

HB

833

Memo to Terry Gardiner and Bill Parker

Re: Act Relating to the Abatement of Nuisances

Purpose and Effect of Bill

Suits to enjoin pollution have been taking place for hundreds of years (contrary to the popular belief that the Sierra Club doctored up the idea). Prior to modern environmental and pollution statutes the classic garden variety case was one to abate a "nuisance" in the courts of equity. In order to facilitate the growing number of suits as population and industrial growth clashed the courts evolved a distinction between "public nuisances" and "private nuisances."

The so-called "private nuisance" is classically defined as "an interference with the use and enjoyment of land." Prosser, Law of Torts p. 611.

"So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance." Supra, p. 613.

"No better definition of a public nuisance has been suggested than that of an act or omission 'which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects.'" Prosser, supra p. 605. The term comprehends a miscellaneous group of acts or omissions which interfere with the interests of the community, or the comfort or convenience of the general public.

To be considered public, the nuisance must affect an interest common to the general public, rather than peculiar to one individual, or several. Thus, while the mere pollution of a stream inconveniencing property owners along the stream would be a private nuisance, the nuisance would become public if fish began to die from the pollution.

In the latter situation the courts have long held that a private individual cannot abate such a public nuisance unless his damage is in some way to be distinguished from that sustained by other members of the general public. The effect of this bill, if passed into law, would be to grant standing to any member of the public affected by the pollution to abate that pollution after the individual went through the specified drill.

Need For the Bill

A. Small Picture-right now the Dept. of Law initiates actions at the request of DEC. As you might suspect the requests for action cover situations such as cesspools overflowing into a creek as well as the big cases such as the Galbraith Lake oilspill. As a practical matter the DOL-Civil Section is swamped with the big cases. Result: the small public nuisance pollution cases are prioritized to the bottom of a big list. DEC requests for action in small cases invariably is initiated by a citizen complaint. Prioritization often leaves an outraged citizenry, disgusted with red tape, with no remedy and worse no answer to the problem he complained of.

B. Big Picture-every day Reserve Mining dumps 60,000 tons of asbestos like fibers into Lake Superior near Duluth. 40% of Duluth drinks bottled water. A study of the history of the Reserve case reveals that this "public nuisance" has been such for years, yet for some reason in the past the public body responsible for protecting the public interest in public nuisances would not force a settlement with Reserve for cleaner, healthier water. Now the equities in balance are staggering. It's simply a matter of balancing the interests in the health of thousands versus the interest in employing thousands. Had Minnesota a law on the books such as this years ago when the Reserve health hazard became apparent, the politics of the times could have been checked by a citizen suit resulting in the problem being dealt with in 1946 when solutions were workable rather in 1976 when no solution is equitable for the public interest.

#### Committee Testimony

For the sponsor, Bill Parker, Doug Pope testified essentially the same as the above material. Commissioner Mueller testified that DEC approved of the bill. Will Condon, DOL, approved a letter from the AG's that stated no opposition to concept or form.

#### Questions to Field

A. Is this another non-problem? There's no telling how many small cases have been prioritized to the bottom of the list, but I saw several in 3 months time in Fairbanks. The bigger cases are more obvious and for the most part have been dealt with very well by the AG. There have been abuses though, most notably in recent years the Collier Chemical destruction of water supplies in Kenai. Although there may have been politics in the Galbraith Lake cases, it's important to note how this overlaps with the answer to the next question.

B. Does this open the door to the environmental groups from the states to barge in? No, emphatically no. It's important to remember that before an individual can proceed he must be part of the general public sustaining damage. That puts the standing question right where it should be--with the court. This bill merely eliminates the public-private distinction when the right drill is followed. A person still has to show that he is part of the public being damaged. Returning to the Galbraith Lake situation, the court would inquire whether any ~~public~~ public damage is alleged. In short, it's arguable that only the State can still proceed in an area so remote that there is no definable public. More clear would be an example of pollution in Dillingham. If the Dillingham public is damaged, then it must be a member of the Dillingham public before standing is granted.

C. Does this interfere with the boroughs? No. Read the bill, it forces the person to contact the DEC or "the local authority vested with pollution control powers."

D. Will this bill result in increased litigation? Only if DEC is not doing its job. Comm. Mueller agreed that in regard to the little cases that this might provide them with a more satisfying relief. Right now DEC couldn't let the citizen get in the action even if they wanted him to, which they would prefer in some of the smaller cases.

E. Who could file an action after the appropriate steps are taken? "Person" is defined in title 46 so broadly that it could include an individual, a partnership or corporation, or any municipal or government body.

F. Does this mean that DEC will have to file suits when they would otherwise settle a pollution problem? No. Abate means to either put an end to or to decrease in amount or degree. If DEC responds to the demand that they are settling the problem through avenues short of litigation then the spirit of the bill is complied with.

G. Do any other states have a law like this? At least one-- Wisconsin.

H. Who would object to a bill such as this? Business or industrial concerns who make or save capital by polluting rather than complying. When a lot of money is at stake private interests can be lobbied against public officials who must make the determination whether to proceed with a plan to abate an infringement on the public interest. This bill democratizes that decision making process. Another one of the many ideas from the boys who brought you open government.

1 IN THE HOUSE

BY PARKER

2 HOUSE BILL NO. 833

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 NINTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the abatement of nuisances."

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

8 \* Section 1. AS 46.03.760(e) is amended to read:

9 (e) Nothing in this section affects an individual's right to re-  
10 cover damages or to obtain injunctive relief under sec. 870(c) of this  
11 chapter, other applicable statutes or the common law.

12 \* Sec. 2. AS 46.03.870(a) is amended to read:

13 (a) Except as specified in secs. 822 - 828 of this chapter, the  
14 bases for proceedings or actions resulting from violations of this  
15 chapter or a regulation promulgated under this chapter inure solely to  
16 and are for the benefit of the state, and are not intended to in any way  
17 create new, or enlarge existing rights of persons or groups of persons  
18 in the state except as provided in (c) of this section.

19 \* Sec. 3. AS 46.03.870(c) is amended to read:

20 (c) This chapter does not estop the state, persons or political  
21 subdivisions of the state in the exercise of their rights to suppress  
22 nuisances, to seek damages, or to otherwise abate or recover for the  
23 effects of pollution or other environmental degradation. If a person  
24 has submitted a formal request to the department that it take action to  
25 abate a form of pollution or environmental degradation declared to be a  
26 nuisance under this chapter and that request either has been rejected or  
27 the department has not responded to the request within 30 days after it  
28 has been submitted, nothing in this chapter affects the right to bring  
29 an action to abate that pollution or environmental degradation as a

1 nuisance. A person bringing the action need not show injury different  
2 in kind, or in degree, from that sustained by the general public to  
3 prevail.  
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# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K — STATE CAPITOL  
JUNEAU 99811

JAY S. HAMMOND, GOVERNOR

February 27, 1976

The Honorable Terry Gardiner  
Chairman  
House Judiciary Committee  
Pouch V  
Juneau, Alaska 99811

Re: HB 833

Dear Representative Gardiner:

In regards to your request as to our view of HB 833, the Department of Law, after consultation with the Department of Environmental Conservation, has no objections to HB 833.

Sincerely,

AVRUM M. GROSS  
ATTORNEY GENERAL

By:

  
John R. Messenger  
Assistant Attorney General

JRM:jeh

AS 46.03.760(e) is amended to read:

(e)Nothing in this section affects an individual's right to recover damages or to obtain injunctive relief under sec. 895 of this chapter, ~~or~~ other applicable statutes of the common law.

AS 46.03.870(a) is amended to read:

(a)Except as specified in secs. 822-828 of this chapter, the bases for proceedings or actions resulting from violations of this chapter or a regulation promulgated under this chapter inure solely to and are for the benefit of the state, and are not intended to in any way create new, or enlarge existing rights of persons or groups of persons in the state except as provided in sec. 895 of this chapter.

AS 46.03 is amended by adding a new section to read:

46.03.895(a) A person has standing to enforce the provisions of this chapter in abating pollution, environmental degradation or any other matter declared to be a nuisance under this chapter if that person has submitted a formal request to the department or an appropriate municipality vested with local pollution control powers, that either the department or municipality take action to abate a form of air or water pollution, environmental degradation or nuisance and that request has been formally rejected or the department or municipality has not affirmatively responded to the request within 30 days after it has been submitted. A person bringing the action need not show injury different in kind, or degree, from that sustained by the general public to prevail.

(1)"affirmatively responded" as used in ~~xxx~~ this section means that the department or appropriate municipality has determined and formally replied that action will be taken to abate the pollution, degradation or nuisance complained of.

Doug Pope

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25 abate a form of pollution or environmental degradation <sup>of any matter</sup> declared to be a  
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