

**CSHB 129(FIN) creates a high probability that the State will lose in any public interest lawsuit challenging the Department of Natural Resources permitting of oil and gas development.**

On March 29, 2013, in *Sullivan v. REDOIL*, the Alaska Supreme Court issued a decision examining the constitutional principle that the State's natural resources are to be made "available for maximum use consistent with the public interest."

To meet this principle, the Court ruled that DNR has a constitutional duty to

- analyze and consider the cumulative impacts throughout all phases of an oil and gas project; and
- provide timely and meaningful public notice of DNR's cumulative impact analysis.

The legislative findings in CSHB 129 significantly misstates the Court's decision, asserting that the Court "noted" the constitutional duty to analyze and consider cumulative impacts would be met by DNR "taking a 'continuing hard look at new information and changing circumstances'" as projects proceed.

But that is the opposite of what the Court concluded. The Court ruled that DNR has an existing constitutional duty to take a hard look at new information and changing circumstances, and that duty is met in part by DNR analyzing and considering the cumulative impacts throughout the course of a project."<sup>1</sup>

The Court states that the constitution tasks the legislature with the duty of establishing procedures for the required cumulative impact analysis and meaningful public notice of the analysis.

Unless the legislature acts now, and in an appropriate manner, future oil and gas projects will be vulnerable to public interest lawsuits with a high likelihood the State will lose, creating uncertainty for developers.

If implemented correctly, the Court's ruling requiring a cumulative impact analysis with public notice could help reduce lawsuits by including affected communities in project decision-making and resolving potential conflicts with other resources and uses.

**Recommended Amendments to CSHB 129(FIN)**

- The entire legislative findings section should be deleted. In a constitutional challenge to an oil and gas project, the findings will serve as evidence that the legislature failed to fulfill its constitutional duty to address the Court's ruling in *REDOIL*.
- The attached amendment provides legislative direction and the statutory authority for DNR to fulfill its constitutional duty to analyze and consider cumulative impacts of oil and gas lease activities, and to provide meaningful public notice of its cumulative impact analysis.

---

<sup>1</sup> See the decision at <http://courts.alaska.gov/ops/sp-6769.pdf>, pages 19-26.

**CSHB 129 (FIN)**  
**AMENDMENT**

Page 3, after line 21, insert the following:

“\* **Sec. 3.** AS 38.05.035 is amended by adding new subsections to read:

(p) When the director is considering approval of a lease or unit plan of operations, the director shall

(1) analyze and consider the cumulative impacts of the project;

(2) provide public notice of the cumulative impact analysis using the methods described in AS 38.05.945(b) and (c); and

(3) provide opportunity for public comment on the cumulative impact analysis for a period of not less than 30 days.

(q) For the purposes of subsection (p) of this section, a cumulative impact analysis shall consider the project as a whole, taking into account all aspects of a project and in the context of existing development; an analysis does not require speculation about unknown and unpredictable future events.”