

SCOMM

78:38

SENATE COMMITTEE REPORT
FIRST COMMITTEE OF REFERRAL

DATE: 2/14/92

FURTHER: Resources
Judiciary

Date of 5-Day Notice: 2/18/92
(in accordance with Uniform Rule 23)

DATE TURNED
INTO OFFICE: 4/14/92

Senate Special Committee
on Oil and Gas

considered

SB 405

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

and recommends:

and a majority of the
committee recommends it
be replaced with

[✓] replace with _____ CS SB 405 (OK)

[✓] same title
[] new title
[] technical
title change
(HB only)

[] attaches amendment(s)

and do pass

[✓] adopts OIA Letter of Intent

[] further referral to the _____

[✓] do pass

[] do not pass

[] no recommendation

[] individual recommendations

NEW FISCAL NOTES:

Dept/Date

[✓] zero fiscal notes DEC/2/21/92
SB 405

[] fiscal notes _____

[] appropriation--no fiscal note

PREVIOUS FISCAL NOTES:

Dept/Date

[] Governor's bill with fiscal notes:

zero fiscal notes _____

fiscal notes _____

DO PASS:

OTHER RECOMMENDATIONS:

Shirley Craft
true/peace
Huff

Chair: Signature and Recommendation
Cotton Seal R. G. L. Polanco
4/15

FISCAL NOTE

No. 1Bill Version: SB 405BILL NO. (S) Publish Date: 4-15-92STATE OF ALASKA
1992 LEGISLATIVE SESSION

Revision Date:

Title:

Financial responsibility for
oil operations

Sponsor:

Hoffman

Requestor:

(S) Oil and Gas

Department Affected:

EnvironmentalConservation

BRU:

Spill Prevention and Response

Component:

Spill Prevention, Planning andManagement

COMPONENT SERIAL NO.

1 4 3 0

EXPENDITURES/REVENUES:

(Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

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

REVENUE						
FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
FUND SOURCE:						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

Estimate of current year impact: none

ANALYSIS: (Attach a separate page if necessary.)

Changes in SB 405 (O+G)
have no fiscal impact. This
fiscal note is appropriate.
4-15-92 Jenny Bylund
date Comte Alde (initial)

Prepared by: Janice AdairDivision: Commissioner's OfficePhone: 465-3010Date: 2/21/92Approved by Commissioner: [Signature]Agency: Environmental ConservationDate: 2/21/92

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev. 10/90

FISCAL NOTE

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. SE 403

Revision Date: _____ Department Affected: Environmental
Title: Financial responsibility for
oil operations Conservation
Sponsor: Hoffman BRU: Spill Prevention and Response
Requestor: (S) Oil and Gas Component: Spill Prevention, Planning and
Management

COMPONENT SERIAL NO. 1 4 3 0

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

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

REVENUE						
FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
FUND SOURCE:						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

Estimate of current year impact: none

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: Janice Adair

Division: Commissioner's Office

Phone: 465-5010

Date: 2/21/92

Approved by Commissioner: [Signature]

Agency: Environmental Conservation

Date: 2/21/92

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

adopted.

Revised Letter of intent to SB 405:

The Department of Environmental Conservation, the Division of Insurance within the Department of Commerce and Economic Development, and the Legislative Research Agency shall research the possibility of group pooling or other mechanisms to assist non-crude operators in meeting the state's financial responsibility requirements for oil spill pollution coverage, and shall report back to the Legislature with their findings and recommendations by February 1, 1993.

Letter of intent to SB 405:

The Department of Environmental Conservation and the Legislative Research Agency shall research the possibility of group pooling for the purposes of meeting the state's financial responsibility requirements for oil spill pollution coverage for non-crude operators, and shall report back to the Legislature with their findings and recommendations by February 1, 1993.

Alaska State Legislature

Senator Sam Cotten Chairman
Senator Drue Pearce, Vice-Chairman
Senator Shirley Craft
Senator Lyman F. Hoffman
Senator Dick Shultz



State Capitol
Juneau, AK 99801-1182
(907) 465-3711

Senate Committee on Oil and Gas

February 25, 1992

Overview on the Status of Oil Spill Statutes and Regulations
SB 405 An act relating to evidence of financial responsibility

- I. Overview on the Status of Oil Spill Statutes and Regulations (30 minutes)
 - A. DEC- Mead Treadwell, Status and Content of Regulations (10 minutes)
 - B. Dept. of Law- Deb Behr, Status of Law regulation review, hiring of paralegal, DEC authority to certify RACs under existing statutes, amending regs. for RAC certification (10 minutes)
 - C. Questions and discussion (10 minutes)
- II. SB 405 An act relating to evidence of financial responsibility (1 hour)
 - A. Senator Hoffman (10 minutes)
 - B. DEC - Mead Treadwell, DEC proposed bill substitute (10 minutes)
 - C. Law - Jim Cantor and Breck Tostevin (10 minutes)
 - D. Foss, Crowley, Petromarine, ARECA (5 minutes each)
 - E. Questions and discussion (5 minutes)

Senator Lyman F. Hoffman

Alaska State Senate

P.O. Box V • Juneau, Alaska 99811 • (907) 465-4453

SB 405 FINANCIAL RESPONSIBILITY OF NONCRUDE OPERATORS Background Paper

History: On March 24, 1989 the *Exxon Valdez* ran aground on Bligh Reef in Prince William Sound, causing the largest crude oil spill in United States history. As a result, the Alaska Legislature and the United States Congress significantly strengthened oil spill prevention and cleanup standards. One bill, HB 567, passed in 1990, made three major changes in state oil spill protection. It 1) established new response planning standards; 2) imposed new financial responsibility requirements for contingency plan holders; and 3) allowed the Department of Environmental Conservation to give credits for incorporating prevention measures into contingency plans. These major changes were to have gone into effect on and after June 1, 1991.

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

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

SPONSOR STATEMENT

P.O. Box 763 • Bethel, Alaska 99559 • (907) 543-3543

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

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

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

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

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

Solution: CS SB405 (O&G) does several things:

- Section 1 clarifies that the financial responsibility of an insurer is limited to the type of risk assumed and the amount of coverage specified in the proof of financial responsibility. It also clarifies that these limits do not apply to an applicant who self-insures.
- Section 2 gives new authority to DEC to approve an applicant's proof of financial responsibility if the applicant attests in a sworn statement that direct action insurance has been diligently sought, but is determined to be unavailable; if such efforts are made and proven every six months; and if all other financial responsibility requirements are met.
- Sections 3 and 4 ratify similar exemptions made by DEC during the past year.
- Sections 5,6 and 7 calls for an immediate effective date; if that date is after June 1, 1992, makes it retroactive to June 1, 1992; and repeals the exemption law on June 1, 1994.
- Letter of intent adopted by the Senate Oil and Gas Committee directs DEC, the Division of Insurance within Commerce Department, and the Legislative Research Agency to research possible alternative solutions to assist non-crude operators in meeting the state's financial responsibility requirements for oil spill pollution coverage.

Solution: SB 405 does several things:

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

SB 405
FINANCIAL RESPONSIBILITY
OF NONCRUDE OPERATORS
Opening Remarks

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

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

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

My legislation also delayed the effective date of the enhanced oil discharge prevention and contingency plans HB 567 required of non-crude operators. However, since most operators appear to be prepared to meet the new requirements, I am not seeking any further delay in these.

Nearly one year later, however, there has been no change in the insurance markets' position on direct action coverage, and development of an insurance pool so far has proved unfeasible. With

the June 1, 1992, effective date of the financial responsibility requirements approaching, and the unavailability of direct action coverage just as complete as it was in 1991, non-crude operators once again face the prospect of either operating out of compliance with Alaska law or ceasing operations. The large crude oil operators do not face this problem, because they have sufficient assets and working capital to either self-insure or comply with the law through other means, such as surety bonds or letters of credit.

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

Solution: SB 405 does several things:

- It clarifies that financial responsibility of an insurer is limited to the maximum amount covered by the insurance policy, except for traditional exceptions such as attorney fees, litigation costs, or bad faith failures to settle claims.

- It limits the current quasi-waiver of the "direct action" requirement to crude oil operations, which requires a minimum of \$50,000,000 of "direct action" insurance.

- It gives new authority to DEC to waive the "direct action" requirement for non-crude oil operations, with no minimum "direct action" insurance requirement.

I don't know if SB 405 as now written is necessarily the best way to solve this problem. I know that DEC has developed an alternate proposal that was given to me late last night. However, I do know that this is a problem that must be solved, and I'm open to looking at other solutions.

There are people here to testify from the major barge lines, and the electric co-ops, to testify.

DIVISION OF LEGAL SERVICES

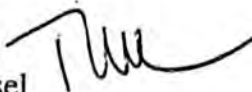
LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

240 Main Street, Suite 500
Juneau, Alaska 99801-2101

MEMORANDUM

February 24, 1992

SUBJECT: Sectional Analysis (SB 405)
TO: Senator Lyman Hoffman
FROM: Terri Lauterbach 
Legislative Counsel

Following is a sectional analysis of SB 405, a bill relating to financial responsibility laws affecting the oil industry:

Section 1 clarifies the extent of liability borne by an insurance carrier or P & I group that agrees to help an insured demonstrate financial responsibility. While the first sentence of this section (current law) demands that the financial responsibility extend to certain types of losses and assessments, the second sentence (new law) limits the amount of exposure of the insurer or group to the face amount of the policy issued or the group's agreement. Full liability for amounts above the insurance policy would be borne by the person who is insured.

This clarification is intended to address a fear that has reportedly been expressed by insurers and P & I clubs. As I understand it, they have feared that their exposure might be unlimited, regardless of what the face amount of their policy or agreement is. DEC tried to address this fear in its regulations, but the insurers and clubs have reportedly not been satisfied that DEC has such authority to interpret the law's intent.

This section is made retroactive by sec. 6. Retroactivity will have the effect of ratifying DEC's practice of requiring a "face amount" endorsement on policies and agreements since the effective date of the new financial responsibility requirements -- June 1, 1991.

Section 2 amends a subsection of current law under which DEC can accept some evidence of financial responsibility that does not allow for an action to be filed directly against the insurer as long as the applicant shows that the first \$50 million of liability is covered by "direct action" insurance. The applicant must also show that

Senator Lyman Hoffman
February 24, 1992
Page 2

additional "direct action" insurance is unavailable. The amendment limits the applicability of this section to crude oil operations.

Section 3 enacts a new subsection of law that applies only to noncrude oil operations. The new law would allow DEC to accept evidence of financial responsibility that does not allow for an action to be filed directly against the insurer without any minimum amount of "direct action" insurance being provided. The applicant would still have to show that "direct action" insurance is unavailable.

Section 4 repeals the new noncrude "direct action" exemption of section 3 in 1994.

Section 5 repeals a 1991 session law that provides that all of the new 1990 changes in financial responsibility laws apply on June 1, 1992, to noncrude operators. The repeal is necessary because SB 405 would make changes in the 1990 Act. If SB 405 passes, it would no longer be true that all of the 1990 changes will apply to noncrudes in 1992. They will all apply, except as amended by SB 405.

Section 6 makes sections 1 - 3 of this bill retroactive to June 1, 1991 (the effective date of the new financial responsibility laws passed in 1990). This will ratify actions taken by DEC since that date that may have been done with questionable authority with respect to "face amount" endorsements and waiver of the "direct action" requirement for noncrudes.

Section 7 ensures that the repealer of section 5 will apply as of June 1, 1992, even if the governor signs SB 405 after June 1. This will cover transmittal delays and the delay involved in reviewing bills before the governor signs them. Without this section, late signing of SB 405 could mean that for some time period the full financial responsibility changes made in 1990 would apply to noncrude operations without the amendments made by SB 405.

Section 8 gives SB 405 an immediate effective date.

I hope you find this description helpful. Please let me know if you have further questions.

TML:pl
92-125.plm

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

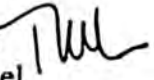
240 Main Street, Suite 500
Juneau, Alaska 99801-2101

MEMORANDUM

February 12, 1992

SUBJECT: Financial Responsibility Laws (Work Order No. 7-LS2003)

TO: Senator Lyman Hoffman
ATTN: Molly

FROM: Terri Lauterbach 
Legislative Counsel

Enclosed is a draft of a bill that I believe is responsive to your requests made during our meeting on Monday with the representatives of noncrude operators.

Section 1 is intended to address the "face amount" controversy. You will note that I have limited it to insurers and groups of insureds (P & I's), but if the same issue is arising with respect to sureties or guarantors, perhaps you might wish to expand the new language to cover them. Also, I'm not sure if this is an issue with letters of credit.

Section 2 limits the current quasi-waiver of the "direct access" requirement to crude oil operations.

Section 3 enacts new authority for DEC to waive the "direct access" requirement for noncrude oil operations. It is like section 2, except that there is no minimum amount of "direct access" insurance that must be shown.

Section 4 makes the new waiver authority of sec. 3 expire in 1994.

Section 5 repeals the provision of temporary law enacted in 1991 that said all the financial responsibility requirements enacted in 1990 apply to noncrude oil operators on June 1, 1992. (This was last year's "fix" for the noncrudes.) This would not be accurate if the enclosed bill takes effect, i.e., not all of the 1990 amendments would apply after June 1 because the enclosed draft makes further changes, so the draft repeals the 1991 "fix." However, I assume you do not want to speed up the applicability of any of the 1990 amendments, so the 1991 provision that delays their applicability is not repealed until June 1, 1992.

Senator Lyman Hoffman
February 12, 1992
Page 2

Section 6 makes the first three sections of the bill retroactive to last year so that DEC's "waivers" since then for noncrudes are ratified and their required endorsement that limits policy liability to the "face amount" for both crudes and noncrudes is also ratified.

Section 7 is intended to make sure that the bill takes effect June 1, 1992, (when, under current law the delay for noncrudes expires) even if the governor does not sign the bill by May 31, 1992.

I hope you find this description helpful. Please let me know if I can be of further assistance.

TML:gc
92-122.glc

Enclosure

Hunny:

4-3-92
4:15 pm

- Jim Cantor, 269-5274
- 1) not there next week
 - 2) Working draft SB405
looks like includes
all DEC requested
w/exception of proposed
subsection (p).
TYPO: subsection (K)
In (K) refers to subsection
(j) which should be (e)

Janet

ALTERNATIVE PROPOSAL FOR ADDITION TO DEPARTMENT OF
ENVIRONMENTAL CONSERVATION DRAFT AMENDMENTS TO AS 46.04.040
(CONCERNING SE 405)

(b) The commissioner may contract with one or more insurance companies to provide individual or group coverage required under this section provided

(1) all costs of such insurance are borne by the applicants;
and

(2) the State does not incur costs or liabilities as an insurer.

3/12/92

PROPOSAL FOR ADDITION TO DEPARTMENT OF
ENVIRONMENTAL CONSERVATION DRAFT AMENDMENTS TO AS 46.04.040
(CONCERNING SB 405)

(o) Notwithstanding the requirements of (j) of this section, the department may, with respect to noncrude operations, approve proof of financial responsibility by a person other than the applicant who does not agree to be subject to direct action in the state or to appoint an agent for service of process if:

(1) the applicant provides proof of financial responsibility in the form required by (d) of this section and in the amounts specified in (a), (b), and (c) of this section;

(2) the applicant provides and the department accepts a sworn statement that the applicant has diligently attempted to obtain a form of financial responsibility which would provide for direct action or service of process, describing the steps the applicant has taken to obtain a form of financial responsibility which would provide for direct action or service of process, and stating that a form of financial responsibility which would provide for direct action or service of process is unavailable;

(3) the applicant continues its diligent efforts to obtain a form of financial responsibility which would provide for direct action or service of process and provides a sworn statement every four months for acceptance by the department containing the information required in (n)(2) of this section;

(4) approval of proof of financial responsibility as set forth in this section shall not be granted to an applicant for more than two years, inclusive of all renewals.

(p) The commissioner may by regulation establish a mandatory or voluntary joint arrangement for applicants to pool contributions in order to assume risks from losses to the participants on a group basis or purchase coverage for the participants in the group to meet some or all of the requirements of this section.

(o) same

(1) same ; and

(2) same ; and

*and which has been
certified as reasonable by
the Director of the
Division of Insurance.*

(3) the Director of the Division of Insurance, Department of Commerce and Economic Development, in a finding issued semi-annually, concurs that no such form of direct action insurance is available at reasonable rates through an underwriter of good repute and financial standing; and

(4) sunset in 2 years..

(p) - eliminate.

use Dept. of Law language concerning limits of liability.

7-LS2003V
Lauterbach
4/13/92

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

BY

Offered:
Referred:

Sponsor(s): SENATOR HOFFMAN

A BILL
FOR AN ACT ENTITLED

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

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

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

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

1 surety, guarantor, person furnishing an approved letter of credit, or other group or person
2 providing proof of financial responsibility approved by the department shall appoint an agent for
3 service of process in the state. For purposes of this subsection, an insurer, other than a group
4 of insureds whose agreement has been approved by the department, must either be authorized by
5 the Department of Commerce and Economic Development to sell insurance in the state or be an
6 unauthorized insurer listed by the Department of Commerce and Economic Development as not
7 disapproved for use in the state. In this subsection, "third-party insurer" means a third-party
8 insurer, surety, guarantor, person furnishing a letter of credit, or other group or person
9 providing proof of financial responsibility on behalf of an applicant under this section;
10 "third-party insurer" does not include the applicant.

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

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

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

18 (2) provides a sworn statement that

19 (A) is acceptable to the department;

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

23 (C) describes the steps the applicant has taken to obtain a form of proof of
24 financial responsibility that would provide for a direct action and appointment of an agent for
25 service of process;

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

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

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

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

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

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

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

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

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

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

CS FOR SENATE BILL NO. 405 ()

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:

Referred:

Sponsor(s): SENATOR HOFFMAN

A BILL

FOR AN ACT ENTITLED

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

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

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

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

per Alaska-like an insurer.

includes definition.

does not include

1.

applicant self-insuring

CSSB 405()

New Text Underlined [DELETED TEXT BRACKETED]

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

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

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

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

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

(A) is acceptable to the department;

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

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

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

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

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

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

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

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

7-LS2003D
Lauterbach
4/1/92

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

BY THE SENATE SPECIAL COMMITTEE ON OIL AND GAS

Offered:
Referred:

Sponsor(s): SENATOR HOFFMAN

A BILL
FOR AN ACT ENTITLED

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

31

But does not include an
applicant.

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

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

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

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

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

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

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

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

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

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

29 (2) provides a sworn statement that

30 (A) is acceptable to the department;

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

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

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

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

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

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

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

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

SENATE BILL NO. 405

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY SENATOR HOFFMAN

Introduced: 2/14/92

Referred: O&G, Resources, Judiciary

A BILL

FOR AN ACT ENTITLED

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

TO: Representative Bill Hudson
Chairman, Oil and Gas Committee

FROM Representative Richard Foster
House District 23

SUBJECT: HB 501

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

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

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

HB 501 and SB 405 propose:

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

The Department of Environmental Conservation propose:

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

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

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

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

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

PROBLEM

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

WHY?

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

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

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

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

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

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

SOLUTION

HB 501 does several things:

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

PROOF OF FINANCIAL RESPONSIBILITY

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



Alaska
Department of
Environmental
Conservation

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) provide for cooperative oil discharge notification procedures.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(f) Acceptance of proof of financial responsibility expires

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(q) In this section,

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

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

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

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

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

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

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

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

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

REPLY TO:

☒ 1031 W 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 269-5100
FAX: (907) 276-3697

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

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

March 11, 1992

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

Dear Senators Cotten & Hoffman:

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

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

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

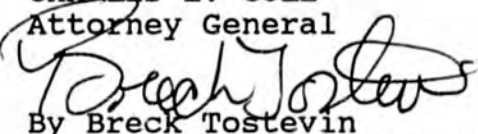
Senator Sam Cotten
Senator Lyman F. Hoffman
Senate Select Committee on Oil and Gas

March 11, 1992
Page 2

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

Sincerely,

CHARLES E. COLE
Attorney General


By Breck Tostevin
Assistant Attorney General

BCT/jv

Enclosures (6)

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

3/12/92

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

February 24, 1992

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

RE: SB 405 DEC Alternative

Dear Senator Hoffman:

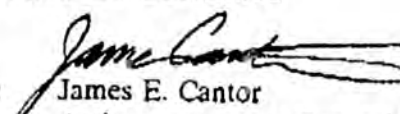
I am enclosing an alternative to SB 405 which the Department of Environmental Conservation would like to propose for consideration. SB 405 deals with the oil spill financial responsibility requirements which oil facility operators must meet. SB 405 was proposed because operators are generally no longer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

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

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

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

CHARLES E. COLE
ATTORNEY GENERAL

By: 
James E. Cantor
Assistant Attorney General

JEC:bnk

Encl

cc: Janice Adair
Deborah Behr

WALTER J. HICKEL, GOVERNOR

REPLY TO:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FROM: AG's Office - Jim Cantor

TO: Glenn Adams JUNEAU/ADEC

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

CC:

SUBJECT: Financial Responsibility

PRIORITY: R

ATTACHMENTS: fr

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

Jim Cantor

=====

Ref 12

46.04.900

46.06.17
10 financial resp
c.c. plans

FACSIMILE TRANSMITTAL

STATE OF ALASKA



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

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

Phone: (907) 465-5225

Fax: (907) 465-5245

TO: Ms. Gering Fay

Senator Colton's Office

FAX: 465-4979

FROM: Glenn Adams

NUMBER OF PAGES INCLUDING COVER SHEET: 6

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

MESSAGE CONFIRMATION
TRANSMISSION

MAR-26-'92 THU 09:35

TERM ID:

P-9999

FAX NO. :

NO.	DATE	ST. TIME	TOTAL TIME	ABBR/SBD	ID	DEPT CODE	#PGS
283	03-26	09:32	00° 03' 36		-G3-		OK- 6 NG- 0

Financial Responsibility Report

PAGE #: 1

NON CRUDE OPERATIONS IN COMPLIANCE

DATE : 03/25/92

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

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

Total # =

Financial Responsibility Report

NON CRUDE OPERATORS THAT COMPLIED SINCE 01/01/92

PAGE #: 1

DATE : 03/25/92

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

Total # =

Financial Responsibility Report

PAGE #: 1

NON COMPLIANT OPERATORS OUT OF COMPLIANCE IN 90 DAYS

DATE : 03/25/92

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

Total # =

Financial Responsibility Report

PAGE #: 1

NON CRUDE OPERATORS OUT OF COMPLIANCE

DATE : 03/25/92

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

Total # =

MEMORANDUM

STATE OF ALASKA

DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Division of Spill Prevention and Response

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

DATE: REVISED LIST

March 6, 1992

FILE #:

PHONE #:

SUBJECT: Insurance Not Approved as
Proof of Financial Responsibility

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

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

31

10

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

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

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

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

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

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

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

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

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

MEMORANDUM

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

Revised

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

DATE: March 6, 1992

FILE #:

PHONE #:

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

SUBJECT: FR INSURANCE

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

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

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

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

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

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

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

Financial Responsibility

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

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

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

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

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

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

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

2/28/92

Ginny,

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

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

Have a good weekend —

Nike



MICHAEL A. CONWAY
DIRECTOR
SPILL PREVENTION AND
RESPONSE DIVISION

STATE OF ALASKA
DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

410 WILLOUGHBY, SUITE 105
JUNEAU, ALASKA 99801-1795



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

HOUSE BILL 567 - MAJOR PROVISIONS

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

REGULATED FACILITIES:

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

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

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

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

CRUDE OIL PIPELINES

PLANNING STANDARDS

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

PREVENTION

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

FINANCIAL RESPONSIBILITY

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

HB 567 WORKING GROUP

ORGANIZATION REPRESENTED

AGENCIES

Alaska Department of Environmental Conservation

Alaska Department of Fish and Game

Alaska Department of Natural Resources

Alaska Oil and Gas Conservation Commission

Environmental Protection Agency

United States Coast Guard

PUBLIC INTEREST GROUPS

Alaska Center for the Environment

Alaska Municipal League

Arctic Marine Resources Commission

Cook Inlet Regional Citizens Advisory Council

Prince William Sound Regional Citizens Advisory Council

United Fisherman of Alaska

INDUSTRY

Exxon

Tesoro

Alyeska

Non-crude operators

Prince William Sound Tanker Operators

Association of Rural Electric Cooperatives of Alaska

HB 567 POLICY ISSUES

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

HOUSE BILL 567

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

FINANCIAL RESPONSIBILITY

Self-Insurance

RESPONSE PLANNING STANDARDS

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

PREVENTION

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

HB567 POLICY ISSUES DECISIONS

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

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

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

ISSUE 3: DRUG ABUSE AND OTHER MEDICAL PROBLEMS

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

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

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

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

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

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

ISSUE 5: RESPONSE TO BLOWOUTS

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

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

ISSUE 6: OPERATIONAL RESTRICTIONS

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

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

ISSUE 7: COASTAL ZONE REVIEW OF CONTINGENCY PLANS

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

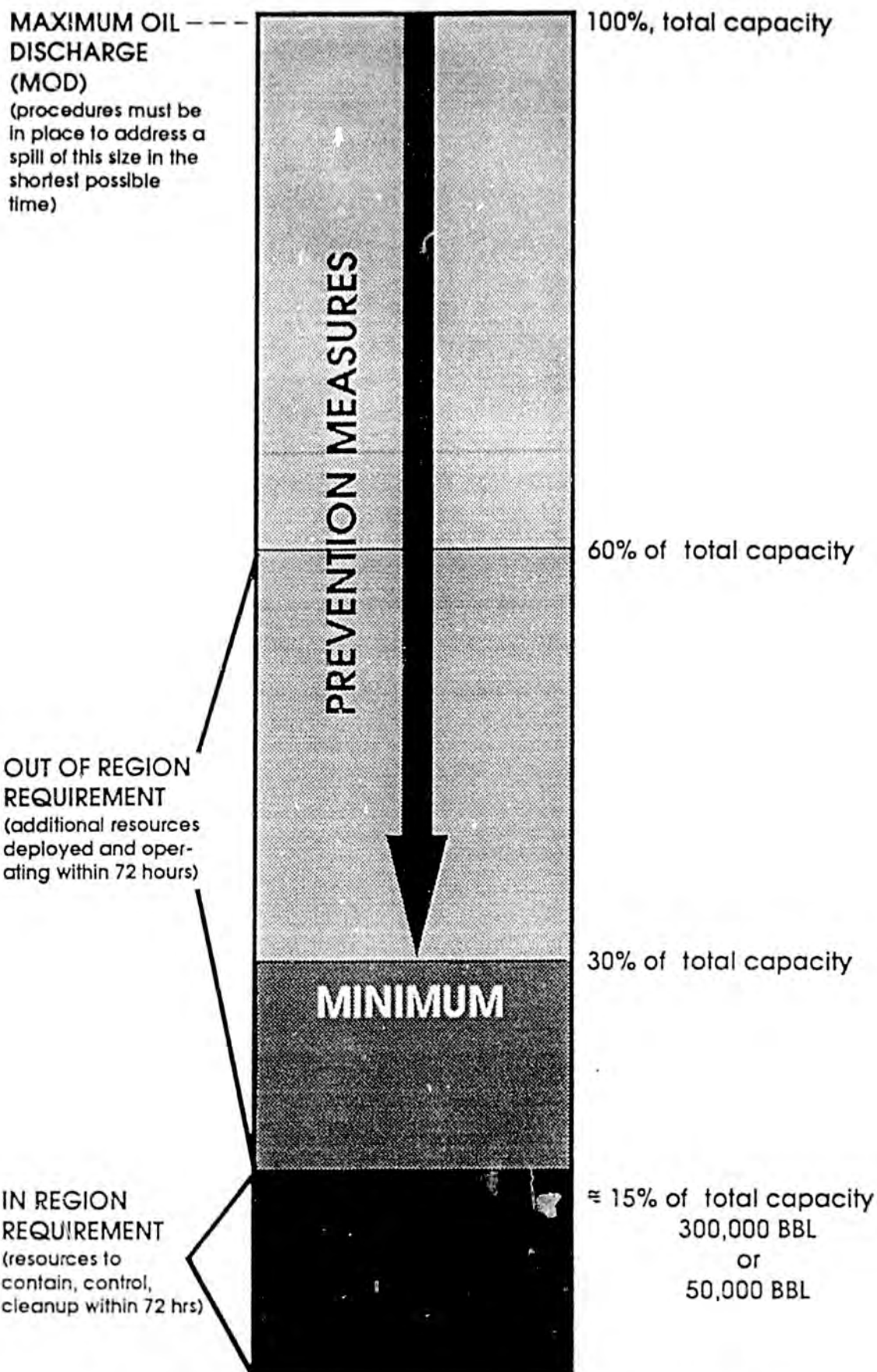
DECISION: Language has been added to the Department review procedures to achieve the functional equivalent of ACMP review regulations, with assistance from DGC.

ISSUE: 8 FINANCIAL RESPONSIBILITY - SELF INSURANCE

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

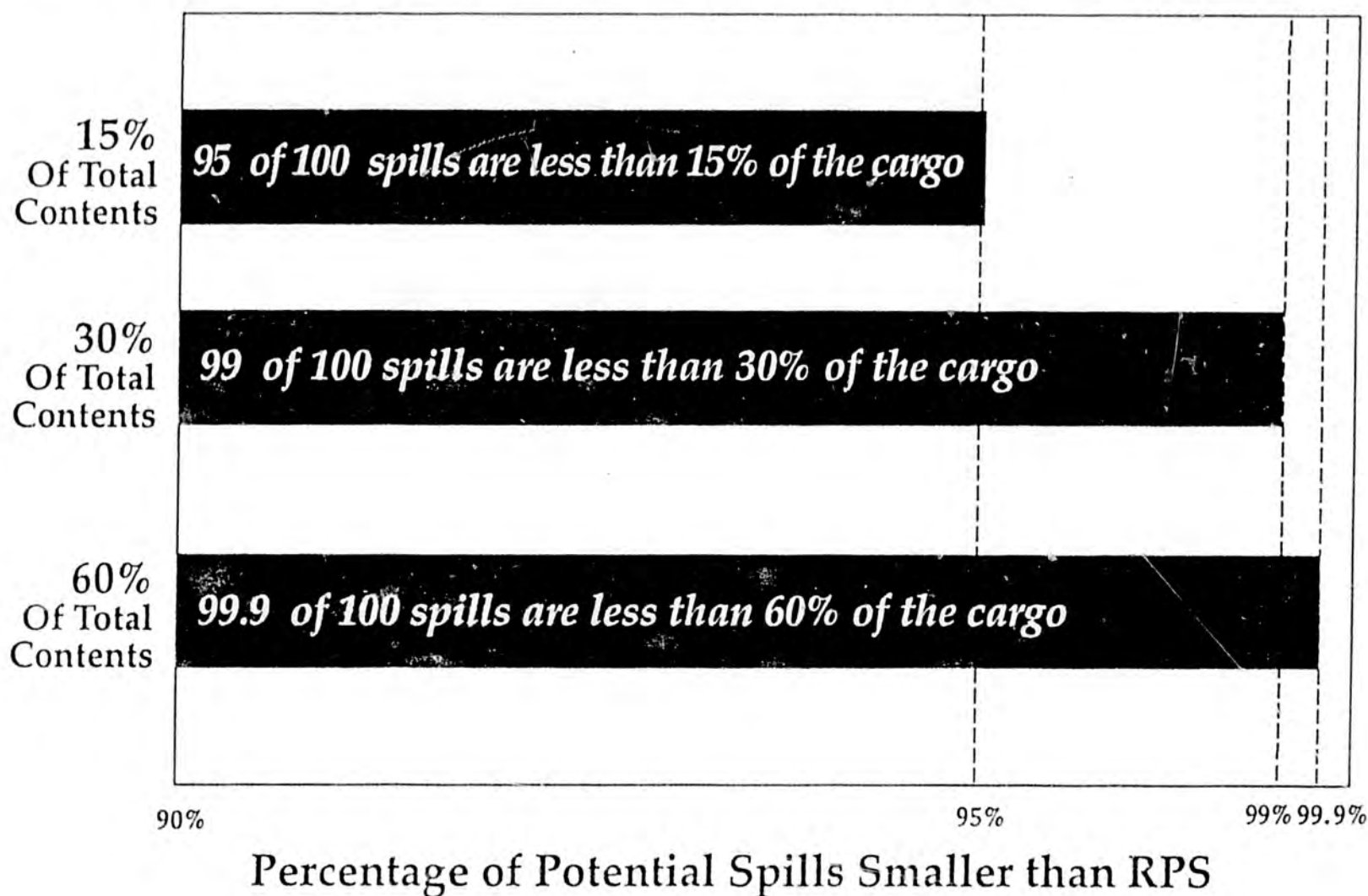
DECISION: A waiver provision for inclusion in the regulations is being evaluated by the departments of Revenue and Commerce and Economic Development that would allow the use of bond ratings and accounting ratios to be substituted for the current requirements for working capital located in the United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

Crude Oil Tank Vessel Response Planning Standards*



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

Vessel Response Planning Standards (RPS) vs Risk



MEMORANDUM

STATE OF ALASKA

DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Division of Spill Prevention and Response

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

DATE: REVISED LIST
February 21, 1992
FILE #:

PHONE #:

SUBJECT: Insurance Not Approved as
Proof of Financial Responsibility

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

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

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

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

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

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

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

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

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

Adams

United States Coast Guard

National Pollution Funds Center

4200 Wilson Blvd

Suite 1000

Arlington, Va 22203-1804

COPY TO

LYNN

C. LYNN

Fax Transmittal Sheet

RECEIVED

FEB 06 1992

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



MIKE C
JIM CARTER, INC
PTN TO MIKE M

Number of Pages Including this page 11

Date: 2-5-92

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

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

Transmitted By _____

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

DIRECT ACTION

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

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

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

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

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

POLICY DEFENSES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



City of Galena

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

January 16, 1992

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

Dear Governor Hickel:

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

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

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

Sincerely,

Chris Hladick
City Manager

RECEIVED
JAN 31 1992

GOVERNOR'S OFFICE

RECEIVED

JAN 31 1992

A.D.E.C.
COMMISSIONER'S OFFICE

Ray Gillespie
Gillespie & Associates
Lobbying & Governmental Affairs



10390 Mendenhall Loop Road
Juneau, Alaska 99801
Telephone: (907) 463-3375
Fax: (907) 463-5522

MEMORANDUM

TO: Senate and House Oil and Gas Committees

DATE: February 10, 1992

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

RE: Marine Pollution Insurance Problems

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

Briefly, these problems are:

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

I.

LIABILITY LIMIT/EXPOSURE OF INSURERS OR GUARANTORS.

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

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

Alaska Statute 46.04.040 (i) reads as follows:

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

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

II.

"DIRECT ACTION" PROBLEM

AS 46.04.040 (e) reads in part as follows:

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

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

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

III.

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

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

responsibility without the "direct action" endorsement. This provision has been interpreted as authority to issue conditional permits only upon proof of at least \$50 million in insurance or other financial responsibility which has the direct action endorsement. Since the maximum financial responsibility coverage for a non-crude operator (tank vessel and barges) is \$35 million under AS 46.04.040 (c) (?), the waiver or conditional permit provisions of subsection (1) is not available to them.

The D.E.C. has, however, been issuing conditional permits to non-crude operators which have complied with the monetary financial responsibility requirements, but are unable to get such coverage with the "direct action" endorsement. The "direct action" endorsement is unavailable in the market place to some, if not most, non-crude operators. Due to the commercial unavailability of financial responsibility with the required endorsement, the DEC is in the unpleasant predicament of denying operating permits to established responsible carriers who have been doing business in Alaska for years. Denial of such operating permits because of commercial unavailability of "direct action" endorsement is potentially devastating and would likely eliminate most non-crude refined product delivery to many Alaskan communities.

This provision should be revisited by the Legislature to reflect the realities of the insurance market and availability of coverage. As of last week, D.E.C. has suspended any Conditional Permits.

IV.

SUGGESTED SOLUTIONS

Legislation which:

1. Places explicit language in statute which limits the exposure of an insurer or P&I club to the face amount of the policy;
2. Eliminates the "direct action" requirement;
3. Provides a substitute mechanism to "direct action" which satisfies the State of Alaska and yet recognizes the realities of the available insurance or P&I club coverage;

4. Clarifies D.E.C. authority to grant conditional operating permits to non-crude operators who have otherwise complied with the monetary requirements for financial responsibility; or

5. Combination of the above.



Alaska State Legislature

Please enter into the record my testimony to the Senate Oil & Gas
committee name

committee on SB 405, dated 2-25-92
bill/subject

testimony in support of SB 405

Kodiak Oil Sales Inc is a fuel distributor serving the Kodiak Area. We are a family owned business and have operated as a family business since 1950. My comments relate to the availability of insurance which meets the State of Alaska's requirements for non-crude oil terminals.

The State at times passes laws which have effects which were not the intent of the original legislation. I do not believe that it was the intent of the legislature to make it impossible to meet the financial responsibility requirements of the statute. But that is what has occurred by having the "direct access" clause as a requirement for insurance.

Kodiak Oil Sales like many non-crude operators depends on insurance to provide "proof of financial responsibility". We are able to get insurance that meets or exceeds the requirements with the exception of the "direct access" clause. At this time there is no insurance company in the world which will write a policy that contains this "direct access" clause.

Companies such as mine supply petroleum products to the people who live and work in Alaska. If the "direct access" clause is not removed from the statutes we will not be able to meet the financial responsibility requirements, and State of Alaska will have to tell us not to sell fuel anymore.

Page 1 of 2 pages

Signed: _____

Testifier

Kodiak Oil Sales Inc

Representing (Optional)

Box 1487 - Kodiak AK

Address

486-3245

Phone No.

486-3205 Fax



Alaska State Legislature

Please enter into the record my testimony to the Senate Oil & Gas
committee name
committee on SB 405, dated 2-25-92
bill/subject

What this means in real terms is that there will be no place in most of Alaska for people to buy petroleum products. Can you imagine living in Alaska without heating oil, gasoline and diesel fuel, I can't.

I further ask that the Department of Environmental Conservation have the authority to grant "conditional approval" in the case of financial responsibility. There may be a time in the future when a problem such as this arises and it may not be convenient to ask the legislature to change the law. The DEC should have the authority to work with industry till the situation can be resolved.

Jim Ramaglia
Vice President
Kodiak Oil Sales Inc.

page 2 of 2 pages

Signed: Jim Ramaglia Jim Ramaglia
Testifier
Kodiak Oil Sales Inc.
Representing (Optional)
Box 1487 Kodiak AK
Address
486-3245- 486-3205 Fax
Phone No.



Electric Service for 300,000 Alaskans

Alaska

Rural

Electric

Cooperative

Association, Inc.

703 W. Tudor Rd., #200
Anchorage, AK 99503
(907) 561-6103
FAX (907) 561-5547

February 24, 1992

Dear Senator Hoffman:

Thank you for the interest and concern you have shown for a problem common to many residents throughout the state who have to handle petroleum products in the course of business. SB 405, which you recently introduced, is certainly a step in the right direction. But I fear that, as drafted, it does not go far enough toward resolving the problem.

The people I represent on this issue are small electric utilities owned by the consumers or the communities they serve. They have found it absolutely impossible to purchase insurance policies which both transfer risk and satisfy AS 46.04.040(e). We have no reason to believe this situation is temporary.

From our perspective there are three basic problems in attempting to buy insurance to cover this risk:

- (1) The "direct access" language in AS 46.04.040(e) is something no insurance company will accept. The insurance industry's method of doing business is to pay for losses experienced by their insureds rather than providing a pot of money to be used at the discretion of some third party. If there is a dispute regarding a loss, an insurance company pays only after a court determines the responsibility for and the amount of the loss. This is inherent to the insurance industry, and they will not change just because the State of Alaska would like for them to do so.

The big companies can satisfy their proof of financial responsibility without insurance by simply posting their financial statement and qualifying as self-insurers. Most of our members don't qualify as self-insurers, and they are small enough that it would be prudent for them to transfer the risk if they could do so at a reasonable cost.

- (2) The "strictly liable, jointly and severally" language in AS 46.04.040(g) is another severe problem. It is unusual for an insurance company to be willing to write a policy under those conditions because they would be required to pay a loss without any finding of fault on the part of their insureds. This provision severely limits the number of insurance companies that will issue these policies, and that seriously increases the cost of such insurance.
- (3) The third basic problem is the sheer complexity of the drafting of the statutes involved. In diagramming the statutes in an effort to understand them, I came up with this:

Page 2, line 21 of SB 405 refers to "judgments under statutes listed in (i) of this section..."

"(i) of this section" refers to:

a loss compensable under

AS 46.03.760(e) which refers to

AS 46.03.740-750 and

AS 46.03.822

or

AS 46.03.822

and assessments under

AS 46.03.758 which also includes

liability under AS 46.03.760(a)

AS 46.03.759

AS 46.03.760(a) which also refers to

AS 46.03.070(c)

or

AS 46.04.030(g)

My point is that this is such complex and confusing legalese that insurance companies simply will not deal with it unless they expect to earn very large premiums on policies issued under the law.

With large businesses able to satisfy the financial responsibility requirements in some way other than through buying insurance, the small businesses like my members face the formidable task of trying to find insurance companies willing to write this coverage just for them.

What needs to happen is for non-crude handlers to be completely separated under the law from crude handlers. There should be a simple, concise statement of the requirements that apply to them which eliminates "direct access" and "strictly liable, jointly and severally." Then the commercial insurance industry could do its job of providing insurance at a reasonable cost for businesses like those I represent.

Members of ARECA will be pleased to assist you in this effort in any way we can.

Sincerely,



David Hutchens
Executive Director



STATE OF ALASKA
LEGISLATIVE AFFAIRS AGENCY
DIVISION OF PUBLIC SERVICES

DATE: February 25, 1992

Please accept the enclosed original(s) of written testimony
for the Senate Oil & Gas Committee teleconference hearing that was
scheduled on SB 403 on 2-25-92.

A copy of this testimony was transmitted to your committee via
fax on 2-25-92.

Thank you,

LORNA Steelman

Samson Tug & Barge Company, Inc.

Phone (907) 747-8559 • Fax(907) 747-5370 • P.O. Box 559 • Sitka, Alaska 99835

Senator Sam Cotten
Alaska State Legislature
Capitol Building
Juneau, AK. 99801-1182

February 26, 1992

Dear Senator Cotten:

This correspondence contains commentary on two bills that have been introduced this year.

Senate Bill 405/House Bill 501: We urge your support of this bill and to encourage your colleagues to support it. As a small business transporting petroleum products in Southeast Alaska, we can provide evidence of financial responsibility with insurance only. Without a change in the statutes, we and many other small operations will be forced to cease transporting petroleum products. This would place a hardship on the people of Alaska and raise the price of oil. The state government would be paying higher prices for fuel and in a year when the budget is facing real scrutiny, additional cost are unwanted. Passage of these bills would allow continuing operations by all the barge companies involved in business in Alaska.

House Bill 232 (Sunken or Abandoned Vessels Bill): We have been advised this bill will be retroactive to cover all existing wrecks and a requirement to remove them within 30 days. Senator, this is unrealistic, impractical, impossible, unwarranted, and someones pipedream. A wooden fishing boat that sinks and rolls over in fifty feet of water will be reduced to only machinery in a years time. A steel vessel sinks in a narrow channel in a 140 feet of water, tidal current 5 + knots . The first problem is locating the vessel (all but impossible). Placing divers in water with this velocity to work is placing their lives in jeopardy. For what? Weather conditions in most of Alaska prohibits salvage attempts. Why regulate, what nature prohibits?

It is our understanding the bill relates to direct action against the underwriters and there is no limit to liability. Senator, we all know the type of problem created when direct action provisions against the underwriter are placed in regulation. That is why SB 405 was introduced. But even more important, Alaska whose main route of importing and exporting its goods is by the sea, will be dealt a devastating blow with passage of this bill.

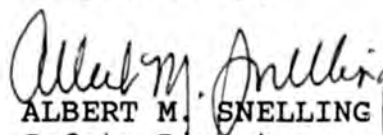
If you were an insurance underwriter, would your write a policy on a fish processor or tender or lograft tug, if you knew direct action would be taken against you and the vessel that sinks in 200 feet of water must be removed in 30 days, irregardless of safety

of lives. Does no limit of liability mean the cost to put the shells back on the beach exactly the way they were before a vessel grounded?

Senator, you are a fisherman and you have been around boats and most likely you have insurance. You know more about the sea than many of your colleagues. Tell them how it is. No one wants to damage or destroy the environment of Alaska's coast, but a bill of this nature could very well destroy a portion of it's economy.

We appreciate your time and we hope you will consider our comments.

Respectfully,


ALBERT M. SNELLING
Safety Director



JOSEPH H. LANGJAHR
Vice President & General Counsel

March 5, 1992

Re: Oil Pollution Financial Responsibility
HB 501 and SB 405

To: House and Senate Oil and Gas Committees

Foss Maritime Company respectfully submits the attached material as supplemental information to the testimony we offered, along with several other representatives of non-crude oil operators, before the Senate Oil and Gas Committee on February 25, 1992.

To briefly reiterate, while we can demonstrate financial responsibility through pollution insurance that provides us coverage of up to \$500 million -- far in excess of the amount required by HB 567 -- the Protection and Indemnity (P&I) Clubs that offer such coverage flatly refuse to submit to Alaska's "direct action" provision. We have had numerous conversations with representatives of the P&I Clubs, and their message remains unchanged: They are indemnity insurers only; they will not act as a guarantor available to be sued by third parties; they will not submit themselves to direct action lawsuits in the courts of any state or federal government.

As evidence of the clubs' steadfastness on this issue, I submit a letter from Harold E. Mesirow, a Washington, D. C. attorney for the International Group of P&I Clubs, and a transcript of a statement given before the U. S. House Merchant Marine Committee by J. Richard Youell, chairman of Janson Green Marine Ltd., a marine underwriting agency at Lloyd's of London. Although the subject at hand in both documents is the federal Oil Pollution Act of 1990 (like HB 567, OPA 90 was enacted in response to the EXXON VALDEZ spill) the primary issue addressed is the same -- the refusal of the clubs to act as guarantor or submit to direct action legal claims.

This situation has not entered into a category of crisis on the federal level so far, because the U. S. Coast Guard is under no deadline to promulgate its financial responsibility regulations and is not expected to do so before the end of the year.

The position of Alaska's smaller fuel distributors, vessel operators and rural electric utilities that maintain fuel stores find ourselves in is decidedly more urgent because we will have to come into compliance with Alaska's new rules on June 1, 1992. With that deadline now just over three months away, the simple fact is that we have found no commercially available alternatives to P&I Club coverage that can meet the state's direct action requirement. And, because most small operators lack the necessary working capital, self-

insurance and other allowable methods of meeting the financial responsibility requirements in fact are not realistic alternatives.

We support legislation that would give DEC the authority to grant us approval to operate without direct action coverage, as long as we met the other conditions of Alaska's financial responsibility requirements. This, in effect, is what the State Legislatures of California, Washington, Florida and Virginia each decided to do in the course of strengthening their pollution laws in the wake of the EXXON VALDEZ spill; all of them now accept entry into a P&I Club as proof of financial responsibility without requiring the clubs to submit to direct action.

Foss Maritime Company recognizes the need for providing evidence of financial responsibility so that government entities and other legitimate claimants can be compensated for their damages in the event of a spill. But it seems clear to us -- as it did to the Legislatures of those four states -- that between the pollution coverage offered by the P&I Clubs and the readily accessible \$1 billion federal OPA trust fund, there are more than ample funds available to deal with any incident involving non-crude operators, and direct action is not necessary.

If it appears that we are advocating for the insurance industry's position, please be assured that is not our intention. We are simply caught in the middle by being forced to meet a state requirement that insurers refuse to provide. All signs indicate the industry is not going to relent, so unless the Alaska Legislature grants us some form of relief, we will be in the decidedly distasteful position beginning June 1 of choosing to either operate out of compliance or not operate at all. As a responsible company that has been transporting products to and within Alaska for the past sixty years, neither of those choices is in any way attractive to us. We therefore urge the Oil and Gas Committees to act favorably on SB 405 and HB 501.

Respectfully submitted,

A handwritten signature in cursive script, reading "Joseph H. Langjahr". The signature is written in dark ink and is positioned above the printed name.

Joseph H. Langjahr

ROBINS, KAPLAN, MILLER & CIRESI

ATTORNEYS AT LAW

ATLANTA
BOSTON
CHICAGO
DALLAS
MINNEAPOLIS
NEWPORT BEACH
SAINT PAUL
SAN FRANCISCO
WASHINGTON

SUITE 1200
1801 K STREET, N.W.
WASHINGTON, D. C. 20006-1301
TELEPHONE (202) 775-0725
FACSIMILE (202) 223-8604
TELEX 4931197 RKMC

HAROLD E. MESIROW
(202) 736-2700

January 22, 1992

VIA HAND DELIVERY

Executive Secretary
Marine Safety Council
G-LRA-2/3406
CGD 91-005
U.S. Coast Guard Headquarters
2100 Second Street, S.W.
Washington, D.C. 20593-0001

Re: Notice of Proposed Rulemaking
[CGD 91-005] -- Financial Responsibility
for Water Pollution (Vessels)

Dear Sir or Madam:

Submitted herewith, on behalf of the International Group of PandI Clubs ("the Group"), are comments on the above-referenced Notice of Proposed Rulemaking (the "NRPM").

I. INTRODUCTION

The Group consists of seventeen mutual insurance companies ("PandI Clubs" or "Clubs") who between them insure the liabilities of over 95% of the world's ocean going merchant fleet. This includes effectively all oil tankers and almost all dry cargo ships trading to the United States together with a substantial proportion of the U.S. coastal traders. All the Clubs in the Group are linked by reinsurance arrangements so that they form what is in effect one insurance pool for the larger liability risks of shipowners worldwide.

The constituent PandI Clubs of the Group are mutual, non-profit organizations which exist to insure the liabilities of their

shipowner Members. In this capacity, the Clubs provide shipowners with services extending to up-front claims handling, including the appointment of lawyers, surveyors and other experts and the swift settlement of claims. This is particularly true in the case of oil pollution where Clubs play an active role in the shipowners' response to a spill. (This approach contrasts with that of the traditional commercial insurance industry, which normally leaves the insured to deal with the incident and reviews the insurance implications after the event.) The Clubs therefore have many years of experience throughout the world in responding to oil spills both as regards clean-up and damage settlement.

The Clubs are virtually the sole providers of insurance backing for the certificates currently issued by the US Coast Guard ("USCG") under the Clean Water Act ("CWA") for ocean going vessels. The only significant exception to this is a group of US insurers known as the Water Quality Insurance Syndicate ("WQIS") who provide certificates limited to USD 5 million for certain small coastal and inland waterway carriers.

In addition, the Clubs are effectively the sole providers of the insurance certificates required by international law under the 1969 Civil Liability Convention ("1969 CLC") in order for participating countries to issue certificates of financial responsibility to oil tankers under that international Convention. This position has enabled the Clubs to cooperate closely with the Director of the International Oil Pollution Compensation Fund ("the Fund") both in the handling and settlement of oil spills under the 1969 CLC and under the 1971 Fund Conventions.

In the circumstances it would be fair to state that the smooth working of both the CWA and the 1969 CLC owes much to the Clubs.

These comments submitted on behalf of the Clubs consist of: (1) general comments concerning the position of the Clubs on the issue of certification and the role of the Clubs as mutual indemnity insurers; (2) a discussion of the financial responsibility requirements of the Oil Pollution Act of 1990 ("OPA 90") and the NPRM; (3) the Group's responses to the specific questions posed in the NPRM; and (4) a discussion of possible changes to the NPRM.

II. GENERAL COMMENTS

A. The Position of the Clubs on Cover and Certification

1. Cover

The Clubs currently provide insurance cover for their shipowner members which is wide enough in scope to include all US civil liabilities and in terms of oil pollution is more than sufficient in amount to meet the financial responsibility require-

ments of OPA 90. It is the current intention of the Clubs to maintain this cover.

2. Certificates of Financial Responsibility

In debates during the legislative process which culminated in OPA 90, the Clubs consistently stated the position that they would not provide certification of financial responsibility under any law which differed markedly from the 1984 Protocols to the 1969 CLC. The Clubs' position remains the same, and they will not be providing certification under OPA 90 or under any of the state oil pollution laws.

3. Cover but no Certification

Although the Clubs do not exclude liabilities under OPA 90 from the cover under their Rules, they will not provide certification of financial responsibility. The reasons for this may be summarized in the statement that the Clubs' function is to act as indemnity insurers not guarantors. As a general policy the Clubs have consistently refused to give anticipatory guarantees. Exceptions have been made to this with regard to certificates required under International Conventions where different criteria apply, and the limited certification under the CWA. (The basis for each of these exceptions is discussed later in these comments.) In addition, the Clubs believe that the reinsurances which they obtain from the commercial insurance market, and which are vital to their coverage, would be imperilled by the giving of certificates under OPA 90.

B. The Clubs are Indemnity Underwriters, not Guarantors

The essential role of the Clubs is to act as indemnity insurers, not guarantors. The Clubs have a longstanding policy of not providing anticipatory guarantees for the potential liabilities of their shipowner members. The reasons for this policy become clear on consideration of the consequences of acting as guarantor for all the potential liabilities arising from many different risks (not just oil pollution) in every country of the world in respect of every merchant ship currently trading.

Exceptions have been made to this policy in providing the insurance backing to the USCG certificates currently issued under the CWA and the insurance backing given to the government certificates issued under the 1969 CLC. As to the first exception, in this context it should be recalled that the Clubs have always supported the policy of prompt and even voluntary clean-up. The giving of USCG certificates in 1970 was consistent with that policy as they were specifically limited in scope to federal costs of oil spill clean-up, and in amount to USD 150 per grt. In addition, the CWA did not require that insurers giving certification forego the

policy defenses which are abrogated under OPA 90. The decision to issue such certificates came at the time of the first CWA (1970) when the United States was seen as introducing interim protection for federal clean-up costs in advance of the 1969 CLC coming into force (1975) and in the expectation that the USA would ratify the Convention when it came into force. That expectation was never fulfilled. With respect to the second exception, the Clubs have traditionally supported International Conventions in the interests of international uniformity of approach and consider that such Conventions provide a consistent and predictable liability regime.

C. The Extraordinary Scope of the Liabilities to be Guaranteed under OPA 90

Our discussion is confined to the issue of certification. Accordingly it does not include a full review of the liability provisions of OPA 90. However, in order to understand the position taken by the Clubs on certification it is necessary to be aware of the overall effect of those provisions. OPA 90 has drastically increased the liability of shipowners in respect of oil spills, both in amount and scope. Liability under the CWA was limited in amount to USD 150 per gross ton and, as stated above, applied to the federal government's costs of clean-up. OPA 90 has increased liability limits fourfold for dry cargo vessels (more for smaller ships) and eightfold for tank vessels. Moreover, OPA 90 has introduced a completely new range of liabilities and penalties relating to oil spills which extend to both economic and non-economic losses, including losses relating to damages to natural resources calculated under OPA 90's Natural Resource Damage Assessment procedure and expenses of state and local governments for fire, police and other safety services. Even more significantly, OPA 90 abandons the principles of the Robins Dry Dock case so that "claimants" could apparently include anyone who has suffered any loss whatsoever from the spill, whether or not they have any direct connection with the incident. This change runs counter to the policy which has been adopted by the US Courts for many years and which was justified and explained very neatly by Chief Justice Cardozo when he said that without such a direct connection defendants would be exposed to "liability in an indeterminate amount for an indeterminate time to an indeterminate class" Ultramares Corporation v. Touche, 255 NY 170, 174 N.E. 441 (N.Y. 1931). This is precisely the unfortunate situation in which shipowners now find themselves. OPA 90 also makes specific provision for individual states to introduce their own legislation which may be inconsistent with or additional to Federal requirements, thus introducing a series of potentially overlapping additional liabilities and indeed financial responsibility requirements. Thus the way is cleared for speculative damages which are potentially recoverable by an exceptionally wide range of plaintiffs.

The limitation of liability for shipowners provided for in OPA 90 is equal to the amount for which certification of financial responsibility is required. However, it is generally agreed that the limitation of liability provided in OPA 90 is illusory. OPA 90's liability limit is not available if the incident is proximately caused by the gross negligence of the responsible party, his servants, agents or contractors, or if it is caused by the violation of an applicable federal safety, construction or operating regulation by the responsible party, his servants, agents or contractors. Given the likelihood of establishing a breach of some applicable federal regulation and the unknown and highly flexible nature of the test for "gross negligence" at the shipboard level, denial of the right to limit liability is a probability in any major spill.

It may be argued that OPA 90 only requires an insurer to certify up to the fixed amounts stated in OPA 90. However if, as the NPRM proposes, the insurer is forced to submit to the jurisdiction of the US federal courts as a guarantor (which submission will probably also be construed as de facto submission to the jurisdiction of state courts), he will lose the contractual defenses which are a very important part of the cover given by any insurer and he will become exposed as the deepest available pocket to the risk of having to pay sums in excess of the amount certified, or even insured. It may be said that this should not happen, but all insurers genuinely fear the possibility of a US federal or state court finding some reason to impose such excess liability.

In addition, the Act contains a number of penalties which attach to the handling of a spill and its settlement, for all of which the guarantor itself could be personally liable. This introduces a new and serious risk. Indeed, it places a financial guarantor in an extraordinary position in which he is transformed by the Act from financial guarantor into spiller.

As a consequence of the foregoing, the Clubs are not willing to act as guarantors under OPA 90. While, as has always been the case, they are prepared to live up to their obligations to pay claims pursuant to the terms of their contracts of insurance, they are not prepared to offer themselves to the US courts as guarantors directly responsible for all claims made as a consequence of oil spills of their shipowner Members, thus in effect becoming the property insurers for claimants under OPA 90 rather than the liability insurers of shipowners.

D. The Mutuality of the Clubs

The shipowner directors of the Clubs have a special responsibility to the totality of their membership, many of whom never trade to the United States, to ensure that the mutual insurance structure and the reinsurance arrangements which protect

that structure are not put at risk. There is frequent pressure on the Clubs in various parts of the world to give anticipatory guarantees for unknown claims in unknown circumstances to potential claimants, both Governments and private parties. These pressures have always been firmly resisted. In this regard it is important to distinguish between on the one hand, a Club indemnifying its Members' liabilities, with policy defenses preserved, and, on the other, becoming a financial guarantor of those liabilities in each jurisdiction in which the liability may arise. Moreover, a fragmented approach to the certification of oil pollution liabilities would seriously weaken the development of the International Conventions by encouraging countries to believe that the Conventions have no future and that the only way forward is to follow the example of the United States, take unilateral action and demand their own certification. This would not only be detrimental to the development of orderly international law, but also would lead to (1) administrative chaos, (2) serious repercussions in terms of insurance cost, and (3) much more importantly in the long term, severe reduction in the availability of adequate insurance coverage for shipowners' liabilities generally.

The United States has chosen not to ratify the International Conventions in this area and has in their place created its own uniquely onerous liability regime for oil spills. Those who insure risks worldwide on behalf of an international community must take this unique risk into account. The Clubs and their international shipowner Members have given careful consideration to the exposure created by OPA 90 and have concluded that it would be wrong for them to give certificates and submit to United States jurisdiction as guarantors. It is difficult to justify providing certificates in respect of one risk in a single country, however important, when this exposes the whole international system to the dangers described above.

E. Other Insurers Take the Same Position

The Clubs are not alone in taking this position.

Other insurers in the international market have reacted to OPA 90 and state certification by ensuring that all their policies contain a standard market clause which reads as follows:

"This policy of insurance is not evidence of financial responsibility under the Oil Pollution Act of 1990 or any similar federal or state laws and may not be shown or tendered to the USCG or any federal or state agency as evidence of financial responsibility or evidence of insurance. The insurers do not consent to be guarantors."

The only possible exception to this relates to certification for small domestic inland and coastal vessels. However, the scope of the cover provided by WQIS is limited, as described in particular in the oral testimony of its president, Robert S. Lagatolla, at the November 6, 1991 Hearing before the House Merchant Marine and Fisheries Subcommittee on Coast Guard and Navigation. (The printed transcript of the Hearing containing this oral testimony is expected to be publicly released in the near future. As soon as it becomes available, pertinent portions will be provided for the record herein.)

F. The Clubs' Reinsurers are Likely to React Adversely to Certification

The Clubs, although competing for business between themselves, combine to purchase reinsurance collectively. The resultant economy of scale enables each Club to purchase more coverage than would be available to it as a separate entity, and also at reduced cost. Furthermore, this approach, combined with the arrangements between the Clubs for pooling their losses above a certain figure, helps to ensure continuity and stability in a highly cyclical market. The Group's reinsurance contract is one of the biggest liability contracts in the world and absorbs the available cover worldwide. There is no alternative reinsurance market. Indeed, some of the largest insurers in the world are reluctant to accept the risk of providing the necessary reinsurance -- less than ten percent of the current reinsurance contract is underwritten in the United States.

The worldwide reinsurance market for large risks of this type is very limited and in effect all large insurance claims worldwide are paid by the same limited number of reinsurers. This market has been badly affected recently by an unusually large number of major incidents such as, for example, the Piper Alpha oil platform explosion, the Phillips refinery fire, the EXXON VALDEZ oil spill, Hurricane Hugo and severe storm damage in Europe. This has led to a dramatic contraction of the market and greatly increased cost.

When an insurance market enters this phase of its cycle, underwriters are forced to cut back on the risks they accept and attempt to exclude the most dangerous or uncertain.

OPA 90 and the emotion attendant on the EXXON VALDEZ oil spill are considered to have increased the US oil pollution risk very significantly. This is against the background that the US is already considered a high risk area, with an unpredictable and expensive legal system. Nowhere is this fear greater than in uncertain areas of claims, and OPA 90 has made US oil pollution claims highly uncertain. The market has reacted to the possibility

of being asked or deemed to have certified liabilities under OPA 90 with the sort of exclusionary wording set out above.

The existing reinsurances of the Clubs are provided on the basis of the stated position of the Clubs that they will not provide certificates under OPA 90. If the Clubs were to depart from this position it is understood that many of the existing reinsurers would refuse to continue their reinsurances.

Reference is made above to the importance for the Clubs of maintaining the present mutual structure, including the necessary reinsurances. In that regard, it is now clear that the giving of certificates under OPA 90 is not a merely theoretical or long term threat to that structure and those reinsurances, but that it could provoke an immediate withdrawal of support from the reinsurance market. (See specifically in this regard the testimony of J. Richard L. Youell at the November 6, 1991 Hearing before the House Merchant Marine and Fisheries Subcommittee on Coast Guard and Navigation, attached as an Exhibit hereto.)

III. FINANCIAL RESPONSIBILITY REQUIREMENTS OF OPA AND THE NPRM

A. General Comments on the NPRM

Since a high percentage of existing USCG certificates are issued on the basis of insurance certificates provided by the Clubs and the Clubs will not be issuing the certificates required under OPA 90, there must be the possibility that ocean going operators of all vessels, not just tankers, will encounter difficulty in complying with the financial responsibility requirements of OPA 90.

It is correct for the NPRM to state that the Clubs have continued and propose to continue to provide the insurance cover against liabilities under both OPA 90 and state legislation and thus that virtually all shipowners using US waters have obtained insurance to meet OPA 90 financial responsibility limits.

It is, however, not correct to state as does the NPRM that "without the higher [than existing USCG] guarantees, the value of the insurance in the event of a catastrophic spill is highly questionable."

Since the EXXON VAL 7 spill in March 1989 there have been more than twenty serious spills in the United States including the incidents involving WORLD PRODIGY, PRESIDENT RIVERA, AMERICAN TRADER, B.T. NAUTILUS, MEGA BORG and SAMMI SUPERSTARS. Many of these incidents had financial consequences in excess of the CWA guarantee limits and liabilities. In every case where the Clubs were insurers they have responded in full under the terms of their cover. However Clubs are insurers of legal liability and therefore naturally reserve the right to examine all claims and resist those

which are exaggerated or spurious. Equally where an assured has breached the terms of his insurance policy, cover will be withheld.

Since the USCG certificates were first issued in 1970 there have been a large number of incidents insured by the clubs where liabilities have considerably exceeded the limits and liabilities of the CWA guarantee with perhaps the most notable instance of an insurance payment in excess of the CWA guarantee being the USD 400 million paid to Exxon following the ARCO VALDEZ incident. This represented the limit of insurance cover as opposed to the maximum liability under the CWA certificate of USD 14,249,850.

(It is however true that there is no means of obtaining any form of guarantee from a ship exercising the right of innocent passage or not entering US waters, other than under an International Convention. Oil may of course be spilled from a vessel passing along either the East or West Coast of the US or indeed visiting a Caribbean, Latin American or Canadian port and this oil can have a serious impact on the US coastline. The 1969 CLC and the 1984 Protocol to the CLC were expressly designed to deal with this sort of problem.)

B. The NPRM's Treatment of Section 1016 of OPA 90

We would note that the Coast Guard has made no reference in its NPRM to key portions of the statute bearing upon certification. OPA 90 provides that financial responsibility "may be established by any one, or a combination of the following methods which the Secretary determines to be acceptable: evidence of insurance, surety bond, guaranty, letters of credit, qualification as a self-insurer, or other evidence of financial responsibility." (emphasis added)

Despite the flexibility in approaches to financial responsibility contemplated under OPA 90, the NPRM proposes only insurance, surety bonds, guarantees and self insurance as means of establishing financial responsibility and makes no mention of any "other evidence of financial responsibility" that might be utilized in satisfying the statutory requirements.

In addition, the NPRM does not in any way address the issue of what policy conditions and defences might be utilized in establishing evidence of financial responsibility. The Act, however, authorizes the Coast Guard, in promulgating financial responsibility requirements, to "specify policy or other contractual terms, conditions, or defenses which are necessary or which are unacceptable." (emphasis added) Moreover, as stated at pages 119-120 of the Conference Report which accompanied OPA 90, the Coast Guard's authority in this regard is to be exercised in a manner

that will foster a continuing market for providers of financial responsibility."

A possible explanation for these omissions is that the USCG have taken a restrictive view of what Congress intended in passing OPA 90.

The Clubs also note with concern that Sections 130.8 and 130.9 of the NPRM do not appear to reflect accurately the provisions of Section 1016(a) of OPA which require proof of financial responsibility only in respect of the largest vessel in a fleet and not for each vessel individually in the aggregate.

C. Consolidation of Financial Responsibility Requirements Under OPA 90 and CERCLA

The NPRM proposes that the financial responsibility requirements of OPA 90 should be combined with those of the Comprehensive Environmental Response, Compensation and Liability Act [42 USC 9601] ("CERCLA"). CERCLA concerns liability for hazardous substances and has been in force since 1980. Regulations implementing its financial responsibility provisions, however, have never been issued because no insurer could be found willing to provide the necessary certificates. By combining the two regimes the NPRM increases the amount required under each vessel certificate by USD 300 per grt and significantly extends the already large potential liabilities of OPA 90. In effect every vessel trading in US waters will require a minimum USD 5 million certificate under CERCLA.

The Clubs note with interest Section 108(b)(2) of CERCLA which states that:

"To the maximum extent practicable the President shall co-operate with and seek the advice of the commercial insurance industry in developing financial responsibility requirements."

And the Clubs note also with considerable concern the ambiguity inherent in Section 108(d) of the NPRM which appears to expose a guarantor to liability beyond the amount of his guarantee. The section reads:

"Any guarantor acting in good faith shall be liable only up to the monetary limits of the policy of insurance or indemnity contract such guarantor has undertaken or of the

guaranty or other evidence of financial responsibility furnished"

D. Continuation of Present Regulations

The NPRM suggests that it might be possible to allow existing certificates to remain valid until their normal expiry date "if evidence of financial responsibility sufficient to meet OPA and CERCLA requirements is established and maintained." The reason for this is "to avoid unnecessary disruption of commerce and the burden on vessel operators."

It would seem, however, that this proposed administrative short cut will only be possible if the existing insurance guarantors are willing to provide the new certificates. In the case of the Clubs this is not the case.

E. Regulatory Evaluation

The NPRM states that "This proposal is not major under Executive Order 12291" (EO 12291). The Clubs disagree; the criteria under EO 12291 define a "major rule" as any regulation which is likely to result in:

- an annual effect on the economy of \$100 million or more; or
- a major increase in cost or prices for consumers, individual industries, federal, state or local government agencies, or geographic regions; or
- significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of US based enterprises to compete with foreign-based enterprises in domestic or export markets.

There can be no doubt that the proposed regulations qualify as a major rule under not just one but under each of the criteria. Indeed, the Clubs consider that the potential impact of the present NPRM on owners of all types of vessels is so serious that preparation of a Regulatory Impact Statement ("RIA") pursuant to Executive Order 12291 is essential and that the promulgation of any final rule should be postponed until the fullest possible opportunity for comment on the RIA and reconsideration of the NPRM has been given.

IV. THE QUESTIONS

The Group submits the following responses to the questions posed in the NPRM. Paragraph numbers correspond to the numbers assigned to each question in the NPRM.

1. The Clubs would suggest relaxation of the criteria necessary to qualify as a self-insurer and consideration of the "other evidence of financial responsibility" permitted under OPA 90.
2. & 3. The Clubs consider that the requirement for net worth in the US is likely to have a very restrictive effect on the ability of foreign shipowners to meet the self-insurance requirements.
4. The Clubs cannot comment.
5. See 2 and 3 above.
- 6,7,8,9. The Clubs are not in a position to comment.
10. The percentage of oil imported by the major oil companies is relatively small and it seems unlikely that the oil companies would be willing to provide guarantees for independent companies or non-tank vessels.
11. The Clubs consider it unlikely that any independent vessel operator would be able to meet the standard of self-insurance proposed in the NPRM.
- 12,13,14,15. The Clubs are not in the best position to answer these questions.
16. No, for the reasons set out above. The amount of the guarantee is not the only or the most important factor.

V. POSSIBLE CHANGES IN THE NPRM

With regard to possible changes to the NPRM, two important considerations need to be taken into account. The first is that the Clubs currently provide insurance cover which is wide enough in scope to meet the civil liabilities imposed by both Federal and

State legislation and sufficient in amount to more than satisfy the maximum financial responsibility requirements of both OPA 90 and CERCLA. The Clubs cannot guarantee that this cover will always be available, but they intend to continue it if possible. The reality of the position is therefore that any owner who has entered his vessel in one of the Clubs with full oil pollution cover has shown financial responsibility sufficient to meet the requirements of OPA 90.

The second consideration is that the NPRM takes a restrictive view of OPA 90. The self-insurance requirements could be made considerably less onerous and "other evidence of financial responsibility" could be taken into account.

Regulatory agencies and legislatures in the states of California, Washington, Florida and Virginia, which have already considered the question of financial responsibility, do not share the USCG's opinion that "the value of insurance in the event of a catastrophic spill is highly questionable because of the multitude of policy defences, exclusions and conditions." Indeed, these states have all accepted entry in a PandI Club as sufficient proof of financial responsibility in itself without requiring the Clubs to submit to direct action, even where applicable authorising legislation permits direct action against insurers. Their only concern has been with how this entry should be evidenced.

We understand there is a difference of views as to whether or not there is any legal impediment to the Coast Guard adopting a similar approach in drafting federal regulations. However, given the severity of the consequences of the Coast Guard's narrow view on possible methods for certification of financial responsibility, careful and thorough consideration should be given to expanding those regulations. If this is not possible, then legislative amendment may be called for.

Failing such action, either in a regulatory or legislative framework, certification of financial responsibility under OPA 90 will not be possible for tanker and dry cargo vessels presently operating to and from the United States.

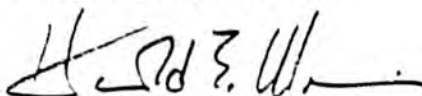
VI. CONCLUSION

In conclusion, OPA 90 is fundamentally different from comparable legislation elsewhere in the world. It departs from the norm of the civil liability conventions and their attendant protocols, and encourages the problem of multiple state and federal liabilities and penalties.

The Clubs cannot agree to provide any form of certification under OPA 90 not because of any one aspect of the law, but rather because of the cumulative effect of its individual provisions.

There is therefore nothing which can be done by way of regulation or minor legislative amendment which will enable the Clubs to change their position. The Clubs, however, are striving to maintain their cover and do not object if a way can be found through regulation or legislative change to utilize the existence of this cover so as to enable shipowners to demonstrate their financial responsibility under OPA 90, provided that the Clubs do not thus become guarantors under the Act. In permitting their cover to be used in this way the Clubs are going beyond the position adopted by commercial insurers in an effort to enable their members to continue to trade to the United States.

Very truly yours,



Harold E. Mesirow
Robert J. Stefani
Robins, Kaplan, Miller & Ciresi

Counsel for The International
Group of P&I Clubs

HEM:RJS:vmc
Attachment

STATEMENT OF J. RICHARD L. YUELL
BEFORE THE
HOUSE MERCHANT MARINE AND FISHERIES
SUBCOMMITTEE ON COAST GUARD
AND NAVIGATION

November 6, 1991

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to appear before you today.

My name is J. Richard L. Youell. I am a marine Underwriter at Lloyd's of London and Chairman of Janson Green Marine Ltd., which is an underwriting agency at Lloyd's. Lloyd's is one of the oldest insurance institutions in the world, having begun in 1688. Lloyd's, however, is not a company but a marketplace of some 27,000 individual underwriting members. These underwriting members operate through some 300 syndicates, and I am the principal professional Underwriter for several of the syndicates managed by the Janson Green agency.

Because Lloyd's is a marketplace in which each syndicate decides for itself what risks it will accept, there is no one voice which can speak for the whole of the Lloyd's market on

This material is prepared by Richard Youell of One Lime Street, London, England and LeBoeuf, Lamb Leiby & MacRae, 1875 Connecticut Avenue, N.W., Washington, D.C., who are registered with the Department of Justice, Washington, D.C. under the Foreign Agents Registration Act as agents of Lloyd's of London, One Lime Street, London, England. This material is filed with the Department of Justice where the required registration statement is available for public inspection. Registration does not indicate approval of the contents of the material by the United States Government.

any matter of underwriting judgment. Therefore, my remarks today are, strictly speaking, only one Underwriter's view.

Nevertheless, as an Underwriter with 26 years' experience at Lloyd's and as a member of several market committees within the Lloyd's community, I believe I can fairly say that my views on guaranteeing financial responsibility under the U.S. Oil Pollution Act of 1990 (OPA) are widely held among marine Underwriters at Lloyd's.

The Lloyd's market collectively is one of the largest sources of insurance capacity in the world, and over its 303-year history it has earned a reputation for innovative and flexible responses to unusual risks, as well as unsurpassed security. Lloyd's pioneered marine oil pollution insurance, and Lloyd's is still one of the world's principal sources for such cover for both offshore production facilities and tankers and other vessels. Indeed, the U.S. insurance market generates virtually no capacity for liability insurance for oil pollution from vessels. London and other non-U.S. markets provide most of the coverage worldwide. We at Lloyd's have every intention of continuing to provide oil pollution insurance for our many insureds, some of whom have been insured at Lloyd's for many years. We would hope to go on providing this insurance for U.S. waters even though the growing multiplicity of liability rules imposed at the Federal and State levels makes this cover increasingly difficult to underwrite.

Although the amount of coverage available at Lloyd's or elsewhere in the world varies from year to year, our capacity at this moment in time is more than sufficient to meet on an indemnity basis the monetary limits of the financial responsibility requirements of OPA for vessels and offshore facilities. However, because the vessel owner's limit of liability might be easily breached under OPA Section 1004(c) and further because OPA does not preempt State laws imposing additional liability for the same incident, vessel owners may have exposures well in excess of the OPA financial responsibility requirements for which they endeavor to buy insurance cover to cover this risk. For example, the Lloyd's market currently makes available a layer of \$200 million per incident in excess of the \$500 million primary cover offered by P&I Clubs to all tanker owners. However, the owner's U.S. liability risk from these cumulative sources may now be well beyond the bounds of insurance cover available even if the owner meets the applicable financial responsibility amounts.

Please be assured that we are in the business of writing difficult classes of insurance, and we take pride in providing our insureds with continuity of coverage even in difficult times. We will continue to provide as much insurance capacity as possible to these insureds. However, we are unable to provide unlimited insurance coverage, because such risk cannot be quantified to determine the appropriate premium, nor can we be sure of our ability to respond, for an unlimited amount, to the

promise to pay that is a fundamental element of an insurance contract.

The proposed financial responsibility rules under OPA present us with a situation which is fundamentally different from simply entering into contracts of insurance with our insureds. As a result, while we expect to continue writing pollution insurance for U.S. waters, it is clear that we cannot responsibly agree to be a "guarantor" under these rules. As indemnity insurers, we promise an insured that we will make good any liability losses he sustains within the terms and limits of the contract. As I have said, the promise is not for an unlimited amount and is subject to contractual restrictions, such as safe warranties which the insured ignores at his peril. Such requirements serve to concentrate the insured's mind on his responsibilities under the contract, on which any recovery relies.

Moreover, our contract is with the insured, not the rest of the world. By specific endorsement, insurance contracts are often amended to name additional parties as loss payees, such as banks holding mortgage interests or consignees. These parties might then be entitled to receive the policy proceeds directly, but always subject to the terms and conditions of the original contract. These parties are always identified in advance and specifically agreed to by the insurer.

In the past, we have considered the insurance form required by the 1972 Clean Water Act (Form CG 5358-9) to be, effectively, a policy endorsement naming the U.S. Government as a loss payee. We support the prompt clean-up of oil spills. We have been willing to deal directly with the U.S. Government under the terms of Form CG 5358-9, but always with the expectation that Federal legislation would eventually be harmonized with international convention. That hope was dashed by OPA. We do not, however, customarily agree to be sued directly by unnamed, indeed unimagined third parties.

Added to this is the problem that OPA Section 1014 appears to require a guarantor, if the responsible party fails to act, begin local advertising and the like immediately after the spill. Until regulations defining the scope of this responsibility are written, it is another reason why insurers must refuse to be a guarantor.

The proposed OPA version of Form CG 5358-9 (the "OPA Insurance Form") is, superficially, similar to the Clean Water Act version, but it poses very different problems. First, it would require the insurer to agree to non-governmental third-party direct actions. Second, the insurer's policy defenses in direct action are not clearly preserved. OPA Section 1016(e) gives the Secretary of Transportation authority to specify which original policy defenses (and other terms and conditions) are preserved in direct actions. Yet the proposed OPA Insurance

states "[t]he Insurer shall be entitled to invoke only the right and defenses specifically permitted to guarantors by the Act under which the action is brought." Unfortunately, this begs the question. The Act, OPA, says that the Coast Guard will by regulation, specify which terms, conditions and policy defenses will be permitted or not in a direct action. But the regulation fails to do so.

Third, OPA's failure to preempt State liability and certification laws leaves open the possibility that third-party claimants will be able to assert State law claims outside of OPA against an insurer/guarantor, creating the possibility of horizontal exposure to multiple limits against an insurer for which no premium was collected and no insurance capacity remained. Our fear is that every State requesting a certificate will construe it to be a separate limit for the same spill thus multiplying the amount an insurer would have to pay for a single spill. Worse, already we have seen a law passed in Texas after OPA's enactment which seems to say that if an insurer files an Insurance Form CG 5358-9 with the Coast Guard in Washington, Texas will assert the right of its citizens to sue that insurer in Texas courts under the Texas law, possibly for damages in excess of the limit the insurer may have agreed to pay paid out under the OPA certificate. This may occur even though the insurer in no way may have consented to providing evidence of financial responsibility to Texas. Thus, he may be powerless

limit his Federal Insurance Form to its intended purpose of certifying a single limit of liability to the Coast Guard.

We at Lloyd's wish to respond in a constructive fashion to the insurance requirements which arise any where in the world. However, it is impossible to justify employing our capital and resources in an insurance environment where some of the fundamental principles of insurance practice are not able to operate. If the OPA rules were no less arbitrary than those enforced under the Clean Water Act and the risk of multiple limits under State legislation for a single spill were removed, then we would earnestly endeavor to continue to provide the protection to our insureds that your laws require.

Thank you.



American Steamship Owners Mutual Protection and Indemnity Association, Inc.
Shipowners Claims Bureau, Inc., manager

Five Hanover Square, New York, N.Y. 10004
(212) 269-2350

Cable Address "PANDICLUB"
Telex No. 222091
Telefax (212) 825-1391

February 25, 1992

TO ALL MEMBERS

RE: CERTIFICATES OF ENTRY

Dear Sirs:

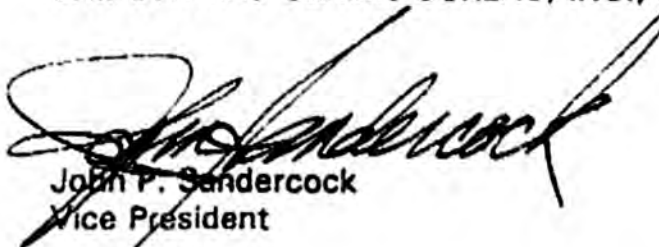
For 1992/93 all policies which are issued by the Club will automatically contain the following endorsement:

"This policy is evidence only of the contract of indemnity insurance between the above named Member(s) and the Association and shall not be construed as evidence of any undertaking, financial or otherwise, on the part of the Association to any other party.

If a Member tenders this policy as evidence of insurance under any applicable law relating to financial responsibility, or otherwise shows or offers it to any other party as evidence of insurance, such use of this policy by the Member is not to be taken as any indication that the Association thereby consents to act as guarantor or to be sued directly in any jurisdiction whatsoever. The Association does not so consent".

The purpose of the endorsement is to make clear to Members and to any person who may receive a copy of a policy or confirmation from a Member or his agent that the document is no more than evidence of the Member's entry in the Club at a particular date.

Very truly yours,
SHIPOWNERS CLAIMS BUREAU, INC., MANAGER



John P. Sandercock
Vice President

The American Waterways Operators



Pacific Regional Office

5615 West Marginal Way, SW
Seattle, WA 98106

TEL: (206) 764-1321
FAX: (206) 764-1323

Gerald P. McMahon
Vice President - Pacific Region

February 20, 1992

Senator Lyman Hoffman
Capitol Building
P.O. Box V
Juneau, AK 99811

Dear Senator Hoffman

The American Waterways Operators (AWO) is the national trade association representing the inland and coastal barge and towing industry. Several of our members are based in Alaska or operate in Alaskan waters involving the marine transportation of petroleum and petroleum products.

I write in support of Senate Bill 405 which will provide statutory relief from the existing State of Alaska "direct action" requirements of evidence of financial responsibility. This requirement has been a longstanding problem with our industry which makes it impossible to obtain insurance to meet this Alaskan requirement. This is a responsible bill which would establish a financial responsibility standard which protects claimants who have been harmed by a spill and recognizes the realities of the insurance marketplace, and does not bring a major and essential portion of Alaska's petroleum distribution network to a grinding halt.

We thank you for introducing HB 501 and urge your colleagues to support its passage as soon as possible.

Sincerely,

Gerald P. McMahon



ALASKA

NUSHAGAK ELECTRIC CO-OPERATIVE, INC.

P.O. BOX 350
DILLINGHAM, ALASKA 99576

TELEPHONE (907) 842-5251
TELECOPIER (907) 842-2799

GS

January 16, 1992

Honorable George Jacko
PO Box V
Juneau, Alaska 99811

Dear Representative Jacko:

This is to follow up on my conversation with Bryce Tuesday, January 14 concerning the Financial Responsibility requirements of AS 46.04 which was amended by HB 567 in 1990.

First of all I want to assure you that NEC wants to be squeaky clean in its fuel handling operations because we are very sensitive to the fact that we owe our existence to the natural resources provided by the waters in and around Nushagak Bay.

With that thought in mind we turn to the statute which requires terminal oil operators (i.e., those with storage capacity exceeding 10,000 BBLs) to provide proof of financial responsibility. According to our understanding financial responsibility may be achieved in several ways as follows:

1. Pollution liability insurance
2. Letter of credit
3. Self-insurance
4. Surety bonds
5. Guarantee

For all practical intent and purposes, only items 1 and 2 above are available to us. We opted to purchase insurance over a letter of credit because the potential liability created if a letter of credit had to be exercised would likely bankrupt the cooperative thus increasing the likelihood that a spill would have to be cleaned up with the use of public (i.e. state) funds. (In addition to destroying the ability of the Cooperative to provide power to the community at a price anyone could afford).

Representative Jacko
January 16, 1992
Page 2

Since 1985 we have purchased pollution liability insurance from Lloyds of London with a current cost in excess of \$30,000 per year. (This insurance is not provided by U.S. Carriers.) The policy now reads more restrictive than it once did. The underwriters have added (as of November, 1990) a section (copy enclosed) to the policy which reads as follows:

"This insurance does not constitute evidence of financial responsibility under the Oil Pollution Act of 1990 or any similar Federal or State law and it is a condition of this insurance that it shall not be submitted to the United States Coast Guard or any other Federal or State agency as evidence of financial responsibility. The underwriters do not consent to be guarantors."

We renewed the policy simply because we had no alternatives. We have copied DEC and they recognized that the new policy "does not have the endorsement required by regulation 18 AAC 20.065 (b)." I believe that the required endorsement is probably also addressed in AS 46.04 as well.

DEC has communicated with us on October 25, 1991; November 19, 1991; and December 26, 1991 on this issue. Copies of this correspondence are enclosed. We have asked our attorney to comment on this matter and he raises some serious questions. A copy of his letter of December 5, 1991 is also enclosed.

As we see it now, it is impossible for Nushagak Electric Cooperative to meet the requirements of the statute. Yet it does appear that, legally or no, DEC is willing to waive certain requirements. This is not a good situation and it does nothing to address concerns that generated HB 567 in the first place.

Our perception of this matter is twofold; namely,

1. The absolute necessity to prevent spills at all costs.
2. Should a spill occur, have the resources immediately available to proceed with cleanup and restoration.

The current statute and regulations do little to encourage prevention. From a practical matter, we believe that spills will continue to occur, most of them small but occasionally one of large magnitude such as the recent Cook Inlet spill. The number and diversity of fuel storage facilities in the state are simply too great to address all situations in a single statute or set of regulations.

Representative Jacko
January 16, 1992
Page 3

Additionally, terminal oil facilities are not treated consistently by provisions of the statute. We previously mentioned five different methods by which an entity can provide financial responsibility acceptable to DEC. However, only the first two methods are available to the smaller operator. The smallest operators (i.e. those with under 10,000 BBS of storage capacity) have no financial responsibility requirements at all and yet they probably have 90% of the risk (although only a fraction of the volume). The first two methods of financial responsibility are badly flawed as previously described and also commented on by DEC. They really do not adequately address either prevention or cleanup and restoration.

Finally there is the standard of volume vis-a-vis thruput of product. You could have two terminals with identical capacities of 1,000,000 gallons each sitting side by side. Terminal no. 1 might be filled once a year but terminal no. 2 might be filled ten times a year; however, financial requirements based on AS 46.04 require identical amounts of coverage for each terminal. This feature really doesn't make much sense because the exposure to a potential spill is ten times greater in terminal no. 2.

What are possible alternatives to these issues?

It probably should be recognized that HB 567 which attempted to address deficiencies in existing statutes was enacted in response to concerns raised by the Exxon Valdez oil spill. If this piece of legislation did nothing else, it raised our awareness of what could go wrong under certain conditions.

Almost two years has passed since the bill was enacted and it has given us some perspective and some ideas on how to generate a high level of interest in prevention as well as providing the resources for cleanup and restoration. We would suggest the following:

1. That a state agency be assigned the task of establishing an insurance pool where every terminal oil operator would be obligated to pay into it based on his thruput of product NOT CAPACITY to adequately address exposures.
2. That this state agency utilizing a portion of pooled funds for administrative and operational purposes establish a circuit rider inspection program where every terminal oil operator in the state could be inspected for compliance with Federal and State regulations as well as American Petroleum Institute (API) Specifications and Practices.

Representative Jacko
January 16, 1992
Page 4

3. That the fund pool be built to a certain level or cap until such time that the fund would be self supporting; that is, it would support the administration and operation of the program as well as establish a "pool" to draw from in the event of a spill.

We believe that this may well be an ideal undertaking for the Alaska Energy Authority. It would certainly give them an added justification for their existence, the administrative structure is already in place and dollars presently spent for foreign insurance coverages or meaningless letters of credit would remain in the state providing economic benefits.

Most important, we believe this would be a much more productive way of delivering a high level of prevention as well as the resources necessary for spill cleanup and restoration in a consistent manner.

We don't have much to lose by trying something different because the present system has too many holes in it.

Sincerely,



David F. Bouker
General Manager

ljc

Enc (5): Excerpt of Disclaimer from Pollution Liability Policy
DEC letters (10/25; 11/19; 12/26)
Kemppel letter (12/5)

Copy sent by facsimile 1/16/92

DEPT. OF ENVIRONMENTAL CONSERVATION

DIVISION OF SPILL PREVENTION & RESPONSE
SPILL PREVENTION, PLANNING & MANAGEMENT SECTION
410 WILLOUGHBY AVE., SUITE 150
JUNEAU, AK 99801-1795

Telephone No.
(907) 465-5225
Fax No.
(907) 465-5245

December 26, 1991

Mr. David F. Bouker
Nushagak Electric Co-operative, Inc.
P.O. Box 350
Dillingham, AK 99576

DEC 1991
Received
Nushagak
Electric/Telephone
Cooperative, Inc.

Re: Financial Responsibility

Dear Mr. Bouker:

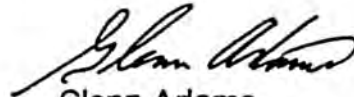
I received the insurance information that you submitted. As I said in my last letter the insurance does not meet State requirements.

We have been telling other applicants in similar situations that in the event no proof other than insurance is available, we will allow use of insurance policies that meet all State requirements except direct action in state courts, provided that all other means of proof (letters of credit, self-insurance, surety bonds, and guarantee) have been exhausted.

A letter is needed to explain why each of the methods of proof cannot be used, then a conditional/temporary approval can be issued while we wait for the insurers or legislators to make changes..

Another application form is enclosed, your approval period is determined by the date your insurance expired. Please contact me if you have questions.

Sincerely,


Glenn Adams
Financial Responsibility

File # 4.01.095

LAW OFFICES OF
KEMPEL, HUFFMAN AND GINDER
A PROFESSIONAL CORPORATION

ROGER R. KEMPEL
RICHARD R. HUFFMAN
PETER C. GINDER
DONALD C. ELLIS

ANDREW J. FIERRO
GEORGE S. HARRINGTON JR.
BOBBY DEAN SMITH
JAY D. DURYCH

December 5, 1991

ANCHORAGE OFFICE
285 E. FIREWEED LANE, SUITE 200
ANCHORAGE, ALASKA 99503
(907) 277-1604
TELECOPIER (907) 276-2493

CORDOVA OFFICE
520 2ND STREET
P.O. BOX 1829
CORDOVA, ALASKA 99574
(907) 424-7410
TELECOPIER (907) 424-7484

David F. Bouker
General Manager
Nushagak Electric Cooperative, Inc.
P.O. Box 350
Dillingham, AK 99576

Re: Financial Responsibility Requirements -
Oil Spill

Dear Dave:

You have asked me to comment upon the extent of the coverage being offered by The Coleman Wade Group at Lloyds.

I am aware that the above coverage was first sought by NEC, in part, to comply with the State's oil spill financial responsibility requirements and that this coverage through Lloyds of London seems to be the only coverage available to NEC. It is clear, however, that the policy being offered does not comply with the State of Alaska's requirements, and in fact it specifically states that it does not. There is, however, some indication that the State of Alaska, DEC, may be willing to waive certain provisions required to be in a policy of insurance presented as evidence of financial responsibility.

With respect to this last point (waiver by DEC), I have some very real concerns. It may be true that DEC, if it follows the appropriate regulatory procedure, may be able to waive certain of its regulations, specifically the provisions of 18 AAC 20.065(b). I believe that the Attorney General might, however, successfully take the position that DEC is without power to waive the statutory requirements, specifically AS 46.04.040(i). If this is in fact the case, NEC could very well be in violation of state statutes even though DEC had granted you a form of administrative waiver.

Turning to the question of coverage itself, the policy which you have provided seems to be written around the Oil Pollution Act of 1990--part of the United States Code. In fact, specific U. S. Code sections are cited in the policy. While there is some language mentioning "similar state law," that language is found in the disclaimer section at the beginning of the policy. The policy itself generally reads as if it concerns only the federal act, stating, for instance, that the insurer is liable "with respect to: second: Liability under Section 1,005(a) of the Act . . ." Given a substantial claim under this policy, I believe we might well find ourselves in the position of litigating whether the Alaska statute is "similar" to the federal statute, thereby creating coverage by this insurer.

David F. Bouker
December 5, 1991
Page 2

At the very least, the disclaimer language found at the beginning of the policy and the failure to include the 18 AAC 20.065(b) endorsement makes it clear that this policy does not cover the potential liability set out in AS 46.04.040(i). It is worth at least outlining these potential exposures.

AS 46.03.758 establishes civil penalties in the amount of \$10.00 per gallon, \$2.50 per gallon, or \$1.00 per gallon, depending upon whether the spill takes place in fresh water, marine estuaries, or unrestricted saltwater. The statute also provides for multiplying the above fines times five in the case of gross negligence.

AS 46.03.760(a) provides for:

1. Compensation for damage to the environment;
2. The State of Alaska's costs associated with detection and cleanup;
3. Economic savings to the insured (NEC) of not complying with the oil spill statutes and regulations.

AS 46.04.030(g) provides for potential strict liability for the holder of an oil spill contingency plan who fails to respond and clean up an oil spill as quickly or to the extent which DEC finds reasonable.

Turning now to the cover note and exclusions which are a part of the policy. You should note that the policy is subject to seven exclusions which are named by number and are set out in a document dated December 1988 which I assume is the document which has been provided to us and attached to the cover notes.

You should note, however, that the "U. S. Oil Pollution Exclusion Clause November 1990" has also been included, although I cannot find the text of this exclusion.

Turning to what I presume to be the December 1988 exclusions, I would note that No. 8 excludes damage or loss arising from disposal or transportation of any oil or oil-soaked dirt. You should also note that "removing and/or nullifying and/or cleaning up" are also not covered. It should also be noted that "subsurface operations" are not covered, although the term "subsurface" is not defined, and it is unclear whether our buried pipeline would constitute such operations.

Paragraph No. 12 excludes all penalties which would of course include all of those penalties created under the Alaska statutory section cited earlier.

The policy excludes coverage for directors and officers "by reason of any breach of their fiduciary duty," but the policy goes well beyond this in exclusion paragraph number 20. This paragraph excludes coverage for damage caused by negligence or "mistake of a professional nature committed or alleged to have been committed by or on behalf of the insured" [Emphasis added.] You should note that this exclusion not only excludes coverage for oil spill damage caused by your engineer but also that oil spill damage caused by NEC's own actions of a professional nature. For instance, what if the oil spill occurred because NEC failed to adequately design the valving of the system? What if the oil spill was found to have occurred because NEC negligently supervised the oil transfer operation? What if the oil spill was found to have occurred because

David F. Bouker
December 5, 1991
Page 3

NEC negligently failed to inspect the pipeline prior to its use? Design, supervision, inspection, and engineering by NEC are all mistakes of a professional nature which are excluded from coverage under the policy being offered to you. It would seem to me that a damaged party could be expected to make at least one of the above claims in any litigation against NEC resulting from an oil spill.

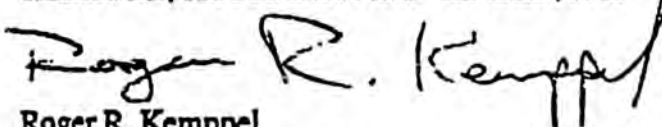
I am sure that this analysis does not give you or the board much comfort. It would certainly seem that we are insuring only a small part of the actual risk associated with our fuel deliveries for the premium dollars involved. This is especially true when you consider that neither this insurance nor the State's financial responsibility statute deals with one major cost which we know we will have in connection with any spill--NEC's own costs to clean up and dispose of oil-contaminated material.

Even given the above, I hesitate recommending, on the one hand, that NEC proceed without at least some insurance in this area. On the other hand, however, I cannot help but wonder whether NEC and the community of Dillingham might not receive more protection by expending the \$25,000 premium amount on items which would actually prevent or lessen the impact of an oil spill. Such items might include additional radios, additional personnel stationed on the barge, at the header, along the pipeline, and at the tank farm, additional inspections, pressure gauges, fail-safe valves, emergency shutoff valves, automatic sensor alarms, or improved flexible couplings on the dock. A good bit of additional oil absorbent boom could be purchased and/or deployed for this kind of money. I am not suggesting that we do not currently have a safe oil transfer operation. I am simply questioning whether these dollars might better be allocated toward prevention rather than insuring a relatively small portion of the loss should an oil spill occur.

If you or the board have any further questions, please feel free to contact me.

Sincerely yours,

KEMPPEL, HUFFMAN AND GINDER, P.C.



Roger R. Kempel
General Counsel for NEC

RRK:lka

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

DIVISION OF SPILL PREVENTION & RESPONSE
P.O. BOX 0, JUNEAU, AK 99811-1800

Telephone No.
(907)465-2630

November 19, 1991

Mr. David F. Bouker
Nushagak Electric Co-operative, Inc.
P.O. Box 350
Dillingham, AK 99576

Re: Financial Responsibility

Dear Mr. Bouker:

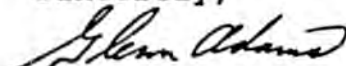
I just received the insurance information that you submitted. I was hoping that London would include the endorsement that is required by Regulation AAC 20.065(b) but they sent their standard policy.

If you read the first paragraph, it states " This insurance does not constitute evidence of financial responsibility under the oil pollution act of 1990 or any similar federal or state law and it is a condition of this insurance that it shall not be submitted to the United States Coast Guard or any other federal or state agency as evidence of financial responsibility. The underwriters do not consent to be guarantors."

Pretty strong language, I'm sure you can see that it does not meet State requirements. We have been telling other applicants in similar situations that in the event no proof other than insurance is available, we will allow use of insurance policies that meet all State requirements except direct action in state courts, provided that all other means of proof (letters of credit, self-insurance, surety bonds, and guarantee) have been exhausted. A letter is needed to explain why each of the methods of proof cannot be used, then a conditional/temporary approval can be issued while we wait for the insurers or legislators to make changes..

Another application form is enclosed, your approval period is determined by the date your insurance expired. Please contact me if you have questions.

Sincerely,



Glenn Adams
Financial Responsibility

File # 4.01.095

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

DIVISION OF SPILL PREVENTION & RESPONSE
P.O. BOX 0, JUNEAU, AK 99811-1800

Telephone No.
(907) 465-2630

October 25, 1991

Mr. David F. Bouker
Nushagak Electric Co-operative, Inc.
P.O. Box 350
Dillingham, AK 99576

▲
OCT 1991
Received
Nushagak
Electric/Telephone
Cooperative, Inc.

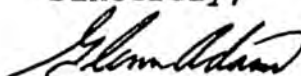
Re: Financial Responsibility

Dear Mr. Bouker:

Thank you for submitting your replacement insurance coverage, I thought that I had faxed a new application form to your office, a form is enclosed for your use.

I have reviewed the insurance coverage and found it does not have the endorsement required by regulation 18 AAC 20.065(b), last years policy did have it. Would you please contact you agent to see if they can have the endorsement added.

Sincerely,



Glenn Adams
Financial Responsibility

File # 4.01.095

London
November, 1990

LIMITED U.S. OIL POLLUTION INSURANCE POLICY

THIS INSURANCE DOES NOT CONSTITUTE EVIDENCE OF FINANCIAL RESPONSIBILITY UNDER THE OIL POLLUTION ACT OF 1990 OR ANY SIMILAR FEDERAL OR STATE LAW AND IT IS A CONDITION OF THIS INSURANCE THAT IT SHALL NOT BE SUBMITTED TO THE UNITED STATES COAST GUARD OR ANY OTHER FEDERAL OR STATE AGENCY AS EVIDENCE OF FINANCIAL RESPONSIBILITY. THE UNDERWRITERS DO NOT CONSENT TO BE GUARANTORS.

I. INSURING AGREEMENT

In consideration of the premium stated herein and subject to all the terms, conditions and limitations contained herein, the Underwriters do hereby agree to indemnify the Assured for such amounts in excess of the Deductible shown on Item 3 of the Declarations as the Assured shall, (as owner or operator of the Vessel(s) or Facility(s) named on the Declaration page) have become liable to pay and shall pay, by reason of or with respect to:

FIRST: Liability under Section 1002 of the Act for a discharge of oil as defined in Section 1001(23) of the Act, or the substantial threat of a discharge of oil, (from a covered Vessel or Facility,) into or upon the navigable waters or adjoining shorelines or the exclusive economic zone of the United States for the following specified removal costs or damages:

1. Removal Costs:

- (a) removal costs incurred by the United States, a State, or an Indian Tribe under subsection (c), (d), or (1) of Section 311 of the Federal Water Pollution Control Act (33 U.S.C. (1321), as amended by the Act, under the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.), or under State law insofar as such removal costs are recoverable under the Act; and
- (b) removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan.

2. Damage as specified in Section 1002(b)(2) of the Act;

SECOND: Liability under Section 1005(a) of the Act to a claimant for interest on an amount paid in satisfaction of a claim under Section 1002 of the Act;

CI00330 /009

