

HB

409

HOUSE COMMITTEE REPORT file

(11)

Date Referred: February 26, 1990

FURTHER REFERRALS:

Date of Committee Action: 4/10/90

The FINANCE Committee considered:

HB 409

HOUSE BILL NO. 409

DEC ADMINISTRATIVE PENALTIES

"An Act relating to the reform of certain environmental conservation laws and the penalties for their violation."

RECOMMENDATIONS:

- [] be replaced with CS HB 409 (FIN) [] the same title
- [] a new title
- [] have attached amendment(s)
- [] do pass
- [] do not pass
- [] no recommendation
- [] individual recommendations
- [] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(S):
(Dept)

APPROVES PREVIOUS:

(Date/Dept)

- [] fiscal impact _____
- [] zero fiscal note _____
- [] zero with analysis _____

- 1 [] fiscal note(s) ENVIRONMENTAL CONSV. 2/21/90
- 2 [] zero fiscal note(s) Do Law & AK. Court 2/21/90 2/26/90
- [] zero fn/analysis _____

SIGNING DO PASS:

SIGNING:

(Check approp. column)

Do Not
Pass No Rec Amend

[Signature] Swackhamm
[Signature] BROWN
[Signature] Koponen
[Signature] Umerz

Name	Do Not Pass	No Rec	Amend
<u>[Signature]</u> Hoffman	X		
<u>[Signature]</u> Larson	X		
<u>[Signature]</u> Phillips	✓		
<u>[Signature]</u> RIEGER	✓		
<u>[Signature]</u> WALLIS	✓		
<u>[Signature]</u> Barnes	X		
<u>[Signature]</u> Shultz	✓		

[Signature] Hoffman
 CD - Chairman's Signature
[Signature] Larson

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: An Act relating to Environmental
Law Reform
Sponsor: Representative Mike Davis
Requestor: House Judiciary

Agency Affected: Environmental Conservation
BRU: Environmental Quality
Administrative Services
Components: Administrative Services

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	112.0	112.0	112.0	112.0	112.0	112.0
TRAVEL	5.0	5.0	5.0	5.0	5.0	5.0
CONTRACTUAL	20.0	20.0	20.0	20.0	20.0	20.0
SUPPLIES	2.0	2.0	2.0	2.0	2.0	2.0
EQUIPMENT	10.0	10.0	10.0	10.0	10.0	10.0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	149.0	149.0	149.0	149.0	149.0	149.0

CAPITAL	0	0	0	0	0	0
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REVENUE	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

GENERAL FUND	149.0	149.0	149.0	149.0	149.0	149.0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	149.0	149.0	149.0	149.0	149.0	149.0

POSITIONS:

FULL-TIME	2	2	2	2	2	2
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS : (Attach a separate page if necessary)

The fiscal impact for FY 90 would be zero. Analysis is attached.

Prepared by: Gail Gatton
Division: Administrative Services

Phone: 465-2600
Date: 2/23/90

Approved by Commissioner: 
Agency: Environmental Conservation

Date: 2/26/90

Distribution (by preparer):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Adopted

House Bill 409
2/21/90 Version

Section 4 of this bill gives the Department new authority to assess administrative penalties for violations of laws and regulations designed to protect the environment. Due process, under this bill, allows for a hearing to be held prior to the assessment of penalties. Since DEC does not currently have this authority, we do not have any positions capable of performing these functions. Therefore, the Department would need one hearing officer and a paralegal to conduct the hearings required before assessment of administrative penalties.

Contractual(\$12.0) includes court reporter, transcripts, and professional contracts.

<u>Position</u>	<u>100</u>	<u>200</u>	<u>300</u>	<u>400</u>	<u>500</u>	<u>Total</u>
Attorney III	68.0	5.0	8.0	1.0	5.0	\$87.0
Paralegal Assistant II	44.0			1.0	5.0	\$50.0
(Contractual)			12.0			\$12.0
TOTALS	112.0	5.0	20.0	2.0	10.0	\$149.0

Position Title Attorney III			No. of Positions 1	Range/Step 12A	Barg. Unit N/A
Time Status PFT	Staff Months 12		Location Juneau		Election District 04
Type of Expenditure			Amount		
1			2		
3					
Salary			52.3		
Benefits			15.7		
Premium Pay			0		
Other			0		
Total Personal Services			68.0 \$		
Travel			5.0		
Contractual			8.0		
Commodities			1.0		
Equipment			5.0		
Other			-		
Total Cost			87.0 \$		
Funding Source for Total Cost					
Federal Receipts 1002			0		
G. F. Match 1003			0		
General Fund 1004			87.0		
GF Program Receipts 1005			0		
Other			0		
Justification					
<p>This position will be necessary to perform the functions required in this legislation. The administrative penalty process allows for a hearing to be held prior to the assessment of penalties, if review is sought, within 30 days. This position will review these proposed penalties, do legal research, conduct hearings, evaluate the case, and make an assessment as to the appropriateness of penalties. We do not currently have anyone on staff qualified to perform this function.</p>					

**Request For
New Position**

Agency Environmental Conservation
 BRU Administrative Services
 Component Administrative Services

Page 3 of 4
 Revised Date

FY 91

Position Title Paralegal Assistant II		No. of Positions 1	Range/Step 16A	Barg. Unit GGU
Time Status PFT	Staff Months 12	Location Juneau		Election District 04
Type of Expenditure		Amount		
1		2		3
Salary		32.0		
Benefits		12.0		
Premium Pay		0		
Other		0		
Total Personal Services		44.0		Justification This position will assist the hearing officer to determine administrative penalties. Will perform research, help review cases, organize hearings and otherwise ensure that the hearing process is carried out in an appropriate and timely manner.
Travel		0		
Contractual		0		
Commodities		1.0		
Equipment		5.0		
Other		0		
Total Cost		50.0		
Funding Source for Total Cost				
Federal Receipts	1002	0		
G. F. Match	1003	0		
General Fund	1004	50.0		
GF Program Receipts	1005	0		
Other		0		

Request For
New Position

Agency Environmental Conservation
 BRU Administrative Services
 Component Administrative Services

Page 4 of 4
 Revised Date

FY 91

FISCAL NOTE

REQUEST:

Revision Date: February 26, 1990
Title: "An Act relating to the reform of
certain environmental conservation laws..."
Sponsor: House Judiciary
Requestor: House Judiciary

Agency Affected: Department of Law
BRU: Legal Services
Components: Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see the attached analysis.

Prepared by: Richard I. Pegues
Richard I. Pegues, Director
Division: Administrative Services
Phone: 465-3672
Date: February 26, 1990
Approved by Commissioner: Richard I. Pegues / D.B. Baily
Douglas B. Baily, Attorney General
Date: February 26, 1990
Agency: Department of Law

Distribution (by preparer):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Adopted

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSHB 409 (JUD)

The committee substitute for HB 409 changes the state's environmental conservation laws in four important respects.

First, section 1 amends AS 46.03.020(6) to provide that the Department of Environmental Conservation may copy records during a voluntary inspection to investigate either actual or suspected pollution or contamination or to ascertain compliance or noncompliance with AS 46.03, AS 46.04, or AS 46.09. Section 2 adds a new paragraph to AS 46.03.020 that grants to the Department of Environmental Conservation the right to enter and inspect the property or premises of a pervasively regulated facility and copy records to investigate either actual or suspected sources of pollution or contamination or to ascertain compliance or noncompliance with AS 46.03, AS 46.04, or AS 46.09. The bill defines pervasively regulated facility as a facility where activities or operations are or were conducted that affect a significant public interest and that the Department of Environmental Conservation comprehensively regulates.

Second, section 4 amends AS 46.03 by adding a new section that establishes a system of administrative penalties for pollution. Under the section, an administrative penalty not to exceed \$25,000 a day for each violation may be assessed against a person who violates or causes or permits to be violated a provision of AS 46.03, AS 46.04, or AS 46.09.

Third, section 5 repeals and reenacts AS 46.03.850 to give the Department of Environmental Conservation the power to issue binding compliance orders, coupled with a formal administrative review/appeal process. Under existing law, the department notifies a person of its determination that a violation exists, or is about to exist, and the person is given time to file a report stating measures have been and are being taken, or are proposed to be taken, to correct or control the conditions outlined in the determination notice. At this time, a compliance order can be issued only after all of these steps have been taken.

Fourth, section 6 would amend AS 46.03 by adding a new section that provides that the commissioner of environmental conservation may require a person to conduct an environmental audit and to prepare and submit an environmental audit report, as part of a judicial or administrative enforcement action.

It is impossible to predict what additional costs, if any, the Department of Law may experience if this bill is adopted. On the one hand, the bill's provisions greatly streamline existing enforcement procedures, thereby reducing attorney resources currently used for litigation and lengthy settlement negotiations. On the other hand, these improved procedures may result in increased enforcement and require additional resources. Nevertheless, to the extent that increased enforcement may outweigh the efficiencies provided by the bill, any resulting cost will be borne by the oil and hazardous substance fund, provided under AS 46.08 and AS 46.09, as well as federal fund sources such as the federal LUST Trust and the federal Superfund.

STATE OF ALASKA
1990 LEGISLATIVE SESSION

No. 3
Bill Version: CSHB 409(JUD)
Publish Date: HOUSE 2/26/90

FISCAL NOTE

REQUEST:

Revision Date <u>2/26/90</u>	Agency Affected: <u>Alaska Court System</u>	
Title: <u>An Act relating to the reform of certain environmental conservation laws...</u>	BRU: <u>Trial Courts</u>	
Sponsor: <u>Davis, Brown, Koponen, Navarre...</u>	Components: _____	
Requestor: _____		

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Jan Stranberg, General Counsel
 Division: Alaska Court System

Approved by: Arthur H. Snowden, II, Administrative Director
 Agency: Alaska Court System

Phone: 284-8228
 Date: 02/26/90

Date: 02/26/90

Distribution (by preparer):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management & Budget
 Impacted Agency(ies)

Adopted

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

IN THE HOUSE

BY THE FINANCE COMMITTEE

CS FOR HOUSE BILL NO. 409 (Finance)

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; amending Rule 82, Alaska Rules of Civil Procedure."

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

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

(6) at reasonable times [ENTER] and [INSPECT] with the consent of the owner or occupier, enter and inspect any property or premises and copy relevant records 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 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 [A REGULATION WHICH MAY BE ADOPTED UNDER AS 46.03.020 - 46.03.040;] information and records relating to secret processes, [OR] methods of manufacture, financial and commercial information and records, and other information and records as agreed by the department and the owner or occupier of the property discovered during the investigation [IS CONFIDENTIAL];

* 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 pervasively regulated facility if that facility 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 with both significant air and wastewater emissions regulated under this chapter, and copy relevant records to investigate either actual or suspected sources of pollution or contamination or to ascertain compliance or noncompliance with this chapter, AS 46.04, 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 other information and records as agreed by the department and the owner or occupier of the property that is discovered during the investigation; in this paragraph, "pervasively regulated facility" means a facility where activities or operations are or were conducted that affect a significant public interest and that the department comprehensively regulates.

* Sec. 3. 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, AS 44.62 does not apply to administrative proceedings conducted or 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. In determining the amount of a penalty assessed under this section, the department shall consider the effect of the violation on the public health or the environment, a prior history of violations, deterrence of future violations, and other factors that the department considers relevant.

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

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

(f) 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.

(g) 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.

(h) 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;
- (2) interest from the date the department issued the assessment notice under (d) of this section;
- (3) full reasonable attorney fees and costs incurred by the state in the collection action; and
- (4) a nonpayment penalty of five percent for each 30-day period or fraction of a period in which the assessment remains unpaid but not to exceed 25 percent of the administrative penalty.

* Sec. 4. 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

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.

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4/9/90
Rep. Kay Brown

OUTLINE OF CHANGES
CS HB 409 (Jud) to CS HB 409 (Fin - proposed)

(relative to the Judiciary version)

Section 1 - Consensual Inspections

Changes to clarify provisions concerning the terms and conditions of inspections by consent.

Add "relevant" to describe the records to be copied.

Reword sentence, place "enter and inspect" after "occupier" (clarifies that consent is required).

Add "financial and commercial information and records" after "methods of manufacture".

Section 2 - Nonconsensual Inspections

Delete existing section 2 (pervasively regulated facilities).

Replace with language that allows access to the extent authorized under the Alaska and U.S. Constitutions. Also further defines which specific facilities would be subject to inspections under this subsection.

Section 3 - Variances and Renewals

Delete. This conforming amendment is not necessary.

Section 4 - Administrative Penalties

Reduce penalty to a maximum of \$15,000/day.

Replace language concerning the penalty for non-payment to make consistent with the treatment by the Department of Revenue for non-payment of taxes.

Section 5 - Compliance Orders

Amends provision concerning compliance orders (COs) to state that a CO may be issued "after investigation" (rather than "in the opinion" of the department) and adds language requiring that the CO contain:

- 1) the nature of violation be identified;
- 2) the nature of the required response; and
- 3) a deadline for compliance be identified by the CO.

Language added by new section (see below) requires department to adopt regulations under the APA to implement this chapter.

New Section

Require the department to adopt regulations under the Administrative Procedures Act to implement chapter.

4/10/90
Rep. Kay Brown

SECTIONAL ANALYSIS
Proposed House Finance Committee Substitute
CS HB 409 () - Work Draft 4/10/90

Section 1 - Consensual Inspections

Amends existing law to clarify certain provisions pertaining to consensual inspections. Proposed Finance CS adds language to clarify that consent is required to copy "relevant" records. Provision is made to keep "trade secret" records confidential.

Section 2 - Nonconsensual Inspections

Adds provision to provide authority for nonconsensual inspections in the case of "pervasively regulated facilities" to the extent "permitted by the United States and Alaska Constitutions" but only in the case of certain specific types of facilities listed in the proposed Finance CS. These facilities must be "pervasively regulated" by the department *and* be a type of facility specifically listed in the legislation. Provision is made to keep "trade secret" records confidential.

Section 3 - Administrative Penalties

Authorizes administrative penalties not to exceed \$15,000 per day for each incident. Criteria are provided in the legislation to guide the assessment of penalties (e.g., effect of the violation on public health; prior history of violations; deterrence of future violations). Administrative hearings are provided for as is the option of judicial review of administrative penalties, should the violator choose to contest the penalty. Administrative penalties would be "set off" against civil penalties subsequently awarded by a court for the same violation.

Due process provisions are specifically established in the legislation:

1. Notice of assessment served personally or by certified mail.
2. Person has 30 days to request adjudicatory hearing.
3. Person gets adjudicatory hearing.
4. Person gets 30 days to file for judicial review.
5. Person gets judicial review in State Superior Court.
6. Person gets appeal as of right to State Supreme Court.

Attorney General authorized to bring action against a person who fails to pay an administrative penalty after the penalty has become final. Proposed CS

replaces language concerning the penalty for non-payment to make consistent with the treatment of non-payment of taxes.

Section 4 - Compliance Orders

Repeals and reenacts present law to provide that when "the department finds after an investigation" violations exist or are about to occur, a compliance order can be issued that would be effective upon receipt.

The compliance order shall describe:

- 1) the nature of violation be identified;
- 2) the nature of the required response; and
- 3) a deadline for compliance be identified by the CO.

A person's right to contest liability or seek contribution from other parties is not curtailed by this section. Due process provisions are specifically established in the legislation:

1. Compliance order served personally or by certified mail.
2. Person has 30 days to request adjudicatory hearing.
3. Person gets adjudicatory hearing.
4. Person gets 30 days to file for judicial review.
5. Person gets judicial review in State Superior Court.
6. Person gets appeal as of right to State Supreme Court.

Section 5 - Environmental Audits

As part of a judicial or administrative enforcement action, would be authorized to require a person to conduct an "environmental audit" to be prepared by an independent contractor, selected by the person, but subject to the approval of the department. An environmental audit is a systematic analysis of a facility's operations to insure compliance with state environmental laws.

Language added in proposed Finance CS to clarify that "an individual may refuse to provide a specific item of information on the basis of the privilege against self-incrimination."

Language added in proposed Finance CS to limit the number of audits the department may require at a single site.

Section 6 - Adoption of Regulations Required

The commissioner shall adopt regulations under the Administrative Procedures Act to implement the provisions established by this legislation.

Sections 7 & 8

Amends Civil Procedures Rule 82 to allow full recovery of reasonable attorney's fees and costs if a person fails to pay an administrative fine. This provision requires a two-thirds vote of the legislature.

Sections 9 & 10

Amends Civil Procedures Rule 82 to allow full recovery of reasonable attorney's fees and costs resulting from enforcement of a Compliance Order. This provision requires a two-thirds vote of the legislature.

MICHAEL S. O'MEARA
P.O. BOX 1125
HOMER, AK 99603

FEBRUARY 11, 1990

REPRESENTATIVE PETER GOLL
ALASKA STATE LEGISLATURE
P.O. BOX V (MS 3100)
JUNEAU, AK 99811

DEAR REPRESENTATIVE GOLL:

As I understand it, HB 409, relating to reform of environmental conservation laws and enforcement, is now in the House Judiciary Committee. Since you are co-chairman of the committee, I want to express my support for the bill.

Given the constraints imposed upon the Department of Environmental Conservation, it is easy to understand why it has been impossible to enforce regulations to date. It is time to give our regulators the tools they need to clamp down on the petroleum industry. As a citizen, I feel that I have a right to reasonable protection from both chronic and catastrophic pollution, and I am counting on you folks in the legislature to help see that I get it.

Unfortunately, I have not had the time to study the bill to the degree necessary for detailed discussion of each section. Let me instead just explain what I think the bill should accomplish.

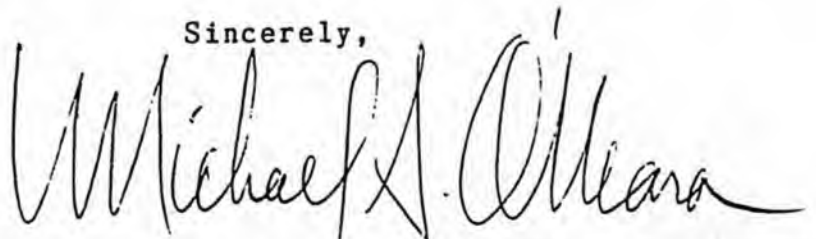
The DEC or other regulatory agencies should have whatever access they need to check on the activities of the petroleum industry whenever there is a need to do so. Since to my mind every part of the industry qualifies as a "pervasively regulated facility", there should be no qualifying language -- period.

Agency personnel should be able to carry out unannounced inspections of all facilities. They should have access and be able to copy all documents or records. There should be authority to apply administrative penalties, issue compliance orders, or close down operation of a facility on the spot. Environmental audits should be conducted by DEC for all facilities on a periodic basis.

Certainly, the industry should have the right to appeal any findings or actions by a regulatory agency, but should not be able to delay or deter the application and enforcement of regulations.

It is vital that we do a better job of regulating the petroleum industry and protecting environmental quality and public health. You have my support and encouragement for passage of this bill.

Sincerely,

A handwritten signature in cursive script that reads "Michael S. O'Meara". The signature is written in dark ink and is positioned below the typed name and the word "Sincerely,".

LEAGUE OF WOMEN VOTERS OF ALASKA

WHEREAS, the League of Women Voters of Alaska and the League of Women Voters of the United States have a long-standing commitment to promote an environment beneficial to life through the protection and wise management of natural resources in the public interest by recognizing the interrelationship of air quality, energy, land use, waste management, and water resources, and

WHEREAS, April 22, 1990, is the 20th anniversary of Earth Day;

THEREFORE BE IT RESOLVED, that LWVAK will promote education and action on three areas of environmental concern: strengthening the Alaska Department of Environmental Conservation (ADEC); reducing consumption of energy, including transportation uses; and recycling of solid materials.

BE IT FURTHER RESOLVED, LWVAK urges local and state lawmakers to take actions to:

- (1) Improve Department of Environmental Conservation functioning through increased funding to meet existing statutory environmental and health responsibilities, enhance enforcement mechanisms, and strengthen sanctions to prevent pollution (increase DEC budget, support HB 409/SB 497, support HB 315).
- (2) Establish a task force to examine the issue of global warming and recommend remediation actions for the State of Alaska (support HCR 56).
- (3) Develop a state transportation fund that can finance public transportation and non-motorized trails across the state .
- (4) Improve long-range municipal solid waste management plans through incorporation of waste reduction and recycling, institutionalize procurement of recycled materials in state and local governments, provide incentives to schools to pursue waste reduction and recycling projects, and provide incentives to consumers to reuse and recycle beverage containers (support HB 478-481, support SB 443).

LWVAK, THEREFORE, meeting in Convention in Sitka on April 8, 1990, adopted this resolution to publicly state LWVAK's support for these actions and to urge the Alaska State Legislature to pass the above-referenced bills.

TESTIMONY OF MICHELE BROWN
BEFORE THE
HOUSE SUBCOMMITTEE ON WATER, POWER,
AND OFFSHORE ENERGY RESOURCES
March 29, 1990

Mr. Chairman and Members of the Committee:

My name is Michele Brown. I am the Regional Administrator for the Division of Environmental Quality for the Alaska Department of Environmental Conservation. Some of the most challenging environmental issues associated with the Trans-Alaska Pipeline are posed by the operation of Alyeska's Valdez Marine Terminal, which is located within my region.

I appreciate the opportunity to appear before this committee today and thank you for your continuing interest in the proper operation of TAPS to balance the nation's energy needs with the preservation of Alaska's environment and cultural lifestyles.

You have asked what environmental problems associated with the operation of the pipeline system are of concern to the State and whether the State's oversight and regulation of TAPS has been adequate. I will address each of these in turn. While the State is, of course, concerned about oil spills and environmental safety over the entire length of the pipeline, I will focus today on air and wastewater pollution issues from the Valdez Terminal.

The issues are significant for today's hearing both for their impact on the quality of the environment and as illustrative of the type of oversight that the State has undertaken of TAPS.

WATER QUALITY

Tankers arrive at the TAPS Valdez Marine Terminal carrying ballast water in their cargo holds to keep the tankers stable during the voyage north. More ballast water is used in the winter because seas are worse. Unsegregated ballast water mixes with residual oil in the holds of the tankers, and therefore becomes contaminated. The ballast water is off-loaded and treated in Alyeska's ballast water treatment system ("BWT").

The BWT is intended to reduce the contamination from the ballast water, particularly of BETX (benzene, ethylbenzene, toluene, and xylene), which are among the most actively toxic components of crude oil. Then the ballast water is discharged into Valdez Bay. The BWT is regulated under a National Pollution Discharge Elimination System ("NPDES") permit. The NPDES permit sets effluent limits and other conditions for operating the BWT. The State's role in NPDES permitting is to impose any conditions necessary to certify "reasonable assurance" that Alaska's water quality standards are met.

Alyeska said it would provide a state-of-the-art BWT when it first installed the system. Alyeska also contracted with the State in the Right-of-Way Lease for TAPS to prevent or abate any environmental damage, including any damage to water quality. But, Alyeska failed to install or use several of the key components to that state-of-the-art system over the years. Instead, Alyeska modified the system in 1986 to add a biological ("bug") treatment component.

These bugs are supposed to eat most of the last remaining vestiges of the toxics and other polyaromatic hydrocarbon compounds in the effluent water before discharge. Alyeska chose to add the bugs as the least expensive method of improving the BWT performance during permit review, not because bugs were necessarily the most effective technology.

After EPA issued a proposed new NPDES permit, Alaska certified the permit only with more stringent limits on the amount of BETX in the effluent. Alaska also imposed some additional conditions to assure compliance with State law. Alyeska aggressively challenged each term of the State's Certificate, as well as EPA's NPDES permit, in a series of administrative proceedings in both the state and federal arenas. Alyeska unsuccessfully sued the State of Alaska to challenge the permit terms, including the reduced BETX limits. Nonetheless, still pending is a petition Alyeska filed to reduce the State's water quality standards to allow for a higher discharge rate of BETX.

After six years, this permit is now finally in place. We are approaching resolution of remaining challenges to it. Alyeska is installing additional treatment to improve its BETX removal rate. Although regulated, the facility is still discharging approximately 18 million gallons of wastewater, containing 152 pounds of BETX, on a daily basis. That is a discharge of 27.7 tons of BETX a year. Accordingly, permit inspection and monitoring is an ongoing intensive task.

AIR QUALITY

The TAPS Lease covenants with Alaska impose a continuing obligation on Alyeska to construct and operate TAPS using state-of-the-art technology to prevent or abate activities that could harm air quality. Alyeska agreed to conduct all activities associated with TAPS in a manner that will avoid or minimize air pollution.

Nonetheless, there are two major sources of air pollution at the terminal and in the past there have been frequent occurrences of a smoky blue haze around the terminal. The first is hydrocarbon emissions from the crude oil storage tanks and other equipment. The second is hydrocarbon and combustion emissions from the tankers docked at the terminal.

When Alyeska first applied for air permits for the terminal in 1976, it promised installation of a vapor recovery system which eliminates all major hydrocarbon emissions from the crude oil storage tanks and incinerates excess displaced vapors. Alyeska planned construction of four incinerators with three to be operational at any time and a fourth to be reserved in a standby capacity.

The vapor recovery system was neither constructed nor operated as planned. The fourth incinerator was never built. The three incinerators constructed have not been on-line on a regular basis due to repeated maintenance problems. During shut-downs, excess hydrocarbons are vented directly to the atmosphere from the crude oil storage tanks. Approximately 400 tons of hydrocarbons are emitted yearly. Because of lengthy delays in these repair shut-downs, the State entered an order placing Alyeska on a binding schedule for repairs of the incinerators.

Additionally, Alyeska has made numerous modifications to the equipment at the terminal and pump stations which have caused an increase in emissions. The cumulative effect of these emissions on air quality is unknown because no actual measurements of air emissions have been made. Over a year ago, Alyeska announced that it would install a risk assessment type of air monitoring program. Alaska supported the proposal generally but did not concur that the sites chosen would produce valid regulatory data. Alyeska has yet to install monitoring devices. Alaska plans to order monitoring and measurement in the next air permit.

Tanker traffic to the Valdez Marine Terminal creates additional air pollution by venting hydrocarbons during loading, at an approximate average rate of 70 tons per load, and through fuel burning. At an average of 2.6 vessels loading per day, approximately 66,000 tons of hydrocarbons are emitted yearly which is equal to 5% to 10% of total hydrocarbon emissions in the Los Angeles basin. Moreover, tankers are run at a very high proportion of their boiler capacity during ballast off-loading, adding combustion products to the air pollution. Since the early 1980's, tanker traffic has increased, the sulphur content of tanker fuel has increased, and almost twice as much ballast water was off-loaded than was originally projected in 1976, all adding substantially to air pollution. Alyeska has in the past denied any responsibility for evaluating, controlling, or alleviating air pollution caused by the tanker traffic. Recently, Alyeska, in conjunction with several of its owner companies, launched a study of the tanker emissions problems.

For two years the State has attempted pre-enforcement review of the modification to the equipment at the terminal, dealt with the failure of the vapor recovery system, and tried to get an analysis of the tanker emission problems. The State currently is evaluating renewal of air quality permits for the Valdez marine

Terminal and the 12 pump stations along TAPS.

Alyeska promised in the lease covenants to stay abreast of technology developments and to continually upgrade equipment. In our view, however, the difference between what was promised and what was delivered is substantial. The technology gap has meant the absence of such basic measurement data that it has taken the State's full attention to evaluate whether Alyeska complies with minimum state and federal standards.

STATE OVERSIGHT

Alaska's oversight and regulation of TAPS has been steadily growing over the years. The State's relationships with its counterparts in the federal system have matured into solid working relationships where cooperation and respect for both federal and State standards can be accommodated.

However, the State's regulatory relationship with Alyeska has developed less smoothly. Until recently, Alyeska took an adversarial approach to State oversight. This diverted State resources from data acquisition and inspection programs into labor intensive battles just to defend basic State permits. Therefore, too frequently Alaska has had to rely on Alyeska's assurances and data to evaluate the operation of TAPS. Reliance upon Alyeska's data has created two problems for the State.

The first is that estimates and modeling of potential contaminant discharges have been used rather than actual measurements and the estimates have proved inaccurate. For example, in 1989, Alaska was informed by Alyeska that tank vessel owners had taken actual measurements of air emissions from the crude oil storage tanks aboard vessels and determined that they were five times as high as were originally estimated, which emission factors had formed the basis of the original air permit application. Only now, twelve years from the start of operation of TAPS, have actual measurements of emissions begun.

The second problem is that Alyeska frames its data in terms of showing that no demonstrable harm has occurred to the environment. For instance, Alyeska has done extensive analyses to justify its position that aquatic resources in Valdez Bay have not been harmed by the discharge of treated ballast water. Yet, that is not the standard by which the State must judge the proper operation of the facility. The standard of the Clean Water Act is to prevent the degradation of existing water quality. The State's test data indicate that there has been a change in the water quality of Valdez Bay, even if it does not yet amount to observable, adverse impacts on uses.



Coastal Resource Service Area

P.O. Box 3110, Dillingham, Alaska 99576

(907) 842-2666 - 842-2667

April 2, 1990

Representative Hoffman
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, Alaska 99811

Dear Representative Hoffman:

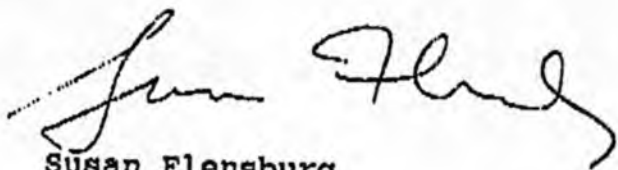
The Bristol Bay Coastal Resource Service Area (BBCRSA) Board is writing in support of HB 409 - an act relating to the reform of certain environmental conservation laws and the administrative penalties for their violation.

We had intended to testify at today's hearing on HB 409 before the House Finance Committee but were just notified that testimony will be limited to the fiscal note attached to the bill. Because we have not yet reviewed the fiscal note for HB-409, it is difficult for us to provide specific comments at this point. HOWEVER, we believe that a commensurate level of funding to the Department of Environmental Conservation is essential if the agency is to effectively exercise it's statutory role in overseeing the oil industry and its safety practices.

HB 409 would provide the DEC with stronger regulatory and enforcement authority with which to address pollution problems, and would implement one of several recommendations called for in the Alaska Oil Spill Commission report. This report notes that "inevitably, a major spill will occur". Perhaps just as inevitably, oil development in Bristol Bay may also occur in the next decade or two. Understandably, the people of this region have a strong interest in the current legislative process to reduce the unnecessary risks associated with oil and gas development. We believe that one of the ways to help reduce those risks is to provide DEC with a broad range of enforcement tools in order to effectively regulate and prevent pollution problems.

The Bristol Bay CRSA supports the provisions of HB 409 and urges the House Finance Committee to pass this important legislation.

Sincerely,

A handwritten signature in cursive script, appearing to read "Susan Flensburg".

Susan Flensburg
Director
Bristol Bay CRSA

cc: House Finance Committee members
Representative Jacko
Governor Cowper

ACCESS

ENVIRONMENTAL QUALITY LAWS

HAWAII

(A) To enter upon permittee's or variance holder's premises or premises of a person subject to pretreatment requirements in which an effluent source is located or in which any records are required to be kept under the terms and conditions of the permit or variance or pretreatment requirements;

(B) To inspect any monitoring equipment or method required in the permit or variance or by pretreatment requirements; and

(C) To sample any discharge of pollutants or effluent;

AIR LAWS

WASHINGTON

70.94.200 *Investigation of conditions by control officer or secretary of social and health services or director of health — Entering private, public property.* For the purpose of investigating conditions specific to the control, recovery or release of air contaminants into the atmosphere, a control officer, the department, or their duly authorized representatives, shall have the power to enter at reasonable times upon any private or public property, excepting nonmultiple unit private dwellings housing two families or less. No person shall refuse entry or access to any control officer, the department, or their duly authorized representatives, who requests entry for the purpose of inspection, and who presents appropriate credentials; nor shall any person obstruct, hamper or interfere with any such inspection.

NEW JERSEY

26:2C-9.1

No person shall obstruct, hinder or delay, or interfere with by force or otherwise, the performance by the department or its personnel of any duty under the provisions of this act, or of the act of which this act is amendatory and supplementary, or refuse to permit such personnel to perform their duties by refusing them upon proper identification or presentation of a written order of the department, entrance to any premises at reasonable hours.

VIRGINIA

§10-17.22. Right of entry. — Whenever it is necessary for the purposes of this chapter, the Board or any member, agent or employee when duly authorized by the Board may at reasonable times enter any establishment or upon any property, public or private, for the purpose of obtaining information or conducting surveys or investigations.

SOUTH DAKOTA

34A-1-41. Any duly authorized officer, employee, or representative of the department may enter and inspect that part of any property, premise or place in which he has reasonable grounds to believe is the source of air pollution at any reasonable time for the purpose of investigating the air pollution or of ascertaining the state of compliance with this chapter and rules and regulations in force pursuant thereto. No person shall refuse entry or access to any authorized representative of the department who requests entry for the purpose of such investigation, and who presents appropriate credentials; nor shall any person obstruct, hamper or interfere with any such investigation.

VERMONT

§557. Inspections

Any duly authorized officer, employee, or representative of the secretary may enter and inspect any property, premise or place on or at which an air contaminant source is located or is being constructed or installed at any reasonable time for the purpose of ascertaining the state of compliance with this chapter and rules in force pursuant thereto. No authorized person shall refuse entry or access to any authorized representative of the secretary who requests entry for purposes of inspection, and who presents appropriate credentials; nor shall any person obstruct, hamper or interfere with the inspection. If requested, the owner or operator of the premises shall receive a report setting forth all facts found which relate to compliance status.

Pennsylvania

§4013.1. Search Warrants. — Whenever an agent or employe of the department, charged with the enforcement of the provisions of this act, has been refused the right to examine any air contamination source, or air pollution control equipment or device, or is refused access to or examination of books, papers and records pertinent to any matter under investigation, such agent or employe may apply for a search warrant to any Commonwealth to issue the same to enable him to have access and examine such property, air contamination source, air pollution control equipment or device, or books, papers and records, as the case may be. It shall be sufficient probable cause to issue a search warrant that the inspection is necessary to properly enforce the provisions of this act.

Rhode Island

23-23-12. Whenever the director has reason to believe that emission is occurring in excess of that permitted under any rule, regulation or order made hereunder, the director may without hearing conduct tests to determine the emission of air contaminants from premises, buildings or other places belonging to or controlled by any person, or to require such person to provide such information as he may request regarding such emission. The person owning or controlling the premises, building or other place to be tested shall provide the director or his representatives or consultants access during working hours. The director, his representatives or consultants shall be empowered to erect scaffolding provide necessary holes and stack or duct work or such other sampling and test facilities. The director may specify the testing method to be used by qualified personnel in accordance with good professional practice and should such test show that a violation of a rule or regulation made hereunder or any order of the director was occurring the person shall pay in addition to any other regulatory, civil, and/or criminal penalties the entire cost of such test or tests and an additional administrative fine of up to one hundred percent (100%) of said cost of such test or tests. Said costs and fines shall be deposited in the account established in §23-23-12.1.

North Dakota

23-25-05.

1. Any duly authorized officer, employe, or agent of the department may enter and inspect any property, premise, or place on or at which an air contaminant source is located or is being constructed, installed, or established at any reasonable time for the purpose of ascertaining the state of compliance with this chapter and rules and regulations enforced pursuant thereto. If requested, the owner or operator of the premises shall receive a report setting forth all facts found which relate to compliance status.

2. The department may conduct tests and take samples of air contaminants, fuel, process material, and other materials which affect or may affect emission of air contaminants from any source, and shall have the power to have access to and copy any records required by department rules or regulations to be maintained, and to inspect monitoring equipment located on the premises. Upon request of the department the person responsible for the source to be tested shall provide necessary holes in stacks or ducts and such other safe and proper sampling and testing facilities exclusive of instruments and sensing devices as may be necessary for proper determination of the emission of air contaminants. If an authorized representative of the department, during the course of an inspection, obtains a sample of air contaminant, fuel, process material, or other material, he shall issue a receipt for the sample obtained to the owner or operator of, or person responsible for, the source tested.

Nebraska

(c) For refusing the right of entry and inspection to any authorized departmental representative, for violation of any effluent standards and limitations, filing requirements, monitoring requirements, or water quality standards, for failure to obtain a permit, or for violation of a permit or any permit condition or limitation or any rules, regulations, or orders of the director under the National Pollutant Discharge Elimination System, created by the Clean Water Act, as amended, 33 U.S.C. 1251 et seq., be subject to a civil penalty of not more than five thousand dollars per day, the amount of such penalty to be based on the size of the operation and the degree and extent of the pollution;

Section 81-1508. (1) Any person who violates any of the provisions of the Environmental Protection Act, or who fails to perform any duty imposed by such act shall:

WATER LAWS

ALABAMA

Any member of the commission or its employees or agents, without advance notice and upon presentation of appropriate credentials, may enter any property or any industrial or other establishment at any reasonable time for the purpose of collecting such information, and no owner or official in charge shall refuse to admit such member, employee or agent for any purposes necessary to the discharge of his official duty. Any records, reports or information obtained by any member, employee or agent of the commission from any person shall be subject to the provisions of this subsection concerning confidentiality.

WATER LAWS

INDIANA

13-1-3-6. The department has the right through any authorized agent, to enter at all reasonable times in or upon any private or public property for the purpose of inspecting and investigating conditions relating to the pollution of any water of this state. The department may call upon any state officer, board, department, school, university, or other state institution, and the officers or employees thereof, and receive any assistance necessary to carrying out this chapter.

COLORADO

25-8-306. Authority to enter and inspect premises and records. (1) The division has the power, upon presentation of proper credentials, to enter and inspect at any reasonable time and in a reasonable manner any property, premise, or place for the purpose of investigating any actual, suspected, or potential source of water pollution, or ascertaining compliance or noncompliance with any control regulation or any order promulgated under this article. Such entry is also authorized for the purpose of inspecting and copying records required to be kept concerning any effluent source.

(2) In the making of such inspections, investigations, and determinations, the division, insofar as practicable, may designate as its authorized representatives any qualified personnel of the department of agriculture. The division may also request assistance from any such state or local agency or institution.

(3) If such entry or inspection is denied or not consented to, the division is empowered to and shall obtain, from the district or county court for the judicial district or county in which such property, premise, or place is located, a warrant to enter and inspect any such property, premise, or place prior to entry and inspection. The district and county courts of the state of Colorado are empowered to issue such warrants upon a proper showing of the need for such entry and inspection.

MONTANA

75-5-603. Power to inspect. The authorized representative of the department, upon presentation of his credentials, may at reasonable times enter upon any public or private property to:

(1) investigate conditions relating to pollution of state waters or violations of permit conditions;

(2) have access to and copy any records required under this chapter;

(3) inspect any monitoring equipment or method required under 75-5-602(3); and

(4) sample any effluents which the owner or operator of such source is required to sample under 75-5-602(4).

SOUTH DAKOTA

A-2-45. The secretary shall, at reasonable times, have access to any point, including an industrial user of a publicly owned treatment works, and copy records, inspect any monitoring equipment or method required under A-2-44, to sample any effluents being discharged into the waters of the state, or assure compliance with the provisions of this chapter.

A-2-46. The secretary may enter, upon presentation of proper credentials, any premises in which a point, including an industrial user of a publicly owned treatment works, is located in which any records are required to be maintained pursuant to §33A-2-44 are maintained.

RHODE ISLAND

R-12-15. The director shall have full power to inspect, and make orders regarding and directing all methods, means and devices employed on any steamer or vessel in the waters of the state, or at any installation on land, in receiving, carrying, storing, heating, handling or disposing any petroleum, gasoline, kerosene, tar, oil, or any product or mixture thereof; and the director may by order establish all rules and regulations to prevent the discharge or escape of any of said substances into the waters of the state.

WASHINGTON

RCW 90.48.355 — Right of entry, access to records, pertinent to environmental investigations. The department through its authorized representatives, shall have the power to enter upon any private or public property, including the deck of any ship, at any reasonable time, and the managing agent, master or occupant of such property shall permit such entry for the purpose of investigating conditions relating to violations of possible provisions of RCW 90.48.315 through 90.48.365, and to have access to any pertinent records relating to such property, including but not limited to operation and maintenance records and logs; provided, That in connection with the authority granted herein no person shall be compelled to divulge trade secret processes.

WASHINGTON

WAC 173-201-110 SURVEILLANCE.

A continuing surveillance program, to ascertain whether the regulations, waste disposal permits, orders, and directives promulgated and/or issued by the department are being complied with, will be conducted by the department staff as follows:

- (1) Inspecting treatment and control facilities.
- (2) Monitoring and reporting of waste discharge characteristics.
- (3) Monitoring receiving water quality.

ARKANSAS

82-1905. Persons operating disposal system — Furnishing information and permitting examinations and surveys. — Subdivision 1. FURNISHING INFORMATION. The owner or operator of or any contributor of sewage, industrial wastes, or other wastes to any disposal system or industrial user of a publicly owned treatment system, when requested by the Director, shall furnish to the Department any information which is relevant to the subject of this Act and shall establish and maintain such records, make such reports, install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), sample such effluents and provide such other information as the Director may reasonably require.

Subdivision 2. EXAMINATION OF BOOKS AND RECORDS. The Department or any authorized employee or agent thereof, may examine and copy any books, papers, records or memoranda pertaining to the operation of a disposal system.

Subdivision 3. ENTRANCE ON PROPERTY. Whenever it shall be necessary for the purpose of this Act, the Department or any authorized member, employee or agent thereof may enter upon any property, public or private, for the purpose of obtaining information or conducting surveys or investigations.

Report of the Alaska Oil Spill Commission
Executive Summary

SPIII

The Wreck of the Exxon Valdez
Implications for Safe Marine Transportation

January 1990

"What tends to happen is DEC will get dragged into a septic tank argument and it will drain away as many resources as fighting, for instance, the Alyeska ballast water treatment plant. There's a real problem with priorities within DEC."

*Sue Libenson, Executive Director
Alaska Center for the Environment
Alaska Oil Spill Commission
hearing, 9/21/89*

**Recommendation 13
Enhanced regulatory
strength**

The state should expand and exercise its regulatory authority over environmental safety. Measures voluntarily adopted by industry should be backed up by state regulation. Federal technical standards and safety requirements should not preclude more stringent state standards.

The State of Alaska currently does not exercise its full power under the U.S. Constitution to regulate environmental safety. Recent congressional enactments and judicial decisions make it clear that Congress does not intend that states should hesitate to protect local environments with greater stringency than the minimums established under federal law. The state should have the power, for example, to prohibit vessels from entering or departing Alaska ports and waters under unsafe circumstances.

Regulatory effectiveness also should be improved through assessment of administrative and civil penalties to encourage prevention, no pre-

- Identify unmet needs and recommend priorities, strategies and obstacles to achieving them;
- Encourage coordination of spill prevention and response programs currently spread among several agencies that cumulatively deserve high priority;
- Make budget and resource allocation recommendations;
- Evaluate programs and recommend elimination of marginal activities;
- Recommend changes based on new technologies and scientific impacts;
- Designate advisory panels, if deemed necessary, including appropriate representation, ex-officio, of appropriate departments of the state and municipalities, regional oil spill authorities, representatives of fishing and environmental groups, and shippers, owners and residential groups on the pipeline route; and
- Issue an annual report and safety assessment. Reports to the governor should include regular statistical and special reports on accidents and near-misses, the status of major risks, the performance of state and federal agencies, and long-term options for improving safety.

forcement review of compliance orders, environmental audits, stronger criminal penalties, and statutory provision for citizen lawsuits. Private voluntary prevention measures, though commendable, are often ignored as memories fade unless backed up by state regulations.

The state should renew and strengthen its authority to conduct inspections and spill response drills on vessels calling at Alaska ports and marine terminals.

The Valdez tanker fleet, built in the 1970s is approaching obsolescence. Structural weaknesses, technical malfunctions and other equipment problems can be expected to increase in frequency and seriousness.

Inspections and reports, done in cooperation with the Coast Guard or alone, should include examinations for structural integrity and environmental hazards. Inspection duties may be allocated between the harbor administration office proposed in this report and the Department of Environmental Conservation. State authority should include the power to levy substantial summary civil fines for interfering with inspections or failing to cooperate with response drills.

The lack of any quality control or assurance program on tanker operations from Prince William Sound or Cook Inlet allows serious hazards to arise. Coast Guard authorities already perform inspections on tankers calling at Valdez, but state inspection would provide an added measure of safety. In the past, when the state and the Coast Guard both inspected vessels, the two agencies reenforced each other's effectiveness. When the state was stopped from making inspections on the grounds that the activity was exclusively federal, the quality of Coast Guard inspections declined. Inspection by two governments is not needless duplication but needed redundancy, providing a greater measure of safety.

The "two-tier" system of quality control was adopted during construction of the trans-Alaska pipeline. The value of the two-tier system has been reenforced by the National Aeronautics and Space Administration experience with space disasters. The official inquiry into the 1986 Challenger space shuttle explosion found that system capabilities had been stretched to the limit in the winter of 1985-86 to support the flight schedule of the shuttle program. System capabilities for shipping oil from Valdez were similarly stretched to accommodate increasing throughput of the trans-Alaska pipeline to 2.2 million barrels per day without increasing other elements of the system, such as tank storage capacity.

Recommendation 14
Strengthened state inspections

"We are obligated to provide systems which enhance marine transportation safety, and we do it economically."

Jerry Aspland, President, ARCO Marine, Inc.

Alaska Oil Spill Commission hearing, 9/1/89

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

OFFICE OF THE COMMISSIONER
PO BOX 0, JUNEAU, ALASKA 99811-1800

(907) 465-2600

February 7, 1990

POSITION PAPER

House Bill 409

The Department strongly supports this legislation. As has been so aptly pointed out in the aftermath of the T/V Exxon Valdez, the key to dealing effectively with a major oil spill is prevention. An active role on the part of the regulatory agencies in preventing a spill is essential. This principle applies as well to preventing other kinds of environmental pollution. House Bill 409 would provide some of the necessary tools to streamline the enforcement processes and enable the Department to encourage compliance with existing regulatory safeguards.

This bill addresses four major issues: access, administrative penalties, compliance orders, and environmental audits. Each issue is addressed separately below.

ACCESS

The ability to inspect to determine whether pollution violations are occurring is a necessary component of a credible enforcement program. Current practices have prevented the Department from gaining access quickly when necessary. Current law requires the consent of the facility owner or obtaining a search warrant before possible violations can be investigated, often leading to the dissipation or dispersal of the pollution before the Department can enter and gather the evidence necessary to charge the polluter with a crime.

Section 1 of House Bill 409 adds to existing authority the right to copy records. Section 2 allows reasonable access to regulated facilities for the purpose of investigating actual or suspected pollution violations without the consent of the owner. The proposed changes in this bill should significantly improve the Department's ability to investigate violations.

ADMINISTRATIVE PENALTIES

Penalties are an important enforcement tool that reduces the economic incentive to violate existing environmental laws. The Department currently has two avenues to pursue when a violation

occurs: 1) issue or negotiate a compliance order requiring corrective action, or 2) commence a judicial enforcement action. The ability to assess administrative penalties would provide a process to impose a financial incentive to comply with the law.

Administrative penalties procedures already exist in 28 other states and are used extensively by the federal government. They have proven to offer an efficient and fair means of enforcement. Handling matters administratively, rather than judicially, is far more expeditious and cost effective for both industry and the Department. Development of sound administrative penalty criteria and establishment of a consistent track record when penalties are imposed adds fairness and certainty to the process. The administrative penalty process also allows for judicial review, should the violator choose to contest the decision.

COMPLIANCE ORDERS

An essential component of a sound, effective environmental enforcement program is the ability to issue compliance orders without cumbersome procedural delays. The Department cannot currently issue a compliance order to stop ongoing pollution or commence cleanup of a contaminated site without a lengthy hearing process.

Section 5 of House Bill 409 would allow compliance orders to be effective immediately, so that pollution will stop and clean up will commence. This process would prevent delays from being introduced when the goal is to promptly eliminate risks to the public health and environment.

A person's right to contest liability or seek contribution from other responsible parties is not curtailed under this section. An affected party has 30 days to request an administrative hearing which can be elevated to a judicial review if necessary. A request for an administrative hearing, however, does not affect the provisions and deadlines set out in the compliance order. In essence, this section provides that rights and liabilities can be litigated after the fact, while protection of the public health and environment must take place immediately. This is essentially a reversal of the existing situation. This is an important tool for the Department's enforcement program.

ENVIRONMENTAL AUDITS

This section would allow the Department, as part of an ongoing enforcement action, to require an environmental audit to be performed by an independent contractor selected by the person required to conduct the audit. The Department retains authority to approve the selection of the contractor.

Audits have proven to be beneficial to both industry and government because they insert a neutral, yet qualified party into the process. Environmental audits have also been a part of effective prevention programs because potential problems can be identified before reaching unmanageable or catastrophic proportions.

The four components of this bill will significantly add to the Department's ability to protect the public health and the environment through a more efficient, effective enforcement program.

Alaska State Legislature

Legislative Research Agency



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February 6, 1990

MEMORANDUM

TO: Representative Mike Davis

ATTN: Barnaby Dow

FROM: Leola Weimer *LW*
Legislative Analyst

RE: Administrative Penalties
Research Request 90.156

You asked which Alaska state agencies have the authority to assess penalties for violations of their regulations and statutes. You also wanted to know if agencies in other state governments have this authority. Specifically, you asked how authority for imposing an administrative penalty has been granted to agencies similar to the Alaska Department of Environmental Conservation (DEC); if the Environmental Protection Agency (EPA) requires administrative penalty authority for Resource Conservation and Recovery Act (RCRA) certification; and what the fiscal impact of such programs might be.

Summary

In Alaska, the authority to assess administrative penalties is granted to certain state agencies under Article 8 of the Administrative Procedure Act (AS 44.62.30-44.62.630). Under this section, the DEC has limited powers of administrative adjudication but does not have the general authority to assess administrative penalties.

Twenty-eight states and the federal government have administrative penalty systems for enforcing RCRA standards. States which have adopted administrative penalty systems have found them to save time and money; to be a more effective means of enforcement; and to be a more equitable means of punishment.

The Environmental Protection Agency (EPA) and the General Accounting Office (GAO) recommend that all states adopt administrative penalty systems to manage and enforce regulations concerning the environment.

Administrative Penalty Authority

In Alaska, the authority to assess administrative penalties is granted to certain state agencies under Article 8 of the Administrative Procedure Act (AS 44.62.300-

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44.62.630). The power of administrative adjudication is limited to the named functions of the agencies listed under AS 44.62.330(a) (see Attachment A).

Further restrictions are outlined in AS 44.62.330(d). According to the Attorney General, "The policy of § 44.62.330(d) is to limit the adjudication procedure set forth in the Act to procedural matters, and matters regarding which the agency must make substantial determinations of fact."¹ The purpose of this act is to prescribe a fair procedure for determinations of fact. The powers of administrative adjudication do not extend to situations where facts have been determined by the courts.

Administrative penalty authority is a power commonly assigned to both state and federal agencies. The Department of Public Safety's ability to issue traffic citations is a typical example of a state-level administrative penalty authority. The Environmental Protection Agency's ability to assess fines for pollution and hazardous waste violations is an example of federal administrative penalty authority. Some states have administrative law judges who determine the penalties for a variety of violations; others rely upon hearing officers assigned to specific agencies to assess penalties.

In general, the system of administrative law judges and hearing officers is preferred to civil or criminal court systems because less time and cost are involved. Administrative law judges and hearing officers are able to solve a greater number of cases in a shorter period of time. They are also able to correct a greater number of violations. Strict administrative procedures and penalty matrixes make enforcement procedures less arbitrary and more consistent. Like a person who intentionally parks in a no parking zone, companies know in advance what the penalties and procedure will be if they are found in violation of certain regulations.

Relying upon administrative law judges and hearing officers may foster a more cooperative atmosphere between industry and administrators than is found in a court room. However, if an agreement cannot be reached by the administrative process, the right of appeal to the higher courts is always available under administrative penalty procedures.

Department of Environmental Conservation (DEC)

The Alaska DEC has been given the powers of administrative adjudication under AS 44.62.330(a) sections (27), (30) and (44) with reference to AS 17.20 (Alaska Food, Drug, and Cosmetic Act), AS 18.35.010-18.35.090 (regulation of tourist and trailer camps, motor courts, and motels), and AS 46.03 respectively.

¹ 1963 Opinions of the Attorney General No. 10, pp. 2-3.

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DEC procedure for determining violations and assessing penalties is outlined in AS 46.03. If an investigation or inspection uncovers a violation, the usual procedure is to first issue a notice of violation which spells out the statute or regulation violated and describes what needs to be done to come back into compliance. If this does not resolve the situation, or if a situation is more serious and complex, a compliance order is issued.

Compliance orders may be issued either with the consent of the violator or unilaterally by DEC. Compliance orders by consent are a binding contract where the violator agrees to meet a specified compliance schedule. An agreed amount of penalty may be levied as part of the compliance order or as punishment for not meeting the compliance schedule. Unilateral compliance orders, on the other hand, are not contractual in nature and do not include fines or penalties.

If a violator fails to follow either a consent or unilateral compliance order, DEC may then file civil or criminal charges. The commissioner of DEC also has the authority to put an immediate stop to a violation by issuing an Emergency Order. Emergency Orders are typically issued only once or twice a year and involve violations which have a high potential of causing a public health hazard (e.g., broken sewage line). If the violation is not grievous but nonetheless a relatively major problem (e.g. the discharge of muddy water into a spawning stream), the commissioner may seek an injunction from the court.

Other States

Twenty-eight states have adopted administrative penalty systems for the enforcement of their environmental protection statutes. The systems in three of these states is described below.

State of Washington

Washington State's Department of Ecology has authority to levy penalties of up to \$10,000 per day for violations of the state's environmental protection statutes. Once a violation is discovered, the commissioner issues a notice of violation describing the regulations violated and amount of penalty assessed. Accompanying the notice of violation is an order for corrective action to be taken. Refusal or failure to comply is considered a separate violation and allows for additional penalties. The violator has ten days to appeal his or her case to the Pollution Control Hearing Board. This board is appointed by the governor and is under the jurisdiction of the Department of Ecology. The Pollution Control Hearing Board then conducts a formal hearing and passes judgment as to the appropriateness and amount of penalty assessed. This decision may be appealed to the Washington Superior Court.

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According to Jerry Ackerman, Assistant Attorney General for the Department of Ecology, most notices of violation and compliance orders are not appealed. The few cases that do go before the Pollution Control Hearing Board take an average of ten to twelve weeks to resolve (as compared to the previous judicial system that took an average of one and one half years to complete). Of those cases that receive hearings, approximately one quarter are appealed to superior court.

State of California

When a violation of the environmental laws of California is discovered, the Department of Health Services may issue simultaneously a corrective action order and an administrative complaint. The corrective action order is like a compliance order and outlines the specific steps that must be taken to come back into compliance. An administrative complaint is like a civil penalty with a maximum of \$25,000 per day. Upon receiving an order, a violator has ten days to request a hearing. Independent hearing officers are appointed from the Office of Administrative Hearings, Department of General Services. After receiving the hearing officer's decision, either party has thirty days within which to appeal for judicial review. Penalties and corrective action, however, are not postponed by either the hearing or appeals process.

California has three classes of penalties: 1) the "Toxic Ticket" is similar to a traffic ticket. For minor violations, inspectors may issue corrective action orders and administrative complaints of up to \$500 on site; 2) moderate violations are handled under the newly developed "Desk Order." After completing an inspection an investigator may fill out a more detailed report and issue a penalty of greater than \$500; and 3) "Correction Orders" are reserved for the major violations. They require greater documentation and carry heavier fines.

According to Bill Soo Hoo, Legal Council for California's Department of Health Services, in the past two years only four cases have received administrative hearings and one corrective action has been appealed to the courts. In FY 89 the department collected a total of \$1,147,000 from judicial penalties and \$2,926,500 from administrative penalties.

State of Oregon

Oregon has had a system of administrative penalties since the early 1970s. The Department of Environmental Quality (DEQ) has the power to issue a five-day warning letter and order of compliance and penalty. Five-day warning letters may be waived in cases where the public health is endangered. After receiving notice, a violator has twenty days to appeal its case to the Environmental Quality Commission. Members of this commission are appointed by the governor. Typically one hearing officer reviews the case and holds an informal trial with presentation of evidence and cross examination of witnesses. The hearing officer then has a maximum of 90 days in which to decide the final order. This decision

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may be appealed within 30 days to the five-member board under the Environmental Quality Commission. Their decision may in turn be appealed to the Oregon State Court of Appeals.

According to Van Skollias, Director of Enforcement for the DEQ, only a few of the Environmental Quality Commission's decisions have been appealed to the state court. In an effort to make this system more efficient and equitable, a formal penalty matrix was adopted in March 1989 (see attachment B). The matrix classifies the severity of violation and takes into consideration such things as prior violations, economic gain, cooperation and economic conditions. Since the adoption of the matrix, both the number and amount of penalties collected has drastically increased. In 1988, Oregon DEQ recovered \$78,000 in penalties. After the adoption of the matrix, they collected \$392,000. The largest fine collected was \$80,000 in an asbestos case with multiple violations. The average fine was under \$10,000.

New Federal Requirement

Additional support for the adoption of administrative penalty systems has come from the Environmental Protection Agency (EPA) and the General Accounting Office (GAO).

Currently states may have either administrative or judicial penalty systems to qualify for Resource Conservation and Recovery Act (RCRA) authorization. According to Betty Wise, Director of Region Ten RCRA Programs, the EPA has decided to change this policy and make both administrative and judicial penalties a requirement. An announcement is expected to appear in the Federal Register in March or April of this year.

Last year the EPA held two conferences on the proposed RCRA rule changes. At both the East Coast Conference and West Coast Conference, administrative penalty systems were the major topic of discussion. In 1988 the GAO conducted an audit of EPA RCRA enforcement programs and found the lack of administrative penalty systems to be a major obstacle to implementing EPA's standards of "timely and appropriate."

According to Jeffery Mach, Chief of Solid & Hazardous Waste Management Program for DEC, Alaska intends to apply for RCRA authorization in early 1992. If these expected rule changes go into effect, Alaska will be required to adopt an administrative penalty system before it can receive RCRA authorization.

I hope this information answers your questions. If you would like additional information, please contact this agency.

Attachments

CIVIL PENALTIES (ADMINISTRATIVE)

TABLE 13

CIVIL PENALTIES UNDER HAZARDOUS WASTE LAWS

<u>State</u>	<u>Administrative Civil Penalties</u>	<u>Judicial Civil Penalties</u>
Alabama	\$25,000/day (\$250,000 "cap")	\$25,000/day (no "cap")
Alaska	None	\$100,000 plus \$10,000/day
Arizona	None	\$10,000/day
Arkansas	\$25,000/day	None
California	\$10,000/day \$1,000-\$10,000/day (Porter-Cologne Act)	\$10,000/day \$25,000/day (intentional or negligent violation or violation of order) \$25,000-\$20,000-\$15,000-\$10,000- \$5,000/day (Porter-Cologne Act)
Colorado	None	\$25,000/day
Connecticut	\$25,000/day	\$25,000/day
Delaware	"reasonable penalty" (viol. of law, permit, reg.) \$25,000/day (viol. of order)	\$25,000/day
District of Columbia	None	\$25,000/day
Florida	None	\$50,000/day
Georgia	\$25,000/day	None
Hawaii	\$10,000/day	\$10,000/day
Idaho	None	\$10,000/day

Note: Penalty amount shown is the maximum assessment per violation unless otherwise indicated.

Note: States that lack authority to impose administrative civil penalties absent a violator's consent receive a "None" in the administrative penalties column.

Table 13 (continued)

<u>State</u>	<u>Administrative Civil Penalties</u>	<u>Judicial Civil Penalties</u>
Illinois	\$25,000/day	\$25,000/day
Indiana	\$25,000/day	\$25,000/day (plus an additional \$500/hour for violating any emergency order)
Iowa	\$1,000/day	\$10,000/day
Kansas	\$10,000/day	\$10,000/day
Kentucky	None	\$25,000/day
Louisiana	\$25,000/day \$50,000/day (order violation)	\$25,000/day \$50,000/day (order violation)
Maine	None	\$25,000/day
Maryland	\$1,000/day (\$50,000 "cap")	\$10,000/day
Massachusetts	\$1,000/day \$25,000/day (for unauthorized release, handling without license, failure to report)	\$25,000/day
Michigan	None	\$25,000/day
Minnesota	\$10,000 per inspection (regardless of # violations or days; waived if corrected within 30 days of receipt of order)	\$25,000/day
Mississippi	\$25,000/day	None
Missouri	None	\$10,000/day
Montana	None	\$10,000/day
Nebraska	None	\$10,000/day
Nevada	None	\$10,000/day
New Hampshire	None	\$50,000/day

Table 13 (continued)

<u>State</u>	<u>Administrative Civil Penalties</u>	<u>Judicial Civil Penalties</u>
New Jersey	\$25,000 per violation (plus \$2,500/day after receipt of order)	\$25,000/day \$50,000/day (violation of order or failure to pay)
New Mexico	\$10,000/day	\$10,000/day
New York	\$25,000/day \$50,000/day (subs. violation)	\$25,000/day \$50,000/day (subs. violation)
North Carolina	\$10,000/day	None (<i>de novo</i> review of admin. penalty)
North Dakota	None	\$25,000/day
Ohio	None	\$10,000/day
Oklahoma	\$10,000/day (but only for viol. of order)	\$10,000/day
Oregon	\$10,000/day	None
Pennsylvania	\$25,000/day	\$25,000/day
Rhode Island	\$10,000/day	\$10,000/day
South Carolina	\$25,000/day	\$25,000/day
South Dakota	None	\$10,000/day
Tennessee	\$10,000/day	None
Texas	\$10,000/day	\$25,000/day
Utah	None	\$10,000/day
Vermont	None	\$10,000/day
Virginia	None	\$10,000/day
Washington	\$10,000/day	None
West Virginia	None	\$25,000/day
Wisconsin	None	\$25,000/day
Wyoming	None	\$10,000/day

STATE OF ALASKA

DEPARTMENT OF LAW

VIA FACSIMILE

OFFICE OF THE ATTORNEY GENERAL

Telecopier #456-1317

April 2, 1990

Representative Ron Larson, Co-Chair
 Representative Lyman Hoffman, Co-Chair
 House Finance Committee
 P.O. Box V
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STEVE COWPER, GOVERNOR

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Re: H.B. 409 access provisions

Dear Representatives Larson and Hoffman:

At last week's House Finance Committee hearing on H.B. 409, several questions arose regarding the types of facilities which would qualify as "pervasively regulated facilities." This memorandum responds to those questions.

Section 2 of H.B. 409 authorizes the Department of Environmental Conservation ("DEC") to enter and inspect at reasonable times a "pervasively regulated facility" in order to investigate actual or suspected sources of pollution or to ascertain compliance with DEC statutes and regulations. Section 2 defines "pervasively regulated facility" as

a facility where activities or operations are or were conducted that affect a significant public interest and that the department comprehensively regulates.

The above definition, which explicitly tracks the case law developed under both the United States and Alaska constitutions, contains two distinct components:

(1) the operations conducted at the facility must "affect a significant public interest." In other words, the nature of the activities conducted at the facility must present the potential for a substantial adverse environmental impact upon the public;

and

(2) the operations conducted at the facility must be subject to comprehensive regulation by DEC. In other words, the facility's activities must be subject to broad regulation and oversight by DEC.

Representative Ron Larson
Re: HB 409 access provisions

April 2, 1990
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In order to qualify as a pervasively regulated facility, the facility must satisfy both components of the definition. Hence, the vast majority of premises in Alaska will not fall under the definition. For example, private residences, restaurants, fishing vessels, small placer mines, gas stations, and most small businesses do not qualify. The activities conducted at these places are not subject to comprehensive DEC regulations. Furthermore, the activities conducted at most of these places do not have the potential to pose a significant environmental threat to the public. Likewise, the corporate headquarters of a large company would not qualify--even if other facilities owned by the company did satisfy the test. This is because the type of activities typically conducted at a corporate headquarters are not subject to broad DEC regulation and oversight.

Conversely, certain types of facilities would qualify as pervasively regulated facilities in most circumstances. Examples of such facilities include the Alyeska Pipeline Company's Valdez terminal, Trans-Alaska Pipeline pump stations, oil refineries, most permitted hazardous substance or hazardous waste disposal facilities, and hazardous waste temporary storage facilities. Such facilities usually will satisfy both components of the definition.

Under present law, before DEC may enter onto private property DEC must either obtain the property owner's consent or obtain a search warrant. As the above discussion demonstrates, H.B. 409 does not increase DEC's right to enter the vast majority of private property in Alaska. H.B. 409 would, however, allow DEC to take advantage of the narrow, judicially recognized, exception to the search warrant requirement for a limited group of facilities that have a particular potential to harm the health and welfare of Alaska's citizens.

If you have any further questions, or if I may be of further assistance, please contact me.

Sincerely,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By:


John A. McDonagh

Assistant Attorney General

JAM:jah

Representative Ron Larson
Re: HB 409 access provisions

April 2, 1990
Page 3

cc: Rep. C.E. Swackhammer
Rep. Kay Brown
Rep. Niilo Koponen
Rep. Fran Ulmer
Rep. Kay Wallis
Rep. Ramona Barnes
Rep. Randy Phillips
Rep. Steve Rieger
Rep. Dick Shultz
Jeff Bush, Department of Law

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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VIA FACSIMILE

February 20, 1990

Representative Peter Goll, Co-Chairman
Representative Max Gruenberg, Co-Chairman
Representative Mike Davis, Vice-Chairman
House Judiciary Committee
Room 122, Capitol Building
P.O. Box V
Juneau, AK 99811

Re: HB 409

Dear Representatives Goll, Gruenberg, and Davis:

You have asked two questions concerning HB 409. The first is whether the bill's provision authorizing the Department of Environmental Conservation to enter and inspect the property of a pervasively regulated industry is constitutional. The second is whether the authorization of administrative penalties requires the right to a jury trial. In our view, the inspection access provision of this bill is constitutional as limited to facilities or premises with a history of pervasive regulation and a strong governmental interest in ensuring compliance with environmental laws. We also conclude that the authorization for administrative penalty proceedings does not require a criminal or civil jury trial. We will discuss each question in turn.

I. ACCESS AND INSPECTION AUTHORITY

Section 2 of HB 409 authorizes the Department of Environmental Conservation to enter and inspect at reasonable times the property or premises of a pervasively regulated facility to investigate actual or suspected sources of pollution or to ascertain compliance with state environmental laws and regulations. Section 1 requires the Department to have the consent of the owner or occupier to enter and inspect any property which is not part of a pervasively regulated industry. The distinction between those facilities which are pervasively regulated and those which are not explicitly tracks the caselaw developed under both the U.S. and Alaska Constitutions.

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Gruenberg, and Davis

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A. U.S. Constitution. In 1987, the United States Supreme Court in New York v. Burger, 107 S. Ct. 2636 (1987), upheld a New York statute providing for warrantless searches of automobile junkyards because junkyards are "pervasively regulated businesses" subject to regular inspection. The Court reasoned that owners or operators of commercial facilities with a long history of governmental oversight had a reduced expectation of privacy in those facilities. That reduced privacy interest, when joined with a strong governmental public health and safety interest in regulating such facilities, rendered a warrantless search permissible under the Fourth Amendment to the U.S. Constitution.

A number of state courts have upheld state environmental warrantless entry and inspection statutes when challenged under the federal Constitution. State v. Bonaccorso, 545 A.2d 853 (N.J. Super. 1988) (water pollution inspection of meat packing house upheld as pervasively regulated industry); State v. Santiago, 527 A.2d 963 (N.J. Super. 1986) (pesticide inspection statute); Middlesex County Health Dept. v. Roehsler, 561 A.2d 1212 (N.J. Super. 1989) (solid waste inspection of solid waste facilities upheld as pervasively regulated); Blosenski Disposal v. Commonwealth, 543 A.2d 159 (Pa. Cmwlth 1988) (solid waste inspection statute); Commonwealth v. Fiore, 516 A.2d 704 (Pa. 1986) (hazardous waste facilities pervasively regulated); United States v. Kaiyo Maru No. 53, 699 F.2d 989 (9th Cir. 1983) (fishing industry pervasively regulated and warrantless administrative search of fishing vessel by Coast Guard upheld); Trustees for Alaska v. EPA, 749 F.2d 549 (9th Cir. 1984) (condition of water discharge permit that facilities subject to search upheld against facial challenge); V-1 Oil Company v. State of Wyoming, Dept. of Env. Quality, 696 F. Supp. 578 (D. Wyo. 1988) (inspection and sampling of leaking underground storage tank contamination at gas station upheld as pervasively regulated).

B. Alaska Constitution. The seminal case for warrantless administrative searches under the Alaska Constitution is Woods & Rohde, Inc. v. State, Dept. of Labor, 565 P.2d 138 (Alaska 1977). The Alaska Supreme Court held that the Alaska Occupational Health and Safety Act's warrantless search provisions were unconstitutional because they extended to facilities and premises without a history of pervasive regulation and covered an enormous number of unrelated and disparate activities, essentially all private enterprise. Id.

The Court, in finding such a broad scope unconstitutional, specifically distinguished warrantless inspection provisions for those commercial facilities which have been subject to a long history of supervision, inspection, and pervasive

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regulation. Business with a history of pervasive regulation held less of an expectation of privacy and, therefore, warrantless administrative inspection would be constitutional under Alaska law in those limited circumstances.

The Alaska Supreme Court subsequently upheld airport screening as constitutional. State v. Salit, 613 P.2d 245 (Alaska 1980). The Court noted that the air travel industry was pervasively regulated and, although the searches involved passengers, the rationale extended to them as well. The Alaska Court of Appeals, in Dye v. State, 650 P.2d 418 (Alaska App. 1982), upheld a warrantless administrative search of a fishing vessel, concluding that fishing is a pervasively regulated industry. The Appellate Court noted that, in reviewing warrantless access provisions, the inquiry should be: (1) whether the industry is so regulated as to diminish its expectation of privacy and; (2) whether the commercial enterprises' subjective expectations of privacy are ones which society would protect. Id. at 421-422.

Section 2 of HB 409 distinguishes on its face those facilities which are pervasively regulated and, thus, have a reduced expectation of privacy. Further, such facilities are pervasively regulated because of the need for assurance that their operation does not jeopardize the public health and safety. Consequently, there are compelling state interests in regular inspections for compliance with state environmental laws and to ensure that there is no pollution at the facility. Inspections further that interest. See New York v. Burger, 107 S.Ct. 2636, 2644 (1987). Since HB 409 adheres to this well developed distinction for pervasively regulated facilities, we believe it to be constitutional under both the U.S. and Alaska Constitutions.

II. ADMINISTRATIVE PENALTIES.

Section 4 of HB 409 authorizes the Department of Environmental Conservation to assess an administrative penalty for a violation of AS 46.03, AS 46.04, AS 46.09 or a regulation promulgated hereunder. The bill sets forth in detail the administrative procedure to be followed in assessing a penalty and the judicial appellate review process for reviewing the administrative decision. Specifically, after the final administrative decision is made, that decision may be reviewed by the superior court as an administrative appeal, not as a de novo review. You have asked whether the administrative penalty provisions require a jury trial as either a criminal or civil proceeding.

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The first issue is whether the administrative penalty provisions are similar to criminal proceedings, thereby creating the right to a jury trial. The Alaska Supreme Court, in Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970), held that individuals subject to criminal prosecutions are entitled to a jury trial and the Court defined criminal prosecutions broadly as "any offense the direct penalty for which may be incarceration in a jail or penal institution . . . includ[ing] offenses which, even if incarceration is not a possible punishment, still connote criminal conduct in the traditional sense of the term." Id. at 402. The Court noted that "[a] heavy enough fine might also indicate criminality because it can be taken as a gauge of the ethical and social judgments of the community." Id. at n. 29.

The Supreme Court specifically excluded from the category of those "criminal" prosecutions requiring jury trials the revocation of licenses pursuant to administrative proceedings because lawful criteria other than criminality are a proper concern in protecting public welfare and safety. The Court's rationale is that the basis of revocation or suspension in such instances is not that one has committed a criminal offense, but that the individual is not fit to be licensed, apart from considerations of only guilt or innocence of crime. The Court further excluded from its holding those "legal measures which can be considered regulatory rather than criminal in thrust, so long as incarceration is not one of the possible modes of punishment." Id.

In determining whether the penalty imposed is akin to a criminal proceeding triggering the right to a jury trial, the court does not necessarily look to the size of the fine or the risk of loss, but rather to whether the penalties under consideration serve to brand the defendant with the same stigma as a misdemeanor conviction. Beran v. State, 705 P.2d 1280, 1284 n. 4 (Alaska App. 1985). For example, in Alaska Public Defender Agency v. Superior Court, 584 P.2d 1106, 1110 (Alaska 1978), the Court held that prosecution for a violation of a city ordinance against "harassment" punishable by a \$500 fine did not constitute a criminal proceeding because the fine alone did not connote criminality in the constitutional sense. Moreover, in State v. O'Neill Investigations, Inc., 609 P.2d 520 (Alaska 1980), the Court held that a \$5,000 civil penalty for each count of unfair methods of competition and unfair trade practices did not constitute criminal penalties. The Court noted that "[t]he use of civil monetary penalties, woven into the fabric of many regulatory statutes as a sanction for non-compliance, has become commonplace." Id. at 526. Analyzing the penalty under the Baker v. City of Fairbanks test, two Supreme Court justices wrote in their concurrence:

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"Furthermore, the argument that a penalty of \$5,000 per violation indicates criminality deserves consideration. However, the reason that the court has used contemporary social values and heaviness of the authorized penalty as measures of criminality is that they are a gauge of the community ethical and social judgment of persons who commit the wrongful act. In turn, the reason for determining the community's judgment of such persons is that the extent and nature of that judgment helps one predict the severity of collateral consequences which may be suffered by the defendant. Baker, 471 P.2d at 395. In discussing potential collateral consequences of conviction under the ordinance in Baker, we noted that "one convicted under this ordinance might suffer severe disabilities in obtaining future employment or in having heaped upon him a certain amount of social opprobrium."

The collateral consequences of finding that a debt collection agency or other business has committed "unfair trade practices in the conduct of trade or commerce" are not of this nature.

Id. at 538.

Consequently, while assessment of civil penalties against an environmental polluter may very well subject that person to community disfavor, this is not the type of collateral consequences envisioned in Baker and its progeny. The administrative penalty provision is civil and regulatory to encourage compliance rather than to punish as in a criminal proceeding. Thus, no right to a jury trial is required.

This interpretation is supported by federal law as well. The United States Supreme Court, in construing the U.S. Constitution, has concluded that civil penalties of up to \$50,000 per offense under the oil spill provisions of the Clean Water Act are not criminal in nature. United States v. Ward, 448 U.S. 240 (1980). Under the federal test, where the legislature "has indicated an intention to establish a civil penalty, [the court] inquires[s] further whether the civil statutory scheme is so punitive either in purpose or effect as to negate that intention." Id. at 248-49. The court noted that the oil discharge prohibition was a strict liability offense and that separate criminal provisions required proof of scienter. The court concluded that the civil penalties were not criminal in nature, and therefore, did not trigger constitutionally mandated criminal proceedings.

Representatives Goll,
Gruenberg, and Davis

February 20, 1990
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Id. at 254. The same is true for the administrative penalty provision of Section 4 of HB 409.

The second issue you posed is whether the fact that the administrative determination to impose an administrative penalty is not reviewable de novo on appeal to the superior court deprives a person of his/her right to a jury trial in a civil suit under the Alaska Constitution. Article I section 16 of the Alaska Constitution provides that "[i]n civil cases where the amount in controversy exceeds two hundred and fifty dollars, the right of trial by a jury of twelve is preserved to the same extent as it existed at common law." This provision is modeled after the guarantee in the Seventh Amendment to the U.S. Constitution. See Shope v. Sims, 658, P.2d 1336 (Alaska 1983).

In Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977), the U.S. Supreme Court held that "when Congress creates new statutory public rights, it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment." Id. at 455. This case involved administratively assessed penalties for violations of OSHA workplace safety regulations.

In an earlier case, NLRB v. Jones & Laughlin Steel Corporation, 301 U.S. 1 (1937), the U.S. Supreme Court upheld a provision of the National Labor Relations Act empowering the Board to make findings of fact that were conclusive on review and to issue orders concerning challenged labor practices. The Court overruled defendant's Seventh Amendment objections, stating: "the instant case is not a suit at law or in the nature of a suit. The proceeding is one unknown to the common law. It is a statutory proceeding." Id. at 8.

As one commentator has noted, these decisions represent the Court's recognition that the legislature may put certain decisions in the hands of administrative agencies because "in some instances complex problems [are] not easily comprehended by laypeople [and] should be decided by a specialized group of experts; to inject a jury into that process would seriously impair its utility and effectiveness." J. Friedenthal, M. Kane & A. Miller, Civil Procedure 499 (1985).

As a result, since many of the environmental statutes found in Title 46 did not exist at common law, the legislature may constitutionally vest their enforcement in administrative agencies without providing for a jury trial.

Representatives Goll,
Gruenberg, and Davis

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If you have any further questions, or if we can be of further assistance, please contact us.

Very truly yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL



Michele D. Brown
Breck C. Tostevin
Assistant Attorneys General

MDB/640.tv
cc: Jeff Bush
John McDonagh

EARTH MOVERS OF FAIRBANKS, INC.

GENERAL CONTRACTOR

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Fairbanks, Alaska 99709-2197

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February 26, 1990

State of Alaska
Senate Judiciary Committee
House Finance Committee
Interior Delegation
HB 409 Sponsors
P.O. Box V
Juneau, AK 99811

Re: HB 409 and SB 497

Dear Ladies and Gentlemen:

We are writing this letter in opposition to HB 409 and SB 497. We feel either version of these bills, if passed, have the potential of permitting unfounded and far reaching devastating effects to the statewide business structure and environment.

These bills grant massive administrative powers to DEC to enter premises without a search warrant, copy records, administer large administrative fines, shut down business operations, etc., without any recourse to the courts until well after these actions occur and administrative appeal procedures are exhausted.

Due to the fact that people will be administering these bills, and the fact that people do make mistakes or carry grudges, it is very possible that an administrator could wrongfully shut a business down for an inordinate length of time. This opinion is also based on the following interpretation of the bill:

- Once a person appeals a decision to the agency, there is no time limit on how fast the agency needs to respond.
- Appeals to an agency which issued a decision generally result in a "rubber stamp" of the previous decision.
- The agency has the ability to shut down an operation without regard to severity of the occurrence or without regard to commonly accepted and generally used practices.

It is our understanding that existing regulations give DEC essentially the same powers if an emergency is declared, and require an immediate Judicial response to an appeal. We would support leaving existing regulations as they are.

If new regulations must be adopted, we would recommend the following changes:

- Any appeals to a decision should be ruled on by a disinterested third party within a reasonable time limit.
- An operation which is not immediately life threatening, has been in operation for an extended period of time, and has appealed a decision should be permitted to continue operating until a conclusive decision has been reached.
- The 20 percent penalty per quarter for unpaid fines should be reduced to statutory interest.


These bills as proposed remind us of "Big Brother" in the book 1984. They give ultimate power to a state agency and do nothing to protect the business-man's rights. Let's see what we can do to encourage business in this state, not discourage it.

We also questions the constitutionality of these bills since they permit a person to be convicted and penalized before being judged by a jury of his peers.

Should you have any questions, please contact the undersigned.

Sincerely,

EARTH MOVERS OF FAIRBANKS, INC.


Randy Brand
Vice President

RB/lm

EXXON COMPANY, U.S.A.
COMMENTS ON CSHB 409

House Judiciary Committee
February 14, 1990

Exxon Company, U.S.A., welcomes the opportunity to offer the following comments on CSHB 409. The procedures described in this bill would deny all Alaska's citizens (not just oil companies) the most basic due process protections. The bill seeks to impose arbitrary and unilateral procedures in non-emergency situations. The DEC already has more than ample statutory authority to issue any immediate order in an emergency. This bill would allow the exercise of regulatory power justified only in an emergency when there is no emergency.

The current compliance order statute sets forth a three stage procedure for non-emergency situations. First, the DEC gives the citizen notice of the alleged environmental violations. The citizen then has an opportunity to meet with the department and to attempt to cure the violations. Finally, if the problem cannot be satisfactorily resolved on an informal basis, an administrative hearing is held to determine what action would be appropriate.

This existing procedure is the appropriate way to deal with non-emergency situations. It is our understanding that prior testimony in support of this bill has stated that the proposed amendments are necessary to conform Alaska's compliance order procedures to federal law. As a general rule, that is simply not correct.

The federal government has a very wide and complex range of environmental statutes and regulations, many of which provide some type of compliance order authority. Most federal compliance order procedures, however, incorporate a three step notice and opportunity to be heard procedure similar to Alaska's current compliance order statute. The compliance order procedures employed in Part 24 of the EPA regulations on hearings are a good example.

The EPA's three stage process protects citizens' due process rights to reasonable notice and opportunity to be heard before the government takes final action against them. It also reflects common sense. Most alleged environmental violations can be resolved without resort to formal judicial enforcement actions. The procedure proposed in HB 409 threatens Alaskans with an impossible dilemma: either immediately comply with arbitrary compliance orders, or refuse to obey the DEC order at the risk of immediate penalties and force the Department of Law to file a judicial enforcement action. The current statutory procedures are far preferable to this type of confrontation. For these reasons Exxon strongly recommends that the compliance order procedures not be amended.

The current draft of this bill contains a section on nonconsensual searches of "pervasively regulated facilities." This section is unnecessary and unreasonable. In 1977, the Alaska Supreme Court held that a similar rule which allowed OSHA inspectors to enter workplaces without a search warrant violated the Alaska Constitution. In 1978, the U.S. Supreme Court held that an OSHA regulation allowing a warrantless search violated the federal constitution.

The language in the latest draft would allow the DEC to enter and search "pervasively regulated facilities," without a warrant. In the absence of an emergency, there is no legal justification for this type of search in the enforcement of environmental laws. The United States Supreme Court has held that certain types of enterprises involving liquor and firearms. The warrantless search provisions are therefore unconstitutional and should be taken out of the bill.

Finally, we have objections to the administrative penalty provisions of the proposed bill. No one has presented any reasonable justification to show that administrative penalties are needed. Section 760 of the present statutes provides more than ample judicial penalties.

If administrative penalties are adopted, they should at the least include the procedural safeguards contained in similar federal statutes. The proposed scheme provides for an assessment notice to be sent out that becomes final in 30 days. A hearing may be requested, but there is no indication of when or whether such a hearing will take place. The safeguards of the Administrative Procedure Act are expressly denied.

Those major federal environmental laws which do provide for administrative penalties also provide for notice and a right to a hearing before the penalty can be imposed. (The Clean Air Act, Federal Insecticide Fungicide and Rodenticide Act (FIFRA), the Solid Waste Disposal Act, the Toxic Substances Control Act, the Clean Water Act, and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).)

Citizens who deal with the Alaska Department of Environmental Conservation should be afforded the same due process protections by DEC as they are by the federal agencies. These rights include the right to a notice of the assessment, a clear right to a hearing, comprehensive rules that describe the hearing process, and the requirement that the administrative agency make and prove its case before the citizen is required to bear the burden of suffering any penalty.

In closing, we would like to emphasize that this bill, if adopted, would seriously impact all Alaskan citizens and businesses. Alaskans, like all Americans, are entitled to the basic due process protections when dealing with state administrative agencies and their staff. The proposals included in CSHB 409 would significantly undermine those protections. We continue to believe that the existing statutes fairly address both emergency and non-emergency situations, and therefore recommend that this bill not be enacted into law.



Alaskan Wilderness Sailing Safaris

16th Season

Honorable Peter Goll
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, AK 99811

February 12, 1990

RECEIVED FEB 14 1990

Dear Honorable Peter Goll:

It is indeed a sign that change is necessary when the President of Alyeska Pipeline Service Company and Alaskan Wilderness Sailing Safaris agree. Mr. Hermiller's recent statements that DEC's budget and regulatory procedures need to be strengthened and enforced more equitably, however, do have our support.

AWSS believes that HB 409 and HB 315 re essential first steps towards achieving better DEC enforcement of environmental laws through administrative penalties, no pre-enforcement review of compliance orders, citizen suits (HB315), and environmental audits. We believe this bill will reduce the "over-kill" aspects of the current legislation and provide greater fairness to small businesses who abide by DEC regulations. In the past DEC penalties were so severe, they were rarely used because of the adverse economic effect on the polluter. However, this hurts competing businesses who do abide by DEC regulations, as we must also compete in the same marketplace. Alaskan Wilderness Sailing Safaris supports HB 409 because it gives greater flexibility, is more economical and efficient.

We support changing Section 2 (14) "at reasonable times" to "at any time", "pervasively regulated facility" to "permitted facility," and defining environmental audit to include "engineering audits." Please pass HB 409 and HB 315 out of committee promptly with a "Do Pass."

Sincerely yours,

R. James Lethcoe

Alaskan Wilderness Sailing Safaris

P.O. Box 1313, Valdez, AK 99686. Phone: (907) 835-5175 (Sept. 15 to May 15)
P.O. Box 701, Whittier, AK 99686. Phone (907) 835-5175 (May 15 to Sept. 15)



ALASKA STATE CHAMBER OF COMMERCE

217 Second Street, Suite 201

Juneau, Alaska 99801

(907) 586-2323

February 14, 1990

Alaska State Legislature
Representative Peter Goll
House Judiciary Co-chair
P. O. Box V
Juneau, AK 99811

Dear Representative Goll:

On February 7, 1990, we offered testimony in House Resources on CSHB 409, an act dealing with DEC penalties. In our testimony we expressed our serious reservations over several of the provisions in the 2nd committee substitute.

While we applaud the effort to utilize administrative rather than judicial procedures for the enforcement of environmental laws and regulations, we have a major concern in that the bill does not appear to provide the basic minimal guarantees of due process and regulatory procedure found in the Administrative Procedures Act. As a case in point, Section 5 dealing with compliance orders, would permit DEC to issue an order without prior notice and would permit that order to stand without the right for an administrative hearing. As a matter of fact, given the right of DEC to issue emergency orders, we are hard put to find any rationale in the background materials for a customized method of administrative penalties and compliance orders. To put this issue in a comparative light, we would raise the rhetorical question of whether or not the legislature would support similar legislation for the Department of Public Safety.

Section 1, paragraph 6, would seem to permit an unrestricted right to copy records. In addition to a very substantial constitutional issue concerning the right to privacy and the problem of unlimited search, we would suggest that there are substantial practical problems with this provision. The manager or owner of a "pervasively regulated facility", if prudent, would see to it that no hard copies of any records were present on the property. In this era of telecommunications and data transfer it would be quite simple to bury site information in a data base at another location.


Continuing on the matter of copying records, we feel compelled to point out the obvious, in that the market place advantage a firm may be enjoying will be found in a wide variety of business and accounting records. Secret processes and methods of manufacturing are more rare than common. Without restrictions on the information to be gathered and available for public scrutiny a business could run a significant risk that highly sensitive business related information would become available to customers, creditors and competitors.

Finally, the question of what constitutes a significant deterrent in terms of penalties is a matter which is arguable. However, in our opinion the upper limit of \$25,000 per day per violation as described in Section 4 is excessive

to the point of vindictiveness. We reached this conclusion in light of the provisions in paragraph (h) of section 4, describing the additional liabilities that could be incurred by a defendant.

The Alaska State Chamber wishes to thank you for the opportunity to present these thoughts on CSHB 409 and are willing to assist, if requested, in the development of suitable amendments and changes.

Sincerely,



George Krusz
President

cc: Ernie Polley

GK:EP:cks/CSHB409

An Appeal for Significant Improvement in the Enforcement of
Alaska's Environmental Laws

Recommended Legislative Remedies

submitted by: Sue Libenson, Executive Director
Alaska Center for the Environment

Mike Wenig, Staff Attorney
Trustees for Alaska

Introduction

In the wake of the Exxon Valdez oil spill, Alaska's greatest environmental tragedy, it is anticipated that the legislature will consider numerous approaches to improving public policy with the intent of preventing future spills. Many of these changes will focus on improvements within the Alaska Department of Environmental Conservation (DEC) which has the bulk of the State's responsibility with regards to oil spill prevention and response.

For any of the legislature's potential actions to succeed, however, they must be backed by one underlying factor - improved enforcement. While there are undoubtedly needs for change in spill prevention and response, the Commission must recognize that the current failure of existing regulatory safeguards is largely due to the inability of agencies, including DEC, to properly enforce the law and thereby create an atmosphere which encourages compliance by potential polluters.

The following outlines a package of legislative recommendations for improving the enforcement of Alaska's environmental laws and regulations. The implementation of these measures will ultimately be improved compliance, the ultimate tool in preventing future pollution catastrophes.

Recommendations

- I. Authorize DEC to assess administrative penalties.
- II. Strengthen criminal penalties for violations of pollution laws.
- III. Authorize DEC to make reasonable inspections without first obtaining a warrant.
- IV. Eliminate administrative and judicial "pre-enforcement review" of compliance orders.
- V. Provide for citizen suits to enforce environmental statutes and regulations.
- VI. Provide adequate funding for DEC to fulfill its regulatory

mandate.

Discussion of Recommendations

I. DEC SHOULD HAVE THE STATUTORY AUTHORITY TO ASSESS ADMINISTRATIVE PENALTIES

Among the tools that are necessary for DEC to have a credible, forceful, and efficient enforcement program is the authority to assess administrative penalties for violations of the State's environmental laws.

Penalties, generally, are an important enforcement tool because they greatly reduce the economic incentives to violate the State's environmental laws. However, DEC currently has the authority only to issue a compliance order requiring corrective action or to commence a judicial enforcement action for civil or criminal penalties.¹ Like most litigation, however, judicial enforcement actions require the State to commit substantial resources and time and, thus, are used only for the most extreme violators. By themselves, judicial enforcement actions cannot provide a sufficient enforcement threat.

A civil penalty program is thus a necessary tool for a credible enforcement arsenal. Administrative penalties could be assessed through a fair yet far less resource intensive administrative hearing procedure than court proceedings. Decisions by administrative hearing officers would be judicially reviewable on the record, rather than through a cumbersome trial

¹ Two of these three tools, themselves, need to be strengthened, as explained below in sections IV and VI.

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procedure.

Administrative penalties would greatly strengthen DEC's enforcement presence and capability by providing the agency with a relatively quick and efficient means of imposing penalties. The authority to assess administrative penalties is particularly important for the relatively numerous yet small violators, for whom DEC's commencement of lengthy judicial enforcement proceedings is simply not worthwhile. By greatly reducing the resources necessary to levy penalties, an administrative penalty program would provide an enforcement threat that is otherwise not present at all for these small violators.

Administrative penalties are an integral component of the federal environmental enforcement program.² Numerous state agencies also have the authority to assess penalties for violations of state environmental laws.³ Administrative penalties should become an essential component of DEC's enforcement arsenal as well.

Of course, merely having the legal authority to assess penalties is not enough. DEC must also be given the corresponding budgetary resources to hire sufficient technical

² See, e.g., section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g); section 3008(a) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(a); section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 1361(a); section 16(a) of the Toxic Substances Control Act, 15 U.S.C. § 2615(a); and section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9609.

³ For example, see Washington, RCW 90.48.144.

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staff and permanent hearing officers to make the administrative penalty process work.

II. CRIMINAL PENALTIES FOR VIOLATIONS OF STATE ENVIRONMENTAL LAWS SHOULD BE STRENGTHENED

Stiff criminal sanctions are another essential component of the kind of enforcement program that is necessary to achieve full compliance with the State's environmental laws. The current liability for criminal violations of Alaska's environmental laws is inadequate.

With a few exceptions, negligent and knowing violations of the State's environmental laws are currently only class B and A misdemeanors, respectively. AS 46.03.790(a), (b). Class B misdemeanors are punishable by a fine of not more than \$1000 and by imprisonment for no longer than 90 days; Class A misdemeanors are punishable by a fine of not more than \$5000 and by a maximum of imprisonment for one year. AS 12.55.035(b)(3), (4); 12.55.135(a), (b).

These liabilities stand in stark contrast with criminal liabilities for violations of federal environmental laws. For example, under section 309(c) of the federal Clean Water Act, negligent violations are punishable by either or both maximum fines of \$25,000 per violation and/or one year imprisonment; knowing violations are punishable by either maximum fines of \$50,000 per violation or by three years imprisonment. 33 U.S.C.

§ 1319(c).⁴

Alaska's criminal liabilities should be strengthened by making negligent violations Class A misdemeanors and knowing violations Class C felonies, which are punishable by a maximum fine of \$50,000 per violation and five years' imprisonment. AS 12.55.035((b)(2); 12.55.125(e). In addition, the definition in AS 46.03.900(17) of "persons" who are subject to criminal sanctions should be amended to include "any responsible corporate officer." See Clean Water Act section 309(c)(6), 33 U.S.C. § 1319(c)(6).

The last legislature increased civil penalties for oil polluters (see SB 271) and considered tougher criminal sanctions in the oil pollution context. The legislature should now complete its mission and stiffen criminal sanctions for violations of all State environmental laws.

As to criminal liability for oil spills, in particular, two bills sponsored by the Governor and introduced in the last legislative session should become law. Among other things, HB 315 classifies as Class C felonies, oil spills of 10,000 barrels or more involving a failure to comply with an oil discharge contingency plan or a failure to adequately clean up a discharge of oil. HB 316 expands the penalties that can be levied against a defendant that is an organization by including fines equal to twice the damage or loss caused by the defendant.

⁴ See also, e.g., section 3008(d) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d); section 113(c) of the Clean Air Act, 42 U.S.C. § 7413(c).

III. DEC SHOULD HAVE THE AUTHORITY TO MAKE REASONABLE INSPECTIONS WITHOUT FIRST OBTAINING A WARRANT

The ability to make inspections to determine whether violations of the State's environmental laws are occurring is still another necessary element of a credible enforcement program. Currently, AS 46.03.860 appears to require DEC to obtain a search warrant before it can investigate possible violations. Federal environmental laws, in contrast, contain no such warrant requirement. For example, section 308(a)(B) of the Clean Water Act expressly provides the EPA with a "right of entry" and with authority "at reasonable times" to make inspections and copy relevant records. 33 U.S.C. § 1318(a)(B).⁵

Consistent with federal environmental law, AS 46.03.860 should be amended to remove the warrant requirement and thereby improve the DEC's ability to investigate potential violations of the State's environmental laws.

IV. THERE SHOULD BE NO "PRE-ENFORCEMENT REVIEW" OF DEC'S COMPLIANCE ORDERS IN EITHER AN ADMINISTRATIVE ADJUDICATORY HEARING OR JUDICIAL PROCEEDING

A sixth tool that is necessary for a sound, effective State environmental enforcement program is the ability of the enforcing agency to issue compliance orders without cumbersome procedural constraints. DEC does not presently have this ability.

Current State law (AS 46.03.850) provides DEC with the authority to issue compliance orders for known or suspected

⁵ See also, e.g., section 3007 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6927; and section 114(a) of the Clean Air Act, 42 U.S.C. § 7414(a).

violations of the State's environmental laws, but the required procedures for issuing such orders are so cumbersome as to render the compliance order an infrequently used and thus ineffective enforcement tool.

State law appears to require that, before DEC can issue an order requiring a polluter to comply with an applicable State environmental law, the agency must first notify the polluter of its finding that the polluter is or may be in violation and give the polluter an opportunity to respond to the finding. AS 46.03.850(a), (b).⁶

In addition, although compliance orders become effective upon receipt (AS 46.03.850(c)), it appears that recipients can subsequently contest the order in an adjudicatory hearing that is required to include the extensive procedural steps set out in the Administrative Procedure Act. See AS 44.62. Recipients of a compliance order can also challenge an adverse ruling by a hearing officer in court. AS 44.62.560.

By requiring DEC to defend an order at administrative and, subsequently, judicial hearings, Alaska law imposes substantial resource constraints on the use of the compliance order as an enforcement tool by DEC (and its legal representatives in the Department of Law). These constraints effectively discourage DEC

⁶ AS 46.03.865 allows DEC to sidestep this pre-notification procedure, but only in the extremely narrow circumstances, where DEC has found that there is an "actual or imminent" discharge of either oil, a hazardous substance, or a low level radioactive material.

from invoking this tool, except in extremely rare circumstances.⁷ As a result, the tool has not been used to fulfill its obvious role, as an efficient, relatively quick means for DEC to command compliance with the State's environmental laws and to compel the cleanup of unlawful discharges of harmful pollutants.

As with several of the other enforcement tools discussed above, State law regarding the procedures for issuing compliance orders does not compare with EPA's legal authority to issue orders to compel compliance with federal laws. Federal environmental law generally adheres to the sound policy of not allowing "pre-enforcement review" of EPA's compliance orders. This means that compliance orders which do not also require the recipient to pay an administrative penalty generally can not be challenged in any administrative or judicial proceeding, until and unless EPA commences a judicial proceeding to enforce the order and seeks penalties for violations of the order. At that time, the validity of the order can be questioned by the

⁷ In fact, the right of a recipient to challenge an order in an administrative adjudicatory hearing, by itself, appears sufficient to effectively discourage DEC from issuing compliance orders. DEC's budget does not include sufficient funds for a permanent in-house staff of hearing officers. Thus, when an adjudicatory hearing is requested, DEC must hire hearing officers on a contract basis. The substantial expense of such outside contracting, alone, strongly discourages DEC from issuing compliance orders.

recipient as a defense to EPA's enforcement suit.⁸

As the Second Circuit Court of Appeals recognized, in upholding the principle of no pre-enforcement review of compliance orders issued under the federal Clean Air Act:

To introduce the delay of court review of administrative action taken to ameliorate a potential public health hazard would conflict with Congress' aim to 'accelerate . . . the prevention and control of pollution.' . . . In short, immediate pre-enforcement review of compliance orders . . . would 'serve neither efficiency nor enforcement' of the Clean Air Act.

Asbestec Const. Services, Inc. v. EPA, 849 F.2d 765, 769 (2d Cir. 1988).

Not until DEC's ability to issue compliance orders is as procedurally unencumbered as that of the EPA, will the compliance order become an effective tool in the State's environmental enforcement arsenal.

V. PRIVATE CITIZENS SHOULD HAVE THE AUTHORITY TO ENFORCE THE STATE'S ENVIRONMENTAL LAWS

The final, necessary, and, perhaps, most critical component of a viable, credible State enforcement program is the ability of citizens to act as "private attorneys general" by bringing suits to enforce the State's environmental laws. This ability is nonexistent under current law.

AS 46.03.760 and 46.03.765 provide State courts with authority to compel the payment of civil penalties and to grant

⁸ For example, section 113(h) of CERCLA, 42 U.S.C. § 9613(h) expressly prohibits federal courts from reviewing challenges to compliance orders, except under limited circumstances, including a suit brought by EPA to seek penalties for a violation of the order.

injunctive relief for violations of the State's environmental laws. But AS 46.03.870 provides that the bases for the enforcement actions listed above "inure solely to and are for the benefit of the state. . . ." Similarly, AS 46.03.890 provides that only State officials are authorized to enforce the State's environmental laws.

The ability of private citizens to enforce environmental laws is a critical supplement to government enforcement because resource constraints inevitably prevent governments from taking all the enforcement measures that would otherwise be warranted. Given the DEC's severely limited enforcement resources (even if a separate enforcement unit like the one recommended above were available), citizen suits are necessary to present to the regulated community a forceful and credible message that violations of the State's environmental laws will not be tolerated.

Congress has wisely recognized the value of citizen suits as supplements to governmental enforcement and thus provided citizens with ample authority to enforce the federal environmental laws.⁹ The record of citizens suits to enforce these laws is a strong one. Citizens enforcement actions have proven not to be unreasonable avenues for harassment of industry

⁹ See, e.g., section 505 of the Clean Water Act, 33 U.S.C. § 1365; section 7002 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972, section 304 of the Clean Air Act, 42 U.S.C. § 7604; and section 310 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659.

or the EPA, but to be valuable means for stopping major violators whom the EPA had not been able to reach.

Full enforcement and, in turn, compliance with the State's environmental laws will simply not be achieved without the ability of citizens as well as the government to enforce those laws.

VI. THE LEGISLATURE SHOULD PROVIDE ADEQUATE FUNDING FOR DEC TO FULFILL ITS LEGAL MANDATE OF PROTECTING THE ENVIRONMENT

A State such as Alaska which relies on a healthy environment for many of its economic mainstays such as tourism and fisheries and yet persistently scrimps on environmental protection will continue to run the risk of environmental and associated economic degradation. Current funding levels for DEC not only preclude effective enforcement, they also result in delayed and inadequately researched permits as well as narrow interpretation of regulations intended to protect the environment. Future funding should provide for sufficient personnel, including attorneys, to provide DEC the ability to more effectively enforce Alaska's environmental laws. A commitment to increased funding would more realistically reflect the immense mandate of environmental protection assumed by DEC and the importance of DEC's success in assuring that there will be a viable environment for Alaska's long term needs. We will be working shortly towards providing the legislature with some recommendations for DEC budget needs.



Alaska State Legislature

Representative Mike Davis

District 19

P.O. Box V
Juneau, Alaska 99311
(907) 465-4930

Interim Office:
P.O. Box 81435
Fairbanks, Alaska 99708
(907) 456-8161

To: All Members
House Finance Committee

From: Rep. Mike Davis

Re: HB 409

Date: March 29, 1990

The CS for HB 409 passed out of the Judiciary Committee addresses the critical need for a stronger regulatory presence when it comes to pollution violations. In recent years the state has been plagued by hundreds of oil, chemical and hazardous waste spills, many of which the state has been forced to clean up at its own expense. During my visits to cleanup sites on the North Slope, in the Interior and at Prince William Sound, it became clear to me that tougher rules are desperately needed if we are going to keep industry to its obligation to clean up pollution.

HB 409 follows Recommendation #13 of the Alaska Oil Spill Commission report which calls for greater state oversight. If enacted Hb 409 would accomplish the following:

1) Allow the DEC access to inspect regulated facilities without consent of the operator. DEC officials have expressed frustration at being barred or delayed from entering sites in order to make routine and specific investigations. This provision allows immediate entry at all reasonable times.

2) Allow the Commissioner of Environmental Conservation to levy administration penalties of up to \$25,000 per day for pollution violations and provide for an appeal process. Administrative penalties will provide for an economical, efficient and consistent system to deal with pollution matters. This is similar to federal law and may soon be required by the EPA. Judicial review is also provided under the section.

3) Eliminate "pre-enforcement review" of compliance orders. Today, industry is allowed to challenge the orders before they go into effect, tying the hands of regulators and delaying timely solution of pollution problems. Under this change, stopping the pollution will get top priority. Challenges to the orders would still be allowed judicial review, after correction has begun.

March 29, 1990
Page Two

4) Allow the Commissioner to require environmental audits, so that the state and industry can "Trouble shoot" pollution problems before they become unmanageable. Environmental audits are used on both a state and federal level with considerable success. hundred of corporations have voluntarily adopted environmental audit program.

Section #1.

This section revises the DEC's present general access authority to include the right to copy records. This section also clarifies the present access provisions' scope. Note that it continues the requirement that the DEC obtain consent for access from the owner of occupier of the premises.

Section #2.

Allows the DEC access to "pervasively regulated facilities" to investigate suspected sources of pollution without the owners consent. Although access to facilities is required under most permits issued by the state, agencies have wound up in court over the particulars of when and where officials can investigate. These court delays have had the effect of limiting the states ability to enforce pollution laws. Constitutional law provides that a lessened expectation of privacy exists for pervasively regulated facilities and activities. A "pervasively regulated facility" is defined as a facility where the operations affect a significant public interest and are comprehensively regulated by the DEC.

Section #3.

Are housekeeping measures.

Section #4.

Establishes a new section creating an administrative penalties procedure for violation of DEC's statutes, regulations, orders or permits. The amount may not exceed \$25,000 per day for each violation. Current procedures for addressing violators are long, cumbersome and expensive, hampering the state's ability to deal quickly with pollution problems. This section establishes an administrative review process that streamlines the process of adjudicating these claims. Many states already have administrative penalties procedures. The EPA may soon require states to have a similar process in place. Section #4 also provides for an administrative hearing and judicial review of the penalties ordered.

Section #5.

Allows for a compliance order to become effective immediately to start cleanup up of a contaminated site or to stop an ongoing pollution incident. Presently, industry can challenge compliance orders before implementation, causing substantial delays, to the detriment of the environment and public health. This section also provides for an administrative hearing and for judicial review of the hearing decision.

Section #6.

Allows the Commissioner to require environmental audits conducted by in independent contractor. An environmental audit is an objective and systematic analysis of a facility's operations to insure compliance with state environmental laws and to spot pollution problems before they become unmanageable. The EPA uses a similar process that has been very successful.

Sections #7 & 8.

Amends the Civil Procedure Rule 82 to allow the full recovery of reasonable attorney's fees and costs if a person fails to pay and administrative fine (Section 4). This provision requires a two thirds vote of the Legislature.

Sections #9 & 10.

Amends the Civil Procedure Rule 82 to allow the full recovery of reasonable attorney's fees and costs for enforcement to maintain the Compliance Order (section 5). This provision requires a two thirds vote of the Legislature.

EXXON COMPANY, U.S.A

**Comments on CSHB 409
House Finance Committee
March 29, 1990**

The procedures proposed in this bill would deny all Alaska's citizens, not just oil companies, the most basic due process protections. The bill seeks to impose arbitrary and unilateral procedures in non-emergency situations. The DEC already has more than ample statutory authority to issue appropriate immediate orders in an emergency. This bill would allow the exercise of intrusive regulatory power, justifiable only in an emergency, when there is no emergency.

The current compliance order statute sets forth a three stage procedure for non-emergency situations. First, the DEC gives the citizen notice of the alleged environmental violations. The citizen then has an opportunity to meet with the department and to attempt to cure any problem. Finally, if the problem cannot be satisfactorily resolved on an informal basis, an administrative hearing is held to determine what action would be appropriate.

This existing procedure is the appropriate way to deal with non-emergency situations. In prior testimony in support of this bill, its proponents have asserted that the proposed amendments are necessary to conform Alaska's compliance order procedures to federal law. As a general rule, that is simply not correct.

As you are aware, the federal government has a very wide and

complex range of environmental statutes and regulations, many of which provide some type of compliance order authority. Most federal compliance order procedures, however, incorporate a three step notice and hearing procedure similar to Alaska's current compliance order statute. The compliance order procedures employed in Part 24 of the EPA regulations on hearings are a good example.

The EPA's three stage process protects citizens' due process rights to reasonable notice and opportunity to be heard before the government takes final action against them. It also reflects common sense. Most alleged environmental violations can be resolved without resort to formal judicial enforcement actions. The procedure proposed in HB 409 threatens Alaskans with an impossible dilemma: either immediately comply with what may be an arbitrary compliance order, or refuse to obey the DEC order at the risk of immediate penalties and force the Department of Law to file a judicial enforcement action. The current statutory procedures are far preferable to this type of confrontation. For these reasons Exxon strongly recommends that the compliance order procedures not be amended.

This bill also contains an entirely new section on nonconsensual searches of "pervasively regulated facilities." This new section is unnecessary and unreasonable. In 1977, the Alaska Supreme Court held that a similar rule which allowed OSHA inspectors to enter workplaces without a search warrant violated

the Alaska Constitution. In 1978, the U.S. Supreme Court held that an OSHA regulation allowing a warrantless search violated the federal constitution.

The language in this bill would allow the DEC to enter and search "pervasively regulated facilities," without a warrant. In the absence of an emergency, there is no legal justification for this type of search in the enforcement of environmental laws. The United States Supreme Court has held that certain types of highly regulated industries, not highly regulated facilities, may be searched without a warrant, but the businesses to which they have applied this rule have been limited to enterprises in highly regulated industries like those involving liquor and firearms. The warrantless search provisions in this bill are unconstitutional and should be taken out of the bill.

Finally, we have strong concerns regarding the administrative penalty provisions of the proposed bill. No one has presented any reasonable justification to show that administrative penalties are needed. Section 760 of the present statute provides more than ample judicial penalties.

If administrative penalties are adopted, they should at the least include the procedural safeguards contained in similar federal statutes. The bill proposes a scheme that provides for an

assessment notice that becomes final in 30 days. A hearing may be requested, but there is no indication of when or whether such a hearing will take place. The safeguards of the Administrative Procedure Act are expressly denied.

Those major federal environmental laws which do provide for administrative penalties also provide for notice and a right to a hearing before any penalty can be imposed. (The Clean Air Act, Federal Insecticide Fungicide and Rodenticide Act (FIFRA), the Solid Waste Disposal Act, the Toxic Substances Control Act, the Clean Water Act, and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).)

Under both the Alaskan and federal Constitutions, citizens who deal with the Alaska Department of Environmental Conservation should be afforded the same due process protections by DEC as they are by the federal agencies. These rights include the right to a notice of the assessment, a clear right to a hearing, comprehensive rules that describe the hearing process, and the requirement that the administrative agency make and prove its case before the citizen is required to bear the burden of suffering any penalty.

In closing, we would like to emphasize that this bill, if adopted, would seriously impact all Alaskan citizens and businesses. Alaskans, like all Americans, are entitled to basic due process protections when dealing with administrative agencies

of the state and their staff. The proposals included in CSHB 409 would significantly undermine those protections. We continue to believe that the existing statutes fairly address both emergency and non-emergency situations, and therefore we recommend that this bill not be enacted into law.

Thank you.

exxn409.com

1-23-90 Testimony of Daniel Lawn
Before the House Resources Committee

Mr. Chairman

In 1973 I received a Bachelor of Science degree in environmental resources engineering from the University of California at Humboldt.

In the fall of 1973, I joined Fluor Engineers and Constructors, the prime design and engineering management contractor for the Valdez Marine Terminal. After spending a year in the civil design and project engineering section in the LA area, I was one of the 1st two people Fluor sent to Valdez as their construction start up team.

From May 4, 1974 to March 1977, I was a field engineer/civil supervisor for Fluor at the Valdez Marine Terminal. My primary responsibilities included oversight of construction activities of the prime Earth work contractor.

I joined the Department of Environmental Conservation as an Environmental Engineer III in August of 1977, shortly after oil began flowing through the Trans-Alaska Pipeline System.

As requested; I am prepared to give you my impression from a field perspective of the Valdez Office's role in the oversight of

the Alyeska Marine Terminal. Our basic experience has been that the harder we worked, the more we found, the more difficult access to the terminal became. But let me first give you some background.

In the early days, my chief duties were the development and implementation of the field activities as they related to the Tanker Inspection Program at Valdez. In addition, I responded to most of the oil spills at the Valdez Marine Terminal, where I observed Alyeska's Contingency plan in action. I documented, analyzed and reported on the adequacy of their response.

At that time, the Prince William Sound District Office was a regional office with as many as 5 field positions and 1 clerical position.

As I recall, two positions were sole Alyeska oversight with reimbursable funding. Two other positions covered other Departmental programs and the regional supervisor's position which primarily interfaced with Alyeska Management, the several community leaders in Prince William Sound area, and other department oil program development, management and administrative functions.

In 1979 with the demise of Alaska's tanker safety program some planned positions for Valdez never became a reality. The Prince

William Sound Regional Office was downgraded to a District Office and one position was transferred to Anchorage; and the other was never filled.

Since that time, the Valdez District Office has had 3 field and one clerical position.

In addition, funding sources changed and all the positions started working in all program areas (DW, WW, AQ, SAN, OIL, etc). There was no position dedicated solely to Alyeska oversight, so oversight of Alyeska suffered and became almost non-existent or cursory at best.

In 1981 I was appointed the District Engineer/District Supervisor which was an additional work load.

In 1982 during an Alyeska Contingency Plan review, field staff used the first 5 years of oil spill response and clean up observations to say Alyeska's cleanup response was inadequate and their skimmer capacity highly overrated.

In 1984, I wrote two memos which described in some detail a general "disemboweling" of the Alyeska trained cleanup team and documented broken down clean up equipment.

From 1977 up to this period, 1984, Valdez field staff had

relative easy access to the Terminal although not enough time or energy to spend much time there.

In 1985 the Department began responding to allegations that their were serious problems at the Valdez Marine Terminal.

A good portion of the Valdez Field staff's workload was reassigned and increased so that we had an increased presence at the Terminal. I became the Department's principal investigator in Valdez.

This investigation has taken place over several years and covered many topics. One of which was a monumental undertaking of reviewing thousands of pages of reports and documents concerning the ballast treatment plant. The Valdez field office staff's knowledge and understanding of the system allowed us to evaluate some of these reports. Our work helped the Department set new discharge limits in the NPDES permit.

Also during this time the Department undertook another review of the Alyeska Contingency Plan. This review was hampered by the resistance of Alyeska to make changes in their plan and to drastically improve implementation of the plan. This delaying and resistance turned a few week process into an 18 month exercise.

Since 1985 when the Department began to investigate these several allegations, it seemed to all the Valdez field staff that the harder we worked, the more we found, the more we found, the more difficult access to the terminal became. The restricted access delayed entry onto the terminal to a point that on some occasions field staff were unable to carry out inspections.

I can give you some examples:

In 1986, Valdez field staff documented access problems over a 16 day period. During that time the staff made over 70 phone calls to Alyeska to schedule the 28 trips to the terminal. About 1/3 of the trips were for unannounced compliance sampling, 1/3 for spill response, and 1/3 related to oversight of the Ballast Water Treatment Tank cleaning sludge removal process.

Department staff lost almost two man days trying to contact Alyeska to schedule visits. After the visits were scheduled, we lost 1/2 day waiting at the gate. We lost another 1 1/2 days being taken or directed to go somewhere other than where we needed to go.

In addition, on several occasions we were prevented from inspecting certain activities for several hours (2-4) and in one case that delay was over 20 hours. On more than one occasion the delay actually prevented the inspection due to other commitments.



Northern Alaska Environmental Center

218 DRIVEWAY
FAIRBANKS, ALASKA 99701
(907) 452-5021

***** NEWS RELEASE *****

March 9, 1989
Release: Immediately

Contact: Rex Blazer
907-452-5021

HAZARDOUS AND TOXIC WASTES DUMPED, INJECTED INTO PIPELINE.

Environmentalists learned this week that the U.S. Environmental Protection Agency has determined that the MAPCO refinery near North pole, Alaska illegally dumped toxic and hazardous waste into the Alaska pipeline as well as the air, ground, and water of this suburban Fairbanks community.

"While it is legal to re-inject things like dirty fuel and oil into the pipeline, it most definitely is not to inject things like aniline, sodium hydroxide, and hydrogen peroxide" said Carl Reller, hazardous waste coordinator for the Northern Alaska Environmental Center. "These wastes ultimately end up at the Valdez terminal where the water soluble substances go directly into Valdez harbor, while the oil soluble wastes could damage refinery techniques and equipment."

The Alaska Department of Environmental Conservation has found more than a quarter of a million gallons of fuel in the ground under MAPCO thus far.

* MORE *

Only this week did environmentalists learn that on January 6 EPA quietly ordered MAPCO to begin an extensive and costly clean-up that will take nearly three years and require monitoring the ground water for decades. Over 10,000 people live within a three mile radius of the contaminated area, which is on land leased from the state by MAPCO.

Environmentalists called on the state Department of Environmental Conservation and EPA to establish an advisory group as provided for under the Resource Conservation and Recovery Act. "The drinking water wells for North Pole are less than a half mile from the contaminated zone and in the path of the toxic plume, yet the public has had no opportunity to become involved," Reller said. "MAPCO claimed that the public can't even be told the location of their monitoring wells. We feel the people of North Pole have the right to be involved in this critical process."

"The situation at MAPCO is extremely disturbing in light of other serious compliance problems stemming from North Slope oil development." said Rex Blazer, Executive Director of the Northern Alaska Environmental Center, who cited hazardous waste problems at Tesoro's Kenai refinery and a recently leaked EPA report which documented serious environmental damage resulting from improper and careless management of chemical and oil wastes on Alaska's North Slope. "If this

sort of thing is going on right next to our major population centers and indeed within a few miles of regulatory agency offices, how can we trust the oil industry to operate in compliance with environmental laws in the distant and more sensitive lands of the Arctic National Wildlife Refuge?"

* END *

MAPCO Oil Refinery
Compliance Chronology

July 13, 1984

DEC conducts a Superfund inspection of MAPCO using an independent contractor. Toxic chemicals are present which if spilled or discarded would be hazardous waste.

August 1986

DEC conducts a second Superfund inspection of MAPCO using an independent contractor. Toxic chemicals are present and MAPCO employees explained that when old or used they are dumped into the pipeline.

March 5, 1987

EPA headquarters requests DEC to conduct an official hazardous waste inspection of MAPCO. DEC reports that the injection of hazardous waste into the pipeline is not "disposal". DEC notes that north slope oil production facilities dump waste into the pipeline as do pump stations along the way. DEC verbally asks for a copy of a log book which contained the record of what was injected into the pipeline. MAPCO denies DEC the logbook. DEC labels their conclusions as a "training enforcement exercise".

May 15, 1987

The federal Government Accounting Office (GAO) opened an investigation into allegations that DEC compromised their enforcement at MAPCO.

MAY 15, 1987

EPA orders MAPCO to provide information concerning their hazardous waste management activities.

May 16, 1987

MAPCO states: "One, we do not handle toxic waste at the North Pole refinery. Two, We have not injected toxic waste into the Trans Alaska Pipeline. Three, we have not pumped hazardous waste into the pipeline." DEC denies enforcement of MAPCO was compromised

June 24, 1987

DEC agrees with the Ombudsman's findings that "DEC has not fulfilled the spirit and letter of the law."

July 9, 1987

A special investigator from the GAO office meets with DEC employees.

July 15, 1987

The DEC Commissioner meets with the EPA Administrator in Washington D.C.

MAPCO Oil Refinery
Compliance Chronology

September 2, 1987

The Alaska Ombudsman reviews DEC's comments and restates the problems of lax enforcement and closes the case.

February 23, 1988

EPA and MAPCO agree to resolve hazardous waste violations through an Administrative Order.

April 7, 1988

The GAO with holds the MAPCO/DEC report as "confidential". The DEC Commissioner states, "I can only assume we handled the matter properly."

June 16

August 1 and

September 7, 1988

EPA and MAPCO negotiate the Compliance Order.

July 20, 1988

EPA conducts an intensive hazardous waste investigation of the MAPCO refinery using an independent contractor.

October 23, 1988

EPA and MAPCO complete a draft Compliance Order.

December 1988

EPA determines MAPCO dumped hazardous and toxic waste into the pipeline, into surface waters, and on the ground. MAPCO is declared as having a "RCRA surface impoundment", the most difficult kind of hazardous waste dump to clean up (EPA Docket 1087-12-01-3008a).

January 1989

120 Oil Refinery
Compliance Chronology
Tesoro Oil Refinery
Compliance Chronology

Tesoro spills 120,000 pounds of hazardous waste
August 12, 1980 ~~120,000 pounds of hazardous waste~~
August 12, 1980 ~~120,000 pounds of hazardous waste~~

Tesoro notifies EPA of hazardous waste activities.
January 3, 1982

September 1980 information from Tesoro concerning spill and
DEC inspects Tesoro hazardous waste pits and issues a

Compliance Order requiring Tesoro to stop violating Alaska
May 2 law, no record of compliance was found. ~~120,000 pounds of hazardous waste~~
EPA inspects Tesoro

October 8, 1980 Tesoro claims records are ~~inadequate~~
Tesoro requests DEC to allow hazardous waste disposal pits
be permitted as normal solid waste landfills, application is
seriously deficient, DEC denies permit. hazardous waste
Tesoro was ~~inspected~~

November 11, 1980 ~~will investigate - no record of records~~
Tesoro files a RCRA part A application for hazardous waste
activity, application is incomplete.

July 24, 1981
November 14, 1980 Tesoro ~~information~~ regarding spill of

Tesoro receives a report from their consultant identifying
pits containing over one million pounds of hazardous waste.

1981-1982 informs Tesoro that it does not have an OIT spill

Tesoro claims DEC provided verbal approvals for hazardous
waste activities, no written records were kept.

January 1982 conducts an inspection of Tesoro ~~finds spill~~

EPA acknowledges Tesoro's claim that the refinery is
designed to manage up to 30,000,000 pounds of hazardous
waste each day (three types of RCRA waste). ~~action to Tesoro.~~

April 14, 1983 multiple hazardous waste violations.

Tesoro attempts to use hazardous waste for berm material to
"protect" the hazardous waste pits, request is denied by
EPA.

September 10, 1983
Closure costs are estimated to be \$1,500,000.

November 10, 1983 ~~cost \$10,000 for violations found on~~

Tesoro proposes to dump hazardous waste into Cook Inlet via
a ballast water treatment plant, EPA initially denies then
later approves Tesoro's request. ~~ground water is severely~~

July 5, 1984 ~~area.~~

EPA meets with Tesoro and informs them of nine hazardous
waste violations.

July 6, 1984 ~~action presents a substantial threat to human health~~
DEC inspects Tesoro and finds unpermitted hazardous waste
activities.

Tesoro Oil Refinery
Compliance Chronology

2

August 8, 1984

Tesoro spills ~~over~~ 120,000 pounds of hazardous waste, DEC approves a ~~grossly~~ inadequate clean up.

January 3, 1985

EPA requests information from Tesoro concerning spills and disposals of hazardous waste.

May 28, 1985

EPA inspects Tesoro and finds multiple hazardous waste violations. Tesoro claims records are kept in Texas but when pressed by inspector, Tesoro admits required hazardous waste records do not exist. Oily tar sludges (which appear identical to hazardous waste) are seen in a road side ditch. Tesoro was apparently illegally dumping hazardous waste, DEC promise EPA it will investigate - no follow up records were found.

July 24, 1985

EPA requests Tesoro for information regarding spillage of hazardous waste.

November 18, 1985

DEC informs Tesoro that it does not have an Oil Spill Contingency plan.

February 6, 1986

EPA conducts an inspection of Tesoro and finds numerous violations.

April 1, 1986

DEC recommends EPA issue a Notice of Violation to Tesoro because of multiple hazardous waste violations.

September 12, 1986

EPA issues a Complaint and Compliance Order because Tesoro ignored the July request for information, Tesoro is fined \$38,750.

January 23, 1987

EPA fines Tesoro \$19,000 for violations found on February 1986.

June 2, 1987

Tesoro informs EPA that the ground water is severely contaminated.

August 24, 1987

EPA issues a Consent Order to Tesoro because ground water contamination presents a substantial threat to human health

FDNM 2/11/89

Mapco to pay fine, changes procedures

By BRIAN O'DONOGHUE
Staff Writer

Mapco Alaska Petroleum has agreed to institute new test procedures and pay an \$80,000 fine to conclude a 2-year-old investigation into past waste disposal violations at its North Pole oil refinery.

"The whole thing was largely a matter of administrative issues," said Mapco Vice President Buki Wright Jr. "We did agree to pay the fine. Certain administrative procedures have been changed and corrected. But no criminal charges were even considered."

The settlement was publicized this week by the Northern Alaska Environmental Center, a Fairbanks-based environmental group that wants a citizens advisory group created to monitor ongoing clean-up efforts at the refinery.

"It would work to everyone's benefit, because the public would gain more confidence in the methods they're using," said Carl Reller,

the center's hazardous waste expert.

Both the testing requirements and the fine arose as a result of inspections by representatives of the U.S. Environmental Protection Agency in March 1987. During those inspections, conducted by the state Department of Environmental Conservation, a number of drums containing hazardous cleaning solvents and refinery by-products were found improperly stored. The company's internal record-keeping and disposal program for hazardous materials were also determined to violate federal guidelines.

According to Wright, the majority of the problems addressed in the consent orders concerned technical violations of the EPA's complex waste monitoring regulations. He denied the environmental center's assertion that EPA determined Mapco has injected waste products into the trans-Alaska pipeline.

"The (EPA consent) order in no way concluded or implied that Mapco has dumped toxic or hazardous waste into the pipeline," Wright said. "We did not put anything into the pipeline—period."

While the consent orders make no reference to the practice, Reller said EPA's file on the oil refinery contains four separate reports, by environmental officials and independent consultants, referring to the possibility such waste injection occurred. The most recent report, produced last September by California consultant A.T. Kearney, states: "Tank 112 stores recovered oil from Tank 192 as well as distillation residues and other process wastes. Material in this tank is piped to TAPS. According to facility personnel, this tank has never been cleaned out."

"Certainly we have to get the return oil back into the pipeline," Wright said when informed of the
(See MAPCO, Back Page)

MAPCO

(Continued from Page 1)

EPA reports. "But nothing collected from the sumps is injected into the pipeline. Those consent orders found we did not put anything hazardous into the pipeline."

Reller praised the new protections and testing requirements specified in the consent orders. But he and center Executive Director Rex Blazer cite the refinery's past problems as grounds for opposing development of the Arctic National Wildlife Reserve.

"The situation at Mapco is extremely disturbing in light of other serious compliance problems stemming from North Slope oil de-

velopment," Blazer said. "If this sort of thing is going on right next to our major population centers and indeed, within a few miles of regulatory agency offices, how can we trust the oil industry to operate in compliance with environmental laws in the distant and more sensitive lands of the Arctic National Wildlife Reserve?"

Wright believes the center's interest in Mapco's clean-up plans is rooted in the controversy over opening the refuge to development.

"There's nothing new about this," he said. "This whole thing is just a ploy to discredit ANWR. It has very little to do with Mapco."

Alyeska gets tough with state

3-10

Pipeline company demands DEC inspections by the rules

AIR POLLUTION REVIEW: Alyeska wants to do its own, rather than have the state or federal government do inspections. E-6

By **PATTI EPLER**
Daily News reporter

Alyeska Pipeline Service Co. has told the state it will exercise tighter control of environmental inspectors who regularly visit the Valdez oil shipping terminal.

The pipeline company on Friday said it would no longer allow regulatory officials to bring photographic equipment on routine inspection visits unless they get prior approval from the terminal superintendent.

Moreover, Alyeska told the state Department of Environmental Conservation, the company will now enforce rules governing DEC's visits that have been largely ignored by both sides for the past few years. The rules require that the state tell Alyeska when it wants to visit the terminal, that DEC officials be accompanied at all times by Alyeska personnel and that DEC officials ride in Alyeska vehicles. Former DEC commissioner Bill Ross agreed to those rules in 1986.

Friday's directive, addressed to Dan Lawn, DEC's Valdez supervisor, comes as a dispute between DEC and Alyeska over air pollution problems is moving closer to court.

State lawyers and company counsel have recently been writing each other letters arguing over whether Alyeska has to apply for a new permit governing the release of tons of toxic hydrocarbons into the air at the terminal.

Alyeska insists the air pollution dispute, as well as a three-year investigation into water pollution allegations, has no bearing on Friday's missive to DEC.

Instead, the company asserts, DEC's Lawn has recently taken to harassing employees and interfering with the company's work.

"He's become kind of a jerk," said Tom Brennan, an Alyeska spokesman. "He's basically just a troublemaker."

Brennan said Lawn has sometimes asked Alyeska to shut down operations so he could inspect them or take pictures, and that he has created hazardous situations for himself and employees.

Recently, Brennan said, Lawn showed up with a video camera and filmed operations at

See Back Page, **ALYESKA**

ALYESKA: Pipeline company wants state inspections by the book

Continued from Page A-1

the company's wastewater treatment plant. Brennan said Lawn was "sticking the camera in employees' faces and interviewing them on a spot basis."

"We're not trying to interfere with him doing his job," Brennan said. "As a matter of fact the law allows for inspections on short notice."

"But what we have here is harassment by a regulatory official ... and that's interfering with work we're doing to benefit the environment," he added.

Lawn, who has been inspecting the Alyeska terminal for 10 years, was miffed by the allegations of harassment and safety viola-

tions. He considers himself a professional who knows better than to use a flash around volatile gases, and he denies sticking a camera in anyone's face.

But he said he wasn't particularly surprised that he's been singled out by the company.

"I'm one of the only people who looks at them on a regular basis," Lawn said. "When you get one inspector going back 10 years, you finally figure out that what they say sometimes doesn't make sense."

Lawn and Lawn's boss, Bill Lamoreaux, suggested Alyeska may be trying to discredit Lawn because Lawn recently wrote a highly critical review of an Alyeska scientific study that's central to an argument over water pollution.

Lamoreaux said he's never gotten any complaints about Lawn from Alyeska. "They have not brought anything to my attention so I'd have to assume they're just fabricating these things," he said.

Generally, Lamoreaux said, it appears Alyeska "wants to circumvent our ability to collect information ... to reduce the staff's ability to document violations."

One common method to record operations and violation has been to take pictures, Lamoreaux said.

Asking permission to bring a camera, as well as waiting for Alyeska personnel to escort officials around the facility, causes unnecessary delays that hinder inspections or investigations, he said.

Alyeska isn't the first oil company to try to control who goes where or does what. North Slope operators and state agencies routinely skirmish over access.

The lawyers usually are called in to sort it out, said Larry Dietrick, DEC's director of environmental quality. He acknowledged that some of the oil companies' concerns are legitimate and arise out of safety risks.

Earlier this summer, state officials responsible for overseeing North Slope operations reported oil companies wanted to accompany them on field inspections. When that request was turned down, company security guards followed inspectors around in company vehicles for a few days but then disappeared, said.

Attached #13

Anchorage Daily News



Winner, 1976 Pulitzer Prize Gold Medal for Public Service

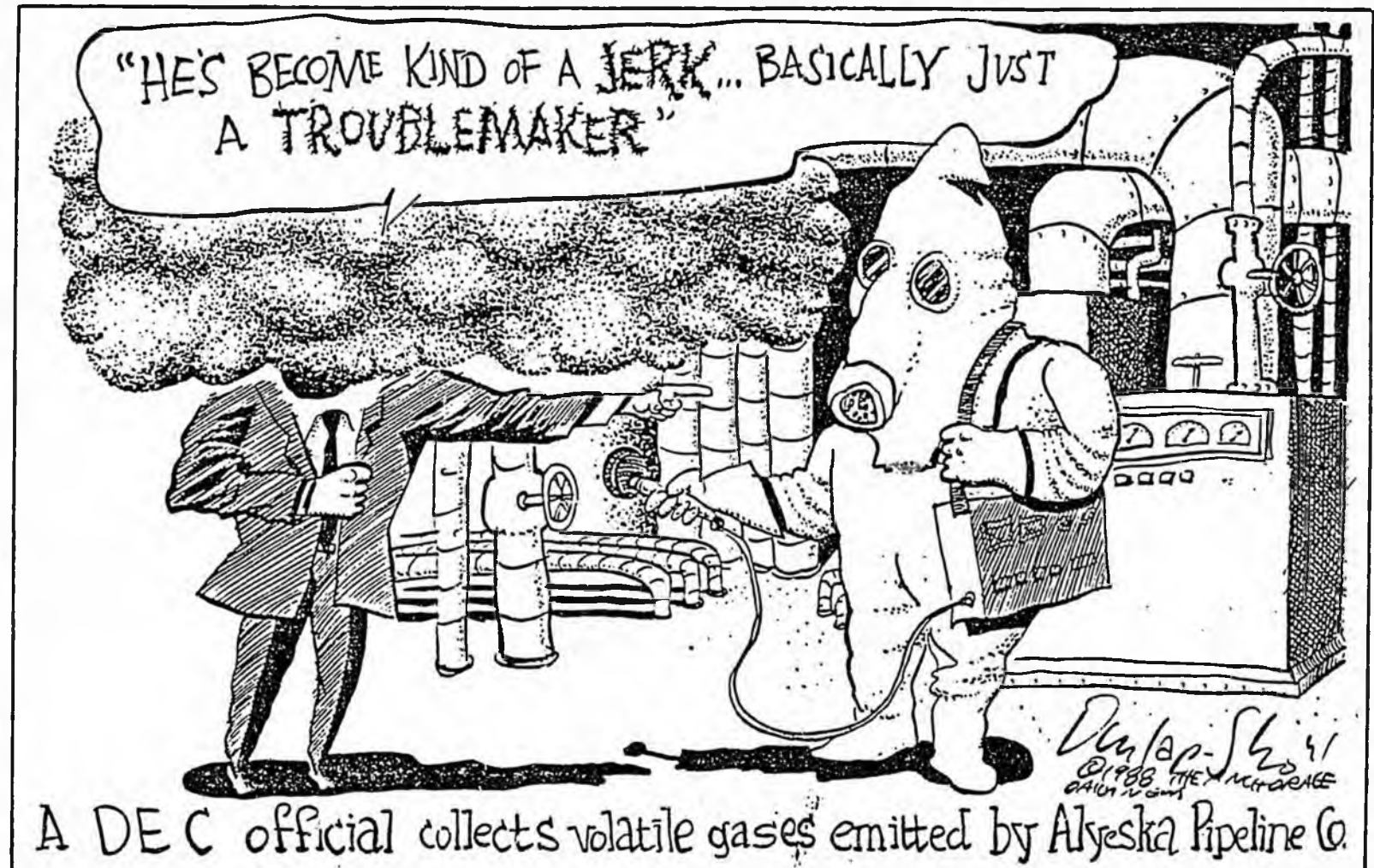
Gerald E. Grilly
Publisher

Howard Weaver
Managing Editor

Michael Carey
Editorial Page Editor

Katherine Fanning, Editor and Publisher 1971 to 1983
Lawrence Fanning, Editor and Publisher 1967 to 1971

Founded in 1946 by Norman C. Brown



Since 1985 when the Department began to investigate these several allegations, it seemed to all the Valdez field staff that the harder we worked, the more we found, the more we found, the more difficult access to the terminal became. The restricted access delayed entry onto the terminal to a point that on some occasions field staff were unable to carry out inspections.

I can give you some examples:

In 1986, Valdez field staff documented access problems over a 16 day period. During that time the staff made over 70 phone calls to Alyeska to schedule the 28 trips to the terminal. About 1/3 of the trips were for unannounced compliance sampling, 1/3 for spill response, and 1/3 related to oversight of the Ballast Water Treatment Tank cleaning sludge removal process.

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Attached # 11

Thurs

Business

Records verify pipeline en

Pollution control flawed for years

By Bob Ortega
Times Writer

Over the last eight years, the air pollution control system at the trans-Alaska pipeline's Valdez terminal has been shut down an average of more than one day in five, according to operating logs, allowing uncontrolled emissions of toxic hydrocarbons into the air.

The system has been fully operational fewer than two days a month, being run at partial capacity the rest of the time, also according to logs kept by the Alyeska Pipeline Service Co., which operates the pipeline.

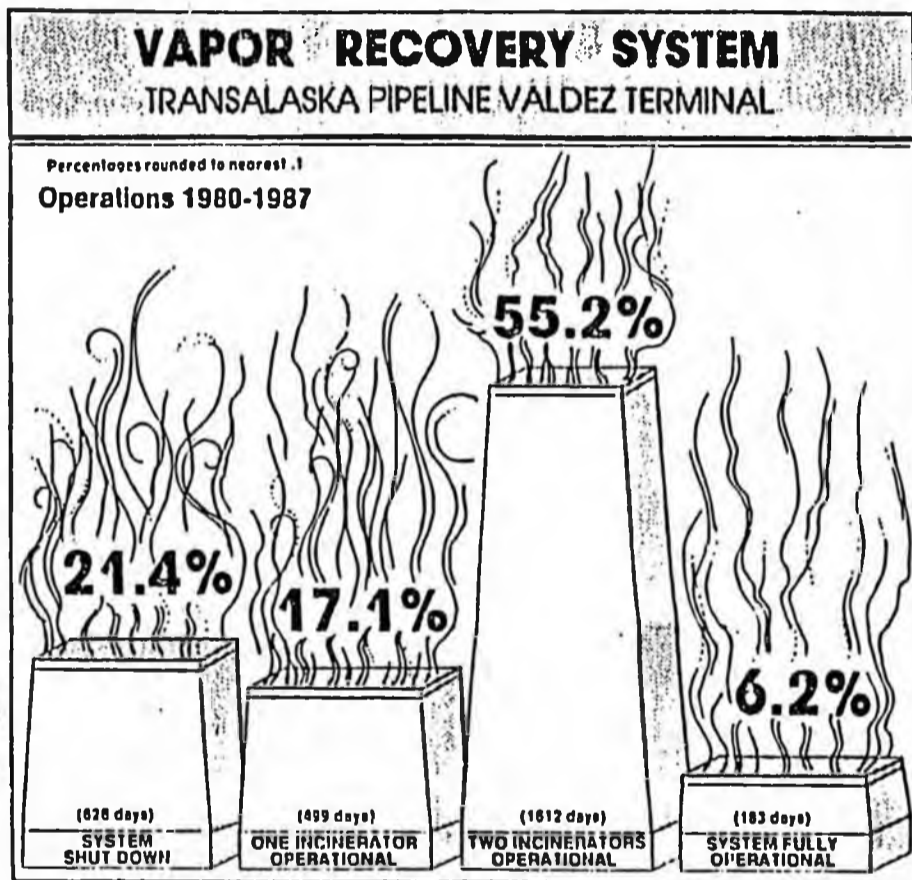
Air pollution at the Valdez terminal has been under investigation by state and federal environmental officials since last fall. Now, records turned over by Alyeska to Alaska's Department of Environmental Conservation confirm that thousands of tons a year of toxic hydrocarbons have been allowed to escape into the air.

Several months ago, based on limited data, the DEC estimated 40 tons of hydrocarbons an hour were being emitted last year whenever the system was down — 10 weeks in all.

Now Alyeska estimates that since December 1986, the terminal has produced roughly four tons of hydrocarbon vapors an hour when ships are loading and slightly more than nine tons an hour the rest of the time — figures that still would indicate more than 9,000 tons of emissions in those 10 weeks. And there are more questions about possible emissions when the system is operating at partial capacity.

According to Alyeska's records, problems with the air pollution control system date back to at least 1980. The system was down for two months that year, for nine months in a row starting in May 1981, and for considerable periods of time in 1982, 1985 and 1986. Last year, it was down for 74 days.

Alyeska environmental advisor Dick Mikkelsen blamed the shut-downs on unexpected corrosion to the system's pipes and pumps, and on



Source: Alyeska Pipeline Service Co.

posed to burn up waste gases. He said all three incinerators and the rest of the system are now fully operational.

But officials at the Environmental Protection Agency said Alyeska should not have to shut the system

down so frequently for repairs.

"Because of the extended periods of downtime we don't feel that these are acceptable maintenance proce-

See Pollution, page E-3

DEC orders air pollution tests

The state Department of Environmental Conservation says the operators of the trans-Alaska pipeline have violated state law by failing to report the nature and extent of air pollution caused by operations at the pipeline's Valdez terminal.

A formal notice of violation issued by the DEC orders Alyeska Pipeline Service Company to conduct tests by the end of this month to provide accurate data about the sulfur content and the total emissions from a pollution control system at the terminal.

Last fall, state environmental officials estimated that operations at the terminal were emitting thousands of tons of air pollutants

been trying to get hard facts on how much and what kind of pollutants are getting into the atmosphere. The March 18 notice says that Alyeska has failed to provide state investigators "accurate and true information."

"As acknowledged by your staff on March 7, 1988, laboratory and sampling technology for (reports on the nature and amount of emissions) has neither been appropriate nor valid," wrote DEC regional supervisor Bill Lamoreaux in a hand-delivered letter to Alyeska.

Alyeska spokesman John Ratterman says the company will conduct

E

missions Shortages limit agency monitoring

By Bob Ortega
Times Writer

State and federal environmental officials say they learned only recently that air pollution control equipment at the trans-Alaska pipeline's Valdez terminal has been shut down for extended periods over the last eight years.

Critics say that raises serious questions about the lack of oversight by Alaska's Department of Environmental Conservation and by the federal Environmental Protection Agency.

"The agencies, because they're understaffed and underbudgeted, have relied on Alyeska to monitor itself," said Dr. Riki Ott, a toxicologist representing a Cordova fishing union, "and we can see now it has not worked."

DEC Regional Supervisor Bill Lamoreaux said Alyeska — as well as Alaska's oil industry in general — has been allowed to police itself because neither the EPA nor the DEC "has ever been staffed to do all the checks necessary for compliance."

While Alyeska often let the EPA know about imminent shutdowns, it usually didn't provide follow-up notices saying how long each shutdown lasted. By way of explanation, Alyeska spokesman John Ratterman pointed to a 1983 letter from the EPA saying the agency felt it lacked authority to enforce the standards that required the pollution control system in Valdez.

But Lamoreaux said Alyeska still should have kept the state informed.

"They have an air permit from us, regardless of anything the EPA does or doesn't require," he said.

Both Lamoreaux and EPA environmental protection specialist Ruy Nye said that until recently the agencies had not understood the extent of the problem.

Ott is calling for establishing an independent review board, funded by Alyeska, to monitor the company's compliance with pollution permits.

Pollution: Flaws mar control system

Continued from page E-1

dures." EPA spokesman Ray Nye said.

The original design of the "vapor recovery system" called for four incinerators. But Alyeska determined that fewer would suffice, so three were constructed.

From 1980 through 1986, there were a total of 23 days when all three incinerators and the rest of the system were up.

Most of the time, Alyeska operated on two incinerators — enough to handle the vapors, the company said. Roughly one day in six, only one incinerator was on. One day in five, all were shut down.

Environmental officials, who received the logs last week, still don't know what that means in

terms of how much pollution was produced. What's at issue — beyond the quality of the air in Valdez — is whether all the shutdowns constitute a violation of Alyeska's air permit and whether the company should pay substantial fines.

Investigators are also focusing specifically on the company's operations last year.

In December 1986, oil producers on the North Slope began adding 50,000 barrels a day of natural gas liquids, or NGLs, to the oil being pumped down the line. Because NGLs vaporize far more readily than crude oil, officials say emissions may have increased dramatically since then.

Mikkelsen says recent tests by an Alyeska contractor, with all three incinerators running, show the system can handle all the va-

pors being generated.

But there are questions about Alyeska's data. In a March 16 memo sent to the DEC, the company said the system's capacity to handle hydrocarbon vapors was more than adequate when three incinerators are operating at 1,400 degrees.

But operating graphs obtained by KIMO-TV several months ago show that for at least three months last year the incinerators were operated at temperatures between 700 and 1,100 degrees. And an Alyeska memo leaked along with the graphs indicates the incinerators have been run at

those lower temperatures for at least seven months.

Mikkelsen referred questions about the operating temperatures to Alyeska's engineering manager, Ivan Henman, who was out of town. But Mikkelsen said the "set-points" might have been lowered because of problems with the brick refractories.

"Obviously if the temperatures are lower, they're burning less," said Lamoreaux. "That's one of the things we're looking at," he said, to determine whether "the system even has a chance to keep up with the volume of pollutants."

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ASSOCIATED PRESS

Minnesota, holds a young bald eagle being

System snafu forces Valdez shutdown

Pipeline pollution system will need major overhaul

By BOB ORTEGA
Times Writer

Equipment problems at the trans-Alaska pipeline's Valdez terminal have forced the pipeline's operators to shut down parts of an ailing air pollution control system.

That system will operate at two-thirds capacity for several weeks, while the Alyeska Pipeline Service Co. carries out inspections and repairs, said Alyeska vice president Ivan Henman. It is not clear how much additional emissions will be released as a result, said Alaska Department of Environmental Conservation officials.

Alyeska and the DEC have been at an impasse for several months. Both sides agree that the air pollution control system badly needs a major overhaul. But the DEC won't give permission for a proposed 10-week shutdown to carry out repairs on the system unless Alyeska applies for a variance from its air control permit.

Alyeska officials — while making no provision to deal with thousands of tons of pollution that would be emitted into the air during the shutdown — insist that legally, they don't need a variance, and they say the company won't apply for one.

Meanwhile, the system continues to deteriorate, leading to

the current partial shutdown for temporary repairs.

Hydrocarbon vapors from the millions of barrels of oil that move through or are stored at the terminal each day are routed to three incinerators to be burned up. One of those incinerators has been shut down for the last eight days. Monday, under a low overcast, fishermen converging on the port for a pink salmon opening complained about pollution from the terminal.

"It just stunk," said Cordova seiner Tom Copeland. "As soon as we came around the corner at the narrows, the natural gas fumes were just tremendous, to the point where people were joking about not lighting any cigarettes. It pervaded the whole bay."

Another seiner, Ross Mullins, said there was a blue haze over most of the port.

"We were five miles away when I noticed it. It was like when you're driving on the New Jersey turnpike and you get near Bayonne. There was a definite hydrocarbon aroma."

Henman said the haze might have been due to smoke — "particulates" — from oil tankers. He said that at the distance the fishermen must have been from the terminal, he doubted there'd be any detectable smell either from

See Valdez, page B-2

Attached #6

Report calls for changes by Alyeska

Chemist says treatment of wastewater not the best

By PATTI EPLER
Daily News reporter

A process that removes toxic hydrocarbons from oily wastewater at the Valdez oil-shipping terminal is releasing uncontrolled amounts of cancer-causing substances into the air, according to a leading expert on treatment systems.

The so-called biological treatment process used by Alyeska Pipeline Service Co. and tentatively approved by the federal Environmental Protection Agency should be abandoned in favor of a system that not only removes hydrocarbons from the water but captures them in the air as well, California chemist Ihor Lysyj says in a report to the state.

Alyeska officials immediately criticized the concerns as misleading and exaggerated.

An EPA official said the agency had considered alternate treatment methods but liked the biological process the best. Tests of the air near the treatment facility showed hydrocarbon levels well within workplace standards, the EPA has said.

The report was released Wednesday by the Alaska Department of Environmental Conservation as part of its continuing review of a new environmental permit for Alyeska's wastewater treatment plant. The state wants even tighter controls on pollution than the

See Back Page, OIL TERMINAL

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PRICE

SPECIAL REPORT

Corrosion along the 800-mile
trans-Alaska pipeline could result
in a multibillion-dollar repair bill
costing the state millions in lost taxes

By **GEORGE FROST**
and **PATTI EPLER**

Daily News reporter
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The trans-Alaska pipeline, one of the biggest engineering feats of the petroleum age, is under fierce attack by an elemental force of nature.

The \$9 billion oil-delivery system is pitted with rust in hundreds of locations, and the repair bill could run into the billions of dollars.

Alyeska Pipeline Service Co., which runs the pipeline for the seven major oil companies that own it, vows the pipeline system is sound. Trouble spots are confined to isolated areas, Alyeska says. But the company stops short of assuring there is no chance of a rupture.

The danger of a disastrous oil spill is only one consequence of the pipeline's corrosion.

The state treasury also will be depleted. Pipeline owners are paying for repairs by raising their tariffs — or fees — for carrying the oil from Prudhoe Bay to Valdez. This higher fee lowers the value of North Slope crude and this year alone will cost the state an estimated \$21 million in taxes and royalties. In the next few years, the treasury could lose perhaps \$200 million due to corrosion repairs. And less oil revenue means the state will be sending Alaskans smaller permanent fund dividends each year.

Please see Page A-6, **PIPELINE**

Federal agencies caught off-guard by extent of corrosion

By **PATTI EPLER**
and **GEORGE FROST**

Daily News reporter
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In April 1988, Perry Francis gave the trans-Alaska oil pipeline his blessing. "I am convinced that corrosion is under control on (the pipeline) and the corrosion program is working effectively," wrote Francis, a federal Bureau of Land

Management engineer, in a memo.

Less than six months later, Alyeska Pipeline Service Co. was reporting an alarming amount of corrosion on the 800-mile pipeline; more than 200 spots were suspected of serious rust.

Last July, 15 months after Francis concluded corrosion was under control, Alyeska quadrupled its estimate of

trouble spots. Alyeska said it would have to spend hundreds of millions of dollars to save the pipeline.

BLM and the federal Department of Transportation, both of which regulated the pipeline, conceded they were caught off guard when substantial corrosion surfaced. Now DOT is investigating possible violations of federal law.

Both agencies are hiring more engineers and vow to scrutinize Alyeska more closely.

For the past 13 years, both agencies' oversight consisted largely of accepting whatever Alyeska told them about the pipeline and corrosion. They lacked expertise to interpret corrosion data supplied by the

Please see Page A-8, **REGULATORS**

The corrosion crisis has provoked an engineering and construction boom that could grow into the biggest Alaska project since the pipeline was built in the mid-1970s. Union hiring halls expect calls for hundreds of truckers, pipe fitters, carpenters and laborers in a corrosion fight that could continue as long as the pipeline moves oil.

Alyeska has assembled a team of hundreds of people to combat the corrosion.

The company has launched an accelerated repair program and last year welded new pipe over 31 spots where the main line was judged too weak to safely contain the crude.

Over the next three years, Alyeska says, it will spend as much as \$800 million on corrosion control. The state thinks the repair bill could top \$1.5 billion. No one knows the price tag for sure until Alyeska digs up more pipe and completes a thorough analysis, the company says.

The worst corrosion discovered so far has been confined largely to a 14-mile segment, 160 miles south of Prudhoe Bay, where the pipe is buried in a floodplain and its corrosion-protection coating is peeling off.

But throughout the 800 miles of pipeline Alyeska has found hundreds of problem spots.

The pipeline itself is not the only Alyeska facility under attack by rust. Other problems include:

- Interior corrosion at the eight northernmost of the pipeline's 12 pump stations has gotten bad enough to require \$50 million in repairs next year, with \$30 million going to rebuild Pump Station 3 just north of the Brooks Range.

- At the Valdez terminal, where 75 tankers call each month to haul crude oil to Lower 48 refineries, several key environmental protection systems have been riddled with corrosion for years, and storage tank bottoms are getting rusty. Repairs are costing at least \$125 million.

- Corrosion has attacked gas lines providing fuel to pump stations 1 through 4. No cost estimate for repairs is available.

- At North Slope oil fields, corrosion keeps dozens of technicians busy every day. Arco Alaska Inc. and BP Exploration (Alaska) Inc. will spend \$34 million this year to fight rust. For Arco, the Prudhoe Bay problem is so serious the company spends 20 percent of its field operating budget on corrosion.

Alyeska's corrosion problem has prompted an investigation by the federal pipeline safety office, according to Jack Overly, head of that agency's Denver office.

The company faces fines of hundreds of thousands of dollars if investigators find it broke safety rules building or maintaining the pipeline.

WHAT HAPPENED?

All metal is subject to decay. At its most elemental level, pipeline corrosion is simply the process of steel deteriorating into its original state. Energy used to turn iron ore into steel doesn't stick around forever; corrosion is the goodbye note.

The trans-Alaska pipeline is the nation's most important oil pipeline. Daily it moves 1.9 million barrels of hot petroleum — one-fourth of U.S. oil production — toward refineries that turn it into gasoline, jet fuel, heating oil, plastics and other petroleum products.

Almost half the pipeline is underground, an environment especially conducive to corrosion. The buried pipe is encased in a thick bulb of warm soil that has been thawed by the hot oil in the pipe. The melted soil conducts the electrical charges that cause corrosion far more readily than frozen permafrost.

"The warmer the earth from pipeline heat, the more active the corrosion," wrote A.W. Peabody, designer of Alyeska's corrosion system, in a 1979 technical journal.

Pipe buried in river drainages is particularly vulnerable because it's bathed in moisture.

The company says it always has done everything it could to stop corrosion. To do less, said spokesman George Jurkowich, would be to jeopardize "Goal 1," moving oil through the pipeline.

From before construction, oil executives promised the pipeline would be protected by the best means available. The steel was a special alloy, highly resistant to rust, they testified. The pipe was to be coated with a proven epoxy, and sealed with special insulating tape to keep out water and impurities that can cause rust.

Alyeska's corrosion plan in 1974 — the year construction began — promised to "insure the integrity of the pipeline from a corrosion standpoint over an operating life of 30 years."

Alyeska adapted familiar methods to fight corrosion in the harsh arctic environment, including visual and electronic inspections, and a buried "cathodic protection system" — miles of

zinc and magnesium strips designed to draw off natural electrical currents that flow through the pipe and cause corrosion, weakening the steel.

STEEL EXPOSED TO ELEMENTS

But those safeguards may have been undermined even before oil began surging through the line.

The highly touted Japanese steel used in the pipe was not particularly resistant to corrosion, according to Harry Brandt, an engineering professor at the University of California at Davis who warned in 1972 the oil industry had exaggerated the quality of its steel.

Even the best steel will rust if it is mistreated. This pipe was exposed to salt air and spray during shipment from Japanese steel plants in 1969 and 1970. Some of the 100,000 lengths of pipe sat outside, exposed to Fairbanks snow and ice fog, for more than a year.

In 1971, all the pipe at the three storage yards in Fairbanks, Prudhoe Bay and Valdez got a protective coating of Scotchkote, an epoxy resin made by the 3M Co.

But the resin worked poorly, according to Bill Howitt, Alyeska's engineering manager. Some coating flaked off the pipe, exposing the steel. Alyeska calls this disbonding. The coating also cracked when the pipe was bent during installation. Alyeska sued, charging that 3M had altered the coating's formula and used an "inferior substitute." Attorneys for 3M argued the bare pipe was already so contaminated the coating could not be blamed. The lawsuit was settled in 1981 for an undisclosed sum.

Rather than strip off the bad coating, Alyeska wrapped the pipe in tape, according to Howitt and others. Federal regulators approved the move during the last winter of construction as Alyeska pushed to finish the line. The first wrapping of tape didn't work, Howitt said, so the company rewrapped the pipe with a second layer.

In the Atigun floodplain, where the most extensive corrosion has been found, construction workers had serious problems wrapping the pipe. The pipe had to be heated to 200 degrees for the coating to bond, a difficult chore in minus 20- and minus 30-degree weather, Howitt said. The tape wrap was prepared and applied improperly, he said.

Today, most of the external corrosion appears to be caused by the pipe losing its seal of epoxy coating and protective tape, Howitt said. The pipe is getting exposed. This is an insidious problem that can't be prevented or detected before it causes corrosion save by digging up a lot of pipe, he said.

"Nothing protects against disbonding," he said. "Nothing."

A key question — so far unanswered — is whether the corrosion resulted from isolated defects, or a systemwide failure of the seals all along the buried sections of the pipeline.

WARNING SIGNALS

Alyeska has known for years Alaska's oil faucet was starting to rust.

The company found minor corrosion in the early 1980s when parts of the protective coating lost its seal, according to internal Alyeska reports. Throughout the mid-1980s it knew that its cathodic protection system was failing to protect miles of pipe, company reports show. And the company performed a major corrosion repair in 1988.

In 1983, Andy Smart, then Alyeska's

chief corrosion engineer, proposed a \$70 million, six-year program that included retaping substantial sections of the pipeline, according to a federal Bureau of Land Management memo. BLM is the primary government regulator of the pipeline.

Don Knight, then BLM's chief corrosion engineer and author of the memo, said Smart frequently tried to persuade Alyeska management to focus on corrosion, with little success until 1983.

Smart declined an interview about his work at Alyeska.

Jurkovich, the Alyeska spokesman, denied any such proposal was made.

Any substantial corrosion-control work that engineers may have recommended was derailed by an extensive analysis by Battelle Petroleum Technology Center for Alyeska. Based on that study, Alyeska concluded in 1984 the pipeline was in "excellent condition." There was no evidence the pipe wrap and cathodic protection system were "suffering from accelerated deterioration," according to Alyeska reports.

So Alyeska reduced its corrosion-monitoring program. It would dig up the line about 12 times a year looking for corrosion instead of about 200. The company canceled plans to develop in-house a more sensitive "pig" — a high-tech device that runs through the pipe to check its shape and thickness.

Alyeska looked to other companies to develop a smarter pig.

NKK Corp. of Japan and a Canadian firm were separately developing more sophisticated pigs.

Pigs look for "anomalies" — deviations in the standard thickness of the pipe. Not all anomalies represent dangerous corrosion.

Earlier pigs could "see" anomalies at least a quarter-inch deep, or half the thickness of the pipe. The Canadian pig could pick up anomalies one-seventh of an inch deep.

In 1987, the Canadian pig turned up 14 anomalies. The next year a second run of the same pig showed 241 anomalies when engineers used a new method to interpret the data.

Alyeska engineers were skeptical they would find significant corrosion in buried pipe, Howitt said. But of the first 98 checked, 81 were

corrosion-related. A dozen damaged spots were repaired with pipe sleeves.

Last spring, the new NKK pig went down the line. The Japanese company promised its pig could detect anomalies of only one-twentieth of an inch deep. Altogether the smart pigs found 827 anomalies. Alyeska realized it had a serious problem.

Alyeska spokeswoman Marnie Isaacs said engineers are studying readings from the pig more closely using a different method to re-evaluate the data. The company expects to have many new points — perhaps thousands more — to investigate, she said.

FRUSTRATING WORK

Alyeska hired more than 300 workers last summer to begin digging up and inspecting the pipe.

The work is expensive and frustrating.

At one location, workers carefully peeled away 29 feet of frozen earth to reveal the pipe. After sandblasting off the protective tape and coating, workers eyeballed the pipe for corrosion and scanned it with infrared instruments. This single inspection cost \$2 million. It found no corrosion.

But other crews doing similar work found plenty.

Corrosion has been discovered at 202 of the 215 sites dug up so far, said Jurkovich, the Alyeska spokesman.

The worst segment, in the Atigun floodplain about 160 miles south of Prudhoe Bay, is to be replaced next year. Replacing nine miles of pipe will require a two-day shutdown of the pipeline.

Engineers fear they might lose pressure in the Prudhoe Bay oil column in a longer shutdown. That means thousands of barrels of oil that otherwise could be pumped might never be recovered. But Alyeska promises to get the job done in time by building an entire replacement section alongside the damaged pipe, making quick cuts to attach the new line, Howitt said. —

THE STATE TAKES A LOOK

State officials say they were as startled as Alyeska says it was by the extent of the rust.

The state is concerned that repair costs are being added to the pipeline

tariff. That's a cost that gets deducted from the price of oil before taxes and royalties get paid.

Chuck Logsdon, the state's chief petroleum economist, estimates the state will lose \$200 million if the tariff rises to cover \$800 million in corrosion-related expenses.

Late last year, Attorney General Doug Baily assembled lawyers, accountants and corrosion consultants to investigate. After their initial work, the state opposed adding corrosion costs to the tariffs in a protest filed with the Federal Energy Regulatory Commission, which oversees tariffs on U.S. pipelines.

The state alleges protective safeguards were undermined by the frantic pace of construction. Damaged pipe, defective wrapping materials and inadequate testing all may have contributed to later problems, the state says.

"If it was foreseeable and they knew they had problems and could have avoided it, at some point they can't roll that cost into the tariff and they can eat those costs," Baily said.

Alyeska attorneys argue the state gave up its right to challenge tariff increases caused by defective design, construction and maintenance in 1985, when it signed an agreement to settle a dispute over pipeline tariffs.

The state has established a pipeline office and is planning to share office space and technical information with BLM.

"We are expecting the monitoring and corrosion to be an ongoing issue," said Jerry Brossia, who heads the new office.

Brossia said the state made a serious mistake by ceding authority and responsibility for pipeline monitoring to the federal government.

"It's foolish and certainly imprudent not to be actively looking at it," he said.

When the state opted out of oversight, scrutiny of the pipeline fell on BLM and the DOT's pipeline safety office, both of which concede they didn't have the expertise to analyze pig results or perform independent analyses of corrosion.

Both BLM and DOT are expanding their budgets to look closer at the pipeline problems.

Congress also is starting to pay attention.

U.S. Rep. George Miller, D-Calif., who chairs an Interior subcommittee challenging oil company practices in Alaska, links pipeline corrosion to opening the Arctic National Wildlife Refuge east of Prudhoe Bay to oil development.

The oil industry "wants us to extend the life of that system another 25 to 50 years by allowing new drilling onshore and offshore," Miller said. "They tell us everything is just fine . . . that it's state of the art. Well, I think there's some question as to whether or not that's true."

A section of the trans-Alaska pipeline south of Pump Station 4 is covered with plastic sheeting while repairs are made. The pipe is buried here as it cuts ac

REGULATORS: Agencies caught off-guard by the extent of corr

Continued from Page A-1

company and never hired consultants to help them out.

The April 1988 memo from Francis lauding Alyeska's corrosion effort is a case in point. Francis wrote it after only reviewing a 45-page company report and talking with a senior Alyeska engineer, according to his memo.

BLM is the main pipeline watchdog. DOT's pipeline safety office is in Denver, and officials there rely on BLM for information.

The state, pleading lack of money, shut down its oil pipeline monitoring office in 1979. Last fall, driven by the public outcry over the Exxon Valdez oil spill and the discovery of substantial corrosion, the state resurrected the office.

BLM said it's doing an effective job.

"I don't believe there's another pipeline in the United States . . . that gets the scrutiny the trans-Alaska pipeline gets," said John Santora, deputy director for minerals for BLM.

Francis said he spends half his time in the field, and when he's not there another BLM inspector

is. "I can't say we've seen all the corrosion that's been dug up," Francis said, but he thinks officials understand the problem and how Alyeska is working to solve it.

Alyeska is required to reimburse BLM for any expenses. Alyeska pays the salaries of BLM engineers and other staff. Pipeline inspectors fly on Alyeska helicopters, stay in Alyeska housing and drive Alyeska trucks. Alyeska knows when inspectors are coming and where they're going.

BLM officials say Alyeska does not dictate their budget. BLM sends Alyeska a bill and Alyeska has never quibbled over payments, they say.

Through the 1980s, that bill got smaller. BLM cut its budget every year from 1982 to last year, when corrosion became a significant problem, according to BLM reports. The budget fell from \$1 million in 1982 to \$300,000 in 1987, before rising to \$500,000 last year. Staffing fell from 24 workers to six today.

Mike Menge, head of BLM's pipeline office for the past 20 months, said BLM cut spending due to a higher degree of confidence in the pipeline and

Alyeska. "Over time, an awful lot of the anxiety associated with the original construction went away," he said.

The relationship has caught the attention of U.S. Rep. George Miller, D-Calif., chairman of a subcommittee scrutinizing the Alaska oil industry. Miller prompted the General Accounting Office to investigate pipeline corrosion and whether BLM and DOT have shirked their duty to the public.

"I think what's happened over the life of this project is that everyone's gotten far too cozy," Miller said. "I think the policy makers have bought into the company line, which is, 'We know what we're doing.' I think that now has been discredited and if those relationships (between BLM and Alyeska) need to be changed, then so be it."

Menge said he trusts the integrity of his staff.

"The bottom line is you just have to do your job and not take anybody's word for anything," he said.

Yet BLM reports reflect mainly Alyeska's corrosion work and not independent checks by federal agencies.

BLM also appears to have assumed the role of a protective

big brother to Alyeska.

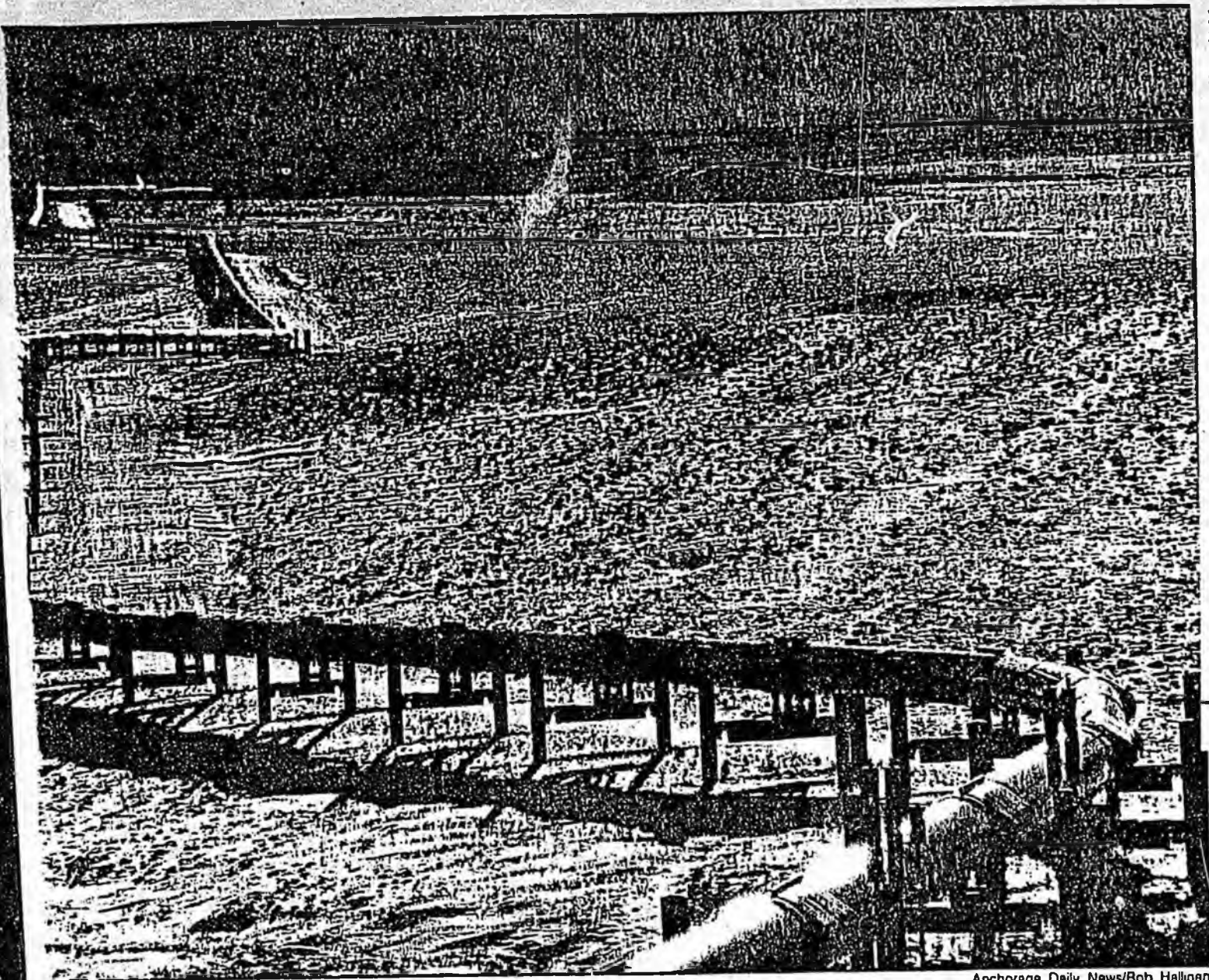
Last December, weeks after Alyeska had already briefed the press, legislators and other officials on the extent of corrosion, BLM's Santora refused to say how much corrosion had been found until getting clearance from Alyeska. When BLM called Alyeska, a secretary rushed in to interrupt George Jurkovich, a company official, from a meeting.

"I said, 'What are they asking us for? We've been telling everybody and his brother that (number) for months,'" Jurkovich said.

Since the corrosion issue arose, the DOT has started making annual visits to Alaska, said Jack Overly, head of DOT's Office of Pipeline Safety in Denver.

Mainly inspectors review Alyeska records, although they do accompany Alyeska and BLM officials on a tour of the pipeline, he said.

Last year inspectors also started coming to Alaska to check out safety problems, he said. Alyeska is required to notify DOT when corrosion reaches a certain depth in areas under high pressure and could pose a threat to the line. The company sent DOT a flurry of those reports last spring and they've continued



Anchorage Daily News/Bob Hallinan

ear Pump Station 4 In the Brooks Range



Overly couldn't say how much his office spends to oversee Alyeska. He said the office has a travel budget of about \$80,000 a year to visit dozens of pipelines in 12 states, including Alaska.

DOT has three engineers on staff and is proposing to hire two or three more in the next few years to deal with the Alaska pipeline, Overly said. —

One new DOT engineer may wind up being stationed in Alaska, working out of an office shared with the state and BLM. The three agencies hope to team up to finally get a regulatory grasp on the corrosion problem.

The state, facing the loss of hundreds of millions of dollars in taxes and royalties as corrosion repair bills climb, has hired a firm of corrosion experts from Ohio to conduct an independent investigation.

But BLM continues to look to an unprepared DOT for help in sorting through the reams of technical data and reports being produced by Alyeska.

BLM staffers lack expertise to understand Alyeska's data, Menge said. "We rely on DOT's experts for that," he said.

"We don't have that expertise," said Overly.

Other problems along the line

By PATTI EPLER
Daily News reporter

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The trans-Alaska pipeline is not the only piece of Alaska's oil machinery in need of major overhaul.

Here is a summary of the major problems from Prudhoe Bay to Valdez.

THE PUMP STATIONS

A significant portion of the piping at Pump Station 3 on the northern flank of the Brooks Range will be replaced within the next year. Corrosion caused by a bacteria has devastated the pipe.

The \$30 million repair job includes removing and replacing hundreds of feet of pipe within the pump station, and involves slowing the flow of oil through the main pipeline for perhaps a month.

Alyeska Pipeline Service Co. has budgeted \$50 million to deal with pump station corrosion this year, including work at Pump Station 1 at Prudhoe Bay, which will require a half-day shutdown of the pipeline.

The bacteria is in water that accompanies oil through the pipeline. The corrosion occurs in "deadlegs," pump-station pipe installed for a future connection but never hooked up, according to Bill Howitt, Alyeska engineering manager.

Alyeska discovered the bacteria and related corrosion in 1988. Since then the problem has crept south to infect eight of the 12 pump stations that keep oil moving along the 800-mile pipeline. More than 1,200 deadlegs are suspected of having bug-related corrosion. Alyeska has inspected 800 and found corrosion in more than 120 spots, but only seven have been serious enough to require immediate repair, Howitt said.

WET INSULATION

Pipe buried in the permafrost beneath many pump stations became wet after just a few years of pipeline operation, and the company began finding extensive pitting.

Howitt said Alyeska is about two-thirds through a multimillion-dollar, six-year program to repair and reinsulate buried pipe. Alyeska has put in a new corrosion-control system that is designed to work when insulation gets wet, Howitt said.

CHEAP PIPE

At the Valdez shipping terminal, Alyeska has patched and replaced miles of corroded pipes carrying oily ballast water from tankers to a treatment plant.

Rust has attacked two different sets of carbon steel pipelines. Such pipe is cheaper than stainless steel but more easily corroded.

It took \$30 million and two summers' work to reline with a fiberglass coating nearly five miles of pipe running from tanker berths to holding tanks at the treatment plant, said Chuck O'Donnell, terminal superintendent.

And this year the company plans to spend \$11 million replacing another 3,700 feet of above-ground pipe with stainless steel lines, he said.

AIR POLLUTION CONTROLS

Alyeska's air pollution control system in Valdez has deteriorated almost from the day it began operating, costing the company at least \$35 million in repairs.

Three giant incinerators that burn toxic oil vapors are being rebuilt at a cost of about \$22 million. A \$5.5 million machine to remove condensation that corrodes pipe is being installed. And repairs to the pipes themselves are running in the millions of dollars.

So far, Alyeska has replaced about a mile of pipe, in some cases using more rust-resistant stainless steel instead of the original carbon steel pipe, O'Donnell said.

OIL FIELD RUST

The battle against corrosion at aging North Slope oil fields has escalated dramatically in the last three years, as engineers fight off corrosive acids, microscopic bugs and the arctic weather.

North Slope operators have more than doubled their spending on corrosion-control programs in the last two years — from \$34 million in 1987 to \$71 million in 1989 at the Prudhoe Bay field alone.

"I'd say there's not a week that goes by" in which the engineering staff doesn't face a new corrosion problem, said Bill Patterson, an Arco Alaska Inc. corrosion engineer.

"Any place you've got water in contact with metal you've got a potential for a problem," said Don Scheve, Arco's Prudhoe operations engineering manager.

There's lots of metal and water on the North Slope. At Prudhoe Bay, the largest oil field in North America, each of the 800 producing oil wells has 20,000 feet of steel casing and tubing. About 900 miles of pipeline carry oil, water, gas and other liquids. The most troublesome water is the 42 million gallons daily pumped from oil reservoirs. This water production has doubled since 1987, said Doug Webb, BP Exploration (Alaska) Inc.'s operations vice president.

BP has replace more than two miles of pipe but never had a leak, Webb said.

Arco hasn't been as lucky. Two winters ago, leaks developed in an oil and gas line on Arco's half of Prudhoe Bay. The company replaced about three miles of pipe.

"That was the worst we'd seen at Prudhoe Bay," Scheve said.

Arco replaced a total of another seven miles of pipe in 1988 and 1989, Patterson said.

Trouble on the trans-Alaska pipeline

How corrosion is affecting the 800-mile pipeline

Corrosion is an electrochemical process that weakens metal by stripping away charged subatomic particles called ions. A corrosion circuit works much like a car battery with electricity flowing from an anode to another point called a cathode. The electricity flows through water, soil or acid.

How corrosion is affecting the buried sections of pipeline

The trans-Alaska pipeline is protected from corrosion by several safeguards. First it is coated with an epoxy that bonds to the steel. Next, the epoxy coat is wrapped in a special tape designed to keep out moisture. Finally, ribbons of zinc or bags of magnesium are attached to the pipe to divert electrical currents away from the pipe. Because they conduct electricity more easily than steel pipe, these sacrificial metals are supposed to corrode instead of the pipe. This is called a cathodic protection system.

1 External corrosion results from a failure of the epoxy coating and tape to keep water and acids away from the pipe.

Layer of protective tape

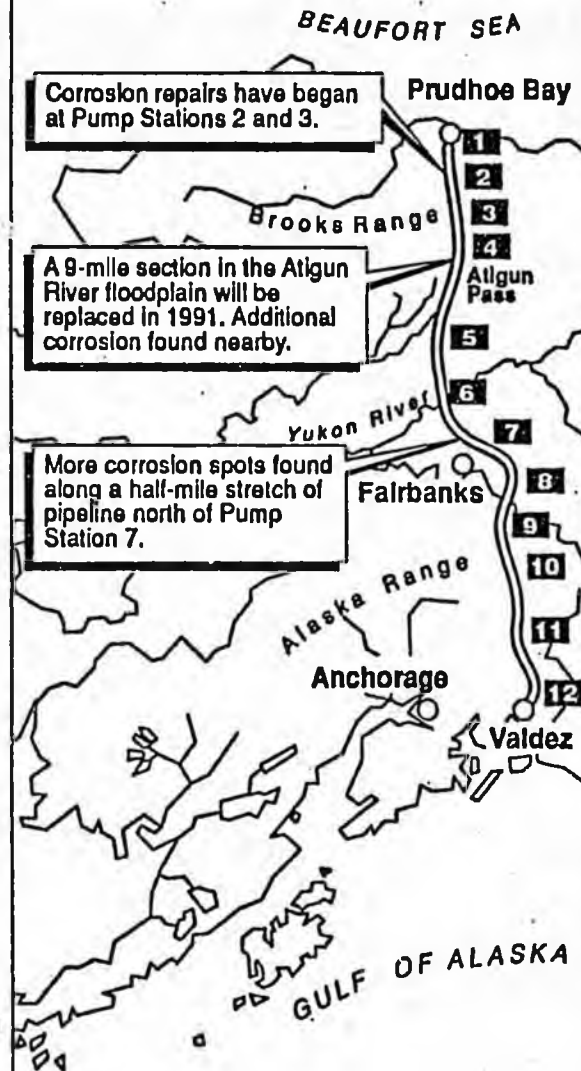
Epoxy paint

1/2-inch thick steel pipe

2 A failure of the cathodic protection system to divert electricity to the sacrificial anodes further enhances the possibility of corrosion.

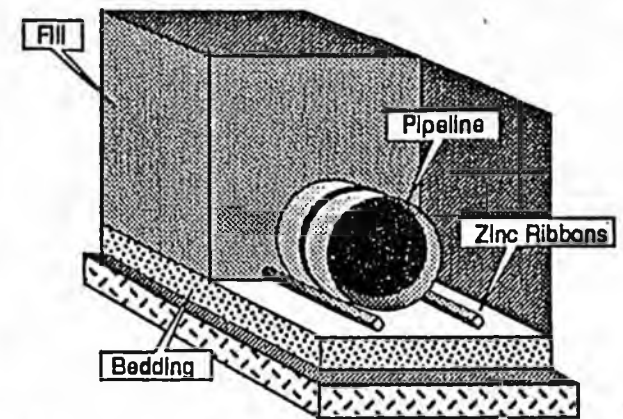
Zinc ribbon anodes

3 Water and acids begin to rust the steel pipe turning it to iron oxide.



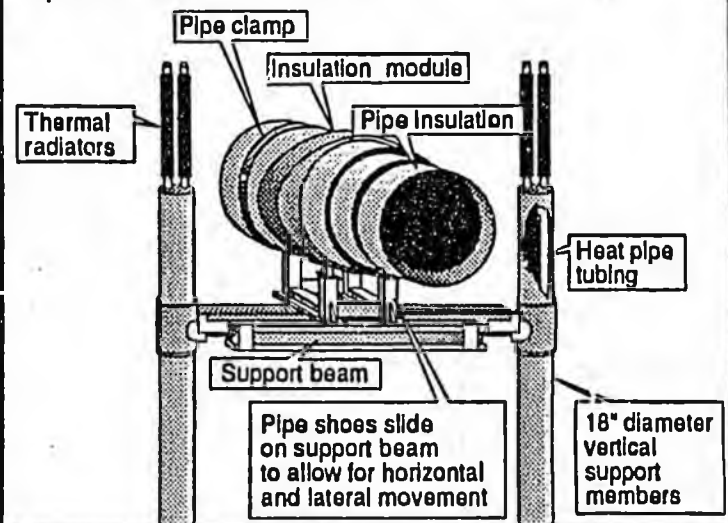
Cross section of buried pipeline

The Trans Alaska Pipeline is buried where stable soil and rock permit. A short section at Atigun Pass is buried in an insulated box atop a concrete slab.



Cross section of elevated pipeline

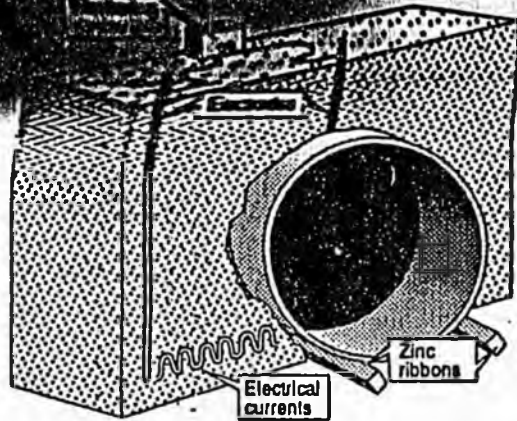
Above-ground supports, located every 60 feet allow for movement to accommodate expansion and contraction of the pipe or possible seismic disturbance.



How Alyeska monitors corrosion on the pipeline

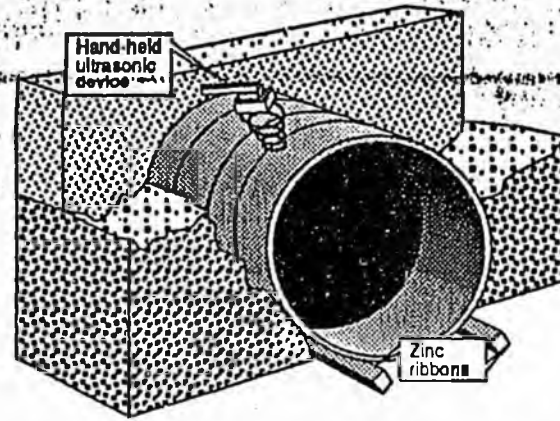
1 Annual surveys

Surveys are made of the pipe to measure the potential for electrical currents to flow from the pipe through the soil. Instruments measure whether the buried zinc strips are working. The zinc strips are part of the protection system designed to draw off electrolytic currents to the sacrificial metal.



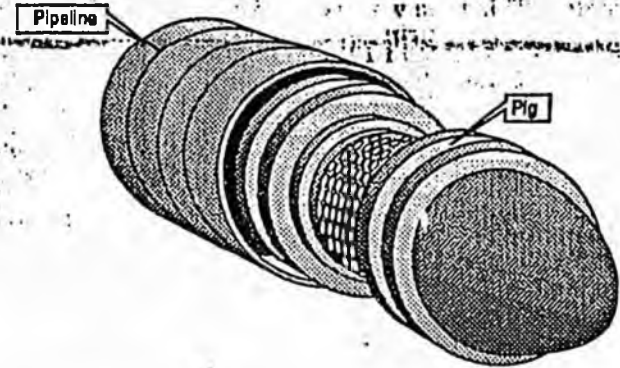
2 Digging up the pipe

The pipe is visually inspected for corrosion after stripping off the protective tape and epoxy coating. Hand-held ultrasonic instruments are also used to detect variations in the thickness of the pipe in areas where corrosion is suspected.



3 The corrosion pig

The pig is a self-contained tool equipped with 255 ultrasonic devices which measure the thickness of the pipeline wall by sending out sound waves and receiving the resulting echoes. It records readings for each square half-inch of the pipeline wall. The pig is 10 feet, 6 inches long, and 48 inches in diameter. It is made of titanium and weighs 6,600 pounds.



The Pipeline

Date oil was discovered: Nov. 20, 1968

Date construction began: 1974

Date oil was delivered: Aug. 2, 1977

Length: 800 miles

Pipe: Half-inch thick, 48-inches diameter

Construction cost: \$9 billion

Work force: 22,000

Length of pipeline buried: 400 miles

Number of vertical support members: 77,800

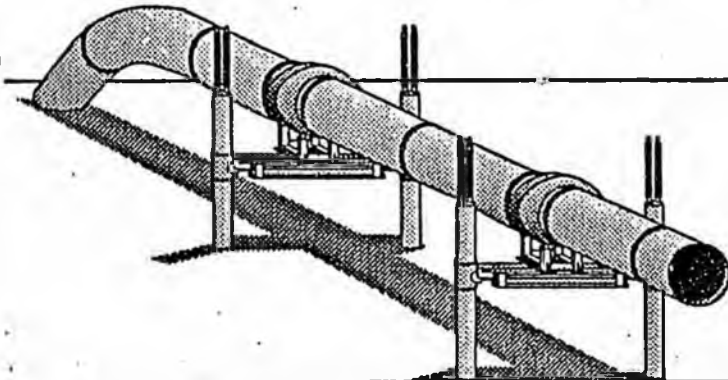
Highest elevation: 4,800 feet / Allgun Pass

Output: 80 million gallons of crude per day

Flow: 4.6 days to flow the length, at 7.35 mph

Temperature of oil: 140 degrees F

Capacity: 9 million barrels



Valdez: System deteriorates

Eagle

Continued from page B-1

vapors that escape while tankers are loaded with oil, or from other terminal operations.

DEC environmental engineer Dan Lawn said if the fishermen were operating downwind they might have smelled hydrocarbon vapors from tanker loading, although he cautioned that without taking measurements it would be hard to be certain.

Earlier this month, assistant state attorney general Mike Frank wrote Alyeska that the state plans to start regulating hydrocarbon emissions from tanker loading. Although reliable figures aren't available, DEC officials have estimated that up to 1,000 tons a week of hydrocarbon vapors are being emitted into the air during the loading.

According to the DEC, there's been a substantial increase in hydrocarbon vapors since early last year, when oil producers in Prudhoe Bay started injecting up to 50,000 barrels a day of natural gas liquids (NGLs) into the pipeline. NGLs vaporize more readily than crude oil.

Alyeska has said that when all three incinerators are running, the terminal's "vapor recovery system" can handle all the vapors from the pipes and storage tanks at Valdez. When tankers are loading, one or two incinerators can handle the load, Henman said. But vapors from the



Ivan Henman
... Alyeska vice president

loading process are not captured by the recovery system, and escape into the air, he conceded.

Henman said that it would probably take another week or so to repair the "B" incinerator. As soon as that incinerator is back on line, the "C" incinerator will be shut off for repairs as well, for one to two weeks. Then it will be the "A" incinerator's turn to be shut off, inspected, and if necessary repaired.

"We notified the DEC and EPA (Environmental Protection Agency) that the work was necessary," Henman said. The "B" incinerator had developed a hot spot where its refractory — a

brick lining inside the combustion chamber — had melted. And several oil burner tips had been badly burned and need to be replaced, he said.

When the incinerator was inspected several days ago, Alyeska officials seemed surprised at the extent of the damage, Lawn said.

The "C" incinerator was last repaired six months ago, and it's disconcerting that it's having problems already, said DEC Air Quality Specialist Bill MacClarence.

"The breakdowns are occurring on a pretty frequent basis," he said, adding, "it seems pretty questionable whether they can make it to next summer" without a major overhaul.

The vapor recovery system has a long history of frequent breakdowns. Last year it was down for 74 days, according to Alyeska operating logs. Between 1980 and 1987, the system was shut down an average of one day in five, the logs show.

The DEC says Alyeska has operated and maintained the system improperly, and has threatened to fine the company for what it says are violations of its air permit.

"In our legal opinion there have been no violations," Henman said two weeks ago.

The state and Alyeska have been negotiating over a variety of issues.

Continued from p

dance in Southeastern Alaska — combing ground for fish.

Bald eagles in every state but Alaska, pollution and development.

Their recovery efforts in 1980 protecting young eagles.

Including the Alaska has contracts in New York, North Carolina and Tennessee. The U.S. Fish and Wildlife Service maintains a nationwide.

"The demand for supply can't meet the need for a great booby. Smith of the Fish and Wildlife Agency, which has been releasing eagles in that state.

The process is in the contractors' term. They are old enough to confuse humans and new territories to the top of poles, old enough to fly.

Once the eagles hope they'll return to cages when they are to five years.

Based on the scattered reports of biologists are coming, though they are a few years.

In the meantime

Obituaries

Wilhelm T. Boutillier

Wilhelm "Bill" T. Boutillier, 57, of Anchorage died July 28 while fishing off Anchor Point near Homer.

Mr. Boutillier was born Aug. 14, 1930, in Great Falls, Mont.

He moved to Alaska in December 1968, and owned and operated Aerotronics of Alaska until 1974 when he sold



Administration in its avionics department.

Survivors include his wife, Dolores, of Anchorage; four daughters, Gail Cooper, Lynette Campoamor and Kathy Campoamor, all of Anchorage, and Susan Sullivan, of San Jose, Calif.; two brothers: Dick of Great Falls, Ore., and Curt of North Bend, Ore.; one sister: Genevieve Fechner, of Duluth, Minn.; and five grandchildren.

Services will be held at 2 p.m. Monday at Evergreen Memorial Chapel, with the Rev. Morris Wall of South Anchorage Baptist

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The corrosion crisis has provoked an engineering and construction boom that could grow into the biggest Alaska project since the pipeline was built in the mid-1970s. Union hiring halls expect calls for hundreds of truckers, pipe fitters, carpenters and laborers in a corrosion fight that could continue as long as the pipeline moves oil.

Alyeska has assembled a team of hundreds of people to combat the corrosion.

The company has launched an accelerated repair program and last year welded new pipe over 31 spots where the main line was judged too weak to safely contain the crude.

Over the next three years, Alyeska says, it will spend as much as \$800 million on corrosion control. The state thinks the repair bill could top \$1.5 billion. No one knows the price tag for sure until Alyeska digs up more pipe and completes a thorough analysis, the company says.

The worst corrosion discovered so far has been confined largely to a 14-mile segment, 160 miles south of Prudhoe Bay, where the pipe is buried in a floodplain and its corrosion-protection coating is peeling off.

But throughout the 800 miles of pipeline Alyeska has found hundreds of problem spots.

The pipeline itself is not the only Alyeska facility under attack by rust. Other problems include:

- Interior corrosion at the eight northernmost of the pipeline's 12 pump stations has gotten bad enough to require \$50 million in repairs next year, with \$30 million going to rebuild Pump Station 3 just north of the Brooks Range.

- At the Valdez terminal, where 75 tankers call each month to haul crude oil to Lower 48 refineries, several key environmental protection systems have been riddled with corrosion for years, and storage tank bottoms are getting rusty. Repairs are costing at least \$125 million.

- Corrosion has attacked gas lines providing fuel to pump stations 1 through 4. No cost estimate for repairs is available.

- At North Slope oil fields, corrosion keeps dozens of technicians busy every day. Arco Alaska Inc. and BP Exploration (Alaska) Inc. will spend \$34 million this year to fight rust. For Arco, the Prudhoe Bay problem is so serious the company spends 20 percent of its field operating budget on corrosion.

Alyeska's corrosion problem has prompted an investigation by the federal pipeline safety office, according to Jack Overly, head of that agency's Denver office.

The company faces fines of hundreds of thousands of dollars if investigators find it broke safety rules building or maintaining the pipeline.

WHAT HAPPENED?

All metal is subject to decay. At its most elemental level, pipeline corrosion is simply the process of steel deteriorating into its original state. Energy used to turn iron ore into steel doesn't stick around forever; corrosion is the goodbye note.

The trans-Alaska pipeline is the nation's most important oil pipeline. Daily it moves 1.9 million barrels of hot petroleum — one-fourth of U.S. oil production — toward refineries that turn it into gasoline, jet fuel, heating oil, plastics and other petroleum products.

Almost half the pipeline is underground, an environment especially conducive to corrosion. The buried pipe is encased in a thick bulb of warm soil that has been thawed by the hot oil in the pipe. The melted soil conducts the electrical charges that cause corrosion far more readily than frozen permafrost.

"The warmer the earth from pipeline heat, the more active the corrosion," wrote A.W. Peabody, designer of Alyeska's corrosion system, in a 1979 technical journal.

Pipe buried in river drainages is particularly vulnerable because it's bathed in moisture.

The company says it always has done everything it could to stop corrosion. To do less, said spokesman George Jurkovich, would be to jeopardize "Goal 1," moving oil through the pipeline.

From before construction, oil executives promised the pipeline would be protected by the best means available. The steel was a special alloy, highly resistant to rust, they testified. The pipe was to be coated with a proven epoxy, and sealed with special insulating tape to keep out water and impurities that can cause rust.

Alyeska's corrosion plan in 1974 — the year construction began — promised to "insure the integrity of the pipeline from a corrosion standpoint over an operating life of 30 years."

Alyeska adapted familiar methods to fight corrosion in the harsh arctic environment, including visual and electronic inspections, and a buried "cathodic protection system" — miles of

draw off natural electrical currents that flow through the pipe and cause corrosion, weakening the steel.

STEEL EXPOSED TO ELEMENTS

But those safeguards may have been undermined even before oil began surging through the line.

The highly touted Japanese steel used in the pipe was not particularly resistant to corrosion, according to Harry Brandt, an engineering professor at the University of California at Davis who warned in 1972 the oil industry had exaggerated the quality of its steel.

Even the best steel will rust if it is mistreated. This pipe was exposed to salt air and spray during shipment from Japanese steel plants in 1969 and 1970. Some of the 100,000 lengths of pipe sat outside, exposed to Fairbanks snow and ice fog, for more than a year.

In 1971, all the pipe at the three storage yards in Fairbanks, Prudhoe Bay and Valdez got a protective coating of Scotchkote, an epoxy resin made by the 3M Co.

But the resin worked poorly, according to Bill Howitt, Alyeska's engineering manager. Some coating flaked off the pipe, exposing the steel. Alyeska calls this disbonding. The coating also cracked when the pipe was bent during installation. Alyeska sued, charging that 3M had altered the coating's formula and used an "inferior substitute." Attorneys for 3M argued the bare pipe was already so contaminated the coating could not be blamed. The lawsuit was settled in 1981 for an undisclosed sum.

Rather than strip off the bad coating, Alyeska wrapped the pipe in tape, according to Howitt and others. Federal regulators approved the move during the last winter of construction as Alyeska pushed to finish the line. The first wrapping of tape didn't work, Howitt said, so the company rewrapped the pipe with a second layer.

In the Atigun floodplain, where the most extensive corrosion has been found, construction workers had serious problems wrapping the pipe. The pipe had to be heated to 200 degrees for the coating to bond, a difficult chore in minus 20- and minus 30-degree weather, Howitt said. The tape wrap was prepared and applied improperly, he said.

Today, most of the external corrosion appears to be caused by the pipe losing its seal of epoxy coating and protective tape, Howitt said. The pipe is getting exposed. This is an insidious problem that can't be prevented or detected before it causes corrosion save by digging up a lot of pipe, he said.

"Nothing protects against disbonding," he said. "Nothing."

A key question — so far unanswered — is whether the corrosion resulted from isolated defects, or a systemwide failure of the seals all along the buried sections of the pipeline.

OIL TERMINAL: Report calls for different method of wastewater treatment

Continued from Page A-1

EPA has proposed, and has said Alyeska might have to put in more treatment facilities in order to meet tougher standards.

That permit now is expected to be given to the state for final approval in October, EPA said Thursday.

Lysyj, described by state and federal officials as one of the foremost experts on wastewater treatment systems, was hired to give his opinion on a wide range of scientific and technical information the state is reviewing prior to certifying the new permit, said Dan Wilkerson of DEC.

"He's intimately familiar with the system," Wilkerson said, noting that Lysyj has done several studies of the Alyeska plant over the past 10 years.

Three years ago, Lysyj inspected the plant for EPA. His report resulted in EPA ordering Alyeska to make substantial changes in the treatment facility, changes that ultimately led to the biological process in use today.

The Alyeska plant cleans oily ballast water brought in on tankers from the Lower 48. The water is discharged into Port Valdez and must meet limits on pollutants such as hydrocarbons.

In 1986, under pressure from EPA and DEC, Alyeska started using a biological treatment process to help remove even more pollutants

from the ballast water. In that method, water is pushed slowly through two giant holding ponds filled with microorganisms that "eat" the hydrocarbons.

The treatment method is central to the new environmental permit EPA is writing; limits on hydrocarbons and other pollutants in the permit have been based on what the treatment method can accomplish.

But Lysyj contends that the process leads to "non-contained and uncontrolled releases" of carcinogenic substances into the air, "with possible harm to human life and the environment."

Other treatment methods well-suited for the Alaska environment are commercially available and are widely used elsewhere, he said.

Moreover, he cites oil company studies done for Alyeska that conclude biological treatment is less effective and less suitable than other methods.

Those studies, as well as the review of treatment methods by EPA, conclude water temperatures in Valdez are too cold for the microbes that consume the pollution, Lysyj said.

The irregular flow of water through the Alyeska plant, triggered by the arrival of tankers, also disrupts the biological process, Lysyj said.

He also noted that biological treatment

produces large quantities of sludge, a substance that Alyeska has no means of dealing with.

Lysyj said it appeared EPA had approved the biological method simply because it was cheaper than other, more efficient technologies.

Alyeska spent about \$2 million in capital costs and spends about \$500,000 a year to operate the biological process, according to the EPA. A system like the one suggested by Lysyj would cost about \$8.7 million to build and \$1.9 million a year to operate, the EPA said.

Ivan Henman, vice president of engineering and environment for Alyeska, acknowledged that cost was a factor. But, he said, the biological method is satisfactory. After two years of operation, it has reduced hydrocarbons in the wastewater by 85 percent, he said. "It's simply not true" that harmful amounts of hydrocarbons are going into the air, he said.

Henman disagreed that the treatment methods suggested by Lysyj that strip pollutants from the water and capture them in the air are widely used at other facilities.

In fact, he said, at least one refinery that tried the process found it didn't work well and discontinued it.

More importantly, Henman said, those technologies are "complex and unreliable" and

have not been proven in Alaska, nor have they been shown to be effective for the large amounts of ballast water processed by Alyeska — about 13 million gallons a day.

"The arguments are overwhelming in favor of the biological process," he said.

He said Lysyj misrepresented what the oil company studies say. Besides, he said, scientists have learned more about biological processes since the studies were done in 1980 and 1981.

"Probably the most important thing is if we had elected to go to one of the more sophisticated systems ... it would have been three to four, maybe as long as five years to have a working system," Henman said. "We had the biological system working in a matter of four months."

Janis Hastings, an EPA official in charge of drafting the new permit, said the Lysyj report didn't contain any new information. EPA has considered all the issues raised in the report, she said.

Lysyj also suggested that the state establish an independent technical review board to help DEC and EPA sort out environmental concerns at the Valdez terminal. He said Alyeska's past record of poor compliance with its permit is argument for such a board.

DEC and commercial fishermen have urged EPA to set up an advisory group, but the idea is strongly opposed by Alyeska.