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**LEGISLATIVE HISTORY OF AMENDMENT
TO AS 46.04.040
PROOF OF FINANCIAL RESPONSIBILITY
(HB 567: 1990)**

Volume I: Miscellaneous Documents Providing Information on Issue
of Proof of Financial Responsibility Prior to
Development of HB 567.

1. Correspondence between the Department of Law and the Transportation Institute regarding compliance of tug and tank barge operators with financial responsibility requirements under AS 46.04.040: (a) letter from Assistant Attorney General Douglas K. Mertz to William T. Lawrence, Transportation Institute, re failure of tug and tank barge operators to obtain insurance in compliance with financial responsibility requirements under AS 46.04.040 (12/30/81); (b) letter from William T. Lawrence, Transportation Institute to Andrew M. Spear, Manager of Oil Pollution Control, Alaska Department of Environmental Conservation (DEC), requesting assistance in obtaining responses to insurers' concerns regarding compliance with financial responsibility requirements under AS 46.04.040 (1/25/82); (c) memorandum from Assistant Attorney General Douglas K. Mertz to Commissioner Ernst W. Mueller, DEC, providing an Attorney General's opinion interpreting AS 46.04.040 and the enforcement policy for that statute (5/13/82); and (d) letter from Commissioner Ernst W. Mueller, DEC, to William D. Lawrence, Transportation Institute, requesting explanation as to why it is not possible for tank barge operators to obtain self-insurance, surety bonds and guarantees in compliance with AS 46.04.040 (5/21/82).
2. Group of four memoranda from Glenn Adams, Oil Pollution Control, DEC, to ADEC Staff listing: (a) the tank vessels with approved proof of financial responsibility through 6/30/90 (9/19/89); (b) the barges with approved proof of financial responsibility through 6/30/90 (11/1/89); (c) oil terminals with approved proof of financial responsibility through 6/30/89 (11/20/89); and (d) offshore and productions facilities with approved proof of financial responsibility through 6/30/89 (11/29/89).
3. "Department of Environmental Conservation, Barges in Alaska Trade," list of barges by company (sent by facsimile on 3/28/90)
4. Chart entitled "Cargo and Refined Product Vessels Sunk, Worldwide, with a Total Loss of Cargo (1979 to Present)" (undated).

5. Report by W.J. Graham, Oil Spill Liability and Compensation: A Review of and Evaluation of Alaska's Civil Penalty Scheme. University of Washington, Seattle: Institute of Marine Studies (1989). [*See tab #5* s of obtaining a copy les at Alaska
of this document f
Archives.]
6. Excerpts from the entitled "Spill: Implications for S recommendations pe mission's Final Report on Valdez, Oil," listing ry 1990). *Mary*
7. Appendix G to the Alaska Oil Spill Commission's Final Report entitled "The Role of Insurance for the Preparedness and Response to Oil Spills: Liability and Compensation Issues" by the Mitigation Assistance Corporation (December 1989).
8. Article entitled "Focus on Oil Spills" by Roger Vielvoye regarding additional pollution insurance clause in contracts for voyage and time charters (undated).

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PROOF OF FINANCIAL RESPONSIBILITY
(HB 567: 1990)**

Volume II: Correspondence and Drafts from the Department of
Law's File No. 883-90-0183 Assigned to Assistant
Attorney General John McDonagh re HB 567

1. Memorandum from Shari Kochman, legislative Staff Assistant to Assistant Attorney General Arthur H. Peterson regarding opening of new file with handwritten notations by John McDonagh (2/13/90).
2. Department of Law Drafts of HB 567, some with handwritten editorial notes (2/15/90).
3. Memorandum from Commissioner Lennie Gorsuch, Department of Natural Resources to Denby Lloyd, Special Staff Assistant, Office of the Governor providing comments and recommended changes to oil spill bills; includes handwritten notes (2/16/90).
4. Handwritten note on Office of the Governor letterhead listing major remaining policy questions on the oil spill legislation (2/17/90).
5. Handwritten note to Assistant Attorney General Jeff Bush providing instructions as to procedures for making changes on bill draft and enclosing a sectional analysis of the contingency plan/financial responsibility proposed legislation (2/17/90).
6. Department of Law Drafts of HB 567 with handwritten editorial notes (2/20/90).
7. Memorandum from Attorney General Douglas B. Baily to Governor Steve Cowper enclosing proposed oil spill legislation implementing the Alaska Oil Spill Commission's recommendations in its Executive Summary report issued in January 1990, enclosing draft transmittal letter to the legislature and a sectional analysis for each bill (2/20/90).

LEGISLATIVE HISTORY OF AMENDMENT
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(HB 567: 1990)

Volume III: Passage of HB 567 from Introduction to Legislature
to Consideration by the Senate Special Committee
on Oil and Gas

1. Summary of legislative history of HB 567.
2. Transmittal letters from Governor Steve Cowper to Speaker of the House Sam Cotten and President of the Senate Tim Kelly for HB 565, HB 566 and HB 567 (2/21/90).
3. Drafts of HB 567 from Department of Law File No. 773-90-0053 (dated February 1990).
4. "Letter of Intent for HB 567" (undated).
5. Fiscal Note for HB 567 from DEC (2/19/90); and Fiscal Note for HB 567 from Alaska Department of Fish and Game (ADF&G) (2/14/90).
6. Charts listing the existing and proposed financial responsibility requirements for non-crude barges, existing non-crude barge companies, non-crude terminals, and Barrow non-crude terminals (undated).
7. "SB 504/HB 567" summarizing contents of the 2/21/90 version of these bills (undated).
8. Memorandum from Representatives Menard and Davidson, Co-chairmen of the House Resources Committee to all teleconference sites enclosing charts of issues in HB 565 and HB 567 to be discussed at teleconference (undated).
9. Excerpts from minutes of House Resources Committee meeting held on 2/26/90 regarding HB 565, HB 566, and HB 567.
10. Letter from Walt Schlotfeldt, President of Petro Star Inc. to Representative Curt Menard voicing concerns regarding HB 567 (3/7/90).
11. Excerpts from minutes of House Resources Committee meeting held on 3/8/90 regarding HB 565, HB 566 and HB 567.
12. Comments of the Alaska Rural Electric Cooperative Association on HB 567 and SB 504 (3/8/90).
13. Excerpts from minutes of House Resources Committee meeting held on 3/9/90 regarding HB 565, HB 566 and HB 567.

14. Written testimony on HB 567 by Dave Bouker, General Manager of Nushagak Electric Cooperative (3/9/90).
15. Memorandum from Bernie Saupe, Saupe Enterprises, Inc. to House Resources Committee expressing concerns about effect of HB 567 on small fuel distributors (3/8/90).
16. Written testimony on HB 565, HB 566, and HB 567 by Riki Ott, Oil Reform Alliance (3/9/90).
17. Letter from Tim Robertson, Vice President of Oil Spill Prevention and Response, Regional Citizen Advisory Committee to Representative Curt Menard enclosing position paper on various proposed legislation, including HB 567 (3/12/90).
18. Excerpts from minutes of House Resources Committee held on 3/14/90 on HB 567.
19. Memorandum from DEC Commissioner Dennis D. Kelso to Governor Steve Cowper presenting alternatives to the provisions currently in HB 567/SB 504 on additional requirements for financial responsibility and oil spill contingency plans for non-crude oil facilities (3/16/90).
20. "Statement of Jerry A. Aspland, President, ARCO Marine, Inc., Before the Alaska House Resources Committee, House Bill 567" (3/20/90).
21. Memorandum from Ray Gillespie, Gillespie & Associates, Lobbying and Governmental Affairs, to Representatives Menard and Davidson, Co-Chairmen, House Resources Committee regarding civil penalty and financial responsibility for non-crude oil distributors (3/21/90).
22. Letter from Jim Ramaglia, Vice President, North Pacific Fuel to Representative Cliff Davidson regarding financial responsibility and penalties with respect to refined oil terminals (2/21/90).
23. Memorandum from Assistant Attorney General John A. McDonagh to DEC Deputy Commissioner Amy Kyle regarding draft language on small terminal facilities issue; amends HB 567 by adding a new section AS 42.04.065 (3/20/90).
24. Graph and charts showing fuel storage capacity of 100 Alaska rural electric utilities by the Alaska Energy Authority (3/23/90).
25. Work draft of HB 567 (Resources) with handwritten notes (3/27/90).
26. Work draft of HB 567 (Resources) (3/28/90).
27. Amendment to CSHB 567 (Resources) (3/28/90).

28. Excerpts from minutes of House Resources Committee meeting held on 3/28/90
29. Memorandum from Ray Gillespie, Gillespie & Associates, Lobbying and Governmental Affairs, to Representatives Menard and Davidson, Co-Chairmen, House Resources Committee supplementing 3/21/90 memo on civil penalty and financial responsibility for non-crude oil distributors (3/29/90).
30. Letter from Dave Hutchens, Executive Director of the Alaska Rural Electric Cooperative Association, Inc. to Representative Cliff Davidson opposing increasing the rate of financial responsibility on refined storage petroleum storage tanks from \$25 to \$35 per barrel (3/29/90).
31. Typewritten notes on CSHB 567 by R. Foster (3/29/90).
32. Draft of HB 567 (Resources) with handwritten notes (3/30/90).
33. Excerpts from the minutes of House Resources Committee meeting held on 3/30/90.
34. House Committee Report by the House Resources Committee on HB 567 (3/30/90).
35. Draft of CS HB 567 (Resources) (4/2/90).
36. Fiscal Notes on CSHB 567 (Resources) and CSHB 567 (Finance) from DEC (4/2/90).
37. "CS HB 567 (Resources)" section analysis (4/2/90).
38. "HB 567/SB 504 Contingency Planning, Financial Responsibility, Tanker Inspections" with handwritten note (undated).
39. "Amendment to HB 567" proposing amending AS 46.04.040(c) "Proposed Amendment for H.B. 567" proposing amending AS 46.04.040(e); and "Analysis of Amendments" (4/11/90).
40. Miscellaneous amendments to CSHB 567 (Resources) (undated).
41. "Proposed Changes to House Bill 567 from CS HB 567 (Res) to CS HB 567 () draft 4/20/90 changes relative to CS HB 567 (Res) (4/20/90).
42. Letter from W. Gene Burden, Vice President, Administration and Government Relations, Tesoro Alaska Petroleum Company, to House Finance Committee Members regarding the option of the State of Alaska of not enforcing the provisions requiring financial assurance (4/21/90).
43. Fiscal Notes from ADF&G for CSHB 567 (Finance) (4/23/90).

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Volume IV: (A) Consideration of SCS CSHB 567 by the Senate
Special Committee on Oil and Gas

1. Excerpt from minutes of Senate Special Committee on Oil and Gas meeting held on 4/30/90.
2. Excerpt from minutes of Senate Special Committee on Oil and Gas meeting held on 5/2/90.
3. Chart entitled "Financial Responsibility Requirements" showing the differences in requirements between CS HB 567 (Finance) and SCS HB 567 (Oil & Gas) (undated).
4. Draft of SCS for CS for HB 567 (Oil & Gas) (undated).
5. "Letter of Intent for Senate CS for CS for HB 567 (Oil and Gas)" (undated).
6. Amendment Nos. 1 through 8 to 5/3/90 draft for SCS CSHB 567.
7. Three amendments to SCS CSHB 567 (Oil & Gas) (undated).
8. Excerpt from minutes of Senate Special Committee on Oil and Gas meeting held on 5/3/90.
9. Fiscal notes from ADF&G (4/23/90), DEC (5/4/90) and DNR for SCS CSHB 567 (Oil & Gas) (5/5/90).
10. Excerpt from minutes of Senate Special Committee on Oil and Gas meeting held on 5/7/90.
11. Sectional analysis of SCS CS HB 567 (Oil & Gas) (5/8/90).
12. Draft of SCS for CS for HB 567 (Oil & Gas) (5/8/90).
13. Senate Finance Committee Report from Senate Special Committee on Oil and Gas on CS HB 567 (Finance) (5/8/90).

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Volume IV: (B) Attorney General Review and Enactment of SCS
CS HB 567 (Finance)

1. Letter from Kari Repplinger, Legislative Staff Assistant, Office of the Governor to Attorney General Douglas B. Baily re transmitting SCS CS HB 567 (Finance) for review by his office (6/4/90).
2. PROFS note from Assistant Attorney General Arthur H. Petersen to John McDonagh regarding review of SCS CSHB 566 (Finance) and SCS CSHB 567 (Finance) (6/4/90).
3. Draft letter from Attorney General Douglas B. Baily to Governor Steve Cowper regarding review of SCS CSHB 567 (Finance) (6/12/90).
4. Letter from Attorney General Douglas B. Baily to Governor Steve Cowper regarding review of SCS CSHB 567 (Finance) (6/15/90).
5. SCS CSHB 567 (Finance) as passed by the Alaska House and Senate on 5/8/90.
6. Letters to Speaker of the House Sam Cotten and President of the Senate Tim Kelly from Governor Steve Cowper regarding signing of SCS CS HB 567 (Finance) and forwarding to Lieutenant Governor's office for permanent filing (6/26/90).

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STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

JAY S. HAMMOND, GOVERNOR

POUCH K-STATE CAPITOL
JUNEAU, ALASKA 99811

December 30, 1981

William Lawrence
Transportation Institute
Norton Bldg., Rm. 1502
801 Second Avenue
Seattle, Washington 98104

Dear Bill:

Thank you for setting up the meeting with the tug and tank barge operators on December 17. I believe the opening of these lines of communication will help to resolve the problems we face. We have already discussed these matters with the Department of Environmental Conservation.

As I promised at the meeting, I'm writing to confirm my oral statements regarding the operators' current legal status under our oil spill laws. Alaska Statute 46.03.040 does require proof of financial responsibility to respond to damages for oil spills, and as was pointed out at the meeting, operators covered by the statute who have not shown financial responsibility by one of the methods acceptable under the statute are indeed in technical violation. However, the current difficulty in obtaining insurance puts the matter in a different light.

First, if an operator is truly unable to comply with the statute, because neither the insurance nor the other forms of proof of financial responsibility are available, and the firm is unable to self-insure, then I believe it would have a valid defense to an action brought because of the technical failure to comply. And secondly, we can assure you that as long as we are convinced that an operator is making a diligent good faith effort to comply with the requirements, but is unable to do so despite its best efforts, we will not bring any such action because of the failure to comply. Naturally I consider meetings such as ours, with continuing efforts to make insurance available, to be important evidence of such good faith efforts.

Mr. William Lawrence

December 30, 1981

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

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

Sincerely,

WILSON L. CONDON
ATTORNEY GENERAL

By:


Douglas K. Mertz
Assistant Attorney General

DKM:dlm

cc: Ernst W. Mueller
Commissioner
Department of Environmental
Conservation

596 3762

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Manager, Pacific Coast Office

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President
Waterman Steamship Corporation

January 25, 1982

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

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

Dear Mr. Spear:

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

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

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

Mr. Andrew M. Spear
January 25, 1982
Page Two

From the standpoint of our members, the only practical avenue available to them to attempt to meet the "Proof of Financial Responsibility" requirement is through certification by their insurers.

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

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

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

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

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

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

Mr. Andrew M. Spear
January 25, 1982
Page Three

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

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

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

"If the department determined that containment or cleanup activities are not adequate, it may direct the person engaged in the activities to cease and may undertake the activities itself through contract or its own resources or both."

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

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

07 11 1980 1415 FROM TRANSPORTATION INSTITUTE TO 140726771

Mr. Andrew M. Spear
January 25, 1982
Page Four

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

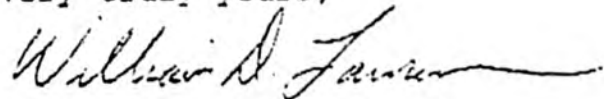
The above comments and enclosures clearly indicate that certification under the Alaska Oil Pollution Control Law will not be provided by the world insurance markets. Both the United States and London markets have a commitment to Federal pre-emption in the area of pollution laws.

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

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

Your prompt attention to this letter will be greatly appreciated.

Very truly yours,



William D. Lawrence
West Coast Manager
TRANSPORTATION INSTITUTE

WDL:ib
Enclosures

cc: Douglas Mertz
Members of Committee

MEMORANDUM

State of Alaska

TO Ernst W. Mueller, Commissioner
Department of Environmental
Conservation

DATE May 13, 1982

FILE NO J-66-462-82

TELEPHONE NO 465-3600 x 54

FROM WILSON L. CONDON
ATTORNEY GENERAL

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

By: 
Douglas K. Mertz
Assistant Attorney General

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

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

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

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

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

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

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

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

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

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

Ernst W. Mueller, Commissioner

May 13, 1982

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

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

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

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

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

Ernst W. Mueller, Commissioner

May 13, 1982

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

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

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

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

Ernst W. Mueller, Commissioner

May 13, 1982

Page 5

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

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

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

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

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

Ernst W. Mueller, Commissioner

May 13. 1982

Page 6

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

Please let me know if you have any other questions.

DKM/jb

DEPT. OF ENVIRONMENTAL CONSERVATION

JAY S. HAMMOND, GOVERNOR

465-2653

POUCH 0 - JUNEAU 0011

May 21, 1982

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

Dear Mr. Lawrence:

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

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

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

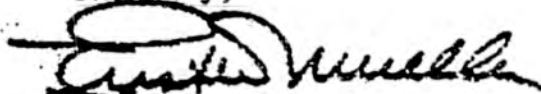
In the meantime we will open direct communications with the various marine insurance concerns, offer them our opinion as to the interpretation of the law and secure a definite answer as to their intentions in this matter.

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

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

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

Sincerely,



Ernst W. Mueller
Commissioner

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

office copy

STATE OF ALASKA

JAY S. HAMBROND, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

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

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

Dear Mr. Lawrence:

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

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

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

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

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

Mr. William D. Lawrence

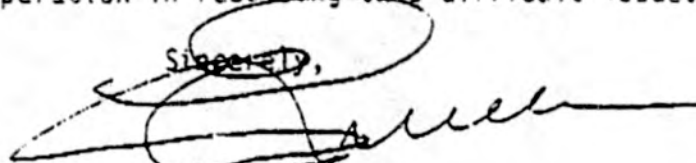
Page 2

August 5, 1982

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

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

Sincerely,

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

Ernst W. Mueller
Commissioner

cc Doug Mertz
Barge Operators

2

FACSIMILE
TRANSMITTAL

ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION
OIL & HAZARDOUS SUBSTANCE SPILL RESPONSE
9000 OLD GLACIER HIGHWAY, SUITE 200
P.O. BOX 0
JUNEAU, ALASKA 99811-1800
Telephone: (907)465-2630 Facsimile: (907)789-5673

Other ADEC fax numbers:

Anchorage: 562-4026

Soldotna: 262-2294

FCO and EH, Juneau: 463-3566

Fairbanks: 451-8130

Valdez: 835-8103

To:

Marilyn Heiman

Attn:

Fax number:

465-4565

From:

Glen Adams
ADEC

Number of pages including cover sheet:

15

Comments:

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

MEMORANDUM

State of Alaska

TO: ADEC Staff

DATE: September 19, 1989

FILE NO:

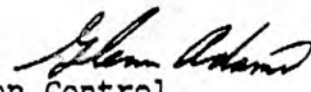
TELEPHONE NO:

THRU:

SUBJECT: 465-2630

Vessels w/Approved
Proof of Financial
Responsibility

FROM:

Glenn Adams 
Oil Pollution Control

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

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

ADEC STAFF

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September 19, 1989

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

DEC Staff

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September 19, 1989

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

ADEC

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September 19, 1989

Vessel Owner/Operator	Vessel Name	Comments	Financial Responsibility
Trinidad Corporation P.O. Box 11787 St. Louis, MO 63105-3721	Admiralty Bay Aspen Glacier Bay	Taps only " "	Guaranty S.P. America
West Coast Shipping Company P.O. Box 4258 Los Angeles, CA 90051-2258	Coast Range Sansinena II Sierra Madre		Guaranty Union Oil
Flyum's Barge Ser., Inc. P.O. Box 2838 Homer, AK 99603	Bradley River	Self- propelled barge	Insurance
Western Hemisphere P.O. Box 2401 Santa Monica, CA 90406-2401	Lion of Calif.		Self-insurance Tesco Corporation
White Pass Transpor- tation, Ltd. P.O. Box 4070 Whitehorse, Yukon YIA 3T1	Frank H. Brown	Cargo/ Tanker	Insurance
Marine Transport Lines, Inc. 150 Meadowland Pky. Secaucus, NJ 07096-1550	Various vessels		Military Sealift Command - U.S.N.S.
BP America 200 Public Square Cleveland, Ohio 44114-2375	Various vessels		Guaranty
<i>H.S. Oil Refining Co. P.O. Box 21913 S.A. Cal. 90062</i>	<i>Cove Leader</i>	<i>"</i>	<i>Insurance</i>

ADEC

-5-

September 19, 1989

Companies providing guarantees or insurance coverage for spot charters.

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

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

20M Insurance

MEMORANDUM

State of Alaska

TO: ADEC Staff

DATE: November 1, 1989

FILE NO:

TELEPHONE NO: (907) 465-2630

THRU:

SUBJECT: Barges with Approved
Proof of Financial
Responsibility

FROM:

Glenn Adams *Glenn Adams*
Oil Pollution Control

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

OWNER/OPERATOR

BARGE NAME OR NUMBER

PROOF FOR
FINANCIAL
RESPONSIBILITY

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

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

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

Surety Bond

(WNER/OPERATOR

BARGE NAME OR NUMBER

PROOF FOR
FINANCIAL
RESPONSIBILITY

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

OWNER/OPERATOR	BARGE NAME OR NUMBER	PROOF FOR FINANCIAL RESPONSIBILITY
Exxon Corporation P.O. Box 3342 Houston, TX 77253	Exxon Barge #502	Self-insure
Samson Tug & Barge Co., Inc. P.O. Box 559 Sitka, AK 99835	ANNAHOOTZ	Insurance
Texaco Marine Services, Inc. 2000 Westchester Ave. White Plains, NJ 10650	Valiant/Pennsylvania Victory/Texas (tug/barges)	Self-insure
Smith Lighterage Co., Inc. P.O. Box 106 Dillingham, AK 99576	Skip I	Ray 'Sons Insurance
Moody's Sea Lighterage, Inc. Aleknagik, AK 99555	Sealite I	ST 20 Insurance
Kugkaktlike Limited General Delivery Kipnuk, AK 99614	Chalin	Kangitsuk Insurance
Alaska Marine Charters, Inc. 106 110th Place S.E., Suite B Belluvue, WA 98004	Investigator	Insurance
Northland Services, Inc. 601 South Myrtle Street Seattle, WA 98124	ZPC 401	Kvichak Trader Insurance
Bering Sea Fisheries, Inc. 4413 83rd Avenue, S.E. Everett, WA 98205	King Salmon	Insurance
Brice Inc. P.O. Box 668 Fairbanks, AK 99707	OBS-4000	Insurance
Bering Marine Corporation P.O. Box 3757 Seattle, WA 98124	KC-4	KC-251 Insurance
<i>White Pine Transportation, Ltd. 2 2400 90</i>	<i>Alaskan Spirit</i>	<i>Insurance</i>

MEMORANDUM

State of Alaska

(TO: ADEC Staff

DATE: November 20, 1989

FILE NO:

TELEPHONE NO: (907) 465-2630

THRU:

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

FROM:

Glenn Adams *Glenn Adams*
Oil Pollution Control

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

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

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

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

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

(2)

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

MEMORANDUM

State of Alaska

TO: ADEC Staff

DATE: November, 29, 1989

FILE NO:

TELEPHONE NO: (907) 465-2630

THRU:

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

FROM:

Glenn Adams *Glenn Adams*

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

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

(2)

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

3

DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Barges in Alaska trade

CROWLEY MARITIME CORPORATION

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

FOSS MARITIME

FOSS 255

525880

2637

39114

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

YUTANA BARGE LINES, INC.

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

NORTHLAND SERVICES, INC.

ZPC 401		1739	30000
KVICHAK TRADER		2227	39000

UNITED MARINE TUG AND BARGE, INC.

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

ALASKA MARINE CHARTERS, INC.

INVESTIGATOR	638965	1730	16031
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4

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

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

933,000 tons

90,000 tons*

1,023,000

x 7.4

=7,570,200 barrels

x310

=317,130,000 gallons

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

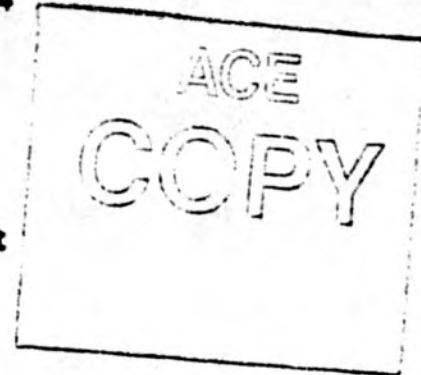
Source = Phone conversation with Mr. Arthur McKinzie, Tanker Advisory Center, Inc. NY, NY 3-6-90.

5

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Final Report

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

by Wendy J. Graham

January, 1989

Acknowledgement

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

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

W. J. G.

January, 1989

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INTRODUCTION

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

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

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

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

2. *Id.* at p. 4.

3. *Id.* at p. 4.

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

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

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

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

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

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

8. Alaska Statutes 46.03.758(b).

9. Alaska Statutes 46.03.758(d).

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

1.1 The pre-1977 Regime

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

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

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

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

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

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

2. Alaska Statutes Title 46.

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

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

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

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

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

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

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

1.2 The Impetus for Change

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

In its evaluation Alaska took the position that oil pollution

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

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

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

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

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

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

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

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

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

8. *Id.* at p. 3.

9. *Id.* at p. 1.

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

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

12. Sponsor Analysis at p. 4.

13. *Id.* at p. 5.

14. *Id.* at p. 4.

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

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

15. 14.

CHAPTER 2. The Present Alaska Oil Spill Liability Scheme

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

2.1 Why a Civil Penalty Scheme?

2.1.1 The Statute

The legislative findings of AS 46.03.758 assert that,

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

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

2.1.2 The Legislative History—Civil Penalties as Compensation

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

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

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

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

2. AS 46.03.758(a).

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

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

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

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

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

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

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

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

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

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

9. Sponsor Analysis, at p. 6.

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

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

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

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

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

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

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

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

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

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

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

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

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

18. See *Supra* note 16.

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

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

2.1.4 Premises and Intent of the Civil Penalty Scheme

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

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

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

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

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

8. The scheme is not intended to be punitive.

2.2 The Amount of the Penalty

2.2.1 The Statute

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

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

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

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

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

2.2.2 The Legislative History

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

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

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

24. AS 46.03.758(b)(7).

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

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

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

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

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

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

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

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

30. See Supra note 11.

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

32. Id.

33. Id. Emphasis added.

34. Sponsor Analysis at p. 7.

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

2.2.3 The Intent

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

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

2.3 Vicarious Liability

2.3.1 The Statute

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

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

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

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

37. With regard to extending liability for the unlawful discharge of oil to include the outer continental shelf adjacent to the state, J. Tillinghast asserted at the legislative hearings considering HB 137 that "(T)here is a substantial state interest in what happens on the OCS, and the person charged with the act out there has contact with the state itself, you can regulate activities on the OCS if not otherwise pre-empted by federal law." (See statement by J. Tillinghast as contained in the House Judiciary Committee Meeting Minutes of 3/28/77). To date no suits have been brought under this provision, and thus it has not yet been subjected to interpretation by either the state court or the U. S. Supreme Court. (Personal interview with Doug Marx, Assistant Attorney General for the State of Alaska, June 10, 1977).

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

2.3.2 The Legislative History

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

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

38. AS 46.03.758(e).

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

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

41. AS 46.03.760(e).

42. See Supra note 40.

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

44. AS 46.03.760(e).

45. See Spenser Analysis at p. 9.

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

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

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

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

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

46. Sponsor Analysis at pp. 8-9.

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

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

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

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

51. Sponsor Analysis at p. 9.

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

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

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

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

2.3.3 The Intent

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

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

2.4 \$100 Million Ceiling on Liability

2.4.1 The Statute

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

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

54. See Sponsor Analysis at p. 12.

2.4.2 The Legislative History

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

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

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

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

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

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

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

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

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

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

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

2.4.3 The Intent

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

2.5 Deduction for the Gallons Cleaned Up

2.5.1 The Statute

AS 46.03.758(f) provides that

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

2.5.2 The Legislative History

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

Industry lobbyists were quick to point out that

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

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

⁶⁰ See Sponsor Analysis at pp. 7-8.

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

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

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

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

Also,

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

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

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

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

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

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

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

68. Id.

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

2.5.3 The Intent

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

2.6 The Mitigation Clause

2.6.1 The Statute

AS 46.03.758(g) provides that

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

2.6.2 The Legislative History

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

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

⁶⁹ Id.

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

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

⁷² See, for example, Supra note 57.

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

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

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

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

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

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

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

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

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

2.6.3 The Intent

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

2.7 The 18,000 Gallon Exemption

2.7.1 The Statute

The legislative findings of AS 46.03.758 assert in part that

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

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

2.7.2 The Legislative History

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

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

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

78. AS 46.03.758(a)(3).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.7.3 The Intent

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

2.8 Summary and Conclusion

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

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

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

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

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

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

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

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

CHAPTER 3. Implementation of AS 46.03.758

3.1 The Regulations—Statutory Mandate and Legislative History

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

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

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

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

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

2. AS 46.03.758(d).

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

4. Sponsor Analysis at p. ii.

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

3.1.1 Certain Provisions Fall Outside the Purview of the Statute

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

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

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

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

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

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

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

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

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

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

3.1.2 Certain Biological Criteria are not Supported by Fact

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

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

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

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

12. Id.

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

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

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

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

17. Id.

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

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

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

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

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

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

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

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

21. Id., Mueller letter.

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

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

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

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

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

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

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

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

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

28. See statement by J. Tillinghast as contained in the ARJC Meeting Minutes of 3/9/78, and correspondence from ADEC Commissioner Mueller to Representative Al Ott, 3/2/78 as contained in the Alaska Attorney General's file on HB 912, 1978 (this bill pertains to the 18,000 gallon exemption). It should be noted that based on an examination of the available historical records, this paper assumes that 'toxicity' as used in the civil penalty statute and regulations refers to the chemical toxicity of oil (i.e. the lethal effects of an oil resulting from its chemical composition), as opposed to the mechanical or physical toxicity of oil (e.g. the lethal effects of oil caused by suffocation resulting from a marine animal's gills being covered with oil, or drowning or hypothermia which may occur when the animal itself is coated with oil). This interpretation is also, perhaps, supported by the regulations promulgated by the ADEC. For example, bunker fuel and #1.2 & Arctic diesel fuel all have an aromatic content of around 25% (See Table 1). However, bunker fuel only receives a toxicity factor number of .5, while #1.2 & Arctic diesel fuel are given a toxicity factor number of 1.0. #1.2 & Arctic diesel fuel are 'light' oils as compared to bunker fuel and as such are much more chemically (as opposed to physically) toxic. Thus, assuming that the toxicity factor numbers are based on chemical toxicity it makes sense that these oils would be given a higher factor number than bunker fuel. For a discussion of oil's chemical and mechanical toxicity and fate in the marine environment, see Rubin, Jonathan, 'A Review of Petroleum Toxicity and Fate in the Marine Environment, with Implications for the Development of a Penalty

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

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

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

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

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

30. Id.

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

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

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

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

3.1.4 Prosecutorial Discretion and Annual Reporting

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

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

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

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

3.1.5 Penalty For Oil Which Enters More Than One Receiving Environment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁹Id. at p. 6.

¹⁰Id. at p. 8.

TABLE 1 (Cont.)

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

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

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

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

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

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

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

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

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

3.3 The Civil Penalty Scheme in Practice

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

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

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

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

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

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

49. *Id.*

50. *Id.*

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

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

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

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

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

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

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

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

55. According to Alaska Assistant Attorney General Doug Mertz, the State will commonly allege liability under both in its complaint. A decision as to which statute recovery will be sought under is made once adequate information is available. Telephone communication with Doug Mertz, July, 1983.

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

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

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

56. See *Supra* note 48.

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

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

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

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

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

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

60. See Section 3.3.7 below.

61. See *Supra* note 51.

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

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

3.3.2 Ability to Determine the Amount Spilled

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

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

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

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

63. See Chapter 1 of this paper for a discussion of the Alaska statutes cited in this paragraph. Proof of financial responsibility is set forth in AS 46.04.040 as follows:

- (a). Oil terminal facility: Proof of financial responsibility need not exceed \$50,000,000, but must not be less than \$10 per incident for each barrel of storage capacity at the facility, or \$1,000,000, whichever is greater.
- (b). Offshore exploration or production facility: Not less than \$35,000,000 per incident.
- (c). To be allowed to transfer oil to or from a tank vessel, or to or from an oil barge, proof of financial responsibility is as follows:
 - (1). for a tank vessel or oil barge transporting trans-Alaska pipeline oil, the amount required under the federal Trans-Alaska Pipeline Authorization Act (43 USC 1653(e)(3) (sec. 304(e)(3)));
 - (2). for any other oil barge, the amount required by section 311(p)(1) of the Clean Water Act (CWA), or \$1,000,000, whichever is greater;
 - (3). for any other tank vessel, the amount required by section 311(p)(1) of the CWA, or \$20,000,000, whichever is greater.

64. Unless otherwise stated, the problems encountered in establishing the amount of oil discharged in an oil spill incident as discussed in this section were provided by Alaska Assistant Attorney General Madeline Levy during a telephone interview on August 12, 1988.

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

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

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

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

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

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

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

67. See *Supra* note 54 at p. 1.

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

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

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

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

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

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

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

70. *Id.* at p. i.

71. See *Supra* note 52.

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

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

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

3.3.3 Spiller Defense To Liability: The Mitigation Clause

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

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

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

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

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

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

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

77. *Id.* Mertz interview.

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

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

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

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

3.3.4 Spiller Defense to Liability: The LLA

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

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

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

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

82. See Chapter 2, note 49.

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

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

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

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

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

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

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

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

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

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

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

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

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

88. AS 46.03.758(e)(7).

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

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

91. Id. Judgment of Exoneration.

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

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

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

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

92. AS 46.06.020, Removal of Oil Discharges, and 33 USC 311(c)(1) (the Clean Water Act).

93. *Id.*

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

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

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

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

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

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

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

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

97. See *Supra* notes 84 and 85.

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

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

100. See *Supra* note 74.

101. *Id.*

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

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

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

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

3.3.6 Impact of the 18,000 Gallon Exemption

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

102. See Supra note 93. Report, at p. 1.

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

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

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

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

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

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

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

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

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

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

107. See *Supra* note 92.

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

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

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

109. See *Supra* note 98.

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

111. See *Supra* note 98.

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

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

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

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

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

The complaint filed by Alaska alleged that over 180,000 gallons of jet A aviation fuel was discharged into Cook Inlet. This is a critical marine environment as defined in 18 AAC 75.5 with a base penalty of \$2.50. The aromatic content of the oil is not available. However, assuming it was around 15% as set forth in Table 4, and assuming that it was established in court that 180,000 gallons were actually discharged, the penalty under AS 46.03.758 would be determined by the following formula:

$$\frac{((15/45 \times 1) + .25 + .15) \times \$2.50 \times 180,000}{3}$$

3

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

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

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

116. *Id.*

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

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

119. *Id.*

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

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

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

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

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

120. Unless otherwise indicated, the information in this section regarding the response to the Atigun River spill was obtained from the Report on Milepost 166-167 Oil Spill June 10, 1979, by the Alaska Pipeline Office, Department of Interior, Anchorage Alaska, August 30, 1979. This report is contained in the ADEC archived file on this incident.

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

122. See *Supra* note 120.

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

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

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

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

3

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

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

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

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

124. *Id.*

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

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

beaches as late as October 1980, 18 months after the incident.¹²⁷ Several oiled birds and a few oiled furbearing animals were found. However, Federal and state biologists determined that the acute toxic effect of the spilled oil on marine life was minimal (this spill occurred in the winter when overall production and activity was at an annual low).¹²⁸ As such, no full scale natural resource damage assessment studies were done and no restocking of affected species was attempted.¹²⁹

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

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

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

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

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

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

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

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

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

132. *Id.*

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

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

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

Both of these settlements may be interpreted as 'good' for several reasons. First of all even though the court determined that the CWA as opposed to the LLA was the controlling federal statute as to liability for cleanup costs, if these cases had gone to court, the state and federal governments would have incurred both the time and expense of litigation in their efforts to recover the exact amounts settled for without having to go to court. Secondly, the evaluations performed by the federal and state governments in this case concluded that the extent of natural resource damage was minimal. It is possible, if not probable that the PRPs would have been found not liable for the damages which were detected based on the LLA. Finally, it is possible that the State could have recovered approximately \$190,000 in assessed penalties under AS 46.03.753 even if the LLA was found to apply (the penalty would be assessed on the entire 100,000 gallons spilled since the responsible parties did not clean it up). However, in order to recover this amount the State would have had to prove that approximately 80,000 gallons remained in the water after the estimated 20,000 gallons had been removed. Since the vessel sank, establishing this would have been quite a problem.

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

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

S. District Court, District of Alaska, No. A-80-199-Civ, April 1, 1982. Regarding the U. S. settlement, this information was provided by Mr. Beytim. See Supra note 7A.

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

137. See "Eleave Oil Hinders Cleanup," by PAC Ed Moroth, in the Coast Guard July-September, 1987 issue (Vol. 3, Issue 4) of the Alaska Beat, and "Crews Winning Oil Battle," by Dirk Miller, The Anchorage Times, July 11, 1987.

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

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

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

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

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

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

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

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

143. See Supra note 73.

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

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

146. Id. Browne interview. As discussed in Section 3.1.1 above, it is questionable whether a court would allow recovery of both the civil penalties and actual damages based on the double recovery issue.

147. Personal interview with Alaska Assistant Attorney Doug Mertz, June 22, 1988; personal interview with Paul O'Brien, Alaska Department of Environmental Conservation, June 22, 1988.

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

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

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

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

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

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

150. See *Supra* notes 74 and 147.

151. See *Supra* note 74.

152. See *Supra* notes 147, Mertz interview.

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

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

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

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

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

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

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

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

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

1. Personal interview with Alaska Assistant Attorney General Doug Mertz, Juneau, AK, April 20, 1988; personal interview with Paul O'Brien, ADEC, Juneau, AK, April 15, 1988.

2. 42 USC Section 9601-9673.

3. Section 301 (c)(1), 43 USC Section 9651 (c)(1). The president delegated this responsibility to the DOI. See Exec. Order No. 12316, 46 Fed. Reg. 42,237 (Aug. 14, 1981), later superseded by Exec. Order No. 12580, 52 Fed. Reg. 2,923 (Jan. 29, 1987). (This information was obtained from the Brief For Respondents prepared in the case of *State of Ohio v. U. S. DOI and Donald Hodel, Secretary*, on Petition for Review of an Action of the United States Department of the Interior, No. 26-1529 and Consolidated Cases, U. S. Court of Appeals for the District of Columbia Circuit, August 10, 1987). 33 USC 1321 (f) is entitled "Liability for Actual Costs of Removal." Sections (4) and (5) address liability for restoration or replacement of natural resources impacted by a discharge of oil or a hazardous substance.

4. Section 301 (c)(2), 43 USC 9651 (c)(2). The Type 'A' assessment actually consists of a computer program. Various factors including, for example, the location of the spill, the amount spilled, and the time of the year, are put into this program and the program is then supposed to determine the expected fate of the oil, what natural resources can be expected to be impacted, and what the economic value of those damages may be. This approach is intended to establish actual damages without incurring the time and expense of a full scale damage assessment, and is a possible alternative to using civil penalties when a damage assessment is determined to be inappropriate. However, the program presently can only take into consideration a very few different types of oil, and includes only a limited number of receiving environment categories. As such, it is presently of limited value at best. See U. S. DOI, CERCLA 301 Project, "Measuring Damages to Coastal and Marine Natural Resources, Concepts and Data Relevant for CERCLA Type A Damage Assessments," F887-142483, Washington, DC, January, 1987, (two volumes). The Type 'B' assessment is equivalent to what has been referred to here as a full scale natural resource damage assessment.

5. 43 CFR Subpart A, Subpart B—Pre-assessment Phase, and Subpart C—Assessment Plan Phase.

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

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

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

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

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

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

7. Brief for Respondents in the case of State of Ohio v. U. S. DOI and Donald Hodel, Secretary, on Petition for Review of an Action of the U. S. DOI, No. 86-1529 and Consolidated Cases, U. S. Court of Appeals for the District of Columbia Circuit, August 18, 1988. In this case the State of Ohio as well as several other states and groups are challenging the natural resource damage assessment rules promulgated by the DOI. With regard to the 'reasonable cost' criterion, petitioners focus on the third requirement of the definition (that the anticipated cost of the assessment is expected to be less than the anticipated damage amount) and assert that this requirement is arbitrary, that the reasonableness of a cost cannot be determined mechanically as the DOI provides, and that a limit on recovery of essential costs based on a strict proportionality is not reasonable. (See Joint Opening Brief of Petitioners in State of Ohio v. U. S. DOI and Donald Hodel, No. 86-1529 and Consolidated Cases, U. S. Court of Appeals for the District of Columbia Circuit, April 25, 1988 at pp. 79-80). DOI responds that petitioners have incorrectly focused on this single aspect of the definition, and thus fail to recognize that the definition in its entirety neither results in an irrational one-to-one linkage of assessment costs to that of expected damages nor discourages trustees from performing assessments to recover damages. The definition specifies anticipated costs and damages. Thus, the design of the assessment to be done is based on the anticipated damage amount. The trustee is not precluded from expanding the assessment and its costs if sufficient information gathered during the assessment warrants collecting additional data, using other methodologies, or applying other procedures. Thus, the DOI asserts, the regulations are not inflexible in their allowance for 'reasonable and necessary' costs of performing assessments. In fact, the regulations are flexible in allowing the trustee to design an assessment consistent

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

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

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

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

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

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

9. Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 AAC 75.510. FRESHWATER ENVIRONMENTS

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

Critical

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

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

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

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

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

Sensitive

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

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

APPENDIX A (Cont.)

18 AAC 75.528. MARINE ENVIRONMENTS

(a) Estuarine, intertidal and saltwater environments:

Critical

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

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

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

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

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

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

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

Sensitive

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

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

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

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

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

APPENDIX B: CHARACTERIZATIONS OF PETROLEUM PRODUCTS AND BYPRODUCTS.

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

18 AAC 75.540. TOXICITY OF PETROLEUM PRODUCTS/BYPRODUCTS

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

18 AAC 75.550. DEGRADABILITY OF PETROLEUM PRODUCT/BYPRODUCT

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

APPENDIX B (Cont.)

18 AAC.560. DISPERSIBILITY OF PETROLEUM PRODUCTS/BYPRODUCTS

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

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

18 AAC 75.570. Schedule of Civil Penalties

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

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

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

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

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

Dispersibility	Factor
High	0.15
Moderate	0.50
Low	1.00

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

APPENDIX C (Cont.)

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

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

Formula for assessing the penalty for refined petroleum products:

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

Formula for assessing the penalty for crude oil:

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

18 AAC 75.530 Prosecutorial Discretion

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

18 AAC 75.590 Annual Reporting

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

6

Alaska Oil Spill Commission

Final Report

SPILL

The Wreck of the *Exxon Valdez*

Implications for Safe Transportation of Oil



The state should require maintenance and personnel audits at oil transportation facilities to provide information and pinpoint problems in spill prevention.

Recommendation 19
Maintenance and
personnel audits

Accurate, timely information is central to the exercise of the oversight function and must be available to all government actors in prevention and response. The state can gather information on conditions relating to spill prevention through technical maintenance audits, thereby supporting the work of the state advisory council and regulatory agencies. Technical and personnel audits may be done by outside contract.

Training and experience standards for marine pilots in Alaska should be upgraded to require actual experience in Alaska operations of vessels at thresholds of 60,000 and 150,000 deadweight tons.

Recommendation 20
Marine pilot
qualifications

Training and experience requirements have been reduced for pilots of large tankers in Prince William Sound and Cook Inlet since the late 1970s, allowing pilots to qualify for very large ship operations on insufficient experience. While no accidents have been caused by this circumstance, a system with multiple thresholds is inherently safer.

Insurance policies should identify the State of Alaska as an additional insured or named beneficiary.

Recommendation 21
State as co-insured

The shipping industry is responsive to economic incentives. Insurance premiums and premium requirements create incentives. The insurance industry is responsive to the needs of co-insureds. Such practices were required during construction of the trans-Alaska pipeline. There is every reason to revive them.

The state should set rigorous requirements for private oil spill prevention and response capability in remote locations. The state also should develop response plans for major spills and articulate a prevention program from the Aleutian Islands to the Arctic.

Recommendation 22
Remote spill
response

Despite the state's obligation to respond to major spills, only if private resources are committed to prevention systems and response can an acceptable reduction in risk be achieved.

Marine traffic in arctic Alaska already poses unacknowledged risk. Fuel provisions delivered by sea and vessels fueled by oil create risks of damage in these hazardous and environmentally fragile waters. Spills are usually impossible or much more

the time of the accident. The wreck would not have occurred if the Coast Guard had prioritized the installation of up-to-date vessel monitoring systems. The wreck would have been less likely if the Coast Guard had exercised strong oversight of tanker crews and manning practices.

The Coast Guard's power to determine required crew levels is of little consequence as exercised. The determination is largely a paper exercise in which the shipper submits a proposal that typically is routinely approved without inspection, sea trials or a determination of need under foreseeable emergency or unusual conditions.

In the normal course, Coast Guard personnel retire or transfer to the shipping industry in large numbers, particularly at the executive level. It may be that the prospect of working for industry is reflected in the attitude of some Coast Guard personnel. The "revolving door" and the resulting sympathy of interests between regulators and the regulated is a common problem in other areas of government service.

Congress should revisit the antitrust exemption granted to marine industrial insurance to require that premiums reflect design and operational considerations in accident prevention and pollution abatement.

The shipping industry is responsive to economic incentives. Insurance premiums and premium requirements create incentives. Congress has adopted special provisions concerning the conditions under which marine insurance is exempt from antitrust regulation. Various requirements must be observed as a condition of the exemption. These conditions should require additional features affecting premium structure and loss control to encourage design improvements and operational practices that enhance environmental safety in the shipment of oil.

Congress should require corporations transporting oil or hazardous substances to file environmental safety reports as part of their Securities and Exchange Commission 10K filing. These corporations also should include a separate environmental report card in their annual reports to shareholders.

Safety is a factor in long-term profitability that may be neglected in management preoccupation with annual profit. Safety is a factor of cost and accountability. SEC requirements are intended to inform investors of facts needed to assess risk. A company's record and status concerning environmental safety should be available to inform such assessments.

A company responsible for oil transportation should report to its shareholders on the safety of its operations in addition to their profitability. The report should include an

Recommendation 32
Insurance premiums
to reflect risk

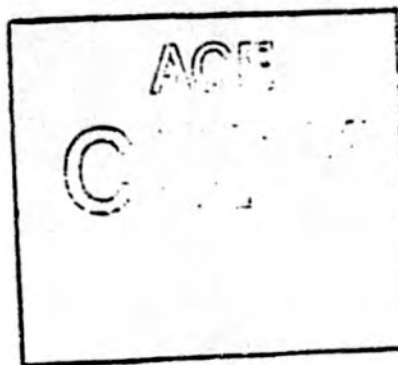
Recommendation 33
Corporate safety
reporting

7

SPILL

The Wreck of the *Exxon Valdez*

Appendix A-I



APPENDIX G

**THE ROLE OF INSURANCE FOR
THE PREPAREDNESS AND RESPONSE TO OIL SPILLS:
LIABILITY AND COMPENSATION ISSUES**

**THE ROLE OF INSURANCE FOR
THE PREPAREDNESS AND RESPONSE TO OIL SPILLS:
LIABILITY AND COMPENSATION ISSUES**

**PREPARED FOR
THE ALASKA OIL SPILL COMMISSION
UNDER CONTRACT #026**

BY

THE MITIGATION ASSISTANCE CORPORATION

DECEMBER 1989

ACE 531055

**THE ROLE OF INSURANCE FOR
THE PREPAREDNESS AND RESPONSE TO OIL SPILLS:
LIABILITY AND COMPENSATION ISSUES**

INTRODUCTION

The insurance industry can potentially be an important partner in a comprehensive program to reduce oil spill losses by providing insurance incentives for the safe transportation of oil and other hazardous cargo. This research paper seeks to examine the current state of the maritime insurance industry -- in general and in Alaska -- and offer suggestions on how insurance can play a role in reducing losses and improving preparedness and response. Information on pollution insurance was gathered from reports in insurance journals, congressional testimony, and articles and analyses by insurers, academics, newspapers, and government publications. In addition, telephone interviews were conducted with insurance representatives from Exxon, the Lloyd McClennan Insurance group, and the National Flood Insurance Program.

Exxon has accepted responsibility, but not liability, for oil damages resulting from the accidental grounding of the Exxon Valdez in March of 1989. To date, Exxon has spent \$1.25 billion in cleanup and in the payment of damages to individuals and businesses that suffered from the direct impacts of the oil spill, including economic injury due to lost business (Wall St. Journal November 30, 1989). In addition to further cleanup and unresolved private claims, Exxon faces potentially huge fines and penalties under numerous state and federal statutes governing water pollution. The Alyeska Pipeline Service Company may be as liable as Exxon since it is obligated under the Prince William Sound Contingency Plan to respond to, contain, and clean up spills in the Sound. "Alyeska handed off the spill response to Exxon without approval by the state, and Exxon's subsequent response was not according to the state-approved plan" (Oil Spill Chronicle November 14, 1989). In any case, judgments regarding liability and compensation are sure to be discussed in the courts for years.

INSURANCE THEORY

Insurance offers a means of managing risk by distributing it among large numbers of individuals or enterprises. Risk is the possibility of injury or loss. Through the payment of insurance premiums, "the insured avoids the risk of suffering a large loss by substituting the certainty of suffering a small one... in effect, the insurer distributes risk among all of its insureds" (Abraham 1986).

It should be noted that there are a number of ways besides insurance to manage risk. In oil transportation, optimizing safety through advanced technology, training programs, adequate staffing, repair and maintenance, response plans, and other methods is a particularly important means of risk management. Within the insurance industry, risk pools, deductibles, and policy limits are risk management techniques.

In theory, insurance assigns the costs and benefits of risk exposure to those who experience the risk, stimulates the policy holder's motivation to avoid risks "through a differential rate structure which rewards prudence and penalizes imprudence," and provides for accumulation of reserve funds to meet large payout requirements associated with rare catastrophic occurrences. In practice, however, insurance functions depend on the price of the service, the appeal of the service, the industry's willingness to provide the service, and industry's assessment of its capacity to meet extraordinary payouts without sacrificing its economic viability (Petak and Atkisson 1982).

As the industry's assessment of its ability to accurately predict risk declines, the prices for the service rise, or may not be offered at all. When a solid actuarial base of information concerning the probability of loss to particular persons or properties under particular defined circumstances is missing, the price goes up or the industry's willingness to engage in the service goes down (Petak and Atkisson 1982).

When such prohibitive conditions exist, the federal government may become involved in order to help remove disincentives to purchase, assist in assessing risks, and assist in developing reserves, or "capacity," for meeting very large payouts (e.g., flood insurance and earthquake insurance, discussed below). The federal government could also assume a more direct role by: (1) sharing in premium payments (with state and local governments), (2)

acting as a direct reinsurer for prime oil spill insurance carriers, or (3) providing research, technical assistance, and financial support in the establishment of state insurance programs (Petak and Atkisson 1982).

Currently, there is pending federal oil spill legislation that exceeds these possibilities. The legislation is titled the "Oil Pollution Prevention, Response, Liability, and Compensation Act of 1989." It has been passed by the House of Representatives as HR 1465 and is currently before the Senate for modification, amendment, and passage. This legislation will combine, supercede, and improve a host of earlier laws.

A stronger regulator role (than Petak and Atkisson's or the pending legislation) might require the purchase of a particular type of insurance as a condition for receiving federally insured loans, federally subsidized loans, and/or loans provided by federally regulated financial institutions. The insurance industry strictly opposes such "mandation," unless it is accompanied by means to protect insurers from huge payouts in catastrophic incidents. There exists, however, many examples of mandatory insurance: states require purchase of no-fault automobile insurance, lenders require purchase of fire insurance, states require purchase of workmen's compensation insurance, etc. A variation of required insurance is contingent insurance, where coverage (either private or federal) is provided only when certain conditions, such as licensing, manning, training, and equipment standards are met.

HAZARD INSURANCE

Insurance as Hazard Policy

The development of the National Flood Insurance Program (NFIP) and the investigation into a national earthquake insurance program has grown out of a recognition that these hazards are national problems with far-reaching economic impacts. These federal programs also attempt to fill the void created by the private insurance industry's inability to market this type of service profitably. These programs also recognize the limited means that potential victims otherwise have to protect themselves and reduce their vulnerability to hazard risks. These programs are designed to meet needs similar to those posed by a potential oil spill.

The primary difference between federal flood and earthquake insurance and federal oil spill insurance is that in the former, insurance is purchased by those at risk from losses resulting from unpredictable natural events. Oil spill insurance (if it were to become available) would be purchased by those responsible for losses resulting from preventable human error or mechanical failure. Insurance from floods and earthquakes (potentially) gives those at risk from losses some control over their own protection. Oil spill insurance would protect the spiller from liability claims resulting from those at risk to losses, who have no way to protect themselves other than placing the responsibility for compensation with those responsible for the damage. Under these programs, potential victims can protect themselves against flood or earthquake, but not the effects of oil spills. In the latter instance, the victim's only protection is being provided by the perpetrator. Thus, the latter is really compensation, not insurance.

Vulnerability is the susceptibility or exposure to injury, loss, or liability from a hazard. Alaska's vulnerability to oil spill hazards is largely a consequence of national energy needs and the development of Alaska's oil reserves, the Trans-Alaska Pipeline, and the transportation of oil through the state's sensitive coastal environment. People, businesses, economics, natural resources, and the environment are potentially vulnerable. The considerable risks are nonetheless acceptable to local, state, and national interests, who share with private industry in the benefits and risks involved. As a petroleum-dependent society, it is said that "we're all in the oil business" because to some degree, all Americans are affected by Alaska's oil trade, which accounts for nearly one quarter of U.S. petroleum production. Considering this, and the possibility that private industry may not be able to insure oil pollution liability in the future, arguments for a user's tax or national insurance program to compensate oil spill losses may deserve further examination, and in fact, is an element of the pending federal oil spill liability legislation.

Insurance as a Mitigation Tool

Hazard mitigation "is a management strategy that balances current actions and expenditures with potential losses from future hazard occurrences" (Petak and Atkisson 1982). Mitigation activities go further than distributing or sharing the risk and are intended to

eliminate or reduce the probability of occurrence of a hazard event, or reduce the impacts of hazards that do occur. Successful mitigation usually involves a combination of approaches in a coordinated, cost-effective strategy. Providers of fire insurance, for example, offer mitigation incentives by basing a community's fire coverage premiums partly on factors such as proximity to fire stations and hydrants, available water pressure, hose diameters, and number and type of fire trucks. Local governing boards maintain favorable fire insurance rate classes for their communities by ensuring that fire alarms, water supplies, facilities, staffing, equipment, and training exceed industry standards. While the cost to a community for these improvements could easily be \$1 million, each structure owner's premium might be reduced by \$25.00. In a community of 50,000 insured structures, this would represent an *annual* savings of \$1.25 million.

Some general insurers are encouraging comprehensive prefire plans for large facilities, businesses storing hazardous and flammable substances, and structures containing costly assets, such as computers. The two objectives of prefire planning are to identify potential fire hazards in specific facilities and to familiarize firefighters with these hazards in advance. Prefire plans consider building characteristics, fire suppression systems, available public fire protection, warning systems, evacuation plans, hazards in proximity, assignment of emergency duties, coordination with law enforcement, emergency medical services and local media, and types, quantities, and locations of hazardous and flammable materials (Brotzman 1989). Both approaches to fire insurance provide incentives to reduce fire losses by maximizing the firefighting capabilities of the response system. Provisions in the national flood and earthquake programs offer additional examples of how risks may be balanced with proactive efforts to prevent or reduce losses.

National Flood Insurance Program (NFIP)

The 1968 National Flood Insurance Act (Public Law 90-448) made nationally-subsidized flood insurance available to individuals in communities that enforced federally approved floodplain management regulations. Following passage of a 1969 amendment, floodprone communities could become eligible for limited amounts of flood insurance under an "emergency phase." As detailed flood maps and local regulations were developed,

communities could enter the "regular" program, whereby larger amounts of insurance coverage became available to policyholders (May and Williams 1986).

The Flood Disaster Protection Act (Public Law 93-234) in 1973 mandated that floodprone communities regulate their floodplains or forfeit access by its residents to federal loans and loans from federal institutions. This regulation was softened in 1977 to prohibit only federal disaster flood relief, unless flood insurance was purchased.

The Federal Emergency Management Agency (FEMA) is the federal agency responsible for managing the flood insurance and disaster relief programs. FEMA's responsibilities in implementing the program fall under two categories: insurance activities (e.g., enrolling individual participants, establishing rates, paying claims) and floodplain management activities (e.g., establishing flood zones, enrolling communities, establishing standards). Flood insurance is available only to individuals in communities that have adopted a floodplain ordinance and regulations developed under FEMA guidelines. The objective of the ordinance is to ensure that proposed development does not aggravate existing flood hazards and that new buildings will be protected from future floods. Communities that do not adhere to the floodplain management standards may be suspended from the NFIP. Communities and individuals may appeal suspensions or locations of structures on FEMA maps. Of the roughly 20,000 floodprone communities in the U.S., over 17,000 participate in the NFIP (May and Williams 1986).

In an effort to recognize and encourage community activities that go beyond minimum program standards to reduce flood losses, the NFIP has developed a Community Rating System that awards flood insurance premium credits to communities that undertake: (1) public information activities, such as outreach projects; (2) mapping and regulatory activities, such as open space preservation; (3) flood damage reduction activities, such as flood control projects; and/or (4) preparedness activities, such as flood warning systems. Like fire insurance incentives, there is an enormous potential savings to constituents of a jurisdiction willing to fund some major improvements that will mitigate the risk.

Earthquake Insurance

In response to the limited availability and high cost of earthquake insurance in high risk areas of the U.S., a federally-supported system has been developed to cover catastrophic losses and protect insurers and reinsurers from "institution-destroying loss levels," where reserves are insufficient or the magnitude of an accident exceeds worst-case scenarios (Petak and Atkisson 1982).

Underwriters of earthquake insurance need to establish the Probable Maximum Loss for each hazard zone and for individual locations in order to determine total earthquake exposure and reinsurance needs. The most important and most elusive factors affecting earthquake underwriting decisions are probability that an earthquake will occur and estimated maximum intensity. However, utilizing probability studies, seismic building codes, and hazard mitigation recommendations, geologists today are much more capable of making these projections. Other factors that influence the underwriting include: proximity to known faults, height of structure, soil conditions, age of structure, type of construction, type of materials, and the value of contents (Holtom 1989).

Although earthquakes are beyond anyone's control, the selection of risks, underwriting standards, retentions, deductibles, and rates are not. Careful consideration of these factors can take some of the unknowns out of earthquake underwriting (Holtom 1989).

Currently the federal government is investigating the possibility of establishing a national earthquake insurance program, similar to the flood program, where insurance would be made available at a subsidized rate, but only after a community adopts regulations that require new construction to meet seismic safety standards and perhaps the retrofitting of certain classes and types of older, more vulnerable structures.

Development of an "actuarially sound national catastrophe fund" to compensate oil spill victims from federal and state and oil industry contributions might accomplish essentially the same ends "as a more conventional insurance system" (Petak and Atkisson 1982).

MARITIME INSURANCE

Commercial insurers provide maritime insurance to cover the hull, cargo, and, to some extent, the liability associated with the transportation by commercial vessels. The U.S. hull insurance market grew up following World War I in order to accumulate capacity, develop underwriting expertise, and keep expenses under control. The American Hull Insurance Syndicate, comprised of 55 member companies, was formed to create a single agency for the underwriting of hull business, such as issuing policies, collecting premiums, and settling claims on behalf of its member companies. There is also a market of independent insurance companies writing hull business. Together, they have a capacity of over \$80 million (about \$40 million each). The Syndicate also insures ship owners outside the U.S. and is active in reinsurance relationships with European nations and other international markets (Schumacher 1984).

In order to determine adequate premium levels to meet exposures presented by a particular shipowner, the Syndicate typically reviews:

1. The background of executive and operating officers of the fleet;
2. The age, classification status, and condition of fleet ships;
3. The operations, training, and origin of fleet crews;
4. The trading patterns of the company;
5. Cargos carried;
6. The distribution and frequency of the routes used;
7. The maintenance and repair policies of the company (Schumacher 1984).

Pollution Liability Insurance

Prior to the 1970s, the insurance industry provided comprehensive general liability policies for U.S. businesses which covered a broad range of commercial liability due to accidental personal injury or property damage. In the early 1970s, certain pollution-related liabilities were specifically excluded as the nature and cost of pollution incidents and associated liabilities became more evident. Some insurers developed separate policies, specifically to cover pollution risks, that imposed dollar limits per incident (General Accounting Office [GAO] 1987).

By the mid-1980s, however, few insurance companies were offering pollution insurance due to the uncertainties regarding potentially enormous claim payments, "unfavorable" legal trends involving liability standards and insurance coverage, and the broad liability established by federal and state environmental laws. The insurance industry has maintained that the basic concerns of underwriting a risk -- the process of identifying and evaluating risks and setting the premium to be charged for risks accepted by the insurer -- cannot be satisfied when assessing pollution risks, thereby making them uninsurable (GAO 1987).

Commercial pollution insurance is generally unavailable and when it is, coverage is limited and expensive and selectively provided to clients that carry coverage by the insurer for other risks. One option to traditional insurance coverage is participant-owned and operated risk pools that cover catastrophic liability losses. It is unclear from the literature examined in this research how effective risk pools have been in meeting the insurance needs of the oil transportation industry. Another option for pollution liability coverage, when available, is reinsurance. Reinsurers are companies (or governments) that assume a portion of the potential liability risks that the insurance companies underwrite in exchange for a share of the premium (GAO 1987).

In the absence of available and affordable liability coverage, many oil shippers operate without it once they have demonstrated financial capability to the limits of liability set forth in applicable federal laws. These financial requirements ensure that operators have assets on hand to cover the pollution liabilities faced. In essence, these shippers are self-insured.

Ocean maritime insurance differs from property and casualty insurance in that there are no regulations regarding the filing of rates and policy forms with state insurance authorities (partly due to great variations in commodities, vessels, distances, etc.) (Picone 1989). Liability insurance premiums are calculated according to the type of vessel and the degree of risk of different classes of vessels. Oil carriers are rated at the high risk end of the scale. In spite of these differential ratings, owners with poor loss records have generally paid only slightly higher premiums (Schenker 1981).

In light of California's Proposition 103 rollback of automobile insurance rates, the U.S. marine insurance market is concerned about the political climate for retaining its exemption from rate and form regulations. The U.S. market is very slow relative to the international insurance market, primarily due to the unpredictable future of U.S. trade. All quotas on imports, for instance, impact the business of cargo underwriters (Picone 1989).

The potential for huge catastrophic payouts has probably had the greatest impact on the market. According to John Hickey, President, American Hull Insurance Syndicate, "There is no way that we can continue to pay tomorrow's catastrophe claims with today's inadequate premiums." The hull syndicate had a profitable year in 1988 because they were selective and "lucky," and because they had no major casualties for two years. "We shall continually strive to write marine business the only way we know how -- profitably. We are a unique organization with a long tradition and we are perfectly positioned to pick up the pieces when the current market explodes -- which it will," said Hickey (Picone 1989).

Although the Exxon Valdez is a relatively new tanker, the average age of most ships, according to Lloyd's Register, is over 10 years old, and the high costs of shipbuilding will preclude any rapid modernization of the fleet. Due to the poor economic condition of the shipping industry, according to Walter Kramer, Vice President of the American Institute of Marine Underwriters, the emphasis "is on cost-cutting measures and economies of scale." Kramer maintains that the aging fleet and smaller crews on more automated ships will contribute to more accidents in the future. The research being conducted for the paper, "The Impact of Fatigue and Other Factors on Human Performance and How They Relate to Maritime Accidents," also supports this. Higher underwriting losses will then lead to higher insurance rates, compounding problems in the industry. Ship owners and insurers need to work together to reduce the chances of accidents, and those "practicing sound hull loss prevention techniques should receive credit for their efforts" (Picone 1989).

OIL SPILL LIABILITY AND COMPENSATION

International Conventions

The myriad international, national and state laws, statutes, and funds that address pollution from oil spills has been widely characterized as a "patchwork quilt" of overlaying standards and liability limits. The following is a discussion of the various acts, treaties, and funds potentially applicable to U.S. oil transportation interests or to accidents in U.S. waters.

The Convention on Civil Liability for Oil Pollution Damage (1969) and Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage (1971) provide a means of sharing oil pollution costs among countries that are parties to the Conventions. The two international oil spill treaties establish maximum liability amounts of oil shippers (Smets 1983). The 1984 Civil Liability Convention (CLC) establishes a financial responsibility regime where each party is required to ensure that ships in its ownership have insurance or other financial security to cover the owners' liability under the Convention up to the prescribed limits.

The 1984 CLC and FUND Protocols implement the provisions of the above conventions. They allow member nations a way to enforce judgments that affect foreign vessels and help ensure that the assets of the owner or insurer liable for oil pollution will be available to meet damage claims. The U.S. has failed to ratify the 1984 Protocols. Opponents maintain that the Protocols would provide coverage beyond current federal and state laws under only a limited set of circumstances and, in some cases, they would preempt state liability laws. Supporters argue that the Protocols offer a way to share the costs of U.S. oil spills worldwide by allowing the U.S. access to the international oil spill compensation fund and would also allow the U.S. to influence international maritime negotiations. Amendments to the Protocols, they claim, could be added in the future to increase liability limits (U.S. Senate 1989).

The Bush Administration favors adoption of the 1984 Protocols but opposes the preemption of state liability laws beyond the extent necessary to implement the Protocols. Secretary of Transportation Skinner has testified that any claims for damages in excess of the owner's

limit of liability could be brought directly to the international fund, which, according to Skinner, has an excellent record of payment (on average, eight months) (U.S. Senate 1989).

The French government ratified the 1984 Protocols within two months of their introduction, but unfortunately six years after the Amoco Cadiz accident. Eleven years later, the lawsuits are being settled for a fraction of what France spent dealing with the spill (U.S. Senate 1989).

Federal Laws

The Federal Water Pollution Control Act, 1970, as amended by The Clean Water Act, requires owners to file a certificate of financial responsibility for each tank ship owned that demonstrates financial capability to the extent of the owner's minimum cleanup liability.

The Clean Water Act of 1977 provides liability of up to \$50 million for the actual costs incurred by federal and state governments to remove the oil and restore natural resources and the environment. Section 311 provides that the vessel owner is liable to the U.S. Government at \$150 per gross ton unless the spill is the result of "willful negligence or willful misconduct within the privity and knowledge of the owner," then the liability of the spiller is unlimited. At \$150/gross ton, the liability limit for the Exxon Valdez is approximately \$14 million. The 311 (k) revolving fund is maintained by federal appropriations at a targeted balance of \$35 million and is administered by the U.S. Coast Guard. Only one-half of the \$143 million from the fund spent since 1971 has been recovered from responsible parties. The fund currently stands at only \$2 million (House of Representatives 1989a).

The Federal Limited Liability Act allows ship owners to petition to limit liability for damages to the value of the vessel and freight on board following the accident, thus disallowing liability for any damages. This legislation has been enforced inconsistently in past oil spill litigation.

The Offshore Oil Pollution Compensation Fund is a renewable fund of up to \$200 million administered by the Secretary of Transportation to cover oil removal costs and damages to fishing, recreation, ecosystems, and related activities. These funds, as well as those under Section 311 of The Clean Water Act and the following two acts, would all be combined into one large oil spill compensation fund under the pending federal legislation.

Other federal laws that may be applicable in major oil spills are the Outer Continental Shelf Lands Act Amendments (OCS) of 1978 and the Deep Water Ports Act of 1974.

State Liability Systems

The Trans-Alaska Pipeline (TAP) Fund was established in 1973 by the Trans-Alaska Pipeline Authorization Act to pay damage claims, including cleanup costs resulting from oil spills from vessels carrying oil to ports from the pipeline system. The Fund is liable without regard to fault for damages in excess of \$14 million but not more than \$100 million per incident. To date, the Fund has never paid a claim. Exxon has agreed to administer all claims it receives and may submit claims to the Fund before the two-year application deadline in March of 1991. Since the act exempts the Fund from liability arising from a claimant's negligence, Fund officials intend to contest any claims filed by Exxon (GAO 1989).

Alaska Statute 46.03.780 Liability for Restoration provides that a spiller is liable to the state for damages related to the sum of money required to "restock," "replenish," and "restore" the environment to its previous condition. Damages are recovered by the State Attorney General on behalf of the citizens of Alaska (Graham 1989).

Alaska Statute 46.03.822 Strict Liability for the Discharge of Hazardous Substances provides that the "person owning or having control over" a polluting vessel may be relieved of strict liability only if the spill is due to act of war, negligence of a third party, negligence on the part of the state of Alaska or the United States, or an Act of God (Graham 1989).

Alaska Statute 46.03.758 Civil Penalties for Discharges of Oil, enacted in 1977, establishes "substantial civil penalties" in order to provide a "meaningful incentive for the safe handling of oil" and to insure compensation for the state. The regulations establish a range of penalties, depending upon "toxicity, degradability, and dispersal characteristics" of the spilled oil and the "sensitivity and productivity of the receiving environment." Alaska Statute 46.03.758(b)(2) provides that penalties can be multiplied by a factor of five if the spill is due to an intentional or grossly negligent act or if the spiller did not make reasonable attempts to contain and clean up the spill (Graham 1989).

Variations in the maximum penalty amounts are designed to accommodate recovery needs in the most sensitive environments:

1. Maximum \$10.00 per gallon for oil entering most freshwater environments;
2. Maximum \$2.50 per gallon for oil entering most confined saltwater environments;
3. Maximum \$1.00 per gallon for unconfined saltwater or other environments without significant aquatic resources (Graham 1989).

Other features of the Civil Penalty statute include:

1. A vicarious liability provision that holds owners liable for actions of their contractors. Intended to provide a further incentive for safe operations, this feature also increases the likelihood the state will be able to recover for damages to the environment;
2. A liability limit of \$100 million was added under strong pressure from the oil industry, which argued that the industry needed advance knowledge of its maximum potential exposure;
3. A deduction for the gallons cleaned up from penalties owed by the spiller, in order to provide an incentive to clean up as much spilled oil as possible;
4. Reductions in penalties for mitigating circumstances, when events surrounding a spill would make full penalties inappropriate;
5. Exemption of spills less than 18,000 gallons, in order to provide some protection for small oil handlers (Graham 1989).

A spiller may be liable under the Civil Penalty statute, as well as other state statutes, but recovery will generally be sought under one statute or the courts may interpret the action as a double recovery. The state may allege liability under all applicable state and federal statutes and then pursue the course that provides the maximum potential recovery. Once a case is filed, however, it is usually settled out of court for a lump sum amount. Otherwise, if left to the courts, a determination would be made as to which is the controlling statute.

A detailed investigation of Alaska's civil penalty scheme for oil spill liability and compensation was completed in January of 1989 at the University of Washington's Institute for Marine Studies (Graham 1989). The investigation was documented as a Master's Thesis and includes an evaluation of the existing system. The report concludes that Alaska's civil penalty approach is viable. However, it also identifies inconsistencies and shortcomings, and offers sound recommendations to make Alaska's liability and compensation system more effective. This report is attached to this paper as an appendix. Review of this study's recommendations by the Alaska Oil Spill Commission (AOSC) and the state legislature is an important recommendation of this report.

PROBLEM STATEMENT

In the aftermath of the Exxon Valdez accident, the Alyeska Pipeline Service Company -- the industry consortium that operates the Trans-Alaska Pipelines on behalf of seven oil companies that own the facilities -- has been soundly criticized for allegedly allowing the oil companies to save money by curtailing preparations for a large-scale oil spill throughout the 1980s. In addition to the problems caused by economic and competitive pressures, automation, safety violations, and a poor preparedness and response evidently also contributed to the disaster (this is also substantiated by research completed for the paper, "The Impact of Fatigue and Other Factors on Human Performance and How They Relate to Maritime Accidents").

1. Economic pressures: the competitive pressures in the oil and oil transportation industry, particularly with respect to competing with foreign carriers, most of which rely on lower standards and have less technology to

finance. Oil transporters are under constant pressure to move fast and stay on schedule. The Exxon Valdez was five days behind schedule when it ran aground. The Exxon Valdez was also on the outer fringes of the Coast Guard Vessel Traffic System (VTS) when the accident occurred. Federal cutbacks are primarily responsible for the failure to extend the VTS to the outer rim of Prince William Sound. The cost of extending the system, according to the Coast Guard, is estimated at \$20 million (House of Representatives 1989a). Expansion of VTS is included in the pending federal legislation.

In 1981, a 20-member emergency team responsible for 24-hour response to oil spills in Valdez Harbor and Prince William Sound was disbanded by Alyeska to cut costs. Alyeska officials argued that such a large-scale spill as the Valdez was highly unlikely (New York Times). Also in 1981, Alyeska turned down an offer from the city of Valdez to stockpile cleanup equipment and materials. Alyeska personnel advised city officials that warehousing booms, dispersants, and other types of cleanup resources sufficient to attack a large-scale spill would be "a tremendous waste of city money" (House of Representatives 1989a). The pending legislation will reinstate national emergency strike teams and require contingency plans for major spills and adequate equipment for response.

2. Automation: as discussed in this paper, more automated ships and smaller crews may lead to an increase in accidents and resulting oil spills. When the Valdez ran aground, the systems that automatically power and steer the ship were on, a violation in that part of the Sound. These systems may have contributed to both the grounding and the large volume of oil released.
3. Safety violations: violations of the Valdez master pilot involving alcohol have been the most publicized, but a number of other violations connected to the accident apparently took place: the Valdez didn't notify the Coast Guard, as required, that it was leaving the shipping lanes to avoid ice floes; and federal

violations involving improper manning for the waters, including control of the ship by third mate (not certified as a pilot) and the failure of the Master to be on the bridge. The look-out was out of position, helping the local pilot depart the ship just minutes before the grounding.

4. Inadequate response and preparedness: As mentioned above, there were inadequate resources in Valdez to respond to an accident of this magnitude. Alyeska's contingency plan included a scenario for a catastrophic incident and noted that the response would be inadequate. After the Valdez spill, it took hours for emergency work to begin. Alyeska's only cleanup barge was out of service, an absorbent boom was buried under snow, and only 45 drums of dispersant were on hand -- enough to dissipate 3% of the spill (Anchorage Daily News November 3, 1989).

Our investigation did not find any evidence that insurance adversely affected the response to this incident. This question came to light when the response to a recent (November, 1989) Alaska grounding was delayed until the hull underwriter could determine whether or not there could be any salvage value. Possible responses involved burning, sinking, or blowing up the ship. These actions were not allowed without the approval of the underwriter.

POSSIBLE SOLUTIONS

The advantages and disadvantages of a number of alternatives to maximizing safety and preparedness through insurance and liability mechanisms are discussed below.

Unlimited Liability

The threat of unlimited liability, it is argued, encourages a higher standard of care in the oil industry and prompts prevention-related activities in both the public and private sectors. Supporters of unlimited liability essentially support the rights of states to establish liability, in order to go beyond federal or international minimums as necessary to protect the health and welfare of their people and environments. Opponents of unlimited liability maintain

that this alternative will result in commercial insurance being unavailable and the oil industry taking its business away from states with unlimited liability laws. (Since nearly one quarter of the U.S. source of petroleum comes from Alaska, this seems unlikely.) Most states and environmental groups argue that states should nonetheless have the right to protect their tourist and fishing industries from oil spills at the expense of a certain amount of business activity (United States Senate 1989).

Advantages:

1. Strongest position in support of "the spiller/polluter pays" principle;
2. Encourages a higher standard of care;
3. Preserves state's rights.

Disadvantages:

1. No insurer will provide unlimited coverage;
2. Oil industry may avoid states with unfavorable limits;
3. Spiller could "hide" assets, declare bankruptcy, and "walk away" from spill.

Limited Liability

In the wake of the Exxon Valdez disaster, future liability limits will face pressures to relate more realistically to the full range of oil pollution damages -- not just for cleanup, but for damages to property, natural resources, losses in earnings, and loss of use of real or personal property. Documentation of a carrier's financial capability levels may also have to follow suit (Schenker 1981). If Congress sets liability limits in the proposed federal compensation and liability legislation, limits could be driven by the financial capability of each company and by its commitment to state-of-the-art technology as a safety incentive (i.e., lower limits available to shippers that commit to modern cleanup equipment, modern monitoring systems, advanced ship designs, etc.). (United States Senate 1989). The recommendations of the investigative report detailing Alaska's civil penalty scheme for oil spills makes similar recommendations through the elimination of certain provisions, including the \$100 million ceiling on penalties. The pending federal legislation suggests lower limits for safer transfer points, such as deepwater ports.

Advantages:

1. High, but fair liability limits might stimulate U.S. marine insurance market;
2. Parties responsible for spills will at least pay something, both into reserve fund and for damages up to limits;

Disadvantages:

1. Probably won't cover all damages in catastrophic accidents;
2. Unless the limits of liability are very high (and reflective of full range of costs), the "cost of doing business mentality" toward managing oil (spills are inevitable) will prevail (United States Senate 1989).

User's Fees

In addition to setting minimum liability limits, toughening standards, and lifting all liability limits in some cases, possibly the most important feature of proposed federal liability and compensation legislation is the establishment of a national fund for cleanup and recovery costs that exceed liability limits. The fund would be developed through a 5-cent per barrel tax on the oil industry, the rationale being that oil companies should bear a responsibility for cleaning up and restoring the environment when damages exceed the responsible party's limit of liability (United States Senate 1989). According to Atlantic Richfield Company testimony before the Senate Subcommittee, merging the federal funds created by the TAPS Act, OCS Act, and Deep Water Ports Act would immediately establish a reserve fund in excess of \$400 million (United States Senate 1989). This is included in the pending legislation. This legislation also includes user fees for the expansion of the VTS.

Advantages:

1. Prevents need for each state to establish its own fund (more economical and efficient);
2. Allows oil shippers to pay into one centralized oil fund instead of individual funds of each state;
3. Retains state liability laws;

4. Can be established together with adoption of 1984 Protocols to cover incidents where damages exceed Convention liability limits;
5. When fund builds up, part of it can be dedicated to improving safety measures, training programs, etc.

Disadvantages:

1. Does nothing to eliminate the "patchwork quilt" of regulations.

National Contingent Insurance

As was the case with hazard insurance for floods and earthquakes prior to the development of national and federally-supported insurance programs, commercial pollution insurance, when available, has become increasingly unaffordable. Nationally, we are all dependent on the Alaskan oil business and concern over the frequency and magnitude of the impacts of oil spills has become a strong national issue. In addition, its resources and natural beauty make Alaska a "national treasure" and a source of national pride. Proponents of national oil pollution insurance make these and other points in support of arguments for a national program.

Advantages:

1. Mitigation and contingency planning can be required as a condition of participation;
2. Incentives relating to the cost of coverage can be employed to prompt oil shippers to operate in as safe a manner as possible.

Disadvantages:

1. Oil shippers may become more complacent or careless with insurance protection to fall back on;
2. Many are not convinced that the oil industry can be relied upon to protect the environment.

Deepwater Ports

Government and industry could investigate the possible development of new offshore deepwater ports, such as the Louisiana Offshore Oil Port (LOOP), where spills may be less likely to occur and easier to clean up than those closer to shore. The open waters around offshore ports are also more amenable to the use of "non-mechanical cleanup means," such as dispersants. Oil is transported between port and shore via underground pipelines.

Advantages:

1. Eliminates threats of groundings and narrow channels;
2. Spills would affect less sensitive environments;
3. LOOP operates wide "safety zone" around port and 24-hour traffic control and communications.
4. Pending legislation calls for lower liability limits for vessels utilizing deepwater ports.

Disadvantages:

1. LOOP has been losing money and has not proven to be an economical alternative for potential port users or investors (United States Senate 1989).
2. Exposure to harsher environment could potentially limit the number of days facilities could be used.

RECOMMENDATIONS

1. The AOSC and the state legislature should review the analysis of the civil penalty scheme for oil spill liability and compensation in Alaska (Graham 1989) and determine the appropriateness of the studies' recommendations for adoption and implementation.
2. The development of a user's tax and national oil spill compensation fund offers a number of important advantages over the "patchwork" liability and compensation system currently in place, and deserves further examination in the near term. These,

and many useful mitigation measures, are incorporated into the pending federal legislation. Alaska should strongly support this legislation package.

3. Localized liability and penalty schemes should be investigated on a port-by-port basis. These schemes should investigate the potential of providing access to terminals contingent not only upon certain levels of liability or financial capability, but also upon certain standards for vessel manning, training, licensing, and equipment.
4. Offshore deepwater ports -- and their obvious advantages in limiting oil spill damages -- may provide the best long-term solution to the problem, provided that economic and environmental problems can be overcome.

Any of these initiatives should be pursued in the context of a complementary liability and compensation system that: (1) defines the relationship with other international, federal, and state laws; (2) preserves state liability laws; (3) clearly defines the liability of each shipowner and the scope of claims that can be made against the responsible party; (4) retains the "polluter pays" principle in pollution liability; and (5) serves to bring under a single umbrella all aspects of oil spill liability and compensation to ensure that all claimants are compensated (United States Senate 1989). The pending federal legislation accomplishes these goals and should be promoted. Reviewing the recommendations of Alaska's civil penalty scheme for oil spills will also accomplish these goals. Developing particular schemes for individual ports can address the varying degree of risk due to frequency of vessels and localized conditions. This may also provide the only mechanism that ensures that a certain level of safety is maintained by visiting vessels, regardless of their nation of origin or registry.

The national flood and earthquake insurance programs, as models, can serve to guide those involved in the development of a similar program for oil spill pollution hazards. Loss prevention should become a strong factor in the development of insurance rates and costs. Repetitive offenders might find it difficult to obtain protection at any cost (Schenker 1981)

or find insurance too expensive to stay in business. Those ship owners and operators working to reduce the likelihood of accidents should get credit for doing so.

Lower liability limits could be made available only to those companies that can demonstrate financial responsibility, good safety records, and a commitment to state-of-the-art technology. Inadequate training procedures, inadequate charts and guiding systems, and inadequate maintenance and repair policies are examples of reasons to deny lower liability limits (United States Senate 1989).

The Exxon Valdez disaster has revealed the need for more mitigation and preparedness planning throughout the system (ship owners, pipeline operators, local, state, and federal governments). Contingency response plans should consider the extraordinary resource demands placed on the response system in major oil spill accidents, and then improve plans through regular drills and exercises. Following the grounding of the Arco Anchorage off Port Angeles in 1985, Arco, the Coast Guard, and the Washington Department of Ecology co-managed a successful cleanup effort that took four months. Coordinators credited a joint response exercise conducted a year earlier with creating a familiarity that led to a smooth working relationship in the actual event (Anchorage Daily News May 7, 1989).

The best opportunities to implement mitigation measures generally follow the occurrence of a disaster, when the hazard is still fresh in memories and there is usually a mandate to improve or change the system. The state of Alaska, Alyeska Pipeline Service Company, and Exxon have all taken proactive steps to mitigate the impacts of future spills. Alyeska has acquired several new, large oil skimming vessels to escort tankers from the Valdez Terminal out of Prince William Sound. Alyeska now plans to stockpile cleanup equipment and supplies and is increasing tariffs approximately \$3 per barrel in order to finance pipeline corrosion repairs, oil spill prevention and improved spill response, and legal fees from the Valdez spill. The state is raising severance taxes to create a \$50 million emergency relief fund for oil spill cleanups (Anchorage Daily News November 2, 1989) and the AOSC has recommended a number of new safety measures, including giving authority to the State Harbor Authority to close down ports if conditions are unsafe (Anchorage

Daily News November 12, 1989). The glaring shortfalls in response and preparedness systems may, in the long run, prove to be more positive if steps are undertaken that prevent future such occurrences. It is important to institutionalize these measures now so that the system does not become lax in between oil spills.

Although the costs of monitoring systems, training programs, and other prevention and response measures may seem relatively minor compared to oil profits, cost/benefit analyses of mitigation opportunities must demonstrate that mitigation and preparedness are in the best financial interests of the oil industry as well. A public/private partnership is likely to produce the best mitigation results.

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with Roger Vielvoye from London

Focus on oil spills

Oil spills like the Exxon Valdez incident off Alaska, Khark 5 off Morocco, and American Trader off California are concentrating the minds of oil companies on environmental and public relations repercussions from their world tanker operations.

One of the biggest oil transporters, Royal Dutch/Shell Group, has moved to ensure that tankers on charter to the company are adequately insured against the potentially crippling costs of cleaning up a major spill in a sensitive area and meeting any liabilities that might emerge from the incident.

Shell has a global interest in pollution-free tanker operations. On any day, the company has 50-60 of its own vessels on the high seas, 40 tankers on time charter, and another 40 on charter for single voyages.

Beefed up coverage

Shell International Marine Ltd., London, has told owners of all tankers carrying crude or products for the company an additional pollution insurance clause has been inserted into contracts for voyage and time charters. It will take effect immediately. In the future, the clause will become one of the standard terms for obtaining business from Shell.

Tanker owners are required to show they have oil pollution insurance coverage of \$700 million that will remain in place during the time the vessel is working for Shell.

The international Group of P&I (protection and indemnity) Clubs, which cover owners for risks other than damage to tanker hulls, increased the oil pollution coverage to \$500 million from \$400 million effective Feb. 20.

At the same time, the clubs offered members an additional voluntary portion of oil pollution coverage of \$200 million to push total coverage to \$700 million.

In a letter to tanker owners, Shell said responsible owners would want to acquire this additional coverage. And it reminded owners that recent events had shown that costs of pollution prevention/cleanup can on occasion substantially exceed the coverage presently available.

Oil pollution is also very much on the mind of the Royal Dutch/Shell Group's British affiliate, Shell U.K. Ltd.

The company has the dubious distinction of being the subject of the first major prosecution by Britain's newly formed National Rivers Authority.

River Mersey spill

The case arose over Shell's spill of 157 metric tons of very heavy Venezuelan crude into the River Mersey in Northwest England from a pipeline linking an import terminal to the 262,000 b/d refinery at Stanlow, Cheshire.

Cleaning up the mess in the Mersey estuary cost Shell U.K. £1.4 million (\$2.38 million). The court case cost it another £1 million (\$1.7 million) in fines, a substantial penalty by U.K. standards.

Imposing the fine, the judge criticized Shell for flushing a further 7 tons of crude out of the pipeline after the initial leak, against the advice of all local authorities.

The judge said the fine would have been higher but for Shell's good record on conservation and its support of the arts and other worthwhile causes.

FERC to keep crediting plan for interstates

The Federal Energy Regulatory Commission has declined to change its cross crediting mechanism in its open access transportation program for U.S. interstate gas pipelines.

In Order 500-I, FERC denied requests for substantial changes in its final rule on the program.

At the mandate of the District of Columbia Circuit Court of Appeals, in Order 500-H the commission reaffirmed cross crediting but moved the take or pay cost recovery deadline from Mar. 31, 1989, to Dec. 31, 1990, and set a sunset date for the take or pay crediting mechanism: Dec. 31, 1990, or the date on which a pipeline accepts a gas inventory charge authorization, whichever occurs first.

Pipelines sought a rehearing, and in Order 500-I FERC agreed to change to 60 days from 30 days the notice period before which pipelines may apply take or pay credits to gas they must take.

"No" to other changes

FERC denied requests for other changes, saying Order 500 has been instrumental in encouraging settlements that are removing take or pay problems. It said pipelines' take or pay exposure has decreased from \$10.7 billion in 1986 to \$2.4 billion as of Mar. 31, 1989.

It again refused to exercise its authority under Section 5 of the Natural Gas Act to change or abrogate problem gas contracts, as some pipelines have urged. It again maintained it lacks authority to modify contracts for the sale of nonjurisdictional gas.

The Interstate Natural Gas Association of America said FERC's action "simply repeats the justifications it has previously made for failing to provide take or pay relief and takes wholly unjustified credit for settlements that have taken place in spite of, rather than because of, its earlier actions."