

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672

2071 SCOMM 78: SENATE SPEC. COMM. ON OIL & GAS, 1991-1992

89

1 * Sec. 3. RATIFICATION OF PREVIOUS EXEMPTIONS GIVEN BY DEPARTMENT OF
2 ENVIRONMENTAL CONSERVATION TO NONCRUDE OIL OPERATIONS. Notwithstanding
3 AS 46.04.040, the Department of Environmental Conservation may, with respect to noncrude oil
4 operations, approve proof of financial responsibility by a person, other than the applicant, who does not
5 agree to be subject to a direct action in the state or to appoint an agent for service of process if the
6 applicant, before June 1, 1992,

7 (1) provides proof of financial responsibility in the form and amounts otherwise required
8 under AS 46.04.040;

9 (2) attests in a statement to the department that the applicant has diligently attempted to
10 obtain a form of proof of financial responsibility that would provide for a direct action and appointment
11 of an agent for service of process and that this form of proof is unavailable to the applicant; and

12 (3) agrees to continue diligent efforts to obtain a form of proof of financial responsibility
13 that would provide for a direct action and appointment of an agent for service of process.

14 * Sec. 4. Section 3 of this Act is retroactive to June 1, 1991.

15 * Sec. 5. If this Act takes effect after June 1, 1992, sec. 2 of this Act is retroactive to June 1, 1992.

16 * Sec. 6. Section 2 of this Act is repealed June 1, 1994.

17 * Sec. 7. This Act takes effect immediately under AS 01.10.070(c).

CS FOR SENATE BILL NO. 405 ()

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:

Referred:

Sponsor(s): SENATOR HOFFMAN

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to evidence of financial responsibility provided by persons who conduct
2 oil operations; and providing for an effective date."

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

4 * Section 1. AS 46.04.040(e) is amended to read:

5 (e) Financial responsibility may be demonstrated by (1) self-insurance, (2) insurance, (3)
6 surety, (4) guarantee, (5) letter of credit approved by the department, or (6) other proof of
7 financial responsibility approved by the department including proof of financial responsibility
8 provided by a group of insureds who have agreed to cover pollution risks of members of the
9 group under terms the department may prescribe. An action brought under AS 46.03.758,
10 46.03.759, 46.03.760(a) or (c), 46.03.822, or as 46.04.030(g) may be brought in a state court
11 directly against ~~the insurer, the group, or another person providing evidence of financial~~
12 ~~responsibility, however, their liability under this section is limited to the type of risk~~
13 ~~assumed and the amount of coverage specified in the proof of financial responsibility~~
14 ~~furnished to and approved by the department.~~ The applicant, and an insurer, surety,

pollution-like as insurers.

includes definition.

does not include

1.

applicant self-insuring

CSSB 405()

New Text Underlined [DELETED TEXT BRACKETED]

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

8 * Sec. 2. TEMPORARY LAW APPLICABLE TO NONCRUDE OIL OPERATIONS.

9 Notwithstanding AS 46.04.040, the Department of Environmental Conservation may, with respect to
10 noncrude oil operations, approve proof of financial responsibility by a person, other than the applicant,
11 who does not agree to be subject to a direct action in the state or to appoint an agent for service of
12 process if the applicant

13 (1) provides proof of financial responsibility in the form otherwise required under
14 AS 46.04.040 and in the amounts specified in AS 46.04.040;

15 *only thing they* (2) provides a sworn statement that
16 *arent known*
17 *doing*

(A) is acceptable to the department;

18 (B) attests that the applicant has diligently attempted to obtain a form of financial
19 responsibility that would provide for a direct action and appointment of an agent for service of
20 process;

21 (C) describes the steps the applicant has taken to obtain a form of financial
22 responsibility that would provide for a direct action and appointment of an agent for service of
23 process and the director of the division of insurance, Department of Commerce and Economic
24 Development, certifies that the steps taken were reasonable;

25 (D) states that a form of financial responsibility that would provide for a direct
26 action and appointment of an agent for service of process is unavailable to the applicant;

27 (3) continues diligent efforts to obtain a form of financial responsibility that would
28 provide for a direct action and appointment of an agent for service of process and provides a sworn
29 statement every six months that is acceptable to the department, containing the information required in
30 (2) of this section.

31 * Sec. 3. Section 2 of this Act is retroactive to June 1, 1991. * - ?

* Sec. 4. Section 2 of this Act is repealed June 1, 1994.

*not they what
they have been
doing
maybe to April 1-*

1 * Sec. 5. This Act takes effect immediately under AS 01.10.070(c).

7-LS2003D
Lauterbach
4/1/92

CS FOR SENATE BILL NO. 405 (OIL & GAS)
IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE SPECIAL COMMITTEE ON OIL AND GAS

Offered:
Referred:

Sponsor(s): SENATOR HOFFMAN

A BILL
FOR AN ACT ENTITLED

1 "An Act relating to evidence of financial responsibility provided by persons who conduct
2 oil operations; and providing for an effective date."

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

4 * Section 1. AS 46.04.040(c) is amended to read:

5 (c) Except as provided in (d) [(m)] of this section, a person may not operate a tank vessel
6 or an oil barge within the waters of the state, or cause or permit the transfer of oil to or from a
7 tank vessel or an oil barge, unless the person operating the tank vessel or oil barge has furnished
8 to the department, and the department has approved, proof of financial ability to respond in
9 damages. Proof of financial responsibility required under this subsection is

10 (1) \$300, per incident, for each barrel of storage capacity or \$100,000,000,
11 whichever is greater, for a tank vessel or barge carrying crude oil;

12 (2) \$100, per incident, for each barrel of storage capacity or \$1,000,000,
13 whichever is greater, subject to a maximum of \$35,000,000, for a tank vessel or barge carrying
14 noncrude oil.

1 * Sec. 2. AS 46.04.040(d) is repealed and reenacted to read:

2 (d) A tank vessel or oil barge that is conducting, or is available only for conducting, oil
3 discharge response operations is exempt from the requirements of (c) of this section if the tank
4 vessel or oil barge has received prior approval of the department. The department may approve
5 an exemption under this subsection upon application and presentation of information required by
6 the department.

7 * Sec. 3. AS 46.04.040(e) is amended to read:

8 (e) Financial responsibility may be demonstrated by (1) self-insurance, (2) insurance, (3)
9 surety, (4) guarantee, (5) letter of credit approved by the department, or (6) other proof of
10 financial responsibility approved by the department, including proof of financial responsibility
11 provided by a group of insureds who have agreed to cover pollution risks of members of the
12 group under terms the department may prescribe. [AN ACTION BROUGHT UNDER
13 AS 46.03.758, 46.03.759, 46.03.760(a) OR (e), 46.03.822, OR AS 46.04.030(g) MAY BE
14 BROUGHT IN A STATE COURT DIRECTLY AGAINST THE INSURER, THE GROUP, OR
15 ANOTHER PERSON PROVIDING EVIDENCE OF FINANCIAL RESPONSIBILITY. THE
16 APPLICANT, AND AN INSURER, SURETY, GUARANTOR, PERSON FURNISHING AN
17 APPROVED LETTER OF CREDIT, OR OTHER GROUP OR PERSON PROVIDING PROOF
18 OF FINANCIAL RESPONSIBILITY APPROVED BY THE DEPARTMENT SHALL APPOINT
19 AN AGENT FOR SERVICE OF PROCESS IN THE STATE.] For purposes of this subsection,
20 an insurer, other than a group of insureds whose agreement has been approved by the department,
21 must either be authorized by the Department of Commerce and Economic Development to sell
22 insurance in the state or be an unauthorized insurer listed by the Department of Commerce and
23 Economic Development as not disapproved for use in the state. Upon acceptance and approval
24 of proof of financial responsibility under this section, the department shall issue to the
25 applicant a certificate stating that the state's financial responsibility requirements have been
26 satisfied. The certificate must include the name of the facility, pipeline, tank vessel, or oil
27 barge for which it is issued and the expiration date of the certificate.

28 * Sec. 4. AS 46.04.040(g) is amended to read:

29 (g) The person whose proof of financial responsibility is accepted by the department
30 under this section shall notify the department at least 30 days before the effective date of a
31 change, expiration, or cancellation in the self-insurance, surety bond, guarantee, insurance

1 agreement, letter of credit, or other proof of financial responsibility. Application for renewal of
2 acceptance of proof of financial responsibility under this section must be filed at least 30 days
3 before the date of expiration.

4 * Sec. 5. AS 46.04.040(i) is amended to read:

5 (i) Financial responsibility under this section extends to a loss compensable under
6 AS 46.03.760(e) or 46.03.822 and an assessment under AS 46.03.758, 46.03.759, 46.03.760(a),
7 or AS 46.04.030(g). The applicant shall appoint an agent for service of process in the state.

8 * Sec. 6. AS 46.04.040(j) is repealed and reenacted to read:

9 (j) An action brought under AS 46.03.758, 46.03.759, 46.03.760(a) or (e), 46.03.822, or
10 AS 46.04.030(g) may be brought in a state court directly against a third-party insurer. A third-
11 party insurer shall appoint an agent for service of process in the state, but the agent is only
12 subject to service of process under this section for the actions specifically authorized under this
13 section. [The liability under this section of a third-party insurer is limited to the type of risk
14 assumed and the amount of coverage specified in the proof of financial responsibility provided
15 to and approved by the department.] Jurisdiction obtained under this section over a third-party
16 insurer is limited to issues concerning the liability imposed by this section and the sections cited
17 in this subsection. A third-party insurer who appears under this subsection is not by reason of
18 that appearance subject to service of process for another purpose even if the other purpose arises
19 from the same transaction or occurrence for which jurisdiction is already established. A third-
20 party insurer may tender the full amount of its potential liability under the financial responsibility
21 documents approved by the department under this section by appearing as an interpleader. Upon
22 deposit of the full amount with the court and proper notification of potential claimants, the court
23 shall dismiss the third-party insurer from an action brought under this section. Except as
24 otherwise specifically provided in this section, this section does not enlarge or diminish
25 jurisdiction and service for other purposes under other laws, regulations, or court rules. If
26 jurisdiction and service are properly obtained over a third-party insurer, a court may order
27 consolidation with an action brought under this section. [In this subsection, "third-party insurer"
28 means a third-party insurer, surety, guarantor, person furnishing a letter of credit, or other group
29 or person providing proof of financial responsibility on behalf of an applicant under this section.]

30 * Sec. 7. AS 46.04.040(k) is amended to read:

31

But does not include an
applicant.

1 (k) It is not a defense to an action brought for violation of (a) - (c) of this section that
2 the person charged believed in good faith that proof of financial ability to respond in
3 damages had been furnished to, and approved by, the department unless the person charged
4 (1) relied on a certificate of approval issued under (j) of this section; and
5 (2) did not know or have[UNLESS THE PERSON KNEW OR HAD] reason to
6 know at the time of the alleged violation that the approval had been revoked or was expired.

7 * Sec. 8. AS 46.04.040(l) is amended to read:

8 (l) Notwithstanding the requirements of (j) [(e)] of this section, the applicant may provide
9 evidence of financial responsibility provided by an insurer or other person who does not agree
10 to be subject to direct action in state courts or to appoint an agent for service of process if

11 (1) the department is satisfied that the insurance or other form of financial
12 responsibility covers judgments under the statutes listed in (j) [(e)] of this section;

13 (2) the applicant provides proof of \$50,000,000, or the amount required by (a) -
14 (c) of this section, whichever is less, in insurance or other form of financial responsibility that
15 meets the requirements of (j) [(e)] of this section; and

16 (3) the applicant provides a sworn statement or affidavit that insurance or other
17 form of financial responsibility that meets the requirements of (j) [(e)] of this section is not
18 available in greater amounts.

19 * Sec. 9. AS 46.04.040(m) is repealed and reenacted to read:

20 (m) The state is not liable for damages arising from its actions or omissions relating to
21 proof of financial responsibility required under this section.

22 * Sec. 10. TEMPORARY LAW APPLICABLE TO NONCRUDE OPERATIONS. Notwithstanding
23 AS 46.04.040(j), the Department of Environmental Conservation may, with respect to noncrude
24 operations, approve proof of financial responsibility by a person, other than the applicant, who does not
25 agree to be subject to direct action in the state or to appoint an agent for service of process if the
26 applicant

27 (1) provides proof of financial responsibility in the form required under AS 46.04.040(d)
28 and in the amounts specified in AS 46.04.040(a) - (c);

29 (2) provides a sworn statement that

30 (A) is acceptable to the department;

31 (B) attests that the applicant has diligently attempted to obtain a form of financial

1 responsibility that would provide for direct action and service of process;

2 (C) describes the steps the applicant has taken to obtain a form of financial
3 responsibility that would provide for direct action or service of process ~~and the director of the~~
4 ~~division of insurance, Department of Commerce and Economic Development, certifies that the~~
5 ~~steps taken were reasonable;~~

6 (D) states that a form of financial responsibility that would provide for direct
7 action or service of process is unavailable to the applicant;

8 (3) continues diligent efforts to obtain a form of financial responsibility that would
9 provide for direct action or service of process and provides a sworn statement every six months that is
10 acceptable to the department, containing the information required in (2) of this section.

11 * Sec. 11. Section 10 of this Act is repealed June 1, 1994.

12 * Sec. 12. If this Act takes effect after June 1, 1992, this Act is retroactive to June 1, 1992.

13 * Sec. 13. This Act takes effect immediately under AS 01.10.070(c).

SENATE BILL NO. 405

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY SENATOR HOFFMAN

Introduced: 2/14/92

Referred: O&G, Resources, Judiciary

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to evidence of financial responsibility provided by persons who conduct
2 oil operations; and providing for an effective date."

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

4 * Section 1. AS 46.04.040(i) is amended to read:

5 (i) Financial responsibility under this section extends to a loss compensable under
6 AS 46.03.760(e) or 46.03.822 and an assessment under AS 46.03.758, 46.03.759, 46.03.760(a),
7 or AS 46.04.030(g). However, if financial responsibility is demonstrated by use of insurance
8 or evidence that a group of insureds has agreed to cover pollution risks of members of the
9 group, the maximum liability of the ^{responsible party} insurer or group of insureds is limited to the maximum
10 amount covered by the insurance policy or the agreement of the group of insureds, subject
11 to the limitations on restrictions normally associated with these arrangements such as when
12 there is evidence that an [?]insurer has, in bad faith, failed to settle a claim or when attorney
13 fees and other costs of litigation are payable in addition to the face amount of a policy or
14 other agreement.

TO: Representative Bill Hudson
Chairman, Oil and Gas Committee

FROM Representative Richard Foster
House District 23

SUBJECT: HB 501

As HB 501 has a companion bill SB 405, I have provided you with a quick synopsis of the current status of both bills.

HB 501 and SB 405 (Senator Hoffman) are currently identical.

SB 405 was heard yesterday in Senate Oil and Gas. Several differences between the department, the AG's office and the sponsor were identified. Basically, the major problem is "DIRECT ACTION" The department require it, the insurance companies won't provide it, therefore the non-crude operators are out of compliance and therefore subject to being shut down.

HB 501 and SB 405 propose:

1. limiting financial responsibility of insurer to maximum amount covered by insurance policy.
2. Limits the current waiver of "direct action" requirements to crude oil operations, requiring a minimum of \$50 million direct action insurance. A crude operator may obtain insurance for any amount of \$50 million from a company who does not have direct access.
2. Gives authority for DEC to waive direct action requirement for non-crude oil operation. Non-crude operators may obtain insurance from a company, however, the company may not have agreed to direct access.

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

SENATE BILL NO. 405

IN THE LEGISLATURE OF THE STATE OF ALASKA

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6 AS 46.03.760(e) or 46.03.822 and an assessment under AS 46.03.758, 46.03.759, 46.03.760(a),
7 or AS 46.04.030(g). However, if financial responsibility is demonstrated by use of insurance
8 or evidence that a group of insureds has agreed to cover pollution risks of members of the
9 group, the maximum liability of the ^{responsible party} insurer or group of insureds is limited to the maximum
10 amount covered by the insurance policy or the agreement of the group of insureds, subject
11 to the limitations on restrictions normally associated with these arrangements such as when
12 there is evidence that an [?]insurer has, in bad faith, failed to settle a claim or when attorney
13 fees and other costs of litigation are payable in addition to the face amount of a policy or
14 other agreement.

1 * Sec. 2. AS 46.04.040(l) is amended to read:

2 (l) Notwithstanding the requirements of (e) of this section, an [THE] applicant may ,
3 with respect to crude oil operations, provide evidence of financial responsibility provided by
4 an insurer or other person who does not agree to be subject to direct action in state courts or to
5 appoint an agent for service of process if

6 (1) the department is satisfied that the insurance or other form of financial
7 responsibility covers judgments under the statutes listed in (i) [(e)] of this section, subject to the
8 limitation described in (i) of this section;

9 (2) the applicant provides proof of \$50,000,000, or the amount required by (a) -
10 (c) of this section, whichever is less, in insurance or other form of financial responsibility that
11 meets the requirements of (e) of this section; and

12 (3) the applicant provides a sworn statement or affidavit that insurance or other
13 form of financial responsibility that meets the requirements of (e) of this section is not available
14 in greater amounts.

15 * Sec. 3. AS 46.04.040 is amended by adding a new subsection to read:

16 (n) Notwithstanding the requirements of (e) of this section, an applicant may, with
17 respect to noncrude oil operations, provide evidence of financial responsibility provided by an
18 insurer or other person who does not agree to be subject to direct action in state courts or to
19 appoint an agent for service of process if

20 (1) the department is satisfied that the insurance or other form of financial
21 responsibility covers judgments under the statutes listed in (i) of this section, subject to the
22 limitation described in (i) of this section; and

23 (2) the applicant provides a sworn statement or affidavit that insurance or another
24 form of financial responsibility that meets the requirements of (e) of this section is not available.

25 * Sec. 4. AS 46.04.040(n), enacted by sec. 3 of this Act, is repealed June 1, 1994.

26 * Sec. 5. Section 32(d), ch. 191, SLA 1990, as added by sec. 3, ch. 9, SLA 1991, is repealed June 1,
27 1992.

28 * Sec. 6. Sections 1 - 3 of this Act are retroactive to June 1, 1991.

29 * Sec. 7. If this Act takes effect after June 1, 1992, sec. 5 of this Act is retroactive to June 1, 1992.

30 * Sec. 8. This Act takes effect immediately under AS 01.10.070(c).

TO: Representative Bill Hudson
Chairman, Oil and Gas Committee

FROM Representative Richard Foster
House District 23

SUBJECT: HB 501

As HB 501 has a companion bill SB 405, I have provided you with a quick synopsis of the current status of both bills.

HB 501 and SB 405 (Senator Hoffman) are currently identical.

SB 405 was heard yesterday in Senate Oil and Gas. Several differences between the department, the AG's office and the sponsor were identified. Basically, the major problem is "DIRECT ACTION" The department require it, the insurance companies won't provide it, therefore the non-crude operators are out of compliance and therefore subject to being shut down.

HB 501 and SB 405 propose:

1. limiting financial responsibility of insurer to maximum amount covered by insurance policy.
2. Limits the current waiver of "direct action" requirements to crude oil operations, requiring a minimum of \$50 million direct action insurance. A crude operator may obtain insurance for any amount of \$50 million from a company who does not have direct access.
2. Gives authority for DEC to waive direct action requirement for non-crude oil operation. Non-crude operators may obtain insurance from a company, however, the company may not have agreed to direct access.

The Department of Environmental Conservation propose:

1. clarifies that insurers are only liable up to the amounts specified in their policies.
2. Narrows scope to allow an injured Alaskan to sue to insurer in Alaska court, however, jurisdiction would be limited to the limits of the insurance policy.

**HB 501
FINANCIAL RESPONSIBILITY
OF NONCRUDE OPERATORS
SPONSOR STATEMENT**

In 1989, the legislature enacted strong legislation dealing with oil spill prevention and clean up standards. HB 567, which passed in 1990, made three major changes in state oil spill protection:

1. It established new response planning standards
2. Allowed Department of Environmental Conservation to give credits for incorporating prevention measures into contingency plans
3. imposed new financial responsibility requirements for contingency plan holders.

Although HB 567 was passed as a result of the Exxon Valdez oil spill and was aimed at the crude oil industry, non-crude carriers and facilities were also subject to the changes. Regulations implementing these changes have been drafted by the Department of Environmental Conservation, and are still being reviewed by the Department of Law.

PROBLEM

Smaller fuel distributors, barge lines that transport refined petroleum products, and rural electric utilities that must maintain fuel stores have found it all but impossible to meet the new financial responsibility requirements imposed by HB 567. Although these non-crude operators are able to purchase the required amounts of pollution insurance, underwriters in both the domestic and overseas markets steadfastly refuse to include the "direct action" clause in these policies that Alaska law requires.

WHY?

The insurance companies perceive the risk as far too great. With Alaska state courts seemingly allowing large direct action claims, the insurance industry feel the their liability is unlimited.

Alaska's direct action requirements have been in effect since 1981. The provision allows an action to be brought in state court directly against the insurer, rather than going first to the responsible party. Ambiguities about whether insurers are limited to the face amount of the policy, plus the greatly increased amounts of coverage required since the *Exxon Valdez* spill, have combined to produce the current unavailability of direct action coverage.

When it became clear by early 1991 that insurers would not provide direct action coverage, Senator Lyman Hoffman introduced legislation to delay the effective date of HB 567's financial responsibility requirements for non-crude operators. The hope was that over the year's time, either the insurance markets would overcome their objections to providing direct action, or that perhaps a risk pool could be developed to provide such coverage. The Legislature unanimously approved Senator Hoffman's bill.

Sen. Hoffman's legislation also delayed the effective date of the enhanced oil discharge prevention and contingency plans HB 567 required of non-crude operators; most operators appear to be prepared to meet the new requirements and no further delay in complying with them is being sought.

Nearly one year later, however, there has been no change in the insurance markets' position on direct action coverage, and development of an insurance pool so far has proved unfeasible. With the June 1, 1992, effective date of the financial responsibility requirements approaching, and the unavailability of direct action coverage just as complete as it was in 1991, non-crude operators once again face the prospect of either operating out of compliance with Alaska law or ceasing operations. The large crude oil operators do not face this problem, because they have sufficient assets and working capital to either self-insure or comply with the law through other means, such as surety bonds or letters of credit.

Over the past two years, DEC has given conditional waivers to some non-crude operators who have been unable to obtain direct action insurance but who in all other respects meet the state's financial responsibility requirements. Whether DEC has authority to grant such waivers is highly questionable, however, and the agency recently decided to end the practice.

SOLUTION

HB 501 does several things:

1. It clarifies that financial responsibility of an insurer is limited to the maximum amount covered by the insurance policy, except for traditional exceptions such as attorney fees, litigation costs, or bad faith failures to settle claims.
2. It limits the current quasi-waiver of the "direct action" requirements to crude oil operators, which requires a minimum of \$50,000 of "direct action" insurance.
3. It gives new authority to DEC to waive the "direct action" requirement for non-crude oil operations, with no minimum "direct action" insurance requirement.

PROOF OF FINANCIAL RESPONSIBILITY

Type of Facility	Before June 1, 1991	After June 1, 1991
OIL TERMINALS		
Oil Terminals/Crude (5,000 barrel (bbl.) and up)	\$10 per bbl. of storage capacity or \$1,000,000, whichever is greater, \$50,000,000 maximum	\$50,000,000 per incident
Oil Terminals/Non-Crude (10,000 bbl. and up)	Same as above	\$25 per bbl. of storage capacity or \$1,000,000, whichever is greater, \$50,000,000 maximum
Oil Terminals/Crude and Non-Crude combined	Same as above	If mostly crude - \$50,000,000 per incident. If mostly non-crude - \$25 per bbl. of total capacity
PIPELINES & EXPLORATION FACILITIES		
Pipelines and Offshore Exploration or Production	\$35,000,000 per incident	\$50,000,000 per incident
Onshore Production	EXEMPT	\$20,000,000 per incident
Onshore Exploration	EXEMPT	\$5,000,000 per incident
VESSELS & BARGES		
Tank Vessel & Oil Barge/Crude	Trans-Alaska Pipeline related: \$14,000,000. Other tankers: per Clean Water Act or \$20,000,000, whichever is greater. Other barges: per CWA or \$1,000,000.	\$300 per bbl. per incident storage capacity or \$100,000,000, whichever is greater
Tank Vessel & Barge/Non-Crude	Same as above	\$100 per bbl. storage capacity per incident or \$1,000,000, whichever is greater, \$35,000,000 maximum



Alaska
Department of
Environmental
Conservation

credited to a special account called the "oil and hazardous substance release mitigation account". (§ 2 ch 116 SLA 1980; am § 8 ch 191 SLA 1990)

Sec. 46.04.020. Removal of oil discharges. (a) A person causing or permitting the discharge of oil shall immediately contain and clean up the discharge. The department may waive this requirement

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

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

(b) The containment and cleanup of discharged oil shall be carried out in a manner approved by the department. Wastes generated as a result of containment or cleanup activities shall be disposed of in a manner approved by the department. The requirement of this subsection for approval of containment and cleanup activities does not apply to the United States Coast Guard or United States Environmental Protection Agency acting under the authority of § 311(c) or (d) of the Clean Water Act.

(c) If the department determines that containment or cleanup activities are not adequate, it may direct the person engaged in the activities to cease and may undertake the activities itself through contract or its own resources, or both. The department may not direct the cessation of containment or cleanup activities undertaken by the United States Coast Guard or United States Environmental Protection Agency under § 311 of the Clean Water Act. However, the department may undertake, direct, or authorize supplemental cleanup or containment efforts.

(d) The department shall provide for the immediate containment or cleanup of an oil discharge of unexplained origin unless

(1) the department determines, in consultation with the United States Coast Guard or the United States Environmental Protection Agency that containment or cleanup of the oil discharge is technically not feasible; or

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

(e) The department shall enter into negotiations for memoranda of understanding or cooperative agreements with the United States Coast Guard, the United States Environmental Protection Agency, and other persons in order to

(1) facilitate coordinated and effective oil discharge prevention and response in the state, including agreements relating to development and enforcement of vessel traffic control and monitoring systems for tank vessels and oil barges operating in or near the waters of the state;

(2) provide for cooperative review of oil discharge prevention and contingency plans submitted to the department under AS 46.04.030;

(3) provide for cooperative inspections of oil terminal facilities by the department and the United States Coast Guard or United States Environmental Protection Agency; and

(4) provide for cooperative oil discharge notification procedures.

(f) In fulfilling its responsibilities under (e) of this section, the department shall consult with the governing bodies of municipalities and villages. (§ 2 ch 116 SLA 1980; am § 8 ch 191 SLA 1990; am § 12 ch 83 SLA 1991)

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

Effect of amendments. — The 1990 amendment, effective June 27, 1990, substituted all of the present language of

paragraph (e)(1) following "discharge" for "response in the state", and inserted "prevention and" in paragraph (e)(2).

The 1991 amendment, effective June 28, 1991, added subsection (f).

Editor's notes. — Section 311 of the Clean Water Act, referred to in subsections (b) and (c), may be found in 33 U.S.C. § 1311.

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

Sec. 46.04.030. Oil discharge prevention and contingency plans. (a) A person may not cause or permit the operation of an oil terminal facility in the state unless an oil discharge prevention and contingency plan for the facility has been approved by the department and the person is in compliance with the plan.

(b) A person may not cause or permit the operation of a pipeline or an exploration or production facility in the state unless an oil discharge prevention and contingency plan for the pipeline or facility has been approved by the department and the person is in compliance with the plan.

(c) Except as provided in (n) of this section, a person may not operate a tank vessel or an oil barge within the waters of the state, or cause or permit the transfer of oil to or from a tank vessel or an oil barge, unless an oil discharge prevention and contingency plan for the tank vessel or oil barge has been approved by the department and the person is in compliance with the plan.

(d) Upon approval of a contingency plan, the department shall issue to the plan holder a certificate stating that the contingency plan has been approved by the department. The certificate must include the name of the facility, pipeline, tank vessel, or oil barge for which it is issued, the effective date of the contingency plan, and the date by which the contingency plan must be submitted for renewal. A contingency plan must be submitted for renewal every three years.

(e) The department may attach reasonable terms and conditions to its approval or modification of a contingency plan that the department determines are necessary to ensure that the applicant for a contingency plan has access to sufficient resources to protect environmentally sensitive areas and to contain, clean up, and mitigate potential oil discharges from the facility or vessel as provided in (k) of this section, and to ensure that the applicant complies with the contingency plan. The contingency plan must provide for the use by the applicant of the best technology that was available at the time the contingency plan was submitted or renewed. The department may require an applicant or holder of an approved contingency plan to take steps necessary to demonstrate its ability to carry out the contingency plan, including:

- (1) periodic training;
 - (2) response team exercises;
 - (3) verifying access to inventories of equipment, supplies, and personnel identified as available in the approved contingency plan.
- (f) Upon request of a plan holder or on the department's own initiative, the department, after notice and opportunity for hearing, may modify its approval of a contingency plan if the department determines that a change has occurred in the operation of a facility or vessel necessitating a suspended or supplemented plan, or the operator's discharge experience demonstrates a necessity for modification. The department, after notice and opportunity for hearing, may revoke its approval of a contingency plan if the department determines that:
- (1) approval was obtained by fraud or misrepresentation;
 - (2) the operator does not have access to the quality or quantity of resources identified in the plan;
 - (3) a term or condition of approval or modification has been violated; or

(4) the person is not in compliance with the contingency plan and the deficiency substantially affects the plan holder's response capability.

(g) Failure of a holder of an approved or modified contingency plan to comply with the plan, or to have access to the quality or quantity of resources identified in the plan or to respond with those resources within the shortest possible time in the event of a spill is a violation of this chapter for purposes of AS 46.03.760(a), 46.03.765, 46.03.790, and any other applicable law. If the holder of an approved or modified contingency plan fails to respond to and conduct cleanup operations of an unpermitted discharge of crude oil, the department may, in addition to the civil penalty assessed under AS 46.03.758, 46.03.759, or 46.03.760 against any other person for that discharge:

resources identified in the plan and in a manner required under the plan, the holder is strictly liable, jointly and severally, for the civil penalty assessed under AS 46.03.758, 46.03.759, or 46.03.760 against any other person for that discharge.

(h) The department is the only state agency that has the power to approve, modify, or revoke a contingency plan for the purposes of this section. The department shall exercise its power under this section in a timely manner. Except as provided in (i) of this section, it is not a defense to an action brought for a violation of (a) — (c) of this section that the person charged believed that a current contingency plan had been approved by the department.

(i) It is a defense to an action brought for a violation of (a) — (c) of this section that the person charged relied on a certificate of approval issued by the department under (d) of this section unless the person knew or had reason to know at the time of the alleged violation that approval of the plan had been revoked or that the holder of the plan was not capable of carrying out the plan.

(j) Before the department approves or modifies a contingency plan under this section, the department shall provide a copy of the contingency plan to the Department of Fish and Game and to the Department of Natural Resources for their review. The department shall by regulation establish the procedures and time limits applicable to agency review of contingency plans.

(k) Except as provided in (m) and (o) of this section, the holder of an approved contingency plan required under this section shall maintain, or have available under contract, in its region of operation or in another region of operation approved by the department, singly or in conjunction with other operators, sufficient oil discharge containment, storage, transfer, and cleanup equipment, personnel, and resources to meet the following response planning standards:

(1) for a discharge from an oil terminal facility, the plan holder shall plan to be able to contain or control, and clean up a discharge equal to the capacity of the largest oil storage tank at the facility within 72 hours, except that if the department determines that the facility is located in an area of high risk because of natural or man-made conditions outside of the facility, it may increase the volume requirement under this paragraph so that the contingency plan must be designed for a response that is greater in amount than the capacity of the largest oil storage tank at the facility;

(2) for a discharge from an exploration or production facility or a pipeline, the plan holder shall plan to be able to contain or control, and clean up the realistic maximum oil discharge within 72 hours;

(3) for a discharge of crude oil from a tank vessel or oil barge, the plan holder shall plan to be able to contain or control, and clean up a realistic maximum oil discharge as provided in (A), (B), and (C) of this

(4) "region of operation," with respect to the holder of a contingency plan, means the area where the operations of the holder that require a contingency plan are located, the boundaries of which correspond to the regional boundaries established by the commissioner for regional master planning purposes under AS 46.04.210. (§ 2 ch 116 SLA 1980; am §§ 1, 2 ch 140 SLA 1988; am § 6 ch 41 SLA 1989; am §§ 9, 10 ch 191 SLA 1990; am § 59 ch 21 SLA 1991)

Cross references. — For interim operation by persons with approved crude oil discharge prevention and contingency plans who submit amendments to comply with ch. 191, SLA 1990, see § 4, ch. 9, SLA 1991 in the Temporary and Special Acts.

Effect of amendments. — The 1988 amendment, in subsection (e), added paragraphs (1)-(3) and substituted "or holder of an approved contingency plan to take steps necessary to demonstrate its ability to carry out the contingency plan, including" for "to undertake discharge exercises" in the last sentence in the introductory paragraph; and added subsection (g).

The 1989 amendment, effective August 10, 1989, added the second sentence in subsection (g).

The 1990 amendment, effective June 27, 1990, rewrote subsections (a)-(g) and added subsections (h)-(q).

The 1991 amendment, effective June 11, 1991, in subsection (h), deleted "for prosecutions under AS 46.03.790(h) and

except" following "Except" at the beginning of the third sentence.

Editor's notes. — Section 32(a), ch. 191, SLA 1990, as amended by § 2(a), ch. 9, SLA 1991, provides that (k)-(m) of this section "do not apply to oil discharge prevention and contingency plans for crude oil operations until June 1, 1991. On and after June 1, 1991, a contingency plan for a crude oil operation must comply with AS 46.04.030(k)-(m), regardless of whether the contingency plan is due for renewal under AS 46.04.030(d), as amended by § 9, ch. 191, SLA 1990." Section 32(c), ch. 191, SLA 1990, as added by § 3, ch. 9, SLA 1991, provides that (k)-(m) of this section "do not apply to oil discharge prevention and contingency plans for noncrude oil operations until June 1, 1992. On and after June 1, 1992, a contingency plan for a noncrude oil operation must comply with AS 46.04.030(k)-(m), regardless of whether the contingency plan is due for renewal under AS 46.04.030(d), as amended by § 9, ch. 191, SLA 1990."

Sec. 46.04.040. Proof of financial responsibility. (a) A person may not cause or permit the operation of an oil terminal facility in the state unless the person has furnished to the department, and the department has approved, proof of financial ability to respond in damages. Proof of financial responsibility required for a crude oil terminal is \$50,000,000 per incident. Proof of financial responsibility required for a noncrude oil terminal is \$25, per incident, for each barrel of total noncrude oil storage capacity at the terminal or \$1,000,000, whichever is greater, subject to a maximum of \$50,000,000. For purposes of this subsection, an oil terminal facility that stores both crude oil and noncrude oil is subject to the financial responsibility requirements applicable to the type of facility that corresponds to the type of oil storage that predominates at the facility. However, if the facility stores more noncrude oil than crude oil, the \$25 per incident, per barrel requirement of this subsection applies to each barrel of oil storage capacity at the facility.

(b) A person may not cause or permit the operation of a pipeline or an exploration or production facility in the state unless the person has furnished to the department, and the department has approved, proof of financial ability to respond in damages. Proof of financial responsibility required for a pipeline or an offshore exploration or production facility is \$50,000,000 per incident. Proof of financial responsibility required for an onshore production facility is \$20,000,000 per incident. Proof of financial responsibility required for an onshore exploration facility is \$5,000,000 per incident.

(c) Except as provided in (m) of this section, a person may not operate a tank vessel or an oil barge within the waters of the state, or cause or permit the transfer of oil to or from a tank vessel or an oil barge, unless the person operating the tank vessel or oil barge has furnished to the department, and the department has approved, proof of financial ability to respond in damages. Proof of financial responsibility required under this subsection is

(1) \$300, per incident, for each barrel of storage capacity or \$100,000,000, whichever is greater, for a tank vessel or barge carrying crude oil;

(2) \$100, per incident, for each barrel of storage capacity or \$1,000,000, whichever is greater, subject to a maximum of \$35,000,000, for a tank vessel or barge carrying noncrude oil.

(d) Except as provided in (k) of this section, it is not a defense to an action brought for violation of (a) — (c) of this section that the person charged believed in good faith that proof of financial ability to respond in damages had been furnished to, and approved by, the department.

(e) Financial responsibility may be demonstrated by (1) self-insurance, (2) insurance, (3) surety, (4) guarantee, (5) letter of credit approved by the department, or (6) other proof of financial responsibility approved by the department, including proof of financial responsibility provided by a group of insureds who have agreed to cover pollution risks of members of the group under terms the department may prescribe. An action brought under AS 46.03.758, 46.03.759, 46.03.760(a) or (e), 46.03.822, or AS 46.04.030(g) may be brought in a state court directly against the insurer, the group, or another person providing evidence of financial responsibility. The applicant, and an insurer, surety, guarantor, person furnishing an approved letter of credit, or other group or person providing proof of financial responsibility approved by the department shall appoint an agent for service of process in the state. For purposes of this subsection, an insurer, other than a group of insureds whose agreement has been approved by the department, must either be authorized by the Department of Commerce and Economic Development to sell insurance in the state or be an unauthorized insurer listed by the Department of Commerce and Economic Development as not disapproved for use in the state.

(f) Acceptance of proof of financial responsibility expires

(1) one year from its issuance for self-insurance;
 (2) on the effective date of a change in the surety bond, guarantee, insurance agreement, letter of credit, or other proof of financial responsibility; or

(3) on the expiration or cancellation of the surety bond, guarantee, insurance agreement, letter of credit, or other proof of financial responsibility.

(g) The person whose proof of financial responsibility is accepted by the department under this section shall notify the department at least 30 days before the effective date of a change, expiration or cancellation in the surety bond, guarantee, insurance agreement, letter of credit, or other proof of financial responsibility. Application for renewal of acceptance of proof of financial responsibility under this section must be filed at least 30 days before the date of expiration.

(h) The department, after notice and hearing, may revoke acceptance of proof of financial responsibility if it determines:

- (1) acceptance was procured by fraud or misrepresentation;
- (2) a change of circumstance has occurred other than a change specified in (f)(1) — (3) of this section, which would have warranted the application.

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

(j) Upon acceptance and approval of proof of financial responsibility under this section, the department shall issue to the applicant a certificate stating that the state's financial responsibility requirements have been satisfied. The certificate must include the name of the facility, pipeline, tank vessel, or oil barge for which it is issued and the expiration date of the certificate.

(k) It is a defense to an action brought for violation of (a) — (c) of this section that the person charged relied on a certificate of approval issued under (j) of this section unless the person knew or had reason to know at the time of the alleged violation that the approval had been revoked or was expired.

(l) Notwithstanding the requirements of (e) of this section, the applicant may provide evidence of financial responsibility provided by an insurer or other person who does not agree to be subject to direct action in state courts or to appoint an agent for service of process if:

(1) the department is satisfied that the insurance or other form of financial responsibility covers judgments under the statutes listed in (e) of this section;

(2) the applicant provides proof of \$50,000,000, or the amount required by (a) — (c) of this section, whichever is less, in insurance or other form of financial responsibility that meets the requirements of (e) of this section.

(3) the applicant provides a sworn statement or affidavit that insurance or other form of financial responsibility that meets the requirements of (e) of this section is not available in greater amounts.

(m) A tank vessel or oil barge that is conducting, or is available only for conducting, oil discharge response operations is exempt from the requirements of (c) of this section if the tank vessel or oil barge has received prior approval of the department. The department may approve an exemption under this subsection upon application and presentation of information required by the department. (§ 2 ch 116 SLA 1980; §§ 117, 118 ch 59 SLA 1982; am §§ 7, 8 ch 41 SLA 1989; am §§ 11 — 18 ch 191 SLA 1990; am § 60 ch 21 SLA 1991)

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

Effect of amendments. — The 1989 amendment, effective August 10, 1989, inserted "or AS 46.04.030(g)" or to collect penalties imposed under AS 46.03.759" in the second sentence in subsection (e) and inserted the references to "46.03.759" and "46.04.030(g)" in subsection (i).

The 1990 amendment, effective June 27, 1990, rewrote subsections (a)-(f); in subsection (g) substituted all of the present language of the first sentence following "guarantee" for "or insurance agreement"; and added subsections (j)-(m).

The 1991 amendment, effective June 11, 1991, in subsection (d), deleted "for prosecutions under AS 46.03.790(b) and except" following "Except" at the beginning.

Editor's notes. — Section 32, ch. 191, SLA 1990, as amended by § 2(b), ch. 9, SLA 1991, provides that the amendments to this section made by §§ 11-18, ch. 191, SLA 1990, "do not apply to persons re-

quired to show proof of financial responsibility for crude oil operations until June 1, 1991. On and after June 1, 1991, proof of financial responsibility for a crude oil operation must comply with AS 46.04.040, as amended by §§ 11-18, ch. 191, SLA 1990, regardless of whether acceptance of proof of financial responsibility has expired under AS 46.04.040(f), as amended by § 16, ch. 191, SLA 1990." Section 32(d), ch. 191, SLA 1990, as added by § 3, ch. 9, SLA 1991, provides that the amendments to this section made by §§ 11-13, ch. 191, SLA 1990 "do not apply to persons required to show proof of financial responsibility for noncrude oil operations until June 1, 1992. On and after June 1, 1992, proof of financial responsibility for noncrude oil operation must comply with AS 46.04.040, as amended by §§ 11-18, ch. 191, SLA 1990, regardless of whether acceptance of proof of financial responsibility has expired under AS 46.04.040(f), as amended by § 16, ch. 191, SLA 1990."

Opinions of attorney general. — Letters of undertaking are not adequate for proof of financial responsibility under this section. August 28, 1986 Op. Att'y Gen.

Sec. 46.04.045. Adjustment of dollar amounts. (a) The dollar amounts in AS 46.04.040 change, as provided in this section, according to and to the extent of changes in the Consumer Price Index for all urban consumers for the Anchorage metropolitan area compiled by the Bureau of Labor Statistics, United States Department of Labor (the index). The index for January 1990 is the reference base index.

(b) The dollar amounts change on October 1 of each third year according to the percentage change between the index for January of that year and the most recent index used to determine whether to change the dollar amounts. After calculation of the new amounts, the

(A) for tank vessels and oil barges having a cargo volume of less than 500,000 barrels, the plan holder shall maintain at a minimum in the region of operation, equipment, personnel, and other resources sufficient to contain or control, and clean up a 50,000 barrel discharge within 72 hours;

(B) for tank vessels and oil barges having a cargo volume of 500,000 barrels or more, the plan holder shall maintain at a minimum in its region of operation, equipment, personnel, and other resources sufficient to contain or control, and clean up a 300,000 barrel discharge within 72 hours;

(C) in addition to the minimum equipment, personnel, and other resources required to be maintained within the region of operation by (A) or (B) of this paragraph, a plan holder shall maintain, either within or outside of the plan holder's region of operation, additional equipment, personnel, and other resources sufficient to contain or control, and clean up a realistic maximum discharge within the shortest possible time; the plan holder must demonstrate that the equipment, personnel, and other resources maintained outside the plan holder's region of operation are accessible to the plan holder and will be deployed and operating at the discharge site within 72 hours;

(4) for a discharge from a tank vessel or oil barge carrying noncrude oil in bulk as cargo, the plan holder shall plan to be able to contain or control 15 percent of the maximum capacity of the vessel or barge or the realistic maximum oil discharge, whichever is greater, within 48 hours and clean up the discharge within the shortest possible time consistent with minimizing damage to the environment;

(5) for a discharge subject to the provisions of (1) — (3) of this subsection that enters a receiving environment other than open water, the time requirement for clean up of the portion of the discharge that enters the receiving environment may, in the department's discretion, be within the shortest possible time consistent with minimizing damage to the environment.

(l) The provisions of (k) of this section do not constitute cleanup standards that must be met by the holder of a contingency plan. Notwithstanding (k) of this section, failure to remove a discharge within the time periods set out in (k) of this section does not constitute failure to comply with a contingency plan for purposes of (g) of this section or for the purpose of imposing administrative, civil, or criminal penalties under any other law.

(m) When considering whether to approve or modify a contingency plan, the department may consider evidence that oil discharge prevention measures such as double hulls or double bottoms on vessels or barges, secondary containment systems, hydrostatic testing, enhanced vessel traffic systems, or enhanced crew or staffing levels have been implemented, and, in its discretion, may make exceptions to the requirements of (k) of this section to reflect the reduced risk of oil dis-

charges from the facility, pipeline, vessel, or barge for which the plan is submitted or being modified.

(n) A tank vessel or oil barge that is conducting, or is available only for conducting, oil discharge response operations is exempt from the requirements of (c) of this section if the tank vessel or oil barge has received prior approval of the department. The department may approve exemptions under this subsection upon application and presentation of information required by the department.

(o) A holder of an approved contingency plan does not violate the terms of the contingency plan by furnishing to another plan holder, with the approval of the department, equipment, materials, or personnel to assist the other plan holder in a response to an oil discharge. The plan holder shall replace or return the transferred equipment, materials, and personnel as soon as feasible. The department shall by regulation determine the maximum amount of equipment, materials, or personnel and the maximum amount of time for which it will approve a transfer.

(p) The department shall approve or disapprove a proposed contingency plan within 65 days after it receives a complete application for approval under this section.

(q) In this section,

(1) "contingency plan" means an oil discharge prevention and contingency plan required under this section;

(2) "in compliance with the plan" means, with respect to a contingency plan, to

(A) establish and carry out procedures identified in the plan as being the responsibility of the holder of the plan;

(B) have access to and have on hand the quantity and quality of equipment, personnel, and other resources identified as being accessible or on hand in the plan;

(C) fulfill the assurances espoused in the plan in the manner described in the plan;

(D) comply with terms and conditions attached to the plan by the department under the authority of (e) of this section; and

(E) successfully demonstrate the ability to carry out the plan when required by the department under (e) of this section;

(3) "realistic maximum oil discharge" means the maximum and most damaging oil discharge that the department estimates could occur during the lifetime of the tank vessel, oil barge, facility, or pipeline based on the size, location, and capacity of the tank vessel, oil barge, facility, or pipeline; on the department's knowledge and experience with the tank vessel, oil barge, facility, or pipeline or with similar tank vessels, oil barges, facilities, or pipelines; and on the department's analysis of possible mishaps to the tank vessel or oil barge or at the facility or pipeline or to similar tank vessels or oil barges or at similar facilities or pipelines.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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March 11, 1992

Senator Sam Cotten
Senator Lyman F. Hoffman
Senate Select Committee on Oil and Gas
P.O. Box V
Juneau, AK 99811

Dear Senators Cotten & Hoffman:

In response to questions raised by your staff in the March 5 work session on SB 405, we enclose some materials of potential interest to you.

With regard to questions concerning the public policy considerations behind direct action statutes, we enclose two articles which discuss those issues. Note, The Direct Action Statute and Ocean Marine Insurance: Can Protection and Indemnity Insurers Convince the Courts "To Manacle An Old And Beaten Enemy," 37 Loyola Law Review 121, 122-23 (1991); Comment, Direct Actions Against Marine Insurers: A Call for Uniform Legislation, 21 Willamette Law Review 279, 280-90 (1985). We have also forwarded separately copies of our office's research binders setting forth the legislative history of Alaska's financial responsibility statutes.

Finally, with regard to questions about the trust fund established by the federal Oil Pollution Act of 1990 ("OPA 90"), we enclose several commentaries on the Act. Several are written by American private maritime attorneys and one by a director of one of the British P&I Clubs. Once the OPA 90 regulations are adopted by the federal government, injured Alaskan private claimants would have access to the fund for oil pollution damages recognized in the act. Claims will be first submitted to the responsible parties for the spill and subsequently to the federal fund.

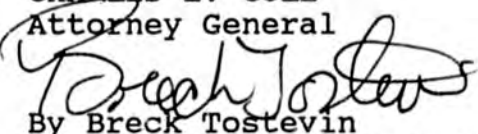
Senator Sam Cotten
Senator Lyman F. Hoffman
Senate Select Committee on Oil and Gas

March 11, 1992
Page 2

We trust that this material will be of assistance to you.

Sincerely,

CHARLES E. COLE
Attorney General


By Breck Tostevin
Assistant Attorney General

BCT/jv

Enclosures (6)

cc: Deborah Behr, DOL/Juneau (w/o enc)
Paul Fuhs, Office of the Governor (w/o enc)

3/12/92

Sec. 46.04.040. Proof of financial responsibility. (a) A person may not cause or permit the operation of an oil terminal facility in the state unless the person has furnished to the department, and the department has approved, proof of financial ability to respond in damages. Proof of financial responsibility required for a crude oil terminal is \$50,000,000 per incident. Proof of financial responsibility required for a noncrude oil terminal is \$25, per incident, for each barrel of total noncrude oil storage capacity at the terminal or \$1,000,000, whichever is greater, subject to a maximum of \$50,000,000. For purposes of this subsection, an oil terminal facility that stores both crude oil and noncrude oil is subject to the financial responsibility requirements applicable to the type of facility that corresponds to the type of oil storage that predominates at the facility. However, if the facility stores more noncrude oil than crude oil, the \$25 per incident, per barrel requirement of this subsection applies to each barrel of oil storage capacity at the facility.

(b) A person may not cause or permit the operation of a pipeline or an exploration or production facility in the state unless the person has furnished to the department, and the department has approved, proof of financial ability to respond in damages. Proof of financial responsibility required for a pipeline or an offshore exploration or production facility is \$50,000,000 per incident. Proof of financial responsibility required for an onshore production facility is \$20,000,000 per incident. Proof of financial responsibility required for an onshore exploration facility is \$5,000,000 per incident.

(c) Except as provided in (n) [~~(m)~~] of this section, a person may not operate a tank vessel or an oil barge within the waters of the state, or cause or permit the transfer of oil to or from a tank vessel or an oil barge, unless the person operating the tank vessel or oil barge has furnished to the department, and the department has approved, proof of

financial ability to respond in damages. Proof of financial responsibility required under this subsection is

(1) \$300, per incident, for each barrel of storage capacity or \$100,000,000, whichever is greater, for a tank vessel or barge carrying crude oil;

(2) \$100, per incident, for each barrel of storage capacity or \$1,000,000, whichever is greater, subject to a maximum of \$35,000,000, for a tank vessel or barge carrying noncrude oil.

~~[(d) Except as provided in (k) of this section, it is not a defense to an action brought for violation of (a) -- (c) of this section that the person charged believed in good faith that proof of financial ability to respond in damages had been furnished to, and approved by, the department.]~~

Current subsection (d) concerns defending against actions brought for violation AS 46.04.040. In this proposal, current subsection (d) has been moved and combined below with subsection (k), which addresses the same topic.

(d) ~~[(e)]~~ Financial responsibility may be demonstrated by (1) self-insurance, (2) insurance, (3) surety, (4) guarantee, (5) letter of credit approved by the department, or (6) other proof of financial responsibility approved by the department, including proof of financial responsibility provided by a group of insureds who have agreed to cover pollution risks of members of the group under terms the department may prescribe. ~~[An action brought under AS 46.03.758, 46.03.759, 46.03.760(a) or (c), 46.03.822, or AS 46.04.030(g) may be brought in a state court directly against the insurer, the group, or another person providing evidence of financial responsibility. The applicant, and an insurer, surety, guarantor, person furnishing an approved letter of credit, or other group or person providing proof of financial responsibility approved by the department shall appoint an agent for service of process in the state.]~~ For purposes of this subsection, an insurer, other

than a group of insureds whose agreement has been approved by the department, must either be authorized by the Department of Commerce and Economic Development to sell insurance in the state or be an unauthorized insurer listed by the Department of Commerce and Economic Development as not disapproved for use in the state.

The deleted portions of current subsection (e) have been moved to proposed subsection (j), below.

(e) Upon acceptance and approval of proof of financial responsibility under this section, the department shall issue to the applicant a certificate stating that the state's financial responsibility requirements have been satisfied. The certificate must include the name of the facility, pipeline, tank vessel, or oil barge for which it is issued and the expiration date of the certificate.

Proposed subsection (e) is exactly the same as current subsection (j). This organizational change is proposed to aid the readability and logic of this increasingly complex statute.

(f) Acceptance of proof of financial responsibility expires

- (1) one year from its issuance for self-insurance;
- (2) on the effective date of change in the surety bond, guarantee, insurance agreement, letter of credit, or other proof of financial responsibility; or

- (3) on the expiration or cancellation of the surety bond, guarantee, insurance agreement, letter of credit, or other proof of financial responsibility.

(g) The person whose proof of financial responsibility is accepted by the department under this section shall notify the department at least 30 days before the effective date of a change, expiration or cancellation in the self-insurance, surety bond, guarantee, insurance agreement, letter of credit, or other proof of financial responsibility.

Application for renewal of acceptance of proof of financial responsibility under this section must be filed at least 30 days before the date of expiration.

(h) The department, after notice and hearing, may revoke acceptance of proof of financial responsibility if it determines that

(1) acceptance was procured by fraud or misrepresentation; or

(2) a change of circumstance has occurred other than a change specified in (f)(1)

– (3) of this section, which would have warranted denial of the application.

(i) Financial responsibility under this section extends to a loss compensable under AS 46.03.760(e) or 46.03.822 and an assessment under AS 46.03.758, 46.03.759, 46.03.760(a), or AS 46.04.030(g). The applicant shall appoint an agent for service of process in the state.

The concept of an applicant appointing an agent for service of process was moved here from current subsection (e).

(i) An action brought under AS 46.03.758, 46.03.759, 46.03.760(a) or (e), 46.03.822, or AS 46.04.030(g) may be brought in a state court directly against the third-party insurer, surety, guarantor, person furnishing a letter of credit, [the] group [;] or [another] person providing evidence of financial responsibility;[:]

The above sentence was moved to proposed subsection (j) from current subsection (e). Additions to the current language are indicated with a double underline. Deletions to the current language are indicated with brackets. The additions do not change or add to the current meaning of the statute. The additions are necessary because moving the sentence detaches introductory language contained in what was formerly a preceding sentence.

(1) Any third-party [an] insurer, surety, guarantor, person furnishing an approved letter of credit, or other group or person providing proof of financial responsibility approved by the department shall appoint an agent for service of process in the state of those actions specifically authorized by this section .

The requirement that an applicant appoint an agent for service was moved from current subsection (e) to proposed subsection (i). Except as noted by double underlines or brackets, the remainder of the current sentence concerning the appointment of an agent for service was moved here from current subsection (e). For third party insurers, etc., the role of the agent has been limited to accepting service of those actions specifically authorized by this section.

(2) The liability under this section of a third-party insurer, surety, guarantor, person furnishing a letter of credit, group or person providing proof of financial responsibility shall be limited to the type of risk assumed and amount of coverage specified in the proof of financial responsibility provided to and approved by the department;

The main concern expressed by the insurance industry over Alaska's current financial responsibility law is that the law does not clearly specify that an insurer is only liable up to the limits of the insurance policy. Insurers are afraid that they might be held responsible for the full cost of a cleanup, even though they may have only provided coverage for a fraction of that amount. Proposed subsection (j)(2) specifies that an insurer shall only be liable for those types of risks assumed by the insurer, up to the amount of coverage provided by the policy. Proposed subsection (j)(2) refers to "the type of risk assumed [by an insurer]" because a single insurer may not provide coverage for all risks; an operator may use more than one policy to prove the full amount of financial responsibility required by law.

(3) Jurisdiction obtained over any third-party providing proof of financial responsibility pursuant to this section shall be limited to issues concerning the liability imposed by this section and the sections cited in this section; third-parties appearing pursuant to this section shall not by reason of their appearance be subject to service of process for any other purposes, even if those other purposes arise from the same transactions or occurrences for which jurisdiction is already asserted;

The insurance industry is concerned that enterprising plaintiffs and courts will utilize the deep-pocket opportunity created when an insurance company appears in an Alaska court to assert additional claims against the insurer. Proposed subsection (j)(3) limits the jurisdiction a court may assert over the insurer. The proposed subsection also specifies that a foreign insurer, by virtue of the fact that it has appeared in Alaska, shall not waive the protections offered by the current rules of service. By limiting service and jurisdiction, a court could not

automatically entertain collateral claims brought against an insurance company for, say, bad faith treatment of an injured third party.

(4) Any third-party wishing to tender the full amount of its potential liability under those contractual documents approved by the department may appear solely for the purpose of interpleader and shall be dismissed from an action brought pursuant to this section once the full amount has been deposited with the court and potential claimants have been notified;

Proposed subsection (j)(4) allows an insurer to tender the full amount of its policy in situations where the amount of damage will exceed the policy limits. Claimants are protected because the full amount of the policy will be interpled with the court. Insurers are protected because they "shall" be dismissed from the action, and thus cannot be present as a target for creative courts.

(5) Except as otherwise stated, this section does not enlarge or diminish jurisdiction and service for other purposes under other laws, regulations, or court rules. If jurisdiction and service are properly attained, a court may order consolidation with an action brought pursuant to this section.

Proposed subsection (j)(5) clarifies that none of the proposed changes to AS 46.04.040 will change other aspects of existing law. A claimant who would have had a claim against an insurer under some other aspect of existing law may still assert the claim by following the current rules for jurisdiction and service, independent of the rules for jurisdiction or service under AS 46.04.040.

~~[(f)]—Upon acceptance and approval of proof of financial responsibility under this section, the department shall issue to the applicant a certificate stating that the state's financial responsibility requirements have been satisfied. The certificate must include the name of the facility, pipeline, tank vessel, or oil barge for which it is issued and the expiration date of the certificate.]~~

In this proposal, current subsection (j) has been relabeled to become (e), above.

(k) It is not a defense to an action brought for violation of (a) – (c) of this section that the person charged believed in good faith that proof of financial ability to respond in damages had been furnished to, and approved by, the department unless [It is a defense to an action brought for violation of (a) – (c) of this section that] the person charged relied on a certificate of approval issued under (e) [(f)] of this section [unless the person knew or had reason] and the person did not know or have reason to know at the time of the alleged violation that the approval had been revoked or was expired.

Proposed subsection (k) combines two current subsections, (d) and (k), both dealing with the topic of defenses.

(l) Notwithstanding the requirements of (d) [(e)] of this section, the applicant may provide evidence of financial responsibility provided by an insurer or other person who does not agree to be subject to direct action in state courts or to appoint an agent for service of process if

(1) the department is satisfied that the insurance or other form of financial responsibility covers judgments under the statutes listed in (i) [(e)] of this section;

(2) the applicant provides proof of \$50,000,000, or the amount required by (a) – (c) of this section, whichever is less, in insurance or other form of financial responsibility that meets the requirements of (j) [(e)] of this section; and

(3) the applicant provides a sworn statement or affidavit that insurance or other form of financial responsibility that meets the requirements of (j) [(e)] of this section is not available in greater amounts.

(m) The State of Alaska is not liable for any damages arising from its actions or omissions relating to any proof of financial responsibility required under this section.

This section clarifies that the State of Alaska is not liable for an operator's inability to obtain insurance when that inability is caused by the international

insurance industry's refusal to write oil spill pollution policies. The State of Alaska also cannot be held responsible for interpreting the complex contractual documents which form the policy between a private insurer and a private operator. This section is important to assure that in the event of an oil spill, the state is able to focus its litigation efforts on the culpable parties and that the state is not obligated to fight expensive and unnecessary countersuits.

(n) ~~[(m)]~~ A tank vessel or oil barge that is conducting, or is available only for conducting, oil discharge response operations is exempt from the requirements of (c) of this section if the tank vessel or oil barge has received prior approval of the department. The department may approve an exemption under this subsection upon application and presentation of information required by the department.

(§ 2 ch 116 SLA 1980; §§ 117, 118 ch 59 SLA 1982; am §§ 7, 8 ch 41 SLA 1989; am §§ 11 – 18 ch 191 SLA 1990; am § 60 ch 21 SLA 1991; am § __ ch __ SLA 1992)

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

February 24, 1992

The Honorable Lyman Hoffman
Alaska State Senate
Room 510, Capitol
P.O. Box V
Juneau, AK 99811

RE: SB 405 DEC Alternative

Dear Senator Hoffman:

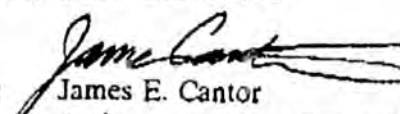
I am enclosing an alternative to SB 405 which the Department of Environmental Conservation would like to propose for consideration. SB 405 deals with the oil spill financial responsibility requirements which oil facility operators must meet. SB 405 was proposed because operators are generally no longer able to obtain insurance which complies with state law. SB 405 puts a two year moratorium on the financial responsibility requirements.

The attached alternative does not propose a moratorium. Instead, the alternative directly addresses the insurance industry's reasons for not writing policies. The most important points in the proposal are contained in subsection (j).

Subsection (j) clarifies that insurers are only liable under AS 46.04.040 up to the amounts specified in their policies. With subsection (j), the financial responsibility law could not subject an insurer to unlimited liability.

Subsection (j) also narrows the potential scope of the current direct action requirement. Subsection (j) would allow an injured Alaskan to sue the insurer in Alaska court, as is currently allowed. However, jurisdiction would be limited so that an insurer appearing pursuant to this section could not be sued for additional damages, above and beyond the limits of the insurance policy.

CHARLES E. COLE
ATTORNEY GENERAL

By: 
James E. Cantor
Assistant Attorney General

JEC:bnk

Encl

cc: Janice Adair
Deborah Behr

WALTER J. HICKEL, GOVERNOR

REPLY TO:

☒ 1031 W 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1934
PHONE: (907) 269-5100
FAX: (907) 275-3697

☐ KEY BANK BUILDING
100 CUSHMAN ST., SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1568
FAX: (907) 456-1317

☐ P.O. BOX K - STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

oil barge has furnished to the department, and the department has approved, proof of financial ability to respond in damages. Proof of financial responsibility required under this subsection is

(1) \$300, per incident, for each barrel of storage capacity or \$100,000,000, whichever is greater, for a tank vessel or barge carrying crude oil;

(2) \$100, per incident, for each barrel of storage capacity or \$1,000,000, whichever is greater, subject to a maximum of \$35,000,000, for a tank vessel or barge carrying noncrude oil.

~~[(d) Except as provided in (k) of this section, it is not a defense to an action brought for violation of (a) (c) of this section that the person charged believed in good faith that proof of financial ability to respond in damages had been furnished to, and approved by, the department.]~~

Current subsection (d) concerns defending against actions brought for violation AS 46.04.040. In this proposal, current subsection (d) has been moved and combined below with subsection (k), which addresses the same topic.

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

~~guarantor, person furnishing an approved letter of credit, or other group or person providing proof of financial responsibility approved by the department shall appoint an agent for service of process in the state.]~~ For purposes of this subsection, an insurer, other than a group of insureds whose agreement has been approved by the department, must either be authorized by the Department of Commerce and Economic Development to sell insurance in the state or be an unauthorized insurer listed by the Department of Commerce and Economic Development as not disapproved for use in the state.

The deleted portions of current subsection (e) have been moved to proposed subsection (j), below.

(e) Upon acceptance and approval of proof of financial responsibility under this section, the department shall issue to the applicant a certificate stating that the state's financial responsibility requirements have been satisfied. The certificate must include the name of the facility, pipeline, tank vessel, or oil barge for which it is issued and the expiration date of the certificate.

Proposed subsection (e) is exactly the same as current subsection (j). This organizational change is proposed to aid the readability and logic of this increasingly complex statute.

- (f) Acceptance of proof of financial responsibility expires
- (1) one year from its issuance for self-insurance;
 - (2) on the effective date of change in the surety bond, guarantee, insurance agreement, letter of credit, or other proof of financial responsibility; or
 - (3) on the expiration or cancellation of the surety bond, guarantee, insurance agreement, letter of credit, or other proof of financial responsibility.

(f) The person whose proof of financial responsibility is accepted by the department under this section shall notify the department at least 30 days before the effective date of a change, expiration or cancellation in the self-insurance, surety bond, guarantee, insurance agreement, letter of credit, or other proof of financial responsibility. Application for renewal of acceptance of proof of financial responsibility under this section must be filed at least 30 days before the date of expiration.

(h) The department, after notice and hearing, may revoke acceptance of proof of financial responsibility if it determines that

- (1) acceptance was procured by fraud or misrepresentation; or
- (2) a change of circumstance has occurred other than a change specified in (f)(1) — (3) of this section, which would have warranted denial of the application.

(i) Financial responsibility under this section extends to a loss compensable under AS 46.03.760(e) or 46.03.822 and an assessment under AS 46.03.758, 46.03.759, 46.03.760(a), or AS 46.04.030(g). The applicant shall appoint an agent for service of process in the state.

The concept of an applicant appointing an agent for service of process was moved here from current subsection (e).

(j) An action brought under AS 46.03.758, 46.03.759, 46.03.760(a) or (e), 46.03.822, or AS 46.04.030(g) may be brought in a state court directly against the third-party insurer, surety, guarantor, person furnishing a letter of credit, [the] group [;] or [another] person providing evidence of financial responsibility[;]

The above sentence was moved to proposed subsection (j) from current subsection (e). Additions to the current language are indicated with a double underline. Deletions to the current language are indicated with brackets. The additions do not change or add to the current meaning of the statute. The

additions are necessary because moving the sentence detaches introductory language contained in what was formerly a preceding sentence.

(1) Any third-party [an] insurer, surety, guarantor, person furnishing an approved letter of credit, or other group or person providing proof of financial responsibility approved by the department shall appoint an agent for service of process in the state of those actions specifically authorized by this section .

The requirement that an applicant appoint an agent for service was moved from current subsection (e) to proposed subsection (i). Except as noted by double underlines or brackets, the remainder of the current sentence concerning the appointment of an agent for service was moved here from current subsection (e). For third party insurers, etc., the role of the agent has been limited to accepting service of those actions specifically authorized by this section.

(2) The liability under this section of a third-party insurer, surety, guarantor, person furnishing a letter of credit, group or person providing proof of financial responsibility shall be limited to the type of risk assumed and amount of coverage provided in those contractual documents between the applicant and the third-party which have been approved by the department;

The main concern expressed by the insurance industry over Alaska's current financial responsibility law is that the law does not clearly specify that an insurer is only liable up to the limits of the insurance policy. Insurers are afraid that they might be held responsible for the full cost of a cleanup, even though they may have only provided coverage for a fraction of that amount. Proposed subsection (j)(2) specifies that an insurer shall only be liable for those types of risks assumed by the insurer, up to the amount of coverage provided by the policy. Proposed subsection (j)(2) refers to "the type of risk assumed [by an insurer]" because a single insurer may not provide coverage for all risks; an operator may use more than one policy to prove the full amount of financial responsibility required by law.

(3) Jurisdiction obtained over any third-party providing proof of financial responsibility pursuant to this section shall be limited to issues concerning the liability

imposed by this section and the sections cited in this section; third-parties appearing pursuant to this section shall not by reason of their appearance be subject to service of process for any other purposes, even if those other purposes arise from the same transactions or occurrences for which jurisdiction is already asserted;

The insurance industry is concerned that enterprising plaintiffs and courts will utilize the deep-pocket opportunity created when an insurance company appears in an Alaska court to assert additional claims against the insurer. Proposed subsection (j)(3) limits the jurisdiction a court may assert over the insurer. The proposed subsection also specifies that a foreign insurer, by virtue of the fact that it has appeared in Alaska, shall not waive the protections offered by the current rules of service. By limiting service and jurisdiction, a court could not automatically entertain collateral claims brought against an insurance company for, say, bad faith treatment of an injured third party.

(4) Any third-party wishing to tender the full amount of its potential liability under those contractual documents approved by the department may appear solely for the purpose of interpleader and shall be dismissed from an action brought pursuant to this section once the full amount has been deposited with the court and potential claimants have been notified;

Proposed subsection (j)(4) allows an insurer to tender the full amount of its policy in situations where the amount of damage will exceed the policy limits. Claimants are protected because the full amount of the policy will be interpled with the court. Insurers are protected because they "shall" be dismissed from the action, and thus cannot be present as a target for creative courts.

(5) Except as otherwise stated, this section does not enlarge or diminish jurisdiction and service for other purposes under other laws, regulations, or court rules. If jurisdiction and service are properly attained, a court may order consolidation with an action brought pursuant to this section.

Proposed subsection (j)(5) clarifies that none of the proposed changes to AS 46.04.040 will change other aspects of existing law. A claimant who would have

had a claim against an insurer under some other aspect of existing law may still assert the claim by following the current rules for jurisdiction and service, independent of the rules for jurisdiction or service under AS 46.04.040.

~~[(j)] Upon acceptance and approval of proof of financial responsibility under this section, the department shall issue to the applicant a certificate stating that the state's financial responsibility requirements have been satisfied. The certificate must include the name of the facility, pipeline, tank vessel, or oil barge for which it is issued and the expiration date of the certificate.]~~

In this proposal, current subsection (j) has been relabeled to become (e), above.

(k) It is not a defense to an action brought for violation of (a) — (c) of this section that the person charged believed in good faith that proof of financial ability to respond in damages had been furnished to, and approved by, the department unless ~~[It is a defense to an action brought for violation of (a) — (c) of this section that]~~ the person charged relied on a certificate of approval issued under (e) [(j)] of this section ~~[unless the person knew or had reason]~~ and the person did not know or have reason to know at the time of the alleged violation that the approval had been revoked or was expired.

Proposed subsection (k) combines two current subsections, (d) and (k), both dealing with the topic of defenses.

(l) Notwithstanding the requirements of (d) [(e)] of this section, the applicant may provide evidence of financial responsibility provided by an insurer or other person who does not agree to be subject to direct action in state courts or to appoint an agent for service of process if

(1) the department is satisfied that the insurance or other form of financial responsibility covers judgments under the statutes listed in (i) [(e)] of this section;

(2) the applicant provides proof of \$50,000,000, or the amount required by (a) — (c) of this section, whichever is less, in insurance or other form of financial responsibility that meets the requirements of (j) [(e)] of this section; and

(3) the applicant provides a sworn statement or affidavit that insurance or other form of financial responsibility that meets the requirements of (j) [(e)] of this section is not available in greater amounts.

(m) The State of Alaska is not liable for any damages arising from its actions or omissions relating to any proof of financial responsibility required under this section.

This section clarifies that the State of Alaska is not liable for an operator's inability to obtain insurance when that inability is caused by the international insurance industry's refusal to write oil spill pollution policies. The State of Alaska also cannot be held responsible for interpreting the complex contractual documents which form the policy between a private insurer and a private operator. This section is important to assure that in the event of an oil spill, the state is able to focus its litigation efforts on the culpable parties and that the state is not obligated to fight expensive and unnecessary countersuits.

(n) [(m)] A tank vessel or oil barge that is conducting, or is available only for conducting, oil discharge response operations is exempt from the requirements of (c) of this section if the tank vessel or oil barge has received prior approval of the department. The department may approve an exemption under this subsection upon application and presentation of information required by the department.

(§ 2 ch 116 SLA 1980; §§ 117, 118 ch 59 SLA 1982; am §§ 7, 8 ch 41 SLA 1989; am §§ 11 — 18 ch 191 SLA 1990; am § 60 ch 21 SLA 1991; am § __ ch __ SLA 1992)

FROM: AG's Office - Jim Cantor

TO: Glenn Adams JUNEAU/ADEC

DATE: 02-20-92
TIME: 16:00

CC:

SUBJECT: Financial Responsibility

PRIORITY: R

ATTACHMENTS: fr

Glenn: I am attaching a copy of our proposal for tightening up AS 46.04.040. Look particularly a subsection (j). Please call me if you have any comments. Also, I sent a copy of Sen. Hoffman's bill (SB 405) via fax to Lynn.

Jim Cantor

=====

Ref. 12
46.04.040
46.06.040
10 financial resp
CC-plan

FACSIMILE TRANSMITTAL

STATE OF ALASKA



DEPARTMENT OF ENVIRONMENTAL CONSERVATION
DIVISION OF SPILL PREVENTION & RESPONSE
SPILL PREVENTION, PLANNING & MANAGEMENT
FINANCIAL RESPONSIBILITY PROGRAM

410 Willoughby Ave., Suite 105
Juneau, AK 99801-1795

Phone: (907) 465-5225

Fax: (907) 465-5245

TO: Ms. Gering Fay

Senator Colton's Office

FAX: 465-4979

FROM: Glenn Adams

NUMBER OF PAGES INCLUDING COVER SHEET: 6

COMMENTS: Mike Mansker is out of the office today, he asked that I
get these reports to you. I called your office yesterday afternoon and
again this morning but you were not in. Our financial responsibility
data base fields are not complete, we are still entering information to
be able to obtain custom reports. The "non crude operator in compliance"
report was based on expiration dates but 18 of the operators using
insurance are still pending approval of the policies because they do
not contain the required insurance endorsement. Please call me
if you have questions, my number is shown above.

MESSAGE CONFIRMATION
TRANSMISSION

MAR-26-'92 THU 09:35

TERM ID:

P-9999

FAX NO. :

NO.	DATE	ST. TIME	TOTAL TIME	ABBR/SBD	ID	DEPT CODE	#PGS
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Financial Responsibility Report

PAGE #: 1

NON CRUDE OPERATIONS IN COMPLIANCE

DATE : 03/25/92

Company Name	SUBJECT	FORM OF PROOF	Expire Date
Alaska Pulp Corporation	Terminal	BOND	06/30/92
Brice Inc., Marine Division	Vessel, barge	EXPT	01/31/93
International Marine Carriers, Inc.	Vessels, tankers, U.S. Navy	EXPT	06/30/92
U.S. Air Force	terminals	EXPT	06/30/92
U.S. Air Force	Terminal	EXPT	06/30/92
U.S. Air Force	terminal	EXPT	06/30/92
U.S. Air Force	terminal	EXPT	06/30/92
U.S. Defense Fuel Supply Center	Pipeline and Terminals	EXPT	06/30/92
U.S. Navy	Terminals	EXPT	09/10/92
U.S. Navy	Terminal	EXPT	06/30/92
U.S. Air Force	Terminals, Radar Sites	EXPT	03/09/93
U.S. Air Force	Terminal	EXPT	09/17/92
Western Geophysical	Vessel/terminal	EXPT	12/23/92
Coastwise Trading Co., Inc.	Vessels, barge	GRTY	06/30/92
Mapco Alaska Petroleum, Inc.	Vessels, tankers NC	GRTY	06/01/92
Marathon Oil Company	Vessels, tankers NC LNG	GRTY	06/30/92
North Pacific Expediting, Inc.	Vessel, barge	GRTY	06/30/92
Western Hemisphere Corp. (TOSCO)	Vessels, tanker NC	GRTY	06/01/92
Alaska Electric Generation & Transmission	Terminal	INSR	05/04/92 → HAS DIRECT ACTION
Anchorage Fueling & Service Co.	Terminal and Pipeline	INSR	07/01/92 → ENDORSEMENT
Arctic Slope Regional Corp.	Terminals & Refinery	INSR	01/09/93 → " "
Bering Sea Fisheries, Inc.	Vessel, barge	INSR PENDING	05/05/92
Bethel Fuel Sales, Inc.	Terminal	INSR PENDING	08/15/92
Dojer, Ltd.	Vessels, barges	INSR PENDING	01/30/93
Forty Niner Transportation, Inc.	Vessels, barges	INSR PENDING	11/20/92
Island Providers Trnsp. (Olsen Ent.)	Vessel, NC self-propelled landing craft	INSR PENDING	06/01/92
Kodiak Oil Sales, Inc.	Terminal	INSR PENDING	11/19/92
Kotzebue Electric Assn., Inc.	Terminal	INSR	06/01/92 → " "
Kugakhtlik Limited (Kipnuk Fuel Co.)	Vessel, barge	INSR PENDING	07/07/92
Lutak Petroleum, J.V. dba Totem Oil Co.	Terminal, NC	INSR PENDING	03/31/93
Naknek Electric Association, Inc.	Terminal	INSR	11/01/92 → " "
Northland Services, Inc.	Vessels, barges	INSR PENDING	04/01/92
Nushagak Electric Cooperative, Inc.	Terminal	INSR PENDING	09/21/92
Orca Oil Co., Inc.	Terminal	INSR PENDING	04/22/92
Saupe Enterprises Inc. dba Chevron Dist.	Terminal	INSR PENDING	06/01/92
Sitka Fuels, Inc.	Terminal	INSR PENDING	06/04/92
Smith Lighterage Co., Inc.	Vessels, barges	INSR PENDING	06/01/92
Terminal Oil Sales, Inc.	Terminal	INSR PENDING	08/30/92
Yutana Barge Lines, Inc.	Terminals	INSR	03/29/92 → Policy EXPIRES
Foss Launch and Tug Co.	Vessels, barges	LETR	09/12/92
Trident Seafoods Corporation	Terminals	LETR	11/01/92
Trident Seafoods Corporation	Vessels, barges NC	LETR	11/01/92
Alaska Marine Charters, Inc.	Vessel, barge	OTHR PENDING	12/19/92
Boyer Towing, Inc.	Vessels, barges	OTHR PENDING	02/20/93
Samson Tug & Barge Co., Inc.	Vessel, barges	OTHR PENDING	04/22/92
City of Saint Paul	Terminal	SELF	06/01/92
Cominco Alaska, Inc./ Red Dog Mine	Terminal	SELF	06/30/92

Company Name	SUBJECT	FORM OF PROOF	Expire Date
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Crowley Maritime Corp.	Terminals	SELF	06/01/92
Crowley Maritime Corp. et al	Vessels, barges	SELF	06/01/92
Golden Valley Electric Assn., Inc.	Terminal	SELF	08/15/92
Haines terminal & Highway Co.	Terminal Facilities	SELF	06/30/92
Haines Terminal & Highway Co.	Vessels,tanker & barge NC	SELF	06/30/92
Harbor Enterprises, Inc.	Terminals	SELF	06/01/92
Ketchikan Pulp Co.	Terminal	SELF	06/30/92
Municipality of Anchorage, Light & Power	Terminal	SELF	06/30/92
Nome Joint Utility System	Terminal	SELF	06/30/92
North Slope Borough	Terminals	SELF	06/01/92
Peter Pan Seafoods, Inc.	Terminals	SELF	06/01/92
Phillips Petroleum Co.	Terminal LNG	SELF	08/15/92
Tesoro Alaska Petroleum Co.	Vessels,Tankers NC Spot Charter	SELF	06/01/92
Tesoro Petroleum Corporation	Terminals/OnshoreProduction/Pipeline	SELF	06/30/92
Texaco Refining & Marketing, Inc.	Terminal	SELF	06/30/92
Union Oil Co. of Cal.	Terminals, NC	SELF	06/30/92
Western Pioneer Inc. (Delta Western)	Vessels, barges	SELF	06/01/92
Western Pioneer Inc. (Delta Western)	Terminals	SELF	06/30/92
Wickland Oil Company	Vessel, tankers NC	SELF	04/19/92

Total # =

Financial Responsibility Report

NON CRUDE OPERATORS THAT COMPLIED SINCE 01/01/92

PAGE #: 1

DATE : 03/25/92

Company Name	SUBJECT	FORM OF PROOF	Expire Date
U.S. Air Force	Terminals, Radar Sites	EXPT	03/09/93
Trident Seafoods Corporation	Vessels, barges NC	LETR	11/01/92
Trident Seafoods Corporation	Terminals	LETR	11/01/92
City of Galena	Terminal	SELF	
City of Saint Paul	Terminal	SELF	06/01/92
Wickland Oil Company	Vessel, tankers NC	SELF	04/19/92

Total # =

Financial Responsibility Report

PAGE #: 1

NON COMPLIANT OPERATORS OUT OF COMPLIANCE IN 90 DAYS

DATE : 03/25/92

Company Name	SUBJECT	FORM OF PROOF	Expire Date
Mapco Alaska Petroleum, Inc.	Vessels, tankers NC	GRTY	06/01/92
Western Hemisphere Corp. (TOSCO)	Vessels, tanker NC	GRTY	06/01/92
Alaska Electric Generation & Transmission	Terminal	INSR	05/04/92
Bering Sea Fisheries, Inc.	Vessel, barge	INSR	05/05/92
Island Providers Trnsp.(Olsen Ent.)	Vessel, NC self-propelled landing craft	INSR	06/01/92
Kotzebue Electric Assn., Inc.	Terminal	INSR	06/01/92
Northland Services, Inc.	Vessels, barges	INSR	04/01/92
Orca Oil Co., Inc.	Terminal	INSR	04/22/92
Saupe Enterprises Inc. dba Chevron Dist.	Terminal	INSR	06/01/92
Sitka Fuels, Inc.	Terminal	INSR	06/04/92
Smith Lighterage Co., Inc.	Vessels, barges	INSR	06/01/92
Yutana Barge Lines, Inc.	Terminals	INSR	03/29/92
Samson Tug & Barge Co., Inc.	Vessel, barges	OTHR	04/22/92
City of Saint Paul	Terminal	SELF	06/01/92
Crowley Maritime Corp.	Terminals	SELF	06/01/92
Crowley Maritime Corp. et al	Vessels, barges	SELF	06/01/92
Harbor Enterprises, Inc.	Terminals	SELF	06/01/92
North Slope Borough	Terminals	SELF	06/01/92
Peter Pan Seafoods, Inc.	Terminals	SELF	06/01/92
Tesoro Alaska Petroleum Co.	Vessels, Tankers NC Spot Charter	SELF	06/01/92
Western Pioneer Inc. (Delta Western)	Vessels, barges	SELF	06/01/92
Wickland Oil Company	Vessel, tankers NC	SELF	04/19/92

Total # =

Financial Responsibility Report

PAGE #: 1

NON CRUDE OPERATORS OUT OF COMPLIANCE

DATE : 03/25/92

Company Name	SUBJECT	FORM OF PROOF	Expire Date
Brix Maritime Co. c/o Gene Sause & Co.	Vessels, barges	INSR	02/20/92
Moody's Sea Lighterage Inc.	Vessel, barges	INSR	01/22/92
UIC Construction, Inc.	Terminal	INSR	03/03/92
Yutana Barge Lines, Inc.	Vessels, barges	INSR	02/20/92
Frosty Fuel Inc.	Terminal	SELF	06/30/91

Total # =

MEMORANDUM

STATE OF ALASKA

DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Division of Spill Prevention and Response

TO: Lynn Kent
Env. Manager
SPAR/SPPM
THRU: Mike Mansker
Program Coordinator
SPAR/SPPM
FROM: Glenn Adams *GA*
Project Asst.
SPAR/SPPM

DATE: REVISED LIST

March 6, 1992

FILE #:

PHONE #:

SUBJECT: Insurance Not Approved as
Proof of Financial Responsibility

The following is a list of applicants that have insurance that does not comply or are trying to get insurance. Some of these applicants are trying to get coverage by some other means, but most have run out of sources.

File #	Name	Subject	Insurance Coverage Type
074	Alaska Marine Charters	1 barge	Lloyds'
061	Anderes Oil Co.	terminal	Agricultural Excess & Surplus Ins.
088	Bering Sea Fisheries	1 barges	Lloyds'
108	Bethel Fuel Sales	terminal	Lloyds'
025	Boyer Towing	2 barges	P&I club
036	Brix Maritime Co.	2 barges	P&I club
119	City of Galena	terminal	looking for coverage
133	Dojer, Ltd.	1 barges	Lloyds'
129	Forty Niner Transportation	2 barges	P&I club
071	Kugkaktlik Limited	1 barge	Lloyds'
067	Moodys Sea Lighterage	2 barges	Lloyds'
079	Northland Services, Inc.	2 barge	Water Quality Insurance Syndicate
095	Nushagak Electric Cooperative	terminal	ILU
089	Orca Fuel Co.	terminal	Lloyds' & ILU
065	Smith Lighterage Co.	2 barges	Lloyds' & ILU
070	Terminal Oil Sales	terminal	Lloyds
109	UIC Construction, Inc.	terminal	Agricultural Excess & Surplus Ins.
035	Yutana Barge Lines, Inc.	12 barges	P&I club
146	Island Providers Trnsp. Co.	1 vessel	WQIS/Lloyd's
102	Kodick Oil Sales, Inc.	terminal	Lloyds' & ILU
040	Samson Tug & Barge Co, Inc.	1 barges	WQIS
072	Saupe' Enterprises Inc.	terminal	Lloyds' & ILU
045	Sitka Fuels, Inc.	terminal	National Union Fire Insurance Co.

31

10

At the present time: Oil barges are required to have \$1 million in coverage, after June 1, 1992 the amount will be \$100 per barrel of storage capacity or \$1 million whichever is greater to a maximum of \$35 million. Most of the above barges are small enough that they will remain in the minimum amount next year, at the most I would say that \$1½ million would be the maximum.

Noncrude terminals are required to have coverage in an amount of \$10 per barrel of storage capacity with \$1 million minimum, after June 1, 1992 it will be \$25 per barrel. Because of storage capacity, some terminals will need up to \$ 2 million in coverage next year.

One company, Island Providers, has a landing craft vessel classified as a noncrude tanker that now requires \$20 million but will drop to \$1 million next year because of small storage capacity.

Pipelines are required to provide \$50 million in coverage. Cook Inlet Pipeline was able to get an insurance policy that meets the requirements.

We found that the barge operated by Brice Inc. could be classified as exempt because it only supplied fuel to other company vessels and to deck equipment.

Trident Seafoods was able to cover their barges and terminals with a letter of credit.

The City of St. Paul recently covered their terminal by self-insurance.

Arctic Slope Regional Corp. recently submitted an insurance policy for their terminal facilities from National Union Fire Insurance Company that has the required endorsement and was approved.

The Agricultural Excess and Insurance Co. think they will be able to provide a policy with the required endorsement, we are working with them.

MEMORANDUM

STATE OF ALASKA
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
Division of Spill Prevention and Response

Revised

TO: Mike Mansker
Enviro. Specialist
SPAR/SPPM
THRU:

DATE: March 6, 1992

FILE #:

PHONE #:

FROM: Glenn Adams *Glenn*
Project Assistant
SPAR/SPPM

SUBJECT: FR INSURANCE

Financial responsibility accounts that have insurance policies meeting State requirements and include the required endorsement.

Anchorage Fueling and Service Co. (terminal & pipeline operation for airport) File .013
Insured by Institute of London Underwriters Amount \$30 M
Insurance agents, Johnson & Higgins, Seattle, WA.
Three year policy, second year renewal expires 7/1/92

Cook Inlet Pipe Line Co. (terminal & pipeline) File .018
Insured by Lloyd's and Institute of London Underwriters Amount \$45 M
Insurance agents, Marsh McLennan Marine & Energy
One year policy, expires 7/15/92
Modified endorsement that includes AS 46.04.040(i) & (e).

Tesoro Alaska Petroleum Co. (crude tanker) File .046a
Insured by O.I.L. Insurance Ltd. (a Bermuda co.) Amount \$150 M
Insured through, Alexander Insurance Managers Ltd as managers for Sabinal Insurance Co. Ltd., Bermuda
Has automatic renewal clause to 12/31/95
The O.I.L. Co. is a Mutual type insurance company (member organization) and qualifies under AS 46.04.040(e)(6).

Alaska Electric Generation & Transmission File .100
Kotzebue Electric Assoc., Inc. File .104
Naknek Electric Assoc., Inc. File .078
Insured by ARECA Insurance Exchange thru ARECA Insurance Management, Inc., Anchorage, AK.
This is an insurance company set up to insure electrical cooperatives.
Policies contain the required endorsement. Amount \$1 M

Arctic slope Regional Corp. (terminals) File .064
Insured by National Union Fire Insurance Amount \$1 M
Insured through Alexander & Alexander of Washington
One year policy expires 1/9/93

**DEPARTMENT OF ENVIRONMENTAL CONSERVATION
DIVISION OF SPILL PREVENTION AND RESPONSE
SPILL PREVENTION PLANNING AND MANAGEMENT SECTION**

Financial Responsibility

As of March 6, 1992, 23 oil vessel or terminal operators are still unable to find insurance policies that meet the state's Financial Responsibility requirements. On the encouraging side, 7 operators have now found insurance that does meet all of the State's requirements, including direct action.

Though this is a serious problem, it does need to be kept in perspective. ADEC records indicate that 128 operators have submitted applications covering 79 tankships, 93 barges, 24 spot charter tankships, and approximately 133 facilities. By type of coverage, those numbers break down as follows:

TYPE OF COVERAGE	NUMBER OF: VESSELS/FACILITIES
Insurance (30 operators, 23 are out of compliance)	54 (15%) 43/11
Self Insurance (38 operators)	156 (44%)
Guarantee (29 operators)	67 (20%)
Bond (3 operators)	22 (6%)
Letter of Credit(3 operators)	11 (3%)
Other (6 operators)	9 (1%)
Exempt (16 operators)	<u>37</u> (11%)
	356

("Public" vessels/facilities and vessels used only for response are exempt)

The majority of operators are in compliance with state Financial Responsibility requirements. Most of those in compliance have provided proofs other than insurance.

Most of those operators who have not been able to comply are not able to find means of proof other than insurance. These operators have been able to find insurance policies, but those policies do not meet state requirements because insurers have been uncomfortable submitting to the state's "direct action" requirement. Those insurers have repeatedly cited uncertain limits of liability for insurers as their reason for not agreeing to direct action.

Most of the operators who cannot get adequate insurance policies operate barges and small facilities. The situation is slowly improving even for these operators as they find other acceptable proofs of Financial Responsibility, or insurers who will submit to direct action.

2/28/92

Ginny,

Attached is a copy of the outline I used at your hearing on Tuesday morning.

I'd be glad to discuss details with you and I'm preparing a more detailed briefing in anticipation of further hearings.

Have a good weekend —

Nike



MICHAEL A. CONWAY
DIRECTOR
SPILL PREVENTION AND
RESPONSE DIVISION

STATE OF ALASKA
DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

PHONE: (907) 465-5250
FAX: (907) 465-5244

410 WILLOUGHBY, SUITE 105
JUNEAU, ALASKA 99801-1795



HOUSE BILL 567 - MAJOR PROVISIONS

- 1. Enhanced industry spill response planning standards / Realistic Maximum Oil Discharge (RMOD)**
- 2. Required incorporation of prevention measures in industry contingency plans and allows the Department to reduce the response planning standards when selected prevention measures are implemented**
- 3. Increased the amount of financial responsibility required of oil handlers and allows for additional methods to demonstrate proof of financial responsibility**

REGULATED FACILITIES:

**ALL VESSELS CARRYING OIL
AS CARGO - TANKERS AND
BARGES**

**BULK CRUDE OIL STORAGE
GREATER THAN 5,000 BBLS**

**BULK NON-CRUDE OIL
STORAGE GREATER THAN
10,000 BBLS**

**OIL EXPLORATION AND
PRODUCTION FACILITIES
(ON AND OFFSHORE)**

CRUDE OIL PIPELINES

PLANNING STANDARDS

- Requires oil discharge prevention and contingency plans for oil terminal facilities, exploration or production facilities, pipelines, crude and noncrude oil tank vessels and barges
- Defines the information that must be in the application
- Establishes response planning standards for each of the categories mentioned above
- Sets approval criteria that the Department uses to evaluate c-plans
- Identifies Department review procedures
- Provisions for transfers between plan holders, inspections, drills, and c-plan boundaries

PREVENTION

- There may be better technologies for preventing spills than for cleaning them up once they have occurred
- There are reduced risks after companies incorporate specific prevention measures
- Companies employing preventative techniques such as double hulls may have their planning standards adjusted downward according to formulae written into regulations
- The objective is to encourage investment in prevention and prevention technology

FINANCIAL RESPONSIBILITY

- Operators of vessels and facilities handling oil must give proof that they possess the financial resources to pay for cleanup and damages from potential spills
- HB 567 sets new requirements for the amounts of financial responsibility and broadens the acceptable forms of proof.

HB 567 WORKING GROUP

ORGANIZATION REPRESENTED

AGENCIES

Alaska Department of Environmental Conservation

Alaska Department of Fish and Game

Alaska Department of Natural Resources

Alaska Oil and Gas Conservation Commission

Environmental Protection Agency

United States Coast Guard

PUBLIC INTEREST GROUPS

Alaska Center for the Environment

Alaska Municipal League

Arctic Marine Resources Commission

Cook Inlet Regional Citizens Advisory Council

Prince William Sound Regional Citizens Advisory Council

United Fisherman of Alaska

INDUSTRY

Exxon

Tesoro

Alyeska

Non-crude operators

Prince William Sound Tanker Operators

Association of Rural Electric Cooperatives of Alaska

HB 567 POLICY ISSUES

- 1 Deferral of Prevention Regulations Promulgation
- 2 Workgroup Re-review of Prevention Regulations/2nd Public Notice
- 3 Drug Testing and Health Considerations
- 4 Response Planning Standards for Crude and Noncrude Tank
 Vessels and Oil Barges
- 5 Response to Blowouts
- 6 Operational Restrictions
- 7 Coastal Zone Review of Contingency Plans
- 8 Financial Responsibility

HOUSE BILL 567

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graph TD; A[HOUSE BILL 567] --- B[FINANCIAL RESPONSIBILITY]; A --- C[RESPONSE PLANNING STANDARDS]; A --- D[PREVENTION]; B --- B1[Self-Insurance]; C --- C1[Crude/Noncrude Vessels & Barges]; C --- C2[Response to Blowouts]; C --- C3[Operational Restrictions]; C --- C4[Coastal Zone Reviews]; D --- D1[Deferral of Promulgation]; D --- D2[Re-Review/2nd Public Notice]; D --- D3[Drug Testing and Health];
```

FINANCIAL RESPONSIBILITY

Self-Insurance

RESPONSE PLANNING STANDARDS

**Crude/Noncrude Vessels & Barges
Response to Blowouts
Operational Restrictions
Coastal Zone Reviews**

PREVENTION

**Deferral of Promulgation
Re-Review/2nd Public Notice
Drug Testing and Health**

HB567 POLICY ISSUES DECISIONS

ISSUE 1&2: DELAY OF PREVENTION REGULATIONS/SECOND PUBLIC NOTICE

The oil pollution prevention portion of the regulations are entirely new. As they were developed, members of the HB 567 Technical Work Group suggested that the department take more time to write them.

DECISION: The prevention regulations will be adopted on schedule with the rest of the regulation package, without a second public review period.

ISSUE 3: DRUG ABUSE AND OTHER MEDICAL PROBLEMS

Members of the public questioned whether it is appropriate for the department to adopt a requirement suggested by the Alaska Oil Spill Commission that would require operators to ensure that employees are free of drug and health problems that would effect their performance.

DECISION: The requirement has been reworded to require that operators **institute programs** rather than "ensure" that employees are not hindered by substance abuse or medical problems.

ISSUE 4: RESPONSE PLANNING STANDARDS(RPS) FOR CRUDE AND NONCRUDE TANK VESSELS AND OIL BARGES

The Department is tasked with establishing appropriate response planning standards for crude and noncrude tank vessels and oil barges and developing a methodology for making exceptions to the response planning standards for incorporation of prevention measures.

DECISION: The RPS for crude tank vessels and barges requires the plan holder to have deployed and operating within 72 hours within or outside its region of operation sufficient discharge containment, storage, transfer and cleanup personnel and resources to contain and control and cleanup at least 60 percent of the total cargo capacity. The standard allows credits for **hydrostatic loading, double hulls, double bottoms, or emergency response vessels.**

DECISION: The RPS for noncrude tank vessels and barges requires the plan holder to have sufficient oil discharge containment, storage, transfer and cleanup equipment, personnel and other resources to contain or control within 48 hours, and cleanup within the shortest possible time, 15 percent of the total cargo capacity. No credits apply since this is an interim continuation level standard.

ISSUE 5: RESPONSE TO BLOWOUTS

Explicit relief well provisions were required for all well-related operations in a discharge prevention and contingency plan.

DECISION: This section was re-written to include plans for other methods of well control in addition to relief wells, and to clarify seasonal environmental conditions that would preclude emergency operations to regain well control.

ISSUE 6: OPERATIONAL RESTRICTIONS

The original proposal provided that the Department may require specific prevention measures including temporary shutdown of operations when environmental conditions exceeded the limitations for response.

DECISION: This section was changed to only allow the Department to require specific prevention measures to eliminate or significantly reduce the risk or magnitude of a spill during periods when planned spill response methods are rendered ineffective by environmental conditions.

ISSUE 7: COASTAL ZONE REVIEW OF CONTINGENCY PLANS

The Division of Governmental Coordination (DGC), at DEC's request, has proposed that oil spill contingency plans be removed from review under the consistency review procedures of the Alaska Coastal Management Program (ACMP), with the understanding that the Department review procedures in the HB567 regulations would satisfy requirements of the Alaska Coastal Management Program (ACMP).

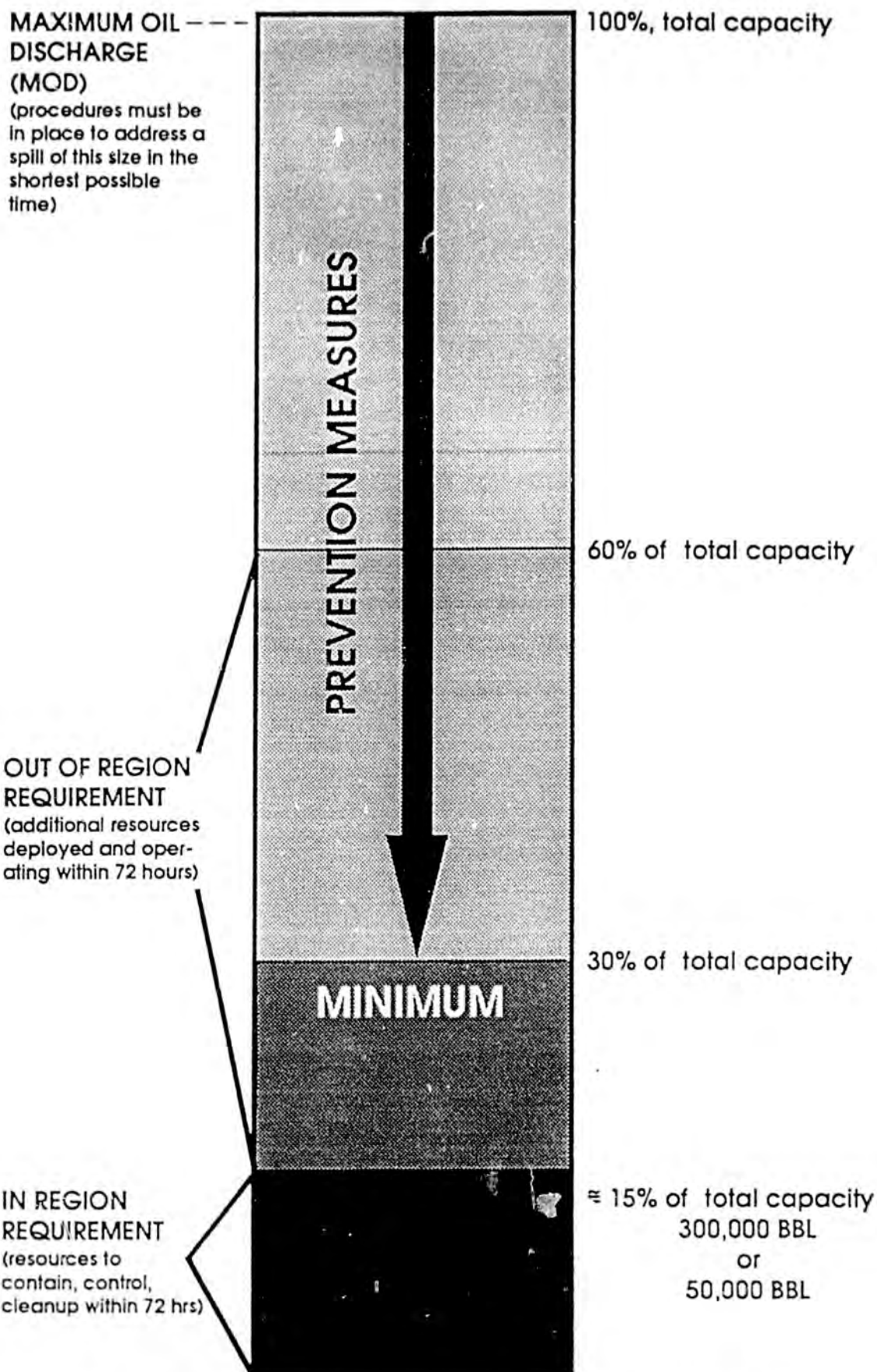
DECISION: Language has been added to the Department review procedures to achieve the functional equivalent of ACMP review regulations, with assistance from DGC.

ISSUE: 8 FINANCIAL RESPONSIBILITY - SELF INSURANCE

Some major oil companies are not able to qualify for self-insurance as a means of proving financial ability to respond to an oil spill.

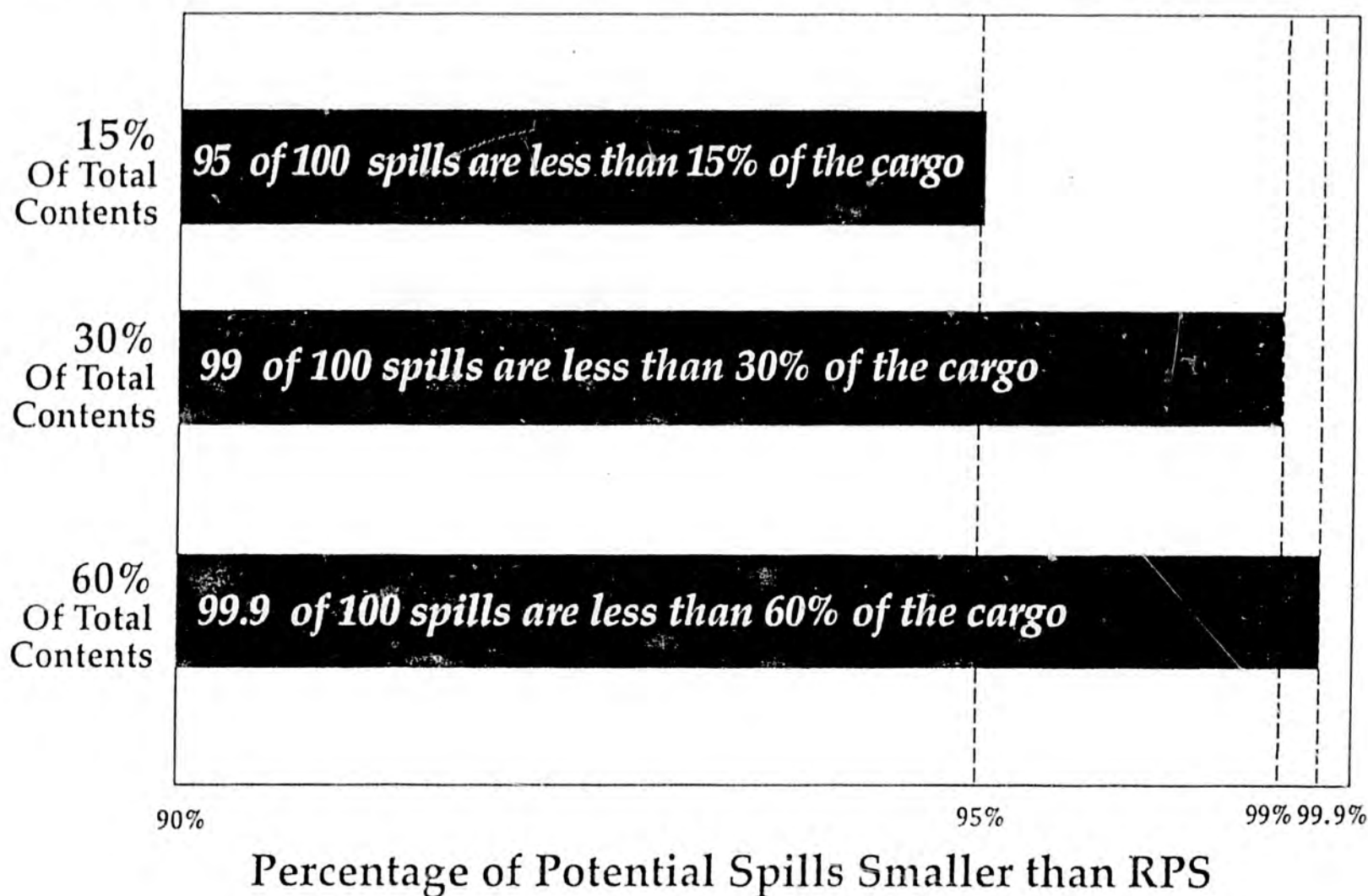
DECISION: A waiver provision for inclusion in the regulations is being evaluated by the departments of Revenue and Commerce and Economic Development that would allow the use of bond ratings and accounting ratios to be substituted for the current requirements for working capital located in the United States.

Crude Oil Tank Vessel Response Planning Standards*



* Response planning standards do not constitute cleanup standards that must be met by the holder of a response plan

Vessel Response Planning Standards (RPS) vs Risk



MEMORANDUM

STATE OF ALASKA

DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Division of Spill Prevention and Response

TO: Lynn Kent
Env. Manager
SPAR/SPPM
THRU: Mike Mansker *CDJ*
Program Coordinator
SPAR/SPPM
FROM: Glenn Adams *Glenn Adams*
Project Asst.
SPAR/SPPM

DATE: REVISED LIST
February 21, 1992
FILE #:

PHONE #:

SUBJECT: Insurance Not Approved as
Proof of Financial Responsibility

The following is a list of applicants that have insurance that does not comply or are trying to get insurance. Some of these applicants are trying to get coverage by some other means, but most have run out of sources.

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067	Moodys Sea Lighterage	barges	Lloyds'
079	Northland Services, Inc.	barge	Water Quality Insurance Syndicate
095	Nushagak Electric Cooperative	terminal	ILU
089	Orca Fuel Co.	terminal	Lloyds' & ILU
065	Smith Lighterage Co.	barges	Lloyds' & ILU
070	Terminal Oil Sales	terminal	Lloyds
109	UIC Construction, Inc.	terminal	Agricultural Excess & Surplus Ins.
035	Yutana Barge Lines, Inc.	barges	P&I club
146	Island Providers Trnsp. Co.	vessel	WQIS/Lloyd's
102	Kodiak Oil Sales, Inc.	terminal	Lloyds' & ILU
040	Samson Tug & Barge Co, Inc.	barges	WQIS
072	Saupe' Enterprises Inc.	terminal	Lloyds' & ILU
045	Sitka Fuels, Inc.	terminal	Union Fire Insurance Co.
064	Arctic Slope Regional Corp.	terminal	Agricultural Excess & Surplus Ins.

At the present time: Oil barges are required to have \$1 million in coverage, after June 1, 1992 the amount will be \$100 per barrel of storage capacity or \$1 million whichever is greater to a maximum of \$35 million. Most of the above barges are small enough that they will remain in the minimum amount next year, at the most I would say that \$1½ million would be the maximum.

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Pipelines are required to provide \$50 million in coverage. Cook Inlet Pipeline was able to get an insurance policy that meets the requirements.

We found that the barge operated by Brice Inc. could be classified as exempt because it only supplied fuel to other company vessels and to deck equipment.

Trident Seafoods was able to cover their barges and terminals with a letter of credit.

The Agricultural Excess and Insurance Co. thinks they will be able to provide a policy with the required endorsement, we are still waiting to hear from them.

Adams

United States Coast Guard

National Pollution Funds Center

4200 Wilson Blvd

Suite 1000

Arlington, Va 22203-1804

COPY TO

LYNN

C. LYNN

Fax Transmittal Sheet

RECEIVED

FEB 06 1992

STATE OF ALASKA
DEPT OF ENVIRONMENTAL CONSERVATION
DIV OF SPILL PREVENTION & RESPONSE



MIKE C
JIM CARTER, INC
PTN TO MIKE M

Number of Pages Including this page 11

Date: 2-5-92

From <u>Bob Skell</u>	To <u>Mike Mansueti</u>
Fax # (FTS) _____ () _____	Fax # (FTS) _____ () _____
Voice# (FTS) _____ (703) <u>225-4704</u>	Voice# (FTS) _____ () _____

Subject: Here are all I could find: some old thoughts on
a 1985 bill and our Admiral's Nov. 16, 1991
testimony on our proposed COFP rules -- see issue
1-2 on pg 4

Transmitted By _____

*Thoughts re S. 51,
amendments to Superfund (CERCLA)
Buss 8/21*

DIRECT ACTION

1. It is doubtful that many companies, especially single-vessel "paper" corporations, will pay substantial amounts for pollution damages without being forced to. That means litigation and forced liquidation proceedings at DOJ/Coast Guard (taxpayer's) expense. Jurisdiction over a solvent vessel operator might easily be obtained, but to what end if assets are few or can't be reached? The most obvious asset, the vessel, may have been a total loss or may be worth only scrap value or may have been chartered. In the latter case, why would a completely innocent vessel owner pay for the charterer's actions without a judgement? Again, that means litigation and forced liquidation expenses for taxpayers.

2. In the absence of direct action, if a liable vessel operator is solvent, but has insufficient assets to pay claims, the superfund will pay for the pollution damages. That should not be favored by the Administration because a superfund tax on oil/chemical companies is actually a tax on consumers. Had we been able to comment on these legislative changes, we would have explained that the current financial responsibility system under the FWPCA works exceptionally well because of direct action. CERCLA should not be any different in connection with vessel liability.

3. With respect to vessel liability insurance under a financial responsibility system, CERCLA's current direct action provision doesn't change the traditional way of writing coverage -- it's the only way it has ever been written for vessels. Vessel insurers live with direct action and are not testifying against it. It is the shoreside insurers who are testifying and lobbying against it -- they never had it and they are afraid of it because of the bizarre court decisions being handed down in waste dump cases. Because these Love Canal-type cases involve many technically liable entities spread over a number of years, with a resulting insoluble legal tangle, socially minded judges are creating insurance coverage where none exists and thus forcing shoreside insurers to pay claims for non-culpable insureds from whom insurers never received adequate premiums. In the case of a spill from a vessel, however, either the spiller is liable or it isn't. If it is, equity demands that under a financial responsibility system the insurer who accepted the premiums and took the risk should pay; not consumers and taxpayers. Vessel insurers, incidentally, are not being driven out of business and are not threatening to stop writing pollution coverage for vessels.

4. CERCLA coverage for vessel liability is attractive and is being sold today, everywhere. Vessel underwriters, however, require and deserve a legislative fix in order to write CERCLA coverage as "guarantors" within the meaning of CERCLA. Basically such fix involves common sense changes such as allowing an insurer to know, beforehand, the maximum dollar amount of its potential liability and limiting its liability to section 107(a)(1) of CERCLA.

5. Nothing in the Treasury Department's study of June 1983 points to direct action itself as a reason why CERCLA guarantees will not be written by vessel insurers.

POLICY DEFENSES

1. Allowing an insurer/guarantor any defense it wishes makes no sense under a financial responsibility program. Either an insurer agrees to pay under predetermined circumstances or it doesn't. Unknown, unlisted policy defenses (failure of the insured to pay premiums that month, or failure of the insured to remember and notify the insurer of all of the different hazardous substances it may be able to transport, or failure to notice and correct a minor state of disrepair that leads to a spill, etc., etc.) fly in the face of a financial responsibility program. Only statutorily permitted defenses should be permitted (e.g., Act of God, fault of the claimant) to an insurer/guarantor. Those insurers who thereafter choose not to act as guarantors are free to do so.

2. Vessel underwriters do not like the absence of so-called policy defenses in the current CERCLA, but they either cannot or will not satisfactorily explain why. These same insurers readily write coverage (OCS vessel liability) without the benefit of policy defenses and have never invoked a policy defense under a financial responsibility system even when they could have done so. Moreover, the CLC international regime, in force since 1975 and ratified by 55 countries, proscribes policy defenses but suffers from no lack of ready and willing insurers -- insurers who currently issue CERCLA coverage and who would willingly act as CERCLA guarantors if CERCLA's guarantor liability provisions were amended as urged by the Coast Guard. The lack of policy defenses is not anathema to vessel underwriters, but they will not look a gift horse (S.51) in the mouth.

3. There was no actual analysis or study of the policy defenses issue in the Treasury Department's "study". All it did was restate the insurers' dislike of the absence of policy defenses. The Coast Guard's Financial Responsibility Division is certain that the availability of policy defenses is not mandatory to the execution of CERCLA insurance. If in fact some defense, now termed a policy defense, was absolutely necessary, that defense would have been articulated and added to the law years ago.

DEPARTMENT OF TRANSPORTATION
U. S. COAST GUARD
STATEMENT OF REAR ADMIRAL RICHARD A. APPELBAUM
ON VESSEL FINANCIAL RESPONSIBILITY FOR WATER POLLUTION
BEFORE THE
SUBCOMMITTEE ON COAST GUARD AND NAVIGATION
COMMITTEE ON MERCHANT MARINE AND FISHERIES
HOUSE OF REPRESENTATIVES
NOVEMBER 6, 1991

GOOD MORNING, MR. CHAIRMAN. I AM HONORED TO APPEAR BEFORE THIS DISTINGUISHED SUBCOMMITTEE TODAY TO DISCUSS THE STATUS OF THE COAST GUARD'S ACTIONS TO IMPLEMENT THE VESSEL FINANCIAL RESPONSIBILITY PROVISIONS IN THE OIL POLLUTION ACT OF 1990 (OPA 90) AND THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA). IT IS ONE OF THE RESPONSIBILITIES OF MY COMMAND, THE NATIONAL POLLUTION FUNDS CENTER, TO CARRY OUT THE VESSEL FINANCIAL RESPONSIBILITY PROVISIONS OF THESE ACTS.

THE COAST GUARD PUBLISHED A NOTICE OF PROPOSED RULEMAKING IN THE FEDERAL REGISTER ON SEPTEMBER 26, 1991 (CGD 91-005). THIS NOTICE ALLOWS A PERIOD FOR THE PUBLIC TO SUBMIT COMMENTS. AFTER THE COMMENT PERIOD CLOSURES, WE PLAN TO PUBLISH A FINAL RULE WHICH WILL INCORPORATE ANY CHANGES MADE. WE LOOK FORWARD TO RECEIVING THE PUBLIC'S INPUT TO HELP US CRAFT THE BEST REGULATORY PACKAGE.

IN ADDITION TO THE USUAL REGULATORY EVALUATION, THE COAST GUARD WILL PREPARE A REGULATORY IMPACT ANALYSIS. THIS ANALYSIS WILL ASSESS THE POTENTIAL EFFECTS ARISING FROM DIFFICULTIES OCEANGOING OPERATORS MAY ENCOUNTER IN OBTAINING THE USUAL GUARANTIES OF INSURANCE FROM THEIR INSURANCE ENTITIES ONCE THE RULE GOES INTO EFFECT. TO ASSIST IN PREPARING THIS ANALYSIS, THE NOTICE OF PROPOSED RULEMAKING CONTAINS A LIST OF QUESTIONS

SOLICITING SPECIFIC INFORMATION REGARDING SOME OF THE SUBJECTS THAT MAY BE ADDRESSED IN THE ANALYSIS. UPON CONSIDERATION OF THE COMMENTS AND OTHER INFORMATION RECEIVED, THE ANALYSIS WILL BE COMPLETED AND NOTICE OF ITS AVAILABILITY WILL BE PLACED IN THE FEDERAL REGISTER. BASED ON THE COMMENTS RECEIVED IN RESPONSE TO THE NOTICE OF PROPOSED RULEMAKING, IF ADDITIONAL OPPORTUNITY FOR PUBLIC COMMENT ON THE ANALYSIS IS INDICATED, THE COAST GUARD WILL PROVIDE AN OPPORTUNITY FOR SUCH COMMENT BEFORE PUBLISHING A FINAL RULE.

CURRENTLY, PENDING PROMULGATION OF A FINAL RULE, FOR PURPOSES OF CERTIFICATION (AS CONTRASTED WITH LIABILITY), WE ARE USING VESSEL FINANCIAL RESPONSIBILITY NUMBERS THAT ARE PROVIDED IN PRE-OPA 90 LAWS, SUCH AS THE CLEAN WATER ACT. TODAY, TO OBTAIN A CERTIFICATE AND OPERATE IN THE U.S., A VESSEL OPERATOR NEED ONLY PROVIDE EVIDENCE OF FINANCIAL RESPONSIBILITY WHICH IS A FRACTION OF THAT PRESCRIBED IN OPA 90. THAT OWNER OR OPERATOR MAY BE LIABLE UP TO MUCH HIGHER AMOUNTS, BUT ADSENT UPDATED RULES, THERE IS NO REQUIREMENT TO PRODUCE EVIDENCE OF FINANCIAL RESPONSIBILITY COMMENSURATE WITH SUCH HIGHER AMOUNTS. THE PROPOSED RULE SEEKS TO BLEND THE SPECIFIC REQUIREMENTS OF THE ACT, INCLUDING ITS INCREASED LIMITS OF LIABILITY WITH BASIC PROCEDURAL STEPS THAT HAVE BEEN IN EFFECT FOR MANY YEARS.

THE REQUIREMENTS FOR VESSEL FINANCIAL RESPONSIBILITY HAVE BEEN IN EFFECT IN THE U.S. SINCE 1971. OPA 90 HAS NOT CHANGED THE MECHANICS OF THIS SYSTEM. ALTHOUGH THE STATUTORY LIMITS AND SCOPE OF LIABILITY HAVE INCREASED THROUGHOUT THE YEARS, THE SYSTEM FOR ESTABLISHING FINANCIAL RESPONSIBILITY HAS REMAINED THE

SAME. HISTORICALLY, FOUR WORKABLE METHODS FOR ESTABLISHING FINANCIAL RESPONSIBILITY HAVE BEEN IDENTIFIED BY INDUSTRY AND GOVERNMENT: 1) INSURANCE GUARANTIES, 2) SURETY BOND GUARANTIES, 3) SELF-INSURANCE AND 4) FINANCIAL GUARANTIES, WHICH ARE SIMILAR TO SELF-INSURANCE. OF THESE METHODS, INSURANCE GUARANTIES ARE, BY FAR, THE MOST FREQUENTLY USED, PARTICULARLY IN THE INTERNATIONAL VESSEL OPERATING COMMUNITY.

THE COAST GUARD CERTIFICATION PROCESS IS SIMPLE: ONCE THE OWNER/OPERATOR AND THE VESSELS ARE IDENTIFIED ON AN APPLICATION FORM, AND THE GUARANTOR OR SELF-INSURER HAS PROVIDED THE COAST GUARD WITH SUFFICIENT EVIDENCE OF FINANCIAL RESPONSIBILITY, THE AFFECTED VESSELS ARE ISSUED CERTIFICATES OF FINANCIAL RESPONSIBILITY (COFR'S). APPLICATION AND CERTIFICATION FEES MUST BE PAID. IN GENERAL TERMS, VESSELS LACKING VALID COFR'S ARE PROHIBITED BY THE COAST GUARD, AS WELL AS THE U.S. CUSTOMS SERVICE, FROM OPERATING IN U.S. WATERS, ENTERING OR LEAVING U.S. PORTS. OPA 90 AND CERCLA CONTINUE TO MANDATE SUCH ENFORCEMENT.

OVER THE PAST SEVERAL MONTHS, THE NATIONAL POLLUTION FUNDS CENTER HAS BEEN NOTIFIED OF SEVERAL CONCERNS OF THE MARITIME COMMUNITY. I WILL IDENTIFY THE PRINCIPAL ISSUES RAISED THUS FAR.

ONE CONCERNS THE LIMITS OF LIABILITY. UNDER OPA 90, THE LIMITS OF LIABILITY FOR TANK VESSELS GENERALLY ARE SEVERAL TIMES HIGHER THAN UNDER THE PREVIOUS STATUTES. BUT, EVEN WITH THIS INCREASE, THE LIMITS OF LIABILITY ARE WELL BELOW THE COVERAGE THAT WE UNDERSTAND IS ROUTINELY PROVIDED BY THE INTERNATIONAL SHIPPING COMMUNITY'S INSURANCE ENTITIES, CALLED PROTECTION AND INDEMNITY (P&I) CLUBS. ALSO, THE LIMITS OF LIABILITY ARE

SPECIFIED IN THE STATUTE AND THERE ARE NO NEW PROCEDURAL CONCEPTS IN THE PROPOSED RULE. VIRTUALLY ALL OCEANGOING OPERATORS WHO USE U.S. WATERS ALREADY WOULD HAVE MORE THAN THE NECESSARY INSURANCE COVERAGE FOR FEDERAL PURPOSES FROM THEIR P&I CLUBS. ALL THAT IS REQUIRED BY OPA 90 AND CERCLA, AND THEREFORE BY THE PROPOSED RULE, IS THAT THE COVERAGE BE SUBMITTED IN A FORM ACCEPTABLE TO ESTABLISH EVIDENCE OF FINANCIAL RESPONSIBILITY, BUT ONLY UP TO THE LIMITS OF OPA 90 AND CERCLA. I SHOULD ADD HERE THAT FOR THE GREAT MAJORITY OF OCEANGOING VESSELS, THE P&I CLUBS HAVE ALWAYS BEEN THE GUARANTORS FOR U.S. FINANCIAL RESPONSIBILITY PURPOSES. THE CLUBS ALSO PROVIDE FINANCIAL SECURITY FOR THE OIL POLLUTION DAMAGE LIABILITY OF SHIP OWNERS WHO TRADE IN, OR FLY THE FLAGS OF, SIXTY-NINE OTHER COUNTRIES PARTY TO THE 1969 CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE. WE UNDERSTAND THAT INSURANCE GUARANTIES FOR THE NON-OCEANGOING OR "BROWN WATER" VESSEL OPERATORS ARE READILY AVAILABLE FROM THE COMMERCIAL MARINE INSURANCE INDUSTRY IN THE UNITED STATES. I AM TOLD THAT THEY WILL REMAIN AVAILABLE.

A SECOND ISSUE RAISED IS THAT OF DIRECT ACTION AGAINST A GUARANTOR BY PRIVATE CLAIMANTS. OPA 90 REQUIRES THAT CLAIMANTS, INCLUDING PRIVATE CLAIMANTS, BE ABLE TO PRESENT A CLAIM FOR REMOVAL COSTS OR DAMAGES DIRECTLY AGAINST AN INSURER OR OTHER GUARANTOR SHOULD A VESSEL BE INVOLVED IN A POLLUTION INCIDENT. DIRECT ACTION BY PRIVATE CLAIMANTS IS NOT A NEW CONCEPT. ALTHOUGH ONLY THE FEDERAL GOVERNMENT COULD TAKE DIRECT ACTION AGAINST THE GUARANTOR UNDER THE CLEAN WATER ACT, DIRECT ACTION BY PRIVATE CLAIMANTS WAS A FEATURE OF THE FINANCIAL RESPONSIBILITY

A CASE WHERE A RESPONSIBLE PARTY'S LIMIT OF LIABILITY IS BROKEN, THE GUARANTOR WOULD STILL ONLY BE LIABLE UP TO THE LIMITS OF ITS GUARANTEE. IN THE EVENT OF THE RESPONSIBLE PARTY'S WILLFUL MISCONDUCT, THE GUARANTOR IS NOT LIABLE AT ALL. IT IS THE RESPONSIBLE PARTY - NAMELY THE OWNER AND/OR OPERATOR OF THE VESSEL - WHO WOULD BE RESPONSIBLE FOR ANY UNLIMITED LIABILITY.

A FIFTH ISSUE CONCERNS POLICY DEFENSES. INSURANCE GUARANTIES, TO HAVE ANY PRACTICAL MEANING, CANNOT CONTAIN POLICY DEFENSES, WHICH ARE A HOST OF EXCLUSIONS IN THE UNDERLYING INSURANCE CONTRACT, AS WELL AS IN CASE LAW, BETWEEN THE INSURER AND INSURED. THESE DEFENSES OR EXCLUSIONS VOID THE UNDERLYING INSURANCE FOR A VARIETY OF REASONS. WHILE OPA 90 ALLOWS THE SECRETARY TO SPECIFY NECESSARY POLICY DEFENSES IN PROMULGATING FINANCIAL RESPONSIBILITY REQUIREMENTS, WE HAVE FOUND NONE, OTHER THAN THOSE PERMITTED BY STATUTE, THAT WOULD "EFFECTUATE THE PURPOSES OF THIS ACT." IT APPEARS TO US THAT CONGRESS INTENDED DIRECT ACTION TO BE A PRINCIPAL FEATURE OF THE LAW, AND POLICY DEFENSES APPEAR TO RUN COUNTER TO THE CONCEPT OF DIRECT ACTION.

THE FINAL ISSUE CONCERNS SELF-INSURANCE. SELF-INSURANCE IS ONE OF THE STATUTORILY-PERMITTED METHODS OF ESTABLISHING FINANCIAL RESPONSIBILITY. THE MEANS OF ESTABLISHING SELF-INSURANCE IN THE PROPOSED RULE HAVE NOT CHANGED FROM CURRENT REGULATIONS. TO SUMMARIZE THEIR REQUIREMENTS: A SELF-INSURER MUST HAVE ASSETS IN THE U.S. THAT CAN BE ATTACHED BY CLAIMANTS (INCLUDING THE OIL SPILL LIABILITY TRUST FUND), IF NECESSARY TO SATISFY A JUDGMENT. IN ADDITION, U.S. ASSETS MUST BE BALANCED AGAINST INTERNATIONAL LIABILITIES. THAT IS, A SELF-INSURER'S

WORLDWIDE LIABILITIES MUST BE LESS THAN ITS U.S. ASSETS. THIS IS TO HELP ENSURE THAT THE U.S. ASSETS REMAIN AVAILABLE TO U.S. CLAIMANTS AND ARE NOT DEPLETED IN MEETING FOREIGN LIABILITIES.

I HAVE RECENTLY HEARD OF A PROPOSAL TO ALLOW THE USE OF P&I CLUB MEMBERSHIP OR INSURANCE AS AN "ASSET" FOR SELF-INSURANCE PURPOSES. THERE ARE SEVERAL POINTS I WOULD LIKE TO MAKE CONCERNING THIS PROPOSAL. FIRST, AS BETWEEN THE INSURED AND THE INSURER, INSURANCE IS SUBJECT TO POLICY DEFENSES, SOME OF WHICH MAY NOT BE EXPLICIT IN INSURANCE CONTRACTS. FOR A HOST OF REASONS, AN INSURED MAY END UP WITHOUT ANY COVERAGE. THAT, BY ITSELF, SEEMS TO ELIMINATE AVAILABILITY OF MEMBERSHIP OR INSURANCE AS AN ASSET FOR SELF-INSURANCE PURPOSES. SECOND, TYPICALLY, P&I CLUB INSURANCE SPECIFICALLY PROHIBITS ATTACHMENT OR DIRECT ACTION BY CLAIMANTS. IF SOMETHING CAN NOT BE ATTACHED, IT PROBABLY SHOULD NOT BE USED AS AN ASSET FOR PURPOSES OF SELF-INSURANCE. THIRD, WE UNDERSTAND THAT P&I INSURANCE NORMALLY CAN BE CANCELLED WITHOUT THE CONSENT OF THE SHIPOWNER AND WITHOUT THE KNOWLEDGE OF THE COAST GUARD. FOURTH, P&I INSURANCE IS TYPICALLY CHARACTERIZED AS INDEMNITY INSURANCE. THAT MEANS THAT IF A VESSEL COVERED BY A P&I CLUB HAS AN OIL SPILL, THE INSURED MUST FIRST PAY FOR THE REMOVAL COST AND DAMAGES OUT OF ITS OWN POCKET. THEN, AND ONLY THEN, WOULD THE SHIPOWNER HAVE LEGAL STANDING TO DEMAND THAT THE P&I CLUB PAY UP; PROVIDED, OF COURSE, THAT THE CLUB DID NOT HAVE THE RIGHT TO ASSERT A POLICY DEFENSE. AS AN EXAMPLE, THE SUBCOMMITTEE RECENTLY WROTE THE COMMANDANT CONCERNING A CASE INVOLVING THE CIERO SAVANNAH SPILL IN WHICH A POLICY DEFENSE WAS EMPLOYED AGAINST THE INSURED. WHILE THIS DID

NOT AFFECT THE GUARANTEE OF FINANCIAL RESPONSIBILITY TO THE COAST GUARD, IT DEMONSTRATES ONE OF THE SHORTCOMINGS OF USING INSURANCE AS AN ASSET.

IN SHORT, OUR ANALYSIS TO DATE INDICATES THAT USE OF TYPICAL MEMBERSHIP OR INSURANCE AS AN "ASSET" FOR SELF-INSURANCE PURPOSES WOULD NOT ENSURE FINANCIAL RESPONSIBILITY. MOREOVER, MR. CHAIRMAN, OPA 90 DEFINES ANY PERSON, OTHER THAN THE RESPONSIBLE PARTY, WHO PROVIDES EVIDENCE OF FINANCIAL RESPONSIBILITY AS A "GUARANTOR." IT FURTHER PROVIDES FOR DIRECT ACTION AGAINST ANY "GUARANTOR." IF REGULATIONS PERMITTED AN INSURANCE POLICY TO BE COUNTED AS AN ASSET, THEREBY ALLOWING THE INSURER TO AVOID THE DIRECT ACTION REQUIREMENTS OF OPA 90, THE REGULATIONS WOULD APPEAR TO BE CONTRARY TO THE SPIRIT OF THE LAW.

MR. CHAIRMAN, I WILL BE GLAD TO RESPOND TO ANY QUESTIONS YOU OR THE OTHER MEMBERS OF THE SUBCOMMITTEE MAY HAVE.



City of Galena

Antoski Hall • P.O. Box 149 • Galena, Alaska 99741 • Telephone (907) 656-1301

January 16, 1992

Governor Walter Hickel
Third Floor, Capitol Bldg.
P.O. Box A
Juneau, AK 99811

Dear Governor Hickel:

I am writing you in regards to AS 46.04.040 which is having a drastic effect on communities with fuel storage facilities in this state, in particular Galena. Either this piece of legislation is so stringent in wording that Lloyds of London will not underwrite insurance policies in this regard, or they are gun shy because of past oilspills in the state. In any event, there is a red flag up! The City of Galena does not have sudden or accidental spill coverage at this time for it's bulk fuel facility.

Since no carrier in the state can get coverage the DEC has accepted self insurance as an option. This is an end run around the problem. All one needs for self insurance is to show that \$10/barrel is on hand in reserves, proved by submitting financial statements each quarter. In our case that is \$142K for a 600K gallon facility. This would probably clean up a small spill but nothing major.

I believe this issue needs to be addressed head on. The answer to the problem will have to come from the legislature and soon. I am not comfortable with the situation since my name is on the fuel spill contingency plan for Galena. There are a lot of fuel storage facilities in the state at risk because of this problem. I'd like to see something done about it.

Sincerely,

Chris Hladick
City Manager

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Hickel
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Ray Gillespie
Gillespie & Associates
Lobbying & Governmental Affairs



10390 Mendenhall Loop Road
Juneau, Alaska 99801
Telephone: (907) 463-3375
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MEMORANDUM

TO: Senate and House Oil and Gas Committees

DATE: February 10, 1992

FROM:  Ray Gillespie, for Crowley Maritime, Delta Western and Petro Marine

RE: Marine Pollution Insurance Problems

This will outline three problems non-crude carriers and operators are experiencing in obtaining marine pollution insurance to satisfy the financial responsibility and "direct action" provisions of Alaska law.

Briefly, these problems are:

1. Confusion created by apparent inconsistencies between statute and regulations concerning insurer liability/exposure when issuing a policy meeting the specific requirements of financial responsibilities statutes.
2. P&I club and insurance coverage with "direct action" endorsement is virtually unavailable to most Alaska operators in the present commercial insurance or P&I club market.
3. Whether D.E.C. has statutory authority to grant conditional operating permits to operators who have met the financial responsibility requirement dollar amounts, but can not satisfy the "direct action" endorsement due to its unavailability.

I.

LIABILITY LIMIT/EXPOSURE OF INSURERS OR GUARANTORS.

Environmental Conservation Regulation, 18 AAC 75.230 (b), requires a policy of insurance certificate or binder to carry an endorsement which reads in part as follows:

"Any other provision of this policy notwithstanding: (1) this policy insures against any liability the insured may incur under Alaska Statute 46.04.040 (i), or any provision cited in it as a result of an unlawful discharge of oil within or affecting Alaska lands or waters within the territorial jurisdiction of the State of Alaska; however, the insurer's liability does not exceed the limits of coverage set out in Section _____ of this policy...." (emphasis added)

Alaska Statute 46.04.040 (i) reads as follows:

"Financial responsibility under this section extends to loss compensable under AS 46.03.760 (e) or 46.03.822 and an assessment under AS 46.03.758, 46.03.759, 46.03.760 (a) or 46.04.030 (g)."

This statute in combination with 18 AAC 75.230 (b) has led P&I clubs and insurance underwriters to conclude that their exposure under a policy may not be limited to the face amount of the policy even though it meets the other monetary requirements for financial responsibility (AS 46.04.030 (k)). In other words, because statutes generally supersede any inconsistent regulation, insurers have advised operators that the potential for unlimited liability and the uncertainty of a judicial interpretation of these statutes and regulations prevents insurance underwriters and P&I clubs from writing the insurance with the required endorsement.

II.

"DIRECT ACTION" PROBLEM

AS 46.04.040 (e) reads in part as follows:

"An action brought under AS 46.03.758, 46.03.759, 46.03.760 (a) or (e), 46.03.822, or AS 46.04.030 (g) may be brought in a state court directly against the insurer, the group, or any person providing evidence of financial responsibility. The applicant, and insurer, surety, guarantor, person furnishing an approved letter of credit, or other group or person providing proof of financial responsibility approved by the department shall appoint an agent or service of process in the state...." (emphasis added)

This provision requires that any insurer or P&I club submit directly to the Alaska jurisdiction and be subject directly to legal action against it in Alaska courts without first proceeding against the spilling operator. The State of Alaska or private party can, under this provision, proceed directly in Alaska courts against the insurer. Typically, P&I club coverage is an indemnity policy, which first requires a provable loss against the operator before the P&I club pays that loss. This is the so-called "direct action" provision which prevents many operators from securing coverage meeting the requirements of Alaska Statutes.

In the States of Washington and California recently enacted financial responsibility statutes do not require the "direct action" endorsement. In essence, California and Washington simply allow for P&I club and insurance coverage which meets the monetary financial responsibility requirements and requires no other showing of a "direct action" endorsement.

III.

UNCERTAINTY OF D.E.C. AUTHORITY TO ISSUE CONDITIONAL OPERATING PERMITS WHERE DIRECT ACTION ENDORSEMENTS ARE NOT AVAILABLE.

AS 46.04.040 (1) provides that under certain circumstances DEC may issue permits to an operator who has proof of financial