

HOUSE BILL NO. 322

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTIETH LEGISLATURE - SECOND SESSION

BY THE HOUSE RESOURCES COMMITTEE

Introduced: 1/31/18

Referred: Resources, Finance

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to penalties for discharges of oil and other pollution violations; relating**
2 **to oil discharge prevention and contingency plans for commercial motor vehicles**
3 **transporting crude oil; and providing for an effective date."**

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

5 * **Section 1.** AS 46.03.758(a) is amended to read:

6 (a) The legislature finds that

7 (1) [RECENT INFORMATION DISCLOSES THAT] the discharge of
8 oil may cause significant short and long-term damage to the state's environment; even
9 minute quantities of oil released to the environment may cause high mortalities among
10 larval and juvenile forms of important commercial species, may affect salmon
11 migration patterns, and may otherwise degrade and diminish the renewable resources
12 of the state;

13 (2) the exact nature and extent of oil pollution can be neither
14 documented with certainty nor precisely quantified on a spill-by-spill basis; however,

1 in light of the magnitude of harm **that** [WHICH] may be caused by oil discharges, and
 2 the vital importance of commercial, sport, and subsistence fishing, tourism, and the
 3 state's natural abundance and beauty to the economic future of the state and its quality
 4 of life, it is the judgment of the legislature that substantial civil penalties should be
 5 imposed for the discharge of oil in order to provide a meaningful incentive for the safe
 6 handling of oil and to **ensure** [INSURE] that the public does not bear substantial
 7 losses from oil pollution for which, because of its subtle, long-term, or unquantifiable
 8 nature, compensation would not otherwise be received; and

9 (3) the handling of oil in large quantities is a hazardous undertaking
 10 that poses a significant threat to the economy and environment of the state, which can
 11 be substantially reduced only by the taking of rigorous safety precautions involving
 12 considerable expense; conversely, persons handling oil in smaller amounts pose a
 13 correspondingly lower risk to the economy and environment of the state, and are
 14 capable of safe oil handling practices at correspondingly lower costs; in order to
 15 provide an incentive that is effective, [BUT NOT PUNITIVE,] it is necessary and
 16 appropriate that the assessment of [CIVIL] penalties for discharges of small quantities
 17 of oil be left for case-by-case [JUDICIAL] determination, while ensuring, through the
 18 penalty provisions of this section, that the handling of oil in large quantities occurs in
 19 a manner that will not impair the renewable resources of the state.

20 * **Sec. 2.** AS 46.03.758(b) is amended to read:

21 (b) **The** [NO LATER THAN THE 10TH DAY AFTER THE CONVENING
 22 OF THE SECOND SESSION OF THE TENTH ALASKA LEGISLATURE, THE]
 23 department shall **establish in** [SUBMIT TO THE LEGISLATURE] regulations
 24 [ESTABLISHING] the following schedule of fixed penalties for discharges of oil:

25 (1) subject to (2) of this subsection, the penalties for the following
 26 categories of receiving environments may not exceed

27 (A) **\$20** [\$10] per gallon of oil **that** [WHICH] enters an
 28 anadromous stream or other freshwater environment with significant aquatic
 29 resources;

30 (B) **\$5** [\$2.50] per gallon of oil **that** [WHICH] enters an
 31 estuarine, intertidal or confined saltwater environment; and

(C) **\$2** [\$1] per gallon of oil **that** [WHICH] enters an unconfined saltwater environment, public land or freshwater environment without significant aquatic resources;

(2) for discharges of oil that are caused by the gross negligence or intentional act of the discharger, or when the court finds that the discharger did not take reasonable measures to contain and clean up the discharged oil, the penalty shall be determined by multiplying the penalty established under (1) of this subsection by a factor of five.

* **Sec. 3.** AS 46.03.758 is amended by adding a new subsection to read:

(m) The department shall annually increase the amounts of the civil penalties authorized in (b) of this section by a percentage equal to the percentage of increase in all items of the Consumer Price Index for all urban consumers for Anchorage, Alaska. The index for January of 2018 is the reference base index.

* **Sec. 4.** AS 46.03.759(a) is amended to read:

(a) A person who is found to be liable under any other state law for an unpermitted discharge of crude oil in excess of 18,000 gallons is, in addition to liability for any other penalties or for damages or the cost of containment and cleanup, liable to the state in a civil action for a civil penalty, up to a maximum of \$500,000,000, in the amount of

(1) **\$16** [\$8] per gallon of crude oil discharged for the first 420,000 gallons discharged; and

(2) **\$25** [\$12.50] per gallon of crude oil discharged for amounts discharged in excess of 420,000 gallons.

* **Sec. 5.** AS 46.03.759 is amended by adding new subsections to read:

(h) For the purpose of determining the volume of discharged crude oil under this section, the department shall include the produced water, if any, that was mixed with the discharged crude oil at the time of the discharge.

(i) The department shall annually increase the amounts of the civil penalties authorized in (a) of this section by a percentage equal to the percentage of increase in all items of the Consumer Price Index for all urban consumers for Anchorage, Alaska. The index for January of 2018 is the reference base index.

1 * **Sec. 6.** AS 46.03.760(a) is amended to read:

2 (a) A person who violates or causes or permits to be violated a provision of
3 this chapter other than AS 46.03.250 - 46.03.313, or a provision of AS 46.04 or
4 AS 46.09, or a regulation, a lawful order of the department, or a permit, approval, or
5 acceptance, or term or condition of a permit, approval, or acceptance issued under this
6 chapter or AS 46.04 or AS 46.09 is liable, in a civil action, to the state for a sum to be
7 assessed by the court of not less than \$1,000 [\$500] nor more than \$200,000
8 [\$100,000] for the initial violation, nor more than \$25,000 [\$5,000] for each day after
9 that on which the violation continues, and that shall reflect, when applicable,

10 (1) reasonable compensation in the nature of liquidated damages for
11 any adverse environmental effects caused by the violation, which shall be determined
12 by the court according to the toxicity, degradability, and dispersal characteristics of
13 the substance discharged, the sensitivity of the receiving environment, and the degree
14 to which the discharge degrades existing environmental quality;

15 (2) reasonable costs incurred by the state in detection, investigation,
16 and attempted correction of the violation;

17 (3) the economic savings realized by the person in not complying with
18 the requirement for which a violation is charged; and

19 (4) the need for an enhanced civil penalty to deter future
20 noncompliance.

21 * **Sec. 7.** AS 46.03.760(d) is amended to read:

22 (d) In addition to liability under (a) and (c) [(a) - (c)] of this section, a person
23 who violates or causes or permits to be violated a provision of AS 46.03.740 -
24 46.03.750 is liable to the state, in a civil action brought under AS 46.03.822, for the
25 full amount of actual damages caused to the state by the violation, including

26 (1) direct and indirect costs associated with the abatement,
27 containment, or removal of the pollutant;

28 (2) restoration of the environment to its former state;

29 (3) amounts paid as grants under AS 29.60.510 - 29.60.599 and as
30 emergency first response advances and reimbursements under AS 46.08.070(c); and

31 (4) all incidental administrative costs.

1 * **Sec. 8.** AS 46.03.760(e) is amended to read:

2 (e) A person who violates or causes or permits to be violated a provision of
 3 AS 46.03.250 - 46.03.313, 46.03.460 - 46.03.475, AS 46.14, or a regulation, a lawful
 4 order of the department, or a permit, approval, or acceptance, or term or condition of a
 5 permit, approval, or acceptance issued under AS 46.03.250 - 46.03.313, 46.03.460 -
 6 46.03.475, AS 46.14, or under the program authorized by AS 46.03.020(12), is liable,
 7 in a civil action, to the state for a sum to be assessed by the court of not less than
 8 **\$1,000** [\$500] nor more than **\$200,000** [\$100,000] for the initial violation, nor more
 9 than **\$25,000** [\$10,000] for each day after that on which the violation continues, and
 10 that shall reflect, when applicable,

11 (1) reasonable compensation in the nature of liquidated damages for
 12 any adverse environmental effects caused by the violation, that shall be determined by
 13 the court according to the toxicity, degradability and dispersal characteristics of the
 14 substance discharged, the sensitivity of the receiving environment, and the degree to
 15 which the discharge degrades existing environmental quality; for a violation relating to
 16 AS 46.14, the court, in making its determination under this paragraph, shall also
 17 consider the degree to which the discharge causes harm to persons or property; for a
 18 violation of AS 46.03.463, the court, in making its determination under this paragraph,
 19 shall also consider the volume of the graywater, sewage, or other wastewater
 20 discharged; this paragraph may not be construed to limit the right of parties other than
 21 the state to recover for personal injuries or damage to their property;

22 (2) reasonable costs incurred by the state in detection, investigation,
 23 and attempted correction of the violation;

24 (3) the economic savings realized by the person in not complying with
 25 the requirement for which a violation is charged; and

26 (4) the need for an enhanced civil penalty to deter future
 27 noncompliance.

28 * **Sec. 9.** AS 46.03.760(f) is amended to read:

29 (f) An owner, agent, employee, or operator of a commercial passenger vessel,
 30 as defined in AS 43.52.295, who falsifies a registration or report required by
 31 AS 46.03.460 or 46.03.475 or who violates or causes or permits to be violated a

provision of AS 46.03.250 - 46.03.314, 46.03.460 - 46.03.490, AS 46.14, or a regulation, a lawful order of the department, or a permit, approval, or acceptance, or term or condition of a permit, approval, or acceptance issued under AS 46.03.250 - 46.03.314, 46.03.460 - 46.03.490, or AS 46.14 is liable, in a civil action, to the state for a sum to be assessed by the court of not less than **\$10,000** [\$5,000] nor more than **\$200,000** [\$100,000] for the initial violation, nor more than **\$25,000** [\$10,000] for each day after that on which the violation continues, and that shall reflect, when applicable,

(1) reasonable compensation in the nature of liquidated damages for any adverse environmental effects caused by the violation, that shall be determined by the court according to the toxicity, degradability, and dispersal characteristics of the substance discharged, the sensitivity of the receiving environment, and the degree to which the discharge degrades existing environmental quality; for a violation relating to AS 46.14, the court, in making its determination under this paragraph, shall also consider the degree to which the discharge causes harm to persons or property; this paragraph may not be construed to limit the right of parties other than the state to recover for personal injuries or damage to their property;

(2) reasonable costs incurred by the state in detection, investigation, and attempted correction of the violation;

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

(4) the need for an enhanced civil penalty to deter future noncompliance.

* **Sec. 10.** AS 46.03.760(g) is amended to read:

(g) As used in this section, "economic savings" means **the economic benefit of noncompliance** [THAT SUM WHICH A PERSON WOULD BE REQUIRED TO EXPEND FOR THE PLANNING, ACQUISITION, SITING, CONSTRUCTION, INSTALLATION AND OPERATION OF FACILITIES NECESSARY TO EFFECT COMPLIANCE] with the standard violated. **When determining an "economic savings," the court may consider**

(1) deferred and avoided costs of compliance with the standard

violated;

(2) a competitive advantage gained by noncompliance with the standard violated; and

(3) income derived as a result of noncompliance with the standard violated from operations that were not authorized or permitted.

* **Sec. 11.** AS 46.03.760 is amended by adding new subsections to read:

(h) When assessing the need for an enhanced civil penalty to deter future noncompliance under this section, the court may take into consideration

(1) the seriousness of the violation;

(2) the degree of culpability of the person;

(3) the history of previous violations of the person;

(4) other penalties assessed for the same violation;

(5) good faith efforts made by the person to comply with applicable requirements and to minimize or mitigate the effects of the violations;

(6) the economic effect of the violation on the person; and

(7) other factors as justice may require.

(i) The department shall annually increase the daily civil penalty caps in (a), (e), and (f) of this section by a percentage equal to the percentage of increase in all items of the Consumer Price Index for all urban consumers for Anchorage, Alaska. The index for January of 2018 is the reference base index.

* **Sec. 12.** AS 46.03 is amended by adding a new section to read:

Sec. 46.03.762. Administrative penalties for discharges of oil and crude oil.

(a) In addition to the actions available under AS 46.03.758 - 46.03.760, the department may assess an administrative penalty against a person who causes or permits a serious discharge or repeat discharges of oil not permitted under applicable state or federal law.

(b) An administrative penalty assessed under this section may not be less than \$1,000 nor more than \$10,000 for the initial violation, and may not exceed \$24 a gallon of oil discharged. When assessing a penalty under this section, the department shall consider

(1) the effect of the discharge on the public health or the environment;

1 (2) reasonable costs incurred by the state in the detection,
2 investigation, and attempted correction of the discharge;

3 (3) any previous history of compliance or noncompliance by the
4 person with this chapter, AS 46.04, AS 46.09, and AS 46.14;

5 (4) the need to deter future discharges; and

6 (5) the extent and seriousness of the discharge, including the potential
7 for the discharge to threaten public health or the environment.

8 (c) If a person fails to pay an administrative penalty assessed under this
9 section, the department may bring an action to collect the penalty. The amount of the
10 penalty is not subject to review by the court in an action to collect the penalty
11 described in this section.

12 (d) In a collection action under (c) of this section, the court shall award the
13 prevailing party full reasonable attorney fees and costs incurred in the collection
14 action.

15 (e) Action under this section by the department does not limit or otherwise
16 affect the authority of the department to otherwise enforce this chapter, AS 46.04,
17 AS 46.08, AS 46.09, AS 46.14, or regulations adopted under those statutes, or to
18 recover damages, restoration expenses, investigation costs, court costs, attorney fees,
19 or other necessary expenses. The court shall set off against a judicial civil assessment
20 subsequently awarded under AS 46.03.758, 46.03.759, or 46.03.760 an amount
21 ordered to be paid under this section by the same person for the same discharge.

22 (f) For the purpose of determining the volume of discharged oil under this
23 section, the department shall include the produced water, if any, that was mixed with
24 the discharged oil at the time of the discharge.

25 (g) The department shall annually increase the amounts of the administrative
26 penalties authorized in (b) of this section by a percentage equal to the percentage of
27 increase in all items of the Consumer Price Index for all urban consumers for
28 Anchorage, Alaska. The index for January of 2018 is the reference base index.

29 (h) In this section,

30 (1) "discharge" means entry of oil into or on the water or public land of
31 the state, regardless of causation, except discharges into an enclosed and impervious

1 oil spill containment area;

2 (2) "oil" means crude oil, petroleum, and any substance refined from
3 petroleum.

4 * **Sec. 13.** AS 46.04.030(d) is amended to read:

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

11 * **Sec. 14.** AS 46.04.030(e) is amended to read:

12 (e) The department may attach reasonable terms and conditions to its approval
13 or modification of a contingency plan that the department determines are necessary to
14 ensure that the applicant for a contingency plan has access to sufficient resources to
15 protect environmentally sensitive areas and to contain, clean up, and mitigate potential
16 oil discharges from the facility, **commercial motor vehicle**, or vessel as provided in
17 (k) of this section, and to ensure that the applicant complies with the contingency plan.
18 If a contingency plan submitted to the department for approval relies on the services of
19 an oil spill primary response action contractor, the department may not approve the
20 contingency plan unless the primary response action contractor is registered and
21 approved under AS 46.04.035. The contingency plan must provide for the use by the
22 applicant of the best technology that was available at the time the contingency plan
23 was submitted or renewed. The department shall identify the prevention and response
24 technologies that are subject to a best available technology determination. The
25 department may find that any technology meeting the response planning standards in
26 (k) of this section or a prevention performance standard established under
27 AS 46.04.070 is the best available technology. The department may prepare findings
28 and maintain a list of those technologies that are considered the best available. The
29 department may require an applicant or holder of an approved contingency plan to
30 take steps necessary to demonstrate the applicant's or holder's ability to carry out the
31 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.

* **Sec. 15.** AS 46.04.030(f) is amended to read:

(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, commercial motor vehicle, 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.

* **Sec. 16.** AS 46.04.030(k) is amended to read:

(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

1 this paragraph so that the contingency plan must be designed for a response that is
 2 greater in amount than the capacity of the largest oil storage tank at the facility;

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

6 (3) for a discharge of crude oil from a tank vessel or oil barge, the plan
 7 holder shall plan to be able to contain or control, and clean up a realistic maximum oil
 8 discharge as provided in (A), (B), and (C) of this paragraph:

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

13 (B) for tank vessels and oil barges having a cargo volume of
 14 500,000 barrels or more, the plan holder shall maintain at a minimum in its
 15 region of operation, equipment, personnel, and other resources sufficient to
 16 contain or control, and clean up a 300,000 barrel discharge within 72 hours;

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

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

31 (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;

(6) for a discharge from a commercial motor vehicle, 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 compartment of the vehicle or the realistic maximum oil discharge, whichever is greater, within 48 hours.

* **Sec. 17.** AS 46.04.030(r) is amended by adding a new paragraph to read:

(5) "commercial motor vehicle" means a motor vehicle primarily used for the commercial transportation of crude oil.

* **Sec. 18.** AS 46.04.030 is amended by adding a new subsection to read:

(s) A person may not operate a commercial motor vehicle transporting crude oil on a highway or road maintained by the state, unless the department has approved an oil discharge prevention and contingency plan for the commercial motor vehicle and the person is in compliance with the plan.

* **Sec. 19.** AS 46.03.758(c) and 46.03.760(b) are repealed.

* **Sec. 20.** The uncodified law of the State of Alaska is amended by adding a new section to read:

TRANSITION: REGULATIONS. The Department of Environmental Conservation may adopt regulations necessary to implement the changes made by this Act. The regulations take effect under AS 44.62 (Administrative Procedure Act), but not before January 1, 2019.

* **Sec. 21.** Section 20 of this Act takes effect immediately under AS 01.10.070(c).

* **Sec. 22.** Except as provided in sec. 21 of this Act, this Act takes effect January 1, 2019.