ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
5824 HOUSE JUDICIARY

228

Governor's Revised Proposal

NON-CRUDE ISSUES ADDRESSED IN HB 565 AND HB 567

ISSUE	EXISTING LAW	ADMINISTRATION PROPOSAL 3/15/90
Penalty Levels	**$10/gallon** for anadromous stream or other freshwater environment; **$2.50/gallon** for sensitive or confined saltwater areas; **$1/gallon** for unconfined saltwater, public land or freshwater without significant aquatic resources. Subject to a schedule that varies for toxicity, degradability and dispersal characteristics, as well as receiving environment.	**$12.50/gallon** for any surface or subsurface freshwater environment; **$8/gallon** for sensitive or confined saltwater areas; **$6/gallon** for unconfined saltwater, public land or subsurface land. Subject to the existing schedule that varies for toxicity, degradability and dispersal characteristics.
Exemptions	Spills of less than 18,000 gallons are not subject to penalties under AS 46.03.758.	Spills of less than 18,000 gallons are subject to penalties under AS 46.03.758.
Cleanup Credit	Allows the court to deduct the amount of oil removed from the environment when calculating penalties, with no regard for the length of time involved in the cleanup operation.	Allows the court to deduct the amount of oil removed from the environment within the first 36 hours of a discharge onto surface water or land when calculating penalties. Does not allow any credit for subsurface spills.
Financial Responsibility	SEE ATTACHED CHART	SEE ATTACHED CHART
Contingency Plans	Not required for facilities with less than 10,000 barrels storage capacity.	Not required for facilities with less than 10,000 barrels storage capacity. The department would be given the authority to survey, inspect, and inventory facilities with a storage capacity between 5,000 and 10,000 barrels. The department will report back to the legislature within a year with recommendations to address oil spill prevention and response for facilities under 10,000 barrels.

TABLE 1

Oil Contingency Plan Requirements
Financial Responsibility Requirements
Vessel Inspection

TYPE OF FACILITY	CURRENT FINANCIAL RESPONSIBILITY REQUIREMENTS	SB 504 HB 567	PROPOSED 3/15 REVISION
Crude Oil Terminals			
> 10,000 bbl.	$1 million up to $50 million @ $10/bbl. capacity	$50 million	$50 million
5 - 10,000 bbl.	None	$50 million	$50 million
Non-Crude Terminals			10 to 20,000 bbl. = $5 million
> 10,000 bbl.	$1 million up to $50 million @ $10/bbl. capacity	$50 million	> 20,000 bbl. = $10 million
5 to 10,000 bbl.	None	$1 million	None
Offshore exploration and production facilities	$35 million	$50 million	$50 million
Crude Oil Tank Vessels and Barges	TAPS = $14 million, Non-TAPS = $20 million. TAPS covered for an additional $86 million per vessel.	$500 million	$500 million
Non-Crude Oil Tank Vessels and Barges	Tank Vessels = $20 million, Barges = $1 million	$20 million	< 5,000 bbl = None 5,000 to 10,000 bbl = $ 5 million 10,000 to 50,000 bbl = $1 million 50,000 to 100,000 bbl = $10 million 100,000 + bbl = $20 million

Note: the following notes are not based on a comprehensive review of vessels and facilities; rather, they are examples of how the proposed revisions might affect some operators.

Currently there are 6 Tanker Vessels chartered by Petro-Diamond and Petro-Marine that are under 50,000 bbl. capacity and are required to have $20 million coverage. Under proposed revisions of 3/15 their Financial Responsibility requirement would drop to $1 million.

From information provided in contingency plans, all of Yutana Barge Lines barges are under 10,000 bbl., therefore their Financial Responsibility requirement would be cut in half to $500 thousand.

Crowley has 10 barges listed at over 100,000 bbl., but they are covered by surety bond and not a regular insurance policy.

United Marine Tug and Barge, Inc. has at least 2 barges over 50,000 bbl., so their coverage would increase from $1 million to $10 million.

HB 565

773-90-0051

SECTIONAL ANALYSIS

The following is a sectional analysis of the bill that strengthens civil penalty and damage provisions.

Section 1 modifies the legislative findings in the non-crude oil damages and penalties provision (AS 46.03.758(a)) to make the findings consistent with the changes in this bill.

Section 2 increases the maximum per gallon civil penalties for non-crude oil discharges into various receiving environments and authorizes the Department of Environmental Conservation ("DEC") to adopt in regulations a schedule of penalties applicable to each type of receiving environment.

Section 3 provides that for non-crude oil discharges into multiple receiving environments, the penalty value applicable to the most sensitive receiving environment applies unless the defendant establishes the amount of oil which entered each receiving environment.

Section 4 removes the penalty exemption for non-crude oil discharges of less than 18,000 gallons.

Section 5 allows a defendant to deduct the number of gallons of non-crude oil recovered within 36 hours after a non-crude oil spill for penalty calculation purposes.

Section 6 reenacts AS 46.03.758(i) to allow a person who pays a civil penalty under AS 46.03.758 to set off the amount paid against a civil penalty awarded under AS 46.03.760(a). Section 8 also provides that an AS 46.03.758 civil penalty award does not affect DEC's authority to recover damages, restoration expenses, and other costs.

Section 7 amends the crude oil discharge civil penalty provision (AS 46.03.759) to remove the penalty exemption for crude oil discharges of less than 18,000 gallons; increase the AS 46.03.759(c) penalty multiplier from four to five times; allow a person who pays a civil penalty under AS 46.03.759 to set off the amount paid against a civil penalty award under AS 46.03.760(a); and provide that an AS 46.03.759 civil penalty award does not affect DEC's authority to recover damages, restoration expenses, and other costs.

Sections 8 and 9 revise and streamline DEC's major civil penalties and damages statute, AS 46.03.760.

Section 8 raises the minimum civil penalty from $500 to $2,500 per day for each violation, and modifies and expands the

factors the court evaluates in determining the proper amount.

Section 9 modifies the AS 46.03.760(e) damages provision to make it consistent with the changes in sec. 8 and 11.

Section 10 expands the state's authority to recover the attorney fees and costs incurred by the state in DEC enforcement cases.

Section 11 repeals the requirement for legislative approval of the regulations adopted by DEC under sec. 2; removes the AS 46.03.758(g) "mitigation defense" which now allows a court to "reduce or totally eliminate" the civil penalty for non-crude oil discharges; repeals the AS 46.03.760(b) restriction that amounts assessed must only be "compensatory and remedial"; repeals AS 46.03.760(c) as redundant because sec. 8 makes timeliness of compliance a factor for the court to weigh under AS 46.03.760(a); and repeals the AS 46.03.760(f) civil penalty provision as redundant because sec. 8 incorporates the penalties under AS 46.03.760(a).

Section 12 acknowledges that sec. 10 has the effect of changing Alaska Rule of Civil Procedure 82.

Section 13 provides that the Act becomes effective immediately.

D R A F T

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting three bills implementing recommendations made by the Alaska Oil Spill Commission.

One bill authorizes the governor to use the oil and hazardous substance release response fund, established under AS 46.08.010, to respond to declared disaster emergencies under AS 26.23.020(c). The bill also repeals the exception in AS 46.04.080(a) that requires the Department of Environmental Conservation (DEC) to perform the duties of the Division of Emergency Services during a catastrophic oil discharge. Finally, the bill creates in statute the State Emergency Response Commission, presently established by an administrative order.

Another bill extensively revises AS 46.03.758 - 46.03.763, which deals with civil penalties for oil spills. In general, the bill increases penalties for spills and eliminates unwarranted exemptions and defenses.

The third bill strengthens DEC's authority to require compliance with oil discharge contingency plans. Of particular significance is the requirement that applicants for contingency plans must maintain sufficient resources to contain and remove, within the shortest possible time, a realistic maximum oil discharge. Next, this bill increases the financial responsibility requirements for offshore oil exploration and production activities, to guarantee

that in the event of another spill, significant financial resources will exist to compensate damaged parties, including the state. Finally, this bill authorizes DEC to inspect oil industry facilities and tankers to guarantee compliance with contingency plans and to assure structural integrity of the equipment.

Sectional analyses of each bill, describing the bills in detail, are attached.

As you know, the Oil Spill Commission "Executive Summary," issued last month, includes over 50 recommendations. Through this legislation, as well as other bills already under consideration by the legislature (House Bill 409, Senate Bills 359, 421, and 497), most of those recommendations are being addressed. Furthermore, additional legislative proposals based upon these recommendations are still under consideration, and, after review of the full commission report, just released, additional proposals might be forthcoming.

The Oil Spill Commission, after extensive study, has identified several ways for the state to improve its ability to prevent future spills and to better respond if a serious bill occurs again. These bills are critical to prevent another disaster like the Exxon Valdez spill. I therefore urge your serious discussion, consideration, and passage of these measures.

Sincerely,

Steve Cowper

Governor

Testimony before the Alaska Senate Special Committee on Oil and Gas

on SB 503 and SB 504

Walter B. Parker, Chairman
Alaska Oil Spill Commission

1 March 1990

SB 503

In general, SB 503 reflects several of the major thrusts of recommendations by the Alaska Oil Spill Commission. Mainly, it brings oil spill response into the state's emergency response network and mandates strong cooperation between those state agencies concerned with emergency response to hazardous substances, including crude oil and refined petroleum products. Most important, it concentrates on establishing immediate response at the local level, something addressed by several of the commission's recommendations, most strongly Recommendations 27 and 49.

Section 1, 2 and 4

Recommendations 52 and 53 address the need for an immediately available oil or hazardous substance response fund. Broadening the use of the 470 fund and providing the governor with the flexibility to use those funds in addressing oil spills and other emergencies is directly consistent with the commission's intent in these recommendations.

Section 3

The problem the commission wrestled with in the relationships between the Department of Environmental Conservation and Division of Emergency Services was ultimately the determination of who would be in charge of a catastrophic spill response and at what level the response authority of DES would be implemented. Our recommendation on the use of the Incident Command System (Recommendation 48) is our major response to this problem. The key element is having an on-scene commander in each emergency response district that has the authority to bring the Incident Command System into operation.

The bill recognizes DES expertise in communications, logistics, equipment procurement, manpower and community liaison. This is supported by our Recommendations 50 and 51. DEC expertise in providing measurement and evaluations of environmental conditions is in the bill, but their role in directing initial response and later cleanup is not absolutely clear. The commission believed that use of the ICS would clarify the difference between oversight roles and management roles in a response mobilization at any level. It also would clarify federal and private participation in response, beyond the responsibilities outlined in the district contingency plan. In the best of worlds, each district will have a contingency plan that is absolutely clear on what role each party will play. We found that the Incident Command System does the best job of this.

Each district may have different structures that reflect the differences in state agency structure, federal agency structure, local government capabilities and private capabilities. We felt that maximizing the use of existing governmental and private capabilities through the ICS would be the most cost-effective and efficient way to achieve an oil spill response system that can meet the target of responding to a worst-case situation within 72 hours.

The commission did not address the formation of the State Emergency Response Commission. The SERC does carry out the intentions of Recommendations 27 and 49 on local involvement and Recommendations 45 and 50 on allocation of state response authority. Most importantly, it provides the structure for developing effective regional response plans. These plans are the most critical element of the entire response structure because it is in the region that the ability to respond quickly and effectively must be lodged.

SB 504

Section 1

Our Recommendation 55 should be considered. We feel that contingency plans should be based on the ability to respond to a "worst-case spill" within 72 hours. The language in the bill of a "realistic maximum" oil discharge and to remove that discharge "within the shortest possible time" does not provide a firm mandate for private contingency plans. It does not do enough to mitigate the risk oil shipment imposes on residents of adjacent coasts. It is not in line with our overall policy Recommendations 1, 2 and 3.

The requirement that contingency plans be properly implemented is a longstanding loophole that needs to be closed. If private plans are not implemented the government will have to take up the slack or we will have regional response plans whose effectiveness is as suspect as those that failed last March 24.

Section 2

The commission did not address in its report any amounts for financial responsibility. We did make the point in Recommendation 21 that the state should require the shipping industry to insure the state and its citizens against risk and this section carries out that idea.

Section 4

Providing DEC with the authority to inspect tankers, terminals, exploration and production facilities is, in many ways, the most important regulatory prevention measure that must be undertaken if the system is to truly improve. We address this in Recommendation 14, with other aspects addressed in Recommendations 11 and 13.

Recommendations not contained in SB 502, SB 503 or SB 504

Recommendation 9—**Tank farm capacity** at Valdez.

Recommendation 12—**A citizens advisory council** to oversee the safe transportation of oil, gas and other hazardous substances.

Recommendation 16—**State licensing** of private personnel involved in oil transportation.

Recommendation 25—**Harbor Administration.**

Recommendation 47—**A system for emergency economic maintenance.**

Recommendation 57—**In-state research institute.**

STATEMENT OF
MIKE WILLIAMS
Vice President for Environmental Planning & Control
Alyeska Pipeline Service Company
to the
Senate Oil and Gas Committee
on
March 1, 1990

Thank you for inviting Alyeska Pipeline Service Company to describe the Tanker Spill Prevention and Response Plan for Prince William Sound. My name is Mike Williams. I am Vice President for Environmental Planning and Control at Alyeska. Shortly after the EXXON VALDEZ spill, I was transferred by my employer, British Petroleum, to lead the team that developed and implemented Alyeska's new Tanker Spill Prevention and Response Plan that I will describe during my testimony.

My career with BP began in 1958 as an apprentice on board tankers. Ultimately, I earned an unlimited master's license. During the construction of the pipeline, I was assigned to the Marine Department of Sohio.

Alyeska wishes to cooperate with the Legislature in its evaluation and, where appropriate, enactment of the Oil Spill Commission recommendations. We urge, in the process of consideration of any new legislation related to oil spills, that you include comprehensive analysis of federal and state laws. That analysis will be essential to effective, fair and responsible legislation. For the most part, we at Alyeska believe that existing laws provide an adequate framework for prevention and management of oil spills.

and the General Accounting Office, the Commission concluded that it is impossible, given existing technology, to remove all of a catastrophic spill. In a study for the General Accounting Office, ECO, which also provided technical support for the Oil Spill Commission, concluded that if all of the recovery equipment and manpower assembled in Prince William Sound by August last year had been immediately available to respond to the spill, only 35% to 45% of the oil would have been recovered. Few people urge that thousands of people and hundreds of skimmers should be positioned in Prince William Sound, Cook Inlet, southeast and western Alaska to respond if another catastrophic spill occurs.

Instead, most agree with the Oil Spill Commission's recommendation, that in light of the limited ability to recover spilled oil, our first priority should be prevention.

> Prevention is the only way to protect the oceans and coastlines from oil spills. Once it reaches the water, spilled oil is extremely difficult to contain and collect, even under ideal conditions. And the conditions under which oil is spilled are seldom ideal.
>
> General Accounting Office data suggest no more than 10-15 percent of oil lost in a major spill is ever recovered.

AOSC Executive Summary, p. 11

As initial responder on behalf of tankers in Prince William Sound, Alyeska has developed a Tanker Spill Prevention and Response Plan that is being reviewed by the state and federal agencies and the public, in a series of 19 public hearings. Prevention of spills from tankers is the first priority in the

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
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Alyeska's goal is to determine and meet reasonable expectations for prevention efforts and response capability in Prince William Sound. We feel compelled to remind you that even as Alyeska achieves that goal, you still must resolve difficult issues such as the appropriate role for state government in Prince William Sound spill response and the appropriate blend of federal, state and private efforts in the rest of Alaska. During the next year, enactment and implementation of comprehensive federal legislation will establish major new components of a national prevention and response system. Also, the State's planning and response capability mandated last year will be developed during 1990. All involved should strive through coordination and cooperation to achieve maximum benefit from the private and public funds expended.

The Alaska Oil Spill Commission has made several recommendations that are addressed by bills before this Committee. My testimony will describe the prevention and response planning under way at the Valdez Marine Terminal and in Prince William Sound. I will also briefly comment on SB 503 and SB 504. Alaska should encourage prevention and response capabilities that are compatible with other state and federal efforts, are based on achievable, economically realistic standards, and are unambiguous and easily understood by all parties. We at Alyeska are prepared to work with the State to meet those guidelines.

The Oil Spill Commission's report provides an appropriate starting point for your policy deliberations. Like the Coast Guard

and the General Accounting Office, the Commission concluded that it is impossible, given existing technology, to remove all of a catastrophic spill. In a study for the General Accounting Office, ECO, which also provided technical support for the Oil Spill Commission, concluded that if all of the recovery equipment and manpower assembled in Prince William Sound by August last year had been immediately available to respond to the spill, only 35% to 45% of the oil would have been recovered. Few people urge that thousands of people and hundreds of skimmers should be positioned in Prince William Sound, Cook Inlet, southeast and western Alaska to respond if another catastrophic spill occurs.

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plan. A comprehensive risk assessment for Prince William Sound, by a contractor to Alyeska, identified the risks that should be addressed by prevention strategies. Independently of Alyeska's risk assessment and planning work, the Commission's technical experts assessed the risks of spills in Prince William Sound and recommended appropriate prevention strategies.

As shown in the following table, Alyeska has implemented ECO's prevention strategies that are directly applicable to Alyeska.

Before describing the tanker plan for Prince William Sound, I would like to make a few additional comments on the Commission's report.

While reviewing legislation based on the Commission's recommendations, you must independently evaluate the direct and indirect costs to the state. During earlier testimony, Commissioners estimated that implementation of all of its prevention recommendations for Prince William Sound would cost six cents per barrel. Alyeska's prevention and response costs already exceed that level. Not counting administrative and capital costs, we are now spending around $44,000,000 per year, which equals over seven cents per barrel at an average throughput of 1.9 million barrels per day. That cost per barrel will rise with inflation and declining throughput. Many believe that other areas cannot support the level of protection now in place for Prince William Sound. Obviously, important public policy issues are involved as the Legislature establishes standards for industry and makes appropria-

tions for oil spill programs. We hope that before creating new programs, you determine whether existing ones, with adequate funding, can be molded to meet new demands.

Alyeska agrees with the Commission's conclusion that regulation of industry should meet the expectations of Alaska citizens. In our opinion, the best way to achieve this goal is through a constructive professional relationship between industry and its regulators. We agree with Commissioner Parker's testimony last night that liability is not an effective enforcement tool. To establish and maintain a constructive relationship between the state and industry, regulations must be rational, scientifically based, and predictable. It is critical that agencies - especially the DEC - are adequately funded. Without adequate funding, the DEC is unable to develop and implement clear and concise regulations. Without adequate funding, the agency cannot employ enough qualified employees to interpret and enforce these regulations across all walks of industry. Without good, clear, concise and scientifically accurate regulations, it is difficult -if not impossible - for industry to operate free of controversy with an agency. With funding, both sides benefit.

On the subject of our relationship with the DEC, Alyeska desires to establish a constructive relationship consistent with the need for safety and our prerogative to make daily operational decisions. The Commission has expressed concern about DEC access to the Valdez Marine Terminal. During discussions in November 1989 with DEC personnel in Valdez, we renewed our commitment to provide

TABLE VI-2. COSTS ASSOCIATED WITH
PRINCE WILLIAM SOUND MARINE TRANSPORTATION SYSTEM
MODIFICATIONS *

SYSTEM MODIFICATION	ALYESKA PREVENTION EFFORTS
GROUP I	GROUP I
1. Mandatory Drug and Alcohol Testing	1. Alcohol testing for Masters and Crew
2. Emergency and High-risk Navigation Area Training	2. Endorse Navigation Committee
3. Port Closure System	3. Endorse Navigation Committee
4. Two Person Watchstanding Requirement	4. Vessel prerogative
5. Improved Loading/Unloading Procedures	5. All vessels boomed at Terminal; booms monitored
6. Local Spill Prevention Involvement	6. Regional Citizens Advisory Committee; Area and Community Response Centers
7. Spill Response Equipment Coordination	7. Incident Command System; predesignated call out, including contracts with fishermen
GROUP II	GROUP II
1. Vessel Monitoring System	1. Support mandatory Vessel Traffic System
2. Traffic Separation Lanes with One-Way Traffic	2. Vessels to stay in lane; reduce speed if encounter ice. One way traffice in Valdez Narrows
3. Designated Anchorage Areas	3. In Spill Prevention and Response Plan
4. Emergency Response Pollution Control Vessels	4. Five ERV's in Valdez. Two vessels escort laden tankers
5. Improved Loading/Unloading Design	5. Will review when full response available
GROUP III	GROUP III
1. Improved Tanker Design	1. Issues for tankers

* Reproduced based on Table VI-2, ECO Report to Alaska Oil Spill Commission

rapid, escorted access to the DEC in Valdez that would not delay or impede legitimate regulatory processes. Recently, I have discussed access with DEC officials and believe we will agree that DEC employees will be allowed to proceed immediately, without escort, to vessels or to an office on the terminal provided by Alyeska. Escorts to other areas from the DEC office on the terminal will be provided within 10 minutes of the request. In turn, we believe that local and state government agents should conduct an exit interview after inspecting a facility and should, as a matter of course, provide written documents generated as a result of a site visit. We anticipate receiving this cooperation from the DEC in the future.

Alyeska also agrees with the Commission recommendation that the company employ an executive whose principal responsibility is to achieve compliance with environmental regulations. That is my job which Alyeska's new President, Jim Hermiller, created last fall. Alyeska has created a new division, which I head, employing approximately 50 people with an additional 100 people employed under contract as crews on the Emergency Response Vessels and as spill response workers. For the past nine months, I have focused much of my energy on directing the development of a new spill prevention and response plan for Prince William Sound. I am also responsible for environmental compliance company-wide and will provide internal review of contingency planning and preparedness and response to spills.

I would like to summarize the prevention and response systems that I mentioned earlier. State and federal law places liability and clean up responsibility for an oil discharge on the spiller - in this case a tanker owner/operator. As operator of the pipeline, Alyeska has no direct affiliation with tanker owners and operators. However, to centralize prevention and initial response efforts on behalf of those tankers, Alyeska has developed the Prince William Sound plan. Once approved, the Tanker Spill Prevention and Response Plan developed by Alyeska will be incorporated into tanker contingency plans that must be approved by the DEC for each vessel in the TAPS trade. Alyeska will contract with the vessels to provide this service. Those contracts and the vessel plans will prescribe an orderly transition of spill response management from Alyeska to the vessel in the event of a large spill. An overview of the plan is submitted for your reference. One copy of the three volume plan is provided to the Committee.

Alyeska agrees with the Commission that recovery of all the oil from a catastrophic spill is impossible and, therefore, prevention is the first priority. Programs to prevent tanker accidents in Prince William Sound include:

1. Tanker crew members returning from shore leave are tested for alcohol if their conduct or breath odors indicate consumption.
2. Tanker masters are given a breathalyzer test within one hour prior to sailing.

3. Drug testing will be implemented once federal regulations are in place.

4. Alyeska installed new communications sites in Prince William Sound in order to maintain radio contact with tankers in the Sound.

5. Each laden tanker is escorted in Prince William Sound by two vessels that have the capability to tow a fully loaded tanker. This system proved its effectiveness when the vessel Atigun Pass lost power in the vicinity of Bligh Reef and was taken under tow by its escorts.

6. Alyeska supports Coast Guard operation of an appropriate Vessel Traffic System in Prince William Sound.

7. Through its escort system, Alyeska has obtained tanker agreement to abide by traffic rules in Prince William Sound, including a 10 knot speed limit, no deviation from traffic lanes, and a decrease in speed when ice is encountered.

8. Alyeska will not provide escort services if the weather in the Sound would appear to create unacceptable safety hazards for personnel on the ERV. Through this approach, Alyeska is in effect saying tankers will not sail in bad weather. We are building an experience base to determine the safe operating conditions. Presently, if bad weatner

develops during the transit of the Sound, the Coast Guard and the masters decide how to proceed.

9. We are working with the Coast Guard to develop rules governing tanker operations in the port area during adverse weather conditions.

Prevention strategies must be backed up by appropriate oil spill response strategies. Alyeska's strategies are based on the assumptions that oil will spread rapidly once it is on water, and that weathering and changing environmental factors make recovery more difficult as time passes. If a spill occurs, our initial strategy will be to control the oil as close to the source as practical. Then we will endeavor to remove the oil quickly, prior to weathering or loss of control due to weather or sea conditions.

To enable these two fundamental strategies, booming and skimming equipment is kept in proximity to laden tankers traveling through the Sound. Under the tanker plan, response capability includes:

1. Rapid response with booms and sea skimmers from at least one of the escort vessels.
2. Additional large scale skimming and lightering capability from vessels anchored in Prince William Sound midway along the tanker route.
3. Additional ocean skimming equipment and response material in Valdez.

4. Pre-positioned equipment and pre-trained spill responders in communities and hatcheries.

5. Larger stockpiles of dispersants and Alaska-based application equipment.

6. Larger stockpiles of fire boom and igniters for in *situ* burning.

Alyeska's response to a tanker spill will utilize the Incident Command System (ICS), recommended to us by Prince William Sound communities and wholeheartedly endorsed by the Oil Spill Commission. This ICS will be tailored to facilitate coordination between industry and government response efforts and to structure transition of response management from Alyeska to the spiller. Alyeska held its first major desk top drill of the Incident Command System in Valdez the last week of January 1990. Alyeska, shippers and government personnel, along with representatives of potentially impacted communities participated in, and critiqued, the drill. It may be of interest for you to know that BP used the ICS system developed by Alyeska in its successful response to the Huntington Beach spill.

It is essential to note that despite our desire and commitment to prevent an oil spill, or to clean up as much oil as possible after a spill, there can be no guarantee that all accidents will be prevented or all spilled oil recovered. Nonetheless, we believe the prevention and response systems now in place are second to none.

Alyeska is funding and working with an independent citizens advisory committee that represents a cross-section of the concerned communities, to evaluate these new measures and assist our training and diligence. Our goal for Alyeska is to meet our responsibility to the people of Alaska while operating the pipeline efficiently. We are receptive to your suggestions, on behalf of your constituents.

I would like to conclude with a few general comments on SB 503 and SB 504.

SB 503. At the urging of Prince William Sound communities, and with the support of the Commission, Alyeska has developed an Incident Command System to organize its response to tanker spills. The system will be used to manage industry response internally, coordinate it with federal and state response to a spill and establish the capability for rapid, military style decision making. However the state allocates response capability, state responders should be at least as well trained as their industry and federal counterparts and should be prepared to make decisions as rapidly as necessary. This may require making decisions based on limited information or based on tradeoffs that seem appropriate at the time. State and regional plans should be designed to effectively integrate the state response with other efforts. Industry should be encouraged to participate in all of the state's response planning and on commissions that oversee the government effort.

SB 504. Alyeska's primary concern with this bill is what response capability will be required. Last night, Walt Parker, Chairman of the Oil Spill Commission, reiterated that complete removal of a catastrophic spill is an unachievable goal with existing technology. As a result, you must establish a policy that will create achievable standards applicable throughout Alaska. Alaska law should encourage and nurture prevention. After prevention, we would suggest that on hand response capability focus on the most likely spills. In addition, in Prince William Sound, we are preparing for another catastrophic event of 250,000 barrels. Because of numerous variables, neither Alyeska nor the tankers can guarantee removal of all the oil spilled. With the civil and criminal penalties in place, no responsible business would guarantee recovery of a large spill. If legislation requires unattainable performance guarantees, our operation would end and the state would be presented with the difficult goal of meeting its energy needs when businesses are not capable of providing guarantees for movement of refined and crude petroleum.

Rather than seeking unachievable guarantees for worst case spills, the state should require transporters to have realistic crisis management plans that detail equipment and manpower mobilization for response in the event of a worst case spill. Rather than requiring a replication of these large scale mobilization plans for each facility and vessel covered by this legislation, the state's master plan should provide a system to be utilized by all in the state. This could be achieved by a coopera-

tive planning effort between transporters and the state. The final crisis management plan could be incorporated into each individual plan.

After we hear more about this legislation from the administration, we would appreciate the opportunity to comment further on specific issues that are of concern.

Thank you for the opportunity to testify this evening.

BP EXPLORATION (ALASKA), INC.
Testimony Before the House Resources Committee
March 9, 1990

Good afternoon, my name is John Ringstad. I am representing BP Exploration (Alaska). Thank you for giving BP the opportunity to comment on House Bills 565, 566 and 567. While most of BP's comments ' be directed towards this legislation, it is important to understand that oil spill legislation combined with other state and federal actions, will implement Alaska's total oil spill response program. To accurately judge any piece of legislation, the entire program must be viewed as a whole. Therefore, my comments also address the general subject of laws affecting oil spill response.

HB 565

use Bill 565 increases the penalties on all oil spills. BP Exploration doesn't handle any refined productions in Alaska, so a good portion of this bill doesn't apply directly to us. BP does believe, however, that these types of penalties would be very damaging to many smaller businesses in Alaska who do distribute refined oil products.

Imposition of the required penalties on crude oil and refined product spills of any size (by deleting the 18,000 gallon minimum) will discourage additional development of marginal oil reserves, result in increased paperwork and discourage the reporting of all spills as we now do.

HB 566

Portions of House 566 attempt to implement recommendations made by the Alaska Oil Spill Commission. BP supports the Oil Spill Commission's recommendation that the Division of Emergency Services be given primary responsibility to respond to an oil spill. The Division of Emergency Services, as part of the Department of Military and Veteran's Affairs, uses a military command structure and has experience in dealing with complicated logistics and supply problems. This type of experience and operational command is exactly what is needed in an oil spill response. Experience plus a clear and effective chain of command will promote prompt decisions and a rapid response to a spill.

While the Department of Environmental Conservation has scientific and technical expertise, it is not as well equipped as the Division of Emergency Services to deal with the logistics of responding to a spill. Consequently their services should be used to provide the Division of Emergency Services with scientific and technical direction, in coordination with the applicable facility, regional or state oil spill plan as ultimately developed by the DEC. As the Oil Spill Commission recommended, the Division of Emergency Services should be the lead State Agency for oil spill response.

House Bill 567

House Bill 567 seeks to strengthen oil spill contingency requirements, increase financial responsibility requirements, and give the Department of Environmental Conservation the authority to inspect

the structural integrity of tank vessels and oil barges. Viewed in the abstract, these goals are reasonable. However, when the bill is examined section by section, it becomes increasingly apparent that these new provisions are unreasonable as well as impractical.

1. Delays in Reviewing Oil Spill Contingency Plans. In the past, the DEC has not been able to review or approve oil spill contingency plans in a timely manner. For example, since January 1988, BP has had its Prudhoe Bay and Endicott oil spill contingency plans pending before the DEC. If HB 567 was enacted tomorrow, both fields would be required to cease operations because the spill contingency plans had not been approved. While the extensive administrative discretion incorporated in HB 567 might permit waivers to be granted by the DEC, essentially HB 567 relinquishes all decisions about the operation of oil terminal facilities and tanker vessels or oil barges to the DEC. BP believes that the DEC is not the appropriate agency to exercise such discretion. Further, any legislation which links continued operation of a facility with approval of the oil spill contingency plan should also contain provisions which force approval of submitted plans within a definite time, and which outlines the contents of an acceptable plan.

2. The Cleanup Standard. Subsection (f) of Section .030 requires the permittee to maintain "in its area of operation . . . sufficient oil discharge containment, storage, transfer, and

removal equipment, manpower and resources to rapidly contain a realistic maximum oil discharge and remove that discharge within the shortest possible time." A maximum oil discharge is further defined as the DEC's estimate of the maximum and most damaging oil discharge that could occur during the life of a facility. The magnitude of oil produced from North Slope fields and the immense volume of oil transported through TAPS make literal application of this provision impossible. Even though significant changes have occurred in cleanup capability at the Valdez terminal, the concept of maintaining equipment and manpower equal to what was required during the Exxon Valdez disaster across the entire North Slope and along the entire length of the pipeline is simply unworkable.

3. Financial Responsibility. While it is desirable to require proof of financial responsibility for operators of facilities subject to this legislation, the increase in limits and the use of ambiguous language in the legislation combine to make it difficult, if not impossible, to implement the provisions of the bill. For example, the legislation requires that the limits be on a "per incident" basis but the meaning of this phrase is not defined in the bill. The Committee should also be aware that the continued operation of the facilities covered by the legislation is conditioned upon obtaining proof of financial responsibility. Consequently, the feasibility of insurance should be understood before a provision of this nature is adopted.

4. Inspection of Tanker Vessels and Oil Barges. The U.S. Coast Guard currently inspect tanker vessels and oil barges; this legislation would establish a second regulatory regime requiring inspection by the DEC, an agency with no previous experience in this area. Inspection of tanker vessels and oil barges is a specialized, complicated and sometimes dangerous process requiring entry into the compartments where oil is stored. The legislation provides no guidelines for the methods or frequency of inspections to be provided by DEC. Further, there is no evidence of appropriate fiscal or manpower resources within DEC to implement such a program. Rather than renewed testing of the limits of Alaska's jurisdiction in this area, a more constructive approach would be to require close cooperation between the Coast Guard and the DEC concerning the approval of tanker vessels.

In closing, BP hopes that this committee view the entire oil spill legislative and regulatory program before enacting specific pieces of legislation. BP will continue to help and assist in this process.

COMMENTS ON SB 502, SB 503, AND SB 504

GOVERNOR COWPER'S OIL & GAS LEGISLATIVE PACKAGE
AND SB 468

PRESENTED TO THE SENATE SPECIAL COMMITTEE ON OIL & GAS

MARCH 5, 1990

MICHAEL S. O'MEARA

P.O. BOX 1125, HOMER, ALASKA 99603

I was very pleased to see the Governor's oil and gas legislative package introduced. It is disappointing, however, that prior to introduction he chose to present the bills to industry alone for critique. This bodes ill for the greater public oversight and participation recommended by the Alaska Oil Spill Commission. Happily, you have taken a step in the right direction by scheduling these teleconferences at a time convenient for the working public. Let me commend you and thank you for the opportunity to express my views.

In a recent presentation to the Homer Chamber of Commerce, Exxon's Don Carpenter explained that it was company policy to comply with the "letter of the law", not the "spirit of the law." High officials from British Petroleum and other corporations have reflected the same commitment on a number of occasions.

If nothing else does, this should bring home the need to reform that body of law governing oil industry operations in Alaska. Some of the legislative reforms which I feel should be enacted are touched upon in the Governor's bills.

1. Increase, broaden, and clarify civil and criminal penalties for parties responsible for chronic and catastrophic spills of petroleum and other hazardous substances.

2. Require effective, coordinated response planning for both industry and government.

3. Require full financial responsibility for operators of oil & gas facilities and vessels.

4. Strengthen and clarify the authority of regulatory agencies to inspect oil & gas facilities and vessels.

5. Improve the ability of regulatory agencies to assure compliance with health, safety, and environmental regulations and lease or permit stipulations.

6. Provide adequate funding for more effective spill prevention and response capabilities.

To the extent that these bills would help realize these reforms, I support them. In reading over them it became obvious that in a number of ways they fall short of doing so, and of course, there are important areas of concern beyond their scope which must be addressed as well. For now I will confine my comments to suggestions regarding the reforms enumerated.

There are a number of important omissions in the Governor's package. At least twelve of the Alaska Oil Spill Commission's recommendations have not been addressed -- as follows:

1) Seven day tank farm capacity (PG. 18)

2) Establish a harbor administration office (PG. 28)

3) Establish state (PG. 21) and Regional advisory councils (PG.29) and they should represent local governments (PG. 29)

4) Licensing of all transportation safety personnel (PG. 24)

5) Compensation for persons impacted by oil spill who are not protected by unemployment insurance (PG. 44)

6) Regional and State oversight council (PG. 21)

7) Government space at Alyeska or other major terminals (PG. 24)

8) Task force on the environmental safety of pipeline (PG. 27)

9) Interstate compact (PG. 25)

10) Provision for citizen lawsuits (PG. 23)

11) Quick response (PG. 44)

12) Plans to cover worst-case scenarios (PG. 52)

Another important area that has not been considered in the present bills is the matter of criminal penalties. The State House has done so with HB 315 and HB 316, and it is my hope that the Senate will be supportive of this issue.

A major flaw in the liability legislation passed last spring was the exemption of refined products. As far as I can tell, the Governor's bills do not correct this error. It seems vital to me that all spill related law include both crude oil and refined product.

Now to specific bills (2/21/90 -- go00510s, go00520s, go00530s)

SB 502 CIVIL PENALTIES AND DAMAGE PROVISIONS

Page 2, Sec. 2, Lines 24 & 25

The wording "penalties...may not exceed" should be changed to read, "penalties...shall be set at"
At the very least, if a maximum penalty is to be stated, then a minimum penalty should be stated as well. As written, application of penalties in discretionary.

Page 4, Sec. 3, Line 1

I am pleased to see that the language exempting spills of 18,000 gallons or less has been stricken. Penalties should apply to all spills regardless of size.

Page 7, Sec. 8, Lines 20-25

This seems to relate to the same statutes as HB 409. It might be to incorporate language from that bill here -- especially with respect to administrative penalties.

SB 503 AUTHORIZING USE OF HAZARDOUS SUBSTANCE RELEASE RESPONSE FUND/ROLE OF ADES/ESTABLISHING EMERGENCY RESPONSE COMMISSION

The first thing that this bill should do is increase the size of the response fund to a minimum of $1 billion.

This bill should incorporate language from HB 421, broadening the uses for the fund to cover many of the costs associated with prevention and response preparedness.

Page 1, Sec. 2, Lines 22-25

This language should be clarified to assure that the fund can be used only for prevention of and response to oil and hazardous substance disasters.

Page 2, Sec. 5, Lines 18, 19, 22, & 23

It is unclear exactly what the role and authority of the Alaska Division of Emergency Services is with respect to the A.D.E.C. and other agencies. This needs to be made clear.

Page 2, Sec. 6, Lines 26-28 and on...

Again, this is all very unclear. We need to have a clear understanding of the relative authority, responsibility, and working structure involving:

1. The Alaska Div. of Emergency Services
2. The Alaska State Emergency Response Commission
3. The A.D.E.C. Oil Spill Response Office, its response corps and depots
4. THE DEPARTMENT OF MILITARY AND VETERANS AFFAIRS

We need to know who is in charge. A single administrative presence with clear authority to direct all response activity is vital. Experience shows that we cannot do this by a committee of peers.

Page 3, Sec. 6, Lines 16-21 and Page 5, Sec. 6, Lines 8-11

Do the "emergency planning districts" correspond to the areas covered by the "regional contingency plans"? Will the commission take over direction of contingency plan and response office office development started by A.D.E.C.? This is very confusing and we really need to get it worked out before we have to deal with another emergency.

-- page 6, O'MEARA --

HB 504 CONTINGENCY PLAN REQUIREMENTS/FINANCIAL RESPONSIBILITY/ INSPECTION AUTHORITY

Page 1, Sec. 1, Lines 13, 20, and 23

The bill requires a contingency plan for operation of oil terminals, oil platforms, and tank vessels or barges. I would suggest that it should also require such a plan for operation of refineries, pipelines, and onshore facilities.

Page 2, Sec. 1, Lines 11-16

There should a provision for public as well as agency oversight of contingency plan approval or modification. Citizen oversight and advisory councils as suggested on pages 21 and 29 of the Alaska Oil Spill Commission's executive summary could fulfill that role.

Page 2, Sec. 1, Line 22 and Page 3, Line 3

Requiring response to a spill in the "shortest possible time" is a fine idea, but I think we need to have some clarification as to what that means. It would be helpful if we could tie it down a bit more.

Page 5, Sec. 2, Lines 20 & 21

Given the great costs associated with oil spills, it would seem that demonstration of financial responsibility greater than $500 million is called for. I would suggest raising the minimum to $1 billion for tank vessels and barges.

Page 6, Sec. 2, Lines 15-17

There are only two ways to be sure of actual financial responsibility -- through bona fide insurance or by posting bond. These should be the only acceptable proofs of financial responsibility. I suggest all other so-called proofs be deleted from this bill.

Page 8, Sec. 4, Line 9

Clarification of rights of access for regulating agencies is very important and I am pleased to see this language. It does seem related to language in HB 409, and I would suggest adding the more comprehensive provisions from that bill here. I would also repeat my previous suggestion that provisions of this bill apply to refineries, pipelines, and all onshore facilities as well as those already cited in the bill.

PLEASE — NO LIMITS ON "REALISTIC MAXIMUM OIL DISCHARGE" OIL IS OIL! WE MUST BE PROTECTED NO MATTER WHO IS INVOLVED. COST SHOULD NOT BE A FACTOR.

That concludes my remarks on these bills for now. Thank you again for you effort in bringing them before the public. I would appreciate being kept apprised of further work on these bills as well as introduction of other legislation dealing with oil and gas reform.

P.S. — I JUST GOT A COPY OF THIS BILL, SOOOO...

SB 468 DUTIES OF — DEPT. OF MILITARY AND VETERANS AFFAIRS DEPT. OF ENVIRONMENTAL CONSERVATION IN RELATION TO OIL, ETC.

IT APPEARS THAT THIS BILL IS AN ATTEMPT TO ORGANIZE A VERY CONFUSING SITUATION I AM IN FAVOR OF THAT.

PAGE 1, SECTION 1, LINES 13-17

THIS IS CONFUSING. IT SAYS THAT ~~DMVA~~ ADES SHALL ESTABLISH THE OIL AND HAZARDOUS RESPONSE OFFICE — LAST YEAR SB 264 WAS PASSED CHARGING ADEC TO DO THAT. SB 503 SEEMS TO CHARGE ADEC TO DO THAT ALSO, THROUGH FORMATION OF THE ALASKA STATE EMERGENCY RESPONSE COMMISSION. WHO IS IT? WHO IS IN CHARGE. SEE MY COMMENTS ON SB 503.

PAGE 2, SECTION 3, LINES 11-17

IT SEEMS HERE THAT THE DIVISION OF EMERGENCY SERVICES IS THE LEAD AGENCY. IS THAT CORRECT? WHO IS THE ADMINISTRATOR WITH ULTIMATE AUTHORITY TO DIRECT COORDINATED SPILL RESPONSE?

PAGE 3, SECTION 5, LINES 21 AND 26-29

- GOOD THAT PLANS WILL BE SUBMITTED FOR PUBLIC REVIEW.
- GOOD THAT UNANNOUNCED DRILLS WILL BE REQUIRED

PAGE 4, SECTION 7, LINES 10-27

- GOOD THAT YOU WISH TO EXPAND USE OF FUND THIS IS SIMILAR TO LANGUAGE IN SB 503 AND HB 421 — THESE BILLS SHOULD BE COMBINED. SEE MY COMMENTS ON SB 503.

I WOULD SUGGEST THAT THE FUND MIGHT ALSO BE USED TO FUND A STAFF OF DEDICATED MONITORING

4AND
PAGE 5, SECTION, 8

Page 8, P. O. means

THIS SEEMS TO FINE TUNE PROVISIONS IN LAST YEAR'S SB 264. IS THAT TRUE?

Oil Reform Alliance

HOUSE JUDICIARY COMMITTEE

HB565

April 5, 1990

My name is Riki Ott. I am a commercial fisherman from Cordova. My training is in marine toxicology. I have a masters degree in oil pollution and a doctorate in sediment pollution. I am testifying as President of the Oil Reform Alliance.

The Oil Reform Alliance is a grassroots coalition of fishermen, environmentalists, tourism and business people - citizens - who combined efforts after the Exxon Valdez spill to work on reforming both state and federal policies on oil.

The Oil Reform Alliance supports HB565 with amendments.

Prevention of future oil spills starts with attitude changes and attitudes are influenced by penalties. The penalty structure should strike a balance between being too low, so as not to deter potential polluters, and being too high, so as to impair ability to operate.

It is clear from the compliance records that Alaskan laws are far too lenient: the penalty structure is not deterring polluters.

A report entitled, "An Environmental Compliance Audit of the Oil and Gas Industry Kenai, Alaska," concludes that violations of pollution control laws [by the Nikiski petrochemical industry] are a frequent occurrence. Some industries have chosen to simply ignore existing laws, others violate them on almost a daily basis."

Further, "laws with sole federal jurisdiction have the best compliance record. Federal laws the state is authorized to enforce have a poor compliance record. [While] State laws without federal jurisdiction are almost without compliance or enforcement."

This study was funded by the Alaska Conservation Foundation and is the first such study to comprehensively evaluate the pollution discharges, record of violations, and

enforcement record for the Nikiski petrochemical industry, an industry which has been operating for over thirty years.

Lack of compliance with state environmental laws has lead to unacceptably high public risk in the Fairbanks area from extensive contamination of groundwater, including drinking water, with fuel. This report entitled, "A Citizen's Guide to Hazardous and Toxic Waste Sites of Fairbanks, Alaska," shows that 25 of the 33 study sites involved some form of petrochemical pollution.

While these two studies were funded by citizen advocacy groups, I also have the compliance chronology of both the MAPCO and Tesoro oil refineries, according to EPA and DEC records. The chronology partially elucidates why we have chronic petroleum pollution in the Fairbanks and Kenai areas.

After the Arthur Kill fuel oil spill of 567,000 gal, the governors of NY and NJ stated: "The oil industry is NOT doing enough. We need greater public scrutiny of current industry practices. Industry explanations for these spills are no longer sufficient.".

But industry explanations for spills are all that we Alaskans are going to get until we enact stiff penalties to provide a strong incentive for safer handling of these hazardous substances.

The civil penalties for non-crude oil as amended by the Administration do NOT go far enough towards providing strong incentives. (Here, I'm on page 2, lines 25-29, and page 3, lines 1-3.) I also have a chart attached to my testimony which details that which I'm about to explain.

The penalties in the bill before you establishes fines of $12.50/gal of oil discharged in a freshwater environment, $8/gal of oil discharged in a confined marine environment, and $6/gal of oil discharged in an unconfined marine environment. For the sake of the following discussion, let's refer to these penalties as $12.50-$8-$6. Now stick with me.

The current penalties, as set in 1978, are $10-$2.50-and $1. There was no mechanism established in statute then to inflation-proof these penalties. Should there have been such a mechanism in place, the 1978 penalties would be equal to $20-$5-$2, based on the national consumer price index.

The amended penalties of $12.50-$8-$6 do not even keep pace with inflation, for fines in freshwater environments, and are just barely better than inflation-proofed rates for fines in marine environments. These penalties are not the

extensive revisions and strong incentives for safe handling of oil as originally proposed by the Administration.

The Cowper Administration originally proposed penalties of $50-$50-$25 per gallon of oil spilled into the different receiving environments. This is very similar, in intent and magnitude, to the penalties proposed in 1977 by the Hammond Administration of $50-$25-$10.

The legislative history of how we arrived at the current penalty structure of $10-$2.50-$1 from the Hammond Administration's original proposal is very well documented in a final report dated January, 1989, prepared for the Institute of Marine Studies, University of Washington, and entitled, "Oil Spill Liability and Compensation: A Review and Evaluation of Alaska's Civil Penalty Scheme."

The historic perspective reveals that the Administration and legislature, quite frankly, succumbed to the arguments of industry lobbyists. And now history is in danger of being repeated. The Administration has already buckled to industry pressure.

We propose that committee members adopt the civil penalties originally proposed by the Hammond Administration by replacing on page 2, line 25, $12.50 with $50, on line 28, $3.00 with $25.00, and on page 3, line 1, $6.00 with $10.00.

Further, we propose that the Hammond Administration proposed penalty structure for noncrude oil is then adopted for crude oil by replacing the language on page 6, lines 1-6, with the amended language on page 2, lines 25-29, and page 3, lines 1-3.

We support price indexing these civil penalties as provided in HB565.

We ask committee members to not follow the lead of the Administration. Don't buckle to industry pressure as the Administration did. Support the ideals originally set forth by two different administrations over a span of 13 years. Set higher civil penalties and chart this state on a new course of meaningful incentives for safer handling of oil.

Thank you for the opportunity to testify.

COMPARISON OF

CIVIL PENALTY STRUCTURES

FOR NONCRUDE OIL

Rec'ing Environ.	Current Law	1977-1990 with CPI	1977 Hammond	Amended Cowper	Original Cowper
FRESH	$10	$20	$50	$12.50	$50
MARINE confined	2.50	5	25	8	50
MARINE unconfined	1	2	10	6	25

CPI: Consumer Price Index

NOTE: The Oil Reform Alliance recommends adopting the civil penalties originally proposed by the Hammond Administration in 1977 (1977 Hammond, above) for both crude and noncrude oil.

HB565 PROPOSED AMENDMENTS

April 5, 1990

Amendment #1
Page 5, line 28, delete [UP TO A MAXIMUM OF $500,000,000].

Justification: legislature found that "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" as per language in Sec. 1 pages 1-2, lines 28-2. Unlimited liability provides such an incentive.

Amendment #2
Page 6, lines 8-9, delete: "[SUBJECT TO THE $500,000,000 MAXIMUM SET UNDER (a) OF THIS SECTION]

Justification: same as for #1 above.

Amendment #3
Page 2, line 25, replace "$12.50" with "$50.00".

Page 2, line 28, replace "$8.00" with "25.00".

Page 3, line 1, replace "$8.00" with "10.00".

Justification:
See #1 above, and these were penalties originally proposed by Hammond Administration in 1977 and are very similar in intent and magnitude to original proposal of Cowper Administration. Historic perspective reveals that Hammond Administration and legislation succumbed to arguments of industry lobbyists. History is in danger of being repeated. We need meaningful incentives for safer handling of oil.

Amendment #4
Page 6, lines 1-6, delete entirely and replace with language identical to that on page 2, lines 25-29, and page 3, lines 1-3 as amended above:

"(A) $50 per gallon of oil that enters an anadromous stream or other freshwater environment with significant aquatic resources;

(B) $25 per gallon of oil that enters an estuarine, intertidal, or confined saltwater environment;

(C) $10 per gallon of oil that enters an unconfined saltwater environment, public land, or a freshwater environment without significant aquatic resources."

Justification: See #1 and #3 above. Also, raising the penalties for illegal discharges of crude oil to equal that of products oil eliminates the justifiable arguments of operators with refined products that this bill makes it more expensive for them to spill their product.

Amendment #5
Page 2, lines 24 & 25, amend to read: "(1) Subject to (2) of this subsection, the penalties for the following categories of receiving environments may not exceed, nor be less than 75% of:"

Justification: this ensures that penalties will be substantial, yet gives DEC the ability to apply its penalty matrix with some flexibility.

HB
565 GRUENBERG

Prepared for

The Oil Spill Damage Assessment Study
Institute for Marine Studies
University of Washington
Seattle, WA 98195
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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

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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

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1. David W. Abecassis, 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 1501 et. seq; Florida Statutes Section 403.165; 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., Dower, Roger C., Menefee, 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).

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		

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

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

[3] DISP: 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.

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

[8] For 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.

[9] Id. at p. 6.

[10] Id. at p. 8.

TABLE 1 (Cont.)

OIL TYPE	TOX	DEG	DISP	%(W/O)	%AR	%(W)
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		

[11] In 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 crudes. 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 Application of the 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).

[12] See Supra note 9 at p. 21. (Percentage of aromatics for Bunker 'C').

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 1986[2] (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]

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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 9601-9675.

3. Section 301 (c)(1), 42 USC Section 9651 (c)(1). The president delegated this responsibility to the DOI. See Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (Aug. 14, 1981), later superseded by Exec. Order No. 12,580, 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. 86-1529 and Consolidated Cases, U. S. Court of Appeals for the District of Columbia Circuit, August 10, 1988). 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), 42 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 damage 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," PB87-142485, 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 Subtitle 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.[7]

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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 10, 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 mechanistically 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 Petitioner(ers) 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 degree 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 Leschine 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 this criterion. The information

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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. Leschine, "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 damage 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 amendmended 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 themeselves. 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]

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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 that study.

Oil Reform Alliance

HOUSE JUDICIARY COMMITTEE

HB565

April 5, 1990

My name is Riki Ott. I am a commercial fisherman from Cordova. My training is in marine toxicology. I have a masters degree in oil pollution and a doctorate in sediment pollution. I am testifying as President of the Oil Reform Alliance.

The Oil Reform Alliance is a grassroots coalition of fishermen, environmentalists, tourism and business people - citizens - who combined efforts after the Exxon Valdez spill to work on reforming both state and federal policies on oil.

The Oil Reform Alliance supports HB565 with amendment.

Prevention of future oil spills starts with attitude changes and attitudes are influenced by penalties. The penalty structure should strike a balance between being too low, so as not to deter potential polluters, and being too high, so as to impair ability to operate.

It is clear from the compliance records that Alaskan laws are far too lenient: the penalty structure is not deterring polluters.

A report entitled, "An Environmental Compliance Audit of the Oil and Gas Industry Kenai, Alaska," concludes that violations of pollution control laws [by the Nikiski petrochemical industry] are a frequent occurrence. Some industries have chosen to simply ignore existing laws, others violate them on almost a daily basis."

Further, "laws with sole federal jurisdiction have the best compliance record. Federal laws the state is authorized to enforce have a poor compliance record. [While] State laws without federal jurisdiction are almost without compliance or enforcement."

This study was funded by the Alaska Conservation Foundation and is the first such study to comprehensively evaluate the pollution discharges, record of violations, and

enforcement record for the Nikiski petrochemical industry, an industry which has been operating for over thirty years.

Lack of compliance with state environmental laws has lead to unacceptably high public risk in the Fairbanks area from extensive contamination of groundwater, including drinking water, with fuel. This report entitled, "A Citizen's Guide to Hazardous and Toxic Waste Sites of Fairbanks, Alaska," shows that 25 of the 33 study sites involved some form of petrochemical pollution.

While these two studies were funded by citizen advocacy groups, I also have the compliance chronology of both the MAPCO and Tesoro oil refineries, according to EPA and DEC records. The chronology partially elucidates why we have chronic petroleum pollution in the Fairbanks and Kenai areas.

After the Arthur Kill fuel oil spill of 567,000 gal, the governors of NY and NJ stated: "The oil industry is NOT doing enough. We need greater public scrutiny of current industry practices. Industry explanations for these spills are no longer sufficient.".

But industry explanations for spills are all that we Alaskans are going to get until we enact stiff penalties to provide a strong incentive for safer handling of these hazardous substances.

The civil penalties for non-crude oil as amended by the Administration do NOT go far enough towards providing strong incentives. (Here, I'm on page 2, lines 25-29, and page 3, lines 1-3.) I also have a chart attached to my testimony which details that which I'm about to explain.

The penalties in the bill before you establishes fines of $12.50/gal of oil discharged in a freshwater environment, $8/gal of oil discharged in a confined marine environment, and $6/gal of oil discharged in an unconfined marine environment. For the sake of the following discussion, let's refer to these penalties as $12.50-$8-$6. Now stick with me.

The current penalties, as set in 1978, are $10-$2.50-and $1. There was no mechanism established in statute then to inflation-proof these penalties. Should there have been such a mechanism in place, the 1978 penalties would be equal to $20-$5-$2, based on the national consumer price index.

The amended penalties of $12.50-$8-$6 do not even keep pace with inflation, for fines in freshwater environments, and are just barely better than inflation-proofed rates for fines in marine environments. These penalties are not the

extensive revisions and strong incentives for safe handling of oil as originally proposed by the Administration.

The Cowper Administration originally proposed penalties of $50-$50-$25 per gallon of oil spilled into the different receiving environments. This is very similar, in intent and magnitude, to the penalties proposed in 1977 by the Hammond Administration of $50-$25-$10.

The legislative history of how we arrived at the current penalty structure of $10-$2.50-$1 from the Hammond Administration's original proposal is very well documented in a final report dated January, 1989, prepared for the Institute of Marine Studies, University of Washington, and entitled, "Oil Spill Liability and Compensation: A Review and Evaluation of Alaska's Civil Penalty Scheme."

The historic perspective reveals that the Administration and legislature, quite frankly, succumbed to the arguments of industry lobbyists. And now history is in danger of being repeated. The Administration has already buckled to industry pressure.

We propose that committee members adopt the civil penalties originally proposed by the Hammond Administration by replacing on page 2, line 25, $12.50 with $50, on line 28, $8.00 with $25.00, and on page 3, line 1, $6.00 with $10.00.

Further, we propose that the Hammond Administration proposed penalty structure for noncrude oil is then adopted for crude oil by replacing the language on page 6, lines 1-6, with the amended language on page 2, lines 25-29, and page 3, lines 1-3.

We support price indexing these civil penalties as provided in HB565.

We ask committee members to not follow the lead of the Administration. Don't buckle to industry pressure as the Administration did. Support the ideals originally set forth by two different administrations over a span of 13 years. Set higher civil penalties and chart this state on a new course of meaningful incentives for safer handling of oil.

Thank you for the opportunity to testify.

COMPARISON OF

CIVIL PENALTY STRUCTURES

FOR NONCRUDE OIL

Rec'ing Environ.	Current Law	1977-1990 with CPI	1977 Hammond	Amended Cowper	Original Cowper
FRESH	$10	$20	$50	$12.50	$50
MARINE confined	2.50	5	25	8	50
MARINE unconfined	1	2	10	6	25

CPI: Consumer Price Index

NOTE: The Oil Reform Alliance recommends adopting the civil penalties originally proposed by the Hammond Administration in 1977 (1977 Hammond, above) for both crude and noncrude oil.

HB565 PROPOSED AMENDMENTS

April 5, 1990

Amendment #1
Page 5, line 28, delete [UP TO A MAXIMUM OF $500,000,000].

Justification: legislature found that "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" as per language in Sec. 1 pages 1-2, lines 28-2. Unlimited liability provides such an incentive.

Amendment #2
Page 6, lines 8-9, delete: "[SUBJECT TO THE $500,000,000 MAXIMUM SET UNDER (a) OF THIS SECTION]

Justification: same as for #1 above.

Amendment #3
Page 2, line 25, replace "$12.50" with "$50.00".

Page 2, line 28, replace "$8.00" with "25.00".

Page 3, line 1, replace "$8.00" with "10.00".

Justification:
See #1 above, and these were penalties originally proposed by Hammond Administration in 1977 and are very similar in intent and magnitude to original proposal of Cowper Administration. Historic perspective reveals that Hammond Administration and legislation succumbed to arguments of industry lobbyists. History is in danger of being repeated. We need meaningful incentives for safer handling of oil.

Amendment #4
Page 6, lines 1-6, delete entirely and replace with language identical to that on page 2, lines 25-29, and page 3, lines 1-3 as amended above:

"(A) $50 per gallon of oil that enters an anadromous stream or other freshwater environment with significant aquatic resources;

(B) $25 per gallon of oil that enters an estuarine, intertidal, or confined saltwater environment;

(C) $10 per gallon of oil that enters an unconfined saltwater environment, public land, or a freshwater environment without significant aquatic resources."

Justification: See #1 and #3 above. Also, raising the penalties for illegal discharges of crude oil to equal that of products oil eliminates the justifiable arguments of operators with refined products that this bill makes it more expensive for them to spill their product.

Amendment #5
Page 2, lines 24 & 25, amend to read: "(1) Subject to (2) of this subsection, the penalties for the following categories of receiving environments may not exceed, nor be less than 75% of:"

Justification: this ensures that penalties will be substantial, yet gives DEC the ability to apply its penalty matrix with some flexibility.

Original sponsor(s): Rules/Governor

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 565 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to civil penalty, damages, costs, and attorney fee provisions concerning the discharge of oil and other environmental violations."

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

* Section 1. AS 46.03.758(a) is amended to read:

(a) The legislature finds that

(1) recent information discloses that the discharge of oil may cause significant short and long-term damage to the state's environment; even [. EVEN] minute quantities of oil released to the environment 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 that [WHICH] may be caused by oil discharges, and the vital importance of commercial, sport and subsistence fishing, tourism, and Alaska's natural abundance and beauty to the economic future of the state and its quality of life, it is the judgment of the legislature that 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 ensure [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; and

(3) the handling of oil in large quantities is a hazardous undertaking that [WHICH] poses a significant threat to the economy and environment of the state, that [WHICH] can be substantially reduced only by the taking of rigorous safety precautions involving considerable expense; conversely, persons handling oil in smaller amounts might pose a correspondingly lower risk to the economy and environment of the state, and might be [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].

* Sec. 2. AS 46.03.758(b) is repealed and reenacted to read:

(b) In order to promote the safe handling of oil, the department shall adopt regulations that establish a schedule of penalties for discharges of oil into the receiving environments described in (1) - (3) of this subsection. Subject to AS 46.08.761 and (m) of this section, the penalties may not exceed

(1) $50 per gallon of oil that enters an anadromous stream or other freshwater environment with significant aquatic resources;

(2) $25 per gallon of oil that enters an estuarine, intertidal, or confined saltwater environment;

(3) $10 per gallon of oil that enters an unconfined saltwater environment, public land, or a freshwater environment without significant aquatic resources.

* Sec. 3. AS 46.03.758(d) is amended to read:

(d) The schedule must [SHALL] vary according to the toxicity, degradability, and dispersal characteristics of the oil. The schedule must [SHALL] also vary according to the sensitivity and productivity of the receiving environment. Variations under this subsection may be by subcategories of receiving environments, specific receiving environments, or both. The maximum penalties established in (b) of this section must [SHALL] apply to discharges in the most sensitive and productive of receiving environments within each category of receiving environment, and the penalty must [SHALL] decrease for less productive or sensitive receiving environments. If oil is discharged into multiple receiving environments, the penalty must be based upon the schedule penalty value applicable to the most sensitive and productive receiving environment unless the defendant proves how much oil entered each receiving environment by clear and convincing evidence.

* Sec. 4. AS 46.03.758(e) is amended to read:

(e) If a discharge of oil in excess of 500 [18,000] gallons not permitted under applicable state and federal law occurs within the territorial jurisdiction of the state, or into or upon the adjacent outer continental shelf of the state, the following persons, in addition to the person causing or permitting the discharge, are jointly and severally liable to the state, in a civil action, for the full amount of penalties established under this section and in the regulations adopted under this section:

(1) if the discharge occurs from a [ANY] commercial or industrial facility other than a vessel or offshore platform, the owner, lessee or permittee, and operator of the facility;

(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 deep-water 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.

* Sec. 5. AS 46.03.758(f) is repealed and reenacted to read:

(f) For purposes of assessing a penalty under (b) of this section, in determining how many gallons of oil have been discharged, the court shall deduct the number of discharged gallons of oil that the defendant proves by clear and convincing evidence were removed by the defendant from the environment within 365 days after the discharge as a result of a cleanup operation undertaken in conformity with applicable state and federal law, except that if the oil was discharged onto a surface freshwater or saltwater environment or onto the surface of public land, the court shall deduct the number of discharged gallons of oil that the defendant proves by clear and convincing evidence were removed by the defendant from the environment within the first 36 hours after the discharge as a result of a cleanup operation undertaken in conformity with applicable state and federal law. The dispersal of oil through burning, the use of chemical agents, biological additives, sinking agents, or other means is not considered removal for purposes of this subsection.

* Sec. 6. AS 46.03.758(i) is repealed and reenacted to read:

(i) The imposition of a civil penalty under this section does not limit or otherwise affect the authority of the department to enforce a provision of this chapter, AS 46.04, or AS 46.09, or to recover damages, restoration expenses, investigation costs, court costs, and attorney fees. A person who pays a civil penalty imposed under this section is entitled to set off the penalty amount paid against a civil penalty awarded by a court against the person for the same discharge under AS 46.03.760(a).

* Sec. 7. AS 46.03.758 is amended by adding a new subsection to read:

(m) The penalty that would otherwise be assessed under (b) of this section shall be multiplied by a factor of five if a court determines that

(1) the discharge was caused by the gross negligence or intentional act of the discharger;

(2) the discharger did not take reasonable measures to contain and cleanup the discharged oil; or

(3) the defendant did not respond in accordance with an approved oil discharge contingency plan.

* Sec. 8. AS 46.03.759(a) is amended to read:

(a) A person who is found to be liable under any other state law for an unpermitted discharge of crude oil [IN EXCESS OF 18,000 GALLONS] is, in addition to liability for any other penalties or for damages or the cost of containment and cleanup, liable to the state in a civil action for a civil penalty, up to a maximum of $500,000,000, subject to adjustment under AS 46.03.761, in the amount of

(1) $50 [$8] per gallon of crude oil that enters an anadromous stream or other freshwater environment with significant aquatic resources, subject to adjustment under AS 46.03.761

[DISCHARGED FOR THE FIRST 420,000 GALLONS DISCHARGED]; [AND]

(2) $25 [$12.50] per gallon of crude oil that enters an estuarine, intertidal, or confined saltwater environment, subject to adjustment under AS 46.03.761; and

(3) $10 per gallon of crude oil that enters an unconfined saltwater environment, public land, or a freshwater environment without significant aquatic resources, subject to adjustment under AS 46.03.761 [DISCHARGED FOR AMOUNTS DISCHARGED IN EXCESS OF 420,000 GALLONS].

* Sec. 9. AS 46.03.759(c) is amended to read:

(c) Subject to the [$500,000,000] maximum set under (a) of this section the court shall assess five [FOUR] times the penalty amounts set out in (a) of this section if the court finds

(1) the discharge was caused by the gross negligence or intentional act of the defendant;

(2) the defendant did not take reasonable measures to contain and clean up the discharged oil; or

(3) the defendant did not respond in accordance with an approved oil discharge contingency plan.

* Sec. 10. AS 46.03.759(d) is repealed and reenacted to read:

(d) The imposition of a civil penalty under this section does not affect the authority of the department to enforce a provision of this chapter, AS 46.04, or AS 46.09, or to recover damages, restoration expenses, investigation costs, court costs, and attorney fees. A person who pays a civil penalty imposed under this section is entitled to set off the penalty amount paid against a civil penalty awarded by a court against the person for the same discharge under AS 46.03.760(a).

* Sec. 11. AS 46.03.760(a) is repealed and reenacted to read:

(a) A person who violates or causes or permits to be violated a provision of this chapter, AS 46.04, AS 46.09, or a regulation, order of the department, permit, approval, or certificate issued under this chapter, AS 46.04, or AS 46.09, is liable to the state in a civil action for a sum to be assessed by the court of not less than $2,500 nor more than $100,000 a day for each violation, subject to adjustment under AS 46.03.761. Each violation is a separate and distinct offense, and where a violation continues from day to day each day constitutes a separate violation. The amount assessed by the court under this subsection must reflect, as applicable,

(1) reasonable compensation for adverse environmental effects of the violation;

(2) reasonable costs incurred by the state in the detection, investigation, and attempted correction of the violation;

(3) the economic savings realized by the person in not complying with the requirement for which the violation is charged;

(4) the prior history of violations committed by the person;

(5) the need for an enhanced civil penalty to deter future violations;

(6) the extent and seriousness of the violation;

(7) the person's attainment of compliance, within the shortest feasible time, with the requirement for which the violation is shown;

(8) the person's ability to pay; and

(9) other factors that the court determines are in the interest of justice.

* Sec. 12. AS 46.03.760(e) is amended to read:

(e) In addition to liability under (a) [- (d)] of this section,

a person who violates or causes or permits to be violated a provision of AS 46.03.740 - 46.03.750 is liable to the state, in a civil action brought under AS 46.03.822, for the full amount of actual damages caused to the state by the violation, including direct and indirect costs associated with the abatement, containment and [OR] removal of the pollutant, restoration of the environment to its former state, and all incidental administrative costs.

* Sec. 13. AS 46.03 is amended by adding a new section to read:

Sec. 46.03.761. ADJUSTMENT OF DOLLAR AMOUNTS. (a) The dollar amounts in AS 46.03.758, 46.03.759, and 46.03.760 and in the regulations adopted under AS 46.03.758 change, as provided in this section, according to and to the extent of changes in the Consumer Price Index for all urban consumers for the Anchorage metropolitan area compiled by the Bureau of Labor Statistics, United States Department of Labor (the index). The index for January of the year in which this section becomes effective 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 resulting amounts shall be rounded to the nearest cent.

(c) If the index is revised, the percentage of change is calculated on the basis of the revised index. If a revision of the index changes the reference base index, a revised reference base index is determined by multiplying the reference base index applicable by the rebasing factor furnished by the United States Bureau of Labor Statistics. If the index is superseded, the index referred to in this section is the one represented by the Bureau of Labor Statistics as reflecting most accurately changes in the purchasing power of the

dollar for Alaskan consumers.

(d) The department shall adopt a regulation

(1) announcing, on or before June 30 of each third year, the changes in dollar amounts required by (b) of this section;

(2) amending, on or before June 30 of each third year, the regulations adopted under AS 46.03.758(b) to reflect the changes in dollar amounts required by (b) of this section; and

(3) announcing, promptly after the changes occur, changes in the index required by (c) of this section, including, if applicable, the numerical equivalent of the reference base index under a revised reference base index and the designation or title of any index superseding the index.

(e) The department shall also provide notification of a change in dollar amounts required under (b) of this section to the clerks of court in each judicial district of the state.

* Sec. 14. AS 46.04.040(e) is amended to read:

(e) Financial responsibility may be demonstrated by self-insurance, insurance, surety, or guarantee, under terms the department may prescribe. An action brought under AS 46.03.758, 46.03.760(e) [46.03.760(a) OR (e)], 46.03.822, or AS 46.04.030(g) or to collect penalties imposed under AS 46.03.759 may be brought in a state court directly against the insurer or another person providing evidence of financial responsibility. The applicant, and an insurer, surety, or guarantor shall appoint an agent for service of process in the state. An insurer 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.

* Sec. 15. AS 46.04.040(i) is amended to read:

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

* Sec. 16. AS 46.03.758(c), 46.03.758(g), 46.03.760(b), 46.03.760(c), and 46.03.760(f) are repealed.

HB

568

HOUSE COMMITTEE REPORT

3/30

(7)
Date Referred: February 22, 1990 FURTHER REFERRALS:

Rules

Date of Committee Action: _____

added → Judiciary 2/23

The STATE AFFAIRS Committee considered: HB 568

HOUSE BILL NO. 568 RETIREMENT BENEFITS NOT EXEMPT FROM QDRO

"An Act relating to the definition of qualified domestic relations orders for retirement plan interest and payment exemptions."

RECOMMENDATIONS:

[ ] be replaced with _____ [ ] the same title [ ] a new title

[ ] have attached amendment(s)

[ ] do pass

[ ] do not pass

[X] no recommendation

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal impact _____

[X] zero fiscal note DOA

[ ] zero with analysis _____

APPROVES PREVIOUS: (Date/Dept)

[ ] fiscal note(s) _____

[ ] zero fiscal note(s) _____

[ ] zero fn/analysis _____

SIGNING DO PASS:

ZANACKI

BOUCHER

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend
HANLEY		✓	
FINKELSTEIN		✓	
MACLEAN			
DONLEY		X	

Chairman's Signature

Alaska State Legislature

House of Representatives
House Judiciary Committee

P. O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990
(907) 465-4712

April 13, 1990

Mr. Joe Caswell, Chair
Anchorage Police and Fire
Retirement Board
P.O. Box 196650
Anchorage, AK 99519-6650

Dear Mr. Caswell:

Thank you for your letter of April 10 regarding HB 568. That bill has not yet been scheduled for a hearing before the Judiciary Committee. When it is scheduled, I will make sure that you are notified.

In the meantime, I have included a copy of your letter and the enclosures in the committee members' files.

Sincerely,

Peter Goll

Municipality of Anchorage

P.O. BOX 196650
ANCHORAGE, ALASKA 99519-6650
(907) 343-4295

TOM FINK.
MAYOR

POLICE AND FIRE RETIREMENT BOARD

RECEIVED APR 12 1990

April 10, 1990

The Honorable Peter Goll, Co-Chairman
House of Representatives
Judiciary Committee
P. O. Box V, Capitol, Room 122
Juneau, AK 99811

Dear Representative Goll:

On April 2, 1990, we sent you correspondence on House Bill (HB) 568, which has been referred to the House Judiciary Committee. It is our understanding that this bill is on the calendar for the House Judiciary Committee during the week of April 16, 1990.

The members of the Anchorage Police and Fire Retirement Board would like to testify, via teleconference, at the time the bill is discussed by the Judiciary Committee. Please contact us at 343-4399.

As you are aware, HB 568 was sponsored by Representative Boucher and a similar bill (Senate Bill 252) has been drafted by the Senate Judiciary Committee and is sponsored by Senator Faiks. The Police and Fire Retirement System is not asking for a change to practical application of AS 09.38.017(c) but only clarification that governmental retirement plans are not included in the definition incorporated in AS 09.38.017(c), and have the right to establish the meaning given QDRO by the Plan.

Under AS 09.38.017(c), certain pension benefits are arguably subject to attachment as this statute states pension plans in Alaska must comply with a Qualified Domestic Relations Order (QDRO) as defined by ERISA (U.S.C. 414). This Federal legislation allows for payment of benefits to an alternate payee (i.e. spouse) at the time members are first eligible to retire, not when they actually retire. At 26 U.S.C., 401(c), all governmental retirement plans are specifically exempt from ERISA and U.S.C. 414 allows governmental retirement plans to draft local legislation for the administration of QDRO's.

AS 39.35.370(e), for Public Employees Retirement System (PERS) and AS 14.25.110 for the Teachers Retirement System (TRS), do not allow for payment of QDRO's until a member actually retires.

Anchorage Municipal Code (AMC) 3.85.075, which passed in June 1988, allows the Police and Fire Retirement System to make payments to an alternate payee only from the date the member actually retires.

The Alaska State Attorney General provided an opinion to Governor Cowper, dated June 6, 1988, on AS 09.38.017(c) prior to it being signed into law by the Governor. It is the Alaska State Attorney General's opinion that AS 09.38.017(c) does not apply to governmental plans, such as PERS, TRS and municipal retirement plans as the definition of a QDRO under 26 U.S.C. 414(P)(9) does not apply to governmental plans.

With this confusion in Federal, State and Local statutes, the Police and Fire R .irement System is asking only that AS 09.38.017(c) be clarified to reflect that governmental retirement plans are not included in the definition incorporated in AS 09.38.017(c). The Police and Fire Retirement Board feels the clarification of the State Statute would stop any costly litigation in the courts as to which statute is applicable to the Police and Fire Retirement System.

We have attached a copy of the State Attorney General's opinion and HB 568, as well as a fact sheet which outlines the problems as we see them. If you have any questions, please call me or the Police and Fire Retirement Board Staff at 343-6440.

Sincerely,

Joe Caswell

Joe Caswell
Chairman

JC/lhk
Attachments

cc: Representative Boucher

(D.78/PGoll2.Ltr)

Introduced: 2/22/90
Referred: State Affairs

6-2274A

BY THE STATE AFFAIRS COMMITTEE

IN THE HOUSE

HOUSE BILL NO. 568

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the definition of qualified domestic relations orders for retirement plan interest and payment exemptions."

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

* Section 1. AS 09.38.017(c) is amended to read:

(c) The exemptions provided by (a) of this section do not prevent the payment of benefits under a retirement plan to an alternate payee under a qualified domestic relations order. In this subsection, "qualified domestic relations order" has the meaning given in 26 U.S.C. 414(p), except as applied to "governmental plans" as defined under 29 U.S.C. 1002 in which case "qualified domestic relations order" has the meaning given by the plan or by the law governing the plan.

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF LAW

ATTORNEY GENERAL

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

FAX TRANSMITTAL MEMO

TO: LEE WORTHINGTON
DEPT: _____ FAX #: 343-4455
FROM C.S. CHRISTENSEN PHONE: 465-4523
CO: _____ FAX #: _____
Post-it™ brand fax transmittal memo 7671

NO. OF PAGES 7

June 6, 1988

Honorable Steve Cowper
Governor
State of Alaska
P.O. Box A
Juneau, AK 99811

Re: CSSB 508(Fin) -- property exemptions for homesteads, retirement plan interests, etc.
Our file: 883-88-0108

Dear Governor Cowper:

At Judy Fleming's request on your behalf, we have reviewed CSSB 508(Fin), relating to property exemptions for homesteads, retirement plan interests and payments, and other property. The bill raises policy and legal questions, and you might want to consider vetoing it. There are two basic categories of concern: (1) the retirement provisions, and (2) the increases in the exemption values.

This bill was introduced by the Senate Judiciary Committee on April 14, 1988. The Senate Finance Committee Substitute was offered May 3, 1988 and passed by the Senate on May 5, 1988, and the House passed it on May 9, 1988.

We are concerned that the retirement plan provisions in sec. 3 of the bill could be interpreted as requiring the federal definition of "qualified domestic relations order" (QDRO) to apply to the public employees' (PERS) and teachers' (TRS) retirement systems. The statutes for both of those systems include a definition of "QDRO" that differs from the federal definition. The bill also would allow bankruptcy creditors to reach TRS and PERS contributions made by a member within 120 days before the member files for bankruptcy. These are serious and, we believe, unintended effects of the bill.

The Senate Finance Committee's substitute bill (offered six days before the end of the session) doubles the dollar amount of exemptions from claims of creditors. That raises important policy questions. We are concerned about the full effects of that doubling, including the effect on the state's own collection efforts and on the state's private lending institutions. In light of its importance, we believe that the subject merits more

:3-CSSLH

extended consideration than was possible during the extremely brief period that the committee substitute was pending at the hectic end of the legislative session.

As originally introduced, SB 508 related only to exemptions for certain retirement plan interests and payments (i.e., secs. 3, 8, 10, and part of 5 of this final version). The purpose of this part of the bill is not at all clear from the language of the bill itself. However, we have ascertained from documents provided by the Legislative Affairs Agency that, although the only reference to bankruptcy in the proposed AS 09.38.017 is in its subsec. (b), and the basic subsec. (a) is worded in general terms, the purpose is to exclude or exempt from the property of a bankruptcy debtor's estate that is subject to the reach of the debtor's creditors 1/ the bankruptcy debtor's interest in or payments to be received from a pension plan. An understanding of this purpose and the manner in which it is accomplished requires analysis of provisions of federal law, including the U.S. Bankruptcy Code, the Internal Revenue Code, and the Employee Retirement Income Security Act of 1974 (ERISA), as well as the relationship between federal bankruptcy law and state exemption statutes.

This analysis is fairly succinctly provided by the case of Goff v. Taylor, 706 F.2d 574 (5th Cir. 1983). That case explains that, upon filing of bankruptcy, an estate is created that includes all property in which the bankruptcy debtor has a legal or equitable interest. 11 U.S.C. 541(a)(1). An exception for this is that a debtor's interest in a trust that is subject to a restriction under an "applicable nonbankruptcy law" is excluded from the bankruptcy estate. 11 U.S.C. 541(c)(2). The interest in the trust never enters the estate.

After a bankruptcy estate is created, certain property is then exempted from the estate. 11 U.S.C. 522. (Exclusions are different from exemptions.) A bankruptcy debtor may choose whether to take exemptions provided by the Bankruptcy Code (listed at 11 U.S.C. 522(d)) or to take exemptions provided by state law. State law exemptions may be more favorable than the

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1/ Notwithstanding that apparently intended purpose, this section also has the effect of providing an exemption in situations other than bankruptcy, for interests in certain governmental pension plans that are not currently protected under the Alaska Exemptions Act or any federal law.

law. State law exemptions may be more favorable than the Bankruptcy Code exemptions, or vice versa, depending on the type of property the bankruptcy debtor owns and depending on the specific provisions of state exemption statutes. In Goff, the bankruptcy debtors had chosen state law exemptions which, unlike the Bankruptcy Code, did not provide a limited exemption for Keogh plans. Nevertheless, the debtors argued that ERISA was an "applicable nonbankruptcy law," and that restrictions on assignment and alienation of interests in the Keogh plan under ERISA prevented their interest in the plan from entering the estate.

The court rejected this argument. It found that Congress did not intend to include ERISA plan restrictions in the reference to "applicable nonbankruptcy law." Rather, it found that Congress only intended "spendthrift trusts" to be excluded from the property of the estate. The Keogh plan was found not to be a spendthrift trust, because of the availability of the assets of the plan to the debtors, with only a 10 percent penalty, at any time before reaching retirement age. Under Goff, if a plan is not a spendthrift trust that is afforded protection under state nonbankruptcy law, a debtor's interest in the plan is not excluded from the bankruptcy estate. If the bankruptcy debtor chooses state law exemptions that do not include an exemption for the debtor's interest in a pension plan, the interest is not exempted from the estate. The result is that bankruptcy debtors may be forced to forego favorable exemptions under state law (such as the Texas homestead exemption discussed later in this bill-review letter) in order to gain at least partial protection of their pension plan interests provided by the federal bankruptcy exemptions.

Current provisions of the Alaska Exemptions Act (AS 09.38) do not provide an exemption for interests in retirement plans which is applicable in bankruptcy proceedings. See existing AS 09.38.055. Both the original and final versions of this bill add a new section, AS 09.38.017 (in sec. 3 of the CS), to the Alaska Exemptions Act, which provides an exemption for interests in certain "retirement plans." That exemption will be applicable in bankruptcy proceedings by virtue of the amendment of AS 09.38.055 in sec. 10 of the CS. By the definition of "retirement plan" in the bill, the new exemption is for interests in qualified plans under 26 U.S.C. 401(a), individual employee annuity plans under 26 U.S.C. 403(a), tax sheltered annuity plans under 26 U.S.C. 403(b), individual retirement accounts and annuities and simplified employee pension plans under 26 U.S.C. 408,

and employee stock ownership plans under 26 U.S.C. 409. 2/ No exemption is provided for interests in pension plans that do not qualify for favorable tax treatment under the specified provisions of the Internal Revenue Code.

The definition of "retirement plan" in the bill includes PERS and TRS, since those plans are qualified plans under 26 U.S.C. 401(a). Two problems arise from application of this bill to PERS and TRS. First, the bill provides that the exemptions do not apply to contributions "made by an individual under a retirement plan within 120 days before the individual files for bankruptcy." We believe that the purpose of this provision is to prevent individuals from increasing their contributions to retirement plans shortly before filing bankruptcy in order to shelter additional assets from creditors. However, PERS and TRS member contributions are statutorily fixed and involuntary, thus preventing the kind of abuse addressed by this provision. 3/ Administration of this provision would require changes in the PERS and TRS statutes, since there is currently no way for the systems to make available to creditors an employee's contributions that are made within 120 days before filing bankruptcy. There are no provisions in either PERS or TRS allowing a partial refund of a member's contribution account to pay creditors (either while the member is still employed or after termination of employment), allowing an adjustment of service credit to reflect a reduction in the contribution account, or allowing a member to repay contributions that have been paid to creditors.

Second, the bill provides that the exemptions do not prevent payment of retirement plan benefits to an alternate payee under a qualified domestic relations order (QDRO) as defined by 26 U.S.C. 414(p). Proposed AS 09.38.017(c). The potential problem with this is that the statutes providing for both PERS and TRS include a definition of "QDRO" that is different in a significant respect from the definition of "QDRO" in 26 U.S.C. 414(p). Existing AS 14.25.220(31) and AS 39.35.680(34). Under the federal definition, a QDRO can order payment of a benefit to an

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2/ The federal Bankruptcy Code exemptions provide an exemption for payments under these plans only "to the extent reasonably necessary for the support of the debtor and any dependant of the debtor." 11 U.S.C. 522(d)(10)(E).

3/ This might also be true of some private pension plans that will be affected by this bill.