

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672

2075 SCOMM 78: SENATE SPEC. COMM. ON OIL & GAS, 1991-1992

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Mr. William Lawrence

December 30, 1981

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Of course, the opposite side of the coin is that if insurance, or another acceptable form of proof of financial responsibility, becomes available, the operators could not claim that compliance is impossible; and we would not consider an operator to be pursuing compliance with good faith if he made no real efforts to find or arrange that coverage. And I'm sure the operators realize that if an actual spill occurs, inability to secure insurance would not relieve them from liability for damages caused by the spill.

I hope this clarifies our position. Let me know if you have further questions. Meantime I trust you will distribute this letter to those present at the meeting, and to any other persons you believe would be interested..

Sincerely,

WILSON L. CONDON
ATTORNEY GENERAL

By:


Douglas K. Mertz
Assistant Attorney General

DKM:dlm

cc: Ernst W. Mueller
Commissioner
Department of Environmental
Conservation

596 3762

TRANSPORTATION INSTITUTE

PACIFIC COAST OFFICE
1000 SECOND AVENUE, SUITE 1502
SEATTLE, WASHINGTON 98104
206-464-9824



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January 25, 1982

Mr. Andrew M. Spear, Manager
Oil Pollution Control
State of Alaska
Department of Environmental
Conservation
Pouch O
Juneau, Alaska 99811

Re: Proof of Financial Responsibility for Oil Spills
Alaska Statute 46.04.040

Dear Mr. Spear:

As West Coast Manager of the Transportation Institute, representing tug and barge owners/operators trading between and/or amongst the states of Alaska, Washington, Oregon and California, I would like to thank you and Mr. Douglas Mertz for your attendance at the meeting of December 17, 1981, in our offices, to listen to comments and suggestions from members of the Institute and insurance industry representatives in connection with the subject matter.

This letter will also acknowledge receipt of Mr. Douglas Mertz's letter of December 30, 1981, copies of which have been distributed to the membership.

As you know, the purpose of our meeting of December 17, 1981, was to allow our members, together with insurance industry representatives, to discuss with you the concerns they are having in attempting to comply with Alaska Statute 46.04.040 (Proof of Financial Responsibility) insofar as this law relates to oil barges, other than inland oil barges, carrying oil as cargo (except those transporting pipeline oil). These concerns have led to considerable frustration on the part of our member vessel operators, in view of the substantial penalties, which could be imposed on them and other nonmember operators, for failure to meet the requirements of the current Alaska law.

Mr. Andrew M. Spear
January 25, 1982
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From the standpoint of our members, the only practical avenue available to them to attempt to meet the "Proof of Financial Responsibility" requirement is through certification by their insurers.

Our members have, over the past year, discussed the matter of Certification at length with the insurance markets in both the United States and overseas. These markets are centered in New York and London, respectively, and, between them, insure virtually the world's entire oil pollution liabilities.

The United States market, headquartered in New York, is made up of first class stock and mutual companies, who as members of the American Institute of Marine Underwriters formed the Water Quality Insurance Syndicate (WQIS) at the time of the Federal Water Pollution Control Act of 1970 to provide insurance for its clients, as a result of the liabilities that could be imposed upon them by the Act.

The London market is made up of a number of international Protection and Indemnity Clubs referred to as the "International Group of P&I Clubs." These clubs, between them, insure the oil pollution liabilities of nearly all the ocean going tanker tonnage.

As mentioned earlier, responses from the insurance industry to requests by our member operators for certification of Proof of Financial Responsibility under the Alaska law have been met with a polite but firm "no".

The specific areas that create problems for the insurers are listed as follows:

- I. Of foremost concern is the requirement for financial responsibility through insurance that (18 AAC 20.065) (2) the insurer agrees that any final judgement against the insured for damages under AS46.04.040(i) resulting from an unlawful discharge of oil from or by any vessel or facility named in the policy may be enforced or executed directly against the insurer to the amount of coverage of this policy;). It is felt by the insurers that this provision allowing direct access, strips the insurers of their right to defenses that are allowed their insured, such as the limitation of liability provision under maritime law. Without recourse to defenses normally available to the company they are insuring, the insurance companies feel extremely vulnerable. A clarification of the rights of the insurers under direct access is needed.

Mr. Andrew M. Spear
January 25, 1982
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II. Another area of concern to insurers is the requirement to certify coverage to different entities such as states and countries, based on varying laws provided by these individual entities.

III. Civil penalties are allowed by the state of Alaska from \$500 - \$100,000 for the initial violation and then \$5,000 per day for each day the violation continues up to a maximum overall limit of \$100,000,000. These civil penalties can be assessed to a person who violates or causes or permits to be violated a provision of the Act or a regulation, a lawful order of the department, or a permit, or a term or cancellation of a permit issued under the Act. These penalties are excessive and the insurers also feel there is danger of making payments under the law that will amount to windfall gains for the state of Alaska.

... Under AS46.04.020 (c), the department can require clean-up beyond that required by the U.S. Coast Guard.

"If the department determined 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."

This could lead to unlimited costs for cleanup far beyond that provided by insurers of the Federal Clean Water Act (\$150 per GRT) and perhaps beyond the minimum limit required for financial responsibility of \$1,000,000 since there is no check on type or nature of expense, or a lid on total expense. This is unlike a restoration for damages since 1) the determination of proper cleanup can be arbitrarily determined and, 2) there is no independent review in determining reasonable cost.

Distributed at our recent meeting was a letter addressed to me care of Christopher Arundell of Pettit-Morrey Company, from Mr. Robert S. Lagattolla, President, of the Water Quality Insurance Syndicate (WQIS) dated December 15, 1981, stating the WQIS's position on oil spill statutes, including reasons for not issuing the "Alaska Endorsement" proscribed under the Alaska law. A copy of that letter is enclosed for reference. Similarly, I am also enclosing a copy of a letter from the American Institute of Marine Underwriters (AIMU) to Chris Arundell of Pettit-Morrey Company dated January 14, 1982, expressing its views and the views of the American Marine Insurance Market on this subject.

07 11 1980 14153 FROM TRANSPORTATION INSTITUTE TO 150726771

Mr. Andrew M. Spear
January 25, 1982
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As you know, it has been stated by P&I Club representatives that the London Market's reasons for being unable to comply with Alaska law are similar to those advocated by the U.S. Market. Representatives of the "International Group of P&I Clubs" met with you early last year to express their group's position on oil pollution law, including their concerns over the Alaska law.

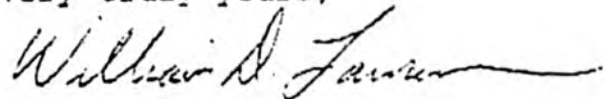
The above comments and enclosures clearly indicate that certification under the Alaska Oil Pollution Control Law will not be provided by the world insurance markets. Both the United States and London markets have a commitment to Federal pre-emption in the area of pollution laws.

It is clear that the Alaska law imposes considerable additional requirements over and above the existing Federal Pollution laws and that the oil carrying barge operators are unable to meet these additional requirements.

While we do appreciate the assurances given in Mr. Mertz's letter of December 30, 1981, we request your assistance in obtaining meaningful and satisfactory responses to insurers' concerns noted above (Items I through IV), including possible changes in the law as it presently exists in order that the carriers can achieve compliance with financial responsibility provisions.

Your prompt attention to this letter will be greatly appreciated.

Very truly yours,



William D. Lawrence
West Coast Manager
TRANSPORTATION INSTITUTE

WDL:ib
Enclosures

cc: Douglas Mertz
Members of Committee

MEMORANDUM

State of Alaska

TO: Ernst W. Mueller, Commissioner
Department of Environmental
Conservation

DATE: May 12, 1982

FILE NO: J-66-462-82

TELEPHONE NO: 465-3600 x. 54

FROM: WILSON L. CONDON
ATTORNEY GENERAL

SUBJECT: Financial
Responsibility
and the Insur-
ance Industry
(AS 46.04.040)

By: 
Douglas K. Mertz
Assistant Attorney General

You have asked this office for an opinion on several questions concerning Alaska's oil spill laws, specifically the provisions dealing with proof of financial responsibility, AS 46.40.040 (§ 2, ch 116 SLA 1980). In conversations with representatives of various tank vessel and oil barge owners, it has become apparent that a good deal of confusion exists regarding the effect of AS 46.04.040. This opinion is intended to convey our interpretation of that statute as well as this department's policy regarding enforcement of it.

First, we want to make clear what the statute does not do: It does not create any new or increased liabilities whatsoever. Its role is limited to requiring proof that an owner or operator has the financial ability to compensate damages for which that person is liable under other state statutes. ^{1/} While those other statutes may expose an owner or operator to varying degrees of liability (see infra), AS 46.04.040 neither increases nor decreases the potential liability derived from those preexisting statutes.

Some concern has been expressed by the insurance industry as to the effect of the "direct action" provision of subsection (e) (. . . An action brought under AS 46.03.758, 64.03.760(a) or (e), or 46.04.822 may be brought in a state court directly against the insurer . . .). Specifically, their question has been whether this provision may subject insurers to even greater liabilities than their insureds because the insurer could not assert defenses personal to the insured. Of most immediate concern is whether the insurer could take advantage of the federal Limitation of Liability Act of 1851, 46 U.S.C. § 181, et. seq., which

^{1/} Specifically, AS 46.03.758, 46.03.760(a) and (e), and 46.03.822.

on its face is limited to vessel owners and demise charterers. The law on whether a direct action statute can deprive an insurer of the benefit of such defenses has never been settled 2/ Several jurisdictions besides Alaska allow direct actions against insurers in some circumstances. 3/

Of most direct relevance is the Louisiana statute, La. Rev. Stat. 22:655, which is a detailed provision clearly intending to work a fundamental change in the relationship between insurer, insured, and third-party claimant. At present, it appears that under the Louisiana statute an insurer may be successfully prevented from involving the insured's personal defenses. See Olympic Towing Corp. v. Nebel Towing Co., 419 F.2d 230 (5th Cir. 1969). In contrast is the Federal Clean Water Act provision on financial responsibility, 33 U.S.C. § 1321(p), after which the Alaskan act is in part modeled, which allows direct actions against the insurer, but explicitly permits the insurer to invoke the insured's defenses.

The Alaska statute contains no detailed indicia of intent to deny the insured's defenses, as in the Louisiana statute, nor an explicit provision retaining the insured's defenses, as in the Clean Water Act. The legislative history contains little evidence, except for the testimony on behalf of the Department of Environmental Conservation, as prime sponsor of the bill. William A. Publicover, Deputy Director of Environmental Quality Operations, testified that the bill's intent was

. . . to provide an easy way for an individual Alaskan to collect for damages to his property or for loss of income due to an oil spill. . . We want the injured party to be able to go to state court, even small claims court, file his claim against someone who is

2/ See Maryland Casualty Co. v. Cushing, 347 U.S. 409 (1954); Olympic Towing Corp. v. Nebel Towing Co., 419 F.2d 230 (5th Cir. 1969).

3/ See, e.g., N.Y. INS. LAW, (McKinney) Section 167; Louisiana Revised Statutes 22:655; California Insurance Code, Section 11580 (West 1977); Shingleton v. Bussey, 223 So.2d 713 (Fla. 19-69); Third Parties (Rights against Insurers) Act 1930 (United Kingdom).

Ernst W. Mueller, Commissioner

May 13, 1982

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attachable, someone who does business in Alaska, or who has an agent in Alaska, and we seek timely satisfaction of his claim.

Publicover went on to describe the costly and time-consuming process of identifying the responsible party and pursuing an action in a distant forum. The direct access provision, he said, was designed to provide a speedy remedy which as a practical matter could be secured by an Alaskan fisherman, for example, with a minor claim. Publicover did not mention any intent whatsoever to deny the insurer the insured's defenses.

Against this background, we believe the courts would read AS 46.04.040(e) as intended only to provide a local forum in which to proceed against a solvent fund, and would not read into it the much more far-reaching result intended by Louisiana's statute. In short, as we read AS 46.04.040(e), although a claimant may proceed directly against the insurer under this statute, the insurer would "step into the shoes" of the insured by being able to assert any substantive defense available to the insured.

At the same time, the insurer would always retain an absolute limit to its liability, namely the policy limits. Since the insurer's liability is derivative, through the insured's policy, even with "direct access" we believe the courts would not hold the insurer liable for more than the amount contracted for in the policy. (This interpretation is confirmed in the implementing regulations, at 18 AAC 20.065: ". . . the insurer's liability does not exceed the limits of coverage . . .").

In conversation with insurers it has also appeared that there is concern about multiple "certification" requirements, that is, about the insurers having to undertake the bureaucratic burden of supplying Alaska with a separate certificate of insurance, in addition to furnishing the federal government with a Federal Maritime Commission certificate to comply with federal requirements. We would point out, however, that AS 46.04.040 contains no technical "certification" requirement; instead, it and the related regula-

Ernst W. Mueller, Commissioner

May 13, 1982

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tions (18 AAC 20.005 -- 18 AAC 20.900) are quite flexible as to how a party may demonstrate the existence of requisite financial responsibility. As to insurance, for example, the party need only submit a suitable binder along with a copy of the underlying policy, or a certificate of entry. If financial responsibility is shown through a surety bond or guaranty sample forms are included in the regulations. If self-insurance is used, the regulations merely call for a set of financial statements and affidavits, in place of which a party may substitute forms already prepared for submission to the Securities and Exchange Commission or the Federal Energy Regulatory Commission (see 18 AAC 20.055). Thus, the regulations, far from imposing a rigid and extensive set of bureaucratic requirements, are quite flexible and easy to satisfy once the required financial responsibility is acquired.

Finally, we address the question of whether AS 46.04.040, or its related statutes, could ever result in a windfall recovery for the state (a recovery greater than actual damages) or subject an insurer to liability for a punitive penalty assessed against the insured. To answer the question it is necessary to review the four statutes to which the financial responsibility requirements of AS 46.04.040 apply:

AS 46.03.760(a) is a standard civil penalty provision providing for an assessment to the state of \$500 to \$100,000 for violations of various state pollution statute; the assessment is required to reflect "reasonable compensation in the nature of liquidated damages for any adverse environmental effects . . .," as well as state costs in investigating and correcting the violation. Subsection (b) states: "Actions under this section may not be used for punitive purposes, and sums assessed by the court must be compensatory and remedial in nature."

AS 46.03.760(e) provides for recovery by the state, in a civil action, of actual measurable damages caused by unlawful oil discharges, including cleanup and restoration costs. The prohibition in subsection (b) of punitive sanctions also applies to actions under subsection (e). We read subsections (a), (b), and (e) together to provide a scheme of alternative methods for securing compensation from oil spills, through either liquidated damages (subsection (a)) or actual damages (subsection (e)); in neither case could punitive sanctions be applied. Since both subsections have the same

Ernst W. Mueller, Commissioner

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purpose -- to provide full compensation -- we believe that a recovery under either one would be credited toward a recovery under the other, thus eliminating the possibility of a double recovery.

AS 46.03.758 is yet another provision for securing compensation to the state for damages from oil spills. Specifically, amounts assessed under this provision are intended to compensate for those elements of damage which are not able to be measured or valued directly. Under this method, a formula is used, taking into account the amount spilled, amount recovered, the toxicity, dispersibility, and degradability of the oil, and the sensitivity of the receiving environment, to generate a final figure which would compensate for the actual damage to the environment not directly measurable. The civil penalty is explicitly not to be punitive (AS 46.03.758(a)(3)), and a person may not be subjected to civil penalty assessments under both AS 46.03.758 and AS 46.03.760(a) (see AS 46.03.758(i)).

AS 46.03.322 is the general strict liability statute for damages caused by hazardous substances, including oil; it also provides for a number of defenses. This is the statute upon which private parties may rely to secure damages.

These are the only statutes for which financial responsibility must be shown, and to which AS 46.04.040 applies; we note particularly that it does not require proof of financial responsibility for sanctions under AS 46.03.-790, the parallel criminal penalty provision. From the details of the four provisions to which the financial responsibility requirements apply, we conclude that (1) in no case would an insurer, providing coverage only under the four listed statutes, be liable for a punitive or criminal assessment; and (2) since all four of the listed provisions are basically compensatory in intent, amounts assessed under any one of them which were intended to compensate for a particular set of damages would necessarily be credited toward recoveries for the same damages under any of the other statutes, so there is no possibility of multiple recoveries for the same damages.

This discussion reflects our Department's view of the statutes and regulations in question and is the basis for any enforcement action to be taken under the law. It thus appears to us that the concerns expressed by the industry on these points are without foundation, and we are

Ernst W. Mueller, Commissioner

May 13. 1982

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pleased to be able to give our assurances that the State of Alaska's Department of Law intends to enforce these laws in a manner which should satisfy the industry as to its fairness.

Please let me know if you have any other questions.

DKM/jb

DEPT. OF ENVIRONMENTAL CONSERVATION

JAY S. HAMMOND, GOVERNOR

465-2653

POUCH 0 - JUNEAU 0011

May 21, 1982

Mr. William D. Lawrence
Manager, Pacific Coast Office
Transportation Institute
801 Second Ave, Room 1502
Seattle, Washington 98104

Dear Mr. Lawrence:

Thank you and Steve Scalzo for visiting with us and discussing the various issues involved in securing proof of financial responsibility for the Alaskan tank barge operators. This letter will serve to memorialize some of our discussion and inform you of the Attorney General's opinion regarding certain sections of Alaska's pollution laws.

As you know we have been actively seeking a resolution to the problem that certain barge owners have had in securing insurance to cover the Alaska proof of financial responsibility requirements (AS 46.04.040). During the past year, discussions with you, the barge owners and the insurance brokers have resulted in the issuance of at least one insurance policy covering five vessels, a surety bond for another three, and self-insurance by one large company. In the meantime, pressure has been brought to bear on some insurance underwriters not to issue policies by certain segments of the insurance industry.

It should be noted that we are not completely satisfied that all other avenues for proof of financial responsibility have been fully employed, namely self insurance surety bond, and guarantee. Some companies claim that it is against their policy to use self-insurance and it has been pointed out that certain small operators may not have sufficient assets to self-insure or use surety bonds. Of course, you understand that company policy is not a valid excuse for noncompliance with Alaska's requirements; only legal or physical impossibility in obtaining proof of financial responsibility would provide such a defense. In order to fully evaluate this situation we request a detailed explanation of why it is not possible for tank barge operators to obtain self-insurance, insurance, surety bonds and guarantees which will satisfy the State's financial responsibility requirements under AS 46.04.040 and subsequent regulations. We would appreciate this information from each firm which is represented by your organization. As we discussed, this justification should include sufficient factual information which the Alaska Department of Environmental Conservation can evaluate and satisfy itself as to the validity of the company's position. We also request that you furnish us with any correspondence or other material you may have concerning the inability of tank barge operators to obtain pollution insurance.

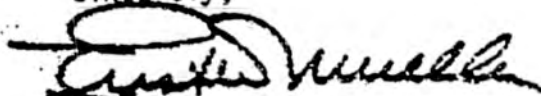
In the meantime we will open direct communications with the various marine insurance concerns, offer them our opinion as to the interpretation of the law and secure a definite answer as to their intentions in this matter.

Because it is important to conclude this matter as quickly as possible we will hold to the following schedule:

- | | |
|---------------|---|
| May - June | <ol style="list-style-type: none"> 1. Issue Department of Law legal opinion. May 13. 2. Open communications with marine insurance underwriters. 3. Establish marine underwriter's position and intentions. 4. Receive information from tank barge operators (as above). |
| July - August | <ol style="list-style-type: none"> 1. Make evaluations of various methods of showing proof of financial responsibility and/or 2. Secure and evaluate any additional information necessary. |
| September | Issue official findings on the ability of certain operators to comply with the provisions of AS 46.04.040. Proof of Financial Responsibility. |

Depending on meetings with the different parties concerned, availability of information and other unknown factors, this schedule will be flexible. However, we intend to make findings on these matters at the earliest possible time. Until we issue those findings, we will not refer any cases of non-compliance with AS 46.04.040 and subsequent regulations to the Attorney General's office for prosecution. Again, it should be clear that this does not relieve anyone from the responsibility for compensating those damaged from oil spills or from the requirement to clean up any spilled oil.

Sincerely,



Ernst W. Mueller
Commissioner

cc: Doug Mertz, Department of Law
Distribution List -- Tank Barge Operators

office copy

STATE OF ALASKA

JAY S. HAMBROND, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

465-2600 / POUCH 3 - JUNEAU DIST
August 11, 1982

Mr. William D. Lawrence
Manager, Pacific Coast Office
Transportation Institute
801 Second Avenue, Room 1502
Seattle, Washington 98104

Dear Mr. Lawrence:

This is a follow up of our May 21, 1982 letter to the Transportation Institute regarding the problem of non-compliance with AS 46.04.040.

We are gravely concerned that both the citizens and the resources of the State of Alaska are not receiving the protection that was to have been afforded them by AS 46.04.040. Since January 1, 1981, many oil barges have been operating in State waters without furnishing proof of financial ability to respond to damages caused by the accidental discharge of oil.

After several discussions and meetings over the past months, we concluded that positive and definitive steps would have to be taken by both the barge operators and the State to resolve this problem. These were presented to you in my May letter. The State has now accomplished several of these tasks and has gone one important step further. This was to hire a contractor who soon will investigate the entire set of circumstances associated with the financial responsibility statute, including reasons for non-compliance.

In my letter I requested that barge owners and operators individually furnish this department with detailed explanations of why it is not possible for them to obtain insurance, self-insurance, surety bonds or guarantees. To this date we have not received a single response, even though we asked to receive this information in the months of May and June. I was concerned to hear that the Transportation Institute has done very little to urge the barge owners and operators to respond to our request for information.

Please recall that the commitment we gave the operators was conditional upon their taking measures to obtain liability coverage. We expect firm and tangible evidence of these measures in the form of correspondence, as an example. A mere verbal communique is entirely inadequate and will not be acceptable. Also, we expect that all four provisions for demonstrating financial responsibility be investigated by the operator and evidence of that investigation be sent to us for evaluation. For example, this might take the form of audited balance sheets to manifest the self-insurance option.

Mr. William D. Lawrence

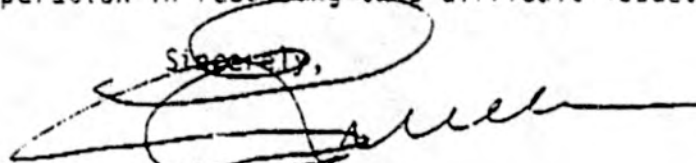
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August 5, 1982

As I mentioned previously, the contractor will start his investigation very shortly and one of his tasks involves review of evidence of efforts to obtain liability coverage. Failure to obtain adequate evidence from this review could result in our reevaluating our current agreement to withhold referring cases to the office of the Attorney General.

Once again, we urge your cooperation in resolving this difficult issue.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Ernst W. Mueller', is written over the word 'Sincerely,'. The signature is fluid and cursive, with a large loop at the end.

Ernst W. Mueller
Commissioner

cc Doug Mertz
Barge Operators

2

FACSIMILE
TRANSMITTAL

ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION
OIL & HAZARDOUS SUBSTANCE SPILL RESPONSE
9000 OLD GLACIER HIGHWAY, SUITE 200

P.O. BOX 0

JUNEAU, ALASKA 99811-1800

Telephone: (907)465-2630 Facsimile: (907)789-5673

Other ADEC fax numbers:

Anchorage: 562-4026

Soldotna: 262-2294

FCO and EH, Juneau: 463-3566

Fairbanks: 451-8130

Valdez: 835-8103

To:

Marilyn Heiman

Attn:

Fax number:

465-4565

From:

*Glen Adams**ADEC*

Number of pages including cover sheet:

15

Comments:

*per request - All tender, barge, terminal
and off-shore facilities that have approved forms
of financial responsibility for FY90*

MEMORANDUM

State of Alaska

TO: ADEC Staff

DATE: September 19, 1989

FILE NO:

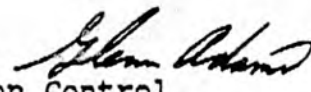
TELEPHONE NO:

THRU:

SUBJECT: 465-2630

Vessels w/Approved
Proof of Financial
Responsibility

FROM:

Glenn Adams 
Oil Pollution Control

The following tank vessels have approved proof of financial responsibility through June 30, 1990 except as noted:

Vessel Owner/Operator <i>MANAGER</i>	Vessel Name	Comments	Financial Responsibility
Amerada Hess Corp. 1185 Ave. of the Americas New York, NY 10036	St. Lucia Mt. Cabrite Seal Island	Taps only Taps only Taps only	Guaranty Amerada Hess
Arco Marine Inc. 300 Oceangate Long Beach, CA 90802-5617	Arco Alaska Arco Anchorage Arco Juneau Arco Prudhoe Bay Arco California Arco Fairbanks Arco Independence Arco Sag River Arco Spirit Arco Texas		Self-insured Arco
Bay Tankers 270 Sylvan Ave. Suite 100 Englewood Cliffs, NJ 07632	Bay Ridge	Taps only 4	Guaranty B.P. America
America Trading Transportation Co. 555 Fifth Avenue New York, NY 10017	American Trader		Guaranty B.P. America

ADEC STAFF

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September 19, 1989

Vessel Owner/Operator	Vessel Name	Comments	Financial Responsibility
Chevron Shipping Co. 225 Bush St., Rm 1015 San Francisco, CA 94104	Chev. California Chev. Mississippi Chev. Oregon Chev. Washington Chev. Colorado Chev. Louisiana Chev. Arizona	Taps only	Self-insurance Chevron Corp.
Exxon Shipping Co. P.O. Box 1512 Houston, TX 77251-1512	Exxon Benicia " " New Orleans " " North Slope " " Philadelphia " " San Francisco " " Baton Rouge " " Baltimore " " Baytown " " Galveston " " Jamestown " " Lexington " " Long Beach " " Princeton " " Washington " " Valdez " " Yorktown	Taps only "	Guaranty Exxon Corporation
Interocean Management Corporation Three Parkway Suite 1300 Philadelphia, PA 19102	Brooks Range Thompson Pass	Taps only Taps only	Guaranty B.P. America
Keystone Shipping Co. 313 Chestnut Street Philadelphia, Pa. 19106	Antigun Pass Kenai Keystone Canyon Tonsina Chestnut Hill Golden Gate Kittanning	Taps only Taps only Taps only Taps only "	Guaranty B.P. America Chas Kurtz Co. Inc
Marithon Oil Co. Natural Gas Division P.O. Box 3128 77253 Houston Texas	Polar Alaska Arctic Tokyo	LNG LNG	Guaranty Marithon Oil

DEC Staff

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September 19, 1989

Vessel Owner/Operator	Vessel Name	Comments	Financial Responsibility
Maritime Overseas Corporation 43 West 42nd Street New York, N.Y. 10036	Eastern Lion	Taps only	Guaranty Amerada Hess
	Northern Lion	Taps only	
	Southern Lion	Taps only	
	Western Lion	Taps only	
	Overseas New York	Taps only	Guaranty
	Overseas Washington	Taps only	
	Overseas Boston	Taps only	
	Overseas Ohio	Taps only	Guaranty/Overseas Shipholding Group
	Overseas Juneau	Taps only	
Mobil Oil Corp. 150 East 42nd Street New York, N.Y. 10017-5666	Mobil Arctic Mobil Meridian Syosset		Self-insurance Mobil Oil Corp.
OMI Corp. 280 Park Avenue New York, NY 10017-1282	OMI Columbia	Taps only	Guaranty B.P. America
Shell Oil Company P.O. Box 2463 Houston, TX 77252	B.T. San Diego B.T. Alaska		Guaranty Shell Oil
Sun Transport, Inc. P.O. Box 2224 Aston, PA 19014-2224	Texas Sun	Taps only	Self-insurance Sun Co., Inc.
	New York Sun	" "	
	Philadelphia Sun	" "	
	Tropic Sun	" "	
	Prince William Sound	" "	
Texaco Marine Ser., Inc. 2000 Westchester Ave. White Plains, NY 10650	Texaco California	"	Self-insurance Texaco Inc.
	" " Connecticut		
	" " Florida		
	" " Georgia		
	" " Massachusetts		
	" " Minnesota		
	" " Mississippi		
	" " Montana		
	" " New York		
	" " Rhode Island		
	" " Brooklyn	Taps only	

ADEC

-4-

September 19, 1989

Vessel Owner/Operator	Vessel Name	Comments	Financial Responsibility
Trinidad Corporation P.O. Box 11787 St. Louis, MO 63105-3721	Admiralty Bay Aspen Glacier Bay	Taps only " "	Guaranty S.P. America
West Coast Shipping Company P.O. Box 4258 Los Angeles, CA 90051-2258	Coast Range Sansinena II Sierra Madre		Guaranty Union Oil
Flyum's Barge Ser., Inc. P.O. Box 2838 Homer, AK 99603	Bradley River	Self- propelled barge	Insurance
Western Hemisphere P.O. Box 2401 Santa Monica, CA 90406-2401	Lion of Calif.		Self-insurance Tesco Corporation
White Pass Transpor- tation, Ltd. P.O. Box 4070 Whitehorse, Yukon YIA 3TI	Frank H. Brown	Cargo/ Tanker	Insurance
Marine Transport Lines, Inc. 150 Meadowland Pky. Secaucus, NJ 07096-1550	Various vessels		Military Sealift Command - U.S.N.S.
BP America 200 Public Square Cleveland, Ohio 44114-2375	Various vessels		Guaranty
<i>H.S. Oil Refining Co. P.O. Box 21913 X.A. Cal. 90062</i>	<i>Cove Leader</i>	<i>"</i>	<i>Insurance</i>

ADEC

-5-

September 19, 1989

Companies providing guarantees or insurance coverage for spot charters.

COMPANY		Financial Responsibility
Tesoro Alaska Petroleum Company 8700 Tesoro Drive San Antonio, TX 78217	20 M	Guaranty
Petro-Diamond, Inc. P.O. Box 92713-9617 Irvine, CA 92713-9617	20 M	Surety bond
Pacific Resources, Inc. P.O. Box 3379 Honolulu, HI 96842	20 M	Insurance
Petro-Marine Services 1600 A Street, Suite 307 Anchorage, AK 99501	20 M	Insurance
Mapco-Alaska Petroleum Inc. 1800 South Baltimore Avenue Tulsa, OK 74101-0645	20 M	Guaranty
Pacific Fuel Trading Corporation (Japan Air Lines) c/o Alexander & Alexander of Washington 2800 Columbia Center 701 Fifth Avenue Seattle, WA 98104-7074	20 M	Insurance
Astra Oil Company, Inc. 100 Oceangate, Suite 940 Long Beach, CA 90802	20 M	Insurance
Chinese Petroleum Corporation c/o Unical International Supply & Trading Co. 1201 West Fifth Street Los Angeles, CA 90017	20 M	Insurance
Wickland Oil Company 2 Embarcadero Center, Suite 610 San Francisco, CA 94111	20 M	Insurance
Cove Shipping Incorporated 200 Virginia Street Mobil, AL 36603		

H.S. Oil and Refining Co.
P.O. Box 36913
L.A., CA 90036

20M Insurance

MEMORANDUM

State of Alaska

TO: ADEC Staff

DATE: November 1, 1989

FILE NO:

TELEPHONE NO: (907) 465-2630

THRU:

SUBJECT: Barges with Approved
Proof of Financial
Responsibility

FROM:

Glenn Adams *Glenn Adams*
Oil Pollution Control

The following barges have approved proof of financial responsibility through June 30, 1990:

OWNER/OPERATOR

BARGE NAME OR NUMBER

PROOF FOR
FINANCIAL
RESPONSIBILITY

Browley Maritime
Corporation
101 California St.
San Francisco, CA
94111-5875

Satco 10
Satco 21
S.T. 23
Kodiak #1
Orca #2
14
450-10-
16-
254-
B&R 5
B&R 80-2
120-1
160-1
BC 151
BC 154
211
213
251
312-3
CINNABAR
Cordova
McKinley
Palmer
Juneau
✓102
450-3
450-6

Satco 20
S.T. 22
Napamute
EEK
Oil #1
17
500-2-
18-
DB 300-
B&R 80-1
B&R 80-3
120-2
160-4
BC 152
210
212
218
255
Artic Challenger
PAC 570
Nikiski
Ketchikan
Kodiak
101
450-2
450-4
450-7

Surety Bond

(WNER/OPERATOR

BARGE NAME OR NUMBER

PROOF FOR
FINANCIAL
RESPONSIBILITY

	450-8	450-9	
	450-11	UT-10	
	250-10		
Foss Maritime Co. 660 West Ewing Street Seattle, WA 98119-1587	Foss 255 Foss 248-P1 Tesoro Energizer Foss 255	Foss Tongass Foss 248-P2 SEA 76 Phoenix 121 HANDLER (2/4/90)	Insurance
Boyer Towing Inc. 7318 4th Ave. So. Seattle, WA 98108	Callapooya	Kootznahoo	Insurance
Delta Western P.O. Box 102916 Anchorage, AK 99501-2916	D.W. 282		Self-insured
United Marine Tug & Barge, Inc. 1441 N. Northlake Way Seattle, WA 98103	KRS 180-1 UMTB 180-2 MLC 260 MLC 165	MLC 332 MLC 333 MLC 340-1 MLC 344	Insurance
Seaspan International, Limited 10 Pemberton Avenue North Vancouver, B.C. V7P 2R1	Seaspan 822 Seaspan 824 Seaspan 870		Insurance
Yutana Barge Lines, Inc. P.O. Box 220 Nenana, AK 99760	Riverways7 Riverways8 Riverways9 Riverways10 Riverways11 Riverways12 Frank Turner #1 Stewart Lucky	Oil Barge 1 Oil Barge 2 Oil Barge 3 Oil Barge 4 Oil Barge 5 Oil Barge 6 Polaris #6 Barge 17	Insurance
Trident Seafoods Corp. 5303 Shilshole Ave., N.W. Seattle, WA 98107	NC-S-1	J-S-1	Insurance
Knappton Corporation P.O. Box 83018 Portland, OR 97203	Palmer	Sitka	Insurance

OWNER/OPERATOR	BARGE NAME OR NUMBER	PROOF FOR FINANCIAL RESPONSIBILITY
Exxon Corporation P.O. Box 3342 Houston, TX 77253	Exxon Barge #502	Self-insure
Samson Tug & Barge Co., Inc. P.O. Box 559 Sitka, AK 99835	ANNAHOOTZ	Insurance
Texaco Marine Services, Inc. 2000 Westchester Ave. White Plains, NJ 10650	Valiant/Pennsylvania Victory/Texas (tug/barges)	Self-insure
Smith Lighterage Co., Inc. P.O. Box 106 Dillingham, AK 99576	Skip I	Ray 'Sons
Moody's Sea Lighterage, Inc. Aleknagik, AK 99555	Sealite I	ST 20
Kugkaktlike Limited General Delivery Kipnuk, AK 99614	Chalin	Kangitsuk
Alaska Marine Charters, Inc. 106 110th Place S.E., Suite B Belluvue, WA 98004	Investigator	Insurance
Northland Services, Inc. 601 South Myrtle Street Seattle, WA 98124	ZPC 401	Kvichak Trader Insurance
Bering Sea Fisheries, Inc. 4413 83rd Avenue, S.E. Everett, WA 98205	King Salmon	Insurance
Brice Inc. P.O. Box 668 Fairbanks, AK 99707	OBS-4000	Insurance
Bering Marine Corporation P.O. Box 3757 Seattle, WA 98124	KC-4	KC-251
White Pine Transportation, Ltd. 24009	Alaskan Spirit	Insurance

MEMORANDUM

State of Alaska

(TO: ADEC Staff

DATE: November 20, 1989

FILE NO:

TELEPHONE NO: (907) 465-2630

THRU:

SUBJECT: Oil Terminal with
approved Proof of
Financial Responsi-
bility

FROM:

Glenn Adams *Glenn Adams*
Oil Pollution Control

The following Oil Terminals have approved proof of financial
responsibility through June 30, 1990.

<u>Owner/Operator</u>	<u>Fuel Storage Location</u>	<u>Proof for Financial Responsibility</u>
Alaska Pulp Corp. P.O. Box 1050 Sitka, AK 99835	Sitka	Surety bond
Alyeska Pipeline Service Company 1835 S. Bragaw St. Anchorage, AK 99512	Valdez Marine Terminal (TAPS)	Self-insurance and Guaranty
Anchorage Fueling and Service Company 810 "N" Street Anchorage, AK 99501-3293	Port of Anchorage and Anchorage International Airport	Insurance
Crowley Maritime Corp. P.O. Box 2287 Seattle, WA 98111	Captain's Bay Terminal Nome Tank Farm Kotzebue Tank Farm	Surety bond
Chevron U.S.A. Inc. 225 Bush St., Rm. 1015 San Francisco, CA 94104	Anchorage Terminal Valdez Terminal	Guaranty
Kenai Pipeline Company 555 Market Street San Francisco, CA 94120 -7141	Kenai Pipeline Terminal	Self-insurance

<u>Owner/Operator</u>	<u>Fuel Storage Location</u>	<u>Proof for Financial Responsibility</u>
Delta Western P.O. Box 102916 Anchorage, AK 99501 -2916	Dillingham Bulk Plant Juneau Bulk Plant Dutch Harbor Bulk Plant Wood River Tank Farm Naknek Bulk Plant Yakutat Bulk Plant Captain's Bay (offshore)	Self-insurance
Ketchikan Pulp Company P.O. Box 6600 Ketchikan, AK 99901	Ward Cove	Self-insurance
Mobil Oil Corporation 150 East 42nd Street New York, NY 10017-5666	Ketchikan Terminal	Self-insurance
Marathon Oil Company P.O. Box 102380 Anchorage, AK 99510	Trading Bay Production Facility Granit Point Production Facility	Self-insurance
Yutana Barge Lines, Inc. P.O. Box 220 Nenana, AK 99760	Fort Yukon Oil Terminal (Yukon Fuel Inc.) Galena Oil Terminal (Nenana Fuel Co.) St. Michael Fuel Co.	Insurance
Phillips Petroleum Co. P.O. Box 66 Kenai, AK 99511	Kenai LNG Plant	Self-insurance
Reeve Aleutian Airways, Inc. 4700 W. International Airport Road Anchorage, AK 99502-1091	Cold Bay Airport Terminal (Frosty Fuel Company)	Self-insurance
Shell Oil Company 601 W. Fifth Ave., Suite 810 Anchorage, AK 99501	Onshore Gathering System facilities (Middle Ground Shoal Field) Cock Inlet	Self-insurance
Tesoro Alaska Petroleum Company 3380 "C" Street Anchorage, AK	Kenai Terminal Anchorage Terminal Valdez Terminal Fairbanks Terminal	Self-insurance
Texaco U.S.A. P.O. Box 7812 Universal City, CA 91608-7812	Anchorage Sales Terminal	Self-insurance

<u>Owner/Operator</u>	<u>Fuel Storage Location</u>	<u>Proof for Financial Responsibility</u>
UNOCAL Refining & Marketing P.O. Box 76 Seattle, WA 98121	Juneau Bulk Plant (Taku Oil Sales) Ketchikan Terminal Sitka Bulk Plant (Sitka Sound Seafoods, Inc.)	Self-insurance
White Pass & Yukon Corporation, Ltd. P.O. Box 4070 Whitehorse, Yukon Y1A 3T1	Skagway (Pacific & Arctic Railway & Navigation Company) Haines, Skagway, Sitka, Ketchikan, Petersburg, Wrangell (Haines Terminal & Highway Company) Craig (Southeast Alaska Oil Companies, Inc.)	Self-insurance
Eskimos Inc. P.O. Box 129 Barrow, AK 99723	Block B Tank Farm Browerville Tank Farm Wainwright Storage Facility	Insurance
Saupe' Enterprises, Inc. P.O. Box 510 Fairbanks, AK 99707	Fairbanks Bulk Plant Fairbanks Bulk Lube Oil Plant	Insurance
Alco Alaska Petroleum, Incorporated Pouch 720 Fairbanks, AK 99707	North Pole Refinery Fairbanks Bulk Facilities Anchorage Bulk Facilities <i>GALENA Bulk Storage 1/4/90</i>	Self-insurance
Naknek Electric Assn., Incorporated P.O. Box 118 Naknek, AK 99633	Tank Farm in Naknek	Insurance
Municipality of Anchorage P.O. Box 6650 Anchorage, AK 99519-6650	George M. Sullivan Power Plant	Self-insurance
Harbor Enterprises, Inc. P.O. Box 389 Seward, AK 99669	Seward (Harbor Fuel Serv.) Dutch Harbor Main Plant-RESOFF Dutch Harbor-Ballyhoo (Petro Marine Services) Nikiski (Arness)	Insurance
Nushagak Electric Cooperative, Inc. P.O. Box 350 Dillingham, AK 99576	Tank Farm in Dillingham	Insurance

<u>Owner/Operator</u>	<u>Fuel Storage Location</u>	<u>Proof for Financial Responsibility</u>
Conoco Incorporated 3201 "C" St., Suite 200 Anchorage, AK 99503	Milne Point Central Facilities pad	Surety bond
Trident Seafood Corp. 5303 Shilshole Ave., N.W. Seattle, WA 98107	Sand Point (Popoff Is. Fuel Co.)	Insurance
Kodiak Oil Sales, Inc. P.O. Box 1487 Kodiak, AK 99615	Kodiak Bulk Plant (North Pacific Fuel)	Insurance
Nome Joint Utility Systems P.O. Box 70 Nome, AK 99762	Nome Tank Farm	Self-insurance
Golden Valley Electric Association, Inc. P.O. Box 1249 Fairbanks, AK 99707-1249	North Pole Fuel storage facility	Self-insurance
North Slope Borough P.O. Box 69 (Barrow, AK 99723)	Barrow Tank Farm Point Hope Tank Farm Wainwright Generator Plant	Self-insurance
Peter Pan Seafoods 1000 Denny Building Sixth & Blanchard Seattle, WA 98121-1802	King Cove False Pass	Self-insurance
Highland Resources, Inc. P.O. Box 636 Haines, AK 99827	Haines Terminal	Insurance

(2)

Owner/Operator Name	Facility Name	Location
Shell Oil Company P.O. Box 2463 Houston, TX 77252	Onshore Gathering System at Middle Ground Shoal Field Platforms: Shell "A" and Shell "C" Goose Island Tern Island	Cook Inlet Cook Inlet Beaufort Sea Beaufort Sea
B.P. America, Inc. 200 Public Square Cleveland, OH 44114	Niakuk Island (Manmade) Well #4 Endicott Development, Main Production Island, Satellite Drilling Island Endeavor Island, SAG Delta #9 Niakuk Island (Natural), Wells 1, 1A, 2, and 2A	North Slope North Slope North Slope North Slope
Union Oil Co. of Calif. 909 West Ninth Anchorage, AK 99501	Grayling Platform Monopod Platform Granite Point Platform	Cook Inlet Cook Inlet Cook Inlet
Union Pacific Resources Company c/o Nortec 750 W. Second Avenue, Suite 100 Anchorage, AK 99501	"Diamond M. Falcon" Jackup Rig at No. 1 WECO-UPRC Cannery Creek 42-36 Exploratory Well	Cook Inlet

MEMORANDUM

State of Alaska

TO: ADEC Staff

DATE: November, 29, 1989

FILE NO:

TELEPHONE NO: (907) 465-2630

THRU:

SUBJECT: Offshore & Productions
Facilities with Approved
Proof of Financial
Responsibility

FROM:

Glenn Adams *Glenn Adams*

The following offshore and production facilities have approved proof of financial responsibility through June 30, 1990.

Owner/Operator Name	Facility Name	Location
Amerada Hess Corp. 1185 Ave. of the Americas New York, NY 10036	Northstar "A" Gravel Island Seal Gravel Island	Beaufort Sea Beaufort Sea
Arco Alaska, Inc. P.O. Box 100360 Anchorage, AK 99510	Prudhoe Bay Topping Plant Prudhoe Bay Oilfield Kuparuk River Oilfield Lisburne Participating Area Swanson River Oilfield Beluga River Oilfield King Salmon Platform Stinsen Exploratory Program	North Slope North Slope North Slope North Slope Kenai Kenai Cook Inlet Beaufort Sea
Amoco Production Co. P.O. Box 800 Denver, CO 80201	Platforms: Anna, Bruce, Baker and Dillon East Foreland Delivery System	Cook Inlet Kenai
Marathon Oil Co. P.O. Box 190168 Anchorage, AK 99519	Platforms: Dolly Varden and Spark Trading Bay Onshore Production- Facility Granite Point Production Facility Resolution Island Steelhead Platform Spurr Platform	Cook Inlet Cook Inlet Cook Inlet Beaufort Sea Cook Inlet Cook Inlet
Phillips Petroleum P.O. Drawer 66 Kenai, AK 99611	NCIU Platform "A"	Cook Inlet

(2)

Owner/Operator Name	Facility Name	Location
Shell Oil Company P.O. Box 2463 Houston, TX 77252	Onshore Gathering System at Middle Ground Shoal Field Platforms: Shell "A" and Shell "C" Goose Island Tern Island	Cook Inlet Cook Inlet Beaufort Sea Beaufort Sea
B.P. America, Inc. 200 Public Square Cleveland, OH 44114	Niakuk Island (Manmade) Well #4 Endicott Development, Main Production Island, Satellite Drilling Island Endeavor Island, SAG Delta #9 Niakuk Island (Natural), Wells 1, 1A, 2, and 2A	North Slope North Slope North Slope North Slope
Union Oil Co. of Calif. 909 West Ninth Anchorage, AK 99501	Grayling Platform Monopod Platform Granite Point Platform	Cook Inlet Cook Inlet Cook Inlet
Union Pacific Resources Company c/o Nortec 750 W. Second Avenue, Suite 100 Anchorage, AK 99501	"Diamond M. Falcon" Jackup Rig at No. 1 WECO-UPRC Cannery Creek 42-36 Exploratory Well	Cook Inlet

3

DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Barges in Alaska trade

CROWLEY MARITIME CORPORATION

BARGE NAME:	OFFICIAL #:	GRT:	CAPACITY:
B&R 5	284930	247	4019 BBL.
" 80-1	261941	109	1667
" 80-2	271650	121	1904
" 80-3	271651	121	1904
120-1	622202	318	4128
120-2	627820	318	4128
548	502911	320	5300
160-1	517535	530	9402
160-4	525850	569	8608
BC 151	507673	629	10000
BC 152	507674	629	10000
BC 154	508468	629	10000
210	524569	1256	6010
211	524570	1256	6010
212	524571	1256	6010
213	524572	1256	6010
218	524577	1256	6010
251	518644	2637	33800
255	520633	2971	49508
312-3	292360	3157	6905
ARCTIC CHALLENGER	574046	4717	51000
PAC 570	503135	5057	57878
CORDOVA	522842	5051	6370
NIKISKI	517734	5051	6370
KETCHIKAN	526660	5051	6370
PALMER	516339	5051	36568
KODIAK	229125	5051	10562
JUNEAU	524833	5145	6370
101	513536	5498	103968
102	528789	7970	154608
450-2	570955	8123	136882
450-3	571894	5123	148242
450-4	573167	8123	149726
450-6	531167	8987	148502
450-7	633295	8987	148238
450-8	631688	8123	148238
450-9	636557	8134	148238
450-11	647827	8923	148502
250-10			
UT-10			

FOSS MARITIME

FOSS 255

525880

2637

39114

FOSS 256	525881	2637	37505
FOSS 248-P1	625262	2060	33354
FOSS 248-P2	630656	2060	35000
FOSS TONGASS	515337	744	11394
SEA "76"	519398	830	12654
TESORO ENERGIZER	646688	4757	75510
PHOENIX 121	651632	3218	48000
HANALEA		1840	27315

YUTANA BARGE LINES, INC.

O.B. 2	650872	207	3291
O.B. 3	009449	473	7150
O.B. 4	002718	473	7150
O.B. 5	295687	485	7600
O.B. 6	532598	485	7600
O.B. STEWART	008755	265	2000
FRANK TURNER #1	273812	105	1274
POLARIS #6	175265	62	714
RIVERWAYS #7	274076	129	1476
RIVERWAYS #8	293716	319	4376
RIVERWAYS #9	287766	319	4394
RIVERWAYS #10	176106	454	7123
RIVERWAYS #11	271235	353	5000

NORTHLAND SERVICES, INC.

ZPC 401		1739	30000
KVICHAK TRADER		2227	39000

UNITED MARINE TUG AND BARGE, INC.

MLC 281	590980		
MLC 282	596502		
MLC 283	639882		
MLC 330	645770		
MLC 331	646673		
MLC 332	648909		
MLC 333	653764		
MLC 340-1	657024	5214	74100
MLC 344	647179	5214	74100

ALASKA MARINE CHARTERS, INC.

INVESTIGATOR	638965	1730	16031
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4

CARGO AND REFINED PRODUCT VESSELS SUNK, WORLDWIDE, WITH A TOTAL LOSS OF CARGO (1979 TO PRESENT)

Record#	DATE	NAME	SIZE	COUNTRY	SPILL	CARGO	CAUSE
1	1/79	Betelgeuse	121,000 tons	French	40,000 tons	Crude	Exploded at dock
2	4/79	Gino	49,000 tons	Liberia	32,000 tons	Carbon Blk.	Collision
3	7/79	Atlantic Empress	293,000 tons	Greek	275,00 tons	Crude	Collision
4	9/79	Chevron Hawaii	71,000 tons	U.S.A.	3,000 tons	Crude	Exploded at dock
5	2/80	Irenes Serenade	150,000 tons	Cyriot	40,000 tons	Crude	Exploded at anchor
6	3/80	Tanio	29,000 tons	Malagasy	13,000 tons	Fuel Oil	Broke up
7	1/83	Assimi	59,000 tons	Greek	55,000 tons	Crude	Fire, explosion
8	8/83	Castillo De Bellver	267,000 tons	Spanish	260,000 tons	Crude	Fire, broke up
9	11/83	Proc Basilan	16,000 tons	Phillipines	13,000 tons	Gasoline	Fire, sunk
10	10/84	Puerto Rican	35,000 tons	U.S.A	5,000 tons	Fuel Oil	Fire & explosion at port
11	3/85	Lyudrik Svobode	16,000 tons	Russia	1,000 tons	Crude	Explosion while loading
12	5/85	Petrage I	30,000 tons	Panama	5,000 tons	Refined oil	Explosion and sunk in port
13	4/88	Athenim Venture	31,000 tons	Cypriot	30,000 tons	Crude	Explosion
14	11/88	Odyssey	140,000 tons	Liberia	131,000 tons	Crude	Sunk
15	3/89	Maasguser	39,000 tons	Liberia	30,000 tons	Chemicals	Explosion and fire

933,000 tons

90,000 tons*

1,023,000

x 7.4

=7,570,200 barrels

x310

=317,130,000 gallons

* Vessels can reasonably be expected to be carrying 2,000-10,000 tons of fuel, (mean 6,000).

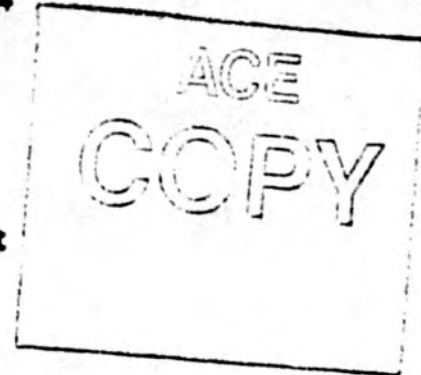
Source = Phone conversation with Mr. Arthur McKinzie, Tanker Advisory Center, Inc. NY, NY 3-6-90.

5

Wendy J. Graham

Prepared for

The Oil Spill Damage Assessment Study
Institute for Marine Studies
University of Washington
Seattle, WA 98195
(206) 543-7004



Final Report

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

by Wendy J. Graham

January, 1989

Acknowledgement

Financial assistance was provided by the Washington State Legislature in conjunction with a study of the State's oil spill damage assessment procedures.

This document also appears as my Master's thesis under the title "Civil Penalties as Compensation for Oil Pollution Damage: A Review and Evaluation of 'The Alaska Method'" in partial fulfillment of the requirements for the degree of Master of Marine Affairs, Institute for Marine Studies, University of Washington, January, 1989.

W. J. G.

January, 1989

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INTRODUCTION

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

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

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

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

2. *Id.* at p. 4.

3. *Id.* at p. 4.

4. See, for example, Federal Water Pollution Control Act Section 1321(f), 33 USC Section 1251 et. seq.; Outer Continental Shelf Lands Act Amendments of 1978 Sections 303, 304, 43 USC Section 1331 et. seq.; Deep Water Port Act of 1974, 33 USC Section 1301 et. seq.; Florida Statutes Section 403.145; Washington Revised Code Sections 90.48.142, 90.48.144, 90.48.320, 90.48.336; California Navigational Code Section 293.

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

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

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

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

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

8. Alaska Statutes 46.03.758(b).

9. Alaska Statutes 46.03.758(d).

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

1.1 The pre-1977 Regime

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

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

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

In addition, AS 46.03.760(a) holds a person who causes or permits an unlawful discharge of oil liable, "in a civil action, to the state for a sum to be assessed by the court of not less than \$500 nor more than \$100,000 for the initial violation, nor more than \$5,000 for each day after that on which the violation continues..."⁴ The penalties assessed under this provision are to reflect, when applicable,

- 1). reasonable compensation in the nature of liquidated damages⁵ for any adverse environmental effects caused by the discharge, to be determined by the court according to the toxicity, degradability and dispersal characteristics of the oil, the sensitivity of the receiving environment, and the degree to which the discharge degrades existing environmental quality;
- 2). reasonable costs incurred by the state in detection, investigation, and attempted correction of the violation; and

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

2. Alaska Statutes Title 46.

3. 12 U.S. Treaties, V. 3, pp. 2989-3037; 17 U.S. Treaties, V. 2, pp. 1523-1551.

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

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

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

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

Finally, in addition to liability under AS 46.03.760(a), AS 46.03.760(e) holds a person causing or permitting an unlawful discharge of oil strictly liable, to the state, in a civil action "...for the full amount of actual damages caused to the state by the violation, including direct and indirect costs associated with the abatement, containment or removal of the (oil), restoration of the environment to its former state, and all incidental administrative costs."

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

1.2 The Impetus for Change

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

In its evaluation Alaska took the position that oil pollution

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

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

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

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

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

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

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

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

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

8. *Id.* at p. 3.

9. *Id.* at p. 1.

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

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

12. Sponsor Analysis at p. 4.

13. *Id.* at p. 5.

14. *Id.* at p. 4.

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

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

15. Id.

CHAPTER 2. The Present Alaska Oil Spill Liability Scheme

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

2.1 Why a Civil Penalty Scheme?

2.1.1 The Statute

The legislative findings of AS 46.03.758 assert that,

- (1)...the discharge of oil may cause significant short and long-term damage to the state's environment. Even minute quantities...may cause high mortalities among larval and juvenile forms of important commercial species, may affect salmon migration patterns, and may otherwise degrade and diminish the renewable resources of the state;
- (2) the exact nature and extent of oil pollution can be neither documented with certainty nor precisely quantified on a spill-by-spill basis; however, in light of the magnitude of harm which may be caused..., and the vital importance of (the natural resources) to the economic future of the state and its quality of life...substantial civil penalties should be imposed for the discharge of oil in order to provide a meaningful incentive for the safe handling of oil and to insure that the public does not bear substantial losses from oil pollution for which, because of its subtle, long-term or unquantifiable nature, compensation would not otherwise be received...²

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

2.1.2 The Legislative History—Civil Penalties as Compensation

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

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

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

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

2. AS 46.03.758(a).

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

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

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

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

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

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

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

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

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

8. See Statements by Jonathan Tillingham at the House Resources Committee Meeting on 2/17/77 and the House Judiciary Committee Meeting on 3/4/77 as contained in the Meeting Minutes.

9. Sponsor Analysis, at p. 6.

10. Statement by Jonathan Tillingham as contained in the House Resources Committee Meeting Minutes of 2/17/77.

11. Statement by Ernest Mueller, Commissioner of the Alaska Department of Environmental Conservation, as contained in the House Judiciary Committee Meeting Minutes of 3/4/77.

12. Statement by Jonathan Tillingham as contained in the House Judiciary Committee Meeting Minutes of 4/12/77.

13. Statement by Jonathan Tillingham quoting the Court in U.S. v. Contractors, as contained in the House Judiciary Committee Meeting Minutes of 4/12/77. Mr. Tillingham does not state which Federal law he is referring to.

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

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

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

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

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

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

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

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

17. See Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) which struck down a Washington State statutory provision requiring specific safety features on oil tankers of between 40,000 and 125,000 DWT entering state waters. A similar statute in Alaska attempted to charge tankers varying 'risk avoidance' charges to fund an oil spill cleanup fund depending on the safety features present on the tanker, such that if a tanker did not possess a particular safety feature that the state deemed appropriate, that tanker's risk avoidance charge would be increased by the amount it would cost to install that piece of equipment. This provision was also struck down. See Chevron v. Hamoyood, U.S. District Court for the District of Alaska, No. A-77-193, Memorandum of Decision by Judge James M. Fitzgerald, June 30, 1978.

18. See *Supra* note 16.

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

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

2.1.4 Premises and Intent of the Civil Penalty Scheme

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

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

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

20. See statement by J. Tillinghast as contained in the House Judiciary Committee Meeting Minutes of 3/4/77, and Sponsor Analysis at p. 5. During the 1978 legislative review of the regulations promulgated by the ADEC, Tillinghast asserted that the maximum \$10, \$250 and \$1 penalty amounts were inserted into the penalty schedule by the legislature to assure that the assessed penalty would not be punitive. See the Administrative Regulation Review Committee Meeting Minutes of 2/28/78.

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

8. The scheme is not intended to be punitive.

2.2 The Amount of the Penalty

2.2.1 The Statute

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

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

- a. \$10 per gallon of oil which enters an anadromous stream or other freshwater environment with significant aquatic resources;
- b. \$2.50 per gallon of oil which enters an estuarine, intertidal or confined saltwater environment; and
- c. \$1 per gallon of oil which enters an unconfined saltwater environment, public land or freshwater environment without significant aquatic resources.²²

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

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

2.2.2 The Legislative History

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

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

23. AS 46.03.758(d). See also the statement by J. Tillingham as contained in the House Judiciary Committee Meeting Minutes of 4/12/77. The legislative record makes it clear that if a discharge of oil enters more than one receiving environment with different penalty amounts, only that portion which enters the most sensitive environment would be assessed the higher rate. See discussion in this regard as contained in the Administrative Regulation Review Committee Meeting Minutes of 2/28/78. See also Section 3.1.5 below.

24. AS 46.03.758(b)(7).

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

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

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

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

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

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

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

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

30. See Supra note 11.

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

32. *Id.*

33. *Id.* Emphasis added.

34. Sponsor Analysis at p. 7.

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

2.2.3 The Intent

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

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

2.3 Vicarious Liability

2.3.1 The Statute

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

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

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

36. HB 137 as originally introduced directed the ADEC to adopt regulations establishing a schedule of fixed penalties for oil discharges of not less than \$5 nor more than \$50 per gallon. Many at the legislative hearings expressed concern that this wording allowed too much discretion to an administrative agency, with several expressing fear that all spills would be determined to be in the \$50 range. Partially in response to these concerns the state offered an amendment which divided the receiving environments into three categories substantially like those enacted in the legislation, with a maximum per gallon penalty for the three categories set at \$30, \$25, and \$15. Later these maximum amounts were reduced to \$10, \$2.50 and \$1 and a 'magnitude factor' was introduced (see section 2.7 below). The available legislative record offers no insight as to why, but at some point the magnitude factor was dropped, while the lower maximum penalties were maintained and subsequently enacted into law.

37. With regard to extending liability for the unlawful discharge of oil to include the outer continental shelf adjacent to the state, J. Tillingham asserted at the legislative hearings considering HB 137 that "(T)here is a substantial state interest in what happens on the OCS, and the person charged with the act out there has contact with the state itself, you can regulate activities on the OCS if not otherwise pre-empted by federal law." (See statement by J. Tillingham as contained in the House Judiciary Committee Meeting Minutes of 3/28/77). To date no suits have been brought under this provision, and thus it has not yet been subjected to interpretation by either the state court or the U. S. Supreme Court. (Personal interview with Doug Marx, Assistant Attorney General for the State of Alaska, June 10, 1988).

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

2.3.2 The Legislative History

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

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

38. AS 46.03.750(e).

39. AS 46.03.750(e). See Chapter 1 of this paper for a more detailed discussion on this liquidated damages statute.

40. AS 46.03.760, Oil Pollution. See Chapter 1 of this paper for a more detailed discussion of this provision.

41. AS 46.03.760(e).

42. See Supra note 40.

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

44. AS 46.03.760(e).

45. See Spenser Analysis at p. 9.

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

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

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

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

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

46. Sponsor Analysis at pp. 8-9.

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

48. 46 USC Sections 183, 186. See also Sponsor notes 46 at p. 10.

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

50. The state often the Torrey Canyon case as an example. On March 18, 1967 that vessel ran aground off the coast of England spilling approximately 100,000 tons of crude oil. Pursuant to the LLA, the owner of the Torrey Canyon (Barracuda Tanker Corp.) sued to limit its liability. The federal court allowed this, limiting the owner's liability to \$20, the value of one lifeboat which survived the bombing of the vessel by England. See Sponsor Analysis at pp. 10-11. See also In Re Barracuda Tanker Corp., 281 F. Supp. 228, 232 (S.D.N.Y. 1968).

51. Sponsor Analysis at p. 9.

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

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

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

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

2.3.3 The Intent

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

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

2.4 \$100 Million Ceiling on Liability

2.4.1 The Statute

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

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

54. See Sponsor Analysis at p. 12.

2.4.2 The Legislative History

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

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

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

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

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

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

55. See *Spencer Analysis* at pp. 7-8. As originally introduced, the maximum penalty under HB 137 was \$50 per gallon. See *Supra* notes 36 and section 2.2 of this chapter for further discussions in this regard.

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

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

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

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

2.4.3 The Intent

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

2.5 Deduction for the Gallons Cleaned Up

2.5.1 The Statute

AS 46.03.758(f) provides that

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

2.5.2 The Legislative History

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

Industry lobbyists were quick to point out that

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

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

⁶⁰ See Sponsor Analysis at pp. 7-8.

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

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

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

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

Also,

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

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

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

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

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

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

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

68. Id.

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

2.5.3 The Intent

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

2.6 The Mitigation Clause

2.6.1 The Statute

AS 46.03.758(g) provides that

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

2.6.2 The Legislative History

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

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

69. Id.

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

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

72. See, for example, Supra note 57.

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

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

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

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

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

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

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

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

76. Statement by an unidentified Senator as contained in the Minutes of the Senate Floor Session considering HB 137, 5/25/77.

2.6.3 The Intent

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

2.7 The 18,000 Gallon Exemption

2.7.1 The Statute

The legislative findings of AS 46.03.758 assert in part that

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

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

2.7.2 The Legislative History

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

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

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

78. AS 46.03.758(a)(3).

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

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

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

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

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

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

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

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

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

84. 14. House Judiciary Committee Meeting Minutes. Statement by Ken Schowaldt, Solon lobbyist.

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

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

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

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

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

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

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

87. See Minutes of the Senate Floor Session of 3/28/77. There is no discussion as to why this exemption was removed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.7.3 The Intent

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

2.8 Summary and Conclusion

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

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

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

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

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

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

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

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

CHAPTER 3. Implementation of AS 46.03.758

3.1 The Regulations—Statutory Mandate and Legislative History

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

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

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

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

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

2. AS 46.03.758(d).

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

4. Sponsor Analysis at p. ii.

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

3.1.1 Certain Provisions Fall Outside the Purview of the Statute

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

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

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

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

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

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

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

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

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

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

3.1.2 Certain Biological Criteria are not Supported by Fact

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

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

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

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

12. Id.

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

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

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

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

17. Id.

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

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

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

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

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

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

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

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

21. Id., Mueller letter.

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

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

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

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

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

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

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

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

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

28. See statement by J. Tillinghast as contained in the ARRC Meeting Minutes of 3/9/78, and correspondence from ADEC Commissioner Mueller to Representative Al Ott, 3/2/78 as contained in the Alaska Attorney General's file on HB 912, 1978 (this bill pertains to the 18,000 gallon exemption). It should be noted that based on an examination of the available historical records, this paper assumes that 'toxicity' as used in the civil penalty statute and regulations refers to the chemical toxicity of oil (i.e. the lethal effects of an oil resulting from its chemical composition), as opposed to the mechanical or physical toxicity of oil (e.g. the lethal effects of oil caused by suffocation resulting from a marine animal's nostrils being covered with oil, or drowning or hypothermia which may occur when the animal itself is coated with oil). This interpretation is also, perhaps, supported by the regulations promulgated by the ADEC. For example, bunker fuel and #1.2 & Arctic diesel fuel all have an aromatic content of around 25% (See Table 1). However, bunker fuel only receives a toxicity factor number of 5, while #1.2 & Arctic diesel fuel are given a toxicity factor number of 10. #1.2 & Arctic diesel fuel are 'light' oils as compared to bunker fuel and as such are much more chemically (as opposed to physically) toxic. Thus, assuming that the toxicity factor numbers are based on chemical toxicity it makes sense that these oils would be given a higher factor number than bunker fuel. For a discussion of oil's chemical and mechanical toxicity and fate in the marine environment, see Rubin, Jonathan, 'A Review of Petroleum Toxicity and Fate in the Marine Environment, with Implications for the Development of a Penalty

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

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

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

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

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

30. Id.

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

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

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

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

3.1.4 Prosecutorial Discretion and Annual Reporting

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

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

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

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

3.1.5 Penalty For Oil Which Enters More Than One Receiving Environment

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

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

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

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

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

First of all, while not explicitly set forth in the statute, the legislative record makes it clear that the phrase "the schedule shall vary according to the sensitivity of the receiving environment" as set forth in AS 46.03.753(d) at least reasonably, if not necessarily, implies that the penalty schedule should take into consideration the time of year that a spill occurs.⁴² It is arguable that the

37. See *Supra* note 4, Draft Regulations.

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

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

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

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

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

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

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

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

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

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

43. According to Paul O'Brien, ADEC, the critical freshwater category was amended in 1986 to include ground waters (18 AAC 75.510(1)(a)). Prior to this time, only those ground waters with a water use permit, or those which in fact were being used for a purpose specified in 11 AAC 72.300 were considered critical. By default, ground waters which were being used for a purpose that would qualify for a water use permit, but which did not in fact have one, and which were not being used for a purpose specified in 11 AAC 72.300 were classified as

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

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

AS 46.03.758(b)(1) states that the \$10 maximum penalty for freshwater environments shall apply to oil spills into anadromous streams or other freshwater environments with significant aquatic resources, while the \$2.50 maximum penalty for marine environments shall apply to oil spills into estuarine, intertidal or confined saltwater environments. Nothing therein would preclude specific references to non-anadromous fish, crustacea, mollusks or other aquatic resources in the regulations. However, with regard to the critical freshwater classification, only anadromous fish are specifically taken into account. Thus, freshwater areas which do not fall into one of the other critical categories, but which are important to the continued existence of other types of fish or aquatic resources, are assigned to the less sensitive designations with their attendant significantly reduced per gallon penalties. Similarly, marine waters within Prince William Sound and the inside waters of Southeast Alaska which may be important to, for example, the continued viability of shellfish, crustacea or non-anadromous fish are considered only sensitive as opposed to critical unless they fall within a game/fish reserve area etc. which would be assigned to the critical category.

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

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

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

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

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

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

45. AS 44.03.758(b) and (d).

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

OIL TYPE	TOX ¹	DEG ²	DISP ³	%W/O ⁴	%AR ⁵	%W ⁶
#1.2 & Arctic diesel fuel & heating oil	1.0	0.25	0.15	46.6	25 ⁷	31.9
Jet aviation fuels A & B	1.0	0.25	0.15	46.6	15 ⁸	24.4
Motor/aviation gasoline	1.0	0.25	0.15	46.6	10 ⁹	20.7
Kerosene	1.0	0.25	0.15	46.6	15 ¹⁰	24.4
Stationary turbine fuels	1.0	0.25	0.15	46.6		
Waste oil/ waste oil mix	0.75	0.50	0.50	58.3		

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

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

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

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

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

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

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

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

⁹Id. at p. 6.

¹⁰Id. at p. 8.

TABLE 1 (Cont.)

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

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

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

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

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

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

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