

HOUSE BILL REPORT

HB 1691

As Reported by House Committee On:
Environment & Energy

Title: An act relating to financial responsibility requirements related to oil spills.

Brief Description: Concerning financial responsibility requirements related to oil spills.

Sponsors: Representatives Gregerson, Lekanoff, Fitzgibbon, Ramel, Sells, Bateman, Duerr, Valdez, Davis, Fey, Macri, Peterson, Senn, Simmons, Pollet and Kloba.

Brief History:

Committee Activity:

Environment & Energy: 1/13/22, 1/21/22 [DPS].

Brief Summary of Substitute Bill

- Requires the owners or operators of vessels subject to financial responsibility demonstration requirements under existing law to obtain a certificate of financial responsibility (COFR) from the Department of Ecology (Ecology), and provides that COFRs may not have a term greater than two years and are conclusive evidence that the COFR holder is the party responsible for a vessel or facility for purposes of determining liability under state water pollution laws.
- Adds federally recognized Indian tribes to the list of entities that owners or operators of stationary oil facilities must be able to compensate in the event of a reasonable worst-case oil spill, in order to demonstrate required financial responsibility to Ecology.
- Requires Ecology rules related to vessel and facility demonstrations of financial responsibility through self-insurance to meet certain standards, and adds certificates of deposit, letters of credit, and protection and indemnity club membership as acceptable options for vessels and facilities to demonstrate financial responsibility to Ecology.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

HOUSE COMMITTEE ON ENVIRONMENT & ENERGY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Fitzgibbon, Chair; Duerr, Vice Chair; Dye, Ranking Minority Member; Klicker, Assistant Ranking Minority Member; Berry, Fey, Goehner, Harris-Talley, Ramel, Shewmake and Slatter.

Minority Report: Without recommendation. Signed by 2 members: Representatives Abbarno and Boehnke.

Staff: Jacob Lipson (786-7196).

Background:

Oil Spill Contingency Planning Requirements and Spill Penalties.

The Department of Ecology (Ecology) administers an oil spill preparedness, prevention, and response program. Among other laws implemented by Ecology's oil spills program, operators of vessels and facilities, including oil refineries, terminals, pipelines, and railroads that are involved in the bulk transfer of oil, must put in place oil spill contingency plans that outline containment and remediation responses to potential oil spills. The contingency plans of facilities and vessels must be designed to be capable of removing oil and minimizing damage to the environment from a worst-case spill of oil. For facilities, a worst-case spill is defined as the largest foreseeable spill into state waters from the facility in adverse weather conditions; for vessels, a worst-case spill is a spill of the entire cargo and fuel of the vessel in adverse weather conditions.

Under state water pollution control laws, oil spills in state waters are subject to civil penalties of up to \$10,000 per day per violation, plus additional criminal penalties for willful violations. Parties responsible for oil spills must also pay natural resource damages associated with the spill according to either a prescribed schedule or based on an assessment of the damages to natural resources. Beyond environmental penalties and natural resource damages, strict liability is established for damages to public or private property due to oil spills, including loss of income, the means of producing revenue, or economic benefits resulting from an injury due to loss of real property or natural resources.

Financial Assurance Requirements for Facilities and Vessels.

Facilities such as oil refineries and terminals must demonstrate to Ecology the financial ability to compensate the state and local governments for damages from a reasonable worst-case spill. In calculating this amount, Ecology is directed to consider matters including the amount of oil that could be spilled from the facility into navigable waters, the frequency of facility operations, the damages that could result from the spill, and the commercial availability and affordability of financial responsibility.

Likewise, certain vessels including barges and tank vessels that use state waters or ports

must also document their financial ability to pay for oil spill removal costs, natural-resource damages, and related expenses. Depending on the type and size of vessel, and whether the vessel transports hazardous substances or oil, and whether it does so in bulk as cargo or as fuel for the vessel, the financial assurance that a vessel owner or operator must demonstrate to Ecology ranges from five hundred thousand dollars to one billion dollars. The hazardous substances subject to financial responsibility requirements are substances identified in a United States Environmental Protection Agency rule adopted in 2003.

Financial responsibility must be demonstrated to Ecology by providing evidence of insurance, surety bonds, qualification as a self-insurer, or other evidence of financial responsibility. The owner or operator of a vessel may also file a certificate with Ecology indicating compliance with federal or another states' financial responsibility demonstration requirements if those requirements require the same or greater financial responsibility to be demonstrated. Financial responsibility requirements do not apply to vessels or facilities owned or operated by the federal government, state government, or local governments, or to certain oil spill response barges.

Ecology has adopted rules to implement the financial assurance requirements applicable to certain vessels, but has not adopted rules to implement the financial assurance requirements applicable to facilities. The 2021-2023 Operating Budget included a proviso requiring Ecology to adopt financial assurance rules applicable to facilities.

Federal and Other State Oil Spill Financial Assurance Provisions.

Under the federal Oil Pollution Act of 1990, the United States Coast Guard administers a program that requires certain vessels and facilities that pose a substantial threat of oil discharge to obtain a certificate of financial responsibility after demonstrating the ability to meet a maximum amount of liability specified in federal law. Under state law, Ecology is authorized to enforce these federal financial responsibility requirements.

Other states, including California and Alaska, also require certain vessels and facilities to obtain certificates of financial responsibility after demonstrating the ability to pay specified amounts of damages in the event of an oil spill.

Summary of Substitute Bill:

Certificates of Financial Responsibility.

The owner or operator of a vessel or facility required to document financial responsibility to the Department of Ecology (Ecology) must do so by obtaining a certificate of financial responsibility (COFR) from Ecology, or by relying upon an equivalent certificate issued by another state or the federal government. A COFR:

- is a written acknowledgment by Ecology that the owner or operator of a facility or vessel, or the owner of the oil, has demonstrated to Ecology's satisfaction that the entity has a financial ability to pay for costs and damages caused by an oil spill;

- is conclusive evidence that the person holding it is the party responsible for a specified vessel, facility or oil for purposes of determining liability under state water pollution control laws;
- may not have a term greater than two years; and
- may cover multiple vessels or facilities owned or operated by the same person, in which case the terms of the COFR are based on the vessel or facility that represents the greatest financial risk in the event of a spill.

Ecology must reevaluate the validity of a COFR upon being notified of an oil spill, discharge, or other potential liability by the owner or operator of a vessel or facility. Ecology may suspend or revoke a COFR if it determines that the COFR holder is likely to no longer have the financial resources to pay damages for the spill, discharge, or other liability and still have remaining resources sufficient to meet the financial responsibility demonstration requirements. If a COFR applies to multiple vessels or facilities, and a spill occurs for which Ecology determines the COFR holder may be liable in an amount exceeding 5 percent of the amount of the COFR, then the COFR immediately is rendered inapplicable to any vessel or facility not associated with the spill. If a COFR is rendered inapplicable, suspended, or revoked, the owner or operator of the vessel or facility may receive a new COFR upon demonstrating an ability to meet the financial responsibility requirements in addition to paying all reasonably estimated anticipated damages arising from the spill.

Calculations of the Amount of Financial Responsibility Demonstrated by Oil Facilities.

Oil facilities must demonstrate to Ecology financial responsibility sufficient to compensate damages to affected federally recognized Indian tribes, in addition to the state, counties, and cities. Ecology must adopt a rule to calculate the damages that might occur from a reasonable worst-case spill from a facility by considering the worst-case amount of oil that could be spilled, as calculated in the applicant's oil spill contingency plan, in addition to the current criteria that Ecology must consider.

Other.

In order to maintain consistency with federal regulations, Ecology may update, by rule, the hazardous substances whose transport by vessel triggers financial responsibility demonstration requirements.

Certificates of deposit, letters of credit, and protection and indemnity club membership are added as acceptable options for vessels and facilities to demonstrate financial responsibility to Ecology. Ecology rules allowing self-insurance must require an applicant to thoroughly demonstrate the security of the applicant's financial position, and must be no less protective than the qualification standards for self-insurance in other jurisdictions. Ecology may require a self-insurer to demonstrate a greater monetary amount of financial responsibility than applicants relying on an alternative method of self-insurance

Various technical corrections and clarifications are included.

A severability clause is included.

Substitute Bill Compared to Original Bill:

The substitute bill:

- extends the maximum term of a certificate of responsibility (COFR) to two years;
- clarifies that an equivalent COFR issued by another state may be used in lieu of a Washington COFR, in addition to being usable as a method of obtaining a Washington COFR;
- restores the authorization, but does not require, that the Department of Ecology (Ecology) enforce federal financial assurance requirements established under the 1990 Oil Pollution Act;
- clarifies that a COFR is conclusive evidence that the person holding the certificate is the responsible party for a vessel, facility or oil for purposes of determining liability under state water quality laws that establish penalties and damages for oil spills;
- directs that Ecology must adopt a rule for the demonstration of financial responsibility by oil facilities that considers the worst case amount of oil that could be spilled, as measured in the applicant's oil spill contingency plan, in addition to the criteria required in current law (the cost of cleaning up the spilled oil, the frequency of operations at the facility, the damages that could result from the spill, and the commercial availability and affordability of financial responsibility); and
- authorizes facilities to demonstrate financial responsibility through self-insurance, but: (1) requires Ecology rules allowing self-insurance to require an applicant to thoroughly demonstrate the security of the applicant's financial position; (2) requires Ecology rules to be no less protective than the qualification standards for self-insurance in other jurisdictions; and (3) authorizes Ecology to require a self-insurer to demonstrate a greater monetary amount of financial responsibility than applicants relying on an alternative method of self-insurance.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Financial responsibility laws were first enacted decades ago, and the process of trying to modernize them began in the Legislature years ago. Oil transportation has gotten safer as a result of the state's new regulatory requirements added over the past decade, but oil financial responsibility program implementation has remained a high-priority unfunded

program to reduce oil spill risks. The goal of financial responsibility laws is to ensure that companies responsible for oil vessels and facilities are able to pay for damages and cleanup costs in the event that a spill occurs. Oil spills inevitably happen because oil transportation is an inherently risky business. This bill will ensure that state and federal taxpayers do not have to bear the costs of a big oil spill when one occurs, and that spill recovery actions will not be slowed by a lack of available cleanup funds. A foreseeably large oil spill could result in costs and damages of hundreds of millions or billions of dollars. Volumes of oil arriving in Washington by ship, according to Ecology's quarterly reports, have been increasing significantly since late 2020, demonstrating the increasing likelihood of a spill. Self-insurance is not a viable form of financial responsibility because companies can shuffle assets through bankruptcies, mergers, and acquisitions. Other types of fossil fuel businesses, such as coal companies in recent years, have been able to evade environmental liabilities through the bankruptcy process. This proposal is a first step towards broader risk bonding requirements on companies involved in the fossil fuel supply chain that make them bear the externalized costs of their activities, including the costs of climate adaptation.

(Opposed) The bill increases regulatory complexity and costs for ship operators. Washington does not need a stand-alone program to ensure financial responsibility and has long relied on federal certificates of financial responsibility as sufficient. The shipping industry has operated safely and with few incidents without this program in place. The Department of Ecology (Ecology) does not have the staff or skills to manage a financial assurance certificate program. Establishing a state certificate program will create a regulatory patchwork where vessel operators need to obtain as many as three different certificates to operate on the West Coast. The California program upon which this proposal is based is challenging for vessel owners and operators, as certificates expire after a year, and government regulators do not always act on renewal applications in a timely manner. The reasonable per-barrel costs that oil facilities must demonstrate financial responsibility for should be given a more specific cost range.

(Other) Washington's oil spills program is widely considered to be the best in the nation. The option for facilities to self-insure to meet financial responsibility requirements should be assured. The proposed new standard basing financial responsibility demonstration amounts on a reasonable per-barrel cleanup cost should be amended to be less ambiguous, in order to facilitate obtaining financial products that would ensure satisfaction of that requirement. The director of Ecology should not have a blanket directive to revoke a facility or vessel's certificate in the event of the spill, which could lead to hasty decision-making based on perceptions. Instead, Ecology should re-examine financial information carefully in the event of a spill before deciding whether to revoke a certificate.

Persons Testifying: (In support) Representative Mia Gregerson, prime sponsor; Laura Feinstein, Sightline Institute; John Talberth; Jase Brooks, Department of Ecology; Lovel Pratt, Friends of the San Juans; and David Perk, 350 Seattle.

(Opposed) Amber Carter, Columbia River Steamship Operators Association; and Peter

Godlewski.

(Other) Tom Wolf, BP America; and Greg Hanon, Communico.

Persons Signed In To Testify But Not Testifying: None.