regulations and everything connected with it, it looks to me like the people who I am concerned with could literally be wiped out.⁹¹ And if I have to make a choice between the Sierra Club's fear of having some oil spills somewhere or the life's earnings of some of my constituents, at least with me there's no problem where my sympathy lies.⁹²

Finally, taking both the presumed damages and small operator concerns into consideration, another legislator observed,

I'm advised that in Fairbanks that fuel costs have gone up...about 3 cents a gallon as a result of establishing reserves anticipating these regulations. In the absence of some data to show specific short-term damage or long-term damage, it makes me really cautious in terms of...the small operators...it puts me in a difficult position to have a person's livelihood floating on the line all the time.⁹³

With regard to the presence of significant unquantifiable and long-term damage following an oil spill, the State stressed that the difficulties inherent in proving either the existence or non-existence of such damages was one of the very reasons that this legislation was enacted to begin with.⁹⁴ Regarding the concern over the potential exposure of small operators under the act, the State argued that Chevron, which vigorously opposed the bill, had raised inappropriate concerns. The State argued that, in fact, the exposure for most small spills under the new law would actually be less than under the old law (AS 46.03.760(a)). For example, the maximum possible fine for a 1,000 gallon spill into an anadromous stream under the new law would be \$10,000 (\$10/gallon), while the court could potentially impose a fine of \$50,000 or even the maximum \$100,000 under the old law. As expressed by Mr. Tillinghast,

Chevron has gone to a substantial effort to get a lot of small operators upset. In many respects Chevron is engaged in some rather disconcerting misrepresentation...(A)nd in terms of saying that for small oil spills this law is

90. Statement by Senator Sumner as contained in the ARRC Meeting Minutes of 3/9/78.

91. Several testifying expressed concern as to whether small operators could even obtain insurance for this type of liability, and if so, whether they could afford the premiums. See, for example, the statement by Tim Bradner, lobbyist for BP Alaska, as contained in the House Judiciary Committee Meeting Minutes of 3/4/77.

92. See *Supra* note 90. Statement by Representative Freeman. See also statement by Senator Poland as contained in the ARRC Meeting Minutes of 3/16/78.

93. Statement by an unidentified legislator as contained in the ARRC Meeting Minutes of 3/9/78.

94. See statements by J. Tillinghast as contained in the ARRC Meeting Minutes of 2/28/78 and 3/9/78, and the statement of Av Gross as contained in the ARRC Meeting Minutes of 3/16/78.

worse than the old law, I think is erroneous for the vast majority of small spills that occur, spills in the hundreds of gallons, mainly the small spills one could expect from a small operation.⁹⁵

Further, the State argued that because of the cost of prosecution, actions against small spills would rarely be initiated.⁹⁶

The Administrative Regulation Review Committee was not willing to accept the State's arguments. Under the auspices that proper procedures had not been followed in formulating the regulations, the Committee threatened to annul the regulations in order to keep the law from coming into effect at least until the regulations could be re-worked and reviewed again during the next legislative session.⁹⁷

Realizing that the risk of losing the statute was imminent, the State conceded that their primary concern was to ensure that adequate redress was available in the event of a major tanker spill. The State thus proposed to amend the statute to exempt spills of 5,000 gallons or less from the purview of the act. Liability for these spills would revert back to the liquidated damages provision of AS 46.03.760(a).⁹⁸ As expressed by Jerry Reinwand, ADEC Deputy Commissioner in a letter to Frank Tupper, lobbyist for Commercial Fishermen, from the North Pacific Fisheries Association:

Ernie (Mueller, ADEC Commissioner) and Av Gross (Alaska Attorney General) got into the act soon after the (3/9/78) hearing (it was obvious we needed to roll out the big guns) and were able to keep the Legislature from annulling the regulations by cutting a deal. The deal is: "small" oil spills will not be covered by the civil penalty statute but instead will be covered by the existing section of our law (Section 760). As this will take a statutory change, the bills have been introduced into the House and Senate to make the amendment to the civil penalty law. However, the House and Senate versions differ as to what is a small spill. The House bill exempts spills of 5,000 gallons or less from the regs while the Senate bill exempts 12,500 gallons and less. Ultimately, they'll probably compromise on a figure between the two...Although we were not happy with the idea of having to compromise, we did so in order to save the regulations. Av Gross in particular did one heck of a lobbying job to pull it off. I think the compromise is warranted as the "big" spills will still be covered by the regulations, and it was the specter of a massive tanker spill that got the bill through the Legislature last year.⁹⁹

In the end, the 'compromise,' resulted in an exemption of 18,000 gallons or less in recognition of the volumetric capacity of some of the Alaskan village storage tanks.¹⁰⁰

95. Statement by J. Tillinghast as contained in the ARRC Meeting Minutes of 2/28/78.

96. See, for example, the statement by J. Tillinghast as contained in the ARRC Meeting Minutes of 3/9/78.

97. See, for example, the Minutes of a private discussion held by the members of the ARRC as contained in the 3/16/78 Meeting Minutes.

98. See statement by Av Gross as contained in the ARRC Meeting Minutes of 3/16/78. The 5,000 gallon figure was arrived at by asking several major oil companies the carrying capacity of their tanker trucks.

99. Reinwand, Jerry, Correspondence from Jerry Reinwand, Deputy Commissioner of the Dept. of Environmental Conservation, to Frank Tupper from the North Pacific Fisheries Association, Juneau Alaska, 4/6/78. Correspondence contained in the Dept. of Environmental Conservation Files on HB 137, 1977.

100. See Minutes of the Senate Floor Session of 6/11/78.

2.7.3 The Intent

The above discussion reveals that from the State's perspective the purpose of the 18,000 gallon exemption was to keep the legislature from annulling the regulations and thus in effect annulling the law. However, from the perspective of many legislators and lobbyists, this exemption is intended to recognize that the mandatory penalties imposed by AS 46.03.758 are so excessive for handlers of small amounts of oil that they do not provide a meaningful incentive to safe operations. Since the imposition of a penalty under this statute could be financially devastating to a small oil handler, rather than being compensatory and regulatory, such a fine would in fact be punitive.

2.8 Summary and Conclusion

In the mid-1970's the State of Alaska concluded that its existing oil spill liability and compensation scheme would not adequately protect the environment of the State in light of pending oil production on the North Slope. AS 46.03.758, 'Civil Penalties for Discharges of Oil' was enacted into law by the Alaska legislature in May, 1977 in an effort to correct the problems which were believed to be present in the existing scheme. The civil penalties imposed by AS 46.03.758 are intended, first, to compensate the public for the unquantifiable and undetectable natural resource and environmental damage which would not be compensated for under the more traditional liability statutes because of the insurmountable burden of proof on the state. Secondly, they are intended to provide oil handlers with a meaningful incentive to perform their operations as safely as possible.

The amounts of the penalties are not intended to reflect the actual harm caused by oil pollution, and no effort was made to equate them. Instead, they are intended to reflect the gravity of the incident (the degree of public harm) and the purposes of the legislation (compensation and incentive). As such, there is nothing 'magical' about any particular penalty amount. The statute itself sets forth only the maximum allowable per gallon penalties for the variously defined receiving environments. The ADEC is then directed to further refine the penalty schedule down from these maximum amounts based on the toxicity, degradability, and dispersal characteristics of the oil, and the sensitivity and productivity of the receiving environments.

The vicarious liability provision is intended to further the 'incentive to safe operations' aspect of the law by holding those who induce and profit from oil handling activities responsible for the activities of those they contract with. It may also be surmised that a second purpose of this provision is to increase the likelihood that the State would be able to recover for environmental harm resulting from an unlawful oil discharge than would be possible without it.

The ceiling on liability was added to the statute in response to industry pressure. It is intended to provide oil handlers with advanced knowledge of their potential exposure under the statute. Further, while again there is nothing magical about the \$100 million figure, this maximum

exposure amount is intended to reasonably relate to the incentive and compensation purposes of the law.

The provisions allowing the court to reduce the assessed penalty based on the number of gallons cleaned up or on mitigating circumstances were also added to the statute in response to industry pressure. The State and the legislature were both eventually swayed by industry's argument that the bill as originally introduced provided a disincentive to quickly and efficiently clean up spilled oil since the same fine would be levied whether cleanup was attempted or not. The provision allowing the court to reduce the penalty based on the amount of oil cleaned up was thus added in an effort to rectify this perceived shortcoming. The mitigation clause was added in response to industry concerns that not only did this bill fail to take into consideration actual damages, but that it also did not allow for recognition of circumstances surrounding a spill. This provision is thus intended to recognize that in some cases unusual or unique events surrounding a spill would make imposition of the total assessed penalty inappropriate.

Finally, as originally enacted AS 46.03.758 applied to all unlawful discharges of oil. However, one year later when the regulations enforcing this statute were being reviewed by the legislature it was evident that the sentiment toward this statute had shifted rather markedly in the interim. Of particular concern was the devastating financial impact that the penalties might have on the handlers of small quantities of oil. This concern, coupled with the concern over imposing a substantial penalty for damages which could not be proven with certainty, led the legislature to threaten annulment of the regulations in order to keep the law from coming into effect. Ultimately a compromise was reached wherein spills of 18,000 gallons or less were exempted from the provisions of the civil penalty statute. From the perspective of some legislators and lobbyists the intent of this provision is to recognize that in the case of small oil handlers the penalties imposed by AS 46.03.758 would be punitive, rather than compensatory and regulatory as contemplated by the act. Conversely, from the State's perspective the purpose of the exemption was to keep the legislature from annulling the regulations and thus in effect annulling the law.

While the civil penalty statute as enacted is substantially 'watered down' compared to the original bill, several State of Alaska employees who use this statute are very pleased indeed to have it in place. This paper will now examine the implementation of this civil penalty statute.

CHAPTER 3. Implementation of AS 46.03.758

3.1 The Regulations—Statutory Mandate and Legislative History

The regulations enforcing AS 46.03.758 are set forth in 18 Alaska Administrative Code (hereinafter AAC), Chapter 75, Article 5, 'Schedule of Civil Penalties.' A somewhat condensed version is set forth in Appendices A-C. Based on a review of the available historical records, I will now examine how these regulations were formulated.

AS 46.03.758(b) sets forth only the maximum allowable per gallon penalties for unlawful oil discharges over 18,000 gallons into the variously defined receiving environments. The ADEC is then directed to promulgate regulations establishing a schedule of civil penalties which vary in relation to these maximum amounts based on the toxicity, degradability and dispersal characteristics of the oil, and the sensitivity and productivity of the receiving environment.¹ AS 46.03.758(d) further provides that the variation in the penalty amounts "...may be by subcategories of receiving environments, specific receiving environments, or both." The maximum penalties established in the statute are to apply to discharges into the most sensitive and productive of receiving environments within each category of receiving environments, with the penalty then decreasing for less productive or sensitive receiving environments.²

By AS 46.03.758(c) the regulations were required to be reviewed and approved by the legislature prior to becoming effective.³ The ADEC is authorized to periodically revise the regulations if deemed appropriate. Revisions must also be submitted to the legislature for approval.

With regard to the ADEC being assigned the job of further refining the penalty schedule, the Sponsor Analysis of HB 137 asserts that while the legislature establishes both the maximum amount of the penalties and the criteria for their application, the remaining task of ranking the "...relative sensitivity of the receiving environments, and the relative toxicity of various types of oil...is a technical effort which is properly vested in an administrative agency."⁴ Pursuant to its legislative mandate, the ADEC thus developed a set of draft regulations and introduced them into the legislature in January, 1978. The Administrative Regulation Review Committee (hereinafter ARRC) then held several hearings to discuss them. Those attending included representatives from the Alaska Department of Law, the ADEC, and interested parties.

1. AS 46.03.758(b) and (d).

2. AS 46.03.758(d).

3. Regulations are typically submitted to the legislature for review after an adoption order has been signed. The legislature then has the power to annul or approve the regulations. The provision requiring the civil penalty regulations to be reviewed by the legislature prior to adoption was apparently inserted into AS 46.03.758 in order to give the legislature an active role in the promulgation of these regulations. See Minutes from the Administrative Regulation Review Committee Meetings of 2/28/78 and 3/9/78 for further discussions in this regard.

4. Sponsor Analysis at p. 6.

Several concerns with regard to the regulations were expressed by both legislative members of the ARRC and industry lobbyists. Most specifically, it was asserted that some provisions of the regulations fell outside the purview of the statute, that some biological categories were not supported by fact, and that some of the toxicity, degradability and dispersal classifications of the variously defined oils were both "scientifically and...ly flawed" and "too artificial and insufficiently precise." In an effort to resolve these criticisms the ARRC directed the ADEC to convene a workshop to be attended by interested Committee members and industry representatives. Each of these issues will be discussed in turn.

3.1.1 Certain Provisions Fall Outside the Purview of the Statute

Keeping within the purview of the statute, the regulations promulgated by ADEC classify 'freshwater environments with significant aquatic resources' as either 'critical' or 'sensitive'.⁵ In the draft regulations the 'critical' freshwater category included those streams and rivers classified as wild, scenic or recreational; and the lakes, streams, rivers and freshwater wetlands within the boundaries of national, state, and municipal parks or park reserves, monuments, preserves and wildernesses, and the water of lakes, streams and rivers which flow or empty into those waters.⁶ Further, 'sensitive' freshwater environments were defined to include "streams and rivers within the boundaries of incorporated cities and unified municipalities other than those classified (as critical)."⁷

With regard to marine waters, 'estuarine, intertidal or confined saltwater environments' are also broken down into categories of either 'critical' or 'sensitive.' In the draft regulations 'critical' marine environments were defined to include "marine waters within the boundaries of national parks, wilderness areas, recreation areas, monuments, (and) preserves."⁸ 'Sensitive' marine environments were defined to include "marine water within the boundaries of an incorporated city or unified municipality not otherwise classified (as critical)."⁹

No criticisms were raised with regard to the use of the 'critical' and 'sensitive' designations as a means of categorizing environments with significant aquatic resources. However, when reviewing the regulations the ARRC took the position that the provision "the schedule shall...vary according to the sensitivity and productivity of the receiving environment," as contained in AS 46.03.758, intended that the aquatic receiving environment categories should be derived only from

5. Classifying freshwater environments with significant aquatic resources as either 'critical' or 'sensitive' may reasonably be interpreted as a variation in subcategories of receiving environments, which is specifically authorized by AS 46.03.758(d).

6. Draft of Alaska Administrative Code Title 18, Environmental Conservation, Chapter 75, Oil and Hazardous Substances Pollution Control, Article 5, Schedule of Civil Penalties, Section 510(a)(1), subsections (C), (D), (G), and (H), as contained in the Alaska Attorney General's file on these regulations.

7. Id., 18 AAC 75.510(a)(2)(A).

8. Id., 18 AAC 75.520(a)(1)(D).

9. Id., 18 AAC 75.520(a)(2)(C).

biological criteria. As such, the 'critical' and 'sensitive' designations discussed above, which are based on where the receiving environment is located as opposed to the biological values of the water in question, are at variance with the intent of the law.¹⁰

The State conceded that these designations were in fact not based on biological criteria. The motivation for including them in the 'critical' and 'sensitive' categories was rather "...the human being conception of the value of (the areas)."¹¹ That is, it was contemplated that a spill in a national park would be considered more offensive by the public than a spill into waters on unappropriated state lands.¹² However, the State agreed with the ARRC's interpretation of the statute and removed them from these categories. In the regulations as adopted, these receiving environments are thus designated as 'without significant aquatic resources,' unless biological criteria warrant one of the more sensitive designations.¹³

3.1.2 Certain Biological Criteria are not Supported by Fact

In the draft regulations 'critical' marine environments were defined to include marine waters within one statute mile of the mouth of waters designated as important for the spawning, rearing, or migration of anadromous fish; and marine waters within ten statute miles of a seabird colony or marine mammal rookery or hauling ground.¹⁴ Further, the 'sensitive' designation was assigned to Prince William Sound, and the bays, arms, fjords, ports and other inside waters of Prince William Sound; and all marine water within ten statute miles of any point of those waters designated as 'critical' marine environments.¹⁵

The 'critical' designation of one statute mile surrounding waters important for spawning, rearing or migration of anadromous fish is based on the premise that significant concentrations of salmon can be found lingering in this area before going upstream.¹⁶ While the legislative record is quite slim in this regard, the oil industry apparently agreed that salmon do linger at the mouth of streams before heading up to their spawning grounds. However, the one mile designation was considered excessive. Chevron, for example, urged that the 'critical' designation should be limited to 1,000 feet surrounding the mouth of such streams, rivers, etc.¹⁷ While no authority is cited, the State argued that the one mile designation is supported by fact, and in the end this 'critical' designation was retained in the regulations as adopted.

10. For discussions in this regard, please refer to the ARRC Meeting Minutes of 3/9/78, and the correspondence from ADEC Commissioner Ernest Mueller to Honorable Al Use, Alaska State House of Representatives, Juneau Ak, March 2, 1978, as contained in the Alaska Attorney General's file on HB 912, An Act Relating to the Exemption of Small Oil Discharges from the Penalty Provisions of AS 46.03.758, 1978.

11. Statement by Commissioner Ernest Mueller as contained in the ARRC Meeting Minutes of 2/28/78.

12. Id.

13. Statement by Assistant Attorney General J. Tillinghast as contained in the ARRC Meeting Minutes of 3/9/78.

14. See Supra note 6, 18 AAC 75.520(a)(1)(E) and (F).

15. Id. 18 AAC 75.520(a)(2)(D) and (F).

16. See statement by J. Tillinghast as contained in the ARRC Meeting Minutes of 2/28/78.

17. Id.

The motivation for designating the area within ten statute miles of seabird colonies, marine mammal rookeries and hauling grounds as 'critical' was similar to that of the one mile 'critical' designation surrounding the mouth of salmon streams. In particular, the state urged that since these animals typically forage some distance from these areas, some range surrounding them should be protected. The State conceded that as the distance from a rookery, etc. increases, probably fewer animals would be found, and also that it is likely that the animals would range in some directions and not others.¹⁸ However, it was argued that the distance and direction that the animals would travel cannot be predicted with certainty. This being the case, the easiest way to handle the situation would be to set up an admittedly arbitrary artificial distance.¹⁹

The legislative record on this issue is again quite slim. However, concern was apparently expressed that the ten mile 'critical' designation was not supported by fact.²⁰ The state yielded on this point and the ten mile 'critical' range was reduced to one mile. The State was successful in retaining the 'sensitive' classification for a distance extending out ten miles from all zones designated as 'critical'.²¹

Finally, the oil industry was critical of Prince William Sound being designated as a 'sensitive' marine environment. It was asserted that it should in fact be designated as 'without significant aquatic resources'.²² The State countered that this area is vital to the migration, spawning and rearing cycles of salmon and other marine animals and as such it is worthy of the 'sensitive' designation. The State won this battle and Prince William Sound along with the bays, arms, fjords, ports and other inside waters of Prince William Sound retained the 'sensitive' classification in the regulations as adopted.²³

3.1.3 Some Oil Characteristic Classifications are "Scientifically and Technically Flawed" and "Too Artificial and Insufficiently Precise"²⁴

Substantially like the regulations as adopted and as set forth in Appendices B and C, the draft regulations categorized the various oils in relation to their toxicity, degradability and dispersal characteristics. A factor number was then assigned to each classification. Crude oil was divided into two toxicity and degradability categories based on its American Petroleum Institute (API) gravity. A crude with an API gravity greater than 25 was designated as moderately toxic and moderately degradable, while crude with an API gravity less than 25 was assigned to the less toxic and low degradability categories. The per gallon penalty for both refined petroleum products/byproducts and crude oil would then be determined by multiplying the base penalty,

18. See statement by ADEC Commissioner Ernest Mueller as contained in the ARRC Meeting Minutes of 2/28/78.

19. Id. See also Supra note 10, Mueller letter.

20. Id., Mueller letter. See also statement by J. Tillinghast as contained in the ARRC Meeting Minutes of 2/28/78.

21. Id., Mueller letter.

22. See statement by J. Tillinghast as contained in the ARRC Meeting Minutes of 3/16/78.

23. See statement by J. Tillinghast as contained in the ARRC Meeting Minutes of 3/9/78.

24. See Supra note 10, Mueller letter, and statement by Mueller as contained in the ARRC Meeting Minutes of 3/9/78.

which was established on the basis of the sensitivity category assigned to the receiving environment (see Appendix C), by the arithmetic mean of the toxicity, degradability and dispersal factor numbers assigned to the particular oil spilled. The result of this calculation would then be multiplied by the number of gallons of oil spilled (less the number of gallons cleaned up by the spiller) to arrive at the total penalty to be assessed.²⁵

Although no specific references are cited, the toxicity, degradability, and dispersal classifications assigned to the variously defined oils in the draft regulations, and substantially like those in the final regulations as well, were apparently derived from information provided to the ADEC by Shell Oil Company.²⁶ While Larry Vauvre, lobbyist for Union Oil Company suggested that "...the Shell study is not the absolute answer in establishing criteria by which a person can be subjected to a civil penalty without regard (to) damages,"²⁷ no significant arguments were raised against the toxicity, degradability and dispersal categories to which the various oils were assigned. However, severe criticisms were raised with regard to the classifications of refined petroleum products and byproducts within each toxicity category. Further, while it was not specifically contended that the toxicity and degradability classifications for crude oil were inappropriate, concern was expressed over the considerable variation in the assessed penalty that would occur between spills of crude which fall into these different categories.

The criticisms regarding the toxicity classifications for refined petroleum products and byproducts rested on the argument that among the various oils assigned to any one toxicity category, there may be a wide variation in actual toxicity. That is, while it was generally agreed that motor gasoline is relatively more toxic than asphalt, it was argued that one gasoline will be more or less toxic than another gasoline depending on their chemical composition.²⁸ Further,

25. See *Supra* note 6, draft regulations.

26. See statement by ADEC Commissioner Mueller as contained in the ARRC Meeting Minutes of 2/22/78.

27. Statement by Larry Vauvre, Union Oil Co. lobbyist as contained in the ARRC Meeting Minutes of 3/9/78.

28. See statement by J. Tillingham as contained in the ARRC Meeting Minutes of 3/9/78, and correspondence from ADEC Commissioner Mueller to Representative Al Ose, 3/2/78 as contained in the Alaska Attorney General's file on HD 912, 1978 (this bill pertains to the 18,000 gallon exemption). It should be noted that based on an examination of the available historical records, this paper assumes that 'toxicity' as used in the civil penalty statute and regulations refers to the chemical toxicity of oil (i.e. the lethal effects of an oil resulting from its chemical components), as opposed to the mechanical or physical toxicity of oil (e.g. the lethal effects of oil caused by suffocation resulting from a marine animal's habitat being covered with oil, or drowning or hypothermia which may occur when the animal itself is coated with oil). This interpretation is also, perhaps, supported by the regulations promulgated by the ADEC. For example, bunker fuel and #1,2 & Arctic diesel fuel all have an aromatic content of around 25% (See Table 1). However, bunker fuel only receives a toxicity factor number of .5, while #1,2 & Arctic diesel fuel are given a toxicity factor number of 1.0. #1,2 & Arctic diesel fuel are 'light' oils as compared to bunker fuel and as such are much more chemically (as opposed to physically) toxic. Thus, assuming that the toxicity factor numbers are based on chemical toxicity it makes sense that these oils would be given a higher factor number than bunker fuel. For a discussion of oil's chemical and mechanical toxicity and fate in the marine environment, see Rubin, Jonathan, 'A Review of Petroleum Toxicity and Fate in the Marine Environment, with Implications for the Development of a Penalty

while both kerosene and motor oil (both classified as highly toxic) are generally considered more toxic than asphalt, their toxicity compared to one another may vary significantly.

The State responded that the statute neither required nor allowed the use of actual toxicity in establishing the penalty schedule. In fact, given the present state of scientific knowledge, establishing the actual toxicity for each and every petroleum product would be impossible.²⁹ What the statute required was the use of relative toxicity.³⁰ That is, the penalty schedule should establish that one type of oil (e.g. gasoline) is relatively more toxic than another (e.g. asphalt). However, the State was receptive to the notion that the toxicity level of, for example, two gasolines or of two different oils which are both considered, for example, highly toxic, may differ substantially. Chevron offered that while it is not a precise measure of toxicity, the amount of aromatic hydrocarbons present in an oil is the major contributor to that oil's toxicity, such that as the percent of aromatic hydrocarbons increases the toxicity also increases. The State thus suggested "...tempering the fee schedule in general by a factor related to the aromatic hydrocarbon concentration in each of the categories. In other words, a gasoline (with) say 20% aromatic hydrocarbons would have half the (toxicity factor) of one (with) 40% aromatic hydrocarbons."³¹ This suggestion was accepted and the regulations as adopted require the toxicity factor number to be determined by multiplying the number from the toxicity table for the oil spilled by a fraction whose numerator is the percent concentration of aromatics in the oil and whose denominator is 45.³²

Regarding the concern over the significant variation in the per gallon penalty for crude oils which fall into the different toxicity and degradability categories, industry representatives urged that the cutoff at API gravity 25 was 'overly arbitrary.'³³ The State responded by lumping all crude oils

Table for Spilled Oil," Report prepared for the Oil Spill Damage Assessment Study, Institute for Marine Studies, University of Washington, Seattle, WA, Final Draft, October, 1988.

29. See statement by Commissioner Mueller as contained in the ARRC Meeting Minutes of 2/28/78.

30. Id.

31. Statement by Commissioner Mueller as contained in the ARRC Meeting Minutes of 2/28/78. See also *Supra* note 28, Mueller letter, and statement by J. Tillinghast as contained in the ARRC Meeting Minutes of 3/9/78.

32. This formula applies to all petroleum products and by-products. Crude oil is excluded. The formula to be used in assessing the toxicity factor for crude oil will be discussed next. There is no indication in the available legislative record of how the modification factor of 45 was arrived at, or why it is used at all, except for one statement by J. Tillinghast which suggests that it was provided by Chevron Oil Company. See ARRC Meeting Minutes of 3/9/78. At any rate, it may be surmised that the use of a modification factor in this formula "...is an attempt to account for differences in the toxicity of various refined products." An analysis of the regulations indicates that dividing the % aromatics by 45 makes the formula quite insensitive to changes in the aromatic concentrations. If the % aromatics was divided by a number less than 45, or by no number, the formula would become much more sensitive to changes in the % of aromatic hydrocarbons present in an oil. See Rubin, Jonathan, "Description and Analysis of Alaska's Formula to Assess Civil Penalties and Implications of this Formula to the Port Angeles and Anacortes Oil Spills," Report prepared for the Oil Spill Damage Assessment Study, Institute for Marine Studies, University of Washington, Seattle WA, Draft Final, October, 1988.

33. See statement by J. Tillinghast as contained in the ARRC Meeting Minutes of 3/9/78.

together into the moderately toxic and moderate degradability categories.³⁴ Then a sliding scale formula based on API gravity to be used in determining the toxicity and degradability factor numbers for all crude oils was added. The purpose of this formula is to assure that a crude with say 24.9 API gravity and another with 25.1 API gravity will not be assessed widely disparate penalties. This formula appears in the regulations as adopted. It requires that the toxicity factor number for a crude oil be determined by multiplying the crude oil number from the toxicity table set forth in the regulations (0.75) by a fraction whose numerator is the API gravity of the crude in question and whose denominator is 30. Similarly, the degradability factor number for crude is determined by multiplying the crude oil number from the degradability table (0.5) by a fraction whose numerator is 30 and whose denominator is the API gravity of the crude in question.³⁵

3.1.4 Prosecutorial Discretion and Annual Reporting

Even with the above discussed modifications, the regulations as adopted were not to the liking of many legislators and, needless to say, many of those potentially subject to them. Also, as was discussed in relation to the 18,000 gallon exemption, the sentiment toward the civil penalty statute itself had shifted quite markedly between 1977 and 1978. The legislative record makes it clear that 18 AAC 75.580, Prosecutorial Discretion, and 18 AAC 75.590, Annual Reporting (see Appendix C) were added to the regulations prior to the addition of the 18,000 gallon exemption in an effort to assure both concerned legislators and those potentially subject to the law that the ADEC would not turn overnight into an 'environmental gestapo,' assessing a penalty for every spill and thus potentially causing the financial ruin of small operators and private citizens.³⁶ These provisions were retained in the regulations after the 18,000 exemption was added. As will become evident from the discussion in Section 3.3 below, the 'discretion' provision has seen extensive use in practice for spills which are subject to this civil penalty scheme.

34. The arithmetic mean of the moderate toxicity, degradability and dispersal factor numbers (.583) is less than the arithmetic mean of the less toxic, low degradability and moderate dispersal factor numbers (.667). Thus, for those crude oils which originally fell under the less toxic and low degradability categories, the percent of the base penalty which would be used in assessing the per gallon penalty was reduced by moving them into the moderately toxic and moderate degradability categories. As will be seen, the percentage of the base penalty which will be used in establishing the per gallon penalty to be assessed for crude oil spills is further decreased when the API gravity is also taken into consideration.

35. As with the denominator of 45 used in the formula to establish the toxicity factor for refined petroleum products and by-products, the available legislative record provides little insight as to where the modification factor of 30 for establishing the toxicity and degradability factor numbers for crude oil came from. However, based on an analysis of the formula, it may be surmised that this number was provided by the oil industry. Using the number 30 as a modification factor in this formula results in a mathematical minimum value when the API gravity of crude is 24.5. The API gravity of Alaskan North Slope crude is generally about 26.4. See *Supra* note 32, Report by Jonathan Rubin. See also section 3.2 of this chapter for a further discussion on how the use of a modification factor affects the amount of the per gallon penalty for both refined petroleum products and by-products as well as crude oil.

36. See statement by ADEC Commissioner Mueller as contained in the ARRC Meeting Minutes of 3/9/78.

3.1.5 Penalty For Oil Which Enters More Than One Receiving Environment

Finally, for completeness it is worth noting that the draft regulations included a provision which stated that "...if oil enters more than one receiving environment, the most sensitive receiving environment will be used in calculating the base penalty."³⁷ This provision was interpreted by both ARRC members and industry representatives to mean that if the oil entered more than one receiving environment, the most sensitive receiving environment would be used to calculate the base penalty for the entire spill. Based on this interpretation, industry representatives argued that this provision was 'unfair and irrational.'³⁸

The State responded that this was in fact the wrong interpretation. Biologists who were consulted on this issue assured the State that if oil entered more than one receiving environment it would be feasible to estimate the amount of oil which entered each. This being the case, it was intended that the most sensitive receiving environment would be used in calculating the base penalty for that portion of the spill.³⁹ Keeping with this interpretation, the State made an effort to clarify the ambiguity by removing the provision as cited above and replacing it with another provision which states "(i)f a portion of the oil enters more than one receiving environment, the civil penalty will be based upon the most sensitive receiving environment which that portion of the oil enters."⁴⁰

With the modifications and clarifications discussed in this section, the ARRC approved the regulations. However, it should be noted that the legislative record indicates that a further condition for acceptance was the exemption of spills of 18,000 gallon or less from the purview of the civil penalty statute and these regulations.⁴¹ The regulations as adopted (See Appendices A-C) became effective in April, 1978.

3.2 The Regulations in Relation to the Legislative Intent and Statutory Mandate

Before discussing Alaska's practical experience with this civil penalty approach as an oil spill liability and compensation scheme, several remarks regarding the relationship between the regulations as adopted and the legislative intent and various provisions of the civil penalty statute should be noted.

First of all, while not explicitly set forth in the statute, the legislative record makes it clear that the phrase "the schedule shall vary according to the sensitivity of the receiving environment" as set forth in AS 46.03.758(d) at least reasonably, if not necessarily, implies that the penalty schedule should take into consideration the time of year that a spill occurs.⁴² It is arguable that the

37. See *Supra* note 6, Draft Regulations.

38. See discussion of this issue as contained in the ARRC Meeting Minutes of 2/28/78.

39. *Id.* See also *Supra* note 28, Mueller letter.

40. 18 AAC 75.570(3). See Appendix C.

41. See Chapter 2 of this paper and the ARRC Meeting Minutes of 3/16/78 for further discussions in this regard.

42. See discussion in this regard as contained in the House Resources Committee Meeting Minutes of 2/17/77.

receiving environment categories set forth in the regulations fail to consider this factor since the environments designated as critical, sensitive, or without significant aquatic resources retain such designations regardless of the time of year. Conversely, it could also be argued that, for example, an area important to the migration of anadromous fish should be considered critical year round. An oil spill in such an area when the fish are not present could still affect later spawning, rearing, and migration patterns or success by fatally injuring food sources, by altering the area through cleanup efforts, and/or by the actual physical persistence of the oil when the fish return.

For a freshwater environment to be defined as critical based on its importance to the spawning, rearing, or migration of anadromous fish, it must be so designated under AS 16.05.870(a). Similarly, marine waters within one statute mile of the mouth of waters important to the spawning, rearing, or migration of anadromous fish are designated as critical only if the freshwater environments they relate to are designated as important to the spawning, rearing, or migration of anadromous fish under AS 16.05.870(a).

AS 16.05.870 is entitled Protection of Fish and Game. Section (a) provides that "(t)he Commissioner shall, in accordance with the Administrative Procedures Act (AS 44.62) specify the various rivers, lakes and streams or parts of them that are important for the spawning, rearing or migration of anadromous fish. Pursuant to this direction 5 AAC 95.010(a) designates waters important to anadromous fish as follows:

The Atlas to the Catalog of Waters Important for Spawning, Rearing or Migration of Anadromous Fishes, and the Catalog of Waters Important for Spawning, Rearing or Migration of Anadromous Fishes, as revised March 1987, are adopted by reference. The six-volume atlas is a compilation of topographic maps upon which are designated, in accordance with AS 16.05.870(a), the various rivers, lakes, or streams, or parts of them, that are important for the spawning, rearing, or migration of anadromous fish. The catalog is a listing of those water bodies which sets out legal descriptions of the mouth and the known upper range of the fish of each stream, river, or lake designated on the maps in the atlas.

As can be inferred by reviewing Appendix A, any rivers or streams and the one mile marine environment areas surrounding the mouth of rivers and streams which are not contained in this atlas, or which do not fall within one of the other critical designations, are by default designated as 'without significant aquatic resources.' Similarly, the regulations require that all fresh and marine waters associated with the National Wildlife Refuge System, fish and game reserves, etc., be so designated prior to a spill in order to be considered critical. If not so identified, these areas would also fall under the category of 'without significant aquatic resources.'⁴³

43. According to Paul O'Brien, ADEC, the critical freshwater category was amended in 1986 to include ground waters (18 AAC 75.510(1)(a)). Prior to this time, only those ground waters with a water use permit, or those which in fact were being used for a purpose specified in 11 AAC 72.200 were considered critical. By default, ground waters which were being used for a purpose that would qualify for a water use permit, but which did not in fact have one, and which were not being used for a purpose specified in 11 AAC 72.200 were classified as

Prior designation of aquatic environments is indeed equitable so that those potentially subject to these civil penalties possess advanced knowledge of their potential financial exposure and will hopefully take the precautions necessary to prevent a spill. The point to be made is that if the aquatic receiving environments are not 'appropriately' categorized, in the event of a spill the public may not be adequately compensated for the harm done.

Next, the legislative record makes it clear that the aquatic receiving environment categories should be based on biological criteria. While addressing too many biological criteria would surely make the regulations too cumbersome for practical use, the biological factors considered in the regulations as adopted are arbitrary and quite limited in number.

AS 46.03.758(b)(1) states that the \$10 maximum penalty for freshwater environments shall apply to oil spills into anadromous streams or other freshwater environments with significant aquatic resources, while the \$250 maximum penalty for marine environments shall apply to oil spills into estuarine, intertidal or confined saltwater environments. Nothing therein would preclude specific reference to non-anadromous fish, crustacea, mollusks or other aquatic resources in the regulations. However, with regard to the critical freshwater classification, only anadromous fish are specifically taken into account. Thus, freshwater areas which do not fall into one of the other critical categories, but which are important to the continued existence of other types of fish or aquatic resources, are assigned to the less sensitive designations with their attendant significantly reduced per gallon penalties. Similarly, marine waters within Prince William Sound and the inside waters of Southeast Alaska which may be important to, for example, the continued viability of shellfish, crustacea or non-anadromous fish are considered only sensitive as opposed to critical unless they fall within a game/fish reserve area etc. which would be assigned to the critical category.

The State may well have wanted to designate some receiving environments as more sensitive than in the regulations as accepted. However, given the sentiment toward the civil penalty statute at the time the regulations were being reviewed, this would likely have worked against, rather than for the State in its quest to get the regulations adopted. The point is that the biological criteria considered by Alaska in formulating the civil penalty regulations are not the only, and arguably not the only significant, biological factors which could (or perhaps in the best of all worlds should) be considered in an effort to reflect as accurately as possible the true 'sensitivity and productivity'⁴⁴ of the various receiving environments.

without significant aquatic resources for the purposes of 46.03.758. Personal interview with Paul O'Brien, Juneau Alaska, April 15, 1988.

44. Of course, what would be considered in an effort to reflect the 'sensitivity and productivity' of the receiving environment would depend on how 'sensitive' and 'productivity' are defined. AS 46.03.758 provides no definition for these terms.

Perhaps the most significant comment to be made regarding the relationship between the regulations and the intent and mandate of the statute has to do with the maximum per gallon penalties which can be imposed under the regulations. The statute states that the maximum per gallon penalties shall not exceed \$10, \$2.50, and \$1 for the three defined receiving environments. These maximum amounts are to apply to discharges in the most sensitive and productive receiving environments within each category of receiving environment.⁴⁵ Thus, given the receiving environments set forth in the regulations, the \$10 penalty should apply to all spills into critical freshwater environments, the \$2.50 penalty to all spills into critical marine environments, and the \$1 penalty to all oils spills into aquatic environments without significant aquatic resources. However, under the regulations as adopted, it is impossible to ever reach these maximum per gallon penalties because of the toxicity, degradability and dispersal factor numbers assigned to the variously listed oils. As can be seen in Table 1, the factor numbers assigned to these three oil characteristics tend to offset one another. For example, an oil that is highly toxic (factor number 1.0) tends also to be highly dispersible (factor number .15) and highly degradable (factor number .25). In all cases, when the arithmetic mean of the factor numbers assigned to the oils is calculated, the result is less than one. When this result is then multiplied by the appropriate base penalty, the per gallon penalty amount is always less than the base penalty assigned to the receiving environment where the spill occurred. Table 1, column 4 shows the percentages of the base penalties which would actually be used in assessing a penalty if this were the end of the calculation. However, one will recall that the negotiations in relation to the regulation review resulted in a further modification of the formula to determine the penalty. In the regulations as adopted the percent of aromatic hydrocarbons present in refined petroleum products and byproducts and the API gravity of crude must be factored in. Adding these calculations to the original formula, the percent of the base penalty used in determining the per gallon penalty is further reduced. For those refined petroleum products and byproducts for which an estimate of the aromatic hydrocarbon content could be readily established, Table 1, column 6 shows the percent of the base penalty which will actually be used in assessing the penalty. For crude, the generally stated API gravity of Alaskan North Slope crude is used.

As an example of refined products, Table 1, column 6 shows that only 32% of the base penalty would be used to calculate the per gallon penalty for #1, #2, and Arctic diesel fuel and heating oil. Thus, if such a spill occurred in a critical freshwater environment, base penalty \$10, the actual per gallon penalty would be only \$3.20. For the same spill into a critical marine environment where the base penalty is \$2.50, the per gallon penalty would be only \$0.80.

With regard to the use of API gravity and the modification factor of 30 in assessing the toxicity and degradability factors for crude, Alaska crude generally has an API gravity of 26.4. The

45. AS 46.03.758(b) and (d).

TABLE 1: PERCENTAGE OF THE BASE PENALTY USED IN CALCULATING THE PER GALLON PENALTY

<u>OIL TYPE</u>	<u>TOX</u> ¹	<u>DEG</u> ²	<u>DISP</u> ³	<u>%(W/O)</u> ⁴	<u>%AR</u> ⁵	<u>%(W)</u> ⁶
#1,2 & Arctic diesel fuel & heating oil	1.0	0.25	0.15	46.6	15 ⁷	31.9
Jet aviation fuels A & B	1.0	0.25	0.15	46.6	15 ⁸	24.4
Motor/aviation gasoline	1.0	0.25	0.15	46.6	10 ⁹	20.7
Kerosene	1.0	0.25	0.15	46.6	15 ¹⁰	24.4
Stationary turbine fuels	1.0	0.25	0.15	46.6		
Waste oil/waste oil mix	0.75	0.50	0.50	58.3		

¹TOX: The toxicity factor number for the oil in question from 18 AAC 540-570. (See Appendices B and C).

²DEG: The degradability factor number for the oil in question from 18 AAC 540-570. (See Appendices B and C).

³DISP: The dispersibility factor numbers for the oil in question from 18 AAC 540-570. (See Appendices B and C).

⁴%(W/O): The percentage of the base penalty which would be assessed if only the arithmetic mean of the toxicity, degradability, and dispersibility factor numbers were considered in the formula to assess the per gallon penalty.

⁵%AR: The percentage of aromatic hydrocarbons present in the oil in question (for those which this number could readily be identified).

⁶%(W): The percentage of the base penalty which will be assessed on the percentage of the aromatic hydrocarbons present in the oil in question is factored into the formula.

⁷The percent aromatics used here is for fuel oil #2 (Diesel oil) as contained in the NOAA Technical Memorandum ERL MESA-17, "Chemical and Physical Properties of Refined Petroleum Products," by Herbert Curt, Jr. and Kevin O'Donnell (1977) at p. 12.

⁸For the purpose of illustration, the percentage of aromatics used here is the average (from 1 to 30%) aromatic hydrocarbon content for light naphthas and aviation gasolines as set forth in The Annual Book of the American Society for Testing and Materials (ASTM) Standards, Volume 05.02, Petroleum Products and Lubricants, ASTM, Philadelphia, PA, 1987, at p. 112.

⁹Id. at p. 6.

¹⁰Id. at p. 8.

TABLE 1 (Cont.)

<u>OIL TYPE</u>	<u>TOX</u>	<u>DEG</u>	<u>DISP</u>	<u>%(W/O)</u>	<u>%AB</u>	<u>%(W)</u>
Lubricating oil	0.75	0.50	0.50	58.3		
Other jet fuels	0.75	0.25	0.15	38.3		
Crude oil	0.75	0.50	0.50	58.3	26.4 ¹¹	57.5
Bunker/ residual fuel oils	0.50	1.0	1.0	83.3	25 ¹²	75.9
Hydraulic fluids	0.50	0.50	0.15	38.3		
Asphalts	0.25	1.0	1.0	75.0		
Tars	0.25	1.0	1.0	75.0		
Emulsified oil mixes	0.25	1.0	0.50	58.3		
All other	0.25	1.0	1.0	75.0		

¹¹In the case of crude oil, the formula for assessing the per gallon penalty takes into account the API gravity of the crude in question as opposed to the aromatic content. The number used here is the average API gravity for Alaska North Slope crude. Generally speaking, the API gravities for crudes range from 10 to 49.1. The average is 33.1 with a standard deviation of 6.7. See "Description and Analysis of Alaska's Formula to Assess Civil Penalties and Applications of this Formula to the Port Angeles and Anacortes Oil Spills," by Jonathan Rubin, prepared for the Oil Spill Damage Assessment Study, Institute for Marine Studies, University of Washington, Seattle, WA, Final Draft, October, 1988, (cites omitted).

¹²See Supra note 9 at p. 21. (Percentage of aromatics for Bunker 'C').

appropriate calculation reveals that 57.6% of the base penalty will actually be used in assessing the base penalty for a spill of this type of oil. The modification factor was apparently added to the formula to assess the penalty for crude oil in an effort to better capture the harmful effects of the spilled oil. However, it is interesting to note that of the various whole numbers between 1 and 100 tried in the formula, the lowest percentage of the base penalty is used in assessing the penalty for Alaska crude when a modification factor of 32 is used. As discussed above, it is quite likely that the information as to what modification factor should be used was provided to the ADEC by the oil industry. Given the slight difference which would result in using a modification factor of 32 as opposed to 30 (.11%), it is perhaps reasonable to conclude that the modification factor in the formula was rounded off to 30 for simplicity's sake.⁴⁶ Conversely, given the small variation in the percentage of the base penalty which is used in establishing the per gallon penalty for crude oil between when the modification factor of 30 is used or none at all (.73% assuming an API gravity of 26.40), it is somewhat surprising that industry representatives would have pushed so strongly for the modification factor to be inserted in the formula at all.

Since the statute requires only that the maximum penalties set forth therein apply to the variously identified receiving environments, the regulations as adopted can reasonably be interpreted to fall within the purview of the statute in this regard. Also, given the attitude toward the civil penalty scheme in general at the time the regulations were being reviewed, this further reduction in the per gallon penalty amounts may quite conceivably have been a necessary compromise on the part of the sponsors of the law in order to save the regulations from being annulled and perhaps the law from being repealed as well. However, keeping in mind that the legislative history indicates that the penalty amounts are intended to reflect the gravity of the incident and the purposes of the legislation (compensation and incentive), it is questionable whether the penalty amounts which will be assessed under the regulations actually meet these goals.

A comment regarding the ceiling on liability as contained in this statute is worth noting. One will recall that AS 46.03.758(e) holds a spiller liable for the penalties imposed by this statute up to a maximum of \$100 million. Given the amount of the per gallon penalties which will be assessed under this statute, it is highly unlikely that this maximum amount would ever be reached. Table 1, column 6 shows that the highest percentage of the base penalty would be used in assessing a spill of bunker or residual fuel (76%). Assuming a spill of one of these types of oil into the most sensitive receiving environment, i.e., a critical freshwater environment, the per gallon penalty would be \$7.60 (76% of the \$10 base penalty). One would have to spill over 13 million gallons to reach the \$100 million maximum penalty. A spill of this magnitude into this environment is highly unlikely.

46. See *Supra* note 32, Rubin. In this paper Rubin discusses the sensitivity of the penalty formula to various modification factor numbers.

In the mind of one individual close to the legislative process, this civil penalty approach as an oil spill liability and compensation scheme was, as originally conceived and introduced to the legislature, a good idea. However, after all of the modifications and compromises, the civil penalty scheme as enacted is considered to be 'wimped out,' with the maximum \$10 penalty said to be 'not close to a good deal for the environment.'⁴⁷ As was shown above, even this maximum amount, which is greatly reduced from the bill as originally introduced, will never be assessed against a spiller.

Contrary to this rather negative opinion, one assistant attorney general who presently works with the civil penalty law, but who was not involved in the formulation of the law or regulations, is in general very pleased with both the statute and the regulations.⁴⁸ This paper will now discuss how this scheme has worked in practice.

3.3 The Civil Penalty Scheme in Practice

First and foremost, it should be noted that to date all cases in which the State has asserted responsible party liability under AS 46.03.758 have settled out of court. In the opinion of one Alaska Assistant Attorney General good settlements are typically achieved.⁴⁹ Also, the fact that all cases brought under AS 46.03.758 have settled out of court is considered a validation that this civil penalty law works.

3.3.1 AS 46.03.758 in Relation to Other Natural Resource Damage Liability Laws; Proof of Financial Responsibility

As discussed in Chapter 2, Alaska's civil penalty statute is based on the assumption that all oil spills will cause natural resource damage. However, as a practical matter considerations such as the availability of adequate evidence, and the relationship between the time and expense that will be incurred in litigation and the amount that will potentially be recovered may dictate whether a case is pursued. Most particularly, when the responsible party has cleaned up most of the oil or has made a good faith effort to clean it up, especially if the State has not spent much money in responding to the incident, the Alaska Attorney General may elect not to initiate a lawsuit at all.⁵⁰

When litigation is deemed appropriate, the State will file a complaint alleging spiller liability under not only AS 46.03.758, but also under other potentially applicable state and federal statutes, and in some cases under common law theories of liability as well. Or, as stated by Paul O'Brien of the ADEC, the State will "throw the book at them," or "shoot for the moon."⁵¹ Three examples will serve to illustrate.

47. Personal interview with Randy Bayliss, former ADEC Director, Valdez Office, in Juneau Alaska, April 18, 1988.

48. Personal interview with Alaska Assistant Attorney General Doug Mertz, Juneau Alaska, April 20, 1988.

49. Id.

50. Id.

51. Personal interview with Paul O'Brien, Oil Spill Response Coordinator for ADEC, Juneau Alaska, April 15, 1988.

First of all, in June, 1979 a rupture in the trans-Alaska oil pipeline released over 210,000 gallons of crude oil. A portion of the oil entered both the Atigun and Sagavanirktok rivers. The complaint prepared by the State alleged that the defendant (Alyeska Pipeline Service Co., Inc.) was liable for the civil penalties imposed by AS 46.03.758, and strictly liable for natural resource damages under the federal Trans-Alaska Pipeline Authorization Act (43 USC section 1653).⁵²

Secondly, on December 25, 1979 the Panamanian ore carrier M/V Lee Wang Zin capsized in Canadian waters. It then drifted into Alaskan waters spilling an estimated 100,000 gallons of bunker fuel into a 'critical' marine environment. In court documents filed by the State it was alleged that the defendants were liable for cleanup and restoration costs under AS 46.03.760(e) and AS 46.03.780; the civil penalties imposed by AS 46.03.758 multiplied by five based on allegations of gross negligence or an intentional act, and inadequate cleanup efforts; liquidated damages under AS 46.03.760(a); strictly liable for the full amount of actual damages to the state including cleanup, restoration and administrative costs, under AS 46.03.822; and damages under the common law theories of negligence, trespass, unjust enrichment, and public nuisance.⁵³

Finally, on January 21, 1984, the Greek tanker M/V Cepheus ran aground in Cook Inlet. Over 180,000 gallons of its cargo of jet A aviation fuel was released. The complaint filed by the State of Alaska asserted that the defendants were liable for liquidated damages under AS 46.03.760(a); strictly liable for natural resource damages under AS 46.03.822; liable for the civil penalties imposed by AS 46.03.758; and liable for environmental restoration under AS 46.03.780.⁵⁴

AS 46.03.758(i) does indicate that a person liable for the civil penalties imposed by this statute is not also liable for the liquidated damages penalties imposed by AS 46.03.760(a).⁵⁵ Otherwise, none of the above cited state or federal statutes or common law theories of liability preclude recovery of both the civil penalties imposed by AS 46.03.758 for the loss resulting from damages which are unquantifiable and unidentifiable, and an amount under one of the other statutes or common law theories for those actual natural resource damages which are quantifiable and identifiable. However, according to Alaska Assistant Attorney General Doug Mertz, it is

52. Unsigned complaint in State of Alaska v. Alyeska Pipeline Service Co., Inc., Superior Court for the State of Alaska, Fourth Judicial District, by Doug Mertz, Assistant Attorney General for the State of Alaska, November, 1979, as contained in the archived Alaska Attorney General's file on this case.

53. Claims of the State of Alaska in The Matter of The Complaint of Lee Wang Zin Navigation Co., S. A. and Kee Yeh Maritime Co., LTD. for Exoneration from or Limitation of Liability, in the United States District Court for the District of Alaska at Anchorage, No. A-80-199-Civ, August 29, 1980, by G. Thomas Koester, Assistant Attorney General for the State of Alaska.

54. Complaint filed in State of Alaska v. Transportes Del Este Navegacion, S. A., et. al. in the Superior Court for the State of Alaska, Third Judicial District, No. 84-961, January 31, 1984, by Madeleine R. Levy, Assistant Attorney General for the State of Alaska. Please see Chapter 1 of this paper for a discussion of the Alaska statutes cited in this paragraph.

55. According to Alaska Assistant Attorney General Doug Mertz, the State will commonly allege liability under both in its complaint. A decision as to which statute recovery will be sought under is made once adequate information is available. Telephone communication with Doug Mertz, July, 1988.

unlikely that a court would allow recovery of both. In Mertz opinion it is likely that a court would interpret reimbursement under both this civil penalty statute and one of the other statutes or common law theories as a double recovery for at least some of the damage.⁵⁶

Mertz' opinion on this double recovery issue is supported by an agreement which was struck early in the life of this law between the Alaska Attorney General and those who insure against oil spill liability. Specifically, when AS 46.03.758 was passed in 1977, those with pollution insurance coverage assumed that their policies covered liability for the civil penalties that this statute imposed. While pollution insurance policies apparently do not normally cover civil penalties of this nature, insurers did not question the adequacy of the pollution insurance policies until the early 1980s when suits began to be filed under AS 46.03.758. At that time insurers stated that the civil penalties were in fact not covered by existing policies. Negotiations ensued, and the State of Alaska was able to convince the insurers that the civil penalties are in some measure related to actual damages. The State then indicated that to the extent the civil penalties compensate for actual damages, recovery for those same damages would not also be sought under one of the other applicable statutes or common law theories.⁵⁷

This agreement blurs the distinction between the intent of this civil penalty statute and other oil spill liability laws. AS 46.03.758 is intended to compensate only for the loss that the public suffers as a result of unidentifiable and unquantifiable damage.⁵⁸ 'Actual damages' are compensable under the other applicable oil pollution liability laws. This agreement means that actual damages, in addition to the loss resulting from unidentifiable and unquantifiable damages, may in fact be compensated for by the civil penalties imposed by AS 46.03.758. Under it, if actual damages are determined to be worth less than the civil penalty imposed the State would not be

56. See Supra note 48.

57. *Id.* Also, telephone communication with Doug Mertz, July, 1988. During their negotiations, another agreement was also struck between the State of Alaska and the pollution insurers. Section (e) of AS 46.04.040 states in part that "(a) an action brought under AS 46.03.758, 46.03.760(a) and (e), or 46.03.822 may be brought in a state court directly against the insurer or another person providing evidence of financial responsibility." Insurers expressed concern that because of the way AS 46.03.758 is written, if the state pursued a claim against the insurer in an oil spill incident, the insurer might not be allowed all of the defenses in the statute which are available to those they insure. The Alaska Attorney General resolved this concern by issuing an opinion clarifying that in fact all defenses available to insureds would also be available to the insurers if the state sued the insurers for the civil penalties in an oil spill incident. See Supra note 48.

58. It could be argued that the State could, consistent with this agreement, still pursue recovery of both the full civil penalty imposed by AS 46.03.758 and an amount under one of the other applicable laws for quantifiable and identifiable damages. Specifically, this agreement indicates that to the extent the civil penalties compensate for 'actual damages,' compensation for those same damages would not be sought under any other applicable liability law. The unidentifiable and unquantifiable damages referred to in AS 46.03.758 may indeed be 'actual' and as such compensation for them would not be sought under any other liability law. As such, the State could pursue recovery of compensation for all 'actual' identifiable and quantifiable damages under the other applicable liability laws. However, to date the State has not actively pursued recovery of both.

prevented from recovering the entire assessed penalty.⁵⁹ In this case the State would still be able to collect some compensation for the harm which is presumed to exist as a result of unidentifiable and unquantifiable damages. Conversely, if the value of actual damages is determined to exceed the amount of the assessed penalty, the State would be limited to collecting only the total actual damage amount either under the civil penalty statute and one of the other applicable laws, or simply under one of the other applicable laws alone. Since all cases have settled out of court, it is unclear whether in a case like this a court might allow at least some amount in civil penalties for the harm which is presumed to exist as a result of unidentifiable and unquantifiable damages.

While this use of the civil penalty statute is at odds with its intent, it does avoid the double recovery issue. In practice the State of Alaska will thus initially allege liability under all applicable state or federal statutes or common law theories of liability. The State will then impress upon the defendants that if the case does go to court, it will pursue the avenue which offers the maximum potential recovery, while avoiding a possible double counting of damages. However, as will become evident from the discussion in Section 3.3.7 below, in practice Alaska rarely performs thorough natural resource damage assessment studies in order to determine the full extent of actual damages as would be necessary to support a claim under the more traditional oil spill liability laws. This indicates that as a practical matter the State does rely heavily on the civil penalty statute as a means of recovering compensation for actual damages. Yet it is also evident that the State has been successful in recovering some substantial settlement amounts.⁶⁰ This in turn indicates that the civil penalty statute has in practice proven to be a valuable tool for the State in assuring that compensation for actual damages is achieved.

Since the spills in the cases where a suit is filed are typically quite large, at least some of the defendants are commonly large oil interests with substantial resources. According to O'Brien, these defendants will use all of their resources to refute to the extent possible the allegations made by the State, and will assert all available defenses to liability.⁶¹ According to Mertz, once a case is filed the parties will 'dance around' until a settlement is reached. The settlement is always in a lump sum amount. It is never broken down as constituting a particular amount in compensation or penalties. This way the defendants can call it what they want, and the State can call it what it wants, and everyone is satisfied.⁶²

59. The mitigation clause may weaken the State's chances of actually collecting the entire assessed penalty. See Section 3.3.3 below.

60. See Section 3.3.7 below.

61. See *Supra* note 51.

62. See *Supra* note 48. It should be noted that the discussion in this section regarding recovery under AS 46.03.758 and/or the other applicable statutes or common law theories pertains only to recovery for natural resource or environmental harm. Some of these statutes and common law theories also impose liability for cleanup and/or administrative costs incurred by the state in responding to a spill incident. These expenses would thus be recoverable in addition to the amount recovered for natural resource or environmental harm. Since all cases have settled out of court in a lump sum amount, it is unclear whether restoration costs would be

Those potentially subject to the civil penalty statute are not required to provide proof of financial responsibility to the \$100 million ceiling imposed by this statute. Rather, AS 46.04.040, Proof of Financial Responsibility, sets forth the amounts of money that oil terminal facilities, offshore exploration production facilities, oil barges and tank vessels must have ready access to in order to operate within the state for the purposes of a loss compensable under AS 46.03.760(e), 46.03.822, and an assessment under AS 46.03.758 or 46.03.760(a).⁶³

3.3.2 Ability to Determine the Amount Spilled

Although the amount of the civil penalty to be imposed is relatively easy to establish in comparison to determining the full extent of actual damages, calculating it is not nearly as straightforward as one would imagine. The most significant problem lies in the ability to determine the amount of oil spilled. Establishing this is commonly a major point of contention between the State and defendants.

Take, for example, a tanker carrying oil as cargo. The first potential problem that arises is how well the quantity of cargo was gauged when the vessel was loaded. In some cases, the quantity of oil loaded will be quite accurately measured. However, in other cases this may not be so. For example, when an oil company is transporting its own oil from the production site to the refinery precise gauging is not necessary and thus may not be done.⁶⁴

Secondly, even assuming that there is an accurate record of the amount of oil onboard the vessel when loaded, the ability to determine the amount remaining after a spill will depend on the availability of gauging devices, the accuracy of the gauging method used, and the capability of the person performing it. The primary goal after a spill is to get the oil out of the damaged vessel and into secure tanks. As such, precise measurement of the quantity of oil being transferred may not be a priority. If the oil is transferred into metered tanks, accurate measurements of the remaining

considered a separate recoverable item, or whether they would be considered to be included in an amount recovered under the civil penalty statute or an amount recovered for actual damages under one of the other statutes or common law theories.

63. See Chapter 1 of this paper for a discussion of the Alaska statutes cited in this paragraph. Proof of financial responsibility is set forth in AS 46.04.040 as follows:
- (a). Oil terminal facility: Proof of financial responsibility need not exceed \$50,000,000, but must not be less than \$10 per incident for each barrel of storage capacity at the facility, or \$1,000,000, whichever is greater.
 - (b). Offshore exploration or production facility: Not less than \$35,000,000 per incident.
 - (c). To be allowed to transfer oil to or from a tank vessel, or to or from an oil barge, proof of financial responsibility is as follows:
 - (1). for a tank vessel or oil barge transporting trans-Alaska pipeline oil, the amount required under the federal Trans-Alaska Pipeline Authorization Act (43 USC 1653(c)(3) (sec. 204(c)(3)));
 - (2). for any other oil barge, the amount required by section 311(p)(1) of the Clean Water Act (CWA), or \$1,000,000, whichever is greater;
 - (3). for any other tank vessel, the amount required by section 311(p)(1) of the CWA, or \$20,000,000, whichever is greater.
64. Unless otherwise stated, the problems encountered in establishing the amount of oil discharged in an oil spill incident as discussed in this section were provided by Alaska Assistant Attorney General Madeleine Levy during a telephone interview on August 12, 1988.

oil may not be a problem. Conversely, when transferred into unmeasured tanks accurate measurements may be impossible. Further, some gauging methods are intended to be used when the vessel is stable. These methods are less reliable when the vessel is rocking, listing, etc.

Temperature is another important factor. First of all, changes in temperature may cause oil expansion, contraction or evaporation thereby affecting the volume of oil present at any given time. Secondly, temperature may affect the accuracy or even the ability to use some gauging techniques.⁶⁵

Accurate calculations of the total amount of oil spilled may also be hindered when, for example, a portion of the oil remaining in a damaged tank has been removed and a further spill of the oil still in the damaged tank occurs. A second spill of this type occurred in the M/V Cepheus case. Accurate information as to the amount of oil present in the tank prior to this second spill was not available. Estimates of the quantity discharged thus ranged from 5,300 gallons to 21,000 gallons.⁶⁶

When a vessel sinks during or following a spill, an accurate calculation of the amount of oil still onboard versus the amount actually discharged into the aquatic environment may never be established. In the case of the Lee Wang Zin sinking, court papers filed by the State of Alaska asserted that at the time the vessel left British Columbia, Canada, she carried 1,100 tons (316,340 gallons) of bunker oil and 67 tons (19,698 gallons) of diesel oil. However, the amount of oil which actually seeped from the tanks was 'undetermined.'⁶⁷ Other available records estimate the amount discharged at around 100,000 gallons (bunker oil).⁶⁸

Determining the amount of oil discharged in the event of a pipeline spill may also present many problems. If the pipeline is being closely monitored and the discharge is detected immediately, a close approximation of the amount spilled may be possible. Conversely, if the pipeline is not closely or accurately monitored, the difficulties one would encounter in attempting to determine the amount spilled are rather obvious. Further, even if a pipeline is being monitored, only a portion of the oil flowing through it may actually escape. Thus again, especially if the spill is not detected for some time, determining the amount released may be quite a problem. Take for example the June 1979 Atigun Pass spill. In that case a portion of the oil flowing through the trans-Alaska pipeline escaped through a 5 inch Z-shaped crack. A Department of Interior report on the incident states

65. A report entitled M/V Cepheus Major Oil Spill, as contained in the ADEC's archived file on this spill indicates that cold temperatures made the use of "water indicating paste and Bio Marine Flammable Gas/oxygen meters" unreliable. Another gauging technique, however, was successfully used (p. 14). Yet even this technique only narrowed down the amount spilled to between 100,000 and 200,000 gallons (p. 4).

66. Id. M/V Cepheus Major Oil Spill report at p. 8.

67. See Supra note 54 at p. 3.

68. See the Alaska Attorney General's archived file on this case.

that although the date and time that the discharge began is unknown, it is believed to have begun 2-4 days before being detected.⁶⁹ Regarding the amount spilled, the report states

(it) is open to speculation. There are too many variables to come up with a hard and fast figure in measured volume. Since the collected volume has reached 2062 barrels of oil with some water (earlier it was thought to be 3126 barrels) recovered, the initial spill estimate of 1500 barrels seems low.⁷⁰

The amount spilled was ultimately estimated to be around 5062 barrels (212,604 gallons). Subtracting the amount cleaned up from this total (2062 barrels or 86,604 gallons), the defendant, Alyeska Pipeline Service Co., Inc., could potentially have been held liable for the civil penalty assessed on the remaining 169,000 gallons. In the complaint drafted by the State, the total amount spilled was alleged to be 'in excess of 210,000 gallons' and the amount recovered to be 'in excess of 125,000 gallons.'⁷¹ The exact amount of each would be 'proven at trial.' This case, as all other cases brought under AS 46.03.758, settled out of court. Thus, a more precise approximation of the amount spilled was never established.

Finally, in the event of an offshore oil production spill, one can expect many of the same problems in establishing the amount of oil spilled as in the case of an unmetered pipeline spill.

The intent of this section is not to provide an exhaustive list of all problems which may be encountered in determining the number of gallons discharged in an oil spill incident. Rather, the point to be illustrated is that this can in fact be a rather speculative undertaking. Even assuming that good gauging records are available, according to Alaska Assistant Attorney General Madeleine Levy gauging the amount of oil present at any time is itself not an exact science. Further, it should be made clear that in determining the amount of oil spilled it will be necessary for the State to rely at least to some extent, if not entirely, on the availability and/or reliability of the spillers records. For example, the spiller will most likely be the one with records indicating the quantity of oil loaded on a vessel. Also, if the State does not have a gauging consultant present when the remaining oil is transferred after a spill, it may again be necessary to rely on the spillers records. The Glacier Bay spill in Cook Inlet on July 2, 1987 provides an example.⁷² In that case, the vessel Glacier Bay was carrying 390,000 gallons of North Slope crude oil when it struck an object in Cook Inlet thereby causing the release of a portion of its cargo. The potentially responsible parties accomplished the transfer of the oil remaining in the tanks following the spill. The gauging records of the amount transferred, however, are apparently quite difficult to interpret. The ADEC has thus found it necessary to hire an outside expert to try to determine exactly what

69. Report on Milepost 166-167 Oil Spill, June 10, 1979, Alaska Pipeline Office, Department of Interior, Anchorage, Alaska, by Morris J. Turner, Authorized Officer, August 20, 1979.

70. *Id.* at p. i.

71. See *Supra* note 52.

72. Unless otherwise indicated, the information in this paragraph regarding the Glacier Bay spill was provided by Paul O'Brien during an interview in Juneau Alaska on April 15, 1988.

these records say. The amount spilled is still an unresolved issue. For some time estimates ranged from as low as 50,000 gallons to as high as 150,000 gallons. The range has recently been reduced to between 50,000 and 85,000 gallons. The exact amount within this range is still a hotly disputed issue.⁷³

Two final comments are worth noting. First of all, in the opinion of Randy Bayliss, former Director of the Valdez ADEC office, if you can get within 50% of the actual amount spilled, you are going well.⁷⁴ Secondly, Paul O'Brien of the ADEC concedes that gauging the amount of oil spilled may not make recovery for environmental harm any easier than a damage assessment. However, he also stresses that even if it is difficult to determine the amount spilled it doesn't mean that the law is bad. You would still have problems if damage assessments were the standard.⁷⁵

3.3.3 Spiller Defense To Liability: The Mitigation Clause

In the opinion of Alaska Assistant Attorney General Doug Mertz, the mitigation clause is potentially the biggest weakness in AS 46.03.758 from the State's perspective.⁷⁶ In turn, Mertz states that from the defendant's perspective this provision offers the best defense against liability for the civil penalties.⁷⁷

One will recall from the discussion in Section 2.6 above that this provision allows the court to reduce or totally eliminate the assessed penalty if it is demonstrated beyond a preponderance of the evidence "that mitigating circumstances relating to the effects of the discharge would make imposition of the full penalty inappropriate."⁷⁸ According to Mertz, this provision has been interpreted by defendants to mean that if the assessed penalty is shown to be excessive in relation to the environmental effects of a spill, the burden would then be shifted to the State to prove that the actual damages warrant imposition of the entire penalty. The discussion in Chapter 2 above makes it clear that the civil penalty statute does not by its legislative history or statutory language contemplate the need to assess actual damages. Yet in Mertz opinion if a court accepted the defendants interpretation of the mitigation clause, the whole question of actual damages could be reopened.

It should be made clear that under this interpretation the initial burden would be on the defendant to prove a special case. However, discussions with members of the ADEC and the Alaska Attorney General's Office reveal that the State of Alaska is certainly not anxious to incur the

73. Telephone interview with Alaska Assistant Attorney General Michelle Browne, Anchorage Alaska, on August 30, 1988.

74. Personal interview with Randy Bayliss, former Director of the ADEC Valdez Alaska office, in Juneau Alaska of April 18, 1988.

75. See Supra note 72, personal interview with Paul O'Brien.

76. Personal interview with Alaska Assistant Attorney General Doug Mertz in Juneau Alaska on April 20, 1988. This opinion was also voiced by Assistant Attorney General Michelle Browne. Specifically, she concedes that this clause undercuts the purpose of the civil penalty law. Telephone interview with Ms. Browne, August 30, 1988.

77. Id. Mertz interview.

78. Alaska Statute 46.03.758(g). Emphasis added.

time and expense necessary to perform a full scale natural resource damage assessment.⁷⁹ Rather, they prefer to settle the matter out of court for some amount less than the assessed penalty. Thus, it is evident that the mitigation clause as interpreted in practice has become a useful tool for defendants in settling these cases.

Yet referring back again to the discussion of this clause in Section 2.6 above, it is apparent that the interpretation that this provision has received in practice does not coincide with the intent as set forth by Attorney General Av Gross when the bill was under consideration in the legislature. In fact, one will recall that Mr. Gross explicitly stated that the 'unusual circumstances (later changed to mitigating circumstances) relating to the effects' of a discharge as contemplated by this provision were not intended to relate to damages at all. Instead, 'mitigating circumstances relating to the effects' of the discharge were intended to relate to unusual events or deviations from the normal circumstances surrounding a spill. For example, the penalty could be reduced if a fire burned off the oil, or if a strong wind or tide immediately transported the entire spill from a more sensitive to a less sensitive environment. As stated by Mr. Gross 'the provision does not contemplate that the courts will again become mired in a 'battle of experts' over the effects of oil pollution. It merely recognizes that, in certain rare instances, peculiar circumstances surrounding the discharge may justify a lower assessment.'⁸⁰

Given the wording of the mitigation clause, the interpretation it has received in practice is not surprising. However, based on an examination of the available historical records it is clear that this interpretation is at odds with the legislative intent. Since all cases to date in which the state has asserted spiller liability under AS 46.03.758 have settled out of court, this provision has not yet received an official court interpretation. But, according to Alaska Assistant Attorney General Michelle Browne, one judge relied heavily on this clause in assisting the parties in settlement negotiations in one case.⁸¹

3.3.4 Spiller Defense to Liability: The LLA

One will recall from Section 2.3.2 above that the Limitation of Liability Act (hereinafter LLA) allows a vessel owner or bareboat charterer to petition to limit his liability for the damages resulting from a maritime casualty to the value of the vessel and the freight on board after the incident.⁸² In the case of the capsizing and ultimate sinking of the M/V Lee Wang Zin (LWZ), the LWZ Navigation Co., S. A. and Kee Yeh Maritime Co., Ltd, both alleged to be owners of the LWZ within the meaning

79. Personal impressions from interviews with Paul O'Brien, see *Supra* note 72; and Doug Mertz, see *Supra* note 76.

80. Gross, Avrum M., Correspondence from Alaska Attorney General Av Gross to Alaska Governor Jay S. Hammond, Juneau Alaska, June 10, 1977, from the Attorney General's Bill Review File on HB 137, 1977. *Emphasis added.*

81. See *Supra* note 76, interview with Ms. Browne. Ms. Browne was not involved in the case mentioned and did not identify the case name.

82. See Chapter 2, note 49.

of the LLA, sought exoneration from or a limitation of their liability pursuant to this act.⁸³ Since the LWZ sank, the value of the vessel was stated to be 0 dollars. The pending freight on board was alleged to be worth \$46,339.92. In keeping with the LLA these petitioners thus urged the court to decree that they were not liable for any damages, claims, or injuries consequent to the fatal voyage of the LWZ. In the alternative, they argued that if any liability were found to exist, it should be limited to \$46,339.92, their interest in the vessel and pending freight at the time and place that the voyage terminated.

In response to this petition, the United States filed a claim asserting that the costs incurred by the U. S. in removing the oil from the navigable waters of the U. S. did not fall within the purview of the LLA.⁸⁴ Rather, the U. S. urged that the Clean Water Act (CWA, 33 USC 1321(f)) was the controlling statute as to liability for cleanup costs. Under this act the LWZ Navigation Co., S. A. and Kee Yeh Maritime Co., LTD would be held liable for the cleanup costs incurred by the U. S. in the amount of \$2,238,012.08.⁸⁵ The Court held that indeed the CWA was controlling as to liability for cleanup costs.⁸⁶ As such, the U. S. would be able to seek recovery of its costs under this act.

The State of Alaska also filed a claim asserting in part that petitioners LWZ Navigation Co., S. A. and Kee Yeh Maritime Co., LTD. were liable for expenses incurred by the State in responding to this spill incident, as well as the civil penalties imposed by AS 46.03.758.⁸⁷ A couple of comments regarding the relationship between Alaska's claim and the LLA are worth noting. First of all, as discussed in Section 2.3.2 above, the sponsors of HB 137 argued that one of the reasons the vicarious liability provision was needed in the new law was that litigation against the owner might be fruitless in the case of a tanker grounding or sinking where the owner petitioned to limit his liability under the LLA. One will recall that the vicarious liability provision as it relates to an oil

83. See "Complaint for Exoneration from or Limitation of Liability," filed in The Matter of The Complaint of Lee Wang Zin Navigation Co., S. A. and Kee Yeh Maritime Co., LTD. for Exoneration from or Limitation of Liability, U. S. District Court for the District of Alaska at Anchorage, No. A-80-199, June 25, 1980, by Michael H. Woodell, Bradbury, Bliss & Riordan, Inc., on behalf of plaintiffs. The other information in this paragraph regarding the claim for exoneration from or limitation of liability was also obtained from this document.

84. See "Claim of the United States of America" filed in The Matter of the LWZ Navigation Co., S. A. and Kee Yeh Maritime Co., LTD for Exoneration from or Limitation of Liability, U. S. District Court of Alaska, No. A-80-199-Cv, August 26, 1980, by Warren A. Schneider, U. S. Department of Justice.

85. Id. The owners of the LWZ did not accept cleanup responsibility of the oil spilled in this case. Thus, the U. S. in conjunction with the State of Alaska took responsibility for this activity. "The Wreck of the Lee Wang Zin," ADEC publication, Alaska Environment, Vol. 4, No. 1, March-May 1980, at p. 1.

86. See "Order and Opinion" entered in The Matter of the Complaint of the LWZ Navigation Co., S. A. and Kee Yeh Maritime Co., LTD for Exoneration from or Limitation of Liability, U. S. District Court for the District of Alaska, No. A-80-199-Cv, February 4, 1981, by Judge James M. Fitzgerald.

87. See "Answer of the State of Alaska to the Complaint for Exoneration from or Limitation of Liability" filed in The Matter of the Complaint of LWZ Navigation Co., S. A. and Kee Yeh Maritime Co., LTD for Exoneration from or Limitation of Liability, U. S. District Court for the District of Alaska at Anchorage, No. A-80-199-Cv, August 29, 1980, by Alaska Assistant Attorney General G. Thomas Koester.

spill from a vessel holds the vessel owner, the vessel operator, and the owner of the oil carried as cargo jointly and severally liable for the civil penalties imposed by this statute.⁸⁸

As it relates to the LWZ, it would appear that this vicarious liability provision was of little use to the State of Alaska. The oil discharged was not oil carried as cargo, rather it was the vessel's fuel. Available records indicate that the State of Alaska accepted, or at least did not strongly contest, that the LWZ Navigation Co., S. A. and Kee Yeh Maritime Co., LTD. were both owners and operators of the LWZ.⁸⁹ Thus, if these two petitioners were able to limit their liability under the LLA, there apparently would have been no other potentially responsible party from which to seek recovery of the civil penalties.

However, and the second point to be made, AS 46.03.758 imposes liability for civil penalties, while the LLA applies to relief from liability for damages. No court ruling has been rendered as to the applicability of the LLA to this civil penalty statute. Thus it is possible that Alaska could have recovered the penalties imposed by AS 46.03.758 from the petitioners even if the LLA was determined to apply. Whether as a result of the court ruling in favor of the U. S. regarding liability for cleanup costs, the possibility that the State of Alaska could have recovered the civil penalties imposed by AS 46.03.758 even if the LLA was found to apply, and/or because of the expense which would have been incurred in allowing the case to go to court, the petitioners eventually agreed to settle both the U. S. and the State of Alaska's claims out of court. In turn, the possibility that the LLA would have applied as to liability for damages most likely had an influence on the U. S. and Alaska's decisions to settle these claims as well.⁹⁰ Once these settlements were reached, the Court entered a judgment (without reference to the LLA) exonerating and discharging LWZ Navigation Co., S. A. and Kee Yeh Maritime Co., LTD. from any losses, damages or injuries arising out of the incident, except for claims made by representatives of crew members on board when the vessel sank.⁹¹

3.3.5 Incentive to Clean Up Spilled Oil: Effectiveness of the Penalty Deduction For Oil Removed

One will recall from the discussion in Section 2.5 above that the provision allowing the court to reduce the assessed penalty based on the number of gallons cleaned up was added to AS 46.03.758 in an effort to provide spillers with an added incentive to clean up as much oil as

88. AS 46.03.758(e)(2).

89. See Supra note 87 and Alaska Department of Law inter office Memo from Assistant Attorney General G. Thomas Koester to Assistant Attorneys General Jonathan Tillinghast, Doug Mertz and Loni Levy, September 2, 1980, as contained in the Alaska Attorney General's archived file on this case.

90. For more information regarding the settlement of these claims, see "Judgment of Exoneration" signed by Judge James Fitzgerald on April 12, 1982, and the "Stipulation for Dismissal" signed to by all parties in April 1982, in The Matter of LWZ Navigation Co., S. A. and Kee Yeh Maritime Co., LTD. for Exoneration from or Limitation of Liability, U. S. District Court for the District of Alaska, No. A-80-199-Civ.

91. Id. Judgment of Exoneration.

possible. By both Alaska state and federal statutes, a potentially responsible party (PRP) is required to initiate cleanup efforts.⁹² Only if such cleanup efforts are determined to be inadequate, or if the person causing the spill cannot be found, may the state or federal government take over the cleanup response.⁹³

It is very difficult if not impossible to determine the effectiveness of this provision as an 'incentive to clean up spilled oil.' Many other factors may also influence a PRP's decision on whether to attempt cleanup. For example, aside from the potential reduction in the penalty, factors such as public image, concern for the environment, liability for cleanup costs incurred by the state or federal government, liability for actual environmental damage and private claims and/or the monetary value of recovered oil may also provide a PRP with an incentive to clean up as much oil as possible. Conversely, a potential reduction in the penalty may not provide a sufficient added incentive to clean up spilled oil in cases where a PRP does not consider himself liable for the spill and/or cleanup costs, if adequate manpower and/or equipment are not readily available, if weather conditions make cleanup either excessively expensive or impossible, and/or if it is believed that the oil will disperse or evaporate thereby causing little if any identifiable physical damage. Ultimately, the decision by a PRP on whether to attempt cleanup or not will result from a weighing of some or all of these factors. The four cases examined in this respect are perhaps illustrative.

In the June, 1979 Atigun Pass case, Alyeska Pipeline Service Co. accepted cleanup responsibility and approximately 40% of the spilled oil was ultimately recovered.⁹⁴ While a potential reduction in the penalty may have had some influence on the decision to clean up the oil, it is likely that public image was considered since Alyeska has a long term interest in the State of Alaska. Also, the fact that a portion of the oil was reusable was most likely an important factor as well.⁹⁵

In the M/V Cepheus case, the vessel operator accepted responsibility for cleanup. However, only a very small portion was actually recovered. Approximately 40% either evaporated, was dispersed into the water, or was absorbed in or entrained in or under the ice and was therefore inaccessible. For that portion which was visible, cleanup was deemed impossible due to ice clogged waters and strong currents.⁹⁶

92. AS 46.04.020, Removal of Oil Discharges, and 33 USC 311(c)(1) (the Clean Water Act).

93. Id.

94. The Complaint drafted by the state in this case indicates that around 210,000 gallons were discharged, and approximately 125,000 gallons were not recovered. The estimated 85,000 gallons removed is about 40% of the total spilled.

95. The federal On Scene Coordinator's report of this incident indicates that 2257 barrels (94,794 gallons) of the spilled oil was either stored or reinjected into the pipeline. Report on Milepost 166-167 Oil Spill, June 10, 1979, Alaska Pipeline Office, Department of Interior, Anchorage Alaska, August 20, 1979 at p. 9.

96. "Ice, Tides Hamper Recovery of Spilled Oil," by Pat O'Brien, Anchorage Times, January 27, 1984.

In the M/V Lee Wang Zin case the vessel owners denied that they were responsible for cleanup based on the LLA. The U. S. Coast Guard thus took responsibility for the cleanup effort, incurring expenses of over \$2 million.⁹⁷

Finally, in the recent Glacier Bay spill in Cook Inlet, Alaska, three PRPs, the vessel owner, the oil owner at the time the vessel was loaded, and the oil purchaser (it was unclear exactly who owned the oil at the time of the spill), separately and sequentially attempted to clean up the spill.⁹⁸ However, the overall response was soon determined to be inadequate because the PRPs did not have access to necessary equipment. The U. S. Coast Guard thus took over.⁹⁹

Again, since the potential reduction in the penalty is only one of many factors which may influence a decision on whether to attempt cleanup, a conclusive statement as to the success of the 'incentive to clean up oil' provision in AS 46.03.758 would be speculative at best. Yet focusing exclusively on the relationship between the decision of whether to clean up spilled oil and the penalty imposed by AS 46.03.758 as distinct from these other considerations, several observations are worth noting.

First of all, from a strictly economic perspective, the incentive to clean up the oil will cease at the point where the cost of cleaning up the next gallon exceeds the cost of the penalty to be assessed on that and all remaining gallons. According to Randy Bayliss, former Director of the Valdez ADEC office, the cost of cleaning up spilled oil may be as high as \$1,000 per gallon.¹⁰⁰ As discussed in Section 3.1 above, the highest per gallon penalty which will be assessed under AS 46.03.758 is 76% of the base penalty. For spills into freshwater and marine environments the highest possible penalties will be \$7.60/gallon and \$1.90/gallon respectively (these amounts could be multiplied by five if the spill was caused by gross negligence or an intentional act, or if reasonable clean up efforts were not undertaken). Thus, when the cost of cleanup per gallon exceeds these per gallon penalty amounts, the economic incentive to continue cleanup will no longer be present. From this strictly economic perspective, the effectiveness of this 'incentive to clean up spilled oil' provision is questionable.

Secondly, in the opinion of Mr. Bayliss it is to the spiller's advantage to postpone cleanup as long as possible because if enough time elapses the oil will disperse and cleanup will be impossible.¹⁰¹ One can imagine a situation in which this tactic, in relation to the civil penalty statute, would make economic sense from the spiller's perspective. As discussed above, determining the amount of oil spilled can be a rather speculative undertaking. Allowing the oil to disperse rather than cleaning it up may in some cases be to the spiller's advantage with regard to

97. See *Supra* notes 84 and 85.

98. Personal interview with Paul O'Brien, ADEC, Juneau Alaska on April 15, 1988.

99. U. S. Coast Guard News Release, July 17, 1987, as contained in the U. S. Coast Guard file on this incident.

100. See *Supra* note 74.

101. *Id.*

determining the total amount spilled. In the Atigun Pass case, for example, it was only after 2062 barrels of oil were cleaned up that the initial total spill estimate of 1500 barrels was determined to be too low.¹⁰² Further, if it costs the spiller more per gallon to clean up the oil than the per gallon penalty imposed by AS 46.03.758, it will make financial sense to dawdle in cleaning up the oil as long as possible thereby allowing the oil to disperse, rather than incurring both the expense of cleanup, and the civil penalty imposed by AS 46.03.758.

Finally, according to Bayliss, the market value of oil is around \$1/gallon, the cost of cleaning up the oil may be as high as \$1,000/gallon, and the penalty imposed by AS 46.03.758 may be as low as \$0.25.¹⁰³ Based on these amounts, and the premise that it is to the spillers advantage to delay cleanup as long as possible, Bayliss suggests that perhaps the best oil spill liability system would be based not on the number of gallons spilled, but on cleanup costs. In his opinion, the spiller should not be allowed to do cleanup at all. Instead, a contractor should be hired by the state to insure that adequate manpower and equipment are always available, and that cleanup will be done in a timely manner and to an acceptable extent. The spiller would then be held liable for the contractor's costs.

Alaska Assistant Attorney General Doug Mertz does not share Bayliss' view on this issue. Rather, Mertz holds that for some spills, for example those in remote areas, it could take the state up to three days to assess the situation and to get crews to the site.¹⁰⁴ Mertz feels that under the present system there is at least a chance that the spiller will clean up the spill immediately, since he would be threatened with an increased penalty (the whole fine multiplied by five) if he did not respond in this manner.

There is also a second shortcoming of Bayliss' proposal. That is, if an oil spill liability scheme was based on cleanup costs, no recovery would be made in a case such as the M/V Cepheus where cleanup was impossible due to weather conditions, evaporation, etc. In a case such as this, even though the exact amount of the spill may not be established with certainty, at least some recovery as compensation for damages may be possible.

3.3.6 Impact of the 18,000 Gallon Exemption

According to one Alaska official, the 18,000 gallon exemption has in practice resulted in raising 'false issues' and as such has hindered the State's enforcement efforts.¹⁰⁵ Specifically, in borderline cases (or even not so borderline cases), spillers vigorously attempt to establish that the amount of oil discharged is less than 18,000 gallons in order to evade liability under this fixed civil penalty statute. Yet, this official contends that a 'small' spill into a critical marine environment can result in more environmental damage than a 'large' spill in an open area. Further, according to

102. See *Supra* note 95, Report, at p. 1.

103. The argument in this paragraph was offered by Mr. Bayliss during a personal interview. See *Supra* note 74.

104. The argument in this paragraph was offered by Mr. Mertz during a personal interview. See *Supra* note 48.

105. Telephone interview of Alaska Assistant Attorney General Michelle Browne, Anchorage Alaska, August 30, 1988.

Alaska Assistant Attorney General Doug Mertz, it is prohibitively expensive for the state to pursue recovery for the damage resulting from 'small' spills under the other applicable statutes, and thus they tend to slip through the system.¹⁰⁶

3.3.7 Alaska's Response to Oil Spill Incidents, and the Amount and Fate of Recovered Funds

To put the State of Alaska's response to spill incidents into context, a preliminary statement regarding the relationship between the response responsibilities of the spiller, the federal government, and the state government is in order.

First of all, as mentioned previously the party or parties responsible for an oil spill incident are required by both Alaska state and federal statute to clean up the oil.¹⁰⁷ Pursuant to section 311 of the Clean Water Act (CWA, 33 USC 1321), for spills into coastal and offshore waters, the U. S. Coast Guard is assigned the responsibility of approving and monitoring the spiller's cleanup efforts, as well as determining the extent of natural resource damage and what restoration or replacement of damaged or destroyed resources will be required of the spiller. For oil spills into inland waters and their tributaries, these responsibilities are similarly assigned to the federal Environmental Protection Agency (EPA). The response by these agencies is to be coordinated with the State, and when appropriate, some or all of these responsibilities may be delegated to the appropriate state agency or agencies. In the event that a spiller's response is determined to be inadequate, or if the spiller cannot be located, the appropriate federal agency then acquires full responsibility for the cleanup and restoration activities. Again, when appropriate some or all of these responsibilities may be delegated to the state.

Section 311(k) of the CWA sets up a fund to provide the Coast Guard and EPA ready access to funds in carrying out their oil spill response responsibilities. Recovery of money spent by these agencies may then be sought, up to various identified limits based on the type of facility or vessel from which the spill originated, from the PRPs. When a state incurs expenses covered by the 311(k) fund, it may then request reimbursement from the fund.

The State of Alaska in turn has a statute in place which authorizes the ADEC to take over cleanup and containment efforts if the spiller's response is determined to be inadequate.¹⁰⁸ If cleanup efforts are being performed by the Coast Guard or EPA, this statute explicitly states that the ADEC may not take over the response. However, if the federal response is considered inadequate, the ADEC may undertake supplemental cleanup or containment measures as appropriate. Recovery of all costs incurred by the State in responding to a spill incident would be sought from the spiller in a civil action.

106. Personal interview with Alaska Assistant Attorney General Doug Mertz, in Juneau Alaska, April 20, 1988.

107. See Supra note 92.

108. AS 46.04.020(e). The other references to this statute in this paragraph also refer to this section of the statute.

The nature of Alaska's response to a spill incident will, of course, depend to some extent on the circumstances surrounding the particular spill in question. However, based primarily on financial considerations Alaska will generally rely heavily on the federal response to an oil spill in state waters. As stated by O'Brien, the ADEC will typically "ride the coat tails" of the Coast Guard or EPA depending on them to fund as far as possible the response to a spill.¹⁰⁹ Assuming this stance, Alaska's response will generally be limited to assisting the Coast Guard or EPA in monitoring cleanup activities, in performing damage assessments, in determining what restoration will be required of the spiller, and if necessary and appropriate, in actually cleaning up the spilled oil. If the federal response is found to be inadequate, the State may incur the expense of further cleanup or a more thorough assessment of damage. In addition, if not available from the spiller, or if not included in the federal response, the State may incur the cost of determining the amount of oil spilled and/or the aromatic content of refined oil or the API gravity of crude oil for the purposes of assessing the penalty under AS 46.03.758. Four examples will serve to illustrate the State's response in a variety of circumstances.

M/V Cepheus: Following the 1984 M/V Cepheus grounding in Cook Inlet, the vessel owner took responsibility for the cleanup response and the transfer of the oil from the damaged vessel to sound tanks.¹¹⁰ As mentioned earlier, very little oil was recovered due to oil evaporation and dispersion, and harsh weather conditions.¹¹¹ Thus, monitoring of cleanup activities was not necessary. The Coast Guard took responsibility for advising and monitoring the transfer of oil to sound tanks.¹¹² The Anchorage Fire Department stood by in case of fire, but the overall participation of state agencies in this activity was minimal. As part of the federal response, NOAA contracted for studies to assess evaporation and dispersion rates and the predicted fate of the spilled oil, and provided a spill trajectory analysis. Based on this information it was concluded that the environmental impact would be minimal.¹¹³ Thus, no full scale natural resource damage assessment was done and no monitoring of restoration was necessary. The ADEC did participate in overflights of Cook Inlet in an effort to locate pools of spilled oil. No significant pools were positively identified. The ADEC also chartered a helicopter and obtained samples of ice and sediment for fingerprinting¹¹⁴ purposes.

109. See *Supra* note 98.

110. See Draft memo of ADEC Commissioner Richard Neve to Office of the Governor, Chief of Staff John Shively, January 27, 1984, as contained in the ADEC archived file on this incident.

111. See *Supra* note 96.

112. Unless otherwise indicated, the information in this paragraph regarding the response to the M/V Cepheus spill comes from the Coast Guard News Releases of the incident and the Coast Guard M/V Cepheus Major Oil Spill 21 Jan-7 Feb 1984 report, both contained in the ADEC archived file on this incident.

113. *Id.* See also Memo from Dave Kennedy, Scientific Support Coordinator, to Coast Guard On Scene Coordinator Captain Haines, February 14, 1984, as contained in the ADEC archived file on this incident.

114. Fingerprinting entails a laboratory analysis of oil for the purpose of determining whether oil at various locations originated from the spill in question.

According to Alaska Assistant Attorney General Madeleine Levy, the aromatic content of the spilled oil was obtained from the spiller's records.¹¹⁵ Further, available records indicate that gauging the amount of oil present when the vessel was loaded was done by the cargo owner, and gauging the amount of oil remaining in the vessel's tanks following the grounding was done as part of the federal response. Thus, no additional expense was incurred by the State in this regard.

An exact figure as to the amount spent by Alaska in responding to this incident is not available. However, according to Levy, the amount was minimal, and the entire response was made by state agency employees as part of their normal duties.¹¹⁶

The complaint filed by Alaska alleged that over 180,000 gallons of jet A aviation fuel was discharged into Cook Inlet. This is a critical marine environment as defined in 18 AAC 75.5 with a base penalty of \$250. The aromatic content of the oil is not available. However, assuming it was around 15% as set forth in Table 4, and assuming that it was established in court that 180,000 gallons were actually discharged, the penalty under AS 46.03.758 would be determined by the following formula:

$$\frac{((15/45 * 1) + .25 + .15) * \$250 * 180,000}{3}$$

3

The total penalty would thus be \$110,000. This case ultimately settled out of court for approximately \$150,000.¹¹⁷ Based only on the amount of the penalty and the fact that actual damages were determined to be minimal, this is obviously a very good settlement. However, the complaint filed by Alaska in this case asserts that the defendants "...failed to procure approval of an oil discharge contingency plan...as required by (statute)" and "failed to submit proof of financial responsibility...as required by (statute)."¹¹⁸ If found liable for these failures, each could have carried a civil penalty of "...not less than \$500 nor more than \$100,000 for the initial violation plus not more than \$5,000 for each day thereafter upon which (the violation continues)."¹¹⁹ Plus, the defendants could have been found liable for the costs the State did incur in responding to this incident. These potential liabilities, in addition to liability for the civil penalties, surely had an impact on the settlement achieved in this case.

Atigun Pass: As mentioned earlier, in June 1979 over 210,000 gallons of crude oil escaped through a crack in the trans-Alaska pipeline. Alyeska Pipeline Service Co., Inc. took responsibility

115. Telephone interview of Alaska Assistant Attorney General Madeleine Levy, Anchorage Alaska, August 30, 1988.

116. Id.

117. Telephone interview of Alaska Assistant Attorney General Madeleine Levy, Anchorage Alaska, August 12, 1988.

118. Complaint filed by the State of Alaska in State of Alaska v. Transportes Del Este Navegacion, S. A., et. al., in the Superior Court for the State of Alaska, Third Judicial District, by Alaska Assistant Attorney General Madeleine Levy, January 31, 1984. Referring to liability under AS 46.03.760(a).

119. Id.

for and accomplished the cleanup and restoration response.¹²⁰ The EPA designated On Scene Coordinator (OSC) took primary responsibility for monitoring the adequacy of Alyeska's cleanup and restoration activities. The EPA, Bureau of Land Management, and the U. S. Fish and Wildlife Service took primary responsibility for the damage assessment activities. The ADEC and Alaska Department of Fish and Game assisted in both monitoring the cleanup response and in the damage assessment activities. Alyeska's cleanup effort was criticized for not being completed as quickly as it should have been. However, neither the federal OSC nor the State of Alaska deemed it necessary to take over the effort, and the end result was considered excellent.

The Atigun river was the water source most heavily impacted. The federally headed evaluation of the impact concluded that because of a lack of baseline data, the actual effects of the oil on aquatic species was unknown and probably would never be determined. It was generally agreed that the importance of this area as a fishery was limited. However, it was considered a very important transportation corridor for spawning fish. FWS biologists observed no fish where fish had previously been reported. This was interpreted to mean fish were avoiding impacted areas. Given the lack of adequate data no full scale natural resource damage assessment studies were done and no restocking of the area was attempted. The federal response also included analyses of water samples for aromatic content. These studies showed insignificant quantities of dissolved aromatic fractions remaining in the system.

Regarding plantlife impacted by the oil, the federal response, in coordination with the state, determined that removal of them could be expected to cause stream bank instability which would cause greater long-term damage. Alyeska was thus directed only to remove the free oil from the ground around the vegetated areas and to disturb the plants as little as possible.

The impact of the oil on mammals and waterfowl in the area was determined to be minimal. No restoration response was deemed necessary in this regard. Some reseeded of tundra in the area where the spill originated was requested by the federal OSC and subsequently carried out by Alyeska. Finally, according to Alaska Assistant Attorney General Doug Mertz, once cleanup was completed the State participated in a four year monitoring program of the area affected by the spill in order to make sure that natural rehabilitation of vegetation took place, and that the fish returned to the area.¹²¹

An OSC report indicates that the federal response included an effort to establish the amount of oil discharged.¹²² Thus, Alaska need not have incurred any extra expense in making this

120. Unless otherwise indicated, the information in this section regarding the response to the Atigun Pass spill was obtained from the Report on Milepost 166-167 Oil Spill June 10, 1979, by the Alaska Pipeline Office, Department of Interior, Anchorage Alaska, August 20, 1979. This report is contained in the ADEC archived file on this incident.

121. Personal interview with Alaska Assistant Attorney General Doug Mertz, Juneau Alaska, April 20, 1988.

122. See Supra note 120.

determination. Finally, the OSC report gives no indication that the federal response included an attempt to determine the API gravity of the crude spilled. It is unlikely that the State incurred a great deal of expense in finding this out. It is generally known that Alaska North Slope crude has an API gravity of around 26.4. The complaint drafted by the State estimates the API gravity was around 26.8.¹²³ It is likely that Alyeska had access to this information and provided it to the state. Yet since no information is available on this issue, it is possible that the State did incur the expense of determining this API gravity number.

No records are available as to the amount the State spent in responding to this incident. However, given that the cleanup and restoration response was accomplished by the responsible party and that the federal government took the primary oversight responsibility, it is likely that, similar to the M/V Cepheus case, the amount was minimal, and consisted primarily of agency employee salaries.

As discussed earlier, the State estimated that the amount spilled, less the amount cleaned up, exceeded 125,000 gallons.¹²⁴ The waters affected were classified as critical freshwater environments. Assuming that all of the oil that was not cleaned up actually entered the water, and that it was established in court that 125,000 gallons were not recovered, the penalty would be determined as follows:

$$((26.8/30 * .75) + (30/26.8 * .5) + .5) * \$10 * 125,000$$

3

The total penalty would thus be \$813,764.37. This case ultimately settled for around \$350,000. According to Mertz, this settlement amount was significantly more than the cost incurred by the State in responding to this incident.¹²⁵ In his opinion, this was a good settlement.

The M/V Lee Wang Zin: In the case of the capsizing and sinking of the M/V Lee Wang Zin, the vessel owners denied that they were responsible for cleanup of the spilled bunker oil. The Coast Guard, with the assistance of the State, thus took primary responsibility for this activity as well as damage assessment.¹²⁶ Cleanup efforts were hampered by foul weather and the remoteness of the areas where the oil was located.

An estimated 20,000 gallons of the estimated 100,000 gallons spilled was recovered. Available records indicate that ADEC personnel continued to find and remove LWZ oil from various

123. Complaint drafted in the case of the State of Alaska v. Alyeska Pipeline Service Co., Inc., by Doug Mertz, November, 1979. This document is contained in the Alaska Attorney General's archived file on this incident.

124. Id.

125. Telephone interview of Alaska Assistant Attorney General Doug Mertz, Juneau Alaska, July, 1988.

126. See Supra note 85 and "Capsizing and Sinking of the M/V Lee Wang Zin," U. S. Coast Guard OSC report, July 9, 1980. Unless otherwise indicated, the other information contained herein with regard to the response to the LWZ spill was also obtained from these documents.

beaches as late as October 1980, ten months after the incident.¹²⁷ Several oiled birds and a few oiled furbearing animals were found. However, federal and state biologists determined that the acute toxic effect of the spilled oil on marine life was minimal (this spill occurred in the winter when overall production and activity was at an annual low).¹²⁸ As such, no full scale natural resource damage assessment studies were done and no restocking of affected species was attempted.¹²⁹

Gauging the amount of oil present on the vessel following the spill was not possible since the vessel sank. The estimate of 100,000 gallons spilled and 20,000 gallons removed made by Coast Guard and ADEC officials during cleanup operations was used by the State in determining the amount of the potential penalty under AS 46.03.758.¹³⁰

The State did incur the expense of fingerprinting analyses which were undertaken in an effort to determine whether oil found at various locations had indeed come from the LWZ. The State also participated in a monitoring program of areas affected by the spill over the next several years.¹³¹

There is no information available as to whether the State attempted to determine the aromatic content of the bunker oil spilled. It is perhaps likely that this was never done. In an ADEC memorandum to the Alaska Department of Law, the formula to establish the amount of the penalty imposed by AS 46.03.758 was used without taking this factor into consideration.¹³²

Available records indicate that the ADEC incurred expenses of \$68,495 in responding to this incident. The federal government incurred expenses in the amount of \$2,238,012.08.¹³³ Settlement documents indicate that the State case was ultimately settled for exactly the cost incurred by the ADEC.¹³⁴ According to Bayliss, the federal government also recovered its expenses in its out of court settlement.¹³⁵

127. Bayliss, Randolph, ADEC Southeast Regional office, Juneau AK, and Captain Raymond Spoltman, Anchorage Marine Safety Office, Anchorage AK, "The Wreck of the Lee Wang Zin," contained in the ADEC's archived file on this incident.

128. See *Supra* note 121. See also "The Wreck of the Lee Wang Zin—Report to Senator Ziegler (Status as of January 29, 1980)" by Randolph Bayliss, Regional Supervisor, ADEC, Juneau Alaska.

129. *Id.*, Bayliss report. See also "Lee Wang Zin Oil Spill, Wildlife Observations," by Robert Wood, Biologist, Alaska Department of Fish & Game and Paul Harrington, Biologist, USFS.

130. See Memorandum from Randolph Bayliss, ADEC, to Jonathan Tillinghast, Alaska Dept. of Law, May 29, 1980, as contained in the ADEC archived file on this incident.

131. See *Supra* note 127 at p. 21.

132. *Id.*

133. Regarding the expenses incurred by the state, this figure was derived from ADEC office notes contained in the ADEC's file on this incident. Regarding the expenses incurred by the federal government, see *Supra* note 84.

134. Some expenses were also incurred by the Alaska Department of Fish & Game, however, they were apparently not itemized out and thus were not sought in a recovery from the responsible parties. See *Supra* note 133, ADEC office notes.

135. Regarding the state's settlement, see "Release of All Claims" filed in the Matter of the Complaint of the Lee Wang Zin Navigation Co., S. A. and Kee Yeh Maritime Co., LTD. for Exoneration from or Limitation of Liability, U.

Both of these settlements may be interpreted as 'good' for several reasons. First of all even though the court determined that the CWA as opposed to LLA was the controlling federal statute as to liability for cleanup costs, if these cases had gone to court, the state and federal governments would have incurred both the time and expense of litigation in their efforts to recover the exact amounts settled for without having to go to court. Secondly, the evaluations performed by the federal and state governments in this case concluded that the extent of natural resource damage was minimal. It is possible, if not probable that the PRPs would have been found not liable for the damages which were detected based on the LLA. Finally, it is possible that the State could have recovered approximately \$190,000 in assessed penalties under AS 46.03.758 even if the LLA was found to apply (the penalty would be assessed on the entire 100,000 gallons spilled since the responsible parties did not clean it up). However, in order to recover this amount the State would have had to prove that approximately 80,000 gallons remained in the water after the estimated 20,000 gallons had been removed. Since the vessel sank, establishing this would have been quite a problem.

The Glacier Bay: Finally, in the case of the Glacier Bay spill in Cook Inlet, Alaska, in July, 1987, the Coast Guard took over the cleanup response five days after the spill occurred when it was determined that the PRPs response was inadequate.¹³⁶ The State again assisted the Coast Guard in both cleanup and damage assessment activities. Cleanup efforts were hampered by tides which carried oil ashore and riptides which drove the oil down into the water, releasing it later when the riptides relaxed, sometimes some distance from where originally located.¹³⁷ In all, approximately 18,000 gallons of the current estimate of 50,000-85,000 gallons of crude oil discharged was recovered.¹³⁸

The Alaska Department of Fish and Game contracted several fishing vessels to do test fishing in some areas in order to determine the potential impact of the oil on commercial salmon fishing in those locations.¹³⁹ The State also conducted visual inspections of the salmon caught and funded chemical analyses of both salmon and clams. These studies determined that clams in

S. District Court, District of Alaska, No. A-80-199-Civ, April 1, 1982. Regarding the U. S. settlement, this information was provided by Mr. Bayliss. See *Supra* note 74.

136. The PRPs response was determined to be inadequate on the basis that they were unable to get the necessary equipment set up as quickly as the Coast Guard OSC wanted. Control over the cleanup operations was returned to the PRPs eight days later when the Coast Guard OSC was sure that they understood what response was expected. See Coast Guard News Releases dated July 8, 1987 and July 17, 1987, as contained in the Coast Guard file on this incident.

137. See "Elusive Oil Hinders Cleanup," by PAC Ed Moreth, in the Coast Guard July-September, 1987 issue (Vol. 5, Issue 4) of the Alaska Bear, and "Crews Winning Oil Battle," by Dirk Miller, The Anchorage Times, July 11, 1987.

138. See "Officials Plan to Scale Down Oil Spill Cleanup," by Ronnie Chappell, The Anchorage Daily News, July 14, 1987.

139. See "Record Catch—Cook Inlet Drift Fishermen Haul in Record Catch Despite the Oil Spill," by Bert Grubb, Peninsula Clarion, July 13, 1987.

the areas tested were unaffected and that the impact on salmon was less than expected.¹⁴⁰ The drift net salmon fishery was opened on time eight days after the discharge occurred, although some traditionally profitable areas where contact with the oil was most likely remained closed.¹⁴¹ Only about 4,000 of the record 600,000 red salmon caught had to be (officially) destroyed due to oil contamination.¹⁴² However, according to Alaska Assistant Attorney General Michelle Browne, the full impact of the spill on salmon will not be known until the salmon runs potentially affected return to spawn in 1990.¹⁴³ Even then, if the runs are less than anticipated establishing a causal link between the decline and the spill will likely be impossible.

As discussed previously in this paper, the dispute as to the amount spilled is ongoing, and the State has incurred the expense of hiring an outside expert to decipher what the spillers offloading records say.¹⁴⁴ To date, responding to this incident has cost the State over \$500,000 and the Coast Guard over \$1 million.¹⁴⁵ The State is continuing to monitor areas affected by the oil and thus is still incurring expenses in relation to this incident. Neither the State nor the federal government has yet filed a claim against the PRPs. The State has attempted to settle the matter with the PRPs. However, negotiations recently broke off. If a settlement is not achieved, Alaska will file a suit. Since an impact on salmon was documented, the State will actively pursue recovery for this damage. Yet according to Ms. Browne, the 'damages' that the State will claim will be revenues that the State lost as a result of the impact on salmon, not 'damages' in the nature of compensation for the total number of salmon affected.¹⁴⁶ The State will also assert liability for its response costs and the penalties (times 5 based on the assertion of inadequate cleanup efforts) imposed by AS 46.03.758.

As these examples illustrate, and as confirmed by Alaska officials,¹⁴⁷ Alaska's response to oil spill incidents does not typically include full scale natural resource damage assessment studies. From this it may be inferred that the penalties imposed by AS 46.03.758 are in practice used to compensate for actual damages. This use of AS 46.03.758 is clearly at odds with its legislative intent. Yet it is evident that the State has been successful in recovering some substantial settlements, sometimes well in excess of the responsible parties' potential liabilities excluding

140. See "Oil Fouls up Eastside Nets," by Polly Crawford. Peninsula Clarion, July 15, 1987.

141. See "Despite the Oil, the Fishing will go on," by Bert Grubb. Peninsula Clarion, July 10, 1987.

142. See *Supra* note 139 and "Cleanup Reduced to Chasing Goo," Homer News, July 23, 1987.

143. See *Supra* note 73.

144. *Id.* See also *Supra* note 72, personal interview with O'Brien.

145. *Id.*, Browne interview, regarding the expense to the state. See "Liability a Slippery Question," by Yereth Rosea, Anchorage Times, July 19, 1987, regarding the Coast Guard expenses. The remainder of the information contained in this paragraph regarding settlement negotiations and a possible lawsuit was offered by Browne during the telephone interview of August 30, 1988.

146. *Id.*, Browne interview. As discussed in Section 3.3.1 above, it is questionable whether a court would allow recovery of both the civil penalties and actual damages based on the double recovery issue.

147. Personal interview with Alaska Assistant Attorney Doug Mertz, Juneau, Alaska, April 20, 1988; personal interview with Paul O'Brien, Alaska Department of Environmental Conservation, Juneau, Alaska, April 15, 1988.

liability for natural resource damages. This in turn indicates that the civil penalty statute has proven to be a useful tool for the State in achieving compensation for at least some natural resource damage without having to incur the time and expense of damage assessment studies.

It is worth noting that the cases examined above also illustrate that even when natural resource damage assessment studies are not performed, the costs incurred by the State in responding to a spill incident may still be significant. Further, when more detailed studies are deemed appropriate, the costs incurred by the State will increase substantially.

By AS 46.08.020, money recovered by the State for costs incurred in responding to oil spill incidents, as well as the sums recovered as fines, penalties and/or damages, are deposited in the State's general fund and credited to a special account called the 'oil and hazardous substance release mitigation account.'¹⁴⁸ The State legislature may then annually appropriate the amount placed in this account during the preceding year to the 'oil and hazardous substance release response fund' for use by the ADEC in responding to the threat or actual release of oil or hazardous substances during the next year.¹⁴⁹ Focusing specifically on money recovered in oil spill incidents, nothing in these statutes requires the legislature to return these funds to the response fund for use by the ADEC. In turn, nothing in these statutes requires the ADEC to use the money placed in the fund to restock or replenish environments or natural resources impacted by an oil spill incident. Nor does the ADEC have such a policy in place. In fact, as the above examples illustrate, and again as confirmed by Alaska officials,¹⁵⁰ other than reseeding tundra areas affected by an oil spill incident, the State of Alaska does not, or at least has not yet, attempted to restock or replenish fish, waterfowl, wildlife or vegetation impacted by oil pollution. Rather, the emphasis in Alaska is on cleaning up as much of the oil as possible and then relying on the environment to restore itself. As stated by Bayliss, with proper cleanup restoration falls out.¹⁵¹ Further, according to Mertz restoration in the sense of restocking or replenishing impacted resources is not as practical in Alaska as it is in other states, and the environment in Alaska will eventually restore itself.¹⁵²

Yet even though funds recovered by the State in excess of the amount incurred in responding to a spill incident are not used to restock or replenish oil impacted environments, it can be said that commonly at least a portion of this sum is 'returned to the environment' in the form of long term monitoring projects. Conversely, there is no evidence to indicate that if an area affected by oil pollution does not require long term monitoring, that recovered funds will in fact be 'returned to the environment' in any other manner. The point is that the State of Alaska has no policy in

148. AS 46.08.020(a) and (b).

149. AS 46.08.010(b), and AS 46.08.040.

150. See Supra notes 74 and 147.

151. See Supra note 74.

152. See Supra note 147, Mertz interview.

place which requires these funds to be returned to the affected environment. Rather, this decision is made on an ad hoc basis.

CHAPTER 4. Suggestions for Improving the Effectiveness of Alaska's Oil Spill Liability and Compensation Scheme

This paper has discussed in some detail the legislative history and intent of Alaska's 'Civil Penalties for Discharges of Oil' statute and regulations, as well as how this statute and the regulations have been implemented in practice. Several inconsistencies between legislative intent and practical application, and several shortcomings inherent in the provisions of the law and regulations themselves have been identified. These factors weaken the overall effectiveness of this civil penalty approach as a response to the issues of oil spill liability and compensation. In this final chapter I will discuss how Alaska's oil spill liability and compensation scheme in general, and the civil penalty statute and regulations in particular, might be strengthened to better respond to these issues.

The intent of an oil spill liability and compensation scheme, as it relates to liability for natural resource damages, is to assure that the public is compensated for the natural resource damages resulting from a spill incident. The discussion in Chapter 2 of this paper makes it clear that the civil penalties imposed by AS 46.03.758 are intended to compensate only for the harm that the public suffers as a result of unidentifiable and unquantifiable damages resulting from an oil spill incident. However, as discussed in Chapter 3, Alaska does not typically perform natural resource damage assessment studies aimed at determining the full extent of actual damages. These studies would be necessary in order to pursue compensation for identifiable and quantifiable damages under the more traditional oil spill liability laws. Instead, compensation for these damages are in practice sought through the civil penalties imposed by AS 46.03.758.

Because of several factors unique to the State of Alaska, it may well be that the civil penalty approach will commonly be the most effective way of assuring that the public is compensated for natural resource damages in that state. For example, because of harsh weather conditions, the remote locations where spills commonly occur, and/or a lack of baseline data, natural resource damage assessment studies may simply not be feasible in many cases. However, it should be made clear that there is a tradeoff between using the civil penalties to compensate for actual damages, and determining the extent of actual damages and pursuing recovery of that amount. That is, the civil penalties are by their very nature arbitrary. As such, when the extent of actual damages are not determined, there is no assurance that the civil penalty imposed will adequately compensate for the damage done.

To assure that the public is adequately compensated, the decision to pursue compensation for actual damages through the civil penalties, as opposed to determining the full extent of those damages and pursuing compensation for them under other applicable liability laws, should be based on some criteria that this is indeed the most appropriate response. From the cases

examined in Chapter 3, as well as the interviews held with Alaska officials,¹ there is no indication that Alaska goes through such a decision making process. Alaska's oil spill liability and compensation scheme would thus be strengthened by the introduction of some criteria upon which to base this decision.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986² (SARA) provides some guidance. In particular, CERCLA Section 301 directs the President, acting through Federal officials, (in this case the Department of Interior (DOI)), to promulgate regulations for assessing the "...damages for injury to, destruction of, or loss of natural resources resulting from a release of oil or a hazardous substance for the purposes of this chapter and section 1321(f)(4) and (5) of Title 33 (The Clean Water Act)."³ The regulations are to specify "(A) standard procedures for simplified assessments requiring minimal field observation, including establishing measures of damages based on units of discharge or release or units of affected area (type 'A' assessments), and (B) alternative protocols for conducting assessments in individual cases to determine the type and extent of short-and long-term injury, destruction, or loss (type 'B' assessments)."⁴ These regulations would be used by a state or federal trustee when the trustee would be seeking recovery for the damages from the responsible party under the provisions of this act.

In the CERCLA natural resource damage assessment regulations promulgated by the DOI, a trustee is required to perform a pre-assessment screen before a damage assessment is done.⁵

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1. Personal interview with Alaska Assistant Attorney General Doug Mertz, Juneau, AK, April 20, 1988; personal interview with Paul O'Brien, ADEC, Juneau, AK, April 15, 1988.
 2. 42 USC Section 9601-9675.
 3. Section 301 (c)(1), 42 USC Section 9651 (c)(1). The president delegated this responsibility to the DOI. See Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (Aug. 14, 1981), later superseded by Exec. Order No. 12,580, 52 Fed. Reg. 2,923 (Jan. 29, 1987). (This information was obtained from the Brief For Respondents prepared in the case of State of Ohio v. U. S. DOI and Donald Hodel, Secretary, on Petition for Review of an Action of the United States Department of the Interior: No. 86-1529 and Consolidated Cases, U. S. Court of Appeals for the District of Columbia Circuit, August 10, 1988). 33 USC 1321 (f) is entitled "Liability for Actual Costs of Removal." Sections (4) and (5) address liability for restoration or replacement of natural resources impacted by a discharge of oil or a hazardous substance.
 4. Section 301 (c)(2), 42 USC 9651 (c)(2). The Type 'A' assessment actually consists of a computer program. Various factors including, for example, the location of the spill, the amount spilled, and the time of the year, are put into this program and the program is then supposed to determine the expected fate of the oil, what natural resources can be expected to be impacted, and what the economic value of those damages may be. This approach is intended to establish actual damage without incurring the time and expense of a full scale damage assessment, and is a possible alternative to using civil penalties when a damage assessment is determined to be inappropriate. However, the program presently can only take into consideration a very few different types of oil, and includes only a limited number of receiving environment categories. As such, it is presently of limited value at best. See U. S. DOI, CERCLA 301 Project, "Measuring Damages to Coastal and Marine Natural Resources, Concepts and Data Relevant for CERCLA Type A Damage Assessments," PB87-142485, Washington, DC, January, 1987, (two volumes). The Type 'B' assessment is equivalent to what has been referred to here as a full scale natural resource damage assessment.
 5. 43 CFR Subtitle A, Subpart B—Pre-assessment Phase, and Subpart C—Assessment Plan Phase.

The purpose of the screen is to determine whether a 'reasonable cost' criterion can be met for either the 'type A' simplified assessment procedures or the more detailed 'type B' assessment procedures before either is carried out, so that the costs incurred will be recoverable from the spiller under CERCLA.

DOI has defined 'reasonable costs' in the regulations as follows:

'Reasonable cost' means the amount that may be recovered for the cost of performing a damage assessment. Costs are reasonable when: (1) the Injury Determination, Quantification, and Damage Determination phases (of the actual damage assessment) have a well-defined relationship to one another and are coordinated; (2) the anticipated increment of extra benefits in terms of the precision or accuracy of estimates obtained by using a more costly injury, quantification, or damage determination methodology are greater than the anticipated increment of extra costs of that methodology; (3) and the anticipated cost of the assessment is expected to be less than the anticipated damage amount determined in the Injury, Quantification, and Damage Determination phases.⁶

DOI holds that this definition, and its application in the natural resource damage assessment regulations, means that,

...the natural resource damage assessment must be well planned in advance of the actual conduct of the assessment and expenditure of costs. The assessment must be directed towards achieving a goal—the derivation of a damage amount based on the injuries sustained as a result of the discharge or release. To this end, the trustee is directed to collect only the minimum amount of information required to move from one phase of the assessment to another. In addition, the planned assessment costs should be maintained below the anticipated damage amount. Studies of injury or damages that do not directly contribute to the determination of a dollar value for the injured resource should not be part of the damage claim.

6. 43 CFR Subtitle A, Section 11.14(ee).

7. Brief for Respondents in the case of State of Ohio v. U. S. DOI and Donald Hodel, Secretary, on Petition for Review of an Action of the U. S. DOI, No. 86-1529 and Consolidated Cases, U. S. Court of Appeals for the District of Columbia Circuit, August 10, 1988. In this case the State of Ohio as well as several other states and groups are challenging the natural resource damage assessment rules promulgated by the DOI. With regard to the 'reasonable cost' criterion, petitioners focus on the third requirement of the definition (that the anticipated cost of the assessment is expected to be less than the anticipated damage amount) and assert that this requirement is arbitrary, that the reasonableness of a cost cannot be determined mechanically as the DOI provides, and that a limit on recovery of essential costs based on a strict proportionality is not reasonable. (See Joint Opening Brief of Petition(ers) in State of Ohio v. U. S. DOI and Donald Hodel, No. 86-1529 and Consolidated Cases, U. S. Court of Appeals for the District of Columbia Circuit, April 25, 1988 at pp. 79-80). DOI responds that petitioners have incorrectly focused on this single aspect of the definition, and thus fail to recognize that the definition in its entirety neither results in an irrational one-to-one linkage of assessment costs to that of expected damages nor discourages trustees from performing assessments to recover damages. The definition specifies anticipated costs and damages. Thus, the design of the assessment to be done is based on the anticipated damage amount. The trustee is not precluded from expanding the assessment and its costs if sufficient information gathered during the assessment warrants collecting additional data, using other methodologies, or applying other procedures. Thus, the DOI asserts, the regulations are not inflexible in their allowance for 'reasonable and necessary' costs of performing assessments. In fact, the regulations are flexible in allowing the trustee to design an assessment consistent

As envisioned here for use in Alaska, each resource potentially impacted by an oil spill would be evaluated during the reconnaissance stage with regard to whether the three elements of CERCLA's 'reasonable cost' criterion, or a criterion modeled after CERCLA's, can be met. If the requirements of the criterion cannot be met, then compensation for that resource would be sought through the civil penalty provisions of AS 46.03.758. If it can be met, a damage assessment would proceed and compensation for the amount of damage determined would be sought under one of the other applicable liability laws. Alaska could still pursue compensation for unidentifiable and unquantifiable damages. However, rather than referring to them as damages which cannot be determined, they might more accurately be referred to as damages which cannot be identified and quantified at a reasonable cost, based on the 'reasonable cost' criterion.

Using a 'reasonable cost' criterion as a basis for the decision on whether to pursue compensation under the civil penalty statute or under one of the other applicable liability laws would strengthen Alaska's oil spill liability and compensation scheme in several ways. First of all, it would assure that compensation is sought in the most effective and appropriate way. Secondly, it would provide a focus for reconnaissance activities. Rather than simply determining, for example, that overall damages 'may be expected to be minimal,' each resource would be examined individually and evaluated in the same manner. This would assure consistency between damage assessment studies conducted following any particular spill, as well as consistency between damage assessment studies conducted among different spills.

Further, by forcing state officials to closely examine all resources potentially impacted by a spill, this process might also identify some damages for which compensation might not otherwise be sought. This situation was identified by Geselbracht and Leschine in an examination of Washington State's natural resource damage assessment procedures.⁸ In particular, they found that damage assessments were not performed, and thus no damage claims were made, for some resource damage where recovery might well have been accomplished.⁹

Evaluating resources based on a 'reasonable cost' criterion might also provide the State of Alaska with valuable information. For example, Alaska may find that the extent of actual damages for some resources can in fact be determined within the confines of this criterion. The information

with the anticipated damage amount. (See Brief for Respondents cited above at pp. 97-98). This case is still pending. CERCLA's 'reasonable cost' criterion might not be the appropriate criterion for use in Alaska. It is offered here only as an example of a criterion that Alaska could use for making a determination as to whether compensation for damages should be sought through the civil penalties or through a damage assessment process.

8. Geselbracht, Laura and Thomas M. Leschine, "Washington's Compensation Recovery Mechanisms for Aquatic Resource Damages from Pollutant Spills: A Review and Appraisal." A Report from the Oil Spill Damage Assessment Study, Institute for Marine Studies, University of Washington, Seattle, WA. Final Draft, October, 1988.

9. Id.

gained might well serve as the beginning of the state's baseline data in many areas, but in any case it would be valuable information if a spill should occur in the same location at a later date.

Finally, going through the same evaluation for every resource potentially impacted would strengthen the State's case when a civil penalty is assessed in lieu of actual damages. In particular, when the 'reasonable cost' criterion cannot be met due to, for example, harsh weather conditions or the remote location where a spill occurs, the State would have a strong basis for asserting that the civil penalty is indeed the most appropriate way of compensating the public for the damage against which it is assessed.

By specifically allowing the civil penalties to compensate for actual damages, if both the civil penalty and compensation for actual damages are sought in a given case, the double recovery issue would surely be raised. To avoid this, when the extent of actual damage to a particular resource is determined, the monetary value of this harm could be reduced from the total penalty amount to be assessed in that case. The remaining amount of the civil penalty could still be recoverable as compensation for the remaining damages which reconnaissance activities indicate cannot be fully quantified within the constraints of the 'reasonable cost' criterion. When actual damages exceed the total assessed penalty, to avoid the double recovery issue the State could pursue only the actual damage amount.

This oil spill liability and compensation scheme could also be manipulated in a way which has not been tried in the State of Alaska. That is, if spilled oil enters two different receiving environments, the civil penalty could be used to compensate for damages in one area (based on the number of gallons entering that environment), while actual damages, or the civil penalty less actual damages, could be pursued in the second area. Here again, a double counting of damages would be avoided.

With Alaska's oil spill liability and compensation scheme modified in this way, many of the inconsistencies between intent and implementation as well as many of the shortcomings identified in the civil penalty statute and regulations themselves might be addressed and resolved.

First of all, the amounts of the civil penalties in the statute and regulations were originally intended to compensate only for the harm resulting from unidentifiable and unquantifiable damages. However, as used in practice, and as suggested here, the civil penalties are considered as compensation for actual damages as well. The amount of the penalties should thus be reviewed and if appropriate, raised. Several Alaska officials have in fact expressed some concerns about the amount of the fines in the existing civil penalty schedule. For example, Bayliss asserts that the maximum \$10 penalty is 'not close to a good deal for the environment.'¹⁰ Mertz also feels that the penalty amounts are not particularly high, and notes that they have not been adjusted for

10. Personal interview with Randolph Bayliss, former director of the Alaska Department of Environmental Conservation, Valdez office, in Juneau AK on April 18, 1988.

inflation since the law came into effect over ten years ago.¹¹ Finally, O'Brien also implies that the penalties are too low and suggests that the schedule might be better if it were more evident where the base penalty amounts came from.¹²

One will recall that the amount of the penalties imposed vary from the base penalty amounts depending on the productivity and sensitivity of the receiving environment, and the toxicity, degradability, and dispersal characteristics of the oil. As discussed in Chapter 3, when the regulations were being formulated the State of Alaska was limited to including only biological criteria (and only a limited number of biological criteria were actually used) in determining the sensitivity and productivity of the receiving environments, and the toxicity factor takes into consideration only the aromatic content of the oil spilled. Again, the civil penalties were intended to compensate only for the harm done as a result of unidentifiable and unquantifiable damages, not actual damages. The State would still have been able to pursue compensation for actual damages under the other applicable liability laws. As such, it is arguable that the receiving environment categories and oil characteristics did not need to be determined as precisely as possible. However, allowing the civil penalties to compensate for actual damages in those cases where a 'reasonable cost' criterion indicates that a full scale damage assessment is not appropriate suggests that the receiving environments and the oil characteristics should be more thoroughly evaluated. For example, more biological criteria could be taken into account. Also, non-biological factors such as recreational values may affect the overall value of an area to society. These factors may be worth taking into consideration as well.

Regarding the oil characteristics, other factors besides aromatic content may influence the toxicity of an oil (for example nitrogen, sulfur and oxygen compounds). These other factors could be examined and included in the oil characteristic criteria if appropriate in order to better capture the actual toxic effects of oil. Further, as discussed in Chapter 3, the purpose of the modification factor numbers in the penalty schedule is unclear. The formula for assessing the per gallon penalty should thus be re-examined. Yet it must be acknowledged that while it may be possible to formulate a civil penalty schedule with a more solid foundation than the one presently used in Alaska, these are civil penalties, as opposed to actual damages, and as such it will be impossible to avoid at least some measure of arbitrariness.

As a practical matter, it is doubtful that the maximum \$100 million penalty will ever be assessed in any oil spill case. However, under the other Alaska statutes which impose liability for actual damages, the responsible party is held liable for those damages to an unlimited maximum amount. Since the penalties are being discussed here as compensation for actual damages, if the

11. See *Supra* note 1, Mertz interview.

12. See *Supra* note 1, O'Brien interview.

assessed penalty should ever exceed this ceiling, the responsible party should be held liable for the total amount. As such, this ceiling should be removed.

Next, one will recall from Chapter 3 that the mitigation clause as interpreted in practice could potentially re-open the whole question of actual damages. As suggested here, the civil penalty would take into account actual damages. However, by using a 'reasonable cost' criterion the State would have a stronger basis for asserting that the assessed penalty or the damage amount claimed is appropriate. When a penalty is deemed appropriate based on this criterion, the question of actual damages should be precluded. As such, the mitigation clause should be removed.

As indicated in Section 3.3.6 above, the 18,000 gallon exemption as entailed in the civil penalty schedule has in practice hindered enforcement efforts. For example, according to Browne, experience has shown that small spills can cause a great deal of damage. Yet as noted by Mertz, it is prohibitively expensive for the State to pursue recovery for the damage resulting from 'small' spills, and thus they tend to slip through the system. It is likely that in many cases it will be more difficult to meet the 'reasonable cost' criterion for small spills than large spills. Or in other words, that full scale natural resource damage assessment studies will be deemed appropriate more often in cases of large spills than small spills. In order to assure compensation for damage which may result even from a small spill, the 18,000 gallon exemption should be removed.

Finally, with regard to the reduction in the assessed penalty based on the amount of oil cleaned up, as discussed in Section 2.5.2, when this civil penalty statute was being considered in the legislature the State argued that cleanup takes time and as such some natural resource damage would still result. Further, as discussed in Section 3.3.5, it is questionable how effective this provision is as an incentive to clean up spilled oil. Also, if a responsible party was held liable for actual damages, there would be no credit in the damage amount for oil removed. Again, as discussed here the civil penalties would be assessed in lieu of actual damages, not in addition to them. Based on all of these considerations, this provision should be removed.

A comment regarding the use of recovered funds is worth noting. As discussed in Chapter 3 above, restoration or 'returning recovered funds to the environment' is not a priority in the State of Alaska. However, under the present system, the full extent of actual damages are not in fact determined. As such, the State never has knowledge of the monetary value of that damage for purposes of returning that amount to the environment. Under the modified scheme being discussed here, when the 'reasonable cost' criterion indicates that the actual extent of damage to a resource should be determined, it is perhaps reasonable to suggest that Alaska should consider returning at least this amount to the environment. Support for this suggestion might be found in federal natural resource liability statutes. Specifically, CERCLA as originally enacted only required that sums recovered for natural resource damage be available for use to restore, rehabilitate, or to

acquire the equivalent of the injured resources.¹³ However, CERCLA, as amended by SARA now requires that recovered sums be used for these purposes.¹⁴

In conclusion, Alaska's experience with AS 46.03.758 has shown that the civil penalty approach is a viable method of assuring that the public is compensated for damages resulting from oil spill incidents. However, this paper has identified several inconsistencies between the legislative intent of this statute and its implementation, as well as several shortcomings inherent in the provisions of the statute and regulations themselves. This chapter has suggested how these factors might be addressed in order to make Alaska's overall oil spill liability and compensation scheme more effective. While this modified scheme is being offered to Alaska as an alternative to its present one, it is a viable scheme for other states as well. As such, it is hoped that the information provided in this paper might prove useful to other states contemplating a review of their present oil spill liability and compensation schemes.¹⁵

13. 42 USC 9607(f) (before being amended by SARA).

14. 42 USC 9607(f) (following the SARA amendments of 1986).

15. Concern over the relationship between the cost of natural resource damage assessment studies and the amount of damages ultimately claimed has led the Washington State legislature to request a review of that State's procedures for deciding when damage assessment studies are appropriate. See Washington Law, Chapter 479, Second Substitute Senate Bill No. 5986, Oil Spills, Section 1, 1987. This examination and evaluation of Alaska's civil penalty statute has in fact been done as part of that study.

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The Matter of The Complaint of Lee Wang Zin Navigation Co., S. A. and Kee Yeh Maritime Co., LTD. for Exoneration from or Limitation of Liability. Claim of the United States of America, filed in the United States District Court for the District of Alaska, No. A-80-199-Civ, by Warren A. Schneider, U. S. Department of Justice, August 26, 1980.

The Matter of The Complaint of Lee Wang Zin Navigation Co., S. A. and Kee Yeh Maritime Co., LTD. for Exoneration from or Limitation of Liability. Complaint for Exoneration from or Limitation of Liability, filed in the United States District Court for the District of Alaska at Anchorage, No. A-80-199-Civ, by Michael H. Woodell, Bradbury, Bliss & Riordan, Inc., on behalf of plaintiffs, June 25, 1980.

The Matter of The Complaint of Lee Wang Zin Navigation Co., S. A. and Kee Yeh Maritime Co., LTD. for Exoneration from or Limitation of Liability. Judgment of Exoneration signed by Judge James M. Fitzgerald, and Stipulation for Dismissal signed by all parties, filed in the United States District Court for the District of Alaska, No. A-80-199-Civ, April, 1982.

The Matter of The Complaint of Lee Wang Zin Navigation Co., S. A. and Kee Yeh Maritime Co., LTD. for Exoneration from or Limitation of Liability. Order and Opinion entered in the United States District Court for the District of Alaska, No. A-80-199-Civ, by Judge James M. Fitzgerald, February 4, 1981.

The Matter of The Complaint of Lee Wang Zin Navigation Co., S. A. and Kee Yeh Maritime Co., LTD. for Exoneration from or Limitation of Liability. Release of All Claims, filed in the United States District Court, District of Alaska, No. A-80-199-Civ, April 1, 1982.

The Matter of The Complaint of Lee Wang Zin Navigation Co., S. A. and Kee Yeh Maritime Co., LTD. for Exoneraton from or Limitation of Liability. Stipulation for Dismissal, signed by all parties, April, 1982.

Tillinghast, Jonathan. Personal Interview. Juneau, Alaska, April 18, 1988.

Trans-Alaska Pipeline Authorization Act. 43 U.S.C., Section 1653.

United States Coast Guard. News Releases of July 4-July 18, 1987 pertaining to the Glacier Bay oil spill of July 2, 1987

United States Coast Guard. "Capsizing and Sinking of the M/V Lee Wang Zin," U. S. Coast Guard On Scene Coordinator Report, July 9, 1980.

United States Department of Interior. "Measuring Damages to Coastal and Marine Resources, Concepts and Data Relevant for CERCLA Type A Damage Assessment," CERCLA 301 Project, PB87-142485, Washington, DC, January, 1987, (two volumes).

Washington Laws. Chapter 479, Second Substitute Senate Bill No. 5986, Oil Spills, Section 1, 1987.

Washington Revised Code. Chapter 90.48.

Wood, Robert, Alaska Department of Fish and Game, and Harrington, Paul, U.S.F.S. "Lee Wang Zin Oil Spill, Wildlife Observations, undated.

Yang, Edward J., Dower, Roger, C., and Mark Menefee. "The Use of Economic Analysis in Valuing Natural Resource Damages," Environmental Law Institute, Washington DC, June, 1984.

APPENDIX A: RECEIVING ENVIRONMENT CLASSIFICATIONS. Source: 18 Alaska Administrative Code, Chapter 75, Article 5, 'Schedule of Civil Penalties,' Register 103, October, 1987. Classifications of public land environments as contained in 18 AAC 75.530 have been omitted.

18 AAC 75.510. FRESHWATER ENVIRONMENTS

(a) Freshwater environments with significant aquatic resources are classified as follows:

Critical

--surface & subsurface water supplies with a water use permit or which are in fact being used for a purpose that would qualify for a water use permit;

--rivers, lakes and streams designated under AS 16.05.870(a) as important for spawning, rearing, or migration of anadromous fish, and the fresh waters which flow or empty into those waters;

--lakes, streams, rivers and freshwater wetlands w/i the boundaries of land administered under the National Wildlife Refuge System, and the fresh waters which flow or empty into those waters;

--lakes, streams, rivers and freshwater wetlands w/i the boundaries of game reserve areas, refuges, critical habitat areas, and sanctuaries established under AS 16.05.255(1) or AS 16.20, and the fresh waters which flow or empty into those waters

--lakes, streams, rivers and freshwater wetlands w/i the boundaries of fish reserve areas, refuges, critical habitat areas, and sanctuaries established under AS 16.05.251(1) or AS 16.05, and the fresh waters which flow or empty into those waters;

Sensitive

--lakes, freshwater wetlands and subsurface fresh waters other than those classified as 'critical'

(b) All freshwaters not classified above are classified as 'without significant aquatic resources.'

APPENDIX A (Cont.)

18 AAC 75.520. MARINE ENVIRONMENTS

(a) Estuarine, intertidal and saltwater environments:

Critical

--marine waters w/i the boundaries of state games refuges established under AS 16.05.255(1) or AS 16.20;

--marine waters w/i the boundaries of fish and game critical habitats established under AS 16.20;

--marine waters w/i the boundaries of marine sanctuaries established under 33 USC 1401 *et seq.*;

--marine waters w/i the boundaries of areas administered under the National Wildlife Refuge System;

--marine waters w/i one statute mile of the mouth of waters designated under AS 16.05.870(a) as important to spawning, rearing or migration of anadromous fish;

--marine waters w/i one statute mile of a seabird colony or marine mammal rookery or hauling ground identified in Alaska's Wildlife and Habitat, January, 1973; and

--marine waters w/i the barrier island-lagoon ecosystem--from the Colville River to Canning River, seaward to the Copper River delta.

Sensitive

--the inside waters of Southeast Alaska not otherwise classified as 'critical';

--saltwater wetlands and other intertidal and estuarine areas not otherwise classified as 'critical';

--Prince William Sound, and the bays, arms, fjords, ports and other marine waters of Prince William Sound; and

--all marine waters w/i 10 statute miles of any point of those marine waters designated as 'critical.'

(b) All marine waters not classified above are classified as 'without significant aquatic resources.'

APPENDIX B: CHARACTERIZATIONS OF PETROLEUM PRODUCTS AND BYPRODUCTS.

Source: 18 Alaska Administrative Code, Chapter 75, Article 5, 'Schedule of Civil Penalties,'
Register 66, July, 1978.

18 AAC 75.540. TOXICITY OF PETROLEUM PRODUCTS/BYPRODUCTS

Highly Toxic	Mod Toxic	Less Toxic	Relative nontoxic
#1,2 & Arctic diesel fuel & heating oil	waste oil & waste mixes	bunker & residual fuel oils	asphalts
jet aviation fuels A & B	lubricating oil	hydraulic fluids	tars
motor gasoline including aviation gasoline	all other jet fuels		all other petroleum products & byproducts
kerosene	crude oil		
stationary turbine fuels			

18 AAC 75.550. DEGRADABILITY OF PETROLEUM PRODUCT/BYPRODUCT

Low	Moderate	High
asphalt	hydraulic fluids	motor gasoline including aviation gasoline
tar	lubricating oil	#1,2 & Arctic diesel fuel & heating oil
bunker & residual fuel oils	waste oils, waste oil mixtures	jet & stationary turbine fuels
all other petroleum products/byproducts	crude oil	kerosene

APPENDIX B (Cont.)

18 AAC.560. DISPERSIBILITY OF PETROLEUM PRODUCTS/BYPRODUCTS

High	Moderate	Low
motor gasoline, including aviation gasoline	emulsified oil mixes	bunker & residual fuel oils
all jet fuels	lubricating oils	asphalts
kerosene	waste oils & waste oil mixtures	tars
#1,2 & Arctic diesel fuel & heating oil	crude oils	all other petroleum products/byproducts
hydraulic fluids		
stationary turbine fuels		

APPENDIX C: DETERMINING THE CIVIL PENALTY. Source: 18 Alaska Administrative Code, Chapter 75, Article 5, 'Schedule of Civil Penalties,' Register 66, July, 1978. The base penalties for public land receiving environments as contained in 18 AAC 75.570(1) have been omitted.

18 AAC 75.570. Schedule of Civil Penalties

The civil penalty which a person may be held liable for under AS 46.03.758(e) is established as follows:

(1). Base penalty for discharges into various receiving environments is as follows:

	Freshwater	Marine
Critical envt. resources	\$10.00	\$2.50
Sensitive envt. resources	\$5.00	\$2.00
W/O significant envt. resources	\$1.00	\$1.00

(2). Toxicity, degradability and dispersibility factors are as follows:

Toxicity [#]	Factor	Degradability ^{##}	Factor
High	1.00	Low	1.00
Moderate	0.75	Moderate	0.50
Less	0.50	High	0.25
Relatively nontoxic	0.25		

Dispersibility	Factor
High	0.15
Moderate	0.50
Low	1.00

(3). The net per gallon penalty is calculated by multiplying the base penalty (Number 1) by the arithmetic mean of the toxicity, degradability and dispersibility factors (Number 2). If a portion of the oil enters more than one receiving environment, the penalty is based on the most sensitive receiving environment which that portion of the oil enters.

APPENDIX C (Cont.)

To determine the toxicity factor, the factor from the table is multiplied by a fraction whose numerator is the percent concentration of aromatics in the oil and denominator is 45. The toxicity factor shall never exceed 1.0. For crude oil, the toxicity factor is multiplied by a fraction whose numerator is the API gravity of the crude and whose denominator is 30.

For crude oil, the degradability factor is multiplied by a fraction whose numerator is 30 and whose denominator is the API gravity of the crude.

Formula for assessing the penalty for refined petroleum products:

$$\frac{(\text{Tox}\# \cdot (\% \text{ aromatics} / 45) + \text{degr}\# + \text{disp}\#)}{3} \cdot \text{penalty} \cdot \text{volume}$$

Formula for assessing the penalty for crude oil:

$$\frac{(\text{Tox}\# \cdot (\text{API} / 30) + \text{degr}\# \cdot (30 / \text{API}) + \text{disp}\#)}{3} \cdot \text{penalty} \cdot \text{volume}$$

18 AAC 75.580 Prosecutorial Discretion

In appropriate cases the department will, in its discretion, either settle actions out of court for less than the full penalty or decline to file a suit under AS 46.03.758.

18 AAC 75.590 Annual Reporting

Within 10 days after the convening of each regular session, the department will report to the legislature on actions brought during the preceding year, and the status of those cases.

SENATE COMMITTEE REPORT

FURTHER

FIN

DATE TURNED INTO OFFICE _____

4/14/89

Mr. President:

RESOURCES _____ Committee considered _____ sb 271

civil penalties for the unpermitted discharge of uncontaminated crude oil and for the failure to implement an oil discharge contingency plan in response to an unpermitted discharge of uncontaminated crude oil and recommended

- replace with _____ CS SB 271 (Resources)) same title
- or adopt _____ CS _____) new title
- attached amendment(s) and technical title change (HB only)
- _____ letter of intent adopted

- do pass
- do not pass
- no recommendation
- individual recommendations
- further referral to _____

FISCAL NOTE(S) zero fiscal impact appropriation no FN
 new updated previous
 same as previous fiscal note(s) published _____

MEMBERS SIGNING DO PASS
Celina Sturgulovich

OTHER RECOMMENDATIONS
Debra Ann No Rec.
Rick Halford Do Not Pass w/o Am.

Debra Ann
 Chairman signature and recommendation

Committee Backup attached

Amended: 4/29/89
Offered: 4/27/89
Referred: Finance

6-1197D

Original sponsors: Senate Special
Committee on Oil and Gas

1 IN THE SENATE BY THE RESOURCES COMMITTEE
2 CS FOR SENATE BILL NO. 271 (Resources) am
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 SIXTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to civil penalties for the unpermit-
7 ted discharge of oil and for the failure to implement
8 an oil discharge contingency plan in response to an
9 unpermitted discharge of crude oil; and removing a
10 maximum limit on civil penalties for discharges of
11 oil."

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

13 * Section 1. AS 46.03.758(e) is amended to read:

14 (e) If [AFTER APRIL 19, 1978, IF] a discharge of oil in excess
15 of 18,000 gallons not permitted under applicable state and federal law
16 occurs within the territorial jurisdiction of the state, or into or
17 upon the adjacent outer continental shelf of the state, the following
18 persons, in addition to the person causing or permitting the dis-
19 charge, are jointly and severally liable to the state, in a civil
20 action, for the full amount of penalties established in the regula-
21 tions adopted under this section: [, OR \$100,000,000, WHICHEVER IS
22 LESS,]

23 (1) if the discharge occurs from any commercial or indus-
24 trial facility other than a vessel or offshore platform, the owner,
25 lessee or permittee, and operator of the facility;

26 (2) if the discharge occurs from a vessel,

27 (A) the owner and operator of the vessel; and

28 (B) the owner of the oil carried as cargo on the
29 vessel at the time the vessel was loaded, if the loading occurred

1 within the territorial jurisdiction of the state, or at a deep-
2 water port or other offshore storage facility adjacent to the
3 state; however, if the owner of the oil temporarily transfers
4 ownership of the oil to another person, and the transfer has the
5 purpose or effect of evading the vicarious liability imposed by
6 this section, the transferor will be considered the owner of the
7 oil for the purposes of this subsection; and

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

11 * Sec. 2. AS 46.03.758(1)(6) is amended to read:

12 (6) "oil" means petroleum [, CRUDE OIL,] and any substance
13 refined from petroleum, except [uncontaminated] [OR] crude oil;

14 * Sec. 3. AS 46.03 is amended by adding a new section to read:

15 Sec. 46.03.759. CIVIL PENALTIES FOR DISCHARGES OF CRUDE OIL.

16 (a) A person who is found to be liable under any other state law for
17 an unpermitted discharge of uncontaminated crude oil in excess of
18 18,000 gallons is, in addition to liability for any other penalties or
19 for damages or the cost of containment and cleanup, liable to the
20 state in a civil action for a civil penalty in the amount of

21 (1) ~~\$5.85~~^{8.00} per gallon of crude oil discharged for the first
22 420,000 gallons discharged; and

23 (2) ~~\$10~~^{12.50} per gallon of crude oil discharged for amounts
24 discharged in excess of 420,000 gallons.

25 (b) In determining how many gallons of crude oil have been dis-
26 charged for purposes of assessing a penalty under (a) of this section,
27 the court shall deduct the number of discharged gallons of crude oil
28 that the defendant proves were removed by the defendant from the
29 environment within the first 36 hours after the discharge as a result

1 of a cleanup operation undertaken in conformity with applicable state
2 and federal law. The dispersal of oil through the use of chemical
3 *biological additives, burning or sinking agents* agents or other means is not considered removal for the purposes of
4 this subsection.

5 (c) The court shall assess five times the penalty set out in (a)
6 of this section if the court finds

7 (1) the discharge was caused by the gross negligence or
8 intentional act of the defendant; or

9 (2) the defendant did not take reasonable measures to
10 contain and clean up the discharged oil.

11 (d) Notwithstanding AS 46.03.875, *(3) Def did not resp in acc w/ an approved* a person liable *cont. section* for civil

12 penalties under this section is not also liable for the discharge of
13 the crude oil under AS 46.03.760(a). A person causing or permitting a
14 discharge of uncontaminated crude oil of 18,000 gallons or less not
15 permitted under applicable state or federal law is liable for that
16 discharge under the penalty provisions of AS 46.03.760(a); however,
17 the court may impose a penalty of less than \$500 for the discharge.

18 (e) The court may reduce the penalty imposed under this section
19 if the defendant demonstrates, by a preponderance of the evidence,
20 that the discharge was caused solely by a negligent act of a third
21 person unless the third person is a person with whom the defendant was
22 found jointly and severally liable for the discharge under other state
23 law.

24 (f) In this section, "discharge" means entry of uncontaminated
25 crude oil into or upon the water or public land of the state, regard-
26 less of causation, except discharges into an enclosed and impervious
27 oil spill containment area.

28 * Sec. 4. AS 46.03.770 is amended to read:

29 Sec. 46.03.770. DETENTION OF VESSEL WITHOUT WARRANT AS SECURITY

1 FOR DAMAGES. A vessel that is used in or in aid of a violation of
2 AS 46.03.740 - 46.03.750 may be detained after a valid search by the
3 department, an agent of the department, a peace officer of the state,
4 or an authorized protection officer of the Department of Fish and
5 Game. Upon judgment of the court having jurisdiction that the vessel
6 was used in, or was the cause of, a violation of AS 46.03.740 - 46.-
7 03.750 with knowledge of its owner or under circumstances indicating
8 that the owner should reasonably have had this knowledge, the vessel
9 may be held as security for payment to the state of the amount of
10 damages assessed by the court under AS 46.03.758, 46.03.759, 46.03.-
11 760, [AND] 46.03.822, and AS 46.04.030(g). If the damages assessed
12 are not paid within 30 days after judgment or final determination of
13 an appeal, the vessel shall be sold at public auction, or as otherwise
14 directed by the court, and the damages paid from the proceeds. The
15 balance, if any, shall be paid by the court to the owner of the ves-
16 sel. The court shall permit the release of the vessel upon posting of
17 a bond set by the court in an amount not to exceed the maximum amount
18 of damages available under AS 46.03.758, 46.03.759, 46.03.760, [AND]
19 46.03.822, and AS 46.04.030(g). The damages received under this
20 section shall be transmitted to the proper state officer for deposit
21 in the general fund. A vessel seized under this section shall be
22 returned or the bond exonerated if no damages are assessed under
23 AS 46.03.758, 46.03.759, 46.03.760, [OR] 46.03.822, or AS 46.04.-
24 030(g).

25 * Sec. 5. AS 46.04.030(g) is amended to read:

26 (g) Failure of a holder of an approved oil discharge contingency
27 plan to have access to the quality or quantity of resources identified
28 in the plan and, in the event of a spill, to respond with those re-
29 sources within the shortest feasible time is a violation of this

1 chapter for purposes of AS 46.03.760(a), 46.03.765, 46.03.790, and any
2 other applicable law. If the holder of an approved oil discharge
3 contingency plan fails to respond to an unpermitted discharge of
4 uncontaminated crude oil with the quality and quantity of resources
5 identified in the plan and in a manner required under the plan, the
6 holder is strictly liable, jointly and severally, for the civil pen-
7 alty assessed under AS 46.03.759 against any other person for that
8 discharge.

9 * Sec. 6. AS 46.04.040(e) is amended to read:

10 (e) Financial responsibility may be demonstrated by self-insur-
11 ance, insurance, surety, or guarantee, under terms the department may
12 prescribe. An action brought under AS 46.03.758, 46.03.760(a) or (e),
13 [OR] 46.03.822, or AS 46.04.030(g) or to collect penalties imposed
14 under AS 46.03.759 may be brought in a state court directly against
15 the insurer or another person providing evidence of financial respon-
16 sibility. The applicant, and an insurer, surety, or guarantor shall
17 appoint an agent for service of process in the state. An insurer must
18 either be authorized by the Department of Commerce and Economic Devel-
19 opment to sell insurance in the state or be an unauthorized insurer
20 listed by the Department of Commerce and Economic Development as not
21 disapproved for use in the state.

22 * Sec. 7. AS 46.04.040(i) is amended to read:

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

*Attys fees + costs - civil rule
change 2/3 -*

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: DEC
 Title: An Act relating to civil penalties BRU: _____
for the unpermitted discharge of uncontaminated crude oil...
 Sponsor: _____ Components: _____
 Requestor: Senator Pearce

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
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	0	0	0	0	0	0

POSITIONS: None

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Ann D. Kyle Phone: 465-2600
 Division: Commissioner's Office Date: _____
 Approved by Commissioner: A. D. Kyle Date: 4/18/89
 Agency: Department of Environmental Conservation

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

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: An Act relating to civil penalties for discharge of unpermitted contaminated oil discharge contingency plan
Sponsor: Senate Special Committee on Oil and Gas

Agency Affected: Environmental Conservation
BRU: Environmental Quality
Components: Environmental Quality

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-

CAPITAL						
----------------	--	--	--	--	--	--

REVENUE						
----------------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL		-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME		-0-	-0-	-0-	-0-	-0-
PART-TIME		-0-	-0-	-0-	-0-	-0-
TEMPORARY		-0-	-0-	-0-	-0-	-0-

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Dan Easton Phone: 465-2640
Division: Environmental Quality Date: April 11, 1989

Approved by Commissioner: *ADK* Date: 4/13/89
Agency: Alaska Department of Environmental Conservation

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

Alaska State Legislature

Senator Drue Pearce, Chair
Senator Tim Kelly
Senator Rick Halford
Senator Paul Fischer
Senator Al Adams



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SENATE SPECIAL COMMITTEE ON OIL AND GAS

To: Members of the Senate Special
Committee on Oil and Gas

From: Senator Drue Pearce, Chair

Re: SB 271, Sponsor Statement

Date: April 11, 1989

This legislation will put into effect a necessary civil penalty structure that 1). will compensate the public for the unquantifiable and undetectable natural resource and environmental damage caused by massive oil discharge and 2). will provide oil handlers with a meaningful incentive to perform their operations as safely as possible.

The existing civil penalty statute, AS 46.03.758, caps liability at \$100,000,000. It can be expected that the massive discharge into Prince William Sound will cost the state much more in terms of damage to the environment, tourism, the fisheries industry and the well-being of the residents of the effected areas.

While in 1977 the legislature attempted to draft a civil penalty statute which would provide the incentive to the oil companies to operate in a prudent and responsible manner, extensive lobbying by the industry significantly watered-down the legislation. The original legislation contained penalties of \$50, \$25 and \$10 per gallon depending on what type of environment was impacted. The current penalties, ranging from \$10 to \$1 per gallon, do not carry the weight necessary to adversely impact a multi-national corporation's profit.

Even at the lower penalty levels, the industry regarded the penalties as excessive. In a House Judiciary Committee Meeting on March 4, 1977, an Exxon lobbyist testified that

"the penalty limits in this bill are so excessively high that they threaten the viability of the oil business in the State of Alaska. The risks of spilling all of the oil in a large tanker are very minimal. But for example, a 250,000 dead weight ton tanker

carries 250,000 tons or approximately 1.7 million barrels of oil. At 42 gallons/barrel, that's 73,500,000 gallons. At \$50/gallon, that's \$3.5 billion, even at the reduced maximum penalty of \$10, the penalty would be \$735 million."

I have introduced SB 271 to provide the type of incentive that will be seriously considered by the oil companies. This bill only deals with the catastrophic discharge of crude oil, spills in excess of 100,000 barrels. The \$1,000 and \$2,000 per barrel penalties should garner serious thought toward safe operations.

I have also included an incentive section, similar to the present law, which would credit the oil companies for each barrel cleaned up within 36 hours of the discharge. This does not apply to chemical dispersions.

These penalties will be increased fivefold for those acts that are based on gross negligence or intentional acts or when the defendant did not take reasonable measures to clean up the discharged oil.

These penalties supersede all other penalties for the discharge of oil. The penalties may be reduced if the defendant can demonstrate that the discharge was caused solely by the negligent act of a third party who cannot be found jointly and severally liable for the discharge.

Section 4 extends the civil penalty provisions of this bill to any person who has an oil discharge contingency plan who fails to respond in a manner required by law.

In conclusion, even though an event such as a massive oil spill, may have a low risk probability, it is important to raise the penalties to the level where this risk is taken into account when making operational decisions.

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: Environmental Conservation
 Title: An Act relating to civil penalties for discharge of unpermitted contaminated oil discharge contingency plan BRU: Environmental Quality
 Sponsor: Senate Special Committee on Oil and Gas Components: Environmental Quality

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL		-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME		-0-	-0-	-0-	-0-	-0-
PART-TIME		-0-	-0-	-0-	-0-	-0-
TEMPORARY		-0-	-0-	-0-	-0-	-0-

ANALYSIS : (Attach a separate page if necessary)

[Empty box for analysis]

Prepared by: Dan Easton Phone: 465-2641
 Division: Environmental Quality Date: April 11 1989

Approved by Commissioner: A. D. Kohl Date: 4/13/89
 Agency: Alaska Department of Environmental Conservation

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

Changes in The Resources CS have no fiscal effect. This fiscal note is appropriate.
 page 1 of 1
 4/27/89
 D. Cousens

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

April 7, 1989

SUBJECT: Civil Penalties for Oil Discharges
(Work Order No. 6-1197)

TO: Senator Drue Pearce, Chair
Senate Special Committee on Oil and Gas

FROM: Terri Lauterbach *TLW*
Legislative Counsel

Enclosed is a draft relating to your request to increase civil penalties for the discharge of crude oil.

Section 1 of the draft amends the definition of "oil" in the current civil penalty statute to exclude uncontaminated crude oil.

Section 2 of the draft enacts a new penalty scheme for discharges of uncontaminated crude oil. It assumes a finding of liability under another statute and imposes a civil penalty that would be in addition to any other liability of the discharger. The penalty would be approximately \$24 per gallon for the first 420,000 gallons and \$48 per gallon for discharges over that amount. However, I have drafted the penalty in terms of barrels, as you requested.

Subsection (b) establishes the incentive for cleanup in the first 36 hours, as you requested. Subsection (c) is patterned after AS 46.03.758(b)(2), causing a higher penalty on a showing of gross negligence or failure to reasonably respond to a discharge. Subsection (d) is patterned after AS 46.03.758(i). Subsection (e) is patterned after AS 46.03.758(j). The definition in subsection (f) is patterned after the definition in AS 46.03.758(1)(3). (Note that it includes discharges on public land - you had asked about discharges on land when we last spoke.)

At your direction, I have not included a subsection on mitigation like that of AS 46.03.758(g). I have also not

Senator Drue Pearce, Chair
Page 2
April 7, 1989

included a subsection patterned after AS 46.03.758(h) because those exceptions would be covered in the underlying liability determination that would occur before the new civil penalty section would be applicable.

Section 3 makes a technical change to accommodate the new civil penalties enacted by secs. 2 and 4 of the draft.

Section 4 makes a person who fails to implement a contingency plan jointly and severally liable for a civil penalty assessed under AS 46.03.759. If it is your intent that their penalty be separate and in addition to the other person's penalty, please let me know, and I will redraft section 4. As drafted, the penalty is not limited to oil terminal facilities, but would be applicable to anyone who didn't respond adequately if their plan called for them to respond to a particular discharge.

Sections 5 and 6 make technical changes to accommodate the new civil penalties enacted by secs. 2 and 4 of the draft.

For your information, I have enclosed a general summary of statutes related to oil pollution discharges like the Prince William Sound disaster and a bibliography of material available at the Alaska State Library related to oil spills. The bibliography was prepared by the Alaska State Library.

If I can be of further assistance, please let me know.

TL:gc
WKG9/024

Enclosure

A M E N D M E N T

OFFERED IN THE SENATE

BY HALFORD

TO: CSSB 271(Oil & Gas)

Page 3, after line 3:

Insert a new subsection to read:

"(c) In determining how many barrels of crude oil have been discharged for purposes of assessing a penalty under (a) of this section, the court may deduct 50 percent of the number of discharged barrels of crude oil that the defendant proves were removed by the defendant ~~within the first 36 hours after the discharge~~ within the first 36 hours after the discharge through the use of dispersing agents or other chemical agents approved by the department for use under the defendant's oil discharge contingency plan. The court may estimate the number of barrels removed under this subsection."

Reletter the remaining subsections accordingly.

and to bring the oil discharge contingency plan into compliance with the provisions of this chapter;

- (2) a proposed time schedule for making the corrections; and
- (3) an interim proposal for oil discharge containment and cleanup for the period of variance. (Eff. 9/9/81, Register 79)

Authority: AS 46.03.020
AS 46.04.030
AS 46.04.070

18 AAC 75.375. NOTIFICATION OF NONREADINESS. If any significant equipment specified in a contingency plan becomes non-operational, or is removed from a designated storage location, the responsible operator or carrier shall, within three days, notify the department in writing and provide a schedule for its substitution, repair, or return to service. (Eff. 9/9/81, Register 79)

Authority: AS 46.03.020
AS 46.04.030
AS 46.04.070

18 AAC 75.385. DISCHARGE EXERCISES. (a) Upon notice by the department, applicants shall conduct an exercise for the purpose of testing the adequacy of the contingency plan and its execution. No more than two exercises will be required of an applicant in any year, unless an exercise demonstrates that the applicant's contingency plan or its execution is inadequate (under criteria established in 18 AAC 75.355), in which case the department will, in its discretion, direct the holding of additional exercises until it is satisfied that the contingency plan and its execution are adequate. The department will give sufficient notice so that the applicant can be at the alert level that would exist during normal oil handling.

(b) Wherever possible, discharge exercises will be coordinated with the U.S. Coast Guard and the U.S. Environmental Protection Agency.

(c) The department will, in its discretion, consider regularly scheduled training exercises as discharge exercises.

(d) Should the department find through a discharge exercise that the applicant is unable to execute the discharge contingency plan under criteria established in 18 AAC 75.350, it may rescind or modify approval of the plan in accordance with AS 46.04.030(f). (Eff. 9/9/81, Register 79)

Authority: AS 46.03.020
AS 46.04.030
AS 46.04.070

18 AAC 75.395. DEFINITIONS FOR 18 AAC 75.305 — 18 AAC 75.385. Unless the context indicates otherwise, in 18 AAC 75.305 — 18 AAC 75.385

(1) "approved loading manual" means the manual including information regarding trim and stability, hullbending moment, and information meeting the requirements of 46 CFR § 45.105;

(2) "containment and exclusion equipment" means booms, logs, curtains, and other devices designed or constructed and deployed in order to control, concentrate and restrict the movement and spreading of oil;

(3) "discharge" means any spilling, leaking, pumping, pouring, sweating, emitting, emptying, or dumping;

(4) "lightering" means pumping or transferring of oil from cargo compartments of tank vessels to another vessel or storage container;

(5) "liquefied petroleum gas" means natural gas converted to a liquid state by pressure and cooling, butane, propane, and other light ends which at 70 degrees F. and atmospheric pressure revert to the gaseous state. (Eff. 9/9/81, Register 79)

Authority: AS 46.03.020
AS 46.04.030
AS 46.04.070

Editor's notes. — For the purposes of this chapter, the following terms are defined in AS 46.04.120: "department"; "off-shore exploration and production facility"; "oil"; "oil barge"; "oil terminal facility"; "operator"; "person"; "tank vessel"; "vessel."

Article 5. Schedule of Civil Penalties

Section	Section
500. Applicability	560. Dispersibility of petroleum, petroleum products, and byproducts
510. Freshwater environments	570. Schedule of civil penalties
520. Marine environments	580. Prosecutorial discretion
530. Public land environments	590. Annual report
540. Toxicity of petroleum, petroleum products, and byproducts	600. Definitions
550. Degradability of petroleum, petroleum products, and byproducts	

18 AAC 75.500. APPLICABILITY. 18 AAC 75.510 — 18 AAC 75.600 establish a schedule of civil penalties for the discharge of oil under AS 46.03.758. The schedule of civil penalties established by this chapter does not apply to discharges of oil which are specifically made subject to the penalty provisions of AS 46.03.760(a). (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

18 AAC 75.510. FRESHWATER ENVIRONMENTS. (a) For the purposes of AS 46.03.758(b)(1)(A), freshwater environments with significant aquatic resources are classified as follows:

- (1) Critical freshwater environments include

(A) surface and subsurface water supplies for which the commissioner of natural resources has issued a water use permit under AS 46.15.040 et seq., or which are in fact being used for a purpose that would qualify for a water use permit;

(B) rivers, lakes, and streams designated under AS 16.05.870(a) as important for the spawning, rearing, or migration of anadromous fish, and the water of lakes, streams, and rivers which flows or empties into those designated waters;

(C) lakes, streams, rivers, and freshwater wetlands within the boundaries of land administered under the National Wildlife Refuge System, and the water of lakes, streams, and rivers which flows or empties into those waters;

(D) lakes, streams, rivers, and freshwater wetlands within the boundaries of game reserve areas, refuges, critical habitat areas, and sanctuaries established under AS 16.05.255(1) or AS 16.20, and the water of lakes, streams, and rivers that flows or empties into those waters; and

(E) lakes, streams, rivers, and freshwater wetlands within the boundaries of fish reserve areas, refuges, critical habitat areas, and sanctuaries established under AS 16.05.251(1) or AS 16.20, and the water of lakes, streams, and rivers that flows or empties into those waters;

(2) Sensitive freshwater environments include

(A) lakes other than those classified in (1) of this subsection;

(B) freshwater wetlands other than those classified in (1) of this subsection; and

(C) subsurface freshwaters other than those classified in (1)(A) of this subsection.

(b) For the purposes of AS 46.03.758(b)(1)(C), all freshwater of the state not classified in (a)(1) or (2) of this section is classified as without significant aquatic resources. (Eff. 4/19/78, Register 66; am 8/6/87, Register 103)

Authority: AS 46.03.758

18 AAC 75.520. MARINE ENVIRONMENTS. (a) For the purposes of AS 46.03.758(b)(1)(B), estuarine, intertidal and saltwater environments are classified as follows:

(1) Critical marine environments include

(A) marine water within the boundaries of state game refuges established under AS 16.05.255(1) or AS 16.20;

(B) marine water within the boundaries of fish and game critical habitats established under AS 16.20;

(C) marine water within the boundaries of marine sanctuaries established under 33 U.S.C. 1401 et seq. (P.L. 92-532);

(D) marine water within the boundaries of areas administered under the National Wildlife Refuge System;

(E) marine water within one statute mile of the mouth of waters designated under AS 16.05.870(a) as important for the spawning, rearing or migration of anadromous fish;

(F) marine water within one statute mile of a seabird colony or marine mammal rookery or hauling ground identified by the Alaska Department of Fish and Game in Alaska's Wildlife and Habitat, January, 1973;

(G) high density sea otter habitat identified by the Alaska Department of Fish and Game in Alaska's Wildlife and Habitat, January, 1973; and

(H) marine water within the barrier island-lagoon ecosystems extending from the Colville River to Canning River, and seaward of the Copper River delta;

(2) Sensitive marine environments include

(A) the inside waters of Southeast Alaska not otherwise classified in (1) of this subsection;

(B) saltwater wetlands and other intertidal and estuarine areas not otherwise classified in (1) of this subsection; and

(C) Prince William Sound, and the bays, arms, fjords, ports and other inside marine waters of Prince William Sound; and

(D) all marine water within 10 statute miles of any point of those waters designated in (1) of this subsection.

(b) For the purposes of AS 46.03.758(b)(1)(C), marine water not classified in (a) of this section is classified as without significant aquatic resources. (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

18 AAC 75.530. PUBLIC LAND ENVIRONMENTS. (a) For the purposes of AS 46.03.758(b)(1)(C), public land is classified as follows:

(1) Critical terrestrial environments include

(A) state game reserve areas, refuges and sanctuaries established under AS 16.05.255(1) or AS 16.20 et seq.;

(B) state parks, campgrounds and waysides;

(C) municipal parks and park reserves;

(D) national parks, preserves, wilderness areas, monuments, recreation areas and lands administered under the National Wildlife Refuge System;

(E) established campgrounds, scenic waysides and picnic areas; and

(F) national historical sites;

(2) Very sensitive terrestrial environments include

(A) land administered under the National Forest System not otherwise classified in (1) of this section.

(B) land underlain with continuous permafrost not otherwise classified in (1) of this subsection; and

(C) land in state forests and research areas not otherwise classified in (1) of this subsection;

(3) Sensitive terrestrial environments include land other than that classified in (1) or (2) of this subsection upon which continuous natural terrestrial vegetation cover is present.

(b) For the purposes of AS 46.03.758(b)(1)(C), all public land not classified in (a) of this section is classified as without significant terrestrial environmental resources. (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

18 AAC 75.540. TOXICITY OF PETROLEUM, PETROLEUM PRODUCTS, AND BYPRODUCTS. For the purposes of AS 46.03.758(d), the toxicity of petroleum, petroleum products, and byproducts is as follows:

(1) highly toxic

(A) numbers 1, 2 and Arctic diesel fuel and heating oil;

(B) jet aviation fuels A and B;

(C) motor gasoline including aviation gasoline;

(D) kerosene; and

(E) stationary turbine fuels;

(2) moderately toxic

(A) waste oil and waste oil mixtures;

(B) lubricating oil;

(C) jet fuels other than those specified in (1)(B) of this section; and

(D) crude oil;

(3) less toxic

(A) bunker and residual fuel oils; and

(B) hydraulic fluids;

(4) relatively nontoxic

(A) asphalts;

(B) tars; and

(C) other petroleum, petroleum products, and byproducts not listed in (1) — (3) of this section. (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

18 AAC 75.550. DEGRADABILITY OF PETROLEUM, PETROLEUM PRODUCTS, AND BYPRODUCTS. For the purposes of AS 46.03.758(d), the degradability of petroleum, petroleum products and byproducts is as follows:

(1) low degradability

(A) asphalt;

(B) tar;

(C) bunker and residual fuel oils; and

(D) other petroleum, petroleum products, and byproducts not otherwise listed in (2) or (3) of this section;

(2) moderate degradability

(A) hydraulic fluids;

(B) lubricating oil;

(C) waste oils and waste oil mixtures; and

(D) crude oil;

(3) high degradability

(A) motor gasoline, including aviation gasoline;

(B) numbers 1, 2 and Arctic diesel fuel and heating oil;

(C) jet and stationary turbine fuels; and

(D) kerosene.

(Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

18 AAC 75.560. DISPERSIBILITY OF PETROLEUM, PETROLEUM PRODUCTS, AND BYPRODUCTS. For the purposes of AS 46.03.758(d), the dispersibility of petroleum, petroleum products, and byproducts is as follows:

(1) highly dispersible

(A) motor gasoline, including aviation gasoline;

(B) all jet fuels;

(C) kerosene;

(D) numbers 1, 2 and Arctic diesel fuel and heating oil;

(E) hydraulic fluids; and

(F) stationary turbine fuels;

(2) moderately dispersible

(A) emulsified oil mixtures;

(B) lubricating oils;

(C) waste oil and waste oil mixtures; and

(D) crude oils;

(3) low dispersibility

(A) bunker and residual fuel oils;

(B) asphalts;

(C) tars; and

(D) other petroleum, petroleum products, and byproducts not otherwise listed in (1) or (2) of this section. (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

18 AAC 75.570. SCHEDULE OF CIVIL PENALTIES. The schedule of civil penalties for which a person may be held liable under AS 46.03.758(e) is established as follows:

(1) The base civil penalty for discharges into various receiving environments is as follows:

	Freshwater \$10.00	Marine \$2.50	Public Land \$1.00
Critical environmental resources			
Very sensitive environmental resources	N/A	N/A	.75
Sensitive environmental resources	5.00	2.00	.50
Without significant environmental resources	1.00	1.00	.25

(2) Toxicity, degradability and dispersibility factors are as follows:

	Factor
(A) toxicity*	
(i) highly toxic	1.0
(ii) moderately toxic	0.75
(iii) less toxic	0.5
(iv) relatively nontoxic	0.25
(B) degradability**	
(i) low degradability	1.0
(ii) moderate degradability	0.5
(iii) high degradability	0.25
(C) dispersibility	
(i) high dispersibility	0.15
(ii) moderate dispersibility	0.5
(iii) low dispersibility	1.0

(3) The net civil penalty which will be assessed per gallon of oil discharged is calculated by multiplying the base penalty established in (1) of this section by the arithmetic mean of the toxicity, degradability, and dispersibility factors established in (2) of this section. If a portion of the oil enters more than one receiving environment, the civil penalty will be based upon the most sensitive receiving environment which that portion of the oil enters. (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

*To determine the toxicity factor for a particular oil, the factor from the table is multiplied by a fraction whose numerator is the percent concentration of aromatics in the oil and whose denominator is 45. In no event shall the toxicity factor exceed 1.0. The toxicity factor in crude oil is .75 multiplied by a fraction whose numerator is the API gravity of the crude oil and whose denominator is 30.
 **The degradability factor for crude oil is .5 multiplied by a fraction whose numerator is 30 and whose denominator is the API gravity of the crude oil.

18 AAC 75.580. PROSECUTORIAL DISCRETION. In appropriate cases, the department will, in its discretion, either settle actions out of court under AS 46.03.758 for less than the full penalty provided for under this chapter, or decline to file an action under AS 46.03.758. This section is intended to confirm the department's litigation discretion, and may not be construed as creating a reviewable decision. (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

18 AAC 75.590. ANNUAL REPORT. Within 10 days after the convening of each regular legislative session, the department will report to the legislature on all actions brought during the preceding calendar year, and the status and disposition of those actions. (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

18 AAC 75.600. DEFINITIONS. As used in secs. 500 — 600 of this chapter

(1) "estuary" means a semienclosed, coastal body of water which has a free connection with the sea and within which seawater is measurably diluted with freshwater derived from land drainage;

(2) "freshwater wetlands" means those environments characterized by rooted vegetation which is partially submerged either continuously or periodically by surface freshwater with less than .5 parts per thousand salt content and not exceeding three meters in depth;

(3) "inside waters of Southeast Alaska" includes all those marine waters lying inside the boundary line established in 33 C.F.R. secs. 82.1705-1730, 42 Federal Register 35791 (July 11, 1977);

(4) "marine water" means all saltwater environments, including saltwater wetlands, estuaries, and the intertidal zone;

(5) "permafrost" means soil or other earth material supporting vegetation with a temperature which remains below 0 degrees Celsius (32 degrees Fahrenheit) for two or more years;

(6) "Prince William Sound" includes all marine water lying inside the boundary line established in 33 C.F.R. sec. 82-1740, 42 Federal Register 35791 (July 11, 1977); and

(7) "saltwater wetlands" means those coastal areas along sheltered shorelines characterized by halophytic hydrophytes and macroalgae extending from extreme low tide to an area above extreme high tide which is influenced by sea spray or tidally induced water table changes. (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

...except that if a person demonstrates by clear and convincing evidence that the environmental damage^d caused by the discharge is substantially less than the amount specified in the schedule of penalties, the court may reduce the penalty by no more than fifty percent.

ERIC MYERS

465-2718

Location

MIKE FRANK

PROJECT

MENTS

CRIMINAL PENALTIES FOR VIOLATIONS OF DEC STATUTES & REGULATIONS

OFFENSES	STATUTORY CITES	SCIENTER	PENALTIES ^{2/}
I. <u>A VIOLATION</u> of a permit term or conditions, violation of AS 46.03, AS 46.04, AS 46.09, violation of a DEC regulation, any term of a compliance order, or other DEC approval or acceptance (e.g., approved oil spill contingency plans, approved proof of financial responsibility)	AS 46.03.790(a)	Negligence ^{1/}	For a natural person: \$1,000/90 days. For an organization: the greater of \$100,000 or 3 times pecuniary gain realized per AS 12.55.035(c).
	AS 46.03.790(b)	Knowingly ^{1/}	For a natural person \$5,000/1 year. For an organization: the greater of \$100,000 or 3 times pecuniary gain realized per AS 12.55.035(c).
II. <u>FAILURE TO PROVIDE OR FALSELY STATING INFORMATION</u> required on an oil discharge report or under AS 46.04 or AS 46.09 ^{3/}	AS 46.03.790(d)	None	For a natural person: \$25,000 per day/1 year. For an organization: the greater of \$100,000 or 3 times pecuniary gain realized per AS 12.55.035(c).
III. <u>HAZARDOUS WASTE VIOLATIONS:</u> ^{4/} transport to an unpermitted facility; treating, storing or disposing without a permit; false statement or representation on any document used for compliance purposes	AS 46.03.790(e)	Knowingly ^{1/}	For a natural person: \$10,000 per day/1 year. For an organization: the greater of \$100,000 or 3 times pecuniary gain realized per AS 12.55.035(c).
IV. <u>FAILURE TO ABATE NUISANCE:</u> neglect or refusal to abate nuisance on land, water or in the air	AS 46.03.800(b) & AS 46.03.810(h)	Knowingly ^{1/}	For a natural person: () either \$1,000/90 days or \$5000/1 year plus damages for expenses of abatement ^{5/} . For an organization: the greater of \$100,000 or 3 times pecuniary gain realized per AS 12.55.035(c).
V. <u>LITTERING</u>	AS 46.06.080	None	\$1000
VI. <u>SALE OF IMPROPERLY DESIGNED BEVERAGE CONTAINER</u>	AS 46.06.090	None	\$3000
VII. <u>VIOLATIONS OF AGRICULTURAL OR LIVESTOCK OR FISHERIES PRODUCTS STATUTES or regulations or orders or permits</u>	AS 03.05.090	None	\$5000

FROM LEAD ANCH CIVIL
DATE/INSE OS:SB
P. 9

VIII. OTHER RELATED VIOLATIONS

- creation of a "hazardous condition" without "legal justification or excuse"	AS 11.61.110(a)	Recklessly	Class B misdemeanor 10 days maximum. For fines, see AS 12.55.035
- false entry in a public record ^{6/} (e.g., oil spill report)	AS 11.56.820	Knowingly	Class A misdemeanor. See AS 12.55.035 and 12.55.135
- activities in or affecting anadromous stream without a permit	AS 16.05.880	None	Class A misdemeanor. See AS 12.55.035 and 12.55.135
- falsifying business records, e.g., to conceal pollution incident and avoid penalties and money damages	AS 11.46.630	Intent to defraud	Class C felony. See AS 12.55.035 and 12.55.125
- deceptive business practices including sale of adulterated or misbranded products	AS 11.46.710	None	Class A misdemeanor. See AS 12.55.035 and 12.55.135
- unsworn falsification	AS 11.56.210	Intent to mislead a public servant	Class A misdemeanor. See AS 12.55.035 and 12.55.135

1 The following definitions of scienter requirements are applicable only to crimes defined by Title 11. These definitions do not necessarily govern crimes set forth in Title 46, but are provided here for purposes of guidance:

A person acts with "criminal negligence" with respect to a result or to a circumstance described by a provision of law defining an offense when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

AS 11.81.900(a)(4)

A person acts "knowingly" with respect to conduct or to a circumstance described by a provision of law defining an offense when the person is aware that the conduct is of that nature or that the circumstance exists; when knowledge is established if a person is aware of a substantial probability of its existence, unless the person actually believes it does not exist; a person who is unaware of conduct or a circumstance of which the person would have been aware had that person not been intoxicated acts knowingly with respect to that conduct or circumstance;

AS 11.81.900(a)(2)

- 2 Other penalties available include community work project assignments per AS 12.55.055 including "work on projects designed to reduce or eliminate environmental damage." Courts in other states have sentenced environmental offenders to publish ads in newspapers saying they won't do it again or to lecture at schools or other public fora on the nature of their crime and why it did not pay; we should be creative in requesting sentences which fit the crime and which will have a deterrent effect. Also restitution per AS 12.55.045, as measured by the environmental damage, is always available as a penalty and should always be sought. The court may order restitution in an amount which does not exceed the actual damage or loss caused by the crime. Fee v. State, 656 P.2d 1202 (Alaska App. 1982).
- 3 Oil is defined as "petroleum, acid, coal or oil tar, lampblack, aniline, asphalt, bitumen or a residuary product of petroleum" per AS 46.03.740 and as "(9) 'oil' means oil of any kind and in any form, whether crude, refined, or a petroleum by-product, including but not limited to petroleum, fuel oil, gasoline, lubricating oils, oily sludge, oil refuse, oil mixed with other wastes, crude oils, liquefied natural gas, propane, butane, or other liquid hydrocarbons regardless of specific gravity," per AS 46.04.120(9).
- 4 Hazardous substance is defined as "(A) an element or compound that, when it enters into or on the surface or subsurface land or water of the state, presents an imminent and substantial danger to the public health or welfare, or to fish, animals, vegetation, or any part of the natural habitat in which fish, animals, or wildlife may be found; or (B) a substance defined as a hazardous substance under 42 U.S.C. 9601 - 9657 (Comprehensive Environmental Response, Compensation, and Liability Act of 1980); 'hazardous substance' does not include uncontaminated crude oil or uncontaminated refined oil in an amount of 10 gallons or less," per AS 46.08.900(6).
- 5 This is an unclassified misdemeanor.
- 6 Public record is defined as "a document, paper, book, letter, drawing, map, plat, photo, photographic file, motion picture, film, microfilm, microphotograph, exhibit, magnetic or paper tape, punched card or other document of any other material, regardless of physical form or characteristic, developed or received under law or in connection with the transaction of official business and preserved or appropriate for preservation by any agency, municipality, or any body subject to the open meeting provision of AS 44.62.310, as evidence of the organization, function, policies, decisions, procedures, operations, or other activities of the state or municipality or because of the informational value in it; it also includes staff manuals and instructions to staff that affect the public," per AS 11.81.900(47).

6-1197J ✓
Lauterbach
4/27/89

Original sponsors: Senate Special
Committee on Oil and Gas

1 IN THE SENATE

BY THE RESOURCES COMMITTEE

2 CS FOR SENATE BILL NO. 271 (Resources)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to civil penalties for the unpermit-
7 ted discharge of oil and for the failure to implement
8 an oil discharge contingency plan in response to an
9 unpermitted discharge of crude oil; and removing a
10 maximum limit on civil penalties for discharges of
11 oil."

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

13 * Section 1. AS 46.03.758(e) is amended to read:

14 (e) If [AFTER APRIL 19, 1978, IF] a discharge of oil in excess
15 of 18,000 gallons not permitted under applicable state and federal law
16 occurs within the territorial jurisdiction of the state, or into or
17 upon the adjacent outer continental shelf of the state, the following
18 persons, in addition to the person causing or permitting the dis-
19 charge, are jointly and severally liable to the state, in a civil
20 action, for the full amount of penalties established in the regula-
21 tions adopted under this section: [, OR \$100,000,000, WHICHEVER IS
22 LESS,]

23 (1) if the discharge occurs from any commercial or indus-
24 trial facility other than a vessel or offshore platform, the owner,
25 lessee or permittee, and operator of the facility;

26 (2) if the discharge occurs from a vessel,

27 (A) the owner and operator of the vessel; and

28 (B) the owner of the oil carried as cargo on the
29 vessel at the time the vessel was loaded, if the loading occurred

1 within the territorial jurisdiction of the state, or at a deep-
2 water port or other offshore storage facility adjacent to the
3 state; however, if the owner of the oil temporarily transfers
4 ownership of the oil to another person, and the transfer has the
5 purpose or effect of evading the vicarious liability imposed by
6 this section, the transferor will be considered the owner of the
7 oil for the purposes of this subsection; and

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

11 * Sec. 2. AS 46.03.758(1)(6) is amended to read:

12 (6) "oil" means petroleum [, CRUDE OIL,] and any substance
13 refined from petroleum, except uncontaminated [OR] crude oil;

14 * Sec. 3. AS 46.03 is amended by adding a new section to read:

15 Sec. 46.03.759. CIVIL PENALTIES FOR DISCHARGES OF CRUDE OIL.

16 (a) A person who is found to be liable under any other state law for
17 an unpermitted discharge of uncontaminated crude oil in excess of
18 18,000 gallons is, in addition to liability for any other penalties or
19 for damages or the cost of containment and cleanup, liable to the
20 state in a civil action for a civil penalty in the amount of

21 (1) \$5.83 per gallon of crude oil discharged for the first
22 420,000 gallons discharged; and

23 (2) \$10 per gallon of crude oil discharged for amounts
24 discharged in excess of 420,000 gallons.

25 (b) In determining how many gallons of crude oil have been dis-
26 charged for purposes of assessing a penalty under (a) of this section,
27 the court shall deduct the number of discharged gallons of crude oil
28 that the defendant proves were removed by the defendant from the
29 environment within the first 36 hours after the discharge as a result

1 of a cleanup operation undertaken in conformity with applicable state
2 and federal law.

3 (c) The court shall assess five times the penalty set out in (a)
4 of this section if the court finds

5 (1) the discharge was caused by the gross negligence or
6 intentional act of the defendant; or

7 (2) the defendant did not take reasonable measures to
8 contain and clean up the discharged oil.

9 (d) Notwithstanding AS 46.03.875, a person liable for civil
10 penalties under this section is not also liable for the discharge of
11 the crude oil under AS 46.03.760(a). A person causing or permitting a
12 discharge of uncontaminated crude oil of 18,000 gallons or less not
13 permitted under applicable state or federal law is liable for that
14 discharge under the penalty provisions of AS 46.03.760(a); however,
15 the court may impose a penalty of less than \$500 for the discharge.

16 (e) The court may reduce the penalty imposed under this section
17 if the defendant demonstrates, by a preponderance of the evidence,
18 that the discharge was caused solely by a negligent act of a third
19 person unless the third person is a person with whom the defendant was
20 found jointly and severally liable for the discharge under other state
21 law.

22 (f) In this section, "discharge" means entry of uncontaminated
23 crude oil into or upon the water or public land of the state, regard-
24 less of causation, except discharges into an enclosed and impervious
25 oil spill containment area.

26 * Sec. 4. AS 46.03.770 is amended to read:

27 Sec. 46.03.770. DETENTION OF VESSEL WITHOUT WARRANT AS SECURITY
28 FOR DAMAGES. A vessel that is used in or in aid of a violation of
29 AS 46.03.740 - 46.03.750 may be detained after a valid search by the

1 department, an agent of the department, a peace officer of the state,
2 or an authorized protection officer of the Department of Fish and
3 Game. Upon judgment of the court having jurisdiction that the vessel
4 was used in, or was the cause of, a violation of AS 46.03.740 -
5 46.03.750 with knowledge of its owner or under circumstances indicat-
6 ing that the owner should reasonably have had this knowledge, the
7 vessel may be held as security for payment to the state of the amount
8 of damages assessed by the court under AS 46.03.758, 46.03.759,
9 46.03.760, [AND] 46.03.822, and AS 46.04.030(g). If the damages as-
10 sessed are not paid within 30 days after judgment or final deter-
11 mination of an appeal, the vessel shall be sold at public auction, or
12 as otherwise directed by the court, and the damages paid from the
13 proceeds. The balance, if any, shall be paid by the court to the
14 owner of the vessel. The court shall permit the release of the vessel
15 upon posting of a bond set by the court in an amount not to exceed the
16 maximum amount of damages available under AS 46.03.758, 46.03.759,
17 46.03.760, [AND] 46.03.822, and AS 46.04.030(g). The damages received
18 under this section shall be transmitted to the proper state officer
19 for deposit in the general fund. A vessel seized under this section
20 shall be returned or the bond exonerated if no damages are assessed
21 under AS 46.03.758, 46.03.759, 46.03.760, [OR] 46.03.822, or AS 46.-
22 04.030(g).

23 * Sec. 5. AS 46.04.030(g) is amended to read:

24 (g) Failure of a holder of an approved oil discharge contingency
25 plan to have access to the quality or quantity of resources identified
26 in the plan and, in the event of a spill, to respond with those re-
27 sources within the shortest feasible time is a violation of this
28 chapter for purposes of AS 46.03.760(a), 46.03.765, 46.03.790, and any
29 other applicable law. If the holder of an approved oil discharge

1 contingency plan fails to respond to an unpermitted discharge of
2 uncontaminated crude oil with the quality and quantity of resources
3 identified in the plan and in a manner required under the plan, the
4 holder is strictly liable, jointly and severally, for the civil pen-
5 alty assessed under AS 46.03.759 against any other person for that
6 discharge.

7 * Sec. 6. AS 46.04.040(e) is amended to read:

8 (e) Financial responsibility may be demonstrated by self-insur-
9 ance, insurance, surety, or guarantee, under terms the department may
10 prescribe. An action brought under AS 46.03.758, 46.03.760(a) or (e),
11 [OR] 46.03.822, or AS 46.04.030(g) or to collect penalties imposed
12 under AS 46.03.759 may be brought in a state court directly against
13 the insurer or another person providing evidence of financial respon-
14 sibility. The applicant, and an insurer, surety, or guarantor shall
15 appoint an agent for service of process in the state. An insurer must
16 either be authorized by the Department of Commerce and Economic Devel-
17 opment to sell insurance in the state or be an unauthorized insurer
18 listed by the Department of Commerce and Economic Development as not
19 disapproved for use in the state.

20 * Sec. 7. AS 46.04.040(i) is amended to read:

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