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

*ALASKA BAR

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 Representative 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

The Honorable Brian Porter
April 21, 1993
Page 2


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\LTR\SPORTER.LTR



April 26, 1993

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

Re: House CS for CS for Senate Bill 178(JUD)

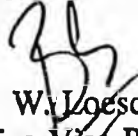
Dear Mr. Porter:

Attached is a proposed revised version of HCS CSSB 178(JUD). This proposed version incorporates several changes suggested by Sealaska Corporation after discussion with proponents of the legislation. The attached language represents a compromise and, while it addresses a number of concerns previously expressed by Sealaska Corporation, there may be other interested parties whose valid concerns have not been addressed.

Accordingly, Sealaska will withdraw its stated objections to the Bill if the attached version is considered and enacted.

Sincerely,

SEALASKA CORPORATION


Robert W. Loescher
Executive Vice President
Resource Management

RWL/bjw

Enclosure

[PROPOSED]

HOUSE CS FOR CS FOR SENATE BILL NO. 178(JUD)
IN THE LEGISLATURE OF THE STATE OF ALASKA
EIGHTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered: 4/22/93
Referred: Finance

Sponsor(s): SENATE JUDICIARY COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to civil nuisance actions."

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

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 AS 09.45.230 is repealed and reenacted to read:

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

7 (b) A person may not maintain an action under this section if the occupation,
8 structure, or act, associated with an air emission or water or solid waste discharge but

1 excluding the placement of nuclear waste, that is the subject of the action is expressly
2 authorized by and is not in violation of a term or condition of

3 (1) a statute or regulation;

4 (2) a license, permit, or order issued after public hearing by the state or
5 federal government, and subject to continuing compliance monitoring and periodic review
6 by the issuing agency, and subject to renewal on a periodic basis; or subject to AS 46.40.010
7 - 46.40.210;

8 (3) a court order or judgment.

9 Notwithstanding other provisions of law, except AS 09.50.170 - 09.50.240 and AS
10 19.25.080 - 19.25.180, a person may not bring a civil action to enjoin or abate a private
11 nuisance or to recover damages for a private nuisance unless the action is authorized by
12 subsection (a) or this subsection (b).

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

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

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

SEALASKA PROPOSED CHANGES

HOUSE CS FOR CS FOR SENATE BILL NO. 178(JUD)
IN THE LEGISLATURE OF THE STATE OF ALASKA
EIGHTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered: 4/22/93
Referred: Finance

Sponsor(s): SENATE JUDICIARY COMMITTEE

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6 action.

SB0178d

HCS CSSB 178(JUD)

New Text Underlined [DELETED TEXT BRACKETED]
SEALASKA CORPORATION BOLD UNDERLINED

1 (b) A person may not maintain an action under this section if the occupation,
2 structure, or act, [INCLUDING] associated with an air emission or water or solid waste
3 discharge but excluding the placement of nuclear waste, that is the subject of the action is
4 expressly authorized by and is not in violation of a term or condition of

5 (1) a statute or regulation;

6 (2) a license, permit, or order issued after public hearing by the state or
7 federal government, and subject to continuing compliance monitoring and periodic review
8 by the issuing agency, and subject to renewal on a periodic basis; or subject to AS 46.40.010
9 - 46.4[0.]210:

10 (3) a court order or [DECISION] judgment.

11 [(C)] Notwithstanding other provisions of law, except AS 09.50.170 - 09.50.240
12 and AS 19.25.080 - 19.25.180, a person may not bring a civil action to enjoin or abate a
13 private nuisance or to recover damages for a private nuisance unless the action is authorized
14 by subsection (a) or this subsection (b).

15 [(C) THE PROVISIONS OF (b) OF THIS SECTION DO NOT APPLY TO
16 ACTIONS REGARDING A NUISANCE IN AN AREA ZONED AS RESIDENTIAL BY
17 A CITY, BOROUGH, OR MUNICIPALITY REGARDING VIEW, ODCR, OR NOISE.

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

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

SB0178d

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2 the effective date of this Act, and to that extent this Act is retroactive under AS 01.10.090.

SB0178d

HCS CSSB 178(JUD)

New Text Underlined [DELETED TEXT BRACKETED]
SEALASKA CORPORATION BOLD UNDERLINED

April ²¹~~14~~, 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

quantity,
Am glad Mr. Clark
mentioned this regulation.
10/2

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 unfair. Municipalities who have an interest and profound commitment to their citizens and property welcome public involvement need to be protected from individuals & organizations who initiate frivolous lawsuits at great expense of time, energy & dollars to the city at no potential cost the litigant is not in the public interest.

Signed: Dixon Gray

Testifier City of Borough Seward

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 SB 178 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 with which this bill is being pushed through leads me to believe legislators may have an agenda that may not be in my best interests. 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: James E. Edl
 Testifier
 Self
 Representing (Optional)
P.O. Box 1673
 Address
747-5354
 Phone No.

Testimony

April 27, 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 adamantly opposed to this bill. Bureaucracs 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 US. Constitution and bill of rights. How do you feel about Pt. Hope? should it be ignored with no recourse? this issue is not reduced to nuclear or nuisance only it applys to all facets of our lives.

Signed: Cheryl Pritchard
Testifier
Self
Representing (Optional)
Box 6209
Address

Phone No.



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

I am adamantly opposed to this ^{bill} ~~action~~ 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} ~~look~~!

Signed: Valerie 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, dated 4-21-93
bill/subject

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

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 J. Calver
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 ~~the~~ 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 Kahoe

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 all 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 1092, Sitka

Address
747-6734

Phone No.

HOUSE COMMITTEE REPORT

(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:

be replaced with HCS CSSB 178 (JUD)

the same title
 a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal impact _____

fiscal note(s) _____

zero fiscal note _____

zero fiscal note(s) LAW (4-13-93)

SIGNING <u>DO</u> PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
_____		Jannelle Jones		✓	
_____	✓	_____		✓	
_____	✓	_____		✓	
_____		Kim Nordlund	✓		
_____		Cliff Danden (unconstal)	✓		
_____		(UNCONSTITUTIONAL)			

Brian D. Porter
 CHAIRMAN'S SIGNATURE

Rep. Brian Porter, Chairman

House Judiciary Committee

Date: April 21, 1993
Place: Capitol Room 120

Subject of Meeting: SB 173 Group Health Insurance for Small Employers; SB 178 Civil Nuisance Actions

Please Print Name	Representing	Business/Personal Mailing Address	Zip	(H) Phone	(W) Phone	Do you Want to Testify?	Which Subject/ Which Bill?
✓ Chip Thoma	Self	#2 Marine Way	99801			(Y) N	SB 178
✓ Jim Clark						(Y) N	SB 178
✓ Chuck Aehberg	Alliance for T. mca	3000 Winter Bluff	99801			(Y) N	SB 178
✓ Jamie Parsons	State Chamber	412 Second St. 201				(Y) N	SB 173 SB 178
✓ Steve Burrell	Alaska Miners Assn	501 W. Northern Lts Anch	99503		276-0347	(Y) N	SB 178
★ Gordon Evans	HIAA	318 4th St, Juneau	99801		586-3281	IF NECESSARY (Y) N	SB 173
✓ Walter Trout	self	One Sealaska Plaza, Ste 4455 (at 6th St) 301	99801	790-2001	586-2890	(Y) N	SB 178
★ Resa Terrel	NFIB	9159 Skywood	99801		789-4278	(Y) N	SB 173
★ Jay Frank	State Farm Allstate	431 N. Franklin St	99801		6-5777	(Y) N	SB 173
✓ Bob LESHER	SELF	Box 3 Pelican AK	99832	735-2276		(Y) N	SB 178
✓ Douglas Metz	self	319 Seward, Juneau	99801		6-4004	(Y) N	SB 178
✓ Al GROSS	Self	424 N. Franklin ^{Jiuk}	99801		6-1786	(Y) N	SB 178
✓ Vance Sanders	Self	" "			6-1786	Yes	SB 178 Page 1 of
✓ Paula Terrel	Thore Neighborhood Assn.	5025 Thore Rd Juneau AK 99801	99801		586-5451 465-2327	(Y)	SB 178

Rep. Brian Porter, Chairman

Date: April 21, 1993
Place: Capitol Room 120

Subject of Meeting: SB 173 Group Health Insurance for Small Employers; SB 178 Civil Nuisance Actions

House Judiciary Committee

Please Print Name	Representing	Business/Personal Mailing Address	Zip	(H) Phone	(W) Phone	Do you Want to Testify?	Which Subject/ Which Bill?
✓ LAURIE FERGUSON CRAIG	ALASKANS FOR JUNEA	PO BOX 22428 JUNO	99802	789-2768	463-5065	(Y) N	SB 178
✓ RICHARD HOFMANN	SELF	5025 THANE Rd LUNEA AK 99801	99801	586-3451	SELF	(Y) N	SB 178
✓ BOB ENGELBRECHT	TEMSON Helicopters	1650 Modena Way	99801	789-9901 407- 789-9901	789-9901	(Y) N	SB 178
✓ Russell GATH	ALASKA ENVIRONMENTAL LEAGUE	PO BOX 22151 LUNEA AK	99802	/	463-3366	(Y) N	SB 178
✓ Robert W. Loesch	Sealaska Corp	Sealaska Plaza Juneau AK			586 1512	(Y) N	SB 178
Pamela Brodie	Sierra Club	2611 E. 5th Ave. #205 Anchorage AK	99501		276-4048	(Y) N	SB 178
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	

04/21/93
13:32:38

LEGISLATIVE TELECONFERENCE NETWORK SYSTEM
PARTICIPANT LIST (ALL PARTICIPANTS)
TCN:30549 SCHEDULED FOR:04/21/93 13:00 TO 15:00
PUBLIC HEARING HOUSE JUDICIARY

LTN1150
BY:KOD
FOR:KOD

LOCATION:KODIAK
SB 178

MS. MARY

FORBES ✓

TESTIFY

04/21/93
13:08:57

LEGISLATIVE TELECONFERENCE NETWORK SYSTEM
PARTICIPANT LIST (ALL PARTICIPANTS)
TCN:30549 SCHEDULED FOR:04/21/93 13:00 TO 15:00
PUBLIC HEARING HOUSE JUDICIARY

LTN1150
BY:ANC
FOR:ANC

LOCATION:ANCHORAGE
SB 178

RICHARD

FOLEY

(WAS APPOINTMENT AT 2:15)

TESTIFY

04/21/93
13:53:00

LEGISLATIVE TELECONFERENCE NETWORK SYSTEM
PARTICIPANT LIST (ALL PARTICIPANTS)
TCN:30549 SCHEDULED FOR:04/21/93 13:00 TO 15:00
PUBLIC HEARING HOUSE JUDICIARY

LTN1150
BY:SOL
FOR:SOL

LOCATION:KEN/SOL

SB 178
SB 178

MR.
MR.

PETER
CHUCK

EHRHARDT ✓
ROBINSON ✓

SELF
SELF

TESTIFY
TESTIFY

04/21/93
13:42:15

LEGISLATIVE TELECONFERENCE NETWORK SYSTEM
PARTICIPANT LIST (ALL PARTICIPANTS)
TCN:30549 SCHEDULED FOR:04/21/93 13:00 TO 15:00
PUBLIC HEARING HOUSE JUDICIARY

LTN1150
BY:VAL
FOR:VAL

LOCATION:VALDEZ
SB 178

MS.

NANCY ___R.

LETHCOE ✓

AWRTA

TESTIFY

04/21/93
15:11:48

LEGISLATIVE TELECONFERENCE NETWORK SYSTEM
PARTICIPANT LIST (ALL PARTICIPANTS)
TCN:30549 SCHEDULED FOR:04/21/93 13:00 TO 15:00
PUBLIC HEARING HOUSE JUDICIARY

LTN1150
BY:KTN
FOR:KTN

LOCATION:KETCHIKAN
SB 178

MR.

DAVID-----

KATZ ✓-----

TESTIFY

SB 178
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SB 178

MR.
MR.
MS.
MR.
MR.
MS.
MS.
MS.
MR.
MR.
MR.
MS.

MATTHEW
DON
VALORIE
ROBERT
RONN
SUSAN
CAROLYN
NATASHA
DAN
G. L.
PAT

DONOHUE ✓
MULLER ✓
NELSON ✓
ELLIS ✓
DICK ✓
STURM ✓
NICHOLS ✓
CALVIN ✓
KECK D.N.T.
PAXTON " " "
KEHOE " " "

CITY OF SITKA
CITY OF SITKA

TESTIFY
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Sitka

update

04/21/93 16:10:22 LEGISLATIVE TELECONFERENCE NETWORK SYSTEM
MESSAGE FROM: LIOCTHE IN SITKA

LTN1120
JNU

RE TCN: 30549 SCHEDULED FOR: 04/21/93 13:00 TO 16:30
SPONSOR: HOUSE JUDICIARY PURPOSE: PUBLIC HEARING

MESSAGE TEXT: SITKA HAS ONE JUST ARRIVED TO TESTIFY ✓... mr. SEVER

AMENDMENT

OFFERED IN THE HOUSE

BY REPRESENTATIVE DAVIDSON

TO: CSSB 178(JUD) am (efd fld)

Page 2, after line 13:

Insert a new bill section to read:

"* Sec. 4. PROVISIONS NOT SEVERABLE. Notwithstanding AS 01.10.030, the provisions of this Act are not severable."

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.

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 there 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.

Lib

*3 - proposed changes -
suggested by Charlie Cole -
Jim Clark will prepare. JH*

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

IN THE LEGISLATURE OF THE STATE OF ALASKA
EIGHTEENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Amended: 4/19/93
Offered: 4/13/93

Sponsor(s): SENATE JUDICIARY COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to civil nuisance actions."

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

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

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

7 (b) A person may not maintain an action under this section if the occupation,
8 structure, or act, including an emission or discharge but excluding the placement of
9 nuclear waste, that is the subject of the action is authorized by and is not in violation
10 of a term or condition of

11 (1) ^{valid} a statute or regulation;

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

14 (3) a court order ^{Judgments} ~~[or decision]~~

15 (c) The provisions of (b) of this section do not apply to actions regarding a

1 nuisance in an area zoned as residential by a city, borough, or municipality regarding
2 view, odor, or noise.

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

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

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

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

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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

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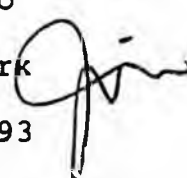
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M E M O R A N D U M

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

^{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:

) 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.

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.

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 milestone 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-

SITKA Daily SENTINEL
4/20/93

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

James said he was aware of the economic constraints, 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.

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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 vi .agers, 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

The Honorable Brian Porter
April 21, 1993
Page 2

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\LTRSPORTER.LTR

(907) 586-4004

Douglas Kemp Merz

fax (907) 586-4141

Attorney at Law
319 Seward Street
Juneau, Alaska 99801

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.

The retroactive effective date is patently unfair and is probably also unconstitutional. 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.*

This bill is an improper attempt to have the legislature intervene in pending litigation. 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

Mr. C.J.
880 H St #200A

Zane

274-9019

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



Alaska Environmental Lobby, Inc.

P.O. Box 22151 Juneau, Alaska 99802

Received

APR 19 1993

Brian Porter
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.

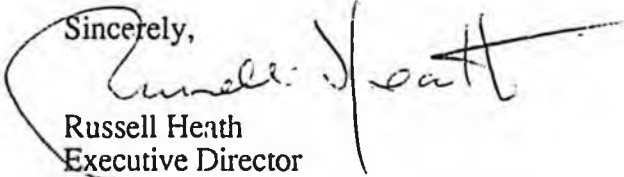
The practical implications to SB 178 are immense. The state issues thousands and thousands of permits each year. If it were the state and not the permittee, that were responsible for ensuring that the permitted activity were performed in such a way so as to not create a nuisance, then:

- 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

FISCAL NOTE

No. 1

STATE OF ALASKA
1993 LEGISLATIVE SESSION

Bill Version: SB 178

(S) Publish Date: 4-13-93

Revision Date: April 1, 1993

Department Affected: Department of Law

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

BRU: Legal Services

Sponsor: Senate Judiciary Committee

Component: Operations

Requestor: Senate Judiciary Committee

COMPONENT SERIAL NO. 0093

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
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REVENUE FUND SOURCE:						
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FUNDING:

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

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

Estimate of current year (FY93) impact: -0-

Changes in CSSB 178 (JVD) have no fiscal impact. This fiscal note is appropriate.

ANALYSIS: (Attach a separate page if necessary.)

4/12/93 KRL
date Comte Aide (initial)

Please see the attached analysis.

Prepared by: Richard I. Peques, Director
Division: Administrative Services Division

Phone: 465-3672

Date: April 1, 1993

Approved by Commissioner: Charles E. Cole, Attorney General

Date: April 1, 1993

Agency: Department of Law

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FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. SB 178

ANALYSIS (Continued):

This bill repeals and reenacts AS 09.45.230, which permits civil actions to enjoin or abate a nuisance. The existing statute currently provides that an action may be brought by a person whose property is injuriously affected or whose personal enjoyment is lessened by a private nuisance to enjoin or abate the nuisance. This current authority to bring an action would be narrowed by the bill, which provides that a person may not bring an action based on a nuisance if the occupation, structure, or act, including an emission or discharge, that is the subject of the action is authorized under the following circumstances:

- (1) a statute or regulation;
- (2) a license, permit, or other document issued by the state or federal government, or
- (3) a court order or decision.

The state rarely uses this statute to enjoin or abate nuisances, because other state regulatory authority is usually available for those activities where the state might be involved in abating a nuisance. Consequently, any impact that may occur will be felt by private parties and there will not be a fiscal impact for the Department of Law.

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

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MEMORANDUM

TO: Representative Brian Porter
Chair, House Judiciary Committee

FROM: Senator Robin Taylor
Chair, Senate Judiciary Committee 

DATE: 20 April 1993

RE: SB 178 Civil Nuisance Actions:
Request for hearing

This morning Senate Bill 178 received a referral to the House Judiciary Committee. With this memorandum I request that a hearing be scheduled for this legislation at your earliest convenience.

In addition, background information for the legislation is attached under this cover including a sponsor statement, sectional analysis, supporting letters to the editor of the Sitka Sentinel, and the written testimony submitted to the Senate Judiciary Committee. Please note that the sectional analysis and sponsor statement refer specifically to CSSB 178 (JUD).

Thank you for your timely response to this matter. If I can be of any further assistance, please do not hesitate to contact my office.

District A:

Hyder • Ketchikan • Kupreanof • Meyers Chuck • Petersburg • Saxman • Sitka • Wrangell

Alaska State Legislature

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

Member, State Affairs Committee
Committee on Committees
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Senator Robin L. Taylor

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 when they are acting within the limits of their permits. 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.

JUDICIARY COMMITTEE SUBSTITUTE 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.



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 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 282 (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.

APR 16 1993

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JOSEPH M. CHOMSKI**
JOHN J. CONNORS
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ERIC A. EISEN**
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JOSEPH W. EVANS**
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JOHN WYETH GRIGGS**
JESSE A. HALVORSEN*
WILLIAM P. HORN*
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STEPHEN H. HUTCHINGS
ROY S. JONES*
MARC W. JUNE
BRAD S. KANE
STANLEY T. LEWIS
LESLIE LONGENBAUGH
RONALD W. LORENSEN

L. MERRILL LOWDEN
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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

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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

The Honorable Gail Phillips

April 16, 1993

Page -2-

Comments on HB 282

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.

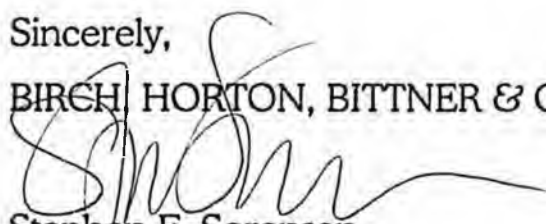
The only aspect of HB 282 that is supportable, is changing the definition of nuisance to "substantial and unreasonable" interference with property rights. This would raise the threshold of harm required to prevail in a nuisance action and discourage frivolous actions. I note, however, that there is no 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



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.

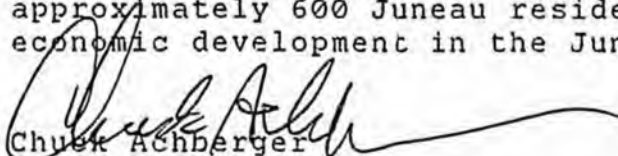
Without the protection of SB 178, Alaska risks having the regulatory system usurped or superseded by a judicially created "nuisance" system. The resulting uncertainty in the law will surely drive business and industry away from our state.

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

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



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.

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

**Municipality
of
Anchorage**



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

TOM FINK,
MAYOR

OFFICE OF THE MUNICIPAL ATTORNEY

April 1, 1993

APN - 5 RECO

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 attorney's 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

Senator Robin Taylor
April 1, 1993
Page 2

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

ms\lrc\mcveigh\house/dp



APR 13 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


Page Two
April 13, 1993

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

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.

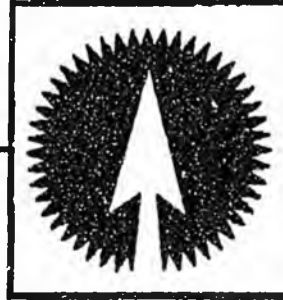
When brought for legitimate reasons, lawsuits based on nuisance encourage the economically efficient use of property by forcing a person to consider the impact of his actions on others. For this reason, the balance of SB 178 may be overbroad in its efforts to limit such litigation. If a nuisance is defined 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.

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



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

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 substantial, 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.

**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**

Arthur S. Robinson • Allan Beiswenger • Peter Ehrhardt

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.

329-333 Katlian Street

Sitka, Alaska 99835



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,

A handwritten signature in dark ink, appearing to be "H. Thompson", written over a horizontal line.

Harold Thompson
President

(907) 747-8662

TELEFAX (907) 747-8268

Telex 090-48-391 SSSZAFOOD SIK

FRESH AND FROZEN SALMON, COD, BLACK COD, HALIBUT, ROCK FISH, CRAB, HERRING





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 quiet 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

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

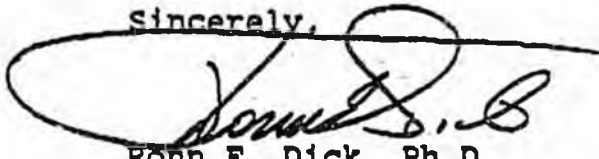
informs DEC about the current level of discharge of specific pollutants and DEC writes the standards so that those levels of discharge can be maintained.

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.

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



Alaska State Legislature

Please enter into the record my testimony to the Senate Judiciary
 committee name
 committee on Civil Nuisance Actions, dated April, 1993.
 bill/subject

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 legislature's goal to cut General Fund Spending. SB 178 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 SB 178 would further degrade this process. Lastly, SB 178 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 ~~Socio~~ 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 178 / SCR 4
bill/subject

dated

4/15/93

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 April 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 its 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 state wide.

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 Jellio

Testifier

Sitka Property Owner

Representing (Optional)

Box 2966 Sitka

Address

747-8950

Phone No.



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

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 rights of the citizens of Alaska.

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 run 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 prevalent. 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 expe-

rience 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, long-shoremen, 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 effect of each dollar paid out in wages, and calculates where they go. Such as the grocery clerks, gas station attendants, 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 Mome 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 courts, 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

By WILL SWAGEL
Sentinel Staff Writer

3/3/92
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 4-2-72

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 \$5 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 ML Edgumbe 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

Class Action Suit Filed Against APC

Sitka Daily Sentinel
March 2, 1992

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 scientific 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

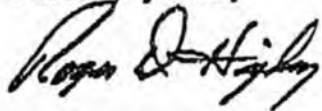
Dear Mr. Poulson,

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.

Sincerely yours,



Roger D. Higley
P. O. Box 1082
Sitka, Alaska 99835

copy to: Frank Roppel
Alaska Pulp Corporation

April 7, 1992
514 Halibut Pt. Rd.
Sitka, AK 99835

Alaska Pulp Corporation
4600 Sawmill Creek Road
Sitka, AK 99835

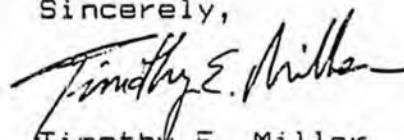
Dear Sirs:

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 appreciate 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
Pastor
First Baptist Church