ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
6376 SENATE JUDICIARY

780

3. Consistent with the Lt. Governor's responsibilities to review and certify state regulations and the ADEC Commissioner's responsibilities under ADEC's enabling Act, a Regulatory Reform Task Force should be configured, with participation from EPA, to review all existing regulations dealing with environmental issues and insure that they:

a) Are based on scientific fact
b) Actually achieve a positive result in the environment
c) Establish reasonable performance standards/goals rather than stipulate prescriptive means and methods.
d) Require performance by government in the permitting processes
e) Establish clear information submission standards so that permit applicants know and understand what is required of them
f) Stimulate the development of new technologies
g) Recognize the uniqueness and diversity of Alaskan environments
h) Are consistent with statute and our Constitution

Certainly there are other regulatory goals that will come to mind but this illustrates a direction of thinking that would be very positive and productive.

State and Federal laws and regulations dealing with the human environment in Alaska are too complex, overlapping and confusing. New laws have been enacted without a real understanding of their relationship to existing laws. Old laws no longer based on scientific fact or new technologies, should be reviewed and amended. The structure of the laws, now on the books, and ADEC's administration of complex networks of authority require substantive analysis and reform.

The State must assume EPA clean water and hazardous waste programs if we are to facilitate responsible economic growth.

With the implementation of these three points we believe Alaska can take an important and essential step forward in both regulatory reform and environmental protection as well as economic recovery. We believe that implementation of these actions will provide a forum for the type of dialogue Alaska needs and deserves in its quest to stimulate our economy while ensuring a quality and sustainable human environment.

Rather than review each of the specific objections we have with HB 409 - we would state clearly that we believe this legislation reflects an excess of zeal without the proper maturity and understanding critical for good public policy. We believe there are clear and convincing arguments against enactment of this bill. We also must conclude that this legislation is not an

implementation of existing EPA statutes into State law but rather significantly broadens ADEC powers beyond those in federal law.

There must remain a balance with proper checks on the use of State authority to ensure against abuse. No act of law should be exempt from the Alaska Administrative Procedures Act.

We have reviewed the testimony of most of those who have come before the Legislature regarding so called "Oil Spill Legislation". This is exactly the type of dialogue we believe appropriate in the ADEC policy review process we suggest above. If the Legislature desires to establish an interim committee, and we think that appropriate, to work with ADEC in its implementation of its statutory requirements in statewide environmental planning and the establishment of the Policy Review Board - we believe this legislation should be reviewed as a part of that process. We do not believe HB 409 should be passed into law as it is presently written. We have come to the same conclusion in our review of SB 502 and HB 316.

Good public policy can withstand debate and public process. Alaska can not afford to impose unrealistic statutory or regulatory regimes on an economy that is just beginning to struggle back to life. Alaska can also not afford to ignore its responsibilities to protect its human environment.

We hope these comments have been helpful and would be most willing to continue to participate in the discussion of these issues. We believe we have presented a slightly different approach to these issues and placed them in a broader context which we find appropriate at this point in the debate.

With respect,
ENVIRONMENTAL SERVICES, LTD.

Ric Davidge
Planning, Permitting &
Government Affairs

KLUKWAN FOREST PRODUCTS'
TESTIMONY TO THE SENATE
JUDICIARY HEARING ON
BILL 409

Good afternoon Senator Faiks, and members of the Senate Judiciary Committee. I am Ronald R. Wolfe, Chief Forester for Klukwan Forest Products, I live at 9446 Brandy Place, Juneau, Alaska; and I am here today before you to offer testimony against House Bill 409.

This bill is characterized as oil spill legislation not applicable to small business. On the contrary, our attorneys have agreed that this bill applies to the general authority of the Department of Environmental Conservation and would affect all businesses regulated by DEC, not just a select few.

Only Section 2 of the bill applies specifically to "pervasively regulated" facilities. That portion of the bill allows DEC to enter and inspect a premises without the consent of the owner and to copy relevant records. This is the section that prompted the nickname, "The Gestapo Bill." If there is any confusion over what is a pervasively regulated industry, I am concerned at some point DEC will use as liberal definition as possible to apply Section 2 to industries not originally contemplated as "pervasively regulated."

Section 3 - Administrative Penalties

* Section 3 allows administrative penalties of up to $15,000 per day for each violation. These penalties are higher than what a court is allowed to assess in judicial penalties. Administrative penalties should encourage compliance, not be so high as to be strictly punitive in nature.

* The Environmental Protection Agency's administrative penalty authority requires a choice. EPA must choose either to file a civil lawsuit or issue a penalty. HB 409 allows DEC to pursue both.

* The bill exempts administrative penalties from the due process standards of the Administrative Procedures Act leaving the determination of penalties solely up to the discretion of the commissioner.

Administrative penalties should be subject to the standards of the Administrative Procedures Act, unless a process for fair review is detailed in the statute. Otherwise, the commissioner would have virtually unlimited authority to impose penalties.

It is in fact frightening to give DEC the kind of Super Powers contemplated in Section 3.

Section 4 - Compliance Orders

* A compliance order is effective upon receipt. HB 409 states that a request for a hearing to contest the order does not stay the provision or deadlines in the compliance order. (In other words, guilty until proven innocent.)

* The bill allows DEC to issue a compliance order when a person is "about to violate" or is "otherwise endangering or creating the potential of pollution." This language is clearly too vague to serve as a standard upon which to issue compliance orders. DEC has existing emergency order authority if serious public health or environmental harm is threatened. The expansion of this power from emergencies to what is contemplated is Section 4 is simply <u>not</u> necessary.

* As with Administrative penalties, the bill makes the due process standards of the Alaska Administrative Procedures Act inapplicable to compliance orders.

Section 5 - Environmental Audits

* HB 409 give DEC the authority to require a person to have an independent contractor conduct an environmental audit as part of a judicial or administrative enforcement action. Audits can be a very expensive undertaking. The way the

bill is written, DEC could order an audit as part of a compliance order which could not be contested before being required to comply.

This section is of the most concern to me. First, Environmental Audit Firms must be approved by DEC, yet it is unclear what is required to stay in DEC's favorable standing to be selected. Second, biological sciences are in fact in exact sciences leaving considerable room for professional disagreement. This latitude could be abused by Environmental Audit firms.

In closing I would just like to say thank you for this time to offer testimony to your committee on HB 409.

May 1, 1990

Madam Chairman and Members of the Committee:

I have had the opportunity to study the April 20, 1990 version of Committee Substitute for House Bill 409 and I find that are serious problems with the proposed legislation that will adversely affect all businesses in either the immediate or near future. I would like to call your attention to the four most serious problems from my perspective.

Section 2 provides that ADEC can conduct searches of certain facilities without the consent of the owner/operator of the facility or a court approved search warrant provided that the facility has "significant air and wastewater emission" (line 2, page 2) and that the facility or operations "affect a significant public interest" (line 15, page 2). The section goes on to list certain facilities "by way of example only" that are no included in the provisions of Section 2. The first problem in section 2 is the whole concept of warrantless searches and the rights of citizens of this state. The second is the definition of "significant" and the conflicts with the examples of unregulated facilities. In the NEPA usage, significant is a judgment call by the agency that has historically become smaller and smaller; projects that a few years ago had no significant impacts now require Environmental Impact Statements, fewer people are required to create significant public interest. Federal agencies have ruled that single family residences located in certain areas have significant public interest in their prevention or removal, wetlands and in-holders in Parks. Federal Courts have ruled that small placer mines have such significant air and water emissions to justify EIS's for their operation. The overall NEPA record indicates that even the list of excluded facilities is at least partially included under the present definition of significant and based on the historical trend, all will soon be included.

Section 3 and Section 4 (line 26, page 2; line 21, page 3; line 20, page 5) both contain language limiting the review of administrative penalties and compliance orders by the courts. This language is totally unacceptable due to the amount of discretion that is vested in an administrative agency. The language allows enforcement activities for environmental issues where similar conduct by a law enforcement agency in the most heinous crime would allow the perpetrator to go free for violation of civil rights. Civil rights in this country extend to all activities.

Section 4 (line 23 and 27, page 4) provides that ADEC may issue a compliance order when a person "is about to violate" or "is endangering or creating the potential of pollution". Almost any activity creates the potential of pollution, at some level of risk and severity and anyone who is doing anything is about to

violat', at some undetermined level of risk and time frame, an ADEC regulation. The scope of discretion granted to ADEC in this section is overwhelming and it applies to all activities regulated by ADEC.

I request that you do not pass this legislation as long as it is written in the broad and adversarial language of the April 20, 1990 version.

John D Cooper
8183 Threadneedle
Juneau, AK 99801

BERG CONSTRUCTION CO., Inc.
GENERAL CONTRACTORS
Juneau, Alaska 99802
PHONE
(907) 780-6444

May 1, 1990

Madam Chairperson and Committee Members:

My name is Clifford Berg. I'm President of Berg Construction Co., Inc., a Juneau based construction company started here in Juneau by my father and myself in 1937. Over the years, we have worked throughout Southeast Alaska from Haines and Skagway in the North, to Metlakatla in the South including all the cities, towns and most of the villages and have built roads in some areas where the towns haven't been started yet.

I appreciate this opportunity to testify before you and vehemently oppose passage of H.B. 409.

The Department of Environmental Conservation currently has sufficient regulatory powers to accomplish their duties. I certainly object to giving this agency "Police" powers such as entering premises without a warrant, doling out high penalties, and issuing compliance orders which put a company out of business until a hearing is held.

Many of the Communist countries of the world are finally lifting their yoke of suppression so it is difficult to understand why we in Alaska should be slowly strangling ourselves with additional punitive regulations.

I understand that this bill is aimed primarily at the Petroleum Industry because of the 1989 Exxon Valdez oil spill, and while this shot may only wound the goose that's laying our big golden eggs, it may also kill many of the smaller birds that lay smaller golden eggs: fishing, mining, logging and construction, to name a few.

Please vote against H.B. 409. Thank you.

BERG CONSTRUCTION CO., Inc.

Clifford Berg

Clifford Berg, President

CB:p

48 years of building

Juneau man has worked all over Southeast

By KIRK McALLISTER
The Juneau Empire

To say that Alaska pioneers built the state and made it what it is today is certainly true in the case of Juneau contractor Cliff Berg – especially the "build" part.

In his 48 years in the construction business, Berg has become familiar with most of the communities in Southeast – in fact he has left a lasting imprint on most of them.

Berg, president of Berg Construction Co. Inc. of Juneau, has been at it a long time. He formed a partnership with his father in 1937 after graduating from Juneau High School the year before.

Since then, many of the roads, bridges, docks, air fields, buildings and water and sewer systems in Southeast are the result of his work.

He put in the original streets in Metlakatla, did the first street paving and built the float plane dock in Petersburg, built a school and civic center in Kake, a fire station in Hoonah, enlarged the harbor and rebuilt the airfield in Skagway, did road work near Haines and built part of the highway and ferry terminal in Wrangell.

He also did road work in Sitka and Ketchikan and installed several Federal Aviation Administration guidance systems around Southeast for airplane navigation.

He has built logging roads on Prince of Wales Island and has worked in many remote areas on Kupreanof, Mitkof, Zarembo and Kuiu islands.

"I guess I've lived and worked in all the towns and most of the villages in Southeast, and a lot of places where they haven't built the town yet," says Berg, a cheerful and friendly man of 68.

Born and raised in Juneau, Berg has left his mark on his home town as well.

He put in the fill for construction of Juneau-Douglas High School, cut timber off the Mendenhall Peninsula to help planes landing at the airport, installed an airplane navigation system at Lena Point and did the original clearing for the Mendenhaven subdivision in 1960 when the Mendenhall Valley's main business was fox farms.

He built the fire stations at the airport and Auke Bay, helped remodel the airport in 1973, built the Westridge Condominiums in downtown Juneau, widened the highway to the Auke Bay ferry terminal, worked on what is now Yandukin Drive, widened Thane Road, built roads and bridges at Peterson Creek and Eagle River flats, worked on the Eaglecrest road and bridge, built the powerhouse at Eaglecrest, the Auke Bay sewage treatment plant and erected several of the metal buildings at the airport.

Not one to rest on his laurels, Berg's latest job was finished in September – road work and site preparation for student housing at the University of Alaska-Juneau.

While his construction projects many times took him out of Juneau, often for years at a time, he did find time to build his own house on 10th Street in Juneau. When the Lutheran Church across the street burned down, Berg got the contract to rebuild it.

"It was the closest job I ever had to home," he said jokingly.

Berg has seen the construction industry change radically in his lifetime – equipment has evolved from hand digging to cable shovels to power backhoes, and drilling and blasting techniques have gotten more efficient and sophisticated.

He has also seen the ups and downs of the construction industry in Alaska, the feverish pace fueled by the flush of oil money and the current slowdown as the oil dollars have begun shrinking.

Berg has also been recognized by his peers. He has been selected president of the Alaska Chapter of the Associated General Contractors of America, Inc. for 1986. The group has about 900 members in Alaska and indirectly represents the 25,000 to 30,000 construction workers in the state.

At a town meeting in Juneau earlier this month, Berg, speaking on behalf of the AGC, told Gov. Bill Sheffield that the organization would like to see a minimum of $500 million per year budgeted for capital projects around the state. The governor has earmarked $298.2 million for public construction in his proposed budget, released last week.

Berg says extra money for capital construction could be made available by shrinking or eliminating the permanent fund dividend program or using part of the undistributed income account (the amount of the fund earnings left over after inflation proofing and dividend payments).

"Having all this wealth ($6.9 billion in the permanent fund) and locking it up doesn't make sense," Berg said. "How wealthy do we have to be before we should provide basic services to people such as water, sewer and power."

Berg also said he was concerned about increasing unemployment in the construction industry. About 1,500 construction jobs were lost in Alaska last year and 2,000 more are expected to be lost next year, he said.

According to figures from the Department of Labor, there are some 16,000 unemployed construction workers in Alaska with about 21 percent of those being out-of-state claimants.

Berg said he favored cutting the operating budget of state government since private sector jobs were being lost and unless the cost of government is curtailed it will mean added taxes on state residents to make up for the shortfall in oil dollars.

He pointed to a study of the costs of government by a group called Common Sense for Alaska, Inc., that showed that wages and salaries of state employees are nearly $9,000 per year higher than the nationwide average and the state employee benefits package is more than $3,000 per year higher than the national average.

The same study compared government expenses to population and found that Alaska spends more than $5,000 per resident – five times the national average. Capital spending is 12 times the national norm.

In his job as AGC president, Berg makes his wishes known to the ad

Photo by Mark Kelley

Cliff Berg: new president of builder's group

ministration and legislature. He said the group would like to see state grant projects put out to competitive bid, and the Department of Transportation should handle construction projects for all state agencies. Both those changes would make projects more efficient and easier for contractors to deal with, he said.

But Berg's main focus will remain his Juneau business where his son Jan Vernon serves as vice president. Despite traveling the world with his wife, Pat, (he also served in the Aleutians during World War II) he still enjoys the hunting, fishing and photographic opportunities around his hometown.

TELECOPIER 907-747-5588
TELEPHONE 907-747-2711

ALASKA PULP CORPORATION
4600 SAWMILL CREEK ROAD
SITKA, AK 99835-9801

TESTIMONY FOR HB 409 **5/01/90**
(DEC ADMINISTRATIVE PENALTIES AND SEARCHES)

Senators, Committee Members:

We are distressed about HB 409 and its long reach toward industries outside of the oil industry. This is a bad bill and one that should be killed.

Alaska Pulp Corporation is one of Alaska's largest year-around manufacturers and, with about 1000 employees, one of Southeast Alaska's largest employers. We are not against environmental regulation. We are not against expenditures for pollution control. In 1989, we spent $5.0 million on improvements to air quality at our pulp mill in Sitka and another $14 million to improve water quality. We spend about $10 million a year to make current pollution-control equipment perform. We have been doing our fair share toward cleaner air and water and we feel strongly that DEC, without new legislation, has sufficient power to enforce compliance of its regulations.

The proposal for fines of an extraordinary high level, as stated in Section 3 of HB 409, are excessive. Our state's administration should be working hand-and-hand with industry to encourage compliance, to solve pollution problems, and not working adversarily by establishing prohibitive fines through legislation.

HB 409 gives the Department of Environmental Conservation extraordinary and arbitrary powers of enforcement. The bill exempts administrative penalties from the due process standards of the Administrative Procedures Act and leaves the determination of penalties up to the discretion of the commissioner. This is wrong.

This bill gives Department of Environmental Conservation Gestapo-like powers to establish compliance and compliance orders, based merely on allegations. DEC has the ability now, under emergency order authority, to issue these compliance orders if serious public health or environmental harm is threatened.

Although this piece of legislation is aimed at the the oil industry, it will have a farther reaching effect. From the timber industry vantage, we are concerned how it will affect us. We want to continue to cooperate with state, as well as federal, agencies concerned about our environment.

If this bill passes, the State of Alaska will be sending a clear message to new businesses, investors and ventures to stay clear of Alaska.

Thank you,

Frank Roppel
Executive Vice-President

Alaska State Legislature

Please enter into the record my testimony to the Jud. Com.
committee name

committee on H.B 409 . dated 5/1/90 .
bill/subject

I am opposed to all aspects of the referenced bill. I am particularly opposed to Sec. 2 (14) wherein the D.E.C. is authorized to make unannounced visits to pervasively regulated facilities.

H&H Contractors, Inc. operates two hot plants that are both permitted by D.E.C.. We view legislation that would give any person or agency the right to make unauthorized visits to our facilities as an invasion of our rights. Additionally, we are also regulated by O.S.H.A and M.S.H.A. Both of these agencies require that visitors to our facility first report to our office. The proposed legislation seems to contradict these federal regulations.

We respectfully request that you not pass HB 409 from your committee. Alaskan industry and Alaskans do not need this legislation.

Signed: Anton K. Johansen Anton K. Johansen
Testifier

H&H Contractors, Inc.
Representing (Optional)

P.O. Box 60610 Fairbanks 99706
Address

(907) 479-2235
Phone No.

Alaska State Legislature

Senate Judiciary

Please enter into the record my testimony to the (House Bill 502)
committee name

committee on _____, dated 4/11/90 as amended 4/20/90.
bill/subject

This bill seems to have been prompted by legitimate concerns, but is crafted poorly to address those concerns. It is far too broad and has had too little public input to constitute a reasonable review. As an average, concerned, diligent citizen I would counsel our legislators to postpone action on House Bill 409 until the issues of access to private files and records without an authorizing warrant has been adequately discussed and assessed in the light of the restriction of constitutional rights. (over)

Signed: Clark R. Milne, PE
Testifier

Representing (Optional)

1119 Coppet St.
Address

474-9580
Phone No.

Alaska State Legislature

HB#409 and SB502 / Rule 82

Please enter into the record my testimony to the RULES / Governor staff committee name

committee on OIL POLLUTION PREVENTION bill/subject dated May 1'90 — LAKDAY

Be it enacted by Legislature (new act, or add on)

All ocean vessels carrying oil should be required to carry on decks plastic barrels of CORN STARCH sufficient to sop up the total amt. of oil should the total amt. of oil be spilled. LARGE retaining hoses for the Cornstarch and oil should also be readily available.

Safe-ty Storage
15 ELEANOR AVENUE • FAIRBANKS, ALASKA 99701

SYBIL SKELTON 907-456-SAFE

Representing (Optional)

Address

Phone No.

Alaska State Legislature

Please enter into the record my testimony to the Senate Judiciary Committee
committee name

committee on HB 409,SB502, HB316 , dated May 1, 1990
bill/subject

KECE Kodlak Envlromental Cleanup Effort
PO Box 625 • Kodlak, Alaska 99615 • (907) 486-5113

May 1, 1990

Testimony to be given to Senate Judiciary Committee

My name is Mike Milligan, and I'm Vice-President of the KECE which we formed to deal with the effects of the spill of the Exxon Valdez. We are a member of the Oil Reform Alliance. I am a commerical fisherman, a construction worker and a parent, my wife and I are raising 5 kids, all born in Alaska. I worked as a laborer on the Trans-Alaska Pipeline.

I want to testify today in support of strong oil spill legislation, particularly HB 409, SB502, and HB316.

Alaska has been plagued and tormented by a boom-bust economy. Many of these oil spill bills will strenghten the oil (and resourse) industry in our state, by mandating greater vigilance and respect towards the environment. What this equates to for industry is that they will have to hire more personnel and use better equipment. Many of the restrictions that these bills will impose are already being adhered to by some of the more reputable firms doing business in Alaska. Corporations with a firm commitment to our state will not have as much trouble ahering to these regulations as will resourse corporations that just want the quick profits.

Passage of these bills in an unditued state won't create an economic boom but it will contribute to economic stability. Environmental vigilance potions basically mean more maintenance. Maintenance positions tend to go to local people, people that are willing to work a forty hour work week, pay local property taxes, and spend their money in state. ENVIRONMENTAL LEGISLATION CREATES DEVELOPMENT AND MORE JOBS.

Anyone that thinks that industry can't afford stricker regulations has to wonder where the 2 billion for last summers cleanup is going to come from. Any legislator that thinks we don't need to hold the industry to such high environmental standards should walk around the union halls in Fairbanks and tell the workers that we don't really need corrosion repair this summer.

Passage of these bills at their original strength will herald a new era of resourse development in Alaska. It will make development of ANWR a closer possibility. We need to look at resourse development in terms of the 1990's, not the 1970's.

CON'T

HB 409 has come under fire of late from a section of the news media with a certain zeal for sensationalizing the issuses. Their arguments are not well founded with facts.

As an owner of a 32 ft. commercial fishing vessel I'm relieved to see that the legislature wants to cater to me by listing (on page 2 line 18 of CSHB 409 (FIN) am)fishing vessels among the facilities that are exempt from HB 409. But the exemption does me little good as I'm already subject to administrative penalties under current Coast Guard regulations. I can get a $5,000 ticket from the U.S.C.G. for as little as 1/2 a cup of oil on the water. I can be boarded and inspected, and it doesn't really bother me because I intend to operate my vessel in a professional manner.

Any industry people that want to leave the state because they feel threatened won't be to retreat to Alabama or Louisianna because they already have administrative penalty laws there as well, in fact they have them in over 25 states.

I urge this committee and this legislature to pass strong environmental laws during this legislative session.

Thank You,

Mike Milligan
Vice-President KECE

This 'n That

As a staunch member of the local chapter of the "*Coot 'n Codger Club*," I feel it neçesaary from time to time to refer to my treasured copy of "*Today in Alaskan History*" and to report to you some headlines of days gone by in good old AK's earlier days. For instance, on April 29, 1930: "*The cornerstone of the Federal and Territorial Building, now the Alaska State Capitol, was laid in Juneau.*" And on April 30, 1913: "*The bill creating the Alaska Pioneer's Home was approved by Walter E. Clark, Governor of the Territory of Alaska.*" (Should be of great interest to we C 'n C's.) Oh, here's an appropriate one, though it would never happen in this day and age. On May 2, 1913, "*The first Alaska Territorial Legislature adjourned sine die (without a day being set for meeting again) after 61 days.*" And here's a peculiar one for you, on May 2, 1974, "*Standard Oil and Exxon opposed the Alaska Pipeline, preferring a Canadian route which would have better served the financial interests of the two companies.*" One only has to think of the great Alaska oil spill of 1989 to ponder a bit over that bit of information ... what if ... ?

New Watch Dog

I received a flyer in the mail last week sent by the Greater Juneau Chamber of Commerce called "*Legislative Alert.*" It has to deal with three House bills that the Chamber feels are not in the best interest of the business community. It also relates our two representatives' (Ulmer and Hudson) position on said bills. Ulmer supported H.B. 210 cosponsored H.B. 409 and H.B. 558.

H. B. 210, "*Reservation of Instream Flows for Fish.*" Title sounds good on the surface, but in reality, it virtually can stop any development by the private sector or for that matter, a municipality if it uses any part of a stream for its water source.

H.B. 409 would give the Department of Environmental Conservation (DEC) the sweeping authority to search *your place of business without a warrant if they "even suspect"* that a permitted business (say a fish processor and smokery) is in violation of waste water or air emissions pollution. Violators could be subject to a $15.000 per day (without limit) fine.

H.B. 558 would give the private citizen the right to sue companies directly on environmental issues. I understand that originally the bill would have allowed persons to sue *government agencies* and *commissioners* as well, however the government saw the absolute horror of this monster bill and got themselves pulled out.

These are scary bills! Moreover, they are a direct result of the current "over reaction" on saving the environment. Legislators have a tendency to be terrific targets for the *frenzied few* who feel that all our environmental ills can be cured by overkill measures such as proposed by these bills. The Chamber mentioned that some people labeled them "*witch hunts*" with "*Gestapo*" authority ... I wholeheartedly agree.

At press time I understand that H.B. 409 was voted on: 21 yeas and 19 nays with a notice of re-consideration. H.B. 210 and 558 were still in rule committees.

I keep asking myself ... why are we Americans so willing to throw away our freedoms and impose *heavy State restrictions* upon ourselves? Can't we see the problems the people are having in countries in the communist block? They are struggling toward gaining freedom and democracy while we blithely are so willing to give up ours. The "*big stick*" authority of the State mentality is definitely, in my opinion, not what our forefathers had in mind when they framed the Constitution. I applaud the Chamber of Commerce in their effort to seek out, identify and label these anti-business, anti-capitalism pieces of legislation.

On the Brighter Side ...

I notice the cross walks, center lines and other street markings are almost completely obliterated from this past winters' hard wear and tear. But, as the weather permits, I understand the "stripers" will be out with a fresh batch of white and yellow paint.

Litter Free!

The 4th annual area-wide clean-up sponsored by Litter Free, Inc., was an enormous success, thanks to the hundreds of you who volunteered and participated. Yellow litter bags sprouted up like daffodils all over the borough roadsides. Tons of trash and litter were collected in not-so-great weather. All of the results are still not in ... we will publish them as soon as they are all compiled. All the local media were involved this year and cooperated wonderfully in this effort. Mary Mahoney, this year's president of Litter Free, Inc., *(and our own marketing director here at Commercial Art/Info-Juno)* with the help of her board, will have news releases

(Cont on Page 60)

Rap With Rip... (Cont. from page 21)

available to the media in the next few days. With all the people who supported the clean up, there are a lot of *"thank yous"* to be made. *Environmentally speaking, this effort was an exceptional testimony to the commitment of those involved.*

As a consequence of this effort I just found out that Juneau won an award **"For the Most Improved City in Alaska in 1989"** sponsored by ALPAR (Alaskans For Litter Prevention and Recycling). They supply all those yellow litter bags free of charge. They asked Mary to come to Anchorage to accept the award and represent our community. Well this was certainly unexpected as none of us on the board were aware that such an award existed. Congratulations to Litter Free, Inc., and Juneauites who participated!

Star Bug Contest

Look on the back cover of your last week's *Info* (Apr. 21-27) ... right in the middle of the **Honda Hut** advertisement, next to the outboard and lawnmower, the winning bug may be found. If you find one you're going to be eligible to collect over $80 worth of gift certificates! If you are a winner, come into Commercial Art in the Emporium Mall and pick up gift certificates for the following prizes: A free burger, pasta or chicken dinner at **Mike's**, a kitchen knife from the **Bullet and Blade**, a 12 pack of Pepsi from **Alpac Corp.**, a free pass to one of **Gross-Alaska theaters**, one complimentary breakfast from the **Fiddlehead**, two free movie rentals from **"On the Go Video,"** a cap with the famous Red Dog logo on it from the **Red Dog Saloon**, a dish of ice cream at the **Cookhouse**, a free AA, C, D or 9V battery a month for a year from **Vintage Electronics** and a free cut and style from **Troy's Hair House**. Last week our lucky winner was **Carmen Wynn**.

Well gang, that's it for this week. Old Rip gives the Chamber of Commerce and Litter Free, Inc., an "A" ... and an "F" to framers and supporters of over-kill so-called "environmental bills" and to litter bugs ... both are extremes !!

Rudy J. Rip

EARTH MOVERS OF FAIRBANKS, INC.

GENERAL CONTRACTOR
925 Aurora Drive
Fairbanks, Alaska 99709-2197

BL. 035813
REG. AA253
Phone (907) 456-5087
(907) 452-5634
Fax (907) 451-7632

February 26, 1990

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

Re: HB 409 and SB 497

Dear Ladies and Gentlemen:

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

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

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

- Once a person appeals a decision to the agency, there is no time limit on how fast the agency needs to respond.

- Appeals to an agency which issued a decision generally result in a "rubber stamp" of the previous decision.

- The agency has the ability to shut down an operation without regard to severity of the occurrence or without regard to commonly accepted and generally used practices.

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

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

- Any appeals to a decision should be ruled on by a disinterested third party within a reasonable time limit.

- An operation which is not immediately life threatening, has been in operation for an extended period of time, and has appealed a decision should be permitted to continue operating until a conclusive decision has been reached.

- The 20 percent penalty per quarter for unpaid fines should be reduced to statutory interest.

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

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

Should you have any questions, please contact the undersigned.

Sincerely,

EARTH MOVERS OF FAIRBANKS, INC.

Randy Brand
Vice President

RB/lm

Alaska Loggers Association, Inc.

217 Second Street, Suite 203
Juneau, Alaska 99801
(907) 463-3175

111 STEDMAN, SUITE 200
KETCHIKAN, ALASKA 99901-6599
Phone 907-225-6114
FAX 907-225-5920

April 23, 1990

Joe Poor, Executive Director
Greater Juneau Chamber of Commerce
1107 W. Eighth St. #1
Juneau, Alaska 99801

Dear Joe,

At the Chamber's request, I have detailed below some of the concerns that numerous business organizations have with House Bill 409.

This bill is characterized as oil spill legislation not applicable to small business. On the contrary, our attorneys have agreed that this bill applies to the general authority of the Department of Environmental Conservation and would affect all businesses regulated by DEC, not just a select few.

Only Section 2 of the bill applies specifically to "pervasively regulated" facilities. That portion of the bill allows DEC to enter and inspect a premises without the consent of the owner and to copy relevant records. This is the section that prompted the nickname, "The Gestapo Bill."

Since there has been so much attention paid to the "pervasively regulated" issue, I'd like to focus these comments on those sections of the bill that would apply to all who are regulated by DEC, big and small.

Section 3 - Administrative Penalties

* Section 3 allows administrative penalties of up to $15,000 per day for each violation. These penalties are higher than what a court is allowed to assess in judicial penalties. Administrative penalties should encourage compliance, not be so high as to be strictly punitive in nature.

* The Environmental Protection Agency's administrative penalty authority requires a choice. EPA must choose either to file a civil lawsuit or issue a penalty. HB 409 allows DEC to pursue both.

* The bill exempts administrative penalties from the due process standards of the Administrative Procedures Act leaving the determination of penalties solely up to the discretion of the commissioner.

Administrative penalties should be subject to the standards of the Administrative Procedures Act, unless a process for fair review is detailed in the statute. Otherwise, the commissioner would have virtually unlimited authority to impose penalties.

Section 4 - Compliance Orders

* A compliance order is effective upon receipt. HB 409 states that a request for a hearing to contest the order does not stay the provision or deadlines in the compliance order. (In other words, guilty until proven innocent.)

* The bill allows DEC to issue a compliance order when a person is "about to violate" or is "otherwise endangering or creating the potential of pollution." This language is clearly too vague to serve as a standard upon which to issue compliance orders. DEC has existing emergency order authority if serious public health or environmental harm is threatened.

* As with Administrative penalties, the bill makes the due process standards of the Alaska Administrative Procedures Act inapplicable to compliance orders.

Section 5 - Environmental Audits

* HB 409 gives DEC the authority to require a person to have an independent contractor conduct an environmental audit as part of a judicial or administrative enforcement action. Audits can be a very expensive undertaking. The way the bill is written, DEC could order an audit as part of a compliance order which could not be contested before being required to comply.

For your information, I have attached a list of the business organizations we have been working with on this bill. Representatives of these organizations have reviewed this letter and concur with the concerns detailed here.

Sincerely,

Thyes J. Shaub
Governmental Affairs Director

cc: Representative Fran Ulmer

Represented Business Interests

Alaska Loggers Association
Alaska Pulp Corporation
Echo Bay Exploration, Inc.
Alaska Coal Association
Alaska Miners Association
Resource Development Council
Associated General Contractors of Alaska
Forest Alliance
Alaska State Chamber of Commerce
Greens Creek Mining Company
Alyeska Pipeline Service Company
Arco Alaska, Inc.
KONCOR Forest Products, Inc.
Klukwan Forest Products, Inc.
Kensington Venture
The Producers Council
Timber Trading Company

ASSOCIATED GENERAL CONTRACTORS of ALASKA

[illegible] STREET • ANCHORAGE, ALASKA [illegible]
PO BOX 240809 • ANCHORAGE, ALASKA [illegible]
TELEPHONE (907) 561-5354 • FAX (907) 562-0118

April 13, 1990

The Honorable Sam Cotten
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Speaker Cotten:

The Associated Ge[illegible]l Contractors of Alaska (AGC) opposes passage of HB 409 in [illegible]ant form. We have not yet been able to assess the full sw[illegible] the warrantless search provision proposed in Section 2[illegible] bill.

AGC is co[illegible]ed about the Department of Environmental Conservation's in[illegible]vement in regard to environmental audit procedures. Without p[illegible]er safeguards we believe it could be used for delay tactics a[illegible]harassment.

Also, the [illegible]torney's fees should work both ways. If these issues go to court a[illegible]d the Department loses, it should return any moneys administra[illegible]ively taken and pay the court costs and attorney fees for the prevailing party. This would impose discipline on the Department that is absolutely vital.

There is a real need to advise small business in Alaska of the ramifications of HB 409. There appears to be a rush to pass this legislation to avoid small business knowing what the impact will be under this legislation.

HB 409 should be held over and field hearings conducted throughout Alaska describing the proposed impacts. We believe that if you conduct field hearings, you will find that a large majority of Alaskans would speak out in opposition to this legislation. It sets dangerous precedents and is poor legislative policy because it

represents environmental overkill as the result of the emotional over reaction to the oil spill in Prince William Sound.

We urge you not to let HB 409 go to the Floor of the House of Representatives in its present form.

Sincerely,

ASSOCIATED GENERAL CONTRACTORS
OF ALASKA

F. Michael Swalling
President

cc: All House Members

PO Box 21135
Juneau, Alaska 99802-1135
May 3, 1990

Senator Jan Faiks
Chair, Senate Judiciary Committee
Capitol Building
Juneau, Alaska 99811

Dear Senator Faiks:

I would like to offer the following comments regarding House Bill No. 409 - An Act relating to the reform of certain environmental conservation laws and the administrative penalties for their violation." I offer these comments as an individual citizen who has resided in Alaska for over twenty five years - with my experience in Alaska dating back to 1953. I also offer these comments as a former federal government administrator and manager of forest and other related natural resources.

I do not believe this proposed Bill should be favorably reported out of Committee in its present form. My primary reasons for opposing this Bill in its present form can be summarized as follows:

1. The Bill's present coverage is open to a broad interpretation of businesses covered. The term "pervasively regulated" is not adequately defined. One can conclude that both big and small businesses would be covered by this Bill.

2. I am opposed to authorization for government agencies to issue administer penalties without following the due process standards of the Adminisrative Procedures Act. The Bill apparently leaves the determination of penalties to the discretion of the Commissioner. Administrative penalties should be subject to the standards of the Administrative Procedures Act.

3. Section 4 of the Bill apparently authorizes the issuance of compliance orders without the requirement of adhering to the standards of the Administrative Procedures Act.

4. I am opposed to the provisions of Section 2 which apparently allows entry and inspection of premises and records without the consent of the owner or consent of the Court.

5. The Environmental Audits (Section 5) part of the Bill is also too broadly worded. It appears to require such audits without the owner being able to contest or seek a modification of such an Audit.

As one who has represented the government in natural resource management issues for over twenty five years, I believe there is real merit in having a system of due process, or checks against the possible unfair application of government regulations. In the interest of fairness, I would respectively suggest this Bill not be reported favorably without restoring the due process and related fairness requirements noted above. Thank you for the opportunity to comment.

Sincerely,

John A. Sandor

Testimony of Robert G. Loiselle
For The Forest Alliance
Senate Judiciary Committee Hearing
HB 409
May 3, 1990
Juneau, Alaska

The Forest Alliance is a broadly constituted organization of forest land owners, manufacturers, loggers and others having commercial and professional interests in the proper management and development of forest lands. The members of the Alliance include all of the major private timber owners in the state of Alaska.

Our members are very concerned about HB 409, because despite testimony to the contrary, this bill is not simply oil spill legislation, but rather is legislation which would affect a broad spectrum of Alaska industry and business. We understand that this was not the intent of the bill, but it would certainly be the effect.

Our intent is not to question the necessity of adequate environmental regulation or of adequate enforcement tools. The issues in question with this bill are simply ones of fairness and due process. Indeed, the bill does not address environmental regulations per se, but rather their enforcement. Enforcement actions should not be punitive and they should provide for adequate due process, particularly where the very survival of a business may be at stake.

The amount of administrative penalty that DEC may administer is a question of public policy, and I would argue that $15,000 per day is too high to assess without an evidentiary hearing. And the standards for administering the penalty are so vague and the standard of judicial review (substantial evidence) so loose, that meaningful review of the amount of the penalty will be impossible.

Even though these penalties could be used to offset a judicial penalty, the individual is still subject to the attendant costs of multiple proceedings for a single action. Also, a single action could be characterized as multiple violations, opening the door for a host of penalties and proceedings.

We also take great exception to being put in the situation where we are "guilty until proven innocent". This is particularly alarming considering the limited judicial review available.

The question of environmental audits, where audits can be required as part of an enforcement action even before someone violates the law, needs serious examination.

Existing law already provides for substantial civil and criminal penalties. If it is determined that the administrative penalties provided for in this bill are required, then they should be changed to reflect amounts that are adequate, but not punitive. And these

amounts should be clearly spelled out for the various types of offenses and not left to the discretion of the commissioner. Those accused of violations should have all of the rights of due process that are normally available.

Thank you for this opportunity to testify. I would be happy at this time to respond to any questions you may have.

Alaska Loggers Association, Inc.

217 Second Street, Suite 203
Juneau, Alaska 99801
(907) 463-3175

111 STEDMAN, SUITE 200
KETCHIKAN, ALASKA 99901-6599
Phone 907-225-6114
FAX 907-225-5920

April 23, 1990

Chris: Our lobbyist group helped draft this letter. It's a good, short summary of our opposition.

Joe Poor, Executive Director
Greater Juneau Chamber of Commerce
1107 W. Eighth St. #1
Juneau, Alaska 99801

Dear Joe,

At the Chamber's request, I have detailed below some of the concerns that numerous business organizations have with House Bill 409.

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For your information, I have attached a list of the business organizations we have been working with on this bill. Representatives of these organizations have reviewed this letter and concur with the concerns detailed here.

Sincerely,

Thyes J. Shaub
Governmental Affairs Director

cc: Representative Fran Ulmer

Represented Business Interests

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Alaska Pulp Corporation
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Alyeska Pipeline Service Company
Arco Alaska, Inc.
KONCOR Forest Products, Inc.
Klukwan Forest Products, Inc.
Kensington Venture
The Producers Council
Timber Trading Company

Alaska State Legislature

Representative Mike Davis District 19

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

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

To: Senator Jan Faiks
Senate Judiciary Committee

From: Rep. Mike Davis

Re: HB 409

Date: April 27, 1990

I am writing to request a hearing for HB 409, which would give the Department of Environmental Conservation authority to assess Administrative Penalties. HB 409 addresses the critical need for a stronger regulatory presence when it comes to pollution violations. In recent years the state has been plagued by hundreds of oil, chemical and hazardous waste spills, many of which the state has been forced to clean up at its own expense. It has become clear to me that a streamlined regulatory atmosphere is desperately needed if we are going to keep both the state and industry to their obligation to prevent pollution and to clean up promptly when it becomes a problem. Administrative penalties will provide for an economical, efficient and consistent system to deal with chronic polluters. This is similar to laws in 28 states and may soon be required by the EPA.

In addition HB 409 allows the DEC access to inspect a select group of pervasively regulated facilities, requires environmental audits and strengthen the department ability to craft effect compliance orders.

Today, many states are using these management tools to give government and industry clear guidelines to protect the public and our environment. In is report on the Exxon Valdez tragedy, the Alaska Oil Spill Commission has recommended the addition of these regulatory tools as an essential first step towards prevention of future pollution disasters.

Thank you for your consideration.

Sectional Analysis - CS to HB 409 (Finance) am April 27, 1990

Section 1 - Consentual Inspections

This section revises the DEC's present general access authority to include the right to copy "relevant records". It continues the requirement that the DEC obtain consent from the owner or occupier of the premises.

Section 2 - Nonconsentual Inspections

Adds a provision to provide authority for nonconsentual inspections in the case of "pervasively regulated facilities" to the extent "permitted by the United States and Alaska Constitutions" but only in the case of certain specific types of facilities. These facilities must be "pervasively regulated" by the department and be a type specifically listed in this section. A provision is also made to keep trade secrets confidential.

Section 3 - Administrative Penalties

Establishes a new section creating an administrative penalties procedure for violation of DEC's statutes, regulations, orders or permits. The amount may not exceed $15,000 per day for each violation. Current procedures for addressing violators are long, cumbersome and expensive, hampering both state and industry's ability to deal quickly with pollution problems. Criteria are provided to guide the assessment of penalties (e.g., effect of the violation on public health; prior history of violation; deterrence of future violations). This section establishes an administrative review process that streamlines the process of adjudicating these claims and provides for judicial review should the violator wish to challenge the penalty.

Due process provisions are specifically established:

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

Section 4 - Compliance Orders

Allows for a compliance order to become effective immediately to start cleanup up of a contaminated site or to stop an ongoing pollution incident. Presently, industry can challenge compliance orders before implementation, causing substantial delays. This section also provides for an administrative hearing and for judicial review of the hearing decision as in Section 3.

Section 5 - Environmental Audits

Allows the Commissioner to require environmental audits conducted by in independent contractor. An environmental audit is an objective and systematic analysis of a facility's operations to insure compliance with state environmental laws and to spot pollution problems before they become unmanageable. The EPA uses a similar process that has been very successful. Audits may not be required more than once per violation as long as conditions remain in compliance with the law.

Section 6 - Adoption of Regulations

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

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

REPLY TO:

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SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550

☒ *1st NATIONAL CENTER*
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701-4679
Phone: (907) 452-1568

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

VIA FACSIMILE

Telecopier #456-1317
April 2, 1990

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

Re: H.B. 409 access provisions

Dear Representatives Larson and Hoffman:

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

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

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

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

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

and

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

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

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

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

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

Sincerely,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: John A. McDonagh
Assistant Attorney General

JAM:jah

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

Alaska State Legislature

HOUSE OF REPRESENTATIVES

Official Business

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

TO: House Members

FROM: Representative Mike Davis

DATE: April 20, 1990

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

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

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

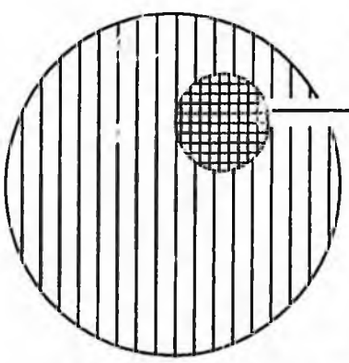
However, not all pervasively regulated facilities in Alaska would be subject to nonconsentual inspections under CS HB 409 (Finance). The legislation further narrows the type of facilities in Alaska potentially subject to nonconsentual inspections. First, by limiting the department's authority to conduct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

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

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

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

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



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

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

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

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

Alaska State Legislature

Legislative Research Agency

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

February 6, 1990

MEMORANDUM

TO: Representative Mike Davis

ATTN: Barnaby Dow

FROM: Leola Weimer LW
Legislative Analyst

RE: Administrative Penalties
Research Request 90.156

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

Summary

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

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

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

Administrative Penalty Authority

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

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

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

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

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

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

Department of Environmental Conservation (DEC)

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

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

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

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

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

Other States

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

State of Washington

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

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

State of California

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

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

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

State of Oregon

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

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

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

New Federal Requirement

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

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

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

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

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

Attachments

CIVIL PENALTIES
(ADMINISTRATIVE)

TABLE 13

CIVIL PENALTIES UNDER HAZARDOUS WASTE LAWS

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

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

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

Table 13 (continued)

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

Table 13 (continued)

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

ATTACHMENT A

Alaska Statute 44.62.330
Article 8. Administrative Adjudication

lates art. II of the state constitution. State v. ALIVE Voluntary, 606 P.2d 769 (Alaska 1980).

No implied general power to veto agency regulations by informal legislative action exists. State v. ALIVE Voluntary, 606 P.2d 769 (Alaska 1980).

Cited in Wickersham v. State, Com. Fisheries Entry Comm'n, 680 P.2d 1135 (Alaska 1984).

Article 8. Administrative Adjudication.

NOTES TO DECISIONS

Applied in Schnabel v. State, 663 P.2d 960 (Alaska Ct. App. 1983).

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

(1) *[Repealed, § 5 ch 159 SLA 1980.]*

(2) Board of Chiropractic Examiners;

(3) Board of Dental Examiners;

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

(5) *[Repealed, § 13 ch 218 SLA 1976.]*

(6) Board of Examiners in Optometry;

(7) *[Repealed, § 5 ch 159 SLA 1980.]*

(8) State Medical Board;

(9) Division of Lands under Alaska Land Act where applicable;

(10) Board of Nursing;

(11) Board of Pharmacy;

(12) Board of Public Accountancy;

(13) Department of Labor as to functions relating to employment security only as provided in (c) of this section;

(14) Real Estate Commission;

(15) Alaska Workers' Compensation Board, where procedures are not otherwise expressly provided by the Alaska Workers' Compensation Act;

(16) Department of Transportation and Public Facilities, as to functions relating to aeronautics and communications;

(17) *[Repealed, § 12 ch 131 SLA 1980.]*

(18) *[Repealed, § 49 ch 94 SLA 1980.]*

(19) *[Repealed, § 54 ch 169 SLA 1978.]*

(20) *[Repealed, § 16 ch 82 SLA 1982.]*

(21) *[Repealed, § 54 ch 169 SLA 1978.]*

(22) *[Repealed, § 11 ch 181 SLA 1976.]*

(23) Department of Public Safety, as to suspension or revocation of a security guard's license under AS 18.65.400 — 18.65.490;

(24) Department of Health and Social Services, under AS 47.35, relating to boarding and foster homes for children;

(25) *[Repealed, § 60 ch 98 SLA 1966.]*

(26) *[Repealed, § 4 ch 120 SLA 1971.]*

(27) Department of Health and Social Services and Department of Environmental Conservation under AS 17.20 (Alaska Food, Drug, and Cosmetic Act), and Department of Commerce and Economic Development in connection with the licensing of embalmers and funeral directors under AS 08.42;

(28) Department of Health and Social Services and the Hospital Advisory Council, under AS 18.20.010 — 18.20.130;

(29) *[Repealed, § 4 ch 120 SLA 1971.]*

(30) Department of Environmental Conservation, under AS 18.35.010 — 18.35.090, concerning the regulation of tourist and trailer camps, motor courts, and motels;

(31) *[Repealed, § 40 ch 206 SLA 1975.]*

(32) *[Repealed, § 4 ch 106 SLA 1970.]*

(33) Board of Marine Pilots;

(34) Alaska Police Standards Council;

(35) Big Game Commercial Services Board;

(36) Board of Dispensing Opticians;

(37) *[Repealed, § 20 ch 110 SLA 1981.]*

(38) *[Expired pursuant to § 3 ch 128 SLA 1974; am § 7 ch 108 SLA 1975.]*

(39) Alaska Public Offices Commission;

(40) Board of Fisheries;

(41) Board of Game;

(42) the Department of Education and the Professional Teaching Practices Commission with regard to proceedings to revoke or suspend a teacher's certificate under AS 14.20.030 — 14.20.040 and AS 14.20.470(a)(4);

(43) Alaska Commission on Postsecondary Education under AS 14.48 as to denial of applications and revocation of authorizations and permits;

(44) Department of Environmental Conservation, except to the extent that AS 44.62.360 — 44.62.400 are inconsistent with the manner in which proceedings are initiated under the provisions of AS 46.03;

(45) University of Alaska, except to the extent that its inclusion is inconsistent with the provisions of AS 14.40;

(46) *[Repealed, § 77 ch 14 SLA 1987.]*

(47) Board of Psychologist and Psychological Associate Examiners;

(48) the Department of Fish and Game as to functions relating to the protection of fish and game under AS 16.05.870;

(49) Board of Veterinary Examiners;

(50) Board of Nursing Home Administrators;

(51) Board of Barbers and Hairdressers;

(52) Department of Natural Resources concerning the Alaska grain reserve program under former AS 03.12;

(53) Department of Commerce and Economic Development concerning the licensing and regulation of audiologists under AS 08.11;

(54) Department of Commerce and Economic Development concerning the licensing and regulation of hearing aid dealers under AS 08.55.

(b) The procedure of an agency not listed in (a) of this section shall be conducted under AS 44.62.330 — 44.62.630 only as to those functions to which AS 44.62.330 — 44.62.630 are made applicable by the statutes relating to that agency.

(c) Judicial review and scope of judicial review of all final decisions of the commissioner of labor on an appeal relating to employment security shall be in accord with this chapter notwithstanding anything to the contrary in AS 23.20 (Alaska Employment Security Act). All other procedures of the Department of Labor relating to employment security shall be as provided in AS 23.20 and the regulations under AS 23.20.

(d) Except in a case of reinstatement or reduction of penalty, the provisions of this chapter do not affect statutory provisions concerning

(1) civil or criminal penalties;

(2) additional relief by injunction or restraining order;

(3) penalty provisions relating to suspension, revocation, reissuance, and other similar matters of licenses, permits, leases, concessions, and other similar matters;

(4) related matters that in their context do not relate to procedure.

(§ 2 (ch 2) ch 143 SLA 1959; am § 14 ch 2 SLA 1964; am § 60 ch 98 SLA 1966; am § 2 ch 120 SLA 1966; am § 1 ch 58 SLA 1967; am § 18 ch 143 SLA 1968; am § 2 ch 83 SLA 1969; am § 2 ch 118 SLA 1969; am §§ 3, 4 ch 106 SLA 1970; am § 6 ch 104 SLA 1971; am § 4 ch 120 SLA 1971; am § 2 ch 178 SLA 1972; am § 5 ch 179 SLA 1972; am § 2 ch 17 SLA 1973; am § 3 ch 45 SLA 1973; am § 2 ch 82 SLA 1973; am § 2 ch 7 FSSLA 1973; am § 5 ch 76 SLA 1974; am § 2 ch 126 SLA 1974; am § 6 ch 9 SLA 1975; am § 25 ch 25 SLA 1975; am §§ 39, 40 ch 206 SLA 1975; am § 4 ch 25 SLA 1976; am § 2 ch 59 SLA 1976; am § 11 ch 181 SLA 1976; am §§ 13, 106 ch 218 SLA 1976; am § 18 ch 220 SLA 1976; am § 9 ch 40 SLA 1977; am § 3 ch 140 SLA 1977; am § 54 ch 169 SLA 1978; am § 10 ch 59 SLA 1979; am § 23 ch 58 SLA 1980; am § 3 ch 84 SLA 1980; am §§ 49, 60 ch 94 SLA 1980; am § 15 ch 130 SLA 1980; am § 12 ch 131 SLA 1980; am § 15 ch 141 SLA 1980; am §§ 4, 5 ch 159 SLA 1980; am § 20 ch 110 SLA 1981; am E.O. No. 51, §§ 38, 39 (1981); am § 16 ch 82 SLA 1982; am § 2 ch 100 SLA 1983; am § 124 ch 6 SLA 1984; am § 11 ch 131 SLA 1986; am § 77 ch 14 SLA 1987; am § 12 ch 37 SLA 1989)

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

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

The 1989 amendment, effective May 12, 1989, substituted "Big Game Commercial Services Board" for "Guide Licensing and Control Board" in paragraph (a)(35).

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

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

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

The accusation and hearing procedure set forth in the Administrative Procedure Act was not applicable to the suspension or revocation of liquor licenses by the Alcoholic Beverage Control Board after a conviction of a licensee of certain offenses as set forth in former AS 04.15 [repealed]. 1963 Op. Att'y Gen., No. 10.

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

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

quired by the Administrative Procedure Act, 1963 Op. Att'y Gen., No. 10.

Not all of this chapter, as it relates to workers' compensation proceedings, has been repealed by implication. For example, the Alaska Workers' Compensation Act is silent as to judicial review and the scope of judicial review. This chapter therefore applies, since there is nothing in the Alaska Workers' Compensation Act which covers the same ground or which is inconsistent with provisions in this chapter relating to judicial review and the scope of such review. 1959 Op. Att'y Gen., No. 24.

But this section and AS 44.62.450 were superseded with respect to workers' compensation hearings by AS 23.30.115 and 23.30.135 of the Alaska Workers' Compensation Act. 1959 Op. Att'y Gen., No. 24.

NOTES TO DECISIONS

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

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

Applicability to workers' compensation proceedings. — The legislature intended to substitute, upon the effective date of the Administrative Procedure Act, the judicial scope of review as provided therein for the judicial scope of review as provided in the Workers' Compensation Act. Manthey v. Collier, 367 P.2d 884 (Alaska 1962).

The superior court is controlled by the Administrative Procedure Act in proceedings, or in a review of proceedings from the Alaska Workers' Compensation Board. See Manthey v. Collier, 367 P.2d 884 (Alaska 1962). But see Aleutian Homes v. Fischer, 418 P.2d 769 (Alaska 1966).

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

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

But not to termination of grazing leases. — The adjudicatory provisions of the Alaska Administrative Procedure Act do not apply to the termination of grazing leases by the state Division of Lands. McCarrey v. Commissioner of Natural Resources, 526 P.2d 1353 (Alaska 1974).

Nor to local school boards. — The Administrative Procedure Act by its express terms does not apply to local school boards. Matanuska-Susitna Borough v. Lum, 538 P.2d 994 (Alaska 1975).

Nor to boards of adjustment. — Boards of adjustment are not included on the list in subsection (a) of agencies, boards and administrative bodies specifically subject to this chapter. Galt v. Stanton, 591 P.2d 960 (Alaska 1979).

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

Burden of proof. — While the Alaska Administrative Procedure Act, does not specifically state who has the burden of proof in administrative adjudications, it does provide in AS 44.62.460(e) that "Nothing herein shall be construed to alter the ordinary rules of burden of proof of judicial proceedings in Alaska." The foregoing provision coupled with the fact that under the Administrative Procedure Act a hearing to determine whether a license should be granted, issued or renewed shall be initiated by filing a "statement of issues" which must be served upon the person seeking the issuance or renewal of the license as the respondent (AS 44.62.370, AS 44.62.380), and against which the respondent may defend by filing a notice of defense (AS 44.62.390) impelled the supreme court to the conclusion that the burden of proof on the issue raised by the statement of issues was upon the state.

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

Applied in Vick v. Board of Elec. Examrs., 626 P.2d 90 (Alaska 1981).

Quoted in Pan American Petroleum Corp. v. Shell Oil Co., 455 P.2d 12 (Alaska 1969).

Stated in Furth v. Northern Stevedoring & Handling Corp., 385 P.2d 944 (Alaska 1963); Union Oil Co. v. State Dep't of Natural Resources, 526 P.2d 1357 (Alaska 1974); West Air Alaska, Inc. v. Department of Revenue, 647 P.2d 1067 (Alaska 1982).

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

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

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

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

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

NOTES TO DECISIONS

Alaska Transportation Commission exempted. — Former AS 42.07.151(a) specifically exempted the Alaska Transportation Commission from the requirements of both this section, forbidding the delegation of the hearing power absent express statutory authorization, and AS 44.62.600, requiring the hearing officer to prepare a proposed decision and holding members of the applicable government agency from voting on the decision if they have not heard the evidence. Alaska Transp. Comm'n v. Gaudin, 602 P.2d 402 (Alaska 1979).

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

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

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

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

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

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

ATTACHMENT B

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

The Oregonian

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THURSDAY, DECEMBER 28, 1989

Hammer away on polluters

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

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

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

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

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

• Write a policy that reflects public expectations. The commission lic wants polluters punished.

• Provide DEQ Director Fred Har sen with a procedure to set consis tent and rational penalties statewide

Prior to adopting these goals, DE directors had broad discretion in se ting penalty amounts. Most of th agency's directors, including Har sen, have been too lenient.

The penalty guide embraces variety of factors, including severit of the environmental damage, inten (whether the violator had received prior warning or had been coopera tive), prior violations, negligence an whether the violator received a economic benefit from the violation.

The agency should continue t refine its enforcement policy in 199 The goal, of course, is to increas compliance, preferably voluntarily rather than to jack up the fine received. But this is a hammer-and nail process: Many of the nails (com pliance) probably won't be rammed home without the hammer (fines).

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

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

CIVIL PENALTY SCHEDULE MATRICES
340-12-042
In addition to any liability, duty, or other penalty provided by law, the Director may assess a civil penalty for any violation pertaining to the Commission's or Department's statutes, regulations, permits or orders by service of a written notice of assessment of civil penalty upon the respondant. The amount of any civil penalty shall be determined through the use of the following matrices in conjunction with the formula contained in OAR 340-12-045:

(1)

$10,000 Matrix

<---------- Magnitude of Violation

Class of Violation

	Major	Moderate	Minor
Class I	$5,000	$2,500	$1,000
Class II	$2,000	$1,000	$500
Class III	$500	$250	$100

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

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

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

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

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

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

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

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

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

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

(3)

$500 Matrix

<——————Magnitude of Violation

Class of Violation

	Major	Moderate	Minor
Class I	$400	$300	$200
Class II	$300	$200	$100
Class III	$200	$100	$50

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

(a) Any violation related to residential open burning;

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

MEMORANDUM State of Alaska

TO: Gordon S. Harrison
Director
Legislative Research Agency

DATE: March 13, 1990

FILE NO.:

THRU:

TELEPHONE NO.: 465-2600

SUBJECT: House Bill 409

FROM: Dennis D. Kelso
Commissioner
Department of Environmental Conservation

You requested information from this office regarding House Bill 409. Specifically you asked the following questions:

1. How will the authority to assess administrative penalties affect our traditional interaction with small businesses?

The department's enforcement policy for small businesses will remain essentially the same, which is assistance oriented. We follow a four-step process when dealing with enforcement. First we provide education to help the business manager understand the law, environmental safety and technology to achieve compliance. Then we provide the necessary technical assistance to help achieve compliance. Our next step is to formalize a voluntary compliance schedule. It is only if all of those steps fail, that we move to enforcement.

2) Will the newly acquired authority lower the threshold for active intervention by the department? If so, what are the consequences of the change?

This authority does not lower the threshold for department intervention, if "active intervention" is defined to mean enforcement. Current law provides for the pursuit of civil or criminal proceedings for violations of the majority of our statutes and regulations. The administrative penalties apply to the same violations, with no change in the scope of our actions. The administrative penalties will allow us to establish penalties for a variety of acts of noncompliance. These penalties will be set based on the type and severity of the violation, prior history, public health impacts, and other factors.

Administrative penalties will clearly identify the type of offenses and penalties that would apply, provide certainty about what the consequences of violating environmental laws would be, and establish predictability with regard to how the department will deal with violations.

I hope that this has answered your questions. Please do not hesitate to contact us if you need additional information.

ACCESS

ENVIRONMENTAL QUALITY LAWS

HAWAII

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

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

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

WASHINGTON

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

NEW JERSEY

26:2C-9.1

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

VIRGINIA

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

SOUTH DAKOTA

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

VERMONT

§557. Inspections

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

Pennsylvania

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

Rhode Island

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

North Dakota

23-25-05.

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

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

Nebraska

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

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

ALABAMA

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

INDIANA

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

COLORADO

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

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

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

MONTANA

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

(1) investigate conditions relating to pollution of state waters or violations of permit conditions;

(2) have access to and copy any records required under this chapter;

(3) inspect any monitoring equipment or method required under 75-5-602(3); and

(4) sample any effluents which the owner or operator of such source is required to ~~sample under~~ 75-5-602(4).

SOUTH DAKOTA

\-2-45. The secretary shall, at rea-
le times, have access to any point
, including an industrial user of a
ly owned treatment works, and copy
ecords, inspect any monitoring equip-
or method required under
-2-44, to sample any effluents being
rged into the waters of the state, or
sure compliance with the provisions
s chapter.

A-2-46. The secretary may enter,
presentation of proper credentials
any premises in which a point
e, including an industrial user of a
ly owned treatment works, is locat-
in which any records is required to
aintained pursuant to §34A-2-44 are
ed.

RHODE ISLAND

-12-15. The director shall have full
ers to inspect, and make orders regu-
g and directing all methods, means
devices employed on any steamer or
vessel in the waters of the state, or at
installation on land, in receiving, car-
g, storing, heating, handling or dis-
ging any petroleum, gasoline, kero-
, tar, oil, or any product or mixture
eof; and the director may by order
blish all rules and regulations to pre-
the discharge or escape of any of said
stances into the waters of the state.

WASHINGTON

355 — Right of entry, access to records, pertinent
rtment investigations. The department through its
thorized representatives, shall have the power to
con any private or public property, including the
g of any ship, at any reasonable time, and the
managing agent, master or occupant of such
y shall permit such entry for the purpose of
ating conditions relating to violations of possible
ns of RCW 90.48.315 through 90.48.365, and to
cess to any pertinent records relating to such
y, including but not limited to operation and
nance records and logs: provided, That in connec-
h the authority granted herein no person shall be
d to divulge trade secret processes.

WASHINGTON

WAC 173-201-110 SURVEILLANCE. A continuing surveillance program, to ascertain whether the regulations, waste disposal permits, orders, and directives promulgated and/or issued by the department are being complied with, will be conducted by the department staff as follows:

(1) Inspecting treatment and control facilities.

(2) Monitoring and reporting of waste discharge characteristics.

(3) Monitoring receiving water quality.

ARKANSAS

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

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

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

STATE OF ALASKA
DEPT. OF ENVIRONMENTAL CONSERVATION

STEVE COWPER, GOVERNOR

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

February 7, 1990

POSITION PAPER

House Bill 409

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

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

ACCESS

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

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

ADMINISTRATIVE PENALTIES

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

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

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

COMPLIANCE ORDERS

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

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

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

ENVIRONMENTAL AUDITS

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

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

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

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

REPLY TO:

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VIA FACSIMILE

February 20, 1990

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

Re: HB 409

Dear Representatives Goll, Gruenberg, and Davis:

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

I. ACCESS AND INSPECTION AUTHORITY

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

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

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

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

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

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

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

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

II. ADMINISTRATIVE PENALTIES.

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

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

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

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

> "Furthermore, the argument that a penalty of $5,000 per violation indicates criminality deserves consideration. However, the reason that the court has used contemporary social values and heaviness of the authorized penalty as measures of criminality is that they are a gauge of the community ethical and social judgment of persons who commit the wrongful act. In turn, the reason for determining the community's judgment of such persons is that the extent and nature of that judgment helps one predict the severity of collateral consequences which may be suffered by the defendant. Baker, 471 P.2d at 395. In discussing potential collateral consequences of conviction under the ordinance in Baker, we noted that "one convicted under this ordinance might suffer severe disabilities in obtaining future employment or in having heaped upon him a certain amount of social opprobrium."
>
> The collateral consequences of finding that a debt collection agency or other business has committed "unfair trace practices in the conduct of trade or commerce" are not of this nature.

Id. at 538.

Consequently, while assessment of civil penalties against an environmental polluter may very well subject that person to community disfavor, this is not the type of collateral consequences envisioned in Baker and its progeny. The administrative penalty provision is civil and regulatory to encourage compliance rather than to punish as in a criminal proceeding. Thus, no right to a jury trial is required.

This interpretation is supported by federal law as well. The United States Supreme Court, in construing the U.S. Constitution, has concluded that civil penalties of up to $50,000 per offense under the oil spill provisions of the Clean Water Act are not criminal in nature. United States v. Ward, 448 U.S. 240 (1980). Under the federal test, where the legislature "has indicated an intention to establish a civil penalty, [the court] inquires[s] further whether the civil statutory scheme is so punitive either in purpose or effect as to negate that intention." Id. at 248-49. The court noted that the oil discharge prohibition was a strict liability offense and that separate criminal provisions required proof of scienter. The court concluded that the civil penalties were not criminal in nature, and therefore, did not trigger constitutionally mandated criminal proceedings.

Id. at 254. The same is true for the administrative penalty provision of Section 4 of HB 409.

The second issue you posed is whether the fact that the administrative determination to impose an administrative penalty is not reviewable de novo on appeal to the superior court deprives a person of his/her right to a jury trial in a civil suit under the Alaska Constitution. Article I section 16 of the Alaska Constitution provides that "[i]n civil cases where the amount in controversy exceeds two hundred and fifty dollars, the right of trial by a jury of twelve is preserved to the same extent as it existed at common law." This provision is modeled after the guarantee in the Seventh Amendment to the U.S. Constitution. See Shope v. Sims, 658, P.2d 1336 (Alaska 1983).

In Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977), the U.S. Supreme Court held that "when Congress creates new statutory public rights, it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment." Id. at 455. This case involved administratively assessed penalties for violations of OSHA workplace safety regulations.

In an earlier case, NLRB v. Jones & Laughlin Steel Corporation, 301 U.S. 1 (1937), the U.S. Supreme Court upheld a provision of the National Labor Relations Act empowering the Board to make findings of fact that were conclusive on review and to issue orders concerning challenged labor practices. The Court overruled defendant's Seventh Amendment objections, stating: "the instant case is not a suit at law or in the nature of a suit. The proceeding is one unknown to the common law. It is a statutory proceeding." Id. at 8.

As one commentator has noted, these decisions represent the Court's recognition that the legislature may put certain decisions in the hands of administrative agencies because "in some instances complex problems [are] not easily comprehended by laypeople [and] should be decided by a specialized group of experts; to inject a jury into that process would seriously impair its utility and effectiveness." J. Friedenthal, M. Kane & A. Miller, Civil Procedure 499 (1985).

As a result, since many of the environmental statues found in Title 46 did not exist at common law, the legislature may constitutionally vest their enforcement in administrative agencies without providing for a jury trial.

If you have any further questions, or if we can be of further assistance, please contact us.

Very truly yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL

Michele D. Brown
Breck C. Tostevin
Assistant Attorneys General

MDB/640.tv
cc: Jeff Bush
John McDonagh

Report of the Alaska Oil Spill Commission
Executive Summary

SPILL

The Wreck of the Exxon Valdez
Implications for Safe Marine Transportation

January 1990

- Identify unmet needs and recommend priorities, strategies and obstacles to achieving them;

- Encourage coordination of spill prevention and response programs currently spread among several agencies that cumulatively deserve high priority;

- Make budget and resource allocation recommendations;

- Evaluate programs and recommend elimination of marginal activities;

- Recommend changes based on new technologies and scientific impacts;

- Designate advisory panels, if deemed necessary, including appropriate representation, ex-officio, of appropriate departments of the state and municipalities, regional oil spill authorities, representatives of fishing and environmental groups, and shippers, owners and residential groups on the pipeline route; and

- Issue an annual report and safety assessment. Reports to the governor should include regular statistical and special reports on accidents and near-misses, the status of major risks, the performance of state and federal agencies, and long-term options for improving safety.

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

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

Recommendation 13
Enhanced regulatory strength

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

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

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

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

Recommendation 14
Strengthened state inspections

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

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

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

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

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

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

Jerry Aspland, President, ARCO Marine, Inc.

Alaska Oil Spill Commission hearing, 9/1/89

MEMORANDUM State of Alaska

TO: Gordon S. Harrison
Director
Legislative Research Agency

DATE: March 13, 1990

FILE NO.:

THRU:

TELEPHONE NO.: 465-2600

SUBJECT: House Bill 409

FROM: Dennis D. Kelso
Commissioner
Department of Environmental Conservation

You requested information from this office regarding House Bill 409. Specifically you asked the following questions:

1. How will the authority to assess administrative penalties affect our traditional interaction with small businesses?

The department's enforcement policy for small businesses will remain essentially the same, which is assistance oriented. We follow a four-step process when dealing with enforcement. First we provide education to help the business manager understand the law, environmental safety and technology to achieve compliance. Then we provide the necessary technical assistance to help achieve compliance. Our next step is to formalize a voluntary compliance schedule. It is only if all of those steps fail, that we move to enforcement.

2) Will the newly acquired authority lower the threshold for active intervention by the department? If so, what are the consequences of the change?

This authority does not lower the threshold for department intervention, if "active intervention" is defined to mean enforcement. Current law provides for the pursuit of civil or criminal proceedings for violations of the majority of our statutes and regulations. The administrative penalties apply to the same violations, with no change in the scope of our actions. The administrative penalties will allow us to establish penalties for a variety of acts of noncompliance. These penalties will be set based on the type and severity of the violation, prior history, public health impacts, and other factors.

Administrative penalties will clearly identify the type of offenses and penalties that would apply, provide certainty about what the consequences of violating environmental laws would be, and establish predictability with regard to how the department will deal with violations.

I hope that this has answered your questions. Please do not hesitate to contact us if you need additional information.

Compliance / "Cease and Desist Orders

ENVIRONMENTAL ACTS

LOUISIANA

D. Requirements of compliance orders

Any order issued under this Section shall state with reasonable specificity all of the following:

(1) The nature of the violation.

(2) A time limit for compliance.

(3) That in the event of noncompliance, a civil penalty may be assessed.

E. Civil Penalties.

(1) Any person found to be in violation of any requirement of this Chapter may be liable for a civil penalty, to be assessed by the commission, the secretary, the assistant secretary, or the court of not more than one million dollars or the cost of any cleanup made necessary by such violation and a penalty of not more than twenty-five thousand dollars for each day of violation and may be subject to revocation or suspension of any permit, license, or variance which had been issued to said person. Any person found to be in violation of this Chapter shall be liable for legal interest from the date of the assessment of a civil penalty until paid.

(2) Any person to whom a compliance order or a cease and desist order is issued pursuant to R.S. 30:1073(C) who fails to take corrective action within the time specified in said order shall be liable for a civil penalty to be assessed by the commission, the secretary, the assistant secretary, or the court of not more than fifty thousand dollars for each day of continued violation or noncompliance.

(3) (a) In determining whether or not a civil penalty is to be assessed and in determining the amount of the penalty or the amount agreed upon in compromise, the following factors shall be considered:

(i) The history of previous violations or repeated noncompliance.

(ii) The nature and gravity of the violation.

(iii) The gross revenues generated by the respondent.

(iv) The degree of culpability, recalcitrance, defiance, or indifference to regulations or orders.

(v) The monetary benefits realized through noncompliance.

(vi) The degree of risk to human health or property caused by the violation.

(vii) Whether the noncompliance or violation and the surrounding circumstances were immediately reported to the department and whether the violation or noncompliance was concealed or there was an attempt to conceal by the person charged.

(viii) Whether the person charged has failed to mitigate or to make a reasonable attempt to mitigate the damges caused by his noncompliance or violation.

(ix) The costs of bringing and prosecuting an enforcement action, including staff time, equipment use, hearing records, expert assistance, and such other items as the commission finds to be a cost of the action.

(b) The secretary may supplement such criteria by rule. In the event that the order with which the person failed to comply was an emergency cease and desist order, no penalty shall be assessed if it appears, upon later hearing, that said order was issued without reasonable cause.

(4) No penalty shall be assessed without the person charged being given notice and an opportunity for a hearing on such charge. The person charged may waive a hearing on the issue of whether or not a violation has occurred, and his culpability for such violation and any other ultimate issue. When a hearing on the violation is waived, a decision may be rendered upon the uncontested facts.

(5) After submission for a penalty determination at a hearing, the commission, secretary, or assistant secretary shall provide an opportunity for relevant and material public comment relative to any penalty which may be imposed.

LOUISIANA

C. Compliance orders; emergency cease and desist orders

(1) Upon a determination that a violation of this Chapter is occurring or is about to occur which is endangering or causing damage to public health or the environment, the commission, the secretary, the assistant secretary or an authorized technical secretary may issue an emergency cease and desist order. Upon a finding that the ordered cessation of operations, or any portion thereof, will not completely abate the damages to the environment, in addition to the emergency cease and desist order, affirmative obligations may be imposed on the violator requiring him to take whatever steps deemed necessary to abate the irreparable damage to the environment. The issuance of such an emergency cease and desist order shall not be subject to the limitations and formalities relating to notice and hearings imposed with regard to adjudications under R.S. 49:950 et seq., but shall be subject to all other applicable provisions of law. The emergency cease and desist order shall remain in force until a hearing can be held concerning the situation which prompted the emergency order, but in no event shall such an emergency order remain in force longer than fifteen days.

(2) Upon determining that a violation of any requirement of this Chapter has occurred or is about to occur, notice may be given either by personal service or certified mail, return receipt requested, to the violator of his failure to comply with such requirement or proceed pursuant to Paragraph (3) of this subsection. If such violation extends beyond the thirtieth day after notification, the commission, secretary or assistant secretary shall either issue an order requiring compliance within a specified time period, or the commission shall commence a civil action for appropriate relief, including a temporary or permanent injunction.

(3) Upon determining that a violation of any requirement of this Chapter has occurred or is about to occur, the commission, secretary, the assistant secretary or the authorized representative of the assistant secretary shall either issue an order requiring compliance within a specified time period or the commission or secretary shall commence a civil action for appropriate relief, including a temporary or permanent injunction.

No prior hearing required

CONNECTICUT

Section 22a-7. Cease and desist order, subsequent hearing

The commissioner, whenever he finds after investigation that any person is causing, engaging in or maintaining, or is about to cause, engage in or maintain, any condition or activity which, in his judgment, will result in or is likely to result in imminent and substantial damage to the environment, or to the public health within the jurisdiction of the commissioner under the provisions of chapters 440, 442, 445, 446a, 446c, 446d and 446k or whenever he finds after investigation that there is a violation of the terms and conditions of a permit issued by him that is in his judgment substantial and continuous and it appears prejudicial to the interests of the people of the state to delay action until an opportunity for a hearing can be provided, may, without prior hearing, issue a cease and desist order in writing to such person to discontinue, abate or alleviate such condition or activity. Upon receipt of such order such person shall immediately discontinue, abate or alleviate or shall refrain from causing, engaging in or maintaining such condition or activity. The commissioner shall, within ten days of such order, hold a hearing to provide the person an opportunity to be heard and show that such condition does not exist. Such order shall remain in effect until ten days after the hearing within which time a new decision based on the hearing shall be made.

ALABAMA

(k) Whenever the commission has cause to believe that any person is violating any rule or regulation promulgated by the commission, the commission shall cause a prompt investigation to be made in connection therewith. If, upon inspection, the commission discovers a condition which is in violation of the provisions of this chapter, or any rule or regulation promulgated pursuant thereto, it shall be authorized to order such violation to cease and to take such steps necessary to enforce such an order. The said order shall state the items which are in violation and shall provide a reasonable specified time within which the violation must cease. The person responsible shall make the corrections necessary to comply with the requirements of this chapter, or rule or regulation promulgated pursuant thereto, within the time specified in the order. Nothing in this subsection shall be deemed to prevent the commission or the attorney general from prosecuting any violation of this chapter, or any permit, order or rule or regulation promulgated pursuant thereto, notwithstanding that such violation is corrected in accordance with any order.

DELAWARE

§6163. Cease and desist order

The Secretary shall have the power to issue an order to any person violating any rule, or regulation, or permit condition, or lease condition, or provision of this Chapter, to cease and desist from such violation. Any cease and desist order issued pursuant to this section shall expire (1) after 30 days of its issuance, or (2) upon withdrawal of said order by the Secretary, or (3) when the order is superseded by an injunction, whichever occurs first.

COLORADO

25-8-605. Cease and desist orders. If the division determines, with or without hearing, that a violation of any provision of this article or of any order, permit, or control regulation issued or promulgated under authority of this article exists, the division may issue a cease and desist order. Such order shall set forth the provision alleged to be violated, the facts alleged to constitute the violation, and the time by which the acts or practices complained of must be terminated.

JAY S. HAMMOND, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

465-2653

POUCH O - JUNEAU 99811

May 21, 1982

Mr. William O. Lawrence
Manager, Pacific Coast Office
Transportation Institute
801 Second Ave, Room 1502
Seattle, Washington 98104

Dear Mr. Lawrence:

Thank you and Steve Scalzo for visiting with us and discussing the various issues involved in securing proof of financial responsibility for the Alaskan tank barge operators. This letter will serve to memorialize some of our discussion and inform you of the Attorney General's opinion regarding certain sections of Alaska's pollution laws.

As you know we have been actively seeking a resolution to the problem that certain barge owners have had in securing insurance to cover the Alaska proof of financial responsibility requirements (AS 46.04.040). During the past year, discussions with you, the barge owners and the insurance brokers have resulted in the issuance of at least one insurance policy covering five vessels, a surety bond for another three, and self-insurance by one large company. In the meantime, pressure has been brought to bear on some insurance underwriters not to issue policies by certain segments of the insurance industry.

It should be noted that we are not completely satisfied that all other avenues for proof of financial responsibility have been fully employed, namely self insurance surety bond, and guarantee. Some companies claim that it is against their policy to use self-insurance and it has been pointed out that certain small operators may not have sufficient assests to self-insure or use surety bonds. Of course, you understand that company policy is not a valid excuse for noncompliance with Alaska's requirements; only legal or physical impossibility in obtaining proof of financial responsibility would provide such a defense. In order to fully evaluate this situation we request a detailed explanation of why it is not possible for tank barge operators to obtain self-insurance, insurance, surety bonds and guarantees which will satisfy the State's financial responsibility requirements under AS 46.04.040 and subsequent regulations. We would appreciate this information from each firm which is represented by your organization. As we discussed, this justification should include sufficient factual information which the Alaska Department of Environmental Conservation can evaluate and satisfy itself as to the validity of the company's position. We also request that you furnish us with any correspondence or other material you may have concerning the inability of tank barge operators to obtain pollution insurance.

In the meantime we will open direct communications with the various marine insurance concerns, offer them our opinion as to the interpretation of the law and secure a definite answer as to their intentions in this matter.

Because it is important to conclude this matter as quickly as possible we will hold to the following schedule:

May - June	1. Issue Department of Law legal opinion. May 13. 2. Open communications with marine insurance underwriters. 3. Establish marine underwriter's position and intentions. 4. Receive information from tank barge operators (as above).
July - August	1. Make evaluations of various methods of showing proof of financial responsibility and/or 2. Secure and evaluate any additional information necessary.
September	Issue official findings on the ability of certain operators to comply with the provisions of AS 46.04.040. Proof of Financial Responsibility.

Depending on meetings with the different parties concerned, availability of information and other unknown factors, this schedule will be flexible. However, we intend to make findings on these matters at the earliest possible time. Until we issue those findings, we will not refer any cases of non-compliance with AS 46.04.040 and subsequent regulations to the Attorney General's office for prosecution. Again, it should be clear that this does not relieve anyone from the responsibility for compensating those damaged from oil spills or from the requirement to clean up any spilled oil.

Sincerely,

Ernst W. Mueller
Commissioner

cc: Doug Mertz, Department of Law
Distribution List -- Tank Barge Operators

Office copy

JAY S. HAMMOND, GOVERNOR

DEPT. OF ENVIRONMENTAL CONSERVATION

465-2600 POUCH O – JUNEAU 99811

August 11, 1982

Mr. William D. Lawrence
Manager, Pacific Coast Office
Transportation Institute
801 Second Avenue, Room 1502
Seattle, Washington 98104

Dear Mr. Lawrence:

This is a follow up of our May 21, 1982 letter to the Transportation Institute regarding the problem of non-compliance with AS 46.04.040.

We are gravely concerned that both the citizens and the resources of the State of Alaska are not receiving the protection that was to have been afforded them by AS 46.04.040. Since January 1, 1981, many oil barges have been operating in State waters without furnishing proof of financial ability to respond to damages caused by the accidental discharge of oil.

After several discussions and meetings over the past months, we concluded that positive and definitive steps would have to be taken by both the barge operators and the State to resolve this problem. These were presented to you in my May letter. The State has now accomplished several of these tasks and has gone one important step further. This was to hire a contractor who soon will investigate the entire set of circumstances associated with the financial responsibility statute, including reasons for non-compliance.

In my letter I requested that barge owners and operators individually furnish this department with detailed explanations of why it is not possible for them to obtain insurance, self-insurance, surety bonds or guarantees. To this date we have not received a single response, even though we asked to receive this information in the months of May and June. I was concerned to hear that the Transportation Institute has done very little to urge the barge owners and operators to respond to our request for information.

Please recall that the commitment we gave the operators was conditional upon their taking measures to obtain liability coverage. We expect firm and tangible evidence of these measures in the form of correspondence, as an example. A mere verbal communique is entirely inadequate and will not be acceptable. Also, we expect that all four provisions for demonstrating financial responsibility be investigated by the operator and evidence of that investigation be sent to us for evaluation. For example, this might take the form of audited balance sheets to manifest the self-insurance option.

As I mentioned previously, the contractor will start his investigation very shortly and one of his tasks involves review of evidence of efforts to obtain liability coverage. Failure to obtain adequate evidence from this review could result in our reevaluating our current agreement to withhold referring cases to the office of the Attorney General.

Once again, we urge your cooperation in resolving this difficult issue.

Sincerely,

Ernst W. Mueller
Commissioner

cc Doug Mertz
Barge Operators

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K-STATE CAPITOL
JUNEAU, ALASKA 99811

December 30, 1981

William Lawrence
Transportation Institute
Norton Bldg., Rm. 1502
801 Second Avenue
Seattle, Washington 98104

Dear Bill:

Thank you for setting up the meeting with the tug and tank barge operators on December 17. I believe the opening of these lines of communication will help to resolve the problems we face. We have already discussed these matters with the Department of Environmental Conservation.

As I promised at the meeting, I'm writing to confirm my oral statements regarding the operators' current legal status under our oil spill laws. Alaska Statute 46.03.040 does require proof of financial responsibility to respond to damages for oil spills, and as was pointed out at the meeting, operators covered by the statute who have not shown financial responsibility by one of the methods acceptable under the statute are indeed in technical violation. However, the current difficulty in obtaining insurance puts the matter in a different light.

First, if an operator is truly unable to comply with the statute, because neither the insurance nor the other forms of proof of financial responsibility are available, and the firm is unable to self-insure, then I believe it would have a valid defense to an action brought because of the technical failure to comply. And secondly, we can assure you that as long as we are convinced that an operator is making a diligent good faith effort to comply with the requirements, but is unable to do so despite its best efforts, we will not bring any such action because of the failure to comply. Naturally I consider meetings such as ours, with continuing efforts to make insurance available, to be important evidence of such good faith efforts.

Of course, the opposite side of the coin is that if insurance, or another acceptable form of proof of financial responsibility, becomes available, the operators could not claim that compliance is impossible; and we would not consider an operator to be pursuing compliance with good faith if he made no real efforts to find or arrange that coverage. And I'm sure the operators realize that if an actual spill occurs, inability to secure insurance would not relieve them from liability for damages caused by the spill.

I hope this clarifies our position. Let me know if you have further questions. Meantime I trust you will distribute this letter to those present at the meeting, and to any other persons you believe would be interested..

Sincerely,

WILSON L. CONDON
ATTORNEY GENERAL

By: Douglas K. Mertz
Douglas K. Mertz
Assistant Attorney General

DKM:dlm

cc: Ernst W. Mueller
Commissioner
Department of Environmental
Conservation

SRC 3762

TRANSPORTATION INSTITUTE

PACIFIC COAST OFFICE
801 SECOND AVENUE, SUITE 1502
SEATTLE, WASHINGTON 98104
(206) 624-9824

January 25, 1982

Mr. Andrew M. Spear, Manager
Oil Pollution Control
State of Alaska
Department of Environmental
Conservation
Pouch O
Juneau, Alaska 99811

Re: Proof of Financial Responsibility for Oil Spills
Alaska Statute 46.04.040

Dear Mr. Spear:

As West Coast Manager of the Transportation Institute, representing tug and barge owners/operators trading between and/or amongst the states of Alaska, Washington, Oregon and California, I would like to thank you and Mr. Douglas Mertz for your attendance at the meeting of December 17, 1981, in our offices, to listen to comments and suggestions from members of the Institute and insurance industry representatives in connection with the subject matter.

This letter will also acknowledge receipt of Mr. Douglas Mertz's letter of December 30, 1981, copies of which have been distributed to the membership.

As you know, the purpose of our meeting of December 17, 1981, was to allow our members, together with insurance industry representatives, to discuss with you the concerns they are having in attempting to comply with Alaska Statute 46.04.040 (Proof of Financial Responsibility) insofar as this law relates to oil barges, other than inland oil barges, carrying oil as cargo (except those transporting pipeline oil). These concerns have led to considerable frustration on the part of our member vessel operators, in view of the substantial penalties, which could be imposed on them and other nonmember operators, for failure to meet the requirements of the current Alaska law.

From the standpoint of our members, the only practical avenue available to them to attempt to meet the "Proof of Financial Responsibility" requirement is through certification by their insurers.

Our members have, over the past year, discussed the matter of Certification at length with the insurance markets in both the United States and overseas. These markets are centered in New York and London, respectively, and, between them, insure virtually the world's entire oil pollution liabilities.

The United States market, headquartered in New York, is made up of first class stock and mutual companies, who as members of the American Institute of Marine Underwriters formed the Water Quality Insurance Syndicate (WQIS) at the time of the Federal Water Pollution Control Act of 1970 to provide insurance for its clients, as a result of the liabilities that could be imposed upon them by the Act.

The London market is made up of a number of international Protection and Indemnity Clubs referred to as the "International Group of P&I Clubs." These clubs, between them, insure the oil pollution liabilities of nearly all the ocean going tanker tonnage.

As mentioned earlier, responses from the insurance industry to requests by our member operators for certification of Proof of Financial Responsibility under the Alaska law have been met with a polite but firm "no".

The specific areas that create problems for the insurers are listed as follows:

I. Of foremost concern is the requirement for financial responsibility through insurance that (18 AAC 20.065) (2) the insurer agrees that any final judgement against the insured for damages under AS46.04.040(i) resulting from an unlawful discharge of oil from or by any vessel or facility named in the policy may be enforced o[redacted] to the amount of coverage of this policy;. . . . ." It is felt by the insurers that this provision allowing direct access, strips the insurers of their right to defenses that are allowed their insured, such as the [redacted] Without recourse to defenses normally available to the company they are insuring, the insurance companies feel extremely vulnerable. A clarification of the rights of the insurers under direct access is needed.