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AMENDMENT

OFFERED IN THE HOUSE:

By: Finance Committee

To: CS HOUSE BILL No. 84 (Res)

SENATE BILL No. _____

PAGE: 2

LINE: 5

after "time" add ", or unless the agency makes a written finding stating why more time is required and sets a deadline for issuance or denial of the permit"

BETTYE FARMERKAMP, CHAIRMAN
VIC FISCHER, VICE-CHAIRMAN
DICK HADLEY
DICK ELIASOF
DON GILMAN
BOB MULCAHY
ARLISS STURCULEWSKI



FOUCH V
STATE CAPITOL
JUNEAU, ALASKA 99801
(907) 465-3034
(907) 465-3035

Senate

Committee on Resources

MEMORANDUM

TO: SENATE RESOURCES COMMITTEE MEMBERS

FROM: JIM PALMER
SENATE RESOURCES COMMITTEE STAFF

RE: SECTIONAL ANALYSIS OF PROPOSED COMMITTEE SUBSTITUTE FOR SB 84

DATE: MARCH 27, 1981

A committee substitute has been prepared for SB 84. A copy of this proposed substitute is attached.

There are two main reasons why this substitute has been prepared. First, Billy Berrier of the Legislative Affairs Agency suggested in a memorandum to the Chairman that Sections 7, 8 and 10 which refer to approval of Alaska coastal management programs create a single subject problem in the original bill. He stated that "It can be argued that coastal management programs relate directly to the permit process since in many instances permits must be consistent with approved programs. The purpose of expediting permit issuance would be served by having a clearly constitutional means of approving these programs. While in my opinion our Court would hold that the single subject rule had not been violated under the liberal construction it has given that rule, this inclusion would subject the bill to serious constitutional attack."

Second, the establishment of the Permit Reform Commission was also deleted from the original bill. The reason for this deletion was similar to the reason for deleting sections 7, 8 and 10. The subject matter could easily be seen as constituting separate legislation. In addition, the controversy surrounding permit reform is substantial enough without adding additional items to this legislation.

SECTIONAL ANALYSIS OF PROPOSED COMMITTEE SUBSTITUTE FOR SB 84

SECTION 1 FINDINGS. This section states that the development of resources and employment of Alaskans have been retarded because of the current permit system. The system causes delay and uncertainty because of the time requirements, the complexity, the duplicity and the unjustified requirements of the current permit process. The public interest will be served by a streamlined permit system.

SECTION 2 adds new sections to AS 44.62, the Administrative Procedure Act, which are titled Article 8A. ISSUANCE OF PERMITS.

Sec. 44.62.632 sets time limits on the processing of permits.

Subsection (a) states that the responsible state agency shall issue a final decision granting, denying or reasonably conditioning the issuance of the permit within specific time periods unless the applicant and the agency mutually agree to a different period of time. These time periods start upon receipt by the agency of the permit application.

The time periods are (1) any time period specifically required by law; (2) 60 days if a public notice, hearing or comment period is specifically required by law and; (3) 30 days in all other cases.

Subsection (b) states that the final decision on the permit application shall include (1) the conclusions of the agency which support its decision including the factual basis and statutory authority for any conditions or stipulations, and (2) the agency's statement of its decision on the permit.

Subsection (c) mandates that the final decision on the permit must bear a fair and substantial relation to the object of the law.

* Subsection (d) states that a permit may not be denied because of either the lack of any other permit or be conditioned upon the acquisition of any other permit.

* Subsection (e) provides that the failure to make a final decision within the time periods specified in subsection (a) under 44.62.632 constitutes approval of the permit.

Sec. 44.62.634 requires an agency receiving a permit application for which it does not have authority to issue a permit or for which it believes a permit is unnecessary, to notify the applicant within 10 days. Such notice is the final decision of the agency. Subsection (b) states that an agency which receives an application which does not contain sufficient information for a permit decision to notify the applicant within 10 days and specify all information that is required.

Sec. 44.62.635 states that the final decision of an agency may be reviewed at the request of the applicant. The applicant is entitled to a review de novo if requested in the original request for review, otherwise the request is on the record. This request must be filed within 30 days after the applicant has received the agency's decision.

The Commissioner or board shall issue a decision within 10 days of receipt of the review request if the review is on the record. If the request is for a hearing de novo, the hearing shall be held within 30 days of the receipt of the request. The decision of the commissioner or board shall be made within 30 days of the hearing de novo.

Unless the entire agency decision is confirmed in toto, the decision must be in written form and contain the commissioner's or board's findings and conclusions in full.

Sec. 44.62.636 provides for the review of the final permit decision issued by a state agency or commissioner by the state superior court. The applicant's right to appeal to the superior court is not affected by the failure to seek reconsideration or further review under AS 44.62.635.

Subsection (b) puts the burden of proving that the decision is in accordance with AS 44.62.632 and 44.62.634 upon the agency which issued the final decision. Subsection (c) provides that an appeal under this section takes preference over other civil actions before the court and shall be decided without unnecessary delay.

SECTION 3 DEFINITIONS.

"Permit" is defined as a permit, license, certification, consistency determination, comments on pending permit applications (including environmental impact statements plan review, and other authorization or approval by a state agency before construction or operation of a project.

Permit is defined so as to exclude conveyances of interest in state land or water and the provision of financial assistance.

"Permit Application" is defined to include a document submitted to a state agency by a governmental entity which solicits comments in connection with a permit being processed by that governmental entity. An application is a document requesting the issuance of a permit which contains sufficient information to allow the state agency determine if the project is in compliance with state law.

"Project" is defined to include a new activity or expansion or addition to an existing activity for which permits are required before construction or operation.

"State Agency" includes local or regional air pollution authorities and coastal resource districts and coastal resource service boards.

- an application which does not contain sufficient information for a permit.

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907.465.3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

June 22, 1981

SUBJECT: CSSB 84 (Rules) -- Permits

TO: Representative John G. Fuller
Chairman, House Rules Committee

FROM: Billy G. Berrier *BGB*
Director
Division of Legal Services

The draft submitted raises many questions of style and substance. Since these are related here, I have made only changes clearly needed for style except for the change in the title which is constitutionally required under the descriptive title requirement.

A more important problem is that Sec. 4 of the bill is a clear violation of the single subject rule. Substantive law governing who has preference rights to leases of state land is not related to the process by which permits are granted which is otherwise the subject of the bill.

EGB:ljb

Enclosure

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

June 22, 1981

The Honorable Jack Fuller
Chairman, House Rules Committee
Alaska State Legislature
Pouch V
Juneau, AK 99811

Re: House CSSB 84 (Rules)

Dear Chairman Fuller:

We have been informed that Legislative Counsel has concluded that House CSSB 84 (Rules) violates the single-subject rule of Alaska Const., Art. II, sec. 13. They have reached this conclusion, apparently, because the bill contains both substance and procedure." * Specifically, the bill creates a preference right for a tidelands lease in the upland owner.

There is no rule requiring that "procedural" bills not contain "substance." The two are intermingled all the time. If Legislative Counsel were correct, a bill establishing a permit program would have to have the permit procedures in one piece of legislation, and the permit standards in another.

Rather, all that is required by our rule is that "...the Act should embrace some one general subject...merely that all matters treated of should fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject. Gellert v. State, 522 P.2d 1120, 1123 (Ak. 1974). The rule is merely designed to prevent the inclusion of "unrelated matters" so as to avoid "stealth and fraud." Suber v. Alaska State Bond Committee, 414 P.2d 546 (Ak. 1969).

The inclusion of the surface leasing provisions clearly satisfy that rule. The primary purpose of the bill is to speed up state natural resource decision making. The

* Phone conversation with Bill Berrier.

The Honorable Jack Fuller
June 22, 1981
Page Two

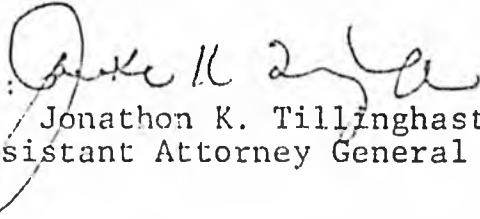
main complaint received from the public is the inordinate time necessary to obtain a tidelands lease. This has been a particular problem for upland owners, where a tidelands lease is necessary for upland development.

By giving upland owners a preference right in appropriate circumstances, the upland owner will be able to enter the land through interim permit, and will be able to receive a lease without awaiting an auction. It is obvious that this approach falls within the "general idea" of permit reform. Certainly it does by "popular understanding" and we would submit that it equally does so "logically."

The problem, in sum, is non-existent.

Sincerely,

WILSON L. CONDON
ATTORNEY GENERAL

By: 
Jonathon K. Tillinghast
Assistant Attorney General

JKT/blc

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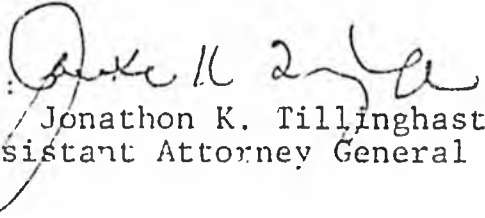
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The problem, in sum, is non-existent.

Sincerely,

WILSON L. CONDON
ATTORNEY GENERAL

By: 
Jonathon K. Tillinghast
Assistant Attorney General

JKT/blc

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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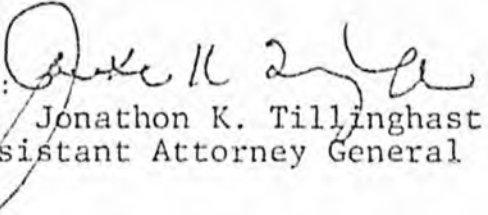
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WILSON L. CONDON
ATTORNEY GENERAL

By: 
Jonathon K. Tillinghast
Assistant Attorney General

JKT/blc

MEMORANDUM

State of Alaska

TO: Jerry Reinwand, Executive Assistant DATE: June 22, 1981
Office of the Governor

FILE NO:

TELEPHONE NO: 465-3603

FROM: WILSON L. CONDON
ATTORNEY GENERAL

SUBJECT: Consensus permit re-
form legislation

By:

Jonathan K. Tillinghast
Assistant Attorney General

CONFIDENTIAL

The administration's permit reform proposals have been criticized on several grounds. While most industrial groups in the state have supported our regulations, there have been valid criticisms that our proposal does not go far enough. As you are aware, I support those complaints. By introducing SB 84, Senator Bennett provided a vehicle for these additional changes to be made.

Unfortunately, SB 84 went awry in its committee substitute, with the result that people who want the same things became adversaries. As I understand it, we have one last opportunity to put together a comprehensive permit reform bill -- thanks again to Senator Bennett. Under the consensus SB 84, the real deficiencies in 22 AAC 10 would be cured without the problems involved in the committee substitute.

On that understanding, I have prepared what I believe to be the best and most effective permit reform bill possible. It starts with SB 84, which as originally introduced was good legislation. It adds legislative proposals which have been carefully developed over the past year, but which were not introduced because of agency inertia. Most important of all, it accepts the major industry complaints over the administration's proposal. I cannot recommend too enthusiastically its adoption. The bill does the following:

1. retains SB 84's permit classifications, as well as its provision that permits are automatically issued if a deadline is missed;

2. adjusts the deadline sequence to conform to the uniform procedural regulations. The bill thus retains one of the best aspects of the regulations;

3. requires the establishment of a lead agency. This aspect alone will cause most oil industry lobbyists to

support the bill. If the administration had done this initially, there would have been no need for SB 84;

4. revises the Environmental Procedures Coordination Act to make "one stop shopping" for permits feasible, even for small operators. This revision consumes most of the bill's text. DEC actively supports this change;

5. implements new and expedited surface leasing procedures, worked out carefully with the Alaska Loggers' Association and SeaAlaska. These procedures allow a potential lessee entry on the land 65 days after application -- rather than one to two years under current practice. This would be done without in any manner impairing the public interest; and

6. transfers coastal management responsibility to DEC. DEC has an impressive track record in dealing expeditiously with the private sector. No businessman should have to deal directly with planners.

Jerry, I hope you and Senator Bennett could come to an accord on this. The permit reform package I am enclosing would solve virtually every major problem in regulatory practice in Alaska, and would cast the ultimate product as a joint legislative/administrative effort.

JKT/pjg

Enc.

1. By establishing a 30-day deadline for state permits the bill exceeds the capabilities of the administrative agencies affected. No extensions are allowed, no matter how complex or controversial a project is. No public notice is allowed.
2. Public participation in state natural resource decision making will be drastically limited by the bill. Public hearings and local government review are not permitted and no records will be available for the courts to review.
3. The oil and gas companies are the main promoters of S.B. 84. Essentially, 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.
4. Unlike those who apply for permits, however, the burden of proof is not shifted. The public and local governments who challenge a permit have the usual burden of showing that the agency was wrong. This violates the equal protection clause of the State constitution and is unconstitutional.
6. The bill will actually delay the permit process by forcing agencies to deny permits rather than let approval occur by a forced deadline.
7. The bill will prohibit the establishment of a "lead agency" for coastal management purposes.
8. Existing agency appeal procedures are disregarded. The result is to ensure greater litigation and therefore actually more delay for most projects.

This legislation was opposed in Judiciary Committee testimony by:

- The Dept. of Law
- Bristol Bay Native Association
- City of Barrow
- North Slope Planning Office (Barrow)
- Eskimo Whaling Commission
- Sealaska
- AK Loggers Assoc.
- AK Gillnetters
- AK Trollers
- Rural CAP
- UFA
- League of Women Voters
- Sierra Club
- National Audubon Society
- AKPIRG
- AK Center for the Environment
- National Wildlife Assoc.

The bill was supported by:

- AK Miners Assoc.
- Resource Council (Anchorage)

(Not appearing before the committee were the authors of the bill, the ALASKA OIL AND GAS ASSOCIATION)

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



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

June 23, 1981

The Honorable Rick Halford

SB 84 - Background Explanation

The purpose of this bill is to change the way the State grants land-use authorizations and permits.

The first portion of the bill relates to permits and permit-reform. Significant changes from recent versions of the bill include the provision for a lead agency in issuing permits, shortening the time for issuing permits and simplifying procedures.

The bill creates a new Section 44.62.634, which allows the agency issuing a permit to ask for further information on a proposed activity. This provision is not intended to create new authority in an agency -- the information requested must be of the sort traditionally required by an agency in the past. The passage of this bill will require the rewriting of portions of the proposed Uniform Permit Procedure Regulations. While the bill proposes an October 1 deadline for writing regulations, it is contemplated that adoption may occur earlier.

The second portion of this bill relates to surface leasing. These provisions require public notice and the identification of competitive bidders to occur far earlier than is presently the case. The bill also creates preference rights to acquire tidelands if the applicant holds a lease or other interest in the adjacent uplands.

The bill also shifts the staff of the Office of Coastal Management to the Department of Community and Regional Affairs.

Finally, the bill amends AS 46.35, the Master Application procedures in the Department of Environmental Conservation, to provide for permit coordination. Because these procedures are not universally utilized, the bill makes explicit that the use of these procedures is entirely voluntary.

cc Rep. Fuller

HOUSE CS FOR CS FOR SENATE BILL NO. 84 (2nd Rules)

For an Act entitled: "An Act relating to the granting of land use authorizations by state agencies;"

Sec. 44.62.632(b).

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(b) Final regulations classifying its permits, and uniform procedural regulations providing for the processing of these permits, shall be adopted by each state resource agency by October 1, 1981. Permits applied for after this date must be issued in accordance with the time periods specified in (a) of this section, and the provisions of the implementing regulations. Regulations adopted under this section may be revised.

Sec. 44.62.633.

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23-28

(b) Upon a finding by the head of a resource agency that a permit being considered involves unusual complex issues so that the agency cannot render a final, pre-adjudicatory decision within the time period specified in AS 44.62.632(a), the head of the agency may prescribe a time period within which the final, pre-adjudicatory decision will be made. The finding of the head of the agency may be appealed at the superior Court under the Appellate Rules of Procedure. (Substituted for "Judicial Review")

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(d) The time period specified in AS 44.62.632(a) may be extended if necessary to facilitate joint processing of a permit application through memorandum of understanding by state and federal agencies, and strict adherence to the time periods established in AS 44.62.632(a) would pose an irreconcilable conflict with a federal statute or regulation.

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6-10

(e) Subject to (a) - (d) of this section and AS 44.62.634, failure of a resource agency to make a final, pre-adjudicatory decision within 30 days after the receipt of a completed application for a class I permit, or within 65 days after the receipt of a completed application for a class II permit, constitutes approval of the application. In an appeal of a permit issued by operation of this subsection, the record shall be construed in a light most

favorable to the applicant, and the permit shall be accorded a presumption of regularity.

p. 3
1.29 -
p. 4
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1-10

Sec. 4.62.635. LEAD AGENCY. There are established lead agencies which are solely responsible for issuing coastal management consistency determinations under AS 46.40 and for preparing and submitting state comments on federal permit applications. The lead agency may vary for classes of activities, but shall be that agency which has principal responsibility for authorizing the overall activity. For classes of activities for which no agency with principal responsibility exists the governor shall designate a lead agency by administrative order no later than October 1, 1981. In performing its functions under this section, the lead agency shall consult with other resource agencies and with coastal resource districts under AS 46.40. The lead agency shall balance competing factors in reaching its decision. Great weight shall be given to the comments of resource agencies within their primary area of expertise, and also to the comments of coastal resource districts with approved coastal management plans, unless the district's recommendation would result in the arbitrary or unreasonable restriction or exclusion of uses of state concern as that term is defined in AS 46.40.-070(c).

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11-19

Sec. 44.62.634. ADDITIONAL INFORMATION. (a) If a resource agency receives a completed permit application form which does not contain sufficient information concerning the project's compliance with the agency's statutes and regulations, the agency shall notify the applicant within 15 days after (of) receipt of a completed application for a class I permit, and within 30 days after (of) receipt for a class II permit. The notification must specify all information that the agency believes at the time to be necessary to determine compliance of the project with the agency's statutes and regulations.

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26-28

(c) If a timely request under this section is made, the time period specified in AS 44.62.632 is suspended from the date of request to the date of full compliance with the request.

P. 10

Sec. 46.35.035. (d) The use of the master applica-
tion procedures established in this chapter shall be at the sole
discretion of the applicant.

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1-3

P. 13 l. 24

Sec. 18 is deleted. *effective date clause*

P. 7

Sec. 44.19.162. COUNCIL STAFF. The council shall
utilize the staff of the office of coastal management within
the Department of Community and Regional Affairs [DIVISION OF
POLICY DEVELOPMENT AND PLANNING] in discharging its powers and
duties. The commissioner [COORDINATOR OF THE OFFICE], with the
concurrence of the council, may contract with or employ per-
sonnel or consultants he considers necessary to carry out the
powers and duties of the council.

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17-23

no
from DEC

P. 8

Sec. 46.35.030. PERMIT COORDINATION REQUEST [MASTER
APPLICATION]. (a) A person proposing a project which requires
the issuance of one or more permits may at his sole discretion
submit a permit coordination request [MASTER APPLICATION] to the
department requesting the issuance of all permits and documents
covered by this chapter [NECESSARY BEFORE THE CONSTRUCTION AND
OPERATION OF THE PROJECT IN THE STATE]. The request [MASTER
APPLICATION] shall be on a form established by the department
and shall contain sufficient information as to the location and
the nature of the project, including discharge of wastes and
use of or interference with natural resources of the state.

lines
9-18

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effective date."

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descriptive as well as single
subject

granting includes substance + procedure

b, c, d

p.6