

SCOMM

93:12

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. House Bill No. 384

Revision Date: _____	Dept. Affected: <u>Environmental Conservation</u>
Title: <u>Financial Requirements: Noncrude Oil Operations</u>	BRU: <u>Spill Prevention and Response</u>
Sponsor: <u>Representative Foster</u>	Component: <u>Industry Preparedness and Response</u>
Requestor: <u>House Oil & Gas</u>	COMPONENT SERIAL NO. _____

Expenditures/Revenues	(Thousands of Dollars)					
	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
OPERATING EXPENDITURES						
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE	(Thousands of Dollars)					
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTA						
Other: 1052 Oil/Haz "470" Fund	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY95) cost: \$ not applicable

POSITIONS

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

ANALYSIS: (Attach a separate page if necessary)
No fiscal impact anticipated.

Prepared by:	Robert Poe, Director	
Division:	Information and Administrative Services	
Approved by:	John Sandor, Commissioner	
Agency:	Environmental Conservation	

Phone: 465-5010	
Date:	<u>1/20/94</u>
Date:	<u>1/20/94</u>

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HB 384 FINANCIAL RESPONSIBILITY OF NON CRUDE OPERATORS

Background Paper

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

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

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

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

Alakanuk, Chevak, Elim, Emmonak, Gambell, Golovin, Hooper Bay, Kotlik, Koyuk, Marshall, Mehovuk, Mountain Village, Newtok, Nightmute, Nome, Pilot Station, Pitka's Point, Russian Mission, St. Mary's, St. Michael, Savoonga, Scammon Bay, Shaktoolik, Sheldon Point, Stebbins, Toksook Bay, Tununak, Unalakleet, White Mountain

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

To date, there has been no change in the insurance markets position on direct action coverage, and development of an insurance pool so far has proved unfeasible. With the June 1, 1994 date of the financial responsibility requirements approaching, and the unavailability of direct action coverage just as complete as it was in 1991, non crude operators once again face the prospect of either operating out of compliance with Alaska law or ceasing operations. The large crude oil operators do not face this problem, because they have sufficient assets and working capital to either self-insure or comply with the law through other means, such as surety bonds or letters of credit.

Solution: This act repeals Section 6 which is the Sunset clause repealing Section 2 TEMPORARY LAW APPLICABLE TO NON CRUDE OIL OPERATIONS.

PETRO MARINE SERVICES

Petroleum Marketing to the Marine Industry

January 20, 1994

House Special Committee on Oil & Gas
Senate Special Committee on Oil & Gas

Subject: Direct access insurance for noncrude operators

Petro Marine Services is the largest Alaskan owned fuel distributor and specializes in marketing bulk fuel and packaged petroleum products to the marine industry. We operate seven bulk marine terminals and several harbor fuel facilities in Alaska. We have been trying unsuccessfully to obtain direct access insurance as a means of certifying financial responsibility. At this time we do not have any indication that such insurance is available to us in a form we can afford.

In the absence of any indications that such insurance is or soon will be available, the temporary law which permits ADEC to approve Certification of Financial Responsibility (COFR) without direct access should be permanently adopted. I encourage you to enact SB 239 and HB 384 thereby repealing the temporary nature of ADEC's authority to approve applications for COFR for noncrude operators. This action would assure that we could continue to operate without continually having to ask the legislature to reenact ADEC's authority to approve our COFR. I appreciate your attention and interest in eliminating this extra and unnecessary work.

Sincerely,



W. B. Schoephoester
Manager, Planning & Projects



A Division of Western Pioneer, Inc.

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January 24, 1994

House Special Committee on Oil & Gas
Senate Special Committee on Oil & Gas

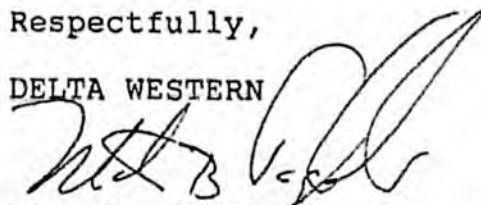
Subject: Direct access insurance for noncrude operators

Delta Western is one of the largest fuel distributors in the State of Alaska specializing in bulk fuels, Chevron lubricants and petroleum transportation services. We operate ten bulk fuel facilities and provide marine transportation throughout Southeast Alaska, Cook Inlet, the Alaska Peninsula, the Aleutian Chain, Bristol Bay and in the Kuskokwim and Yukon Rivers. Delta Western has been unsuccessful in its endeavors to obtain direct access insurance as a means of certifying financial responsibility. We have had no indication at this time that such insurance will be available to us in a form we can afford.

In the absence of any indications that such insurance is or soon will be available, the temporary law which permits ADEC to approve Certification of Financial Responsibility (COFR) without direct access should be permanently adopted. I encourage you to enact SB 239 and HB 384 thereby repealing the temporary nature of ADEC's authority to approve applications for COFR for noncrude operators. This action would assure that we could continue to operate without continually having to ask the legislature to reenact ADEC's authority to approve our COFR. I appreciate your attention and interest in eliminating this extra and unnecessary work.

Respectfully,

DELTA WESTERN



Mike B. Tagliavento
General Manager
Marketing/Operations

**CROWLEY MARINE SERVICES, INC.**

January 24, 1994

House Special Committee on Gas & Oil
Senate Special Committee on Gas & Oil

Subject: Direct access insurance for noncrude operators

Crowley Marine Services, Inc. ("Crowley") is a major tug and barge transporter of noncrude petroleum products in the State of Alaska. Crowley transports and delivers approximately 100 million gallons of bulk petroleum products annually to the Western Alaska region. Deliveries are performed to approximately 125 coastal and river communities. These communities are spread across some 4,000 miles of coastlines and rivers stretching from Kodiak Island to Barter Island. Virtually all of these villages are dependent on seasonal deliveries of fuel for their existence.

Our company has asked its insurance brokers to investigate the availability of direct access insurance. Direct access insurance is currently not available with the limits and extent of coverage provided by the P&I insurance in place for the Crowley fleet. Crowley presently has one billion dollars per occurrence P&I insurance coverage for pollution liability. Any limited direct access insurance would be in addition to our P&I insurance and a significant business cost with questionable benefit.

We ask that you enact SB 239 and HB 384 repealing the temporary nature of ADEC's authority to approve applications for Certification of Financial Responsibility (COFR) for noncrude operators. The temporary law which permits ADEC to approve COFR without direct access should be permanently adopted. We believe that the uncertainty of continued operations in Alaska by having to ask the legislature to reenact ADEC's authority to approve Crowley's COFR will be eliminated by this legislation.

I thank you for your interest and action in eliminating this confusing and unnecessary work.

Sincerely,

Charles F. Nalen
Vice President Environmental Affairs

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**Alaska Department of Environmental Conservation
Position Paper on Direct Action Insurance and Financial Responsibility**

January 24, 1994

Purpose of the Legislation: To give ADEC the continuing authority to grant waivers to those oil facilities which can get insurance, but whose insurance does not allow the insurer to be directly sued in Alaska.

Background of the Legislation: Under state law, owners of facilities that are oil spill threats are required to submit proof of financial responsibility in the case of a spill. Financial responsibility may be demonstrated by (1) self-insurance, (2) insurance, (3) surety, (4) guarantee, (5) letter of credit approved by the department, or (6) other proof of financial responsibility provided by a group of insureds who have agreed to cover pollutions risks of members of the group under terms the department may prescribe.

The law further provides that insurers or others providing financial responsibility coverage must agree to be sued in a state court (i.e., direct action.) Prior to the Exxon Valdez, this insurance was widely available. But when a similar "direct action" requirement was included in national law, under the Oil Pollution Act of 1990, many of the world's insurance providers stopped issuing coverage for this insurance.

Two years ago, the Alaska Legislature gave ADEC the authority to waive the direct action requirement if the person submitting insurance as a form of financial responsibility signed a quarterly affidavit that the direct action coverage was not available.

A House Bill pending now (HB 384) would extend ADEC's authority to grant a waiver to direct action permanently. The companion Senate version, SB 239, would extend the waiver authority just two years.

DEC's Position: The Department supports continuing this waiver provision, and making the waiver provision permanent. Without this provision, we may have to shut down facilities which provide fuel throughout Alaska. We are continuing to work with the insurance industry to make direct action coverage more readily available; there is a proposed product now under department review (with review also by the Department of Law) that would serve as a rider for insurance coverage that does not offer direct action. We believe the waiver provisions are strict enough (with a quarterly affidavit required and the Department's ability to deny waivers) that the provision may be made a permanent part of the law. Thus we support the House language as optimal.

DIVISION OF LEGAL SERVICES

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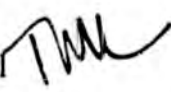
130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

January 21, 1994

SUBJECT: Sectional Summary of HB 384, relating to an exemption for proof of financial responsibility by noncrude oil operations

TO: Representative Joe Green

FROM: Terri Lauterbach
Legislative Counsel 

You have requested a sectional summary of the above-described bill.

Section 1.

In 1992, the legislature gave noncrude oil operations a two-year exemption from the normal requirement that their proof of financial responsibility include "direct action" in our state courts against the surety or insurer who provided their coverage. In order to get this exemption, the noncrude operation had to show that "direct action" insurance was not available after diligent search.

Section 1 of the bill would make this exemption permanent by repealing the two-year limitation.

Section 2.

This section is included to make sure that there will be no gap in the exemption that is made permanent by section 1. Since the two-year exemption expires on June 1, 1994, and there is a slight possibility that this bill, even if passed by the legislature in May, might not be transmitted or signed by the governor by June 1, the bill is made retroactive to June 1.

Section 3.

Immediate effective date.

TML:gc
94-053.glc

Legislative Research Agency

Alaska State Legislature



130 Seward Street, Suite 218
Juneau, Alaska 99801-2196

Phone: (507) 465-3991
Fax: (907) 463-3351

November 10, 1993

MEMORANDUM

TO: Senator Loren Leman

FROM: Maria Gladziszewski *MSX*
Legislative Analyst

RE: Other States' Direct Action Clauses for Oil Spill Insurers
Research Request 94.044

You asked if any coastal states have repealed those statutory provisions that allow states to bring claims directly against insurers in oil spill cases. Such provisions are often referred to as direct action clauses and allow states to bring action against insurers in state courts. If so, you asked if these clauses had been replaced with other provisions regarding action in local courts. You were particularly interested in the situation in California, Florida, and Washington, and you asked for a copy the relevant statute from Florida.

For a previous memorandum prepared by this agency, we asked environmental officials or assistant attorneys general from the 22 other coastal states about their state's direct action provisions. Seventeen of those states--including California, Florida and Washington--have never included direct action provisions in their laws regarding oil spill insurers.¹ For this memorandum, we contacted officials from the 5 coastal states that had, or formerly had, direct action provisions to determine if laws had changed since our original memorandum was prepared. Because you specifically asked about California, Florida and Washington, we also contacted officials in those states.

This telephone survey revealed that Louisiana, New Jersey, New York and Virginia currently have direct action provisions for oil spill insurers. In 1993, the Texas legislature repealed direct action requirements.

¹The following state statutes contain no mention of direct action: Alabama, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, North Carolina, Oregon, Rhode Island, South Carolina and Washington.

Laws in California, Florida, Washington and the 5 states which currently have, or formerly had, direct action provisions for oil spill insurers are discussed below. Copies of statutes in the 8 states are attached.

STATES WITH DIRECT ACTION PROVISIONS

Louisiana: Tim Hebert of the Oil Spill Coordinator's Office said that the oil spill statutes do not specifically contain direct action provisions. Steve Hawkland, an attorney for the Secretary of State office said, however, that a general insurance statute requires direct action for all insurance providers (R.S. 22:655).

New Jersey: Section 58:10-23.11s of New Jersey statutes permits the state or injured persons to bring claims "directly against the bond, insurer, or any other person providing evidence of financial responsibility."

New York: According to Gordon Johnson, an assistant attorney general for New York, the state may assert claims directly against a bond or the insurer for cleanup costs, damages and civil penalties (Navigation Law Section 190).

Virginia: State statutes require operators of tank vessels to make a cash deposit of \$500 per gross ton. Tank vessel operators may be exempted if operators provide evidence of financial responsibility (by self insurance, insurance, guaranty or surety). To obtain an exemption from the cash deposit requirements, the operator and insurer "shall appoint an agent for service of process in the Commonwealth. . . and any instrument of insurance, guaranty or surety must provide that actions may be brought on such instrument or insurance, guaranty or surety directly against the insurer . . ." (62.1-44.34:16).

According to Assistant Attorney General Carl Josephson, however, state lawyers conclude that P&I clubs are not subject to direct action provisions.² The Virginia Corporation Commission, which regulates the insurance industry, rendered an opinion that P&I clubs do not come under their jurisdiction. Mr. Josephson said that since Virginia does not consider P&I clubs to be insurers, P&I clubs would not be subject to direct action.

²Protection and Indemnity (P&I) clubs are mutuals made up of a number of tanker and oil companies. Many oil transporters and terminal facility operators claim that P&I clubs provide the only means for insuring against oil spills. Protection and Indemnity clubs have traditionally opposed attempts to include direct action provisions in state and federal statutes.

STATES WITH REPEALED DIRECT ACTION PROVISIONS

Texas: In May 1993, the Texas legislature revised sections of its oil pollution statutes. Among other things, the passage of SB 1049 repealed Section 40.255 of the Natural Resource Code which formerly permitted the state to "bring suit directly against any bond, insurer, guarantor or person providing evidence of financial responsibility . . ." Assistant Attorney General Ingrid Hansen said that this provision was deleted after heavy lobbying from the insurance industry. Ms. Hansen said that Texas law does not have separate financial responsibility requirements other than those mandated by the federal Oil Pollution Act of 1990 (OPA 90).

ADDITIONAL STATES: CALIFORNIA, FLORIDA AND WASHINGTON

You also specifically asked about the law in California, Florida and Washington. The laws in those states are discussed below.

California

California law has never contained a direct action provision. Carl Moore, regulations supervisor with the California Department of Fish and Game Office of Spill Prevention and Response, said that California lawmakers "deliberately and systematically avoided the issue of direct action. . . we saw [the direct action debate] as a red herring." Mr. Moore reports that California lawmakers decided instead to mandate that responsible parties are absolutely liable for damages, jointly and severally. Mr. Moore said that lawmakers felt these provisions assured adequate financial capability to cover oil spills.

In addition, Mr. Moore reports that the California Office of Spill Prevention and Response has made a policy decision to take as evidence of financial responsibility P&I club policies even though policies may specifically state that they may not be used as proof of financial responsibility under OPA 90.

Florida

According to Pat Kincaid, Office of the General Counsel of Florida's Environmental Protection Agency, Florida statutes contain no mention of direct action against oil spill insurers. Ms. Kincaid said "there's nothing in our law that says we can or cannot [take action directly against insurers]."

Senator Leman
November 10, 1993
Page 4

Provisions in Florida law regarding financial responsibility have been amended in the last few years. Debbie Preble, an environmental administrator for the Office of Coastal Protection, said that 1990 legislation required all oil spill insurers to provide proof of financial security and to pay damages to the Coastal Protection Trust Fund. The P&I clubs, however, refused to comply with this requirement and other insurance companies would not provide vessel owners with oil spill insurance. As a result, companies had to provide proof of self-insurance. Smaller companies were able to self-insure only a few of their vessels at one time and therefore only provided proof of insurance for vessels when they were in Florida waters. Because the state was burdened with the continuous processing of insurance certificates, the law was changed in 1991 by deleting the requirement that insurers pay damages to the trust fund (FS 376.12 - 376.14).

Washington

According to Cathy Carruthers, Washington Department of Ecology, Washington statutes are silent regarding whether direct action may or may not be taken against insurers. Regulations may or may not be written to include direct action. Officials from the Office of Marine Safety have not yet written regulations for vessels; Department of Ecology officials have written a draft rule for facilities. The draft rule states that facility insurers must provide coverage regardless of the financial status of the insured. That is, the draft rule provides for direct action against insurers of facilities covered by indemnity insurance in the event of the bankruptcy of the insured [Washington Administrative Code 173-182-050(3)(d)].

During the 1991 legislative session, Washington exempted P&I clubs from financial responsibility requirements [88.40.020(c)]. According to Harry Reinert, counsel to the Washington House Environmental Affairs Committee, "[Washington lawmakers] think membership in a P&I club meets financial responsibility requirements but we do require some evidence of membership." Mr. Reinert also stated that "there wasn't a big battle over direct action here as there has been in other states. . .there wasn't a big battle over the P&I club exemption either. We didn't spend a lot of time on the issue. . . Maybe we didn't understand the full impact.

I hope that this information answers your questions. Please contact us if we may provide additional assistance.

Attachments

REVISED LIST OF OIL OPERATORS THAT USE INSURANCE AS PROOF OF FINANCIAL RESPONSIBILITY

JANUARY 20, 1994

The operators that are marked "aprvd" have policies that meet all the state requirements for proof of financial responsibility. The operators that are marked "condaprvd" have conditional approvals because their policies do not meet the state requirements and they cannot obtain any other type of proof coverage. Some companies are listed more than once because they have separate files for barges and terminals.

File #	Operator Name	Status	Insurer
4.01.078	Naknek Electric Assoc., Inc.	aprvd	Areca Insurance Exch
4.01.035b	St. Michael Fuel Co. (Yutana Barge)	aprvd	ILU
4.01.154	Stewart Petroleum Co.	aprvd	Lloyd's & London com
4.01.018	Cook Inlet Pipe Line Co.	aprvd	Lloyd's & others
4.01.035c	Yukon Fuel Co. (Yutana Barge Line)	aprvd	ILU
4.01.104	Kotzebue Electric Assn., Inc.	aprvd	Areca Insurance Exch
4.01.020	Kenai Pipe Line Co.	aprvd	Lloyd's & London com
4.01.177	Alaskan Crude Corp.	aprvd	Lloyd's & London com
4.01.013	Anchorage Fueling & Service Co.	aprvd	Zurich American Ins.
4.01.095	Nushagak Electric Coop., Inc.	aprvd	Areca Insurance Exch
4.01.035c	Galena Fuel Co. (Yutana Barge Line)	aprvd.	ILU
4.01.178	International Tug & Barge Ltd.	Condaprvd	WQIS
4.01.072	Saupe Enterprises dba Chevron Dist.	condaprvd	ILU
4.01.089	Orca Oil Co., Inc.	condaprvd	ILU
4.01.016	Crowley Marine Services, Inc.	condaprvd	West of England Ship
4.01.109	UIC Construction, Inc.	condaprvd	Agri. Excess & Surpl
4.01.108	Bethel Fuel Sales, Inc.	condaprvd	Fireman's Fund, ILU
4.01.087a	Harbor Ent. dba Petro Marine Services	condaprvd	Lloyd's & ILU
4.01.088	Bering Sea Fisheries	condaprvd	WQIS
4.01.161	Ocean Marine Services, Inc.	condaprvd	No. of England P&I A
4.01.005	Alaska Pulp Corp.	condaprvd	American Int. Specia
4.01.153	Lutak Petroleum JV dba Totem Oil Co.	condaprvd	Commerce & Industry
4.01.061	Anderes Oil Co.	condaprvd	Agri. Excess & Surpl
4.01.025	Boyer Towing, Inc.	condaprvd	United Kingdom Mutua
4.01.146	Olsen Ent. dba Island Providers Trnsp.	condaprvd	Lloyd's
4.01.173	Silver Bay Logging, Inc.	condaprvd	WQIS
4.01.071	Kugkaktlik Limited dba Kipnuk Fuel	condaprvd	WQIS
4.01.161a	Ocean Marine Services, Inc.	condaprvd	WQIS
4.01.067	Moody's Sea Lighterage Inc.	condaprvd	WQIS
4.01.173a	Silver Bay Logging, Inc.	condaprvd	WQIS
4.01.065	Smith Lighterage Co., Inc.	condaprvd	WQIS
4.01.102	Kodiak Oil Sales, Inc.	condaprvd	ILU
4.01.129	Forty Niner Transportation, Inc.	condaprvd	WQIS
4.01.040	Samson Tug & Barge Co. Inc.	condaprvd	WQIS
4.01.16a	Crowley Marine Services, Inc.	condaprvd	Lloyd's & American H
4.01.035a	Yutana Barge Lines, Inc. (barges)	condaprvd	W. of England Ship O
4.01.163	Seacor Marine, Inc.	condaprvd	U.S. & British compa
4.01.045	Sitka Fuels, Inc.	condaprvd	Commerce & Industry

PROOF OF FINANCIAL RESPONSIBILITY

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



Alaska
Department of
Environmental
Conservation



credited to a special account called the "oil and hazardous substance release mitigation account". (§ 2 ch 116 SLA 1980; am § 15 ch 59 SLA 1986)

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

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

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

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

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

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

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

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

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

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

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

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

(4) provide for cooperative oil discharge notification procedures.

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

Cross references. — For civil penalties for discharges of oil, see AS 46.03.788; for civil actions for pollution, see AS 46.03.780; for provisions imposing strict liability for discharge of hazardous substances, see AS 46.03.822.

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

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

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

Editor's notes. — Section 311 of the Clean Water Act, referred to in subsections (b) and (c), may be found in 33 U.S.C. § 1321.

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

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

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

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

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

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

- (1) periodic training;
- (2) response team exercises; and
- (3) verifying access to inventories of equipment, supplies, and personnel identified as available in the approved contingency plan.

(f) Upon request of a plan holder or on the department's own initiative, the department, after notice and opportunity for hearing, may modify its approval of a contingency plan if the department determines that a change has occurred in the operation of a facility or vessel necessitating an amended or supplemented plan, or the operator's discharge experience demonstrates a necessity for modification. The department, after notice and opportunity for hearing, may revoke its approval of a contingency plan if the department determines that

- (1) approval was obtained by fraud or misrepresentation;
- (2) the operator does not have access to the quality or quantity of resources identified in the plan;
- (3) a term or condition of approval or modification has been violated; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) \$30¢, per incident, for each barrel of storage capacity or \$100,000,000, whichever is greater, for a tank vessel or barge carrying crude oil;

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

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

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

(f) Acceptance of proof of financial responsibility expires

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

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

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

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

(i) Financial responsibility under this section extends to a loss compensable under AS 46.03.760(e) or 46.03.822 and an assessment under AS 46.03.768, 46.03.759, 46.03.760(a), or AS 46.04.030(g).

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

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

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

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

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

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

(m) A tank vessel or oil barge that is conducting, or is available only for conducting, oil discharge response operations is exempt from the requirements of (c) of this section if the tank vessel or oil barge has received prior approval of the department. The department may approve an exemption under this subsection upon application and presentation of information required by the department. (§ 2 ch 111 SLA 1980; §§ 117, 118 ch 59 SLA 1982; am §§ 7, 8 ch 41 SLA 1989; am §§ 11 — 18 ch 191 SLA 1990; am § 60 ch 21 SLA 1991)

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

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

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

The 1991 amendment, effective June 11, 1991, in subsection (d), deleted "for prosecutions under AS 46.03.760(b) and except" following "Except" at the beginning.

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

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

Opinions of attorney general. — Letters of undertaking are not adequate for proof of financial responsibility under this section. August 28, 1988 Op. Att'y Gen.

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

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