

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
6350 SENATE JUDICIARY

754



alaska judicial council

1029 W. Third Avenue, Suite 201, Anchorage, Alaska 99501 (907) 279-2526 FAX (907) 276-5046

EXECUTIVE DIRECTOR
William T. Cotton

NON-ATTORNEY MEMBERS
Hilbert J. Henrickson, M.D.
Leona Okakok
Janis G. Roller

February 21, 1990

RECEIVED

FEB 23 1990

JAN FAIKS
SENATE OFFICE

ATTORNEY MEMBERS
Daniel L. Callahan
William T. Council
James D. Gilmore

CHAIRMAN, EX OFFICIO
Warren W. Matthews
Chief Justice
Supreme Court

Chris Christensen
Office of Senator Jan Faiks
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, Alaska 99811

Dear Chris:

I enjoyed finally meeting you last week. I understand that either Representative Gruenberg or his aide Andy Hemingway have talked to you about adding our proposed legislation on district court judges (see attached memo) to Senate Bill 482 which would raise the district court jurisdiction level to \$50,000. I am, of course, available to discuss this proposal or answer questions at the hearings as needed.

I would also be interested in testifying on SB448 (the proposed sentencing commission) when this bill is considered by the Senate Judiciary Committee. The Judicial Council staff believe that the Council is the logical place for the commission staff. This would be more efficient than starting a new bureaucracy and would take advantage of the Judicial Council's expertise in sentencing. I have attached a list of Judicial Council studies and reports for your information.

Please give me a call if you have any questions.

Very truly yours,

A handwritten signature in cursive script that reads "William T. Cotton".

William T. Cotton
Executive Director

WTC/jmz

Enclosures



alaska judicial council

1029 W. Third Avenue, Suite 201, Anchorage, Alaska 99501 (907) 279-2526 FAX (907) 276-5046

ACTING EXECUTIVE DIRECTOR
Teresa W. Carns

NON-ATTORNEY MEMBERS
Hilbert J. Henrickson, M.D.
Leona Okakok
Janis G. Foller

December 12, 1989

ATTORNEY MEMBERS
Daniel L. Callahan
William T. Council
James D. Gilmore

CHAIRMAN, EX OFFICIO
Warren W. Matthews
Chief Justice
Supreme Court

M E M O R A N D U M

TO: Judicial Council

FROM: Staff *JWC*

RE: District Court Judges' Terms (AS 15.35.100)

The purpose of this memo is to suggest that the Judicial Council consider sponsoring legislation to increase the length of district court judges' probationary terms in order to allow more adequate time for evaluation. At present, district court judges must stand for retention at the first general election more than one year after appointment, and every four years thereafter.

These terms were established in 1967, some years preceding the 1975 legislation that authorized the Council to evaluate judges standing for retention. At that time, judges would have been "evaluated" by the electorate at the polls one to two years after their appointment. Today, however, the Council conducts an evaluation of each judge that takes about six months. The results of this evaluation must be submitted to the Lieutenant Governor by August 7 preceding the election for publication in the Official Election Pamphlet. The result is that some district court judges have served less than a year before their evaluation begins.

Two district court judges, Michael Wolverton of Anchorage and Peter Froelich in Juneau, are standing for retention in 1990 for the first time. Judge Wolverton was appointed in August of 1988 and under the proposed change would still stand for retention at this election. He will have been on the bench for about 18 months at the time evaluation starts in February of 1990. Judge Froelich was appointed in June of 1989. He will have been on the bench for just under eight months in February. Under the proposed change, he would not stand for retention until 1992.

MAJOR STUDIES AND REPORTS RELATING TO SENTENCING
BY THE ALASKA JUDICIAL COUNCIL

1. Sentencing in Alaska. (March, 1975). Statistical analysis of felony sentences imposed in 1973.
2. Bail in Anchorage. (March, 1975). Statistical analysis of bail practices for Anchorage felony cases in 1973.
3. 1973 Sentences of Five Years or Longer. (April, 1975). Analysis of factors contributing to lengthy sentences, and the impact of appellate review of sentencing.
4. Report on Repeat Bail Recidivists in 1973. (April, 1975). Case-by-case analysis of defendants who violated bail conditions by committing more than one new crime while on bail for a felony offense.
5. Alaska Felony Sentencing Patterns: A Multivariate Statistical Analysis -- 1974-1976. (April, 1977). Study requested by the legislature and used to structure presumptive sentencing provisions of the new criminal code. Also resulted in the creation of the Sentencing Guidelines Committee.
6. Interim Report on the Elimination of Plea Bargaining. (May, 1977). Summarized effects of the Attorney General's 1975 ban on plea bargaining as reported by attorneys, judges, and defendants.
7. Interim Report of the Alaska Judicial Council on Findings of Apparent Racial Disparity in Sentencing. (Oct., 1978). Summary of data accumulated on felony case dispositions and sentencing patterns from Anchorage, Fairbanks, and Juneau (1974-1976) giving evidence of racial and other disparities in sentencing for certain types of offenses. Resulted in legislation creating the Advisory Committee on Minority Judicial Sentencing Practices, and funding of Judicial Council follow-up studies of felonies and misdemeanors. See text of Tenth Report for other effects.
8. The Effect of the Official Prohibition of Plea Bargaining on the Disposition of Felony Cases in Alaska Criminal Courts. (Dec., 1978). [Reprinted by the Government Printing Office, Washington, D.C. as Alaska Bans Plea Bargaining, 1979]. Evaluates the effectiveness and consequences of the Attorney General's 1975 ban on plea bargaining, including the results of over 400 interviews with attorneys, judges, and criminal justice personnel, and 2-year felony statistical study.
9. Alaska Misdemeanor Sentences: 1974-76 Plea Bargaining. (Aug., 1979). Analysis of misdemeanor sentences to determine effect of plea bargaining ban on sentences imposed after trial or plea.
10. Alaska Misdemeanor Sentences: 1974-76 Racial Disparity. (Nov., 1979). Analysis of existence of racial disparity in misdemeanor sentences; shows significant disparity for several categories of offense.

CORRECTION

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



alaska judicial council

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FROM: Staff *JWC*
RE: District Court Judges' Terms (AS 15.35.100)

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These terms were established in 1967, some years preceding the 1975 legislation that authorized the Council to evaluate judges standing for retention. At that time, judges would have been "evaluated" by the electorate at the polls one to two years after their appointment. Today, however, the Council conducts an evaluation of each judge that takes about six months. The results of this evaluation must be submitted to the Lieutenant Governor by August 7 preceding the election for publication in the Official Election Pamphlet. The result is that some district court judges have served less than a year before their evaluation begins.

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Memorandum

Re: District Court Judges' Terms (AS 15.35.100)

December 12, 1989

Page Two

Hypothetically, a judge could have an even shorter time before evaluation. A judge appointed on November 5, 1989, for example, would probably not actually start work until a month or so later. The judge could have only two or three months on the bench before being evaluated. This does not seem to be the intent of the legislature in setting the "more than one year after appointment" initial term. Presumably they intended that the judge would be evaluated on the basis of twelve or more months' experience on the bench.

AS 15.35.100 could be revised to make a district court judge "subject to approval or rejection at the first general election held more than two years [one year] after [his] appointment...." This proposal should not create any costs or any other difficulties. A fiscal note of \$0 should be submitted with the proposed legislation.

Please let us know your thoughts on this suggestion.

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BY THE ALASKA JUDICIAL COUNCIL

1. Sentencing in Alaska. (March, 1975). Statistical analysis of felony sentences imposed in 1973.
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10. Alaska Misdemeanor Sentences: 1974-76 Racial Disparity. (Nov., 1979). Analysis of existence of racial disparity in misdemeanor sentences; shows significant disparity for several categories of offense.

11. Sentencing Under Revised Criminal Code. (Jan., 1980). Probation Officer training manual for the revised criminal code.
12. Alaska Felony Sentences: 1976-1979. (Nov., 1980). Follow-up study requested by the legislature on felony disparities; shows disappearance of most racial disparities. Additional analysis and findings on sentences in rural areas, effects of attorney type, and possible continuing trends from the plea bargaining ban.
13. A Preliminary Statistical Description of Fish & Game Sentences. (1981). Reviews data from Fish and Wildlife Protection data tapes; finds sufficient disparities to warrant full-scale statistical analysis.
14. Alaska Prison Population Impact Analysis. (1982). Funded by Division of Corrections. Estimates growth in sentenced felon prison populations based on potential and actual legislative changes.
15. Alaska Felony Sentences: 1980. (Dec. 2, 1982). Study requested by the legislature as a continued monitoring of sentence disparities and analysis of the effects of the revised criminal code. Shows disappearance of disparities (racial and attorney type), shortened sentence lengths.
16. Statistical Analysis of Major Fish & Game Offense Sentencing Outcomes. (Dec., 1983). Funded by the legislature in 1982 to study sentences imposed on 1980 and 1981 fish and game violators. Found widespread disparities and fluctuations in charging and sentencing patterns. Recommended complete revision of applicable statutes and codes.
17. Alaska Misdemeanor Sentences: 1981. (Dec., 1983). Funded by the legislature to analyze misdemeanor sentences imposed during 1981. Recommended alcohol treatment programs for convicted defendants and increased legislative sanctions for DWI to reduce the incidence of alcohol-related crime.
18. DWI Sentences: 1981. (March, 1984). Additional analysis of DWI (drunk driving) sentences included in the 1981 Misdemeanor Study data base. Types of sentences imposed for DWI convictions and characteristics of offenders are described.
19. Alaska Felony Sentences: 1984. (March, 1987). Describes felony sentencing patterns for 1984 cases. Analyzes the impacts of presumptive sentencing and other criminal justice system changes between 1980 and 1986.
20. Plea Bargaining Ban/Presumptive Sentencing (I/P). (December, 1990). Follow-up evaluation of Alaska's ban on plea bargaining and its interaction with presumptive sentencing. Describes the evolution of the Attorney General's policy between 1975 and 1990; analyzes statutes and case law affecting sentencing; and provides detailed statistical data about case dispositions and sentences between 1984 and 1987.

BILL NO: SB 522

DATE: March 22, 1990

TITLE: An Act authorizing the
Alaska Court System to
establish a mediation
pilot project

CONTACT: Barbara Miklos
465-4356

SB 522 authorizes the Court System to establish and evaluate a mediation pilot project. The Council on Domestic Violence and Sexual Assault appreciates and supports the following provisions in the bill agreed upon by the Court System: the exclusion from the project of cases involving domestic violence; limiting mandatory mediation to one session, after which either party may choose to withdraw; ensuring that cases participating in mediation will not be delayed by the court; informing all parties of their rights, and the scope and purpose of the mediation project before mediation begins; disqualifying the mediator from making recommendations to the court about the disposition of the controversy should mediation fail; and allowing parties to consult with their attorneys at any point during the mediation process.

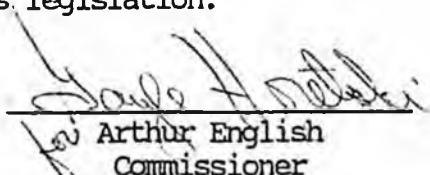
It is very important to exclude domestic violence cases from mediation. Mediation depends on equality of personal, social and economic power between the disputing parties. Violence severely distorts the balance of power in a relationship. Violent men physically and psychologically coerce women, by domination and intimidation. Women who are severely intimidated and frightened of the violence will not be able to make independent decisions in their own best interests or those of their children. It is important to note that violence often does not decrease after a separation and, in fact, may increase in severity.

The Council has concerns about the pilot project being mandatory. To be effective, mediation must be voluntary. Research on conflict resolution indicates that to the extent that one or both parties to mediation feels coerced, negotiations will be deadlocked, or agreements that are reached are likely to fail to be implemented.

Another concern about the project is that it will not exclude property from mediation. There are built-in protections in our legal system for addressing financial and property matters. Mediation will occur behind closed doors, without legal protections, and may be done by persons with no expertise in financial matters. It has been known that, in divorce cases, some women have bargained away financial assets in order to retain custody of minor children. We believe that this could be a serious problem under the pilot project, leading to unfair settlements.

We believe that the evaluation criteria need to be revised. The primary goal of mediation, when there are children, should be the best interests of the children; therefore, this needs to be an evaluation criteria. If property is included in mediation, criteria need to be developed to evaluate the settlements to insure they are just for both parties.

The Council is generally neutral about this project. Our major concern, that all cases of domestic violence be excluded from the project, has been addressed in this legislation.


Arthur English
Commissioner

DEPARTMENT OF
PUBLIC SAFETY

COMMUNICATIONS SECTION

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: An Act ... to establish and
evaluate a mediation pilot project
Sponsor: Senate Judiciary
Requestor: Senate Judiciary

Agency Affected: Public Safety
BRU: Council on Domestic Violence
and Sexual Assault
Component: _____

EXPENDITURES/REVENUES: (Thousands of Dollars) (Inflation not included)

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	- 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						
FEDERAL FUNDS						
OTHER/PROG RCPT						
TOTAL	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

This bill is expected to have no fiscal impact on the Department of Public Safety.

Prepared by: Barbara Miklos, Executive Director
Division: Council on Domestic Violence
and Sexual Assault
Approved by Commissioner: Arthur English
Agency: Department of Public Safety

Phone: 465-4356
Date: 3/22/90
Date: 3-22-90
Page 1 of 1



Alaska Court System
State of Alaska

OFFICE OF ADMINISTRATIVE DIRECTOR
303 K STREET
ANCHORAGE, ALASKA 99501

STEPHANIE J. COLE
Deputy Administrative Director

(907) 264-8230

March 8, 1990

FAXED

Barbara Miklos
Executive Director
Council on Domestic Violence and
Sexual Assault
P. O. Box N
Juneau, Alaska 99811

Dear Ms. Miklos *Barbara*

I believe that, as a result of our phone conversation this morning (March 8), we agreed that the court, in a mediation pilot project, shall:

(3) exclude from the scope of the project cases involving domestic violence on any family members;

(4) limit mandatory participation of parties to one (1) mediation session, after which either party may choose to withdraw from mediation;

(5) ensure that the resolution of cases chosen to participate in the mediation project are not delayed by the court because of the mediation, should the attempts to reach a mediated agreement fail;

(6) inform all parties of their rights and the scope and purpose of the pilot project before mediation begins;

(7) disqualify the mediator from making recommendations to the court about the disposition of the controversy, should mediation fail;

(8) allow parties to consult with their attorneys at any point during the mediation process.

Barbara Miklos
March 8, 1990
Page 2

Although this does not resolve all of the issues we discussed, I believe the above is correct. (Please let me know if it's not!)

Very truly yours,

Stephanie

Stephanie J. Cole
Deputy Administrative Director

SJC:bh

cc: Senator Jan Faiks

Alaska State Legislature

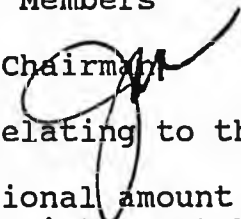


Senate Judiciary Committee

February 28, 1990

MEMORANDUM

TO: Judiciary Committee Members

FROM: Senator Jan Faiks, Chairman 

SUBJECT: SB 482 "An Act relating to the judiciary."

SB 482 revises the jurisdictional amount of the district court. As you know, the district court has jurisdiction in civil cases not exceeding \$35,000; cases exceeding that amount must be tried in superior court. SB 482 would raise the jurisdictional amount to \$50,000.

The jurisdictional amount of the district court for many years was \$10,000. In 1985, the Legislature raised this to \$25,000, and in 1987 it was raised to the current level. For years there has been significant support for raising the jurisdictional amount to \$50,000; however, it was felt that the civil justice system would be better served if the level was raised in increments.

The primary effect of raising the jurisdictional amount to \$50,000 would be to move many marginal cases from superior court to district court. This is advantageous for several reasons. First, general civil cases come to trial more quickly in district court than in superior court. For example, in Anchorage the time to disposition of a civil case (excluding small claims) in district court is 286 days; in superior court it is 453 days.

Second, and more importantly, there has been a reduction in the district court caseload in recent years, while the superior court caseload has remained steady or increased. For example, the district court caseload in Anchorage was down 10% in 1989, while the superior court civil caseload remained steady, and its felony and children's caseload increased. SB 482 will increase the efficiency of the court system by allowing many civil cases to be heard in the system with the declining caseload.

A committee substitute has been prepared and is in the

member's files. This substitute adds two sections to the bill at the request of the Court System and the Judicial Council.

First, section one provides that a district judge is subject to approval or rejection at the first general election held more than two years after appointment to the bench. Current law requires a district court judge to stand for retention at the first general election held more than one year after appointment.

The Judicial Council has requested this change because of the conflict current law has with the council's retention evaluation of district court judges. The one year period was established in 1967, and it was intended that the judge would serve at least one year before his or her performance was "evaluated" at the polls by the voters; in 1975, however, the council was authorized to evaluate judges for retention, to provide guidance to voters. Results of this evaluation must be submitted to the lieutenant governor by August 7 preceding the election. Since the council's evaluation takes six months, this means that the council can start evaluating a district court judge for retention after only two or three months on the bench. This defeats the purpose of the one year evaluation time period set up in 1967. By changing this period to two years, a judge will serve at least one year before the council begins its evaluation.

The second addition to the committee substitute is found in section three. This section, added at the request of the Court System, sets up a one year mediation pilot project in Anchorage and Fairbanks. The Court System intends to use this project to channel certain contested domestic relations cases to mediation, rather than directly to court. Such procedures in other states have been credited with reducing judicial workload and court overcrowding, reducing disputant's costs and lowering barriers to their access to justice, and achieving more satisfactory resolution of disputes. The project must be evaluated for cost effectiveness, efficiency, and participant satisfaction.

If there are any questions or comments about this legislation, please do not hesitate to contact my office.

FISCAL NOTE

REQUEST:

Revision Date:	Agency Affected: <u>Alaska Court System</u>
Title: <u>An Act relating to the judiciary</u>	BRU: <u>Trial Courts</u>
Sponsor: <u>Falks</u>	Components: _____
Requestor: _____	

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

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

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

FUNDING: (Thousands of Dollars)

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

POSITIONS:

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

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

Phone: 264-8228
 Date: 02/23/90
 Date: 02/23/90

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

FISCAL NOTE

REQUEST:

Revision Date 3/5/90 Agency Affected: Alaska Court System
 Title: An Act relating to the judiciary BRU: Trial Courts
 Sponsor: Falks Components: _____
 Requestor: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95
Personal Services		107.6				
Travel						
Contractual						
Supplies						
Equipment		3.3				
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	110.8	0.0	0.0	0.0	0.0

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

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

FUNDING: (Thousands of Dollars)

General Funds	0.0	110.8	0.0	0.0	0.0	0.0
Federal Funds						
Other						
TOTAL	0.0	110.8	0.0	0.0	0.0	0.0

POSITIONS:

Full-time		2.0				
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

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

Phone: 284-8228
 Date: 03/05/90

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

Date: 03/05/90

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

Alaska Court System
CSSB 482
Fiscal Analysis

Personal Services

	<u>Salary</u>	<u>Benefits</u>	<u>Total</u>
1 - Mediator, PFT, 18A, Anchorage	\$37,548	\$12,900	\$50,448
1 - Mediator, PFT, 18A, Fairbanks	42,984	14,096	<u>57,080</u>
Total Personal Services			<u>107,528</u>

Equipment

File cabinet, typewriter and dictating machine for each position			<u>3,270</u>
Total one-time cost			<u>\$110,798</u>

Fiscal Analysis of Mediation Pilot Project

Purpose of Project

The only section of this bill that has a fiscal impact is section three of the mediation pilot project. The purpose of this pilot project is to determine the effectiveness of mediation in divorce cases in Anchorage and Fairbanks. In the 1988 court system budget the legislature stated its intent:

that the court system educate judges, attorneys and the public on the potential benefits of mediation. The court system should evaluate and quantify the potential benefits to the consumers as well as the court system of mediation, as an option.

Scope of Project

During the period of the project, contested domestic relations cases would be assigned to one of two "tracks" upon filing. Cases assigned to the "trial track" would be handled under current procedures, which focus on readying the case for trial before a judge. Cases assigned to the "mediation track" would be transferred to the office of the mediator, where the parties would be scheduled for mediation sessions. Should mediation not be successful in an individual case, the case will be assigned a trial date.

Guidelines for assignment of cases to the tracks will insure that a number of each type of dispute (custody, visitation and/or property issues) will be assigned to both tracks. Information will be gathered about the resolutions of the cases handled on each track, through the use of questionnaires and statistics from case files. The court should be able to compare the two tracks to determine:

1. the time to resolution of the dispute
2. the parties' satisfaction with the process
3. the parties' satisfaction with the result
4. the cost to the parties

At the end of the pilot period, information about the value of mediation services in domestic relations disputes in Anchorage and Fairbanks will be available. Using this information, a determination can be made whether mediation services should continue to be provided.

Other states have found that mediation is most successful in jurisdictions where there is some degree of court support. Because the pilot project will require some but not all parties in domestic disputes to participate in mediation, it is not feasible to assess a cost to the parties for the mediation services during the pilot period. However, should mediation be expanded to require that all domestic disputes attempt mediation prior to proceeding to trial, systems could be developed to require the parties to bear the cost of mediation. Charges could also be assessed if a system is developed in which parties have the option to enter mediation, but it is not required.

Costs of Project

The costs associated with the project would be incurred only once as the project would last one year. The project would consist of a mediator in Anchorage and a mediator in Fairbanks. Their personal services and associated equipment costs would total \$110,798.

If the pilot project were to be limited to one mediator in Fairbanks, the cost would be \$58,715.

If the pilot project were to be limited to one mediator in Anchorage, the cost would be \$52,083.

If section three is deleted in its entirety, the bill has no fiscal impact.



alaska judicial council

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FROM: Staff *WJC*

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The purpose of this memo is to suggest that the Judicial Council consider sponsoring legislation to increase the length of district court judges' probationary terms in order to allow more adequate time for evaluation. At present, district court judges must stand for retention at the first general election more than one year after appointment, and every four years thereafter.

These terms were established in 1967, some years preceding the 1975 legislation that authorized the Council to evaluate judges standing for retention. At that time, judges would have been "evaluated" by the electorate at the polls one to two years after their appointment. Today, however, the Council conducts an evaluation of each judge that takes about six months. The results of this evaluation must be submitted to the Lieutenant Governor by August 7 preceding the election for publication in the Official Election Pamphlet. The result is that some district court judges have served less than a year before their evaluation begins.

Two district court judges, Michael Wolverton of Anchorage and Peter Froelich in Juneau, are standing for retention in 1990 for the first time. Judge Wolverton was appointed in August of 1988 and under the proposed change would still stand for retention at this election. He will have been on the bench for about 18 months at the time evaluation starts in February of 1990. Judge Froelich was appointed in June of 1989. He will have been on the bench for just under eight months in February. Under the proposed change, he would not stand for retention until 1992.

Memorandum

Re: District Court Judges' Terms (AS 15.35.100)

December 12, 1989

Page Two

Hypothetically, a judge could have an even shorter time before evaluation. A judge appointed on November 5, 1989, for example, would probably not actually start work until a month or so later. The judge could have only two or three months on the bench before being evaluated. This does not seem to be the intent of the legislature in setting the "more than one year after appointment" initial term. Presumably they intended that the judge would be evaluated on the basis of twelve or more months' experience on the bench.

AS 15.35.100 could be revised to make a district court judge "subject to approval or rejection at the first general election held more than two years [one year] after [his] appointment...." This proposal should not create any costs or any other difficulties. A fiscal note of \$0 should be submitted with proposed legislation.

Please let us know your thoughts on this suggestion.

6-2186E
Chenoweth
3/2/90

Original sponsor(s): SEN. FAIKS

1 IN THE SENATE BY THE JUDICIARY COMMITTEE
 2 CS FOR SENATE BILL NO. 482 (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 amending the jurisdiction of the district
 7 court, increasing the period during which a district
 8 court judge serves under an initial appointment
 9 before being subject to voter approval, and authoriz-
 10 ing the Alaska Court System to establish and evaluate
 11 a mediation pilot project."

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

13 * Section 1. AS 15.35.100(a) is amended to read:

14 (a) Each district judge shall be subject to approval or re-
 15 jection at the first general election held more than two years [ONE
 16 YEAR] after the judge's appointment under the provisions of AS 22.15.-
 17 170. If approved, the judge shall thereafter be subject to approval
 18 or rejection in a like manner every fourth year.

19 * Sec. 2. AS 22.15.030(a) is amended to read:

20 (a) The district court has jurisdiction of civil cases, includ-
 21 ing foreign judgments filed under AS 09.30.200 and arbitration pro-
 22 ceedings under AS 09.43.170, as follows:

23 (1) for the recovery of money or damages when the amount
 24 claimed exclusive of costs, interest, and attorney fees does not
 25 exceed \$50,000 [\$35,000];

26 (2) for the recovery of specific personal property, when
 27 the value of the property claimed and the damages for the detention do
 28 not exceed \$50,000 [\$35,000];

29 (3) for the recovery of a penalty or forfeiture, whether

1 given by statute or arising out of contract, not exceeding \$50,000
2 [\$35,000];

3 (4) to give judgment without action upon the confession of
4 the defendant for any of the cases specified in this section, except
5 for a penalty or forfeiture imposed by statute;

6 (5) for establishing the fact of death of any person in the
7 manner prescribed in AS 09.55.020 - 09.55.060;

8 (6) for the recovery of the possession of premises in the
9 manner provided under AS 09.45.070 - 09.45.160 when the value of the
10 arrears and damage to the property does not exceed \$50,000 [\$35,000];

11 (7) for the foreclosure of a lien when the amount in con-
12 troversy does not exceed \$50,000 [\$35,000];

13 (8) for the recovery of money or damages in motor vehicle
14 tort cases when the amount claimed exclusive of costs, interest, and
15 attorney fees does not exceed \$50,000 [\$35,000];

16 (9) over civil actions for taking utility service and for
17 damages to or interference with a utility line filed under AS 42.20.-
18 030;

19 (10) over cases involving injunctive relief for domestic
20 violence under AS 25.35.010 and 25.35.020.

21 * Sec. 3. MEDIATION PILOT PROJECT. The Alaska Court System shall

22 (1) create a pilot project for mediation using a court mediator
23 in Anchorage and Fairbanks for specified cases; and

24 (2) evaluate the project created under (1) of this section for
25 cost effectiveness, efficiency, and participant satisfaction.

26 * Sec. 4. Section 3 of this Act is repealed one year after the effec-
27 tive date of this Act.

28 * Sec. 5. The provisions of AS 15.35.100(a), as amended by sec. 1 of
29 this Act, apply to district court judges who enter into the duties of the
CSSB 482(Jud)

1 office on or after the effective date of this Act.
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Original sponsor(s): SEN. FAIKS

1 IN THE SENATE

BY THE JUDICIARY COMMITTEE

2 CS FOR SENATE BILL NO. 482 (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 judiciary."

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

8 * Section 1. AS 15.35.100(a) is amended to read:

9 (a) Each district judge shall be subject to approval or re-
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11 YEAR] after the judge's appointment under the provi s of AS 22.15.-
12 170. If approved, the judge shall thereafter bject to approval
13 or rejection in a like manner every fourth ye

14 * Sec. 2. AS 22.15.030(a) is amended to read:

15 (a) The district court has jurisdiction civil cases, includ-
16 ing foreign judgments filed under AS 09.30.200 nd arbitration pro-
17 ceedings under AS 09.43.170, as follows:

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19 claimed exclusive of costs, interest, and attorney fees does not
20 exceed \$50,000 [\$35,000];

21 (2) for the recovery of specific personal property, when
22 the value of the property claimed and the damages for the detention do
23 not exceed \$50,000 [\$35,000];

24 (3) for the recovery of a penalty or forfeiture, whether
25 given by statute or arising out of contract, not exceeding \$50,000
26 [\$35,000];

27 (4) to give judgment without action upon the confession of
28 the defendant for any of the cases specified in this section, except
29 for a penalty or forfeiture imposed by statute;

1 (5) for establishing the fact of death of any person in the
2 manner prescribed in AS 09.55.020 - 09.55.060;

3 (6) for the recovery of the possession of premises in the
4 manner provided under AS 09.45.070 - 09.45.160 when the value of the
5 arrears and damage to the property does not exceed \$50,000 [\$35,000];

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18 in Anchorage and Fairbanks for specified cases; and

19 (2) evaluate the project created under (1) of this section for
20 cost effectiveness, efficiency, and participant satisfaction.

21 * Sec. 4. Section 3 of this Act is repealed one year after the effec-
22 tive date of this Act.

23 * Sec. 5. The provisions of AS 15.35.100(a), as amended by sec. 1 of
24 this Act, apply to district court judges who enter into the duties of the
25 office on or after the effective date of this Act.
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last fiscal - FY 89

Anch - district is faster - 286
- 453 - superior ct

general civil w/ small claims

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418

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177

Fly

When take traffic out
d.c. is down 18%

- marginal superior ct cases

super ct is the same.

- help super. ct out

- up in felony + children's

FY 89

W/o small claims, general civil cases:

- time to disposition in Anchorage:

(a) district court - 286 days

(b) superior court - 453 days

3/6/90

SEN. JUD

SB 482

3/2/90 CS adopted

Held until Thursday

88 2 40 12
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3-1-80

SB 482

- CG =
- Tighter title
 - fiscal note
 - authority to charge fee?

the judge shall designate the district where the judge has served the major portion of the judge's term. (§ 7.56 ch 83 SLA 1960)

NOTES TO DECISIONS

Scope of vote. — Art. IV, § 6 of the state constitution, dealing with retention of judges, does not specify that the vote will be held on a district-wide basis even though this section currently provides that retention of superior court judges will be decided by the voters of the judge's judicial district, and AS 15.35.100(b) sets forth the same rule for district court judges. Hornaday v. Rowland, Sup. Ct. Op. No. 2761 (File No. 7810), 674 P.2d 1333 (1983).

Sec. 15.35.090. Placing name of superior court judge on ballot. The director shall place the name of a superior court judge who has properly filed a declaration of candidacy for retention on the judicial ballot in the judicial district designated in the declaration of candidacy for the general election at which approval is sought. (§ 7.57 ch 83 SLA 1960; am § 3 ch 18 SLA 1969; am § 154 ch 100 SLA 1980)

Sec. 15.35.100. Approval or rejection of district judge. (a) Each district judge shall be subject to approval or rejection at the first general election held more than one year after the judge's appointment under the provisions of AS 22.15.170. If approved, the judge shall thereafter be subject to approval or rejection in a like manner every fourth year.

(b) The district judge shall seek approval in the judicial district in which the judge was originally appointed, or in the district where the judge has served the major portion of the judge's term. The district judge shall designate on the declaration of candidacy the judicial district in which the judge was appointed, or the district where the judge has served the major portion of the judge's term. (§ 1 ch 138 SLA 1966; am § 1 ch 164 SLA 1968)

NOTES TO DECISIONS

Scope of vote. — Art. IV, § 6 of the state constitution, dealing with retention of judges, does not specify that the vote will be held on a district-wide basis even though AS 15.35.080 currently provides that retention of superior court judges will be decided by the voters of the judge's judicial district, and subsection (b) of this section sets forth the same rule for district court judges. Hornaday v. Rowland, Sup. Ct. Op. No. 2761 (File No. 7810), 674 P.2d 1333 (1983).
Quoted in Delahay v. State, Sup. Ct. Op. No. 648 (File No. 1252), 476 P.2d 908 (1970).
Cited in Stephens v. Hammersley, Sup. Ct. Op. No. 1275 (File No. 2505), 550 P.2d 1268 (1976); Kochutin v. State, Sup. Ct. Op. No. 3194 (File No. S-1894), 739 P.2d 170 (1987).

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Subs
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Sup " " 6
DC 171 4

required for a judgment of impeachment. The judgment may not extend beyond removal from office, but does not prevent proceedings in the courts on the same or related charges. (§ 28 ch 50 SLA 1959)

Sec. 22.10.180. Restrictions. A superior court judge while holding office may not practice law, nor engage in the conduct of any other profession, vocation, or business for profit or compensation, which conduct would interfere with the performance of the judicial duties of the judge, nor may a judge hold office in a political party, or hold any other office or position of profit under the United States, the state or its political subdivisions. A superior court judge filing for another elective public office other than delegate to a constitutional convention of this state or the United States forfeits the judicial position. (§ 29 ch 50 SLA 1959; am § 2 ch 30 SLA 1971; am § 11 ch 12 SLA 1989)

Opinions of attorney general. — Because the University of Alaska is an instrumentality of the state and membership on its Board of Regents is necessarily an office under the state, a judge may not sit as a regent while holding judicial office. December 27, 1976 Op. Att'y Gen. When a judge sits as a regent, the judge

is not sitting in a representative capacity of the judicial branch or exercising judicial power but rather is exercising certain executive powers of control vested in the regents over the state's sole institution of higher learning. This, the judge may not do pursuant to Alaska Const., art. IV, § 14. December 27, 1976 Op. Att'y Gen.

NOTES TO DECISIONS

Cited in *Begich v. Jefferson*, Sup. Ct. Op. No. 481 (File No. 894), 441 P.2d 27 (1968).

Collateral references. — Propriety and permissibility of judge engaging in the practice of law. 89 ALR2d 886.

Validity and application of statute regarding prohibition of judge from practicing law. 17 ALR4th 829.

Sec. 22.10.190. Compensation. (a) The monthly salary for each superior court judge is equal to Step E, Range 28 of the salary schedule in AS 39.27.01(a) for Juneau, Alaska.

(b) A salary warrant may not be issued to a superior court judge until the judge has filed with the state officer designated to issue salary warrants an affidavit that no matter referred to the judge for opinion or decision has been uncompleted or undecided by the judge for a period of more than six months.

(c) In addition to annual salary, a superior court judge is entitled to receive a geographic cost-of-living adjustment, based on the location of the judge's primary office assignment, equal to 3.5 per cent of the judge's annual salary times the number of pay step increases provided under AS 39.27.020 for a state employee working in the same election

district in those districts for which AS 39.27.020 specifies zero-to-five pay step increases. In an election district for which AS 39.27.020 specifies more than five pay steps, the number of pay step increases under this section is limited to five. Any retirement benefits to which a superior court judge may be entitled shall be computed only on the annual salary. (§ 30 ch 50 SLA 1959; am § 5 ch 115 SLA 1965; am § 4 ch 83 SLA 1967; am § 2 ch 101 SLA 1969; am § 2 ch 193 SLA 1970; am § 2 ch 34 SLA 1974; am § 2 ch 205 SLA 1975; am § 3 ch 148 SLA 1976; am § 4 ch 263 SLA 1976; am § 5 ch 80 SLA 1978; am §§ 4, 19 ch 3 SLA 1980)

Editor's notes. — Chapter 205, SLA 1976, which amended this section, was submitted to the voters by referendum and was rejected.

A reference to AS 29.27.020 was changed to AS 39.27.020 in subsection (c).

by the revisor of statutes pursuant to AS 01.05.031.

Legislative history reports. — For report on ch. 83, SLA 1967 (HB 1411), see 1967 House Journal, pp. 337-340.

NOTES TO DECISIONS

Cited in *Kochutin v. State*, Sup. Ct. Op. No. 3194 (File No. S-1894), 739 P.2d 170 (1987).

Chapter 15. District Courts.

Article

- District Judges and Magistrates (§§ 22.15.010 — 22.15.270)
- Public Administrator (§§ 22.15.310 — 22.15.350)

Article 1. District Judges and Magistrates.

Section

- Establishment of the district court of the State of Alaska
- Number of district judges and magistrates
- Civil jurisdiction
- Small claims
- Actions not within civil jurisdiction
- Criminal jurisdiction
- Extent of jurisdiction
- Change of venue
- Sessions and general powers of district court
- Functions and powers of district judge and magistrate
- Additional duties of district judge and magistrate
- Limitations on proceedings which magistrate may hear
- Process

Section

- Jury trials
- Qualifications of district judges and magistrates
- Selection of district judges and magistrates
- Oath of office
- Assignment of district judges and magistrates
- Approval or rejection
- Impeachment
- Restrictions
- Compensation
- Additional compensation
- Appeal
- Disposition of fines
- Bond
- Retention of fines, etc., by political subdivisions

Sec. 22.15.010. Establishment of the district court of the State of Alaska. There is established a district court of the State of Alaska for each of the four judicial districts of the superior court of this state. (§ 1 ch 184 SLA 1959; am § 1 ch 24 SLA 1966)

Revisor's notes. — In implementing § 3, ch 24, SLA 1966, "district court of the State of Alaska" has in most instances been shortened to "district court," following the approach of the Alaska Supreme Court in its handling of the magistrate-court district-court name change in the court rules. (See, for example, Supreme Court Order No. 82 and Supreme Court Order No. 101, with appendix)

Cross references. — For legislative intent related to this chapter, see § 25, ch 184, SLA 1959, in the Temporary and Special Acts and Resolves

Opinions of attorney general. — This chapter, which provides for the jurisdiction of district courts, does not give these courts probate jurisdiction 1959 Op. Atty Gen. No. 31

NOTES TO DECISIONS

Jurisdictional boundaries. — Nowhere in the statutes are any boundaries within the district prescribed in which a particular magistrate (now judge) may exercise jurisdiction, but this chapter, which establishes the district courts, does provide that the court shall meet in its district at such place or places therein as may be designated by rule or order of the supreme court. Lege v. Strand, Sup. Ct. Op. No. 157 (File No. 301), 384 P.2d 685 (1963).

Applied in Larson v. State, Sup. Ct. Op. No. 1430 (File No. 2433), 564 P.2d 365 (1977); Oxerok v. State, Sup. Ct. Op. No. 2076 (File No. 3902), 611 P.2d 913 (1980).

Quoted in City of Fairbanks v. Schroek, Sup. Ct. Op. No. 567 (File No. 1032), 457 P.2d 242 (1969).

Cited in Delahay v. State, Sup. Ct. Op. No. 648 (File No. 1252), 476 P.2d 908 (1970), appeal dismissed, 402 U.S. 901, 91 S. Ct. 1381, 28 L. Ed. 2d 642 (1971).

Collateral references. — 20 21 C.J.S., Courts, § 1 et seq. 48A C.J.S., Am. Jur. 2d, Courts, § 1 et seq. 46 21 C.J.S., Courts, § 1 et seq.

Sec. 22.15.020. Number of district judges and magistrates. (a) Except as hereinafter provided, each district court of the State of Alaska shall have the number of district judges set out below opposite the name of the judicial district over which the court has jurisdiction:

- First Judicial District 3
- Second Judicial District 1
- Third Judicial District 12
- Fourth Judicial District 4

(b) Except as hereinafter provided, each district court of the State of Alaska shall have the number of magistrates set out below opposite the name of the judicial district over which the court has jurisdiction:

- First Judicial District 10
- Second Judicial District 7
- Third Judicial District 19
- Fourth Judicial District 17

(c) The number of district judges or magistrates within each judicial district may be increased or decreased by rule of the supreme court. (§ 2 ch 184 SLA 1959; am § 2 ch 24 SLA 1966; am § 3 ch 137 SLA 1984)

Effect of amendments. — The 1984 amendment in subsection (a) increased the number of district judges in the Third Judicial District from 4 to 12 and in the Fourth Judicial District from 2 to 4.

NOTES TO DECISIONS

Jurisdictional boundaries. — See same catchline in note to AS 22.15.010.

The legislature's intent in creating the office of magistrate was to meet the immediate requirements of justice in the less populated areas of the state. Buckalew v. Holloway, Sup. Ct. Op. No. 1988 (File No. 4058), 604 P.2d 240 (1970).

Magistrates are "judges of other courts" within the meaning of Alaska Const., art. IV, § 4. Buckalew v. Holloway, Sup. Ct. Op. No. 1988 (File No. 4058), 604 P.2d 240 (1979).

Application of subsection (c). — Subsection (c) of this section could not provide the basis for deciding the presiding superior court judge's authority to move a district court judge from one place to another since subsection (c) creates power in the supreme court, not the presiding judge; and no permissible delegation of power to that judge was found in this case. Hornaday v. Rowland, Sup. Ct. Op. No. 2761 (File No. 7810), 674 P.2d 1333 (1983).

Sec. 22.15.030. Civil jurisdiction. (a) The district court has jurisdiction of civil cases, including foreign judgments filed under AS 09.30.200 and arbitration proceedings under AS 09.43.170, as follows:

- (1) for the recovery of money or damages when the amount claimed exclusive of costs, interest, and attorney fees does not exceed \$35,000;
- (2) for the recovery of specific personal property, when the value of the property claimed and the damages for the detention do not exceed \$35,000;
- (3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding \$35,000;
- (4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;
- (5) for establishing the fact of death of any person in the manner prescribed in AS 09.55.020 — 09.55.060;
- (6) for the recovery of the possession of premises in the manner provided under AS 09.45.070 — 09.45.160 when the value of the arrears and damage to the property does not exceed \$35,000;
- (7) for the foreclosure of a lien when the amount in controversy does not exceed \$35,000;
- (8) for the recovery of money or damages in motor vehicle tort cases when the amount claimed exclusive of costs, interest, and attorney fees does not exceed \$35,000;
- (9) over civil actions for taking utility service and for damages to or interference with a utility line filed under AS 42.20.030;

(10) over cases involving injunctive relief for domestic violence under AS 25.35.010 and 25.35.020.

(b) Insofar as the civil jurisdiction of the district courts and the superior court is the same, the jurisdiction is concurrent. Except for a petition for injunctive relief under AS 25.35.010 or 25.35.020, an action that falls within the concurrent jurisdiction of the superior court and the district court may not be filed in the superior court, except as provided by rules of the supreme court. (§ 3 ch 184 SLA 1959; am § 8 ch 110 SLA 1967; am § 1 ch 163 SLA 1968; am §§ 1 — 5 ch 38 SLA 1971; am §§ 1, 2 ch 36 SLA 1972; am § 24 ch 94 SLA 1980; am § 55 ch 59 SLA 1982; am § 3 ch 17 SLA 1985; am § 7 ch 38 SLA 1987)

Effect of amendments. — The 1985 amendment in subsection (a) substituted "\$25,000" for "\$10,000" except as provided in (10) of this subsection" at the end of paragraph (1), "\$25,000" for "\$10,000" at the end of paragraphs (2), (3), and (6) through (8), designated former paragraph (8) as present paragraph (6) and former paragraphs (9) through (11) as present paragraphs (7) through (9), and added paragraph (10), and in subsection (b) substituted "the" for "such" preceding "jurisdiction" in the first sentence and added the second sentence.

The 1987 amendment in subsection (a) in the introductory language substituted "including foreign judgments filed under AS 09.30.200 and arbitration proceedings under AS 09.43.170" for "and proceedings," deleted "of the property or" following "when the value" in paragraph (6), and substituted "\$35,000" for "\$25,000" throughout the section.

Editor's notes. — Section 12, ch 17, SLA 1985 provides that the 1985 amendment to (b) of this section applies only to cases filed on or after July 1, 1985.

NOTES TO DECISIONS

Limited jurisdiction. — District courts in Alaska are limited to jurisdiction in civil matters to cases involving amounts under \$3,000 (now \$35,000). *Pennington v. Snow*, Sup. Ct. Op. No. 525 (File No. 1101), 471 P.2d 370 (1970).

District court is a creature of the statute creating it. *Ex parte Oates*, 8 Alaska 319 (1931), rev'd on other grounds sub nom. *United States v. Oates*, 61 F.2d 536 (9th Cir. 1932).

And its powers must be exercised within limits conferred by law. — The jurisdiction and authority of a district court continues only so long as it confines the exercise of its powers within the limits conferred by law. *Ex parte Oates*, 8 Alaska 319 (1931), rev'd on other grounds sub nom. *United States v. Oates*, 61 F.2d 536 (9th Cir. 1932).

No intents or presumptions will be indulged in favor of jurisdiction of a district court. *Ex parte Oates*, 8 Alaska 319 (1931), rev'd on other grounds sub nom. *United States v. Oates*, 61 F.2d 536 (9th Cir. 1932).

Jurisdiction cannot be conferred by consent of parties. — Consent of parties

cannot confer upon a district court a jurisdiction or a power to act upon subjects which are not submitted to its judgment by the law. *Myers v. Swineford*, 1 Alaska 10 (1888).

Nur ousted by counterclaim in excess of jurisdictional amount. — A defendant cannot oust the jurisdiction of a district court by pleading a counterclaim which exceeds the amount for which judgment can be obtained in such court. *Bennett v. Forrest*, 69 F. 421 (D. Alaska 1895).

Whole proceeding void in absence of jurisdiction. — If a court of limited jurisdiction assumes to act in a case over which the law does not give it authority, the whole proceeding, from the issuing of the writ to the rendition of judgment, is void. *Myers v. Swineford*, 1 Alaska 10 (1888).

The record of a district court is always open to attack in a habeas corpus proceeding, and when thus challenged, such court must justify its official acts at any and every stage of the proceedings, by showing that it acted within its jurisdiction. *Ex parte Oates*, 8 Alaska 319

(1931), rev'd on other grounds sub nom. *United States v. Oates*, 61 F.2d 536 (9th Cir. 1932).

Jurisdiction under paragraph (a)(9). — In the absence of a clear intent by the legislature to limit the jurisdiction extended by paragraph (a)(9) to liens other than on real property, the supreme court refused to so limit the district court's jurisdiction. *Stephens v. Hammersley*, Sup. Ct. Op. No. 1275 (File No. 2505), 552 P.2d 652 (1976).

AS 22.15.050(1) not impliedly repealed by paragraph (a)(7). — Paragraph (a)(7), authorizing actions for foreclosure of liens under \$10,000 (now \$35,000) in district courts, was enacted subsequent to AS 22.15.050(1) prohibiting actions in district court where title to real property is at issue. But repeal of AS 22.15.050(1) will not be implied since the two provisions can be reconciled by holding that lien foreclosures under \$10,000 (now \$35,000), including those on real property, are permissible as long as title to real property is not in question. *Stephens v. Hammersley*, Sup. Ct. Op. No. 1275 (File No. 2505), 550 P.2d 1268 (1976).

District court lacked jurisdiction over action for accrued rent. — Where the district court had no jurisdiction over

actions for forcible entry and detainer in 1965, the court also lacked jurisdiction to enter a 1966 judgment on a second cause of action for accrued rent under the special form of summons used in forcible entry and detainer actions. *McDowell v. Lenarduzzi*, Sup. Ct. Op. No. 1242 (File No. 2413), 546 P.2d 1315 (1976).

Serving as a district judge constitutes the "practice of law." In re *Brewer*, Sup. Ct. Op. No. 864 (File No. 1643), 506 P.2d 676 (1973).

The district judge is continuously involved with legal problems of a wide variety as indicated by the statutory jurisdiction of the district court, and the nature of the judge's duties includes conducting court hearings, ruling on questions of evidence, and adjudicating issues of law and fact, so as clearly to constitute the "practice of law." In re *Brewer*, Sup. Ct. Op. No. 864 (File No. 1643), 506 P.2d 676 (1973).

Applied in *Oxereok v. State*, Sup. Ct. Op. No. 2076 (File No. 3902), 611 P.2d 913 (1980).

Cited in *Dowling Supply & Equip., Inc. v. City of Anchorage*, Sup. Ct. Op. No. 739 (File No. 1450), 490 P.2d 907 (1971); *Aguchak v. Montgomery Ward Co.*, Sup. Ct. Op. No. 1026 (File No. 1940), 520 P.2d 1352 (1974).

Sec. 22.15.040. Small claims. (a) When a claim for relief does not exceed \$5,000 exclusive of costs, interest, and attorney fees, and request is so made, the district judge or magistrate shall hear the action as a small claim unless important or unusual points of law are involved. The supreme court shall prescribe the procedural rules and standard forms to assure simplicity and the expeditious handling of small claims.

(b) All potential small claim litigants shall be informed if mediation, conciliation, and arbitration services are available as an alternative to litigation. (§ 8(4) ch 184 SLA 1959; added by § 1 ch 91 SLA 1961; am § 1 ch 12 SLA 1970; am § 1 ch 23 SLA 1978; am §§ 1, 2 ch 3 SLA 1986)

Cross references. — Small claims rules may be found in District Court Civ. R. 8-22.

Effect of amendments. — The 1986

amendment in the first sentence of subsection (a) substituted "\$5,000" for "\$2,000" and added subsection (b).

NOTES TO DECISIONS

Magistrates are "judges of other courts" within the meaning of Alaska Const., art. IV, § 4. *Huckalew v. Holloway*, Sup. Ct. Op. No. 1988 (File No. 4058), 604 P.2d 240 (1979).

Notice to indigent bush defendants. — Proper tailoring of notice to the capacities and circumstances of indigent bush defendants requires the communication of substantially more information regarding the methods by which such defendants can respond to a distant lawsuit than is presently imparted. *Aguchak v. Montgomery Ward Co.*, Sup. Ct. Op. No. 1026 (File No. 1940), 520 P.2d 1352 (1974).

A notice that fails to inform the indigent bush defendant of the right to file a written pleading is not reasonably calculated to afford the defendant an opportunity to be heard at a meaningful time and in a meaningful manner. *Aguchak v. Montgomery Ward Co.*, Sup. Ct. Op. No. 1026 (File No. 1940), 520 P.2d 1352 (1974).

The summons served upon indigent bush defendants in a small claims action was constitutionally defective because it

did not adequately convey the information necessary to their defense against a creditor's claim. The district court's assumption of personal jurisdiction over the debtors based on such a summons therefore violated the due process rights which inure to the debtors under Alaska Const., art. I, § 7. *Aguchak v. Montgomery Ward Co.*, Sup. Ct. Op. No. 1026 (File No. 1940), 520 P.2d 1352 (1974).

Counsel for collection suit defendants. — The bulk of collection suit defendants, due to indigency, cannot afford to engage counsel to advise them of their "venue" rights. *Aguchak v. Montgomery Ward Co.*, Sup. Ct. Op. No. 1026 (File No. 1940), 520 P.2d 1352 (1974).

The difficulties of locating counsel in the outlying areas of Alaska exacerbate the already substantial impediments to defense of the collection suit. *Aguchak v. Montgomery Ward Co.*, Sup. Ct. Op. No. 1026 (File No. 1940), 520 P.2d 1352 (1974).

Applied in *Oxereok v. State*, Sup. Ct. Op. No. 2076 (File No. 3902), 611 P.2d 913 (1980).

Sec. 22.15.050. Actions not within civil jurisdiction. The jurisdiction of the district courts does not extend to

- (1) an action in which the title to real property is in question;
- (2) an action for false imprisonment, libel, slander, malicious prosecution, actions of an equitable nature (except as otherwise provided by law), or actions in which the state is a defendant. (§ 4 ch 184 SLA 1959; am § 6 ch 38 SLA 1971; am § 4 ch 17 SLA 1985)

Effect of amendments. — The 1985 amendment in paragraph (2) deleted "criminal conversation, seduction upon a

promise to marry," inserted "otherwise," and substituted "by law" for "in AS 22.15.030(a)(9)."

NOTES TO DECISIONS

Actions involving lien. — District court will not automatically be precluded from exercising jurisdiction merely because a lien is sought to be enforced on real property. *Stephens v. Hammersley*, Sup. Ct. Op. No. 1275 (File No. 2505), 550 P.2d 1268 (1976).

Absent title disputes, questions concerning the validity of a particular lien, such as whether a lien was properly filed, or questions as to the amount of a lien will not automatically divest a district court of the power to proceed in an action. *Stephens v. Hammersley*, Sup. Ct. Op. No.

1275 (File No. 2505), 550 P.2d 1268 (1976).

Court lacks jurisdiction under paragraph (1) only where title is in issue. — In light of the legal qualifications of present district court judges, the supreme court does not believe that the legislature intended that a district court lack jurisdiction under subsection (1) unless, from the pleadings and the issues actually contested, title to property is clearly in issue. *Stephens v. Hammersley*, Sup. Ct. Op. No.

1275 (File No. 2505), 550 P.2d 1268 (1976).

The original reason for the type of jurisdictional limitation as in paragraph (1) was to prevent the complex and intricate questions which frequently arise in a title dispute from being decided by a court presided over by a person who was not learned in the law. As applied to the district courts of this state, however, the distinction is an anachronism, since a district court judge must be licensed to practice law in Alaska. Nevertheless, the jurisdictional limitation remains. *Stephens v. Hammersley*, Sup. Ct. Op. No. 1275 (File No. 2505), 550 P.2d 1268 (1976).

Repeal of paragraph (1) not implied from enactment of AS 22.15.030(a)(7). — AS 22.15.030(a)(7), authorizing actions for foreclosure of liens under \$10,000 (now \$35,000) in district courts, was enacted subsequent to paragraph (1) prohibiting actions in district court where title to real property is at issue. But repeal of paragraph (1) will not be implied since the two provisions can be reconciled by holding that lien foreclosures under \$10,000 (now \$35,000), including those on real property, are permissible as long as title to real property is not in question. *Stephens v. Hammersley*, Sup. Ct. Op. No. 1275 (File No. 2505), 550 P.2d 1268 (1976).

Issue of title must appear on trial from the evidence. — A magistrate (now judge) not only has the right, but the duty, to enter upon the trial of a cause for which there otherwise is jurisdiction, notwithstanding an issue of title is made by the pleadings, and, unless it appears on the trial from the evidence that the title to land is actually in dispute, to proceed to try the cause out and render judgment. *Blue v. Green*, 7 Alaska 47 (1923).

Forcible entry and detainer action. — Where plaintiff attempted in a forcible entry and detainer action to litigate the merits of defendant's title, defendant's motion to dismiss the action should have been granted pursuant to AS 09.45.150 and this section. *Johnson v. Robinson*, Sup. Ct. Op. No. 2452 (File No. 6948), 637 P.2d 1051 (1981).

Suing for money after disaffirmance of fraudulently induced contract. — Where the plaintiff sued for moneys paid by him on a contract which he alleged he was induced to enter into through misrepresentations and fraud of the defendant, and plaintiff disaffirmed the contract by reason of such misrepresentations and fraud, this was an action at law, and it was the duty of the court to have entertained such action. *Blue v. Green*, 7 Alaska 47 (1923).

Plaintiff seeking equitable relief. — If the plaintiff is seeking equitable relief, then a motion to dismiss can properly be laid before the magistrate (now judge) for want of jurisdiction to entertain the action. *Blue v. Green*, 7 Alaska 47 (1923).

District court lacks jurisdiction to hear parole eligibility complaints. — The legislature did not intend to empower the district court to hear complaints regarding eligibility for parole. *Bishop v. Municipality of Anchorage*, Ct. App. Op. No. 392 (File No. A-169), 685 P.2d 103 (1984).

District court lacked jurisdiction to decide challenges to parole board's interpretation of AS 33.15.180 (now repealed) and to the constitutionality of the section as interpreted; such challenges must be brought in the superior court. *Bishop v. Municipality of Anchorage*, Ct. App. Op. No. 392 (File No. A-169), 685 P.2d 103 (1984).

Or Criminal Rule 35(c) proceedings. — The district court lacks jurisdiction over Alaska R. Crim. P. 35(c) proceedings. *Bishop v. Municipality of Anchorage*, Ct. App. Op. No. 392 (File No. A-169), 685 P.2d 103 (1984).

Applied in *Oxereok v. State*, Sup. Ct. Op. No. 2076 (File No. 3902), 611 P.2d 913 (1980).

Quoted in *Anchorage Helicopter Serv., Inc. v. Anchorage Westward Hotel*, Sup. Ct. Op. No. 361 (File No. 628), 417 P.2d 903 (1966).

Cited in *Buckalew v. Holloway*, Sup. Ct. Op. No. 1988 (File No. 4058), 604 P.2d 240 (1979).

Sec. 22.15.060. Criminal jurisdiction. (a) The district court has jurisdiction of the following crimes:

- (1) a misdemeanor unless otherwise provided in this chapter;
- (2) a violation of an ordinance of a political subdivision.

(b) Insofar as the criminal jurisdiction of the district courts and the superior court is the same, such jurisdiction is concurrent. (§ 5 ch 184 SLA 1959)

NOTES TO DECISIONS

Where defendant was first charged in the district court and then, for the same offense, in the superior court, it was held that there was no need to establish in Alaska the rule that the matter must be tried in the court first obtaining jurisdiction. *Theodore v. State*, Sup. Ct. Op. No. 305 (File No. 550), 407 P.2d 182 (1965), cert. denied, 384 U.S. 951, 86 S. Ct. 1570, 16 L. Ed. 2d 547 (1966).

Serving as a district court judge constitutes the "practice of law." In re Brewer, Sup. Ct. Op. No. 861 (File No. 1643), 506 P.2d 676 (1973).

The district judge is continuously involved with legal problems of a wide variety as indicated by the statutory jurisdiction of the district court, and the nature of the duties includes conducting court hearings, ruling on questions of evidence, and adjudicating issues of law and fact, so as

Sec. 22.15.070. Extent of jurisdiction. The civil jurisdiction and the criminal jurisdiction of the district court of the State of Alaska extend over the entire state. (§ 6(1) ch 184 SLA 1959; am § 3 ch 36 SLA 1972)

NOTES TO DECISIONS

This section expressly confers state-wide jurisdiction upon the district courts. *Aguchak v. Montgomery Ward Co.*, Sup. Ct. Op. No. 1026 (File No. 1940), 520 P.2d 1352 (1974).

Distinction between jurisdiction and venue. — This section and AS 22.15.080 establish a distinction between jurisdiction and venue. "Jurisdiction" connotes the inherent power of a court to hear and

clearly to constitute the "practice of law." In re Brewer, Sup. Ct. Op. No. 861 (File No. 1643), 506 P.2d 676 (1973).

Applied in *State v. Peto*, Sup. Ct. Op. No. 372 (File No. 673), 420 P.2d 338 (1966); *Oxereok v. State*, Sup. Ct. Op. No. 2076 (File No. 3902), 611 P.2d 913 (1980).

Quoted in *State v. City of Anchorage*, Sup. Ct. Op. No. 932 (File No. 1743), 513 P.2d 1101 (1973).

Stated in *City of Fairbanks v. Schrock*, Sup. Ct. Op. No. 607 (File No. 1032), 457 P.2d 242 (1969).

Cited in *State v. Browder*, Sup. Ct. Op. No. 699 (File No. 1323), 486 P.2d 925 (1971); *Huckalew v. Holloway*, Sup. Ct. Op. No. 1988 (File No. 4058), 604 P.2d 240 (1979); *Rollins v. State ex rel. Municipality of Anchorage*, Ct. App. Op. No. 769 (File No. A-1928), P.2d (1988).

adjudicate the subject matter in a given case, while "venue" designates the particular place or locality in which a court having such jurisdiction may in the first instance properly hear and determine the case. *Leege v. Strand*, Sup. Ct. Op. No. 157 (File No. 301), 384 P.2d 665 (1963).

Cited in *Pete v. State*, Sup. Ct. Op. No. 137 (File No. 290), 379 P.2d 625 (1963).

Sec. 22.15.080. Change of venue. The court in which an action is pending shall change the place of trial of the action from one place to another place in the same judicial district or to a designated place in another judicial district when the court finds any of the following:

- (1) there is reason to believe that an impartial trial cannot be had;
- (2) the convenience of witnesses and the ends of justice would be promoted by the change;

(3) the judge or magistrate is disqualified from acting, but if another judge or magistrate is assigned to try the action, no change of place of trial need be made;

(4) the defendant will be put to unnecessary expense and inconvenience, and if the court finds that the expense and inconvenience were intentionally caused, the court may assess costs against the plaintiff. (§ 6(2) ch 184 SLA 1959; am § 33 ch 8 SLA 1971)

Legislative history reports. — For report on ch. 8, SLA 1971 (HB16), see 1971 *Houss's Journal*, p. 62.

NOTES TO DECISIONS

Distinction between jurisdiction and venue. — See same catchline in note to AS 22.15.070.

Change of venue on proper ground constitutional. — No constitutional right of a defendant was violated by a change of venue on motion of the prosecution on the ground that an impartial trial could not be had in the place where defendant had been indicted. *United States v. Hoyt*, 7 Alaska 276 (1925).

Small claims are subject to change of venue. — Small claims, like other actions in the district courts, are subject to

change of venue when the defendant cannot, without unnecessary expense and inconvenience, defend the action in the plaintiff's chosen forum. *Aguchak v. Montgomery Ward Co.*, Sup. Ct. Op. No. 1026 (File No. 1940), 520 P.2d 1352 (1974).

Denial reversed only where discretion abused. — A lower court's decision to deny a change of venue motion will be reversed only if the decision amounts to an abuse of discretion. *Jerrel v. State*, Ct. App. Op. No. 815 (File No. A-1627), P.2d (1988).

Sec. 22.15.090. Sessions and general powers of district court. (a) The district court shall always be open for the transaction of business, except on judicial holidays as determined by rule of the supreme court. However, the court may at any time

(1) exercise its powers in a criminal action, or in a proceeding of a criminal nature, including the issuance of orders pertaining to bail,

(2) receive a verdict or discharge a jury,

(3) issue writs of *habeas corpus*,

(4) issue warrants of arrest and summons and search warrants.

(b) The court shall meet in its district at times and places that may be designated by rule or order of the supreme court. The district court has all power and authority necessary to carry into complete execution all its judgments, decrees, and determinations in all matters within its jurisdiction according to the constitution, the laws of the state, and the common law. (§ 7 ch 184 SLA 1959)

NOTES TO DECISIONS

Jurisdictional boundaries. — See same catchline in note to AS 22.15.010.

Sec. 22.15.100. Functions and powers of district judge and magistrate. Each district judge and magistrate has the power

(1) to issue writs of habeas corpus for the purpose of inquiring into the cause of restraint of liberty, returnable before a judge of the superior court, and the same proceedings shall be had on the writ as if it had been granted by the superior court judge under the laws of the state in such cases;

(2) of a notary public;

(3) to issue marriage licenses and to solemnize marriages;

(4) to issue warrants of arrest, summons, and search warrants according to manner and procedure prescribed by law and the supreme court;

(5) to act as an examining judge or magistrate in preliminary examinations in criminal proceedings; to set, receive, and forfeit bail and to order the release of defendants under bail;

(6) to act as a referee in matters and actions referred to the judge or magistrate by the superior court, with all powers conferred upon referees by laws;

(7) of the superior court in all respects including but not limited to contempts, attendance of witnesses, and bench warrants;

(8) to order the temporary detention of a minor, or take other action authorized by law or rules of procedure, in cases arising under AS 47.10, when the minor is in a condition or surrounding dangerous or injurious to the welfare of the minor or others that requires immediate action; the action may be continued in effect until reviewed by the superior court in accordance with rules of procedure governing these cases;

(9) to issue a temporary order for injunctive relief in cases involving domestic violence as provided in AS 25.35.010 and 25.35.024;

(10) to review an administrative revocation of a person's driver's license or nonresident privilege to drive, and an administrative refusal to issue an original license, when designated as a hearing officer by the commissioner of public safety and with the consent of the administrative director of the state court system. (§ 8(1) ch 184 SLA 1959; am § 1 ch 5 SLA 1960; am § 6 ch 110 SLA 1967; am § 4 ch 139 SLA 1980; am § 24 ch 77 SLA 1983; am § 5 ch 17 SLA 1985)

Revisor's notes. — In implementing § 3, ch 24, SLA 1966, in AS 22.15.100(5) "judge" was added to rather than substituted for "magistrate" because it is clear from the lead-in line that, as used in the old version, the word "magistrate" included both the district magistrate and the deputy magistrate. Therefore both the district judge and the magistrate are now included.

Effect of amendments. — The 1985

amendment in paragraph (9) deleted "emergency" preceding "injunctive" and inserted "AS 25.35.010 and."

Editor's notes. — Section 7, ch. 110, SLA 1967, as amended by § 80, ch. 69, SLA 1970, provides: "In exercising its jurisdiction under AS 47.10, the superior court may designate district judges and magistrates as masters under Civil Rule 53."

NOTES TO DECISIONS

Magistrates are "judges of other courts" within the meaning of Alaska Const., art. IV, § 4. *Hucknaw v. Holloway*, Sup. Ct. Op. No. 1988 (File No. 4058), 604 P.2d 240 (1970).
Applied in *Larson v. State*, Sup. Ct. Op. No. 1430 (File No. 2433), 564 P.2d 365

(1977); *Gisnato v. Occhipinti*, Sup. Ct. Op. No. 1962 (File No. 3756), 602 P.2d 442 (1979).

Cited in *Bishop v. Municipality of Anchorage*, Ct. App. Op. No. 392 (File No. A-169), 685 P.2d 103 (1984).

Collateral reference. — Manner or extent of examination of witnesses by trial judge. 6 ALR4th 951.

Sec. 22.15.110. Additional duties of district judge and magistrate. Each district judge and magistrate shall

(1) perform the duties and exercise the authority of coroner as prescribed by law;

(2) record birth, death, and marriage certificates presented to them for record in the manner prescribed by law;

(3) take custody and control of and preserve the property and estate of deceased persons until a legal custodian is appointed;

(4) *[Repealed, § 25 ch 21 SLA 1985.]* (§ 8(2) ch 184 SLA 1959; am § 4 ch 5 SLA 1960; am § 8 ch 145 SLA 1975; am § 25 ch 21 SLA 1985)

Effect of amendments. — The 1985 amendment repealed paragraph (4), concerning filing copies of certain recorded conveyances with the commissioner of commerce and economic development.

Sec. 22.15.120. Limitations on proceedings which magistrate may hear. A magistrate shall preside only in cases and proceedings under AS 22.15.040, 22.15.100, and 22.15.110, and as follows:

(1) for the recovery of money or damages only when the amount claimed, exclusive of costs, interest, and attorney fees, does not exceed \$5,000;

(2) for the recovery of specific personal property when the value of the property claimed and the damages for the detention do not exceed \$5,000;

(3) for the recovery of a penalty or forfeiture, whether given by statute or arising out of contract, not exceeding \$5,000;

(4) to give judgment without action upon the confession of the defendant for any of the cases specified in this section, except for a penalty or forfeiture imposed by statute;

(5) to give judgment of conviction upon a plea of guilty by the defendant in a criminal proceeding within the jurisdiction of the district court;

(6) to hear, try, and enter judgments in all cases involving misdemeanors, if the defendant consents in writing that the magistrate may try the case;

(7) to hear, try and enter judgments in all cases involving infractions under AS 28, violations under AS 11, and violations of ordinances of political subdivisions;

(8) for the extradition of fugitives as authorized under AS 12.70. (§ 19 ch 184 SLA 1959; am § 5 ch 5 SLA 1960; am § 1 ch 85 SLA 1961; am § 2 ch 91 SLA 1961; am § 12 ch 70 SLA 1964; am § 8 ch 110 SLA 1967; am §§ 18 — 20 ch 71 SLA 1972; am § 1 ch 65 SLA 1978; am § 3 ch 3 SLA 1986; am § 10 ch 12 SLA 1986; am § 8 ch 38 SLA 1987)

Cross references. — For declaration of death proceeding under magistrate, see AS 09.55.020 — 09.55.060.

Effect of amendments. — The first 1986 amendment at the end of paragraph

(1) — (3) substituted "\$5,000" for "\$1,000."

The second 1986 amendment added paragraph (8).

The 1987 amendment inserted "violations under AS 11" in paragraph (7).

NOTES TO DECISIONS

Magistrates are "judges of other courts" within the meaning of Alaska Const., art. IV, § 4. *Buckalew v. Holloway*, Sup. Ct. Op. No. 1988 (File No. 4058), 604 P.2d 240 (1979).

Applied in *Larson v. State*, Sup. Ct. Op. No. 1430 (File No. 2433), 564 P.2d 365 (1977).

Stated in *Theodore v. State*, Sup. Ct. Op. No. 305 (File No. 550), 407 P.2d 182 (1965), cert. denied, 384 U.S. 951, 86 S. Ct. 1570, 16 L.Ed.2d 547 (1966).

Cited in *Annas v. State*, Ct. App. Op. No. 647 (File No. A-954), 726 P.2d 552 (1986).

Collateral references. — Constitutional restrictions on nonattorney acting

as judge in criminal proceeding. 71 ALR3d 562.

Sec. 22.15.130. Seal of court. [Repealed, § 2 ch 64 SLA 1974. For current law, see AS 22.05.060.]

Sec. 22.15.140. Process. Process of the district court shall be in the name of the State of Alaska, signed by the district judge, magistrate, clerk or deputy clerk of the district court in the judicial district where the process is issued, dated when issued, sealed with the seal of the court, and made returnable according to rule prescribed by the supreme court and shall run throughout the state. (§ 10 ch 184 SLA 1959; am § 1 ch 35 SLA 1970)

NOTES TO DECISIONS

Quoted in *Agudak v. Montgomery Ward Co.*, Sup. Ct. Op. No. 1026 (File No. 1910), 529 P.2d 1352 (1974).

Cited in *Larson v. State*, Sup. Ct. Op. No. 1430 (File No. 2433), 564 P.2d 365 (1977).

Sec. 22.15.150. Jury trials. The trial jury in the district courts consists of a body of six persons in number. (§ 10A ch 184 SLA 1959 as added by § 1 ch 82 SLA 1961)

NOTES TO DECISIONS

No conflict between this section and Alaska Const., art. I, § 11. — There is no conflict between Alaska Const., art. I, § 11, which provides for a jury of 12 in criminal cases but states that the legislature may provide for a jury of not more than 12 nor less than six in courts not of record, and this section, which provides for a jury of six in a district court, since the district court is a court not of record. *Lopez v. Anchorage*, Sup. Ct. Op. No. 1863 (File No. 3883), 597 P.2d 140 (1979).

As used in Alaska Const., art. I, § 11, the phrase "courts not of record" means courts of limited jurisdiction, such as the district court, which have been created by the legislature pursuant to constitutional authority and which the legislature has not seen fit to designate specifically as "courts of record." *Lopez v. Anchorage*, Sup. Ct. Op. No. 1863 (File No. 3883), 597 P.2d 149 (1979).

Sec. 22.15.160. Qualifications of district judges and magistrates. (a) A district judge shall be a citizen of the United States and of the state, at least 21 years of age, a resident of the state for at least five years immediately preceding appointment, and (1) have been engaged in the active practice of law for not less than three years immediately preceding appointment and at the time of appointment licensed to practice law in the State of Alaska; or (2) have served for at least seven years as a magistrate in the state. The supreme court may prescribe additional qualifications.

(b) A magistrate shall be a citizen of the United States and of the state, at least 21 years of age, and a resident of the state for at least six months immediately preceding appointment. The supreme court may prescribe additional qualifications. (§ 11 ch 184 SLA 1959; am § 1 ch 117 SLA 1967; am § 12 ch 12 SLA 1980)

Editor's notes. — Section 36, ch. 12, SLA 1980 provides: "The amendments enacted in Secs. 5, 9 and 12 of this Act apply

only to justices and judges appointed on or after the effective date of this Act [March 22, 1980]."

NOTES TO DECISIONS

Appointment of district court judge as superior court judge pro tempore. — The chief justice's authority under Alaska Const., art. IV, § 16 to assign a judge "from one court . . . to another for temporary service," included the authority to appoint a judge of the district court to serve as judge of the superior court pro tempore, regardless of the differences that existed in the qualifications required by statute for permanent appointment to ei-

ther of these courts prior to the 1980 amendments. *Oxereok v. State*, Sup. Ct. Op. No. 2076 (File No. 3902), 611 P.2d 913 (1980).

Applied in *Buckalew v. Holloway*, Sup. Ct. Op. No. 1988 (File No. 4058), 604 P.2d 240 (1979).

Cited in *Stephens v. Hammersley*, Sup. Ct. Op. No. 1275 (File No. 2505), 570 P.2d 1268, 552 P.2d 632 (1976).

Collateral references. — Validity of requirement that candidate or public officer have been resident of governmental unit for specified period. 65 ALR3d 1048.
Validity and construction of constitu-

tional or statutory provision making legal knowledge or experience a condition of eligibility for judicial office. 71 ALR3d 498.
Validity of age requirement for state public office. 90 ALR3d 990.

Sec. 22.15.170. Selection of district judges and magistrates.

(a) The governor shall fill a vacancy or appoint a successor to fill an impending vacancy in an office of district judge within 45 days after receiving nominations from the judicial council by appointing one of two or more persons nominated by the council for each actual or impending vacancy. The appointment to fill an impending vacancy becomes effective upon the actual occurrence of the vacancy.

(b) The presiding judge of the superior court in each judicial district may appoint acting district judges as needed to serve at the pleasure of the presiding judge for a term of no longer than 12 months or until succeeded by an appointment made under (a) of this section, whichever first occurs. An acting district judge shall be a citizen of the United States and of the state, at least 21 years of age, but need not be licensed to practice law in any of the United States and need not have established Alaska residence before appointment. Service as an acting district judge is not considered a judicial service for the purposes of AS 22.25 unless the judge is subsequently appointed under (a) of this section.

(c) The presiding judge of the superior court in each judicial district shall appoint the magistrates for the district court for the judicial district. Each magistrate serves at the pleasure of the presiding judge of the superior court in the judicial district for which appointed.

(d) Vacancies for magistrates shall be filled in the same manner as appointments.

(e) The office of a district court judge becomes vacant 90 days after the election at which the judge is rejected by a majority of those voting on the question or for which the judge fails to file a declaration of candidacy. Upon the occurrence of (1) an actual vacancy; (2) the certification of rejection following an election; or (3) the election following failure of a judge to file a declaration of candidacy, the judicial council shall meet within 90 days and submit to the governor the names of two or more persons qualified for the judicial office; except that this 90-day period may be extended by the council with the concurrence of the supreme court. In the event of an impending vacancy other than by reason of rejection or failure to file a declaration of candidacy, the council may meet at any time within the 90-day period immediately preceding the effective date of the vacancy and submit to the governor the names of two or more persons qualified for the judicial office. (§ 12 ch 181 SLA 1959; am § 2 ch 138 SLA 1966; am § 2 ch 117 SLA 1967;

am § 1 ch 162 SLA 1968; am § 1 ch 165 SLA 1968; am § 3 ch 160 SLA 1972; am §§ 1, 2 ch 194 SLA 1976; am § 4 ch 7 SLA 1985)

Cross references. — For voting to approve or reject a district judge, see AS 15.35.100 — 15.35.130.

Effect of amendments. — The 1985 amendment in subsection (e) at the end of the first sentence substituted "for which the judge fails to file a declaration of candidacy" for ", if a judge fails to file a declaration of candidacy, 90 days after the filing deadline" and in the second sentence

inserted "election following" preceding "failure of a judge" and substituted "90" for "45" and "90-day."

Legislative history reports. — For report on ch. 162, SLA 1968 (HB 461), see 1968 House Journal, p. 168. For legislative committee report on ch. 166, SLA 1968 (HB 463), see 1968 House Journal, p. 160.

NOTES TO DECISIONS

- I. General Consideration.
- II. Selection Procedure.
- III. Magistrates.

I. GENERAL CONSIDERATION.

Permanent intra-district transfer of district court judge. — A permanent intra-district transfer of a district court judge by a judicial officer does not contravene the principle of separation of powers. *Hornaday v. Rowland*, Sup. Ct. Op. No. 2761 (File No. 7810), 674 P.2d 1333 (1983).

There is no constitutional power residing in the executive to designate the particular location where a district court judge will serve. *Hornaday v. Rowland*, Sup. Ct. Op. No. 2761 (File No. 7810), 674 P.2d 1333 (1983).

Stated in *Theodore v. State*, Sup. Ct. Op. No. 305 (File No. 550), 407 P.2d 182 (1965), cert. denied, 384 U.S. 951, 86 S. Ct. 1670, 16 L. Ed. 2d 517 (1966).

Cited in *Stephens v. Hammersley*, Sup. Ct. Op. No. 1275 (File No. 2505), 550 P.2d 1268 (1976); *Oxereck v. State*, Sup. Ct. Op. No. 2076 (File No. 3902), 611 P.2d 913 (1980).

II. SELECTION PROCEDURE.

Constitutionality. — Section 3, ch. 117, SLA 1967, does not violate the provisions of Alaska Const., art. IV, § 4. *Delahay v. State*, Sup. Ct. Op. No. 648 (File No. 1252), 476 P.2d 908 (1970), appeal dismissed, 402 U.S. 901, 91 S. Ct. 1381, 28 L. Ed. 2d 642 (1971).

The selection procedure enacted into law by this section follows the constitutional scheme of Alaska Const., art. IV, § 5, for appointment of supreme court justices and superior court judges. *Delahay v.*

State, Sup. Ct. Op. No. 648 (File No. 1252), 476 P.2d 908 (1970), appeal dismissed, 402 U.S. 901, 91 S. Ct. 1381, 28 L. Ed. 2d 642 (1971).

This section prescribes no particular form of appointment. *Delahay v. State*, Sup. Ct. Op. No. 648 (File No. 1252), 476 P.2d 908 (1970), appeal dismissed, 402 U.S. 901, 91 S. Ct. 1381, 28 L. Ed. 2d 642 (1971).

Nominating four persons for three positions. — By nominating four persons for three positions, the judicial council complied with the requirements that they nominate at least two persons for each position; the governor could select from among all four nominees for the first position, from among three for the second, and between two for the third. *Delahay v. State*, Sup. Ct. Op. No. 648 (File No. 1252), 476 P.2d 908 (1970), appeal dismissed, 402 U.S. 901, 91 S. Ct. 1381, 28 L. Ed. 2d 642 (1971).

Appointment not place specific. — Nowhere in subsection (a) of this section is it stated that the governor's appointment is place specific. *Hornaday v. Rowland*, Sup. Ct. Op. No. 2761 (File No. 7810), 674 P.2d 1333 (1983).

III. MAGISTRATES.

Magistrate is "judge". — A magistrate is not merely "an assistant" to a district court judge, but presides with full authority over a court of limited jurisdiction, exercising the judicial power vested by Alaska Const., art. IV, § 1. Such a person is a "judge" within the meaning of Alaska Const., art. IV, § 4. *Buckalew v.*

Holloway, Sup. Ct. Op. No. 1988 (File No. 4058), 604 P.2d 240 (1979).

Providing that magistrates serve at the pleasure of the presiding judge of the superior court in the judicial district for which appointed does not conflict with the requirement of Alaska Const., art. IV, § 4 that judges be "selected . . . for terms prescribed by law," since with respect to the accountability demanded in this requirement, service "at the pleasure of" constitutes a "term." Buckalew v. Holloway, Sup. Ct. Op. No. 1988 (File No. 4058), 604 P.2d 240 (1979).

Since magistrates do not campaign, are never accountable to the voting public, and are not appointed by the governor, for a magistrate to serve "at the pleasure of" the presiding superior court judge does not impair the independence of the magistrate to adjudicate cases impartially. Buckalew v. Holloway, Sup. Ct. Op. No. 1988 (File No. 4058), 604 P.2d 240 (1979).

Providing that magistrates serve "at the pleasure of the presiding judge of the superior court" is clearly designed to achieve an ongoing guarantee of accountability. Buckalew v. Holloway, Sup. Ct. Op. No. 1988 (File No. 4058), 604 P.2d 240 (1979).

Even if Alaska Const., art. IV, § 10, which created a commission on judicial qualifications which could recommend to the supreme court that a justice or judge be suspended, removed from office, retired or censured, is applicable to magistrates, it does not restrict the legislature's authority under Alaska Const., art. IV, § 4 to prescribe that magistrates shall serve at the pleasure of the presiding judge, since at the very least, the removal provisions of art. IV are supplementary to the removal procedure that defines the end of a judge's term. Buckalew v. Holloway, Sup. Ct. Op. No. 1988 (File No. 4058), 604 P.2d 240 (1979).

Collateral references. -- Power of successor judge taking office during term

time to vacate, etc., judgement entered by his predecessor. 11 ALR2d 1117.

Sec. 22.15.180. Oath of office. Each district judge and magistrate, upon entering office, shall take and subscribe to an oath of office required of all officers under the constitution and any further oath or affirmation that may be prescribed by law. (§ 13 ch 184 SLA 1959)

Sec. 22.15.190. Assignment of district judges and magistrates. Each district judge and each magistrate shall hold court at times and places that are assigned by the presiding judge of the superior court of the district. The presiding judge in any judicial district may assign any district judge or magistrate within the district to serve temporarily in any other judicial districts. Rules and procedures for temporary assignment including the emergency situation where a superior court judge is not readily available to assign a district judge or magistrate shall be as prescribed by the supreme court. (§ 14 ch 184 SLA 1959)

NOTES TO DECISIONS

Permanent intra-district transfers.

AS 22.10.130, this section, and the court rules concerning the powers of a presiding judge and the assignment of district court judges do not authorize a presiding judge's permanent intra-district transfer of a judge. Hornaday v. Rowland,

Sup. Ct. Op. No. 2761 (File No. 7810), 674 P.2d 1333 (1983).

Stated in *Theodore v. State*, Sup. Ct. Op. No. 305 (File No. 550), 407 P.2d 182 (1965), cert. denied, 384 U.S. 951, 86 S. Ct. 1570, 16 L.Ed.2d 547 (1966).

Sec. 22.15.195. Approval or rejection. Each district court judge is subject to approval or rejection as provided in AS 15 (Alaska Election Code). The judicial council shall conduct an evaluation of each judge before the retention election and shall provide to the public information about the judge and may provide a recommendation regarding retention or rejection. The information and the recommendation shall be made public at least 60 days before the election. The judicial council shall also provide the information and any recommendation to the office of the lieutenant governor in time for publication in the election pamphlet under AS 15.58.050. If a majority of those voting on the question rejects the candidacy of a judge, the rejected judge may not for a period of four years thereafter be appointed to fill any vacancy in the supreme court, court of appeals, superior court or district courts of the state. (§ 3 ch 87 SLA 1975; am § 13 ch 12 SLA 1980)

NOTES TO DECISIONS

Cited in *Stephens v. Hammersley*, Sup. Ct. Op. No. 2761 (File No. 7810), 674 P.2d 1333 (1983).
Ct. Op. No. 1275 (File No. 2505), 550 P.2d 1268 (1976); *Hornaday v. Rowland*, Sup.

Sec. 22.15.200. Incapacity. [Repealed, § 2 ch 213 SLA 1968.]

Sec. 22.15.205. Impeachment. A district judge is subject to impeachment by the legislature for malfeasance or misfeasance in the performance of official duties. Impeachment must originate in the senate and must be approved by two-thirds vote of its members. The motion for impeachment must list fully the basis for the proceeding. Trial on impeachment shall be conducted by the house of representatives. A supreme court justice designated by the court shall preside at the trial. Concurrence of two-thirds of the members of the house is required for a judgment of impeachment. The judgment may not extend beyond removal from office, but does not prevent proceedings in the courts on the same or related charges. (§ 9 ch 38 SLA 1987)

Sec. 22.15.210. Restrictions. (a) A district judge while holding office may not practice law, nor engage in the conduct of any other profession, vocation, or business for profit or compensation, which conduct would interfere with the performance of the judicial duties of the judge, nor may a judge hold office in a political party, or hold any other office or position of profit under the United States, the state or its political subdivisions, except that, with the approval of the chief justice of the Alaska Supreme Court, a district judge may be appointed deputy clerk of the superior court and may hold the office of United States magistrate. A district judge who files for another elec-

five public officer other than delegate to a constitutional convention of this state or the United States forfeits the judicial position.

(b) A magistrate, while holding office, may not hold office in a political party. A magistrate may hold any other office or position of profit under the United States, the state or its political subdivisions, or engage in the conduct of any profession or business which does not interfere with the performance of the judicial duties of the magistrate or require that the magistrate repeatedly disqualify himself or herself from judicial service because of a conflict of interest caused thereby. (3 16 ch 184 SLA 1959; am § 2 ch 5 SLA 1960; am § 3 ch 30 SLA 1971; am § 14 ch 12 SLA 1980)

Legislative history reports. — For report on ch. 5, SLA 1971 (FCS HCSSB 6), see 1971 House Journal, p. 226.

NOTES TO DECISIONS

Quoted in *Regich v. Jefferson*, Sup. Ct. Op. No. 481 (File No. 891), 441 P.2d 27 (1968).

Collateral references. — Validity and application of statute regarding prohibition of judge from practicing law. 17 ALR3d 829.

Sec. 22.15.220. Compensation. (a) The monthly salary for each district judge is equal to Step C, Range 26 of the salary schedule in AS 39.27.011(a) for Juneau, Alaska.

(b) Each magistrate shall receive annual compensation to be determined by the supreme court. Salary increases shall be determined on the basis of percentage of pay increase the legislature provides for state employees in the classified service. The base salary of a magistrate shall be increased by a percentage equal to three and one-half per cent times the number of step increases provided under AS 39.27.020 that a state employee would receive working in the same election district. A magistrate's annual compensation may be payable, at the option of the magistrate, either monthly in 12 equal installments or semi-monthly in 24 equal installments.

(c) A salary warrant may not be issued to a district judge or magistrate until the judge or magistrate has filed with the state officer designated to issue salary warrants, an affidavit that no matter referred to the judge or magistrate for opinion or decision has been uncompleted or undecided by the judge or magistrate for a period of more than six months.

(d) In addition to annual salary, a district court judge is entitled to receive a geographic cost-of-living adjustment, based on the location of the judge's primary office assignment, equal to 3.5 per cent of the

judge's annual salary times the number of pay step increases provided under AS 39.27.020 for a state employee working in the same election district in those districts for which AS 39.27.020 specifies zero-to-five pay step increases. In an election district for which AS 39.27.020 specifies more than five pay steps, the number of pay step increases under this section is limited to five. Any retirement benefits to which a district court judge may be entitled shall be computed only on the annual salary. (§ 17 ch 184 SLA 1959; am § 1 ch 66 SLA 1962; am § 1 ch 64 SLA 1963; am § 1 ch 137 SLA 1966; am § 5 ch 83 SLA 1967; am § 3 ch 101 SLA 1969; am § 3 ch 193 SLA 1970; am § 1 ch 78 SLA 1971; am § 1 ch 188 SLA 1972; am §§ 3, 4 ch 34 SLA 1974; am § 3 ch 205 SLA 1975; am §§ 4, 5 ch 148 SLA 1976; am § 1 ch 196 SLA 1976; am § 5 ch 263 SLA 1976; am § 6 ch 80 SLA 1978; am §§ 5, 20 ch 3 SLA 1980)

Editor's notes. — Chapter 205, SLA submitted to the voters by referendum 1976, which amended this section, was and was rejected.

NOTES TO DECISIONS

Cited in *Kuchutin v. State*, Sup. Ct. Op. No. 3194 (File No. S-1894), 739 P.2d 170 (1987).

Sec. 22.15.230. Additional compensation. Subject to rule of the supreme court, a district judge or magistrate shall receive a per diem allowance and a transportation allowance commensurate with that authorized for other state employees. (§ 18 ch 184 SLA 1959)

Sec. 22.15.240. Appeal. (a) Either party may appeal a judgment of the district court in a civil action to the superior court.

(b) The defendant may appeal a judgment of conviction given in the district court in a criminal action to the superior court. When the judgment is given on a plea of guilty, an appeal may not be taken by the defendant except on the ground that a sentence of imprisonment of 90 days or more was excessive. The state has no right of appeal in criminal actions for which judgment is given in the district courts, except to test the sufficiency of the information or to appeal a sentence on the ground it is too lenient. When a sentence is appealed by the state on the ground it is too lenient, the court may not increase the sentence but may express its approval or disapproval of the sentence and its reasons in a written opinion.

(c) [Repealed, § 47 ch 14 SLA 1987.]

(d) [Repealed, § 47 ch 14 SLA 1987.] (§ 20 ch 184 SLA 1959; am § 3 ch 5 SLA 1960; am § 3 ch 117 SLA 1969; am § 15 ch 12 SLA 1980; am § 47 ch 14 SLA 1987)

Cross references. — For revocation of court of appeals to review decision of the district court, see AS 22.02.050(a). For jurisdiction of superior court, see AS 22.15.020. For procedure on appeal, see Rules 601 — 609, Rules of Appellate Procedure.

Effect of amendments. — The 1987 amendment deleted subsection (c) and (d), concerning appeals from the district court.

NOTES TO DECISIONS

District court is not "court of record." See *Lopez v. Anchorage*, Sup. Ct. Op. No. 1863 (File No. 1863), 597 P.2d 146 (1979).

Magistrates are "judges of other courts" within the meaning of Alaska Const., art. IV, § 4. *Buckalew v. Holloway*, Sup. Ct. Op. No. 1980 (File No. 1980), 601 P.2d 210 (1979).

This section and AS 22.10.020 provide basic and alternative methods of reviewing which were intended to simplify and expedite the handling of appeals. *Lee v. State*, Sup. Ct. Op. No. 107 (File No. 193), 374 P.2d 868 (1962).

Proper standard and scope of review. — In recent cases, the supreme court has set forth the proper standard and scope of review to be applied by it in reviewing superior court sentences appealed to it pursuant to AS 12.55.120. It is the intention of the legislature that the superior court apply an identical standard in reviewing sentences appealed to it pursuant to subsection (b) of this section. *Galaktionoff v. State*, Sup. Ct. Op. No. 700 (File No. 1291), 486 P.2d 919 (1971). The authority to review sentences now resides in the court of appeals, which began operations on September 18, 1980. — Ed. note.

In the exercise of its sentence appeal jurisdiction, the superior court's scope of review is to be identical with that exercised by the supreme court under State v. Chaney, Sup. Ct. Op. No. 653, 777 P.2d 411 (1979). The application of this standard to the superior court means that when a sentence is appealed to the superior court, the reviewing judge is to make his or her own examination of the record and must modify the sentence if he is convinced that the district court was clearly mistaken in imposing the sanction it did. *Galaktionoff v. State*, Sup. Ct. Op. No. 700 (File No. 1291), 486 P.2d 919 (1971).

Trial de novo on appeal prior to 1980 amendment. — For cases discuss-

Editor's notes. — Section 37, ch. 12, SLA 1980 provides "Sections 8, 15 and 31 of this Act have the effect of changing Rule 21, Rules of Appellate Procedure and Rule 7, District Court Criminal Rules by amending AS 22.10.020(a); AS 22.15.240, and AS 12.55.005 — 12.55.185 to provide that a sentence of 90 days or more imposed by the district court may be appealed."

ing power of superior court to grant new trial prior to 1980 amendment, which deleted "unless the superior court, in its discretion, grants a trial de novo, in whole or in part" from the end of subsection (c), see *Lee v. State*, Sup. Ct. Op. No. 107 (File No. 193), 374 P.2d 868 (1962); *Kinsman v. State*, Sup. Ct. Op. No. 786 (File No. 1523), 496 P.2d 63 (1972); *Lopez v. Anchorage*, Sup. Ct. Op. No. 1863 (File No. 3083), 597 P.2d 146 (1979).

Court can hear argument of counsel.

— The superior court can, on a proper showing, based on an appropriate motion, permit counsel for the appellant to be heard in argument before the appeal is disposed of on the record. *Lee v. State*, Sup. Ct. Op. No. 107 (File No. 193), 374 P.2d 868 (1962).

The superior court has the power to entertain appropriate motions. *Kinsman v. State*, Sup. Ct. Op. No. 786 (File No. 1523), 496 P.2d 63 (1972).

"Appropriate motions". — The state's motion for a more particular statement of allegations of prejudice and the stipulations of the parties were "appropriate motions" and the superior court was within its powers in ordering a time schedule for briefing. *Kinsman v. State*, Sup. Ct. Op. No. 786 (File No. 1523), 496 P.2d 63 (1972).

Rules may not be applied to work an injustice. — While inherent in its power to entertain "appropriate motions" is the power to police compliance with its orders entered pursuant to those motions, the superior court may not apply its rules in such a way as to work an injustice. *Kinsman v. State*, Sup. Ct. Op. No. 786 (File No. 1523), 496 P.2d 63 (1972).

Dismissal without warning. — The superior court abused its discretion in ordering a dismissal without first warning the party that continued failure to comply with the ordered schedule for briefs would lead to dismissal. *Kinsman v. State*, Sup.

Ct. Op. No. 786 (File No. 1523), 496 P.2d 63 (1972).

Only crime of conviction considered on appeal. — The fair approach in reviewing sentences is to treat the case as presenting only the crime of which the defendant has been convicted. Other offenses, for which guilt has not been established, should not be considered. *Galaktionoff v. State*, Sup. Ct. Op. No. 700 (File No. 1291), 486 P.2d 919 (1971).

The superior court judge's estimation of crimes committed but not charged cannot provide support for the affirmance of the sentence. *Galaktionoff v. State*, Sup. Ct. Op. No. 700 (File No. 1291), 486 P.2d 919 (1971).

Undue consideration given district judge's opportunity to observe defendant. — The superior court judge gave undue influence and consideration to the district judge's opportunity to observe the defendant, and, in so doing, the reviewing judge failed to make the requisite full and independent examination of the record with a view to determining if the district judge was clearly mistaken in imposing the sanction he did. *Galaktionoff v. State*,

Sup. Ct. Op. No. 700 (File No. 1291), 486 P.2d 919 (1971).

Prosecution of appeal does not change offense from petty to serious. — Where a defendant had no constitutional or statutory right to trial by jury when he originally appeared before a magistrate on a charge of violating a municipal ordinance, the fact that he chose to prosecute an appeal does not change the nature of the offense from petty to serious; the possible penalty is not increased; no additional constitutional or statutory right sprang into existence on his appeal to give him a right to trial by jury. *Knudsen v. City of Anchorage*, Sup. Ct. Op. No. 21 (File No. 58), 358 P.2d 376 (1960).

Appeal from joint judgment. — See *Stanley v. Greenberg*, 5 Alaska 178 (1914).

Applied in *Hanrahan v. City of Anchorage*, Sup. Ct. Op. No. 121 (File No. 247), 377 P.2d 381 (1962); *State v. Marathon Oil Co.*, Sup. Ct. Op. No. 1098 (File No. 2199), 628 P.2d 293 (1974); *Halligan v. State*, Sup. Ct. Op. No. 2299 (File No. 5035), 624 P.2d 281 (1981).

Sec. 22.15.250. Disposition of fines. When by law any fees, fines, forfeitures, or penalties are levied and collected by the district judge or magistrate, the proceeds and all other money collected shall be accounted for and transmitted to the administrative director of the judicial system for transfer to the general fund of the state except as provided in AS 22.15.270. (§ 21 ch 184 SLA 1959)

Sec. 22.15.260. Bond. Before entering upon the duties of office each district judge and magistrate shall execute and file with the administrative director a surety bond in form and amount to be determined by rule of the supreme court. The state shall pay for the bond. (§ 22 ch 184 SLA 1959)

Sec. 22.15.270. Retention of fines, etc., by political subdivisions. All fines, penalties, and forfeitures resulting from violations of ordinances of political subdivisions shall be returned to the political subdivision whose ordinance is involved in the manner provided by rule of the supreme court. Fines, penalties, and forfeitures imposed after appeals accrue to the state, unless the appeal is prosecuted by the political subdivision. (§ 23 ch 184 SLA 1959; am § 1 ch 219 SLA 1976)

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

Recommended Legislative Remedies

submitted by: Sue Libenson, Executive Director
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Introduction

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

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

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

Recommendations

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

mandate.

Discussion of Recommendations

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

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

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

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

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

procedure.

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

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

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

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

³ For example, see Washington, RCW 90.48.144.

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

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

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

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

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

§ 1319(c).⁴

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

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

(907) 465-2600

March 1, 1990

POSITION PAPER

Senate Bill 497

The Department strongly supports this legislation. As has been so aptly pointed out in the aftermath of the T/V Exxon Valdez, the key to dealing effectively with a major oil spill is prevention. An active role on the part of the regulatory agencies in preventing a spill is essential. This principle applies as well to preventing other kinds of environmental pollution. Senate Bill 497 would provide some of the necessary tools to streamline the enforcement processes and enable the Department to encourage compliance with existing regulatory safeguards.

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

ACCESS

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

Section 1 of Senate Bill 497 adds to existing authority the right to copy records. Section 2 allows reasonable access to regulated facilities for the purpose of investigating actual or suspected pollution violations without the consent of the owner. The proposed changes in this bill should significantly improve the Department's ability to investigate violations.

ADMINISTRATIVE PENALTIES

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

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

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

COMPLIANCE ORDERS

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

Section 5 of Senate Bill 497 would allow compliance orders to be effective immediately, so that pollution will stop and clean up will commence. This process would prevent delays from being introduced when the goal is to promptly eliminate risks to the public health and environment.

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

ENVIRONMENTAL AUDITS

Section 6 of Senate Bill 497 would allow the Department, as part of an ongoing enforcement action, to require an environmental audit to be performed by an independent contractor selected by the person required to conduct the audit. The Department retains authority to approve the selection of the contractor.

Senate Bill 497
Page Three

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

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

Report of the Alaska Oil Spill Commission
Executive Summary

SPILL

The Wreck of the Exxon Valdez
Implications for Safe Marine Transportation

January 1990

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

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

**Recommendation 13
Enhanced regulatory
strength**

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

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

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

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

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

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

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

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

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

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

**Recommendation 14
Strengthened state
inspections**

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

Jerry Aspland, President, ARCO Marine, Inc.

Alaska Oil Spill Commission hearing, 9/1/89

Alaska State Legislature

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Legislative Research Agency



February 6, 1990

MEMORANDUM

TO: Representative Mike Davis

ATTN: Barnaby Dow

FROM: Leola Weimer *LW*
Legislative Analyst

RE: Administrative Penalties
Research Request 90.156

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

Summary

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

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

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

Administrative Penalty Authority

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

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

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

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

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

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

Department of Environmental Conservation (DEC)

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

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

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

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

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

Other States

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

State of Washington

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

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

State of California

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

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

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

State of Oregon

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

Representative Davis
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Page 5

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

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

New Federal Requirement

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

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

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

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

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

Attachments

ATTACHMENT A

Alaska Statute 44.62.330
Article 8. Administrative Adjudication

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

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

Article 8. Administrative Adjudication.

Section	Section
500 Application of AS 44.62.330 — 44.62.630	600 Amendment of accusation after submission
340 Delegation of power by agencies	600 Decision in a contested case
346 Appointment of hearing officers	610 Form and effect of decision
346 Accusation	620 Effective date of decision
370 Statement of issues	630 Default
340 Service of accusation	640 Reconsideration
390 Notice of defense	650 Petition for reinstatement or reduction of penalty
400 Amended or supplemental accusations	660 Judicial review
410 Time and place of hearing	670 Scope of review
430 Form of notice of hearing	680 Continuances
430 Subpoenas	690 Contempt
440 Depositions	600 Voting procedure
450 Hearings	610 Charge
480 Evidence rules	620 Power to administer oaths
470 Evidence by affidavit	630 Impartiality
480 Official notice	

NOTES TO DECISIONS

Applied in *Schnabel v. State*, 663 P.2d 980 (Alaska Ct. App. 1983)

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

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

- (4) State Board of Registration for Architects, Engineers and Land Surveyors;
- (5) [Repealed, § 13 ch 218 SLA 1976.]
- (6) Board of Examiners in Optometry;
- (7) [Repealed, § 6 ch 169 SLA 1980.]
- (8) State Medical Board;
- (9) Division of Lands under Alaska Land Act where applicable;
- (10) Board of Nursing;
- (11) Board of Pharmacy;
- (12) Board of Public Accountancy;
- (13) Department of Labor as to functions relating to employment security only as provided in (c) of this section;
- (14) Real Estate Commission;
- (15) Alaska Workers' Compensation Board, where procedures are not otherwise expressly provided by the Alaska Workers' Compensation Act;
- (16) Department of Transportation and Public Facilities, as to functions relating to aeronautics and communications;
- (17) [Repealed, § 12 ch 131 SLA 1980.]
- (18) [Repealed, § 49 ch 94 SLA 1980.]
- (19) [Repealed, § 64 ch 169 SLA 1978.]
- (20) [Repealed, § 16 ch 82 SLA 1982.]
- (21) [Repealed, § 64 ch 169 SLA 1978.]
- (22) [Repealed, § 11 ch 181 SLA 1976.]
- (23) Department of Public Safety, as to suspension or revocation of a security guard's license under AS 18.65.400 — 18.65.490;
- (24) Department of Health and Social Services, under AS 47.35, relating to boarding and foster homes for children;
- (25) [Repealed, § 60 ch 98 SLA 1966.]
- (26) [Repealed, § 4 ch 120 SLA 1971.]
- (27) Department of Health and Social Services and Department of Environmental Conservation under AS 17.20 (Alaska Food, Drug, and Cosmetic Act), and Department of Commerce and Economic Development in connection with the licensing of embalmers and funeral directors under AS 08.42;
- (28) Department of Health and Social Services and the Hospital Advisory Council, under AS 18.20.010 — 18.20.130;
- (29) [Repealed, § 4 ch 120 SLA 1971.]
- (30) Department of Environmental Conservation, under AS 18.35.010 — 18.35.090, concerning the regulation of tourist and trailer camps, motor courts, and motels;
- (31) [Repealed, § 40 ch 206 SLA 1975.]
- (32) [Repealed, § 4 ch 106 SLA 1970.]
- (33) Board of Marine Pilots;
- (34) Alaska Police Standards Council;
- (35) Big Game Commercial Services Board;

- (36) Board of Dispensing Opticians;
 (37) *(Repealed, § 20 ch 110 SLA 1981)*
 (38) *(Expired pursuant to § 3 ch 128 SLA 1974, am § 7 ch 108 SLA 1975)*
 (39) Alaska Public Offices Commission;
 (40) Board of Fisheries;
 (41) Board of Game;
 (42) the Department of Education and the Professional Teaching Practices Commission with regard to proceedings to revoke or suspend a teacher's certificate under AS 14.20.030 — 14.20.040 and AS 14.20.470(a)(4);
 (43) Alaska Commission on Postsecondary Education under AS 14.48 as to denial of applications and revocation of authorizations and permits;
 (44) Department of Environmental Conservation, except to the extent that AS 44.62.360 — 44.62.400 are inconsistent with the manner in which proceedings are initiated under the provisions of AS 48.03;
 (45) University of Alaska, except to the extent that its inclusion is inconsistent with the provisions of AS 14.40;
 (46) *(Repealed, § 77 ch 14 SLA 1987)*
 (47) Board of Psychologist and Psychological Associate Examiners;
 (48) the Department of Fish and Game as to functions relating to the protection of fish and game under AS 16.05.870;
 (49) Board of Veterinary Examiners;
 (50) Board of Nursing Home Administrators;
 (51) Board of Barber and Hairdressers;
 (52) Department of Natural Resources concerning the Alaska grain reserve program under former AS 03.12;
 (53) Department of Commerce and Economic Development concerning the licensing and regulation of audiologists under AS 08.11;
 (54) Department of Commerce and Economic Development concerning the licensing and regulation of hearing aid dealers under AS 08.55.
- (b) The procedure of an agency not listed in (a) of this section shall be conducted under AS 44.62.330 — 44.62.630 only as to those functions to which AS 44.62.330 — 44.62.630 are made applicable by the statutes relating to that agency.
- (c) Judicial review and scope of judicial review of all final decisions of the commissioner of labor on an appeal relating to employment security shall be in accord with this chapter notwithstanding anything to the contrary in AS 23.20 (Alaska Employment Security Act). All other procedures of the Department of Labor relating to employment security shall be as provided in AS 23.20 and the regulations under AS 23.20.
- (d) Except in a case of reinstatement or reduction of penalty, the provisions of this chapter do not affect statutory provisions concerning

- (1) civil or criminal penalties;
 (2) additional relief by injunction or restraining order;
 (3) penalty provisions relating to suspension, revocation, reinstatement, and other similar matters of licenses, permits, leases, concessions, and other similar matters;
 (4) related matters that in their context do not relate to procedure. (§ 2 (ch 2) ch 143 SLA 1959; am § 14 ch 2 SLA 1964; am § 60 ch 9H SLA 1966; am § 2 ch 120 SLA 1966; am § 1 ch 58 SLA 1967; am § 18 ch 143 SLA 1968; am § 2 ch 83 SLA 1969; am § 2 ch 118 SLA 1969; am §§ 3, 4 ch 108 SLA 1970; am § 6 ch 104 SLA 1971; am § 4 ch 120 SLA 1971; am § 2 ch 178 SLA 1972; am § 6 ch 179 SLA 1972; am § 2 ch 17 SLA 1973; am § 3 ch 45 SLA 1973; am § 2 ch 82 SLA 1973; am § 2 ch 7 FSSLA 1973; am § 6 ch 76 SLA 1974; am § 2 ch 128 SLA 1974; am § 6 ch 9 SLA 1976; am § 26 ch 26 SLA 1975; am §§ 39, 40 ch 208 SLA 1975; am § 4 ch 26 SLA 1976; am § 2 ch 69 SLA 1976; am § 11 ch 181 SLA 1976; am §§ 13, 106 ch 218 SLA 1976; am § 18 ch 220 SLA 1976; am § 9 ch 46 SLA 1977; am § 3 ch 140 SLA 1977; am § 64 ch 169 SLA 1978; am § 10 ch 69 SLA 1979; am § 23 ch 58 SLA 1980; am § 3 ch 84 SLA 1980; am §§ 49, 60 ch 94 SLA 1980; am § 15 ch 130 SLA 1980; am § 12 ch 131 SLA 1980; am § 16 ch 141 SLA 1980; am §§ 4, 5 ch 159 SLA 1980; am § 20 ch 110 SLA 1981; am E.O. No. 61, §§ 38, 39 (1981); am § 16 ch 82 SLA 1982; am § 2 ch 100 SLA 1983; am § 124 ch 6 SLA 1984; am § 11 ch 131 SLA 1986; am § 77 ch 14 SLA 1987; am § 12 ch 37 SLA 1989)

Effect of amendments. — The 1988 amendment added paragraphs (53) and (54) of subsection (a).

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

The 1989 amendment, effective May 12, 1989, substituted "Big Game Commercial Services Board" for "Guide Licensing and Control Board" in paragraph (a)(36).

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

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

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

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

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

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

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

passed by the Administrative Procedure Act, 1963 Op. Atty Gen., No. 18. Not all of this chapter, as it relates to workers' compensation proceedings, has been repealed by implication. For example, the Alaska Workers' Compensation Act is silent as to judicial review and the scope of judicial review. This chapter therefore applies, since there is nothing in the Alaska Workers' Compensation Act which covers the same ground or which is

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

But this section and AS 44.62.450 were superseded with respect to workers' compensation hearings by AS 23.30.115 and 23.30.175 of the Alaska Workers' Compensation Act. 1959 Op. Atty Gen., No. 24.

NOTES TO DECISIONS

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

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

Applicability to workers' compensation proceedings. — The legislature intended to submit upon the effective date of the Administrative Procedure Act, the judicial scope of review as provided therein for the judicial scope of review as provided in the Workers' Compensation Act. Manthey v. Collier, 367 P.2d 844 (Alaska 1962).

The superior court is controlled by the Administrative Procedure Act in proceedings, or in a review of proceedings from the Alaska Workers' Compensation Board. See Manthey v. Collier, 367 P.2d 844 (Alaska 1962). But see Aleutian Homes v. Fischer, 418 P.2d 769 (Alaska 1966).

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

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

But not to termination of grazing leases. — The adjudicatory provisions of the Alaska Administrative Procedure Act do not apply to the termination of grazing leases by the state Division of Lands. McCarey v. Commissioner of Natural Resources, 828 P.2d 1353 (Alaska 1974).

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

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

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

Burden of proof. — While the Alaska Administrative Procedure Act, does not specifically state who has the burden of proof in administrative adjudications, it does provide in AS 44.62.46(k) that "Nothing herein shall be construed to alter the ordinary rules of burden of proof of judicial proceedings in Alaska." The foregoing provision coupled with the fact that under the Administrative Procedure Act a hearing to determine whether a license should be granted, issued or renewed shall be initiated by filing a "statement of issues" which must be served upon the person seeking the issuance or renewal of the license as the respondent (AS 44.62.370, AS 44.62.380), and against which the respondent may defend by filing a notice of defense (AS 44.62.390) compelled the supreme court to the conclusion that the burden of proof on the issue raised by a statement of issues was upon the state.

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

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

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

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

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

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

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

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

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

(b) In a law enacted after April 29, 1959, where the word "agency" alone is used, the power to act may be delegated by the agency, and where the words "agency itself" are used, the power to act may not be delegated unless a statute relating to that agency authorizes the delegation of its power to hear and decide. (§ 101 (c) (2) ch 143 SLA 1959)

NOTER TO DECISIONS

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

prepare a proposed decision and including members of the applicable government agency from voting on the decision if they have not heard the evidence. Alaska Transp. Comm'n v. Gandu, 802 P.2d 402 (Alaska 1979).

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

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

73 C.J.S., Public Administrative Law and Procedure, § 64.

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

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

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

ATTACHMENT B

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

The Oregonian

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THURSDAY, DECEMBER 28, 1989

Hammer away on polluters

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

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

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

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

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

- Write a policy that reflects public expectations. The commission

lic wants polluters punished.

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

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

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

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

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

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

CIVIL PENALTY SCHEDULE MATRICES
 340-12-042

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

(1)

\$10,000 Matrix
 ← Magnitude of Violation

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

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

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

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

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

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

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

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

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

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

(3)

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

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

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

(a) Any violation related to residential open burning;

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

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

CIVIL PENALTY DETERMINATION PROCEDURE

340-12-045

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

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

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

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

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

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

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

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

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

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

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

Alaska State Legislature

Legislative Research Agency



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February 7, 1990

MEMORANDUM

TO: Representative Mike Davis

ATTN: Barnaby Dow

FROM: Leola Weimer *LW*
Legislative Analyst

RE: Administrative Penalties
Research Request 90.156 (Supplemental Information)

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

Summary

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

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

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

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

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Access Without A Warrant

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

Environmental Protection Agency

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

Washington

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

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

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

California

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

Oregon

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

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

Environmental Audits

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

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

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

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

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

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

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

²Ibid., p. 1190.

³Ibid., p. 1210.

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

"Pre-Enforcement Review"

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

Washington

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

California

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

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

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Oregon

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

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

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

Attachment

TABLE 13

CIVIL PENALTIES UNDER HAZARDOUS WASTE LAWS

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

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

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

Table 13 (continued)

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

Table 13 (continued)

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

STATE OF ALASKA

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OFFICE OF THE ATTORNEY GENERAL

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VIA FACSIMILE

February 20, 1990

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

Re: HB 409

Dear Representatives Goll, Gruenberg, and Davis:

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

I. ACCESS AND INSPECTION AUTHORITY

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

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

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

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

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

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

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

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

II. ADMINISTRATIVE PENALTIES.

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