

June 8, 1999

The Honorable Tony Knowles
Governor
P.O. Box 110001
Juneau, Alaska 99811-0001

Re: HCS CSSB 128(FIN) -- Moving the Termination Date of the Board of Storage Tank Assistance to June 30, 1999; Relating to the Storage Tank Assistance Fund, to Financial Assistance for Owners and Operators of Underground Storage Tank Systems, and to Discharges from Underground Petroleum Storage Tank Systems
A.G. file no: 883-99-0073

Dear Governor Knowles:

At the request of your legislative director, Pat Pourchot, we have reviewed HCS CSSB 128(FIN), moving the termination date of the Board of Storage Tank Assistance to June 30, 1999, and relating to the storage tank assistance fund, to financial assistance for owners and operators of underground petroleum storage tank systems, and to discharges from underground petroleum storage tank systems.

This bill accelerates the termination date of the Board of Storage Tank Assistance (Board) and amends or creates a number of provisions relating to the storage tank assistance fund. These statutory changes refocus the storage tank assistance programs from grants to loans. Significant appropriations in the operating budget and capital budget are contingent upon enactment of this bill into law. *See* sec. 87, CS CSSB 32(FIN); sec. 30, CCS HB 50.

Section 1 of this bill changes the termination date of the Board from June 30, 2000, to June 30, 1999. Under AS 44.66.010(b), although terminated, the Board would continue to exist until June 30, 2000. During this "wind-down year," the Board would have full authority to carry out its normal business including adoption of new regulations to implement other provisions of this bill and amendment of existing regulations to eliminate Board functions or facilitate transfer of functions to the Department of Environmental Conservation (DEC). *See* 1994 Inf. Op. Att'y Gen. (June 21;

661-94-0744). Other statutory changes dealing with adoption of regulations and adjudication of disputes are likely to be needed as a result of the termination of the Board; although this bill does not address those issues, the Board may be able to develop suggestions for statutory changes during its "wind-down" year.

Section 2 of this bill amends provisions relating to the Board's regulatory authority at AS 46.03.360, eliminating references to the completed tank tightness and site assessment incentive program, AS 46.03.415, repealed in sec. 14, and adding references to a tank cleanup loan program, AS 46.03.422, added in sec. 10 of the bill.

Section 3 of this bill amends the Board's dispute resolution functions by adding a reference to the tank cleanup loan program, AS 46.03.422, added in sec. 10 of the bill. Because of the time necessary for implementation of a new program, as well as the time necessary for adjudication of disputes, it is unlikely that the Board will be able to resolve any disputes that arise under the new program before its "wind-down year" ends.

Section 4 of this bill amends AS 46.03.410(a) to explicitly list a number of purposes for which the legislature may appropriate unencumbered funds from the storage tank assistance fund. This list is permissive, not mandatory, and does not legally constrain the legislature's ability to appropriate from the fund; therefore, this provision does not violate the dedicated fund prohibition of art. IX, sec. 7 of the Alaska Constitution. However, this provision does reflect legislative intent and purpose, and makes it clear that listed uses are appropriate. New listed uses include cleanup expenses relating to an underground storage tank owned or operated by the state or an instrumentality of the state and legal and regulatory expenses associated with underground storage tanks. This section also makes it clear that an application for funds under one of the various underground storage tank assistance programs does not create an encumbrance.

Section 5 of this bill amends AS 46.03.410(b) relating to the commissioner's authority to use money from the storage tank assistance fund. This section eliminates a reference to AS 46.03.415, repealed by sec. 14, and adds a reference to AS 46.03.422, added by sec. 10.

Sections 6, 7, 8, and 9 of the bill amend the current tank cleanup program statute, AS 46.03.420, by sharply limiting the availability and size of grants and loans. The maximum grant available is reduced from \$1,000,000 per occurrence to \$250,000 per owner or operator, with grants under the tank upgrading and closure program, AS 46.03.430, counting toward the \$250,000 limit. Total grant and loan aid under AS 46.03.420, AS 46.03.422, and AS 46.03.430 is also limited to no more than \$500,000. Further, with a narrow exception for state or municipal ownership, grants and no interest loans under AS 46.03.420 are limited to owners and operators who certify that their "tangible net worth," as defined in sec. 12, does not exceed \$1,000,000. Initial application requirements are maintained; application periods have expired and this bill does not reopen those periods, so only existing applicants are impacted by these new limitations and eligibility requirements.

Section 10 of this bill creates a new tank cleanup loan program, AS 46.03.422, providing low-interest loans for applicants unable to obtain grants and loans, or sufficient grants and loans, under the new limitations in AS 46.03.420. This program is limited to those who met the application requirements under AS 46.03.420. Applicants are required to comply with terms and conditions essentially mirroring those that would have been applicable under AS 46.03.420, but they may also be required to provide additional security or collateral. Loans under AS 46.03.422, combined with any grants or loans under AS 46.03.420 and AS 46.03.430 to the same owner or operator, may not exceed \$500,000.

Section 11 of this bill amends the tank upgrading and closure program by establishing new grant eligibility requirements. First, with a narrow exception for state or municipal ownership, grants are limited to owners and operators who certify that their "tangible net worth," as defined in sec. 12, does not exceed \$250,000. Second, total grant aid to an owner or operator under AS 46.03.420 and AS 46.03.430 may not exceed \$250,000, and total grant and loan aid under AS 46.03.420, 46.03.422, and 46.03.430 may not exceed \$500,000.

Section 12 of this bill defines "tangible net worth." The definition is not consistent with definitions in other statutes or regulations or with generally accepted accounting principles. The definition varies from standard definitions in two respects: first it includes some "intangible" assets; second, while it looks at "total" assets, the only liabilities that may be subtracted are those "associated with bringing underground petroleum storage tank systems into compliance with state and federal laws and liabilities associated with releases of petroleum from underground petroleum storage tank systems." Although this definition may cause some confusion among the regulated public and would, by itself, probably make convictions for perjury difficult because the person certifying might use this as a defense to having the required "mental state," these problems can be addressed through regulations dealing with certification of net worth. There is no legal requirement for use of standard definitions and the legislative intent to depart from the standard definition is clear in this case.

Section 13 of this bill amends the limited immunity from liability provisions of sec. 4(a), ch. 96, SLA 1990, and extends that provision to the new cleanup loan program under AS 46.03.422.

Section 14 of this bill repeals existing provisions dealing with a tank tightness and site assessment incentive program at AS 46.03.380(b)(2) and AS 46.03.415. It also repeals AS 46.03.380(b)(3)(B)(ii), eliminating a provision allowing deferral of certain reporting requirements while an application for assistance is pending. Finally, this section repeals a reimbursement program in sec. 7, ch. 96, SLA 1990, under which certain expenses incurred for underground storage tank work undertaken prior to September 5, 1990, could be reimbursed from the storage tank assistance fund.

Section 15 of this bill provides that the new eligibility limitations of AS 46.03.420(e), AS 46.03.422(g), and AS 46.03.430(c)(3) and (4) apply only to financial assistance received on or after July 1, 1999. Thus, grants or loans received prior to July 1, 1999, will not count toward the assistance caps established by these sections.

Section 16 of this bill provides transitional provisions for regulations. Under this section, existing regulations that are not inconsistent with the new provisions remain in effect, and DEC and the Board are given authority to adopt regulations to implement the new provisions. Further, this section provides a limited exception from the Administrative Procedure Act (APA) to allow development of a form for certification of net worth outside the lengthy APA regulation process.

Sections 17 and 18 of this bill deal with effective dates. Under sec. 17, secs. 1 and 16 of this bill will take effect immediately if enacted. Under sec. 18, the remainder of the bill, if enacted, will take effect July 1, 1999.

We are aware of two potential legal issues that have been raised in regard to this bill. The first is the nonstandard definition of "tangible net worth" discussed above. Although this provision may cause some confusion, we do not believe it presents a legal problem. The second is concern that limitation of eligibility based on "tangible net worth" might result in constitutional equal protection violations. As explained below, we believe that this bill does not violate equal protection requirements.

Economic and commercial interests receive minimal scrutiny under federal equal protection analysis, and courts defer to legislative determinations concerning the desirability of particular statutory classifications. *See Pan-Alaska Construction, Inc. v. State*, 892 P.2d 159,162 (Alaska 1995); *Commercial Fisheries Entry Commission v. Apokedak*, 606 P.2d 1255, 1262-63 (Alaska 1980). Alaska's sliding scale equal protection approach is more protective of individual rights than the federal approach: "[e]ven under the lowest form of judicial scrutiny, the means chosen must bear a 'fair and substantial' relation to the attainment of a legitimate government objective." *Pan-Alaska Construction*, 892 P.2d at 162 (citation omitted).

There is no question that the legislative goal of limiting grant payments to small businesses is a legitimate legislative goal. In committee hearings, legislators expressed concerns that many small businesses could not afford the burden of bringing old facilities into compliance with environmental regulations. Legislators were concerned that, in the absence of state grant aid, small operators might simply give up, in which case the state would probably eventually end up having to pay for the full costs of corrective action and cleanup. The "tangible net asset" provision is not a perfect measure of ability of an owner or operator to conduct cleanup without a state grant; the legislature was aware that its definition would allow an owner or operator with an actual net worth of \$1,000,000 to obtain grant aid but might not make grant aid available to an owner or operator with an actual negative net worth. However, perfection is not required all that is required is that the

means chosen substantially further the legitimate purpose. *See, e.g., Barber v. Municipality of Anchorage*, 776 P.2d 1035, 1039 (Alaska 1989). The legislature considered and rejected other approaches for limiting eligibility such as using actual net worth, or number or size of tanks. The legislature determined that each of these measures had its own shortcomings.* The "tangible net assets" limitation chosen has a reasonable relationship to total facility or business size; owners and operators with large businesses or with more than one facility will generally be excluded from grant aid and limited to loan aid.

Further, "the Equal Rights and Opportunities Clause of the Alaska Constitution requires equal treatment only for those who are similarly situated." *Shepard v. State*, 897 P.2d 33, 42 (Alaska 1995). The legislature has drawn a legitimate and rational distinction between owners or operators with "tangible net assets" of over \$1,000,000 and those with more tangible net assets. Owners and operators within the different classifications are not similarly situated, and the limitation of grant aid to those with tangible net assets of \$1,000,000 or less does not violate the principles of equal protection.

We do not believe that this bill presents any significant constitutional or legal problems.

Sincerely,

Bruce M. Botelho
Attorney General

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* Use of "actual" net worth, or total assets minus total liabilities, might allow a large corporation with multiple facilities to obtain grant aid if its liabilities were large. Similarly, use of tank size would allow many facilities to qualify even if they had extensive assets and few liabilities.