

CS FOR HOUSE BILL NO. 258(FIN)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE FINANCE COMMITTEE

Offered:

Referred:

Sponsor(s): REPRESENTATIVE JOULE

A BILL**FOR AN ACT ENTITLED**

1 "An Act directing the Department of Transportation and Public Facilities to develop
2 and implement standards and operating procedures, to evaluate site-specific use plans,
3 and to designate project areas concerning gravel or other aggregate material containing
4 naturally occurring asbestos; authorizing use on an interim basis of gravel or other
5 aggregate material containing naturally occurring asbestos for certain transportation
6 projects and public facilities; providing immunity for the state and for landowners,
7 extractors, suppliers, transporters, and contractors for certain actions or claims arising
8 in connection with the use of gravel or aggregate material containing naturally
9 occurring asbestos in certain areas; requiring contractors to report certain asbestos-
10 related data to the Department of Transportation and Public Facilities; and providing
11 for an effective date."

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

1 * **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section
2 to read:

3 **LEGISLATIVE FINDINGS AND PURPOSE.** (a) The legislature finds that

4 (1) gravel or similar aggregate material is constantly in demand for major
5 construction and maintenance of state and local transportation projects and public facilities
6 and for all types of construction by public and private entities;

7 (2) naturally occurring asbestos may be found in sources of gravel and similar
8 aggregate material throughout the state;

9 (3) while airborne asbestos fibers are a significant threat to workplace safety
10 and public health and are subject to close regulation by federal and state authorities under 42
11 U.S.C. 7401 - 7671q (Clean Air Act) and 15 U.S.C. 2601 - 2692 (Toxic Substances Control
12 Act), use of materials containing naturally occurring asbestos in construction projects may be
13 regulated by states;

14 (4) in communities that do not have sources of gravel or similar aggregate
15 material that is free of naturally occurring asbestos, costs of construction are substantially
16 increased because of the necessity of locating alternative sources of gravel or similar
17 aggregate material and transporting that material to distant construction and maintenance
18 sites; and

19 (5) a recent study suggests that, with careful use and close adherence to
20 appropriate control strategies, state and local transportation projects and public facilities may
21 be safely completed using sources of gravel or similar aggregate material that contains
22 naturally occurring asbestos; the study recommends that the Department of Transportation
23 and Public Facilities establish standards and operating procedures through a statewide process
24 that will apply to the use of gravel and aggregate material that contains asbestos by the
25 department and by any public or private entity.

26 (b) It is the purpose of this Act

27 (1) to authorize and direct the Department of Transportation and Public
28 Facilities to develop, implement, and, as circumstances may require or indicate, modify
29 standards and operating procedures to allow the use in the construction and maintenance of
30 transportation projects and public facilities in certain areas of the state of gravel or aggregate
31 material that contains naturally occurring asbestos, with the expectation that use of that

1 material in a manner that is consistent with those standards and procedures may avoid
2 significant risk to human health and eliminate significantly higher costs of construction and
3 maintenance of projects and facilities associated with using only construction material that is
4 free of asbestos;

5 (2) to establish that a person that uses gravel that contains naturally occurring
6 asbestos in certain areas of the state may prepare specific project plans that conform to the
7 requirements of this Act and the department's standards and operating procedures; and

8 (3) to shield persons and the state, including its agencies, officers, and
9 employees, under certain conditions, from liability based on exposure to naturally occurring
10 asbestos.

11 (c) This Act creates a voluntary program in certain areas of the state and provides
12 civil immunity for the use of gravel or other aggregate material that contains naturally
13 occurring asbestos for contractors meeting the requirements of the program; nothing in this
14 Act mandates a contractor to submit a site-specific plan or to adhere to the requirements of a
15 plan approved by the department.

16 (d) Because neither the state nor the federal government has established a scale
17 assigning a specific risk level to a corresponding amount of naturally occurring asbestos, this
18 Act accepts 0.25 percent by mass, the minimum detectable amount of asbestos under the
19 California Air Resources Board Method 435, as the baseline for the presence of naturally
20 occurring asbestos in gravel or other aggregate material. Health risks resulting from asbestos
21 exposure vary according to the level, type, and duration of exposure. While exposure to very
22 small concentrations of asbestos may pose some health risk, there is not a practical way to
23 prevent all exposure to asbestos for residents in close proximity to deposits that contain
24 naturally occurring asbestos. The intent of this act is to establish a sensible analytical
25 threshold for detection of naturally occurring asbestos in gravel or other aggregate material
26 and to establish appropriate exceptions for the use of gravel or other aggregate material that
27 contains naturally occurring asbestos for certain public facilities and transportation projects
28 involving unusual circumstances, including projects in remote locations or in regions where
29 gravel or other aggregate material free from naturally occurring asbestos is not reasonably
30 available.

31 * **Sec. 2.** AS 09.65 is amended by adding a new section to read:

Sec. 09.65.245. Immunity for certain persons supplying or using gravel or other aggregate material; limitations on asbestos-related actions against defendants. (a) Notwithstanding AS 09.50.250, a civil action or claim for damages or costs alleging a death, injury, illness, disability, property damage, or any other damages resulting from the use of gravel or other aggregate material that contains naturally occurring asbestos may not be brought against a defendant, including a contractor meeting the requirements of the program or the state and its agencies, officers, and employees,

(1) based on the ownership of land within an area designated by the Department of Transportation and Public Facilities under AS 44.42.400(b) or (c) from which gravel or other aggregate material is extracted that, when tested using a bulk method prescribed by the Department of Transportation and Public Facilities by regulation, is determined to have a content equal to or greater than 0.25 percent naturally occurring asbestos by mass; or

(2) for an act or omission occurring in the course of extracting, supplying, transporting, or using gravel or other aggregate material containing naturally occurring asbestos within an area designated by the Department of Transportation and Public Facilities under AS 44.42.400(b) or (c) when the act or omission was in compliance with the requirements of AS 18.31.250 or AS 44.42.410(b), as applicable, and AS 44.42.410(a) and (d) and applicable regulations developed under AS 44.42.420.

(b) A civil action or claim based on noncompliance with the requirements of AS 18.31.250 or AS 44.42.410(b), as applicable, and AS 44.42.410(a) and (e) and applicable regulations developed under AS 44.42.420 for damages or costs alleging an asbestos-related death, injury, illness, or disability or alleging asbestos-related property damage or any other asbestos-related damages may only be brought against a defendant that has direct control over or responsibility for compliance with the requirements of AS 18.31.250 or AS 44.42.410(b), as applicable, and AS 44.42.410(a) and (e) and applicable regulations developed under AS 44.42.420.

(c) Notwithstanding AS 09.50.250, a civil action or claim for damages or costs alleging an asbestos-related death, injury, illness, or disability or alleging asbestos-

related property damage or any other asbestos-related damages may not be brought against any state agency or officer or employee of the state for an act or omission occurring in the course of designating a project area under AS 44.42.400(a) or (b), approving a site-specific use plan, or developing or approving a monitoring plan or a mitigation plan under AS 44.42.410.

(d) In this section, "naturally occurring asbestos" has the meaning given in AS 44.42.430.

* **Sec. 3.** AS 18.31 is amended by adding new sections to read:

Article 2A. Naturally occurring asbestos.

Sec. 18.31.250. Use of materials containing naturally occurring asbestos.

(a) A principal construction contractor or, in the absence of an identified principal construction contractor, person having legal authority for the design and construction of a project may qualify for immunity in a civil action under AS 09.65.245(a)(2) for the use of gravel or other aggregate material that, when tested using a bulk test method prescribed by the Department of Transportation and Public Facilities by regulation, is determined to have a content equal to or greater than 0.25 percent of naturally occurring asbestos by mass.

(b) To qualify for the immunity provided under AS 09.65.245(a)(2), before initiating a construction project not subject to AS 44.42.410(b) that is within an area designated by the Department of Transportation and Public Facilities under AS 44.42.400(b) or (c) and that will use gravel or other aggregate material that contains naturally occurring asbestos, the principal construction contractor or, in the absence of an identified principal construction contractor, the person having legal authority for the design and construction of the project, shall prepare and submit to the Department of Transportation and Public Facilities specific project plans demonstrating compliance with the standards adopted by the department under AS 44.42.420 and the requirements of the site-specific use plan under AS 44.42.410. Before extraction of gravel or other aggregate material may begin, the plan must be approved and returned to the contractor by the department.

(c) To preserve the immunity provided under AS 09.65.245(a)(2), the principal construction contractor or, in the absence of an identified principal

1 construction contractor, the person having legal authority for the design and
2 construction of the project, shall adhere to the site-specific use plan approved by the
3 department and the monitoring and mitigation plan created by the department.

4 **Sec. 18.31.260. Presence of naturally occurring asbestos.** The state shall
5 consider 0.25 percent by mass, the minimum detectable amount of asbestos under the
6 California Air Resources Board Method 435, as the baseline for the presence of
7 naturally occurring asbestos in gravel or other aggregate material.

8 * **Sec. 4. AS 44.42** is amended by adding new sections to read:

9 **Article 3A. Use of Materials Containing Naturally Occurring Asbestos.**

10 **Sec. 44.42.400. Administration.** (a) The department shall designate a single
11 employee who reports to the commissioner to oversee the duties assigned to the
12 department in AS 44.42.400 - 44.42.430 and to serve as the point of contact for
13 inquiries related to projects using gravel or other aggregate material containing
14 naturally occurring asbestos.

15 (b) An area that includes land within a municipality or community may be
16 designated by the department as an area in which certain landowners and contractors
17 are granted immunity under AS 09.65.245(a) for causing asbestos-related injuries only
18 if the municipality or community requests that designation. A municipality or
19 community may request to become an area designated by the department under this
20 subsection by submitting an application to the department. The department may
21 approve an application received under this subsection only after reviewing tests
22 documenting the presence of naturally occurring asbestos in that area, analyzing the
23 effect of the presence of naturally occurring asbestos on construction projects in the
24 area, considering the availability of gravel or other aggregate material free from
25 naturally occurring asbestos in the area, and soliciting public input from residents in
26 the affected municipality or community. The department may require a municipality
27 or community that applies to become a designated area to provide the department with
28 tests documenting the presence of naturally occurring asbestos, information related to
29 the effect of the presence of naturally occurring asbestos on construction projects in
30 the area, information related to availability of gravel or other aggregate material free
31 from naturally occurring asbestos, and other information relevant to the application.

1 After designating an area after approval of an application under this subsection, the
2 department shall notify potentially affected persons that the area has been designated
3 as an area where immunity may be granted under AS 09.65.245(a) for certain
4 landowners and contractors causing asbestos-related injuries.

5 (c) In places that do not include a municipality or community, the department
6 may designate an area in which certain landowners and contractors are granted
7 immunity under AS 09.65.245(a) for causing asbestos-related injuries. Before
8 designating an area under this subsection, the department shall document the presence
9 of naturally occurring asbestos in that area, analyze the effect of the presence of
10 naturally occurring asbestos on construction projects in the area, consider the
11 availability of gravel or other aggregate material free from naturally occurring
12 asbestos in the area, and solicit public input from potentially affected persons. After
13 designating an area under this subsection, the department shall notify potentially
14 affected persons that the area has been designated as an area where immunity may be
15 granted under AS 09.65.245(a) for certain landowners and contractors causing
16 asbestos-related injuries.

17 (d) In this section, "community" means a place in the unorganized borough, in
18 a borough, or in a unified municipality that is not incorporated as a municipality, that
19 is not a reserve, and in which 25 or more individuals reside as a social unit.

20 **Sec. 44.42.410. Site-specific use plan.** (a) To qualify for the immunity
21 provided under AS 09.65.245(a)(2), a contractor intending to use, within an area
22 designated by the department under AS 44.42.400(b) or (c), gravel or other aggregate
23 material that, when tested using a bulk test method prescribed by the department in
24 regulation, is determined to have a content equal to or greater than 0.25 percent of
25 naturally occurring asbestos by mass, shall, after consulting with the owner of the land
26 on which the gravel or other aggregate material containing naturally occurring
27 asbestos will be placed, submit a site-specific use plan to the department that

28 (1) describes the manner in which the proposed use of gravel or other
29 aggregate material that contains naturally occurring asbestos conforms to the standards
30 adopted under AS 44.42.420(b);

31 (2) demonstrates how the proposed construction operation and

1 maintenance practices comply with those that are required and those that are
2 minimally acceptable, as described in AS 44.42.420(b)(5), and otherwise meet
3 requirements of law applicable to the handling of compounds that contain asbestos;

4 (3) outlines the efforts that will be made, as a component of long-term
5 maintenance on the completed project or facility, to ensure that human health and air
6 quality are not compromised by the use of the gravel or other aggregate material that
7 contains naturally occurring asbestos;

8 (4) describes how the gravel or other aggregate material to be used can
9 be contained underneath the project or buried so that asbestos fibers cannot become
10 airborne or otherwise transferred outside of the project area, except as provided in (5)
11 and (6) of this subsection;

12 (5) if the requirements in (4) of this subsection are economically
13 unreasonable, describes how the gravel or other aggregate material to be used will be
14 sealed, including chip sealing or mixing with asphalt, in order to prevent asbestos
15 fibers from becoming airborne or otherwise transferred outside of the project area,
16 except as provided in (6) of this subsection; and

17 (6) if the requirements under (4) and (5) of this subsection are
18 economically unreasonable, describes how the gravel or other aggregate material will
19 be used in order to prevent asbestos from becoming airborne or otherwise transferred
20 outside of the project area, including how the gravel or other aggregate material will
21 be used in order to prevent asbestos from becoming airborne because of vehicle
22 traffic, road maintenance, or grading, if applicable.

23 (b) To qualify for and preserve the immunity provided under
24 AS 09.65.245(a)(2), the department, in its operating procedures applicable to a project
25 that is a transportation facility, including a public highway, airport, or pipeline or
26 railroad track bed, or a public work, as that term is defined in AS 35.95.100, and for
27 which the contractor intends to use, within an area designated by the department under
28 AS.44.42.400(b) or (c), gravel or other aggregate material that, when tested using a
29 bulk testing method prescribed by the department in regulation, is determined to have
30 a content equal to or greater than 0.25 percent of naturally occurring asbestos by mass,
31 shall require that

(1) the contractor submit a plan that details the use of gravel or other aggregate material in the construction or maintenance of the transportation project or public facility in accordance with the requirements of (a) of this section and regulations developed under AS 44.42.420;

(2) before the extraction of the gravel or aggregate material containing naturally occurring asbestos may begin, the plan be approved and returned to the contractor by the department;

(3) the contractor adhere to the monitoring, mitigation, and site-specific use plans.

(c) The department shall review each submitted site-specific use plan and shall work toward approving or disapproving the plan, taking into consideration the construction season in the project location.

(d) The department may not approve a plan for construction with gravel or other aggregate material determined to have a content equal to or greater than 0.25 percent of naturally occurring asbestos by mass unless the department determines that it is economically unreasonable to undertake the construction project with gravel or other aggregate material free from naturally occurring asbestos.

(e) On receiving a plan that meets the requirements of (a) and (d) of this section and the regulations adopted under AS 44.42.420, the department, in consultation with the Department of Environmental Conservation, the Department of Health and Social Services, the Department of Natural Resources, the Department of Law, and the Department of Labor and Workforce Development, shall develop a monitoring and mitigation plan for the project. If the site-specific use plan is approved, the monitoring and mitigation plan developed by the department shall be attached to the site-specific use plan. To qualify for the immunity provided in AS 09.65.245(a)(2), the party that has direct control over or responsibility for the monitoring or mitigation shall comply with the monitoring or mitigation plan developed by the department.

(f) On approval of a site-specific use plan, the department

(1) shall provide to the contractor a copy of the approved site-specific use plan that includes

(A) the monitoring and mitigation plan developed under (e) of

this section;

(B) a requirement that all asbestos-related data collected by the contractor during or after construction be submitted to the department; and

(C) recommended methods for reducing exposure to airborne asbestos fibers;

(2) shall provide a copy of the site-specific use plan, including the monitoring and mitigation plan, to the mayor or manager of a municipality affected by the use of gravel or other aggregate material containing asbestos; and

(3) may provide to the contractor copies of the United States Occupational Safety and Health Administration, United States Mine Safety and Health Administration, and United States Environmental Protection Agency recommended practices for handling and use of gravel or other aggregate material containing naturally occurring asbestos.

(g) Within 60 days after completing a project in accordance with a site-specific plan approved by the department, the contractor shall record in the recording district where the property is located a document that includes a description of the affected property, a reference to the most recent recorded conveyance of that property, and a notice indicating the presence of naturally occurring asbestos, and stating that subsequent interest holders may have legal obligations with respect to preventing the naturally occurring asbestos from becoming airborne or otherwise transferred outside of the project area. The contractor shall provide written notification to the department and the landowner that the document has been recorded.

(h) The contractor shall submit to the department the results of any monitoring or testing performed in accordance with the site-specific use plan and any mitigation measures undertaken.

Sec. 44.42.420. Regulations. (a) The department, after consultation with the Department of Environmental Conservation, the Department of Health and Social Services, the Department of Natural Resources, the Department of Law, and the Department of Labor and Workforce Development, shall prescribe in regulation a bulk testing method for gravel or other aggregate material containing naturally occurring asbestos.

(b) The department, after consultation with the Department of Environmental Conservation, the Department of Health and Social Services, the Department of Natural Resources, the Department of Law, and the Department of Labor and Workforce Development, may adopt regulations under AS 44.62 (Administrative Procedure Act) to implement AS 44.42.400 - 44.42.430, including regulations revising statewide standards on the use in the construction and maintenance of transportation projects and public facilities of gravel or aggregate material that, when tested using a bulk test method prescribed by the department by regulation, is determined to have a content equal to or greater than 0.25 percent of naturally occurring asbestos by mass. The regulations adopted under this subsection must include

(1) procedures for completing site investigations and characterizations of proposed projects, including the development and description of appropriate laboratory practices;

(2) procedures for reviewing design alternatives and preparing and evaluating appropriate comparative cost analyses that consider the use of gravel or other aggregate material that does not contain naturally occurring asbestos;

(3) procedures for evaluating human health concerns arising out of gravel or other aggregate material that contains naturally occurring asbestos and documentation of methods and means to be used during periods of handling of the gravel or other aggregate material to ensure compliance with appropriate workplace safety and air quality standards relating to the project and to ensure the health and safety of communities affected by construction projects that use gravel or other aggregate material containing naturally occurring asbestos;

(4) procedures for preparing designs and design specifications for facilities involving use of gravel or other aggregate material that contains naturally occurring asbestos;

(5) procedures for outlining construction operation and maintenance practices that are required and those that are minimally acceptable to meet requirements of law applicable to the handling of compounds that contain asbestos;

(6) procedures for processing, reviewing, and approving or disapproving site-specific use plans and area designation requests received under

1 AS 44.42.400(b) in a uniform manner;

2 (7) guidelines to analyze the cost of a project;

3 (8) guidelines for determining whether the cost associated with the use

4 of gravel or other aggregate material free from naturally occurring asbestos under

5 AS 44.42.410(d) is economically unreasonable;

6 (9) guidelines for determining whether the cost associated with

7 burying or sealing gravel or other aggregate material containing naturally occurring

8 asbestos under AS 44.42.410(a)(2) and (3) is economically unreasonable;

9 (10) guidelines for establishing areas designated under

10 AS 44.42.400(b) or (c) that take into account the effect on human health in and around

11 the designated area and environmental factors affecting the transfer of asbestos fibers

12 within and outside of a designated area.

13 **Sec. 44.42.430. Definitions.** In AS 44.42.400 - 44.42.430,

14 (1) "contractor" means the principal construction contractor, or in

15 absence of an identified principal construction contractor, the person having legal

16 authority for the design and construction of the project;

17 (2) "naturally occurring asbestos" means chrysotile, amosite,

18 crocidolite, fibrous tremolite, fibrous anthophyllite, and fibrous actinolite asbestos-

19 containing material that has not been processed in an asbestos mill and that, when

20 tested using a bulk method prescribed by the Department of Transportation and Public

21 Facilities by regulation, is determined to have a content equal to or greater than 0.25

22 percent naturally occurring asbestos by mass.

23 * **Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to

24 read:

25 **INTERIM PROJECT AUTHORIZATION.** (a) Notwithstanding AS 44.42.400(a) and

26 (b), added by sec. 3 of this Act, to ensure early application of the policy described in sec. 1 of

27 this Act, the Department of Transportation and Public Facilities may, on a temporary basis,

28 designate a limited number of areas in the state in which certain landowners and contractors

29 are granted immunity under AS 09.65.245(a) for causing asbestos-related injuries where an

30 inability to complete construction projects has been demonstrated because of lack of gravel or

31 other aggregate material free from naturally occurring asbestos. After designating an area on a

1 temporary basis, the department shall notify potentially affected persons that the area has been
2 designated as an area in which immunity may be granted under AS 09.65.245(a) for certain
3 landowners and contractors causing asbestos-related injuries. Notwithstanding AS 18.31.250,
4 added by sec. 3 of this Act, the Department of Transportation and Public Facilities may
5 approve a limited number of appropriate construction projects until the development and
6 implementation of initial standards under AS 44.42.420 and the administrative requirements
7 of AS 44.42.400, added by sec. 4 of this Act, for projects not subject to AS 44.42.410(b), if,
8 under (b) of this section, the Department of Transportation and Public Facilities prepares and
9 adopts interim standards and requires its contractors to prepare site-specific plans for the use
10 of gravel or other aggregate material that, when tested using the bulk method prescribed in
11 sec. 6 of this Act, is determined to have a content equal to or greater than 0.25 percent
12 naturally occurring asbestos by mass in transportation projects and public facilities. The
13 department shall apply the standards developed under (b) of this section to a person described
14 in AS 18.31.250 for a project that is not subject to AS 44.42.410(b).

15 (b) Notwithstanding AS 44.42.400(a) and (b), added by sec. 3 of this Act, to ensure
16 early application of the policy described in sec. 1 of this Act, the Department of
17 Transportation and Public Facilities may, on a temporary basis, designate a limited number of
18 areas in the state in which certain landowners and contractors are granted immunity under
19 AS 09.65.245(a) for causing asbestos-related injuries where an inability to complete
20 construction projects has been demonstrated because of lack of gravel or other aggregate
21 material free from naturally occurring asbestos. After designating an area on a temporary
22 basis, the department shall notify potentially affected persons that the area has been
23 designated as an area where immunity may be granted under AS 09.65.245(a) for certain
24 landowners and contractors causing asbestos-related injuries. Notwithstanding
25 AS 44.42.410(b), added by sec. 4 of this Act, the Department of Transportation and Public
26 Facilities may approve a limited number of appropriate transportation projects and public
27 facilities until the development and implementation of initial standards under AS 44.42.420
28 and the administrative requirements of AS 44.42.400, after consultation with the Department
29 of Environmental Conservation, the Department of Health and Social Services, the
30 Department of Labor and Workforce Development, and appropriate federal agencies. The
31 Department of Transportation and Public Facilities may prepare and adopt interim standards

1 and operating procedures and may require of its contractors the preparation of site-specific
2 plans for the use of gravel or other aggregate material that when tested using the bulk method
3 prescribed in sec. 6 of this Act, is determined to have a content equal to or greater than 0.25
4 percent naturally occurring asbestos by mass.

5 (c) The authority granted by (a) and (b) of this section expires December 31, 2013.

6 * **Sec. 6.** The uncodified law of the State of Alaska is amended by adding a new section to
7 read:

8 **INTERIM STANDARDS FOR APPLICATION OF ASBESTOS BULK TESTING.**
9 Until the Department of Transportation and Public Facilities adopts and prescribes a method
10 of bulk testing under AS 44.42.420(a), added by sec. 4 of this Act, the department shall use
11 California Air Resources Board Method 435, Determination of Asbestos Content of
12 Serpentine Aggregate, adopted on June 6, 1991, as that standard has effect on the effective
13 date of this Act, as the basis for determining the asbestos content of a bulk sample or for
14 interim use as authorized by sec. 5 of this Act.

15 * **Sec. 7.** This Act takes effect immediately under AS 01.10.070(c).