

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
6503 SENATE RESOURCES

907

SB264 Cost Estimate

Response Office	\$1,960,000
Salaries & Benefits	
Office Expenses	
Travel	
Office Equipment	
Response Corps Establishment & Training	\$5,000,000
Depots (11)	
Booms, absorbants, pumps, etc.	\$8,250,000
Speciality Equipment	3,000,000
Contractual Storage	550,000
Subtotal	\$11,800,000
Oil Spill Containmen & Clean-up Technology Research	\$1,000,000
TOTAL	\$19,760,000

Original sponsors: Kelly, Sturgulewski,
Eliason, et al.

1 IN THE SENATE

2 CS FOR SENATE BILL NO. 264 ()

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act establishing an oil and hazardous substance
7 response office, corps, and depots; authorizing use
8 of money in the oil and hazardous substance release
9 response fund for certain related expenses; and
10 providing for an effective date."

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

12 * Section 1. FINDINGS AND PURPOSE. (a) The legislature finds that the
13 March 24, 1989, oil spill disaster in Prince William Sound demonstrates a
14 need for the state to have an independent spill containment and clean-up
15 capability in the event of future discharges of oil or a hazardous sub-
16 stance.

17 (b) It is the purpose of this Act to provide assurance to the people
18 of the state that their health, safety, and well-being will be protected
19 from the adverse consequences of oil and hazardous substance releases of a
20 magnitude that presents a grave and substantial threat to the economy and
21 the environment of the state.

22 * Sec. 2. AS 46.08.040 is amended to read:

23 Sec. 46.08.040. PURPOSES OF THE FUND. The commissioner may use
24 money from the fund to

25 (1) contain, clean up, and take other necessary action,
26 such as monitoring, assessing, investigating, and evaluating the
27 release or threatened release of oil or a hazardous substance that
28 poses an imminent and substantial threat to the public health or
29 welfare, or to the environment;

1 (2) pay all costs incurred to establish and maintain the
2 oil and hazardous substance response office and for the expenses of
3 the oil and hazardous substance response corps and the oil and hazard-
4 ous substance response depots established by that office;

5 (3) provide matching funds for participation in federal oil
6 discharge cleanup activities and under 42 U.S.C. 9601 - 9657 (Compre-
7 hensive Environmental Response, Compensation, and Liability Act of
8 1980); and

9 (4) [(3)] recover the cost to the state or to a municipal-
10 ity of a containment and cleanup resulting from the release or the
11 threatened release of oil or a hazardous substance.

12 * Sec. 3. AS 46.08 is amended by adding new sections to read:

13 ARTICLE 2. OIL AND HAZARDOUS SUBSTANCE RESPONSE OFFICE.

14 Sec. 46.08.100. OFFICE ESTABLISHED. (a) There is established
15 in the department the oil and hazardous substance response office.
16 The office shall include a director and employees who are specially
17 trained in programs and technologies related to the containment and
18 cleanup of releases or threatened releases of oil and hazardous sub-
19 stances.

20 (b) The commissioner may establish and maintain the office by

21 (1) direct employment;

22 (2) contract with political subdivisions, the University of
23 Alaska, transporters, and other private persons; or

24 (3) any combination of (1) and (2) of this subsection.

25 Sec. 46.08.110. RESPONSE CORPS. (a) The office shall establish
26 an oil and hazardous substance response corps.

27 (b) The corps consists of volunteers who register with the
28 office and agree to be trained by the office in techniques for con-
29 tainment and cleanup and to be available on short notice to assist the

1 office in containment and cleanup.

2 (c) Members of the corps are entitled to wages, per diem, and
3 expenses as determined by the commissioner for training and for days
4 spent in service to the state in containment and cleanup actions.

5 Sec. 46.08.120. RESPONSE DEPOTS. The office shall maintain
6 emergency response depots in areas of the state determined by the
7 director to be potential sites of releases or threatened releases of
8 oil or hazardous substances. The depots shall be equipped and staffed
9 in a manner that ensures prompt response when containment and cleanup
10 actions are necessary.

11 Sec. 46.08.130. DUTIES OF THE OFFICE. (a) The office shall be
12 prepared to respond promptly to a discharge of oil or a hazardous
13 substance.

14 (b) The office may respond under (a) of this section to an oil
15 or hazardous substance discharge only if:

16 (1) the oil discharge is a catastrophic oil discharge that
17 constitutes an emergency under AS 46.04.080(a);

18 (2) the discharge of oil or a hazardous substance is de-
19 clared to be an emergency under AS 46.03.865;

20 (3) the governor declares the discharge an emergency under
21 AS 26.23;

22 (4) the commissioner reasonably believes that there has
23 been a discharge of oil or a hazardous substance, or that there is a
24 potential discharge of oil or a hazardous substance, and the discharge
25 may qualify under (1) - (3) of this subsection; or

26 (5) the discharge or potential discharge poses an imminent
27 and substantial threat to public health or welfare or to the environ-
28 ment.

29 Sec. 46.08.140. EMERGENCY POWERS. (a) When the office has

1 reasonable grounds to believe that a release of oil or a hazardous
2 substance has occurred or is threatened to occur which, in the judg-
3 ment of its director, presents an imminent or present danger to the
4 health or welfare of the people of the state or would result in or is
5 likely to result in irreversible or irreparable damage to the natural
6 resources or environment, and it appears to be prejudicial to the
7 interest of the people of the state to delay action until an oppor-
8 tunity for a hearing can be provided, state employees or members of
9 the corps may, with permission of the director and without prior
10 hearing, enter private property for the purpose of containment or
11 cleanup.

12 (b) The property owner affected by a response action taken under
13 (a) of this section has the right to be heard as soon as practicable
14 and to present proof to the office that the containment or cleanup
15 action is unnecessary or that it is not necessary to enter the per-
16 son's property for the containment or cleanup action.

17 Sec. 46.08.150. CONTRACTS. The office may enter into agreements
18 with agencies of the state and federal government, political subdivi-
19 sions, the University of Alaska, and private entities to

20 (1) establish and maintain regional oil and hazardous
21 substances depots and to acquire the supplies and equipment necessary
22 for response readiness;

23 (2) train members of response corps; and

24 (3) conduct research into oil and hazardous substances
25 spill technology.

26 Sec. 46.08.190. DEFINITIONS. In AS 46.08.100 - 46.08.190

27 (1) "corps" means the oil and hazardous substance response
28 corps;

29 (2) "depots" means the oil and hazardous substance supply

1 and equipment storage depots;

2 (3) "office" means the oil and hazardous substance response
3 office.

4 * Sec. 4. APPLICABILITY OF ACT. This Act does not relieve a person
5 responsible for an oil terminal facility, offshore exploration or produc-
6 tion facility, or a vessel that transports crude oil, or a person who has
7 control of a hazardous substance from the responsibility for containing and
8 cleaning up a discharge of oil or the hazardous substance as required by
9 law.

10 * Sec. 5. This Act takes effect immediately under AS 01.10.070(c).
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Chenoweth
4/21/89

Original sponsors: Kelly, Sturgulewski,
Eliason, et al.

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1 IN THE SENATE

2 CS FOR SENATE BILL NO. 264 ()

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act establishing an oil and hazardous substance
7 response office, corps, and depots, establishing an
8 account in the oil and hazardous substance release
9 response fund, and authorizing use of money in that
10 account for certain related expenses." *efil.*

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

12 * Section 1. FINDINGS AND PURPOSE. (a) The legislature finds that the
13 *March 24 1989* Exxon-Valdez oil spill disaster *in RWS* demonstrates a need for the state to have
14 an independent spill containment and clean-up capability in the event of
15 future discharges of oil or a hazardous substance.

16 (b) It is the purpose of this Act to provide assurance to the people
17 of the state that their health, safety, and well-being will be protected
18 from the adverse consequences of oil and hazardous substance releases of a
19 magnitude that presents a grave and substantial threat to the economy and
20 the environment of the state.

21 * Sec. 2. AS 46.08 is amended by adding a new section to read:

22 Sec. 46.08.015. OIL SPILL CONTINGENCY ACCOUNT ESTABLISHED. (a)
23 There is established in the oil and hazardous substance release re-
24 sponse fund the oil spill contingency account. The account shall be
25 administered by the commissioner.

26 (b) Appropriations made to the account and remaining in the
27 account at the end of a fiscal year do not lapse unless otherwise
28 specified in the act making the appropriation.

29 (c) The account shall be used for actual expenses incurred under

1 AS 46.08.100 - 46.08.190 and may not be used for capital improvements.

2 * Sec. 3. AS 46.08.040 is amended by adding a new subsection to read:

3 (b) The commissioner may use money from the oil spill contin-
4 gency account to pay all costs incurred to establish and maintain the
5 oil and hazardous substance response office and for the expenses of
6 the oil and hazardous substance response corps and the oil and hazard-
7 ous response depots established by that office.

8 * Sec. 4. AS 46.08.050(b) is amended to read:

9 (b) The department shall develop procedures governing the expen-
10 diture of, and accounting for, money expended from the fund and from
11 the oil spill contingency account, and may not delay implementation of
12 this chapter pending the effective date of the procedures.

13 * Sec. 5. AS 46.08 is amended by adding new sections to read:

14 ARTICLE 2. OIL AND HAZARDOUS SUBSTANCE RESPONSE OFFICE.

15 Sec. 46.08.100. OFFICE ESTABLISHED. (a) There is established
16 in the department the oil and hazardous substance response office.
17 The office shall include a director and employees who are specially
18 trained in programs and technologies related to the containment and
19 cleanup of releases or threatened releases of oil and hazardous sub-
20 stances.

21 (b) The commissioner may establish and maintain the office by

22 (1) direct employment;

23 (2) contract with political subdivisions, the University of
24 Alaska, transporters, and other private persons; or

25 (3) any combination of (1) and (2) of this subsection.

26 Sec. 46.08.110. RESPONSE CORPS. (a) The office shall establish
27 an oil and hazardous substance response corps.

28 (b) The corps consists of volunteers who register with the
29 office and agree to be trained by the office in techniques for

1 containment and cleanup and to be available on short notice to assist
2 the office in containment and cleanup.

3 (c) Members of the corps are entitled to wages, per diem, and
4 expenses as determined by the commissioner for training and for days
5 spent in service to the state in containment and cleanup actions.

6 Sec. 46.08.120. RESPONSE DEPOTS. The office shall maintain
7 emergency response depots in areas of the state determined by the
8 director to be potential sites of releases or threatened releases of
9 oil or hazardous substances. The depots shall be equipped and staffed
10 in a manner that ensures prompt response when containment and cleanup
11 actions are necessary.

12 Sec. 46.08.130. DUTIES OF THE OFFICE. (a) The office shall be
13 prepared to respond promptly to a discharge of oil or a hazardous
14 substance ^{on the land or} into the navigable waters of the state. ^(standard for severity)

15 (b) The office may respond under (a) of this section to an oil
16 or hazardous substance discharge only if:

17 (1) the oil discharge is a catastrophic oil discharge that
18 constitutes an emergency under AS 46.04.080(a);

19 (2) the discharge of oil or a hazardous substance is de-
20 clared to be an emergency under AS 46.03.865;

21 (3) the governor declares the discharge an emergency under
22 AS 26.23; or

23 (4) the commissioner reasonably believes that there has
24 been a discharge of oil or a hazardous substance, or that there is a
25 potential discharge of oil or a hazardous substance, and the discharge
26 may qualify under (1) - (3) of this subsection.

27 Sec. 46.08.140. EMERGENCY POWERS. (a) When the office has
28 reasonable grounds to believe that a release of oil or a hazardous
29 substance has occurred or is threatened to occur which, in the

1 judgment of its director, presents an imminent or present danger to
2 the health or welfare of the people of the state or would result in or
3 is likely to result in irreversible or irreparable damage to the
4 natural resources or environment, and it appears to be prejudicial to
5 the interest of the people of the state to delay action until an
6 opportunity for a hearing can be provided, state employees or members
7 of the corps may, with permission of the director and without prior
8 hearing, enter private property for the purpose of containment or
9 cleanup.

10 (b) The property owner affected by a response action taken under
11 (a) of this section has the right to be heard as soon as practicable
12 and to present proof to the office that the containment or cleanup
13 action is unnecessary or that it is not necessary to enter the per-
14 son's property for the containment or cleanup action.

15 Sec. 46.08.150. CONTRACTS. The office may enter into agreements
16 with agencies of the state and federal government, political subdivi-
17 sions, the University of Alaska, and private entities to

18 (1) establish and maintain regional oil and hazardous
19 substances depots and to acquire the supplies and equipment necessary
20 for response readiness;

21 (2) train members of response corps; and

22 (3) conduct research into oil and hazardous substances
23 spill technology.

24 Sec. 46.08.160. USE OF MONEY IN THE OIL SPILL CONTINGENCY AC-
25 COUNT. Subject to legislative appropriation, the commissioner may use
26 money in the oil spill contingency account for costs of personal
27 services or contracts entered into under AS 46.08.100 - 46.08.190, and
28 for purchases of necessary equipment, supplies, and transportation for
29 the office, corps, and depots.

1 Sec. 46.08.190. DEFINITIONS. In AS 46.08.100 - 46.08.190

2 (1) "corps" means the oil and hazardous substance response
3 corps;

4 (2) "depots" means the oil and hazardous substance supply
5 and equipment storage depots;

6 (3) "office" means the oil and hazardous substance response
7 office.

8 * Sec. 6. APPLICABILITY OF ACT. This Act does not relieve a person
9 responsible for an oil terminal facility, offshore exploration or produc-
10 tion facility, or a vessel that transports crude oil, or a person who has
11 control of a hazardous substance from the responsibility for containing and
12 cleaning up a discharge of oil or the hazardous substance as required by
13 law.

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Chenoweth
4/20/89

Original sponsors: Kelly, Sturgulewski,
Eliason, et al.

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7 response office, corps, and depots; and authorizing
8 the use of the oil and hazardous substance release
9 response fund for certain related expenses."

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11 * Section 1. FINDINGS AND PURPOSE. (a) The legislature finds that the
12 Exxon Valdez oil spill disaster demonstrates a need for the state to have
13 an independent spill containment and clean-up capability in the event of
14 future discharges of oil or a hazardous substance.

15 (b) It is the purpose of this Act to provide assurance to the people
16 of the state that their health, safety, and well-being will be protected
17 from the adverse consequences of oil and hazardous substance releases of a
18 magnitude that presents a grave and substantial threat to the economy and
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29 (1) direct employment;

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14 emergency response depots in areas of the state determined by the
15 director to be potential sites of releases or threatened releases of
16 oil or hazardous substances. The depots shall be equipped and staffed
17 in a manner that ensures prompt response when containment and cleanup
18 actions are necessary.

19 Sec. 46.08.130. DUTIES OF THE OFFICE. (a) The office shall be
20 prepared to respond promptly to a discharge of oil or a hazardous
21 substance into the navigable waters of the state.

22 (b) The office may respond under (a) of this section to an oil
23 or hazardous substance discharge only if:

24 (1) the oil discharge is a catastrophic oil discharge that
25 constitutes an emergency under AS 46.04.080(a);

26 (2) the discharge of oil or a hazardous substance is de-
27 clared to be an emergency under AS 46.03.865;

28 (3) the governor declares the discharge an emergency under
29 AS 26.23; or

1 (4) the commissioner reasonably believes that there has
2 been a discharge of oil or a hazardous substance, or that there is a
3 potential discharge of oil or a hazardous substance, and the discharge
4 may qualify under (1) - (3) of this subsection.

5 Sec. 46.08.140. EMERGENCY POWERS. (a) When the office has
6 reasonable grounds to believe that a release of oil or a hazardous
7 substance has occurred or is threatened to occur which, in the judg-
8 ment of its director, presents an imminent or present danger to the
9 health or welfare of the people of the state or would result in or is
10 likely to result in irreversible or irreparable damage to the natural
11 resources or environment, and it appears to be prejudicial to the
12 interest of the people of the state to delay action until an oppor-
13 tunity for a hearing can be provided, state employees or members of
14 the corps may, with permission of the director and without prior
15 hearing, enter private property for the purpose of containment or
16 cleanup.

17 (b) The property owner affected by a response action taken under
18 (a) of this section has the right to be heard as soon as practicable
19 and to present proof to the office that the containment or cleanup
20 action is unnecessary or that it is not necessary to enter the per-
21 son's property for the containment or cleanup action.

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25 (1) establish and maintain regional oil and hazardous
26 substances depots and the supplies and equipment necessary for
27 response readiness;

28 (2) train members of response corps; and

29 (3) conduct research into oil and hazardous substances

1 spill technology.

2 Sec. 46.08.190. DEFINITIONS. In AS 46.08.100 - 46.08.190

3 (1) "corps" means the oil and hazardous substance response
4 corps;

5 (2) "depots" means the oil and hazardous substance supply
6 and equipment storage depots;

7 (3) "office" means the oil and hazardous substance response
8 office.

9 * Sec. 3. AS 46.08.040 is amended to read:

10 Sec. 46.08.040. PURPOSES OF THE FUND. The commissioner may use
11 money from the fund to

12 (1) contain, clean up, and take other necessary action,
13 such as monitoring, assessing, investigating, and evaluating the
14 release or threatened release of oil or a hazardous substance that
15 poses an imminent and substantial threat to the public health or
16 welfare, or to the environment;

17 (2) pay all costs incurred to establish and maintain the
18 oil and hazardous substance response office and for the expenses of
19 the oil and hazardous substance response corps and the oil and hazard-
20 ous response depots established by that office;

21 (3) provide matching funds for participation in federal oil
22 discharge cleanup activities and under 42 U.S.C. 9601 - 9657 (Compre-
23 hensive Environmental Response, Compensation, and Liability Act of
24 1980); and

25 (4) [(3)] recover the cost to the state or to a municipal-
26 ity of a containment and cleanup resulting from the release or the
27 threatened release of oil or a hazardous substance.

28 * Sec. 4. APPLICABILITY OF ACT. This Act does not relieve a person
29 responsible for an oil terminal facility, offshore exploration or

1 production facility, or a vessel that transports crude oil, or a person
2 who has control of a hazardous substance from the responsibility for con-
3 taining and cleaning up a discharge of oil or the hazardous substance as
4 required by law.

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FISCAL NOTE

REQUEST:

Revision Date: _____
 Title: An Act establishing an oil spill con Agency Affected: Environmental Conservation
tainment fund to mitigate the effects, etc. BRU: Environmental Quality
Sponsor: Halford, Jones, Coghill, Eliason, Administrative Services
: etc Components: Environmental Quality
Administrative Services

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES		740.0	740.0	740.0	740.0	740.0
TRAVEL		65.0	65.0	65.0	65.0	65.0
CONTRACTUAL		1160.0	1080.0	1080.0	1080.0	1080.0
SUPPLIES		20.0	20.0	20.0	20.0	20.0
EQUIPMENT		115.0	95.0	95.0	95.0	95.0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		2100.0	2000.0	2000.0	2000.0	2000.0

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER		2,000.0	2,000.0	2,000.0	2,000.0	2,000.0
TOTAL		2,000.0	2,000.0	2,000.0	2,000.0	2,000.0

POSITIONS:

FULL-TIME		11	11	11	11	11
PART-TIME		0	0	0	0	0
TEMPORARY		0	0	0	0	0

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Dan Easton Phone: 465-2640
 Division: Environmental Quality Date: April 20, 1989

Approved by Commissioner: AD/ky Date: 4/20/89
 Agency: Alaska Department of Environmental Conservation

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

CSSB 266

ADMINISTER OIL SPILL EMERGENCY CONTAINMENT FUND
(\$170.0)

The Department projects the need for an accountant and an accounting technician to set up and administer the fund, and to track and approve payments from the fund (\$120.0).

The Department also foresees a need for \$50.0 in contractual funds to prepare, publish and distribute the annual report on discharges, environmental effects, the operational status of the response corps, and needed changes.

100	\$	80.0
200	\$	5.0
300	\$	60.0
400	\$	5.0
500	\$	<u>20.0</u>
Total	\$	170.0

ESTABLISH OIL SPILL CONTAINMENT STRIKE FORCE
(\$1,930.0)

The Strike Force would consist of a full-time staff of nine agency personnel: a director, six response specialists, one clerk-typist and one administrative assistant. First-year costs to establish and staff the office are estimated at \$700.0. Subsequent year costs are estimated at \$600.0. Other costs include training contracts (\$200.0), contracts with local governments (\$500.0), wages and per diem for volunteer training (\$300.0), and contracts with private response specialists (\$100.0).

100	\$	660.0
200	\$	60.0
300	\$	1100.0
400	\$	15.0
500	\$	<u>95.0</u>
Total		\$1,930.0*

*includes \$100.0 in first-year costs

Alaska State Legislature

Senator Drue Pearce, Chair
Senator Tim Kelly
Senator Rick Halford
Senator Paul Fischer
Senator Al Adams



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(907) 561 2038

SENATE SPECIAL COMMITTEE ON OIL AND GAS

To: Members of the Senate Special
Committee on Oil and Gas

From: Committee staff

Re: SB 266, sectional analysis

Date: April 11, 1989

Section 1: Fee on Crude Oil Delivered

AS 43.59.010, Fee Levied.

A new chapter is added to Title 43, Revenue and Taxation. Chapter 59, would impose a 2 cent per barrel fee on crude oil that is transported in the marine waters of the state.

AS 43.59.020, Administration of the Fee.

The fee would be paid on the amount of oil, less royalty oil, reported by the person delivering the crude oil to the port for transportation. The person paying the fee would file a report, under oath, with the Department of Revenue. If the report is delinquent, a penalty of \$1,000 per day will be imposed. This penalty is in addition to the penalty for delinquent fees.

The department may also require the person obligated to pay the fee to furnish additional information to determine how the fee was computed. The department also is authorized to conduct hearings, compel witnesses and require the production of documents to investigate the facts supporting the reported volume of crude oil transported.

If the reported volume of crude is untrue or incorrect, or the person responsible fails to make a report, the department shall determine the correct amount of crude oil on which to base the fee.

If the fee is delinquent it will bear an interest of 12 percent. If the report is not filed, the department will examine the documents of the responsible party and compute the fee. The costs of examination will be added to any penalties accrued.

Any overpayment will be refunded. The department may adopt regulations required by this chapter. The department may also require a sufficient bond from the responsible party.

If the reports have not been filed or are insufficient, the Department of Law shall institute the necessary action to enjoin the person from continuing operations.

AS 43.59.030, Disposition of Proceeds of Fee.

The collected fees will be separately accounted for within the general fund.

AS 43.59.040, Use of Revenue Derived from Fee.

The legislature may appropriate the annual estimated balance of the account to the oil spill emergency containment fund.

AS 43.59.050, Suspension and Reimposition of the Fee.

The fee may be suspended or reimposed under varying circumstances. If the fund contains \$20,000,000 after payment of the fees and amounts expended from the fund, fee collection is suspended. When the fund dips below \$20,000,000 the fee is reimposed.

AS 43.59.060, Fee Not Imposed.

A year-long suspension will occur if the legislature fails to appropriate an amount of money from the general fund to restore the contingency fund to at least \$20,000,000.

AS 43.59.100, Definitions.

Definitions pertinent to this section.

Section 2:

AS 46.04.090, Oil Discharge Cleanup Personnel, Equipment Expenses.

This section is amended to require the department, when private contracting is not feasible, to establish and maintain at ports, harbors and other locations from which crude oil is regularly transported, cleanup personnel, equipment and supplies that are necessary to clean up oil discharges.

Section 3: Oil Spill Containment

AS 46.04.200, Oil Spill Emergency Containment Fund.

A new section creating the oil spill emergency containment fund is added to Chapter 4, Oil Pollution Control, Title 46. The fund is a nonlapsing, revolving fund within the Department of Environmental Conservation. The legislature may annually appropriate fees collected under AS 43.59.

AS 46.04.210, Duties of the Commissioner.

The commissioner of ADEC shall administer the fund; pay direct costs associated with an oil discharge; report annually regarding circumstances relating to the use of the fund to the legislature and governor; and make recommendations regarding changes necessary to the strike fund or fund itself.

AS 46.04.220, Use of Fund.

The fund may expend money from the fund when an oil discharge in excess of 100,000 barrels occurs or is imminent, or the governor declares the oil discharge an emergency.

The fund may not be used for grants or to reimburse parties for expenditures incurred without prior authorization from the commissioner.

AS 46.04.230. Oil Spill Containment Strike Force.

The commissioner shall establish an oil spill strike force comprised of oil spill specialists. The commissioner is authorized to hire directly, contract with others or do both. The fund may be used for personal services or contracts and any necessary supplies.

AS 46.04.900 Definitions.

Pertinent definitions to this section.

Section 4:

Repeals existing definition section of Chapter 4.

Section 5:

Immediate effective date.

STATE OF ALASKA
THE LEGISLATURE

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LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

April 6, 1989

SUBJECT: Oil spill emergency fund and response mechanism, and identification of a source of revenue for containment and cleanup -- sectional analysis (Work order 6-1180E)

TO: Senator Rick Halford

FROM: Jack Chenoweth
Legislative Counsel 

The bill title summarizes the principal provisions of this legislation, addressing, as it does

- creation of an oil spill emergency containment fund as a source of money to mitigate the effects of damages from oil spills, and setting limitations on use of money from that fund;
- establishment of a state oil spill containment strike force; and
- imposition of a 2 cent per barrel fee on oil delivered to an Alaska port for transportation from the state by marine vessel.

Bill section 1, amending AS 43, imposes the fee. In essence:

-- AS 43.59.010 levies the fee and defines its application.

-- AS 43.59.020 sets out the process of administration and collection of the fee. Patterned after similar provisions of AS 43.55, the fee is made payable quarterly, 20 days after the close of the calendar quarter, and is due and payable by the party delivering the oil for transportation.

-- AS 43.59.030 requires deposit of the fee proceeds into the general fund and requires a separate accounting of them.

-- AS 43.59.040 authorizes the legislature to appropriate the annual estimated balance of revenue obtained from payment of the fee to the oil spill emergency containment fund established later in the legislation.

-- AS 43.59.050 prescribes circumstances under which the fee may be suspended and reimposed. Payment of the fee is suspended commencing the first day of the second calendar quarter following a determination that the difference between the cumulative deposits of the fee made through the calendar quarter and amounts expended from the contingency fund equal or exceed \$20,000,000. Payment of the fee is reimposed commencing the first day of the second calendar quarter following a determination that the difference between the cumulative deposits of the fee made through the calendar quarter and amounts expended from the contingency fund are less than \$20,000,000. The section sets out a process by which these determinations are to be made.

-- AS 43.59.060 authorizes a year-long suspension of the fee payable during a state fiscal year if the legislature fails to appropriate an amount of money from the general fund to restore the contingency fund to at least \$20,000,000.

-- Definitions pertinent to the fee are collected and set out in AS 43.59.100.

Bill section 2 amends existing AS 46.08.090(a) to require the commissioner of environmental conservation to establish and maintain, at state ports and harbors "from which crude oil is regularly transported by vessel" the necessary personnel and equipment to be able to properly address oil discharges. Authority given in current law by which the commissioner may meet this responsibility by contract is continued.

The material in article 2, added by bill section 3, establishes the oil spill emergency containment fund and defines the duties of the commissioner of environmental conservation with respect to that fund. The requirement of submission of an annual report should serve to keep the legislature apprised of the fund's ability to address oil discharge clean-up efforts. The commissioner may draw on the fund if the

Senator Rick Halford
Page 3
April 6, 1989

discharge is catastrophic or if the governor declares an emergency.

Bill section 3 also specifies that the commissioner is to establish an oil spill containment strike force, and indicates how that force may be maintained. Expenditure of money from the fund for maintenance of the task force is subject to legislative appropriation.

Article 3 bill section 3 carries forward from AS 46.04.120 the definitions applicable to this chapter (AS 46.04). The existing definitions, set out AS 46.04.120, are repealed in bill section 4. (This change effectively re-orders the definitions in order to keep them last in the chapter, following the additional material.)

The bill is given an immediate effective date by bill section 5.

JC:gc
WKG9/019

An oil cleanup barge and small skimmer boats all out the wind

Spill dooms Sound

Counting bodies is all anyone can do, state wildlife

By CRAIG MEDRED
Daily News outdoors editor

As the grimy tentacles of an 11-million-gallon oil spill spread west from Valdez to choke and drown the wildlife of primordial Prince William Sound on Monday, would-be rescuers stood powerless to act.

A body count of dead animals is about all that anyone can hope to do, said Jon Lyman, a spokesman for the Alaska Department of Fish and Game.

The wilderness that has made the Sound so rich and unique now stands as a major barrier to efforts to rescue the thousands of birds, sea otters, fish and other creatures expected to be caught in North America's largest oil spill.

Fewer than 100 animals are known to be dead so far,



but thousands are expected to die.

Officials in the state of Washington estimated that 10,000 birds perished there after a barge spilled 231,000 gallons of bunker oil off that state's southwest coast in late 1988.

Bunker oil is gooier than the North Slope crude that spilled in Prince William Sound, but the Washington spill was only about one-fiftieth the size of the spill near Valdez.

In Washington, rescuers are able to mobilize thou-

sands of volunteers who could easily get to the scene to help. That will not be the case in the Sound.

"There's just a lot of problems out there," said Pam Bergman, head of the regional response team for the Department of the Interior.

Problems cited by Bergman and others include:

- A coastline so remote that rescuers are afraid to send out volunteers for fear they might not be equipped or prepared for wilderness survival.

- Beaches so rugged that in many places it is impossible to land a boat, let alone chase down and capture oil-coated birds or wildlife.

- Distances to aid facilities so great that animals captured on the beach would likely die in captivity waiting to be tak-

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"It's not good," Bergman said.

And as of Monday evening, it was getting worse. Strong, northwest winds were pushing the oil spill farther and farther from the rescue coordination center at Valdez.

The contamination was stretching far beyond the reach of would-be animal rescuers. Bergman said, and the winds had made it impossible to retrieve oil-soaked wildlife.

"It was tough just flying this morning," said Joe Sautner of the Alaska Department of Environmental Conservation. "There is not much that

Please see Page E-3, WILDLIFE

3-28-89

Daily News

How promises about terminal stack up to reality

The North Slope oil companies, Alyeska Pipeline Service Co. and others supporting a tidewater terminus for the Alaska Pipeline made broad promises to the people of Valdez and the rest of Alaska about their ability to operate safely and to respond effectively in the event of a major oil spill.

Here, on the left, from testimony and exhibits presented at U.S. Department of Interior hearings in 1971, are some of the promises.

In the right-hand column is the reality.

WHAT WAS SAID THEN

"From my own experience and the studies of many other workers in the pollution field, I am satisfied that tanker traffic to and from Port Valdez, and operation of an oil port there, will not cause or significant damage to the marine environment or to fisheries interests."

"The contingency plan which will be drawn up will detail methods for dealing promptly and effectively with any oil spill which may occur, so that its effect on the environment will be minimal. We have adequate knowledge for dealing with oil spills and improvements in techniques and equipment are continuing to become available through worldwide research. The best equipment, materials and expertise which will be made available as part of the oil spill contingency plan, will make operations at Port Valdez and in Prince William Sound the safest in the world."

— L.R. Baynon, head of Environmental Studies in British Petroleum's Technical Development Division, representing Alyeska Pipeline Services, 1971.

"When the maximum has been done to prevent spread of oil, the main cleanup activity should always be focused on retrieval of the spillage. . . . It is not proposed to use dispersants or oil spill cleanup in Alaska waters."

— Banyon for Alyeska

"The Port of Valdez and Prince William Sound approaches can accommodate any method of ship movement control now known to man. . . . Bridge-to-bridge and ship-to-shore voice communication systems exist today. Shipboard radar can be augmented by a shore based command center equipped with radar. . . . The few ships in the area can be stopped, backed up, moved sideways, ordered into any maneuver desired or any approach or departure made."

— George Esley, Alaska commissioner of public works, 1971.

WHAT IS BEING SAID NOW



Steve McCall, Coast Guard captain of the Port of Valdez

"There's a lot more equipment due in overnight and tomorrow morning. The first hurdle is getting it in to Valdez and getting it from Valdez out to the site. As we know, it's a difficult, time-consuming process."

— Coast Guard Cmdr. Steve McCall on Saturday, more than a day after the Exxon Valdez spill.

"The oil spill contingency plan, we followed the plan exactly how

Please see Page E-3, NOW

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NOW: What Coast Guard, oil industry officials have to say

Continued from Page E-1

we're supposed to do it. The only deviation we had from that was the fact we had taken all this material off of the barge to be able to weld the punctures that were in the bow. And the additional response that it took was to be able to put that gear back on the barge."

— Alyeska spokesman Chuck O'Donnell, explaining that containment efforts did not begin immediately because the barge needed to carry equipment had been broken for two weeks.

"The volume of oil released in the water is for all intents and purposes beyond control by mechanical means alone."

— McCall of the Coast Guard, Sunday night.

Question from reporter: "How long will it take to clean that 240,000 barrels of oil?"

"I don't know. It's never been done before ... weeks at least."

— Frank Iarosal, president of Exxon Shipping Co., in Valdez on Sunday.

"It's a little mind-boggling to fathom the amount of oil that is in the

water. As has been stated, and most accurately so: This is the largest release of oil in the United States in the history of oil pollution response."

— McCall of the Coast Guard.

"By tomorrow we're going to be going all out, using all the tools at our disposal. ... We weren't even up and running until 12 o'clock yesterday afternoon."

— Iarosal of Exxon, three days after the spill.

"This is a unique situation in that it is a very remote area, presenting very difficult problems, and we see a potential for acute and severe impacts to the animals that use the surface of the waters, i.e. marine mammals, sea birds and inter-tidal fisheries. We're also concerned about the long-term impact for salmon, fry, herring, spawn and tanner crab."

— Spokeswoman for NOAA

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Anchorage Daily News

VOL. XLIV, NO. 85 330 PAGES

ANCHORAGE, ALASKA, SUNDAY, MARCH 26, 1989

PRICE 50 CENTS

Oil keeps spreading in Sound

State says Alyeska's cleanup effort inadequate, slow

INSIDE

■ **PLAN OF ATTACK:** Despite opposition from environmentalists and fishermen, oil company officials intend to drop chemical dispersants on some of the oil to dilute it. A-6



■ **EARLY WARNINGS:** The prospect of an oil spill in the Sound was an issue even before the pipeline was built. A-6

By LARRY CAMPBELL
Daily News reporter

VALDEZ — State, federal and oil company officials ended Saturday as they had begun it, no closer to a solution to the problems posed by more than 11 million gallons of North Slope crude oil washing around the fish-

and-wildlife-rich, enclosed waters of Prince William Sound.

But while the oil of the nation's largest spill was left mostly unmolested, the chief of the state Department of Environmental Conservation assailed the Alyeska Pipeline Service Co. for

its failure to respond quickly to the disaster.

DEC Commissioner Dennis Kelso called Alyeska's response "inadequate and slow," and said the company failed to fulfill its obligations under the state-approved contingency plan Alyeska itself had written.

The accusations came in a letter to the Alaska Regional Response Team, a joint federal-state group charged with overseeing oil spill cleanups. The DEC is a member of the team.

In response, Alyeska ter-

Please see Back Page, OIL

By '84 QUAKE
Lessons For Anchorage?

A CITY ON THE EDGE

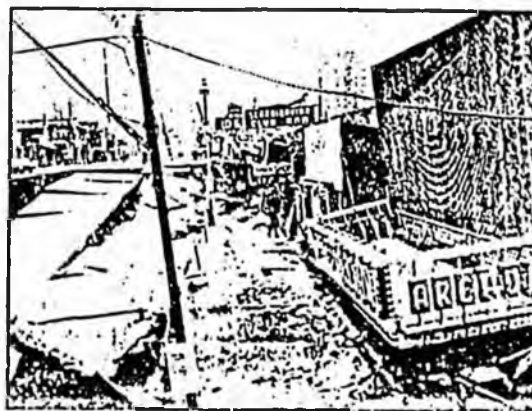


Photo by Steve McClellan
Fourth Avenue was hit hard by the 1964 earthquake.

Captain gets drug, alcohol test in Valdez

Two crewmen also tested;
mechanical failure ruled out

By DAVID HULEN
Daily News reporter

VALDEZ — The Coast Guard has given drug and alcohol tests to the captain and two members of the crew of the grounded tanker Exxon Valdez, and a team from the National Transportation Safety Board is scheduled to arrive here today to find out why the accident that caused the nation's largest oil spill happened.

The head of Exxon Shipping Co., which owns the tanker, said his company's invest-

THE BACK PAGE

OIL SPILL: State says Alyeska's response slow and inadequate

Continued from Page A-1

minal superintendent Chuck O'Donnell said Kelso was right.

"This one time, I'd have to say, yes," O'Donnell said. "We were behind."

The spill occurred about 12:30 a.m. Friday, when the tanker Exxon Valdez ran aground on Bligh Reef, about 25 miles southwest of here. The accident punctured at least eight of the ship's tanks, spewing crude oil into the Sound. The tanker was well outside the normal shipping lanes when it hit the well-marked and well-charted reef.

Alyeska's plan calls for, among other things, a response within five hours that would have brought containment booms and oil skimmers to the spill site.

But the equipment sat idle for five hours because the barge that carries it was down for repairs. Since reaching the scene late, the equipment has not made much headway against the spill. Kelso said Saturday that he still considered the company's efforts inadequate.

The plan also requires Alyeska to call on local boat owners to haul materials to the spill. Lots of local boat owners say they never heard from the company, but O'Donnell said his company did ask for private help.

The shifting answers and vague information about the accident and the ineffective containment and clean-up effort is creating lots of frustration among Prince William Sound fishermen and local residents. These people see their livelihoods endangered, both from the spilled oil and from the chemical dispersants that may finally be used to solve the problem.

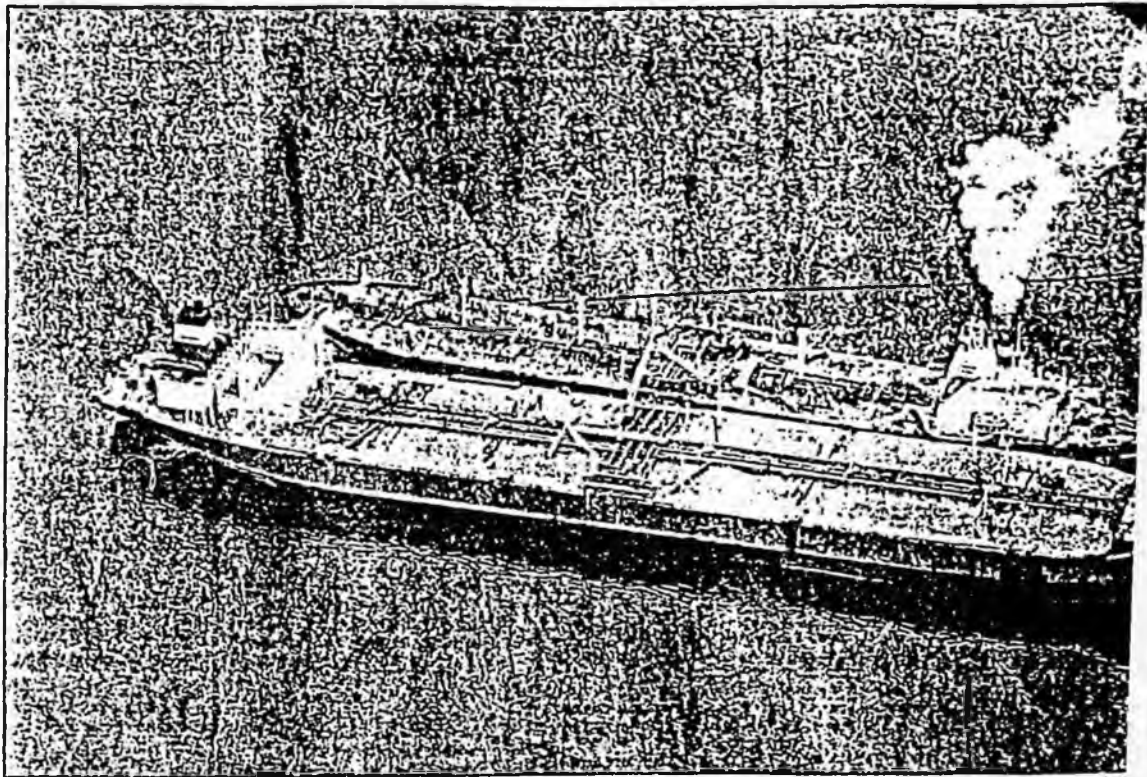
"Am I angry? Angry's not the word for it," said Sandra Cesarini, who owns the Sea Hawk Seafoods processing plant with her husband, Ray. "I'm beside myself."

Environmentalists are equally critical. In Anchorage, the environmental law firm Trustees for Alaska urged the state to mount its own cleanup effort "to prevent any more destruction to the marine resources." The state could pay for that with more than \$17 million in oil-spill penalties the law allows it to collect from Exxon, said Randall Weiner, the group's executive director.

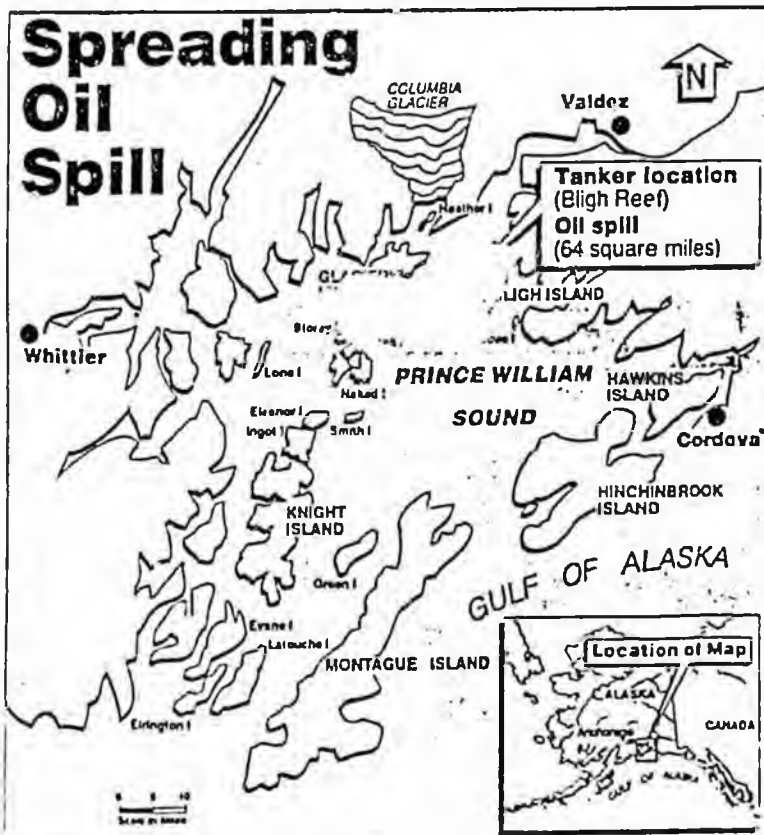
In Juneau, David Ramseur, Gov. Steve Cowper's press secretary, said that despite DEC's criticism of Alyeska, the state has no plans for its own cleanup. "I'm not sure we are equipped to do that, or if it would help at this point," he said.

For whatever else it might be worth, with 11 million gallons of crude oil strung out over a 64-square-mile area, O'Donnell's admission didn't do much to solve the growing problem.

As of Saturday evening, the oil slick had extended 10 miles to the west from its original 30-square-mile area, and those current-driven streams were turning south. Oil sheen surrounded tiny Reef Island and was lapping at Bligh



The Exxon Baton Rouge, the smaller ship at top, moves alongside the Exxon Valdez, bottom, in an attempt to offload oil from the Valdez.



the tanker's 13 cargo holds are damaged, including "six to eight openings large enough for a man to swim through, and a number of open seams, one to two inches wide," he said. Still of concern is what the broken ship will do once its cargo is unloaded. If the ship floats, it may also list and capsize or break apart.

an armed security guard, wearing a yellow hard hat, at the door. "I think he'd just ask you to please not enter," said Exxon spokesman Tom Cirigliano, acknowledging the guard. "We just can't have all kinds of people trying to get in." While a legion of state, federal and oil officials

have to take a look at everything. By late Saturday night, however, Exxon had completed preparations to bomb the slick with the dispersant Corexit 9527 delivered by aircraft. Dispersants are controversial. The chemicals are intended to bond with the oil, break it into small pieces, and cause it to mix with the

AGROUND: Capt. tested for drugs, a

Continued from Page A-

be available for questioning, a Coast said.

The three men were ordered by a p investigators to give blood samples Friday morning, according to Todd Ne spokesman. The samples were sent to they were to be analyzed for both aic

Coast Guard officials would not say the tests are known. Under federal required of all crewmen "directly in marine accidents.

larossi said two Exxon lawyers bo tanker, about 25 miles south of Valdez Saturday and began interviewing crew

According to the Coast Guard and ship left the Alyeska tanker terna Thursday night and steamed on a route passed through the three-quarter-mile v it dropped off the harbor pilot and cor the Gulf of Alaska.

The ship "ran across ice after dro farossi said, "and in the process the v course changes and had turned towa when it grounded."

The ship is sitting between one and regular tanker shipping lanes, its bow the shipping lanes.

Exxon officials can still not explain so far outside the lanes, or why cre avoid the reef, which local boaters c best-known hazards in Prince William Sound. The Coast Guard routinely monito going from the Alyeska port, usin vessels. But the Valdez was on the t that can be monitored by radar, and ship was not being monitored becau ships in the area and there was no c. collision.

The NTSB's involvement is the unusual, according to a safety board D C.

"The safety board is charged w aviation, highway, railroad, manue a said Terry J. Armentrout, director of Accident Investigations.

"Since this is a U.S. flag ship, authority," he said, adding that the t 23 marine accident last year. "We ar that makes and enforces the rule." The team is being headed by Bill i investigator. The team is composed e gators and a "human performance Armentrout described as a person it look into such things as fatigue an

THEY...
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For whatever else it might be worth, with 11 million gallons of crude oil strung out over a 64-square-mile area, O'Donnell's admission didn't do much to solve the growing problem.

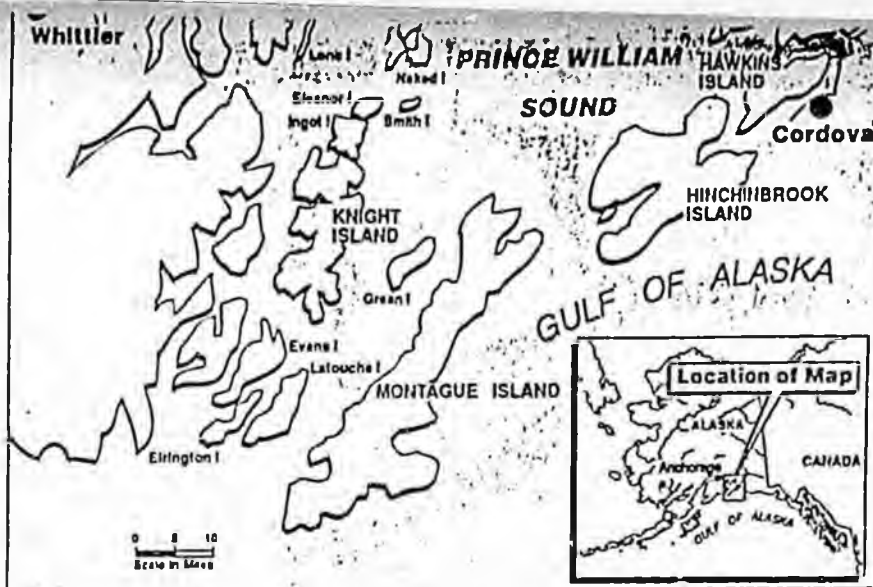
As of Saturday evening, the oil slick had extended fingers 10 miles to the west from its original 30-square-mile area, and those current-driven streams were turning south. Oil sheen surrounded tiny Reef Island and was lapping at Bligh Island, both on the east shore of the Sound.

Exxon officials say about 50 sea lions could be affected by the oil and some birds have been killed, but that no major fish and wildlife destruction has yet been caused.

Efforts to pump oil from the damaged tanker into another, the Exxon Baton Rouge, have been stymied since they began late Friday night. First, a defective hose had to be replaced. When that was fixed, the transfer had to be stopped when a new leak developed. Officials did not know where the new oil was coming from, maybe from a loose connection, maybe from beneath the vessel.

Divers swam beneath the Valdez in the blackness of early morning Saturday. According to Exxon Shipping Co. President Frank Iarossi, they found the ship in a more precarious position than they first thought.

The vessel is actually balanced on a ridge of rock, with deeper water beneath its bow and stern. Eight of



Anchorage Daily News / Ron Engstrom

the tanker's 13 cargo holds are damaged, including, "six to eight openings large enough for a man to swim through, and a number of open seams, one to two inches wide," he said.

Still of concern is what the broken ship will do once its cargo is unloaded. If the ship floats, it may also list and capsize or break apart.

That was why the company had a number of crewmen taken off the Valdez Saturday, and everyone left on board, including a DEC observer, were wearing cold water survival suits.

The sense of concern was obvious early Saturday morning when DEC regional supervisor, Dan Lawn, talked to Joe LeBenu, his man aboard the Valdez, by marine telephone.

"They're afraid she (the Valdez) may turn turtle on 'em," Lawn said, hunched over his office phone. "There's gonna be no more people on board."

More experts are on shore in Valdez than on the tanker Valdez. Exxon officials, environmental officials from other states and Canada, and spill experts from around the world continued to arrive in town Saturday, most of them gathering at the Westmark Hotel, overlooking the small boat harbor.

Also at the Westmark, Exxon has set up its command headquarters, complete with a telephone bank in a second-floor room and

an armed security guard, wearing a yellow hard hat, at the door.

"I think he'd just ask you to please not enter," said Exxon spokesman Tom Cirigliano, acknowledging the guard. "We just can't have all kinds of people trying to get in."

While a legion of state, federal and oil officials spoke about options in cleaning up the spill, it seemed the final solution was in black and white all the time. In the Alyeska Oil Spill Contingency Plan, chemical treatment is continually mentioned as the best possible option.

The portion of the plan dealing with the Prince William Sound includes a scenario for dealing with a hypothetical, 200,000-barrel spill. Such a spill is termed in the plan as "catastrophical."

The plan concludes: "In reviewing the aspects of this size spill it becomes very apparent how important it is to have dispersants approved so that they can be used very effectively to prevent the continuing input of oil..."

Yet, all day Saturday, in press conferences and private interviews, state, federal and oil company officials remained adamant that other options were open.

"I don't think that means that dispersants are the only solution," Kelso said. "We

have to take a look at everything."

By late Saturday night, however, Exxon had completed preparations to bomb the slick with the dispersant Corexit 9527 delivered by aircraft.

Dispersants are controversial. The chemicals are intended to bond with the oil, break it into small pieces, and cause it to mix with the water. Environmentalists say that just spreads the oil through the water from top to bottom, endangering many different life forms. Fishermen fear the oil will harm salmon, bottomfish and crustaceans.

Late Friday and again Saturday, Alyeska and Exxon officials tried spreading dispersant in a small test. The test failed, because calm seas didn't produce the agitation needed to mix the chemicals with the oil.

Iarossi said a burn test might also be conducted, but that had not been done by late evening Saturday. That would involve corralling a portion of the spill and setting it afire.

The officials say they are taking the cautious approach. But folks in Valdez are growing increasingly impatient.

"We've put our blood into this operation, and now, no one can tell us what's going to happen," Cesarini said. "What am I going to tell my employees? What am I going to tell my fishermen?"

tanker, about 25 miles south of Valdez near Bligh Island, on Saturday and began interviewing crew members.

According to the Coast Guard and Exxon officials, the ship left the Alyeska tanker terminal near Valdez on Thursday night and steamed on a routine 10 miles. After it passed through the three-quarter-mile wide Valdez Narrows, it dropped off the harbor pilot and continued south toward the Gulf of Alaska.

The ship "ran across ice after dropping off the pilot," Iarossi said, "and in the process the vessel made a series of course changes and had turned toward the ... ship lane when it grounded."

The ship is sitting between one and two miles east of the regular tanker shipping lanes, its bow pointed west toward the shipping lanes.

Exxon officials can still not explain why the ship veered so far outside the lanes, or why crew members failed to avoid the reef, which local boaters describe as one of the best-known hazards in Prince William Sound.

The Coast Guard routinely monitors tankers coming and going from the Alyeska port, using radar to track the vessels. But the Valdez was on the outer edge of the area that can be monitored by radar, and a spokesman said the ship was not being monitored because there were no other ships in the area and there was no danger of a ship to ship collision.

The NTSB's involvement in the investigation is not unusual, according to a safety board official in Washington, D.C.

"The safety board is charged with investigation of all aviation, highway, railroad, marine and pipeline accidents," said Terry J. Armentrout, director of the agency's Bureau of Accident Investigations.

"Since this is a U.S. flag ship, we have investigative authority," he said, adding that the board looked into about 30 marine accident last year. "We are not the Coast Guard that makes and enforces the rules."

The team is being headed by Bill Woody, a marine safety investigator. The team is composed of three marine investigators and a "human performance investigator," whom Armentrout described as a person trained in psychology to look into such things as fatigue and substance abuse.

Daily News reporter David Whitney in Washington, D.C., contributed to this story.

WARNINGS: Sounded years ago

Continued from Page A-6

Prince William Sound. The Sound's fjord-like topography means that the effects of an oil spill there might be magnified many times.

Contamination will be widespread and the oil's residence time can be very high because it will become entrapped," said M.P. "Pat" Wennekens, an oceanographer with the state's Arctic Environmental Information and Data Center, who spoke at a conference at Cordova in April 1977.

Chancy Croft, an Alaska state senator, told the conference: "Some time there's going to be an oil spill" in Prince William Sound. The only questions, he said, are how soon and what size.

The fishermen and state

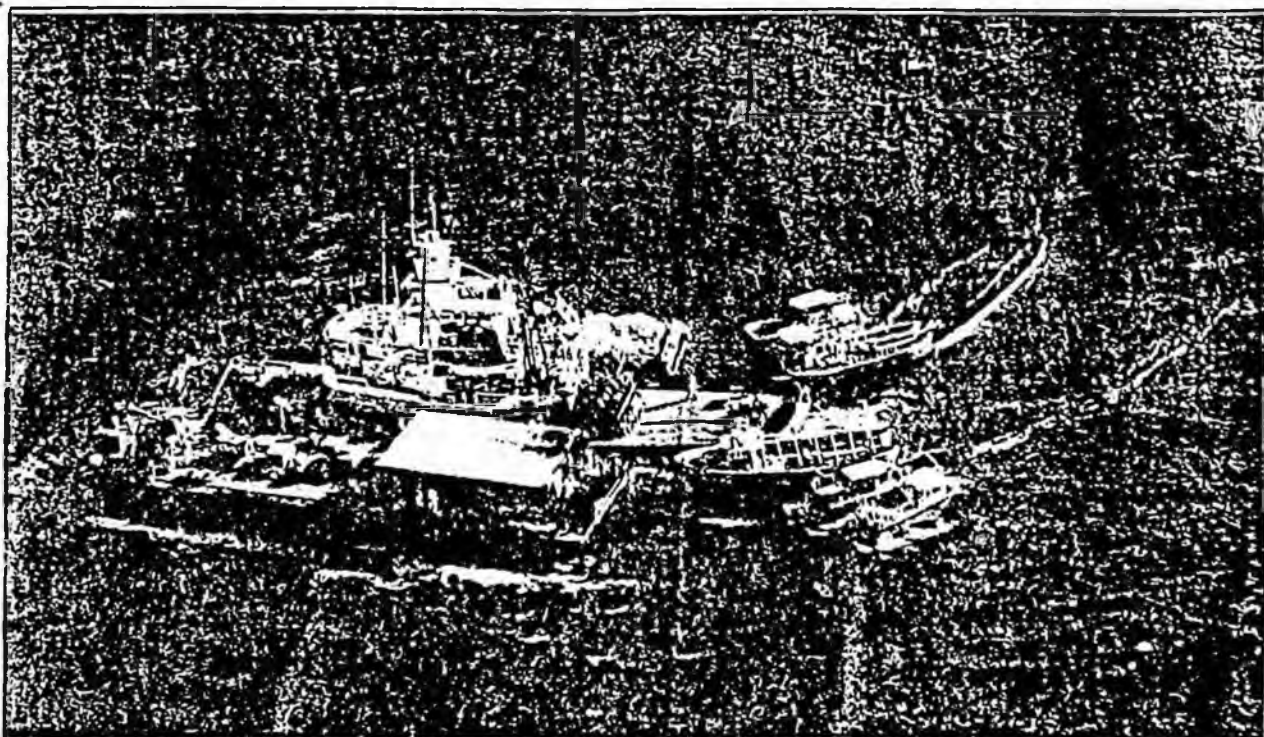
officials argued that because of the remote area's logistics problems, oil skimmers and oil-containment booms should be located at specially designated areas on islands in the sound.

"In most cases, equipment coming from Port Valdez will arrive too late to contain a spill in Prince William Sound before it reaches shore," said a 1977 report on Alyeska's contingency planning for an oil spill by the Alaska Department of Fish and Game.

Coast Guard officials admitted that an oil spill in the Sound would be difficult to deal with. "It could take two days, two weeks or two months, depending on the weather, before we could get our equipment in," one officer said.

METRO

TUESDAY
SECTION E March 28, 1989



Anchorage Daily News/ENR 113

An oil cleanup barge and smaller skimmer boats sit out the wind and rough seas near Bligh Reef on Monday, unable to do their work.

Spill dooms Sound animals

Counting bodies is all anyone can do, state wildlife official says

By CRAIG MEDRED
Daily News outdoors editor

As the grimy tentacles of an 11-million-gallon oil spill spread west from Valdez to choke and drown the wildlife of primordial Prince William Sound on Monday, would-be rescuers stood powerless to act.

A body count of dead animals is about all that anyone can hope to do, said Jon Lyman, a spokesman for the Alaska Department of Fish and Game.

The wilderness that has made the Sound so rich and unique now stands as a major barrier to efforts to rescue the thousands of birds, sea otters, fish and other creatures expected to be caught in North America's largest oil spill.

Fewer than 100 animals are known to be dead so far,



but thousands are expected to die.

Officials in the state of Washington estimated that 10,000 birds perished there after a barge spilled 231,000 gallons of bunker oil off that state's southwest coast in late 1988.

Bunker oil is gooier than the North Slope crude that spilled in Prince William Sound, but the Washington spill was only about one-fiftieth the size of the spill near Valdez.

In Washington, rescuers were able to mobilize thou-

sands of volunteers who could easily get to the scene to help. That will not be the case in the Sound.

"There's just a lot of problems out there," said Pam Bergman, head of the regional response team for the Department of the Interior.

Problems cited by Bergman and others include:

- A coastline so remote that rescuers are afraid to send out volunteers for fear they might not be equipped or prepared for wilderness survival.

- Beaches so rugged that in many places it is impossible to land a boat, let alone chase down and capture oil-coated birds or wildlife.

- Distances to aid facilities so great that animals captured on the beach would likely die in captivity waiting to be tak-

en to a hospital.

- And wild animals so large and powerful that rescuers could be seriously injured.

"It's not good," Bergman said.

And as of Monday evening, it was getting worse. Strong, northwest winds were pushing the oil spill farther and farther from the rescue coordination center at Valdez.

The contamination was stretching far beyond the reach of would-be animal rescuers, Bergman said, and the winds had made it impossible to retrieve oil-soaked wildlife.

"It was tough just flying this morning," said Joe Sautner of the Alaska Department of Environmental Conservation. "There is not much that

SHOOTER

A MYSTERY: I'm wri-
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and souvenir suppliers say
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a first name

In a bullish market.

"A market that was al-
ready poised to trade up a
little was set on fire," said
Madison Galbraith, senior
energy specialist with Mer-

change trading. Prices for
subsequent months also rose
sharply.

It was the highest near-
month closing price for the
key grade since Aug. 14,

delivered to Gulf of Mexico
refineries, soared 95 cents a
barrel to close at \$19.40.

The price surge was
sparked by the oil spill off
the port of Valdez, where an

futures.

"The market's reaction
was a little overdone" de-
spite the interruption in
North Slope supplies, Gal-
braith said.

WILDLIFE: Spill holds would-be rescuers powerless

Continued from Page E-1

can be done now ... under
these conditions."

Sautner reported surf
pounding oil onto beaches at
a half-dozen islands. The far-
thest of those was 75 miles
by airplane from Valdez.

The spill is already
threatening thousands of ani-
mals and more are arriving
daily as northward migra-
tions of birds, sea mammals
and fish begin.

Bergman said some
thought had been given to
setting up an animal rescue
facility closer to that west-
ward spreading oil, but
there is simply no place to
put such a facility.

There are no communities
in the southwest portion of
the Sound. It is an area of
rocky reefs and tree-studded
islands, of wilderness and
wildlife. It is a land few
people call home.

"There are few good
beaches in many of the ar-
eas," Bergman said. "A lot
of the beaches that are there
are small."

None of them would work
well for catching birds, she
said, and catching birds
from boats is out for safety
reasons.

"Nobody wants anybody
getting hurt capturing wild-
life," she said.

Bergman has recent expe-
rience in bird rescues. She
was in Dutch Harbor in the

Aleutians only a few weeks
ago trying to catch oil-fouled
sea birds.

At Dutch Harbor, she
said, volunteers were able to
drive to a long, sandy beach
perfect for captures. They
still only caught 28 birds,
and they were able to save
only eight.

"It's difficult, even in a
good situation," Bergman
said.

"It's real hard to sneak up
on (birds)," she said. "You
end up racing the birds
down the beach with a net
trying to catch them. Once
you capture an oiled bird,
you can't leave it in a box
for 12 hours."

The bird must go almost
immediately to a rehabilita-
tion center where it can be
fed, de-oiled and dried. That
is its only hope. And nobody
has come up with a good
way to get oiled birds from
the western Sound to a facil-
ity in any community.

"Could you airlift birds
out?" Bergman asked. "Is
that the reasonable and best
use of helicopters? There are
a finite number of helicop-
ters available here. As far as
I know, no one is talking
about doing that."

Sea otters present even
bigger problems, she added.
People need a lot of training
and a fair amount of experi-
ence to learn how to handle
them safely.

"They're a potential dan-

ger," she said. "They look
sweet and cuddly and won-
derful, but they got sharp
teeth and claws."

A lot of people want to
help. Bergman said she's
been talking to groups orga-
nizing volunteers. But rescue
coordinators aren't sure
what volunteers could do.

They might be able to
help, but they might also do
harm.

"You don't want a bunch
of these boats going out
there and getting oily and
spreading oil elsewhere,"
Bergman said.

A bird and animal clean-
up after the Washington
spill didn't really get going
for a week or more and then
lasted about six weeks.

Two thousand volunteers
worked the beaches of Wash-
ington, according to Pam
Miller, ocean issues coordi-
nator for the Washington
State Department of Ecolo-
gy. They found 8,000 dead
birds, and 3,000 oiled birds
that were still alive. Only
1,000 of the oiled birds ever
made it back to the wild, she
added.

Murres, a cousin of the
puffin, seemed to have the
best chances of survival,
Miller said. Other birds,
among them loons, often
died from shock as soon as
they were picked up.

Ken Pritchard, an activist
with Adopt-A-Beach, a non-
profit organization involved

in Washington state oil
clean-ups, said any rescue
effort requires a lot of plan-
ning.

Rescuers must find some-
where to set up a roomy bird
hospital, he said. The facili-
ty has to have lots of hot
water and access to volun-
teers. Few such sites are
available anywhere in Alas-
ka.

Pritchard recommended
Anchorage as the best possi-
bility. It might be far from
the oil spill, but it is closer
to the thousands of volun-
teers that would be needed,
he said.

Pritchard was not opti-
mistic about the chances for
the birds that could be
rounded up. Many of the
birds brought to the hospital
probably would be killed by
lethal injection because of
their slim chance of surviv-
al, he said.

The rest would be tube-
fed pureed food until their
health stabilized. Then, they
would be rinsed or washed
in soapy water. Eventually,
he said, some would be re-
leased back into the wild.

Environmental groups in
Anchorage have begun orga-
nizing volunteers should
their help become needed.
Bergman has asked that vol-
unteers not come to Valdez.

There is no place to stay,
no boats to take people out,
no equipment to work with,
and nothing to do, she said.

NOW: What Coast Guard, oil industry officials have to say

Guard engineer, holds a...
n the spill of the Exxon Valdez. plane at the Valdez airport. The detergent will be used to clean oil-soaked birds.

Officials hope dispersants will dilute the spill

Daily News 3-26-89

Warnings of tanker spill's likelihood go back a long way

By LARRY PRYOR
Los Angeles Times

Throughout the mid-1970s, as the trans-Alaska Pipeline System was being planned and debated, the pipeline's builders said that chances of an oil spill in Prince William Sound were extremely remote. The normal safety precautions used in domestic tanker trade would provide sufficient protection to coastal waters.

But environmentalists and Alaska state officials strenuously argued that a tanker accident there was inevitable. They said that the fleet designated to carry the North Slope oil should be specially designed to be maneuverable in the close confines of the sound and have special ballast tanks and double bottoms to limit leakage if a tanker had an accident.

Until Friday, the oil industry had won the argument.

The debate over threats of oil spills from the fleet of the trans-

Alaska Pipeline System fleet, or TAPS, as it became known, began almost from the day in 1968 when Atlantic Richfield and Humble Oil and Refining (now Exxon USA) discovered the Prudhoe Bay oil field and planning began for the 800-mile pipeline, its terminus at Valdez and the transportation fleet.

The pipeline's marine leg was the first movement of large amounts of domestic crude oil by means other than large pipelines.

Some members of Congress sought a study of the feasibility of bringing the oil by pipeline through Canada, but that idea was cut off even before the planning stage. A bitter Rep. Morris Udall, D-Ariz., said at that time: "The saga of the trans-Alaska pipeline is at once one of the most remarkable and regrettable of the decade."

In order to shortcut the review process required by the National Environmental Policy Act, Secre-

tary of Interior Rogers Morton and Alyeska Pipeline Service Co., the consortium of eight oil companies building the pipeline, in 1972 testified that the TAPS fleet would "set new and exacting standards to govern the marine transportation of American oil."

Morton testified before a congressional committee that "newly constructed American flag vessels carrying oil from Port Valdez to the United States ports will be required to have segregated ballast systems incorporating a double bottom ..."

The environmental impact statement on the project made repeated references to the "modern Alyeska tanker system," and Alyeska published a brochure promising that its fleet of tankers would be "thoroughly modern and unique" and would be "precedent-setting in the petroleum and marine industries."

Alaska regulators and environmental groups opposed to the pipe-

line interpreted those promises as meaning that the ships entering Prince William Sound would be a specially dedicated fleet with segregated ballast to be used as defensive space, with double bottoms and added maneuvering systems, such as double screw and bow thrusters.

However, as the pipeline drew close to being finished in August 1977, it became clear that only a handful of the ships that would carry the North Slope oil would have double bottoms. Because of a series of decisions by the U.S. Coast Guard and the oil companies, most innovations in tankers did not apply to the TAPS fleet.

Moreover, the 500-member Cordova District Fisheries Union, as well as Alaska officials and scientists, urged Alyeska and the Coast Guard to take special precautions in case of a tanker accident in

Please see Back Page, WARNINGS

more toxic compound in the water," said Rick Steiner, a biologist who heads the University of Alaska marine advisory program in Cordova.

Hydrogen and oxygen atoms in the normally harmless water could bond with chemicals in dispersants to create new and harmful chemicals, he said, or chemical reactions between the water and the dispersants could release heavy metals or other toxics formerly locked up in hydrocarbon compounds.

Most of the dangerous

that inhabits the surface and the wildlife in the water column and on the floor."

An oil company executive said that was not the case. Dispersants would help more than hurt, insisted Don Cornett, Alaska coordinator for Exxon USA. He said dispersants could prevent oil from reaching sensitive beaches and the shallow water where herring are beginning to spawn.

"We believe we can substantially limit the damage done to the shoreline," Cornett said.

it to be a cure-all.

"To the common layman, you'd think: 'Blast it with this stuff, and it will go away, and it's cheaper.' But it's not quite that simple," he said.

He noted a long list of potential problems:

- The dispersants have only limited effectiveness. Lautenberger said the success rate ranges from 0 to 80 percent. He expected a 30 percent success rate in the Sound. Trial use early Saturday failed because there wasn't enough wind and tide to agitate the chemicals, the

- No one is certain what dissolved oil, or even the dispersant, will do to marine life in the long term.

"It might not cause absolute, acute mortality," Steiner said, but it could still cause plenty of damage. The fisheries of the Sound are particularly vulnerable at this time of year, he said.

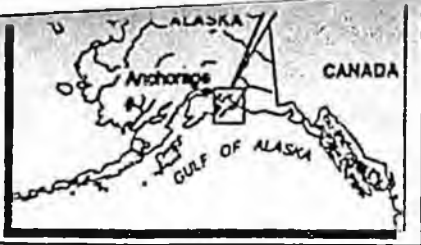
Young salmon emerging from their natal streams depend on adequate supplies of plankton, which could fall victim to dispersed oil. Larval crabs, clams and herring eggs are sensitive as well.

Herring eggs exposed to

agency agrees the best way to clean up the oil is to skim it off the surface mechanically, Lautenberger said.

But, realistically, this spill is so big and the equipment on scene so limited that dispersants might be one of the best options available, Lautenberger said.

Others options have, however, been discussed, including burning the oil or dumping sand on it. The sand would bond to the oil, and together they would sink to the bottom. Steiner said Cordova fishermen are backing that idea, but environmental



Anchorage Daily News / Ron Engstrom

... which local boaters describe as one of the best-known hazards in Prince William Sound.

The Coast Guard routinely monitors tankers coming and going from the Alyeska port, using radar to track the vessels. But the Valdez was on the outer edge of the area that can be monitored by radar, and a spokesman said the ship was not being monitored because there were no other ships in the area and there was no danger of a ship to ship collision.

The NTSB's involvement in the investigation is not unusual, according to a safety board official in Washington, D.C.

"The safety board is charged with investigation of all aviation, highway, railroad, marine and pipeline accidents," said Terry J. Armentrout, director of the agency's Bureau of Accident Investigations.

"Since this is a U.S. flag ship, we have investigative authority," he said, adding that the board looked into about 30 marine accident last year. "We are not the Coast Guard that makes and enforces the rules."

The team is being headed by Bill Woody, a marine safety investigator. The team is composed of three marine investigators and a "human performance investigator," whom Armentrout described as a person trained in psychology to look into such things as fatigue and substance abuse.

Daily News reporter David Whitney in Washington, D.C., contributed to this story.

WARNINGS: Sounded years ago

Continued from Page A-6

Prince William Sound. The Sound's fjord-like topography means that the effects of an oil spill there might be magnified many times.

"The contamination will be widespread and the oil's residence time can be very high because it will become entrapped," said M.P. "Pat" Wennekens, an oceanographer with the state's Arctic Environmental Information and Data Center, who spoke at a conference at Cordova in April 1977.

Chancy Croft, an Alaska state senator, told the conference: "Some time there's going to be an oil spill" in Prince William Sound. The only questions, he said, are how soon and what size.

The fishermen and state

officials argued that because of the remote area's logistics problems, oil skimmers and oil-containment booms should be located at specially designated areas on islands in the sound.

"In most cases, equipment coming from Port Valdez will arrive too late to contain a spill in Prince William Sound before it reaches shore," said a 1977 report on Alyeska's contingency planning for an oil spill by the Alaska Department of Fish and Game.

Coast Guard officials admitted that an oil spill in the Sound would be difficult to deal with. "It could take two days, two weeks or two months, depending on the weather, before we could get our equipment in," one officer said.

rd, have to take a look at every-
nat, thing."

By late Saturday night, however, Exxon had completed preparations to bomb the slick with the dispersant Corexit 9527 delivered by aircraft.

Dispersants are controversial. The chemicals are intended to bond with the oil, break it into small pieces, and cause it to mix with the water. Environmentalists say that just spreads the oil through the water from top to bottom, endangering many different life forms. Fishermen fear the oil will harm salmon, bottomfish and crustaceans.

Late Friday and again Saturday, Alyeska and Exxon officials tried spreading dispersant in a small test. The test failed, because calm seas didn't produce the agitation needed to mix the chemicals with the oil.

Tarossi said a burn test might also be conducted, but that had not been done by late evening Saturday. That would involve corralling a portion of the spill and setting it afire.

The officials say they are taking the cautious approach. But folks in Valdez are growing increasingly impatient.

"We've put our blood into this operation, and now, no one can tell us what's going to happen," Cesarini said. "What am I going to tell my employees? What am I going to tell my fishermen?"

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1000
Original sponsors: Halford, Jones,
Coghill, et al.

1 IN THE SENATE

*Shapiro alternate
Forsberg
Medeiros*

2 CS FOR SENATE BILL NO. 266 ()

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act imposing a nickel-per-barrel fee on crude oil
7 and providing for suspension and reimposition of the
8 fee under certain conditions; authorizing the appro-
9 priation of the proceeds of the fee to the oil and
10 hazardous substance release response fund; and pro-
11 viding for an effective date."

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

13 * Section 1. FINDINGS AND PURPOSE. (a) The legislature finds that the
14 March 24, 1989, oil spill disaster in Prince William Sound demonstrates a
15 need for the state to have an independent spill containment and cleanup
16 capability in the event of future discharges of oil or a hazardous sub-
17 stance.

18 (b) It is the purpose of this Act to provide assurance to the people
19 of the state that their health, safety, and well-being will be protected
20 from the adverse consequences of oil and hazardous substance releases of a
21 magnitude that presents a grave and substantial threat to the economy and
22 the environment of the state.

23 * Sec. 2. AS 43 is amended by adding a new chapter to read:

24 CHAPTER 59. FEE ON CRUDE OIL.

25 Sec. 43.59.010. FEE LEVIED. Every person who delivers crude oil
26 to a port for transportation by a vessel that transits the navigable
27 waters of the state shall pay a fee of \$.05 per barrel of the crude
28 oil delivered, less royalty oil the ownership or right to which is
29 exempt from taxation under this title.

1 Sec. 43.59.020. ADMINISTRATION OF THE FEE. (a) The fee on
2 crude oil shall be paid quarterly. The fee is due on the 20th day of
3 the month following the close of the calendar quarter on crude oil
4 delivered to the port during the preceding calendar quarter. If the
5 fee is not paid before the end of the month in which it becomes due,
6 the fee becomes delinquent.

7 (b) The fee shall be paid by the person delivering the crude oil
8 to the port for transportation.

9 (c) In making settlement with the royalty owner the person
10 paying the fee may deduct the amount of the fee paid on royalty oil,
11 or may at the time the fee becomes due deduct royalty oil equivalent
12 in value to the amount of the fee paid.

13 (d) The fee shall be paid to the department, and the person
14 required to pay the fee shall file with the department at the time the
15 fee is required to be paid a report, under oath, on forms prescribed
16 by or acceptable to the department, giving with other information
17 required, the following:

18 (1) the name of the person paying the fee;

19 (2) the total volume of the crude oil delivered for trans-
20 portation; and

21 (3) the name of the first purchaser and the price received
22 for the crude oil if sold in the state.

23 (e) Reports by or on behalf of the person required to report
24 under (d) of this section are delinquent the first day following the
25 day the fee is due. Each person required to report under (d) of this
26 section is subject to a penalty of \$1,000 a day for each day during
27 which the report is not filed. The penalty for failure to file a
28 report is in addition to the penalty for delinquent fees under (h) of
29 this section, and is a lien against the assets of the person required

1 to report under (d) of this section.

2 (f) The department may

3 (1) require a person who is obligated to pay the fee due
4 under this chapter, the agent or employee of the person, or the owner
5 or former owner of a royalty interest in crude oil, to furnish addi-
6 tional information that is considered by the department as necessary
7 to compute the amount of the fee;

8 (2) examine the books, records, and files of a person
9 identified in (1) of this subsection;

10 (3) conduct hearings and compel the attendance of witnesses
11 and the production of books, records, and papers of any person identi-
12 fied in (1) of this subsection; and

13 (4) make an investigation or hold an inquiry that is cor-
14 sidered necessary to a disclosure of the facts as to the volume of
15 crude oil transported.

16 (g) The department may determine whether or not a report re-
17 quired under this chapter is correct. If a person makes an untrue or
18 incorrect report, or fails or refuses to make a report, the department
19 shall, under regulations prescribed by it, determine the correct
20 amount of crude oil on which the fee is payable and compute the fee.

21 (h) When the fee provided for in this chapter becomes delin-
22 quent, it bears interest at the rate prescribed in AS 43.05.225. If a
23 person fails to make a report required by this chapter within the time
24 prescribed by law for the report, the department shall examine the
25 books, records, and files of the person to determine the amount and
26 value of the crude oil delivered to compute the fee, and the depart-
27 ment shall add to the fee the cost of the examination, together with
28 any penalties accrued.

29 (i) In case of overpayment, duplicate payment, or payment made

1 in error, the department may issue a certificate stating the facts and
2 the amount of the refund to which the person required to pay the fee
3 is entitled. Upon presentation of the certificate to the Department
4 of Administration, the Department of Administration shall issue a
5 warrant for the refund.

6 (j) The department may adopt regulations for the purpose of
7 making and filing reports required by this chapter and otherwise
8 necessary to the enforcement of this chapter. The department may
9 require a sufficient bond from every person charged with the making
10 and filing of reports and the payment of the fee. The bond shall run
11 to the state and shall be conditioned upon the making and filing of
12 reports as required by law, upon compliance with the regulations of
13 the department, and for the prompt payment, by the principal on the
14 bond, of all fees due the state by virtue of this chapter.

15 (k) If reports required have not been filed or are insufficient
16 to furnish the information required by the department, the Department
17 of Law shall institute, in the name of the state upon relation of the
18 department, the necessary action or proceedings to enjoin the person
19 from continuing operations until the reports are filed.

20 Sec. 43.59.030. DISPOSITION OF PROCEEDS OF FEE. (a) The com-
21 missioner shall deposit the proceeds of the fee into the general fund.

22 (b) The commissioner of administration shall separately account
23 for all proceeds of the fee deposited into the general fund.

24 Sec. 43.59.040. USE OF REVENUE DERIVED FROM FEE. The legisla-
25 ture may appropriate the annual estimated balance of the account
26 established under AS 43.59.030 to the oil and hazardous substance
27 release response fund established by AS 46.08.010.

28 Sec. 43.59.050. SUSPENSION AND REIMPOSITION OF THE FEE. (a)
29 Not later than 30 days after the end of each calendar quarter, the

1 commissioner of administration shall determine the cumulative total of
2 money

3 (1) that has been deposited through that calendar quarter
4 into the general fund under AS 43.59.030;

5 (2) expended through that calendar quarter from the oil and
6 hazardous substance release response fund established in AS 46.08.010.

7 (b) Within 15 days after making the determinations required by
8 (a) of this section, the commissioner of administration shall report
9 to the commissioner the difference between the amount determined under
10 (a)(1) of this section and amount determined under (a)(2) of this
11 section.

12 (c) If the commissioner of administration reports that the
13 difference determined under (b) of this section equals or exceeds
14 \$20,000,000, the commissioner of revenue shall suspend imposition and
15 collection of the fee levied and collected under AS 43.59.010. Sus-
16 pension of the imposition and collection of the fee begins on the
17 first day of the calendar quarter next following the commissioner's
18 receipt of the commissioner of administration's report under (b) of
19 this section. Before the first day of a suspension authorized by this
20 subsection, the commissioner shall make a reasonable effort to notify
21 all persons who are known to the department to be paying the fee under
22 this chapter that the fee will be suspended.

23 (d) Except as provided in AS 43.59.060, if the commissioner of
24 administration reports that the difference determined under (b) of
25 this section is less than \$20,000,000, the commissioner of revenue
26 shall require imposition and collection of the fee authorized under
27 AS 43.59.010. Reimposition of the fee begins on the first day of the
28 calendar quarter next following the commissioner's receipt of the
29 commissioner of administration's report under (b) of this section.

1 Before the first day of reimposition of the fee authorized by this
2 subsection, the commissioner shall make a reasonable effort to notify
3 all persons who are known to the department to be required to pay the
4 fee under this chapter that the fee will be reimposed.

5 Sec. 43.59.060. FEE NOT IMPOSED. The fee authorized by this
6 chapter is not levied during any fiscal year for which the estimated
7 revenue from the fee would be sufficient to restore the balance of the
8 oil spill emergency containment fund on the first day of the fiscal
9 year to at least \$20,000,000, and the legislature does not, during the
10 regular legislative session preceding the first day of the fiscal
11 year, appropriate money from the general fund to the oil spill emer-
12 gency containment fund sufficient to restore the balance of the oil
13 spill emergency containment fund on the first day of the fiscal year
14 to at least \$20,000,000.

15 Sec. 43.59.100. DEFINITIONS. In this chapter

16 (1) "barrel of oil" has the meaning given in AS 43.55.140;

17 (2) "fee" means the fee levied by AS 43.59.010;

18 (3) "navigable waters" has the meaning given in AS 38.05.-
19 965;

20 (4) "oil" has the meaning given in AS 43.55.140;

21 (5) "ownership or right to which is exempt from taxation"
22 has the meaning given in AS 43.55.140;

23 (6) "vessel" has the meaning given in AS 46.04.120.

24 * Sec. 3. APPLICATION OF AS 43.59.060. (a) AS 43.59.060, added by
25 sec. 2 of this Act, does not apply to prevent the levy and collection of
26 the fee imposed by AS 43.59 until the first day of the fiscal year next
27 following the day on which the balance of the oil and hazardous substance
28 release response fund first exceeds \$20,000,000.

29 (b) The commissioner of administration shall certify to the
CSSB 266()

1 commissioner of environmental conservation, the commissioner of revenue,
2 and the division of legislative finance the date on which the balance of
3 the oil and hazardous substance release response fund first exceeds
4 \$20,000,000.

5 * Sec. 4. APPLICABILITY OF ACT. This Act does not relieve a person
6 responsible for an oil terminal facility, offshore exploration or produc-
7 tion facility, or a vessel that transports crude oil, or a person who has
8 control of a hazardous substance, from the responsibility for containing
9 and cleaning up a discharge of oil or the hazardous substance as required
10 by law.

11 * Sec. 5. This Act takes effect immediately under AS 01.10.070(c).
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Prepared for
The Oil Spill Damage Assessment Study
Institute for Marine Studies
University of Washington
Seattle, WA 98195
(206) 543-7004

Final Report

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

by Wendy J. Graham

January, 1989

Acknowledgement

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

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

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January, 1989

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INTRODUCTION

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

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

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

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

2. *Id.* at p. 4.

3. *Id.* at p. 4.

4. See, for example, Federal Water Pollution Control Act Section 1321(f), 33 USC Section 1251 et. seq.; Outer Continental Shelf Lands Act Amendments of 1978 Sections 303, 304, 43 USC Section 1331 et. seq.; Deep Water Port Act of 1974, 33 USC Section 1501 et. seq.; Florida Statutes Section 403.165; Washington Revised Code Sections 90.48.142, 90.48.144, 90.48.320, 90.48.336; California Navigational Code Section 293.

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

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

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

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

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

8. Alaska Statutes 46.03.758(b).

9. Alaska Statutes 46.03.758(d).

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

1.1 The pre-1977 Regime

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

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

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

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

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

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

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

2. Alaska Statute Title 46.

3. 12 U.S. Treaties, V. 3, pp. 2989-3027; 17 U.S. Treaties, V. 2, pp. 1523-1551.

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

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

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

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

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

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

1.2 The Impetus for Change

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

In its evaluation Alaska took the position that oil pollution

...can and does cause a wide range of harm to renewable resources, and the environment in general. Many types of harm, which can have devastating long-term effects on important marine resources, cannot be quantified. Included within this category are mortality of fish and shellfish larvae, food chain contamination, carcinogenic effects, and chronic toxicity.⁷

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

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

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

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

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

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

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

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

8. Id. at p. 3.

9. Id. at p. 1.

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

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

12. Sponsor Analysis at p. 4.

13. Id. at p. 5.

14. Id. at p. 4.

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

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

15. Id.

CHAPTER 2. The Present Alaska Oil Spill Liability Scheme

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

2.1 Why a Civil Penalty Scheme?

2.1.1 The Statute

The legislative findings of AS 46.03.758 assert that,

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

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

2.1.2 The Legislative History—Civil Penalties as Compensation

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

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

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

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

2. AS 46.03.758(a).

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

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

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

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

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

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

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

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

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

8. See Statements by Jonathan Tillinghast at the House Resources Committee Meeting on 2/17/77 and the House Judiciary Committee Meeting on 3/4/77 as contained in the Meeting Minutes.
9. Sponsor Analysis, at p. 6.
10. Statement by Jonathan Tillinghast as contained in the House Resources Committee Meeting Minutes of 2/17/77.
11. Statement by Ernest Mueller, Commissioner of the Alaska Department of Environmental Conservation, as contained in the House Judiciary Committee Meeting Minutes of 3/4/77.
12. Statement by Jonathan Tillinghast as contained in the House Judiciary Committee Meeting Minutes of 4/12/77.
13. Statement by Jonathan Tillinghast quoting the Court in U. S. v. Contractors, as contained in the House Judiciary Committee Meeting Minutes of 4/12/77. Mr. Tillinghast does not state which Federal laws he is referring to.

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

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

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

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

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

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

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

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

17. See Rav v. Atlantic Richfield Co., 435 U. S. 151 (1978) which struck down a Washington State statutory provision requiring specific safety features on oil tankers of between 40,000 and 125,000 DWT entering state waters. A similar statute in Alaska attempted to charge tankers varying 'risk avoidance' charges to fund an oil spill cleanup fund depending on the safety features present on the tanker, such that if a tanker did not possess a particular safety feature that the state deemed appropriate, that tanker's risk avoidance charge would be increased by the amount it would cost to install that piece of equipment. This provision was also struck down. See Chevron v. Hammond, U. S. District Court for the District of Alaska, No. A-77-195, Memorandum of Decision by Judge James M. Fitzgerald, June 30, 1978.

18. See Supra note 16.

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

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

2.1.4 Premises and Intent of the Civil Penalty Scheme

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

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

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

20. See statement by J. Tillinghast as contained in the House Judiciary Committee Meeting Minutes of 3/4/77, and Sponsor Analysis at p. 5. During the 1978 legislative review of the regulations promulgated by the ADEC, Tillinghast asserted that the maximum \$10, \$2.50 and \$1 penalty amounts were inserted into the penalty schedule by the legislature to assure that the assessed penalty would not be punitive. See the Administrative Regulation Review Committee Meeting Minutes of 2/28/78.

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

8. The scheme is not intended to be punitive.

2.2 The Amount of the Penalty

2.2.1 The Statute

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

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

- a. \$10 per gallon of oil which enters an anadromous stream or other freshwater environment with significant aquatic resources;
- b. \$250 per gallon of oil which enters an estuarine, intertidal or confined saltwater environment; and
- c. \$1 per gallon of oil which enters an unconfined saltwater environment, public land or freshwater environment without significant aquatic resources.²²

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

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

2.2.2 The Legislative History

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

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

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

24. AS 46.03.758(b)(2).

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

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

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

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

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

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

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

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

30. See *Supra* note 11.

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

32. *Id.*

33. *Id.* Emphasis added.

34. Sponsor Analysis at p. 7.

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

2.2.3 The Intent

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

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

2.3 Vicarious Liability

2.3.1 The Statute

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

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

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

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

37. With regard to extending liability for the unlawful discharge of oil to include the outer continental shelf adjacent to the state, J. Tillinghast asserted at the legislative hearings considering HB 137 that "(1) (there is) a substantial state interest in what happens on the OCS, and the person charged with the act out there has contact with the state itself, you can regulate activities on the OCS if not otherwise pre-empted by federal law." (See statement by J. Tillinghast as contained in the House Judiciary Committee Meeting Minutes of 3/28/77). To date no suits have been brought under this provision, and thus it has not yet been subjected to interpretation by either the state court or the U. S. Supreme Court. (Personal interview with Doug Mertz, Assistant Attorney General for the State of Alaska, Juneau Alaska, 4/20/88).

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

2.3.2 The Legislative History

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

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

38. AS 46.03.758(e).

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

40. AS 46.03.740, Oil Pollution. See Chapter 1 of this paper for a more detailed discussion of this provision.

41. AS 46.03.760(e).

42. See *Supra* note 40.

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

44. AS 46.03.760(e).

45. See Sponsor Analysis at p. 9.

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

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

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

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

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

46. Sponsor Analysis at pp. 8-9.

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

48. 46 USC Sections 183, 186. See also Supra note 46 at p. 10.

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

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

51. Sponsor Analysis, at p. 9.

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

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

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

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

2.3.3 The Intent

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

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

2.4 \$100 Million Ceiling on Liability

2.4.1 The Statute

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

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

54. See Sponsor Analysis at p. 12.

2.4.2 The Legislative History

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

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

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

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

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

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

55. See Sponsor Analysis at pp. 7-8. As originally introduced, the maximum penalty under HB 137 was \$50 per gallon.

See Supra note 36 and section 2.2 of this chapter for further discussions in this regard.

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

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

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

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

2.4.3 The Intent

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

2.5 Deduction for the Gallons Cleaned Up

2.5.1 The Statute

AS 46.03.758(f) provides that

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

2.5.2 The Legislative History

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

Industry lobbyists were quick to point out that

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

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

60. See Sponsor Analysis at pp. 7-8.

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

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

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

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

Also,

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

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

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

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

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

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

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

68. Id.

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

2.5.3 The Intent

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

2.6 The Mitigation Clause

2.6.1 The Statute

AS 46.03.758(g) provides that

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

2.6.2 The Legislative History

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

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

69. Id.

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

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

72. See, for example, *Supra* note 57.

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

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

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

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

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

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

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

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

76. Statement by an unidentified Senator as contained in the Minutes of the Senate Floor Session considering HB 137, 5/28/77.

2.6.3 The Intent

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

2.7 The 13,000 Gallon Exemption

2.7.1 The Statute

The legislative findings of AS 46.03.758 assert in part that

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

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

2.7.2 The Legislative History

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

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

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

78. AS 46.03.758(a)(3).

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

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

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

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

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

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

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

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

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

84. Id. House Judiciary Committee Meeting Minutes. Statement by Ken Schovalder, Sohio lobbyist.

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

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

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

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

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

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

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

87. See Minutes of the Senate Floor Session of 5/28/77. There is no discussion as to why this exemption was removed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.7.3 The Intent

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

2.8 Summary and Conclusion

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

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

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

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

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

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

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

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

CHAPTER 3. Implementation of AS 46.03.758

3.1 The Regulations—Statutory Mandate and Legislative History

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

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

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

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

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

2. AS 46.03.758(d).

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

4. Sponsor Analysis at p. 6.

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

3.1.1 Certain Provisions Fall Outside the Purview of the Statute

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

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

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

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

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

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

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

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

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

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

3.1.2 Certain Biological Criteria are not Supported by Fact

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

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

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

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

12. Id.

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

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

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

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

17. Id.

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

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

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

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

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

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

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

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

21. Id., Mueller letter.

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

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

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