

SENATE BILL NO. 343

IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-SECOND LEGISLATURE - SECOND SESSION

BY THE SENATE RESOURCES COMMITTEE

Introduced: 2/27/02
Referred: Resources

A BILL

FOR AN ACT ENTITLED

1 **"An Act clarifying the term 'best technology' required for use in oil discharge**
2 **prevention and contingency plans; affirming existing Department of Environmental**
3 **Conservation regulations defining 'best technology' and oil discharge prevention and**
4 **contingency plans approved using those regulations; and providing for an effective**
5 **date."**

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

7 * **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section
8 to read:

9 LEGISLATIVE FINDINGS, INTENT, AND PURPOSE. (a) The legislature finds
10 that

11 (1) AS 46.04.030(a) - (c) provide that certain facilities may not operate
12 without first securing an oil discharge prevention and contingency plan that has been
13 approved by the Department of Environmental Conservation;

1 (2) AS 46.04.030(k) provides that the holder of an approved contingency plan
2 must meet certain response planning standards;

3 (3) AS 46.04.030(e) provides that the holder of a contingency plan must have
4 access to sufficient resources to protect environmentally sensitive areas and to meet the
5 requirements of AS 46.04.030(k), including the response planning standards;

6 (4) AS 46.04.030(e) also provides that the contingency plan must provide for
7 the use by the applicant of "the best technology that was available at the time the contingency
8 plan was submitted or renewed";

9 (5) under AS 46.04.030(j) and 46.04.070, the Department of Environmental
10 Conservation adopted regulations at 18 AAC 75.445(k), effective April 4, 1997, that
11 established a reasonable three-tiered process for defining what was meant by best available
12 technology;

13 (6) those regulations were developed using a negotiated rulemaking process
14 that occurred over a period of several years, involved a facilitator, and included numerous
15 stakeholders from throughout the state;

16 (7) more than 100 contingency plans have been issued under those
17 regulations;

18 (8) on February 1, 2002, the Alaska Supreme Court held that the regulation
19 defining best available technology, although having considerable theoretical merit, is contrary
20 to the court's interpretation of the legislature's intent in enacting AS 46.04.030(e) and (k), and
21 therefore invalidated 18 AAC 75.445(k)(1) and (2);

22 (9) the Alaska Supreme Court's recent ruling potentially jeopardizes the status
23 of existing contingency plans, the timely issuance of new contingency plans, and the timely
24 renewal of existing contingency plans;

25 (10) the Alaska Supreme Court's recent ruling has little or no positive benefit
26 to the environment or the state; the negative consequences of the ruling include

27 (A) the creation of uncertainty for all existing contingency plan
28 holders;

29 (B) a depletion of Department of Environmental Conservation
30 appropriations if the department conducts new reviews of existing contingency plans;

31 (C) substantial delay and uncertainty for persons seeking renewals of

1 existing contingency plans;

2 (D) delay and uncertainty for persons seeking new contingency plans;
3 and

4 (E) a negative effect on the development of the state's natural
5 resources.

6 (b) It is the intent of the legislature to

7 (1) clarify that the Department of Environmental Conservation's 1997
8 regulations meet the legislature's intent with respect to application of best available
9 technology through reliance on proven, appropriate, and reliable technology meeting the
10 response planning standards in AS 46.04.030(k) and the use of performance standards set in
11 regulation or other specific criteria for determining best available technology; and

12 (2) create a solution to the uncertainty caused by the Alaska Supreme Court's
13 recent ruling.

14 (c) The purpose of this Act is to overrule *Lakosh v. Alaska Department of*
15 *Environmental Conservation*, Op. No. 5531 (Supreme Court file number S-9619) (February 1,
16 2002), which invalidated parts of the Department of Environmental Conservation's best
17 available technology regulations.

18 * **Sec. 2.** AS 46.04.030(e) is amended to read:

19 (e) The department may attach reasonable terms and conditions to its approval
20 or modification of a contingency plan that the department determines are necessary to
21 ensure that the applicant for a contingency plan has access to sufficient resources to
22 protect environmentally sensitive areas and to contain, clean up, and mitigate potential
23 oil discharges from the facility or vessel as provided in (k) of this section, and to
24 ensure that the applicant complies with the contingency plan. If a contingency plan
25 submitted to the department for approval relies on the services of an oil spill primary
26 response action contractor, the department may not approve the contingency plan
27 unless the primary response action contractor is registered and approved under
28 AS 46.04.035. The contingency plan must provide for the use by the applicant of the
29 best technology that was available at the time the contingency plan was submitted or
30 renewed. **The department shall identify the prevention and response technologies**
31 **that are subject to a best available technology determination. The department**

1 **may find that technologies meeting the response planning standards in (k) of this**
 2 **section or a prevention performance standard established under AS 46.04.070 are**
 3 **the best available technology. The department may prepare findings and**
 4 **maintain a list of those technologies that are considered the best available.** The
 5 department may require an applicant or holder of an approved contingency plan to
 6 take steps necessary to demonstrate **the applicant's or holder's** [ITS] ability to carry
 7 out the contingency plan, including

8 (1) periodic training;

9 (2) response team exercises; and

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

12 * **Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to
 13 read:

14 TRANSITION: EXISTING BEST AVAILABLE TECHNOLOGY REGULATIONS.

15 The regulations relating to the determination of best available technology for use in oil
 16 contingency plans adopted by the Alaska Department of Environmental Conservation before
 17 the effective date of this section remain in effect as valid regulations implementing this Act.
 18 The Alaska Department of Environmental Conservation may administer and enforce those
 19 previously adopted regulations relating to the determination of best technology for use in
 20 contingency plans.

21 * **Sec. 4.** The uncodified law of the State of Alaska is amended by adding a new section to
 22 read:

23 TRANSITION: APPROVED OIL DISCHARGE PREVENTION AND
 24 CONTINGENCY PLANS. A contingency plan that, on the effective date of this Act, has
 25 been approved by the Department of Environmental Conservation under AS 46.04.030
 26 remains in effect, and the plan holder may continue to operate under that plan until the plan is
 27 modified or revoked under AS 46.04.030(f) or expires, whichever first occurs.

28 * **Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to
 29 read:

30 RETROACTIVITY. The amendment to AS 46.04.030(e) made by sec. 2 of this Act is
 31 retroactive to April 4, 1997.

1 * **Sec. 6.** This Act takes effect immediately under AS 01.10.070(c).