

**ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE**

March 12, 2012

12:32 p.m.

MEMBERS PRESENT

Senator Hollis French, Chair
Senator Bill Wielechowski, Vice Chair
Senator Joe Paskvan
Senator John Coghill

MEMBERS ABSENT

Senator Lesil McGuire

COMMITTEE CALENDAR

SENATE BILL NO. 151

"An Act relating to mitigation at sentencing in a criminal case for a defendant found by the court to have been affected by a fetal alcohol spectrum disorder."

- HEARD & HELD

SENATE BILL NO. 180

"An Act directing the Department of Transportation and Public Facilities to develop and implement standards and operating procedures allowing for the use in the construction and maintenance of transportation projects and public facilities and in the construction of projects by public and private entities of gravel or aggregate materials that contain a limited amount of naturally occurring asbestos, and authorizing use on an interim basis of those materials for certain transportation projects and public facilities; relating to certain claims arising out of or in connection with the use of gravel or aggregate materials containing a limited amount of naturally occurring asbestos; and providing for an effective date."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 151

SHORT TITLE: FETAL ALCOHOL SPEC. DISORDER AS MITIGATOR

SPONSOR(s): SENATOR(s) MEYER

01/17/12 (S) PREFILE RELEASED 1/13/12
01/17/12 (S) READ THE FIRST TIME - REFERRALS
01/17/12 (S) HSS, JUD
03/05/12 (S) HSS AT 1:30 PM BUTROVICH 205
03/05/12 (S) Moved CSSB 151(HSS) Out of Committee
03/05/12 (S) MINUTE(HSS)
03/06/12 (S) HSS RPT CS 4DP NEW TITLE
03/06/12 (S) DP: DAVIS, DYSON, MEYER, EGAN
03/12/12 (S) JUD AT 12:30 AM BELTZ 105 (TSBldg)

BILL: SB 180

SHORT TITLE: NATURALLY OCCURRING ASBESTOS IN GRAVEL

SPONSOR(s): SENATOR(s) OLSON

01/27/12 (S) READ THE FIRST TIME - REFERRALS
01/27/12 (S) TRA, JUD
02/23/12 (S) TRA AT 1:00 PM BUTROVICH 205
02/23/12 (S) Moved CSSB 180(TRA) Out of Committee
02/23/12 (S) MINUTE(TRA)
02/24/12 (S) TRA RPT CS 3DP NEW TITLE
02/24/12 (S) DP: KOOKESH, MENARD, THOMAS
02/24/12 (S) FIN REFERRAL ADDED AFTER JUD
03/12/12 (S) JUD AT 12:30 AM BELTZ 105 (TSBldg)

WITNESS REGISTER

SENATOR KEVIN MEYER
Alaska State Legislature
Juneau, AK

POSITION STATEMENT: Sponsor of SB 151.

CHRISTINE MARASIGAN, Staff
Senator Kevin Meyer
Alaska State Legislature
Juneau, AK

POSITION STATEMENT: Provided information on SB 151 on behalf of the sponsor.

JUDGE MICHAEL JEFFERY, representing himself
Barrow, AK

POSITION STATEMENT: Testified in support of SB 151.

VICKY TINKER, Team Coordinator
Kenai Peninsula FASD Diagnostic Program
Kenai, AK

POSITION STATEMENT: Testified in support of SB 151.

KATE BURKHART, Executive Director
Alaska Mental Health Board and
Advisory Board on Alcoholism and Drug Abuse
Juneau, AK

POSITION STATEMENT: Testified in support of SB 151.

RICK IANNOLINO, representing himself
Juneau, AK

POSITION STATEMENT: Testified in support of SB 151.

MARGARET VROLYK, Parent Navigator
Juneau FASD Diagnostic Clinic
Juneau, AK

POSITION STATEMENT: Testified in support of SB 151.

DAVID SCOTT, Staff
Senator Donny Olson
Alaska State Legislature
Juneau, AK

POSITION STATEMENT: Introduced SB 180 on behalf of the sponsor.

DOCTOR JOE MCLAUGHLIN, State Epidemiologist
Department of Health and Social Services (DHSS)
Anchorage, AK

POSITION STATEMENT: Testified on SB 180 and provided information on the human health risks associated with exposure to airborne asbestos.

ACTION NARRATIVE

[12:32:22 PM](#)

CHAIR HOLLIS FRENCH called the Senate Judiciary Standing Committee meeting to order at 12:32 p.m. Present at the call to order were Senators Wielechowski, Paskvan, and Chair French. Senator Coghill arrived soon thereafter.

SB 151-FETAL ALCOHOL SPEC. DISORDER AS MITIGATOR

[12:32:39 PM](#)

CHAIR FRENCH announced the consideration of SB 151, "An Act relating to mitigation at sentencing in a criminal case for a defendant found by the court to have been affected by a fetal alcohol spectrum disorder." He asked for a motion to adopt the proposed committee substitute (CS).

SENATOR WIELECHOWSKI moved to adopt the proposed CS for SB 151, labeled 27-LS1132\0, as the working document.

CHAIR FRENCH announced that without objection, version 0 was before the committee.

SENATOR COGHILL joined the committee.

12:32:59 PM

SENATOR KEVIN MEYER, sponsor of SB 151, explained that the bill would specifically include Fetal Alcohol Spectrum Disorders (FASD) in the state's existing definition of "mental disease or defect" and as a mitigating factor in sentencing. He cautioned that the intent was not to appear soft on crime, but to allow for more appropriate sentencing for people who suffer from this disability. This dovetails with Chief Justice Carpeneti's recent speech to the Legislature that emphasized flexibility in sentencing.

SENATOR MEYER said flexibility is particularly important when a judge considers sentencing for a person with a spectrum disorder. Alaska has the highest rate of FASD in the nation, and according to the experts at the Alaska FASD Partnership, people with FASD are disproportionately represented within the criminal justice system. He spoke of his motivation to do more to prevent this very preventable disability.

12:36:43 PM

CHAIR FRENCH asked if the mitigator in paragraph (18), page 3, lines 12-16, had been used in FASD cases, and if it was used why wasn't it working.

SENATOR MEYER said part of the reason for bringing the bill forward was that paragraph (18) has produced inconsistent results from judges. Some say FASD is included while others say it is not implicitly defined.

12:37:41 PM

CHRISTINE MARASIGAN, staff to Senator Kevin Meyer, confirmed that interpretation of that section was inconsistent, and suggested that Judge Jeffry could address the question more thoroughly. She also pointed out that the sponsor deferred to the Department of Law (DOL) and other FASD advocates and removed from version 0 the section that included "impaired brain function" in the definition of "mental disease or defect." That also accounts for the expanded definition at the end of the bill.

CHAIR FRENCH asked who would make the diagnosis that a defendant is affected by FASD.

SENATOR MEYER directed attention to page 3, line 30. It says a determination is made by a neuropsychological examination.

CHAIR FRENCH asked if a medical doctor would make the diagnosis.

SENATOR MEYER said yes.

CHAIR FRENCH opened public testimony.

[12:40:41 PM](#)

JUDGE MICHAEL JEFFERY, representing himself, Barrow, AK, relayed his personal experience to illustrate that the mitigator in existing law was not adequate for use in FASD cases. In 1990, he accepted a non-statutory mitigating factor for a FASD condition, and a three-judge panel sent it back saying he could not use it because the Legislature spoke and the mental disease or defect did not fit that condition. He was therefore required to impose the presumptive term. He emphasized the importance of this legislation.

Addressing the question of who does the diagnosis, he said it is appropriate that a medical doctor makes the diagnosis, but requiring that specialty designation would be a big limitation. Many people who have a professional FASD diagnosis would not fit within that definition. He continued to say that this was all about smart justice. If it can be shown by clear and convincing evidence that the defendant has the condition and it significantly affected his or her conduct, a judge could use discretion and potentially adjust the presumptive term downward.

JUDGE JEFFERY said he was pleased that version 0 provides more flexibility by eliminating the prohibition on the mitigator being applicable to anyone with an assaultive offense.

[12:45:02 PM](#)

CHAIR FRENCH asked how prevalent FASD was among defendants who appear in his court.

JUDGE JEFFERY said it was unusual for a defendant to have a medical diagnosis, and it was very difficult to identify FASD without one. A defendant who has a FASD diagnosis most probably received it earlier when he or she was in the child welfare system or the juvenile justice system. He relayed his belief that a significant percentage of the people that appear before

him are affected to some degree and he accommodates that by slowing things down and asking more questions.

[12:48:16 PM](#)

SENATOR COGHILL asked about the balance between this mitigater, public safety, and responsibility for one's actions.

JUDGE JEFFERY explained that there is not an automatic reduction of sentence and the criminal justice system will continue to hold people responsible for their actions. A person who presents a danger to the public won't be rehabilitated in the community, and a person who is released under treatment and commits another offense will be returned to jail.

[12:50:58 PM](#)

VICKY TINKER, Team Coordinator, Kenai Peninsula FASD Diagnostic Program, Kenai, AK, introduced herself.

CHAIR FRENCH asked Ms. Tinker her perspective of what it would take to put FASD evidence in front of a court.

MS. TINKER explained that in Alaska a physician makes the final diagnosis after getting input from a psychologist, a speech therapist, and sometimes an occupational therapist, all of which are part of a diagnostic team. She agreed that the current language "as determined by a neuropsychological examination" could be problematic. Not all the teams have a psychologist with that particular specialty and a neuropsychologist does not make the final diagnosis.

CHAIR FRENCH summarized her points.

MS. TINKER added that the medical provider on the team can be a mid-level practitioner such as a nurse practitioner or physician assistant, but it would be unusual for either to make the official diagnosis alone.

[12:53:20 PM](#)

CHAIR FRENCH said he would not feel comfortable having anyone but a medical doctor make the final diagnosis.

MS. TINKER said in cases when a physician [assistant] or nurse practitioner makes the final medical diagnosis, they are also using information from the other providers on the team. It is not an independent diagnosis.

CHAIR FRENCH said the committee would work with the sponsor on that language.

[12:54:14 PM](#)

SENATOR COGHILL asked the number of diagnostic teams statewide.

MS. TINKER estimated there were eight or nine.

SENATOR COGHILL asked if the court could access these teams easily or if they were ad hoc.

MS. TINKER replied the court can easily draw upon them, and a team in one area can fill needs in another area that does not have one.

[12:55:04 PM](#)

SENATOR PASKVAN asked what type of examination she would recommend if it would be too narrow to require a neuropsychological examination.

MS. TINKER suggested it would be safe to say, "as determined by a physician or a diagnostic team."

CHAIR FRENCH asked if it would be too narrow to say, "as determined by a physician."

MS. TINKER said yes, and provided an example. The medical provider on the diagnostic team associated with Assets, Inc. in Anchorage is probably more knowledgeable about FASD than most physicians, and that person is an advanced nurse practitioner.

CHAIR FRENCH asked if there was a definition in law for "diagnostic team."

MS. TINKER said no. She said she believes that by law, a medical provider makes the diagnosis, but the gold standard for diagnosis is the University of Washington model. That is what Alaska uses.

SENATOR PASKVAN asked if there was information in the packet about the University of Washington model, because it probably addresses the physician's participation in the team process.

CHAIR FRENCH noted that someone in the audience indicated they could talk about that.

SENATOR COGHILL said he would like more information on the range of the disorder because he suspects the ability to respond accountably will be a factor for the court to consider.

MS. TINKER said on one end of the spectrum a person may be able to function in society and not break rules, whereas someone on the other end may have so little control over their behavior and decision-making that they need to be institutionalized. However, even someone who is lightly impaired may have difficulty controlling their impulses and connecting consequences to their actions.

SENATOR COGHILL said he was looking at ways for the judge to be as informed as possible.

1:00:50 PM

KATE BURKHART, Executive Director, Alaska Mental Health Board and Advisory Board on Alcoholism and Drug Abuse, testified in support of SB 151. She stated that the FASD population in Alaska is disproportionately represented in the corrections and criminal justice systems, and SB 151 provides an opportunity to embrace Chief Justice Carpeneti's call for smart justice. It looks first to alternative sentences and punishments that both protect the public and rehabilitate the perpetrator. She reiterated Judge Jeffery's comments that dangerous persons will not be rehabilitated in the community. Rather, SB 151 affords judges the discretion to balance public safety and community rehabilitation.

MS. BURKHART echoed the concerns about the neuropsychological examination limitation and suggested saying, "a physician or University of Washington credentialed FASD diagnostic team." That would probably address the concerns about the level of experience and expertise of the person making the diagnosis and would reflect the actualities of what Alaska's diagnostic teams do. She directed attention to paragraph (18) on page 3 and suggested revising the language to say that the mitigator could be applied in crimes against a person except for repeat felonies. That balances the opportunity to be smart and flexible to potentially break the cycle of recidivism for someone diagnosed with FASD.

1:06:33 PM

RICK IANNOLINO, representing himself, said he was the coordinator of the Juneau FASD Diagnostic Clinic. He described the physical aspects that are considered in diagnosing FASD and said it should not be a problem that a non-physician medical

person does these exams because that has been the practice for many years. Addressing the concern about the neuropsychological examination, he said a neuropsychologist is not a required member of the team under the University of Washington diagnostic team certification. He discussed the wide range of tests performed by each of the team members. The psychologist looks at the brain functions, the speech and language pathologist looks at receptive communication, the occupational therapist looks at everyday activities and the physical therapist looks at the large muscle functions.

Responding to a series of questions from the Chair, he explained that the FASD provider agreement requires each team to have a physician, a psychologist, an occupational therapist or a physical therapist or a speech and language pathologist, and a parent navigator. As coordinator, he does not assist in rendering the diagnosis, but he ensures the professionals are appropriate for the client. The Juneau team sees about 24 clients in a year.

[1:13:07 PM](#)

SENATOR COGHILL asked if a person with FASD could experience cognitive growth.

MR. IANNOLINO replied someone with FASD may be able to accommodate other ways of learning, but the brain damage is permanent.

SENATOR PASKVAN asked if the credentialing is affected if one of the volunteer members withdraws.

MR. IANNOLINO responded that the Juneau team is the exception; most teams do not rely on volunteers.

SENATOR PASKVAN asked how many credentialed team members would be qualified to present this as a mitigator at a criminal proceeding.

MR. IANNOLINO said most people come to the clinic because they are having severe problems at school, with their families, or with the law.

[1:16:52 PM](#)

CHAIR FRENCH asked if many of the people who arrive at the clinic have pending criminal cases.

MR. IANNOLINO said yes.

CHAIR FRENCH asked if they are seeking a diagnosis for court purposes or if a variety of issues has driven them to the clinic.

MR. IANNOLINO said they are trying to live and inadvertently make poor decisions.

[1:18:11 PM](#)

MARGARET VROLYK, Parent Navigator, Juneau FASD Diagnostic Clinic, testified in support of SB 151. She spoke of her experience as a parent of a son with FASD and voiced concern with the exception in paragraph (18) on page 3. It is very easy for someone with FASD to become a felon by association, she said.

[1:20:53 PM](#)

CHAIR FRENCH held SB 151 in committee.

SB 180-NATURALLY OCCURRING ASBESTOS IN GRAVEL

[1:21:04 PM](#)

CHAIR FRENCH announced the consideration of SB 180 and asked for a motion to adopt the work draft committee substitute (CS).

[1:21:41 PM](#)

SENATOR WIELECHOWSKI moved to adopt the proposed CS for SB 180, labeled 27-LS1219\D, as the working document.

CHAIR FRENCH announced that without objection, version D was before the committee.

DAVID SCOTT, staff to Senator Donny Olson, introduced SB 180 on behalf of the sponsor. He explained that the bill regulates the use of gravel that contains naturally occurring asbestos (NOA). This gravel is used primarily for transportation projects and is very prevalent in certain areas throughout the state. Since NOA was found in the gravel in the Ambler area of the upper Kobuk Valley, all construction has stopped.

CHAIR FRENCH asked when it came to light that gravel in the Ambler area contained NOA.

MR. SCOTT estimated it was in early 2000, and confirmed that construction projects have been on hold since then. Continuing the introduction, he explained that the bill offers liability

immunity to the state and contractors that follow the standard operating procedures of the state.

1:24:21 PM

CHAIR FRENCH observed that the immunity would be to hold anyone harmless for what may be deleterious health effects of exposure to naturally occurring asbestos.

MR. SCOTT reiterated that the immunity was dependent on following the established procedure. Anyone who does not follow the procedure or decides to use gravel that contains NOA without getting plan approval from the Department of Transportation and Public Facilities (DOTPF) would be liable for any civil action brought forward.

CHAIR FRENCH asked if naturally occurring asbestos presents the same health issues as asbestos that has been used in paint and insulation.

MR. SCOTT deferred the question to representatives from the Department of Environmental Conservation (DEC), the Department of Health and Social Services (DHSS) or Department of Transportation and Public Facilities (DOTPF). He noted that the bill defines naturally occurring asbestos as ["asbestos-containing material that has not been processed in an asbestos mill."]

1:26:08 PM

CHAIR FRENCH asked if NOA occurs in gravel in areas other than the Ambler region.

MR. SCOTT answered yes; it is found throughout the state and is prevalent in areas that have concentrations of jade.

1:26:52 PM

DOCTOR JOE MCLAUGHLIN, state epidemiologist, Department of Health and Social Services (DHSS), stated that the concern with asbestos is that it is hazardous to humans in any form, and can cause lung cancer, mesothelioma, and non-malignant lung conditions such as asbestosis. Naturally occurring asbestos does not present a health threat if it is not disturbed, but if natural weathering or human disturbance breaks the NOA into microscopic fibers it can readily become airborne and inhaled. That is cause for concern. In general, longer, thinner fibers are more toxic and irritating to the alveoli. The good news for Ambler is that the type of asbestos found there is considered

the least toxic of the six major asbestos fibers. However, it is not non-toxic.

1:28:44 PM

SENATOR PASKVAN asked if it is an issue to dig the gravel and put it on a roadway that would be subject to wear and natural erosion.

DR. MCLAUGHLIN said yes; health concerns are the reason that projects in the Ambler area have languished.

1:29:29 PM

SENATOR WIELECHOWSKI asked if there was any safe level of asbestos exposure.

DR. MCLAUGHLIN said no; from a human health standpoint, there is no save level of airborne exposure to asbestos. The U.S. Centers for Disease Control and Prevention (CDC), the U.S. Environmental Protection Agency (EPA), and all health departments in the country have raised this concern.

SENATOR WIELECHOWSKI asked the typical latency period for getting asbestosis, mesothelioma or other asbestos-related diseases.

DR. MCLAUGHLIN replied most asbestos-related diseases occur 10-40 years after the first exposure.

SENATOR WIELECHOWSKI mentioned the immunity provided in the bill, and asked if there would be a risk of airborne asbestos from NOA containing gravel that is been used on a roadbed.

DR. MCLAUGHLIN replied there is always a risk when naturally occurring asbestos is airborne. He offered his understanding that the bill seeks to establish an analytic threshold for detection of NOA in gravel, modeling the California law that says that gravel that contains less than .25 percent NOA can be used for surfacing roads. He described the process and calculations for determining the analytical detection limit. If a fiber of asbestos is found in one of 400 point observations, that calculates to .25 percent of naturally occurring asbestos in that substrate [$1/400 \times 100$] and the gravel cannot be used. If no fibers are detected, the level of NOA is below the analytical threshold level and the gravel can be used.

CHAIR FRENCH asked what percent of asbestos occurs in the gravel in the Ambler area.

DR. MCLAUGHLIN said it depends on the site tested, but the concentrations range from greater than or equal to 10 percent to less than 1 percent. He noted that he did not have the data from the most recent DOTPF tests.

CHAIR FRENCH asked if any process could separate even some asbestos from the gravel.

DR. MCLAUGHLIN deferred to DOTPF.

[1:34:30 PM](#)

CHAIR FRENCH asked if the California standard presupposes the use of gravel containing NOA in pavement or for all purposes.

DR. MCLAUGHLIN offered to send a copy of the ATCM for Surfacing Applications, the California document that lists exemptions. One is that NOA containing gravel may be used on unpaved roads in rural areas where an alternative is not available.

SENATOR WIELECHOWSKI asked if the federal limit for using gravel containing NOA was similar to .25 percent, and the type of safety gear workers would need to wear.

DR. MCLAUGHLIN said the federal agencies have not established a safe threshold for exposure to naturally occurring asbestos so it is a zero threshold toxin from the human health standpoint. However, the federal government does regulate the use of asbestos to protect human health. He described specific regulations and guidelines in detail.

[1:38:20 PM](#)

CHAIR FRENCH announced that he would hold SB 180 in committee.

[1:38:46 PM](#)

There being no further business to come before the committee, Chair French adjourned the meeting at 1:38.