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TESTIMONY BEFORE HOUSE JUDICIARY ON SB84

My name is Mollie Dent. I am an attorney with the Sierra Club Legal Defense Fund. Thank you for the opportunity to testify on SB 84.

We have followed the Governor's Permit Reform Project very closely for the past 6 months, at the request of nearly 20 public interest groups around the State. We reviewed several drafts of the Governor's proposal, and submitted several sets of detailed comments. We attended many, many meetings, with the Governor's staff, with State agencies, with local governments, and with public interest groups. We did legal research on many of the proposals; we analyzed permit reform efforts in other states, and we submitted several of our own proposals for consideration.

After all this effort, we still believe that the Governor's reform measures give too much advantage to vested private interests.

We still believe that the "coastal consistency" determination should not be made by DNR and that a procedure for reviewing these determinations is necessary.

However, on the whole, we believe that the Governor's process has been fair and that a sincere effort has been made to balance the many important interests affected by permits.

We cannot say the same for SB 84. This bill threatens to replace the Governor's workable permit reform measures with a scheme that is not only unworkable, but also illegal.

This is more than ironic. It is unnecessary and very ill-advised. We have worked closely with the Governor's staff for 6 months in order to avoid litigation. We have resolved many of differences.

But with SB 84, I am sure that at least one of the many public interest groups or local governments we have worked with will bring an immediate legal challenge.

The most obvious ground for such a legal challenge is the denial of "equal protection" to the public and to local governments. SB 84 denies "equal protection" by giving an unfair advantage to permit applicants. The bill does this by shifting the burden of proof from the applicant to the agency, whenever a permit is denied. This means

that an applicant can challenge an agency for denying a permit, and force the agency to defend its position in court.

However, if the public or a local government challenges a permit, the burden remains on them to show that the agency was wrong.

Even the Department of Law believes this is unconstitutional.

SB 84 also does not address the additional expenses that will be imposed by this scheme. The agencies will need more staff to process permits within the 30-day limit; the Attorney General's office will need more lawyers to defend the challenges; and the courts will need more judges and clerks to hear the de novo trials.

I was informed by the Committee staff that the testimony should be brief, so I will conclude. There is a mood throughout the country that developers are overregulated and that the country suffers because of it. This may be true in many instances.

The solution, however, is a reform measure like the Governor's -- a measure that cuts out the excess "fat" in government permits, but leaves the "muscle" intact. Under this kind of reasoned approach to permit reform, everyone is better off, including industry. Even an industrial giant like Dow Chemical Company has

stated that compliance with sound environmental permits
can eventually make money for the company.*/

And that's all we're asking -- sound,
reasonable permit procedures.

Thank you.

*/ Statement by Chester E. Otis, Manager,
Environmental Affairs, Dow Chemical Company,
reported in Rodgers, Environmental Law (West, 1977)



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TESTIMONY BEFORE HOUSE JUDICIARY
COMMITTEE ON CSSB 84

My name is Roland Shanks. Thank you for the opportunity to testify on SB 84.

Unfortunately this bill does not solve the problems of permit delay. Nor does SB 84 balance the diverse interests affected by State environmental permits. Rather, the bill's inflexible permit deadlines are designed to eliminate local government and public involvement in the decision-making process.

On the other hand, the Governor's permit reform proposals also establish permit deadlines, but in a manner that attempts to consider the rights of all Alaskans and their local governments. After 6 months of cooperation with the Governor's office on Permit Reform in order to avoid litigation, I must stress the fact that environmental groups are certain to challenge the AOGA bill in court. It's either that or roll over and play dead.

The 30-day deadline imposed by the bill on state agencies for most permits make it impossible for local governments or the public to review the permits.

The Governor's proposal also establishes a 30-day deadline for many permits, but at least it allows an extension when the project is too complex for quick review. Also the Governor's proposal provides a 20-day extension if a public hearing is necessary. The AOGA bill allows no extensions, regardless of how complex or controversial a project is.

Confronted with an inflexible and unrealistic deadline and a complex or controversial permit, conscientious state agencies will be forced to deny a permit rather than let it be issued automatically because the deadline for reviewing the application has run. This dilemma, created by the AOGA bill, will prevent state agencies from reaching legally defensible decisions on those permit applications that are most likely to generate litigation.

SB 84 also abandons the requirement that parties "exhaust their administrative remedies" before going to court. The requirement to exhaust remedies serves important purposes. It avoids unnecessary litigation; it shortens court proceedings by giving the court a complete record to review; and it keeps everyone's costs down -- the court's, the agencies, the applicant's, and the public's.

Errors that might have been corrected by an

agency without litigation, must be reviewed directly by the courts under SB 84. Because public hearings and local government review of permits are not permitted by the AOGA bill, no record will be available for the courts to review. Cases must be decided de novo (from scratch) in a court trial. This hurts everybody.

Not only does SB 84 send everyone immediately to court, it also changes the rules once they get there. And it is easy to guess who benefits from the change, and who is left out in the cold.

The oil and gas companies benefit. The rules are changed so that when a company does not get its permit, the burden is on the agency to prove it was justified in denying the permit. This is a reversal of the usual rule, which puts the burden on the party challenging the agency.

The burden, however, is shifted only for those who apply for permits. The citizens and the cities who challenge a permit have the usual burden of showing that the agency was wrong.

This rule change means that permits will be granted that should not be, and that citizens and the cities will rarely never win a challenge.

This rule change is grossly unfair to citi-

zens and cities. It is also illegal. The State Constitution gives every Alaskan "equal protection" under the laws. I stress equal. There are many things you could say about SB 84, but you could never say it provided "equal protection". It benefits only the oil and gas companies, at the expense of all other Alaskans.

To conclude, the proposed "reforms" i.e. SB 84 will increase litigation and increase the delay and expense of obtaining permits. The public interest is not served by advancing the interests of a few private companies above all other Alaskans. The AOGA bill will shut off the public's voice and shut out local governments in matters of great importance to their futures.

State agencies will be prevented from adequately reviewing permit applications. Many may deny permits rather than have them automatically issued because a deadline has run. A few may exploit the scheme and issue all permits, no matter how destructive. As the Department of Law analysis concluded, "the potential for collusion and abuse in this regard is monstrous."

I urge you to reject this extremely biased bill. The damage to state and local government, and to the entire democratic process in Alaska, is too great to risk.

Thank you.

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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465-3603

June 1, 1981

The Honorable Fred E. Brown
Chairman
House Judiciary Committee
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: Department of Law Analysis
of CSSB 84

Dear Representative Brown:

Enclosed is the Department of Law's analysis of CSSB 84 (Resources). I have also enclosed a copy of the administration's Uniform Procedural Regulations.

As the analysis indicates, the Department of Law has severe problems with the legislation in its current form. We are also deeply concerned over the absence of a fiscal note accompanying this legislation. The possible fiscal impact of this legislation is three-fold:

1. By establishing a 30-day deadline for most state permits, even in complex cases, the bill exceeds the capabilities of the administrative agencies affected. The administration's Uniform Procedural Regulations also establish permit deadlines, but allow for extensions in complex and controversial cases. Even so, the notice of proposed rule-making projected a fiscal impact for these regulations of \$302,000 for fiscal year 1982. Because of the nature of the deadlines imposed in the bill, the fiscal impact of CSSB 84 will in all likelihood be significantly higher. In addition, the bill imposes additional procedural obligations on the administrative agency even for permits which the Uniform Procedural Regulations envision will be issued "over the counter;"

2. As the attached analysis indicates, the Department of Law is concerned that this legislation will result in additional litigation, because administrative agencies will no longer have the opportunity to correct staff errors through an appeal to the commissioner's office. Additionally,

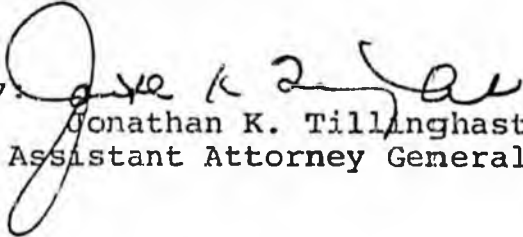
the litigation which results will be in the nature of a trial proceeding rather than an appeal on the record. Because litigation will thus be at once more frequent and more lengthy, the legislation may have a fiscal impact on the Department of Law;

3. Finally, if our fears over the impact of this legislation are justified, the legislation will have a fiscal impact on the court system. Courts will essentially be playing the role currently exercised by the commissioner's offices of the various agencies, and, under the legislation, their performance of that role "has preference on the calendar of civil actions before the court." p. 4, ls. 13-14. Certainly, the judicial branch should be consulted in this regard.

Finally there is little question that this bill would have a drastic impact on public participation in state natural resource decision making. Before the public's rights are constricted to the degree envisioned in this bill, we would suggest that the committee seriously consider a teleconferenced hearing on the proposed legislation.

Sincerely,

WILSON L. CONDON
ATTORNEY GENERAL

By: 
Jonathan K. Tillinaghast
Assistant Attorney General

JKT/kh

cc: Members of the House Judiciary Committee
The Honorable Jack Fuller

DEPARTMENT OF LAW ANALYSIS OF CSSB 84

I. Introduction

We have reviewed CSSB 84 (Resources). The legislation, drafted by the Alaska Oil and Gas Association, curtails local government and public involvement in natural resource permit decisions by establishing inflexible permit deadlines. The Administration's Uniform Procedural Regulations (22 AAC 10), which have recently been adopted by the departments of Environmental Conservation, Natural Resources and Fish and Game, also establish permit deadlines, but do so in a manner which protects the rights of Alaskans and their local representatives.

CSSB 84 is biased legislation. Moreover, the bill is more a "protest statement" on bureaucratic sloth rather than a remedy for acknowledged problems in permit processing. As a result, this "quick fix" to the complex problems in Alaska administrative law has the following fundamental shortcomings:

1. A central provision of the bill, in our opinion, is probably unconstitutional. The provision--proposed AS 44.62.636(b)--arbitrarily varies the burden of proof in judicial review proceedings between the applicant on the one hand, and other equally interested parties on the other;

2. The bill is primarily designed to deny local governments and the public any involvement in most state permit decisions. Under the AOGA bill, public notice on permit applications will almost never be given, and public hearings become impossible;

3. The bill discards existing rules governing permit appeal procedures universally employed by all 50 states, and at the federal level. These universally accepted rules are replaced with a bizarre and cumbersome relationship between the courts and administrative agencies which threatens far more frequent litigation, and has a far greater potential for project delay, than existing law; and

4. The deadline provisions of the bill will at once:
- a. effectively coerce state agencies into denying a permit rather than let a deadline

run;

- b. afford administrative agencies the ability to insulate an unlawful permit decision from judicial review;
- c. prevent an agency from reaching a legally defensible decision in complex cases; and
- d. ironically, prohibit the establishment of a "lead agency" for coastal management purposes.

The succeeding sections of this analysis will discuss these difficulties in turn.

II. The relationship of CSSB 84 to the administration's Uniform Procedural Regulations

During the last legislative session, the administration and the oil, timber and mining industries developed a consensus permit reform bill which would mandate the expeditious processing of state permits, while at the same time avoid the severe problems present in CSSB 84. The legislation (CSSB 548) died in House Rules upon adjournment. Thereafter, Governor Hammond committed the administration to implementing the major provisions of CSSB 548 administratively. To this end, the administration commenced a year-long, full-time process to

develop and adopt uniform procedural regulations. These regulations were intended to achieve the following goals:

1. Replace the current mishmash of state procedures with one uniform set of permit rules. Currently, permit procedures vary inexplicably between and within agencies, and an applicant seeking to understand his rights and privileges must consult a vast array of regulations, administrative orders, internal memoranda, memoranda of understanding, and must as well be privy to a series of unwritten ground rules known only to those most intimate with state government. A chief goal of the administration was to place in one location the full array of procedural ground rules applicable to a permit proceeding. While recognizing that, viewed in isolation, the resultant product would look somewhat lengthy and complicated, when compared to the morass which it was replacing, the benefits of the effort should be apparent;

2. Establish deadlines on permit issuance which achieved the maximum possible degree of certainty consistent with sound public policy and the rights of other interested parties;

3. Solve a festering coastal management consistency determination problem. Under existing practice, each state agency with permit jurisdiction over a project is required to determine whether that project is consistent with the state's coastal management standards found in 6 AAC 80.

Additionally, the Division of Policy Development and Planning is required to inform federal permitting agencies if the activity is "consistent" with the state standards. The result is that a project needing several permits will need multiple consistency determinations. It was felt by the administration that the "consistency" question should be addressed once for all federal and state law purposes by a "lead agency."

Working sessions on the regulations were held with industrial representatives--including AOGA--in September. A working draft of the regulations was released on December 3, and separate working sessions with industry and environmental/public interest groups were held later in December. A public notice draft was released in January, which was transmitted to the legislature with a personal appeal from Governor Hammond to become actively involved in their development.

Three public hearings were held on the regulations, and the public comment period was extended until April 1. Throughout that period, numerous informal sessions with both industry and environmental groups were held, and the regulations were on the Coastal Policy Council's agenda on three occasions. Additionally, that council held a separate workshop in Juneau on the regulations.

Recently, the regulations were adopted by the departments of Fish and Game, Environmental Conservation and Natural

Resources. However, the filing of these regulations with the Lieutenant Governor's Office has been deferred pending a comprehensive review of their terms by the Administrative Regulations Review Committee. See Attachment 1.

It is beyond the scope of this analysis to explain the regulations in detail. The specific controversies which have emerged between AOGA on the one hand, and environmental groups on the other, are both numerous and complex. As noted previously, the administration's proposed resolution of these several controversies is currently undergoing detailed review by the Administrative Regulations Review Committee. As Attachment 1 indicates, that committee will shortly be serving detailed questions with respect to the regulations on the administration, and we will thereafter be filing our responses. Those documents, of course, will be provided to this committee.

Suffice it to say at this point that the regulations are acceptable to neither the oil industry nor environmental groups. 1/ Essentially, AOGA believes that the regulations provide unwarranted recognition of the rights of local governments, the public in general, and the departments of Environmental Conservation and Fish and Game in state natural

1/ However, industry opposition to the regulations has largely been confined to the oil industry. The Alaska Loggers' Association, and Sealaska Regional Corporation, for example, support the regulations.

resource decision making. Decisions on oil and gas permitting matters could be made faster, and with more certainty of result, if these interests were denied meaningful involvement in the permit process. SB 84 was introduced and pursued primarily to accomplish this goal.

Thus, in many respects, an informed decision on CSSB 84 necessarily involves a rather detailed comparison of the path taken in that legislation and the choices made in the Uniform Procedural Regulations. That in turn, of course, would necessitate close coordination between the House Judiciary Committee, and the Administrative Regulations Review Committee.

Above all, it must be recognized that the disagreements over the regulations are as specific as the differences between interest groups are fundamental. To date, hearing testimony on the regulations has contained more rhetoric than substance. 2/ Criticism that the regulations are "complicated," and are "a lawyer's dream," are not only unfair and inaccurate (see above), but have absolutely nothing to do with the heart of the controversy. As an introduction, we have appended as Attachment 2 the Executive

2/ For example, in Senate Resource Committee hearings, AOGA representatives testified at length that the Uniform Procedural Regulations did not go far enough in establishing a "lead agency." They therefore argued that CSSB 84 was necessary. CSSB 84, of course, does not address this topic at all. However, (Footnote continued)

Summary on the proposed Uniform Procedural Regulations, which details the major disagreements between the oil industry and environmental organizations. The summary gives a flavor of the difficult issues which any permit reform measure--be it administrative or legislative--needs to address.

III. Constitutional Problems

Under existing law, a person challenging an agency decision in court has the burden of proving--at least as to issues of disputed fact--that the agency decision was in error. See AS 44.62.570(c); State Department of Labor v. Boucher, 581 P.2d 660 (Ak 1978); Interior Paint Company v. Rodgers, 522 P.2d 164 (Ak 1974). Proposed AS 44.62.636(b) (p. 4, ls. 10-12) would reverse that burden of proof, so that the agency would be required to justify its decision. The burden of proof is switched, however, only for the applicant. Unfortunately, the applicant may not be the only person seriously affected by the decision. Thus, although the impact of the permit decision may severely affect other people (or local governments), the applicant is assigned a favorable burden of proof, while other injured parties must proceed under the traditional standard.

(Footnote 2 continued from p. 7) in operation, the bill would prevent any lead agency designation for any purpose. See Section VI, infra.

In sum, the bill would make an appeal of an agency decision far more difficult for some persons than for others. In our view, this discrimination probably violates the equal protection rights (Alaska Const. Article 1, sec. 1) of the non-applicant injured party. Even under federal constitutional law--which affords states more flexibility in making legislative classifications than does Alaska's equal protection provision (see below)--changing appellate ground rules for only some individuals has been declared unconstitutional. Lindsey v. Normet, 405 U.S. 56, 74 (1972). See also Stanley v. Illinois, 405 U.S. 645 (1972). Irrespective of the constitutionality of the discrimination under federal law, Alaska equal protection analysis is more demanding--requiring that the state show a "fair and substantial relationship" between the discrimination and a proper legislative purpose. Isackson v. Rickey, 550 P.2d 359 (Ak 1976). The purpose of this discrimination seems plain enough--to give an inherent and significant advantage to one party in an appellate proceeding, regardless of the relative injuries involved. Certainly, the purpose of a judicial appeal--to determine whether the agency has met applicable statutory standards--is hardly served by a provision which parcels out the burden of proof depending upon sympathies for the various litigants.

IV. The legislation invites litigation and project delay

Under existing administrative law--as it exists in all 50 states, and at the federal level--the initial permit decision

is made by the agency's staff. A person disagreeing with the staff decision must appeal that decision to the head of the agency. That appeal involves varying levels of formality, depending upon the interest involved. Only when the appeal to the commissioner has been decided is the person allowed to take his case to court. Put in legal terms, the person is required to "exhaust his administrative remedies." CSSB 84 abolishes this requirement. AS 44.62.636(a); p. 4, ls. 6-8.

There are two reasons for the "exhaustion" requirement. First, agency staff occasionally makes mistakes. Judicial review proceedings are time consuming and usually expensive. The courts, and the parties, should not be subjected to this delay and expense unless the agency has had a chance to correct its own errors.

Second, in assessing whether the agency made a correct decision, the court will require a fully developed "record" on which to base its decision. This record normally needs to be developed in an "adversarial" process where each party's evidence can be contested by the other. This process does not and cannot occur at the staff level. The entire purpose of the administrative appeal is to provide this adversarial setting. The court will then use the record so developed to reach its decision. It will not be required to hold a trial to develop evidence, but will conduct a "review" of the adversarial record developed by the agency. If, however, that record has not been developed at the agency

level, the court will hold a "de novo hearing"--in other words, a trial. Alaska courts have made it very clear that where a sufficient adversarial process has not occurred at the administrative level, a "de novo hearing" is necessary. State v. Lundgren Pacific Construction Company, 603 P.2d 889 (Alaska 1979). A "de novo hearing" is very much a trial proceeding, and the trial may not conclude for months, and in many cases years, after the complaint has been filed.

In sum, there is no "free lunch" with respect to the appellate process. If the time is not taken to conduct an administrative appeal, far more time will be taken by the court when a judicial appeal is initiated. 3/

The "exhaustion" requirement thus serves the dual purpose of avoiding unnecessary and premature litigation, and shortening the length of judicial proceedings by limiting the court's role to review of the fully-developed administrative

3/ The relative "delay" caused by an administrative appeal vs. a judicial trial becomes far more dramatic under the Uniform Procedural Regulations. Under the Class A appeal procedures (22 AAC 10.700 et seq.) which will govern oil and gas permitting matters--the commissioner may decide the appeal on its merits in some cases immediately upon filing of the appeal (22 AAC 10.640(c)), and, in most remaining cases, with 15 days of granting an appeal. Compare 22 AAC 10.700 and 10.710(a). Even in complex cases, when further briefing is required, the commissioner can render his decision within 30 days of granting of an appeal. 22 AAC 10.710 and 10.730. No administrative appeal procedure--either state or federal--has been shown to the administration which even approaches the brevity of the Class A appeal procedure.

record. Allowing a person to proceed directly from the staff decision to court may save days in the short run, but will cost months or years in the long run. Despite all this, CSSB 84, by ignoring literally hundreds of years of administrative law in its abolition of the "exhaustion" requirement, would set Alaska apart, in a very embarrassing way, from the body of administrative law in our nation.

Finally, the legislation aggravates its own shortcomings with the "burden of proof" concept discussed in the previous section. If the reversal of the burden of proof is retained in the legislation, it is our view that the burden must be reversed for all injured parties. Thus, it will be easy for an environmental group to stop a project. When an environmental group takes a staff decision to court 4/, it will at the outset argue that it is entitled to a full trial. For the reasons stated above, it will probably prevail in that argument. The question then becomes whether to stop the project pending the trial. Under Alaska law, it is not necessary, in order to obtain an injunction pending trial, for a party to show that it is likely to win. Rather, under some circumstances it will be entitled to an injunction if it raises "serious and substantial issues." Alaska Public Utilities Commission v. Greater Anchorage Area Borough, 534 P.2d 549 (Ak 1975). Since, under the burden of proof language in the bill, the court must presume that the environmental

4/ A decision which, again, the commissioner's office has had no opportunity to review.

group is correct in its allegations, it will be very difficult for the agency to defeat that showing. As a result, the court more often than not will order that the project be halted.

V. The legislation prohibits informed review of complex projects, and shuts out the public and local governments from state decision making.

Under both CSSB 84, and the Uniform Procedural Regulations, all state permits are required to be classified as either a "Class I" or "Class II" permit. Under both, Class I permits must be issued in 30 days. For Class II permits, the bill provides 60 days, and the regulations 65. Compare proposed AS 44.62.632(a) and 22 AAC 10.060.

There are no extensions from the deadlines allowable under CSSB 84--regardless of how complex or controversial the project may be. The Uniform Procedural Regulations, on the other hand, permit an extension when the commissioner's office certifies that the project is too complex for review within the time period applicable (22 AAC 10.020(a)(1)). Additionally, the agency can extend a deadline by a maximum of 20 days in the event that a public hearing is determined to be desirable under strict criteria. 22 AAC 10.020(a)(2); 22 AAC 10.030.

At the outset, the immutable deadlines in CSSB 84 are unrealistic. In the vast bulk of cases, these deadlines can

be met. However, it is silly to think, for example, that the public interest would have been protected if the Department of Environmental Conservation had been given only 65 days to set pollution limits for the Valdez Terminal of the Trans-Alaska pipeline. The occasional ability to undertake more intensive review of complex projects is absolutely indispensable if Alaska's natural resource laws are to remain anything but a facade. 5/

5/ Under CSSB 84, for example, Alyeska Pipeline Service Co. could have sat upon its environmental, engineering and technical data with respect to waste discharges until literally the last minute, dumping a veritable library of data on the Department of Environmental Conservation. DEC would then have a mere 65 days to make the kind of detailed technical decisions necessary to ensure that state water quality standards will be met from the facility.

The absence of a "complex project" deadline override aside, CSSB 84 ensures that local governments and the public will have little or no input on state natural resource decisions, regardless of their significance. To understand the full impact of CSSB 84 on the public, it must be understood at the outset that an inflexible 30 day deadline precludes review of the application by local governments or the public. There simply will not be the time to involve these parties.

To give but one example, an absolute 30 day permit deadline obviously precludes the holding of a public hearing. Under both CSSB 84 and the Uniform Procedural Regulations, it is envisioned that a majority of state permits will be designated as "Class I" permits, with a 30 day deadline. However, under the Uniform Procedural Regulations, the 30 day Class I deadline can be extended for a maximum of 20 days if the agency determines that public concern for the project warrants a public hearing.

Since CSSB 84 provides no such extension, neither public notice nor a public hearing is possible unless the agency is allowed to designate a particular class of permits as "Class II" permits--in which a 60 (CSSB 84) or 65 (22 AAC 10) day review period is provided. However, under the bill, an agency can provide for a 60 day review period only if "a public notice, public hearing, or comment period is specifically required by state law in connection with the permit application." AS 44.62.632(a)(2); p. 2, ls. 7-10. Almost no state permits

have such a statutory requirement. Rather, state permit laws generally leave the decision as to whether to issue public notice, or hold a public hearing, to the discretion of the permitting agency. Thus, under the bill, almost all state permits will have a 30 day deadline, with a resultant preclusion of public notice and public hearings.

While there is a difference of opinion over the value of public hearings, on occasion a hearing is warranted even when there is no statutory requirement. 6/ For example, permits for activities within state parks are issued under AS 38.05.330. As with most state permit laws, there is no statutory requirement for public notice or hearing. However, on occasion, activities are proposed in heavily utilized portions of state parks which generate significant public controversy. Attachment 3--a memorandum from state parks Director Chip Dennerlein--gives two recent examples in Chugach State Park and the Chena Recreation area. In both cases, public hearings were both necessary and beneficial. Under the Uniform Procedural Regulations, the Division of Parks would propose to classify the types of applications described in Attachment 3 as Class II permit applications--so that public notice, and if necessary a public hearing--would be provided. Under CSSB 84, however, all permit applications in state parks would be required to be issued in 30 days. As a result, the public would have no knowledge of, and certainly would have no ability to comment upon, any proposed

6/ Indeed, agencies occasionally are strongly encouraged by legislators to hold a hearing.

use of a state park, no matter how significant, incompatible or controversial.

CSSB 84 represents a decision that the public should neither be informed of nor involved in state natural resource decision making. 7/ The statement is true in spades with respect to local governments. The same time constraints that preclude public involvement also preclude consultation with municipalities, Native organizations and other interested parties. This denial of local government involvement becomes particularly disturbing in the context of the Alaska Coastal Management Act (AS 46.40). Under that act, the legislature has encouraged local governments to develop coastal management plans. Once those plans have been developed and approved by the Alaska Coastal Policy Council, the legislature has committed itself to allowing local governments a greater role in state decision making. AS 46.40.100; AS 46.40.200. Unfortunately, under CSSB 84, local governments will never learn of state decisions prejudicing their approved coastal management plans--much less have any meaningful ability to shape the outcome of that decision. 8/

7/ Environmental organizations believe that the Uniform Procedural Regulations are guilty of the same sin, since, in their opinion, an insufficient number of state permits are being placed in the "Class I" category. Be that as it may, the Uniform Procedural Regulations do place substantially more permits in the Class II category than would be permissible under CSSB 84. Moreover, as noted previously, even with Class I (30 day) permits, the regulations provide that the deadline can be extended for 20 days in order to accommodate a public hearing.

8/ 22 AAC 10.130 requires state agencies to defer at the outset to local governments on the question of whether a particular activity is consistent with a state-approved (Footnote continued)

All of which, of course, brings us to the heart of AOGA's preference for CSSB 84 over the Uniform Procedural Regulations. While the Uniform Procedural Regulations attempt to safeguard the rights of local governments and the public (see 22 AAC 10.130), AOGA strongly believes that decisions on their proposed activities--even when they prejudice approved coastal management plans--should be made without meaningful involvement of local governments or the public. This is what CSSB 84 is all about, and the administration is unwilling to accept it.

VI. CSSB 84 would prevent use of the "lead agency" concept.

As noted in Sec. II of this analysis, a primary goal of the Uniform Procedural Regulations is to assign the responsibility for making a single coastal management consistency determination to a "lead agency." Under the "lead agency" approach, one agency would make a consistency determination which would bind all state agencies on coastal management issues for both state and federal law purposes.

The choice of the "lead agency" was the most difficult decision facing the administration and the Coastal Policy Council. For almost all oil and gas activities, the administration agreed with AOGA that the Department of Natural Resources should be the "lead agency." Where the administration and

8/ (Footnote continued from p. 17) local coastal plan. No such provision is possible under CSSB 84, since local governments normally won't even know the activity is being proposed until the bulldozers arrive.

AOGA parted company, however, was with respect to the obligations which DNR would assume in return for its ability to bind not only its sister state agencies, but as well local governments with approved district programs, on coastal management issues. In return for transferring their current coastal management authority to DNR, the departments of Fish and Game and Environmental Conservation, in conjunction with local governments asked to ensure that their views would receive a fair hearing through formal interagency and local government review. The rights of local governments and other state agencies were protected in the regulations in 22 AAC 10.130.

The procedural protections provided local governments and state agencies in sec. 130 have been vigorously opposed by AOGA. Currently, oil and gas operations are reviewed by DNR in an informal manner. There is nothing wrong with that approach, as long as local governments and other agencies will get their own "shot" at those operations, as far as coastal management issues are involved, in other forums. Under the regulations, however, those other forums are removed, and thus the integrity of DNR's decision-making process in reviewing oil and gas operations becomes vital.

Additionally, under sec. 307(c)(3) of the federal Coastal Zone Management Act (16 U.S.C. § 1456(c)(3)), any federal permitting agency must obtain from the state a certification that the activity is "consistent" with the

state coastal management standards. Under the Uniform Procedural Regulations, DNR will conduct that determination as well. ^{9/} Under 15 C.F.R. 930.61, that consistency determination cannot be made until public notice on the issue has been given. Therefore, as a matter of federal law, if DNR--as AOGA desires--is to be the coastal management "lead agency" for oil and gas matters, DNR must provide public notice for its review of oil and gas operations in the coastal zone.

However, under CSSB 84, DNR would be required to approve oil and gas operations plans in 30 days. Thus, as a matter of federal law, and as well because of the need to protect the rights of local governments and sister agencies on coastal management issues, DNR could not, under CSSB 84, be the "lead agency" for coastal management matters. Rather, that responsibility could only be given to an agency which issues permits for oil and gas operations for which a notice, hearing or comment period is "specifically required by state law." AS 44.62.632(a)(2). In certain cases DEC may be able to perform that role. AS 46.03.100. Generally, however, there will be no such agency, with the result that the whole concept of a "lead agency" goes out the window.

Thus, while AOGA clearly wants the Department of Natural Resources to serve as the coastal management "lead agency,"

^{9/} Currently, this is done by the Division of Policy Development and Planning.

it has drafted legislation which would necessarily require that the status quo be maintained. This difficulty is but one example of the dangers inherent in attempting to cure complicated problems with hasty legislation.

VII. Other problems

In addition to the fundamental difficulties with the legislation, there are innumerable technical problems with the bill, each of which holds within it the potential for necessary litigation. For example, under proposed AS 44.62.-632(b)(1) (p. 2, ls. 14-17), even the most rudimentary of permits could not be issued until the agency prepares formal findings and conclusions. In the January 9 proposed Uniform Procedural Regulations, the administration had proposed that findings and conclusions be prepared only for Class II--or more significant--permits. Even this limited requirement of "findings and conclusions" was opposed by the Natural Resources Section of the Alaska Bar Association. While the Alaska Supreme Court has ruled that, at least for significant administrative decisions, the agency must explain its reasons (Moore v. State, 553 P.2d 8 (Ak 1976)), it has never ruled that agencies are obligated to prepare formal "findings and conclusions" in the judicial sense. Therefore, the Alaska Bar Association, and several oil companies, recommended that we go no further than the rule in Moore v. State, supra, and that we merely require, in Class II proceedings, that a

"statement of reasons" be provided. The administration accepted the Bar Association's request. See 22 AAC 10.160(1). CSSB 84, ironically, requires "conclusions" for all permits--ranging from swimming pool plan approval to firewood permits.

Additionally, proposed AS 44.62.632(c) (p. 2, ls. 20-22) requires that permit decisions "must bear a fair and substantial relation to the object of the law." This particular legal term, to our knowledge, is limited to constitutional equal protection analysis. In terms of reviewing an administrative decision, the term to our knowledge has never been used, and we haven't the foggiest idea what this curious standard of review means. This phrase alone will require the development of a body of case law to define it. Again, we find a bill ostensibly designed to limit litigation in fact encouraging it.

Finally, the "automatic issuance" provision of the bill is contrary to sound public policy. Proposed AS 44.62.632(e) provides:

A permit application which has not been approved or rejected by the responsible state agency within the time period specified in (a) of the section is approved as submitted.

Particularly in light of the fact that no extension, no matter how justifiable, is permissible under CSSB 84, this provision literally puts administrative agencies against the wall in terms of processing difficult permit applications. Using the prior example of major permits for the trans-Alaska pipeline, it is more likely than not the agency could not meet the applicable deadline. Taking its statutory responsibilities seriously, the agency obviously would not allow the application to be approved "as submitted." It will, quite simply, deny the permit when the deadline runs.

Of course, that decision is appealable to the courts, and under the bill the agency must bear the burden of proof. In appealing the denial, however, the applicant--for the reasons stated in Section IV--has bought himself a lengthy lawsuit, during the pendency of which it is unlikely that he would be allowed to proceed with the project. Either the court will conduct a lengthy trial, or will remand the matter to the agency to reach a meaningful decision. In either event, the entire exercise would seem a silly waste of time.

This, then, is the risk to the applicant of an "automatic approval/no extension" bill. There is also a serious risk to the public, and indeed to the integrity of the legislative process. In permit legislation, the legislature has set down the criteria for the approval of various activities. If an administrative agency does not believe that a proposed activity can meet those criteria, yet, for whatever

reason, would nonetheless like to grant the permit to the applicant, it can insulate that otherwise unlawful decision from judicial review by simply letting the deadline run. Since, under CSSB 84, it would be a statutorily sufficient reason to grant a permit that a certain arbitrary deadline has been missed, the potential for collusion and abuse in this regard is monstrous.

Respectfully submitted,

Attachment 1
STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3800

May 29, 1981

The Honorable Jack Fuller
Chairman, Administrative
Regulations Review Committee
Alaska State Legislature
Pouch V
Juneau, AK 99811

Re: Uniform Procedural Regulations
and CSSB 84

Dear Representative Fuller:

The purpose of this letter is to confirm discussions which have been held between Assistant Attorney General Jon Tillinghast and Allen Blume of your office concerning your committee's review of the Uniform Procedural Regulations (22 AAC 10) which have recently been adopted by the departments of Environmental Conservation, Natural Resources and Fish and Game and the Alaska Coastal Policy Council.

As you are aware, the Uniform Procedural Regulations have generated a great deal of controversy within and outside state government. In particular, environmental groups on the one hand, and the Alaska Oil and Gas Association on the other hand, have been and remain opposed to the course taken in the regulations.

Unfortunately, in legislative hearings held to date, the specific issues surrounding the regulations have been lost amidst the frustration and polarization attendant the entire topic of permit reform. As a result, the only concrete progress ever made by state government on the issue of regulatory reform is in jeopardy. I cannot convey too strongly my belief that ending this year-long, full-time effort in failure would be a disaster--particularly so in light of the fact that there does not appear on the horizon any legislative or administrative initiative which would begin to address, much less resolve the multitude of difficult and controversial issues addressed in the regulations we have proposed.

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Thanks largely to the efforts of your staff, and Mr. Blume in particular, it appears as though the regulations will now receive the kind of deliberate analysis which we had hoped for at the outset. Mr. Blume has been provided with a complete copy of the public comments received on the regulations, as well as a lengthy position paper which Mr. Tillinghast prepared for the Governor's consideration. From this, and the materials provided the Legislature in January, Mr. Blume, in consultation with you and the committee, will prepare a list of specific written questions on the regulations. These questions will deal with specific issues addressed in the regulations of concern for the committee, and will solicit the administration's justification for choosing the particular course taken. The questions, and the answers, would then form a focus for committee hearings.

This approach has the singular advantage of focusing the analysis on the heart of the controversy, minimizing the risk that the real issues at stake will be obscured. It will also, of course, save the committee from lengthy dissertations by the administration on matters of no concern to any of its members.

This process, as I understand it, will be accomplished in short order so that the committee can commence full hearings on the regulations at an early date. It is my understanding that the committee's questions will be given to our department on or about June 3, and we can certainly have detailed responses back in the committee's hands by June 8.

Although the regulations have been adopted, they will not be filed with the Lieutenant Governor's Office in the near future. Deferring the filing of these regulations will enable the administrative agencies involved to propose and adopt their own regulations classifying individual permits as "Class I" or "Class II" for the purposes of the Uniform Procedures regulations. It will also enable the administration to make any necessary changes in the regulations following the conclusion of your committee's hearings. For the reasons articulated in Governor Hammond's letter to you, we felt that it was necessary to bring this unusually prolonged and difficult rule-making process to a close. Nonetheless, particularly in light of the kind of deliberate review which these regulations will apparently undergo in your committee, everyone's interest would seem better served by deferring the filing of these regulations until that review can be completed.

Hopefully, any remaining disagreements after your committee's review has been completed can be accommodated amicably. There may, however, be additional permit reform measures which are of particular importance to the legislature, and which are compatible with the regulations themselves. One particular area of interest to some legislators has been the expansion of the "lead agency concept" in the regulations to include the preparation of a single state position on related federal permit applications. Such an approach could be established by supplemental legislation drafted by the committee. While we certainly cannot pre-commit the Governor on this issue, we can observe that lead agency legislation would not significantly affect the regulations themselves.

Any legislation, however, should be carefully considered for the impact which it may have on the balance which these regulations attempt to strike. As you turn to the specific provisions of these regulations, it should become evident that, at every turn, we faced an accommodation between the competing interests involved. The balance struck is held together by interrelated provisions. Legislation which pushes a particular issue towards one extreme may require significant changes in other provisions of the regulations. CSSB 84 provides an excellent example of this problem. Shortly, we will be forwarding to the House Judiciary Committee a detailed analysis of that bill. Suffice it to say at this point that, if enacted in its present form, that AOGA-drafted legislation would have the unintended effect of precluding implementation of many of the provisions of the regulations which the oil industry has strongly supported.*

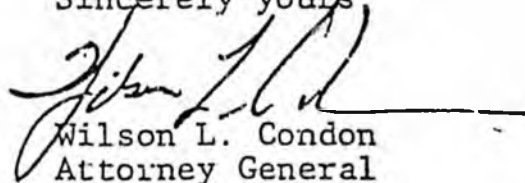
* As one example, CSSB 84 would require that the Department of Natural Resources reach a decision on oil and gas plans of operations within 30 days. Within that time period, the Department of Natural Resources could not make a coastal management consistency determination on those operations in conformity with federal law. As a result, the regulations would have to provide that either the Department of Environmental Conservation, or the Division of Policy Development and Planning, would determine whether the oil and gas activities are consistent with the state's coastal management standards. As the forthcoming detailed analysis of the legislation will demonstrate, this is but one example of the dangers of a hasty "quick fix" which CSSB 84 represents.

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No one to our knowledge has ever argued that there is nothing in the regulations worth saving. Indeed, many-- such as the Alaska Loggers' Association and Sealaska Regional Corporation--strongly believe that the regulations should be adopted and implemented as written.

I frankly doubt that there exists any irreconcilable differences between the legislature and the executive on the specific issues involved in these regulations. I cannot be more pleased with the relationship developing between us on this matter, and I look forward to working with you in the days ahead.

Sincerely yours,



Wilson L. Condon
Attorney General

WLC/blc

cc: Representative Fred Brown

Jerry Reinwand
Executive Assistant
to the Governor

PHIL. R. HOLDSWORTH, P.E.

CONSULTING ENGINEER & LEGISLATIVE COUNSEL
MINING - GEOLOGY - LANDS

PHONE 907-586-1383

326 FOURTH STREET No. 1009
JUNEAU, ALASKA 99801

June 2, 1981

Rep. Fred Brown, Chairman
House Judiciary Committee
Pouch "V" - State Capitol
Juneau, Alaska 99811

Dear Representative Brown:

The following statement is submitted on behalf of the Alaska Miners Association in support of CSSB 84(Res) which will be subject to hearings before your committee tomorrow. The undersigned must be in Anchorage for a meeting of the Alaska Growth Policy Council and will be unable to present it in person.

CSSB 84(Res) is similar to CSSB 548 of the Eleventh Legislature - Second Session. That bill passed the Senate and reached House Rules where it was held through the closing days of the session. During the interim period between sessions Governor Hammond, by memorandum, directed the state agencies involved in permitting processes to meet with industry representatives and develop permitting regulations responsive to the 1980 proposed legislation.

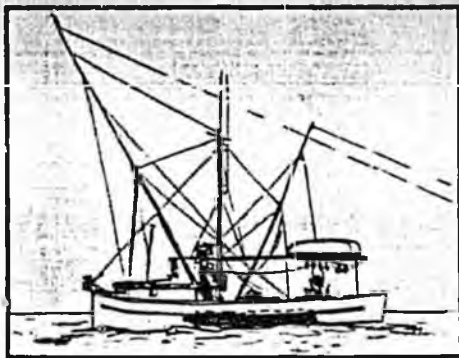
The draft regulations resulting from these efforts are so unsatisfactory, and would be so restrictive in their application, that the general consensus of those who would be affected is that the legislative approach is necessary; and that proper guide line should be statutorily identified.

The Alaska Miners Association strongly supports the bill before your committee - CSSB 84(Res) - and urges its approval.

Respectfully submitted,



Phil R. Holdsworth
Lobbyist
Alaska Miners Assoc.



Alaska Trollers Association

REPRESENTING ALASKA POWER TROLLERS

205 North Franklin Street
Juneau, Alaska 99801
(907) 586-9400

June 1, 1981

Representative Fred Brown
Alaska Legislature
Pouch V
Juneau, AK 99811

RE: CSSB 84 (Res)

Dear Representative Brown:

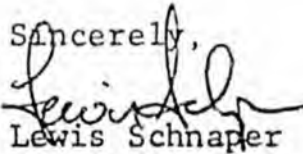
We would like to ask your help in defeating this bill--which is now in House Judiciary committee.

Commercial fishermen are vitally concerned with all aspects of the state permit process. The reason for this is that we are the people who will pay the immediate and personal price of any land-use error which takes place near salmon habitat.

We feel that this bill will have the following negative effects:

- 1) All permits must issue within 30-days. This will effectively exclude public notice and participation.
- 2) In an action for judicial review of the permits, the burden of proof will be on the plaintiff citizen (unless the plaintiff is the applicant).
- 3) There is no fiscal note--and at the present level of resource commitment to permit review this will mean that all permits will issue by default.
- 4) The concept of "exhaustion of administrative remedies" is abandoned. This might be desirable from our immediate interests, but it will mean that litigation will replace administrative review. With the bill's provision that actions under it will take precedence over other civil cases, this will result in confusion in the courts.

Thank you for your assistance.

Sincerely,

Lewis Schnaper