ENVIRONMENT

ANALYSIS OF IMPORTANT SECTIONS OF

SPONSOR SUBSTITUTE FOR SB 267

Section 2 and Section 19. Grants and loans for water supply and sewerage systems.

Section 2 substantially revises current law relating to local grants for water supply and sewerage system purposes. Current federal law precludes the possibility of a state's advancing to local governments the anticipated federal share for projects on which construction commenced after July 1, 1972. Section 19 of this bill thus repeals Section 30(a).

The important part of the proposed revision to AS 46.03.030 is the increase in state participation to 50 per cent of the total project cost or 50 per cent of the non-federal share, whichever is the lesser. This program involves state funding of projects which often are not eligible for federal funds, particularly in public water systems, which are often neglected, and projects which can receive federal funding are undertaken instead. In much of Alaska, public water supply systems are badly in need of upgrading, especially as they will have to meet new standards promulgated under the Safe Drinking Water Act of 1974. By increasing the state's share in these projects from the present maximum of 25 per cent to 50 per cent, we feel that more communities will be able to acquire badly needed facilities.

Section 3. Waste Disposal Permits.

This section expands the waste disposal permit jurisdiction of the department to any operation which results in the disposal of waste material into the water.

This amendment is necessary if the state is to assume jurisdiction over the National Pollutant Discharge Elimination System permit process, currently being administered in the state by the U. S. Environmental Protection Agency under Section 402 of the Federal Water Pollution Control Act amendments of 1972 (FWPCA). Under that section, it is currently necessary for a person to obtain a federal permit from EPA for any discharge from any point source into the water of the state, whether or not the receiving waterbody is navigable. See United States v. Holland, 378 F. Supp. 665 (DCMD Fla. 1974).

Under Section 402(b) of the Act, states may assume control of the NPDES permit program if the state possesses water quality authority at least equal to that possessed by EPA. A majority of states have acquired this delegation, precluding the need for continuing extensive federal involvement in state water quality management. However, the State of Alaska cannot assume this authority at the present time, because our water quality permit jurisdiction is limited to commercial or industrial operations.

Section 7. Plan Review.

The department is currently in the process of developing regulations to implement state responsibilities under the Safe Drinking Water Act of 1974 (P.L. 92-523). In order to assume authority for implementation of the Safe Drinking Water Act within the State of Alaska, it is necessary that the state possess "adequate procedures for the enforcement of . . . state regulations" (Section 1413(a)(2)). This section, by way of a new subsection (b) to AS 46.03.720, provides for the review of plans for larger public water supply systems in order to adequately insure that these systems will be constructed and operated in conformity with the state's substantive regulations.

Section 9, Section 11, Section 13. Pollution Enforcement.

1. The department currently possesses no civil "option" for enforcement of anything but oil spills (unless the department sues for costs of restoration under Section 780--a provision which often is not relevant). Thus, particularly in air pollution or sewerage disposal matters, the department must either proceed criminally, or simply drop the matter. It should be noted that a civil remedy is necessary to assume federal permit authority. Environmental enforcement is, to a large degree, either compensatory or remedial in nature--that is, the punishing of a culpable individual is often only tangential to the main purposes of an environmental enforcement agency. The main concern is preventing or remedying damage.

Revised AS 46.03.760 establishes a civil option for the full range of violations currently covered only by the criminal provisions of AS 46.03.790. We believe the existence of this civil option will at once greatly increase both the fairness and effectiveness of the department's enforcement functions.

The "normal" response to the need for a civil option in environmental enforcement has been the creation of civil penalties. The problem with this approach is that some courts may view this as an attempt to penalize or punish a defendant without affording him the normal range of rights given to a criminal defendant, i.e., privilege against self-incrimination, jury trial, etc. See Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). As a matter of both policy and law, the argument has some merit.

Accordingly, the proposed revision of Section 760 has been written in a manner which frames the civil assessment to recognize the two primary goals of environmental enforcement--that is, compensation and correction.

2. Current oil spill liability provisions are deficient in many respects. Under current AS 46.03.822, a private party or a governmental agency other than the state is entitled the full compensation, based on strict liability for all actual damages caused by an oil spill. However, the availability of strict liability compensation to the state is limited by the provisions of current 760(b), which places an upper limit on state compensation of $100,000.

Requiring the state (and the state alone) to prove negligence to obtain full recovery for actual damages flies in the face of judicial and legislative opinion that the handling of oil is a hazardous undertaking, for which the handlers should be strictly liable in the event of injury. The Alaska Legislature has recognized this in Section 822 and has accordingly granted unlimited recovery for actual damages based on strict liability to any person, except the state. In Section 13 of this bill, revisions to Section 822 remove this distinction, and permit the state to recover for all actual damages caused to it by an oil pollution incident.

Section 10. Injunctions.

Currently Title 46 does not confer upon the department the power to seek an injunction for violations of its standards. This power is necessary to assume federal permit jurisdiction. Absent a specific statutory provision authorizing such suits, the courts will not enjoin the violation of a statute or regulation as such. Thus, except in cases where an actual "public nuisance" can be demonstrated, the department's authority to seek immediate effective remedial action may be extremely limited.

At common law, in order to obtain a preliminary injunction, it was necessary for the plaintiff to demonstrate that physical irreparable harm would be caused to him by a failure to grant the preliminary relief. There has emerged a judicial response toward this problem. Particularly in federal courts, it is often not necessary to demonstrate physical irreparable harm when seeking an injunction against a violation of a public welfare statute--such as environmental legislation. See Jones v. District of Columbia Redevelopment Agency, 499 F.2d 502, 512 (CADC 1974); Environmental Defense Fund v. TVA, 468 F.2d 1164, 1184 (CA6 1972); Lathan v. Volpe, 455 F.2d 111 (CA9 1971). Section 765 mirrors this judicial philosophy.

Moreover, Section 765 mirrors current judicial attitudes toward the balancing of equities in environmental actions, as articulated in United States v. Reserve Mining Co., 514 F. 2d 492. The court in that case held that the balancing of equities in environmental enforcement actions would be relevant in determining the timing of compliance, but not in the ultimate necessity of complying within a reasonable time.

Section 14. Compliance Order.

The compliance order is often the most effective single means of enforcing environmental quality standards. It is effective and expeditious, and does not necessarily require expensive and time-consuming litigation on the part of either the department or the person on whom the compliance order is served. Its very informality makes it a useful tool to the department and an important alternative to formal judicial action. Section 14 expands the order procedure beyond water quality matters.

Section 19. Repealers.

AS 46.03.230(a) is repealed. This was not included in original SB 267. Presently, the state funds local air pollution control authorities under two statutes--AS 43.18-.010(a)(3), state aid to local governments, and AS 46.03.230(a), state and federal aid. The Title 43 provision provides for $2.00 per capita to cities and boroughs for both air and water pollution control facilities. The Title 46 provision currently provides that localities are entitled to a block grant The amount of money appropriated by the legislature for AS 46.03.230(a) purposes has represented only a token contribution (total $25,000) compared with the total budgets of the

three boroughs that presently have air pollution control authority. The costs of administering these two funding programs are also duplicative, as essentially the same information must be regenerated for each application.

Because the legislature is currently undertaking a comprehensive review of the state's revenue-sharing laws, the administration believes that the establishing of adequate levels of air and water pollution control funding should be analyzed in the context of that debate. However, SSSB 267 does take the matter halfway, by removing the unnecessary duplication of programs by repealing current subsection (a) of Section 230, and making subsection (b) the full text of that section. The related AS 46.03.240 is likewise repealed.