

ALASKA LEGISLATURE COMMITTEE FILES 2001-2002 8672

10409 HOUSE RESOURCES

S B

3 4 3



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
Commerce

Alaska Wilderness
Recreation & Tourism
Association

Chugach Alaska
Corporation

City of Cordova

City of Homer

City of Kodiak

City of Seldovia

City of Seward

City of Valdez

City of Whittier

Community of
Chenega Bay

Community of
Tatitlek

Cordova District
Fishermen United

Kcnoi Peninsula
Borough

Kodiak Island
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;



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
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

City of Seward

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 Valdez

City of Whittier

Community of
Chena Bay

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
Tatitlek

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):

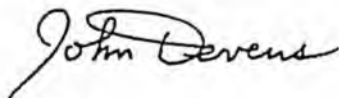
(5) under AS 46.04.030(j) and 46.04.070, the Department of Environmental Conservation adopted regulations at 18 AAC 75.445(k), effective April 4, 1997, that established a reasonable three-tiered process, **including periodic Best Available Technology Conferences**, for defining what was meant by best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



"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

Alaska Native Groups

Environmental Groups

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.

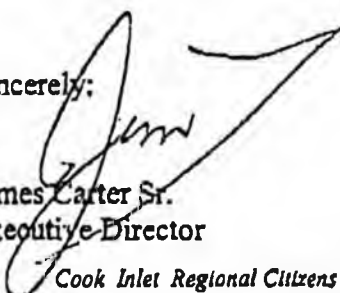
We are writing you today to voice our support for Senate Bill 343. This legislation is intended to overturn the recent Supreme court decision regarding *Lakosh v. ADEC*, in which it said that Alaska statute AS 46.04.030(e) requires that the ADEC do individualized assessments of oil spill contingency 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						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

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						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

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

[IPP home](#)

GENERAL

INFORMATION

[Financial responsibility](#)

[Response action contractors](#)

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 Technical Review - Pipelines](#)

[Leak Detection Technical Review - Fuel 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

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

[\[SPAR division\]](#) [\[Top of Page\]](#) [\[State of Alaska\]](#) [\[disclaimer\]](#)

Sponsored by:



The Amaize-ing Rocks
that Make You Feel Like a
Million

Alaska Legal Resource Center

Made available by Touch N' Go Systems, Inc., and the
Law Offices of James B. Gottstein.

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

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. 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 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1954
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.

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

A.G. Letter

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.

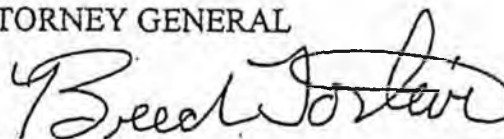
Lastly, one testifier found fault with DEC initiating a public comment period on new regulatory revisions in order to respond to the Alaska Supreme Court's ruling at the same time it is supporting this legislation clarifying that the 1997 regulations are consistent with the statute. On the advice of 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
Page 4

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

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.

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 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 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.

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						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

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						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

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

[IPP home](#)

GENERAL

INFORMATION

[Financial 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 Technical Review - Pipelines](#)

[Leak Detection Technical Review - Fuel 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

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

[\[SPAR division\]](#) [\[Top of Page\]](#) [\[State of Alaska\]](#) [\[disclaimer\]](#)

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907)269-5100
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: 661-02-0412.

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

A.G. Letter

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

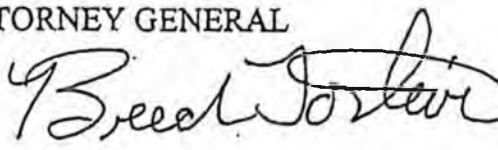
Alaska Legislature's intent in establishing the best available technology requirement in the first place. As two members of the Alaska Supreme Court noted concerning the Court's repeated cases seeking to interpreting another statute, "[i]t would be better for the legislature to revisit the statute and, 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
Page 4

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

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.

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 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 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.

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.

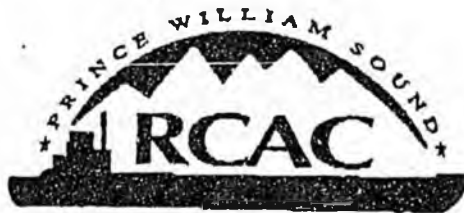
Given that the Alaska Supreme Court's ruling overturned the 1997 workgroup's use of the statutory response planning standards and regulatory oil spill prevention performance standards in determining best available technology, the BAT statutory requirement is ripe for Legislative clarification.

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 3009 / 339 Hazelet Avenue / Valdez, Alaska 99686 / (907) 835-5957 / FAX (907) 835-5926

MEMBERS

March 20, 2002

Alaska State Chamber of Commerce

Alaska Wilderness Recreation & Tourism Association

Chugach Alaska Corporation

City of Cordova

City of Homer

City of Kodiak

City of Seldovia

City of Seward

City of Valdez

City of Whittier

Community of Chenega Bay

Community of Tatitlek

Cordova District Fishermen United

Kenai Peninsula Borough

Kodiak Island Borough

Kodiak Village Mayors Association

Oil Spill Region Environmental Coalition

Prince William Sound Aquaculture Corporation

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

SUBJECT: Senate Bill 343

Dear Representative Fife:

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.

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.

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*.

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.

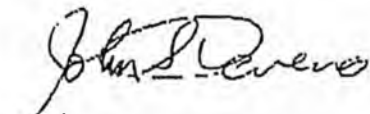
We suggest that such language could be inserted at 1(a)(5) by changing it to read as follows (new language in boldface):

(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

SB 343 ~ Best Available Technology

TO: House Oil and Gas Committee

DATE: March 22, 2002

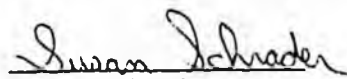
Alaska Conservation Voters (ACV) is a nonprofit organization dedicated to protecting Alaska's environment through public education and advocacy. Our 32 member organizations represent over 35,000 registered Alaskan voters, many of whom have participated in efforts, since the *Exxon Valdez* oil spill, 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

S B

3 5 6

ALASKA STATE LEGISLATURE

SENATOR
Gene Therriault
Cushman Suite 101
Fairbanks, Alaska 99701
(907) 488-0857
FAX (907) 488-4271



While in Juneau
State Capitol
Juneau, Alaska
99801-1182
(907) 465-4797
FAX (907) 465-3884

119 N.

Senate
Senate District Q

WHAT ARE GENERAL PERMITS?

- General permits (GPs) apply to a class or group of operations that are similar—from an operational and waste discharge perspective. GPs contain specific performance or operational requirements, and can be applied statewide or limited to a specific geographic or environmental setting. Some GPs incorporate site-specific requirements relevant to a location or receiving environment.
- GPs go through public review at the time they are proposed. In most cases, operators who wish to discharge or dispose of waste under the terms of a GP are required to receive written authorization from DEC in order to proceed.
- GPs are widely used by both federal and state agencies. DEC, like most other states, has used GPs for years, however state law regarding discharges of wastewater and solid waste does not specify procedures for general permits.

WHAT TYPE OF OPERATION USES A GENERAL PERMIT?

- Remote camps and lodges
- Fish hatcheries
- Sewage treatment for communities with fewer than 1,000 people
- Oil well drilling operations

WHY ARE GENERAL PERMITS VALUABLE?

- GPs allow DEC to avoid duplication by creating one permit instead of multiple identical permits for activities where the risk and impact to the environment is either low or can be easily mitigated with common treatment practices.
- GPs save DEC and the regulated community time and money while accomplishing the goal of environmental protection. GPs go hand in hand with the permit fees structure created by the Legislature in 1999 with HB361 by allowing the resource agencies to establish fixed fees for GPs.
- GPs allow DEC to allocate more resources to field site visits and inspections — the agency's best opportunity to make sure the permits are working as designed and that the public health and environment are being protected.

WHAT DOES SB356 ACCOMPLISH?

- The bill establishes procedures for developing and issuing GPs in DEC's water and solid waste divisions.
- The bill requires clear public access to information about which facilities and activities are operating under the terms of a GP.

STATE OF ALASKA

DEPT. OF ENVIRONMENTAL CONSERVATION

DIVISION OF AIR AND WATER QUALITY
DIRECTOR'S OFFICE

TONY KNOWLES, GOVERNOR

555 Cordova Street
Anchorage, AK 99501-2617
PHONE: (907) 269-7634
FAX: (907) 269-3098
<http://www.state.ak.us/dec/>

April 2, 2002

The Honorable John Torgerson
Chairman, Senate Resources Committee
State Capitol
Room 427
Juneau, AK 99801-1182

Re: Senate Bill 356

Dear Senator Torgerson:

At the request of the Senate State Affairs Committee, Department of Environmental Conservation is providing the following information to the Senate Resources Committee regarding SB 356, an act clarifying DEC's authority to issue general permits for certain solid waste disposal and wastewater discharges.

General permits are widely used by the Environmental Protection Agency and U.S. Army Corp of Engineers in implementing the federal Clean Water Act and other federal laws. They are also commonly used by most, if not all, states, including Alaska. However, existing state law does not specify the procedures for issuing general permits. Our understanding is that SB 356 seeks to clarify that issue, following on the passage of HB 361 two years ago which sets permit fees for individual and general permits.

General permits are used for similar operations where the discharge effluent or solid waste can and should be managed in the same way at each location. They avoid duplication of work by creating one permit instead of multiple identical permits. This allows the department to use the time saved in permit review to enhance our field presence. Field site visits and inspections are the best opportunity to make sure permits are working as designed. In short, general permits save money and time while still accomplishing the environmental and public health protection goals.

In 1999, the department sponsored a work group to provide recommendations on how to rebuild DEC's wastewater permitting functions following budget cuts. A majority of the work group members recommended that general permits should be used where feasible and practical. A few members expressed reservations, preferring individual permits.

If the legislature is interested in clarifying the procedures for the issuance of general permits, it is important that two key points be addressed. First, general permits, in our view, are appropriate only when the risk and impact to the environment is either low or can be readily and fully mitigated with common treatment practices. General permit use should not be expanded to activities that pose a potential for serious impact or require rigorous treatment.

Clean Air, Clean Water

The Honorable John Torgerson

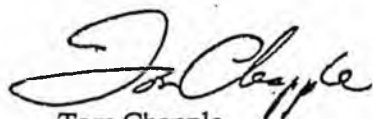
-2-

April 2, 2002

Second, the procedures for developing and issuing general permits set out in statute, must describe how the public can comment on a proposed general permit and must provide for a reasonable dissemination of information on which facilities or activities are operating under a general permit.

We thank you for considering our comments and would be pleased to answer any questions from the Committee.

Sincerely,



Tom Chapple
Director, Air & Water Quality



Janice Adair
Director, Environmental Health

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES



Resource Development Council for Alaska, Inc.

121 West Fireweed Lane, Suite 250, Anchorage, Alaska 99503-2035
(907) 276-0700 Fax: (907) 276-3887 e-mail: Resources@akrdc.org

Founded 1975

EXECUTIVE DIRECTOR
Thaddeus J. Owens

2000-2001 EXECUTIVE COMMITTEE
Robert B. Stiles, President
Charles W. Johnson, Sr. Vice President
Mark Hanley, Vice President
Uwa L. Gross, Secretary
Stephanie Madsen, Treasurer

Allen Bingham
Charlie Boddy
Charles D. Brower
Marilyn Crockett
Mario Frey
Paul S. Glavinovich
Charles J. Greene
Paul Laird
Ryan Lance
Thomas Maloney
Kirk McGee
David J. Parish
Thyes J. Shaub
John Shively
Sally Smith
Scott L. Thorson
Jack Williams

DIRECTORS
Irene A. Anderson
Dale Bagley
Ernest Ballard
John A. Barnes
C. E. Eric Britten
Frank M. Brown
Al Burch
Richard Cattanach
James L. Cloud
Stephen M. Connelly
Jeffrey J. Cook
Bert Cottle
Robert E. Cox
Larry Daniels
Paula P. Easley
Lon Eussen
Jeffrey Y. Foley
Donald S. Follows
Ronald A. Getbrich
Carol C. Gassam
John K. Handoland
Rick P. Harris
Joseph R. Henn
Jan Jansen
William Jeffress
David A. Jensen
Erling T. Johansen
John Key
Brian J. Lettich
Wendy Lindskoog
David L. Matthews
William McLaughlin
James Mery
Ron Noel
John K. Norman
R. Michael O'Neill
Dean Owen
Sarah H. Palm
Robert J. Pawlowski
Gail Phillips
William E. Pierce
Debbie Reinwand
Elizabeth Rensch
Rick Rogers
Dennis Roper
Patrick R. Smith
Joseph Sprague
John L. Sturgeon
Jim Taro
Rupert G. Tart, Jr.
Barry D. Thomson
Lon Trotter
Nancy B. Usera
J.C. Wingfield
George P. Wuertch
Eric P. Yould

HONORARY DIRECTORS
Phil R. Holdsworth
Rocky Miller
George R. Schmitt
William R. Wood

EX-OFFICIO MEMBERS
Senator Ted Stevens
Senator Frank Murkowski
Congressman Don Young
Governor Tony Knowles

April 2, 2002

Senator John Torgerson
Chair, Senate Resources Committee
Alaska State Legislature
State Capitol
Juneau, Alaska 99801

Re: SB356 — General Permit for Water/Waste Disposal

Dear Senator Torgerson:

On behalf of the Resource Development Council for Alaska, Inc. (RDC), I am writing to express our strong support for SB356 — General Permit for Water/Waste Disposal. This legislation affirms the Department of Environmental Conservation's (DEC) authority to issue general permits for water and solid waste disposal. Essentially a housekeeping measure, this bill demonstrates the Legislature's commitment to permit streamlining and strikes a balance between environmental protection and economic and community development.

As you know, RDC is a private, membership-funded, non-profit trade association. Our members include companies from the mining, timber, oil and gas, tourism and fishing industries. Also within our ranks are local communities, Native corporations, organized labor and industry support firms. Our mission is to expand Alaska's economic base through the responsible development of the state's natural resources.

General permits (GPs) are widely used by both federal and state agencies. DEC currently issues GPs for fish hatcheries, remote camps and lodges, sewage treatment facilities in small communities and oil and gas drilling operations among other activities. GPs allow DEC to avoid duplication by creating one permit, instead of multiple identical permits, for activities where the risk and impact to the environment is either low or can be easily mitigated with common treatment practices. GPs save DEC and the regulated community time and money while accomplishing the goal of environmental protection.

In addition, GPs go hand in hand with the extremely successful permit fees structure created by the Legislature in 1999 with HB361— Fees for State Services. An important aspect of HB361 was the support it provided the state's resource agencies in establishing fixed fees for GPs. Both the resources agencies and the regulated community have fared well under the new permit fees structure and SB356 is an important step toward ensuring its continued success.

RDC appreciates your consideration of this issue and we urge the Senate Resources Committee to move SB356 forward. Please feel free to contact me with any questions.

Sincerely,

A handwritten signature in cursive script that reads "Tadd Owens".

Tadd Owens
Executive Director



ALASKA MINERS ASSOCIATION, INC.

3705 Arctic #202 Anchorage Alaska 99503 • (907) 563-9279 • FAX (907) 563-9225 • www.alaskaminers.org

April 2, 2002

Honorable Gene Therriault
Alaska State Senate
State Capitol
Juneau, AK 99801

RE: Senate Bill 356, General Permits

Dear Senator Therriault,

Thank you for the opportunity to comment on Senate Bill 356 regarding General Permits issued by the Department of Environmental Conservation. We support this bill and urge its passage at the earliest possible date.

SB-356 will establish authority in statute regarding the promulgation of General Permits for solid and water discharges. This bill will ensure that there is no question that DEC has the proper legal basis for issuing General Permits.

General Permits are important for both the mining industry and the DEC. GPs allow industry, the public and the agency to establish a permit that can be used by many different operations without the time and cost of individual permits. If the miner or explorationist can accept the terms of the GP, he can obtain the permit in short order. GPs reduce uncertainty because the miner knows from the start exactly what the terms will be and can utilize these during planning and mine design. GPs also ensure equal treatment for all operators.

GPs are also important for controlling costs while the DEC works to meet its regulatory requirements. It is much more cost effective to establish a GP that can then be used for several years, versus issuing individual permits to each operator.

Thank you again for the opportunity to comment on this bill and we urge its passage at the earliest possible date.

Sincerely,

Steven C. Borell, P.E.
Executive Director

cc: Commissioner Michelle Brown

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: SB 356
 (S) Publish Date: 4/4/02

Revision Date/Time (Note if correction): _____ Dept. Affected: Environmental Conservation
 Title: "An Act relating to the authority of the Dept. of BRU Multiple
Env. Conservation to issue general and individual permits. . ." Component Multiple
 Sponsor Senate State affairs Committee
 Requester Resources Component No. 633

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	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

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						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

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					
Part-time					
Temporary					

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Mary Siroky
 Division: Statewide Public Services
 Approved by: Kurt Fredriksson, Deputy Commissioner
 Agency: Department of Environmental Conservation

Phone 465-5312
 Date/Time 3/29/02 12:00 AM
 Date 3/29/2002

U.S. Army, Alaska Proposed Amendment to SB 356 am Background Summary

Background: On 12 April 2002, a group of national and local environmental organizations sued the United States Army and the Department of Defense in an attempt to close down Ft. Richardson's only artillery training range, Eagle River Flats (ERF).

- The Army's ability to continue live fire artillery training at ERF is critical to Ft. Richardson's national defense mission. It's a matter of troop readiness: "We must train like we fight." In practice, this means that our soldiers must engage in regular training exercises that include the use of live munitions--e.g., artillery, explosives, high-caliber weaponry, etc.
- ERF is the only location south of the Alaska Range where soldiers can conduct live fire heavy artillery training. Without the ERF range, Ft. Richardson's future could be at risk. And it won't stop there. If the environmental plaintiffs are successful in stopping training at FRA, other military training ranges in Alaska are likely to come under similar attack.

Request for Assistance: The U.S. Army, Alaska needs your help.

- The plaintiffs argue, among other things, that the Federal court should force the Army to close the ERF range because the Army has not obtained an ADEC water and solid waste discharge permit (i.e., an "AS 46.03.100 permit") for the firing of artillery munitions into ERF.
- ADEC has never required a state discharge permit for munitions firing on active military ranges. Traditionally, the AS 46.03.100 permit requirement has applied to activities such as discharges of wastewater from an industrial facility or construction of solid waste landfills.
- Expanding the ADEC permit requirement to cover live-fire military training activities on active military ranges sets an unacceptable precedent. If the effort succeeds, ADEC may well be pressured into attempting to regulate critical aspects of training exercises, such as the type of munitions used, firing locations, firing times and parameters, etc. ADEC is not equipped to do this, and we have no reason to believe that ADEC wishes to assume this role. It's a bad idea all around.

What we seek: A bill, SB 356 am, is pending in the House Resources Committee and is scheduled for hearing this Friday afternoon. SB 356 deals with ADEC's authority to issue disposal permits under AS 46.03.100. AS 46.03.100 already contains a list of exceptions to the permit requirement (*see* AS 46.03.100(d)). The U.S. Army, Alaska seeks a short, simple amendment to AS 356 am to that would add *discharges resulting from the firing of munitions in training activities conducted on active military ranges* to the list of activities exempted from the AS 46.03.100 permit requirement. A proposed version of the amendment is attached.

Proposed Amendment to SB 356 am

SB 356 am shall be amended to add a new section that reads as follows:

Sec. __. AS 46.03.100(d) is amended to read:

(d) This section does not apply to

(1) disposals subject to regulation under AS 31.05.030(e)(2); [OR]

(2) injection projects permitted under AS 31.05.030(h) [.]; or

(3) discharges resulting from the firing or other use of

munitions in training activities conducted on active ranges operated by the United States Department of Defense or a United States military agency.

Jennifer

House Resources Comm

From Will Abbott

263-2110

Will_Abbott@RCFF.Ste.AK.US

From our conversation this morning.

Thanks

Will

The licensing of small hydro projects in Alaska by Alaskans could be an important step in building economical renewable energy sources in many parts of state. SB 140 can give us the vehicle to improve the regulatory process for licensing such projects. With this bill and the Federal legislation in hand we must scope the regulatory process and insure the State can perform the responsibilities delegated to us in a responsible, efficient manner that is more responsive to the needs of Alaskans and achieves the goals set for us by the Governor and SB 140.

Therefor the Regulatory Commission of Alaska in consultation with the Commissioners of DNR, DCED and DF&G will report to the legislature in 2003 with their assessment of how the licensing of small hydro projects by the State of Alaska would be accomplished. This report will include the impact on the operating budget, funding mechanism, staff requirements, potential statutory changes, timelines and public participation for developing regulations and any other items deemed important by the administration.



Alaska State Legislature

Please enter into the record my testimony to the H RESOURCE
Committee name

Committee on SB 356, dated 4-26-02
Bill/Subject

4 PAGES
↑
TOTAL

Signed: DANA L. OLSON
Testifier

Representing (Optional)
HC-30 BOX 5438 WASILLA, AK 99654
Address
373-4612
Phone number

DANA L. OLSON
 HC-30 Box 5438
 WASILLA, AK 99654
 26 April 2002

TO House Resources Committee
 SB No 356 AM

I cite Article 1 Sec 2 of AK Constitution
 to object to AS 46.03.100 (F) (1) AND (3)

"All political power is inherent in the
 people. It is founded upon their
 will only, AND INSTITUTED FOR THE
 GOOD AS THE PEOPLE AS A WHOLE.

1. Where (1) AND (3) do not undergo consideration
 in A LAND-use PLAN previously
2. HAVE not been considered in a ~~law~~ ENVIRONMENTAL
 PLAN under AS 46.03.040
- (3) ~~2~~ No review in CM2 AS NO permit ^{or permit} ^{state}
 IN A Ffective AS WATER ARE NOT
 MANAGED BY LOCAL COASTAL DISTRICTS.

AS 46.03.100 Line 2.3, the COMMISSIONER
 OF DEC LACK expertise... both educationally,
 AND this has NO consideration of SOCIAL &
 economic impacts to communities AND
 those activities related to sustained yield.
 Under public trust I object to a general permit /
 or consideration by DEC Commissioner.
 NO credible, documentary evidence
 to provide reliance on this AS section.

I will oppose (AS 46.03.100(h) or dept
may on its own initiative propose the
applicant be issued a general permit.

With streamlining of permits this is not
necessary. See Olson EPA petition ~~for~~
ON streamlining of permits.
(sufficiency of notice)

I state no requirement exists for
public notice (under due process) to only
be on a computer unless electricity is
provided to all persons AND computers.

~~proposed~~ I allege federal equivalents
will be negated by this legislation.
I will oppose your permittees?

The CMZ allows for public participation
at all aspects of planning. Giving notices
to agencies with no current ^{updated} LAND-USE ^{or comprehensive} PLANS
Plans is meaningless as they act in
ignorance!

AS 46.03110(d) is too vague
AND NOT enforceable under CLEAN water
Act. The federal Act requires
enforceable standards, as citizen
suit provision applies.

P 4, Line 9; Sec 8

Where no criteria has been set by the
LegisLature, regulations themselves
CAN be challenged, AND ALSO permittee
USE.

60pg; Sent to EPA. (Bad Faith by LegisLature)

Sincerely
Anna J Olson

P.S The LegisLature CAN ^{not Act}
_(Not done)
LegisLative AS46.03.040 AND concurrently Qui-judical
defining my dec process rights;

- ① Without Adequate, AND Sufficient
notice (OF Location) OF Activities proposed.
- ② ^{AND} deny (First public participation)
requirement under federal LAWS.
There ARE MANY!



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.aevoters.org

SB 356 am ~ General Permit for Water / Waste Disposal

TO: House Resources Committee Members

DATE: April 26, 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. Our members, as most Alaskans, support strong laws that safeguard the quality of Alaska's waters. In an attempt to address industry's desire for permit streamlining and "regulatory efficiency," SB 356 goes too far. Because it is so broadly written as to invite abuse, we oppose SB 356.

Senate Bill 356 would allow the Department of Environmental Conservation (DEC) to exempt the disposal of any non-hazardous waste from the individual permit requirements in AS 46.03.100, by allowing use of a non-site specific general permit. Although DEC currently authorizes certain activities under a variety of existing general permits, this bill allows DEC to broaden the range of activities covered by general permits, thereby getting around what the law otherwise requires them to do: review the proposals on an individual basis and make sure the proposals are consistent with state water quality and solid waste law. Waste disposal via general permits is bad public policy because the disposal of waste under a general permit will not receive full site-specific attention of either the regulatory agencies or the public. The major problems with this legislation include:

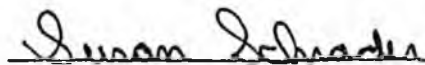
- **General permits force a "one-size fits all" on projects** – Section 3 of SB 356 allows DEC to issue a general permit "on a statewide, regional, or other geographical basis." In an effort to streamline the permitting process, DEC would not have to consider, for example, that solid waste disposal at a mine in the dry Interior is a different concern than disposal at a mine in Southeast Alaska. Unique attributes of a site could be easily disregarded.
- **Opportunity for public review is markedly limited** – All Alaskans, including adjacent property owners, Native Alaskans using an area for subsistence, or commercial fishermen concerned with protection of salmon habitat, would have very limited opportunities to find out about and comment upon projects seeking a general permit. While Section 5 of SB 356 does provide for public notice and comment *when a new general permit is being proposed*, Section 7 of the bill requires that public notice, via a posting on the Internet, be given *only* when DEC specifically authorizes a discharge under an existing general permit. For discharges that DEC chooses not to require authorizations, neither the public nor DEC will have a reliable method to find out about the discharges or their impacts.

OVER

- **This legislation introduces new, undefined, vague terms and phrases** –Section 3 uses the following that are undefined: “waste disposal,” “water disposal,” “similar in nature, and “minimal adverse environmental effects.” “Waste disposal” could refer to both solid and liquid waste; “water disposal” could refer to disposal of water generally, or to disposal of heated process or cooling water, or more generally to disposal *into* water. Does “similar in nature” mean similar in chemical composition, or a disposal of waste from similar sources, or a disposal from members of a similar industry? How minimal is “minimal”? Are “environmental effects” the same as “environmental impacts”? The overly-broad, imprecise language of this bill contributes to the bad public policy presented by SB 356.

Supporters defend this legislation by stating the bill only clarifies in statute DEC’s existing authority to write general permits. **However, SB 356 goes far beyond what is needed to achieve that goal.** With vague language and overly-broad provisions, this bill opens the door for abuse of the permitting process, an important safeguard of Alaska’s water quality.

We urge you to oppose SB 356.


Susan Schrader

TONY KNOWLES
OCYBINGA



STATE OF ALASKA
OFFICE OF THE GOVERNOR
WASHINGTON, DC

Chairman Joe Barton
Energy and Power Subcommittee
United States House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515-6115

Re: S. 422 Hearing on March 30, 2000

Mr. Chairman:

The State of Alaska supports legislation that would offer the State the opportunity to assume jurisdiction over licensing of hydroelectric projects of five megawatts or less. Development of small hydroelectric projects is critical to the economic development of our state. Of the 29 hydropower projects supplying power to public utilities in Alaska, 17 are five megawatts or less in size.

Small hydro is especially important in rural Alaska where the cost of other energy sources is high and the resulting availability of power can be limited. The only practical alternative in many rural villages is small-scale diesel generation, which can also create undesirable environmental impacts. Where hydropower generation is feasible, it offers reliability unmatched by other, currently available, alternatives. Unfortunately, the financial feasibility of many small hydroelectric projects is impeded by the relatively high cost and lengthy process it takes to license these plants under the existing Federal Energy Regulatory Commission (FERC) regulatory regime.

Alaska's rural electrical production is unique. Over 150 villages in Alaska are isolated from any larger electrical grid, and each village is supplied with power almost exclusively from its own diesel generators. The cost of power in these communities is very high. Median residential rates are between 40 and 45 cents per kilowatt-hour, which is four to five times the average elsewhere in the United States.

Small hydro projects can help reduce these rates if the projects can be built economically. For example, at King Cove, Alaska, which is a remote community of 900 people in the Aleutian Islands, an 800 kilowatt hydro project completed in 1995 not only reduced costs but provides cost stability over the long-term by displacing most of the utility's diesel

generation. Similar long-term benefits are expected from the new 825-kilowatt Tazimina hydro project, which serves a remote population of 450 people who live about 200 miles from Anchorage.

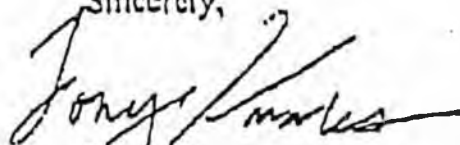
One of the important themes of my administration is that development must be done right. We apply this theme equally to hydroelectric development. For example, this includes ensuring that every hydroelectric project protects fish and wildlife. In the past, we have worked closely - and successfully - with the FERC to protect fish and wildlife populations and to consider the cumulative impacts of development. It is critical that this cooperation continues under this legislation as well.

The State of Alaska is not presently able to assume exclusive authority to authorize small hydroelectric projects, because state law does not provide a regulatory regime for project review, monitoring, or licensing of these projects. We feel such a framework must be in place at the state level before the State of Alaska could apply to the Secretary of Energy to take jurisdiction. The regulatory framework needs to include regulations to ensure proper project design and construction, and to protect fish and wildlife populations at least as well as under existing federal law. Present FERC authority is broader than that held by the State, in that FERC may assert jurisdiction over watersheds, while the regulatory authority of the Alaska Department of Fish and Game is confined to the area between stream banks.

In addition to the lack of a State regulatory regime, the State has established no appropriate funding mechanism to support small hydro licensing and monitoring. Such a funding mechanism could be either a direct appropriation or be based on a user fee system.

Again, the State appreciates the opportunity to express its support of S. 422. Although we desire the benefits that this legislation offers, it is important to state clearly we are not currently in a position to implement the option that this legislation would present to Alaska.

Sincerely,



Terry Knowles
Governor



Alaska State Legislature

Please enter into the record my testimony to the H RESOURCE
Committee name

Committee on SB 356, dated 4-26-02
Bill/Subject

4 PAGES
↑
TOTAL

Signed: DANA L. OLSON
Testifier

Representing (Optional)

HC-30 BOX 5438 WASILLA, AK 99654
Address

373-4612

Phone number

DANA L. OLSON
HC-30 Box 5438
Wasilla, AK 99654
26 April 2002

TO House Resources Committee
SB No 356 Am

I cite Article 1 Sec 2 of AK Constitution
to object to AS 46.03.100 (F) (1) AND (3)

"All political power is inherent in the
people. It is founded upon their
will only, AND instituted for the
good as the people as a whole.

1. Where (1) AND (3) do not undergo consideration
in a LAND-use PLAN previously
2. HAVE not been considered in a ~~law~~ ENVIRONMENTAL
PLAN under AS 46.03.040
- (3) ~~is~~ No review in CM 2 AS no permit or permit
in A Ffective AS WATER ^{state} ARE not
MANAGED by LOCAL COASTAL districts.

AS 46.03.100 Line 23, the Commissioner
OF DEC LACK expertise both educationally,
AND this has no consideration of social +
economic impacts to communities AND
those activities related to sustained yield.

Under public trust I object to a general permit /
or consideration by DEC Commissioner.

No credible, documentary evidence
to provide reliance on this Assertion.

I will oppose AS 46.03.100(h) or dept may on its own initiative propose the applicant be issued a general permit.

With streamlining of permits this is not necessary. See Olson EPA petition ~~on~~ ON streamlining of permits.
(sufficiency of notice)

I state no requirement exists for public notice (under due process) to only be on a computer unless electricity is provided to all persons AND computers.

~~Allege~~ I allege federal equivalents will be negated by this legislation.
I will oppose your permittees?

The CM2 allows for public participation at all aspects of planning. Giving notices to agencies with no current ^{updated} land-use, ^{or comprehensive} plans is meaningless as they act in ignorance!

AS 46.03110(d) is too vague AND NOT enforceable under CLEAN WATER Act. The Federal Act requires enforceable standards; AS citizen suit provision applies.

P 4, Line 9; Sec 8
Where no criteria has been set by the
LegisLature, regulations themselves
CAN be challenged, AND ALSO permitter
USE.

GOpy Sent to EPA. (Bad Faith by LegisLature)

Sincerely
Donna J Olson

P.S The LegisLature CAN ^{not act}_{Not done}
LegisLative AS46-03-040 AND concurrently Qui-judical
defining my due process rights;

- ① With out Adequate, AND Sufficient
notice (of Location) of Activities proposed.
- ② deny^{AND} (First public participation)
requirement under Federal LAWS.
There Are many!

Proposed Amendment to SB 356 am

SB 356 am shall be amended to add a new section that reads as follows:

Sec. __. AS 46.03.100(d) is amended to read:

(d) This section does not apply to

(1) disposals subject to regulation under AS 31.05.030(e)(2); [OR]

(2) injection projects permitted under AS 31.05.030(h) [.] or

(3) discharges resulting from the firing or other use of

munitions in training activities conducted on active ranges operated by the United States Department of Defense or a United States military agency.

Please draft this language

twice -

① as an amend to the bill

② as it's own separate bill
to be introduced on the
Floor.

J.Y.
X3715

Col Lehman's Testimony - see printed side

Rep Stevens Q: ~~was this~~ ^{really} ~~was~~ ^{was} he being

also John McDonough - ENJ. counsel to the Army

Kittula Q - tell us about the

April 12th 2002 by. US district Ct. AK

AK



**U.S. Army, Alaska Proposed Amendment to SB 356 am
Background Summary**

Background: On 12 April 2002, a group of national and local environmental organizations sued the United States Army and the Department of Defense in an attempt to close down Ft. Richardson's only artillery training range, Eagle River Flats (ERF).

- The Army's ability to continue live fire artillery training at ERF is critical to Ft. Richardson's national defense mission. It's a matter of troop readiness: "We must train like we fight." In practice, this means that our soldiers must engage in regular training exercises that include the use of live munitions- e.g., artillery, explosives, high-caliber weaponry, etc.
- ERF is the only location south of the Alaska Range where soldiers can conduct live fire heavy artillery training. Without the ERF range, Ft. Richardson's future could be at risk. And it won't stop there. If the environmental plaintiffs are successful in stopping training at FRA, other military training ranges in Alaska are likely to come under similar attack.

Request for Assistance: The U.S. Army, Alaska needs your help.

- The plaintiffs argue, among other things, that the Federal court should force the Army to close the ERF range because the Army has not obtained an ADEC water and solid waste discharge permit (i.e., an "AS 46.03.100 permit") for the firing of artillery munitions into ERF.
- ADEC has never required a state discharge permit for munitions firing on active military ranges. Traditionally, the AS 46.03.100 permit requirement has applied to activities such as discharges of wastewater from an industrial facility or construction of solid waste landfills.
- Expanding the ADEC permit requirement to cover live-fire military training activities on active military ranges sets an unacceptable precedent. If the effort succeeds, ADEC may well be pressured into attempting to regulate critical aspects of training exercises, such as the type of munitions used, firing locations, firing times and parameters, etc. ADEC is not equipped to do this, and we have no reason to believe that ADEC wishes to assume this role. It's a bad idea all around.

What we seek: A bill, SB 356 am, is pending in the House Resources Committee and is scheduled for hearing this Friday afternoon. SB 356 deals with ADEC's authority to issue disposal permits under AS 46.03.100. AS 46.03.100 already contains a list of exceptions to the permit requirement (*see AS 46.03.100(d)*). The U.S. Army, Alaska seeks a short, simple amendment to AS 356 am to that would add *discharges resulting from the firing of munitions in training activities conducted on active military ranges* to the list of activities exempted from the AS 46.03.100 permit requirement. A proposed version of the amendment is attached.

FILED
U.S. DISTRICT COURT
DISTRICT OF ALASKA

RECEIVED
ATTORNEY OFF

COX & MOYER

Scott J. Allen (California State Bar #178925) - Pro Hac Vice Motion
703 Market Street, Suite 1800
San Francisco, CA 94103
Tel: (415) 543-9464
Fax: (415) 777-1828

TRUSTEES FOR ALASKA

Valerie Brown (Alaska Bar Number 9712099)
1026 W. 4th Avenue, Ste. 200
Anchorage, Alaska 99501
Tel: (907) 276-2422 ext. 107
Fax: (907) 276-7110

Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA AT ANCHORAGE**

ALASKA COMMUNITY ACTION ON)
TOXICS, COOK INLET KEEPER, THE)
CHICKALOON VILLAGE TRADITIONAL)
COUNCIL, JANET DANIELS, RICHARD)
MARTIN, and THE MILITARY TOXICS)
PROJECT)

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE)
ARMY, UNITED STATES DEPARTMENT OF)
DEFENSE, and DONALD RUMSFELD IN HIS)
OFFICIAL CAPACITY AS UNITED STATES)
SECRETARY OF DEFENSE,)

Defendants.

Civil Action No:

A 0 2 - 0 0 8 3 CV

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs allege as follows:

NATURE OF THE CASE

1. This is a citizens' suit brought pursuant to the provisions of Clean Water Act 33 U.S.C. §1251, *et seq.*, the Solid Waste Disposal Act, 42 U.S.C. §6901, *et seq.*, and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601, *et seq.*

JURISDICTION

2. This Court has jurisdiction over the subject matter of the First Count herein pursuant to 33 U.S.C. §1365(a)(1). Defendants have waived sovereign immunity to the First Count pursuant to 33 U.S.C. §§1323(a) and 1365(a)(1).

3. This Court has jurisdiction over the subject matter of the Second Count pursuant to 42 U.S.C. §6972(a)(1)(A). The Defendants have waived sovereign immunity to the Second Count pursuant to 42 U.S.C. §§6961(a) and 6972(a)(1)(A).

4. This Court has jurisdiction over the subject matter of the Third Count pursuant to 42 U.S.C. §9659(a)(1). The Defendants have waived sovereign immunity to the Third Count pursuant to 42 U.S.C. § 9659(a)(1).

5. By letter dated June 15, 2001, the Plaintiffs gave notice of their intent to commence this action as required by 33 U.S.C. § 1365(b)(1) and 42 U.S.C. §§ 6972(b)(1) and 9659(d)(1). Shortly following the Defendants' receipt of said letter, the Plaintiffs and Defendants commenced negotiations aimed at reaching a settlement of the claims asserted herein. At the request of the Defendants, Plaintiffs agreed that they would not commence this action

until such time as the Plaintiffs and Defendants ceased their negotiations. By letter dated about April 10, 2002, the Defendants terminated said negotiations. Plaintiffs commenced this action as soon as possible thereafter.

FIRST COUNT

VIOLATIONS OF CLEAN WATER ACT

6. Each of the Plaintiffs is a "citizen" as said term is defined in 33 U.S.C. § 1365(g), in that they are persons having an interest which is or may be adversely affected by the actions of the Defendants described in this First Count. Each of the Plaintiffs likewise has one or more interests that are or may be adversely affected by the actions or inactions of the Defendants described in the Second and Third Counts below.

7. This First Count is brought against Defendants, United States Department of the Army and the United States Department of Defense only.

8. Defendants, United States Department of the Army and United States Department of Defense, maintain jurisdiction and/or control over an installation consisting of approximately 60,000 acres known as Fort Richardson, located north of Anchorage, Alaska. Fort Richardson lies within this district.

9. Beginning at a time currently unknown to the Plaintiffs and continuing to the present, the Army has and/or continues to and/or plans to discharge munitions, and the constituents and/or by-products and/or residues of munitions, in to and on various lands and waters on and/or in the vicinity of Fort Richardson.

10. The Army has and/or continues to and/or plans to discharge munitions, and the constituents and/or by-products and/or residues of munitions, into waters and/or on to lands on or

in the vicinity of Fort Richardson, using cannons, rifles, artillery and/or other sources.

11. The waters into which the Army has and continues to discharge munitions include the waters of the Eagle River, Eagle River Flats and/or Knik Arm.

12. The Army has not applied for, nor has it been issued, a permit from the United States Environmental Protection Agency ("EPA") authorizing the discharge of munitions into waters as described in this First Count.

13. The Army therefore has violated, continues to violate and/or threatens to violate 33 U.S.C. §§1311(a) and 1323(a), as well as 40 C.F.R. §122.21.

14. The waters of the Eagle River on and in the vicinity of Fort Richardson violate the water quality standards established by 18 Alaska Administrative Code 070.20(b). The Army's actions described in this First Count have caused and/or contributed, and continue to cause and/or contribute, to this violation of water quality standards in the Eagle River. The Army's actions therefore have violated and continue to violate 18 Alaska Administrative Code 070.10 and 33 U.S.C. §1323(a).

15. The Army's actions described in this First Count have polluted and/or added to the pollution of the land and/or waters on and/or in the vicinity of Fort Richardson. Said lands and/or waters include lands and/or waters in, on and/or under the Eagle River, Eagle River Flats, and/or the Knik Arm. The Army's actions therefore have violated and continue to violate Alaska Statutes 46.03.710 and 33 U.S.C. §1323(a).

16. The Army's actions described in this First Count have resulted in the disposal of solid and/or liquid waste material into the waters and/or on to land on or in the vicinity of Fort Richardson. The Army does not have, nor has it applied for, a permit, from the Alaska

Department of Environmental Quality authorizing said discharge into waters and/or on to land. The Army's actions therefore have violated and continue to violate Alaska Statutes 46.03.100(a) and 33 U.S.C. §1323(a).

SECOND COUNT

VIOLATIONS OF SOLID WASTE DISPOSAL ACT

17. This Second Count is brought against Defendants, United States Department of the Army and the United States Department of Defense only.

18. As described in the First Count above, the Army has violated and continues to violate Alaska Statutes §§46.03.710 and 46.03.100(a).

19. The Army's violations of Alaska Statutes §§46.03.710 and 46.03.100(a) constitute a violation of 42 U.S.C. §6961(a).

THIRD COUNT

VIOLATIONS OF CERCLA

20. This Third Count is brought against all of the Defendants named above.

21. In 1994, due to a high level of pollution, the Environmental Protection Agency placed Fort Richardson on the National Priorities List, a list of the nation's most polluted facilities that are to be given priority for cleanup.

22. Shortly thereafter, the EPA, the State of Alaska, and the Army entered into an "interagency agreement" (as that term is used in 42 U.S.C. §9620(e)) entitled "Federal Facility Agreement Under CERCLA Section 120 Administrative Docket Number 1092-05-02-120" (hereinafter the "FFA") regarding Fort Richardson.

23. Live, unexploded ordnance exists in, on, and/or under the lands and/or water on or

in the vicinity of Fort Richardson, including without limitation the lands and/or waters of the Eagle River, Eagle River Flats and/or the Knik Arm, as well as the land and/or waters in an area referred to by the Army as the OB/OD pad. Unexploded ordnance may also exist in, on, and/or under other lands and/or waters on or in the vicinity of Fort Richardson.

24. This unexploded ordnance constitutes and contains "hazardous substances" and/or "pollutants or contaminants" as those terms are defined in 42 U.S.C. §§9601(17) and 9601(33). The Army, however, has taken, and continues to take, the position that this unexploded ordnance neither constitutes nor contains "hazardous substances" and/or "pollutants or contaminants" as those terms are defined in 42 U.S.C. §§9601(17) and 9601(33).

25. The Army has never commenced, nor has it performed, a remedial investigation or feasibility study (RI/FS) regarding unexploded ordnance or the constituents of such ordnance on Fort Richardson.

26. The Army's failure to commence or perform such an RI/FS violates and continues to violate 42 U.S.C. §9620(e)(i) as well as paragraphs 8.8 and 8.9 and Attachment 1 of the FFA (including without limitation section 3.1 of Attachment 1).

27. The Army has never adopted a plan for remediation of the unexploded ordnance described above; nor has the Army commenced or performed remediation of such ordnance. The Army therefore has violated and continues to violate 42 U.S.C. §§9620(e)(2)-(e)(4) as well as ¶8.10 and Attachment 1 to the FFA.

REQUEST FOR RELIEF

Plaintiffs respectfully request the following relief:

28. Declare that the Army's discharge of munitions into waters as described in the