

HPB

29

# Alaska State Legislature

Legislative Research Agency



P.O. Box Y  
Juneau, AK 99811-3100  
Phone: (907) 465-3091  
Fax: (907) 463-3351

March 15, 1991

## MEMORANDUM

TO: Representative Niilo Koponen

FROM: Glenn T. Gray <sup>GTG</sup>  
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



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,

*Marjorie Hays (LWS)*

Marjorie Hays  
President



# TELECOPY COVER SHEET

Kodiak Legislative Information Office

Office - (907) 488-8116

Fax - (907) 488-5284

TO: Juneau LIO - House Resources Committee

ATTN: \_\_\_\_\_ FAX: \_\_\_\_\_ PHONE: \_\_\_\_\_

FROM: Kodiak LIO PHONE: \_\_\_\_\_

INSTRUCTIONS: Please make available for  
members of H. Res

SENT: Date 5-9-91 Time \_\_\_\_\_

DISPOSAL OF ORIGINAL: Discard \_\_\_\_\_ Hold for Pickup \_\_\_\_\_

NUMBER OF PAGES: 2 (NOT counting cover sheet)

TRANSMITTED BY: Tina



# Alaska State Legislature

Please enter into the record my testimony to the House Resources Committee  
committee name

committee on HB 29, dated May 9, 1991  
bill/subject

The Kodiak Environmental Network (KEN) supports the passing of HB 29. Recommendation<sup>1</sup> 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 underfunded & understaffed & this would help the enforcement of our pollution laws.  
We hope you will support this bill.

Thank you,  
Sincerely,  
Jacey Akers

Kodiak Environmental  
Network

P.O. BOX 2661  
KODIAK, AK 99615

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE DAVIDSON

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

EOM-FZ

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DATE: 91/02/26  
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KOFOHEN	FRANK
M.W.MILLER	SHULTZ
MOYER	
SHARP	
DOHLEY	
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-  
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.

ZIP: 99686

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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

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.

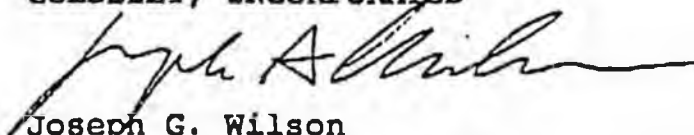
Goldbelt is Native Corporation that owns timberland near Juneau and sand and gravel resources in Juneau. We are well aware of the environmental regulations that concern our operations and work hard to see that we do not violate the law. Nonetheless, timber harvesting is an untidy business. It involves 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

May 6, 1991

REC'D

**KFP**  
Koncor Forest Products Company

150' Dana Drive 202  
Juneau, Alaska 99801  
PH: 582 3335 FAX: 907 582 1899

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.

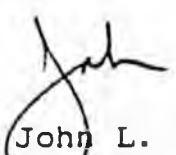
In past deliberations, concerns have been expressed that small and/or rural communities should be exempted from the bill's preview since they do not have the resources to defend themselves against spurious suits. We would submit that private businesses are even more vulnerable to financial ruin than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

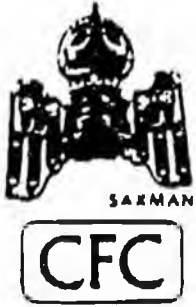
The list of undesirable aspects of the bill is too excessive for simply fixing it, therefore, it needs to be stopped completely. Alaska's businesses and industries simply cannot be exposed to irresponsible lawsuits that this bill would allow.

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
To: Cliff Davidson	From: [unclear]	
Co. [unclear]	Co. [unclear]	
Dept. [unclear]	Phone # 225-5163	
Fax # [unclear]	Fax # [unclear]	

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

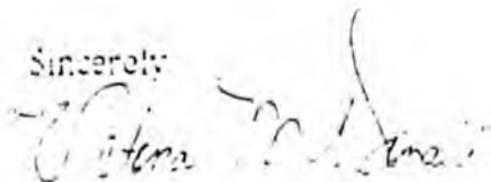
House Bill 2988: Citizen suits to Enforce Environmental Laws is a law we desperately need in the aftermath of the Exxon Valdez disaster. Big industry has often done as they please with the environment. Alaska is so big there can never be sufficient law enforcement officials to watch each project. Private 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,



Victoria McDonald



# 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

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Ducky L. Gay

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 George P. Wuerich

## EX-OFFICIO MEMBERS

Senator Ted 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.



# 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



# 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?

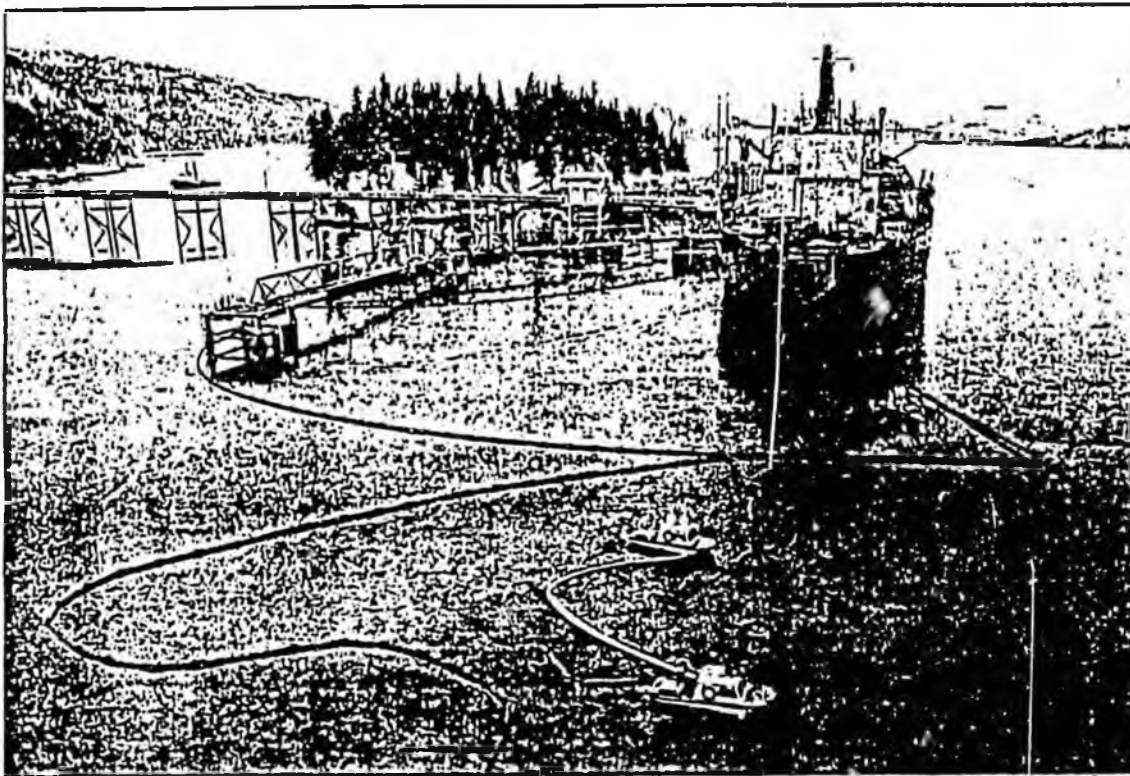
Congress has recognized the value of citizen suits as supplements to the government's enforcement. Citizens have ample authority to enforce federal environmental laws. Citizen enforcement actions have proven not to be unreasonable avenues for harassment of industry or the EPA, but to be a valuable means 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?

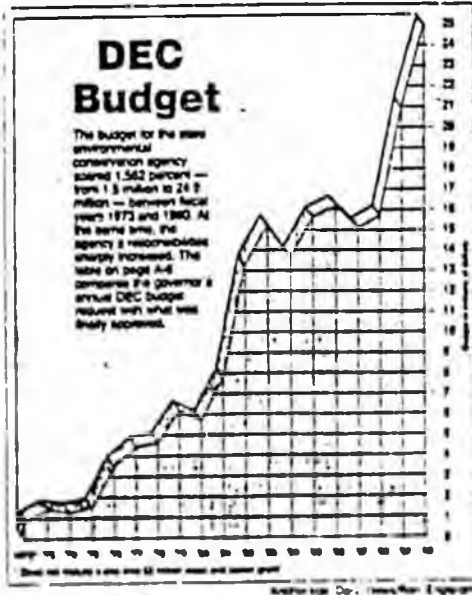
Alaskans can bring a lawsuit against polluters who are violating federal environmental laws. In some cases, Alaskans do have the legal authority to sue violators of some state laws, including the state surface mining coal law. *Interestingly, citizen suits are a prominent feature of the Oil and Gas Commission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

*Despite years of warnings from its field staffers about Alyeska's poor oil-spill preparedness, the DEC did next to nothing.*

# PAPER TIGER



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.



## Department leaders put no real heat on Alyeska

By PATTI EPLER  
Daily News reporter  
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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 Port 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

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 29,000 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 7.6 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 precluded 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 and federal officials to observe a drill in which Alyeska pretended a tanker spilled oil at the dock, and surrounded the "spill" with booms, 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 "Woodie," 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. Woodie 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.

"Clean-up 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, 1985.

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."

# Despite warnings, top officials didn't get tough with Alyeska

## State's test wasn't hard; Alyeska didn't pass by much

By PATTIEPLER  
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 8 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 60 barrels — 2,200 gallons — spilled into the port area. Oranges dumped into the water were used to simulate oil.

When the genuine spill came fast 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 know 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 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?'"



Bill Ross: He's had sleepless nights.



## **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



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, that 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.

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
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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						
<b>TOTAL OPERATING</b>	<b>****</b>	<b>****</b>	<b>****</b>	<b>****</b>	<b>****</b>	<b>****</b>

CAPITAL						
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REVENUE						
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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.



## Alaska Environmental Lobby, Inc.

P.O. Box 22151 Juneau, Alaska 99802

907-463-3366  
Fax 907-463-3312

### 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 TeVrucht, 5/8/91.

ALASKA CENTER FOR THE ENVIRONMENT • ALASKA CHAPTER SIERRA CLUB • ALASKA FRIENDS OF THE EARTH  
ANCHORAGE AUDUBON SOCIETY • ARCTIC AUDUBON SOCIETY • CLEAN AIR COALITION • DENALI CITIZENS COUNCIL  
DENALI GROUP SIERRA CLUB • JUNEAU AUDUBON SOCIETY • JUNEAU GROUP SIERRA CLUB  
KACHEMAK BAY CONSERVATION SOCIETY • KENAI PENINSULA AUDUBON SOCIETY • KNIK CANOERS AND KAYAKERS  
KNIK GROUP SIERRA CLUB • KODIAK AUDUBON SOCIETY • LYNN CANAL CONSERVATION • NORTHERN ALASKA ENVIRONMENTAL CENTER  
PRINCE WILLIAM SOUND CONSERVATION ALLIANCE • SITKA CONSERVATION SOCIETY • SOUTHEAST ALASKA CONSERVATION COUNCIL

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.

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M E M O R A N D U M

To: Rep. Cliff Davidson  
Chair, House Resource Committee

From: Rep. Niilo Koponen *NK*

Re: Citizen Suits

Date: 2/27/91

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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

Cliff Davidson  
2/27/91  
p. 2

statutes that the full weight of the state was placed behind a plaintiff's 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.*" AS 31.05.160 (b) (emphasis added)

In addition, the waiting period after giving notice of intent to sue is a mere 10 days.

*These statutes exist to serve oil and gas producers.* I find no justice in providing such remedies to multi-national oil companies seeking to protect their property interests while denying them to citizens seeking to protect their health and that of their communities.

**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**

§ 27.21.940

§ 27.21.950

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§ 27.21.950

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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.

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**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

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- (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.

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(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.

on shall  
certifica-

- (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

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, SLA 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**

random, 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**

New Jersey  
2A:35A-1

CIVIL AND CRIMINAL JUSTICE

CHAPTER 35A. 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. 7:1H-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.

CIVIL AND CRIMINAL JUSTICE

2A:35A-4  
Note 1

Notes of Decisions

1. 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 § 25.5.

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 3.5

Injunctions 2

Review 4

Standing 1.5

1. Construction and application

Action plan applied as "a more specific stan-

Notes of Decisions

Alaska State Legislature  
Representative Niilo Koponen

Pouch V  
Juneau, Alaska 99811  
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House District 21

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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

Legislative Research Agency



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

April 29, 1991

## MEMORANDUM

TO: Representative Cliff Davidson  
Vice Chairman, Legislative Council

FROM: Gordon S. Harrison, Director *gsh*

RE: Oversight/Liaison Committee for Legislative Research Agency

I would like to propose that a subcommittee of the Legislative Council be appointed to provide oversight and liaison for the Legislative Research Agency. This agency reports to the Legislative Council, and it seems to me important that we maintain open communication with the council.

Last session there was an oversight committee comprised of the chairman and co-chairman of the council, the president of the Senate and speaker of the House of Representatives. Not surprisingly, the committee members were too busy to give much attention to the agency. Thus, a new committee might best have a different, or at least broader, composition.

The only immediate issue that I would like to bring before the council is how we should approach our interim research work. However, council members may have issues they would like to discuss, and we welcome suggestions about how we can improve our service to the legislature.



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 law is changed, the only outside force which ADEC will have any inclination to 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



# Alaska State Legislature

Please enter into the record my testimony to the House Resources Committee  
committee name

committee on HB 29, dated May 9, 1991  
bill/subject

The Kootenai Environmental Network (KEN) supports the passing of HB 29. Recommendation #1 by the Oil Spill Commission advised the state to adopt citizen suits as a component in Alaska's regulatory scheme. Citizen 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.

Thanks you,

Sincerely,

Jacq Akers

Kodiak Environmental  
Network

P.O. BOX 2661

KODIAK, AK 99615



# Alaska State Legislature

Please enter into the record my testimony to the House Resources  
committee name

committee on H.B. 29, dated 5/9  
bill/subject

The Northern Alaska Environmental Center supports H.B. 29, which is the simple most cost effective means to insure that environmental laws passed by the legislature will be enforced fully - despite the ephemeral attitudes and budget priorities of the <sup>any</sup> current administration.

We urge you not to turn your back on this clear demonstration of pro-active citizen empowerment and pass this bill

Signed: Rex Blazer (Rex Blazer)  
Testifier

Northern Alaska Environmental Center  
Representing (Optional)

218 Driveway Fairbanks AK 99701  
Address

452-5021  
Phone No.

# 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,

Larry D. Crawford  
Municipal Manager

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

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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.

# TELECOPY COVER SHEET

## Fairbanks Legislative Information Office

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TO: House Resources Comm. FAX: \_\_\_\_\_ PHONE: \_\_\_\_\_

FROM: FBX LIO PHONE: \_\_\_\_\_

INSTRUCTIONS: Please submit following written testimony  
into record of TC # 91-05-030, Rep.  
Finkelstein chair. Hard copy to follow in pouch.

RECEIVED: Date \_\_\_\_\_ Time \_\_\_\_\_

SENT: Date 5-9-91 Time 4:40 P.M.

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SENT BY: Mike



# Alaska State Legislature

Please enter into the record my testimony to the House Resources  
committee name.

committee on H.B. 29, dated 5/9  
bill/subject

The Northern Alaska Environmental Center supports H.B. 29, which is the simple most cost effective means to insure that environmental laws passed by the legislature will be enforced fully - despite the ephemeral attitudes and budget priorities of the <sup>and</sup> current administration.

We urge you not to turn your back on this clear demonstration of pro-active citizen involvement and pass this bill!

Signed: Rex Blazer (Rex Blazer)  
Testifier

Northern Alaska Environmental Center  
Representing (Optional)

218 Driveway Fairbanks AK 99701  
Address

452-5021

Phone No.