

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

1 IN THE HOUSE

BY THE FINANCE COMMITTEE

2 CS FOR HOUSE BILL NO. 409 (Finance)
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
13 consent of the owner or occupier, enter and inspect any property or
14 premises and copy relevant records to investigate either actual or
15 suspected sources of pollution or contamination or to ascertain com-
16 pliance or noncompliance with this chapter, AS 46.04, or AS 46.09, or
17 a regulation, order of the department, permit, approval, or acceptance
18 issued under this chapter, AS 46.04, or AS 46.09; the department shall
19 maintain as confidential [A REGULATION WHICH MAY BE ADOPTED UNDER
20 AS 46.03.020 - 46.03.040;] information and records relating to secret
21 processes, [OR] methods of manufacture, financial and commercial
22 information and records, and other information and records as agreed
23 by the department and the owner or occupier of the property discovered
24 during the investigation [IS CONFIDENTIAL];

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

26 (14) to the extent permitted by the United States and Alaska
27 Constitutions, at reasonable times enter and inspect a pervasively
28 regulated facility if that facility is an oil terminal facility
29 regulated under AS 46.04.030, a refinery, a crude oil or gas

1 exploration, production, or transportation facility, a hazardous waste
2 transportation, storage, or disposal facility regulated under AS 46.-
3 03.302, a major solid waste disposal facility, or a facility with both
4 significant air and wastewater emissions regulated under this chapter,
5 and copy relevant records to investigate either actual or suspected
6 sources of pollution or contamination or to ascertain compliance or
7 noncompliance with this chapter, AS 46.04, AS 46.09, or with a regu-
8 lation, order of the department, permit, approval, or acceptance
9 issued under this chapter, AS 46.04, or AS 46.09; the department shall
10 maintain as confidential information and records relating to secret
11 processes, methods of manufacture, financial and commercial informa-
12 tion and records, and other information and records as agreed by the
13 department and the owner or occupier of the property that is dis-
14 covered during the investigation; in this paragraph, "pervasively
15 regulated facility" means a facility where activities or operations
16 are or were conducted that affect a significant public interest and
17 that the department comprehensively regulates.

18 * Sec. 3. AS 46.03 is amended by adding a new section to read:

19 Sec. 46.03.761. ADMINISTRATIVE PENALTIES FOR POLLUTION. (a)
20 The department may assess an administrative penalty against a person
21 who violates or causes or permits to be violated a provision of this
22 chapter, AS 46.04, or AS 46.09, or a regulation, order of the depart-
23 ment, permit, approval, or certificate issued under this chapter,
24 AS 46.04, or AS 46.09.

25 (b) Except for the adoption of regulations under AS 46.03.885,
26 AS 44.62 does not apply to administrative proceedings conducted or
27 judicial review sought under this section.

28 (c) An administrative penalty assessed under this section may
29 not exceed \$15,000 a day for each violation. Each violation is a

1 separate and distinct offense and where the violation continues from
2 day to day, each day constitutes a separate violation. In determining
3 the amount of a penalty assessed under this section, the department
4 shall consider the effect of the violation on the public health or the
5 environment, a prior history of violations, deterrence of future
6 violations, and other factors that the department considers relevant.

7 (d) The assessment notice shall be personally served on or sent
8 by certified mail, return receipt requested, to the person affected.
9 An administrative penalty assessed under this section becomes final 30
10 days after receipt of the assessment notice unless an administrative
11 hearing is requested. Failure to request an administrative hearing
12 within 30 days after receipt of the assessment notice constitutes a
13 waiver of the right to an administrative hearing and to judicial
14 review.

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

27 (f) Action by the department under this section does not limit
28 or otherwise affect the authority of the department to enforce this
29 chapter, AS 46.04, or AS 46.09, or to recover damages, restoration

1 expenses, investigation costs, court costs, and attorney fees. The
2 court shall set off the administrative penalty amount paid under this
3 section against a civil penalty subsequently awarded by a court
4 against the person for the same violation under AS 46.03.760.

5 (g) The assessment of an administrative penalty under this
6 section does not affect the obligation of a person to comply with this
7 chapter, AS 46.04, AS 46.09, or with a regulation, order of the de-
8 partment, permit, approval, or certificate issued under this chapter,
9 AS 46.04, or AS 46.09.

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

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

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

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

19 (4) a nonpayment penalty of five percent for each 30-day
20 period or fraction of a period in which the assessment remains unpaid
21 but not to exceed 25 percent of the administrative penalty.

22 * Sec. 4. AS 46.03.850 is repealed and reenacted to read:

23 Sec. 46.03.850. COMPLIANCE ORDER. (a) When the department
24 finds after an investigation that a person is violating or is about to
25 violate a provision of this chapter, AS 46.04, AS 46.09, or AS 03.05,
26 or of a regulation, order of the department, permit, approval, or
27 certificate issued under this chapter, AS 46.04, AS 46.09, or AS 03.-
28 05, or is otherwise endangering or creating the potential of pollution
29 of the surface or subsurface air, land, or water within the

1 jurisdiction of the state, the department may issue a compliance
2 order. The compliance order shall describe with reasonable speci-
3 ficity the nature of the violation and set out the nature of the
4 required response measures and a deadline for compliance.

5 (b) The compliance order shall be personally served on or sent
6 by certified mail, return receipt requested, to the person affected.
7 Service is complete on a corporation upon receipt by an officer of the
8 corporation or by its registered agent and on a partnership on receipt
9 by a partner. The compliance order is effective on receipt. A re-
10 quest for an administrative hearing under (c) of this section does not
11 stay the provisions or deadlines set out in the compliance order.

12 (c) The person affected may request an administrative hearing
13 within 30 days after receipt of the compliance order. Failure to re-
14 quest a hearing within 30 days after receipt of the compliance order
15 constitutes a waiver by the person of the right to an administrative
16 hearing and to judicial review.

17 (d) After the conclusion of the administrative hearing, the
18 department may modify, rescind, or affirm the compliance order. The
19 affected person may obtain judicial review of the compliance order by
20 filing a notice of appeal in the superior court within 30 days after
21 the department's issuance of the administrative hearing decision. The
22 court may set aside the compliance order only if the administrative
23 record, taken as a whole, does not contain a reasonable basis to
24 support the provisions of the compliance order or the department's
25 decision to issue the compliance order. Except as provided in this
26 section, the compliance order is not subject to judicial or adminis-
27 trative review.

28 (e) Except for the adoption of regulations under AS 46.03.885,
29 AS 44.62 does not apply to administrative proceedings conducted or

1 judicial review sought under this section.

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

5 (g) The attorney general may seek enforcement of a compliance
6 order by bringing an action in superior court. In an action to en-
7 force a compliance order, the attorney general may recover full rea-
8 sonable attorney fees and costs incurred by the state in maintaining
9 the action.

10 * Sec. 5. AS 46.03 is amended by adding a new section to read:

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

15 (b) Each environmental audit shall be performed by a qualified
16 independent contractor selected by the person required to conduct the
17 audit. The selection of the independent contractor is subject to the
18 approval of the commissioner.

19 (c) If an individual is required to conduct an environmental
20 audit, the individual may refuse to provide a specific item of infor-
21 mation on the basis of the privilege against self-incrimination. In
22 that case, the commissioner may request the attorney general to apply
23 to the superior court for immunity for the individual under AS 12.50.-
24 101 and for an order compelling production of the specific item of
25 information.

26 (d) A person may not be required to conduct more than one en-
27 vironmental audit under this section for a specific violation at its
28 site as long as the operations or conditions at that site remain in
29 compliance with applicable law, permits, or approvals of the

1 department.

2 (e) In this section

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

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

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

12 Sec. 46.03.885. REGULATIONS. The commissioner shall adopt
13 regulations under the Administrative Procedure Act (AS 44.62) to
14 implement AS 46.03.020(6) and (14), 46.03.761, 46.03.850, and 46.03.-
15 861.

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

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

24 * Sec. 9. The provisions of AS 46.03.850(g), as added by sec. 4 of this
25 Act, have the effect of amending Alaska Rule of Civil Procedure 82 by
26 allowing the recovery of full reasonable attorney fees and costs in certain
27 actions.

28 * Sec. 10. AS 46.03.850(g), as added by sec. 4 of this Act, takes
29 effect only if sec. 9 of this Act receives the two-thirds majority vote of

1 each house of the legislature required by art. IV, sec. 15, Constitution of
2 the State of Alaska.