H B 409

Amended: 4/20/90
Offered: 4/11/90
Referred: Rules

6-1741D

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

~~IN THE HOUSE~~ ~~BY THE FINANCE COMMITTEE~~

SCS CS FOR HOUSE BILL NO. 409 (~~Finance~~) (Fin) ~~am~~

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."

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, as agreed by the department and the owner or occupier of the property, other information and records 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 trans-

portation, 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, as agreed by the department and the owner or occupier of the property, other information and records 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 but does not include, by way of example only, single-family residences, restaurants, hospitals, health clinics, fishing vessels, small placer mines, and service stations;

* Sec. 3. AS 46.03 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 46.03.895, 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; and

BOTH

(3) 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 jurisdiction of the state, the department may issue a compliance order. The

compliance order shall describe with reasonable specificity the nature of the violation and set out the nature of the required response measures and a deadline for compliance.

(b) The compliance order shall be personally served on or sent by certified mail, return receipt requested, to the person affected. Service is complete on a corporation upon receipt by an officer of the corporation or by its registered agent and on a partnership on receipt by a partner. The compliance order is effective on receipt. A request for an administrative hearing under (c) of this section ~~does not~~ stays the provisions or deadlines set out in the compliance order, unless the compliance order is issued pursuant to AS 46.03.820 or .865

(c) The person affected may request an administrative hearing within 30 days after receipt of the compliance order. Failure to request a hearing within 30 days after receipt of the compliance order constitutes a waiver by the person of the right to an administrative hearing and to judicial review.

(d) After the conclusion of the administrative hearing, the department may modify, rescind, or affirm the compliance order. The affected person may obtain judicial review of the compliance order 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 compliance order only if the administrative record, taken as a whole, does not contain a reasonable basis to support the provisions of the compliance order or the department's decision to issue the compliance order. Except as provided in this section, the compliance order is not subject to judicial or administrative review.

OUT (APA)

(e) 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.

OUT (APA)

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

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

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

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

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

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

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

(e) In this section

(1) "environmental audit" means a systematic, documented, periodic, and objective review of a person's operations, practices,

and performance related to meeting each applicable environmental standard and requirement, including permit conditions;

(2) "environmental audit report" means a written report that candidly and thoroughly presents findings from a review, conducted as part of an environmental audit, of a person's environmental operations, practices, and performance.

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

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

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

IN THE HOUSE BY THE JUDICIARY COMMITTEE

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

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) interest from the date the department assesses the

administrative penalty under (a) of this section.

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

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

(2) degree of the respondent's culpability;

(3) prior history of violations;

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

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

(6) economic savings realized through noncompliance;

(7) respondent's ability to pay.

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

Sec. 46.03.850. COMPLIANCE ORDER. (a) When the department finds after an investigation that a person is violating or is about to violate a provision of this chapter, AS 46.04, AS 46.09, or AS 03.05, or of a regulation, order of the department, permit, approval, or certificate issued under this chapter, AS 46.04, AS 46.09, or AS 03.-05, or is otherwise endangering or creating the potential of pollution of the surface or subsurface air, land, or water within the jurisdiction of the state, the department may issue a compliance order. The compliance order shall describe with reasonable specificity the nature of the violation and set out the nature of the required response measures and a deadline for compliance.

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

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

(c) The department shall, on request, grant an adjudicatory hearing to a person against whom a compliance order is issued under (a) of this section. The adjudicatory hearing shall be conducted under 18 AAC 15.200 and 18 AAC 15.20- ^ 15.310 as the regulations exist on the effective date of this Act. A person against whom a compliance order is issued may appeal the decision of the department to the superior court. ~~The superior court shall hear the appeal de novo on the record~~.

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

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

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

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

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

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

(c) In this section

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

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

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

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

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

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

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

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

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

CHUGACH ELECTRIC
ASSOCIATION, INC.

May 8, 1990

Senator Bettye M. Fahrenkamp, Chair
Senate Resources Committee
P. O. Box V
Juneau, Alaska 99811

Re: House Bill 409

Dear Senator Fahrenkamp:

Chugach Electric Association, Inc. (Chugach) wishes to express its opposition to House Bill 409. As currently drafted, it is seriously flawed legally. It would also present significant operational problems for Chugach and other utilities that would negatively impact their ratepayers. Chugach is a member-owned electric utility. Its operations do not present a high degree of risk to the environment. It is Chugach's view that House Bill 409 is overly broad, particularly in its application to entities such as Chugach. The following are some of Chugach's concerns about this Bill. It is by no means an exhaustive list.

1. Section 1 may not protect attorney-client information or other privileged information from disclosure, unless Chugach and DEC agreed.

2. Section 2 would permit warrantless searches of Chugach property simply on "'suspicion' of pollution" without requiring Chugach's consent. This is unconstitutional under the Alaska Constitution.

3. Section 3 extends the DEC's pervasive, unilateral departmental authority from emergency situations to the ordinary course of business.

4. Section 4, Subsection (c) assesses an administrative penalty of $15,000 a day per violation. It is unclear whether a violation which occurs once but whose clean-up extends over a period of days is to be treated as one or several violations. Determination of the amount of penalty to be assessed in a given situation, in the absence of the requirement to first adopt regulations, would vest in the unbridled discretion of the DEC. The absence of criteria, procedures and specific standards for determining factors to be considered by the DEC in determining the amount of the penalty assessed under this Section makes it constitutionally deficient. Similar Federal

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statutes under, e.g., TSCA (Toxic Substance Control Act), have regulations which proscribe the criteria to be considered when assessing penalties.

Subsection (e) prohibits collateral judicial or administrative review of the "validity, amount and appropriateness" of the penalty. This is an unusually restrictive provision.

Subsection (g) presents "double jeopardy" problems. For example, if civil penalties were recovered against a violator under statutes other than AS 46.03.760, the concurrent assessment of an administrative penalty could not be offset. See Subsection (f).

5. Section 5 amends existing laws with respect to compliance orders. It would make immediate compliance with the DEC's order mandatory regardless of whether it is arbitrary, and without a hearing, which is granted only at the discretion of the DEC. Judicial review of the order is extremely limited, and stays of provisions or deadlines in the order are prohibited.

Subsection (b) could/should at a minimum be limited to circumstances in which significant, immediate threats to public health or safety required immediate compliance with such an order; the proposed Section makes compliance mandatory and non-discretionary in all cases.

6. Section 6 would authorize the Commissioner of DEC to require Chugach to retain an independent consultant to prepare and submit an environmental audit documenting its environmental compliance as part of both administrative and judicial enforcement actions. This raises potential self-incrimination issues, as well as privacy and confidentiality issues, under the Alaska Constitution. Further, the expense of the audit would be borne by Chugach, even if it revealed no environmental violation(s). Giving DEC this unbridled discretion to require Chugach to incur the expense of hiring a consultant to prepare the audit enables DEC to deprive Chugach of property without due process. Further, Chugach would not have an opportunity to appeal from such order. As noted above, the information reported may subject Chugach to criminal penalties. This provision, as with Section 1, does not contain the constitutional protections provided in similar Federal laws. For example, CERCLA and the Clean Water Act provide:

> Notification received pursuant to this subsection or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

Inclusion of such language could remove the risk of asserting the privilege against self-incrimination. The language in Subsection (c) does not cure this problem, and in fact seems to confuse the issue; it refers to an "individual" who can be given a grant of immunity from prosecution; it is not clear if this is the same individual as the "person" (i.e., Chugach) in previous Subsections (a) and (b), such that the information from the audit cannot be used to prosecute Chugach? Also, the use of the word "periodic" in Subsection (e)(1) which defines "environmental report" is troublesome, even though preceding Subsection (d) may be an attempt to cure the question of whether the performance of an audit is a one-time obligation. The rest of the definition of "environmental audit" is vague.

These are just a few of Chugach's concerns about this Bill. Chugach has and will continue to comply with local, state and federal environmental statutes and regulations. Our record in this regard is excellent. However, this legislation would seriously effect Chugach's ability to operate efficiently and economically. We hope your Committee will take these issues into consideration.

Very truly yours,

CHUGACH ELECTRIC ASSOCIATION, INC.

David L. Highers

David L. Highers
General Manager

DH:CJ:jg

Trustees for ALASKA

A Non-Profit, Public Interest, Environmental Law Firm

May 4, 1990

Senator Jan Faiks
P.O. Box V
Juneau, Ak. 99811

Dear Senator Faiks:

Thank you for the opportunity to testify at the Senate Judiciary hearing yesterday on HB 409.

I am writing to apologize for over-generalizing in my testimony about the status of "federal law" regarding the same matters that are addressed in HB 409.

Enclosed is a brief memo I prepared yesterday after talking with Mr. Christiansen about compliance orders under federal law. I stand ready to provide more assistance or comments if you need them.

Sincerely,

Mike Wenig

Mike Wenig
Staff Attorney

725 Christensen Drive, Suite 4 Anchorage, Alaska 99501 (907) 276-4244

MEMORANDUM

To: Chris Christiansen, Senator Faik's Staff
From: Mike Wenig, Trustees for Alaska
Re: Federal Law On Admin/Judicial Review of Environmental Compliance Orders (not incl. an order assessing an administrative penalty)
Date: May 4, 1990

Below is a brief outline of statutory provisions and caselaw relating to administrative and/or judicial review of compliance orders under CERCLA, the Clean Air Act (CAA), Clean Water Act (CWA), and RCRA.

At the hearing yesterday, I stated that, under "federal law," the only review allowed for an EPA compliance order is in a judicial action brought by EPA to enforce the order.

The outline below indicates that, with the exception of varying provisions regarding pre-issuance notice and rights to confer, my statement is (or, in the case of the CWA, appears to be) accurate for:

(1) compliance orders issued under the Clean Air Act;

(2) compliance orders issued under the Clean Water Act;

(3) orders under CERCLA to abate an "imminent and substantial endangerment" caused by the release of hazardous substances;[1] and

(4) orders issued under RCRA to compel owners or operators of hazardous waste facilities suspected of presenting a "substantial hazard to human health or the environment" to conduct monitoring, testing, analysis, and reporting with respect to the facility.

As you pointed out to me by phone yesterday, my statement was incorrect for "corrective action" orders issued by EPA under RCRA sections 3008(a) and (h), and 9003(h)(4) and 9006, for violations of the hazardous waste and leaking underground storage tank provisions, respectively, in RCRA. There is a right to an administrative hearing prior to the time these orders become "final." It is unclear whether there is also a right to judicial review of these orders in any proceeding other than judicial actions brought by EPA to compel compliance with the orders.

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[1] CERCLA 106 orders may be judicially reviewed in citizen enforcement and cost recovery cases, as well as in EPA enforcement actions.

Finally, RCRA section 7003 orders to abate an imminent and substantial endangerment do not, on the face of the statute, contain provisions requiring "pre-enforcement" administrative or judicial review. I have not had a chance to check the caselaw on the reviewability of these orders.

It is not clear to me why RCRA compliance orders (other than 7003 orders) are treated differently than those issued under the CWA, CAA, and CERCLA. For whatever its worth, the set of releases of hazardous wastes that are subject to RCRA section 3008 orders and which also present an "imminent and substantial endangerment" can be addressed in RCRA 7003 and in CERCLA section 106 orders.[2] Thus, for this subset of releases, at least, EPA appears to be able to choose the less-cumbersome RCRA 7003 and CERCLA procedures.

I greatly apologize for over-generalizing regarding EPA's authority under "federal law."

A. CERCLA

Section 106(a), 42 U.S.C. § 9606(a), authorizes the President to issue "such orders as may be necessary to protect public health and welfare and the environment" when the President finds that there "may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance. . ."

Section 113(h), 42 U.S.C. § 9613(h), expressly prohibits federal courts from reviewing CERCLA section 106(a) orders, except in

(1) a judicial action by EPA or another party to recover cleanup costs;
(2) a judicial enforcement action by EPA to enforce the order or recover penalties for noncompliance with the order;
(3) an action by a private party for reimbursement of cleanup costs expended;
(4) a citizen suit
(5) an action by EPA to compel a remedial action.

B. Clean Air Act

Section 113(a) authorizes EPA to issue compliance orders for violations of various provisions of the CAA. 42 U.S.C. § 7413(a). Orders issued under subsections (a)(1), for violations of state implementation plans, require 30 days prior notice to the violator. All section 113(a) orders, except those regarding

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[2] CERCLA "hazardous substances" are defined in CERCLA section 101(14), 42 U.S.C. § 9614, to include RCRA hazardous wastes.

emissions of hazardous air pollutants, do not take effect until after the recipient of the order has had an opportunity to "confer" with EPA.

Section 307(b) provides for judicial review of specific actions taken by EPA under the CAA (not including issuance of section 113 orders) and any other "final" action. 42 U.S.C. § 7607(b). Section 304 authorizes citizens to sue EPA to compel the Agency to perform a mandatory duty under the CAA. 33 U.S.C. § 7604.

In Asbestec Const. Services, Inc. v. EPA, 849 F.2d 765 (2d Cir. 1988), the Second Circuit Court of Appeals held that a section 113 compliance order based on violations of the national emission standard for asbestos was not reviewable under section 307. Rejecting Asbestec's due process claims, the court held that EPA's order could be reviewed only in a judicial enforcement action brought by EPA against the recipient of the order for noncompliance with the order.[3] According to the court:

> 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.

849 F.2d at 769.

C. Clean Water Act

Section 309(a) authorizes EPA to issue compliance orders for various violations of the CWA. 33 U.S.C. § 1319(a). Orders based on violations of state-issued CWA permits require 30 days prior notice. Orders regarding reporting, record-keeping requirements in section 308 do not take effect until after the recipient of the order has had an opportunity to "confer" with EPA.

Section 509(b)(1) provides for judicial review of several EPA actions but not including the issuance of compliance orders under section 309(a). 33 U.S.C. § 1369(b)(1). Unlike the CAA, the CWA does not also provide for judicial review of all other "final" agency actions under the CWA. Section 505 authorizes citizens to bring suits to compel EPA to perform a mandatory duty under the Act.

My research last night did not reveal any CWA cases

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[3] I was the Justice lawyer representing EPA on this case.

regarding judicial review of section 309 compliance orders. However, since the judicial review provisions under the CWA are even more restrictive than those under the CAA, the rule set out in the Asbestec decision regarding CAA orders would be applied with full force to CWA orders as well.

D. RCRA

Section 3008(a) and (h) authorize EPA to issue "corrective action" orders to hazardous waste treatment, storage, and disposal facilities. 42 U.S.C. § 6928(a) and (h). Section 3008(b) provides that recipients of 3008 orders are entitled to a "public hearing" before such orders become "final."

Section 9006 provides a similar scheme for violations of the substantive provisions regarding underground storage tanks. 42 U.S.C. § 6991e.

An EPA attorney (Caroline Wehling, 202-382-7703) indicated to me this morning that 3008 and 9006 orders are judicially reviewable after the conclusion of an administrative hearing.

Section 7003 of RCRA authorizes EPA to issue "such orders as may be necessary to protect public health and the environment" from a solid or hazardous waste that "may present an imminent and substantial endangerment to health or the environment. . . ." 42 U.S.C. § 6973(a). That section provides for pre-issuance notice to the affected state, but not to the recipient of the order. The provision does not address administrative or judicial review and suggests that the order is effective upon receipt. I assume that the Asbestec principle would apply to these emergency-type orders, but I have not had a chance to research the caselaw on this issue.

Section 3013(a) authorizes EPA to issue orders to compel monitoring, testing, analysis, and reporting by owners or operators of facilities with hazardous waste the "may present a substantial hazard to human health or the environment." 42 U.S.C. § 6934(a). Section 3013(b) requires that such an order give the recipient 30 days to produce a "proposal" for complying with the order and an opportunity to confer with EPA before EPA requires the recipient to comply.

The same prohibition of "pre-enforcement review" applied by the Second Circuit in Asbestec for CAA orders has been considered to apply (with some reservation, at least) to RCRA section 3013 orders. E.I. DuPont deNemours & Co. v. Daggett, 610 F.Supp. 260 (W.D.N.Y. 1985).

cc. Barnaby Dow
John McDonagh

Resource Development Council
for Alaska, Inc.

807 "G" Street, Suite 200, Anchorage, Alaska 99501-3440
Box 100518, Anchorage, Alaska 99510-0518 907/278-0700 Fax 276-3887

5/1/90

To: Sen. Jan Faiks, Senate Judiciary committee
From: Debbie Reinwand, Resource Development Council
RE: SB 502, HB 316, HB 409

The Resource Development Council for Alaska, Inc., would like to incorporate its comments on the aforementioned bills into the hearing record.

RDC is opposed to all three bills.

SB 502, which would increase penalties for oil spills and other environmental law violations, has the potential to adversely affect a number of our members, who are responsible corporate citizens and operate in an environmentally-sensitive manner. As the committee has heard, the insurance burden placed on barge operators, for instance, as a result of SB 502, would be quite costly. RDC also objects to the section that provides for punitive rather than compensatory penalties.

With regard to HB 316, this measure is also of concern to RDC, because of the excessive power it will give the Alaska Department of Conservation when combined with HB 409. As with HB 409, this bill is part of an oil spill package, that while aimed at one industry, slops over onto numerous other operators and ultimately deals a devastating blow to the Alaska business community.

Finally, RDC has been opposed to HB 409 since its inception. In the fervor to enact oil spill legislation that will "protect" Alaska citizens from future environmental degredation, certain legislators have produced bills that have the potential to stop Alaska business growth in its tracks. As several concerned individuals testified before the Judiciary committee, this bill allows the DEC to slap a compliance order on an operator when the agency believes there is a "potential" an environmental law is going to be broken.

This bill has been rightly dubbed the "DEC Gestapo" bill. As a gentleman from Southeast Alaska mentioned before the committee, he could face a compliance order and fine if DEC believes a piece of his machinery might have a defect that could result in an environmental infraction.

One of the most offensive sections of the bill is that which finds an operator guilty until proven innocent. Although an alleged polluter is appealing a compliance order and fine, that person is still subject to the compliance order, etc.

Although numerous organizations have worked to correct deficiencies in the bill, RDC believes the flaws cannot be fixed and urges the Senate not to support HB 409.

FLUOR DANIEL

Fluor Daniel Alaska, Inc.
900 West 5th Avenue, Suite 300, P.O. Box 196680
Anchorage, Alaska 99519-6680
(907) 276-2636

May 2, 1990

Senate Judiciary Committee
P.O. Box "V"
Juneau, Ak 99811

Dear Madam Chairman:

House Bill No. 409

Please accept the following comments in lieu of testimony on the subject legislation.

I am opposed to HB 409 and related SB 502 and HB 316. Taken as a whole this proposed legislation adopts a punitive, adversarial posture that is not in the best interest of the State.

Specifically objectionable are provisions of HB 409 which:

- Empowers the executive branch for search and seizure without due process. Not even federal enforcement and investigative agencies such as the DEA and FBI can pursue such actions without authority of the courts. Further, not withstanding efforts to define targeted businesses, such sweeping powers will inevitably effect affiliated businesses such as engineering firms such as Fluor Daniel.

- Imposes penalty fines without conviction. This shifting of the burden of proof to the accused to prove innocence is blatantly unacceptable.

- Requires environmental audits as dictated by the agency. Clearly the discretionary power to impose costly and time consuming studies, with the scope and selection of contractor controlled by the agency, gives the government the ability to bankrupt a firm at will. No executive department should have such unchecked power.

I urge the committee to reject the legislation in its entirety.

Very truly yours,

George P. Wuerch
President

GPW:jnr
0122A.W89

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

REPLY TO:

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PHONE: (907) 276-3550
FAX: (907) 276-3697

☐ *1st NATIONAL CENTER*
100 CUSHMAN ST. SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1568
FAX: (907) 456-1317

☐ *P.O. BOX K—STATE CAPITOL*
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

VIA FACSIMILE

May 3, 1990

The Honorable Jan Faiks, Chairman
Senate Judiciary Committee
State Capitol
P.O. Box V
Juneau, AK 99811

Re: House Bill 409

Dear Chairman Faiks:

We have been asked by Michele Brown of the Alaska Department of Environmental Conservation to respond to several questions raised by Senator Halford during the Senate Judiciary Committee hearings on HB 409.

1) Procedures in HB 409 for the Assessment of Administrative Penalties

A question was raised about the administrative procedures proposed in HB 409 for assessment of administrative penalties by the Department of Environmental Conservation as they compare to the procedures set forth in the Administrative Procedures Act, AS 44.62.

Article 8 of the Administrative Procedures Act (APA) provides procedures for the administrative adjudication of the issuance, renewal, suspension, or revocation of a permit, license, authority, privilege or other right. AS 44.62.330 - .630. By statute these procedures do not generally apply to provisions for civil or criminal penalties, injunctive relief or other penalty provisions relating to a suspension of the license or permit. AS 44.62.330(d).

The procedural provisions in HB 409 for notice, hearing and judicial review are, however, comparable and provide similar protections as those under the APA. Under section 3(d) of HB 409, an assessment notice is personally served on, or sent by certified mail return receipt requested to the affected person. Under the APA, the "accusation" is either personally served or sent by certified mail if statute or regulations requires that individual to file an address with the agency. AS 44.62.380(c) APA requires the respondent to request a hearing within fifteen days of service or the right to a hearing [and judicial review] is waived. AS 44.62.390. Under section 3(d) of HB 409, a hearing must be requested within thirty days or the right to an administrative hearing and judicial review is waived.

APA and HB 409 both provide for judicial review of the final administrative order. The APA allows an appeal to be filed within 30 days of the last day the agency action could be reconsidered or, in other words, within 60 days of the initial agency decision. AS 44.62.560. Section 3(e) of HB 409 similarly provides for judicial review only if an appeal is filed within 30 days of the department's issuance of the administrative hearing decision.

Both APA and HB 409, limit the scope of judicial review of the administrative decision. AS 44.62.570; section 3(e) HB 409. While the APA provides that a court may "exercise its independent judgment on the evidence," a court's review of evidence is limited to an "abuse of discretion" standard. AS 44.62.570(c). Such an abuse of discretion is found under the APA if the evidentiary findings of an administrative agency are not supported by substantial evidence in light of the whole record. Swindel v. Kelly, 499 P.2d 291, 298 (Alaska 1972). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. State, Department of Labor v. Boucher, 581 P.2d 660, 662 (Alaska 1978). However, in cases where the decision involves administrative expertise as to either complex subject matter or fundamental policy formulations, the Alaska Supreme Court has held that deference should be given to an administrative decision if it has a reasonable basis in law and fact. Alaska Public Utility Commission v. Chugach Electric Association, 580 P.2d 687, 694 (Alaska 1978), disapproved on other grounds sub. nom. City & Borough of Juneau v. Thibodeau, 595 P.2d 626 (Alaska 1979). The court, however, will substitute its own judgment for questions of law where no agency expertise is involved. Jager v. State, 537 P.2d 1100, 1107 (Alaska 1975).

HB 409 limits review of an administrative penalty decision to the administrative record and allows reversal only if the administrative record taken as a whole does not contain a reasonable basis to support the finding of a violation or the amount of the penalty assessed. Section 3(e). This limited scope of judicial review is in keeping with the Alaska Supreme Court's decisions recognizing that deference be given to administrative decisions involving agency expertise. Alaska Public Utility Comm'n, supra. Courts have acknowledged that the complex factual and legal determinations by a specialized administrative agency involving environmental issues are deserving of judicial deference. See Chevron U.S.A., Inc. v. Natural Resource Defense Council, 467 U.S. 837, 844 (1984); Miners Advocacy Council v. State, Dep't of Envtl Conserv., 778 P.2d 1126, 1137 (Alaska 1988).

Finally, HB 409 provides that "[e]xcept as provided in this section, the validity, amount, and appropriateness of the administrative penalty are not subject to judicial or administrative review." Section 3(e). This provision codifies the doctrine of exhaustion of administrative remedies also applicable to agency actions under the APA. This judicially created doctrine requires that before challenging an agency action

in court the challenger must complete the administrative process and seek review through the appeals process. The exhaustion of administrative remedies ensures that a reviewing court has before it a complete record and has the advantage of the agency's findings as well as its technical expertise on the subject. State, Dept. of Labor v. University of Alaska, 664 P.2d 575 (Alaska 1983); Ben Lomand, Inc. v. City of Anchorage, 761 P.2d 119 (Alaska 1988). Section 3(e) makes the application of the doctrine explicit and ensures that unless judicial review is sought pursuant to the administrative appeal process the court is without jurisdiction to hear the case.

2) Other State Statutes Providing for Administrative Penalties

A number of other state agencies have been granted administrative penalty authority, for example, Alaska Department of Natural Resources (coal mining) (AS 27.21.250); Alaska Department of Commerce and Economic Development (securities) (AS 45.55.200), the Division of Insurance (AS 21.27.440), the Alaska Public Utilities Commission (AS 42.05.551 -- .601; AS 42.06.530 -- .570), the Alaska Public Offices Commission (AS 39.50.135), the Alaska Department of Labor (OSHA) (AS 18.60.095) and the State Commission for Human Rights (AS 18.80.120 -- .130). None of these statutes require adherence to the procedures of the APA. Procedures for assessment of these administrative penalties are set forth either in the authorizing language of the statute itself or in the agency's regulations. Administrative penalties assessed by the Alaska Public Utility Commission and the State Commission for Human Rights are subject to judicial review under APA. In contrast, penalties assessed by the Department of Natural Resources, Alaska Public Offices Commission and Alaska Department of Labor are judicially reviewed pursuant to separate statutory authority. AS 27.21.240; AS 39.50.135 ("subject to appeal to the superior court"); AS 18.60.97(e) ("substantial-evidence basis" of review).

In sum, we conclude that the proposed administrative penalty scheme in HB 409 is not without precedent in Alaska law and that the procedural protections and safeguards provided in HB 409 for the assessment of penalties are similar to those protections provide in the APA. If you have any further questions, or if we can be of further assistance, please contact us.

Sincerely,

DOUGLAS B. BAILY
ATTORNEY GENERAL

Breck C. Tostevin
Assistant Attorney General

cc: Senator Rick Halford
Jeff Bush

Alyeska pipeline SERVICE COMPANY

240 MAIN STREET, SUITE 800, JUNEAU, ALASKA 99801, TELEPHONE (907) 586-3340, TELEX 090-25-127

May 3, 1990

The Honorable Jan Faiks
Alaska State Legislature
P. O. Box V
Juneau, Alaska 99811

Dear Senator Faiks:

One rationale offered by the Administration to support the warrantless search provisions in HB 409 is that the new statute is needed to obtain adequate access to the Valdez Marine Terminal.

Under the National Pollution Discharge Elimination System permit recently issued to Alyeska for the Ballast Water Treatment (BWT) system at the terminal, the DEC has access to the BWT facility and related records during any time that the BWT facility is operational. A copy of the relevant portions of the permit are included for your review.

Similar access is available to the DEC under existing statues and under permits for other regulated activities. On February 29, 1990, I wrote Commissioner Kelso to propose guidelines for agency access to the Terminal. Among other things, the letter offered immediate access to vessels, an office within the Terminal and an escort (for safety reasons) from the Terminal office to any part of the facility within 10 minutes after a request. A copy of our proposal is attached. To date, I have not received a reply to this proposal.

So long as DEC personnel abide by safety regulations, they have appropriate access to the Terminal. We have asked the DEC to provide verbal and written feedback after each inspection at the Terminal. Full communication will allow us to address concerns noted by the DEC during its inspection. We believe this type of feedback is appropriate for all facilities, not just ours.

Sincerely,

for Mike Williams, Vice President
Environmental Planning and Control

CORPORATE OFFICES
1835 SOUTH BRAGAW STREET, ANCHORAGE, ALASKA 99512, TELEPHONE (907) 278 1611, TELEX 090-25-127

Permit No.: AK-002324-8
Application No.: AK-002324-8

FINAL
PERMIT

United States Environmental Protection Agency
Region 10
1200 Sixth Avenue
Seattle, Washington 98101

AUTHORIZATION TO DISCHARGE UNDER THE

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the Clean Water Act, 33 U.S.C. §1251 et seq., as amended by the Clean Water Act of 1987, P.L. 100-4, the "Act,"

Alyeska Pipeline Service Company
1835 South Bragaw Street
Anchorage, Alaska 99512

is authorized to discharge from the Ballast Water Treatment (BWT) facility and marine terminal located near Jackson Point, Alaska, to receiving waters of Port Valdez in accordance with discharge points, effluent limitations, monitoring requirements and other conditions set forth herein.

This permit shall become effective June 7, 1989.

This permit and the authorization to discharge shall expire at midnight, June 6, 1994.

Signed this 8th day of May 1989.

Robert S. Burd
Director, Water Division, Region 10
U.S. Environmental Protection Agency

PART II. STANDARD MONITORING, RECORDING AND REPORTING REQUIREMENTS

A. Representative Sampling. Samples taken in compliance with the monitoring requirements established under Part I shall be collected from the effluent stream prior to discharge into the receiving waters. Samples and measurements shall be representative of the volume and nature of the monitored discharge.

B. Monitoring Procedures. Monitoring must be conducted according to test procedures approved under 40 CFR Part 136, unless other test procedures have been specified in this permit or are approved in advance by EPA in writing.

C. Reporting of Monitoring Results.

Monitoring results shall be summarized each month on the Discharge Monitoring Report (DMR) form (EPA No. 3320-1). The reports shall be submitted monthly and are to be postmarked by the 15th day of the following month. Legible copies of these, and all other reports, shall be signed and certified in accordance with the requirements of Part IV.H. Signatory Requirements, and submitted to the Director, Water Division and ADEC at the following addresses:

original to: United States Environmental Protection Agency
Region 10
1200 Sixth Avenue, WD-135
Seattle, Washington 98101

copy to: Alaska Department of Environmental Conservation
Southcentral Region
437 "E" Street - Second Floor
Anchorage, Alaska 99501

copy to: Alaska Department of Environmental Conservation
Prince William Sound District Office
Drawer 1709
Valdez, Alaska 99686

Additionally, daily monitoring data utilized to calculate the DMR monthly summaries shall be supplied to ADEC on IBM XT compatible floppy disks, with description of the data fields formatting the software to be utilized to access the data.

D. Additional Monitoring by the Permittee. If the permittee monitors any pollutant more frequently than required by this permit, using test procedures approved under 40 CFR 136 or as specified in this permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the DMR. Such increased frequency shall also be indicated.

The permittee shall notify ADEC when additional monitoring of any pollutant either in the influent, effluent or within the treatment system, regardless of the method used, is conducted. This includes samples taken from tankers. Results shall be made available upon request.

E. Records Contents. Records of monitoring information shall include:

1. The date, exact place, and time of sampling or measurements;

2. The individual(s) who performed the sampling or measurements;

3. The date(s) analyses were performed;

4. The individual(s) who performed the analyses;

5. The analytical techniques or methods used; and

6. The results of such analyses.

F. Retention of Records. The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least three years from the date of the sample, measurement, report or application. This period may be extended by request of the Director or ADEC at any time. Data collected on-site, copies of Discharge Monitoring Reports, and a copy of this NPDES permit must be maintained on-site during the duration of activity at the permitted location.

G. Twenty-four Hour Notice of Noncompliance Reporting.

1. The following occurrences of noncompliance shall be reported by telephone within 24 hours from the time the permittee becomes aware of the circumstances:

a. Any noncompliance which may endanger health or the environment;

b. Any unanticipated bypass which exceeds any effluent limitation in the permit (See Part III.G., Bypass of Treatment Facilities.);

c. Any upset which exceeds any effluent limitation in the permit (See Part III.H., Upset Conditions.), or

d. Violation of a maximum daily discharge limitation for any of the pollutants listed in the permit to be reported within 24 hours.

2. A written submission shall also be provided within five days of the time that the permittee becomes aware of the circumstances. The written submission shall contain:

a. A description of the noncompliance and its cause;

b. The period of noncompliance, including exact dates and times;

c. The estimated time noncompliance is expected to continue if it has not been corrected; and

d. Steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.

3. The Director may waive the written report on a case-by-case basis if the oral report has been received within 24 hours by the Water Compliance Section in Seattle, Washington, by phone. (206) 442-1213.

4. Reports shall be submitted to the addresses in Part II.C., Reporting of Monitoring Results.

H. Other Noncompliance Reporting. Instances of noncompliance not required to be reported within 24 hours shall be reported at the time that monitoring reports for Part II.C. are submitted. The reports shall contain the information listed in Part II.G.2.

I. Inspection and Entry. The permittee shall allow the Director, ADEC, or an authorized representative, upon the presentation of credentials and other documents as may be required by law, to:

1. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

2. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;

3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and

4. Sample or monitor, at reasonable times, for the purpose of assuring permit compliance or as otherwise authorized by the Act, any substances or parameters at any location.

5. For purposes of ADEC's inspection and entry authority as allowed by this permit, "reasonable times" is defined as "those times during which the BWT Facility is operational."

J. Compliance Schedules. Reports of compliance or noncompliance with, or any progress reports on interim and final requirements contained in any Compliance Schedule of this permit (Part I) shall be submitted no later than 10 days following each schedule date.

Alyeska pipeline SERVICE COMPANY
1835 SOUTH BRAGAW STREET, ANCHORAGE, ALASKA 99512 TELEPHONE (907) 278-1011 TELEX 090-25-127

February 29, 1990

Letter No. 90-7188-G
File No. 16.07

Commissioner Dennis D. Kelso
AK Department of Environmental
Conservation
3220 Hospital Drive
Pouch O
Juneau, Alaska 99811-1800

Dear Commissioner Kelso:

At the House Resource Committee Hearings last month both you and I were questioned on Alyeska's policies concerning access to the Valdez Marine Terminal for DEC employees.

It was apparent to me that there is dissatisfaction on both sides with the current arrangements even though both parties are following arrangements previously agreed with your predecessor.

Since the Juneau hearing I have discussed the access question with Alyeska officials and with members of your staff. Based on those conversations I wish to propose the following guidelines for access to the Terminal.

1. DEC officials who wish to visit a ship or ships may enter the Terminal at any time and drive directly to the parking area closest to the jetty and from there proceed to the ship. The official will inform the Alyeska guard at the gate which ship(s) he intends to visit.

2. DEC officials who wish to visit other parts of the Valdez Terminal may enter the Terminal facilities at any time and drive directly to an office that will be provided for them close to the Administration Building. Alyeska Operations will provide an employee to act as a guide for the DEC official within ten minutes of the request and the employee will then accompany the official to any place he wishes to visit.

   At the Juneau hearing I believe everyone understood the requirements for safety in the Terminal and it is safety that requires us to still insist that DEC officials be

accompanied to any area other than when visiting a vessel. Even then they must abide by our safety and industrial hygiene policies when accessing our berths. We would point out that all Alyeska staff at the Terminal must be clean shaven.

Should the DEC official wish to visit another area of the Terminal after visiting a ship he may drive to the designated office and await the Alyeska employee as set out above.

3. During the House Resources Hearing you were asked if you had any problems with your officials giving Alyeska a verbal report on their visit, including details of any concerns they might have, prior to their exiting the Terminal. As I recall you agreed that this was proper. You did, however, state that a written report within seven days as I had requested was probably not practical.

We therefore request that all DEC officials visiting the Terminal present an Alyeska official with a verbal report of their findings upon their exit and send a written report to the Terminal Superintendant within 30 days.

Sincerely,

M.F.G. Williams
Vice President,
Environmental Planning & Control

sks

90s026

bcc: S.D. Dietrich
T.C. Haber
I.L. Herman
J.H. Hermiller
G.J. Jurkowich
C.F. O'Donnell
T.F. Plummer
T.L. Polasek
A.T. Smith

ENVIRONMENTAL SERVICES Ltd.

April 3, 1990

Senator Jan Faiks
Chairwoman
Senate Judiciary Committee

REF: TESTIMONY ON HB 409, HB 316 AND SB 502

It is the business of ENVIRONMENTAL SERVICES, LTD. (ESL) to assist both the public and private sectors resolve conflicts and facilitate progress through cooperation. For almost 20 years ESL has worked with federal and state agencies, local governments and with private enterprise including the oil and gas industries. We played an important role in the aftermath of the Exxon Valdez spill having developed the first federally approved beach cleanup plan just days after the spill. In 1978 we prepared the State's Oil Spill Contingency Plan and have been very active in the development of Coastal Zone Management Plans for communities in Prince William Sound as well as others. We have also prepared a number of State and Federal plans and reports addressing a wide range of environmental issues and providing advice on public policy.

As independent, third party consultants ESL has a reputation of providing objective professional advice to government and industry.

The reaction to the Exxon Valdez spill is understandable but political emotions do not necessarily make for good public policy. We agree that there are problems within ADEC as well as the Oil Patch, but these problems will not be resolved by violating basic rights protected under our State and Federal Constitutions. These problems will be resolved with competent and responsible management in government and the growing sensitivity of the oil industry and their support service providers. ESL looks forward to continuing its role in facilitating the dialogue essential between these parties. This is not only good corporate policy but in the best interest of Alaska.

In recent testimomy, a number of speakers have suggested a very appropriate and necessary step towards building a broad understanding of what the rules are, with respect to environmental laws and regulations in Alaska, and how those laws and regulations should be applied. Although ESL, in part, makes its living from some of this confusion we believe it is in the public interest that the State fully implement two components of the Department of Environmental Conservations enabling Act. We offer a third component that works to assist the others.

4201 TUDOR CENTRE DRIVE, SUITE 307 ANCHORAGE, ALASKA 99508 (907) 563-1912 FAX (907) 562-1824

1. Section 46.03.040 requires (it is not discretionary) that ADEC "formulate and annually review and revise a statewide environmental plan for the management and protection of the quality of the environment and the natural resources of the state".

We are not an advocate of endless planning, but this requirement, in law since the creation of the agency, mandates the Administration to develop and present to the people of Alaska its plan or strategy for meeting its legal responsibilities in environmental protection. To our knowledge this has never been done.

It would be within this context that a rationale for change be developed if it was determined that ADEC needs additional statutory authority to protect the human environment consistent with their enabling Act. It is most appropriate to bring this to the attention of the Legislature at this time in light of the testimony presented by a wide range of groups in opposition to these bills. For we believe it is through this process of preparing an annual review and plan that the concepts put forward by these bills would be best served. This would allow the people of Alaska, and yes that includes pro and anti development groups, to understand and participate in self determination.

ADEC claims that they have simply not had the time nor resources to comply with this statutory requirement. We respectfully disagree and believe it essential to bring direction to our State environmental policies as well as properly informing the State Legislature, the rest of the Administration and the people and businesses of our State. It also can provide some continuity in our State environmental public policies.

2. Section 44.46.030 requires (it is not discretionary) the establishment of an Environmental Policy Advisory Board consisting of the Commissioner of DEC and eight (8) members who are not State officials or employees.

The Board, consistent with Section 44.46.050, shall advise the commissioner in the review and appraisal of programs and activities of state departments and agencies in light of the policies set out by DEC's enabling Act and serve as a forum for the exchange of views, concerns, ideas, information and recommendations relating to the quality of the environment. To our knowledge this Board has never been established.

With the proper appointments the Board, working with the annual statewide environmental planning process required under Section 46.03.040, and the Administration can provide the kind of leadership the Alaskan people desire and deserve in responsibly protecting our human environment.

3. Consistent with the Lt. Governor's responsibilities to review and certify state regulations and the ADEC Commissioner's responsibilities under ADEC's enabling Act, a Regulatory Reform Task Force should be configured, with participation from EPA, to review all existing regulations dealing with environmental issues and insure that they:

a) Are based on scientific fact
b) Actually achieve a positive result in the environment
c) Establish reasonable performance standards/goals rather than stipulate prescriptive means and methods.
d) Require performance by government in the permitting processes
e) Establish clear information submission standards so that permit applicants know and understand what is required of them
f) Stimulate the development of new technologies
g) Recognize the uniqueness and diversity of Alaskan environments
h) Are consistent with statute and our Constitution

Certainly there are other regulatory goals that will come to mind but this illustrates a direction of thinking that would be very positive and productive.

State and Federal laws and regulations dealing with the human environment in Alaska are too complex, overlapping and confusing. New laws have been enacted without a real understanding of their relationship to existing laws. Old laws no longer based on scientific fact or new technologies, should be reviewed and amended. The structure of the laws, now on the books, and ADEC's administration of complex networks of authority require substantive analysis and reform.

The State must assume EPA clean water and hazardous waste programs if we are to facilitate responsible economic growth.

With the implementation of these three points we believe Alaska can take an important and essential step forward in both regulatory reform and environmental protection as well as economic recovery. We believe that implementation of these actions will provide a forum for the type of dialogue Alaska needs and deserves in its quest to stimulate our economy while ensuring a quality and sustainable human environment.

Rather than review each of the specific objections we have with HB 409 - we would state clearly that we believe this legislation reflects an excess of zeal without the proper maturity and understanding critical for good public policy. We believe there are clear and convincing arguments against enactment of this bill. We also must conclude that this legislation is not an

implementation of existing EPA statutes into State law but rather significantly broadens ADEC powers beyond those in federal law.

There must remain a balance with proper checks on the use of State authority to ensure against abuse. No act of law should be exempt from the Alaska Administrative Procedures Act.

We have reviewed the testimony of most of those who have come before the Legislature regarding so called "Oil Spill Legislation". This is exactly the type of dialogue we believe appropriate in the ADEC policy review process we suggest above. If the Legislature desires to establish an interim committee, and we think that appropriate, to work with ADEC in its implementation of its statutory requirements in statewide environmental planning and the establishment of the Policy Review Board - we believe this legislation should be reviewed as a part of that process. We do not believe HB 409 should be passed into law as it is presently written. We have come to the same conclusion in our review of SB 502 and HB 316.

Good public policy can withstand debate and public process. Alaska can not afford to impose unrealistic statutory or regulatory regimes on an economy that is just beginning to struggle back to life. Alaska can also not afford to ignore its responsibilities to protect its human environment.

We hope these comments have been helpful and would be most willing to continue to participate in the discussion of these issues. We believe we have presented a slightly different approach to these issues and placed them in a broader context which we find appropriate at this point in the debate.

With respect,
ENVIRONMENTAL SERVICES, LTD.

Ric Davidge
Planning, Permitting &
Government Affairs

KLUKWAN FOREST PRODUCTS'
TESTIMONY TO THE SENATE
JUDICIARY HEARING ON
BILL 409

Good afternoon Senator Faiks, and members of the Senate Judiciary Committee. I am Ronald R. Wolfe, Chief Forester for Klukwan Forest Products, I live at 9446 Brandy Place, Juneau, Alaska; and I am here today before you to offer testimony against House Bill 409.

This bill is characterized as oil spill legislation not applicable to small business. On the contrary, our attorneys have agreed that this bill applies to the general authority of the Department of Environmental Conservation and would affect all businesses regulated by DEC, not just a select few.

Only Section 2 of the bill applies specifically to "pervasively regulated" facilities. That portion of the bill allows DEC to enter and inspect a premises without the consent of the owner and to copy relevant records. This is the section that prompted the nickname, "The Gestapo Bill." If there is any confusion over what is a pervasively regulated industry, I am concerned at some point DEC will use as liberal definition as possible to apply Section 2 to industries not originally contemplated as "pervasively regulated."

Section 3 - Administrative Penalties

* Section 3 allows administrative penalties of up to $15,000 per day for each violation. These penalties are higher than what a court is allowed to assess in judicial penalties. Administrative penalties should encourage compliance, not be so high as to be strictly punitive in nature.

* The Environmental Protection Agency's administrative penalty authority requires a choice. EPA must choose either to file a civil lawsuit or issue a penalty. HB 409 allows DEC to pursue both.

* The bill exempts administrative penalties from the due process standards of the Administrative Procedures Act leaving the determination of penalties solely up to the discretion of the commissioner.

Administrative penalties should be subject to the standards of the Administrative Procedures Act, unless a process for fair review is detailed in the statute. Otherwise, the commissioner would have virtually unlimited authority to impose penalties.

It is in fact frightening to give DEC the kind of Super Powers contemplated in Section 3.

Section 4 - Compliance Orders

* A compliance order is effective upon receipt. HB 409 states that a request for a hearing to contest the order does not stay the provision or deadlines in the compliance order. (In other words, guilty until proven innocent.)

* The bill allows DEC to issue a compliance order when a person is "about to violate" or is "otherwise endangering or creating the potential of pollution." This language is clearly too vague to serve as a standard upon which to issue compliance orders. DEC has existing emergency order authority if serious public health or environmental harm is threatened. The expansion of this power from emergencies to what is contemplated is Section 4 is simply <u>not</u> necessary.

* As with Administrative penalties, the bill makes the due process standards of the Alaska Administrative Procedures Act inapplicable to compliance orders.

Section 5 - Environmental Audits

* HB 409 give DEC the authority to require a person to have an independent contractor conduct an environmental audit as part of a judicial or administrative enforcement action. Audits can be a very expensive undertaking. The way the

bill is written, DEC could order an audit as part of a compliance order which could not be contested before being required to comply.

This section is of the most concern to me. First, Environmental Audit Firms must be approved by DEC, yet it is unclear what is required to stay in DEC's favorable standing to be selected. Second, biological sciences are in fact in exact sciences leaving considerable room for professional disagreement. This latitude could be abused by Environmental Audit firms.

In closing I would just like to say thank you for this time to offer testimony to your committee on HB 409.

May 1, 1990

Madam Chairman and Members of the Committee:

I have had the opportunity to study the April 20, 1990 version of Committee Substitute for House Bill 409 and I find that are serious problems with the proposed legislation that will adversely affect all businesses in either the immediate or near future. I would like to call your attention to the four most serious problems from my perspective.

Section 2 provides that ADEC can conduct searches of certain facilities without the consent of the owner/operator of the facility or a court approved search warrant provided that the facility has "significant air and wastewater emission" (line 2, page 2) and that the facility or operations "affect a significant public interest" (line 15, page 2). The section goes on to list certain facilities "by way of example only" that are no included in the provisions of Section 2. The first problem in section 2 is the whole concept of warrantless searches and the rights of citizens of this state. The second is the definition of "significant" and the conflicts with the examples of unregulated facilities. In the NEPA usage, significant is a judgment call by the agency that has historically become smaller and smaller; projects that a few years ago had no significant impacts now require Environmental Impact Statements, fewer people are required to create significant public interest. Federal agencies have ruled that single family residences located in certain areas have significant public interest in their prevention or removal, wetlands and in-holders in Parks. Federal Courts have ruled that small placer mines have such significant air and water emissions to justify EIS's for their operation. The overall NEPA record indicates that even the list of excluded facilities is at least partially included under the present definition of significant and based on the historical trend, all will soon be included.

Section 3 and Section 4 (line 26, page 2; line 21, page 3; line 20, page 5) both contain language limiting the review of administrative penalties and compliance orders by the courts. This language is totally unacceptable due to the amount of discretion that is vested in an administrative agency. The language allows enforcement activities for environmental issues where similar conduct by a law enforcement agency in the most heinous crime would allow the perpetrator to go free for violation of civil rights. Civil rights in this country extend to all activities.

Section 4 (line 23 and 27, page 4) provides that ADEC may issue a compliance order when a person "is about to violate" or "is endangering or creating the potential of pollution". Almost any activity creates the potential of pollution, at some level of risk and severity and anyone who is doing anything is about to

violat', at some undetermined level of risk and time frame, an ADEC regulation. The scope of discretion granted to ADEC in this section is overwhelming and it applies to all activities regulated by ADEC.

I request that you do not pass this legislation as long as it is written in the broad and adversarial language of the April 20, 1990 version.

John D Cooper
8183 Threadneedle
Juneau, AK 99801

BERG CONSTRUCTION CO., Inc.
GENERAL CONTRACTORS
Juneau, Alaska 99802
PHONE
(907) 780-6444

May 1, 1990

Madam Chairperson and Committee Members:

My name is Clifford Berg. I'm President of Berg Construction Co., Inc., a Juneau based construction company started here in Juneau by my father and myself in 1937. Over the years, we have worked throughout Southeast Alaska from Haines and Skagway in the North, to Metlakatla in the South including all the cities, towns and most of the villages and have built roads in some areas where the towns haven't been started yet.

I appreciate this opportunity to testify before you and vehemently oppose passage of H.B. 409.

The Department of Environmental Conservation currently has sufficient regulatory powers to accomplish their duties. I certainly object to giving this agency "Police" powers such as entering premises without a warrant, doling out high penalties, and issuing compliance orders which put a company out of business until a hearing is held.

Many of the Communist countries of the world are finally lifting their yoke of suppression so it is difficult to understand why we in Alaska should be slowly strangling ourselves with additional punitive regulations.

I understand that this bill is aimed primarily at the Petroleum Industry because of the 1989 Exxon Valdez oil spill, and while this shot may only wound the goose that's laying our big golden eggs, it may also kill many of the smaller birds that lay smaller golden eggs: fishing, mining, logging and construction, to name a few.

Please vote against H.B. 409. Thank you.

BERG CONSTRUCTION CO., Inc.

Clifford Berg

Clifford Berg, President

CB:p

48 years of building

Juneau man has worked all over Southeast

By KIRK McALLISTER
The Juneau Empire

To say that Alaska pioneers built the state and made it what it is today is certainly true in the case of Juneau contractor Cliff Berg – especially the "build" part.

In his 48 years in the construction business, Berg has become familiar with most of the communities in Southeast – in fact he has left a lasting imprint on most of them.

Berg, president of Berg Construction Co. Inc. of Juneau, has been at it a long time. He formed a partnership with his father in 1937 after graduating from Juneau High School the year before.

Since then, many of the roads, bridges, docks, air fields, buildings and water and sewer systems in Southeast are the result of his work.

He put in the original streets in Metlakatla, did the first street paving and built the float plane dock in Petersburg, built a school and civic center in Kake, a fire station in Hoonah, enlarged the harbor and rebuilt the airfield in Skagway, did road work near Haines and built part of the highway and ferry terminal in Wrangell.

He also did road work in Sitka and Ketchikan and installed several Federal Aviation Administration guidance systems around Southeast for airplane navigation.

He has built logging roads on Prince of Wales Island and has worked in many remote areas on Kupreanof, Mitkof, Zarembo and Kuiu islands.

"I guess I've lived and worked in all the towns and most of the villages in Southeast, and a lot of places where they haven't built the town yet," says Berg, a cheerful and friendly man of 68.

Born and raised in Juneau, Berg has left his mark on his home town as well.

He put in the fill for construction of Juneau-Douglas High School, cut timber off the Mendenhall Peninsula to help planes landing at the airport, installed an airplane navigation system at Lena Point and did the original clearing for the Mendenhaven subdivision in 1960 when the Mendenhall Valley's main business was fox farms.

He built the fire stations at the airport and Auke Bay, helped remodel the airport in 1973, built the Westridge Condominiums in downtown Juneau, widened the highway to the Auke Bay ferry terminal, worked on what is now Yandukin Drive, widened Thane Road, built roads and bridges at Peterson Creek and Eagle River flats, worked on the Eaglecrest road and bridge, built the powerhouse at Eaglecrest, the Auke Bay sewage treatment plant and erected several of the metal buildings at the airport.

Not one to rest on his laurels, Berg's latest job was finished in September – road work and site preparation for student housing at the University of Alaska-Juneau.

While his construction projects many times took him out of Juneau, often for years at a time, he did find time to build his own house on 10th Street in Juneau. When the Lutheran Church across the street burned down, Berg got the contract to rebuild it.

"It was the closest job I ever had to home," he said jokingly.

Berg has seen the construction industry change radically in his lifetime – equipment has evolved from hand digging to cable shovels to power backhoes, and drilling and blasting techniques have gotten more efficient and sophisticated.

He has also seen the ups and downs of the construction industry in Alaska, the feverish pace fueled by the flush of oil money and the current slowdown as the oil dollars have begun shrinking.

Berg has also been recognized by his peers. He has been selected president of the Alaska Chapter of the Associated General Contractors of America, Inc. for 1986. The group has about 900 members in Alaska and indirectly represents the 25,000 to 30,000 construction workers in the state.

At a town meeting in Juneau earlier this month, Berg, speaking on behalf of the AGC, told Gov. Bill Sheffield that the organization would like to see a minimum of $500 million per year budgeted for capital projects around the state. The governor has earmarked $298.2 million for public construction in his proposed budget, released last week.

Berg says extra money for capital construction could be made available by shrinking or eliminating the permanent fund dividend program or using part of the undistributed income account (the amount of the fund earnings left over after inflation proofing and dividend payments).

"Having all this wealth ($6.9 billion in the permanent fund) and locking it up doesn't make sense," Berg said. "How wealthy do we have to be before we should provide basic services to people such as water, sewer and power."

Berg also said he was concerned about increasing unemployment in the construction industry. About 1,500 construction jobs were lost in Alaska last year and 2,000 more are expected to be lost next year, he said.

According to figures from the Department of Labor, there are some 16,000 unemployed construction workers in Alaska with about 21 percent of those being out-of-state claimants.

Berg said he favored cutting the operating budget of state government since private sector jobs were being lost and unless the cost of government is curtailed it will mean added taxes on state residents to make up for the shortfall in oil dollars.

He pointed to a study of the costs of government by a group called Common Sense for Alaska, Inc., that showed that wages and salaries of state employees are nearly $9,000 per year higher than the nationwide average and the state employee benefits package is more than $3,000 per year higher than the national average.

The same study compared government expenses to population and found that Alaska spends more than $5,000 per resident – five times the national average. Capital spending is 12 times the national norm.

In his job as AGC president, Berg makes his wishes known to the ad

Photo by Mark Kelley

Cliff Berg: new president of builder's group

ministration and legislature. He said the group would like to see state grant projects put out to competitive bid, and the Department of Transportation should handle construction projects for all state agencies. Both those changes would make projects more efficient and easier for contractors to deal with, he said.

But Berg's main focus will remain his Juneau business where his son Jan Vernon serves as vice president. Despite traveling the world with his wife, Pat, (he also served in the Aleutians during World War II) he still enjoys the hunting, fishing and photographic opportunities around his hometown.

TELECOPIER 907-747-5588
TELEPHONE 907-747-2711

ALASKA PULP CORPORATION
4600 SAWMILL CREEK ROAD
SITKA, AK 99835-9801

TESTIMONY FOR HB 409 **5/01/90**
(DEC ADMINISTRATIVE PENALTIES AND SEARCHES)

Senators, Committee Members:

We are distressed about HB 409 and its long reach toward industries outside of the oil industry. This is a bad bill and one that should be killed.

Alaska Pulp Corporation is one of Alaska's largest year-around manufacturers and, with about 1000 employees, one of Southeast Alaska's largest employers. We are not against environmental regulation. We are not against expenditures for pollution control. In 1989, we spent $5.0 million on improvements to air quality at our pulp mill in Sitka and another $14 million to improve water quality. We spend about $10 million a year to make current pollution-control equipment perform. We have been doing our fair share toward cleaner air and water and we feel strongly that DEC, without new legislation, has sufficient power to enforce compliance of its regulations.

The proposal for fines of an extraordinary high level, as stated in Section 3 of HB 409, are excessive. Our state's administration should be working hand-and-hand with industry to encourage compliance, to solve pollution problems, and not working adversarily by establishing prohibitive fines through legislation.

HB 409 gives the Department of Environmental Conservation extraordinary and arbitrary powers of enforcement. The bill exempts administrative penalties from the due process standards of the Administrative Procedures Act and leaves the determination of penalties up to the discretion of the commissioner. This is wrong.

This bill gives Department of Environmental Conservation Gestapo-like powers to establish compliance and compliance orders, based merely on allegations. DEC has the ability now, under emergency order authority, to issue these compliance orders if serious public health or environmental harm is threatened.

Although this piece of legislation is aimed at the the oil industry, it will have a farther reaching effect. From the timber industry vantage, we are concerned how it will affect us. We want to continue to cooperate with state, as well as federal, agencies concerned about our environment.

If this bill passes, the State of Alaska will be sending a clear message to new businesses, investors and ventures to stay clear of Alaska.

Thank you,

Frank Roppel
Executive Vice-President

Alaska State Legislature

Please enter into the record my testimony to the Jud. Com.
committee name

committee on H.B 409 . dated 5/1/90 .
bill/subject

I am opposed to all aspects of the referenced bill. I am particularly opposed to Sec. 2 (14) wherein the D.E.C. is authorized to make unannounced visits to pervasively regulated facilities.

H&H Contractors, Inc. operates two hot plants that are both permitted by D.E.C.. We view legislation that would give any person or agency the right to make unauthorized visits to our facilities as an invasion of our rights. Additionally, we are also regulated by O.S.H.A and M.S.H.A. Both of these agencies require that visitors to our facility first report to our office. The proposed legislation seems to contradict these federal regulations.

We respectfully request that you not pass HB 409 from your committee. Alaskan industry and Alaskans do not need this legislation.

Signed: Anton K. Johansen Anton K. Johansen
Testifier

H&H Contractors, Inc.
Representing (Optional)

P.O. Box 60610 Fairbanks 99706
Address

(907) 479-2235
Phone No.

Alaska State Legislature

Senate Judiciary

Please enter into the record my testimony to the (House Bill 502)
committee name

committee on _____, dated 4/11/90 as amended 4/20/90.
bill/subject

This bill seems to have been prompted by legitimate concerns, but is crafted poorly to address those concerns. It is far too broad and has had too little public input to constitute a reasonable review. As an average, concerned, diligent citizen I would counsel our legislators to postpone action on House Bill 409 until the issues of access to private files and records without an authorizing warrant has been adequately discussed and assessed in the light of the restriction of constitutional rights. (over)

Signed: Clark R. Milne, PE
Testifier

Representing (Optional)

1119 Coppet St.
Address

474-9580
Phone No.

Alaska State Legislature

HB#409 and SB502 / Rule 82

Please enter into the record my testimony to the RULES / Governor staff committee name

committee on OIL POLLUTION PREVENTION bill/subject dated May 1'90 — LAKDAY

Be it enacted by Legislature (new act, or add on)

All ocean vessels carrying oil should be required to carry on decks plastic barrels of CORN STARCH sufficient to sop up the total amt. of oil should the total amt. of oil be spilled. LARGE retaining hoses for the Cornstarch and oil should also be readily available.

Safe-ty Storage
15 ELEANOR AVENUE • FAIRBANKS, ALASKA 99701

SYBIL SKELTON 907-456-SAFE

Representing (Optional)

Address

Phone No.

Alaska State Legislature

Please enter into the record my testimony to the Senate Judiciary Committee
committee name

committee on HB 409,SB502, HB316 , dated May 1, 1990
bill/subject

KECE Kodlak Envlromental Cleanup Effort
PO Box 625 • Kodlak, Alaska 99615 • (907) 486-5113

May 1, 1990

Testimony to be given to Senate Judiciary Committee

My name is Mike Milligan, and I'm Vice-President of the KECE which we formed to deal with the effects of the spill of the Exxon Valdez. We are a member of the Oil Reform Alliance. I am a commerical fisherman, a construction worker and a parent, my wife and I are raising 5 kids, all born in Alaska. I worked as a laborer on the Trans-Alaska Pipeline.

I want to testify today in support of strong oil spill legislation, particularly HB 409, SB502, and HB316.

Alaska has been plagued and tormented by a boom-bust economy. Many of these oil spill bills will strenghten the oil (and resourse) industry in our state, by mandating greater vigilance and respect towards the environment. What this equates to for industry is that they will have to hire more personnel and use better equipment. Many of the restrictions that these bills will impose are already being adhered to by some of the more reputable firms doing business in Alaska. Corporations with a firm commitment to our state will not have as much trouble ahering to these regulations as will resourse corporations that just want the quick profits.

Passage of these bills in an unditued state won't create an economic boom but it will contribute to economic stability. Environmental vigilance potions basically mean more maintenance. Maintenance positions tend to go to local people, people that are willing to work a forty hour work week, pay local property taxes, and spend their money in state. ENVIRONMENTAL LEGISLATION CREATES DEVELOPMENT AND MORE JOBS.

Anyone that thinks that industry can't afford stricker regulations has to wonder where the 2 billion for last summers cleanup is going to come from. Any legislator that thinks we don't need to hold the industry to such high environmental standards should walk around the union halls in Fairbanks and tell the workers that we don't really need corrosion repair this summer.

Passage of these bills at their original strength will herald a new era of resourse development in Alaska. It will make development of ANWR a closer possibility. We need to look at resourse development in terms of the 1990's, not the 1970's.

CON'T

HB 409 has come under fire of late from a section of the news media with a certain zeal for sensationalizing the issuses. Their arguments are not well founded with facts.

As an owner of a 32 ft. commercial fishing vessel I'm relieved to see that the legislature wants to cater to me by listing (on page 2 line 18 of CSHB 409 (FIN) am)fishing vessels among the facilities that are exempt from HB 409. But the exemption does me little good as I'm already subject to administrative penalties under current Coast Guard regulations. I can get a $5,000 ticket from the U.S.C.G. for as little as 1/2 a cup of oil on the water. I can be boarded and inspected, and it doesn't really bother me because I intend to operate my vessel in a professional manner.

Any industry people that want to leave the state because they feel threatened won't be to retreat to Alabama or Louisianna because they already have administrative penalty laws there as well, in fact they have them in over 25 states.

I urge this committee and this legislature to pass strong environmental laws during this legislative session.

Thank You,

Mike Milligan
Vice-President KECE

This 'n That

As a staunch member of the local chapter of the "*Coot 'n Codger Club*," I feel it neçesaary from time to time to refer to my treasured copy of "*Today in Alaskan History*" and to report to you some headlines of days gone by in good old AK's earlier days. For instance, on April 29, 1930: "*The cornerstone of the Federal and Territorial Building, now the Alaska State Capitol, was laid in Juneau.*" And on April 30, 1913: "*The bill creating the Alaska Pioneer's Home was approved by Walter E. Clark, Governor of the Territory of Alaska.*" (Should be of great interest to we C 'n C's.) Oh, here's an appropriate one, though it would never happen in this day and age. On May 2, 1913, "*The first Alaska Territorial Legislature adjourned sine die (without a day being set for meeting again) after 61 days.*" And here's a peculiar one for you, on May 2, 1974, "*Standard Oil and Exxon opposed the Alaska Pipeline, preferring a Canadian route which would have better served the financial interests of the two companies.*" One only has to think of the great Alaska oil spill of 1989 to ponder a bit over that bit of information ... what if ... ?

New Watch Dog

I received a flyer in the mail last week sent by the Greater Juneau Chamber of Commerce called "*Legislative Alert.*" It has to deal with three House bills that the Chamber feels are not in the best interest of the business community. It also relates our two representatives' (Ulmer and Hudson) position on said bills. Ulmer supported H.B. 210 cosponsored H.B. 409 and H.B. 558.

H. B. 210, "*Reservation of Instream Flows for Fish.*" Title sounds good on the surface, but in reality, it virtually can stop any development by the private sector or for that matter, a municipality if it uses any part of a stream for its water source.

H.B. 409 would give the Department of Environmental Conservation (DEC) the sweeping authority to search *your place of business without a warrant if they "even suspect"* that a permitted business (say a fish processor and smokery) is in violation of waste water or air emissions pollution. Violators could be subject to a $15.000 per day (without limit) fine.

H.B. 558 would give the private citizen the right to sue companies directly on environmental issues. I understand that originally the bill would have allowed persons to sue *government agencies* and *commissioners* as well, however the government saw the absolute horror of this monster bill and got themselves pulled out.

These are scary bills! Moreover, they are a direct result of the current "over reaction" on saving the environment. Legislators have a tendency to be terrific targets for the *frenzied few* who feel that all our environmental ills can be cured by overkill measures such as proposed by these bills. The Chamber mentioned that some people labeled them "*witch hunts*" with "*Gestapo*" authority ... I wholeheartedly agree.

At press time I understand that H.B. 409 was voted on: 21 yeas and 19 nays with a notice of re-consideration. H.B. 210 and 558 were still in rule committees.

I keep asking myself ... why are we Americans so willing to throw away our freedoms and impose *heavy State restrictions* upon ourselves? Can't we see the problems the people are having in countries in the communist block? They are struggling toward gaining freedom and democracy while we blithely are so willing to give up ours. The "*big stick*" authority of the State mentality is definitely, in my opinion, not what our forefathers had in mind when they framed the Constitution. I applaud the Chamber of Commerce in their effort to seek out, identify and label these anti-business, anti-capitalism pieces of legislation.

On the Brighter Side ...

I notice the cross walks, center lines and other street markings are almost completely obliterated from this past winters' hard wear and tear. But, as the weather permits, I understand the "stripers" will be out with a fresh batch of white and yellow paint.

Litter Free!

The 4th annual area-wide clean-up sponsored by Litter Free, Inc., was an enormous success, thanks to the hundreds of you who volunteered and participated. Yellow litter bags sprouted up like daffodils all over the borough roadsides. Tons of trash and litter were collected in not-so-great weather. All of the results are still not in ... we will publish them as soon as they are all compiled. All the local media were involved this year and cooperated wonderfully in this effort. Mary Mahoney, this year's president of Litter Free, Inc., *(and our own marketing director here at Commercial Art/Info-Juno)* with the help of her board, will have news releases

(Cont on Page 60)

Rap With Rip... (Cont. from page 21)

available to the media in the next few days. With all the people who supported the clean up, there are a lot of *"thank yous"* to be made. *Environmentally speaking, this effort was an exceptional testimony to the commitment of those involved.*

As a consequence of this effort I just found out that Juneau won an award **"For the Most Improved City in Alaska in 1989"** sponsored by ALPAR (Alaskans For Litter Prevention and Recycling). They supply all those yellow litter bags free of charge. They asked Mary to come to Anchorage to accept the award and represent our community. Well this was certainly unexpected as none of us on the board were aware that such an award existed. Congratulations to Litter Free, Inc., and Juneauites who participated!

Star Bug Contest

Look on the back cover of your last week's *Info* (Apr. 21-27) ... right in the middle of the **Honda Hut** advertisement, next to the outboard and lawnmower, the winning bug may be found. If you find one you're going to be eligible to collect over $80 worth of gift certificates! If you are a winner, come into Commercial Art in the Emporium Mall and pick up gift certificates for the following prizes: A free burger, pasta or chicken dinner at **Mike's**, a kitchen knife from the **Bullet and Blade**, a 12 pack of Pepsi from **Alpac Corp.**, a free pass to one of **Gross-Alaska theaters**, one complimentary breakfast from the **Fiddlehead**, two free movie rentals from **"On the Go Video,"** a cap with the famous Red Dog logo on it from the **Red Dog Saloon**, a dish of ice cream at the **Cookhouse**, a free AA, C, D or 9V battery a month for a year from **Vintage Electronics** and a free cut and style from **Troy's Hair House**. Last week our lucky winner was **Carmen Wynn**.

Well gang, that's it for this week. Old Rip gives the Chamber of Commerce and Litter Free, Inc., an "A" ... and an "F" to framers and supporters of over-kill so-called "environmental bills" and to litter bugs ... both are extremes !!

Rudy J. Rip

EARTH MOVERS OF FAIRBANKS, INC.

GENERAL CONTRACTOR
925 Aurora Drive
Fairbanks, Alaska 99709-2197

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REG. AA253
Phone (907) 456-5087
(907) 452-5634
Fax (907) 451-7632

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 businessman'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

Alaska Loggers Association, Inc.

217 Second Street, Suite 203
Juneau, Alaska 99801
(907) 463-3175

111 STEDMAN, SUITE 200
KETCHIKAN, ALASKA 99901-6599
Phone 907-225-6114
FAX 907-225-5920

April 23, 1990

Joe Poor, Executive Director
Greater Juneau Chamber of Commerce
1107 W. Eighth St. #1
Juneau, Alaska 99801

Dear Joe,

At the Chamber's request, I have detailed below some of the concerns that numerous business organizations have with House Bill 409.

This bill is characterized as oil spill legislation not applicable to small business. On the contrary, our attorneys have agreed that this bill applies to the general authority of the Department of Environmental Conservation and would affect all businesses regulated by DEC, not just a select few.

Only Section 2 of the bill applies specifically to "pervasively regulated" facilities. That portion of the bill allows DEC to enter and inspect a premises without the consent of the owner and to copy relevant records. This is the section that prompted the nickname, "The Gestapo Bill."

Since there has been so much attention paid to the "pervasively regulated" issue, I'd like to focus these comments on those sections of the bill that would apply to all who are regulated by DEC, big and small.

Section 3 - Administrative Penalties

* Section 3 allows administrative penalties of up to $15,000 per day for each violation. These penalties are higher than what a court is allowed to assess in judicial penalties. Administrative penalties should encourage compliance, not be so high as to be strictly punitive in nature.

* The Environmental Protection Agency's administrative penalty authority requires a choice. EPA must choose either to file a civil lawsuit or issue a penalty. HB 409 allows DEC to pursue both.

* The bill exempts administrative penalties from the due process standards of the Administrative Procedures Act leaving the determination of penalties solely up to the discretion of the commissioner.

Administrative penalties should be subject to the standards of the Administrative Procedures Act, unless a process for fair review is detailed in the statute. Otherwise, the commissioner would have virtually unlimited authority to impose penalties.

Section 4 - Compliance Orders

* A compliance order is effective upon receipt. HB 409 states that a request for a hearing to contest the order does not stay the provision or deadlines in the compliance order. (In other words, guilty until proven innocent.)

* The bill allows DEC to issue a compliance order when a person is "about to violate" or is "otherwise endangering or creating the potential of pollution." This language is clearly too vague to serve as a standard upon which to issue compliance orders. DEC has existing emergency order authority if serious public health or environmental harm is threatened.

* As with Administrative penalties, the bill makes the due process standards of the Alaska Administrative Procedures Act inapplicable to compliance orders.

Section 5 - Environmental Audits

* HB 409 gives DEC the authority to require a person to have an independent contractor conduct an environmental audit as part of a judicial or administrative enforcement action. Audits can be a very expensive undertaking. The way the bill is written, DEC could order an audit as part of a compliance order which could not be contested before being required to comply.

For your information, I have attached a list of the business organizations we have been working with on this bill. Representatives of these organizations have reviewed this letter and concur with the concerns detailed here.

Sincerely,

Thyes J. Shaub
Governmental Affairs Director

cc: Representative Fran Ulmer

Represented Business Interests

Alaska Loggers Association
Alaska Pulp Corporation
Echo Bay Exploration, Inc.
Alaska Coal Association
Alaska Miners Association
Resource Development Council
Associated General Contractors of Alaska
Forest Alliance
Alaska State Chamber of Commerce
Greens Creek Mining Company
Alyeska Pipeline Service Company
Arco Alaska, Inc.
KONCOR Forest Products, Inc.
Klukwan Forest Products, Inc.
Kensington Venture
The Producers Council
Timber Trading Company

ASSOCIATED GENERAL CONTRACTORS of ALASKA

[illegible] STREET • ANCHORAGE, ALASKA [illegible]
PO BOX 240809 • ANCHORAGE, ALASKA [illegible]
TELEPHONE (907) 561-5354 • FAX (907) 562-0118

April 13, 1990

The Honorable Sam Cotten
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Speaker Cotten:

The Associated Ge[illegible]l Contractors of Alaska (AGC) opposes passage of HB 409 in [illegible]ant form. We have not yet been able to assess the full sw[illegible] the warrantless search provision proposed in Section 2[illegible] bill.

AGC is co[illegible]ed about the Department of Environmental Conservation's in[illegible]vement in regard to environmental audit procedures. Without p[illegible]er safeguards we believe it could be used for delay tactics a[illegible]harassment.

Also, the [illegible]torney's fees should work both ways. If these issues go to court a[illegible]d the Department loses, it should return any moneys administra[illegible]ively taken and pay the court costs and attorney fees for the prevailing party. This would impose discipline on the Department that is absolutely vital.

There is a real need to advise small business in Alaska of the ramifications of HB 409. There appears to be a rush to pass this legislation to avoid small business knowing what the impact will be under this legislation.

HB 409 should be held over and field hearings conducted throughout Alaska describing the proposed impacts. We believe that if you conduct field hearings, you will find that a large majority of Alaskans would speak out in opposition to this legislation. It sets dangerous precedents and is poor legislative policy because it

represents environmental overkill as the result of the emotional over reaction to the oil spill in Prince William Sound.

We urge you not to let HB 409 go to the Floor of the House of Representatives in its present form.

Sincerely,

ASSOCIATED GENERAL CONTRACTORS
OF ALASKA

F. Michael Swalling
President

cc: All House Members

PO Box 21135
Juneau, Alaska 99802-1135
May 3, 1990

Senator Jan Faiks
Chair, Senate Judiciary Committee
Capitol Building
Juneau, Alaska 99811

Dear Senator Faiks:

I would like to offer the following comments regarding House Bill No. 409 - An Act relating to the reform of certain environmental conservation laws and the administrative penalties for their violation." I offer these comments as an individual citizen who has resided in Alaska for over twenty five years - with my experience in Alaska dating back to 1953. I also offer these comments as a former federal government administrator and manager of forest and other related natural resources.

I do not believe this proposed Bill should be favorably reported out of Committee in its present form. My primary reasons for opposing this Bill in its present form can be summarized as follows:

1. The Bill's present coverage is open to a broad interpretation of businesses covered. The term "pervasively regulated" is not adequately defined. One can conclude that both big and small businesses would be covered by this Bill.

2. I am opposed to authorization for government agencies to issue administer penalties without following the due process standards of the Adminisrative Procedures Act. The Bill apparently leaves the determination of penalties to the discretion of the Commissioner. Administrative penalties should be subject to the standards of the Administrative Procedures Act.

3. Section 4 of the Bill apparently authorizes the issuance of compliance orders without the requirement of adhering to the standards of the Administrative Procedures Act.

4. I am opposed to the provisions of Section 2 which apparently allows entry and inspection of premises and records without the consent of the owner or consent of the Court.

5. The Environmental Audits (Section 5) part of the Bill is also too broadly worded. It appears to require such audits without the owner being able to contest or seek a modification of such an Audit.

As one who has represented the government in natural resource management issues for over twenty five years, I believe there is real merit in having a system of due process, or checks against the possible unfair application of government regulations. In the interest of fairness, I would respectively suggest this Bill not be reported favorably without restoring the due process and related fairness requirements noted above. Thank you for the opportunity to comment.

Sincerely,

John A. Sandor

Testimony of Robert G. Loiselle
For The Forest Alliance
Senate Judiciary Committee Hearing
HB 409
May 3, 1990
Juneau, Alaska

The Forest Alliance is a broadly constituted organization of forest land owners, manufacturers, loggers and others having commercial and professional interests in the proper management and development of forest lands. The members of the Alliance include all of the major private timber owners in the state of Alaska.

Our members are very concerned about HB 409, because despite testimony to the contrary, this bill is not simply oil spill legislation, but rather is legislation which would affect a broad spectrum of Alaska industry and business. We understand that this was not the intent of the bill, but it would certainly be the effect.

Our intent is not to question the necessity of adequate environmental regulation or of adequate enforcement tools. The issues in question with this bill are simply ones of fairness and due process. Indeed, the bill does not address environmental regulations per se, but rather their enforcement. Enforcement actions should not be punitive and they should provide for adequate due process, particularly where the very survival of a business may be at stake.

The amount of administrative penalty that DEC may administer is a question of public policy, and I would argue that $15,000 per day is too high to assess without an evidentiary hearing. And the standards for administering the penalty are so vague and the standard of judicial review (substantial evidence) so loose, that meaningful review of the amount of the penalty will be impossible.

Even though these penalties could be used to offset a judicial penalty, the individual is still subject to the attendant costs of multiple proceedings for a single action. Also, a single action could be characterized as multiple violations, opening the door for a host of penalties and proceedings.

We also take great exception to being put in the situation where we are "guilty until proven innocent". This is particularly alarming considering the limited judicial review available.

The question of environmental audits, where audits can be required as part of an enforcement action even before someone violates the law, needs serious examination.

Existing law already provides for substantial civil and criminal penalties. If it is determined that the administrative penalties provided for in this bill are required, then they should be changed to reflect amounts that are adequate, but not punitive. And these

amounts should be clearly spelled out for the various types of offenses and not left to the discretion of the commissioner. Those accused of violations should have all of the rights of due process that are normally available.

Thank you for this opportunity to testify. I would be happy at this time to respond to any questions you may have.

Alaska Loggers Association, Inc.

217 Second Street, Suite 203
Juneau, Alaska 99801
(907) 463-3175

111 STEDMAN, SUITE 200
KETCHIKAN, ALASKA 99901-6599
Phone 907-225-6114
FAX 907-225-5920

April 23, 1990

Chris: Our lobbyist group helped draft this letter. It's a good, short summary of our opposition.

Joe Poor, Executive Director
Greater Juneau Chamber of Commerce
1107 W. Eighth St. #1
Juneau, Alaska 99801

Dear Joe,

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cc: Representative Fran Ulmer

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Arco Alaska, Inc.
KONCOR Forest Products, Inc.
Klukwan Forest Products, Inc.
Kensington Venture
The Producers Council
Timber Trading Company

Alaska State Legislature

Representative Mike Davis District 19

P.O. Box V
Juneau, Alaska 99811
(907) 465-4930

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

To: Senator Jan Faiks
Senate Judiciary Committee

From: Rep. Mike Davis

Re: HB 409

Date: April 27, 1990

I am writing to request a hearing for HB 409, which would give the Department of Environmental Conservation authority to assess Administrative Penalties. HB 409 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. It has become clear to me that a streamlined regulatory atmosphere is desperately needed if we are going to keep both the state and industry to their obligation to prevent pollution and to clean up promptly when it becomes a problem. Administrative penalties will provide for an economical, efficient and consistent system to deal with chronic polluters. This is similar to laws in 28 states and may soon be required by the EPA.

In addition HB 409 allows the DEC access to inspect a select group of pervasively regulated facilities, requires environmental audits and strengthen the department ability to craft effect compliance orders.

Today, many states are using these management tools to give government and industry clear guidelines to protect the public and our environment. In is report on the Exxon Valdez tragedy, the Alaska Oil Spill Commission has recommended the addition of these regulatory tools as an essential first step towards prevention of future pollution disasters.

Thank you for your consideration.

Sectional Analysis - CS to HB 409 (Finance) am April 27, 1990

Section 1 - Consentual Inspections

This section revises the DEC's present general access authority to include the right to copy "relevant records". It continues the requirement that the DEC obtain consent from the owner or occupier of the premises.

Section 2 - Nonconsentual Inspections

Adds a provision to provide authority for nonconsentual 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. These facilities must be "pervasively regulated" by the department and be a type specifically listed in this section. A provision is also made to keep trade secrets confidential.

Section 3 - Administrative Penalties

Establishes a new section creating an administrative penalties procedure for violation of DEC's statutes, regulations, orders or permits. The amount may not exceed $15,000 per day for each violation. Current procedures for addressing violators are long, cumbersome and expensive, hampering both state and industry's ability to deal quickly with pollution problems. Criteria are provided to guide the assessment of penalties (e.g., effect of the violation on public health; prior history of violation; deterrence of future violations). This section establishes an administrative review process that streamlines the process of adjudicating these claims and provides for judicial review should the violator wish to challenge the penalty.

Due process provisions are specifically established:

1. Notice of assessment served in person or 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 4 - Compliance Orders

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. This section also provides for an administrative hearing and for judicial review of the hearing decision as in Section 3.

Section 5 - Environmental Audits

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. Audits may not be required more than once per violation as long as conditions remain in compliance with the law.

Section 6 - Adoption of Regulations

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

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

REPLY TO:

☐ *1031 W 4th AVENUE*
SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550

☒ *1st NATIONAL CENTER*
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701-4679
Phone: (907) 452-1568

☐ *P.O. BOX K—STATE CAPITOL*
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600

VIA FACSIMILE

Telecopier #456-1317
April 2, 1990

Representative Ron Larson, Co-Chair
Representative Lyman Hoffman, Co-Chair
House Finance Committee
P.O. Box V
Juneau, Alaska 99811

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 ascer ain compliance with DEC statutes and regulations. Section 2 def_nes "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.

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

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

Alaska State Legislature

HOUSE OF REPRESENTATIVES

Official Business

P.O. Box V
State Capitol
Juneau, Alaska 99811

TO: House Members

FROM: Representative Mike Davis

DATE: April 20, 1990

SUBJ: CS HB 409 (Finance) - Nonconsentual Inspection Authorities

Section 2 of CS HB 409 (Finance) provides authority for nonconsentual (warrantless) inspections only in certain narrow circumstances for a very few specific types of facilities. Only a very fewAlaska businesses -- those with major facilities posing a substantial public health or pollution risk -- would be affected by this provision.

Specifically, the legislation expressly provides that nonconsentual inspections can take place only "to the extent permitted by the United States and Alaska Constitutions" consistent with the privacy protections provided by the federal and Alaska constitutions. Federal and state courts have identified "pervasively regulated facilities" as potentially subject to nonconsentual inspections.

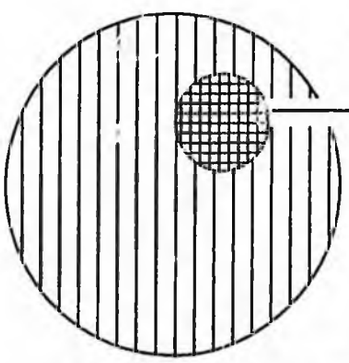
However, not all pervasively regulated facilities in Alaska would be subject to nonconsentual inspections under CS HB 409 (Finance). The legislation further narrows the type of facilities in Alaska potentially subject to nonconsentual inspections. First, by limiting the department's authority to conduct nonconsentual inspections in the case of *facilities that are pervasively regulated by DEC* (it is not sufficient that the facility is comprehensively regulated by another federal or state agency). Second, by still further limiting suchinspections to a *specific type of facilities* listed in Section 2 of the bill (see below).

In summary, in order to use the nonconsentual inspection authority provided by CS HB 409 (Finance), a facility must meet <u>two</u> tests:

1) it must be "pervasively regulated" <u>by the department</u> *and*
2) be a type of facility specifically listed in the legislation.

CS HB 409 (Finance) also provides for keeping "trade secret" records confidential.

The types of facilities potentially subject to warrantless inspections is illustrated below.



<u>FACILITIES SUBJECT TO A NONCONSENTUAL SEARCH (SECTION 2)</u>

Oil Terminal Facilities (AS 46.04.030)
Refineries
Crude Oil Exploration, Production, or Transportation Facilities
Hazardous Waste Transportation, Storage or Disposal Facilities (AS 46.03.302)
Major Solid Waste Disposal Facilities
Facilities with Significant Air <u>*and*</u> Wastewater Emmissions regulated by DEC

TOTAL NUMBER OF "PERVASIVELY REGULATED FACILITIES" POTENTIALLY SUBJECT TO CONSTITUTIONALLY SANCTIONED NONCONSENTUAL SEARCHES UNDER STATE AND FEDERAL COURT DECISIONS.

FACILITIES POTENTIALLY SUBJECT TO NONCONSENTUAL INSPECTIONS UNDER CS HB 409 (FIN). MUST BE 1) PERVASIVELY REGULATED BY DEC AND 2) SPECIFICALLY IDENTIFIED IN CS HB 409 (FIN) AS SUBJECT TO NONCONSENTUAL SEARCHES

Alaska State Legislature

Legislative Research Agency

P.O. Box Y
Juneau, AK 99811-3100
Phone: (907) 465-3991
Fax: (907) 463-3331

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-

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.

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

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.

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

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 intents 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

State	Administrative Civil Penalties	Judicial Civil Penalties
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)

State	Administrative Civil Penalties	Judicial Civil Penalties
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)

State	Administrative Civil Penalties	Judicial Civil Penalties
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 (de novo 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

ATTACHMENT A

Alaska Statute 44.62.330
Article 8. Administrative Adjudication

lates art. II of the state constitution. State v. ALIVE Voluntary, 606 P.2d 769 (Alaska 1980).

No implied general power to veto agency regulations by informal legislative action exists. State v. ALIVE Voluntary, 606 P.2d 769 (Alaska 1980).

Cited in Wickersham v. State, Com. Fisheries Entry Comm'n, 680 P.2d 1135 (Alaska 1984).

Article 8. Administrative Adjudication.

NOTES TO DECISIONS

Applied in Schnabel v. State, 663 P.2d 960 (Alaska Ct. App. 1983).

Sec. 44.62.330. Application of AS 44.62.330 — 44.62.630. (a) The procedure of the state boards, commissions, and officers listed in this subsection or of their successors by reorganization under the constitution shall be conducted under AS 44.62.330 — 44.62.630. This procedure, including, but not limited to, accusations and statements of issues, service, notice and time and place of hearing, subpoenas, depositions, matters concerning evidence and decisions, conduct of hearing, judicial review and scope of judicial review, continuances, reconsideration, reinstatement or reduction of penalty, contempt, mail vote, oaths, impartiality, and similar matters shall be governed by this chapter, notwithstanding similar provisions in the statutes dealing with the state boards, commissions, and officers listed. Where indicated, the procedure that shall be conducted under AS 44.62.330 — 44.62.630 is limited to named functions of the agency.

(1) *[Repealed, § 5 ch 159 SLA 1980.]*

(2) Board of Chiropractic Examiners;

(3) Board of Dental Examiners;

(4) State Board of Registration for Architects, Engineers and Land Surveyors;

(5) *[Repealed, § 13 ch 218 SLA 1976.]*

(6) Board of Examiners in Optometry;

(7) *[Repealed, § 5 ch 159 SLA 1980.]*

(8) State Medical Board;

(9) Division of Lands under Alaska Land Act where applicable;

(10) Board of Nursing;

(11) Board of Pharmacy;

(12) Board of Public Accountancy;

(13) Department of Labor as to functions relating to employment security only as provided in (c) of this section;

(14) Real Estate Commission;

(15) Alaska Workers' Compensation Board, where procedures are not otherwise expressly provided by the Alaska Workers' Compensation Act;

(16) Department of Transportation and Public Facilities, as to functions relating to aeronautics and communications;

(17) *[Repealed, § 12 ch 131 SLA 1980.]*

(18) *[Repealed, § 49 ch 94 SLA 1980.]*

(19) *[Repealed, § 54 ch 169 SLA 1978.]*

(20) *[Repealed, § 16 ch 82 SLA 1982.]*

(21) *[Repealed, § 54 ch 169 SLA 1978.]*

(22) *[Repealed, § 11 ch 181 SLA 1976.]*

(23) Department of Public Safety, as to suspension or revocation of a security guard's license under AS 18.65.400 — 18.65.490;

(24) Department of Health and Social Services, under AS 47.35, relating to boarding and foster homes for children;

(25) *[Repealed, § 60 ch 98 SLA 1966.]*

(26) *[Repealed, § 4 ch 120 SLA 1971.]*

(27) Department of Health and Social Services and Department of Environmental Conservation under AS 17.20 (Alaska Food, Drug, and Cosmetic Act), and Department of Commerce and Economic Development in connection with the licensing of embalmers and funeral directors under AS 08.42;

(28) Department of Health and Social Services and the Hospital Advisory Council, under AS 18.20.010 — 18.20.130;

(29) *[Repealed, § 4 ch 120 SLA 1971.]*

(30) Department of Environmental Conservation, under AS 18.35.010 — 18.35.090, concerning the regulation of tourist and trailer camps, motor courts, and motels;

(31) *[Repealed, § 40 ch 206 SLA 1975.]*

(32) *[Repealed, § 4 ch 106 SLA 1970.]*

(33) Board of Marine Pilots;

(34) Alaska Police Standards Council;

(35) Big Game Commercial Services Board;

(36) Board of Dispensing Opticians;

(37) *[Repealed, § 20 ch 110 SLA 1981.]*

(38) *[Expired pursuant to § 3 ch 128 SLA 1974; am § 7 ch 108 SLA 1975.]*

(39) Alaska Public Offices Commission;

(40) Board of Fisheries;

(41) Board of Game;

(42) the Department of Education and the Professional Teaching Practices Commission with regard to proceedings to revoke or suspend a teacher's certificate under AS 14.20.030 — 14.20.040 and AS 14.20.470(a)(4);

(43) Alaska Commission on Postsecondary Education under AS 14.48 as to denial of applications and revocation of authorizations and permits;

(44) Department of Environmental Conservation, except to the extent that AS 44.62.360 — 44.62.400 are inconsistent with the manner in which proceedings are initiated under the provisions of AS 46.03;

(45) University of Alaska, except to the extent that its inclusion is inconsistent with the provisions of AS 14.40;

(46) *[Repealed, § 77 ch 14 SLA 1987.]*

(47) Board of Psychologist and Psychological Associate Examiners;

(48) the Department of Fish and Game as to functions relating to the protection of fish and game under AS 16.05.870;

(49) Board of Veterinary Examiners;

(50) Board of Nursing Home Administrators;

(51) Board of Barbers and Hairdressers;

(52) Department of Natural Resources concerning the Alaska grain reserve program under former AS 03.12;

(53) Department of Commerce and Economic Development concerning the licensing and regulation of audiologists under AS 08.11;

(54) Department of Commerce and Economic Development concerning the licensing and regulation of hearing aid dealers under AS 08.55.

(b) The procedure of an agency not listed in (a) of this section shall be conducted under AS 44.62.330 — 44.62.630 only as to those functions to which AS 44.62.330 — 44.62.630 are made applicable by the statutes relating to that agency.

(c) Judicial review and scope of judicial review of all final decisions of the commissioner of labor on an appeal relating to employment security shall be in accord with this chapter notwithstanding anything to the contrary in AS 23.20 (Alaska Employment Security Act). All other procedures of the Department of Labor relating to employment security shall be as provided in AS 23.20 and the regulations under AS 23.20.

(d) Except in a case of reinstatement or reduction of penalty, the provisions of this chapter do not affect statutory provisions concerning

(1) civil or criminal penalties;

(2) additional relief by injunction or restraining order;

(3) penalty provisions relating to suspension, revocation, reissuance, and other similar matters of licenses, permits, leases, concessions, and other similar matters;

(4) related matters that in their context do not relate to procedure.

(§ 2 (ch 2) ch 143 SLA 1959; am § 14 ch 2 SLA 1964; am § 60 ch 98 SLA 1966; am § 2 ch 120 SLA 1966; am § 1 ch 58 SLA 1967; am § 18 ch 143 SLA 1968; am § 2 ch 83 SLA 1969; am § 2 ch 118 SLA 1969; am §§ 3, 4 ch 106 SLA 1970; am § 6 ch 104 SLA 1971; am § 4 ch 120 SLA 1971; am § 2 ch 178 SLA 1972; am § 5 ch 179 SLA 1972; am § 2 ch 17 SLA 1973; am § 3 ch 45 SLA 1973; am § 2 ch 82 SLA 1973; am § 2 ch 7 FSSLA 1973; am § 5 ch 76 SLA 1974; am § 2 ch 126 SLA 1974; am § 6 ch 9 SLA 1975; am § 25 ch 25 SLA 1975; am §§ 39, 40 ch 206 SLA 1975; am § 4 ch 25 SLA 1976; am § 2 ch 59 SLA 1976; am § 11 ch 181 SLA 1976; am §§ 13, 106 ch 218 SLA 1976; am § 18 ch 220 SLA 1976; am § 9 ch 40 SLA 1977; am § 3 ch 140 SLA 1977; am § 54 ch 169 SLA 1978; am § 10 ch 59 SLA 1979; am § 23 ch 58 SLA 1980; am § 3 ch 84 SLA 1980; am §§ 49, 60 ch 94 SLA 1980; am § 15 ch 130 SLA 1980; am § 12 ch 131 SLA 1980; am § 15 ch 141 SLA 1980; am §§ 4, 5 ch 159 SLA 1980; am § 20 ch 110 SLA 1981; am E.O. No. 51, §§ 38, 39 (1981); am § 16 ch 82 SLA 1982; am § 2 ch 100 SLA 1983; am § 124 ch 6 SLA 1984; am § 11 ch 131 SLA 1986; am § 77 ch 14 SLA 1987; am § 12 ch 37 SLA 1989)

Effect of amendments. — The 1986 amendment added paragraphs (53) and (54) of subsection (a).

The 1987 amendment repealed paragraph (a)(46), which read "Department of Commerce and Economic Development concerning the fishery enhancement loan program (AS 16.10.500 — 16.10.620)."

The 1989 amendment, effective May 12, 1989, substituted "Big Game Commercial Services Board" for "Guide Licensing and Control Board" in paragraph (a)(35).

Opinions of attorney general. — The purpose of the adjudication procedure is to prescribe a fair procedure for determinations of fact; this is indicated by paragraph (d)(4), which excepts from the adjudication procedure related matters that in their context do not relate to procedure. 1983 Op. Att'y Gen., No. 10.

The policy of subsection (d) of this section is to limit the adjudication procedure set forth in the Administrative Procedure Act to procedural matters, and matters regarding which the agency must make substantial determinations of fact. 1983 Op. Att'y Gen., No. 10.

The words of subsection (d), "in a case of reinstatement or reduction of penalty," refer to AS 44.62.550, which provides that a person whose license is revoked or suspended may petition the agency for reinstatement or reduction of penalty after one year from the effective date of the decision or from the date of denial of the similar petition. 1963 Op. Att'y Gen., No. 10.

The accusation and hearing procedure set forth in the Administrative Procedure Act was not applicable to the suspension or revocation of liquor licenses by the Alcoholic Beverage Control Board after a conviction of a licensee of certain offenses as set forth in former AS 04.15 [repealed]. 1963 Op. Att'y Gen., No. 10.

The exceptions set forth in subsection (d) refer to situations in which there is no need for the agency to make a determination of fact since such facts have been determined by the courts. 1963 Op. Att'y Gen., No. 10.

Where the power to suspend or revoke a license is implied by the statutory authority to issue a license, it is clear that suspension or revocation may be ordered only after formal accusation and hearing as re-

quired by the Administrative Procedure Act, 1963 Op. Att'y Gen., No. 10.

Not all of this chapter, as it relates to workers' compensation proceedings, has been repealed by implication. For example, the Alaska Workers' Compensation Act is silent as to judicial review and the scope of judicial review. This chapter therefore applies, since there is nothing in the Alaska Workers' Compensation Act which covers the same ground or which is inconsistent with provisions in this chapter relating to judicial review and the scope of such review. 1959 Op. Att'y Gen., No. 24.

But this section and AS 44.62.450 were superseded with respect to workers' compensation hearings by AS 23.30.115 and 23.30.135 of the Alaska Workers' Compensation Act. 1959 Op. Att'y Gen., No. 24.

NOTES TO DECISIONS

Board of Governors of Alaska Bar Association. — The legislature expressly included the Board of Governors of the Alaska Bar Association as an agency subject to the adjudicative procedures of the Administrative Procedure Act (AS 44.62 under former paragraph (a)(22). In re Peterson, 499 P.2d 304 (Alaska 1972).

Administrative responsibility of Alaska Bar. — While the supreme court ultimately reserves the authority to determine whether or not an applicant should be admitted to the bar, considerable administrative responsibility has been delegated to the Alaska Bar Association. In re Peterson, 499 P.2d 304 (Alaska 1972).

Applicability to workers' compensation proceedings. — The legislature intended to substitute, upon the effective date of the Administrative Procedure Act, the judicial scope of review as provided therein for the judicial scope of review as provided in the Workers' Compensation Act. Manthey v. Collier, 367 P.2d 884 (Alaska 1962).

The superior court is controlled by the Administrative Procedure Act in proceedings, or in a review of proceedings from the Alaska Workers' Compensation Board. See Manthey v. Collier, 367 P.2d 884 (Alaska 1962). But see Aleutian Homes v. Fischer, 418 P.2d 769 (Alaska 1966).

The Administrative Procedure Act (AS 44.62) is applicable to Workers' Compensation Board hearings except where otherwise expressly provided in the Workers' Compensation Act. Employers Com. Employers Com. Union Ins. Group v. Schoen, 519 P.2d 819 (Alaska 1974).

Act applies to leasing procedures. — The judicial review portions of the Administrative Procedure Act govern leasing procedures conducted by the Division of Lands under the Alaska Land Act. Alyeska Ski Corp. v. Holdsworth, 426 P.2d 1006 (Alaska 1967).

But not to termination of grazing leases. — The adjudicatory provisions of the Alaska Administrative Procedure Act do not apply to the termination of grazing leases by the state Division of Lands. McCarrey v. Commissioner of Natural Resources, 526 P.2d 1353 (Alaska 1974).

Nor to local school boards. — The Administrative Procedure Act by its express terms does not apply to local school boards. Matanuska-Susitna Borough v. Lum, 538 P.2d 994 (Alaska 1975).

Nor to boards of adjustment. — Boards of adjustment are not included on the list in subsection (a) of agencies, boards and administrative bodies specifically subject to this chapter. Galt v. Stanton, 591 P.2d 960 (Alaska 1979).

Under subsection (d), a hearing is not required before an alcoholic beverage dispensary license is suspended, although it would be permissible if the Alcoholic Beverage Control Board chose to grant it. Frontier Saloon, Inc. v. ABC Bd., 524 P.2d 657 (Alaska 1974).

Burden of proof. — While the Alaska Administrative Procedure Act, does not specifically state who has the burden of proof in administrative adjudications, it does provide in AS 44.62.460(e) that "Nothing herein shall be construed to alter the ordinary rules of burden of proof of judicial proceedings in Alaska." The foregoing provision coupled with the fact that under the Administrative Procedure Act a hearing to determine whether a license should be granted, issued or renewed shall be initiated by filing a "statement of issues" which must be served upon the person seeking the issuance or renewal of the license as the respondent (AS 44.62.370, AS 44.62.380), and against which the respondent may defend by filing a notice of defense (AS 44.62.390) impelled the supreme court to the conclusion that the burden of proof on the issue raised by the statement of issues was upon the state.

Alaska ABC Bd. v. Malcolm, Inc., 391 P.2d 441 (Alaska 1964).

Applied in Vick v. Board of Elec. Exmrs., 626 P.2d 90 (Alaska 1981).

Quoted in Pan American Petroleum Corp. v. Shell Oil Co., 455 P.2d 12 (Alaska 1969).

Stated in Furth v. Northern Stevedoring & Handling Corp., 385 P.2d 944 (Alaska 1963); Union Oil Co. v. State Dep't of Natural Resources, 526 P.2d 1357 (Alaska 1974); West Air Alaska, Inc. v. Department of Revenue, 647 P.2d 1067 (Alaska 1982).

Cited in Mobil Oil Corp. v. Local Boundary Comm'n, 518 P.2d 92 (Alaska 1974); Sisters of Providence in Wash., Inc. v. Department of Health & Social Servs., 648 P.2d 970 (Alaska 1982); Kenai Peninsula Borough v. State, Dep't of Community & Regional Affairs, 751 P.2d 14 (Alaska 1988).

Collateral references. — 1 Am. Jur. 2d, Administrative Law, § 138 et seq.

73 C.J.S., Public Administrative Law and Procedure, § 115 et seq.

Sec. 44.62.340. Delegation of power by agencies. (a) An agency listed in AS 44.62.330 may delegate the power to act, to hear, and to decide, unless expressly prohibited by law.

(b) In a law enacted after April 29, 1959, where the word "agency" alone is used, the power to act may be delegated by the agency, and where the words "agency itself" are used, the power to act may not be delegated unless a statute relating to that agency authorizes the delegation of its power to hear and decide. (§ 1(1) ch 2 ch 143 SLA 1959)

NOTES TO DECISIONS

Alaska Transportation Commission exempted. — Former AS 42.07.151(a) specifically exempted the Alaska Transportation Commission from the requirements of both this section, forbidding the delegation of the hearing power absent express statutory authorization, and AS 44.62.600, requiring the hearing officer to prepare a proposed decision and holding members of the applicable government agency from voting on the decision if they have not heard the evidence. Alaska Transp. Comm'n v. Gaudin, 602 P.2d 402 (Alaska 1979).

Cited in In re Peterson, 499 P.2d 304 (Alaska 1972).

Collateral references. — 2 Am. Jur. 2d, Administrative Law, §§ 221 to 226.

73 C.J.S., Public Administrative Law and Procedure, § 66.

Sec. 44.62.350. Appointment of hearing officers. (a) The governor shall assign a qualified, unbiased, and impartial hearing officer, with experience in the general practice of law, to conduct hearings under this chapter. The hearing officer may perform other duties in connection with the administration of this chapter and other laws.

(b) An agency with hearing officers may continue their employment as hearing officers on an unbiased and impartial basis within the particular agency and may hire additional officers and prescribe additional qualifications.

(c) A hearing officer hired after April 29, 1959, except to conduct hearings under AS 23.20 (Alaska Employment Security Act), shall

ATTACHMENT B

State of Oregon
Penalty Matrix for Department of Environmental Quality Violations
Adopted March 1989

The Oregonian

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THURSDAY, DECEMBER 28, 1989

Hammer away on polluters

Polluters, take note: The state Department of Environmental Quality is serious. It no longer is willing to be ignored by you. Its reputation as a regulatory wimp is no longer accurate.

So far this year, DEQ has levied more than $355,000 in fines against polluters — four times the amount it levied against individuals, industries and governments in any other year.

Offenders — as well as the press and others — pay attention to fines. They do not guarantee compliance, but they do assure a response. Warnings without penalties breed contempt.

The Oregon Environmental Quality Commission revised DEQ's enforcement policy last February with these goals in mind:

• Write a consistent and fair but firm enforcement policy that lets violators know that fines will not be used as sparingly as in the past.

• Write a policy that reflects public expectations. The commission lic wants polluters punished.

• Provide DEQ Director Fred Har sen with a procedure to set consis tent and rational penalties statewide

Prior to adopting these goals, DE directors had broad discretion in se ting penalty amounts. Most of th agency's directors, including Har sen, have been too lenient.

The penalty guide embraces variety of factors, including severit of the environmental damage, inten (whether the violator had received prior warning or had been coopera tive), prior violations, negligence an whether the violator received a economic benefit from the violation.

The agency should continue t refine its enforcement policy in 199 The goal, of course, is to increas compliance, preferably voluntarily rather than to jack up the fine received. But this is a hammer-and nail process: Many of the nails (com pliance) probably won't be rammed home without the hammer (fines).

So, hammer away — especially when public health and safety ar

(6) The formal enforcement actions described in subsection (1) through (5) of this section in no way limit the Department or Commission from seeking legal or equitable remedies in the proper court as provided by ORS Chapters 454, 459, 466, 467 and 468.
(Statutory Authority: ORS CHS 454, 459, 466, 467 and 468)

CIVIL PENALTY SCHEDULE MATRICES
340-12-042
In addition to any liability, duty, or other penalty provided by law, the Director may assess a civil penalty for any violation pertaining to the Commission's or Department's statutes, regulations, permits or orders by service of a written notice of assessment of civil penalty upon the respondant. The amount of any civil penalty shall be determined through the use of the following matrices in conjunction with the formula contained in OAR 340-12-045:

(1)

$10,000 Matrix

<---------- Magnitude of Violation

Class of Violation

	Major	Moderate	Minor
Class I	$5,000	$2,500	$1,000
Class II	$2,000	$1,000	$500
Class III	$500	$250	$100

No civil penalty issued by the Director pursuant to this matrix shall be less than fifty dollars ($50) or more than ten thousand dollars ($10,000) for each day of each violation. This matrix shall apply to the following types of violations:

(a) Any violation related to air quality statutes, rules, permits or orders, except for residential open burning (and field burning);

(b) Any violation related to of ORS 468.875 to 468.899 relating to asbestos abatement projects;

(c) water quality statutes, rules, permits or orders, except for violations of ORS 164.785(1) relating to the placement of offensive substances into waters of the state;

(d) Any violation related to underground storage tanks statutes, rules, permits or orders, except for failure to pay a fee due and owing under ORS 466.785 and 466.795;

(e) Any violation related to hazardous waste management statutes, rules, permits or orders, except for violations of ORS 466.890 related to damage to wildlife;

(f) Any violation related to oil and hazardous material spill and release statutes, rules and orders, except for negligent or intentional oil spills;

(g) Any violation related to polychlorinated biphenyls management and disposal statutes; and

(h) Any violation ORS 466.540 to 466.590 related to environmental cleanup [remedial action] statutes, rules, agreements or orders.

(2) Persons causing oil spills through an intentional or negligent act shall incur a civil penalty of not less then one hundred dollars ($100) or more than twenty thousand dollars ($20,000). The amount of the penalty shall be determined by doubling the values contained in the matrix in subsection (a) of this rule in conjunction with the formula contained in 340-12-045.

(3)

$500 Matrix

<——————Magnitude of Violation

Class of Violation

	Major	Moderate	Minor
Class I	$400	$300	$200
Class II	$300	$200	$100
Class III	$200	$100	$50

No civil penalty issued by the Director pursuant to this matrix shall be less than fifty dollars ($50) or more than five hundred dollars ($500) for each day of each violation. This matrix shall apply to the following types of violations:

(a) Any violation related to residential open burning;

(b) Any violation related to noise control statutes, rules, permits and orders;

MEMORANDUM State of Alaska

TO: Gordon S. Harrison
Director
Legislative Research Agency

DATE: March 13, 1990

FILE NO.:

THRU:

TELEPHONE NO.: 465-2600

SUBJECT: House Bill 409

FROM: Dennis D. Kelso
Commissioner
Department of Environmental Conservation

You requested information from this office regarding House Bill 409. Specifically you asked the following questions:

1. How will the authority to assess administrative penalties affect our traditional interaction with small businesses?

The department's enforcement policy for small businesses will remain essentially the same, which is assistance oriented. We follow a four-step process when dealing with enforcement. First we provide education to help the business manager understand the law, environmental safety and technology to achieve compliance. Then we provide the necessary technical assistance to help achieve compliance. Our next step is to formalize a voluntary compliance schedule. It is only if all of those steps fail, that we move to enforcement.

2) Will the newly acquired authority lower the threshold for active intervention by the department? If so, what are the consequences of the change?

This authority does not lower the threshold for department intervention, if "active intervention" is defined to mean enforcement. Current law provides for the pursuit of civil or criminal proceedings for violations of the majority of our statutes and regulations. The administrative penalties apply to the same violations, with no change in the scope of our actions. The administrative penalties will allow us to establish penalties for a variety of acts of noncompliance. These penalties will be set based on the type and severity of the violation, prior history, public health impacts, and other factors.

Administrative penalties will clearly identify the type of offenses and penalties that would apply, provide certainty about what the consequences of violating environmental laws would be, and establish predictability with regard to how the department will deal with violations.

I hope that this has answered your questions. Please do not hesitate to contact us if you need additional information.

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;

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, employee, 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:

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.

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

\-2-45. The secretary shall, at rea-
le times, have access to any point
, including an industrial user of a
ly owned treatment works, and copy
ecords, inspect any monitoring equip-
or method required under
-2-44, to sample any effluents being
rged into the waters of the state, or
sure compliance with the provisions
s chapter.

A-2-46. The secretary may enter,
presentation of proper credentials
any premises in which a point
e, including an industrial user of a
ly owned treatment works, is locat-
in which any records is required to
aintained pursuant to §34A-2-44 are
ed.

RHODE ISLAND

-12-15. The director shall have full
ers to inspect, and make orders regu-
g and directing all methods, means
devices employed on any steamer or
vessel in the waters of the state, or at
installation on land, in receiving, car-
g, storing, heating, handling or dis-
ging any petroleum, gasoline, kero-
, tar, oil, or any product or mixture
eof; and the director may by order
blish all rules and regulations to pre-
the discharge or escape of any of said
stances into the waters of the state.

WASHINGTON

355 — Right of entry, access to records, pertinent
rtment investigations. The department through its
thorized representatives, shall have the power to
con any private or public property, including the
g of any ship, at any reasonable time, and the
managing agent, master or occupant of such
y shall permit such entry for the purpose of
ating conditions relating to violations of possible
ns of RCW 90.48.315 through 90.48.365, and to
cess to any pertinent records relating to such
y, including but not limited to operation and
nance records and logs: provided, That in connec-
h the authority granted herein no person shall be
d 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 book, 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.

STATE OF ALASKA
DEPT. OF ENVIRONMENTAL CONSERVATION

STEVE COWPER, GOVERNOR

OFFICE OF THE COMMISSIONER
PO BOX O, 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.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

REPLY TO:

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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.

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. Bonaccurso, 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

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 pubic 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 thereunder. 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.

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:

> "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 trace 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.

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 statues 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.

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

Report of the Alaska Oil Spill Commission
Executive Summary

SPILL

The Wreck of the Exxon Valdez
Implications for Safe Marine Transportation

January 1990

- 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.

"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 preen-

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.

Recommendation 14
Strengthened state inspections

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.

"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

MEMORANDUM State of Alaska

TO: Gordon S. Harrison
Director
Legislative Research Agency

DATE: March 13, 1990

FILE NO.:

THRU:

TELEPHONE NO.: 465-2600

SUBJECT: House Bill 409

FROM: Dennis D. Kelso
Commissioner
Department of Environmental Conservation

You requested information from this office regarding House Bill 409. Specifically you asked the following questions:

1. How will the authority to assess administrative penalties affect our traditional interaction with small businesses?

The department's enforcement policy for small businesses will remain essentially the same, which is assistance oriented. We follow a four-step process when dealing with enforcement. First we provide education to help the business manager understand the law, environmental safety and technology to achieve compliance. Then we provide the necessary technical assistance to help achieve compliance. Our next step is to formalize a voluntary compliance schedule. It is only if all of those steps fail, that we move to enforcement.

2) Will the newly acquired authority lower the threshold for active intervention by the department? If so, what are the consequences of the change?

This authority does not lower the threshold for department intervention, if "active intervention" is defined to mean enforcement. Current law provides for the pursuit of civil or criminal proceedings for violations of the majority of our statutes and regulations. The administrative penalties apply to the same violations, with no change in the scope of our actions. The administrative penalties will allow us to establish penalties for a variety of acts of noncompliance. These penalties will be set based on the type and severity of the violation, prior history, public health impacts, and other factors.

Administrative penalties will clearly identify the type of offenses and penalties that would apply, provide certainty about what the consequences of violating environmental laws would be, and establish predictability with regard to how the department will deal with violations.

I hope that this has answered your questions. Please do not hesitate to contact us if you need additional information.

Compliance / "Cease and Desist Orders

ENVIRONMENTAL ACTS

LOUISIANA

D. Requirements of compliance orders

Any order issued under this Section shall state with reasonable specificity all of the following:

(1) The nature of the violation.

(2) A time limit for compliance.

(3) That in the event of noncompliance, a civil penalty may be assessed.

E. Civil Penalties.

(1) Any person found to be in violation of any requirement of this Chapter may be liable for a civil penalty, to be assessed by the commission, the secretary, the assistant secretary, or the court of not more than one million dollars or the cost of any cleanup made necessary by such violation and a penalty of not more than twenty-five thousand dollars for each day of violation and may be subject to revocation or suspension of any permit, license, or variance which had been issued to said person. Any person found to be in violation of this Chapter shall be liable for legal interest from the date of the assessment of a civil penalty until paid.

(2) Any person to whom a compliance order or a cease and desist order is issued pursuant to R.S. 30:1073(C) who fails to take corrective action within the time specified in said order shall be liable for a civil penalty to be assessed by the commission, the secretary, the assistant secretary, or the court of not more than fifty thousand dollars for each day of continued violation or noncompliance.

(3) (a) In determining whether or not a civil penalty is to be assessed and in determining the amount of the penalty or the amount agreed upon in compromise, the following factors shall be considered:

(i) The history of previous violations or repeated noncompliance.

(ii) The nature and gravity of the violation.

(iii) The gross revenues generated by the respondent.

(iv) The degree of culpability, recalcitrance, defiance, or indifference to regulations or orders.

(v) The monetary benefits realized through noncompliance.

(vi) The degree of risk to human health or property caused by the violation.

(vii) Whether the noncompliance or violation and the surrounding circumstances were immediately reported to the department and whether the violation or noncompliance was concealed or there was an attempt to conceal by the person charged.

(viii) Whether the person charged has failed to mitigate or to make a reasonable attempt to mitigate the damges caused by his noncompliance or violation.

(ix) The costs of bringing and prosecuting an enforcement action, including staff time, equipment use, hearing records, expert assistance, and such other items as the commission finds to be a cost of the action.

(b) The secretary may supplement such criteria by rule. In the event that the order with which the person failed to comply was an emergency cease and desist order, no penalty shall be assessed if it appears, upon later hearing, that said order was issued without reasonable cause.

(4) No penalty shall be assessed without the person charged being given notice and an opportunity for a hearing on such charge. The person charged may waive a hearing on the issue of whether or not a violation has occurred, and his culpability for such violation and any other ultimate issue. When a hearing on the violation is waived, a decision may be rendered upon the uncontested facts.

(5) After submission for a penalty determination at a hearing, the commission, secretary, or assistant secretary shall provide an opportunity for relevant and material public comment relative to any penalty which may be imposed.

LOUISIANA

C. Compliance orders; emergency cease and desist orders

(1) Upon a determination that a violation of this Chapter is occurring or is about to occur which is endangering or causing damage to public health or the environment, the commission, the secretary, the assistant secretary or an authorized technical secretary may issue an emergency cease and desist order. Upon a finding that the ordered cessation of operations, or any portion thereof, will not completely abate the damages to the environment, in addition to the emergency cease and desist order, affirmative obligations may be imposed on the violator requiring him to take whatever steps deemed necessary to abate the irreparable damage to the environment. The issuance of such an emergency cease and desist order shall not be subject to the limitations and formalities relating to notice and hearings imposed with regard to adjudications under R.S. 49:950 et seq., but shall be subject to all other applicable provisions of law. The emergency cease and desist order shall remain in force until a hearing can be held concerning the situation which prompted the emergency order, but in no event shall such an emergency order remain in force longer than fifteen days.

(2) Upon determining that a violation of any requirement of this Chapter has occurred or is about to occur, notice may be given either by personal service or certified mail, return receipt requested, to the violator of his failure to comply with such requirement or proceed pursuant to Paragraph (3) of this subsection. If such violation extends beyond the thirtieth day after notification, the commission, secretary or assistant secretary shall either issue an order requiring compliance within a specified time period, or the commission shall commence a civil action for appropriate relief, including a temporary or permanent injunction.

(3) Upon determining that a violation of any requirement of this Chapter has occurred or is about to occur, the commission, secretary, the assistant secretary or the authorized representative of the assistant secretary shall either issue an order requiring compliance within a specified time period or the commission or secretary shall commence a civil action for appropriate relief, including a temporary or permanent injunction.

No prior hearing required

CONNECTICUT

Section 22a-7. Cease and desist order, subsequent hearing

The commissioner, whenever he finds after investigation that any person is causing, engaging in or maintaining, or is about to cause, engage in or maintain, any condition or activity which, in his judgment, will result in or is likely to result in imminent and substantial damage to the environment, or to the public health within the jurisdiction of the commissioner under the provisions of chapters 440, 442, 445, 446a, 446c, 446d and 446k or whenever he finds after investigation that there is a violation of the terms and conditions of a permit issued by him that is in his judgment substantial and continuous and it appears prejudicial to the interests of the people of the state to delay action until an opportunity for a hearing can be provided, may, without prior hearing, issue a cease and desist order in writing to such person to discontinue, abate or alleviate such condition or activity. Upon receipt of such order such person shall immediately discontinue, abate or alleviate or shall refrain from causing, engaging in or maintaining such condition or activity. The commissioner shall, within ten days of such order, hold a hearing to provide the person an opportunity to be heard and show that such condition does not exist. Such order shall remain in effect until ten days after the hearing within which time a new decision based on the hearing shall be made.

ALABAMA

(k) Whenever the commission has cause to believe that any person is violating any rule or regulation promulgated by the commission, the commission shall cause a prompt investigation to be made in connection therewith. If, upon inspection, the commission discovers a condition which is in violation of the provisions of this chapter, or any rule or regulation promulgated pursuant thereto, it shall be authorized to order such violation to cease and to take such steps necessary to enforce such an order. The said order shall state the items which are in violation and shall provide a reasonable specified time within which the violation must cease. The person responsible shall make the corrections necessary to comply with the requirements of this chapter, or rule or regulation promulgated pursuant thereto, within the time specified in the order. Nothing in this subsection shall be deemed to prevent the commission or the attorney general from prosecuting any violation of this chapter, or any permit, order or rule or regulation promulgated pursuant thereto, notwithstanding that such violation is corrected in accordance with any order.

DELAWARE

§6163. Cease and desist order

The Secretary shall have the power to issue an order to any person violating any rule, or regulation, or permit condition, or lease condition, or provision of this Chapter, to cease and desist from such violation. Any cease and desist order issued pursuant to this section shall expire (1) after 30 days of its issuance, or (2) upon withdrawal of said order by the Secretary, or (3) when the order is superseded by an injunction, whichever occurs first.

COLORADO

25-8-605. Cease and desist orders. If the division determines, with or without hearing, that a violation of any provision of this article or of any order, permit, or control regulation issued or promulgated under authority of this article exists, the division may issue a cease and desist order. Such order shall set forth the provision alleged to be violated, the facts alleged to constitute the violation, and the time by which the acts or practices complained of must be terminated.

JAY S. HAMMOND, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

465-2653

POUCH O - JUNEAU 99811

May 21, 1982

Mr. William O. Lawrence
Manager, Pacific Coast Office
Transportation Institute
801 Second Ave, Room 1502
Seattle, Washington 98104

Dear Mr. Lawrence:

Thank you and Steve Scalzo for visiting with us and discussing the various issues involved in securing proof of financial responsibility for the Alaskan tank barge operators. This letter will serve to memorialize some of our discussion and inform you of the Attorney General's opinion regarding certain sections of Alaska's pollution laws.

As you know we have been actively seeking a resolution to the problem that certain barge owners have had in securing insurance to cover the Alaska proof of financial responsibility requirements (AS 46.04.040). During the past year, discussions with you, the barge owners and the insurance brokers have resulted in the issuance of at least one insurance policy covering five vessels, a surety bond for another three, and self-insurance by one large company. In the meantime, pressure has been brought to bear on some insurance underwriters not to issue policies by certain segments of the insurance industry.

It should be noted that we are not completely satisfied that all other avenues for proof of financial responsibility have been fully employed, namely self insurance surety bond, and guarantee. Some companies claim that it is against their policy to use self-insurance and it has been pointed out that certain small operators may not have sufficient assests to self-insure or use surety bonds. Of course, you understand that company policy is not a valid excuse for noncompliance with Alaska's requirements; only legal or physical impossibility in obtaining proof of financial responsibility would provide such a defense. In order to fully evaluate this situation we request a detailed explanation of why it is not possible for tank barge operators to obtain self-insurance, insurance, surety bonds and guarantees which will satisfy the State's financial responsibility requirements under AS 46.04.040 and subsequent regulations. We would appreciate this information from each firm which is represented by your organization. As we discussed, this justification should include sufficient factual information which the Alaska Department of Environmental Conservation can evaluate and satisfy itself as to the validity of the company's position. We also request that you furnish us with any correspondence or other material you may have concerning the inability of tank barge operators to obtain pollution insurance.

In the meantime we will open direct communications with the various marine insurance concerns, offer them our opinion as to the interpretation of the law and secure a definite answer as to their intentions in this matter.

Because it is important to conclude this matter as quickly as possible we will hold to the following schedule:

May - June	1. Issue Department of Law legal opinion. May 13. 2. Open communications with marine insurance underwriters. 3. Establish marine underwriter's position and intentions. 4. Receive information from tank barge operators (as above).
July - August	1. Make evaluations of various methods of showing proof of financial responsibility and/or 2. Secure and evaluate any additional information necessary.
September	Issue official findings on the ability of certain operators to comply with the provisions of AS 46.04.040. Proof of Financial Responsibility.

Depending on meetings with the different parties concerned, availability of information and other unknown factors, this schedule will be flexible. However, we intend to make findings on these matters at the earliest possible time. Until we issue those findings, we will not refer any cases of non-compliance with AS 46.04.040 and subsequent regulations to the Attorney General's office for prosecution. Again, it should be clear that this does not relieve anyone from the responsibility for compensating those damaged from oil spills or from the requirement to clean up any spilled oil.

Sincerely,

Ernst W. Mueller
Commissioner

cc: Doug Mertz, Department of Law
Distribution List -- Tank Barge Operators

Office copy

JAY S. HAMMOND, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

465-2600 POUCH O – JUNEAU 99811

August 11, 1982

Mr. William D. Lawrence
Manager, Pacific Coast Office
Transportation Institute
801 Second Avenue, Room 1502
Seattle, Washington 98104

Dear Mr. Lawrence:

This is a follow up of our May 21, 1982 letter to the Transportation Institute regarding the problem of non-compliance with AS 46.04.040.

We are gravely concerned that both the citizens and the resources of the State of Alaska are not receiving the protection that was to have been afforded them by AS 46.04.040. Since January 1, 1981, many oil barges have been operating in State waters without furnishing proof of financial ability to respond to damages caused by the accidental discharge of oil.

After several discussions and meetings over the past months, we concluded that positive and definitive steps would have to be taken by both the barge operators and the State to resolve this problem. These were presented to you in my May letter. The State has now accomplished several of these tasks and has gone one important step further. This was to hire a contractor who soon will investigate the entire set of circumstances associated with the financial responsibility statute, including reasons for non-compliance.

In my letter I requested that barge owners and operators individually furnish this department with detailed explanations of why it is not possible for them to obtain insurance, self-insurance, surety bonds or guarantees. To this date we have not received a single response, even though we asked to receive this information in the months of May and June. I was concerned to hear that the Transportation Institute has done very little to urge the barge owners and operators to respond to our request for information.

Please recall that the commitment we gave the operators was conditional upon their taking measures to obtain liability coverage. We expect firm and tangible evidence of these measures in the form of correspondence, as an example. A mere verbal communique is entirely inadequate and will not be acceptable. Also, we expect that all four provisions for demonstrating financial responsibility be investigated by the operator and evidence of that investigation be sent to us for evaluation. For example, this might take the form of audited balance sheets to manifest the self-insurance option.

As I mentioned previously, the contractor will start his investigation very shortly and one of his tasks involves review of evidence of efforts to obtain liability coverage. Failure to obtain adequate evidence from this review could result in our reevaluating our current agreement to withhold referring cases to the office of the Attorney General.

Once again, we urge your cooperation in resolving this difficult issue.

Sincerely,

Ernst W. Mueller
Commissioner

cc Doug Mertz
Barge Operators

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K-STATE CAPITOL
JUNEAU, ALASKA 99811

December 30, 1981

William Lawrence
Transportation Institute
Norton Bldg., Rm. 1502
801 Second Avenue
Seattle, Washington 98104

Dear Bill:

Thank you for setting up the meeting with the tug and tank barge operators on December 17. I believe the opening of these lines of communication will help to resolve the problems we face. We have already discussed these matters with the Department of Environmental Conservation.

As I promised at the meeting, I'm writing to confirm my oral statements regarding the operators' current legal status under our oil spill laws. Alaska Statute 46.03.040 does require proof of financial responsibility to respond to damages for oil spills, and as was pointed out at the meeting, operators covered by the statute who have not shown financial responsibility by one of the methods acceptable under the statute are indeed in technical violation. However, the current difficulty in obtaining insurance puts the matter in a different light.

First, if an operator is truly unable to comply with the statute, because neither the insurance nor the other forms of proof of financial responsibility are available, and the firm is unable to self-insure, then I believe it would have a valid defense to an action brought because of the technical failure to comply. And secondly, we can assure you that as long as we are convinced that an operator is making a diligent good faith effort to comply with the requirements, but is unable to do so despite its best efforts, we will not bring any such action because of the failure to comply. Naturally I consider meetings such as ours, with continuing efforts to make insurance available, to be important evidence of such good faith efforts.

Of course, the opposite side of the coin is that if insurance, or another acceptable form of proof of financial responsibility, becomes available, the operators could not claim that compliance is impossible; and we would not consider an operator to be pursuing compliance with good faith if he made no real efforts to find or arrange that coverage. And I'm sure the operators realize that if an actual spill occurs, inability to secure insurance would not relieve them from liability for damages caused by the spill.

I hope this clarifies our position. Let me know if you have further questions. Meantime I trust you will distribute this letter to those present at the meeting, and to any other persons you believe would be interested..

Sincerely,

WILSON L. CONDON
ATTORNEY GENERAL

By: Douglas K. Mertz
Douglas K. Mertz
Assistant Attorney General

DKM:dlm

cc: Ernst W. Mueller
Commissioner
Department of Environmental
Conservation

SRC 3762

TRANSPORTATION INSTITUTE

PACIFIC COAST OFFICE
801 SECOND AVENUE, SUITE 1502
SEATTLE, WASHINGTON 98104
(206) 624-9824

January 25, 1982

Mr. Andrew M. Spear, Manager
Oil Pollution Control
State of Alaska
Department of Environmental
Conservation
Pouch O
Juneau, Alaska 99811

Re: Proof of Financial Responsibility for Oil Spills
Alaska Statute 46.04.040

Dear Mr. Spear:

As West Coast Manager of the Transportation Institute, representing tug and barge owners/operators trading between and/or amongst the states of Alaska, Washington, Oregon and California, I would like to thank you and Mr. Douglas Mertz for your attendance at the meeting of December 17, 1981, in our offices, to listen to comments and suggestions from members of the Institute and insurance industry representatives in connection with the subject matter.

This letter will also acknowledge receipt of Mr. Douglas Mertz's letter of December 30, 1981, copies of which have been distributed to the membership.

As you know, the purpose of our meeting of December 17, 1981, was to allow our members, together with insurance industry representatives, to discuss with you the concerns they are having in attempting to comply with Alaska Statute 46.04.040 (Proof of Financial Responsibility) insofar as this law relates to oil barges, other than inland oil barges, carrying oil as cargo (except those transporting pipeline oil). These concerns have led to considerable frustration on the part of our member vessel operators, in view of the substantial penalties, which could be imposed on them and other nonmember operators, for failure to meet the requirements of the current Alaska law.

From the standpoint of our members, the only practical avenue available to them to attempt to meet the "Proof of Financial Responsibility" requirement is through certification by their insurers.

Our members have, over the past year, discussed the matter of Certification at length with the insurance markets in both the United States and overseas. These markets are centered in New York and London, respectively, and, between them, insure virtually the world's entire oil pollution liabilities.

The United States market, headquartered in New York, is made up of first class stock and mutual companies, who as members of the American Institute of Marine Underwriters formed the Water Quality Insurance Syndicate (WQIS) at the time of the Federal Water Pollution Control Act of 1970 to provide insurance for its clients, as a result of the liabilities that could be imposed upon them by the Act.

The London market is made up of a number of international Protection and Indemnity Clubs referred to as the "International Group of P&I Clubs." These clubs, between them, insure the oil pollution liabilities of nearly all the ocean going tanker tonnage.

As mentioned earlier, responses from the insurance industry to requests by our member operators for certification of Proof of Financial Responsibility under the Alaska law have been met with a polite but firm "no".

The specific areas that create problems for the insurers are listed as follows:

I. Of foremost concern is the requirement for financial responsibility through insurance that (18 AAC 20.065) (2) the insurer agrees that any final judgement against the insured for damages under AS46.04.040(i) resulting from an unlawful discharge of oil from or by any vessel or facility named in the policy may be enforced o[redacted] to the amount of coverage of this policy;. . . . ." It is felt by the insurers that this provision allowing direct access, strips the insurers of their right to defenses that are allowed their insured, such as the [redacted] Without recourse to defenses normally available to the company they are insuring, the insurance companies feel extremely vulnerable. A clarification of the rights of the insurers under direct access is needed.

II. Another area of concern to insurers is the requirement to certify coverage to different entities such as states and countries, based on varying laws provided by these individual entities.

III. [redacted] allowed by the state of Alaska from $500 - $100,000 for the initial violation and then $5,000 per day for each day the violation continues up to a maximum overall limit of $100,000,000. These civil penalties can be assessed to a person who violates or causes or permits to be violated a provision of the Act or a regulation, a lawful order of the department, or a permit, or a term or cancellation of a permit issued under the Act. [redacted] insurance [redacted] there is danger of making payments under the law that will amount to windfall gains for the state of Alaska.

IV. Under AS46.04.020 (c), the department can require clean-up beyond that required by the U.S. Coast Guard.

> "If the department determined that containment or cleanup activities are not adequate, it may direct the person engaged in the activities to cease and may undertake the activities itself through contract or its own resources or both."

[redacted] financial responsibility of $1,000,000 since there is no check on type or nature of expense, or a lid on total expense. This is unlike a restoration for damages since 1) the determination of proper cleanup can be arbitrarily determined and, 2) there is no independent review in determining reasonable cost.

Distributed at our recent meeting was a letter addressed to me care of Christopher Arundell of Pettit-Morry Company, from Mr. Robert S. Lagattolla, President, of the Water Quality Insurance Syndicate (WQIS) dated December 15, 1981, stating the WQIS's position on oil spill statutes, including reasons for not issuing the "Alaska Endorsement" proscribed under the Alaska law. A copy of that letter is enclosed for reference. Similarly, I am also enclosing a copy of a letter from the American Institute of Marine Underwriters (AIMU) to Chris Arundell of Pettit-Morry Company dated January 14, 1982, expressing its views and the views of the American Marine Insurance Market on this subject.

As you know, it has been stated by P&I Club representatives that the London Market's reasons for being unable to comply with Alaska law are similar to those advocated by the U.S. Market. Representatives of the "International Group of P&I Clubs" met with you early last year to express their group's position on oil pollution law, including their concerns over the Alaska law.

The above comments and enclosures clearly indicate that certification under the Alaska Oil Pollution Control Law will not be provided by the world insurance markets. Both the United States and London markets have a commitment to Federal pre-emption in the area of pollution laws.

It is clear that the Alaska law imposes considerable additional requirements over and above the existing Federal Pollution laws and that the oil carrying barge operators are unable to meet these additional requirements.

While we do appreciate the assurances given in Mr. Mertz's letter of December 30, 1981, we request your assistance in obtaining meaningful and satisfactory responses to insurers' concerns noted above (Items I through IV), including possible changes in the law as it presently exists in order that the carriers can achieve compliance with financial responsibility provisions.

Your prompt attention to this letter will be greatly appreciated.

Very truly yours,

William D. Lawrence

William D. Lawrence
West Coast Manager
TRANSPORTATION INSTITUTE

WDL:lb
Enclosures

cc: Douglas Mertz
Members of Committee

MEMORANDUM State of Alaska

TO Ernst W. Mueller, Commissioner
Department of Environmental
Conservation

DATE May 13, 1982

FILE NO J-66-462-82

TELEPHONE NO 465-3600 x 54

FROM WILSON L. CONDON
ATTORNEY GENERAL

By:
Douglas K. Mertz
Assistant Attorney General

SUBJECT Financial Responsibility and the Insurance Industry (AS 46.04.040)

You have asked this office for an opinion on several questions concerning Alaska's oil spill laws, specifically the provisions dealing with proof of financial responsibility, AS 46.40.040 (§ 2, ch 116 SLA 1980). In conversations with representatives of various tank vessel and oil barge owners, it has become apparent that a good deal of confusion exists regarding the effect of AS 46.04.040. This opinion is intended to convey our interpretation of that statute as well as this department's policy regarding enforcement of it.

First, we want to make clear what the statute does not do: It does not create any new or increased liabilities whatsoever. Its role is limited to requiring proof that an owner or operator has the financial ability to compensate damages for which that person is liable under other state statutes. 1/ While those other statutes may expose an owner or operator to varying degrees of liability (see infra), AS 46.04.040 [illegible] the potential [illegible] those preexisting statutes.

Some concern has been expressed by the insurance industry as to the effect of the "direct action" provision of subsection (e) (. . . An action brought under AS 46.03.758, 64.03.760(a) or (e), or 46.04.822 may be brought in a state court directly against the insurer . . ."). Specifically, their question has been whether this provision may subject insurers to even greater liabilities than their insureds because the insurer could not assert defenses personal to the insured. Of most immediate concern is whether the insurer could take advantage of the federal Limitation of Liability Act of 1851, 46 U.S.C. § 181, et. seq., which

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1/ Specifically, AS 46.03.758, 46.03.760(a) and (e), and 46.03.822.

on its face is limited to vessel owners and demise charterers. The law on whether a [illegible] can deprive an insurer of the benefit of such defenses has never been settled 2/ Several jurisdictions besides Alaska allow direct actions against insurers in some circumstances. 3/

Of most direct relevance is the Louisiana statute, La. Rev. Stat. 22:655, which is a detailed provision clearly intending to work a fundamental change in the relationship between insurer, insured, and third-party claimant. At present, it appears that under the Louisiana statute an insurer may be successfully prevented from involving the insured's personal defenses. See Olympic Towing Corp. v. Nebel Towing Co., 419 F.2d 230 (5th Cir. 1969). In contrast is the federal Clean Water Act provision on financial responsibility, 33 U.S.C. § 1321(p), after which the Alaskan act is in part modeled, which allows direct actions against the insurer, but explicitly permits the insurer to invoke the insured's defenses.

The Alaska statute contains no detailed indicia of intent to deny the insured's defenses, as in the Louisiana statute, nor an explicit provision retaining the insured's defenses, as in the Clean Water Act. The legislative history contains little evidence, except for the testimony on behalf of the Department of Environmental Conservation, as prime sponser of the bill. William A. Publicover, Deputy Director of Environmental Quality Operations, testified that the bill's intent was

> . . . to provide an easy way for an individual Alaskan to collect for damages to his property or for loss of income due to an oil spill. . . We want the injured party to be able to go to state court, even small claims court, file his claim against someone who is

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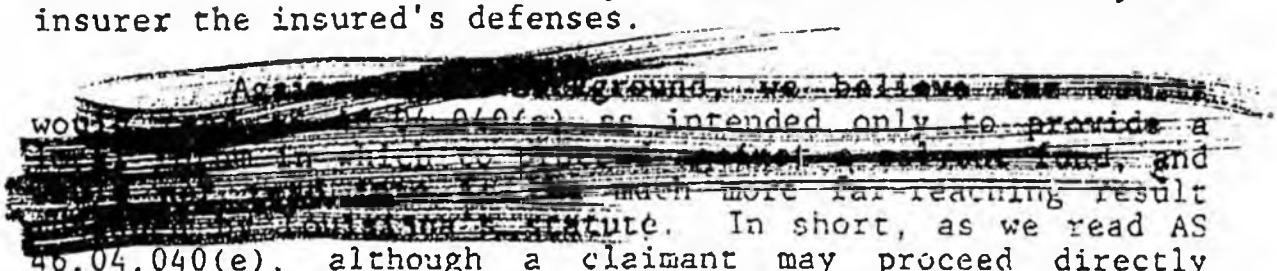
2/ See Maryland Casualty Co. v. Cushing, 347 U.S. 409 (1954); Olympic Towing Corp. v. Nebel Towing Co., 419 F.2d 230 (5th Cir. 1969).

3/ See, e.g., N.Y. INS. LAW, (McKinney) Section 167; Louisiana Revised Statutes 22:655; California Insurance Code, Section 11580 (West 1977); Shingleton v. Bussey, 223 So.2d 713 (Fla. 19-69); Third Parties (Rights against Insurers) Act 1930 (United Kingdom).

attachable, someone who does business in Alaska, or who has an agent in Alaska, and we seek timely satisfaction of his claim.

Publicover went on to describe the costly and time-consuming process of identifying the responsible party and pursuing an action in a distant forum. The direct access provision, he said, was designed to provide a speedy remedy which as a practical matter could be secured by an Alaskan fisherman, for example, with a minor claim. Publicover did not mention any intent whatsoever to deny the insurer the insured's defenses.



As a background, we believe [illegible] would [illegible] 46.04.040(e) as intended only to provide a [illegible] much more far-reaching result [illegible] statute. In short, as we read AS 46.04.040(e), although a claimant may proceed directly against the insurer under this statute, the insurer would "step into the shoes" of the insured by being able to assert any substantive defense available to the insured.

At the same time, the insurer would always retains an absolute limit to its liability, namely the policy limits. Since the insurer's liability is derivative, through the insured's policy, even with "direct access" we believe the courts would not hold the insurer liable for more than the amount contracted for in the policy. (This interpretation is confirmed in the implementing regulations, at 18 AAC 20.065: ". . . the insurer's liability does not exceed the limits of coverage . . . ").

In conversation with insurers it has also appeared that there is concern about multiple "certification" requirements, that is, about the insurers having to undertake the bureaucratic burden of supplying Alaska [illegible] federal government with a federal Maritime Commission certificate to comply with federal requirements. We would point out, however, that AS 46.04.040 contains no technical "certification" requirement; instead, it and the related regula-

tions (18 AAC 20.005 -- 18 AAC 20.900) [redacted] as to how a party may demonstrate the existence of requisite financial responsibility. As to insurance, for example, the party need only submit a suitable binder along with a copy of the underlying policy, or a certificate of entry. If financial responsibility is shown through a surety bond or guaranty sample forms are included in the regulations. If self-insurance is used, the regulations merely call for a set of financial statements and affidavits, in place of which a party may substitute forms already prepared for submission to the Securities and Exchange Commission or the Federal Energy Regulatory Commission (see 18 AAC 20.055). Thus, the regulations, far from imposing a rigid and extensive set of bureaucratic requirements, are quite flexible and easy to satisfy once the required financial responsibility is acquired.

Finally, we address the question of whether AS 46.04.040, or its related statutes, could ever result in a windfall recovery for the state [redacted] punitive penalty assessed against the insured. To answer the question it is necessary to review the four statutes to which the financial responsibility requirements of AS 46.04.040 apply:

AS 46.03.760(a) is a standard civil penalty provision providing for an assessment to the state of $500 to $100,000 for violations of various state pollution statute; the assessment is required to reflect "reasonable compensation in the nature of liquidated damages for any adverse environmental effects . . .," as well as state costs in investigating and correcting the violation. Subsection (b) states: "Actions under this section may not be used for punitive purposes, and sums assessed by the court must be compensatory and remedial in nature."

AS 46.03.760(e) provides for recovery by the state, in a civil action, of actual measurable damages caused by unlawful oil discharges, including cleanup and restoration costs. The prohibition in subsection (b) of punitive sanctions also applies to actions under subsection (e). We read subsections (a), (b), and (e) together to provide a scheme of alternative methods for securing compensation from oil spills, through either liquidated damages (subsection (a)) or actual damages (subsection (e)); in neither case could punitive sanctions be applied. Since both subsections have the same

purpose -- to provide full compensation -- we believe that a recovery under either one would be credited toward a recovery under the other, thus eliminating the possiblity of a double recovery.

AS 46.03.758 is yet another provision for securing compensation to the state for damages from oil spills. Specifically, amounts assessed under this provision are intended to compensate for those elements of damage which are not able to be measured or valuated directly. Under this method, a formula is used, taking into account the amount spilled, amount recovered, the toxicity, dispersibility, and degradability of the oil, and the sensitivity of the receiving environment, to generate a final figure which would compensate for the actual damage to the environment not directly measurable. The civil penalty is explicitly not to be punitive (AS 46.03.758(a)(3)), and a person may not be subjected to civil penalty assessments under both AS 46.03.758 and AS 46.03.760(a) (see AS 46.03.758(i)).

AS 46.03.822 is the general strict liability statute for damages caused by hazardous substances, including oil; it also provides for a number of defenses. This is the statute upon which private parties may rely to secure damages.

These are the only statutes for which financial responsibility must be shown, and to which AS 46.04.040 applies; we note particularly that it does not require proof of financial responsibility for sanctions under AS 46.03.790, the parallel criminal penalty provision. From the details of the four provisions to which the financial responsibility requirements apply, we conclude that (1) in no case would an insurer, providing coverage only under the four listed statutes, be liable for a punitive or criminal assessment; and (2) since all four of the listed provisons are basically compensatory in intent, amounts assessed under any one of them which were intended to compensate for a particular set of damages would necessarily be credited toward recoveries for the same damages under any of the other statutes, so there is no possibility of multiple recoveries for the same damages.

This discussion reflects our Department's view of the statutes and regulations in question and is the basis for any enforcement action to be taken under the law. It thus appears to us that the concerns expressed by the industry on these points are without foundation, and we are

pleased to be able to give our assurances that the State of Alaska's Department of Law intends to enforce these laws in a manner which should satisfy the industry as to its fairness.

Please let me know if you have any other questions.

DKM/jb

STATE OF ALASKA
1990 LEGISLATIVE SESSION

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

FISCAL NOTE

REQUEST:

Revision Date 2/26/90
Agency Affected: Alaska Court System
Title: An Act relating to the reform of certain environmental conservation laws...
BRU: Trial Courts
Sponsor: Davis, Brown, Koponen, Navarre...
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 Strandberg, General Counsel
Phone: 264-8228
Division: Alaska Court System
Date: 02/26/90

Approved by: Arthur H. Snowden, II, Administrative Director
Date: 02/26/90
Agency: Alaska Court System

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

CC

No. 1

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CSHB 409(Res)
PUBLISH DATE: HOUSE 2/9/90

FISCAL NOTE

REQUEST:

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

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
REVENUE	0	0	0	0	0	0

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
Phone: 465-2600
Division: Administrative Services
Date: 1/30/90

Approved by Commissioner: [signature]
Date: 30 Jan 90
Agency: Environmental Conservation

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

House Bill 409
1/29/90 Version

Section 3 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.

Position	100	200	300	400	500	Total
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

No. 1
CSHB 409 (Res)
2/9/90

Position Title	No.of Positions	Range/Step	Barg. Unit
Attorney III	1	12A	N/A

Time Status	Staff Months	Location	Election District
PFT	12	Juneau	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

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.

Request For New Position

Agency: Environmental Conservation
BRU: Administrative Services
Component: Administrative Services

Revised Date

FY 91

No. 1
CSHB 405 (Res)
2/9/90

Position Title	No of Positions	Range/Step	Barg. Unit
Paralegal Assistant II	1	16A	CGU

Time Status	Staff Months	Location	Election District
PFT	12	Juneau	04

Type of Expenditure		Amount
1	2	
Salary	32.0	
Benefits	12.0	
Premium Pay	0	
Other	0	
Total Personal Services		44.0
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

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 proce ` is carried out in an appropriate and timely manner.

Request For New Position

Agency Environmental Conservation
BRU Administrative Services
Component Administrative Services

FY 91

No. 2

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CSHB 409 (JUD)
PUBLISH DATE: HOUSE 2/26/90

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						
REVENUE						

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.

Richard L. Pegues
Prepared by: Richard L. Pegues, Director
Phone: 465-3672
Division: Administrative Services
Date: February 26, 1990

Richard L. Pegues /FAX/
Approved by Commissioner: 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)

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.

Bill would give DEC more search power

By BRIAN O'DONOGHUE
News-Miner Bureau

JUNEAU—A state legislator speculated last week that Rep. Mike Davis' efforts to increase the state's power to inspect oil facilities might enable a state employee to bomb the Alyeska pipeline terminal in Valdez.

"Could some saboteur who works for DEC (the Department of Environmental Conservation) go through the gate without someone accompanying him, go anywhere he wants and blow it up?" Rep. Ron Larson, D-Palmer, asked Davis at a hearing Thursday.

"If we have a DEC employee who's also a saboteur, we're in a world of hurt," Davis said after a long pause. "We're also looking at a lot of liability."

Larson said later that he was not joking about his concern about the unrestricted access provided by the bill.

At issue was a provision in HB 409 allowing DEC to enter and inspect "pervasively regulated" facilities, such as the pipeline terminal, pump stations and refineries. The bill, which also grants DEC authority to assess administrative penalties of up to $25,000 a day against major polluters, has become a lightning rod of controversy in the debate over legislation introduced in response to the Exxon Valdez oil spill.

Earlier in the session, Rep. Bert Sharp, R-Fairbanks, sent out a letter warning constitutents that HB 409 would subject small businesses to "Gestapo-style" searches from the state's environmental agency.

According to Davis, the reference to "pervasively regulated industries" insures the increased inspection powers only apply to major facilities with great potential for environmental harm. For example, HB 409 would grant DEC the power to conduct an unannounced inspection of the Mapco refinery, but not a local photo lab.

Supporters of the bill said that DEC field inspectors have been delayed as long as 20 hours when seeking access to the oil terminal in Valdez. Inspectors need the new authority to make sure industry follows Alaska's environmental laws, they said.

"If the industry or firm is in compliance, it should have nothing to fear," said Riki Ott of the Oil Reform Alliance, a coalition of fishing and environmental groups.

The administrative fines also are needed, because present civil penalties require a lengthy court process, she said.

Critics, including representatives of Exxon, ARCO Alaska Inc. and Alyeska Pipeline Co., said the authority granted by HB 409 for warrantless inspections and new administrative fines is too broad.

ARCO attorney William Christian said the unscheduled inspections and unrestricted copying of company records permitted by HB 409 probably would violate the Alaska Constitution.

In a Feb. 20 memo, state attorney General Douglas Baily rejected the ARCO attorney's argument.

"In our view," Attorney General Douglas Baily wrote, "the inspection access provision of this bill is constitutional as limited to facilities or premises with a history of pervasive regulation and strong governmental interest in ensuring compliance with governmental laws."

Davis' bill and a host of other House spill legislation will be up for further consideration in House Finance Monday. Both the House and Senate are considering separate packages of spill bills. The major pieces of legislation under consideration have yet to win approval from either chamber.

DEC AND APA ADMINISTRATIVE PROCEDURES
SIDE-BY-SIDE COMPARISON

DEC PROCEDURES	APA PROCEDURES
1. Department serves decision via personal delivery, registered mail, or certified mail (rrr).	1. Department files an "accusation" to "determine whether a right, authority, license or privledge should be revoked, suspended, limited, or conditioned." Service by any means, but no right may be affected unless service is made personally or by registered mail.
2. Person has 30 days after service to request adjudicatory hearing. Person serves hearing request on commissioner.	2. Person has 15 days to file "notice of defense" and request for a hearing.
3. Within 10 days after service of the hearing request, department must serve its decision on the hearing request. Department must grant hearing request if requestor would be adversely affected by the decision, has raised a genuine issue of material fact, and has complied with procedures for filing the hearing request.	3. Hearing is granted if person denies accusation and follows procedures for filing hearing request. Failure to request a hearing waives the right to a hearing.
4. Department must publish notice of the hearing in a newspaper of general circulation.	4. N/A
5. Other interested persons have 10 days after notice publication to petition for intervention status. Any party has 10 days to object to the intervention petition. DEC must decide whether to grant or deny the intervention petition within 10 days.	5. N/A
6. Where multiple hearing requests are made on the same matter, the hearing may be consolidated. DEC must serve all parties with notice of the consolidation within 20 days after granting the last consolidation request.	6. N/A

7. Within 30 days after last party is added, each hearing requestor must serve summary of disputed issues, witness list, and evidence list upon DEC. Within 20 days after service of these materials, DEC must serve each requestor with its witness list and evidence list. Either party may request the deciding officer to grant further disccvery (e.g. depositions)	7. N/A. However, the department may amend or supplement its accusation at any time before the matter is submitted for decision. Respondent may not file further pleadings unless permission is granted.
8. Commissioner may appoint deciding officer to hear case.	8. Governor assigns impartial hearing officer (a lawyer); However, an agency with hearing officers may use them on an impartial basis.
9. Prehearing conference provided. At least 10 days notice of conference must be served on all parties. Perhearing conference must be recorded on the record.	9. No prehearing conference. Either party may seek issuance of subpoenas or undertake discovery (e.g. depositions).
10. Within 10 days after the prehearing conference, the deciding officer must serve a written prehearing order on all parties. The order must include a statement of the areas of disputed facts, the procedures to be used to develop the evidence, the procedural obligations of the parties, and the applicable deadlines.	10. Department gives 10 days notice of hearing.
11. Full adjudicatory hearing on the record provided. Hearing transcript prepared (available for use in subsequent judicial review).	11. Full adjudicatory hearing provided. Hearing must be recorded or other means used to preserve the record. [Agency may seek amendments to the accusation after submission for decision. However, if the amendments prejudice the respondent, the respondent may reopen the case.]
12. Deciding officer certifies record as soon as hearing transcript is prepared. Deciding officer must serve notice of record certification on all parties.	12. Hearing officer (acting alone) prepares the proposed decision and serves it on all parties. Hearing officer (acting for agency) assists agency in preparing decision.

13. Within 10 days after certification of the record, each party has opportunity to submit proposed findings of fact. The deciding officer may also order the parties to submit posthearing briefs.

14. Within 30 days after certification of the record, the deciding officer must serve his findings of fact and conclusions of law upon the parties.

15. The department's decision is not automatically stayed during the pendency of the hearing. However, any requestor may file a motion to stay the decision. Any other party may respond to the stay motion within 10 days. The decision on the stay motion must be served within 10 days after the response is due. The stay will be granted or denied based upon the following considerations: (1) the relative harm to the parties from the grant or denial of the stay; (2) the resources which would be committed during the pendency of the hearing if the stay were granted or denied; and (3) the likelihood that the person requesting the stay will prevail on the merits.

13. N/A

14. Hearing officer's decision is filed with Lt. Governor (if hearing officer is acting alone). If hearing officer proposes decision, department may accept or reject the decision. Agency can prepare its own decision on the record, but must give parties an opportunity to present argument. Decision must be in writing and include findings of fact.

15. Decision is effective 30 days after delivered or mailed unless reconsideration is ordered or agency orders an earlier effective date. Stay may be included and may include requirement that respondent comply with specific terms.

16. If respondent does not answer or appear, agency may take action based upon other evidence.

17. Department may order reconsideration on its own motion or at the request of any party within 30 days.

FEDERAL STATUTORY PROVISIONS COMPARISON

ADMINISTRATIVE PENALTIES

Clean Water Act

Sec. 309(g):

Class I Penalties: $10,000 per violation. $25,000 cap. Informal hearing procedures.

Class II Penalties: $10,000 per day per violation. $125,000 cap. APA formal hearing procedures.

RCRA

Sec. 3008(a) (42 USC 6928(a)):
$25,000 per day per violation. No cap.

Sec. 3008(h) (42 USC 6928(h)) (Interim Status Facilities):
$25,000 per day per violation. No cap.

Clean Air Act

Sec. 120 (42 USC 7420):
Penalty amount is function of violator's profits from non-compliance. No cap.

SARA Title III

Sec. 325(b) (42 USC 11045(b)) (Acc. Rels. Rpt. Viol):
Class I Penalties: $25,000 per violation.
Class II Penalties: $25,000 per day per violation. $75,000 per day per violation for 2nd time offender.

Sec. 325(c) (42 USC 11045(c)):
$25,000/$10,000 per violation.

Sec. 325(d) (42 USC 11045(d)) (false trade secret claims):
$25,000 per violation (claim).

FIFRA

Sec. 14(a) (7 USC 1361(a)) (Commercial violations):
$5,000 per violation.

Sec. 14(b) (7 USC 1361(b)) (Private violations):
$1,000 per violation.

COMPLIANCE ORDER AUTHORITY

CERCLA

Sec. 106(a):
Order effective 7 days after receipt. Recipient may request conference within 3 days. Imminent and substantial endangerment required. Judicial review limited (see Sec. 113(h) (42 USC 9613(h)).

Clean Air Act

Sec. 113(a) (42 USC 7413(a)):
Orders take effect after recipient has opportunity to "confer" with EPA. Judicial review of order only available when EPA brings action against the recipient for violation of the order. See Asbestec Const. Serv.Inc. v. EPA, 849 F.2d 765 (2nd Cir. 1988) (Immediate pre-enforcement review of compliance orders serves neither efficiency nor enforcement of CAA). Citizen suit enforcement available.

Clean Water Act

Sec. 309(a) (33 USC 1319(a)):
Orders take effect after recipient has opportunity to "confer" with EPA. Asbestec judicial review rule probably applies. Citizen suit enforcement available.

RCRA

Sec. 3008(a) and (h) (42 USC 6928(a) and (h)):
Order effective 30 days after issuance. Order stayed if hearing requested. Recipient entitled to a public hearing before order becomes final. See 42 USC 6928(b). Citizen suit enforcement available.

Sec. 7003 (42 USC 6973(a)):
Order effective upon receipt. Imminent and substantial endangerment required. Asbestec judicial review rule probably applies.

Sec. 3013(a) (42 USC 6934(a)):
Order becomes effective after recipient gets 30 days to produce compliance proposal and opportunity to "confer" with EPA. Asbestec judicial review rule probably applies. See DuPont v. Dagget, 610 F. Supp. 260 (N.D.N.Y. 1985).

TSCA

Sec.6 6 (15 USC 2605):
EPA can issue "rules" ordering a wide variety of actions to be taken respecting the manufacturing, distribution and disposal of certain chemical substances. APA informal rulemaking procedures apply (non-adjudicatory, notice and comment). However, EPA can make the rule immediately effective upon publication in the Fed. Register if there is "an unreasonable risk of serious or widespread injury." See 15 USC 2605(d). Citizen suit enforcement available.

ACCESS/INSPECTIONS

TSCA

Sec. 11 (15 USC 2610):
EPA may inspect "any establishment, facility, or other premises in which chemical substances...are manufactured, processed, stored or held before or after their distribution in commerce and any conveyance used to transport chemical substances...." Inspections extend to "all things within the premises or conveyance... bearing on the requirements this chapter". However, financial data, sales data, pricing data, personnel data and certain research data are excluded "unless the nature and extent of such data are described with reasonable certainty" in the inspection notice. Inspector must show credentials and present a written inspection notice. Inspections must be completed with reasonable promptness. (This was the section of TSCA that USEPA used to obtain information related to Alyeska's discharge of pollutants at the Valdez terminal. See USEPA v. Alyeska, 836 F.2d 443 (9th Cir. 1988).

RCRA

Sec. 3007 (42 USC 6927(a)):
EPA may "enter...any establishment or other place where hazardous wastes are or have been generated, stored, treated, disposed of, or transported from" to "inspect and obtain samples of any such wastes and...containers or labeling...."

CERCLA

Sec. 104(e) (42 USC 9604(e)):
EPA may "enter...any establishment or other place where...hazardous substances are or have been generated, stored, treated, or disposed of, or transported from" to "inspect and obtain samples from any person of any such substance and ... containers or labeling...." Inspections must be completed with reasonable promptness. In addition, the operator must furnish the EPA inspector with the "information related to such [hazardous] substances and permit such person at all reasonable times to have access to, and to copy all records relating to such substances."

FIFRA

Sec. 9 as amended (7 USC 136g(a)):
EPA may "enter at reasonable times (A) any establishment or other place where pesticides or devices are held for distribution or sale for the purpose of inspecting and obtaining samples of any pesticides or devices, packaged, labeled, and released for shipment...and containers or labeling..., or (B) any place where there is being held any pesticide the registration of which has been suspended or cancelled...."

(2) a copy of the citation indicating that the right to an appearance is waived, a plea of no contest is entered and the bail is forfeited.

(d) When bail has been forfeited under (c) of this section, a judgment of conviction shall be entered. Forfeiture of bail and all seized items is a complete satisfaction for the misdemeanor. The clerk of the court accepting the bail shall provide the offender with a receipt stating that fact.

(e) If the person cited fails to pay the bail amount established under (b) of this section or to appear in court as required, the citation is considered a summons for a misdemeanor.

(f) Notwithstanding other provisions of law, if a person cited for a misdemeanor for which a bail amount has been established under (b) of this section appears in court and is found guilty, the penalty that is imposed for the offense may not exceed the bail amount for that offense established under (b) of this section. (§ 6 ch 132 SLA 1984)

Sec. 16.05.170. Power to execute warrant. Each peace officer designated in AS 16.05.150 may execute a warrant or other process issued by an officer or court of competent jurisdiction for the enforcement of this title except AS 16.51 and AS 16.52, and may, with a search warrant, search any place at any time. The judge of a court having jurisdiction may, upon proper oath or affirmation showing probable cause, issue a warrant in all cases. (§ 21 art I ch 94 SLA 1959; am § 7 ch 132 SLA 1984)

Effect of amendments. — The 1984 amendment substituted "this title except AS 16.51 and AS 16.52" for "this chapter" in the first sentence.

Sec. 16.05.180. Power to search without warrant. Each peace officer designated in AS 16.05.150 may without a warrant search any thing or place if the search is reasonable or is not protected from searches and seizures without warrant within the meaning of art. I, § 14, Alaska State Constitution, which specifically enumerates "persons, houses and other property, papers and effects." However, before a search without warrant is made a signed written statement by the person making the search shall be submitted to the person in control of the property or object to be searched, stating the reason the search is being conducted. A written receipt shall be given by the person conducting the search for property which is taken as a result of the search. The enumeration of specific things does not limit the meaning of words of a general nature. (§ 22 art I ch 94 SLA 1959)

Opinions of attorney general. — This section is constitutional. 1959 Op. Att'y Gen. No. 15.

This section is tailored carefully to art. I, § 14, of the Alaska Constitution and is therefore valid. 1959 Op. Att'y Gen. No. 15.

There is no constitutional requirement that all searches be with warrant, and reasonable searches may be made without

warrant. A reasonable search is one made (a) upon probable cause that fruits of a crime or evidence relating to the crime will be found; (b) under circumstances which would make the securing of a warrant impracticable. 1961 Op. Att'y Gen. No. 19.

A search may be made pursuant to a valid arrest, providing that the arrest is made prior to the search. 1961 Op. Att'y Gen. No. 19.

The amendment requiring a written signed statement of the reason for the search is objectionable but valid. It is objectionable because it unnecessarily ties the hands of the field agents charged with enforcement of the fish and game laws, and is a provision which is quite uncommon, if not unique. 1959 Op. Att'y Gen. No. 15.

The statutory requirement that fish and game agents fill out a form stating the objects of search will not make an otherwise invalid search valid, but it may invalidate an otherwise valid search if not complied with. 1961 Op. Att'y Gen. No. 15.

In the case of a vessel, the limits of the area open to search probably include the entire vessel. 1961 Op. Att'y Gen. No. 19.

NOTES TO DECISIONS

Observation of items in plain view. — The mere observation of items which are in plain view or which are open and apparent, is not a search. Consequently, evidence based on such observations is admissible so long as the observing officer was legally in the position where the observations were made. Klockenbrink v. State, Sup. Ct. Op. No. 631 (File No. 1149), 472 P.2d 958 (1970).

This section requires that notice be given to the person "in control" of crab pots. Nathanson v. State, Sup. Ct. Op. No. 1310 (File No. 2541), 554 P.2d 456 (1976).

Failure to notify owner of crab pots was not a violation of this section where officers of the Department of Fish and Game approached the crab pots to conduct a search to check the extent of compliance with a regulation providing that fishermen could place their crab pots in the water up to 72 hours prior to the opening of the season and the owner was not present, attending to his crab pots; there being no "person in control of the property or object to be searched," the officers were unable to give the fisherman the required notice. Nathanson v. State, Sup. Ct. Op. No. 1310 (File No. 2541), 554 P.2d 456 (1976).

Notice required for search of vessel, building, etc. — The considerations leading to the conclusion that no notice was required for a search of crab pots would not apply to the search of a vessel, building or other effects in which the owner would have a reasonable expectation of privacy. Nathanson v. State, Sup. Ct. Op. No. 1310 (File No. 2541), 554 P.2d 456 (1976).

Crab pots outside prot of notice requirements. - re intended crab pots s to be outside the pro ie notice requirements o n. Wamser v. State, Sup. C . 1953 (File No. 3645), 600 (1979).

Officers' not violate section. — Ac state fish and wildlife officers in p defendant's gear, marking the con and seizing samples of the bai di violate this section although such ns were taken without giving defenc notice of the officers' intentions. Wa r v. State, Sup. Ct. Op. No. 1953 (Fil No. 3645), 600 P.2d 1359 (1979).

Applied in Dye v. State, Ct. App. Op. No. 125 (File No. 5599), 650 P.2d 418 (1982); Gudjonnson v. State, Ct. App. Op. No. 275 (File Nos. 7291, 7292), 667 P.2d 1254 (1983).

Sec. 16.05.190. Seizure and disposition of equipment. Guns, traps, nets, fishing tackle, boats, aircraft, automobiles or other vehicles, sleds, and other paraphernalia used in or in aid of a violation of this chapter or a regulation of the department may be seized under a valid search, and all fish and game, or parts of fish and game, or nests or eggs of birds, taken, transported, or possessed contrary to the provisions of this chapter or a regulation of the department shall be seized

Collateral references. — Wrongful pollution of stream by municipality as creating single cause of action or successive causes of action. 75 ALR 529.

Right to maintain action to enjoin public nuisance as affected by existence of pollution control agency. 60 ALR3d 665.

Recovery in trespass for injury to land caused by airborne pollutants. 2 ALR4th 1054.

Sec. 46.03.830. Proof of financial responsibility required for petrochemical facility or hazardous waste disposal site operation. (a) A person may not operate a petrochemical facility or a hazardous waste disposal site unless the person has furnished proof to the commissioner of financial ability to control a hazardous waste that will be used in, produced by, or disposed of at the facility or the site. Proof of financial responsibility shall include responsibility for the hazardous waste after the facility or site is closed, and may be demonstrated by self-insurance, insurance, surety, or guarantee, under regulations adopted by the department.

(b) Acceptance of proof of financial responsibility under this section expires

(1) one year from its issuance for self-insurance;

(2) on the effective date of a change in the surety bond, guarantee, or insurance agreement; or

(3) on the expiration or cancellation of the surety bond, guarantee, or insurance agreement. (§ 13 ch 93 SLA 1981)

Sec. 46.03.833. Compliance with financial responsibility requirements. (a) A person whose proof of financial responsibility is accepted by the department under AS 46.03.830 or 46.03.100(c) shall notify the department at least 90 days before the effective date of a change, expiration, or cancellation in the surety bond, guarantee, or insurance agreement. Application for renewal of acceptance of proof of financial responsibility under AS 46.03.830 or 46.03.100(c) must be filed at least 90 days before the date of expiration.

(b) The department, after notice and hearing, may revoke acceptance of proof of financial responsibility if it determines that

(1) acceptance was procured by fraud or misrepresentation; or

(2) a change of circumstance has occurred that warrants revocation under regulations adopted by the department. (§ 13 ch 93 SLA 1981)

Sec. 46.03.840. Radiation penalties. [Repealed, § 12 ch 172 SLA 1978. For current provisions, see AS 18.60.475 — 18.60.545.]

Sec. 46.03.850. Compliance order. (a) When, in the opinion of the department, a person is violating or is about to violate a provision of this chapter or AS 46.04, or a regulation or lawful order of the department, or a permit or certificate, or a term or condition of a permit or certificate issued by the department under this chapter or AS 46.04, the department may notify the person of its determination

by personal service or certified mail. The determination and notice do not constitute an order under AS 46.03.820.

(b) The recipient of the determination shall file with the department, within the time period specified in the notice, a report stating what measures have been and are being taken, or are proposed to be taken, to correct or control the conditions outlined in the notice.

(c) After the report is filed under (b) of this section or the time period specified for it has elapsed, the department may issue a compliance order in conformity with the authority of the department and the public policy declared in AS 46.03.010. A copy of the compliance order shall be served personally or sent by certified mail to the person affected. A compliance order is effective upon receipt.

(d) Within 30 days after receipt the recipient may request a hearing to review the compliance order. Failure to request a hearing within 30 days after the receipt of a compliance order constitutes a waiver of the recipient's right of review.

(e) The department shall hold a hearing within 20 days after receipt of a request for one under (d) of this section. After the hearing the department may rescind, modify or affirm the compliance order.

(f) The attorney general shall seek enforcement of a compliance order. (§ 14 ch 220 SLA 1976; am § 9 ch 266 SLA 1976; am § 113 ch 59 SLA 1982)

Collateral references. — Modern status of rules as to balance of convenience or social utility as affecting relief from nuisance. 40 ALR3d 601.

Sufficiency of evidence of violation in administrative proceeding terminating in abatement order. 48 ALR3d 795.

Article 8. General Provisions.

Collateral references. — 61A Am. Jur. 2d, Pollution Control, §§ 46-49, 110-125, 174-181, 263-265, 271-273, 287-292, 4-7-433, 589, 590.

39A C.J.S., Health and Environment, §§ 133-157.

Sec. 46.03.860. Inspection warrant. The department may seek search warrants for the purpose of investigating actual or suspected sources of pollution or contamination or to ascertain compliance or noncompliance with this chapter or a regulation adopted under this chapter. (§ 3 ch 120 SLA 1971)

Article 5. Adjudicatory Hearings

18 AAC 15.200. REQUEST FOR AN ADJUDICATORY HEARING. (a) Within 30 days after service of a decision under sec. 80 or 160 of this chapter, or AS 46.03.170, any person may serve a request on the commissioner for an adjudicatory hearing. The request must contain

(1) the name, mailing address, and telephone number of the person making the request;

(2) the names and addresses of all persons adversely affected by the decision whom the requestor represents;

(3) a clear and concise factual statement of the nature and scope of the interests of the requestor, and an explanation of how and to what extent those interests would be directly and adversely affected by the decision;

(4) a clear and concise statement of the genuine factual issues proposed for consideration at the hearing; and

(5) where applicable, specific reference to the contested terms or conditions of the decision, as well as suggested alternative terms and conditions, which, in the judgment of the requestor, would be required to implement applicable criteria.

(b) Where application was made solely for a permit amendment, requests for an adjudicatory hearing may not raise issues relating to the validity of the permit for which an amendment is sought, nor to unrelated terms and conditions of the permit for which no amendment has been sought. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.160
AS 46.03.090 AS 46.03.330
AS 46.03.100 AS 46.03.720
AS 46.03.110 AS 46.35.090(e)

18 AAC 15.210. STAY OF DECISION. (a) The department's decision is not stayed during the pendency of the hearing. However, a requestor may, contemporaneous with the service of his request for a hearing under sec. 200 of this chapter, serve a motion (together with a supporting memorandum) upon the commissioner to stay the department's decision, or a portion of it, pending the hearing. The department will then serve the request upon all other requestors, and the

applicant. In reviewing a stay motion the commissioner or his designee will consider

(1) the relative harm to the person requesting the stay, the applicant, and the public health and environment from the granting or denial of a stay;

(2) the resources which would be committed during the pendency of the hearing if the stay were granted or denied; and

(3) the likelihood that the person requesting the stay will prevail on the merits.

(b) No stay will be granted on a denial of a permit application or request for certification for either a new operation, or an operation which commenced after the effective date of the statute or regulation requiring a permit, written approval, or certification.

(c) Within 10 days after service of the stay petition under (a) of this section, a requestor (or the applicant) may serve a responsive memorandum upon the commissioner and all other requestors.

(d) The department will serve its decision on a stay petition within 10 days after the expiration of the deadline for a responsive memorandum under (c) of this section. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.160
AS 46.03.090 AS 46.03.330
AS 46.03.100 AS 46.03.720
AS 46.03.110 AS 46.35.090(e)

18 AAC 15.220. ACTION ON HEARING REQUESTS; INTERVENTION. Within 10 days after service of a request for an adjudicatory hearing, the department will serve its decision on the request upon the requestor. The department will grant a request for a hearing if the request discloses that the requestor would be adversely affected by the department's decision, that the requestor has raised a genuine issue of fact material to the decision, and that the requirements of sec. 200 of this chapter have otherwise been met. If the department grants an adjudicatory hearing request, it will publish notice of the action in a newspaper of general circulation for the affected area, and will serve notice on all persons who either submitted timely written comments or testified at a public hearing on the application. A person wanting to intervene in the proceedings may serve upon the commissioner and all parties a petition for intervention containing the information specified in sec. 200 of this chapter, within 10 days after publication of notice or mailing of notice under this section, whichever first occurs. Any party may serve an objection to the intervention petition within 10 days after service of the petition upon him. The department will reach a decision on the intervention request within 10 days after the expiration of the period for serving an objection according to the criteria established in this section. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.160
AS 46.03.090 AS 46.03.330
AS 46.03.100 AS 46.03.720
AS 46.03.110 AS 46.35.090(e)

18 AAC 15.230. CONSOLIDATION. When more than one hearing request is granted, all requests will be joined in a single proceeding. Each requestor, the applicant, where the applicant has made no request, and the department will be made parties to the proceeding. Notice of consolidation will be given to all parties within 20 days after the granting of the last timely request for an adjudicatory hearing. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.160
AS 46.03.090 AS 46.03.330
AS 46.03.100 AS 46.03.720
AS 46.03.110 AS 46.35.090(e)

18 AAC 15.240. DISCOVERY. (a) Immediately after the department determines that additional parties will be added to the proceeding, it will serve notice on each requestor that, within 30 days, each requestor must serve upon each respondent

(1) a complete and concise summary of the issues and factual matters which the requestor will present at the hearing;

(2) the name, address, telephone number, and occupation of each witness whom the requestor intends to call at the hearing, and the purpose of his testimony; and

(3) the nature, location, and custodian of any real or documentary evidence which the requestor intends to introduce at the hearing, and the purpose of its introduction.

(b) Within 20 days after service of the matters specified in (a) of this section, each respondent must serve upon each requestor

(1) the name, address, telephone number, and occupation of each witness which the respondent intends to call at the hearing, and the purpose of his testimony; and

(2) the nature, location, and custodian of any real or documentary evidence which the respondent intends to introduce at the hearing, and the purpose of its introduction.

(c) When a party is both a requestor and a respondent, he must serve the matters under (a) of this section as to those issues for which he is a requestor, and must serve the matters under (b) of this section as to those issues for which he is a respondent. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.160
AS 46.03.090 AS 46.03.330
AS 46.03.100 AS 46.03.720
AS 46.03.110 AS 46.35.090(e)

18 AAC 15.250. PREHEARING CONFERENCE. (a) The deciding officer may direct the holding of a prehearing conference if he determines that a conference will substantially aid resolution of the case. At least 10 days' notice of the conference will be given to all parties. The time and place of the conference will be set by the deciding officer, with due regard for the convenience of the parties.

(b) At the prehearing conference, the deciding officer may explore and is empowered to make any appropriate order regarding

(1) the simplification, clarification, or limitation of the issues, the striking of immaterial issues, and the summary disposition of issues over which there is no genuine dispute;

(2) the admission of facts and the genuineness of documents, and stipulations with respect to facts and documents;

(3) objections to the introduction into evidence at the hearing of any written testimony, documents, papers, exhibits, or other submissions proposed by a party; however, the failure to raise an evidentiary objection at the conference does not preclude a party from raising the objection at the hearing;

(4) matters of which official notice will be taken;

(5) establishment of a schedule, including definite or tentative times relating to the progress of the hearing;

(6) the taking and introduction of depositions;

(7) the use of affidavits in place of oral testimony;

(8) accepting, on good cause shown, supplements to the witness and evidence lists provided under sec. 240 of this chapter (specifically including rebuttal evidence to matters submitted under sec. 240(b) of this chapter);

(9) the exclusion of unduly repetitive or irrelevant evidence; and

(10) any other matter which will expedite the hearing or aid disposition of the matter.

(c) The prehearing conference will be tape recorded.

(d) The deciding officer will prepare, and will serve upon all parties, within 10 days after holding the conference, a written prehearing order reciting the actions taken at the prehearing conference and setting out the schedule for the hearing. The order will include a written statement of the areas of factual agreement and disagreement and of the methods and procedures to be used in developing the evidence and the respective duties of the parties in connection therewith. The order will control the subsequent course of the hearing unless modified by the deciding officer for good cause shown. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.160
AS 46.03.090 AS 46.03.330
AS 46.03.100 AS 46.03.720
AS 46.03.110 AS 46.35.090(e)

18 AAC 15.260. DECIDING OFFICER. The case will be heard and decided by the commissioner or his designee. The commissioner or his designee will, in his discretion, be accompanied during any proceeding, conference or deliberation by a representative of the Department of Law, other than an attorney who has been involved in the formulation of the agency's decision. The Department of Law representative and the deciding officer will be subject to the requirements and restrictions of AS 44.62.630. Notice of designation of the deciding officer will be served with the notification under sec. 240(a) of this chapter. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.160
AS 46.03.090 AS 46.03.330
AS 46.03.100 AS 46.03.720
AS 46.03.110 AS 46.35.090(e)

18 AAC 15.270. HEARINGS. (a) The sequence of argument, examination, and summation shall conform to the prehearing order. The deciding officer may question a witness. The deciding officer, in multiparty proceedings, may limit cross-examination to one party on each side if he is satisfied that the cross-examination by one party will adequately protect the other parties. Other parties may, however, engage in cross-examination as to matters not covered by previous cross-examination.

(b) The deciding officer may admit any material evidence of the type on which a reasonable man might rely in the conduct of serious business affairs, except that which is unduly repetitious.

(c) The burden of proof and of going forward with the evidence is on the requestor.

(d) No issue, testimony or real or documentary evidence may be introduced or advanced at the hearing which was not previously disclosed under sec. 240 or 250(b)(8) of this chapter. The deciding officer may waive this prohibition if the failure to previously disclose was due to

(1) surprise;

(2) newly discovered evidence which by due diligence could not have previously been discovered and disclosed; or

(3) fraud misrepresentation, or other misconduct of an opposing party.

(e) The prohibition of (d) of this section does not apply to evidence offered solely to rebut or impeach matters first disclosed pursuant to sec. 250(b)(8) of this chapter. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.160
AS 46.03.090 AS 46.03.330
AS 46.03.100 AS 46.03.720
AS 46.03.110 AS 46.35.090(e)

18 AAC 15.280. CERTIFICATION OF RECORD. As soon as the hearing transcript has been prepared, the deciding officer shall certify the record of the hearing and provide notice of the certification to all parties. Except for good cause shown, the cost of transcribing the hearing must be borne by the requestor. Where there is more than one requestor, the deciding officer may apportion the costs. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.160
AS 46.03.090 AS 46.03.330
AS 46.03.100 AS 46.03.720
AS 46.03.110 AS 46.35.090(e)

18 AAC 15.290. FINDINGS AND BRIEFS. Within 10 days after notice of the certification of the record under 18 AAC 15.280, a party may serve upon the deciding officer, and all parties, proposed findings of fact. The deciding officer, at the close of the hearing, will, in his discretion, also order the submission of briefs if he determines that briefing will substantially aid his resolution of the case. The proposed findings are intended only as an aid to the deciding officer, and a ruling on the acceptance or rejection of the proposed findings is not required. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.160
AS 46.03.090 AS 46.03.330
AS 46.03.100 AS 46.03.720
AS 46.03.110 AS 46.35.090(e)

18 AAC 15.300. DECISION. The deciding officer will serve his findings of fact and conclusions of law upon the parties within 30 days after notice of certification of the record under 18 AAC 15.280. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.160
AS 46.03.090 AS 46.03.330
AS 46.03.100 AS 46.03.720
AS 46.03.110 AS 46.35.090(e)

18 AAC 15.310. RELAXATION OF REGULATIONS. The deciding officer may waive any requirement or deadline established in 18 AAC 15.240—18 AAC 15.300 if it appears to him that strict adherence to the deadline or requirement would work an injustice. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.160
AS 46.03.090 AS 46.03.330
AS 46.03.100 AS 46.03.720
AS 46.03.110 AS 46.35.090(e)

which expires more than one year from the date of issuance of the permit.

(g) The department will, in its discretion, and upon written notification to the permittee, summarily revoke a permit to apply pesticides if it determines that violations of this chapter or of the stipulations of the permit have occurred, or if an unanticipated hazard to the public health or safety, or to the environment exists. (Eff. 11/25/77, Register 64)

Authority: AS 46.03.020(10) AS 46.03.330
AS 46.03.320 AS 46.03.730

18 AAC 90.060. DEFINITIONS. In this chapter

(1) "category of use" means a specialty category such as agricultural pest control, forest pest control, ornamental and turf pest control, seed treatment, aquatic pest control, right-of-way pest control, industrial, institutional, structural and health related pest control, regulatory pest control, mosquito and biting fly pest control, and aerial pest control;

(2) "commissioner" means the commissioner of the Department of Environmental Conservation;

(3) "certified applicator" means a person certified under sec. 10 of this chapter;

(4) "commercial applicator of restricted-use pesticides" means a certified applicator other than a private applicator of restricted-use pesticides;

(5) "department" means the Department of Environmental Conservation;

(6) "labeling" means the label affixed to a pesticide container and any other written, printed, or graphic matter to which reference is made on the label or in literature accompanying the pesticide or device, except current official publications of federal and state government agencies or institutions;

(7) "passing" means receiving 70 percent of the highest possible grade;

(8) "persons engaged in the custom, commercial, or contract spraying or application of pesticides" means persons who apply, or offer to apply pesticides for a fee;

(9) "pesticide" includes any chemical or biological agent intended for use as an insecticide, herbicide, rodenticide, fungicide, or other biocide;

(10) "private applicator of restricted-use pesticides" means a certified applicator who uses or supervises the use of restricted-use pesticides for purposes of producing any agricultural commodity either on property owned or rented by him or his employer, or, if applied without compensation (other than trading of personal services between producers of agricultural commodities), on the property of another person;

(11) "public pesticide project" means a project involving the application of a pesticide which affects properties owned separately by two or more persons and which is directed, conducted, or participated in by the state or a borough or city of any class;

(12) "restricted-use pesticides" means pesticides that are classified for restricted use under sec. 3(d)(1)(c) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. § 136a(d)(1)(c)); and

(13) "under direct supervision" means the application of a pesticide by a competent person acting under the instruction and control of a certified applicator who is responsible for the actions of that person and who is available if and when needed, even though the certified applicator is not physically present at the time and place the pesticide is applied. (Eff. 9/1/73, Register 47; am 11/25/77, Register 64)

Authority: AS 46.03.020(10)
AS 46.03.320
AS 46.03.900

CHAPTER 95. ADMINISTRATIVE ENFORCEMENT

Article
1. Compliance Orders (18 AAC 95.010 — 18 AAC 95.170)
5. Definitions (18 AAC 95.900)

Article 1. Compliance Orders

18 AAC 95.010. INITIATION OF COMPLIANCE ORDER PROCEEDINGS. (a) Compliance order proceedings are initiated by the service of a notice of intent to issue a compliance order upon the person or persons responsible for an actual or threatened violation. The notice of intent will be signed by the deputy commissioner.

(b) The notice of intent will

(1) recite the condition, activity or conduct which the deputy commissioner has determined is causing or is threatening to cause a violation;

(2) disclose the basis of the deputy commissioner's determination;

(3) specify the statute, regulation, order, permit or certificate which is being or threatens to be violated;

(4) request of the respondent a detailed report specifying what measures have been or are being taken, or are proposed to be taken, to correct, control or prevent the violation; and

(5) briefly describe the statutory procedures of compliance order proceedings, and the penalties and liabilities to which the respondent is exposed.

(c) A copy of this chapter, and an objection form, will accompany the notice of intent. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.020. RESPONDENT'S REPORT AND OBJECTION. (a) Unless otherwise specified, the respondent shall serve upon the regional office designated in the notice of intent the report requested under sec. 10(b)(4) of this chapter within 15 days of service of the notice of intent. The deadline for service of the report may be shortened by the deputy commissioner if necessary to protect the public health or environment. If a service period of less than 15 days is provided, the notice of intent will state the reasons for that.

(b) Respondent's report must be of sufficient detail to permit an informed judgment by the deputy commissioner as to the adequacy of the actual or proposed remedial or preventive measures. The report must be specific with regard to the precise equipment, facilities, materials or operations to be used, as well as deadlines and timetables. Maps, diagrams and the like should be used to promote clarity, and any germane surveys, reports or sampling or test results should be attached to the report.

(c) If the respondent believes that

(1) the violations specified in the notice of intent have not or do not threaten to occur;

(2) he is not responsible for the violations specified;

(3) no corrective or preventive action of any sort is necessary; or

(4) the notice of intent is so indefinite or uncertain that he cannot identify the transaction, prepare his defense or prepare the report under (b) of this section

he may serve an objection upon the deputy commissioner within 10 days of service of the notice of intent, or within a shorter time period specified in the notice of intent in cases where a time period of less than 15 days is provided for service of the report. Upon service of a

timely objection, the time period for service of the report will be held in abeyance pending action by the deputy commissioner under (e) or (g) of this section. If a defense specified in (1) – (3) of this subsection is raised, the objection must concisely state the basis for that defense.

(d) The failure to raise the defense specified in (c)(4) of this section in a timely served objection constitutes a waiver of that defense. All other defenses are preserved, and may be raised in a notice of defense following issuance of the compliance order under sec. 30 of this chapter.

(e) Upon service of a timely objection raising a defense specified in (c)(1) — (3) of this section, and after a review of the record, the deputy commissioner may

(1) if the record warrants, terminate the compliance order proceedings against the respondent;

(2) if he determines that a defense raises a serious and substantial issue, and that the public health or environment will not be unduly harmed or threatened by the delay inherent in a bifurcated hearing, treat the objection as a notice of defense and set the matter for hearing in conformity with secs. 50 — 130 of this chapter; or

(3) if he determines that the defenses do not raise a serious and substantial issue, or that the public health or environment would be unduly harmed or threatened by the delay inherent in a bifurcated hearing, notify the respondent of his determination, and provide the respondent with the unexpired portion of the service period for the report, or five days, whichever is greater, in which to serve his report; notification may be made orally.

(f) A determination by the deputy commissioner under (e)(3) of this section does not constitute final agency action. Findings of fact and, when appropriate, conclusions of law supporting the determination will be made in the compliance order issued under sec. 30 of this chapter, and the deputy commissioner's findings and conclusions may be contested in a hearing held after the issuance of the compliance order.

(g) If a timely served objection raises the defense specified in (c)(4) of this section, and the deputy commissioner determines that there is good cause for the objection, he shall serve a supplemental notice of intent within seven days of service of the objection. If the deputy commissioner determines that there is not good cause for the objection, he shall so notify the respondent within three days of service of the objection. Notification may be made orally. Upon notification, respondent will be afforded the unexpired portion of the service period for the report, or five days, whichever is greater, in which to serve his report.

(h) Upon service of a motion on the deputy commissioner within seven days of service of the notice of intent (or within three days of notification of a determination under (e)(3) or (g) of this section) the

deputy commissioner shall grant an extension for service of the report upon finding that

(1) good cause exists for the extension; and

(2) the public health or environment will not be unduly harmed or threatened by the extension.

(i) The time period specified in the notice of intent (or in a determination made under (e)(3) or (g) of this section) for service of the report will be held in abeyance from the date of service of a motion under this subsection until service of the decision by the deputy commissioner. If an extension request is denied, the respondent will be afforded the unexpired portion of the service period for the report, or five days, whichever is greater, in which to file the report.

(j) Neither the report, nor any evidence directly obtained as a result of exploitation of the report, will be used against a person providing the report in any criminal proceeding concerning the violation or violations to which the notice of intent is addressed.

(k) The report must contain the name and mailing address of the respondent, and, if respondent is represented by counsel, the name, mailing address and telephone number of the respondent's attorney. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.030. COMPLIANCE ORDER. (a) Upon receipt of respondent's report, or at the expiration of the service period if no report is served, the deputy commissioner shall review the record of the case, and shall, in his discretion, thereafter issue a compliance order.

(b) In addition to any findings and conclusions required by sec. 20(e)(3) of this chapter, the compliance order will contain findings of fact that

(1) there exists an actual or threatened violation which the respondent has caused or permitted;

(2) where a report has been submitted, and the corrective or preventive measures specified in the order differ from or supplement the measures proposed in the report, the measures specified in the report will not provide a reasonable assurance of correction of the actual violation or prevention of the threatened violation; and

(3) the measures specified in the order will provide a reasonable assurance of correction or prevention.

(c) The findings made in the notice of intent may be incorporated by reference.

(d) The order will specify the measures to be taken by the respondent. No deadline will be imposed which expires sooner than 30 days from the date of service of the order.

(e) The order will inform the respondent of his right to an adjudicatory hearing. It will also inform the respondent that his failure to serve upon the commissioner a notice of defense requesting a hearing within 30 days of service of the order constitutes a waiver of respondent's rights to judicial review of the order.

(f) The order will be accompanied by a notice of defense form.

(g) The order will designate the prosecuting office.
(Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.040. EFFECTIVE DATE OF ORDER. (a) A compliance order is effective upon receipt.

(b) A timely request for a hearing under sec. 30(e) of this chapter acts as a stay of the provisions of the order pending decision by the commissioner or his designee.

(c) If the respondent does not make a timely request for a hearing, no other action is necessary by the deputy commissioner or the commissioner or his designee. The deadlines of the order fall due as specified in the order. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.050. SCHEDULING OF HEARING. (a) Immediately upon service of a request for a hearing (or upon a determination under sec. 20(c)(2) of this chapter), the department will schedule a hearing to be held no later than 20 days after service of the request or determination. The location of the hearing will conform to AS 44.62.110. Notice of the hearing will be immediately served upon the respondent.

(b) At any time before the hearing, a party may serve upon the commissioner or his designee, and the opposing party, a request for postponement of the hearing. Postponements will only be granted by the commissioner or his designee in unusually complex cases, or when a failure to grant a postponement would pose a substantial hardship to the requesting party. No postponement will be granted when significant harm to the public health or environment will result from a delay.

(c) If the respondent served his request for a hearing more than 10 days after service of the compliance order, a request by the respondent for postponement of the hearing will be viewed with disfavor, and will be granted only in the most extraordinary of circumstances. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.060. HEARING OFFICER. (a) Immediately upon service of a request for a hearing, the department will arrange for the appointment of a hearing officer under AS 44.62.350.

(b) The department will hear the case with the hearing officer. The hearing officer will preside at the prehearing conference and the hearing, rule on the admission and exclusion of evidence, advise the department on matters of law, and be present during post hearing consideration of the case.

(c) The case will be heard by the commissioner or his designee. The commissioner or his designee will, in his discretion, be accompanied during any proceeding, conference or deliberation by a representative of the Department of Law other than an attorney who has been involved in the investigation or prosecution of the case. The Department of Law representative shall be subject to the requirements and restrictions of AS 44.62.630. The commissioner may designate any employee of the department, other than an employee involved in the investigation or prosecution of the case.

(d) Notice of designation under (c) of this section will be served upon the respondent no later than 10 days prior to the hearing. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.070. DISCOVERY. (a) At any time after service of the compliance order, and upon 24 hours' notice, the respondent may inspect and copy all documents and records pertaining to the case at the prosecuting office during normal working hours. Except for good cause shown, a fee of 10 cents per page of copied material must be paid by the respondent before he may take possession of the copies.

(b) Within seven days of service of a request for a hearing, the prosecuting office shall serve upon the respondent

(1) the names and addresses of witnesses whom the prosecuting office intends to call at the hearing to support the findings made under sec. 30(b) of this chapter (or the prosecuting office's position in hearings held under sec. 20(e)(2) of this chapter) and a brief summary of the purpose of their testimony;

(2) the nature, location and custodian of any real or documentary evidence which the prosecuting office intends to introduce at the hearing to support the findings made under sec. 30(b) of this chapter (or the prosecuting office's position in hearings held under sec. 20(e)(2) of this chapter); and

(3) matters of which the prosecuting office proposes to take official notice at the hearing.

(c) Within seven days of service of the matters specified in (b) of this section, the respondent shall serve upon the prosecuting office

(1) a specification of the issues, defenses and factual matters which respondent intends to introduce at the hearing either to contest the findings made under sec. 30(b) of this chapter (or the prosecuting office's position in hearings held under sec. 20(e)(2) of this chapter), or to argue affirmative matters of defense;

(2) the names and addresses of all witnesses whom the respondent intends to call at the hearing to support any matter specified in (1) of this subsection, and a brief summary of the purpose of their testimony; and

(3) the nature, location and custodian of any real or documentary evidence which the respondent intends to introduce at the hearing to support any matter specified in (1) of this subsection. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.080. PREHEARING CONFERENCE. (a) If the hearing officer determines that a prehearing conference will aid disposition of the case, he shall notify the parties no later than seven days before the scheduled date of the hearing of the date, time and location of the conference. The conference shall be held no later than two days before the hearing.

(b) At the conference, the hearing officer may make any order or ruling necessary or appropriate regarding

(1) the identification and simplification of disputed issues of fact and law;

(2) the entry of stipulations of fact and documents, and the exclusion of irrelevant or unduly repetitive matters;

(3) matters of which official notice will be permitted to be taken;

(4) scheduling an onsite inspection;

(5) accepting, on good cause shown, supplements to the discovery responses submitted under secs. 70(b) and (c) of this chapter (specifically including rebuttal evidence by the prosecuting office);

(6) limitation of the number of expert and other witnesses;

(7) procedure at the hearing; or

(8) any other matter that may expedite the hearing or aid in the disposition of the proceeding.

(c) No transcript or recording of any prehearing conference will be made unless a request for one by one of the parties is granted by the hearing officer. Except for good cause shown, the requesting party shall bear the cost of the taking of the transcript or recording. The hearing officer shall prepare and file for the record a prehearing order, which must incorporate any stipulations or agreements made by the parties at or as a result of the conference and all rulings upon matters considered at the conference. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.090. HEARING PROCEDURES. (a) The sequence of argument, examination and summation must follow that of a civil proceeding, except to the extent modified under sec. 80(b)(7) of this chapter. However, either the hearing officer may or the commissioner, in his discretion, will or the commissioner's designee may question a witness.

(b) No issue, defense, testimony or real or documentary evidence may be introduced at the hearing which was not previously disclosed pursuant to either secs. 70(b) or (c) or sec. 80(b)(5) of this chapter. This prohibition may be waived by the hearing officer if the introduction would not unduly prejudice the opposing party, and the failure to disclose was due to

(1) surprise or excusable neglect;

(2) newly discovered evidence which by due diligence could not have previously been discovered and disclosed; or

(3) fraud, misrepresentation or other misconduct of the opposing party.

(c) The prohibition in (b) of this section does not apply to evidence offered solely to impeach evidence or respond to new issues first disclosed pursuant to sec. 80(b)(5) of this chapter. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.100. PROPOSED FINDINGS. Within three days of the close of the hearing, a party may serve upon the commissioner or his designee and all other parties proposed findings of fact. The proposed findings are intended only as an aid to the commissioner or his designee, and a ruling on the acceptance or rejection of the proposed findings is not required. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.110. DECISION. (a) The commissioner or his designee will serve upon the parties an order rescinding, modifying or affirming the compliance order (or ruling on the defenses raised in hearings held under sec. 20(e)(2) of this chapter) within 30 days of the close of the hearing. The order serves as an automatic vacation of the stay under sec. 40(b) of this chapter, and any deadlines or timetables in the order run from the date of service of the affirmed or modified order.

(b) The order under (a) of this section must contain

(1) a brief summary of the nature and history of the case;

(2) findings of fact and conclusions of law; and

(3) a specification of the terms and conditions of the final compliance order; the requirements imposed under sec. 30(c) of this chapter may be incorporated by reference. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.120. PETITION FOR RECONSIDERATION. (a) Within 30 days of service of the order under sec. 110(a) of this chapter (except for a petition by the respondent pertaining to a hearing held under sec. 20(e)(2) of this chapter), a party may serve upon the commissioner, and the opposing party, a petition for reconsideration and supporting memorandum. If the commissioner did not hear the case himself, a copy of the transcript of the hearing, if available, shall also be served upon the commissioner and the opposing party.

(b) Within 10 days of service of the petition, the opposing party may serve upon the commissioner and the petitioning party a responsive memorandum.

(c) Neither the submission nor granting of a petition for reconsideration acts as a stay of any provision of the compliance order unless the commissioner otherwise directs. Applications for a stay will be granted only when the petition raises serious and substantial questions regarding the validity of the order, and no significant harm to the public health or environment will be caused by a delay.

(d) After granting a petition, and upon a review of the record, the commissioner will affirm, modify or reverse the order made under sec. 110(a) of this chapter within 20 days of the granting of the petition. The commissioner will, in his discretion, also order the taking of new evidence.

(e) A petition for reconsideration by the respondent pertaining to a hearing held under sec. 20(e)(2) of this chapter may be served only after service of the order under sec. 110 of this chapter affirming or modifying the compliance order. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.130. TRANSCRIPT OF HEARING. Hearings must be tape recorded. At any time after the close of the hearing, a party may request a transcript of the hearing from the department. Except for good cause shown, the party requesting the transcript shall pay the cost of the transcript and all requested copies of it before the party may take possession of the transcript. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.140. SERVICE. (a) Any matter required to be served under this chapter may be served by personal service, registered mail, or certified mail, return receipt requested.

(b) Proof of service must be made by an affidavit of service, or on appropriate forms if service is made by a peace officer. Upon the filing of a notice of defense, a copy of all matters subsequently served, and proof of service, must be mailed to the commissioner or his designee; and they become part of the administrative record.

(c) When a pleading or paper filed in a case discloses that a respondent is represented by counsel, service upon the respondent must be made upon his attorney.

(d) Where applicable, service of the notice of intent and compliance order must be delivered or mailed in conformity with Rule 4(d)(4) — (11) of the Alaska Rules of Civil Procedure.

(e) When mail is used for service, service occurs upon the date of postmark for the purpose of the serving party's obligations, and upon receipt for the purpose of commencing time limits upon the receiving party.

(f) All papers served by mail upon the department, must have the designation "COMPLIANCE ORDER NO....," in capital letters, typed on the face of the envelope. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.150. RELAXATION OF REGULATIONS. The hearing officer may, the commissioner in his discretion will, and the commissioner's designee may, in the interests of justice, relax or dispense with a deadline or requirement imposed by this chapter. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.160. CONSENT ORDERS. At any time during the compliance order proceedings, the parties may enter into a consent order. Any consent or compromise agreement must take the form of a stipulated compliance order, and must be signed and confirmed by the commissioner or his designee. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.170. RELATIONSHIP TO ADMINISTRATIVE PROCEDURE ACT. Secs. 50 — 160 of this chapter supplement, and

are not intended to diminish or restrict any right or privilege which a party may have under AS 44.62.410 — 44.62.540. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

Article 5. Definitions

Section
900. Definitions

18 AAC 95.900. DEFINITIONS. As used in this chapter, unless the context otherwise requires

(1) "commissioner" means the commissioner of the Department of Environmental Conservation;

(2) "department" means the Department of Environmental Conservation;

(3) "designee" means the employee of the department to whom the commissioner has delegated the power to hear and decide a particular case;

(4) "objection" means a submission by the respondent, in response to a notice of intent, which raises any matter specified in sec. 20(c) of this chapter;

(5) "party" means the respondent and the prosecuting office;

(6) "prosecuting office" means the division or regional office of the department primarily responsible for prosecution of a case;

(7) "reasonable assurance" means that, after taking into account predictable natural or human intervention, the remaining risk of violation is negligible, and the costs of further reducing the negligible risk are disproportionate to the remaining risk itself; a lowering of the risk beyond that level is not a "reasonable assurance";

(8) "report" means a detailed submission by the respondent, in response to a notice of intent, which specifies what measures have been or are being taken, or are proposed to be taken to correct or prevent the violation;

(9) "threatened violation" means that it is more likely than not that, unless corrective or preventive measures are taken, a violation will occur in the foreseeable future; and

(10) "violation" includes a violation of a provision of AS 46.03 or AS 30.25, or of a regulation, permit, certificate, order or term or condition of a permit, certificate or order issued or promulgated by the department under authority of AS 46.03 or AS 30.25. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

deputy commissioner shall grant an extension for service of the report upon finding that

(1) good cause exists for the extension; and

(2) the public health or environment will not be unduly harmed or threatened by the extension.

(i) The time period specified in the notice of intent (or in a determination made under (e)(3) or (g) of this section) for service of the report will be held in abeyance from the date of service of a motion under this subsection until service of the decision by the deputy commissioner. If an extension request is denied, the respondent will be afforded the unexpired portion of the service period for the report, or five days, whichever is greater, in which to file the report.

(j) Neither the report, nor any evidence directly obtained as a result of exploitation of the report, will be used against a person providing the report in any criminal proceeding concerning the violation or violations to which the notice of intent is addressed.

(k) The report must contain the name and mailing address of the respondent, and, if respondent is represented by counsel, the name, mailing address and telephone number of the respondent's attorney. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.030. COMPLIANCE ORDER. (a) Upon receipt of respondent's report, or at the expiration of the service period if no report is served, the deputy commissioner shall review the record of the case, and shall, in his discretion, thereafter issue a compliance order.

(b) In addition to any findings and conclusions required by sec. 20(e)(3) of this chapter, the compliance order will contain findings of fact that

(1) there exists an actual or threatened violation which the respondent has caused or permitted;

(2) where a report has been submitted, and the corrective or preventive measures specified in the order differ from or supplement the measures proposed in the report, the measures specified in the report will not provide a reasonable assurance of correction of the actual violation or prevention of the threatened violation; and

(3) the measures specified in the order will provide a reasonable assurance of correction or prevention.

(c) The findings made in the notice of intent may be incorporated by reference.

(d) The order will specify the measures to be taken by the respondent. No deadline will be imposed which expires sooner than 30 days from the date of service of the order.

(e) The order will inform the respondent of his right to an adjudicatory hearing. It will also inform the respondent that his failure to serve upon the commissioner a notice of defense requesting a hearing within 30 days of service of the order constitutes a waiver of respondent's rights to judicial review of the order.

(f) The order will be accompanied by a notice-of-defense form.

(g) The order will designate the prosecuting office.

(Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.040. EFFECTIVE DATE OF ORDER. (a) A compliance order is effective upon receipt.

(b) A timely request for a hearing under sec. 30(e) of this chapter acts as a stay of the provisions of the order pending decision by the commissioner or his designee.

(c) If the respondent does not make a timely request for a hearing, no other action is necessary by the deputy commissioner or the commissioner or his designee. The deadlines of the order fall due as specified in the order. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

18 AAC 95.050. SCHEDULING OF HEARING. (a) Immediately upon service of a request for a hearing (or upon a determination under sec. 20(c)(2) of this chapter), the department will schedule a hearing to be held no later than 20 days after service of the request or determination. The location of the hearing will conform to AS 44.62.410. Notice of the hearing will be immediately served upon the respondent.

(b) At any time before the hearing, a party may serve upon the commissioner or his designee, and the opposing party, a request for postponement of the hearing. Postponements will only be granted by the commissioner or his designee in unusually complex cases, or when a failure to grant a postponement would pose a substantial hardship to the requesting party. No postponement will be granted when significant harm to the public health or environment will result from a delay.

(c) If the respondent served his request for a hearing more than 10 days after service of the compliance order, a request by the respondent for postponement of the hearing will be viewed with disfavor, and will be granted only in the most extraordinary of circumstances. (Eff. 7/24/77, Register 63)

Authority: AS 46.03.020(10)
AS 46.03.850

search held unconst.

Rec - speed Argument & void

[436 US 307]

RAY MARSHALL, Secretary of Labor, et al., Appellants,

v

BARLOW'S, INC.

436 US 307, 56 L Ed 2d 305, 98 S Ct 1816

[No. 76–1143]

Argued January 9, 1978. Decided May 23, 1978.

SUMMARY

After a businessman refused to permit an inspector from the Occupational Safety and Health Administration to conduct a warrantless search of his business premises pursuant to § 8(a) of the Occupational Safety and Health Act of 1970 (29 USCS § 657(a)), which empowers agents of the Secretary of Labor to search the work area of any employment facility within the Act's jurisdiction in order to inspect for safety hazards and regulatory violations, the Secretary petitioned the United States District Court for the District of Idaho for an order compelling admittance of the inspector. The requested order was issued, but the businessman again refused to permit the inspection, and sought injunctive relief against warrantless searches under the Act. Entering an injunction against searches and inspections pursuant to § 8(a), the three-judge District Court ruled that the Fourth Amendment required a warrant for the type of search involved, and that the statutory authorization for warrantless inspections was unconstitutional. (424 F Supp 437).

On direct appeal, the United States Supreme Court affirmed. In an opinion by WHITE, J. joined by BURGER, Ch. J. and STEWART, MARSHALL, and POWELL, JJ. it was held that (1) § 8(a) violated the Fourth Amendment insofar as it purported to authorize inspections without a warrant or its equivalent, but the Secretary was not prohibited from exercising the inspection authority conferred by § 8(a) pursuant to regulations and judicial process satisfying the Fourth Amendment, and (2) the entitlement of the Secretary to inspect, under a warrant or other process, pursuant to § 8(a) did not depend on his demonstrating probable cause to believe that conditions in violation of the Act existed on the premises but could be based on a showing that reasonable legislative or administrative standards for conducting an inspection were satisfied with respect to a particular establishment.

Briefs of Counsel, p 832, infra.

STEVENS, J., joined by BLACKMUN and REHNQUIST, JJ., dissented, expressing the view that (1) the warrantless inspection was not "unreasonable" within the meaning of the Fourth Amendment, and therefore was not prohibited by that Amendment, and (2) if such warrantless inspections were in fact unreasonable in the constitutional sense, the issuance of a warrant not based upon a true showing of particularized probable cause could not validate them.

BRENNAN, J., did not participate.

HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

Search and Seizure § 25 — OSHA — inspection — warrant

1a, 1b, 1c. Section 8(a) of the Occupational Safety and Health Act of 1970 (29 USCS § 657(a)), which empowers agents of the Secretary of Labor to search the work area of any employment facility within the Act's jurisdiction in order to

inspect for safety hazards and regulatory violations, violates the Fourth Amendment insofar as it purports to authorize inspections without a warrant or its equivalent; however, the Secretary is not prohibited from exercising the inspection authority conferred by § 8(a) pursuant to regulations and judicial process satisfying the Fourth Amendment. (Stevens, Blackmun, and Rehnquist, JJ., dissented from this holding.)

Search and Seizure § 25 — Fourteenth Amendment — warrant clause

2. The warrant clause of the Fourth Amendment protects commercial buildings as well as private homes.

Search and Seizure § 25 — Fourth Amendment — search warrant — particular industries

3. With regard to the search warrant requirement of the Fourth Amendment, certain industries have such a history of government oversight that no reasonable expectation of privacy can exist for a proprietor over the stock of such an enterprise; liquor and firearms are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of government regulation.

Search and Seizure § 25 — OSHA — warrantless search

4. With regard to inspections conducted pursuant to § 8(a) of the Occupational Safety and Health Act of 1970 (29 USCS § 657(a)), which empowers agents of the Secretary of Labor to search the work area of any employment facility within the Act's jurisdiction in order to inspect for safety hazards and regulatory violations, the government inspector, without a warrant, stands in no better position than a member of the public—what is observable by the public being observable, without a warrant, by the government inspector as well; the owner of a business has not, by the necessary utilization of employees in his operation, scrutiny of government agents, and the fact that an employee is free to report, and the government is free to use, any evidence of noncompliance with the Act that the employee observes, furnishes no justification for federal agents to enter a place of business from which the public is restricted and to conduct their own warrantless search.

Search and Seizure § 25 — OSHA — inspections — warrant

5a, 5b. While § 8(a) of the Occupational Safety and Health Act of 1970 (29 USCS § 657(a)), which empowers agents of the Secretary of Labor to search the work area of any employment facility within the Act's jurisdiction in order to inspect for safety hazards and regulatory violations, purports to authorize inspections without a warrant, nevertheless it does not forbid the Secretary from proceeding to inspect only by warrant or other process.

Search and Seizure § 27 — OSHA — inspection — probable cause

6. The entitlement of the Secretary of Labor to inspect under a warrant or other process with or without prior notice pursuant to § 8(a) of the Occupational Safety and Health Act of 1970 (29 USCS § 657(a)), which empowers agents of the Secretary of Labor to search the work area of any employment facility within the Act's jurisdiction in order to inspect for safety hazards and regulatory violations, does not depend on his demonstrating probable cause to believe that conditions in violation of the Act exist on the premises, probable cause in the criminal sense not being required; for purposes of such an administrative search, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation, but also on a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment; a warrant showing that a specific business has been chosen for a search on the basis of a general adminis-

as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, will protect an employer's Fourth Amendment rights. (Stevens, Blackmun, and Rehnquist, JJ., dissented from this holding.)

Search and Seizure § 25 — regulatory statutes — warrantless search — reasonableness

7. With regard to the constitutionality of warrantless search provisions in regulatory statutes, the reasonableness of such a search will depend upon the specific enforcement needs and privacy guarantees of each statute.

Search and Seizure § 25 — OSHA — document inspection — warrant

8a, 8b. During the course of an inspection conducted pursuant to § 8(a) of the Occupational Safety and Health Act of 1970 (29 USCS § 657(a)), which empowers agents of the Secretary of Labor to search the work area of any employment facility within the Act's jurisdiction in order to inspect for safety hazards and regulatory violations, an inspection of those documents specified in 29 CFR § 1903.3, which includes among an Occupational Safety and Health Administration inspector's powers the authority "to review records required by the Act and regulations published in this chapter, and other records which are directly related to the purpose of the inspection," may not be effected without a warrant.

SYLLABUS BY REPORTER OF DECISIONS

Appellee brought this action to obtain injunctive relief against a warrantless inspection of its business premises pursuant to § 8(a) of the Occupational Safety and Health Act of 1970 (OSHA), which empowers agents of the Secretary of Labor to search the work area of any employment facility within OSHA's jurisdiction for safety hazards and violations of OSHA regulations. A three-judge District Court ruled in appellee's favor, concluding in reliance on Camara v Municipal Court, 387 US 523, 528–529, 18 L Ed 2d 930, 87 S Ct 1727, and See v Seattle, 387 US 541, 543, 18 L Ed 2d 943, 87 S Ct 1737, that the Fourth Amendment required a warrant for the type of search involved and that the statutory authorization for warrantless inspections was unconstitutional. *Held:* The inspection without a warrant or its equivalent pursuant to § 8(a) of OSHA violated the Fourth Amendment.

(a) The rule that warrantless searches are generally unreasonable applies to commercial premises as well as homes. Camara v Municipal Court, supra, and See v Seattle, supra.

(b) Though an exception to the search warrant requirement has been recognized for "closely regulated" industries "long subject to close supervision and inspection." Colonnade Catering Corp. v United States, 397 US 72, 74, 77, 25 L Ed 2d 60, 90 S Ct 774, that exception does not apply simply because the business is in interstate commerce.

(c) Nor does an employer's necessary utilization of employees in his operation mean that he has opened areas where the employees alone are permitted to the warrantless scrutiny of Government agents.

(d) Insofar as experience to date indicates, requiring warrants to make OSHA inspections will impose no serious burdens on the inspection system or the courts. The advantages of surprise through the opportunity of inspecting without prior notice will not be lost if, after entry to an inspector is refused, an ex parte warrant can be obtained, facilitating an inspector's reappearance at the premises without further notice; and appellant Secretary's entitlement to a warrant will not depend on his demonstrating probable cause to believe that conditions on the premises violate OSHA but merely that reasonable legislative or administrative standards for conducting an

inspection are satisfied with respect to a particular establishment.

(e) Requiring a warrant for OSHA inspections does not mean that, as a practical matter, warrantless search provisions in other regulatory statutes are unconstitutional, as the reasonableness of those provisions depends upon the specific enforcement needs and privacy guarantees of each statute.

424 F Supp 437, affirmed.

White, J., delivered the opinion of the Court, in which Burger, C. J., and Stewart, Marshall, and Powell, JJ., joined. Stevens J., filed a dissenting opinion, in which Blackmun and Rehnquist, JJ., joined. Brennan, J., took no part in the consideration or decision of the case.

APPEARANCES OF COUNSEL

Solicitor General **Wade H. McCree** argued the cause for appellants.

John L. Runft argued the cause for appellee.

Briefs of Counsel, p 832, infra.

OPINION OF THE COURT

[436 US 309]

Mr. Justice **White** delivered the opinion of the Court.

Section 8(a) of the Occupational Safety and Health Act of 1970 (OSHA or Act)[1] empowers agents of the Secretary of Labor (Secretary) to search the work area of any employment facility within the Act's jurisdiction. The purpose of the search is to inspect for safety hazards and violations of OSHA regulations. No search warrant or other process is expressly required under the Act.

On the morning of September 11, 1975, an OSHA inspector entered the customer service area of Barlow's, Inc., an electrical and plumbing installation business located in Pocatello, Idaho. The president and general manager, Ferrol G. "Bill" Barlow, was on hand; and the OSHA inspector, after showing his credentials,[2] informed Mr. Barlow that he wished to conduct

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a search of the working areas of the business. Mr. Barlow inquired whether any complaint had been received about his company. The inspector answered no, but that Barlow's, Inc., had simply turned up in the agency's selection process. The inspector again asked to enter the nonpublic area of the business; Mr. Barlow's response was to inquire whether the inspector had a search warrant. The inspector had none. Thereupon, Mr. Barlow refused the inspector admission to the employee area of his business. He said he was relying on his rights as guaranteed by the Fourth Amendment of the United States Constitution.

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1. "In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

"(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

"(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee." 84 Stat 1598, 29 USC § 657(a) [29 USCS § 657(a)].

2. This is required by the Act. See n 1, supra.

Three months later, the Secretary petitioned the United States District Court for the District of Idaho to issue an order compelling Mr. Barlow to admit the inspector.[3] The requested order was issued on December 30, 1975, and was presented to Mr. Barlow on January 5, 1976. Mr. Barlow again refused admission, and he sought his own injunctive relief against the warrantless searches assertedly permitted by OSHA. A three-judge court was convened. On December 30, 1976, it ruled in Mr. Barlow's favor. 424 F Supp 437. Concluding that Camara v Municipal Court, 387 US 523, 528–529, 18 L Ed 2d 930, 87 S Ct 1727 (1967), and See v Seattle, 387 US 541, 543, 18 L Ed 2d 943, 87 S Ct 1737 (1967), controlled this case, the court held that the Fourth Amendment required a warrant for the type of search involved here[4] and that the statutory authorization for warrantless inspections was unconstitutional. An injunction against searches or inspections pursuant to § 8(a) was entered. The Secretary appealed, challenging the judgment, and we noted probable jurisdiction. 430 US 964, 52 L Ed 2d 354, 97 S Ct 1642.

[436 US 311]

I

[1a] The Secretary urges that warrantless inspections to enforce OSHA are reasonable within the meaning of the Fourth Amendment. Among other things, he relies on § 8(a) of the Act, 29 USC § 657(a) [29 USCS § 657(a)], which authorizes inspection of business premises without a warrant and which the Secretary urges represents a congressional construction of the Fourth Amendment that the courts should not reject. Regretably, we are unable to agree.

[2] The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes. To hold otherwise would belie the origin of that Amendment, and the American colonial experience. An important forerunner of the first 10 Amendments to the United States Constitution, the Virginia Bill of Rights, specifically opposed "general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed."[5] The general warrant was a recurring point of contention in the Colonies immediately preceding the Revolution.[6] The particular offensiveness it engendered was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists.[7] "[T]he Fourth Amendment's

3. A regulation of the Secretary, 29 CFR § 1903.4 (1977), requires an inspector to seek compulsory process if an employer refuses a requested search. See infra, at 317, and n 12, 56 L Ed 2d, at 314.

4. No res judicata bar arose against Mr. Barlow from the December 30, 1975 order authorizing a search, because the earlier decision reserved the constitutional issue. 424 F Supp 437.

5. H. Commager, Documents of American History 104 (8th ed 1968).

6. See, e.g., Dickerson, Writs of Assistance as a Cause of the Revolution, in The Era of the American Revolution 40 (R. Morris ed 1939).

7. The Stamp Act of 1765, the Townshend Revenue Act of 1767, and the tea tax of 1773 are notable examples. See Commager, supra, n 5, at 53, 63. For commentary, see 1 S. Morison, H. Commager, & W. Leuchtenburg, The Growth of the American Republic 143, 149, 159 (1969).

commands grew in large measure out of the colonists' experience with the writs of assistance . . . [that] granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods." United States v Chadwick, 433 US 1, 7–8, 53 L Ed 2d 538, 97 S Ct 2476 (1977).

[436 US 312]

See also G. M. Leasing Corp. v United States, 429 US 338, 355, 50 L Ed 2d 530, 97 S Ct 619 (1977). Against this background, it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence.

This Court has already held that warrantless searches are generally unreasonable, and that this rule applies to commercial premises as well as homes. In Camara v Municipal Court, supra, at 528–529, 18 L Ed 2d 930, 87 S Ct 1727, we held:

> "[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."

On the same day, we also ruled:

> "As we explained in Camara, a search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." See v Seattle, supra, at 543, 18 L Ed 2d 943, 87 S Ct 1737.

These same cases also held that the Fourth Amendment prohibition against unreasonable searches protects against warrantless intrusions during civil as well as criminal investigations. Ibid. The reason is found in the "basic purpose of this Amendment . . . [which] is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara, supra, at 528, 18 L Ed 2d 930, 87 S Ct 1727. If the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or

[436 US 313]

regulatory standards. It therefore appears that unless some recognized exception to the warrant requirement applies, See v Seattle, would require a warrant to conduct the inspection sought in this case.

[3] The Secretary urges that an exception from the search warrant requirement has been recognized for "pervasively regulated business[es]," United States v Biswell, 406 US 311, 316, 32 L Ed 2d 87, 92 S Ct 1593 (1972), and for "closely regulated" industries "long subject to close supervision and inspection." Colonnade Catering Corp. v United States, 397 US 72, 74, 77, 25 L Ed 2d 60, 90 S Ct 774 (1970). These cases are indeed exceptions, but they represent re-

sponses to relatively unique circumstances. Certain industries have such a history of government oversight that no reasonable expectation of privacy, see Katz v United States, 389 US 347, 351–352, 19 L Ed 2d 576, 88 S Ct 507 (1967), could exist for a proprietor over the stock of such an enterprise. Liquor (Colonnade) and firearms (Biswell) are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation.

Industries such as these fall within the "certain carefully defined classes of cases," referenced in Camara, supra, at 528, 18 L Ed 2d 930, 87 S Ct 1727. The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware. "A central difference between those cases [Colonnade and Biswell] and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon him." Almeida-Sanchez v United States, 413 US 266, 271, 37 L Ed 2d 596, 93 S Ct 2535 (1973).

The clear import of our cases is that the closely regulated industry of the type involved in Colonnade and Biswell is the exception. The Secretary would make it the rule. Invoking

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the Walsh-Healey Act of 1936, 41 USC §§ 35 et seq. [41 USCS §§ 35 et seq.], the Secretary attempts to support a conclusion that all businesses involved in interstate commerce have long been subjected to close supervision of employee safety and health conditions. But the degree of federal involvement in employee working circumstances has never been of the order of specificity and pervasiveness that OSHA mandates. It is quite unconvincing to argue that the imposition of minimum wages and maximum hours on employers who contracted with the Government under the Walsh-Healey Act prepared the entirety of American interstate commerce for regulation of working conditions to the minutest detail. Nor can any but the most fictional sense of voluntary consent to later searches be found in the single fact that one conducts a business affecting interstate commerce; under current practice and law, few businesses can be conducted without having some effect on interstate commerce.

The Secretary also attempts to derive support for a Colonnade-Biswell-type exception by drawing analogies from the field of labor law. In Republic Aviation Corp. v NLRB, 324 US 793, 89 L Ed 1372, 65 S Ct 982, 157 ALR 1081 (1945), this Court upheld the rights of employees to solicit for a union during nonworking time where efficiency was not compromised. By opening up his property to employees, the employer had yielded so much of his private property rights as to allow those employees to exercise § 7 rights under the National Labor Relations Act. But this Court also held that the private property rights of an owner prevailed over the intrusion of nonemployee organizers, even in nonworking areas of the plant and

during nonworking hours. NLRB v Babcock & Wilcox Co. 351 US 105, 100 L Ed 975, 76 S Ct 679 (1956).

[4] The critical fact in this case is that entry over Mr. Barlow's objection is being sought by a Government agent.[8] Employees

[436 US 315]

are not being prohibited from reporting OSHA violations. What they observe in their daily functions is undoubtedly beyond the employer's reasonable expectation of privacy. The Government inspector, however, is not an employee. Without a warrant he stands in no better position than a member of the public. What is observable by the public is observable, without a warrant, by the Government inspection as well.[9] The owner of a business has not, by the necessary utilization of employees in his operation, thrown open the areas where employees alone are permitted to the warrantless scrutiny of Government agents. That an employee is free to report, and the Government is free to use, any evidence of noncompliance with OSHA that the employee observes furnishes no justification for federal agents to enter a place of business from which the public is restricted and to conduct their own warrantless search.[10]

II

The Secretary nevertheless stoutly argues that the enforcement scheme of the Act requires warrantless searches, and that the restrictions on search discretion contained in the Act and its regulations already protect as much privacy as a warrant would. The Secretary thereby asserts the actual reasonableness of OSHA searches, whatever the general rule against warrantless searches might be. Because "reasonableness is still the ultimate standard," Camara v Municipal

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Court, 387 US, at 539, 18 L Ed 2d 930, 87 S Ct 1727, the Secretary suggests that the Court decide whether a warrant is needed by arriving at a sensible balance between the administrative necessities of OSHA inspections and the incremental protection of privacy of business owners a warrant would afford. He suggests that only a decision exempting OSHA inspections from the Warrant Clause would give "full recognition to the competing public and private interests here at stake." Ibid.

The Secretary submits that warrantless inspections are essential to the proper enforcement of OSHA because they afford the opportunity to inspect without prior notice and hence to preserve the advantages of surprise. While the dangerous conditions outlawed by the Act include

8. The Government has asked that Mr. Barlow be ordered to show cause why he should not be held in contempt for refusing to honor the inspection order, and its position is that the OSHA inspector is now entitled to enter at once, over Mr. Barlow's objection.

9. Cf. Air Pollution Variance Bd. v Western Alfalfa Corp. 416 US 861, 40 L Ed 2d 607, 94 S Ct 2114 (1974).

10. The automobile-search cases cited by the Secretary are even less helpful to his position than the labor cases. The fact that automobiles occupy a special category in Fourth Amendment case law is by now beyond doubt due, among other factors, to the quick mobility of a car, the registration requirements of both the car and the driver, and the more available opportunity for plain-view observations of a car's contents. Cady v Dombrowski, 413 US 433, 441–442, 37 L Ed 2d 706, 93 S Ct 2523 (1973); see also Chambers v Maroney, 399 US 42, 48–51, 26 L Ed 2d 419, 90 S Ct 1975 (1970). Even so, probable cause has not been abandoned as a requirement for stopping and searching an automobile.

structural defects that cannot be quickly hidden or remedied, the Act also regulates a myriad of safety details that may be amenable to speedy alteration or disguise. The risk is that during the interval between an inspector's initial request to search a plant and his procuring a warrant following the owner's refusal of permission, violations of this latter type could be corrected and thus escape the inspector's notice. To the suggestion that warrants may be issued ex parte and executed without delay and without prior notice, thereby preserving the element of surprise, the Secretary expresses concern for the administrative strain that would be experienced by the inspection system, and by the courts, should ex parte warrants issued in advance become standard practice.

[5a] We are unconvinced, however, that requiring warrants to inspect will impose serious burdens on the inspection system or the courts, will prevent inspections necessary to enforce the statute, or will make them less effective. In the first place, the great majority of businessmen can be expected in normal course to consent to inspection without warrant; the Secretary has not brought to this Court's attention any widespread pattern of refusal.[11] In those cases where an owner does insist

[436 US 317]

on a warrant, the Secretary argues that inspection efficiency will be impeded by the advance notice and delay. The Act's penalty provisions for giving advance notice of a search, 29 USC § 666(f) [29 USCS § 666(f)], and the Secretary's own regulations, 29 CFR § 1903.6 (1977), indicate that surprise searches are indeed contemplated. However, the Secretary has also promulgated a regulation providing that upon refusal to permit an inspector to enter the property or to complete his inspection, the inspector shall attempt to ascertain the reasons for the refusal and report to his superior, who shall "promptly take appropriate action, including compulsory process, if necessary." 29 CFR § 1903.4 (1977).[12] The

11. We recognize that today's holding itself might have an impact on whether owners choose to resist requested searches; we can only await the development of evidence not present on this record to determine how serious an impediment to effective enforcement this might be.

12. [5b] It is true, as the Secretary asserts, that § 8(a) of the Act, 29 USC § 657(a) [29 USCS § 657(a)], purports to authorize inspections without warrant; but it is also true that it does not forbid the Secretary from proceeding to inspect only by warrant or other process. The Secretary has broad authority to prescribe such rules and regulations as he may deem necessary to carry out his responsibilities under this chapter "including rules and regulations dealing with the inspection of an employer's establishment." § 8(g)(2), 29 USC § 657(g)(2) [29 USCS § 657(g)(2)]. The regulations with respect to inspections are contained in 29 CFR Part 1903 (1977). Section 1903.4, referred to in the text, provides as follows:

"Upon a refusal to permit a Compliance Safety and Health Officer, in the exercise of his official duties, to enter without delay and at reasonable times any place of employment or any place therein, to inspect, to review records, or to question any employer, owner, operator, agent, or employee, in accordance with § 1903.3, or to permit a representative of employees to accompany the Compliance Safety and Health Officer during the physical inspection of any workplace in accordance with § 1903.8, the Compliance Safety and Health Officer shall terminate the inspection or confine the inspection to other areas, conditions, structures, machines, apparatus, devices, equipment, materials, records, or interviews concerning which no objection is raised. The Compliance Safety and Health Officer shall endeavor to ascertain the reason for such refusal, and he shall immediately report the refusal and the reason therefor to the Area Director. The Area Director shall immediately consult with the Assistant Regional Director and the Regional Solicitor, who shall promptly take appropriate action, including compulsory process, if necessary."

regulation represents a choice to proceed

[436 US 318]

by process where entry is refused; and on the basis of evidence available from present practice, the Act's effectiveness has not been crippled by providing those owners who wish to refuse an initial requested entry with a time lapse while the inspector obtains the necessary process.[13] Indeed, the kind of process sought in this case and apparently anticipated by the regulation provides notice to the business operator.[14]

[436 US 319]

If this safeguard

When his representative was refused admission by Mr. Barlow, the Secretary proceeded in federal court to enforce his right to enter and inspect, as conferred by 29 USC § 657 [29 USCS § 657].

13. A change in the language of the Compliance Operations Manual for OSHA inspectors supports the inference that, whatever the Act's administrators might have thought at the start, it was eventually concluded that enforcement efficiency would not be jeopardized by permitting employers to refuse entry, at least until the inspector obtained compulsory process. The 1972 Manual included a section specifically directed to obtaining "warrants," and one provision of that section dealt with ex parte warrants:
"In cases where a refusal of entry is to be expected from the past performance of the employer, or where the employer has given some indication prior to the commencement of the investigation of his intention to bar entry or limit or interfere with the investigation, a warrant should be obtained before the inspection is attempted. Cases of this nature should also be referred through the Area Director to the appropriate Regional Solicitor and the Regional Administrator alerted." Dept. of Labor, OSHA Compliance Operations Manual V-7 (Jan. 1972).
The latest available manual, incorporating changes as of November 1977, deletes this provision, leaving only the details for obtaining "compulsory process" *after* an employer has refused entry. Dept. of Labor, OSHA Field Operations Manual, Vol V, pp V-4–V-5. In its present form, the Secretary's regulation appears to permit establishment owners to insist on "process"; and hence their refusal to permit entry would fall short of criminal conduct within the meaning of 18 USC §§ 111 and 1114 (1976 ed) [18 USCS §§ 111 and 1114], which make it a crime forcibly to impede, intimidate, or interfere with federal officials, including OSHA inspectors, while engaged in or on account of the performance of their official duties.

14. The proceeding was instituted by filing an "Application for Affirmative Order to Grant Entry and for an Order to show cause why such affirmative order should not issue." The District Court issued the order to show cause, the matter was argued, and an order then issued authorizing the inspection and enjoining interference by Barlow's. The following is the order issued by the District Court:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the United States of America, United States Department of Labor, Occupational Safety and Health Administration, through its duly designated representative or representatives, are entitled to, entry upon the premises known as Barlow's Inc., 225 West Pine, Pocatello, Idaho, and may go upon said business premises to conduct an inspection and investigation as provided for in Section 8 of the Occupational Safety and Health Act of 1970 (29 USC §§ 651, et seq. [29 USCS §§ 651, et seq.]), as part of an inspection program designed to assure compliance with that Act; that the inspection and investigation shall be conducted during regular working hours or at other reasonable times, within reasonable limits and in a reasonable manner, all as set forth in the regulations pertaining to such inspections promulgated by the Secretary of Labor, at 29 CFR, Part 1903; that appropriate credentials as representatives of the Occupational Safety and Health Administration, United States Department of Labor, shall be presented to the Barlow's Inc. representative upon said premises and the inspection and investigation shall be commenced as soon as practicable after the issuance of this Order and shall be completed within reasonable promptness; that the inspection and investigation shall extend to the establishment or other area, workplace, or environment where work is performed by employees of the employer, Barlow's Inc., and to all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including but not limited to records, files, papers, processes, controls, and facilities) bearing upon whether Barlow's Inc. is furnishing to its employees employment and a place of employment that are free from

endangers the efficient administration of OSHA, the Secretary should never have adopted it, particularly when the Act does not require it. Nor is it immediately

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apparent why the advantages of suprise would be lost if, after being refused entry, procedures were available for the Secretary to seek an ex parte warrant and to reappear at the premises without further notice to the establishment being inspected.[15]

[6] Whether the Secretary proceeds to secure a warrant or other process, with or without prior notice, his entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation[16] but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." Camara

[436 US 321]

v Municipal Court, 387 US, at 538, 18 L Ed 2d 930, 87 S Ct 1727. A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights.[17] We doubt that the consump-

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recognized hazards that are causing or are likely to cause death or serious physical harm to its employees, and whether Barlow's Inc. is complying with the Occupational Safety and Health Standards promulgated under the Occupational Safety and Health Act and the rules, regulations, and orders issued pursuant to that Act; that representatives of the Occupational Safety and Health Administration may, at the option of Barlow's Inc., be accompanied by one or more employees of Barlow's Inc., pursuant to Section 8(e) of that Act; that Barlow's Inc., its agents, representatives, officers, and employees are hereby enjoined and restrained from in anyway whatsoever interfering with the inspection and investigation authorized by this Order and, further, Barlow's Inc. is hereby ordered and directed to, within five working days from the date of this Order, furnish a copy of this Order to its officers and managers, and, in addition, to post a copy of this Order at its employee's bulletin board located upon the business premises; and Barlow's Inc. is hereby ordered and directed to comply in all respects with this order and allow the inspection and investigation to take place without delay and forthwith."

15. Insofar as the Secretary's statutory authority is concerned, a regulation expressly providing that the Secretary could proceed ex parte to seek a warrant or its equivalent would appear to be as much within the Secretary's power as the regulation currently in force and calling for "compulsory process."

16. Section 8(f)(1), 29 USC § 657(f)(1) [29 USCS § 657(f)(1)], provides that employees or their representatives may give written notice to the Secretary of what they believe to be violations of safety or health standards and may request an inspection. If the Secretary then determines that "there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable." The statute thus purports to authorize a warrantless inspection in these circumstances.

17. The Secretary, Brief for Petitioner, 9 n 7, states that the Barlow inspection was not based on an employee complaint but was a "general schedule" investigation. "Such general inspections," he explains, "now called Regional Programmed Inspections, are carried out in accordance with criteria based upon accident experience and the number of employees exposed in particular industries. U. S. Department of Labor, Occupational Safety and Health Administration, Field Operations

tion of enforcement energies in the obtaining of such warrants will exceed manageable proportions.

[7] Finally, the Secretary urges that requiring a warrant for OSHA inspectors will mean that, as a practical matter, warrantless-search provisions in other regulatory statutes are also constitutionally infirm. The reasonableness of a warrantless search, however, will depend upon the specific enforcement needs and privacy guarantees of each statute. Some of the statutes cited apply only to a single industry, where regulations might already be so pervasive that a Colonnade-Biswell exception to the warrant requirement could apply. Some statutes already envision resort to federal-court enforcement when entry is refused, employing specific language in some cases[18] and general language in others.[19] In short, we base

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today's opinion on the facts and law concerned with OSHA and do not retreat from a holding appropriate to that statute because of its real or imagined effect on other, different administrative schemes.

[8a] Nor do we agree that the incremental protections afforded the employer's privacy by a warrant are so marginal that they fail to justify the administrative burdens that may be entailed.

[436 US 323]

The authority to make warrantless searches devolves almost unbridled discretion upon exec-

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Manual, supra, 1 CCH Employment Safety and Health Guide ¶ 4327.2 (1976)."

18. The Federal Metal and Nonmetallic Mine Safety Act provides: "Whenever an operator . . . refuses to permit the inspection or investigation of any mine which is subject to this chapter . . . a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the Secretary in the district court of the United States for the district . . . ." 30 USC § 733(a) [30 USCS § 733(a)]. "The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court . . . whenever such operator or his agent . . . refuses to permit the inspection of the mine . . . . Each court shall have jurisdiction to provide such relief as may be appropriate." 30 USC § 818 [30 USCS § 818]. Another example is the Clean Air Act, which grants federal district courts jurisdiction "to require compliance" with the Administrator of the Environmental Protection Agency's attempt to inspect under 42 USCA § 7414 (1977 pamphlet) [42 USCS § 7414], when the Administrator has commenced "a civil action" for injunctive relief or to recover a penalty. 42 USCA § 7413(b)(4)(1977 pamphlet) [42 USCS § 7413(b)(4)].

19. Exemplary language is contained in the Animal Welfare Act of 1970 which provides for inspections by the Secretary of Agriculture; federal district courts are vested with jurisdiction "specifically to enforce, and to prevent and restrain violations of this chapter, and shall have jurisdiction in all other kinds of cases arising under this chapter." 7 USC § 2146(c) (1976 ed) [7 USCS § 2146(c)]. Similar provisions are included in other agricultural inspection Acts; see, e.g., 21 USC § 674 (meat product inspection) [21 USCS § 674]; 21 USC § 1050 (egg product inspection) [21 USCS § 1050]. The Internal Revenue Code, whose excise tax provisions requiring inspections of businesses are cited by the Secretary, provides: "The district courts . . . shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction . . . and such other orders and processes, and to render such . . . decrees as may be necessary or appropriate for the enforcement of the internal revenue laws." 26 USC § 7402(a) [26 USCS § 7402(a)]. For gasoline inspections, federal district courts are granted jurisdiction to restrain violations and enforce standards (one of which, 49 USC § 1677 [49 USCS § 1677], requires gas transporters to permit entry or inspection). The owner is to be afforded the opportunity for notice and response in most cases, but "failure to give such notice and afford such opportunity shall not preclude the granting of appropriate relief [by the district court]." 49 USC § 1679(a) [49 USCS § 1679(a)].

utive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria.[20] Also, a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed.[21] These are important functions for a warrant to perform, functions which underlie the Court's prior decisions that the Warrant Clause applies to

[436 US 324]

inspections for compliance with regulatory statutes.[22] Camara v Municipal Court,

20. The application for the inspection order filed by the Secretary in this case represented that "the desired inspection and investigation are contemplated as a part of an inspection program designed to assure compliance with the Act and are authorized by Section 8(a) of the Act." The program was not described, however, or any facts presented that would indicate why an inspection of Barlow's establishment was within the program. The order that issued concluded generally that the inspection authorized was "part of an inspection program designed to assure compliance with the Act."

21. Section 8(a) of the Act, as set forth in 29 USC § 657(a) [29 USCS § 657(a)], provides that "[i]n order to carry out the purposes of this chapter" the Secretary may enter any establishment, area, work place or environment "where work is performed by an employee of an employer" and "inspect and investigate" any such place of employment and all "pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and . . . question privately any such employer, owner, operator, agent, or employee." Inspections are to be carried out "during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner." The Secretary's regulations echo the statutory language in these respects. 29 CFR § 1903.3 (1977). They also provide that inspectors are to explain the nature and purpose of the inspection and to "indicate generally the scope of the inspection." 29 CFR § 1903.7(a) (1977). Environmental samples and photographs are authorized, 29 CFR § 1903.7(b) (1977), and inspections are to be performed so as "to preclude unreasonable disruption of the operations of the employer's establishment." 29 CFR § 1903.7(d) (1977). The order that issued in this case reflected much of the foregoing statutory and regulatory language.

22. [8b] Delineating the scope of a search with some care is particularly important where documents are involved. Section 8(c) of the Act, 29 USC § 657(c) [29 USCS § 657(c)], provides that an employer must "make, keep and preserve, and make available to the Secretary [of Labor] or to the Secretary of Health, Education and Welfare" such records regarding his activities relating to OSHA as the Secretary of Labor may prescribe by regulation as necessary or appropriate for enforcement of the statute or for developing information regarding the causes and prevention of occupational accidents and illnesses. Regulations requiring employers to maintain records of and to make periodic reports on "work-related deaths, injuries and illnesses" are also contemplated, as are rules requiring accurate records of employee exposures to potential toxic materials and harmful physical agents.

In describing the scope of the warrantless inspection authorized by the statute, § 8(a) does not expressly include any *records* among those items or things that may be examined, and § 8(c) merely provides that the employer is to "make available" his pertinent records and to make periodic reports.

The Secretary's regulation, 29 CFR § 1903.3 (1977), however, expressly includes among the inspector's powers the authority "to review records required by the Act and regulations published in this chapter, and other records which are directly related to the purpose of the inspection." Further, § 1903.7 requires inspectors to indicate generally "the records specified in § 1903.3 which they wish to review" but "such designations of records shall not preclude access to additional records specified in § 1903.3." It is the Secretary's position, which we reject, that an inspection of documents of this scope may be effected without a warrant.

The order that issued in this case included among the objects and things to be inspected "all other things therein (including but not limited to records, files, papers, processes, controls and facilities) bearing upon whether Barlow's, Inc. is furnishing to its employees

387 US 523, 18 L Ed 2d 930, 87 S Ct 1727 (1967); See v Seattle, 387 US 541, 18 L Ed 2d 943, 87 S Ct 1737 (1967). We conclude that the concerns expressed by the Secretary do not suffice to justify warrantless inspections under OSHA or vitiate the general constitutional requirement that for a search to be reasonable a warrant must be obtained.

[436 US 325]

III

[1b] We hold that Barlow's was entitled to a declaratory judgment that the Act is unconstitutional insofar as it purports to authorize inspections without warrant or its equivalent and to an injunction enjoining the Act's enforcement to that extent.[23] The judgment of the District Court is therefore affirmed.

So ordered.

Mr. Justice **Brennan** took no part in the consideration or decision of this case.

SEPARATE OPINION

Mr. Justice **Stevens**, with whom Mr. Justice **Blackmun** and Mr. Justice **Rehnquist** join, dissenting.

Congress enacted the Occupational Safety and Health Act to safeguard employees against hazards in the work areas of businesses subject to the Act. To ensure compliance, Congress authorized the Secretary of Labor to conduct routine, nonconsensual inspections. Today the Court holds that the Fourth Amendment prohibits such inspections without a warrant. The Court also holds that the constitutionally required warrant may be issued without any showing of probable cause. I disagree with both of these holdings.

The Fourth Amendment contains two separate Clauses, each

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flatly prohibiting a category of governmental conduct. The first Clause states that the right to be free from unreasonable searches "shall not be violated";[1] the second unequivocally prohibits the issuance of warrants except "upon probable cause."[2] In this case the ultimate question is whether the category of warrantless searches authorized by the statute is "unreason-

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employment and a place of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees, and whether Barlow's, Inc. is complying with . . ." the OSHA regulations.

23. [1c] The injunction entered by the District Court, however, should not be understood to forbid the Secretary from exercising the inspection authority conferred by § 8 pursuant to regulations and judicial process that satisfy the Fourth Amendment. The District Court did not address the issue whether the order for inspection that was issued in this case was the functional equivalent of a warrant, and the Secretary has limited his submission in this case to the constitutionality of a warrantless search of the Barlow establishment authorized by § 8(a). He has expressly declined to rely on 29 CFR § 1903.4 (1977) and upon the order obtained in this case. Tr of Oral Arg 19. Of course, if the process obtained here, or obtained in other cases under revised regulations, would satisfy the Fourth Amendment, there would be no occasion for enjoining the inspections authorized by § 8(a).

1. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

2. "[A]nd no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

able" within the meaning of the first Clause.

In cases involving the investigation of criminal activity, the Court has held that the reasonableness of a search generally depends upon whether it was conducted pursuant to a valid warrant. See, e.g., Coolidge v New Hampshire, 403 US 443, 29 L Ed 2d 564, 91 S Ct 2022. There is, however, also a category of searches which are reasonable within the meaning of the first Clause even though the probable-cauuse requirement of the Warrant Clause cannot be satisfied. See United States v Martinez-Fuerte, 428 US 543, 49 L Ed 2d 1116, 96 S Ct 3074; Terry v Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383; South Dakota v Opperman, 428 US 364, 49 L Ed 2d 1000, 96 S Ct 3092; United States v Biswell, 406 US 311, 32 L Ed 2d 87, 92 S Ct 1593. The regulatory inspection program challenged in this case, in my judgment, falls within this category.

I

The warrant requirement is linked "textually . . . to the probable-cause concept" in the Warrant Clause. South Dakota v Opperman, supra, at 370 n 5, 49 L Ed 2d 1000, 96 S Ct 3092. The routine OSHA inspections are, by definition, not based on cause to believe there is a violation on the premises to be inspected. Hence, if the inspections were measured against the requirements of the Warrant Clause, they would be automatically and unequivocally unreasonable.

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Because of the acknowledged importance and reasonableness of routine inspections in the enforcement of federal regulatory statutes such as OSHA, the Court recognizes that requiring full compliance with the Warrant Clause would invalidate all such inspection programs. Yet, rather than simply analyzing such programs under the "Reasonableness" Clause of the Fourth Amendment, the Court holds the OSHA program invalid under the Warrant Clause and then avoids a blanket prohibition on all routine, regulatory inspections by relying on the notion that the "probable cause" requirement in the Warrant Clause may be relaxed whenever the Court believes that the governmental need to conduct a category of "searches" outweighs the intrusion on interests protected by the Fourth Amendment.

The Court's approach disregards the plain language of the Warrant Clause and is unfaithful to the balance struck by the Framers of the Fourth Amendment—"the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary strugg with England."[3] This preconstitu nal history includes the controversy in England over the issuance of general warrants to aid enforcement of the seditious libel laws and the colonial experience with writs of assistance issued to facilitate collection of the various import duties imposed by Parliament. The Framers' familiarity with the abuses attending the issuance of such general warrants provided the principal stimulus for the restraints on arbitrary governmental intrusions embodied in the Fourth Amendment.

3. J. Landynski, Search and Seizure and the Supreme Court 19 (1966).

"[O]ur constitutional fathers were not concerned about warrantless searches, but about overreaching warrants. It is perhaps too much to say that they feared the warrant more than the search, but it is plain enough that the warrant was the prime object of their concern. Far from

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looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches . . . ."[4]

Since the general warrant, not the warrantless search, was the immediate evil at which the Fourth Amendment was directed, it is not surprising that the Framers placed precise limits on its issuance. The requirement that a warrant only issue on a showing of particularized probable cause was the means adopted to circumscribe the warrant power. While the subsequent course of Fourth Amendment jurisprudence in this Court emphasizes the dangers posed by warrantless searches conducted without probable cause, it is the general reasonableness standard in the first Clause, not the Warrant Clause, that the Framers adopted to limit this category of searches. It is, of course, true that the existence of a valid warrant normally satisfies the reasonableness requirement under the Fourth Amendment. But we should not dilute the requirements of the Warrant Clause in an effort to force every kind of governmental intrusion which satisfies the Fourth Amendment definition of a "search" into a judicially developed, warrant-preference scheme.

Fidelity to the original understanding of the Fourth Amendment, therefore, leads to the conclusion that the Warrant Clause has no application to routine, regulatory inspections of commercial premises. If such inspections are valid, it is because they comport with the ultimate reasonableness standard of the Fourth Amendment. If the Court were correct in its view that such inspections, if undertaken without a warrant, are unreasonable in the constitutional sense, the issuance of a "new-fangled warrant"—to use Mr. Justice Clark's characteristically expressive term—without any true showing of particularized probable cause would not be sufficient to validate them.[5]

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II

Even if a warrant issued without probable cause were faithful to the Warrant Clause, I could not accept the Court's holding that the Government's inspections program is constitutionally unreasonable because it fails to require such a warrant procedure. In determining whether a warrant is a necessary safeguard in a given class of cases, "the Court has weighed the public interest against the Fourth Amendment interest of the individual . . . ." United States v Martinez-Fuerte, supra, at 555, 49 L Ed 2d 1116, 96 S Ct 3074. Several considerations persuade me that this balance should be struck in favor of the routine inspections authorized by Congress.

Congress has determined that regulation and supervision of safety in

4. T. Taylor, Two Studies in Constitutional Interpretation 41 (1969).

5. See v Seattle, 387 US 541, 547, 18 L Ed 2d 943, 87 S Ct 1737 (Clark, J., dissenting).

the work place furthers an important public interest and that the power to conduct warrantless searches is necessary to accomplish the safety goals of the legislation. In assessing the public interest side of the Fourth Amendment balance, however, the Court today substitutes its judgment for that of Congress on the question of what inspection authority is needed to effectuate the purposes of the Act. The Court states that if surprise is truly an important ingredient of an effective, representative inspection program, it can be retained by obtaining ex parte warrants in advance. The Court assures the Secretary that this will not unduly burden enforcement resources because most employers will consent to inspection.

The Court's analysis does not persuade me that Congress' determination that the warrantless inspection power as a necessary adjunct of the exercise of the regulatory power is unreasonable. It was surely not unreasonable to conclude that the rate at which employers deny entry to inspectors would increase if covered businesses, which may have safety violations on their premises, have a right to deny warrantless entry to a compliance inspector. The Court is correct that this problem could be avoided by requiring inspectors to obtain a warrant prior to every inspection visit. But the adoption of

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such a practice undercuts the Court's explanation of why a warrant requirement would not create undue enforcement problems. For, even if it were true that many employers would not exercise their right to demand a warrant, it would provide little solace to those charged with administration of OSHA; faced with an increase in the rate of refusals and the added costs generated by futile trips to inspection sites where entry is denied, officials may be compelled to adopt a general practice of obtaining warrants in advance. While the Court's prediction of the effect a warrant requirement would have on the behavior of covered employers may turn out to be accurate, its judgment is essentially empirical. On such an issue, I would defer to Congress' judgment regarding the importance of a warrantless search power to the OSHA enforcement scheme.

The Court also appears uncomfortable with the notion of second-guessing Congress and the Secretary on the question of how the substantive goals of OSHA can best be achieved. Thus, the Court offers an alternative explanation for its refusal to accept the legislative judgment. We are told that, in any event, the Secretary, who is charged with enforcement of the Act, has indicated that inspections without delay are not essential to the enforcement scheme. The Court bases this conclusion on a regulation prescribing the administrative response when a compliance inspector is denied entry. It provides: "The Area Director shall immediately consult with the Assistant Regional Director and the Regional Solicitor, who shall promptly take appropriate action, including compulsory process, if necessary." 29 CFR § 1903.4 (1977). The Court views this regulation as an admission by the Secretary that no enforcement problem is generated by permitting employers to deny entry and delaying the inspection until a warrant has been obtained. I disagree. The regulation was promulgated against the background of a statutory right to immediate entry, of which covered em-

ployers are presumably
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aware and which Congress and the Secretary obviously thought would keep denials of entry to a minimum. In these circumstances, it was surely not unreasonable for the Secretary to adopt an orderly procedure for dealing with what he believed would be the occasional denial of entry. The regulation does not imply a judgment by the Secretary that delay caused by numerous denials of entry would be administratively acceptable.

Even if a warrant requirement does not "frustrate" the legislative purpose, the Court has no authority to impose an additional burden on the Secretary unless that burden is required to protect the employer's Fourth Amendment interests.[6] The essential function of the traditional warrant requirement is the interposition of a neutral magistrate between the citizen and the presumably zealous law enforcement officer so that there might be an objective determination of probable cause. But this purpose is not served by the new-fangled inspection warrant. As the Court acknowledges, the inspector's "entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. . . . For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based . . . on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].' " Ante, at 320, 56 L Ed 2d, at 316. To obtain a warrant, the inspector need only show that "a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived
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from neutral sources . . . ." Ante, at 321, 56 L Ed 2d, at 316. Thus, the only question for the magistrate's consideration is whether the contemplated inspection deviates from an inspection schedule drawn up by higher level agency officials.

Unlike the traditional warrant, the inspection warrant provides no protection against the search itself for employers who the Government has no reason to suspect are violating OSHA regulations. The Court plainly accepts the proposition that random health and safety inspections are reasonable. It does not question Congress' determination that the public interest in workplaces free from health and safety hazards outweighs the employer's desire to conduct his business only in the presence of permittees, except in those rare instances when the Government has probable cause to suspect that the premises harbor a violation of the law.

What purposes, then, are served by the administrative warrant procedure? The inspection warrant purports to serve three functions: to inform the employer that the inspection is authorized by the statute, to advise him of the lawful limits of the inspection, and to assure him

6. When it passed OSHA, Congress was cognizant of the fact that in light of the enormity of the enforcement task "the number of inspections which it would be desirable to have made will undoubtedly for an unforeseeable period, exceed the capacity of the inspection force . . . ." Senate Committee on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970, 92d Cong, 1st Sess, 152 (Comm Print 1971).

that the person demanding entry is an authorized inspector. Camara v Municipal Court, 387 US 523, 532, 18 L Ed 2d 930, 87 S Ct 1727. An examination of these functions in the OSHA context reveals that the inspection warrant adds little to the protections already afforded by the statute and pertinent regulations, and the slight additional benefit it might provide is insufficient to identify a constitutional violation or to justify overriding Congress' judgment that the power to conduct warrantless inspections is essential.

The inspection warrant is supposed to assure the employer that the inspection is in fact routine, and that the inspector has not improperly departed from the program of representative inspections established by responsible officials. But to the extent that harassment inspections would be reduced by the necessity of obtaining a warrant, the Secretary's present enforcement scheme would have precisely the same effect.

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The representative inspections are conducted "'in accordance with criteria based upon accident experience and the number of employees exposed in particular industries.'" Ante, at 321 n 17, 56 L Ed 2d, at 316. If, under the present scheme, entry to covered premises is denied, the inspector can gain entry only by informing his administrative superiors of the refusal and seeking a court order requiring the employer to submit to the inspection. The inspector who would like to conduct a nonroutine search is just as likely to be deterred by the prospect of informing his superiors of his intention and of making false representations to the court when he seeks compulsory process as by the prospect of having to make bad-faith representations in an ex parte warrant proceeding.

The other two asserted purposes of the administrative warrant are also adequately achieved under the existing scheme. If the employer has doubts about the official status of the inspector, he is given adequate opportunity to reassure himself in this regard before permitting entry. The OSHA inspector's statutory right to enter the premises is conditioned upon the presentation of appropriate credentials. 29 USC § 657(a)(1) [29 USCS § 657(a)(1)]. These credentials state the inspector's name, identify him as an OSHA compliance officer, and contain his photograph and signature. If the employer still has doubts, he may make a toll-free call to verify the inspector's authority. Usery v Godfrey Brake & Supply Service, Inc. 545 F2d 52, 54 (CA8 1976), or simply deny entry and await the presentation of a court order.

The warrant is not needed to inform the employer of the lawful limits of an OSHA inspector. The statute expressly provides that the inspection may enter all areas in a covered business "where work is performed by an employee of an employer," 29 USC § 657(a)(1) [29 USCS § 657(a)(1)], "to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner . . . all pertinent conditions, structures, machines, apparatus,

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devices, equipment, and materials therein. . . ." 29 USC § 657(a)(2) [29 USCS § 657(a)(2)]. See also 29 CFR § 1903 (1977). While it is true that the inspection power granted by Congress is broad, the warrant procedure required by the Court

does not purport to restrict this power but simply to ensure that the employer is apprised of its scope. Since both the statute and the pertinent regulations perform this informational function, a warrant is superfluous.

Requiring the inspection warrant, therefore, adds little in the way of protection to that already provided under the existing enforcement scheme. In these circumstances, the warrant is essentially a formality. In view of the obviously enormous cost of enforcing a health and safety scheme of the dimensions of OSHA, this Court should not, in the guise of construing the Fourth Amendment, require formalities which merely place an additional strain on already overtaxed federal resources.

Congress, like this Court, has an obligation to obey the mandate of the Fourth Amendment. In the past the Court "has been particularly sensitive to the Amendment's broad standard of 'reasonableness' where . . . authorizing statutes permitted the challenged searches." Almeida-Sanchez v United States, 413 US 266, 290, 37 L Ed 2d 596, 93 S Ct 2535 (White, J., dissenting). In United States v Martinez-Fuerte, 428 US 543, 49 L Ed 2d 1116, 96 S Ct 3074,, for example, respondents challenged the routine stopping of vehicles to check for aliens at permanent checkpoints located away from the border. The checkpoints were established pursuant to statutory authority and their location and operation were governed by administrative criteria. The Court rejected respondents' argument that the constitutional reasonableness of the location and operation of the fixed checkpoints should be reviewed in a Camara warrant proceeding. The Court observed that the reassuring purposes of the inspection warrant were adequately served by the visible manifestations of authority exhibited at the fixed checkpoints.

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Moreover, although the location and method of operation of the fixed checkpoints were deemed critical to the constitutional reasonableness of the challenged stops, the Court did not require Border Patrol officials to obtain a warrant based on a showing that the checkpoints were located and operated in accordance with administrative standards. Indeed, the Court observed that "[t]he choice of checkpoint locations must be left largely to the discretion of Border Patrol officials, to be exercised in accordance with statutes and regulations that may be applicable . . . [and] [m]any incidents of checkpoint operation also must be committed to the discretion of such officials." 428 US, at 559–560, n 13, 49 L Ed 2d 1116, 96 S Ct 3074. The Court had no difficulty assuming that those officials responsible for allocating limited enforcement resources would be "unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class." Id., at 559, 49 L Ed 2d 1116, 96 S Ct 3074.

The Court's recognition of Congress' role in balancing the public interest advanced by various regulatory statutes and the private interest in being free from arbitrary governmental intrusion has not been limited to situations in which, for example, Congress is exercising its special power to exclude aliens. Until today, we have not rejected a congressional judgment concerning the reasonableness of a category of regulatory inspections of commercial

premises.[7] While businesses are unquestionably entitled to Fourth Amendment protection, we have "recognized that a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context."

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G. M. Leasing Corp. v United States, 429 US 338, 353, 50 L Ed 2d 530, 97 S Ct 619. Thus, in Colannade Catering Corp. v United States, 397 US 72, 25 L Ed 2d 60, 90 S Ct 774, the Court recognized the reasonableness of a statutory authorization to inspect the premises of a caterer dealing in alcoholic beverages, noting that "Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand." Id., at 76, 25 L Ed 2d 60, 90 S Ct 774. And in United States v Biswell, 406 US 311, 32 L Ed 2d 87, 92 S Ct 1593, the Court sustained the authority to conduct warrantless searches of firearm dealers under the Gun Control Act of 1968 primarily on the basis of the reasonableness of the congressional evaluation of the interests at stake.[8]

The Court, however, concludes that the deference accorded Congress in Biswell and Colonnade should be limited to situations where the evils addressed by the regulatory statute are peculiar to a specific industry and that industry is one which has long been subject to Government regulation. The Court reasons that only in those situations can it be said that a person who engages in business will be aware of and consent to routine, regulatory inspections. I cannot agree that the respect due the congressional judgment should be so narrowly confined.

In the first place, the longevity of a regulatory program does not, in my judgment, have any bearing on the reasonableness of routine inspections necessary to achieve adequate enforcement of that program. Congress' conception of what constitute

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urgent federal interests need not remain static. The recent vintage of public and congressional awareness of the dangers posed by health and safety hazards in the workplace is not a basis for according less respect to the considered judgment of Congress. Indeed, in Biswell, the Court upheld an inspection program authorized by a regulatory statute enacted in 1968. The Court there noted that "[f]ederal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry, but

7. The Court's rejection of a legislative judgment regarding the reasonableness of the OSHA inspection program is especially puzzling in light of recent decisions finding law enforcement practices constitutionally reasonable, even though those practices involved significantly more individual discretion than the OSHA program. See, e.g., Terry v Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383; Adams v Williams, 407 US 143, 32 L Ed 2d 612, 92 S Ct 1921; Cady v Dombrowski, 413 US 433, 37 L Ed 2d 706, 93 S Ct 2523; South Dakota v Opperman, 428 US 364, 49 L Ed 2d 1000, 96 S Ct 3092.

8. The Court held:

"In the context of a regulatory inspection system of business premises that is carefully in time, place, and scope, the legality of the search depends . . . on the authority of a valid statute.

. . . . . .

"We have little difficulty in concluding that where, as here, regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute." 406 US, at 315, 317, 32 L Ed 2d 87, 92 S Ct 1593.

close scrutiny of this traffic is undeniably" an urgent federal interest. 406 US, at 315, 32 L Ed 2d 87, 92 S Ct 1593. Thus, the critical fact is the congressional determination that federal regulation would further significant public interests, not the date that determination was made.

In the second place, I see no basis for the Court's conclusion that a congressional determination that a category of regulatory inspections is reasonable need only be respected when Congress is legislating on an industry-by-industry basis. The pertinent inquiry is not whether the inspection program is authorized by a regulatory statute directed at a single industry, but whether Congress has limited the exercise of the inspection power to those commercial premises where the evils at which the statute is directed are to be found. Thus, in Biswell, if Congress had authorized inspections of all commercial premises as a means of restricting the illegal traffic in firearms, the Court would have found the inspection program unreasonable; the power to inspect was upheld because it was tailored to the subject matter of Congress' proper exercise of regulatory power. Similarly, OSHA is directed at health and safety hazards in the workplace, and the inspection power granted the Secretary extends only to those areas where such hazards are likely to be found.

Finally, the Court would distinguish the respect accorded Congress' judgment in Colonnade and Biswell on the ground that businesses engaged in the liquor and firearms industry "'accept the burdens as well as the benefits of their trade . . . .'"

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Ante, at 313, 56 L Ed 2d, at 312. In the Court's view, such businesses consent to the restrictions placed upon them, while it would be fiction to conclude that a businessman subject to OSHA consented to routine safety inspections. In fact, however, consent is fictional in both contexts. Here, as well as in Biswell, businesses are required to be aware of and comply with regulations governing their business activities. In both situations, the validity of the regulations depends not upon the consent of those regulated, but on the existence of a federal statute embodying a congressional determination that the public interest in the health of the Nation's work force or the limitation of illegal firearms traffic outweighs the businessman's interest in preventing a Government inspector from viewing those areas of his premises which relate to the subject matter of the regulation.

The case before us involves an attempt to conduct a warrantless search of the working area of an electrical and plumbing contractor. The statute authorizes such an inspection during reasonable hours. The inspection is limited to those areas over which Congress has exercised its proper legislative authority.[9] The area is also one to which employees

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have regular access without any suggestion that the work performed or the equipment used

9. What the Court actually decided in Camara v Municipal Court, 387 US 523, 18 L Ed 2d 930, 87 S Ct 1727, and See v Seattle, 387 US 541, 18 L Ed 2d 943, 87 S Ct 1737, does not require the result it reaches today. Camara involved a residence, rather than a business establishment; although the Fourth Amendment extends its protection to commercial buildings, the central importance of protecting residential privacy is manifest. The building involved in See was, of course, a commercial establishment, but a holding that

has any special claim to confidentiality.[10] Congress has determined that industrial safety is an urgent federal interest requiring regulation and supervision, and further, that warrantless inspections are necessary to accomplish the safety goals of the legislation. While one may question the wisdom of pervasive governmental oversight of industrial life, I decline to question Congress' judgment that the inspection power is a necessary enforcement device in achieving the goals of a valid exercise of regulatory power.[11]

I respectfully dissent.

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a locked warehouse may not be entered pursuant to a general authorization to "enter all buildings and premises, except the interior of dwellings, as often as may be necessary," 387 US, at 541, 18 L Ed 2d 943, 87 S Ct 1737, need not be extended to cover more carefully delineated grants of authority. My view that the See holding should be narrowly confined is influenced by my favorable opinion of the dissent written by Mr. Justice Clark and joined by Justices Harlan and Stewart. As Colonnade and Biswell demonstrate, however, the doctrine of stare decisis does not compel the Court to extend those cases to govern today's holding.

10. The Act and pertinent regulation provide protection for any trade secrets of the employer. 29 USC §§ 664–665 [29 USCS §§ 664–665]; 29 CFR § 1903.9 (1977).

11. The decision today renders presumptively invalid numerous inspection provisions in federal regulatory statutes. E.g., 30 USC § 813 (Federal Coal Mine Health and Safety Act of 1969) [30 USCS § 813]; 30 USC §§ 723, 724 (Federal Metal and Nonmetallic Mine Safety Act) [30 USCS §§ 723, 724]; 21 USC § 603 (inspection of meat and food products) [21 USCS § 603]. The fact that some of these provisions apply only to a single industry, as noted above, does not alter this fact. And the fact that some "envision resort to federal-court enforcement when entry is refused" is also irrelevant since the OSHA inspection program invalidated here requires compulsory process when a compliance inspector has been denied entry. Ante, at 321, 56 L Ed 2d, at 317.

[436 US 340]

UNITED STATES, Petitioner,

v

JOHN MAURO AND JOHN FUSCO (No. 76–1596)

UNITED STATES, Petitioner,

v

RICHARD THOMPSON FORD (No. 77–52)

436 US 340, 56 L Ed 2d 329, 98 S Ct 1834

[Nos. 76–1596 and 77–52]

Argued February 27, 1978. Decided May 23, 1978.

SUMMARY

In these two, consolidated cases, the major questions presented were whether a writ of habeas corpus ad prosequendum, issued by a Federal District Court to state prison authorities to secure the presence of a state prisoner in the federal court to stand trial on federal criminal charges, constituted either a "detainer" or a "written request for temporary custody" within the meaning of the Interstate Agreement on Detainers (see 18 USCS App)—which prescribes procedures by which a member state (including the United States) may obtain for trial a prisoner incarcerated in another member jurisdiction by filing a "detainer" and a "request" for temporary custody. In the first case (No. 76–1596), the United States District Court for the Eastern District of New York issued writs of habeas corpus ad prosequendum to New York prison authorities to secure the presence of two state prisoners for arraignment on federal criminal charges. After the prisoners pleaded not guilty, and after their trial dates were set, the District Court, because of overcrowded federal facilities, directed that the prisoners be returned to their respective state prisons to await their federal trials. Subsequently, the District Court granted the prisoners' motions to dismiss the indictments, holding that the Agreement governed their removal from state custody by means of the writs of habeas corpus ad prosequendum, and that the government had violated the Agreement's requirement that a prisoner must be tried in the receiving state before being returned to the

Briefs of Counsel, p 834, infra.

[8, 9] If a court does stay the statutory claim, it must nonetheless "consider the employee's [statutory] claim *de novo*." *Alexander*, 415 U.S. at 60, 95 S.Ct. at 1025. The findings of the arbitrator on factual matters "may be admitted as evidence and accorded such weight as the court deems appropriate." *Id.* In its consideration of the weight to be given the arbitrator's decision, the court should consider the adequacy of the record with respect to the section 510 claim, the procedures used in the arbitral forum, and the significance of new evidence that has been produced through pretrial discovery. *Cf. Alexander*, 415 U.S. at 60 n. 21, 95 S.Ct. at 1025 n. 21 (factors to consider in exercising discretion to accept arbitral findings in Title VII case). In the end, the court must exercise its discretion based on the circumstances of each individual case, while keeping in mind that the courts are the forum that must ultimately decide these statutory claims. *Id.*

CONCLUSION

We reverse the district court's finding that the decision on the first grievance is res judicata of the employees' statutory claim. We remand the case to the district court to decide whether the statutory claim should be stayed pending the determination of the August 13, 1981 grievance. When the employees proceed with their statutory claim, the claim must be considered *de novo*, subject to the appropriate deference due the arbitrator's findings on factual matters.

John R. BALELO, Andrew Castagnola, Leo Correia, Manuel S. Jorge, Bryan R. Madruga, Harold Medina, John A. Silva, Ralph F. Silva, Jr., George Sousa, Manuel S. Vargas, Jr., John B. Zolezzi, Jr., Plaintiffs-Appellees,

v.

Malcolm BALDRIGE, Secretary of Commerce of the United States, Richard A. Frank, Administrator, National Oceanic and Atmospheric Administration and Terry Leitzell, Assistant Administrator for Fisheries, National Marine Fisheries Service, Defendants-Appellants,

Environmental Defense Fund, Inc., et al., Intervenors-Defendants-Appellants.*

UNITED STATES of America, Plaintiff,

v.

$50,178.80, THE MONETARY VALUE OF 57 TONS OF TUNA, Defendant,

Gladiator Fishing, Inc., Claimant.**

Nos. 81-5806, 81-5807 and 82-5433.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted En Banc Sept. 15, 1983.

Decided Jan. 24, 1984.

Action was brought challenging validity of regulation requiring vessel owners to consent to placement of observers, who could collect data which could be used in civil or criminal penalty proceedings against owners, as condition of obtaining commercial fishing permit under the Marine Mammal Protection Act. The United States District Court for the Southern District of California, Gordon Thompson, Jr., J., 519 F.Supp. 573, granted declaratory judgment invalidating the regulation, and the Secretary of Commerce appealed. This appeal was taken en banc along with an appeal from an order of the United States District Court for the Central District of California,

* Appeal from the United States District Court for the Southern District of California Gordon Thompson, Jr., District Judge, Presiding.

** Appeal from the United States District Court for the Central District of California Laughlin Waters, District Judge, Presiding.

Laughlin E. Waters, J., on remand, 698 F.2d 1233, denying a motion to suppress evidence of observer-collected data in a civil forfeiture proceeding. The Court of Appeals, Alarcon, Circuit Judge, held that: (1) regulation, although not expressly authorized by the Act, was implicitly authorized by the broad rule-making power delegated to the Secretary by the Act, and (2) the closely regulated industry exception to the Fourth Amendment applied to the regulation.

Judgment of the Southern District reversed and remanded; judgment of Central District affirmed.

Pregerson, and Nelson, Circuit Judges, filed concurring opinions.

Tang, Circuit Judge, filed a dissenting opinion in which Ferguson, Circuit Judge, joined and Canby, Circuit Judge, joined in part.

Ferguson, Circuit Judge, filed a dissenting opinion.

1. Fish ⇐16

Regulation requiring vessel owners to consent to placement of observers, who could collect data which could be used in civil or criminal penalty proceedings against owners, as condition of obtaining commercial fishing permit under Marine Mammal Protection Act, although not expressly authorized by the Act, was valid where it was implicit in broad rule-making authority delegated to Secretary of Commerce to implement the Act and was consistent with objective and directives of the Act and where Congress amended the Act without disturbing the regulation. Marine Mammal Protection Act of 1972, §§ 103(a, f), 104, 104(d)(1), (f, h), as amended, 16 U.S.C.A. §§ 1373(a, f), 1374, 1374(d)(1), (f, h).

2. Fish ⇐16

Fact that Congress authorized funds only for program placing observers on vessels for which fishing permits under the Marine Mammal Protection Act had been obtained did not indicate intent to ban observer program at end of the two years porpoise but thereafter Secretary of Commerce was authorized to waive moratorium and to adopt appropriate regulations. Marine Mammal Protection Act of 1972, §§ 101, 101(a)(2), (a)(3)(A), 103, as amended, 16 U.S.C.A. §§ 1371, 1371(a)(2), (a)(3)(A), 1373.

3. Fish ⇐16

Fact that bill to authorize use for enforcement purposes of data collected from observers placed on vessels which had obtained commercial fishing permits under the Marine Mammal Protection Act was introduced but not enacted did not demonstrate congressional disapproval of observer program where subsequent amendment of the Act did not alter power of Secretary of Commerce to continue the program. Marine Mammal Protection Act of 1972, § 101, as amended, 16 U.S.C.A. § 1371.

4. Searches and Seizures ⇐7(1)

Search within meaning of Fourth Amendment involves governmental prying into hidden places for that which is concealed by persons exhibiting legitimate expectation of privacy. U.S.C.A. Const. Amend. 4.

5. Searches and Seizures ⇐7(10)

Regulation requiring vessel owner to consent to placement of observers, who could collect data which could be used in civil or criminal penalty proceedings against owners, as condition of obtaining commercial fishing permits under Marine Mammal Protection Act, did not violate Fourth Amendment since it was authorized by closely regulated industry exception to warrant requirement and was reasonable. Marine Mammal Protection Act of 1972, § 101, as amended, 16 U.S.C.A. § 1371; U.S.C.A. Const.Amend. 4.

Raymond F. Zvetina, Haskins, Nugent, Newham, Kane & Zvetina, San Diego, Cal., Shirli Fabbri Weiss, Gray, Cary, Ames &

Wayne S. Braverman, Tuttle & Taylor, Dept. of Justice, Washington, D.C., for defendants-appellants in Nos. 81-5806 and 81-5807; William N. Kammer, Gray, Cary, Ames, & Frye, San Diego, Cal., for defendants-appellants in No. 82-5433.

Appeals from the United States District Courts for the Southern and Central Districts of California.

Before BROWNING, SNEED, KENNEDY, ANDERSON, TANG, SCHROEDER, PREGERSON, ALARCON, FERGUSON, NELSON and CANBY, Circuit Judges.

ALARCON, Circuit Judge:

In *Balelo v. Klutznick*, 519 F.Supp. 573 (S.D.Cal.1981), plaintiffs-appellees, who are captains of tuna purse seiners (hereinafter the Captains), instituted this action against defendants-appellants (hereinafter the Secretary) seeking declaratory and injunctive relief.[1] The district court granted a declaratory judgment invalidating subsection (f) of regulation 50 C.F.R. § 216.24 (1981) promulgated by the Secretary of Commerce[2] pursuant to the Marine Mammal Protection Act (hereinafter MMPA), 16 U.S.C. § 1371.

Under the regulation, the Captains are permitted to take porpoise during commercial fishing operations only if they comply with certain conditions.[3] They must allow government observers to board and accompany the vessel on regular fishing trips "for the purpose of research or observing operations." 50 C.F.R. 216.24(f). The regulation further authorizes the collection of data which may be used in MMPA enforcement proceedings. *Id.* The district court ruled that the regulation was unconstitutional only insofar as it permitted the use of observer collected data in MMPA enforcement proceedings.

In *United States v. $50,178.80, the Monetary Value of 57 Tons of Tuna and Gladiator Fishing, Inc.*, Cv. No. 79-4466-LEW (MX) (C.D.Cal. April 21, 1982), a civil forfeiture proceeding, the district court denied a motion to suppress evidence of observer collected data.

We have taken these matters en banc to consider whether the regulation is valid under the MMPA, and if so, whether it violates the fourth amendment. For the reasons set forth below, we have concluded that: (1) the regulation was authorized under the broad rule-making power delegated by Congress to the Secretary; (2) the regulation is consistent with the policies and objectives of the MMPA; and (3) the regulation falls within the pervasively regulated industry exception to the warrant requirement of the fourth amendment.

FACTUAL AND STATUTORY BACKGROUND

The Captains utilize a method of fishing for yellow-fin tuna which results in the incidental taking[4] of certain species of por-

1. Defendants-appellants include: the Secretary of Commerce; the Administrators of National Oceanic and Atmospheric Administration (NOAA) and National Marine Fisheries Service (NMFS), the Assistant Administrator for Fisheries; the Environmental Defense Fund, Inc.; and the Defenders of Wildlife.

2. The Secretary delegated authority to carry out the provisions of the MMPA to the NOAA Administrator and the Assistant Administrator for Fisheries of the NMFS.

3. *See*, e.g., 50 C.F.R. § 216.24(a)(1) (1981): which states that:

> No marine mammals may be taken in the course of a commercial fishing operation unless: The taking constitutes an incidental catch . . ., a general permit and certificate(s) of inclusion have been obtained and such taking is not in violation of such permit, certificate(s) and regulation.

Section (c)(2) provides that "[i]n order to receive a certificate of inclusion, the operator shall have satisfactorily completed required training." 50 C.F.R. § 216.25(c)(2) (1981). The certificate of inclusion must be renewed annually.

4. 50 C.F.R. § 216.3 (1981) provides that:

> "Take" means to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill, any marine mammal, including, without limitation, any of the following: The collection of dead animals, or parts thereof; the restraint or detention of a marine mammal, no matter how temporary; tagging a marine mammal; or the negligent or intentional operation of an aircraft or ves-

poise. Porpoise tend to swim in association with yellow-fin tuna in the eastern tropical Pacific. The porpoise is larger and more active on the ocean's surface. Thus, the Captains can locate yellow-fin tuna by spotting porpoise. Purse seine nets are then set around schools of porpoises. The tuna swimming beneath them are encircled when the net is closed or "pursed" around them. During this operation, significant numbers of porpoise are injured or drowned. Their carcasses are discarded into the sea. In the two years preceding the enactment of the MMPA in 1972, the incidental taking resulted in more than 600,000 porpoise mortalities. *Committee for Humane Legislation Inc. v. Richardson*, 414 F.Supp. 297, 300 (D.D.C.), *aff'd*, 540 F.2d 1141 (D.C.Cir.1976).

Congress' overriding purpose in enacting the MMPA was the protection of marine mammals. Congress declared the immediate goal of the MMPA to be "that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate." 16 U.S.C. § 1371(a)(2) (1976–1982). To accomplish this goal, Congress imposed a moratorium on the taking and importing of marine mammals. 16 U.S.C. § 1371(a) (1976–1982). A two-year exemption from the moratorium for the taking of marine mammals incidental to commercial fishing operations was allowed. 16 U.S.C. § 1371(a)(2) (1976), *amended by* 16 U.S.C. § 1371(a)(2) (1982). The legislative history indicates that the exemption was provided "for the refinement of these fishing gear modifications" which industry representatives proffered as a solution to the porpoise mortality problem. *Committee for Humane Legislation*, 414 F.Supp. at 301.[5] In addition, the Act directed the "immediate" undertaking of a research and development program to devise improved fishing methods and gear so as to reduce the incidental taking of marine mammals in connection with commercial fishing. 16 U.S.C. § 1381(a) (1976).

Although the commercial fishing industry was exempted for two years from the moratorium, the incidental taking of mammals during this time was conditioned on industry compliance with section 1381.[6] *See,*

sel, or the doing of any other negligent or intentional acts which result in the disturbing or molesting of a marine mammal.

5. The testimony quoted by the court is that of Captain Joe Medina who reported the results of a new and old tests and asserted that the problem was "licked." *Committee for Humane Legislation, Inc. v. Richardson*, 414 F.Supp. at 301 n. 8 (quoting *Hearings on H.R. 10420 Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 1st Sess., part 1, at 348 (testimony of Captain Joe Medina)). Thus, "Congressman Pelly . . . proposed a temporary moratorium . . . 'to give the tuna fisheries association an opportunity to develop what they indicate is certainly a solution.'" *Committee for Humane Legislation*, 414 F.Supp. at 301 n. 9 (quoting *Hearing on H.R. 10420, supra*, at 407).

6. 16 U.S.C. § 1381 (1976) provides:
Commercial fisheries gear development
(a) *Research and development program; report to Congress; authorization of appropriations.*
The Secretary of the department in which the National Oceanic and Atmospheric Administration is operating (hereinafter referred to in this section as the "Secretary") is hereby authorized and directed to immediately undertake a program of research and development for the purpose of devising improved fishing methods and gear so as to reduce to the maximum extent practicable the incidental taking of marine mammals in connection with commercial fishing. At the end of the full twenty-four calendar month period following the date of the enactment of this Act [enacted Oct. 21, 1972], the Secretary shall deliver his report in writing to the Congress with respect to the results of such research and development. For the purposes of this section, there is hereby authorized to be appropriated the sum of $1,000,000 for the fiscal year ending June 30, 1973, and the same amount for the next fiscal year. Funds appropriated for this section shall remain available until expended.
(b) *Reduction of level of taking of marine mammals incidental to commercial fishing operations.*
The Secretary, after consultation with the Marine Mammal Commission, is authorized and directed to issue, as soon as practicable, such regulations, covering the twenty-four-month period referred to in section [1371] of this title as he deems necessary or advisable, to reduce to the lowest practicable level the taking of marine mammals incidental to com-

e.g., 16 U.S.C. § 1371(a)(2) (1976), *amended by* 16 U.S.C. § 1371(a)(2) (1982). Subsection (d) of section 1381 requires the industry to allow agents of the Secretary "to board and to accompany any commercial fishing vessel ... on a regular fishing trip for the purpose of conducting research or observing operations in regard to the development of improved fishing methods and gear as authorized by this section." 16 U.S.C. § 1381(d) (1976–1982). Since expiration of this two-year exemption in 1974, the taking of marine mammals incidental to commercial fishing must be pursuant to a permit issued by the Secretary, 16 U.S.C. § 1371(a)(2), "subject to regulations prescribed by the Secretary in accordance with section 1373." 16 U.S.C. § 1371(a)(2) (1976–1982).

Section 1373 requires the Secretary to consider, in promulgating the regulations, the "existing and future levels of marine mammal species and population stocks," 16 U.S.C. § 1373(b)(1) (1976–1982), and the "marine ecosystem and related environmental considerations," 16 U.S.C. § 1373(b)(3) (1976–1982). The regulations may also restrict the taking of porpoise by species, number, age, sex, or other factors. 16 U.S.C. § 1373(c) (1976–1982). In addition to the rule-making authority conferred upon the Secretary, 16 U.S.C. § 1373, the MMPA provides for the imposition of civil and criminal penalties for violations of the provisions of the Act or the regulations or permits issued thereunder. 16 U.S.C. § 1375(a) (1982).

In 1974, the Secretary promulgated a regulation, 50 C.F.R. § 216.24(f) (1974), in language virtually identical to that set forth in section 1381,[7] the statutory observer program, that required the placement of observers on vessels.

Pursuant to the powers granted under the MMPA, the Secretary promulgated the regulation at issue here. The challenged regulation, effective January 1, 1981, requires as a condition of engaging in fishing operations that vessel owners:

> (1) ... [S]hall, upon the proper notification by the [NMFS], allow an observer duly authorized by the secretary to accompany the vessel on any or all regular fishing trips for the purpose of conducting research and observing operations, *including collecting information which may be used in civil or criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions.*
>
> * * * * * *
>
> (4) The Secretary shall provide for the payment of all reasonable costs directly related to the quartering and maintaining of such observers on board such vessels. A vessel certificate holder who has been notified that the vessel is required to

mercial fishing operations. Such regulations shall be adopted pursuant to section 553 of title 5, United States Code. In issuing such regulations, the Secretary shall take into account the results of any scientific research under subsection (a) of this section and, in each case, shall provide a reasonable time not exceeding four months for the persons affected to implement such regulations.

* * * * * *

(d) *Research and observation.*
Furthermore, after timely notice and during the period of research provided in this section, duly authorized agents of the Secretary are hereby empowered to board and to accompany any commercial fishing vessel documented under the laws of the United States, there being space available, on a regular fishing trip for the purpose of conducting research or observing operations in regard to the development of improved fishing methods and gear as authorized by this section. Such research and observation shall be carried out in such manner as to minimize interference with fishing operations. The Secretary shall provide for the cost of quartering and maintaining such agents. No master, operator, or owner of such a vessel shall impair or in any way interfere with the research or observation being carried out by agents of the Secretary pursuant to this section.

7. 50 C.F.R. § 216.14(f) (1974), *amended by* 50 C.F.R. § 216.14(f) (1981) provides in part:

> Any duly authorized agents of the Secretary may from time to time, after timely oral or written notice to the vessel owner ..., board and/or accompany commercial fishing vessels ... on regular fishing trips, for the purpose of conducting research or observing operations ....

To compare the text of section 1381(d), the statutory observer program, *see* note 6 *supra*.

carry an observer, via certified letter from the National Marine Fisheries Service, shall notify the office from which the letter was received at least five days in advance of the fishing voyage to facilitate observer placement. *A vessel certificate holder who has failed to comply with the provisions of this section may not engage in fishing operations for which a general permit is required.*

50 C.F.R. § 216.24(f) (1981) (emphasis added).[8]

The Captains appear to have no objection to the observers' scientific role on board ship. Their objection is directed solely at those provisions of the 1981 regulation which authorize the use of observer collected data in enforcement proceedings. In the Captain's opening brief we are told that: "The District Court's injunction properly stripped the observer program of its unauthorized and impermissible *search* function and restored it to its pristine role of pure scientific fact-gathering." Appellees' opening brief at 9 (emphasis added).

IMPLIED CONGRESSIONAL AUTHORIZATION

[1] The first issue we must address is whether the 1981 regulation is authorized by the rule-making power delegated by Congress to the Secretary. *See FCC v. Schreiber*, 381 U.S. 279, 290, 291, 85 S.Ct. 1459, 1467, 1468, 14 L.Ed.2d 383 (1965) (Court first addressed whether regulation promulgated by agency was authorized by statute); *Haig v. Agee*, 453 U.S. 280, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981) (same).

The Captains argue that the regulation prescribing the observer program is invalid because it was not expressly authorized by Congress. The Captains contend that the observer program is a constitutionally questionable method of enforcing regulatory schemes and that under *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959) authorization for such a rule cannot be found absent an explicit congressional grant. *Greene* does not stand for the proposition that Congress must expressly authorize any action which might be challenged on constitutional grounds. Rather, the case indicates that Congress will not be presumed to have authorized agency methods which depart radically from accepted norms. In the matter before us, we are being asked to decide whether a particular warrantless search is authorized by Congress and whether that search violates the fourth amendment. Merely because some warrantless searches may violate the fourth amendment, it does not follow that no warrantless search may be undertaken pursuant to federal law absent express congressional authorization. Unlike the types of procedures at issue in *Greene*, certain types of warrantless searches have traditionally

8. Subsections (2) and (3) and section (g) provide:

(2) Research and observation duties shall be carried out in such a manner as to minimize interference with commercial fishing operations. The navigator shall provide true vessel locations by latitude and longitude, accurate to the nearest minute, upon request by the observer. No owner, master, operator, or crew member of a certified vessel shall impair or in any way interfere with the research or observations being carried out.

(3) Marine mammals killed during fishing operations which are accessible to crewmen and requested from the certificate holder or master by the observer shall be brought aboard the vessel and retained for biological processing, until released by the observer for return to the ocean. Whole marine mammals designated as biological specimens by the observer shall be retained in cold storage aboard the vessel until retrieved by authorized personnel of the National Marine Fisheries Service when the vessel returns to port for unloading.

* * * * * *

(g) *Penalties and rewards:* Any person or vessel subject to the jurisdiction of the United States shall be subject to the penalties provided for under the Act for the conduct of fishing operations in violation of these regulations. The Secretary shall recommend to the Secretary of the Treasury that an amount equal to one-half of the fine incurred but not to exceed $2,500 be paid to any person who furnishes information which leads to a conviction for a violation of these regulations. Any officer, employee, or designated agent of the United States or of any State or local government who furnishes information or renders service in the performance of his official duties shall not be eligible for payment under this section.

50 C.F.R. § 216.24(f), (g) (1981).

been recognized as constitutionally valid. *See Henderson v. United States*, 390 F.2d 805 (9th Cir.1967) (border searches); *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) (search incident to arrest); *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976) (inventory searches); *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967) (exigent circumstances); *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981) (regulated industry searches). Nothing in *Greene* prohibits us from determining whether Congress implicitly authorized the observer program. In our discussions below, we reject the contentions that the observer program substantially departs from accepted methods of enforcing regulatory schemes, and the *Greene* case is therefore inapplicable.

To determine whether the regulation was authorized by Congress, we must analyze the language of the statute. *Haig v. Agee*, 453 U.S. 280, 289–90, 101 S.Ct. 2766, 2773, 69 L.Ed.2d 640 (1981). Section 1371 of the MMPA provides in pertinent part:

> There shall be a moratorium on the taking and importation of marine mammals.... Marine mammals may be taken incidentally in the course of commercial fishing operations and permits may be issued therefor under section 1374 ... subject to regulations prescribed by the Secretary in accordance with section 1373.... The Secretary ... is authorized and directed ... to determine when, *to what extent, if at all, and by what means, it is compatible with this chapter to waive the requirements of this section so as to allow taking, or importing of any marine mammal*, ... and to adopt suitable regulations, issue permits, and make determinations ... permitting and governing such taking and importing....

16 U.S.C. § 1371 (1976–1982) (emphasis added).

Section 1373 provides that the Secretary "shall prescribe such regulations with respect to the taking ... as he deems *necessary and appropriate to insure* that such taking will not be to the disadvantage of those species ... and will be consistent with the purposes and policies set forth in section 1361." 16 U.S.C. § 1373(a) (1976–1982) (emphasis added). The Secretary is required to report to Congress every twelve months on the status of the species and "to describe those actions taken and those measures believed necessary, including where appropriate, the issuance of permits ... to assure the well being of such marine mammals." 16 U.S.C. § 1373(f).

Section 1374 provides that the Secretary may issue permits and that he "shall prescribe such procedures *as are necessary to carry out this section.*" 16 U.S.C. § 1374(d)(1) (emphasis added). In addition, the applicant for any permit "*must demonstrate to the Secretary that the taking ... under such permit will be consistent with the purposes of this Chapter ... and the applicable regulations established under section* [1373]." *Id.* at § 1374 (emphasis added). The Secretary may issue general permits for the "taking of marine mammals" together with regulations to cover the use of such permits which are "[c]onsistent with the regulations prescribed pursuant to section 1373 ... and the requirements of section 1371." 16 U.S.C. § 1374(h).

It is quite true that the MMPA does not expressly confer upon the Secretary a power to impose, as a condition of obtaining a permit, the stationing of an observer on a vessel. In our view, however, that power is implicit in the broad rule-making authority expressly delegated to the Secretary. *See Haig v. Agee*, 453 U.S. at 291, 101 S.Ct. at 2773–2774 (Secretary of State's power to revoke passports is implicit in broad rule-making authority conferred upon the Secretary by the Passport Act).

The Supreme Court has admonished that even though a statute does not explicitly delegate a specific action, "particularly in light of the 'broad rule-making authority granted' ... a consistent administrative construction of that statute must be followed by the courts " 'unless there are compelling indications that it is wrong' " ...." *Haig v. Agee*, 453 U.S. at 291, 101 S.Ct. at

2774. (citations omitted.) Accordingly, the specific content of the regulation need not be expressly authorized. The regulation is proper so long as it conforms to the fundamental objective of the Act, rationally complements its remedial scheme, *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11, 12, 100 S.Ct. 883, 890, 891, 63 L.Ed.2d 154 (1980), and "the policy [thereby] announced ... is 'sufficiently substantial and consistent' to compel the conclusion that Congress approved it." *Haig*, 453 U.S. at 307, 101 S.Ct. at 2782 (quoting *Zemel v. Rusk*, 381 U.S. 1, 12, 85 S.Ct. 1271, 1279, 14 L.Ed.2d 179 (1965)). *Accord Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1660–61, 36 L.Ed.2d 318 (1973); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177, 88 S.Ct. 1994, 2005, 20 L.Ed.2d 1001 (1968) ("We may not in the absence of compelling evidence that such was not Congress' intention ... prohibit administrative action imperative for achievement of an agency's ultimate purposes."). (citation omitted); *American Trucking Ass'n v. United States*, 344 U.S. 298, 310, 73 S.Ct. 307, 314–15, 97 L.Ed. 337 (1953) (Congress creates regulatory agencies so that they will bring to their work the expert's familiarity with industry conditions that delegating legislatures cannot be expected to possess).

In *Mourning*, the Supreme Court upheld the power of the Federal Reserve Board to promulgate regulation "Z" pursuant to the Board's broad rule-making authority under the Truth and Lending Act. 15 U.S.C. § 1604. The Court emphasized that:

> Where the empowering provision of a statute states simply that the agency may "make ... such rules and regulations as may be necessary to carry out the provisions of this Act," ... a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of the enabling legislation."

411 U.S. at 369, 93 S.Ct. at 1660–1661. (citations omitted).

It appears to us that the regulation at issue here is consistent with the objective and directives of the MMPA. Requiring the Captains to consent to the placement of observers on their vessels as a condition of obtaining a fishing permit is reasonably related to the purposes of the enabling legislation. The paramount purpose of the Act is "the protection and conservation of marine mammals." 16 U.S.C. § 1371.[9] As the D.C. Circuit has observed, the MMPA is to be administered "for the benefit of protected species, rather than for the benefit of commercial exploitation." *Committee for Humane Legislation*, 540 F.2d at 1148.

Effective implementation of the MMPA would be impossible without the use of observers for enforcement purposes. Under the MMPA, any incidental taking of marine mammals must be pursuant to a permit issued by the Secretary. 16 U.S.C. § 1371. The permits must specify such factors as the number, kind, age, sex, and location of the mammals to be taken. 16 U.S.C. § 1374(b). Such limitations are necessary to assure that the MMPA's goal of reducing marine mammal mortality to the minimum practical is met.

The affidavit offered by the government on its motion for summary judgment discloses that the use of on-board observers is the only practicable method of enforcing the limitations in MMPA permits. The tuna vessels subject to the Secretary's regulation operate over thousands of square miles of open ocean for months at a time. No independent surveillance program could

9. In its Declaration of Policy, Congress stated:
> [T]hat the protection and conservation of marine mammals is therefore necessary .... Marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the optimum carrying capacity of the habitat.

16 U.S.C. § 1361 (1976–1982).

hope to be able to verify whether or not a particular vessel complied with its trip quota. Even if such a technically feasible surveillance program were available, its costs would be prohibitive. The observer program is thus "necessary and appropriate to insure that such taking will not be to the disadvantage of those species . . . and will be consistent with the purposes and policies set forth in the [MMPA]." 16 U.S.C. § 1373(a). Because the observer program is necessary for the enforcement of the MMPA, it is within the authority granted to the Secretary by Congress. *See Southwestern Cable*, 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (authority normally presumed for regulations necessary to enforce its statutory mandate); *cf. Mourning*, 411 U.S. at 371–72, 93 S.Ct. at 1662 ("That some other remedial provision might be preferable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority."). In addition, the Secretary could not fulfill his duty under the MMPA to make annual reports to Congress if the observer program were discontinued. *See* 16 U.S.C. § 1373(f); *cf. FCC v. Schreiber*, 381 U.S. at 294, 85 S.Ct. at 1469–1470 (rule promulgated by FCC necessary to execute its duty to make annual reports to Congress).

In upholding the regulation, we are impressed by the fact that Congress, through oversight hearings, was made aware of the continued existence of the observer program. Congress was informed through hearings conducted from 1976 to 1981 that information gathered by observers might be used in penalty proceedings.[10] In 1981, Congress amended the MMPA and did not disturb the Secretary's broad-rule making authority in spite of this regulation.[11] *See Haig v. Agee*, 453 U.S. at 301 & n. 50, 101 S.Ct. at 2779 & n. 50 (quoting *Zemel v. Rusk*, 381 U.S. at 21, 85 S.Ct. at 1283 (fact that Congress left rule-making authority untouched while amending Act gives rise to presumption that Congress has adopted the construction)). Thus, as in *Haig v. Agee*, "the inference of congressional approval 'is supported by more than mere congressional inaction.'" 453 U.S. at 301, 101 S.Ct. at

10. *See, e.g., Hearings on Tuna-Porpoise Amendments Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine Fisheries*, 94th Cong., 2d Sess., Ser. 29 (1976) at 352–53 (government compliance plan to court's order in *Committee for Humane Legislation, Inc. v. Richardson*, 414 F.Supp. 297 (D.D.C.) *aff'd*, 540 F.2d 1141 (D.C.Cir.1976)); *Hearings on Oversight of the Tuna-Porpoise Problem Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 94th Cong., 2d Sess., Ser. 45 (1976) at 212 (remarks of Dr. White); *id.* at 223–24, 262 (remarks of Dr. Fox); *Hearings on Reducing Porpoise Mortality Before the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess. 3 (1977) at 209–10, 213, 216–17 (remarks of Dr. White); *Hearings of Tuna-Porpoise Oversight Before the House Comm. on Merchant Marine and Fisheries*, at 463 (remarks of Mr. Bonker); *id.* at 465–66 (remarks of Mr. McCloskey); *Hearings on Oversight into the Marine Mammal Protection Act Before the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong., 1st Sess., Ser. 12 at 17 (1977) (remarks of Dr. White); *Hearings on Marine Mammal Protection Act Authorization Before Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 97th Cong., 1st Sess., Ser. 8 at 81–82 (1981) (remarks of Mr. Breaux and Mr. Burney); *id.* at 83–86 (remarks of Mr. Hertel and Mr. Burney).

11. *See* Pub.L. No. 97–58, 95 Stat. 979, *codified at* 16 U.S.C. § 1371(a)(2) (1982).

As one official explained, the observers started gathering compliance data in 1976. *Hearings on Reducing Porpoise Mortality and Tuna-Porpoise Oversight Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess. 465–66 (1977). The government compliance plan submitted in accordance with the order in *Committee for Humane Legislation, Inc. v. Richardson*, 540 F.2d 1141 (D.C.Cir.1976), was also the subject of 1977 oversight hearings, *e.g., Hearings on Marine Mammal Oversight Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess. 20–24 (1977) (use of observers to collect information on compliance is more effective than aircraft surveillance).

2779. (quoting *Zemel v. Rusk*, 381 U.S. 1, 11–12, 85 S.Ct. 1271, 1283, 14 L.Ed.2d 179 (1965)); *cf. Fredericks v. Kreps*, 578 F.2d 555, 563 (5th Cir.1978) (en banc) (congressional oversight committee's awareness of regulations before they were put into effect reinforces determination that regulation is consistent with Congress' intent). *See also Andrus v. Allard*, 444 U.S. 51, 57, 100 S.Ct. 318, 322, 62 L.Ed.2d 210 (1979) (Court upheld regulation noting that Congress twice reviewed and amended the Act without rejecting the Department's view that it was authorized under the Eagle Protection Act, 16 U.S.C. § 688, to bar sale of preexisting artifacts); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274–75, 94 S.Ct. 1757, 1761–62, 40 L.Ed.2d 134 (1974) (great weight may be accorded a long standing interpretation of a statute by an agency charged with its administration especially where Congress has reenacted the statute without pertinent change; failure to repeal or revise the agency's interpretation is persuasive evidence that Congress intended the interpretation).

[2] The Captains advance two arguments against this construction. The first is that since Congress explicitly authorized funds for an observer program for only two years, 16 U.S.C. § 1381, the Secretary's regulation adopting an observer program beyond this two-year period exceeds statutory authority. As noted earlier, the legislative history suggests, and the statute itself reflects, that this program was adopted to enable the Secretary to observe the industry's utilization of advanced gear which purportedly would protect marine mammals.[12] Moreover, the program was a *condition* to the industry's incidental taking of porpoise during the *exemption* from the moratorium. 16 U.S.C. § 1371(a)(2) (1976), *amended by* 16 U.S.C. § 1371 (1982). Thereafter, the *Secretary* was authorized to waive the moratorium pursuant to regulations he deemed necessary and appropriate. *Id.;* 16 U.S.C. § 1373. Certainly, if Congress deemed the observer program a necessary condition to allowing the industry an exemption from the moratorium to ensure the protection of marine mammals, it is not unreasonable for the Secretary, in waiving the moratorium, to so condition the issuance of a permit for commercial fishing. The fact that funding for the statutory program was authorized by Congress only during the industry's two-year exemption does not indicate to us that Congress intended to *ban* the use of observer programs.

Further, the expiration of the statutory observer program and the termination of the industry's exemption from the moratorium on takings imposed by the MMPA coincided with the commencement of the rule-making authority delegated to the Secretary. 16 U.S.C. § 1371(a)(2) (1976), *amended by* 16 U.S.C. § 1371(a)(2) (1982). This suggests that Congress meant what the MMPA clearly states: The *Secretary* would have the broad authority to "determine when, to what extent, *if at all, and by what means,* it is compatable with ... [the MMPA] to allow taking ... of any marine mammal, ... and to adopt suitable regulations, issue permits, and make determinations ... permitting and governing such taking." 16 U.S.C. § 1371(a)(3)(A) (1976–1982) (emphasis added).

We believe that section 1381 of the MMPA, which expressly included an observer program, provided the Secretary with a model of Congress' view as to what was necessary to carry out the purposes of the statute.

[3] The Captains' second argument is that since the House approved a bill in May of 1977[13] that explicitly authorized the use of observer data for enforcement purposes, but the Senate did not act upon it, congressional *disapproval* must be inferred. The House Oversight Committee, however, was well aware of the continued existence of the observer program and the fact that the

12. *See* note 6 *supra*.

13. H.R. 6970 would have amended 16 U.S.C. § 1381 to provide that an observer program for 400 ton capacity vessels should be established and maintained. The observer's responsibilities would have included determining compliance with MMPA regulations.

Senate might not act on the bill.[14] The Committee was informed that existing funds were not adequate to staff all such vessels. Committee members expressed concern that the bill, which would have authorized additional funding for the observer program to staff all vessels with a capacity of four hundred or more tons,[15] might not be acted upon by Congress. This concern stemmed from the discrepancy in numbers of porpoise mortalities reported by observed and unobserved vessels and the belief that the observer program was the only means of obtaining accurate information.[16] We have found nothing in the 1977 or 1978 hearings of the Oversight Committee that suggests that the Committee disapproved of the collection of compliance data. When Congress amended the MMPA in 1981, it did nothing to alter Secretary's power to continue the existence of the observer program. Thus, we conclude that the mere failure of the bill to be enacted does not demonstrate congressional disapproval of the observer program. *Cf. American Trucking Association v. U.S.*, 344 U.S. 298, 309 n. 10, 73 S.Ct. 307, 314 n. 10, 97 L.Ed. 337 (1952) (fact that Act as originally drafted defined commerce to include leasing but lease terminology was stricken was of no consequence to Interstate Commerce Commission's implied power to regulate leasing practices).

The Captains also contend that the observer program exceeds the Secretary's rule-making authority under the MMPA because section 1377 narrowly defines the acceptable enforcement procedures. The observer program is said to be in direct conflict with section 1377, which allows warrantless searches if there exists reasonable cause to believe a vessel is in violation of the MMPA. We disagree.

Section 1377 provides that "the Secretary shall enforce the provisions" of the MMPA, 16 U.S.C. § 1377(a). The statute provides further that its provisions concerning enforcement by arrest, search and seizure, are "in addition to any other authority conferred by law[.]" 16 U.S.C. § 1377(d). Thus, section 1377 does not limit enforcement procedures to those expressly authorized in that section. The regulation prescribing the observer program comes within the meaning of "other authority conferred by law" as used in section 1377.

CONSTITUTIONALITY OF THE REGULATION

The Captains contend that the regulation authorizes a warrantless search in violation of the fourth amendment.

[4] Whether the observer program constitutes a search is a question which is not free from doubt. This circuit has held that not every boarding of a vessel constitutes a search. *United States v. Olander*, 584 F.2d 876, 888 (9th Cir.1978) (boarding to serve process is not a search), *vacated on other grounds sub nom. Harrington v. United States*, 443 U.S. 914, 99 S.Ct. 3104, 61 L.Ed.2d 878 (1979). A search within the meaning of the fourth amendment involves governmental prying into hidden places for that which is concealed by persons exhibiting a "legitimate expectation of privacy." *See Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978). The regulation does not authorize an inspection of private papers, nor a search of the person, or the personal effects of the Captains or their crews. Instead, the observers must confine their observations to the fishing operations of the vessel, which occur on the open sea or on deck. Thus, the information they may gather is restricted to evidence which is in plain view. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v.*

14. *Hearings on Reducing Porpoise Mortality and Tuna-Porpoise Oversight Before Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess., 455–56, 463, 465–66 (1977) (remarks of Dr. Fox and Mr. Frank).

15. *Id.* at 4631 (colloquy between Congressman Bonker and Mr. Frank, the NOAA administrator).

16. *Id.*

United States, 389 U.S. 347 at 351, 88 S.Ct. 507 at 511, 19 L.Ed.2d 576 (1967). *See United States v. Whitmire*, 595 F.2d 1303, 1312 (5th Cir.1979), (high levels of privacy might be accorded to crews living quarters on tanker that travels for months, but no crew member has legitimate claim of privacy on open deck of a fishing smack or in the hold of a cargo vessel available for hire), *cert. denied*, 448 U.S. 906, 100 S.Ct. 3048, 65 L.Ed.2d 1136 (1980).

It can be argued with equal force, however, that the observer's constant surveillance of the activities of the Captains and their crews, for a prolonged period of time, constitutes an intrusion into liberty and privacy interests, protected by the fourth amendment, by exposing "what [a person] seeks to preserve as private, even in an area accessible to the public." *Katz*, 389 U.S. at 351, 88 S.Ct. at 511.

[5] We need not pause to resolve this nice question. Even if we assume that the regulation authorizes a warrantless *search* of the operations of a fishing vessel, it is our view that the regulation requiring the presence of observers on purse seiners does not violate the fourth amendment.

The fourth amendment prohibits *unreasonable* searches and seizures. Warrantless searches may be reasonable under certain circumstances. *See, e.g., Weeks v. United States*, 232 U.S. 383, 392, 34 S.Ct. 341, 344, 58 L.Ed. 652 (1914) (search incident to a lawful arrest); *Carroll v. United States*, 267 U.S. 132, 146, 45 S.Ct. 280, 282–83, 69 L.Ed. 543 (1925) (search of vehicles based on probable cause that contraband is being carried); *South Dakota v. Opperman*, 428 U.S. 364, 367–76, 96 S.Ct. 3092, 3096–3101, 49 L.Ed.2d 1000 (1976) (inventory search of impounded vehicles without a showing of probable cause); *Illinois v. LaFayette*, —— U.S. ——, ——, 103 S.Ct. 2605, 2611, 77 L.Ed.2d 65 (1983) (booking search of a man's purse-type shoulder bag); *United States v. Villamonte-Marquez*, —— U.S. ——, ——, 103 S.Ct. 2573, 2582, 77 L.Ed.2d 22 (1983) (boarding of vessels without articulable suspicion). In *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1924), the Supreme Court commented: "Under the common law and agreeably to the Constitution [a] search may in many cases be legally made without a warrant. The Constitution does not forbid search, as some parties contend, but it does forbid unreasonable search." 267 U.S. at 146, 45 S.Ct. at 282.

The Supreme Court has recognized that warrantless searches in closely regulated industries can be reasonable. The Court has held that warrantless inspections are reasonable if they are reasonably necessary to further important federal interests and the federal regulatory presence is sufficiently comprehensive and predictable that "the assurance of regularity provided by a warrant is rendered unnecessary." *Donovan v. Dewey*, 452 U.S. 594, 599–602, 101 S.Ct. 2534, 2538–40, 69 L.Ed.2d 262 (1981).[17] The Court has applied the exception where the business premises searched are part of an industry "long subject to close supervision and inspection." *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76–77, 90 S.Ct. 774, 776–77, 25 L.Ed.2d 60 (1970); *see also United States v. Raub*, 637 F.2d 1205, 1208 (9th Cir.1980) ("One of the recognized exceptions to the warrant requirement is for administrative searches of enterprises that traditionally have been closely regulated."). In *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313, 98 S.Ct. 1816, 1820–21, 56 L.Ed.2d 305 (1978), the Court observed that certain industries have had such a history of close governmental supervision that no reasonable proprietor entering into them could have a justifiable expectation of privacy. In *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972), the Court extended the pervasively regulated industry

17. As noted earlier, we have concluded that the observer program furthers substantial federal interests in protecting marine mammals. Congress was aware that an important national asset was being depleted by the commercial tuna fishing industry. Congress also determined that the Secretary needed broad rulemaking power to adopt measures consistent with the MMPA to remedy the problem. The Secretary reasonably concluded that the observer program was necessary to further the regulatory scheme presented under the MMPA.

exception to industries without a long tradition of regulation where frequent unannounced inspections are essential to further an important governmental interest.

Where the regulation involves a comprehensive and predictable governmental presence, the owner "is not left to wonder about the purposes of the inspector or the limits of his task." 406 U.S. at 316, 92 S.Ct. at 1596. The Court has also noted that where the industry is closely regulated, the owner cannot help but be aware that the government will conduct periodic inspections for specific purposes. *Donovan v. Dewey,* 452 U.S. 594, 600, 101 S.Ct. 2534, 2538–39, 69 L.Ed.2d 262 (1981). The reasonableness of a search in a closely regulated industry does not depend on the existence of probable cause but rather on the "pervasiveness and regularity of the federal regulations." 452 U.S. at 606, 101 S.Ct. at 2542. When a person chooses to engage in a closely regulated industry and to accept a license which is conditioned upon such warrantless intrusion and inspection, he does so with full knowledge of the restrictions on his privacy. He is also free not to submit to such regulation and warrantless inspection by declining to seek a federal permit. *Biswell,* 406 U.S. at 315–16, 92 S.Ct. at 1596.

The Captains argue that the closely regulated industry exception does not apply to a warrantless administrative search unless it is expressly authorized by Congress. This argument was presented and rejected by the court in *United States v. Rucinski,* 658 F.2d 741 (10th Cir.1981), *cert. denied,* 455 U.S. 939, 102 S.Ct. 1430, 71 L.Ed.2d 649 (1982). It is quite true that in each of the cases cited above where the Supreme Court determined that a warrantless search of a closely regulated industry was reasonable under the fourth amendment, the entry was expressly authorized by statute. The Captains assume that since the Supreme Court has held that a warrantless search of a closely regulated industry is reasonable when expressly authorized by Congress, the search of such a business violates the fourth amendment if it is conducted pursuant to a regulation *impliedly* authorized by Congress. No authority is cited for this novel constitutional proposition. The law is to the contrary. Congress cannot authorize conduct which violates the fourth amendment. The proper inquiry when a warrantless search is challenged is whether it is authorized by the fourth amendment—not by an act of Congress.

In *Raub,* this court noted that "[c]ommercial fishing has a long history of being a closely regulated industry." 637 F.2d at 1208 (footnote omitted). Regulation of the fishing industry began in 1793. *Id.* at 1209 n. 5. Since 1972, the tuna industry has been closely regulated by Congress because its fishing operations threatened the extinction of the porpoise. Congress' interest in the protection of marine mammals was made known to all commercial fishermen in 1972 when Congress expressly authorized the placing of observers on purse seiners to protect the porpoise under the MMPA. As discussed above, in the MMPA, Congress authorized the Secretary to prescribe regulations and to issue a permit restricting the taking of marine mammals. Congress also authorized the Secretary to limit the issuance of permits to those persons who can demonstrate that any taking of marine mammals will be consistent with the MMPA, 16 U.S.C. § 1373. Thus, commercial fishermen have been made aware since 1972 that to take porpoise they must have a permit which is subject to conditions that will insure that marine mammals are given the protection required by Congress. The statutory observer program had been one such condition. Since 1974 commercial fishermen have also been aware of the regulation which prescribes the observer program. Any tuna boat Captain who does not wish to expose himself to the observation of his open deck activities is free not to submit to such an intrusion by refraining from seeking a permit. *See Biswell,* 406 U.S. at 315–16, 92 S.Ct. at 1596. *See also Wyman v. James,* 400 U.S. 309, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971) (a welfare recipient may avoid an entry into his home by refusing to accept public assistance).

In determining whether warrantless searches in a closely regulated industry are

reasonable we must decide whether the regulatory scheme "in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant." *Dewey*, 456 U.S. at 603, 101 S.Ct. at 2540. It is evident to us that the observer program regulation provides an adequate substitute for a warrant for several reasons.

First, the MMPA, the regulation, and the National Marine Fisheries Services' (NMFS) Manual establish a predictable and guided federal presence and limit the scope of the data collection. The MMPA delegates to the Secretary the authority to waive the moratorium on porpoise takings only when he can determine that such takings will not disadvantage protected species. The MMPA specifically sets forth permissible restrictions on the takings of porpoises and authorizes the Secretary to impose additional ones. The Act also requires publication of proposed regulations, and clearly defines its objectives and purposes.

Under the observer program, vessel owners are sent advance calendars of scheduled observer trips. This notification includes a statement of the significant regulations promulgated by the Secretary. The regulation, 50 C.F.R. § 216.24(f), limits the scope of observer activities to data collection. The National Marine Fishery Service Field Manual further defines the data collection activities of individual observers. The 1979 Manual informs observers that they are not enforcement agents and they are not "to record extraneous comments, editorials, or personal opinions . . . or evaluate or interpret data." Observers are instructed simply to record the data called for in the form. The Manual, which is available to the industry, contains sections on the observer's responsibilities, instructions to the observers, and standardized forms to record information. The 1981 Manual additionally establishes a predeparture conference between the owner, master, observer, and an agency official to ensure a common understanding of the scope of observers' activities.

Second, the regulation requires that tuna vessel owners be given advance notice of the stationing of an observer on their vessel. Thus, the surprise element of many warrantless inspections is lacking here. *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 657, 99 S.Ct. 1391, 1398, 59 L.Ed.2d 660 (1979). This advance notice also provides the Captains with an opportunity to seek judicial review of a particular scheduled observer trip. *Cf. Dewey*, 452 U.S. at 604–05, 101 S.Ct. at 2541 (opportunity for judicial review is factor important in reasonableness determination). They are also free to request a court order accommodating any privacy interests that may need protection. We conclude that the regulation as limited by the field manual provides a constitutionally adequate substitute for a warrant.

Use of observers advances the legitimate government interest of meaningful protection of the porpoise population, while the safeguards built into the observer program insure that there will be no significant intrusion on the Captains' fourth amendment interests. *Cf. Delaware v. Prouse*, 440 U.S. at 654, 99 S.Ct. at 1396 (constitutionality of a law enforcement procedure is basically tested by balancing its intrusion on fourth amendment interests against its promotion of legitimate government interests).

The Captains ask us to invalidate the observer program on the ground that a less restrictive alternative for obtaining the information exists. The government's affidavit, however, demonstrates that the suggested techniques—aerial surveillance and the like—are prohibitive in terms of cost and are ineffective in terms of data collection necessary for the Secretary to waive the moratorium on takings of porpoise and to issue permits. *Cf. Wyman*, 400 U.S. at 322, 91 S.Ct. at 388 (although secondary sources might be helpful, they would not always assure identification of information required for receipt of benefits).

In *Villamonte-Marquez*, the Court noted that the nature of water borne commerce in waters providing ready access to the open sea is sufficiently different from the nature of vehicular traffic on highways so as to make possible alternatives to the boarding of a vessel less likely to accomplish essential

governmental procedures. —— U.S. at ——, 103 S.Ct. at 2581.

CONCLUSION

We hold that the requirement that observers be permitted to board purse seiners on a scheduled basis as a condition of obtaining a permit to take porpoise is reasonable under the fourth amendment. The regulation and the field manual do not authorize the observers to conduct searches of the persons, personal effects, or living quarters of the Captains and their crews. Such a search would have to be justified independently under the fourth amendment.

The judgment in *Balelo* is reversed and remanded for further proceedings consistent with this opinion. The judgment in *Gladiator* is affirmed.

PREGERSON, Circuit Judge, concurring:

I concur in the majority's opinion but write separately to say that the observer program does not constitute a "search" within the meaning of the fourth amendment.

Fourth amendment protection operates when two conditions are met. First, a person must have exhibited an expectation of privacy in the place where the Government has allegedly intruded. Second, this expectation must be one that a free society is prepared to recognize as reasonable. *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516–17, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring).

The tuna boat captains have failed to meet either condition. They conduct fishing operations at sea on decks covered only by the sky and open to view by other crew members, nearby vessels, and overflying aircraft.

Moreover, our society is not prepared to recognize an expectation of privacy on open tuna boat decks, which are really no different from work areas in any industry the Government regulates to safeguard the public health and welfare. Federal inspectors, without impinging on any reasonable expectation of privacy, routinely monitor work areas in the coal mining, *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981) (Federal Mine Safety and Health Act of 1977), firearms, *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972) (Gun Control Act of 1968), and salmon fishing, *United States v. Raub*, 637 F.2d 1205 (9th Cir.1980) (Sockeye Salmon Fishing Act of 1947), industries, to name just a few.

In the final analysis, I think the question whether a governmental intrusion into a private area constitutes a reasonable search under the fourth amendment depends on the kind and degree of intrusion that a free society is willing to tolerate. *United States v. Solis*, 393 F.Supp. 325, 328 (C.D.Cal.1975) (Pregerson, J.), *aff'd in relevant part*, 536 F.2d 880 (9th Cir.1976). With few exceptions, our society does not tolerate warrantless intrusions into private dwellings and offices. *E.g., Camara v. Municipal Court*, 387 U.S. 523, 528–29, 87 S.Ct. 1727, 1730–31, 18 L.Ed.2d 930 (1967). But the presence on open decks of government scientists monitoring commercial fishing operations to save the porpoise from extinction is the kind and degree of intrusion that our society should tolerate.

NELSON, Circuit Judge, concurring:

If hard cases make bad law, I fear the result of cases such as this. I write specially to reveal the extraordinary difficulties I find in this case, and to explain its limited applicability.

First, I would make explicit that the search involved here is overwhelmingly intrusive. Stationing an observer on a small boat for months at a time is both a search and a massive invasion of privacy. Thus, when I balance the need for government regulation with the degree of intrusion in this case, I find both sides of the scale weighted heavily. I would not simply "assume *arguendo*" that this is a search, but would call it by its name and treat it accordingly.

Warrantless searches are presumptively unreasonable. *See, e.g., Camara v. Municipal Court*, 387 U.S. 523, 528–29, 87 S.Ct.

1727, 1730-31, 18 L.Ed.2d 930 (1967). The pervasively regulated industry exception is narrowly crafted, and should be limited as much as possible. *See See v. City of Seattle*, 387 U.S. 541, 543, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967). It is only because I view a commercial fishing vessel to be a workplace (unlike, say, a house boat or a recreational boat) that I am willing to apply the exception here. Even then, however, I am wary of permitting warrantless searches of residences that double as workplaces. But for the unique inaccessibility of ships at sea, I would not permit a warrantless search. *See United States v. Villamonte-Marquez*, — U.S. —, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983).

Second, I write to emphasize the magnitude of the governmental interest involved in this case. If the world loses genetic diversity, it has truly suffered irreparable harm. Marine mammals have long been threatened by the onslaught of technology; if we must take drastic steps to avoid further encroachment, so be it.

Last, I am struck by the precautions the government has taken to limit the intrusiveness of the observer program. The regulatory scheme is detailed; the inspectors can report about porpoises and nothing more; absolutely no alternative method of enforcement exists. Under these circumstances, I hesitantly concur. Were the situation less compelling in any respect, I would not.

TANG, Circuit Judge, with whom FERGUSON, Circuit Judge, joins, and with whom CANBY, Circuit Judge, joins in Part II, dissenting:

I respectfully dissent. In my view the challenged regulation is not authorized by Congress and the provision for warrantless searches offends the Constitution.

I

The regulation, 50 C.F.R. § 216.24(f), establishes an indefinite policy of stationing federal observers aboard tuna boats for enforcement as well as research purposes. Because Congress expressly restricted the use of observers to the two-year period following passage of the Act and limited the function of such officials to research and scientific observation, this regulation goes far beyond the design of the statute it purports to implement.

Regulations promulgated pursuant to an enabling statute will be upheld if they are reasonably related to the purposes of the enabling legislation, *Mourning v. Family Publication Service, Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1660, 36 L.Ed.2d 318 (1973), but such regulations will not be sustained when they are contrary to congressional design. "The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213–14, 96 S.Ct. 1375, 1391, 47 L.Ed.2d 668 (1976) (quoting *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134, 56 S.Ct. 397, 400, 80 L.Ed. 528 (1936)). Thus, "our primary task when testing the statutory authority of a challenged regulation must always be to determine the intent of Congress." *State of California v. Block*, 663 F.2d 855, 860 (9th Cir.1981).

In this case, the language of the statute and its legislative history both indicate that Congress intended to restrict the use of on-board observers to the two-year period following passage of the Act.

16 U.S.C. § 1381 provided:

> [a]fter timely notice and *during the period of research provided in this section*, duly authorized agents of the Secretary are hereby empowered to board and to accompany any commercial fishing vessel ... on a regular fishing trip for the purpose of conducting research or observing operations in regard to the development of improved fishing methods and gear as authorized by this section. 16 U.S.C. § 1381(d) (1976). (emphasis added)

The period of research referred to in § 1381(d) covered "the full twenty-four calendar month period following October 21, 1972," after which the results of such research were to be reported to Congress. 16 U.S.C. § 1381(a). Funding for the observer program was also limited to the two-year period provided in the statute. The statutory objective was to use the observers as part of "a program of research and development for the purpose of devising improved fishing methods and gear so as to reduce to the maximum extent practicable the incidental taking of marine mammals in connection with commercial fishing." 16 U.S.C. § 1381(a). Congress clearly expressed its intent to use the observers only as part of a short term research program. The majority, however, sanctions the agency's administrative decision to transform one part of a limited research program into an ongoing regulatory policy of indefinite duration.

The legislative history of the observer program underscores the two-year limitation as part of the Act's congressional design. Section 1381 of the Act originated as a Senate amendment. The Senate report indicates that Congress intended the observer research and development program to terminate two years after passage of the Act. The majority is simply incorrect when it suggests that the observer program was merely a model after which a regulatory observer policy could be patterned. "The committee has authorized a $2 million, 2-year program to devise new methods of netting and tuna boat operating procedures which will reduce the killing of marine mammals. The committee has provided a 2-year period because it is believed that science can come up with new systems within that time." S.Rep. No. 863, 92nd Cong., 2d Sess. 9–10 (1972). At the end of the two-year period, the best available fishing methods, if feasible, were to be mandated on commercial fishing vessels, S.Rep., *supra* at 21. The research program, including its $2 million appropriation and federal observer component, was restricted to a two-year period in clear and explicit terms. Neither the statutory language nor the legislative history of the observer program hint that the agency retained any discretion to extend the use of on-board observers beyond the explicit two-year period.

In addition to its unauthorized extension of the operative period for the observer program, the regulation also expands the function of the government observers beyond the research component contemplated by Congress by enlisting them as inspection and enforcement officials. When Congress created the two-year observer program, it expressly stated that the observer presence was a research tool aimed at "the development of improved fishing methods and gear as authorized by this section." 16 U.S.C. § 1381(d). The regulation, however, extends the duration of the observer presence indefinitely and transforms the observers from mere researchers into enforcement officers who collect information for use against the fishermen in civil and criminal actions. To label them now merely "observers" is an understatement. They are now federal inspectors who maintain constant surveillance to ensure that fishermen comply with federal law. The majority is correct to say this is probably the most efficient way to guarantee that the fishermen fish by the rules, but it is not what Congress provided. The observer program was not developed in a spirit of expediency. If Congress contemplated the use of live-in observers for enforcement purposes, it could have expressly provided for such a function in the observer statute or at least granted the Secretary the discretion to create additional functions for the observers.

Instead, Congress specifically addressed the methods of enforcing the statutory scheme in § 1377 of the Act, which allows warrantless searches of vessels only if there is "reasonable cause to believe" that a vessel or crew member is violating the Act or its regulations. 16 U.S.C. § 1377(d).[1]

1. Execution of process; arrest; search; seizure

(d) Any person authorized by the Secretary to enforce this subchapter may execute any

Hence, the very structure of the Act itself—indeed its own language—indicates that Congress did not envision warrantless searches by on-board observers as an enforcement mechanism. The majority, however, seizes on that part of the language of § 1377 which suggests that the enforcement measures it authorizes are "in addition to any other authority conferred by law." 16 U.S.C. § 1377(d). The majority asserts that this language indicates that Congress vested the Secretary with the power to create additional enforcement measures even in contravention of the express statutory limitations of § 1377. Under the majority's reading of the statute, the Secretary, apparently without limitation, may abrogate the explicit search and seizure restrictions of § 1377 and effectively render most of that section a nullity. Beyond the fact that neither the plain language of the statute nor its legislative history substantiates such an interpretation, the majority's reading defies basic principles of statutory construction because "acceptance of that meaning would lead to absurd results ... or would thwart the obvious purpose of the statute." *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643, 98 S.Ct. 2053, 2061, 56 L.Ed.2d 591 (1978) (*quoting Commissioner v. Brown*, 380 U.S. 563, 571, 85 S.Ct. 1162, 1166, 14 L.Ed.2d 75 (1965)). This self-emasculating interpretation of § 1377 is contrary to the presumption against reading a statute in a manner which renders it ineffective. *F.T.C. v. Manager, Retail Credit Co.*, 515 F.2d 988, 995 (D.C.Cir.1975). The majority's reading of § 1377 exaggerates the language of a single phrase to eviscerate the statute's internal enforcement scheme, a scheme that was designed to enforce the Act without disregarding the privacy concerns of those who would be subject to it.

The majority suggests that subsequent congressional inaction infers approval of the way observers are used under the regulation. Such inaction is not a helpful indicator of congressional intent when the statutory language itself suggests a contrary interpretation. *S.E.C. v. Sloan*, 436 U.S. 103, 117, 98 S.Ct. 1702, 1711, 56 L.Ed.2d 148 (1978). When Congress has squarely faced the propriety of a regulatory measure, congressional non-action may be evidence of congressional approval. *Bob Jones University v. United States*, — U.S. —, 103 S.Ct. 2017, 2033, 76 L.Ed.2d 157 (1983). Absent such direct consideration, however, "[n]on-action by Congress is not often a useful guide..." *Bob Jones University*, *supra*, at 2033.

The majority attempts to bolster its finding of congressional approval by noting that Congress has amended the Act without disturbing the Secretary's use of on-board observers. This argument is unpersuasive because the on-board observer program was not specifically addressed in subsequent legislative action. Indeed, the Supreme Court recently rejected such an argument in *Aaron v. S.E.C.*, 446 U.S. 680, 100 S.Ct. 1945, 64 L.Ed.2d 611 (1980). There, the Court refused to adopt an agency's statutory interpretation which was premised on congressional

warrant or process issued by any officer or court of competent jurisdiction for the enforcement of this subchapter. Such person so authorized may, in addition to any other authority conferred by law—

(1) with or without warrant or other process, arrest any person committing in his presence or view a violation of this subchapter or the regulations issued thereunder;

(2) with a warrant or other process, or without a warrant if he has reasonable cause to believe that a vessel or other conveyance subject to the jurisdiction of the United States or any person on board is in violation of any provision of this subchapter or the regulations issued thereunder, search such vessel or conveyance and arrest such person;

(3) seize the cargo of any vessel or other conveyance subject to the jurisdiction of the United States used or employed contrary to the provision of this subchapter or the regulations issued hereunder or which reasonably appears to have been so used or employed; and

(4) seize, whenever and wherever found, all marine mammals and marine mammal products taken or retained in violation of this subchapter or the regulations issued thereunder and shall dispose of them in accordance with regulations prescribed by the Secretary.

16 U.S.C. 1377(d).

failure to disturb that interpretation in subsequent legislative amendments to the authorizing act. "[S]ince the legislative consideration of those statutes was addressed principally to matters other than that at issue here, it is our view that the failure of Congress to overturn the Commission's interpretation falls far short of providing a basis to support a construction of § 10(b) so clearly at odds with its plain meaning and legislative history." *Id.* at 694, n. 11, 100 S.Ct. at 1954, n. 11.

Because the plain language of § 1381 and its legislative history demonstrate that the on-board observer program was limited to research duties during the two-year period following passage of the Act, the Secretary's regulation adopting an indefinite policy of on-board observers for enforcement purposes as well as research is unauthorized.

II

The absence of statutory authorization, however, is only one basis for finding this regulation invalid. The regulation also offends the Constitution because it empowers federal inspectors to conduct searches in violation of the fourth amendment.

The majority, in its discussion of the regulation's fourth amendment impact, sidesteps and fails to confront the threshold question of whether the intrusiveness of stationing government observers on private fishing vessels for extended periods constitutes a search. The majority suggests that the observer policy may not constitute a search within the meaning of the fourth amendment because the government officials confine their observations to the open deck or open sea. This understates the actual operation of the observers. They are more than mere passive onlookers; they are uninvited government inspectors who live with the crew for weeks at sea, watching all aspects of fishing operations, conducting research and collecting data and information that may be used against the tuna fishermen in civil and criminal proceedings. This is not "a brief detention where officials come on board, visit public areas of the vessel, and inspect documents." *United States v. Villamonte-Marquez*, — U.S. —, 103 S.Ct. 2573, 2581, 77 L.Ed.2d 22 (1983). This regulation places live-in government inspectors on private vessels for surveillance purposes over a period of months and results in the type of governmental invasion that is well within the protection of the fourth amendment. Despite the majority's ambivalence on this issue, the use of government inspectors under the regulation is a search within the meaning of the fourth amendment. As such, it is presumptively unconstitutional in the absence of a warrant, and "[t]he burden is on the government to prove that the departure from the warrant requirement was justified." *United States v. Martin*, 693 F.2d 77, 78 (9th Cir.1982) (per curiam); *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971).

The majority decides, however, that even if this use of observers constitutes a search, it is reasonable because it falls within the pervasively regulated industry exception to the warrant requirement. The majority suggests that because the tuna fishing industry has been subject to government regulation, the acceptance of federal observers must be part of the regulatory burden that goes with the benefit of tuna fishing. The majority ventures into uncharted territory, however, because the Supreme Court has admonished that the regulated industry exception is a narrow one, one that neither the Supreme Court nor this court has ever embraced in the absence of explicit statutory authorization for the warrantless search scheme it purports to justify. Moreover, the regulated industry exception has never been used to justify warrantless surveillance schemes such as the one in this case. Until now, the exception has only applied to warrantless inspections of particular businesses on a periodic basis. The majority breaks new ground by applying the exception to warrantless surveillance schemes conducted for days and months at a time.

In regulated industry cases, warrantless searches are still presumptively unreasonable and the government retains the burden

of justifying its disregard for the warrant requirement. *Marshall v. Barlow's Inc.*, 436 U.S. 307, 312–13, 98 S.Ct. 1816, 1820–21, 56 L.Ed.2d 305 (1978). "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *Id.*, at 312, 98 S.Ct. at 1820 (quoting *See v. Seattle*, 387 U.S. 541, 543, 87 S.Ct. 1737, 1739, 18 L.Ed.2d 943 (1967)). In this case, the government has failed to meet its burden of justifying the warrantless intrusions which the challenged regulation authorizes.

Under the pervasively regulated industry exception, a warrant may not be required "when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Donovan v. Dewey*, 452 U.S. 594, 600, 101 S.Ct. 2534, 2539, 69 L.Ed.2d 262 (1981). While planting government observers on fishing vessels for the duration of the expeditions may offer the most efficient method of policing the Act, enthusiasm for this enforcement technique should not obscure the essential constitutional requirement that the warrantless quality of such a procedure must be vital to the regulatory scheme. The government has not proffered any convincing explanation why waiver of the warrant requirement is essential to the enforcement of the Act or to the effective implementation of the observer program.

In *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981), the Supreme Court upheld a warrantless search scheme under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(a) (1976). The statute allowed federal mine inspectors to make unannounced inspections of underground mines four times a year and surface mines twice a year. The Court noted that a warrant requirement could frustrate such an inspection scheme because unannounced inspections were needed to effectuate the scheme's objective of deterring hazardous mine conditions. *Id.* at 603, 101 S.Ct. at 2540. In *United States v. Kaiyo Maru No. 53*, 699 F.2d 939 (9th Cir.1983), this court upheld a warrantless search scheme designed to enforce the Fishery Conservation and Management Act. 16 U.S.C. § 1861(b). The court concluded that dispensing with the warrant requirement for Coast Guard inspections of fishing boats in the Fishery Conservation Zone was necessary due to the logistical barriers of obtaining a warrant for ships at sea. *Id.* at 995.

A comparable element of necessity is missing in this case. The regulation authorizes boarding by federal observers at the time of departure and provides for notification of the observer presence several days before the expedition begins. After they are aboard, the observers make their observations and inspections throughout the duration of the fishing trip. Nothing in this procedure indicates that a warrant requirement would frustrate the objectives of the regulatory search scheme. Research and observation activities under the regulatory procedure can be conducted in the same manner whether or not a warrant is obtained. Although a warrant requirement in this case might be an administrative annoyance, the inconvenience it poses is an insufficient basis to "vitiate the general constitutional requirement that for a search to be reasonable a warrant must be obtained." *Marshall*, 436 U.S. at 324, 98 S.Ct. at 1827. Moreover, a warrant requirement pursuant to a regulatory search scheme need not be based on evidence of specific violations or actions on particular boats. A warrant requirement in this context would be designed to ensure governmental compliance with reasonable legislative and regulatory standards for the frequency and scope of the search operation. *Id.* at 320, 98 S.Ct. at 1824; *Camara v. Municipal Court*, 387 U.S. 523, 538, 87 S.Ct. 1727, 1735–36, 18 L.Ed.2d 930 (1967). Such a requirement preserves the historic function of checking the potential for arbitrary government conduct without frustrating the legitimate objectives of the Marine Mammal Protection Act. This

balance is especially important as virtually all guidelines regarding the conduct of the observer operation emanate from internal agency policies instead of statutory or regulatory guidelines with force of law.

As the reasonableness of a regulatory search scheme "depends on the specific enforcement needs and privacy guarantees of each statute," *Kaiyo Maru No. 55*, 699 F.2d at 995, and as the burden of demonstrating the need to by-pass the warrant requirement rests with the government, the absence of any persuasive proof that warrantless searches are necessary calls for adherence to the general rule instead of the exception. A warrant is required for this regulatory search scheme.

III

Because 50 C.F.R. § 216.24(f) exceeds congressional authorization and establishes a search scheme in violation of the fourth amendment of the Constitution, I dissent.

FERGUSON, Circuit Judge, dissenting:

Today the majority installs a federal agent in the temporary home of 14 to 18 fishermen for a two- to three-month period without requiring a warrant or a showing of probable cause to believe that the law has been broken. The fourth amendment, assuring that the people are to be secure in their homes, mandates that warrantless government intrusion into even a temporary home is *per se* unreasonable. This protection is not lost because the place called home is also used for commercial purposes, i.e. as a fishing vessel, for both commercial premises and seafaring vessels are covered by the fourth amendment.

The National Oceanic and Atmospheric Administration (NOAA), an agency of the federal government, has by regulation placed federal agents on board tuna fishing vessels for two- to three-month fishing trips by conditioning the license to fish for tuna upon the vessel owner's consent to the presence of federal observers. 50 C.F.R. § 216.24(f) (1982). The federal "observers" are authorized to conduct research and collect information "which may be used in civil or criminal penalty proceedings, forfeiture actions, or permit or certificate sanctions," *id.* § 216.24(f)(1), while they live for the extended fishing trip on a 150- to 250-foot boat with the crew of 14–18 men. M.K. Orbach, *Hunters, Seamen, and Entrepreneurs* (1977) (hereinafter "Orbach"). It has been stipulated by the parties that the observers take their meals with the fishermen, are not confined to any particular areas of the vessel, and are expected to "maintain open communication" with and question vessel operators and other personnel while recording data pertaining to the enforcement of the Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1407.

Any possibility of separating the business aspects of a fishing vessel from the home aspects is belied by the realities of life on such a vessel:

> [I]t is impossible to get more than about 50 feet from any of the other 15 men with whom you are going to spend the next two months. You can draw curtains or close doors and remain out of sight a good part of the time, but you can never get *away* from them, and the fishing process forces you into regular interaction with them.

Orbach at 25 (emphasis in original). Both Congress and the Supreme Court have acted to specially protect the rights and comforts of seamen due to this unusual characteristic of their work. *See Aguilar v. Standard Oil Co.*, 318 U.S. 724, 732, 63 S.Ct. 930, 934–35, 87 L.Ed. 1107 (1943) ("Of necessity, during the voyage [the seaman] must eat, drink, lodge and divert himself within the confines of the ship. In short, during the period of his tenure the vessel is not merely his place of employment; it is the framework of his existence."); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 782, 72 S.Ct. 1011, 1014, 96 L.Ed. 1294 (1952); *Warner v. Goltra*, 293 U.S. 155, 162, 55 S.Ct. 46, 49, 79 L.Ed. 254 (1934), ("[T]he maritime law by inveterate tradition has made the ordinary seaman a member of a favored class.").

The NOAA's effort to install a federal agent on board a fishing vessel without securing a warrant based on probable cause

is reminiscent of the "indiscriminate searches and seizures conducted under the authority of 'general warrants' [which] were the immediate evils that motivated the framing and adoption of the Fourth Amendment." *Payton v. New York*, 445 U.S. 573, 583, 100 S.Ct. 1371, 1378, 63 L.Ed.2d 639 (1980); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311, 98 S.Ct. 1816, 1819–20, 56 L.Ed.2d 305 (1978). The fourth amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects...." The Supreme Court has defined the scope of the fourth amendment to include a person's "reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Such a definition extends fourth amendment protections beyond the literal meaning of "houses" to temporary residences, such as a hotel, *Stoner v. California*, 376 U.S. 483, 490, 84 S.Ct. 889, 893, 11 L.Ed.2d 856 (1964), a rooming house, *McDonald v. United States*, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948), and even a mobile home, *People v. Carney*, 34 Cal.3d 597, 194 Cal.Rptr. 500, 668 P.2d 807 (1983) and to commercial premises, *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329, 99 S.Ct. 2319, 2326, 60 L.Ed.2d 920 (1979) (adult bookstore); *Mancusi v. DeForte*, 392 U.S. 364, 367, 88 S.Ct. 2120, 2123, 20 L.Ed.2d 1154 (1968) (office); *See v. City of Seattle*, 387 U.S. 541, 543, 87 S.Ct. 1737, 1739, 18 L.Ed.2d 943 (1967) (warehouse), as well as to seafaring vessels, *United States v. Villamonte-Marquez*, —— U.S. ——, 103 S.Ct. 2573, 2581, 77 L.Ed.2d 22 (1983), and automobiles, *Delaware v. Prouse*, 440 U.S. 648, 662–63, 99 S.Ct. 1391, 1400–01, 59 L.Ed.2d 660 (1979). More important, the "Fourth Amendment protects people, not places," *Katz v. United States*, 389 U.S. at 351, 88 S.Ct. at 511, and thus prohibits warrantless surveillance of a person's ordinarily private actions and words. *Id; United States v. United States District Court*, 407 U.S. 297, 313, 92 S.Ct. 2125, 2134–35, 32 L.Ed.2d 752 (1972). As the Court stated over twenty years ago:

> At the very core [of the fourth amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. This Court has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard.

Silverman v. United States, 365 U.S. 505, 511–12, 81 S.Ct. 679, 683, 5 L.Ed.2d 734 (1961) (citations omitted). It is precisely this "right to be let alone," *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting), that is trampled when tuna fishermen are required to live, eat, sleep, lodge and relax in the presence of a federal agent within the confines of a 150- to 250-foot boat in the middle of the ocean for two to three months at a time.

The fourth amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause ... particularly describing the place to be searched, and the persons or things to be seized." A warrantless search is presumptively unreasonable. *Payton v. New York*, 445 U.S. at 586 n. 25, 100 S.Ct. at 1380 n. 25; *Marshall v. Barlow's, Inc.*, 436 U.S. at 312, 98 S.Ct. at 1820; *United States v. United States District Court, supra.* If the reasonableness of a search could be based "on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests ... Fourth Amendment protection in this area would approach the evaporation point." *Chimel v. California*, 395 U.S. 752, 764–65, 89 S.Ct. 2034, 2041, 23 L.Ed.2d 685 (1969). Rather, "a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant" or falls within one of carefully defined exceptions to the warrant requirement. *Camara v. Municipal Court*, 387 U.S. 523, 528–29, 87 S.Ct. 1727, 1730–31, 18 L.Ed.2d 930 (1967).

This rule must be strictly enforced as "[t]he right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Id.* at 529, 87 S.Ct. at 1731 (quoting *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948)). As shown by Judge Tang in his dissent, the regulation at issue here cannot be justified under any of the recognized exceptions to the warrant requirement, particularly the "pervasively regulated industry" exception.

Tuna fishermen do not waive their right to be free from unreasonable search or surveillance by temporarily living onboard a fishing vessel. The fishing boat is not just their place of employment, but for two to three months it is "the framework of [their] existence," *Aguilar v. Standard Oil Co.*, 318 U.S. at 732, 63 S.Ct. at 934, and their home. This home cannot be entered by law enforcement officers absent a warrant based on probable cause to believe that a crime has been or is being committed. It is well established that an administrative regulation which by its terms violates the fourth amendment is unconstitutional and should not be enforced. *Marshall v. Barlow's, Inc., supra.*

The majority states that it is necessary to place federal observers aboard tuna fishing vessels to protect the lives of porpoises. Maj.op., at 760, 761. However, it fails to address the question whether a warrant authorizing the placement of such observers on a case-by-case basis would undercut the objectives of the Marine Mammal Protection Act. Clearly, if a warrant is required under the Marine Mammal Protection Act, those on the fishing vessel upon which an observer may be stationed could conceal no more than they could conceal with the federal agent forced aboard without the prophylatic protections of a warrant issued by a neutral officer. *See Marshall v. Barlow's, Inc.*, 436 U.S. at 323, 98 S.Ct. at 1826. Moreover, the regulation by its own terms undermines the argument that notice would frustrate the objectives of the observer program as it provides that the fishing vessel owner receive notice of the placement of an "observer" five days prior to the voyage. 50 C.F.R. § 216.24(f)(4). Contrary to the majority position (maj.op., at 765), mere knowledge of the existence of a regulatory purpose cannot eliminate one's expectation of privacy, for that would consume the rule against warrantless searches in the exception. *Cf. Michigan v. Tyler*, 436 U.S. 499, 508, 98 S.Ct. 1942, 1949, 56 L.Ed.2d 486 (1978).

The majority states that the warrantless quartering of a federal agent on a 30–60 day fishing trip is so clearly limited by regulation that the regulation is the substantial equivalent of a warrant. Maj.op. at 765–766. However, it has been recognized that when law enforcement officers are lawfully on the premises for limited purposes, the restrictions placed on the scope of their search or duties "may be more theoretical than real." *Payton v. New York*, 445 U.S. at 589, 100 S.Ct. at 1381. Moreover, the majority's position that the observer may legitimately gather evidence in "plain view" on the ship belies the weight of the limitations placed on the observer by the regulations. Maj.op., at 763. The fishermen are placed in the position of hiding their everyday acts and comments from the federal agent in order to establish and protect their fundamental right to be let alone. *See Illinois v. Andreas*, — U.S. —, 103 S.Ct. 3319, 3327, 77 L.Ed.2d 1003 (1983) (Brennan, J., dissenting). The NOAA has made the price of being a tuna fisherman include the "dread of subjection to an unchecked surveillance power." *United States v. United States District Court*, 407 U.S. at 314, 92 S.Ct. at 2135.

The fourth amendment was a response to the general warrant whereby an officer was authorized to search private premises without evidence of unlawful activity. *Marshall v. Barlow's, Inc.*, 436 U.S. at 311, 98 S.Ct. at 1819–20. Today the majority holds that a

federal agent cannot only search a private vessel, but collect data, question fishermen, and live on the vessel for months at a time without the need to secure a warrant based on a legitimate suspicion of unlawful activity. The regulation at issue here can subject "even the most law-abiding citizen" to unprecedented and unjustified government intrusion and surveillance. *See Camara v. Municipal Court*, 387 U.S. at 530, 87 S.Ct. at 1731. Surely the lives of porpoises cannot be more sacred to us than the right to privacy and freedom from government intrusion protected by the fourth amendment.

James WARREN, Jack Warren, Jerry Warren, Robert Warren and Frieda Warren, Plaintiffs-Appellants,

v.

The UNITED STATES DEPARTMENT OF the INTERIOR BUREAU OF LAND MANAGEMENT; Nevada Bureau of Land Management; and Does I–X, inclusive, Defendants-Appellees.

No. 82–4642.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Oct. 13, 1983.

Decided Jan. 24, 1984.

Parents and brothers of decedent brought wrongful death action against Government. The United States District Court for the District of Nevada, Bruce R. Thompson, J., dismissed action, and plaintiffs appealed. The Court of Appeals, Skopil, Circuit Judge, held that jurisdictional limitations on tort claims against Federal Government do not encompass regulations promulgated pursuant to agencies' claims settlement authority.

Reversed and remanded.

Sneed, Circuit Judge, filed dissenting opinion in which Wallace and J. Blaine Anderson, Circuit Judges, joined.

1. United States ⇐113

Jurisdictional limitations on tort claims against Federal Government do not encompass regulations promulgated pursuant to agencies' claims settlement authority; overruling *House v. Mine Safety Appliances Co.*, 573 F.2d 609. 28 U.S.C.A. §§ 2672, 2675(a).

2. United States ⇐113

Claimant against Federal Government or his legal representative is required to file written statements sufficiently describing injury to enable agency to begin its own investigation, and a sum certain damages claim. 28 U.S.C.A. § 2675(a).

Robert J. Peyton, Houston & Peyton, Reno, Nev., for plaintiffs-appellants.

Al J. Daniel, Jr., U.S. Dept. of Justice, Washington, D.C., for defendants-appellees.

Appeal from the United States District Court for the District of Nevada.

Before BROWNING, WALLACE, SNEED, ANDERSON, TANG, SKOPIL, SCHROEDER, FARRIS, BOOCHEVER, NORRIS, and REINHARDT, Circuit Judges.

SKOPIL, Circuit Judge:

The issue presented is whether jurisdictional limitations on tort claims against the federal government encompass regulations promulgated pursuant to the agencies' claims settlement authority. *See* 28 U.S.C. §§ 2675(a) and 2672 (1982). We decide the case *en banc* to resolve a conflict in our prior decisions. *Compare Graves v. United States Coast Guard*, 692 F.2d 71 (9th Cir. 1982) with *House v. Mine Safety Appliances Co.*, 573 F.2d 609 (9th Cir.), *cert. denied*, 439 U.S. 862, 99 S.Ct. 182, 58 L.Ed.2d 171

Federal Register

Wednesday
July 9, 1986

Part IV

Environmental Protection Agency

Environmental Auditing Policy Statement; Notice

ENVIRONMENTAL PROTECTION AGENCY

[OPPE-FRL-3048-6]

Environmental Auditing Policy Statement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final policy statement.

SUMMARY: It is EPA policy to encourage the use of environmental auditing by regulated entities to help achieve and maintain compliance with environmental laws and regulations, as well as to help identify and correct unregulated environmental hazards. EPA first published this policy as interim guidance on November 8, 1985 (50 FR 46504). Based on comments received regarding the interim guidance, the Agency is issuing today's final policy statement with only minor changes.

This final policy statement specifically:

- Encourages regulated entities to develop, implement and upgrade environmental auditing programs;
- Discusses when the Agency may or may not request audit reports;
- Explains how EPA's inspection and enforcement activities may respond to regulated entities' efforts to assure compliance through auditing;
- Endorses environmental auditing at federal facilities;
- Encourages state and local environmental auditing initiatives; and
- Outlines elements of effective audit programs.

Environmental auditing includes a variety of compliance assessment techniques which go beyond those legally required and are used to identify actual and potential environmental problems. Effective environmental auditing can lead to higher levels of overall compliance and reduced risk to human health and the environment. EPA endorses the practice of environmental auditing and supports its accelerated use by regulated entities to help meet the goals of federal, state and local environmental requirements. However, the existence of an auditing program does not create any defense to, or otherwise limit, the responsibility of any regulated entity to comply with applicable regulatory requirements.

States are encouraged to adopt these or similar and equally effective policies in order to advance the use of environmental auditing on a consistent, nationwide basis.

DATES: This final policy statement is effective July 9, 1986.

FOR FURTHER INFORMATION CONTACT:

Leonard Fleckenstein, Office of Policy, Planning and Evaluation, (202) 382-2728;

or

Cheryl Wasserman, Office of Enforcement and Compliance Monitoring, (202) 382-7550.

SUPPLEMENTARY INFORMATION:

ENVIRONMENTAL AUDITING POLICY STATEMENT

I. Preamble

On November 8, 1985 EPA published an Environmental Auditing Policy Statement, effective as interim guidance, and solicited written comments until January 7, 1986.

Thirteen commenters submitted written comments. Eight were from private industry. Two commenters represented industry trade associations. One federal agency, one consulting firm and one law firm also submitted comments.

Twelve commenters addressed EPA requests for audit reports. Three comments per subject were received regarding inspections, enforcement response and elements of effective environmental auditing. One commenter addressed audit provisions as remedies in enforcement actions, one addressed environmental auditing at federal facilities, and one addressed the relationship of the policy statement to state or local regulatory agencies. Comments generally supported both the concept of a policy statement and the interim guidance, but raised specific concerns with respect to particular language and policy issues in sections of the guidance.

General Comments

Three commenters found the interim guidance to be constructive, balanced and effective at encouraging more and better environmental auditing.

Another commenter, while considering the policy on the whole to be constructive, felt that new and identifiable auditing "incentives" should be offered by EPA. Based on earlier comments received from industry, EPA believes most companies would not support or participate in an "incentives based" environmental auditing program with EPA. Moreover, general promises to forgo inspections or reduce enforcement responses in exchange for companies' adoption of environmental auditing programs—the "incentives" most frequently mentioned in this context—are fraught with legal and policy obstacles.

Several commenters expressed concern that states or localities might use the interim guidance to *require* auditing. The Agency disagrees that the policy statement opens the way for states and localities to require auditing. No EPA policy can grant states or localities any more (or less) authority than they already possess. EPA believes that the interim guidance effectively encourages *voluntary* auditing. In fact, Section II.B. of the policy states: "because audit quality depends to a large degree on genuine management commitment to the program and its objectives, auditing should remain a voluntary program."

Another commenter suggested that EPA should not expect an audit to identify all potential problem areas or conclude that a problem identified in an audit reflects normal operations and procedures. EPA agrees that an audit report should clearly reflect these realities and should be written to point out the audit's limitations. However, since EPA will not routinely request audit reports, the Agency does not believe these concerns raise issues which need to be addressed in the policy statement.

A second concern expressed by the same commenter was that EPA should acknowledge that environmental audits are only part of a successful environmental management program and thus should not be expected to cover every environmental issue or solve all problems. EPA agrees and accordingly has amended the statement of purpose which appears at the end of this preamble.

Yet another commenter thought EPA should focus on environmental performance results (compliance or non-compliance), not on the processes or vehicles used to achieve those results. In general, EPA agrees with this statement and will continue to focus on environmental results. However, EPA also believes that such results can be improved through Agency efforts to identify and encourage effective environmental management practices, and will continue to encourage such practices in non regulatory ways.

A final general comment recommended that EPA should sponsor seminars for small businesses on how to start auditing programs. EPA agrees that such seminars would be useful. However, since audit seminars already are available from several private sector organizations, EPA does not believe it should intervene in that market, with the possible exception of seminars for government agencies, especially federal agencies, for which EPA has a broad mandate under Executive Order 12088 to

provide technical assistance for environmental compliance.

Requests for Reports

EPA received 12 comments regarding Agency requests for environmental audit reports, far more than on any other topic in the policy statement. One commenter felt that EPA struck an appropriate balance between respecting the need for self-evaluation with some measure of privacy, and allowing the Agency enough flexibility of inquiry to accomplish future statutory missions. However, most commenters expressed concern that the interim guidance did not go far enough to assuage corporate fears that EPA will use audit reports for environmental compliance "witch hunts." Several commenters suggested additional specific assurances regarding the circumstances under which EPA will request such reports.

One commenter recommended that EPA request audit reports only "when the Agency can show the information it needs to perform its statutory mission cannot be obtained from the monitoring, compliance or other data that is otherwise reportable and/or accessible to EPA, or where the Government deems an audit report material to a criminal investigation." EPA accepts this recommendation in part. The Agency believes it would not be in the best interest of human health and the environment to commit to making a "showing" of a compelling information need before ever requesting an audit report. While EPA may normally be willing to do so, the Agency cannot rule out in advance all circumstances in which such a showing may not be possible. However, it would be helpful to further clarify that a request for an audit report or a portion of a report normally will be made when needed information is not available by alternative means. Therefore, EPA has revised Section III.A., paragraph two and added the phrase: "and usually made where the information needed cannot be obtained from monitoring, reporting or other data otherwise available to the Agency."

Another commenter suggested that (except in the case of criminal investigations) EPA should limit requests for audit documents to specific questions. By including the phrase "or relevant portions of a report" in Section III.A., EPA meant to emphasize it would not request an entire audit document when only a relevant portion would suffice. Likewise, EPA fully intends not to request even a portion of a report if needed information or data can be otherwise obtained. To further clarify this point EPA has added the phrase, "most likely focused on particular information needs rather than the entire report," to the second sentence of paragraph two, Section III.A. Incorporating the two comments above, the first two sentences in paragraph two of final Section III.A. now read: "EPA's authority to request an audit report, or relevant portions thereof, will be exercised on a case-by-case basis where the Agency determines it is needed to accomplish a statutory mission or the Government deems it to be material to a criminal investigation. EPA expects such requests to be limited, most likely focused on particular information needs rather than the entire report, and usually made where the information needed cannot be obtained from monitoring, reporting or other data otherwise available to the Agency."

Other commenters recommended that EPA not request audit reports under any circumstances, that requests be "restricted to only those legally required," that requests be limited to criminal investigations, or that requests be made only when EPA has reason to believe "that the audit programs or reports are being used to conceal evidence of environmental non-compliance or otherwise being used in bad faith." EPA appreciates concerns underlying all of these comments and has considered each carefully. However, the Agency believes that these recommendations do not strike the appropriate balance between retaining the flexibility to accomplish EPA's statutory missions in future, unforeseen circumstances, and acknowledging regulated entities' need to self-evaluate environmental performance with some measure of privacy. Indeed, based on prime informal comments, the small number of formal comments received, and the even smaller number of adverse comments, EPA believes the final policy statement should remain largely unchanged from the interim version.

Elements of Effective Environmental Auditing

Three commenters expressed concerns regarding the seven general elements EPA outlined in the Appendix to the interim guidance.

One commenter noted that were EPA to further expand or more fully detail such elements, programs not specifically fulfilling each element would then be judged inadequate. EPA agrees that presenting highly specific and prescriptive auditing elements could be counter-productive by not taking into account numerous factors which vary extensively from one organization to another, but which may still result in effective auditing programs. Accordingly, EPA does not plan to expand or more fully detail these auditing elements.

Another commenter asserted that states and localities should be cautioned not to consider EPA's auditing elements as mandatory steps. The Agency is fully aware of this concern and in the interim guidance noted its strong opinion that "regulatory agencies should not attempt to prescribe the precise form and structure of regulated entities' environmental management or auditing programs." While EPA cannot require state or local regulators to adopt this or similar policies, the Agency does strongly encourage them to do so, both in the interim and final policies.

A final commenter thought the Appendix too specifically prescribed what should and what should not be included in an auditing program. Other commenters, on the other hand, viewed the elements described as very general in nature. EPA agrees with these other commenters. The elements are in no way binding. Moreover, EPA believes that most mature, effective environmental auditing programs do incorporate each of these general elements in some form, and considers them useful yardsticks for those considering adopting or upgrading audit programs. For these reasons EPA has not revised the Appendix in today's final policy statement.

Other Comments

Other significant comments addressed EPA inspection priorities for, and enforcement responses to, organizations with environmental auditing programs.

One commenter, stressing that audit programs are *internal* management tools, took exception to the phrase in the second paragraph of section III.B.1. of the interim guidance which states that environmental audits can 'complement' regulatory oversight. By using the word 'complement' in this context, EPA does not intend to imply that audit reports must be obtained by the Agency in order to supplement regulatory inspections. 'Complement' is used in a broad sense of being in addition to inspections and providing something (i.e., self-assessment) which otherwise would be lacking. To clarify this point EPA has added the phrase "by providing self-assessment to assure compliance" after "environmental audits may complement inspections" in this paragraph.

The same commenter also expressed concern that, as EPA sets inspection priorities, a company having an audit program could appear to be a 'poor performer' due to complete and accurate reporting when measured against a

company which reports something less than required by law. EPA agrees that it is important to communicate this fact to Agency and state personnel and will do so. However, the Agency does not believe a change in the policy statement is necessary.

A further commenter suggested EPA should commit to take auditing programs into account when assessing all enforcement actions. However, in order to maintain enforcement flexibility under varied circumstances, the Agency cannot promise reduced enforcement responses to violations at all audited facilities when other factors may be overriding. Therefore the policy statement continues to state that EPA may exercise its discretion to consider auditing programs as evidence of honest and genuine efforts to assure compliance, which would then be taken into account in fashioning enforcement responses to violations.

A final commenter suggested the phrase "expeditiously correct environmental problems" not be used in the enforcement context since it implied EPA would use an entity's record of correcting nonregulated matters when evaluating regulatory violations. EPA did not intend for such an inference to be made. EPA intended the term "environmental problems" to refer to the underlying circumstances which eventually lead up to the violations. To clarify this point, EPA is revising the first two sentences of the paragraph to which this comment refers by changing "environmental problems" to "violations and underlying environmental problems" in the first sentence and to "underlying environmental problems" in the second sentence.

In a separate development EPA is preparing an update of its January 1984 *Federal Facilities Compliance Strategy*, which is referenced in section III. C. of the auditing policy. The Strategy should be completed and available on request from EPA's Office of Federal Activities later this year.

EPA thanks all commenters for responding to the November 8, 1985 publication. Today's notice is being issued to inform regulated entities and the public of EPA's final policy toward environmental auditing. This policy was developed to help (a) encourage regulated entities to institutionalize effective audit practices as one means of improving compliance and sound environmental management, and (b) guide internal EPA actions directly related to regulated entities' environmental auditing programs.

EPA will evaluate implementation of this final policy to ensure it meets the above goals and continues to encourage better environmental management, while strengthening the Agency's own efforts to monitor and enforce compliance with environmental requirements.

II. General EPA Policy on Environmental Auditing

A. Introduction

Environmental auditing is a systematic, documented, periodic and objective review by regulated entities[1] of facility operations and practices related to meeting environmental requirements. Audits can be designed to accomplish any or all of the following: verify compliance with environmental requirements; evaluate the effectiveness of environmental management systems already in place; or assess risks from regulated and unregulated materials and practices.

Auditing serves as a quality assurance check to help improve the effectiveness of basic environmental management by verifying that management practices are in place, functioning and adequate. Environmental audits evaluate, and are not a substitute for, direct compliance activities such as obtaining permits, installing controls, monitoring compliance, reporting violations, and keeping records. Environmental auditing may verify but does not include activities required by law, regulation or permit (e.g., continuous emissions monitoring, composite correction plans at wastewater treatment plants, etc.). Audits do not in any way replace regulatory agency inspections. However, environmental audits can improve compliance by complementing conventional federal, state and local oversight.

The appendix to this policy statement outlines some basic elements of environmental auditing (e.g., auditor independence and top management support) for use by those considering implementation of effective auditing programs to help achieve and maintain compliance. Additional information on environmental auditing practices can be found in various published materials.[2]

Environmental auditing has developed for sound business reasons, particularly as a means of helping regulated entities manage pollution control affirmatively over time instead of reacting to crises. Auditing can result in improved facility environmental performance, help communicate effective solutions to common environmental problems, focus facility managers' attention on current and upcoming regulatory requirements, and generate protocols and checklists which help facilities better manage themselves. Auditing also can result in better integrated management of environmental hazards, since auditors frequently identify environmental liabilities which go beyond regulatory compliance. Companies, public entities and federal facilities have employed a variety of environmental auditing practices in recent years. Several hundred major firms in diverse industries now have environmental auditing programs, although they often are known by other names such as assessment, survey, surveillance, review or appraisal.

While auditing has demonstrated its usefulness to those with audit programs, many others still do not audit. Clarification of EPA's position regarding auditing may help encourage regulated entities to establish audit programs or upgrade systems already in place.

B. EPA Encourages the Use of Environmental Auditing

EPA encourages regulated entities to adopt sound environmental management practices to improve environmental performance. In particular, EPA encourages regulated entities subject to environmental regulations to institute environmental auditing programs to help ensure the adequacy of internal systems to achieve, maintain and monitor compliance. Implementation of environmental auditing programs can result in better identification, resolution and avoidance of environmental problems, as well as improvements to management practices. Audits can be conducted effectively by independent internal or third party auditors. Larger organizations generally have greater resources to devote to an internal audit team, while smaller entities might be more likely to use outside auditors.

Regulated entities are responsible for taking all necessary steps to ensure compliance with environmental requirements, whether or not they adopt audit programs. Although environmental laws do not require a regulated facility to have an auditing program, ultimate responsibility for the environmental

[1] "Regulated entities" include private firms and public agencies with facilities subject to environmental regulation. Public agencies can include federal, state or local agencies as well as special-purpose organizations such as regional sewage commissions.

[2] See, e.g., "Current Practices in Environmental Auditing," EPA Report No. EPA-230-09-83-006, February 1984; "Annotated Bibliography on Environmental Auditing," Fifth Edition, September 1985, both available from: Regulatory Reform Staff, PM-223, EPA, 401 M Street SW, Washington, DC 20460.

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performance of the facility lies with top management, which therefore has a strong incentive to use reasonable means, such as environmental auditing, to secure reliable information of facility compliance status.

EPA does not intend to dictate or interfere with the environmental management practices of private or public organizations. Nor does EPA intend to mandate auditing (though in certain instances EPA may seek to include provisions for environmental auditing as part of settlement agreements, as noted below), because environmental auditing systems have been widely adopted on a voluntary basis in the past, and because audit quality depends to a large degree upon genuine management commitment to the program and its objectives, auditing should remain a voluntary activity.

III. EPA Policy on Specific Environmental Auditing Issues

A. Agency Requests for Audit Reports

EPA has broad statutory authority to request relevant information on the environmental compliance status of regulated entities. However, EPA believes routine Agency requests for audit reports[4] could inhibit auditing in the long run, decreasing both the quantity and quality of audits conducted. Therefore, as a matter of policy, EPA will *not* routinely request environmental audit reports.

EPA's authority to request an audit report, or relevant portions thereof, will be exercised on a case-by-case basis where the Agency determines it is needed to accomplish a statutory mission, or where the Government deems it to be material to a criminal investigation. EPA expects such requests to be limited, most likely focused on particular information needs rather than the entire report, and usually made where the information needed cannot be obtained from monitoring, reporting or other data otherwise available to the Agency. Examples would likely include situations where: audits are conducted under consent decrees or other settlement agreements; a company has placed its management practices at issue by raising them as a defense; or state of mind or intent are a relevant element of inquiry, such as during a criminal investigation. This list is illustrative rather than exhaustive, since there doubtless will be other situations, not subject to prediction, in which audit reports rather than information may be required.

EPA acknowledges regulated entities' need to self-evaluate environmental performance with some measure of privacy and encourages such activity. However, audit reports may not shield monitoring, compliance, or other information that would otherwise be reportable and/or accessible to EPA, even if there is no explicit requirement[5] to generate that data.[6] Thus, this policy does not alter regulated entities' existing or future obligations to monitor, record or report information required under environmental statutes, regulations or permits, or to allow EPA access to that information. Nor does this policy alter EPA's authority to request and receive any relevant information—including that contained in audit reports—under various environmental statutes (e.g., Clean Water Act section 308, Clean Air Act sections 114 and 208) or in other administrative or judicial proceedings.

Regulated entities also should be aware that certain audit findings may by law have to be reported to government agencies. However, in addition to any such requirements, EPA encourages regulated entities to notify appropriate State or Federal officials of findings which suggest significant environmental or public health risks, even when not specifically required to do so.

B. EPA Response to Environmental Auditing

1. General Policy

EPA will not promise to forgo inspections, reduce enforcement responses, or offer other such incentives in exchange for implementation of environmental auditing or other sound environmental management practices. Indeed, a credible enforcement program provides a strong incentive for regulated entities to audit.

Regulatory agencies have an obligation to assess source compliance status independently and cannot eliminate inspections for particular firms or classes of firms. Although environmental audits may complement inspections by providing self-assessment to assure compliance, they are in no way a substitute for regulatory oversight. Moreover, certain statutes (e.g. RCRA) and Agency policies establish minimum facility inspection frequencies to which EPA will adhere.

However, EPA will continue to address environmental problems on a priority basis and will consequently inspect facilities with poor environmental records and practices more frequently. Since effective environmental auditing helps management identify and promptly correct actual or potential problems, audited facilities' environmental performance should improve. Thus, while EPA inspections of self-audited facilities will continue, to the extent that compliance performance is considered in setting inspection priorities, facilities with a good compliance history may be subject to fewer inspections.

In fashioning enforcement responses to violations, EPA policy is to take into account, on a case-by-case basis, the honest and genuine efforts of regulated entities to avoid and promptly correct violations and underlying environmental problems. When regulated entities take reasonable precautions to avoid noncompliance, expeditiously correct underlying environmental problems discovered through audits or other means, and implement measures to prevent their recurrence, EPA may exercise its discretion to consider such actions as honest and genuine efforts to assure compliance. Such consideration applies particularly when a regulated entity promptly reports violations or compliance data which otherwise were not required to be recorded or reported to EPA.

2. Audit Provisions as Remedies in Enforcement Actions

EPA may propose environmental auditing provisions in consent decrees and in other settlement negotiations where auditing could provide a remedy for identified problems and reduce the likelihood of similar problems recurring in the future.[7] Environmental auditing provisions are most likely to be proposed in settlement negotiations where:

- A pattern of violations can be attributed, at least in part, to the absence or poor functioning of an environmental management system; or
- The type or nature of violations indicates a likelihood that similar noncompliance problems may exist or occur elsewhere in the facility or at other facilities operated by the regulated entity.

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[4] An "environmental audit report" is a written report which candidly and thoroughly presents findings from a review, conducted as part of an environmental audit as described in section II.A., of facility environmental performance and practices. An audit report is not a substitute for compliance monitoring reports or other reports or records which may be required by EPA or other regulatory agencies.

[5] See, for example, "Duties to Report or Disclose Information on the Environmental Aspects of Business Activities," Environmental Law Institute report to EPA, final report, September 1985.

[6] EPA is developing guidance for use by Agency negotiators in structuring appropriate environmental audit provisions for consent decrees and other settlement negotiations.

Through this consent decree approach and other me. .s, EPA may consider how to encourage effective auditing by publicly owned sewage treatment works (POTWs). POTWs often have compliance problems related to operation and maintenance procedures which can be addressed effectively through the use of environmental auditing. Under its National Municipal Policy EPA already is requiring many POTWs to develop composite correction plans to identify and correct compliance problems.

C. Environmental Auditing at Federal Facilities

EPA encourages all federal agencies subject to environmental laws and regulations to institute environmental auditing systems to help ensure the adequacy of internal systems to achieve, maintain and monitor compliance. Environmental auditing at federal facilities can be an effective supplement to EPA and state inspections. Such federal facility environmental audit programs should be structured to promptly identify environmental problems and expeditiously develop schedules for remedial action.

To the extent feasible, EPA will provide technical assistance to help federal agencies design and initiate audit programs. Where appropriate, EPA will enter into agreements with other agencies to clarify the respective roles, responsibilities and commitments of each agency in conducting and responding to federal facility environmental audits.

With respect to inspections of self-audited facilities (see section III.B.1 above) and requests for audit reports (see section III.A above), EPA generally will respond to environmental audits by federal facilities in the same manner as it does for other regulated entities, in keeping with the spirit and intent of Executive Order 12088 and the EPA *Federal Facilities Compliance Strategy* (January 1984, update forthcoming in late 1986). Federal agencies should, however, be aware that the Freedom of Information Act will govern any disclosure of audit reports or audit-generated information requested from federal agencies by the public.

When federal agencies discover significant violations through an environmental audit, EPA encourages them to submit the related audit findings and remedial action plans expeditiously to the applicable EPA regional office (and responsible state agencies, where appropriate) even when not specifically required to do so. EPA will review the audit findings and action plans and either provide written approval or negotiate a Federal Facilities Compliance Agreement. EPA will utilize the escalation procedures provided in Executive Order 12088 and the EPA *Federal Facilities Compliance Strategy* only when agreement between agencies cannot be reached. In any event, federal agencies are expected to report pollution abatement projects involving costs (necessary to correct problems discovered through the audit) to EPA in accordance with OMB Circular A-106. Upon request, and in appropriate circumstances, EPA will assist affected federal agencies through coordination of any public release of audit findings with approved action plans once agreement has been reached.

IV. Relationship to State or Local Regulatory Agencies

State and local regulatory agencies have independent jurisdiction over regulated entities. EPA encourages them to adopt these or similar policies, in order to advance the use of effective environmental auditing in a consistent manner.

EPA recognizes that some states have already undertaken environmental auditing initiatives which differ somewhat from this policy. Other states also may want to develop auditing policies which accommodate their particular needs or circumstances. Nothing in this policy statement is intended to preempt or preclude states from developing other approaches to environmental auditing. EPA encourages state and local authorities to consider the basic principles which guided the Agency in developing this policy:

- Regulated entities must continue to report or record compliance information required under existing statutes or regulations, regardless of whether such information is generated by an environmental audit or contained in an audit report. Required information cannot be withheld merely because it is generated by an audit rather than by some other means.
- Regulatory agencies cannot make promises to forgo or limit enforcement action against a particular facility or class of facilities in exchange for the use of environmental auditing systems. However, such agencies may use their discretion to adjust enforcement actions on a case-by-case basis in response to honest and genuine efforts by regulated entities to assure environmental compliance.
- When setting inspection priorities regulatory agencies should focus to the extent possible on compliance performance and environmental results.
- Regulatory agencies must continue to meet minimum program requirements (e.g., minimum inspection requirements etc.).
- Regulatory agencies should not attempt to prescribe the precise form and structure of regulated entities' environmental management or audit programs.
- An effective state/federal partnership is needed to accomplish the mutual goal of achieving and maintaining high levels of compliance with environmental laws and regulations. The greater the consistency between state or local policies and this federal response to environmental auditing, the greater the degree to which sound auditing practices might be adopted and compliance levels improved.

Dated: June 26, 1986.

Lee M. Thomas,
Administrator.

Appendix—Elements of Effective Environmental Auditing Programs

Introduction: Environmental auditing is a systematic, documented, periodic and objective review by a regulated entity of facility operations and practices related to meeting environmental requirements.

Private sector environmental audits of facilities have been conducted for several years and have taken a variety of forms, in part to accommodate unique organizational structures and circumstances. Nevertheless, effective environmental audits appear to have certain discernible elements in common with other kinds of audits. Standards for internal audits have been documented extensively. The elements outlined below draw heavily on two of these documents: "Compendium of Audit Standards" (©1983, Walter Willborn, American Society for Quality Control) and "Standards for the Professional Practice of Internal Auditing" (©1981, The Institute of Internal Auditors, Inc.). They also reflect Agency analyses conducted over the last several years.

Performance-oriented auditing elements are outlined here to help accomplish several objectives. A general description of features of effective, mature audit programs can help those starting audit programs, especially federal agencies and smaller businesses. These elements also indicate the attributes of auditing EPA generally considers important to ensure program effectiveness. Regulatory agencies may use these elements in negotiating environmental auditing provisions for consent decrees. Finally, these elements can help guide states and localities considering auditing initiatives.

An effective environmental auditing system will likely include the following general elements:

I. *Explicit top management support for environmental auditing and commitment to follow up on audit findings.* Management support may be demonstrated by a written policy articulating upper management support for the auditing program, and for compliance with all pertinent requirements, including corporate policies and permit requirements as well as federal, state and local statutes and regulations.

Management support for the auditing program also should be demonstrated by an explicit written commitment to follow-up on audit findings to correct identified problems and prevent their recurrence.

II. *An environmental auditing function independent of audited activities.* The status or organizational locus of environmental auditors should be sufficient to ensure objective and unobstructed inquiry, observation and testing. Auditor objectivity should not be impaired by personal relationships, financial or other conflicts of interest, interference with free inquiry or judgment, or fear of potential retribution.

III. *Adequate team staffing and auditor training.* Environmental auditors should possess or have ready access to the knowledge, skills, and disciplines needed to accomplish audit objectives. Each individual auditor should comply with the company's professional standards of conduct. Auditors, whether full-time or part-time, should maintain their technical and analytical competence through continuing education and training.

IV. *Explicit audit program objectives, scope, resources and frequency.* At a minimum, audit objectives should include assessing compliance with applicable environmental laws and evaluating the adequacy of internal compliance policies, procedures and personnel training programs to ensure continued compliance.

Audits should be based on a process which provides auditors: all corporate policies, permits, and federal, state, and local regulations pertinent to the facility; and checklists or protocols addressing specific features that should be evaluated by auditors.

Explicit written audit procedures generally should be used for planning audits, establishing audit scope, examining and evaluating audit findings, communicating audit results, and following-up.

V. *A process which collects, analyzes, interprets and documents information sufficient to achieve audit objectives.* Information should be collected before and during an onsite visit regarding environmental compliance(1), environmental management effectiveness(2), and other matters (3) related to audit objectives and scope. This information should be sufficient, reliable, relevant and useful to provide a sound basis for audit findings and recommendations.

a. *Sufficient* information is factual, adequate and convincing so that a prudent, informed person would be likely to reach the same conclusions as the auditor.

b. *Reliable* information is the best attainable through use of appropriate audit techniques.

c. *Relevant* information supports audit findings and recommendations and is consistent with the objectives for the audit.

d. *Useful* information helps the organization meet its goals.

The audit process should include a periodic review of the reliability and integrity of this information and the means used to identify, measure, classify and report it. Audit procedures, including the testing and sampling techniques employed, should be selected in advance, to the extent practical, and expanded or altered if circumstances warrant. The process of collecting, analyzing, interpreting, and documenting information should provide reasonable assurance that audit objectivity is maintained and audit goals are met.

VI. *A process which includes specific procedures to promptly prepare candid, clear and appropriate written reports on audit findings, corrective actions, and schedules for implementation.* Procedures should be in place to ensure that such information is communicated to managers, including facility and corporate management, who can evaluate the information and ensure correction of identified problems. Procedures also should be in place for determining what internal findings are reportable to state or federal agencies.

VII. *A process which includes quality assurance procedures to assure the accuracy and thoroughness of environmental audits.* Quality assurance may be accomplished through supervision, independent internal reviews, external reviews, or a combination of these approaches.

Footnotes to Appendix

(1) A comprehensive assessment of compliance with federal environmental regulations requires an analysis of facility performance against numerous environmental statutes and implementing regulations. These statutes include:

Resource Conservation and Recovery Act
Federal Water Pollution Control Act
Clean Air Act
Hazardous Materials Transportation Act
Toxic Substances Control Act
Comprehensive Environmental Response, Compensation and Liability Act
Safe Drinking Water Act
Federal Insecticide, Fungicide and Rodenticide Act
Marine Protection, Research and Sanctuaries Act
Uranium Mill Tailings Radiation Control Act

In addition, state and local government are likely to have their own environmental laws. Many states have been delegated authority to administer federal programs. Many local governments' building, fire, safety and health codes also have environmental requirements relevant to an audit evaluation.

(2) An environmental audit could go well beyond the type of compliance assessment normally conducted during regulatory inspections, for example, by evaluating policies and practices, regardless of whether they are part of the environmental system or the operating and maintenance procedures. Specifically, audits can evaluate the extent to which systems or procedures:

1. Develop organizational environmental policies which: a. implement regulatory requirements; b. provide management guidance for environmental hazards not specifically addressed in regulations;

2. Train and motivate facility personnel to work in an environmentally-acceptable manner and to understand and comply with government regulations and the entity's environmental policy;

3. Communicate relevant environmental developments expeditiously to facility and other personnel;

4. Communicate effectively with government and the public regarding serious environmental incidents;

5. Require third parties working for, with or on behalf of the organization to follow its environmental procedures;

(7)

6. Make proficient personnel available at all times to carry out environmental (especially emergency) procedures;

7. Incorporate environmental protection into written operating procedures;

8. Apply best management practices and operating procedures, including "good housekeeping" techniques;

9. Institute preventive and corrective maintenance systems to minimize actual and potential environmental harm;

10. Utilize best available process and control technologies;

11. Use most-effective sampling and monitoring techniques, test methods, recordkeeping systems or reporting protocols (beyond minimum legal requirements);

12. Evaluate causes behind any serious environmental incidents and establish procedures to avoid recurrence;

13. Exploit source reduction, recycle and reuse potential wherever practical; and

14. Substitute materials or processes to allow use of the least-hazardous substances feasible.

(3) Auditors could also assess environmental risks and uncertainties.

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various provisions of the Bill of Rights. In fact, the potential clash between federal regulatory schemes in the environmental context and individual constitutional safeguards promises to be a more active area for future judicial attention than the logically prior question of congressional power for at least two reasons. First, the extreme breadth of potential congressional power in this area makes it likely that political rather than constitutional considerations will prove to be the limiting factor in determining the proper federal-state balance, thus avoiding the need to probe judicially the ultimate limits of federal authority. Second, the imposition of governmental controls, whether state or federal, over essentially private activities raises issues that have received a considerably greater degree of respectful judicial attention in recent years than is the case with respect to claims that Congress has invaded areas reserved to the states by the Tenth Amendment. Accordingly, new initiatives in the environmental area that regulate the use of property or impose criminal and civil sanctions on environmentally undesirable conduct are more likely to lead to questions concerning, *e.g.*, the "taking" of property or the observance of required procedural safeguards than to claims that Congress has exceeded enumerated powers.

1. Fourth Amendment issues

A regulatory scheme that imposes minimum standards on certain activities or premises in order to protect public health, safety, or environmental values will usually depend for its success on periodic checks for compliance by appropriate administrative officials. This need for administrative inspection must be accommodated to the provisions of the Fourth Amendment concerning the government's right to conduct searches and seizures.[106] That Amendment has consistently been construed to mean that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."[107] Furthermore, such warrants are not to be issued except "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[108]

The leading Supreme Court decisions construing the application of those two requirements in the case of routine administrative inspections are *Camara v. Municipal Court*[109] and *See v. City of Seattle*.[110] In the former, the Court,

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106 "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV.

107 Camara v. Municipal Court, 387 U.S. 523, 528, 529 (1967).

108 U.S. CONST. amend. IV.

109 387 U.S. 523 (1967).

110 387 U.S. 541 (1967).

overruling an earlier contrary decision,[111] held that the warrant requirement applied to a municipal health inspector's search of a private residence. In *See* a similar conclusion was reached with respect to a fire inspector's attempted search of a commercial warehouse. But while thus extending the warrant requirement, the Court also indicated that a lesser degree of "probable cause" would be required for an administrative search warrant than for the typical criminal search warrant, thus allowing in the former case, *e.g.*, routine, periodic searches of all structures in a given area based on an appraisal of conditions in the area as a whole rather than on a knowledge of conditions in any particular building. The reasonableness of such inspections is to be determined "by balancing the need to search against the invasion which the search entails,"[112] considering such factors as the history of judicial and public acceptance of such inspections, whether inspection is the only reasonable means of abating a dangerous condition of legitimate public concern, and the extent of invasion of the citizen's privacy — the invasion presumably being less where the inspection is "neither personal in nature nor aimed at the discovery of evidence of crime."[113] Specifically excluded from the warrant requirement, however, were traditional "emergency situations;"[114] in addition, the observation that "warrants should normally be sought only after entry is refused" was modified to permit immediate entry in the case of "a citizen complaint, or ... other satisfactory reason,"[115] such as where surprise is crucial.

Although *Camara* and *See* thus establish the basic framework for accommodating inspection needs to Fourth Amendment requirements, three subsequent Supreme Court decisions appear to have expanded somewhat the area of permissible warrantless entries in this context. In *Colonnade Catering Corp. v. United States*[116] the Court interpreted statutes regulating the inspection of federally licensed liquor dealers to preclude forcible entries without a warrant. In the course of its opinion, however, the Court seemed to agree that such entry would not amount to a constitutional violation, distinguishing *See* on the basis of the historically broad authority of the government to regulate the liquor industry.

In *Wyman v. James*[117] the Court upheld warrantless home "visits" by welfare workers on the grounds that such visits were not "searches" and that even if they were, the absence of a warrant did not make them "unreasonable." *Camara* was distinguished in reaching the latter conclusion primarily on

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111 Frank v. Maryland, 359 U.S. 360 (1959).
112 Camara v. Municipal Court, 387 U.S. at 537.
113 *Id.*
114 *See Id.*, at 539.
115 *Id.* at 539, 40.
116 397 U.S. 72 (1970).
117 400 U.S. 309 (1971).

the basis of the community welfare, rather than criminal, context of the home visitations. Finally, in *United States v. Biswell*,[118] the Court upheld a warrantless search of a locked storeroom under provisions of the Gun Control Act that authorized official entry during business hours for the purpose of conducting inspections of federally licensed dealers in firearms. While conceding that federal regulation of the firearms industry was not as deeply rooted in history as was control of the liquor industry in *Colonnade*, the Court nevertheless refused to extend *See* primarily on the ground that warrantless inspections were essential to the effective enforcement of the regulatory scheme. In *See*, the Court observed, the building code violations that the inspection was designed to discover could not easily be corrected or concealed in a short time. "Periodic inspection sufficed, and inspection warrants could be required and privacy given a measure of protection with little if any threat to the effectiveness of the inspection system ...."[119] In the case of firearms, on the other hand, unannounced, even frequent inspections were crucial to the success of the system: "and if the necessary flexibility as to time, scope, and frequency is to be preserved, then the protection afforded by a warrant would be negligible."[120] Other factors leading to this result were the "urgent" nature of the federal interest, and the limited threat to "the dealers' justifiable expectations of privacy":

> When a dealer chooses to engage in this pervasively regulated business and to accept a Federal license, he does so with the knowledge that his business records, firearms and ammunition will be subject to effective inspection.[121]

These decisions become particularly relevant in the environmental context in view of the extensive reliance of existing and proposed federal pollution control schemes on an adequate system of inspection. The Clean Air Act, for example, bluntly declares that in order to implement and enforce the requirements of the Act appropriate officials:

> shall have a right of entry to, upon, or through any premises in which an emission source is located ... [and] may at reasonable times have access to and ... inspect any monitoring equipment or method ... and sample any emissions ... [122]

Virtually identical provisions are contained in the recently enacted Federal Water Pollution Control Act Amendments of 1972.[123] In both cases, questions of the need to secure a warrant and of the grounds that will support entry are

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118 406 U.S. 311 (1972).

119 *Id.* at 316.

120 *Id.*

121 *Id.*

122 42 U.S.C. §1857c-9(a)(2) (1970). ELR 41210.

123 §308(a)(B), 33 U.S.C. §1318 (Supp. 1973). ELR 41114.

apparently left for subsequent judicial resolution.[124]

The latter issue — whether "administrative probable cause" will support routine inspections in the environmental area — should, it seems, be answered in the affirmative by comparison with the factors referred to as decisive in this respect in *Camara* and *See*. Historically, perhaps, routine pollution inspections have not been as traditional as inspections for housing and safety code violations. But if construed broadly enough, one can view the former type of inspection as simply a modern version and recently recognized species of the latter. Moreover, the court's retreat in *Biswell* from *Colonnade's* emphasis on history as crucial to the Fourth Amendment inquiry, suggests that this factor should not be decisive in any event. With respect to the other factors, the urgency of the federal interest, the limited nature of the invasion, and the need

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124 In contrast, the new Federal Environmental Pesticide Control Act of 1972, 86 Stat. 973 (codified in scattered sections of 7,15,21 U.S.C.), ELR 41301, after authorizing entry by appropriate officials at "reasonable times" and "for the purpose of inspecting and obtaining samples," proceeds to describe in somewhat more detail the procedures to be followed in exercising this right of entry. "Before undertaking such inspection" according to §9(a), the official:

> must present to the owner, operator, or other agent in charge of the establishment . . . appropriate credentials and a written statement . . . as to whether a violation of the law is suspected. If no violation is suspected, an alternate and sufficient reason shall be given in writing.

The immediately following subsection discusses "warrants" but only to the extent of declaring that officials are "empowered" to obtain such documents authorizing entry, inspection, and seizure "upon a showing to an officer or court of competent jurisdiction that there is reason to believe that the provisions of the Act have been violated."

As an attempt to integrate Fourth Amendment requirements with the special needs of an administrative inspection system, these provisions leave a great deal to be desired. In the first place, the standard employed in §9(b) for securing a warrant does not appear distinguishable from the traditional "probable cause" standard which would be applicable in any normal context. *See* Carroll v. United States, 267 U.S. 132 (1925). ("Probable cause exists where the facts and circumstances within [the officers'] knowledge and over which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.) Thus if §9(b) were interpreted as more than simply an enabling provision, conferring search power on certain officers and employees of EPA, one might conclude that Congress has erected higher standards here than would have been required by the Fourth Amendment: whenever a warrant is necessary, it can only be issued on a showing of probable cause, and not on the lesser showing that would traditionally justify routine inspections as in *Camara* and *See*. Under this view, it becomes all the more important to ascertain just when inspections must be preceded by warrants.

for periodic routine inspection do not seem distinguishable from the situations in *Camara* and *See*.[125]

The more difficult issue is whether *Biswell* should be viewed as substantially modifying the result in *See* with respect to the need to secure a warrant at all. The factors emphasized in *Biswell* to justify the warrantless search — the urgent (or historical) federal interest, the limited nature of the invasion, and the necessity for random inspections — seem to be the same factors relied on in *See* but only to justify a less than traditional showing of probable cause and not to dispense with the warrant requirement altogether. Explanation for the difference in result seems to lie in the fact that what in *See* appeared to be only an occasional possibility — resort to unannounced surprise inspections — appeared in *Biswell* to be a frequent and vital element of effective enforcement.[126] Under this view, the critical factor determining the applicability of the warrant requirement in the environmental context becomes the question of whether frequent, unannounced inspections are essential to effective enforcement of the pollution control scheme. If they are, then as in *Biswell*, requiring prior recourse to such "routine warrants" seems unlikely to result in sufficient additional protection of privacy to make the warrant essential to the "reasonableness" of the search under the Fourth Amendment.

Application of this general test appears very much to depend on the particular kind of pollution control scheme at issue. For example, where the inspection is not random, but is aimed at a particular polluter whose emission into the air or discharges into the water can be measured by an external observer, it seems quite likely that the traditional standard of probable cause to suspect a violation may be met and thus ought to withstand prior judicial testing under a normal warrant procedure. At the other extreme, it is possible that pollution control schemes, *e.g.*, a system of effluent charges which depends on reliable self-monitoring by the affected polluter, can be enforced only by random and frequent inspections. Whether such inspections must also occur unannounced depends on the ease with which the polluter, in the short period following a refusal to permit the search and the securing of a warrant, can remedy the unlawful pollution practice or disguise tampering with self-monitoring equipment.[127]

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125 *See* Note, *The Effluent Fee Approach For Controlling Air Pollution*, 1970 DUKE L. J. 943, 975-76.

126 *See* text accompanying note 120, *supra*. For a review of this apparent exception as employed by lower courts since *Camara* and *See*, *see* Note, *Law of Administrative Inspections: Are Camara and See Still Alive and Well*, 1972 WASH. U.L.Q. 313.

127 For further discussion of these possibilities *see* Comment, *Camara and See: A Constitutional Problem with Effect on Air Pollution Control*, 10 ARIZ. L. REV. 120 (1968); Note, *supra* note 125 at 943. A variety of pollution control schemes appear to require random and even unannounced inspections, although it is not clear that they must be so frequent that prior resort to a warrant where surprise is crucial

According to this analysis, the focus of the constitutional inquiry in this area will be very much on the particular regulatory scheme at issue. Since it is not always easy for a court to draw the necessary factual conclusions from an inspection of the substantive provisions of the statute alone, one might expect this field to become increasingly a matter for congressional attention as reflected in the "findings" relied on to support a particular enforcement system. Indeed in both *Colonnade* and *Biswell*, the Court virtually extended an invitation to Congress to define for itself the requirements of "reasonableness" as regards administrative inspections, with the Court impliedly playing a more limited reviewing role in measuring the congressional determination against the demands of the Fourth Amendment. The provisions of the new pesticide legislation which require written notice of the purpose of the inspection[128] might, for example, be viewed as just such an attempt to strike a legislative balance between the privacy interests of the owner of the establishment and the enforcement interests of the Government. But this emphasis on an increased congressional role also suggests a possible counterpresumption to protect the interests that underlie *Camara* and *See:* where Congress has not attempted explicitly to set reasonable boundaries to the situations calling for warrantless inspections, and where the facts of the inspection do not otherwise clearly indicate that the warrant requirement would frustrate enforcement, *Camara* and *See* should be viewed as controlling.

2. Fifth Amendment (self-incrimination) issues

In addition to inspection schemes, the effectiveness of governmental regulation of private or commercial activity often depends on the ability to impose record keeping and reporting requirements on those subject to the regulation. Environmental legislation is no exception in this respect, as evidenced by the very similar provisions in both the Clean Air Act and the new amendments to the Federal Water Pollution Control Act, authorizing the administrator of EPA to:

> require the owner or operator of any [emission or point] source to [1] establish and maintain such records, [2] make such reports ..., and [5] provide such other information as he may reasonably require ...[129]

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would frustrate the system. Inspection to ensure that pesticides stored for commercial distribution comply with labeling and use restrictions, for example, seem similar in concept to inspections that have long been conducted under various provisions of the Food and Drug Acts. *See, e.g.*, United States v. Stanack Sales Co., 387 F.2d 849 (3d Cir. 1968); *cf.*, United States v. Ottimart, Inc., 429 F.2d 1006 (9th Cir. 1970), *cert. denied*, 400 U.S. 926 (1970).

128 *See* note 124, *supra*.

129 *See* Clean Air Act, 42 U.S.C. §1857c-9(a)(1) (1970), ELR 41210; FWPCA §308(a), 33 U.S.C. §1388 (Supp. 1973), ELR 41114.

INTERNATIONAL

OIL TAX COMPARISON

STUDY

Prepared for

the Alaska State Legislature

and

the Alaska Department of Revenue

April 1990

INTERNATIONAL

OIL TAX COMPARISON

STUDY

PART I THE ECONOMIC ANALYSIS: ALASKA, UNITED KINGDOM, NORWAY, INDONESIA, & AUSTRALIA

by

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PART II FINANCIAL AND OTHER ASPECTS OF OIL INDUSTRY INVESTMENT

by

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INTERNATIONAL TAX COMPARISON STUDY

Prepared for

THE STATE OF ALASKA

AUPEC

Aberdeen University Petroleum
and Economic Consultants

GCA

Gaffney, Cline and Associates

April, 1990

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INTRODUCTION

The State of Alaska has undertaken a project to develop a model that will enable the State to compare the climate for investment in Alaska vis-a-vis other oil and gas provinces.

In the past few years a controversy has arisen between the oil industry and the State of Alaska. The Industry believes that its investors are not receiving a rate of return commensurate with the risks inherent in the exploration and development of new and existing fields. The State of Alaska contends that it is incumbent upon the State to pursue an aggressive oil royalty and taxation policy. The development of a comparative model is desired to increase the reliability of information available to the Alaska Legislature for use in the decision-making process in legislation on oil taxation.

The work was carried out under the aegis of a joint Senate/House Committee under the chairmanship of Senator Bettye Fahrenkamp. The consultants were selected in such a way as to represent a broad spread of expertise in the industry. Meetings were held with the Committee in Anchorage in November and in Juneau in January, at which the key questions raised by the Committee at their initial internal deliberations were addressed at some length. During the meetings and after subsequent work by the consultants the scope of the consultants' work was adjusted slightly to incorporate carrying out the actual tax comparisons in conjunction with the Revenue Department.

Four key Alaskan fields were chosen. It was decided to model historical Prudhoe Bay as well as to forecast its performance, together with hypothetical developments at the West Sak, North Star and Niakuk discoveries. The performance of an incremental project at Prudhoe Bay was also examined.

In addition to meetings with the Committee, extensive discussions were held with the Revenue Department and various tax models from other jurisdictions were made available. The Revenue Department prepared the four field economic cases under the Alaskan legislation and worked with the consultants to ensure the model would provide a framework for future ongoing work by the Department. Legislative comparisons were made with the UK, Norway, Indonesia and Australia. The study was carried out by, in effect, translating these four legislations to Alaska and examining the economic performance of the Alaskan fields as though that legislation had been in place

in Alaska. The models used included provisions to examine, among other things sensitivity to oil price, costs, exploration programs, and differences between current and new investors.

The State of Alaska has requested the consultancy Gaffney Cline and Associates (GCA), in co-operation with AUPEC (Aberdeen University Petroleum and Economic Consultants), and Dr. Motamen Scobie, Economic Consultant, to prepare a report covering the methodology and results of the comparative modelling.

The division of work was as follows:

AUPEC Group

Professor Alex Kemp and David Rose, AUPEC, carried out the cashflow/country model computer runs.

GCA

GCA was to be an arbitrator of fairness in the analysis and be responsible for the reporting and also for the inclusion of the prospectivity analysis.

AUPEC and GCA worked together to select relevant criteria and to assess the validity of comparisons.

Dr. Motamen Scobie

Dr. Motamen Scobie was to examine the financial aspects of comparative legislation in terms of investor credibility, and was to review other legislations not included in the current group. Dr. Motamen's work is the subject of a separate presentation.

Department of Revenue

The oil group of the Department of Revenue carried out the historical and forecast assessment of the Prudhoe Bay field together with forecasting the performance under Alaskan legislation of the three new Alaskan fields which were to be considered. All base data for the Alaskan modelling were provided by the Department, and the

Department worked with the Consultants to ensure a compatible and appropriate comparison. The basic field data provided by the Department provided the base data for the comparisons.

A draft report was presented in mid March to the Committee and at separate meetings to the Senate Finance and House Finance Committees in addition to a discussion with Industry.

Although the industry was most helpful in general no direct information regarding for instance specific development plans or allocated exploration expense or their appropriateness was made available directly to consultants in time to be incorporated.

The following presentation reflects the work of AUPEC and GCA in this phase of the study. It was not the intention of these comparisons to mirror the industry's exact performance as each company will handle its tax arrangements differently and they will, indeed, be in a different position. The attempt was to try and compare on a "reasonably level playing field" how particular projects would have looked if they had been carried out in Alaska under different tax legislation environments.

Insufficient time was available to adequately cross check the material validity of the hypothetical development plans or to assess the impact of a realistic incremental project on Prudhoe Bay. With the current results to hand it would also be prudent to ensure that the base case Alaska cashflow analysis was also carried out under the same identical system as the comparison fields to ensure more complete compatibility. In these senses the work should be considered preliminary.

Nevertheless recognising that the original objective of this work was to set up a 'model' with which to make comparisons, a basic approach has been selected, models made available and a first pass of comparisons carried out.

Acknowledgements

The not inconsiderable help of the Revenue Department in Anchorage, the Revenue Commissioner's Office in Juneau and the Committee members and their staff is acknowledged. We are also grateful for material provided by industry and the opportunity to see the North Slope operations on site. No multiple organisation operation of this type works without cooperation and the cooperation provided by both State and Industry made possible the completion of this study.

SUMMARY OF RESULTS

Broad comparisons are possible and useful. While these comparisons show that both the State and the companies did well from Prudhoe Bay they do not necessarily suggest that the State could have done much better as the returns under all the other legislatic- which were not designed for a Prudhoe Bay sized field appear punitive.

The comparisons do show the new projects on the North Slope are marginal especially if sunk exploration costs are included. These projects look better especially under the U.K. and Norwegian systems, of course, the field sizes are more in line with the size of fields more typical of the North Sea region, so these comparisons are reasonable.

Being a current investor helps substantially and all the new projects look much worse from a new player's point of view.

It is important to stress that unlike other countries Alaska is disadvantaged as it only controls a part of total taxation and gains only very indirectly from employment, services and manufacture occurring in the lower 48.

In examining the many subjective perceptions that drive investments in the industry, it is clear that Alaska's image is one of being more difficult in many respects than the other countries concerned. Indeed the perceptions are reinforced by the results of the new projects mentioned above.

In summary we have answered a number of the initial questions raised by the committee including the usefulness and methodology of making some comparisons.

We have provided a framework for comparison and provided model capability. The first phase of model comparisons has been completed and some comments on the Alaskan legislation relative to other legislations have been made. Some observations have also been made on how in very general terms it might be possible to achieve one or more of a series of potential goals if these goals were indeed the State's objectives.

RESULTS OF COMPARISONS

Method of Approach

In order to present effectively and concisely the results of what amounts to a large volume of information, it has been necessary to adopt a summary approach in the following presentation. Full details of the economic analysis have been made available to the Department of Revenue. Essentially the key comparative components are shown on the attached graphs with a brief written summary of the results.

The basic analysis has consisted of establishing the value of each project by calculating the Net Present Value (NPV) on a 12.5% real basis (17% nominal), a measure of the size of each project in each country. This was carried out for both the company and government share.

Among other factors considered were:

Internal Rate of Return (IRR), a relative measure of return on investment, typically we would expect projects to stand some chance of proceeding if rates of return were at least 10% (real) or about 15% nominal.

Payout from initial development, a measure of how long the total funds were exposed.

Prospectivity, a series of very subjective judgements on the relative attraction of a Country for investment.

In addition, the sensitivity to changes in oil price, costs and the impact of exploration costs were also examined together with the effect of being a new investor as apposed to an existing one with tax sheltering capability.

The base case factors were as follows: real discount rate 12.5% (equivalent to a 17% nominal rate), oil prices US$14.50 per barrel for Prudhoe wellhead, prices adjusted for quality and transportation for other fields, and inflation of 4.5% p.a. The base case also assumed an existing investor and takes account of some of the allocatable sunk past exploration costs. The Prudhoe Bay field was examined through its history and appropriate inflation rates were used for the prior period.

Net Present Value (NPV)

Net Present Value is an approach to illustrating the worth of a project after taking into account the time value of money. Typically the oil industry uses this approach to get a true idea of the value of the project and to compare the project with others. In carrying out our analysis we first brought past costs forward, using the US inflation rates of the day, so that $1,000 spent 10 years ago in a particular country might represent the equivalent of $2,000 today. Similarly, in examining future income, $1,000 received ten years hence might be worth only $500 today.

Next, we have to discount the stream of net income - to allow comparisons with other projects and give a yardstick as to how far above or below we are from our minimum return. The discounts applied to obtain Net Present Value in oil are commonly in the range of ten to fifteen percent above inflation. However, from time to time, financial institutions, in particular, may use higher percentage discounts in order to try and use the discounting approach to assess some sort of project related risk. For our purposes we have chosen a medium 12.5% real discount rate (i.e. 17% if there is 4.5% inflation) for the base case valuations but have also examined the projects at discounts of 10% and 15% in the detailed results which have been made available.

It is also clear that even a very large project which is carried out long into the future and evaluated with a high discount rate might have a very low Net Present Value. On the other hand a very small successful project occurring in the near future and evaluated perhaps with the same discount rate might appear to be a much more attractive project.

Net Present Value is a good indicator of project size but it in fact gives no indication of duration. Project payout on the other hand is a good indication of how long funds are at risk from the point of major investment but gives no indication of return on investment or project size. Rate of Return gives an indication of project success but no indication of timing or size.

While there are many performance criteria we can use in the interests of simplifying the results, we have limited our analysis to comparing the government and company Net Present Values, in real dollars, Internal Rate of Return in % terms and payout in years for each field, for each of the five legislative scenarios.

In order to present the most meaningful comparisons on the graph, anomalously high values have been capped. This is shown by the value of the bar being fully extended to the margin of the graph at its maximum or minimum value.

Company Net Present Value (NPV at 12.5%) Results

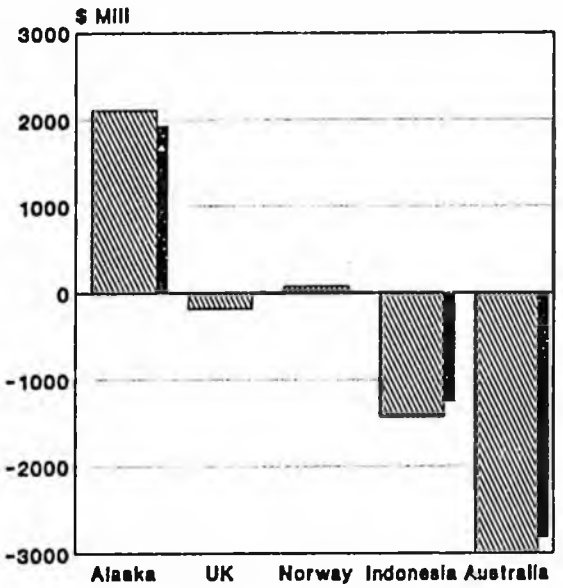
Company NPV for Prudhoe Bay is higher under the Alaskan legislation than under any others but it is unlikely that development could have proceeded under the Indonesian and Australian legislations. Note that this analysis looks at Prudhoe Bay as of 1975 - all other analysis uses 1990.

The remaining Net Present Value of Prudhoe Bay was also examined under each legislation in 1990 terms. This remaining NPV analysis does not include all likely necessary new investments typical of such situations and probably overstates the company position.

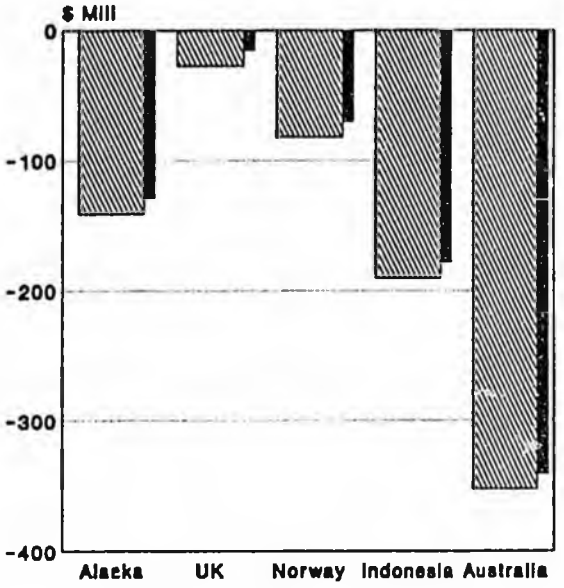
The remaining Prudhoe Bay Net Present Value is shown separately comparing government and company shares at zero discount and at the standard 12.5%. On the bar chart showing the relatively high remaining U.K. government NPV it must be remembered that while the marginal tax rate is very high, the U.K. allows offset of very significant exploration and some development costs against current production taxes.

For the other three fields only Niakuk in the U.K. appears positive, indeed all three fields would do better under both U.K. and Norwegian legislation. The high front end exploration and the low effective oil price make these projects all look unsuccessful under Indonesian and Australian legislation as these legislations are particularly geared to higher oil price regimes. Removing exploration costs, of course, makes all three projects look better and indeed viable in the model cases under some legislations.

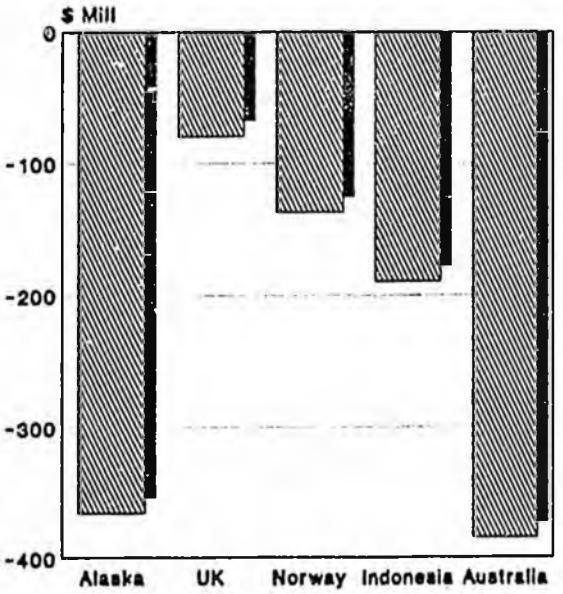
COMPANY NPV $ REAL
Prudhoe Bay
Base Case at 12.5%



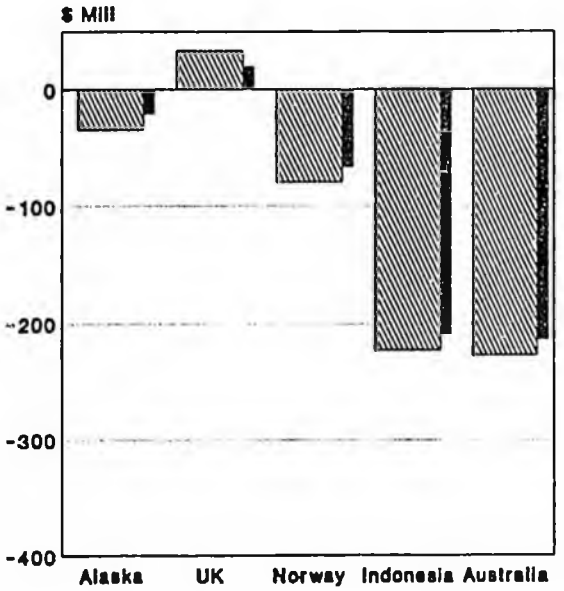
COMPANY NPV $ REAL
West Sak
Base Case at 12.5%



COMPANY NPV $ REAL
North Star
Base Case at 12.5%



COMPANY NPV $ REAL
Niakuk
Base Case at 12.5%



Government Net Present Value (NPV at 12.5%) Results

Prudhoe Bay

Apart from Australia where the revenues would have been so high as to negate the project, Alaska appears to have received somewhat less present value from the project than if the project had been under the other three legislations. Timing of revenues affects this type of analysis as funds received later will be worth less when present valued back to 1975 as was done in this case. Note that Prudhoe Bay government NPV shows the split between State and Federal taxes.

West Sak

Government NPV's look good in all cases except U.K. but the project is marginal from an investment point of view.

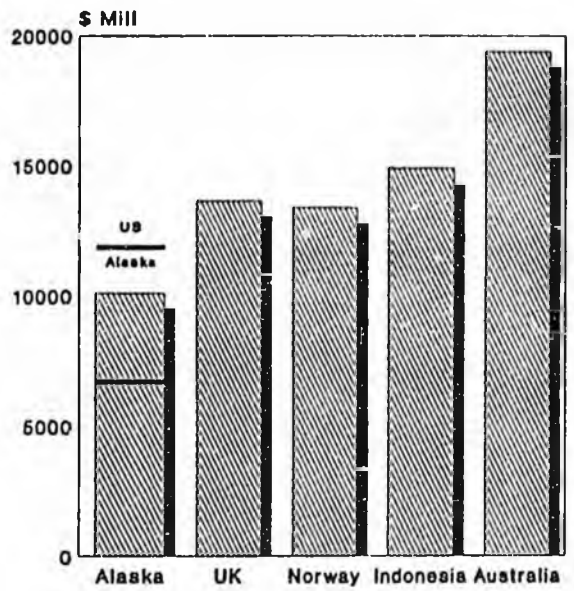
North Star

This project which is marginal appears to have a positive government NPV only in Alaska suggesting that, by comparison, it would be treated more favourable elsewhere.

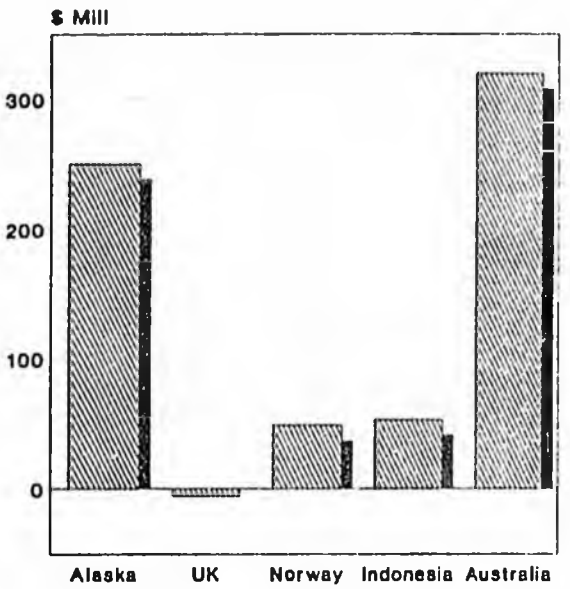
Niakuk

As in North Star, Alaska government's NPVs are much higher and indeed positive.

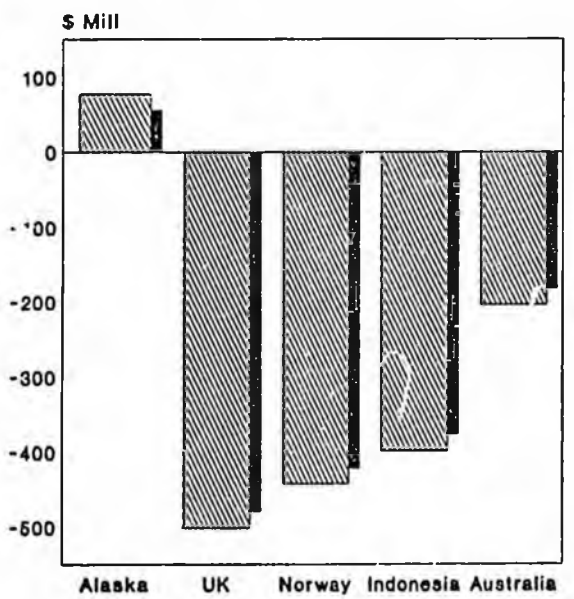
GOVERNMENT NPV $ REAL
Prudhoe Bay
Base Case at 12.5%



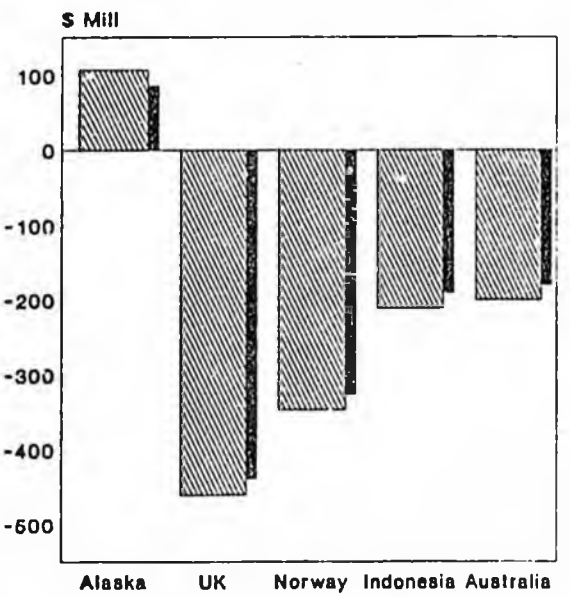
GOVERNMENT NPV $ REAL
West Sak
Base Case at 12.5%



GOVERNMENT NPV $ REAL
North Star
Base Case at 12.5%



GOVERNMENT NPV $ REAL
Niakuk
Base Case at 12.5%



Company and Government Prudhoe Bay NPV and Government Take - Various Discounts

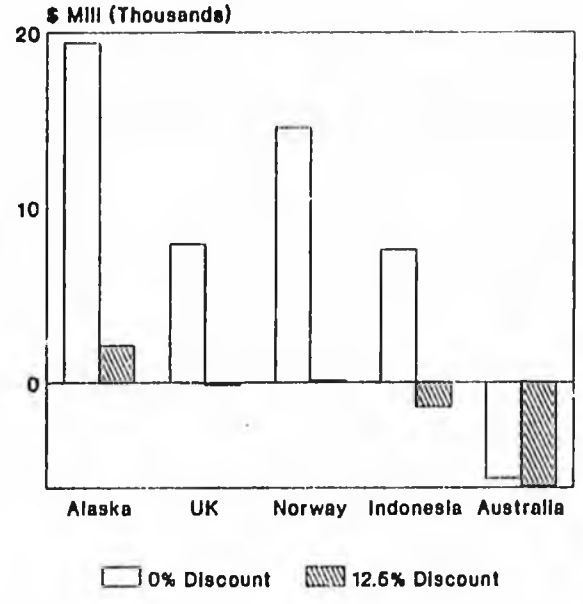
The following charts illustrate Prudhoe Bay Net Present Value from a government and company view based on different discount rates.

The government chart also shows the split between State and Federal taxes for Prudhoe Bay.

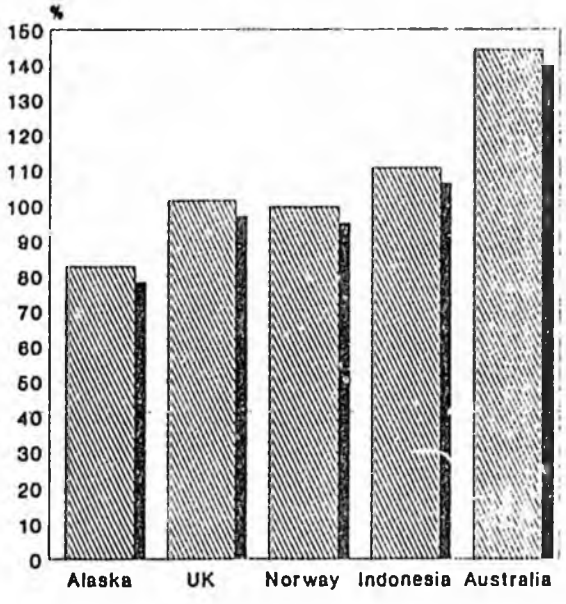
The government take chart shows the percentage government take for Prudhoe Bay over and above a 12.5% discount.

In Alaska this is just over 80% rising to over 100% for the other legislations. In other words this represents the percentage of what is referred to as the Economic Rent which is taken by the government. It can be seen that at 12.5% the take would be unreasonably high in all other countries giving grounds to the concept that their legislation was not geared to a Prudhoe Bay field.

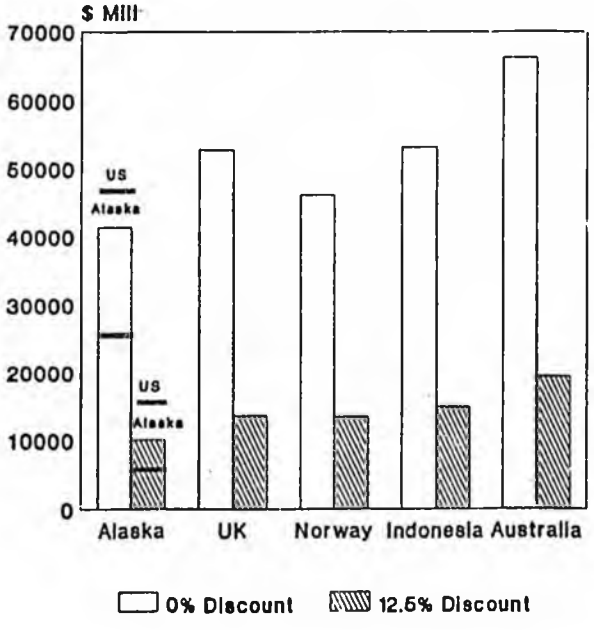
COMPANY NPV $ REAL
Prudhoe Bay
Base Case Varying Discount



GOVERNMENT TAKE %
Prudhoe Bay
Base Case at 12.5%



GOVERNMENT NPV $ REAL
Prudhoe Bay
Base Case Varying Discount

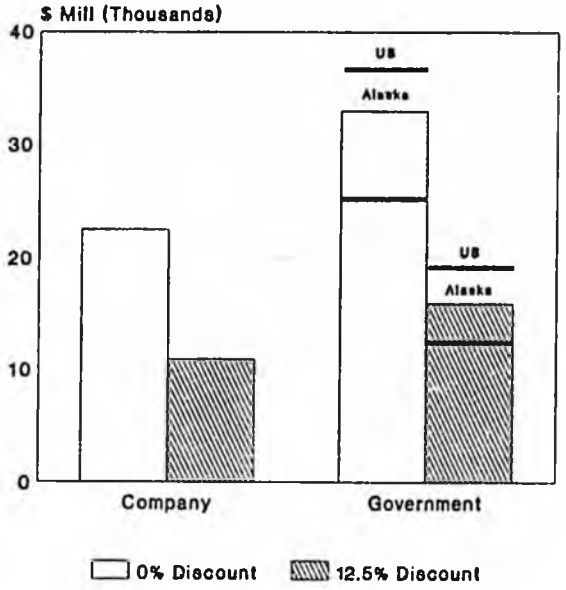


Prudhoe Bay Remaining Net Present Value (1990)

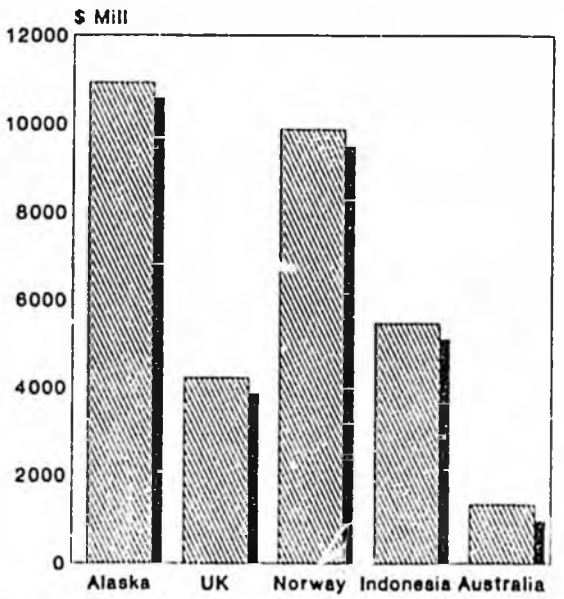
The remaining Net Present Value of Prudhoe Bay was also examined under each legislation in 1990 terms. This remaining NPV analysis does not include all likely necessary new investments typical of such situations and probably overstates the company position.

The remaining Prudhoe Bay Net Present Value is shown separately comparing government and company shares at zero discount and at the standard 12.5%. On the bar chart showing the relatively high remaining U.K. government NPV it must be remembered that while the marginal tax rate is very high, the U.K. allows offset of very significant exploration and some development costs against current production taxes.

REMAINING NPV COMP+GOV
Prudhoe Bay- Alaska
Base 1990$ Varying Discount



REMAINING NPV COMPANY
Prudhoe Bay
Base Case 1990 $ at 12.5%



Rate of Return (ROR) and Internal Rate of Return (IRR)

These are measures, typically quoted as percentages, of the amount of the investment which is recovered on an annual basis. Thus if we invest $100 and get $10 back within a year this might be referred to as a 10% return.

Internal Rate of Return is more typically used in the oil industry. It is the percentage rate of return which could still be achieved if the project was to only break even, i.e. the rate of return at which the Net Present Value (NPV) of a project is zero. Rates of Return are excellent comparative tools but they give no indication of size or duration of the project. Thus a very small investment with a correspondingly small Net Present Value might have a very high Rate of Return. Correspondingly, a very large project with a very large NPV could also have a very small Rate of Return. It is important to stress that these performance measures cannot be considered in isolation, and a series of the various project performance tools must be used.

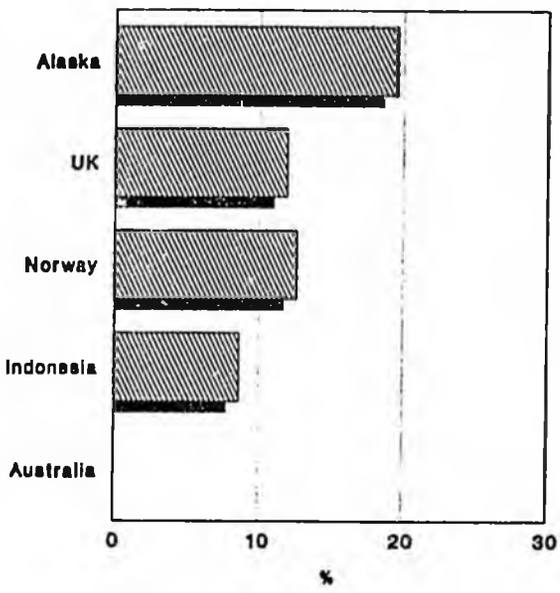
For rate or return purposes, only positive Internal Rate of Return (IRR) values were shown so that the lowest value in the rate of return is zero. Negative IRR values can be misleading.

Internal Rate of Return Results

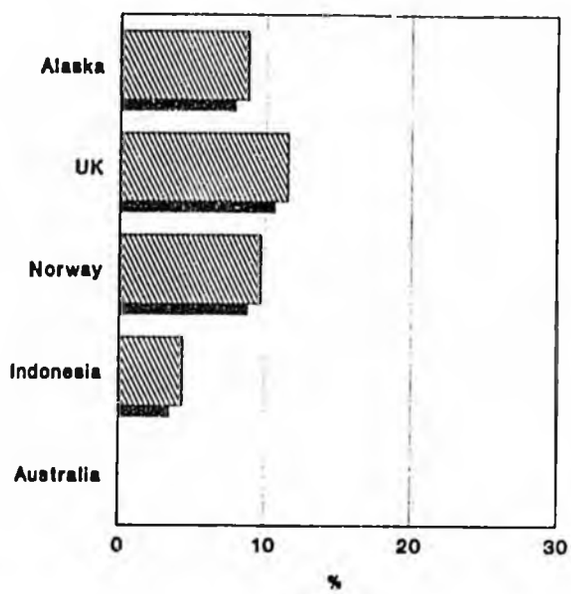
Prudhoe Bay IRR% is higher in Alaska than in all the other countries. This is partially so because other countries tightened their legislation significantly as prices rose in the late Seventies/early Eighties. Indeed the U.K. was at its most aggressive with high rate Petroleum Revenue Tax (PRT), Supplimental Petroleum Duty (SPD) and Advanced Petroleum Revenue Tax (APRT) payments all occurring in the late Seventies and adversely affecting the early production of Prudhoe Bay under that simulated legislation.

All three new fields look better under U.K. legislation, while North Star only has a positive rate of return under U.K. and Norwegian legislations.

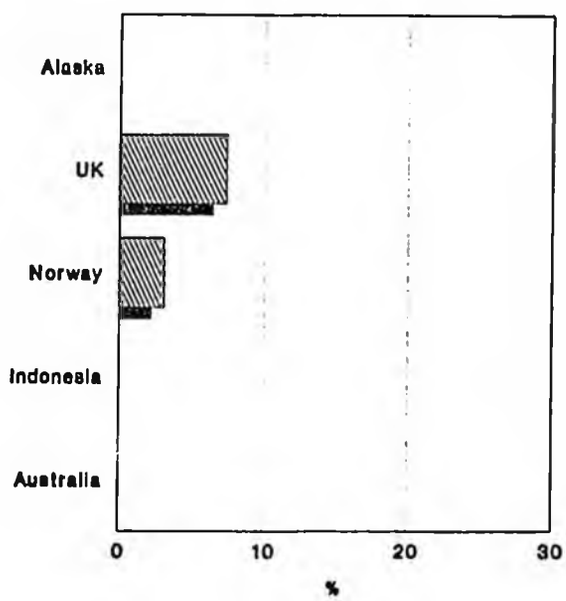
COMPANY IRR % REAL
Prudhoe Bay
Base Case



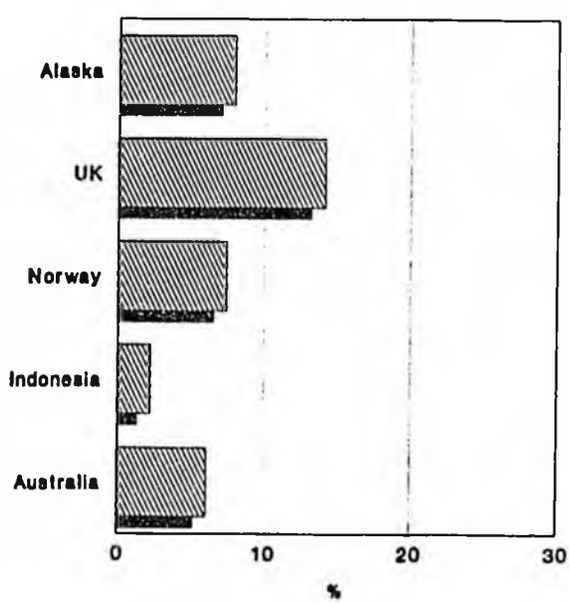
COMPANY IRR % REAL
West Sak
Base Case



COMPANY IRR % REAL
North Star
Base Case



COMPANY IRR % REAL
Niakuk
Base Case



Years to Payout

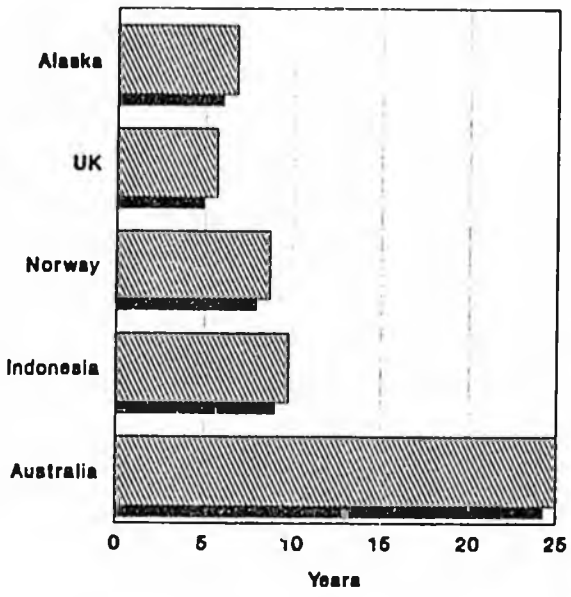
This is defined as the time required to recover the original investment including a full exploration program.

How soon payout was achieved from the beginning of each of the projects at the development stage was examined. It should be noted that payout, of course, would take rather longer if the period from the beginning of the exploration stage had been taken; but payout as calculated does incorporate repayment of the inflation- adjusted exploration costs no matter how long ago they had been expended.

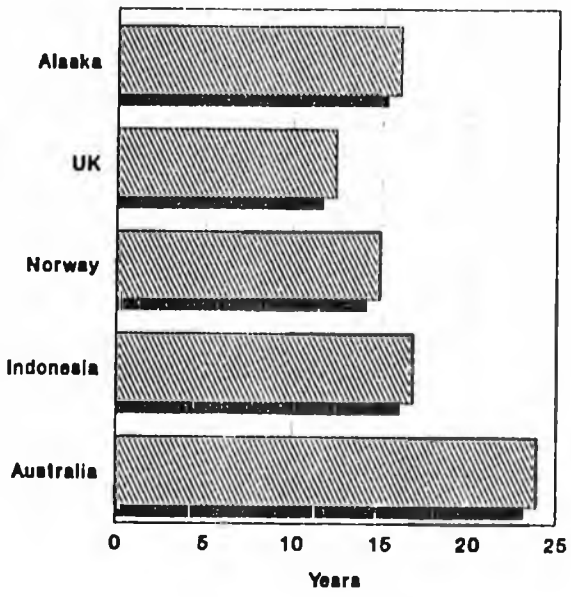
Years to Payout Results

Prudhoe Bay would have paid out sooner under U.K. legislation but Alaska, Norway and Indonesia were all of the same order of magnitude. North Star and Niakuk payout earlier under U.K. legislation.

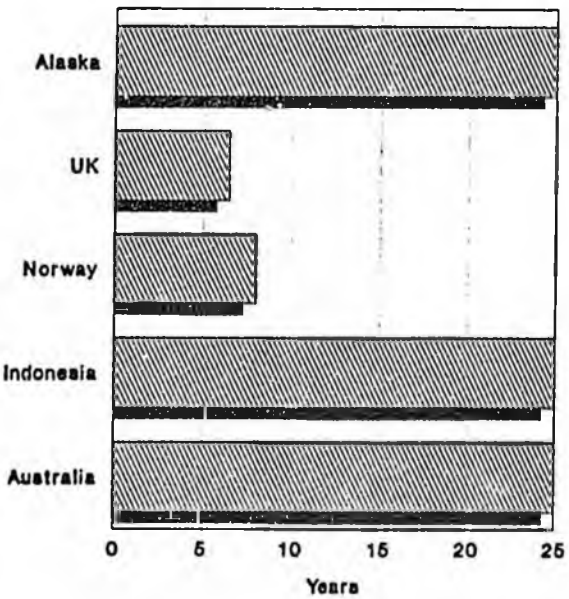
YEARS TO PAYOUT
Prudhoe Bay
Base Case



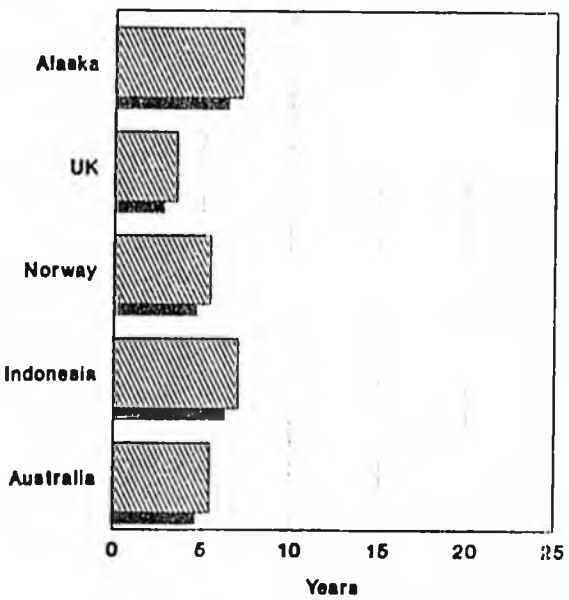
YEARS TO PAYOUT
West Sak
Base Case



YEARS TO PAYOUT
North Star
Base Case



YEARS TO PAYOUT
Niakuk
Base Case



Net Present Value for Incremental Prudhoe Bay Project

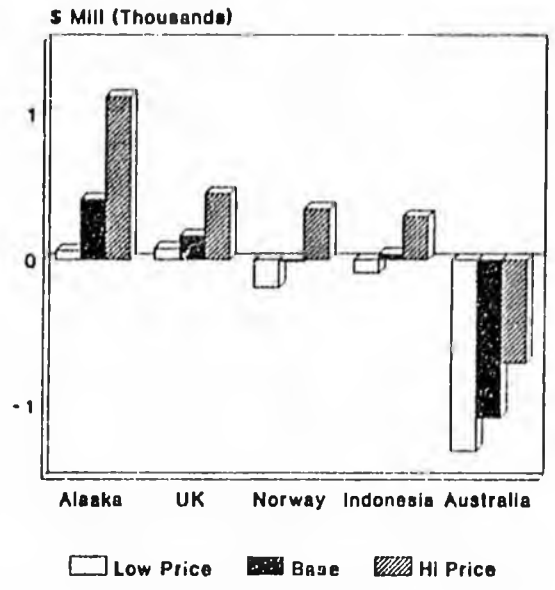
We have examined for Prudhoe Bay, in each legislative scenario, the impact of a late-life incremental project (i.e. additional reserves, additional revenues and additional costs) on the Net Present Value of the overall project.

Net Present Value for Incremental Project Results

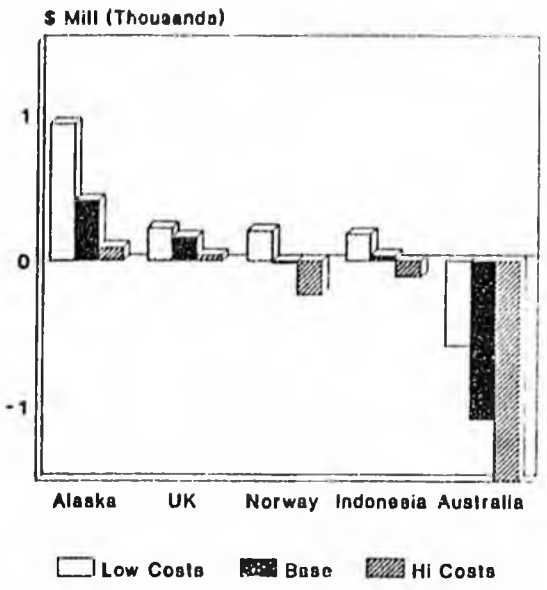
The incremental project (Hurl State Analogy) looks better under Alaska legislation than it does under any of the others.

However, this incremental project was a Hurl State Analog and insufficient time was available to evaluate its appropriateness as an incremental project. Indeed it is clear that it does not adequately simulate some likely aspects of typical late life field investments and costs.

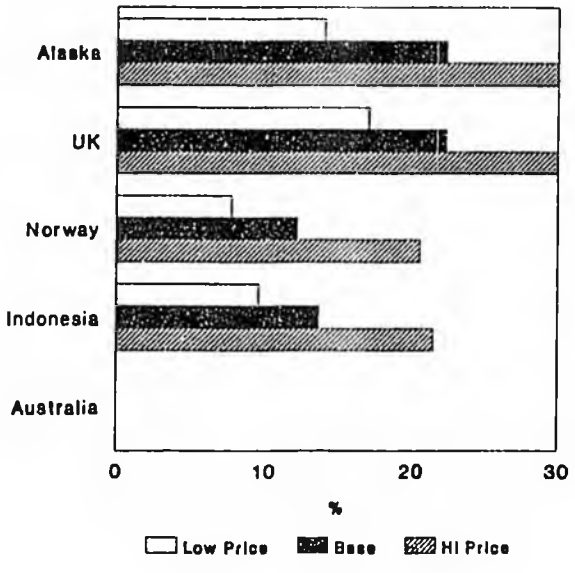
COMPANY NPV $ REAL
Prudhoe Bay Increment
Sensitivity to Oil Price



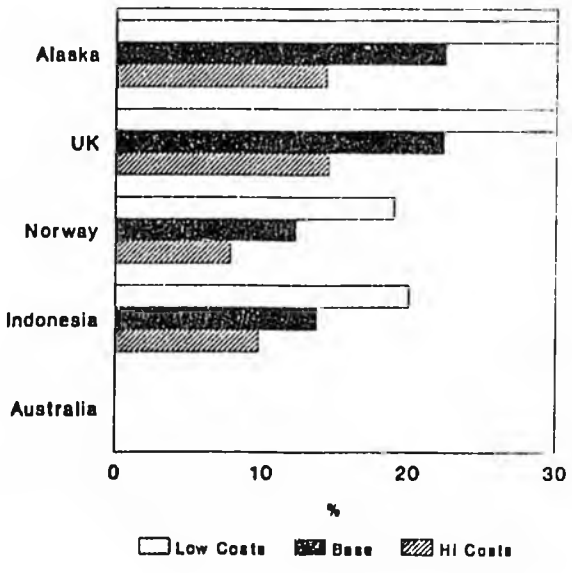
COMPANY NPV $ REAL
Prudhoe Bay Increment
Sensitivity to Costs



COMPANY IRR % REAL
Prudhoe Bay Increment
Sensitivity to Oil Price



COMPANY IRR % REAL
Prudhoe Bay Increment
Sensitivity to Costs



Prospectivity

It is well recognised within the industry that decisions are made on the basis of more than just the previously mentioned economic criteria. It is the combination of criteria that allows proper assessment of the opportunity. No one company at any one time will be driven by the same influences or use the same performance yardsticks yet, from time to time, the industry as a whole may rush to a new or revitalised area, for instance, offshore China in the early 1980s.

Companies which want to invest in exploration have to perceive that the geological prospects are good and that the combination of resources and technology available to them make it possible for them to expect economic success.

Included among the key criteria in what we might generally call prospectivity is the perception of how good the geological prospects are, the size of those prospects, the logistics, costs, legislative and political environment, the time to do a deal, the time to get on production, the market, and what we might generally describe as the hassle factor. Of course, in addition to these are the availability of capital within the company and issues of pricing and costs which are largely taken care of in the economic analysis.

In reviewing the prospectivity charts one must accept that this is a subjective judgement made at a precise moment. Such an assessment will vary with time, with company, with prospect and with opportunity levels. The charts are given solely to give an idea of some of the factors which have a very real bearing on initial and reinvestments.

<u>Geology</u>

The geological prospects for oil or gas have to be reasonable.

<u>Field or Opportunity Size</u>

Large companies will rarely look in areas where the potential field size is very small. They have limited staff resources and their way of doing business is such that their costs will form too high a burden on small fields. For any given area the geological prospectivity will suggest the types of field sizes which might be possible. These field sizes

have to be large enough in the particular logistical and economic climate to be viable for the type and size of organisation that is investing in them.

Logistics

Difficult logistics, for instance in transport, environment, the lack of existing pipelines or a simple method of extracting the crude, will dictate that much larger fields have to be found to make the ultimate project viable. In such situations, longer periods of time are necessary and hence exploration funds are exposed at risk for a longer period. Poor logistics in combination with other marginal factors can lead to a company deciding not to invest. Good logistical factors are a major plus, for instance, in many parts of the North Sea.

Costs

There will be a perception of costs in each particular area. Major variations will depend among other factors upon the logistics, environment and the nature and depth of the potential prospects. If the operation is perceived extremely costly then naturally one has to be looking for larger fields. To the extent that costs are high this will tend to mitigate against the involvement of smaller, less adequately financed concerns and favour larger companies who can handle major longer term expenditures.

Legislative and Political Risk

Legislative and political risk is mainly a perception of potential change which might affect the company's ability to recover an investment. If the prospects and economic returns look good the industry frequently takes on board what are huge risks, investing in volatile legislative scenarios and where there may be very real potential risk exposure.

Time to Do a Deal

To many companies an important aspect is their perception of whether it would be possible to do a deal and get exploration acreage in a

reasonable finite period. How long will it take to obtain the opportunity in the first place? If the prospects are excellent and the perceived field sizes large, companies will be quite happy to wait around for years, all other things being largely positive. If, on the other hand, the current returns appear marginal they may be more inclined to be impatient and at the very least place the opportunity on the back burner.

Time to Get Production (Time to Product)

Smaller companies and indeed larger ones are frequently concerned about how long it will take once they have found production to get it on stream and begin to make a return. The nature of the legislation itself can define how fast they can make their return and these items are dealt with in the economic criteria presented elsewhere. If the combination of logistics, environment, location etc. indicate in the end a very long time to get production on stream, then this has a negative impact.

Markets

Availability of a market, particularly today for gas and also for instance heavy oil, can be a major factor in the timing and ability to carry out both exploration and development. With long lead-times, (exploration through to discovery and development) particularly in the more harsh environments, companies must make judgements on oil and gas prices and markets well into the future. To the extent that there appears some other element of market risk this will downgrade attractiveness of the project. To the extent that there appears to be no significant market risk, projects get upgraded.

Hassle/Pizzaz Factor

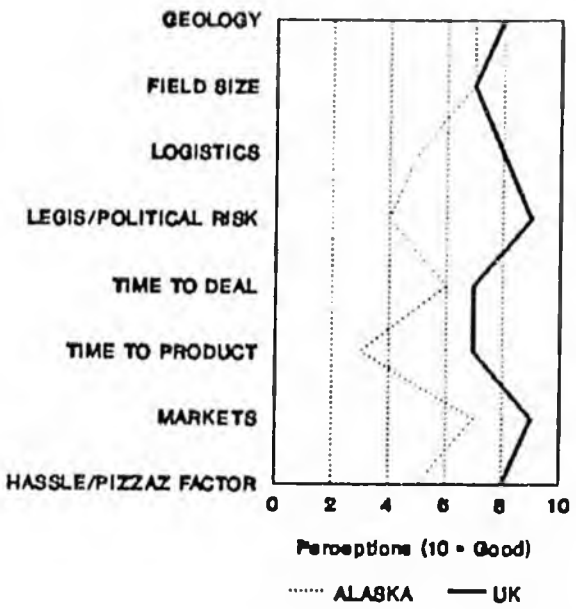
Industry is frequently driven, like any exploration-based natural resource concern, on what we might call the gold-rush concept. Is there a new place where a new series of large or even small discoveries appears imminent? Is there an old area we can revisit with new technology and do well? So from time to time we see the industry move

suddenly to new pastures where there is a perception of major new opportunity. The industry moved to the North Sea in the early 70s with successful results and moved to offshore China in the early 80s with very poor results. Regions and indeed countries become fashionable even though particular countries and environments may have large problems. Environmental aspects may cause substantial delays; there may be difficulties in getting expatriate staff in place or with approvals for the importing of equipment. There may even be concerns of terrorist activity. The combination of these makes up what we might generally refer to as the hassle and/or pizzaz factor. If there are high hopes and it is a fashionable area, the industry will frequently cope with quite exceptional circumstances. On the other hand if the prospects are less attractive, the industry is less inclined to invest in the first place.

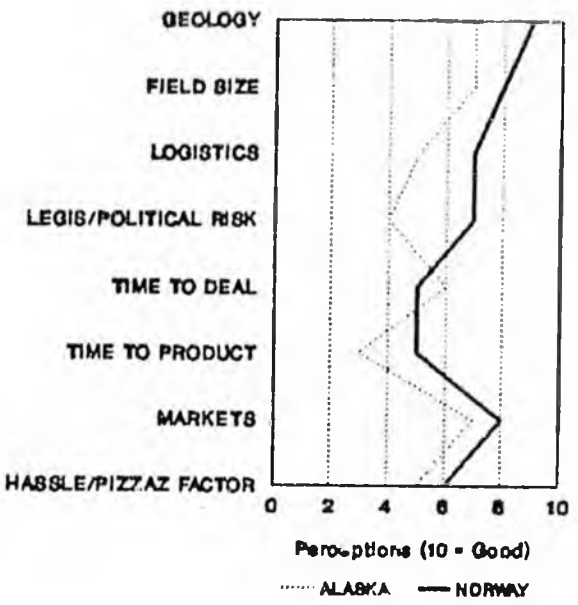
Prospectivity Results

Generally, Alaska looks less attractive under the scenario's examined at this "snap-shot" in time. Legislative/political risk appears higher in Alaska because among other reasons, the UK, Norway and Indonesia have all made material improvements in their legislation in more recent times. Recognising the subjective nature of the approach, overall Alaska appears similar to Norway and generaliy less attractive than the U.K. North Sea.

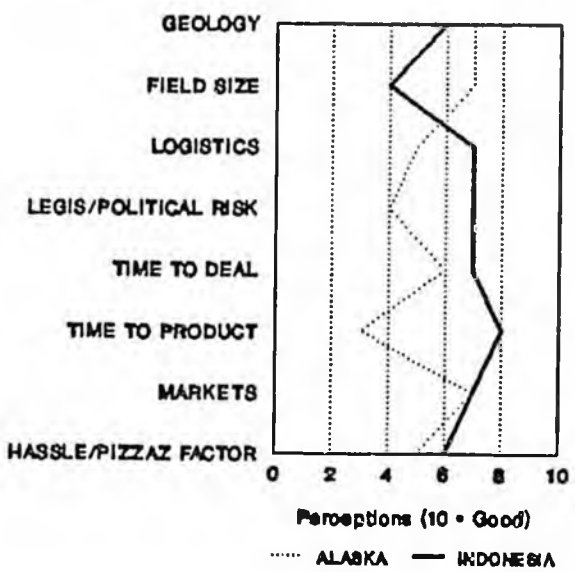
PROSPECTIVITY
United Kingdom



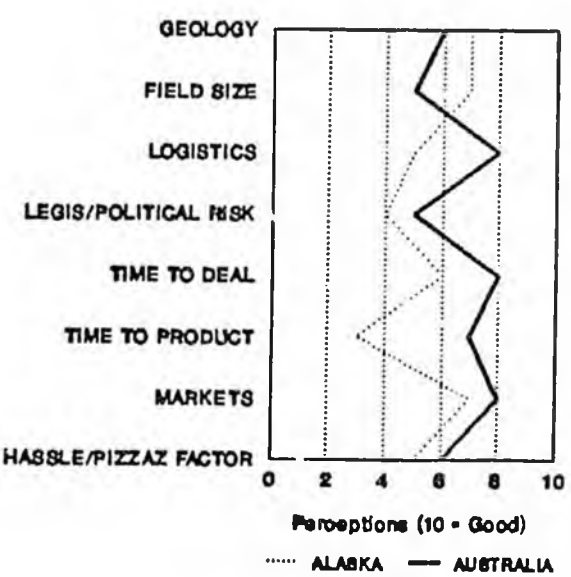
PROSPECTIVITY
Norway



PROSPECTIVITY
Indonesia



PROSPECTIVITY
Australia



Sensitivities

Sensitivities to Prices

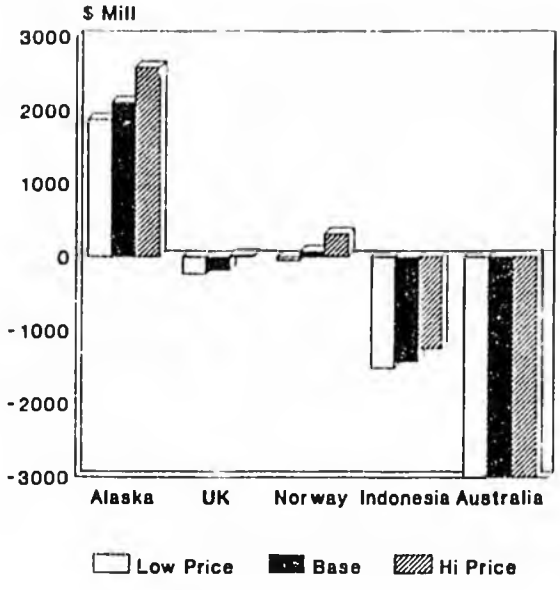
The following two pages of charts show the sensitivity to a high and low price, US$3 down (US$17/Bbl sale price) and US$6 up (US$26/Bbl sale price) from our base case (US$20/Bbl sale price - US$14.40 well head).

The sensitivity on the Net Present Value and on the internal rate of return is illustrated.

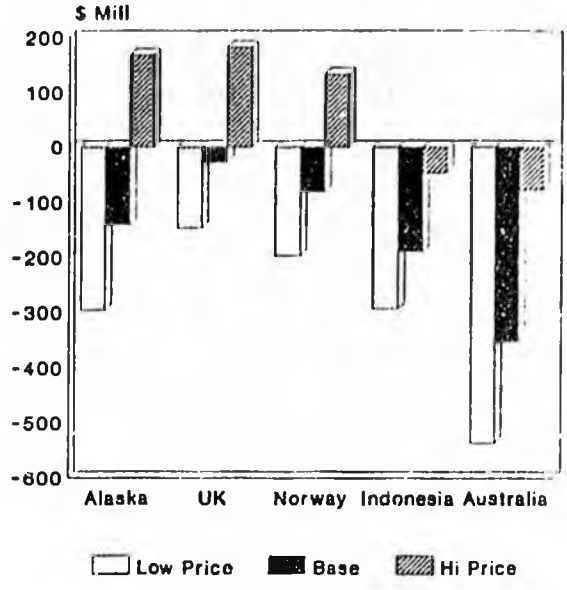
Prudhoe Bay historical rate of return is extremely insensitive to future prices when looking back from 1975. This is, of course, because a large part of the production is already at a market established price.

High prices put West Sak and Niakuk into a better looking scenario rate of return wise but only under U.K. legislation does North Star look to reach an even marginally acceptable internal rate of return. The rate of return on Niakuk demonstrates quite clearly the difference between the U.K. and Alaskan legislation, as even under a low price the rate of return is above 10% in U.K. versus 2% for Alaska. While under a high price the Alaskan return exceeds that in the U.K.

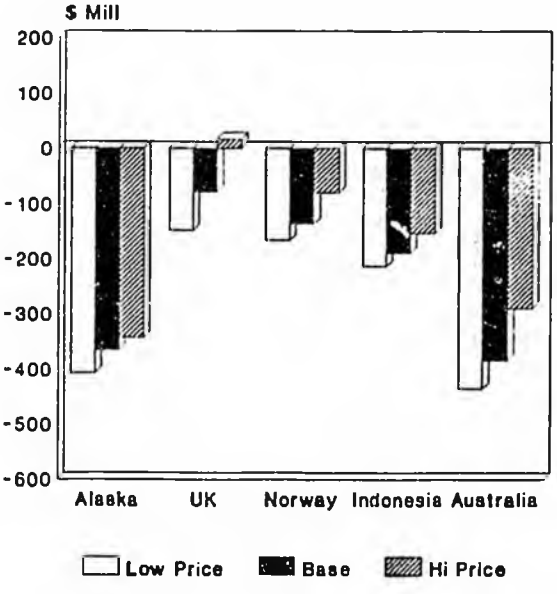
COMPANY NPV $ REAL
Prudhoe Bay
Sensitivity to Oil Price



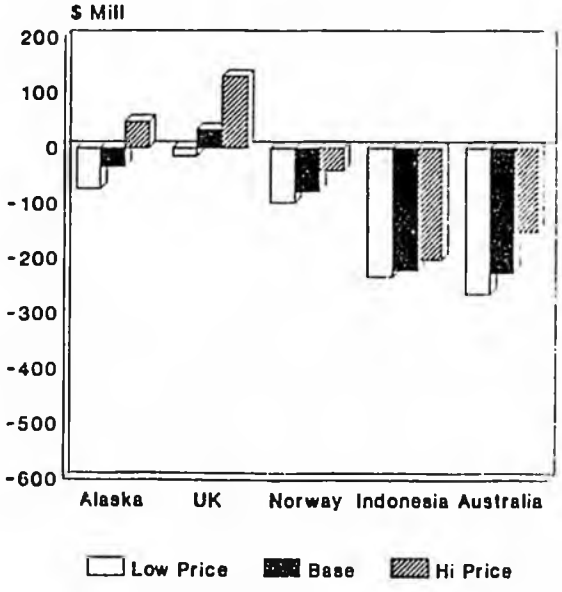
COMPANY NPV $ REAL
West Sak
Sensitivity to Oil Price



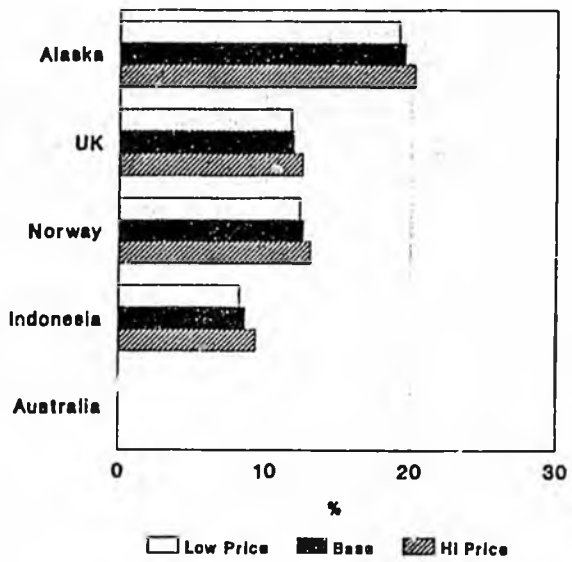
COMPANY NPV $ REAL
North Star
Sensitivity to Oil Price



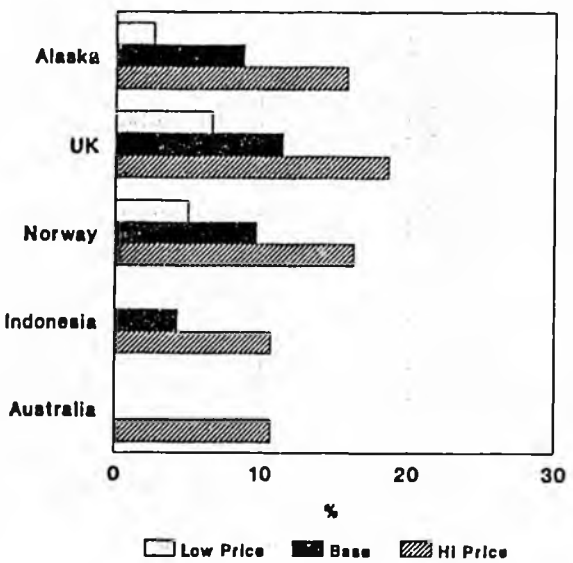
COMPANY NPV $ REAL
Niakuk
Sensitivity to Oil Price



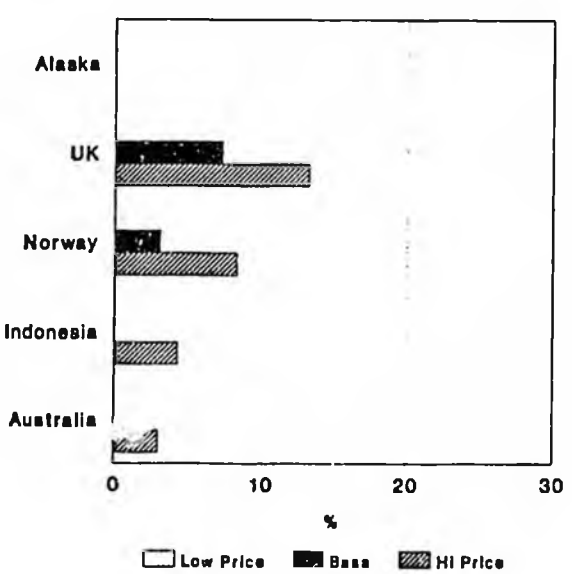
COMPANY IRR % REAL
Prudhoe Bay
Sensitivity to Oil Price



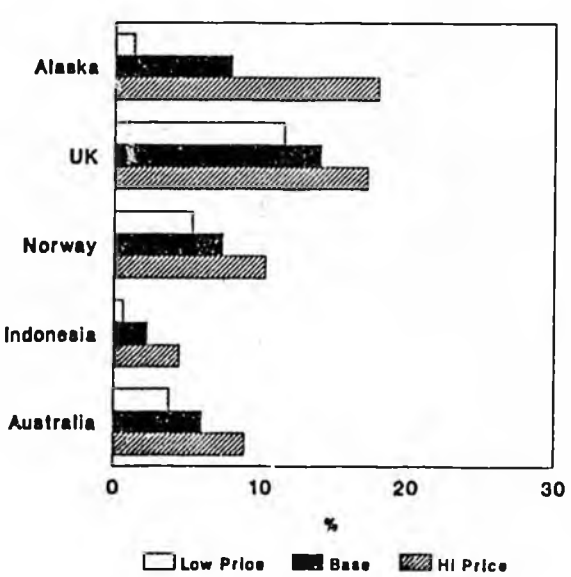
COMPANY IRR % REAL
West Sak
Sensitivity to Oil Price



COMPANY IRR % REAL
North Star
Sensitivity to Oil Price



COMPANY IRR % REAL
Niakuk
Sensitivity to Oil Price



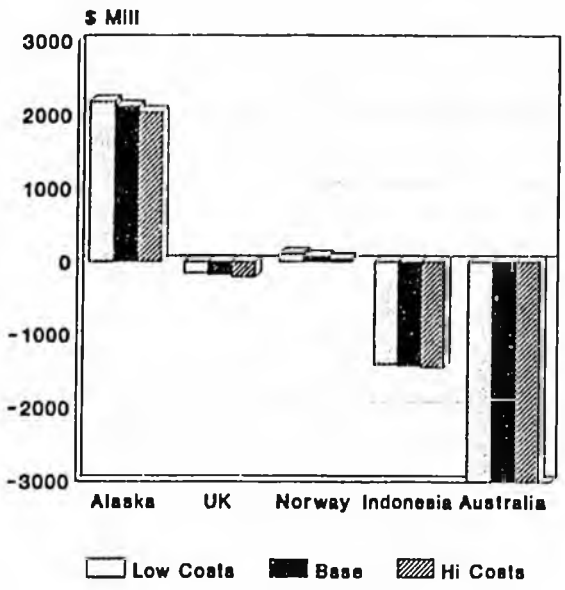
Sensitivity to Costs

The following two pages of charts show the sensitivity to a high (+25%) and low (-25%) cost scenario. The sensitivity on the Net Present Value and on the internal rate of return is illustrated.

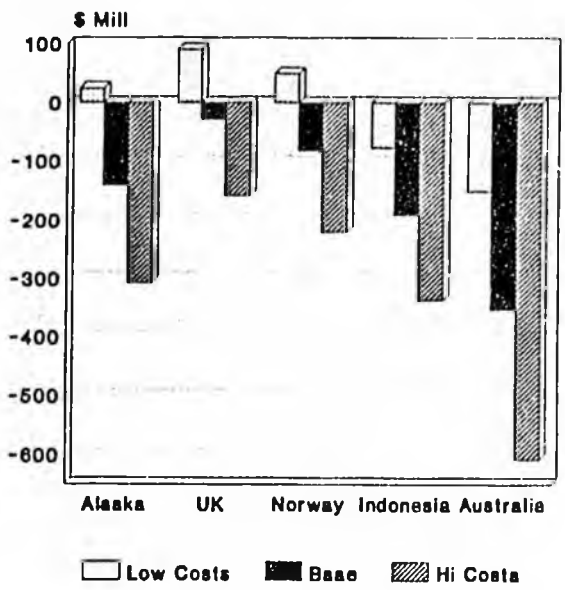
Again Prudhoe Bay is very insensitive to future cost changes when viewed from 1975. A low cost case makes West Sak and Niakuk look more attractive. Even North Star gets up in the range of potential investment consideration under U.K. legislation if costs can be reduced by 25%.

Sensitivity to costs is more marked in rate of return numbers in Alaska than say in U.K. or Norway.

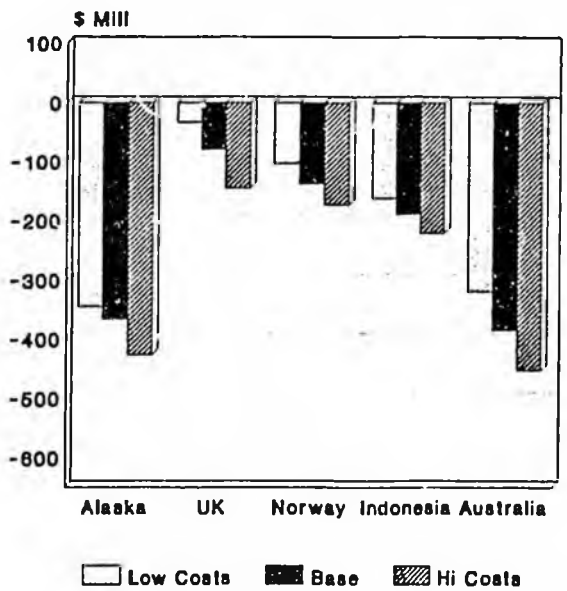
COMPANY NPV $ REAL
Prudhoe Bay
Sensitivity to Costs



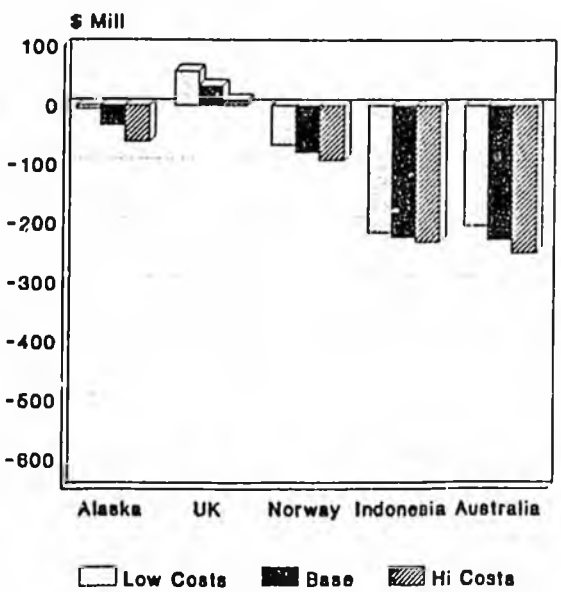
COMPANY NPV $ REAL
West Sak
Sensitivity to Costs



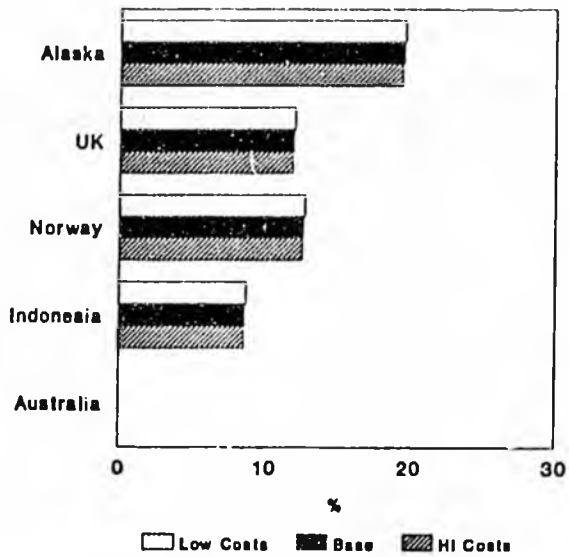
COMPANY NPV $ REAL
North Star
Sensitivity to Costs



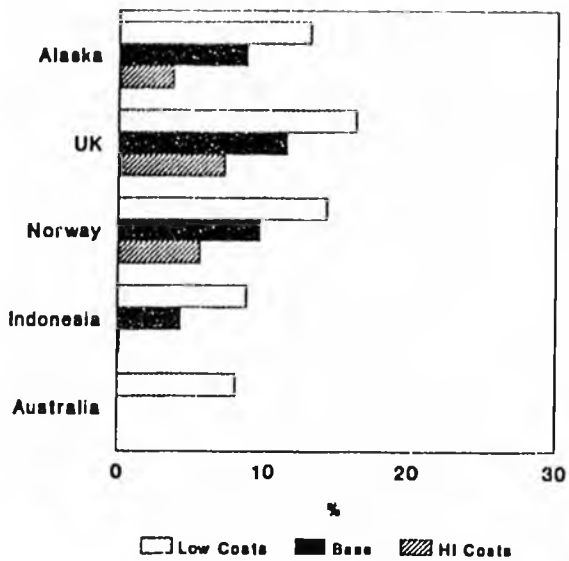
COMPANY NPV $ REAL
Niakuk
Sensitivity to Costs



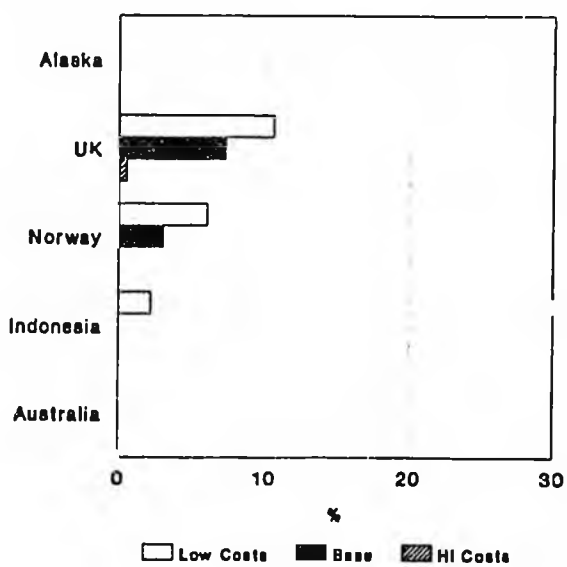
COMPANY IRR % REAL
Prudhoe Bay
Sensitivity to Costs



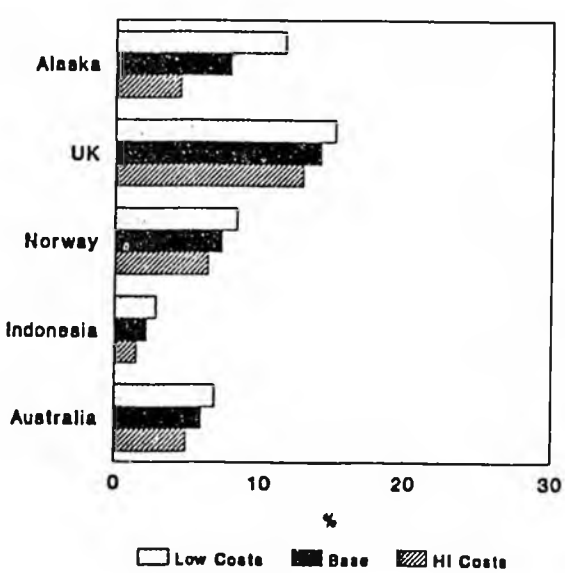
COMPANY IRR % REAL
West Sak
Sensitivity to Costs



COMPANY IRR % REAL
North Star
Sensitivity to Costs



COMPANY IRR % REAL
Niakuk
Sensitivity to Costs



Sensitivity to Exploration and New Investment

The following two pages of charts show the sensitivity to the sunk exploration costs on the Net Present Value and internal rate of return of the four fields.

Also shown on the same two pages is the effect of being a new player and not having the benefit of exploration write off against other projects.

Sunk Exploration Costs

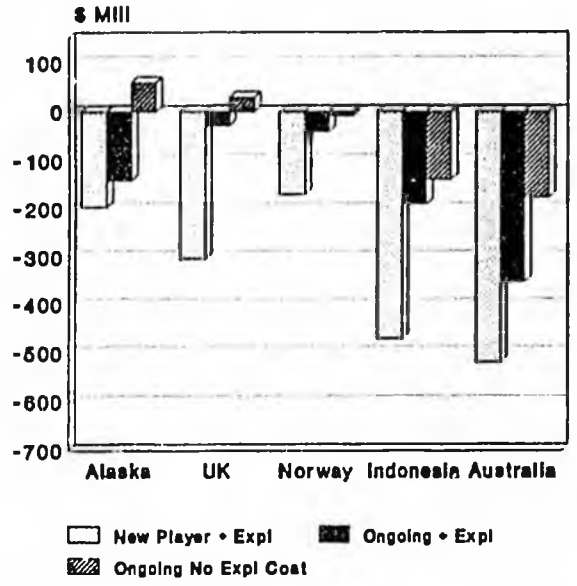
The decision to explore implies a commitment to later development of attractive opportunities. Unrecovered unsuccessful exploration effort has to be incorporated in the overall industry economics. So while a new area may look attractive from a development point alone the necessary front end exploration costs including related unsuccessful efforts must be considered in early assessments of going ahead on a new exploration venture. The exploration bill has to be paid somewhere.

Having made a discovery the analysis of the development economics may well take place without allocating sunk costs of exploration and development in the basic decision to proceed. However to the extent that such costs are not notionally recoverable against the project regardless of whether previously offset against past tax, the industry is simply cutting its losses rather than investing in a sensible project. It is clear that taking out the sunk exploration costs made Niakuk and West Sak especially more attractive projects.

New Player Versus Ongoing Investors

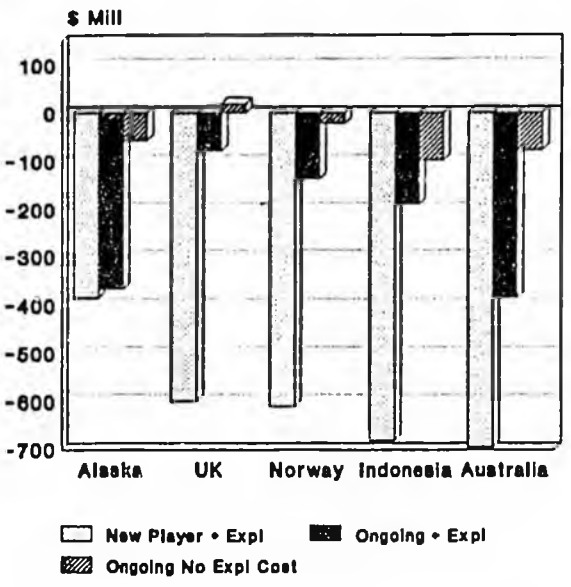
The impact of being a new player is also shown in the "Exploration" Sensitivity charts. As is to be expected, a new player would find the three new developments much less attractive than a current player, indeed none of the projects would look viable with the possible exception of West Sak.

COMPANY NPV $ REAL
West Sak
Sensitivity to Exploration



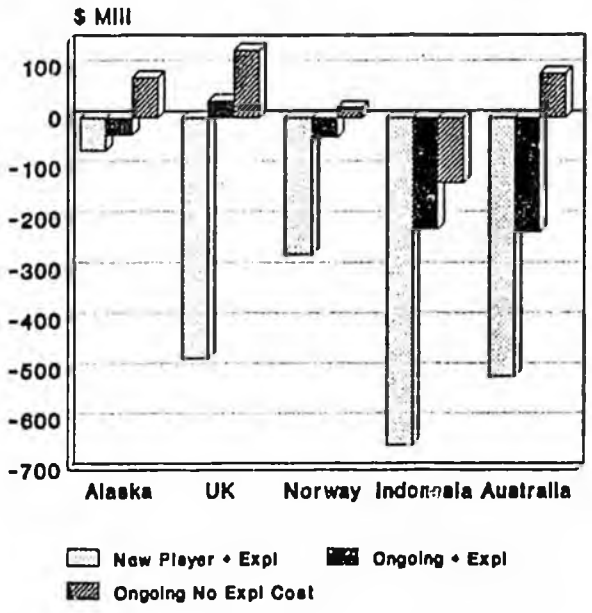
Ongoing + Expl Costs is Base Case

COMPANY NPV $ REAL
North Star
Sensitivity to Exploration



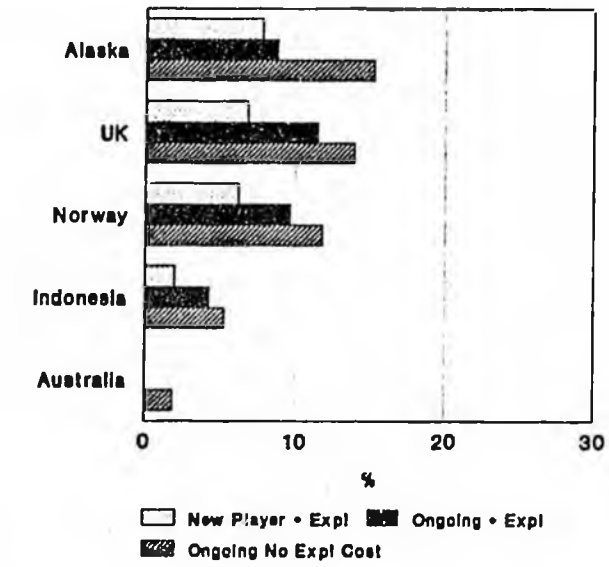
Ongoing + Expl Costs is Base Case

COMPANY NPV $ REAL
Niakuk
Sensitivity to Exploration



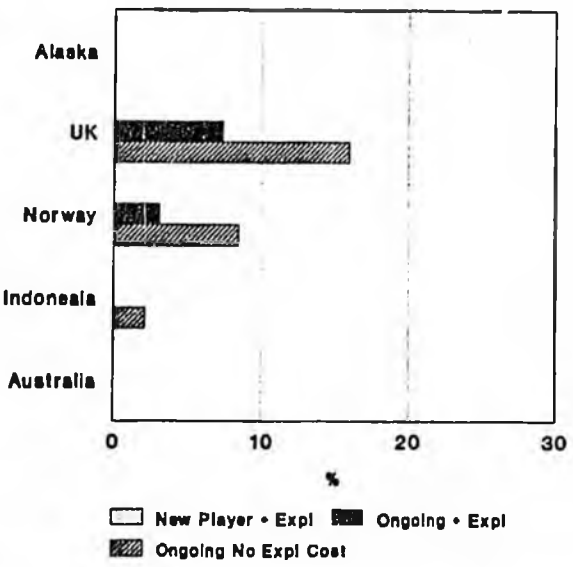
Ongoing + Expl Costs is Base Case

COMPANY IRR % REAL
West Sak
Sensitivity to Exploration



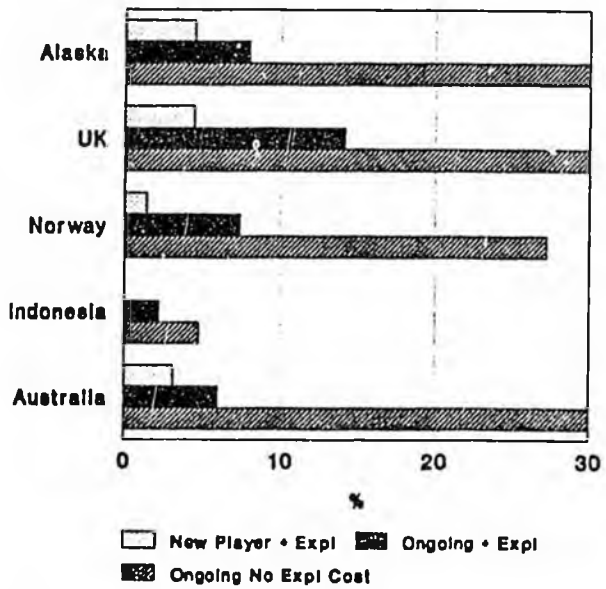
Ongoing • Expl Costs is Base Case

COMPANY IRR % REAL
North Star
Sensitivity to Exploration



Ongoing • Expl Costs is Base Case

COMPANY IRR % REAL
Niakuk
Sensitivity to Exploration



Ongoing • Expl Costs is Base Case

Encouraging Activity

Whether it be under concession arrangements such as in the United Kingdom or production-sharing agreements such as in Indonesia, these two governments have certainly used a pragmatic approach to adjust relative returns to the industry. This has been achieved by modifications to the contract conditions and/or to tax accounting guidelines. If encouraging exploration and development are objectives, the most successful approach has been that in the U.K. where the tax write-offs are significant enough to continue to encourage major exploration effort so that high marginal tax rates are offset by substantial exploration offset provisions. A similar, if somewhat more restricted approach, is taken under the Indonesian Production-Sharing Contract. Any government; of course must make a decision on the extent to which it wishes to encourage further exploration, investment in existing fields or new developments based relative to its need for current or longer term revenue from the industry, in addition to aspects such as employment and infrastructure which are critical in many jurisdictions.

While from a purely Alaskan view much of the employment and equipment manufacturing benefits may occur elsewhere, they do for the most part occur within the same government jurisdiction, i.e. the United States. Thus major projects, particularly on the North Slope or elsewhere, can have a significant impact in relative terms on the whole of the U.S. oil industry environment.

Certainly, governments in other countries have sought to encourage development and indeed domestic employment and domestic manufacture, but they are, of course, more concerned that such employment occurs within the country rather than a particular State. In the U.K., however, the emphasis has been more localised and significant efforts have been made to ensure that much of the offshore benefits accrue to Scotland.

Policy Goals

While the goal in Australia has been to maximise revenue the perception has been that prospects were not good for finding major new fields. In Indonesia while foreign currency and revenue were key issues the government has recognised a need to continue encouraging the industry for long term benefits of revenue, foreign exchange, employment and infrastructure.

In Norway the goal has been to maximise both revenue and local involvement and at the same time control development so as not to allow it to get out of hand.

The United Kingdom has pursued a varied policy over the last several years but overall it can be said to have wanted first to reduce or eliminate the oil deficit by encouraging exploration and development, then encouraging domestic industry with the resulting employment. Those two planks, maximising production and local involvement continue to be key driving forces, although it must be recognised that the U.K. marginal tax rate on large fields is one of the harshest in the world. This in turn is offset by generous exploration offsets to encourage further exploration.

How does the Government control industry in other countries?

The industry is largely controlled in most countries by a combination of the equivalent of a Ministry or Department of Energy and an appropriate Department of Revenue. Basically, the Ministry is responsible for issuing of new licences, exploration/production (the equivalent of lease sales), the approval of appropriate permits and for the general regulation and control of the industry, and will typically have involvment in the basic terms and conditions affecting the return to the industry. The revenue authorities typically will be involved in adjustments to the tax code and the general guidance of the government and the ministry or equivalent to encourage/discourage further investment by way of tax enhancements/disincentives.

To the extent that some countries have separated aspects of basic petroleum control and taxation into more than one or two groups, there has definitely been some reduction in effectiveness and there appears to be an increased likelihood of litigation.

The Legislative Dilemma

We must recognise the long time between encouraging exploration or reinvestment on the one hand and seeing the results in terms of taxation revenues in a remote and costly location on the other. This time gap makes it difficult for governments to establish a reasonable basis for judging the level of appropriate

benefits today as opposed to what one should encourage for a tomorrow which could be more than a decade away. While the oil industry is not unique in this regard, because much of it is so visible - it continues to present all legislators with very difficult choices.

The median view would seem to be to continue to encourage re-investment and development and exploration at the expense of current revenues to the extent necessary while reasonable prospects and opportunities appear to exist in the future. Industry itself provides the barometer of the reality of those opportunities since they are unlikely to invest even small percentages in a tax-efficient manner if the opportunities are indeed poor. To achieve this happy, and perhaps ideal mean, does require the government to have its own ongoing and reasonable analysis of prospects and opportunities and to be close enough to the industry to recognise their own driving forces and to encourage them accordingly.

As indicated in discussions with the Committee we are dealing with a worldwide industry and other opportunities will cause the limited capital resources to move away from one area to another. This will require governments of the day to adjust their revenue-sharing arrangements if they wish to continue to attract risk funds.

Similarly, from time to time it may well be that the existing structure, as we have seen in the U.K. and in other parts of the world, is no longer appropriate and it may be necessary to increase the tax share. Logically, how one treats the industry will be different if it forms a high proportion of government revenues, than how the industry is treated where it is but a small fraction. The principles may well be the same but the approach will be different.

Ideally from both governments' and industry's point of view a tax system which seeks to increase the state take as the project becomes more attractive, be it because of price, improved performance or whatever reason, is one that seems to find the most favour with all parties. Unfortunately, most systems are not even-handed in how they treat and encourage re-investment, development of marginal fields or encouragement of exploration, especially under lower oil price scenarios. However, it is fair to say that there is no panacea in defining legislation, for each country has particular circumstances which both require and justify somewhat different handling.

Some Observations

We must recognise that the analysis carried out is by no means exhaustive in terms of examining a full spectrum of opportunities for Alaska. Nevertheless, it may be helpful to examine the possible direction in which legislation might achieve one or another end, based on what has been carried out in other countries. A significant amount of additional study on the Alaskan Legislation and the appropriateness and application of necessary directions would be needed to recommend specific detailed tax policies and indeed the Legislature would need to define objectives accordingly.

Let us suppose that the hypothetical objective was to encourage domestic employment to the extent that such approaches were acceptable under federal regulations. It might be possible to grant some relief on future development to those concerns which demonstrated in all their operations an increase in Alaskan domiciled employees (e.g. perhaps those who qualify for payouts from the permanent fund).

If we assume that a longer term objective might be to maximise the State revenue to reduce the potential fiscal gap as much as possible, then we might proceed as follows. Carry out a reasonable assessment preferably with industry's help of remaining potential exploration, development and incremental projects. Then modify the fiscal legislation to make it more progressive so as to encourage a reasonable amount of exploration and development on an ongoing basis.

An efficient fiscal system applied to petroleum exploitation may be defined as one which collects a share of any economic rents to the State while at the same time maintaining incentives for (a) continued exploration, (b) new field developments, and (c) incremental investments. Account should be taken of the risks involved in petroleum exploitation, and the lead times between initial expenditures and income from production. In assessing investment opportunities oil companies employ discount rates which reflect their costs of capital and the perceived risks. A well-designed tax system should take these factors into account.

In practice an efficient fiscal system should be related to the profitability of petroleum exploitation. It should be sensitive to the variations in the factors determining project viability, such as oil prices and development costs.

A profits-related system is better able to satisfy these conditions than one based on production or gross revenues. Thus, when oil prices fall impositions based on gross revenues can render marginal fields uneconomic. The impact of profits-based taxes also depends upon the timing of the reliefs for exploitation costs. A slow rate of relief brings earlier revenue to government but reduces the post-tax returns in present value terms. A delicate balance is required to maintain incentives. This issue is especially important when there are very long lead times between expenditure and income.

Should the objective be to maximise oil production and the discovery of the maximum resource, then the recommended approach adopted in the previous case must be relaxed to greater extent to ensure that exploration development and investment funds are encouraged to move toward Alaska preferentially. Ideally this would mean providing early relief from higher rates of State tax, but in a more general sense doing whatever is possible at State level to minimise the impact of whatever environmental legislation is in place so as to reduce at least the time delay inherent in the current systems.

Overall legislation should be a blend of the various competing objectives. Achieving that blend is no easy task but will be facilitated by bringing the various alternative objectives into plain view where they can be discussed by all interested parties. It seems reasonable to assume that a significant number of potentially attractive exploration, development and re-investment opportunities remain in the North Slope area onshore and offshore and it would seem prudent to try and encourage the necessary activities to produce these resources.

APPENDIX

Base Case Summary

Ongoing operator (i.e. not a new player)

Includes allocated exploration and bonus costs

Government take includes state and federal revenues but not bonuses except in the case of the analysis of the effect of the 900 million bonus

NPV's and IRR's are for Real $ Cashflows

Discount Rate is 12.5% real (i.e. 17% if there is 4.5% inflation) (except where stated)

Prices and Costs were escalated at 4.5% p.a.

Oil price was $14.50 a barrel wellhead price Prudhoe Bay, with quality and transportation adjustments for the other fields as necessary. This is equivalent to a sale price of about US$20.00/Bbl

The Prudhoe Bay base case is for a full life cycle of the field from 1975 though 2016 and the Real $ are 1975 dollars for Prudhoe Bay as against 1990 dollars for the analysis of the remaining Prudhoe Bay production and all other fields

Analysis Details and Comments

The base case for each field in each legislation was taken from 1990 with a median oil price, median costs, inclusive of an exploration program and assuming an existing investor. In addition a number of sensitivities were run.

As indicated elsewhere the discount rate chosen for the valuation was 12.5% real 17% and ranged about 10-15%. The oil price chosen for the base case was $14.50 per barrel wellhead price Prudhoe Bay, with quality and transportation adjustments for the other fields as necessary. Prices were escalated at 4.5% p.a. as were capital and operating costs. High and low oil price cases at the equivalent of minus $3.00, that is $11.50 per barrel Prudhoe Bay, and plus $6 which is $20.50 per barrel, were also examined to note price effects. The impact of different operating and capital costs from the base case was evaluated by examining the effects of increasing or decreasing such costs by 25%.

The net present values and rates of return determined for type fields, were not meant to reflect exactly what companies achieve but instead to provide a base for comparison. Some companies may have incorporated additional exploration costs in their assessment of the Alaskan fields, others may allocate costs differently.

Indeed, the base data may not reflect exactly how the new projects might be carried out in future. We have examined some measure of the impact of exploration by considering the allocation of some, but by no means all, unsuccessful efforts. Similarly the analysis has been carried out at the wellhead and does not attempt to evaluate the impact on, for instance, the TAPS pipeline. Further it should be clear that this analysis is centred around developments and production in the North Slope region. production using the TAPS Pipeline for export. It is not meant to give comparisons with other parts of Alaska where transportation methods are more or less costly and where other factors could be more relevant.

Sensitivity analyses to price, cost, the impact of whether one was a new investor or was an existing investor and therefore had ongoing tax right-offs, were carried out to give some idea of the impact of these aspects. The benefits of an existing player, particularly in the United Kingdom, are very significant under current legislation and this has no small impact in attracting new capital to explore for and indeed develop existing discoveries.

Extensive analysis was carried out to compare the value of North Slope crude to other market crudes in the key countries considered. However, bearing in mind the complexities involved, the decision was to treat the analysis as though the legislation had been moved to Alaska rather than to bring in the impact of different crude price and market regimes.

Similarly, extensive investigation was carried out to look into the allocated costs for discoveries in the countries considered with a view to using different exploration costs for each region, but again in the interests of making comparisons on basis of legislation alone, this approach was left for consideration if necessary at some later stage.

Other measures of performance.

Marginal Tax Rates on Prudhoe Bay

In order to make an assessment of historical taxes, it was necessary to make a judgement on marginal tax rates. To be conservative relatively high marginal tax rates were assumed to apply for the past period. This almost certainly overstates the relative amount of tax that the government might have obtained and also overstates the amount of tax the companies would have paid. The time and the complexities involved did not justify running this analysis significantly further at this time.

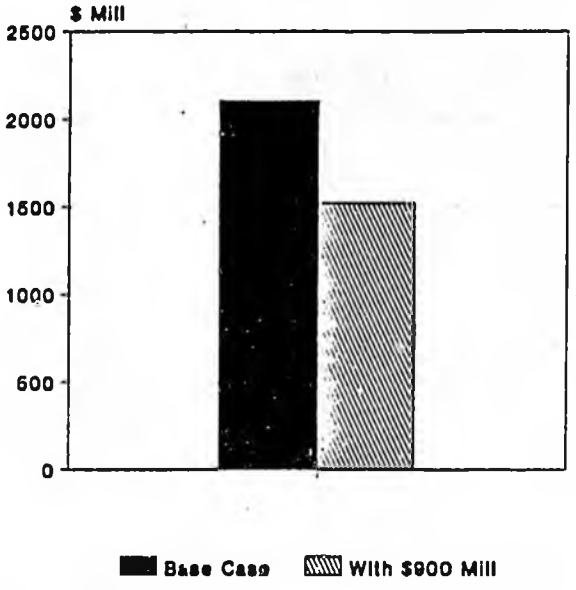
$900 Million (1969) Bonus

Impact of allocating full $900 Million (1969) Bonus payments to Prudhoe Bay is shown in the following charts.

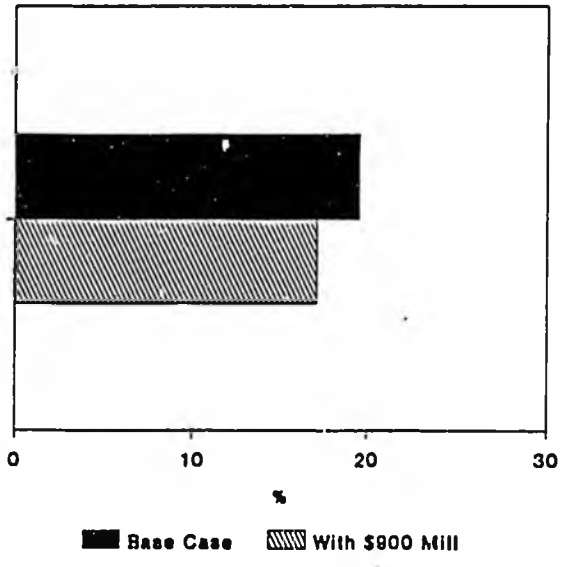
Base Data Note

In the data presented by the revenue group some fields were kept in production after they had a negative cash flow - this was necessary in order to present a full data set for use under the other regimes. For comparative purposes it was necessary to "produce" these fields where possible to similar points although an economic cut-off was used. This aspect produces some inconsistencies but it is believed these are not meaningful in the broader-brush comparisons illustrated.

COMPANY NPV $ REAL
Prudhoe Bay Alaska
Sensitivity to $900 Mill Bonus



COMPANY IRR % REAL
Prudhoe Bay Alaska
Sensitivity to $900 Mill Bonus



Countries and Fields Selected for Comparison

The countries selected for comparison were the United Kingdom, Norway, Indonesia and Australia. They have been chosen because they represent jurisdictions where the legislation has either led to continued industry attention, or where there have been problems in maintaining investment.

U.K.

The United Kingdom was chosen in view of the very considerable proportion of major exploration funds which continue to be spent in the North Sea. This has occurred partly as a result of the very attractive tax driven exploration policy adopted by the government, where at the margin some 83-87% of costs of exploration are borne by the governmen by way of tax. However, these tax concessions combined with prospects still have to be good for the industry to invest. Continuing high success ratios, albeit with smaller fields, have continued to make the United Kingdom an attractive exploration and development arena.

Norway

Norway was included in the comparison mix because of the large size of its fields and also because it had demonstrated a more aggressive approach to legislation than that of the United Kingdom. Larger and more expensive projects and long periods before development can take place have made a number of international companies recently offer for sale their interests in Norway. This has confirmed the view that Norway largely remains an arena for the long term players with requireme ts for large producing volumes and one where it is difficult for companies not currently involved to justify investment.

Indonesia

Indonesia was incorprated in the assessment as it has remained an attractive arena over the last 15 or more years. Offshore field sizes, of course, are small by comparison with both the North Sea and Alaska but the

production-sharing contracts and pragmatic government approach have continued to encourage investment.

Australia

The Australian Bass Straits area largely contain older fields which represent a large proportion of Australia's production. This production has been subject to special tax handling (excise tax), and new development has been plagued by stop/start industry policy as perceived returns under the then current legislation/price scenarios became more or less attractive.

Thus in general, the United Kingdom and Indonesian legislations demonstrably were situations where industry was investing and has continued to invest heavily during the recent period, while the Australian and Norwegian legislations were of a more aggressive type where industry was less able to justify continued investment.

Alaskan Fields Selected for Comparison

The four Alaskan fields selected for comparison were Prudhoe Bay, West Sak, North Star (Seal Island) and Niakuk.

Prudhoe Bay

Prudhoe Bay is a large mature oil field. It was developed in the mid 1970s, with first production in 1977. Current estimates of ultimate reserves are in excess of 11 billion barrels.

West Sak

West Sak is a relatively large higher cost oil field with estimated recoverable reserves of 633 million barrels, with first production due in 1992.

North Star (Seal)

North Star is a medium sized higher cost oil field with estimated recoverable reserves of 178 million barrels. Development expenditure is due to commence in 1997, with first production in 2000.

Niakuk

Niakuk is a smaller or relatively lower cost oil field with estimated recoverable reserves of 58 million barrels. Development expenditure is taken to start in 1990, with first production in 1994.

UNITED KINGDOM

In the United Kingdom the state owns any oil or gas in place that is discovered. The Government has the power to award licences which permit exploration or development in the areas covered by the licences.

Exploration licences entitle the holder to conduct preliminary exploration activities in the area and have recently been issued every 2 years. The exploration period is typically 6 years. A production licence entitles the holder to appraise and develop fields subject to the consent of the Department of Energy. Consent is usually obtained following the submission of a detailed development plan.

The Government take from oil and gas revenues is essentially made up of the following elements

- Government Royalties
- Petroleum Revenue Tax (PRT)
- Corporation Tax (CT)

Government Royalties - on the first to fourth Round Licences (i.e. pre 1972) royalty is payable at 12.5% on the wellhead value of the petroleum, i.e. certain costs of conveying and initial treatment are deducted from the landed value of production. On fifth and later Round Licences (i.e. post 1976) royalty is payable at 12.5% of the market value of the petroleum. On fields given development approval after April 1st 1982 there is no royalty charged. Royalty where applicable is taken in cash.

Petroleum Revenue Tax (PRT) is assessed on a field basis for six-monthly chargeable periods at 75% of the assessable net profits.

Net Profit	=	Market Value of Oil Sales
	+	tariff receipts less allowance
	+	Asset disposal receipts
	+	Conveying and treating receipts
	-	Royalty payable
	-	Allowable Field Expenditure

- Uplift
- Exploration and appraisal expenditure
- Research and development expenditure
- Cross field allowance

Allowable field expenditure essentially means any expenditure relating to the search for, production of, transportation of, treatment and storage of petroleum. Uplift is a supplementary allowance intended to compensate for the inability to offset loan interest against tax. It is set at 35% of expenditure mainly related to the appraisal and development of the field and is allowed only prior to payback. The oil allowance is currently set to 500,000 tonnes per chargeable period up to a maximum of 10 million tonnes for fields given development consent after April 1st, 1982*. Crossfield allowance gives an opportunity for 10% of the development costs of a field incurred after March 1987 outside of the Southern Basin to be offset against the PRT payment on existing U.K. production.

Corporation Tax (CT) is charged on a company basis at a rate of 35% of trading profits.

Trading Profits	=	Gross revenues
	-	Royalty
	-	PRT
	-	Operating Costs
	-	Capital allowances

Capital allowances are essentially depreciation on plant and machinery assessed at 25% of the prior year's written down balance. Most development drilling is 100% for first year. CT is payable in that year following the chargeable period.

* This means in effect that smaller fields pay little or no PRT.

NORWAY

In Norway the state participates in each licence through Statoil (the 100% state- owned oil company). The requirement for foreign companies to carry the state through the exploration and appraisal stage was removed for licences issued after January 1st, 1987. The state awards production licences which allow for an exploration period of 6 years and a production period of 30 years. Field development requires the approval of the Storting (Parliament).

The government take from oil and gas revenues consists of the following elements:

- Government Royalties
- Income tax
- Special Petroleum Tax (SPT)

Royalty - Fields receiving development approval after January 1st, 1986 are exempt from Royalty payments. Post 1972 licences have a varying rate for oil between 8% and 16% of the wellhead value depending on the rate of production. Gas and NGL are subject to a constant rate of 12.5% of the wellhead value. On new fields the royalty is zero. The market value 'norm' is fixed for each field for each calendar quarter by a board appointed by the Ministry of Energy.

Income Tax - this includes	Municipal Tax	23%
	State Tax	27.8%
	Capital Tax	0.3%

Municipal tax is levied at the rate of 23% of Profit before Tax. The State Tax is levied at the rate of 27.8% of Profit Before Tax less dividends paid. Capital Tax is paid at the rate of 0.3% of net worth. Net worth is Book Asset value less debt (excluding income tax).

Special Petroleum Tax (SPT) is assessed at a rate of 30% of profits adjusted for 'norm' price. For fields given development approval before January 1st, 1987 an annual uplift deduction from profits is allowed. The uplift is calculated as 6.666% of total assets used in oil production and pipeline transportation and lasts for a period of 15 years. For fields given development approval after January 1st, 1987,

SPT is calculated on net income exceeding a production allowance'. The production allowance is set at 15% of the value of produced petroleum based on 'norm prices'. Depreciation for both income tax and special tax is on six year straight line basis.

INDONESIA

In Indonesia the state participates in oil and gas activity through the use of Production-Sharing Contracts. The exploration period lasts for 6-8 years and should a commercial discovery be made, the contract period is extended to 30 years.

The Government take from oil and gas revenues is made up of the following elements.

- Bonus Payment
- Production-Sharing Contract (PSC)
- Income Tax

Bonus Payment - A negotiable signature bonus of several million U.S. Dollars is payable on signing the contract. In addition, production bonuses may be payable when specified rates of production are reached.

Production-Sharing Contract - the PSC allows a sliding scale government share (between 51.9 to 80.77%) dependent of the age and area of the contract and type of development. In this study the pre-tax government share is 71.1538% on new fields.

The Contractor is allowed to recover his costs from production but the maximum annual cost recovery is now limited to 80% of annual production. Allowable costs include exploration costs, capital costs depreciated on a declining balance, plus an uplift of 17% of oil field development costs and operating expenses. Any costs in excess of the annual allowable cost recovery may be carried forward for up to five years. The PSC also obliges the Contractor to supply the state with up to 25% of total field production for which it is paid the market price for the first five years of production and thereafter 10% of the export price, but of course the company then recovers all costs associated with the domestic obligation under the cost recovery program.

Income Tax - Corporation tax is charged at an effective rate of 48% of the total value of the Contractor's taxable income (35% income tax and 20% dividend tax). The depreciation rules under the post 1984 time permits some assets to be reserved at 50% declining balance, some at 25% and some at 10%.

AUSTRALIA - BASS STRAIT AREA

In Australia, offshore permits are administered by the Australian Commonwealth Government under the control of the Petroleum (Submerged Lands) Act of 1967. The permits take two forms, exploration permits which have an initial duration of 6 years with possible extension of 5 years up to a total of 26 years and production permits having an initial period of 21 years with an extension of 21 years so long as the field is commercial. The Government take for the Bass Strait area consists of

- Royalty
- Excise Tax
- Corporation Tax (CT)

Royalty - for production from an exploration permit or initial production permit royalty is levied at the rate of 10% of wellhead value. For production from an extended production permit, royalty is levied at a rate between 11% to 12.5% of wellhead value fixed by the Government.

Excise Tax - The Excise Tax is on sliding scale levy based on field oil production rates. The applicable rates are dependent on the timing of the discovery and development of the individual field. There are three categories of crude oil - old, middle and new. Applicable Excise rates are shown below:

Annual Production	Excise Rate, %		
000s Bbls	Old oil	Middle oil	New oil
0 - 315	0	0	
315 - 629	5	0	0
629 - 1259	15	0	0
1259 - 1888	20	0	0
1888 - 2517	40	15	0
2517 - 3146	70	30	0
3146 - 3776	75	50	10
3776 - 4405	75	55	20
4405 - 5034	75	55	30
5034 +	75	55	35

Corporation Tax - CT is charged on a company basis at the rate of 39% of trading profits. Depreciation of developments costs can be either under fiscal terms for "prescribed petroleum operations", in which case the rate is currently 10 year straight line or under normal tax rates. In the latter case the rate for plant and machinery is 20% straight line basis and 33.3% for drilling plant and downhole equipment.

FINANCIAL AND OTHER ASPECTS OF OIL INDUSTRY ACTIVITIES AND INVESTMENT

Prepared for

THE INTERNATIONAL TAX COMPARISON COMMITTEE,

THE STATE OF ALASKA

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FINANCIAL AND OTHER ASPECTS OF OIL INDUSTRY ACTIVITIES AND INVESTMENT

Outline

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EXECUTIVE SUMMARY

This part of the study, prepared for the International Tax Comparison Committee of the State of Alaska Legislature, focusses on the financial and other dimensions of oil industry activities and investment.

An attempt is made to show that, while tax is an important factor, there are others which play a part in any investment decision-making process, in particular when a company considers entering a new area. Thus, a comparison of different petroleum fiscal regimes would not be complete without reference to these specific aspects.

Accordingly, the factors highlighted in Parts One and Two can be applied as a checklist when the superiority of one region over another is being assessed. The components of this checklist are featured in sections 1.6, 1.7, 1.8, 1.9, 2.2 and 2.3 of this part of the study. Going through the checklist, Alaska scores favourably as an investment climate.

The interaction between industry and government in the countries chosen for comparison is examined in Part Three. Here are shown cases where relationships have deteriorated to the point of exodus of industry, and situations where relationships have improved over time.

The importance of coordinated government policy is stressed in Part Four where examples are given from other countries, and the encouragement and role of independents is discussed in Part Five.

Finally, in Part Six, it is concluded that in the current climate of the oil industry there would be neither a lack of finance nor a shortage of companies willing to enter Alaska, should the opportunities present themselves. The international petroleum industry today is both cash-rich and highly acquisitive.

One - FINANCIAL ASPECTS OF OIL INDUSTRY ACTIVITIES

Preface

This part of the report is written for a wide readership including the non-expert. Those with some knowledge of the oil industry may well be familiar with some or indeed most of the points raised here. They are mainly intended to help demonstrate various facets of the industry for international comparisons.

1.1 - Introduction

Traditionally the oil industry has been characterized as one of extremes, with giants and very small players and few in between. Either a company had adequate cash flow and did not require long-term finance or it simply wasn't large enough to obtain such funding.

This pattern has changed substantially over time and today the international petroleum industry accommodates all sizes of companies. Large amounts have been raised externally in the last two decades for major capital expenditure programmes and for acquisition financing in the oil and gas sector.

The interplay of finance and the activities of the international petroleum industry are, thus, quite significant. Indeed this dimension is so vast that the comparative analyses of the countries chosen for this report could be the subject of a separate study (given the mixture of companies in operation in these regions). Nevertheless, an overview is presented here of some of the financial issues and other aspects of industry investment (discussed in Section Two below) that have direct relevance for this particular report. This should form a checklist that can be used when examining complaints from industry about the tax structure.

In short, when international comparisons are drawn, two key questions have to be the guiding principle: i) Is there ready finance available for the development of oil and gas projects in the area chosen for comparison? ii) What are the comparative advantages and limitations of sinking funds in the region?

1.2 - Sources of Finance

Finance for the development of the oil and gas industry is made available through three major sources: i) internal finance; ii) external finance through bank loans; and iii) external finance through the issue of shares (or some other instruments such as royalty units, etc.) in the case of publicly quoted companies. Further details on modes of financing are given in section 1.10 below.

1.3 - Industry Background

In the context of this particular report, it is worth pointing out some of the day to day workings of industry and its interaction with the financial world.

Companies with public ownership of shares are always interested in attracting new shareholders as well as convincing existing ones to buy more of their stock. Usually when a company gives an account of its activities to the financial community it tends to draw attention to the more positive aspects of its future prospects - highlighting information that makes investment in the company as attractive and profitable as possible. For instance, they would point out development of new fields that will enhance their oil and gas production in future years, or an increase in their exploration activities, etc.

Conversely the same company lobbying the government for tax reduction or for prevention of a tax revision would place the emphasis elsewhere. Both pieces of information are wholly accurate. They are made available to the public and are not in the least false. The question is, which statistics are highlighted at which presentation. Indeed, the legislature has to look at both sides of the story when in receipt of evidence of a loss on the basis of an ad hoc calculation for a single oil field.

Usually, for a publicly quoted company, the annual report is a good starting point to form an overview of the profitability of a subsidiary (such as one based in Alaska) and its future prospects. The size of a company's profit for each segment of its activities (in relation to the assets) provides some basis for consistency of argument.

For ultimately, if in the light of the tax revisions the subsidiary becomes unprofitable for a period of time, corporations have a responsibility to their shareholders to pull out of a loss-making operation. They either have to sell off or shut down the subsidiary. The reader should be cautioned here, though, not to interpret every sale of assets as a consequence of high taxes - for it could be the result of company rationalisation decisions. This aspect will be further discussed in section 2.1 below.

1.4 - Structure of Petroleum Industry

Oil companies are run in a decentralised manner. It tends not to matter how large or small each subsidiary unit or outfit is. The rule is that each subsidiary must stand on its own by producing a positive net return (unless the operation is set up purely as a tax vehicle). Thus, when a new subsidiary starts, ample time is given by the parent company to recover initial investment and produce a positive cash flow.

After an initial gestation period, however, an operation has to be profitable. If it continues making losses which are not caused by exogenous factors such as the sudden collapse of oil prices or a stock market crash, then the parent looks closely at the operation. Persistent losses call for a shutdown of the entire operation of the subsidiary or for submerging it under another subsidiary to reduce overheads. In particular, if the company in question is a publicly quoted company, its stockholders would require it to secure the maximum return.

In the final analysis one can ask how far can oil taxes rise before companies put their oil and gas operations up for sale, and what would be the asking price? Alternatively, a real test would be at what price would a company be willing to depart from the area and give up its entire operations.

1.5 - Categories of Companies

To gain further insight into the financing of petroleum industry activities, one can break oil companies into four separate categories:

a) The oil majors - with public ownership of their shares (nearly all such companies seem to have a presence in Alaska)

b) The independents - with public ownership of their shares (noticeably absent from Alaska)

c) The private, smaller type, firms - with no public ownership of their shares (again noticeably absent from Alaska)

d) The state oil companies

Examples of category d are Statoil in Norway, Pertamina in Indonesia, and Petrocanada - the last of which is to be privatised soon.

1.6 - Freedom of Investment by Non-indigenous Companies

When international comparisons are drawn, a premium has to be attached to investment in a location where no barriers to investment exist for foreign oil companies who wish to enter the region. In this respect Alaska (being part of the United States) contrasts sharply with countries such as Canada, for instance, where a foreign oil group can hold only 30% of an existing oil and gas company, unless the Canadian firm being acquired is in grave financial difficulty.

When a company invests in Alaska, they have the implicit assurance that at any time they can sell their entire assets and investments in Alaska without any government interference. Hence, their sale to a foreign (i.e. non-US company) would not be prevented, should a favourable offer be presented. For it could prolong the sale considerably if the vendor has to wait for an indigenous buyer. Moreover, it would dampen the price if there is an absence of global competition.

This aspect is a significant advantage for Alaska and makes it clearly a superior region compared to its neighbour Canada, or Australia, as an investment climate in which to operate. Barriers to foreign investment as imposed by the government body "Investment Canada" are further discussed in Section 3.2. Furthermore, an account will be given of the harrowing experience of a Canadian oil and gas company with the Government of Canada at the time when a British firm was acquiring half of their corporation.

1.7 - Foreign Exchange Control

The absence of foreign exchange control in Alaska is an advantageous factor for industry and as an investment climate can command a premium. For when a country restricts the outward flow of foreign exchange it is always a worry for the company concerned whether they can repatriate their entire post-tax profit or capital if need be. This imposes an implicit limit on the company, forcing it to reinvest its profit within the country concerned.

Such a restriction exists in many parts of the world where there are petroleum reservoirs. It is not confined to the Third World, where export earnings fall short of their import requirements; it is prevalent in certain OECD countries where oil exploration and production take place.

In Australia there was an element of foreign exchange control up to 1982. It was monitored by a government agency known as the Foreign Investment Review Board. Any transfer of sums larger than A$10,000 out of Australia had to be cleared by FIRA.

In France, to take another example, until the beginning of 1990 a foreign oil firm operating in the Paris Basin would need to get clearance from the French Treasury in order to repatriate profits and assets to the parent company. The law has been more stringent for companies whose parents are not regarded as part of the European Community, such as a US group. Of course it should be pointed out that within the European Community there are plans to phase out all foreign exchange controls before 1992. In the UK, as in the United States, at present there is no foreign exchange control.

In most of the less developed countries, however, such as practically all of Africa, parts of the Middle East and parts of the Far East, there is some element of foreign exchange control. This in turn prohibits the availability of finance. Hence, bank loans are either not available for smaller companies or are not advanced on a non-recourse basis.

There have been cases when, even if the World Bank acts as a backer and provides a guarantee for such companies, most financial institutions are not willing to provide loans for investment in oil projects. Examples are countries such as Senegal, Gabon and the like.

Occasionally an oil company can access 'blocked funds' in exchange controlled countries, such as India or parts of Africa. These funds can be acquired for less than the principal of the loan. Here the owner of such funds is willing to release them for a lower amount in order to get them out of the country. But these are exceptions rather than the rule.

1.8 - Premium for Political Stability

Political stability is a crucial factor for lending purposes. In recent years many banks have lost a great deal of money on Third World debts which have had to be written off. So banks at board level have made a conscious decision not to finance projects in certain parts of the world that have 'Country Risks'. They treat them as restricted zones for funding purposes.

This in reality means: no matter how good the geology of the field or how handsome the prospects of the cash flow, when the request for finance for development of a field is placed in front of the credit department of a bank, the loan is turned down. Also this has been applicable to date to most of the centrally planned areas, for example Hungary.

[This is based on the consultant's personal experience. In May 1988, the Chairman of the Council of Ministers of Hungary paid a visit to Britain as a guest of the Prime Minister. At that time I was executive director of an investment bank in London. The Hungarian Council Chairman paid me a visit at the bank and invited me to advise them on their macroeconomic modelling efforts. I mentioned his visit to the chairman of our bank and asked if he was interested in meeting him. The answer was, "We wouldn't be prepared to lend such countries a penny. So what would be the point of meeting him?" (Incidentally, it should be pointed out that Hungary has a certain amount of oil and gas assets and Occidental has been the chief foreign investor.)]

Broadly speaking, in areas where 'Country Risks' exist for the purpose of external finance, oil companies have to use their internal finance. This factor tends to limit the industry to the oil majors or very large independents wherever there is an element of political instability.

Again, for Alaska this is an advantageous factor being excluded from such zones and as an investment climate it is a superior region.

1.9 - Stability of the Currency

Another factor is the stability of the currency of the country. A fair amount of hedging is required for the forward sale of the oil concerned when a currency is unstable. Usually, the more volatile the currency, the more the cost of the hedging.

For instance, the Australian dollar is regarded as internationally more unstable compared with the US dollar, and, hence, there has always existed a degree of concern about debt-financing in foreign currency.

The escalation of the Australian interest rate in 1989 to around 20% has created an overvalued currency. This implies once interest rates fall (though currently they have been reduced marginally to the current range of 17½ to 19%), a downturn in the Australian dollar is to be expected. Since the sale of crude oil is denominated in US dollars, a depreciation in the Australian dollar will in turn mean a decline in revenue for the Australian oil and gas companies.

This problem does not arise so much in the case of Alaska. The prices of crude oil and related petroleum products (being internationally traded commodities) are denominated in dollars. At the same time the revenues on oil industry activities in Alaska are earned in dollars. If the parent of a company is based outside the United States, however, and wants to repatriate the profits, some degree of hedging against movements in the dollar would be undertaken by the company.

1.10 - Modes of Oil Industry Finance

External financing for the oil industry has become more and more sophisticated over the years. New ideas have been emerging - perfecting the techniques of finance to suit the needs of the industry more closely.

It is preferable for companies to seek long term external funds - matching the life of their debt to their future production profile. This is not, of course, always feasible but companies try to get as close to it as possible. Modes of finance are many. A brief account of some of the different options for external finance open to companies is given below.

i) Equity Finance

This is when a company raises funds by way of an issue of its stock to finance a specific acquisition or development project. It is carried out through either a rights issue or treasury issue and is usually underwritten by one or a group of investment banks.

ii) Private Placement

Through this method both equity finance and debt finance can be arranged for specific purposes, e.g. the construction of a cross-country pipeline for oil and gas. For equity finance the private placement market comprises mainly large pension funds and insurance companies. This enables companies to raise cash without resort to public quotation.

Loans of fixed maturities can be secured whereby an issue of interest-bearing debt is privately placed with financial institutions without resort to public issues in capital markets. For example, a UK independent completed a $75 million five-year loan in 1987 through a private placement with seven Japanese trust and banking institutions.

iii) Bonds

A company can raise finance through an issue of a long-term (ten years, say) bond from a financial market. Where the bond is issued in a foreign market, the currency exposure is usually hedged.

iv) Banking Facility

This is a special arrangement with a bank where a fixed amount of credit is granted for a fixed period of time. The longer the maturity of the facility the better for the company. For instance, the European Investment Bank in December 1987 granted an oil company a £50 million facility of up to 14 years.

v) 'Charter' or Contractor Finance

This is one of the more innovative type of financing for field development that has taken place in the UK recently. Under this scheme the development of the an oil field is subcontracted to a contractor who in turn takes out the finance. The loan is then repaid out of the cash flow of the field by the contractor. In other words the finance is for 'renting' of the equipment such as chartering a drilling rig, etc. Thus the repayment of the capital is limited to the production levels of the field.

For every barrel the company pays the contractor a sum agreed a priori and the contractor in turn pays the financier.

This method was tried for the development of the Emerald field in the North Sea. Emerald has reserves of around 30 million barrels and a life of 5-7 years with a development cost of around £120 million. The contractor's finance was guaranteed by the UK government through the Department of Trade and Industry. Moreover, in the case of Emerald, the oil was forward sold to another company with a minimum agreed price.

The purpose of mentioning this type of funding is not for its frequent use. But it is intended to bring to the attention of the Legislature the most up-to-date information about the more creative types of financing for the development of some of the more marginal fields.

vi) Project Financing

"Project financing" is a form of loan increasingly used for natural resource development. As far as definition is concerned, it is a type of funding which must meet the following requirement: a) it is used primarily for the purchase of equipment, knowhow and machinery associated with a certain project, b) the duration of the loan is linked to the capability of the project to produce adequate cash flow for repayment of the loan, c) if the loan is in foreign currency, the project should produce adequate foreign exchange to meet repayments.

Effectively, this method enables reliance upon a free-standing investment such that its cash flow is isolated and specifically assigned to the project. The revenue is used for the payment of the project and does not accrue to the parent. This allows the lender to liquidate a mortgaged security in the case of default or cash flow interruption.

The move into expensive offshore production and other costly areas has created the need for such loan finance, and the oil majors have been able to raise their funds on the finest terms.

vii) Limited Recourse Finance

Under this scheme there is no recourse to the other assets of the company. It has gained increasing prominence as a preferred method for the funding of very large natural resource projects involving substantial capital investment. The assigned cash flow and associated costs are not included in the profit and loss account of the company. Also the related assets are excluded from the balance sheet.

This is a financing method used for the UK Brae fields (South, Central and North Brae).

1.11 - Interaction of Banks with the Oil Sector

In recent years the international financial sector has become a great deal more sophisticated, as well as aggressive, in its interaction with the oil and gas industry. A large number of major banks (both corporate and investment banks) have developed extensive in-house expertise and capabilities in this area. Thus, the initiation of finance is no longer a one-way route where an oil company first approaches the financier. Rather, it has developed into a two-way system. In fact more and more the direction of approach is reversed and the first steps are taken by the banks to initiate deals.

A bank can now 'create a deal' and plant the seeds of a transaction within the oil companies. Hence, a company is presented with both the asset and the financing that would accompany it as a package. Such oil assets can be in the form of a producing field, proven and undeveloped reserves, or exploration acreage, as well as shares of a particular company. Thus, companies in many cases simply respond to opportunities presented to them. The term 'opportunities' in this instance embraces a variety of activities, viz. development of a field, farm-ins, acquisition of a producing asset, or even exploration.

If a banker, say, approaches an oil company with a financial package to invest in Alaska (be it in the form of any of the above activities), the company may not instantaneously respond and quite possibly may turn down the deal. But the information regarding the deal acts as a reminder for the company of the existence of some potential opportunities in the region. It triggers further thought and awareness and may later lead into another completely different transaction.

In the case of Alaska there isn't the same frequency of such reminders presented to the rest of the world's oil and gas industry (as, say, in the UK).

1.12 - Comments on the Financing of Individual Fields in the Countries under Comparison

For the development of a field as large as Prudhoe, there would be ready finance available in all the four countries concerned. We shall concentrate on financing of fields which have to be developed, namely West Sak, Niakuk and Seal Island.

i) UK

A comparable field in the UK to Prudhoe, though much smaller in reserve size, would be the Forties field offshore in the North Sea. It should be pointed out the British government's policy of enhancing activity in the North Sea has been such that all exploration expenditure can be offset against Petroleum Revenue Tax.

Thus, when the Forties field became PRT-paying the operator of the field sold a small number of ½% and ¼% units of the field. These so-called 'Forties Units' were attractive as tax shelter and were bought by companies who could offset their exploration expenditure against the PRT liabilities of these small units. Forties Units have been ideal for foreign petroleum companies entering the UK for the first time or for independents wishing to expand their exploration activities.

The reserve estimates of the Forties field were raised in 1988 from 2,391 to 2,470 million barrels. By the end of 1988, approximately 1,909 million barrels had been extracted, leaving 561 million barrels. The average daily production of the Forties field in 1988 was 290,000 barrels per day. Thus a ½% unit held by an independent company amounted to 1,450 barrels per day of production. The Forties Units were traded at between £5 million and £3.5 million during 1988.

For the other fields, finance would be available on a 40 : 60 basis, whereby 60 per cent of the required finance would be available on a limited recourse basis. For the Seal Island field which has considerable risk one could attain 'Charter finance' if the price of oil rose considerably from its current level.

ii) Australia

Before discussing the financing of the smaller fields in Australia , it may be useful to give some background to the Australian oil and gas scene. It is a combination of a large number of junior oil companies with a market value of less than A$25 million and a small number of major oil companies.

The current economic climate, while adversely effecting the indigenous sector, has created favourable conditions for foreign investors. A cash-rich company has abundant opportunities for farm-ins with generous terms. There are also attractive acquisition possibilities of oil and gas assets.

The most likely financing route available for the development of the smaller fields by the independent companies would be through venture capital on the basis of 20 : 80. That is to say, 20% would be laid down by the owner of the reserves and 80% by the venture capitalist. If the development of the fields is undertaken by an oil major, an issue of medium-term notes seems to be the preferred route. In December 1989 a subsidiary of one of the oil majors offered to the market A$100 million of corporate bonds maturing in 1995 with a coupon rate of 14%. This was part of the company's financing package for their investments in 1989 and 1990. The gearing of this subsidiary is around 40%.

iii) Indonesia

Finance available for foreign companies to invest in the fields in Indonesia would be primarily granted on a corporate basis rather than localised to the assets in the country. Foreign companies who have invested in Indonesia over the past years have raised their loans on a corporate basis and have not obtained them on the basis of non-recourse limited finance. In fact, the financial community ranks Indonesia last for funding purposes, behind the UK, Norway and Australia. In this respect, Japanese banks have a different attitude. Their behaviour is more unique to themselves and differs to some extent from the rest of the financial community.

iv) Norway

The Norwegian banking sector has suffered major losses in the past three years. The collapse of oil prices in 1986 brought about losses on both loans and guarantees. The tide is just beginning to turn as a result of a great deal of rationalisation within the banking sector. The national oil company Statoil holds most of its long-term debt in foreign currency.

Recent acquisitions in the oil sector have been financed through internal cash flow of the companies. For instance in March 1990 a Finnish oil company, acquired the Norwegian arm of an American oil company.

Two - OTHER ASPECTS OF OIL INDUSTRY INVESTMENT

It is essential for politicians and civil servants not to review a tax structure in isolation from other aspects of petroleum industry investment. These 'other' aspects throw light on why companies may leave a certain area, and what other factors may influence their investment decisions besides tax.

2.1 - Strategic Decisions of Companies

The exiting of a company from a region may be construed by some as the result of excessive taxes. However, if one looks beneath the surface, it may turn out to be a strategic issue.

If one is led to believe that a certain oil major, say, is leaving Alaska, one has to closely examine the nature of the assets they are selling. Is it just downstream (namely refining and marketing), as it was in the case of one company recently, or is it upstream (exploration and production)? As far as is known the company concerned was planning to maintain its exploration acreage in Alaska. The production it was intending to sell (which it subsequently withdrew), was small and could have been part of its restructuring strategy. Companies periodically undertake a program of rationalisation and pull out of certain areas in order to consolidate some of their other activities. If they have a small operation in a particular region, it makes economic sense to withdraw and consolidate their resources and efforts in areas where they have bigger production and leases.

This does not mean that oil and gas activities in that area are inherently undesirable for the entire oil industry - or that the undesirability of the tax is the prime factor responsible for the exodus of a particular oil company.

Example: In 1988 one of the largest independent oil companies in the UK examined its international portfolio of assets and decided to sell its small interests in countries such as Holland, Ireland, etc. It chose to consolidate its assets in the UK North Sea. So when it put up for sale its Dutch exploration interests, it was faced with a very keen interest from a European company who had made a decision at board level to expand their Dutch activities.

In fact the European firm was so keen to acquire the interest and conclude the deal that they bid considerably above the initial price the British independent had in mind. In the end,

however, the British independent did not sell. It arranged a swop of the Dutch assets with another company. This made sense, for the cash receipts would have been subject to capital gains tax.

In short the British independent's decision to exit the Netherlands was in no way a reflection on the Dutch oil and gas taxation regime. On the contrary, the Netherlands has become quite an attractive area for the industry to enter in recent years (further explained in section 2.5 where we look at two more tax jurisdictions relevant for comparison with Alaska).

2.2 - Existence of Production Quotas

Another element is production control imposed by OPEC within the thirteen member countries. For a company to operate in any one of these countries where production quotas are imposed is anything but the best investment climate. Any given field has an optimal depletion rate with which one should not interfere, as far as optimal reservoir management is concerned. This was confirmed by the reservoir engineers during the consultants' visit to Prudhoe Bay. [In Iran, for example, as a result of continuous cutbacks (due either to the Gulf War or OPEC quotas) and, hence, poor reservoir management, a great deal of the country's reserves have diminished.]

Clearly, an OPEC member country with a quota system, such as Indonesia, is an inferior region compared to Alaska where no production restriction exists.

2.3 - Consequences of Cutbacks in Production

Within the non-OPEC countries chosen, Norway has in the past three years been trying to help OPEC with some self-imposed "cutbacks". This voluntary restraint during 1989 was 7.5%. For 1990 Norway has restricted oil companies to producing at 95% capacity.

Although the effective cutback has been on the growth of production and not on the actual level of production, this again is both destabilizing and undesirable from the oil industry's viewpoint. Once an oil company has undertaken the investment in a field it should be allowed to produce at the optimal rate. Cutbacks would be simply eating into the profits of the industry.

2.4 - Mixture of Companies Active in an Area

In drawing up tax comparisons between different countries, it is essential that one also looks at the mixture of different companies active in the petroleum sector of those regions. For any changes in the oil taxation could affect them differently. It is important to study how many lose and how many gain.

This dimension of the analysis is particularly relevant if the government is conscious of the absence of oil independents and wants to encourage investment in the area by smaller companies.

The distribution and mixture of the licence holders for some of the countries examined in this study are given here. These tax jurisdictions are: the UK, Norway, Australia and the Netherlands.

i) In the UK there are a total of 118 licence holders of which 39 companies hold around 94% of the total licences. These companies would be categorised as the principal licence holders. What is significant is that the remaining 6% of the total area leased is held by 79 licence holders. This reflects the large number of independents active in the UK part of the North Sea.

ii) In Norway there are a total of 38 licence holders of which 17 companies hold over 96% of the total leases as the principal licence holders. Less than 4% of the total area leased is held by 21 licence holders. The number of independents in Norway is substantially below that of the UK. This is significant - considering that Norway will be the largest oil and gas producer in Europe after 1994.

iii) There are over two hundred participants in the Australian industry of which less than a hundred are actual owners of oil and gas reserves. Despite the large number of players, 86% of the oil and gas reserves is in the hands of nine companies. Among these nine significant owners of the reserves are three Australians and the rest are international majors.

iv) In the Netherlands there are a total of 64 licence holders of which 20 companies hold around 85% of the total leases as the principal licence holders. Less than 15% of the total area leased is held by 44 licence holders. What contrasts Holland with the other two is the lower concentration of the principal licencees - 85% against 94% in the UK and 96% in Norway.

The consultant has not been able to obtain the comparable distribution figures for Alaska. This comparison could be carried out perhaps at a later date with the help of the Department of Natural Resources.

2.5 - A Look at Two More Tax Jurisdictions Relevant for Comparison with Alaska: The Netherlands and Canada

At the January meeting of the International Tax Comparison Committee it was requested that the comparative study of taxation for Alaska should include a brief review of the tax and industry activities in two more regions: The Netherlands and Canada.

i) Dutch Petroleum Taxes and Environment

Although Dutch offshore activities can be regarded as being in the mature phase, the oil industry has witnessed a growing number of takeovers. Moreover, assets have been changing hands more frequently in recent years. It is evident that interest in the Netherlands is rising and oil companies, both large and small, have paid premium prices for the purchase of assets in this area. A good example is the purchase of such assets by a British independent in October 1988.

Furthermore, when the Dutch seventh round of licensing took place during 1988 (over the period 1 October to 30 December), 115 applications were received from 23 different consortia amounting to 59 different companies. A brief overview of the Dutch taxation system is given below.

Netherlands Fiscal Regime

The Dutch Petroleum Tax Regime has two main components which are mutually dependent. Thus the computation of the tax liability is in a way similar to the solution of a simultaneous equations system. There are two types of licences - 'old' and 'new'. This distinction essentially amounts to a ring fence whereby losses from one group cannot be offset against profits from another.

a) Royalty:

Royalty is charged on a field depending on its production rate and the time when the licence was first awarded. The rate is halved if there is state participation in a given licence. Royalty rate does not exceed 16%.

b) Profit Share Tax (PST):

Due to the simultaneity problem mentioned above, it becomes imperative to compute provisional values of profit share tax and corporation tax (explained below). Thus, the provisional PST estimate is income less royalty, operating cost, depreciation and uplift. Uplift is at the rate of 70% for new licences and 50% for old licences. When the provisional corporation tax calculation has been made the final liability of PST can be computed taking the provisional CT into account. PST is paid in two instalments with on average a delay of about seven months.

c) Corporation Tax (CT):

Corporation Tax is provisionally calculated on approximately the same basis as PST and is not subject to any ring fence provisions. Once the final PST calculation has been made, liability for CT can be calculated with the PST incurred removed from the income liable for taxation. CT is payable on average 18 months after liability is incurred. From March 1988 Corporation Tax has been 35%.

ii) Canadian Petroleum Taxes and Environment:

When examining the Canadian system it is important to note that the country has a very heterogeneous mixture of fields located in different parts of the country. There are considerable variations in field sizes and field costs.

The oil and gas fiscal system underwent major revisions from the mid-1980s which were introduced by both the Provincial Governments of Canada and the Federal Government. The prime intention of this revision was to devise a system that was geared to market forces in the oil and gas industry.

Most significant was the abolition of Petroleum & Gas Revenue Tax (PGRT) both for new fields (with effect from 1985), and for fields already in production (with effect from 1988). The PGRT on the latter category was gradually reduced to zero over a period of three years.

Parallel to the cut in taxes was the removal of investment tax credit in 1988. By the summer of 1989 Corporate income tax became 33%. Currently no provincial taxes exist for offshore oil production.

In Alberta, the current provincial royalty formula takes account of three major factors: i) the time of discovery, ii) the level of oil prices, and iii) the volume of well production. The major tax reliefs are royalty holiday, royalty tax credit and royalty rebates.

The reformed tax system (after the National Energy Program of 1985) applied to Alberta is quite complex and details of the structure of the tax are beyond the scope of this report. [For further information see Dept. of Energy, Mines & Resources of Canada Report (1985): The National Energy Program (Ottawa, Canada).]

The tax scheme introduced after the National Energy Program provides incentives for further exploration particularly in Alberta. Indeed, compared to most oil producing regions of the world, the Canadian tax system is more conducive to exploration activities.

Three - INTERACTION OF GOVERNMENT AND OIL INDUSTRY

It has happened in many regions that at the time licences for exploration and development of fields are given, the government of a particular region has had a fairly lax attitude towards taxes and royalties. Once the industry has taken all the risks and sunk funds into investment - having found it profitable on the basis of the initial calculation - the government then revises the tax upward (sometimes gradually and sometimes more steeply) and prevents the investors from acquiring the rewards for which they took the initial risks. This happened in the 1970s in Britain as a result of decisions taken by the Labour Government which was in power between 1974 and 1979.

3.1 - BRITAIN

The deterioration of relations between the British Government and the oil industry during the 1970s can best be explained through the experiences of an American oil independent called Mesa Petroleum [as narrated by the company chairman T. Boone Pickens Jr. in Boone (1978), Hodder & Stoughton Ltd., Great Britain, pp 112 - 121]. Mesa Petroleum, now worth around $3 billion, both entered and exited the UK North Sea during that decade.

After the discovery of oil in the North Sea in 1965, the British Government gave 50,000-acre tracts free to any company who undertook to carry out exploration in that region. Mesa Petroleum obtained two licences in the early 1970s and explored for two years. By the mid-1970s they had a discovery. This was the Beatrice field, named after the chairman's wife.

While the American independent was exploring and spending millions of dollars, a new Labour Government came into power in 1974 and the rules changed. They created a state oil company named the British National Oil Corporation (BNOC). Oil companies were told then that they had to negotiate with BNOC who wanted "participation".

Mesa protested to the UK Government that they had signed an agreement with their company. The response they received was, says the chairman of the company, "If I didn't like the terms, they could make things a lot worse for us".

Mesa entered into a series of long and arduous negotiations with the UK Department of Energy and was finally told by an official there, "You might as well give up. This has been decided." BNOC took a twenty percent interest in the field. To Mesa this was an unusual 'collaboration', since the new partner had no financial risk but had a veto power on everything. This included Mesa's expenditure. They discovered that "the original partners of the field would continue to share all the risks and costs of developing the field". As Mesa's chairman put it, "This was the British idea of partnership".

The BNOC representatives were present at all the operator meetings and applied their veto power wherever they chose.

The Labour Government's treatment of the industry worsened with successive upward revisions of taxes in those years to the point that the oil companies felt they left little reward for taking risks.

In 1978 Mesa complained to an official of the Department of Energy how they were wasting their money on the one hand and increasing their taxes on the other, leaving them with little profit. This could force them to leave.

The official replied, "Oh you'll stay. We have studied people like you. You are an entrepreneur. You have to keep risking your money, because that's the way you are". That statement turned out to be the straw that broke the camel's back. Mesa at that point made a final decision to leave the UK and sell off their North Sea operation. "If there is no profit, an entrepreneur isn't going to be interested very long," said the chairman of Mesa to the DOE official.

BNOC had the option to buy the production from any field, should a partner wish to sell. This proved another arduous and agonising ordeal for Mesa when negotiating a price with the state oil company. Mesa finally left Britain in 1979 with $31.2 million profit. But to them this was not such a good deal, for they sold their largest discovery at a wholesale price.

When the Conservatives came to power in 1979, after an initial phase of tax increases, the petroleum fiscal policy was reversed and the system became more profit oriented. Downward revisions were introduced year after year. Accordingly, exploration and development activities in the UK side of the North Sea responded positively as shown in Fig. 1 and Fig. 2.

Parallel to the increased level of activities was a reduction in UK government revenue from the oil and gas sector as portrayed in Table 1. This decline in revenue, which is partly due to the collapse of oil prices in 1986 and partly due to reduced production, reflects the magnitude of exploration costs offset against taxation. Moreover, Fig. 3 shows that the substantial drop in UK government revenue is not matched by a significant fall in oil and gas production during the years 1986,'87 and '88. The fall in production in 1988 was partly due to the shutdown of fields caused by accidents such as that of the Piper Alpha field.

In 1988 at a gathering organised by the consultant, the Labour Party Spokesman for Energy addressed some two hundred senior executives of the oil industry. His only message seemed to be "Tell us what you want and we shall act upon it." This was interpreted by the attendants as a sign that the Labour Party had no clear direction. Many of the participants left the meeting relieved that the Labour Party were not in power, not having forgotten the party's grim policies of the mid- and late 70s.

Presently the UK is one of the most attractive regions for exploration and development from a taxation point of view. Suffice it to say, the shortfall in revenue from the oil and gas sector could be readily absorbed by the government, for it coincided with its privatisation of many large corporations, such as British Gas, British Telecom, British Airports Authority, etc.

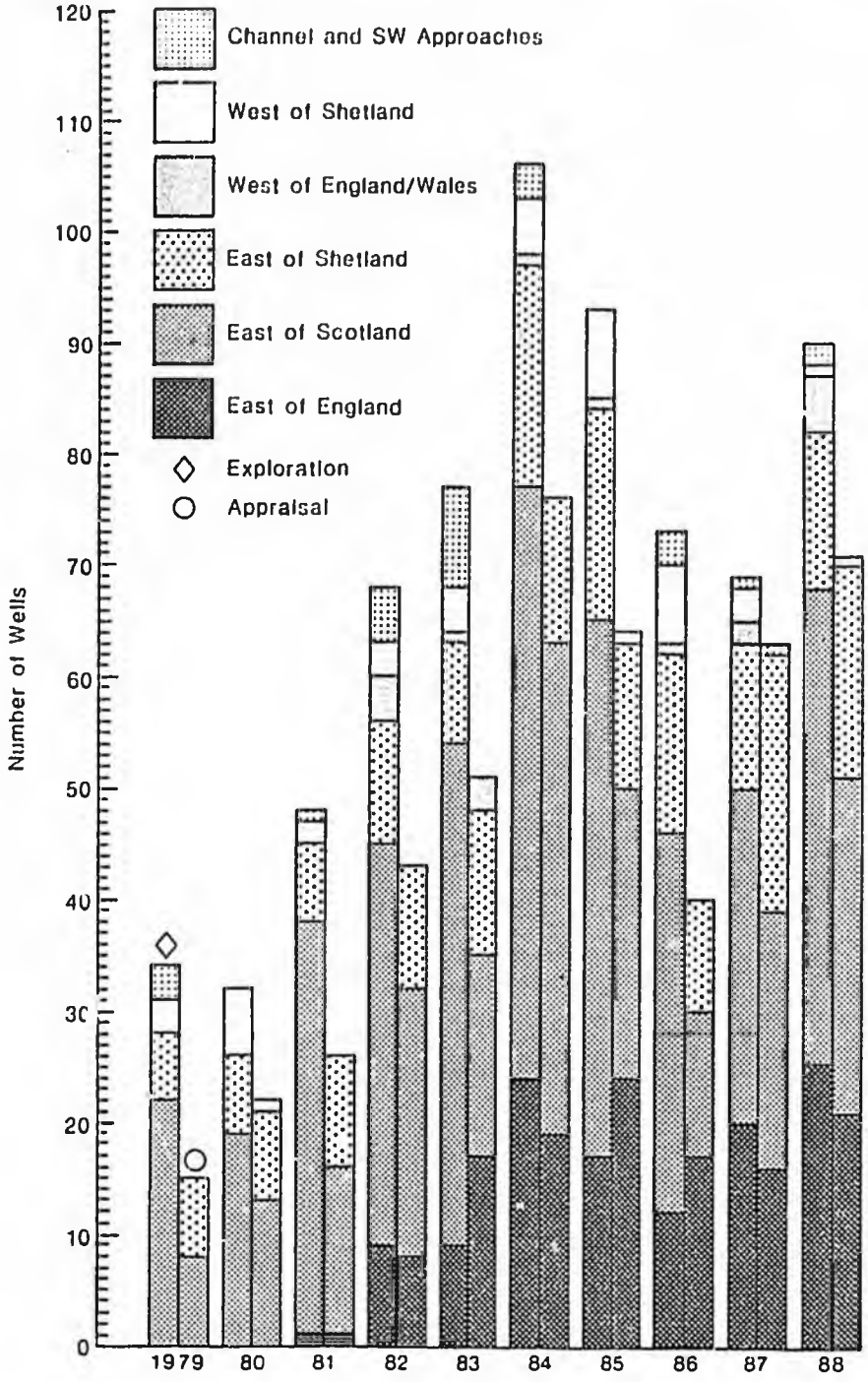
If one looks at forecasts made for the UK future oil production profile made in the early 1980s, a sharp decline was foreseen for the end of the decade with the peak projected for 1984/5. In fact this trend proved incorrect and the decline has been much less severe. This can to some extent be attributed to the continual revision of taxes and, hence, encouragement given towards further investment by the government.

Table 1: TAXES AND ROYALTIES ATTRIBUTABLE TO UK AND UKCS OIL AND GAS

Financial Year	1979/80	1980/1	1981/2	1982/3	1983/4	1984/5	1985/6	1986/7	1987/8	1988/9 (prov)
(£ Million)										
Royalty	628	992	1396	1632	1904	2426	2057	919	1024	600
Supplementary Petroleum Duty	-	-	2025	2395	-	-	-	-	-	-
Petroleum Revenue Tax	1435	2410	2390	3274	6017	7177	6375	1188	2296	1300
Corporation Tax	250	341	681	521	877	2425	2917	2683	1350	1300
Total Revenues	2313	3743	6492	7822	8798	12028	11349	4790	4670	3200

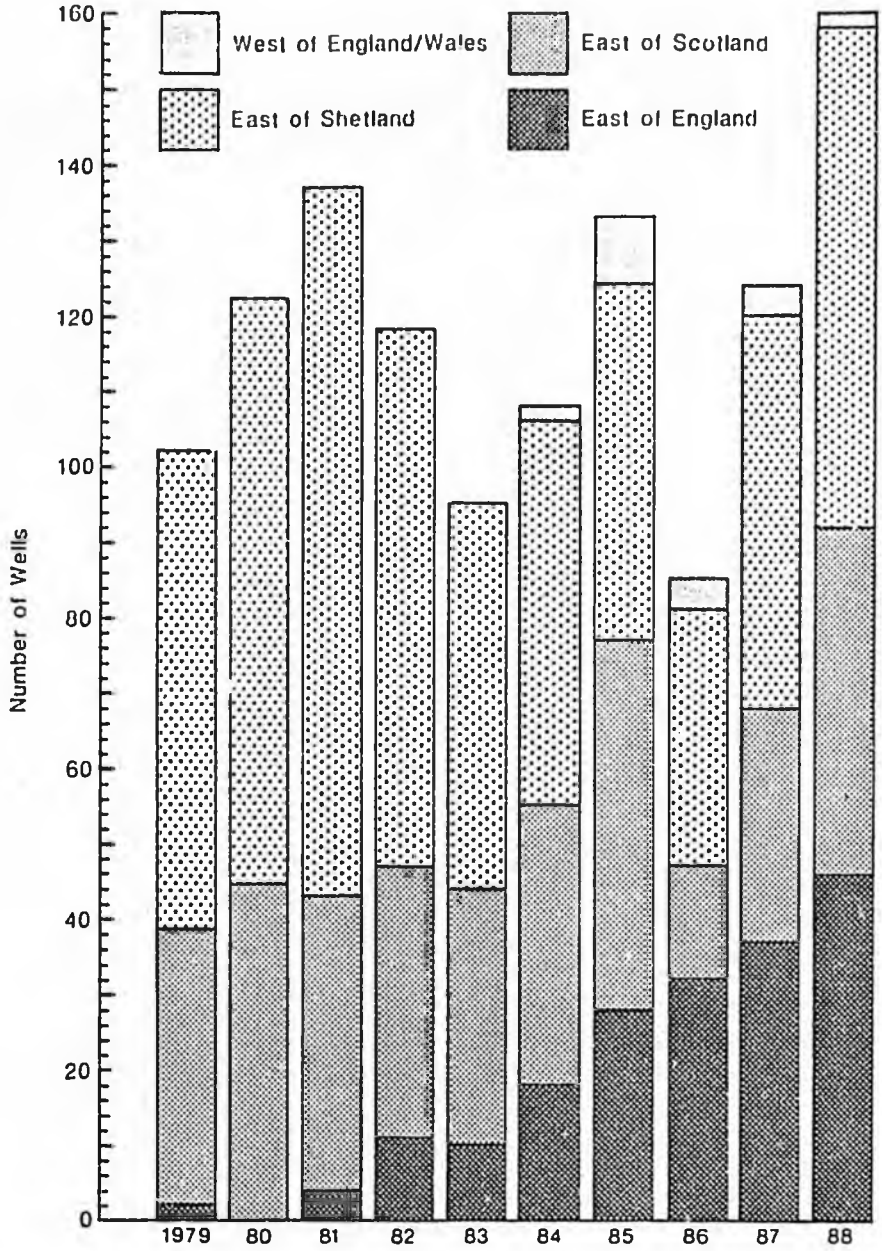
Source: UK Department of Energy, The Development of Oil & Gas Resources of the United Kingdom, London, HMSO, April 1989.

Fig. 1: OFFSHORE EXPLORATION AND APPRAISAL WELL DRILLING



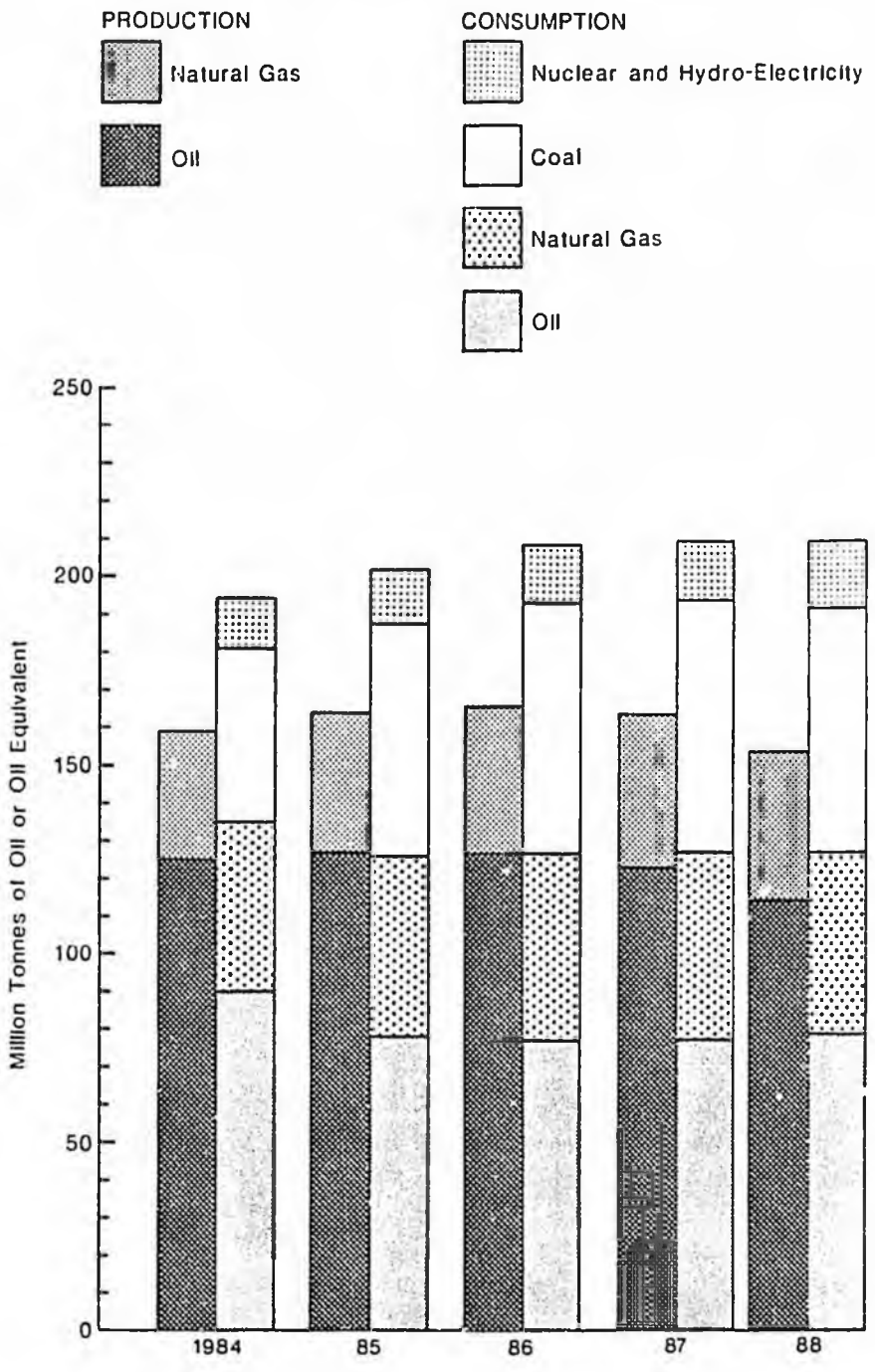
Source: UK Department of Energy, The Development of Oil & Gas Resources of the United Kingdom, London, HMSO, April 1989.

Fig. 2: OFFSHORE DEVELOPMENT WELL DRILLING



Source: UK Department of Energy, The Development of Oil & Gas Resources of the United Kingdom, London, HMSO, April 1989.

Fig. 3: UKCS AND ONSHORE OIL AND GAS PRODUCTION COMPARED WITH UK TOTAL PRIMARY FUEL CONSUMPTION



Source: UK Department of Energy, The Development of Oil & Gas Resources of the United Kingdom, London, HMSO, April 1989.

3.2 - CANADA

In July 1987 a British company made an offer to purchase 50 per cent of the shares of a publicly quoted Canadian oil and gas company. The company, worth then about C$800 million, was based in Alberta and owned substantial assets in the UK North Sea, which were of interest to the large British company.

The offer was approved by the Board of Directors of the Canadian company and the British firm was led to believe that the acquisition would be approved by the Canadian Government.

About a year prior to the offer, the Canadian Government had decided to reverse its interventionist policies and had opted to actually encourage foreign investment in Canada. It changed the name of the quango hitherto called "FIRA" (a foreign investment review body) to "Investment Canada". Indeed, the name itself had the connotation that the state was in favour of the flow of capital to the country. But this turned out not to be the case when the British firm's offer was presented for government approval. The former was given a great deal of trouble having already announced the deal to its shareholders.

The executives of the Canadian firm had to carry ou' tiresome negotiations trying to untangle the bureauc' n Ottawa while at the same time maintaining the inte' nd goodwill of the British investing firm.

In the end the government in Ottawa did not give i' d the British company had to split its 49% shareholding to ' voting shares and the remaining 19% non-voting Z shares.

Following this incidence, and to avoid further adverse publicity, the Canadian Government attempted to r' generate interest and encourage the flow of investment from abro ad.

In November 1987 a Belgian oil and gas company attempted to enter Canada by making acquisitions. Again the barriers posed by the government forced the company to return empty-handed.

The Canadian protectionist policies have indeed been damaging and counter-productive. Presently the government is in severe financial difficulty suffering from a large budget deficit. Somehow the policy-makers seem to ignore the economic reality that the lower the level of investment, the lower the level of activity, and, hence, the less tax revenue available for government. Today the public sector debt-servicing burden in Canada is ten times higher than in 1975. Thus, to reduce the deficit a 7 per cent goods and services tax is to be introduced from January 1991.

3.3 - AUSTRALIA

Australia is a federation of six States and two Territories (Canberra, known as the Australian Capital Territory, and the Northern Territory).

In an effort to improve the mounting balance of payments deficit, the Australians imposed a revenue tax on production at the time of high oil prices. This tax has not been reduced proportionally as the price of oil halved.

In June 1987, the Australian government introduced some tax concessions where the excise tax was to be cut from 80% in 1986/87 to 75% in 1989/90.

These modifications were not, however, considered adequate. For the combination of the excise tax and the corporation tax brought the government take on a barrel of oil to 88%. The industry tried to exert further pressure on the government to ease oil taxation.

In November 1988 some 25,000 barrels of production in the Bass Strait was shut down. Following this, in January 1989, the Australian government proposed a new sliding scale of taxes for certain fields in the Bass Strait (regarded as a mature area for so called "old oil").

The new arrangement was announced as a "non-negotiable" sliding scale to replace the existing 77% rate that applied to half of the Bass Straight oil. The range of the sliding scale was between 77% at an oil price of above A$21 a barrel and a minimum of 55% if the price dropped to A$8.

In May 1989 a European oil giant put up for sale all its Australian oil and gas production assets, after 27 years of exploration search. A statement made by the head office of the company said these assets were no longer within the international policy of the group.

The sale of the above assets coincided with another divestment: that of a UK independent of its Eastern Australia assets, although it should be pointed out that the company in question has simultaneously been expanding its North Western Australian activities.

Finally, another burden imposed by the state has been the policy of high interest rates pursued in Australia since last year. Thus, oil and gas investments that have required corporate financing or project financing have had to be postponed.

In June 1989 the government in Canberra launched a review of Australia's crude oil tax. The study is to be completed by mid-1990.

Table 2: AUSTRALIAN GOVERNMENT REVENUE FROM CRUDE OIL, NATURAL GAS & LPG

(A$million)	1983/4	84/5	85/6	86/7	87/8
COMMONWEALTH					
Crude oil excise	3593.6	4041.8	4310.6	2195.4	-
LPG excise	92.9	69.4	81.9	37.6	-
Crude oil & LPG total	3686.5	4111.2	4392.5	2233.0	2193.7
Crude oil & LPG refunds	12.5	3.5	102.1	236.6	71.0
Total	3699.0	4114.7	4494.6	2469.6	2264.7
VICTORIA					
Royalties on production	173.7	197.5	202.8	147.3	144.1
Total	173.7	197.5	202.8	147.3	144.1
QUEENSLAND					
Royalties crude oil	2.2	18.9	32.6	17.6	22.7
Royalties natural gas	2.5	2.6	3.2	2.3	3.6
Royalties LPG	-	-	-	-	0.2
Total	4.7	21.5	35.8	19.9	26.5
SOUTH AUSTRALIA					
Royalties on production	11.1	24.3	47.5	26.3	28.8
Total	11.1	24.3	47.5	26.3	28.8
WESTERN AJSTRALIA					
Royalties crude oil	14.8	13.8	29.3	21.9	23.8
Royalties natural gas	3.4	3.8	3.6	4.8	4.9
Royalties condensate	-	-	-	-	1.3
Total	18.2	17.6	32.9	26.7	30.0
NORTHERN TERRITORY					
Royalties crude oil	-	0.8	2.1	1.3	0.6
Royalties natural gas	-	0.1	0.1	0.5	1.0
Total	-	0.9	2.2	1.8	1.6
TOTAL AUSTRALIA	3906.7	4376.5	4815.8	2691.6	2495.7

Source: Australian Bureau of Statistics (annual reports and budget papers of relevant State and Northern Territory departments).

3.4 - NORWAY

Oil and gas production commenced in 1971 when the Ekofisk field started production. In Norway the state (through 'tatoil) participates directly on the investment side of the siness. Statoil has gone through a change of organisation and after a period of overrunning cost, the company is quite profitable now. However, privatising this company is not likely to happen in the near future.

The former Norwegian Minister (of the Labour Party) who was in power until Autumn 1989, was a strong advocate of regulating the offshore oil and gas developments and carried out interventionist policies. For instance, the sales of Norwegian gas are negotiated only by three domestic companies. These restricting policies brought about a reduction in activity in Norway and reduced exploration activities. Compared to the UK North Sea, where on average 160-170 wells are drilled each year, in Norway the number has been dwindling rapidly from 50 exploration wells in 1985 to around 25 in 1989.

Table 3: ROYALTIES IN 1987 AND 1988 (NOK MILLION)

		1987	1988
OIL	Ekofisk/Valhall/Ula	1190.8	1029.1
	Statfjord	4832.6	3321.9
	Murchison	14.5	21.5
	Heimdal	-12.4	-0.3
	Oseberg	33.0	12.9
	Gullfaks	82.5	165.2
GAS/NGL	Ekofisk Fields	545.3	415.7
	Valhall	14.7	0.4
	Ula	-2.6	-1.2
	Frigg/Ne Frigg/Odin	785.0	521.4
	Statfjord	5.6	0.0
	Murchison	-0.3	0.2
	Heimdal	27.8	-6.0
	Gullfaks	0.0	0.0
TOTAL ALL FIELDS		7516.7	5480.9

Source: The Norwegian Petroleum Directorate, Annual Report 1988.

Table 4: CENTRAL GOVERNMENT INCOME FROM OIL ACTIVITIES IN NORWAY, 1981-1988

Year	1981	1982	1983	1984	1985	1986	1987	1988
(Million kroner)								
Royalty	3639	5308	7663	9718	11626	8211	7517	5481
Special tax on oil income	4955	8062	8870	11078	13013	9996	3184	1072
Ordinary tax on property, capital and income	9912	13804	14232	18333	21809	17308	7137	5129
Area tax, etc.	63	69	75	84	219	237	243	184
Total	18569	27243	30840	39213	46667	35752	18081	11866

Source: Norwegian Central Government Account.

In 1987/88 there were major revisions to the Norwegian tax regime in order to induce development of new fields. But a suspicion has existed on the part of industry that the Norwegian government had simply modified the tax law with a view to making certain petroleum development projects more attractive. Industry has felt that the modification would disappear as soon as the projects had been developed and profitable production started flowing.

Whereas in the UK part of the North Sea the relationship between industry and the government has been quite good in the '80s, in Norway there are cases of litigation between the government and the oil industry. For example, in December 1989 partners of the state oil company on the Ula field took their claim regarding excessive pipeline tariffs to arbitration. The field's operator, a British company, pleaded that the tariffs charged by the state oil company for the use of its pipeline (i.e. the Ula/Ekofisk line) are unreasonably high. Thus, the partners are demanding a 50% reduction on the tariffs on the grounds that they were set when the price of oil was around $30 a barrel. The state oil company, on the other hand, argues that the alternative of buoy-loading or construction of a line owned by all the Ula partners was presented to the partners. Yet, they all opted for the state oil company to build the entire pipeline alone.

A new Minister of Petroleum and Energy was appointed in October 1989 when the Centre Party came into power (as part of a new non-socialist coalition). Following his appointment some oil companies began to lobby the government for modifications in licensing terms enabling them to take greater risks. In November 1989 the new minister indicated that he would be "open to companies' creativity, if this can stimulate exploration which otherwise would not have taken place". Subsequently, he introduced revisions to the terms of some of the existing licences. At the end of November 1989 he confirmed "the dropping of the state's right to have its exploration costs met - or carried - by other partners in the block".

3.5 - INDONESIA

Indonesia produces 1.7 million barrels per day in line with its OPEC quota. During the fiscal year 1988/89 the government revenue from oil and LNG (as shown in Table 5 below) comprised 41% of the total domestic revenues collected. With the weaker oil prices during 1988 the hydrocarbon revenue for the year 88/89 fell by 5%. This income is expected to rise by 36% in the year 89/90.

Table 5: INDONESIAN DOMESTIC REVENUE FISCAL YEAR 1988/89

	(in trillion rupiah)		(billion US dollars)	
Hydrocarbon revenues		9.5		5.6
Oil	8.3		4.9	
LNG	1.2		0.7	
Non-hydrocarbon		13.5		8.0
Total domestic revenue		23.0		13.6

Daily average production of oil during 1989 was 809,050 and the yearly production of liquefied petroleum gas has been 18.5 million of LNG.

A split of 85 : 15 (between government and industry) existed until August 1988. But for frontier areas the government offered a revised profit-sharing arrangement. Under this scheme, at lower quantities of oil production, a bigger share was to be attributed to the company and the reverse was to take place at higher production.

This change was necessary because the 85 : 15 split did not differentiate between the high cost and low cost fields.

In February 1989, the government improved the production sharing agreement further by giving an investment credit for deep sea contracts. At the same time the gas pricing policy was changed and was based on the production cost of different fields instead of the previous basis, namely, the type of the end user.

Although these revisions were welcomed by industry, the general reaction is that a great deal more revisions would be required to attract significant expenditure on exploration. There is a belief by oil producers that the improved terms have to apply to existing contract areas where actual production and enhanced recovery take place. Nevertheless, the number of foreign companies keen to sign contracts has been rising. There are altogether more than forty foreign companies active in Indonesia.

3.6 - MECHANISMS THAT IMPROVE INDUSTRY/GOVERNMENT RELATIONS

The relationship between industry and government improves only through closer contacts and frequent informal meetings. In the UK the Secretary of State for Energy or the Junior Ministers of the Department of Energy are often invited to informal lunches by both industry and the financial community. On these occasions companies are able to express their views freely and the government is able to 'hear'.

Usually when the invitation is from industry it is arranged by a single company and its views, which contain information of a proprietary nature, can be expressed openly without the presence of competitors. Government officials (be it Ministers or Members of Parliament concerned with the oil industry) are accompanied by their advisors who would supply them with necessary information should a specific issue be raised. In addition Ministers are accompanied by their Parliamentary Private Secretary who is another Member of Parliament.

There seems to be a lack of such opportunities in Alaska. It is helpful to allow industry the chance for such meetings on a single company basis due to the confidential nature of the business information. Moreover, opportunities have to be given to the financial community to host lunches with both government officials and representatives of industry present. This eases the flow of information and forward movement of activity. Moreover, the private sector can gain useful knowledge and advice from the government.

In Norway there is a government body, the Norwegian Petroleum Directorate, which acts as coordinator between different departments. It was set up in 1973 and has regular meetings with both industry and different government departments. With the expertise, experience and interdisciplinary insights it represents, it evaluates economic, technological and safety-related aspects of the petroleum resources.

As far as attraction of overseas companies is concerned there seems to be a perception on the part of the Government of Alaska that it cannot be seen to promote investment from abroad into the state. This is in sharp contrast with most countries where public sector officials actively promote foreign investment. In the UK even the Prime Minister makes frequent trips abroad specifically discussing the issue of the flow of investment into the United Kingdom. The same is true of Norway, Australia and Indonesia.

Four - COORDINATED GOVERNMENT POLICY

A striking feature of the Alaskan oil and gas scene is the lack of coordination between different government agencies active in the sector. It has been clear to the consultant through various contacts with representatives of the state government that there is an absence of an exchange of information and ideas on a constructive basis.

In the United Kingdom the Inland Revenue is under the direct auspices of the Treasury which in turn determines the taxation structure.

The former also works very closely with the Department of Energy (DOE) in formulating taxation policy. Naturally the Inland Revenue is privy to confidential information which it does not divulge to the DOE. However, it is able to receive the advice and recommendations of the latter as to what type of tax relief could further stimulate activity in the oil and gas sector. This is then fed to the Treasury through the computations put forward by the Inland Revenue. Finally the the Chancellor of the Exchequer decides upon the necessary tax revisions and announces them in the Budget each year in March.

An official of the Inland Revenue or the Treasury is often present at the meetings of the Department of Energy with the financial community or industry. Moreover, there is a liaison between the Department of Trade and Industry (DTI) and the Department of Energy. Where an oil development project cannot get off the ground because the contractors require financial guarantees, the DTI undertakes the necessary guarantees.

An example is the development of the Emerald field. Following the approval of the Annex B (i.e. the development consent) by the Department of Energy, assistance came from the Department of Trade and Industry. As the chairman of the operator of the field stated in their 1988 Annual Report, "The contractor's finance could not have been completed without the support of the Department of Trade and Industry, who guaranteed a £94 million package of equipment and service from British suppliers." This created 2,000 jobs for the industry in the UK.

As far as the relationship between the Alaskan Department of Natural Resources (DNR) and the Department of Revenue, there should be more coherence between their respective policies for the best interests of the state. Specifically, the former can formulate tax policies with the help of the latter to achieve the highest level of exploration and development. Accordingly, the DNR can encourage further development of the petroleum sector by the awarding of licences through a merit system. Companies acting in the best interests of the state would be given preference in the granting of new licences.

Moreover, the entry of the smaller explorers would be brought closer by relaxing some of the terms stipulated for new acreage releases. Many junior oils are looking at investment outside their own countries, having found their domestic opportunities dwindling, e.g. in Australia.

It would be useful if there were a review of work commitments by the Alaskan Department of Natural Resources as to how companies have utilised their exploration licences and how much actual drilling has been performed. There seems to be a belief in the Department of Natural Resources in Alaska that everything should be left to the market and the companies know best. If companies are not exploring, there must be a good economic reason for it. This is not necessarily true. What holds at microeconomic level does not necessarily hold at macroeconomic level, and, in a competitive market, what is good for one company may not be good for another.

Five - ENCOURAGEMENT/ROLE OF INDEPENDENTS

As far as encouragement of the independents into Alaska is concerned, perhaps there are some lessons to be learnt from the UK.

A Select Committee was set up by the UK Government in 1988 which examined the future of the British independents. The main finding of the study was that the independents have made a significant contribution to the development of oil and gas in Britain. Furthermore, the report recognised the importance of their ongoing role. The committee concluded that they wished to see an enhanced capability for the independents.

The UK Department of Energy has been encouraging the development of small British independents by granting them approval to act as field operators. This is a change of policy on the part of the government in recent years, for historically the responsibility of acting as an offshore field operator has been placed in the hands of the oil majors.

Six - CONCLUDING REMARKS

There would be a great many petroleum companies worldwide who would be interested in entering Alaska. Thus, if faced with the threat of closure or departure by some companies, the government of Alaska should be reassured that there would be others willing to enter the region should the opportunity present itself. In addition there would be abundant external finance available for investment.

In the international petroleum scene today there are always companies who are willing to offer prices over and above what would be classed as 'commercial terms'. They pay such prices in order to achieve their longer term objectives of expanding their upstream positions.

Furthermore, it would be just as effective to introduce the foreign banking community to Alaska, as it is to expose the industry worldwide to Alaska. For the bankers themselves would carry out half the task of encouraging further investment into Alaska through their own fervour for initiating deals, as explained in detail in section 1.11.

This should not be misinterpreted as saying the State of Alaska is short of capital and, hence, so few oil companies are active in the region. Rather, the call for energy-oriented bankers is for their ability to circulate further information about opportunities in Alaska among the international oil industry. The stimulus the financial community is able to make can be quite effective for the encouragement of newcomers into Alaska. The term 'opportunities' in this instance embraces a variety of activities, viz. development of a field, farm-ins, acquisition of a producing asset, or even exploration. Accordingly the investment by the newcomer would be undertaken to suit the company concerned.

It would be up to the Government of Alaska to bring the opportunities to the attention of both foreign oil companies and the foreign banking communities. One possible way would be through sponsoring various conferences on 'The Oil and Gas Scene in Alaska' - inviting both a large number of oil companies absent from Alaska as well as the energy-oriented international banking community. The desired result would not be instantaneous. Such an initiative would be a starting point that can bring about further awareness for outsiders. But the reminders have to continue in a frequent manner if the momentum is not to be lost.

All the government would be doing in this case would be to create the environment - reminding the independents that their presence would be desirable. The rest of the thinking would be done by industry if the environment is found conducive to investment.

The superiority of Alaska as an investment region can be summarised by way of a checklist, itemised in Sections 1.6, 1.7, 1.8, 1.9, 2.2, and 2.3 above.

For funding purposes the ranking given by the financial community is the following: 1) UK, 2) Norway, 3) Australia and 4) Indonesia.

Suffice it to say when an oil company considers entering a new area tax is but one factor out of many. When it contemplates exiting, tax may be the only factor.

In examining Alaskan taxes one has to ask the question: does the fiscal system guarantee a maximum tax payable on a given field? This guarantee exists in the British system by way of a tax clause known as "safeguard". Such a provision acts as a check between the flow of income in relation to the capital sunk in the project and, hence, the payment of tax.

Another factor when examining the Alaskan Tax system is to see whether there is consideration for profitability of a field by specifically looking at the payback period, i.e. when it breaks even. This provision is met in the UK tax system by allowing uplift of 35% on capital expenditure until the field reaches payback.

In analysing the effect of a change in oil taxes it is important to study the different characteristics of the companies active in the State and compare the mixture with other areas. Any changes in the oil taxation have to be examined in relation to the balance of the losers and gainers (see Section 2.4).

If the government is concerned about its immediate income as well as the future of oil activity in Alaska, there is one strategy that can be considered. That is a tax change which is revenue neutral and at the same time makes the tax system more related to profits of a given field. This can ensure that there is no immediate loss of revenue. At the same time it gives the industry the comfort that if profits decline (as a result of oil price falls or cost escalation), they pay less tax.

The neutrality of revenue can be achieved through, say, abolition or reduction of royalty and simultaneous reduction of allowances. In the case of the UK it was done through halving of oil allowances. If Alaska does not have an oil allowance, then it can be done through perhaps reduction of cost allowances.

A key question is whether there is any evidence that the current Alaskan fiscal regime has deterred investment from the State. Have there been opportunities to invest which have been refused by industry?

The state government should have the authority to reduce the royalty/tax if it believes this would lead to the recovery of petroleum which would otherwise not materialise. This happens in other jurisdictions, e.g. in Australia the Commonwealth Government has such a power.

Finally, an issue of concern is how much has the state of Alaska helped the oil industry tax-wise since the collapse of oil prices in 1986 up to the present compared to other tax jurisdictions. As everyone knows, the price of oil went from the mid-twenties dollar a barrel in 1985 down to as low as $8 in 1986 and oscillated between $22 and $12 since then. Has there been a downward revision of tax or up-front relief during this period?

Although since the collapse of oil prices in 1986 there haven't been much external funds available for pure exploration (particularly for start up positions), this picture is expected to change in the 1990s.

It is almost inevitable that the commercial interests of a company may differ periodically from that of the state. Tension may arise from time to time between the government of the country in which it operates (in particular the Department of Revenue) and the company.

The Group Managing Director of the Royal Dutch Shell Group, John Jennings, made an interesting statement in a recent speech which has an important message for both the industry and for governments. "Mechanisms are available," he said, "which effectively meet the legitimate aims and aspirations of all, without any of them [resource holders or investors] being required to forego what they have come to regard as essential rights and controls". In the opinion of this consultant one of the most effective methods is the continual dialogue between the state and the industry.

ment data, pricing data, personnel data, and research data (other than data relating to registered pesticides or to a pesticide for which an application for registration has been filed).

(June 25, 1947, c. 125, § 8, as added Oct. 21, 1972, P. L. 92-516, § 2, 86 Stat. 987.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

Prior to the enactment of Act Oct. 21, 1972, Act June 25, 1947, commonly known as the Federal Insecticide, Fungicide, and Rodenticide Act, was classified as 7 USCS §§ 135 et seq.; see notes to former 7 USCS §§ 135 et seq.

Effective date of section:

For the effective date of this section, see § 4 of Act Oct. 21, 1972, P. L. 92-516, 86 Stat. 998, set out at 7 USCS § 136 note.

CODE OF FEDERAL REGULATIONS

Books and records of pesticide production and distriction, 40 CFR Part 169.

CROSS REFERENCES

This section is referred to in 7 USCS §§ 136j, 136o

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Annotations:

Adequacy, under Federal Constitution, of immunity granted in lieu of privilege against self-incrimination—Supreme Court cases. 32 L Ed 2d 869.

INTERPRETIVE NOTES AND DECISIONS

Evidence obtained by government from visits to consignees was admissible, even though addresses and names had been acquired from inspection of records of defendant. United States v Weinreb (1951, DC NY) 99 F Supp 763.

§ 136g. Inspection of establishments, etc.

(a) In general. For purposes of enforcing the provisions of this Act [7 USCS §§ 136 et seq.], officers or employees duly designated by the Administrator are authorized to enter at reasonable times, any establishment or other place where pesticides or devices are held for distribution or sale for the purpose of inspecting and obtaining samples of any pesticides or devices, packaged, labeled, and released for shipment, and samples of any containers or labeling for such pesticides or devices.

Before undertaking such inspection, the officers or employees must present to the owner, operator, or agent in charge of the establishment or other place where pesticides or devices are held for distribution or sale, appropri-

ate credentials and a written statement as to the reason for the inspection, including a statement as to whether a violation of the law is suspected. If no violation is suspected, an alternate and sufficient reason shall be given in writing. Each such inspection shall be commenced and completed with reasonable promptness. If the officer or employee obtains any samples, prior to leaving the premises, he shall give to the owner, operator, or agent in charge a receipt describing the samples obtained and, if requested, a portion of each such sample equal in volume or weight to the portion retained. If an analysis is made of such samples, a copy of the results of such analysis shall be furnished promptly to the owner, operator, or agent in charge.

(b) **Warrants.** For purposes of enforcing the provisions of this Act [7 USCS §§ 136 et seq.] and upon a showing to an officer or court of competent jurisdiction that there is reason to believe that the provisions of this Act [7 USCS §§ 136 et seq.] have been violated, officers or employees duly designated by the Administrator are empowered to obtain and to execute warrants authorizing—

(1) entry for the purpose of this section;

(2) inspection and reproduction of all records showing the quantity, date of shipment, and the name of consignor and consignee of any pesticide or device found in the establishment which is adulterated, misbranded, not registered (in the case of a pesticide) or otherwise in violation of this Act [7 USCS §§ 136 et seq.] and in the event of the inability of any person to produce records containing such information, all other records and information relating to such delivery, movement, or holding of the pesticide or device; and

(3) the seizure of any pesticide or device which is in violation of this Act [7 USCS §§ 136 et seq.].

(c) **Enforcement.** (1) Certification of facts to Attorney General.—The examination of pesticides or devices shall be made in the Environmental Protection Agency or elsewhere as the Administrator may designate for the purpose of determining from such examinations whether they comply with the requirements of this Act [7 USCS §§ 136 et seq.]. If it shall appear from any such examination that they fail to comply with the requirements of this Act [7 USCS §§ 136 et seq.], the Administrator shall cause notice to be given to the person against whom criminal or civil proceedings are contemplated. Any person so notified shall be given an opportunity to present his views, either orally or in writing, with regard to such contemplated proceedings, and if in the opinion of the Administrator it appears that the provisions of this Act [7 USCS §§ 136 et seq.] have been violated by such person, then the Administrator shall certify the facts to the Attorney General, with a copy of the results of the analysis or the examination of such pesticide for the institution of a criminal proceeding pursuant to section 14(b) [7 USCS § 136 *l* (b)] or a civil proceeding under section 14(a) [7 USCS § 136*l* (a)], when the

Administrator determines that such action will be sufficient to effectuate the purposes of this Act [7 USCS §§ 136 et seq.].

(2) Notice not required.—The notice of contemplated proceedings and opportunity to present views set forth in this subsection are not prerequisites to the institution of any proceeding by the Attorney General.

(3) Warning notices.—Nothing in this Act [7 USCS §§ 136 et seq.] shall be construed as requiring the Administrator to institute proceedings for prosecution of minor violations of this Act [7 USCS §§ 136 et seq.] whenever he believes that the public interest will be adequately served by a suitable written notice of warning.

(June 25, 1947, c. 125, § 9, as added Oct. 21, 1972, P. L. 92-516, § 2, 86 Stat. 988.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

Prior to the enactment of Act Oct. 21, 1972, Act June 25, 1947, commonly known as the Federal Insecticide, Fungicide, and Rodenticide Act, was classified as 7 USCS §§ 135 et seq.; see notes to former 7 USCS §§ 135 et seq.

Effective date of section:

For the effective date of this section, see § 4 of Act Oct. 21, 1972, P.L. 92-516, 86 Stat. 998, set out at 7 USCS § 136 note.

CROSS REFERENCES

This section is referred to in 7 USCS § 136j

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Am Jur:

61 Am Jur 2d, Pollution Control § 105

§ 136h. Protection of trade secrets and other information

(a) In General. In submitting data required by this Act [7 USCS §§ 136 et seq.], the applicant may (1) clearly mark any portions thereof which in his opinion are trade secrets or commercial or financial information and (2) submit such marked material separately from other material required to be submitted under this Act [7 USCS §§ 136 et seq.].

(b) Disclosure. Notwithstanding any other provision of this Act [7 USCS §§ 136 et seq.], the Administrator shall not make public information which in his judgment contains or relates to trade secrets or commercial or financial information obtained from a person and privileged or confidential, except that, when necessary to carry out the provisions of this Act [7 USCS §§ 136 et seq.], information relating to formulas of products acquired by authorization of this Act [7 USCS §§ 136 et seq.] may be revealed to any Federal agency consulted and may be revealed at a public hearing or in findings of fact issued by the Administrator.

(c) Disputes. If the Administrator proposes to release for inspection information which the applicant or registrant believes to be protected from disclosure under subsection (b), he shall notify the applicant or registrant, in writing, by certified mail. The Administrator shall not thereafter make available for inspection such data until thirty days after receipt of the notice by the applicant or registrant. During this period, the applicant or registrant may institute an action in an appropriate district court for a declaratory judgment as to whether such information is subject to protection under subsection (b).

(June 25, 1947, c. 125, § 10, as added Oct. 21, 1972, P. L. 92-516, § 2, 86 Stat. 989.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

Prior to the enactment of Act Oct. 21, 1972, Act June 25, 1947, commonly known as the Federal Insecticide, Fungicide, and Rodenticide Act, was classified as 7 USCS §§ 135 et seq.; see notes to former 7 USCS §§ 135 et seq.

Effective date of section:

For the effective date of this section, see § 4 of Act Oct. 21, 1972, P.L. 92-516, 86 Stat. 998, set out at 7 USCS § 136 note.

CROSS REFERENCES

This section is referred to in 7 USCS §§ 136a, 136e

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Forms:

9 Federal Procedural Forms L Ed, Environmental Protection §§ 29:252, 29:257.

INTERPRETIVE NOTES AND DECISIONS

1. Identification of data
2. Relief

1. Identification of data

Neither provision for compensation provided for in 7 USCS § 136a(c)(1)(D) nor that for nonconsideration of data protected by 7 USCS § 136h(b) can have any meaning or chance of actual application without specific delineation and identification of data which is to be used to support application for registration; specific identification is required in order to establish data involved and ownership of data. Dow Chemical Co. v Train (1976, DC Mich) 423 F Supp 1359.

2. Relief

In granting preliminary injunction, Federal District Court required that administrator of Environmental Protection Agency allow 60 days, after plaintiff had received notice specifically identifying information on which applicant seeks to rely, in which plaintiff may make any claim that information is protected from consideration by reason of 7 USCS §§ 136h(b) and 136a(c)(1)(D). Dow Chemical Co. v Train (1976, DC Mich) 423 F Supp 1359.

RESEARCH GUIDE

Am Jur:
61A Am Jur 2d, Pollution Control §§ 3, 247, 248, 254, 265.

Law Review Articles:
Hazardous Waste Management: A Symposium. 9 Capitol U L Rev 425, Spring, 1980.
Goldfarb, Hazards of Our Hazardous Waste Policy. 19 Natural Resources J 389, 1979.
Private Nuisance Approach to Hazardous Waste Disposal Sites. 7 Ohio North L Rev 86, Jan 1980.

§ 6927. Inspections

(a) **Access entry.** For purposes of developing or assisting in the development of any regulation or enforcing the provisions of this title [42 USCS §§ 6901 et seq.], any person who generates, stores, treats, transports, disposes of, or otherwise handles or has handled hazardous wastes shall, upon request of any officer, employee or representative of the Environmental Protection Agency, duly designated by the Administrator, or upon request of any duly designated officer, employee or representative of a State having an authorized hazardous waste program, furnish information relating to such wastes and permit such person at all reasonable times to have access to, and to copy all records relating to such wastes. For the purposes of developing or assisting in the development of any regulation or enforcing the provisions of this title [42 USCS §§ 6901 et seq.], such officers, employees or representatives are authorized—

(1) to enter at reasonable times any establishment or other place where hazardous wastes are or have been generated, stored, treated, disposed of, or transported from;

(2) to inspect and obtain samples from any person of any such wastes and samples of any containers or labeling for such wastes.

Each such inspection shall be commenced and completed with reasonable promptness. If the officer, employee or representative obtains any samples, prior to leaving the premises, he shall give to the owner, operator, or agent in charge a receipt describing the sample obtained and if requested a portion of each such sample equal in volume or weight to the portion retained. If any analysis is made of such samples, a copy of the results of such analysis shall be furnished promptly to the owner, operator, or agent in charge.

(b) **Availability to public.** (1) Any records, reports, or information obtained from any person under this section [(including records, reports, or information obtained by representatives of the Environmental Protection Agency)] shall be available to the public, except that upon a showing satisfactory to the Administrator (or the State, as the case may be) by any person that records, reports, or information [informs], or particular

part thereof, to which the Administrator (or the State, as the case may be), or any officer, employee or representative thereof has access under this section if made public, would divulge information entitled to protection under section 1905 of title 18 of the United States Code [18 USCS § 1905], such information or particular portion thereof shall be considered confidential in accordance with the purposes of that section, except that such record, report, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this Act [42 USCS §§ 6901 et seq.], or when relevant in any proceeding under this Act [42 USCS §§ 6901 et seq.].

(2) Any person not subject to the provisions of section 1905 of title 18 of the United States Code [18 USCS § 1905] who knowingly and willfully divulges or discloses any information entitled to protection under this subsection shall, upon conviction, be subject to a fine of not more than $5,000 or to imprisonment not to exceed one year, or both.

(3) In submitting data under this Act [42 USCS §§ 6901 et seq.] a person required to provide such data may—

(A) designate the data which such person believes is entitled to protection under this subsection, and

(B) submit such designated data separately from other data submitted under this Act [42 USCS §§ 6901 et seq.].

A designation under this paragraph shall be made in writing and in such manner as the Administrator may prescribe.

(4) Notwithstanding any limitation contained in this section or any other provision of law, all information reported to, or otherwise obtained by, the Administrator (or any representative of the Administrator) under this Act [42 USCS §§ 6901 et seq.] shall be made available, upon written request of any duly authorized committee of the Congress, to such committee.

(Oct. 20, 1965, P. L. 89-272, Title II, Subtitle C, § 3007, as added Oct. 21, 1976, P. L. 94-580, § 2, 90 Stat. 2810; Nov. 8, 1978, P. L. 95-609, § 7(j), 92 Stat. 3082; Oct. 21, 1980, P. L. 96-482, § 12, 94 Stat. 2339.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

In subsec. (b), the bracketed word "informs" is inserted as the probable intent of Congress.

The phrase "(including records, reports, or information obtained by representatives of the Environmental Protection Agency)" appears in brackets in subsec. (b)(1) to conform to the probable intent of Congress, since Act Oct. 21, 1980, P.L. 96-482, § 12(b)(4), 94 Stat. 2339, which amended this section (see the 1980 Amendments note to this section), directed that such phrase be inserted in subsec. (b)(1), but did not specify the point of insertion.