

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
6352 SENATE JUDICIARY

756

PROPOSED REVISIONS TO SS FOR SB 502
AS INTRODUCED 4/13/90

Legend: Additions or changes in language are shown with blocks
at the beginning and end of the new language and
deletions are shown by strikethroughs.

IN THE SENATE

SPONSOR SUBSTITUTE FOR SENATE BILL NO. 502
IN THE LEGISLATURE OF THE STATE OF ALASKA
SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to strengthening the
civil penalty and damage provisions
concerning the discharge of oil and other
environmental violations; amending Rule
82, Alaska Rules of Civil Procedure; and
providing for an effective date."

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 discharges 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 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 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 which poses a significant threat to the economy and environment of the state, which can be substantially reduced only by the taking of rigorous safety precautions involving considerable expense; conversely, persons handling oil in smaller amounts might pose a correspondingly lower risk to the economy and environment of the state, and might be [PRE] 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

1 PROVISIONS OF THIS SECTION, THAT THE HANDLING OF OIL IN LARGE
2 QUALITIES OCCURS IN A MANNER WHICH WILL NOT IMPAIR THE RENEWABLE
3 RESOURCES OF THE STATE].

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 AS 46.03.758(b) is repealed and reenacted to read:

5 (b) In order to promote the safe handling of oil, the
6 department shall adopt regulations that establish a schedule of
7 penalties, up to a maximum of \$500,000,000 for discharges of oil
8 into the following categories of receiving environments:

9 (1) Subject to (2) of this subsection, the penalties for
10 the following categories of receiving environments may not exceed

11 (A) \$12.50 per gallon of oil that enters any
12 surface or subsurface freshwater environment;

13 (B) \$8 per gallon of oil that enters an estuarine,
14 intertidal, or confined saltwater environment;

15 (C) \$6 per gallon of oil that enters an unconfined
16 saltwater environment or onto the land or subsurface land of the
17 state.

18 (2) Subject to the \$500,000,000 maximum set in this
19 section, the penalty shall be determined by multiplying the
20 penalty established under (1) of this subsection by a factor of
21 ^{four} ~~five~~ if a court determines that

22 (A) the discharge was caused by the gross
23 negligence or intentional act of the discharger;

24 (B) the discharger did not take reasonable measures
25 ^{or control} to contain and cleanup the discharged oil; or

1 ~~(C) the defendant did not respond in accordance~~
2 ~~with an approved oil discharge contingency plan.~~


3 **[(C) the defendant did not reasonably perform its**
4 **duties prescribed in an approved oil discharge contingency plan**
5 **after taking into account the weather conditions at the time of**
6 **the discharge, the distance to the site of the discharge and the**
7 **dispersal characteristics of the substance discharged.]**

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

9 (d) The schedule shall vary according to the toxicity,
10 degradability and dispersal characteristics of the oil. The
11 schedule shall also vary according to the sensitivity and
12 productivity of the receiving environment. Variations under this
13 subsection may be by subcategories of receiving environments,
14 specific receiving environments, or both. The maximum penalties
15 established in (b) of this section shall apply to discharges in the
16 most sensitive and productive of receiving environments within each
17 category of receiving environment, and the penalty shall decrease
18 for less productive or sensitive receiving environments. If oil
19 is discharged into multiple receiving environments, the penalty
20 shall be based upon the schedule penalty value applicable to the
21 most sensitive and productive receiving environments unless the
22 defendant proves the amount of oil that entered each receiving
23 environment by clear and convincing, a preponderance of, evidence.

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


25 (e) If a discharge of oil in excess of 500 [18,000] gallons
26 not permitted under applicable state and federal law occurs within

1 the territorial jurisdiction of the state, or into or upon the
2 adjacent outer continental shelf of the state, the following
3 persons, in addition to the person causing or permitting the
4 discharge, are jointly and severally liable to the state, in a 
5 civil action, for the full amount of penalties established under
6 this section and in the regulations adopted under this section:

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

10 (2) if the discharge occurs from a vessel,

11 (A) the owner and operator of the vessel; and

12 (B) the owner of the oil carried as cargo on the
13 vessel at the time the vessel was loaded, if the loading 
14 occurred within the territorial jurisdiction of the state,
15 or at a deep-water port or other offshore storage facility
16 adjacent to the state: however, if the owner of the oil
17 temporarily transfers ownership of the oil to another person,
18 and the transfer has the purpose or effect of evading the
19 vicarious liability imposed by this section, the transferor
20 will be considered the owner of the oil for the purposes of
21 this subsection; and

22 (3) if the discharge occurs from an offshore platform,
23 the lessee or permittee of the tract or acreage upon which the
24 platform is situated, and the operator of the platform.

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

Don't Amend (S)

(f) In determining how many gallons of oil have been discharged for purposes of assessing a penalty under (b) of this section, the court shall deduct the number of discharged gallons of oil that the defendant proves were removed by the defendant from the environment within the first 72 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 limited 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 may 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).~~

■(i) Notwithstanding AS 46.03.875, a person liable under this section is not also liable for the discharge of oil under AS 46.03.760(a). A person causing or permitting a discharge of oil of 18,000 gallons or less not permitted under applicable state or federal law is liable for that discharge under the penalty provisions of AS 46.03.760(a); however, the court may impose a penalty of less than \$500 for the discharge.■

1 * Sec. 7. AS 46.03.759 is amended to read:

2 Sec. 46.03.759. CIVIL PENALTIES FOR DISCHARGES OF CRUDE OIL.

3 (a) A person who is found to be liable under any other state law
4 for an unpermitted discharge of crude oil ~~{IN EXCESS OF 18,000~~
5 GALLON} **in excess of 18,000 gallons** is, in addition to liability
6 for any other penalties or for damages or the cost of containment
7 and cleanup, liable to the state in a civil action for a civil
8 penalty, up to a maximum of \$500,000,000, in the amount of

9 (1) \$8 per gallon of crude oil discharged for the first
10 420,000 gallons discharged; and

11 (2) \$12.50 per gallon of crude oil discharged for
12 amounts discharged in excess of 420,000 gallons.

13 (b) In determining how many gallons of crude oil have been
14 discharged for purposes of assessing a penalty under (1) of this
15 section, the court shall deduct the number of discharged gallons
16 of crude oil that the defendant proves were removed by the
17 defendant from the environment within the first ~~36~~ **72** hours after
18 the discharge as a result of a cleanup operation undertaken in
19 conformity with applicable state and federal law. The dispersal
20 of oil through burning, the use of chemical agents, biological
21 additives, or sinking agents, or other means is not considered
22 removal for the purposes of this subsection.

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

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

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

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

7 **■(3) the defendant did not reasonably perform its duties**
8 **prescribed in an approved oil discharge contingency plan after**
9 **taking into account the weather conditions at the time of the**
10 **discharge, the distance to the site of the discharge and the**
11 **dispersal characteristics of the substance discharged.■**

12 ~~(d) The imposition of a civil penalty under this section does
13 not limit or otherwise affect the authority of the department to
14 enforce a provision of this chapter, AS 46.04, or AS 46.09, or to
15 recover damages, restoration expenses, investigation costs, court
16 costs, and attorney fees. A person who pays a civil penalty
17 imposed under this section may set off the penalty amount paid
18 against a civil penalty awarded by a court against the person for
19 the same discharge under AS 46.03.760(a). [NOTWITHSTANDING AS
20 46.03.275, A PERSON LIABLE FOR CIVIL PENALTIES UNDER THIS SECTION
21 IS NOT ALSO LIABLE FOR THE DISCHARGE OF THE CRUDE OIL UNDER AS
22 46.03.760(a). A PERSON CAUSING OR PERMITTING A DISCHARGE OF CRUDE
23 OIL OF 12,000 GALLONS OR LESS NOT PERMITTED UNDER APPLICABLE STATE
24 OF FEDERAL LAW IS LIABLE FOR THAT DISCHARGE UNDER THE PENALTY
25 PROVISIONS OF AS 46.03.760(a); HOWEVER, THE COURT MAY IMPOSE A
26 PENALTY OF LESS THAN \$500 FOR THE DISCHARGE.]~~

1 (e) The court may reduce the penalty imposed under this
2 section if the defendant demonstrates, by a preponderance of the
3 evidence, that the discharge was caused solely by a negligent act
4 of a third person unless the third person is a person with whom the
5 defendant was found jointly and severally liable for the discharge
6 under other state law.

7 (f) Except as provided in (e) and (g) of this section, the
8 entire penalty specified in this section may be imposed, except
9 that a person who discharges oil into a receiving environment may
10 demonstrate, by a preponderance of evidence, that mitigating
11 circumstances relating to the effects of the discharge would make
12 imposition of the full penalty inappropriate. In determining
13 whether mitigating circumstances exist, the court shall recognize
14 that scientific knowledge pertaining to oil spills is very limited
15 and if there is insufficient knowledge either to predict a base
16 case or to show mitigating circumstances varying from that base
17 case, the administratively established schedule of penalties shall
18 apply. If mitigating circumstances are proven by a preponderance
19 of the evidence, the court may reduce or totally eliminate the
20 penalty, in accordance with the purposes of this section.

21 (g) ~~(f)~~ A person otherwise liable for penalties under this
22 section is not liable if the person demonstrates, by a
23 preponderance of the evidence that the discharge occurred solely
24 as a result of

25 (1) an act of God;

1 (2) a negligent or intentional act of the State of
2 Alaska or the United States; or

3 (3) an act of war.

4 ~~§(1)~~~~(2)~~ In this section, "discharge" means entry of crude
5 oil into or upon the water or public land of the state, regardless
6 of causation, except discharges into an enclosed an impervious oil
7 spill containment area.

8 * Sec. 8. AS 46.03.760(a) is repealed and reenacted to read:

9 (a) A person who violates or causes or permits to be violated
10 a provisio.. of this chapter, AS 46.04, AS 46.09, or a regulation,
11 order of the department, permit, approval, or certificate issued
12 under this chapter, AS 46.04, or AS 46.09, is liable to the state
13 in a civil action for a sum to be assessed by the court of not less
14 than \$2,500 nor more than \$100,000 a day for each violation ~~the~~
15 initial day of violation and no more than \$25,000 a day for each
16 day of violation thereafter. Each violation is a separate and
17 distinct offense, and where a violation continues from day to day
18 each day constitutes a separate violation. The amount assessed by
19 the court under this subsection shall reflect, as applicable,

20 ~~(1) reasonable compensation for any adverse~~
21 ~~environmental effects caused by the violation.~~

22 ~~§(1)~~ reasonable compensation in the nature of liquidated
23 damages for any adverse environmental effects caused by the
24 violation, which shall be determined by the court according to the
25 toxicity, degradability and dispersal characteristics of the
26 substance discharged, the sensitivity of the receiving environment,

1 and the degree to which the discharge degrades existing
2 environmental quality;¶

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

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

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

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

12 ¶(5)¶(6) the extent and seriousness of the violation;

13 ¶(6) the person's good faith efforts to comply with the
14 requirement for which the violation is shown;¶

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

18 ¶(7) the economic impact of the penalty on the violator;

19 and¶

20 ~~(8) the ability to pay; and~~

21 ¶(8)¶(9) any other factors that the court determines
22 justice requires.

23 * Sec. 9. AS 46.03.750(e) is amended to read:

24 (e) In addition to liability under (a) [- (d)] of this
25 section, a person who violates or causes or permits to be violated
26 a provision of AS 46.03.740 - 46.03.750 is liable to the state, in

1 a civil action brought under AS 46.03.822. or the full amount of
2 actual damages caused to the state by the violation, including
3 direct and indirect costs associated with the abatement,
4 containment and [OR] removal of the pollutant, restoration of the
5 environment to its former state, and all incidental administrative
6 costs.

7 * Sec. 10. AS 46.03.763 is amended to read:

8 Sec. 46.03.763. ATTORNEY FEES AND COSTS. In an action [TO
9 IMPOSE CIVIL PENALTIES] under AS 46.03.758, 46.03.759, [OR]
10 46.03.760, 46.03.765, 46.03.780, or 46.03.822 [FOR A DISCHARGE OF
11 OIL], the state may recover full reasonable attorney fees and costs
12 incurred by the state in maintaining the action.

13 * Sec. 11. AS 46.03.758(c), ~~46.03.758(g), 46.03.760(b),~~
14 ~~46.03.760(c),~~ and 46.03.760(f) are repealed.

15 * Sec. 12. Section 10's amendment of AS 46.03.763 has the effect
16 of amending Rule 82, Alaska Rules of Civil Procedure, by allowing
17 the recovery of full reasonable attorney fees and costs in certain
18 additional actions.

19 * Sec. 13. This Act takes effect immediately under AS
20 01.10.070(c).

21 VPS/10293/463.1



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

April 18, 1990

The Honorable Tim Kelly
President of the Senate
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Mr. President:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a sponsor substitute for SB 502, relating to civil penalties and damages for oil spills. This bill differs from the original (see my February 21, 1990 transmittal letter at 1990 Senate Jour. 2525) in the following three respects:

(1) Section 2 of the sponsor substitute sets out substantially lower per-gallon penalties for non-crude oil discharges than did the original bill.

(2) Section 4 of the sponsor substitute allows imposition of the per-gallon penalties for non-crude oil discharges only where the discharge is in excess of 500 gallons. The original bill would have allowed imposition of the per-gallon penalties for any amount discharged (eliminating the present 18,000-gallon floor).

(3) Section 5 of the sponsor substitute allows a defendant to deduct the number of gallons of non-crude oil recovered within 72 hours after a non-crude oil spill for penalty calculation purposes. The original bill allowed a defendant to deduct the amount of oil recovered only within 36 hours after a spill.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Cowper", written over the typed name and title.

Steve Cowper
Governor



Oil Reform Alliance



PLEASE SUPPORT THIS OIL SPILL PACKAGE!

INCREASED INCENTIVE FOR INDUSTRY

CS HB 565 Increased dollar-per-gallon penalties for both crude
Judiciary and refined products. SUPPORT penalties of \$50-\$25-
\$10/gallon for both crude and noncrude.

CS HB 567 Allows DEC to inspect tankers, improves contingency
Finance plans, makes industry work to prevent spills, improves
insurance requirements for reimbursing victims, and
allows the state to monitor vessel traffic.

INCREASED ENFORCEMENT FOR STATE

CS HB 409 Strengthens DEC's ability to enforce pollution laws.
Finance Improves inspection authority, helps DEC fine pollutes
by adopting administrative penalties used in 28 other
states.

EMPOWERMENT OF CITIZENS FOR OVERSIGHT

CS HB 558 Allows citizens to take court action against a polluter
Judiciary directly. (State has been exempted from bill to
encourage its passage.)

CS HB 578 Sets up a Citizen's Oversight Council on oil spill
Finance prevention to make sure regulatory agencies do their
job. Council then sets up regional committees to
oversee industry.



UNITED FISHERMEN OF ALASKA

Riki Ott, Ph.D.
Chairman
Habitat Committee

211 4th Street, Suite 112
Juneau, AK 99801

(907) 586-2088
Fax# (907) 463-2545

**OIL REFORM ALLIANCE BRIEFING PAPER ON
CS HB 558 JUDICIARY**

PURPOSE OF BILL: To enhance the effectiveness of public interest laws by allowing citizens to take action against a polluter where the state either can not or will not.

WHO CAN BE SUED?

Any person who is allegedly in violation or the DEC commissioner, only if the Commissioner fails to perform a nondiscretionary act or duty.

WHAT REMEDIES CAN BE ACHIEVED?

The court may award civil penalties, issue an injunction, or provide for other relief in cases against polluters. The court may issue only an injunction or other relief in cases against the Commissioner.

WHEN CAN A SUIT NOT BE FILED?

A suit cannot be filed until 60 days after the plaintiff has given notice of violation to the Commissioner and to the person or if the Commissioner is already prosecuting a civil action or administrative penalty proceedings. A suit against the Commissioner cannot be filed until 60 days after giving notice.

ARE THERE ANY EXCEPTIONS?

Action can be initiated immediately in cases involving hazardous waste, a hazardous substance, or a hazardous air pollutant.

WHAT HAPPENS TO ATTORNEY'S FEES?

Fees may be awarded at the court's discretion to a substantially prevailing plaintiff or to a defendant if the court finds that the plaintiff's action is frivolous. This is the prevailing common law for public interest cases.

**Alaska Center for the Environment Briefing Paper on
HB 409/SB 497**

Purpose of bill: To increase the effectiveness of the Department of Environmental Conservation's (DEC) regulatory authority.

Why is this legislation important?

HB 409/SB 497 offer long-term deterrents to pollution. All of the elements of the bill were recommended by the state-appointed Oil Spill Commission.

What is in HB 409/SB 497?

-**Administrative penalties** can be assessed in a less resource and time-intensive process, but still offer a fair and consistent system of regulatory enforcement. They require an administrative hearing rather than a judicial hearing, and are assessed on a matrix system that matches the penalty to the severity of the crime. 28 other states and the EPA use administrative penalties.

-**Making compliance orders effective upon receipt** will cause facilities in violation of environmental laws to bring their operation into compliance immediately. At present, compliance orders can be challenged even before they become effective.

-**Environmental audits** are like a tax audit, but used to determine how well a facility is complying with environmental laws. This provision of the legislation allows the Department of Environmental Conservation to order a facility to contract with a private consultant and issue an environmental audit report back to DEC.

-**Increased access provisions** of the legislation allow DEC to conduct inspections at "reasonable times" at specific types of "pervasively regulated facilities" (for instance, "a refinery, a crude oil or gas...facility, a hazardous waste...facility, a major solid waste disposal facility, or a facility with both significant air and wastewater emissions...") This ability to inspect these facilities matches EPA's powers under federal law, and is consistent with both the Alaska and the U.S. Constitutions.

**OIL REFORM ALLIANCE BRIEFING PAPER ON
HB 578**

PURPOSE OF BILL: To combat institutional complacency and maintain proper vigilance over handling of oil and hazardous substances.

WHY IS THIS BILL IMPORTANT?

"Because many individuals and communities are placed at risk by modern oil transportation systems, citizens should be involved in oversight arrangements at every level of government."

Recommendation #3, Alaska Oil Spill Commission.

A citizens' advisory council should be established and given responsibility for overseeing the safe transportation of oil, gas, and other hazardous substances.

Recommendation #12, Alaska Oil Spill Commission.

"Proposed legislation would not duplicate the federal provisions." "I agree that a combination of the federal and state legislation would create the ultimate level of citizen involvement to ensure ... against another tragedy like The Exxon Valdez."

Senator Ted Stevens

WHAT CAN THE COUNCIL DO?

OVERSEE STATE AND FEDERAL AGENCIES responsible for preventing release of oil and hazardous substances to determine whether they are carrying out their duties.

MAKE APPROPRIATE RECOMMENDATIONS to prevent spills, improve regulatory performance, improve environmental safety, and enhance citizen participation.

ASSIST IN DEVELOPMENT OF INTERSTATE COMPACTS.

CONDUCT INVESTIGATIONS AND SUBPOENA WITNESSES necessary to conduct its duties.

WHAT CAN'T THE COUNCIL DO?

CAN'T UNILATERALLY IMPOSE REGULATIONS, POLICIES, OR RULES.

CAN'T INDEPENDENTLY ESTABLISH ADDITIONAL ADVISORY COMMITTEES.

CAN'T BE FINANCED WITH MONEY FROM THE GENERAL FUND; rather the council is financed by the 470 Fund.

ARCTIC AUDUBON SOCIETY

P.O. BOX 82098
COLLEGE, ALASKA 99708

19 April 1990

Senator Jan Faiks
Chair, Senate Judiciary Committee
Pouch V
Juneau, AK 99811

RE: HB 409, HB 567, HB 578, HB 565

Dear Senator Faiks:

The Board of the Arctic Audubon chapter of the National Audubon Society urges you to work toward passage of the four House bills known as the oil spill legislation package. These bills represent the legacy of the *Exxon Valdez* disaster: the recognition that the state's relationship with the oil industry had become far too lax and uncritical; that the state had relinquished the control and oversight that is an essential component of environmentally-sound oil development. If the petroleum industry is to co-exist responsibly with the state's interest in clean air, unpolluted land, and a productive marine environment, the state must restore the balance between its oversight powers and the oil industry. The Spill Bills go a long way toward restoring that balance.

Of particular concern has been the inability of the Department of Environmental Conservation to monitor major facilities, notably the Valdez terminal and the MAPCO refinery. This impotence allowed Alyeska to by-pass important environmental safeguards, with the result with which we are all familiar: the miserable state of preparedness at the Valdez terminal the night of March 24, 1989. HB 409 improves DEC's inspection authority and strengthens its ability to enforce pollution laws. Although compliance with environmental regulations is important at all levels, HB 409 is not aimed at small villages admittedly struggling with waste disposal problems, and any attempt to thus portray it should be rejected. We urge you to work actively toward passage of this bill.

The other three bills, House Bills 565, 567, and 578, also redress the balance of power and clarify the industry's responsibilities to prepare for and prevent accidents. They, too, are an essential part of the package.

We are concerned both by the slow pace of these bills through the legislature and by the degree of industry opposition they have attracted. That industry is fighting valid reforms does not speak well for their sincerity in the wake of the *Valdez*. Realistically, however, it also means that if these bills do not pass this year, it is doubtful that they ever will. Please do your best to get these four bills through the legislature this session. Failure to stand up to the oil industry this year, one year after the *Exxon Valdez*, would shame Alaska before the nation and give the lie to our proclamations of "environmentally-sound development."

RECEIVED

APR 23 1990

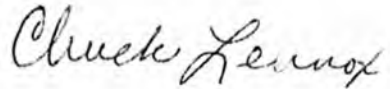
JAN FAIKS
SENATE OFFICE



Finally, we strongly oppose the administration's Camden Bay bills, SB 539 and SB 540. They represent precisely the wrong approach to dealing with problems in a lease sale, all the moreso when those problems were agreed to in a unanimous Alaska Supreme Court finding. We urge you to reject those bills.

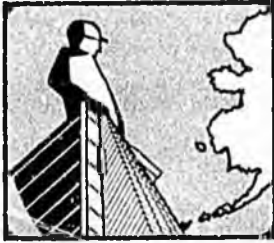
Thanks for your consideration of these comments.

Sincerely,

A handwritten signature in cursive script that reads "Chuck Lennox". The signature is written in dark ink and is positioned above the typed name and title.

Chuck Lennox
President

P.S. We would appreciate your providing the members of the Senate Judiciary Committee with a copy of this letter. Thank you!



*Chris
F41*

Bering Sea Fishermen's Association

725 Christensen Drive
Anchorage, Alaska 99501
(907) 279-6519

RECEIVED

APR 23 1990

JAN FAIKS
SENATE OFFICE

Senator Jan Faiks
P.O. Box V
Juneau, Alaska 99511

April 17, 1990

Re: 1990 Oil Spill Legislation

Dear Senator Faiks,

Bering Sea Fishermen's Association, both as a member of the United Fishermen of Alaska and the Oil Reform Alliance, and as an organization whose fishermen depend upon clean and healthy oceans for their livelihood, urges you to support the bills regarding oil spill legislation which have been introduced this session. We have learned from the spill of the Exxon Valdez that prevention is our best weapon against these disasters. It will only be with strong incentives such as those put forth in these bills that the industry will take all the actions needed to ensure that additional spills will be prevented. Our position on each of the bills follows on a bill by bill basis.

CSHB 409:

BSFA supports this bill as amended by the House Finance Committee. It is derived from the hard work of the state appointed Oil Spill Commission and is a long term analysis of our states' oil spill regulations by its citizens. This bill will recognize the careful study and many hours of work that were performed by the Commission. Administrative penalties, making compliance orders effective upon receipt, environmental audits, and increased access provisions will increase the effectiveness of DEC's regulatory authority.

HB 565/SB 502:

This bill will provide industry with the strong incentives needed to ensure that they take all measures needed to prevent oil spills if it is amended. In addition, it will provide state regulations with consistency in addressing oil spills. BSFA supports the following changes to the bill, which will strengthen the penalties:

1. Remove the liability limit, there should be no cap on liability.

2. Change the penalty structure to \$50/gal for oil spilled into freshwater environments; \$25/gal for oil spilled into confined salt-water environments; and \$10/gal for oil spilled into an unconfined salt-water or onto land of the state.

HB 566/SB 503:

BSFA supports this bill in the form which gives the lead to DEC as the agency in charge of catastrophic oil spills. We do not support CSSB 503, as it will leave many legal questions about who is in charge of cleanups and it will undermine DEC's authority. This substitute bill is in direct opposition to the recommendations of the Oil Spill Commission which was composed of a non-partisan citizens group. The House/Senate conference committee which will iron out differences with the bill should be composed of legislators who will listen to the recommendations of their peers on the Oil Spill Commission and support DEC as the lead agency in charge of cleanups.

HB 567/SB 504:

We need the strength which this legislation will add to the DEC's authority on contingency plans, requiring financial responsibility for shippers, and inspection of production and shipping facilities. BSFA supports this bill and urges legislators to get this legislation moving so it can pass through both houses this session.

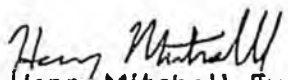
HB 578:

BSFA supports this bill as written. A citizens oversight council on oil spill prevention will ensure that regulatory agencies can and will do their jobs.

We urge you to take action on this legislation this session, we've seen the results of slack regulations and the inability of the oil industry to clean up their spills. We need to ensure that spills don't occur, and that if they ever do they are as small as possible, cleaned up as quickly as possible, and the spiller clearly understands their liability.

We appreciate your support.

Sincerely,


Henry Mitchell, Executive Director
Bering Sea Fishermen's Association



UNITED COOK INLET DRIFT ASSOCIATION

BOX 4649 - KENAI, ALASKA 99611

April 20, 1990

RECEIVED

APR 25 1990

JAN FAIKS
SENATE OFFICE

Senator Jan Faiks
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, Alaska 99811

Dear Senator Faiks:

United Cook Inlet Drift Association (UCIDA) represents 400 Cook Inlet drift fishermen and is a member of United Fishermen of Alaska (UFA) and the Oil Reform Alliance (ORA). UCIDA supports these organizations' positions on current state legislation and would encourage your support also.

The following is a synopsis of UCIDA's position on those issues:

ISSUE 1: Subsistence. UCIDA opposes all current versions of constitutional amendments.

It is irresponsible for the legislature to ask us to amend our constitution when neither the Federal Government nor the Alaskan Legislature can supply the definition for "rural," "customary and traditional," "trade and barter." Even were an amendment to pass, Alaska would still find these terms "redefined" by federal courts as we saw in the Kenaitze decision. Until Congress provides the state and the courts with clear definitions of these terms, Alaska can not take any action with any certainty of its long term impact on the state and its citizens.

We would like to respond to those who cite the need for uniform management and fear a federal "takeover." These people should realize that the Federal government is and has always been in control of management on federal lands. All decisions by the Boards of Fish and Game and all actions by the Department of Fish and Game are subject to federal scrutiny and federal court action. The recent decision by Judge Holland in the Kwethluk caribou case should make this clear.

In conclusion, UCIDA opposes any state action that would call into question the current state definition of "rural" as established by the Alaska State Legislature and any action that will only serve to perpetuate the endless cycle of Federal court cases where, in effect, each case "opens ANILCA" and "redefines the rules of the game."

ISSUE 2: Oil Spill Legislation. UCIDA strongly supports the following legislation:

CSHB 409
HB 565/SB 502
HE 566/SB 503
HB 567/SB 504
HB 578

The legislature is to be commended for the oil spill legislation they passed last session. Those bills essentially set state policy and direction. We feel the above bills are needed to supply state agencies the "tools" necessary to carry out state policy.

With respect to the current "DEC - DES" debate between the House and the Senate, UCIDA would like to remark that we clearly see DEC as the appropriate lead agency. We therefore oppose CSSB 503.

ISSUE 3: Forest Resources and Practices Act. UCIDA supports the passage of the Forest Resources and Practices Act presented to the Resource Committees- HB 331, SB 317- as presented. We are particularly concerned that the riparian buffer standards on state lands managed by DNR and "other public lands" not be reduced.

ISSUE 4: In Stream Flow. UCIDA supports HB 210. Adequate reservations of water are vital to the long term health of our fishery resources. If this legislation does not pass this session we shall certainly make it a campaign issue for the fall elections.

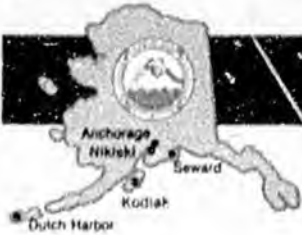
ISSUE 5: Mariculture. UCIDA supports SB 397 and HB 432 which would prohibit fin fish mariculture in Alaska.

Thank you for considering these positions as you near the end of this legislative session.

Sincerely,



Theo Matthews
President



PETRO MARINE SERVICES

A HARBOR ENTERPRISES COMPANY

1600 A Street, Suite 307 • Anchorage, Alaska 99503 • (907) 278-7586

Seward
224-3190

RECEIVED

April 27, 1990

APR 30 1990

JAN FAIKS
SENATE OFFICE

Nikiski
776-8000

The Honorable Jan Faiks
State Senate
P.O. Box V
Juneau, Alaska 99811

Subject: Senate Bill 502 - Relating to Civil Penalties

Dear Senator Faiks:

This is to express our company's opposition to Senate Bill 502.

The primary concern with the bill is that it will convert civil penalties to what are essentially punitive penalties rendering them uninsurable. Current law contains a prohibition against using the civil penalties for punitive purposes. This provision would be repealed by Senate Bill 502 thereby allowing the assessment of penalties for punitive purposes. We are advised by our insurance broker that this change makes these penalties uninsurable under any policy available in the current market place.

Kodiak
486-3421

Secondly, Alaska's AS 47.040.040(i) requires that financial responsibility extend to an assessment made under the penalty provisions. Senate Bill 502 would make it impossible to comply with this provision because insurance is not currently available for punitive penalties.

There are several other significant problems with the legislation, including the 36-hour limitation on credit for cleanup and the changes to burden of proof.

Dutch Harbor
581-1350

April 27, 1990
The Honorable Jan Faiks
Page 2

The enormous costs of cleanup and restoration are incentive enough for an oil distributor or dealer to operate carefully and within the restrictions of law. The additional threat of penalties, no matter how much, is not going to make a better or more careful operator out of a distributor. If the goal is to inspire better operators and insure that there are sufficient resources to clean up a spill, we must distinguish between willful or negligent spills caused by careless operators and accidents which victimize even the most careful.

Thank you for the opportunity to comment on this legislation.

Very truly yours,

A handwritten signature in cursive script, appearing to read "W.B. Schoephoester", is written over a horizontal line.

W.B. Schoephoester
Manager Planning and Projects

WES:hg

**OIL REFORM ALLIANCE BRIEFING PAPER ON
CS HB 567 FINANCE**

PURPOSE OF BILL: Sets a higher standard of spill prevention and response.

WHY IS THIS BILL IMPORTANT?

"System design must provide for redundancy--backup systems to prevent error from becoming disaster and overbuilding to provide for wider margins of error. Proper functioning requires constant testing, inspection vigilance, cooperation, discipline, expertise and commitment of organizations at every level of government and industry."

Alaska Oil Spill Commission, Executive Summary

WHAT DOES THIS BILL DO?

- **REQUIRES PREVENTION AND CONTINGENCY PLANS** for oil terminals, exploration and production facilities, and tank vessels and oil barges.
- **REQUIRES USE OF BEST TECHNOLOGY AVAILABLE** for spill response.
- **REQUIRES INDUSTRY TO** maintain sufficient equipment, personnel, and resources to rapidly contain a "realistic maximum discharge" and to remove that discharge within 72 hours.
- **INCREASES INSURANCE REQUIREMENTS** for oil terminals, exploration and production facilities, and tank vessels and oil barges.
- **ALLOWS STATE TO MONITOR** vessel traffic and inspect tankers and oil pipelines.
- **ORDERS STATE SURVEY** of noncrude oil terminals to determine inventory, ability to respond to release, and structural integrity.

**OIL REFORM ALLIANCE BRIEFING PAPER ON
CS HB 565 JUDICIARY**

PURPOSE OF BILL: To provide strong incentives for safe handling of oil.

WHY IS THIS BILL IMPORTANT?

"Obviously, the present system, providing minimum penalties for creating massive environmental damage, has not deterred the industry from putting the coasts and oceans of the world at constant hazard."

Walt Parker, Alaska Oil Spill Commission.

Not only are current civil penalties not high enough to provide meaningful incentives and compensation, penalties established in statute in 1978 were not inflation-proofed. Further, it is impossible to ever reach maximum per gallon penalties because base penalties are lowered 40-80% depending on the characteristics of oil.

WHAT DOES THIS BILL DO?

INCREASES THE CIVIL PENALTIES for discharges of oil so penalties are both compensatory and punitive.

INFLATION-PROOFS CIVIL PENALTIES so costs for damages and compensation are tied in with the consumer price index.

REMOVES INSURANCE REQUIREMENT for civil penalties as insurance companies do not cover punitive penalties.

RETAINS MAXIMUM OF \$500,000,000 for civil penalties. Persons fined civil penalties are entitled to set off penalty amounts against penalties awarded by courts for the same discharge.

ESTABLISHES CONSISTENCY FOR CRUDE AND NONCRUDE discharges in terms of base penalties in three receiving environments (fresh water - \$50/gal, marine confined - \$25/gal, marine unconfined - \$10/gal).

PROVIDES INCENTIVES TO INDUSTRY to rapidly remove oil that has been discharged by exempting penalties on gallons recovered within a set time frame (36 hr. for surface spills, 1 yr. for subsurface spills).

PROVIDES INCENTIVES TO INDUSTRY to prevent oil spills and to comply with state and federal laws.

CROWLEY MARITIME CORPORATION



April 30, 1990

Senator Jan Faiks
3111 C Street
Anchorage, AK 99503

RECEIVED

MAY 2 1990

JAN FAIKS
SENATE OFFICE

Dear Senator Faiks:

As a resident of the State of Alaska, living in Anchorage, and as General Manager of Oil Industry Services for Crowley Maritime Corporation in Alaska, I would like to share with you our concerns with S.B. 502. While I appreciate the intention of the bill to provide a "meaningful incentive" for the safe handling of oil, those of us involved with the marine transportation of oil believe that the proposed civil penalties are excessive and will drive the reputable vessel operators out of the State of Alaska.

Crowley Maritime Corporation has a long history of safe and pollution free operations in Alaskan waters. The Crowley companies; APUTCO, Arctic Lighterage Company, Arctic Marine Freighters, Kuskokwim Transportation Company, Pacific Alaska Lines and Puget Sound Tug & Barge Company have operated in Alaska for many years. Our companies transport petroleum fuels that are vital for heating in remote villages and for the aviation industry. Crowley tugs and barges annually deliver fuel and supplies to over 130 villages and communities in Alaska from Ketchikan to Kaktovik.

We also operate fuel storage terminals in the State of Alaska. The Crowley company, Pacific Alaska Fuel Services operates oil terminals in Captains Bay, Kotzebue and Nome. These terminals serve the vast fishing fleet and supply local communities with heating fuel, gasoline and aviation fuel.

Our company was involved in assisting the state in formulating the original oil spill contingency plan requirements in 1981. The Crowley contingency plans were a model for the Alaska Department of Environmental Conservation.

We have considerable experience in operating marine equipment in the potentially harsh environment of Alaskan waters.

Crowley Maritime Plaza
Post Office Box 2287
Seattle, Washington 98111
(206) 443-8100
Telex 47-40099

101 California Street
San Francisco, California 94111-5875
(415) 546-2500
Telex 34-0578

4300 B Street, Suite 507
Anchorage, Alaska 99503-5997
(907) 56-4
Telex 090-25403
Telecopier 762-3330

Post Office Box 17178
Portland, Oregon 97217-0178
(503) 283-1244
Telex 36-0935

Senator Jan Faiks
April 30, 1990
Page 2

This experience has taught us to invest heavily in our equipment and human resources. Ongoing vessel and terminal inspections are critical to prevent equipment failures that could result in oil spills. Crew training programs are conducted to reduce the possibility of human error. We are currently conducting eight seminars at the California Maritime Academy for vessel masters, mates and chief engineers involved with the transportation of oil barges. Over 200 marine personnel will complete the six day seminars at a cost of approximately \$400,000. Seminar topics include: oil spill prevention and response, tankbarge operations, engineering, marine operations procedures, weather routing and radar plotting.

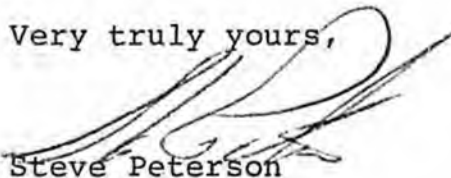
The concept in S.B. 502 that the marine transportation industry needs large civil penalties to prevent oil pollution is very difficult to understand for the reputable operator. As part of our costs to operate in Alaska we must pay high insurance premiums for pollution liability insurance and prepare detailed oil spill contingency plans. The pollution insurance is requiring higher deductibles which is a financial risk to the company in the event of a spill. Contingency plans require response equipment, technical evaluations of the operating regions to prevent damage to fish and wildlife in the event of a spill and response crew training. With the requirements of increased financial responsibility and more extensive oil spill contingency plans, we fail to see the necessity of higher civil penalties. It appears that the entire impact of all pending oil spill legislation on the maritime industry has not been considered. This bill is short sighted and will prohibit us from continuing to conduct oil transportation and storage business in the State of Alaska.

It is our opinion that S.B. 502 places the vessel owner or operator in the position of betting the farm each time it transports oil in state waters. We strongly oppose these excessive penalties considering all the pending legislation designed to prevent oil spills.

Kindly let me know if I can provide you with any additional information or answer any questions.

Thank you for your consideration in this critical matter impacting the marine transportation industry in our state.

Very truly yours,



Steve Peterson
General Manager
Oil Industry Services

kf

CROWLEY MARITIME CORPORATION



April 30, 1990

Senator Jan Faiks
3111 C Street
Anchorage, AK 99503

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Crowley Maritime Plaza
Post Office Box 2187
Seattle, Washington 98111
(206) 445-8182
Telex 47-68999

101 California Street
San Francisco, California 94111-6875
(415) 846-2800
Telex 34-0678

4300 B Street, Suite 807
Anchorage, Alaska 99503-8897
(907) 863-1114
Telex 090-36408
Teletypewriter 962-9280

Post Office Box 17178
Portland, Oregon 97217-0178
(503) 388-1344
Telex 26-8834

Senator Jan Faiks
April 30, 1990
Page 2

This experience has taught us to invest heavily in our equipment and human resources. Ongoing vessel and terminal inspections are critical to prevent equipment failures that could result in oil spills. Crew training programs are conducted to reduce the possibility of human error. We are currently conducting eight seminars at the California Maritime Academy for vessel masters, mates and chief engineers involved with the transportation of oil barges. Over 200 marine personnel will complete the six day seminars at a cost of approximately \$400,000. Seminar topics include: oil spill prevention and response, tankbarge operations, engineering, marine operations procedures, weather routing and radar plotting.

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Kindly let me know if I can provide you with any additional information or answer any questions.

Thank you for your consideration in this critical matter impacting the marine transportation industry in our state.

Very truly yours,



Steve Peterson
General Manager
Oil Industry Services

kf

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION : SS SB502

PUBLISH DATE : 4/18/90

FISCAL NOTE

REQUEST:

Revision Date 4/16/90
Title: An Act relating to the strengthen-
ing of DEC's civil Penalty and damage provisions.
Sponsor: Rules Committee
Requestor: Governor

Agency Affected: Environ. Conservation
BRU: Environmental Quality
Components: Environmental Quality

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND&STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	6.0	0.0	0.0	0.0	0.0	6.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL	0.0	0.0	0.0	0.0	0.0	0.0
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REVENUE	0.0	0.0	0.0	0.0	0.0	0.0
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FUNDING: (Thousands of Dollars)

GENERAL FUND	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS	0.0	0.0	0.0	0.0	0.0	0.0
OTHER	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

The bill revises the schedule of penalties for the discharge of oil.

Prepared by: David Bruce
Division: Environmental Quality

Phone: 465-2630
Date: 4/16/90

Approved by Commissioner: AD Hyle
Agency: Department of Environmental Conservation

Date: 4/16/90

Distribution (by preparer) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

February 21, 1990

2525

SR 502 cont'd

was read the first time and referred to the Judiciary Committee and the Resources Committee.

Zero fiscal note published today from Department of Environmental Conservation. Fiscal note published today from Department of Fish and Game.

Governor's transmittal letter dated February 21:

Dear Mr. President:

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, will be provided by my staff.

As you know, the Oil Spill Commission "Executive Summary," issued last month, includes over 50 recommendations.

February 21, 1990

2526

SB 502 cont'd

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,

/s/
Steve Cowper
Governor

SB 503

SENATE BILL NO. 503 by the Rules Committee by request of the Governor, entitled:

"An Act authorizing the governor to spend money from the oil and hazardous substance release response fund for declared disasters; expanding the role of the division of emergency services during oil-spill-related declared disasters; establishing the Alaska State Emergency Response Commission; and providing for an effective date."

was read the first time and referred to the Senate Special Committee on Oil and Gas, the Resources Committee and the Finance Committee.

Fiscal notes published today from Department of Environmental Conservation and Department of Fish and Game.

Governor's transmittal letter dated February 21:

Dear Mr. President:

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.



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

April 18, 1990

The Honorable Tim Kelly
President of the Senate
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Mr. President:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a sponsor substitute for SB 502, relating to civil penalties and damages for oil spills. This bill differs from the original (see my February 21, 1990 transmittal letter at 1990 Senate Jour. 2525) in the following three respects:

(1) Section 2 of the sponsor substitute sets out substantially lower per-gallon penalties for non-crude oil discharges than did the original bill.

(2) Section 4 of the sponsor substitute allows imposition of the per-gallon penalties for non-crude oil discharges only where the discharge is in excess of 500 gallons. The original bill would have allowed imposition of the per-gallon penalties for any amount discharged (eliminating the present 18,000-gallon floor).

(3) Section 5 of the sponsor substitute allows a defendant to deduct the number of gallons of non-crude oil recovered within 72 hours after a non-crude oil spill for penalty calculation purposes. The original bill allowed a defendant to deduct the amount of oil recovered only within 36 hours after a spill.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Cowper", written over a circular stamp or seal.

Steve Cowper
Governor

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.

(2) may not exceed \$10,000 for any single proposal or project.

(d) The department shall establish an advisory committee, consisting of five members, to assist the department in reviewing and evaluating grant applications under this section. The advisory committee must include

- (1) an officer or employee of the department;
- (2) a representative of the University of Alaska;
- (3) a professional civil or chemical engineer with experience in environmental engineering;
- (4) an owner or representative of a small business; and
- (5) a public member. (§ 3 ch 97 SLA 1989)

Effective dates. — Section 5, ch. 97, SLA 1989, provides: "This Act takes effect July 1, 1989."

Article 7. Prohibited Acts and Penalties.

<p>Section 758. Civil penalties for discharges of oil 759. Civil penalties for discharges of crude oil 763. Attorney fees and costs 770. Detention of vessel without warrant as security for damages</p>	<p>Section 822. Strict liability for the release of hazardous substances 823. Hazardous substance response action contractors 826. Definitions</p>
---	--

Sec. 46.03.758. Civil penalties for discharges of oil. (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 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 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 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 which poses a significant threat to the economy and environment

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

(b) No later than the 10th day after the convening of the Second Session of the Tenth Alaska Legislature, the department shall submit to the legislature regulations establishing the following schedule of fixed penalties for discharges of oil:

(1) Subject to (2) of this subsection, the penalties for the following categories of receiving environments may not exceed

(A) \$10 per gallon of oil which enters an anadromous stream or other freshwater environment with significant aquatic resources;

(B) \$2.50 per gallon of oil which enters an estuarine, intertidal or confined saltwater environment; and

(C) \$1 per gallon of oil which enters an unconfined saltwater environment, public land or freshwater environment without significant aquatic resources.

(2) For discharges of oil which are caused by the gross negligence or intentional act of the discharger, or when the court finds that the discharger did not take reasonable measures to contain and clean up the discharged oil, the penalty shall be determined by multiplying the penalty established under (1) of this subsection by a factor of five.

(c) Regulations adopted under (b) of this section shall become effective 60 days after submission to the legislature, unless disapproved by a special concurrent resolution introduced in either house, and concurred in by a majority of the members in joint session within 60 days of the submission of the regulations. The department may periodically revise regulations adopted under (b) of this section. Revised regulations shall be submitted to the legislature no later than 10 days after the convening of the appropriate regular session of the legislature, and are subject to disapproval as specified in this subsection.

(d) The schedule shall vary according to the toxicity, degradability and dispersal characteristics of the oil. The schedule 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 shall apply to discharges in the most sensitive and productive of receiving environ-

ments within each category of receiving environment, and the penalty shall decrease for less productive or sensitive receiving environments.

(e) If a discharge of oil in excess of 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 in the regulations adopted under this section:

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

(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.

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

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

(h) A person otherwise liable for penalties under (e) of this section is not liable if the person demonstrates, by a preponderance of the evidence, that the discharge occurred solely as a result of

(1) an act of God;

(2) an act of a third person with intent to cause a discharge, unless the third person is a person with whom the person charged is made jointly and severally liable under (e)(1) — (3) of this section;

(3) a negligent or intentional act of the State of Alaska or the United States; or

(4) an act of war.

(i) Notwithstanding AS 46.03.875, a person liable under this section is not also liable for the discharge of oil under AS 46.03.760(a). A person causing or permitting a discharge of oil of 18,000 gallons or less not permitted under applicable state or federal law is liable for that discharge under the penalty provisions of AS 46.03.760(a); however, the court may impose a penalty of less than \$500 for the discharge.

(j) The court may reduce the penalty imposed under this section if the person charged demonstrates, by a preponderance of the evidence, that the discharge was caused solely by a negligent act of a third person, unless the third person is a person with whom the person charged is made jointly and severally liable under (e)(1) — (3) of this section.

(k) *[Repealed, § 19 ch 59 SLA 1986.]*

(l) In this section

(1) "adjacent outer continental shelf" means that portion of the outer continental shelf which would be within the territorial jurisdiction of the state if its boundaries were extended seaward to the outer margin of the outer continental shelf;

(2) "confined saltwater environment" means a bay, sound or other partially enclosed saltwater body in which flushing through tidal or current action is significantly restricted;

(3) "discharge of oil" means the entry of oil into or upon the water or public land of the state (except oil discharges into an enclosed and impervious oil spill containment area), regardless of causation;

(4) "intertidal" means the ocean area between highest high water and lowest low water of tidal action;

(5) "offshore platform" means an offshore structure, whether floating or temporarily or permanently secured to the floor of the ocean or other water body, which is used primarily for the exploration for or production of oil or natural gas;

(6) "oil" means petroleum and any substance refined from petroleum, except crude oil;

(7) "operator" means the person who, through contract, lease, sublease, or otherwise, exerts general supervision and control of activities at the facility; the term includes, by way of example and not limita-

tion, a prime or general contractor, the master of a vessel and the master's employer, or any other person who, personally or through an agent or contractor, undertakes the general functioning of the facility;

(8) "vessel" means any form or manner of watercraft, whether or not capable of self-propulsion, except offshore platforms. (§ 1 ch 129 SLA 1977; am §§ 1 — 3 ch 128 SLA 1978; am § 110 ch 59 SLA 1982; am § 19 ch 59 SLA 1986; am §§ 1, 2 ch 41 SLA 1989)

Effect of amendments. — The 1989 amendment, effective August 10, 1989, deleted "After April 19, 1978" at the beginning and substituted "adopted under this section" for "or \$100,000,000, which-

ever is less" at the end of subsection (e) and rewrote the definition of "oil" in paragraph (7)(6) which read "means petroleum, crude oil, and any substance refined from petroleum or crude oil."

Sec. 46.03.759. Civil penalties for discharges of crude oil.

(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, in the amount of

(1) \$8 per gallon of crude oil discharged for the first 420,000 gallons discharged; and

(2) \$12.50 per gallon of crude oil discharged for amounts discharged in excess of 420,000 gallons.

(b) In determining how many gallons of crude oil have been discharged for purposes of assessing a penalty under (a) of this section, the court shall deduct the number of discharged gallons of crude oil that the defendant proves 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, or sinking agents, or other means is not considered removal for the purposes of this subsection.

(c) Subject to the \$500,000,000 maximum set under (a) of this section the court shall assess four times the penalty 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.

(d) Notwithstanding AS 46.03.875, a person liable for civil penalties under this section is not also liable for the discharge of the crude oil under AS 46.03.760(a). A person causing or permitting a discharge of crude oil of 18,000 gallons or less not permitted under applicable state or federal law is liable for that discharge under the penalty

provisions of AS 46.03.760(a); however, the court may impose a penalty of less than \$500 for the discharge.

(e) The court may reduce the penalty imposed under this section if the defendant demonstrates, by a preponderance of the evidence, that the discharge was caused solely by a negligent act of a third person unless the third person is a person with whom the defendant was found jointly and severally liable for the discharge under other state law.

(f) A person otherwise liable for penalties under this section is not liable if the person demonstrates, by a preponderance of the evidence, that the discharge occurred solely as a result of

- (1) an act of God;
- (2) a negligent or intentional act of the State of Alaska or the United States; or
- (3) an act of war.

(g) In this section, "discharge" means entry of crude oil into or upon the water or public land of the state, regardless of causation, except discharges into an enclosed and impervious oil spill containment area. (§ 3 ch 41 SLA 1989)

Revisor's notes. — The introductory language of (c) of this section was reorganized in 1989 to conform to the style of the Alaska Statutes.

Effective dates. — Chapter 41, SLA 1989, which enacted this section, took effect on August 10, 1989.

Sec. 46.03.763. Attorney fees and costs. In an action to impose civil penalties under AS 46.03.758, 46.03.759, or 46.03.760 for a discharge of oil, the state may recover full reasonable attorney fees and costs incurred by the state in maintaining the action. (§ 4 ch 41 SLA 1989)

Cross references. — For effect of this section on Rule 82, Alaska Rules of Civil Procedure, see § 9, ch. 41, SLA 1989 in the Temporary and Special Acts.

Effective dates. — Chapter 41, SLA 1989, which enacted this section, took effect on August 10, 1989.

Sec. 46.03.770. Detention of vessel without warrant as security for damages. A vessel that is used in or in aid of a violation of AS 46.03.740 — 46.03.750 may be detained after a valid search by the department, an agent of the department, a peace officer of the state, or an authorized protection officer of the Department of Fish and Game. Upon judgment of the court having jurisdiction that the vessel was used in, or was the cause of, a violation of AS 46.03.740 — 46.03.750 with knowledge of its owner or under circumstances indicating that the owner should reasonably have had this knowledge, the vessel may be held as security for payment to the state of the amount of damages assessed by the court under AS 46.03.758, 46.03.759, 46.03.760, 46.03.822, and AS 46.04.030(g). If the damages assessed are not paid

(8) "vessel" means any form or manner of watercraft, whether or not capable of self-propulsion, except offshore platforms. (§ 1 ch 129 SLA 1977; am §§ 1-3 ch 128 SLA 1978; am § 110 ch 59 SLA 1982; am § 19 ch 59 SLA 1986)

Revisor's notes. — In 1987, a reference in paragraph (b)(1) to "(3) of this subsection" was changed to "(2) of this subsection" to correct a manifest error.

Cross references. — For provision that actions brought under this section may be brought directly against insurers or other persons providing evidence of financial responsibility, see AS 46.04.040(c).

For schedule of civil penalties under (b) of this section, see 18 AAC 75.510 — 18 AAC 75.600.

Effect of amendments. — The 1986 amendment repealed subsection (k), concerning the "oil spill mitigation account."

Editor's notes. — The effective date (referred to in (e) of this section) of the regulation adopting the schedules is April 19, 1978.

Sec. 46.03.760. Civil action for pollution; damages. (a) A person who violates or causes or permits to be violated a provision of this chapter other than AS 46.03.250 — 46.03.314, or a provision of AS 46.04 or AS 46.09, or a regulation, a lawful order of the department, or a permit, approval, or acceptance, or term or condition of a permit, approval, or acceptance issued under this chapter or AS 46.04 or AS 46.09 is liable, in a civil action, to the state for a sum to be assessed by the court of not less than \$500 nor more than \$100,000 for the initial violation, nor more than \$5,000 for each day after that on which the violation continues, and that shall reflect, when applicable,

(1) reasonable compensation in the nature of liquidated damages for any adverse environmental effects caused by the violation, which shall be determined by the court according to the toxicity, degradability and dispersal characteristics of the substance discharged, the sensitivity of the receiving environment, and the degree to which the discharge degrades existing environmental quality;

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

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

(b) Except as determined by the court under (f)(4) of this section, actions under this section may not be used for punitive purposes, and sums assessed by the court must be compensatory and remedial in nature.

(c) The court, upon motion of the department or upon its own motion, may defer assessment of all or part of that portion of the sum imposed upon a person under (a)(3) of this section conditioned upon the person complying, within the shortest feasible time, with the requirement for which a violation is shown.

(d) As used in this section, "economic savings" means that sum which a person would be required to expend for the planning, acquisi-

tion, siting, construction, installation and operation of facilities necessary to effect compliance with the standard violated.

(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 or removal of the pollutant, restoration of the environment to its former state, and all incidental administrative costs.

(f) A person who violates or causes or permits to be violated a provision of AS 46.03.250 — 46.03.314, or a regulation, a lawful order of the department, or a permit, approval, or acceptance, or term or condition of a permit, approval, or acceptance issued under AS 46.03.250 — 46.03.314 is liable, in a civil action, to the state for a sum to be assessed by the court of not less than \$500 nor more than \$100,000 for the initial violation, nor more than \$10,000 for each day after that on which the violation continues, and that shall reflect, when applicable,

(1) reasonable compensation in the nature of liquidated damages for any adverse environmental effects caused by the violation, that shall be determined by the court according to the toxicity, degradability and dispersal characteristics of the substance discharged, the sensitivity of the receiving environment, and the degree to which the discharge degrades existing environmental quality;

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

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

(4) the need for an enhanced civil penalty to deter future noncompliance. (§ 3 ch 120 SLA 1971; am § 9 ch 220 SLA 1976; am § 5 ch 266 SLA 1976; am §§ 5, 6 ch 116 SLA 1980; am §§ 5 — 7 ch 77 SLA 1984; am § 9 ch 59 SLA 1986)

Cross references. — For oil pollution control, see AS 46.04. For provision that actions brought under (a) and (e) of this section may be brought directly against insurers or other persons providing evidence of financial security, see AS 46.04.040(e).

Effect of amendments. — The 1984 amendment substituted "other than AS 46.03.250 — 46.03.314, or a provision of"

for "or" in the introductory language of subsection (a) and made a series of technical changes through the rest of this subsection, added "Except as determined by the court under (f)(4) of this section" at the beginning of subsection (b), and added subsection (f).

The 1986 amendment in the introductory language of subsection (a) inserted "or AS 46.09" in two places.

S B

513

FISCAL NOTE

REQUEST:

Revision Date: _____
 Title: "An act relating to unlawful
 exploitation of a minor..."
 Sponsor: Senate Judiciary
 Requestor: Senate Judiciary

Agency Affected: Department of Law
 BRU: Prosecution
 Components: All

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

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

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see the attached analysis.

Prepared by: Richard I. Pegues
 Richard I. Pegues, Director
 Division: Administrative Services
 Phone: 465-3672
 Date: April 18, 1990

Approved by Commissioner: Richard I. Pegues / FOR
 Douglas B. Baily, Attorney General
 Date: April 18, 1990
 Agency: Department of Law

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SB 513

This bill amends AS 11.41.455 to include audio recordings in the crime of unlawful exploitation of a minor. The bill also amends AS 11.61.125(a) to include the distribution of any material, which aurally depicts conduct described in the unlawful exploitation of a minor statute, in the crime of distribution of child pornography. The conduct that is already prohibited by these statutes is fairly comprehensive. Consequently, the addition of audio recordings will not have a fiscal impact.

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465-3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 23, 1990

SUBJECT: Amendments to child pornography laws
(Work Order No. 6-2285)

TO: Senator Jan Faiks, Chair
Senate Judiciary Committee

FROM: John B. Gaguine *JBG*
Legislative Counsel

Enclosed is a bill amending the two child pornography statutes in Alaska, AS 11.41.455 (unlawful exploitation of a minor) and AS 11.61.125 (distribution of child pornography). I added the amendment to the latter statute to keep the two statutes consistent.

My gut feeling is that this bill may present serious constitutional problems. It is now well established that restrictions on visual child pornography are constitutionally acceptable, because the free speech elements are outweighed by the damage that child pornography does to the child. However, it seems to me that a court might well reach a different balance when there is no visual element involved. A court would probably approve a law that banned audio recording of the actual sexual acts listed in AS 11.41.455(a). But that statute also bans simulated acts. Since an aural recording of simulated acts does not require the child even to undress, let alone engage in any physical conduct, it seems quite possible that a court would not find the harm necessary to counterbalance the free speech interests.

If I may be of further assistance, please advise.

JBG:gc
G13/105

Enclosure

(2) telephones another and fails to terminate the connection with intent to impair the ability of that person to place or receive telephone calls;

(3) makes repeated telephone calls at extremely inconvenient hours;

(4) makes an anonymous or obscene telephone call or a telephone call that threatens physical injury;

(5) subjects another person to offensive physical contact; or

(6) violates a provision of an order issued under AS 25.35.010(b) or 25.35.020 restraining the respondent from communicating directly or indirectly with the petitioner.

(b) Harassment is a class B misdemeanor. (§ 7 ch 166 SLA 1978; am § 10 ch 61 SLA 1982)

Cross references. — For provisions authorizing arrest without warrant in certain cases where the police officer has rea-

sonable cause to believe that the person has committed a crime under this section, see AS 12.25.030(b).

NOTES TO DECISIONS

For case construing former AS 11.45.035 relating to illegal use of telephones, see *Anniskette v. State*, 489 P.2d 1012 (Alaska 1971).

Quoted in *Allen v. State*, 759 P.2d 541 (Alaska Ct. App. 1988).

Cited in *Brower v. State*, 728 P.2d 645 (Alaska Ct. App. 1986).

Collateral references. — Misuse of telephones as disorderly conduct, 97 ALR2d 504.

Validity, construction, and application of state criminal statute forbidding use of telephone to annoy or harass, 95 ALR3d 411.

Forum state's jurisdiction over nonresident defendant in action based on obscene or threatening telephone call from out of state, 37 ALR4th 852.

Sec. 11.61.125. Distribution of child pornography. (a) A person commits the crime of distribution of child pornography if the person brings or causes to be brought into the state for distribution, or in the state distributes, or in the state possesses, prepares, publishes, or prints with intent to distribute, any material that visually depicts conduct described in AS 11.41.455(a), knowing that the production of the material involved the use of a child under 18 years of age who engaged in the conduct.

(b) This section does not apply to acts that are an integral part of the exhibition or performance of a motion picture if the acts are performed within the scope of employment by a motion picture operator or projectionist employed by the owner or manager of a theater or other place for the showing of motion pictures, unless the motion picture operator or projectionist

(1) has a financial interest in the theater or place in which employed; or

(2) causes the performance or motion picture to be performed or exhibited without the consent of the manager or owner of the theater or other place of showing.

(c) Distribution of child pornography is a class C felony.

(d) In this section, "distribution" includes delivering, selling, renting, leasing, lending, giving, circulating, exhibiting, presenting, providing, and exchanging, whether or not for monetary or other consideration. (§ 2 ch 57 SLA 1983; am §§ 1, 2 ch 39 SLA 1985)

Cross references. — For crime of unlawful exploitation of a minor, see AS 11.41.455.

Effect of amendments. — The 1985 amendment in subsection (a) deleted "sale or" preceding "distribution" and "sell, or exhibit to others for commercial consideration" preceding "any material." inserted

"in the state distributes, or," and substituted "in" for "under" following "conduct described"; and added subsection (d).

Collateral references. — Validity and construction of statutes and ordinances regulating sexual performance by child, 21 ALR4th 239.

Sec. 11.61.130. Misconduct involving a corpse. (a) A person commits the crime of misconduct involving a corpse if

(1) except as authorized by law or in an emergency, the person intentionally disinters, removes, conceals, or mutilates a corpse;

(2) the person engages in sexual penetration of a corpse; or

(3) the person detains a corpse for a debt or demand or upon a lien or charge.

(b) Misconduct involving a corpse is a class A misdemeanor. (§ 7 ch 166 SLA 1978)

Collateral references. — 22 Am. Jur. 2d, Dead Bodies, §§ 47-50.

25A C.J.S., Dead Bodies, §§ 8(2)-8(4).

Action at law for desecration of grave, 172 ALR 554.

Immunity from liability for unlawful treatment of dead body in operation of hospital by state or governmental unit or agency, 25 ALR2d 244.

Liability in damages for withholding corpse from relatives, 48 ALR3d 240.

Validity, construction, and application of statutes making it a criminal offense to mistreat or wrongfully dispose of dead body, 81 ALR3d 1071.

Sec. 11.61.140. Cruelty to animals. (a) A person commits the crime of cruelty to animals if the person

(1) intentionally inflicts severe and prolonged physical pain or suffering on an animal;

(2) recklessly neglects an animal and, as a result of that neglect, causes the death of the animal or causes severe pain or suffering to the animal; or

(3) kills an animal by the use of a decompression chamber.

(b) It is a defense to a prosecution under (a)(1) or (2) of this section that the conduct of the defendant

(1) conformed to accepted veterinary practice;

(2) was part of scientific research governed by accepted standards;

or

NOTES TO DECISIONS

Applied in *Jager v. State*, 748 P.2d 1172 (Alaska Ct. App. 1988).

Sec. 11.41.450. Incest. (a) A person commits the crime of incest if, being 18 years of age or older, that person engages in sexual penetration with another who is related, either legitimately or illegitimately, as

- (1) an ancestor or descendant of the whole or half blood;
 - (2) a brother or sister of the whole or half blood; or
 - (3) an uncle, aunt, nephew, or niece by blood.
- (b) Incest is a class C felony. (§ 3 ch 166 SLA 1978)

NOTES TO DECISIONS

Death of defendant abated prosecution under former section. *Hartwell v. State*, 423 P.2d 282 (Alaska 1967). (Decided under former AS 11.40.110.)

Cited in *Theodore v. State*, 692 P.2d 987 (Alaska Ct. App. 1985).

Collateral references. — Aiding and abetting offense of incest by one not related to party, 5 ALR 784; 74 ALR 1110; 131 ALR 1322.

Relationship created by adoption as within statute regarding incest, 151 ALR 1146.

Consent as element of incest, 36 ALR2d 1299.

Sexual intercourse between persons related by half blood, 72 ALR2d 706.

Prosecutrix as accomplice or victim, 74 ALR2d 705.

Rape, incest as included within charge of, 76 ALR2d 484.

Sec. 11.41.455. Unlawful exploitation of a minor. (a) A person commits the crime of unlawful exploitation of a minor if, in the state and with the intent of producing a live performance, film, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct listed in (1) — (6) of this subsection, the person knowingly induces or employs a child under 18 years of age to engage in, or photographs, films, or televises a child under 18 years of age engaged in, the following actual or simulated conduct:

- (1) sexual penetration;
- (2) the lewd touching of another person's genitals, anus, or breast;
- (3) the lewd touching by another person of the child's genitals, anus, or breast;
- (4) masturbation;
- (5) bestiality; or
- (6) the lewd exhibition of the child's genitals.

(b) A parent, legal guardian, or person having custody or control of a child under 18 years of age commits the crime of unlawful exploitation of a minor if, in the state, the person permits the child to engage in conduct described in (a) of this section knowing that the conduct is

intended to be used in producing a live performance, film, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct.

(c) Unlawful exploitation of a minor is a class B felony. (§ 3 ch 166 SLA 1978; am § 1 ch 57 SLA 1983)

Cross references. — For crime of distribution of child pornography, see AS 11.61.125.

NOTES TO DECISIONS

Conviction and sentence upheld. — See *Depp v. State*, 686 P.2d 712 (Alaska Ct. App. 1984).

Applied in *Qualr v. State*, 652 P.2d 481 (Alaska Ct. App. 1982).

Cited in *Lawrence v. State*, 764 P.2d 318 (Alaska Ct. App. 1988).

Sec. 11.41.460. Indecent exposure. (a) An offender commits the crime of indecent exposure if the offender intentionally exposes the offender's genitals to another person with reckless disregard for the offensive, insulting, or frightening effect the act may have on that person.

(b) Indecent exposure before a person under 16 years of age is a class A misdemeanor. Indecent exposure before a person 16 years of age or older is a class B misdemeanor. (§ 4 ch 78 SLA 1983)

Sec. 11.41.470. Definitions. For purposes of AS 11.41.410 — 11.41.470, unless the context requires otherwise,

(1) "incapacitated" means temporarily incapable of appraising the nature of one's own conduct and physically unable to express unwillingness to act;

(2) "mentally incapable" means suffering from a mental disease or defect that renders the person incapable of understanding the nature or consequences of the person's conduct, including the potential for harm to that person;

(3) "victim" means the person alleged to have been subjected to sexual assault in any degree or sexual abuse of a minor in any degree;

(4) "without consent" means that a person

(A) with or without resisting, is coerced by the use of force against a person or property, or by the express or implied threat of death, imminent physical injury, or kidnapping to be inflicted on anyone; or

(B) is incapacitated as a result of an act of the defendant. (§ 3 ch 166 SLA 1978; am § 5 ch 78 SLA 1983; am § 5 ch 96 SLA 1988; am § 28 ch 50 SLA 1989)

Revisor's notes. — Reorganized in 1988 to alphabetize the defined terms.

Cross references. — For definition of terms used in this title, see AS 11.81.900.

S B

522



Alaska Court System

State of Alaska

303 "K" STREET
ANCHORAGE, ALASKA
99501

ARTHUR H. SNOWDEN II
ADMINISTRATIVE DIRECTOR

(907) 274-8111

February 22, 1990

Senator Jan Faiks
Alaska State Legislature
P. O. Box V
Juneau, Alaska 99811

RE: Mediation Pilot Project Bill

Dear Senator Faiks:

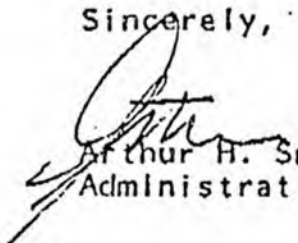
The Alaska Court System supports proposed legislation which would create a pilot project in mediation in Anchorage and Fairbanks. For a one year period, certain contested domestic relations cases in Anchorage and Fairbanks would be channelled into a mediation program annexed to the court, rather than onto the traditional path which leads directly to the courtroom for an adversarial determination of the issues by a judge. At the end of the one year period, the pilot project will be evaluated. This evaluation, which will explore the program's efficiency, cost-effectiveness and litigant satisfaction, will help the court and the legislature determine if a permanent mediation program would be worthwhile.

According to the Report of the National Conference on Dispute Resolution and the State Courts (held in late 1988), dispute resolution procedures such as mediation are credited with reducing judicial workload and court overcrowding, reducing disputants' costs and lowering barriers to their access to justice, and achieving more satisfactory resolution of disputes than is likely to happen from traditional courtroom battle and settlement on the courthouse steps.



The pilot project has received an endorsement from the Task Force on Mediation appointed by the Chief Justice in 1988. The task force consists of state court judges and judicial administrative staff, a private sector mediator and a private sector attorney.

Sincerely,



Arthur H. Snowden, II
Administrative Director

Pilot Project in Mediation

A pilot project for mediation of domestic relations cases will be implemented in the court system in Anchorage and Fairbanks.

In the Custody Investigator's offices in Anchorage and Fairbanks, a staff mediator will be hired. During the course of the first year of the project, a certain number of domestic relations cases (chosen in accord with established guidelines) will be referred to the mediators, who will attempt to resolve the disputes. Records will be kept on the resolution of the cases, and on the impressions of the parties and their attorneys about the process. At the end of the first year, the project will be evaluated for its cost-effectiveness, its efficacy and "customer satisfaction" with the process.

If the program is funded for three years, the staff mediators may also develop an expanded mediation program which will utilize volunteer mediators. The staff mediators will be responsible for recruitment, training, assignment and evaluation of the volunteer mediators.

The Alaska Judicial Council may be asked to monitor and evaluate the pilot project.

POSITION TITLE: Mediator				RANGE/STEP 18A	BARG. UNIT X	FORM C100 PAGE/LINE
TYPE OF POSITION Permanent Full-time	STAFF NO. 12	CHS	PCN NUMBER	BRU PRIORITY	LOCATION Anchorage	ELECTION DISTRICT 7
CONTINUATION LEVEL		ADDITION X		JUSTIFICATION		
TYPE OF EXPENDITURE		AMOUNT				
Personal Services						
Salary		37,548				
Variable Benefits		5,831				
Supplemental Benefits		2,429				
Fixed Costs		4,640				
Total Personal Services			50,448			
Travel						
Contractual						
Supplies						
Equipment	(1)		1,635			
Other						
Total Cost			52,083			
RECEIPT CODE	FUNDING SOURCE					
1002	Federal Receipts					
1003	G.F. Match					
1004	General Funds		52,083			
1005	GF/Prog. Rec.					
1007	I-A Receipts					
	Other					
(1) File cabinet, typewriter and dictating machine						

C190 New Position Request

Agency ALASKA COURT SYSTEM
 BRU TRIAL COURTS
 Component THIRD DISTRICT

FY 91

Page _____ of _____

POSITION TITLE: Mediator			RANGE/STEP 18A	BARG. UNIT X	FORM C100 PAGE/LINE
TYPE OF POSITION Permanent Full-time	STAFF MONTHS 12	PCN NUMBER	BRU PRIORITY	LOCATION Fairbanks	ELECTION DISTRICT 20
CONTINUATION LEVEL		ADDITION	JUSTIFICATION		
TYPE OF EXPENDITURE			X		
Personal Services			AMOUNT		
Salary		42,984			
Variable Benefits		6,675			
Supplemental Benefits		2,781			
Fixed Costs		4,640			
Total Personal Services			57,080		
Travel					
Contractual					
Supplies					
Equipment (1)			1,635		
Other					
Total Cost			58,715		
RECEIPT CODE	FUNDING SOURCE				
1002	Federal Receipts				
1003	G.F. Match				
1004	General Funds		58,715		
1005	GF/Prog. Rec.				
1007	I-A Receipts				
	Other				
(1) File cabinet, typewriter and dictating machine					

C190 New Position Request

Agency ALASKA COURT SYSTEM

BRU TRIAL COURTS

Component FOURTH DISTRICT

Page _____ of _____

191

Award of custody of child when contest is between natural parent and step-parent, 10 ALR4th 767.

Right of incarcerated mother to return

custody of infant in penal institution, 14 ALR4th 748.

Propriety of awarding joint custody of children, 17 ALR4th 1013.

Sec. 25.20.070. Temporary custody of the child. Unless it is shown to be detrimental to the welfare of the child, the child shall have, to the greatest degree practical, equal access to both parents during the time that the court considers an award of custody under AS 25.20.060 — 25.20.130. (§ 6 ch 88 SLA 1982)

Editor's notes. — For legislative intent behind the 1982 change in the child custody law, see editor's note to AS 25.20.060.

Collateral references. — Necessity of notice of application for temporary custody of child, 31 ALR3d 1378.

Sec. 25.20.080. Mediation of child custody matter. (a) At any time within 30 days after a petition for child custody is filed under AS 25.20.060 the court may order the parties to submit to mediation. Each party shall have the right to challenge peremptorily one mediator appointed.

(b) Mediation shall be conducted informally as a conference, or by telephone, or series of conferences, as determined by the mediator. The parties to the action and a court-appointed representative of the minor children shall attend.

(c) If the mediator determines that mediation efforts are unsuccessful, the mediator shall terminate mediation and notify the court that mediation efforts have failed. The custody proceeding shall proceed in the usual manner.

(d) Upon submission of the parties to mediation under this section, a pending child custody proceeding shall be stayed for a period of 30 days or until the court is notified that mediation efforts have failed. All court orders made during the pending custody proceeding remain in effect during the period of mediation.

(e) Costs of mediation shall be paid as ordered by the court by one party, by both parties, or by the state if both parties are indigent. (§ 6 ch 88 SLA 1982)

Sec. 25.20.090. Factors for consideration in awarding shared child custody. In determining whether to award shared custody of a child the court shall consider

- (1) the child's preference if the child is of sufficient age and capacity to form a preference;
- (2) the needs of the child;
- (3) the stability of the home environment likely to be offered by each parent;
- (4) the education of the child;

Collateral references. — Desertion as affected by remonstrance or resistance, 3 ALR 503.

Abuse by relatives of other spouse as cruelty constituting grounds for divorce, 3 ALR 993.

Conduct amounting to treatment endangering life within statute defining grounds for divorce, 5 ALR 712.

Discretion as to denial of divorce or separation where statutory grounds are established, 74 ALR 271.

Knowledge of offense as condition of condonation, 109 ALR 683.

What amounts to habitual intemperance, drunkenness, etc., within statute relating to substantive grounds for divorce, 120 ALR 1176; 29 ALR2d 925.

Act, character or nature of crime contemplated by statute as substantive ground for divorce, 135 ALR 851.

Children's testimony as to grounds of divorce of parents, 2 ALR2d 1329.

Antenuptial knowledge relating to alleged grounds as barring right to divorce, 15 ALR2d 670.

What constitutes duress sufficient to warrant divorce, 16 ALR2d 1430.

Conviction in another jurisdiction as within statute making conviction of crime a ground of divorce, 19 ALR2d 1047.

Racial, religious or political differences as grounds for divorce, separation or annulment, 25 ALR2d 928.

Written separation agreement as bar to divorce on ground of desertion, 34 ALR2d 954.

What constitutes reconciliation of separated spouses, 35 ALR2d 746.

What amounts to incompatibility or inability of parties to live together within statute relating to substantive grounds for divorce, 58 ALR2d 1218.

Concealed premarital unchastity or parenthood as ground of divorce, 64 ALR2d 742.

What constitutes impotency as ground for divorce, 65 ALR2d 776.

Homosexuality as ground for divorce, 78 ALR2d 807.

Time of pendency of former suit for divorce, annulment, alimony, or maintenance as included in period of desertion, 80 ALR2d 855.

Mistreatment of children as ground for divorce, 82 ALR2d 1361.

Acts occurring after commencement of suit for divorce as ground for decree under original complaint, 98 ALR2d 1264.

Fault of spouse as affecting right to divorce under statute making separation a substantive ground of divorce, 14 ALR3d 502.

Retrospective effect of statute prescribing grounds of divorce, 23 ALR3d 626.

Separation within statute making separation a substantive ground for divorce, 35 ALR3d 1238.

Refusal of sexual intercourse as justifying divorce or separation, 32 ALR3d 660.

Transvestism or transsexualism of spouse as justifying divorce, 82 ALR3d 725.

What constitutes contract between husband or wife and third person promotive of divorce or separation, 93 ALR3d 523.

Sec. 25.24.060. Mediation. (a) At any time within 30 days after a complaint or cross-complaint in a divorce action is filed, a party to the action may file a motion with the court requesting mediation, for the purpose of achieving a mutually agreeable settlement in termination of the marriage. When a party moves for settlement mediation, the other party shall answer the motion on the record, and the judge may order mediation. When no request for mediation is made, the court may at any time order the parties to submit to mediation if it determines that mediation may result in a more satisfactory settlement between the parties.

(b) The court appoints the mediator. The court may appoint any person the court finds suitable to act as mediator. Each party shall have the right once to challenge peremptorily any mediator appointed.

(c) Mediation shall be conducted informally as a conference or series of conferences. The parties to the action and a court-appointed representative of any minor children of the marriage shall attend. Counsel for the parties may attend all such conferences.

(d) After the first conference, either party may withdraw, or the mediator may terminate mediation if the mediator determines that mediation efforts are unsuccessful. Upon withdrawal by either party or termination by the mediator, the mediator shall notify the court that mediation efforts have failed, and the divorce action shall proceed in the usual manner.

(e) Upon submission of the parties to mediation under this section, divorce proceedings then pending shall be stayed for a period of 30 days or until the court is notified that mediation efforts have failed. All court orders made under AS 25.24.140 remain in effect during the period of mediation. (§ 2 ch 188 SLA 1975)

Revisor's notes. — Formerly AS 09.55.115. Renumbered in 1983. intent, see § 1, ch. 188, SLA 1975 in the Temporary and Special Acts.

Cross references. — For legislative

Sec. 25.24.070. Confession of adultery. — In an action for divorce on the ground of adultery, a confession of adultery is not alone sufficient to justify a judgment of divorce. (§ 3.18 ch 101 SLA 1962)

Revisor's notes. — Formerly AS 09.55.120. Renumbered in 1983.

Sec. 25.24.080. Residence requirements for action to declare marriage void. When a marriage has been solemnized and the plaintiff is a resident of the state, an action to declare the marriage void may be brought at any time. (§ 12.06 ch 101 SLA 1962; am § 8 ch 67 SLA 1983)

Revisor's notes. — Formerly AS 09.55.130. Renumbered in 1983. following "solemnized" and deleted the former second sentence, which set a

Effect of amendments. — The 1983 amendment deleted "in the state" one-year residency requirement for marriages not solemnized in the state.

NOTES TO DECISIONS

Editor's notes. — The cases cited in the notes below were decided under former AS 09.55.140, which specified a one-year residence requirement for divorce.

The court has no jurisdiction of the action where the plaintiff was not a resident of Alaska. Cutting v. Cutting, 11 Alaska 255 (1946).

Residence means a place of abode, and within the meaning of this section it is

the place where the plaintiff resides. Terrill v. Terrill, 2 Alaska 475 (1905).

And has the same meaning as domicile. — See Wilson v. Wilson, 10 Alaska 616 (1945).

But domicile is not the sole jurisdictional basis for divorce unless made so by statute. Lauterbach v. Lauterbach, Sup. Ct. Op. No. 219 (File No. 425), 392 P.2d 24 (1964).