

Original sponsor(s): REP. M.DAVIS, Brown, Koponen, Navarre, Goll, Ulmer,
Ellis

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE
2 CS FOR HOUSE BILL NO. 409 (Judiciary)
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the reform of certain environ-
7 mental conservation laws and the administrative
8 penalties for their violation; amending Rule 82,
9 Alaska Rules of Civil Procedure."

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

11 * Section 1. AS 46.03.020(6) is amended to read:

12 (6) at reasonable times enter and inspect with the consent
13 of the owner or occupier any property or premises and copy records to
14 investigate either actual or suspected sources of pollution or con-
15 tamination or to ascertain compliance or noncompliance with this
16 chapter, AS 46.04, or AS 46.09, or a regulation, order of the depart-
17 ment, permit, approval, or acceptance issued under this chapter,
18 AS 46.04, or AS 46.09; the department shall maintain as confidential
19 [A REGULATION WHICH MAY BE ADOPTED UNDER AS 46.03.020 - 46.03.040;]
20 information and records relating to secret processes, [OR] methods of
21 manufacture, and other information and records as agreed by the de-
22 partment and the owner or occupier of the property, discovered during
23 the investigation [IS CONFIDENTIAL];

24 * Sec. 2. AS 46.03.020 is amended by adding a new paragraph to read:

25 (14) at reasonable times enter and inspect the property or
26 premises of a pervasively regulated facility and copy relevant records
27 to investigate either actual or suspected sources of pollution or con-
28 tamination or to ascertain compliance or noncompliance with this
29 chapter, AS 46.04, AS 46.09, or with a regulation, order of the

1 department, permit, approval, or certificate issued under this chap-
2 ter, AS 46.04, or AS 46.09; the department shall maintain information
3 and records relating to secret processes or methods of manufacture
4 discovered during investigations as confidential; in this paragraph
5 "pervasively regulated facility" means a facility where activities or
6 operations are or were conducted that affect a significant public
7 interest and that the department comprehensively regulates.

8 * Sec. 3. AS 46.03.170(f) is amended to read:

9 (f) A variance or renewal granted under this section may not be
10 construed to prevent or limit the application of the [EMERGENCY]
11 orders of the commissioner issued under AS 46.03.820 and 46.03.850.

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

13 Sec. 46.03.761. ADMINISTRATIVE PENALTIES FOR POLLUTION. (a)

14 The department may assess an administrative penalty against a person
15 who violates or causes or permits to be violated a provision of this
16 chapter, AS 46.04, or AS 46.09, or a regulation, order of the depart-
17 ment, permit, approval, or certificate issued under this chapter,
18 AS 46.04, or AS 46.09.

19 (b) AS 44.62 does not apply to administrative proceedings con-
20 ducted or judicial review sought under this section.

21 (c) An administrative penalty assessed under this section may
22 not exceed \$25,000 a day for each violation. Each violation is a
23 separate and distinct offense and where the violation continues from
24 day to day, each day constitutes a separate violation. In determining
25 the amount of a penalty assessed under this section, the department
26 shall consider the effect of the violation on the public health or the
27 environment, a prior history of violations, deterrence of future
28 violations, and other factors that the department considers relevant.

29 (d) The assessment notice shall be personally served on or sent

1 by certified mail, return receipt requested, to the person affected.
2 An administrative penalty assessed under this section becomes final 30
3 days after receipt of the assessment notice unless an administrative
4 hearing is requested. Failure to request an administrative hearing
5 within 30 days after receipt of the assessment notice constitutes a
6 waiver of the right to an administrative hearing and to judicial
7 review.

8 (e) After the conclusion of the administrative hearing, the
9 department may modify, rescind, or affirm the administrative penalty.
10 A person against whom an administrative penalty is assessed may obtain
11 judicial review of the administrative penalty by filing a notice of
12 appeal in the superior court within 30 days after the department's
13 issuance of the administrative hearing decision. The court may set
14 aside the administrative penalty only if the administrative record,
15 taken as a whole, does not contain a reasonable basis to support the
16 finding of violation or the amount of penalty assessed by the depart-
17 ment. Except as provided in this section, the validity, amount, and
18 appropriateness of the administrative penalty are not subject to
19 judicial or administrative review.

20 (f) Action by the department under this section does not limit
21 or otherwise affect the authority of the department to enforce this
22 chapter, AS 46.04, or AS 46.09, or to recover damages, restoration
23 expenses, investigation costs, court costs, and attorney fees. The
24 court shall set off the administrative penalty amount paid under this
25 section against a civil penalty subsequently awarded by a court
26 against the person for the same violation under AS 46.03.760.

27 (g) The assessment of an administrative penalty under this
28 section does not affect the obligation of a person to comply with this
29 chapter, AS 46.04, AS 46.09, or with a regulation, order of the

1 department, permit, approval, or certificate issued under this chap-
2 ter, AS 46.04, or AS 46.09.

3 (h) If a person fails or refuses to pay an administrative penal-
4 ty assessed under this section after the penalty has become final, the
5 attorney general may bring an action to collect the penalty and the
6 defendant is liable for

7 (1) the amount of the administrative penalty assessed;

8 (2) interest from the date the department issued the as-
9 sessment notice under (d) of this section;

10 (3) full reasonable attorney fees and costs incurred by the
11 state in the collection action; and

12 (4) a nonpayment penalty for each quarter year in which the
13 assessment remains unpaid of 20 percent of the assessed administrative
14 penalty.

15 * Sec. 5. AS 46.03.850 is repealed and reenacted to read:

16 Sec. 46.03.850. COMPLIANCE ORDER. (a) When, in the opinion of
17 the department, a person is violating or is about to violate a pro-
18 vision of this chapter, AS 46.04, AS 46.09, or AS 03.05, or of a
19 regulation, order of the department, permit, approval, or certificate
20 issued under this chapter, AS 46.04, AS 46.09, or AS 03.05, or is
21 otherwise endangering or creating the potential of pollution of the
22 surface or subsurface air, land, or water within the jurisdiction of
23 the state, the department may issue a compliance order.

24 (b) The compliance order shall be personally served on or sent
25 by certified mail, return receipt requested, to the person affected.
26 Service is complete on a corporation upon receipt by an officer of the
27 corporation or by its registered agent and on a partnership on receipt
28 by a partner. The compliance order is effective on receipt. A re-
29 quest for an administrative hearing under (c) of this section does not

1 stay the provisions or deadlines set out in the compliance order.

2 (c) The person affected may request an administrative hearing
3 within 30 days after receipt of the compliance order. Failure to re-
4 quest a hearing within 30 days after receipt of the compliance order
5 constitutes a waiver by the person of the right to an administrative
6 hearing and to judicial review.

7 (d) After the conclusion of the administrative hearing, the
8 department may modify, rescind, or affirm the compliance order. The
9 affected person may obtain judicial review of the compliance order by
10 filing a notice of appeal in the superior court within 30 days after
11 the department's issuance of the administrative hearing decision. The
12 court may set aside the compliance order only if the administrative
13 record, taken as a whole, does not contain a reasonable basis to
14 support the provisions of the compliance order or the department's
15 decision to issue the compliance order. Except as provided in this
16 section, the compliance order is not subject to judicial or adminis-
17 trative review.

18 (e) The Administrative Procedure Act (AS 44.62) does not apply
19 to administrative proceedings conducted or judicial review sought
20 under this section.

21 (f) A compliance order issued under this section is an order of
22 the department for purposes of this chapter, AS 46.04, AS 46.09, and
23 AS 03.05.

24 (g) The attorney general may seek enforcement of a compliance
25 order by bringing an action in superior court. In an action to en-
26 force a compliance order, the attorney general may recover full rea-
27 sonable attorney fees and costs incurred by the state in maintaining
28 the action.

29 * Sec. 6. AS 46.03 is amended by adding a new section to read:

1 Sec. 46.03.861. ENVIRONMENTAL AUDITS. (a) As part of a judi-
2 cial or administrative enforcement action, the commissioner may re-
3 quire a person to conduct an environmental audit and to prepare and
4 submit to the commissioner an environmental audit report.

5 (b) Each environmental audit shall be performed by a qualified
6 independent contractor selected by the person required to conduct the
7 audit. The selection of the independent contractor is subject to the
8 approval of the commissioner.

9 (c) In this section

10 (1) "environmental audit" means a systematic, documented,
11 periodic, and objective review, of a person's operations, practices,
12 and performance related to meeting each applicable environmental
13 standard and requirement, including permit conditions;

14 (2) "environmental audit report" means a written report
15 that candidly and thoroughly presents findings from a review, con-
16 ducted as part of an environmental audit, of a person's environmental
17 operations, practices, and performance.

18 * Sec. 7. The provisions of AS 46.03.761(h)(3), as added by sec. 4 of
19 this Act, have the effect of amending Alaska Rule of Civil Procedure 82 by
20 allowing the recovery of full reasonable attorney fees and costs in certain
21 actions.

22 * Sec. 8. AS 46.03.761(h)(3), as added by sec. 4 of this Act, takes
23 effect only if sec. 7 of this Act receives the two-thirds majority vote of
24 each house of the legislature required by art. IV, sec. 15, Constitution of
25 the State of Alaska.

26 * Sec. 9. The provisions of AS 46.03.850(g), as added by sec. 5 of this
27 Act, have the effect of amending Alaska Rule of Civil Procedure 82 by
28 allowing the recovery of full reasonable attorney fees and costs in certain
29 actions.

1 * Sec. 10. AS 46.03.850(g), as added by sec. 5 of this Act, takes
2 effect only if sec. 9 of this Act receives the two-thirds majority vote of
3 each house of the legislature required by art. IV, sec. 15, Constitution of
4 the State of Alaska.