

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILES 8672
2942 SCOMM 128: HOUSE SPEC.COMM. ON OIL AND GAS, 2001-02 706

STATE OF ALASKA

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

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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: 661-02-0412.

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.

The Alaska Supreme 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 of 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 is 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.

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

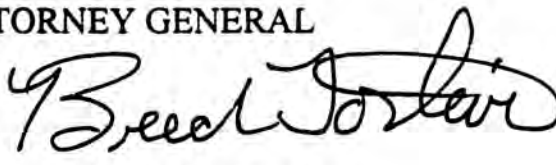
Alaska Legislature's intent in establishing the best available technology requirement in the first place. As two members of the Alaska Supreme Court noted concerning the Court's repeated cases seeking to interpreting another statute, "[i]t would be better for the legislature to revisit the statute and, 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.

Lastly, one testifier found fault with DEC initiating a public comment period on new regulatory revisions in order to respond to the Alaska Supreme Court's ruling at the same time it is supporting this legislation clarifying that the 1997 regulations are consistent with the statute. On the advice of the Department of Law, DEC proposed changes to its regulation in order to comply with the Alaska Supreme Court's ruling. This regulatory response is necessary, pending legislative clarification, because of the pending contingency plan approval and renewal applications now before DEC. There is nothing legally incongruous with DEC complying with a court ruling pending legislative clarification of the statute.

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: 

Breck C. Tostevin
Assistant Attorney General

cc: The Honorable Gary Wilken, Vice-Chair, Senate Resources Committee
The Honorable Rick Halford, Senate Resources Committee
The Honorable Robin Taylor, Senate Resources Committee
The Honorable Ben Stevens, Senate Resources Committee
The Honorable Kim Elton, Senate Resources Committee
The Honorable Georgianna Lincoln, Senate Resources Committee

Senator Torgerson

CS SB 343(RES). AGO File No. 661-02-0416.

March 7, 2002

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Douglas Mertz, Prince William Sound RCAC

Jim Carter, Cook Inlet RCAC

Marilyn Crockett, AOGA

Ross Coen, Alaska Forum for Environmental Responsibility

Dennis Dooley

Walter Parker

Tom Lakosh

Gary Carlson, Forest Oil Corporation

Deborah Behr, AGO Juneau

Chrystal Smith, AGO Juneau

Mike Abbott, Governor's Office

Commissioner Michele Brown, DEC

Larry Dietrick, Director of Spill Prevention and Response, DEC

**TESTIMONY OF THE
ALASKA OIL AND GAS ASSOCIATION
ON SB 343**

Senate Resources Committee
March 4, 2002

My name is Marilyn Crockett, and I am Deputy Director of the Alaska Oil and Gas Association (AOGA). 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. We appreciate the opportunity to testify before you today to express our support for SB 343, and to thank Chairman Torgerson for initiating this measure.

As described in SB343, 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 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.

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 the matter before you today.

In our view, SB 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.

There is one additional point we'd like to go on record about here today. 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 here today that the *only* objective sought by AOGA and its members at this time is Legislative affirmation of the rules prior to the Court decision.

SB343 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. SB343 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, action by the Legislature through SB343 is critical to continued C plan administration within the State of Alaska. SB343 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 the Committee to adopt SB343.

HAND DELIVERED

2/13/02 5:23 PM

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3
4 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

5 Tom Lakosh)
Plaintiff)
6 vs.)
Alaska Department of Environmental Conservation,)
7 Defendants,)
ARCO Marine Inc., BP Oil Shipping Company, USA,)
8 Sea River Maritime, Inc.)
Defendants in Intervention)

Case No. 3AN-01-07929 CI
On Remand from the Supreme Court
of the State of Alaska Case No. S-961

9
10 Motion for Status Conference, or in the alternative,

11 Motion for Declaratory and Injunctive Relief

12 Pro per plaintiff, Tom Lakosh, moves the court to schedule a status conference at its
13 earliest possible convenience to develop reasonable procedures for addressing appropriate relief
14 in the instant case. If the court cannot schedule a timely status conference, or is otherwise
15 indisposed to development of alternative relief from the unlawfully issued permits, plaintiff
16 seeks an immediate declaration of the court invalidating all Oil Discharge Prevention and
17 Contingency Plan Permits issued by DEC since April 4, 1997, and; order enjoining DEC from
18 issuing new permits pending implementation and application of regulations consistent with the
19 authorizing statute.

20 On February 1, 2002 the Supreme Court issued Opinion No. 5531 reversing summary
21 judgment in the instant case and declaring the contested regulations inconsistent with the
22 authorizing statute. The authorizing statute has been in effect for over 21 years but has never

23

Motion for Status Conference lakosh/2/15/02

Page 1 of 3

1 been appropriately applied by DEC in its review of oil spill contingency plans. The users of
2 Alaska's natural resources have suffered unlawful risk and damage from oil spills during this
3 period, but moreover, have been denied the mandated timely improvement of oil spill prevention
4 and response capability for 21 years.

5 DEC regulation, 18 AAC 75.445(f), provides for temporary and extraordinary spill
6 prevention measures when spill response cannot be performed in accordance with mandated
7 requirements:

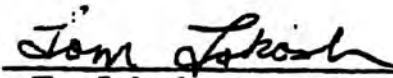
8 "The department will, in its discretion, require the plan holder to take specific
9 temporary prevention measures until environmental conditions improve to reduce the risk
10 or magnitude of an oil discharge during periods when planned spill response methods are
11 rendered ineffective by environmental limitations."

12 Where DEC has deliberately amended its regulations to diminish statutory protections
13 and otherwise grossly abused its discretion, it is imperative that the court apply its discretion in
14 application of the principles set forth in DEC regulations to insure that the public does not suffer
15 further undue risk and damage from oil spills or unnecessary economic harm from invalidation
16 of existing permits. Plaintiff has attempted to resolve this matter with DEC, but to no avail.
17 Plaintiff therefore suggests that the court engage in formulation of equitable relief, short of
18 revocation of permits, to provide the public with the protections that have been denied over 21
19 years which have resulted in billions of dollars of damage to Alaska's natural resources and loss
20 of revenue to the State.

21 Plaintiff will endeavor to seek advice of affected communities in formulation of cost
22 effective spill prevention measures as equitable relief to the above stated ongoing injuries, which
23 could not otherwise be remedied during the period of time it takes to reissue a proper regulation

1 and implement the technology improvements mandated by law across some 120 permits. An
2 orderly schedule for revision of the regulation and permit reevaluation will also be sought in the
3 remedy phase of this case. Plaintiff requests the court specify its intent for resolution of these
4 matters in its order regarding the instant motions.

5 Dated this 15th day of February, 2002

6 
7 Tom Lakosh
Pro Per Plaintiff

8 **Certificate of Service**

I certify that a true copy of the foregoing document was hand delivered to Brock Toostevin, (DEC), Kevin Callahan
(Sea River), Chuck Flynn (ARCO and BP) on 2/15/02 by 

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

Tom Lakosh

Plaintiff

vs.

Alaska Department of Environmental Conservation,
Defendants,

ARCO Marine Inc., BP Oil Shipping Company, USA,

Sea River Maritime, Inc.

Defendants in Intervention

Case No. 3AN-01-07929 CI
On Remand from the Supreme Court
of the State of Alaska Case No. S-9615

(Proposed) ORDER

The Court having fully considered Plaintiff's Motion for Status Conference, filed on
2/15/02, GRANTS the motion. The conference will held on at

The parties should cooperate in preparation of a discussion of remedies and scheduling as
suggested by Mr. Lakosh.

So ORDERED this day of , 2002

John Reese
Superior Court Judge

Notice: This opinion is subject to correction before publication in the Pacific Reporter. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0608, fax (907) 264-0878, e-mail corrections@appellate.courts.state.ak.us.

THE SUPREME COURT OF THE STATE OF ALASKA

TOM LAKOSH,	)	
	)	Supreme Court No. S-9619
Appellant,	)	
	)	Superior Court No.
v.	)	3AN-97-2572 CI
	)	
ALASKA DEPARTMENT OF	)	
ENVIRONMENTAL	)	
CONSERVATION, ARCO	)	O P I N I O N
MARINE, INC., BP OIL SHIPPING	)	
COMPANY, U.S.A., and	)	
SEARIVER MARITIME, INC.,	)	[No. 5531 - February 1, 2002]
	)	
Appellees.	)	
	)	

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, John Reese, Judge.

Appearances: Tom Lakosh, pro se, Anchorage.
Breck C. Tostevin, Assistant Attorney General,
Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for
Appellee State of Alaska, Department of Environmental Conservation.

Before: Fabe, Chief Justice, Matthews,
Eastaugh, Bryner, and Carpeneti, Justices.

BRYNER, Justice.

I. INTRODUCTION

In 1990, after the Exxon Valdez spilled more than 230,000 barrels of crude oil into Prince William Sound, the Alaska legislature strengthened Alaska's oil spill contingency plan statute by adding to the existing provisions, which required the use of "best available technology," a new provision that required all contingency plans to meet a set of specified response performance standards. After the Department of Environmental Conservation (DEC) adopted regulations to implement the new response performance standards and the best available technology requirement, Tom Lakosh sued DEC, challenging two aspects of its regulation defining best available technology. The superior court granted summary judgment to the state, and Lakosh appealed. Because the challenged regulation conflicts with the authorizing statute, we reverse and remand.

II. FACTS AND PROCEEDINGS

In 1980 the Alaska legislature, finding that "it is a matter of the highest urgency and priority to protect Alaska's coastal and inside water, estuaries, wetlands, beaches, and land from the damage which may be occasioned by the discharge of oil," enacted Alaska's Oil Pollution Control Act. [Fn. 1] One provision of the Act, AS 46.04.030, required persons engaged in various oil-related activities to file and obtain DEC's approval of oil spill prevention and contingency plans. [Fn. 2]

As originally enacted, this statute simply required that

oil spill prevention and contingency plans "provide for the use of the best available technology by the applicant." [Fn. 3] But in 1990, the year after the Exxon Valdez ran aground in Prince William Sound, the legislature strengthened the statute to require that all contingency plans meet legislatively specified performance standards for containing, controlling, and cleaning up spills. [Fn. 4] At the same time, the legislature retained a slightly modified version of the best available technology requirement, specifying that contingency plans "must provide for use . . . of the best technology that was available at the time the contingency plan was submitted or renewed." [Fn. 5]

The legislature left the phrase "best available technology" undefined but directed DEC to "establish the procedures and time limits applicable to agency review of contingency plans." [Fn. 6] To address this directive, DEC formed a working group comprising various stakeholders from the regulated industries, environmental and other public interest groups, local governments, and DEC representatives. The group held public workshops, published notices of proposed regulations in various newspapers, and received comments regarding the regulatory definition of best available technology. Tom Lakosh participated in the workshops and submitted written comments voicing his disapproval of the regulations. But the regulations were ultimately adopted, and their definition of best available technology took effect on April 4, 1997.

Lakosh filed a declaratory judgment action in superior court, challenging the new definition of best available technology as inconsistent with the underlying statutory requirements set out in AS 46.04.030(e). Superior Court Judge John Reese granted summary judgment in favor of DEC, upholding the regulations. Lakosh appeals, challenging two aspects of the regulations' definition of best available technology.

III. DISCUSSION

A. Standard of Review

We review a grant of summary judgment de novo. [Fn. 7] We exercise our independent judgment to determine whether administrative regulations are valid and to interpret the underlying statutory language. [Fn. 8] When an agency has adopted regulations under a delegation of authority from the legislature and using the process prescribed by the Administrative Procedure Act, [Fn. 9] we presume that the regulations are valid and place the burden of proving otherwise on the challenging party. [Fn. 10] We limit our review to "whether the regulation[s] [are] consistent with and reasonably necessary to carry out the purposes of the statutory provisions . . . [and] whether the regulation[s] [are] reasonable and not arbitrary." [Fn. 11]

In making the consistency determination, we use our independent judgment unless the "issue involves agency expertise or the determination of fundamental policy questions on subjects committed to an agency." [Fn. 12] If the issue involves agency expertise, we review under the reasonable basis standard and defer to the agency if its interpretation is reasonable. [Fn. 13] We also employ rational basis review in deciding whether a regulation is necessary to implement the statute [Fn. 14] and whether a regulation is reasonable and not arbitrary. [Fn. 15]

B. Statutory and Regulatory Provisions

Alaska Statute 46.04.030(a) provides that "[a] person may not cause or permit the operation of an oil terminal facility in the state unless an oil discharge prevention and contingency plan for the facility has been approved by [DEC] and the person is in compliance with the plan." [Fn. 16] Moreover, subsection .030(k) further requires that contingency plan holders be able to comply with specified standards. The subsection sets specific spill containment and cleanup performance standards [Fn. 17] and commands plan holders to maintain, or have available under contract,

* "sufficient oil discharge containment, storage, transfer, and cleanup equipment, personnel, and resources to meet" these standards. [Fn. 18] DEC has adopted regulations setting analogous performance standards that plan holders must meet with respect to oil spill prevention. [Fn. 19] And finally, subsection .030(e) requires that oil spill contingency plans also "provide for the use by the applicant of the best technology that was available at the time the contingency plan was submitted or renewed."

It is this latter provision, subsection .030(e)'s best available technology requirement, that is in controversy here. DEC chose to adopt a three-tiered approach for determining whether a contingency plan provides for the use of the best available technology. [Fn. 20] The first tier of the definition, set out in 18 AAC 75.445(k)(1), covers {cleanup and containment technology} governed by the oil spill response performance standards mandated by AS 46.04.030(k); cleanup and containment technology included in this tier meets the best available technology requirement if it is capable of complying with the statutory cleanup and containment performance standards that is, if the technology "as a whole" is "appropriate and reliable for the intended use as well as the magnitude of the applicable response planning standard." [Fn. 21] The second tier of the definition, 18 AAC 75.445(k)(2), governs {oil spill prevention technology}, which is governed by the oil pollution prevention standards found in 18 AAC 75.005 - .080; with limited exceptions not relevant here, the oil spill prevention technology in this tier meets the best available technology requirement if it is capable of meeting the performance standards in the applicable oil spill prevention regulations. [Fn. 22] The third tier of the definition, set out in 18 AAC 75.445(k)(3), covers {remaining technology} not subject to either the cleanup or prevention performance standards; in this tier, DEC determines whether the best available technology requirement has been met by undertaking a case-by-case evaluation based on specified criteria. [Fn. 23]

Thus, the challenged regulation uses individualized analysis to determine compliance with the best available technology requirement only for those residual classes of technology included in the third tier of the definition. [Fn. 24] For technologies covered in the first two tiers those involved in almost all oil spill prevention, containment, and cleanup activities compliance with the applicable performance standards essentially serves as a proxy for the best available technology determination.

C. The Parties' Arguments

Lakosh takes issue with the first two tiers of DEC's three-tiered method for determining whether technology is the best available, contending that they are inconsistent with AS 46.04.030(e). [Fn. 25] He argues that the legislature intended to require a "state of the art" quality of response equipment" that "necessarily requires a comparative analysis of available technologies" an individualized analysis like one prescribed for third-tier technology in 18 AAC 75.445(k)(3). In Lakosh's view, a definition that categorically approves any technology capable of achieving the applicable spill prevention or cleanup standards in other words, any technology "appropriate and reliable" to meet the standards conflicts with the statutory intent to require that only the best available technology be used. Lakosh thus protests that the tier one and two standards set out in 18 AAC 75.445(k)(1) and (2) are "static" and contain no provisions for requiring plan holders to employ state-of-the-art technologies.

But DEC responds that the best available technology statute "leaves it to the DEC to define what is best available technology." In DEC's view, requiring that a technology be "appropriate and reliable" to meet the "magnitude of the applicable response planning standard" suffices to define best available technology because the performance standards themselves are "the

*residual
classes
provide
for individual
analysis*

most demanding . . . standards in the world." Indeed, DEC argues, the performance standards actually encourage innovation by allowing a plan holder to use "a new, different and more efficient technology to meet the performance standard rather than simply imposing a 'one-size-fits-all' technological fix." [Fn. 26] Hence DEC urges us to recognize that, given the discretion delegated to it by the legislature, either a performance-based test like those specified in the first two tiers of the challenged regulation or an individualized analysis like the one set out in the third tier can be used to determine what is best available technology.

D. The First Two Tiers of the Definition, Set Out in 18 AAC 75.445(k)(1) and (2), Are Inconsistent with the Statutory Best Available Technology Requirement.

In addressing the parties' arguments we must first consider whether to give deference to DEC's interpretation of the best available technology statute. DEC contends that we should give deference to its judgment because "oil spill contingency planning and the application of a best technology requirement to oil spill response technologies . . . and oil spill prevention technologies . . . implicate DEC's specialized technical expertise and experience." This argument has considerable merit, but only to the extent that the legislature actually granted DEC authority to define best available technology. DEC's selection of a specific definition from among the many potentially encompassed within the general directive requiring "best available technology" certainly involved the kind of technical expertise and experience that courts are ill-equipped to second guess. To the extent that DEC's definition of best available technology lies within the broad contours contemplated by the legislature, then, the agency's judgment deserves considerable deference. [Fn. 27]

But whether DEC's definition lies within the limits of authority delegated by the legislature raises a threshold question of legislative intent. The Alaska legislature specifically required that a "contingency 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." [Fn. 28] The question whether DEC properly interpreted the legislature's mandate in promulgating 18 AAC 75.445(k)(1) and (2) is answerable through "statutory interpretation or other analysis of legal relationships about which courts have specialized knowledge and experience." [Fn. 29] Because this preliminary legal question resides within the traditional province of judicial review and involves no technical expertise, we decide it using our independent judgment. [Fn. 30]

In contending that a basic conflict exists between the statutory best-available-technology mandate and DEC's regulation implementing that mandate, Lakosh emphasizes the statute's use of the word "best." As commonly defined, the superlative "best" posits a universe of suitable or satisfactory candidates and denotes selection of a smaller group of those most desirable within that universe. [Fn. 31] Here, Lakosh argues, DEC effectively ignored the legislature's mandate to select the most desirable technologies from among the larger universe of satisfactory technologies by defining the first two tiers of "best available technology" to include essentially all suitable and satisfactory oil spill prevention and cleanup technologies.

Under 18 AAC 75.445(k)(1), all oil spill containment and cleanup technologies that can satisfy the containment and cleanup response planning standards set out in AS 46.04.030(k) that is, all that are "appropriate and reliable" to meet those standards are automatically deemed "best." Correspondingly, under 18 AAC 75.445(k)(2), all oil pollution prevention technology that is not expressly made subject to individualized best available technology review is automatically deemed "best" as long as it can satisfy that is, "comply with" the oil pollution discharge performance standards specified in 18 AAC 75.005 - .080. Both the first and

R

But

second tiers of the regulation, then, seemingly defy the legislative intent implicit in the usual meaning of "best": the intent to require a selection of the most desirable technologies from among a broader universe of technologies that would be suitable and satisfactory to comply with the requirements of a contingency plan which include a demonstrated ability to meet applicable performance standards.

Of course the plain meaning of "best" is not the end of the story. In construing statutory language, "we have rejected the mechanical application of the 'plain meaning' rule in favor of a sliding scale approach under which '[t]he plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be.'" [Fn. 32] But here, both the legislative history and context of the best available technology statute support its plain meaning.

In revising the original oil spill prevention and contingency plan statute, the legislature adopted detailed response planning standards governing spill containment and cleanup that contingency plans must address when submitted for approval. [Fn. 33] DEC has subsequently adopted detailed oil pollution prevention standards that must be addressed in contingency plans. [Fn. 34] The legislature also specified that, before DEC may approve a contingency plan, the agency must "ensure that the applicant for a contingency plan has access to sufficient resources to protect environmentally sensitive areas and to contain, clean up, and mitigate potential oil discharges from the facility or vessel as provided [by the response planning standards] and to ensure that the applicant complies with the contingency plan." [Fn. 35] DEC has likewise provided that contingency plan applicants and holders are "responsible for meeting the applicable requirements" of the performance standards set out in its oil pollution prevention regulations. [Fn. 36] And the legislature has given DEC broad authority to require plan applicants or holders to demonstrate their ability to carry out their contingency plans. [Fn. 37]

These mandatory performance standards are thus baseline requirements that all plan holders must be prepared to meet. And because the legislature adopted mandatory cleanup and containment performance standards at the same time that it required the use of best available technology to carry out those standards, it obviously did not intend to equate best available technology with the ability to meet performance standards; rather, it intended best available technology to be an additional requirement. Because they stand as statute, then, AS 46.04.030(k)'s mandatory response planning standards and AS 46.04.030(e)'s best available technology requirement evince an intent to impose two separate requirements: under subsection .030(k), all contingency plan holders must demonstrate their ability to comply with applicable performance standards; and under subsection .030(e), all applicants must also provide that they will achieve this compliance which is required as part of their plans by using "the best technology that was available at the time the contingency plan was submitted or renewed."

The first two tiers of DEC's best available technology regulation conflate these separate requirements by collapsing best available technology into compliance with requisite performance standards. Yet this interpretation effectively renders AS 46.04.030(e)'s best available technology requirement superfluous, for if the legislature had wanted nothing more than to require technology to provide an "appropriate and reliable" way of complying with performance standards, it could as easily have omitted subsection .030(e)'s best available technology language entirely and let the balance of section .030 stand on its own.

We decline to read the best available technology provision in this way. It is a well-recognized rule of statutory

construction that "the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous." [Fn. 38] Defining best available technology in terms of statutory minimums, then, cannot be consistent with the legislative intent of requiring that plan holders provide for the use of best available technology. And DEC points to no legislative history supporting a contrary interpretation.

The legislature plainly required that plan holders meet response planning standards and provide for the use of the best available technology in contingency plans. Because agencies are "not free to disregard any of the standards the legislature has articulated," DEC's regulations must reflect both statutory requirements. [Fn. 39] Paragraphs (k)(1) and (k)(2) of 18 AAC 75.445 fail to reflect both requirements and are therefore deficient.

Paragraph (k)(1) allows plan holders to meet the best available technology requirement for oil spill cleanup and containment by planning to use any reasonably satisfactory technology that is, any technology that would be "appropriate and reliable" to meet the cleanup and containment performance standards mandated by the response planning statute, AS 46.04.030(k). But as already indicated, AS 46.04.030(e) requires an additional step: a selection of the best technology from among all that is reasonably capable of meeting the response planning standards. Hence, by equating best available technology to "appropriate and reliable" compliance with performance standards, the definition in paragraph (k)(1) of the regulation violates AS 46.04.030(e)'s command to select the best of all available technology that is capable of complying with performance standards.

The same conclusion holds true for the definition of best available technology set out in paragraph (k)(2) of the regulation, which effectively equates best available oil pollution prevention technology to technology that is reasonably capable of meeting specified oil pollution prevention performance standards.

In defense of its regulation, DEC essentially argues that performance standards are a legitimate proxy for best available technology that good technology is bound to follow if performance standards are set sufficiently high. [Fn. 40] The challenged regulation reflects this approach. But while we assume that DEC's approach may have considerable theoretical merit, it is legally incompatible with the approach that the Alaska legislature adopted in AS 46.04.030(e) and (k), for the statute requires DEC to insist on the use of best available technology in addition to demanding compliance with performance standards. As DEC correctly notes, "[t]he [l]egislature did not choose between approaches." Yet DEC fails to recognize that the legislature chose both approaches and that this decision precludes DEC from then choosing one approach and ignoring the other.

Though we declare the challenged regulations invalid, we emphasize the limited scope of our ruling. We recognize of course that the task of defining best available technology is well outside the scope of the judiciary's responsibility and falls squarely within DEC's area of authority and expertise. We readily acknowledge that the legislature has vested DEC with broad discretion to decide how "best available technology" should be defined; and we believe that the agency is free to exercise this discretion not only in prescribing the methods for selecting the best from among all available technologies that are satisfactory, but also in deciding how broadly the class of best technologies should be drawn that is, how many of all available satisfactory technologies should be accepted as "best." But as a matter of statutory interpretation we are nevertheless constrained to hold that DEC's definition must at least include some winnowing process that AS 46.04.030(e) requires something more than accepting all

available technology that can "appropriately and reliably" comply with oil spill prevention and cleanup performance standards. We agree with Lakosh that DEC's current definitions fail this threshold requirement.

IV. CONCLUSION

Because the definition of best available technology in 18 AAC 75.445(k)(1) and (2) is contrary to AS 46.04.030(e), we REVERSE the superior court's summary judgment order and REMAND for entry of judgment declaring the regulation invalid.

FOOTNOTES

Footnote 1:

Ch. 116, sec. 1(a)(1), SLA 1980.

Footnote 2:

See former AS 46.04.030. Under AS 46.04.030(a) & (k), "oil discharge prevention and contingency plan[s]" are plans to prevent, contain, and clean up oil spills from oil tank vessels, offshore oil exploration or production facilities, and large oil terminal facilities.

Footnote 3:

Former AS 46.04.030(e).

Footnote 4:

AS 46.04.030(k); see ch. 191, sec.sec. 9, 10, SLA 1990.

Footnote 5:

AS 46.04.030(e).

Footnote 6:

AS 46.04.030(j); see also AS 46.04.070 ("[DEC] shall adopt regulations that are necessary to carry out the purposes of this chapter and that do not conflict with and are not preempted by federal law or regulations."); ch. 191, sec. 10, SLA 1990.

Footnote 7:

O'Callaghan v. Rue, 996 P.2d 88, 94 (Alaska 2000); Bd. of Trade, Inc. v. State, Dep't of Labor, Wage & Hour Admin., 968 P.2d 86, 89 (Alaska 1998).

Footnote 8:

Lauth v. State, Dep't of Health & Soc. Servs., 12 P.3d 181, 184 (Alaska 2000); Bd. of Trade, 968 P.2d at 89.

Footnote 9:

See AS 44.62. Because Lakosh does not argue that DEC violated the Administrative Procedure Act in promulgating the regulations, we need not analyze whether DEC complied with the Act's provisions.

Footnote 10:

O'Callaghan, 996 P.2d at 95; Bd. of Trade, 968 P.2d at 89; State, Dep't of Revenue, Permanent Fund Dividend Div. v. Cosio, 858 P.2d 621, 624 (Alaska 1993); State v. Anderson, 749 P.2d 1342, 1344 (Alaska 1988); State v. Alyeska Pipeline Serv. Co., 723 P.2d 76, 78 (Alaska 1986).

Footnote 11:

Kelly v. Zamarello, 486 P.2d 906, 911 (Alaska 1971); accord Lauth, 12 P.3d at 184; O'Callaghan, 996 P.2d at 94-95; Anderson, 749 P.2d at 1343-44; Chevron U.S.A. Inc. v. LeResche, 663 P.2d 923, 926-27, 930 n.15 (Alaska 1983).

Footnote 12:

O'Callaghan, 996 P.2d at 94.

Footnote 13:

Id.

Footnote 14:

Id. at 94-95. However, "reasonable necessity is not a requirement separate from consistency. If it were, courts would be required to judge whether a particular administrative regulation is desirable as a matter of policy"; this is a function of the agency. State, Bd. of Marine Pilots v. Renwick, 936 P.2d 526, 531 (Alaska 1997) (citing Cosio, 858 P.2d at 624).

Footnote 15:

O'Callaghan, 996 P.2d at 95.

Footnote 16:

Subsections .030(b) and (c) extend this requirement to persons operating pipelines, exploration or production facilities, tank vessels, and barges.

Footnote 17:

See AS 46.04.030(k)(1)-(5). For example, a plan holder must be able to "contain or control, and clean up a discharge equal to the capacity of the largest oil storage tank at the [oil terminal] facility within 72 hours." AS 46.04.030(k)(1).

Footnote 18:

Footnote 19:

See 18 Alaska Administrative Code (AAC) 75.005 - .080 (2001) (setting forth requirements for personnel training, security measures, record-keeping, oil transfers, leak detection, monitoring, operations, storage tanks, secondary containment, and facility piping).

Footnote 20:

DEC generally defined "best available technology" to mean "the best proven technology that satisfies the provisions of 18 AAC 75.425(e)(4) and 18 AAC 75.445(k)." 18 AAC 75.990(9). DEC defined "technology" to mean "equipment, supplies, other resources, and related practices ." 18 AAC 75.990(130).

Footnote 21:

18 AAC 75.445(k)(1); see also 18 AAC 75.430 - .442 (establishing the standards and factors).

Footnote 22:

See 18 AAC 75.445(k)(2).

Footnote 23:

For technology included in the third tier, 18 AAC 75.445(k)(3) requires DEC to determine compliance with the best available technology requirement by considering

(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.

Footnote 24:

See 18 AAC 75.425(e)(4) (listing the residual classes).

Footnote 25:

Lakosh does not dispute the criteria for evaluating third-tier technology under 18 AAC 75.445(k)(3).

Footnote 26:

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 argues that its reliance on a technology's appropriateness and reliability to comply with performance standards will be rendered more meaningful as a test of best available technology because DEC will have this "breakthrough technology" information at hand when evaluating whether prevention and contingency plans use best available technology.

Footnote 27:

See *State, Bd. of Marine Pilots v. Renwick*, 936 P.2d 526, 531 (Alaska 1997) (quoting *Whaley v. State*, 438 P.2d 718, 722 (Alaska 1968)) ("[T]he well settled rule [] requires courts to give consideration and respect to the contemporaneous construction of a statute by those charged with its administration, and not to overrule such construction except for weighty reasons.") (alterations in original).

Footnote 28:

AS 46.04.030(e).

Footnote 29:

Kelly v. Zamarello, 486 P.2d 906, 916 (Alaska 1971); see also *Lauth v. State, Dep't of Health & Soc. Servs.*, 12 P.3d 181, 184 (Alaska 2000); *Bd. of Trade, Inc. v. State, Dep't of Labor, Wage & Hour Admin.*, 968 P.2d 86, 89 (Alaska 1998) (stating that the court will not replace the agency's judgment with its judgment, but will review for reasonableness, arbitrariness, and consistency); *State, Commercial Fisheries Entry Comm'n v. Templeton*, 598 P.2d 77, 80-81 (Alaska 1979).

Footnote 30:

See sources cited *supra* note 29.

Footnote 31:

According to Webster's, for example, "best" means "1. Exceeding all others in excellence, achievement, or quality: most excellent . . . 2. Most satisfactory, suitable, or useful: most desirable . . ." Webster's II New College Dictionary 105 (1999).

Footnote 32:

Bd. of Trade, 968 P.2d at 91 (quoting Muller v. BP Exploration (Alaska), Inc., 923 P.2d 783, 787-88 (Alaska 1996)).

Footnote 33:

AS 46.04.030(k) provides:

Except as provided in (m) and (o) of this section, the holder of an approved contingency plan required under this section shall maintain, or have available under contract, in its region of operation or in another region of operation approved by [DEC], singly or in conjunction with other operators, sufficient oil discharge containment, storage, transfer, and cleanup equipment, personnel, and resources to meet the following response planning standards:

(1) for a discharge from an oil terminal facility, the plan holder shall plan to be able to contain or control, and clean up a discharge equal to the capacity of the largest oil storage tank at the facility within 72 hours, except that if [DEC] determines that the facility is located in an area of high risk because of natural or man-made conditions outside of the facility, it may increase the volume requirement under this paragraph so that the contingency plan must be designed for a response that is greater in amount than the capacity of the largest oil storage tank at the facility;

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

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

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

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

(C) in addition to the minimum equipment, personnel, and other resources required to be maintained within the region of operation by (A) or (B) of this paragraph, a plan holder shall maintain, either within or outside of the plan holder's region of operation, additional equipment, personnel, and other resources sufficient to contain or control, and clean up a

realistic maximum discharge within the shortest possible time; the plan holder must demonstrate that the equipment, personnel, and other resources maintained outside the plan holder's region of operation are accessible to the plan holder and will be deployed and operating at the discharge site within 72 hours;

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

(5) for a discharge subject to the provisions of (1) - (3) of this subsection that enters a receiving environment other than open water, the time requirement for clean up of the portion of the discharge that enters the receiving environment may, in [DEC's] discretion, be within the shortest possible time consistent with minimizing damage to the environment.

DEC has retained and elaborated these standards in 18 AAC 75.430 - .442.

Footnote 34:

See 18 AAC 75.005 - .080.

Footnote 35:

AS 46.04.030(e).

Footnote 36:

18 AAC 75.005.

Footnote 37:

See AS 46.04.030(e)(1) - (3).

Footnote 38:

Kodiak Island Borough v. Exxon Corp., 991 P.2d 757, 761 (Alaska 1999) (quoting Rydwell v. Anchorage Sch. Dist., 864 P.2d 526, 530-31 (Alaska 1993)).

Footnote 39:

Kalmakoff v. State, Commercial Fisheries Entry Comm'n, 693 P.2d 844, 853 (Alaska 1985).

Footnote 40:

For commentary discussing whether performance standards like those established in paragraphs (k)(1) and (k)(2) of 18 AAC 75.445 are superior to traditional best available technology standards, compare Bruce A. Ackerman & Richard B. Stewart, Reforming Environmental Law, 37 Stan. L. Rev. 1333, 1354 (1985) (arguing for

a change from technology-based standards to pollution-based performance standards) with Howard Latin, Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and Fine Tuning Regulatory Reforms, 37 Stan. L. Rev. 1267, 1267, 1273 (1985) (arguing that fine-tuning approaches like performance standards have not been proven effective).