

**ALASKA STATE LEGISLATURE**  
**SENATE RESOURCES STANDING COMMITTEE**

February 16, 2018

3:32 p.m.

**MEMBERS PRESENT**

Senator Cathy Giessel, Chair  
Senator John Coghill, Vice Chair  
Senator Natasha von Imhof  
Senator Kevin Meyer  
Senator Click Bishop

**MEMBERS ABSENT**

Senator Bert Stedman  
Senator Bill Wielechowski

**COMMITTEE CALENDAR**

SENATE BILL NO. 173

"An Act relating to the liability of a person or the state for the release of certain pesticides during application on a utility pole."

- MOVED CSSB 173 (RES) OUT OF COMMITTEE

SENATE BILL NO. 92

"An Act relating to abandoned and derelict vessels; relating to the registration of vessels; relating to certificates of title for vessels; relating to the duties of the Department of Administration; relating to the duties of the Department of Natural Resources; establishing the derelict vessel prevention program; establishing the derelict vessel prevention program fund; and providing for an effective date."

- MOVED CSSB 92 (RES) OUT OF COMMITTEE

**PREVIOUS COMMITTEE ACTION**

BILL: SB 173

SHORT TITLE: LIABILITY: PESTICIDES & UTILITY POLES

SPONSOR(S): SENATOR(S) MICCICHE

02/02/18           (S)           READ THE FIRST TIME - REFERRALS

02/02/18 (S) RES  
 02/12/18 (S) RES AT 3:30 PM BUTROVICH 205  
 02/12/18 (S) Heard & Held  
 02/12/18 (S) MINUTE (RES)  
 02/14/18 (S) RES AT 3:30 PM BUTROVICH 205  
 02/14/18 (S) Heard & Held  
 02/14/18 (S) MINUTE (RES)  
 02/16/18 (S) RES AT 3:30 PM BUTROVICH 205

BILL: SB 92

SHORT TITLE: VESSELS: REGISTRATION/TITLES; DERELICTS  
 SPONSOR (S): SENATOR (S) MICCICHE

03/10/17 (S) READ THE FIRST TIME - REFERRALS  
 03/10/17 (S) RES, FIN  
 03/27/17 (S) RES AT 3:30 PM BUTROVICH 205  
 03/27/17 (S) Heard & Held  
 03/27/17 (S) MINUTE (RES)  
 03/31/17 (S) RES AT 3:30 PM BUTROVICH 205  
 03/31/17 (S) Heard & Held  
 03/31/17 (S) MINUTE (RES)  
 02/12/18 (S) RES AT 3:30 PM BUTROVICH 205  
 02/12/18 (S) Scheduled but Not Heard  
 02/14/18 (S) RES AT 3:30 PM BUTROVICH 205  
 02/14/18 (S) Heard & Held  
 02/14/18 (S) MINUTE (RES)  
 02/16/18 (S) RES AT 3:30 PM BUTROVICH 205

**WITNESS REGISTER**

SENATOR MICCICHE  
 Alaska State Legislature  
 Juneau, Alaska  
**POSITION STATEMENT:** Sponsor of SB 173 and SB 92.

ERIC FJELSTAD, Attorney  
 Perkins Coie  
 Representing Homer Electric Association  
 Anchorage, Alaska  
**POSITION STATEMENT:** Answered questions on SB 173.

EMILY NAUMAN, Attorney  
 Division of Legislative Legal  
 Legislative Affairs Agency  
 Alaska State Legislature  
 Juneau, Alaska  
**POSITION STATEMENT:** Answered questions on SB 173.

KRISTIN RYAN, Director  
Division Spill Prevention and Response  
Department of Environmental Conservation (DEC)  
Anchorage, Alaska

**POSITION STATEMENT:** Supported SB 173.

**ACTION NARRATIVE**

[3:32:13 PM](#)

**CHAIR CATHY GIESSEL** called the Senate Resources Standing Committee meeting to order at 3:32 p.m. Present at the call to order were Senators Coghill, Meyer, Von Imhof, Bishop, and Chair Giessel. Senators Wielechowski and Stedman were excused.

**SB 173-LIABILITY: PESTICIDES & UTILITY POLES**

[3:32:44 PM](#)

**CHAIR GIESSEL** announced consideration of SB 173 [CSSB 173 (RES), version 30-LS1332\D, was before the committee]. She said the bill was heard on Monday at which time public testimony was opened and closed. It was heard again on Wednesday when the committee adopted a committee substitute (CS) and had initial discussion. No amendments were submitted. Today they would have a final discussion and consider some legal questions.

[3:33:25 PM](#)

**SENATOR MICCICHE**, Alaska State Legislature, Juneau, Alaska, said he wanted to make sure Alaskans were protected from negligence and gross negligence [from pesticides on utility poles] with SB 173. This bill is designed to remove strict liability only for a specific reason [from pesticides on utility poles]. Other law covers regular liability, public nuisance, nuisance, trespass, negligence, and gross negligence.

**CHAIR GIESSEL** asked what liability the utilities would have or if they are completely absolved.

**ERIC FJELSTAD**, Attorney, Perkins Coie, representing Homer Electric Association, Anchorage, Alaska, answered that this bill only modifies the strict liability scheme in AS 46.03.822 that is sometimes called the State Super Fund Law. All other statutes and regulations that would apply to this situation continue to be in force.

He said discussion at the outset included whether all applicable laws should be changed, and the answer was "no." This just

modifies one law, which is the strict liability scheme. Common law and nuisance trespass are still in play.

[3:35:40 PM](#)

SENATOR COGHILL asked if contamination is affecting someone's groundwater, are they saying there is no liability.

MR. FJELSTAD answered that they are saying this particular statute cannot be used to recover costs or require clean-up. However, they are not saying there isn't a full panoply of other authorities that DEC and others can avail themselves of like water quality standards and various other statutory provisions in Title 46 that are not changed at all by this legislation.

SENATOR COGHILL said the question he wanted answered is if this pesticide is used, there is no liability, period.

MR. FJELSTAD replied there is no liability under this statute. It's not true that there is no liability, period. There is no liability under this statute to require clean-up costs.

Focusing on two points, Mr. Fjelstad said one is what the intent of this issue is. These poles use pesticides that are approved by EPA and applied. When the pesticide is applied in accordance with EPA - a key point - EPA has made a policy decision that that is appropriate use: it's common to have a little area of contamination of the ground around the pole. So, this focuses on the question of whether appropriate to require a utility to clean up that zone of impact, which might be 18 inches out. Testimony has indicated that is not inexpensive. It can cost up to \$30,000/pole.

MR. FJELSTAD said the question has been asked why this hasn't come up before and the answer is positive: these poles have not been significant issues. There aren't any examples of a utility pole causing ground contamination or showing up in someone's well in Alaska.

CHAIR GIESSEL summarized that he is saying the small amount of leaching doesn't create a super fund site.

MR. FJELSTAD said that was correct.

[3:39:49 PM](#)

SENATOR BISHOP said Fairbanks has contaminated wells and he understands what Mr. Fjelstad is saying, but what if a water

well had trace elements of Penta in it, would those people still have some recourse?

MR. FJELSTAD answered the other tools in the toolbox - common law, nuisance and trespass - are there and that DEC absolutely has recourse under common law.

CHAIR GIESSEL asked MS. Nauman, Legislative Legal Attorney, who drafted the bill if she agreed with that answer.

[3:41:01 PM](#)

EMILY NAUMAN, Attorney, Division of Legislative Legal, Legislative Affairs Agency, Alaska State Legislature, Juneau, Alaska, answered yes, she agrees.

SENATOR COGHILL asked what other tools outside of the Super Fund Act would a liability issue follow under these pole conditions.

[3:42:01 PM](#)

KRISTIN RYAN, Director, Division Spill Prevention and Response, Department of Environmental Conservation (DEC), Anchorage, Alaska, answered that this legislation would say the utility company is not liable for contamination or leeching from the pole.

SENATOR COGHILL asked what the middle ground is if liability was found, because the Super Fund is pretty big hammer.

MS. RYAN replied that the department recognizes the situation: if six inches of soil is contaminated around a utility pole. But if contamination has leaked further and is of a more serious nature, it's nice to have this tool in the toolbox to say they caused damage.

She said the department uses discretion and only uses the hammer when it is needed. They try to work with operators with best management practices and other methods and don't need the hammer in this situation.

[3:44:32 PM](#)

SENATOR BISHOP asked if she has a toxicology report and when it will be available.

MS. RYAN answered yes; some tests are being done on some poles that have been moved on the Kenai Peninsula by a DOTPF road project to see if there has been any leeching onto wetlands. The goal for that work is to help the department draft best

management practices. The research is on-going, and they hope to have some results by the end of March.

SENATOR BISHOP asked if they have baseline data to say there is a real problem.

MS. RYAN responded that some data was taken from the Kenai Wildlife Refuge that started this conversation, but it was an unscientific process and no significant event is triggering concern at the moment.

[3:46:34 PM](#)

CHAIR GIESSEL asked how long this pesticide has been used to treat poles in Alaska.

MS. RYAN replied Penta has been approved for this use by the Environmental Protection Agency (EPA) at least since 2008. She added that some committee members wanted to know the difference between Penta and creosote. The EPA still allows Creosote to be used, but they encourage using Penta instead for a variety of reasons, the main one being safety of utility workers; Creosote-covered poles are slippery and cause injuries. Penta tends to be a drier inhibitor of growth that is being used all over the U.S.

[3:47:59 PM](#)

CHAIR GIESSEL asked if the Department of Environmental Conservation (DEC) is the agency that tests and approves on-site water wells for homes.

MS. RYAN answered that the Department of Natural Resources (DNR) provides water use rights; the DEC protects and approves public water systems, which are defined as being used by 25 people or more.

[3:48:34 PM](#)

CHAIR GIESSEL asked if Penta had shown up in any of the DEC tests from these wells.

MS. RYAN answered no.

SENATOR MICCICHE said this issue isn't about calculation of risk because the U.S. has tens of millions of treated poles and they've heard a story about one well in the Northeast that may have had a problem. The reality is that all they are doing is changing the level of state liability to the liability defined under the federal EPA, a very conservative agency. Language is being changed from not observing the federal law exemption to

observing it under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

SENATOR COGHILL said the line of questioning is appropriate because a strict exemption needs context and that there is still some recourse.

SENATOR MICCICHE said he wanted to be able to look constituents in the eye and tell them that there is other recourse if there is that minute nearly non-existent probability that Penta ever transfers to a water table that it has to be evaluated.

[3:51:03 PM](#)

SENATOR COGHILL moved to report CSSB 173 (RES), version 30-LS1332\D, from committee with individual recommendations and attached zero fiscal note. There were no objections and it was so ordered.

[3:51:41 PM](#)

At ease

**SB 92-VESSELS: REGISTRATION/TITLES; DERELICTS**

[3:52:46 PM](#)

CHAIR GIESSEL called the meeting back to order and announced consideration of SB 92 [CSSB 92(RES), version 30-LS0481\J, was before the committee]. This is its third hearing in this committee and a committee substitute was adopted; public testimony was concluded. A deadline for amendments was for 5 p.m. yesterday and none were received.

SENATOR MICCICHE, sponsor of SB 92, Alaska State Legislature, Juneau, Alaska, said this bill originally had two pieces: one was identifying ownership and responsibility for a vessel and the other was financial capacity to be responsible. Because of difficulties some people had, they decided to remove the insurance requirement, but more work needs to be done on a cradle-to-grave situation.

He related that one of his vessels he has owned since 1985, and when he gets to the point of moving on to a new commercial fishing vessel, his boat will probably be purchased by someone who is in a different stage of vessel care and the ability to invest in that vessel. At some point it could end up in a harbor with a lot of marine growth and will eventually start sitting a little bit lower in the water.

Things happen to vessels over time. When it gets to that point harbor master will have the tools to know who owns the vessel and to be able to notify him of problems. If the problem isn't dealt with, the boat will get pulled out of the water while it is still afloat for just a fraction of the cost of lifting it from the bottom of the harbor or a channel. This is a first step in that process.

SENATOR COGHILL asked what the intent is of the forfeiture rule on page 5, line 25.

SENATOR MICCICHE replied that "or" is because the municipality or state has the flexibility to realize taking a vessel out of the water is the best option. Hopefully, it never results in a misdemeanor or a fine; hopefully one can arrive at a solution that avoids a vessel being on the bottom. But the state must be given the opportunity to act and that includes up to forfeiture.

He added that sometimes a boat owner no longer lives in the state and forfeiture may be the only way to remove the vessel. In other cases, an owner may not be financially capable of even removing the vessel from the water. This measure delivers some options and a little bit of a stick for folks that may be fighting to have the vessel dealt with.

SENATOR COGHILL said the testimony from the working group on this was "truly impressive," and this is a partial solution. He didn't want to go down the road of tools that were going to be costlier to do or could be misused.

He noted that SB 92 has civil penalties and forfeiture and should probably should go to the Judiciary Committee.

CHAIR GIESSEL reminded the committee that Senator Coghill brought up the cost involved, and the fiscal note is there from DMV and not yet from DNR. But they heard that one vessel in Dutch Hour cost 250 hours of DNR Division of Mining, Land, and Water staff time.

[4:00:55 PM](#)

SENATOR BISHOP asked if a vessel is deemed worthy to be preserved by the division, would that be honored.

The DNR commissioner [in the audience] indicated yes.

CHAIR GIESSEL noted three fiscal notes attached to the bill; one from DNR, one from DEC, and one from the Division of Motor Vehicles (DMV).

SENATOR COGHILL moved to report CSSB 92(RES), version 30-LS0481\J, from committee with individual recommendations and attached fiscal note(s). There were no objections and it was so ordered.

[4:02:45 PM](#)

CHAIR GIESSEL finding no further business to come before the committee, adjourned the Senate Resources Committee meeting at 4:02 p.m.