



Turning Conservation Values into State Priorities

www.acvoters.org

January 30, 2013

Representative Wes Keller
State Capitol, Rm. 118
Juneau, AK 99801-1182

Dear Rep. Keller:

The Alaska Conservation Voters opposes HB 47, which would require Alaskans to post a bond or security when seeking a stay or injunction against a government-issued permit affecting an industrial operation.

HB 47 puts corporate and foreign interests above Alaskans and their communities.

To begin, this legislation is not aimed at frivolous lawsuits. Already, a frivolous lawsuit will not receive a stay or preliminary injunction, because a court can't issue those remedies unless it first determines that the plaintiff is likely to win and that "irreparable harm" would result without the stay or injunction. Instead, this legislation is targeted at lawsuits with merit, and this legislation imposes its burden at the expense of ordinary Alaskans and their communities. Under HB 47, the Alaskan seeking an injunction or stay will be required to post a bond that is typically unaffordable to all but the most wealthy corporations and individuals. In sum, the bill penalizes all but the extraordinarily wealthy and deters meritorious claims before they are adjudicated at all.

Further, when a case against a permit is brought forward by an Alaskan, it is questioning the permitting process used by the issuing governmental agency or illegal practices by industry. Thus, an injunction or stay will only be issued when government hasn't done its job properly, or when a corporation is violating the law or the terms of its permit, as determined by judicial review. Requiring a citizen to pay for a governmental error or corporate crime puts a chilling effect on a long tradition of protecting American whistleblowers in our democracy.

HB 47 would block Alaskans from protecting their communities and way of life by preventing them from challenging government-issued permits that have resulted in legally redressible injuries. It would force Alaskans challenging a permit to post a bond equal to potential damages suffered by an industrial operation. This remedy protects wealthy corporations – many of which merely do business in Alaska and/or are from foreign countries – over resident Alaskans who live, work, and raise their families in this great state. The bond will in many cases exceed \$1

million, which effectively prevents almost any Alaskan from filing a suit to challenge what may be a fast-tracked, sloppy agency decision. Obviously this is the intent of the legislation—to keep Alaskans from exercising their constitutional rights.

HB 47 violates the Alaska Constitution.

Beyond being bad policy, the bill is also likely unconstitutional for three reasons. First, it violates the Equal Protection clause by targeting those litigants who challenge permits for industrial operations, and protecting only industrial operations. This discriminates unconstitutionally against local landowners, community groups, native organizations, commercial and sport fishers and hunters, and other Alaskans who seek to ensure that state agencies are doing their jobs.

Second, in practice it would often deny access to courts, in violation of Due Process rights, for Alaskans who do not have the financial resources to post the required bond but have an otherwise valid claim. It is not hard to imagine a landowner or a community that does not have the millions to post the bond this bill would require. That person or community would be prohibited from protecting the land it has owned for decades yet is now threatened by a major industrial operation.

Third, HB 47 is a change to court rules, which violates the Alaska Constitution unless the bill is approved by two-thirds of each house and specifically states that it is a change to court rules. Currently Civil Rule 65(c) and Appellate Rules 204(d) and 603(a)(2) govern the bonds that would be affected by HB 168. Indeed, the bill closely parallels the language of Civil Rule 65(c).

HB 47 is poorly drafted and would be extraordinarily difficult for a court to apply.

The bill contains several provisions that are ambiguous or make no sense and would be challenging for a court to enforce. For example, the bill purports to require a bond for an order “vacating” a permit. However, a court will vacate a permit only at the conclusion of a case, after finding that the issuing agency actually violated the law. That is not a situation where bonds come into play. Bonds are instead required only for temporary injunctions or stays, in case the person does not ultimately prevail. It would make no sense and serve no purpose to require a bond of the party who has won the case. If that is the intent of the bill, then it is merely a punitive and unconstitutional attempt to prevent successful litigants from obtaining the relief to which they are entitled.

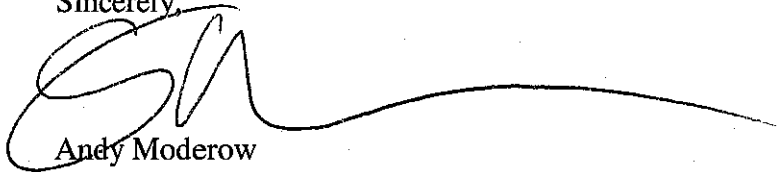
Similarly, the bill purports to require the bond to cover damages wrongfully suffered by “an industrial operation.” An industrial operation, in turn, is defined in the bill as various activities. But damages are suffered only by litigants, such as persons, corporations, or organizations. There is no precedent for measuring or awarding damages to an activity rather than a party, and the very concept is bizarre and seemingly impossible to apply.

Further, the legislation is ambiguous as to the point at which a bond would be required. Departing from current court rules, the bill requires a bond from a party “seeking” a stay,

preliminary injunction, or vacatur. If that were read to require a bond whenever a case was filed against an industrial permit, it would effectively require an exorbitant fee at the time of filing—an unconstitutional requirement and drastic change to current court procedures. Further, if the bill were interpreted to require bonds whenever a stay or preliminary injunction is sought, and before the court orders one, its main impact would be to deter likely meritorious claims from ever being raised—again a clear violation of constitutional rights.

For the reasons stated above, the Alaska Conservation Voters opposes HB 47. The only purpose the bill would serve is to keep regular Alaskans out of court and to protect sloppy permitting decisions that could greatly impact Alaska's future.

Sincerely,

A handwritten signature in dark ink, appearing to be 'AM', with a long horizontal flourish extending to the right.

Andy Moderow
Executive Director
Alaska Conservation Voters