

LEGAL SERVICES

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MEMORANDUM

March 22, 2010

SUBJECT: Draft CSHB 333(), addressing use of gravel or other aggregate materials containing naturally occurring asbestos, and providing immunity for certain claims arising out of or in connection with the use of asbestos -- sectional analysis (Work Order No. 26-LS1248\S)

TO: Representative Reggie Joule

FROM: Jack Chenoweth
Assistant Revisor

This is by way of response to Christine Hess's request for a sectional analysis of CSHB 333(), prepared for your office as a draft committee substitute without sponsor.

House Bill 333 is a measure principally intended to authorize and regulate use of "gravel or other aggregate material that is not free of naturally occurring asbestos" -- a phrase intended to cover aggregate material from which asbestos, naturally occurring in small quantities, cannot be readily removed before use -- in conjunction with various construction projects. The phrase is defined in the bill at page 5, beginning at line 31, to mean:

... gravel, rock, sand, and similar materials that are appropriate to and intended for use in construction of a transportation project or public facility that, when tested using a bulk test method prescribed by the department by regulation, are determined to have a content of at least 0.25 percent asbestos by mass.

In the permanent law provisions of the bill --

Bill section 4 proposes to add new material to AS 44.42.020 -- a new subsection (c) -- to prescribe what the Department of Transportation and Public Facilities shall do to implement direction given to make use of gravel and aggregate materials that contain naturally occurring asbestos. The subsection first directs the department to develop, implement, and revise statewide standards and operating procedures to allow use of these materials in construction and maintenance projects. Paragraph (c)(1) spells out the required content of the means and measures to be adopted as part of the department's standards. Paragraph (c)(2) gives direction to the department as to the content of its project operating procedures that apply to use of this aggregate material in transportation

facilities and in public works projects -- that is, in projects initiated or contracted for by the department. Paragraph (c)(3) contains the operative definition described above and, in the absence of a separate definition, cross references the definition of "asbestos" already set out in AS 18.31.500.¹

Bill section 3 amends the state code provisions addressing asbestos by adding a new section, AS 18.31.250, to authorize use of this aggregate material in construction projects that are not initiated or contracted for by the Department of Transportation and Public Facilities. As with state-initiated projects, if the construction of a facility or project contemplates use of gravel, rock, sand, or a similar aggregate material that is not free of naturally occurring asbestos, the principal construction contractor or the party having legal authority for the facility's or project's design and construction is directed to file documents with the department demonstrating compliance with the department's standards and operating procedures and to secure department approval under those standards and procedures before initiating use of the material in the construction of the facility or project.

Bill section 2 speaks to the matter of immunity from civil action or a claim for civil damages based on an alleged asbestos-related death, injury, illness, or disability or an asbestos-related property damage claim. The provision would bar actions against a defendant based on the defendant's ownership of land from which asbestos is taken or based on the defendant's supplying or using gravel when that activity complies with the appropriate requirements of AS 18.31.250 or AS 44.42.020(c) in the course of use of gravel or aggregate containing naturally occurring asbestos. Additionally, the proposal would limit recovery based on noncompliance with the two new codified sections, AS 18.31.250 and AS 44.42.020(c), "only as against a defendant that has direct control over or responsibility for compliance with the requirements" of the provisions of the two new codified sections. This bill section contains a definition of the term "asbestos" that cross-references AS 18.31.500; the text of the definition appears in this memo's earlier note.

In the temporary, or uncodified, provisions of the measure --

Bill section 1 contains legislative findings and purpose statements to explain and support the measure. This material, drawn from language submitted by your office at the time of the initial drafting request, is intended to provide support to the permanent law changes in the provisions that follow it.

The department's development of generally-applicable initial standards and operating procedures will take time. **Bill section 5**, a temporary law provision, permits the department to review and approve site-specific plans submitted for state projects and

¹ AS 18.31.500 defines "asbestos" to mean "chrysotile, amosite, crocidolite, fibrous tremolite, fibrous anthophyllite, and fibrous actinolite," a technical definition but one commonly used in statutory definitions in other jurisdictions.

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for projects not initiated by the department during the interim period before initial standards and operating procedures are adopted and take effect. The approval authority provided in this bill section is scheduled to expire December 31, 2011. **Bill section 6** authorizes the department to use a specific standard previously adopted by the California Air Resources Board on an interim basis for the purpose of determining the asbestos content of a bulk sample in a bulk test required under the new permanent law provisions until the department adopts its initial standards that may be more relevant to this state's experience.

An effective date provision, **bill section 7**, would give the measure an immediate effective date.

JBC:med

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