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SB20 - Relating to implied consent to preliminary breath test by aircraft and watercraft operators.

Under Title 28, all drunk driving laws which apply to motor vehicles apply to aircraft and watercraft as well. Operators of motor vehicles, aircraft and watercraft are required to submit to breath tests for alcohol. However, only motor vehicle operators are required to submit to preliminary breath tests in the field. SB20 would make watercraft and aircraft operators subject to the administration of a preliminary breath test by a law enforcement officer at the scene of an incident.

STATE OF ALASKA 1985 LEGISLATIVE SESSION  
FISCAL NOTE

Revision Date: \_\_\_\_\_

REQUEST

Bill/Resolution No.: SB 20  
 Title: An Act relating to implied consent to preliminary breath test...  
 Sponsor: Sen. Ray  
 Requestor: Sen. HESS  
 Date of Request: 2-6-85

FISCAL DETAIL

Agency Affected: Public Safety  
 Program Category Affected: Administration of Justice  
 BRU, Program or Subprogram(s) Affected: Alaska State Troopers

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
<b>OPERATING</b>						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>

<b>CAPITAL</b>						
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<b>REVENUE</b>						
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FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

Prepared By: Paul Conger Phone: 465-4338  
 Division: Administrative Services Date: 2-6-85

Approved by: Commissioner Date: 2-6-85  
 Agency: Public Safety

Distribution (by Agency preparing fiscal note):  
 Legislative Finance  
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 Office of Management and Budget  
 Impacted Agency(ies)

7/1/84

DEPARTMENT OF PUBLIC SAFETY

POSITION PAPER \_ SB 20

Support

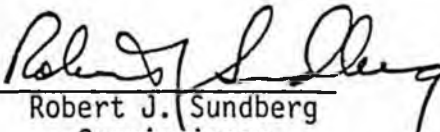
February 1, 1985

SB 20 - "An Act relating to implied consent to preliminary breath test by aircraft and watercraft operators."

The purpose of this legislation is to include aircraft and watercraft operators in the implied consent statute for breath tests.

Passage of this legislation will allow law enforcement officers to administer the preliminary breath test which can provide probable cause to administer an additional test of sufficient validity to stand as court evidence of operating a vehicle, watercraft, or aircraft while intoxicated.

During the past few years numerous instances have taken place where lives have been lost due to watercraft operators and pilots being under the influence of alcohol.

  
Robert J. Sundberg  
Commissioner

STATE OF ALASKA  
THE LEGISLATURE

POUCH Y STATE CAPITOL  
JUNEAU, ALASKA 99811  
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

December 17, 1984

SUBJECT: Operating watercraft while intoxicated  
(Work Order No. 14-0225)

TO: Senator Bill Ray

FROM: George W. Edwards *GWE*  
Legislative Counsel

In response to your request concerning legislation in the area of watercraft operation, I researched existing law and made copies of relevant statutes for your review. Existing law addresses the intoxicated watercraft operator situation in Title 5, Amusements and Sports, at AS 5.25.060 and in Title 28, Motor Vehicles. Under Title 28 all of the drunk-driving laws which apply to motor vehicles apply to aircraft and watercraft as well. Thus it would appear that our existing prohibition against intoxicated watercraft operators is at least as strong as that of other states.

There is however a distinction among vehicle operators made in AS 28.35.031 which may warrant elimination. There operators of motor vehicles, aircraft and watercraft are all required by the implied consent law to submit to a breath test for alcohol. Only motor vehicle operators, however, are required to submit to preliminary breath tests in the field under subsection (b). These preliminary test devices are handheld portable units and I can't think of any practical reason they could not be used on aircraft and watercraft operators under essentially the same circumstances as they are now used on drivers of motor vehicles. These circumstances must include either an accident or a moving violation of law before the preliminary test can be required.

If there is any other help I can give you with regard to this inquiry please let me know.

GWE:ojb  
J10/034

(23) "veterans organization" means a civic, service or charitable organization in the state, or a branch or lodge or chapter of a national or state organization in the state, not for pecuniary profit, the membership of which consists of individuals who were members of the armed services or forces of the United States, and which has been in existence for five years before applying for a license under this chapter. (§ 1 ch 27 SLA 1960; am §§ 4, 5 ch 66 SLA 1976; am §§ 6-8 ch 27 SLA 1982; am § 8 ch 59 SLA 1983)

**Revisor's notes.** — This section was reorganized in 1983 to put the defined words in alphabetical order.

**Effect of amendments.** — The 1982 amendment inserted "outboard motor association" and "or nonprofit trade" in paragraph (15), inserted a comma

following "rights to participate" and the language beginning "the specified kinds of games" and ending "52 or less and in" in paragraph (16), and added paragraph (22).

The 1983 amendment added paragraph (16).

## Chapter 25. Watercraft.

### Article

3. General Provisions (§§ 05.25.060, 05.25.090)

### Article 3. General Provisions.

#### Section

60. Prohibited operation

90. Penalties

**Sec. 05.25.060. Prohibited operation.** (a) A person may not operate a watercraft whether for recreational purposes or any other purpose or manipulate water skis, a surfboard, or a similar device on the waters of the state in a reckless or negligent manner so as to endanger the life or property of another person.

(b) A person may not operate a watercraft whether for recreational purposes or any other purpose in violation of AS 28.35.030 on the waters of the state while under the influence of any intoxicating liquor, narcotic drug, barbiturate or marijuana. (§ 3 ch 63 SLA 1961; am § 1 ch 60 SLA 1976; am § 3 ch 117 SLA 1982)

**Effect of amendments.** — The 1982 amendment substituted "in violation of AS 28.35.030" for "or manipulate water skis, a surfboard, or a similar device" in subsection (b).

**Sec. 05.25.090. Penalties.** A person who violates any provision of this chapter is guilty of a misdemeanor and is punishable by a fine of not more than \$500, or by imprisonment of not more than six months, or by both, for each violation unless that person is convicted of a violation of AS 28.35.030, in which case the sentence shall be in accordance with AS 28.35.030. (§ 10 ch 63 SLA 1961; am § 4 ch 117 SLA 1982)

**Sec. 28.35.030. Operating a vehicle, aircraft or watercraft while intoxicated.** (a) A person commits the crime of driving while intoxicated if the person operates or drives a motor vehicle or operates an aircraft or a watercraft

(1) while under the influence of intoxicating liquor, or any controlled substance listed in AS 11.71.140 — 11.71.190;

(2) when, as determined by a chemical test taken within four hours after the alleged offense was committed, there is 0.10 percent or more by weight of alcohol in the person's blood or 100 milligrams or more of alcohol per 100 milliliters of blood, or when there is 0.10 grams or more of alcohol per 210 liters of the person's breath; or

(3) while the person is under the combined influence of intoxicating liquor and another substance.

(b) Driving while intoxicated is a class A misdemeanor.

(c) Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 72 consecutive hours and a fine of not less than \$250 if the person has not been previously convicted in this or another jurisdiction of driving while intoxicated under this or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under AS 28.35.032 or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 20 consecutive days and a fine of not less than \$500 if, within the preceding 10 years, the person has been previously convicted once in this or another jurisdiction of driving while intoxicated under this or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under AS 28.35.032 or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 30 consecutive days and a fine of not less than \$1,000 if, within the preceding 10 years, the person has been previously convicted in this or another jurisdiction of more than one of the following offenses or has more than once been previously convicted of one of the following offenses: (1) driving while intoxicated under this or another law or ordinance with substantially similar elements; (2) refusal to submit to a chemical test under AS 28.35.032 or another law or ordinance with substantially similar elements. The execution of sentence may not be suspended nor may probation be granted except on condition that the minimum imprisonment provided in this section is served. Imposition of sentence may not be suspended. In addition, if the offense involved driving a motor vehicle for which a driver's license is required, the person's driver's license shall be revoked in accordance with AS 28.15.181 and the vehicle used in commission of the offense may be forfeited under AS 28.35.036. In addition, the court shall order, and a person convicted under this section shall undertake, for a term specified by the court, that program of

alcohol education or rehabilitation that the court, after consideration of any information compiled under (d) of this section, finds appropriate.

(d) Except as prohibited by federal law or regulation, every provider of treatment programs to which persons are ordered under (c) of this section shall supply the Alaska court system with the information regarding the condition and treatment of those persons as the supreme court may require by rule. Information compiled under this subsection is confidential and may only be used by a court in sentencing a person convicted under (c) of this section, or by an officer of the court in preparing a presentence report for the use of the court in sentencing a person convicted under (c) of this section.

(e) A person who is sentenced to imprisonment for 72 consecutive hours upon a first conviction under (c) of this section and who is not released from imprisonment after 72 hours may not bring an action against the state or a municipality or its agents, officers, or employees for damages resulting from the additional period of confinement if

(1) the employee or employees who released the person exercised due care and, in releasing the person, followed the standard release procedures of the prison facility; and

(2) the additional period of confinement did not exceed 12 hours.

(f) For purposes of this section, convictions for both driving while intoxicated and for refusal to submit to a chemical test of breath under AS 28.35.031(a), if arising out of a single transaction and a single arrest, are considered one previous conviction.

(g) In this section,

(1) "operate an aircraft" means to use, navigate, pilot, or taxi an aircraft in the airspace over this state, or upon the land or water inside this state;

(2) "operate a watercraft" means to navigate or use a vessel used or capable of being used as a means of transportation on water for recreational or commercial purposes on all waters, fresh or salt, inland or coastal, inside the territorial limits or under the jurisdiction of the state. (§ 50-5-3 ACLA 1949; am § 1 ch 107 SLA 1955; am § 1 ch 121 SLA 1967; am § 45 ch 32 SLA 1971; am § 4 ch 74 SLA 1974; am §§ 2, 3 ch 152 SLA 1978; am § 28 ch 94 SLA 1980; am § 10 ch 129 SLA 1980; am § 21 ch 45 SLA 1982; am §§ 13 — 15 ch 117 SLA 1982; am §§ 13 — 15 ch 77 SLA 1983)

**Revisor's notes.** — In 1984, former subsection (f) was redesignated as present subsection (g) and former subsection (g) was redesignated as present subsection (f).

**Cross references.** — For sentences for class A misdemeanors, see AS 12.55.035(b)(3) and 12.55.135(a).

**Effect of amendments.** — The first 1980 amendment, in subsection (a) as it existed prior to the second 1980 amendment, deleted "under AS 11.05.150" from

the end of the third sentence and substituted "AS 28.15.181" for "AS 28.15.210(c)" in the fourth sentence.

The second 1980 amendment rewrote the section.

The first 1982 amendment substituted "or any controlled substance listed in AS 11.71.140 — 11.71.190" for "depressant, hallucinogenic, stimulant or narcotic drug as defined in AS 17.10.230(13) and AS 17.12.150(3)" in subsection (a)(1).

purposes of statute or ordinance making it a criminal offense to operate an automobile while in that condition, 142 ALR 555.

What is a "motor vehicle" within statutes making it an offense to drive while intoxicated, 66 ALR2d 1146.

Right to trial by jury in criminal prosecution for driving while intoxicated or similar offense, 16 ALR3d 1373.

Driving under the influence, or when addicted to the use, of drugs as criminal offense, 17 ALR3d 815.

Applicability, to operation of motor vehicle on private property, of legislation making drunken driving a criminal offense, 29 ALR3d 938.

What amounts to violation of drunken driving statute in officer's "presence" or "view" so as to permit warrantless arrest, 74 ALR3d 1138.

What constitutes driving, operating, or being in control of motor vehicle for purposes of driving while intoxicated statute or ordinance, 93 ALR3d 7.

Reckless driving as lesser included offense of driving while intoxicated or similar charge, 10 ALR 1252.

Denial of accused's request for initial contact with attorney — drunk driving cases, 18 ALR4th 705.

**Sec. 28.35.031. Implied consent.** (a) A person who operates or drives a motor vehicle in this state or who operates an aircraft as defined in AS 28.35.030(g)(1) or who operates a watercraft as defined by AS 28.35.030 (g)(2) shall be considered to have given consent to a chemical test or tests of the person's breath for the purpose of determining the alcoholic content of the person's blood or breath if lawfully arrested for an offense arising out of acts alleged to have been committed while the person was operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated. The test or tests shall be administered at the direction of a law enforcement officer who has reasonable grounds to believe that the person was operating or driving a motor vehicle or operating an aircraft or a watercraft in this state while intoxicated.

(b) A person who operates or drives a motor vehicle in this state shall be considered to have given consent to a preliminary breath test for the purpose of determining the alcoholic content of the person's blood or breath. A law enforcement officer may administer a preliminary breath test at the scene of the incident if the officer has reasonable grounds to believe that a person's ability to operate a motor vehicle is impaired by the ingestion of alcoholic beverages and that the person

- (1) was driving a motor vehicle that is involved in an accident; or
- (2) committed a moving traffic violation.

(c) Before administering a preliminary breath test under (b) of this section, the officer shall advise the person that refusal may be used against the person in a civil or criminal action arising out of the incident and that refusal is an infraction. If the person refuses to submit to the test, the test shall not be administered.

(d) The result of the test under (b) of this section may be used by the law enforcement officer to determine whether the driver should be arrested.

(e) Refusal to submit to a preliminary breath test at the request of a law enforcement officer is an infraction.

v. State, Sup. Ct. Op. No. 1254 (File No. 2761), 548 P.2d 376 (1976).

Rule announced generally to have prospective effect but also to have partial retroactive effect. — See *Lauderdale v. State*, Sup. Ct. Op. No. 1254 (File No. 2761), 548 P.2d 376 (1976).

Applied in *Nelson v. State*, Ct. App. Op. No. 129 (File No. 6222), 650 P.2d 426 (1982).

Quoted in *Simpson v. Municipality of*

*Anchorage*, Ct. App. Op. No. 57 (File Nos. 4945, 4946, 5288), 635 P.2d 1197 (1981); *Lundquist v. Department of Pub. Safety*, Sup. Ct. Op. No. 2763 (File No. 7075), 674 P.2d 780 (1983); *Jensen v. State*, Ct. App. Op. No. 271 (File No. 7488), 667 P.2d 188 (1983).

Cited in *Coleman v. State*, Ct. App. Op. No. 229 (File No. 7215), 658 P.2d 1364 (1983).

Collateral references. — 60 C.J.S. Motor Vehicles, § 164.16. Duty of law enforcement officer to off r

suspect chemical sobriety test under implied consent law, 95 ALR3d 710.

**Sec. 28.35.032. Refusal to submit to chemical test.** (a) If a person under arrest refuses the request of a law enforcement officer to submit to a chemical test under AS 28.35.031(a), after being advised by the officer that the refusal will, if that person was arrested while operating or driving a motor vehicle for which a driver's license is required, result in the denial or revocation of the license or nonresident privilege to drive, that the refusal may be used against the person in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated, and that the refusal is a misdemeanor, a chemical test shall not be given, except as provided by AS 28.35.035.

(b) *[Repealed, § 25 ch 77 SLA 1983.]*

(c) *[Repealed, § 25 ch 77 SLA 1983.]*

(d) *[Repealed, § 25 ch 77 SLA 1983.]*

(e) The refusal of a person to submit to a chemical test of breath under (a) of this section is admissible evidence in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating or driving a motor vehicle or operating an aircraft or watercraft while intoxicated.

(f) Refusal to submit to the chemical test of breath authorized by AS 28.35.031(a) is a class A misdemeanor.

(g) Upon conviction of a person under this section, the court shall impose a minimum sentence of imprisonment of not less than 72 consecutive hours and a fine of not less than \$250 if the person has not been previously convicted in this or another jurisdiction of driving while intoxicated under AS 28.35.030 or another law or ordinance with substantially similar elements or refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 20 consecutive days and a fine of not less than \$500 if, within the preceding

**Duty to public.** — This section does not create a duty by the Department of Public Safety toward the public which, if breached, can form the basis of a civil action for negligence against the department. *Lundquist v. Department of Pub. Safety*, Sup. Ct. Op. No. 2763 (File No. 7075), 674 P.2d 780 (1983).

**Limitation for purposes other than DWI prosecutions.** — AS 28.35.032(a) cannot be restricted to apply solely to driving while intoxicated prosecutions, and to the extent that the statute, by providing that "a chemical test shall not be given" following a breathalyzer refusal,

affirmatively limits the manner in which evidence of intoxication may be obtained, its limitation must apply with equal force in all prosecutions "arising out of acts alleged to have been committed while the defendant was operating or driving a motor vehicle while intoxicated." *Pena v. State*, Ct. App. Op. No. 245 (File No. 6174), 664 P.2d 169 (1983).

**Former subsection (b) construed.** — See *Graham v. State*, Sup. Ct. Op. No. 2403 (File No. 4092), 633 P.2d 211 (1981).

Cited in *Wilson v. State*, Ct. App. Op. No. 356 (File Nos. 7523, 7526, 7833), P.2d (1984).

**Collateral references.** — 7A Am. Jur. 2d, *Automobiles and Highway Traffic*, §§ 122 to 132, 141.

60 C.J.S., *Motor Vehicles*, § 164.16; 61A C.J.S., *Motor Vehicles*, § 593(1).

Requiring submission to physical examination or test as violation of constitutional rights, 25 ALR2d 1407.

Admissibility in criminal case of evidence that accused refused to submit to scientific test to determine amount of alcohol in system, 87 ALR2d 370, 26 ALR4th 1112.

Suspension or revocation of driver's license for refusal to take sobriety test, 88 ALR2d 1064.

Request before submitting to chemical sobriety test to communicate with counsel as refusal to take test, 97 ALR3d 852.

Request for prior administration of additional test as constituting refusal to submit to chemical sobriety test under implied consent law, 98 ALR3d 572.

**Sec. 28.35.033. Chemical analysis of blood.** (a) Upon the trial of a civil or criminal action or proceeding arising out of acts alleged to have been committed by a person while operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated, the amount of alcohol in the person's blood or breath at the time alleged shall give rise to the following presumptions:

(1) If there was 0.05 percent or less by weight of alcohol in the person's blood, or 50 milligrams or less of alcohol per 100 milliliters of the person's blood, or 0.05 grams or less of alcohol per 210 liters of the person's breath, it shall be presumed that the person was not under the influence of intoxicating liquor.

(2) If there was in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the person's blood, or in excess of 50 but less than 100 milligrams of alcohol per 100 milliliters of the person's blood, or in excess of 0.05 grams but less than 0.10 grams of alcohol per 210 liters of the person's breath, that fact does not give rise to any presumption that the person was or was not under the influence of intoxicating liquor, but that fact may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor.