

SENATE CS FOR CS FOR HOUSE BILL NO. 51(FIN)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - SECOND SESSION

BY THE SENATE FINANCE COMMITTEE

Offered: 4/17/98

Referred: Rules

Sponsor(s): REPRESENTATIVES ROKEBERG AND KELLY, Foster, Hodgins, Vezey, Bunde, Cowdery, Mulder, Kohring

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the Department of Environmental Conservation; amending
2 Rules 79 and 82, Alaska Rules of Civil Procedure; and providing for an effective
3 date."

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

5 * Section 1. FINDINGS. The legislature finds that

6 (1) the federal government has required, in the federal Safe Drinking Water
7 Act amendments of 1996 (P.L. 104-182), that states have minimum administrative penalty
8 authority in order to maintain primary enforcement authority for the federal drinking water
9 program (42 U.S.C. 300f - 300j-26);

10 (2) the state cannot receive federal money for construction of public drinking
11 water systems unless it maintains primacy under the federal program (sec. 130, P.L. 104-182);

12 (3) maintaining state primary enforcement authority for the federal program
13 is in the best interests of the state so as to provide maximum flexibility and local control of
14 this program and to ensure continued federal money for Alaska public water supply system

1 construction projects;

2 (4) ensuring public health through protection of public water supplies is of
3 fundamental importance to the people of the state;

4 (5) sec. 3 of this Act advances the public interest by enacting administrative
5 penalty authority in order to meet the minimum federal requirements for maintaining state
6 primary enforcement authority for the federal drinking water program.

7 * **Sec. 2.** AS 46.03.020 is amended to read:

8 **Sec. 46.03.020. Powers of the department.** The department may

9 (1) enter into contracts and compliance agreements necessary or
10 convenient to carry out the functions, powers, and duties of the department;

11 (2) review and appraise programs and activities of state departments
12 and agencies in light of the policy set out in AS 46.03.010 for the purpose of
13 determining the extent to which the programs and activities are contributing to the
14 achievement of that policy and to make recommendations to the departments and
15 agencies, including but not limited to, environmental guidelines;

16 (3) consult with and cooperate with

17 (A) officials and representatives of any nonprofit corporation or
18 organization in the state;

19 (B) persons, organizations, and groups, public and private,
20 using, served by, interested in, or concerned with the environment of the state;

21 (4) appear and participate in proceedings before any state or federal
22 regulatory agency involving or affecting the purposes of the department;

23 (5) undertake studies, inquiries, surveys, or analyses it may consider
24 essential to the accomplishment of the purposes of the department; these activities may
25 be carried out by the personnel of the department or in cooperation with public or
26 private agencies, including educational, civic, and research organizations, colleges,
27 universities, institutes, and foundations;

28 (6) at reasonable times, enter and inspect with the consent of the owner
29 or occupier any property or premises to investigate either actual or suspected sources
30 of pollution or contamination or to ascertain compliance or noncompliance with a
31 regulation that may be adopted under AS 46.03.020 - 46.03.040; information relating

1 to secret processes or methods of manufacture discovered during investigation is
2 confidential;

3 (7) conduct investigations and hold hearings and compel the attendance
4 of witnesses and the production of accounts, books, and documents by the issuance of
5 a subpoena;

6 (8) advise and cooperate with municipal, regional, and other local
7 agencies and officials in the state, to carry out the purposes of this chapter;

8 (9) act as the official agency of the state in all matters affecting the
9 purposes of the department under federal laws now or hereafter enacted;

10 (10) adopt regulations necessary to effectuate the purposes of this
11 chapter, including, by way of example and not limitation, regulations providing for

12 (A) control, prevention, and abatement of air, water, or land or
13 subsurface land pollution;

14 (B) safeguard standards for petroleum and natural gas pipeline
15 construction, operation, modification, or alteration;

16 (C) protection of public water supplies by establishing minimum
17 drinking water standards, and standards for the construction, improvement, and
18 maintenance of public water supply systems;

19 (D) collection and disposal of sewage and industrial waste;

20 (E) collection and disposal of garbage, refuse, and other
21 discarded solid materials from industrial, commercial, agricultural, and
22 community activities or operations;

23 (F) [REPEALED

24 (G)] control of pesticides;

25 (G) [(H)] other purposes as may be required for the
26 implementation of the policy declared in AS 46.03.010;

27 (H) [(I)] handling, transportation, treatment, storage, and
28 disposal of hazardous wastes;

29 (11) after consultation with other state agencies and local government
30 officials, identify and propose for addition or deletion, by regulation, other licenses,
31 permits, or authorizations for which the provisions of AS 46.35 are applicable;

1 (12) [REPEALED

2 (13)] inspect the premises of sellers and suppliers of paint, vessels, and
3 marine and boating supplies, and take other actions necessary to enforce AS 46.03.715.

4 * **Sec. 3.** AS 46.03 is amended by adding a new section to read:

5 **Sec. 46.03.761. Administrative penalties.** (a) The department may assess
6 an administrative penalty against an entity that violates or causes or permits to be
7 violated a provision of AS 46.03.720(b) or a term or condition of a regulation, order,
8 permit, approval, or certificate of the department issued or adopted under
9 AS 46.03.720(b).

10 (b) Before assessing an administrative penalty under this section, the
11 department shall

12 (1) communicate about the alleged noncompliance with the entity and
13 the governing body of the community or municipality whose residents are served by
14 the public water system; communication under this paragraph must be in language
15 designed to be easily understood by the entity and governing body and must clearly
16 describe the nature of the alleged noncompliance;

17 (2) offer technical assistance to aid in correcting the alleged
18 noncompliance when the department has reason to believe that the entity may lack the
19 resources or expertise to get technical assistance from other sources; and

20 (3) unless the alleged noncompliance poses an immediate threat to the
21 public health, give the entity a reasonable amount of time to correct the alleged
22 noncompliance after the department has complied with (1) and (2) of this subsection.

23 (c) If, after complying with (b) of this section, the department determines that
24 noncompliance still exists and the violation is subject to a penalty under this section,
25 the department may make a preliminary determination to assess the penalty. The
26 department shall provide notice to the entity of its preliminary determination. The
27 entity may, within 10 days after receiving the notice, request the department to
28 reconsider its decision. If a timely request for reconsideration is made, the department
29 shall reconsider its preliminary determination and may affirm or modify the
30 determination. The department shall notify the entity of the decision. If a timely
31 request for reconsideration is not received or if, after reconsideration, the department

determines that a penalty should be assessed, the department may assess the penalty. The department shall provide notice of the assessment and instructions for contesting and appealing the assessment to the entity by personal service or by certified mail, return receipt requested. The notice must inform the entity of the amount of the proposed penalty and that the entity has 45 days within which to file a notice with the department contesting the proposed penalty. If, within 45 days after receiving the notification issued by the department, the entity fails to file a notice contesting the proposed penalty, the proposed penalty is considered a final order. The department may extend the time periods specified in this subsection for good cause.

(d) If an entity sends notice to the department contesting a proposed penalty under (c) of this section, the department shall afford an opportunity for a hearing in accordance with its adjudicatory hearing procedures. After an opportunity for a hearing, the department shall issue an order, based upon findings of fact, affirming, modifying, or rescinding the administrative penalty. The order must include notice that the entity may appeal the order to the superior court and the address of the appropriate superior court. The order is the final agency action on the penalty.

(e) An entity against whom an administrative penalty is assessed under this section may obtain judicial review of the administrative penalty by filing a notice of appeal in the superior court as provided by the Alaska Rules of Appellate Procedure. An order of the department under (d) of this section becomes final and is not subject to review by a court if a notice of appeal is not filed with the superior court within the period provided for by the Alaska Rules of Appellate Procedure.

(f) Unless the notice of appeal is incomplete or otherwise not in conformance with court rules, a notice of appeal under (e) of this section is considered to be filed with the superior court on the day the entity delivers the appropriate documents and fee to the appropriate superior court. Determining whether the notice of appeal is complete and otherwise in conformance with court rules is the responsibility of the superior court.

(g) An administrative penalty assessed under this section may not exceed (1) \$1,000 a day for each violation if the affected public water supply system serves a population of more than 10,000 persons; (2) \$250 a day for each violation if the

1 affected public water supply system serves a population of 10,000 or fewer persons but
 2 more than 1,000 persons; and (3) \$100 a day for each violation if the public water
 3 supply system serves 1,000 or fewer persons. Each provision, term, or condition
 4 violated is a separate and distinct violation. If a violation of a provision, term, or
 5 condition continues from day to day, each day is a separate violation.

6 (h) In determining the amount of a penalty assessed under this section, the
 7 department shall consider

8 (1) the effect of the violation on the public health or the environment;
 9 (2) reasonable costs incurred by the state in the detection, investigation,
 10 and attempted correction of the violation;

11 (3) the economic savings realized by the entity by not complying with
 12 the requirement for which a violation is charged;

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

15 (5) the need to deter future violations;

16 (6) the extent and seriousness of the violation, including the potential
 17 for the violation to threaten public health or the environment;

18 (7) whether the entity achieved compliance with the requirement
 19 violated within the shortest feasible time; and

20 (8) other factors considered relevant to the assessment that are adopted
 21 by the department in regulation.

22 (i) If an entity fails to pay an administrative penalty assessed under this section
 23 after the penalty becomes final, the department may bring an action to collect the
 24 penalty. The amount of the penalty is not subject to review by the court in such an
 25 action.

26 (j) In a collection action under (i) of this section, the court shall award the
 27 prevailing party full reasonable attorney fees and costs incurred in the collection
 28 action.

29 (k) Action under this section by the department does not limit or otherwise
 30 affect the authority of the department to otherwise enforce this chapter, AS 46.04,
 31 AS 46.08, AS 46.09, AS 46.14, or regulations adopted under those statutes, or to

1 recover damages, restoration expenses, investigation costs, court costs, attorney fees,
 2 or other necessary expenses. The court shall set off against a judicial civil assessment
 3 subsequently awarded under AS 46.03.760 an amount ordered to be paid under this
 4 section by the same entity for the same violation.

5 (l) In this section, "entity" means the owner or operator of a public water
 6 system.

7 * **Sec. 4.** AS 46.03.900 is amended by adding a new paragraph to read:

8 (36) "compliance agreement" means a mutual understanding and
 9 voluntary, enforceable agreement on a course of action for a specific set of
 10 circumstances entered into by the department and a person to control, prevent, or abate
 11 air, water, land, or subsurface land pollution.

12 * **Sec. 5.** COURT RULE CHANGES; ATTORNEY FEES AND COSTS. (a)
 13 AS 46.03.761(j), added by sec. 3 of this Act, has the effect of amending Rules 79 and 82,
 14 Alaska Rules of Civil Procedure, by allowing the recovery of full reasonable attorney fees and
 15 costs in certain actions.

16 (b) AS 46.03.761(j), added by sec. 3 of this Act, takes effect only if this section
 17 receives the two-thirds majority vote of each house of the legislature required by art. IV, sec.
 18 15, Constitution of the State of Alaska.

19 * **Sec. 6.** REGULATIONS FOR ADMINISTRATIVE PENALTIES. The Department of
 20 Environmental Conservation may immediately proceed to adopt regulations to implement
 21 changes made by sec. 3 of this Act. The regulations take effect under AS 44.62
 22 (Administrative Procedure Act), but not before the effective date of sec. 3 of this Act.

23 * **Sec. 7.** Except as provided in sec. 8 of this Act, this Act takes effect on the effective date
 24 of regulations adopted by the United States Environmental Protection Agency implementing
 25 the state administrative penalty requirement for state primary enforcement authority under 42
 26 U.S.C. 300g-2 of the federal Safe Drinking Water Act or, if the Environmental Protection
 27 Agency determines that regulations are not necessary, on the date the Environmental
 28 Protection Agency requires under the authority of that statute that the state must have
 29 administrative penalty authority to maintain its state primacy over the federal drinking water
 30 program, whichever occurs first. The commissioner of environmental conservation shall notify
 31 the lieutenant governor and the revisor of statutes of the effective date of the state

1 administrative penalty authority requirement.

2 * **Sec. 8.** Sections 2, 4, and 6 of this Act take effect immediately under AS 01.10.070(c).