

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
6375 SENATE JUDICIARY

779

Alaska State Legislature

HOUSE OF REPRESENTATIVES



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APR 09 1990

REPRESENTATIVE FRAN ULMER

JAN FAIKS
SENATE OFFICE

M E M O R A N D U M

April 6, 1990

TO: Senator Jan Faiks, Chair
Senate Judiciary Committee

FROM: Rep. Fran Ulmer

RE: Offender treatment

Last week the House Judiciary Committee heard a special presentation from Mr. Rob Freeman-Longo, a nationally recognized professional in the field of offender treatment programs, who is on contract with the Alaska Department of Corrections. He made several points during his testimony which I would like to bring to your attention in connection with HB 366, relating to offender treatment.

Mr. Freeman-Longo noted that many states are turning to stricter penalties for sexual offenses and that the number of sex offenders in jail is rising as a result. He stated unequivocally that sex offenders are dangerous if untreated. The recidivism rate for untreated sex offenders is about 80%. In light of the probability that an untreated sex offender will reoffend, one must consider that the average rapist has 10-15 victims for each conviction; a pedophile has 20-30 victims for every conviction.

Most importantly, Mr. Freeman-Longo stated that most sex offenders need to be incarcerated in order to receive the intensive treatment which is available from the state. The sex offender treatment program offered by the state requires 5 hours of treatment per day, 25 hours per week. This is far more than is offered in any out-patient setting. Mr. Freeman-Longo noted that this type of intensive, in-patient treatment is the only program model which consistently gets good results. The recidivism rate for offenders who have participated in Mr. Freeman-Longo's intensive treatment program is approximately 14%.

District 4B — Juneau

P.O. Box V • Juneau, Alaska 99811-3100 • (907) 465-4947

Senator Faiks
April 6, 1990
Page 2

HB 366 provides an incentive for offenders to participate in treatment programs required by the court because it authorizes the Parole Board to revoke parole if treatment is not completed. The effect of this provision is a potential increase of an offender's sentence by up to one-third. In his testimony, Mr. Freeman-Longo strongly supported the concept that offenders should participate in treatment programs and he encouraged the state to provide incentives such as the one included in HB 366.

I urge you to schedule a hearing for HB 366 at the earliest possible date. Without the authorization to mandate treatment which is part of HB 366, Alaska will be merely warehousing offenders rather than rehabilitating them.

STATE OF ALASKA

PUBLIC DEFENDER AGENCY

STEVE COWPER, GOVERNOR

P.O. BOX 203
NOME, ALASKA 99762
PHONE: (907) 443-2281

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APR 09 1990

JAN FAIKS
SENATE OFFICE

REF: HB366

Dear Senator Faiks:

On March 29, HB366 was assigned to the Senate Judiciary Committee, having passed the House on March 27. I realize that a bill which ostensibly promotes "the treatment and rehabilitation of a defendant convicted of an offense" is directed toward a commendable goal. I have reviewed the bill, and I ask that you and the Judiciary Committee carefully consider the underlying premise and policy, as well as the practical impact of the bill. I ask that the bill not be passed out of committee.

A. Court Ordered Treatment Program While Incarcerated.

The goal of those sections of the bill which amend Titles 12 and 33 is to encourage more inmates to participate in available rehabilitation programs by threatening them with longer jail terms. The unstated and unproven premise is that rehabilitation programs can and actually do change behavior in most persons. Because of cultural values, most Alaskan Natives perform poorly in treatment programs featuring modern confrontation theories. The practical effect will be that a disproportionate number of Alaska Natives will serve prison terms of over twice the length of non-native inmates because of probation and parole revocations.

The Medical Model that requires a person to be released from "treatment" only when that person has been "cured" should not be applied to Alaska's Justice System. A person who receives a sentence which is appropriate for his offense and background should be able to "do his time" without being required to "participate in or comply with" questionable treatment programs. Until the State is prepared to guarantee the efficacy of the treatment program, an inmate should not be required to participate in the program under threat of an increased sentence. The bill violates the well-established rule that persons convicted of similar offenses should receive similar sentences. The bill will reintroduce racial and cultural disparity in sentences.

B. Alcohol Treatment Program After DWI

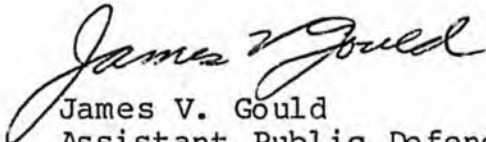
Those sections of the bill which amend Title 28 by delegating the court's sentencing authority in DWI cases to an agency will result in inappropriate, harsh requirements being imposed upon Alaska Natives and rural residents. In many instances there is only one agency in a region which is authorized to make referrals, and it is frequently the same agency which is authorized to provide the purported treatment. In some rural areas, there are no treatment programs being made available in the villages. The practical effect will be that Alaska Natives and rural residents will be required to either enter an inpatient program or move to Anchorage, Fairbanks, or Juneau where a full range of services are available. The resulting unnecessary disruption in family and community life is unacceptable.

C. Fiscal Responsibility

If this bill becomes law, the population of the already overcrowded jails will increase, for the bill provides only for longer sentences, not for shorter. The sentencing hearings will become longer and more expensive, for both the prosecution and the defense will frequently present experts to address the issue of whether the court should order the defendant to participate in treatment while incarcerated. Since experts are not readily available in rural Alaska, any difficulty in providing expert witnesses will fall disproportionately upon Alaska Natives. This bill will substantially increase the cost of Alaska's Justice System.

I ask that you carefully consider the impact of HB366, not merely its goal. I am willing to testify concerning this bill.

Sincerely,



James V. Gould

James V. Gould
Assistant Public Defender

JVG/no

cc: All Senators

Alaska State Legislature

HOUSE OF REPRESENTATIVES



REPRESENTATIVE FRAN ULMER

MEMORANDUM

April 18, 1990

TO: Senator Jan Faiks, Chair
Senate Judiciary Committee

FROM: Rep. Fran Ulmer

RE: CSHB 366, relating to offender treatment

You have received a letter from Assistant Public Defender James Gould raising objections to CSHB 366, relating to offender treatment. Mr. Gould has substantially misstated the facts regarding offender treatment and I would like to offer these corrections to his observations.

ISSUE: Mr. Gould states "The unstated and unproven premise is that rehabilitation programs can and actually do change behavior in most persons." "Until the State is prepared to guarantee the efficacy of the treatment program, an inmate should not be required to participate in the program under threat of an increased sentence."

RESPONSE: A recent presentation to the House Judiciary Committee by nationally recognized offender treatment expert Mr. Rob Freeman-Longo (summarized in my memorandum of 4/6/90 to Sen. Faiks) dramatically substantiated the premise that treatment works. According to Mr. Freeman-Longo, the recidivism rate for untreated sex offenders is approximately 80%; after completing treatment, the recidivism rate is generally between 3%-25%. The experience of Alaska as well as other states which have embarked on intensive treatment programs demonstrates that rehabilitation is the most effective long-term measure for public protection and cost containment in the criminal justice system. Unfortunately, rehabilitation is a painful psychological process which has resulted in a 60% drop out rate. Mr. Freeman-Longo strongly advocated on behalf of incentives to participate in treatment such as the incentive offered in CSHB 366.

District 4B — Juneau

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Senator Jan Faiks
April 18, 1990
Page 2

ISSUE: Mr. Gould states "Because of cultural values, most Alaskan Natives perform poorly in treatment programs featuring modern confrontation theories.."

ANSWER: Mr. Gould is correct. However, the Department of Corrections currently has a specialist on contract to review treatment programs for this very problem and plans to adjust treatment modalities to accommodate cultural differences.

ISSUE: Mr. Gould states "Those sections of the bill which amend Title 28 by delegating the court's sentencing authority in DWI cases to an agency will result in inappropriate, harsh requirements being imposed upon Alaska Natives and rural residents. Alaska Natives and rural residents will be required to either enter an inpatient program or move to Anchorage, Fairbanks, or Juneau where a full range of services are available."

RESPONSE: Mr. Gould is incorrect; CSHB 366 does not delegate any of the court's sentencing authority to any other agency. This bill continues the court's prior practice of referring an offender to the appropriate screening agency after conviction to determine the kind of treatment an offender needs. This practice may result in the requirement for in-patient treatment in lieu of jail, a substitution which may better meet the needs of the offender as well as save the state money in its corrections system. Further, if an offender disagrees with the treatment recommendation made by the referral agency, the offender may contest that recommendation in court before sentence is imposed.

Mr. Gould is incorrect when he assumes that Alaska Natives and rural residents will be required to enter in-patient treatment or move from their communities. There is nothing in the bill which suggests that in-patient treatment will be favored over out-patient treatment. In fact, the thrust of the bill is to ensure that referrals for treatment are based on the specific needs of the individual and receive his or her agreement as well. In addition, the bill includes a provision which allows an offender to object to recommended treatment and to request alternate treatment. Virtually every community in Alaska offers out-patient treatment; this will undoubtedly be the preferred form of treatment because it is substantially lower in cost. However, if the alcohol addiction is so severe that a reoccurrence of the criminal behavior appears to be a substantial likelihood without in-patient treatment, then it is in both the state's and the individual's best interest to refer the offender for that type of treatment.

ISSUE: Mr. Gould states "If this bill becomes law . . . The sentencing hearings will become longer and more expensive, for both the prosecution and the defense will frequently present experts to address the issue of whether the court should order the defendant to participate in treatment while incarcerated. . . . This bill will substantially increase the cost of Alaska's Justice System."

Senator Jan Falks
April 18, 1990
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RESPONSE: Mr. Gould is incorrect; CSHB 366 carries a \$0 fiscal note. Since this bill simply authorizes the continuation of past practice, there will be no change to the length or the cost of sentencing hearings. In addition, one of the underlying purposes of this bill is to contain costs, in the long term, of Alaska's correctional system. Effective rehabilitation will reduce the recidivism rate for a wide range of offenses and thereby reduce future demands on, and costs of, the criminal justice system.

In closing, I would like the Senate Judiciary Committee to remember that CSHB 366 primarily allows the courts to continue their long-established practice of referring offenders for treatment; the bill's effect is to maintain the status quo. In his letter, Mr. Gould objects to what has been determined to be the most effective and humane way society has devised for dealing with violent, costly criminal behavior. Although I am sympathetic to Mr. Gould's concerns regarding the potential racially disparate effects of the bill, those concerns are not created by the bill. As Mr. Freeman-Longo testified before the House Judiciary Committee, the disproportionate number of Native offenders in jail should be addressed through education and prevention efforts, efforts which are clearly outside the scope of CSHB 366.

cc: Senate Judiciary Members
Mr. John Salemi, Public Defender
Mr. James V. Gould, Assistant Public Defender

THE
ALASKA CENTER
FOR RESPONSIBLE ALCOHOL CONTROL

Education
Outreach
Prevention
Training
Treatment

3098 Airport Way
Fairbanks, Alaska 99709
(907) 474-0004

A Program
Operated by
KILA, Inc.

March 30, 1990

To: Judiciary Committee
State of Alaska

From: Barbara J. Staley
Program Manager *BJS*

Re: House Bill 366

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APR 03 1990

JAN FAIKS
SENATE OFFICE

I was greatly distressed to read in the Tuesday, March 27, 1990 issue of The Fairbanks Daily News Miner that House Bill 366 passed the house without one dissenting vote. It is true there is no clear legal authority for judges to order certain offenders into "treatment." Did anyone in the House question the reason that this is so?

Were I in your position, before I placed the burden of mandating "treatment" on the judiciary, I would certainly ask myself some questions.

1. What is "treatment?"
2. What kinds of treatment do we have available to our heterogeneous Alaskan population?
3. Do current screening, evaluation and placement procedures assure that clients will be mandated into appropriate treatment settings?
4. Does "treatment" work?
5. How much will it cost?
6. Who will bear the cost for such coerced treatments and who will bear the liability for unsuccessful or harmful "treatment?"

I have just received an advance copy of the Institute Of Medicine's (IOM) findings commissioned by the National Institute On Alcoholism and Alcohol Abuse (NIAAA), Broadening The Base Of Treatment For Alcohol. The findings will not be available to the general public until April 15th. (It has already been submitted to our U.S. senators and congressman.) I would urge that you delay final action on this bill until you have obtained copies.

The greater preponderance of criminal actions in this state have as a component the use, misuse, or abuse of alcohol. By far the majority of arrests are for DWI or DUI. Any law that you enact is going to effect a large segment of the population. On the surface that might appear to enhance the desirability for passage for such a bill. However, you must look beyond that to the methodologies currently in place to classify offenders. There is no system in place within the State of Alaska to differentiate and match offenders to treatments most appropriate for them. In fact, there is only one treatment modality approved by the DOADA.

It is easy to pass laws in response to what appears on the surface to be logical assumptions. The question you must ask yourself is, "Will passing this kind of law achieve what we are trying to achieve?" I am assuming that the outcome goals would be threefold: 1) Deterring reckless and criminal acts in certain populations; 2) Rehabilitation of offenders, and 3) Reduce recidivism. If these are the goals - then I would urge you to go one step further to assess the means by which these goals may be brought about. What system will you and the judiciary be relying on to achieve these three goals, and how will successful (unsuccessful) outcomes be measured?

You may not assume that the State Division of Alcohol and Drug Abuse has the answers. DOADA is still operating under 1973 guidelines for accrediting substance abuse programs, and working with 1970 methodologies for implementing treatment. The DOADA has just this month recognized the need to differentiate persons with psychopathologies from "gamma alcoholics." How can you place your faith in a system which refuses to recognize what others have long known; that approximately 35% of cases diagnosed and treated as "gamma alcoholics" are in fact in need of psychiatric services and, in some cases, medication? A large percentage of the remainder is usually classified "problem" or "presumptive problem" drinkers regardless of the severity of their involvement with legal or illegal substances.

I am enclosing the summary of the findings from IOM. It is desired that you delay your decision on HB 366 until you can obtain the complete study so that any decisions you make may be based in knowledge and not on faulty assumptions.

Secondly, the people of the State of Alaska deserve to have a voice in this matter. They deserve the facts and the opportunity to weigh the ramifications of this particular bill. Public hearings should be held. An effort should be made to broadly publish the latest findings from the IOM and to inform the general public, and more importantly, to consult the judges who will, as an end result of your actions, be responsible for mandating a particular "treatment" (antidote, cure, panacea, prescription, remedy, therapy, serum) modality for offenders.

This program's goals are, hopefully, the same as yours; the reduction of criminal acts committed while under the influence of legal or illegal substances. The state system we have in place, although not written into law, mandates evaluation and treatment *from a State Approved Program* for offenders already. It has been in use since the early eighties with no perceptible impact either in decreased recidivism or prevention.

Please think before you act.

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: Health & Social Services
 Title: "An Act relating to the treatment and rehabilitation of a defendant convicted of an offense." BRU: Alcohol & Drug Abuse Services
 Sponsor: Ulmer Components: ASAP
 Requestor: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

CAPITAL	-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						
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)

FY 90 Fiscal Impact is "0".

Prepared by: Matthew C. Felix, Coordinator *Matthew Felix* Phone: 586-6201
 Division: Office of Alcoholism & Drug Abuse Date: 1/23/90

Approved by Commissioner: *Myla M. Munn* Date: 1/23/90
 Agency: Health & Social Services

Distribution (by preparer):

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

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Treatment & Rehabilitation of offenders
Sponsor: Rep. Ulmer, et al
Requestor: House 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 will 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: 1/22/90
Date: _____
Page 1 of 1

1/22/90

BGM

AS

FISCAL NOTE

REQUEST:

Revision Date: _____
 Title: "An Act relating to treatment and rehabilitation of a defendant."
 Sponsor: Representative Ulmer
 Requestor: _____

Agency Affected: Department of Corrections
 BRU: _____
 Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

CAPITAL	-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						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

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

ANALYSIS : (Attach a separate page if necessary)

Susan E. Knighton

Prepared by: Susan E. Knighton, Director Phone: 465-3376
 Division: Administrative Services Date: 01/24/90

Approved by Commissioner: S. H. W. Gregory-Barnett Date: 01/24/90
 Agency: Department of Corrections

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

1990 LEGISLATIVE SESSION

FISCAL NOTE

REQUEST:

Revision Date:	Agency Affected:	Alaska Court System
Title: <u>An Act relating to the treatment and and rehabilitation of a defendant</u>	BRU:	<u>Trial Courts</u>
Sponsor: <u>Ulmer</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						
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REVENUE						
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FUNDING: (Thousands of Dollars)

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

POSITIONS:

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact. See attached analysis.

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

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

Phone: 284-8228
 Date: 01/22/90

Date: 01/22/90

Distribution (by preparer):
 Legislative Finance
 Legislative Sponsor

Alaska Court System

HB 366

This proposed legislation may impact the Alaska Court System if a significant number of review hearings are held under sections 4 and 7. Because that number cannot be determined with any accuracy at this time, no present fiscal impact is indicated. If the court finds that it is holding an appreciable number of review hearings, a supplemental appropriation will be requested.

BILL NO: HB 366

DATE: January 22, 1990

TITLE: Treatment and rehabilitation of offenders CONTACT:

Barbara Miklos
465-4356

DEPARTMENT OF PUBLIC SAFETY

The Council on Domestic Violence and Sexual Assault supports HB 366, "An Act relating to the treatment and rehabilitation of a defendant convicted of an offense". Among other things, this legislation enables the Court to order the defendant, while incarcerated, to participate in or successfully complete an inpatient rehabilitation program; to participate in, or successively complete, an inpatient rehabilitation program while on probation, which could be revoked if the court order is violated; to satisfy screening, evaluation and other requirements to make referrals for rehabilitative treatment or to revoke parole if the parolee violates an order of the court to participate in or successfully complete a rehabilitation program.

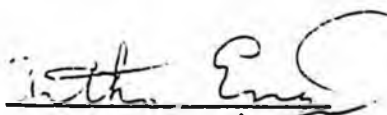
Under current law, courts probably do not have the power to order inpatient treatment as a condition of probation or parole. Recent court cases have limited the courts authority to make treatment and rehabilitation part of a defendant's sentence. We believe it is important that the courts have the authority to do this.

It has been shown that many domestic violence offenders can learn new ways to deal with their anger if given information and treatment. Prison batterers programs have helped reduce aggression in many prisoners. Community batterers' programs have proved that court-mandated treatment programs can affect positive change.

Although the efficacy of sex offender programs is often controversial, it stands to reason that jail time alone will do nothing to change a sex offender's behavior. Other interventions must occur.

Since so much crime in Alaska is associated with alcohol, alcohol treatment is crucial. Alcohol treatment often must be provided before issues of violence can be addressed.

In order to protect victims, we must do all we can to stop crimes. Therefore, courts should have all the tools necessary to help offenders stop their violent or other crimes.


Arthur English
Commissioner

Sec. 12.55.005. Declaration of purpose.

NOTES TO DECISIONS

Chaney criteria incorporated, etc.

In accord with original. See *Schnecker v. State*, 739 P.2d 1310 (Alaska Ct. App. 1987).

Sentencing of "worst offender." — A "worst offender" designation, standing alone, permits imposition of the maximum term for the single most serious offense. The designation does not, however, automatically permit consecutive sentences exceeding the maximum for the single most serious crime. In order to impose such a sentence, the court must actually find, as a matter of fact, that the defendant will continue to pose a danger to the community during the extended term and that his continued isolation is actually necessary. Such a finding does not necessarily justify pyramiding consecutive maximum sentences; rather, such a finding permits only an incrementally more severe sentence based on the actual need for protection of the public under the totality of the circumstances of the prosecution's case. *Hancock v. State*, 741 P.2d 1210 (Alaska Ct. App. 1987).

Sentencing for extended term for deterrence and rehabilitation. — In order to make the determination that a defendant requires a period in excess of 15 years for deterrence and rehabilitation, it

is imperative that the trial court compare his background, experience, and offenses with those of others sentenced to extended terms, disregarding eligibility for parole. *Hancock v. State*, 741 P.2d 1210 (Alaska Ct. App. 1987).

Emphasis on isolation in sentencing. — Based on the trial judge's discretion under the Chaney criteria and the defendant's status as a repeat offender and a worst offender in his class, the original sentence of seven years' imprisonment, with five and one-half years suspended, for 14 fish and game violations was reinstated; the sentencing judge specifically emphasized the Chaney factor of isolation based on the defendant's extensive record of flagrant fish and game violations. *State v. Graybill*, 695 P.2d 725 (Alaska 1985).

Applied in *State v. Andrews*, 797 P.2d 900 (Alaska Ct. App. 1985).

Quoted in *Hancock v. State*, 706 P.2d 1164 (Alaska Ct. App. 1985); *Aveoganna v. State*, 757 P.2d 75 (Alaska Ct. App. 1988).

Cited in *Crouse v. State*, 736 P.2d 783 (Alaska Ct. App. 1987); *Kirby v. State*, 748 P.2d 757 (Alaska Ct. App. 1987); *State v. Ambrose*, 758 P.2d 639 (Alaska Ct. App. 1988).

Sec. 12.55.015. Authorized sentences. (a) Except as limited by AS 12.55.125 — 12.55.175, the court, in imposing sentence on a defendant convicted of an offense, may singly or in combination

- (1) impose a fine when authorized by law and as provided in AS 12.55.035;
- (2) order the defendant to be placed on probation under conditions specified by the court that may include provision for active supervision;
- (3) impose a definite term of periodic imprisonment;
- (4) impose a definite term of continuous imprisonment;
- (5) order the defendant to make restitution under AS 12.55.045;
- (6) order the defendant to carry out a continuous or periodic program of community work under AS 12.55.055;
- (7) suspend execution of all or a portion of the sentence imposed under AS 12.55.080;
- (8) suspend imposition of sentence under AS 12.55.085;
- (9) order the forfeiture to the commissioner of public safety of a deadly weapon that was in the actual possession of or used by the

defendant during the commission of an offense described in AS 11.41, AS 11.46, AS 11.56, or AS 11.61.

(b) The court, in exercising sentencing discretion as provided in this chapter, shall impose a sentence involving imprisonment when

(1) the defendant deserves to be imprisoned, considering the seriousness of the present offense and the defendant's prior criminal history, and imprisonment is equitable considering sentences imposed for other offenses and other defendants under similar circumstances;

(2) imprisonment is necessary to protect the public from further harm by the defendant; or

(3) sentences of lesser severity have been repeatedly imposed for substantially similar offenses in the past and have proven ineffective in deterring the defendant from further criminal conduct.

(c) In addition to the penalties authorized by this section, the court may invoke any authority conferred by law to order a forfeiture of property, suspend or revoke a license, remove a person from office, or impose any other civil penalty.

(d) A court, in imposing sentence on a defendant convicted of misconduct involving a controlled substance in the first, second, third, fourth, fifth, or sixth degree, may, in addition to any mandatory minimum sentence required by law, order the defendant to participate in a program for treatment of drug abusers if the court determines that the defendant is a drug abuser. Participation in such a program may be imposed as a condition of probation, a condition of suspended execution of sentence, or a condition of suspended imposition of sentence. Nothing in this subsection shall be construed to reduce any mandatory minimum sentence.

(e) If the defendant is ordered to serve a definite term of imprisonment, the court may recommend that the defendant serve all or part of the term in a correctional restitution center.

(f) In this section "deadly weapon" has the meaning given in AS 11.81.900. (§ 12 ch 166 SLA 1978; am § 37 ch 102 SLA 1980; am § 3 ch 45 SLA 1982; am § 3 ch 72 SLA 1985; am §§ 2, 3 ch 169 SLA 1988)

Effect of amendments. — The 1985 amendment added subsection (e).

The 1988 amendment, in subsection (a), substituted "that" for "which" in para-

graph (2) and "under" for "as provided in" in paragraphs (5) — (8), and added paragraph (9); and added subsection (f).

NOTES TO DECISIONS

Trial court exceeded scope of sentencing powers by ordering defendant to attend a sexual offender rehabilitation program while incarcerated, where the order was set out as a separate provision of the written judgment and not as a condition of probation, and any failure to abide by the order could not have served as a

predicate for a finding of criminal contempt. *Benboe v. State*, 738 P.2d 356 (Alaska Ct. App. 1987).

Quoted in *Hancock v. State*, 706 P.2d 1164 (Alaska Ct. App. 1985).

Cited in *Schnecker v. State*, 739 P.2d 1310 (Alaska Ct. App. 1987); *State v.*

HB

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STATE OF ALASKA

HOUSE OF REPRESENTATIVES

Box V, Juneau, Alaska 99811

(907) 465-2487 • 465-2498

REPRESENTATIVE CLIFF DAVIDSON • DISTRICT 27 • Box 746, Kodiak, Alaska 99615 • (907) 486-8250

TO: Senator Jan Faiks, Chair
Senate Judiciary Committee

FROM: Representative Cliff Davidson *CD by Jan*

DATE: March 30, 1990

HOUSE BILL 394

"An act relating to utilization of pollock and prohibiting the waste of pollock taken in a commercial fishery."

Pollock are a relatively small, low value fish that are valuable only because of their great abundance. Traditionally, pollock have been caught throughout the year by large trawler vessels. Pollock have provided a stable and reliable year round source of product to the onshore processing industry.

During the spring of each year pollock gather in huge aggregations to spawn. At that time the roe (or eggs) of the female pollock are an extremely valuable and desirable product. Last year in March and April of 1989, the large factory trawler fleet targeted the enormous pollock aggregations spawning in Shelikof Strait between Kodiak and the Alaska Peninsula. These huge vessels caught vast quantities of spawning pollock, throwing overboard everything but roe from the females.

As a result of this enormous waste, and the resulting publicity, the North Pacific Fishery Management Council proposed and passed an emergency regulation prohibiting the stripping of pollock roe in federal waters. That emergency regulation was signed by the Secretary of Commerce but is currently being litigated by an Seattle-based roe stripping company.

The roe stripping ban adopted in HB 394 is intended to parallel action by the federal government. Before the federal ban was implemented last month, the offshore factory/processors were able to begin stripping pollock roe once again. HB 394 is intended to ban the odious practice of roe stripping in state waters and send a message to the Secretary of Commerce that Alaskans do not support roe stripping.

HB 394 Analysis

Section 1.

The legislative findings establishing the justification for banning roe stripping in pollock.

Section 2. Adds new sections to article 3.

AS 16.10.164

Establishes a state policy that roe stripping and not using the eatable flesh is wasteful, and determines that:

- 1) roe stripping should be eliminated to the fullest extent possible and;
- 2) commercially taken pollock should be utilized for human consumption to the fullest extent practicable.

AS 16.10.165

- a) Establishes that a person may not waste pollock
- b) Delegates to the Board of Fish the ability to make regulations under this act.
- c) Makes waste of pollock a class A misdemeanor.
- d) Definitions of terms used in this section

Section 3.

Adds an immediate effective date.

*Note: The language in AS.16.165 is very similar to the language used in the statute prohibiting the roe stripping of herring.



**STATE OF ALASKA
OFFICE OF THE GOVERNOR
BILL ANALYSIS**

DEPARTMENT Fish and Game	DIVISION Commercial Fisheries	BILL NUMBER HB 394	SPONSOR Davidson
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SHORT TITLE OF BILL
Utilization of Pollock

DEPARTMENT POSITION
Support

PREPARED BY Earl Krygier	DATE 01/10/90	COMMISSIONER'S SIGNATURE <i>[Signature]</i>	DATE 1/11/90
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SUMMARY

OTHER AGENCIES AFFECTED BY BILL Public Safety	CONSTITUENT GROUP(S) AFFECTED BY BILL Commercial fishermen and fish processors
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ORGANIZATIONAL SUPPORT FOR BILL	ORGANIZATIONAL OPPOSITION TO BILL
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FISCAL IMPACT: NONE FISCAL NOTE ATTACHED

BACKGROUND/LEGISLATIVE INTENT
 This bill, in conjunction with federal fisheries management regulations recently passed by the North Pacific Fisheries Management Council (NPFMC), is intended to address the problem of pollock roe stripping which occurred in the Gulf of Alaska during the 1989 season. The pollock fishery is managed with a strict quota. In 1989, large factory trawlers moved into the Kodiak area during the pollock spawning season and quickly consumed all remaining quota by stripping the high value roe and discarding males and the usable flesh of the roe-stripped females. As a result, local fish and shore-based processors were left with a surplus.

ANALYSIS OF BILL/PROGRAM EFFECTS Without access to a haul, a stripping in state waters and at shore-based processing facilities. This action, in conjunction with a similar federal regulation governing federal waters, would eliminate pollock roe stripping in all catching and processing sectors of the industry.

AMENDMENTS PROPOSED

STATE OF ALASKA
990 LEGISLATIVE SESSION

BILL VERSION: HB 394
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Utilization of Pollock

Agency Affected: Fish and Game
BRU: Commercial Fisheries

Sponsor: Davidson
Requestor: Governor

Components: ATI

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

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

GENERAL FUND						
OTHER FUNDS						
TOTAL	0	0	0	0	0	0

EMPLOYMENT:

TIME	0	0	0	0	0	0
TIME	0	0	0	0	0	0
PERMANENT	0	0	0	0	0	0

ATTACHMENTS: (Attach a separate page if necessary)

by: Bob Clasby
Commercial Fisheries

Phone: 465-4210
Date: 07/10/90

by Commissioner: [Signature]

Date: 11/1/90

Signature (by preparer):
Director Finance
Executive Sponsor
or
Director of Management and Budget
and Agency(ies)

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pp. 1286 (D.
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Sec. 16.10.125. Use of termination device on shellfish and bot-
tom fish pot required. The Board of Fisheries shall, by regulation,
prescribe a termination device or devices for all shellfish and bottom
fish pots. In this section "termination device" means a biodegradable
seam or panel or other device which renders the pot incapable of
holding shellfish or bottom fish for more than six months when it is
continuously immersed in sea water. (§ 3 ch 103 SLA 1977)

Sec. 16.10.130. Penalties for violation of AS 16.10.120 —
16.10.125. A person who violates AS 16.10.120 — 16.10.125 is guilty
of a misdemeanor, and upon conviction is punishable by imprisonment
for not more than six months, or by a fine of not more than \$1,000, or
by both. (§ 2 ch 26 SLA 1959; am § 4 ch 103 SLA 1977)

Collateral references. — Entrapment
with respect to violation of fishing laws,
75 ALR2d 709.

Article 3. Herring Spawn.

Section	Section
172. Legislative policy on utilization of herring	173. Utilization of commercially taken herring
	175. Removal of herring from state

Secs. 16.10.140 — 16.10.170. Taking of herring spawn; exceptions; certain restrictive covenants; penalties. [Repealed, § 2 ch 91 SLA 1970.]

Sec. 16.10.172. Legislative policy on utilization of herring. The legislature finds the following: (1) extensive and valuable herring populations are available for harvest in waters subject to the jurisdiction of the state; (2) commercial markets are available for herring processed in several forms; (3) one processing technique presently employed involves deliberately permitting decomposition of the herring carcass to allow for removal and subsequent sale of the roe product, with the consequence that the flesh is unusable and discarded. The legislature declares that the process referred to in (3) of this section is wasteful and does not constitute utilization of this resource for the maximum benefit of the people. Therefore, it is the policy of the legislature that this process should be eliminated to the fullest extent possible. (§ 1 ch 9 SLA 1977)

Sec. 16.10.173. Utilization of commercially taken herring.

(a) A person may not waste or cause to be wasted any commercially taken herring. In this subsection, "person" has the meaning given in AS 01.10.060 and also includes a joint venture.

(b) In this section, "waste" means the failure to use the flesh of commercially taken herring for reduction to meal, production of fish food, human consumption, food for domestic animals, scientific or educational purposes, or round herring bait. Normal, inadvertent loss of flesh associated with the uses described in this subsection which cannot be prevented by practical means does not constitute waste. The commissioner may authorize other uses of commercially taken herring consistent with the intent of this section and AS 16.10.172 upon receipt of a request accompanied by a detailed justification.

(c) In this section, "flesh" means all muscular body tissue surrounding the bony skeleton of the herring.

(d) The Board of Fisheries may adopt regulations under the Administrative Procedure Act (AS 44.62) it considers necessary for implementation of this section. The board may delegate its authority under this section to the commissioner.

(e) The provisions of this section do not apply to herring taken commercially in the Bering Sea (including appurtenant bays, sounds, estuaries, and water of the state) north of 56° North Latitude, until January 1, 1979.

(f) A person who violates this section is guilty of a class A misdemeanor. (§ 1 ch 9 SLA 1977; am § 26 ch 132 SLA 1984)

Effect of amendments. — The 1984 amendment added subsection (f).

Editor's notes. — Section 1, ch. 23, SLA 1985 provides: "HERRING STRIPPING. (a) Notwithstanding AS 16.10.173, a person may strip commercially taken herring for the purpose of removing and selling the roe product if prior authorization is obtained from the commissioner of fish and game and the herring is taken from and the carcass disposal process occurs in the following fisheries of the Bering Sea during the following periods:

"(1) the Togiak fishery — south of the latitude of Cape Newenham and north of the latitude of Cape Menshikoff, until July 1, 1986;

"(2) the Security Cove/Goodnews Bay fishery — north of the latitude of Cape Newenham and south of the latitude of Dall Point, until July 1, 1987;

"(3) the Cape Romanzoff fishery — north of the latitude of Dall Point and south of the latitude of Black River, until July 1, 1987;

"(4) the Norton Sound fishery — north

of the latitude of Black River and south of the latitude of Cape Prince of Wales, until July 1, 1988;

"(5) the Kotzebue fishery — north of the latitude of Cape Prince of Wales and south of the latitude of Cape Krusenstern, until July 1, 1988.

"(b) The commissioner may authorize a person to dispose of herring carcasses under (a) of this section only if the person submits to the commissioner an operational plan demonstrating the intent to comply with the provisions of AS 16.10.172 and AS 16.10.173 by the dates specified under (a) of this section for the fishery in which the herring carcasses are to be disposed.

"(c) The Board of Fisheries shall adopt regulations in accordance with the Administrative Procedure Act (AS 44.62) regarding disposal of herring carcasses for each administrative area where disposal occurs.

"(d) The provisions of AS 46.03.100 apply to the disposal of herring carcasses under this section."

Sec. 16.10.175. Removal of herring from state. (a) A person may not remove herring from the state before the herring has been frozen or otherwise processed for shipment.

(b) In this section, "processed for shipment" includes, but is not limited to, icing, stripping or salting of the herring; however, it does not include salting of the herring if five percent or more of the body weight of the herring consists of roe. (§ 3 ch 27 SLA 1980)

Article 4. Migratory Fish and Shellfish.

<p>Section 180. Legislative findings 190. Regulations 200. Unlawful taking prohibited 210. Unlawful sale or offer prohibited</p>	<p>Section 220. Penalties for violation of AS 16.10.200 and 16.10.210 230. Exemptions</p>
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Sec. 16.10.180. Legislative findings. The legislature finds and recognizes these facts:

(1) migratory fish and migratory shellfish are present in commercial quantities inside and outside the territorial waters of the state;

(2) migratory fish and migratory shellfish taken from the waters of the state are indistinguishable, in most cases, from those taken from the adjacent high seas;

(3) substantial quantities of migratory fish and migratory shellfish move inshore and offshore intermittently and at various times during a given year and in so doing often enter and leave territorial waters of the state;

(4) to conserve the migratory fish and migratory shellfish found inside the waters of the state it is necessary to strictly enforce local laws and regulations;

(5) by making certain laws and regulations enacted or adopted for the regulation of the coastal fishery applicable to the adjacent high sea areas, enforcement of these laws and regulations is facilitated;

(6) conservation regulations should not be adopted to impose economic sanctions. (§ 1 ch 121 SLA 1960)

NOTES TO DECISIONS

A state may reasonably extend its jurisdiction to control fish and game resources outside the limited area of its territorial sovereignty, if such an exercise is based on the conservation principles inherent in their migratory characteristics and not based on artificial boundaries or political circumstances. *State v. Bundrant*, Sup. Ct. Op. No. 1232 (File Nos. 2295, 2435, 2444), 546 P.2d 530 (Alaska 1976), rehearing denied, 547 P.2d 838 (Alaska 1976).

Alaska's interest in regulating extrater-

ritorial fishing qualifies as one recognized for a legitimate exercise of police power. There is an established fishery with clear economic impact in the Bering Sea fishery area. The migratory habits of the crab are predictable and fishing outside the three-mile limit depends on growth and development within the limit. If the fishery outside the three-mile limit destroys the resource outside, it will similarly destroy the resource inside the three-mile limit. *State v. Bundrant*, Sup. Ct. Op. No. 1232 (File Nos. 2295, 2435, 2444), 546 P.2d 530

Anchorage Daily

News

VOL XLIV, NO. 83 88 PAGES

ANCHORAGE, ALASKA, FRIDAY, MARCH 24, 198

Fleet dumps thousands

Pollock stripped of roe, then tossed; huge catch prompts

By HAL BERNTON
Daily News reporter

A factory trawler fleet massed off Kodiak this month scooped up more than 37,000 metric tons of pollock; but some of the ships kept only the valuable roe and dumped overboard thousands of tons of edible flesh.

The fishing frenzy of the 17-boat, Seattle-dominated fleet helped trigger Thurs-

day's unexpected shutdown of the major Gulf of Alaska pollock harvest and raise new questions about the ethics of deep-sea seafood.

"When the world is starving, the factory trawlers have decided to discard protein," said John Sevier, superintendent of the Alaska Pacific Seafoods, a Kodiak shore processor that uses the meaty flesh to manufacture

surimi. "It's wanton waste."

The closure order was issued by the National Marine Fisheries Service after determining that the entire year's Gulf harvest quota for pollock had been taken. The order is an economic blow to Kodiak, whose fishermen say their pollock season normally lasts through December and employs hundreds of people to harvest and pro-

cess the fish.

"This is the Seattle-ization of our fisheries," said Dave Harville, an island fisherman who serves shore-based plants with three boats. "They took our fish and shut down their competition. Now, they're going to go on out to the Bering Sea and fish the rest of the year. But we can't move our land."

of tons of fish

closure of Gulf of Alaska fishery

This year was the first time the U.S. factory fleet, which both catches and processes fish, has showed up off Kodiak. They were lured to the Gulf by the pollock roe, which fetches a high price from Japanese consumers. And in about a month's time, the fleet caught and processed about 60 percent of an annual harvest quota that last year went entirely

to shore-based plants.

The roe-stripping tactics of the factory fleet helped speed up the processing, according to Tyson Vogeler, a Kodiak-based North Pacific Fishery Management Council official attempting to monitor the harvest. Many ships reported spectacular catches of 500 to 900 metric

Please see Back Page, FISHERY

THE BACK PAGE

FISHERY: Fleet dumps thousands of tons of pollock after taking roe

tons per day, according to Vogeler.

The only way to handle such daily volumes of fish is to speed up the processing by cutting out the high-value roe, and jettisoning — rather than salvaging — the relatively low-value flesh.

Vogeler said precise data on roe-stripping was impossible to get because the U.S. factory ships — unlike foreign factory ships that used to dominate the fishery — don't have to carry federal observers.

Ted Evans, executive director of the Seattle-based Alaska Factory Trawlers Association, confirmed that at least some of the ships were roe-stripping. He said he didn't know how many.

Evans said he didn't like the waste but pointed out that federal regulations allow the practice. Foreign factory ships that used to fish off Kodiak also jettisoned pollock flesh, he said. And this year, at least one shore-based processor also was wasting pollock meat, he said.

"What degree of waste is acceptable," Evans said. "There are all kinds of philosophical viewpoints on that and we are certainly willing to participate in that debate."

Kodiak industry officials acknowledge that some fish were stripped in town and the carcasses hauled out to sea for dumping. But they say much more fish was wasted on the high seas, and such waste adds insult to the economic injury of the closure.

"There's a gigantic rape of the resource, that's what going on," said Reed Was-

son, president of Kodiak-based Eagle Fisheries.

John Peterson, the chairman of the North Pacific Fishery Management Council, the group that helps regulate the harvest, also questions roe stripping.

"It's just not right in my opinion to waste the fish that way," Peterson said. He would welcome proposals to end the practice, he said.

In the most efficient of factory and shore-based plants, almost all of the fish can be utilized. Flesh is processed into fillets, surimi or other products. And guts, heads, skin, bones and tail are made into fish meal or fertilizer.

Jeff Stephan, manager of the Kodiak-based Alaska Fishermen's Marketing Association, said his group introduced a proposal to force processors to use more of the fish, but the council has not yet seriously considered it.

The arrival of the Seattle factory fleet off Kodiak reflects the final phase of Americanization that has allowed U.S. fishermen, with first claim to the resource, to push almost all foreign ships out of the Alaska bottom fishery.

The fishery is conducted according to federal regulations that offer U.S. shore-based processors no preference over U.S. factory ships.

All must fight for a share of a pre-set annual quota.

Up until this year, U.S. factory ships chose to stay out of the Gulf of Alaska to concentrate on much larger Bering Sea fisheries, where pollock also have been stripped of roe. That allowed shore-based processors in Kodiak to prosper by contracting with small catcher boats to bring the fish onshore for processing.

This year's quota would have been enough to keep the Kodiak plants operating through December, if they processed at the same rate as last year, according to National Marine Fisheries Service statistics.

Instead, unless the council decides to reopen the fishery, they will process a more limited harvest of cod, flat fish, halibut and other species.

To prevent a repeat of 1989, Kodiak fishermen will ask the council to form a special fishing zone in the Gulf, according to Harville. The plan would require boats that choose to fish the

Gulf to remain there the entire year.

"If you want to fish in the Gulf, fine, but you can't then turn around and head for the Bering Sea," Harville said.

Meanwhile, Kodiak fishermen, as well as others in the industry, are pressing for new federal or industry funding to finance a greatly expanded observer program.

Peter Craig, a Kodiak-based state fishery official, said the observer program would help document waste that ranges beyond pollock.

Rock sole, another marketable fish, frequently is stripped of roe and the flesh wasted, Craig said. And many fish are fossed overboard by both factory trawlers and smaller catcher boats because they are too small to fit the processing machinery. The undersized fish are supposed to be reported as part of the catch, but some boats routinely flaunt the law, he said.

"Everybody ... has a waste problem," Craig said.

Fish trashing angers Kodiak

By DANIEL R. SADDLER
Times Writer

*Amc. Times
2/2/89*

An Outside fleet of factory trawlers stripping valuable roe from pollack and discarding edible flesh in the Gulf of Alaska has outraged Kodiak's fishing community and prompted regulators to acknowledge the need to end the practice.

On Thursday, the National Marine Fisheries service ordered the Gulf pollack fishery closed, after fishermen took the entire 1989 allowable catch of 60,000 metric tons of pollack.

"We have reports that there was discarding of pollack carcasses, and only the roe was salvaged," Brooks said. "But I don't know if that was common practice with all operations."

"Our shore-based plants felt 60,000 tons would have gotten them through the year," said Dave Harville, owner of three shore-based trawlers and one longliner in Kodiak. "The factory trawler fleet moved in to the south end of island and just stripped roe until they put us out of business."

He said he could tell the larger ships were stripping roe by how fast they were going through the fish.

Ships stripping roe can use fish three times faster than the shore based processors who take time to fillet, process for surimi, and freeze pollack, he said.

Fishermen were getting \$4 per pound for untreated roe, while pollack flesh fetched about eight cents a pound, said Oscar Dyson, a Kodiak fisherman and member of the North Pacific Fisheries Management Council.

"It's gonna be a disaster if its allowed to shut down our poliack fishery for the rest of the year," Dyson said. "I'd imagine 1,000 cannery workers will be out of work this Sep. the fall pollack fishery would have co."

"It's the first time we've had pollack fishery of this magnitude outside Shelikof Strait," said Brooks. "We were fairly suprised by it ourself."

While roe stripping is legal, the North Pacific Fisheries Management Council acknowledges its problems. Last year, they closed pollack fishing in the Bering Sea during the spawning season when excessive roe fishing threatened stocks, Brooks said.

Brooks said the roe stripping didn't pose a problem to the continued health of the pollock stocks, because any fish caught were included in the total allowable catch.

However, he admitted the process is legal, and predicted the council would study the issue this summer, and eventually ban the practice.

"I think (a ban on roe stripping) has to happen," Brooks said. "How quickly it will happen, I don't know. Over time, discarding the enormous amounts of fish is simply not going to be accepted as a practice that can be sustained."


Jim Campbell, former director of the North Pacific Council, called for an end to roe stripping, the reservation of some share of the pollack catch for on-shore processors, and studies to see if regulators can allow a greater harvest of pollack this year.

"I'm suprised the owners of the large factory trawlers, primarily from Washington made this move to take that total allocation," Campbell said. "They must have known that doing this would inflame Alaskans and the general public."

Pollack stocks are down from their highs of the early 1980s, and as the domestic fishing fleet has taken over from the foreign fleets that formerly took groundfish under joint ventures with the U.S., the demand for the fish has increased.

This year, the domestic fleet had more than enough capacity to catch all the allowable groundfish catch in the Gulf and Bering Sea.

Anchorage Daily News



Winner, 1976 Pulitzer Prize Gold Medal for Public Service

Gerald E. Grilly
Publisher

Howard Weaver
Managing Editor

Michael Carey
Editorial Page Editor

Katherine Fanning, Editor and Publisher 1971 to 1983
Lawrence Fanning, Editor and Publisher 1967 to 1971

Founded in 1946 by Norman C. Brown

Troubled waters off Kodiak Island

A Seattle-dominated fishing fleet's month-long orgy of roe-stripping off Kodiak has yielded a severe blow to the community's fishermen. The fleet moved in, took more than 37,000 metric tons of pollock, stripped the valuable roe from the fish, and tossed much of the flesh back in the water — after which federal authorities shut down the major Gulf of Alaska pollock harvest.

Capping it all off, the Seattle fleet departed the area for the Bering Sea after slaughtering the pollock, the most abundant of the North Pacific bottomfish — leaving Kodiak fishermen to depend on a more limited harvest of other fish.

The debacle raises anew questions about the fairness of fishing regulations. Current regulations permitted the Outside fishermen to devour within a matter of weeks a fishery that otherwise would have contributed to Kodiak's economy through December.

More importantly, the episode renews revulsion at the obscene waste of tons of edible fish. To fish processors, the high-value roe is much preferred over the low-value pollock meat. The decision to strip the roe and throw the fish overboard is a business one. The practice, however, visits horrendous abuse upon the resource — abuse that no resource, fish or otherwise, can long endure.

The bald waste at the scene of a roe-stripping is stunning. Those who have witnessed some of the more frenzied operations report mile upon mile of dead fish in the water. The decaying fish float in the huge masses, then sink to the ocean bottom.

Few involved in the process can claim clean hands on the waste issue. In fact, some of the fish caught by the Seattle fleet were stripped in Kodiak and the fish carcasses hauled out to sea and dumped.

Regulations advancing the stable, long-term interest of the fishery and of Alaska are needed. And a central component of the regulatory process should be a stepped-up system of observer coverage. Observers have proven their value in policing fishing regulations, and a growing body of opinion is urging expansion of the tactic.

The course toward a sane fishing policy must weather a gale of conflicting economic and governmental interests. But the difficulties should not deter attempts to reach that goal. For nothing less than the wise use and preservation of the resource depends on it.



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel
P.O. Box - 21109
Juneau, Alaska 99802-1109
Telephone (907) 586-7414

March 26, 1990

Representative Cliff Davidson
Alaska State Legislature
P. O. Box V
Juneau, Alaska 99811

Re: Speedwell, Inc. v. Mosbacher, Civil (W.D. WA.)

Dear Representative Davidson:

This letter is to advise you of the lawsuit recently filed in United States District Court in Seattle challenging the Secretary of Commerce's emergency rule limiting pollock roe stripping in the fisheries of the United States exclusive economic zone off Alaska. Plaintiff Speedwell, Inc., is a Seattle-based corporation engaged in processing pollock and other groundfish within the exclusive economic zone in the Gulf of Alaska and the Bering Sea. Speedwell first argues that the Secretary of Commerce violated various Federal procedural and substantive requirements in promulgating the emergency rule. Speedwell then argues that because the State of Alaska has not prohibited roe stripping in waters and on land under its jurisdiction, the emergency rule is ineffective and moreover that it actually grants a preference to shoreside processing plants, floaters operating solely within the territorial sea, and the Alaska fishermen who land fish at those plants. Speedwell requests a court order setting aside the emergency rule, but alternatively seeks an order requiring the Secretary of Commerce to formally preempt Alaska state law and apply the Federal roe stripping limitation within Alaska under section 306(b) of the Magnuson Fishery Conservation and Management Act, at Title 16, United States Code, section 1856(b).

I understand that you have sponsored legislation that would limit pollock roe stripping by shore plants and processing vessels operating within the territorial sea of Alaska. Prompt enactment of this companion State legislation is desirable for two reasons. First, enactment of the State legislation would negate Speedwell's argument that a Federal emergency rule applicable only within the exclusive economic zone cannot adequately implement a roe stripping limitation in the entire Alaska pollock fishery. Second, the State legislation would undermine Speedwell's argument that the Secretary of Commerce has tried to benefit Alaska-based operations at the expense of non-Alaska operations, and would remove any basis for Secretarial preemption under Magnuson Act section 306(b).



-2-

I have enclosed a copy of the plaintiff's complaint in this lawsuit for your information. Please call me if you would like to discuss any of these issues in more detail.

Sincerely,

A handwritten signature in black ink, appearing to read "Jonathan Pollard". The signature is written in a cursive style with a large, stylized initial "J" and "P".

Jonathan Pollard
NOAA Staff Attorney

Attachment

MEMORANDUM

State of Alaska

TO: Honorable Don Collinsworth
Commissioner
Dept. of Fish & Game

DATE: October 7, 1986

FILE NO: 663-86-0453

TELEPHONE NO: 465-3600

FROM: Harold M. Brown
Attorney General

SUBJECT: Herring processing
under AS 16.10.175

By: Larri Irene Spengler
Assistant Attorney General
Department of Law

You have asked for an analysis of whether AS 16.10.175 violates the commerce clause of the United States Constitution. The statute prohibits the removal of herring from Alaska unless the herring has first been "frozen or otherwise processed for shipment." Based upon principles of statutory construction, the legislative history of this section, and the commerce clause test, we believe that the statute could be defended against a commerce clause challenge. 1/

PRESUMPTION OF CONSTITUTIONALITY

In examining whether a state statute is constitutional, the first step is an acknowledgement of the presumption followed with virtual uniformity by the courts that favors the validity of an act of the legislature and that dictates that all doubts must be resolved in support of an act. 2A N. Singer, Sutherland Statutory Construction § 45.11 (4th ed. 1984). The Alaska Supreme Court has recognized the "well-established rule of statutory construction" that if possible courts should construe statutes to avoid unconstitutionality. Kimoktoak v. State, 584 P.2d 25, 31 (Alaska 1978). That rule

recognizes that the legislature, like the courts, is pledged to support the state and federal

1/ You also inquired whether the definition of "processed for shipment" in AS 16.10.175(b) was unconstitutionally vague. We believe that it is not, and any ambiguities could be clarified by the Board of Fisheries. Under AS 16.05.251(a)(4), the Board of Fisheries has the authority to adopt regulations "establishing the methods and means employed in the pursuit, capture and transportation of fish." That authority would encompass the adoption of regulations interpreting or clarifying AS 16.10.175(b); this would be advisable if the statutory list -- "icing, stripping or salting" -- has been the source of misunderstanding, or enforcement problems.

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constitutions and that the courts, therefore, should presume that the legislature sought to act within constitutional limits.

Id.

Thus, in examining AS 16.10.175 and its legislative history in light of the commerce clause test, any doubts about the validity of the statute must be resolved in favor of its constitutionality.

THE COMMERCE CLAUSE

The commerce clause, article I, section 8, clause 3 of the United States Constitution, provides that "Congress shall have power ... to regulate commerce ... among the several states." It has been consistently construed by the Supreme Court "not only as an authorization for Congressional action, but, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation." Hughes v. Oklahoma, 441 U.S. 322, 326 (1979) (footnote omitted). Hughes found unconstitutional an Oklahoma statute making it illegal to ship for sale outside Oklahoma minnows procured from waters within the state. The court first overruled its decision in Geer v. Connecticut, 161 U.S. 519 (1896), which had essentially held that the commerce clause had no bearing on any state's actions involving its wildlife. Then the court articulated the usual commerce clause analysis, which requires an inquiry into:

(1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect;

(2) whether the statute serves a legitimate local purpose; and if so,

(3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Hughes v. Oklahoma 441 U.S. 322, 366 (1979).

Oklahoma had defended its statute as a conservation measure, designed to protect minnows from depletion. The court, however, found that the statute on its face discriminated against interstate commerce, and that it could not withstand the strict

scrutiny to which facially discriminatory laws must be subjected because a less discriminatory conservation measure could have been selected. Id. at 338.

On the other hand, the Supreme Court recently upheld a ban by Maine on the importation of a species of minnow used as bait fish. Maine v. Taylor, 477 U.S. ___, 91 L.Ed.2d 110 (1986). The Court noted that statutes which affirmatively discriminate against interstate transactions, such as the one challenged in that case, are subjected to a more demanding scrutiny than statutes that burden such transactions only incidentally. 91 L.Ed.2d at 120-21. The Court held that even under strict scrutiny Maine had a legitimate purpose in guarding against environmental risks. Id. at 127. The Court approved that purpose, despite the view of the court of appeals in reviewing the case that there were "signs of protectionist intent." Id. The Supreme Court noted:

Shielding in-state industries from out-of-state competition is almost never a legitimate local purpose, and state laws that amount to "simple economic protectionism" consequently have been subject to a "virtually per se rule of invalidity." [Citations omitted.] But there is little reason in this case to believe that the legitimate justifications the state has put forward for its statute are merely a sham or "post hoc rationalization."

Id. (emphasis added). As discussed below, similarities can be found between AS 16.10.175 and the Maine statute when the commerce clause test is applied to the Alaska statute.

THE STATUTE

The legislature enacted AS 16.10.175 in 1980. Section 3, ch. 27, SLA 1980. The provision states:

(a) A person may not remove herring from the state before the herring has been frozen or otherwise processed for shipment.

(b) In this section, "processed for shipment" includes, but is not limited to, icing, stripping or salting of the herring; however, it does not include salting of the herring if five percent or more of the body weight of the herring consists of roe.

It is not apparent from the face of this statute what purpose the legislature intended the requirement to further. You note in your memorandum of inquiry that the prohibition could "either be a method of insuring some degree of in-state labor for economic considerations, or it could be to ensure that a quality product reaches the market as a way of maintaining a good reputation for that product." You also note that the legislature has not imposed quality assurance laws on all fish exported from the state.

As explained below, while some legislators may have been interested in expanding the state's economy, the legislature was very concerned about the wasteful practice of handling herring by discarding the carcasses and keeping only the roe. This practice had been declared wasteful and prohibited several years earlier, but the prohibition had apparently been avoided to some extent by vessels exiting state waters and then discarding the carcasses. The legislature sought to close that loophole by requiring processing "for shipment" (rather than complete processing) before removal from state waters. (Apparently no practice had developed which involved intentional discarding salmon carcasses to obtain salmon roe. Thus there was no similar prohibition on disposal of salmon carcasses, and no need to require that salmon be processed for shipment to prevent their carcasses from being wasted.)

LEGISLATIVE HISTORY

The original bill (HB 590) that eventually became ch. 27, SLA 1980, contained only the language currently present in AS 16.10.175(a). The House Resources Committee Substitute for HB 590 was accepted by the House, and eventually adopted by the Senate. 1980 House J. 684-86; 1980 Senate J. 822-23. Sections 1 and 2 of the committee substitute related to AS 16.10.172 and AS 16.10.173. Those statutes, adopted three years earlier (sec. 1, ch. 9, SLA 1977), (1) express a legislative policy against discarding herring carcasses from which the roe has been removed by stripping, which the legislature declares to be wasteful, and (2) prohibit the failure to use the flesh of commercially taken herring for specified purposes.

The committee substitute for HB 590 in 1980 authorized certain exceptions to the prohibition on "waste." Sec. 1 and 2, ch. 27, SLA 1980. Those exceptions provide that, notwithstanding the prohibition on waste in AS 16.10.173, herring carcasses could be discarded if the herring were taken from waters with a sufficient herring population to support a stripping industry

without substantially reducing the amount of herring available for other uses, and if

the stripping process is conducted in an area of the state where local industry either does not exist, or if it does exist, it is insufficient to provide reasonable economic support to the people who live in the area.

Sec. 1(b), ch. 27, SLA 1980 (emphasis added).

This concern articulated in 1980 for "reasonable economic support" for people who live in the areas in which the fishing occurs is expressed in the very bill (HB 590) that imposed the prohibition on removing herring from the state unless "processed for shipment." Some legislators may have believed that one of the reasons the prohibition was enacted was to further local industries. For example, in 1980 in response to a request for an explanation of how the committee substitute differed from the original HB 590, Representative Halford stated:

The original bill was designed to prohibit removal of herring from the state waters without processing. It was designed to protect local jobs in the processing industry and to protect the herring from the waste. But, generally, what was explained in committee is the result of the original bill would be that there would be less jobs for Alaskan fishermen; there would be less jobs in the fishing fleet; there would be less jobs in local processing, because the capacity isn't there. So the fish simply couldn't be taken. They'd be taken by the high seas fishery, and instead of allowing Alaskans to utilize the processes that are available, those same processes would be carried out on the high seas fishery, and the economic benefit would not come to Alaska.

1980 House J. 654-56; tape 1, side A, House proceedings for March 17, 1980. On the Senate side, the only floor remarks were made by Senator Mulcahy:

It has been called the in-state herring processing bill, and while I don't think it's quite that, it is a move in that direction It's aimed at on-shore Alaska labor in a developing fishery and it's kind of a compromise between total in-state

Alaska processing and the need for a little more flexibility in a developing fishery.

1980 Senate J. 822-23; tape 1, side A, Senate proceedings for April 22, 1980.

While some legislators may have believed that one of the purposes underlying the legislative enactment of AS 16.10.175 was to promote local economic benefits, that clearly was not the sole legislative goal. As Representative Halford explained, the 1980 prohibition against removing herring from the state unless "processed for shipment" was designed to effectuate more fully the prohibition enacted by the legislature in 1977 in AS 16.10.173 on waste of herring:

This [1980] bill is not a step backward. It is a step forward because what happened when [the 1977 act] took effect to cover waste, the processors started light salting and export of the herring. The original bill that you introduced [in 1977] was to stop that process ... and this bill does that It stops an abuse, although it allows the industry and people involved to deal with it in an economic sense so that they are not hurt by that stoppage.

1980 House J. 685-86; tape 1, side A, House proceedings for March 19, 1980.

Other discussion on the House floor demonstrates extensive concern among legislators about the exceptions to the prohibition against waste provided in the 1980 bill. For example, Representative Eliason expressed his support for the legislative policy in AS 16.10.172 against allowing the processing of herring in a manner designed solely to obtain the roe, while discarding the carcasses. 1980 House J. 654-56; tape 1, side A, House proceedings for March 17, 1980. He describes the method, explaining that the males are discarded completely and the female carcasses are discarded after the roe is extracted. Id. He, and other representatives, spoke vigorously against providing a waiver that would allow this practice to occur, which they considered to be waste. Id. Representative Halford responded by explaining that the bill would phase out the harvest for roe alone by 1983, which would allow the industry time to develop methods for handling the carcasses, and that thus the bill would ultimately "reach the goal that I think all Alaskans want, which is utilization without waste of the fishery."

Id.

If the legislature had been interested solely in developing in-state jobs, it presumably would have required processing in state; "processing" is defined by Board of Fisheries regulation 5 AAC 39.975(29) as the "completion" of cooking, canning, smoking, salting, drying, or freezing. Instead, the legislature only required processing "for shipment," defined in AS 16.10.175(b) as icing, stripping, or salting. However, salting was not acceptable if 5 percent or more of the herring weight was roe, presumably since that would have fostered the practice which the legislature was trying to control -- lightly salting the catch and then discarding the carcasses and keeping the roe.

Thus, it appears that a primary legislative purpose of the prohibition in AS 16.10.175 on removing herring from the state unless "processed for shipment" was to further the policy against waste and to promote full utilization of herring. The legislature was apparently seeking to curb the practice of lightly salting the herring, removing it from the state, and then extracting the roe and discarding the carcasses, an act which would have been illegal under AS 16.10.173 if it had occurred in state waters. ^{2/} This goal of reducing waste and promoting full utilization appears to be separate from the effect of promoting local economic development.

CONSTITUTIONALITY

Preliminarily, the prohibition in AS 16.10.175 against removing herring from the state unless "processed for shipment" does on its face discriminate against interstate commerce. Thus, a court would apply strict scrutiny in an analysis. The next inquiry under the commerce clause test is whether the statute serves a legitimate local purpose. To the extent that one purpose is the protection of local economic interests, that is not considered "legitimate." Dean Milk Company v. Madison, 340 U.S. 349, 354 (1951).

^{2/} Not all the members of the Legislature were convinced the abuse was occurring. Representative Eliason, at least, expressed doubt that the carcasses of a "food fish" would actually be discarded. 1980 House J. 654-56; tape 1, side A, House proceedings for March 17, 1980.

While there is evidence that economic benefits to Alaska were one factor certain legislators weighed in reviewing the statute, there also is ample evidence of a major legislative concern about the prevention of waste and the promotion of full utilization of the herring resource both in the legislative history and in the companion statutes. 1980 House J. 654-56 and 683-86 (tape 1, side A, House proceedings for March 17 and for March 19, 1980); AS 16.10.172; AS 16.10.173. As the Supreme Court noted in Maine v. Tavor, 477 U.S. _____, _____, 91 L.Ed.2d 110, 128 (1986), "there is very little reason in this case to believe that the legitimate justifications the state has put forward for its statutes are merely a sham." The Court affirmed the legitimacy of state's interest in use of its natural resources:

The commerce clause significantly limits the ability of states and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a state does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' [citation omitted], it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.

91 L.Ed.2d at 129 (emphasis added).

The legitimacy of waste prevention has been specifically recognized by at least one court. In 1981, in Bristol Herring Marketing Cooperative v. Skoog, No. A81-043 Civ. (D. Alaska 1981), the federal district court in Alaska preliminarily enjoined the enforcement of a regulation that prohibited foreign vessels in state waters from catching or processing fish, or from transporting fish outside the state unless processing had been completed. 5 AAC 39.198. ^{3/} The court ruled that the prohibition in state waters on foreign fish-related activities probably constituted an impermissible burden on commerce, and in particular, on foreign commerce, and enjoined the offending regulation. It also preliminarily enjoined AS 16.10.175, apparently based on the misunderstanding that the statute

^{3/} The case was settled, and thus the court did not reach the merits, beyond the preliminary injunction stage.

required that more than simply processing-for-shipment occur in state waters. However, the court in its April 1, 1981 preliminary injunction order required that the foreign vessels which would be permitted to operate in state waters under the injunction "shall comply with the management and conservation statutes and regulations" of the state, and "shall not waste herring." Preliminary injunction, pp. 2 and 4. Thus, while striking down the state's attempt to prohibit foreign vessels from operating in state waters, the court recognized the legitimacy of the state's interest in prohibiting waste of herring.

Thus, the second part of the commerce clause test can be answered in favor of the processing-for-shipment requirement. It has a legitimate purpose, although some might argue that it may also have had about it "an aura of economic protectionism." Maine v. Taylor, 477 U.S. at _____, 91 L.Ed.2d at 124 (1986).

The third question under the commerce clause test is whether alternative means could discourage waste and promote utilization without discriminating against interstate commerce. Enacted three years before the statute under examination here, AS 16.10.173 prohibits waste of commercially taken herring. Sec. 1, ch. 9, SLA 1977. As discussed above in detail, the legislature appears to have identified a method used to circumvent the prohibition on waste; vessels were at least believed to have left the state without processing the herring and then later extracted the roe and simply disposed of the carcasses. 1980 House J. 685-86; tape 1, side A, House proceedings for March 19, 1980. The prohibition on export of unprocessed herring was aimed at least in part at halting that perceived abuse. Id.

It is possible to imagine other ways the legislature might have sought to attack the problem. For example, it could have adopted a stronger antiwaste provision, with severe enforcement penalties. Another possibility would have been an attempt to prohibit future fishing in state waters by vessels which violated the waste provisions. The problem with these solutions is that they could not address the disposal of carcasses beyond state waters, because the legislature could not prohibit vessels from dumping carcasses once they were beyond the state's jurisdiction.

In closing the loophole, the legislature appears to have selected the narrowest method feasible. As discussed above,

the legislature did not require complete processing ^{4/} -- cooking, canning, smoking, salting, drying, or freezing -- to occur in state waters. Rather, the legislature only required enough processing "for shipment" to prevent the abuse in question. Under AS 16.10.175(b), the herring could simply be iced or stripped. Under that provision, the herring could even be salted, as long as less than 5 percent of the herring weight was roe. It could be argued that the legislature's prohibition was overbroad, in that the entire processed-for-shipping requirement could have been applied only to herring harvested for roe (roe comprising 5 percent or more of the body weight). However, the vast majority of the commercial herring is for roe herring. For example, the Department of Fish and Game informs me that in 1986, 87 percent of the total commercial harvest was for roe herring and the majority of the remaining 13 percent was harvested for bait, which would be used fresh or processed immediately by freezing in any case. So the breadth of the statute coincides fairly well with the breadth of the potential problem harvests.

It appears that the legislature had available no other mechanism to prevent the removal of herring from the state and the subsequent disposal of the carcasses. Further, the legislature chose to impose the least onerous requirements possible to solve the problem of waste.

The method chosen by the Alaska legislature to combat waste of herring can be contrasted with the primary processing requirements imposed in Alaska on the timber industry, and struck down in South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984). The court noted there that the only purpose of the "naked restraint on export of unprocessed logs" was promoting employment in the state, and thus ruled it unconstitutional. Id. at 99.

Similarly, in Pike v. Bruce Church Inc., 399 U.S. 137 (1970), the court struck down an Arizona statute requiring cantaloupes grown in Arizona to be crated in Arizona, which promoted the reputation of the Arizona cantaloupe industry. The court noted that to comply with this statute the challenger would have to "build and operate an unneeded \$200,000 packing plant" in Arizona. Id. at 145. The court stated that it has viewed

^{4/} 5 AAC 39.975(29).

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with particular suspicion state statutes requiring business operations to be performed in the home state that could more efficiently be performed elsewhere.

Id. (emphasis added).

The former Alaska timber requirement and the Arizona cantaloupe requirement can be contrasted to the Alaska requirement that herring be processed for shipment in state waters. The achievement of the goal -- prevention of waste of herring -- could not "more efficiently be performed elsewhere." Once the vessels leave the state's jurisdiction, the legislature has no leverage over the wasteful practice it is attempting to control.

CONCLUSION

In general, statutes are presumed constitutional. 2A. N. Singer, Sutherland Statutory Construction § 45.11 (4th ed. 1984). In the absence of clear legislative intent, we can not presume that the legislature enacted AS 16.10.175 solely to further an improper protectionist purpose, especially in light of the evidence that the legislature was greatly concerned about waste and under-utilization of herring in general.

As noted above, the legislative history relating to the purpose of this statute is mixed, but at least one primary purpose of AS 16.10.175 is legitimate. The goal of reducing waste and promoting full utilization of herring cannot be effectuated by other means, despite the fact that the means used affects interstate commerce. Thus, although we cannot guarantee that AS 16.10.175 would be upheld in court, we believe it could be defended in good faith against a commerce clause challenge, especially in light of the presumption of constitutional validity and the recent United States Supreme Court analysis in Maine v. Tavior, 477 U.S. ___, 91 L.Ed.2d 110 (1986).

LIS:cck

cc: Steve Pennoyer
Ken Parker
Dept. of Fish & Game

warrant. A reasonable search is one made (a) upon probable cause that fruits of a crime or evidence relating to the crime will be found; (b) under circumstances which would make the securing of a warrant impracticable. 1961 Op. Att'y Gen. No. 19.

A search may be made pursuant to a valid arrest, providing that the arrest is made prior to the search. 1961 Op. Att'y Gen. No. 19.

The amendment requiring a written signed statement of the reason for the search is objectionable but valid. It is objectionable because it unnecessarily ties the hands of the field agents charged with

enforcement of the fish and game laws, and is a provision which is quite uncommon, if not unique. 1959 Op. Att'y Gen. No. 15.

The statutory requirement that fish and game agents fill out a form stating the objects of search will not make an otherwise invalid search valid, but it may invalidate an otherwise valid search if not complied with. 1961 Op. Att'y Gen. No. 15.

In the case of a vessel, the limits of the area open to search probably include the entire vessel. 1961 Op. Att'y Gen. No. 19.

NOTES TO DECISIONS

Observation of items in plain view. — The mere observation of items which are in plain view or which are open and apparent, is not a search. Consequently, evidence based on such observations is admissible so long as the observing officer was legally in the position where the observations were made. *Klockenbrink v. State*, Sup. Ct. Op. No. 631 (File No. 1149), 472 P.2d 958 (1970).

This section requires that notice be given to the person "in control" of crab pots. *Nathanson v. State*, Sup. Ct. Op. No. 1310 (File No. 2541), 554 P.2d 456 (1976).

Failure to notify owner of crab pots was not a violation of this section where officers of the Department of Fish and Game approached the crab pots to conduct a search to check the extent of compliance with a regulation providing that fishermen could place their crab pots in the water up to 72 hours prior to the opening of the season and the owner was not present, attending to his crab pots; there being no "person in control of the property or object to be searched," the officers were unable to give the fisherman the required notice. *Nathanson v. State*, Sup. Ct. Op. No. 1310 (File No. 2541), 554 P.2d 456 (1976).

Notice required for search of vessel,

See 16.05.190. Seizure and disposition of equipment. Guns, traps, nets, fishing tackle, boats, aircraft, automobiles or other vehicles, sleds, and other paraphernalia used in or in aid of a violation of this chapter or a regulation of the department may be seized under a valid search, and all fish and game, or parts of fish and game, or nests or eggs of birds, taken, transported, or possessed contrary to the provisions of this chapter or a regulation of the department shall be seized

by any peace officer designated in AS 16.05.150. Upon conviction of the offender or upon judgment of the court having jurisdiction that the item was taken, transported, or possessed in violation of this chapter or a regulation of the department, all fish and game, or parts of them are forfeited to the state and shall be disposed of as directed by the court. If sold, the proceeds of the sale shall be transmitted to the proper state officer for deposit in the general fund. Guns, traps, nets, fishing tackle, boats, aircraft, or other vehicles, sleds, and other paraphernalia seized under the provisions of this chapter or a regulation of the department, unless forfeited by order of the court, shall be returned, after completion of the case and payment of the fine, if any. (§ 23 art I ch 94 SLA 1959)

NOTES TO DECISIONS

Due process requirements. — The standards of due process under the Alaska and federal constitutions require that a deprivation of property be accompanied by notice and opportunity for hearing at a meaningful time to minimize possible injury. *F/V Am. Eagle*, ADF&G No. 39 v. State, Sup. Ct. Op. No. 2227 (File Nos. 3973, 3974, 4023), 620 P.2d 657 (1980), appeal dismissed, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).

When the seized property is used by its owner in earning a livelihood, notice and an unconditioned opportunity to contest the state's reasons for seizing the property must follow the seizure within days, if not hours, to satisfy due process guarantees even where the government interest in the seizure is urgent. *F/V Am. Eagle*, ADF&G No. 39 v. State, Sup. Ct. Op. No. 2227 (File Nos. 3973, 3974, 4023), 620 P.2d 657 (1980), appeal dismissed, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).

Due process does not require that any owner of a vessel seized by the state for suspected use in illegal activity has an absolute right to obtain release of the property upon the posting of an adequate bond. To permit this would frustrate one purpose of forfeitures, which is to prevent possible use of the property in further illicit acts. *F/V Am. Eagle*, ADF&G No. 39 v. State, Sup. Ct. Op. No. 2227 (File Nos. 3973, 3974, 4023), 620 P.2d 657 (1980), appeal dismissed, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).

A seizure is a prerequisite to forfeiture under the provisions of this section. *Itubino v. State*, Sup. Ct. Op. No. 216 (File No. 395), 391 P.2d 946 (1964).

Forfeiture nets upon the thing itself. — In case of forfeiture, the decree of the court acts upon the thing itself and binds the interest of all the world, whether any party actually appears or not. If it is condemned, the title of the property is completely changed, and the new title acquired by the forfeiture travels with the thing in all its future progress. *United States v. Pollastrine*, 8 Alaska 104 (1929).

It divests titles and liens. — A forfeiture necessarily divests every existing right, whether of title or lien or other interest, in the thing forfeited. There is no reason why it should not extinguish the right of a lienholder equally with that of the owner. It binds the interests of all the world. *United States v. Pollastrine*, 8 Alaska 104 (1929).

Section distinguishes between mandatory and discretionary forfeiture. — This section distinguishes between mandatory forfeiture of contraband (fish, game, birds) upon conviction, and discretionary forfeiture of paraphernalia (guns, traps, aircraft, etc.). *Graybill v. State*, Sup. Ct. Op. No. 1234 (File No. 238c), 545 P.2d 629 (1976).

Not between criminal or civil forfeiture proceedings. — The distinction which the legislature sought to draw between contraband and paraphernalia is between mandatory and discretionary forfeiture, not between requiring criminal or civil forfeiture proceedings. *Graybill v. State*, Sup. Ct. Op. No. 1234 (File No. 238c), 545 P.2d 629 (1976).

Forfeitures, even when civil in form, are basically criminal in nature. *Graybill v. State*, Sup. Ct. Op. No. 1234 (File No. 238d), 545 P.2d 629 (1976).

The quasi-criminal nature of forfeiture proceedings under this section and AS 16.05.195 has been recognized by the state supreme court in *Graybill v. State*, Sup. Ct. Op. No. 1234 (File No. 2386), 545 P.2d 629 (1976); *F/V Am. Eagle, ADF&G No. 39 v. State*, Sup. Ct. Op. No. 2227 (File Nos. 3973, 3974, 4023), 620 P.2d 657 (1980), appeal dismissed, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).

"Order of the court" may refer to orders rendered following criminal conviction. — Since the "case" and "fine" referred to in this section concern criminal proceedings, it is reasonable to interpret an "order of the court" as likewise referring to orders rendered subsequent to a criminal conviction, as well as those following a separate civil action. *Graybill v. State*, Sup. Ct. Op. No. 1234 (File No. 2386), 545 P.2d 629 (1976).

Valid forfeiture where defendant convicted under AS 16.05.920. — Where defendant was convicted under AS 16.05.920, which makes certain acts unlawful, in order to effect a valid forfeiture of defendant's aircraft, it was not necessary for the state to institute a separate

civil in rem proceeding against the aircraft. *Graybill v. State*, Sup. Ct. Op. No. 1234 (File No. 2386), 545 P.2d 629 (1976).

While forfeiture is a civil remedy unless otherwise provided by statute, this section, as it applied to a defendant who was convicted under AS 16.05.920, did so provide. *Graybill v. State*, Sup. Ct. Op. No. 1234 (File No. 2386), 545 P.2d 629 (1976).

For cases construing seizure and forfeiture under the provision of ACLA 1949, § 30-2-10, see *United States v. One Fish Trap*, 7 Alaska 216 (1924); *United States v. The Pacific*, 7 Alaska 260 (1924); *United States v. One Floating Fish Trap*, 7 Alaska 334 (1925); 7 Alaska 334 (1925).

Applied in *Jordan v. State*, Ct. App. Op. No. 360 (File No. 7782), 681 P.2d 346 (1984).

Quoted in *Wamser v. State*, Sup. Ct. Op. No. 1953 (File No. 3646), 600 P.2d 1359 (1979).

Cited in *Wacek v. State*, Sup. Ct. Op. No. 1108 (File No. 2166), 530 P.2d 751 (1975); *Reynolds v. State*, Ct. App. Op. No. 182 (File No. 6432), 655 P.2d 1313 (1982).

Sec. 16.05.195. Forfeiture of equipment. (a) Guns, traps, nets, fishing gear, vessels, aircraft, other motor vehicles, sleds, and other paraphernalia or gear used in or in aid of a violation of this title, or regulation adopted under this title, and all fish and game or parts of fish and game or nests or eggs of birds taken, transported or possessed contrary to the provisions of this title, or regulation adopted under it, may be forfeited to the state

(1) upon conviction of the offender in a criminal proceeding of a violation of this title in a court of competent jurisdiction; or

(2) upon judgment of a court of competent jurisdiction in a proceeding in rem that an item specified above was used in or in aid of a violation of this title or a regulation adopted under it.

(b) Items specified in (a) of this section may be forfeited under this section regardless of whether they were seized before instituting the forfeiture action.

(c) An action for forfeiture under this section may be joined with an alternative action for damages brought by the state to recover damages for the value of fish and game or parts of them or nests or eggs of birds taken, transported or possessed contrary to the provisions of this title or a regulation adopted under it.

(d) It is no defense that the person who had the item specified in (a) of this section in possession at the time of its use and seizure has not been convicted or acquitted in a criminal proceeding resulting from arising out of its use.

(e) Forfeiture may not be made of an item subsequently sold to an innocent purchaser in good faith. The burden of proof as to whether the purchaser purchased the item innocently and in good faith shall be on the purchaser.

(f) An item forfeited under this section shall be disposed of at the discretion of the department. Before the department disposes of an aircraft it shall consider transfer of ownership of the aircraft to the Alaska Wing, Civil Air Patrol. (§ 3 ch 124 SLA 1974; am § 1 ch 18 SLA 1983)

Effect of amendments. — The 1983 amendment added the second sentence of subsection (f).

NOTES TO DECISIONS

Purposes for forfeiture. — See *State v. Rice*, Sup. Ct. Op. No. 2321 (File Nos. 4777, 4778), 626 P.2d 104 (1981).

Strict construction against government. — As a general rule, forfeitures are disfavored by the law, and thus forfeiture statutes should be strictly construed against the government. *F/V Am. Eagle, ADF&G No. 39 v. State*, Sup. Ct. Op. No. 2227 (File Nos. 3973, 3974, 4023), 620 P.2d 657 (1980), appeal dismissed, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).

Due process requirements. — The standards of due process under the Alaska and federal constitutions require that a deprivation of property be accompanied by notice and opportunity for hearing at a meaningful time to minimize possible injury. *F/V Am. Eagle, ADF&G No. 39 v. State*, Sup. Ct. Op. No. 2227 (File Nos. 3973, 3974, 4023), 620 P.2d 657 (1980), appeal dismissed, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).

When the seized property is used by its owner in earning a livelihood, notice and an unconditioned opportunity to contest the state's reasons for seizing the property must follow the seizure within days, if not hours, to satisfy due process guarantees even where the government interest in the seizure is urgent. *F/V Am. Eagle, ADF&G No. 39 v. State*, Sup. Ct. Op. No. 2227 (File Nos. 3973, 3974, 4023), 620 P.2d 657 (1980), appeal dismissed, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).

Due process does not require that any owner of a vessel seized by the state for suspected use in illegal activity has an absolute right to obtain release of the prop-

erty upon the posting of an adequate bond. To permit this would frustrate one purpose of forfeitures, which is to prevent possible use of the property in further illicit acts. *F/V Am. Eagle, ADF&G No. 39 v. State*, Sup. Ct. Op. No. 2227 (File Nos. 3973, 3974, 4023), 620 P.2d 657 (1980), appeal dismissed, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).

Where the seizure of a fishing vessel is authorized by a judicially approved warrant issued upon probable cause and the state files a civil complaint on the next working day following the seizure, and the owners are promptly notified, the owners are afforded procedural due process. *State v. Baranof*, Sup. Ct. Op. No. 2785 (File Nos. 7287, 7324), 677 P.2d 1245 (1984), cert. denied, 496 U.S. 823, 105 S. Ct. 98, 83 L. Ed. 2d 43 (1984).

Section not preempted by federal law. — The Fishery Conservation and Management Act, 16 U.S.C. § 1801 et seq., does not preempt state regulation of king crab harvesting in the extraterritorial fishery conservation zone by vessels registered in Alaska. *State v. F/V Baranof*, Sup. Ct. Op. No. 2787 (File Nos. 7287, 7324), 677 P.2d 1256 (1984).

The federal Fishery Management and Conservation Act does not preempt Alaskan king crab regulation of vessels registered in Alaska. *State v. Baranof*, Sup. Ct. Op. No. 2785 (File Nos. 7287, 7324), 677 P.2d 1245 (1984), cert. denied, 496 U.S. 823, 105 S. Ct. 98, 83 L. Ed. 2d 43 (1984).

Concurrent state jurisdiction of in rem admiralty forfeiture actions. — In rem admiralty forfeiture actions brought by the state to enforce violations of law may be brought in state courts under con-

HB

409

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

1 ~~IN THE HOUSE~~ BY ~~THE FINANCE COMMITTEE~~

2 ~~CS FOR HOUSE BILL NO. 409 (Finance) am-~~ (two)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the reform of certain environ-
7 mental conservation laws and the administrative
8 penalties for their violation."

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

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

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

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

25 (14) to the extent permitted by the United States and Alaska
26 Constitutions, at reasonable times enter and inspect a nervasively
27 regulated facility if that facility is an oil terminal facility reg-
28 ulated under AS 46.04.030, a refinery, a crude oil or gas exploration,
29 production, or transportation facility, a hazardous waste trans-

5,000 (AS 46.09.70) 500-100,000 (not No.)
5000 sub days.

1 not exceed \$15,000-a day for each violation. Each violation is a
2 separate and distinct offense and where the violation continues from
3 day to day, each day constitutes a separate violation. In determining
4 the amount of a penalty assessed under this section, the department
5 shall consider the effect of the violation on the public health or the
6 environment, a prior history of violations, deterrence of future
7 violations, ^{part in section} and other factors that the department considers relevant. (*)

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

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

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

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PART EPA

1 chapter, AS 46.04, or AS 46.09, or to recover damages, restoration
2 expenses, investigation costs, court costs, and attorney fees. The
3 court shall set off the administrative penalty amount paid under this
4 section against a civil penalty subsequently awarded by a court
5 against the person for the same violation under AS 46.03.760.

6 (g) The assessment of an administrative penalty under this
7 section does not affect the obligation of a person to comply with this
8 chapter, AS 46.04, AS 46.09, or with a regulation, order of the de-
9 partment, permit, approval, or certificate issued under this chapter,
10 AS 46.04, or AS 46.09.

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

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

16 (2) interest from the date the department issued the as-
17 sessment notice under (d) of this section; and

18 (3) a nonpayment penalty of five percent for each 30-day
19 period or fraction of a period in which the assessment remains unpaid
20 but not to exceed 25 percent of the administrative penalty.

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

22 Sec. 46.03.850. COMPLIANCE ORDER. (a) When the department
23 finds after an investigation that a person is violating or is about to
24 violate a provision of this chapter, AS 46.04, AS 46.09, or AS 03.05,
25 or of a regulation, order of the department, permit, approval, or
26 certificate issued under this chapter, AS 46.04, AS 46.09, or AS 03.-
27 05, or is otherwise endangering or creating the potential of pollution
28 of the surface or subsurface air, land, or water within the jurisdic-
29 tion of the state, the department may issue a compliance order. The

1 compliance order shall describe with reasonable specificity the nature
2 of the violation and set out the nature of the required response
3 measures and a deadline for compliance.

4 (b) The compliance order shall be personally served on or sent
5 by certified mail, return receipt requested, to the person affected.
6 Service is complete on a corporation upon receipt by an officer of the
7 corporation or by its registered agent and on a partnership on receipt
8 by a partner. The compliance order is effective on receipt. A re-
9 quest for an administrative hearing under (c) of this section ~~does not~~
10 stay the provisions or deadlines set out in the compliance order, *unless the*
compliance order is issued pursuant to AS 46.03.820 or .865

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

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

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

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

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

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

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

11 (b) Each environmental audit shall be performed by a qualified
12 independent contractor selected by the person required to conduct the
13 audit. ~~The selection of the independent contractor is subject to the~~
14 ~~approval of the commissioner.~~ *The contractor shall meet requirements established by the Department for Environmental Audits*

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

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

27 (e) In this section

28 (1) "environmental audit" means a systematic, documented,
29 periodic, and objective review of a person's operations, practices,

1 and performance related to meeting each applicable environmental
2 standard and requirement, including permit conditions;

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

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

8 Sec. 46.03.885. REGULATIONS. The commissioner shall adopt
9 regulations under the Administrative Procedure Act (AS 44.62) to
10 implement AS 46.03.020(6) and (14), 46.03.761, 46.03.850, and 46.03.-
11 861.

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

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

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

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the reform of certain environ-
7 mental conservation laws and the administrative
8 penalties for their violation; and amending Rule 609
9 of the Alaska Rules of Appellate Procedure."

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

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

12 (6) at reasonable times and with the consent of the owner
13 or occupier, enter and inspect any property or premises and copy
14 records that are required to be kept by this chapter, AS 46.04,
15 AS 46.09, or by a substantially similar federal law or regulation, or
16 by a regulation, order of the department, permit, approval, or accep-
17 tance issued under this chapter, AS 46.04, AS 46.09, or a substantial-
18 ly similar federal law or regulation, to investigate either actual or
19 suspected sources of pollution or contamination or to ascertain com-
20 pliance or noncompliance with this chapter, AS 46.04, or AS 46.09, or
21 with a regulation, order of the department, permit, approval, or
22 acceptance issued under this chapter, AS 46.04, or AS 46.09; the
23 department shall maintain as confidential information and records
24 relating to secret processes, methods of manufacture, financial and
25 commercial information and records and, as agreed by the department
26 and the owner or occupier of the property, other information and
27 records discovered during the investigation; before undertaking an
28 inspection, an authorized employee of the department must present to
29 the owner or occupier of the facility appropriate credentials and if

1 requested a written statement as to the reason for the inspection,
2 including a statement as to whether pollution, contamination, or
3 noncompliance is suspected; if pollution, contamination, or noncompli-
4 ance is not suspected, an alternate and sufficient reason shall be
5 given in writing; each inspection shall be commenced and completed
6 with reasonable promptness; if the employee obtains any samples,
7 before leaving the facility the employee shall give to the owner or
8 occupier a receipt describing the sample obtained, and if requested a
9 portion of each sample equal in weight or volume to the portion re-
10 tained; if an analysis is made of the samples, the department shall
11 provide a copy of the results of the analysis and a written summary of
12 the findings of the inspection to the owner or occupier no more than
13 15 days after the analysis is received; if samples were not taken, the
14 department shall provide a written summary of the findings of the
15 inspection to the owner or occupier no more than 30 days after the
16 inspection is complete;

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

18 (14) to the extent permitted by the United States and Alaska
19 Constitutions, at reasonable times enter and inspect a facility if the
20 facility is pervasively regulated and is an oil terminal facility
21 regulated under AS 46.04.030, a refinery, a crude oil or gas explora-
22 tion, production, or transportation facility, a hazardous waste trans-
23 portation, storage, or disposal facility regulated under AS 46.03.302,
24 a major solid waste disposal facility, or a facility that is required
25 to have both a waste disposal permit and an air emissions permit, and
26 copy records that are required to be kept by this chapter, AS 46.04,
27 AS 46.09, or by a substantially similar federal law or regulation, by
28 a regulation, order of the department, permit, approval, or acceptance
29 issued under this chapter, AS 46.04, AS 46.09, or a substantially

1 similar federal law or regulation, to investigate either actual or
2 suspected sources of pollution or contamination or to ascertain com-
3 pliance or noncompliance with this chapter, AS 46.04, or AS 46.09, or
4 with a regulation, order of the department, permit, approval, or
5 acceptance issued under this chapter, AS 46.04, or AS 46.09; the
6 department shall maintain as confidential information and records
7 relating to secret processes, methods of manufacture, financial and
8 commercial information and records and, as agreed by the department
9 and the owner or occupier of the property, other information and
10 records discovered during the investigation; before undertaking an
11 inspection, an authorized employee of the department must present to
12 the owner or occupier of the facility appropriate credentials and a
13 written statement as to the reason for the inspection, including a
14 statement as to whether pollution, contamination, or noncompliance is
15 suspected; if pollution, contamination, or noncompliance is not sus-
16 pected, an alternate and sufficient reason must be given in writing;
17 each inspection shall be commenced and completed with reasonable
18 promptness; if the employee obtains any samples, before leaving the
19 facility the employee shall give to the owner or occupier a receipt
20 describing the sample obtained, and if requested a portion of each
21 sample equal in weight or volume to the portion retained; if an analy-
22 sis is made of the samples, the department shall provide a copy of the
23 results of the analysis and a written summary of the findings of the
24 inspection to the owner or occupier no more than 15 days after the
25 analysis is received; if samples were not taken, the department shall
26 provide a written summary of the findings of the inspection to the
27 owner or occupier no more than 30 days after the inspection is com-
28 plete; in this paragraph, "pervasively regulated facility" means a
29 facility where commercial activities or operations are or were

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

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

9 (b) When the department has the authority to issue a permit
10 under this chapter, AS 46.04, or AS 46.09 to a pervasively regulated
11 facility as defined in (a)(14) of this section, the department may
12 attach to the permit terms and conditions relating to access for the
13 entry and inspection of property and premises and the copying of
14 records that are required to be kept by this chapter, AS 46.04,
15 AS 46.09, or by a substantially similar federal law or regulation, or
16 by a regulation, order of the department, permit, approval, or accep-
17 tance issued under this chapter, AS 46.04, AS 46.09, or a substantial-
18 ly similar federal law or regulation.

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

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

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

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

5 (d) The department shall, on request, grant an adjudicatory
6 hearing to a person against whom an administrative penalty is as-
7 sessed. The adjudicatory hearing shall be conducted under 18 AAC
8 15.200 - 15.310 as the regulations exist on the effective date of this
9 Act. A person against whom an administrative penalty is assessed may
10 appeal the decision of the department to the superior court. The
11 superior court shall hear the appeal de novo on the record.

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

19 (f) The assessment of an administrative penalty under this
20 section does not affect the obligation of a person to comply with this
21 chapter, AS 46.04, AS 46.09, or with a regulation, order of the de-
22 partment, permit, approval, or certificate issued under this chapter,
23 AS 46.04, or AS 46.09.

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

- 28 (1) the amount of the administrative penalty assessed; and
29 (2) interest from the date the department assesses the

1 administrative penalty under (a) of this section.

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

6 (1) degree of environmental harm resulting from the vio-
7 lation;

8 (2) degree of the respondent's culpability;

9 (3) prior history of violations;

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

12 (5) need for an enhanced penalty to deter future viola-
13 tions;

14 (6) economic savings realized through noncompliance;

15 (7) respondent's ability to pay.

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

17 Sec. 46.03.850. COMPLIANCE ORDER. (a) When the department
18 finds after an investigation that a person is violating or is about to
19 violate a provision of this chapter, AS 46.04, AS 46.09, or AS 03.05,
20 or of a regulation, order of the department, permit, approval, or
21 certificate issued under this chapter, AS 46.04, AS 46.09, or AS 03.-
22 05, or is otherwise endangering or creating the potential of pollution
23 of the surface or subsurface air, land, or water within the jurisdic-
24 tion of the state, the department may issue a compliance order. The
25 compliance order shall describe with reasonable specificity the nature
26 of the violation and set out the nature of the required response
27 measures and a deadline for compliance.

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

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

2 (c) The department shall, on request, grant an adjudicatory
3 hearing to a person against whom a compliance order is issued under
4 (a) of this section. The adjudicatory hearing shall be conducted
5 under 18 AAC 15.200 ^{and 18 AAC 15.20 -} 15.310 as the regulations exist on the effective
6 date of this Act. A person against whom a compliance order is issued
7 may appeal the decision of the department to the superior court. ~~The~~
8 ~~superior court shall hear the appeal de novo on the record.~~

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

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

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

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

19 Sec. 46.03.861. ENVIRONMENTAL AUDITS. (a) As part of a judi-
20 cial or administrative enforcement action, the department may request
21 a person to conduct an environmental audit and to prepare and submit
22 to the commissioner an environmental audit report. The person may
23 decline to conduct an environmental audit.

24 (b) An environmental audit may be performed either by the person
25 requested to conduct the audit or by an independent contractor select-
26 ed by the person. The person performing the audit must meet reason-
27 able qualifications established by the commissioner.

28 (c) In this section

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

1 and objective review of a person's operations, practices, and perfor-
2 mance related to the specific environmental standards and require-
3 ments, including permit conditions, relevant to the enforcement ac-
4 tion;

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

9 (d) The department shall maintain as confidential all informa-
10 tion and records obtained under an environmental audit.

11 (e) Penalties assessed in a judicial or administrative enforce-
12 ment action may be set off against the reasonable costs of an environ-
13 mental audit performed as part of the enforcement action.

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

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

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

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



CHUGACH ELECTRIC ASSOCIATION, INC.

May 8, 1990

Senator Bettye M. Fahrenkamp, Chair
Senate Resources Committee
P. O. Box V
Juneau, Alaska 99811

Re: House Bill 409

Dear Senator Fahrenkamp:

Chugach Electric Association, Inc. (Chugach) wishes to express its opposition to House Bill 409. As currently drafted, it is seriously flawed legally. It would also present significant operational problems for Chugach and other utilities that would negatively impact their ratepayers. Chugach is a member-owned electric utility. Its operations do not present a high degree of risk to the environment. It is Chugach's view that House Bill 409 is overly broad, particularly in its application to entities such as Chugach. The following are some of Chugach's concerns about this Bill. It is by no means an exhaustive list.

1. Section 1 may not protect attorney-client information or other privileged information from disclosure, unless Chugach and DEC agreed.
2. Section 2 would permit warrantless searches of Chugach property simply on "'suspicion' of pollution" without requiring Chugach's consent. This is unconstitutional under the Alaska Constitution.
3. Section 3 extends the DEC's pervasive, unilateral departmental authority from emergency situations to the ordinary course of business.
4. Section 4, Subsection (c) assesses an administrative penalty of \$15,000 a day per violation. It is unclear whether a violation which occurs once but whose clean-up extends over a period of days is to be treated as one or several violations. Determination of the amount of penalty to be assessed in a given situation, in the absence of the requirement to first adopt regulations, would vest in the unbridled discretion of the DEC. The absence of criteria, procedures and specific standards for determining factors to be considered by the DEC in determining the amount of the penalty assessed under this Section makes it constitutionally deficient. Similar Federal

May 8, 1990

statutes under, e.g., TSCA (Toxic Substance Control Act), have regulations which proscribe the criteria to be considered when assessing penalties.

Subsection (e) prohibits collateral judicial or administrative review of the "validity, amount and appropriateness" of the penalty. This is an unusually restrictive provision.

Subsection (g) presents "double jeopardy" problems. For example, if civil penalties were recovered against a violator under statutes other than AS 46.03.760, the concurrent assessment of an administrative penalty could not be offset. See Subsection (f).

5. Section 5 amends existing laws with respect to compliance orders. It would make immediate compliance with the DEC's order mandatory regardless of whether it is arbitrary, and without a hearing, which is granted only at the discretion of the DEC. Judicial review of the order is extremely limited, and stays of provisions or deadlines in the order are prohibited.

Subsection (b) could/should at a minimum be limited to circumstances in which significant, immediate threats to public health or safety required immediate compliance with such an order; the proposed Section makes compliance mandatory and non-discretionary in all cases.

6. Section 6 would authorize the Commissioner of DEC to require Chugach to retain an independent consultant to prepare and submit an environmental audit documenting its environmental compliance as part of both administrative and judicial enforcement actions. This raises potential self-incrimination issues, as well as privacy and confidentiality issues, under the Alaska Constitution. Further, the expense of the audit would be borne by Chugach, even if it revealed no environmental violation(s). Giving DEC this unbridled discretion to require Chugach to incur the expense of hiring a consultant to prepare the audit enables DEC to deprive Chugach of property without due process. Further, Chugach would not have an opportunity to appeal from such order. As noted above, the information reported may subject Chugach to criminal penalties. This provision, as with Section 1, does not contain the constitutional protections provided in similar Federal laws. For example, CERCLA and the Clean Water Act provide:

Notification received pursuant to this subsection or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

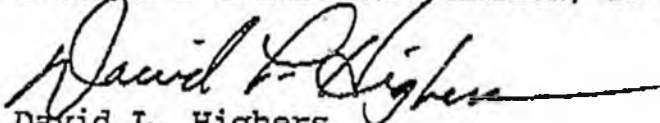
May 8, 1990

Inclusion of such language could remove the risk of asserting the privilege against self-incrimination. The language in Subsection (c) does not cure this problem, and in fact seems to confuse the issue; it refers to an "individual" who can be given a grant of immunity from prosecution; it is not clear if this is the same individual as the "person" (i.e., Chugach) in previous Subsections (a) and (b), such that the information from the audit cannot be used to prosecute Chugach? Also, the use of the word "periodic" in Subsection (e)(1) which defines "environmental report" is troublesome, even though preceding Subsection (d) may be an attempt to cure the question of whether the performance of an audit is a one-time obligation. The rest of the definition of "environmental audit" is vague.

These are just a few of Chugach's concerns about this Bill. Chugach has and will continue to comply with local, state and federal environmental statutes and regulations. Our record in this regard is excellent. However, this legislation would seriously effect Chugach's ability to operate efficiently and economically. We hope your Committee will take these issues into consideration.

Very truly yours,

CHUGACH ELECTRIC ASSOCIATION, INC.



David L. Highers
General Manager

DH:CJ:jg

Trustees for ALASKA

A Non-Profit, Public Interest, Environmental Law Firm

May 4, 1990

Senator Jan Faiks
P.O. Box V
Juneau, Ak. 99811

Dear Senator Faiks:

Thank you for the opportunity to testify at the Senate Judiciary hearing yesterday on HB 409.

I am writing to apologize for over-generalizing in my testimony about the status of "federal law" regarding the same matters that are addressed in HB 409.

Enclosed is a brief memo I prepared yesterday after talking with Mr. Christiansen about compliance orders under federal law. I stand ready to provide more assistance or comments if you need them.

Sincerely,

Mike Wenig

Mike Wenig
Staff Attorney

MEMORANDUM

To: Chris Christiansen, Senator Faik's Staff
From: Mike Wenig, Trustees for Alaska
Re: Federal Law On Admin/Judicial Review of Environmental
Compliance Orders (not incl. an order assessing an
administrative penalty)
Date: May 4, 1990

Below is a brief outline of statutory provisions and caselaw relating to administrative and/or judicial review of compliance orders under CERCLA, the Clean Air Act (CAA), Clean Water Act (CWA), and RCRA.

At the hearing yesterday, I stated that, under "federal law," the only review allowed for an EPA compliance order is in a judicial action brought by EPA to enforce the order.

The outline below indicates that, with the exception of varying provisions regarding pre-issuance notice and rights to confer, my statement is (or, in the case of the CWA, appears to be) accurate for:

- (1) compliance orders issued under the Clean Air Act;
- (2) compliance orders issued under the Clean Water Act;
- (3) orders under CERCLA to abate an "imminent and substantial endangerment" caused by the release of hazardous substances;¹ and
- (4) orders issued under RCRA to compel owners or operators of hazardous waste facilities suspected of presenting a "substantial hazard to human health or the environment" to conduct monitoring, testing, analysis, and reporting with respect to the facility.

As you pointed out to me by phone yesterday, my statement was incorrect for "corrective action" orders issued by EPA under RCRA sections 3008(a) and (h), and 9003(h)(4) and 9006, for violations of the hazardous waste and leaking underground storage tank provisions, respectively, in RCRA. There is a right to an administrative hearing prior to the time these orders become "final." It is unclear whether there is also a right to judicial review of these orders in any proceeding other than judicial actions brought by EPA to compel compliance with the orders.

¹ CERCLA 106 orders may be judicially reviewed in citizen enforcement and cost recovery cases, as well as in EPA enforcement actions.

- 2 -

Finally, RCRA section 7003 orders to abate an imminent and substantial endangerment do not, on the face of the statute, contain provisions requiring "pre-enforcement" administrative or judicial review. I have not had a chance to check the caselaw on the reviewability of these orders.

It is not clear to me why RCRA compliance orders (other than 7003 orders) are treated differently than those issued under the CWA, CAA, and CERCLA. For whatever its worth, the set of releases of hazardous wastes that are subject to RCRA section 3008 orders and which also present an "imminent and substantial endangerment" can be addressed in RCRA 7003 and in CERCLA section 106 orders.² Thus, for this subset of releases, at least, EPA appears to be able to choose the less-cumbersome RCRA 7003 and CERCLA procedures.

I greatly apologize for over-generalizing regarding EPA's authority under "federal law."

A. CERCLA

Section 106(a), 42 U.S.C. § 9606(a), authorizes the President to issue "such orders as may be necessary to protect public health and welfare and the environment" when the President finds that there "may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance. . ."

Section 113(h), 42 U.S.C. § 9613(h), expressly prohibits federal courts from reviewing CERCLA section 106(a) orders, except in

- (1) a judicial action by EPA or another party to recover cleanup costs;
- (2) a judicial enforcement action by EPA to enforce the order or recover penalties for noncompliance with the order;
- (3) an action by a private party for reimbursement of cleanup costs expended;
- (4) a citizen suit
- (5) an action by EPA to compel a remedial action.

B. Clean Air Act

Section 113(a) authorizes EPA to issue compliance orders for violations of various provisions of the CAA. 42 U.S.C. § 7413(a). Orders issued under subsections (a)(1), for violations of state implementation plans, require 30 days prior notice to the violator. All section 113(a) orders, except those regarding

² CERCLA "hazardous substances" are defined in CERCLA section 101(14), 42 U.S.C. § 9614, to include RCRA hazardous wastes.

- 3 -

emissions of hazardous air pollutants, do not take effect until after the recipient of the order has had an opportunity to "confer" with EPA.

Section 307(b) provides for judicial review of specific actions taken by EPA under the CAA (not including issuance of section 113 orders) and any other "final" action. 42 U.S.C. § 7607(b). Section 304 authorizes citizens to sue EPA to compel the Agency to perform a mandatory duty under the CAA. 33 U.S.C. § 7604.

In Asbestec Const. Services, Inc. v. EPA, 849 F.2d 765 (2d Cir. 1988), the Second Circuit Court of Appeals held that a section 113 compliance order based on violations of the national emission standard for asbestos was not reviewable under section 307. Rejecting Asbestec's due process claims, the court held that EPA's order could be reviewed only in a judicial enforcement action brought by EPA against the recipient of the order for noncompliance with the order.³ According to the court:

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.

849 F.2d at 769.

C. Clean Water Act

Section 309(a) authorizes EPA to issue compliance orders for various violations of the CWA. 33 U.S.C. § 1319(a). Orders based on violations of state-issued CWA permits require 30 days prior notice. Orders regarding reporting, record-keeping requirements in section 308 do not take effect until after the recipient of the order has had an opportunity to "confer" with EPA.

Section 509(b)(1) provides for judicial review of several EPA actions but not including the issuance of compliance orders under section 309(a). 33 U.S.C. § 1369(b)(1). Unlike the CAA, the CWA does not also provide for judicial review of all other "final" agency actions under the CWA. Section 505 authorizes citizens to bring suits to compel EPA to perform a mandatory duty under the Act.

My research last night did not reveal any CWA cases

³ I was the Justice lawyer representing EPA on this case.

- 4 -

regarding judicial review of section 309 compliance orders. However, since the judicial review provisions under the CWA are even more restrictive than those under the CAA, the rule set out in the Asbestec decision regarding CAA orders would be applied with full force to CWA orders as well.

D. RCRA

Section 3008(a) and (h) authorize EPA to issue "corrective action" orders to hazardous waste treatment, storage, and disposal facilities. 42 U.S.C. § 6928(a) and (h). Section 3008(b) provides that recipients of 3008 orders are entitled to a "public hearing" before such orders become "final."

Section 9006 provides a similar scheme for violations of the substantive provisions regarding underground storage tanks. 42 U.S.C. § 6991e.

An EPA attorney (Caroline Wehling, 202-382-7703) indicated to me this morning that 3008 and 9006 orders are judicially reviewable after the conclusion of an administrative hearing.

Section 7003 of RCRA authorizes EPA to issue "such orders as may be necessary to protect public health and the environment" from a solid or hazardous waste that "may present an imminent and substantial endangerment to health or the environment. . . ." 42 U.S.C. § 6973(a). That section provides for pre-issuance notice to the affected state, but not to the recipient of the order. The provision does not address administrative or judicial review and suggests that the order is effective upon receipt. I assume that the Asbestec principle would apply to these emergency-type orders, but I have not had a chance to research the caselaw on this issue.

Section 3013(a) authorizes EPA to issue orders to compel monitoring, testing, analysis, and reporting by owners or operators of facilities with hazardous waste the "may present a substantial hazard to human health or the environment." 42 U.S.C. § 6934(a). Section 3013(b) requires that such an order give the recipient 30 days to produce a "proposal" for complying with the order and an opportunity to confer with EPA before EPA requires the recipient to comply.

The same prohibition of "pre-enforcement review" applied by the Second Circuit in Asbestec for CAA orders has been considered to apply (with some reservation, at least) to RCRA section 3013 orders. E.I. DuPont deNemours & Co. v. Daggett, 610 F.Supp. 260 (W.D.N.Y. 1985).

cc. Barnaby Dow
John McDonagh

...END...



Resource Development Council for Alaska, Inc.

807 "G" Street, Suite 200, Anchorage, Alaska 99501-3440
Box 100516, Anchorage, Alaska 99510-0516 907/278-0700 Fax 276-3887

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To: Sen. Jan Faiks, Senate Judiciary committee
From: Debbie Reinwand, Resource Development Council
RE: SB 502, HB 316, HB 409

The Resource Development Council for Alaska, Inc., would like to incorporate its comments on the aforementioned bills into the hearing record.

RDC is opposed to all three bills.

SB 502, which would increase penalties for oil spills and other environmental law violations, has the potential to adversely affect a number of our members, who are responsible corporate citizens and operate in an environmentally-sensitive manner. As the committee has heard, the insurance burden placed on barge operators, for instance, as a result of SB 502, would be quite costly. RDC also objects to the section that provides for punitive rather than compensatory penalties.

With regard to HB 316, this measure is also of concern to RDC, because of the excessive power it will give the Alaska Department of Conservation when combined with HB 409. As with HB 409, this bill is part of an oil spill package, that while aimed at one industry, slops over onto numerous other operators and ultimately deals a devastating blow to the Alaska business community.

Finally, RDC has been opposed to HB 409 since its inception. In the fervor to enact oil spill legislation that will "protect" Alaska citizens from future environmental degradation, certain legislators have produced bills that have the potential to stop Alaska business growth in its tracks. As several concerned individuals testified before the Judiciary committee, this bill allows the DEC to slap a compliance order on an operator when the agency believes there is a "potential" an environmental law is going to be broken.

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Lonny Arseneault
Rich Baker
Richard Barnes
James K. Barnell
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Kelly M. Campbell
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J.J. Cinochia
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Senator Ted Stevens
Senator Frank Murkowski
Congressman Don Young

This bill has been rightly dubbed the "DEC Gestapo" bill. As a gentleman from Southeast Alaska mentioned before the committee, he could face a compliance order and fine if DEC believes a piece of his machinery might have a defect that could result in an environmental infraction.

One of the most offensive sections of the bill is that which finds an operator guilty until proven innocent. Although an alleged polluter is appealing a compliance order and fine, that person is still subject to the compliance order, etc.

Although numerous organizations have worked to correct deficiencies in the bill, RDC believes the flaws cannot be fixed and urges the Senate not to support HB 409.



FLUOR DANIEL

Fluor Daniel Alaska, Inc.
900 West 5th Avenue, Suite 300, P.O. Box 196680
Anchorage, Alaska 99519-6680
(907) 276-2636

May 2, 1990

Senate Judiciary Committee
P.O. Box "V"
Juneau, Ak 99811

Dear Madam Chairman:

House Bill No. 409

Please accept the following comments in lieu of testimony on the subject legislation.

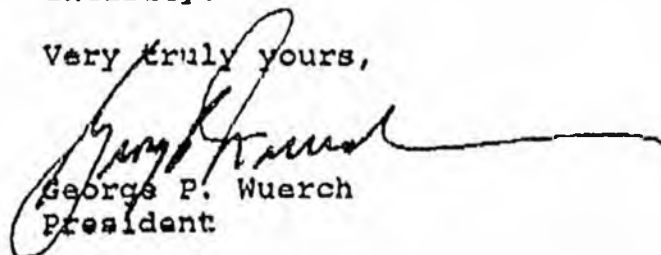
I am opposed to HB 409 and related SB 502 and HB 316. Taken as a whole this proposed legislation adopts a punitive, adversarial posture that is not in the best interest of the State.

Specifically objectionable are provisions of HB 409 which:

- Empowers the executive branch for search and seizure without due process. Not even federal enforcement and investigative agencies such as the DEA and FBI can pursue such actions without authority of the courts. Further, notwithstanding efforts to define targeted businesses, such sweeping powers will inevitably effect affiliated businesses such as engineering firms such as Fluor Daniel.
- Imposes penalty fines without conviction. This shifting of the burden of proof to the accused to prove innocence is blatantly unacceptable.
- Requires environmental audits as dictated by the agency. Clearly the discretionary power to impose costly and time consuming studies, with the scope and selection of contractor controlled by the agency, gives the government the ability to bankrupt a firm at will. No executive department should have such unchecked power.

I urge the committee to reject the legislation in its entirety.

Very truly yours,



George P. Wuerch
President

GPW:jnr
0122A.W89

STATE OF ALASKA

DEPARTMENT OF LAW

VIA FACSIMILE OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

REPLY TO:

- 1031 W 4th AVENUE SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550
FAX: (907) 276-3697
- 1st NATIONAL CENTER
100 CUSHMAN ST. SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1588
FAX: (907) 456-1317
- PO BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

May 3, 1990

The Honorable Jan Faiks, Chairman
Senate Judiciary Committee
State Capitol
P.O. Box V
Juneau, AK 99811

Re: House Bill 409

Dear Chairman Faiks:

We have been asked by Michele Brown of the Alaska Department of Environmental Conservation to respond to several questions raised by Senator Halford during the Senate Judiciary Committee hearings on HB 409.

1) Procedures in HB 409 for the Assessment of Administrative Penalties

A question was raised about the administrative procedures proposed in HB 409 for assessment of administrative penalties by the Department of Environmental Conservation as they compare to the procedures set forth in the Administrative Procedures Act, AS 44.62.

Article 8 of the Administrative Procedures Act (APA) provides procedures for the administrative adjudication of the issuance, renewal, suspension, or revocation of a permit, license, authority, privilege or other right. AS 44.62.330 - .630. By statute these procedures do not generally apply to provisions for civil or criminal penalties, injunctive relief or other penalty provisions relating to a suspension of the license or permit. AS 44.62.330(d).

The procedural provisions in HB 409 for notice, hearing and judicial review are, however, comparable and provide similar protections as those under the APA. Under section 3(f) of HB 409, an assessment notice is personally served on, or sent by certified mail return receipt requested to the affected person. Under the APA, the "accusation" is either personally served or sent by certified mail if statute or regulations requires that individual to file an address with the agency. AS 44.62.380(c) APA requires the respondent to request a hearing within fifteen days of service or the right to a hearing [and judicial review] is waived. AS 44.62.390. Under section 3(d) of HB 409, a hearing must be requested within thirty days or the right to an administrative hearing and judicial review is waived.

APA and HB 409 both provide for judicial review of the final administrative order. The APA allows an appeal to be filed within 30 days of the last day the agency action could be reconsidered or, in other words, within 60 days of the initial agency decision. AS 44.62.560. Section 3(e) of HB 409 similarly provides for judicial review only if an appeal is filed within 30 days of the department's issuance of the administrative hearing decision.

Both APA and HB 409, limit the scope of judicial review of the administrative decision. AS 44.62.570; section 3(e) HB 409. While the APA provides that a court may "exercise its independent judgment on the evidence," a court's review of evidence is limited to an "abuse of discretion" standard. AS 44.62.570(c). Such an abuse of discretion is found under the APA if the evidentiary findings of an administrative agency are not supported by substantial evidence in light of the whole record. Swindel v. Kelly, 499 P.2d 291, 298 (Alaska 1972). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. State, Department of Labor v. Boucher, 581 P.2d 660, 662 (Alaska 1978). However, in cases where the decision involves administrative expertise as to either complex subject matter or fundamental policy formulations, the Alaska Supreme Court has held that deference should be given to an administrative decision if it has a reasonable basis in law and fact. Alaska Public Utility Commission v. Chugach Electric Association, 580 P.2d 687, 694 (Alaska 1978), disapproved on other grounds sub. nom. City & Borough of Juneau v. Thibodeau, 595 P.2d 626 (Alaska 1979). The court, however, will substitute its own judgment for questions of law where no agency expertise is involved. Jager v. State, 537 P.2d 1100, 1107 (Alaska 1975).

HB 409 limits review of an administrative penalty decision to the administrative record and allows reversal only if the administrative record taken as a whole does not contain a reasonable basis to support the finding of a violation or the amount of the penalty assessed. Section 3(e). This limited scope of judicial review is in keeping with the Alaska Supreme Court's decisions recognizing that deference be given to administrative decisions involving agency expertise. Alaska Public Utility Comm'n, supra. Courts have acknowledged that the complex factual and legal determinations by a specialized administrative agency involving environmental issues are deserving of judicial deference. See Chevron U.S.A., Inc. v. Natural Resource Defense Council, 467 U.S. 837, 844 (1984); Miners Advocacy Council v. State, Dep't of Env'tl Conserv., 778 P.2d 1126, 1137 (Alaska 1988).

Finally, HB 409 provides that "[e]xcept as provided in this section, the validity, amount, and appropriateness of the administrative penalty are not subject to judicial or administrative review." Section 3(e). This provision codifies the doctrine of exhaustion of administrative remedies also applicable to agency actions under the APA. This judicially created doctrine requires that before challenging an agency action

in court the challenger must complete the administrative process and seek review through the appeals process. The exhaustion of administrative remedies ensures that a reviewing court has before it a complete record and has the advantage of the agency's findings as well as its technical expertise on the subject. State, Dept. of Labor v. University of Alaska, 664 P.2d 575 (Alaska 1983); Ben Lomand, Inc. v. City of Anchorage, 761 P.2d 119 (Alaska 1988). Section 3(e) makes the application of the doctrine explicit and ensures that unless judicial review is sought pursuant to the administrative appeal process the court is without jurisdiction to hear the case.


2) Other State Statutes Providing for Administrative Penalties

A number of other state agencies have been granted administrative penalty authority, for example, Alaska Department of Natural Resources (coal mining) (AS 27.21.250); Alaska Department of Commerce and Economic Development (securities) (AS 45.55.200), the Division of Insurance (AS 21.27.440), the Alaska Public Utilities Commission (AS 42.05.551 -- .601; AS 42.06.530 - .570), the Alaska Public Offices Commission (AS 39.50.135), the Alaska Department of Labor (OSHA) (AS 18.60.095) and the State Commission for Human Rights (AS 18.80.120 -- .130). None of these statutes require adherence to the procedures of the APA. Procedures for assessment of these administrative penalties are set forth either in the authorizing language of the statute itself or in the agency's regulations. Administrative penalties assessed by the Alaska Public Utility Commission and the State Commission for Human Rights are subject to judicial review under APA. In contrast, penalties assessed by the Department of Natural Resources, Alaska Public Offices Commission and Alaska Department of Labor are judicially reviewed pursuant to separate statutory authority. AS 27.21.240; AS 39.50.135 ("subject to appeal to the superior court"); AS 18.60.97(e) ("substantial-evidence basis" of review).

In sum, we conclude that the proposed administrative penalty scheme in HB 409 is not without precedent in Alaska law and that the procedural protections and safeguards provided in HB 409 for the assessment of penalties are similar to those protections provide in the APA. If you have any further questions, or if we can be of further assistance, please contact us.

Sincerely,

DOUGLAS B. BAILY
ATTORNEY GENERAL


Breck C. Tostevin
Assistant Attorney General

cc: Senator Rick Halford
Jeff Bush

May 3, 1990

The Honorable Jan Faiks
Alaska State Legislature
P. O. Box V
Juneau, Alaska 99811

Dear Senator Faiks:


One rationale offered by the Administration to support the warrantless search provisions in HB 409 is that the new statute is needed to obtain adequate access to the Valdez Marine Terminal.

Under the National Pollution Discharge Elimination System permit recently issued to Alyeska for the Ballast Water Treatment (BWT) system at the terminal, the DEC has access to the BWT facility and related records during any time that the BWT facility is operational. A copy of the relevant portions of the permit are included for your review.

Similar access is available to the DEC under existing statues and under permits for other regulated activities. On February 29, 1990, I wrote Commissioner Kelso to propose guidelines for agency access to the Terminal. Among other things, the letter offered immediate access to vessels, an office within the Terminal and an escort (for safety reasons) from the Terminal office to any part of the facility within 10 minutes after a request. A copy of our proposal is attached. To date, I have not received a reply to this proposal.

So long as DEC personnel abide by safety regulations, they have appropriate access to the Terminal. We have asked the DEC to provide verbal and written feedback after each inspection at the Terminal. Full communication will allow us to address concerns noted by the DEC during its inspection. We believe this type of feedback is appropriate for all facilities, not just ours.

Sincerely,

for 
Mike Williams, Vice President
Environmental Planning and Control

Permit No.: AK-002324-8
Application No.: AK-002324-8

FINAL PERMIT

United States Environmental Protection Agency
Region 10
1200 Sixth Avenue
Seattle, Washington 98101

AUTHORIZATION TO DISCHARGE UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the Clean Water Act,
33 U.S.C. §1251 et seq., as amended by the Clean Water Act of 1987,
P.L. 100-4, the "Act."

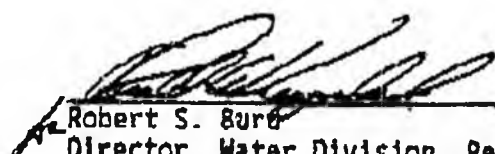
Alyeska Pipeline Service Company
1835 South Bragaw Street
Anchorage, Alaska 99512

is authorized to discharge from the Ballast Water Treatment (BWT) facility and
marine terminal located near Jackson Point, Alaska, to receiving waters of
Port Valdez in accordance with discharge points, effluent limitations,
monitoring requirements and other conditions set forth herein.

This permit shall become effective June 7, 1989.

This permit and the authorization to discharge shall expire at
midnight, June 6, 1994.

Signed this 8th day of May 1989.


Robert S. Bure
Director, Water Division, Region 10
U.S. Environmental Protection Agency

ALYESKA PIPELINE SERVICE COMPANY
FINAL PERMIT

Permit No. AK-002324-8
Page 23 of 36

PART II. STANDARD MONITORING, RECORDING AND REPORTING REQUIREMENTS

- A. Representative Sampling. Samples taken in compliance with the monitoring requirements established under Part I shall be collected from the effluent stream prior to discharge into the receiving waters. Samples and measurements shall be representative of the volume and nature of the monitored discharge.
- B. Monitoring Procedures. Monitoring must be conducted according to test procedures approved under 40 CFR Part 136, unless other test procedures have been specified in this permit or are approved in advance by EPA in writing.
- C. Reporting of Monitoring Results.

Monitoring results shall be summarized each month on the Discharge Monitoring Report (DMR) form (EPA No. 3320-1). The reports shall be submitted monthly and are to be postmarked by the 15th day of the following month. Legible copies of these, and all other reports, shall be signed and certified in accordance with the requirements of Part IV.H. Signatory Requirements, and submitted to the Director, Water Division and ADEC at the following addresses:

- original to: United States Environmental Protection Agency
Region 10
1200 Sixth Avenue, WD-135
Seattle, Washington 98101
- copy to: Alaska Department of Environmental Conservation
Southcentral Region
437 "E" Street - Second Floor
Anchorage, Alaska 99501
- copy to: Alaska Department of Environmental Conservation
Prince William Sound District Office
Drawer 1709
Valdez, Alaska 99686

Additionally, daily monitoring data utilized to calculate the DMR monthly summaries shall be supplied to ADEC on IBM XT compatible floppy disks, with description of the data fields formatting the software to be utilized to access the data.

- D. Additional Monitoring by the Permittee. If the permittee monitors any pollutant more frequently than required by this permit, using test procedures approved under 40 CFR 136 or as specified in this permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the DMR. Such increased frequency shall also be indicated.

The permittee shall notify ADEC when additional monitoring of any pollutant either in the influent, effluent or within the treatment system, regardless of the method used, is conducted. This includes samples taken from tankers. Results shall be made available upon request.

ALYESKA PIPELINE SERVICE COMPANY
FINAL PERMITPermit No. AK-002324-8
Page 24 of 36E. Records Contents. Records of monitoring information shall include:

1. The date, exact place, and time of sampling or measurements;
2. The individual(s) who performed the sampling or measurements;
3. The date(s) analyses were performed;
4. The individual(s) who performed the analyses;
5. The analytical techniques or methods used; and
6. The results of such analyses.

F. Retention of Records. The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least three years from the date of the sample, measurement, report or application. This period may be extended by request of the Director or ADEC at any time. Data collected on-site, copies of Discharge Monitoring Reports, and a copy of this NPDES permit must be maintained on-site during the duration of activity at the permitted location.G. Twenty-four Hour Notice of Noncompliance Reporting.

1. The following occurrences of noncompliance shall be reported by telephone within 24 hours from the time the permittee becomes aware of the circumstances:
 - a. Any noncompliance which may endanger health or the environment;
 - b. Any unanticipated bypass which exceeds any effluent limitation in the permit (See Part III.G., Bypass of Treatment Facilities.);
 - c. Any upset which exceeds any effluent limitation in the permit (See Part III.H., Upset Conditions.), or
 - d. Violation of a maximum daily discharge limitation for any of the pollutants listed in the permit to be reported within 24 hours.
2. A written submission shall also be provided within five days of the time that the permittee becomes aware of the circumstances. The written submission shall contain:
 - a. A description of the noncompliance and its cause;
 - b. The period of noncompliance, including exact dates and times;

ALYESKA PIPELINE SERVICE COMPANY
FINAL PERMITPer. r No. AK-002324-8
Page 25 of 36

- c. The estimated time noncompliance is expected to continue if it has not been corrected; and
 - d. Steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance.
3. The Director may waive the written report on a case-by-case basis if the oral report has been received within 24 hours by the Water Compliance Section in Seattle, Washington, by phone, (206) 442-1213.
 4. Reports shall be submitted to the addresses in Part II.C., Reporting of Monitoring Results.
- H. Other Noncompliance Reporting. Instances of noncompliance not required to be reported within 24 hours shall be reported at the time that monitoring reports for Part II.C. are submitted. The reports shall contain the information listed in Part II.G.2.
- I. Inspection and Entry. The permittee shall allow the Director, ADEC, or an authorized representative, upon the presentation of credentials and other documents as may be required by law, to:
1. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;
 2. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;
 3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and
 4. Sample or monitor, at reasonable times, for the purpose of assuring permit compliance or as otherwise authorized by the Act, any substances or parameters at any location.
 5. For purposes of ADEC's inspection and entry authority as allowed by this permit, "reasonable times" is defined as "those times during which the BWT Facility is operational."
- J. Compliance Schedules. Reports of compliance or noncompliance with, or any progress reports on interim and final requirements contained in any Compliance Schedule of this permit (Part I) shall be submitted no later than 10 days following each schedule date.

Alyeska pipeline

SERVICE COMPANY

100 SOUTH BRADLAW STREET, ANCHORAGE, ALASKA 99501 TELEPHONE (907) 278-1111 TELEEX 090-06-127

February 29, 1990

Letter No. 90-7188-G
File No. 16.07

Commissioner Dennis D. Kalso
AK Department of Environmental
Conservation
3220 Hospital Drive
Pouch 0
Juneau, Alaska 99811-1800

Dear Commissioner Kalso:

At the House Resource Committee Hearings last month both you and I were questioned on Alyeska's policies concerning access to the Valdez Marine Terminal for DEC employees.

It was apparent to me that there is dissatisfaction on both sides with the current arrangements even though both parties are following arrangements previously agreed with your predecessor.

Since the Juneau hearing I have discussed the access question with Alyeska officials and with members of your staff. Based on those conversations I wish to propose the following guidelines for access to the Terminal.

1. DEC officials who wish to visit a ship or ships may enter the Terminal at any time and drive directly to the parking area closest to the jetty and from there proceed to the ship. The official will inform the Alyeska guard at the gate which ship(s) he intends to visit.
2. DEC officials who wish to visit other parts of the Valdez Terminal may enter the Terminal facilities at any time and drive directly to an office that will be provided for them close to the Administration Building. Alyeska Operations will provide an employee to act as a guide for the DEC official within ten minutes of the request and the employee will then accompany the official to any place he wishes to visit.

At the Juneau hearing I believe everyone understood the requirements for safety in the Terminal and it is safety that requires us to still insist that DEC officials be

Commissioner Dannie D. Kelso
Letter No. 90-7188-G
February 28, 1990
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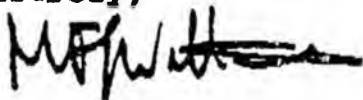
accompanied to any area other than when visiting a vessel. Even then they must abide by our safety and industrial hygiene policies when accessing our berths. We would point out that all Alyeska staff at the Terminal must be clean shaven.

Should the DEC official wish to visit another area of the Terminal after visiting a ship he may drive to the designated office and await the Alyeska employee as set out above.

3. During the House Resources Hearing you were asked if you had any problems with your officials giving Alyeska a verbal report on their visit, including details of any concerns they might have, prior to their exiting the Terminal. As I recall you agreed that this was proper. You did, however, state that a written report within seven days as I had requested was probably not practical.

We therefore request that all DEC officials visiting the Terminal present an Alyeska official with a verbal report of their findings upon their exit and send a written report to the Terminal Superintendent within 30 days.

Sincerely,



M.F.G. Williams
Vice President,
Environmental Planning & Control

skw

908026

cc: S.D. Dietrich
T.C. Haber
I.L. Herman
J.B. Hamiller
G.J. Jurkovich
C.F. O'Donnell
T.F. Plummer
T.L. Polasek
A.T. Smith



ENVIRONMENTAL SERVICES Ltd.

April 3, 1990

Senator Jan Faiks
Chairwoman
Senate Judiciary Committee

REF: TESTIMONY ON HB 409, HB 316 AND SB 502

It is the business of ENVIRONMENTAL SERVICES, LTD. (ESL) to assist both the public and private sectors resolve conflicts and facilitate progress through cooperation. For almost 20 years ESL has worked with federal and state agencies, local governments and with private enterprise including the oil and gas industries. We played an important role in the aftermath of the Exxon Valdez spill having developed the first federally approved beach cleanup plan just days after the spill. In 1978 we prepared the State's Oil Spill Contingency Plan and have been very active in the development of Coastal Zone Management Plans for communities in Prince William Sound as well as others. We have also prepared a number of State and Federal plans and reports addressing a wide range of environmental issues and providing advice on public policy.

As independent, third party consultants ESL has a reputation of providing objective professional advice to government and industry.

The reaction to the Exxon Valdez spill is understandable but political emotions do not necessarily make for good public policy. We agree that there are problems within ADEC as well as the Oil Patch, but these problems will not be resolved by violating basic rights protected under our State and Federal Constitutions. These problems will be resolved with competent and responsible management in government and the growing sensitivity of the oil industry and their support service providers. ESL looks forward to continuing its role in facilitating the dialogue essential between these parties. This is not only good corporate policy but in the best interest of Alaska.

In recent testimony, a number of speakers have suggested a very appropriate and necessary step towards building a broad understanding of what the rules are, with respect to environmental laws and regulations in Alaska, and how those laws and regulations should be applied. Although ESL, in part, makes its living from some of this confusion we believe it is in the public interest that the State fully implement two components of the Department of Environmental Conservation enabling Act. We offer a third component that works to assist the others.

1. Section 46.03.040 requires (it is not discretionary) that ADEC "formulate and annually review and revise a statewide environmental plan for the management and protection of the quality of the environment and the natural resources of the state".

We are not an advocate of endless planning, but this requirement, in law since the creation of the agency, mandates the Administration to develop and present to the people of Alaska its plan or strategy for meeting its legal responsibilities in environmental protection. To our knowledge this has never been done.

It would be within this context that a rationale for change be developed if it was determined that ADEC needs additional statutory authority to protect the human environment consistent with their enabling Act. It is most appropriate to bring this to the attention of the Legislature at this time in light of the testimony presented by a wide range of groups in opposition to these bills. For we believe it is through this process of preparing an annual review and plan that the concepts put forward by these bills would be best served. This would allow the people of Alaska, and yes that includes pro and anti development groups, to understand and participate in self determination.

ADEC claims that they have simply not had the time nor resources to comply with this statutory requirement. We respectfully disagree and believe it essential to bring direction to our State environmental policies as well as properly informing the State Legislature, the rest of the Administration and the people and businesses of our State. It also can provide some continuity in our State environmental public policies.

2. Section 44.46.030 requires (it is not discretionary) the establishment of an Environmental Policy Advisory Board consisting of the Commissioner of DEC and eight (8) members who are not State officials or employees.

The Board, consistent with Section 44.46.050, shall advise the commissioner in the review and appraisal of programs and activities of state departments and agencies in light of the policies set out by DEC's enabling Act and serve as a forum for the exchange of views, concerns, ideas, information and recommendations relating to the quality of the environment. To our knowledge this Board has never been established.

With the proper appointments the Board, working with the annual statewide environmental planning process required under Section 46.03.040, and the Administration can provide the kind of leadership the Alaskan people desire and deserve in responsibly protecting our human environment.