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Nauman
3/8/12

CS FOR SENATE BILL NO. 180()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY

Offered:

Referred:

Sponsor(s): SENATOR OLSON

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, evaluate site-specific use plans,**
3 **develop and maintain an information database that includes locations of gravel or other**
4 **aggregate material that contains naturally occurring asbestos, gravel or other aggregate**
5 **material free from naturally occurring asbestos, and suggests locations to stockpile**
6 **gravel or other aggregate material free from naturally occurring asbestos, and transmit**
7 **reports related to the use in the construction and maintenance of transportation projects**
8 **and public facilities and in the construction of projects by public and private entities of**
9 **gravel or aggregate material that contains naturally occurring asbestos, and authorizing**
10 **use on an interim basis of that material for certain transportation projects and public**
11 **facilities; providing immunity for the state and for landowners, extractors, suppliers,**
12 **transporters, and contractors for certain actions or claims arising in connection with the**

1 **use of gravel or aggregate material containing naturally occurring asbestos; requiring**
2 **contractors to report certain asbestos-related data to the Department of Transportation**
3 **and Public Facilities; and providing for an effective date."**

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

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

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

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

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

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

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

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

30 (b) It is the purpose of this Act

(1) to authorize and direct the Department of Transportation and Public Facilities to develop, implement, and, as circumstances may require or indicate, modify standards and operating procedures to allow the use in the construction and maintenance of transportation projects and public facilities of gravel or aggregate material that contains naturally occurring asbestos, with the expectation that use of that material in a manner that is consistent with those standards and procedures may avoid significant risk to human health and eliminate significantly higher costs of construction and maintenance of projects and facilities associated with using only construction material that is free of asbestos;

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

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

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

(d) Because neither the state nor the federal government has established a scale assigning a specific risk level to a corresponding amount of naturally occurring asbestos, this Act accepts 0.25 percent by mass, the smallest testable amount of asbestos under the California Air Resources Board Method 435, as the baseline for the presence of naturally occurring asbestos in gravel or other aggregate material.

* **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 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 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 approving a site-specific use plan or in the course of developing or approving a monitoring plan or a mitigation plan under AS 44.42.410.

(d) In this section,

(1) "asbestos" has the meaning given in AS 18.31.500;

(2) "naturally occurring asbestos" means asbestos-containing material that has not been processed in an asbestos mill.

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

Article 2A. Use of materials containing 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, before initiating a construction project not subject to AS 44.42.410(b) 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 construction contractor, the person having legal authority for the design and construction of the project, shall adhere to the site-specific use plan approved by the department and the monitoring and mitigation plan created by the department.

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

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

Sec. 44.42.400. Administration. The department shall

(1) designate a single employee who reports to the commissioner to oversee the duties assigned to the department in AS 44.42.400 - 44.42.430 and to serve as the point of contact for inquiries related to projects using gravel or other aggregate material containing naturally occurring asbestos;

(2) establish and maintain a database of

1 (A) sites in the state for which the department has acquired or
2 received information indicating that the sites contain naturally occurring
3 asbestos;

4 (B) sources of gravel or other aggregate material that,
5 according to information available to the department from reasonably reliable
6 sources, are free from naturally occurring asbestos within reasonable proximity
7 to known sites of naturally occurring asbestos;

8 (C) sources of gravel or other aggregate material for all known
9 projects the state or a municipality intends to undertake within 25 miles of a
10 community in the next five years where the state or municipality intends to use
11 gravel or other aggregate material containing naturally occurring asbestos that,
12 according to information available to the department from reasonably reliable
13 sources, are free from naturally occurring asbestos; the database must include
14 all sources of gravel or other aggregate material within 25 miles of the
15 community;

16 (D) communities that have reported to the department that they
17 do not have reasonable access to gravel or other aggregate material free from
18 naturally occurring asbestos; and

19 (E) all data collected under the requirements of
20 AS 44.42.410(g)(1)(B), by project;

21 (3) annually transmit to the commissioner and publish on the
22 department's Internet website a report containing

23 (A) a listing of all current projects for which a plan has been
24 submitted under AS 18.31.250 or AS 44.42.410(b);

25 (B) a listing of all known projects intended to be undertaken by
26 the state or a municipality in the next five years where the state or municipality
27 intends to use gravel or aggregate material containing naturally occurring
28 asbestos;

29 (C) suggestions for potential locations to stockpile gravel or
30 other aggregate material free from naturally occurring asbestos for use in
31 future projects and an estimate of the cost of stockpiling that gravel; and

(D) suggestions for potential locations, in coordination with ongoing state and municipal construction projects, to stockpile gravel or other aggregate material free from naturally occurring asbestos for future projects and an estimate of the cost of stockpiling that gravel; and

(4) annually provide a report on the monitoring and mitigation data transmitted by contractors to the department under AS 44.42.410(i) and the results of site monitoring performed by the department to the Department of Environmental Conservation, the Department of Health and Social Services, and the Department of Labor and Workforce Development.

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

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

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

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

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

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

(6) if the requirements under (4) and (5) of this subsection are economically unreasonable, describes how the gravel or other aggregate material will be used in order to prevent asbestos from becoming airborne or otherwise transferred outside of the project area.

(b) To qualify for and preserve the immunity provided under AS 09.65.245(a)(2), the department, in its operating procedures applicable to a project that is a transportation facility, including a public highway, airport, or pipeline or railroad track bed, or a public work, as that term is defined in AS 35.95.100, and for which the contractor intends to use gravel or other aggregate material that, when tested using a bulk testing method prescribed by the department in regulation, is determined to have a content equal to or greater than 0.25 percent of naturally occurring asbestos by mass, 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, 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) The department shall approve or disapprove a site-specific plan. The department may require a contractor submitting a site-specific plan to provide additional information or test results before the department approves or disapproves a site-specific plan. If the department determines that it is economically unreasonable to undertake a construction project with gravel or aggregate material free from naturally occurring asbestos under (d) of this section or if the department determines that it is economically unreasonable to bury or seal the gravel or other aggregate material that contains naturally occurring asbestos under (a)(4) or (a)(5) of this section, the department shall make findings to support the determination.

(g) 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;

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

(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.

(h) 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. The contractor shall provide written notification to the department and the landowner that the document has been recorded.

(i) 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, Department of Health and Social Services, and 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, Department of Health and Social Services, and Department of Labor and Workforce Development, shall develop, implement, and revise 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 standards adopted under this subsection must include procedures for

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

(2) 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) 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;

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

(5) 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.

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

(1) "asbestos" has the meaning given in AS 18.31.500;

(2) "contractor" means the principal construction contractor, or in absence of an identified principal construction contractor, the person having legal authority for the design and construction of the project;

(3) "naturally occurring asbestos" means asbestos-containing material that has not been processed in an asbestos mill.

* **Sec. 5.** The uncoded law of the State of Alaska is amended by adding a new section to read:

INTERIM PROJECT AUTHORIZATION. (a) Notwithstanding AS 18.31.250, added by sec. 3 of this Act, to ensure early application of the policy described in sec. 1 of this Act to a limited number of appropriate construction projects until the development and implementation of initial standards under AS 44.42.420 and the administrative requirements of AS 44.42.400, added by sec. 4 of this Act, for projects not subject to AS 44.42.410(b), if, under (b) of this section, the Department of Transportation and Public Facilities prepares and adopts interim standards and requires its contractors to prepare site-specific plans for the use of gravel or other aggregate material that, when tested using the bulk method prescribed in sec. 6 of this Act, is determined to have a content equal to or greater than 0.25 percent

1 naturally occurring asbestos by mass in transportation projects and public facilities, the
2 department shall apply those standards to a person described in AS 18.31.250 for a project
3 that is not subject to AS 44.42.410(b).

4 (b) Notwithstanding AS 44.42.410(b), added by sec. 4 of this Act, to ensure early
5 application of the policy described in sec. 1 of this Act to a limited number of appropriate
6 transportation projects and public facilities until the development and implementation of
7 initial standards under AS 44.42.420 and the administrative requirements of AS 44.42.400,
8 after consultation with the Department of Environmental Conservation, Department of Health
9 and Social Services, Department of Labor and Workforce Development, and appropriate
10 federal agencies, the Department of Transportation and Public Facilities may prepare and
11 adopt interim standards and operating procedures and may require of its contractors the
12 preparation of site-specific plans for the use of gravel or other aggregate material that when
13 tested using the bulk method prescribed in sec. 6 of this Act, is determined to have a content
14 equal to or greater than 0.25 percent naturally occurring asbestos by mass.

15 (c) The authority granted by (a) and (b) of this section expires December 31, 2012.

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

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

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