

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

March 21, 2011

1:07 p.m.

MEMBERS PRESENT

Representative Carl Gatto, Chair
Representative Steve Thompson, Vice Chair
Representative Wes Keller
Representative Bob Lynn
Representative Lance Pruitt
Representative Max Gruenberg
Representative Lindsey Holmes

MEMBERS ABSENT

Representative Mike Chenault (alternate)

COMMITTEE CALENDAR

HOUSE BILL NO. 168

"An Act requiring the amount of the security given by a party seeking an injunction or order vacating or staying the operation of a permit affecting an industrial operation to include an amount for the payment of wages and benefits for employees and payments to contractors and subcontractors that may be lost if the industrial operation is wrongfully enjoined."

- HEARD & HELD

HOUSE BILL NO. 6

"An Act authorizing the governor to remove or suspend a member of the Board of Regents of the University of Alaska for good cause; and establishing a procedure for the removal or suspension of a regent."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 168

SHORT TITLE: INJUNCTION SECURITY: INDUSTRIAL OPERATION

SPONSOR(S): REPRESENTATIVE(S) FEIGE

| | | |
|----------|-----|---------------------------------|
| 02/23/11 | (H) | READ THE FIRST TIME - REFERRALS |
| 02/23/11 | (H) | JUD |

02/25/11 (H) BILL REPRINTED 2/24/11
03/21/11 (H) JUD AT 1:00 PM CAPITOL 120

BILL: HB 6

SHORT TITLE: REMOVING A REGENT

SPONSOR(S): REPRESENTATIVE(S) GRUENBERG

01/18/11 (H) PREFILE RELEASED 1/7/11
01/18/11 (H) READ THE FIRST TIME - REFERRALS
01/18/11 (H) EDC, JUD
02/11/11 (H) EDC AT 8:00 AM CAPITOL 106
02/11/11 (H) Heard & Held
02/11/11 (H) MINUTE(EDC)
02/21/11 (H) EDC AT 8:00 AM CAPITOL 106
02/21/11 (H) Moved CSHB 6(EDC) Out of Committee
02/21/11 (H) MINUTE(EDC)
02/23/11 (H) EDC RPT CS(EDC) 5DP
02/23/11 (H) DP: P.WILSON, SEATON, KAWASAKI, FEIGE,
DICK
03/21/11 (H) JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

REPRESENTATIVE ERIC FEIGE
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Sponsor of HB 168.

SCOTT THORSON

Anchorage, Alaska

POSITION STATEMENT: Testified in support of HB 168.

TINA KOBAYASHI, Chief Assistant Attorney General - Statewide
Section Supervisor
Oil, Gas & Mining Section
Civil Division (Juneau)
Department of Law (DOL)
Juneau, Alaska

POSITION STATEMENT: Responded to questions during discussion of
HB 168.

TOM CRAFFORD, Director
Office of Project Management & Permitting
Department of Natural Resources (DNR)
Anchorage, Alaska

POSITION STATEMENT: Responded to questions during discussion of
HB 168.

LYNN TOMICH KENT, Director
Division of Water
Department of Environmental Conservation (DEC)
Anchorage, Alaska

POSITION STATEMENT: Responded to a question during discussion of HB 168.

TED MADSEN, Staff
Representative Max Gruenberg
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Presented HB 6 on behalf of the sponsor, Representative Gruenberg.

ACTION NARRATIVE

[1:07:48 PM](#)

CHAIR CARL GATTO called the House Judiciary Standing Committee meeting to order at 1:07 p.m. Representatives Gatto, Thompson, Lynn, Keller, and Pruitt were present at the call to order. Representatives Gruenberg and Holmes arrived as the meeting was in progress.

HB 168 - INJUNCTION SECURITY: INDUSTRIAL OPERATION

[1:08:06 PM](#)

CHAIR GATTO announced that the first order of business would be HOUSE BILL NO. 168, "An Act requiring the amount of the security given by a party seeking an injunction or order vacating or staying the operation of a permit affecting an industrial operation to include an amount for the payment of wages and benefits for employees and payments to contractors and subcontractors that may be lost if the industrial operation is wrongfully enjoined."

[1:08:31 PM](#)

REPRESENTATIVE ERIC FEIGE, Alaska State Legislature, sponsor, offered his understanding that there have been several cases over the years that were later dismissed in which the courts [initially] issued an injunction against an entity engaged in resource extraction or construction, with the result being [an unnecessary] delay in that entity's project. House Bill 168 would ensure that a party take some risk in bringing suit

against such a project. He offered his belief that under current law, there is no risk to bringing a frivolous lawsuit. Referring to the sectional analysis included in members' packets, he noted that it says in part that HB 168 won't prohibit a party that is wrongly enjoined from other relief, or otherwise limit the amount that a party may recover in the action. House Bill 168 is accompanied by zero fiscal notes, and members' packets include an article from High Country News titled "'Firebrand ways'" indicating that injunctions are being used to stop projects, as well as a 2011 report by the Alaska Minerals Commission highlighting the need for litigation reform - including requiring security bonds of those initiating legal actions - and information regarding a similar Montana law. He added that research thus far indicates that that law, enacted in 1995, has yet to be used, surmising that this means that it is having its intended effect of limiting frivolous lawsuits.

REPRESENTATIVE KELLER mentioned that he is a co-sponsor of HB 168.

REPRESENTATIVE FEIGE, in response to a question, indicated that the bill would only apply [in situations where a party seeks a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation].

[1:14:32 PM](#)

SCOTT THORSON, expressing approval with the legislature for addressing this issue, offered his belief that it's far too easy for someone to bring a lawsuit to stop a resource development project that has already been issued a permit by the state or the federal government, resulting in extra costs - in terms of time and money - being incurred by contractors, employees, and vendors. In conclusion, he relayed that he is in full support of HB 168.

REPRESENTATIVE FEIGE, in response to questions, explained that the concept of HB 168 was something that he'd come up with on his own, and that the bill was drafted before he'd become aware of the aforementioned similar Montana law and was therefore not modeled on it, and that he is unaware of any court interpretations or legal opinions pertaining to the construction or constitutionality of that Montana law. He confirmed that in addition to [costs and damages that may be suffered by an industrial operation, the security bond authorized by HB 168 could also include payments to contractors and subcontractors,

and employee wages and benefits]. In response to further questions, he explained that the reach of the bill, and determinations regarding which costs to include in the security bond, would be made by the courts, adding that "the objective with [HB 168] is ... not to change a court rule," and that he doesn't believe that a court rule change would be necessitated by adoption of the bill's proposed statute.

REPRESENTATIVE GRUENBERG noted that the bill drafter had relayed to him his understanding that [Rule 65(c) of the Alaska Rules of Civil Procedure] applies to temporary restraining orders and preliminary injunctions, but not additionally to permanent injunctions regarding orders vacating or staying the operation of a permit that affects an industrial operation.

REPRESENTATIVE FEIGE, in response to further comments, mentioned that research he's conducted indicates that HB 168 neither conflicts with [Rule 65(c)] nor constitutes a court rule change.

[1:25:54 PM](#)

TINA KOBAYASHI, Chief Assistant Attorney General - Statewide Section Supervisor, Oil, Gas & Mining Section, Civil Division (Juneau), Department of Law (DOL), offered her understanding that under the wording of [the bill], when setting the amount of the security bond, the court may take into account the potential damages that might be suffered by the industrial operation if it is wrongfully enjoined or restrained, and that the intent of bill is to not change the court's discretion in determining the appropriate amount of the security bond.

REPRESENTATIVE GRUENBERG noted that Rule 65(c) says in part:

(c) **Security.** 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.

REPRESENTATIVE GRUENBERG asked whether there have been any court cases wherein a security bond required under Rule 65(c) has included an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors.

MS. KOBAYASHI said she is not aware of any such cases or any cases wherein that issue was even raised.

REPRESENTATIVE GRUENBERG questioned whether HB 168 could be construed to be affecting the public interest such that application of Rule 24(c) of the Alaska Rules of Civil Procedure would be necessitated should the bill be challenged on constitutional grounds. Rule 24(c) says in part:

When the constitutionality of a state statute affecting the public interest is drawn in question in any action to which the state or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of Alaska of such fact, and the state shall be permitted to intervene in the action.

MS. KOBAYASHI indicated that in such a situation, application of that court rule would be necessitated.

REPRESENTATIVE HOLMES asked whether the bill would apply in situations involving the operation of a federal permit.

MS. KOBAYASHI offered her belief that in such situations, federal law would apply instead of HB 168.

REPRESENTATIVE HOLMES asked whether the bill would apply in situations involving the operation of a permit issued by a local government.

MS. KOBAYASHI offered her belief that it would.

REPRESENTATIVE GRUENBERG raised the questions of whether the bill is intended to also address industrial operations owned by a governmental agency, and of whether, if so, the proposed security bond could then include the payment of wages and benefits for government employees.

[1:37:18 PM](#)

TOM CRAFFORD, Director, Office of Project Management & Permitting, Department of Natural Resources (DNR), expressed concern that the bill might impact the various regulatory programs that the state either has obtained or is obtaining primacy for from the federal government, such as [the Surface Mining Control and Reclamation Act of 1977 (SMCRA) programs, the National Pollutant Discharge Elimination System (NPDES) permit

program, and the Congestion Mitigation and Air Quality Improvement (CMAQ) Program]. Generally, when such programs are assumed from their associated federal agencies, it's with the understanding that the state's laws are at least as protective as the federal laws, and so the concern centers on the fact that those federal agencies could perhaps find that HB 168 results in state laws that are not as stringent as required. Therefore, he opined, consideration should be given to how the bill might affect the state's assumption of the aforementioned federal regulatory programs.

[1:42:27 PM](#)

LYNN TOMICH KENT, Director, Division of Water, Department of Environmental Conservation (DEC), in response to a question, explained that if a permit is stayed, then the industrial operation's activity that would purportedly cause damage to an area wouldn't actually occur during the extent of that stay.

REPRESENTATIVE FEIGE additionally offered his belief that HB 168 won't prevent a party from seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation, but would instead simply increase the party's risk in bringing an action by requiring a security bond, a bond which could at least partially mitigate a wrongfully-enjoined industrial operation's losses. He added that should the party bringing the action prevail, it is his intention that that security bond would be returned.

CHAIR GATTO noted, though, that even a prevailing party would be out the cost of obtaining the bond.

REPRESENTATIVE GRUENBERG asked whether there were any mechanisms that would allow a party bringing a successful action to recoup that cost or any other costs.

REPRESENTATIVE FEIGE ventured that it would be the court which would be in the best position to ensure that the financial interests of all the parties are protected, and to address frivolous claims. And, again, it would be up to the court to determine the appropriate amount of the security bond; this judicial discretion should ensure that even a small party with a potentially-legitimate claim isn't precluded from bringing an action. In response to another question, Representative Feige reiterated that the bill would only apply [in situations where a party seeks a restraining order, preliminary injunction, or

order vacating or staying the operation of a permit that affects an industrial operation].

[1:50:01 PM](#)

REPRESENTATIVE HOLMES noted that the term, "industrial operation" is defined in the bill as including a construction, energy, or timber activity, and oil, gas, and mineral exploration, development, and production. She characterized the term, "construction" as perhaps being overly broad, appearing to allow the bill to apply to any construction activity, including a neighbor's home-renovation project, for example.

REPRESENTATIVE FEIGE said he is not expecting the bill to be used by individuals to stop the activities of other individuals - other private property owners - but acknowledged that perhaps an amendment excluding residential construction activities might be in order.

REPRESENTATIVE HOLMES observed that the potential costs and damages of some industrial operations could potentially be so high as to preclude a party from obtaining a security bond in that amount.

REPRESENTATIVE FEIGE acknowledged that point, but noted that industrial operations, whether large or small, if wrongfully enjoined, could incur substantial costs and suffer substantial damages as a result of a stay based on a frivolous claim. Again, it would be up to the court to determine what the amount of the proposed security bond should be, and the court wouldn't have to set the bond so high that it results in the party being unable to obtain it. There should be some kind of risk placed on the plaintiff in order to "weed out" frivolous lawsuits, he opined, since even when frivolous, they are still lawsuits and can still result in costs and damages being incurred and suffered as the result of a stay, with serious implications for the state's economy. In response to comments, he surmised that the court, too, has a role in determining which claims have potential merit.

CHAIR GATTO reiterated Representative Holmes's point regarding large security bonds.

REPRESENTATIVE THOMPSON, too, observed that as currently written, the bill could apply in situations involving residential construction projects.

CHAIR GATTO questioned how a forfeited security bond would be distributed to an industrial operation and its contractors, subcontractors, and employees when it is found to have been wrongfully enjoined or restrained.

REPRESENTATIVE FEIGE indicated his belief that it would be up to the court to handle that distribution.

1:58:18 PM

REPRESENTATIVE GRUENBERG pointed out that the phrase, "wrongfully enjoined or restrained" as used in both the bill and Rule 65(c) signifies only that the party bringing the action hasn't prevailed, and not necessarily that its assertions were frivolous. He questioned whether the sponsor is intending for the bill to only be applied in situations where the party's assertions are found to be frivolous.

REPRESENTATIVE FEIGE indicated a preference for the proposed security bond to be forfeited in any situation wherein the party bringing the action doesn't prevail regardless that its assertions weren't frivolous. In response to comments and a question regarding the definition of the term, "industrial operation", he suggested that the bill be amended to exclude certain types of residential construction activities, though exactly which types to exclude would be up to the committee to determine.

REPRESENTATIVE KELLER pointed out that as currently written, the bill would apply to any construction activity that requires a permit.

REPRESENTATIVE LYNN suggested limiting the bill to just activities involving the development of the state's natural resources, offering his understanding that the bill is only meant to address frivolous lawsuits filed with the intention of stopping resource development.

REPRESENTATIVE FEIGE indicated that he doesn't intend for the bill to apply to "some of the smaller level of activities," but rather only to projects requiring a permit, even residential construction projects. In response to further comments and questions, he acknowledged that the committee could choose to somewhat limit the scope of the bill as it relates to residential construction activities.

CHAIR GATTO relayed that HB 168 would be held over.

The committee took an at-ease from 2:10 p.m. to 2:12 p.m.

HB 6 - REMOVING A REGENT

[2:12:10 PM](#)

CHAIR GATTO announced that the final order of business would be HOUSE BILL NO. 6, "An Act authorizing the governor to remove or suspend a member of the Board of Regents of the University of Alaska for good cause; and establishing a procedure for the removal or suspension of a regent." [Before the committee was CSHB 6(EDC).]

[2:13:06 PM](#)

REPRESENTATIVE KELLER moved to adopt the proposed committee substitute (CS) for HB 6, Version 27-LS0027\T, Mischel, 2/25/11, as the working document.

REPRESENTATIVE HOLMES objected for the purpose of discussion.

[2:13:59 PM](#)

TED MADSEN, Staff, Representative Max Gruenberg, Alaska State Legislature, explained on behalf of the sponsor of HB 6, Representative Gruenberg, that back in 2007, a member of the Board of Regents of the University of Alaska was indicted on many counts of fraud and embezzlement of federal funds but refused to resign his position as regent, and so in addition to the Senate's beginning formal impeachment proceedings, a bill was introduced in the House that would have created a procedure by which to remove a regent. At that time, the Board of Regents didn't have such a procedure in place, and so was invited [by the House Judiciary Standing Committee] to adopt policies through which the Board of Regents could remove one of its own members, but it didn't do so then and has yet to do so. Specifically, HB 6 would allow the governor to remove a regent for good cause, and provides for the establishment of both a removal procedure and a suspension procedure, with both procedures complying with Alaska's Administrative Procedure Act (APA). He offered his belief that Section 1, which pertains to legislative findings and purposes, offers reassurance that the bill is intended to allow for the removal of a regent only for good cause, while also ensuring that the university remains insulated from politics.

MR. MADSEN explained that Section 2's proposed AS 14.40.155(a) enumerates instances in which a regent may be suspended. Under Version T, though, proposed AS 14.40.155(a)(3) now says, "a probable cause determination of a knowing ethics violation under AS 39.52 that results in a complaint under consideration by the personnel board"; and proposed AS 14.40.155(a)(4) now says, "a verified complaint of malfeasance or nonfeasance in office described under (g)(4) of this section under consideration by the governor". These two changes in language address a concern that mere allegations could [result in suspension]. Also under Version T, proposed AS 14.40.155(a) now contains a paragraph (5) that says, "proceedings involving misconduct that is related to the regent's ability to serve as a regent under consideration by a professional or occupational licensing body".

[2:19:00 PM](#)

MR. MADSEN explained that Section 2's proposed AS 14.40.155(b) provides [a regent facing an accusation by a governor seeking the regent's removal] an opportunity for a hearing and judicial review; that Section 2's proposed AS 14.40.155(c) allows a suspended regent to request a hearing to defend against the stated grounds for the suspension, or a hearing to have the suspension lifted; that Section 2's proposed AS 14.40.155(d) allows the governor to delegate the office of administrative hearings to conduct such hearings - such delegation is commonly done for hearings pertaining to many of the state's boards and commissions; that Section 2's proposed AS 14.40.155(e) states that the APA - AS 44.62.330 through AS 44.62.630 - shall apply to all proceedings under proposed AS 14.40.155; that Section 2's proposed AS 14.40.155(f) stipulates that among other things, a complete record of the removal proceeding shall be filed with the lieutenant governor's office; and that Section 2's proposed AS 14.40.155(g) defines the term, "good cause" as it would be used in proposed AS 14.40.155 to justify the removal of a regent. Under Version T, though, proposed AS 14.40.155(g)(5) now says good cause also means, "misconduct related to the regent's ability to serve as a regent and resulting in the revocation or suspension of a professional or occupational license issued under state law".

MR. MADSEN, in conclusion, explained that Section 3 - the applicability section - stipulates that the bill would apply to all conduct and acts occurring before, on, or after the bill's effective date.

REPRESENTATIVE GRUENBERG, in response to a question and speaking as the sponsor, explained that currently, the only way a regent could be removed would be via a formal impeachment proceeding conducted by the legislature. Such a limitation is neither practical nor responsible, given that the legislature meets for only part of the year, he opined.

REPRESENTATIVE HOLMES referred to the language of proposed AS 14.40.155(g)(1) stipulating that "good cause" also means a violation of the Alaska Executive Branch Ethics Act - AS 39.52 - and questioned whether that includes even minor violations of that Act.

REPRESENTATIVE GRUENBERG said that as the sponsor of the bill, it's his intention that it would have to be a very major violation. Because the Board of Regents of the University of Alaska has been established by the Alaska State Constitution, a regent should not be removed except for a reason so serious that the person either cannot or should not continue to function as a regent. He mentioned that he would be amenable to altering proposed AS 14.40.155(g)(1) in order to ensure that that's really the case - perhaps by stipulating that it must be a serious violation, or a very serious violation. In response to a comment regarding proposed AS 14.40.155(g)(3) stipulating that "good cause" also means a conviction of a misdemeanor involving dishonesty, breach of trust, or the University of Alaska, he characterized such misdemeanors as very serious [for a regent to have committed].

[2:24:55 PM](#)

REPRESENTATIVE LYNN referred to proposed AS 14.40.155(g)(1), and suggested that perhaps it could instead be amended to stipulate only violations of the Alaska Executive Branch Ethics Act for which a substantial penalty is assessed.

REPRESENTATIVE GRUENBERG indicated that he would be amenable to such a change as an alternative to his suggestion. In response to comments and a question, he offered his understanding that members' packets include a memorandum from the drafter defining a number of the terms used in proposed AS 14.40.155(g), and relayed that he would be amenable to holding HB 6 over.

REPRESENTATIVE HOLMES said she wants to ensure that HB 6 complies with the sponsor's intent, that being that a regent would only be removed for a very serious reason.

REPRESENTATIVE LYNN referred to proposed AS 14.40.155(g)(4)(B) stipulating that "good cause" also means malfeasance or nonfeasance in office, including an inability to serve, and opined that the length of that inability to serve should be specified.

REPRESENTATIVE GRUENBERG mentioned that he would continue to work on the bill in order to address members' concerns.

CHAIR GATTO relayed that HB 6 would be held over [with the motion to adopt Version T as the working document left pending].

[2:28:11 PM](#)

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 2:28 p.m.