

LEGISLATIVE FINANCE-HOUSE / SENATE FINANCE COMM. FILES 8879

HB 406 cont. - HB 409 519

HB

406

SENATE FINANCE COMMITTEE REPORT

DATE: 4/24/90

DATE TURNED INTO OFFICE: 4/30/90

The Finance Committee considered CSHB 406 (Finance)

"An Act relating to the sale or transfer of consumer electrical products."

and recommended:

replace with _____ CS _____
 or adopt SCS CS HB 406 (LFC)
 attached amendment(s)
 _____ letter of intent adopted

same title
 new title
 technical title change (HB only)

do pass

do not pass

no recommendation

individual recommendations

further referral to _____

ATTACHES NEW FISCAL NOTE(S):
Dept/Date:

fiscal note(s) _____

zero fiscal note(s) _____

APPROVES PREVIOUS:

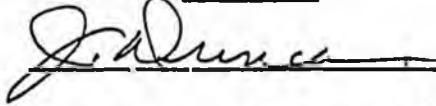
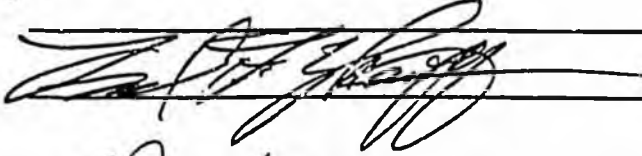
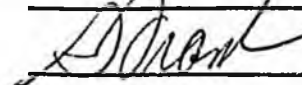
Dept/Date:

fiscal note(s) _____

zero fiscal note(s) DO Law 1/30/90
DO Labor 2/23/90

appropriation-no fiscal note

SIGNING DO PASS:

OTHER RECOMMENDATIONS:

 2. Rule (Relief) (DO PASS)

1. _____

Co-Chairs: Signatures and Recommendations

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act relating to the sale, gift, or transfer for value of electrical products."
Sponsor: Repr. Cotten
Requestor: Repr. Cotten

Agency Affected: Department of Law
BRU: Consumer Protection
Components: Consumer Protection

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 I. Pegues Director Phone: 465-3672
Division: Administrative Services Date: January 30, 1990
Approved by Commissioner: Richard I. Pegues / FBI Date: January 30, 1990
Agency: Douglas B. Bailly, Attorney General
Department of Law

Distribution (by preparer):

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

) Changes in SCS CS HB 406 (L+C) have no fiscal impact. This fiscal note is appropriate. Projections of no fiscal impact would continue through 1996.

Adopted

HS 406

This bill amends AS 45.45 by adding a new section (AS 45.45.910) that provides that a person may not, in the course of the person's business, sell, give away, or exchange for value an electrical product unless the electrical product is labeled or listed by an approved testing laboratory, in accordance with the minimum electrical standards established by AS 19.60.550.

The bill also provides that the consumer protection section of the Department of Law shall maintain a list of approved testing laboratories. Approved testing laboratory is defined as a laboratory that meets the requirements of the 1984 Standard Guide for Laboratory Accreditation Systems, ASTM E-944, published by the American Society for Testing and Materials.

A previous attempt by the U.S. Department of Labor, to adopt the ASTM E-944 standards, resulted in a lawsuit requiring the Department of Labor to certify 900+ testing laboratories, including many offshore testing firms. Because of the number of potential testing firms that could be certified under ASTM E-944 is so great, it would be nearly impossible for the consumer protection section to maintain a list of approved testing laboratories. The department believes that substitution of ANSI Z-34.1-1987, the American National Standard for Certification - Third Party Certification Program, published by the American National Standards Institute, in place of the ASTM E-944 standards, may eliminate most of this problem. Otherwise, it appears that simply keeping-up with the paperwork for the large number of potential approved testing laboratories could be extremely time consuming and expensive, without any real assurance that a product has been properly tested.

Lastly, the bill amends AS 45.50.471 by providing that violation of proposed AS 45.45.910 is an unlawful act under the state's Unfair Trade Practices and Consumer Protection Act. Approval of this provision will increase the number of unlawful acts specified under AS 45.50.471 from 28 to 29. The consumer protection section currently consists of one attorney, two paraprofessionals, and one and one-half secretaries, in sharp contrast to the three attorneys, seven paraprofessionals, and five secretaries who staffed the section prior to the FY87 budget crisis. Consequently, the section can only handle the most serious violations. The department therefore recommends adoption of the ANSI Z-34.1-1987 certification standards, in order to provide for a workable method of records-keeping and in order to avoid unnecessary cost.

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: SCS CS HB 406 (L+C) (b)
PUBLISH DATE: 4-24-90

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: Labor
Title: "An Act relating to the sale
or transfer of consumer electrical products." BRU: Labor Standards & Safety
Sponsor: Cotten Components: Mechanical Inspection
Requestor: House Labor & Commerce

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	0.0	0.0	0.0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND						
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)

Note: there is no fiscal impact in FY 90

Prepared by: Tom Stuart, Director Phone: 465-2712
Division: Labor Standards & Safety Date: 2/23/90

Approved by Commissioner: Jim Sampson Date: 2/23/90
Agency: Department of Labor

Distribution (by preparer) :) Changes in SCS CS HB 406 (L+C)
Legislative Finance) have no fiscal impact. This
Legislative Sponsor) fiscal note is appropriate.
Requestor :) Projections of no fiscal impact
Office of Management and Budget :) would continue through 1996.
Impacted Agency(ies)

Adopted

Original sponsor(s): REP. COTTEN

1 IN THE HOUSE BY THE LABOR & COMMERCE COMMITTEE
2 SENATE CS FOR CS FOR HOUSE BILL NO. 406 (L&C)
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 SIXTEENTH LEGISLATURE - SECOND SESSION
5 A BILL

6 For an Act entitled: "An Act relating to the sale or transfer of consumer
7 electrical products."

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

9 * Section 1. AS 45.45 is amended by adding a new section to read:

10 Sec. 45.45.910. SALE OR TRANSFER OF CONSUMER ELECTRICAL PROD-
11 UCTS. (a) Unless exempted by the department under (d) of this sec-
12 tion, a person may not sell, offer to sell, or otherwise transfer in
13 the course of the person's business a consumer electrical product that
14 is manufactured after the effective date of this Act, unless the
15 product is clearly marked as being listed by an approved third-party
16 certification program.

17 (b) A person may not sell, offer to sell, or otherwise transfer
18 in the course of the person's business a consumer electrical product
19 that is manufactured before the effective date of this Act, unless the
20 product is clearly marked

21 (1) as being listed by an approved third-party certifica-
22 tion program; or

23 (2) with a warning label that complies with (e) of this
24 section.

25 (c) A person may not sell, offer to sell, or otherwise transfer
26 in the course of the person's business a consumer electrical product
27 that has been exempted under (d) of this section, unless the product
28 is clearly marked with a warning label that complies with (e) of this
29 section.

1 (d) If a consumer electrical product is a work of art or an item
2 that has an unusual application that makes approval by a third-party
3 certification program not reasonably available, the department shall
4 upon request exempt the item from (a) of this section. The department
5 shall establish by regulation guidelines to identify consumer electri-
6 cal products that qualify for an exemption under this section.

7 (e) The warning label required by this section must be a bright-
8 ly colored label that contains in simple, direct language a warning
9 that the electrical product is not listed by an approved third-party
10 certification program. The department shall adopt regulations estab-
11 lishing the exact content, color, design, and use of the warning
12 label.

13 (f) Unless a later version has been adopted by the Department of
14 Labor by regulation, a certification program must meet the require-
15 ments of ANSI Z-34.1 - 1987, American National Standards for Certi-
16 fication - Third-Party Certification Program, published by the Ameri-
17 can National Standards Institute, in order to qualify as an approved
18 third-party certification program under this section. The Department
19 of Labor may adopt by regulation later versions of the American Na-
20 tional Standards for Certification - Third-Party Certification Pro-
21 gram, as the standard for third-party certification programs under
22 this section. If the Department of Labor has adopted a later version,
23 a certification program must meet the requirements of the most recent
24 version adopted by the department in order to qualify as an approved
25 third-party certification program under this section.

26 (g) In this section,

27 (1) "approved third-party certification program" means a
28 program that qualifies under (f) of this section;

29 (2) "consumer electrical product" means an electrical

1 product that is marketed for and commonly purchased by the general
2 public and that is

3 (A) an assembled device that has an electrical circuit
4 that operates at 110 volts AC or higher, except for mechanical
5 attachments, including pump heads, pulleys, and fan blades, that
6 are used in the application of the device;

7 (B) a device that when assembled has an electrical
8 circuit that operates at 110 volts AC or higher; or

9 (C) an individual component part that is intended to
10 be part of an electrical circuit that operates at 110 volts AC or
11 higher;

12 (3) "department" means the Department of Labor.

13 * Sec. 2. AS 45.50.471(b) is amended by adding a new paragraph to read:

14 (29) violating AS 45.45.910(a), (b), or (c).

HB

408

HOUSE COMMITTEE REPORT



(11)

Date Referred: January 9, 1990

FURTHER REFERRALS:

Date of Committee Action: 3/5/90

The FINANCE Committee considered:

HB 408

HOUSE BILL NO. 408

APPROP: BUDGET RESERVE FUND

"An Act making special appropriations to the budget reserve fund; and providing for an effective date."

RECOMMENDATIONS:

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

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(S):
(Dept)

APPROVES PREVIOUS:
(Date/Dept)

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

- [] fiscal note(s) _____
- [] zero fiscal note(s) _____
- [] zero fn/analysis _____

SIGNING DO PASS:

SIGNING:
(Check approp. column)

Do Not Pass No Rec Amend

[Signature] Hoffman
[Signature] Brown
[Signature] KORDEN
[Signature] Uimer

Signature	Do Not Pass	No Rec	Amend
<u>[Signature]</u> CARSON		Pass if Amend	
<u>[Signature]</u> SWACKHAMMER			
<u>[Signature]</u> BARNES			Constitutional H.S. 7
<u>[Signature]</u> SHULT			
<u>[Signature]</u> PHILLIPS			
<u>[Signature]</u> Do Not Pass w/Amend			
<u>[Signature]</u> RIEGER			
<u>[Signature]</u> WALLIS			

[Signature] CARSON
 Chairman's Signature
[Signature] HOFFMAN

BY REP. M. DAVIS, Ulmer, Boyer

1 IN THE HOUSE

2

HOUSE BILL NO. 408

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

SIXTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

6

For an Act entitled: "An Act making special appropriations to the budget

7

reserve fund; and providing for an effective date."

8

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

9

* Section 1. The sum of \$61,800,000 is appropriated from the general
10 fund to the budget reserve fund (AS 37.05.540).

11

* Sec. 2. That portion of the money received by the state during fiscal
12 year 1990 from a settlement or a judicial determination of the North Slope
13 royalty case (State v. Amerada Hess, et al.) and not deposited into the
14 Alaska permanent fund under AS 37.13.010(a)(1) or (2) or into the public
15 school trust fund under AS 37.14.110 is appropriated to the budget reserve
16 fund (AS 37.05.540).

17

* Sec. 3. This Act takes effect immediately under AS 01.10.070(c).



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 Finance Committee

FROM: Rep. Mike Davis *Mike*

RE: HB 408

DATE: February 14, 1990

HB 408 is a small bill with a big message. In the simplest of terms it lets Alaskans know that the Legislature is serious about saving for the future.

Under the terms of the bill the projected surplus would be placed in the Budget Reserve Account for use at a later date. Office of Management and Budget's mid case forecast presently puts the surplus at \$61.8 million, but that figure is expected to rise substantially if oil prices continue there current trend.

Monies earned from the settlement of the Amerada Hess dispute would also be deposited in the fund.

With production at Prudhoe Bay on the decline, and revenues projections forecasting a severe drop in just a few years, it is time for the Legislature to act to protect the future interests of Alaskans before it's too late.

Thank you for your consideration.

HB

B

41

00

88

SENATE FINANCE COMMITTEE REPORT

DATE: 5/7/90

FURTHER: _____

DATE TURNED INTO OFFICE: 5/8/90

The Finance Committee considered

CSHB 408 (Rules)

Special appropriation to the budget reserve fund; efd.

and recommended:

- replace with _____ CS _____
- or adopt _____ CS _____
- attached amendment(s)
- _____ letter of intent adopted

- same title
- new title
- technical title change (HB only)

do pass

do not pass

no recommendation

individual recommendations

further referral to _____

ATTACHES NEW FISCAL NOTE(S):

Dept/Date:

fiscal note(s) _____

zero fiscal note(s) _____

APPROVES PREVIOUS:

Dept/Date:

fiscal note(s) _____

zero fiscal note(s) _____

appropriation-no fiscal note

SIGNING DO PASS:

OTHER RECOMMENDATIONS:

[Signature]
[Signature]
[Signature]
[Signature]

[Signature] No Rec

1.

[Signature]
[Signature]

[Signature]
[Signature]

Co-Chairs' Signatures and Recommendations

Original sponsor(s): REP. M. DAVIS, Ulmer, Boyer, Koponen

1 IN THE HOUSE BY THE RULES COMMITTEE

2 CS FOR HOUSE BILL NO. 408 (Rules)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act making a special appropriation to the budget
7 reserve fund; and providing for an effective date."

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

9 * Section 1. That portion of the money received by the state on or
10 after the effective date of this Act as a result of the termination,
11 through settlement or otherwise, of an administrative proceeding or litigation
12 involving mineral lease rentals, royalties, royalty sale proceeds, or
13 federal mineral revenue sharing payments or bonuses that is not dedicated
14 to the permanent fund under art. IX, sec. 15, Constitution of the State of
15 Alaska, or to the public school trust fund under AS 37.14.150 is appropri-
16 ated to the budget reserve fund (AS 37.05.540).

17 * Sec. 2. This Act takes effect immediately under AS 01.10.070(c).

HB

409

HOUSE COMMITTEE REPORT file

(11)

Date Referred: February 26, 1990

FURTHER REFERRALS:

Date of Committee Action: 4/10/90

The FINANCE Committee considered:

HB 409

HOUSE BILL NO. 409

DEC ADMINISTRATIVE PENALTIES

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

RECOMMENDATIONS:

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

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(S):
(Dept)

APPROVES PREVIOUS:

(Date/Dept)

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

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

SIGNING DO PASS:

SIGNING:

(Check approp. column)

Do Not
Pass No Rec Amend

[Signature] Swackhamm
[Signature] BROWN
[Signature] Koponen
[Signature] Umer

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

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

FISCAL NOTE

REQUEST:

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

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

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

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

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

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

Prepared by: Gail Gatton
Division: Administrative Services

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

Approved by Commissioner: 
Agency: Environmental Conservation

Date: 2/26/90

Distribution (by preparer):

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

Adopted

House Bill 409
2/21/90 Version

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

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

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

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

**Request For
New Position**

Agency Environmental Conservation
 BRU Administrative Services
 Component Administrative Services

Page 3 of 4
 Revised Date

FY 91

Position Title Paralegal Assistant II		No. of Positions 1	Range/Step 16A	Barg. Unit GGU
Time Status PFT	Staff Months 12	Location Juneau		Election District 04
Type of Expenditure		Amount		
1	2	3		
Salary	32.0			
Benefits	12.0			
Premium Pay	0			
Other	0			
Total Personal Services		44.0		
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

Page 4 of 4
 Revised Date

FY 91

FISCAL NOTE

REQUEST:

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

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

CAPITAL						
---------	--	--	--	--	--	--

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

Distribution (by preparer):

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

Adopted

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSHB 409 (JUD)

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

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

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

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

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

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

STATE OF ALASKA
1990 LEGISLATIVE SESSION

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

FISCAL NOTE

REQUEST:

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

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

POSITIONS:

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

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

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

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

Date: 02/26/90

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

Adopted

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

IN THE HOUSE

BY THE FINANCE COMMITTEE

CS FOR HOUSE BILL NO. 409 (Finance)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the reform of certain environmental conservation laws and the administrative penalties for their violation; amending Rule 82, Alaska Rules of Civil Procedure."

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

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

(6) at reasonable times [ENTER] and [INSPECT] with the consent of the owner or occupier, enter and inspect any property or premises and copy relevant records to investigate either actual or suspected sources of pollution or contamination or to ascertain compliance or noncompliance with this chapter, AS 46.04, or AS 46.09, or a regulation, order of the department, permit, approval, or acceptance issued under this chapter, AS 46.04, or AS 46.09; the department shall maintain as confidential [A REGULATION WHICH MAY BE ADOPTED UNDER AS 46.03.020 - 46.03.040;] information and records relating to secret processes, [OR] methods of manufacture, financial and commercial information and records, and other information and records as agreed by the department and the owner or occupier of the property discovered during the investigation [IS CONFIDENTIAL];

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

(14) to the extent permitted by the United States and Alaska Constitutions, at reasonable times enter and inspect a pervasively regulated facility if that facility is an oil terminal facility regulated under AS 46.04.030, a refinery, a crude oil or gas

exploration, production, or transportation facility, a hazardous waste transportation, storage, or disposal facility regulated under AS 46.03.302, a major solid waste disposal facility, or a facility with both significant air and wastewater emissions regulated under this chapter, and copy relevant records to investigate either actual or suspected sources of pollution or contamination or to ascertain compliance or noncompliance with this chapter, AS 46.04, AS 46.09, or with a regulation, order of the department, permit, approval, or acceptance issued under this chapter, AS 46.04, or AS 46.09; the department shall maintain as confidential information and records relating to secret processes, methods of manufacture, financial and commercial information and records, and other information and records as agreed by the department and the owner or occupier of the property that is discovered during the investigation; in this paragraph, "pervasively regulated facility" means a facility where activities or operations are or were conducted that affect a significant public interest and that the department comprehensively regulates.

* Sec. 3. AS 46.03 is amended by adding a new section to read:

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

(b) Except for the adoption of regulations under AS 46.03.885, AS 44.62 does not apply to administrative proceedings conducted or judicial review sought under this section.

(c) An administrative penalty assessed under this section may not exceed \$15,000 a day for each violation. Each violation is a

separate and distinct offense and where the violation continues from day to day, each day constitutes a separate violation. In determining the amount of a penalty assessed under this section, the department shall consider the effect of the violation on the public health or the environment, a prior history of violations, deterrence of future violations, and other factors that the department considers relevant.

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

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

(f) Action by the department under this section does not limit or otherwise affect the authority of the department to enforce this chapter, AS 46.04, or AS 46.09, or to recover damages, restoration

expenses, investigation costs, court costs, and attorney fees. The court shall set off the administrative penalty amount paid under this section against a civil penalty subsequently awarded by a court against the person for the same violation under AS 46.03.760.

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

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

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

* Sec. 4. AS 46.03.850 is repealed and reenacted to read:

Sec. 46.03.850. COMPLIANCE ORDER. (a) When the department finds after an investigation that a person is violating or is about to violate a provision of this chapter, AS 46.04, AS 46.09, or AS 03.05, or of a regulation, order of the department, permit, approval, or certificate issued under this chapter, AS 46.04, AS 46.09, or AS 03.05, or is otherwise endangering or creating the potential of pollution of the surface or subsurface air, land, or water within the

1 jurisdiction of the state, the department may issue a compliance
2 order. The compliance order shall describe with reasonable speci-
3 ficity the nature of the violation and set out the nature of the
4 required response measures and a deadline for compliance.

5 (b) The compliance order shall be personally served on or sent
6 by certified mail, return receipt requested, to the person affected.
7 Service is complete on a corporation upon receipt by an officer of the
8 corporation or by its registered agent and on a partnership on receipt
9 by a partner. The compliance order is effective on receipt. A re-
10 quest for an administrative hearing under (c) of this section does not
11 stay the provisions or deadlines set out in the compliance order.

12 (c) The person affected may request an administrative hearing
13 within 30 days after receipt of the compliance order. Failure to re-
14 quest a hearing within 30 days after receipt of the compliance order
15 constitutes a waiver by the person of the right to an administrative
16 hearing and to judicial review.

17 (d) After the conclusion of the administrative hearing, the
18 department may modify, rescind, or affirm the compliance order. The
19 affected person may obtain judicial review of the compliance order by
20 filing a notice of appeal in the superior court within 30 days after
21 the department's issuance of the administrative hearing decision. The
22 court may set aside the compliance order only if the administrative
23 record, taken as a whole, does not contain a reasonable basis to
24 support the provisions of the compliance order or the department's
25 decision to issue the compliance order. Except as provided in this
26 section, the compliance order is not subject to judicial or adminis-
27 trative review.

28 (e) Except for the adoption of regulations under AS 46.03.885,
29 AS 44.62 does not apply to administrative proceedings conducted or

1 judicial review sought under this section.

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

5 (g) The attorney general may seek enforcement of a compliance
6 order by bringing an action in superior court. In an action to en-
7 force a compliance order, the attorney general may recover full rea-
8 sonable attorney fees and costs incurred by the state in maintaining
9 the action.

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

11 Sec. 46.03.861. ENVIRONMENTAL AUDITS. (a) As part of a judi-
12 cial or administrative enforcement action, the commissioner may re-
13 quire a person to conduct an environmental audit and to prepare and
14 submit to the commissioner an environmental audit report.

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

19 (c) If an individual is required to conduct an environmental
20 audit, the individual may refuse to provide a specific item of infor-
21 mation on the basis of the privilege against self-incrimination. In
22 that case, the commissioner may request the attorney general to apply
23 to the superior court for immunity for the individual under AS 12.50.-
24 101 and for an order compelling production of the specific item of
25 information.

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

1 depart~~ment~~.

2 (e) In this section

3 (1) "environmental audit" means a systematic, documented,
4 periodic, and objective review of a person's operations, practices,
5 and performance related to meeting each applicable environmental
6 standard and requirement, including permit conditions;

7 (2) "environmental audit report" means a written report
8 that candidly and thoroughly presents findings from a review, con-
9 ducted as part of an environmental audit, of a person's environmental
10 operations, practices, and performance.

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

12 Sec. 46.03.885. REGULATIONS. The commissioner shall adopt
13 regulations under the Administrative Procedure Act (AS 44.62) to
14 implement AS 46.03.020(6) and (14), 46.03.761, 46.03.850, and 46.03.-
15 861.

16 * Sec. 7. The provisions of AS 46.03.761(h)(3), as added by sec. 3 of
17 this Act, have the effect of amending Alaska Rule of Civil Procedure 82 by
18 allowing the recovery of full reasonable attorney fees and costs in certain
19 actions.

20 * Sec. 8. AS 46.03.761(h)(3), as added by sec. 3 of this Act, takes
21 effect only if sec. 7 of this Act receives the two-thirds majority vote of
22 each house of the legislature required by art. IV, sec. 15, Constitution of
23 the State of Alaska.

24 * Sec. 9. The provisions of AS 46.03.850(g), as added by sec. 4 of this
25 Act, have the effect of amending Alaska Rule of Civil Procedure 82 by
26 allowing the recovery of full reasonable attorney fees and costs in certain
27 actions.

28 * Sec. 10. AS 46.03.850(g), as added by sec. 4 of this Act, takes
29 effect only if sec. 9 of this Act receives the two-thirds majority vote of

1 each house of the legislature required by art. IV, sec. 15, Constitution of
2 the State of Alaska.

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4/9/90
Rep. Kay Brown

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

(relative to the Judiciary version)

Section 1 - Consensual Inspections

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

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

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

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

Section 2 - Nonconsensual Inspections

Delete existing section 2 (pervasively regulated facilities).

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

Section 3 - Variances and Renewals

Delete. This conforming amendment is not necessary.

Section 4 - Administrative Penalties

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

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

4/10/90
Rep. Kay L. C.

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

Section 1 - Consensual Inspections

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

Section 2 - Nonconsensual Inspections

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

Section 3 - Administrative Penalties

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

Due process provisions are specifically established in the legislation:

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

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

Sections 7 & 8

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

Sections 9 & 10

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

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

4/9/90
Rep. Kay Brown

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

(relative to the Judiciary version)

Section 1 - Consensual Inspections

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

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

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

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

Section 2 - Nonconsensual Inspections

Delete existing section 2 (pervasively regulated facilities).

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

Section 3 - Variances and Renewals

Delete. This conforming amendment is not necessary.

Section 4 - Administrative Penalties

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

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

Section 5 - Compliance Orders

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

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

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

New Section

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

4/10/90
Rep. Kay Brown

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

Section 1 - Consensual Inspections

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

Section 2 - Nonconsensual Inspections

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

Section 3 - Administrative Penalties

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

Due process provisions are specifically established in the legislation:

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

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

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

Section 4 - Compliance Orders

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

The compliance order shall describe:

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

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

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

Section 5 - Environmental Audits

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

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

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

Section 6 - Adoption of Regulations Required

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

Sections 7 & 8

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

Sections 9 & 10

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

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

FEBRUARY 11, 1990

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

DEAR REPRESENTATIVE GOLL:

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

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

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

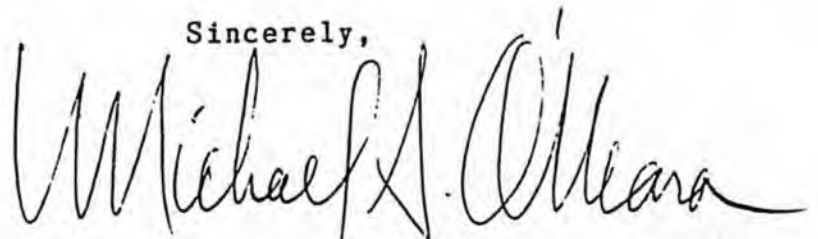
The DEC or other regulatory agencies should have whatever access they need to check on the activities of the petroleum industry whenever there is a need to do so. Since to my mind every part of the industry qualifies as a "pervasively regulated facility", there should be no qualifying language -- period.

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

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

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

Sincerely,

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

LEAGUE OF WOMEN VOTERS OF ALASKA

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

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

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

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

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

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

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

Mr. Chairman and Members of the Committee:

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

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

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

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

WATER QUALITY

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

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

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

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

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

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

AIR QUALITY

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

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

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

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

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

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

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

Terminal and the 12 pump stations along TAPS.

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

STATE OVERSIGHT

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

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

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

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



Coastal Resource Service Area

P.O. Box 3110, Dillingham, Alaska 99576

(907) 842-2666 - 842-2667

April 2, 1990

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

Dear Representative Hoffman:

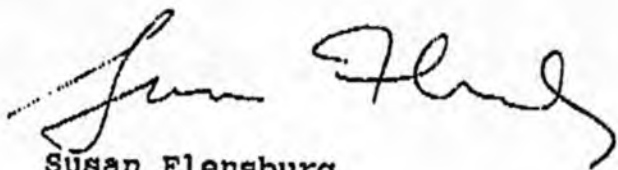
The Bristol Bay Coastal Resource Service Area (BBCRSA) Board is writing in support of HB 409 - an act relating to the reform of certain environmental conservation laws and the administrative penalties for their violation.

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

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

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

Sincerely,

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

Susan Flensburg
Director
Bristol Bay CRSA

cc: House Finance Committee members
Representative Jacko
Governor Cowper

ACCESS

ENVIRONMENTAL QUALITY LAWS

HAWAII

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

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

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

AIR LAWS

WASHINGTON

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

NEW JERSEY

26:2C-9.1

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

VIRGINIA

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

SOUTH DAKOTA

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

VERMONT

§557. Inspections

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

Pennsylvania

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

Rhode Island

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

North Dakota

23-25-05.

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

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

Nebraska

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

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

WATER LAWS

ALABAMA

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

WATER LAWS

INDIANA

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

COLORADO

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

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

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

MONTANA

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

- (1) investigate conditions relating to pollution of state waters or violations of permit conditions;
- (2) have access to and copy any records required under this chapter;
- (3) inspect any monitoring equipment or method required under 75-5-602(3); and
- (4) sample any effluents which the owner or operator of such source is required to ~~sample under 75-5-602(4).~~

SOUTH DAKOTA

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

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

RHODE ISLAND

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

WASHINGTON

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

WASHINGTON

WAC 173-201-110 SURVEILLANCE.

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

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

ARKANSAS

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

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

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

Report of the Alaska Oil Spill Commission
Executive Summary

SPIII

The Wreck of the Exxon Valdez
Implications for Safe Marine Transportation

January 1990

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

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

**Recommendation 13
Enhanced regulatory
strength**

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

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

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

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

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

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

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

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

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

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

Recommendation 14
Strengthened state inspections

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

Jerry Asplund, President, ARCO Marine, Inc.

Alaska Oil Spill Commission hearing, 9/1/89

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

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

(907) 465-2600

February 7, 1990

POSITION PAPER

House Bill 409

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

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

ACCESS

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

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

ADMINISTRATIVE PENALTIES

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

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

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

COMPLIANCE ORDERS

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

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

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

ENVIRONMENTAL AUDITS

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

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

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

Alaska State Legislature

Legislative Research Agency



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

February 6, 1990

MEMORANDUM

TO: Representative Mike Davis

ATTN: Barnaby Dow

FROM: Leola Weimer *LW*
Legislative Analyst

RE: Administrative Penalties
Research Request 90.156

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

Summary

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

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

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

Administrative Penalty Authority

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

Representative Davis
February 6, 1990
Page 2

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.

Representative Davis
February 6, 1990
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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.

Representative Davis
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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

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

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

New Federal Requirement

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

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

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

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

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

Attachments

CIVIL PENALTIES (ADMINISTRATIVE)

TABLE 13

CIVIL PENALTIES UNDER HAZARDOUS WASTE LAWS

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

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

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

Table 13 (continued)

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

Table 13 (continued)

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

STATE OF ALASKA

DEPARTMENT OF LAW

VIA FACSIMILE

OFFICE OF THE ATTORNEY GENERAL

Telecopier #456-1317

April 2, 1990

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

STEVE COWPER, GOVERNOR

REPLY TO:

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

Re: H.B. 409 access provisions

Dear Representatives Larson and Hoffman:

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

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

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

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

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

and

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

Representative Ron Larson
Re: HB 409 access provisions

April 2, 1990
Page 2

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

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

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

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

Sincerely,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By:


John A. McDonagh

Assistant Attorney General

JAM:jah

Representative Ron Larson
Re: HB 409 access provisions

April 2, 1990
Page 3

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

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

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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 hereunder. The bill sets forth in detail the administrative procedure to be followed in assessing a penalty and the judicial appellate review process for reviewing the administrative decision. Specifically, after the final administrative decision is made, that decision may be reviewed by the superior court as an administrative appeal, not as a de novo review. You have asked whether the administrative penalty provisions require a jury trial as either a criminal or civil proceeding.

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

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

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

Representatives Goll,
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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.

Representatives Goll,
Gruenberg, and Davis

February 20, 1990
Page 7

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

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February 26, 1990

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

Re: HB 409 and SB 497

Dear Ladies and Gentlemen:

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

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

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

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

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

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

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

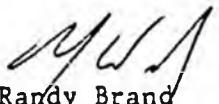
These bills as proposed remind us of "Big Brother" in the book 1984. They give ultimate power to a state agency and do nothing to protect the business-man's rights. Let's see what we can do to encourage business in this state, not discourage it.

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

Should you have any questions, please contact the undersigned.

Sincerely,

EARTH MOVERS OF FAIRBANKS, INC.


Randy Brand
Vice President

RB/lm

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

House Judiciary Committee
February 14, 1990

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

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

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

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

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

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

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

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

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

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

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

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



Alaskan Wilderness Sailing Safaris

16th Season

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

February 12, 1990

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Dear Honorable Peter Goll:

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

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

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

Sincerely yours,

R. James Lethcoe

Alaskan Wilderness Sailing Safaris

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ALASKA STATE CHAMBER OF COMMERCE

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February 14, 1990

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

Dear Representative Goll:

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

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

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

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

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