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Trustees for ALASKA

a nonprofit public interest environmental law firm

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

Recommended Legislative Remedies

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

Mike Wenig, Staff Attorney
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Introduction

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

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

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

Recommendations

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

mandate.

Discussion of Recommendations

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

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

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

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

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

procedure.

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

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

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

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

³ For example, see Washington, RCW 90.48.144.

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

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

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

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

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

§ 1319(c).⁴

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

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

(907) 465-2600

March 1, 1990

POSITION PAPER

Senate Bill 497

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. Senate Bill 497 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 Senate Bill 497 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 Senate Bill 497 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

Section 6 of Senate Bill 497 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.

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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.

Report of the Alaska Oil Spill Commission
Executive Summary

SPILL

The Wreck of the Exxon Valdez
Implications for Safe Marine Transportation

January 1990

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

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

**Recommendation 13
Enhanced regulatory
strength**

- 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.

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 preven-

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

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

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

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

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

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

Recommendation 14
Strengthened state inspections

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

Jerry Aspland, President, ARCO Marine, Inc.

Alaska Oil Spill Commission hearing, 9/1/89

Alaska State Legislature

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Legislative Research Agency



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.

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

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

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

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

Other States

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

State of Washington

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

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

State of California

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

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

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

State of Oregon

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

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

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

New Federal Requirement

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

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

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

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

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

Attachments

ATTACHMENT A

**Alaska Statute 44.62.330
Article 8. Administrative Adjudication**

Section 11 of the state constitution *State v. ALIVE Voluntary*, 606 P.2d 769 (Alaska 1980).
No implied general power to vote agency regulations by informal legislative

action exists *State v. ALIVE Voluntary*, 604 P.2d 769 (Alaska 1980).
Held in *Wickertsham v. State, Com. Fisheries Entry Commn.*, 690 P.2d 1138 (Alaska 1984).

Article 8. Administrative Adjudication.

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430 Form of notice of hearing	580 Continuances
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NOTES TO DECISIONS

Applied in *Schnabel v. State*, 663 P.2d 980 (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, § 6 ch 169 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, § 64 ch 169 SLA 1978.]
- (20) [Repealed, § 16 ch 82 SLA 1982.]
- (21) [Repealed, § 64 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 48.03;
 (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 Barber 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, reinstatement, 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 9H 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 108 SLA 1970; am § 6 ch 104 SLA 1971; am § 4 ch 120 SLA 1971; am § 2 ch 178 SLA 1972; am § 6 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 § 6 ch 76 SLA 1974; am § 2 ch 128 SLA 1974; am § 6 ch 9 SLA 1976; am § 26 ch 26 SLA 1975; am §§ 39, 40 ch 208 SLA 1975; am § 4 ch 26 SLA 1976; am § 2 ch 69 SLA 1976; am § 11 ch 181 SLA 1976; am §§ 13, 106 ch 218 SLA 1976; am § 18 ch 220 SLA 1976; am § 9 ch 46 SLA 1977; am § 3 ch 140 SLA 1977; am § 54 ch 169 SLA 1978; am § 10 ch 69 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 § 16 ch 141 SLA 1980; am §§ 4, 5 ch 159 SLA 1980; am § 20 ch 110 SLA 1981; am E.O. No. 61, §§ 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 1988 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)(36).

Opinion 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. 1963 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. 1963 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 04.15.100(b) 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-

passed by the Administrative Procedure Act, 1963 Op. Atty Gen., No. 18. 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. Atty 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 23.30.175 of the Alaska Workers' Compensation Act. 1959 Op. Atty 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 procedure of the Administrative Procedure Act (AS 44.62) under former paragraph (a)(2). 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 submit 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 844 (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 844 (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. Alaska Ski Corp v. Hildsworth, 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. McCarey v. Commissioner of Natural Resources, 828 P.2d 1353 (Alaska 1974).

Not to local school boards. — The Administrative Procedure Act by its express terms does not apply to local school boards. Matanuska-Nutina Borough v. Lum, 838 P.2d 994 (Alaska 1978).

Not 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 44.62.46(k) 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) compelled the supreme court to the conclusion that the burden of proof on the issue raised by a statement of issues was upon the state.

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

Applied in Vick v. Board of Elec. Emrs., 828 P.2d 90 (Alaska 1981).

Quoted in Pan American Petroleum Corp v. Shell Oil Co., 468 P.2d 12 (Alaska 1969).

Cited in Forth v. Northern Stevedoring & Handling Corp., 385 P.2d 944 (Alaska 1963); Union Oil Co. v. State Dep't of Natural Resources, 826 P.2d 1357

(Alaska 1974); Wren Air Alaska Inc v. Department of Revenue, 617 P.2d 1067 (Alaska 1982).

Cited in Mohl Oil Corp v. Local Boundary Comm'n, 518 P.2d 92 (Alaska 1974); Sisters of Providence in Wash., Inc v. Department of Health & Social Services, 648 P.2d 970 (Alaska 1982); Kona Peninsula Borough v. State, Dept. 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. (§ 1011 (c) (2) ch 143 SLA 1959)

NOTER 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 including members of the applicable government agency from voting on the decision if they have not heard the evidence. Alaska Transp. Comm'n v. Gandu, 802 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, § 64.

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 Hansen with a procedure to set consistent and rational penalties statewide.

Prior to adopting these goals, DEQ directors had broad discretion in setting penalty amounts. Most of the agency's directors, including Hansen, have been too lenient.

The penalty guide embraces a variety of factors, including severity of the environmental damage, intent (whether the violator had received prior warning or had been cooperative), prior violations, negligence and whether the violator received an economic benefit from the violation.

The agency should continue to refine its enforcement policy in 1990. The goal, of course, is to increase compliance, preferably voluntarily, rather than to jack up the fines received. But this is a hammer-and-nail process: Many of the nails (compliance) probably won't be rammed home without the hammer (fines).

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

(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 respondent. 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

C l a s s o f V i o l a t i o n		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 than 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

C l a s s o f V i o l a t i o n		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;

- (c) Any violation related to on-site sewage disposal statutes, rules, permits, licenses and orders;
- (d) Any violation related to solid waste statutes, rules, permits and orders; and
- (e) Any violation related to waste tire statutes, rules, permits and orders;
- (f) Any violation of ORS 164.785 relating to the placement of offensive substances into the waters of the state or on to land.
(Statutory Authority: ORS Ch. 454, 459, 466, 467 & 468)

CIVIL PENALTY DETERMINATION PROCEDURE

340-12-045

(1) When determining the amount of civil penalty to be assessed for any violation, the Director shall apply the following procedures:

(a) Determine the class of violation and the magnitude of each violation;

(b) Choose the appropriate base penalty established by the matrices of 340-12-042 based upon the above finding;

(c) Starting with the base penalty (BP), determine the amount of penalty through application of the formula $BP + [(0.1 \times BP)(P + H + E + O + R + C)]$ where:

(A) "P" is whether the respondent has any prior violations of statutes, rules, orders and permits pertaining to environmental quality or pollution control. The values for "P" and the finding which supports each are as follows:

(i) 0 if no prior violations, the prior violation described in subsection (ii) is greater than three years old, or there is insufficient information on which to base a finding;

(ii) 1 if the prior violation is [an unrelated Class Three; one Class Two or two Class Threes, or the prior violations described in subsection (iii) are greater than three years old;

(iii) 2 if the prior violation(s) is [an unrelated Class Two, two unrelated Class Threes or an identical Class Three; one Class One or equivalent or the prior violations described in subsection (iv) are greater than three years old;

(iv) 3 if the prior violation(s) is [is] are [an unrelated Class One, three unrelated Class Threes or two identical Class Threes; two Class Ones or equivalents, or the prior violations described in subsection (v) are greater than three years old;

(v) 4 if the prior violations are [two unrelated Class Twos, four unrelated Class Threes, an identical Class Two or three identical Class Threes; three Class Ones or equivalents, or the prior violations described in subsection (vi) are greater than three years old;

(vi) 5 if the prior violations are [five unrelated Class Threes or four identical Class Threes; four Class Ones or equivalents, or the prior violations described in subsection (vii) are greater than three years old;

Alaska State Legislature

Legislative Research Agency



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February 7, 1990

MEMORANDUM

TO: Representative Mike Davis

ATTN: Barnaby Dow

FROM: Leola Weimer *LW*
Legislative Analyst

RE: Administrative Penalties
Research Request 90.156 (Supplemental Information)

You asked for additional information regarding federal and state administrative penalty systems. Specifically, you wanted to know if there were any existing programs which utilized 1) administration access to facilities without search warrant; 2) environmental audits; and/or 3) compliance orders without "pre-enforcement review."

Summary

The Environmental Protection Agency (EPA) and most state environmental agencies have the authority to enter a site without a warrant. Inspectors are often required to show proper identification or present a written order from their department to enter premises at "reasonable times." If access is denied, agencies may apply for a search warrant from the courts.

Environmental audits are widely used by the EPA in their monitoring and enforcement programs. Audits may also be conducted voluntarily on the part of the company or as part of an administrative or judicial compliance order issued by the state. Audits have proven to be an effective means of monitoring compliance and trouble-shooting potential problems.

"Pre-enforcement review" of compliance orders delays action and penalties until the appeals process is exhausted. EPA does not condone "pre-enforcement review" provisions and encourages states to seek court-ordered injunctions or implement cease and desist orders to prevent further destruction of the environment and mandate "timely and appropriate" compliance.

A summary of state administrative and judicial penalty structures is attached.

Representative Davis
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Access Without A Warrant

The EPA and most state environmental agencies have the statutory right to conduct investigations and periodic inspections of facilities under their jurisdiction. In most cases, the right to access at "reasonable times" does not require a search warrant. If access is denied, agencies have the right to seek a search warrant from the courts.

Environmental Protection Agency

Section 307 of the Clean Water Act grants the EPA clear and uncontested authority to inspect facilities and documents at reasonable times. Section 3007 of the Resource Conservation and Recovery Act (RCRA) requires that a state's inspection authority must be at least equal to that granted EPA inspectors. If either federal or state inspectors are barred from a facility or information, they may seek a warrant from the nearest judge.

Washington

Washington statutes grant Department of Ecology inspectors the right to obtain information and enter premises at reasonable times. Washington's clean air statute 70.94.200 states:

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.

Section 90.48.355 of Washington's water laws grants similar powers and provides for the maintenance of confidentiality by providing that "no person shall be required to divulge trade secret processes."

California

California state statutes provide for access at reasonable times without a warrant. According to Mike Shepard, council for the California Department of Health and Safety, access has never been denied to Health and Safety inspectors.

Oregon

Oregon has statutory provisions allowing access to information and premises for inspection purposes at reasonable times. According to Larry Schurr, of the Oregon Department of Environment Quality Enforcement Division, in the few

instances that access has been refused, inspectors were able to obtain court-ordered search warrants in a timely manner.

Environmental Audits

Environmental audits have proven to be an effective means of monitoring compliance and trouble-shooting potential environmental problems. Although the EPA does not have any specific regulations requiring the use of environmental audits, they are commonly used by both the EPA and state agencies.

According to Zack Garitoli, from the headquarters of EPA's Office of Waste Program Enforcement, the EPA conducts environmental audits on a regular basis. Companies may voluntarily provide an independent audit of their facilities or the EPA may choose to conduct its own environmental audit. For routine investigations, the EPA usually contracts with independent auditors. In the case of serious violations or complex cases, the EPA will often require EPA officials to conduct an audit of an operation.

Two types of environmental audits are generally used by the EPA: compliance audits and management audits. According to a review of EPA's environmental audit procedure,

Compliance audits have been used where EPA finds that violations discovered at a facility may be typical of violations at other company facilities, given the company officials apparent lack of familiarity with regulatory requirements. . . [and] Management audits have been negotiated where EPA believed that a pattern of violations resulted in large part from a lack of, or poor functioning of, corporate environmental management or operational controls (emphasis added).¹

The EPA's *Environmental Auditing Policy Statement* emphasizes that audits are to complement inspections and are not to be used as a substitute for regulatory oversight.² Audits conducted by EPA may make special considerations for the protection of a business's confidential material and trade secret processes.³

Like the EPA, states have not needed explicit regulatory authority to conduct environmental audits as part of their environmental inspections and compliance order enforcement. State officials in Washington, California and Oregon

¹Courtney Price and Allen Danzig, "Environmental Auditing: Developing a 'Preventive Medicine' Approach to Environmental Compliance," *Loyola Of Los Angeles Law Review*, Vol. 19:1189, p. 1206.

²Ibid., p. 1190.

³Ibid., p. 1210.

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confirmed that although they do not have a specific program of regulated "environmental audits," audits may be conducted as part of their investigation or enforcement process.

"Pre-Enforcement Review"

According to Zack Garitoli of EPA Headquarters in Washington, D.C., the EPA does not condone "pre-enforcement review" processes. EPA operates under the assumption that their administrative powers give them the right to order corrective action and assess penalties. Delay of action may be issued by a court of appeals but is not considered automatic. Similarly, the EPA recommends that if hearings or appeals processes impose delays in enforcement, states should follow their corrective actions with court-ordered injunctions or emergency cease and desist orders.

Washington

If an order is appealed to the Washington Pollution Control Hearing Board and a stay of penalty or corrective action is granted to the defendant, Washington law requires the hearing board to give priority to the hearing. Emergency orders and injunctive relief may also be sought by the Attorney General for the Washington Department of Ecology.

California

In California, enforcement of an order may not be delayed by an appeal for judicial review. According to Mike Shepard, council for the California Department of Health and Safety, an administrative order is considered final if 1) it is not appealed within ten days, or 2) once an independent hearing officer has issued a decision.⁴ The Department of Health and Safety reserves the right to seek court-ordered injunctions and issue emergency orders or additional penalties to bring a violator into compliance.

⁴Note: this is a correction of information provided by Bill Soo Hoo from the Department of Health and Safety on page 4 of 90.156. "Pre-enforcement review" applies until a final administrative decision has been reached. If a hearing is requested, enforcement may be delayed until the hearing officer issues a decision. "Pre-enforcement review" does not, however, apply when an appeal is made to the court system or in the case of judicial penalties. A defendant may request a stay but it is not granted automatically. In the past two years, only four cases have received administrative hearings and one corrective action has been appealed to the courts.

Representative Davis
February 7, 1990
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Oregon

In Oregon, the policy of "pre-enforcement review" prevails. An order is not considered final until the appeals process has been exhausted. This includes appeals taken to the Oregon State Court of Appeals. According to Larry Schurr of the Oregon Department of Environmental Quality, if action or penalty is delayed by an appeals process, the department may either seek a court injunction to prohibit further harm to the environment and/or issue additional penalties for continued violation. Each additional order must be appealed separately. If an order is not appealed within twenty days of issuance, it is considered final.

A summary of administrative and judicial penalties for each of the fifty states is attached.

I hope this information is useful. If you have any questions, or would like additional information, please call.

Attachment

TABLE 13

CIVIL PENALTIES UNDER HAZARDOUS WASTE LAWS

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

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

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

Table 13 (continued)

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

Table 13 (continued)

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

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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VIA FACSIMILE

February 20, 1990

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

Re: HB 409

Dear Representatives Goll, Gruenberg, and Davis:

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

I. ACCESS AND INSPECTION AUTHORITY

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

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

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

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

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

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

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

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

II. ADMINISTRATIVE PENALTIES.

Section 4 of HB 409 authorizes the Department of Environmental Conservation to assess an administrative penalty for a violation of AS 46.03, AS 46.04, AS 46.09 or a regulation promulgated 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.

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

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

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

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

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

Id. at 538.

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

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

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

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

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

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

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

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

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

Very truly yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL



Michele D. Brown
Breck C. Tostevin
Assistant Attorneys General

MDB/640.tv

cc: Jeff Bush
John McDonagh

SB 497

SECTIONAL ANALYSIS

The following is a sectional analysis of AGO draft legislation which strengthens DEC's authority in the areas of access, administrative penalties, environmental audits, and compliance orders.

Sections 1. Section 1 revises DEC's present general access authority to specifically include the right to copy records. The revisions also clarify the present access provision's scope. Note that this general access provision continues the present section's requirement that DEC obtain consent for the access from the owner or occupier of the premises.

Section 2. Section 2 authorizes DEC to obtain access to "pervasively regulated facilities" without the owner's or occupier's consent. Constitutional law provides that a lessened expectation of privacy exists for facilities and activities which are pervasively regulated, and section 2 takes advantage of this reduced standard to increase DEC's access authority.

Section 3. Section 3 defines "pervasively regulated facility" as a facility where the operations affect a significant public interest and are comprehensively regulated by DEC.

Section 4. Section 4 is a technical amendment.

Section 5. Section 5 authorizes DEC to assess administrative penalties for violations of DEC statutes, regulations, orders, or permits. The administrative penalty amount may not exceed \$25,000 per day for each violation. Section 5 also provides for an administrative hearing and for judicial review of the hearing decision.

Section 6. Section 6 authorizes DEC, in an enforcement action, to require a person to conduct an environmental audit and to submit an environmental audit report to DEC.

Section 7. Section 7 authorizes DEC to impose a mandatory compliance order upon persons who violate DEC's statutes, regulations, orders, or permits. Section 7 also provides for an administrative hearing and for judicial review of the hearing decision.