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

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

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

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25. See Supra note 6, draft regulations.

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

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

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

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

The State responded that the statute neither required nor allowed the use of actual toxicity in establishing the penalty schedule. In fact, given the present state of scientific knowledge, establishing the actual toxicity for each and every petroleum product would be impossible.[29] What the statute required was the use of relative toxicity.[30] That is, the penalty schedule should establish that one type of oil (e.g. gasoline) is relatively more toxic than another (e.g. asphalt). However, the State was receptive to the notion that the toxicity level of, for example, two gasolines or of two different oils which are both considered, for example, highly toxic, may differ substantially. Chevron offered that while it is not a precise measure of toxicity, the amount of aromatic hydrocarbons present in an oil is the major contributor to that oil's toxicity, such that as the percent of aromatic hydrocarbons increases the toxicity also increases. The State thus suggested "...tempering the fee schedule in general by a factor related to the aromatic hydrocarbon concentration in each of the categories. In other words, a gasoline (with) say 20% aromatic hydrocarbons would have half the (toxicity factor) of one (with) 40% aromatic hydrocarbons."[31] This suggestion was accepted and the regulations as adopted require the toxicity factor number to be determined by multiplying the number from the toxicity table for the oil spilled by a fraction whose numerator is the percent concentration of aromatics in the oil and whose denominator is 45.[32]

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

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

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

30. Id.

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

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

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

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

3.1.4 Prosecutorial Discretion and Annual Reporting

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

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

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

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

3.1.5 Penalty For Oil Which Enters More Than One Receiving Environment

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

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

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

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

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

First of all, while not explicitly set forth in the statute, the legislative record makes it clear that the phrase "the schedule shall vary according to the sensitivity of the receiving environment" as set forth in AS 46.03.758(d) at least reasonably, if not necessarily, implies that the penalty schedule should take into consideration the time of year that a spill occurs.[42] It is arguable that the

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37. See Supra note 6, Draft Regulations.
38. See discussion of this issue as contained in the ARRC Meeting Minutes of 2/28/78.
39. Id. See also Supra note 28, Mueller letter.
40. 18 AAC 75.570(3). See Appendix C.
41. See Chapter 2 of this paper and the ARRC Meeting Minutes of 3/16/78 for further discussions in this regard.
42. See discussion in this regard as contained in the House Resources Committee Meeting Minutes of 2/17/77.

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

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

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

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

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

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43. According to Paul O'Brien, ADEC, the critical freshwater category was amended in 1986 to include ground waters (18 AAC 75.510(1)(a)). Prior to this time, only those ground waters with a water use permit, or those which in fact were being used for a purpose specified in 11 AAC 72.200 were considered critical. By default, ground waters which were being used for a purpose that would qualify for a water use permit, but which did not in fact have one, and which were not being used for a purpose specified in 11 AAC 72.200 were classified as

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[9]Id. at p. 6.

[10]Id. at p. 8.

TABLE 1 (Cont.)

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

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

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

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

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

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

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

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

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

3.3 The Civil Penalty Scheme in Practice

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

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

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

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

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47. Personal interview with Randy Baylis, former ADEC Director, Valdez Office, in Juneau Alaska, April 18, 1988.
48. Personal interview with Alaska Assistant Attorney General Doug Mertz, Juneau Alaska, April 20, 1988.
49. Id.
50. Id.
51. Personal interview with Paul O'Brien, Oil Spill Response Coordinator for ADEC, Juneau Alaska, April 15, 1988.

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

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

Finally, on January 21, 1984, the Greek tanker M/V Cenheus ran aground in Cook Inlet. Over 180,000 gallons of its cargo of jet A aviation fuel was released. The complaint filed by the State of Alaska asserted that the defendants were liable for liquidated damages under AS 46.03.760(a); strictly liable for natural resource damages under AS 46.03.822; liable for the civil penalties imposed by AS 46.03.758; and liable for environmental restoration under AS 46.03.780.[54]

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

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

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

54. Complaint filed in State of Alaska v. Transportes Del Este Navegacion, S. A., et. al., in the Superior Court for the State of Alaska, Third Judicial District, No. 84-961, January 31, 1984, by Madeleine R. Levy, Assistant Attorney General for the State of Alaska. Please see Chapter 1 of this paper for a discussion of the Alaska statutes cited in this paragraph.

55. According to Alaska Assistant Attorney General Doug Mertz, the State will commonly allege liability under both in its complaint. A decision as to which statute recovery will be sought under is made once adequate information is available. Telephone communication with Doug Mertz, July, 1988.

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

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

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

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56. See Supra note 48.

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

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

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

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

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

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

60. See Section 3.3.7 below.

61. See Supra note 51.

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

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

3.3.2 Ability to Determine the Amount Spilled

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

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

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

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

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

(a). Oil terminal facility: Proof of financial responsibility need not exceed $50,000,000, but must not be less than $10 per incident for each barrel of storage capacity at the facility, or $1,000,000, which ever is greater.

(b). Offshore exploration or production facility: Not less than $35,000,000 per incident.

(c). To be allowed to transfer oil to or from a tank vessel, or to or from an oil barge, proof of financial responsibility is as follows:

(1). for a tank vessel or oil barge transporting trans-Alaska pipeline oil, the amount required under the federal Trans-Alaska Pipeline Authorization Act (43 USC 1653(c)(3) (sec. 204(c)(3));

(2). for any other oil barge, the amount required by section 311(p)(1) of the Clean Water Act (CWA), or $1,000,000, whichever is greater;

(3). for any other tank vessel, the amount required by section 311(p)(1) of the CWA, or $20,000,000, whichever is greater.

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

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

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

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

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

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

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

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

67. See Supra note 54 at p. 3.

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

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

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

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

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

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

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

70. Id. at p. i.

71. See Supra note 52.

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

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

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

3.3.3 Spiller Defense To Liability: The Mitigation Clause

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

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

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

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73. Telephone interview with Alaska Assistant Attorney General Michelle Browne, Anchorage Alaska, on August 30, 1988.
74. Personal interview with Randy Bayliss, former Director of the ADEC Valdez Alaska office, in Juneau Alaska of April 18, 1988.
75. See Supra note 72, personal interview with Paul O'Brien.
76. Personal interview with Alaska Assistant Attorney General Doug Mertz in Juneau Alaska on April 20, 1988. This opinion was also voiced by Assistant Attorney General Michelle Browne. Specifically, she contends that this clause undercuts the purpose of the civil penalty law. Telephone interview with Ms. Browne, August 30, 1988.
77. Id. Mertz interview.
78. Alaska Statute 46.03.758(g). Emphasis added.

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

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

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

3.3.4 Spiller Defense to Liability: The LLA

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

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

80. Gross, 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. Emphasis added.

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

82. See Chapter 2, note 49.

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

In response to this petition, the United States filed a claim asserting that the costs incurred by the U. S. in removing the oil from the navigable waters of the U. S. did not fall within the purview of the LLA.[84] Rather, the U. S. urged that the Clean Water Act (CWA,33 USC 1321(f)) was the controlling statute as to liability for cleanup costs. Under this act the LWZ Navigation Co. , S. A. and Kee Yeh Maritime Co., LTD would be held liable for the cleanup costs incurred by the U. S. in the amount of $2,238,012.08.[85] The Court held that indeed the CWA was controlling as to liability for cleanup costs.[86] As such, the U. S. would be able to seek recovery of its costs under this act.

The State of Alaska also filed a claim asserting in part that petitioners LWZ Navigation Co., S. A. and Kee Yeh Maritime Co., LTD. were liable for expenses incurred by the State in responding to this spill incident, as well as the civil penalties imposed by AS 46.03.758.[87] A couple of comments regarding the relationship between Alaska's claim and the LLA are worth noting. First of all, as discussed in Section 2.3.2 above, the sponsors of HB 137 argued that one of the reasons the vicarious liability provision was needed in the new law was that litigation against the owner might be fruitless in the case of a tanker grounding or sinking where the owner petitioned to limit his liability under the LLA. One will recall that the vicarious liability provision as it relates to an oil

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

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

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

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

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

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

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

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

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

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

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88. AS 46.03.758(e)(2).

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

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

91. Id. Judgment of Exoneration.

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

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

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

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

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92. AS 46.04.020, Removal of Oil Discharges, and 33 USC 311(c)(1) (the Clean Water Act).

93. Id.

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

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

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

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

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

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

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

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

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97. See Supra notes 84 and 85.

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

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

100. See Supra note 74.

101. Id.

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

Finally, according to Bayliss, the market value of oil is around $1/gallon, the cost of cleaning up the oil may be as high as $1,000/gallon, and the penalty imposed by AS 46.03.758 may be as low as $0.25.[103] Based on these amounts, and the premise that it is to the spillers advantage to delay cleanup as long as possible, Bayliss suggests that perhaps the best oil spill liability system would be based not on the number of gallons spilled, but on cleanup costs. In his opinion, the spiller should not be allowed to do cleanup at all. Instead, a contractor should be hired by the state to insure that adequate manpower and equipment are always available, and that cleanup will be done in a timely manner and to an acceptable extent. The spiller would then be held liable for the contractor's costs.

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

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

3.3.6 Impact of the 18,000 Gallon Exemption

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

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102. See Supra note 95, Report, at p. i.

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

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

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

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

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

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

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

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

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

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

107. See Supra note 92.

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

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

M/V Cepheus: Following the 1984 M/V Cepheus grounding in Cook Inlet, the vessel owner took responsibility for the cleanup response and the transfer of the oil from the damaged vessel to sound tanks.[110] As mentioned earlier, very little oil was recovered due to oil evaporation and dispersion, and harsh weather conditions.[111] Thus, monitoring of cleanup activities was not necessary. The Coast Guard took responsibility for advising and monitoring the transfer of oil to sound tanks.[112] The Anchorage Fire Department stood by in case of fire, but the overall participation of state agencies in this activity was minimal. As part of the federal response, NOAA contracted for studies to assess evaporation and dispersion rates and the predicted fate of the spilled oil, and provided a spill trajectory analysis. Based on this information it was concluded that the environmental impact would be minimal.[113] Thus, no full scale natural resource damage assessment was done and no monitoring of restoration was necessary. The ADEC did participate in overflights of Cook Inlet in an effort to locate pools of spilled oil. No significant pools were positively identified. The ADEC also chartered a helicopter and obtained samples of ice and sediment for fingerprinting[114] purposes.

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109. See Supra note 98.

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

111. See Supra note 96.

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

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

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

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

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

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

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

The total penalty would thus be $110,000. This case ultimately settled out of court for approximately $150,000.[117] Based only on the amount of the penalty and the fact that actual damages were determined to be minimal, this is obviously a very good settlement. However, the complaint filed by Alaska in this case asserts that the defendants "...failed to procure approval of an oil discharge contingency plan...as required by (statute)" and "failed to submit proof of financial responsibility...as required by (statute)."[118] If found liable for these failures, each could have carried a civil penalty of "...not less than $500 nor more than $100,000 for the initial violation plus not more than $5,000 for each day thereafter upon which (the violation continues)."[119] Plus, the defendants could have been found liable for the costs the State did incur in responding to this incident. These potential liabilities, in addition to liability for the civil penalties, surely had an impact on the settlement achieved in this case.

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

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115. Telephone interview of Alaska Assistant Attorney General Madeleine Levy, Anchorage Alaska, August 30, 1988.
116. Id.
117. Telephone interview of Alaska Assistant Attorney General Madeleine Levy, Anchorage Alaska, August 12, 1988.
118. Complaint filed by the State of Alaska in State of Alaska v. Transportes Del Este Naveracion, S. A., et. al., in the Superior Court for the State of Alaska, Third Judicial District, by Alaska Assistant Attorney General Madeleine Levy, January 31, 1984. Referring to liability under AS 46.03.760(a).
119. Id.

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

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

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

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

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

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120. Unless otherwise indicated, the information in this section regarding the response to the Atigun Pass spill was obtained from the Report on Milepost 166-167 Oil Spill June 10, 1979, by the Alaska Pipeline Office, Department of Interior, Anchorage Alaska, August 20, 1979. This report is contained in the ADEC archived file on this incident.

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

122. See Supra note 120.

determination. Finally, the OSC report gives no indication that the federal response included an attempt to determine the API gravity of the crude spilled. It is unlikely that the State incurred a great deal of expense in finding this out. It is generally known that Alaska North Slope crude has an API gravity of around 26.4. The complaint drafted by the State estimates the API gravity was around 26.8.[123] It is likely that Alyeska had access to this information and provided it to the state. Yet since no information is available on this issue, it is possible that the State did incur the expense of determining this API gravity number.

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

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

$$\frac{((26.8/30 * .75) + (30/26.8 * .5) + .5)}{3} * \$10 * 125{,}000$$

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

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

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

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

124. Id.

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

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

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

Gauging the amount of oil present on the vessel following the spill was not possible since the vessel sank. The estimate of 100,000 gallons spilled and 20,000 gallons removed made by Coast Guard and ADEC officials during cleanup operations was used by the State in determining the amount of the potential penalty under AS 46.03.758.[130]

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

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

Available records indicate that the ADEC incurred expenses of $68,495 in responding to this incident. The federal government incurred expenses in the amount of $2,238,012.08.[133] Settlement documents indicate that the State case was ultimately settled for exactly the cost incurred by the ADEC.[134] According to Bayliss, the federal government also recovered its expenses in its out of court settlement.[135]

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

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

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

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

131. See Supra note 127 at p. 21.

132. Id.

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

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

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

Both of these settlements may be interpreted as 'good' for several reasons. First of all even though the court determined that the CWA as opposed to LLA was the controlling federal statute as to liability for cleanup costs, if these cases had gone to court, the state and federal governments would have incurred both the time and expense of litigation in their efforts to recover the exact amounts settled for without having to go to court. Secondly, the evaluations performed by the federal and state governments in this case concluded that the extent of natural resource damage was minimal. It is possible, if not probable that the PRPs would have been found not liable for the damages which were detected based on the LLA. Finally, it is possible that the State could have recovered approximately $190,000 in assessed penalties under AS 46.03.758 even if the LLA was found to apply (the penalty would be assessed on the entire 100,000 gallons spilled since the responsible parties did not clean it up). However, in order to recover this amount the State would have had to prove that approximately 80,000 gallons remained in the water after the estimated 20,000 gallons had been removed. Since the vessel sank, establishing this would have been quite a problem.

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

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

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S. District Court, District of Alaska. No. A-80-199-Civ, April 1, 1982. Regarding the U. S. settlement, this information was provided by Mr. Bayliss. See Supra note 74.

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

137. See "Elusive Oil Hinders Cleanup," by PAC Ed Moreth, in the Coast Guard July-September, 1987 issue (Vol. 5, Issue 4) of the Alaska Bear, and "Crews Winning Oil Battle," by Dirk Miller, The Anchorage Times, July 11, 1987.

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

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

the areas tested were unaffected and that the impact on salmon was less than expected.[140] The drift net salmon fishery was opened on time eight days after the discharge occurred, although some traditionally profitable areas where contact with the oil was most likely remained closed.[141] Only about 4,000 of the record 600,000 red salmon caught had to be (officially) destroyed due to oil contamination.[142] However, according to Alaska Assistant Attorney General Michelle Browne, the full impact of the spill on salmon will not be known until the salmon runs potentially affected return to spawn in 1990.[143] Even then, if the runs are less than anticipated establishing a causal link between the decline and the spill will likely be impossible.

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

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

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

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

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

143. See Supra note 73.

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

145. Id., Browne interview, regarding the expense to the state. See "Liability a Slippery Question," by Yereth Rosen, Anchorage Times, July 19, 1987, regarding the Coast Guard expenses. The remainder of the information contained in this paragraph regarding settlement negotiations and a possible lawsuit was offered by Browne during the telephone interview of August 30, 1988.

146. Id., Browne interview. As discussed in Section 3.3.1 above, it is questionable whether a court would allow recovery of both the civil penalties and actual damages based on the double recovery issue.

147. Personal interview with Alaska Assistant Attorney Doug Mertz, Juneau, Alaska, April 20, 1988; personal interview with Paul O'Brien, Alaska Department of Environmental Conservation, Juneau, Alaska, April 15, 1988.

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

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

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

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

148. AS 46.08.020(a) and (b).
149. AS 46.08.010(b), and AS 46.08.040.
150. See Supra notes 74 and 147.
151. See Supra note 74.
152. See Supra note 147, Mertz interview.

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

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

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

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

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

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

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

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986[2] (SARA) provides some guidance. In particular, CERCLA Section 301 directs the President, acting through Federal officials, (in this case the Department of Interior (DOI)), to promulgate regulations for assessing the "...damages for injury to, destruction of, or loss of natural resources resulting from a release of oil or a hazardous substance for the purposes of this chapter and section 1321(f)(4) and (5) of Title 33 (The Clean Water Act)."[3] The regulations are to specify "(A) standard procedures for simplified assessments requiring minimal field observation, including establishing measures of damages based on units of discharge or release or units of affected area (type 'A' assessments), and (B) alternative protocols for conducting assessments in individual cases to determine the type and extent of short-and long-term injury, destruction, or loss (type 'B' assessments)."[4] These regulations would be used by a state or federal trustee when the trustee would be seeking recovery for the damages from the responsible party under the provisions of this act.

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

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1. Personal interview with Alaska Assistant Attorney General Doug Mertz, Juneau, AK, April 20, 1988; personal interview with Paul O'Brien, ADEC, Juneau, AK, April 15, 1988.
2. 42 USC Section 9601-9675.
3. Section 301 (c)(1), 42 USC Section 9651 (c)(1). The president delegated this responsibility to the DOI. See Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (Aug. 14, 1981), later superseded by Exec. Order No. 12,580, 52 Fed. Reg. 2,923 (Jan. 29, 1987). (This information was obtained from the Brief For Respondents prepared in the case of State of Ohio v. U. S. DOI and Donald Hodel, Secretary, on Petition for Review of an Action of the United States Department of the Interior, No. 86-1529 and Consolidated Cases, U. S. Court of Appeals for the District of Columbia Circuit, August 10, 1988). 33 USC 1321 (f) is entitled "Liability for Actual Costs of Removal." Sections (4) and (5) address liability for restoration or replacement of natural resources impacted by a discharge of oil or a hazardous substance.
4. Section 301 (c)(2), 42 USC 9651 (c)(2). The Type 'A' assessment actually consists of a computer program. Various factors including, for example, the location of the spill, the amount spilled, and the time of the year, are put into this program and the program is then supposed to determine the expected fate of the oil, what natural resources can be expected to be impacted, and what the economic value of those damages may be. This approach is intended to establish actual damage without incurring the time and expense of a full scale damage assessment, and is a possible alternative to using civil penalties when a damage assessment is determined to be inappropriate. However, the program presently can only take into consideration a very few different types of oil, and includes only a limited number of receiving environment categories. As such, it is presently of limited value at best. See U. S. DOI, CERCLA 301 Project, "Measuring Damages to Coastal and Marine Natural Resources, Concepts and Data Relevant for CERCLA Type A Damage Assessments," PB87-142485, Washington, DC, January, 1987, (two volumes). The Type 'B' assessment is equivalent to what has been referred to here as a full scale natural resource damage assessment.
5. 43 CFR Subtitle A, Subpart B--Pre-assessment Phase, and Subpart C--Assessment Plan Phase.

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

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

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

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

> ...the natural resource damage assessment must be well planned in advance of the actual conduct of the assessment and expenditure of costs. The assessment must be directed towards achieving a goal--the derivation of a damage amount based on the injuries sustained as a result of the discharge or release. To this end, the trustee is directed to collect only the minimum amount of information required to move from one phase of the assessment to another. In addition, the planned assessment costs should be maintained below the anticipated damage amount. Studies of injury or damages that do not directly contribute to the determination of a dollar value for the injured resource should not be part of the damage claim.[7]

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

7. Brief for Respondents in the case of State of Ohio v. U. S. DOI, and Donald Hodel, Secretary, on Petition for Review of an Action of the U. S. DOI, No. 86-1529 and Consolidated Cases, U. S. Court of Appeals for the District of Columbia Circuit, August 10, 1988. In this case the State of Ohio as well as several other states and groups are challenging the natural resource damage assessment rules promulgated by the DOI. With regard to the 'reasonable cost' criterion, petitioners focus on the third requirement of the definition (that the anticipated cost of the assessment is expected to be less than the anticipated damage amount) and assert that this requirement is arbitrary, that the reasonableness of a cost cannot be determined mechanistically as the DOI provides, and that a limit on recovery of essential costs based on a strict proportionality is not reasonable. (See Joint Opening Brief of Petition(ers) in State of Ohio v. U. S. DOI and Donald Hodel, No. 86-1529 and Consolidated Cases, U. S. Court of Appeals for the District of Columbia Circuit, April 25, 1988 at pp. 79-80). DOI responds that petitioners have incorrectly focused on this single aspect of the definition, and thus fail to recognize that the definition in its entirety neither results in an irrational one-to-one linkage of assessment costs to that of expected damages nor discourages trustees from performing assessments to recover damages. The definition specifies anticipated costs and damages. Thus, the design of the assessment to be done is based on the anticipated damage amount. The trustee is not precluded from expanding the assessment and its costs if sufficient information gathered during the assessment warrants collecting additional data, using other methodologies, or applying other procedures. Thus, the DOI asserts, the regulations are not inflexible in their allowance for 'reasonable and necessary' costs of performing assessments. In fact, the regulations are flexible in allowing the trustee to design an assessment consistent

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

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

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

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

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

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

9. Id.

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

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

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

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

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

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

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

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

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

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

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

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11. See Supra note 1, Mertz interview.
12. See Supra note 1, O'Brien interview.

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

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

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

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

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

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

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

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

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

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

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The Matter of The Complaint of Lee Wang Zin Navigation Co., S. A. and Kee Yeh Maritime Co., LTD. for Exoneration from or Limitation of Liability. Complaint for Exoneration from or Limitation of Liability, filed in the United States District Court for the District of Alaska at Anchorage, No. A-80-199-Civ, by Michael H. Woodell, Bradbury, Bliss & Riordan, Inc., on behalf of plaintiffs, June 25, 1980.

The Matter of The Complaint of Lee Wang Zin Navigation Co., S. A. and Kee Yeh Maritime Co., LTD. for Exoneration from or Limitation of Liability. Judgment of Exoneration signed by Judge James M. Fitzgerald, and Stipulation for Dismissal signed by all parties, filed in the United States District Court for the District of Alaska, No. A-80-199-Civ, April, 1982.

The Matter of The Complaint of Lee Wang Zin Navigation Co., S. A. and Kee Yeh Maritime Co., LTD. for Exoneration from or Limitation of Liability. Order and Opinion entered in the United States District Court for the District of Alaska, No. A-80-199-Civ, by Judge James M. Fitzgerald, February 4, 1981.

The Matter of The Complaint of Lee Wang Zin Navigation Co., S. A. and Kee Yeh Maritime Co., LTD. for Exoneration from or Limitation of Liability. Release of All Claims, filed in the United States District Court, District of Alaska, No. A-80-199-Civ, April 1, 1982.

The Matter of The Complaint of Lee Wang Zin Navigation Co., S. A. and Kee Yeh Maritime Co., LTD. for Exoneration from or Limitation of Liability. Stipulation for Dismissal, signed by all parties, April, 1982.

Tillinghast, Jonathan. Personal Interview. Juneau, Alaska, April 18, 1988.

Trans-Alaska Pipeline Authorization Act. 43 U.S.C., Section 1653.

United States Coast Guard. News Releases of July 4-July 18, 1987 pertaining to the Glacier Bay oil spill of July 2, 1987

United States Coast Guard. "Capsizing and Sinking of the M/V Lee Wang Zin," U. S. Coast Guard On Scene Coordinator Report, July 9, 1980.

United States Department of Interior. "Measuring Damages to Coastal and Marine Resources, Concepts and Data Relevant for CERCLA Type A Damage Assessments," CERCLA 301 Project, PB87-142485, Washington, DC, January, 1987, (two volumes).

Washington Laws. Chapter 479, Second Substitute Senate Bill No. 5986, Oil Spills, Section 1, 1987.

Washington Revised Code. Chapter 90.48.

Wood, Robert, Alaska Department of Fish and Game, and Harrington, Paul, U.S.F.S. "Lee Wang Zin Oil Spill, Wildlife Observations, undated.

Yang, Edward J., Dower, Roger, C., and Mark Menefee. "The Use of Economic Analysis in Valuing Natural Resource Damages," Environmental Law Institute, Washington DC, June, 1984.

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

18 AAC 75.510. FRESHWATER ENVIRONMENTS

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

Critical

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

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

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

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

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

Sensitive

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

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

APPENDIX A (Cont.)

18 AAC 75.520. MARINE ENVIRONMENTS

(a) Estuarine, intertidal and saltwater environments:

Critical

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

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

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

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

--marine waters w/i one statute mile of the mouth of waters designated under AS16.05.870(a) as important to spawning, rearing or migration of anadromous fish;

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

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

Sensitive

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

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

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

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

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

APPEMDIX B: CHARACTERIZATIONS OF PETROLEUM PRODUCTS AND BYPRODUCTS.
Source: 18 Alaska Administrative Code, Chapter 75, Article 5, 'Schedule of Civil Penalties,' Register 66, July, 1978.

18 AAC 75.540. TOXICITY OF PETROLEUM PRODUCTS/BYPRODUCTS

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

18 AAC 75.550. DEGRADABILITY OF PETROLEUM PRODUCT/BYPRODUCT

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

APPENDIX B (Cont.)

18 AAC.560. DISPERSIBILITY OF PETROLEUM PRODUCTS/BYPRODUCTS

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

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

18 AAC 75.570. Schedule of Civil Penalties

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

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

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

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

Toxicity#	Factor	Degradability##	Factor
High	1.00	Low	1.00
Moderate	0.75	Moderate	0.50
Less	0.50	High	0.25
Relatively nontoxic	0.25		

Dispersibility	Factor
High	0.15
Moderate	0.50
Low	1.00

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

APPENDIX C (Cont.)

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

Formula for assessing the penalty for refined petroleum products:

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

Formula for assessing the penalty for crude oil:

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

18 AAC 75.580 Prosecutorial Discretion

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

18 AAC 75.590 Annual Reporting

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

SENATE COMMITTEE REPORT

FURTHER FIN

DATE TURNED INTO OFFICE _____

4/14/89
Mr. President:

RESOURCES Committee considered sb 271

civil penalties for the unpermitted discharge of uncontaminated crude oil and for the failure to implement an oil discharge contingency plan in response to an unpermitted discharge of uncontaminated crude oil and recommended

[ ] replace with ___ CS SB 271 (Resources)) [] same title
[ ] or adopt _____ CS _____) [X] new title
[] technical title change (HB only)

[ ] attached amendment(s) and

[ ] _____ letter of intent adopted

[ ] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] further referral to _____

FISCAL NOTE(S) [ ] zero [ ] fiscal impact [ ] appropriation no FN
[ ] new [ ] updated [ ] previous
[ ] same as previous fiscal note(s) published _____

MEMBERS SIGNING DO PASS

Carlisle Stangeland

OTHER RECOMMENDATIONS

Pat Gilmore no rec.
Rick Halford Do Not Pass w/o Am.

Bettye Fahrenkamp no rec
Chairman signature and recommendation

[ ] Committee Backup attached

Amended: 4/29/89
Offered: 4/27/89
Referred: Finance

6-1197D

Original sponsors: Senate Special
Committee on Oil and Gas

IN THE SENATE BY THE RESOURCES COMMITTEE

CS FOR SENATE BILL NO. 271 (Resources) am

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to civil penalties for the unpermitted discharge of oil and for the failure to implement an oil discharge contingency plan in response to an unpermitted discharge of crude oil; and removing a maximum limit on civil penalties for discharges of oil."

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

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

(e) <u>If</u> [AFTER APRIL 19, 1978, IF] a discharge of oil in excess of 18,000 gallons not permitted under applicable state and federal law occurs within the territorial jurisdiction of the state, or into or upon the adjacent outer continental shelf of the state, the following persons, in addition to the person causing or permitting the discharge, are jointly and severally liable to the state, in a civil action, for the full amount of penalties established in the regulations <u>adopted under this section:</u> [, OR $100,000,000, WHICHEVER IS LESS,]

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

(2) if the discharge occurs from a vessel,

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

(B) the owner of the oil carried as cargo on the vessel at the time the vessel was loaded, if the loading occurred

within the territorial jurisdiction of the state, or at a deep-water port or other offshore storage facility adjacent to the state; however, if the owner of the oil temporarily transfers ownership of the oil to another person, and the transfer has the purpose or effect of evading the vicarious liability imposed by this section, the transferor will be considered the owner of the oil for the purposes of this subsection; and

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

* Sec. 2. AS 46.03.758(1)(6) is amended to read:

(6) "oil" means petroleum [, CRUDE OIL,] and any substance refined from petroleum, except uncontaminated [OR] crude oil;

* Sec. 3. AS 46.03 is amended by adding a new section to read:

Sec. 46.03.759. CIVIL PENALTIES FOR DISCHARGES OF CRUDE OIL. (a) A person who is found to be liable under any other state law for an unpermitted discharge of uncontaminated crude oil in excess of 18,000 gallons is, in addition to liability for any other penalties or for damages or the cost of containment and cleanup, liable to the state in a civil action for a civil penalty in the amount of

(1) ~~$5.83~~ 8.00 per gallon of crude oil discharged for the first 420,000 gallons discharged; and

(2) ~~$10~~ 12.50 per gallon of crude oil discharged for amounts discharged in excess of 420,000 gallons.

(b) In determining how many gallons of crude oil have been discharged for purposes of assessing a penalty under (a) of this section, the court shall deduct the number of discharged gallons of crude oil that the defendant proves were removed by the defendant from the environment within the first 36 hours after the discharge as a result

of a cleanup operation undertaken in conformity with applicable state and federal law. The dispersal of oil through the use of chemical agents or other means is not considered removal for the purposes of this subsection.

(c) The court shall assess five times the penalty set out in (a) of this section if the court finds

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

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

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

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

(f) In this section, "discharge" means entry of uncontaminated crude oil into or upon the water or public land of the state, regardless of causation, except discharges into an enclosed and impervious oil spill containment area.

* Sec. 4. AS 46.03.770 is amended to read:

Sec. 46.03.770. DETENTION OF VESSEL WITHOUT WARRANT AS SECURITY

FOR DAMAGES. A vessel that is used in or in aid of a violation of AS 46.03.740 - 46.03.750 may be detained after a valid search by the department, an agent of the department, a peace officer of the state, or an authorized protection officer of the Department of Fish and Game. Upon judgment of the court having jurisdiction that the vessel was used in, or was the cause of, a violation of AS 46.03.740 - 46.03.750 with knowledge of its owner or under circumstances indicating that the owner should reasonably have had this knowledge, the vessel may be held as security for payment to the state of the amount of damages assessed by the court under AS 46.03.758, 46.03.759, 46.03.760, [AND] 46.03.822, and AS 46.04.030(g). If the damages assessed are not paid within 30 days after judgment or final determination of an appeal, the vessel shall be sold at public auction, or as otherwise directed by the court, and the damages paid from the proceeds. The balance, if any, shall be paid by the court to the owner of the vessel. The court shall permit the release of the vessel upon posting of a bond set by the court in an amount not to exceed the maximum amount of damages available under AS 46.03.758, 46.03.759, 46.03.760, [AND] 46.03.822, and AS 46.04.030(g). The damages received under this section shall be transmitted to the proper state officer for deposit in the general fund. A vessel seized under this section shall be returned or the bond exonerated if no damages are assessed under AS 46.03.758, 46.03.759, 46.03.760, [OR] 46.03.822, or AS 46.04.030(g).

* Sec. 5. AS 46.04.030(g) is amended to read:

(g) Failure of a holder of an approved oil discharge contingency plan to have access to the quality or quantity of resources identified in the plan and, in the event of a spill, to respond with those resources within the shortest feasible time is a violation of this

chapter for purposes of AS 46.03.760(a), 46.03.765, 46.03.790, and any other applicable law. If the holder of an approved oil discharge contingency plan fails to respond to an unpermitted discharge of uncontaminated crude oil with the quality and quantity of resources identified in the plan and in a manner required under the plan, the holder is strictly liable, jointly and severally, for the civil penalty assessed under AS 46.03.759 against any other person for that discharge.

* Sec. 6. AS 46.04.040(e) is amended to read:

(e) Financial responsibility may be demonstrated by self-insurance, insurance, surety, or guarantee, under terms the department may prescribe. An action brought under AS 46.03.758, 46.03.760(a) or (e), [OR] 46.03.822, or AS 46.04.030(g) or to collect penalties imposed under AS 46.03.759 may be brought in a state court directly against the insurer or another person providing evidence of financial responsibility. The applicant, and an insurer, surety, or guarantor shall appoint an agent for service of process in the state. An insurer must either be authorized by the Department of Commerce and Economic Development to sell insurance in the state or be an unauthorized insurer listed by the Department of Commerce and Economic Development as not disapproved for use in the state.

* Sec. 7. AS 46.04.040(i) is amended to read:

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

Attys fees + costs — civil rule change 2/3 —

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: CSSB 271 (O&G)
PUBLISH DATE: 4/18/89

FISCAL NOTE

REQUEST:

Revision Date: _____
Agency Affected: DEC
Title: An Act relating to civil penalties for the unpermitted discharge of uncontaminated crude oil...
BRU: _____
Sponsor: _____
Components: _____
Requestor: Senator Pearce

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

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

POSITIONS: None

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Amy D. Kyle
Phone: 465-2600
Division: Commissioner's Office
Date: _____

Approved by Commissioner: A Dlyl
Date: 4/18/89
Agency: Department of Environmental Conservation

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

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: SB 271
PUBLISH DATE: 4/8/89

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: An Act relating to civil penalties for discharge of unpermitted contaminated oil discharge contingency plan
Sponsor: Senate Special Committee on Oil and Gas

Agency Affected: Environmental Conservation
BRU: Environmental Quality crude oil and for failure to implement an
Components: Environmental Quality

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME		-0-	-0-	-0-	-0-	-0-
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 11, 1989

Approved by Commissioner: a D Kyle — Date: 4/13/89
Agency: Alaska Department of Environmental Conservation

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

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: Senator Drue Pearce, Chair

Re: SB 271, Sponsor Statement

Date: April 11, 1989

This legislation will put into effect a necessary civil penalty structure that 1). will compensate the public for the unquantifiable and undetectable natural resource and environmental damage caused by massive oil discharge and 2). will provide oil handlers with a meaningful incentive to perform their operations as safely as possible.

The existing civil penalty statute, AS 46.03.758, caps liability at $100,000,000. It can be expected that the massive discharge into Prince William Sound will cost the state much more in terms of damage to the environment, tourism, the fisheries industry and the well-being of the residents of the effected areas.

While in 1977 the legislature attempted to draft a civil penalty statute which would provide the incentive to the oil companies to operate in a prudent and responsible manner, extensive lobbying by the industry significantly watered-down the legislation. The original legislation contained penalties of $50, $25 and $10 per gallon depending on what type of environment was impacted. The current penalties, ranging from $10 to $1 per gallon, do not carry the weight necessary to adversely impact a multi-national corporation's profit.

Even at the lower penalty levels, the industry regarded the penalties as excessive. In a House Judiciary Committee Meeting on March 4, 1977, an Exxon lobbyist testified 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."

I have introduced SB 271 to provide the type of incentive that will be seriously considered by the oil companies. This bill only deals with the catastrophic discharge of crude oil, spills in excess of 100,000 barrels. The $1,000 and $2,000 per barrel penalties should garner serious thought toward safe operations.

I have also included an incentive section, similar to the present law, which would credit the oil companies for each barrel cleaned up within 36 hours of the discharge. This does not apply to chemical dispersions.

These penalties will be increased fivefold for those acts that are based on gross negligence or intentional acts or when the defendant did not take reasonable measures to clean up the discharged oil.

These penalties supersede all other penalties for the discharge of oil. The penalties may be reduced in the defendant can demonstrate that the discharge was caused solely by the negligent act of a third party who cannot be found jointly and severally liable for the discharge.

Section 4 extends the civil penalty provisions of this bill to any person who has an oil discharge contingency plan who fails to respond in a manner required by law.

In conclusion, even though an event such as a massive oil spill, may have a low risk probability, it is important to raise the penalties to the level where this risk is taken into account when making operational decisions.

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: CSSB 271 (Resources)
PUBLISH DATE: 4/27/89

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: An Act relating to civil penalties for discharge of unpermitted contaminated crude oil and for failure to implement an oil discharge contingency plan
Sponsor: Senate Special Committee on Oil and Gas

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME		-0-	-0-	-0-	-0-	-0-
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: 465-2641
Division: Environmental Quality Date: April 11 1989

Approved by Commissioner: A D Kyl Date: 4/13/89
Agency: Alaska Department of Environmental Conservation

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

Changes in the Resources CS have no fiscal effect. This fiscal note is appropriate. 4/27/89
D. Consenstein

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

MEMORANDUM April 7, 1989

SUBJECT: Civil Penalties for Oil Discharges
(Work Order No. 6-1197)

TO: Senator Drue Pearce, Chair
Senate Special Committee on Oil and Gas

FROM: Terri Lauterbach
Legislative Counsel

Enclosed is a draft relating to your request to increase civil penalties for the discharge of crude oil.

Section 1 of the draft amends the definition of "oil" in the current civil penalty statute to exclude uncontaminated crude oil.

Section 2 of the draft enacts a new penalty scheme for discharges of uncontaminated crude oil. It assumes a finding of liability under another statute and imposes a civil penalty that would be in addition to any other liability of the discharger. The penalty would be approximately $24 per gallon for the first 420,000 gallons and $48 per gallon for discharges over that amount. However, I have drafted the penalty in terms of barrels, as you requested.

Subsection (b) establishes the incentive for cleanup in the first 36 hours, as you requested. Subsection (c) is patterned after AS 46.03.758(b)(2), causing a higher penalty on a showing of gross negligence or failure to reasonably respond to a discharge. Subsection (d) is patterned after AS 46.03.758(i). Subsection (e) is patterned after AS 46.-03.758(j). The definition in subsection (f) is patterned after the definition in AS 46.03.758(1)(3). (Note that it includes discharges on public land - you had asked about discharges on land when we last spoke.)

At your direction, I have not included a subsection on mitigation like that of AS 46.03.758(g). I have also not

included a subsection patterned after AS 46.03.758(h) because those exceptions would be covered in the underlying liability determination that would occur before the new civil penalty section would be applicable.

Section 3 makes a technical change to accommodate the new civil penalties enacted by secs. 2 and 4 of the draft.

Section 4 makes a person who fails to implement a contingency plan jointly and severally liable for a civil penalty assessed under AS 46.03.759. If it is your intent that their penalty be separate and in addition to the other person's penalty, please let me know, and I will redraft section 4. As drafted, the penalty is not limited to oil terminal facilities, but would be applicable to anyone who didn't respond adequately if their plan called for them to respond to a particular discharge.

Sections 5 and 6 make technical changes to accommodate the new civil penalties enacted by secs. 2 and 4 of the draft.

For your information, I have enclosed a general summary of statutes related to oil pollution discharges like the Prince William Sound disaster and a bibliography of material available at the Alaska State Library related to oil spills. The bibliography was prepared by the Alaska State Library.

If I can be of further assistance, please let me know.

TL:gc
WKG9/024

Enclosure

A M E N D M E N T

OFFERED IN THE SENATE BY HALFORD

TO: CSSB 271(Oil & Gas)

Page 3, after line 3:

Insert a new subsection to read:

"(c) In determining how many barrels of crude oil have been discharged for purposes of assessing a penalty under (a) of this section, the court may deduct 50 percent of the number of discharged barrels of crude oil that the defendant proves were removed by the defendant [redacted] within the first 36 hours after the discharge through the use of dispersing agents or other chemical agents approved by the department for use under the defendant's oil discharge contingency plan. The court may estimate the number of barrels removed under this subsection."

Reletter the remaining subsections accordingly.

and to bring the oil discharge contingency plan into compliance with the provisions of this chapter;

(2) a proposed time schedule for making the corrections; and

(3) an interim proposal for oil discharge containment and cleanup for the period of variance. (Eff. 9/9/81, Register 79)

Authority: AS 46.03.020
AS 46.04.030
AS 46.04.070

18 AAC 75.375. NOTIFICATION OF NONREADINESS. If any significant equipment specified in a contingency plan becomes nonoperational, or is removed from a designated storage location, the responsible operator or carrier shall, within three days, notify the department in writing and provide a schedule for its substitution, repair, or return to service. (Eff. 9/9/81, Register 79)

Authority: AS 46.03.020
AS 46.04.030
AS 46.04.070

18 AAC 75.385. DISCHARGE EXERCISES. (a) Upon notice by the department, applicants shall conduct an exercise for the purpose of testing the adequacy of the contingency plan and its execution. No more than two exercises will be required of an applicant in any year, unless an exercise demonstrates that the applicant's contingency plan or its execution is inadequate (under criteria established in 18 AAC 75.355), in which case the department will, in its discretion, direct the holding of additional exercises until it is satisfied that the contingency plan and its execution are adequate. The department will give sufficient notice so that the applicant can be at the alert level that would exist during normal oil handling.

(b) Wherever possible, discharge exercises will be coordinated with the U.S. Coast Guard and the U.S. Environmental Protection Agency.

(c) The department will, in its discretion, consider regularly scheduled training exercises as discharge exercises.

(d) Should the department find through a discharge exercise that the applicant is unable to execute the discharge contingency plan under criteria established in 18 AAC 75.350, it may rescind or modify approval of the plan in accordance with AS 46.04.030(f). (Eff. 9/9/81, Register 79)

Authority: AS 46.03.020
AS 46.04.030
AS 46.04.070

18 AAC 75.395. DEFINITIONS FOR 18 AAC 75.305 — 18 AAC 75.385. Unless the context indicates otherwise, in 18 AAC 75.305 — 18 AAC 75.385

(1) "approved loading manual" means the manual including information regarding trim and stability, hullbending moment, and information meeting the requirements of 46 CFR § 45.105;

(2) "containment and exclusion equipment" means booms, logs, curtains, and other devices designed or constructed and deployed in order to control, concentrate and restrict the movement and spreading of oil;

(3) "discharge" means any spilling, leaking, pumping, pouring, sweating, emitting, emptying, or dumping;

(4) "lightering" means pumping or transferring of oil from cargo compartments of tank vessels to another vessel or storage container;

(5) "liquefied petroleum gas" means natural gas converted to a liquid state by pressure and cooling, butane, propane, and other light ends which at 70 degrees F. and atmospheric pressure revert to the gaseous state. (Eff. 9/9/81, Register 79)

Authority: AS 46.03.020
AS 46.04.030
AS 46.04.070

Editor's notes. — For the purposes of this chapter, the following terms are defined in AS 46.04.120: "department"; "offshore exploration and production facility"; "oil"; "oil barge"; "oil terminal facility"; "operator"; "person"; "tank vessel"; "vessel."

Article 5. Schedule of Civil Penalties

18 AAC 75.500. APPLICABILITY. 18 AAC 75.510 — 18 AAC 75.600 establish a schedule of civil penalties for the discharge of oil under AS 46.03.758. The schedule of civil penalties established by this chapter does not apply to discharges of oil which are specifically made subject to the penalty provisions of AS 46.03.760(a). (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

18 AAC 75.510. FRESHWATER ENVIRONMENTS. (a) For the purposes of AS 46.03.758(b)(1)(A), freshwater environments with significant aquatic resources are classified as follows:

(1) Critical freshwater environments include

(A) surface and subsurface water supplies for which the commissioner of natural resources has issued a water use permit under AS 46.15.040 et seq., or which are in fact being used for a purpose that would qualify for a water use permit;

(B) rivers, lakes, and streams designated under AS 16.05.870(a) as important for the spawning, rearing, or migration of anadromous fish, and the water of lakes, streams, and rivers which flows or empties into those designated waters;

(C) lakes, streams, rivers, and freshwater wetlands within the boundaries of land administered under the National Wildlife Refuge System, and the water of lakes, streams, and rivers which flows or empties into those waters;

(D) lakes, streams, rivers, and freshwater wetlands within the boundaries of game reserve areas, refuges, critical habitat areas, and sanctuaries established under AS 16.05.255(1) or AS 16.20, and the water of lakes, streams, and rivers that flows or empties into those waters; and

(E) lakes, streams, rivers, and freshwater wetlands within the boundaries of fish reserve areas, refuges, critical habitat areas, and sanctuaries established under AS 16.05.251(1) or AS 16.20, and the water of lakes, streams, and rivers that flows or empties into those waters;

(2) Sensitive freshwater environments include

(A) lakes other than those classified in (1) of this subsection;

(B) freshwater wetlands other than those classified in (1) of this subsection; and

(C) subsurface freshwaters other than those classified in (1)(A) of this subsection.

(b) For the purposes of AS 46.03.758(b)(1)(C), all freshwater of the state not classified in (a)(1) or (2) of this section is classified as without significant aquatic resources. (Eff. 4/19/78, Register 66; am 8/6/87, Register 103)

Authority: AS 46.03.758

18 AAC 75.520. MARINE ENVIRONMENTS. (a) For the purposes of AS 46.03.758(b)(1)(B), estuarine, intertidal and saltwater environments are classified as follows:

(1) Critical marine environments include

(A) marine water within the boundaries of state game refuges established under AS 16.05.255(1) or AS 16.20;

(B) marine water within the boundaries of fish and game critical habitats established under AS 16.20;

(C) marine water within the boundaries of marine sanctuaries established under 33 U.S.C. 1401 *et seq.*, (P.L. 92-532);

(D) marine water within the boundaries of areas administered under the National Wildlife Refuge System;

(E) marine water within one statute mile of the mouth of waters designated under AS 16.05.870(a) as important for the spawning, rearing or migration of anadromous fish;

(F) marine water within one statute mile of a seabird colony or marine mammal rookery or hauling ground identified by the Alaska Department of Fish and Game in Alaska's Wildlife and Habitat, January, 1973;

(G) high density sea otter habitat identified by the Alaska Department of Fish and Game in Alaska's Wildlife and Habitat, January, 1973; and

(H) marine water within the barrier island-lagoon ecosystems extending from the Colville River to Canning River, and seaward of the Copper River delta;

(2) Sensitive marine environments include

(A) the inside waters of Southeast Alaska not otherwise classified in (1) of this subsection;

(B) saltwater wetlands and other intertidal and estuarine areas not otherwise classified in (1) of this subsection; and

(C) Prince William Sound, and the bays, arms, fjords, ports and other inside marine waters of Prince William Sound; and

(D) all marine water within 10 statute miles of any point of those waters designated in (1) of this subsection.

(b) For the purposes of AS 46.03.758(b)(1)(C), marine water not classified in (a) of this section is classified as without significant aquatic resources. (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

18 AAC 75.530. PUBLIC LAND ENVIRONMENTS. (a) For the purposes of AS 46.03.758(b)(1)(C), public land is classified as follows:

(1) Critical terrestrial environments include

(A) state game reserve areas, refuges and sanctuaries established under AS 16.05.255(1) or AS 16.20 *et seq.;*

(B) state parks, campgrounds and waysides;

(C) municipal parks and park reserves;

(D) national parks, preserves, wilderness areas, monuments, recreation areas and lands administered under the National Wildlife Refuge System;

(E) established campgrounds, scenic waysides and picnic areas; and

(F) national historical sites;

(2) Very sensitive terrestrial environments include

(A) land administered under the National Forest System not otherwise classified in (1) of this

(B) land underlain with continuous permafrost not otherwise classified in (1) of this subsection; and

(C) land in state forests and research areas not otherwise classified in (1) of this subsection;

(3) Sensitive terrestrial environments include land other than that classified in (1) or (2) of this subsection upon which continuous natural terrestrial vegetation cover is present.

(b) For the purposes of AS 46.03.758(b)(1)(C), all public land not classified in (a) of this section is classified as without significant terrestrial environmental resources. (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

18 AAC 75.540. TOXICITY OF PETROLEUM, PETROLEUM PRODUCTS, AND BYPRODUCTS. For the purposes of AS 46.03.758(d), the toxicity of petroleum, petroleum products, and byproducts is as follows:

(1) highly toxic
  (A) numbers 1, 2 and Arctic diesel fuel and heating oil;
  (B) jet aviation fuels A and B;
  (C) motor gasoline including aviation gasoline;
  (D) kerosene; and
  (E) stationary turbine fuels;
(2) moderately toxic
  (A) waste oil and waste oil mixtures;
  (B) lubricating oil;
  (C) jet fuels other than those specified in (1)(B) of this section; and
  (D) crude oil;
(3) less toxic
  (A) bunker and residual fuel oils; and
  (B) hydraulic fluids;
(4) relatively nontoxic
  (A) asphalts;
  (B) tars; and
  (C) other petroleum, petroleum products, and byproducts not listed in (1) — (3) of this section. (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

18 AAC 75.550. DEGRADABILITY OF PETROLEUM, PETROLEUM PRODUCTS, AND BYPRODUCTS. For the purposes AS 46.03.758(d), the degradability of petroleum, petroleum products d byproducts is as follows:

(1) low degradability
  (A) asphalt;

  (B) tar;
  (C) bunker and residual fuel oils; and
  (D) other petroleum, petroleum products, and byproducts not otherwise listed in (2) or (3) of this section;
(2) moderate degradability
  (A) hydraulic fluids;
  (B) lubricating oil;
  (C) waste oils and waste oil mixtures; and
  (D) crude oil;
(3) high degradability
  (A) motor gasoline, including aviation gasoline;
  (B) numbers 1, 2 and Arctic diesel fuel and heating oil;
  (C) jet and stationary turbine fuels; and
  (D) kerosene.

(Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

18 AAC 75.560. DISPERSIBILITY OF PETROLEUM, PETROLEUM PRODUCTS, AND BYPRODUCTS. For the purposes of AS 46.03.758(d), the dispersibility of petroleum, petroleum products, and byproducts is as follows:

(1) highly dispersible
  (A) motor gasoline, including aviation gasoline;
  (B) all jet fuels;
  (C) kerosene;
  (D) numbers 1, 2 and Arctic diesel fuel and heating oil;
  (E) hydraulic fluids; and
  (F) stationary turbine fuels;
(2) moderately dispersible
  (A) emulsified oil mixtures;
  (B) lubricating oils;
  (C) waste oil and waste oil mixtures; and
  (D) crude oils;
(3) low dispersibility
  (A) bunker and residual fuel oils;
  (B) asphalts;
  (C) tars; and
  (D) other petroleum, petroleum products, and byproducts not otherwise listed in (1) or (2) of this section. (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

18 AAC 75.570. SCHEDULE OF CIVIL PENALTIES. The schedule of civil penalties for which a person may be held liable under AS 46.03.758(e) is established as follows:

(1) The base civil penalty for discharges into various receiving environments is as follows:

	Freshwater	Marine	Public Land
Critical environmental resources	$10.00	$2.50	$1.00
Very sensitive environmental resources	N/A	N/A	.75
Sensitive environmental resources	5.00	2.00	.50
Without significant environmental resources	1.00	1.00	.25

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

	Factor
(A) toxicity*	
(i) highly toxic	1.0
(ii) moderately toxic	0.75
(iii) less toxic	0.5
(iv) relatively nontoxic	0.25
(B) degradability**	
(i) low degradability	1.0
(ii) moderate degradability	0.5
(iii) high degradability	0.25
(C) dispersibility	
(i) high dispersibility	0.15
(ii) moderate dispersibility	0.5
(iii) low dispersibility	1.0

(3) The net civil penalty which will be assessed per gallon of oil discharged is calculated by multiplying the base penalty established in (1) of this section by the arithmetic mean of the toxicity, degradability, and dispersibility factors established in (2) of this section. If a portion of the oil enters more than one receiving environment, the civil penalty will be based upon the most sensitive receiving environment which that portion of the oil enters. (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

*To determine the toxicity factor for a particular oil, the factor from the table is multiplied by a fraction whose numerator is the percent concentration of aromatics in the oil and whose denominator is 45. In no event shall the toxicity factor exceed 1.0.
The toxicity factor in crude oil is .75 multiplied by a fraction whose numerator is the API gravity of the crude oil and whose denominator is 30.

**The degradability factor for crude oil is .5 multiplied by a fraction whose numerator is 30 and whose denominator is the API gravity of the crude oil.

18 AAC 75.580. PROSECUTORIAL DISCRETION. In appropriate cases, the department will, in its discretion, either settle actions out of court under AS 46.03.758 for less than the full penalty provided for under this chapter, or decline to file an action under AS 46.03.758. This section is intended to confirm the department's litigation discretion, and may not be construed as creating a reviewable decision. (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

18 AAC 75.590. ANNUAL REPORT. Within 10 days after the convening of each regular legislative session, the department will report to the legislature on all actions brought during the preceding calendar year, and the status and disposition of those actions. (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

18 AAC 75.600. DEFINITIONS. As used in secs. 500 — 600 of this chapter

(1) "estuary" means a semienclosed, coastal body of water which has a free connection with the sea and within which seawater is measurably diluted with freshwater derived from land drainage;

(2) "freshwater wetlands" means those environments characterized by rooted vegetation which is partially submerged either continuously or periodically by surface freshwater with less than .5 parts per thousand salt content and not exceeding three meters in depth;

(3) "inside waters of Southeast Alaska" includes all those marine waters lying inside the boundary line established in 33 C.F.R. secs. 82.1705-1730, 42 Federal Register 35791 (July 11, 1977);

(4) "marine water" means all saltwater environments, including saltwater wetlands, estuaries, and the intertidal zone;

(5) "permafrost" means soil or other earth material supporting vegetation with a temperature which remains below 0 degrees Celsius (32 degrees Fahrenheit) for two or more years;

(6) "Prince William Sound" includes all marine water lying inside the boundary line established in 33 C.F.R. sec. 82-1740, 42 Federal Register 35791 (July 11, 1977;) and

(7) "saltwater wetlands" means those coastal areas along sheltered shorelines characterized by halophytic hydrophytes and macroalgae extending from extreme low tide to an area above extreme high tide which is influenced by sea spray or tidally induced water table changes. (Eff. 4/19/78, Register 66)

Authority: AS 46.03.758

...except that if a person demonstrates by clear and convincing evidence that the environmental damage caused by the discharge is substantially less than the amount specified in the schedule of penalties, the court may reduce the penalty by no more than fifty percent.

Eric Myers
465-2718
MIKE FRANK

CRIMINAL PENALTIES FOR VIOLATIONS OF DEC STATUTES & REGULATIONS

	OFFENSES	STATUTORY CITES	SCIENTER	PENALTIES [2]
I.	A VIOLATION of a permit term or conditions, violation of AS 46.03, AS 46.04, AS 46.09, violation of a DEC regulation, any term of a compliance order, or other DEC approval or acceptance (e.g., approved oil spill contingency plans, approved proof of financial responsibility)	AS 46.03.790(a)	Negligence [1]	For a natural person: $1,000/90 days. For an organization: the greater of $100,000 or 3 times pecuniary gain realized per AS 12.55.035(c).
		AS 46.03.790(b)	Knowingly [1]	For a natural person $5,000/1 year. For an organization: the greater of $100,000 or 3 times pecuniary gain realized per AS 12.55.035(c).
II.	FAILURE TO PROVIDE OR FALSELY STATING INFORMATION required on an oil [3] discharge report or under AS 46.04 or AS 46.09	AS 46.03.790(d)	None	For a natural person: $25,000 per day/1 year. For an organization: the greater of $100,000 or 3 times pecuniary gain realized per AS 12.55.035(c).
III.	HAZARDOUS WASTE VIOLATIONS: [4] transport to an unpermitted facility; treating, storing or disposing without a permit; false statement or representation on any document used for compliance purposes	AS 46.03.790(e)	Knowingly [1]	For a natural person: $10,000 per day/1 year. For an organization: the greater of $100,000 or 3 times pecuniary gain realized per AS 12.55.035(c).
IV.	FAILURE TO ABATE NUISANCE: neglect or refusal to abate nuisance on land, water or in the air	AS 46.03.800(b) & AS 46.03.810(b)	Knowingly [1]	For a natural person: ([redacted]) either $1,000/90 days or $5000/1 year plus damages for expenses of abatement [5]. For an organization: the greater of $100,000 or 3 times pecuniary gain realized per AS 12.55.035(c).
V.	LITTERING	AS 46.06.080	None	$1000
VI.	SALE OF IMPROPERLY DESIGNED BEVERAGE CONTAINER	AS 46.06.090	None	$3000
VII.	VIOLATIONS OF AGRICULTURAL OR LIVESTOCK OR FISHERIES PRODUCTS STATUTES or regulations or orders or permits	AS 03.05.090	None	$5000

VIII. OTHER RELATED VIOLATIONS			
- creation of a "hazardous condition" without "legal justification or excuse"	AS 11.61.110(a)	Recklessly	Class B misdemeanor 10 days maximum. For fines, see AS 12.55.035
- false entry in a public record [6/] (e.g., oil spill report)	AS 11.56.820	Knowingly	Class A misdemeanor. See AS 12.55.035 and 12.55.135
- activities in or affecting anadromous stream without a permit	AS 16.05.880	None	Class A misdemeanor. See AS 12.55.035 and 12.55.135
- falsifying business records, e.g., to conceal pollution incident and avoid penalties and money damages	AS 11.46.630	Intent to defraud	Class C felony. See AS 12.55.035 and 12.55.125
- deceptive business practices including sale of adulterated or misbranded products	AS 11.46.710	None	Class A misdemeanor. See AS 12.55.035 and 12.55.135
- unsworn falsification	AS 11.56.210	Intent to mislead a public servant	Class A misdemeanor. See AS 12.55.035 and 12.55.135

1 The following definitions of scienter requirements are applicable only to crimes defined by Title 11. These definitions do not necessarily govern crimes set forth in Title 46, but are provided here for purposes of guidance:

> A person acts with "criminal negligence" with respect to a result or to a circumstance described by a provision of law defining an offense when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.
> AS 11.81.900(a)(4)
>
> A person acts "knowingly" with respect to conduct or to a circumstance described by a provision of law defining an offense when the person is aware that the conduct is of that nature or that the circumstance exists; when knowledge is established if a person is aware of a substantial probability of its existence, unless the person actually believes it does not exist; a person who is unaware of conduct or a circumstance of which the person would have been aware had that person not been intoxicated acts knowingly with respect to that conduct or circumstance;
> AS 11.81.900(a)(2)

2 Other penalties available include community work project assignments per AS 12.55.055 including "work on projects designed to reduce or eliminate environmental damage." Courts in other states have sentenced environmental offenders to publish ads in newspapers saying they won't do it again or to lecture at schools or other public fora on the nature of their crime and why it did not pay; we should be creative in requesting sentences which fit the crime and which will have a deterrent effect. Also restitution per AS 12.55.045, as measured by the environmental damage, is always available as a penalty and should always be sought. The court may order restitution in an amount which does not exceed the actual damage or loss caused by the crime. Fee v. State, 656 P.2d 1202 (Alaska App. 1982).

3 Oil is defined as "petroleum, acid, coal or oil tar, lampblack, aniline, asphalt, bitumen or a residuary product of petroleum" per AS 46.03.740 and as "(9) 'oil' means oil of any kind and in any form, whether crude, refined, or a petroleum by-product, including but not limited to petroleum, fuel oil, gasoline, lubricating oils, oily sludge, oil refuse, oil mixed with other wastes, crude oils, liquefied natural gas, propane, butane, or other liquid hydrocarbons regardless of specific gravity," per AS 46.04.120(9).

4 Hazardous substance is defined as "(A) an element or compound that, when it enters into or on the surface or subsurface land or water of the state, presents an imminent and substantial danger to the public health or welfare, or to fish, animals, vegetation, or any part of the natural habitat in which fish, animals, or wildlife may be found; or (B) a substance defined as a hazardous substance under 42 U.S.C. 9601 - 9657 (Comprehensive Environmental Response, Compensation, and Liability Act of 1980); 'hazardous substance' does not include uncontaminated crude oil or uncontaminated refined oil in an amount of 10 gallons or less," per AS 46.08.900(6).

5 This is an unclassified misdemeanor.

6 Public record is defined as "a document, paper, book, letter, drawing, map, plat, photo, photographic file, motion picture, film, microfilm, microphotograph, exhibit, magnetic or paper tape, punched card or other document of any other material, regardless of physical form or characteristic, developed or received under law or in connection with the transaction of official business and preserved or appropriate for preservation by any agency, municipality, or any body subject to the open meeting provision of AS 44.62.310, as evidence of the organization, function, policies, decisions, procedures, operations, or other activities of the state or municipality or because of the informational value in it; it also includes staff manuals and instructions to staff that affect the public," per AS 11.81.900(47).

6-1197J ✓
Lauterbach
4/27/89

Original sponsors: Senate Special
Committee on Oil and Gas

IN THE SENATE BY THE RESOURCES COMMITTEE

CS FOR SENATE BILL NO. 271 (Resources)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to civil penalties for the unpermitted discharge of oil and for the failure to implement an oil discharge contingency plan in response to an unpermitted discharge of crude oil; and removing a maximum limit on civil penalties for discharges of oil."

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

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

(e) If [AFTER APRIL 19, 1978, IF] a discharge of oil in excess of 18,000 gallons not permitted under applicable state and federal law occurs within the territorial jurisdiction of the state, or into or upon the adjacent outer continental shelf of the state, the following persons, in addition to the person causing or permitting the discharge, are jointly and severally liable to the state, in a civil action, for the full amount of penalties established in the regulations adopted under this section: [, OR $100,000,000, WHICHEVER IS LESS,]

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

(2) if the discharge occurs from a vessel,

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

(B) the owner of the oil carried as cargo on the vessel at the time the vessel was loaded, if the loading occurred

within the territorial jurisdiction of the state, or at a deep-water port or other offshore storage facility adjacent to the state; however, if the owner of the oil temporarily transfers ownership of the oil to another person, and the transfer has the purpose or effect of evading the vicarious liability imposed by this section, the transferor will be considered the owner of the oil for the purposes of this subsection; and

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

* Sec. 2. AS 46.03.758(1)(6) is amended to read:

(6) "oil" means petroleum [, CRUDE OIL,] and any substance refined from petroleum, except uncontaminated [OR] crude oil;

* Sec. 3. AS 46.03 is amended by adding a new section to read:

Sec. 46.03.759. CIVIL PENALTIES FOR DISCHARGES OF CRUDE OIL. (a) A person who is found to be liable under any other state law for an unpermitted discharge of uncontaminated crude oil in excess of 18,000 gallons is, in addition to liability for any other penalties or for damages or the cost of containment and cleanup, liable to the state in a civil action for a civil penalty in the amount of

(1) $5.83 per gallon of crude oil discharged for the first 420,000 gallons discharged; and

(2) $10 per gallon of crude oil discharged for amounts discharged in excess of 420,000 gallons.

(b) In determining how many gallons of crude oil have been discharged for purposes of assessing a penalty under (a) of this section, the court shall deduct the number of discharged gallons of crude oil that the defendant proves were removed by the defendant from the environment within the first 36 hours after the discharge as a result

of a cleanup operation undertaken in conformity with applicable state and federal law.

(c) The court shall assess five times the penalty set out in (a) of this section if the court finds

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

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

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

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

(f) In this section, "discharge" means entry of uncontaminated crude oil into or upon the water or public land of the state, regardless of causation, except discharges into an enclosed and impervious oil spill containment area.

* Sec. 4. AS 46.03.770 is amended to read:

Sec. 46.03.770. DETENTION OF VESSEL WITHOUT WARRANT AS SECURITY FOR DAMAGES. A vessel that is used in or in aid of a violation of AS 46.03.740 - 46.03.750 may be detained after a valid search by the

department, an agent of the department, a peace officer of the state, or an authorized protection officer of the Department of Fish and Game. Upon judgment of the court having jurisdiction that the vessel was used in, or was the cause of, a violation of AS 46.03.740 - 46.03.750 with knowledge of its owner or under circumstances indicating that the owner should reasonably have had this knowledge, the vessel may be held as security for payment to the state of the amount of damages assessed by the court under AS 46.03.758, 46.03.759, 46.03.760, [AND] 46.03.822, and AS 46.04.030(g). If the damages assessed are not paid within 30 days after judgment or final determination of an appeal, the vessel shall be sold at public auction, or as otherwise directed by the court, and the damages paid from the proceeds. The balance, if any, shall be paid by the court to the owner of the vessel. The court shall permit the release of the vessel upon posting of a bond set by the court in an amount not to exceed the maximum amount of damages available under AS 46.03.758, 46.03.759, 46.03.760, [AND] 46.03.822, and AS 46.04.030(g). The damages received under this section shall be transmitted to the proper state officer for deposit in the general fund. A vessel seized under this section shall be returned or the bond exonerated if no damages are assessed under AS 46.03.758, 46.03.759, 46.03.760, [OR] 46.03.822, or AS 46.04.030(g).

* Sec. 5. AS 46.04.030(g) is amended to read:

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

contingency plan fails to respond to an unpermitted discharge of uncontaminated crude oil with the quality and quantity of resources identified in the plan and in a manner required under the plan, the holder is strictly liable, jointly and severally, for the civil penalty assessed under AS 46.03.759 against any other person for that discharge.

* Sec. 6. AS 46.04.040(e) is amended to read:

(e) Financial responsibility may be demonstrated by self-insurance, insurance, surety, or guarantee, under terms the department may prescribe. An action brought under AS 46.03.758, 46.03.760(a) or (e), [OR] 46.03.822, or AS 46.04.030(g) or to collect penalties imposed under AS 46.03.759 may be brought in a state court directly against the insurer or another person providing evidence of financial responsibility. The applicant, and an insurer, surety, or guarantor shall appoint an agent for service of process in the state. An insurer must either be authorized by the Department of Commerce and Economic Development to sell insurance in the state or be an unauthorized insurer listed by the Department of Commerce and Economic Development as not disapproved for use in the state.

* Sec. 7. AS 46.04.040(i) is amended to read:

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

SB

276

Alaska State Legislature

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MEMORANDUM

MAY 1 1989

TO: Senator Bettye Fahrenkamp, Chairman
Senate Resources Committee

FROM: Senator Paul Fischer PF

SUBJECT: Senate Bill 276
(refunds to local governments of proceeds of the fisheries business tax during fiscal year 1990)

DATE: May 1, 1989

I would appreciate your scheduling the above referenced bill before the Senate Resources Committee at your earliest possible convenience.

I have introduced this legislation in order to assure that a refund payable to a municipality from the proceeds of the fisheries business tax is not substantially reduced because of the effects of the Valdez oil discharge disaster.

The Senate Community & Regional Affairs Committee had a hearing on this legislation last Thursday, adopted a Committee Substitute; however, did not have a quorum in order to move it out of committee. The chairman, therefore, waived the committee referral on Saturday. It would be my desire that the Resources Committee consider the proposed C&RA Committee Substitute.

I had requested that the Department of Revenue provide the most accurate fiscal note they could prepare; however you will note that I have provided in a section of the bill that the administration be allowed to request a supplemental appropriation if payments are insufficient to pay the full amount of all refunds required.

Your consideration will be greatly appreciated.

PAF/sgn

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: SB 276
PUBLISH DATE: 4/12/89

FISCAL NOTE

REQUEST:

Revision Date:
Title: Refunds to local governments - fisheries business tax during FY 90
Sponsor: Fischer, et al
Requestor: CRA & Res. & Fin

Agency Affected: Reve
BRU: Income & Excise A
Components: Operating

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95
OPERATING						
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LANDS & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	-	(4341.0)	-	-	-	-

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS: See attached.

Prepared By: Steven E. Kettel
Division: Income and Excise Audit
Phone: (907) 465-2320
Date: April 21, 1989

Approved by Commissioner: Hugh Malone
Agency: Department of Revenue
Date: April 21, 1989

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

SB 276
Prepared by:
Steven E. Kettel, Director
Income and Excise Audit Division
April 21, 1989

BILL ANALYSIS

Section 2

Presently communities receive 50% of the fisheries business tax paid on fish processed in that community. The tax is a percentage of the ex-vessel value (price paid fishermen) of the processed fish.

Due to the catastrophic oil spill in Prince William Sound, the amount of the tax revenues which are available to share to communities may drop drastically for several reasons:

1) fisheries may be closed by the Department of Fish and Game;
2) fish may be intercepted before they reach the areas affected by the spill and processed in alternative communities;
3) market values worldwide for Alaska seafood products may drop; affecting the ex-vessel value price paid to fishermen
4) toxic properties of the oil may kill either returning fish or fry as they leave the streams and swim into affected waters, impacting future year's salmon returns.

To mitigate the affect on communities that a drop in tax revenues would have, SB 276 will provide a new formula for determining state revenues payable to communities in lieu of the current statutory shared revenue formula. To be eligible for increased share a community must pass a three-pronged test:

1) FY90 share computed under existing law is less than FY89 actual share;
2) The average actual share for FY87, FY88 and FY89 must exceed FY90 share under existing law.
3) The reduction is attributable to the Valdez oil discharge disaster.

The third prong of this test will be met if any one of four conditions are met. Of these conditions, one has the potential to entitle every fishing community in the State of Alaska to receive a larger revenue share computed under this bill. This condition links the reduction in shared revenue payment to the drop in price paid for fisheries resources delivered to any municipality in the state. Conceivably, the price paid for all fisheries resources harvested throughout Alaska will be lower following the spill merely because of the adverse publicity the discharge has caused worldwide.

For purposes of this fiscal note we have estimated the impact the discharge would have on communities directly in the spills path as of April 19, 1989. The estimate assumes that all fisheries in the oil spill area will be closed in 1989. No projection can be made for 1990 and beyond at this time.

SB 276
Prepared by:
Steven E. Kettel, Director
Income and Excise Audit Division
April 21, 1989

Cities and Boroughs directly in path of oil spill which receive shared fish taxes have received payments for the past two years as follows:.

	FY 87	FY 88	Average
Valdez	64,993	166,311	115,652
Cordova	382,413	815,106	598,760
Seldovia	11,854	12,570	12,212
Kodiak Island Borough	871,500	1,156,269	1,013,885
Old Harbor	3,901	0	1,950
Larsen Bay	13,179	4,927	9,053
Kenai Borough	656,525	1,482,779	1,069,652
Kodiak	617,960	885,584	751,772
Homer	89,036	170,726	129,881
Kenai	174,530	364,879	269,704
Seward	151,656	221,921	186,789
Whittier	9,128	24,664	16,896
Municipality of Anchorage	90,923	239,337	165,130
Total	3,137,598	5,545,073	4,341,336

DEPARTMENT POSITION

The Department has no objection to this legislation. It is certainly a legitimate response to a potentially devastating situation. Obviously, should "hold harmless" funds be made available, they will come from General Funds