

HB 168: A Hole So Big You Could Drive A Mine Through It

The Alaska State House of Representatives recently passed H.B. 168. If passed by the Senate and signed by Governor Parnell, this bill would undercut the ability of Alaskans to protect their economic and traditional ways of life, their communities, and their air and water quality. It does this by seeking to require judges to force people challenging government permits to post bonds equal to the potential economic loss of the permit holder as well as others.ⁱ

In many cases such bonds would be so expensive as to render judicial review meaningless. Just like the Humpty Dumpty of children's lore, once the damage is done, all the king's horses and all the king's men can't put it back together again – just ask Prince William Sound residents and fishermen. That the courts are not directly precluded from reviewing the legality of the permit matters not at all – ask those same people from Prince William Sound what good a court judgment did for them.

The truth is that independent judicial review of agency decisions is essential to ensuring that the development of Alaska's resources is done in a responsible manner, and we Alaskans should not be scared into thinking otherwise. The check and balance on bureaucratic decisions provided by the courts ensures that those decisions are rational and supported by law. The judiciary already has the ability to impose bonds where appropriate,ⁱⁱ and to prevent, and sanction those who file, frivolous lawsuits.ⁱⁱⁱ And to require a person to post a bond before he or she can petition the government for a redress of grievances is unconstitutional.^{iv} Further, this bill threatens to undo the delegation to Alaska of the Environmental Protection Agency's pollution prevention programs, as EPA can only support such delegation if access to the courts is not restricted.^v

The Bottom Line:

H.B. 168 creates a hole so big you could drive a mine through it.

i H.B. 168 provides, in relevant part:

A party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation shall give security in an amount the court considers proper for costs that may be incurred and damages that may be suffered by an industrial operation that has been wrongfully enjoined or restrained, including an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation.

ii *See e.g.*, Alaska Rule of Civil Procedure 65(c) ("No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.")

iii Proponents of H.B. 168 claim that it is needed to "impose a penalty" on frivolous lawsuits. *See* <http://www.housemajority.org/spon.php?id=27hb168-114> (statement of bill sponsor Representative Eric Feige). Yet, Alaska Rule of Civil Procedure 11 already provides authority to the courts to prevent and sanction frivolous lawsuits. Among other things, it provides that

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless expense in the cost of litigation..

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iv The Alaska Constitution provides that "[t]he right of the people ... to petition the government shall never be abridged." Alaska Constitution, Article I, Section 6. The First Amendment to the United States Constitution provides, "*Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*"

Similar bills in other states have been vetoed (by Republican Governors) as unconstitutional. *See* <http://www.standard.net/topics/utah-legislature/2011/02/28/note-legislature-first-amendment-covers-tree-huggers-too>

v *See* 40 C.F.R. § 123.60 (judicial review requirements for delegated State programs); 40 C.F.R. § 123.63 (criteria for withdrawing State programs when the programs no longer comply with regulatory requirements); *see also Akaik Native Community v. United States Environmental Protection Agency*, 625 F.3d 1162, 1168 (9th Cir. 2010) (judicial review must provide meaningful opportunity for public participation in the permitting process).