

**CS FOR HOUSE BILL NO. 51(RLS)**

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY THE HOUSE RULES COMMITTEE

Offered: 3/20/97

Referred: Rules

Sponsor(s): REPRESENTATIVES ROKEBERG AND KELLY, Foster, Hodgins, Vezey, Bunde, Cowdery, Mulder, Kohring

**A BILL**

**FOR AN ACT ENTITLED**

1 "An Act relating to the Department of Environmental Conservation; amending  
2 Rules 79 and 82, Alaska Rules of Civil Procedure; and providing for an effective  
3 date."

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

5 \* **Section 1.** FINDINGS AND INTENT. (a) The legislature confirms that it is the policy  
6 of the state to adopt laws and implement water quality standards based on scientific and  
7 technical evidence. The legislature specifically requests the Department of Environmental  
8 Conservation, when implementing AS 46.03.085 - 46.03.088, enacted by sec. 4 of this Act,  
9 to coordinate its efforts with other state agencies to achieve cost efficiencies and, when  
10 adopting regulations, to consider measures that encourage the creation and retention of jobs  
11 for Alaskans and the economic development of the state's natural resources consistent with  
12 the public interest. It is the legislature's intent that Alaska's water quality regulations be  
13 adopted and implemented in a credible manner, be based on scientific criteria, and be  
14 economically feasible to comply with. The people of Alaska express their will through the

1 legislature, and regulations implement legislative action.

2 (b) The legislature also finds that

3 (1) the federal government has required, in the federal Safe Drinking Water  
4 Act amendments of 1996 (P.L. 104-182), that states have minimum administrative penalty  
5 authority in order to maintain primary enforcement authority for the federal drinking water  
6 program (42 U.S.C. 300f - 300j-26);

7 (2) the state cannot receive federal money for construction of public drinking  
8 water systems unless it maintains primacy under the federal program (sec. 130, P.L. 104-182);

9 (3) maintaining state primary enforcement authority for the federal program  
10 is in the best interests of the state so as to provide maximum flexibility and local control of  
11 this program and to ensure continued federal money for Alaska public water supply system  
12 construction projects;

13 (4) ensuring public health through protection of public water supplies is of  
14 fundamental importance to the people of the state;

15 (5) sec. 5 of this Act is in the public interest by enacting administrative penalty  
16 authority in order to meet the minimum federal requirements for maintaining state primary  
17 enforcement authority for the federal drinking water program.

18 \* **Sec. 2.** AS 46.03.050 is amended by adding a new subsection to read:

19 (b) The department may continue to investigate the feasibility of securing  
20 federal approval under 33 U.S.C. 1342(b) of the state's permit program for discharges  
21 into navigable water so that the department has authority to administer the national  
22 pollutant discharge elimination system in the state in lieu of the federal permit program  
23 otherwise applicable to the state under 33 U.S.C. 1342(a). Nothing in AS 46.03.085 -  
24 46.03.088 may be interpreted to prevent the department from continuing its effort to  
25 secure approval under 33 U.S.C. 1342(b).

26 \* **Sec. 3.** AS 46.03.080 is amended by adding new subsections to read:

27 (b) If the available evidence reasonably demonstrates that the natural condition  
28 of a body of water does not meet the requirements of the quality or purity standards  
29 that would otherwise be applicable to the classification of the water adopted under (a)  
30 of this section, the natural condition of the water shall constitute the applicable  
31 standard of quality or purity.

1 (c) In this section, "natural condition" means the baseline water quality when  
2 the baseline data is obtainable unless the baseline water quality has been altered by  
3 historical or upslope activity. If the baseline data is not obtainable or if the baseline  
4 water quality has been altered by historical or upslope activity, then "natural condition"  
5 has the meaning given to "background condition" in AS 46.03.088.

6 \* **Sec. 4.** AS 46.03 is amended by adding new sections to read:

7 **Sec. 46.03.085. Water quality standards.** (a) In adopting and applying water  
8 quality standards, the department, consistent with 33 U.S.C. 1251 - 1376 (Clean Water  
9 Act),

10 (1) shall ensure that the minimum standards are sufficient to protect  
11 human health and propagation of fish and wildlife;

12 (2) shall consider reasonably available information on the background  
13 or natural condition of bodies of water, including the presence of naturally occurring  
14 pollutants, such as, but not limited to, arsenic;

15 (3) shall use scientific justification to develop water quality standards  
16 that can be reliably measured;

17 (4) may not require water discharged by a user to be of a higher quality  
18 than the background or natural condition of the water receiving the discharge; and

19 (5) shall provide procedures for permitting mixing zones in state bodies  
20 of water under regulations adopted by the department.

21 (b) In adopting mixing zone regulations under (a)(5) of this section and to  
22 ensure that a mixing zone is as small as practicable, the department shall limit the  
23 maximum size of a mixing zone, unless available evidence reasonably demonstrates  
24 that a larger mixing zone will adequately protect human health and the environment  
25 outside the mixing zone, as follows:

26 (1) for estuarine and marine waters, measured at mean lower low water,

27 (A) the cumulative lineal length of all mixing zones intersected  
28 on any given cross section of an estuary, inlet, cove, channel, or other marine  
29 waterway may not exceed 10 percent of the total length of that cross section;  
30 and

31 (B) the horizontal area allocated to mixing zones may not

1           exceed 10 percent of the surface area;

2                   (2) for lakes, the total horizontal area allocated to all mixing zones may  
3 not exceed 10 percent of the lake's surface area; and

4                   (3) for streams, rivers, or other flowing fresh waters, the length of a  
5 mixing zone may not extend beyond the location described in (A) or (B) of this  
6 paragraph, whichever is closer to the point of discharge:

7                           (A) the location that is two times the distance of the computed  
8 point of complete mixing, as determined using a standard river flow mixing  
9 model accepted by the department; or

10                           (B) the location where available evidence reasonably  
11 demonstrates that a public health hazard would occur.

12                   (c) Except when setting standards under AS 03.05.011(a) for shellfish growing  
13 areas, as defined in the national shellfish sanitation program manual of operations  
14 published by the Food and Drug Administration, the department may adopt a water  
15 quality standard or other regulation related to water quality that is more restrictive than  
16 applicable federal water quality criteria or regulations only after following the  
17 procedures in AS 46.03.087(b).

18                   (d) Notwithstanding AS 44.62.230, a person may submit a written request to  
19 the department to amend the state's water quality standards, criteria, or other  
20 regulations to incorporate a reduction in or elimination of a federal water quality  
21 standard, criteria, or other regulation. The request must state clearly and concisely the  
22 state and federal standard, criteria, or regulation in question and provide the department  
23 with the reasons and basis for the requested amendment. Within 90 days after  
24 receiving the request, or by another date mutually agreed on by the applicant and the  
25 department, the department shall either propose regulations to incorporate the reduction  
26 or elimination of the federal provision or initiate the procedure required under  
27 AS 46.03.087(b). If, following the procedure under AS 46.03.087(b), the department  
28 is unable to make the written findings required under AS 46.03.087(b)(3), the  
29 department shall propose regulations that amend the state's water quality standards to  
30 incorporate the reduction in or elimination of the federal water quality criteria or  
31 regulations.

1 (e) Except as otherwise provided in AS 46.03.087, the measurement of  
2 constituents other than sediment to determine whether a permittee is in compliance  
3 with permit limitations based on water quality shall be by methods approved in writing  
4 by the United States Environmental Protection Agency.

5 (f) Except as otherwise provided in AS 46.03.087, the measurement of  
6 sediment to determine whether a permittee is in compliance with permit limitations  
7 based on water quality shall be by the volumetric Imhoff cone method for settleable  
8 solids. However, this subsection may not be construed to limit the department's  
9 authority to adopt water quality criteria for total suspended solids to meet United States  
10 Environmental Protection Agency requirements.

11 **Sec. 46.03.087. Special procedures for certain water quality regulations.**

12 (a) The department may, after following the procedures in this section, adopt a

13 (1) water quality standard or permit limit that is more restrictive than  
14 the applicable federal water quality standard, criteria, or other regulation;

15 (2) water quality standard or permit limit for which there is no  
16 corresponding federal water quality standard, criteria, or other regulation; or

17 (3) regulation that allows the use of a method that is substantially  
18 equivalent to methods approved by the United States Environmental Protection Agency  
19 for the measurement of constituents to determine whether a permittee is in compliance  
20 with permit limitations related to water quality.

21 (b) Before adopting a standard or regulation governed by (a) of this section,  
22 the department shall

23 (1) make available to the public, at convenient locations, copies of the  
24 proposal and the findings of the department that describe the basis for the proposal;

25 (2) consider and prepare a written finding assessing the economic and  
26 technological feasibility of the proposal; and

27 (3) find in writing, as applicable, that

28 (A) biological, chemical, and physical conditions in the area of  
29 the state or at the particular site where the standard or regulation applies  
30 reasonably require the water quality standard, permit limits, or method of  
31 measurement to protect human health and welfare or propagation of fish and

1 wildlife; and

2 (B) biological, chemical, physical, and economic conditions are  
3 significantly different in that area of the state or at that particular site from  
4 those upon which the corresponding federal criteria or regulations are based.

5 **Sec. 46.03.088. Definitions.** In AS 46.03.085 - 46.03.087, and in regulations  
6 of the department that relate to water quality,

7 (1) "background condition" means the biological, chemical, and  
8 physical conditions of a body of water outside the area of influence of the discharge  
9 under consideration; when the department performs background sampling to determine  
10 a background condition during an enforcement action, the department shall measure  
11 conditions that are upslope or outside the area of influence of the discharge; if several  
12 discharges to a body of water exist and an enforcement action is being taken, the  
13 department's background sampling shall measure conditions immediately upslope from  
14 each discharge;

15 (2) "drinking water" means a body of water or a water supply from  
16 which the water is safe to drink in its natural state;

17 (3) "industrial use" means use of a water supply for fish processing,  
18 food processing, mining, placer mining, manufacturing, development, or production,  
19 including energy production;

20 (4) "natural condition" means a physical, chemical, biological, or  
21 radiological condition existing in a body of water before human, industrial, or  
22 commercial use caused an influence on, a discharge to, or addition of material to the  
23 water known at the time of enactment of the federal law known as the Federal Water  
24 Pollution Control Act Amendments of 1972.

25 \* **Sec. 5.** AS 46.03 is amended by adding a new section to read:

26 **Sec. 46.03.761. Administrative penalties.** (a) The department may assess  
27 an administrative penalty against a person who violates or causes or permits to be  
28 violated a provision of AS 46.03.720(b) or a term or condition of a regulation, order,  
29 permit, approval, or certificate of the department issued or adopted under  
30 AS 46.03.720(b).

31 (b) An administrative penalty assessed under this section may not exceed

1 \$1,000 a day for each violation if the affected public water supply system serves a  
2 population of more than 10,000 persons. An administrative penalty assessed under this  
3 section may not exceed \$750 a day for each violation if the affected public water  
4 supply system serves a population of 10,000 or fewer persons. Each provision, term,  
5 or condition violated is a separate and distinct violation. If a violation of a provision,  
6 term, or condition continues from day to day, each day is a separate violation.

7 (c) In determining the amount of a penalty assessed under this section, the  
8 department shall consider

9 (1) the effect of the violation on the public health or the environment;  
10 (2) reasonable costs incurred by the state in the detection, investigation,  
11 and attempted correction of the violation;

12 (3) the economic savings realized by the person by not complying with  
13 the requirement for which a violation is charged;

14 (4) any previous history of compliance or noncompliance with this  
15 chapter, AS 46.04, AS 46.09, and AS 46.14;

16 (5) the need to deter future violations;

17 (6) the extent and seriousness of the violation, including the potential  
18 for the violation to threaten public health or the environment;

19 (7) whether the person achieved compliance with the requirement  
20 violated within the shortest feasible time; and

21 (8) other factors considered relevant to the assessment that are adopted  
22 by the department in regulation.

23 (d) If a penalty is assessed under this section, the department shall provide the  
24 assessment notice to the person assessed by personal service or by certified mail,  
25 return receipt requested. The notice must inform the person of the amount of the  
26 proposed penalty and that the person has 30 days within which to file a notice with the  
27 department contesting the proposed penalty. If, within 30 days after the receipt of the  
28 notification issued by the department, the person fails to file a notice contesting the  
29 proposed penalty, the proposed penalty is considered a final order. The department  
30 may extend the time periods specified in this subsection for good cause.

31 (e) If a person files notice contesting a proposed penalty under (d) of this

1 section, the department shall afford an opportunity for a hearing in accordance with  
2 its adjudicatory hearing procedures. After an opportunity for a hearing, the department  
3 shall issue an order, based upon findings of fact, affirming, modifying, or rescinding  
4 the administrative penalty. The order is the final agency action on the penalty.

5 (f) A person against whom an administrative penalty is assessed may obtain  
6 judicial review of the administrative penalty by filing a notice of appeal in the superior  
7 court as provided by the Alaska Rules of Appellate Procedure. An order of the  
8 department under (e) of this section becomes final and is not subject to review by a  
9 court if a notice of appeal is not filed with the superior court within the period  
10 provided for by the Alaska Rules of Appellate Procedure.

11 (g) Action under this section by the department does not limit or otherwise  
12 affect the authority of the department to otherwise enforce this chapter, AS 46.04,  
13 AS 46.08, AS 46.09, AS 46.14, or regulations adopted under those statutes, or to  
14 recover damages, restoration expenses, investigation costs, court costs, attorney fees,  
15 or other necessary expenses. The court shall set off against a judicial civil assessment  
16 subsequently awarded under AS 46.03.760 an amount ordered to be paid under this  
17 section by the same person for the same violation.

18 (h) If a person fails to pay an administrative penalty assessed under this  
19 section after the penalty becomes final, the department may bring an action to collect  
20 the penalty. The amount of the penalty is not subject to review by the court in such  
21 an action.

22 (i) If the department prevails in a collection action brought under (h) of this  
23 section, the court shall order the person to pay full reasonable attorney fees and costs  
24 incurred by the department in the collection action.

25 \* **Sec. 6.** The provisions of AS 46.03.761(i), added by sec. 5 of this Act, have the effect  
26 of amending Rule 79 and Rule 82, Alaska Rules of Civil Procedure, by allowing the recovery  
27 of full reasonable attorney fees and costs in certain actions.

28 \* **Sec. 7.** AS 46.03.761(i), added by sec. 5 of this Act, takes effect only if sec. 6 of this  
29 Act receives the two-thirds majority vote of each house of the legislature required by art. IV,  
30 sec. 15, Constitution of the State of Alaska.

31 \* **Sec. 8.** TRANSITIONAL REVIEW OF WATER QUALITY REGULATIONS. (a) The

1 Department of Environmental Conservation shall, during the triennial review process of  
2 regulations that is required under 33 U.S.C. 1313(c) (Clean Water Act), review its water  
3 quality regulations that are in effect on the effective date of this Act in order to determine if  
4 they comply with federal requirements and are not more stringent than applicable federal  
5 regulations. If the review indicates that there are state regulations that are more stringent than  
6 applicable federal regulations, the department shall determine whether it could justify those  
7 regulations under the requirements of AS 46.03.087(b)(3), enacted by sec. 4 of this Act. If  
8 the department determines that it cannot meet the requirements of AS 46.03.087(b)(3), the  
9 department shall adopt the necessary revisions to the regulations. It is the legislature's intent  
10 that the department complete its review of all regulations governed by this subsection and its  
11 adoption of all necessary revisions required under this subsection within four years after the  
12 effective date of this section.

13 (b) The Department of Environmental Conservation shall, by January 31, 1999, and  
14 annually thereafter until all of the state water quality regulations in effect on the effective date  
15 of this Act are reviewed, prepare a written report on the status of the department's review and  
16 revisions required under (a) of this section. The department shall submit the report to the  
17 governor and notify the legislature that the report is available.

18 \* **Sec. 9.** TRANSITION: REGULATIONS FOR ADMINISTRATIVE PENALTIES. The  
19 Department of Environmental Conservation may immediately proceed to adopt regulations to  
20 implement changes made by sec. 5 of this Act. The regulations take effect under AS 44.62  
21 (Administrative Procedure Act), but not before the effective date of sec. 5 of this Act.

22 \* **Sec. 10.** Sections 1(b) and 5 of this Act take effect on the effective date of regulations  
23 adopted by the United States Environmental Protection Agency (EPA) implementing the state  
24 administrative penalty requirement for state primary enforcement authority under 42 U.S.C.  
25 300g-2 of the federal Safe Drinking Water Act or, if EPA determines that regulations are not  
26 necessary, on the date EPA requires under the authority of that statute that the state must have  
27 administrative penalty authority to maintain its state primacy over the federal drinking water  
28 program, whichever event occurs first in time. The commissioner of environmental  
29 conservation shall notify the lieutenant governor and the revisor of statutes of the effective  
30 date of the state administrative penalty authority requirement.

31 \* **Sec. 11.** Section 9 of this Act takes effect immediately under AS 01.10.070(c).