SB

178

HOUSE COMMITTEE REPORT

(11)

Date Referred: April 22, 1993 FURTHER REFERRALS:

Date of Committee Action: 3/18/94

The FINANCE Committee considered: CSSB 178(JUD) am(efd fld)

CS FOR SENATE BILL NO. 178(JUD) am(efd fld) CIVIL NUISANCE ACTIONS

"An Act relating to civil nuisance actions."

RECOMMENDATIONS: [ ] the same title
be replaced with H CSSB 178(Fin) [X] a new title

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

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

[X] zero fiscal note LAW [ ] zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Therriault	X	E.P. MacLean		✓	
Richard Foster	*	Ronald D. Larson			
Foster		Mark Hanley Hanley			
		Ramona Parnell		X	
				X	
		Hoffman		✓	
		Kay Brown Brown	✓		
		Mike Navarre			

Ronald D. Larson E.P. MacLean

CHAIRMAN'S SIGNATURE

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HCSCS SB 178 (JUD)

Revision Date: February 7, 1994
Title: "An Act relating to civil nuisance actions."

Sponsor: Senate Judiciary Committee
Requestor: House Finance Committee

Department Affected: Department of Law
BRU: Legal Services
Component: Operations

COMPONENT SERIAL NO. 0093

EXPENDITURES/REVENUES:

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND &						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						
FUNDING:						
1002 Federal						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-
POSITIONS:						
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)
The House Committee Substitute for SB 178 does not change our original analysis, which remains a zero impact for the Department of Law.

Richard L. Pegues

Prepared by: Richard I. Pegues, Director
Division: Administrative Services Division
Phone: 465-3672
Date: February 7, 1994

Richard L. Pegues /FOR

Approved by Commissioner: Bruce M. Botelho, Attorney General
Agency: Department of Law
Date: February 7, 1994

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8-LS0930\D
Bannister
2/12/94

Adopted - rescinded
3/17/94

HOUSE CS FOR CS FOR SENATE BILL NO. 178( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATE JUDICIARY COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act relating to civil nuisance actions; and providing for an effective date."

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

* Section 1. AS 09.45.230 is repealed and reenacted to read:

Sec. 09.45.230. ACTION BASED ON PRIVATE NUISANCE. (a) A person may bring a civil action to enjoin or abate a private nuisance. Damages may be awarded in the action.

(b) A person may not maintain an action under this section based upon an air emission or water or solid waste discharge, other than the placement of nuclear waste, where the emission or discharge was expressly authorized by and is not in violation of a term or condition of

(1) a statute or regulation;

(2) a license, permit, or order that is

(A) issued after public hearing by the state or federal government; and

(B) subject to

(i) continuing compliance monitoring;

(ii) periodic review by the issuing agency;

(iii) renewal on a periodic basis; or

(iv) AS 46.40; or

(3) a court order or judgment.

(c) The provisions of (b) of this section do not apply to actions in which the air emission or water or solid waste discharge that is the subject of the action produces a result that was unknown or not reasonably foreseeable at the time of the authorization.

(d) Notwithstanding other provisions of law, except AS 09.50.170 - 09.50.240 and AS 19.25.080 - 19.25.180, a person may not bring a civil action to enjoin or abate a private nuisance or to recover damages for a private nuisance unless the action is authorized by this section.

*** Sec. 2.** AS 09.45 is amended by adding a new section to article 4 to read:

Sec. 09.45.255. DEFINITION. In AS 09.45.230 - 09.45.255, "nuisance" means a substantial and unreasonable interference with the use or enjoyment of real property, including water.

*** Sec. 3.** This Act applies to an action if judgment has not been entered in the action before the effective date of this Act, and to that extent this Act is retroactive under AS 01.10.090.

*** Sec. 4.** This Act takes effect immediately under AS 01.10.070(c).

AMENDMENT 9 failed

OFFERED IN THE HOUSE REPRESENTATIVE BROWN

TO: HCS CSSB 178 ( ) DRAFT 8-LS0930\I 3/17/94

Page 2, line 1:

Delete "and"

Page 2, line 6:

Delete "or"

Insert "and"

Page 2, after line 6:

Insert a new subparagraph to read:

"(C) issued after a showing by the licensee, permittee, or person subject to the order that the proposed activity will not result in any emission or discharge that is injurious to human health or welfare, animal or plant life, or property, or that would injuriously interfere with the enjoyment of life or property; or"

8-LS0930\D.2
Bannister
3/1/94

AMENDMENT 2 Failed (4-6)

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: HCS CSSB 178( ) Version "D," 2/12/94

(3) (5)

Page 2, following line 18:

Insert new bill sections to read:

"* Sec. 3. AS 46.35.110 is amended to read:

Sec. 46.35.110. APPLICATION. Notwithstanding any other provisions of regulation or statute relating to the processing of application for permits, **except for AS 46.90.010.** the procedures set out in this chapter are exclusive for applications filed under AS 46.35.030. **Except for the procedures in AS 46.90.010. the** [THE] procedures of this chapter are in lieu of [ANY] procedures otherwise provided by law or regulation, and are to be followed by state agency in ruling upon those applications.

* Sec. 4. AS 46 is amended by adding a new chapter to read:

CHAPTER 90. MISCELLANEOUS PROVISIONS.

Sec. 46.90.010. NOTIFICATION OF AFFECTED PROPERTY OWNERS. (a) In addition to other notice required by law, if a person owns private property that is within the area potentially affected by an air emission or water or solid waste discharge license or permit for which a private civil nuisance action may not be maintained under AS 09.45.230, at least 60 days before a state agency issues the license or permit, the state agency shall notify the person by registered letter that the licensed or permitted activity may interfere with the person's enjoyment of the person's property and that AS 09.45.230 may prohibit the person from recovering damages or otherwise seeking relief for the interference by bringing a civil action to enjoin or abate the interference as a private nuisance.

(b) The notice required by (a) of this section must describe what rights the person has to participate in the hearings and other administrative proceedings relating to the issuance or denial of the license or permit.

(c) A person who requests or obtains a license or permit for which notification is required under (a) of this section shall reimburse the agency for the costs of the notification required by this subsection.

(d) In this section, "state agency" has the meaning given in AS 46.35.200."

Renumber the following bill sections accordingly.

Page 2, line 19:

Delete "This Act applies"

Insert "AS 09.45.230, as amended by sec. 1 of this Act, and AS 09.45.255, added by sec. 2 of this Act, apply"

Page 2, following line 21:

Insert a new bill section to read:

"* Sec. 6. AS 46.35.110, amended by sec. 3 of this Act, and AS 46.90.010, added by sec. 4 of this Act, apply to licenses and permits that are issued on or after the effective date of this Act."

Renumber the following bill section accordingly.

8-LS0930\D.2
Bannister
3/1/94

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: HCS CSSB 178( ) Version "D," 2/12/94

Page 2, following line 18:

Insert new bill sections to read:

"* Sec. 3. AS 46.35.110 is amended to read:

Sec. 46.35.110. APPLICATION. Notwithstanding any other provisions of regulation or statute relating to the processing of application for permits, **except for AS 46.90.010,** the procedures set out in this chapter are exclusive for applications filed under AS 46.35.030. **Except for the procedures in AS 46.90.010. the** [THE] procedures of this chapter are in lieu of [ANY] procedures otherwise provided by law or regulation, and are to be followed by a state agency in ruling upon those applications.

* Sec. 4. AS 46 is amended by adding a new chapter to read:

CHAPTER 90. MISCELLANEOUS PROVISIONS.

Sec. 46.90.010. NOTIFICATION OF AFFECTED PROPERTY OWNERS. (a) In addition to other notice required by law, if a person owns private property that is within the area potentially affected by an air emission or water or solid waste discharge license or permit for which a private civil nuisance action may not be maintained under AS 09.45.230, at least 60 days before a state agency issues the license or permit, the state agency shall notify the person by registered letter that the licensed or permitted activity may interfere with the person's enjoyment of the person's property and that AS 09.45.230 may prohibit the person from recovering damages or otherwise seeking relief for the interference by bringing a civil action to enjoin or abate the interference as a private nuisance.

(b) The notice required by (a) of this section must describe what rights the person has to participate in the hearings and other administrative proceedings relating to the issuance or denial of the license or permit.

(c) A person who requests or obtains a license or permit for which notification is required under (a) of this section shall reimburse the agency for the costs of the notification required by this subsection.

(d) In this section, "state agency" has the meaning given in AS 46.35.200."

Renumber the following bill sections accordingly.

Page 2, line 19:

Delete "This Act applies"

Insert "AS 09.45.230, as amended by sec. 1 of this Act, and AS 09.45.255, added by sec. 2 of this Act, apply"

Page 2, following line 21:

Insert a new bill section to read:

"* Sec. 6. AS 46.35.110, amended by sec. 3 of this Act, and AS 46.90.010, added by sec. 4 of this Act, apply to licenses and permits that are issued on or after the effective date of this Act."

Renumber the following bill section accordingly.

AMENDMENT 3 Withdrawn

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: HCS CSSB 178 ( ) (Version "D")

Page 2, line 10

After "authorization" insert:

"The provisions of (b) of this section do not apply unless the authorizing license, permit or order was issued after a written finding by the authorizing agency that no substantial or unreasonable interference with the use or enjoyment of real property, including water, will result from the authorized activity."

(3)

AMENDMENT 4 withdrawn

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: HCS CSSB 178 ( ) (Version "D")

Page 2, after line 14:

Insert a new subsection to read:

"(e) Notwithstanding any other provision of law, the state is liable in damages to a person barred from filing a civil action under (b) of this section if

(1) the license, permit, or order was issued by the state; and

(2) the person would be entitled to an award of damages against the licensee, permittee, or person acting under the authority of the license, permit, or order but for the provisions of this section."

(4)

AMENDMENT 5 Failed (4-6)

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: HCS CSSB 178 ( ) (Version "D")

Page ~~2~~ 3, lines ~~19~~ 12 through ~~21~~ - 14:

Delete all material.

Renumber the following section.

(4)

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: HCS CSSB 178 ( ) (Version "D")

Page 2, lines 19 through 21:

Delete all material.

Renumber the following section.

Failed (-7)

AMENDMENT 6

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: HCS CSSB 178 ( ) (Version "D")

Page ~~2~~, line ~~22~~:

Delete all material

Insert a new bill section to read:

"*Sec. 4. This Act takes effect July 31, 1995."

(6)

8-LS0930\D.3
Bannister
3/1/94

AMENDMENT 7 withdrawn

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: HCS CSSB 178( ) Version "D," 2/12/94

Page 2, lines 11 - 14:

Delete all material and insert:

"(d) This section does not prevent a person from bringing a civil action based on rights provided under other law, including the common law, to enjoin or obtain damages for an activity that affects the person's real property or the person's enjoyment of the real property."

3/17/94 pm

AMENDMENT I Failed (4-5)

OFFERED IN THE HOUSE

TO: HCS CSSB 178 ( ) DRAFT 8-LS0930\I 3/17/94

Page 2, line 1:

Delete "and"

Page 2, line 6:

Delete "or"

Insert "and"

Page 2, after line 6:

Insert a new subparagraph to read:

"(C) issued with a term or condition that provides that the licensee, permittee, or person subject to the order may not permit or authorize any emission or discharge that is injurious to human health or welfare, animal or plant life, or property, or that would injuriously interfere with the enjoyment of life or property; or"

3/17/94 pm

we will rountinely issue permits with a statement that the emissions authorized in this permit does not protect them against nuisance, cancer, or whatever else isn't embodied in the requirements of the permit.

Last, I am in the process of set-up a system which is much would establish how the depar nusiances. My hope was to de Kegler level instead of the c much for wishful thinking.

material from 3/17/94 mtg

ality nuisance regulations to an this bill. The regulations nd addresses air-related in the field at the Al sioner's Sandor's level. So

Although my tone may appear v plying that the intentions of this bill are devious. I am just making you aware of the potential outcomes of this legislation.

==========

FROM: John Stone

TO: Mike Menge

DATE: 03/09/94
TIME: 2:30 PM

CC: Len Verrelli

SUBJECT: SB 178 - The Nuisance Bill
PRIORITY:
ATTACHMENTS:

From Dept. of Law

After reading this bill, I feel compelled to relay a couple of air-related issues to you.

First, none of our current pollutant-specific emission standards were developed to protect the public from nuisances, nor was nuisance even considered in establishing the standards. The only regulation we have that governs nuisance is 18 AAC 50.110. I don't need to elaborate on the history of implementation of this regulation. In short, we are just beginning to implement it as our regulations require after over 20 years of doing nothing with it. This means that the public process has never addressed nuisance, or provided an avenue for an individual to get the department to establish standards to protect them from nuisance.

Second, the department has never issued a permit with conditions that provided protection to the public from nuisance. As we gain experience with 18 AAC 50.110 we may be able to establish some permit conditions that address nusiance. Until that time, none of our permits have allowable limits for nuisance protection.

Third, it is not clear in 230(b) if "emission or discharge" is pollutant specific and nuisance effect specific. We should recommend adding language that clearly establishes the emission is expressly authorized for a particular pollutant and the expected nuisance effects of that specific pollutant. If this section is read as somehow shielding the permittee for every constituent of a emission or discharge by the mere mention of it in the permit, then we have big trouble. For instance, although we rountinely authorize 15 tons of particulate matter emissions in a permit for ambient air quality protection, we do authorize the dioxin emissions that may be present in the same exhaust stream and which the department has not reviewed.

Fourth, am I to read that this bill requires us to establish a nuisance shield in each permit we issue? In other words, are we to establish allowable emission quantities for each pollutant emitted by the facility in such a manner so that a "nuisance" does not occur? If so, I will need about another 10 staff to try to issue a permit. We need to let the Legislature know that this type of shield cannot be easily created, if at all. Unocal Chemical just spent about $1 million tyring to do showing of compliance with 18 AAC 50.110, and their facility is not that complex. Many staff believe that the Sitka

Pulp Mill could never show compliance with 18 AAC 50.110. However, they problably will be able to do a showing now that the mill has shut down. The short of this is that burdoning ADEC with the requirment to create a nusiance shield is coming dangerously close to completely shutting down the permit system. I can't believe the Legislature would want this. Remember Mike that my permit system is to make sure that permittees are in compliance with the Clean Air Act. Nuisance isn't in the Clean Air Act. Do we really want to piggy-back this bill on the back of our permit system? If so, we better recommend that the Legislature make the nuisance shield optional at the request of an owner or operator, and to make it clear to the Legislature that

we will rountinely issue permits with a statement that the emissions authorized in this permit does not protect them against nuisance, cancer, or whatever else isn't embodied in the applicable requirements of the permit.

Last, I am in the process of amending the air quality nuisance regulations to set-up a system which is much less burdensome than this bill. The regulations would establish how the department responds to and addresses air-related nusiances. My hope was to develop the solutions in the field at the Al Kegler level instead of the court room at Commissioner's Sandor's level. So much for wishful thinking.

Although my tone may appear ventful, I am not implying that the intentions of this bill are devious. I am just making you aware of the potential outcomes of this legislation.

==========

3/17/94 pm

ROBERTSON, MONAGLE & EASTAUGH

P. O. Box 21211
Juneau, Alaska 99802-1211

Telephone: (907) 586-3340 Telecopier: (907) 586-6818
Xerox 7020 (G2-G3)

Pages 2

March ~~15~~, 1994

465-2075
FAX: ~~463-6735~~

To: Marie Sansone
From: Mary Nordale
Re: SB 178

Transmitted are the amendments to SB 178 that appear okay to us. I have redrafted your first proposed amendment and added some language that we want included. I have also added the amendment regarding attorney fees. This takes the place of your page 1 proposals.

Your page 2 and 3 are ok. I think page 2 should be a separate bill section, but Terry Bannister should call the shots on that one.

I am substituting a new provision in 230 in place of your amendment on page 4. As long as AS 46.03.900 contains the definition of pollution that it has now, the concerns addressed by your page 4 are met.

Instead of your amendment on your page 5, I have substituted our proposed amendment to insert "a final" before "judgment" in Sec. 3. Whenever estoppel is raised as a defense, the court would take evidence to determine whether or not estoppel exists. Moreover, the court order or judgment referred to on page 2, line 6, of the bill is one entered against the permittee, not a person bringing an action against the state.

After you have had a chance to look at this, call me at 586-3340. I'd like to get the drafts to Rep. Therriault by noon tomorrow, so Terry Bannister can fix them up for the hearing on Thursday.

Client No. 04870 Matter No. 78121

CHANGES INCORPORATED IN WORKDRAFT 8-LS0930\I 3/17/94

Page 2, lines 12-18 Language added to provide that the shield of subsection (b) will be available only as long as there are statutory definitions of "pollution" and "emission." This required redesignation of (d) as (e).

The purpose of this is to incorporate into the nuisance statute the definitions in Title 46 that relate to nuisance.

Page 2, lines 23-31; page 3, line 1 Language added require indemnification of the state if claims or actions in inverse condemnation are brought by people alleging nuisance from a permitted activity.

The purpose of this is to respond to the concerns of the committee that the interests of the state were not sufficiently protected in the inverse condemnation situation.

Page 3, lines 6-11 Language added to amend Alaska Rules of Civil Procedure Nos. 79 and 82 to permit the award of full reasonable attorney fees and costs instead of partial attorney fees as presently awarded by the Supreme Court.

The purpose of this is to diminish the incentive of persons to file claims or sue the state in inverse condemnation as a means of defeating the permitting processes of state agencies.

Page 3, line 12 The word "final" was inserted before "judgment."

The purpose of this is to emphasize that the retrospective application of SB 178 would only affect matters that had not been reduced to final judgment.

Page 3, lines 15-17 Severability language added.

The purpose of this is to emphasize that those portions of SB 178 that are constitutional shall remain in effect even if one or more portions or clauses is found unconstitutional.

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

M E M O R A N D U M March 19, 1994

SUBJECT: Inclusion of references to court rule changes and effective date in title of HCS CSSB 178 (Fin) (Work Order No. 8-LS0930\M)

TO: Representative Ron Larson
Representative Eileen MacLean
Co-Chairs, House Finance Committee
Attn: Carol

FROM: Theresa L. Bannister TLB
Legislative Counsel

The committee substitute adopted by the House Finance Committee (HCS CSSB 178(Fin)) contains new language in the title, specifically the phrases "amending Alaska Rules of Civil Procedure 79 and 82," and "and providing for an effective date." The addition of these phrases to the title in the committee substitute does not violate Uniform Rule 41(b). That rule states

> (b) An amendment to a bill introduced in the other house is not in order if the amendment requires a change of the bill title other than a clerical or technical change.

This office considers the addition of the court rule change language and the effective date language to the title of this bill to be a technical change. As a technical change it is not prohibited by the rule.

If I may be of further assistance, please advise.

94-089.lmb
TLB:lmb

cc: Suzanne Lowell, Chief Clerk

Alaska State Legislature

Senate Majority Leader
Chair, Judiciary Committee
Vice Chair, Community & Regional Affairs

Member, State Affairs Committee
Committee on Committees
Western States Legislative Forestry Task Force
Legislative Council

Senator Robin L. Taylor

State Capitol
Juneau, Alaska 99801-1182
907) 465-3873
Fax: 907) 465-3922

352 Front Street
Ketchikan, Alaska 99901
907) 225-8008
Fax: 907) 225-0713

SPONSOR STATEMENT

SB 178

Senate Bill No. 178 has been introduced to clarify existing law and to protect permit holders from being sued for doing conducting those activities which are authorized by their permit. Senate Bill No. 103 and House Bill No. 167 are bringing Alaska's air quality control program into compliance with Federal standards. Simultaneously, mining and manufacturing businesses are developing and are likely to be permitted dischargers of waste water. Similarly expanding municipalities are requiring larger power plants, waste water treatment plants and incinerators. Unfortunately, the likelihood of private nuisance lawsuits seeking damages against these permitted activities

Alaska needs to maintain its orderly society. Both the state and local governments must be able to permit activities or hold permits for their own activities without the prospect of being sued by every person who simply opposes the permitted activity.

Senate Bill No. 178 amends Alaska's general nuisance statute to clarify the standard to be used by courts in determining whether or not an act or structure is, in fact, a nuisance. The goal is to prevent lawsuits against permit holders <u>when they are acting within the limits of their permits</u>. Senate Bill 178 would NOT protect any permit holder from a nuisance action if the permit holder exceeds or violates the limits of the permit.

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LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM February 15, 1994

SUBJECT: Sectional Summary of HCS CSSB 178( ). (Work Draft 8-LS0930\D, February 12, 1994)

TO: Representative Gene Therriault
Attn: Sara

FROM: Theresa L. Bannister
Legal Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1. This section amends AS 09.45.230 by rewriting it completely. It consists of four subsections, as follows:

Subsection (a). States that a person may bring a civil action to enjoin or abate a private nuisance and that damages may be awarded in that action.

Subsection (b). Provides that a person may not maintain under the section an action for nuisance that is based upon an air emission or water or solid waste discharge, other than the placement of nuclear waste, where the emission or discharge was expressly authorized by and is not in violation of a term or condition of

(1) a statute or regulation;
(2) a license, permit, or order that is
(A) issued after public hearing by the state or federal government; and
(B) subject to
(i) continuing compliance monitoring;
(ii) periodic review by the issuing agency;
(iii) renewal on a periodic basis; or
(iv) AS 46.40; or
(3) a court order or judgment.

Subsection (c). Provides that the defense set out in (b) does not apply to actions in which the air emission or water or solid waste discharge that is the subject of the action produces a result that was unknown or not reasonably foreseeable at the time of the authorization described under (b)(1) - (3).

Subsection (d). States that unless a suit based on a private nuisance is authorized by AS 09.45.230, or is brought under AS 09.50.170 - 09.50.240 or AS 19.25.080 - 19.25.180, it may not be maintained. (The reference to AS 19.25.080 - 19.25.180 (outdoor advertising) is not needed in the bill because those sections relate to public nuisances, not private nuisances; I recommend deleting the reference.)

Section 2. Defines "nuisance" for certain laws relating to nuisances.

Section 3. Makes Act applicable to existing lawsuits unless judgment has been entered before the effective date of the Act, thus making the Act retroactive.

Section 4. Gives the bill an immediate effective date.

If I may be of further assistance, please advise.

TLB:pl
94-128.plm

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM March 7, 1994

SUBJECT: Constitutional problems in private nuisance bill draft (HCS CSSB 178( ), Work Order 8-LS0930\D, 2/12/94)

TO: Representative Mike Navarre
Attn: Tom

FROM: Theresa L. Bannister
Legislative Counsel

You have asked whether there are constitutional problems in the above-referenced bill draft. As you can see from the following, the bill draft does appear to have constitutional problems.

1. Retroactivity provision in sec. 3.

A. Due Process. The retroactivity provision contained in sec. 3 of the bill may be unconstitutional under the due process provision of the state constitution and the 14th amendment to the federal constitution. The determination of constitutionality will depend on the exact nature of the particular rights canceled by the section.

Section 3 has the effect of canceling certain actionable rights even if the right has already accrued and even if the right is being litigated. Section 3 retroactively cancels rights that have accrued before the effective date of the Act. The only exception is if a judgment has been entered in the action.

Protection from improper retroactivity has generally been included within the due process clause. 2 Sutherland Statutory Construction sec. 41.03 (4th ed). Under the state constitution, vested property rights are protected against state action by the due process clause contained in art. I, sec. 7. See Bidwell v. Scheele, 355 P.2d 584 (1960).

An actionable right that is canceled by sec. 3 would be considered a property right that is protected by the due process clause. See Bush v. Reid, 516 P.2d 1215, 1219 (Alaska 1973). Upon the occurrence of an injury, a person acquires a vested right (i.e., a property right protected by the due process clause of the fourteenth amendment to the federal constitution) in those causes of action arising out of the

injury under the state law applicable at the time. See, Greyhound Food Management, Inc. v. City of Dayton, 653 F.Supp. 1207, 1216 (S.D. Ohio 1986), aff'd, 852 F.2d 866 (6th Cir. 1988).

Although it is frequently stated that a statute cannot have retroactive application where that would interfere with, impair, or divest vested rights, there is no consistency in the determination of what is a vested right and it appears to depend on elementary considerations of fairness and justice in each case. 2 Sutherland Statutory Construction sec. 41.06 (4th ed). Therefore, the bill's cancellation of vested rights may violate due process if cancellation in the particular situation violates these elementary considerations of fairness and justice. Each case would have to be examined in this light to determine if its cancellation violated due process.

However, when evaluating a case, it has been held that a legislative act that cuts off an existing remedy so abruptly that no reasonable time is available to exercise the remedy is unconstitutional. 2 Sutherland Statutory Construction sec. 41.09 (4th ed.), citing Bacon v. Wong, 445 F.Supp. 1189, 1193 (N.D. Cal. 1978) (citing additional cases). With regard to existing actions, in at least one case the fact that the lawsuit was filed a while before the statute was enacted was a factor in determining that canceling a right of action violated due process. See Greyhound at 1216.

Therefore, the retroactivity provision in sec. 3 may be unconstitutional under the due process provision of the state constitution and the 14th amendment to the federal constitution in specific situations.

B. Taking. The retroactivity provisions of sec. 3 may also trigger an inverse condemnation taking under the state eminent domain provision, art. I, sec. 18 of the state constitution. That section reads as follows:

> Section 18. Eminent Domain. Private property shall not be taken or damaged for public use without just compensation.

That section applies to personal property rights, and would arguably include the rights of action involved here since the alleged injury has already occurred or begun, if continuing, and may even be the subject of a court action. In this type of case, the court would engage in a case-specific inquiry to determine whether governmental action effects a taking. See Anchorage v. Sandberg, 861 P.2d 554, 557 (Alaska 1993) (citing Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992). The eminent domain section is liberally construed in favor of the property owner. See Ehrlander v. State, 797 P.2d 629 (Alaska 1990), and Alsop v. State, 586 P.2d 1236 (1978).

However, the issue exists whether the rights are being taken for a public use, since the state will not be using them and since the state's only connection is through the authorization of the act, occupation, or structure. In a string of California cases, the

California courts have declined to hold that a taking was for a public use when the only public connection was the public agency's authorization of the private activity. See Ullery v. Contra Costa County, 248 Cal.Rptr. 727, 732 (Cal.App. 1 Dist. 1988), citing Yox v. City of Whittier, 227 Cal.Rptr, 311 (1986). On the other hand, one could argue that a public use exists here, since the state, through legislative action, is taking away apparently vested actionable rights in order to accomplish state goals.

Therefore, the retroactivity provision may amount to an unconstitutional taking under art. I, sec. 18 of the state constitution, since the persons whose rights are taken are not being compensated for the taking.

If the retroactivity were a taking under the state constitution, the state may be held liable for compensating the persons whose rights are taken. The payment of compensation under this scenario would raise the issue of whether state money is being used for a private purpose in violation of art. IX, sec. 6 of the state constitution, the section that prohibits the appropriation of money for or the transfer of state property for other than a public purpose.

Even if the taking of the rights (in this case, their cancellation) is not covered under the eminent domain provision, it could be argued that the state is not authorized to take property unless the taking is for a public purpose under art. I, sec. 18 of the constitution, and that, therefore, the taking goes beyond the constitutional power of the legislature. In other words, allowing private nuisances to injure private parties may amount to an unconstitutional taking of private property for a non-public purpose. See Urie v. Franconia Paper Corporation, 218 A.2d 360, 362 (NH 1966).

2. Prohibition against maintaining certain nuisance actions. The exception for nuclear waste in sec. 09.45.230(b) raises an equal protection issues under the state constitution because it prohibits some persons from bringing nuisance actions while allowing others to do so without an clearly satisfactory rationale for the distinction.

The relevant portion of art. I, sec. 1 of the state constitution provides:

> * * * all persons are equal and entitled to equal rights, opportunities, and protection under the law * * * .

The Alaska Supreme Court has interpreted this clause to offer broader protection than the corresponding federal clause. In so doing, our court has said that in order for a classification to be valid, it must be reasonable, not arbitrary, and must bear a fair and substantial relationship to a legitimate governmental objective, and, depending on the importance of the individual's interest involved, a greater or lesser burden will be placed on the state to show the fair and substantial relationship. Cf. Wilson v. Municipality of Anchorage, 669 P.2d 569 (Alaska 1983).

The interest in redressing wrongs through the judicial process is a significant one. See Wilson v. Municipality of Anchorage, 669 P.2d 569, 572 (Alaska 1983). However, since the interest in bringing a nuisance action would probably not be considered a fundamental one, and since the classification would not be considered a suspect classification, the state would not have to satisfy these tests by demonstrating a compelling state interest. Turner Const. Co., Inc. v. Scales, 752 P.2d 467, 470-471 (Alaska 1988).

The Alaska Supreme Court has said that the guarantee of equality of treatment prohibits a classification that denies to one group of persons the enjoyment of certain rights that are afforded to another group when, considering the purpose of the state program or law, there is no reasonable basis for not treating both groups the same. Cf. Leege v. Martin, 379 P.2d 447 (Alaska 1963).

The purpose of sec. 09.45.230(b) of the bill is to eliminate the possibility that a person conducting an activity within the scope and authority of a law, court order, or certain governmental permit, licenses, or orders will be taken to court by a person claiming injury to the person's property interests under a nuisance theory. In other words, once the government has given the okay to the activity and the activity does not violate the terms of that "okay," the activity may proceed unimpaired by the consequences of damaging the property interests of others.

The exclusion of "the placement of nuclear waste" from the activities encompassed by the ban on civil nuisance suits raises an equal protection question, both from the standpoint of those protected by the bill (permittees) and those who might be prevented from seeking redress by the bill (injured parties). Since certain categories of nuclear waste, which is not defined for the bill, may be less hazardous to the environment or persons than certain chemicals or other hazardous substances, it is difficult to find a reasonable basis that justifies allowing a neighboring property owner to sue for nuisance because of an activity involving nuclear waste, but not one involving, for example, a more dangerous airborne toxin. However, courts do not expect legislatures to make perfect or correct determinations in all cases; in this situation they will look for a rational basis, and the degree of rational basis required will be based on the importance of the right involved in the specific situation.

3. Summary. It appears that the retroactivity provision of the bill (sec. 3) may be unconstitutional under the due process clause of the state constitution. Sec. 2 of the bill raises certain constitutional issues under the eminent domain provision of the state constitution and under art. IX, sec. 6 of the state constitution, which relates to the expenditure of state funds. In sec. 1 of the bill, the nuclear waste exception raises a constitutional equal protection issue.

If I may be of further assistance, please advise.

TLB:gc
94-177.glc

PEARSON & HANSON
ATTORNEYS AT LAW
408 OJA WAY - SUITE B
P.O. BOX 98
SITKA, ALASKA 99835
PHONE: 907-747-3257 FAX: 907-747-4977

DENTON J. PEARSON
ALASKA/OREGON

BRIAN S. HANSON
ALASKA

March 2, 1994

Rep. Ronald Larson
Rep. Eileen McLean
Co-Chairmen, House Finance Committee
Alaska State Legislature
State Capitol (MS 3100)
Juneau, Alaska 99801-1182)

Re: Senate Bill 178

Greetings;

Enclosed is the written version of testimony I offered to the committee at the March 1, 1994 teleconference relating to the Committee Substitute for SB 178. I hope you and the other members of the committee will find it both thoughtful and informative.

As I was leaving the teleconference at the Sitka Legislative Information Office yesterday, a comment by one of the local environmental activists who was in attendance for the teleconference struck me. He said he didn't like SB 178 because it deprived him of "one more bite at the apple", referring to the regulatory process which would almost certainly have to precede any nuisance lawsuit predicated on a permitted discharge. As a former President of our local chamber of commerce and as an independent business person in Sitka over the last ten years, I can tell you that the last thing either our local businesses or our municipality needs is to give activists such as the maker of that comment any more bites at the apple of our community livelihood.

I am convinced that SB 178, as it is presently formulated, would help prevent the further erosion of our economy in Sitka and would assist in helping to retain a vital economy statewide.

Very truly yours,

Denton J. Pearson

TESTLET1.lettersen

Testimony for Senate Bill 178

House Finance Committee
March 1, 1994

Alaska Pulp Corporation
Rollo Pool
4600 Sawmill Creek Rd.
Sitka, AK 99835

Finance Committee Members:

I am the spokesperson for Alaska Pulp Corporation, which accounts for about a thousand workers in Southeast Alaska.

Our company supports Senate Bill 178. We urge you to pass it in its entirety and without delay.

- SB 178 is a bill that is supportive of business, commerce and communities.
- It gives companies that endure the test of public permits and those that operate within the limits of their permit, a small reward: no nuisance lawsuits.
- It gives authority and credence to our state permitting process and to the regulators that deal specifically with these highly technical permit issues.
- This is the kind of bill that the Speaker of the House and President of the Senate invited last year when they addressed the State Chamber of Commerce.
- This bill reflects compromise and hard work on the part of the legislature. As you know, the bill has gone through many changes since it was introduced last April.
- This bill is far less restrictive than the 1986 bill that granted broad exemptions to agricultural nuisances. That bill, incidentally, passed unanimously in both houses, including support from the four members of this committee that were in the legislature at that time (Rep. Larson, Rep. Grussendorf, Rep. Martin, Rep. Navarre).

Some criticism for Senate Bill 178 has come from those that feel the pulp mills have been horrible polluters, bent on polluting at any cost. If that is the case, this bill will not shield them, as was testified last week. In the cases of polluters, if they exceed their permit by any amount, they will be fair game for nuisance suits and there will be no bag limit.

You have to step aside from this bill as one which only supports or benefits one specific industry. You have to look at this bill for what it is. You have to look beyond the exaggerated claims of special interests. This bill is good for mining, oil and gas, municipalities, fish processors, and, yes, for timber and wood processing.

A good deal of the discussion has centered around pulp mills and pollution. As you can tell from some of those offering testimony, Alaska Pulp's public relations efforts have not been reaching the heart and minds of the environmental community.

In the short time we have here, I will not go into the Sitka mill's pollution performance and history. However, you should recognize that there are clearly two or maybe even three sides to most of these issues. It is our position that we have acted in accordance with our major permits and consent decrees. We have voluntarily reported exceedances and have worked with regulators to make our operation cleaner, while spending $100 million in the process. If any member of the committee is truly interested in the company's water and air record from our perspective, all you need do is call us in Sitka and someone will gladly speak to you on this issue.

As for the retroactivity clause, we feel this is fair. Environmental laws and permits often go into effect with conditions that are retroactive or immediate, allowing us no time to catch up or putting immediately in non-compliance. To give you an example of how things change on us: about a dozen years ago, we were installing secondary water treatment equipment . Mid way through construction of a multi-million dollar project, the permit limit was lowered, virtually rendering our pollution abatement effort obsolete. Other times, new permits (air and water) have lowered limits which go into effect immediately upon signing of the permit. This has forced us into compliance orders while we install new equipment. It is our opinion, that many of the new pollution issues we have encountered have come from our pollution technology itself or from regulators from different agencies that do not communicate with each other.

Again, we support SB 178 and appreciate the opportunity to address the committee.

HISTORICAL PERSPECITVE ON ALASKA NUISANCE LEGISLATION

Original Nuisance Law:

In 1962, the Alaska legislature enacted a private nuisance bill (Sec. 09.45.230). This law states that a person can bring a suit against someone for a private nuisance if the person is "injuriously affected" or if his or her "personal enjoyment is lessened."

1986 Nuisance Bill

In 1986, the state legislature passed another nuisance bill – one relating to agriculture and farming. That law (Sec. 09.45.235), also called the Right to Farm Law, says an agricultural operation does not become a private nuisance if:

1) the agricultural operation has been in operation for more than 3 years,
2) the agricultural operation was not a nuisance at the time it was started.

Text (Sec. 09.45.235):
An agricultural operation is not and does not become a private nuisance by a changed condition that exists on neighboring land if the agricultural operation has been in operation for more than three years and if the agricultural operation was not a nuisance at the time the agricultural operation began.

The 1986 law further defines agriculture to include dairying, cultivation of plants, greenhouses, the production of animals, and forestry and timber harvesting operations as well as "any *practice conducted on the agricultural operation as an incident to or in conjunction with"* these defined activities.

No Opposition in 1986:

- The Right to Farm Bill passed without dissent in the State Senate.
- It also passed without dissent in the House by a 38-0.
- There are 14 current legislators who voted for the 1986 bill, seven Democrats and seven Republicans:

Al Adams (D)	Tim Kelly (R)	Drue Pearce (R)
Jim Duncan (D)	Jay Kerttula (D)	Steve Rieger (R)
Steve Frank (R)	Ron Larson (D)	Robin Taylor (R)
Ben Grussendorf (D)	Terry Martin (R)	Fred Zharoff (D)
Rick Halford (R)	Mike Navarre (D)	

Sec. 09.45.220. Effect of payment before judgment or sale.

NOTES TO DECISIONS

Quoted in National Bank v. Warfle, 835 P.2d 1167 (Alaska 1992).

Article 4. Nuisances.

Section
235. Agricultural operations as private nuisances

Sec. 09.45.235. Agricultural operations as private nuisances. (a) An agricultural operation is not and does not become a private nuisance by a changed condition that exists on neighboring land if the agricultural operation has been in operation for more than three years and if the agricultural operation was not a nuisance at the time the agricultural operation began.

(b) The provisions of (a) of this section do not apply to

(1) liability resulting from improper or negligent conduct of agricultural operations; or

(2) flooding caused by the agricultural operation.

(c) The provisions of (a) of this section supersede a municipal ordinance, resolution, or regulation to the contrary.

(d) In this section, "agricultural operation" means

ıfter foreclosure of lien.

DECISIONS

on to re:over debt.

for notice required in notes executed after May 24, 1988, that are secured by a deed of trust or mortgage, see AS 34.20.160.

DECISIONS

Where the terms of a note and deed of trust did not limit the secured creditors to the remedy of nonjudicial foreclosure of their security, the creditors' subsequent claim for judicial foreclosure of that security was not precluded by the judgment in a prior suit on the note. Conrad v. Counsellors Inv. Co., 751 P.2d 10 (Alaska 1988).

(1) any agricultural and farming activity such as

(A) the cultivation, conserving, and tillage of the soil;

(B) dairying;

(C) the operation of greenhouses;

(D) the production, cultivation, growing, and harvesting of an agricultural, floricultural, or horticultural commodity;

(E) the raising of livestock, bees, fur-bearing animals, or poultry

(F) forestry or timber harvesting operations;

(2) any practice conducted on the agricultural operation as an incident to or in conjunction with activities described in (1) of this subsection. (§ 2 ch 34 SLA 1986)

Cross references. — For legislative findings in enacting this section, see § 1, ch. 34, SLA 1986, in the Temporary and Special Acts.

NOTES TO DECISIONS

Purpose of section. — This section is designed to provide a defense against a nuisance action, not against a permit revocation under city ordinances. Gates v. City of Tenakee Springs, 822 P.2d 455 (Alaska 1991).

Testimony of the Alaska Forest Association
by General Counsel
James F. Clark

Introduction

Mr. Chairman, and members of the Committee, my name is Jim Clark. I am general counsel for the Alaska Forest Association (AFA), which strongly supports Senate Bill 178, as proposed by the Subcommittee. The AFA is a private, non-profit organization comprised of companies involved in Alaska's forest products industry on federal, state and private lands. The Association has 119 member companies which are directly involved in the industry. We provide more than 4,000 direct, year-round jobs. The Association has 200 associate member companies which provide goods and services to Alaska timber industries.

The purpose of Senate Bill 178 is to protect holders of major permits from being sued as long as they are in compliance with their permits. The permits which are covered by the subcommittee draft of Senate Bill 178 are the major permits: air, water and solid waste. Often times, these permits take years to obtain and follow an extensive public process which is appealable both administratively to the head of the agency authorizing the permit and judicially through the courts. These permits must be renewed periodically, thus providing their opponents opportunities to contest them again.

We believe that once the agency authorized to issue a major permit has gone through the process of doing so and those opposed to it have had an opportunity to contest the permit through

opportunity to take administrative action against that decision. The adjacent property owner also has the same judicial rights that he or she had when the courts regulated the activity. The adjacent property owner should not also be able to sue the permittee.

The mill operating property owner has been deprived of the right to decide what is reasonable to emit from his or her property. The Legislature has taken over that function by establishing discharge and emission standards. It has assigned responsibility to various agencies to set emission and discharge levels based on human health factors and damage to property. The mill operating property owner no longer has an opportunity to do more than what an agency will include in a permit.

Accordingly, the right to sue in nuisance against a permittee who has been through the modern process for obtaining a permit is an anachronism. It would represent a return to the days when the only source of regulation was the courts. Since the mill operating property owner no longer has the right to determine what is the appropriate level of emissions at which he will not injure surrounding property owners, he or she should no longer be subject to suit for permitted activity through nuisance actions. Since this decision is now made by agencies, and since those agencies are subject to suit, the permittee should not also be subject to suit.

Regulatory Basis for SB 178

SB 178 recognizes that the permit process is designed to protect neighboring property owners and the public in general from emissions or discharges by mill operating property owners and to

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We believe that once the agency authorized to issue a major permit has gone through the process of doing so and those opposed to it have had an opportunity to contest the permit through

the judicial process, litigation should be over. Individual neighboring property owners should not then have yet another opportunity to attack the permit through a common law nuisance action.

Background

In 19th Century industrial England, before pollution regulation, a mill operating property owner could emit what he thought was reasonable for his property if, in fact, he even considered this issue. It made sense then that adjacent property owners could bring an action directly against the polluter, to abate a nuisance. (The right to sue for damages came later.) Since the mill operating property owner had taken the responsibility for his plant's emissions, he had to stand directly accountable to his neighbors and abate to a level that would not unreasonably interfere with their property rights. The courts were the regulators and set the limits of emissions and discharges based on the degree of interference, not the quality of the discharge.

The Legislature has now stepped in to control what is reasonable and what is not reasonable to emit or discharge from a particular property. The Legislature has taken over the regulatory function that had been the province of the courts by legislating standards for what is reasonable for emissions and discharges. It follows that when an agency vested with the regulatory responsibility determines that the level of emissions is low enough to meet the legislative goal of protecting adjacent property and to be permitted, and the adjacent property owner has had at least an

opportunity to take administrative action against that decision. The adjacent property owner also has the same judicial rights that he or she had when the courts regulated the activity. The adjacent property owner should not also be able to sue the permittee.

The mill operating property owner has been deprived of the right to decide what is reasonable to emit from his or her property. The Legislature has taken over that function by establishing discharge and emission standards. It has assigned responsibility to various agencies to set emission and discharge levels based on human health factors and damage to property. The mill operating property owner no longer has an opportunity to do more than what an agency will include in a permit.

Accordingly, the right to sue in nuisance against a permittee who has been through the modern process for obtaining a permit is an anachronism. It would represent a return to the days when the only source of regulation was the courts. Since the mill operating property owner no longer has the right to determine what is the appropriate level of emissions at which he will not injure surrounding property owners, he or she should no longer be subject to suit for permitted activity through nuisance actions. Since this decision is now made by agencies, and since those agencies are subject to suit, the permittee should not also be subject to suit.

Regulatory Basis for SB 178

SB 178 recognizes that the permit process is designed to protect neighboring property owners and the public in general from emissions or discharges by mill operating property owners and to

afford due process to those who object to the issuance of a permit. With air permits, for example, there are federal primary and ambient air standards that must be met. What this means is that the state regulatory process has to be designed to protect human health with a very conservative risk factor attached to it. It must also be designed to protect vegetation and animal life. In addition, Alaska air regulations require that the emissions not create a nuisance such as odor (18 AAC 50.110). All of these conditions have to be met at the edge of the property line.

For example, there is a requirement to reduce SO_2 (sulfur dioxide) emissions to certain levels under the federal program which the State program reduces even further. The same is true of total suspended particulate (TSP) and nitrogen oxides (NOX). The regulatory emission limit for each of these parameters must be met at the mill owner's property line in order to get a permit.

The same level of regulation is also true of water and solid waste regulation. In other words, pursuant to federal and state legislation, the federal and state agencies have regulated the rights of property owners of industrial operations in the name of protecting human health. The police power of the federal and state governments is sufficient and constitutional justification for requiring installation of pollution control equipment. If that were not true, such regulation would be deemed a taking of the private landowner's property. However, the exercise of the police power has been held constitutional because the objective of

protecting human health is part of the general welfare and is reasonable.

The converse should also be true. If a mill owner's property can be constitutionally regulated without a taking by requiring him to protect the property of others, then as long as the mill owner obeys the rules and emits or discharges at the levels authorized by the appropriate regulatory agencies, he ought to be protected from nuisance litigation. Remember that a nuisance claim under this circumstance is basically a contention that, notwithstanding the environmental protections proclaimed by the Legislature and the application of those rules to an industrial operation by the agencies, the mill operation is unreasonable. In these circumstances, a person bringing a nuisance action is, in effect, asking the courts to take back their power to regulate, something the Legislature has specifically determined to do itself.

Our concepts of due process, however, allow a concerned neighboring property owner first to go to the Legislature when it considers the environmental law; he or she may then go to the agencies when they apply the laws to a specific property through a permit; he or she may then have the permits adjudicated in court.

After the permit has survived all this, the permit holder who is obeying the rules should not be subject to another attack on the permit through a nuisance suit.

<u>The Proposed Subcommittee Work Draft has Narrowed the Bill</u>

The proposed House Finance Committee Substitute for the House Judiciary Committee Substitute for Senate Bill 178 - an act

relating to civil nuisance actions - has been substantially narrowed. The changes reflect concerns of Sealaska Corporation, and Lloyd Benton Miller of Sonosky, Chambers, Sachse, Miller & Munson, regarding potential impacts of the previous bill upon Native corporations and the plaintiff victims of the Exxon Valdez oil spill disaster. The changes also attempt to address the concerns of those who testified at the House Judiciary Committee hearing that the bill, as then drawn, protected too large a class of license and permit holders and, thus, precluded nuisance actions where there had not been sufficient public notice of the permit or sufficient agency consideration of a permit's impacts before it was issued.

Specifically, the proposed House Finance Committee Substitute now provides nuisance suit protection to a very limited group of permit holders-i.e., those who meet the terms and conditions of their air permit, water permit or solid waste permit in situations where the emission or discharge is specifically authorized by the permit. The reason for limiting protection to major permits is to assure that: (1) the permits involved provide protection to neighboring property owners as well as to the public in general; (2) there is adequate notice of permit issuance to the public along with an opportunity for them to be heard by the agency issuing the permit; (3) the permits require periodic renewal, thus allowing correction of a mistake in initial terms and conditions of the permit; (4) there is an opportunity for the public to file administrative and judicial actions against the agency issuing the

permit; and (5) there is ongoing compliance monitoring to make sure that the permit holder is meeting permit conditions.

As a practical matter then, this major narrowing of the scope of Senate Bill 178 will eliminate most of the objections which were raised with respect to it at the House Judiciary Committee hearing. There would be no change in the nuisance law with respect to the normal lawsuit of neighbor against neighbor or where minor permits are involved.

The bill's protection will involve major permits normally held by industrial facilities and municipalities. This type of protection is needed to guard against a new type of nuisance lawsuit - the class action nuisance suit. Such a suit, for example, may involve a group of people who live in an area near a municipal waste water treatment works. The suit would normally be a contingent fee case for the law firm involved. The individuals involved would recover some funds if damage due to permitted discharges were shown, but the law firm involved would get the biggest recovery. We do not need this type of lawsuit in Alaska.

Most states provide by statute (California, for example) or by judicial decision (Pennsylvania, for example) that those things that are authorized by law or regulation are not nuisances. Alaska already protects a farm or forestry operation from a nuisance suit (AS 09.45.235) where the operation was in existence for three years before suit and the "changed condition" on the neighboring land occurs because new residential or commercial development has changed land patterns in the neighborhood. People

who choose to locate their homes and businesses near farms or forestry operations may not sue to prevent continued farming or forestry operations. If people choose to "come to the nuisance," they should not be allowed to put those "nuisances" out of business.

Alaska needs to encourage large, natural resource based industries. We need the private sector jobs such industries provide. It is naive to the point of foolishness to believe that tourism can provide the economic development we need to withstand the next decade of low oil revenues. It is clear that national, outside-based environmental organizations want to prevent development of Alaska's timber and mineral resources. SB 178 will encourage the large investments Alaska needs without sacrificing the ability of the citizens to protect the environment. The Alaska Forest Association urges passage of the House Finance Committee substitute.

Thank you for your attention and consideration.

Feb. 22, 1994
~~April 5, 1993~~

To: Finance Committee
Eighteenth Legislature
State of Alaska
Juneau, AK

From: Dr. Ronn E. Dick, Associate Professor
Natural Resources
801 Lincoln St.
Sitka, AK 99835

Dear Sirs:

I am writing as a concerned citizen and as a natural resource management professional to comment on Senate Bill No. 178-House Bill 282, "An Act relating to civil nuisance actions."

I have very serious concerns. On the face of it, this is an obvious, cynical and corrupt exercise of power by an elected representative of the people of Alaska who has decided to do the bidding of powerful, wealthy corporations. This legislation is in direct response to a lawsuit against Alaska Pulp Corporation because of its pollution of Sitka Sound and the effects of this pollution on the waterfront property owners in Sitka Sound. It is ironical that that the special interests of the two pulp mills in SE Alaska, especially Alaska Pulp Corporation (APC), benefit from this Bill. It is ironical because it is these pulp mills that complain the most about the influence of "special interests", on legislation.

Rather than get into the legal details and nuances of such a Legislative Act with respect to individual property rights and due process, I will focus my comments on the underlying principles of justice that this Act violates. Since this Act exempts any polluter from liability if they have the permission of the government to pollute (by virtue of statute or regulation, license or permit, or court order of decision), it is absolutely essential that the integrity of the "permission" process be untainted. The fact is that this permitting process is often lacking of integrity and often involves collusion between the permitting agencies and the polluters.

It is a fact that APC and the State of Alaska Department of Environmental Conservation (DEC) have had numerous private meetings to agree upon acceptable pollution standards. Generally, APC informs DEC about the current level of discharge of specific pollutants and DEC writes the standards so that those levels of discharge can be maintained.

It is a fact that DEC often fails to enforce violation of the standards or to enforce their own regulations. An excellent example of DEC's refusal to enforce their own regulations is DEC's 20+ year refusal to enforce Air Quality Regulation 18 AAC 50.110 Air Pollution Prohibited (Effective 5/26/1972). The Sitka Conservation Society filed an administrative appeal regarding the DEC's failure with respect to this regulation four years ago and

the appeal was decided in favor of the Sitka Conservation Society in May of 1992. In short, this regulation placed the burden of proof on the polluter to prove that the pollution they create is NOT injurious to human health or welfare, animal or plant life, or PROPERTY, or which would unreasonably interfere with the enjoyment of life or property. DEC still has NEVER enforced this regulation in the past and has not enforced this regulation in spite of the appeal decision almost one year ago.

In the April 20, 1993 (yesterday). Sitka Sentinel, it was reported that the EPA is considering a lawsuit against the DEC because the Alaska DEC has been too lenient with Alaska Pulp Corporation.

Now, the Alaska State Legislature is considering a Bill that would disenfranchise the public, the citizens of Alaska, from seeking legal redress when the State Government and corporations collude to circumvent the laws and regulations of the state.

Frankly, this legislation threatens the credibility of our State government and I believe is politically and socially destabilizing. It destroys checks and balances and leaves the citizens of Alaska without any acceptable means of protecting themselves from corporate excesses. This Act should not have been written in the first place. It most certainly should not be passwed into law.

Sincerely,

Ronn E. Dick, Ph.D.
Forest Resources

Alaska Environmental Lobby, Inc.
P.O. Box 22151 Juneau, Alaska 99802
Phone: 907-463-3366
Fax: 907-463-3312

Testimony
SB 178 Public Nuisance Suits

Thank you Mr. Chair and members of the committee. My name is Russell Heath. I am the director of the Alaska Environmental Lobby.

Before I begin I would like to point out that no one yet today has documented that Alaska does indeed have a problem with an unacceptably large number of suits to abate nuisances. No one has provided any research giving us a break down of how many such suits there have been in Alaska; how many were won, how many were lost and how many the court dismissed because they were without merit.

The fact is that Alaska does not have a problem with inappropriate use of the nuisance statutes.

So why this bill was this bill introduced? It was introduced to kill a specific nuisance suit against the Alaska Pulp Company. It was introduced only days after the court ordered APC's Japanese parent corporation to disclose its financial records. APC has evaded complying with air and water quality standards for years by claiming that it was financially unable to do so. Disclosure of those records may well destroy its last defense to avoid compliance.

The private nuisance suit being brought against APC contains many charges. I would like to briefly sketch just one which clearly illustrates both the misunderstandings in SB 178, particularly in regards to the permitting process and why private citizens must have access to the courts.

APC air emissions contain sulfur dioxide. The sulfur dioxide, which turns to sulfuric acid in the atmosphere, burns eyes and throats, and has, as you would imagine, consequently lowered the property values of residences in the surrounding neighborhoods. A monitor erected several years ago near the most impacted neighborhood indicates that the ambient air quality is within APC's permit stipulations.

APC's air quality permits are renewed annually. At the public hearings there are vociferous complaints from the public about the health hazard of SO_2. In addition, DEC has received hundreds of written complaints about the problem. These complaints have been heard by DEC since it first began holding hearings almost 20 years ago. Nevertheless - public concerns have been ignored, and in fact the public has been excluded from the permit writing process. The permits are typically negotiated between DEC and APC behind closed doors. The public has been excluded even when it requested being present at the negotiation simply as observers. When an administrative appeal was filed against DEC accusing it of ignoring public input, DEC's own hearing officer determined that this was indeed the case. DEC was ignoring the public. The officer directed DEC to work more closely with both parties in the future. To date this has not been done.

So to reiterate:

1) SO_2 Emissions are coming from APC which are within permit stipulations but which are clearly causing a nuisance.
2) The public has complained about the these emissions at permit hearings and in writing for almost 2 decades.
3) The permitting process has largely ignored the public and instead favored the regulated industry - as determined by DEC's own hearing officer.

What conclusions are evident here? First, that just because an activity causing the nuisance is permitted, there is no guarantee that private property rights will be protected. But more fundamentally, it is that the government has failed, in its administration of the permitting process, to protect the rights or interests of the residents surrounding the mill. And when the government fails to protect a person's rights, that person's final legitimate recourse is the court.

SB 178 limits Alaskans' access to the courts. It limits our rights to protect our property. Simply put, SB 178 restricts the property rights of 600,000 Alaskans in order to shield a Japanese corporation from an American court. Please do not pass this bill out of Comm. Hlc

(1) when an air quality advisory has been issued under 18 AAC 50.610(c), except for areas set out in (3) of this section visible emissions may not reduce visibility through the exhaust effluent by 50 percent or greater for more than 15 minutes in any one hour;

(2) burning material in a way that creates black smoke is prohibited;

(3) for the Mendenhall Valley wood smoke control area identified in 18 AAC 50.021(d), the provisions of "ORDINANCE OF THE CITY AND BOROUGH OF JUNEAU, ALASKA. Serial No. 88-59." except for the provisions applicable to the Lemon Creek Smoke Hazard Area, are incorporated by reference as part of this chapter; and

(4) when an air emergency has been issued under 18 AAC 50.610(a)(3)(B), no person may operate, permit, or allow the operation of a wood-fired heating device which results in the emission of smoke. (Eff. 11/1/82, Register 84; am 10/30/83, Register 88; am 7/21/91, Register 119)

Authority: AS 46.03.020(10) AS 46.03.140

18 AAC 50.090. ICE FOG LIMITATIONS. The department will, in its discretion, require any person proposing to build or operate an industrial process, fuel-burning equipment or incinerator in areas of potential ice fog, to obtain a permit to operate and to reduce water emissions. (Eff. 5/26/72, Register 42)

Authority: AS 46.03.020(10) AS 46.03.140 AS 46.03.150

18 AAC 50.100. MARINE VESSELS. Within three miles of the coastline of Alaska, visible emissions from any marine vessel, excluding condensed water vapor, may not result in a reduction of visibility through the exhaust effluent of greater than 20 percent for a period or periods aggregating more than

(1) three minutes in any one hour while underway, at berth, or at anchor;

(2) six minutes in any one hour during initial startup of diesel-driven vessels; or

(3) 12 minutes in one hour while anchoring, berthing, getting underway, or maneuvering in port. (Eff. 5/26/72, Register 42; am 5/4/30, Register 74; am 7/21/91, Register 119)

Authority: AS 46.03.020(10) AS 46.03.140 AS 46.03.150

18 AAC 50.110. AIR POLLUTION PROHIBITED. No person may permit any emission which is injurious to human health or wel-

fare, animal or plant life, or property, or which would unreasonably interfere with the enjoyment of life or property. (Eff. 5/26/72, Register 42)

Authority: AS 46.03.020(10) AS 46.03.140 AS 46.03.710

18 AAC 50.120. PERMIT TO OPERATE. Repealed 5/4/80.

18 AAC 50.130. REVOCATION OR SUSPENSION OF PERMIT. Repealed 5/4/80.

18 AAC 50.140. AIR EPISODES. Repealed 5/4/80.

18 AAC 50.150. SOURCE TESTING. Repealed 5/4/80.

18 AAC 50.160. CIRCUMVENTION. Repealed 5/4/80.

18 AAC 50.170. AIR QUALITY CONTROL PLAN. Repealed 5/4/80.

18 AAC 50.180. PENALTIES. Repealed 5/4/80.

18 AAC 50.190. DEFINITIONS. Repealed 5/4/80.

Article 2. Permit Requirements

Section
300. Permit to operate
310. Revocation or suspension of permit

18 AAC 50.300. PERMIT TO OPERATE. (a) No person may construct, modify, reconstruct, operate, or cause the operation of the following without a permit from the department:

(1) a facility containing a source which requires an air contaminant emission control unit or system to comply with emission standards set by 18 AAC 50.040 — 18 AAC 50.060, and which is

(A) an industrial process with a total design rate, capacity, or throughput greater than five tons per hour and which physically or chemically treats the material; or

(B) fuel burning equipment with a rating of 50 million Btu per hour or greater;

(2) fuel burning equipment with a rating of 100 million Btu per hour or more;

(3) a facility containing one or more incinerators with a total combined rated capacity of 1,000 pounds per hour or more;

(907) 586-4004

Douglas Kemp Mertz
Attorney at Law
319 Seward Street
Juneau, Alaska 99801

fax (907) 586-4141

April 21, 1993

Hon. Brian Porter, Chair
House Judiciary Committee
Alaska State House of Representatives

Re: CS SB 178 (JUD), relating to nuisance actions

Dear Representative Porter:

I wish to comment on SB 178, which is before the House Judiciary Committee. I have been practicing law in Alaska for almost twenty years, and for most of that time I was an assistant attorney general involved in environmental enforcement. From that perspective I have become convinced that this bill is bad policy and bad law.

The bill would bar legal actions which have been the prime tool for protecting property owners' rights since the 16th Century. Actions to abate activities which unreasonably interfere with a landowner's property have existed for centuries in every jurisdiction in the country. Private lawsuits to abate harmful activities are not suits to enforce public rights or to require an end to activities which affect the entire public (so-called "public nuisances"), but are intended to allow property owners who suffer specific damages to their own property to abate the problem or gain compensation for their losses (so-called "private nuisances"). Every property owner has an interest in being able to halt activities which harm his property. The property owner must still prove his case in court, but this bill would render the property owner helpless in the face of unreasonably damaging activities nearby his property.

Prohibiting a property owner from protecting his own land is an unconstitutional taking. There is clear caselaw, familiar to every law student, that for a legislature to bar property owners from filing private nuisance suits against persons harming their property constitutes a taking of property by state action for a private purpose. See Urie v. Franconia Paper Co., 218 A.2d 360 (N.H. 1966). There are two conclusions from this caselaw regarding SB 178:

1) Any property owner barred from filing a private nuisance suit due to activities damaging to his property would be entitled to compensation from the State of Alaska for his loss; and

2) the law would likely be unconstitutional, since the constitution forbids the state to spend funds for a private purpose.

The exclusion for some residential property owners is unconstitutional. The bill contains an exclusion from the bar on suits as to property in areas zoned residential. This exclusion is unconstitutionally discriminatory in two ways. First, *the bar would still apply to all commercial, industrial, agricultural, forest, public, and other non-residential lands, including churches, schools, and charitable organizations*. The owners of these types of property have the same interest in being able to prevent damages to their property as do residential owners, yet the bill cavalierly dismisses their right to seek the protection of the courts.

Second, the bill excludes from the bar only those residential property owners in areas zoned residential. That leaves unprotected any property owners in areas zoned differently (e.g., residential reserve) and all property owners in the unorganized borough and in communities without comprehensive zoning. Those property owners have the same interests and should have the same rights as "zoned" residential property owners to protect the value of their property.

The immunity for activities with permits leaves property rights unprotected. The bill prohibits private actions when the particular activity is permitted by a public agency and the emissions are within permit limitations. But that limitation does not protect individual property owners:

*** It assumes that state regulations are designed to prevent *all* harm to *any* property. But regulations are designed to set a general level of emissions or conditions, to protect the general interest of the public. They are not a guarantee that there will not be harm to particular pieces of private property from the permitted activity. Nor are state regulations perfectly crafted; it is easily the case that through imperfect drafting, a permitted level of activity can cause serious and devastating harm to private property. There is no justification for cutting off that private landowner's claim for damages.

*** It assumes that every private landowner will be aware of and be able to participate in the permitting proceedings for activities which may later affect his property. This is an impossible burden for the ordinary landowner, even if there were some way to guarantee notice of the proceedings (many permits do not require public notice or notice to adjacent landowners). Moreover, it does nothing to relieve the situation of the person who purchases land after a permitting proceeding but before the damaging activity has commenced;

that person is left virtually defenseless from his neighbor's harmful activities.

*** It assumes that every private landowner will have notice of and will be permitted to intervene in any court action which could result in a judicial order regarding offensive activities. Again, this is an impossible burden to impose on a landowner as a condition for maintaining some right to oppose harm to his property. To immunize the offensive activity because the property owner has failed to discover or participate in such a proceeding is nothing more than a taking of the owner's right to protect his own property.

<u>The retroactive effective date is patently unfair and is probably also unconstitutional.</u> The bill provides that its limitation extends to actions in process on the effective date. That means that the right of a landowner to protect his property would be cut off, automatically, even though he had no way to anticipate this bill, to participate in any prior permitting process, or to participate in any prior court proceeding. Again, it amounts to depriving the landowner of property without notice or due process and without compensation. *One absolute certainty attaches to this bill: It will result in protracted litigation regarding the constitutionality of the substantive bar on access to the courts, on the constitutionality of the retroactivity provisions, and on the right to compensation from the state for diminished property values.*

<u>This bill is an improper attempt to have the legislature intervene in pending litigation.</u> It is clear to us that this bill was intended to put an end to pending litigation against the Alaska Pulp Corporation in Sitka and likely litigation against the A-J Gold Project in Juneau, by affected property owners. There is no other justification for it, since *the provisions of the bill would work against the interests of business property owners as well as other property owners.* It has been a longstanding rule of the Legislature not to pass bills intervening in purely private litigation. Yet that is precisely what is intended here. Instead, the promoters of this bill should be required to defend against the pending claims on the merits.

Thank you for your consideration of these points.

Sincerely,

Douglas K. Mertz

JUDICIARY COMMITTEE SUBSTITUE FOR SB178

After the initial introduction of SB 178, there was concern that the language of the bill as drafted could be interpreted as interfering with the ability of the state and local governments to protect their citizens from statutorily identified public nuisances. The committee substitute before you has been drafted to address those concerns. CSSB 178 (JUD) narrows the scope of the bill and clarifies its intent to relate to private nuisance actions only.

Sectional Analysis: CSSB178(JUD)

Section 1 OVERVIEW

AS 09.45.230 would be amended by adding two new sections. It preserves the right of people to sue to abate nuisances and recover damages. It specifies those activities that would be protected from such actions, but it preserves the right of people to sue to abate certain public nuisances, namely dilapidated fences (AS 03.30.030), houses of prostitution (AS 09.50.170 - AS 09.50.240), outdoor advertising (AS 19.25.080 - AS 19.25.180) and junkyards (AS 19.27). Suits regarding other public nuisances would remain the responsibility of government, whether state or local. Nothing in this section would prevent private persons from suing the responsible government to compel that government to abate a public nuisance.

Sec. 09.45.230(a) authorizes private persons to bring actions to enjoin or abate a nuisance. It also authorizes the award of damages. This represents no change from current law.

Sec. 09.45.230(b) specifies those actions which would be protected from nuisance lawsuits, such as those authorized by statute, regulation, permit, license or order of an administrative agency, or the order or decision of a court.

Sec. 09.45.230(c) lists the section numbers of the statutes under which private parties could still bring actions to abate or enjoin public nuisances (described in the overview of Section 1).

Section 2 OVERVIEW

Section 2 changes the definition of nuisance, bringing that definition in line with modern legal concepts. The definition of what constitutes a nuisance would become more objective and, therefore, more consistently applied by courts.

Present law provides that a nuisance is that which injuriously affects a person's property or lessens a person's personal enjoyment of his property.

Section 2 of the bill would also add a new section to Article 4 of Title 9 that defines a nuisance as "a substantial and unreasonable interference with the use or enjoyment of real property, including water." The inclusion of "water" as real property is very important. It will allow persons to protect private water supplies as well as protect private recreational developments that include water sources.

Section 3 OVERVIEW

Section 3 would make the amended Sec. 09.45 230 applicable to any pending actions. While Alaska's courts are more likely than not to agree that the amended Sec. 09.45.230 expresses what the modern trend in nuisance actions is throughout the country, the provision for an immediate effective date (as the bill does in Sec. 4) should notify the courts of the Legislature's intention that all sections of the bill will be deemed Alaska's law as of that enactment date. The effective date will clarify when permitted activities are protected.

Section 4

As noted above, Section 4 provides for an immediate effective date.

ANCHORAGE OFFICE

THE ENSERCH CENTER
550 WEST SEVENTH AVENUE, SUITE 1200
ANCHORAGE, ALASKA 99501
PHONE: (907) 277-6693
FACSIMILE: (907) 279-1959

*ROBERT B. BAKER
LEROY J. BARKER
*L.G. BERRY
HAROLD E. SNOW, JR.
WILLIAM F. BRATTAIN, II
SUSAN M. WEST
*JULIA B. BOCKMON
GREGORY G. SILVEY
CHARLES T. HUGUELET

WASHINGTON, D.C. AND
VIRGINIA OFFICE

ARLINGTON COURTHOUSE PLAZA II
2300 CLARENDON BOULEVARD, SUITE 1010
ARLINGTON, VIRGINIA 22201
PHONE: (703) 527-4414
FACSIMILE: (703) 527-0421

**MICHAEL T. THOMAS
*STEVEN W. SILVER
*CARL W. WINNER
*BRADLEY D. GILMAN

ROBERTSON, MONAGLE & EASTAUGH

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
JUNEAU, ALASKA 99802

JUNEAU OFFICE

COURT PLAZA BUILDING, SUITE 800
240 MAIN STREET
P.O. BOX 21211
JUNEAU, ALASKA 99802
PHONE: (907) 586-3340
FACSIMILE: (907) 586-6818

ROYAL ARCH GUNNISON (1873-1918)
R.E. ROBERTSON (1885-1961)
M.E. MONAGLE (1902-1985)
F.O. EASTAUGH (1913-1992)

JAMES F. CLARK
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D. ELIZABETH CUADRA
MARY A. NORDALE
ROBERT P. BLASCO
TERRY L. THURBON
ROBERT J. JURASEK
MARGARET E. OGDEN

*ADMITTED IN WASHINGTON, D.C. AND ALASKA

**ADMITTED IN VIRGINIA, WASHINGTON, D.C. AND ALASKA

ALL OTHERS ADMITTED IN ALASKA

M E M O R A N D U M

TO: Charles E. Cole
Bruce Botelho

FROM: James F. Clark

DATE: April 21, 1993

RE: Senate Bill No. 178

****

Bill History

Senate Bill No. 178 was introduced March 31, 1993. A number of questions arose concerning the bill, particularly as to its breadth and possible interference with the ability of government to abate public nuisances. That criticism was well taken and work commenced immediately to refine the language of the bill in preparation for committee adoption of a substitute. The new language limited the amendment of AS 09.45.230 to private nuisances. On April 12 House Bill No. 282 was introduced containing the new language and on April 14 the Senate Judiciary Committee adopted the new language as a committee substitute and reported out CS SB 178 (Jud). At that point CSSB 178 and HB 282 were identical.

CS SB 178 (Jud) passed the Senate on April 17. Senator Phillips gave notice of reconsideration and on April 19, the Senate took up the reconsideration. The bill was returned to second reading to add some amendments to meet some concerns expressed by Senator Phillips and Senator Rieger. As amended, CS SB 178 was passed.

Bill Provisions

AS 09.45.230 codifies common law to authorize persons to sue to abate or enjoin private nuisances and to recover damages for interference with private property rights.1/ Although Sec. 230 speaks of "injuriously affected" and "lessened personal enjoyment," the courts in Alaska follow the majority of courts throughout the country in applying the more objective reasonableness test.

Senate Bill No. 178 was introduced to codify the reasonableness test and Section 1 of the bill provides in part as follows:

> Sec. 09.45.230. Action based on private nuisance. (a) A person may bring a civil action to enjoin or abate a private nuisance. Damages may be awarded in the action.

Section 2 of the bill adds a new section consisting of a definition of "nuisance" as follows:

> Sec. 09.45.255. Definition. In AS 09.45.230 - 09.45.255, "nuisance" means a substantial and unreasonable interference with the use or enjoyment of real property, including water.

Together Sec. 230(a) and Sec. 255 do nothing more than modernize the language and incorporate the test used by the courts in the common law of nuisance.

Section 1 of CS SB 178 before the floor amendments added to subsections to AS 09.45.230. Subsection (b) bars actions based on "occupation, structure, or act" that is authorized by law, including emissions and discharges that have been permitted or licensed.2/ Subsection (b) prevents collateral attacks on

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1/ AS 09.45.230. Action to abate or enjoin private nuisance. An action may be brought by a person whose property is injuriously affected or whose personal enjoyment is lessened by a private nuisance, and, by the judgment in the action, the nuisance may be enjoined or abated as well as damages recovered.

2/ (b) A person may not maintain an action under this section if the occupation, structure or act, including an emission or discharge, that is the subject of the action is authorized by
(1) a statute or regulation;

(continued...)

permits, licenses, and orders issued by regulatory agencies as well as collateral attacks on judgments, decrees and orders entered by courts. It would also protect a person acting in reliance on the terms and conditions of the authority contained in (b)(1), (2) and (3) from having to defend actions that are brought alleging nuisance, but that are in fact collateral attacks on the authority of governmental entities to regulate or enforce regulations.

Subsection (b) has engendered a considerable amount of controversy, probably because it was not carefully read. However, in order to allay concerns, one of the amendments adopted on the floor emphasizes that the intent of subsection (b) is to bar actions only as to those occupations, structures and acts that are specifically covered by a permit or license, or other authority. The amendment added "and is not in violation of a term or condition of" after "is authorized by."

Additional concern was expressed because many permits and licenses are issued as a matter of course without a public hearing process to inform the general public as to the consequences of the occupation, structure or act that is being permitted. Again, in order to allay concerns, the Senate adopted a qualification that licenses, permit and orders that would be used to bar a suit would only be those issued after a public hearing.

Another amendment was added to deal with concerns expressed by people over the placement of nuclear waste in various remote areas of the state, so the bar to suits over emissions and discharges would not apply to the placement of nuclear waste.

As passed by the Senate, AS 09.45.230(b) reads as follows:

> (b) A person may not maintain an action under this section if the occupation, structure, or act, including an emission or discharge but excluding the placement of nuclear waste, that is the subject of the action is authorized by and is not in violation of a term or condition of
>
> (1) a statute or regulation;
>
> (2) a license, permit, or order issued after public hearing by the state or federal government; or
>
> (3) a court order or decision.

2/(...continued)

(2) a license, permit, or order issued after public hearing by the state or federal government; or

(3) a court order or decision.

Some people have raised concerns that subsection (b) constitutes a taking. This concern is wholly misplaced. A careful reading of subsection (b) even before the amendments makes it clear that nothing in the subsection delegates the government's power of eminent domain to any private person. If any "taking" occurs, it would be either at the time the statute or regulation is adopted or a license, permit or order issued pursuant to the statute or regulation, not the occupation, structure or act licensed, permitted or ordered. All subsection (b) does is prevent continuing litigation constituting collateral attacks on the powers of the executive, legislative and judicial branches to order society reasonably. It also prevents burdening a person who acts in good faith and in compliance with law with costs that are properly those of the government that acted under its police power in the particular way challenged.

Subsection (b) likewise does not give the holder of a license or permit a right to act in an unlawful way or unreasonably interfere with the property rights of others. Subsection (b) only protects authorized activities, not violations of permits and licenses. Moreover, the mere holding of a license or permit does not immunize the holder from any other action for nuisance that may arise from activities for which there is no regulatory authority.

Subsection (b) prevents the impairment of the government's ability to regulate and enforce its regulations. It also prevents the forcing of courts to usurp the regulatory authority of administrative agencies and the legislature by preventing private nuisance actions to enjoin governmentally authorized activities.

Subsection (c) of CS SB 178 (Jud) as amended by the Senate would allow suits for nuisance involving the activities described in subsection (b) when the activities giving rise to the claim of nuisance are "in an area zoned as residential by a city, borough, or municipality regarding view, odor, or noise."

Subsection (d) merely codifies the common law that actions to enjoin or abate private nuisances may only be brought under AS 09.45.230 except those regarding "lewd houses" (houses of prostitution or bawdy houses) and junk yards. These two types of actions are preserved because by the provisions of the statutes, although declaring lewd houses and junkyards to be public nuisances, preserve the right of persons to bring private actions to abate or enjoin them. Abatement of all other public nuisances must be brought by the appropriate governmental entity.

Finally, Section 3 of the bill provides that the provisions of CS SB 178 (Jud' am would apply to all actions if judgment has not been entered on the effective date of the Act.

Some concern has been raised that retroactive legislation is unconstitutional. The Alaska Supreme Court has spoken to this issue and, under AS 01.10.090,3/ has upheld retroactive or retrospective statutes.

In Norton v. Alcoholic Beverage Control Bd., 695 P. 2d 1090 (Alaska 1985), the Alaska Supreme Court recognized that a statute that explicitly states that it is retroactive complies with AS 01.10.090, although it did not apply a statute retrospectively in that case.

In 1992, the Alaska Supreme Court upheld the retroactivity of a tax statute. Arco Alaska, Inc. et al. v. State, 824 P. 2d 708.

A number of states have considered the issue of retroactivity or retrospectivity:

1. New York. The Beaumont Company et al. v. State et al., 477 NYS 2d 272 (1984), dealt with a tax statute.

2. California. Bouquet v. Bouquet, 546 P. 2d 1371 (1976), concerned statutes governing the distribution of assets in a divorce and by permitting the retroactive application of the statutes, allowed the impairment of the wife's property interests. As the court (Tobriner, J.) held "[n]otwithstanding the fact that it denudes the wife of certain vested property rights, we uphold the retroactive application of the amendment."

3. Oregon. Hall v. Northwest Outward Bound School, Inc., 572 P. 2d 1007 (1977), allowed the defenses of contributory negligence and assumption of risk to be supplanted by the apportionment of damages under comparative negligence notwithstanding that the death occurred before such statutes went into effect.

4. Illinois. Sanelli v. Glenview State Bank, 483 N.E. 2d 226 (1985), dealt with mortgages and debts. A statute was given retroactive effect and held not to impair contract rights.

3/ AS 01.10.090. Retrospective Statutes. No statute is retrospective unless expressly declared therein.

All of the cases hold that there is nothing inherently unconstitutional about statutes that have retroactive or retrospective effect. The statutes will not be given such effect if to do so would be to impair vested rights.

Conclusion

CS SB 178 (Jud) am does not impair rights. It simply clarifies and modernizes the definition of a nuisance, bringing the definition into conformity with the general rule throughout the country. The bill expressly applies only to cases in which no vested right has been obtained by reason of entry of a final judgment. The concerns expressed about the constitutionality of the bill are unwarranted.

APR 16 1993

LAW OFFICES
BIRCH, HORTON, BITTNER AND CHEROT A PROFESSIONAL CORPORATION
ONE SEALASKA PLAZA, SUITE 301 • JUNEAU, ALASKA 99801 • TELEPHONE (907) 586-2890 • TELECOPIER (907) 586-9814

DEBRA B. ADLER‡†
THOMAS L. ALBERT*‡‡
THOMAS P. AMODIO
J. GEOFFREY BENTLEY*
RONALD G. BIRCH**
WILLIAM H. BITTNER**
KATHRYN A. BLACK
PHILIP BLUMSTEIN
CORY R. BORGESON
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RALPH V. ERTZ
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GLEN PRICE
MICHAEL V. REUSING
ELISABETH H. ROSS**
JONATHAN B. RUBINI
E. BUDD SIMPSON
STEPHEN F. SORENSEN
JONATHAN K. TILLINGHAST
JEFFREY D. TROUTT
D. KEVIN WILLIAMS

OF COUNSEL
PETER A. GALBRAITH
RONALD SAXTON*

OF COUNSEL
BIRCH, DE JONG & HINDELS
ST. THOMAS, U.S.V.I.

*D.C. BAR
**D.C. AND ALASKA BAR
‡MARYLAND BAR
†OREGON BAR
‡‡VIRGINIA BAR
ALL OTHERS ALASKA BAR

1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3563
(907) 276-1550
TELECOPIER (907) 276-2822

KEY BANK BUILDING
100 CUSHMAN STREET, SUITE 311
FAIRBANKS, ALASKA 99701-4672
(907) 452-1666
TELECOPIER (907) 456-5055

1155 CONNECTICUT AVE., N.W.
SUITE 1200
WASHINGTON, D.C. 20036-4306
(202) 659-5800
TELECOPIER (202) 659-1027

April 16, 1993

HAND-DELIVERED

The Honorable Gail Phillips
House of Representatives, State of Alaska
Capitol Building, Room 216

Re: Comments on House Bill 282 (SB 178)

Dear Representative Phillips:

Thank you for the opportunity of comment on House Bill 282, an act which would limit the ability of private landowners to bring lawsuits based upon nuisance. As I explained at the Alaska Miners Association breakfast meeting this morning, I represent mining companies as well as private landowners, including one private landowner in Sitka who is suing a quarrying operation on the basis of nuisance.

This bill, as well as the Senate's version, SB 178, seeks to redefine "nuisance" to mean a "substantial and unreasonable interference with the use or enjoyment of real property, including water." The bill will prohibit lawsuits based upon nuisance when an activity is conducted pursuant to government (federal, state or local) license or permit. This would undermine the rights of private property owners and would eliminate their right to peaceably enjoy their property. As matter of principle, if one property owner's activities substantially and unreasonably interferes with another property owner's enjoyment of her or his property, the owner causing the interference should be liable. This is view is mandated by simple fairness and concept that the legislature ought not be passing laws favoring the interest of one property owner over another. This bill requires the people of Alaska to pay for costs that ought to be borne by the person causing the nuisance, and presumably benefitting from it.

However, the right to use one's property as one sees fit is not absolute. When a person's use of their property substantially and unreasonably reduces the value or enjoyment of another's property, claim for nuisance is the appropriate

remedy and the person causing the harm should be held accountable. Lawsuits based upon nuisances have been a part of America's legal system and that of the Western World for hundreds of years. The primary purpose of lawsuits based upon nuisance is to protect people from diminished economic value, and loss of quality of life that results from other landowner's activities.

The bill would reverse this by placing the burden of a nuisance caused by private activity, though conducted under a governmental permit or license, on private property owners who neither caused nor benefitted from the activity. Persons who suffered economic damage because of such activity, if rendered unactionable by the HB 282, may have not other recourse. The law of inverse condemnation is inapplicable, as it applies only where the government has taken some action, but not where the government's involvement is only the issuance of a permit, and the action causing the economic damage is done by a private entity.

The only aspect of HB 282 that is supportable, is changing the definition of nuisance to "substantial and unreasonable" interference with property rights. This would raise the threshold of harm required to prevail in a nuisance action and discourage frivolous actions. I note, however, that there is no evidence that a nuisance cause of action has been abused to any great degree. But, the potential for such abuse exists and the new definition adequately addresses this potential problem.

I have taken this opportunity to provide you with a markup of HB 282 so that only the definition remains. I offer this for your consideration. The remainder of the bill is fatally flawed. It would deprive legitimate plaintiffs of an ancient, and perhaps their only, remedy for certain kinds of economic harm.

Thank you again for this opportunity of provide you with my views of HB 282. If I can be of any other assistance on this matter, or if there are any questions, please feel free to contact me.

Sincerely,

BIRCH, HORTON, BITTNER & CHEROT

Stephen F. Sorensen

Enc.: Markup of HB 282

Alaska Environmental Lobby, Inc.
P.O. Box 22151 Juneau, Alaska 99802
Phone: 907-463-3366
Fax: 907-463-3312

SB 178/HB 282 CIVIL NUISANCE ACTIONS

SB 178/ HB 282 "An Act Relating to Civil Nuisance Actions" would protect any permitted activity from legal liability for harm caused by unreasonable interference with a neighbor's property. An individual would not be allowed legal recourse if an activity, including noise, emission or discharge, is authorized by permit, license, statute, regulation, etc.

The Alaska Environmental Lobby opposes SB 178/HB 282.

* SB 178/HB 282 takes away an individual's fundamental right to protect his or her property.. It is not fair to prevent citizens of Alaska from having access to legal actions regarding permitted activities. Fishermen, native corporations, landowners and others would not be allowed to make civil nuisance actions against permitted activities if this legislation is enacted.

* A private landowner could not file a civil nuisance action against a polluter of his or her property if the government has permitted the activity causing the pollution. Examples could include pollution from a sewer system or drilling mud pit, or noise from a zoned activity, such as an animal kennel.

* SB 178/ HB 282 would prevent a nuisance suit against a permitted activity even if the permit is being violated.

* State permits are often negotiated. Variances are often allowed when a business is not in compliance with its permit. According to a 1993 finding of the Citizens Oversight Council on oil and hazardous substances, the public is not sufficiently included in the permitting process and the permitting process often lacks integrity.

* This legislation appears aimed to prevent the one and only active private nuisance suit in Alaska. This suit complains about property damages from pollution of the Sitka pulp mill, which has operated under variances from its permit for many years. At least one attorney connected with the pulp mill is a prominent advocate of SB 178/ HB 282.

* SB 178/ HB 282 has statewide implications. Besides affecting citizens' fundamental property rights, the bill may limit, nullify or affect statutes regarding construction without approval, contaminated food, smoking, abandoned vehicles, obstructions to navigable water, public health nuisances, water, air and land nuisances and more (Legislative Legal Affairs, 4/3/93).

* The legislature has previously shown great reluctance to interfere with pending litigation. SB 178/ HB 282 sets a precedent that may allow litigants to attack cases of their opponents in the legislature.

* SB 178/ HB 282 may be unconstitutional because it denies due process to property owners. It may constitute a "taking" of private property rights by the state of Alaska, and therefore may make the state liable to private property owners for costs of injury to their property caused by a permitted activity.

* It appears that no other state in the U.S. has a similar limitation on civil nuisance actions.

Alaska Environmental Lobby, Inc.

P.O. Box 22151 Juneau, Alaska 99802

Phone: 907-463-3366
Fax: 907-463-3312

April 16, 1993

Representative Brian Porter
State Capitol
Juneau, AK

Dear Representative Porter,

Thank you for meeting with us today. You were the first legislator with whom we have met in regards to SB 178, the bill limiting nuisance suits. I appreciated your points and arguments. They have helped us rethink our own understanding of the bill.

In light of that rethinking, I would like to clarify some of my own points and respond to some that you raised.

I think that the fundamental, and ultimately constitutional, issue in question here is whether the state may, through a permit, enhance one person's property at the expense, or to the diminishment of another's. If the state permits a private (i.e. non-public) activity which causes an "unreasonable interference with the use or enjoyment of real property" owned by another, it would constitute a "taking" and would probably be unconstitutional. The state may take private property, if it compensates the property owner, when it decides that it would be in the public's interest to do so. Condemning a property for the purposes of building a road would be such an example. I would be surprised if the state has the constitutional authority to take property, for private purposes, by simply issuing a permit.

A few comments on the permitting process:

1. The vast majority of permits are issued without any public process. For instance, if you want to burn leaves in your back yard, you go down to city hall and pick up the required permit. There would be no public notice or public hearing, and if there were, it would be extremely unlikely and an unreasonable burden for any of your neighbors to appear.

2. The criteria by which an applicant is judged eligible to receive a permit rarely include the impacts on specific property holders. Usually permit criteria consider more general issues such as, in the leaf burning example, fire safety and *ambient* air quality, i.e. it would not consider the quality of the air in your neighbor's yard, but just your impact on overall air quality.

3. A permit authorizes an activity, it rarely dictates how that activity is to be executed or performed. For instance, you could burn leaves on a workday morning and not disturb anyone, or you could burn leaves on a Sunday afternoon and smoke out your neighbor's barbecue. Though your leaf burning is permitted, it in no way confers on you the right to ruin your neighbor's dinner.

If, as SB 178 suggests, your neighbor's only recourse were to sue the state for damages, then in compensating your neighbor, the state is subsidizing your leaf burning and absolving you of any responsibility of being a good neighbor.

Alaska Environmental Lobby, Inc.
P.O. Box 22151 Juneau, Alaska 99802
Phone: 907-463-3366
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Legal Issues Pertaining to SB 178: An Act Relating to Civil Nuisance Actions

- Is not prohibiting a property owner from protecting his or her own property an unconstitutional "taking" of that property?
- Is the retroactive clause in the bill constitutional under the due process provision of the state constitution?
- If property owners are prohibited from filing nuisance suits to abate a nuisance or to receive compensation because of a nuisance, what is the state's liability?
- Can the state constitutionally compensate a property owner for damage done by another private interest even if that interest has been permitted by the state?
- If the state has no liability, then the property owner has no other recourse by which to gain compensation. Is this good public policy? Is this not a violation of a principle of private property rights, i.e. that owners have the right to protect their property, which has existed in common law for several centuries?
- Property owners living in residentially zoned areas are not prohibited from filing suits to abate certain nuisances. Is this not unconstitutionally discriminatory? Do not all commercial, industrial, agricultural, and other non-residential property owners have the same right to defend their property?
- Is a public hearing, used during the permitting process, the legitimate or proper forum for the state to determine when a private landowner's interests may be harmed?
- Supporters of this bill argue that it is designed to prevent frivolous lawsuits. Is there a demonstrated problem in the state of Alaska with the nuisance statute? How many lawsuits have been filed under AS 09.45.230 which the courts have determined were frivolous, i.e. were without grounds?

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SB 178 CIVIL NUISANCE ACTIONS

SB 178 "An Act Relating to Civil Nuisance Actions" would protect any permitted activity from legal liability for harm it causes to a neighbor's property. An individual would not be allowed legal redress if an activity, including air emission, water or solid waste discharge, is authorized by permit, license, statute or regulation.

The Alaska Environmental Lobby opposes SB 178.

* SB 178 restricts an individual's fundamental right to protect his or her property. Fishermen, native corporations, private and commercial property owners and others would not be allowed to file civil actions to abate a nuisance if the activity causing the nuisance had been permitted under federal, state or local authority and if that activity were in compliance with permit stipulations.

* Even though an activity may be in compliance with permit stipulations, it could still cause a gross nuisance to neighboring property owners. The criteria by which a permit is issued do not usually consider the impacts on specific individuals or properties. Permitting criteria usually consider more general issues such as the degree to which an activity will degrade *ambient* air or water quality, or the amount of a specified pollutant the activity will discharge

* SB 178 may be unconstitutional because it denies due process to property owners. By the simple action of issuing a permit, the State of Alaska would be "taking" or diminishing a person's or corporation's property. The State may therefore be liable for property damage caused by a permitted activity.

* To protect itself from liability, the state would be forced to write extremely restrictive permits, slowing the permitting process as well as placing otherwise unnecessary conditions or restrictions on the permitee.

* If permitting agencies were empowered to diminish neighboring property values, then adjoining property owners would be forced to defend their property rights during the permitting process. This would both lengthen the permitting process and burden under-funded administrative agencies with issues best left to the courts.

2/7/94

Alaska Environmental Lobby, Inc.
P.O. Box 22151 Juneau, Alaska 99802
Phone: 907-463-3366
Fax: 907-463-3312

April 16, 1993

Representative Brian Porter
State Capitol
Juneau, AK

Dear Representative Porter,

Thank you for meeting with us today. You were the first legislator with whom we have met in regards to SB 178, the bill limiting nuisance suits. I appreciated your points and arguments. They have helped us rethink our own understanding of the bill.

In light of that rethinking, I would like to clarify some of my own points and respond to some that you raised.

I think that the fundamental, and ultimately constitutional, issue in question here is whether the state may, through a permit, enhance one person's property at the expense, or to the diminishment of another's. If the state permits a private (i.e. non-public) activity which causes an "unreasonable interference with the use or enjoyment of real property" owned by another, it would constitute a "taking" and would probably be unconstitutional. The state may take private property, if it compensates the property owner, when it decides that it would be in the public's interest to do so. Condemning a property for the purposes of building a road would be such an example. I would be surprised if the state has the constitutional authority to take property, for private purposes, by simply issuing a permit.

A few comments on the permitting process:

1. The vast majority of permits are issued without any public process. For instance, if you want to burn leaves in your back yard, you go down to city hall and pick up the required permit. There would be no public notice or public hearing, and if there were, it would be extremely unlikely and an unreasonable burden for any of your neighbors to appear.

2. The criteria by which an applicant is judged eligible to receive a permit rarely include the impacts on specific property holders. Usually permit criteria consider more general issues such as, in the leaf burning example, fire safety and *ambient* air quality, i.e. it would not consider the quality of the air in your neighbor's yard, but just your impact on overall air quality.

3. A permit authorizes an activity, it rarely dictates how that activity is to be executed or performed. For instance. you could burn leaves on a workday morning and not disturb anyone, or you could burn leaves on a Sunday afternoon and smoke out your neighbor's barbecue. Though your leaf burning is permitted, it in no way confers on you the right to ruin your neighbor's dinner.

If, as SB 178 suggests, your neighbor's only recourse were to sue the state for damages, then in compensating your neighbor, the state is subsidizing your leaf burning and absolving you of any responsibility of being a good neighbor.

I have also talked to several lawyers who have told me that, as currently drafted, the bill would protect permittees' from nuisance suits even though they were violating the terms of their permits.

The practical implications to SB 178 are immense. The state issues thousands and thousands of permits each year. If it were the state and not the permittee, that were responsible for ensuring that the permitted activity were performed in such a way so as to not create a nuisance, then:

- There would be no incentive for the permittee to avoid creating a nuisance.
- The state's potential liabilities would be enormous.
- The state would be forced to write such restrictive permits that any activity requiring a permit would become a bureaucratic and business nightmare.

Clearly this is a complicated issue. However, on reflection, it seems to me that one, SB 178 represents a substantial erosion of private property rights. Two, that it will cause a great increase in the state's intrusion into the private sector if it must now delineate how all permitted activities are to be performed. And three, that it will relieve any permit holder of a great deal of his or her civil responsibilities.

I appreciate your consideration in this matter and thanks again for meeting with us.

Sincerely,

Russell Heath
Executive Director

Alaska Environmental Lobby, Inc.
P.O. Box 22151 Juneau, Alaska 99802
Phone: 907-463-3366
Fax: 907-463-3312

Legal Issues Pertaining to SB 178: An Act Relating to Civil Nuisance Actions

- Is not prohibiting a property owner from protecting his or her own property an unconstitutional "taking" of that property?
- Is the retroactive clause in the bill constitutional under the due process provision of the state constitution?
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- Can the state constitutionally compensate a property owner for damage done by another private interest even if that interest has been permitted by the state?
- If the state has no liability, then the property owner has no other recourse by which to gain compensation. Is this good public policy? Is this not a violation of a principle of private property rights, i.e. that owners have the right to protect their property, which has existed in common law for several centuries?
- Property owners living in residentially zoned areas are not prohibited from filing suits to abate certain nuisances. Is this not unconstitutionally discriminatory? Do not all commercial, industrial, agricultural, and other non-residential property owners have the same right to defend their property?
- Is a public hearing, used during the permitting process, the legitimate or proper forum for the state to determine when a private landowner's interests may be harmed?
- Supporters of this bill argue that it is designed to prevent frivolous lawsuits. Is there a demonstrated problem in the state of Alaska with the nuisance statute? How many lawsuits have been filed under AS 09.45.230 which the courts have determined were frivolous, i.e. were without grounds?

Alaska Environmental Lobby, Inc.

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SB 178 CIVIL NUISANCE ACTIONS

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The Alaska Environmental Lobby opposes SB 178.

* SB 178 restricts an individual's fundamental right to protect his or her property. Fishermen, native corporations, private and commercial property owners and others would not be allowed to file civil actions to abate a nuisance if the activity causing the nuisance had been permitted under federal, state or local authority and if that activity were in compliance with permit stipulations.

* Even though an activity may be in compliance with permit stipulations, it could still cause a gross nuisance to neighboring property owners. The criteria by which a permit is issued do not usually consider the impacts on specific individuals or properties. Permitting criteria usually consider more general issues such as the degree to which an activity will degrade *ambient* air or water quality, or the amount of a specified pollutant the activity will discharge

* SB 178 may be unconstitutional because it denies due process to property owners. By the simple action of issuing a permit, the State of Alaska would be "taking" or diminishing a person's or corporation's property. The State may therefore be liable for property damage caused by a permitted activity.

* To protect itself from liability, the state would be forced to write extremely restrictive permits, slowing the permitting process as well as placing otherwise unnecessary conditions or restrictions on the permitee.

* If permitting agencies were empowered to diminish neighboring property values, then adjoining property owners would be forced to defend their property rights during the permitting process. This would both lengthen the permitting process and burden under-funded administrative agencies with issues best left to the courts.

2/7/94

8-LS0355\M.1
Lauterbach
2/24/94

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: HCS CSSB 45(JUD)

Page 1, line 12:

Delete "and 16"

Insert "and 17"

Page 8, after line 8:

Insert a new bill section to read:

"* **Sec. 16.** AS 47.10 is amended by adding a new section to article 1 to read:

Sec. 47.10.145. SERVICES TO EMANCIPATED MINORS. Upon request of a minor whose disabilities of minority have been removed for general purposes under AS 09.55.590, the department shall offer available counseling services, emergency shelter care, medical care, and other services determined appropriate by the department considering the minor's circumstances."

Renumber the following bill sections accordingly.

Robinson, Beiswenger & Ehrhardt
Lawyers
35401 Kenai Spur Highway
Soldotna, Alaska 99669

Gordon G. Goodman • Associate

Telephone: (907) 262-9164
Telecopier: (907) 262-7034
Toll Free: 1 (800)770-9164

April 5, 1993

Sent via FAX

Senate Judiciary Committee
State Capitol
Juneau, AK 99801-1182

Re: Senate Bill 178

To Whom It May Concern:

Attached to this letter you will find a position paper setting forth the critical reasons why Alaska property owners should not have their property rights extinguished by passage of Senate Bill 178. Senate Bill 178 is a bill intended to protect polluters, including the Alaska Pulp Corporation, from legal liability for harm caused by pollution of their neighbor's property.

Thank you for your attention to this matter.

Sincerely,

PETE EHRHARDT
Attorney at Law
(Counsel in a nuisance suit against
Alaska Pulp Corporation).

PE/rm
Enclosure

POSITION PAPER ON S.B. 178
"An Act Relating to Civil Nuisance Actions"
April 2, 1993

1. Senate Bill 178 should not pass. It has been introduced at the eleventh hour in an attempt to protect the Sitka pulp mill against private nuisance suits by landowners. The bill would allow this mill to go on polluting and prevent victims of this pollution from doing anything about it.

2. The right of an Alaskan to maintain a private nuisance action to protect his property is fundamental. If this act goes forward companies who engage in permitted activity approved by the state will claim that private actions by fishermen, native corporations, landowners, and other persons cannot be maintained because the activity was permitted by the state. Furthermore, as written, the bill would prevent a suit for nuisance against a permitted polluter even if the permit was violated.

3. A private landowner could not maintain an action against a polluter of his property if the government, for example the Department of Environmental Conservation, had permitted the activity such as a sewer system or drilling mud reserve pit.

4. So far as is known, no other state has a similar limitation on nuisance actions.

5. The bill is probably unconstitutional because of two problems.

a. It denies due process to property owners.

b. It constitutes a "taking" of private property rights by the State of Alaska and may make the State of Alaska liable to private property owners for the cost of an injury to their property caused by a permitted activity.

6. S.B. 178 ignores the findings made by the Citizens Oversight Council on oil and other hazardous substances. In February 1993, the council found that the public is not sufficiently included in the permitting process and that the permitting process itself often lacked integrity. S.B. 178 uses permits to immunize polluters from liability. This should not be allowed in light of the findings of the Oversight Committee.

APR 1 3 RECD

SEALASKA CORPORATION

COMMENTS ON SENATE BILL 178
An Act Relating to Civil Nuisance Actions

This proposed legislation seeks to limit both public and private rights of action against activities that are conducted pursuant to various state or federal statutes, regulations, licenses, permits, or other documents, or by court order.

SB 178 would narrow the definition of "nuisance" to mean "a substantial and unreasonable interference with the use and enjoyment of real property, including water." The definition in current State law (A.S. 09.45.230) is that an action may be brought by a person whose property is "injuriously affected or whose personal enjoyment is lessened."

As the largest owner of private lands in Southeast Alaska, Sealaska agrees that the existing definition is too broad and might encourage frivolous claims based on a person's subjective perception that his or her "enjoyment" of a property interest has been "lessened." The proposed language would add the requirements that the interference be both substantial and unreasonable. As a matter of policy, Sealaska believes that lawsuits should not be brought unless the problem is substantial, and the interference is unreasonable. This narrower definition should go a long way towards reducing frivolous lawsuits. It strikes a good balance between the right to use one's property as one sees fit, and the right to peaceably enjoy one's property without undue interference from others.

However, the right to use one's property as one sees fit is not absolute. When one person's use of property substantially reduces the value of another's property, it is appropriate that the person who causes the harm should be liable to the other property owner.

Lawsuits based upon nuisance have been recognized in our legal system for hundreds of years where one person's activity diminishes the use and enjoyment of another's property. The purpose of lawsuits based upon nuisance is to protect people from diminished economic value, and loss of quality of life that results from that use.

When brought for legitimate reasons, lawsuits based on nuisance encourage the economically efficient use of property by forcing a person to consider the impact of his actions on others. For this reason, the balance of SB 178 may be overbroad in its efforts to limit such litigation. If a nuisance is defined as a substantial and unreasonable interference, then Sealaska believes that a private party should have recourse to the courts to abate it. The current common law principle is based on the simple notion of fairness -- that a person who benefits from the use of property should be required to pay for any substantial harm that use causes to others.

Just because the government agency, individual, or company creating the nuisance does so under some type of government permit does not assure that individual property interests will be protected. This Bill does not say that the creator of the nuisance must be in compliance with the permit or even that there is a net economic benefit to the activity. Far more importantly, government permit decisions do not purport to settle other people's rights. It may well be that a person whose property is "substantially and unreasonably" interfered with would not have even participated in the agency permit proceeding, and even if he did participate, he would not have received the formal rights that are necessary before an individual's property rights can be impaired. The effect would be to force one group of property owners to subsidize another for what should be borne as a cost of doing business.

Sealaska endorses the concept of eliminating frivolous and unnecessary litigation as impediments to legitimate activities. Changing the definition as suggested in SB 178 will accomplish that goal in most cases. It is overkill to go beyond that by eliminating the centuries-old private property interest of abatement of nuisances through the courts. It sacrifices one important individual property right in order to promote another.

Accordingly, Sealaska Corporation supports Sec. 2 of SB 178 to the extent that it would clarify the definition of "nuisance" in A.S. 09.45.255. Sealaska opposes the balance of the Bill that would unduly restrict private property owners from access to the courts to protect their interests.

HOUSE COMMITTEE REPORT

4/22

(7)

Date Referred: April 20, 1993 FURTHER REFERRALS: Finance

Date of Committee Action: 4-21-93

The JUDICIARY Committee considered: CSSB 178(JUD) am(efd fld)

CS FOR SENATE BILL NO. 178(JUD) am(efd fld) CIVIL NUISANCE ACTIONS

"An Act relating to civil nuisance actions."

RECOMMENDATIONS: [X] the same title
be replaced with HCS CSSB 178 (JUD) [ ] a new title

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

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[ ] fiscal impact _____
[ ] zero fiscal note _____

APPROVES PREVIOUS: (Dept/Date)
[ ] fiscal note(s) _____
[X] zero fiscal note(s) LAW (4-13-93)

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
[redacted]		Jamesmille James		✓	
Phillips	✓	Green		✓	
Porter	✓	Kott		✓	
		Wordlaw	✓		
		Davidson (unconstitl)	✓		
		(UNCONSTITUTIONAL)			
(2)			(0)	(3)	

Brian D. Porter Porter
CHAIRMAN'S SIGNATURE

Representative Hanley MOVED to ADOPT AMENDMENT 1. Representative Brown OBJECTED.

In response to a question by Representative Grussendorf, Ms. Knuth observed that juveniles awaiting placement in the MacLaughlin correctional facility are held at the Johnson detention facility. Ms. Knuth was not aware of any litigation initiated by a juvenile awaiting placement in a juvenile treatment facility.

A roll call vote was taken on the motion to adopt AMENDMENT 1.

IN FAVOR: Parnell, Hanley, Martin, Larson
OPPOSED: Brown, Foster, Grussendorf, Hoffman, Navarre, MacLean

Representatives Therriault was not present for the vote.

The MOTION FAILED (4-6).

Representative Brown noted that the content of the legislation has changed. She questioned the applicability of the letter of intents. Members decided to address the letter of intents when the legislation is before the House.

(Tape Change, HFC 94-38, Side 1)

Representative Foster MOVED to report HCS CSSB 54 (FIN) out of Committee with individual recommendations and with the accompanying fiscal notes. There being NO OBJECTION, it was so ordered.

SENATE BILL NO. 178

"An Act relating to civil nuisance actions; and providing for an effective date."

Representative Therriault provided members with Work Draft #8-LS0903\D dated 2\22\94 (copy on file). He explained that the work draft substantially narrows the scope of the bill, in order to address concerns expressed in previous hearings. He summarized changes made by the work draft. He noted that the legislation would be limited in effect to those under air, water or solid waste discharge permits. If a facility has acquired a permit subject to continuing compliance monitoring, periodic review by the issuing agency and renewal on a periodic basis than a nuisance lawsuit would not be allowed. The legislation contains an immediate effective date. Section 3 would make the legislation retroactive to any action currently under litigation that has not come to a final

judgement.

FLORIAN SEVER, SITKA testified against CSSB 178 (JUD) am(efd fld), via the teleconference network from Sitka. He asserted that the legislation works against the public's interest. He maintained that the legislation infringes on the public's right to due process and self protection. He felt that the legislation would encourage pollution.

STEVE BORRELL, EXECUTIVE DIRECTOR, ALASKA MINER'S ASSOCIATION testified in support of CSSB 178 (JUD) am(efd fld), via the teleconference network from Anchorage. He emphasized that individuals or companies conducting business within the law should not be subject to nuisance lawsuits. He stressed that Alaska mining activities are in competition for investment dollars from countries around the world.

DON MULLER, SITKA testified against CSSB 178 (JUD) am(efd fld), via the teleconference network from Sitka. He asserted that the Alaska Pulp Company does not respect the rights of the community in which it has operated.

JOEL KAWAHARA, SITKA testified against CSSB 178 (JUD) am(efd fld), via teleconference network from Sitka. He referred to the definition of "nuisance".

RON DICK, ASSOCIATE PROFESSOR, SHELDON JACKSON COLLEGE testified in opposition to CSSB 178 (JUD) am(efd fld), via the teleconference network from Sitka. He asserted that the legislation is a direct response to a lawsuit against the Alaska Pulp Corporation (APC). He maintained that the legislation exempts any polluter from liability if they have the permission of the government to pollute by virtue of statute, regulation, license, or permit.

Mr. Dick observed that the APC had numerous private meetings with the Department of Environmental Conservation to agree upon acceptable pollution standards. He maintained that the Environmental Protection Agency is contemplating a lawsuit against the Department of Environmental Conservation (EPA) for their failure to enforce air quality regulations. He asserted that the Department of Environmental Conservation has been too lenient with APC.

Mr. Dick alleged that CSSB 178 (JUD) am(efd fld) would disenfranchise the public "from seeking legal redress when the state government and industry collude to circumvent the laws and regulations of the state."

RAY JENNINGS, SITKA testified against CSSB 178 (JUD) am(efd fld), via the teleconference network from Sitka. He asserted that the right of an Alaskan to maintain a private nuisance

action to protect his property is fundamental.

NANCY LETTICOE, PRESIDENT, ALASKA WILDERNESS, RECREATION AND TOURISM ASSOCIATION testified in opposition to CSSB 178 (JUD) am(efd fld), via the teleconference network from Valdez. She asserted that the impact on the tourism industry could be considerable. She gave examples of instances of pollution by industry that could effect tourism. She alleged that the legislation was introduced to help APC fight specific court action. She stressed, that if the right of business to bring civil action for damages resulting from civil nuisance is withdrawn, the only recourse will be to sue the State of Alaska.

Mr. Sever provided the Committee with an overview of the litigation against the APC. He stated that discharge monitoring reports by APC to EPA showed that levels of solids being discharged in their waste stream were over the amount allotted by their permit. He asserted that discoloration and damage to the water and ecosystem of Silver Bay resulted. He added that in 1991 and 1992 polluting sludge from APC's waste water treatment facility was showing up in Silver Bay. The sludge was found to contain significant amounts of toxins when tested by EPA. In 1991, EPA found that APC had intentionally violated the Clean Water Act. A fish advisory was issued by the Department of Environmental Conservation advising local processors not to wash fish caught in the waters of Silver Bay due to the contamination of the water. He maintained that beach front property values were effected by the activities of APC.

Mr. Sever understood that the legislation would provide that as long as a business is operating under a permit and is covered by the terms of the permit they cannot be sued in state court for any damage done from discharges covered by the permit.

RUSSELL HEATH, DIRECTOR, ALASKA ENVIRONMENTAL LOBBY testified in opposition to CSSB 178 (JUD) am(efd fld). He stressed that Alaska does not have a problem with an unacceptably large number of suits to abate nuisances. He asserted that the legislation was introduced to kill a specific nuisance suit against APC. He noted that CSSB 178 (JUD) am(efd fld) was introduced only days after the court ordered APC's Japanese parent corporation to disclose its financial records. He maintained that APC has evaded complying with air and water quality standards for years by claiming that it was financially unable to do so. He concluded that the record disclosure could destroy APC's last defense to avoid compliance.

Mr. Heath observed that APC's air emissions contain sulfur

dioxide. He noted that sulfur dioxide turns into sulfuric acid and can burn eyes and throats. He emphasized that there were vociferous complaints against APC at public hearings regarding their Department of Environmental Conservation air quality permit. He added that the Department of Environmental Conservation has also received hundreds of written complaints. He asserted that public concerns have been ignored. He alleged that permits are negotiated behind closed doors. He noted that the Department of Environmental Conservation's administrative appeal hearing officer directed the Department to work more closely with the public.

Mr. Heath emphasized that the permitting process does not guarantee that private property rights will be protected. He asserted that the State of Alaska has failed in its administration of the permitting process. He alleged that CSSB 178 (JUD) am(efd fld) "restricts the property rights of 600,000 Alaskans in order to shield a Japanese corporation form an American Court."

In response to a question by Representative Brown, Mr. Heath noted that APC has received variances on its permit stipulations. He was uncertain how the proposed committee substitute would effect the litigation against APC.

JIM CLARK, GENERAL COUNSEL, ALASKA FOREST ASSOCIATION testified in favor of CSSB 178 (JUD) am(efd fld). He stressed that nuisance laws were crafted to protect property not otherwise regulated. He emphasized that permits take several years to obtain. He maintained that regulations intersect in terms of obtaining permits. He observed that water permits are obtained from EPA. Air permits are issued by the State of Alaska and overseen by EPA. Solid waste permits are issued by the State of Alaska. He discussed the permitting process. He added that permits are renewed every five years. He emphasized that the public has the opportunity to object during the permitting process and permit renewal. He noted that permits are subject to adjudicatory hearings by any aggrieved party. Those not satisfied by the adjudicatory hearing can appeal to the ninth circuit court of appeals.

Mr. Clark discussed the EPA water permit process. He noted that the permit process was developed over a number of years with input from the public. He asserted that human health risk factors, protection of private property, and the effect on animal life and vegetation are taken into account. He maintained that the permit process provides safety.

Mr. Clark stressed that permit conditions must be met at the property line. Water requirements must be met at the edge of the mixing zone. Air permit requirements must be met at the border of the property line. Solid waste permit requirements

must be met at the boundary of the facility.

He asserted that these projections are built in to protect unreasonable interference with property rights of other property owners. He stressed that there are three opportunities for lawsuits in addition to administrative appeals during the permit process. He maintained that once a permit holder has met the requirements of the issuance it is reasonable to cut off litigation possibilities.

Representative Navarre asked why a retroactive clause was added to the legislation. Mr. Clark stressed that the retroactive clause is an effective date. Any case that has not reached a final judgement loses the opportunity to bring further action.

Representative Brown noted that the state's legal counsel has advised that the legislation may be unconstitutional due to the retroactive provision. Mr. Clark observed that the state of California has similar provisions. He did not know if the California provisions were enacted with a retroactive date. He argued that the retroactive date is supportable.

Mr. Clark noted that legislation, sponsored by Senator Kerttula, passed in 1986, cut off nuisance actions for those that moved to the nuisance. He added that North Carolina has similar provisions.

In response to a question by Representative Grussendorf, Mr. Clark acknowledged that permit holders that do not fulfill the terms of their permit will be subject to litigation. Only permit holders meeting the requirements of their permits are covered by the legislation. He observed that violations would not be protected by the permit. Representative Grussendorf observed that if the permit holder was using a chemical or process not covered by the permit they could be subject to a lawsuit. Mr. Clark added that if an impact not anticipated by the permitting process was the cause of injury it could be subject to litigation.

Mr. Clark concluded that the permit holder must be strictly in accordance with the permit, the permit cannot have unanticipated consequences, and if there are violations of the permit terms, the holder's legal protection would be lost. He stressed that the legislation will provide an incentive to meet the terms of the permit.

(Tape Change, HFC 94-38, Side 2)

Representative Therriault clarified that if the public feels that they do not have an avenue to have input into the permit process there are administrative appeals available. Mr. Clark

detailed administrative appeals available to the public.

Representative Therriault MOVED to ADOPT Work Draft #8-LS0903\D dated 2\22\94. There being NO OBJECTION, it was so ordered.

CSSB 178 (JUD) am(efd fld) was HELD in Committee for further discussion.

ADJOURNMENT

The meeting adjourned at 3:55 p.m.

Nuisance-suit ban would be moral, political, economic blow

By JEFFERY TROUT

COMPASS
POINTS OF VIEW FROM OUR COMMUNITY

The Republican leadership in the Alaska Legislature is losing its bearings. By embracing SB178 — which would create a class of people shielded from nuisance liability — it embraces the politics of corporate welfare and rejects conservative, grass-roots populism. Ultimately, this threatens the Republicans' tentative control of the legislature.

When Republicans identify themselves with narrow business interests, they are perceived as the party of the rich and lose elections. When they identify themselves with individual property rights, they are perceived as the party of opportunity and win elections.

Like many Republicans in the legislature, I identify myself as a conservative. Since law school I have worked in support of conservative causes. Not surprisingly, then, I don't side with Democrats and environmentalists on many issues.

But on this one, they are right and we are wrong. They are on the side of private property rights, and the leadership of the Republican legislative majority is, perhaps unwittingly, against them.

Nuisance law has existed since the 16th century — long before Earl Warren, busing and lawsuits to protect spotted owls. It is a private cause of action brought by private plaintiffs to redress harm done to them by another's use of property.

Now, the Republican leadership suggests that the permitting process has made nuisance law obsolete. They tell us if someone has obtained a permit, and the permit is granted under certain conditions, he won't create a nuisance. This is an uncharacteristic display of trust in government. Usually, Republican leaders only say, "Don't worry, folks, you can trust the government to take care of you," when they are making fun of Democrats.

Let me suggest that many permit holders pollute. That's one of the reasons they get permits. Pollution is an unfortunate, but inevitable, side product of economic development. The problem is that sometimes pollution damages other people's property.

A permitting process that attempts to eliminate all pollution will make most economic activity prohibitively expensive, so it makes sense instead to compensate people whose property is damaged by pollution.

The real question is, when one person's pollution affects another person's property, who pays? Six hundred years of Anglo-Saxon jurisprudence says it should be the person who caused the pollution, and who profits from the activity causing it. Supporters of SB178 say that so long as a person has a permit, his neighbors, or the state, should pay.

As I see it, this pits the wisdom of James Madison, John Marshall and Adam Smith against the wisdom of Robin Taylor. I have great respect for Sen. Taylor. But I think Alaskans should think twice before tossing centuries of collective experience out the window. I am aware of no other state that has done so, and maybe there is a good reason for this.

The sponsors of SB178 tell us it will stop frivolous litigation. But banning one type of lawsuit will not stop plaintiffs whose real agenda is to harass or delay economic development. There are plenty of theories of liability that they can use. The environmental litigation industry is like the Hydra or the Medellin drug cartel — cut off one head, another will grow to take its place.

The real problem results from an activist judiciary and the fact that many people look to the courts to resolve political disputes. If the legislature really wants to discourage lawsuits that are brought to halt economic development, it should adopt measures that will reduce the incentive for people to bring them. Examples would include tightening standing requirements, putting real teeth into sanctions against attorneys and litigants who bring frivolous lawsuits, and encouraging courts to readopt the ethics of judicial restraint.

I doubt that lawsuits based on nuisance are much of a problem. The Alaska Digest's listing of cases decided under nuisance law during the territorial and statehood periods reports only nine published decisions — a mere two of them decided since statehood.

While I do not know how many lawsuits based on nuisance have been brought at the Superior and District Court levels in recent years, the paucity of published decisions leads me to believe that they are somewhat infrequent. This makes SB178 the equivalent of using a howitzer to kill a flea.

We each have a right to use our property to compete and prosper in a free market. We have a corresponding responsibility to our neighbors if our actions damage them. That does not mean that an activity should not continue because others are harmed by it. It merely means that a person who causes, and profits by, the activity should compensate those who suffer from it.

The real question is, when one person's pollution affects another person's property, who pays? Six hundred years of Anglo-Saxon jurisprudence says it should be the person who caused the pollution, and who profits from the activity causing it. Supporters of SB178 say that so long as a person has a permit, his neighbors, or the state, should pay.

The mere fact that a person can obtain a government permit for an activity should not mean that his use of property is more important than his neighbors'.

Unfortunately, under SB178, permit holders will be elevated to a special status above mere "property owners," and their neighbors will be required to subsidize the permitted activity. This is morally wrong, economically unwise and, for Republicans, politically suicidal.

Legislatures, state agencies and courts do not always consider the impact of an activity on property values, nor should they. But if SB178 becomes law, they will. The decision-making process will become more politicized than it is now. Government will become more paternalistic, and the people of Alaska more dependent upon government to take care of them.

In the end, government — not the market — will pick economic winners and losers, and determine the value of private property. I don't believe government is equipped, or can be trusted, to make those decisions.

For these reasons, SB178 is anti-private property. It will place the burden of economic activity on people who neither caused nor benefited from the activity. This is at odds with the principles of property rights and individual responsibility that up until now we Republicans have fought long and hard to support. SB178 should not become law.

□ Jeffery D. Troutt is a lawyer with the Juneau office of Birch, Horton, Bittner & Cherot. His clients include timber interests, Native corporations, and other businesses. The views expressed here are his own and not necessarily those of his firm or clients.

VALORIE L. NELSON
P.O. BOX 1356
SITKA, AK 99835
(907) 747-5030

April 23, 1993

Representative Ben Grussendorf
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Mr. Grussendorf:

Please take a few moments of your time to review my feelings of strong opposition to SB 178, and the reasons for my strong opposition. I had the opportunity to testify before the House Judiciary Committee on April 21, 19[illegible] via teleconference from the Sitka Legislative Information Office, however, given the strict time constraint of two minutes that I had to adhere to, it was hard to portray the nightmare that I have gone through and the extra burden this bill would place upon myself and many others.

For the last 13 months I have been fighting the expansion of a non-conforming rock quarry that is located near my property in Sitka, first through administrative appeals and as a last resort a legal action filed in November of 1992 against the City of Sitka and the private individual operating the non-conforming use. I have spent many thousands of dollars in this action on legal fees, even though I have attempted to represent myself in the actions that I felt I was capable of. If this bill goes through, all that I have been fighting for or against will be lost because of the retroactive clause in this bill.

The City of Sitka has subdivided and sold public property to perpetuate the expansion of the rock quarry that is currently operating close to my home and office, and even though the local ordinances clearly state that a conditional use permit is required, none has been granted. The reason the city is not requiring the conditional use permit, according to testimony given in court to the Judge is that because I have appeals filed, the property the City sold is reverted to R-1, and no natural resource extraction is allowed. Therefore, the City has granted a building permit allowing the private individual to extract 100,000 cubic yards of material for a building site all in the guise of running a rock quarry. There are no public hearings required for building permits, and therefore my property rights can not be protected, especially if you choose to pass this bill.

I realize that you are a very busy person, however, I beg you to contact me at the above listed telephone number if you have any questions, or if there is any further information you think I might be able to provide.

Respectfully Yours;

Valorie L. Nelson

Valorie L. Nelson

TESTIMONY OF DENTON PEARSON
BEFORE THE FINANCE COMMITTEE OF
THE ALASKA HOUSE OF REPRESENTATIVES

March 1, 1994

The primary issue raised by Senate Bill 178, as it is now before the Committee, is the uniform application of our laws relating to the regulation of emissions and discharges as a result of commercial or municipal activities. Is it good policy to invite the contradictory results which often are the product of court intervention when a greater uniformity in the application of the laws relating to emissions and discharges can be achieved by leaving such application to the regulators?

The Legislature, at the state level, and Congress, at the federal level, have wisely placed their confidence in experts (DEC and EPA respectively) for the administration of emission and discharge regulatory statutes. These regulators are the specialists who have the expertise to fairly and efficiently control potentially offensive activities. This regulation can and, by and large, is done with a much greater uniformity than is reached with litigation.

Courts, on the other hand, are generalists. Judges and juries differ from state to state and even from community to community. They, therefore, do not approach complex issues with the same degree of uniformity as do the regulators with their specialized expertise. One need look no further than some of the nationally celebrated criminal trials of recent years or to the multi-million dollar verdicts rendered in tort cases which have achieved great notoriety to to draw this conclusion. When inconsistency in the application of law threatens a fragile economy such as the one we have here in Alaska, the legislature should act. Senate Bill 178 would go a long way toward eliminating the risk of contrary results presently connected with the regulation of emissions and discharges in this state.

I appreciate the opportunity to present my views respecting this legislation. If further information on this topic is desired, please contact me at (907) 747-3257.

Denton Pearson

TEST.lettersen

Alaska State Legislature

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

committee on SB 178 bill/subject, dated 3/1/94.

I object strongly to SB 178 because it denies due process to property owners and confers legal immunity for polluters.

It is very clear that APC is backed into a corner. A bill such as SB 178 could only come from a desperate company, a company willing and eager to deny the rights of the citizens of the state.

Signed: Don Muller (DON MULLER)
Testifier

self
Representing (Optional)

Box 1042 Sitka, Alaska 99835
Address

747-8808
Phone No.

Feb. 22, 1994

Hello

My name is Don Muller. For the last 18 years I have been a businessperson here in Sitka. For two years before that I was a chemist at the APC pulp mill.

In a democracy the rights of the individual are supposed to be more important than the wishes of a single industry, especially an industry that has a long, long history of violating laws and regulations such as APC has.

The bill being considered today is written because APC doesn't respect the rights of an individual, because APC doesn't even respect the rights of the community in which it has operated. This bill is dangerously close to fascism; what is worse is that it is retroactive fascism. APC wants to have its own rules. APC believes that its wishes are more important than the rights of the indivdaul.

Please vote against this bill in the interests of democracy and the rights of the citizens of Alaska.

Sincerely,

Don Muller

Don Muller
Box 1042
Sitka, AK 99885
747-8808 (w)

Alaska State Legislature

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

committee on SB 178, dated 2/22/94.
bill/subject

The right of an Alaskan to maintain a private nuisance action to protect his property is fundamental.

Please vote against SB 178.

Signed: Ray Jennings by Dan Muller.
Testifier

Representing (Optional)

801 Lincoln St Sitka, AK 99835
Address

747-5295
Phone No.

Headquarters:
217 2nd Street, Suite 201
Juneau, Alaska 99801
(907) 586-2323 FAX 463-5515

Regional Office:
415 E Street, Suite 201
Anchorage, Alaska 99501
(907) 278-2722 FAX 278-6643

ALASKA STATE CHAMBER OF COMMERCE

Alaska State Chamber of Commerce
HOUSE CS FOR CS FOR SENATE BILL NO. 178(JUD)

"An Act Relating to Civil Nuisance Actions."

On behalf of the Alaska State Chamber of Commerce, we wish to go on record in support of SB 178, which deals with Civil Nuisance actions that are filed opposing projects which are legal and covered by existing laws or permits.

The compromise language before the committee today represents a narrowing of the bill to a limited group of permits; air permits, water permits and solid waste permits. These are permits in which there has been an extensive public hearing process and opportunity for people to object and sue the respective appropriate agency if they think the permit should not be issued.

In summary, the Alaska State Chamber of Commerce supports passage of House CS for CS for Senate Bill 178(JUD) and believes the passage will eliminate a large number of frivolous lawsuits and unnecessary litigation, and will create a more proactive business and development climate in Alaska.

Ref

ANCHORAGE OFFICE

ROBERTSON, MONAGLE & EASTAUGH

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
ANCHORAGE, ALASKA

JUNEAU OFFICE

WASHINGTON, D.C. AND
VIRGINIA OFFICE

M E M O R A N D U M

TO: Charles Cole, Attorney General

FROM: Jim Clark

DATE: March 24, 1993

RE: Nuisance Legislation

****

I have asked Paulette to fax this on to you. The Alaska Forest Association (AFA) is working with the State Chamber to introduce and enact the attached legislation, assuming that you have no major problem with it. What we are seeing, in the lower 48 are nuisance claims combined with class actions to create large lawsuits claiming damages for discharges authorized by federal and state permits. The definition of "nuisance" in the attached amendment is designed to preclude lawsuits against permitted discharges.

I have talked to Senator Miller and Representative Williams about introducing this as a Committee bill, but did not want to proceed if you had major problems. Could you please give me a call at your convenience.

original version by Jim Clark

*Section 1: Amend AS 09.45.230 to read as follows:

AS 09.45.230. Action to abate or enjoin [PRIVATE] nuisance. (a) An action for an injunction or damages may be brought by the state or by a person whose property is injuriously affected or whose enjoyment of his or her property is lessened to abate a nuisance. A judgment in the action may enjoin or abate the nuisance as well as award damages.

(b) In an action brought under (a) the summons shall be served not less than 30 days nor more than 60 days before the date of trial. No continuance shall be granted for a longer period than seven days unless the plaintiff applying for the continuance gives an undertaking to the defendant, with sureties approved by the court, conditioned to the payment of costs that may accrue to the defendant if judgment is rendered against the plaintiff.

(c) In this section

"nuisance" means an act, including a discharge or emission, occupation or structure that causes material annoyance, inconvenience or discomfort. An act, including a discharge or emission, occupation or structure that is licensed, permitted or otherwise authorized by law is not a nuisance; and

"state" includes political subdivisions of the state.

(d) No action may be maintained for nuisance or tortious interference with a person's interest in the use and enjoyment of real property except in conformance with the provisions of this section.

*Sec. 2. AS 09.45.230(a) and (c) apply to all actions in which no judgment has been entered as of the effective date of this Act.

*Sec. 3. This Act takes effect immediately under AS 01.10.070(c).

DESCRIPTION:

This bill would limit nuisance actions to those brought under this statute. This bill would also clarify the definition of "nuisance" to remove any doubt that permitted discharges and emissions are not nuisances. Finally, it would establish a relatively narrow time frame in which trial of nuisance actions could take place. This means that if a plaintiff obtains an injunction against the defendant, the plaintiff cannot drag out the case to the substantial economic hardship of the defendant.

Under the provisions of Sec. 2, the bill would apply to pending actions. Thus, current actions claiming that permitted facilities are nuisances would have to be dismissed.

END

April 5, 1993

To: Senate Judiciary Committee
Eighteenth Legislature
State of Alaska
Juneau, AK

From: Dr. Ronn E. Dick, Associate Professor
Natural Resources
801 Lincoln St.
Sitka, AK 99835

Dear Sirs:

I am writing as a concerned citizen and as a natural resource management professional to comment on Senate Bill No. 178, "An Act relating to civil nuisance actions."

My concerns are both procedural and substantive.

Procedurally, I am distressed by the fast track upon which this piece of legislation has been placed. The Bill was introduced on Wednesday, March 31 and only two working days later the hearings are being held. I have to wonder why this Bill has such priority and who has decided to assign it that priority. The time frame simply does not give anyone in the public or legislature to prepare for detailed consideration of the Bill's merit. In addition, no other legislative committee is scheduled to hold hearings on this Bill.

Substantively, I have even more serious concerns. On the face of it, this is an obvious, cynical and corrupt exercise of power by an elected representative of the people of Alaska who has decided to do the bidding of powerful, wealthy corporations. This legislation is in direct response to a lawsuit against Alaska Pulp Corporation because of its pollution of Sitka Sound and the effects of this pollution on the waterfront property owners in Sitka Sound. It is ironical that that the special interests of the two pulp mills in SE Alaska, especially Alaska Pulp Corporation (APC), benefit from this Bill. It is ironical because it is these pulp mills that complain the most about the influence of "special interests", on legislation.

Rather than get into the legal details and nuances of such a Legislative Act with respect to individual property rights and due process, I will focus my comments on the underlying principles of justice that this Act violates. Since this Act exempts any polluter from liability if they have the permission of the government to pollute (by virtue of statute or regulation, license or permit, or court order of decision), it is absolutely essential that the integrity of the "permission" process be untainted. The fact is that this permitting process is often lacking of integrity and often involves collusion between the permitting agencies and the polluters.

It is a fact that APC and the State of Alaska Department of Environmental Conservation (DEC) have had numerous private meetings to agree upon acceptable pollution standards. Generally, APC

inform DEC about the current level of discharge of specific pollutants and DEC writes the standards so that those levels of discharge can be maintained.

It is a fact that DEC often fails to enforce violation of the standards or to enforce their own regulations. An excellent example of DEC's refusal to enforce their own regulations is DEC's 20+ year refusal to enforce Air Quality Regulation 18 AAC 50.110 Air Pollution Prohibited (Effective 5/26/1972). The Sitka Conservation Society filed an administrative appeal regarding the DEC's failure with respect to this regulation four years ago and the appeal was decided in favor of the Sitka Conservation Society in May of 1992. In short, this regulation placed the burden of proof on the polluter to prove that the pollution they create is NOT injurious to human health or welfare, animal or plant life, or PROPERTY, or which would unreasonably interfere with the enjoyment of life or property. DEC still has NEVER enforced this regulation in the past and has not enforced this regulation in spite of the appeal decision almost one year ago.

Now, the Alaska State Legislature is considering a Bill that would disenfranchise the public, the citizens of Alaska, from seeking legal redress when the State Government and corporations collude to circumvent the laws and regulations of the state.

Frankly, this legislation threatens the credibility of our State government and I believe is politically and socially destabilizing. It destroys checks and balances and leaves the citizens of Alaska without any acceptable means of protecting themselves from corporate excesses. This Act should not have been written in the first place. It most certainly should not receive the approval of the Senate Judiciary Committee.

Sincerely,

Ronn E. Dick, Ph.D.
Forest Resources

April 21, 1993

To: House Judiciary Committee
Eighteenth Legislature
State of Alaska
Juneau, AK

From: Dr. Ronn E. Dick, Associate Professor
Natural Resources
801 Lincoln St.
Sitka, AK 99835

Dear Sirs:

I am writing as a concerned citizen and as a natural resource management professional to comment on Senate Bill No. 178-House Bill 282, "An Act relating to civil nuisance actions."

I have very serious concerns. On the face of it, this is an obvious, cynical and corrupt exercise of power by an elected representative of the people of Alaska who has decided to do the bidding of powerful, wealthy corporations. This legislation is in direct response to a lawsuit against Alaska Pulp Corporation because of its pollution of Sitka Sound and the effects of this pollution on the waterfront property owners in Sitka Sound. It is ironical that that the special interests of the two pulp mills in SE Alaska, especially Alaska Pulp Corporation (APC), benefit from this Bill. It is ironical because it is these pulp mills that complain the most about the influence of "special interests", on legislation.

Rather than get into the legal details and nuances of such a Legislative Act with respect to individual property rights and due process, I will focus my comments on the underlying principles of justice that this Act violates. Since this Act exempts any polluter from liability if they have the permission of the government to pollute (by virtue of statute or regulation, license or permit, or court order of decision), it is absolutely essential that the integrity of the "permission" process be untainted. The fact is that this permitting process is often lacking of integrity and often involves collusion between the permitting agencies and the polluters.

It is a fact that APC and the State of Alaska Department of Environmental Conservation (DEC) have had numerous private meetings to agree upon acceptable pollution standards. Generally, APC informs DEC about the current level of discharge of specific pollutants and DEC writes the standards so that those levels of discharge can be maintained.

It is a fact that DEC often fails to enforce violation of the standards or to enforce their own regulations. An excellent example of DEC's refusal to enforce their own regulations is DEC's 20+ year refusal to enforce Air Quality Regulation 18 AAC 50.110 Air Pollution Prohibited (Effective 5/26/1972). The Sitka Conservation Society filed an administrative appeal regarding the DEC's failure with respect to this regulation four years ago and

I'm glad Mr. Clark mentioned this regulation

the appeal was decided in favor of the Sitka Conservation Society in May of 1992. In short, this regulation placed the burden of proof on the polluter to prove that the pollution they create is NOT injurious to human health or welfare, animal or plant life, or PROPERTY, or which would unreasonably interfere with the enjoyment of life or property. DEC still has NEVER enforced this regulation in the past and has not enforced this regulation in spite of the appeal decision almost one year ago.

In the April 20, 1993 (yesterday) Sitka Sentinel, it was reported that the EPA is considering a lawsuit against the DEC because the Alaska DEC has been too lenient with Alaska Pulp Corporation.

Now, the Alaska State Legislature is considering a Bill that would disenfranchise the public, the citizens of Alaska, from seeking legal redress when the State Government and corporations collude to circumvent the laws and regulations of the state.

Frankly, this legislation threatens the credibility of our State government and I believe is politically and socially destabilizing. It destroys checks and balances and leaves the citizens of Alaska without any acceptable means of protecting themselves from corporate excesses. This Act should not have been written in the first place. It most certainly should not receive the approval of the House Judiciary Committee.

Sincerely,

Ronn E. Dick, Ph.D.
Forest Resources

Alaska State Legislature

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

committee on SB 178, dated 4-21-93.
bill/subject

Frivolous lawsuits where litigants have no liability, even when they find their allegations have no basis are blatantly outrageous. Municipalities who have an inherent and profound commitment to their citizens and properly welcome public involvement need to be protected from individuals & organizations who initiate frivolous lawsuits at great expense & time, energy & dollars to the city at no potential cost the litigants is not in the public interest.

Signed: Alexander Gray

Testifier

City & Borough Sitka

Representing (Optional)

304 Lake St.

Address

Phone No.

Alaska State Legislature

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

committee on SB 178/HB 282, dated 21 April 1993.
bill/subject

The ~~government~~ government in America was set up to have checks and balances. Although it is not a perfect system, it seems to work. I am a little distressed at the idea of SB178 which quickly went through committee & the Senate which may be an attempt to limit my right as an individual when I think big business or the govt has wronged me. The haste which with this bill is being pushed through leads me to believe legislators may have an agenda that may not be in my best interest. I do not think there has been a dearth of law suits by private individuals to warrant this bill being so hastily pushed through. I go on record against this bill.

Signed: Jane E. Edl
Testifier

Self
Representing (Optional)

P.O. Box 1673
Address

747-5354
Phone No.

Testimony

April 23, 1993
1pm Hearing

To the House Judiciary Committee,

I am absolutely against HB282 Civil Nuisance Actions because it takes away my rights as a citizen. This bill is directly aimed at the class action lawsuit being brought against APC. This is just another crooked path APC has taken when it feels pressure from Sitka's residents.

Please see this legislation as a barrier for justice and do not pass it.

Sincerely,
Andrea Thomas

Alaska State Legislature

Please enter into the record my testimony to the house judiciary
committee name

committee on SB . 178 , dated April 21st.
bill/subject

I am adamently opposed to this bill. Bureaucracy do not opperate with the greatest of ease or correctness. Our founding fathers of America recognized this and implemented a judicial system to address it. For the public to be denied access to the judicial system would be a travesty of the individuals right and duty as called for in the U.S. Constitution and bill of rights. How do you feel about it. Hope? should it be ignored with no recourse? this issue is not reduced to nuclear or nuisence only it applys to all facets of our lives.

Signed: Cheryl Pritchard
Testifier

Self
Representing (Optional)

Box 6209
Address

Phone No.

9/86 Legislative Information Office

Alaska State Legislature

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

committee on SB 178 bill/subject, dated 4-21-93.

I am ~~adamantely~~ opposed to this ~~action~~ bill being contemplated by the legislature for many reasons, the main one being that I have an action filed that could be invalidated by the retroactive clause of this bill. It's much the same as changing the rules in the middle of the game. My suit was filed relying on statutes & ordinances as they are now on the books & I have spent thousands of dollars to fight the expansion of a non-conforming use that has been allowed by the "good ole" boys in Sitka.

You people are supposed to be a government of the people, by the people & for the people. this action takes the right of people away to protect their properties.

In closing, I would like to suggest that Mr Taylor go on a permanent elk hunting trip - maybe to Montana. there are a few good ole boys in Sitka that can report on where to ~~hunt~~ hunt!

Signed: Silvia L. Nelson
Testifier

Representing (Optional)

P.O. Box 1356 Sitka, AK 99835
Address

747-5030
Phone No.

Alaska State Legislature

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

committee on SB 178 bill/subject, dated 4-21-93.

This bill would take away my rights as a Citizen and I strongly oppose it.

Is the presumption that the state permitting process, & the DEC will perfectly protect the health & well being of all - that they will always put our well being ahead of industry profits? That they are entirely competent to determine what constitutes well being?

For us with this bill would the state assume entire responsibility for nuisances?

Must we then sue the state to get our rights?

(Line 14) Note that court orders or decisions do not require public notice or inclusion. I have just heard that DEC without Public Knowledge is allowing in a consent decree with APC that dioxin-laden fly ash from the mill can be used in concrete construction in Sitka.

Signed: Natasha D. Calvin
Testifier

Self
Representing (Optional)

Box 2966 Sitka 99835
Address

747-8950
Phone No.

Alaska State Legislature

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

committee on Senate Bill 178, dated 4/21/93.
bill/subject

As a property owner and as an individual involved in the commercial fishing industry I have grave concerns regarding this bill. I would like to address the ramifications of the damage done to members of one industry resulting from the "legal" pollution produced by another industry. In this instance, the fishing industry stands to lose drastically, as do property owners, if the fish, shrimp or crab are found to be tainted. ~~We~~ fishermen have a 7 million dollar investment in the salmon hatchery in the immediate vicinity of the APC mill.

Last year fish prices were negatively affected by an article in Consumers Report Magazine. What will be our recourse if (and this is certainly not a damage that can be anticipated + dealt with in a permit process) our fish are found to be contaminated by pollution (legal or otherwise).

Signed: Pat Kehoe
Testifier

self
Representing (Optional)

PO Box 1615 Sitka
Address

747-0543
Phone No.

Alaska State Legislature

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

committee on SB 178, dated 4/21/93.
bill/subject

Hello

My name is Don Muller. For the last 17 years I have been a businessperson here in Sitka. For two years before that I was a chemist at the APC pulp mill.

I have to admit that the pulp mill attorneys and executives are very clever. And very cunning. SB 178 is a very clever and cunning bill. And Robin Taylor, if he is not telling the truth, is also very clever for getting the bill as far as it has come. If he is telling the truth, he is simply a lackey for the mill. I suspect he is very clever.

But in a democracy, we expect more of our leaders. In a democracy, we expect more of industry executives who claim to be members of the small community in which they live. These people are al. supposed to be more than just clever and cunning. In a democracy the rights of the individual are supposed to be as important, maybe more important, than the rights of a single industry, especially an industry that has a long, long history of violating laws and regulations.

The bill being considered today is obviously written because the pulp mill in Sitka doesn't like yet another right of an individual, yet another right of the community in which it is allowed to operate. The pulp mill wants to have its own rules. The pulp mill believes that the rights of the mill are more important than the rights of any individual or community.

I ask that you vote against this bill in the interests of democracy and the rights of the citizens of Alaska.

Signed: Don G. Muller
Testifier

Self
Representing (Optional)

Box 1042, Sitka
Address

747-6734
Phone No.

Alaska State Legislature

House of Representatives

Official Business

State Capitol
Juneau, Alaska 99801-1182
(907) 465-3718

House Majority Leader

To: Representative Brian Porter Brian

From: Representative Gail Phillips Gail

Date: April 16, 1993

Re: House Bill [redacted] (SB 178)

Please find attached comments on House Bill 282 that I have received from Stephen F. Sorensen. I would like to have them included in the bill file. Thank you.

ALASKA MINERS ASSOCIATION, INC.

501 West Northern Lights Boulevard, Suite 203, Anchorage, Alaska 99503 fax: (907) 278-7997 telephone: (907) 276-0347

April 5, 1993

Honorable Robin Taylor
Chairman
Senate Judiciary Committee
Alaska State Legislature
Juneau, AK 99801-1182

Re: SB-178, Civil Nuisance Actions

On behalf of the Alaska Miners Association I wish to go on record in support of SB-178 which deals with civil nuisance suits that are filed opposing projects which are legal and covered by existing laws or permits. This bill is important for several reasons.

If an individual or company is conducting its business within the law, there should be nothing in statute that would encourage third parties to file nuisance suits against the activity.

This bill will remove one of the incentives for groups or individuals to file nuisance lawsuits. By removing the financial incentive, this bill should decrease the number of suits that are filed to merely harass and stall projects.

If fewer nuisance suits result, individual miners and companies will have one less artificial uncertainty when trying to develop a project.

Lastly, passage of this bill will provide additional tangible evidence to the international mining industry that Alaska truly wants mineral development and that the Alaska State Legislature is interested in removing the impediments to responsible mineral development.

Sincerely,

Steven C. Borell, P.E.
Executive Director

Alaska Forest Association, Inc.

111 STEDMAN SUITE 200
KETCHIKAN, ALASKA 99901-6599
Phone 907-225-6114
FAX 907-225-6920

POSITION OF SUPPORT BY THE ALASKA FOREST ASSOCIATION CONCERNING SB 178 RELATING TO CIVIL NUISANCE ACTIONS FEBRUARY 15, 1993

The Alaska Forest Association (AFA) supports the passage of SB 178 which deals with civil nuisance lawsuits which are filed against legal and permitted activities. This legislation is important due to the need to protect responsible industries which have completed the lengthy and costly permitting process.

It is good public policy to limit the ability of third parties to file litigation against projects which are legal and have valid permits. AFA believes that as long as an entity is within the guidelines of the permit which allows its activity, they should be protected from nuisance litigation. Without this protection, the permitting process is little more than a bureaucratic hurdle before entering the legal arena.

AFA supports the passage of this important legislation. We believe it exhibits the fact that Alaskans believe in the compatibility of jobs and the environment without excessive government.

HAINES FINANCIAL SERVICES

APR 15 RECD

April 12, 1993

Investments
Financial Planning
Real Estate Brokerage
Appraisals
Accounting
Bookkeeping
Consulting

Robin Taylor, Chairman
Senate Judiciary Committee
State Capitol, Rm. 30
Juneau, AK 99801-1182

RE: Senate Bill No. 178 - Limiting Private Property Rights

Dear Senator Taylor:

Each year government places further restrictions on the rights of private property owners. I'm opposed to this legislation (SB 178) since it will make it even more difficult for property owners to obtain relief from actions by others having a negative impact on privately held property. I believe this legislation to be unconstitutional as it severely limits the rights of private property owners to the quiet enjoyment of their property.

If the government has erred and the only option left is the courts, then ***this right should not be restricted by government.*** Serious impacts could render private property worthless or destroy one's constitutionally guaranteed right of quite enjoyment. This bill would give government even more power over my property. Shame on you!

THE BILL OF RIGHTS
ARTICLE V

"...nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation."

Sincerely,

Peter M. Enticknap

cc: Senator Rick Halford
Senator George Jacko
Senator Dave Donley
Senator Suzanne Little
Senator Fred Zharoff
Rick Hunter, President, AK Association of Realtors

840 Muncaster Road • P.O. Box 1086 • Haines, Alaska 99827
Phone/Fax (907) 766-2240

PETRO STAR INC.
CORPORATE OFFICE

Telephone: (907) 474-8210
Fax: (907) 474-9503

P.O. Box 61030
Fairbanks, Alaska 99706-1030

201 Arctic Slope Avenue #200
Anchorage, Alaska 99518
(907) 344-2661

April 7, 1993

TESTIMONY OF STEPHEN T. LEWIS
IN SUPPORT OF S.B. 178

I, Stephen T. Lewis, testify as follows in support of Senate Bill 178:

1. The existing array of environmental regulations already imposes substantial and comprehensive requirements on industry. Compliance with environmental regulations needs detailed and long-range planning and substantial economic investment. Industry needs the assurance that if it obtains appropriate environmental permits and complies with them, it cannot be sued simply because an individual alleges that his or her "personal enjoyment" is impaired by the permitted activity. The agencies already address the questions of whether property will be injuriously affected or the personal enjoyment of Alaskans will be affected when they make permitting determinations.

2. Environmental permitting issues are committed to the regulatory authorities because the agencies are better able than the courts to decide detailed technical questions and to perform the balancing of interests that permitting decisions can involve.

3. Individuals that oppose development projects or complain that projects will affect their enjoyment of their property already are afforded ample opportunities to be heard in the regulatory permitting process, and they potentially can appeal agency

determinations. Private lawsuits raise issues that are substantially the same as those addressed in the permitting process. They waste the courts' time and unfairly allow private plaintiffs a "second bite at the apple" to shut down business activities.

4. There is no reason to believe that the courts make fairer or more accurate decisions than the permitting agencies. The adversary system employed by the courts is particularly ill-suited to address the complex technical and policy issues presented in the field of environmental regulation. "Nuisance" suits can pose a real danger that a court will erroneously shut down a project that the agencies have accurately determined to be a lawful and prudent use of resources.

5. Allowing "nuisance suits" to challenge permitting decisions undermines the regulatory process. The regulated community will have less respect for and less willingness to work with the agencies if agency determinations cannot provide the certainty necessary to prudent business planning. In effect, allowing individuals who are disappointed by the permit process to ignore agency determinations and file private nuisance lawsuits means that an agency determination that stops a project is binding, but one that allows a business to operate is provisional. This creates an impossible situation for orderly environmental regulation and for Alaska.

Respectfully submitted,

Stephen T. Lewis
Chairman, Petro Star Inc.

Alaska Forest Association, Inc.

111 STEDMAN SUITE 200
KETCHIKAN, ALASKA 99901-6599
Phone 907-225-6114
FAX 907-225-5920

Statement of Support

Senate Bill 178 - Civil Nuisance Suits

The Alaska Forest Association is in full support of Senate Bill 178. Under current law, a business or individual can be sued under a "nuisance" action even if they are operating in compliance with applicable laws and permits. This bill would allow a nuisance suit to be brought only if the subject of the action is out of compliance with a law, regulation, permit or court order.

Resource development operations and other business entities are required to comply with an entire realm of laws, regulations and permits that are subject to public scrutiny. If the business is operating within these boundaries then they should not be subject to litigation under a nuisance suit.

The Alaska Forest Association urges passage of SB 178.

D R A F T: April 5, 1993

TESTIMONY OF DAVE MATTHEWS
FOR THE
ALASKA FOREST ASSOCIATION

My name is Dave Matthews. I am acting manager of the Alaska Forest Association (AFA). The AFA submits this testimony for the record. The AFA is a private, non-profit organization comprised of companies involved in Alaska's forest products industry on federal, state and private lands. The Association has 119 member companies which are directly involved in the industry. The AFA provides more than 4,000 direct, year-round jobs. The Association has 200 associate member companies which provide goods and services to Alaska timber industries.

Senate Bill 178 only makes common sense. If an agency has determined that an activity is in the public interest and issued a permit allowing it, why should anyone be able to sue the permit holder based on doing what is authorized by that permit? A permit should be a shield from nuisance lawsuits. Accordingly, the AFA strongly supports passage of Senate Bill 178.

Dave Matthews
Alaska Forest Association

APR 1 3 RECD

April 13, 1993

The Honorable Robin Taylor
The State Senate, State of Alaska
Capitol Building, Room 30
Juneau, Alaska 99801

Re: Senate Bill 178/House Bill 282

Dear Senator Taylor:

Yesterday, the Senate Judiciary Committee heard testimony on Senate Bill 178, an act which would limit the ability of private landowners to bring lawsuits based upon nuisance. Due to a family emergency, I was unable to testify at the hearing. A companion Bill, HB 282, has also just been introduced.

Sealaska Corporation strongly supports some elements of the bill, but strongly opposes others. While I was not able to appear before the committee to pass along Sealaska's position on this bill personally, I want to take this opportunity to do so. A copy of Sealaska's comments on Senate Bill 178 is enclosed, and applies equally to HB 282.

These bills would narrow the definition of "nuisance" to mean "a substantial and unreasonable interference with the use of an enjoyment of real property, including water." By narrowing the definition of "nuisance", the bill would help eliminate lawsuits which are frivolous or brought merely to harass. Sealaska believes that lawsuits based on nuisance are only warranted if the interference with property rights is "substantial and unreasonable," and therefore supports Section 2 of the bill.

The bill also bars lawsuits based on nuisance when an activity is conducted pursuant to a government license or permit. Sealaska believes that this would undermine the rights of private property owners, and would limit their right to peaceably enjoy their property. As a matter of principle, Sealaska believes that if

peaceably enjoy their property. As a matter of principle, Sealaska believes that if one property owner's activities substantially and unreasonably interfere with another property owner's enjoyment of his or her property, the property owner causing the interference should be liable. This belief is based on simple fairness, and the belief that the legislature should not favor the interests of one property owner over those of another. Sealaska, therefore, strongly opposes the remainder of SB 178 and HB 282. I have taken the liberty of enclosing a proposed revision that would change the definition as suggested by both bills, but which deletes the negative aspects. I offer this for your consideration.

Thank you for taking the time to review Sealaska's comments. If you have any questions, please do not hesitate to call.

Sincerely yours,

SEALASKA CORPORATION

Robert W. Loescher
Executive Vice President
Resource Management

RWL/bjw

Municipality of Anchorage

P.O. BOX 196650
ANCHORAGE, ALASKA 99519-6650
(907) 343-4545

TOM FINK,
MAYOR

OFFICE OF THE MUNICIPAL ATTORNEY

APR - 5 RECD

April 1, 1993

Senator Robin Taylor
Chair
Senate Judiciary Committee
State Capitol
Juneau, Alaska 99801

SUBJECT: SB 172 Regarding Awarding of Attorneys Fees and Costs and Civil Actions to Effectuate or Vindicate a Public Policy of the State

Dear Senator Taylor:

The Municipality of Anchorage is very interested in a bill addressing the subject raised in Senate Bill 172, attorneys fees in public interest litigation. In recent years the Municipality of Anchorage has incurred expenses relating to "public interest litigation" in situations where the public interest in avoiding unnecessary municipal legal expenses appears to outweigh the public interest allegedly served by the litigation.

In some situations the Municipality of Anchorage has taken a position asserting a good faith interpretation of the applicable statutes and been forced to defend that interpretation in court. After a successful defense of that interpretation the public interest litigant doctrine has been applied to preclude the Municipality from recovering attorneys fees in cases relating to issues of "public interest" unless the suit is declared frivolous by the court.

In some other situations the Municipality may defend a good faith interpretation of the applicable statutes only to find that that interpretation, however reasonable, is different than the interpretation utilized by the courts. Where the opposing party is a "public interest litigant" the Municipality may be required to pay full attorneys fees regardless of the economic resources of the "public interest" party.

As the costs of litigation increase, this potential liability for defending against any public interest litigation creates a strong motivation for government attorneys to use very restrictive interpretations of statutes when giving advice to legislative or

executive bodies. Where the public interest litigant doctrine creates a financial liability in the event of any challenge to an executive or legislative decision either in the form of attorneys expenses or liability for attorneys fees to the opposing party, and there is no possibility for compensation in the event of a successful defense of the government's position, the frankness and variety of options presented in legal advice offered to legislative and executive decision makers may be adversely affected.

The Anchorage Municipal Attorney strongly endorses the concept set out in Senate Bill 172. The bill could go even farther and, using the Federal Equal Access to Justice Act, 28 USC § 2412, as a pattern, could protect governmental entities from responsibility for full attorneys fees where the position of the government or governmental agency was substantially justified.

Sincerely,

Richard L. McVeigh
Municipal Attorney

m:\ltr\mcveigh\house/dp

LAW OFFICES
SONOSKY, CHAMBERS, SACHSE, MILLER & MUNSON
SUITE 700
900 WEST FIFTH AVENUE
ANCHORAGE, ALASKA 99501
(907) 258-6377
TELEFAX (907) 272-8332

MARVIN J. SONOSKY
HARRY R. SACHSE
REID PEYTON CHAMBERS
WILLIAM R. PERRY
LLOYD BENTON MILLER*
DONALD J. SIMON
DOUGLAS B.L. ENDERSON
MYRA M. MUNSON*
KAY E. MAASSEN GOUWENS*
ANNE D. NOTO
JAMES K. KAWAHARA
RICHARD A. POULIN

OF COUNSEL
TASSIE M.K. HANNA
ROGER W. DUBROCK*
MARY V. BARNEY

*ALASKA BAR

JUNEAU OFFICE
228 FOURTH STREET
JUNEAU, ALASKA 99801
(907) 586-5880
TELEFAX (907) 586-5883

MYRA M. MUNSON

D.C. OFFICE
SUITE 1000
1250 EYE STREET, N.W.
WASHINGTON, D.C. 20005
(202) 682-0240
TELEFAX (202) 682-0249

April 21, 1993

VIA TELEFAX
465-3834

The Honorable Brian Porter
Chairman, Judiciary Committee
Alaska House of Representatives
State Capitol
Room 122
Juneau, Alaska 99801-1182

Dear Representataive Porter:

I write in connection with Senate Bill 178.

Four years ago I was appointed by Chief Judge H. Russel Holland and Superior Court Judge Brian Shortell to serve as the liaison for all of the plaintiffs involved in litigation arising out of the *EXXON VALDEZ* Oil Spill. The oil spill had a devastating impact on the lives of villagers, fishermen, landowners and businesses located from Prince William Sound to portions of the Alaska Peninsula (and even beyond to Bristol Bay and Southeast in terms of its impact on fish prices, including thousands of Anchorage and Kenai Peninsula residents). Because Exxon refused to pay the bulk of the damages suffered by the victims of the spill -- choosing instead to only settle with the state and federal governments -- eventually some four hundred lawsuits were filed by over 5,000 individual Alaska plaintiffs, including lawsuits representing the interests of several thousand additional Alaska citizens. Our most recent estimates show that litigation embracing some 29,000 Alaska citizens.

The proposed bill in Section 1 would bar an action if the alleged "act . . . is authorized by . . . a statute or regulation . . . a license, permit, or order issued by the state or federal government . . . or a court order or decision." Under Section 3, the Act would apply

to any lawsuit where a final judgment has not yet been entered -- meaning it would retroactively affect all liabilities which arose prior to the Act and which have not yet been finally adjudicated by a court.

Without going into detail -- and putting aside the numerous ambiguities in the bill as currently redrafted -- Senate Bill 178 could potentially cut off substantial portions of the oil spill litigation. For example, the bill might well bar a court from inquiring into any allegation of Exxon or Alyeska negligence relating to tanker design, spill preparedness, contingency planning, vessel manning, crew qualifications, clean-up procedures and so forth -- to the extent such issues involve licenses, permits, agency orders or court orders. Recent expert damage reports put the total compensatory damages suffered by the plaintiffs arising from the spill at approximately $2.6 billion. If the Legislature extinguishes $2.6 billion in vested causes of action, it would expose the State of Alaska to $2.6 billion in "just compensation" taking claims under Article I, Sec. 18 of the Alaska Constitution and the Fourteenth Amendment to the U. S. Constitution.

Given the potential ramifications of this bill on the rights of thousands of state citizens -- and on the state treasury -- we respectfully urge that S.B. 178 not be enacted as written, and that it be subjected to far greater debate and public hearing than has been available to date.

Sincerely,

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON

By: Lloyd Benton Miller

LBM:alm
E:\DOCS\EXXON\LTRS\PORTER.LTR

Alliance for Juneau's Future, Inc.

POSITION OF THE ALLIANCE FOR JUNEAU'S FUTURE ON SB 178

The Alliance for Juneau's Future supports Senate Bill 178 for the following reasons:

If business and industry is to invest time and capital in Alaska, they need predictable and stable laws. As the situation stands now, Alaska has two potentially conflicting systems governing land use and pollution: the regulatory system administered by the executive branch of state government and the "nuisance" system which is controlled by the judicial system.

While it is far from perfect, the legislature has made a clear choice that the regulatory system should have primacy. The legislature should defend the authority of the system it has established. SB 178 would do just that.

Without the protection of SB 178, Alaska risks having the regulatory system usurped or superseded by a judicially created "nuisance" system. The resulting uncertainty in the law will surely drive business and industry away from our state.

SB 178 makes another much needed correction to our nuisance statutes. The traditional standard for nuisance suits developed through hundreds of years of the common law was that an interference had to be "substantial and unreasonable." Our statute, AS 09.45.230, has departed from the established standard and endorsed one that is much more subjective and personal. Again, the uncertainty of this standard is harmful to a stable legal environment.

SB 178 will reestablish the traditional common law nuisance standard of a requirement of "substantial and unreasonable" interference with property.

Uncertainty in the law is harmful to those who would develop Alaska resources and provide a stable economic future for our state. But beyond that, it is most harmful to the public's respect for government. SB 178 takes one small step to the legal stability we need.

The Alliance for Juneau's Future is an organization of approximately 600 Juneau residents who support reasonable economic development in the Juneau area and throughout Alaska.

Chuck Achberger
Executive Director

P.O. Box 21143 • Juneau, Alaska 99802-1143 • 586-2495 • FAX 586-2494

217 Second Street, Suite 201
Juneau, Alaska 99801
(907) 586-2323
FAX (907) 463-5515

ALASKA ★STATE★ CHAMBER OF COMMERCE

POSITION PAPER

Senate Bill 178

The Alaska State Chamber of Commerce has endorsed Senate Bill 178 as necessary to provide a good business climate in Alaska as well as to enable private citizens, the State of Alaska, and local government to protect their property from unreasonable intrusions.

Alaska's present nuisance law allows a person to sue his neighbor if he believes that his "personal enjoyment" of his property is lessened by his neighbor's activities. This is a very individual and subjective standard by which to judge the neighbor's actions. What may lessen one person's "personal enjoyment" of his or her property may not bother anyone else. The neighbor should be found liable only if what he is doing would be a nuisance to nearly everyone else in the community. In other words, "personal enjoyment" should be a standard that reflects the entire community.

What Senate Bill No. 178 does is change the standard by which a nuisance would be judged from "injuriously affected" or "lessened personal enjoyment" to "substantial and unreasonable interference." This makes the determination of what constitutes a nuisance a reflection of how an entire community functions.

Senate Bill No. 178 would also significantly reduce nuisance law suits brought against businesses and operations complying with conditions of their respective permits, i.e., air emissions, water discharges, noise, etc.

The Alaska State Chamber of Commerce believes that Senate Bill 178 strikes that proper balance between private interests, private and public interests, and creates the level playing field that makes possible economic development in Alaska and the protection of the environment.

POSITION
ALASKA STATE CHAMBER OF COMMERCE

WRITTEN TESTIMONY SUBMITTED
SB 178 CIVIL NUISANCE ACTIONS

Municipality of Anchorage

Sealaska Corporation

Alaska Forest Association, Inc.

Alaska Miners Association, Inc.

Petro Star Inc.

Pete Ehrhardt, Attorney at Law

Sitka Sound Seafoods

Haines Financial Services

Dr. Ronn E. Dick, Sitka

Mary E. Forbes, Kodiak

Dave Katz, Ketchikan

Robert Ellis, Sitka

Don Muller, Sitka

REF

COMMENTS ON HB 282

BY

JEFFERY D. TROUTT

BEFORE THE

HOUSE JUDICIARY COMMITTEE

APRIL 21, 1993

REF

COMMENTS ON HB 282

BY

JEFFERY D. TROUTT

BEFORE THE

HOUSE JUDICIARY COMMITTEE

APRIL 21, 1993

COMMENTS ON HB 282

My name is Jeffery D. Troutt. I am an attorney with Birch, Horton, Bittner & Cherot here in Juneau. I appear today representing only myself to speak in opposition to HB 282, a bill that would abolish legitimate claims along with the occasional frivolous ones.

Like many of you, I am a conservative Republican. I co-founded my law school's chapter of the Federalist Society, and worked for the Free Congress Foundation in Washington, D.C. for over two years. Here in Alaska, I have remained active in support of conservative causes, and in Republican Party politics.

I provide you with this brief background in order to demonstrate to you that I have strong conservative and Republican credentials, and that I have earned battle scars in support of conservative principles. Having done this, I intend to testify that HB 282 runs contrary to conservative principles by diminishing private property rights we conservatives hold dear.

HB 282 increases the threshold harm to private property rights that a plaintiff must prove to prevail in an action. It does so by adopting a statutory definition of "nuisance" as "a substantial and unreasonable interference with the use or enjoyment of real property". Currently the term "nuisance" is not defined. AS 09.45.230 simply provides that a lawsuit may be brought by person "whose property is injuriously affected or whose personal enjoyment is lessened by a private nuisance".

The bill would also bar lawsuits to enjoin or abate a nuisance, or to obtain damages, if the activity complained of is done under color of law.

I support the new definition of "nuisance" because it will help prevent frivolous and vexatious litigation, and is in accord with the common law definition. However, I strongly oppose the ban on nuisance lawsuits because it would force

people who did not participate in, or receive benefits from, other peoples' private economic activities to bear the economic burden of those activities.

Nuisance law exists to protect the economic value of private property. It is a private cause of action brought by private plaintiffs to redress harm done to them by another's use of his or her property. Unfortunately, nuisance law can be abused by persons interested in impeding economic development. The problem, however, lies not in nuisance law itself, but in the increasing politicization of the judiciary, and the tendency of courts to substitute their judgment for that of the Legislative and Executive branches of government.

Banning lawsuits based on nuisance will not stop frivolous lawsuits or lawsuits meant to harass or delay economic development. There are plenty of theories of liability that plaintiffs who wish to bring such actions can use. To discourage frivolous lawsuits you should consider enacting legislation that will reduce the incentive to bring them. Examples would include tightening standing requirements and eliminating the exemption of public interest litigants from paying attorneys fees under Civil Rule 82.

In preparation for my testimony, I reviewed the Alaska Digest's listing of nuisance cases during the territorial and statehood periods. I found that there are only nine published decisions. Only two of them were decided since statehood, the most recent in 1973. Of the remaining seven, three were brought against bawdyhouses (establishments which presumably were not authorized by statute, permit, or court order).

While I do not know how many lawsuits based on nuisance have been brought at the superior and district court levels in recent years, the paucity of published decisions leads me to believe that nuisance lawsuits are not much of a nuisance at all. In fact, they appear to be brought infrequently. The proposed bill therefore seems to be to be the equivalent of using a howitzer to kill a flea.

When brought for legitimate reasons, lawsuits based on nuisance encourage the economically efficient use of property by forcing a person to consider the impact of his actions on other. They encourage activities that have a net economic benefit, and discourages activities that do not. To use a simplified example, a person may wish to engage in an activity on his property that has an economic value of $100 to him, but which diminishes the value of his neighbor's property by $1,000. The potential for nuisance liability will discourage him from undertaking the activity on his property — an activity which will produce a net loss in the overall economy.

If, however, the activity is worth $2,000 to the property owner, he will still engage in the activity regardless of liability for nuisance. He will profit from the use of his property even if he must pay his neighbor $1,000 for his loss. The economy will receive a net gain, and the neighbors will be compensated for their loss.

While we each have a right to use our property to compete and prosper in a free market, we have a corresponding responsibility to reimburse others if our actions diminishes the value of their property. That does not mean that an activity should not continue because others are harmed by it. It merely means that a person who profits by the activity should reimburse those who suffer from it. The mere fact that a person can obtain a government permit for an activity should not mean that his use of property is more important than his neighbors', or that he is free to trample on the rights of other property owners. Unfortunately, under HB 282, permit holders will be elevated to a special status above mere "property owners", and their neighbors will be required to subsidize the permitted activity. This is not only morally wrong, it is economically unsound.

The legislature, agencies, and courts do not always consider the impact of an activity on property values, nor should they. But if HB 282 becomes law, they will. The decision-making process will become even more politicized than it is today. Government will become more paternalistic, and the people of Alaska will become

even more dependent upon government to take care of them. In the end, government — not the market — will pick economic winners and losers, and determine the value of private property. I don't believe Government is equipped, or can be trusted, to make those decisions.

For these reasons, HB 282 is anti-competitive and anti-business. It is fundamentally flawed in that it would place the burden of economic activity that would otherwise be actionable in nuisance on people who neither caused nor benefited from the activity. This is at odds with principles of property rights and individual responsibility. HB 282 should not become law.

Rf

HB 282
TESTIMONY OF ROBERT W. LOESCHER
EXECUTIVE VICE PRESIDENT, SEALASKA CORPORATION
April 21, 1993

My name is Robert Loescher. I am Executive Vice-President Resource Management for Sealaska Corporation. Sealaska is one of 12 Regional Native Corporations and is the Regional Native Corporation for Southeast Alaska. Sealaska is the largest private landowner in Southeast Alaska.

I am here today to testify about HB 282. I understand that the Senate on Monday passed CSSB 178. In my testimony, I am assuming that the revisions in CSSB 178 have been incorporated into HB 282.

Last week I wrote to you expressing Sealaska's concerns about SB 178. I am pleased and wish to acknowledge that a number of Sealaska's concerns have been addressed in the Senate's Committee Substitute. For example, the Committee Substitute clarifies that a person must be in compliance with a permit or license in order to obtain immunity from suits based on nuisance.

Despite these changes, Sealaska still has significant concerns over whether the Bill represents good public policy. Our principle concern is that it attempts to eliminate frivolous lawsuits by banning all such lawsuits under certain circumstances. If the current HB 282 becomes law, legitimate claims based on nuisance will not be heard, and, as a result, property owners who have legitimate grievances will not be able to have their day in court. There are aspects of the Bill which Sealaska supports. In particular, Sealaska believes that it is good public policy to reduce frivolous lawsuits. Sealaska supports the proposed definition of "nuisance" as "substantial and unreasonable interference with the use or enjoyment of property . . . ." This codifies the common law definition of nuisance and we believe will eliminate the majority of frivolous lawsuits.

Under the legislation passed by the Senate, only property owners in areas zoned as residential can sue for nuisance against a permit or license holder on the basis of "view, odor, or noise." Sealaska has two concerns about this. First, many Alaskans live in areas where there is no zoning. The Bill leaves rural Alaskans, and Alaskans who live in most native villages, with less protection than their urban counterparts. Sealaska opposes any legislation that will give these people second class property rights.

Second, the Bill only allows nuisance lawsuits based upon "view, odor, or noise." This is too narrow. The Bill would ban lawsuits based upon nuisance such as air or water pollution, or other types of damage not listed.

Sealaska is also concerned that the retroactive application of this Bill seems targeted at a specific lawsuit. While this does not affect Sealaska one way or the other, there are constitutional concerns. I appreciate the sponsor's belief that the Bill is constitutional and do not wish to make a judgment one way or the other. However, I do believe there are legitimate arguments on both sides and hope that the Committee weighs the arguments carefully.

Sealaska believes that the current Committee Substitute is an improvement over the original Bill. Sealaska supports the Bill's attempts to weed out frivolous lawsuits. However, it does so by banning valid lawsuits by property owners who have suffered economic loss because of another's activities. That Sealaska cannot support.

I have appreciated the Bill's sponsors' willingness to consider Sealaska's concerns, and this leads me to the conclusion that it is possible for the sponsors to achieve their objectives without harming legitimate individual private property rights.

On balance, and despite improvements, this Bill is flawed. However, it is not unredeemable, and a compromise that Sealaska supports is possible.

One such possible compromise would be a Committee Substitute that incorporates the statutory definition of "nuisance," but does not ban lawsuits based upon nuisance. This would give persons on both sides of the issues time to fashion compromise legislation that would address the sponsors' and other property owners' concerns.

Another possible compromise would be a Committee Substitute that bans suits for injunctive relief where a permit or license has been issued, but allows suits for monetary damages. This compromise would allow economic development which has been sanctioned by the State to go forward. Property owners who have been injured by that economic activity would be able to sue for the lost value of their property, but not to stop the activity.

In closing, I would like to state that Sealaska would be glad to work with this Committee and the Bill's sponsors to fashion legislation which would help eliminate frivolous lawsuits without diminishing legitimate property rights. I hope my comments have been useful to you. Please let me know if their is anything Sealaska can do to assist this Committee in working out a fair compromise.

Thank you very much.

HB 282
EXAMPLES

I would like to present you with a couple examples of how this Bill would operate to deprive property owners of legitimate rights.

Many owners of recreational cabins who depend upon a stream for water supply. Suppose a neighboring landowner obtained a permit to dredge the stream, and by so doing rendered the water unpotable. The cabin owner would suffer an economic loss which would not be actionable.

Now for an example close to my heart. Sealaska owns a large amount of timber in areas which, not surprisingly, are not zoned residential. It is conceivable that someone on land adjoining Sealaska's timberlands may be granted a permit to discharge chemicals into the air or water which could kill the timber. Even if Sealaska participated in a public hearing and opposed granting of the permit, it would be damaged financially by that activity. If this Bill became law, Sealaska could sustain millions of dollars of losses because of the pollution and would be unable to do anything about it.

Alaska State Legislature

Please enter into the record my testimony to the Senate Judiciary Committee
committee name

committee on S.B. 178 , dated 4/5/93 .
bill/subject

Hello: My name is DON MULLER. I have been a businessman in Sitka for the last 17 years. For two years before that I was a chemist at the APC mill.

Just yesterday I returned from Cambodia where I spent the last two months working on an education project for a relief agency. If I may, I would like to draw an analogy between what I saw there and SB 178.

As you all know, Cambodia has been involved with civil war and unrest for the last 25 years. As you also know, much of this has been the result of the genocidal Khmer Rouge

Signed: Don Muller (DON MULLER)
Testifier

Self
Representing (Optional)

Box 1042 Sitka
Address

747-8808, 747-6734
Phone No.

3 Pages

and their ultra-extreme policies. In April of 1991, after tremendous international effort, a peace accord was signed by the parties involved. This resulted in tremendous optimism internationally and, of course, among the Khmer people. Democracy, it appeared, would soon come to Cambodia. The people would finally have their country back.

It soon became apparent, however, that the Khmer Rouge thought differently. And they expressed this very simply, as they always have: anything in the peace accords that they didn't agree with, they simply went around it; if a particular agreement didn't please them at a particular time, they simply ignored it and operated by their own rules. Their own ~~rules~~ concerns were more important than the concerns of the country.

SB 178 is obviously being considered because the pulp mill doesn't like the existing rules. The pulp mill, represented by Robin Taylor and Jim Clark, wants to write its own rules, especially since the mill might be in violation

Over >

of the existing rules. According to the pulp mill, the rights of the mill are more important than the rights of the community it operates in.

I ask that you vote against SB 178 in the interests of democracy and the the rights of the citizens of Alaska.

APR 15 RECD

Alaska State Legislature

Please enter into the record my testimony to the Senate Judiciary committee name

committee on SB 178 Civil Nuisance Actions bill/subject, dated April 1993.

I am opposed to SB 178. Though I do not condone frivolous lawsuits, I do not think the right of property owners to file nuisance suits should be taken away. This could be a costly mistake for the State of Alaska. By denying due process to property owners, the bill could be interpreted as constituting a "taking" of personal property rights by the State of Alaska. The state would then be liable to private property owners should they incur damage to their property as a result of state permitted activities. The Federal Government has not taken this risk. Why should the state of Alaska take it for the benefit of a few citizen? Also, the possible costs the state could incur from the above scenario is contradictory to this legislatures goal to cut General Fund spending. SB178 is also bad public policy. The Citizens Oversight Council on Oil and Other Hazardous Substances (a committee created by this legislature) has concluded that the integrity of the state's permitting process is already in question. Passage of SB178 would further degrade this process. Lastly, SB178 is difficult to understand, very ambiguous and would affect many other existing Alaska statutes. This bill should not pass.

Thank you for the opportunity to testify.

Signed: Mary E Forbes

Testifier

Kodiak Audubon ~~Society~~ Society

Representing (Optional)

418 Mill Bay Rd Kodiak AK 99615

Address

486-2685

Phone No.

Alaska State Legislature

Please enter into the record my testimony to the Senate Judiciary
committee name

committee on SB 118 / SCR 4, dated 4/12/93
bill/subject

Addition to verbal testimony

The effect of both of these measures would be to remove an essential check and balance of our miraculous democracy - it would tilt the playing field in favor of big business, big government and the rich, and deprive common citizens of access to the courts.

Signed: Dave Katz

Testifier

Tongass Conservation Society

Representing (Optional)

PO Box 3377

Address

Ketchikan, AK

Phone No. 225-5827

Alaska State Legislature

Please enter into the record my testimony to the Senate Judiciary Committee
committee name

committee on SB178 . dated 5 Apr 93 .
bill/subject

I am against passage of SB178.
This bill appears to be directed to relieving Alaska Pulp Corporation from its many years of imposition of Sitka pollution on private property owners in Sitka. I speak to this bill in terms of its impact in Sitka but realize the effects would be statewide.

1. This bill would allow the mill to continue polluting and prevent victims of the pollution from relief in court even if the ~~pollution~~ permits continue to be violated.

2-This bill would be a "taking of private property rights and would likely make the State liable for damage to private property resulting from permitted operations.

3-SB178 ignores the fact that the public has not been sufficiently included in the permitting process.

4-SB178 uses permits to immunize polluters from liability.

Signed: Robert Ellis
Testifier

Sitka Property Owner
Representing (Optional)

Box 2966 Sitka
Address

747-8950
Phone No.

Ref

EPA: State Too Easy On APC Mill in Sitka

By EBEN PUNDERSON
Sentinel Staff Writer

The Environmental Protection Agency has objected to the terms of enforcement actions and air pollution control measures laid out in an agreement between Alaska Pulp Corp. and the Department of Environmental Conservation on the grounds they are too lenient.

DEC filed the operating permit without making the changes which the federal agency had suggested during the public comment period, despite notification by the EPA that failure to incorporate its suggestions into the consent decree could result in a lawsuit against the mill.

Sitka Daily Sentinel 11/20/83

EPA's public comments in regard to the APC-DEC consent decree list three areas where the federal authorities feel the state regulatory agency should take a harder line. These are:

— assessment of non-compliance penalties. EPA says DEC should impose higher penalties on the mill — in the range of $2 million to $3 million — for exceeding emission limits. EPA says the fines should be assessed based upon the economic benefits which they say the mill has enjoyed by postponing the installation of pollution control equipment.

— the schedule for installing a mist elimination system to bring the mill's chemical recovery boilers into compliance. EPA recommends that the consent decree be changed to require the mill to install the equipment in two years rather than the four years allowed by DEC.

— the methods proposed by DEC for determining whether APC will exceed ambient air quality standards, as required by the consent decree. EPA says the methods which DEC has allowed the mill to use for collecting data do not comply with the EPA Guideline on Air Quality Models.

DEC's Southeast Regional Air Program Coordinator Jim Baumgartner said EPA's comments came as a surprise to him because he was under the impression that the issues the agency raised had been resolved.

"We thought we had outlined a tack that would be suitable to EPA, so we were a little surprised when they requested we take a much harder line," said Baumgartner.

EPA's mention of a lawsuit was interpreted by Baumgartner as a threat. The comments, written by Air Compliance and Permitting Section Chief Ann Pontius, of EPA's Region 10, list the agency's enforcement options, one of which is "the filing of a judicial case in federal court to assess and collect noncompliance penalties."

"The letter was written in a way that threatens to throw their weight around," said Baumgartner.

But a senior EPA environmental engineer who has been working on the APC project, Chris James, said that a lawsuit would be the last and most severe of several tiers of enforcement measures, which start with a notice of violation.

James said that at this point a lawsuit is not imminent and the agency is currently evaluating what action it will take, if any.

"There's the potential that we may decide, in talking with the state, that, given the situation and other issues that APC is investing in, for example on the water quality side, what (DEC) decides to do is not exactly what we want but is the best they could do under the circumstances," said James.

However, James mentioned that EPA considers the Sitka mill to be one of the highest priority (pollution) sources in the region, and one purpose of its comments was to convey to the state EPA's level of concern.

"We wanted to make it clear to the state that we consider these issues to be serious, and we wanted to lay out all the options available to us to address the violations that exist," said James.

For its part, DEC claims that the EPA's suggestion that it levy steeper fines against the mill would be a form of "double jeopardy."

In his response to EPA, Baumgartner states that a penalty structure already exists for exceeding the power boiler sulfur dioxide limits and particulate matter limits laid out in the Compliance Order by Consent.

DEC says the mill has paid $7,000 in penalties since the order went into effect. Imposing more penalties at this time would thus be a "double payment," and would be "contrary to the intent, if not the letter, of the existing order, and possibly illegal," the response states.

As for the "gravity" fines and fines to penalize APC for the alleged economic benefits of non-compliance, DEC says it has already proposed $4 million worth of penalties.

However, this fine will be waived if APC "meets the final milepost for installing new controls for each recovery system," states Baumgartner's response. "We feel that these proposed penalties are in line with those suggested by EPA, even if not collected up front," the response states.

EPA's allegation that the mill can install the required mist elimination system in two years, rather than four, is countered by DEC's claim that economic considerations must be considered in addition to technical feasibility when establishing a compliance schedule.

APC spokesman Rollo Pool said the mill demonstrated to DEC that it could not purchase and install the equipment in two years without causing detrimental economic effects.

"We have proven to DEC that we cannot afford to do it (in two years). If it were not for the financial situation we could do it quicker," said Pool.

Pool said a soft pulp market is to blame, as well as upcoming expendi-

tures to bring the mill into compliance with new federal water quality standards.

James said he was aware of the economic constra..., but pointed to other mills which have installed the same equipment in two years, such as Ketchikan Pulp Co.

He also argued against favoring one mill over the others. "APC's competitors have been required to put on controls, and we felt that APC was enjoying an economic advantage by not having to expend this capital when their competitors have already done so," said James.

The mist eliminators are required to bring the mill into compliance with federal opacity and particulate standards. Pontius' letter states that, since these standards are federal, EPA will keep an eye on APC's compliance status, and "appropriate enforcement action will be considered by EPA if it is not taken by DEC."

In response to the letter's assertion that APC's proposed methods for air monitoring are inadequate, DEC says that APC has met the federal requirements, and also that EPA's model for measuring air quality is inappropriate for the mill because it overpredicts up to 10 times more emissions from the mill than what is actually recorded by the Heart Lake monitoring site. That site was selected because it was predicted to have the highest ambient impacts from mill emissions.

To address this problem, EPA suggested that an array of monitors be installed to develop a site-specific model. DEC decided this would not be necessary, as the Heart Lake data is "well below health-based standards," and the financial cost to the mill would be great.

EPA's James said his agency does not regard lightly the terms of DEC's consent decree, but expressed hope that the state would address the issues EPA has raised.

"It's always our hope that the state addresses these issues at the state level and we don't have to get involved in a formal legal action against the source. That was the congressional intent in establishing the Clean Air Act. But at the same time we have an oversight role, and we do carry that out," said James.

LETTERS TO THE EDITOR

Alaska Pulp

Dear Editor: I am writing this letter concerning the class action suit filed against Alaska Pulp Corporation of Sitka, Alaska.

In the Sitka Sentinel, March 2, 1992, it states that "some Sitka residents have filed a class-action suit against Alaska Pulp Corp., claiming the mill recklessly polluted the community, damaging the quality of life of waterfront property owners." It further states that "it seeks an undetermined amount of damages on behalf of environmental activist Larry Edwards and about 150 owners of waterfront property they claim is affected by mill pollution."

I have lived in Sitka for 46 years, having moved here when I was 22-years-old. I also live on waterfront property.

This past year I have enjoyed a weekly bridge session with several of my longtime friends, among them two close friends, who live on the beach close to the mill. We have observed pods of whales for months at a time in the area, as well as seals and sea lions. Seals have come in large groups and can be counted in the hundreds. In fact many of us have remarked that we have not seen as much wildlife in years as we have seen this year.

I have lived in Sitka before and after the pulp mill was built. I, and many others, can say the town is better now. Concerning the air, it is a well-known fact here that the smoke coming from wood stoves, particularly in the hospital, school and Swan Lake District, can be seen and smelled for miles. The pulp mill should not be blamed for all the air pollution. In this same newspaper article it is stated that "mill officials have spent nearly $100 million on pollution control since 1968 and report operating expenses of the equipment total $12 million a year." Nothing as far as I know has been spent on cleaning up the wood smoke problem.

One of my late husband's favorite places to fish, before and after the pulp mill, was Long Island. After his death our family set up a James Reeder Long Island Memorial Scholarship Fund at Sheldon Jackson College to be used for a student majoring in fisheries.

I think we should support the pulp mill and its endeavors to fun a clean, efficient plant. I also believe the "150 owners of waterfront property" should put their name where the public can know who they are. To date I can find only one.

Eileen G. Reeder, Sitka

LETTERS TO THE EDITOR

Supports APC

Dear Editor: I am concerned about the class-action suit filed against Alaska Pulp Corp. of Sitka.

What a beautiful country we live in! Wooded islands and streams emptying into Silver Bay. There is a small stream about 500 feet from my home and on these waters beautiful wild ducks come to gather in flocks for their journey both north and south; sometimes for a prolonged stay.

Yes, I have lived on the beach at Thimbleberry Bay, a beautiful natural harbor, since 1965. I prefer this location above any other that I know of. This property was purchased previous to the start-up of the mill and has not changed. We have seals, whales and porpoises in our waters and what a pleasure it is for me to watch them frolic and invite the boat people to a race!

There is also a fish hatchery just a mile or so farther up the bay from the Alaska Pulp mill. On the hills above the mill there are beautiful trees, and lakes where fishermen enjoy catching fish. A very interesting hike for these fishermen.

I am one of the "Older People," 90 years of age, who has in the past years enjoyed both the hiking to the above lakes and fishing on our boat, Tierrah, in the area across the bay from our home and all along the Eastern Channel.

Now I enjoy a walk every day, weather permitting, up my road to the mail box. It is a good quarter mile hike uphill, among beautiful trees, and in clear, invigorating air. It is unbelievable the height and beauty of the trees that I have enjoyed since I have lived here these 27 years.

Since the mill has come to Sitka the town has grown from 3,500 to 8,700 people; new streets and many beautiful homes have been built. There are new stores that offer everything from food to clothing, furniture, fuel oil and most necessities of life. Also appearing is tourism, an airport for the large planes, and a bridge connecting Mt. Edgecumbe to Sitka.

Many boats are owned here from big seiners, trollers, pleasure crafts down to canoes, rowboats, kayaks, and dingies and many of the owners I have heard say they enjoy the Sitka area as one of their favorite places. This is a beautiful, scenic, clean air, wild and natural town to live in and I want it to stay as it is, with the Alaska Pulp mill here, as they make it possible for all to have a better quality of life.

Harriet Stein, Sitka

LETTERS TO THE EDITOR

Supports APC

Dear Editor: Since I have lived and enjoyed my beach property on Thimbleberry Bay since 1948, I would like to evidence my disbelief that anyone could consider their property polluted by Alaska Pulp Corp. as Larry Edwards' class action suit indicates.

My three sons, all their friends, and now their children, as well as numerous visitors from out of town, over the years have enjoyed this property for swimming, fishing, boating and just enjoying the beauty and clear air. My sons and grandchildren are healthy.

In the early years of Alaska Lumber and Pulp Corp. there was enough pollution to cause less marine plant-life on the beach. Since the mill has put in their treatment plants, an area taking up nearly as much land as the mill itself, all marine life is now prevalant. I believe the liquor they are now releasing is benefiting the marine life. This is evidenced by Silver Bay teeming with whales, porpoises, seals, otter, etc.

For my hobby business in seaweed and shells, I know most of the beaches around Sitka. At Herring Cove shoreline, a bay adjacent to the mill, I get some of my finest and best seaweed.

I would like to ask Larry Edwards, and other people so critical of our Sitka mill, why they settled and bought homes in this area? They purchased their property after the mill was established and there has been nothing but improvements since then.

I agree with Eileen Reeder's letter that the 150 owners of waterfront property "should put their name where the public can know who they are." I have called many waterfront property owners and fail to find any of the 150 who wish to sue the mill. Who are they?

We wish people would not harass us in our beautiful area and allow us to have the quality of life we now have.

Mary Richards Sarvela, Sitka

LETTERS TO THE EDITOR

Supports APC

Dear Editor: This letter concerns the class action suit filed against Alaska Pulp Corp. of Sitka.

The Sitka Sentinel March 2 article states "Some Sitka residents have filed a class-action suit against Alaska Pulp Corp., claiming the mill recklessly polluted the community, damaging the quality of life of waterfront property owners" and that it seeks "an undetermined amount of damages on behalf of environmental activist Larry Edwards and about 150 owners of waterfront property they claim is affected by mill pollution."

I have lived on waterfront property close to the mill for 34 years and have enjoyed every minute of it! Being right on the water has given my family and me many hours of pleasure watching the whales, seals, otter, birds and deer and once in awhile a Canadian goose drops by for lunch on our lawn. We feel fortunate to live so close to so much wildlife.

Prior to this time we lived in Washington for 16 years near Mt. Rainier where we enjoyed an abundance of wildlife and clean air. However, driving in the Tacoma area you can experience what polluted air is really like. I have not experienced any air and water pollution of any great magnitude in Sitka, like some people like to have you believe.

My family and I and friends have spent many enjoyable hours here on the bay, swimming, water skiing, boating and picnicking. When friends and relatives come up to visit from the Lower 48 usually their first words are how clean the air is and what wonderful water we have. APC has bent over backwards to keep it that way. They are always willing to help our community in many activities that helps the youth and Sitka citizens. It has never been their intention to pollute.

I resent the implications that are being given about this being a place with "dirty water and dirty air." I believe the quality of life much improved for the people of Sitka since APC came to town and that we should do all what we can to support them in their efforts to maintain and run a clean, efficient plant.

Who are these 150 waterfront people? I also do not know who they are.

This will always be "home," and where I intend to spend the rest of my life.

Verle Kramer, Sitka

LETTERS TO THE EDITOR

More APC Support

Dear Editor: It was with sadness and mixed emotions when I read in the Ketchikan Daily News about another effort by the preservationists to force the Alaska Pulp Corp. to close their doors.

These people will stop at no end to not only close the life blood of Sitka, but eventually the fisheries and any other development.

Where is the silent majority? It is past time to stand up for your future. We in Ketchikan, a short time ago, were forced to have an advisory election (in regard to the U.S. Navy acoustic submarine testing facility). We, the silent majority, mobilized and more than proved the "antis" wrong.

In looking at these same people, it is readily evident that their only interest is to stop any development, whether it be the Tongass National Forest, Glacier Bay, sport fishing, etc.

I can remember when, in 1956, Sitka was just a small fishing village, in conjunction with some assistance from the government at Japonski Island. Look at Sitka today. Sure tourism is great and hopefully fishing will continue to be good, but face it, who can survive on a few months' employment?

Look what Alaska Pulp Corp. has done for the people of Sitka, let alone Sitka itself.

That bale of pulp that Alaska Pulp Corp. produces provides many dollars, not only in direct payroll wages for the employees, but taxes (to operate the City of Sitka, schools, etc.) and those of us employed on the fringes such as, but not limited to, longshoremen, tug boat operators, marine pilots, government officials, customs, immigrations, U.S. Coast Guard; Forest Service employees, loggers, teachers, etc. Then take a look at the domino effort of each dollar paid out in wages, and calculates where they go. Such as the grocery clerks, gas station auendants, clothing and hardware store personnel, city and borough employees.

I own several hundred feet of waterfront property in Sitka — will someone show me the so-called pollution?

I was born and raised in Everett, Wash., where there were four pulp mills — the smelly kind — but these mills meant a prosperous community. I believe there is now one mill, the others are closed, along with a lot of unemployment. These closures were the result of declining market conditions and fortunately there are other jobs available in that area, but not in Sitka. If and when the mill locks the door, where is the future of the mill employees and yours? Who is going to buy your homes? Where do you go for employment?

It is time for the often silent majority affected by the environmentalist actions to speak out.

Cliff R. Taro, Ketchikan

LETTERS TO THE EDITOR

Supports APC

Dear Editor: Some months ago, I don't recall when (time flies when ...), I was driving out Sawmill Creek Road along Silver Bay on one of those rare, clear, sunny days that are so beautiful it takes your breath away.

I was on my way to the Alaska Pulp Corp. mill, a customer where for the last 12 years or so I have called at the cafeteria every Tuesday at about 1:30 p.m. As I rounded the last turn to where I could see the mill I was struck by how much it had changed since I was employed there in the late '60s. The buildings were painted and in good repair, the grounds were neat and clean and, most of all, there was little, if any, odor. The old pall of smoke and fumes that used to hang over the mill were gone except for a few plumes of steam over a couple of buildings and the main stacks. My thoughts at the time were that the mill management should be congratulated on the great clean up job they were doing.

So you can imagine my surprise when, as I went into the cafeteria, I was told about some idiots who had chained themselves to the barge dock ramp in protest of something. My comment at that time, was, "drop the ramp and let's see how far they can swim in their chains."

I live on Morne Island just west of the entrance to Silver Bay. I have commuted daily, rain or shine/snow or blow since 1969. I know whereof I speak when I say there have been major improvements in air and water quality. I see the changes daily. I can't remember when I last noticed any odor from the mill. The water, which on occasion was stained by red liquor, is now clear and clean. The number of logs floating around is greatly reduced to the loss of the firewood cutters. Fishing is the best I have seen since I moved there and there are more whales, sea lions, mink, otter and other wildlife than ever.

Now, I suppose you could argue that the mill would not have spent the money to clean up without community pressure. By the same token, everyone in our community is dragged kicking and screaming into civilized behavior by that same pressure. So imagine yourself walking down the street in your Sunday best. Perhaps you had just taken a bath and found an old pair of long underwear you had thought you had lost. You're pretty proud of yourself, feeling good and looking for a little recognition. Instead, some "Mrs. Olsen" type (remember those ridiculous TV commercials) tells you that you have ring-around- the-collar. I think you would tell Mrs. Olsen (or Larry-the-lip) to go pound sand.

I hope everyone understands the point I am trying to make. But for the brain dead my point is: 1) let's give credit where and when it is due, 2) let's stop the confrontation-style politics that only enriches some lawyer, and 3) let's try to find a forum, other than the court, to resolve the issue; if there is one.

I don't understand Larry's agenda. I would like to think he means well but I suspect his motives. He owns a lot on Galanken Island where he has built a tarpaper shack that is black and ugly. I would hope it is not representative of the condition of soul. I have to look at it every day and consider it visual pollution. Perhaps I could find 150 anonymous individuals to enter a class action suit to require him to either paint it or remove it.

Tom Preuss, Sitka

Sitka Assembly to Face Decision On APC Suit

3/31/92

By WILL SWAGEL
Sentinel Staff Writer

The City and Borough of Sitka, along with state and federal agencies, will probably have to decide at some point whether they want to participate in the class action suit lodged by a Sitka resident against Alaska Pulp Corp., City Attorney Theron Cole told City and Borough Assembly members at a work session Monday.

The suit by Larry Edwards alleges that waterfront property owners are adversely affected by the APC mill's discharges into Silver Bay.

City officials noted that most of the waterfront in the area mentioned by the suit is owned by the city, state and local governments.

Cole told the Assembly the city probably would be given the chance to "opt out" of the suit, which seeks compensatory and punitive damages that plaintiff attorneys say could amount to millions of dollars. The suit was filed February in Superior Court in Juneau.

Edwards is the only plaintiff so far, but his complaint states that another 150 owners of shoreline property also may be considered members of the affected class.

Assembly members said they probably would wish to go for the opt out provision, but Assembly member Pete Hallgren noted that various governments' large holdings might put them in a position to control the lawsuit.

Hallgren, who owns and lives on Brest Island near Galankin Island, said he probably would opt out as an individual. Mayor Dan Keck said he believed the city would not want to participate in a suit against the mill.

Cole stressed that it was yet very early in the suit and the city should wait for correspondence from the court that the identification of class members is under way.

Cole was asked to talk to federal and state officials to gauge their intentions.

He was also asked, after a question from a reporter, to research conflict of interest questions for Assembly members who own waterfront property, as do Hallgren and Assembly member Frank Richards.

Assembly member Dan Hackett, an APC engineer, said he would not vote on the matter since he works for the mill, but he would participate in at least some of the discussions.

Environmental activist Nancy Hope said Assembly members should not opt out of the suit without considering the views of people who might support the legal action. She said, for instance, money gained from the suit could be used to mitigate pollution.

Keck said the public would have a chance to testify at hearings when the issue comes up for a decision and that the Assembly would listen to all opinions.

"That's one of the miserable jobs you get when you're elected," Keck joked.

LETTERS TO THE EDITOR

Supports APC

Dear Editor: This is my first letter to the editor in the 46 years I have lived in Sitka, but I feel compelled to write concerning the class-action suit against Alaska Pulp Corporation. I believe I am one of the silent majority and think it is time to speak out. I have lived, worked and retired here in this beautiful town and am a waterfront property owner.

The comments that I have heard about Sitka is that it is "a beautiful place and they want to keep it that way." This is true. However, it was not as beautiful before the APC came to town. I lived here before and after APC. At the time I came to town there was a mill right in the heart of the city, the Columbia Lumber Company. This mill belched smoke and ashes all day long in downtown Sitka on Lincoln Street. The sewer ran directly into Crescent Harbor from the homes along Lincoln Street and the smell was potent. We had mostly dirt roads that were filled with mud most of the time. Any car would rust out in a few years. At this time our meat came in frozen. The fruits and vegetables arrived about once a month and were not in very good shape on arrival. When we had a heavy rain the water would be brown. The only way to Mt. Edgecumbe was by ferry boat. We had few paved streets. There were two narrow dirt roads to Old Sitka and the site of the present APC. We had few harbor regulations. Dogs ran loose in packs and made a mess of the storefronts. We had no undertaker.

Then APC came to town. Things changed!

One of the first things APC did was purchase a good portion of the Lakeview property and proceed to build homes for the incoming employees. They built the mill 10 miles south of town, away from the population. The building of the mill enabled many of the fishermen here out of work in the wintertime to have jobs. New people came to town, businesses expanded, new schools were built and with the additional tax revenues the city was able to improve the schools, the police department, the fire department, sidewalks and paved roads. Two hospitals have been built as well as several churches. We have a bridge to Mt. Edgecumbe and an airport. Our water and electricity vastly improved. The city was able to secure more funding from federal and state to build a highway leading to the mill and one to Old Sitka. The mill downtown disappeared and in its place we now have the Centennial Building and park along the harbor. An undertaker also came to town!

I believe that the changes that have been made since APC came to Sitka have all been for the good and that we should do all that we can to help them stay in business. The bottom line is Sitka needs a good economic base in order to sustain our present quality of life.

Inez E. Snowden, Sitka

Mill Support

Dear Editor: As a waterfront resident and landowner, I wish to state that I agree with the comments made over the past couple of weeks by various waterfront owners. I have lived in Jamestown Bay for over 27 years and do not agree with the lawsuit filed by Mr. Larry Edwards and 150 concerned waterfront residents against the Alaska Pulp Corporation.

It was a lot of fun this past fall and winter to watch the whales as they went back and forth into Silver Bay, to watch the salmon jumping in front of our house and to see the eagles in the trees.

I feel that Alaska Pulp has done an outstanding job of pollution control and applaud the work that they continue to do.

Roger D. Higley, Sitka

4 Sitka Sentinel 4-3-92

Supports APC

Dear Editor: This is in regard to the class-action suit brought on by Mr. Larry Edwards against the Alaska Pulp Corporation, and it is also my first letter to the editor. The various letters in your paper voice concern that this drastic action creates the false impression that the quality of life in Sitka has been degraded and property values lowered. According to Mr. Edwards' statement, "150 waterfront property owners have suffered this damage."

I agree with the letter writers' concerns that the statements of Mr. Edwards are in error. I have lived on Jamestown Bay for 47 years and still enjoy the scenery and the ducks and herons feeding along the shore. Also the otters regular visits and seals and sea lion accompanying the spring herring ritual. As to the water, it looks clean to me as does the beach. As to smell, I haven't detected any odor other than occasional wood stove smoke in years.

I have a further greater concern and that is the economic health of Sitka. I have just returned from visiting 17 towns in Alaska. During January and February, as state president of the Pioneers of Alaska, and with no offense to the gracious residents of the other towns, I am so proud and happy to return to Sitka with its beautiful setting — the healthy downtown business district, with its well-kept buildings, landscaping and economy.

Economy: this, to me, brings up my real reason of concern of the suit against the pulp mill and that it is a thinly disguised effort to close the mill. The recent Tongass bill was meant to do just that; by starving the mill for logs. Now the apparent strategy is to sue the mill to death.

I know there are people in Sitka who don't like the mill, for one reason or another, and that is their privilege, but I would like to remind all of our most recent citizens that the year before the mill went on the tax roll, the millage rate was 16 mills on our property taxes. However, with the added 55 million value of the mill on the books, the millage dropped to 5 mills. If the mill is closed and its value is deleted from the tax rolls, it is reasonable to assume our taxes would at least triple, possibly more from the domino effect of failed businesses and defaulted mortgages.

I ask, is the pulp mill so bad that we must risk such an economic disaster?

Joe Ashby, Sitka

4/8/92

SITKA SENTINEL

Supports APC

Dear Editor: Beautiful, beautiful Sitka! What a joy it is to return from time to time to see all the great progress Sitka continues to make.

Having read the negative reporting recently in the Anchorage Times I can't believe they were reporting the Sitka I have known for almost 50 years.

I first saw Sitka when it was a small fishing village; the military had pulled out and the town was not too prosperous. We were excited when the Bureau of Indian Affairs school moved to Mt. Edge umbe in February 1947. These few new jobs meant more financial stability to Sitka.

I recall the concerted effort of the Chamber of Commerce and the "city fathers" to secure the pulp mill, as well as the airport.

I saw this small fishing village become a progressive community.

My husband owned property in Sitka long before I appeared on the scene, and we still own some property on Halibut Point Road where we have a fantastic view of the ocean and the many islands.

I recall reading one article in the Anchorage Times concerning the contamination and pollution at the Verstovia School. Our property is very near the school, and the only pollution I have detected has been the smell of wood burning — the latest was on April 5, 1992. On that day I could see for miles in every direction of breathtaking pristine beauty.

There was air and water pollution when the mill first went into production. They certainly have made great strides in solving those problems.

Just to mention some of the benefits I have seen due to the mill's operation are, but not limited to:

1. City office expanded from a cubby-hole in the Lutheran Church building with only a handful of employees to its expanded size with numerous employees.
2. An extended paved road system with sidewalks.
3. Hundreds of new homes. Their tax valuation adds to the city's financial base. Sitka now enjoys a very good bond rating.
4. There were only a few cars, a couple of taxis, and the transfer trucks — used to deliver groceries and caskets to the cemetery.
5. Dr. Charteris and Dr. Hodgins (dentist) were the medical staff. Babies were born in the old Salvation Army Home.
6. The Sitka Sentinel was a half-page weekly. The owner- publisher-reporter and his wife rode their bikes to work.

If the pulp mill is forced to close and Sitka reverts to the small fishing village of the past, how many of those who have moved there since the construction of the mill and who oppose it will remain and shoulder the higher taxes to support Sitka? If they think there is pollution here, they should move to Anchorage.

I wonder how many days, if any, the pollution level exceeds the U.S. standards.

Citizens of Sitka, wake up! Think and act! — Don't let outsiders and the Cheechakos control your destiny.

Helen L. Dolenc, Palmer

Sitka Daily Sentinel
March 2, 1992

Class Action Suit Filed Against APC

By Sentinel Staff and the Associated Press

Some Sitka residents have filed a class-action suit against Alaska Pulp Corp., claiming the mill recklessly polluted the community, damaging the quality of life of waterfront property owners.

The suit was filed Friday in Juneau Superior Court by four law firms — two from Alaska, one from Washington, D.C., and another from Vermont.

It seeks an undetermined amount of damages on behalf of environmental activist Larry Edwards and about 150 owners of waterfront property they claim is affected by mill pollution.

"As of this date, other than collecting fines from APC, no remedial action has been undertaken by state or federal regulators," Washington, D.C., lawyer Terrance Reed was quoted by the Associated Press.

"The regulatory inaction in the face of pollution of this magnitude and persistence is certainly why some members of the community feel frustrated," Reed said.

The suit not only seeks money but also demands the mill change its way of handling pollution. It asks that Alaska Pulp be ordered to install a water recycling system so its more than 40 million gallons of daily industrial waste water does not end up in Sitka's Silver Bay. The mill operates primary and secondary treatment of its waste water.

The plaintiffs did not make any prior announcement of their suit in Sitka, and first word of it was made over the weekend in The Anchorage Times, a daily newspaper that is a subsidiary of an oilfield service firm, and which has been outspokenly critical of the Sitka pulp mill.

Alaska Pulp spokesman Rollo Pool said he and other mill officials are confused by the timing of the suit — when the company's pollution controls are the best they have ever been and the amount of pollution the least.

"It seems to us that the timing doesn't seem to jibe as to what's happening in our environment," he told the Sentinel today.

Regulators have fined the company more than $1.3 million since 1986, the Associated Press said.

Mill officials have spent nearly $100 million on pollution control since 1968 and report operating expenses of the equipment totaling $12 million a year.

Pool said today the company had not received a copy of the suit and could not yet comment on any particulars.

The Associated Press said Sitka lawyer James McGowan, who also represents the plaintiffs, said he has been approached for years by people who wanted to find some way to stop the mill from polluting the community.

"It's impossible to live in this town and not notice the dirty water and dirty air," he was quoted. McGowan was out of town and not available for comment to the Sentinel today. Edwards was also unavailable for comment to the Sentinel.

Reed is doing most of the scentific work for the lawsuit, said Pete Ehrhardt, a former Sitka attorney now practicing in Soldotna and the second Alaska attorney on the case, with McGowan. Ehrhardt said his firm recently won a $50 million settlement in the 1987 Cook Inlet oil spill and presently represents a "substantial" number of litigants in the 1989 Exxon spill in Prince William Sound. The Vermont attorney, Pete Langrock, has particular expertise in suing other pulp mills, said Ehrhardt.

Ehrhardt said he did not expect the case to come to trial for at least a year.

Greg Kellogg, regional chief of water compliance for the U.S. Environmental Protection Agency, and Ron Flinn, acting supervisor of the Southeast Regional Office of the Alaska Department of Environmental Conservation, said they had not seen the suit.

"Until I see this thing I shouldn't even say a word," Kellogg said. "We'd be anxious to see it."

The suit has been planned for more than a year, Edwards was quoted by the Associated Press. Edwards, one of the mill's most outspoken critics, said he agreed to represent the class — waterfront property owners — to prevent others from facing the financial liability if the suit fails.

Alaska law allows the defendant to recover legal fees from the plaintiff of a failed class-action suit.

"I realize that I'm at risk," Edwards said. "The other class members would not be. I feel the case is exceptionally strong, and I feel it's something that should be done."

March 26, 1992

Mr. Thad Poulson
Editor - Daily Sitka Sentinel
112 Barracks St.
Sitka, Alaska 99835

Dear Mr. Poulson,

As a waterfront resident and landowner, I wish to state that I agree with the comments made over the past couple of weeks by various waterfront owners. I have lived in Jamestown Bay for over 27 years and do not agree with the lawsuit filed by Mr. Edwards and 150 concerned waterfront residences against the Alaska Pulp Corporation.

It was a lot of fun this past fall and winter to watch the whales as they went back and forth into Silver Bay, to watch the salmon jumping in front of our house and to see the Eagles in the trees.

I feel that Alaska Pulp has done an outstanding job of pollution control and applaud the work that they continue to do.

Sincerly yours,

Roger D. Higley
P. O. Box 1082
Sitka, Alaska 99835

copy to: Frank Roppel
Alaska Pulp Corporation

April 7, 1993

514 Halibut Pt. Rd.
Sitka, AK 99835

Alaska Pulp Corporation
4600 Sawmill Creek Road
Sitka, AK 99835

Dear Sirs:

Thank you for sponsoring the listing of churches in our local newspaper each Friday. This is a very generous thing for you to do. We appreicate your concern for our community and its churches.

Please know that we, here at First Baptist Church, pray for the pulp mill and its success on a regular basis. We are fully aware of the impact our community would suffer if the mill were ever closed. We are praying that we will never see the lay-offs, unemployment, closing of businesses dependent on pulp mill employed customers, and the decrease of the larger Sitka tax base. We are praying that petty environmentalists will stop harassing you with never-ending, unnecessary lawsuits and appeals. You shouldn't have to spend so much money defending yourself against groundless charges.

If there is ever anything more we can do to help you, please let me know. Thank you again for the church listing in the newspaper.

Sincerely,

Timothy E. Miller

Timothy E. Miller
Pastor
First Baptist Church

Testimony for Senate Bill 178
House Finance

Feb. 14, 1994

Rep. Eileen MacLean & Finance Committee:

I am sick and tired of listening to environmentalists and liberal legislators whine that the world is coming to an end and that business needs more restrictive legislation. Grow up and pass this bill. I support SB 178.

Russell WRIGHT

Russell Wright

2603 Sawmill Creek Rd.
Sitka, AK 99835

Testimony for Senate Bill 178
House Finance Committee

Feb. 14, 1994

Rep. Eileen Maclean:

This is a good bill for Alaska. In this day of declining oil revenue, we need to support other reasonable resource development. We need to ensure our companies and municipalities that if they are operating within the limits of their permits that they will be free from harassment by frivolous lawsuits. Alaska needs more legislation that supports business and sound, reasonable development.

Please distribute my comments to the committee.

Respectfully,

Richard M Ray

Richard M Ray
909 Seward St. #3
Sitka, Alaska
99835

Testimony for Senate Bill 178
House Finance Committee

Feb. 14, 1994

Rep. Eileen Maclean:

This is a good bill for Alaska. In this day of declining oil revenue, we need to support other reasonable resource development. We need to ensure our companies and municipalities that if they are operating within the limits of their permits that they will be free from harassment by frivolous lawsuits. Alaska needs more legislation that supports business and sound, reasonable development.

Please distribute my comments to the committee.

Respectfully,

Richard M Ray

Richard M Ray
909 Seward St. #3
Sitka, Alaska
99835

Testimony for SB 178
House Finance Committee

Feb. 14, 1994

Rep. Eileen Maclean:

This bill (SB 178) is pro-commerce, pro-jobs, pro-community. I like it and support it.

Truly,

PAT OETKEN
PO Box 2276
SITKA, AK 99835

Testimony for Senate Bill 178

Nuisance Bill
House Finance Committee

Feb. 15, 1994

Rep. Eileen MacLean, Ron Larson & Finance Committee:

I support SB 178. Please pass it.

Truly,

ED MILLER
Box 2933
Sitka, AK 99835

Testimony for Senate Bill 178
House Finance Committee

2/14/94

Rep. Eileen MacLean:

This bill has been labeled bad because it helps Alaska industries. If it does, this is much needed support. Our industries are being legislated to death. I strongly support SB 178.

This bill will benefit any permit holder. Therefore, it will help many small businesses survive or get started, as well as being helpful to fish processors, pulp mills, aquaculture farms, oil and gas businesses, miners, and even cities that operate under air and water permits.

Sincerely,

Norman J. Richards
204 Blueberry Lane
Sitka, AK 99835

Please distribute my comments to the committee.

Testimony for Senate Bill 178
House Finance

Feb. 14, 1994

Rep. Eileen MacLean & Finance Committee:

I am sick and tired of listening to environmentalists and some legislators whine that the world is coming to an end and that business needs more restrictive legislation. Pass this bill. I support SB 178.

Don Best

Don Best
2221 HPR
Sitka, Ak 99835

Testimony for Senate Bill 178

Nuisance Bill
House Finance Committee

Feb. 15, 1994

Rep. Eileen MacLean, Ron Larson & Finance Committee:

I support SB 178. Please pass it.

No changes. No amendments. No delays.

Arnold Johnson

Truly,

Arnold Johnson

Box 1131
Sitka, Ak. 99835

Testimony for Senate Bill 178
House Finance Committee

2/14/94

Rep. Eileen MacLean:

This has been labeled as a b.." that helps the pulp mills. If it does, so what? Both our pulp mills have been legislated to death. I support SB 178. If you look at the bill, you will see that it does more than support our mills. It is good for fish processors, aquaculture, oil and gas, mining, even cities that operate under permits.

Arthur A. Hackett
1815 Sawmill Creek Ct
Sitka, AK 99835
(907) 747-5657

ARTHUR D. HACKETT

Testimony for Senate Bill 178
House Finance

February 14, 1994

Finance Committee:

I am sick of hearing environmental extremists and way-out legislators crying that good things will come to Alaska if the legislature delivers more restrictive legislation. Who believes that? Industry in this state has its hands tied.

Pass this bill. I support SB 178.

Truly,

Marla Jones

MARTA Jones
P.O. Box 1638
Wrangell AK 99929

Seley
Corporation
P.O. Box 5380 ● Ketchikan, Alaska 99901

February 14, 1994

POSITION OF SUPPORT BY SELEY CORPORATION AND SEABORNE LUMBER COMPANY CONCERNING SB 178 RELATING TO CIVIL NUISANCE ACTIONS

I am Steve Seley, Jr., President of Seley Corporation and Seaborne Lumber Company. I own timber harvest and manufacture operations based in Ketchikan, Alaska. I support the passage of SB 178 dealing with civil nuisance lawsuits.

Like many other responsible businesses in Ketchikan, we make every effort to insure that we have applied for and have received all necessary permits to conduct our activities. Once granted, we operate within the guidelines of that permit. It is extremely important that SB 178 is passed to protect our business and all others who follow the same operating practice from civil nuisance lawsuits.

Without this legislation, the permitting process and compliance with the permit stipulations and applicable laws affords business little or no protection from frivolous actions taken by others willing to go to any extreme to limit or preclude timber harvest and manufacture activity.

Respectfully submitted,

Steve Seley, Jr.
President

ALASKA WOMEN IN TIMBER
111 STEDMAN ST.
KETCHIKAN, ALASKA 99901
907-225-6114

February 15, 1994

Testimony of Sandi Meske
in Support of SB 178

On behalf of Alaska Women in Timber I would like to go on record in support of the proposed House Finance Committee Substitute to SB 178.

Under current law, a person may bring a nuisance lawsuit if they simply feel their "personal enjoyment" of their property is lessened . This bill protects an individual or company from a nuisance lawsuit based on an air emission or water or solid waste discharge if they have a valid permit and are operating in accordance with the permit.

There are many stringent laws regulating air, water and solid waste discharges. If a company has gone through the lengthy process to obtain a permit and is following the rules of the permit, they should be allowed to operate without fear of continued lawsuit.

This bill makes sense.

I ask for swift passage of SB 178.

Thank you.

Sandra Meske

Testimony for Senate Bill 178

Nuisance Bill
House Finance

February 14, 1994

Rep. Eileen MacLean, Rep. Ron Larson & Finance Committee:

I support SB 178. Period.

Sincerely,

Carl R Alsup

Carl R. Alsup
Box 1789
Wrangell AK. 99929

Testimony for Senate Bill 178

Nuisance Bill
House Finance

February 14, 1994

Rep. Eileen MacLean, Rep. Ron Larson & Finance Committee:

I support SB 178. Period.

Sincerely,

Scott Buness
P.O. Box 2351
Wrangell, AK
99929

Testimony for Senate Bill 178

Nuisance Bill
House Finance

February 14, 1994

Rep. Eileen MacLean, Rep. Ron. Larson & Finance Committee:

I support SB 178. Period.

Sincerely,

Christopher Versteeg
Box 1877
Wrangell, AK. 99929

Testimony for Senate Bill 178

Nuisance Bill
House Finance

February 14, 1994

Rep. Eileen MacLean, Rep. Ron Larson & Finance Committee:

I support SB 178. Period.

Sincerely,

Shelley M. Versteeg
Box 1877
Wrangell, AK. 99929

Testimony for Senate Bill 178
House Finance Committee

2/14/94

Rep. Eileen MacLean:

This has been labeled bad because it is a bill that helps Alaska Industries. If it does, so what? Our industries have been legislated to death. I support SB 178.

If you look at the bill, you will see that it's good for fish processors, pulp mills, aquaculture, oil and gas, mining, even cities that operate under air and water permits.

Truly,

Please distribute my comments to the committee.

Jeni L. Olson

Jeni Olson
PO Bx 1254
Wrangell AK
99929

Testimony for Senate Bill 178
House Finance

February 14, 1994

Finance Committee:

I am sick of hearing environmental extremists and way-out legislators crying that good things will come to Alaska if the legislature delivers more restrictive legislation. Who believes that? Industry in this state has its hands tied.

Pass this bill. I support SB 178.

Truly, Robert Bashelier

Robert Bashelier
Box 1363
Wrangell, AK 99929

Testimony for Senate Bill 178
House Finance

Feb. 14, 1994

Representatives E. MacLean, Ron Larson:

Sitka has just lost 400 high-paying jobs because of excessive environmental regulation. These regulations have driven up the cost of doing business to the point that foreign competition has a big advantage over our companies. Our state government and federal government have done enough to hinder commerce in our state. We have done enough to lock up lands from development. We have to support commerce in Alaska. I support SB 178. Please pass it.

Respectfully,

Rodney D. Hamilton
P.O. Box 608
Wrangell, AK 99929

Testimony for Senate Bill 178

Nulsance Bill
House Finance

February 14, 1994

Rep. Eileen MacLean, Rep. Ron Larson & Finance Committee:

I support SB 178. Period.

Sincerely,

Ken Davidson Jr
P.O Box 156
Wilmar, AR
71675

Testimony for Senate Bill 178

Nuisance Bill
House Finance

February 14, 1994

Rep. Eileen MacLean, Rep. Ron Larson & Finance Committee:

I support SB 178. Period.

Sincerely,

David C. Olie
Box 1261
Wrangell, Ak. 99929

Testimony for Senate Bill 178
House Finance

Feb. 14, 1994

Rep.resentatives E. MacLean, Ron Larson:

Sitka has just lost 400 high-paying jobs because of excessive environmental regulation. These regulations have driven up the cost of doing business to the point that foreign competition has a big advantage over our companies. Our state government and federal government have done enough to hinder commerce in our state. We have done enough to lock up lands from development. We have to support commerce in Alaska. I support SB 178. Please pass it.

Respectfully,

Robert P Skymanski

Robert P Skymanski
PO Box 262
Wrangell AK 99929

Testimony for Senate Bill 178
House Finance

February 14, 1994

Finance Committee:

I am sick of hearing environmental extremists and way-out legislators crying that good things will come to Alaska if the legislature delivers more restrictive legislation. Who believes that? Industry in this state has its hands tied.

Pass this bill. I support SB 178.

Truly,

Jerry Haley
Box 1642
Wrangell Ak.
99929

Testimony for Senate Bill 178
House Finance

Feb. 14, 1994

Representatives E. MacLean, Ron Larson:

Sitka has just lost 400 high-paying jobs because of excessive environmental regulation. These regulations have driven up the cost of doing business to the point that foreign competition has a big advantage over our companies. Our state government and federal government have done enough to hinder commerce in our state. We have done enough to lock up lands from development. We have to support commerce in Alaska. I support SB 178. Please pass it.

Respectfully,

David E. Shilton

CAPE FOX
CORPORATION

February 14, 1994

To the House Finance Committee:

Cape Fox is the village corporation for Saxman on Revillagigedo Island. We are the largest property owner on the Island, and in the Ketchikan Gateway Borough. Our lands include many facilities related to our primary business, timber development. In many instances, our corporation lands are adjacent to other private property.

We support the proposed House Finance Committee Substitute to SB 178.

We are proud of our record of compliance with local, State and Federal law. We are conscientious about permits, notifications and compliance reports. In today's world it is a formidable task to be sure that all laws and regulations are observed. The passage of this law would assure us that we would not be in jeopardy of an allegation of "nuisance" in spite of our compliance with the law.

This bill makes sense to us. We urge passage.

Ernesta Ballard
Chief Executive Officer

P. O. Box 8558 • Ketchikan, Alaska 99901
Tel: (907) 225-5163 • Fax: (907) 225-3137

PENINSULA CLARION

ue 80 MONDAY, FEBRUARY 14, 1994 Soldotna/Kenai, Alaska 50 cents newsstands / 25

LETTERS TO THE EDITOR

Carlisle, Elias did good job as Board of Fish members

The character assassination perpetuated by Ben Ellis and Bob Penny on recent Board of Fisheries members Irv Carlisle and Tom Elias is the greatest tragedy surrounding the current debate on Kenai River sockeye allocations.

Claims by Mr. Ellis that his group only wants a fair hearing and not a "patsy" on the board don't ring true when one considers the long history of concern and involvement in sport fishery issues exhibited by Mr. Carlisle and Mr. Elias. Their commitment to maintaining our resources has been truly commendable.

It is ironic that Ben Ellis and Bob Penny both strongly supported Mr. Elias and Mr. Carlisle's nominations to the Board of Fisheries as sport fishermen. Their dissatisfaction appears to stem from the fact that neither Mr. Elias, nor Mr. Carlisle, acted as puppets when voting on fishing issues. They did not vote the way the commercial guides would have wanted, but rather cast their votes in the best interest of the resource.

Board members hear testimony from the Alaska Department of Fish and Game, Habitat Division and Natural Resources as well as public testimony. Their job is to make responsible decisions to ensure sustained yield based on the information presented. The board process is designed to operate in a non-political manner based on only the facts! Any credible board member will NOT be influenced by ANY special interest group and that includes commercial fishermen and commercial sport fishing guides.

I wish to express my appreciation for the excellent service Mr. Elias and Mr. Carlisle provided the Board of Fisheries, the true Alaskan sports fishermen and the resources of the state including the Kenai River sports fishery. I believe the true sports fishermen whose concern is maintaining the Kenai River fishery for tomorrow will agree. As these two gentlemen will no longer be serving on the Board of Fisheries I can only hope they will continue to advocate for the health of our resources. Thank you for a job well done.

Peggy Moore
Kasilof

TO- ALASKA HOUSE OF REP.
HOUSE RESOURCES COMMITTEE

OFFICIAL Testimony for Senate Bill 178
House Finance Committee

2/14/94

Rep. Eileen MacLean & Committee Members:

Pass SB 178 and get on to more weighty issues, like subsistence and Mental Health Lands.

DAN KECK
203 HARBOR DR.
SITKA, AK
99835

Prewitt Enterprises

SITKA TOURS • ISLAND BUS CO.

Box 1001
Sitka, Alaska
99835
Phone 747-8443
FAX 907-747-7610

February 15, 1994

Representative Eileen MacLean,
House Finance Sub Committee
Alaska State Legislature
State Capital (MS3100)
Juneau, Ak. 99801-1182

RE: OFFICAL TESTIMONY S.B. 178

Dear Representative MacLean:

Small businesses in Alaska face an ever burdensome load of regulation from all levels of government. For those of us that comply with regulation mandates, it becomes important that some protection is provided from frivolous and unnecessary claims against us. Passage of Senate Bill 178 will provide protection for all Alaska businesses and help protect our hard earned investments from again, unnecessary legal challenges.
I appreciate the Sub Committee's consideration, and request passage of S.B. 178.

Respectfully submitted,

John n. Litten

COMMUNICATIONS UNLIMITED, INC.

★★★★★ Five Star

MOBILE COMMUNICATIONS

P. O. Box 6598 • Ketchikan, AK 99901

FAXED TO: 465-2278

Date: February 15, 1994

To: House Finance Committee

From: Don Thornlow

Subject: POSITION OF SUPPORT FOR SB 178

Communications Unlimited, Inc. supports the passage of SB 178 , legislation that deals with civil nuisance lawsuits filed against legal and permitted activities. This legislation is important because of the need to protect responsible industries which have completed the lengthy and costly permitting process.

It is good public policy to limit the ability of third parties to file litigation against projects that are legal and have valid permits. Communications Unlimited, Inc. believes that as long as an entity is within the guidelines of the permit allowing its activity, it should be protected from nuisance litigation. Without this protection, the permitting process is little more than a bureaucratic hurdle before entering the legal arena.

Communications Unlimited, Inc. supports the passage of this important legislation. We believe it exhibits the fact that Alaskans believe in the compatibility of jobs and the environment without excessive government.

(907) 225-1950 • Fax: (907) 225-4169

CAMPBELL TOWING COMPANY

P.O. Box 170 • Wrangell, Alaska 99929
Telephone: (907) 874-3318 • FAX: (907) 874-3281

TESTIMONY FOR
SENATE BILL 178
House Finance Committee

February 15, 1994

Rep. Eileen MacLean, Ron Larson & Finance Committee:

As a businessperson, I support SB 178. Please pass it with no changes, no ammendments, no delays.

Respectfully,

L T Campbell

Cable Address
"Soustevo"

SOUTHEAST STEVEDORING CORPORATION

CONTRACTING STEVEDORES

P. O. BOX 8080

KETCHIKAN, ALASKA 99901

Telephone
907-225-6167

Fax
907-225-8254

Telex:
413818

FAX: 465-2278

2/15/94

TO: HOUSE FINANCE COMMITTEE

FROM: CLIFF R. TARO, PRESIDENT, SOUTHEAST STEVEDORING CORP
Cliff R. Taro
WRANGELL STEVEDORING INC.
NORTH PACIFIC MARITIME INC.
REVILLA TUG CO.
AMAK TOWING CO.
SOUTH TONGASS SERVICE
TARO LEASING
ALASKA BULK HANDLING INC.
VICE PRESIDENT, ALASKA LONGSHORE EMPLOYERS ASSN.
CHAIRMAN, CRUISE LINES AGENCIES OF ALASKA
OWNER, TEMSCO HELICOPTERS INC.

POSITION OF SUPPORT OF SB 178, RELATING TO CIVIL NUISANCE ACTIONS.

SOUTHEAST STEVEDORING CORP. HAS BEEN A RESPONSIBLE BUSINESS OPERATOR, IN ALASKA, FOR OVER 42 YEARS. WE HAVE DEVERSIFIED INTO OTHER OPERATIONS. WE EMPLOY UP TO 500 ALASKANS.

WE ARE GUIDED BY MANY RULES, REGULATIONS, LAWS ETC.

WE DO NOT FEEL IT IS PROPER FOR A THIRD PARTY TO BE ABLE TO FILE LITIGATION AGAINST PROJECTS WHICH ARE LEGAL AND HAVE THE NECESSARY PERMITS. IT IS DIFFICULT ENOUGH TO REMAIN IN BUSINESS WITHOUT SUCH CIVIL NUISANCE ACTIONS.

WE WILL APPRECIATE YOUR FULL SUPPORT OF SB 178

Testimony for Senate Bill 178

Feb. 15, 1994

[redacted]

My name is Nancy Davis and I am here representing the Sitka Chamber of Commerce in support of Senate Bill 178.

Our town has just lost 400 high-paying jobs from our largest employer because of unilateral actions by the federal government and because the cost of environmental regulations have made it difficult to compete in world markets. We do not know all the impacts from the pulp mill closure, but, as a town, we are trying to find new solutions and opportunities for all our industries: fishing, timber and tourism.

Our state government and federal government need to look at ways we can help Sitka and our industries keep jobs, because oil money and the money that trickles to local governments will not always be as plentiful. We also have done good job in this state to protect lands and to protect the environment. We do not need more restrictive legislation.

SB 178 will give companies and municipalities that operate under major permits a chance to plan for their futures without being sued for nuisances. The bill defines what a nuisance is and the legislation does not shield companies that exceed their permits.

It is now time to find legislation, like SB 178, that will be supportive of our industries and commerce in Alaska. I support SB 178 and urge passage of it.

Thank you,

Nancy Davis

NANCY DAVIS
PO Box 1033
Sitka AK 99835
747-8097 Home
747-3272 WORK

Alaska State Legislature

Please enter into the record my testimony to the [redacted] COMM. [redacted]
committee name

committee on SENATE BILL 178, dated 2/15/94.
bill/subject

I ASK THAT YOU DO EVERYTHING IN YOUR POWER TO DEFEAT THIS BILL (SB178). THIS BILL CONSTITUTES AN INFRINGEMENT ON THE RIGHTS OF ALASKA CITIZEN'S TO PROTECT THEMSELVES FROM HABITUAL POLLUTORS & ANY ERRANT REGULATORY AGENCY. THE ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION HAS A RECORD OF "BENDING OVER BACKWARDS" TO ACCOMODATE INDUSTRY IN ALASKA.

THE POWER OF CITIZEN OVERSIGHT IS NEEDED TO KEEP REGULATORY AGENCIES (WHO ARE OFTEN POLITICIZED & LOBBIED by INDUSTRY) IN LINE WITH THE COMMON GOOD.

AT THE VERY LEAST THE "RETROACTIVITY" CLAUSE (IN SECTION 3) MUST BE DELETED —— PAST ACTS COMMITTED WHEN THIS LAW WAS NOT EVEN YET CONCEIVED SHOULD NOT BE FORGIVEN AFTER THE FACT; THEY SHOULD BE RECTIFIED.

Signed: FLORIAN SEVER — Florian Sever
Testifier

SELF
Representing (Optional)

1706 EDGECUMBE DR., SITKA AK 99835
Address

747-8466
Phone No.

Alaska State Legislature

Please enter into the record my testimony to the [redacted] COMMITTEE
committee name

committee on S.B. 178 / NUISANCE LAWSUITS, dated 2/15/94.
bill/subject

I am of the opinion that S.B. 178 represents a practical alternative to the current legal quagmire surrounding the issue of legal action with regards to waste permits. In the past it has been common practice for anti-development groups to file suit against permittees as a legal means of interfering with their operations. This, despite the fact that the aforementioned permittees are operating well within their permit parameters, and despite the fact that the permits themselves have been subjected to public comment and involvement. I believe that this ability to counter-act the permiting process "after the fact" is a disservice to the State and a subversion of the democratic process. After all, if we are going to continue to allow this, then why have a permiting process at all? I am very much in favor of S.B. 178 and I think that the passage of it would benefit permittees, the State and the general public.

Signed: Christopher E. Skoog
Testifier

Self
Representing (Optional)

618 MONASTERY ST. SITKA, AK.
Address

Phone No.

Alaska State Legislature

Please enter into the record my testimony to the [redacted]
committee name

committee on SB 178 , dated FEB 16, 1994 .
bill/subject

1. I support SB 178's definition that a nuisance must be a "substantial and unreasonable interference with the use and enjoyment of property."
2. Nuisance lawsuits can generate millions of dollars of legal costs to businesses and municipalities.
3. It is good public policy to reduce frivolous nuisance lawsuits, Alaska industry is hampered by increasing state and federal regulations that are impending our ability to compete in foreign and domestic markets.
4. This Bill as presently drafted will not shield permit holders that exceed the limits of their permits. This Bill will not circumvent the public participation needed for major permits.
5. [illegible] for the record. [illegible] Board of the

Signed: Donald D. Hoobell
Testifier

– Personal
Representing (Optional)

1815 Sawmill Creek Rd., Sitka, AK 99835
Address

747-8697
Phone No.

PUBLIC OPINION MESSAGE

SB 178
February 15, 1994

I would like to convey to you that my husband Richard and I are very much in favor of SB 178.

Frivolous lawsuits should be never be allowed at the expense of the taxpayer, as in all legal proceedings. The plaintiff should pick up the tab when the party loses. All the rest of us have to, if we decide to sue.

Ellen Onstott
3224 Orion Cir
Anchorage AK 99517-1644

243-8103 (h)

Distributed at the request of Ellen Onstott by Senator Leman

Mr. C.J. Zane 274-9019

880 H St. #200A

Anchorage AK 99501

Date POM Sent	Constituency	Bill Number	Response	Subject
04/05/93	N	SB 178	SUPPORTS	

OUR FAMILY OF COMPANIES, HOLLAND AMERICA LINE, WESTMARK AND GRAY LINE OF ALASKA WHOLEHEARTEDLY SUPPORT THIS BILL. THE COST OF COMPLIANCE WITH THE VAST NUMBER OF LAWS AND REGULATIONS IS HIGH ENOUGH. ELIMINATION OF PURELY

'NUSIANCE' LAWSUITS IS LONG OVERDUE. C.J. ZANE, DIRECTOR FOR GOVERNMENT AND COMMUNITY RELATIONS

329-333 Katlian Street Sitka, Alaska 99835

SITKA SOUND SEAFOODS

Fax Message:

To: Senator Robin Taylor
From: Harold Thompson
Date: 4/13/93

Re: Senate Bill 178

Sitka Sound Seafoods is in favor or SB 178 and think it makes sense.

I hope you can support the bill. Thanks for your consideration.

Regards,

Harold Thompson
President

(907) 747-6662
TELEFAX (907) 747-6268
Telex 090-45-391 SSSEAFOOD SIKA
FRESH AND FROZEN SALMON, COD, BLACK COD, HALIBUT, ROCK FISH, CRAB, HERRING

Testimony-Senate Bill 178
House Finance Committee

Feb. 14, 1994

Rep. Eileen MacLean:

I support SB 178. Please pass it along to the Rules Committee.

Glenda Comstock
Glenda Comstock
P. O. Box 1472
Sitka, AK 99835

Testimony for Senate Bill 178
House Finance

Feb. 15, 1994

Rep. E. MacLean, R. Larson and Committee:

This bill supports commerce, jobs, communities. I like SB 178 and support it.

Karla Hubbell

KARLA HUBBELL
BOX 2715
SITKA, AK 99835

Testimony-SB 178
House Finance Committee

February 14, 1994

Rep. Eileen MacLean:

SB 178 is a must-pass bill. Do not remove the retroactivity clause. Pass it as it is.

Sincerely,

Caprice D. Scarano

Caprice D. Scarano
202 Lakeview Drive
Sitka, AK 99835

Testimony for SB 178
House Finance Committee

Feb. 14, 1994

Rep. Eileen MacLean:

SB 178 is pro-commerce, pro-jobs, pro-community. I like SB 178 and support it. Please pass it and sent it on its way.

Truly,

Ralph Shaub

Box 114
Sitka, Ak. 99835

Testimony for Senate Bill 178

Nuisance Bill
House Finance Committee

Feb. 15, 1994

Rep. Eileen MacLean, Ron Larson & Finance Committee:

I support SB 178. Please pass it.

Truly, Jon McGraw

P.O. Box 784
Sitka Ak.
Jon McGraw

Testimony for Senate Bill 178

Nuisance Bill
House Finance

February 14, 1994

Rep. Eileen MacLean, Rep. Ron Larson & Finance Committee:

I support SB 178. Period.

Sincerely,

GEORGE WOODBURY
Box 671
SITKA, AK 99835

Testimony for Senate Bill 178
Alaska State House Finance Committee

Feb. 14, 1994

Rep. Eileen MacLean, Rep. Ron Larson and Committee:

This bill is fine. I support SB 178.

Truly,

Warren Lee

Warren Lee
BOX 1712
SITKA, AK
99835

Testimony for Senate Bill 178
House Finance

Feb. 14, 1994

Rep. E. MacLean and Rep. R. Larson:

Sitka has just lost 400 high-paying jobs from its largest employer. Excesive regulations and government mandates have driven up the cost of doing business to the point that foreign competition has a big advantage over our companies

We have done enough to hinder commerce in our state. We have done enough to lock up and preserve lands from development. We have to support commerce in Alaska. I support SB 178. Please pass it.

Respectfully,

Kurt w. Korthals

KURT W. KORTHALS
P.O. Box 2494
SITKA, ALASKA 99835

TEL: 907-747-6048

Testimony for SB 178
House Finance

Please copy and distribute to other committee members

Feb. 24, 1994

Rep. Eileen MacLean, Committee Chair:

I like SB 178 and fully support it. It's good for our industries and for our cities. Don't listen to those that want Alaska to be off-limits to any reasonable development. We need our legislature to sponsor bills that support commerce and industry in our state and also that also protect the rights of others.

Signed, Milan Rucka

Milan Rucka
P.O Box 1255
Sitka, Alaska
99835

03/01/94 LEGISLATIVE TELECONFERENCE NETWORK SYSTEM LTN1150
14:31:57 PARTICIPANT LIST (ALL PARTICIPANTS) BY:SIT
TCN:40422 SCHEDULED FOR:03/01/94 13:30 TO 14:45 FOR:SIT
PUBLIC HEARING HOUSE FINANCE

LOCATION:SITKA

SB 178	MR.	VERN	CULP		TESTIFY
SB 178		ARTHUR D.	HACKETT		TESTIFY
SB 178		FLORIAN	SEVER		TESTIFY
SB 178		ROLLO	POOL	AK PULP CORP.	TESTIFY
SB 178		ROBERT	ELLIS		TESTIFY
SB 178	MR.	DON	MULLER		TESTIFY
SB 178	MS.	VALORIE	NELSON		TESTIFY
SB 178	MS.	ERNESTINE	GRIFFIN		TESTIFY
SB 178	MR.	MATT	DONOHOE		TESTIFY
SB 178	MR.	DENTON	PEARSON		TESTIFY

03/01/94 14:32:32 LEGISLATIVE TELECONFERENCE NETWORK SYSTEM LTN1120
MESSAGE FROM: LIOCKAT IN SITKA JNU

RE TCN: 40422 SCHEDULED FOR:03/01/94 13:30 TO 14:45
SPONSOR: HOUSE FINANCE PURPOSE: PUBLIC HEARING

MESSAGE TEXT: MR. PEARSON JUST ARRIVED TO TEST. SORRY