

HB

29

HOUSE COMMITTEE REPORT

(9)

Date Referred: February 19, 1991

FURTHER REFERRALS:

Judiciary

Date of Committee Action: 5/17/91

The RESOURCES Committee considered:

SSHB 29

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 29 SUITS TO ENFORCE ENVIRONMENTAL LAWS

"An Act authorizing suits to enforce environmental laws; and having the effect of amending Rules 24 and 82 of the Alaska Rules of Civil Procedure."

RECOMMENDATIONS:

be replaced with CS SSB 29 (RES) the same title
 a new title

- have attached amendments(s)
- do pass
- do not pass
- no recommendations
- individual recommendations
- additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(S):

(Dept)

fiscal impact Dept. of Law

APPROVES PREVIOUS:

(Dept/Date)

zero fiscal note _____ zero fiscal note(s) _____

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

	Check appropriate column:	Do Not Pass	No Rec	Amend
<u>Cliff Davidson</u> DAVIDSON	<u>[Signature]</u> ZUAW	<input checked="" type="checkbox"/>		
<u>[Signature]</u> FINKELSTEIN				
<u>[Signature]</u> MOBER	<u>[Signature]</u> CAENEY	<input checked="" type="checkbox"/>		
	<u>[Signature]</u> LEMAN			<input checked="" type="checkbox"/>
	<u>[Signature]</u> ZAWACK	<input checked="" type="checkbox"/>		
	<u>[Signature]</u> LINCOLN			<input checked="" type="checkbox"/>

[Signature]
Chairman's Signature

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 29

Revision Date: _____ Department Affected: Department of Law
 Title: "An Act authorizing suits to enforce environmental laws..." BRU: Legal Services
 Component: Operations
 Sponsor: Representative Koponen
 Requestor: Governor's Office/OMB COMPONENT SERIAL NO.

		9	3
--	--	---	---

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	****	****	****	****	****	****

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	****	****	****	****	****	****
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	****	****	****	****	****	****
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Prepared By: Richard I. Pegues, Director Phone: 465-3672
 Division: Administrative Services Date: May 9, 1991
 Approved by Commissioner: Charles E. Cole, Attorney General
 Agency: Department of Law Date: May 9, 1991

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 29

This bill amends the state's environmental conservation laws (Title 46) to provide that a private party or person may bring a law suit against a person (including the state) alleged to be in violation of a law, regulation, permit, plan, or order established under the state's general statute governing air, water, energy, and environmental conservation (AS 46.03); the state's specific statute governing oil and hazardous substance control (AS 46.04); and the state's specific statute governing hazardous substance release control (AS 46.09).

The bill would also authorize a person to bring a law suit against the commissioner of the Department of Environmental Conservation, where a failure of the commissioner to perform a nondiscretionary act or duty specified under AS 46.03, AS 46.04, or AS 46.09 is alleged. The bill specifies that the decision or duty of the commissioner to bring an enforcement action against a person alleged to be in violation of a law, regulation, permit, plan, or order established under the foregoing statutes is a discretionary act or duty.

A person would not be permitted to file a law suit under these provisions until sixty days after the person has given notice of the violation to the person alleged to be violation, or if the commissioner has commenced and is diligently prosecuting a civil action or administrative penalty proceeding to require compliance. A person filing a civil action against the commissioner would also have to give sixty days prior notice to the commissioner before such an action could be filed. The sixty day notice provisions would not apply if the violation involved a hazardous waste under AS 46.03.900, a hazardous substance under AS 46.03.826 or AS 46.09.900, or a hazardous air pollutant under 42 U.S.C. 7412. In such an event, a civil action could be filed immediately after giving notice to the person alleged to be in violation.

Although these provisions would seem to preclude a person from bringing an action, if the commissioner has commenced and is diligently prosecuting a civil action or administrative penalty proceeding, the bill adds a new subsection to AS 46.03.870, (i), giving a person thus precluded the right to intervene in an action or proceeding brought by the commissioner.

Finally, the bill has the effect of changing Alaska Rule of Civil Procedure 24 by limiting the court's control over intervention of parties, and it has the effect of changing Alaska Rule of Civil Procedure 82 by revising the standards for award of attorney fees and costs. In this latter regard, the bill provides that a court may award the costs of litigation, including reasonable attorney and expert witness fees to a substantially prevailing plaintiff, or to a defendant if the court finds that the plaintiff's action was wholly frivolous.

In sum, all of these provisions will have a dramatic and far-reaching impact on how the state's environmental laws are enforced and who will do the enforcement. In effect, nearly any person or entity could assume the duties of the attorney general to enforce state environmental laws. The state would become a defendant in actions brought under the bill in respect to the construction, maintenance and operations of its transportation and all other public facilities.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 29

The nondiscretionary duties of the Department of Environmental Conservation, particularly those involving permitting processes and state regulation of federally-mandated environmental rules, would be subject to repeated attack in court. Moreover, the state's prosecution of violations would become far more complicated due to the intervention of third-parties. In addition to state government concerns, the bill is so broad that it could even be used by one corporation against another for purely corporate purposes.

The changes to Rule 82 unnecessarily expose the state to the payment of excessive attorney and expert witness fees, and set up the state and other potential defendants as ultimate deep pockets. Requiring that a court find that a plaintiff's action was "wholly" frivolous, before a defendant can be awarded fees and costs, will probably assure that a defendant who prevails in court will never be awarded costs and fees. Under current rules, courts rarely find a plaintiff to be even simply frivolous. It is inconceivable that a court could find a plaintiff to be "wholly" frivolous, whatever the phrase may mean. This requirement will undoubtedly establish an incentive to file law suits, because it totally eliminates any monetary constraints from doing so and, indeed, could provide a subsidy for doing so.

Under these circumstances, it is impossible to predict the amount of legal work, and the consequent cost to the Department of Law, if the bill is approved. It is simply too far-reaching. There will obviously be a high, fiscal impact for the state's legal services. At this stage, we cannot say whether we will need four, six, or even ten additional attorneys, but the cost could easily exceed \$1,000,000 per year. There is also no way to predict or calculate the cost to other state programs, industry, private parties, or the economy as a whole if non-governmental entities are permitted to execute the state's environmental laws, as authorized by the bill.

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Revision Date: March 9, 1992

Department Affected: Department of Law

Title: "An Act authorizing suits to enforce environmental laws."

BRU: Legal Services

Sponsor: Representative Koponen

Component: Operations

Requestor: Office of the Governor

COMPONENT SERIAL

		9	3
--	--	---	---

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS	45.0	45.0	45.0	45.0	45.0	45.0
MISCELLANEOUS						
TOTAL OPERATING	45.0	45.0	45.0	45.0	45.0	45.0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE FUND SOURCE:						
----------------------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	45.0	45.0	45.0	45.0	45.0	45.0
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Richard I. Peques

Prepared by: Richard I. Peques, Director

Phone: 465-3672

Division: Administrative Services

Date: March 9, 1992

Approved by Commissioner: Charles E. Cole, Attorney General

Agency: Department of Law

Date: March 9, 1992

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis Ofc., & Impacted Agency(ies).

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 29 (Judiciary Committee Work Draft)

The House Judiciary Committee Work Draft for HB 29, dated 2/21/92, adopts some, but not all of the changes recommended by the Department of Law for this bill, which authorizes third party intervention in state environmental enforcement actions. Despite these changes, the bill will still have a fiscal impact on the state. The Department of Law's comments, revised to reflect the Work Draft version of the bill, are provided below.

This bill amends the state's environmental conservation laws (Title 46) to provide that a private party or person may bring a law suit against a person (including the state) alleged to be in violation of a law, regulation, permit, plan, or order established under the state's general statutes governing air, water, energy, and environmental conservation (AS 46.03); the state's specific statutes governing oil and hazardous substance control (AS 46.04); and the state's specific statute governing hazardous substance release control (AS 46.09).

The bill would also authorize a person to bring a law suit against the commissioner of the Department of Environmental Conservation, where a failure of the commissioner to perform a nondiscretionary act or duty specified under AS 46.03, AS 46.04, or AS 46.09 is alleged. The bill specifies that the decision or duty of the commissioner to bring an enforcement action against a person alleged to be in violation of a law, regulation, permit, plan, or order established under the foregoing statutes is a discretionary act or duty.

A person would not be permitted to file a law suit under these provisions until sixty days after the person has given notice of the violation to the person alleged to be in violation. In addition, a law suit would not be permitted if the commissioner has commenced and is diligently prosecuting a civil action or administrative penalty proceeding to require compliance. A person filing a civil action against the commissioner would also have to give sixty days prior notice to the commissioner before such an action could be filed. The sixty day notice provisions would not apply if the violation involved a hazardous waste under AS 46.03.900, a hazardous substance under AS 46.03.826 or AS 46.09.900, or a hazardous air pollutant under 42 U.S.C. 7412. In such an event, a civil action could be filed either 10 days after notice, or immediately after giving notice if the action involved an imminent and substantial endangerment to health or the environment.

Although the bill prohibits a person from bringing an action if the commissioner "has commenced and is diligently prosecuting a civil action or administrative penalty proceeding,"

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 29 (Judiciary Committee Work Draft)

in practice this exception would be an extremely narrow one. First, most DEC enforcement actions involve compliance orders by consent (COBCs) or, less frequently, administrative compliance order proceedings. Although both of these actions usually involve some form of administrative adjudication, neither COBC actions nor mandatory compliance order actions fall within the exception currently provided in the bill. Second, the phrase "administrative penalty proceeding" is meaningless under current DEC statutes because DEC does not have administrative penalty authority. The narrow nature of this exception invites third party intrusion into a wide variety of DEC enforcement actions because, under current law, intervention could occur unless the commissioner had gone to the extreme step of bringing a law suit. The department therefore strongly recommends substituting "administrative penalty proceeding" with "administrative adjudication proceeding."

The Work Draft provides some restrictions on the type or amount of relief the court can impose against the state. Although this is an improvement from earlier versions, further improvement is recommended. The bill provides that in an action against the state "the court may issue an injunction or other relief." We recommend that the ending of this phrase be revised to read "other equitable relief." This will give a court the flexibility to order correction of a pollution problem, rather than serve as a device to seek monetary damages. The Work Draft version of this section also states, "Nothing in the section authorizes a court to award damages to a party in an action brought under this section." Although this new language is helpful, we believe that the section would be far clearer with the inclusion of "equitable relief", because nothing in the section prohibits award of monetary damages.

Furthermore, the bill will result in costs and attorney fees awards against the state. In most cases, third parties will be able to recover full reasonable costs and attorney fees against the state because such parties usually qualify as public interest litigants. This status has been broadly defined in Alaska, and our courts have usually been generous in awarding costs and fees to public interest litigants. Hence, the bill will continue to provide an economic incentive for third parties to sue the state. In situations where the non-state violator has limited assets, the incentive to search for an underlying "non-discretionary duty" as a basis for a suit against the state increases.

In sum, these provisions could have a far-reaching impact on how the state's environmental laws are enforced and who will do the enforcement. In effect, a private person or entity could assume the duties of the attorney general to enforce state environmental laws. The nondiscretionary duties of the Department

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 29 (Judiciary Committee Work Draft)

of Environmental Conservation, particularly those involving permitting processes and state regulation of federally-mandated environmental rules, would be subject to attack in court. In addition to state government concerns, the bill could be used by one corporation against another for purely corporate purposes.

Over the past several years, the state has paid an average of \$31,964.11 per year in costs and attorney fees in cases where it was a defendant in environmental suits. Because it encourages litigation, we believe that this bill will cause new, additional costs greater than this amount, even if our recommended changes are adopted. This cost estimate is based on the bill causing just one or two additional law suits each year, where the state does not fully prevail. The amount is based upon judgments paid in nine suits which have occurred over the past seven years. This is a very conservative estimate, and the actual cost could easily be much higher. Moreover, some of the time of our department's attorneys, now being spent enforcing the state's environmental laws, will be lost whenever they have to stop to defend the commissioner of environmental conservation against allegations of inaction. Last, we cannot predict the cost to industry, private parties, or government programs if non-governmental entities are permitted to enforce the state's environmental laws. Nonetheless, this could represent a substantial cost to the state's economy on the whole.

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. CSSSHB 29 (RES)

Revision Date: January 23, 1992 Department Affected: Department of Law
 Title: "An Act authorizing suits to enforce environmental laws." BRU: Legal Services
 Component: Operations
 Sponsor: Representative Koponen
 Requestor: House Judiciary Committee COMPONENT SERIAL NO.

		9	3
--	--	---	---

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	****	****	****	****	****	****

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND	****	****	****	****	****	****
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL						

POSITIONS:

FULL-TIME	****	****	****	****	****	****
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Prepared By: Richard I. Pegues, Director Phone: 465-3672
 Division: Administrative Services Date: January 23, 1992
 Approved by Commissioner: Charles E. Cole, Attorney General
 Agency: Department of Law Date: January 23, 1992

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSSHB 29 (RES)

The Resources Committee Substitute for SSHB 29 omits a prior provision in the original bill authorizing third party intervention in state environmental enforcement actions. It also omits the prior provision that expressly authorized awards of attorney fees and costs against the state. Despite these changes, however, the bill would still have a significant adverse fiscal impact on the state. The Department of Law's comments, revised to reflect the Resources Committee Substitute, are provided below.

This bill amends the state's environmental conservation laws (Title 46) to provide that a private party or person may bring a law suit against a person (including the state) alleged to be in violation of a law, regulation, permit, plan, or order established under the state's general statutes governing air, water, energy, and environmental conservation (AS 46.03); the state's specific statutes governing oil and hazardous substance control (AS 46.04); and the state's specific statute governing hazardous substance release control (AS 46.09).

The bill would also authorize a person to bring a law suit against the commissioner of the Department of Environmental Conservation, where a failure of the commissioner to perform a nondiscretionary act or duty specified under AS 46.03, AS 46.04, or AS 46.09 is alleged. The bill specifies that the decision or duty of the commissioner to bring an enforcement action against a person alleged to be in violation of a law, regulation, permit, plan, or order established under the foregoing statutes is a discretionary act or duty.

A person would not be permitted to file a law suit under these provisions until sixty days after the person has given notice of the violation to the person alleged to be in violation. In addition, a law suit would not be permitted if the commissioner has commenced and is diligently prosecuting a civil action or administrative penalty proceeding to require compliance. A person filing a civil action against the commissioner would also have to give sixty days prior notice to the commissioner before such an action could be filed. The sixty day notice provisions would not apply if the violation involved a hazardous waste under AS 46.03.900, a hazardous substance under AS 46.03.826 or AS 46.09.900, or a hazardous air pollutant under 42 U.S.C. 7412. In such an event, a civil action could be filed either 10 days after notice, or immediately after giving notice if the action involved an imminent and substantial endangerment to health or the environment.

Although the bill prohibits a person from bringing an action if the commissioner "has commenced and is diligently

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSSHB 29 (RES)

prosecuting a civil action or administrative penalty proceeding," in practice this exception is an extremely narrow one. First, most DEC enforcement actions involve compliance orders by consent (COBCs) or, less frequently, administrative compliance order proceedings. Neither COBC actions nor mandatory compliance order actions fall within the exception. Second, the phrase "administrative penalty proceeding" is meaningless under current DEC statutes because DEC does not have administrative penalty authority. The narrow nature of this exception invites third party intrusion into a wide variety of DEC enforcement actions. Such intervention has the potential to interfere with DEC's establishment of its enforcement priorities and with the DEC's selection of particular enforcement tools in specific cases.

The present bill's omission of the costs and attorney fees provision will not significantly reduce cost and attorney fees awards against the state. In most cases, third parties will remain able to recover full reasonable costs and attorney fees against the state because such parties qualify as public interest litigants. This status has been broadly defined in Alaska, and our courts have usually been generous in awarding costs and fees to public interest litigants. Hence, even without the cost and attorney fees provision, the bill will continue to provide a strong economic incentive for third parties to sue the state. In situations where the non-state violator has limited assets, the incentive to search for an underlying "non-discretionary duty" as a basis for a suit against the state increases.

Furthermore, the bill appears to place no restrictions on the type or amount of relief the court can impose against the state. The bill provides that in an action against the state "the court may issue an injunction and order other relief." This language could be interpreted as authorization for a court to award damages against the state. Damage awards in environmental cases may be highly speculative and difficult to prove (the dispute over damage amounts encountered in the recent EXXON VALDEZ litigation provides an example). In addition to the actual damage awards, the state can expect to incur the significant legal costs involved in disproving and defending against such alleged damages. Note that the amount of damage awards often hinges upon the sort of fact specific disputes that result in expensive jury trials and in the use of cost-consuming expert witnesses.

The restriction on the use of settlement proceeds seems unclear and may have little practical effect. The restriction does not apply to court-approved settlements. One would expect that in most actions brought under the bill the parties (at least the defendant) would want to have the settlement approved by the court.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSSHB 29 (RES)

In addition, the restriction allows third parties to use the settlement proceeds to fund attorney fees and costs. Hence, the bill provides both public interest and private law firms with an economic incentive to threaten or file law suits under the bill.

In sum, all of these provisions will have a dramatic and far-reaching impact on how the state's environmental laws are enforced and who will do the enforcement. In effect, nearly any person or entity could assume the duties of the attorney general to enforce state environmental laws. In addition, the state would become a defendant in actions brought under the bill in respect to the construction, maintenance and operations of its transportation and all other public facilities, and many other government activities. The nondiscretionary duties of the Department of Environmental Conservation, particularly those involving permitting processes and state regulation of federally-mandated environmental rules, would be subject to repeated attack in court. In addition to state government concerns, the current version of the bill remains so broad that it could even be used by one corporation against another for purely corporate purposes.

Under these circumstances, it is impossible to predict the amount of legal work, and the consequent cost to the Department of Law, if the bill is approved. It is simply too far-reaching. There will obviously be a high fiscal impact for the state's legal services and for the amount the state may eventually have to pay to public interest litigants. At this stage we cannot say what that cost will be, but it could easily exceed \$1,000,000 per year. There is also no way to predict or calculate the cost to other state programs, industry, private parties, or the economy as a whole if non-governmental entities are permitted to execute the state's environmental laws, as authorized by the bill.

HOUSE COMMITTEE REPORT

(7)

Date Referred: May 20, 1991

FURTHER REFERRALS:

Date of Committee Action: 3-13-92

The JUDICIARY Committee considered:

SSHB 29

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 29 SUITS TO ENFORCE ENVIRONMENTAL LAWS

"An Act authorizing suits to enforce environmental laws; and having the effect of amending Rules 24 and 82 of the Alaska Rules of Civil Procedure."

RECOMMENDATIONS:

be replaced with CS HB 29 (JUD) the same title
 a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal impact Law (1123)

fiscal note(s) _____

zero fiscal note DEC (1128)

zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>J. Ellis</i>		<i>Max Gumenberg</i>		-	
		<i>Dave Dudley</i>		X	
		<i>Kevin P. Powell</i>			✓

Dave Dudley

 CHAIRMAN'S SIGNATURE

Alaska State Legislature

Legislative Research Agency



P.O. Box Y
Juneau, AK 99811-3100
Phone: (907) 165-3991
Fax: (907) 163-3351

March 15, 1991

MEMORANDUM

TO: Representative Niilo Koponen

FROM: Glenn T. Gray^{GTG}
Legislative Analyst

RE: Litigation Resulting From Citizen Suit Laws in Other States
Research Request 91.181

You requested information about states with statutes that permit citizen law suits against polluters or against persons that degrade the environment. These laws often include a notification period where the business may respond to the problem before the law suit is initiated. You asked us to contact several different states to find out the number of cases that make it to the notification stage, the number of court cases filed, the number of cases dismissed as frivolous, and the total number of civil cases.

We contacted attorneys general in seven states to inquire about citizen law suit statutes: Connecticut, Florida, Indiana, Michigan, New Jersey, South Dakota, and Wyoming. Statutes from each of these states are attached (Attachment A). Few of the attorneys we contacted were able to provide precise statistics about the number of cases filed using these laws.

Connecticut

Assistant Attorney General Joe Rubin said that people rarely use the Connecticut statute that authorizes citizen suits about environmental matters. Mr. Rubin said that he did not know why the statute is not used more often, but he speculated that citizens do not use it because the state responds quickly to resolve pollution problems. The law empowers any person to sue another person "for protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction" (CS 22a-16). The Connecticut statute does not require a notification period before a citizen can initiate a suit.

Florida

Jeff Peters, chief of the Environmental Litigation Section for the Florida Attorney General's Office, stated that citizens may receive injunctive relief against private companies or government agencies by initiating an action against the state. The citizen initiates an action under the premise that a

Representative Koponen
March 15, 1991
Page 2

state agency is not properly enforcing state law. After a citizen initiates an action, the state has 30 days to respond. If the state takes no action by the end of the 30 days, the citizen may initiate a law suit against the state. Mr. Peters said that it may be possible to add other parties, such as private companies, to the complaint at that time.

The Florida Environmental Protection Act gives standing to any citizen to initiate a law suit if an activity has "the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resource of the state" (FS 403.412). Officials from the Attorney General's Office or the Department of Environmental Regulation were not able to estimate the number of court cases initiated using the act, but no one thought that it was used often. A bill currently before the Florida State Legislature expands the authority of citizens to initiate law suits (attached).

Indiana

According to Chief Counsel Jack Watson of the Indiana Attorney General's Office, between ten and fifteen notices are served each year using the state's citizen law suit provision. Some years a greater number of proceedings are initiated. The statute requires a 90-day waiting period where state agencies attempt to resolve the problem. A citizen may initiate a court action on behalf of the state only if state agencies fail to resolve the problem by the end of the 90-day period. Law suits may be initiated "for the protection of the environment of Indiana from significant pollution, impairment, or destruction" (IC 13-6-1). Most of these actions are resolved administratively without the need to go to court. Mr. Watson said about two or three suits make it to the courts each year, and he did not know of any of cases that have been dismissed as frivolous.

Michigan

The Michigan State Legislature passed one of the earliest statutes that permits citizens to initiate law suits against polluters or those who degrade the environment. A provision in the 1970 Michigan Environmental Protection Act (MEPA) gives standing to individuals to sue polluters, but persons named in the suit have 28 days to respond to the complaint. According to Steve Chester, an assistant attorney general, initial predictions that citizens would flood the courts with frivolous cases never materialized. State and local governments initiate most of the cases under this law. During recent years, however, the state often uses more specific laws to stop pollution (e.g., statutes concerning hazardous waste, clean water, air quality, and the state superfund).

Mr. Chester knows of no recent statistics quantifying the number of cases initiated under this statute. The attached 1985 article from the *Environmental Law Quarterly* states that during the first few years after the

Representative Koponen
March 15, 1991
Page 3

act was passed about two cases were filed per month (Attachment B). By 1982 law suits diminished to about one every two months. The article reports that the act stimulates settlements prior to court proceedings.

New Jersey

The New Jersey statute permitting citizen environmental law suits was recently amended. During 1990, a cap on the amount of attorney fees that may be collected was raised from \$10,000 to \$50,000 for citizen suits, and the cap on suits initiated by governments were unlimited. Charles Licata, assistant environmental prosecutor, estimated that about two citizen suits have been initiated each month since amendments to the statute became effective last July. The law requires that a 60-day notice be given before suits are initiated. State agencies often negotiate a solution to the problem. If no settlement is reached after the 60-day notice period, a citizen may initiate action through the courts. Mr. Licata is not aware of any suits being dismissed as frivolous.

South Dakota

Roxanne Giedd, an assistant attorney general, said that citizen suit provisions permit the state to file enforcement action on behalf of a citizen. The provisions also permit citizens to file suits directly against a polluter. Ms. Giedd said that citizens file about two cases per year against polluters and request state action to mitigate pollution about 40 times per year. State involvement usually results in some action taken by the polluter to resolve the problem. Ms. Giedd did not know of any instances where cases were dismissed as frivolous.

Wyoming

Steve Jones, senior assistant attorney general and head of the environmental section, said that he is aware of only one instance where someone has used Wyoming's citizen lawsuit statute. The statute, WS 35-11-902, permits individuals "having an interest which is or may be affected" to commence a civil action against the state government for failing to enforce the Environmental Quality Act or against any private party that violates provisions of the act. The one law suit Mr. Jones was aware of was dismissed because the plaintiff did not comply with the required 60-day waiting period before initiating a law suit.

Conclusion

Statutory provisions permitting citizens to sue polluters vary among the states. Some states require that the state bring action on behalf of the

Representative Koponen
March 15, 1991
Page 4

individual. Other states permit citizens to initiate law suits on behalf of themselves or on behalf of the state. While some states require citizens to wait a specified number of days before filing a suit, other states permit immediate filings.

State officials we contacted reported that citizen law suit legislation has been used less than initially expected. Government agencies tend to use such statutes as often or more often than citizens. Because of the costs associated with litigation, many polluters settle out-of-court. Therefore, environmental law suit legislation may serve to reduce the number of court cases rather than bog down the court system with an excessive number of civil cases. No one we contacted thought that frivolous law suits were a problem. Few states track the number of court cases initiated in association with citizen law suit statutes, but many officials provided rough estimates. Older laws permitting citizens and government agencies to initiate law suits against polluters tend to be used less often by the states now that newer, more specific laws have been adopted.

Please contact this office if we be of additional assistance.

Attachments

**Alaska Oil Spill Commission
Recommendation 13**

Recommendation 13
*Enhanced regulatory
strength*

The state should expand and exercise its regulatory authority over environmental safety. Measures voluntarily adopted by industry should be backed up by state regulation. Federal technical standards and safety requirements should not preclude more stringent state standards.

The State of Alaska currently does not exercise its full power under the U.S. Constitution to regulate environmental safety. Recent congressional enactments and judicial decisions make it clear that Congress does not intend that states should hesitate to protect local environments with greater stringency than the minimums established under federal law. The state should have the power, for example, to prohibit vessels from entering or departing Alaska ports and waters under unsafe circumstances.

Regulatory effectiveness also should be improved through assessment of administrative and civil penalties to encourage prevention, no preen-

forcement review of compliance orders, environmental audits, stronger criminal penalties, and statutory provision for citizen lawsuits. Private voluntary prevention measures, though commendable, are often ignored as memories fade unless backed up by state regulations.

**Alaska's Surface Coal Mining Act
citizen suit provisions**

ing operation
ion financed
al, state, or

tion of persons engaging in or directly responsible for blasting or the use of explosives in surface coal mining operations. (§ 1 ch 29 SLA 1982)

Revisor's notes. — Formerly AS 41.45.940. Renumbered in 1983.

Sec. 27.21.950. Civil actions. (a) Except as provided in (b) of this section, a person who is or may be adversely affected by a failure to comply with this chapter may commence a civil action in the superior court on the person's own behalf and compel compliance with this chapter against

(1) the commissioner, if the commissioner has failed to perform a nondiscretionary act or duty;

(2) an instrumentality or agency of the state which is in violation of this chapter or a regulation adopted, or an order or permit issued under this chapter; or

(3) a person who is in violation of a regulation adopted or an order or permit issued under this chapter.

(b) A person may not commence an action under (a)(1) of this section until 60 days after giving the commissioner written notice of the intended action in the manner prescribed by regulations adopted by the commissioner, except that an action may be brought immediately after the notice if the commissioner's failure to perform constitutes an imminent threat to the health or safety of the person or would immediately affect a legal interest of the person.

(c) A person may not commence an action under (a)(2) or (a)(3) of this section.

(1) until 60 days after the plaintiff has given notice in writing of the violation to the commissioner and to the agency, instrumentality, or alleged violator;

(2) if the state is diligently prosecuting a civil action in a state or federal court to require compliance with the provisions of this chapter or a regulation adopted or an order or permit issued under this chapter; however, any person may intervene in that civil action as a matter of right.

(d) A person may commence an action under this section only in the judicial district in which the surface coal mining operation is located.

(e) Nothing in this section restricts any right that a person or class of persons may have under statute or common law to seek enforcement of any of the provisions of this chapter and the regulations adopted under it, or to seek any other relief, including relief against the commissioner.

(f) A person who is injured or whose property is damaged by the violation by a permittee of a regulation adopted or an order or permit issued under this chapter may bring an action for damages, including

o encourage
d to allow
ntial, recre-
he approval
rior, autho-
sis from the
under AS
ures if
surface coal
ment than,
ired by this
eparture is
ffectiveness
id
ion afforded
lation. (§ 1

Nothing in
n to protect
urface coal
r of interest
ly of water
se from an
affected by
ulting from
(LA 1982)

ioner shall
d certifica-

reasonable attorney fees and expert witness fees, only in the judicial district in which the permittee's operation is located. Nothing in this subsection affects the rights established by or limits imposed under AS 23.30.

(g) In an action under this section, the commissioner may intervene as a matter of right. (§ 1 ch 29 SLA 1982)

Revisor's notes. — Formerly AS 41.45.950. Renumbered in 1983.

Sec. 27.21.960. Inconsistencies with federal act. (a) A provision of this chapter that is inconsistent with the provisions of the Surface Mining Control and Reclamation Act of 1977 as determined by the Secretary of the United States Department of the Interior under 30 U.S.C. 1255(b) is invalid from the date of the secretary's determination.

(b) If a provision of the Surface Mining Control and Reclamation Act of 1977 or of the regulations promulgated under that Act by the Secretary of the United States Department of the Interior is deleted, amended, set aside, enjoined, or declared invalid by Congress, the secretary, or in a final, unappealable judgment of a court of competent jurisdiction, then the commissioner shall review the changes made and make an appropriate recommendation as to whether changes in this chapter or the regulations adopted under it should be made. (§ 1 ch 29 SLA 1982)

Revisor's notes. — Formerly AS 41.45.960. Renumbered in 1983.

Sec. 27.21.970. Relationship to other laws. (a) Nothing in this chapter abrogates or modifies the power of a state agency to enforce laws and regulations within its jurisdiction, except as specifically stated in this chapter and regulations adopted under it. The commissioner shall coordinate permitting procedures to prevent unnecessary duplication in permit review.

(b) Surface coal mining operations for coal which has been or is conveyed out of federal ownership must meet the requirements of this chapter. (§ 1 ch 29 SLA 1982)

Revisor's notes. — Formerly AS 41.45.970. Renumbered in 1983.

Editor's notes. — Section 2, ch. 29, S.L.A. 1982, purported to add a subsection (c). Section 7 of ch. 29 provided that the amendment take effect on the effective

date of a version of Senate Bill No. 84; however, Senate Bill No. 84 did not pass the House of Representatives, and consequently, the amendment made by § 2 of ch. 29 never took effect.

Sec. 27.21.975. Severability. If any provision of this chapter or the applicability of it to any person or circumstances is held invalid, the remainder of this chapter and the application of that provision to other persons or circumstances is not affected. (§ 1 ch 29 SLA 1982)

**Alaska Oil & Gas Commission Statutes
citizen suit provisions**

carbon
as from
as well
redomi-
the gas
vn at a
person
use of
would
gas to
or light
in the
at the
purpose
it finds
ie time
0 SLA

Funds.

ates a
ission
e than
lation
led for

or any
apter,
unt or
der, or
unt or
y this
ate or
nemo-

randum, the person is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than \$5,000, or by imprisonment in jail for not more than six months, or by both.

(c) A person who knowingly aids or abets another person in the violation of any provision of this chapter, or a regulation or order of the commission adopted under this chapter is subject to the same penalty as that prescribed by this chapter for the violation by the other person.

(d) The penalties provided in this section are recoverable by suit filed by the attorney general in the name and on behalf of the commission in the superior court of the judicial district in which the defendant resides or in which any defendant resides, if there is more than one defendant, or in the superior court of the judicial district in which the violation occurs. The payment of a penalty does not relieve a person on whom the penalty is imposed from liability to any other person for damages arising out of the violation.

(e) The commission may impose a penalty payment on every 1,000 cubic feet of natural gas flared, vented or otherwise determined to be waste as defined in AS 31.05.170. The penalty shall be the fair market value of the natural gas at the point of waste. (§ 12 ch 40 SLA 1955; am § 1 ch 195 SLA 1968)

Collateral references. — 58 C.J.S.
Mines and Minerals § 241.

Sec. 31.05.160. Injunctive relief. (a) Whenever it appears that a person is violating or threatening to violate any provision of this chapter, or any regulation or order of the commission, the commission shall bring suit against that person in the superior court of the judicial district where the violation occurs or is threatened, to restrain the person from continuing the violation or from carrying out the threat of violation. In the suit, the court shall have jurisdiction to grant to the commission, without bond or otherwise undertaking, such prohibitory and mandatory injunctions as the facts warrant.

(b) If the commission fails to bring suit to enjoin a violation or threatened violation within 10 days after receipt of written request to do so by a person who is or will be adversely affected by the violation, the person making the request may bring suit to restrain the violation or threatened violation in the court in which the commission may bring suit. If the court finds that injunctive relief should be granted, the commission shall be made a party and shall be substituted for the person who brought the suit, and the injunction shall be issued as if the commission had at all times been the plaintiff. (§ 13 ch 40 SLA 1955)

Sec. 31.05.170. Definitions. In this chapter, unless the context otherwise requires

(1) "and" includes "or" and "or" includes "and";

(2) "correlative rights" mean the opportunity afforded, so far as it is practicable to do so, to the owner of each property in a pool to produce without waste the owner's just and equitable share of the oil or gas, or both, in the pool; being an amount, so far as can be practically determined, and so far as can practicably be obtained without waste, substantially in the proportion that the quantity of recoverable oil or gas, or both under the property bears to the total recoverable oil or gas or both in the pool, and for such purposes to use the owner's just and equitable share of the reservoir energy;

(3) "commission" means the Alaska Oil and Gas Conservation Commission;

(4) "cubic foot" of natural gas means the volume of gas contained in one cubic foot of space measured at a pressure base of 14.65 pounds per square inch absolute and a temperature base of 60 degrees Fahrenheit;

(5) "field" means a general area which is underlain or appears to be underlain by at least one pool, and includes the underground reservoir containing oil or gas and the words "pool" and "field" mean the same thing when only one underground reservoir is involved, but "field" unlike "pool" may relate to two or more pools;

(6) "gas" includes all natural gas and all hydrocarbons produced at the wellhead not defined as oil;

(7) "landowner" means the owner of the subsurface estate of the tract affected;

(8) "oil" includes crude petroleum oil and other hydrocarbons regardless of gravity which are produced at the wellhead in liquid form and the liquid hydrocarbons known as distillate or condensate recovered or extracted from gas, other than gas produced in association with oil and commonly known as casinghead gas;

(9) "owner" means the person who has the right to drill into and produce from a pool and to appropriate the oil and gas the person produces from a pool for that person and others;

(10) "person" includes a natural person, corporation, association, partnership, receiver, trustee, executor, administrator, guardian, fiduciary or other representative of any kind, and includes a department, agency or instrumentality of the state or a governmental subdivision of the state;

(11) "pool" means an underground reservoir containing, or appearing to contain, a common accumulation of oil or gas. Each zone of a general structure which is completely separated from any other zone in the structure is covered by the term "pool";

(12) "producer" means the owner of a well or wells capable of producing oil or gas or both;

New Jersey Statutes

CHAPTER 36A. ENVIRONMENTAL RIGHTS

Section

- 2A:35A-1. Short title.
 2A:35A-2. Legislative findings and determinations.
 2A:35A-3. Definitions.
 2A:35A-4. Actions to enforce laws on pollution, impairment or destruction of environment, or to protect environment; dismissal of frivolous actions.
 2A:35A-5. Rebuttal to prima facie evidence or affirmative defense; rules of evidence.
 2A:35A-6. Temporary or permanent equitable relief.
 2A:35A-7. Determination and adjudication of impact of conduct on environment.
 2A:35A-8. Remittitur for administrative or other proceedings; retention of jurisdiction; temporary equitable relief.
 2A:35A-9. Security as condition for grant of injunction.
 2A:35A-10. Award of attorney's and expert witness fees; application of doctrines of collateral estoppel and res judicata; consent of originating court for dismissal.
 2A:35A-11. Notice of intention to commence action; persons to whom sent; waiver; exemptions.
 2A:35A-12. Act as additional remedy.
 2A:35A-13. Construction of act, rules, regulations and orders.
 2A:35A-14. Severability.

Law Review Commentaries

A thumbnail sketch of the Environmental Rights Act. Lewis Goldshore (Winter 1975) No. 70 N.J. State Bar J. 18.

Analysis of environmental legislation from 1970 to 1975 in New Jersey. Lewis Goldshore (Summer 1976) 1 Seton Hall Legis J. 1.

Environmental protection: Perspective 1978 Lewis Goldshore (Fall 1978) No. 86 N.J. State Bar J. 44.

2A:35A-1. Short title

This act shall be known and may be cited as the "Environmental Rights Act."

L.1974, c. 169, § 1, eff. Dec. 9, 1974.

Title of Act:

An Act concerning the commencement of actions for the protection of the environment and the public interest therein. L.1974, c. 169.

Administrative Code References

Environmental health standards of administrative procedure, see N.J.A.C. 7:11H-2.1 et seq.

Law Review Commentaries

1985 environmental protection case law (second in a series). Lewis Goldshore and Marsha Wolf, 117 N.J.L.J. 375 (1986).

1985 environmental protection legislation (first in a series). Lewis Goldshore and Marsha Wolf, 117 N.J.L.J. 335 (1986).

2A:35A-2. Legislative findings and determinations

The Legislature finds and determines that the integrity of the State's environment is continually threatened by pollution, impairment and destruction, that every person has a substantial interest in minimizing this condition, and that it is therefore in the public interest to enable ready access to the courts for the remedy of such abuses.

L.1974, c. 169, § 2, eff. Dec. 9, 1974.

Notes of Decisions

I. Jurisdiction

Issue of whether United States Army Corps of Engineers had subject matter jurisdiction over validity of water diversion project was not ripe for adjudication, in light of fact that engineers were being selected to engage in feasibility study to help establish specifics of construction for the project; it would be only after such information was gathered that submission could be made to Army Corps so that it might determine whether it should assert jurisdiction. Application of North Jersey Dist. Water Supply Commission, 175 N.J. Super. 167, 417 A.2d 1095 (A.D.1980).

Notes of Decisions

I. Construction and application

Policy of protecting state's environment from pollution, impairment and destruction is properly effectuated through the zoning power and may influence local zoning decisions. Lusardi v. Curtis Point Property Owners Ass'n, 86 N.J. 217, 430 A.2d 881 (1981).

2A:35A-3. Definitions

For the purposes of this act, the following words and phrases shall have the following meanings:

a. "Person" includes corporations, companies, associations, societies, firms, partnerships and joint stock companies, individuals, the State, any political subdivision of the State and any agency or instrumentality of the State or of any political subdivision of the State.

b. "Pollution, impairment or destruction of the environment" means any actual pollution, impairment or destruction to any of the natural resources of the State or parts thereof. It shall include, but not be limited to, air pollution, water pollution, improper sewage disposal, pesticide pollution, excessive noise, improper disposal of refuse, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds or other water resources, destruction of seashores, dunes, wetlands, open spaces, natural areas, parks or historic areas.

L.1974, c. 169, § 3, eff. Dec. 9, 1974.

Law Review Commentaries

Environmental protection: Perspective 1978. Lewis Goldshore (Fall 1978) No. 85 N.J. State Bar J. 44.

Library References

Words and Phrases (Perm. Ed.)

2A:35A-4. Actions to enforce laws on pollution, impairment or destruction of environment, or to protect environment; dismissal of frivolous actions

a. Any person may maintain an action in a court of competent jurisdiction against any other person to enforce, or to restrain the violation of, any statute, regulation or ordinance which is designed to prevent or minimize pollution, impairment or destruction of the environment.

b. Except in those instances where the conduct complained of constitutes a violation of a statute, regulation or ordinance which establishes a more specific standard for the control of pollution, impairment or destruction of the environment, any person may maintain an action in any court of competent jurisdiction for declaratory and equitable relief against any other person for the protection of the environment, or the interest of the public therein, from pollution, impairment or destruction.

c. The court may, on the motion of any party, or on its own motion, dismiss any action brought pursuant to this act which on its face appears to be patently frivolous, harassing or wholly lacking in merit.

L.1974, c. 169, § 4, eff. Dec. 9, 1974.

Library References

Health and Environment ⇨255.

Injunction ⇨114(1).

C.J.S. Health and Environment §§ 61 to 66, 69, 71 to 73, 78 to 80, 82 to 86, 88 to 90, 94, 104, 110, 115 to 126, 128, 129, 132, 133, 135, 137 to 140, 142, 144 to 153

C.J.S. Injunctions § 173 et seq

Construction and application 1

Damages 5

Enforcement of laws and regulations 2,3

Injunctions 2

Review 4

Standing 1,5

Notes of Decisions

I. Construction and application

Action plan applied as "a more specific standard" to interstate highway construction project

HOUSE BILL 29
COMMENTS BEFORE THE HOUSE JUDICIARY COMMITTEE
ROBERT K. REGES JR.
ON BEHALF OF THE ALASKA
DEPARTMENT OF LAW
AND
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

FEBRUARY 14, 1992

We are not opposed to the concept of providing a cause of action to citizens so that they may enforce chapters 46.03., 46.04 and 46.09. However, we cannot support the draft of HB 29 which is before you now. 1\ From our perspective, the specific shortcomings of that bill are as follows:

DAMAGES AGAINST THE STATE

Some commentators have suggested that the bill is not designed to allow a citizen to secure damages (money) from the state. However, section 2 of the bill proclaims, in pertinent part:

[A] person who has an interest that is or may be adversely affected by the violation may file a civil action against... the state or an agency of the state..

Such a suit would be a suit under (d)(1) of AS 46.03.870. The bill goes on to say:

In an action under (d)(1) of this section, the court may ...order other relief.

This is found in the proposed AS 46.03.870(f).

It is hard to imagine a broader authorization. Clearly,

1\ 7-LS0295\S, CS for Sponsor Substitute for House Bill no. 29 (Resources), Offered 5/20/91

this language would allow a plaintiff to recover damages against the state whenever the state, or an agency of the state is alleged to be in violation of a law, regulation, permit, plan, or order established under AS 46.03, 46.04 or 46.09. This is not in the best interest of any government, particularly an "owner state."

Environmental laws usually hold both the owner and operator liable for a violation. The state is sometimes liable for the actions of persons who are conducting operations on state lands. In the past, concepts of sovereign immunity and other legal barriers have held people back from pursuing the state for this indirect, passive liability. However, under this bill the state becomes an easy target.

The state is a deep pocket. There are no problems establishing jurisdiction over the state for the type of actions at issue here. There is no chance that the state will file bankruptcy or will be able to hide its assets in a series of subsidiaries. For all these reasons, it will be easier to secure relief from the state than it will be to secure relief from the operator who actually caused the damage.

This waiver of sovereign immunity; this cause of action created by the bill, is simply too broad. Perhaps it is in the public's interest to allow injunctions against an owner state. It is not in the public's interest to allow the levy of money damages against the state. Accordingly, we object to the phrase "and order other relief" now found on page 2, line 9.

PENALTIES ACCRUING TO PRIVATE PARTIES

At present the bill also allows a court to "assess civil penalties under AS 46.03.760." 2\ On its face, this would appear to allow private parties to secure penalties.

We note that AS 46.03.760 says that a person who violates state environmental laws "is liable, in a civil action, to the state..." It is our understanding that the sponsors of the bill intended that this language in 760 would prohibit the accrual of any penalties to any person except the state. That is why the bill allows for penalties "under AS 46.03.760." This intent is not clear on the face of HB 29. We recommend clarification, such as:

In an action under (d)(1) of this section, the court may [ASSESS] award civil penalties to the state, irrespective of whether the state is a party to the action, under AS 46.03.760,...

CLOSED SITES AND PAST VIOLATIONS

Some commentators have stated that the bill is not designed to address completely closed sites or entirely past violations. We feel that it fails to accomplish this purpose. At present, a cause of action is provided if the violation is:

...continuing, intermittent, or likely to recur,...

The concept of a continuing nuisance is well established in caselaw. 3\ So long as a hazardous substance leaks from a

2\ Page 2, line 8, which is the proposed subsection AS 46.03.870(f).

3\ E.g. United States v. Price, 523 F.Supp. 1055, 1071(D.N.J. 1981); CPC International, Inc. v. Aerojet-General Corp., 759 F.Supp. 1269, 1277 - 1278 (W.D. Mich. 1991).

buried container, so long as a pollutant migrates from one media to another, the violation is continuing. In order to overcome those precedents; in order to limit this bill to future violations, courts will have to take a narrow reading of terms that define a violation. However, narrow interpretations of words such as "discharge", "disposal", "release" and other synonyms should not be encouraged. Does the violation of our oil spill laws end when the vessel stops releasing oil into the environment or does the "discharge" continue when oil moves from water to beach? We would certainly want to argue the latter. Accordingly, we suggest that the language be changed to expressly state that it does not provide a cause of action for past violations and we further recommend that a definition of "past violation" be crafted to insure that the scope of the bill is not broader than intended.

UNEVEN PLAYING FIELD AS TO COSTS

As written, the bill encourages litigation and discourages prelitigation negotiations. If a person brings a legitimate concern to the attention of ADEC and the matter is resolved without resort to litigation, the person receives no fee for the time spent in discussion or negotiation. On the other hand, if a person files a complaint, he or she may use monies received in settlement to pay attorney's fees and costs.^{4\} This provides an incentive to litigate, rather than attempt to resolve disputes short of litigation.

In the general scheme of things this incentive is offset

^{4\} See proposed AS 46.03.870(i).

by the risk of having to pay a defendant's fees if the defendant prevails. 5\ However, in Alaska this disincentive has been eliminated whenever the plaintiff can establish that he or she is a "public interest litigant." 6\ It is foreseeable and fair to expect that persons who are able to use HB 29 will almost always qualify as public interest litigants. Thus, they can march into court with impunity afforded by caselaw, wielding the causes of action afforded by this bill. The plaintiff risks nothing. Only the defendant is at risk.

This combination of HB 29 and the public interest litigant exception to Civil Rule 82 creates an unlevel playing field. This combination flies in the face of the so-called "American rule" whereby each party bears his or her own costs of litigating. That rule, expressly recognized by the United States Supreme Court in a case that arose in Alaska, 7\ is still the best tool for avoiding nuisance suits. While our courts have seen fit to emasculate the rule with "public interest litigant" exceptions, this legislature -- in the interest of fairness -- should not tip the balance any further in favor of such litigants.

One solution would be to remove the phrase "or for reimbursement of legal fees and costs" from proposed subsection AS

5\ Alaska Rules of Civil Procedure, Rule 82.

6\ See *Sisters of Providence in Washington, Inc. v. Dept. of Health and Social Services*, 648 P.2d 970, 979 (S.Ct.Ak. 1982) (attorneys fees cannot be awarded against a public interest litigant); *Alaska Survival v. Alaska Dept. of Natural Resources*, 720 P.2d 1281, 1292 (S.Ct.Ak. 1986) (a public interest litigant is entitled to full, reasonable fees, not just partial fees).

7\ *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

46.03.870(i). 8\ That way persons settling an action would secure no personal benefit. Benefits would only go to the public purposes purportedly represented. This should remove some of the incentive to bring a suit since the plaintiff will know that most cases settle and, in settlement, he or she will get no fees. Of course, we recognize the downside of this proposition; once a suit is commenced, the motivation to settle is reduced.

Accordingly, we more strongly recommend another solution. State that the public litigant exception does not apply to suits brought under this section. That would eliminate any tendency for plaintiffs to abuse the cause of action provided by the bill.

WINDFALL TO ENVIRONMENTAL GROUPS

Some commentators have said that this bill is not designed to provide a windfall to public interest groups. If that is true; if the purpose of the bill is really to bring about environmental improvement and not to line the pockets of activists, why does the bill allow settlement monies to be used for any purpose by 501(c)(3) organizations? 9\ Most public interest groups fall into this category. If the bill is really designed as it has been touted, this reference should be deleted. Otherwise the bill provides activists with a back door into the coffers of the state and the regulated community.

CONCLUSION

8\ Page 2, line 31 and page 3, line 1 of the bill.

9\ Page 2, line 31 of the bill.

In the environmental arena citizen suits can provide a useful balance to the tension existing between regulators and the regulated community. And, as testimony has revealed, there have been isolated instances where government was unable to resolve environmental concerns as expeditiously as prudence would have dictated. So, there probably is a legitimate basis for allowing third parties to bring an action for injunction or in the nature of mandamus. This is what most other federal and state citizen suit provisions provide.

But this bill goes too far. Unless and until it is recrafted in the manner set forth herein, neither the department of law nor the department of environmental conservation can support it. Thank you.

John C. ...
02/1/12



Alaska Health Project

Information and advocacy on occupational and environmental health.
 1818 W. Northern Lights Blvd., Suite 103, Anchorage, Alaska 99517
 (907) 276-2864 In State 800-478-2864 Fax 907-279-3089 Modem 907-279-3128

January 31, 1992

Representative Dave Donley
 Chair, Judiciary Committee
 House of Representatives
 State Capitol
 Juneau, AK 99801-1182

Dear Representative Donley:

Please include this letter as testimony for the hearing scheduled for February 3 in the Judiciary Committee on HB 29.

The Alaska Health Project is a private, nonprofit organization that has been providing information and services regarding occupational and environmental health to Alaskan residents, workers, and small businesses since 1980.

The provisions that HB-29 proposes to include in our state statutes are provisions that have existed in most federal environmental statutes for many years. Therefore, the concepts in HB 29 are not new and have been implemented at the federal level for quite some time.

A study conducted recently in the Nikiski, Alaska, area investigated the record of environmental law compliance of four major industrial facilities from the 1950's until 1989. The findings were that the best compliance was with the laws that were solely under federal jurisdiction (such as the Clean Water Act.) In the cases where the state is authorized to enforce a federal environmental law, but the federal agency retains oversight, (such as the Clean Air Act), the compliance record was not as good, and limited to cases where the federal agency had been involved in an enforcement action. For the state laws that do not have federal oversight, (such as the solid waste, waste water and waste water sludge regulations) researchers found the worst record, including noncompliance and lack of enforcement. (A copy of this study is included with this letter.)

There could be several explanations for the federal laws having better compliance than the state laws. One major difference between the federal environmental laws and the state environmental laws is the inclusion of citizen suit provisions at

reprinted from: Proceedings of the First International Symposium on Oil and Gas Exploration and Production Waste Management Practices.
U.S. Environmental Protection Agency. September 1990.

AN ENVIRONMENTAL COMPLIANCE AUDIT OF FOUR OIL AND GAS FACILITIES
IN KENAI, ALASKA

Reller, C.
entropy - senior scientist
Box 101255
Anchorage, Alaska 99510

Introduction

Nikiski, a small Alaska town on the Kenai peninsula, 100 km SW of Anchorage, hosts four oil and gas facilities on less than one square mile, including the world's largest ammonia/urea plant, North America's largest exporter of natural gas, and two other petroleum refineries. Located on a deep water port of Cook Inlet, Nikiski is adjacent to 21 oil and gas fields. Along the ice affected coast 15 platforms extract petroleum. Across Cook Inlet is Marathon's Trading Bay facility, the largest oil production facility in North America. Also on the west shore is the Drift River crude oil storage terminal, located in a flood plain dramatically affected by Mt. Redoubt, an active volcano.

Prior to this study there were no comprehensive evaluations of pollution discharges, no compiled records of environmental violations, nor an analyses of enforcement actions for the Kenai industries. The Nikiski facilities selected for investigation because of their proximity to human habitation and potential to pollute. Further research is needed regarding platforms, facilities on the western shore of Cook Inlet, and drilling mud pits.

Research covered a period from the late 1950's to January 1989. More recent events may add to the results but would not affect the conclusions. The four facilities studied are the Unocal-Mitsubishi ammonia/urea plant, Phillips-Marathon-USX natural gas refinery, Tesoro Alaska refinery, and Chevron USA refinery. At Unocal-Mitsubishi over 3 billion pounds of nitrogen based chemicals are produced annually - equal to 2% of the world's annual nitrogen fixing by soil bacteria. Contiguous to the ammonia/urea plant are three refineries that produce and export 2.6 billion gallons a year of gasoline, jet fuel, fuel oils, asphalt, and natural gas. If the refineries combined annual production capacity was placed in barrels and put end-to-end they would encircle the globe with enough left over to reach from Prudhoe Bay to San Francisco.

Method

The research method used is historical in nature. Agency records were systemically collected and evaluated in order to understand past events and analyze trends in environmental regulation. Primary sources of information are inspection reports, permits, enforcement orders, interviews, facility self reporting, letters, and memos. Approximately 5,000 copies were made from a total of 20,000 reviewed pages. Alaska Department of Environmental Conservation (DEC) records were searched in local, regional, and central offices of Kenai, Anchorage, and Juneau. If information was missing or a lack of data was important to document requests were made in writing in accordance with Alaska Public Records Act. Federal records are predominately kept in Seattle and were obtained through the Freedom of Information Act.

Results

The data is organized according to receptor media; that is, air, water, and soils. It is through these media that adverse effects of pollution are transferred between each other and to living things. The total pollution released into each media is listed first then major violations followed by agency responses.

AIR POLLUTION

- RELEASES

The four Nikiski facilities release 67 million pounds of air pollutants annually (Table 1). If these pollutants were individually and uniformly distributed across the state National Air Quality Standards would be exceeded to a height of 250 feet.

MAJOR VIOLATIONS

Unocal-Mitsubishi operates in almost daily violation of Clean Air Act limitations on suspended particulates (1). Major spills of ammonia, as much as 800,000 pounds at one time (2) occur on a regular basis, usually two or three times a year (3). Off site air monitoring instruments have exceeded maximum readings for six hours at a time (4). A major air release occurred during unpermitted hazardous waste treatment, when uncontrolled gasses escaped, (5) spreading across public roads and disrupting industrial operations; including the adjacent liquified natural gas storage facility.

Tesoro refinery hydrocrackers exceed nitrogen oxide standards and Tesoro recently built new sources of air pollution without prior authorization, a violation of the Clean Air Act (6).

At the Phillips-Marathon-USX refinery waste oil and gasses were dumped into a flare pit and burned in violation of air quality standards for a period of 18 years (7).

TABLE 1

Annual Air Pollution from the Nikiski Oil and Gas Industry (8)

<u>pounds</u>	<u>pollutant</u>
30,000,000	ammonia
19,000,000	nitrogen oxides*
5,400,000	carbon monoxide*
4,300,000	hydrocarbons
3,400,000	methanol
2,400,000	particulates*
1,000,000	sulfur oxides*
1,000,000	hazardous waste-arsenic
73,000	benzene
45,000	xylenes
32,000	chloroform
31,000	toluene
18,000	1,1,1 trichloroethane
17,000	cyclohexane
13,000	ethylbenzene
4,000	formaldehyde
500	naphthalene
100	lead*
34	ethylene dichloride
22	polycyclic aromatics
5	ethylene dibromide
2	cadmium
1	chromium
<hr/>	
67,000,000	

(* Clean Air Act permitted releases).

AGENCY RESPONSE

In response to over 15 years of violations at Unocal-Mitsubishi, DEC has done the following: stopped recording violations (9), requested EPA not to issue an enforcement letter to Unocal-Mitsubishi (10), promised to refrain from fines or legal action for past violations (11), amended state air quality regulations thereby creating less stringent standards (12), and allowed Unocal-Mitsubishi to operate with an expired permit.

In response to violations at Tesoro DEC reissued an air permit.

In response to over 18 years of violations at Phillips-Marathon-USX, DEC issued a Notice of Violation.

WATER POLLUTION

RELEASES

The Nikiski facilities release 6.5 million pounds of waste into Cook Inlet each year (Table 2), which does not include the weight of polluted water.

TABLE 2

Annual Surface Water Pollution from the Nikiski Oil and Gas Industry (13)

<u>pounds</u>	<u>pollutant</u>
3,300,000	nitrogen compounds*
2,400,000	sulfuric acid*
690,000	unidentified suspended solids*
140,000	oil and grease*
18,000	zinc*
7,000	ethylene glycol
2,500	1,1,1 trichloroethane
970	chromium*
460	phenols*
550	sulfide*
370	polynuclear aromatics
200	cyclohexane
200	xylenes
130	benzene
60	toluene
7	ethylbenzene
7	arsenic
7	cadmium
4	nickel
4	cyanide

6,500,000

(* Clean Water Act permitted releases).

MAJOR VIOLATIONS

The ammonia/urea plant was formerly owned by "Colliers" at which time self monitoring reports were intentionally falsified (14). More recently Unocal-Mitsubishi dumped hazardous waste containing

methanol and formaldehyde into Cook Inlet in violation of RCRA and the Clean Water Act (15). Unocal-Mitsubishi allowed the out fall diffuser to become plugged, then cut the diffuser off, thus negating the permit mixing zone calculations (16).

Over 200 unpermitted underground injection wells are used to dump water contaminated with ammonia and arsenic (17). A Unocal underground injection well exceeded pressure limits and injected prohibited waste, violations of the Safe Drinking Water Act permit (18).

Tesoro did not meet schedules for effluent bioassays.

Phillips-Marathon-USX uses unpermitted shallow underground injection wells to dump contaminated water. Also the facility discharges waste water into Cook Inlet without a Clean Water Act permit.

AGENCY RESPONSE

After nearly a decade and a half of documented ground water pollution by Unocal-Mitsubishi neither state nor federal authorities have taken enforcement actions.

When Tesoro production capacity increased, EPA and DEC simply allowed total pollution to increase (19) despite the fact bioassay studies have shown the effluent so toxic that all species subjected to a 1:10 dilution were killed and even a 3% mixture severely affected reproduction (20).

SOLID WASTE

RELEASES

Unocal-Mitsubishi disposed of 70,000 pounds of drummed hazardous waste by giving it to the City of Kenai for road oiling (21,22). No records of manifests, storage facility permits, or other required RCRA reports were found in the public record.

Each day Unocal-Mitsubishi dumps 10,000 pounds of metal sludges containing high levels of zinc (250,000 ppm), arsenic (3,300 ppm), copper (25,500 ppm) and lesser amounts of chromium, nickel, lead, and cadmium, into gravel pits (23,24,25). In addition, Unocal-Mitsubishi generates one half million pounds of catalyst each year. Used catalysts are dumped on the ground, used for fill, and buried (26). Laboratory testing in 1983 indicated used catalysts are hazardous waste due to high levels of extractable chromium. Unocal-Mitsubishi repeated laboratory analyses until the catalyst passed EP-tox tests. Intra-laboratory differences of more than 100, between three separate labs were not resolved (27), and the catalyst waste was declared non hazardous.

In a single year as much as 640,000 pounds of hazardous waste were spilled at the ammonia/urea plant (28). Between 1983 and 1985 there were seven reported major hazardous waste spills (29). Halogenated solvents are disposed in waste oil (30, 31), a practice clearly prohibited by the RCRA.

Tesoro generates 10,000,000 pounds of elemental sulfur each year which is dumped on the ground without a permit.

Phillips-Marathon-USX filter charcoal contaminated with arsenic and mercury (32) is used for disposal, masquerading as "road oiling dust control", rather than managed as solid waste. The most recent disposal involved 22,000 pounds of contaminated charcoal. Waste oil, possibly mixed with RCRA listed hazardous waste, is dumped on the ground with the intent of disposal (33).

Chevron dumps "oil filter waste" on roads for the purpose of disposal (34). In the past Chevron dumped hazardous waste in unpermitted pits on Chevron property (35, 36).

MAJOR VIOLATIONS

Unocal-Mitsubishi ignored RCRA regulations and stored over 140,000 pounds of hazardous waste in violation of 40 CFR 270.71. Further mismanagement resulted in unreported spillage from bulldozers knocking over drums of hazardous waste (37). Hazardous waste tanks (190,000 pounds capacity) do not have RCRA tank permits (38).

Tesoro dumped hazardous waste into unlined pits dug in porous soils (39), spread it on public roads (40), illegally stored and shipped hazardous waste (41), and hazardous waste solids were allegedly recycled for disposal pits walls (42).

Chevron adds hazardous waste to consumer products (43). A disposal method not approved by RCRA; because, solids derived from listed hazardous waste are not eligible for recycling (40 CFR 261.1).

AGENCY RESPONSE

EPA cited Unocal-Mitsubishi for violating the same RCRA storage regulation as many as three times in only four months (44).

At Tesoro, EPA imposed fines totalling \$57,750 (45, 46).

Chevron was twice served Notices of Violations by EPA for noncompliance with hazardous waste laws (47).

Discussion

AIR POLLUTION

EPA has delegated authority of the Clean Air Act to DEC. Therefore inspections, reporting, and enforcement are the responsibility of the state. As a result of state authorization DEC lowered state air quality standards; that is, an opacity limit was raised, for the purpose of allowing Unocal-Mitsubishi to gradually come into compliance. However for almost two decades the ammonia/urea plant has exceeded even the generous variance allowed by DEC. When EPA threatened to override DEC primacy the state commissioner pleaded with EPA to not issue an enforcement letter. Unocal-Mitsubishi also leveraged the DEC by pressuring the Alaska legislature. As a result of testimony at public hearings, Unocal-Mitsubishi sent a letter protesting proposed ambient air standards. The protest letter was sent all Alaska's congressmen, governor, and every state representative and senator (48).

Inability and unwillingness to enforce are further illustrated by DEC knowingly allowing construction of new air pollution sources by Tesoro in violation of the Clean Air Act. Despite ongoing violations, the Tesoro permit was renewed. Tesoro and DEC justified renewing the air permit because it would be more economical to bring the facility into compliance at some time in the future.

Prior to DEC acquiring primacy of the Clean Air Act, Alaska had state air quality regulations at which time facilities such as oil and gas platforms and incinerators were required to both obtain operating permits and report regularly. However since assumption of Clean Air Act primacy DEC has substituted less stringent air quality regulations; thus, effectively deregulating oil and gas platforms and large incinerators such as the oily and chemical waste incinerator located at Trading Bay, across Cook Inlet from Nikiski. These deregulated sources are not insignificant. Oil and gas platforms, off shore from Nikiski, emit approximately 34% of the 35 million pounds/year of NO_x produced in upper Cook Inlet. Additional deregulation is evident by the fact that none of the oil and gas platforms; including three with permits, report, measure, or are required to even estimate SO_2 emissions. Despite a history of almost daily violations at multiple facilities, no evidence was found of state assessed fines.

SURFACE WATER POLLUTION

EPA retains authority for enforcing the Clean Water Act. The four Nikiski facilities discharge waste water to Cook Inlet. A review of discharge monitoring reports (DMRs) indicates a high level of

compliance. The exception is an intentional falsification of ammonia/urea plant DMRs. A search of state and federal records did not reveal this enforcement case. However personal communication with a state regional supervisor and enforcement officer revealed the nature of this case. A criminal conviction was reportedly plea bargained for a fine of approximately \$400,000, one of the highest ever assessed nationwide, at the time.

GROUND WATER POLLUTION

DEC regulates the discharge of waste water to the land. However, neither the Unocal-Mitsubishi 200 underground injection wells nor a leaky Unocal-Mitsubishi waste water pipeline nor the several dozen discharges of Phillips-Marathon-USX are permitted. Likewise none of the Nikiski facilities have the state required permits or plans for waste water sludge disposal.

An example of state inability to enforce is illustrated by a Unocal-Mitsubishi response to DEC requests for monitoring wells. Unocal-Mitsubishi claimed their carcinogenic arsenic-containing hazardous waste is "less toxic than table salt" (49). Unocal-Mitsubishi used human subjects for a taste and odor panel to screen for contamination. Unocal claimed "Should any contaminated water somehow reach a domestic water well, the water would acquire a detectable taste or odor prior to becoming hazardous." (50). Eventually Unocal-Mitsubishi groundwater investigations were transferred from RCRA to CERCLA (51). A CERCLA study found that contaminated ground water and unpermitted air releases resulted in a Hazard Ranking System score over 30, high enough for National Priorities List nomination (52). Later, ground water compliance issues were reassigned back to RCRA. There are neither plans nor schedules to evaluate the contamination issues under either RCRA or CERCLA. In the future DEC may request Unocal-Mitsubishi to study their ground water problems.

SOLID WASTE

Solid waste regulations are a complex web of state and federal laws. State laws regulate non-RCRA solid waste. None of the facilities have solid waste permits yet they all dispose of solid waste on their facilities. No record was found of any attempt by DEC to require solid waste permits of these facilities. Additional evidence of widespread disregard for solid waste regulations is borne by the fact that 60 nearby pits used for disposal of drilling muds have no permits.

RCRA waste is regulated jointly by EPA and DEC. EPA actions have resulted in several major compliance actions with fines. Additional federal actions include forcing Tesoro to submit closure plans for

unlined hazardous waste surface impoundments. DEC actions are limited to a few simple reports by an inexperienced inspector. DEC has never taken a RCRA sample from any of the four Nikiski facilities (53).

Conclusions

- I. Environmental laws with sole federal jurisdiction; such as the Clean Water Act in Alaska, have the best compliance record.
- II. When the state is authorized to enforce federal environmental laws; such as, the Clean Air Act and Resource Conservation and Recovery Act, compliance is limited to incidents of federal involvement.
- III. State environmental laws without federal oversight are virtually without compliance and enforcement; such as, solid waste, waste water, and waste water sludges.

References

1. G. O'Neal, (undated). Notice of Violation from EPA to CT Corporation System Agent of Unocal-Mitsubishi, EPA file No. 1087-04-05-113.
2. Tryck, Nyman and Hayes. (1.87). Suspected Uncontrolled Hazardous Waste Site Inspection. DEC CERCLA Site Inspection
3. P. Crawford, (August 9, 1988). What is the Unocal-Mitsubishi Plant Putting Into the Air?. Peninsula Clarion. pp. 1, 20,24.
4. M. Lucky, (June 12, 1985). memo to file DEC Kenai Office.
5. D. Turner, (September 1, 1982). letter from Unocal-Mitsubishi to M. Lucky of DEC.
6. R. Grantham, (March 4 and 30, 1988). letters from Tesoro to L. Verrelli of DEC.
7. M. Lucky. (May 12, 1986). Notice of Violation Permit #8223-AA 002. DEC vs. Phillips Petroleum Company.
8. Data compiled from air permits, SARA Title III facility reports and Alaska Air Toxics Emission Inventory. EPA Region X Contract Number 68-02-3899 Work Assignment 81.
9. M. Schulz, (April 20 1987). EPA Notice of Violation Report.

10. D. Kelso, (May 15, 1987). letter from Commissioner of DEC to Air and Toxic Division Director EPA.
11. Compliance Order by Consent. (1987) DEC vs. Unocal-Mitsubishi.
12. L. Verrelli, (June 27, 1988). letter from Air Quality Program Manager DEC to Unocal-Mitsubishi plant manager.
13. Data compiled from federal and state waste water permits, and SARA section 313 of Title III facility reports.
14. R. Bayliss, B. Lamoreaux, (1988). personal communication.
15. R. Burd, (February 27, 1987). letter from EPA to W. White of Unocal-Mitsubishi.
16. EPA. (July 26, 1988) Fact Sheet Regarding Unocal-Mitsubishi NPDES Permit Number AK-000050-7.
17. M. Lucky, (August 6, 1984). letter from DEC to D. Turner of Unocal-Mitsubishi.
18. R. Burd, (April 10, 1987). letter from EPA to G. Graham of Unocal-Mitsubishi.
19. R. Bowker, Department of the Interior to H. Geren Chief of Water Permits and Compliance Branch EPA.
20. B. Duncan, (January 6, 1987). memorandum from EPA to J. Howe of DEC.
21. W. White, (November 20, 1986). letter from Unocal-Mitsubishi to B. Brighton of City of Kenai.
22. K. Laurie, (June 11, 1987). letter from Unocal-Mitsubishi to K. Kornelius of City of Kenai.
23. Unocal-Mitsubishi. (December 4, 1980). Schematic of Water Flow from NPDES Application.
24. EPA. (July 26, 1988) Fact Sheet Regarding Unocal-Mitsubishi NPDES Permit Number AK-000050-7.
25. Tryck, Nyman and Hayes. (1987).
26. Tryck, Nyman and Hayes. (1987).
27. C. Heus, (October 20, 1983). memorandum from Union Oil Company Chemicals Division to Turner.

28. M. Lucky, (March 5, 1984). memorandum of DEC to B. Lamoreaux.
29. Tryck, Nyman and Hayes. (1987).
30. Tryck, Nyman and Hayes. (1987).
31. C. Burgh, (May 31, 1986). notes of DEC concerning Unocal-Mitsubishi.
32. H. Patterson, (March 4, 1988). letter from Phillips Petroleum Company to L. Leatherberry of DEC.
33. C. Burgh, (September 16, 1987). RCRA Inspection Report of DEC Phillips Petroleum Company Kenai Plant.
34. R. Williams, (April 16, 1984). letter from Chevron USA Kenai Refinery to M. Lucky of DEC.
35. Tetra-Tech. (1984). Preliminary Assessments on 45 Potential Uncontrolled Hazardous Waste Sites. DEC CERCLA.TetraTech
36. C. Rice, (March 3, 1985). memorandum of EPA to S. Torok.
37. A. Smith, (February 29, 1984). Complaint and Compliance Order RCRA Docket No. X84-02-08-3008, EPA vs. Union Oil Company of California.
38. K. Laurie, (July 19, 1985). letter from Union Oil Company to J. Webb of EPA.
39. C. Findley, (September 28, 1987). Complaint and Final Order on Consent Requiring Submission and Implementation of Proposal for Sampling, Analysis, Monitoring, and Reporting RCRA Docket Number 1086-07-12-3008 from EPA to Tesoro Alaska Petroleum Co.
40. M. Necessary, (August 9, 1988). personal communication.
41. R. Fuentes, (July 27, 1984). memorandum of EPA to the file of Tesoro Alaska Petroleum Company RCRA.
42. S. Torok, (May 5, 1983). letter from EPA to R. Measles of Tesoro Alaska Production Company.
43. C. Burgh, (September 16, 1987). RCRA Inspection Report DEC on Chevron USA Kenai Refinery.
44. C. Findley, (November 14, 1984). Notice of Violation and Warning letter from EPA to Keith Laurie of Union Oil Company of California.

- JHM-51-92 FRI 14:21 HHSNA HEALTH PROSEC
45. M. Caldwell, (September 30, 1986 - facsimile date). Complaint and Compliance Order RCRA Docket Number 1086-07-12-3008 from EPA to Tesoro Alaska Petroleum Company.
 46. C. Findley, (September 28, 1987). Complaint and Final Order on Consent Requiring Submission and Implementation of Proposal for Sampling, Analysis, Monitoring, and Reporting RCRA Docket Number 1086-07-12-3008 from EPA to Tesoro Alaska Petroleum Co.
 47. I. Alexakos, (November 12, 1987). memorandum of EPA to C.Rice.
 48. W. White, (August 31, 1988). letter from Unocal-Mitsubishi to Senator F. Murkowski.
 49. D. Turner, (July 20, 1983). letter Unocal to M. Lucky of DEC.
 50. C. Scott, (January 22, 1975). letter from Unocal to D. Wright of Collier Carbon and Chemical Corp.
 51. G. Miller, (June 6, 1985). memorandum of DEC to D. DiTraglia.
 52. Tryck, Nyman and Hayes. (1987).
 53. L. Dietrick, (September 14, 1988). letter from DEC to C. Reller.

Dave Heynen, AIA
608 West 42nd Ave
Anchorage, AK 99503

Phone: 265-4410

Representative Dave Donley,

I understand that a vote is scheduled for this afternoon in the Judiciary Committee on HB 29. I urge you to vote against passing this bill along. HB 29 will give anyone the power to stop development projects due to alleged violations of environmental laws. I believe the intent of this bill is good, but the language currently will create unfounded litigation and delays to worthwhile construction projects, thus adding cost....

As an architect, a lifelong Alaskan, and a constituent of yours concerned about the future of our state, I urge you to vote against HB 29 and look for legislation that will encourage a diversified industrial base for Alaska's future economic health....let's see some incentives for sensible development of our proven resources.

Dave Heynen

DAVE H.

February 21, 1992

Attn: Representative Dave Donley

From: Greg Thompson

Subject: House Bill #29

I am sending this fax in regards to House Bill 29 scheduled before the House Judiciary Committee at 1:30 today.

This bill, as I understand it, has "FIASCO" written all over it. Please do all that you can to ensure that it meets its much deserved demise.

Thank You,

A handwritten signature in cursive script, appearing to read "Greg Thompson", written over a vertical line.

Greg Thompson

10460 Old Seward Highway
Anchorage, Alaska 99515

(907) 349-6474

February 21, 1992

Representative Dave Donley
Ref. HB 29

Dear Representative Donley,

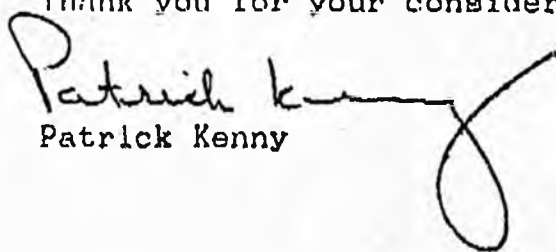
I have heard quite a bit about House Bill 29, and what it would do the Alaskan economy if it were to pass. I have heard both the pro's and con's connected to this bill. I must say that, in my opinion, if this Bill were to pass we would once again pound another nail in our coffin.

I am sure that you have heard the saying, "WE HAVE MET THE ENEMY AND HE IS US", well it is certainly the case in this instance. I am sure that the intent was good behind this Bill; However, I am positive that the thought process was a little cloudy, to say the least.

We need to ensure that positive development continues in the state for ourselves and our children. We have already placed so many obstacles in the way of progress that any real development either can not take place, or is so far in the future our lifetime will never see it.

In summary, this bill must be killed immediately before it goes any further, and you must ensure that it can not rear it's ugly head at any time in the future.

Thank you for your consideration.


Patrick Kenny

To: Rep. Cliff Davidson
Rep. Fred Ghasoff

Re: Citizen Suits; HB 29 (SS) Citizen Suits to Enforce
Environmental Laws

The Roadside Environmental Network (REN) supports the passing of HB 29. Recommendation by the Oil Spill Commission advised the state to adopt citizen suits as a component in Alaska's regulatory scheme. Citizens suits can help give people power to enforce pollution laws when normal administrative channels are not adequate.

We support the bill because:

- 1) It provides an incentive to industry to prevent pollution & comply with anti-pollution laws
- 2) Citizens are watching when DEC is not
- 3) It pushes DEC to take action against polluters & enforce the laws
- 4) People can take action against polluters when DEC has failed to.

The intention of the bill is to enhance the interest of public interest laws. The result would be a cleaner and safer environment for us all. Congress has recognized the right of the citizen to sue for enforcement & allows this under the Clean Water Act, Clean Air Act, & other federal laws. Now it would be a good time for the state to recognize the value of citizen suits.

The EXXON-VALDEZ OIL SPILL might never
have occurred had citizen suits enforced
the existing pollution laws. DEC is under-
funded & understaffed & this would help
the enforcement of our pollution laws.
We hope you will support this bill.

Thank you,
Sincerely,
Tracy Akers
Kodiak Environmental
Network
PO. BOX 2661
KODIAK, AK 99615

1/31/92

Rep. Dave Donley
Chairman, House Judiciary Comm.
Capitol Room 122
Juneau, Alaska 99811

Dear Rep. Donley:

I understand HB 29, authorizing suits to enforce environmental laws, will be heard in your committee on February 3, 1992. I would like to express my concerns about the bill, and request, as well, an opportunity for a teleconference dedicated to this legislation so others like myself can be heard.

I am opposed to HB 29 for a variety of reasons. First, the Alaska Department of Environmental Conservation is charged with monitoring suspected environmental violations, and currently has the authority to pursue any such violations.

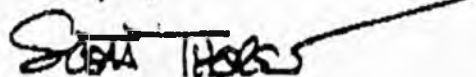
Allowing private actions to be brought against alleged violators will result in a legal free-for-all that would ultimately line the pockets of the environmental groups, who currently lead the charge to stop most development in Alaska. I cannot imagine that trend would do anything but increase under this legislation, since the groups could then take on the role of pseudo-enforcer through their favorite venue - the court system.

In addition, several other states have enacted similar legislation, and according to reports I have read, the end result is the environment gains little from these lawsuits, with most of the penalties or profits going straight to the third-party groups (primarily environmental organizations), which pursue the legal action. I think if you look at the previous hearing record on this bill, and note that the Attorney General's office is opposed to it, and a slew of environmental groups, particularly those that have litigation arms, support HB 29, you can see my point.

This legislation has the potential to do massive damage to the current system, where enforcement is rightfully placed with the state and federal branches of government.

Again, I oppose this bill and request an opportunity for myself and others to testify via the teleconference network at a future date.

Thank-you,



Scott Thorson

2356 Sonstrom Dr.
Anchorage, Alaska 99517
Ph: 243-0644

Feb. 6, 1992

Representative Dave Donkey
Alaska State Legis Bldg
P.O. Box V (MS 3100)
Juneau, Alaska 99801

Dear Representative Donkey:

I am writing to express my opposition to CS 55 HB 29, which would allow citizen lawsuits to enforce environmental laws and regulations.

Current laws vest enforcement authority in State agencies, particularly in the Department of Environmental Conservation. Permitting individuals to share that authority could only undermine DEC's authority. In time, it is possible that DEC would come to rely on such citizen suits as a means of enforcing its authority.

Suits filed by private citizens

2

and organizations do not always consider all of the facts, or even contract or permit stipulations. In such cases a great deal of time and funds of all parties concerned, including the courts, is wasted.

Should such a suit be successful, the penalties - financial penalties - would be awarded to the litigant. This is an open invitation to harassing suits by litigants who, if they do not hope to win, can hope to settle for some lesser sum out of court.

The concept of using the State as a means of increasing one's income appears unethical. Yet that is just what awarding financial penalties to a litigant would do. The potential for abuse of subsection (f) is far too great.

Lastly, public interest groups and individuals who disapprove of development, either a specific project or development as a concept - any development - are invited to try to stop it after all permits have been issued and work has commenced. With increasing costs of both development and government, this is a sure recipe for disaster.

Please use your influence to drop CS55 HB 29 from further consideration.

Sincerely yours,
George R. Schmidt
George R. Schmidt

Representative Donnely
165-2299

Dear Sir:

Please add my name to the list of people OPPOSED to HB 29, Citizens Suits to Enforce Environmental Laws.

If Laws are broken, it should be up to the State to enforce these laws. Upon successful prosecution any fines levied or judgements received should accrue to the State, not a private citizen .

Sincerely yours,

Joseph F. Ruzicka
4065 Hood Court
Anchorage, Ak 99517

February, 6, 1992

Representative, Dave Donley
Chairman, House Judiciary Committee
Capitol Room 122
Juneau, Alaska 99811

RE: HB29 and CS

Dear Representative Donley,

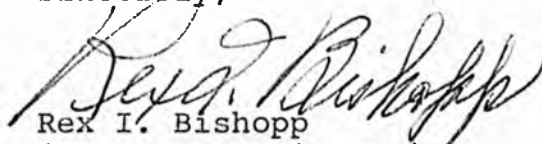
With reference to HB29, I wish to advise you that I am strongly opposed to this bill becoming law. It appears to be a bill that, if enacted, would encourage filing of lawsuits against companies who are "ALLEGED" to have violated pollution control laws.

We already have in place a strong Alaska Department of Environmental Conservation, which is charged with monitoring environmental concerns and has the authority to assess penalties if need be.

Passage of this bill would add another impediment to economic development and another set of regulations to business that is already overburdened with cumbersome regulations.

Again, I oppose this bill and strongly urge you and your associates in the legislature to see that this bill does not become law.

Sincerely,



Rex I. Bishopp
4150 North Point Drive
Anchorage, Alaska 99515

33:RIB:AH11

36
3-2-92

31 January 1992

Representative Dave Donley
House Judiciary Committee
PO Box V
Juneau, Alaska 99811

Dear Chairman Donley:

I would like to express my opposition to House Bill 29, which would allow citizen's lawsuits to enforce environmental laws and regulations. Please enter this letter in the record for the February 3, 1992 hearing, as well as my request for a future teleconference to allow adequate discussion of this bill before the House Judiciary Committee.

As a long-time, responsible Alaska miner and industry consultant, I am opposed to HB 29 for a variety of reasons. The amended version does little to correct the primary problem with this bill, which is setting up citizens as private enforcers of state laws and regulations.

Specifically, this bill will repeal a subsection of state law (AS 64.03.870 a) and would expose an alleged polluter not only to an enforcement action by the Department of Environmental Conservation, but also to complaints of others. This results in an alleged violator being exposed to numerous suits, many of which, I believe would be instigated for the sake of harassment.

There are numerous other subsections of this bill that pose serious problems. They include subsection (f), which permits a court to assess penalties against an alleged polluter, and because of the repeal of subsection (a), those penalties would be awarded to the citizen litigant. This section alone will do more to encourage public interest groups to accelerate their abuse of the court system than virtually any section in the bill.

In addition, I am concerned with subsection (h), which removes from the DEC commissioner the opportunity to investigate an alleged violation to decide what to do. Rather, it forces the commissioner to rush to court in order to maintain control of the incident and

HB 29, Page 2

Glavinovich

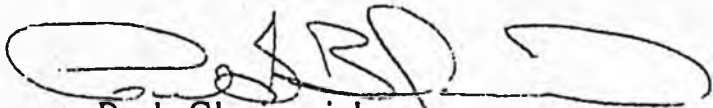
resulting litigation. This particular language forces a direct competition between a state agency charged with enforcing environmental laws, and an overzealous public interest group or citizen interested in pursuing their own legal agenda.

Taken in its current context this bill will plainly encourage non-development, public interest groups to seek out alleged violations, pursue them through the courts, and pocket the proceeds from the fines assessed. This process does not benefit the environment, it does not benefit the state, which is charged with enforcing such laws, and it certainly does not benefit any legitimate industry or business, which deals regularly with DEC. Under HB 29, the person or groups receiving the process from fines assessed by the court is not required to make a report regarding any expenditures of the funds.

Finally, this bill in its entirety would strip the DEC commissioner of administration responsibilities for anti-pollution laws and regs. But worse than that, it strips from an alleged violator the rights guaranteed under both the 5th and 14th Amendments to the U.S. Constitution and Article I of the Alaska Constitution, which are designed to restrain the power of government, not individuals citizens. Endowing citizens with governmental powers, without the afore-mentioned constitutional restraints, will limit the court's ability to guarantee a fair result under HB 29.

I strongly oppose HB 29 and ask that this committee plan a future teleconference hearing to allow further public input.

Sincerely,



Paul Glavinovich



Alaska State Legislature

Please enter into the record my testimony to the Judiciary
committee name
 committee on HB 29, dated 3/9/92
bill/subject

I urge you to support this very important piece of legislation. Please allow the people access to get back into the governing. The people are apathetic now because it is hard to have input into the system. Now all kinds of criminals are able to hide behind the corporate veil. This bill will allow the public to flush some of them out. It will put some power back in the hands of the people and out of the corporations. The corporations need to be reined in as they are now out of control and destroying the biological systems that support us.

Signed: Wane Lane
 Testifier

Representing (Optional) Box 81765, Anchorage 99708

Address 474 8224

Phone No.



Alaska State Legislature

Please enter into the record my testimony to the HOUSE JUDICIARY COMMITTEE
 committee name
 committee on HOUSE BILL 29, dated 5/20/91
 bill/subject

"HAZARDOUS WASTE" AND "HAZARDOUS SUBSTANCE" ARE DEFINED IN AS 46.03.826, 46.03.900 AND 46.09.900. THE DEFINITION FOR "HAZARDOUS SUBSTANCE" IS VERY THOROUGH, WHILE THE ONE FOR "HAZARDOUS WASTE" IS VERY INCOMPLETE. ~~HAZARDOUS WASTES~~

I SUGGEST THIS REMEDY:

IN 46.03.900, STRIKE SECTION (9) AFTER THE WORD "CHARACTERISTICS" AND ADD, "IS A ~~THE~~ HAZARDOUS SUBSTANCE AS DEFINED IN AS 46.03.826;"

IT MUST BE MADE CLEAR THAT HAZ. WASTES ARE HAZ. SUBSTANCES, AND THAT THEIR EFFECTS ON PUBLIC HEALTH & WELFARE, FISH, ANIMALS, VEGETATION, ETC. ARE ALL IMPORTANT, NOT JUST THE EFFECT MORTALITY AND ILLNESS (HUMAN ASSUMED) IN 46.03.900.

Signed: Larry Edwards LARRY EDWARDS
 Testifier

Representing (Optional)
BOX 6001 SITKA
 Address
747-8996
 Phone No.



ASSOCIATED GENERAL CONTRACTORS of ALASKA

4041 B STREET • ANCHORAGE, ALASKA 99503
P.O. BOX 240409 • ANCHORAGE, ALASKA 99524-0409
TELEPHONE (907) 561-5354 • FAX (907) 562-6118

Post-It™ brand fax transmittal memo 7671		# of pages ▶
To	Rep. Dave Donley	From H. Springer
Co.	House Judiciary	Co. AGC
Dept.		Phone # 561.5354
Fax #	465.2299	Fax #

7/Febr. 1992

To

Rep. Dave Donley
House Judiciary Committee
Juneau, Ak.

Subject:

CS SS HB 29 (Resources)

"An Act authorizing suits to enforce environmental laws"

AGC of Alaska is strongly opposed to this bill.

This is another example of completely unnecessary legislation! More than sufficient laws and regulations are in place to protect the environment from pollution and enable adequate enforcement of its provisions. Private individuals and groups have enough access to the processes to safeguard enforcement and corrective actions through the established law enforcement agencies at all Governmental levels.

This bill does not only create unwarranted interference from private sources into Governmental affairs, it creates also incredible possibilities for excessive costs, confusion over jurisdiction and in summary is bad public policy.

This bill deserves to die in committee.

Sincerely,

Henry Springer
Henry Springer
Director

Alaska State Legislature
Representative Niilo Koponen

Pouch V
Juneau, Alaska 99811
(907) 465-4992

House District 21

119 N. Cushman, Suite 207
Fairbanks, Alaska 99701
(907) 456-8172

**Citizen Suits
Questions and Answers**

Q. What is the need for this law?

A. The regulatory process has not worked as well as it could, either due to shortcomings inherent in any bureaucracy or due to lack of funding. In some cases it has failed spectacularly. Testimony received by the House Resources Committee indicated that Alaskans have seen property values destroyed, water wells poisoned, air degraded and fisheries threatened. In one instance, Alaskans waited nine years for the state to act. In the case of the Exxon Valdez disaster, a citizen suit over Alyeska's failure to live up to its permit obligations could have forced the company to be ready when the oil first hit the water.

Q. Don't citizens already have a way to stop pollution and protect themselves through common nuisance suits?

A. Common nuisance suits can, indeed be brought, but only after the damage has been done, small comfort to someone whose drinking water or property value is threatened. Moreover, it is extremely difficult to prove that a particular pollutant or polluting activity caused a particular injury. Environmental laws were established because of the recognition that pollution needs to be stopped before people are hurt and the environment damaged. HB 29 is about preventing pollution, not about recovering damages.

Q. Do citizen suits create unpredictability for industry by allowing suits at any time for past violations.

A. No. HB 29 is limited to three sections of statute (AS 46.03, 46.04 and 46.09) which describe ongoing violations.

In a similar question under federal law, the U. S. Supreme Court has ruled (*Gwaltney v. Chesapeake Bay Foundation*) that only violations which are ongoing or likely to recur are subject to such suit under federal laws. Because HB 29 has been drafted using the same language which was under review in Gwaltney, it is expected that should the issue ever arise, our courts would interpret the law in a similar fashion.

Citizens Suits Q & A

p. 2

Q. Does the inclusion of violations of "permits, plans or orders" in this bill unduly broaden the scope of citizen action?

A. The inclusion of "permits, plans or orders" in language throughout the bill is designed to encourage the regulatory process to work. Laws are crafted broadly. Permits, plans and orders are specific instructions which contain DEC's determination of what a company must do to comply with the law. They are usually drawn up with maximum industry involvement. Allowing citizens to sue only when laws or regulations are violated would circumvent this regulatory process and cast a cloud over such vehicles as compliance orders, which allow industry some latitude for a period of time while measures are being taken to meet environmental standards. Deletion of the language would substitute a hammer for a scalpel and would work to undermine, not strengthen, industry confidence that legal obligations can be met by following DEC instructions.

It is important to note that citizens would only be able to sue a polluter when a permit, plan or order was being violated. Nothing in this bill would allow suit to be brought against an operator simply because a citizen disliked the terms of the permit, plan or order.

Q. Would this bill undermine the finality of legal or administrative action by permitting repeated suits over the same issue.

A. No. Just as in any other area of law, once an issue is decided, it cannot be brought again. Nothing in this bill would override that common legal practice. Again, administrative action would still be, as it is now, final, so long as industry is not violating the terms of any law, permit, plan, or order under which it is operating. Only when those terms are broken could a citizen bring suit. This bill would buttress the administrative process by providing an incentive to comply with legally binding requirements.

Q. Will this law excuse citizens from participating in the agency process to challenge and agency decision?

A. No. This bill has nothing to do with judicial review of agency decisions. A person who wants to challenge an agency permit, order, regulation or other decision will still be required to follow the procedure now in place to bring a lawsuit. Those rights and responsibilities are already spelled out in existing law. This bill simply allow citizens to go to court to enforce the requirements of law, including final agency regulations, permits or orders, against those who are in violation of those requirements. It does not allow citizens a second opportunity to challenge final agency actions.

Citizens Suits Q & A

p. 3

Q. Would HB 29 result in a proliferation of new lawsuits?

A. Nowhere else has this happened. Similar laws have existed for nearly two decades at the federal level and in seventeen states and the District of Columbia. A survey done by the Legislative Research Agency indicates that citizen suit laws are used sparingly. Anecdotal evidence indicates that such laws have exactly the effect intended by the sponsor, i.e., there is greater compliance by industry and greater effectiveness of regulatory agencies.

Q. Will this bill interfere with DEC's ability to settle with industry for violations of pollution laws?

A. No. DEC can reach settlement of an action in court or administrative penalty proceeding without interference from citizens suits.

Alaska State Legislature Representative Niilo Koponen

Pouch V
Juneau, Alaska 99811
(907) 465-4992

House District 21

119 N. Cushman, Suite 207
Fairbanks, Alaska 99701
(907) 456-8172

* Sponsor Statement * SSHB 29

SSHB 29 is intended to give citizens the right to bring polluters to justice when the state lacks the resources to do so. This measure is patterned after federal law, which has been in effect since the early 70's and has proven both judicially acceptable and practical. Citizen suits are provided for in the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Surface Mining Control and Reclamation Act. Seventeen states also have citizen suit provisions.

People facing daily threats to health and well-being from environmental pollution deserve the protection of the law. Often, however, government has inadequate resources to remedy such violations. SSHB 29 would complement the Department's enforcement procedures and afford citizens the protection they currently do not have. The Oil Spill Commission, recognizing that citizen participation would enhance Alaska's regulatory effectiveness, included citizen suits among its recommendations. Citizen suits become especially appropriate in the era of declining state revenues which may soon be upon us.

In the aftermath of the oiling of Prince William Sound, and in light of incidents such as the Kenai dumping now known as Poppy Lane, it is apparent that an involved citizenry is crucial to effective oversight of industry operations. Nothing keeps regulators and industry alert as the active involvement of local residents who have their interests at stake. The key to involving citizens is empowering them. Citizens suits clearly and unequivocally place those who have the most to lose in a position to act.

Alaska State Legislature
Representative Niilo Koponen


Pouch V
Juneau, Alaska 99811
(907) 465-4992

House District 21

119 N. Cushman, Suite 207
Fairbanks, Alaska 99701
(907) 456-8172

M E M O R A N D U M

To: Rep. Cliff Davidson
Chair, House Resource Committee

From: Rep. Niilo Koponen 

Re: Citizen Suits

Date: 2/27/91

The following are states identified by Legislative Research as having broad-based citizen suit provisions in their statutes, that is, statutes which are not tied to narrowly defined causes of action.

Connecticut
Florida
Indiana
Michigan
Minnesota
New Jersey
Massachussets
Nevada
South Dakota
Louisiana
Illinois
Wyoming

In addition, the following states provide for citizen action in certain areas.

Idaho - hazardous waste
Ohio - solid and hazardous waste
Pennsylvania - solid waste
California - coastal protection
District of Columbia - water pollution

This list is probably incomplete, as citizen suit provisions are often embedded in inconspicuous places. Alaska is a case in point. Citizen suits are currently provided for in our Oil & Gas Commission statutes and surface coal mining laws.

Alaska's Oil & Gas Commission statutes are unique, and bear close scrutiny. I have provided committee members with copies. So important did the legislature consider these



Alaska Action Trust

P.O. Box 102323 • Anchorage, Alaska 99510
Office: 540 L Street, Suite 104 • Anchorage
(907) 258-4040

HB 29 - CITIZENS SUITS TO ENFORCE ENVIRONMENTAL LAWS

HB 29 is intended to empower citizens of the State of Alaska who are directly affected by environmental law violations to bring suit to compel the Department of Environmental Conservation (DEC) to act against violators. HB 29 also allows for direct enforcement by the affected citizen. The intent of the bill is to increase the effectiveness of public interest laws by promoting voluntary compliance and citizen enforcement resulting in a safer, cleaner and healthier environment. The beauty of HB 29 is that it clearly places those who have the most to lose in a position to act to enforce environment laws.

Citizen suit provisions are not new or unique. They are provided for in the Clean Air Act, Clean Water Act, Resource Conservation Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), and the Surface Mining Control and Reclamation Act. At least 17 states also have citizens suit provisions as part of their state statutory scheme.

Will this well-intentioned legislation lead to the feeding frenzy by lawyers and the mountains of litigation predicted by some critics? It doesn't seem likely. The State of Alaska's Legislative Research Agency has investigated the effect that citizen suit legislation has had in other states. On March 15, 1991, a legislative analyst reported to Representative Koponen that the citizen suit provisions in other states were rarely used. While accurate statistics were not kept, estimates varied from a reported low in the state of Wyoming (where the official contacted could remember only one instance of the citizen suit provision leading to litigation) to a record high in the well-populated state of New Jersey, where a whopping 24 cases a year are estimated to have been filed since initiation of that state's citizen suit legislation.

HB 29 doesn't give citizens the resources to develop their cases or promote their rights. It does provide a legal tool to help protect people who are the victims of pollution or toxic exposure. Currently these people must depend on the DEC, a state agency that has traditionally been unloved, under-funded, and thus constrained by practical circumstances to be less than an effective advocate for the poison-free environment that we have too long taken for granted, but all wish to make our homes in.

Individual citizen litigants have no monetary incentive under HB 29

to participate in the litigation. If the litigation is effective, they may protect their homes or their families; they won't get rich in the process. Their attorneys in these cases won't get rich either. The most the bill provides to the citizens' counsel is the hope of sooner or later being paid for work that has long since been performed.

Most of the criticisms of HB 29 have been offered by industrial polluters. The fact of the matter is that Alaska, with over 1,000 identified hazardous waste sites, has been used as a dumping ground for industry for a long time. HB 29 is not a cure-all. It will, however, give those people whose lives and property values are directly affected by illegal conduct a chance to stand up for themselves when government either cannot or will not stand up for them. It is an idea whose time has come, and it deserves our support.



Letter submitted by Gerald Hooper, 2-14-92 House Judic. Hearing.

SIERRA CLUB LEGAL DEFENSE FUND, INC.

Sunrise, Mt. McKinley

Ansel Adams

419 6th Street, Suite 323

Juneau, Alaska 99801

(907) 586-2751

ALASKA OFFICE

Lauri J. Adams
Philip S. Barnett
Staff Attorneys

Fern L. Shepard
Law Associate

Other Offices

SAN FRANCISCO OFFICE

2044 Fillmore St.
San Francisco, CA 94115
(415) 567-6100

ROCKY MOUNTAIN OFFICE

1600 Broadway St.
Suite 1600
Denver, CO 80202
(303) 863-9898

WASHINGTON, DC OFFICE

1516 P Street, N.W.
Suite 300
Washington, DC 20005
(202) 667-4500

NORTHWEST OFFICE

216 First Avenue, South
Suite 330
Seattle, WA 98104
(206) 343-7340

August 26, 1987

CERTIFIED MAIL

Our File

BLM District: Steese/White Mountain
BLM Claim Nos.: F-70054, F-70051

Gerald W. Hooper
P.O. Box 2750
Palmer, AK 99645

Re: Notice of Violations of § 301 of the Clean Water Act, 33 U.S.C. § 1311

Dear Mr. Hooper:

The Sierra Club, the Northern Alaska Environmental Center, The Wilderness Society, Birch Creek Village, the Native Village of Minto, and Cenaliulriit Coastal Management District have requested that I inform you that you appear to have violated the Clean Water Act by discharging dredged and fill materials into the waters of the United States without a permit from the United States Army Corps of Engineers.

The Clean Water Act prohibits the discharge of any pollutants into the waters or upon the wetlands of the United States without compliance with its provisions. See 33 U.S.C. § 1311. Section 404 of the Clean Water Act provides that the discharge of dredged or fill material requires a permit from the United States Army Corps of Engineers. See 33 U.S.C. § 1344. We believe that your placer mining operations are in violation of these requirements for the following reasons:

(1) Your 1986 Annual Placer Mining Application (APMA No. 852881) indicates that your reclamation plans include reestablishing stream channels. This implies that your operations have disrupted or will disrupt the stream channels through the discharge of dredged or fill material into the waters of the United States. 33 C.F.R. § 323.2(d) and (f). (If there were no disruption through the discharge of dredged or fill material, there would be no need to reestablish the stream channels.) You do not have the § 404 permit required for such discharge, as far as we can determine.

(2) Regardless of whether the disruption of the stream channels caused by your operations involves the discharge of dredged or fill materials, the reestablishment of the channels planned in your annual application will. 33 C.F.R. § 323.2(d) and (f). You do not have the § 404 permit required for such discharge, as far as we can determine.

(3) Your five-year mining plan that you submitted to the Bureau of Land Management on July 24, 1986, states that in 1988 you plan to "move Swift Creek via a culvert." Moving a creek results in the discharge of dredged or fill material into the waters of the United States. 33 C.F.R. § 323.2 (d) and (f). You do not have the § 404 permit required for this discharge, as far as we can determine.

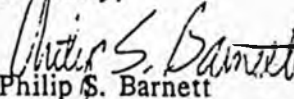
In addition to the violations listed above, we believe that you have violated the dredge and fill permit requirements of the Clean Water Act in conducting your operations by building tailing piles, settling ponds, roads, and other structures on wetlands without obtaining a § 404 permit.

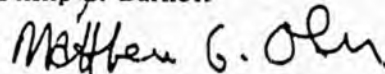
Your failure to obtain the necessary permits prior to discharging dredged or fill material constitutes a violation of the Clean Water Act. As such, you may be subject to a civil enforcement action in federal court and you may be liable for penalties amounting to \$25,000 per day of violation. See 33 U.S.C. § 1319(d).

Pursuant to the notice requirement of § 505 of the Clean Water Act, 33 U.S.C. § 1365(b), we hereby advise you that you should obtain the appropriate permits from the United States Army Corps of Engineers prior to commencing operations in 1988 or you may be subject to a civil enforcement action initiated by one or more of the organizations listed above. We suggest that you contact the Corps as soon as possible to obtain a permit application so that processing of your application can be completed before the start of the 1988 mining season. The Corps' Permit Processing Section in Alaska can be contacted at 907/753-2712, or toll-free at 800/478-2712, or by mail addressed to P.O. Box 898, Anchorage, Alaska 99506-0898.

If you believe that this notice of violation is in error in any way, please write to us as soon as possible.

Sincerely,


Philip S. Barnett


Matthew G. Olsen (law clerk)

cc: Colonel Wilbur T. Gregory, Jr., District Engineer, United States Army
Corps of Engineers, Alaska District
Lee M. Thomas, Administrator, Environmental Protection Agency
Robie G. Russell, Regional Administrator, Environmental Protection Agency,
Region 10
Michael Penfold, State Office Director, Bureau of Land Management, Alaska
Dennis D. Kelso, Commissioner, Alaska Department of Environmental
Conservation

TO: HOUSE JUDICIARY COMMITTEE
FROM: GERALD W. HOOPER BOX 875272 WASILLA, ALASKA
REF: H.B. 29

I HAVE BEEN A RESIDENT OF ALASKA FOR APROX 20 YEARS
I AM A RETIRED ALASKA STATE TROOPER AND AM CURRENTLY
WORKING AS AN INSTRUCTOR IN THE FIELD OF HAZARDOUS
MATERIALS AND RESPONSE TO EMERGENCY RELEASES OF HAZARDOUS
MATERIALS

I AM ALSO A GOLD MINER CURRENTLY HOLDING OVER 300 ACRES OF
FEDERAL MINING CLAIMS NORTH OF THE YUKON RIVER.

WITH MY BACKGROUND I AM VERY CONCERNED AND HAVE BEEN
VERY CONCERNED THAT MY MINING OPERATIONS MEET OR EXCEED
THE STANDARDS ESTABLISHED BY THE LAW AND HAVE INFACCT
GONE TO EXTRA EXPENSE TO INSURE THAT I AM ABLE TO PREFORM
MY OPERATIONS WITH A MIMIMUM OF IMPACT TO THE
ENVIRONMENT.

IN JULY OF 1986 I FILED A FIVE YEAR ANTICIPATED MINING PLAN
WITH THE BUREAU OF LAND MANAGEMENT AFTER CONFIRMING
THAT MY OPERATION AND PLAN WOULD BE IN COMPLIANCE WITH
ALL APPLICABLE REGS AS ISSUED BY BLM, EPA, CORP OF ENGINEERS
AND STATE DIVISION OF DEC, AND ADF&G.

IN AUG OF 1987 I RECIEVED THE ATTACHED LETTER FROM THE
SIERRA CLUB LEGAL DEFENSE FUND

WHAT IS INTERESTING WAS THAT I WAS 2 YEARS BEHIND IN MY
PLAN AND HAD YET TO BEGIN MY OPERATION ADDITIONALLY I HAD
(PRIOR TO SUBMITTING MY MINING PLAN) CONFIRMED WITH BOTH
THE CORP OF ENG, THE EPA AND THE BLM THAT MY CREEK DID NOT
MEET THE STANDARDS SET FORTH IN SECTION 404 OR 33 CFR. AND
THUS NO ADDITIONAL PERMITTING WAS REQUIRED.

MY FEAR IS THAT WITH A BILL SUCH AS WHATS BEEN PROPOSED
THESE ALLEDGED DO-GOODERS THRU NUMEROUS CHEAP AND EASY TO
FILE LAWSUITS.WILL SHUT DOWN ALL SMALL AND LARGE
OPERATORS FOR SOME ALLEDGED VIOLATION THAT IS WITHOUT
SUBSTANCE OR BASIS.

IF THE REGULATORS AND INDUSTRY ARE TIED UP IN COURT TRYING TO FIGHT FRIVOLOUS AND UNSUBSTANTIATED ALLEGATIONS WE WILL HAVE NEITHER THE RESOURCES NOR THE TIME TO GET ANY WORK DONE.

I WOULD URGE THE COMMITTEE TO CHECK WITH BLM IN FAIRBANKS AND DETERMINE THE MANPOWER THAT HAD TO BE ALLOCATED AND THE EXPENSE INCURRED BY THE REGULATORS JUST SO THE SIERRA CLUB. COULD MAIL NOTICES OF THIS TYPE.

THE ARGUMENT THAT THIS BILL WILL NOT RESULT IN FRIVOLOUS LAWSUITS WILL NOT STAND UP, YOU NEED ONLY LOOK TO THE SIERRA CLUB LEGAL DEFENSE FUND OFFICE AND ASK THEM HOW MANY OF THESE SUCH LETTERS WERE MAILED, WITHOUT EVER HAVING ANY FIRST HAND KNOWLEDGE IF A VIOLATION WAS EVEN OCCURRING AT ALL.

THIS BILL WILL ALLOW THESE ORGANIZATIONS TO CARRY THIS FORM OF HARRASSMENT ONE STEP FURTHER WITH NO BASIS IN FACT.

DURING MY CARREER AS AN ALASKA STATE TROOPER I MADE NUMEROUS ARRESTS AND WROTE A LOT OF TICKETS BECAUSE THAT WAS MY JOB AS A REGULATOR. I ALSO RESPONDED TO A NUMBER OF CITIZENS WHO CONTACTED OUR OFFICE WHO HAD OBSERVED A VIOLATION AND WISHED THE OFFENDER DEALT WITH. WHERE I WAS ABLE TO DEVELOP THE NECESSARY EVIDENCE AND DETERMINE THAT A VIOLATION HAD OCCURRED I FILED THE APPROPRIATE CHARGES WITH THE APPROPRIATE COURT.

THIS BILL WILL ALLOW ANYONE TO BECOME A REGULATOR AND TAKE LEGAL ACTION BASED ON THEIR INTREPTATION OF THE LAW AND PERCEPTION OF REGULATORY OVERSIGHT.

GRANTED THERE IS A 60 DAY CLAUSE FOR RESPONSE BUT IN THE EVENT OF A MASSIVE MAILING SUCH AS MAY HAVE OCCURRED DURING THE 1987 CAMPAIGN THAT I WAS A RECEPIENT OF, THE REGULATORY AGENCIES MAY NOT BE ABLE TO RESPOND QUICK ENOUGH TO PREVENT A "COURT PLUGGING INDUSTRY STOPPING, FINANCIALLY DEVASTATING, GOAT ROPE"

THIS PROPOSED BILL SHOULD BE DEFEATED ALONG WITH THIS MESSAGE TO THOSE ENVIROMENTAL GROUPS LOOKING FOR ANOTHER

AVENUE TO STOP ALL GROWTH IN THE STATE "BUZZ OFF. AND LET THE REGULATOR REGULATE AND INDUSTRY OPERATE, AND YOU CAN WATCH AND LET US KNOW IF YOU SEE A REAL VIOLATION AND HAVE SOME REAL EVIDENCE, AND THEN WE THE REGULATORS WILL DO WHAT IS RIGHT.

THANK YOU FOR THE OPPORTUNITY TO OFFER THIS TESTIMONY FOR THE RECORD



Sunrise, Mt. McKinley

Ansel Adams

SIERRA CLUB LEGAL DEFENSE FUND, INC.

The Law Firm for the Environmental Movement

325 4th Street Juneau, Alaska 99801 (907) 586-2751 FAX (907) 463-5891

February 19, 1992

ALASKA OFFICE

Eric P. Jorgensen
Thomas S. Waldo
Staff Attorneys

Kaylene Farley
Office Manager

Other Offices

SAN FRANCISCO OFFICE

2044 Fillmore St.
San Francisco, CA 94115
(415) 567-6100

ROCKY MOUNTAIN OFFICE

1631 Glenarm Place
Suite 300
Denver, CO 80202
(303) 623-9466

WASHINGTON, DC OFFICE

1531 P Street, N.W.
Suite 200
Washington, DC 20005
(202) 667-4500

NORTHWEST OFFICE

216 First Avenue South
Suite 330
Seattle, WA 98104
(206) 343-7340

MID-PACIFIC OFFICE

212 Merchant St.
Suite 202
Honolulu, HI 96813
(808) 599-2436

Representative Dave Donley
Chairman, House Judiciary Committee
Room 122, Capitol Building
P.O. Box V
Juneau, Alaska 99811

Re: H.B. 29

Dear Representative Donley:

I understand that at a recent hearing on H.B. 29, a Mr. Gerald Hooper introduced a letter addressed to him from the Sierra Club Legal Defense Fund as an example of abuse of the citizen suit process. I am writing to you so you and other members of the committee will understand that this is instead an example of just how well federal citizen suit mechanisms work and why Alaska should enact similar provisions.

In fact, the letter to Mr. Hooper and other similar letters to other miners did not result in any harassing litigation. Instead, the Corps of Engineers responded to these letters by stepping in to require placer miners to obtain permits under the Clean Water Act, as it should have been doing all along. As a result, litigation was avoided, the Clean Water Act was enforced and the environment protected from unnecessary destruction.

The letter to Mr. Hooper was sent pursuant to the citizen suit provision of the federal Clean Water Act, 33 U.S.C. § 1365, which requires that, in most cases, at least 60 days notice be provided to any alleged violator of the Act before a lawsuit to enforce the Act can be brought. In this respect, the Clean Water Act is very similar to the prior notice requirements of H.B. 29. The letter concerned potential violations of section 404 of the Clean Water Act by placer miners in Alaska. This section of the Act requires a permit from the Corps of Engineers for discharge of fill material into rivers, wetlands, and other waters of the

February 19, 1992

Page 2

United States. At the time the letter was written, by its own admission the Corps was essentially failing to enforce this requirement for placer mining in Alaska, even though most operations involved activities requiring such a permit.

The Legal Defense Fund responded to requests from environmental and Native groups, and local governments to take steps to protect the streams and wetlands of interior Alaska from the unnecessary pollution and habitat destruction caused by unregulated mining activities. As a result, we pressured the Corps to begin enforcing the law by notifying miners of their obligation to obtain permits. I have attached a copy of one of our letters to the Corps and some newspaper stories about our efforts. At the same time, we attempted to identify placer mining operations which appeared to require permits but did not have them. To identify these operations, we examined state and federal records for existing and proposed mines. We then sent letters to the operators of mines that appeared to require a permit based on the available information, notifying them of the requirements of the Clean Water Act and the need to apply for a permit where needed. Mr. Hooper received one of those letters.

We attempted to find a way to notify the miners of possible violations that would meet the requirements of the law, yet not be unfair to small operators. As you know, most placer mining operations are seasonal in Alaska. Most operations do not proceed in the winter months. We were concerned about waiting until the beginning of operations in the 1988 season to provide notice, in part because of the unfairness to miners. We concluded the best approach was to write letters the year before the next season's operations would begin. This would give operators a reasonable amount of time to contact us if we were in error or to obtain the necessary permit from the Corps. To provide this kind of fair advance warning, we obviously had to notify miners before their next season's operations began and, therefore, based our notice on prior operations at the same site or on plans filed for the next season or both.

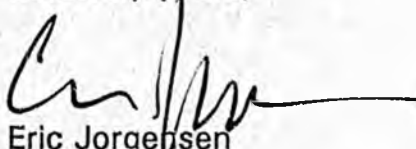
In fact, we never initiated litigation against Mr. Hooper or any other miner under section 404 of the Clean Water Act. After we sent the notice letters, the Corps stepped in to address the problem, at least in part. The following year, the Corps issued a general permit under section 404 for all small placer miners in Alaska, which imposed certain important restrictions on placer mining operations to protect the environment. Many mines were required to obtain individual permits before the 1988 season. Though our clients were not entirely satisfied with the Corps' response, it was, we believed, a sufficient beginning and we elected not to file any litigation on the issue. Today, largely as a result of our efforts, larger mines are required to obtain permits and, in fact, regularly apply for and receive them. Smaller mines are operating

within the limits imposed by the Corps' general permit. As a result, the unnecessary destruction of Alaska's natural resources from such operations has been reduced.

Though we can understand how it might be unsettling to receive a letter like the one Mr. Hooper received, we attempted to handle the notice in the way most fair to the affected miners. We went far beyond the requirements of the law to provide advance notice and attempted to assist the miners to comply by providing detailed information about our concerns and about how to get a permit. We encouraged Mr. Hooper and the other recipients to contact us if we had made a mistake and gave them many months to do so. In fact, as a result of our efforts there was no harassment of miners or even any litigation. Instead, the notice letters led to enforcement of the law by the Corps, which it should have been doing all along. In other words, the citizen suit provision of the Clean Water Act worked exactly as it should. Rather than a reason not to enact H.B. 29, this whole episode is an example of why it is so important for Alaska's citizens to have a similar remedy for enforcement of Alaska state pollution laws.

I hope this letter addresses any concerns which might have been raised by Mr. Hooper's testimony. I would be happy to answer any other questions you may have.

Sincerely yours,



Eric Jorgensen
Managing Attorney

EPJ:ld

enclosures

cc: Rep. Gruenberg
Rep. Ellis
Rep. Parnell
Rep. Hanley
Rep. Martin
Rep. Miller
Rep. Koponen



SIERRA CLUB LEGAL DEFENSE FUND, INC.

Sunrise, Mr. McKinley

Arnel Adams

419 6th Street, Suite 323

Juneau, Alaska 99801

(907) 586-2751

ALASKA OFFICE

Lauri J. Adams
Philip S. Barnett
Staff Attorneys

Fern L. Shepard
Law Associate

Other Offices

SAN FRANCISCO OFFICE

2044 Fillmore St.
San Francisco, CA 94115
(415) 567-6100

ROCKY MOUNTAIN OFFICE

1600 Broadway St.
Suite 1600
Denver, CO 80202
(303) 863-9898

WASHINGTON, DC OFFICE

1516 P Street, N.W.
Suite 300
Washington, DC 20005
(202) 667-4500

NORTHWEST OFFICE

216 First Avenue, South
Suite 330
Seattle, WA 98104
(206) 343-7340

June 12, 1987

Colonel Wilbur T. Gregory, Jr.
District Engineer
United States Army Corps of Engineers, Alaska District
P.O. Box 898
Anchorage, AK 99506-0898

Dear Colonel Gregory:

On behalf of the Sierra Club, the Northern Alaska Environmental Center, The Wilderness Society, Birch Creek Village, and Cenaliulriit Coastal Management District, my office has commenced reviewing the Bureau of Land Management's mining files to determine the extent to which placer mining operators in Alaska comply with the dredge and fill requirements of the Clean Water Act, 33 U.S.C. §§ 1311 and 1344. We recently completed our review of mines within the Anchorage District for which notices or plans of operations were submitted in 1986 or 1987. The results are startling.

We reviewed a total of fifty-six (56) separate mining operations. Even based on the limited information in BLM's files, over half of these operations show the discharge of dredged or fill materials without the necessary permit from the Corps. Usually there are multiple violations at individual mines. Indeed, the average mine violates dredge and fill requirements four (4) times. On the face of BLM's documents were such obvious violations as the construction of on-stream dams and settling ponds and the instream use of bulldozers and draglines. Streams have been diverted, had roads built across them, and had overburden piled into them. To be sure, a more intensive on-the-ground review of these mines would reveal further violations by a far greater proportion of operators.

Notices of violations were sent today on behalf of the organizations listed above under the citizen suit provisions of the Clean Water Act to those operators in the Anchorage District that appear to be in violation with the Act's dredge and fill requirements. You will find details about the specific violations in the notices of violations that we sent to the operators, copies of which are enclosed.

We are gravely concerned about the extensive violations found in the Anchorage District alone. These serious and widespread violations, coupled with our understanding that your agency has issued only one permit under § 404 of the Clean Water Act for a placer mining operation in Alaska to date, indicate that the Corps has systematically failed to monitor mining operations in Alaska for unpermitted

Wilbur T. Gregory
June 12, 1987
Page 2

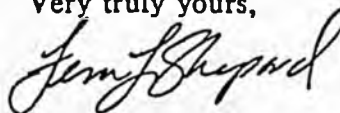
dredge and fill discharges. There could well be hundreds of placer mines in the state that are operating in violation of the dredge and fill requirements that you administer.

Your agency has primary responsibility for insuring compliance with the dredge and fill requirements of the Clean Water Act. 33 U.S.C. § 1344. In addition, your agency is required to notify unpermitted dischargers of their violations. *See Memorandum of Agreement Between Environmental Protection Agency and Department of the Army Concerning Regulation of Discharges of Solid Waste Under the Clean Water Act at 2 (March 14, 1986).* The Clean Water Act's objective is clear: to eliminate the discharge of pollutants by 1985. 33 U.S.C. § 1251(a)(1). The Corps' programmatic failure to address mine dredge and fill discharges constitutes an abdication of your statutory responsibilities rather than an aggressive effort to restore and maintain the integrity of the nation's waters.

Therefore, we request that you take action to prevent mines that have violated or will violate the Clean Water Act from operating in 1988 until the mines obtain the necessary permits. Specifically, we request that you exercise your powers under 33 C.F.R. § 326.3(c) to issue notices of noncompliance to all the operators who are in violation of the dredge and fill requirements. The notices should require the operators to apply for and obtain the necessary Corps permits before commencing operations in 1988. Further, we request that your agency undertake a rigorous review of the notices and plans of operations and State of Alaska tri-agency applications filed for the 1988 mining season to insure that the operators have obtained the necessary Corps permits prior to commencing operations.

We urge your agency to immediately undertake a concerted effort to address these serious deficiencies. I request an opportunity to meet with you as soon as possible to discuss what steps your agency can take to facilitate bringing the mining industry into compliance with the dredge and fill requirements of the Clean Water Act by 1988.

Very truly yours,



Fern L. Shepard
Sierra Club Legal Defense Fund, Inc.

FLS/ke
Encls.

cc: Robie G. Russell, Regional Administrator, Environmental Protection Agency,
Region 10
Michael Penfold, State Office Director, Bureau of Land Management, Alaska
Dennis D. Kelso, Commissioner, Alaska Department of Environmental Conservation

Coalition says Army Corps lax in requiring miner permits

By DAVID FOSTER

Associated Press Writer

ANCHORAGE—The U.S. Army Corps of Engineers has ignored its duty to require permits for placer gold miners who dump earth onto wetlands or change the course of

streams, a coalition of environmental and Native groups charged on Tuesday.

The coalition wrote a letter to the corps, demanding that the agency require all of Alaska's placer miners to comply with the federal

Clean Water Act by the start of the 1988 summer mining season.

The coalition said the corps has issued only one permit for a placer mining operation in Alaska.

"By the very nature of placer mining, which is essentially strip

mining in streambeds and on riparian land, it is clear that corps permits are required for the vast majority of operations," said Fern Shepard, attorney for the Sierra Club Legal Defense Fund, which is representing the coalition.

"The corps has entirely ignored the problem. It is simply not doing its job," Shepard said.

Pat Richardson, a corps spokeswoman, agreed that the agency had not pursued the task vigorously in the past, but she said officials developed a policy paper in April to deal with placer mining.

"It's something we've always had the responsibility to do, but we've had a lot of other things to do, and we were taking our time," said Richardson.

The corps now is working with other regulatory agencies and mining associations to alert miners of a planned increase in enforcement. This fall, the agency will mail letters to miners and ask for their applications during the winter, Richardson said.

The agency, which already handles about 600 applications a year for disturbances of wetlands in Alaska, will try to handle the increased workload of miners' applications with no extra staff, she said.

She predicted that most applications would be approved in some form. "We don't try to prevent people from doing something," she said. "We try to help them implement a plan that would have the least impact."

Shepard said her group examined Bureau of Land Management records for 56 mining operations, mostly in southcentral Alaska.

"Even based on the limited information in BLM's files, over half of these operations show the discharge of dredged or fill materials

without the necessary permit from the corps," she said in a letter to Col. Wilbur Gregory Jr., district engineer for the Army Corps.

Curt McVee, executive director of the Alaska Miners Association, said the coalition's figures may be too high. "The Sierra Club must be assuming that these areas are all wetlands—that's an interpretation that must be left up to the corps," he said.

The coalition also sent notices of violations to 30 miners, a procedure required if the group intends to bring civil suits against them. Notices will be sent to other miners this summer as Shepard and two assistants review other mining records, she said.

The coalition is not threatening lawsuits yet, Shepard said. "But that's certainly something we would consider doing in 1988 if the problem is still unresolved," she said.

The Sierra Club has been successful in other recent lawsuits involving placer mines. A July 1985

decision by a federal judge has shut down placer mining in Alaska's national parks until a cumulative environmental impact statement is finished. The same judge ruled last month that larger mines on BLM land in several rich gold-mining drainages around Fairbanks will have to shut down next summer if the BLM does not finish environmental studies by then.

The earlier lawsuits do not affect any mines on state land, nor do they affect mines disturbing less than five acres of BLM land. But the Army Corps of Engineers has jurisdiction over any operation that disturbs wetlands, Shepard said.

"What we're trying to do is close a loophole," she said. "There are a lot of mines that don't have any environmental review. This is sort of the last piece of the puzzle."

The coalition comprises the Sierra Club, the Northern Alaska Environmental Center, the Wilderness Society, Birch Creek Village and Cenaliurrit Coastal Management District.

**SATURDAY
A.M.**

SPORTS D-1

BUSINESS D-7

World's fastest man?
Lewis Johnson to meet in Rome

Bigger than Texas
Alaska to be top oil producer

***** NEIGHBORS *****
ANCHORAGE TIMES
USPS 025060 2ND CLASS
POSTAGE PAID AT
ANCHORAGE AK 99501

0000225375 8801047 204
SIERRA CLUB
LEGAL DEFENSE FUND, INC.
419 6TH STREET, SUITE 321
JUNEAU AK 99801

The Anchorage

3rd year/52 pages

SATURDAY MORNING, AUGUST 29, 1987

25¢

INSIDE

**Prison guards
need better checks**

Corrections officials say they are looking at ways to tighten background checks of applicants for guard positions at state prisons. **page B-1**

**Scientists install
meters on volcano**

FAIRBANKS. (AP) — Researchers have begun installing devices on Augustine Volcano to warn of imminence

Corps told mines don't comply

By John Quinley
Times Writer

A coalition of environmental and native groups Friday renewed its criticism of the Army Corps of Engineers after finding 89 placer gold mining operations in the Fairbanks area are in violation of the Clean Water Act.

"Mine operators regularly divert and dam streams, build roads across streams and oper-

ate heavy equipment such as bulldozers in streams, all without the required corps permit," said Fern Shepard, attorney for the Sierra Club Legal Defense Fund.

In June, the coalition reported that more than half of the 56 placer mines operating in South-central and Southwest Alaska were discharging dredge and fill materials without a corps permit.

At that time, corps officials acknowledged they had ignored provisions of the Clean Water Act and did not require permits for placer miners.

The corps has begun a program to bring miners into compliance and is compiling a master mailing list of placer miners that is likely to contain more than 450 operations, spokeswoman Pat Richardson said.

letter to be sent this fall will tell miners they need permits to operate.

Permits are required when mining operations place dredged or fill material in waters and wetlands," Richardson said. That includes stockpiling of material, placing material overburden, placing material into streams for stream diversion, building berms or fish pass channels, and building roads

for airstrips on wetlands. The corps has put a three-man team working full-time on the project, she said, and plans to hold informational meetings in the winter and spring to tell miners about what will be required of them.

The coalition also sent letters to individual operators threatening lawsuits unless they obtain permits. **See Corps, page A-10**

George James

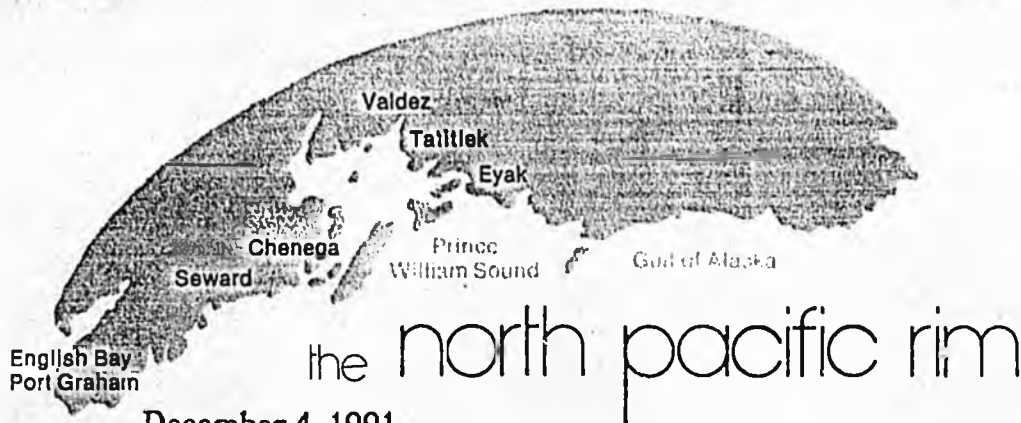
8/29/87

Corps: Takes heat

Continued from page A-1

ing operation to date," Shepard said. "We hope the corps is now serious about initiating a permit program that will bring these mines into compliance by the 1988 mining season." The coalition also includes the Northern Alaska Environmental

In the Bureau of Land Management files are hundreds of unpermitted discharges of dredge and fill, yet the corps has issued only one permit for a placer mine



December 4, 1991

Representative Niilo Koponen
Alaska State Legislature
PO Box V
Juneau, AK 99811

RE: HB0029c

Dear Representative Koponen:

Thank you for informing our Health Director, Leonard Hamilton, concerning HB0029c. We are in full support of having a statutorily created cause of action for protection against environmental threats.

However, please be advised that our in-house counsel believes there is a syntax error at section (d)(1) which should be corrected. On the last line of page one (line 14) and the first line of page two, the type of municipality excluded from suits is described. The prepositional phrase "by the Department of Community and Regional Affairs under AS 14.17.140" is misplaced. As it reads now, that phrase modifies "the alleged violation," which would mean that DCRA is either the violator or the entity alleging the violation. Neither meaning makes sense.

We believe that the phrase should be inserted earlier in the sentence, at line 14 on page one, so that the bill reads as follows:

"....
determination of \$100,000,000 or less as determined by the
Department of Community and Regional Affairs under AS 14.17.140
as of January 1 of the second fiscal year preceding the alleged
violation [BY THE DEPARTMENT OF COMMUNITY AND
REGIONAL AFFAIRS UNDER AS 14.17.140]; ..."

Please advise us when the bill's language has been corrected.



Representative Niilo Koponen
December 4, 1991
Page Two

Again, thank you for informing us about the bill.

Sincerely,
THE NORTH PACIFIC RIM



Richard A. Rolland
Executive Director

cc: Leonard Hamilton, TNPR Health Director
Alaska Native Health Board
Representative Kay Brown
Representative Johnny Ellis



CITY OF HAINES, ALASKA

P.O. BOX 1049

HAINES, ALASKA 99827

(907) 766-2231 • TOURISM (907) 766-2234 • FAX (907) 766-3179

COPY

December 11, 1991

Rep. Jerry Mackie
P.O. Box V (MS 3100)
Juneau, AK 99811

Re: HB 29

Dear Jerry:

The City of Haines supports HB 29. It is an important bill relating to public health in our community.

Pollution by septic tank/leach field systems, outhouses and cesspools affects property located downhill or downstream from the pollution source. This pollution creates unsafe drinking water and a noticeable smell in the neighborhoods. Pools of sewage from septic systems have been noted in children's play areas.

Pollution laws need to be created and enforced; especially where drinking water and public health are impacted.

Please support HB 29.

Thank you for your attention to health-related issues.

Sincerely,

Frank L. Wallace
Mayor
CITY OF HAINES

cc: Sen. Dick Eliason
Rep. Niilo Koponen
Rep. Kay Brown
Rep. Johnny Ellis

Poppy Lane: A Good Case for Citizen Suits

by Karen Wood
3/91

Sheila and Charlie Dickson and their daughter Kim worked for nine years to get relief from toxic exposure to the drilling muds and other wastes being illegally dumped in the Poppy Lane gravel pit behind their house. Nine long years of a toxic nightmare, with the Department of Environmental Conservation slow to take action and the family unable to move because the value of their house lot plunged to zero.

If the Dicksons had been able to sue Unocal to bring the company into compliance with Alaska pollution laws (to stop the illegal dumping and storage of hazardous wastes), they might have found relief sooner. But Alaskans do not have that right under state law.

House Bill 29, reintroduced this year by Representative Niilo Koponen, would give Alaskans the ability to take action to control pollution when DEC has failed to act. Passage of this bill would enable Alaskans like the Dicksons to protect themselves from pollution.

It's too late for Sheila, Charlie and Kim. They have finally escaped their toxic backyard in Kenai and are starting their life over again elsewhere in Alaska. Below is their story, as told to me by Sheila Dickson.

Sheila and Charlie Dickson built their home on Poppy Lane in Soldotna in 1981, expecting to raise their daughter in a quiet, rural setting in Southcentral Alaska. Soon after they moved into their new home, the Dicksons noticed trucks dumping loads of what looked like mud in the gravel pit behind their house; 5-8 vacuum truckloads being dumped each day. Unocal Oil and Gas, owners of the pit, mined gravel there to build their oil and gas production pads.

"I didn't know what drilling muds were," said Sheila. "I thought they were some sort of septic waste."

The Dicksons reported the dumping to the Department of Environmental Conservation (DEC), and Richard Moulton came out to visit the Unocal gravel pit. After looking around, he obtained a search warrant and took samples of muds. Moulton estimated that the pit had been an illegal dumping site for at least 10 years.

"The trucks would run in and hide behind mounds of mud to dump," reports Sheila. The Dicksons couldn't catch the trucks because they'd exit through the Kenai gas fields, and they didn't have a phone in their house. Their nearest neighbor lived a quarter mile away.

After Moulton made his initial investigation, "Unocal got craftier," says Sheila. "They came to dump before we got up in the morning and after dark."

In 1982, Unocal set the pit on fire, infuriating neighborhood residents. Meanwhile, Charlie was learning about drilling muds. He had taken a job running a vacuum truck for Alaska Environmental

Industry where he hauled drilling muds to the Sterling Special Waste Site for disposal, and began to worry about the potential toxicity of the wastes dumped near their home.

The Dicksons had good reason to be concerned. Drilling fluids or muds are suspensions of solids and dissolved materials in a base of water or oil that are used in drilling operations to lubricate and cool drill bits, control formation pressure, remove drill cuttings, and perform other functions. These wastes can contain a number of toxic substances, including petroleum hydrocarbons (including benzenes, naphthalenes, and phenanthrenes) and additives such as bactericides, soluble salts, heavy metals, and ethylene glycol (from Oil in the Arctic).

The family decided to move. They put their house on the market in the fall of 1983, but found little interest in the property. Rumours had begun to spread about the Poppy Lane pit. The number of potential buyers became smaller and smaller, and the Dicksons eventually lost hope that they would ever be able to sell.

"Old-timers began telling us that they were afraid to walk through the pit in rubber boots because of what the stuff dumped there would do to your shoes." For a long time, local residents had gone to the pit to get old barrels for their household rubbish. "They'd just dump the contents of the barrels on the ground--there's no telling what people were exposed to," said Sheila.

Charlie began demanding that DEC take notice of the Poppy Lane pit. Mike Lucky and Bob Canone of DEC held an informal meeting with Bob Anderson and Larry Cutting of Unocal, Charlie and another Poppy Lane resident to discuss the pit. After the meeting, says Sheila, Larry Cutting "came up and poked Charlie in the chest and said, 'I'll see your entire family dead and buried in the dirt before Unocal gives you a dime.'" With that, said Sheila, "the fight was on."

About this time, one of the Dickson's neighbors fell sick from chromium poisoning. Sheila and Charlie began hauling their drinking water from Soldotna, and boiled tap water for all other uses.

In 1984, local residents pushed for an analysis of pit contents, for monitoring wells to measure the extent of pollution and potential groundwater contamination, and for a fence around the pit to keep children out of it.

The analysis began in 1985, and piles of peat soaked with gas condensate were found. It took several years to quantify the contamination. DEC dug nine trenches in different parts of the pit, but didn't find consistent results. Unocal did some testing as well, but used only a small bucket and did not dig deeply, says Sheila.

The Dicksons, along with several of their neighbors, filed suit for damages against Unocal in 1985. The case was based on a nuisance complaint that Unocal had created a nuisance on their land, making it impossible for the Dicksons to sell their own adjacent property.

In 1987, a new, more extensive investigation was begun. Joe Labeaux of DEC obtained a search warrant and interviewed local residents to document dumping sitings. Dave Knuth of DEC collected samples from the pit. Sheila described how, after getting into the

bucket of a backhoe, Knuth was lowered down into a ditch of gas condensate soaked peat. After only a few minutes, Knuth fainted.

At this point, Labeaux visited the Dickson's and advised them not to use the water, even though the samples from the investigation had not yet been analyzed. The family began showering in town.

In the course of the investigation, drilling bits, barrels, a boiler covered with asbestos, and a complete drill rig were removed from the pit. "A lot more substances were found, more hydrocarbons, and more areas where produced waters were dumped," said Sheila.

The contractor responsible for hauling the metal parts away was supposed to steam clean them before disposing of them in the landfill. Sheila said that at one point, two of the Dickson's neighbors followed the contractor's truck. The truck went straight to the landfill; no removal of drilling muds from the metal parts was done. DEC was notified, but the agency did not follow up on the report.

What is happening now at the Poppy Lane site? Clean up is finally underway. The contaminated ground water is being removed from the ground, cleaned, and reinjected into the aquifer. And in December 1990, the Dickson's law suit was finally settled out of court for an undisclosed amount (as requested by Unocal).

Who would have thought this horrible story took place in Alaska? Hazardous pollution does blight even the far reaches of our state, and citizens must be empowered to protect themselves from it. The ability to file a citizen suit to stop the dumping and get a quick cleanup might have ended the Dickson's nightmare sooner. Passage of HB 29 is needed to prevent more Alaskans from suffering similar experiences.



Alaska Center for the Environment

519 West 8th Avenue, Suite 201 • Anchorage, Alaska 99501 • (907) 274-3621

Briefing Paper on HB 29 (HRes) Citizen Self-Protection Act

1/92

Why does Alaska need the Citizen Self-Protection Act?

This bill would enable citizens to 1) provide an incentive to industry to prevent pollution, because a regulatory entity (the citizen) is present and watching even when DEC is not, 2) force DEC to take action to enforce the laws against polluters, or 3) take action against polluters when DEC has failed to do so. Citizen suits would be applicable in the case of an ongoing violation of state pollution laws. The intention is to enhance the effectiveness of public interest laws, resulting in a cleaner environment and better health and well-being.

The Oil Spill Commission advised the state to adopt citizen suits (Recommendation #13) as an important component in Alaska's regulatory scheme. Over 900 hazardous wastes sites have been documented in the state, and more are added to the list each year. The Department of Environmental Conservation, an agency with a large statutory mandate and a large geographical area to cover, was underfunded even before this year's proposed budget cuts. DEC can't do everything. The Citizen Self-Protection Act will put power back into the hands of the people when normal administrative channels aren't adequate.

When can citizens take action?

A suit can not be filed until 60 days after the plaintiff has given notice of violation to the Commissioner and to the alleged polluter. If the Commissioner is already prosecuting a civil or administrative penalty proceeding, a suit may not be filed.

Who can be sued, and what remedies can be achieved?

Citizens could sue any person, the state, or any agency of the state that is allegedly violating pollution laws (Title 46). A citizen may also sue the DEC Commissioner if the Commissioner fails to perform a non-discretionary act or duty.

The court may award civil penalties, issue an injunction, or provide for other relief. Any monetary penalty above and beyond reimbursement of attorney's fees reverts to the state general fund.

Does the federal government or any other states use citizen suit provisions?

Congress has recognized the value of citizen suits as supplements to the government's enforcement. Citizens have ample authority to enforce federal environmental laws. Citizen enforcement actions have proven not to be unreasonable avenues for harassment of industry or the EPA, but to be a valuable means for stopping major violators whom the EPA had been unable to reach. The Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, or Superfund) and the Surface Mining Reclamation Act all have citizen suit provisions. *The business community has operated under these federal laws for nearly 20 years.* Sixteen other states and the District of Columbia have citizen suit provisions in various forms.

What powers do Alaskans have now to protect themselves from pollution?

Alaskans can bring a lawsuit against polluters who are violating federal environmental laws. In some cases, Alaskans do have the legal authority to sue violators of some state laws, including the state surface mining coal law. *Interestingly, citizen suits are a prominent feature of the Oil and Gas Commission laws, existing to protect the interests of the oil industry.* Victims of pollution do not, however, have the power to enforce state pollution laws.

ASLEEP AT THE WHEEL:

**Environmental Regulation and Compliance of the
Oil Industry on the Kenai Peninsula, Alaska**

Executive Summary

prepared for:

Alaska Center for the Environment
519 W. 8th Ave. Suite 201
Anchorage, Alaska 99501
(907) 274-3621

prepared by:

entropy
P.O. Box 101255
Anchorage, Alaska 99510
(907) 243-4783

project funding:

Alaska Conservation Foundation

July, 1991

Introduction

The environmental record of oil development in Alaska has come under increasing scrutiny in the past several years as debate continues over proposed oil development in the Arctic National Wildlife Refuge, Bristol Bay and elsewhere in Alaska. The spill of eleven million gallons of North Slope crude oil into Prince William Sound from the Exxon Valdez tanker has intensified the watchfulness over the oil industry's activities in Alaska. However, the Kenai Peninsula, site of Alaska's first major commercial oil fields, remains largely untouched by the spotlight of legislative, media and Congressional attention. The Kenai oil industry and its regulators continue to operate under the "business as usual" policy--which frequently means haphazard compliance and lax enforcement, resulting in pollution of the water, air and land of the Kenai Peninsula and adjacent Cook Inlet, and frustration and ill health for many residents.

Asleep At the Wheel documents some of the alarming environmental problems on the Kenai Peninsula related to oil development, focusing on the small Kenai town of Nikiski. Nikiski hosts a petrochemical complex of two petroleum refineries, one liquified natural gas facility, and an ammonia-urea chemical plant. (Natural gas is the raw input required for ammonia-urea production.) The extreme degree of pollution emitted from these plants with scarce punitive action by the state government is illustrative of Alaska's inability to protect itself from oil and gas related pollution. Recommendations to improve pollution control and prevention begin on page 5 of this report summary.

Based on extensive review of public records, this report investigated the record of Nikiski's Chevron USA (which ceased operation in 1991) and Tesoro oil refineries; Phillips Liquified Natural Gas Plant which is the largest exporter of natural gas in North America; and Unocal-Mitsubishi ammonia-urea plant, one of the world's largest, which produces over 3 billion pounds of nitrogen based chemicals annually.

The report is not intended to be a comprehensive investigation of all environmental problems on the Kenai Peninsula, or even of the four petrochemical plants. Rather, it should be viewed as a first effort to recognize the scope of the problems. However, the record reveals a disturbing pattern of the oil industry's noncompliance with environmental laws and regulations and an absence of aggressive enforcement on the part of the state and federal environmental agencies. The report also details the inadequacies of state and federal laws and regulations designed to protect public health and the environment.

Information was collected through the review of published material, state and federal regulatory agency files, and interviews with agency personnel. Compliance records were researched through the end of 1988.

Asleep At the Wheel does not address the impacts of offshore or onshore oil field operations; oil and gas pipelines; oil spill contingency plans; effects on subsistence, hunting and fishing; or worker health and safety.

Pollution, Violations, and Lack of Enforcement

Air Pollution

Over 67 million pounds per year of air pollutants are released by the Nikiski petrochemical industry.¹ Kenai citizens have complained to regulatory officials about exacerbated asthma, strong ammonia odors, etched glass on automobiles and foam on lakes.² Documented air pollution problems and monitoring deficiencies include the following accounts:

- * Despite repeated promises as early as 1984 to install ambient air pollution monitoring, the state failed to install any monitoring equipment until 1988. By June of 1991, the state had already decided to dismantle its monitors due to lack of funding and instead will rely on industry monitors.³

- * Vegetation and Bernice Lake located near the Unocal ammonia plant appear to be dying as a result of plant emissions due to overfertilization of the lake and nitrogen deposition on the nearby forest.⁴ Visible emissions at the Unocal plant, which are of concern for respiratory health, have exceeded the applicable standard 75% of the time.⁵

- * Beginning in 1976, in response to input from Unocal, DEC granted Unocal a series of variances and relaxed state regulations for visible emissions from prill towers. (The prill tower is the main source of visible emissions at Unocal and Unocal's tower is the only one in Alaska.) In 1984, DEC noted that "although many tests and studies have been performed, no real progress has been made in decreasing visible emissions from the (Unocal's) prill tower."⁶ In 1985, DEC refused to renew the variance. In 1986 and 1987 Notices of Violation were sent to Unocal but no fines were ever assessed and DEC requested that EPA not take enforcement action.⁷

After signing a Consent Order with DEC in 1988 which required coming into compliance with regulations, Unocal petitioned DEC to change state regulations to allow higher visible emissions. The state agreed to raise the limit from 20% to a 40% average over 24 hours. In 1991, DEC changed the regulations as per Unocal's wishes.

- * By contrast, Unocal's urea plant in Eureka, California operated in compliance with the state's 20% visible emissions standard after having upgraded its facility in response to fines.⁸

Water Pollution

The Nikiski facilities generate millions of gallons of wastewater annually. Nearly seven million pounds of wastewater pollutants are discharged into the waters of Cook Inlet.⁹ Pollution of Cook Inlet's sediments has received virtually no study.¹⁰ As documented below, direct and indirect releases of wastewater have created serious groundwater contamination beneath the Nikiski plants.

- * In 1987, Tesoro reported groundwater contamination found by monitoring wells.

The underground spill was first reported as forty gallons, but eventually estimated at 616,000 gallons.¹¹ Three feet of petroleum product is now known to be floating on top of the water table and at least one water well has been abandoned because of the contamination. Tesoro estimates that it will take over a decade just to pump out the floating product and gross contamination.¹² No estimate for removal of dissolved pollutants is available.

Contaminated Soils, Sludges, and Spills

Historically, the most common way to dispose of solid and even hazardous waste on the Kenai Peninsula has been dumping the waste onto the ground or into unlined pits, and spreading it on roads for dust control. These practices are now manifesting themselves as contaminated soil and groundwater requiring expensive cleanup activities.

* From the 1970's through 1981, Tesoro disposed of listed hazardous wastes in three unlined pits on its property. In 1987, monitoring wells revealed the presence of a layer of floating hydrocarbons on the water table. The groundwater under the pits and beyond the refinery's property boundaries is contaminated with high concentrations of petroleum hydrocarbons. Monitoring wells downgradient of the pits contained 13,000 ug/l benzene, 15,000 ug/l toluene, 10,235 ug/l xylenes, 170 ug/l naphthalene, 62 ug/l trichloroethylene, 48 ug/l phenanthrene and 37 ug/l fluorene. These hydrocarbons are associated with "heavy end" refinery waste, which is consistent with Tesoro's operations.¹³

By November 1988, monitoring results showed that in addition to contamination from the leaking pits, spills at the east tank farm had polluted the unconfined aquifer, while the oily sewers had contaminated the unconfined aquifer on the west side. The plume had also moved south 700 feet onto Marathon Oil Company's property.¹⁴

Almost a decade elapsed between DEC's first compliance efforts in 1980 and closures of Tesoro's waste pits in 1989 due largely to continued delays by Tesoro in submitting acceptable closure plans.

Conclusions

After tabulating the mass of pollutants, analyzing the violations, and evaluating the enforcement actions of the four major petrochemical plants in Nikiski, some patterns are evident.

1. VIOLATIONS

Violations of pollution control laws are a frequent occurrence. Industry's methods of managing violations of environmental laws include petitions for waivers or changes in laws and regulations or delayed response to control pollution until state or federal agencies pursue enforcement actions.

2. ENFORCEMENT and COMPLIANCE

State laws without federal jurisdiction are almost without compliance or enforcement (solid waste, waste water treatment sludges, oil spills, and clean ups not ordered by Superfund).

Officials within the Alaska Department of Environmental Conservation acknowledge limitations in technical expertise, funding for equipment to monitor pollution, and funding for personnel to conduct inspections and to enforce environmental laws.

Federal laws the state is authorized to enforce have a poor compliance record (Clean Air Act), as do laws where jurisdiction is divided (Resource Conservation and Recovery Act).

Laws with sole federal jurisdiction have the best compliance record (Clean Water Act), although the record is not without blemishes.

3. POLLUTION

Although nearly invisible to a casual observer the Nikiski petrochemical industry generates and dumps a large quantity of pollution to all the environmental media each year:

2,300 tons on the ground,

3,200 tons into the ocean,

33,000 tons into the air.

These wastes do not include wastes from oil and gas drilling, production facilities, or underground injection, wastes which are greater in volume, but generally lower in toxicity. Nor do these numbers include waste generated from the clean up of hazardous waste sites which could be in excess of 100,000 tons for a single site with great variations in toxicity.

Recommendations

RECOMMENDATION 1

Alaska state law should be amended to allow citizen enforcement of all pollution control laws. The state of Alaska has not demonstrated the ability or willingness to vigorously enforce pollution control laws. Other states which are dependent on one or two major industries such as oil or mining, experience similar pollution control problems. Enforcement actions usually require considerable legal resources. The legal reserves of a multinational corporation greatly exceed those available to a state environmental regulatory agency. In addition regulatory agencies may not have sufficient funding or expertise to

inspect, sample, and analyze wastes, discharges, and emissions.

If a federal pollution control law is violated and the federal government fails to take action against the polluter, a private citizen has the legal right to enforce that law. Citizen enforcement actions have had major positive impacts on compliance with the federal Clean Water Act.

Federal provisions for citizen enforcement should be adapted to state law. There are precedents in other Alaska state laws, for instance, surface mining (AS 27.21.950) and oil and gas activities (AS 31.05.170). Such provisions should be extended to all environmental statutes.

RECOMMENDATION 2

Ensure that regulatory agency staff who work in technical assistance are not the same people who conduct enforcement actions. The DEC should have sufficient legal assistance dedicated to environmental pollution enforcement.

RECOMMENDATION 3

Potentially affected citizens should be given the right to conduct inspections of facilities regulated under both state and federal law, as is available under state surface mining laws. Affected citizens should have the right to be actively involved in permit development, voluntary cleanup, orders for remedial actions and pollution control.

RECOMMENDATION 4

Regulation of sludge must be done by the state DEC. It should be explicitly fit into either the wastewater or solid waste regulations, but no longer be allowed to slip between the two sets of regulations.

RECOMMENDATION 5

State permit applications should include fees that can help to fund state inspection and enforcement actions. At a minimum, application fees should reflect the actual cost to the state of reviewing an application. Permit fee monies should be used to fund training for inspectors, increased frequency of inspections, joint inspections with EPA, and multi-media inspections.

1. Compiled from state permits, facility reports, and public reports. See full report.
2. Peninsula Clarion, What is the Unocal Plan Putting Into the Air?, August 9, 1988.
DEC, Nikiski Air Monitoring
3. Peninsula Clarion, DEC to Shut Down Two Monitoring Stations, May 24, 1991.
4. DEC staff memo to Commissioner Kelso, September 23, 1988.
5. DEC, March 24, 1988 Compliance Order by Consent 87-2-3-287-1, DEC v. Unocal Chemical Division.
EPA, Notice of Violation, Schulz, April 20, 1987.
6. DEC, letter from Bob Martin to G.L. Ford (Unocal), July 26, 1984
7. DEC, Notices of Violation, July 8, 1986 and May 6, 1987.
DEC, Letter from Commissioner Kelso to EPA Air and Toxic Division Director, May 15, 1987.
8. DEC, memo from William MacClarence to Len Verelli, February 25, 1985.
9. See full report. Data taken from public records.
10. Homer News, 130 Spills in Cook inlet in 3 Years, October 26, 1989.
11. Peninsula Clarion, Tesoro Takes Its Site Problems to the Public, August 9, 1988.
12. id.
13. A.T. Kearney Inc. (for EPA) July 1988 RCRA Facility Assessment. Tesoro Refinery.
14. id.



Alaska Center for the Environment

519 West 8th Avenue, Suite 201 • Anchorage, Alaska 99501 • (907) 274-3621

Briefing Paper on HB 29 (SS) Citizen Suits to Enforce Environmental Laws

2/91

Why does Alaska need citizen suits?

This bill would enable citizens to 1) provide an incentive to industry to prevent pollution, because a regulatory entity (the citizen) is present and watching even when DEC is not, 2) force DEC to take action to enforce the laws against polluters, or 3) take action against polluters when DEC has failed to do so. Citizen suits would be applicable in the case of an ongoing violation of state pollution laws. The intention is to enhance the effectiveness of public interest laws, resulting in a cleaner environment and better health and well-being.

The Oil Spill Commission advised the state to adopt citizen suits (Recommendation #13) as an important component in Alaska's regulatory scheme. Approximately 1000 hazardous wastes sites have been documented in the state, and more are added to the list each year. The Department of Environmental Conservation, an agency with a large statutory mandate and a large geographical area to cover, was underfunded even before this year's proposed budget cuts. DEC can't do everything. Citizen suits will put power back into the hands of the people when normal administrative channels aren't adequate.

When can a suit be filed?

A suit can not be filed until 60 days after the plaintiff has given notice of violation to the Commissioner and to the alleged polluter. If the Commissioner is already prosecuting a civil action or proceeding with administrative actions, a suit may not be filed.

Who can be sued, and what remedies can be achieved?

Citizens could sue any person, the state, or any agency of the state that is allegedly violating pollution laws (Title 46). A citizen may also sue the DEC Commissioner if the Commissioner fails to perform a nondiscretionary act or duty.

The court may award civil penalties, issue an injunction, or provide for other relief. Any monetary penalty above and beyond reimbursement of attorney's fees reverts to the state general fund.

What happens to attorney's fees?

Fees may be awarded at the court's discretion to a substantially prevailing plaintiff or to a defendant if the court finds that the plaintiff's action is frivolous. This is the prevailing common law for public interest cases.

Does the federal government or any other states use citizen suit provisions?

Congress has recognized the value of citizen suits as supplements to the government's enforcement. Citizens have ample authority to enforce federal environmental laws. Citizen enforcement actions have proven not to be unreasonable avenues for harassment of industry or the EPA, but to be a valuable means for stopping major violators whom the EPA had been unable to reach. The Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, or Superfund) and the Surface Mining Reclamation Act all have citizen suit provisions. *The business community has operated under these federal laws for nearly 20 years.* Sixteen other states and the District of Columbia have citizen suit provisions in various forms.

What powers to sue do Alaskans have now?

Alaskans can bring a lawsuit against polluters who are violating federal environmental laws. In some cases, Alaskans do have the legal authority to sue violators of some state laws, including the state surface mining coal law. *Interestingly, citizen suits are a prominent feature of the Oil and Gas Commission laws, existing to protect the interests of the oil industry.* Victims of pollution do not, however, have the power to enforce state pollution laws.



February 28, 1991

Representative Cliff Davidson
Chairman, House Resources Committee
Capitol Room 124
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Chairman Davidson:

I am writing on behalf of the League of Women Voters of Alaska in support of HB 29, giving citizens the authority to sue polluters to bring them into compliance with Alaska's environmental laws. We believe that if citizen authority to guard against pollution is made "official," potential violators of the law will be discouraged from polluting and will take preventative action.

As part of its citizen's rights concerns, the League has long worked for the citizen's right to know and for broad citizen participation in government. The League of Women Voters of the United States believes that democratic government depends upon the informed and active participation of its citizens at all levels of government.

In terms of protecting the environment, the League supports incentives to accelerate pollution control, and believes that mechanisms for citizen appeal must be guaranteed, including access to the courts. Due process rights for the affected public and private parties must be assured.

In a state as large as Alaska, it is difficult for the Department of Environmental Conservation to monitor and control all of the many sources of pollution, making citizen involvement critical to protection of the environment.

The League of Women Voters of Alaska urges you to support House Bill 29. Thank you for your time and consideration of this issue.

Sincerely,

Maxine Hays (LWS)

Maxine Hays

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE DAVIDSON

NAME: DONALD STEIN/CMTE MEMBER
TITLE: AK LEGISLATIVE AFFAIRS WATCH
ADDRESS: P.O. BOX 10904
CITY: FAIRBANKS ZIP: 99710
PHONE: 455-6082
BILL NO: HR 29
SUBJECT: SUITS TO ENFORCE ENVIRONMENTAL LAWS
MESSAGE: AK LEGISLATIVE AFFAIRS WATCH OPPOSES HB 29.

EOM-FZ

POMID: 07090957
DATE: 91/02/26
TIME: 09:09:57
LICNAME: FAIRBANKS LTD

COPIES: REPRESENTATIVES SENATORS

BOYER	FAHRENKAMP
KOPONEN	FRANK
M.W.MILLER	SHULTZ
MOYER	
SHARP	
DCHLEY	
GRUENBERG	
PARNELL	
ELLIS	
MARTIN	
HANLEY	
LINCOLN	
IVAN	
FINKELSTEIN	
CARNEY	
HUDSON	
LEMAN	
ZAWACKI	

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE DAVIDSON

NAME: CLARE PAVIA
TITLE: PWSCA
ADDRESS: P.O. BOX 1697
CITY: VALDEZ
PHONE: N/R-

ZIP: 99686

BILL NO: HB 29

SUBJECT: SUITS TO ENFORCE ENVIRONMENTAL LAWS

MESSAGE: HB 29 IS IMPORTANT FOR ALASKA. THE OIL SPILL COMMISSION'S
RECOMMENDATION TO ADOPT CITIZEN SUITS LEGISLATION SHOULDN'T BE
IGNORED. ENABLING CITIZENS TO TAKE ACTION WHEN REGULATIONS ARE
NOT ENFORCED WILL PROMOTE A CLEANER ENVIRONMENT BY PROVIDING AN
INCENTIVE TO INDUSTRY AND GOVERNMENT TO PREVENT POLLUTION AND TO
ENFORCE POLLUTION LAWS.

POMID: 17141221

DATE: 91/05/03

TIME: 14:12:21

LIONAME: VALDEZ INFORMATION OFFICE

COPIES: REPRESENTATIVES

LINCOLN
IVAN
MOYER
FINKELSTEIN
CARNEY
HUDSON
LEMAN
ZAWACKI

**Goldbelt**

Goldbelt Place, Suite 300/801 W. 10th/Juneau, Alaska 99801/(907) 463-4846

April 23, 1990

The Honorable Cliff Davidson
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: HB 558

Dear Representative Davidson:

I am writing on behalf of Goldbelt, Inc. to express the concerns that we have with respect to the above-referenced bill. It is our strong opinion that this bill is not in the best interests of Goldbelt, or of any other business or individual in this state.

The law proposed in HB 558 would allow anyone to file a lawsuit if he believes that an environmental law has been violated. A plaintiff under this proposal need not have any personal stake in the contest in order to bring suit. The only requirement imposed by the bill is that the potential plaintiff notify the Commissioner of the Department of Environmental Conservation ("DEC") and the proposed defendant and then wait sixty days. The state is permitted as a matter of right to intervene in the citizen's case; likewise, if the state brings suit, any citizen may intervene as a matter of right.

The bill also alters the civil rules governing the award of attorney's fees to a prevailing party. If the plaintiff's case is "wholly frivolous," then a prevailing defendant is entitled to be awarded attorney's fees. All that a plaintiff needs to show in order to be entitled to fees, however, is that he is a "substantially prevailing plaintiff."

This bill is dangerous. It allows a suit by anyone in the world who believes that an Alaskan individual or business has violated an environmental law. No standing requirements are imposed upon the plaintiff. He or she need not have suffered any injury as a result of the alleged violation. If someone in Oregon thinks that Goldbelt has discharged hazardous waste in Juneau, then Goldbelt would be forced to defend the claim. Only if the plaintiff's complaint is later found to be "wholly frivolous" will the defendant be forced to pay the plaintiff's reasonable fees. The award of fees will be scant comfort, however, if the plaintiff is judgment proof, or if he is out of state and difficult to trace. The intervention provisions of the bill make no sense. They allow private intervention as a matter of right in the state's lawsuits and state intervention in private suits without regard for the

HB 558
April 23, 1990
Page 2

normal requirements of an interest or a reason to intervene. This provision invites an explosion of litigation in which parties will join the state's lawsuits out of mere curiosity, and will overwhelm the courts with the problems of multiple party litigation that is unnecessary for the resolution of legitimate disputes.

Goldbelt is Native Corporation that owns timberland near Juneau and sand and gravel resources in Juneau. We are well aware of the environmental regulations that concern our operations and work hard to see that we do not violate the law. Nonetheless, timber harvesting is an untidy business. It involves moving large amounts of raw materials and creates debris, unavoidable hazards, and waste products. State regulatory personnel understand these type of operations because they are professionals with experience and training. If they detect a violation, their judgment in pursuing it is entitled to some weight. On the other hand, allowing every man, woman, and child in the nation the opportunity to play at being attorney general is not a rational way of enforcing environmental laws.

The proposal contained in HB 558 will not improve the administration of Alaska's laws on environmental protection. It will simply encourage more litigation of dubious value and increase the costs of doing business. Furthermore, numerous legal actions by private attorneys general will decrease the predictability of enforcement of environmental laws and reduce the respect accorded to those laws.

Goldbelt opposes this bill for all of the reasons discussed above, and we urge you to vote against it. Alaska has strong environmental laws that are best enforced by those who know what they are doing. Throwing the door open to enforcement by enthusiastic amateurs who have no stake in the outcome invites abuses and does not improve Alaska's environment. This bill, were it to become law, could have a devastating effect on all Alaskan enterprises, particularly those which, like Goldbelt, manage natural resources. We, therefore, urge you to vote against this bill.

Sincerely yours,

GOLDBELT, INCORPORATED



Joseph G. Wilson
President & Chief Executive Officer

RECEIVED

May 6, 1991

KFP
Koncor Forest Products Company

350 Dana Street
Juneau, Alaska 99801
907 582 3335 FAX 907 582 1599

Representative Cliff Davidson
Alaska State House of Representatives
P.O. Box V
Juneau, Alaska 99811

RE: HB 29

cliff

Dear Representative ~~Davidson~~:

I am writing regarding HB 29 now being considered by the resources committee. The proposed legislation allows for citizen suits to enforce permit specifications, State management plans, and environmental laws.

Koncor Forest Products has established an excellent environmental record. In past years we received recognition of such from a variety of sources. In spite of our company's recognized responsible environmental policy, we are deeply concerned regarding this proposed legislation.

For our company to start up a timber harvest operation in the State of Alaska, we must receive numerous permits from the State including but not limited to, permits for tidelands use, sewage disposal, solid waste disposal, and stream crossings. In addition we must continually notify the State of our operational plans at least 30 days in advance. Professional foresters, environmental engineers, and fisheries biologists employed by the various State agencies administer and enforce the provisions of these permits and notifications.

This proposed legislation would allow any citizen regardless of the merits of their claim, to delay our operations, with no real cost to them. The bill would encourage frivolous suits to be used as a delaying tactic by those who perceive our operations as objectionable, regardless of our environmental standards or compliance with laws. The plaintiff in such suits would have nothing to lose by attempting to second guess the agencies whom are entrusted to administer and enforce environmental statutes and regulations. Plaintiffs with few assets could significantly reduce our cash flow, giving us no realistic means of recovering the costs

Representative Davidson
May 6, 1991 RE: HB29

of injunctions or suspensions of operations. In the past these actions have bankrupted legitimate companies that were eventually proven to be doing their operations in an environmentally sound manner.

If there is a problem with the administration's ability to enforce environmental laws and regulations, then such problems should be remedied through adequate funding for these agencies, and proper administrative oversight. To enlist the public as a sort of vigilante resource protection advocate, with the power authorized by this bill, would be a set back for both professional resource management and environmental protection.

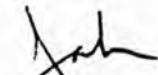
In past deliberations, concerns have been expressed that small and/or rural communities should be exempted from the bill's preview since they do not have the resources to defend themselves against spurious suits. We would submit that private businesses are even more vulnerable to financial ruin than communities.

If passage of this type of legislation is inevitable, then it should apply without exception and there must be protection for defendants from frivolous cases which are used simply to delay operations. One possible avenue would be a bonding requirement for plaintiffs, which would provide defendants, public or private, with a means by which they could recover both the costs of providing a defense, and the costs incurred by suspended operations and make the award of costs mandatory rather than discretionary. A suit should not have to be found wholly frivolous for this action to occur.

The legislature must also consider the hidden costs in terms of State staff hours committed to preparation and defense in such cases. The money would be far more wisely used by committing it to the existing regulatory programs.

Therefore I urge you not to support this proposed legislation.

Sincerely,



John L. Sturgeon
President

JLS/jes

cc: Thyes Shaub



Klukwan Forest Products, Inc.

P.O. Box 34659 • Juneau, Alaska 99803-4659

(907) 789-7104 Fax:(907) 789-0675

May 7, 1991

Representative Davidson, Chairman
House Resources Committee
P.O. Box V
Juneau, AK 99811

Dear Chairman Davidson:

Klukwan Forest Products is opposed to House Bill 29 because if passed into law it would broaden the scope of the type of action that could be brought against another person, the State or an agency of the State. Furthermore, HB29 would make the plaintiff almost totally immune from the consequences of his actions. This action could be brought against a business if the plaintiff feels the law has been violated even if the agency has found no violation.

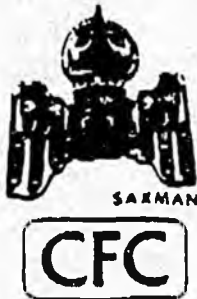
The list of undesirable aspects of the bill is too excessive for simply fixing it, therefore, it needs to be stopped completely. Alaska's businesses and industries simply cannot be exposed to irresponsible lawsuits that this bill would allow.

Sincerely,

Ronald R. Wolfe
Chief Forester

RRW:acp

cc: Thyes Shaub
House Resources Committee



Cape Fox Corporation

P.O. Box 8558
Ketchikan, Alaska 99901
(907) 225-5163

Post-It™ brand fax transmittal memo 7671		# of pages 1/1
To: Cliff Davidson	From: Elliott Skelton	
Co. Cape Fox	Co. Cape Fox	
Dept.	Phone # 225-5163	
Fax # 225-5163	Fax # 225-5163	

May 2, 1991

Chairman Cliff Davidson
Vice Chairman Georgianna Lincoln
House Resources Committee
P. O. Box V
Juneau, AK 99811

Dear Representatives Davidson and Lincoln:

I would like you to know what I think about House Bill 29. Let me preface my remarks by telling you that I served for several years as Regional Administrator in Region 10 for the United States Environmental Protection Agency. In that capacity I had a good deal of experience with law suits of all types, administrative proceedings, compliance negotiations and consent arrangements. Citizen lawsuits were a part of that experience.

In my opinion, there are several elements missing from citizen lawsuits that are generally present where good law and good government exist. Probably the most important of these missing elements are standing, accountability and context.

With respect to standing, what I mean is often a citizen suit is brought by a party that has absolutely no standing in the affair: is not a neighbor, stakeholder, potentially harmed party or in any other way involved. With respect to accountability, what I mean is virtually always, citizen lawsuits are brought by a party for whom nothing is at risk or at stake in the outcome. For example, if the lawsuit delayed a project but ultimately was lost, the "citizen" could not be held accountable for the cost of delay. Finally, with respect to context what I mean is that citizen lawsuits often disregard, or proceed in spite of progress underway in a broader arena. For example, if industry standards are being promulgated to regulate a specific pollutant industry-wide, a specific citizen lawsuit against an individual polluter might actually distract limited resources from solving the larger problem.

I believe that our system of government is a good one. It had stood a long test, and survived on the strength of the balance of power achieved between the legislature, executive

and judiciary. I believe citizens have ample opportunity for involvement in this process at the polls, in the conventional way. If they don't like the laws they can get rid of you guys. If they don't like the administration they can get rid of the executive. Citizen lawsuits pit the citizens against the regulatory agencies in an arena outside the triangle of responsive government. I think they are doomed to create ill-will, and cost money, and achieve very little of real result. I am not in favor of House Bill 29.

Sincerely,

Ernesta Ballard

Ernesta Ballard
Chief Operating Officer

cc. Don Finney, Alaska Forest Association

Box 556
Petersburg AK 99833
May 1 1991

House Resources
PO Box V
Juneau AK 99811

Dear Representative Davidson

House Bill 2988: Citizen suits to Enforce Environmental Laws is a law we desperately need in the aftermath of the Exxon Valdez disaster. Big industry has often done as they please with the environment. Alaska is so big there can never be sufficient law enforcement officials to watch each project. Private citizens will watch their neighborhoods, providing a more effective means of protection than any state agency. However, we must give private citizens some authority, so if a violation is reported, legal repercussions will follow.

Citizen suits are a prominent feature of the Oil and Gas Contamination laws which exist to protect the interests of the oil industry. The federal government recognizes the value of citizen suits, as do sixteen other states.

Great danger exists as we open our resources to development. Please allow private citizens the ability to guard their interests.

Thank you for your time.

Sincerely,

Patricia M. Adams



Resource Development Council

for Alaska, Inc.

807 "G" Street, Suite 200, Anchorage, Alaska 99501-3440
 Box 100516, Anchorage, Alaska 99510-0516 907/276-0700 Fax 276-3887

EXECUTIVE DIRECTOR
 Becky L. Gay

EXECUTIVE COMMITTEE
 William E. Schneider, President
 Curtis W. Foster, Vice Pres.
 John Rense, Vice Pres.
 Rex I. Bishopp, Secretary
 Larry L. Laughman, Treasurer
 John Forcaska
 Mark Frey
 Uwe L. Gross
 Joseph R. Henri
 Roger C. Herrera
 Dan H. Keck
 John C. Miller
 Ethel H. "Pete" Nelson
 Stephen M. Rohnberg
 Jerome Selby
 R.D. Stock
 William Thomas
 Richard W. Tindall
 Lyle Von Bergen
 William R. Wood

DIRECTORS
 Larry G. Anderson
 Sharon E. Anderson
 Richard Barnes
 Mark Begich
 William C. Bivin
 G.G. Booth
 Robert A. Breeze
 Kelly M. Campoelli
 Alexander J. Capasso
 Rich Carsor
 Lynn C. Chrysta
 J.J. Cincotta
 James L. Cloud
 John Devens
 Larry Dinneen
 James V. Drew
 Paula P. Easley
 Don L. Finney
 Lee E. Fisher
 Donald S. Follows
 Lin S. Garrison
 U.K. "Easy" Gilbreth
 Paul Glavinovich
 John L. Hall
 Alan E. Hastings
 Karen J. Ho'stad
 Phil R. Holdsworth
 Lowell A. Humphrey
 Dorothy A. Jones
 John F. Keisey
 Rancall D. Kowale
 Pete Leathard
 Philip L. Locker
 Robert W. Loeschner
 Carl H. Marris
 Ian McLean
 Chuck H. Meacham, Sr.
 C. "Rocky" Miller
 John K. Norman
 Lonnie O. Connor
 Dave Parish
 H.L. Patterson
 Brad Phillips
 Gail Phillips
 Elizabeth Rensch
 George R. Schmidt
 Heinrich "Henry" Springer
 John Swanson
 Leighton M. Thetford
 Barry Thomson
 Scott Thorson
 Paul M. Twetter
 Joseph E. Usidelli, Jr.
 William R. Whiteside
 George P. Wuerch

EX-OFFICIO MEMBERS
 Senator Leo Stevens
 Senator Frank Murkowski
 Congressman Don Young

5/1/91

HB 29-Environmental law enforcement suits RDC Position Paper

HB 29, which is designed to provide for citizen suits to enforce environmental laws in Alaska, is opposed by the Resource Development Council for Alaska, as an unnecessary and dangerous piece of legislation.

The intent of the bill is to allow people who have supposedly been injured by hazardous waste sites, oil spills and similar degradation, a structure under which they can file a lawsuit. However, current law already provides such individuals with the right to sue polluters, and the ability to obtain an injunction if they can prove there is the potential for a dangerous situation. On the other end of the spectrum is the individual without a strong case, who is seeking immediate relief. That person will not have a stronger case under HB 29, but will have the ability to file a weak lawsuit and settle for large damages with the alleged polluter.

What similar bills in other states have provided is an avenue for lawsuit-happy, non-development organizations to use the law for their own gain. A study by the Center for Individual Rights, concerning the private enforcement of environmental law, shows that the vast majority of citizen lawsuits during the 1980s were filed by environmental advocacy groups and not injured citizens. In fact, EPA data between 1983 and 1985, shows that 65 percent of the settlements under legislation similar to HB 29, resulted in approximately \$1 million paid to non-development groups.

RDC believes that HB 29 is poor public policy - an Alaskan who is being subjected to dangerous and illegal pollutants can use current statutes to bring about a change in an expeditious manner. This bill is a thinly-veiled attempt to provide easy legal pickings for Alaska's non-development organizations, and as such, should not become law.

REC-1



Alaska Center for the Environment

519 West 8th Avenue, Suite 201 • Anchorage, Alaska 99501 • (907) 274-3621

February 25, 1991

Representative Cliff Davidson
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representative Davidson:

I am writing to thank you for the time you took to meet with Patti Saunders of our office in early February to discuss HB 29. As you know, the bill is sponsored by Rep. Niilo Koponen (co-sponsors to date are Kay Brown and Johnny Ellis), and enables citizens to sue polluters to bring them into compliance with environmental laws (Alaska Statute Title 46). During our meeting, you asked about the experience of other states with citizen suit laws. We are working with Rep. Koponen's office to get that information, and will forward it to you as soon as it becomes available. Enclosed is some background information to answer further questions you may have.

Citizen suits would enable citizens to 1) provide an incentive to industry to prevent pollution, because a regulatory entity (the citizen) is present and watching even when DEC is not, 2) force DEC to take action to enforce the laws against polluters, or 3) take action against polluters when DEC has failed to do so. State adoption of citizen suits was recommended by the Oil Spill Commission, and have been used for years under federal pollution laws. Please see the enclosed briefing paper for further explanation of the bill.

The Exxon Valdez oil spill might not have occurred if Alaskans had been able to enforce pollution laws. Despite acknowledgement that Alyeska's oil spill contingency plan was very different on paper than it was in reality, DEC did not use its authority to force Alyeska to bring response capability up to par. As you know, other sources of pollution exist in this state beyond the potential for oil spills (placer mines or small oil spills contaminating water supplies, for example), and these are not adequately regulated by DEC. Out of necessity, DEC must prioritize its attentions to the largest sources of environmental issues, leaving other, less pressing pollution uncontrolled. Unfortunately, what is less pressing today often becomes a priority problem tomorrow. A major goal of HB 29 is to motivate industry to install pollution controls today and avoid contamination problems in the future.

HB 29 is important legislation for Alaska. The Alaska Center for the Environment is eager to have your support for HB 29, and would appreciate a response expressing your position on the bill. Thank you for your attention to this issue, and please feel free to call with any questions.

Sincerely,

Karen Wood
Waste Reduction Specialist

enclosures



League of Women Voters of Alaska

To: Cliff Davidson, Rep.
House Resources Committee

From: Marge Hays, President
Alaska League of Women Voters (LWVAK)

Re: HB 29

I am writing on behalf of LWVAK in support of HB 29, giving citizens the authority to sue polluters to bring them into compliance with Alaska's environmental laws. We believe that if citizen authority to guard against pollution is made official, potential violators of the law will be discouraged from polluting and will take preventative action.

As part of its citizen's rights concerns, the League has long worked for the citizen's right to know and for broad citizen participation in government. The League of Women Voters of the United States believes that democratic government depends upon the informed and active participation of its citizens at all levels of government.

In terms of protecting the environment, the League supports incentives to accelerate pollution control, and believes that mechanisms for citizen appeal must be guaranteed, including access to the courts. Due process rights for the affected public and private parties must be assured. In a state as large as Alaska, it is difficult for the DEC to monitor and control all of the many sources of pollution, making citizen involvement critical to protection of the environment.

Thank you for your time and consideration of this issue. I would appreciate your distributing this memo to the other committee members.

Marge Hays
3-4-91

RECEIVED MAR 3 1991

**League of Women Voters of Alaska**

To: Dave Donley, Rep.
House Judiciary Committee

From: Marge Hays, President
Alaska League of Women Voters (LWVAK)

Re: HB 29

I am writing on behalf of LWVAK in support of HB 29, giving citizens the authority to sue polluters to bring them into compliance with Alaska's environmental laws. We believe that if citizen authority to guard against pollution is made official, potential violators of the law will be discouraged from polluting and will take preventative action.

As part of its citizen's rights concerns, the League has long worked for the citizen's right to know and for broad citizen participation in government. The League of Women Voters of the United States believes that democratic government depends upon the informed and active participation of its citizens at all levels of government.

In terms of protecting the environment, the League supports incentives to accelerate pollution control, and believes that mechanisms for citizen appeal must be guaranteed, including access to the courts. Due process rights for the affected public and private parties must be assured. In a state as large as Alaska, it is difficult for the DEC to monitor and control all of the many sources of pollution, making citizen involvement critical to protection of the environment.

Thank you for your time and consideration of this issue. I would appreciate your distributing this memo to the other committee members.

Marge Hays
3-4-91



Box 2876
Soldotna, Alaska 99669

League of Women Voters of Alaska

WHEREAS, the League of Women Voters of Alaska and the League of Women Voters of the United States believe that democratic government depends upon the informed and active participation of its citizens at all levels of government,

WHEREAS, the LWVAK and LWVUS support incentives to accelerate pollution control,

WHEREAS, the LWVAK and LWVUS support environmental protection through inspection, monitoring, and vigorous enforcement mechanisms,

WHEREAS, the LWVAK and LWVUS believe that mechanisms for citizen appeal must be guaranteed, including access to the courts,

WHEREAS, the Alaska Department of Environmental Conservation is faced with the monumental task of monitoring and controlling all of the many sources of pollution spread across our large state, but is constrained by limited resources and personnel,

WHEREAS, the United States Environmental Protection Agency acknowledges the importance of citizen suits as a supplement to government enforcement because the government has only limited resources with which to bring its own enforcement actions and because citizen suits provide a strong incentive for compliance with federal laws;

THEREFORE BE IT RESOLVED, that LWVAK will promote education and action to raise the awareness of the need for citizen suits in Alaska.

BE IT FURTHER RESOLVED, LWVAK urges local and state lawmakers to give Alaskans the authority to sue polluters to bring them into compliance with state environmental laws when the state has failed to act by supporting HB 29 (Koponen).

LWVAK, THEREFORE, meeting in Convention in Anchorage on April 21, 1991, adopted this resolution to publicly state LWVAK's support for these actions and to urge the Alaska State Legislature to pass the above-referenced bills.

**Municipality
of
Anchorage**



P.O. BOX 196650
ANCHORAGE, ALASKA 99519-8650
(907) 343-4433
TOM FINK,
MAYOR

OFFICE OF THE MUNICIPAL MANAGER

May 14, 1991

Representative Cliff Davidson, Chairman
House Resources Committee
P.O. Box V
Juneau, Alaska 99811

Dear Representative Davidson:

Enclosed is a copy of the Municipality of Anchorage position paper on HB 29, regarding lawsuits to enforce environmental laws. Please provide your members with a copy of our position.

Thank you for your assistance and consideration of our views.

Sincerely,

A handwritten signature in cursive script that reads "Larry D. Crawford".

Larry D. Crawford
Municipal Manager

M E M O R A N D U M
MUNICIPALITY OF ANCHORAGE
POSITION PAPER

DATE: May 6, 1991

TO: Larry D. Crawford, Municipal Manager

FROM: Paula Easley, Director, Government Affairs

RE: HB 29, An Act Authorizing Suits to
Enforce Environmental Laws

As requested, I have reviewed HB 29 regarding lawsuits to enforce environmental laws. Over the years I have had opportunities to consider the overall intent and results of such lawsuits. From that experience, it is my recommendation that the Municipality of Anchorage strongly oppose legislation that would encourage more citizen lawsuits.

The citizen lawsuit, rather than a means for legally "injured" individuals to seek redress through the courts, has been used almost exclusively by organized environmental groups as a tool to fund their activities. As these lawsuits have significant nuisance value, they are often settled out of court with fines and attorney fees paid by producers of the nation's commodities. These costs are ultimately passed on to consumers.

Various federal environmental laws already provide the means for citizens with standing to file suit against companies suspected of polluting. Once these citizens show they have been or will be damaged, an injunction can be issued by the court. This additional state-imposed mandate is not in the best interests of our citizens.



Alaska Environmental Lobby, Inc.

P.O. Box 22151 Juneau, Alaska 99802

907-586-2345

HB29 -- CITIZEN SUITS TO ENFORCE ENVIRONMENTAL LAWS

The Alaska Environmental Lobby strongly supports HB29. This bill prevents pollution by providing an incentive to industries not to pollute even if DEC is absent. This bill is critical due to this administration's emphasis on technical assistance rather than enforcement and its desire to cut the budget, leaving DEC overburdened and underfunded.

A person may sue

A. The Commissioner of DEC if he fails to perform tasks required by the legislature; or

B. A polluter when the following is true:

1. The Commissioner fails to take enforcement action against the polluter. A suit cannot be filed if the Commissioner is already acting against the offending party.

2. It is 60 days after the person has given the industry and Commissioner notice of the violation.

HB29 facilitates the enforcement of policy enacted by the Legislature to protect the environment. This partnership between individuals and the Legislature safeguards the environment. As such, HB29 provides a vital and necessary tool for the citizens of Alaska.

prepared by Krista Maciolek and Mollie Tavruucht, 5/8/91.



The Foundation for the
PROTECTION of the
COMMON PEOPLE, INC.
P.O. Box 3122, Sitka AK 99835

Testimony in favor of House Bill No. 29

before the

Senate Resources Committee

May 14, 1991

Mr. Chairman and members of the Committee:

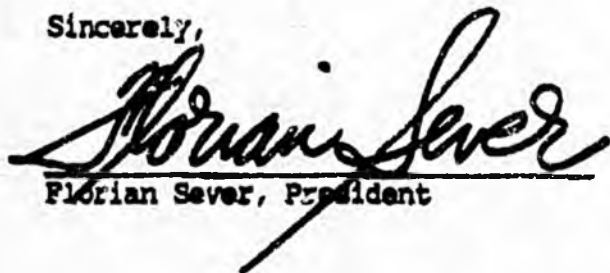
Thank you for the opportunity to testify today. My name is Florian Sever, and I am testifying on behalf of The Foundation for the Protection of the Common People, Inc.; in favor of H.B. No.29. Our organization is dedicated to the protection of the civil and human rights of all individuals; and the compliance with all environmental laws and regulations.

We are in favor of this legislation because, especially over the last few years, it has become increasingly apparent that the Alaska Department of Environmental Conservation has a propensity to "remain at rest, until acted upon by an outside force". Until the existing laws changed, the only outside force which ADEC will have any industry respond to, is industry.

The citizens of Alaska should be provided a forum in which they can bring to light, litigate and compel enforcement of standing regulations and laws. This will act as an incentive for industry to comply with the existing laws and regulations, and make them realize that they will operate within the law, or they will pay the price; not the innocent victims of their violations.

Again, we ask that you support and pass H.B. 29, as written, and in its entirety.

Sincerely,


Florian Sever, President

**CURTIS W. FOSTER
9621 SPRING HILL DRIVE
ANCHORAGE, AK. 99507-4374**

February 10, 1992

Representative Dave Donley
Alaska House of Representatives
P. O. Box V MS 3100
Juneau, AK. 99811

FAX 465-2299

Reference: HB 29 - "An Act Authorizing Suits to Enforce Environmental Laws"
(NOTE: Please enter below comments into the record.)

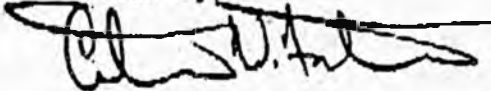
Dear Representative Donley:

In reference to HB 29, "An Act Authorizing Suits to Enforce Environmental Laws", I vigorously oppose this specific bill and similar bills which violate the principles of establishment of agencies and regulations to administer and enforce laws of all the people. This bill is yet another example of unnecessary legislation that provides an alternate path for anti-development groups to hinder development. It also goes beyond the spirit of oversight and provides incentives for "fund-raising" (penalties awarded to the litigant) while creating havoc with free enterprise.

I fully support adequate enforcement of current environmental laws and believe the appropriate method is already in place and is sound, utilizing the designated federal and state agencies to oversee the regulations promulgated from law. Placing the interpretation of regulatory compliance in the hands of the masses will deter from the scientific and practical approaches needed to ensure a balance of technology application and business purpose necessary for a stable economy.

I urge your efforts to defeat this terrible piece of legislation.

Sincerely,



Curtis W. Foster

cc: Rep. B. Bruckman
Rep. D. Choquette

BRENNAN
& **BRENNAN** INC.

PUBLIC RELATIONS COUNSELORS
711 H Street, Suite 620, Anchorage, Alaska 99501
(907) 276-1397, FAX (907) 276-7907

February 21, 1992

Representative Dave Donley
Fax 465-2299

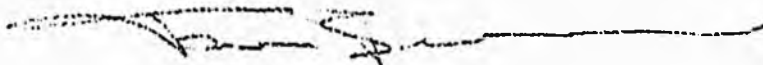
Dear Dave:

Please, please, please kill HB 29 in the Judiciary Committee. There is already ample opportunity for public input and legal action to protect Alaska's environment in business and resource development activities. HB 29 would send a message to prospective investors that Alaska is a risky and undesirable place to do business. It would institutionalize McCarthyism by allowing unfounded accusations to block desirable economic activity.

The prospects for a healthy economy in Alaska are very scary. I have looked closely at the projections for future oil production and revenues, as I'm sure you have. This is the time for Alaska's leaders to show in the most dramatic ways they can that they are working for to make Alaska an attractive place to do business.

We must protect the environment and we are doing so. This bill is unnecessary and would work against the best interests of our state. Thanks for your consideration.

Sincerely,



Tom Brennan
Chairman

BRENNAN

BRENNAN inc.

PUBLIC RELATIONS COUNSELORS
711 H Street, Suite 620, Anchorage, Alaska 99501
(907) 276-1397, FAX (907) 276-7907

February 10, 1992

House Judiciary Committee
% Legislative Information Office
3111 C Street, Suite 150
Anchorage, Alaska 99503

Dear Committee Members:

Re: House Bill 29

I will be unable to testify in person on House Bill 29, but would like to ask that my written comments be made part of the record. This bill would enable citizens to file lawsuits against companies which are "alleged" to have violated pollution laws.

Should this bill pass we will have proven the accuracy of the words of Mr. Whitekeys:

Every time somebody
Does something dumb,
An Alaskan
Does Something Dumber

Thank you.

Sincerely,



Tom Brennan

ALASKA TRUCKING ASSOCIATION, INC.

3443 Minnesota Drive • Anchorage, Alaska 99503 • PHONE (907) 276-1149 • FAX (907) 274-1948

TESTIMONY OF FRANK J. DILLON
BEFORE
HOUSE JUDICIARY COMMITTEE
FEBRUARY 7, 1992

Chairman Donley and members of the committee, my name is Frank J. Dillon. I am Executive Director of Alaska Trucking Association, Inc.

I am here today representing the 300 member companies of Alaska Trucking Association, Inc. ATA is opposed to H.B. 29 and asks that it not be passed.

In reading H.B. 29 we find it offers no additional real protection to the integrity of Alaska's environment beyond the existing adequate protection afforded by current state and federal law and regulations. H.B. 29 would seem to have the potential however to foster by its misguided application a needless burden on the Department of Environmental Conservation, and the business community. For example, unfounded allegations by unscrupulous business competitors could result in a loss of productivity, embarrassment and unnecessary legal fees for a company and its employees guilty of no environmental transgression. ATA finds no merit in this bill and urges that H.B. 29 not be passed.

Thank you.



Rep. Dave Donley

465-2299

HOUSE JUDICIARY COMMITTEE

Hearing on HB29 - Citizen Lawsuits

February 14, 1992

Thank you for this opportunity to present testimony on the legislation pending before you today. My name is Joe Wehrman with Koncor Forest Products in Anchorage.

The committee is to be commended for spending the extra time required to consider this legislation in depth before deciding how to proceed. The legislation has far reaching ramifications that will extend well beyond the situations addressed in the bill at this time. If passed, it will literally establish legislative policy against of any form of developmental activity in Alaska. Legislation such as this tends to expand to incorporate other regulatory authorities rather than stay limited to its original scope.

You have heard and will hear testimony about the benign nature of this bill, how there has been no proliferation of lawsuits in other jurisdictions where this type of litigation is allowed, and how suits filed in other places have not been frivolous. What you will not hear about is the unwarranted cost to industry of defending itself against such suits, or the massive opportunity losses connected with such suits. What you definitely will not hear from supporters of this legislation as it now appears is that, unlike this bill, where such suits are now authorized the penalties do not generally accrue to the plaintiff but instead go to the governmental body having jurisdiction. In those few instances where provision is made for out of court settlements to be payable to the plaintiff, suits are being used as form of environmentalist extortion since it is less costly for the industry to settle than bear the legal expenses and opportunity losses connected with such litigation.

Koncor is widely recognized as being one of the most environmentally sensitive companies in the forest products industry. Our owners are Alaska natives with deep ties to both the land and a subsistence lifestyle. We go far beyond the letter of the law to maintain those values for our shareholders. Even the United Fishermen of Alaska has formally acknowledged our environmental efforts. In spite of this successful track record, we must go on record as being opposed to this legislation. There are several reasons for this opposition.

Many people believe that there is no access to the courts under the present system. That is far from the case. Individuals and groups can appeal decisions by the various agencies in a timely manner and, after exhausting that

avenue, can file suit. We have to submit literally file drawers full of data and permit applications to any number of governmental agencies before we can begin a single operation. At any step in the process any individual can file an appeal and subsequently litigate any agency decision. There are an extraordinary number of opportunities for an individual to intervene under present statutes if they believe the environment is threatened or even if they just plain do not like an agency decision.

There is at present no provision in statute for plaintiffs to make money to fund themselves without any financial risk being incurred. This would be the case if this legislation becomes law. For one of our operations that has thus far been over two years in the permitting process, we have been advised by a single agency that there are five local attorneys lined up to file individual pro-bono suits to stop us from lawfully accessing our resources because they object to the way it will look.

The present version of HB29 is entirely one-sided. It provides no remedy or protection for the defendant and abundant incentive for potential plaintiffs to initiate suits. The plaintiff has no financial exposure. There is no recognition of the opportunity losses that such suits present for private corporations.

The committee must understand that passage of this legislation in any form will increase the burden on the court system and further strain agency staff time now available for the monitoring and enforcement of regulations. If the Committee feels compelled to recommend passage of this legislation it may be possible to amend the bill to make the playing field closer to level for all parties.

The statute must leave no doubt as to the distribution of any fines and/or penalties going to the State rather than the litigant. It may be unconstitutional to do what the statute as presently written indicates with the money from the suits in any case.

Recognition has to be incorporated to insure that a settlement between an agency and a potential defendant leaves both immune from citizen lawsuits.

The premise of "substantially prevailing" needs clarification and has to be applied equally to both sides of the case. Likewise the potential exposure to costs must work both ways.

There must be a bond required from the plaintiff that covers not only the cost of a defense from the suit, but also the potential opportunity losses that might be inflicted on the defendant as a result of a suit.

The exemption for communities must be eliminated. During last year's deliberations on the bill there was wording added to exempt most communities in Alaska. As one legislator put it because "communities couldn't afford to defend themselves against this kind of suit". We question whether the legislature really believes that the private sector is in a better position to absorb these costs and remain in business?

In summary, this bill should not pass. The environment and people of Alaska would be far better served if the regulatory agencies were adequately funded to administer existing regulations than to have this bill passed into law. Maintaining a viable balance between the needs of man and our environment is supposed to be what the environmental movement is all about.

Thank you for allowing me the opportunity to present these thoughts for your consideration.



ASSOCIATED GENERAL CONTRACTORS of ALASKA

4041 B STREET • ANCHORAGE, ALASKA 99503
P.O. BOX 240609 • ANCHORAGE, ALASKA 99524-0609
TELEPHONE (907) 561-5354 • FAX (907) 562-6118

7/Febr. 1992

To

Rep. Dave Donley
House Judiciary Committee
Juneau, Ak.

Subject:
CS SS HB 29 (Resources)
"An Act authorizing suits to enforce environmental laws"

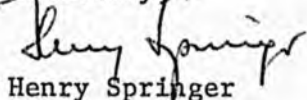
AGC of Alaska is strongly opposed to this bill.

This is another example of completely unnecessary legislation! More than sufficient laws and regulations are in place to protect the environment from pollution and enable adequate enforcement of its provisions. Private individuals and groups have enough access to the processes to safeguard enforcement and corrective actions through the established law enforcement agencies at all Governmental levels.

This bill does not only create unwarranted interference from private sources into Governmental affairs, it creates also incredible possibilities for excessive costs, confusion over jurisdiction and in summary is bad public policy.

This bill deserves to die in committee.

Sincerely,



Henry Springer

Director

FAIRBANKS
P.O. BOX 60075 • FAIRBANKS, AK 99706
(907) 452-1809

JUNEAU
134 N. FRANKLIN, SUITE A • JUNEAU, AK 99801
(907) 586-1740

SOLDOTNA
P.O. BOX 350 • SOLDOTNA, AK 99669
(907) 262-2485



January 10, 1991

Legislative Information Office
3111 C Street Suite 150
Anchorage AK 99503

HOUSE BILL 29
PUBLIC TESTIMONY HOUSE JUDICIARY COMMITTEE, 2/14/92

In lieu of our personal appearance please read our objection to this bill into the record.

We strongly object to HB29, CS FOR SPONSOR SUBSTITUTE FORK HOUSE BILL 29 (RESOURCES), sponsored by Representatives Koponen, Brown and Ellis. As it would apparently allow anyone to bring suit against entities "ALLEGED" to have violated pollution control laws, it would mitigate basic rights guaranteed under our constitutional system in denying due process and assumption of innocence.

This bill is not necessary. There are in place policies, guidelines, plans and laws by which companies must operate to receive a permit for most activities. The state would be remiss if they failed to monitor the permitted activities. Violations should be addressed by the state, but any individual may at present file suit with cause. However, to permit civil suit based on alleged violations is contrary to reason and will stagnate efforts by industry to develop our resources. The likelihood of nuisance suits (without foundation but which, once into the system, must be addressed) will be a serious detriment to the atmosphere of doing business in Alaska.

Sincerely,

PALMER ECONOMIC
DEVELOPMENT AUTHORITY

Brit Lively
Executive Director



Formerly ERT

February 18, 1992

**ENSR Consulting
and Engineering**

750 West Second Avenue
Suite 100
Anchorage, AK 99501
(907) 276-4302

Representative Dave Donley
Chairman, House Judiciary Committee
State Capitol, Room 120
Juneau, Alaska 99801-1182

Re: House Bill 29, "An Act Authorizing Suits to Enforce Environmental Laws"

Dear Mr. Donley:

I am writing to express my opposition to the above-referenced bill. This bill, if passed in its present form, will allow anyone with an anti-development persuasion to file a lawsuit against companies who are only alleged to have violated environmental laws. This is clearly another attempt to give the anti-development environmental lobby additional ammunition to use against those in the resources businesses.

We already have a plethora of environmental regulations and agencies with enforcement powers to see that these regulations are carried out. The employees of these agencies are at least formally trained and have some technical foundation for their enforcement roles. House Bill 29 would essentially give the general public the right to practice enforcement in the court house, but without technical foundation required. Political persuasion would be the underlying motivation.

The authors of House Bill 29 (Kopenen, Brown, and Ellis) have a reputation of consistently proposing this type of anti-development legislation. Apparently, they have never figured out what drives Alaska's economy; at least what there is left of it. It looks to me like these people are in the process of biting the hand that feeds them. They have done sufficient damage already in past sessions of the legislature. Enough is enough. I may not be the brightest guy in the world, but I can clearly identify stupidity when I see it and HB29 surely qualifies.

Please do all you can to see that this dangerous piece of special interest legislation never sees the light of day.

Sincerely,

Robert C. Gardner
Regional Director, Technical Services

cc:; Loren Leman
Mark Hanley
Niilo Hoponen
Kay Brown
Johnny Ellis



THE ALLIANCE

ALASKA SUPPORT INDUSTRY ALLIANCE
4220 "B" Street; Suite 200
Anchorage, Alaska 99503-6911
Phone (907) 563-2226
Fax (907) 561-8870
From: Bill Webb, General Manager

To: REPRESENTATIVE DAVE DONLEY
From: The Alliance - Fax 561-8870

Date: 2-20-92
Page 1 of 1

RE: 3rd Hearings on House Bill 29 - The Stop All Development Bill

As our 350+ member companies continue to plan on downsizing their companies due to lack of viable future development projects in Alaska; the House Judiciary Committee is using their time to hold ANOTHER hearing on House Bill 29 that would cause our members to further reduce their future plans because "ALLEGED ACTS" charged by people with "NO STANDING" would be able to make our state's future development even more difficult than it is now.

We strongly suggest that your committee devote its time to working on legislation that will promote jobs in Alaska. House Bill 29 should simply stay in your committee until the REAL PROBLEMS OF ALASKA ARE RESOLVED.

We will be most interested in how you vote on this bill.

Sincerely yours,

Bill Webb



1300 E. 5th. Avenue
Anchorage, Alaska 99501
Phone (907) 279-9641
FAX (907) 276-8942

FEBRUARY 21, 1992

REPRESENTATIVE DAVE DONLEY

HB 29!

DEAR MR. DONLEY,

VERY SHORTLY YOU ARE GOING TO VOTE ON THIS BILL. NEEDLESS TO SAY, A NO VOTE IS DEFINETLY THE RIGHT VOTE FOR THE BUSINESS AND INDUSTRY OF ALASKA. THIS IS THE WRONG TYPE OF LEGISLATION TO BE SPENDING YOUR VALUABLE TIME ON. LET'S PROMOTE SOME BILLS THAT WILL HELP AND EXPAND OUR ECONOMY AND NOT ONE'S THAT PUT ANOTHER NOOSE AROUND OUR NECKS.

THANKS FOR YOUR ATTENTION AND CONCERN TOWARD THIS ISSUE.

AGAIN, PLEASE VOTE NO!

BEST REGARDS,

A handwritten signature in cursive script, appearing to read "Duane Mathes".

DUANE MATHES
FLEET SALES MANAGER
907-265-7523

TO: Dave Donley

FAX: 465-2299

FROM: Gordon Stevens

10301 Tree Top Lane

Anchorage, Alaska 99516

Reference House Bill 29: This bill will allow the minority to overrule the majority contrary to the principles of democratic government. After the appropriate federal, state and local permits have been granted, this bill would allow anyone who doesn't want a project to go forward to take court action and at least delay the work. Delay means added costs and, if the project is cancelled, loss of JOBS. The government's reputation is low enough now without even considering a bill such as HB 29. KILL IT and spend your time more productively elsewhere.

TO: Alaska State Representative Dave Donley
Fax: 465-2299

FROM: Eugene Juvette

DATE: February 21, 1992

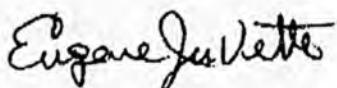
PAGE: 1 of 1

Dear Representative Donley:

I am sending this fax to express my feelings opposing H.B.29 as I understand it.

Without proof or at least reasonable cause, developmental projects should not be put in jeopardy on a whim.

Thank you,



Eugene Juvette
14291 Jarvi Drive
Anchorage, Alaska
(907) 345-5104

Ecology
Responsibility
Nonviolence
Base Democracy



Ecological Wisdom
Grassroots Democracy
Personal and Social Responsibility
Nonviolence
Decentralization
Community-based Economics
Postpatriarchal Values
Respect for Diversity
Global Responsibility
Future Focus/Sustainability

GREEN PARTY OF ALASKA

106 W. BUNNELL AVE. HOMER, AK 99603
(907) 235-7601

Representative Dave Donley
Chair, House Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

RE: HB 29

February 14, 1992

Dear Representative Donley,

I am writing in support of House Bill 29 - "An Act authorizing suits to enforce environmental laws". I did attend the legislative teleconference your committee held this afternoon, but unfortunately did not get a chance to testify. I understand that these meetings are under certain time constraints but I do wish to point out that you concentrated almost exclusively on Anchorage, taking testimony from eight or nine people in a row from that one location. I feel it would have been more appropriate to switch locations more frequently to allow a broader spectrum of opinions to be heard.

After listening to the testimony today I was struck by the vehemence of the opposition to it by industry spokesperson. That alone indicates to me that it is a bill with the general public's interest at heart and would be effective in its intentions. I heard several people mention that the bill is fodder for "meddlesome" people and "anti-development types". This is extremely worrisome, since it denies the fact that private citizens could have real concerns about the degradation of our environment and the resultant danger to the public health. HB 29 will provide one more layer of citizen oversight, a notion that is of growing concern and importance. Indeed, citizen oversight of industry and government regulators is the basis of a true democracy. Moreover, concern for the environment should not be automatically linked to "anti-development" attitudes. What is happening is that more and more people are asking that we proceed with development in a more careful manner than in the past, with a healthy regard for the effects on the environment and the socio-economic impacts on the local citizenry. People are asking "who really benefits?"; "what are the overall effects of the development?" and "is the project sustainable and is it the wisest use of resources?"

[OVER]



There is no incentive for a private citizen to bring a "frivilous" suit against an "alleged" polluter. I support Representative Koponen's amendment deleting the clause that would allow funds to be awarded to 501 (c) 3 organizations. Any monetary awards should be for restoration or rehabilitation of environmental damage, and enivronmental education. The fear of "frivilous" suits shows a lack of trust - equal to the public's lack of trust of industry to operate in an environmentally responsible manner and the ability and desire of government to enforce regulations. I must say that the public has ample evidence in support of their fear. However, this is a vicious cycle that will only be broken by allowing industry and the general public to work together, to enter into "compacts" for the benefit of all. The role of government is to carry out the will of the people.

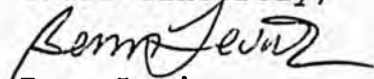
A citizen bringing suit against a company or government agency under the provisions of this bill would have to be anything but "frivilous". There is no possibility of personal gain and if the judgement is in favor of the defendant, they or their lawyers would be liable for court costs.

In many respects it is extremely unfortunate to use the threat of litigation to force compliance with environmental regulations but until the people's concerns are allayed by performance by industry and government, we need the ability to oversee operations and ensure compliance. In a perfect world, there would be no pollution, no threats of fines or litigation, no lack of trust. Until the people are assured that we are heading towards that perfect world, we need HB 29 to protect our interests and allay our fears.

The modern world is waking up to the fact that strong laws protecting the environment and the public health, laws that are strictly enforced, are becoming increasingly necessary. There is a real benefit here too. Strong environmental laws increase inventiveness and creativity on the part of industry. They foster a healthy competition between companies to reduce pollution and waste; ultimately they will make industry more efficient, more competitive and more profitable. In the face of strong environmental standards, companies that promote "good housekeeping" practices, complying with the law, will capture a greater share of their markets, both at home and abroad. In this, everybody profits.

Thank you for taking the time to consider these views and once again I encourage you to move this bill forward with your support.

Yours sincerely,



Benn Levine

Biosystems & Energy Advisor

cc: Reps Koponen, Brown, Navarre, G. Phillips
C. Brodie, Vice-President, Usibelli Coal
R. Borrell, Alaska Miners Association
J. Whitmore, Chair, Green Party of Alaska
Green Party State Council



UDELHOVEN

Oilfield System Services, Incorporated

11401 Olive Lane
Anchorage, Alaska 99515
Fax 907-522-2541
907-344-1577

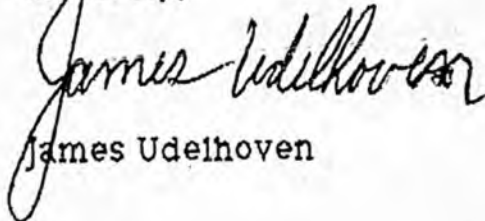
February 24, 1992

Dear Dave,

I am asking your help to kill the HB 29 Bill (An Act Authorizing Suits To Enforce Environmental Laws). This Bill, if it becomes law, would allow extreme environmentalists to deal a death blow to future development in Alaska.

Thank you for your help in this matter.

Sincerely,



James Udelhoven



PETRO MARINE SERVICES

A HARBOR ENTERPRISES COMPANY

P. O. Box 389 • Seward, Alaska 99664 • (907) 224-3190

TELEFAX COVER PAGE

Anchorage
(907) 278-7586

Nikiski
(907) 776-8000

Lube Division
(907) 228-7586

Kodiak
(907) 486-3421

Dutch Harbor
(907) 581-1350

Seattle
(206) 283-0073

FROM: SEWARD TELEFAX NO. 907-224-3937 DATE: 2/21/92

PLEASE DELIVERY THE FOLLOWING PAGES TO:

NAME: REPRESENTATIVE DAVE DONLEY

FIRM: HOUSE OF REPRESENTATIVES

CITY: JUNEAU, AK

FAX #: (907) 465-2299

RE: HB 29

TOTAL NUMBER OF PAGES INCLUDING THIS PAGE: 1

COMMENTS: PLEASE BE ADVISED THAT WE STRONGLY OPPOSE
HOUSE BILL 29 (AN ACT AUTHORIZING SUITS TO ENFORCE
ENVIRONMENTAL LAWS). THIS ACT WILL ALLOW JUST ABOUT
ANYONE TO SUE TO STOP DEVELOPMENT PROJECTS BECAUSE OF
ALLEGED VIOLATIONS OF ENVIRONMENTAL LAWS. THIS BILL
IS A NIGHTMARE AND SHOULD DIE IN COMMITTEE.

SIGNED: *[Signature]*
HARBOR ENTERPRISES, INC.
DALE R. LINDSEY, PRESIDENT

PLEASE NOTIFY US IMMEDIATELY IF YOU DO NOT RECEIVE ALL PAGES

OPERATOR: _____ at 907-224-3190

WE ARE TRANSMITTING FROM A PANAFAX 400 AD, GROUP THREE FAX.

Corporate Telefax Numbers

DUTCH HARBOR907-581-1431	KODIAK907-486-6833
ANCHORAGE907-258-2362	NIKISKI907-776-8088
SEATTLE206-283-0075		

February 21, 1992

~~3/1/92~~
AKFP-HK
see me

KFP
Koncor Forest Products Company

3501 Denali, Suite 202
Anchorage, Alaska 99503
(907) 562-3335 FAX (907) 562-0599

Representative Dave Donley
Alaska House of Representatives
P.O. Box V
Anchorage, Alaska 99811

Dear Representative Donley:

We urge you to not support HB-29. As a small business involved in resource development this bill if passed will be a disaster to us. It allows anyone with an attorney to stop our operations, even if we are doing everything properly. There is already much public involvement in the legislature and administration portion of laws for citizens to participate.

Why doesn't the bill create a level playing field for those involved. The environmentalists who will use this bill for the sole purpose of stopping or delaying a project have nothing to lose. If this bill passes it should at a minimum require environmental groups to post a bond and if charges are false they should pay damages. These damages at a minimum should include attorney fees, costs of delay, lost profits, etc. If the business is wrong that we will pay whatever fine is appropriate. If this bill is not that harmful to small business, why were small communities removed?

In summary, we urge you to not support this anti business bill. Alaska business already have dozens of laws we must comply with to assure the environment is protected. This bill will only delay and bankrupt legitimate Alaskan businesses. It will be used as a tool of extremist environmental groups to stop legitimate operations.

Sincerely,



John L. Sturgeon
President

JLS/jes

KONIAG, INC.



• 4300 B Street, Suite 407, Anchorage, AK 99503

(907) 561-2668 • FAX (907) 562-5258 •

February 21, 1992

VIA FAX

Representative Dave Donley
Alaska State Legislature
P.O. Box V
Juneau, AK 99801

Dear Representative Donley:

The process of trying to conduct any resource development activity, or for that matter any business activity at all, in the State of Alaska is already extremely burdensome given the myriad of rules, regulations, permit requirements and "watch dog" agencies.

The passage of H.B 29 would turn a difficult world into an impossible world. This law borders on lunacy. I would hope that we can count on your support to kill this nonsensical piece of legislation in committee. It is not even worthy of a vote by the full House (or legislature).

Sincerely,

KONIAG, INC.

A handwritten signature in black ink, appearing to read "Uwe L. Gross".

Uwe L. Gross
Chief Executive Officer

**THE PRECEDING PAGES
WERE TREATED AS A UNIT
IN THE ORIGINAL FILE**

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

REPLY TO:

1031 W 4th AVENUE SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550
FAX: (907) 276-3697

KEY BANK BUILDING
100 CUSHMAN ST. SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1568
FAX: (907) 456-1317

P.O. BOX K— STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

February 19, 1992

House Judiciary Committee
Capitol Building
First Floor, Room 120
Juneau, AK 99801

RE: Department of Law, Department
of Environmental Conservation
Comments on HB29

VIA HAND DELIVERY

Honorable Legislators:

Inasmuch as you did not have time for my oral testimony,
I am submitting the following for your consideration:

1. Prepared testimony;
2. Suggested amendments; and
3. Correspondence from the Department of Community and Regional Affairs regarding cities with full value determination in excess of \$100,000,000.

House Judiciary Committee

February 19, 1992
Page 2

Please add these documents to your legislative record and consider them a formal position statement from the Departments of Law and Environmental Conservation.

Sincerely,

CHARLES E. COLE
ATTORNEY GENERAL

By: *Elizabeth J. Kertula for*
Robert K. Reges Jr.
Assistant Attorney General

RKR:bga

Enclosures

cc: Representative Koponen

HOUSE BILL 29
COMMENTS BEFORE THE HOUSE JUDICIARY COMMITTEE
ROBERT K. REGES JR.
ON BEHALF OF THE ALASKA
DEPARTMENT OF LAW
AND
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

FEBRUARY 14, 1992

We are not opposed to the concept of providing a cause of action to citizens so that they may enforce chapters 46.03., 46.04 and 46.09. However, we cannot support the draft of HB 29 which is before you now. 1\ From our perspective, the specific shortcomings of that bill are as follows:

DAMAGES AGAINST THE STATE

Some commentators have suggested that the bill is not designed to allow a citizen to secure damages (money) from the state. However, section 2 of the bill proclaims, in pertinent part:

[A] person who has an interest that is or may be adversely affected by the violation may file a civil action against... the state or an agency of the state..

Such a suit would be a suit under (d)(1) of AS 46.03.870. The bill goes on to say:

In an action under (d)(1) of this section, the court may . . . order other relief.

This is found in the proposed AS 46.03.870(f).

It is hard to imagine a broader authorization. Clearly, this language would allow a plaintiff to recover damages against the state whenever the state, or an agency of the state is alleged to be in violation of a law, regulation, permit, plan, or order established under AS 46.03, 46.04 or 46.09. This is not in the best interest of any government, particularly an "owner state."

Environmental laws usually hold both the owner and operator liable for a violation. The state is sometimes liable for the actions of persons who are conducting operations on state lands. In the past, concepts of sovereign immunity and other legal

1\ 7-LS0295\S, CS for Sponsor Substitute for House Bill no. 29 (Resources), Offered 5/20/91

barriers have held people back from pursuing the state for this indirect, passive liability. However, under this bill the state becomes an easy target.

The state is a deep pocket. There are no problems establishing jurisdiction over the state for the type of actions at issue here. There is no chance that the state will file bankruptcy or will be able to hide its assets in a series of subsidiaries. For all these reasons, it will be easier to secure relief from the state than it will be to secure relief from the operator who actually caused the damage.

This waiver of sovereign immunity; this cause of action created by the bill, is simply too broad. Perhaps it is in the public's interest to allow injunctions against an owner state. It is not in the public's interest to allow the levy of money damages against the state. Accordingly, we object to the phrase "and order other relief" now found on page 2, line 9.

PENALTIES ACCRUING TO PRIVATE PARTIES

At present the bill also allows a court to "assess civil penalties under AS 46.03.760." 2\ On its face, this would appear to allow private parties to secure penalties.

We note that AS 46.03.760 says that a person who violates state environmental laws "is liable, in a civil action, to the state" It is our understanding that the sponsors of the bill intended that this language in 760 would prohibit the accrual of any penalties to any person except the state. That is why the bill allows for penalties "under AS 46.03.760." This intent is not clear on the face of HB 29. We recommend clarification, such as:

In an action under (d)(1) of this section, the court may [ASSESS] award civil penalties to the state, irrespective of whether the state is a party to the action, under AS 46.03.760,...

CLOSED SITES AND PAST VIOLATIONS

Some commentators have stated that the bill is not designed to address completely closed sites or entirely past violations. We feel that it fails to accomplish this purpose. At present, a cause of action is provided if the violation is:

. . . continuing, intermittent, or likely to recur,
. . .

2\ Page 2, line 8, which is the proposed subsection AS 46.03.870(f).

The concept of a continuing nuisance is well established in caselaw. 3\ So long as a hazardous substance leaks from a buried container, so long as a pollutant migrates from one media to another, the violation is continuing. In order to overcome those precedents; in order to limit this bill to future violations, courts will have to take a narrow reading of terms that define a violation. However, narrow interpretations of words such as "discharge", "disposal", "release" and other synonyms should not be encouraged. Does the violation of our oil spill laws end when the vessel stops releasing oil into the environment or does the "discharge" continue when oil moves from water to beach? We would certainly want to argue the latter. Accordingly, we suggest that the language be changed to expressly state that it does not provide a cause of action for past violations and we further recommend that a definition of "past violation" be crafted to insure that the scope of the bill is not broader than intended.

UNEVEN PLAYING FIELD AS TO COSTS

As written, the bill encourages litigation and discourages prelitigation negotiations. If a person brings a legitimate concern to the attention of ADEC and the matter is resolved without resort to litigation, the person receives no fee for the time spent in discussion or negotiation. On the other hand, if a person files a complaint, he or she may use monies received in settlement to pay attorney's fees and costs. 4\ This provides an incentive to litigate, rather than attempt to resolve disputes short of litigation.

In the general scheme of things this incentive is offset by the risk of having to pay a defendant's fees if the defendant prevails. 5\ However, in Alaska this disincentive has been eliminated whenever the plaintiff can establish that he or she is a "public interest litigant." 6\ It is foreseeable and fair to expect that persons who are able to use HB 29 will almost always qualify as public interest litigants. Thus, they can march into court with impunity afforded by caselaw, wielding the causes of

3\ E.g. United States v. Price, 523 F.Supp. 1055, 1071(D.N.J. 1981); CPC International, Inc. v. Aerojet-General Corp., 759 F.Supp. 1269, 1277 - 1278 (W.D. Mich. 1991).

4\ See proposed AS 46.03.870(i).

5\ Alaska Rules of Civil Procedure, Rule 82.

6\ See Sisters of Providence in Washington, Inc. v. Dept. of Health and Social Services, 648 P.2d 970, 979 (S.Ct.Ak. 1982)(attorneys fees cannot be awarded against a public interest litigant); Alaska Survival v. Alaska Dept. of Natural Resources, 723 P.2d 1281, 1292 (S.Ct.Ak. 1986)(a public interest litigant is entitled to full, reasonable fees, not just partial fees).

action afforded by this bill. The plaintiff risks nothing. Only the defendant is at risk.

This combination of HB 29 and the public interest litigant exception to Civil Rule 82 creates an unlevel playing field. This combination flies in the face of the so-called "American rule" whereby each party bears his or her own costs of litigating. That rule, expressly recognized by the United States Supreme Court in a case that arose in Alaska, 7\ is still the best tool for avoiding nuisance suits. While our courts have seen fit to emasculate the rule with "public interest litigant" exceptions, this legislature -- in the interest of fairness -- should not tip the balance any further in favor of such litigants.

One solution would be to remove the phrase "or for reimbursement of legal fees and costs" from proposed subsection AS 46.03.870(i). 8\ That way persons settling an action would secure no personal benefit. Benefits would only go to the public purposes purportedly represented. This should remove some of the incentive to bring a suit since the plaintiff will know that most cases settle and, in settlement, he or she will get no fees. Of course, we recognize the downside of this proposition; once a suit is commenced, the motivation to settle is reduced.

Accordingly, we more strongly recommend another solution. State that the public litigant exception does not apply to suits brought under this section. That would eliminate any tendency for plaintiffs to abuse the cause of action provided by the bill.

WINDFALL TO ENVIRONMENTAL GROUPS

Some commentators have said that this bill is not designed to provide a windfall to public interest groups. If that is true; if the purpose of the bill is really to bring about environmental improvement and not to line the pockets of activists, why does the bill allow settlement monies to be used for any purpose by 501(c)(3) organizations? 9\ Most public interest groups fall into this category. If the bill is really designed as it has been touted, this reference should be deleted. Otherwise the bill provides activists with a back door into the coffers of the state and the regulated community.

7\ Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975).

8\ Page 2, line 31 and page 3, line 1 of the bill.

9\ Page 2, line 31 of the bill.

CONCLUSION

In the environmental arena citizen suits can provide a useful balance to the tension existing between regulators and the regulated community. And, as testimony has revealed, there have been isolated instances where government was unable to resolve environmental concerns as expeditiously as prudence would have dictated. So, there probably is a legitimate basis for allowing third parties to bring an action for injunction or in the nature of mandamus. This is what most other federal and state citizen suit provisions provide.

But this bill goes too far. Unless and until it is recrafted in the manner set forth herein, neither the department of law nor the department of environmental conservation can support it. Thank you.

HB29 SUGGESTED AMENDMENTS

Please note that I have not checked the proposed language against the drafting manual. The concepts, rather than the specific words, are most important to the Department of Law and Alaska Department of Environmental Conservation. Words to be deleted are bracketed, capitalized and bold. Words to be added are underlined.

Sec. 2. AS 46.03.870(f)

Page 2, lines 8 - 10

(f) In an action under (d)(1) of this section, the court may [ASSESS] award civil penalties to the state, irrespective of whether the state is a party to the action, under AS 46.03.760[,] or issue an injunction under AS 46.03.765 [, AND ORDER OTHER RELIEF]. In an action under (d)(2) of this section, the court may issue declaratory judgment or an injunction [AND ORDER OTHER RELIEF].

Sec. 2 AS 46.03.870(g)

Page 2, lines 11 - 21

(g) A person may not file a civil action under (d) of this section for any condition created prior to the effective date of this Act. A person may not file a civil action under (d) of this section for any subsequently created condition, or any violation, unless the condition or violation is substantial and is either continuing, intermittent, or likely to recur, and

(1) if the action is under (d)(1) of this section

(A) until 60 days after the person has given notice of the violation to the commissioner and to the

person alleged to be in violation of a law, regulation, permit, plan, or order; or

(B) if the commissioner has commenced and is diligently prosecuting a civil [ACTION] or administrative [PENALTY] enforcement proceeding to require compliance with the law, regulation, permit, plan, or order; or

(2) if the action is under (d)(2) of this section until 60 days after the person has given notice of the [VIOLATION] alleged inaction to the commissioner.

Sec. 2. AS 46.03.870(i)

Page 2, lines 29 - 31 and page 3, lines 1 - 2

(i) A settlement of a civil action brought under this section [MUST PROVIDE THAT] shall be entered in the court in which the action was commenced, as a consent decree. Except as otherwise provided in Alaska Rules of Evidence, terms and conditions of consent decrees shall not be considered an admission of liability for any purpose, and consent decrees shall not be admissible in any judicial or administrative proceeding except a proceeding to enforce the terms of the decree. The proceeds received by a party under [THE SETTLEMENT] a consent decree must be approved by the court and may only be used for restoration costs, environmental education, [DONATIONS TO GROUPS EXEMPT UNDER 26 U.S.C. 501(c)(3),] or, in accordance with Rule 82, Alaska Rules of Civil Procedure, for [REIMBURSEMENT] an award of legal fees and costs. The public interest litigant exception to Rule 82 shall not be applied in any award under this

subsection. [THIS SUBSECTION DOES NOT APPLY IF THE TERMS OF
THE SETTLEMENT ARE SUBJECT TO APPROVAL BY THE COURT.]

STATE OF ALASKA

DEPT. OF COMMUNITY & REGIONAL AFFAIRS

OFFICE OF THE COMMISSIONER

WALTER J. HICKEL, GOVERNOR

150 THIRD STREET
JUNEAU, ALASKA 99801-1291
PHONE: (907) 465-4700

949 E. 36TH AVENUE, SUITE 400
ANCHORAGE, ALASKA 99508-4302
PHONE: (907) 563-1073

January 27, 1992

RECEIVED
Department of Law

AM JAN 29 1992 PM
7 1 2 3 4 5 6

Mr. Charles Cole
Attorney General
Department of Law
P.O. Box K
Juneau, Alaska 99811

RE: CSSS HB 29 - An Act authorizing suits to enforce
environmental laws

Dear Mr. Cole:

As the Department of Law is the lead agency with regard to HB 29, we are transmitting herewith information that you may find pertinent to your testimony on CSSS HB 29 at the committee hearing scheduled for February 3, 1992.

The Committee Substitute makes municipalities susceptible to civil suits to enforce environmental laws unless they have a full value determination on the taxable real and personal property within their boundaries of less than \$100,000,000.

The Department of Community and Regional Affairs prepares full value determinations and publishes them annually in a publication called Alaska Taxable. The attached information has been prepared for Alaska Taxable 1991 which will be published shortly. The attached tables show that among the boroughs, all but Aleutians East Borough, Denali Borough, and Lake and Peninsula Borough exceeded a full value determination of \$100,000,000 as of January 1, 1991. Several cities outside of boroughs also have a full value determination in excess of \$100,000,000. They are Bethel, Cordova, Dillingham, Nome, Petersburg, Unalaska, Valdez and Wrangell. Within the second class boroughs, the full value determination for a number of cities also exceeded \$100,000,000 on January 1, 1991. Those cities are Fairbanks, North Pole, Homer, Kenai, Seward, Soldotna, Ketchikan, Palmer and Wasilla. All of the above municipalities will be susceptible to civil litigation under the proposed legislation.

Mr. Charles Cole
January 27, 1992
Page two

In case any questions should come up about what is a full value determination, a brief explanation of the concept is included along with the tables.

If we can be of further assistance, please contact the department's legislative liaison, Sandra Wicks, or the State Assessor, Mike Worley, at 465-4750.

Sincerely,

Edgar Blatchford

Edgar Blatchford
Commissioner
Department of Community
and Regional Affairs

Enclosures

TABLE 8

FULL VALUE DETERMINATION

(As of January 1)

BOROUGH/UNIFIED MUNICIPALITIES	AS 29.45 LOCAL TAXABLE FULL VALUE (\$)	AS 43.56 STATE TAXABLE FULL VALUE (\$) (OIL & GAS)	FULL VALUE DETERMINATION (\$)
ALEUTIANS EAST	84,199,100	0	84,199,100
ANCHORAGE	10,203,409,300	63,316,960	10,266,726,260
BRISTOL BAY	160,700,800	0	160,700,800
DENALI BOROUGH	69,533,800	0	69,533,800
FAIRBANKS NORTH STAR	2,721,235,300	453,928,810	3,175,164,110
HAINES BOROUGH	119,427,700	0	119,427,700
JUNEAU	1,479,741,100	0	1,479,741,100
KENAI PENINSULA	2,848,898,300	678,720,260	3,527,618,560

LOCAL TAXABLE FULL VALUE, AS 29.45:

The full value of real and personal property that can be taxed under state law as equalized by the Department of Community and Regional Affairs according to standards defined in Attorney General Opinion No. 18, 1962.

STATE TAXABLE OIL & GAS PROPERTY, AS 43.56:

The assessed value of oil and gas exploration, production and transportation property as determined by the Petroleum Division, Department of Revenue.

FULL VALUE DETERMINATION:

The full value of property taxable under state law (AS 29.45) and oil and gas related property assessed by the State (AS 43.56).

**TABLE 8
CONTINUED**

**FULL VALUE DETERMINATION
(As of January 1)**

BOROUGH/SUNIFIED MUNICIPALITIES	AS 29.45 LOCAL TAXABLE FULL VALUE (\$)	AS 43.56 STATE TAXABLE FULL VALUE (\$) (OIL & GAS)	FULL VALUE DETERMINATION (\$)
KETCHIKAN GATEWAY	915,815,000	0	915,815,000
KODIAK ISLAND	737,468,500	0	737,468,500
LAKE & PENINSULA	66,352,000	0	66,352,000
MATANUSKA-SUSITNA	1,813,566,000	12,032,920	1,825,598,920
NORTH SLOPE	202,946,000	12,290,672,660	12,493,618,660
NORTHWEST ARCTIC	351,181,100	0	351,181,100
SITKA	492,698,800	0	492,698,800

TABLE 8
CONTINUED

FULL VALUE DETERMINATION

(As of January 1)

CITIES	AS 29.45	AS 43.56	FULL VALUE DETERMINATION (\$)
	LOCAL TAXABLE FULL VALUE (\$)	STATE TAXABLE FULL VALUE (\$) (OIL & GAS)	
BETHEL	180,576,300	0	180,576,300
CORDOVA	146,361,700	2,439,160	148,800,860
CRAIG	50,794,100	0	50,794,100
DELTA JUNCTION	31,081,000	0	31,081,000
DILLINGHAM	123,842,000	0	123,842,000
EAGLE	7,972,800	0	7,972,800
GALENA	19,965,100	0	19,965,100
HOONAH	22,813,100	0	22,813,100
HOOPER BAY	5,618,100	0	5,618,100
HYDABURG	5,736,300	0	5,736,300
KAKE	16,951,200	0	16,951,200
KLAWOCK	11,993,800	0	11,993,800
NENANA	15,150,700	0	15,150,700
NOME	130,773,500	0	130,773,500
PELICAN	13,651,000	0	13,651,000
PETERSBURG	180,170,200	0	180,170,200
ST. MARY'S	4,459,300	0	4,459,300
SKAGWAY	63,040,300	0	63,040,300
TANANA	11,245,600	0	11,245,600
UNALASKA	252,114,100	34,380	252,148,480
VALDEZ	159,323,600	1,049,877,060	1,209,200,660
WHITTIER	19,009,000	794,750	19,803,750
WRANGELL	134,546,700	0	134,546,700
YAKUTAT	21,548,100	0	21,548,100

PART C - REAL AND PERSONAL PROPERTY
Municipalities not listed in Part C do not levy a property tax.

BOROUGH/SUNIFIED MUNICIPALITIES	LOCALLY ASSESSED VALUE (\$)	FULL VALUE (\$)	RATIO (%)
ANCHORAGE	9,066,544,711	10,203,409,300	88.86%
BRISTOL BAY	151,282,253	160,700,800	94.14%
FAIRBANKS NORTH STAR	2,157,616,536	2,721,235,300	79.29%
Fairbanks	823,718,964	1,029,283,200	80.03%
North Pole	145,281,780	170,861,800	85.03%
Outside Cities	1,188,615,792	1,521,090,300	78.14%
HAINES BOROUGH	103,550,666	119,427,700	86.71%
Haines	49,668,070	58,207,400	85.33%
Outside Cities	53,882,596	61,220,300	88.01%
JUNEAU	1,277,084,875	1,479,741,100	86.30%
KENAI PENINSULA	2,502,368,216	2,848,898,300	87.84%
Homer	202,191,613	238,375,000	84.82%
Kachemak	15,866,578	19,117,400	83.00%
Kenai	239,829,989	291,192,200	82.36%
Seldovia	16,054,512	19,007,900	84.46%
Seward	141,039,327	169,597,100	83.16%
Soldotna	177,510,047	208,294,200	85.22%
Outside Cities	1,709,876,150	1,903,314,500	89.84%
KETCHIKAN GATEWAY	737,784,800	915,815,000	80.56%
Ketchikan	383,794,100	486,242,200	78.93%
Saxman	8,998,100	13,946,300	64.52%
Outside Cities	344,992,600	415,626,500	83.01%
KODIAK ISLAND	516,304,869	737,468,500	70.01%
MATANUSKA-SUSITNA	1,606,388,261	1,813,566,000	88.58%
Houston	28,962,625	32,912,700	88.00%
Palmer	90,013,433	108,007,400	83.36%
Wasilla	209,081,593	229,966,200	90.92%
Outside Cities	1,278,312,610	1,442,679,700	88.61%
NORTH SLOPE	180,434,531	202,946,000	88.91%
SITKA	432,157,089	492,698,300	87.71%

What is a "Full Value Determination" ?

A full value determination is the sum total for a municipality of the full and true value established for each piece of taxable real and personal property within a municipality. AS 29.45.110 (a) specifies that the full and true value is "the estimated price that the property would bring in an open market and under the then prevailing market conditions in a sale between a willing seller and a willing buyer both conversant with the property and with prevailing general price levels." AS 29.45.110 (a) also requires the assessor to assess property at its full and true value as of January 1 of the assessment year.

The education title of the Alaska Statutes, specifically AS 14.17.140, requires the Department of Community and Regional Affairs, in consultation with the assessor for each school district, to establish the full value of the taxable real and personal property in each city and borough school district. Not all cities and boroughs have property taxes, however, and, consequently, not all cities and boroughs have assessors. For those that do not, the State Assessor, located in the Department of Community and Regional Affairs, must estimate the full value of the taxable real and personal property without the consultation of a local assessor.

The State Assessor then compiles the full value determination for each municipality annually and notifies each municipality. The full value determination plays a significant role in the calculation of both the state foundation aid for education and the state revenue sharing programs. The full and true value of all taxable property, whether the property is actually taxed or not, must be included in the full value determination for the municipality.

**THE FOLLOWING PAGES
WERE TREATED AS A UNIT
IN THE ORIGINAL FILE**

**THE FOLLOWING PAGES MAY
NOT FILM LEGIBLY BECAUSE OF
THE POOR QUALITY OF THE ORIGINAL**

TAKING A STAND

Citizen's suit provision cause for debate over legislation

Law will discourage industry, businesses

By Mary Nordale

Citizen's suits. It's a phrase with a nice ring. It sounds wholesome.

House Bill 29, a bill to authorize citizen suits, was reported out of House Resources Committee on May 17 and ended up in the House Judiciary Committee when the Legislature adjourned. It will be taken up again when the Legislature reconvenes in January 1992.

This bill would authorize citizens to sue for alleged violations of environmental laws, regulations, permits, plans or orders. Any money recovered in settlement of such an action may only be used for restoration costs, environmental education, donations to 501(c)(3) groups or reimbursement of "legal" fees and costs.

Promoters of the bill claim it is necessary because the Department of Environmental Conservation is so overworked that it can't attend to its regulatory duties. That is nonsense. Ask any regulated industry.

The purpose of the bill is to strip the DEC of its regulatory and enforcement powers, vest those powers in "citizens" and the courts, and divert any penalties or fines recovered in an action from the state's treasury to the pockets of "citizens."

The Internal Revenue Service's Revenue Ruling 80-278 held that an organization engaging in environmental litigation, such as Trustees for Alaska or the Sierra Club Legal Defense Fund, qualifies for tax exemption under Section 501(c)(3) of the Internal Revenue Code.

HB29 is being pushed because some of the environmental groups realize that courts have only limited ways in which to respond to such suits. They can either stop a project or let it go forward.

They are unable to work out problems and achieve compromises that will allow a business to continue operations or permit a project to go forward. Even if a project is stopped for a relatively short time, that interruption may mean the death knell to it, the result sought by environmental litigators.

Federal law allows citizen suits in a number of instances in which environmental concerns may arise. In each of the instances in which such suits are allowed, the appropriate federal department may intervene and continue the case. All fines

and penalties go to the federal treasury and the federal agency retains all of its regulatory powers.

It is a system that works fairly well and enables both the citizen concerned about environmental harm and the regulatory agency responsible for protecting the environment to cooperate in achieving the abatement of pollution.

Why didn't the sponsors of HB29 use the federal model? It was rejected by advocates of this bill because the federal model would have left DEC in full command of its regulatory powers and would have denied environmental litigators the opportunity of pursuing litigation from funds that properly belong to the state and, therefore, to all Alaskans.

Resource development is one of the few ways in which Alaska is going to be able to provide jobs and decent living conditions for her people. With the thaw in the Cold War, the Anchorage and Fairbanks International Airports are no longer necessary for the transportation of people and goods between the Orient and Europe.

While we may see an increase in the military presence in the short run, over time we should expect a decline in the importance of the military to Alaska's economy. Alaska has not been able to attract high-tech industries, so we have little alternative but the development of our timber, minerals, oil and gas.

But resource development is inconsistent with the agenda of environmental groups. Let us not forget the bitter comment of an attorney for Trustees for Alaska when, after losing a battle to lockup timber resources of the Chugach Alaska Native Corporation, that it was better to let the Natives in Prince William Sound remain on subsistence and welfare than to let them become "addicted" to paychecks.

All natural resource industries are regulated by the DEC, the agency that issues most of the permits and monitors compliance. No industry can survive if it cannot rely on a regulatory climate that is fair, reasonable and consistent.

If HB29 is enacted, the main regulators will be the courts, on a case-by-case basis. This will bring inconsistency and uncertainty to Alaska's regulatory climate, further discouraging the formation of new businesses or the development of new industries. This bill is a very bad bill.

Mary Nordale is an attorney in private practice in Juneau. Opinions expressed in Taking a Stand do not necessarily reflect the editorial position of The Anchorage Times.

Bill provides needed protection

By Michael J. Schneider

The Anchorage Times has published two guest opinion pieces by James Burling of the Pacific Legal Foundation in which he has criticized the "citizen's suit" provisions of House Bill 29, introduced by Rep. Nillo Koponen of Fairbanks. However, neither article revealed what HB29 intended to do.

The sponsor's statement (Rep. Koponen) expresses the intent of this legislation better than I can:

"... (This bill) is intended to give citizens the right to bring polluters to justice when the state lacks the resources to do so. This measure is patterned after federal law, which has been in effect since the early '70s and has proven both judicially acceptable and practical.

"Citizen suits are provided for in the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation and Liability Act and the Surface Mining Control and Reclamation Act. Seventeen states also have citizen suit provisions.

"People facing daily threats to health and well-being from environmental pollution deserve the protection of the law. Often, however, government has inadequate resources to remedy such violations. ... (This bill) would complement the department's enforcement procedures and afford citizens the protection they currently do not have.

"The Oil Spill Commission, recognizing that citizen participation would enhance Alaska's regulatory effectiveness, included citizen suits among its recommendations. Citizen suits become especially appropriate in the era of declining state revenues which may soon be upon us.

"In the aftermath of the oiling of Prince William Sound, and in light of incidents such as the Kenai dumping now known as Poppy Lane, it is apparent that an involved citizenry is crucial to effect oversight of industry operations. Nothing keeps regulators and industry as alert as the active involvement of local residents who have their interests at stake. The key to involving citizens is empowering them. Citizen suits clearly and unequivocally place those who have the most to lose in the position to act."

Will this well-intentioned legislation lead to the feeding frenzy by lawyers and the mountains of litigation predicted by Mr. Burling? It doesn't seem likely. The state of Alaska's Legislative Research Agency has done some investigation into the effects that citizen suit legislation have had in other states. The agency reported that the citizen suit provisions in other states were rarely used.

Estimates varied from a reported low in the state of Wyoming — where the official contacted could remember only one instance of the citizen-suit provision leading to litigation — to a high in the well-populated state of New Jersey, where 24 cases a year are estimated to have been filed since initiation of that state's citizen suit legislation.

HB29 doesn't give citizens the resources to develop their cases or promote their rights. It does provide a legal tool to help protect people who are the victims of pollution or toxic exposure.

Currently these people must depend on the Department of Environmental Conservation, a state agency that has traditionally been unloved, underfunded and thus constrained by practical circumstances to be less than a fully effective advocate for the poison-free environment that we have too long taken for granted, but all wish to make our homes in.

Individual citizens litigants have no monetary incentive under this bill to participate in the litigation. If the litigation is effective, they may protect their homes or their families; they won't get rich in the process. Their attorney in these cases aren't going to get rich either. The most that the bill provides to the citizen's counsel is of sooner or later being paid for work that has long since been completed.

Most of the criticisms of this bill have been offered by industrial polluters. The fact of the matter is that Alaska has been used as a dumping ground for industry for a long time. HB29 is not likely, by itself, to stop this practice.

It will, however, give those people whose lives and property values are directly affected by illegal conduct a chance to stand up for themselves when government either cannot, or will not, stand up for them. It is an idea whose time has come, and it deserves our support.

Michael J. Schneider is an attorney in private practice in Anchorage. Opinions expressed in Taking a Stand do not necessarily reflect the editorial position of The Anchorage Times.



Schneider

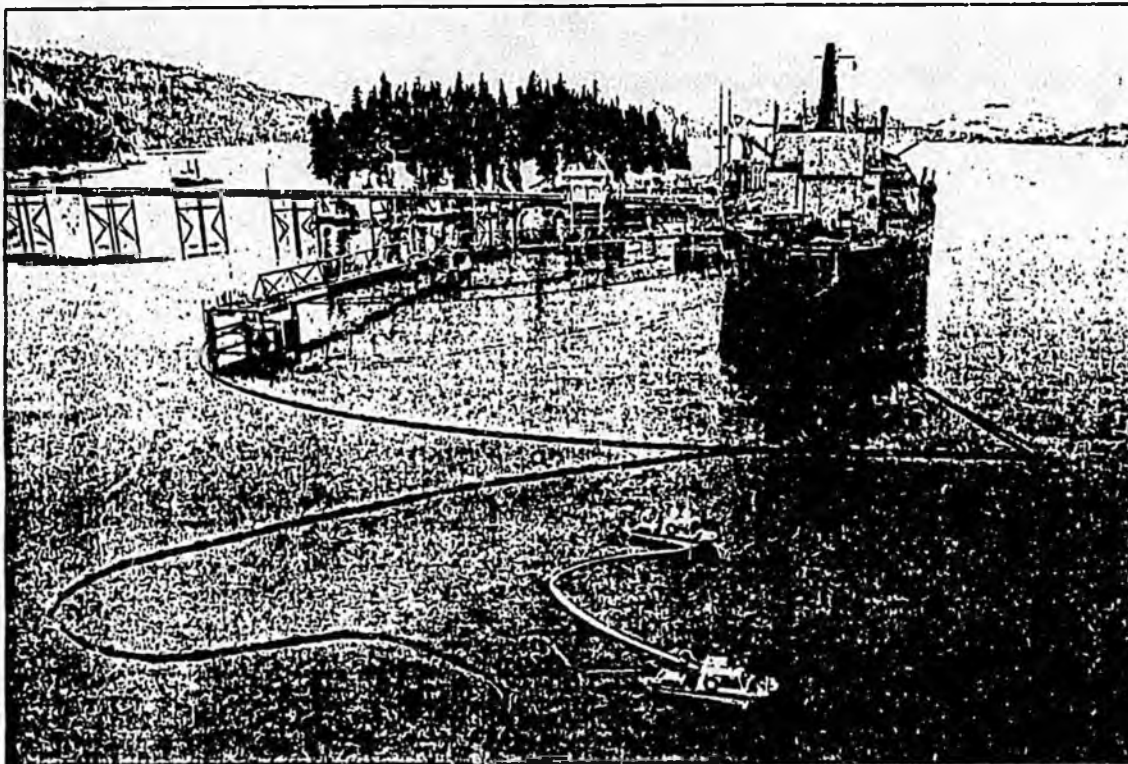


EDITOR'S NOTE: House Bill 29 is pending in the House Judiciary Committee and will be taken up again when the Legislature reconvenes in January 1992.



Despite years of warnings from its field staffers about Alyeska's poor oil-spill preparedness, the DEC did next to nothing.

PAPER TIGER

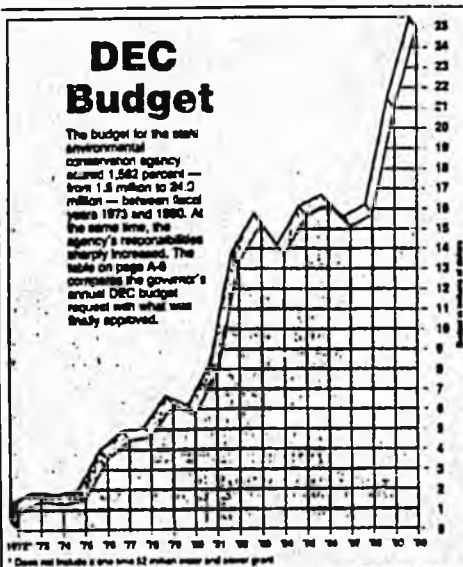


Anchorage Daily News file photo/Pete Souders

Crews on two small boats clean up oil spilled into Valdez Harbor this February while the tanker Mobil Arctic loads oil. Critics of the Department of Environmental Conservation have questioned the agency's resolve in demanding that oil companies have enough gear and well-trained people to respond swiftly and effectively to any oil spills.

DEC Budget

The budget for the state environmental conservation agency soared 1,562 percent — from 1.3 million to 24.2 million — between fiscal years 1973 and 1989. At the same time, the agency's responsibilities sharply increased. The table on page A-6 compares the governor's annual DEC budget request with what was finally approved.



Does not include \$ one-time \$2 million state and federal grant
Anchorage Daily News/Ron Engstrom

Department leaders put no real heat on Alyeska

By PATTI EPLER
Daily News reporter
© Copyright 1989 Anchorage Daily News

For more than a decade before the Exxon Valdez oil spill, top officials of the Alaska Department of Environmental Conservation ignored warnings from their own staff and failed to make oil companies prepare for a major spill in Prince William Sound.

Year after year, DEC staffers, some Alyeska Pipeline Service Co. employees and others warned that catastrophe was likely if Alyeska wasn't ordered to upgrade its equipment and teach cleanup workers to do their jobs, a Daily News investigation shows.

Yet beyond noting the critical field reports, DEC administrators did little to force Alyeska to do better. Every DEC administration since oil began to flow in 1977 has been ineffectual against a stubborn and miserly Alyeska, which behaved as

though a big spill would never happen, according to public records and interviews with former and current state, federal and industry representatives.

Alyeska, the consortium of seven oil companies that own the pipeline and Valdez terminal, cannot legally operate its shipping facility without state approval of a plan to deal with oil spills in Fort Valdez and Prince William Sound.

Yet DEC never moved to withhold its approval as a way of forcing Alyeska to improve oil-spill response. The agency never cited or took any other enforcement action against the pipeline company, a fact that Alyeska now says shows DEC was satisfied with its plan and performance.

As a result, the agency effectively ignored the danger posed by the giant oil tankers and, critics say, shares the

Please see Page A-6, DEC

blame for the devastation from the March 24 spill. The tanker Exxon Valdez, maneuvering to avoid ice, smashed into Bligh Reef about 25 miles from Alyeska's shipping terminal, spilling 11 million gallons of North Slope crude in what has become the nation's worst tanker spill.

"The adjective that most comes to mind when I think of DEC is spineless," says Patti Saunders, a veteran environmental lawyer. "There is this perception about how powerful (the oil companies) are and DEC is not willing to tackle them."

NOT A HIGH PRIORITY

The tanker fleet has spilled small amounts of oil in Prince William Sound more than 400 times during the past dozen years, so DEC officials have had ample opportunity to assess Alyeska's spill preparations. In addition, Alyeska conducts periodic drills for its crews and equipment.

In simulated spills and real ones, DEC has watched Alyeska in action and repeatedly found the company's efforts barely adequate, or worse. Containment booms sank, skimmers clogged and cleanup crews bumbled while oil escaped into open water or washed up on beaches.

Time and again, DEC staffers complained that much of Alyeska's equipment wasn't suitable for the harsh Valdez environment and wouldn't stand a chance against a big spill.

After Alyeska disbanded its full-time spill response team in 1981 and cut back on equipment, DEC staffers wrote impassioned reports warning of disaster and calling for action. They got little support from their superiors.

Alyeska's oil spill plan "just never seemed to be a priority," says Randy Bayliss, former head of the DEC's Valdez office. For years Bayliss tried to get his bosses to order stronger oil spill precautions. "There was always something bigger and more important."

In recent years, prodded by citizen complaints and news coverage, DEC has toughened its stance on water and air pollution at the Valdez terminal. But it continued to largely ignore the tankers that carry billions of gallons of crude oil out of Alaska.

Dennis Kelso, the head of DEC since January 1987, had never been to Valdez as commissioner before the Exxon tanker smashed into Bligh Reef on March 24. When he arrived at the ship that afternoon, his own staff didn't know who he was.

That was the day the staff was vindicated. Alyeska crews took at least 14 hours to find equipment — some of it buried in deep snow — and load it on a barge. Once at the site of the spill, booms and skimmers the state had found acceptable on paper proved inadequate on the water.

Much of the oil that killed animals and birds and blackened a thousand miles of shoreline could have been scooped up by better equipment and trained crews, a study by the General Accounting Office, the investigative arm of Congress, concluded. GAO said more than 4 million of the 11 million gallons released could have been collected before control of the spill was lost to bad weather on March 27.

"It is not surprising that major problems were encountered because no one had realistically prepared to deal with a spill of this magnitude in Prince William Sound," GAO associate director Victor Rezendes told a congressional committee five months after the spill.

Cowper, Kelso and other state leaders were quick to point angry fingers at Alyeska and Exxon. Kelso and Cowper have continually rejected any suggestion that DEC shares the blame.

Kelso says weak laws didn't allow DEC to force Alyeska to acquire the equipment and train the personnel to handle a big spill.

He also says the legislature was at fault because it wouldn't give DEC money to review contingency plans and police



Daily News file photo/Fran Dunner

Dennis Kelso: The commissioner says DEC shares no blame for the effects of the spill.

But Kelso didn't need a new review of the Alyeska plan. His own staff was already telling him that Alyeska, with its aging equipment and untrained workers, could not handle a major spill. In June, six months after becoming commissioner, Kelso approved Alyeska's spill plan without ever reading it or asking much about it.

MISMATCHED TUG-OF-WAR

DEC and Alyeska are like fraternal twins, born of the same circumstances but opposite in nature.

Alyeska was formed in 1970 by the major Alaska oil producers to build and operate the trans-Alaska pipeline and Valdez shipping terminal. DEC was created by the legislature in 1971 to oversee construction of the pipeline and oil development in general.

DEC has always been starved for resources. For nearly 20 years, since its birth, the agency's workload has mushroomed as complex environmental and public health programs evolved. The Cowper administration pushed for two years to increase DEC's budget and succeeded in getting more money from the legislature.

Alyeska, on the other hand, has always had plenty of money to run the pipeline and terminal. Its owners give it whatever it needs, according to Alyeska and owner company officials. Alyeska has made more than \$12 billion for its owners in the past dozen years, a state report says.

In the field, DEC and Alyeska have never gotten along. Last summer, Alyeska refused to allow DEC inspectors access to the terminal, saying Dan Lawn, the agency's chief Valdez investigator, was a "jerk" and a "troublemaker."

Since 1971, there have been three oil-spill contingency plans covering Port Valdez and Prince William Sound. State law requires every terminal and tanker operating in Alaska to submit a document detailing how a spill would be handled. Regulations govern how much equipment facilities must have and allow the state to hold drills to check a company's readiness.

The plans must be reviewed and re-approved every three years, although for Alyeska as well as some 400 others who come under the law that schedule has slipped badly. DEC administrators say they don't have the resources to keep up with the reviews, let alone inspect equipment and personnel.

DEC staffers who reviewed Alyeska's first plan in 1977 asked for major changes.

"Alyeska's Valdez Terminal Oil-Spill Contingency Plan, in almost every major facet, contains mistakes and inadequacies,

demonstrates microscopic thinking and, worse, omits major functions that are necessary," the DEC's Randy Bayliss wrote to his bosses in 1978.

"The initial plan is so bad, the department should consider prosecution for violation of solid-waste regulations."

Bayliss believed Alyeska needed more containment boom — floating fences designed to keep oil from spreading. He wanted more boats and people and more thought given to cleanup techniques.

At least 50,000 feet of boom was needed to combat a spill in Prince William Sound, the state said in 1977.

Alyeska complained that to deploy that much boom "would be like the Normandy invasion," according to a state summary of a

DEC BUDGET

Fiscal Years 1973-90

Year	Governor's Request	Final Budget
1990	\$26.3 million	\$24.9 million
1989	\$22.0 million	\$21.0 million
1988	\$15.3 million	\$15.8 million
1987	\$17.1 million	\$15.1 million
1986	\$17.0 million	\$16.1 million
1985	\$15.7 million	\$15.7 million
1984	\$13.9 million	\$13.8 million
1983	\$14.4 million	\$15.4 million
1982	\$13.7 million	\$13.4 million
1981	\$9.1 million	\$7.8 million
1980	\$7.6 million	\$6.0 million
1979	\$6.3 million	\$6.2 million
1978	\$4.7 million	\$4.7 million
1977	\$4.4 million	\$4.5 million
1976	\$3.2 million	\$3.6 million
1975	\$1.8 million	\$1.5 million
1974	\$1.6 million	\$1.5 million
1973	\$1.8 million	\$1.5 million

Source: Alaska Department of Environmental Conservation

March 1977 meeting between regulators and industry.

When the plan was finally approved a few weeks later, Alyeska was allowed to keep only 19,000 feet at the Valdez terminal.

Twelve years later, when the Exxon Valdez ran aground, the company had about 25,000 feet of boom on hand. But even that wasn't enough to stop the spread of oil in the Sound, even with three calm days after the accident. Cleanup experts doubt that the state's proposed 50,000 feet would have stopped much oil either, although they say it might have contained some of what eventually splattered beaches.

Alyeska "has maneuvered the government into accepting a shoddy piece of work," Al Carson, a state Department of Fish and Game official, wrote to the state pipeline office in June 1977, referring to Alyeska's contingency plan in general.

It was a month before pipeline operations were to begin, but no one was listening.

"The people with the authority were lame-duck administrators by the time they got to that end of it," says Bayliss. "They got the pipeline constructed and the last thing they wanted was to be annoyed with these details about the contingency plan."

WATCHDOG THAT DIDN'T BARK

On Aug. 1, 1977, the Arco Juneau cast off from the Alyeska terminal with the first tanker-load of North Slope crude. Since then, tankers have made more than 8,000 trips across the Sound. Occasional engine failures threatened catastrophe, but until the Exxon Valdez no tanker had run aground in Prince William Sound.

Even so, before March 24, millions of gallons of North Slope crude oil had spilled from tankers, but always elsewhere — in Puget Sound, the Gulf of Alaska, Cook Inlet or off the coast of Hawaii.

Small spills in Port Valdez were frequent and cleanup efforts largely ineffectual, according to the DEC. Early on, DEC staffers in Valdez named a group of tankers "The Dirty Dozen" for repeated small spills caused by sloppy loading or poor maintenance.

In September 1977, barely a month after tankers began calling at Valdez, the tanker Glacier Bay leaked 500 gallons through an 18-inch crack in its hull. Cleanup efforts failed to contain the oil, which washed up on beaches as far as seven miles away.

Coincidentally, scientists and government officials met in Anchorage that same day to debate oil spill responses in the aftermath of another tanker spill, the Argo Merchant, which a year before had sunk off the coast of Massachusetts, spilling its entire cargo of 7.8 million gallons of heavy industrial fuel.

On a couple of snowy days in December 1977, Bayliss and other DEC staffers spent long, dusty hours in Alyeska warehouses and its small-boat harbor checking on the oil-spill gear Alyeska had promised to have in Valdez.

"The examination revealed that a large amount of the equipment . . . is missing or not in condition for immediate operation," tanker specialist Bill Publicover wrote to Alyeska later. He noted that Alyeska had violated regulations by failing to notify the state that essential equipment was broken or missing.

But that was as far as the state went. No fines were levied or charges filed. No effort whatsoever was made to force the pipeline company to do what it had promised.

The state got another chance to review Alyeska's contingency plan in 1981. DEC staffers found numerous deficiencies. But when the agency signed off on the new plan in 1983, it had done little to improve protection of Prince William Sound against a major oil spill.

DEC's Valdez staff called the plan "superficial at best." Dan Lawn, by then the DEC's chief oil spill specialist in Valdez, pointed out that Alyeska's equipment couldn't clean up oil as fast as the company said it could, nor could it reach some parts of the Sound as quickly as it claimed.

One of Alyeska's most significant cutbacks in spill response came in 1981 when it disbanded its full-time oil spill team. The employees were absorbed into regular terminal operations or laid off. Workers in other jobs were trained to respond to spills, according to Alyeska.

DEC objected to the team's dismantling, but did nothing to force Alyeska to keep the oil-spill team.

In fact, the one substantive improvement in Alyeska's response ability came about only because a loaded tanker narrowly avoided a disastrous grounding and frightened regulators into action.

On Jan. 17, 1980, 90 mph winds buffeted the Gulf of Alaska near Hinchinbrook Entrance. The tanker Prince William Sound, filled with 35 million gallons of crude oil, was about to leave the relative safety of the Entrance when a small electrical component malfunctioned. The ship went dead and its crew was unable to re-start the engine.

The captain used his last bit of steam to make a U-turn in the middle of the Entrance, an act that officials later credited with saving the ship and its cargo. The tanker drifted back into the Sound.

For 17 hours it floated powerless while tugs tried to get lines on it. One tug swamped in the heavy seas, and the tanker was minutes from smashing into Fairmount Reef when it finally re-started its engine.

The close call scared both DEC and the Coast Guard. DEC added a section to the contingency plan that required tankers to be fitted with a system of lines, cables and shackles — a towing package — so tugs could more easily hook up in foul weather.

Though the accident made clear the potential for a catastrophic spill, the towing requirement was the only improvement in the Alyeska contingency plan for which DEC could take credit. The agency approved the plan in January 1983, with DEC administrators promising a tougher look at the plan when it came up for review again in 1986.

For the next few years, DEC staffers continued to document serious shortcomings in Alyeska's spill plan, as well as other problems at the terminal.

Lawn, the most persistent critic, told his superiors in May 1984: "Over the past several months, there has taken place a general disemboweling of the Alyeska operational plan," including the oil spill response program.

Response capabilities were hurt by the loss of the dedicated spill team, Lawn said, because there weren't enough workers trained both to handle oil loading and respond to spills.

Spill equipment was outdated and training programs had been cut, he said, yet the number of tankers calling at the terminal — and thus the chances for a major spill — were increasing.

When the terminal opened, 34 tankers a month docked at the terminal. When Lawn was writing the memos, about 50 tankers called each month. Now about 75 a month make the stop.

On Oct. 17, 1984, Alyeska invited state federal officials to observe a drill in which Alyeska pretended a tanker spilled oil at the dock, and surrounded the "spill" with booms and skimmers.

An hour later, according to a federal account, the main boom drifted under a tanker and sank. A workboat wasn't powerful enough to pull it out of the water. Another boom was too short to reach shore, leaving a 30-foot gap through which "oil" escaped.

The drill was canceled when high seas "jeopardized the safety" of Alyeska's main deep-water containment gear, which was what the company apparently planned to use in rougher water outside the port area in the event of a real spill.

"Equipment and manpower may not be appropriate for the environmental conditions of Port Valdez," the Environmental Protection Agency wrote in a critique of the drill. Keeping contingency equipment stored at various places throughout the facility slowed the response and training was inadequate, the report said.

"At this time, EPA is not confident Alyeska is prepared to efficiently respond to

a major spill event," the EPA's Alaska chief, Ron Kreizenbeck, wrote in a November 1984 letter to the Coast Guard. He asked that "appropriate actions" be taken to make sure Alyeska could protect Port Valdez from a spill.

The Coast Guard dismissed Kreizenbeck's concerns as unwarranted. The Coast Guard said Alyeska had hired a new terminal superintendent and new oil spill coordinator a few weeks after the drill and was trying to do better.

But the concerns of the EPA and DEC were echoed by Alyeska's own employees, including its manager of oil-spill cleanup operations, who warned that Alyeska should not attempt to clean up a spill in Prince William Sound.

James Woodle, a former Valdez Coast Guard commander who went to work for Alyeska as its marine superintendent in 1982, was worried about the age of the equipment as well as reductions in trained response personnel. "Response to any spill (beyond the general port area) should not be attempted with present equipment and personnel," he wrote to Alyeska officials in 1984. Woodle had recently been fired from Alyeska for insubordination and later lost a lawsuit challenging his termination.

"We can no longer ignore the routine monitoring of Alyeska," Lawn warned his own superiors at DEC on May 1, 1984, "unless we do not care if a major catastrophic event occurs."

TANKERS ON THE BACK BURNER

A week after Bill Ross took over as DEC commissioner in 1985, Dan Lawn's memos landed on his desk. The DEC staffers responsible for Valdez and Alyeska wanted to know what he wanted them to do, Ross recalled recently.

"But Alyeska also had other serious environmental problems, including its ballast water treatment plant, which was suspected of dumping too much oily waste into Port Valdez.

"Was ballast water being discharged into the bay a worse problem than a potential oil spill?" Ross asks now. "At the time I decided I had to go with ballast water."

The contingency plan — which was about to expire — was considered the second most important Alyeska problem, but still scored low on Ross' list of pressing environmental issues. It fell behind placer mining, widespread oil pollution in Kenai, water quality problems in Anchorage, and subdivision development in the Matanuska-Susitna Valley.

In his 22 months as commissioner, Ross visited Valdez twice. He toured the Alyeska facility and listened to his staff's concerns about potential oil spills.

Meanwhile, Alyeska continued to spill oil and its cleanup efforts continued to fall short. A 700-gallon spill from the tanker BT San Diego in April 1986 proved tough for Alyeska to pick up, even in the port.

"Cleanup equipment did not function, clean-up personnel were not available, supervision was lacking," DEC Valdez field officer Tom McCarty wrote to his superiors on April 17, 1986.

Help from contract laborers and an outside spill expert "came too late," he said, noting that much of the oil from the BT San Diego had already escaped containment.

"DEC staff were already painfully aware that Alyeska's ideas of how to handle a spill looked better on paper than in reality.

"It appears to me that the major problems may not be with the technical contents of the plan but instead with the execution of the plan in the field," Paul O'Brien, the DEC's oil program manager, wrote in an October 1985 memo to Ross. He described problems with training, communications and equipment.

"It is important and necessary to address the allegations," O'Brien told Ross, "so that the public clearly sees that the department is doing something about Alyeska's (contingency) plan and response capability."

They almost never do surprise inspections. If somebody tells them to go away, they just do.

— Patti Saunders

O'Brien and Ross decided Alyeska should prove it could cope with a spill. They decided to hold an "unannounced" drill — the first ever required by DEC.

But the drill, when it happened in November 1986, was very much announced. Alyeska officials, saying they were worried about disrupting tanker traffic, persuaded DEC to hold the drill on a day they picked. Alyeska had all its equipment and people ready — something it wouldn't be likely with a real spill.

Even with plenty of warning, Alyeska barely passed the test. The "spill response was acceptable, I feel, but not by a wide margin," concluded the DEC's Pat Cyr in an evaluation of the drill.

Cyr urged another "unannounced" drill. None ever occurred.

In June 1987, O'Brien notified Alyeska that DEC would reapprove the contingency plan, based in part on "the results" of the 1986 drill. For the first time, however, DEC told Alyeska it might withdraw approval of the plan if the company didn't do better on future spills.

"We have the option of yanking our approval if they can't show they're doing a better job in the future," said O'Brien, who left DEC in February 1989. "We made every spill that occurred from that point . . . open for scrutiny by the department in a formal sense."

Since then, DEC staffers have often complained about Alyeska's efforts to clean up even the smallest spills. But no move has ever been made to withdraw the permit.

As recently as last January, when two tankers in two weeks spewed oil through cracked hulls, DEC again bemoaned what it considered Alyeska's inept cleanup attempts.

One tanker, the Thompson Pass, was surrounded by booms when oil leaked. Alyeska, aided by calm weather, scooped up much of the 70,000 gallons that spilled. The company was lucky rather than efficient, DEC said.

The second spill, from the Cove Leader, though much smaller, eluded Alyeska cleanup crews because they couldn't get the oil corralled in time to keep most of it from running out of Port Valdez.

DEC also sought better spill preparation by requiring Alyeska to document the training of its cleanup workers, and by making the company submit spill "scenarios," which were supposed to show how Alyeska would clean up a spill as large as 200,000 barrels. Ross and O'Brien said they wanted Alyeska to show it had thought through what to do in case of a huge spill.

DEC staffers also brought up problems with aging equipment, but their supervisors decided to leave that for the next plan review — in 1990.

Ross says he never considered rejecting Alyeska's contingency plan, which would have shut down the pipeline.

"It never got to the point of drawing a line in the sand," he says. "Should I have assessed the factual situation here and said, 'Are we headed for deep doo-doo?'"

"There was no one who was really keeping track of the big picture, which is how well was this transportation system holding together. No one thought about whether a captain was drunk or the Coast Guard didn't have an adequate surveillance system."

"The question is," Ross adds, "Was the state responsible at the moment that tanker went up on the rocks? That's a question that has caused me some sleepless nights."

OUT OF SIGHT; OUT OF MIND

Although he'd run the DEC for more than

two years, the first time Commissioner Dennis Kelso ever went to Valdez was March 24, the day he flew out to the stranded tanker to view the nation's worst tanker spill.

Kelso had never met Lawn, the head of his Valdez office. Nor had he ever seen the Alyeska terminal, for years the most environmentally controversial facility in Alaska and the largest of its kind in the world.

Nor had he read Alyeska's oil-spill contingency plan, although he had approved it in June 1987, six months after becoming commissioner.

In fact, Kelso seemed content to let subordinates deal with air and water pollution, tankers and the relatively small oil spills at the Alyeska terminal — until the Exxon Valdez turned the glare of network television cameras on the tiny community.

Since then he's been a frequent visitor, often working long stretches without a day off to get to Valdez, Cordova, Kodiak, Homer and other places affected by the spill. He has become the most visible and outspoken critic of Exxon and Alyeska.

Kelso says he purposely stayed away from Valdez before the spill.

"When I came on board, we were already engaged in some conflict with Alyeska over these other matters," Kelso said in a recent interview. "I did not want to go to the Alyeska facility under circumstances that could be misinterpreted."

A commissioner-level visit to Valdez might be taken by Alyeska as a sign that DEC was softening its position on air and water pollution, he said, or that he didn't trust his staff's judgment.

DEC approval of Alyeska's third contingency plan had been in the final stages when Kelso became commissioner in January 1987. He concedes he didn't take as much interest in the plan as had Ross, his predecessor.

O'Brien, the state oil program manager, doesn't remember meeting with Kelso or talking to him about the plan before sending the commissioner a copy of a June 11, 1987, approval letter. The letter went out under O'Brien's signature after Kelso OK'd it.

"He was just a different commissioner than Bill Ross," O'Brien says. "Bill rolled up his sleeves and got into it. He didn't hesitate to come bashing into our offices at any time with questions."

"Denny's just a different manager. He's more removed, he lets other people take care of it."

Kelso won't discuss DEC's failure to get an adequate oil-spill response plan in place before he became commissioner. He blames the failings during his time on the legislature for not paying for a contingency plan review team, and on state laws he says did not give DEC the clout to make Alyeska and other oil terminals prepare for spills.

Seven months after Kelso took office, the tanker Glacier Bay ran into a submerged rock near Nikiski in Cook Inlet, spilling 150,000 thousand gallons of crude oil just as salmon were bunching for their summer run up the inlet.

The tanker's owner, a small independent shipper called Trinidad Corp., abandoned the cleanup, forcing the Coast Guard to take over. Kelso says the state found out then it didn't have the power to make sure Trinidad could or would clean up a spill.

In 1988, DEC asked the legislature to clarify the state's contingency plan law, which it did. Until then, Kelso says, tankers and terminals may have been required to file cleanup plans, but there was no law under which DEC could make them carry out the plans.

Although the law was "fixed" nearly a year before the Exxon Valdez accident, Kelso's agency didn't use it to get tougher with Alyeska. Instead DEC chose to wait until the Alyeska plan came up for review in 1990.

Kelso says DEC didn't have money to do more. In 1988, DEC asked the legislature for

more than \$300,000 for contingency-plan review and enforcement. The legislature approved \$150,000 to review plans.

In 1988, the legislature gave DEC money to hold five spill drills, but DEC didn't choose to hold an Alyeska drill. In fact, DEC didn't conduct most of the drills until after the Exxon Valdez spill. Then, the money was used to watch a spill drill in Kotzebue Sound and a couple of North Slope drills.

This year, just weeks after the biggest spill in U.S. history, several hundred thousand dollars for contingency plan reviews "fell out of the budget" in the last days of the legislative session, Kelso said. He didn't know why, or how hard the DEC officials responsible for the budget tried to keep it in.

But critics say Kelso is just making excuses, that DEC already had the power to make Alyeska get the equipment and personnel it needed.

"DEC has no idea what their authority is or isn't because they've never tested it," says Patti Saunders, the Anchorage environmental lawyer. "If they won't ever exercise it, it's as good as not having it. That's clearly the biggest problem DEC has."

"They almost never do surprise inspections," said Saunders, who spent several years as an environmental prosecutor for Pennsylvania's environmental protection agency. "If somebody tells them to go away, they just do."

She says DEC is afraid of the oil companies and afraid to go to court. "What they don't realize is the more you do the easier it gets."

"Plus you send a message to everybody in that industry that they're going to get nailed."

Ross concedes he never liked to go to court because of the time and expense. "But I certainly felt I stood up to the oil industry," he said. "We were pushing environmental issues as much as the body politic in Alaska could tolerate."

Even now, critics say, the DEC continues to bow to pressure from Alyeska. The company has frequently complained about Dan Lawn, the DEC's principal Alyeska watchdog.

In August, Larry Dietrick, one of Kelso's chief deputies, removed Lawn as supervisor of the Valdez office. Lawn was taken off investigations of air and water pollution at the terminal and assigned to review oil spill contingency plans.

Kelso and Dietrick vehemently deny they were pressured to move Lawn. But a June 23 memo from Lawn's Anchorage supervisor, Bill Lamoreaux, indicates DEC administrators were uncomfortable with Lawn's aggressive attitude toward Alyeska.

In the memo, Lamoreaux discussed Alyeska's objections to Lawn. He said he believed Lawn had always acted appropriately toward Alyeska, yet Lamoreaux directed Lawn to send other Valdez staffers to deal with the company and to "reduce your overall involvement in routine inspection activities."

Prince William Sound today is protected by an oil-spill response system unmatched in the world. Sophisticated equipment and safety measures that critics have demanded for a dozen years are now in place. Instead of booms and skimmers and cleanup crews trying to cover the Sound from a base in Valdez, escort vessels follow each loaded tanker through the Sound, carrying high-tech equipment ready for immediate deployment.

It happened because of a catastrophic oil spill — the one so many had predicted.

In April, when an angry Gov. Steve Cowper threatened to shut down the pipeline terminal if the industry didn't come up with a better spill response program, oil companies dispatched top executives to Alaska to put together a new plan in six weeks.

□ MONDAY: A look at DEC Commissioner Dennis Kelso.

Despite warnings, top officials didn't get tough with Alyeska

State's test wasn't hard; Alyeska didn't pass by much

By PATTI EPLER
Daily News reporter

In a dozen years of tanker operations, the state has tested Alyeska Pipeline Service Co.'s cleanup capabilities in a realistic drill only once.

Every other time, Alyeska itself created and controlled the exercises on which the state judged the company's ability to carry out its plan for cleaning up oil. State acceptance of the plan was necessary for Alyeska to operate the terminal.

But for the state's one "unannounced" drill, the Department of Environmental Conservation gave Alyeska several weeks' warning, and chose a day recommended by the pipeline company so tanker traffic wouldn't be impeded.

Even so, Alyeska barely passed the exam.

"I made a decision not to disrupt the pipeline," said Bill Ross, then-commissioner of the DEC. "If the presence of the cop on the corner causes you to go 55 in a 55 zone, then most people consider that adequate enforcement. So they cleaned house when they knew we were coming."

The test commenced just after 5 a.m. on Nov. 22, 1986. Snow drifted down lightly from an overcast sky, and visibility was often poor.

Day-shift workers had been on the job for two hours, and Alyeska — expecting a drill that day — had lined up extra help.

Equipment was ready and loaded on boats for deployment.

The state's scenario assumed that a tanker suffered a mechanical failure at the dock, causing a tank to overflow during loading. About 50 barrels — 2,200 gallons — spilled into the port area. Oranges dumped into the water were used to simulate oil.

When the genuine spill came last March 24, conditions couldn't have been more different. The tanker Exxon Valdez ran aground just after midnight, on a dark and drizzly night, about 25 miles from port. Nearly 11 million gallons of crude oil poured into Prince William Sound. Alyeska staffing was minimal because it was night and Good Friday. Extra clean-up workers took six hours to report.

Alyeska's equipment was far from ready: booms, skimmers, pumps and other gear had to be found — some in warehouses, others buried in snow — and loaded on a barge. Some booms had to be repaired before they could be loaded. Crews took 14 hours to pack the barge and reach the spill at Bligh Reef.

Ross and others concede they might have learned more about Alyeska's real state of readiness if they'd conducted a surprise drill, or even if the state had conducted more than one drill at Alyeska.

"One could argue we could have gotten a heads up and addressed those things," said Paul O'Brien, former oil program manager for the DEC who oversaw the 1986 drill.

"If the presence of the cop on the corner causes you to go 55 in a 55 zone, then most people consider that adequate enforcement. So they cleaned house when they knew we were coming."

— Bill Ross

O'Brien said the DEC rarely conducts drills for oil terminals or tankers, even though state law allows two such drills a year for each facility or ship.

Alyeska invites regulators to observe at least one marine spill exercise a year in which the company itself devises the scenario and picks the time — usually summer — and conditions for the drill. Bill Howitt, engineering manager for Alyeska, prefers to call the maneuvers "exercises." He said the state, Coast Guard and other agencies are always invited to watch and offer criticism.

DEC Commissioner Dennis Kelso has said it costs too much for the state to conduct drills. But Ross said he considered it important to test Alyeska's capabilities through an "unannounced" drill before signing off on the contingency plan.

That drill, however, was hardly a sur-

prise. A Nov. 4, 1986, letter in the DEC files — "Subject: Unannounced Spill Drill" — came from from Alyeska's Howitt, then terminal superintendent. Howitt suggested four dates during that month when Alyeska expected minimal tanker traffic. The DEC chose one of the four.

Howitt said Alyeska didn't know the time of day the DEC intended to hold the drill, nor did the company know what the scenario would be.

But Alyeska was able to have equipment ready to go and enough people on hand at the terminal to make the response smooth, he said.

"Alyeska's spill response was acceptable," DEC field officer Pat Cyr wrote in his evaluation, "but not by a wide margin."

Cyr recommended that another "unannounced" drill be held in 1987, using a chemical that behaves like oil, rather than oranges. But it never took place.

Kelso said in a recent interview that it is too expensive for the state to devise a spill scenario and then scrutinize Alyeska's performance, although he didn't know what the actual cost would be. Other DEC officials estimated it might cost as much as \$10,000, including staff salaries just for a drill, travel and per diem pay while in Valdez.

O'Brien agreed that it takes a "tremendous amount of time" to design a spill drill, "but one could say, 'Can we afford not to do that?'"



Daily News photo by Bob Halverson
Bill Ross: He's had sleepless nights.

As DEC stiffens, it needs our help

Exxon deserves the roar of criticism it has received since the Exxon Valdez oil spill, but government regulators merit a scolding as well.

Alaska's main environmental watchdog had the chance to help avert the disaster — and blew it. Department of Environmental Conservation field people in Valdez repeatedly reported that the Alyeska terminal's preparations for an oil spill were deficient and its contingency plans inadequate. But the agency's Juneau leadership refused to act on these reports. Nobody in DEC's top ranks took the threat of a catastrophic oil spill seriously enough to get tough on Alyeska.

DEC officials explain their failings by arguing they never had adequate funding to meet the agency's myriad responsibilities. And it's true that until the Exxon Valdez oil spill, the legislature, ever fearful that a strong DEC would impede rapid resource development, kept the agency underfunded and understaffed.

Nonetheless, DEC's failings with Alyeska do not stem from a lack of money. They stem from a lack of determination and will. Even with its shoestring budget, DEC discovered Alyeska's woeful state of preparedness. DEC's leaders simply failed to back up their field people and demand that Alyeska change its ways.

Since the Exxon spill, DEC has shown encouraging signs of change. It rode herd on Exxon and the Coast Guard to deliver as promised on the spill cleanup. Its budget grew as the spill made environmental protection a more respectable cause among legislators. With about 60 percent more money than two years ago, DEC is better financed than ever.

But bigger budgets won't guarantee safe operations at the Valdez terminal and in Prince William Sound. DEC must develop a more aggressive attitude — scrupulously fair, yes; but more aggressive — toward Alyeska. Gov. Steve Cowper should tell DEC that he expects the agency not to back down if Alyeska complains about the rigors of living up to its obligations.

Ordinary Alaskans have a role to play, too. They should make it clear to the governor and the legislature that they expect vigorous enforcement of environmental rules, that they want an ever-vigilant DEC protecting their environment, health and welfare.

Alaskans have told each other for years that they are "real environmentalists." It's a sentiment full of good intentions, but it must be converted into sound environmental policy, with strict enforcement by a powerful and fearless Department of Environmental Conservation. Nothing less will do.

Anchorage Daily News editorial
October 29, 1989

February 21, 1992

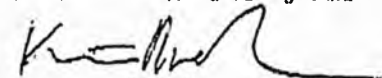
Representative Dave Donley
Re: HB 29

Dear Dave

HB 29 must die in the House Judiciary Committee
February 21st, Everybody talks about doing things for their
children in the future, Well lets insure that responsible
development can always take place, For ourselves and our
children.

It is already prohibited to do certain types of
business in Alaska. And we will end up with no industries
and no voters.

Thank You for your Consideration



Kevin Drake