

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
5801 HOUSE JUDICIARY

205

1 for human consumption, reduction to meal, production of food for
2 domestic animals or fish, or scientific, display, or educational
3 purposes; "waste" does not include normal, inadvertent loss of flesh
4 associated with processing that cannot be prevented by practical
5 means.

HB

409

HOUSE COMMITTEE REPORT

(7)

Date Referred: February 9, 1990

FURTHER REFERRALS:

Date of Committee Action: 2-23-90

FINANCE
(added 2/9)

The JUDICIARY 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 CSHB 409 (JUD) [] the same title
[] a new title
- [] have attached amendment(s)
- [X] do pass
- [X] 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 _____

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

SIGNING DO PASS:

SIGNING:
(Check approp. column)

Max Shenberg
John Jones
Libbe Davis

	Do Not Pass	No Rec	Amend
<u>Terry Martin</u>		<input checked="" type="checkbox"/>	

John Jones / Max Shenberg
Chairman's Signature

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

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 409 (Judiciary)

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 reform of certain environ-
7 mental conservation laws and the administrative
8 penalties for their violation; amending Rule 82,
9 Alaska Rules of Civil Procedure."

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

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

12 (6) at reasonable times enter and inspect with the consent
13 of the owner or occupier any property or premises and copy records to
14 investigate either actual or suspected sources of pollution or con-
15 tamination or to ascertain compliance or noncompliance with this
16 chapter, AS 46.04, or AS 46.09, or a regulation, order of the depart-
17 ment, permit, approval, or acceptance issued under this chapter,
18 AS 46.04, or AS 46.09; the department shall maintain as confidential
19 [A REGULATION WHICH MAY BE ADOPTED UNDER AS 46.03.020 - 46.03.040;]
20 information and records relating to secret processes, [OR] methods of
21 manufacture, and other information and records as agreed by the de-
22 partment and the owner or occupier of the property, discovered during
23 the investigation [IS CONFIDENTIAL];

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

25 (14) at reasonable times enter and inspect the property or
26 premises of a pervasively regulated facility and copy relevant records
27 to investigate either actual or suspected sources of pollution or con-
28 tamination or to ascertain compliance or noncompliance with this
29 chapter, AS 46.04, AS 46.09, or with a regulation, order of the

1 department, permit, approval, or certificate issued under this chap-
2 ter, AS 46.04, or AS 46.09; the department shall maintain information
3 and records relating to secret processes or methods of manufacture
4 discovered during investigations as confidential; in this paragraph
5 "pervasively regulated facility" means a facility where activities or
6 operations are or were conducted that affect a significant public
7 interest and that the department comprehensively regulates.

8 * Sec. 3. AS 46.03.170(f) is amended to read:

9 (f) A variance or renewal granted under this section may not be
10 construed to prevent or limit the application of the [EMERGENCY]
11 orders of the commissioner issued under AS 46.03.820 and 46.03.850.

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

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

19 (b) AS 44.62 does not apply to administrative proceedings con-
20 ducted or judicial review sought under this section.

21 (c) An administrative penalty assessed under this section may
22 not exceed \$25,000 a day for each violation. Each violation is a
23 separate and distinct offense and where the violation continues from
24 day to day, each day constitutes a separate violation. In determining
25 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

1 by certified mail, return receipt requested, to the person affected.
2 An administrative penalty assessed under this section becomes final 30
3 days after receipt of the assessment notice unless an administrative
4 hearing is requested. Failure to request an administrative hearing
5 within 30 days after receipt of the assessment notice constitutes a
6 waiver of the right to an administrative hearing and to judicial
7 review.

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

20 (f) Action by the department under this section does not limit
21 or otherwise affect the authority of the department to enforce this
22 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

1 department, permit, approval, or certificate issued under this chap-
2 ter, AS 46.04, or AS 46.09.

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

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

8 (2) interest from the date the department issued the as-
9 sessment notice under (d) of this section;

10 (3) full reasonable attorney fees and costs incurred by the
11 state in the collection action; and

12 (4) a nonpayment penalty for each quarter year in which the
13 assessment remains unpaid of 20 percent of the assessed administrative
14 penalty.

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

16 Sec. 46.03.850. COMPLIANCE ORDER. (a) When, in the opinion of
17 the department, a person is violating or is about to violate a pro-
18 vision of this chapter, AS 46.04, AS 46.09, or AS 03.05, or of a
19 regulation, order of the department, permit, approval, or certificate
20 issued under this chapter, AS 46.04, AS 46.09, or AS 03.05, or is
21 otherwise endangering or creating the potential of pollution of the
22 surface or subsurface air, land, or water within the jurisdiction of
23 the state, the department may issue a compliance order.

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

1 stay the provisions or deadlines set out in the compliance order.

2 (c) The person affected may request an administrative hearing
3 within 30 days after receipt of the compliance order. Failure to re-
4 quest a hearing within 30 days after receipt of the compliance order
5 constitutes a waiver by the person of the right to an administrative
6 hearing and to judicial review.

7 (d) After the conclusion of the administrative hearing, the
8 department may modify, rescind, or affirm the compliance order. The
9 affected person may obtain judicial review of the compliance order by
10 filing a notice of appeal in the superior court within 30 days after
11 the department's issuance of the administrative hearing decision. The
12 court may set aside the compliance order only if the administrative
13 record, taken as a whole, does not contain a reasonable basis to
14 support the provisions of the compliance order or the department's
15 decision to issue the compliance order. Except as provided in this
16 section, the compliance order is not subject to judicial or adminis-
17 trative review.

18 (e) The Administrative Procedure Act (AS 44.62) does not apply
19 to administrative proceedings conducted or judicial review sought
20 under this section.

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

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

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

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

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

9 (c) In this section

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

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

18 * Sec. 7. The provisions of AS 46.03.761(h)(3), as added by sec. 4 of
19 this Act, have the effect of amending Alaska Rule of Civil Procedure 82 by
20 allowing the recovery of full reasonable attorney fees and costs in certain
21 actions.

22 * Sec. 8. AS 46.03.761(h)(3), as added by sec. 4 of this Act, takes
23 effect only if sec. 7 of this Act receives the two-thirds majority vote of
each house of the legislature required by art. IV, sec. 15, Constitution of
the State of Alaska.

 * Sec. 9. The provisions of AS 46.03.850(g), as added by sec. 5 of this
Act, have the effect of amending Alaska Rule of Civil Procedure 82 by
allowing the recovery of full reasonable attorney fees and costs in certain
actions.

1 * Sec. 10. AS 46.03.850(g), as added by sec. 5 of this Act, takes
2 effect only if sec. 9 of this Act receives the two-thirds majority vote of
3 each house of the legislature required by art. IV, sec. 15, Constitution of
4 the State of Alaska.
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FISCAL NOTE

REQUEST:

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

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

Please see the attached analysis.

Prepared by: Richard I. Pegues, Director
Division: Administrative Services
Approved by Commissioner: Douglas B. Bailly, Attorney General
Agency: Department of Law

Phone: 465-3672
Date: February 26, 1990
Date: February 26, 1990

Distribution (by preparer):

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

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSHB 409 (JUD)

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

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

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

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

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

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

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CSHB 409 (Judiciary)
PUBLISH DATE: 2/21/90

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:

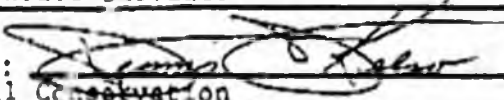
FULL-TIME	2	2	2	2	2	2
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

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 & approved

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

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Position Title Attorney III			No. of Positions 1	Range/Step 12A	Borg. 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				
Pension 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		
Cl. P. Mat.	1003		0		
General Fund	1004		87.0		
GF Program Receipts	1005		0		
Other			0		

Justification

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

**Request For
New Position**

Agency Environmental Conservation
 BRU Administrative Services
 Component Administrative Services

Page 3 of 4
 Revised Date

FY

**STATE OF ALASKA
1990 LEGISLATIVE SESSION**

Bill Version: CS for CSHB400 (Jud)
Publish Date: 2/80

FISCAL NOTE

REQUEST:

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

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

POSITIONS:

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Jan Strandberg
Division: Alaska Court System
Approved by: Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System

Phone: 264-8228
Date: 02/26/90
Date: 02/26/90

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



Alaskan Wilderness Sailing Safaris

16th Season

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

February 12, 1990

RECEIVED
FEB 14 1990

Dear Honorable Peter Goll:

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

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

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

Sincerely yours,

R. James Lethcoe

Alaskan Wilderness Sailing Safaris

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

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.

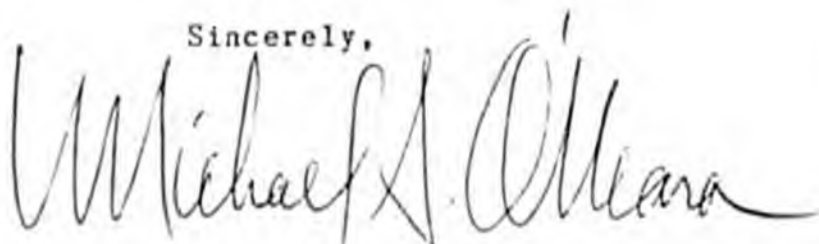
The DEC or other regulatory agencies should have whatever access they need to check on the activities of the petroleum industry whenever there is a need to do so. Since to my mind every part of the industry qualifies as a "pervasively regulated facility", there should be no qualifying language -- period.

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,".



Alaska State Legislature

Representative Mike Davis

District 19

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

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

TO: All Members
House Resources Committee

FROM: Rep. Mike Davis

DATE: February 6, 1990

RE: CS for HB 409

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

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

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

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

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

Rep. Mike Davis
Page Three

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

Special Note:

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

I thank you for your consideration of this legislation.

Sectional Analysis - CS to HB 409

Section #1.

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

Section #2.

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

Section #3.

Are housekeeping measures.

Section #4.

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

Section #5.

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

Section #6.

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



Alaska State Legislature

Representative Mike Davis

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To: Rep. Peter Goll, Co-Chair
House Judiciary Committee

From: Rep. Mike Davis *Mike Davis*

Re: HB 409

Date: February 12, 1990

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

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

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

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

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

4) Eliminate "pre-enforcement review" of compliance orders. Today, industry is allowed to challenge the orders before they go into

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Alaska State Legislature

Legislative Research Agency



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February 6, 1990

MEMORANDUM

TO: Representative Mike Davis

ATTN: Barnaby Dow

FROM: Leola Weimer *LW*
Legislative Analyst

RE: Administrative Penalties
Research Request 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 44.62.30-

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

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

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

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

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

Department of Environmental Conservation (DEC)

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

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

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

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

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

Other States

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

State of Washington

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

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

State of California

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

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

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

State of Oregon

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

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

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

New Federal Requirement

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

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

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

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

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

Attachments

ATTACHMENT A

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

Section II of the state constitution, State v. A.L.I.V.E. Voluntary, 606 P.2d 788 (Alaska 1980).
No implied general power to veto agency regulations by informal legislative

action exists. State v. A.L.I.V.E. Voluntary, 606 P.2d 789 (Alaska 1980).
Cited in Wickorham v. State, Com. Fisheries Entry Comm'n, 690 P.2d 1135 (Alaska 1984).

Article 8. Administrative Adjudication.

Section	Section
330 Application of AS 44.62.330 — 44.62.630	490 Amendment of accusation after submission
340 Delegation of power by agencies	500 Decision in a contested case
350 Appointment of hearing officers	510 Form and effect of decision
360 Accusation	520 Effective date of decision
370 Statement of issues	530 Default
380 Service of accusation	540 Reconsideration
390 Notice of defense	550 Petition for reinstatement or reduction of penalty
400 Amended or supplemental process	560 Judicial review
410 Time and place of hearing	570 Scope of review
420 Form of notice of hearing	580 Continuance
430 Subpoenas	590 Contempt
440 Depositions	600 Voting procedure
450 Hearings	610 Charge
460 Evidence rules	620 Power to administer oaths
470 Evidence by affidavit	630 Impartiality
480 Official notice	

NOTES TO DECISIONS

Applied in *Schaabel v. State*, 643 P.2d 980 (Alaska Ct. App. 1983).

Sec. 44.62.330. Application of AS 44.62.330 — 44.62.630.

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

- (1) *[Repealed, § 5 ch 159 SLA 1980.]*
- (2) Board of Chiropractic Examiners;
- (3) Board of Dental Examiners;

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

- (5) *[Repealed, § 13 ch 218 SLA 1976.]*
- (6) Board of Examiners in Optometry;
- (7) *[Repealed, § 5 ch 169 SLA 1980.]*
- (8) State Medical Board;
- (9) Division of Lands under Alaska Land Act where applicable;
- (10) Board of Nursing;
- (11) Board of Pharmacy;
- (12) Board of Public Accountancy;
- (13) Department of Labor as to functions relating to employment security only as provided in (c) of this section;
- (14) Real Estate Commission;
- (15) Alaska Workers' Compensation Board, where procedures are not otherwise expressly provided by the Alaska Workers' Compensation Act;
- (16) Department of Transportation and Public Facilities, as to functions relating to aeronautics and communications;
- (17) *[Repealed, § 12 ch 131 SLA 1980.]*
- (18) *[Repealed, § 49 ch 94 SLA 1980.]*
- (19) *[Repealed, § 54 ch 169 SLA 1978.]*
- (20) *[Repealed, § 16 ch 82 SLA 1982.]*
- (21) *[Repealed, § 54 ch 169 SLA 1978.]*
- (22) *[Repealed, § 11 ch 181 SLA 1976.]*
- (23) Department of Public Safety, as to suspension or revocation of a security guard's license under AS 18.65.400 — 18.65.490;
- (24) Department of Health and Social Services, under AS 47.35, relating to boarding and foster homes for children;
- (25) *[Repealed, § 60 ch 98 SLA 1966.]*
- (26) *[Repealed, § 4 ch 120 SLA 1971.]*
- (27) Department of Health and Social Services and Department of Environmental Conservation under AS 17.20 (Alaska Food, Drug, and Cosmetic Act), and Department of Commerce and Economic Development in connection with the licensing of embalmers and funeral directors under AS 08.42;
- (28) Department of Health and Social Services and the Hospital Advisory Council, under AS 18.20.010 — 18.20.130;
- (29) *[Repealed, § 4 ch 120 SLA 1971.]*
- (30) Department of Environmental Conservation, under AS 18.35.010 — 18.35.090, concerning the regulation of tourist and trailer camps, motor courts, and motels;
- (31) *[Repealed, § 40 ch 206 SLA 1975.]*
- (32) *[Repealed, § 4 ch 106 SLA 1970.]*
- (33) Board of Marine Pilots;
- (34) Alaska Police Standards Council;
- (35) Big Game Commercial Services Board;

- (36) Board of Dispensing Opticians;
 (37) [Repealed, § 20 ch 110 SLA 1981.]
 (38) [Expired pursuant to § 3 ch 128 SLA 1974, am § 7 ch 108 SLA 1975.]
 (39) Alaska Public Offices Commission;
 (40) Board of Fisheries;
 (41) Board of Game;
 (42) the Department of Education and the Professional Teaching Practices Commission with regard to proceedings to revoke or suspend a teacher's certificate under AS 14.20.030 — 14.20.040 and AS 14.20.470(a)(4);
 (43) Alaska Commission on Postsecondary Education under AS 14.48 as to denial of applications and revocation of authorizations and permits;
 (44) Department of Environmental Conservation, except to the extent that AS 44.62.360 — 44.62.400 are inconsistent with the manner in which proceedings are initiated under the provisions of AS 46.03;
 (45) University of Alaska, except to the extent that its inclusion is inconsistent with the provisions of AS 14.40;
 (46) [Repealed, § 77 ch 14 SLA 1987.]
 (47) Board of Psychologist and Psychological Associate Examiners;
 (48) the Department of Fish and Game as to functions relating to the protection of fish and game under AS 16.05.870;
 (49) Board of Veterinary Examiners;
 (50) Board of Nursing Home Administrators;
 (51) Board of Barbers and Hairdressers;
 (52) Department of Natural Resources concerning the Alaska grain reserve program under former AS 03.12;
 (53) Department of Commerce and Economic Development concerning the licensing and regulation of audiologists under AS 08.11;
 (54) Department of Commerce and Economic Development concerning the licensing and regulation of hearing aid dealers under AS 08.55.
- (b) The procedure of an agency not listed in (a) of this section shall be conducted under AS 44.62.330 — 44.62.630 only as to those functions to which AS 44.62.330 — 44.62.630 are made applicable by the statutes relating to that agency.
- (c) Judicial review and scope of judicial review of all final decisions of the commissioner of labor on an appeal relating to employment security shall be in accord with this chapter notwithstanding anything to the contrary in AS 23.20 (Alaska Employment Security Act). All other procedures of the Department of Labor relating to employment security shall be as provided in AS 23.20 and the regulations under AS 23.20.
- (d) Except in a case of reinstatement or reduction of penalty, the provisions of this chapter do not affect statutory provisions concerning

- (1) civil or criminal penalties;
 (2) additional relief by injunction or restraining order;
 (3) penalty provisions relating to suspension, revocation, reinstatement, and other similar matters of licenses, permits, leases, concessions, and other similar matters;
 (4) related matters that in their context do not relate to procedure. (§ 2 (ch 2) ch 143 SLA 1959; am § 14 ch 2 SLA 1964; am § 60 ch 98 SLA 1966; am § 2 ch 120 SLA 1966; am § 1 ch 58 SLA 1967; am § 18 ch 143 SLA 1968; am § 2 ch 83 SLA 1969; am § 2 ch 118 SLA 1969; am §§ 3, 4 ch 106 SLA 1970; am § 6 ch 104 SLA 1971; am § 4 ch 120 SLA 1971; am § 2 ch 178 SLA 1972; am § 5 ch 179 SLA 1972; am § 2 ch 17 SLA 1973; am § 3 ch 45 SLA 1973; am § 2 ch 82 SLA 1973; am § 2 ch 7 FSSLA 1973; am § 5 ch 76 SLA 1974; am § 2 ch 128 SLA 1974; am § 6 ch 9 SLA 1975; am § 25 ch 25 SLA 1975; am §§ 39, 40 ch 206 SLA 1975; am § 4 ch 25 SLA 1976; am § 2 ch 59 SLA 1976; am § 11 ch 181 SLA 1976; am §§ 13, 106 ch 218 SLA 1976; am § 18 ch 220 SLA 1976; am § 9 ch 46 SLA 1977; am § 3 ch 140 SLA 1977; am § 54 ch 169 SLA 1978; am § 10 ch 69 SLA 1979; am § 23 ch 58 SLA 1980; am § 3 ch 84 SLA 1980; am §§ 49, 60 ch 94 SLA 1980; am § 15 ch 130 SLA 1980; am § 12 ch 131 SLA 1980; am § 15 ch 141 SLA 1980; am §§ 4, 5 ch 159 SLA 1980; am § 20 ch 110 SLA 1981; am E.O. No. 51, §§ 38, 39 (1981); am § 16 ch 82 SLA 1982; am § 2 ch 100 SLA 1983; am § 124 ch 6 SLA 1984; am § 11 ch 131 SLA 1986; am § 77 ch 14 SLA 1987; am § 12 ch 37 SLA 1989.)

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

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

The 1989 amendment, effective May 12, 1989, substituted "High Seas Commercial Services Board" for "Guide Licensing and Control Board" in paragraph (a)(52).

Opinions of attorney general. — The purpose of the adjudication procedure is to prescribe a fair procedure for determinations of fact, this is indicated by paragraph (d)(4), which excepts from the adjudication procedure related matters that in their context do not relate to procedure 1963 Op. Att'y Gen., No. 10.

The policy of subsection (d) of this section is to limit the adjudication procedure set forth in the Administrative Procedure Act to procedural matters, and matters regarding which the agency must make substantial determinations of fact. 1963 Op. Att'y Gen., No. 10.

The words of subsection (d), "in a case of

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

The acquisition and hearing procedure set forth in the Administrative Procedure Act was not applicable to the suspension or revocation of liquor licenses by the Alcohol Beverage Control Board after a conviction of a licensee of certain offenses as set forth in former AS 04.15.100(a). 1963 Op. Att'y Gen., No. 10.

The exceptions set forth in subsection (d) refer to situations in which there is no need for the agency to make a determination of fact other than facts have already been determined by the courts. 1964 Op. Att'y Gen., No. 10.

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

passed by the Administrative Procedure Act, 1963 Op. Att'y Gen., No. 18.

Not all of this chapter, as it relates to workers' compensation proceedings, has been repealed by implication. For example, the Alaska Workers' Compensation Act is silent as to judicial review and the scope of judicial review. This chapter therefore applies, since there is nothing in the Alaska Workers' Compensation Act which covers the same ground or which is

inconsistent with provisions in this chapter relating to judicial review and the scope of such review. 1959 Op. Att'y Gen., No. 24.

But this section and AS 44.62.450 were superseded with respect to workers' compensation hearings by AS 23.30.115 and 23.30.135 of the Alaska Workers' Compensation Act, 1969 Op. Att'y Gen., No. 24.

NOTES TO DECISIONS

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

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

Applicability to workers' compensation proceedings. — The legislature intended to substitute, upon the effective date of the Administrative Procedure Act, the judicial scope of review as provided therein for the judicial scope of review as provided in the Workers' Compensation Act. *Manthey v. Collier*, 367 P.2d 664 (Alaska 1962).

The superior court is controlled by the Administrative Procedure Act in proceedings, or in a review of proceedings from the Alaska Workers' Compensation Board. See *Manthey v. Collier*, 367 P.2d 664 (Alaska 1962). But see *Alaskan Homes v. Fischer*, 418 P.2d 769 (Alaska 1966).

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

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

But not to termination of grazing leases. — The adjudicative provisions of the Alaska Administrative Procedure Act do not apply to the termination of grazing leases by the state. *Division of Lands McCarrey v. Commissioner of Natural Resources*, 528 P.2d 1357 (Alaska 1974).

Not to local school boards. — The Administrative Procedure Act by its express terms does not apply to local school boards. *Matanuska-Susitna Borough v. Lum*, 538 P.2d 944 (Alaska 1975).

Not to boards of adjustment. — Boards of adjustment are not included on the list in subsection (a) of agencies, boards and administrative bodies specifically subject to this chapter. *Galt v. Stanton*, 591 P.2d 960 (Alaska 1979).

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

Burden of proof. — While the Alaska Administrative Procedure Act does not specifically state who has the burden of proof in administrative adjudications, it does provide in AS 44.62.466(e) that "Nothing herein shall be construed to alter the ordinary rules of burden of proof of judicial proceedings in Alaska." The foregoing provision coupled with the fact that under the Administrative Procedure Act a hearing to determine whether a license should be granted, issued or renewed shall be initiated by filing a "statement of issues" which must be served upon the person seeking the issuance or renewal of the license as the respondent (AS 44.62.370, AS 44.62.380), and against which the respondent may defend by filing a notice of defense (AS 44.62.390) compelled the supreme court to the conclusion that the burden of proof on the issue raised by the statement of issues was upon the state.

Alaska ABC Bd v. Malcolm, Inc., 391 P.2d 661 (Alaska 1965).

Applied in *Vick v. Board of Elec. Exms.*, 628 P.2d 90 (Alaska 1981).

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

Reited in *Forth v. Northern Stevedoring & Handling Corp.*, 385 P.2d 944 (Alaska 1963); *Union Oil Co v. State Dept of Natural Resources*, 628 P.2d 1357

(Alaska 1974); *Wien Air Alaska Inc v. Department of Revenue*, 647 P.2d 1007 (Alaska 1982).

Cited in *Mobil Oil Corp v. Local Boundary Comm'n*, 618 P.2d 92 (Alaska 1974); *Sisters of Providence in Wash., Inc v. Department of Health & Social Servs.*, 648 P.2d 970 (Alaska 1982); *Kenai Peninsula Borough v. State, Dept of Community & Regional Affairs*, 751 P.2d 14 (Alaska 1988).

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

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

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

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

NOTES TO DECISIONS

Alaska Transportation Commission exempted. — Former AS 42.07.151(a) specifically exempted the Alaska Transportation Commission from the requirements of both this section, forbidding the delegation of the hearing power absent express statutory authorization, and AS 44.62.600, requiring the hearing officer to

prepare a proposed decision and forbidding members of the applicable government agency from voting on the decision if they have not heard the evidence. *Alaska Transp. Comm'n v. Giandra*, 602 P.2d 402 (Alaska 1979).
Cited in *In re Peterson*, 499 P.2d 304 (Alaska 1972).

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

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

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

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

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

ATTACHMENT B

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

The Oregonian

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THURSDAY, DECEMBER 28, 1989

Hammer away on polluters

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

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

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

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

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

- Write a policy that reflects public expectations. The commission

lic wants polluters punished.

- Provide DEQ Director Fred Hansen with a procedure to set consistent and rational penalties statewide.

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

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

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

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

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

CIVIL PENALTY SCHEDULE MATRICES

340-12-042

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

(1)

\$10,000 Matrix
 ← Magnitude of Violation

C l a s s o f V i o l a t i o n	Major	Moderate	Minor	
	Class I	\$5,000	\$2,500	\$1,000
	Class II	\$2,000	\$1,000	\$500
Class III	\$500	\$250	\$100	

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

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

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

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

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

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

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

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

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

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

(3)

\$500 Matrix
← Magnitude of Violation

C l a s s o f V i o l a t i o n		Major	Moderate	Minor
	Class I	\$400	\$300	\$200
	Class II	\$300	\$200	\$100
	Class III	\$200	\$100	\$50

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

(a) Any violation related to residential open burning;

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

(c) Any violation related to on-site sewage disposal statutes, rules, permits, licenses and orders;

(d) Any violation related to solid waste statutes, rules, permits and orders; and

(e) Any violation related to waste tire statutes, rules, permits and orders;

(f) Any violation of ORS 164.785 relating to the placement of offensive substances into the waters of the state or on to land.

(Statutory Authority: ORS Ch. 454, 459, 466, 467 & 468)

CIVIL PENALTY DETERMINATION PROCEDURE

340-12-045

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

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

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

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

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

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

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

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

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

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

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

Alaska State Legislature

Legislative Research Agency



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February 7, 1990

MEMORANDUM

TO: Representative Mike Davis
ATTN: Barnaby Dow
FROM: Leola Weimer *LW*
Legislative Analyst
RE: Administrative Penalties
Research Request 90.156 (Supplemental Information)

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

Summary

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

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

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

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

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Access Without A Warrant

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

Environmental Protection Agency

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

Washington

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

No person shall refuse entry or access to any control officer, the department, or their duly authorized representatives, who requests entry for the purpose of inspection, and who presents appropriate credentials; nor shall any person obstruct, hamper or interfere with any such inspection.

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

California

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

Oregon

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

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

Environmental Audits

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

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

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

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

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

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

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

²*Ibid.*, p. 1190.

³*Ibid.*, p. 1210.

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

"Pre-Enforcement Review"

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

Washington

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

California

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

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

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Oregon

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

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

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

Attachment

TABLE 13

CIVIL PENALTIES UNDER HAZARDOUS WASTE LAWS

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

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

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

Table 13 (continued)

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

Table 13 (continued)

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

ATTACHMENT A

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

Issue art. II of the state constitution State v. A.L.I.V.E. Voluntary, 606 P.2d 789 (Alaska 1980)
No implied general power to vote agency regulations by informal legislative

action exists State v. A.L.I.V.E. Voluntary, 808 P.2d 789 (Alaska 1991).
Cited in Wickham v. State, Com. Fisheries Entry Comm'n, 690 P.2d 1138 (Alaska 1984).

Article 8. Administrative Adjudication.

Section	Section
330 Application of AS 44.62.330 — 44.62.630	490 Amendment of accusation after submission
340 Delegation of power by agencies	500 Decision in a contested case
350 Appointment of hearing officers	510 Form and effect of decision
360 Accusation	520 Effective date of decision
370 Statement of issues	530 Default
380 Service of accusation	540 Reconsideration
390 Notice of defense	550 Petition for reinstatement or reduction of penalty
400 Amended or supplemental accusation	560 Judicial review
410 Time and place of hearing	570 Scope of review
420 Form of notice of hearing	580 Continuance
430 Subpoenas	590 Contempt
440 Depositions	600 Voting procedure
450 Hearings	610 Charge
460 Evidence rules	620 Power to administer oaths
470 Evidence by affidavit	630 Impartiality
480 Official notice	

NOTES TO DECISIONS

Applied in *Schaebel v. State*, 643 P.2d 980 (Alaska Ct. App. 1982).

Sec. 44.62.330. Application of AS 44.62.330 — 44.62.630.

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

- (1) [Repealed, § 5 ch 159 SLA 1980.]
- (2) Board of Chiropractic Examiners;
- (3) Board of Dental Examiners;

- (4) State Board of Registration for Architects, Engineers and Land Surveyors;
- (5) [Repealed, § 13 ch 218 SLA 1976.]
- (6) Board of Examiners in Optometry;
- (7) [Repealed, § 5 ch 159 SLA 1980.]
- (8) State Medical Board;
- (9) Division of Lands under Alaska Land Act where applicable;
- (10) Board of Nursing;
- (11) Board of Pharmacy;
- (12) Board of Public Accountancy;
- (13) Department of Labor as to functions relating to employment security only as provided in (c) of this section;
- (14) Real Estate Commission;
- (15) Alaska Workers' Compensation Board, where procedures are not otherwise expressly provided by the Alaska Workers' Compensation Act;
- (16) Department of Transportation and Public Facilities, as to functions relating to aeronautics and communications;
- (17) [Repealed, § 12 ch 131 SLA 1980.]
- (18) [Repealed, § 49 ch 94 SLA 1980.]
- (19) [Repealed, § 54 ch 169 SLA 1978.]
- (20) [Repealed, § 16 ch 82 SLA 1982.]
- (21) [Repealed, § 54 ch 169 SLA 1978.]
- (22) [Repealed, § 11 ch 181 SLA 1976.]
- (23) Department of Public Safety, as to suspension or revocation of a security guard's license under AS 18.65.400 — 18.65.490;
- (24) Department of Health and Social Services, under AS 47.35, relating to boarding and foster homes for children;
- (25) [Repealed, § 60 ch 98 SLA 1966.]
- (26) [Repealed, § 4 ch 120 SLA 1971.]
- (27) Department of Health and Social Services and Department of Environmental Conservation under AS 17.20 (Alaska Food, Drug, and Cosmetic Act), and Department of Commerce and Economic Development in connection with the licensing of embalmers and funeral directors under AS 08.42;
- (28) Department of Health and Social Services and the Hospital Advisory Council, under AS 18.20.010 — 18.20.130;
- (29) [Repealed, § 4 ch 120 SLA 1971.]
- (30) Department of Environmental Conservation, under AS 18.35.010 — 18.35.090, concerning the regulation of tourist and trailer camps, motor courts, and motels;
- (31) [Repealed, § 40 ch 206 SLA 1975.]
- (32) [Repealed, § 4 ch 106 SLA 1970.]
- (33) Board of Marine Pilots;
- (34) Alaska Police Standards Council;
- (35) Big Game Commercial Services Board;

- (136) Board of Dispensing Opticians;
 (137) *(Repealed, § 20 ch 110 SLA 1981.)*
 (138) *(Expired pursuant to § 3 ch 120 SLA 1974; am § 7 ch 108 SLA 1975.)*
 (139) Alaska Public Offices Commission;
 (140) Board of Fisheries;
 (141) Board of Game;
 (142) the Department of Education and the Professional Teaching Practices Commission with regard to proceedings to revoke or suspend a teacher's certificate under AS 14.20.030 — 14.20.040 and AS 14.20.470(a)(4);
 (143) Alaska Commission on Postsecondary Education under AS 14.48 as to denial of applications and revocation of authorizations and permits;
 (144) Department of Environmental Conservation, except to the extent that AS 44.62.360 — 44.62.400 are inconsistent with the manner in which proceedings are initiated under the provisions of AS 46.03;
 (145) University of Alaska, except to the extent that its inclusion is inconsistent with the provisions of AS 14.40;
 (146) *(Repealed, § 77 ch 14 SLA 1987.)*
 (147) Board of Psychologist and Psychological Associate Examiners;
 (148) the Department of Fish and Game as to functions relating to the protection of fish and game under AS 16.05.870;
 (149) Board of Veterinary Examiners;
 (150) Board of Nursing Home Administrators;
 (151) Board of Barbers and Hairdressers;
 (152) Department of Natural Resources concerning the Alaska grain reserve program under former AS 03.12;
 (153) Department of Commerce and Economic Development concerning the licensing and regulation of audiologists under AS 08.11;
 (154) Department of Commerce and Economic Development concerning the licensing and regulation of hearing aid dealers under AS 08.55.
- (b) The procedure of an agency not listed in (a) of this section shall be conducted under AS 44.62.330 — 44.62.630 only as to those functions to which AS 44.62.330 — 44.62.630 are made applicable by the statutes relating to that agency.
- (c) Judicial review and scope of judicial review of all final decisions of the commissioner of labor on an appeal relating to employment security shall be in accord with this chapter notwithstanding anything to the contrary in AS 23.20 (Alaska Employment Security Act). All other procedures of the Department of Labor relating to employment security shall be as provided in AS 23.20 and the regulations under AS 23.20.
- (d) Except in a case of reinstatement or reduction of penalty, the provisions of this chapter do not affect statutory provisions concerning

- (1) civil or criminal penalties;
 (2) additional relief by injunction or restraining order;
 (3) penalty provisions relating to suspension, revocation, reissuance, and other similar matters of licenses, permits, leases, concessions, and other similar matters;
 (4) related matters that in their context do not relate to procedure. (§ 2 (ch 2) ch 143 SLA 1959, am § 14 ch 2 SLA 1964; am § 60 ch 98 SLA 1966; am § 2 ch 120 SLA 1966; am § 1 ch 59 SLA 1967, am § 14 ch 143 SLA 1968; am § 2 ch 83 SLA 1969; am § 2 ch 118 SLA 1969, am §§ 3, 4 ch 106 SLA 1970; am § 6 ch 104 SLA 1971, am § 4 ch 120 SLA 1971; am § 2 ch 178 SLA 1972, am § 5 ch 179 SLA 1972, am § 2 ch 17 SLA 1973; am § 3 ch 45 SLA 1973; am § 2 ch 82 SLA 1973, am § 2 ch 7 FSSLA 1973; am § 5 ch 76 SLA 1974; am § 2 ch 128 SLA 1974; am § 6 ch 9 SLA 1975; am § 25 ch 25 SLA 1975, am §§ 39, 40 ch 206 SLA 1975; am § 4 ch 25 SLA 1976; am § 2 ch 59 SLA 1976, am § 11 ch 181 SLA 1976; am § 13, 106 ch 218 SLA 1976; am § 18 ch 220 SLA 1976; am § 9 ch 46 SLA 1977; am § 3 ch 140 SLA 1977; am § 54 ch 169 SLA 1978; am § 10 ch 59 SLA 1979; am § 23 ch 58 SLA 1980; am § 3 ch 84 SLA 1980; am §§ 49, 60 ch 94 SLA 1980, am § 15 ch 130 SLA 1980; am § 12 ch 131 SLA 1980, am § 15 ch 141 SLA 1980; am §§ 4, 5 ch 159 SLA 1980, am § 20 ch 110 SLA 1981; am F.O. No. 51, §§ 38, 39 (1981); am § 16 ch 82 SLA 1982, am § 2 ch 100 SLA 1983; am § 124 ch 6 SLA 1984; am § 11 ch 131 SLA 1986; am § 77 ch 14 SLA 1987; am § 12 ch 37 SLA 1989)

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

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

The 1989 amendment, effective May 12, 1989, substituted "Big Game Commercial Services Board" for "Guide Licensing and Control Board" in paragraph (43).

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

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

The words of subsection (d), "in a case of

reinstatement or reduction of penalty," refer to AS 44.62.551, which provides that a person whose license is revoked or suspended may petition the agency for reinstatement or reduction of penalty after one year from the effective date of the decision or from the date of denial of the similar petition. 1983 Op. Atty. Gen., No. 10.

The accusatory and hearing procedure set forth in the Administrative Procedure Act was not applicable to the suspension or revocation of liquor licenses by the Alcoholic Beverage Control Board after a conviction of a licensee of certain offenses as set forth in former AS 16.15.110(b). 1983 Op. Atty. Gen., No. 10.

The exceptions set forth in subsection (d) refer to situations in which there is no need for the agency to make a determination of fact since such facts have been determined by the courts. 1983 Op. Atty. Gen., No. 10.

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

gated by the Administrative Procedure Act, 1963 Op. Atty. Gen., No. 18.

Not all of this chapter, as it relates to workers' compensation proceedings, has been repealed by implication. For example, the Alaska Workers' Compensation Act is silent as to judicial review and the scope of judicial review. This chapter therefore applies, since there is nothing in the Alaska Workers' Compensation Act which covers the same ground or which is

inconsistent with provisions in this chapter relating to judicial review and the scope of such review. 1959 Op. Atty. Gen., No. 24.

But this section and AN 44.62.480 were superseded with respect to workers' compensation hearings by AS 23.30.115 and 23.30.116 of the Alaska Workers' Compensation Act. 1969 Op. Atty. Gen., No. 34.

NOTES TO DECISIONS

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

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

Applicability to workers' compensation proceedings. — The legislature intended to substitute, upon the effective date of the Administrative Procedure Act, the judicial scope of review as provided therein for the judicial scope of review as provided in the Workers' Compensation Act. *Manthey v. Collier*, 367 P.2d 664 (Alaska 1962).

The superior court is controlled by the Administrative Procedure Act in proceedings, or in a review of proceedings from the Alaska Workers' Compensation Board. See *Manthey v. Collier*, 367 P.2d 664 (Alaska 1962). But see *Alutian Homes v. Fischer*, 418 P.2d 765 (Alaska 1966).

The Administrative Procedure Act (AS 44.62) is applicable to Workers' Compensation Board hearings except where otherwise expressly provided in the Workers' Compensation Act. *Employers Com. Employees Com. Union Inc. Gross v. Schoon*, 519 P.2d 818 (Alaska 1974).

Act applied to leasing procedures. — The judicial review portions of the Administrative Procedure Act govern leasing procedures conducted by the Division of Lands under the Alaska Land Act. *Alaska Nat'l Corp v. Holdsworth*, 424 P.2d 1036 (Alaska 1967).

Alaska ARC Bd v. Malcolm, Inc., 321 P.2d 441 (Alaska 1964).

Applied in *Vick v. Board of Elec. Exms.*, 628 P.2d 90 (Alaska 1981).

Quoted in *Pan American Petroleum Corp v. Shell Oil Co.*, 465 P.2d 12 (Alaska 1969).

Noted in *Forth v. Northern Stevedoring & Handling Corp.*, 385 P.2d 944 (Alaska 1963); *Union Oil Co. v. State Dept. of Natural Resources*, 828 P.2d 1357

(Alaska 1974); *Wien Air Alaska Inc. v. Department of Revenue*, 617 P.2d 1087 (Alaska 1982).

Cited in *Mobil Oil Corp. v. Local Boundary Comm'n.*, 518 P.2d 92 (Alaska 1974); *Statute of Procedure in Wash., Inc. v. Department of Health & Social Servs.*, 648 P.2d 920 (Alaska 1982); *Kennecott Peninsula Borough v. State Dept. of Community & Regional Affairs*, 751 P.2d 14 (Alaska 1988).

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

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

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

(b) In a law enacted after April 29, 1959, where the word "agency" alone is used, the power to act may be delegated by the agency, and where the words "agency itself" are used, the power to act may not be delegated unless a statute relating to that agency authorizes the delegation of its power to hear and decide. (S. 10) (Ch. 2) (Ch. 14) S.L.A. 1959).

NOTES TO DECISIONS

Alaska Transportation Commission exempted. — Former AN 42.07.151(a) specifically exempted the Alaska Transportation Commission from the requirements of both this section, forbidding the delegation of the hearing power absent express statutory authorization, and AN 44.62.600, requiring the hearing officer to

prepare a proposed decision and forbidding members of the applicable government agency from sitting on the decision if they have not heard the evidence. *Alaska Transp. Comm'n v. Gianda*, 602 P.2d 402 (Alaska 1979).

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

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

73 C.J.S., Public Administrative Law and Procedure, § 60.

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

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

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

ATTACHMENT B

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

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THURSDAY, DECEMBER 28, 1989

Hammer away on polluters

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

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

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

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

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

- Write a policy that reflects public expectations. The commission

lic wants polluters punished.

- Provide DEQ Director Fred Hansen with a procedure to set consistent and rational penalties statewide.

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

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

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

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

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

CIVIL PENALTY SCHEDULE MATRICES
 340-12-042

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

(1)

\$10,000 Matrix
 ← Magnitude of Violation

C l a s s o f V i o l a t i o n		Major	Moderate	Minor
	Class I	\$5,000	\$2,500	\$1,000
	Class II	\$2,000	\$1,000	\$500
	Class III	\$500	\$250	\$100

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

- (a) Any violation related to air quality statutes, rules, permits or orders, except for residential open burning [and field burning];
- (b) Any violation related to of ORS 468.875 to 468.899 relating to asbestos abatement projects;

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

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

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

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

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

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

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

(3)

\$500 Matrix
←———— Magnitude of Violation

C l a s s o f v i o l a t i o n		Major	Moderate	Minor
	Class I	\$400	\$300	\$200
	Class II	\$300	\$200	\$100
	Class III	\$200	\$100	\$50

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

(a) Any violation related to residential open burning;

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

(c) Any violation related to on-site sewage disposal statutes, rules, permits, licenses and orders;

(d) Any violation related to solid waste statutes, rules, permits and orders; and

(e) Any violation related to waste tire statutes, rules, permits and orders;

(f) Any violation of ORS 164.785 relating to the placement of offensive substances into the waters of the state or on to land.

(Statutory Authority: ORS Ch. 454, 459, 466, 467 & 468)

CIVIL PENALTY DETERMINATION PROCEDURE

340-12-045

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

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

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

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

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

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

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

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

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

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

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

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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VIA FACSIMILE

February 20, 1990

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

Re: HB 409

Dear Representatives Goll, Gruenberg, and Davis:

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

I. ACCESS AND INSPECTION AUTHORITY

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

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. Cmwltth 1988) (solid waste inspection statute); Commonwealth v. Fiore, 516 A.2d 704 (Pa. 1986) (hazardous waste facilities pervasively regulated); United States v. Kaiyo Maru No. 53, 699 F.2d 989 (9th Cir. 1983) (fishing industry pervasively regulated and warrantless administrative search of fishing vessel by Coast Guard upheld); Trustees for Alaska v. EPA, 749 F.2d 549 (9th Cir. 1984) (condition of water discharge permit that facilities subject to search upheld against facial challenge); V-1 Oil Company v. State of Wyoming, Dept. of Env. Quality, 696 F. Supp. 578 (D. Wyo. 1988) (inspection and sampling of leaking underground storage tank contamination at gas station upheld as pervasively regulated).

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

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

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

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

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

II. ADMINISTRATIVE PENALTIES.

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

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

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

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

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

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.

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.

FEB 20 10 15:30 AM ATTORNEY GENERAL BUSH
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



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John McDonagh

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Telecopier #456-1317
February 23, 1990

VIA FACSIMILE

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

Re: HB 409 amendment

Dear Representatives Gruenberg, Goll and Davis:

During the February 21, 1990 meeting of the House Judiciary Committee, you requested the Department of Law to provide a brief description of the effect of the committee's amendment to H.B. 409 ("amendment no. 1"). Amendment no.1 deletes the sentences which appear at pg. 3, ln. 17-19 and at pg. 5, ln. 15-16 of the committee's February 21, 1990 work draft. The amendment substitutes the following language at pg. 3, ln. 17:

Except as provided in this section, the validity, amount, and appropriateness of the administrative penalty are not subject to judicial or administrative review.

In similar fashion, amendment no. 1 substitutes the following language at pg. 5, ln. 15:

Except as provided in this section, the compliance order is not subject to judicial or administrative review.

The amendment language clarifies that when a person appeals from the department's administrative penalty or compliance order decision, the judicial appeal will proceed in accordance with traditional administrative appeal principles. Judicial review of the department's decision will be based upon the record below. Hence, if a person wishes to challenge the department's imposition of an administrative penalty or compliance order, the person must timely request an administrative hearing. The person must raise the arguments and objections in the administrative hearing in order to preserve the person's opportunity for judicial review.

STEVE COWPER, GOVERNOR

REPLY TO:

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

1st NATIONAL CENTER
100 CUSHMAN ST
SUITE 400
FAIRBANKS, ALASKA 99701-4679

Phone: (907) 452-1568

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

Representatives Gruenberg, Goll & Davis
Re: HB 409 Amendment

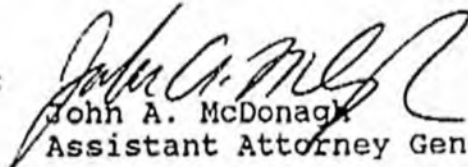
February 23, 1990
Page 2

The amendment language does not preclude collateral actions based upon jurisdictional grounds. For example, if the department failed to provide proper notice of a penalty assessment, the amendment would not prevent the person from raising the lack of notice issue as a defense in a subsequent collection action--even though the person had not sought an administrative hearing. However, such challenges aside, a person who wishes to contest an administrative penalty must do so through the procedures provided in section 4--not in a separate lawsuit or administrative proceeding. Likewise, a person who wishes to challenge a compliance order must do so through the procedures provided in section 5.

Sincerely,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By:


John A. McDonagh
Assistant Attorney General

JAM/jah

HOUSE COMMITTEE REPORT

(9)

Date Referred: January 10, 1990

FURTHER REFERRALS: JUDICIARY

Date of Committee Action: 2/7/90

The RESOURCES 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 (RES) the same title
- have attached amendment(s) a new title
- 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 DEC
- 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

<i>Chris Davidson</i>		✓	
<i>Mike Moore w/amendments</i>	<i>[Signature]</i>	✓	
<i>Mike [Signature]</i>	<i>Barth [Signature]</i>	✓	
<i>[Signature]</i>	<i>Richard [Signature]</i>	X	
<i>[Signature]</i>	<i>[Signature]</i>	X	* <i>with [Signature]</i>
	<i>[Signature]</i>	X	

Chris Davidson

Chairman's Signature

FISCAL NOTE

REQUEST:

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

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

CAPITAL	0	0	0	0	0	0
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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 Garton
Division: Administrative Services

Phone: 465-2600
Date: 1/30/90

Approved by Commissioner: A. D. Kyle
Agency: Environmental Conservation

Date: 30 Jan 90

Distribution (by preparer):

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

House Bill 409
1/29/90 Version

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

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

<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 (Contractual)	44.0		12.0	1.0	5.0	\$50.0 \$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	Borg. 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			Justification		
		Amount	<p>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.</p>		
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			

**Request For
New Position**

Agency Environmental Conservation
 BRU Administrative Services
 Component Administrative Services

Page 4 of 4
 Revised Date

FY 91

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

HOUSE RESOURCES COMMITTEE

P.O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-3715

1st
CHANGES FROM HB 409 TO CSHB 409

Section 1 - Adds a new section to allow DEC to do reasonable inspections of a regulated facility without first obtaining a warrant or without first receiving permission from the owner.

Section 3 - Provides language changes to clarify the procedures for administrative penalties.

Section 4 - Adds a provision to provide DEC with express authority to require environmental audits.

Deletes old section 4 which revised the criminal penalty provisions for oil and hazardous substances releases.

United States
Environmental Protection
Agency

Office of
Enforcement and
Compliance Monitoring
Washington DC 20460

FY 1988 Enforcement Accomplishments Report





FY 1988 Enforcement Accomplishments Report

Judicial Enforcement - Criminal

The Agency's criminal enforcement program has steadily expanded its presence in the regulated community. As the second illustration indicates, criminal case referrals, numbers of defendants charged, and defendants convicted have increased over time. Since 1982, individuals have received prison sentences for committing environmental crimes totaling 91 years and over 450 years of probation have been imposed. Imposition of probation is an extremely effective part of the criminal program because in the event that an individual commits another crime (not limited to environmental crimes) while on probation, the provisions of the probation normally call for the automatic imposition of a prison sentence that was suspended in lieu of probation.

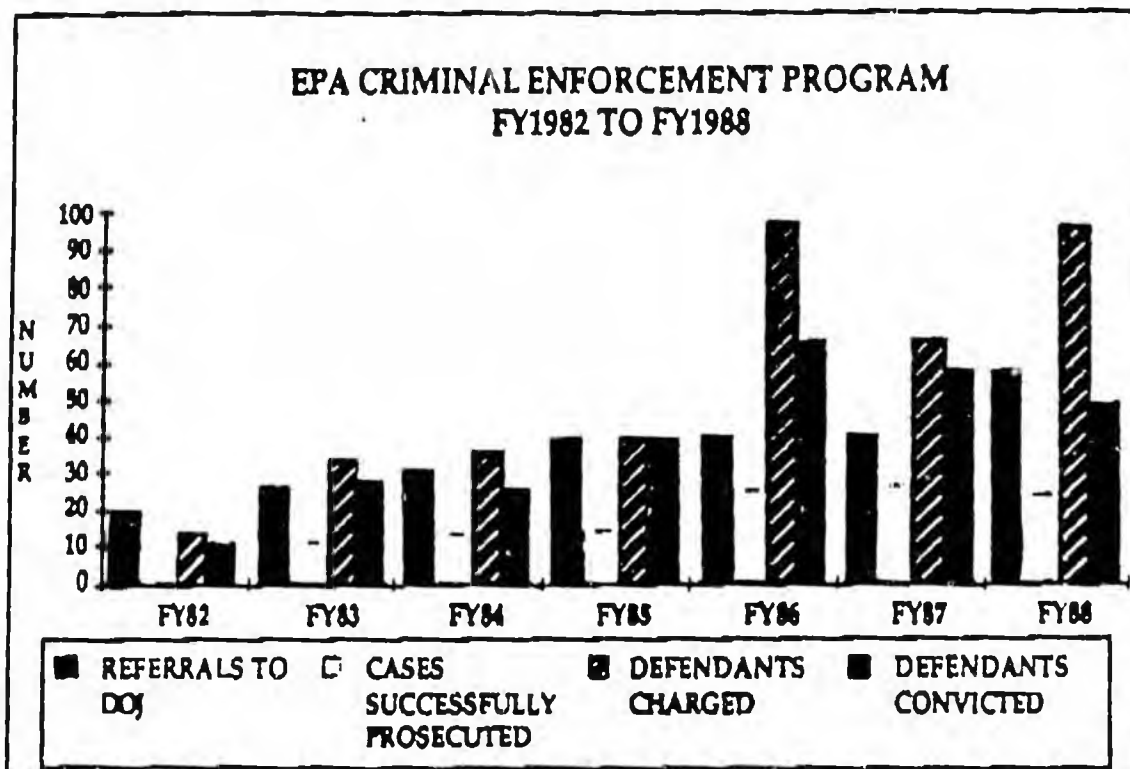


Illustration 2

Administrative Enforcement

Referral of civil and criminal judicial enforcement actions are the performance indicators most commonly looked to by the public and the Congress as they assess EPA's enforcement efforts. While judicial remedies are crucial to EPA's overall success, as time goes on other indicators also need to be evaluated to assess the Agency's effectiveness in enforcing environmental laws and regulations. In the statutes that Congress has enacted or reauthorized over the past few years, EPA has been given expanded authority to use administrative enforcement mechanisms to address violations and compel regulated facilities to achieve compliance or take other corrective actions. Administrative enforcement tools permit the Agency to impose penalties and direct regulated entities to undertake action to correct noncompliance in a less resource intensive way than judicial remedies. As Illustration number 3 shows, EPA enforcement programs are making substantial use of these tools. In FY1988, EPA's enforcement programs issued 3,085 administrative actions. As with judicial enforcement, administrative enforcement activity has been particularly high since EPA instituted internal management improvements in FY1984, with EPA enforcement programs taking 14,638 administrative actions since then. This total represents 43% of all administrative actions taken since the Agency was created.

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<u>SUBJECT</u>	<u>PAGE</u>
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This section provides information on FY1988 levels of Federal civil and criminal judicial case referrals, administrative actions, Federal penalty assessments, and State enforcement activity.	
II. <u>MAJOR ENFORCEMENT LITIGATION AND KEY LEGAL PRECEDENTS</u>	6
An alphabetized summary of important civil and criminal judicial case settlements, administrative actions, and key court decisions on points of law that occurred during the year.	
III. <u>BUILDING AND MAINTAINING A STRONG NATIONAL ENFORCEMENT PROGRAM</u>	21
Summaries of major enforcement program strategies, initiatives, guidance, and management studies.	
IV. <u>MEDIA SPECIFIC ENFORCEMENT PERFORMANCE: RESOLVING SIGNIFICANT NONCOMPLIANCE</u>	31
Contains brief summaries of the Strategic Planning and Management System definitions of Significant Noncompliance and highlights of recent program performance.	
<u>APPENDIX: ENFORCEMENT DATA</u>	
Contains historical enforcement data on Federal and State enforcement activities.	

FISCAL NOTE

REQUEST:

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

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

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SUPPLIES	2.0	2.0	2.0	2.0	2.0	2.0
EQUIPMENT	10.0	10.0	10.0	10.0	10.0	10.0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	149.0	149.0	149.0	149.0	149.0	149.0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

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

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

Approved by Commissioner: *A. D. Hyle* Date: 30 Jan 90
Agency: Environmental Conservation

Distribution (by preparer):

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

House Bill 409
1/29/90 Version

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

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<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			Justification		
		Amount			
1	2	3			
Salary	52.3			<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>	
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	
O. P. Match	1003			0	
General Fund	1004			87.0	
GP Program Receipts	1005			0	
Other				0	

**Request For
New Position**

Agency Environmental Conservation
BRU Administrative Services
Component Administrative Services

Page 3 of 4
Revised Date

FY 91

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

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		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.		
	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	

**Request For
 New Position**

Agency Environmental Conservation
 BRU Administrative Services
 Component Administrative Services

Page 4 of 4
 Revised Date

FY 91