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# SB 343



Regional Citizens' Advisory Council / "Citizens promoting environmentally safe operation of the Alyeska terminal and associated tankers."

In Anchorage: 3709 Spenard Road / Anchorage, Alaska 99503 / (907) 277-7222 / FAX (907) 277-4523

In Valdez: P.O. Box 3089 / 339 Hazelet Avenue / Valdez, Alaska 99686 / (907) 835-5957 / FAX (907) 835-5926

## MEMBERS

Alaska State  
Chamber of  
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Chugach Alaska  
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City of Homer

City of Kodiak

City of Seldovia

City of Seward

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Fishermen United

Kcnoi Peninsula  
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Borough

Kodiak Village Mayors  
Association

Oil Spill Region  
Environmental  
Coalition

Prince William Sound  
Aquaculture  
Corporation

## Suggested Changes to Senate Bill 343

### In the Legislature of the State of Alaska Twenty-Second Legislature – Second Session

The Prince William Sound Regional Citizens' Advisory Council suggests that such language could be inserted into Senate Bill 343 at 1(a)(5) by changing it to read as follows (new language in boldface):

(5) under AS 46.04.030(j) and 46.04.070, the Department of Environmental Conservation adopted regulations at 18 AAC 75.44.001, effective April 4, 1997, that established a reasonable three-tiered process, including periodic **Best Available Technology Conferences**, for defining what was meant by best available technology;



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MEMBERS

Alaska State  
Chamber of  
Commerce

March 25, 2002

Alaska Wilderness  
Recreation & Tourism  
Association

Rep. Drew Scalzi  
House Resources Committee  
Alaska House  
State Capitol (MS 3100)  
Juneau, Alaska 99801-1182

Chugach Alaska  
Corporation

City of Cordova

City of Homer

SUBJECT: Senate Bill 343

City of Kodiak

Dear Representative Scalzi:

City of Seldovia

I am writing to present the Prince William Sound Regional Citizens' Advisory Council's position on Senate Bill 343 (SB343), which comes before your committee this week. PWSRCAC is very concerned that every effort be made to ensure that SB343 does not weaken contingency planning requirements.

City of Seward

City of Valdez

City of Whittier

In particular, we wish to draw your attention to the crucial role of the Best Available Technology conference mandated by the regulations referenced in Section 1(a)(5)-(6) of the bill. As noted in this section, these regulations were developed through a negotiated rulemaking process involving numerous stakeholders, including this organization.

Community of  
Chena Bay

Community of  
Totitlek

Cordova District  
Fishermen United

The Best Available Technology Conference, with industry support, was included in this regulatory package because it sets up a multi-stakeholder process (a process that includes industry) for identifying Best Available Technology in an orderly way. Absent such a formal mechanism, the Best Available Technology process could become chaotic and disorganized, possibly leading to more litigation comparable to *Lakosh v. Alaska Department of Environmental Conservation*.

Kenai Peninsula  
Borough

Kodiak Island  
Borough

Kodiak Village Mayors  
Association

In light of the important role the Best Available Technology Conference plays in this regulatory package, we want to recommend that your committee amend SB343 by explicitly noting that the regulations require this conference.

Oil Spill Region  
Environmental  
Coalition

Prince William Sound  
Aquaculture  
Corporation

We suggest that such language could be inserted at 1(a)(5) by changing it to read as follows (new language in boldface):

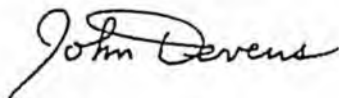
(5) under AS 46.04.030(j) and 46.04.070, the Department of Environmental Conservation adopted regulations at 18 AAC 75.445(k), effective April 4, 1997, that established a reasonable three-tiered process, **including periodic Best Available Technology Conferences**, for defining what was meant by best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

The first of these conferences is now due under the regulations, and DEC has requested a \$250,000 appropriation for that purpose in its CIP budget. We are aware that cost is a sensitive issue in the present budget climate, and so want to assure your committee that this appropriation will not draw from the general fund, or worsen the fiscal gap. The Best Available Technology Conference will be financed out of the Prevention Mitigation Account of the Oil and Hazardous Substances Release Prevention Response Fund (also known as the "470 Fund"). This is a dedicated fund financed by a per-barrel tax on crude oil that is separate and segregated from the General Fund.

Attached is a letter that we received on March 20, 2002 from the Alaska Oil and Gas Association expressing their support of conducting a Best Available Technology conference every five years as contained within the current regulations. Also attached are our proposed changes to SB343 as outlined in this letter.

Thank you for considering our views. Please do not hesitate to contact me if you have any questions or if I can provide additional information on our position regarding SB343.

Sincerely,



John S. Devens, Ph.D.  
Executive Director

cc: Alaska House Resources Committee  
PWSRCAC Board of Directors

THE  
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*"The mission of the Council is to represent the citizens of Cook Inlet in promoting environmentally safe marine transportation and oil facility operations in Cook Inlet."*

**Members**

*Alaska State Chamber of Commerce*

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*Recreational Groups*

*Aquaculture Associations*

*Fishing Organizations*

*City of Kodiak*

*City of Kenai*

*City of Seldovia*

*City of Homer*

*Kodiak Island Borough*

*Kenai Peninsula Borough*

*Municipality of Anchorage*

March 4, 2002

Senator John Torgerson  
State Capital, Room 427  
Juneau, Alaska 99801-1182

Dear Senator Torgerson:

As you know, the mission of the Cook Inlet Regional Citizens Advisory Council (CIRCAC) is to represent the citizens of Cook Inlet in promoting environmentally safe marine transportation and oil facility operations in Cook Inlet.

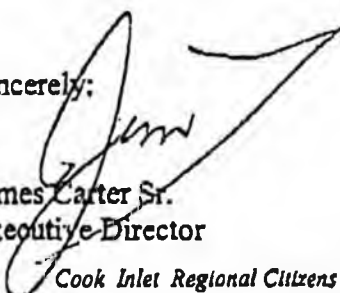
We are writing you today to voice our support for Senate Bill 343. This legislation is intended to overturn the recent Supreme court decision regarding *Lakosh v. ADEC*, in which it said that Alaska statute AS 46.04.030(e) requires that the ADEC do individualized assessments of oil spill contingency plans to insure that each plan incorporates the best technology then available.

We understand that the bill's purpose is not to do away with the requirement of Best Available Technology in spill contingency plans, but is to give ADEC the flexibility to prescribe what technology meets that standard without having to review each and every contingency plan's detailed lists of equipment and technology.

We do not disagree with the bill's purpose. We do however have the following concern: We believe it is essential that the bill recognize that in order to carry out its duty to designate Best Available Technology, ADEC must have the tools to keep up with this changing field. The idea of a periodic conference in cooperation with industry and others at which a consensus would develop on BAT, was incorporated in the statutes and regulations now in place and to date has not been funded by the legislature. Such a conference was to take place in FY 2002. The Legislature will still have to separately authorize expenditures for such a conference in FY 2003. As you recall, there is a component in the Governor's CIP budget for that purpose, and we continue to urge its support.

Please call on us for any help we can give in this matter.

Sincerely:

  
James Carter Sr.  
Executive Director

Cook Inlet Regional Citizens Advisory Council • 910 Highland Avenue, Kenai, AK 99611-8033  
Phone: (907) 283-7222 • Fax (907) 283-6102

# FISCAL NOTE

STATE OF ALASKA  
2002 LEGISLATIVE SESSION

Fiscal Note Number: 1  
Bill Version: SB 343  
(S) Publish Date: 3/6/02

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Environmental Conservation  
Title: An Act clarifying the term "best technology" required BRU Spill Prevention and Response  
for use in oil discharge prevention and contingency plans ... Component Industry Preparedness and  
Sponsor Senate Resources Pipeline Program  
Requester Senate Resources Component No. 1922

### Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ( )						
------------------------	--	--	--	--	--	--

### FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
1052 OHSRPR Prevention Account						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

### POSITIONS

Full-time	0	0	0	0	0	0
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

### ANALYSIS: (Attach a separate page if necessary)

Current statute states that an oil discharge prevention and contingency plan (c-plan) must provide for the use of the best technology that was available at the time the contingency plan was submitted or renewed. DEC developed regulations for determining whether a c-plan meets this "best available technology" (BAT) requirement. The regulations were developed through a negotiated rulemaking process that included stakeholders from around the state representing a broad range of interests. On Feb. 1, 2002, the Alaska Supreme Court determined that, while the regulations had "considerable theoretical merit," the statute as currently written does not allow DEC to rely on response planning standards or performance standards in determining whether these technologies meet the BAT requirement. This bill changes the statute to validate DEC's current approach in considering certain technologies that are proven, appropriate and reliable in meeting State standards for best available technology and therefore there will be no fiscal impact.

Prepared by: Larry Dietrick Phone 465-5250  
Division: Spill Prevention and Response Date/Time 2/28/02 2:36 PM  
Approved by: Kurt Fredriksson Deputy Commissioner Date 2/28/2002  
Agency: Department of Environmental Conservation

# ALASKA STATE LEGISLATURE

Chairman: Senator John Torgerson  
Vice Chair: Senator Gary Wilken  
Senator Rick Halford  
Senator Ben Stevens  
Senator Robin Taylor  
Senator Kim Elton  
Senator Georgianna Lincoln



Official Business

State Capitol, Room 427  
Juneau, AK 99801  
Phone: (907) 465-4907  
Fax: (907) 465-4779

## SENATE RESOURCES COMMITTEE

### Sponsor Statement

SB 343

### "Best Available Technology: Discharge Plan"

The State of Alaska is widely recognized as having one of the most comprehensive oil spill prevention and response requirements in the world. This recognition is due to actions taken by the Legislature and the ADEC to ensure that companies operating in Alaska have taken the appropriate steps to prevent discharges and have access to the resources necessary to rapidly respond and clean up discharges should they occur.

Alaska law and regulation require vessels and facilities to have oil discharge prevention and contingency plans approved by ADEC. Plan holders are required to utilize best available technology as part of these plans. The regulations governing determinations of "best available technology" were developed through a comprehensive stakeholder process, and were adopted by ADEC in 1997. Since that time, over 100 C Plans have been approved, implementing the BAT requirement.

As a result of these requirements and industry efforts, significant advances have been made in technologies utilized and in place in Alaska. The regulations have served Alaska well in the five-year period they have been in effect.

On February 1, 2002, the Alaska Supreme Court struck down two provisions in the regulations (18 AAC 75.445(k)(1) and (2)), ruling that these provisions were inconsistent with that Court's interpretation of the Legislature's intent. At the same time, the Court emphasized the limited scope of its ruling and acknowledged that the Legislature had vested ADEC with broad discretion to define BAT.

This ruling jeopardizes timely issuance of new plans and timely renewals of existing plans. Immediate action by the Legislature is needed to address this ruling to ensure continued plan administration and preclude negative consequences on development of the state's resources. SB 343 affirms that the 1997 regulations and the three-tiered process encompassed in them do, in fact, meet Legislative intent with regard to BAT and are consistent with the statute. The bill also affirms the validity of the regulations and the C Plans.

DEC Home | Air | Water | Land | Food | Oil, chemicals | Public Facilities, businesses | Pollution Prevention

Alaska Department of  
**Environmental Conservation****Spill Prevention and Response Division****Industry Preparedness and Pipeline Program**

Revised 3/11/02

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form](#)[Statement of  
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Alaska)

## About Contingency Plans

Under Alaska law the oil industry must prepare contingency plans for terminals and distributors of crude and refined oil products, marine tankers and barges that transport crude and refined oil products, and oil pipelines and onshore and offshore oil exploration and production facilities. A "c-plan" is officially called an "Oil Discharge Prevention and Contingency Plan" because it embraces actions to prevent an oil spill and, in the event of a spill, describes resources to clean up a spill.

It is common knowledge that the ability to clean up a spill and avoid impacts to the environment ranges from poor to moderately good depending upon many variables. Only some of these variables are practicable to control through human action and by pre-planning. Alaska law is arguably the most demanding in the world with respect to the level of cleanup performance expected. Many states and nations do not require the spill prevention actions embodied in Alaska law.

Most important to DEC in reviewing and approving a prevention and contingency plan is an assurance that the plan is not just a book that sits on the shelf -- instead, it needs to become part of the company's daily operations. A plan must strike a balance between being first a field-friendly, useable document -- a useable guide in those first hectic hours when a spill happens -- and second, a document that is complete enough to satisfy the legal requirements.

The legal requirements include the assurances that industry uses prudent practices and best available technology to keep the oil in its container, and the commitment of people and resources for a rapid and effective response should spill day arrive.

DEC's decision to approve a plan is based on the reasonableness of assertions and evidence that certain essential resources and practices are secured. Many follow-up field tasks are performed by DEC, other government agencies and the industry during the term of the plan. These tasks are done to prove the plan and assure that persons assigned response and prevention duties are trained and ready to go. The tasks range from planned and unannounced inspections and oil spill drills, to regular surveillance of field operations, and to third-party engineering inspections for checking structural integrity of tanks and piping.

State of Alaska

**RELATED SITES**

Alaska's Oil Spill Public Information Center

Prince William Sound Science Center

The Prince William Sound Regional Citizens' Advisory Council

The Cook Inlet Regional Citizens' Advisory Council

Industry Preparedness and Pipeline Program  
Bob Dreyer, Acting Program Manager  
ADEC Division of Spill Prevention and Response  
555 Cordova Street  
Anchorage, AK 99501-2617  
Telephone: (907) 269-7664  
Fax Number: (907) 269-7600  
email Address: [bob\\_dreyer@envircon.state.ak.us](mailto:bob_dreyer@envircon.state.ak.us)

**The Alaska Department of Environmental Conservation** complies with Title II of the Americans with Disabilities Act of 1990. The information on this website is available in alternative communication formats upon request. Please contact the Department at 465-5040 (voice, TDD, TTY) or (fax) 465-5098 to make any necessary arrangements.

*We welcome your comments on this web page.*

Address web page feedback to: [website@envircon.state.ak.us](mailto:website@envircon.state.ak.us)

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You can also search the Alaska Administrative Code, or go  
to The Alaska Legal Resource Center.

Alaska Administrative Code.

Title 18. Environmental Conservation

Chapter 75. Oil and Other Hazardous Substances Pollution Control

Section 445. Approval Criteria

previous: Section 442. Response Planning Standards For Multiple Operations

next: Section 447. Department Examination of New Technologies

## **18 AAC 75.445. Approval Criteria**

(a) The department will use the criteria set out in this section to review an oil discharge prevention and contingency plan submitted under 18 AAC 75.425.

(b) General Response Procedures. The plan must identify the maximum possible discharge that could occur at the facility or operation, and the general procedures to be followed in responding to a discharge of that magnitude, including the identification of resources in addition to those maintained by the plan holder or available under contract to meet the applicable response planning standard for that facility or operation.

(c) Deployment Strategies. The plan must demonstrate that the identified personnel and equipment are sufficient to meet the applicable response planning standard and can be deployed and operating within the time specified under 18 AAC 75.430 - 18 AAC 75.442. The plan must state what conditions were assumed and must take into account the realistic maximum operating conditions and their effects on response capability and the deployment of resources. Plans using contractual resources must demonstrate that the transition and substitution of equipment and resources will occur without interruption of response or cleanup.

(d) Response Strategies. The response strategies must take into account the type of product discharged and must demonstrate that

(1) procedures are in place to stop the discharge at its source within the shortest possible time;

(2) for an exploration or production facility, plans and time frames are in place for controlling a well blowout, including provisions for drilling a relief well, and taking into account any seasonal environmental conditions that might reasonably be expected to preclude emergency operations from regaining control of well pressure;

(3) plans, procedures, and equipment are sufficient to monitor and track the discharge in order to ensure proper allocation and deployment of response personnel and equipment;

(4) sufficient oil discharge response equipment, personnel, and other resources are maintained and available for the specific purpose of preventing discharged oil from entering an environmentally sensitive area or an area of public concern that would likely be impacted if a discharge occurs, and that this equipment and personnel will be deployed and maintained on a time schedule that will protect those areas before oil reaches them according to the predicted oil trajectories for an oil discharge of the volumes established under 18 AAC 75.430 - 18 AAC 75.442; areas identified in the plan must include areas added by the department as a condition of plan approval;

(5) plan strategies are sufficient to meet the applicable response planning standard established under 18 AAC 75.430 - 18 AAC 75.442 for containment, control, recovery, transfer, storage, and cleanup within the specified time and under environmental conditions that might reasonably be expected to occur at the discharge site;

(6) there is access to sufficient lightering equipment and personnel to transfer all oil from damaged tanks and from undamaged tanks if the risk of an additional discharge is present; the plan must provide for commencement and completion of lightering within the shortest possible time, consistent with ensuring the safety of personnel; and

(7) adequate temporary storage and removal capacity for recovered oil and oily wastes will be available at or near the site of the spill to keep up with the skimming and recovery operations and to meet the applicable planning standard established under 18 AAC 75.430 - 18 AAC 75.442 for control, containment, and cleanup; plans for temporary storage and ultimate disposal must include the specific actions to be taken to obtain all necessary permits and approvals.

(e) Receiving Environment. For an onshore facility or operation, the applicant must determine and clearly demonstrate that, based on an analysis of the facility or operation, resources identified in the plan are sufficient to clean up that portion of a discharge of the applicable planning standard volume that might realistically be expected to reach open water within the applicable time limit set out in 18 AAC 75.430 - 18 AAC 75.442.

(f) Realistic Maximum Response Limitations. In designing a spill response, severe weather and environmental limitations that might be reasonably expected to occur during a discharge event must be identified. The plan must use realistic efficiency rates for the specified response methods to account for the reduction of control or removal rates under those severe weather or other environmental limitations that might reasonably be expected to occur. The department will, in its discretion, require the plan holder to take specific temporary prevention measures until environmental conditions improve to reduce the risk or magnitude of an oil discharge during periods when planned spill response methods are rendered ineffective by environmental limitations.

(g) Response Equipment. Response equipment identified in the plan must meet the following conditions:

(1) the applicant must have ready access to enough equipment to meet the applicable response planning standards established under 18 AAC 75.430 - 18 AAC 75.442 using mechanical methods of oil control, containment, and cleanup;

(2) identified equipment must reflect the best available technology at the time the plan is

submitted or renewed;

(3) types and amounts of boom, boom connectors, and anchorage devices must be of the appropriate design for the particular oil product, type of environment, and environmental conditions experienced at the facility or operation; the boom must be of sufficient length to mount an effective response to the volume of discharged oil established under 18 AAC 75.430 - 18 AAC 75.442 for each type of facility or operation;

(4) vessels used to deploy and tow boom must be of a number, size, and power adequate to deploy the types and amounts of boom addressed in (3) of this subsection and must be capable of operating in the manner and at the speeds necessary for the effective use of boom; and

(5) the number and size of skimmers and pumps to be used must be appropriate and adequate for recovery of the planning standard volume of the type of oil discharged within the planning standard time limit for cleanup established under 18 AAC 75.430 - 18 AAC 75.442; equipment types must be compatible with each other as necessary to ensure an efficient response.

(h) Nonmechanical Response Information. Plans which propose the use of dispersants, in situ burning, or other nonmechanical response techniques during periods when environmental conditions or other factors limit the use of mechanical spill response methods must demonstrate their efficiency and effectiveness and must include a full assessment of potential environmental consequences, provisions for continuous monitoring and real-time assessment of environmental effects, and full compliance with all applicable approval requirements. If in situ burning is proposed as a response technique, a completed application for approval by the department must be included.

(i) Oil Spill Primary Response Action Contractor Information. If a plan holder proposes to use the services of an oil spill primary response action contractor to meet a requirement of AS 46.04.030 or 18 AAC 75.400 - 18 AAC 75.495, the contractor must be registered under 18 AAC 75.500 - 18 AAC 75.580. The plan holder shall include a correct and complete list of each primary response action contractor, with name, address, telephone number, and affiliation by company, and, for each response action contract, a statement signed by the plan holder and the primary response action contractor attesting to the department that the contract

(1) clearly specifies that the contractor is obligated to

(A) provide the response services and equipment listed for that contractor in the contingency plan;

(B) respond if a discharge occurs;

(C) notify the plan holder immediately if the contractor cannot carry out the response actions specified in the contract or the contingency plan;

(D) give written notice at least 30 days before terminating its contract with the plan holder;

(E) respond to a department-conducted discharge exercise required of the plan holder; and

(F) continuously maintain in a state of readiness, in accordance with industry standards, the equipment and other spill response resources to be provided by the contractor under the contingency plan; and

(2) contains the provisions required under AS 46.04.030 (r), if the contract is between the plan holder for a tank vessel or oil barge carrying crude oil that has been transported by the Trans Alaska Pipeline System and a primary response action contractor who is the common operating agent for the holders and lessees of the right-of-way agreement for the Trans Alaska Pipeline System.

(j) Training. In addition to maintaining continuous compliance with other applicable state and federal training requirements, the plan holder shall demonstrate that designated oil spill response personnel are trained and kept current in the specifics of plan implementation, including deployment of containment boom, operation of skimmers and lightering equipment, and organization and mobilization of personnel and resources. The plan holder shall ensure that proof of training is maintained for three years and is made available to the department upon request.

(k) Best Available Technology Review. For purposes of 18 AAC 75.425(e) (4), the department will review a plan and make a best available technology determination using the following criteria, as applicable:

(1) technology used for oil discharge containment, storage, transfer, and cleanup to satisfy a response planning standard in 18 AAC 75.430 - 18 AAC 75.442 will be considered best available technology if the technology of the applicant's oil discharge response system as a whole is appropriate and reliable for the intended use as well as the magnitude of the applicable response planning standard;

(2) technology that complies with the performance standards of 18 AAC 75.005 - 18 AAC 75.080 and that is not subject to a best available technology review under 18 AAC 75.425(e) (4)(A), will be considered best available technology;

(3) technology identified under 18 AAC 75.425(e) (4)(A) will be evaluated using the following criteria, if applicable:

(A) whether each technology is the best in use in other similar situations and is available for use by the applicant;

(B) whether each technology is transferable to the applicant's operations;

(C) whether there is a reasonable expectation each technology will provide increased spill prevention or other environmental benefits;

(D) the cost to the applicant of achieving best available technology, including consideration of that cost relative to the remaining years of service of the technology in use by the applicant;

(E) the age and condition of the technology in use by the applicant;

(F) whether each technology is compatible with existing operations and technologies

in use by the applicant;

(G) the practical feasibility of each technology in terms of engineering and other operational aspects; and

(H) whether other environmental impacts of each technology, such as air, land, water pollution, and energy requirements, offset any anticipated environmental benefits.

(I) If the department's determination under (k) of this section is that a technology proposed for use by the applicant is not the best available technology, the department will provide a written finding explaining its decision.

**Authority:**

AS 46.03.020

AS 46.04.020

AS 46.04.030

AS 46.04.035

AS 46.04.070

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**Note to HTML Version:**

The Alaska Administrative Code was automatically converted to HTML from a plain text format. Every effort has been made to ensure its accuracy, but neither Touch N' Go Systems nor the Law Offices of James B. Gottstein can be held responsible for any possible errors. This version of the Alaska Administrative Code is current through December, 2001.

If it is critical that the precise terms of the Alaska Administrative Code be known, it is recommended that more formal sources be consulted. Recent editions of the Alaska Administrative Journal may be obtained from the Alaska Lieutenant Governor's Office on the world wide web. If any errors are found, please e-mail Touch N' Go systems at [touchngo@touchngo.com](mailto:touchngo@touchngo.com). We hope you find this information useful.

Last modified 1/9/2002

## ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION

### Fact Sheet On Proposed Statutory Changes To Oil Discharge Prevention And Contingency Plan "Best Available Technology" Requirements

#### Background

AS 46.04.030(e) states, in part, that an oil discharge prevention and contingency plan (c-plan) "must provide for the use by the applicant of the best technology that was available at the time the contingency plan was submitted or renewed."

In 1997, DEC developed regulatory criteria for determining whether a c-plan meets this "best available technology" (BAT) requirement through a negotiated rulemaking process that included stakeholders from around the state representing a broad range of interests. The workgroup looked at all of the major components of a c-plan, determined which of those components were already subject to a stringent planning or performance standard, and devised an eight-point analysis that could be applied to the remaining critical components to determine whether they represented BAT.

#### Supreme Court Decision

The Alaska Supreme Court invalidated two of the BAT regulatory criteria on February 1, 2002 as inconsistent with statute (Decision No. 5531, *Lakosh v. ADEC, et. al.*). The invalidated sections are 18 AAC 75.445(k)(1) and (k)(2)), which read as follows:

"(1) technology used for oil discharge containment, storage, transfer and cleanup to satisfy a response planning standard in 18 AAC 75.430-18 AAC 75.442 will be considered best available technology if the technology of the applicant's oil discharge response system as a whole is appropriate and reliable for the intended use as well as the magnitude of the applicable response planning standard;

"(2) technology that complies with the performance standards of 18 AAC 75.005-18 AAC 75.080 and that is not subject to a best available technology review under 18 AAC 725(e)(4)(A) will be considered best available technology;..."

The Alaska Supreme Court concluded that, while the workgroup's approach had "considerable theoretical merit," AS 46.04.030(e) as written does not allow DEC to rely on response planning standards for oil spill response technologies, or performance standards for oil spill prevention technologies, in determining whether these technologies meet the BAT requirement. "Best", in the Court's opinion, implied that DEC must employ some comparative or "winnowing" process in its determination of BAT for all major systems or components of a c-plan, and could not merely rely on a substitute standard, however stringent, when applicable.

#### Existing Technologies

The 1990 legislation that led to the present c-plan statutes, undertaken partly in response to the 1989 Exxon Valdez spill, has resulted in the development of a spill prevention and response system that is unsurpassed anywhere in the world. The stringent response planning standards contained in statute, and the subsequent oil spill prevention performance standards that were adopted in regulation, have required the oil industry to upgrade and strengthen its technologies in order to demonstrate compliance.

The existing BAT analyses performed by DEC have been an important part of this improvement in Alaska's oil spill prevention and response system. The existing regulations require an eight-point analysis to be conducted on what DEC has considered to be the critical components of a c-plan that are not otherwise subject to planning or performance standards (18 AAC 75.445(k)(3)).

#### Effect of Bill

This bill will in no way reduce the rigor of existing contingency plan review, or diminish the response readiness and capability of industry. Legislative clarification of the law will validate the BAT approach taken by the 1997 negotiated rulemaking process, and affirm the continued effect of the contingency plan approvals issued under those regulations. No revisions to the existing, stringent regulations will be necessary.

This bill will also reaffirm the importance of continuing research into best available technologies via studies, findings and conferences every five years to ensure that oil discharge prevention and contingency plans employ technologies that continue to keep Alaska in the forefront of environmental protection worldwide.

# STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL

1031 WEST 4<sup>TH</sup> AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501-1994  
PHONE: (907) 269-3100  
FAX: (907) 276-3697

March 7, 2002

The Honorable John Torgerson  
Alaska Senate  
State Capitol, Room 427  
Juneau, Alaska 99801-1182

Re: CS SB 343(RES): Best Available Technology for  
Oil Spill Contingency Plans.  
Our File no: 661 00-0412.

Dear Senator Torgerson:

Thank you for the opportunity to testify on March 4, 2002 concerning Senate Bill 343. After my testimony was complete, several persons testified concerning their interpretation of the legal effect of SB 343 and the ability of the Alaska State Legislature to clarify the best available technology requirement in light of the Alaska Supreme Court's ruling in *Lakosh v. Alaska Department of Environmental Conservation, et al.*, \_\_\_ P.3d. \_\_\_ (February 1, 2002).

I am writing to express my disagreement with the legal statements made in the testimony concerning these matters. I was trial and appellate counsel in the Lakosh case and assisted the Alaska Department of Environmental Conservation (DEC) in the development of the regulations at issue.

First, the argument that SB 343 is rolling back protections enacted in 1990 after the Exxon Valdez oil spill is legally and factually incorrect. The BAT requirement has been part of the contingency statute since 1980, long before the Exxon Valdez spill. In 1990, the legislature amended the existing law to add rigorous oil spill response planning standards, but the legislature did not address the relationship between the planning standards and BAT.

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A.G. Letter

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Given that the Alaska Supreme Court's ruling overturned the 1997 workgroup's use of the statutory response planning standards and regulatory oil spill prevention performance standards in determining best available technology, the BAT statutory requirement is ripe for legislative clarification.

Second, these testifiers' statements that enactment of SB 343 would result in the Legislature undercutting environmental standards is also a factually and legally incorrect interpretation of SB 343. SB 343 is very clear that its purpose and effect is to affirm the best available technology requirement. It also affirms the standards set out in the 1997 negotiated rulemaking regulations. See secs 1(a)(5), (b)(1) of the bill. Section 2 of the bill adds three new sentences to AS 46.04.030(e) to affirm that the three-tier best available technology (BAT) approach taken in the 1997 BAT regulations is consistent with the existing statute. Section 2 affirms the 1997 regulatory criteria by providing three things. First, DEC must specify in regulation what technologies are subject to a BAT determination. Second, DEC may provide that any technology meeting the response planning standards in AS 46.04.030(k) or an oil pollution prevention performance standard adopted under AS 46.04.070 are BAT. Third, DEC may establish BAT independently of the contingency plan renewal process as provided in 18 AAC 75.447.

Affirming the BAT criteria that has been in place for the last five years and which has resulted in major improvements in oil spill response and prevention is not properly legally characterized as a diminishment of the BAT standard. This is particularly true when the Alaska State Legislature has not, up until this point, defined the meaning of best available technology. In short, CS SB 343(RES) does not eliminate or diminish the BAT requirement.

Third, one testifier stated that it is legally improper for the Alaska State Legislature to clarify the best available technology requirement because the Alaska Supreme Court stated in its ruling that determining what is best available technology is a matter "within DEC's area of authority and expertise." This statement ignores the rest of the Alaska Supreme Court's opinion that relied on statutory interpretation in seeking to determine the

Alaska Legislature's intent in establishing the best available technology requirement in the first place. As two members of the Alaska Supreme Court noted concerning the Court's repeated cases seeking to interpreting another statute, "[i]t would be better for the legislature to revisit the statute and, assuming it is not content with the interpretations adopted by this court in recent years, clarify it to reflect the legislature's actual intentions." *R.J.M. v. State*, 946 P.2d 855, 875(Alaska 1997); see also *State, Dept. of Revenue v. Wilder*, 929 P.2d 1280,1283 (Alaska 1997); *Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166, 176 n. 21 (Alaska 1986) ("Subsequent legislation declaring the intent of a previous enactment is entitled to great weight."). This is what SB 343 does in order to affirm DEC's BAT criteria contained in its 1997 regulations.

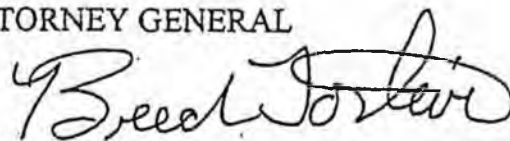
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If I can provide additional assistance concerning CS SB 343(RES) or legal issues concerning the Alaska Supreme Court's decision, please let me know.

Very truly yours,

BRUCE M. BOTELHO  
ATTORNEY GENERAL

By:



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cc: The Honorable Gary Wilken, Vice-Chair, Senate Resources Committee  
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Chrystal Smith, AGO Juneau  
Mike Abbott, Governor's Office  
Commissioner Michele Brown, DEC  
Larry Dietrick, Director of Spill Prevention and Response, DEC

POSITION OF THE  
ALASKA OIL AND GAS ASSOCIATION  
ON CSSB 343 (RES)  
March, 2002

The Alaska Oil and Gas Association (AOGA) is a private, nonprofit trade association whose 19 member companies account for the majority of oil and gas exploration, development, production, transportation, refining and marketing activities in Alaska. In fact, all companies operating in Cook Inlet and on the North Slope, crude oil pipeline companies and all three in-state refiners are members of AOGA, and all are required to have in place approved Oil Discharge Prevention and Contingency Plans, or C Plans.

Clearly, we are heavily vested in ensuring that the State of Alaska has in place appropriate and reliable laws and regulations governing this program.

As described in CSSB343, on February 1, 2002, the Alaska Supreme Court ruled that two provisions (18 AAC 75.455(k)(1) and (2)) governing Best Available Technology (BAT) determinations were contrary to the Court's interpretation of the intent of the Legislature in enacting AS46.04.030. The Court did not, however, take issue with any other component of the BAT-related regulations or statutes.

The regulations adopted by the Department of Environmental Conservation (DEC) in 1997 followed an extensive, year-long, facilitated stakeholder process involving industry, utilities, local governments, and citizens and public interest groups. This deliberative process identified a three-tier process for determining BAT, which the Department adopted into regulation in April, 1997. Since that time, over 100 C Plans have been approved utilizing this three-tiered approach, ensuring continuous improvement of spill prevention and response technologies in Alaska.

AOGA's members participated in that stakeholder process, supporting the regulations ultimately adopted. We stand by our commitment in support of those regulations, including the requirement for the holding of a conference on best available technology at five-year intervals.

The Supreme Court decision has placed everyone—from AOGA's members and others in the regulated community—to DEC who administers the program, in a tenuous position. Companies seeking new plan approvals, and those going through the renewal process on existing plans—all of which incorporate BAT—are faced with the prospect of unnecessary delays and uncertainties. The Department will be forced instead to refocus its resources away from the immediate process of working with Plan holders to ensure appropriate provisions are in place, to going through another rulemaking process which, at the end of the day, lacking specific Legislative language, could once again be called into question.

While the Supreme Court decision emphasized the limited scope of its ruling and acknowledged that the Legislature had vested ADEC with broad discretion to define BAT, the Court was unable to point to specific Legislative intent which justified the approach DEC had taken in its regulations. This lack of specificity is the heart of this legislation.

In our view, CSSB 343 provides the specificity the Court searched for in considering this matter. With the very limited amendment to AS46.04.030(e), the Legislature makes it clear that the regulatory approach taken by DEC—after extensive stakeholder deliberation—meets the Legislature's expectations when it vested this authority to the DEC.

We would like to emphasize one additional point. On any single legislative proposal there is always the potential that there will be differing views among those affected on what is appropriate and what is desired. We wish to make it absolutely clear that the *only* objective sought by AOGA and its members at this time is Legislative affirmation of the rules prior to the Court decision.

CSSB343 does not, in any way, diminish the Department's authorities in the determination of Best Available Technology, nor does it reduce requirements which Plan holders must meet. CSSB343 provides ADEC with the flexibility and ownership of administration of BAT, and provides the ability to recognize BAT with respect to the diverse set of environmental and operational conditions that exist throughout the State. Further, it affirms the validity of C Plans which have been approved under the regulations and effectively removes the obstacles facing pending Plan approvals.

To summarize, immediate action by the Legislature through CSSB343 is critical to continued C plan administration within the State of Alaska. CSSB343 clearly responds to the uncertainty voiced by the Supreme Court by specifying the Legislature's intent with regard to best available technology requirements in C Plans. We respectfully encourage adoption of CSSB343.

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# FISCAL NOTE

**STATE OF ALASKA**  
**2002 LEGISLATIVE SESSION**

Fiscal Note Number: 1  
 Bill Version: SB 343  
 (S) Publish Date: 3/6/02

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Environmental Conservation  
 Title An Act clarifying the term "best technology" required BRU Spill Prevention and Response  
for use in oil discharge prevention and contingency plans ... Component Industry Preparedness and  
 Sponsor Senate Resources Pipeline Program  
 Requester Senate Resources Component No. 1922

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
1052 OHSRPR Prevention Account						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2002) cost: 0.0  
 Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

**POSITIONS**

Full-time	0	0	0	0	0	0
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

**ANALYSIS:** *(Attach a separate page if necessary)*  
 Current statute states that an oil discharge prevention and contingency plan (c-plan) must provide for the use of the best technology that was available at the time the contingency plan was submitted or renewed. DEC developed regulations for determining whether a c-plan meets this "best available technology" (BAT) requirement. The regulations were developed through a negotiated rulemaking process that included stakeholders from around the state representing a broad range of interests. On Feb. 1, 2002, the Alaska Supreme Court determined that, while the regulations had "considerable theoretical merit," the statute as currently written does not allow DEC to rely on response planning standards or performance standards in determining whether these technologies meet the BAT requirement. This bill changes the statute to validate DEC's current approach in considering certain technologies that are proven, appropriate and reliable in meeting State standards for best available technology and therefore there will be no fiscal impact.

Prepared by: Larry Dietrick Phone 465-5250  
 Division: Spill Prevention and Response Date/Time 2/28/02 2:36 PM  
 Approved by: Kurt Fredriksson Deputy Commissioner Date 2/28/2002  
 Agency: Department of Environmental Conservation

# ALASKA STATE LEGISLATURE

Chairman: Senator John Torgerson  
Vice Chair: Senator Gary Wilken  
Senator Rick Halford  
Senator Ben Stevens  
Senator Robin Taylor  
Senator Kim Elton  
Senator Georgianna Lincoln



Official Business

State Capitol, Room 427  
Juneau, AK 99801  
Phone: (907) 465-4907  
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## SENATE RESOURCES COMMITTEE

### Sponsor Statement

#### SB 343

#### "Best Available Technology: Discharge Plan"

The State of Alaska is widely recognized as having one of the most comprehensive oil spill prevention and response requirements in the world. This recognition is due to actions taken by the Legislature and the ADEC to ensure that companies operating in Alaska have taken the appropriate steps to prevent discharges and have access to the resources necessary to rapidly respond and clean up discharges should they occur.

Alaska law and regulation require vessels and facilities to have oil discharge prevention and contingency plans approved by ADEC. Plan holders are required to utilize best available technology as part of these plans. The regulations governing determinations of "best available technology" were developed through a comprehensive stakeholder process, and were adopted by ADEC in 1997. Since that time, over 100 C Plans have been approved, implementing the BAT requirement.

As a result of these requirements and industry efforts, significant advances have been made in technologies utilized and in place in Alaska. The regulations have served Alaska well in the five-year period they have been in effect.

On February 1, 2002, the Alaska Supreme Court struck down two provisions in the regulations (18 AAC 75.445(k)(1) and (2)), ruling that these provisions were inconsistent with that Court's interpretation of the Legislature's intent. At the same time, the Court emphasized the limited scope of its ruling and acknowledged that the Legislature had vested ADEC with broad discretion to define BAT.

This ruling jeopardizes timely issuance of new plans and timely renewals of existing plans. Immediate action by the Legislature is needed to address this ruling to ensure continued plan administration and preclude negative consequences on development of the state's resources. SB 343 affirms that the 1997 regulations and the three-tiered process encompassed in them do, in fact, meet Legislative intent with regard to BAT and are consistent with the statute. The bill also affirms the validity of the regulations and the C Plans.

DEC Home | Air | Water | Land | Food | Oil, chemicals | Public Facilities, businesses | Pollution Prevention

Alaska Department of  
**Environmental Conservation****Spill Prevention and Response Division****Industry Preparedness and Pipeline Program**

Revised 3/11/02

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responsibility](#)[Response  
action  
contracts](#)**CONTINGENCY****PLANS**[About Plans](#)[Nontank Vessel  
Contingency Plans:  
Regulations  
Development](#)[Prince William Sound  
Tankers](#)[C-Plan  
application  
form](#)[Statement of  
Contractual  
Terms](#)[Best Available  
Technology](#)[Leak Detection  
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Review -  
Pipelines](#)[Leak Detection  
Technical  
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Storage Tanks](#)**OTHER DEC SITES**[Division of Spill  
Prevention, Response](#)[ADEC home page](#)[SEARCH](#) (State of  
Alaska)

## About Contingency Plans

Under Alaska law the oil industry must prepare contingency plans for terminals and distributors of crude and refined oil products, marine tankers and barges that transport crude and refined oil products, and oil pipelines and onshore and offshore oil exploration and production facilities. A "c-plan" is officially called an "Oil Discharge Prevention and Contingency Plan" because it embraces actions to prevent an oil spill and, in the event of a spill, describes resources to clean up a spill.

It is common knowledge that the ability to clean up a spill and avoid impacts to the environment ranges from poor to moderately good depending upon many variables. Only some of these variables are practicable to control through human action and by pre-planning. Alaska law is arguably the most demanding in the world with respect to the level of cleanup performance expected. Many states and nations do not require the spill prevention actions embodied in Alaska law.

Most important to DEC in reviewing and approving a prevention and contingency plan is an assurance that the plan is not just a book that sits on the shelf -- instead, it needs to become part of the company's daily operations. A plan must strike a balance between being first a field-friendly, useable document -- a useable guide in those first hectic hours when a spill happens -- and second, a document that is complete enough to satisfy the legal requirements.

The legal requirements include the assurances that industry uses prudent practices and best available technology to keep the oil in its container, and the commitment of people and resources for a rapid and effective response should spill day arrive.

DEC's decision to approve a plan is based on the reasonableness of assertions and evidence that certain essential resources and practices are secured. Many follow-up field tasks are performed by DEC, other government agencies and the industry during the term of the plan. These tasks are done to prove the plan and assure that persons assigned response and prevention duties are trained and ready to go. The tasks range from planned and unannounced inspections and oil spill drills, to regular surveillance of field operations, and to third-party engineering inspections for checking structural integrity of tanks and piping.

State of Alaska

**RELATED SITES**

Alaska's Oil Spill Public  
Information Center

Prince William Sound  
Science Center

The Prince William  
Sound Regional Citizens'  
Advisory Council

The Cook Inlet Regional  
Citizens' Advisory  
Council

Industry Preparedness and Pipeline Program

Bob Dreyer, Acting Program Manager

ADEC Division of Spill Prevention and Response

555 Cordova Street

Anchorage, AK 99501-2617

Telephone: (907) 269-7664

Fax Number: (907) 269-7600

email Address: [bob\\_dreyer@envircon.state.ak.us](mailto:bob_dreyer@envircon.state.ak.us)

**The Alaska Department of Environmental Conservation** complies with Title II of the Americans with Disabilities Act of 1990. The information on this website is available in alternative communication formats upon request. Please contact the Department at 465-5040 (voice, TDD, TTY) or (fax) 465-5098 to make any necessary arrangements.

*We welcome your comments on this web page.*

Address web page feedback to: [website@envircon.state.ak.us](mailto:website@envircon.state.ak.us)

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# STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL

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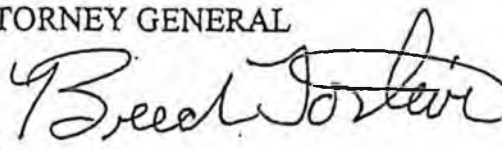
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ON CSSB 343 (RES)  
March, 2002

The Alaska Oil and Gas Association (AOGA) is a private, nonprofit trade association whose 19 member companies account for the majority of oil and gas exploration, development, production, transportation, refining and marketing activities in Alaska. In fact, all companies operating in Cook Inlet and on the North Slope, crude oil pipeline companies and all three in-state refiners are members of AOGA, and all are required to have in place approved Oil Discharge Prevention and Contingency Plans, or C Plans.

Clearly, we are heavily vested in ensuring that the State of Alaska has in place appropriate and reliable laws and regulations governing this program.

As described in CSSB343, on February 1, 2002, the Alaska Supreme Court ruled that two provisions (18 AAC 75.455(k)(1) and (2)) governing Best Available Technology (BAT) determinations were contrary to the Court's interpretation of the intent of the Legislature in enacting AS46.04.030. The Court did not, however, take issue with any other component of the BAT-related regulations or statutes.

The regulations adopted by the Department of Environmental Conservation (DEC) in 1997 followed an extensive, year-long, facilitated stakeholder process involving industry, utilities, local governments, and citizens and public interest groups. This deliberative process identified a three-tier process for determining BAT, which the Department adopted into regulation in April, 1997. Since that time, over 100 C Plans have been approved utilizing this three-tiered approach, ensuring continuous improvement of spill prevention and response technologies in Alaska.

AOGA's members participated in that stakeholder process, supporting the regulations ultimately adopted. We stand by our commitment in support of those regulations, including the requirement for the holding of a conference on best available technology at five-year intervals.

The Supreme Court decision has placed everyone—from AOGA's members and others in the regulated community—to DEC who administers the program, in a tenuous position. Companies seeking new plan approvals, and those going through the renewal process on existing plans—all of which incorporate BAT—are faced with the prospect of unnecessary delays and uncertainties. The Department will be forced instead to refocus its resources away from the immediate process of working with Plan holders to ensure appropriate provisions are in place, to going through another rulemaking process which, at the end of the day, lacking specific Legislative language, could once again be called into question.

While the Supreme Court decision emphasized the limited scope of its ruling and acknowledged that the Legislature had vested ADEC with broad discretion to define BAT, the Court was unable to point to specific Legislative intent which justified the approach DEC had taken in its regulations. This lack of specificity is the heart of this legislation.

In our view, CSSB 343 provides the specificity the Court searched for in considering this matter. With the very limited amendment to AS46.04.030(e), the Legislature makes it clear that the regulatory approach taken by DEC—after extensive stakeholder deliberation—meets the Legislature's expectations when it vested this authority to the DEC.

We would like to emphasize one additional point. On any single legislative proposal there is always the potential that there will be differing views among those affected on what is appropriate and what is desired. We wish to make it absolutely clear that the *only* objective sought by AOGA and its members at this time is Legislative affirmation of the rules prior to the Court decision.

CSSB343 does not, in any way, diminish the Department's authorities in the determination of Best Available Technology, nor does it reduce requirements which Plan holders must meet. CSSB343 provides ADEC with the flexibility and ownership of administration of BAT, and provides the ability to recognize BAT with respect to the diverse set of environmental and operational conditions that exist throughout the State. Further, it affirms the validity of C Plans which have been approved under the regulations and effectively removes the obstacles facing pending Plan approvals.

To summarize, immediate action by the Legislature through CSSB343 is critical to continued C plan administration within the State of Alaska. CSSB343 clearly responds to the uncertainty voiced by the Supreme Court by specifying the Legislature's intent with regard to best available technology requirements in C Plans. We respectfully encourage adoption of CSSB343.

POSITION OF THE  
ALASKA OIL AND GAS ASSOCIATION  
ON CSSB 343 (RES)  
March, 2002

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**Subject: SB 343**

**Date: Mon, 18 Mar 2002 11:44:53 -0900**

**From: "Tom Lakosh" <lakosh@gci.net>**

**To: "Representative\_Scott\_Ogan" <Representative\_Scott\_Ogan@legis.state.ak.us>**

Dear Chairman Ogan;

Would you please provide an invitation to address the Oil and Gas Committee regarding SB 343. I would like to propose amendment of SB 343 to clarify the application of BAT standards and to develop a more competent and cost effective permitting and spill response system. I understand that DEC has previously proposed a "Firehouse" approach to spill response where DEC would operate response depots for permittees. This type of centrally controlled and strategically placed system of response depots is now, more than ever, necessary to provide for rapid permitting and efficient spill coverage for thousands of permits. I have testified to the Senate Resources Committee regarding these changes to provide for a more rational permitting/response system. The SB 343 legislation may provide an opportunity for promoting a more competent permitting and response system if something similar to the following language can be added to page 3 line 30 of the CS:

"The department shall identify the spill prevention and response technologies that are subject to a best available technology determination. These technologies shall be selected for review based upon the need to further protect natural resources susceptible to spill damage and the ability of new technologies to cost effectively improve the permittees' ability to prevent spills or recover oil under problematic circumstances such as in high current rivers, wet lands, high seas, in ice bearing waters, etc. DEC shall evaluate all available spill prevention and response technologies on a semi-annual basis in accordance with the procedures set forth in 18 AAC 75.447. DEC is authorized to extract up to \$500,000 from the "470 Fund" during each semi-annual review cycle to pay for the "Technology Symposium" and professional technology analysis required to carry out the .447 technology review. DEC is authorized to extract up to \$12,500,000 from the "470 Fund" and issue additional bonds totaling no more than \$12,500,000 through the AKRR Authority to stock response depots with BAT technologies that would otherwise be unavailable to protect susceptible resources and fulfill minimum regulatory requirements for permits. DEC may subcontract other entities to supply BAT response services and insurance to permittees. DEC shall apply reasonable fees and surcharges to permits where such permits require the services of DEC response depots, aerial surveillance, laboratory facilities or other DEC services to meet any or all of the regulatory requirements for permit issuance. DEC shall reimburse the "470 Fund" with income received from response services to permittees after a sufficient operating budget for maintaining and expanding DEC's response services is fully funded."

Please let me know if you have suggested text changes that would better promote a competent permitting and response system.

Sincerely, Tom Lakosh 563-7380 ph/fax

Dear Senator Leman;

Would you please provide an invitation to address the Resources Committee for 15-20 minutes this afternoon in consideration of SB 343. I hope to provide alternative solutions to the bill's attempted resolution of DEC's permitting predicament, industries' uncertainty regarding "Best Available Technology", and the private and public's concerns for mitigation of damage from hazardous substance spills. I will propose the creation of a DEC Response Authority, that would provide spill response services in a permit package to permit applicants that would not otherwise be able to arrange much less afford a comprehensive spill response capability.

"Authority" would conduct the research to improve response capability under problematic conditions and would develop a statewide system of public and private hazardous substance spill resources to cope with spills, particularly when and where the private response industry cannot meet strict regulatory requirements.

The proposed Response Authority would command resources and regulatory authority in a manner similar to the Federal Republic of Germany, <http://www.wsv.de/cis/>, but provide fee generating services like the AKRR. It would develop its own response depots and subcontract with established spill response providers to streamline permitting of facilities that utilize extensive transportation corridors or face particularly daunting response challenges with little working knowledge of the demands of the Alaskan environment or intricacies of our spill response laws. The ability of the RA to engage and organize subcontractors that utilize the best tactics and equipment will help insure that fly by night permittees and response contractors will not threaten Alaska's resources for long. A centralized system would also lower average response coverage costs because it would insure a more economical distribution of response resources along entire corridors and at individual locations. The good equipment and personnel will be more effectively utilized, gaps in protection would be minimized and redundant, ineffective or misplaced equipment would be reallocated for use in Alaska or wherever it was designed to operate.

Producers and transporters of hazardous substances would have a more accessible, reliable, and transparent permitting process while the natural resource users will garner the protections mandated by an intertwined legal system of regulations, statutes and Constitutional covenants.

Sincerely, Tom Lakosh

> Dear Senator:

>

> Please reject passage of SB 343 re: DEC's BAT regulations until  
the  
> bill includes proper guidance to DEC for advancement of spill technologies  
> and the proper funding to carry out this mandate. DEC's failure to prepare a  
> fiscal note that reflects the true costs of implementing BAT regulations  
is  
> all too telling of its intent to have the legislature change the law every  
> time it gets caught issuing illegal permits.  
> The Alaska Supreme Court decision in *Lakosh Vs. DEC*, Slip Opinion 5531,  
> includes a history of this legislation and shows an understanding of the  
> intent of the legislatures that repeatedly passed this law in 1980 and  
1990.  
> The history of this law and the Courts broad and detailed ruling in this  
> matter should give each legislator great pause in any cursory review of SB  
> 343. There are underlying Constitutional mandates for protection of  
> resources that are woven throughout the applicable statutes and  
regulations  
> that SB 343 does not address and cannot be swept under the rug.  
> Without a reasoned legislative approach, only the parties to the case are  
> left to develop a proper place for hazardous spill technology advancements  
> in DEC's regulations. This will require extended and expensive legal  
battles  
> that will only delay the spill protection the public deserves and will  
> create the uncertainty the bill espouses to eliminate. The bill must  
remain  
> in the Resources Committee to allow full consideration of DEC's  
obligations  
> and to assess a proper funding level for this purpose.  
> The legislature must recognize that Alaska's resources are far from being  
> appropriately protected from hazardous spills. Most spill response  
equipment

> presently used in Alaska is totally ineffective in waves over six feet, in  
 > fast currents or when there's ice in the water. In effect, there is no  
 > "appropriate and reliable" equipment in Alaska if prevention of  
 catastrophic  
 > spill damage is the mandated minimum standard of resource protection. The  
 > "best technology available" standard is already a compromise of this  
 > mandated protection floor.  
 > The legislature must fully fund those technology assessment programs that  
 it  
 > says it espouses in this bill. The Supreme Court has already recognized  
 that  
 > DEC's best attempt at technology assessment was insufficient:  
 >  
 > Footnote 26: Slip Opinion 5531  
 > DEC further points to 18 AAC 75.447, which requires DEC to  
 > identify and evaluate "breakthrough" technologies by  
 > sponsoring a > technology conference at least once every  
 five years and to  
 > "engag[e] in studies, inquiries, surveys, or analyses  
 [that > DEC]  
 > believes appropriate to the consideration of new >  
 technologies."...  
 >  
 > DEC has continually argued that these "technology  
 > conference[s]...studies... or analyses were a mandatory component for  
 > incorporation of "breakthrough technologies" into spill plan renewals. It  
 > has now been five years since this regulation was first codified and still  
 > no "conference" has been funded, planned or executed by DEC. SB 343 must  
 > return to committee to consider defining areas of spill prevention and  
 > response that desperately need improvement, and to attach a realistic  
 fiscal  
 > note to the bill as a reflection the Senate's commitment to provide swift  
 > and professional approval of plans that minimize the public's exposure to  
 > spill damage and permittee's exposure to liability for that damage.  
 > Sincerely; Tom >  
 Lakosh

House Oil and Gas Committee

**SB 343**

*March 22, 2002*

Testimony of Kurt Fredriksson  
Alaska Department of Environmental Conservation  
Deputy Commissioner

Thank you Mr. Chairman and members of the Committee for the opportunity to comment on SB 343. For the record my name is Kurt Fredriksson and I am the Deputy Commissioner for the Alaska Department of Environmental Conservation.

The Department is responsible for reviewing and approving Oil Discharge Prevention and Contingency Plans for over 120 facilities in Alaska. These facilities include oil terminals, pipelines, exploration and production facilities, tank vessels, oil barges, nontank vessels and the railroad.

The Department of Environmental Conservation has been working with the Department of Law since the recent Supreme Court ruling to devise a remedy that meets the recent Supreme Court ruling on "best available technology" described in contingency plans.

At issue is the legislative intent for meeting the "best available technology" statutory requirement. The court noted that "when an agency has adopted regulations under a delegation of authority from the legislature and using the process prescribed by the Administrative Procedure Act, we presume that the

regulations are valid..... and the review is limited to whether the regulations are consistent with and reasonably necessary to carry out the purposes of the statutory provisions and whether the regulations are reasonable and not arbitrary".

Following the Exxon Valdez oil spill, the legislature established what are arguably the toughest response planning standards in the world. When reviewing a contingency plan DEC has interpreted the statute to mean that meeting Alaska's tough response planning standards also satisfies the best available technology requirement if the equipment is proven, reliable and appropriate for its intended use and the magnitude of the spill it is addressing. This interpretation was developed through an extensive workgroup process when the regulations were developed in 1997.

The court recognized that this approach has considerable merit and that agency judgement in this regard deserves considerable deference but only to the extent that the legislature actually granted DEC authority to define best available technology in terms of reliance on the response planning standards.

The court has raised a rather narrow question regarding whether or not our regulatory interpretation meets the intent and lies within the limits of authority delegated by the legislature. Because "best available technology" was not defined by the legislature the court has interpreted the statutory language to

mean that the legislature intended to impose two separate requirements which precludes DEC from relying on the response planning standards or a performance standard established in regulations to establish BAT.

Clearly the court, in their ruling, has invited the legislature to clarify their intent if they so choose. We believe it is the legislature's prerogative to clarify the intent and appreciate your efforts to expedite a solution.

The department believes that any legislation should meet the following goals:

First and foremost, because of the timing of the release of the court decision and the time remaining during this session, it is imperative that any legislation be limited to only what is necessary to address the court ruling. There is simply not enough time to entertain other changes to the statute and do credible research and coordination with the regulated community and other stakeholders.

Second, to ensure continued operation of Alaska's facilities and eliminate the cloud of uncertainty from the court ruling regarding the validity of existing plan approvals made since 1997, the legislation must be passed this session.

Third, the legislation must validate the existing regulations and preserve the approach used for making BAT determinations as envisioned by the 1997 Task Force.

Fourth, the legislation must sustain the same level of rigor for plan reviews as now practiced and not diminish the existing response capability.

Fifth, the legislation must continue to support the ability of the department to evaluate new technologies and make BAT findings.

SB 343 meets these five goals and provides straightforward language clarifying the legislative intent. The bill validates the BAT approach taken by the department in the 1997 negotiated rulemaking process and affirms the continued effect of contingency plans approved by the department since 1997.

We believe this language is responsive to the Supreme Court ruling and does not reduce the rigor of existing contingency plan review, or diminish the response readiness and capability of industry. The bill also provides for the department's periodic examination of new technologies to keep Alaska in the forefront of environmental protection worldwide.

In conclusion, the department supports SB 343.

Thank you for your attention and I would be glad to answer any questions.

**Testimony of Assistant Attorney General  
Breck C. Tostevin before House Oil & Gas Committee  
concerning CS SB 343(RES)  
Best Available Technology: Discharge Plans**

Thank you Mr. Chairman, Members of the Committee, for the opportunity to testify concerning SB 343. For the record, my name is Breck Tostevin, I am an Assistant Attorney General in the Alaska Department of Law's Environmental Section.

*Overview:* I would like to cover two general topics in my testimony: First, the reasoning and effect of the Supreme Court's recent decision concerning the statutory best available technology requirement for oil discharge prevention and contingency plans; and, second, how this legislation responds to the Supreme Court's decision in a focused and measured way.

*Purpose of Legislation:* The legislation before you today, Senate Bill 343, seeks to clarify the statutory requirement that oil spill contingency plans use best available technology in light of the Alaska Supreme Court's February 1 ruling in the *Lakosh v. DEC* case.

*Legislative History of BAT Requirement:* The best available technology (BAT) requirement has been in place since 1980 for response equipment used in C-plans. Because of the addition of oil spill prevention to the C-plan statute in 1990, the BAT requirement became applicable to prevention equipment. In addition, the 1990 amendments added the rigorous oil spill "response planning standards" in AS 46.04.030(k) to the C-plan statute but the Legislature did not address the relationship between the planning standards and BAT.

*Alaska Supreme Court's Decision:* In its recent ruling, the Court found two parts of DEC's regulatory criteria for determining whether an oil discharge prevention and contingency plan uses best available technology to be inconsistent with statute. These regulatory

criteria were developed as part of a negotiated rulemaking in 1997 that included numerous stakeholders from throughout the state with a broad range of interests.

In the *Lakosh* case, the Alaska Supreme Court was confronted with a general challenge to the regulations. The Court's ruling was a narrow legal decision focusing on the language of the regulations as opposed to a technical determination of whether any particular equipment or technology is indeed best available. In finding parts of the regulations inconsistent with statute, the Court relied upon the dictionary definition of the term "best" and concluded that in the absence of legislative history to the contrary, the BAT regulations could not rely on the stringent response planning standards for oil spill response technologies in determining BAT or rely on performance standards set forth in regulation for determining BAT for oil spill prevention technologies. The Alaska Supreme Court concluded that, while reliance on performance standards for determining BAT had considerable theoretical merit and are used in other federal environmental statutes in lieu of one-size fits all technological rules, the absence of specific legislative history on interplay between these standards and the BAT requirement, led the Court to the conclusion that the 1997 BAT regulatory criteria should be invalidated as inconsistent with statute.

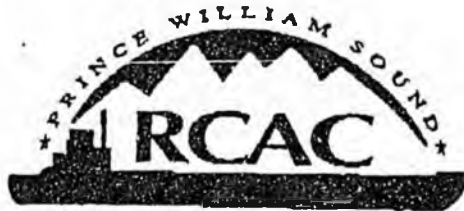
Given that the Alaska Supreme Court's ruling overturned the 1997 workgroup's use of the statutory response planning standards and regulatory oil spill prevention performance standards in determining best available technology, the BAT statutory requirement is ripe for Legislative clarification.

*Proposed Legislation:* The Legislation you have before you today would restore the regulatory criteria adopted by the 1997 negotiated rulemaking group and that has been utilized in approving over one-hundred C-plans since April 1997. This Legislation does not

weaken the best available technology requirement but, rather, is an effort to restore the consensus criteria that has been used for making BAT determinations for the last five years: criteria that has resulted in major improvements in oil spill prevention and response.

SB 343 accomplishes three things. It clarifies that the 1997 negotiated rulemaking regulations which established a three-tier approach for making BAT determinations is a permissible interpretation of the statute. Second, it affirms the continued validity and effect of the 1997 regulations; if SB 343 is enacted, DEC would not be required to revise its BAT regulations. Third and finally, the legislation would affirm the continued effect of contingency plan approvals issued under the 1997 regulations and ensure that plan holders could continue to operate under those approvals.

I would be happy to respond to any questions the Chair or Members of the Committee may have. Thank you.



Regional Citizens' Advisory Council

**Anchorage Office**  
 3709 Spenard Road  
 Anchorage, AK 99503  
 907-277-7222 907-277-4523  
 1-800-478-7221

**Valdez Office**  
 PO Box 3089  
 Valdez, AK 99686  
 907-835-5957 907-835-5926  
 1-877-478-7221

TO: REP HUGH FATE	DATE: 3-20-02
Telephone/Fax: 465-3883	Time:
From: JOHN DEVENS	# Pages (including cover): 3
Regarding: SB343	

Remarks

PLEASE SEE ATTACHED LETTER  
 TO REP. HUGH FATE

\* PLEASE SEE THAT THIS GETS  
 DISTRIBUTED TO THE  
 HOUSE OIL & GAS COMMITTEE  
 MEMBERS

THANK YOU!!

CALL DONNA SCHANTZ 907-277-7222  
 WITH QUESTIONS OR PROBLEMS



Regional Citizens' Advisory Council / "Citizens promoting environmentally safe operation of the Alyeska terminal and associated tankers."

In Anchorage:

3709 Spenard Road / Anchorage, Alaska 99503 / (907) 277-7222 / FAX (907) 277-4523

In Valdez:

P.O. Box 3089 / 339 Hazlet Avenue / Valdez, Alaska 99686 / (907) 835-5957 / FAX (907) 835-5926

MEMBERS

March 20, 2002

Alaska State Chamber of Commerce

Rep. Hugh Fife  
House Oil and Gas Committee  
Alaska House  
State Capitol (MS 3100)  
Juneau, Alaska 99801-1182

Alaska Wilderness Recreation & Tourism Association

Chugach Alaska Corporation

City of Cordova

SUBJECT: Senate Bill 343

City of Homer

Dear Representative Fife:

City of Kodiak

I am writing to present the Prince William Sound Regional Citizens' Advisory Council's position on Senate Bill 343 (SB343), which comes before your committee this week. PWSRCAC is very concerned that every effort be made to ensure that SB343 does not weaken contingency planning requirements.

City of Seldovia

City of Seward

City of Valdez

City of Whittier

In particular, we wish to draw your attention to the crucial role of the Best Available Technology conference mandated by the regulations referenced in Section 1(a)(5)-(6) of the bill. As noted in this section, these regulations were developed through a negotiated rulemaking process involving numerous stakeholders, including this organization.

Community of Chena Bay

Community of Tatitlek

The Best Available Technology Conference, with industry support, was included in this regulatory package because it sets up a multi-stakeholder process (a process that includes industry) for identifying Best Available Technology in an orderly way. Absent such a formal mechanism, the Best Available Technology process could become chaotic and disorganized, possibly leading to more litigation comparable to *Lakosh v. Alaska Department of Environmental Conservation*.

Cordova District Fishermen United

Kenai Peninsula Borough

Kodiak Island Borough

Kodiak Village Mayors Association

In light of the important role the Best Available Technology Conference plays in this regulatory package, we want to recommend that your committee amend SB343 by explicitly noting that the regulations require this conference.

Oil Spill Region Environmental Coalition

Prince William Sound Aquaculture Corporation

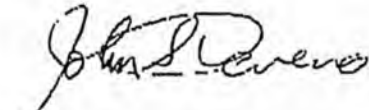
We suggest that such language could be inserted at 1(a)(5) by changing it to read as follows (new language in boldface):

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

The first of these conferences is now due under the regulations, and DEC has requested a \$250,000 appropriation for that purpose in its CIP budget. We are aware that cost is a sensitive issue in the present budget climate, and so want to assure your committee that this appropriation will not draw from the general fund, or worsen the fiscal gap. The Best Available Technology Conference will be financed out of the Prevention Mitigation Account of the Oil and Hazardous Substances Release Prevention Response Fund (also known as the "470 Fund"). This is a dedicated fund financed by a per-barrel tax on crude oil that is separate and segregated from the General Fund.

Thank you for considering our views. Please do not hesitate to contact me if you have any questions or if I can provide additional information on our position regarding SB343.

Sincerely,



John S. Devens, Ph.D.  
Executive Director

cc: Alaska House Oil and Gas Committee  
PWSRCAC Board of Directors



750 West Second Ave., Suite 109, Anchorage Alaska 99501 / Ph. 907.258.6171 / Fax 907.258.6177  
P.O. Box 22151, Juneau Alaska 99802 / Ph. 907.463.3366 / Fax 907.463.3312 / [www.acvoters.org](http://www.acvoters.org)

## SB 343 ~ Best Available Technology

TO: House Oil and Gas Committee

DATE: March 22, 2002

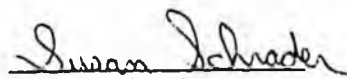
Alaska Conservation Voters (ACV) is a nonprofit organization dedicated to protecting Alaska's environment through public education and advocacy. Our 32 member organizations represent over 35,000 registered Alaskan voters, many of whom have participated in efforts, since the *Exxon Valdez* oil spill, to ensure that our state laws governing oil spill prevention and response are as strong as possible. Senate Bill 343 weakens the state law and, for that reason, we oppose it.

Soon after the *Exxon Valdez* spill, the forward-thinking legislature responded to Alaskans' demand for stricter laws by requiring the use of "Best Available Technology" (BAT) to prevent and respond to oil spills. Last month, the Alaska Supreme Court ruled in the *Lakosh* decision that the Department of Environmental Conservation (DEC) had adopted regulations that were inconsistent with the BAT statute. The department's legal violation was so clear-cut the Court had no choice but to overturn the regulations.

By introducing SB 343 to overturn the *Lakosh* decision, this legislature is taking a step backwards in respect to the quality of our oil spill laws. By equating BAT with the ability to merely meet a planning standard, this bill creates a disincentive for oil companies to research and develop new, more-effective technologies for responding to spills. Further, by reversing the *Lakosh* decision, SB 343 is letting DEC off the hook for looking closely at alternative technologies that could provide a better approach to spill response. SB 343 allows DEC to rubber-stamp the first technology the plan applicant says will meet the planning standard.

The Department of Environmental Conservation's regulatory framework currently provides a forum to address the *Lakosh* decision. ACV believes that an agency process is the best way to establish oil spill rules. We support an approach to BAT that ensures DEC conducts an analysis of a full range of alternative technologies; DEC's choice of BAT should be made following public review and comment, not simply after a DEC-industry conference.

Alaskans have had to pay an extraordinarily high price – the *Exxon-Valdez* spill – for the right to say we have some of the most comprehensive oil spill laws in the world. We do not want an industry-promoted roll back of those laws. SB 343 should not be supported.

  
Susan Schrader