

Article 1. Oil Pollution Control.

Chapter 04. Oil and Hazardous Substance Pollution Control.

Sec. 46.04.010. Reimbursement for cleanup expenses.

The department shall promptly seek reimbursement under AS 46.03.760(d), AS 46.08.070, or from an applicable federal fund, for the expenses it incurs in cleaning up or containing a discharge of oil. If the department obtains reimbursement for a portion of its expenses from a federal fund, the remainder of the expenses incurred may be recovered under AS 46.03.760(d) or AS 46.08.070. Money received by the department under this section shall be deposited in the general fund and credited to

(1) the oil and hazardous substance release response mitigation account established under AS 46.08.025(b); the amount required to be deposited under this paragraph shall represent the proportion of the expenses recovered that were originally paid for from the oil and hazardous substance release account established under AS 46.08.010(a)(2); or

(2) the oil and hazardous substance release prevention mitigation account established under AS 46.08.020(b); the amount required to be deposited under this paragraph is the amount of money recovered that exceeds the amount payable to the response mitigation account under (1) of this section.

Sec. 46.04.020. Removal of oil discharges.

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

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

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

(b) The containment and cleanup of discharged oil shall be carried out in a manner approved by the department. Wastes generated as a result of containment or cleanup activities shall be disposed of in a manner approved by the department. The requirement of this subsection for approval of containment and

cleanup activities does not apply to the United States Coast Guard or United States Environmental Protection Agency acting under the authority of § 311(c) or (d) of the Clean Water Act.

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

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

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

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

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

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

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

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

(4) provide for cooperative oil discharge notification procedures.

(f) In fulfilling its responsibilities under (e) of this section, the department shall consult with the governing bodies

of municipalities and villages.

(g) In addition to existing obligations under state and federal law, and the provisions of the state and federal Trans Alaska Pipeline System right-of-way agreements, the common operating agent for the holder and lessees of the right-of-way agreement for the trans Alaska pipeline shall (1) immediately contain and clean up a discharge or threatened discharge of oil transported by or due to the operation of the Trans Alaska Pipeline System or due to related activities, including activities related to a vessel en route to, berthed at, or transiting from the Trans Alaska Pipeline System marine terminal or traveling on waters within Prince William Sound; and (2) provide services required in a response action under contract terms as provided under AS 46.04.030(q). The obligations imposed under this subsection do not affect the response action duties of another person or the liability of another person for a discharge or threatened discharge. Upon the request of the person required to respond to a discharge or threatened discharge under this subsection, the obligation imposed by this subsection may be transferred to another person required by law to respond to the discharge or threatened discharge if the transfer is approved by the federal and state on-scene coordinators. In this subsection, "Prince William Sound" has the meaning given in AS 46.04.030(q).

(h) A charge, contract term, or financial responsibility requirement imposed by the holders and lessees of the right-of-way agreement for the Trans Alaska Pipeline System, the holders and lessees' common operating agent, or the agent or representative of either the holders and lessees, or their common operating agent, on or for a vessel traveling from a marine terminal and related to containing and cleaning up a discharge or threatened discharge of oil or the obligations imposed under (g) of this section

(1) must be fair, reasonable, and nondiscriminatory; and

(2) with respect to a financial responsibility requirement in excess of \$10,000,000, must

(A) not exceed the potential cost of containment and cleanup as provided in the applicable contingency plan under AS 46.04.030 that the agent may reasonably be expected to incur from a discharge or threatened discharge of oil from that vessel before the transfer of cleanup and containment management and control to the responsible party; in establishing the financial responsibility requirement, the common operating agent shall assume that transfer of management and control will occur at the earliest practicable time following the discharge or threat of

discharge; and

(B) vary among each vessel in proportion to the volume of oil carried by each vessel per voyage from a marine terminal; for purposes of this subparagraph, the volume of oil carried by the vessel must be reduced by the percentage of spill reduction credits granted that vessel under regulations adopted by the department.

(i) The superior court and, with respect to intrastate voyages, the Regulatory Commission of Alaska under AS 42.05.361 – 42.05.431, have concurrent jurisdiction to review and enjoin a charge, contract term, or financial responsibility requirement described under (h) of this section at the request of a vessel owner, operator, or charterer. Except as provided in this subsection, nothing in this section affects the jurisdiction of the Regulatory Commission of Alaska.

Sec. 46.04.025. Confidential information.

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

Sec. 46.04.030. Oil discharge prevention and contingency plans.

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

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

person is in compliance with the plan.

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

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

(e) The department may attach reasonable terms and conditions to its approval or modification of a contingency plan that the department determines are necessary to ensure that the applicant for a contingency plan has access to sufficient resources to protect environmentally sensitive areas and to contain, clean up, and mitigate potential oil discharges from the facility or vessel as provided in (k) of this section, and to ensure that the applicant complies with the contingency plan. If a contingency plan submitted to the department for approval relies on the services of an oil spill primary response action contractor, the department may not approve the contingency plan unless the primary response action contractor is registered and approved under AS 46.04.035. The contingency plan must provide for the use by the applicant of the best technology that was available at the time the contingency plan was submitted or renewed. The department shall identify the prevention and response technologies that are subject to a best available technology determination. The department may find that any technology meeting the response planning standards in (k) of this section or a prevention performance standard established under AS 46.04.070 is the best available technology. The department may prepare findings and maintain a list of those technologies that are considered the best available. The department may require an applicant or holder of an approved contingency plan to take steps necessary to demonstrate the applicant's or holder's ability to carry out the contingency plan, including

- (1) periodic training;

(2) response team exercises; and

(3) verifying access to inventories of equipment, supplies, and personnel identified as available in the approved contingency plan.

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

(1) approval was obtained by fraud or misrepresentation;

(2) the operator does not have access to the quality or quantity of resources identified in the plan;

(3) a term or condition of approval or modification has been violated; or

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

(g) Failure of a holder of an approved or modified contingency plan to comply with the plan, or to have access to the quality or quantity of resources identified in the plan or to respond with those resources within the shortest possible time in the event of a spill is a violation of this chapter for purposes of AS 46.03.760(a), 46.03.765, 46.03.790, and any other applicable law. If the holder of an approved or modified contingency plan fails to respond to and conduct cleanup operations of an unpermitted discharge of 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 46.03.758, 46.03.759, or 46.03.760 against any other person for that discharge.

(h) The department is the only state agency that has the power to approve, modify, or revoke a contingency plan for the purposes of this section. The department shall exercise its power under this section in a timely manner. Except as provided

in (i) of this section, it is not a defense to an action brought for a violation of (a) – (c) of this section that the person charged believed that a current contingency plan had been approved by the department.

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

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

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

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

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

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

provided in (A), (B), and (C) of this paragraph:

(A) for tank vessels and oil barges having a cargo volume of less than 500,000 barrels, the plan holder shall maintain at a minimum in the region of operation, equipment, personnel, and other resources sufficient to contain or control, and clean up a 50,000 barrel discharge within 72 hours;

(B) for tank vessels and oil barges having a cargo volume of 500,000 barrels or more, the plan holder shall maintain at a minimum in its region of operation, equipment, personnel, and other resources sufficient to contain or control, and clean up a 300,000 barrel discharge within 72 hours;

(C) in addition to the minimum equipment, personnel, and other resources required to be maintained within the region of operation by (A) or (B) of this paragraph, a plan holder shall maintain, either within or outside of the plan holder's region of operation, additional equipment, personnel, and other resources sufficient to contain or control, and clean up a realistic maximum discharge within the shortest possible time; the plan holder must demonstrate that the equipment, personnel, and other resources maintained outside the plan holder's region of operation are accessible to the plan holder and will be deployed and operating at the discharge site within 72 hours;

(4) for a discharge from a tank vessel or oil barge carrying noncrude oil in bulk as cargo, the plan holder shall plan to be able to contain or control 15 percent of the maximum capacity of the vessel or barge or the realistic maximum oil discharge, whichever is greater, within 48 hours and clean up the discharge within the shortest possible time consistent with minimizing damage to the environment;

(5) for a discharge subject to the provisions of (1) - (3) of this subsection that enters a receiving environment other than open water, the time requirement for clean up of the portion of the discharge that enters the receiving environment may, in the department's discretion, be within the shortest possible time consistent with minimizing damage to the environment.

(1) The provisions of (k) of this section do not constitute cleanup standards that must be met by the holder of a contingency plan. Notwithstanding (k) of this section, failure to remove a discharge within the time periods set out in (k) of this section does not constitute failure to comply with a contingency plan for purposes of (g) of this section or for the

purpose of imposing administrative, civil, or criminal penalties under any other law.

(m) When considering whether to approve or modify a contingency plan, the department may consider evidence that oil discharge prevention measures such as double hulls or double bottoms on vessels or barges, secondary containment systems, hydrostatic testing, enhanced vessel traffic systems, or enhanced crew or staffing levels have been implemented, and, in its discretion, may make exceptions to the requirements of (k) of this section to reflect the reduced risk of oil discharges from the facility, pipeline, vessel, or barge for which the plan is submitted or being modified.

(n) A tank vessel or oil barge that is conducting, or is available only for conducting, oil discharge response operations is exempt from the requirements of (c) of this section if the tank vessel or oil barge has received prior approval of the department. The department may approve exemptions under this subsection upon application and presentation of information required by the department.

(o) A holder of an approved contingency plan does not violate the terms of the contingency plan by furnishing to another plan holder, with the approval of the department, equipment, materials, or personnel to assist the other plan holder in a response to an oil discharge. The plan holder shall replace or return the transferred equipment, materials, and personnel as soon as feasible. The department shall by regulation determine the maximum amount of equipment, materials, or personnel and the maximum amount of time for which it will approve a transfer.

(p) [Repealed, § 1 ch 16 SLA 1993.]

(q) Except as provided in (n) of this section and in order to receive approval from the department for an oil discharge prevention and contingency plan submitted under this section, the owner, operator, or charterer of a vessel that intends to carry oil that has been transported by the Trans Alaska Pipeline System shall obtain by contract the services required in a response action from the common operating agent for the holders and lessees of the right-of-way agreement for the Trans Alaska Pipeline System. The contract must contain the following provisions: (1) the common operating agent, as a primary response action contractor shall, unless services required in a response action are transferred as provided in (3) of this subsection, provide services required in a response action for a discharge or a threatened discharge of oil to the owner,

operator, or charterer of the vessel while the vessel is berthed at, en route to, or transiting from the Trans Alaska Pipeline System marine terminal or traveling on waters within Prince William Sound; (2) that its coverage for any particular vessel may not be terminated by the common operating agent while that vessel is within Prince William Sound; this provision may not be interpreted to limit the department's authority to revoke approval under this section for an oil discharge prevention and contingency plan submitted by the owner, operator, or charterer of a vessel; and (3) the owner, operator, or charterer of the vessel shall accept a transfer of the services required in a response action to a discharge or threatened discharge, after receiving not less than 72 hours of advance notice and after the transfer has been approved by the federal and state on-scene coordinators. In addition to the requirements of this subsection, the department may require individual vessels to submit additional contingency plans to cover specific vessel response, prevention equipment, and procedures. Nothing in this subsection is intended to preclude the federal or state government from assuming management and control of an oil spill response to a discharge or threatened discharge from a vessel under appropriate circumstances. In this subsection, "Prince William Sound" means all marine waters within the boundary line established at Cape Puget, southeasterly to Cape Cleare, along Montague Island to Zaikof Point, easterly to Cape Hinchinbrook, along Hinchinbrook Island to Point Bintinck, and easterly to Point Whitshed.

(r) In this section,

(1) "contingency plan" means an oil discharge prevention and contingency plan required under this section;

(2) "in compliance with the plan" means, with respect to a contingency plan, to

(A) establish and carry out procedures identified in the plan as being the responsibility of the holder of the plan;

(B) have access to and have on hand the quantity and quality of equipment, personnel, and other resources identified as being accessible or on hand in the plan;

(C) fulfill the assurances espoused in the plan in the manner described in the plan;

(D) comply with terms and conditions attached to the plan by the department under the authority of (e) of this section; and

(E) successfully demonstrate the ability to carry out the plan when required by the department under (e) of this section;

(3) "realistic maximum oil discharge" means the maximum and most damaging oil discharge that the department estimates could occur during the lifetime of the tank vessel, oil barge, facility, or pipeline based on the size, location, and capacity of the tank vessel, oil barge, facility, or pipeline; on the department's knowledge and experience with the tank vessel, oil barge, facility, or pipeline or with similar tank vessels, oil barges, facilities, or pipelines; and on the department's analysis of possible mishaps to the tank vessel or oil barge or at the facility or pipeline or to similar tank vessels or oil barges or at similar facilities or pipelines;

(4) "region of operation," with respect to the holder of a contingency plan, means the area where the operations of the holder that require a contingency plan are located, the boundaries of which correspond to the regional boundaries established by the commissioner for regional master planning purposes under AS 46.04.210.

Sec. 46.04.035. Registration of oil spill response action contractors.

(a) A person may apply to the department for registration as an oil spill primary response action contractor. The department shall adopt regulations governing the registration and approval of oil spill primary response action contractors. Regulations adopted by the department under this section must include

(1) minimum training standards for personnel;

(2) verification requirements that ensure the existence of resources, including personnel, equipment, services, and an adequate deployment plan necessary to a response action or as required by a contingency plan in which the contractor has agreed in writing to be listed and is listed;

(3) minimum professional response action standards and practices; and

(4) minimum planning standards for oil spill primary response action contractors listed in an oil spill contingency

plan approved under AS 46.04.030.

(b) Notwithstanding (a) of this section, the department may substitute a primary response action contractor approval program, and a subsequent process to approve primary response action contractors who agree to be listed in a contingency plan approved under AS 46.04.030, for regulations required under (a) (1) – (3) of this section if the approval program and subsequent process are developed by the United States Coast Guard.

(c) The department shall establish fees applicable to registration under this section in an amount necessary to cover the costs of the registration program. The fees shall be collected by the department.

(d) AS 44.62 (Administrative Procedure Act) applies to regulations and registrations under this section.

(e) The department shall develop and maintain a list of oil spill primary response action contractors registered under this section. The department shall provide the list on request to interested persons.

(f) A primary response action contractor registered under this section shall annually provide to the department a list of all contingency plans approved under AS 46.04.030 in which the primary response action contractor has agreed in writing to be listed as a responder.

(g) Nothing in this section is intended to amend AS 46.04.030(1) or to create a cleanup or performance standard that must be met by a holder of a contingency plan or a response action contractor.

(h) In this section,

(1) "oil" has the meaning given in AS 46.03.826;

(2) "primary response action contractor" means a person who enters into a response action contract with respect to a release or threatened release of oil and who is carrying out the contract, including a cooperative organization formed to maintain and supply response equipment and materials that enters into a response action contract relating to a release or threatened release of oil.

Sec. 46.04.040. Proof of financial responsibility.

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

(b) A person may not cause or permit the operation of a pipeline or an exploration or production facility in the state unless the person has furnished to the department, and the department has approved, proof of financial ability to respond in damages. Proof of financial responsibility required for

(1) a pipeline or an offshore exploration or production facility is \$50,000,000 per incident;

(2) an onshore production facility is

(A) \$20,000,000 per incident if the facility produces over 10,000 barrels per day of oil;

(B) \$10,000,000 per incident if the facility produces over 5,000 barrels per day but not more than 10,000 barrels per day of oil;

(C) \$5,000,000 per incident if the facility produces over 2,500 barrels per day but not more than 5,000 barrels per day of oil;

(D) \$1,000,000 per incident if the facility produces 2,500 barrels per day or less of oil;

(3) an onshore exploration facility is \$1,000,000 per incident.

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

(1) \$300, per incident, for each barrel of storage capacity or \$100,000,000, whichever is greater, for a tank vessel or barge carrying crude oil;

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

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

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

in the state. In this subsection, "third-party insurer" means a third-party insurer, surety, guarantor, person furnishing a letter of credit, or other group or person providing proof of financial responsibility on behalf of an applicant under this section; "third-party insurer" does not include the applicant.

(f) Acceptance of proof of financial responsibility expires

(1) one year from its issuance for self-insurance;

(2) on the effective date of a change in the surety bond, guarantee, insurance agreement, letter of credit, or other proof of financial responsibility; or

(3) on the expiration or cancellation of the surety bond, guarantee, insurance agreement, letter of credit, or other proof of financial responsibility.

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

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

(1) acceptance was procured by fraud or misrepresentation;

or

(2) a change of circumstance has occurred other than a change specified in (f)(1) – (3) of this section, which would have warranted denial of the application.

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

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

oil barge for which it is issued and the expiration date of the certificate.

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

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

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

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

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

(m) A tank vessel or oil barge that is conducting, or is available only for conducting, oil discharge response operations is exempt from the requirements of (c) of this section if the tank vessel or oil barge has received prior approval of the department. The department may approve an exemption under this subsection upon application and presentation of information required by the department.

Sec. 46.04.045. Adjustment of dollar amounts.

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

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

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

(d) The department shall adopt a regulation announcing
(1) on or before June 30 of each third year, the changes in dollar amounts required by (b) of this section; and

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

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

Sec. 46.04.047. Noncrude oil operations.

Notwithstanding AS 46.04.040, the department may, with respect to noncrude oil operations, approve proof of financial responsibility by a person, other than the applicant, who does not agree to be subject to a direct action in the state or to appoint an agent for service of process if the applicant

(1) provides proof of financial responsibility in the form and amounts otherwise required under AS 46.04.040;

(2) provides a sworn statement that

(A) is acceptable to the department;

(B) attests that the applicant has diligently

attempted to obtain a form of proof of financial responsibility that would provide for a direct action and appointment of an agent for service of process;

(C) describes the steps the applicant has taken to obtain a form of proof of financial responsibility that would provide for a direct action and appointment of an agent for service of process;

(D) states that a form of proof of financial responsibility that would provide for a direct action and appointment of an agent for service of process is unavailable to the applicant;

(3) continues diligent efforts to obtain a form of proof of financial responsibility that would provide for a direct action and appointment of an agent for service of process and provides a sworn statement every six months that is acceptable to the department, containing the information required in (2) of this section.

Sec. 46.04.050. Exemptions.

(a) The provisions of AS 46.04.030, 46.04.040, and 46.04.060 do not apply to an oil terminal facility that has an effective storage capacity of less than 5,000 barrels of crude oil or less than 10,000 barrels of noncrude oil.

(b) The provisions of AS 46.04.030 and 46.04.040 do not apply to a natural gas production facility and a natural gas terminal facility; for purposes of this subsection, "natural gas production facility" and "natural gas terminal facility" mean a platform, facility, or structure that, except for storage of refined petroleum products in a quantity that does not exceed 10,000 barrels, is used solely for the production, compression, storage, or transport of natural gas.

(c) The provisions of AS 46.04.030 and 46.04.040 do not apply to a natural gas exploration facility if the Alaska Oil and Gas Conservation Commission has determined under AS 31.05.030(1) that evidence obtained through evaluation demonstrates with reasonable certainty that all of the wells at a natural gas exploration facility will not penetrate a formation capable of flowing oil to the ground surface. If the drilling of a well at an exploration facility exempted under this subsection does

penetrate a formation capable of flowing oil to the surface, the owner or operator shall submit an oil discharge prevention and contingency plan and proof of financial responsibility to the department to meet the requirements of AS 46.04.030 and 46.04.040. For purposes of this subsection, "natural gas exploration facility" means a platform, facility, or structure that, except for storage of refined petroleum products in a quantity that does not exceed 10,000 barrels, is used solely for the exploration for natural gas.

Sec. 46.04.055. Nontank vessels and railroad tank cars.

(a) A person may not operate a nontank vessel within the waters of the state or cause or permit the transfer of oil to or from a nontank vessel unless the person has furnished to the department and the department has approved proof of financial ability to respond to damages meeting the requirements of AS 46.04.040. Proof of financial responsibility required under this subsection is subject to adjustment of dollar amounts under AS 46.04.045 and is established, for a nontank vessel that carries

(1) predominantly persistent product, at \$300 per incident for each barrel of oil storage capacity on the vessel or \$5,000,000, whichever is greater; and

(2) predominantly nonpersistent product, at \$100 per incident for each barrel of oil storage capacity on the vessel or \$1,000,000, whichever is greater.

(b) A person may not transport oil by railroad tank car or cause or permit the transfer of oil to or from a railroad tank car unless the person has furnished to the department and the department has approved proof of financial ability to respond to damages meeting the requirements of AS 46.04.040. Proof of financial responsibility required under this subsection is subject to adjustment of dollar amounts under AS 46.04.045 and is established at

(1) \$300 per incident for each barrel of persistent product based on the maximum amount of persistent product storage capacity of any train on the railroad; and

(2) \$100 per incident for each barrel of nonpersistent product based upon the maximum amount of nonpersistent product storage capacity of any train on the railroad or \$1,000,000, whichever is greater.

(c) For purposes of AS 46.04.030(k), response planning standards apply to nontank vessels and railroad tank cars as follows:

(1) for a nontank vessel,

(A) containment and control of 15 percent of the maximum oil capacity of the nontank vessel within 48 hours; and

(B) cleanup of the discharge within the shortest possible time consistent with minimizing damage to the environment; and

(2) for a railroad tank car,

(A) containment and control of 15 percent of the maximum oil capacity of a train on the railroad within 48 hours; and

(B) cleanup of the discharge within the shortest possible time consistent with minimizing damage to the environment.

(d) Notwithstanding the requirements of AS 46.04.040(e) and (l) and 46.04.047, for purposes of (a) of this section, an applicant may provide evidence of financial responsibility by proof of entry of the nontank vessel in a protection and indemnity association or proof of coverage with another insurer that

(1) is financially solvent and has a favorable history of claim handling;

(2) provides coverage against pollution risks in at least the amount of the financial responsibility required under (a) of this section without any requirement for a special endorsement;

(3) does not agree to be subject to direct action in court or to appointment of an agent for service of process; and

(4) in the case of a protection and indemnity association or group of insureds, is not authorized by the Department of Commerce, Community, and Economic Development to sell insurance in the state so long as it is not listed by the Department of Commerce, Community, and Economic Development as being disapproved for use in the state.

(e) The requirements of this section do not apply to a nontank vessel operating in the waters of the state if the nontank vessel

(1) is engaged in innocent passage; for purposes of this paragraph, a nontank vessel is engaged in innocent passage if

its operation in state waters, irrespective of whether it is a United States or foreign-flag vessel, would constitute innocent passage under the Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 U.S.T. 1606, or the United Nations Convention on the Law of the Sea 1982, December 10, 1982, U.N. Publication No. E 83.V.5, 21 I.L.M. 1261 (1982), were the vessel a foreign-flag vessel;

(2) enters state waters because of imminent danger to the crew, or in an effort to prevent an oil spill or other harm to public safety or the environment, and are inapplicable only until the vessel is able to leave state waters as soon as it may do so without imminent risk of harm to the crew, public safety, or the environment; or

(3) enters state waters after the United States Coast Guard has determined that the vessel is in distress, and are inapplicable only until the vessel is able to leave state waters as soon as it may do so without imminent risk of harm to the crew, public safety, or the environment.

(f) On and after May 26, 2003, a person may not operate a nontank vessel within the waters of the state or cause or permit the transfer of oil to or from a nontank vessel unless the department has approved an oil discharge prevention and contingency plan covering that nontank vessel and the person is in compliance with the plan.

(g) The oil discharge prevention and contingency plan for a nontank vessel required by (f) of this section must include

(1) vessel-specific information;

(2) a response plan consisting of

(A) initial notification procedures;

(B) a certification that the applicant for the nontank vessel contingency plan is a member of, or has a contract with, an oil spill response organization that is an oil spill primary response action contractor with a response action plan approved by the department as meeting the response planning standards of (c)(1) of this section for the maximum oil capacity of the nontank vessel; and

(C) a certification that the applicant for the nontank vessel contingency plan has contracted with an oil spill primary response action contractor providing incident management team services; and

(3) a prevention plan certification stating that the nontank vessel for which contingency plan approval is made complies with applicable federal and International Maritime Organization requirements.

(h) In lieu of the requirements

(1) of (g) (2) (B) of this section, a person may comply with the requirement of (g) (2) (B) of this section by demonstrating, to the satisfaction of the department, that the person is maintaining an oil spill response plan and equivalent equipment, personnel, and resources to enable the person to meet the requirements of this section; and

(2) of (g) (2) (C) of this section, a person may comply with the requirement of (g) (2) (C) of this section by demonstrating, to the satisfaction of the department, that the person is maintaining an incident management team in order to implement a planned response to a release or threatened release of oil from its nontank vessel.

(i) The provisions of AS 46.04.030 (d) – (l), (n), (o), and (r) apply to a nontank vessel, to a nontank vessel contingency plan required by this section, and to a person applying for and holding an approved nontank vessel contingency plan.

(j) On and after June 12, 2003, a person may not transport oil by railroad tank car or cause or permit the transfer of oil to or from a railroad tank car unless the department has approved an oil discharge prevention and contingency plan covering the transportation of oil by railroad tank cars by the railroad and the person is in compliance with the plan.

(k) The provisions of AS 46.04.030 (d) – (l), (n), (o), and (r) apply to a railroad tank car, to a railroad tank car contingency plan required by this section, and to a person applying for and holding an approved railroad tank car contingency plan.

(l) The department shall adopt regulations under AS 46.04.070 to implement

(1) the requirements of response planning standards under (c) of this section;

(2) the requirements of (f) – (i) of this section as applicable to nontank vessels; and

(3) the requirements of (j) and (k) of this section as

applicable to railroad tank cars.

Sec. 46.04.060. Inspections.

(a) In addition to other rights of access or inspection conferred upon the department by law or otherwise, the department may at reasonable times and in a safe manner enter and inspect oil terminal facilities, pipelines, exploration and production facilities, tank vessels, and oil barges in order to

(1) ensure compliance with the provisions of this chapter;
or

(2) participate in an examination of the structural integrity and the operating and mechanical systems of those vessels, barges, pipelines, and facilities by federal and state agencies with jurisdiction.

(b) When the department determines that no federal or state agencies with jurisdiction are performing timely and adequate inspections of an oil terminal facility, pipeline, exploration or production facility, tank vessel, or oil barge, it may perform its own inspection of the structural integrity and operating and mechanical systems of a facility, pipeline, tank vessel, or oil barge by using personnel with qualifications in the areas being inspected.

Sec. 46.04.065. Compliance verification for nontank vessels and for trains and related facilities and operations.

In addition to other rights of access or examination conferred upon the department by law or otherwise, to ensure compliance with the provisions of this chapter relating to oil pollution control, the department may at reasonable times and in a safe manner enter and examine

(1) nontank vessels; and

(2) trains, railroad tracks, associated facilities, and railroad operations.

Sec. 46.04.070. Scope of regulations.

The department shall adopt regulations that are necessary to carry out the purposes of this chapter and that do not conflict with and are not preempted by federal law or regulations.

Sec. 46.04.080. Catastrophic oil discharges.

(a) The commissioner or the adjutant general of the Department of Military and Veterans' Affairs may request the governor to determine that an actual or imminent occurrence of a catastrophic oil discharge constitutes a disaster emergency under AS 26.23. The commissioner and the adjutant general of the Department of Military and Veterans' Affairs shall respond appropriately in the relief of the actual or imminent discharge under the relevant provisions of the applicable incident command system.

(b) The department shall promptly, under AS 46.04.010, seek reimbursement of oil discharge cleanup or containment expenses incurred as a result of an actual or imminent catastrophic oil discharge under AS 26.23.050.

Sec. 46.04.090. Oil discharge cleanup personnel, equipment, expenses.

The department, when feasible, shall enter into contracts with persons or private organizations to provide the personnel, equipment, or other services or supplies that may be required to carry out this chapter. Contracts under this section are governed by AS 36.30 (State Procurement Code). When private contracting is not feasible, the department may establish and maintain at ports, harbors, or other locations in the state, the cleanup personnel, equipment, and supplies that, in its judgment, are necessary to carry out this chapter. When exercising its authority under this subsection, the department shall coordinate with the Department of Military and Veterans' Affairs to avoid duplication of efforts.

Sec. 46.04.100. Compacts authorized.

The governor may execute supplementary agreements, reciprocal arrangements, or compacts with any other state or country,

subject to the approval, if required by the United States Constitution, of the Congress of the United States, for the purpose of implementing this chapter.

Sec. 46.04.110. Municipal powers limited.

If a conflict occurs between a provision of this chapter, or a regulation, order, decision, or other determination of the department under this chapter, and a charter, ordinance, permit, regulation, franchise, decision, or other determination of a municipality, the provisions of this chapter or the regulation, order, decision, or other determination of the department prevail. However, nothing in this chapter precludes a municipality, by ordinance or regulation, from exercising its police powers in the area regulated by this chapter.

Sec. 46.04.120. [Renumbered as AS 46.04.900.]

Article 2. Oil and Hazardous Substance Discharge and Prevention Contingency Plans.

Sec. 46.04.200. State master plan.

(a) The department shall prepare, annually review, and revise as necessary a statewide master oil and hazardous substance discharge prevention and contingency plan.

(b) The state master plan prepared under this section must
(1) take into consideration the elements of an oil discharge prevention and contingency plan approved or submitted for approval under AS 46.04.030;

(2) include incident command systems that clarify and specify the respective responsibilities of each of the following in the assessment, containment, and cleanup of various types and sizes of discharges of oil or a hazardous substance into the environment of the state:

(A) the Department of Environmental Conservation, the division of homeland security and emergency management in the Department of Military and Veterans' Affairs, and other agencies of the state; responsibilities assigned to each agency must be consistent with its statutory authority;

(B) municipalities of the state;

(C) appropriate federal agencies;

(D) operators of facilities;

(E) private parties whose land and other property may be affected by the oil or hazardous substance discharge; and

(F) other parties identified by the commission as having an interest in or the resources to assist in the containment and cleanup of an oil or hazardous substance discharge;

(3) include incident command systems that specify the respective responsibilities of parties identified in (2) of this subsection in an emergency response under AS 26.23, AS 46.03.865, AS 46.04.080, or AS 46.09.030; responsibilities assigned to each state agency must be consistent with its statutory authority; and

(4) identify actions necessary to reduce the likelihood of discharges of oil or hazardous substances.

(c) If the commissioner determines that the state master plan should be revised, the commissioner shall

(1) consult with municipal, community, and local emergency planning committee officials, and with representatives of affected regional organizations;

(2) submit the draft plan with revisions to the public for review and comment;

(3) submit to the legislature for review, not later than the 10th day following the convening of each regular session, any revision of the plan; and

(4) submit any revision of the plan to the Alaska State Emergency Response Commission for its review under AS 26.23.077.

(d) In order to determine whether the state master plan should be revised, or at any other time the commissioner determines it necessary, the commissioner shall require or schedule unannounced oil spill drills to test the sufficiency of an oil discharge prevention and contingency plan approved under AS 46.04.030 or of the cleanup plans of a party identified under (b) (2) of this section.

Sec. 46.04.210. Regional master plan.

(a) For any region of the state, the boundaries of which are determined by the commissioner by regulation, in which the department is required to review and approve an oil discharge prevention and contingency plan submitted by a person under AS 46.04.030, the department shall prepare, annually review, and revise as necessary a regional master oil and hazardous substance discharge prevention and contingency plan.

(b) The provisions of AS 46.04.200(b) and (c) apply to preparation and review of a regional master plan under this section.

(c) In setting boundaries under (a) of this section, the department shall, when possible, group together communities that are likely to require coordination of their efforts to respond effectively to a discharge.

Article 3. Uniform Environmental Covenants Act.

Sec. 46.04.300. Environmental covenant.

(a) An environmental covenant is required if the department makes a remedial decision as part of an environmental response project and that environmental response project results in

(1) residual contamination remaining in the environment in concentrations that are safe for some, but not all, uses; or

(2) an engineered feature or structure that requires monitoring, maintenance, or operation, or that will not function as intended if disturbed.

(b) An environmental covenant may be held by one or more holders. A holder may own an interest in the real property subject to an environmental covenant. The interest of a holder is an interest in real property.

(c) A right of the department under AS 46.04.300 – 46.04.390 or under an environmental covenant, other than a right as a holder, is not an interest in real property.

(d) The department is bound by any obligation it specifically assumes in an environmental covenant, but the department does not assume obligations merely by signing an environmental

covenant. A person other than the department that signs an environmental covenant is bound by the obligations the person assumes in the environmental covenant, but signing the environmental covenant does not change obligations, rights, or protections granted or imposed under law other than under AS 46.04.300 – 46.04.390 unless otherwise provided in the environmental covenant.

(e) The following apply to interests in real property in existence at the time an environmental covenant is created or amended:

(1) an interest that has priority under other law is not affected by an environmental covenant unless the person that owns the interest subordinates that interest to the environmental covenant;

(2) AS 46.04.300 – 46.04.390 do not require a person that owns a prior interest to subordinate that interest to an environmental covenant or to agree to be bound by the environmental covenant;

(3) an environmental covenant may contain a subordination agreement, or a subordination agreement may be contained in a separate record;

(4) the department may decide not to sign an environmental covenant unless each person holding an interest in the land or any part of the land, including each mortgagee, lessee, lienor, and encumbrancer, irrevocably subordinates the interest to the environmental covenant; the department may waive the requirement in this paragraph;

(5) an agreement by a person to subordinate a prior interest to an environmental covenant affects the priority of that person's interest but does not by itself impose any affirmative obligation on the person with respect to the environmental covenant;

(6) if the environmental covenant covers commonly owned property in a common interest community, the record may be signed by any person authorized by the governing board of the owners' association.

Sec. 46.04.305. Contents of environmental covenant.

- (a) An environmental covenant must
- (1) state that the interest is an environmental covenant executed under AS 46.04.300 – 46.04.390;
 - (2) contain a legally sufficient description of the real property subject to the environmental covenant;
 - (3) describe the activity and use limitations on the real property;
 - (4) identify every holder;
 - (5) be signed by the commissioner of the department, every holder, and, unless waived by the department, every owner of the fee simple of the real property subject to the environmental covenant except that for an environmental covenant affecting a land or mineral interest of the Department of Natural Resources, the signature of the commissioner of natural resources may not be waived; and
 - (6) identify the name and location of any administrative record for the environmental response project reflected in the environmental covenant.
- (b) In addition to the information required under (a) of this section, an environmental covenant may contain other information, restrictions, and requirements agreed to by the persons who signed it or required by the department, including
- (1) requirements for notice following transfer of a specified interest in, or concerning proposed changes in use of, applications for building permits for, or proposals for any site work affecting the contamination on, the property subject to the environmental covenant;
 - (2) requirements for periodic reporting describing compliance with the environmental covenant;
 - (3) rights of access to the property granted in connection with implementation or enforcement of the environmental covenant;
 - (4) a brief narrative description of the contamination and remedy, including the contaminants of concern, the pathways of exposure, limits on exposure, and the location and extent of the contamination;
 - (5) a limitation on the amendment or termination of the

environmental covenant that is in addition to the limitations contained in AS 46.04.300 – 46.04.390; and

(6) rights of the holder in addition to the right of the holder to enforce the environmental covenant under AS 46.04.335.

(c) In addition to other conditions for the department's approval of an environmental covenant, the department may require a specified person who has an interest in the real property that is the subject of the environmental covenant to sign the environmental covenant.

Sec. 46.04.310. Validity of environmental covenant; effect on other instruments.

(a) An environmental covenant entered into in accordance with AS 46.04.300 – 46.04.390 runs with the land.

(b) An environmental covenant is valid and enforceable even if
(1) it is not appurtenant to an interest in real property;

(2) it can be or has been assigned to a person other than the original holder;

(3) it is not of a character that has been traditionally recognized at common law;

(4) it imposes a negative burden;

(5) it imposes an affirmative obligation on a person having an interest in the real property or on the holder;

(6) the benefit or burden does not touch or concern real property;

(7) there is no privity of estate or contract;

(8) the holder dies, ceases to exist, resigns, or is replaced; or

(9) the owner of an interest subject to the environmental covenant and the holder are the same person.

(c) An instrument that creates restrictions or obligations with respect to real property that would qualify as activity and use

limitations except for the fact that the instrument was recorded before the effective date of AS 46.04.300 – 46.04.390 is not invalid or unenforceable because of any of the limitations on enforcement of interests described in (b) of this section or because it was identified as an easement, servitude, deed restriction, or other interest. Except as provided in this section, AS 46.04.300 – 46.04.390 do not apply to an instrument described in this subsection.

(d) AS 46.04.300 – 46.04.390 do not invalidate or render unenforceable any interest, whether designated as an environmental covenant or other interest, that is otherwise enforceable under the law of this state.

Sec. 46.04.315. Notice of environmental covenant.

(a) A copy of the environmental covenant shall be provided by the persons and in the manner required by the department to

(1) each person that signed the environmental covenant;

(2) each person holding a recorded interest in the real property subject to the environmental covenant;

(3) each person in possession of the real property subject to the environmental covenant;

(4) each municipality or other unit of local government in which real property subject to the environmental covenant is located; and

(5) any other person the department requires.

(b) The validity of an environmental covenant is not affected by failure to provide a copy of the environmental covenant as required under this section.

Sec. 46.04.320. Recording of environmental covenant.

(a) An environmental covenant and an amendment or termination of the environmental covenant must be recorded in every recording district in which any portion of the real property subject to the environmental covenant is located. For purposes of indexing, a holder shall be treated as a grantee.

(b) An owner of land may not record an environmental covenant unless the owner simultaneously records any subordination documentation required under AS 46.04.300(e).

(c) Except as otherwise provided in AS 46.04.325(f), an environmental covenant is subject to state law governing recording and priority of interests in real property.

(d) A holder shall provide a copy of the final recorded environmental covenant, an amendment made to the environmental covenant, termination documentation, and documentation of other matters related to the environmental covenant to the department.

Sec. 46.04.325. Duration; modification or termination of environmental covenant by administrative or court action.

- (a) An environmental covenant is perpetual unless it is
- (1) by its terms, limited to a specific duration or terminated by the occurrence of a specific event;
 - (2) terminated by consent under AS 46.04.330;
 - (3) terminated under (b), (e), or (g) of this section;
 - (4) terminated by foreclosure of an interest that has priority over the environmental covenant; or
 - (5) terminated or modified in an eminent domain proceeding, but only if
 - (A) the department is a party to the proceeding;
 - (B) every person whose consent is required under AS 46.04.330(a) is given notice of the pendency of the proceeding; and
 - (C) the court determines, after hearing, that the activity and use limitations subject to termination or modification are no longer required to protect human health, safety, or welfare, or the environment.
- (b) The department may terminate or reduce the burden on the real property of an environmental covenant if the department finds that some or all of the activity and use limitations under the environmental covenant are no longer required to protect

human health, safety, or welfare, or the environment, or modify the environmental covenant if the department determines that modification is required adequately to protect human health, safety, or welfare, or the environment.

(c) The department shall provide notice of any proposed action under (b) of this section to each person with a current recorded interest in the real property subject to the environmental covenant, each holder, all other persons who originally signed the environmental covenant, or their successors or assigns, and any other person with rights or obligations under the environmental covenant. The department shall provide 60 days for comment on the proposed action by parties entitled to notice. A determination by the department under this subsection is a final agency decision. Any person entitled to notice under this subsection may request an adjudicatory hearing under the procedures established by the department under AS 46.04.890.

(d) A person entitled to notice under (c) of this section may apply in writing to the department for a determination under (b) of this section that an existing environmental covenant be terminated, that the burden of an environmental covenant be reduced, or that an environmental covenant be modified. The application must specify the determination sought by the applicant, the reasons why the department should make the determination, and the information that would support it. If the department fails to begin a proceeding under (b) of this section within 90 days after receiving the application, the applicant may bring a civil action in superior court for termination, reduction of burden, or modification of the environmental covenant under (e) of this section.

(e) The superior court for a recording district in which the real property subject to an environmental covenant is located may, in a de novo action, under the doctrine of changed circumstances, terminate an environmental covenant, reduce an environmental covenant's burden on the real property, or modify the terms of an environmental covenant if the department fails to begin a proceeding within 90 days as provided under (d) of this section. The applicant under (d) of this section, a holder of the environmental covenant, or another person identified in (c) of this section may begin an action under this subsection. The person beginning the action shall serve notice of the action on the department and any person entitled to notice under (c) of this section. The person bringing the action shall make the department a party to the action. The court shall terminate, reduce the burden of, or modify an environmental covenant if the

court determines that the person bringing the action shows that some or all of the activity and use limitations under the environmental covenant do not, or are no longer required to, protect human health, safety, or welfare, or the environment.

(f) An environmental covenant may not be extinguished, limited, or impaired through issuance of a tax deed, foreclosure of a tax lien, or application of the doctrine of adverse possession, prescription, abandonment, waiver, lack of enforcement, acquiescence, or a similar doctrine.

(g) The department shall terminate an environmental covenant if the environmental covenant was required under AS 46.04.300 solely because of the level or concentration of residual contamination on the property, and the department determines that level or concentration of residual contamination does not endanger human health, safety, or welfare, or the environment. The department shall provide notice of a termination under this subsection to each person with a current recorded interest in the real property subject to the environmental covenant, each holder, all other persons who originally signed the environmental covenant, or their successors or assigns, and any other person with rights or obligations under the environmental covenant.

Sec. 46.04.330. Amendment or termination of environmental covenant by consent.

(a) An environmental covenant may be amended or terminated if the amendment or termination is consented to and signed

(1) by the department;

(2) unless waived by the department, by the current owner of the fee simple of the real property subject to the environmental covenant;

(3) by each person that originally signed the environmental covenant, unless the person

(A) waived the right to consent to termination or modification in the environmental covenant or in another signed and acknowledged instrument recorded with the recording district;

(B) fails to object to the amendment or termination within 60 days after a party to the covenant mails, by certified

mail, return receipt requested, to the person's last known address, a notice requesting the person's consent to amendment or termination and the return receipt is signed by the person; or

(C) cannot be found, as determined by a court, because the person no longer exists or cannot be located or identified with the exercise of reasonable diligence; and

(4) except as otherwise provided in (d) (2) of this section, by the holder.

(b) If an interest in real property is subject to an environmental covenant, the interest is not affected by an amendment of the environmental covenant unless the current owner of the interest consents to the amendment or has waived in a signed record the right to consent to amendments.

(c) Except for an assignment undertaken under a governmental reorganization, assignment of an environmental covenant to a new holder is an amendment.

(d) Except as otherwise provided in an environmental covenant,
(1) a holder may not assign its interest without consent of the other parties specified in (a) of this section;

(2) a holder may be removed and replaced by agreement of the other parties specified in (a) of this section; and

(3) a court of competent jurisdiction may fill a vacant holder position.

Sec. 46.04.335. Enforcement of environmental covenant.

(a) The department is the administrating agency for AS 46.04.300 – 46.04.390 and is empowered to administer and enforce AS 46.04.300 – 46.04.390 using the civil or administrative authority granted to it in AS 46.03. However, the department may, but is not required to, assume any administration or enforcement functions other than those directly related to the environmental covenant.

(b) A civil action for injunctive or other equitable relief for violation of an environmental covenant may be maintained by

(1) a party to the environmental covenant;

(2) the department;

(3) a person that the environmental covenant expressly grants the power to enforce the environmental covenant;

(4) a person whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the environmental covenant; or

(5) a municipality or other unit of government that governs the real property subject to the environmental covenant.

(c) AS 46.04.300 – 46.04.390 do not limit the regulatory authority of the department in an environmental response project.

(d) A person is not responsible for or subject to liability for environmental remediation solely because the person has the right to enforce an environmental covenant.

Sec. 46.04.340. Notice of activity and use limitation.

(a) If a legal impediment prevents an environmental covenant from being entered into, an owner of real property shall, after receiving authorization from the department, record a notice of an activity and use limitation into the appropriate public land records. Failure to record a notice of an activity and use limitation may result in disapproval of the environmental response project.

(b) Once the owner or other person assumes an obligation under a notice of activity and use limitation, that owner or person shall comply with those obligations in accordance with AS 46.04.300 – 46.04.390.

(c) The enactment, modification, or termination of a notice of activity and use limitation is not valid until it is approved by the department.

(d) A notice of activity and use limitation must remain in place for current and subsequent landowners unless it is terminated under (e) or (m) of this section.

(e) A person who proposes to create, modify, or terminate a

notice of activity and use limitation shall provide written notice of the person's intention to the department, to all persons holding an interest of record in the real property that will be subject to the notice of activity and use limitation, to all persons known to the person to have an unrecorded interest in the property, and to all affected persons in possession of the property before the creation, modification, or termination, and shall provide the department with

(1) a copy of the notice provided;

(2) a list of the persons to whom notice was given and the address or other location to which the notice was directed; and

(3) title information required by the department.

(f) Before unilaterally issuing a notice of activity and use limitation, the department shall provide a copy of the proposed notice of activity and use limitation to all persons holding an interest of record in the real property subject to the notice of activity and use limitation, all persons known to the department to have an unrecorded interest in the property, and all affected persons in possession of the property, and shall offer the persons a minimum of 30 days to comment on the proposed notice of activity and use limitation, unless notice has already been provided under (e) of this section. In determining whether to issue the notice of activity and use limitation unilaterally, the department shall consider any comments received. For a notice of activity and use limitation affecting a land or mineral interest of the Department of Natural Resources, concurrence from the Department of Natural Resources is required.

(g) The department shall review and make a determination regarding all requests to create, modify, or terminate a notice of activity and use limitation within 90 days after receiving a request that includes all the information described in (a) of this section.

(h) Upon issuance or approval of a notice of activity and use limitation, the department shall record the notice in every recording district in which a portion of the real property that is subject to the activity and use limitation is located. For approved notices, the department may allow the owner of the property to record the notice. A person may not record a notice without the department's written approval.

(i) Unless there is a legal impediment that prevents entering

into an environmental covenant, the department may authorize that any notice of activity and use limitation created in accordance with this section be replaced by an environmental covenant on the property that is subject to the notice of activity and use limitation. The department may condition its authorization and approval of the termination of the notice of activity and use limitation on the terms of the notice of activity and use limitation, department approval and acceptance, and the effective recording of the environmental covenant.

(j) Modification or termination of a notice of activity and use limitation shall be recorded as provided in (h) of this section. A person may not record a modification or termination of a notice of activity and use limitation without the department's written approval.

(k) A determination by the department to issue, approve, modify, or terminate a notice of activity and use limitation is subject to appeal under the procedures described in AS 46.04.890.

(l) A notice of activity and use limitation, whether recorded or unrecorded, is not

(1) a servitude arising from an environmental response project; or

(2) an interest in real property.

(m) The department shall terminate a notice of activity and use limitation for real property if the notice of activity and use limitation was required solely because of the level or concentration of residual contamination on the property, and the department determines that level or concentration of residual contamination does not endanger human health, safety, or welfare, or the environment. The department shall provide notice of a termination under this subsection to all persons holding an interest of record in the real property subject to the notice of activity and use limitation, all persons known to the department to have an unrecorded interest in the property, and all affected persons in possession of the property.

Sec. 46.04.345. Relationship to other land-use law.

AS 46.04.300 – 46.04.390 do not authorize a use of real property that is otherwise prohibited under AS 29.40 or AS 38.05.037, by

law other than AS 46.04.300 – 46.04.390 regulating use of real property, or by a recorded instrument that has priority over the environmental covenant or a notice of activity and use limitation. An environmental covenant or a notice of activity and use limitation may prohibit or restrict uses of real property that are authorized by zoning or by law other than AS 46.04.300 – 46.04.390.

Sec. 46.04.350. Registry.

The department shall maintain a registry that contains all environmental covenants and notices of activity and use limitation and any amendment or termination of those instruments. The registry may also contain any other information concerning environmental covenants and notices of activity and use limitation and the real property subject to them that the department considers appropriate.

Sec. 46.04.355. Uniformity of application and construction.

In applying and construing AS 46.04.300 – 46.04.390, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact similar provisions.

Sec. 46.04.390. Definitions.

In AS 46.04.300 – 46.04.390,

(1) "common interest community" means a condominium, cooperative, or other real property with respect to which a person, by virtue of the person's ownership of a parcel of real property, is obligated to pay property taxes or insurance premiums, or pay for maintenance, or improvement of other real property described in a recorded environmental covenant that creates the common interest community;

(2) "environmental covenant" means a servitude arising under an environmental response project that imposes activity and use limitations;

(3) "environmental response project" means a plan or work

performed or maintenance of work performed under a federal or state program

(A) including this chapter, AS 46.03, AS 46.09, 42 U.S.C. 9601 – 9675 (Comprehensive Environmental Response, Compensation and Liability Act of 1980), as amended, and 42 U.S.C. 6901 – 6992k (Resource Conservation and Recovery Act of 1976), as amended, governing environmental remediation and management of contaminated real property; or

(B) governing maintenance, closure, or corrective action of a solid waste disposal facility or hazardous waste management unit;

(4) "holder" means the grantee of an environmental covenant as specified in AS 46.04.300(b);

(5) "notice of activity and use limitation" means a notice of a restriction on or obligation concerning an activity on or use of real property, in accordance with AS 46.04.300 – 46.04.390;

(6) "record" has the meaning given in AS 40.17.900.

Article 4. General Provisions.

Sec. 46.04.890. Applicability of Administrative Procedure Act.

Notwithstanding AS 44.62.330(a)(28), adjudicatory hearing procedures to review permit decisions under this chapter need not conform to AS 44.62.330 – 44.62.630 (Administrative Procedure Act).

Sec. 46.04.900. Definitions.

In this chapter, unless the context requires otherwise,

(1) "barrel" is a measure of capacity equal to the space occupied by 42 U.S. gallons at 60 degrees Fahrenheit;

(2) "catastrophic oil discharge" means an oil discharge in excess of 100,000 barrels, or any other discharge which the governor determines presents a grave and substantial threat to the economy or environment of the state;

(3) "Clean Water Act" means the Federal Water Pollution Control Act of 1972 (P.L. 92-500), as amended by the Clean Water Act of 1977 (P.L. 95-217), as amended (33 U.S.C. 1251 - 1376);

(4) "commissioner" means the commissioner of environmental conservation;

(5) "containment and cleanup" includes all direct and indirect efforts associated with the prevention, abatement, containment, or removal of a pollutant, and the restoration of the environment to its former state; when applied to expenses, the term includes the additional costs of providing a reasonable and appropriate function or service incurred in response to the discharge of a pollutant, including administrative expenses for the incremental costs of providing the function or service;

(6) "department" means the Department of Environmental Conservation;

(7) "discharge" means spilling, leaking, pumping, pouring, emitting, emptying, or dumping;

(8) "exploration facility" means a platform, vessel, or other facility used to explore for hydrocarbons in or on the waters of the state or in or on land in the state; the term does not include platforms or vessels used for stratigraphic drilling or other operations that are not authorized or intended to drill to a producing formation;

(9) "natural gas"

(A) means a hydrocarbon that at 70 degrees Fahrenheit and atmospheric pressure is in a gaseous state;

(B) includes liquefied natural gas or other form of natural gas that has been converted to a liquid state by pressure or cooling that at 70 degrees Fahrenheit and atmospheric pressure reverts to a gaseous state;

(10) "nonpersistent product" has the meaning given to "non-persistent or Group I oil" in 33 C.F.R. 155.1020;

(11) "nontank vessel" means a self-propelled watercraft of more than 400 gross registered tons; in this paragraph, "watercraft" includes commercial fishing vessels, commercial

fish processor vessels, passenger vessels, and cargo vessels, but does not include a tank vessel, oil barge, or public vessel;

(12) "oil" means oil of any kind and in any form, whether crude, refined, or a petroleum by-product, including 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;

(13) "oil barge" means a vessel which is not self-propelled and which is constructed or converted to carry oil as cargo in bulk;

(14) "oil terminal facility" means an onshore or offshore facility of any kind, and related appurtenances, including a deepwater port, bulk storage facility, or marina, located in, on, or under the surface of the land or waters of the state, including tide and submerged land, that is used for the purpose of transferring, processing, refining, or storing oil; a vessel, other than a nontank vessel, is considered an oil terminal facility only when it is used to make a ship-to-ship transfer of oil, and when it is traveling between the place of the ship-to-ship transfer of oil and an oil terminal facility;

(15) "operator" means the person who, through contract, lease, sublease, or otherwise, exerts general supervision and control of activities at the facility; the term includes, by way of example and not limitation, a prime or general contractor, the master of a vessel and the master's employer, or any other person who, personally or through an agent or contractor, undertakes the general functioning of the facility;

(16) "persistent product" has the meaning given to "persistent oil" in 33 C.F.R. 155.1020;

(17) "person" means an individual, public or private corporation, political subdivision, government agency, municipality, industry, partnership, association, firm, trust, estate, or any other entity;

(18) "pipeline" means the facilities, including piping, compressors, pump stations, and storage tanks, used to transport crude oil and associated hydrocarbons between production

facilities or from one or more production facilities to marine vessels;

(19) "production facility" means a drilling rig, drill site, flow station, gathering center, pump station, storage tank, well, and related appurtenances on other facilities to produce, gather, clean, dehydrate, condition, or store crude oil and associated hydrocarbons in or on the water of the state or on land in the state, and gathering and flow lines used to transport crude oil and associated hydrocarbons to the inlet of a pipeline system for delivery to a marine facility, refinery, or other production facility;

(20) "public vessel" means a vessel that is operated by and is either owned or bareboat chartered by the United States, a state or a political subdivision of that state, or a foreign nation, except when the vessel is engaged in commerce;

(21) "railroad tank car" means rolling stock used to transport oil in bulk as cargo by rail;

(22) "response action" means an action taken to respond to a release or threatened release of oil, including mitigation, cleanup, or removal;

(23) "self-propelled" means propelled either by machinery aboard the vessel, or by a tug or other vessel secured into the cargo-carrying vessel through special hull design;

(24) "service" means a function performed or service provided by the state, including functions not previously performed and services not previously provided by the state;

(25) "tank vessel" means a self-propelled waterborne vessel that is constructed or converted to carry liquid bulk cargo in tanks and includes tankers, tankships, and combination carriers when carrying oil; the term does not include vessels carrying oil in drums, barrels, or other packages, or vessels carrying oil as fuel or stores for that vessel;

(26) "train" means connected rolling stock operated as a single moving vehicle on rails; for purposes of this paragraph, "connected rolling stock" includes railroad tank cars;

(27) "vessel" includes tank vessels, oil barges, and nontank vessels;

(28) "village" means a place within the unorganized borough or within a borough as to a power, function, or service that is not exercised or provided by the borough on an areawide or nonareawide basis that

(A) has irrevocably waived, in a form approved by the Department of Law, any claim of sovereign immunity that might arise under this chapter; and

(B) has

(i) a council organized under 25 U.S.C. 476 (sec. 16 of the Indian Reorganization Act);

(ii) a traditional village council recognized by the United States as eligible for federal aid to Indians; or

(iii) a council recognized by the commissioner of commerce, community, and economic development under regulations adopted by the Department of Commerce, Community, and Economic Development to determine and give official recognition of village entities under AS 44.33.755(b);

(29) "waters of the state" includes lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, straits, passages, canals, the Pacific Ocean, Gulf of Alaska, Bering Sea and Arctic Ocean, in the territorial limits of the state, and all other bodies of surface or underground water, natural or artificial, public or private, inland or coastal, fresh or salt, which are wholly or partially in or bordering the state or under the jurisdiction of the state.