H B 409

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: SCS CSHB 409(Jud
PUBLISH DATE: 5/7/90 (a)

FISCAL NOTE

REQUEST:

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

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

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

Prepared by: Gail Gatton
Phone: 465-2600
Division: Administrative Services
Date: 1/30/90

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

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

Changes in SCS CSHB 409 (Jud) have no fiscal impact. This fiscal note is appropriate. Projections of no fiscal impact would continue through 1996.

House Bill 409
1/29/90 Version

Section 3 of this bill gives the Department new authority to assess administrative penalties for violations of laws and regulations designed to protect the environment. Due process, under this bill, allows for a hearing to be held prior to the assessment of penalties. Since DEC does not currently have this authority, we do not have any positions capable of performing these functions. Therefore, the Department would need one hearing officer and a paralegal to conduct the hearings required before assessment of administrative penalties.

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

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

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

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

Time Status	Staff Months	Location	Election District
PFT	12	Juneau	04

Type of Expenditure		Amount
1	2	3
Salary	52.3	
Benefits	15.7	
Premium Pay	0	
Other	0	
Total Personal Services		68.0 $
Travel		5.0
Contractual		8.0
Commodities		1.0
Equipment		5.0
Other		-
Total Cost		87.0 $
Funding Source for Total Cost		
Federal Receipts 1002		0
G. F. Match 1003		0
General Fund 1004		87.0
GF Program Receipts 1005		0
Other		0

Justification

This position will be necessary to perform the functions required in this legislation. The administrative penalty process allows for a hearing to be held prior to the assessment of penalties, if review is sought, within 30 days. This position will review these proposed penalties, do legal research, conduct hearings, evaluate the case, and make an assessment as to the appropriateness of penalties. We do not currently have anyone on staff qualified to perform this function.

Request For New Position

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

Revised Date

FY 91

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

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

Time Status	Staff Months	Location	Election District
PFT	12	Juneau	04

Type of Expenditure		Amount
1	2	3
Salary	32.0	
Benefits	12.0	
Premium Pay	0	
Other	0	
Total Personal Services		44.0
Travel		0
Contractual		0
Commodities		1.0
Equipment		5.0
Other		0
Total Cost		50.0

Funding Source for Total Cost		
Federal Receipts	1002	0
G F Match	1003	0
General Fund	1004	50.0
GF Program Receipts	1005	0
Other		0

Justification

This position will assist the hearing officer to determine administrative penalties. Will perform research, help review cases, organize hearings and otherwise ensure that the hearing process is carried out in an appropriate and timely manner.

Request For New Position

Agency Environmental Conservation

BRU Administrative Services

Component Administrative Services

Revised Date

FY 91

CC

No. 1

STATE OF ALASKA
1990 LEGISLATIVE SESSION

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

FISCAL NOTE

REQUEST:

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

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

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

Prepared by: Gail Gatton
Phone: 465-2600
Division: Administrative Services
Date: 1/30/90

Approved by Commissioner: A D Hagle
Date: 30 Jan 90
Agency: Environmental Conservation

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

House Bill 409
1/29/90 Version

Section 3 of this bill gives the Department new authority to assess administrative penalties for violations of laws and regulations designed to protect the environment. Due process, under this bill, allows for a hearing to be held prior to the assessment of penalties. Since DEC does not currently have this authority, we do not have any positions capable of performing these functions. Therefore, the Department would need one hearing officer and a paralegal to conduct the hearings required before assessment of administrative penalties.

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

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Paralegal Assistant II	44.0			1.0	5.0	$50.0
(Contractual)			12.0			$12.0
TOTALS	112.0	5.0	20.0	2.0	10.0	$149.0

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

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

Time Status	Staff Months	Location	Election District
PFT	12	Juneau	04

Type of Expenditure		Amount
1	2	3
Salary	52.3	
Benefits	15.7	
Premium Pay	0	
Other	0	
Total Personal Services		68.0 $
Travel		5.0
Contractual		8.0
Commodities		1.0
Equipment		5.0
Other		-
Total Cost		87.0 $
Funding Source for Total Cost		
Federal Receipts 1002		0
G. F. Match 1003		0
General Fund 1004		87.0
GF Program Receipts 1005		0
Other		0

Justification

This position will be necessary to perform the functions required in this legislation. The administrative penalty process allows for a hearing to be held prior to the assessment of penalties, if review is sought, within 30 days. This position will review these proposed penalties, do legal research, conduct hearings, evaluate the case, and make an assessment as to the appropriateness of penalties. We do not currently have anyone on staff qualified to perform this function.

Request For New Position

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

Revised Date

FY 91

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

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

Time Status	Staff Months	Location	Election District
PFT	12	Juneau	04

Type of Expenditure		Amount
1	2	3
Salary	32.0	
Benefits	12.0	
Premium Pay	0	
Other	0	
Total Personal Services		44.0
Travel		0
Contractual		0
Commodities		1.0
Equipment		5.0
Other		0
Total Cost		50.0
Funding Source for Total Cost		
Federal Receipts 1002		0
G F Match 1003		0
General Fund 1004		50.0
GF Program Receipts 1005		0
Other		0

Justification

This position will assist the hearing officer to determine administrative penalties. Will perform research, help review cases, organize hearings and otherwise ensure that the hearing process is carried out in an appropriate and timely manner.

Request For New Position

Agency Environmental Conservation

BRU Administrative Services

Component Administrative Services

Revised Date

FY 91

No. 2

STATE OF ALASKA
1990 LEGISLATIVE SESSION

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

FISCAL NOTE

REQUEST:

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

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

Please see the attached analysis.

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

Approved by Commissioner: Richard L. Pegues /FOR/ Douglas B. Baily, Attorney General
Date: February 26, 1990
Agency: Department of Law

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

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSHB 409 (JUD)

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

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

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

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

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

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

STATE OF ALASKA
1990 LEGISLATIVE SESSION

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

FISCAL NOTE

REQUEST:

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

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

POSITIONS:

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Jan Strandberg, General Counsel
Phone: 264-8228
Division: Alaska Court System
Date: 02/26/90

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

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

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

IN THE HOUSE BY THE JUDICIARY COMMITTEE

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

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) interest from the date the department assesses the

administrative penalty under (a) of this section.

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

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

(2) degree of the respondent's culpability;

(3) prior history of violations;

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

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

(6) economic savings realized through noncompliance;

(7) respondent's ability to pay.

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

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

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

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

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

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

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

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

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

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

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

(c) In this section

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

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

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

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

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

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

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

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

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

STATE OF ALASKA
DEPT. OF ENVIRONMENTAL CONSERVATION

STEVE COWPER, GOVERNOR

OFFICE OF THE COMMISSIONER
PO BOX O, JUNEAU, ALASKA 99811-1800 (907) 465-2600

February 7, 1990

POSITION PAPER

House Bill 409

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

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

ACCESS

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

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

ADMINISTRATIVE PENALTIES

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

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

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

COMPLIANCE ORDERS

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

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

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

ENVIRONMENTAL AUDITS

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

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

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

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

VIA FACSIMILE

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April 2, 1990

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

Re: H.B. 409 access provisions

Dear Representatives Larson and Hoffman:

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

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

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

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

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

and

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

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

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

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

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

Sincerely,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: John A. McDonagh
Assistant Attorney General

JAM:jah

Alaska State Legislature

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February 6, 1990

MEMORANDUM

TO: Representative Mike Davis

ATTN: Barnaby Dow

FROM: Leola Weimer LW
Legislative Analyst

RE: Administrative Penalties
Research Request 90.156

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

Summary

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

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

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

Administrative Penalty Authority

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

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

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

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

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

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

Department of Environmental Conservation (DEC)

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

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

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

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

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

Other States

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

State of Washington

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

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

State of California

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

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

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

State of Oregon

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

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

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

New Federal Requirement

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

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

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

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

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

Attachments

CIVIL PENALTIES
(ADMINISTRATIVE)

TABLE 13

CIVIL PENALTIES UNDER HAZARDOUS WASTE LAWS

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

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

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

Table 13 (continued)

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

Table 13 (continued)

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

Alaska State Legislature

HOUSE OF REPRESENTATIVES

Official Business

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

TO: House Members

FROM: Representative Mike Davis

DATE: April 20, 1990

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

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

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

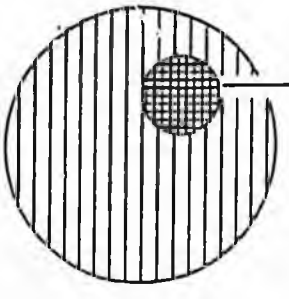
However, not all pervasively regulated facilities in Alaska would be subject to nonconsentual inspections under CS HB 409 (Finance). The legislation further narrows the type of facilities in Alaska potentially subject to nonconsentual inspections. First, by limiting the department's authority to conduct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

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

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

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

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



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

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

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

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

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Gestapo tactics

4-26-90

LAST YEAR'S oil spill in Prince William Sound was a terrible thing, as has been noted a million times since the tanker Exxon Valdez ripped open its bottom on the rocks of Bligh Reef.

But it truly is time for all of us to finally agree that the unfortunate accident did not mark the end of the world and that the global environment wasn't permanently polluted.

For that matter, the environmental beauty of Prince William Sound was not forever harmed, either.

All of us were angry and emotionally devastated when the tanker went aground and caused a terrible mess. But that is no reason for us now to suspend civil rights and the due process of law.

The truth is we can imagine no incident short of an all-out nuclear war — if even then — for which we as a free people should condone doing away with constitutional guarantees that are basic to our American liberties.

Yet that is provided for in legislation passed by the Alaska House the other day as one legislative response to last year's tanker accident.

THE BILL proposes the enactment of bad law — incredibly bad law, as a matter of fact.

And it's simply astonishing that 21 members of the House would vote in its favor.

If passed by the Senate and signed by the governor — two steps that will not be reached, if the Senate acts with wisdom and kills this measure — the state Department of Environmental Conservation will have the authority to enter oil industry buildings and conduct searches without a warrant.

What are these people thinking of? We would not even allow such action by agents of the Federal Bureau of Investigation, much less Alaska State Troopers or officers of the Anchorage Police Department — all of whom, we suspect, boast more highly trained investigators than any environmental inspector on the state payroll.

Not only that, this legislation proposes that administrative fines of up to $15,000 a day could be imposed by DEC for serious violations of environmental laws — as a means of avoiding what the authors of this bill describe as a way to avoid procedures that "are long, cumbersome and expensive."

THIS IS Gestapo stuff.

A company that gets into even a month-long discussion with some high-minded bureaucrat over what constitutes a "serious violation" could well be facing a half-million dollar penalty.

Apply this to the Prince William Sound spill, which by anyone's definition was a serious event.

Until somebody decides that every last trace of the spill has been cleaned up, should Exxon be facing a fine of $15,000 a day — year after year — until finally some bureaucratic agency decides every speck of the sound is once again pure? This would be assessed, too, on top of the more than $2 billion already spent on the cleanup effort.

We have courts for the assessment of this kind of penalty — and there are constitutional processes in place for the protection of individual rights, despite the "long, cumbersome and expensive" hoops through which the government must jump before it takes bureaucratic revenge.

Those safeguards supercede in importance any retribution some members of the legislature apparently still feel they need to seek against the oil industry. This legislation is an affront to constitutional freedoms — and deserves a quick death in the Senate.

Court oversteps bounds on tax issue

George F. Will is a Pulitzer prize-winning columnist for the Washington Post.

WASHINGTON — Just 48 hours after the Supreme Court ruled, Missouri's Jack Danforth, one of the Senate's most judicious and least flamboyant members, proposed this constitutional amendment: "Neither the Supreme Court nor any inferior court of the United States shall have the power to instruct or order a state or political subdivision thereof, or an official of such state or political subdivision, to lay or increase taxes."

It is a measure of the imperiousness of today's imperial judiciary that if such language had been proposed to the constitutional convention in 1787, the language would have been dismissed as absurdly unnecessary. But last week the Court ruled that courts can impose taxation.

A lower court found Kansas City's school district guilty of operating a segregated system. The court, attempting to fine-tune the racial balance of schools by attracting white students, ordered as a remedy the expansion of "magnet schools." The court's plan, priced at upwards of $700 million, included a 25-acre farm, a 25-acre wildlife area, animal rooms, a planetarium, 15 computers per classroom, a model United Nations wired for language translations, greenhouses and vivariums, movie-editing and screening rooms, a temperature-controlled art gallery, a dust-free diesel mechanics room, instruction in cosmetology and robotics, radio and television studios with editing and animation labs. All this and more, mind you, is supposedly mandated by the Constitution.

The lower court even ordered the hiring of a $30,000 "public information specialist" to advocate the court's plan. Thus the court's plan involved extracting taxes from unwilling and unrepresented citizens and spending some of the money to fund expression of views the citizens disapprove.

The school district had neither sufficient money for all this nor the power to raise it. Now the Supreme Court has held, 5-4, that a court has a right to do what was done in Kansas City: a right to order a government to increase taxes and to suspend a state constitutional limit on such increases.

The rationale for this radicalism is that the power of courts to discern unconstitutional behavior entails the power to decree remedies sufficient thereto. The anti-democratic extremism of this is apparent. This thought never crosses the extremists' closed minds:

Measures such as judicial taxation, measures incompatible with the most fundamental constitutional principles, measures that shred democracy's due processes and obliterate the separation of powers — such measures cannot be necessary responses to social conditions deemed incompatible with the Constitution.

The school desegregation era began 70 miles from Kansas City, in Topeka, with Brown v. Board of Education. There, children were being denied enrollment in particular schools because their skins were black.

In the era of judicial fiats for "racial balance," some black children in Kansas City have been denied admission to some schools because their skins are black. Admitting them would complicate some judge's pursuit of his preferred racial numbers. To fund such ugly lunacy, courts are now driven to the anti-constitutional expedient of judicial taxation.

Justice Kennedy, joined in dissent by Rehnquist, O'Connor and Scalia, notes that when advocating ratification of the Constitution, Alexander Hamilton assured Americans that "the judiciary . . . has no influence over . . . the purse" (Federalist 78) and James Madison said that "the legislative department alone has access to the pockets of the people" (Federalist 48). Today a majority of the Court says, in effect, "Well, what did the Founders know about the intent of the Founders?"

Danforth's remedy may be unnecessarily drastic. Congress can by statute limit the jurisdiction of lower courts (as Congress did in the Norris-LaGuardia Act, stripping courts of the power to issue labor injunctions). Besides, the five justices in this benighted majority (White, Brennan, Marshall, Blackmun, Stevens) are the five oldest justices. Nature will change the Court.

Meanwhile, liberals applauding judicial taxation are in an interesting intellectual tangle. Regarding the conduct of foreign policy, a core function of the executive branch, they today take a tolerant view of Congress' claim to capacious powers. (Liberals thought otherwise until they lost confidence in their ability to elect presidents.) And now regarding the power to raise and disperse revenues — surely the core legislative function — liberals are pleased to see this power usurped by the judiciary. (Time was when liberals thought political decisions should be made by the political branches.)

By what principle can these liberal positions be reconciled? None, unless a consistency in sacrificing the Constitution to obtain preferred results can be called a principle. Liberalism has become intellectual mush precisely because it is so disrespectably result-oriented. And one result is the political anemia of liberalism.

How about a Humanity Day celebration?

Gestapo tactics?

Attack on spill bill is pure propaganda

To hear some critics talk, you'd think a bill that passed the state House late last month heralded the second coming of Nazi Germany. The bill supposedly will let the Department of Environmental Conservation engage in "Gestapo" tactics.

But in reality, the critics are guilty of using another Nazi tactic to sink the bill: the Big Lie.

This hyperventilated anti-environmental rhetoric is par for what passes as public discourse in Alaska. Only in Alaska would laws that are standard operating procedure elsewhere draw such fire.

For the record, the measure at issue, HB 409, will not allow DEC to swoop into any oil industry business at any time. It will not allow DEC to fine a firm into bankruptcy with no due process.

The bill simply gives DEC two new powers. First, when DEC suspects a polluter is breaking the law, the agency could do an unannounced inspection. However, this power would be limited to facilities that DEC already regulates closely and that are named in the bill.

Second, DEC could fine polluters without getting a court order first. To preserve due process rights, those fines could be appealed in court.

If those powers make a police state, there are a lot of police states around. Thirty seven states have some version of this authority to inspect polluters. At least 16 states have roughly similar powers.

Alaska's bill would not, as charged, allow inspectors to invade a firm's headquarters unannounced. It would only allow inspectors to visit certain facilities where pollution is produced.

As for allowing agencies to levy pollution fines, 28 states have some version of that power. Indeed, the U.S. Environmental Protection Agency is about to require states to have that authority if they want to enforce federal hazardous waste laws.

Laws similar to HB 409 have survived court challenges at both federal and state levels and in Alaska. The bill is specifically crafted to comply with privacy rights set in the Alaska Constitution.

The critics' rhetorical distortions would be laughable if their opinions weren't shared widely in the Alaska Senate. For too many senators, DEC's main role is to be a whipping boy when environmental disaster strikes, as with the Exxon oil spill.

DEC's enemies would rather keep the environmental watchdog locked in a cage and fed on half-rations. Otherwise, DEC might not have to whine and plead with polluters. It actually might be able to do what it's supposed to do: stop pollution.

Reason No. 1

The first in a series of reasons why

A. FOREIGN COURIERS BRINGING HEROIN THROUGH ANCHORAGE INTERNATIONAL

B. Fo O at

Consider Lithuani

william sa

The following message, dated August 1776, has somewhat anachronistically been released to the world media.

It was addressed to colonials in America who had just issued their provocative and untimely declaration of independence.

To the Secessionary Colonists in America:

Your friends and supporters from afar send their warm good wishes in your time of national trial and personal suffering.

We sympathize with your desire to be free and independent.

We find much to agree with in your presentation of facts to a candid world.

However, the action taken by your representatives in general congress assembled on July 4 is precipitate and unwise.

If you have, as you suggest, "a decent Respect to the Opinions of Mankind," you will rescind or revoke this unilateral declaration at once, or at the very least suspend it.

Please understand that we take no position on the merits of your case for independency.

Certainly the gr you listed in great which you see as ca impelled you to Se — touch the heart.

Our message to purely practical.

Your timing is poo sen. Seventeen seven the worst possible which to declare i dence.

Although King Ge has his shortcoming economic sphere, yo party" in Boston was a sensationalist fair derogation of policy.

He is a force for and order at a terri bulent time.

We happen to kn his court at St. Jam

Mail call: answers

It's time for another mail call. As you will note, I have only answered questions that were accompanied by a self-addressed envelope.

I read where Ivana Trump cannot go out on dates without Donald. If I take her out,

GREATER JUNEAU Chamber of Commerce
1107 West 8th, No. 1 (907) 586-6420 Juneau, Alaska 99801

LEGISLATIVE "ALERT" 4/13/90

WE AS A BUSINESS COMMUNITY have a MAJOR problem brewing on the "Hill" and need you to make your feelings known to our State Legislators. It will only take a phone call to register your opinion, so take the minute and MAKE YOUR OPINION KNOWN. !!
1st WRITE DOWN YOUR OPINION, (50 words or less), Call 465-4648 (Legislative Information Office Network), and read your "Public Opinion Message". The following Legislators should be advised, Curt Menard, Cliff Davidson, Walt Furnace, Richard Foster, Bert Sharp, and our own legislative representatives. AT THIS TIME IT IS OUR BELIEF that the following house bills are not in the best interest of our business community.

HB 210, Supported by Ulmer, opposed by Hudson, would virtually stop any development by the private sector that uses streams for a water source.

HB 409, Sponsored by Ulmer, opposed by Hudson, contrary to what you may have heard, this is not "Oil Spill" legislation, and it would impact YOUR business.

HB 558, Sponsored by Ulmer, opposed by Hudson, would give the private citizen the right to sue companies directly on environmental issues.

IN HB 409, THE HOUSE FINANCE Committee has made substantial improvements to the original bill, but the fact is that anyone in business that has to be concerned with wastewater or emissions from their facility, (under current interpretation, EVERYONE, falls into this category), could be impacted by at LEAST two problems that exist with the current bill: One of which is the following interpretation:

The Department of Environmental Conservation (DEC), in select situations, would have the authority to demand immediate access and inspection of your place of business without a search warrant, if they EVEN SUSPECT that you are in violation of any aspect of the law. You would be subject to a $15,000 per day fine (without limit). It has been labeled by some members of the lobby body as the "Gestapo" bill and it appears to certainly open the door for "witch hunts".

IF YOU COUPLE HB558 AND HB409 together, you could be under attack by ANY citizen that wishes to file suit against your business, (and you know how expensive it is to defend yourself in a court of law), if the citizen feels that the State hasn't adequately PROTECTED THEIR INTERESTS by exercising its authority to regulate, fine, etc. you.

THE JUNEAU CHAMBER OF COMMERCE ASK'S THAT YOU RESPOND TO THESE ISSUES BY REGISTERING YOUR VIEW THROUGH THE PHONE NUMBER NOTED ABOVE, AND EXPRESS YOUR VIEW. IF YOU DON'T TAKE THE TIME TO TELL THE LEGISLATOR'S WHAT YOU WANT, <u>YOU LOSE</u> !!

Northern Alaska Environmental Center

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

20 February 90

RECEIVED

FEB 26 1990

Senator Bettye Fahrenkamp
Chairman, Senate Resources Committee
Box V
Juneau, AK 99811

RE: HB409 (Authority of DEC)

Dear Senator Fahrenkamp:

The Board of the Northern Alaska Environmental Center feels that HB 409, which gives DEC the necessary teeth to enforce environmental regulations, is a significant piece of public-interest legislation.

This is a bill that the oil industry itself has necessitated. Alyeska's attempts to thwart and hinder DEC's legitimate inspections of the Valdez Pipeline Terminal have created a situation which must be corrected if DEC is to fulfill its mandate of environmental oversight and protection. Beyond that, however, we believe that the bill is fundamentally sound public-interest policy, providing the state's environmental agency with the authority it needs to carry out its resposibilities.

The bill, as you know, would strengthen DEC in three critical areas:

1. It would give DEC authority to inspect, without hindrance, major public facilities

2. It provides for assessment of administrative penalties sufficient to deter major violators (up to $25,000 per day per violation) but with an appeal process that safeguards the rights of all

3. It eliminates the "pre-enforcement review" of DEC compliance orders (judicial review remains intact) which violators have used as a stalling tactic to delay or avoid compliance with environmental regulations.

4. It allows DEC to call for an environmental audit."

Some concern has been expressed by rural legislators about the administrative penalties section of HB 409, and (we understand) there is also a more diffuse concern that the bill confers gener-

arly too much power on DEC. The Northern Center considers these objections to be unfounded:

1. The intent language clearly suggests (page 2, lines 23-27) that the penalties are aimed at egregious, persistent violators—not at villages whose landfills are in violation. If fines are deemed necessary to correct a situation, the power to levy them is reserved to the commissioner.

2. The appeals process in the bill carefully strikes a fair balance between the public's interest in environmental protection and the alleged violator's interest in fair process.

3. Twenty-seven other states have significant administrative civil penalties statues, including the oil-producing states of Texas, Louisiana, and Oklahoma; HB 409 relies on that precedent.

The Board members of the Northern Center urge your full support of this bill.

Sincerely,

June Weinstock
President, Board of Directors

cc: Senator Steve Frank

f HB 409

Alaska State Legislature

Representative Mike Davis District 19

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

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

TO: All Members
House Resources Committee

FROM: Rep. Mike Davis

DATE: February 6, 1990

RE: CS for HB 409

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

After listening to the Oil Spill Commission's presentation to the House Resources Committee, I have proposed several changes which compliment recommendation #13 of the Commission's Executive Summary. HB 409 would accomplish the following:

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

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

3) Allow the Commissioner to require environmental audits, so that the state and industry can "Trouble shoot" pollution problems before they become unmanageable.

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

Special Note:

Criminal penalties included in the original HB 409 have been removed in the CS. Negotiations are underway to include them in HB 315.

I thank you for your consideration of this legislation.

Sectional Analysis - CS to HB 409

Section #1.

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

Section #2.

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

Section #3.

Are housekeeping measures.

Section #4.

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

Section #5.

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

Section #6.

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