

HOUSE BILL NO. 33

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTY-SECOND LEGISLATURE - FIRST SESSION

BY REPRESENTATIVE JOSEPHSON

Introduced: 2/18/21

Referred: Resources, Finance

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to penalties for discharges of oil and other pollution violations; and**
2 **providing for an effective date."**

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

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

5 (a) The legislature finds that

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

12 (2) the exact nature and extent of oil pollution can be neither
13 documented with certainty nor precisely quantified on a spill-by-spill basis; however,
14 in light of the magnitude of harm that [WHICH] may be caused by oil discharges, and

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

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

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

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

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

26 (A) **\$40** [\$10] per gallon of oil **that** [WHICH] enters an
 27 anadromous stream or other freshwater environment with significant aquatic
 28 resources;

29 (B) **\$10** [\$2.50] per gallon of oil **that** [WHICH] enters an
 30 estuarine, intertidal or confined saltwater environment; and

31 (C) **\$4** [\$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, every 10 years, 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 2021 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, every 10 years, 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 2021 is the reference base index.

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

(a) A person who violates or causes or permits to be violated a provision of this chapter other than AS 46.03.250 - 46.03.313, or a provision of AS 46.04 or AS 46.09, 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 this chapter or AS 46.04 or AS 46.09 is liable, in a civil action, to the state for a sum to be assessed by the court of not less than **\$2,000** [\$500] nor more than **\$400,000** [\$100,000] for the initial violation, nor more than **\$25,000** [\$5,000] 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, which 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;

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

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

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

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

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

(4) all incidental administrative costs.

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

(e) A person who violates or causes or permits to be violated a provision of AS 46.03.250 - 46.03.313, 46.03.460 - 46.03.475, 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 - 46.03.313, 46.03.460 - 46.03.475, AS 46.14, or under the program authorized by AS 46.03.020(12), is liable, in a civil action, to the state for a sum to be assessed by the court of not less than \$1,000 [\$500] 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; for a violation of AS 46.03.463, the court, in making its determination under this paragraph, shall also consider the volume of the graywater, sewage, or other wastewater discharged; 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. 9.** AS 46.03.760(f) is amended to read:

(f) An owner, agent, employee, or operator of a commercial passenger vessel, as defined in AS 43.52.295, who falsifies a registration or report required by 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

1 regulation, a lawful order of the department, or a permit, approval, or acceptance, or
 2 term or condition of a permit, approval, or acceptance issued under AS 46.03.250 -
 3 46.03.314, 46.03.460 - 46.03.490, or AS 46.14 is liable, in a civil action, to the state
 4 for a sum to be assessed by the court of not less than \$10,000 [\$5,000] nor more than
 5 \$200,000 [\$100,000] for the initial violation, nor more than \$25,000 [\$10,000] for
 6 each day after that on which the violation continues, and that shall reflect, when
 7 applicable,

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

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

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

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

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

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

30 (1) deferred and avoided costs of compliance with the standard
 31 violated;

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

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

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

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

8 (1) the seriousness of the violation;

9 (2) the degree of culpability of the person;

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

11 (4) other penalties assessed for the same violation;

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

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

15 (7) other factors as justice may require.

16 (i) The department shall, every 10 years, increase the daily civil penalty caps
 17 in (a), (e), and (f) of this section by a percentage equal to the percentage of increase in
 18 all items of the Consumer Price Index for all urban consumers for Anchorage, Alaska.
 19 The index for January of 2021 is the reference base index.

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

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

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

26 (b) An administrative penalty assessed under this section may not be less than
 27 \$500 nor more than \$10,000 for each violation. When assessing a penalty under this
 28 section, the department shall consider

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

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

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

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

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

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

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

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

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

23 (g) The department shall, every 10 years, increase the amounts of the
 24 administrative penalties authorized in (b) of this section by a percentage equal to the
 25 percentage of increase in all items of the Consumer Price Index for all urban
 26 consumers for Anchorage, Alaska. The index for January of 2021 is the reference base
 27 index.

28 (h) In this section,

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

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

3 * **Sec. 13.** AS 46.03.900 is amended by adding a new paragraph to read:

4 (38) "produced water" means water that is the byproduct of the
5 exploration, extraction, development, production, refining, processing, or disposal of
6 energy-related products.

7 * **Sec. 14.** AS 46.03.758(c) and 46.03.760(b) are repealed.

8 * **Sec. 15.** The uncodified law of the State of Alaska is amended by adding a new section to
9 read:

10 TRANSITION: REGULATIONS. The Department of Environmental Conservation
11 may adopt regulations necessary to implement the changes made by this Act. The regulations
12 take effect under AS 44.62 (Administrative Procedure Act), but not before the effective date
13 of the law implemented by the regulation.

14 * **Sec. 16.** Section 15 of this Act takes effect immediately under AS 01.10.070(c).

15 * **Sec. 17.** Except as provided in sec. 16 of this Act, this Act takes effect January 1, 2022.