Offered: 5/8/90
Referred: Rules

6-1741P

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

IN THE HOUSE BY THE JUDICIARY COMMITTEE

SENATE CS FOR CS FOR HOUSE BILL NO. 409 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the reform of certain environmental conservation laws and the administrative penalties for their violation; and amending Rule 609 of the Alaska Rules of Appellate Procedure."

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

* Section 1. AS 46.03.020(6) is repealed and reenacted to read:

(6) at reasonable times and with the consent of the owner or occupier, enter and inspect any property or premises and copy records that are required to be kept by this chapter, AS 46.04, AS 46.09, or by a substantially similar federal law or regulation, or by a regulation, order of the department, permit, approval, or acceptance issued under this chapter, AS 46.04, AS 46.09, or a substantially similar federal law or regulation, to investigate either actual or suspected sources of pollution or contamination or to ascertain compliance or noncompliance with this chapter, AS 46.04, or AS 46.09, or with a regulation, order of the department, permit, approval, or acceptance issued under this chapter, AS 46.04, or AS 46.09; the department shall maintain as confidential information and records relating to secret processes, methods of manufacture, financial and commercial information and records and, as agreed by the department and the owner or occupier of the property, other information and records discovered during the investigation; before undertaking an inspection, an authorized employee of the department must present to the owner or occupier of the facility appropriate credentials and if

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requested a written statement as to the reason for the inspection, including a statement as to whether pollution, contamination, or noncompliance is suspected; if pollution, contamination, or noncompliance is not suspected, an alternate and sufficient reason shall be given in writing; each inspection shall be commenced and completed with reasonable promptness; if the employee obtains any samples, before leaving the facility the employee shall give to the owner or occupier a receipt describing the sample obtained, and if requested a portion of each sample equal in weight or volume to the portion retained; if an analysis is made of the samples, the department shall provide a copy of the results of the analysis and a written summary of the findings of the inspection to the owner or occupier no more than 15 days after the analysis is received; if samples were not taken, the department shall provide a written summary of the findings of the inspection to the owner or occupier no more than 30 days after the inspection is complete;

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

(14) to the extent permitted by the United States and Alaska Constitutions, at reasonable times enter and inspect a facility if the facility is pervasively regulated and is an oil terminal facility regulated under AS 46.04.030, a refinery, a crude oil or gas exploration, production, or transportation facility, a hazardous waste transportation, storage, or disposal facility regulated under AS 46.03.302, a major solid waste disposal facility, or a facility that is required to have both a waste disposal permit and an air emissions permit, and copy records that are required to be kept by this chapter, AS 46.04, AS 46.09, or by a substantially similar federal law or regulation, by a regulation, order of the department, permit, approval, or acceptance issued under this chapter, AS 46.04, AS 46.09, or a substantially

similar federal law or regulation, to investigate either actual or suspected sources of pollution or contamination or to ascertain compliance or noncompliance with this chapter, AS 46.04, or AS 46.09, or with a regulation, order of the department, permit, approval, or acceptance issued under this chapter, AS 46.04, or AS 46.09; the department shall maintain as confidential information and records relating to secret processes, methods of manufacture, financial and commercial information and records and, as agreed by the department and the owner or occupier of the property, other information and records discovered during the investigation; before undertaking an inspection, an authorized employee of the department must present to the owner or occupier of the facility appropriate credentials and a written statement as to the reason for the inspection, including a statement as to whether pollution, contamination, or noncompliance is suspected; if pollution, contamination, or noncompliance is not suspected, an alternate and sufficient reason must be given in writing; each inspection shall be commenced and completed with reasonable promptness; if the employee obtains any samples, before leaving the facility the employee shall give to the owner or occupier a receipt describing the sample obtained, and if requested a portion of each sample equal in weight or volume to the portion retained; if an analysis is made of the samples, the department shall provide a copy of the results of the analysis and a written summary of the findings of the inspection to the owner or occupier no more than 15 days after the analysis is received; if samples were not taken, the department shall provide a written summary of the findings of the inspection to the owner or occupier no more than 30 days after the inspection is complete; in this paragraph, "pervasively regulated facility" means a facility where commercial activities or operations are or were

conducted that affect a significant public interest, that is regulated by the department, and where the regulatory presence is sufficiently comprehensive and defined that the owner or occupier cannot help but be aware that the property will be subject to periodic inspections undertaken for specific purposes; the term does not include, by way of example only, single-family residences, restaurants, hospitals, health clinics, fishing vessels, small placer mines, and service stations.

* Sec. 3. AS 46.03.020 is amended by adding a new subsection to read:

(b) When the department has the authority to issue a permit under this chapter, AS 46.04, or AS 46.09 to a pervasively regulated facility as defined in (a)(14) of this section, the department may attach to the permit terms and conditions relating to access for the entry and inspection of property and premises and the copying of records that are required to be kept by this chapter, AS 46.04, AS 46.09, or by a substantially similar federal law or regulation, or by a regulation, order of the department, permit, approval, or acceptance issued under this chapter, AS 46.04, AS 46.09, or a substantially similar federal law or regulation.

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

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

(b) Except for the adoption of regulations under AS 46.03.885 and the right to de novo review under (d) of this section, AS 44.62 does not apply to administrative proceedings conducted, but does apply to judicial review sought, under this section.

(c) An administrative penalty assessed under this section may not exceed $15,000 a day for each violation. Each violation is a separate and distinct offense and where the violation continues from day to day, each day constitutes a separate violation.

(d) The department shall, on request, grant an adjudicatory hearing to a person against whom an administrative penalty is assessed. The adjudicatory hearing shall be conducted under 18 AAC 15.200 - 15.310 as the regulations exist on the effective date of this Act. A person against whom an administrative penalty is assessed may appeal the decision of the department to the superior court. The superior court shall hear the appeal de novo on the record.

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

(f) The assessment of an administrative penalty under this section does not affect the obligation of a person to comply with this chapter, AS 46.04, AS 46.09, or with a regulation, order of the department, permit, approval, or certificate issued under this chapter, AS 46.04, or AS 46.09.

(g) If a person fails or refuses to pay an administrative penalty assessed under this section after the penalty has become final, the attorney general may bring an action to collect the penalty and the defendant is liable for

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

(2) interest from the date the department assesses the

administrative penalty under (a) of this section.

(h) The department shall adopt regulations setting out a matrix of daily penalties for specific categories of violations with the amounts not to exceed those established under (c) of this section. The matrix must establish the penalty amounts based on the

(1) degree of environmental harm resulting from the violation;

(2) degree of the respondent's culpability;

(3) prior history of violations;

(4) respondent's good faith cooperation and efforts to correct the violation;

(5) need for an enhanced penalty to deter future violations;

(6) economic savings realized through noncompliance;

(7) respondent's ability to pay.

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

Sec. 46.03.850. COMPLIANCE ORDER. (a) When the department finds after an investigation that a person is violating or is about to violate a provision of this chapter, AS 46.04, AS 46.09, or AS 03.05, or of a regulation, order of the department, permit, approval, or certificate issued under this chapter, AS 46.04, AS 46.09, or AS 03.05, or is otherwise endangering or creating the potential of pollution of the surface or subsurface air, land, or water within the jurisdiction of the state, the department may issue a compliance order. The compliance order shall describe with reasonable specificity the nature of the violation and set out the nature of the required response measures and a deadline for compliance.

(b) The compliance order is effective 10 days after receipt. A request for an administrative hearing under (c) of this section does

not stay the provisions or deadlines set out in the compliance order.

(c) The department shall, on request, grant an adjudicatory hearing to a person against whom a compliance order is issued under (a) of this section. The adjudicatory hearing shall be conducted under 18 AAC 15.200 - 15.310 as the regulations exist on the effective date of this Act. A person against whom a compliance order is issued may appeal the decision of the department to the superior court. The superior court shall hear the appeal de novo on the record.

(d) Except for the adoption of regulations under AS 46.03.885 and the right to de novo review under (c) of this section, AS 44.62 does not apply to administrative proceedings conducted, but does apply to judicial review sought, under this section.

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

(f) The attorney general may seek enforcement of a compliance order by bringing an action in superior court.

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

Sec. 46.03.861. ENVIRONMENTAL AUDITS. (a) As part of a judicial or administrative enforcement action, the department may request a person to conduct an environmental audit and to prepare and submit to the commissioner an environmental audit report. The person may decline to conduct an environmental audit.

(b) An environmental audit may be performed either by the person requested to conduct the audit or by an independent contractor selected by the person. The person performing the audit must meet reasonable qualifications established by the commissioner.

(c) In this section

(1) "environmental audit" means a systematic, documented,

and objective review of a person's operations, practices, and performance related to the specific environmental standards and requirements, including permit conditions, relevant to the enforcement action;

(2) "environmental audit report" means a written report that presents findings from a review, conducted as part of an environmental audit, of a person's environmental operations, practices, and performance relevant to issues involved in the enforcement action.

(d) The department shall maintain as confidential all information and records obtained under an environmental audit.

(e) Penalties assessed in a judicial or administrative enforcement action may be set off against the reasonable costs of an environmental audit performed as part of the enforcement action.

* Sec. 7. LEGISLATIVE INTENT. AS 46.03.020(b) as enacted in sec. 3 of this Act does not restrict any authority the Department of Environmental Conservation might have to establish access requirements in the permits of an entity that is not a pervasively regulated facility.

* Sec. 8. AS 46.03 is amended by adding a new section to read:

Sec. 46.03.885. REGULATIONS. The commissioner shall adopt regulations under the Administrative Procedure Act (AS 44.62) to implement AS 46.03.020(a)(6), (a)(14), and (b), 46.03.761, 46.03.850, and 46.03.861.

* Sec. 9. AS 46.03.761(d) and 46.03.850(c) have the effect of amending Rule 609 of the Alaska Rules of Appellate Procedure by requiring the superior court to hear certain appeals de novo on the record.