SENATE BILL REPORT
E2SHB 1691

As Reported by Senate Committee On:
Environment, Energy & Technology, February 24, 2022

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

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

Sponsors: House Committee on Appropriations (originally sponsored by Representatives Gregerson, Lekanoff, Fitzgibbon, Ramel, Sells, Bateman, Duerr, Valdez, Davis, Fey, Macri, Peterson, Senn, Simmons, Pollet and Kloba).

Brief History: Passed House: 2/11/22, 83-15.
Committee Activity: Environment, Energy & Technology: 2/22/22, 2/24/22 [DP-WM, DNP, w/oRec].

Brief Summary of Bill

- Requires the owners or operators of facilities and 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

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facilities to demonstrate financial responsibility to Ecology.

SENATE COMMITTEE ON ENVIRONMENT, ENERGY & TECHNOLOGY

Majority Report: Do pass and be referred to Committee on Ways & Means.
Signed by Senators Carlyle, Chair; Lovelett, Vice Chair; Das, Liias, Lovick, Nguyen, Sheldon, Stanford and Wellman.

Minority Report: Do not pass.
Signed by Senators Fortunato and Schoesler.

Minority Report: That it be referred without recommendation.
Signed by Senator Short, Ranking Member.

Staff: Gregory Vogel (786-7413)

Background: Oil Spill Contingency Planning Requirements and Spill Penalties. The Department of Ecology (Ecology) administers an oil spill preparedness, prevention, and response 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.

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 $500,000 to $1 billion. 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 state's 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 Bill: The owner or operator of a vessel or facility required to document financial responsibility to 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. Ecology must adopt rules related to COFR requirements, including to specify the effective date for the requirement that vessels obtain a COFR. 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.

The holder of a COFR must notify Ecology of a spill in Washington waters, consistent with existing reporting obligations. The holder of a COFR must also notify Ecology of an oil spill in another jurisdiction's waters if the COFR holder may be liable and the spill may incur damages that exceed 5 percent of the resources reflected in the COFR. Upon notification, Ecology may reevaluate any COFR, and Ecology must reevaluate any COFR in the event of a spill that may exceed 15 percent of the resources reflected in the COFR. 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 is 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. Ecology decisions related to a COFR are appealable to the Pollution Control Hearings Board.

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.

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 the other acceptable methods.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: Financial assurance protects the public from expensive remediation for oil operations. Over a billion gallons are transported in Washington water every quarter. Multiple spills of thousands of gallons of fuel have happened over the years. It is impossible to eliminate the risk but possible to place responsibility for spills where it belongs, on the oil industry.

It is important to protect the waters of our state and this bill is a practical, commonsense way to do this. As we transition to new types of energy, we can expect consolidation by the oil industry, and we want to avoid a situation where companies can utilize bankruptcy to avoid liability.

There are concerns about the ability to demonstrate financial responsibility through self-insurance. We want to ensure companies have the resources to compensate the state, tribes, and local jurisdictions for damages. The bill describes an important update to current statutes to allow Ecology to manage the financial responsibility program. The certificate program will allow Ecology to quickly identify vessels without coverage and identify responsible parties in the event of a spill for coordinated response.

CON: This bill creates a staff intensive paperwork process, that despite improvements, is unnecessary and duplicative. Current law already establishes evidence of financial documentation requirements. A certificate process does not add additional environmental protections, and Ecology and other stakeholders have not demonstrated there is a problem with the current system.

OTHER: We have long supported Washington's oil spill prevention and response program, which is the best in the country. This is not a new issue and one we have complied with for years. Current requirements have stood the test of time. We support the inclusion of tribes for potential spill costs. We are confident that remaining issues can be worked out by rule.

Persons Testifying: PRO: Laura Feinstein, Sightline Institute; David Perk, 350 Seattle; Lovel Pratt, Friends of the San Juans; Jase Brooks, Washington Department of Ecology.

CON: Amber Carter, Columbia River Steamship Operators Association.

OTHER: Greg Hanon, WSPA.

Persons Signed In To Testify But Not Testifying: No one.