

STATE OF ALASKA

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Representative Reggie Joule
Alaska State Legislature
State Capitol
Juneau, Alaska 99801

Senator Donald Olson
Alaska State Legislature
State Capitol
Juneau, Alaska 99801

Subject: HB 258/SB 180 (Naturally Occurring Asbestos)
Explanation of Immunity

Dear Representative Joule and Senator Olson,

In speaking with your staff regarding HB 258 and SB 180 (naturally occurring asbestos), it appears that there may be a misunderstanding about the need for state immunity within this legislation. Currently, the House Finance CS for HB 258 provides immunity to the state, and the Senate Judiciary CS for SB 180 eliminates state immunity, except for individual employees under certain circumstances outlined in the legislation. The misunderstanding appears to be that the immunity provided in the House Finance CS for HB 258 is not necessary. This is incorrect. This letter is meant to clarify the legal parameters and consequences if state immunity is not included in the final versions of HB 258 or SB 180.

Existing immunities for the state and state employees **are not** equivalent to the immunity found in the House Finance CS for HB 258. This is true for three reasons. First, in the absence of a specific provision in statute expressly providing immunity for the state for the functions outlined in proposed AS 44.42.400 and .410, a determination of state immunity or potential liability would generally require more case development, discovery, and costly litigation. Second, there would be less certainty about the application of immunity under existing law to Department of Transportation and Public Facilities' (DOTPF's) execution of the responsibilities created by this legislation. Third, the express exclusion of the state from the immunity in the Senate Judiciary's CS for SB 180, specifically in AS 09.65.245(b), means that the state could have potential exposure

that private parties and municipalities may not have, relating to ownership of land with naturally occurring asbestos (NOA) gravel or the state's own extraction, supply, transport, or use of NOA gravel. These reasons are explained in more detail below.

Discretionary Immunity and Its Applicability

The Alaska Tort Claims Act (AS 09.50.250) waives sovereign immunity for the State of Alaska with certain exceptions. One such exception is for "discretionary functions." Under AS 09.50.250,

an action [against the state] may not be brought if the claim (1) is an action for tort, and is based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not the statute or regulation is valid; or is an action for tort, and based upon the exercise or performance of the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion is abused.

HB 258 and SB 180 set out a number of actions DOTPF would be required to take in order to carry out the requirements of proposed AS 44.42.400-.430. Broadly, DOTPF would be tasked with the following:

- Designating an area in which certain private contractors and landowners may be granted immunity for causing asbestos-related injuries;
- Adopting regulations regarding procedures for evaluation of site-specific use plans of material containing NOA (to include developing guidelines to determine when the cost for alternatives is "economically unreasonable");
- Approving or disapproving such site-specific use plans based on the above guidelines;
- Developing monitoring and mitigation plans for all approved site-specific use plans;
- Providing copies of all site-specific use plans, including the monitoring and mitigation plans, to the mayor or manager of an affected municipality; and
- If NOA is involved in a DOT project in a designated area, developing a site-specific plan for that project.

The Supreme Court of Alaska identifies discretionary acts or functions "by examining whether the act or function can be described as 'planning' or 'operational'." Acts or functions occurring at the planning level, including policy-making, are entitled to immunity as discretionary functions under AS 09.50.250; those that are merely ministerial or operational are not. *Dep't of Transp. & Pub. Facilities v. Sanders* 944 P.2d 453, 456 (Alaska 1997). If a court found that DOTPF's tasks under the

bills fell under the "planning" and "operational" categories, those actions would be immune as discretionary functions. However, to the extent that a court decided that a ministerial act was potentially responsible for a plaintiff's injury, the discretionary function immunity of AS 09.50.250 would not apply.

Liability of State Employees For the Approval of Plans

There is also an issue of state employee liability, as the discretionary function immunity in AS 09.50.250 applies only to the state (and state agencies), not to claims against individual state employees. Absent express immunity language covering employees, an action could potentially be brought against a state employee for performing duties under this legislation. Although the Senate Judiciary CS for SB 180 maintains immunity for state employees in relation to ownership or extraction of NOA gravel under AS 09.65.245, the Senate Judiciary version does not provide immunity for their involvement in the site designation and planning process. It is possible that official immunity (created by Alaska Supreme Court precedent) may protect a state official or employee who was sued, but that would depend on the circumstances and is not assured.

Immunity Exclusion for State's Actions as Owner or Contractor

In the Senate Judiciary CS, AS 09.65.245(b) expressly says that the state is not covered by the immunity in (a) – so even if DOTPF follows its own site use plan and monitoring/mitigation plan, the immunity in this legislation would not apply to the state. This means that private owners and contractors would be immune for activities for which the state would not have the same immunity.

Conclusion

In summary, the testimony that has been provided by the Department of Law on HB 258 and SB 180 was not meant to imply that the state is otherwise immune for all actions and responsibilities set forth in the bills, regardless of whether immunity for the state is expressly provided in the bill. To the contrary, the testimony was only that some state functions covered by the bill **may be** immune under existing law. However, without the immunity in the House Finance CS for HB 258, the state would still be open to potential liability with respect to ownership or use of NOA gravel and possibly other functions imposed by this legislation, and the ultimate determination of immunity would depend on the circumstances of each case.

If you have any further questions in relation to immunity, please feel free to contact Assistant Attorney General Susan Cox.

Sincerely,

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

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