HB

168

<TARGET><BILL>HB 168</BILL><SUBJECT>HB
168</SUBJECT><COMM>SJUD27</COMM></TARGET>

SENATE COMMITTEE REPORT

DATE: 4/8/11

FURTHER: (Judiciary)

DATE TURNED IN TO OFFICE: 3/20/12

Labor and Commerce Committee considered CS FOR HOUSE BILL NO. 168(JUD)

HB 168-INJUNCTION SECURITY: INDUSTRIAL OPERATION

"An Act requiring the amount of the security given by a party seeking an injunction or order vacating or staying the operation of a permit affecting an industrial operation to include an amount for the payment of wages and benefits for employees and payments to contractors and subcontractors that may be lost if the industrial operation is wrongfully enjoined."

and recommends:

[ ] be **replaced** with **SCS** _____ (_____) *[ ] Same Title [ ] Technical Title Change [ ] New Title/SCR No._____*

[ ] adopt **previous SCS** _____ (_____) *[ ] Same Title [ ] Technical Title Change [ ] New Title/SCR No._____*

[ ] attached amendment(s)

[ ] adopt _____Letter of Intent

[ ] further referral to _____Committee

Dept Abbr.	
ADM	LEG
CED	LAW
COR	LWF
CRT	MVA
EED	DNR
DEC	DPS
DFG	REV
GOV	DOT
DHS	UA

NEW FISCAL NOTE(S)

Dept.	Fiscal	Indet.	Zero	FN #

PREVIOUS FISCAL NOTE(S)

Dept.	Fiscal	Indet.	Zero	FN #
DNR			✓	4
LAW			✓	3
DFG			✓	2
DEC			✓	1

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	PRINTED LAST NAME	DO PASS	DO NOT PASS	NO REC	AMEND
	Giessel	X			
	DAVIS			X	
	PASKVAN			X	
	MENARD	X			
CHAIR:				X	

Representative
Eric Feige
House District 12
House Resources Committee Co-Chair
Education Committee
Transportation Committee
Joint Armed Services Committee

Alaska State Legislature

House of Representatives

During Session:
State Capitol Room 126
Juneau, Alaska 99801-1182
(907) 465-4859
Fax (907) 465-3799
1-888-465-4859

Sponsor Statement for CSHB 168(JUD)

"An Act requiring the amount of the security given by a party seeking an injunction or order vacating or staying the operation of a permit affecting an industrial operation to include an amount for the payment of wages and benefits for employees and payments to contractors and subcontractors that may be lost if the industrial operation is wrongfully enjoined."

Under current law the cost to bring a public litigant lawsuit against a legally permitted project is in effect zero. There is very little risk in bringing a suit. All the risk is borne by the defendants. These actions do shutdown projects at significant costs to working Alaskans, businesses and the state treasury. **CSHB 168(JUD)** seeks to remedy the situation by leveling the playing field.

CSHB168(JUD) parallels the requirements of Alaska Civil Rule 65(c). As written, 65(c) states: *"no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained".*

At the request of the Department of Law, **HB168** was amended to more closely mirror the language of Alaska Civil Rule 65(c) in order to clarify that the proposed statute would not change the court rule. The court already has the ability to require security. **CSHB168(JUD)** simply requests that part of the court's deliberation process should include payment of wages and benefits for employees, payments to contractors and sub-contractors of the industrial operation that is shutdown. The amount of security and how it is calculated is totally within the hands of the court.

E-Mail: Representative.Eric.Feige@legis.state.ak.us

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM April 11, 2012

SUBJECT: EPA concerns relating to posting security for injunction (CSHB 168(JUD); Work Order No. 27-LS0395\D)

TO: Senator Hollis French
Attn: Cindy Smith

FROM: Dennis C. Bailey
Legislative Counsel

You have provided me with a copy of a letter written in 2006 from the U.S. Environmental Protection Agency to then Utah Governor Jon Huntsman, Jr., relating to a bill which had been passed by the Utah Legislature that involved posting a bond in order to request a stay or injunction of a new federal or state environmental permit or approval. You have asked for an opinion concerning the letter and whether CSHB 168(JUD) may raise issues for the EPA similar to those expressed in the letter regarding the Utah bill.

The 2006 Utah bill, HB 100 (copy enclosed), provided that the bond would have to cover costs and damages to a person including lost wages, salaries, benefits. The bond could be large and could deter organizations from seeking stays of permits and other project approvals pending appeal, no matter how compelling their case. The Utah bill requires a an entity that does business in the state to file a bond with the state division of corporations when it requests a stay or injunction in environmental litigation. The bill establishes fees and requires a hearing to establish the bond amount, allows for administrative rules for posting the bond, and requires that an entity that fails to post a bond be administratively dissolved and provides for license revocations. The bill lists a number of federal and state laws to which the bonding requirement applies.

The EPA letter expressed concern over the Utah legislation, noting that the legislation may create "impediments to the public's ability to challenge permits and other projects in state and federal court as required by various environmental statutes" and over "whether important parts of the State's federally approved environmental programs would meet federal requirements for EPA approval." The EPA letter said that the state must provide the same opportunity for judicial review as would be available under the federal program. Apparently in response to the EPA concerns, the Utah governor vetoed the bill based on the conclusion that the bill was preempted by federal law.[1]

---

[1] The governor's veto message relied on federal preemption: state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

By comparison, CSHB 168(JUD) also applies to a court considering the amount of security that must be provided by a person seeking an injunction or order vacating or staying the operation of a permit that affects an industrial operation. The court must consider costs that an industrial operation may incur if the operation is wrongly enjoined and must include an amount for payment of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation. An industrial operation is defined to include construction, energy or timber activity, and oil, gas, and mineral exploration, development, and production.

You asked whether the concerns expressed in the EPA letter could also apply to CSHB 168(JUD). The short answer is yes. Although the 2006 Utah HB 100 has a different structure than CSHB 168(JUD), it was an attempt to accomplish the same purpose as CSHB 168(JUD), i.e., requiring a person applying for an injunction or stay to pay a greater bond that covers specified amounts. The EPA expressed concerns mainly relating to federal preemption and affects of the bill on federal approval of state environmental programs. Because of similarities between the Utah bill and the Alaska bill, it seems possible that the EPA could have similar concerns with CSHB 168(JUD), but only the EPA could give a definitive response to this question.

If I may be of further assistance, please advise.

DCB:ljw
12-279.ljw

Enclosure

Congress." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (U.S. 1983), *quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8
999 18TH STREET- SUITE 300
DENVER, CO 80202-2466
Phone 800-227-8917
http://www.epa.gov/region08

Ref: 8P-SA

MAR 0 2 2006

Honorable Jon Huntsman, Jr.
Governor, State of Utah
Utah State Capitol Complex
East Office Building, Suite E220
PO Box 142220
Salt Lake City, Utah 84114-2220

Dear Governor Huntsman:

I am writing to indicate that legislation recently approved by the 2006 Utah Legislature, House Bill No. 100 (HB 100), is of potential concern to the U.S. Environmental Protection Agency (EPA). EPA is very reluctant to become involved with the actions of a State's legislature. However, this pending legislation raises concerns about whether important parts of the State's federally-approved environmental programs would meet federal requirements for EPA approval. In the spirit of partnership, we offer the following for your consideration, particularly in light of EPA's experience with similar legislative actions and court decisions in the states of Virginia, Oregon, and Montana.

I have been advised by EPA's attorneys that the pending Utah legislation may create impediments to the public's ability to challenge permits and other project approvals in state and federal courts as required by various environmental statutes. As you may know, for a state to assume responsibility for federal environmental programs, that State must provide the same opportunity for judicial review as would be available under the federal program.

If our reading of the pending legislation is correct, it would require entities to post a bond in order to request a stay or injunction of a new federal or State environmental permit or approval. In addition to covering potential damages to the permit applicant, the bond would have to cover costs and damages to any person, including employees' lost wages, salaries, and benefits, and lost State and local tax revenues. The size of the bond could be very large. Thus, the bond requirement could deter organizations from seeking stays of permits and other project approvals pending appeal, no matter how compelling their case.

Also, as noted above, HB 100 would extend to entities seeking a stay or injunction in federal court. This appears to conflict with federal law as we know of no authority under federal law for the State to impose this burden on access to federal court. In addition, HB 100 would prevent entities that fail to post the required bond from doing business within the State of Utah. This too would impede the ability of organizations to seek a stay or injunction in federal or state court.

In sum, it appears that the pending legislation could burden rights to judicial review of permitting decisions and project approvals in Utah and impact the federal-approvability of State environmental programs. I welcome your insights as to whether our understanding of the pending legislation is accurate, and the opportunity to work together to carefully consider the ramifications of the pending legislation. If you need more information, you may call me or Steve Tuber of my staff at (303) 312-6241.

Sincerely yours,

Kerrigan D. Clough /fo

Robert E. Roberts
Regional Administrator

cc: Dianne Nielson, Director
Utah Department of Environmental Quality

STATE OF UTAH

JON M. HUNTSMAN, JR.
GOVERNOR

OFFICE OF THE GOVERNOR
SALT LAKE CITY, UTAH
84114-2220

GARY R. HERBERT
LIEUTENANT GOVERNOR

March 21, 2006

The Honorable Greg J. Curtis
Speaker of the House
and
The Honorable John L. Valentine
President of the Senate

Dear Speaker Curtis and President Valentine:

After careful consideration and study, I have decided to veto H.B. 100, ENVIRONMENTAL LITIGATION BOND, and have transmitted it to the Lieutenant Governor for filing.

This bill seeks to impose new requirements on Utah corporations that initiate lawsuits under the National Environmental Policy Act of 1969, the Atomic Energy Act of 1964, or any of the twenty other federal environmental statutes referenced in the bill. Specifically, it provides that any Utah corporation filing a federal environmental action and "requesting a stay or injunction to a new permit or approval" must "post a corporate surety bond or cash equivalent" in an "amount that will cover the payment of reasonably foreseeable costs and damages suffered in Utah by any person because of the delay caused by the environmental litigation." H.B. 100 at 3 ln. 67, 5 ln. 120-24 (General Session 2006). The amount of the bond would have to be sufficient to cover everything from "employees' lost wages, salaries, and benefits" to "lost net revenue, including local and state tax revenues." *Id.* at 5 ln. 125-26. Any Utah corporation failing to post such a bond upon initiating litigation covered by the bill would be subject to administrative dissolution and other penalties. *See id.* at 5 ln. 139-46.

I have great respect for the sponsors and proponents of H.B. 100, and admire their sincere desire to make our State a better place. Nevertheless, consistent with my oath to "support, obey and defend the Constitution of the United States and the Constitution of this State," Utah Const. art. IV, § 10, I cannot sign this bill into law. The Supremacy Clause of the U.S. Constitution provides that laws enacted by Congress "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, § 2. An analogous clause in our State

Constitution similarly provides that "Utah is an inseparable part of the Federal Union and the Constitution of the United States is the supreme law of the land." Utah Const. art. I, § 3. These provisions make clear that, where a properly enacted federal law conflicts with a State law, the federal law necessarily preempts its State counterpart.

H.B. 100 conflicts with federal law inasmuch as it seeks to impose additional requirements — *i.e.*, bonding requirements that are not imposed by, and are inconsistent with, federal law — on Utah corporations seeking injunctive relief under federal environmental statutes. By so doing, the bill threatens to "'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 204 (1983) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

For the foregoing reasons, I consider this bill preempted by federal law, and therefore cannot allow it to take effect.

Sincerely,

Jon M. Huntsman, Jr.
Governor

THE STATE OF UTAH
BILL TEXT
State Net®

STATENETA LexisNexis® Company

2006 UT H.B. 100

UTAH 56TH LEGISLATURE -- 2006 GENERAL SESSION

HOUSE BILL 100

H.B. 100 ENROLLED
ENVIRONMENTAL LITIGATION BOND
2006 GENERAL SESSION
STATE OF UTAH
CHIEF SPONSOR: AARON TILTON
SENATE SPONSOR: CURTIS S. BRAMBLE COSPONSORS: DOUGLAS C. AAGARD J. STUART ADAMS JEFF ALEXANDER ROGER E. BARRUS DEMAR BUD BOWMAN CRAIG W. BUTTARS D. GREGG BUXTON DAVID CLARK DAVID N. COX GREG J. CURTIS BRADLEY M. DAW MARGARET DAYTON BRAD L. DEE GLENN A. DONNELSON JOHN DOUGALL CARL W. DUCKWORTHJAMES A. DUNNIGAN JAMES A. FERRIN BEN C. FERRY JULIE FISHER LORIE D. FOWLKE CRAIG A. FRANK KERRY W. GIBSON JAMES R. GOWANS NEIL A. HANSEN ANN W. HARDY WAYNE A. HARPER NEAL B. HENDRICKSON DAVID L. HOGUE KORY M. HOLDAWAY GREGORY HUGHES FRED R. HUNSAKER ERIC K. HUTCHINGSBRADLEY T. JOHNSON BRADLEY G. LAST REBECCA D. LOCKHART STEVEN R. MASCARO JOHN G. MATHIS RONDA RUDD MENLOVE MICHAEL T. MORLEY JOSEPH G. MURRAY MICHAEL E. NOEL CURTIS ODA PAUL RAY DAVID URE STEPHEN URQUHART MARK W. WALKER PEGGY WALLACE RICHARD W. WHEELER

BILL TRACKING REPORT: 2006 Bill Tracking UT H.B. 100

2006 Bill Text UT H.B. 100

VERSION: Enrolled

VERSION-DATE: March 10, 2006

SYNOPSIS: LONG TITLE

General Description:

This bill requires entities that do business in the state to file a bond with the Division of Corporations and Commercial Code when it begins the environmental litigation.

DIGEST:

Highlighted Provisions:

This bill:

. defines terms;

. requires an entity doing business in Utah to file a bond with the division when it requests a stay or injunction in environmental litigation;

. authorizes the division to:

. establish a fee for the bond filing;

. hold a hearing to establish the bond amount;

. make rules for posting the bond; and

. administratively dissolve an entity or revoke its authority to do business for failure to post a bond;

. requires the division to dissolve an entity or revoke its authority to do business if another state with a similar law has revoked an entity's certificate of existence;

. provides for revocation of licenses an entity holds, including professional licenses; and

. makes technical changes.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

16-6a-1410, as enacted by Chapter 300, Laws of Utah 2000

16-6a-1515, as enacted by Chapter 300, Laws of Utah 2000

16-10a-1420, as enacted by Chapter 277, Laws of Utah 1992

48-2a-802, as enacted by Chapter 233, Laws of Utah 1990

48-2c-1206, as enacted by Chapter 260, Laws of Utah 2001

ENACTS:

13-1a-10, Utah Code Annotated 1953

NOTICE: [A> UPPERCASE TEXT WITHIN THESE SYMBOLS IS ADDED <A]
[D> Text within these symbols is deleted <D]

TEXT: Be it enacted by the Legislature of the state of Utah:

Section 1. Section 13-1a-10 is enacted to read:

[A> 13-1A-10. <A] Bond required for environmental litigation -- Bond hearing.

[A> (1) AS USED IN THIS SECTION: <A]

[A> (A) "DIVISION" MEANS THE DIVISION OF CORPORATIONS AND COMMERCIAL CODE CREATED IN SECTION 13-1A-1 . <A]

[A> (B) "ENVIRONMENTAL LITIGATION" MEANS ANY ACTION OR COMPLAINT FILED IN A UNITED STATES COURT OR STATE COURT: <A]

[A> (I) WITH A CAUSE OF ACTION ARISING AFTER MAY 1, 2006; AND <A]

[A> (II) REQUESTING A STAY OR INJUNCTION TO A NEW PERMIT OR APPROVAL OF A NEW PROJECT UNDER: <A]

[A> (A) THE ACID PRECIPITATION ACT OF 1980, *42 U.S.C. SEC. 8901* THROUGH 8912; <A]

[A> (B) THE TOXIC SUBSTANCES CONTROL ACT, *15 U.S.C. SEC. 2601* THROUGH 2692; <A]

[A> (C) THE ATOMIC ENERGY ACT OF 1954, *42 U.S.C. SEC. 2014,* 2021, 2022, 2111, 2113, AND 2114; <A]

[A> (D) THE CLEAN AIR ACT, *42 U.S.C. SEC. 7401* THROUGH 7671Q; <A]

[A> (E) THE FEDERAL WATER POLLUTION CONTROL ACT, *33 U.S.C. SEC. 1251* THROUGH 1387; <A]

[A> (F) THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980, *42 U.S.C. SEC. 9601* THROUGH 9675; <A]

[A> (G) THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT OF 1986, *42 U.S.C. SEC. 11001* THROUGH 11050; <A]

[A> (H) THE ENDANGERED SPECIES ACT OF 1973, *16 U.S.C. SEC. 1531* THROUGH 1544; <A]

[A> (I) THE ENERGY SUPPLY AND ENVIRONMENTAL COORDINATION ACT OF 1974, *15 U.S.C. SEC. 791* THROUGH 798; <A]

[A> (J) THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976, *43 U.S.C. SEC. 1701* THROUGH 1785; <A]

[A> (K) THE FOREST AND RANGELAND RENEWABLE RESOURCES PLANNING ACT OF 1974, *16 U.S.C. SEC. 1600* THROUGH 1614; <A]

[A> (L) THE FOREST AND RANGELAND RENEWABLE RESOURCES PLANNING ACT OF 1978, *16 U.S.C. SEC. 1641* THROUGH 1649; <A]

[A> (M) THE HEALTHY FOREST RESTORATION ACT OF 2003, *16 U.S.C. SEC. 6501* THROUGH 6591; <A]

[A> (N) THE LOW-LEVEL RADIOACTIVE WASTE POLICY ACT, *42 U.S.C. SEC. 2021B* THROUGH 2021J; <A]

[A> (O) THE MULTIPLE-USE SUSTAINED-YIELD ACT OF 1960, *16 U.S.C. SEC. 528* THROUGH 531; <A]

[A> (P) THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, *42 U.S.C. SEC. 4321* THROUGH 4370F; <A]

[A> (Q) THE NOISE CONTROL ACT OF 1972, *42 U.S.C. SEC. 4901* THROUGH 4918; <A]

[A> (R) THE NUCLEAR WASTE POLICY ACT OF 1982, *42 U.S.C. SEC. 10101* THROUGH 10270; <A]

[A> (S) THE PUBLIC HEALTH SERVICE ACT, *42 U.S.C. SEC. 300F* THROUGH 300J-26; <A]

[A> (T) THE SOLID WASTE DISPOSAL ACT, *42 U.S.C. SEC. 6901* THROUGH 6992K; <A]

[A> (U) THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977, *30 U.S.C. SEC. 1201* THROUGH 1328; <A]

[A> (V) TITLE 19, CHAPTER 2, AIR CONSERVATION ACT; <A]

[A> (W) TITLE 19, CHAPTER 3, RADIATION CONTROL ACT; <A]

[A> (X) TITLE 19, CHAPTER 4, SAFE DRINKING WATER ACT; <A]

[A> (Y) TITLE 19, CHAPTER 5, WATER QUALITY ACT; <A]

[A> (Z) TITLE 19, CHAPTER 6, PART 1, SOLID AND HAZARDOUS WASTE ACT; <A]

[A> (AA) TITLE 19, CHAPTER 6, PART 2, HAZARDOUS WASTE FACILITY SITING ACT; <A]

[A> (BB) TITLE 19, CHAPTER 6, PART 3, HAZARDOUS SUBSTANCES MITIGATION ACT; <A]

[A> (CC) TITLE 19, CHAPTER 6, PART 6, SOLID WASTE MANAGEMENT ACT; <A]

[A> (DD) THE ADMINISTRATIVE PROCEDURES ACT, *5 U.S.C. SEC. 701* THROUGH 706, WHEN THE ACTION OR COMPLAINT REQUESTS JUDICIAL REVIEW OF ANY FEDERAL AGENCY ACTION BY THE: <A]

[A> (I) ENVIRONMENTAL PROTECTION AGENCY; <A]

[A> (II) U.S. ARMY CORPS OF ENGINEERS; <A]

[A> (III) U.S. DEPARTMENT OF THE INTERIOR; <A]

[A> (IV) U.S. DEPARTMENT OF AGRICULTURE; OR <A]

[A> (V) U.S. DEPARTMENT OF TRANSPORTATION; OR <A]

[A> (EE) TITLE 63, CHAPTER 46B, ADMINISTRATIVE PROCEDURES ACT, WHEN THE ACTION OR COMPLAINT REQUESTS JUDICIAL REVIEW OF ANY AGENCY ACTION BY THE: <A]

[A> (I) UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY; <A]

[A> (II) UTAH DEPARTMENT OF NATURAL RESOURCES; <A]

[A> (III) UTAH DEPARTMENT OF TRANSPORTATION; OR <A]

[A> (IV) UTAH SCHOOL AND INSTITUTIONAL TRUST LANDS ADMINISTRATION. <A]

[A> (2) THE DIVISION SHALL REQUIRE AN ENTITY REGISTERED WITH THE DIVISION TO POST A CORPORATE SURETY BOND OR CASH EQUIVALENT: <A]

[A> (A) IN AN AMOUNT THAT WILL COVER THE PAYMENT OF THE REASONABLY FORESEEABLE COSTS AND DAMAGES SUFFERED IN UTAH BY ANY PERSON BECAUSE OF THE DELAY CAUSED BY THE ENVIRONMENTAL LITIGATION, INCLUDING: <A]

[A> (I) EMPLOYEES' LOST WAGES, SALARIES, AND BENEFITS; AND <A]

[A> (II) LOST NET REVENUE, INCLUDING LOCAL AND STATE TAX REVENUES; <A]

[A> (B) WRITTEN BY A SURETY LICENSED TO DO BUSINESS WITHIN THE STATE; <A]

[A> (C) IN FAVOR OF THE STATE, FOR THE BENEFIT OF ANY PERSON INJURED IN UTAH BY THE ENVIRONMENTAL LITIGATION; AND <A]

[A> (D) CONDITIONED UPON: <A]

[A> (I) THE PAYMENT OF COURT COSTS AND REASONABLE ATTORNEY'S FEES TO THE PREVAILING PARTY INCIDENT TO ANY SUIT UPON THE BOND; AND <A]

[A> (II) THE UNSUCCESSFUL ENVIRONMENTAL LITIGATION. <A]

[A> (3) THE DIVISION MAY ESTABLISH A FEE TO BE PAID WHEN POSTING THE BOND BY FOLLOWING THE PROCEDURES AND REQUIREMENTS OF SECTION 63-38-3.2 . <A]

[A> (4) BY FOLLOWING THE PROCEDURES AND REQUIREMENTS OF TITLE 63, CHAPTER 46A, UTAH ADMINISTRATIVE RULEMAKING ACT, THE DIVISION SHALL MAKE RULES GOVERNING THE PROCEDURES FOR POSTING THE BOND. <A]

[A> (5) THE DIVISION SHALL HOLD A FORMAL ADJUDICATIVE PROCEEDING TO DETERMINE THE BOND AMOUNT BY FOLLOWING THE PROCEDURES AND REQUIREMENTS OF TITLE 63, CHAPTER 46B, ADMINISTRATIVE PROCEDURES ACT. <A]

[A> (6) IF AN ENTITY FAILS TO FILE THE BOND REQUIRED BY SUBSECTION (2): <A]

[A> (A) THE DIVISION SHALL ADMINISTRATIVELY DISSOLVE THE ENTITY OR REVOKE ITS AUTHORITY TO DO BUSINESS; <A]

[A> (B) THE ENTITY IS NO LONGER AUTHORIZED TO TRANSACT BUSINESS IN UTAH; AND <A]

[A> (C) ANY LICENSE HELD BY THE ENTITY, INCLUDING A PROFESSIONAL LICENSE, SHALL BE REVOKED BY THE APPROPRIATE STATE OR LOCAL AUTHORITY. <A]

[A> (7) A PERSON, AS DEFINED IN SECTION 68-3-12, CLAIMING DAMAGES AS A RESULT OF ANY ENVIRONMENTAL LITIGATION PURSUED BY AN ENTITY REGISTERED WITH THE DIVISION MAY FILE A CLAIM UPON THE BOND FOR DAMAGES AGAINST BOTH THE PRINCIPAL AND THE SURETY. <A]

[A> (8) THE TOTAL AGGREGATE LIABILITY ON THE BOND TO ALL PERSONS MAKING CLAIMS MAY NOT EXCEED THE AMOUNT OF THE BOND. <A]

[A> (9) IF ANY OTHER STATE HAS A PROVISION OF LAW SUBSTANTIALLY SIMILAR TO THIS SECTION, AND THE OTHER STATE HAS ADMINISTRATIVELY DISSOLVED AN ENTITY, REVOKED AN ENTITY'S CERTIFICATE OF EXISTENCE OR LICENSE, OR REVOKED THE ENTITY'S AUTHORITY TO TRANSACT BUSINESS IN THAT STATE: <A]

[A> (A) THE DIVISION SHALL ADMINISTRATIVELY DISSOLVE THE ENTITY OR REVOKE ITS AUTHORITY TO DO BUSINESS; AND <A]

[A> (B) THE ENTITY IS NO LONGER AUTHORIZED TO TRANSACT BUSINESS IN UTAH. <A]

Section 2. Section 16-6a-1410 is amended to read:

16-6a-1410. Grounds for administrative dissolution.

The division may commence a proceeding under Section 16-6a-1411 for administrative dissolution of a nonprofit corporation if:

(1) the nonprofit corporation does not pay when they are due any taxes, fees, or penalties imposed by this chapter or other applicable laws of this state;

(2) the nonprofit corporation does not deliver its annual report to the division when it is due;

(3) the nonprofit corporation is without:

(a) a registered agent; or

(b) a registered office;

(4) the nonprofit corporation does not give notice to the division that:

(a) its registered agent or registered office has been changed;

(b) its registered agent has resigned;

(c) its registered office has been discontinued; or

(d) the nonprofit corporation's period of duration stated in its articles of incorporation expires [D> . <D] [A> ; OR <A]

[A> (5) THE NONPROFIT CORPORATION DOES NOT POST A BOND REQUIRED BY SECTION 13-1A-10 . <A]

Section 3. Section 16-6a-1515 is amended to read:

16-6a-1515. Grounds for revocation.

The division may commence a proceeding under Section 16-6a-1516 to revoke the authority of a foreign nonprofit corporation to conduct affairs in this state if:

(1) the foreign nonprofit corporation does not deliver its annual report to the division when it is due;

(2) the foreign nonprofit corporation does not pay when they are due any taxes, fees, or penalties imposed by this chapter or other applicable laws of this state;

(3) the foreign nonprofit corporation is without a registered agent or registered office in this state;

(4) the foreign nonprofit corporation does not inform the division under Section 16-6a-1509 or 16-6a-1510 that:

(a) its registered agent or registered office has changed;

(b) its registered agent has resigned; or

(c) its registered office has been discontinued;

(5) an incorporator, director, officer, or agent of the foreign nonprofit corporation signs a document knowing it is false in any material respect with intent that the document be delivered to the division for filing; [D> or <D]

(6) the division receives a duly authenticated certificate from the division or other official having custody of corporate records in the state or country under whose law the foreign nonprofit corporation is incorporated stating that the foreign nonprofit corporation has dissolved or disappeared as the result of a merger [D> . <D] [A> ; OR <A]

[A> (7) THE FOREIGN NONPROFIT CORPORATION DOES NOT POST A BOND REQUIRED BY SECTION 13-1A-10 . <A]

Section 4. Section 16-10a-1420 is amended to read:

16-10a-1420. Grounds for administrative dissolution.

The division may commence a proceeding under Section 16-10a-1421 for administrative dissolution of a corporation if:

(1) the corporation does not pay when they are due any taxes, fees, or penalties imposed by this chapter or other applicable laws of this state;

(2) the corporation does not deliver a corporate or annual report to the division when it is due;

(3) the corporation is without a registered agent or registered office in this state;

(4) the corporation does not give notice to the division that its registered agent or registered office has been changed, that its registered agent has resigned, or that its registered office has been discontinued; [D> or <D]

(5) the corporation's period of duration stated in its articles of incorporation expires [D> . <D] [A> ; OR <A]

[A> (6) THE CORPORATION DOES NOT POST A BOND REQUIRED BY SECTION 13-1A-10 . <A]

Section 5. Section 48-2a-802 is amended to read:

48-2a-802. Judicial dissolution.

On application by or for a partner or the director of the division, a district court having competent jurisdiction may decree dissolution of the limited partnership [A> : <A]

[A> (1) <A] whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement [D> or <D] [A> ; <A]

[A> (2) <A] for failure to comply with the requirements of this chapter [D> . <D] [A> ; OR <A]

[A> (3) THE PARTNERSHIP DOES NOT POST A BOND REQUIRED BY SECTION 13-1A-10 . <A]

Section 6. Section 48-2c-1206 is amended to read:

48-2c-1206. Grounds for administrative dissolution.

The division may dissolve a company under Section 48-2c-1207 if:

(1) the company does not pay when due, any taxes, fees, or penalties imposed by this chapter or other applicable laws of this state;

(2) the company does not file its annual report with the division when it is due;

(3) the company is without a registered agent or registered office in this state; [D> or <D]

(4) the company fails to give notice to the division that:

(a) its registered agent or registered office has been changed;

(b) its registered agent has resigned;

(c) its registered office has been discontinued; or

(d) the company's period of duration has expired [D> . <D] [A> ; OR <A]

[A> (5) THE COMPANY DOES NOT POST A BOND REQUIRED BY SECTION 13-1A-10 . <A]
Tilton

SUBJECT: APPROPRIATIONS (89%); LICENSES & PERMITS (89%); AGENCY RULEMAKING (59%); ENVIRONMENTAL LAW (59%); HAZARDOUS WASTE (59%); TOXIC TORTS (59%); FORESTRY REGULATION & POLICY (59%); ADMINISTRATIVE PROCEDURE (59%); LEGISLATIVE BODIES (59%); COMPANY LIQUIDATIONS & DISSOLUTIONS (59%); US ENVIRONMENTAL LAW (59%); NONPROFIT ORGANIZATIONS (59%); US STATE GOVERNMENT (59%); LEGISLATION (59%); LAW COURTS & TRIBUNALS (59%); LEGISLATORS (59%); US FEDERAL GOVERNMENT (59%);

COUNTRY: UNITED STATES (98%);

STATE: UTAH, USA (98%);

LOAD-DATE: March 11, 2006

Rule 65. Injunctions.

(a) **Preliminary Injunction.**

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a) (2) shall be so construed and applied as to save the parties any rights they may have to trial by jury.

(b) **Temporary Restraining Order -- Notice -- Hearing -- Duration.**A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) **Security.** No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required

of the state or a municipality or of an officer or agency thereof, or unless otherwise ordered by the court, in domestic relations actions or proceedings.

A surety upon a bond or undertaking under this rule submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

(d) **Form and Scope of Injunction or Restraining Order.** Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) **Standing Preliminary injunctions in Domestic Relations Actions.** The presiding judge of each judicial district may issue a standing injunction which restrains the parties in all domestic relations actions, except dissolutions, domestic violence actions and uniform reciprocal enforcement actions, from:

(1) removing any child who is the subject of the action from the State of Alaska without the written consent of the other party;

(2) disposing of, encumbering or transferring any marital property without the written consent of the other party, except reasonably using funds for the parties or the parties' children's personal and necessary expenses; and

(3) threatening, harassing, or harming the other party.

Such a standing injunction shall be effective against a party upon receipt of a copy of the standing injunction by the party or the party's attorney.

Cindy Smith

From: Linda Hay
Sent: Wednesday, April 11, 2012 9:50 AM
To: Cindy Smith
Subject: HB 168

Cindy - The following people will be providing testimony on HB 168:

Rachael Petro, Alaska State Chamber of Commerce (@ Anch LIO)
Mike Satre - Council of Alaska Producers (in person)
Mike Jungries - Resource Development Council (@ Anch LIO)
Bob Dickson - The Alliance (will try to be @ Anch LIO but may need approval for an offnet)
Barbara Huff - Teamsters (may testify in person or submit written testimony)

Will the bills be taken in the order on the schedule and do you have any idea how long HB343 might go. Resources Committee meets from 1 to 3 p.m. if we get off the floor on time - Rep. Feige is not chairing this week so he will be presenting HB168.

Thanks
lh

Linda Hay
House Resources Committee Aide
Representative Eric Feige
House Resources Co-Chair
State Capitol Room 126
907-465-3715
907-321-1249

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 28, 2011

SUBJECT: Security for injunction (HB 168, Work Order No. 27-LS0395\B)

TO: Representative Eric Feige
Co-Chair of the House Resources Committee
Attn: Linda Hay

FROM: Dennis C. Bailey
Legislative Counsel

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

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

Section 1. Applies to a court considering the amount of security that must be provided by a person seeking an injunction or order vacating or staying the operation of a permit that affects an industrial operation. The court's consideration of the costs that an industrial operation may incur if the operation is wrongly enjoined must include an amount for payment of wages and benefits for employees, and payment to contractors and subcontractors of the industrial operation.

Defines an industrial operation to include a construction, energy, or timber activity and oil, gas, and mineral exploration, development and production.

Does not prohibit a person who is wrongly enjoined from other relief or otherwise limit the amount that a person may recover in the action.

DCB:ljw
11-144.ljw

Alaska Statute to be amended by CSHB 168(JUD)

AS 09.40.230. Authorization for injunction.

When it appears that (1) the plaintiff is entitled to the relief demanded, and the relief or any part of it includes restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the plaintiff; or (2) the defendant is doing, or threatens or is about to do, or is procuring or suffering to be done some act in violation of the plaintiff's rights concerning the subject of the action and tending to render the judgment ineffectual; or (3) the defendant threatens or is about to remove or dispose of property or a part of it with intent to delay or defraud creditors, an injunction may be allowed to restrain such act, removal, or disposition.

Alaska Rules of Procedure
Rule 65. Injunctions.

(a) Preliminary Injunction.

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a) (2) shall be so construed and applied as to save the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order -- Notice -- Hearing -- Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the state or a municipality or of an officer or agency thereof, or unless otherwise ordered by the court, in domestic relations actions or proceedings.

A surety upon a bond or undertaking under this rule submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as

the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 29, 2012

SUBJECT: Security for an injunction for industrial operations (CSHB 168(JUD), Work Order No. 27-LS0395\D)

TO: Senator Dennis Egan
Attn: Dana Owen

FROM: Dennis C. Bailey DCB
Legislative Counsel

You have asked whether the bill requirements for specified injunctions require a rule change, and what voting requirements are applicable.

CSHB 168(JUD) (referred to herein as HB 168) amends AS 09.40.230 by adding a new subsection that requires a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation to give security in an amount determined by a court for costs and damages that may be incurred by an industrial operation that has been wrongfully enjoined or restrained. It also requires that the amount determined by the court "must include an amount for the payment of wages and benefits for the employees of an industrial operation and the contractors and subcontractors of the operation."

The new subsection added by HB 168 parallels the requirements of Alaska Civil Rule 65(c), which requires a court to require a person seeking an injunction to provide security to protect a person who may be wrongfully restrained or enjoined. Civil Rule 65(c) reads:

> (c) **Security.** No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the state or a municipality or of an officer or agency thereof, or unless otherwise ordered by the court, in domestic relations actions or proceedings. A surety upon a bond or undertaking under this rule submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The

> motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

Civil Rule 65(c) exists to protect the interests of a party who is the subject of a temporary restraining order or a preliminary injunction. The analysis used by a court issuing a preliminary injunction is set out as follows:

> The showing required to obtain a preliminary injunction depends on the nature of the threatened injury. If the plaintiff faces the danger of "irreparable harm" and if the opposing party is adequately protected, then we apply a "balance of hardships" approach in which the plaintiff "must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without merit.'" [State v. Kluti Kaah Native Vill. of Copper Ctr., 831 P.2d 1270, 1273 (Alaska 1992) (citations omitted).] If, however, the plaintiff's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, then we demand of the plaintiff the heightened standard of a "clear showing of probable success on the merits." [Id. at 1272 (quoting A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n, 470 P.2d 537, 540 (Alaska 1970)), modified in other respects, 483 P.2d 198 (Alaska 1971).]

HB 168 differs from Civil Rule 65(c) because, under HB 168, (1) the security requirement applies not only to a temporary restraining order or a preliminary injunction, but also includes "an order vacating or staying the operation of a permit that affects an industrial operation"; and (2) the amount of the security determined by the court must include "an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation."

The security requirement for an order staying a permit may arise in the context of a preliminary injunction, although the issue is less clear with an order vacating the operation of a permit. Vacating the operation of a permit is more likely to be the final result of litigation rather than the subject of a preliminary injunction. To the extent that HB 168 requires this security for a final judgment, it may change Appellate Rule 204. ~~is just~~ involves On the other hand, if HB 168 applies only to interlocutory orders, the issue ~~is just~~ Civil Rule 65.

Under existing Civil Rule 65(c), the court could consider and include an amount for wages, benefits, and contract payments. However, HB 168 requires some amount for wages, benefits, and contract payments to be covered by security, so HB 168 does appear to limit the court's discretion under Civil Rule 65(c). The question is whether this is a rule of "practice and procedure" that requires a two-thirds vote.

Article IV, sec. 15 provides:

> **Section 15. Rule-Making Power.** The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

Rule 39(e) of the Uniform Rules requires:

> (e) If a bill or portion of a bill contains matter changing a supreme court rule governing practice and procedure in civil or criminal cases, the bill must contain a section expressly citing the rule and noting what change is being proposed. The section containing the change in a court rule must be approved by an affirmative vote of two-thirds of the full membership of each house. If the section effecting a change in the court rule fails to receive the required two-thirds vote, the section is void and without effect and is deleted from the bill. The fact that a bill contains a section which changes a court rule shall also be noted in the title of the bill.

In order to decide whether a court rule change requires a two-thirds vote, a determination must be made whether the change to the court rules is

(1) a substantive change to court rules, e.g., limitations of actions, burden of proof, presumption, creation of courts, and matters of jurisdiction, which may be changed without special voting requirements;

(2) a matter of practice or procedure of the courts, e.g., forms of action, how an action is commenced, the manner of notice, pleading and motion practice, joinder, pre-trial practice, discovery, the conduct of trial, stay of proceedings, enforcement procedures, post-trial procedures, appeal, venue evidence and special proceedings such as adoption and probate; or

(3) a rule of administration which is protected from legislative modification based on principles of separation of power.[1]

Whether the measure creates a substantive court rule change requiring no special voting requirements or a change to a matter of practice and procedures, which would require a two-thirds vote, is a close question. The problems created by this distinction are readily acknowledged by the court:

> We then turned to the definitions of the terms "procedural" and "substantive." . . . But while this distinction claims venerable origins, it has been recognized that the definition falls far short of drawing an

---

[1] See, Manual of Legislative Drafting, p. 48 - 51, for a general discussion of these categories.

> unequivocal line. Decisions on the method of enforcing a right often affect substantive rights, and the regulation of substantive rights may have an impact upon judicial procedure.

State v. Native Village of Nunapitchuk, 156 P.3d 389, 397 (Alaska 2007) (citations omitted).

An argument could be made that the proposed change offered by HB 168, even if it limits the court's discretion in determining the amount of security required, would be considered a substantive matter. The Alaska Supreme Court found that AS 09.60.060, which allowed the court to require security for costs and attorneys fees, to be a substantive matter. Ware v. Anchorage, 439 P.2d 793, 794 (Alaska 1968). The court said, "The authorities generally agree that substantive law creates, defines and regulates rights, while procedural law prescribes the method of enforcing the rights." The court acknowledged differing decisions on similar facts in both state and federal courts, but concluded that AS 09.60.060 enacted a substantive change to the court rules. The court reasoned that the Act created a new right in the resident defendant and a new liability in the nonresident plaintiff which are separate and apart from, and go beyond, the procedure of computing and assessing costs and attorney's fees. Ware, at 795.

In the more recent case, Nunapitchuk, supra, the court concluded that changes to Civil Rule 82, which relates to attorneys fees, is a rule of practice and procedure that would require a two-thirds vote, but the change to the public interest litigant exception to the attorney fees rules was a rule of substantive law that could be changed by the legislature without a two-thirds vote. Further, the court concluded that when deciding whether the changes to the public interest litigant attorney fees provisions impede access to the courts, the court would not strike the statute down entirely but would determine whether application of the statute would impede access to the courts on a case-by-case basis.

A court considering whether a court rule change and a two-thirds vote is required for HB 168 could take a position similar to Ware and conclude that the changes relating to posting security creates a new liability and is, therefore, a substantive change. Or, a court could conclude that the changes are a procedural change that would require a two-thirds vote. The Manual of Legislative Drafting, at page 49, does include "stay of proceedings" as a subject of "practice and procedure." However, how the issue would be decided cannot be predicted with any certainty.

The current bill draft takes the approach that the change is a substantive change. Taking this approach presumes that a two-thirds vote is not required but runs the risk that a court could conclude that the measure makes a procedural change, so a court rule change had actually occurred, and because a two-thirds vote was required, but not obtained, the change is invalid. With respect to the voting requirement, the safest procedure would be to treat the measure as requiring a rule change and obtain the two-thirds vote required to approve a rule change.

Also, please be aware of the constitutional issue relating to payment of security under the holding in Patrick v. Lynden Transport., 765 P.2d 1375 (Alaska 1988). That case involved a statute that required payment of security for court costs and attorney fees when the plaintiff is a nonresident as a condition for maintaining the lawsuit in Alaska. The court found that access to the courts is a fundamental right, analyzed the case on equal protection grounds under the Alaska Constitution, and relied heavily on the residency versus non-residency issues presented by the case to reach the conclusion that the statute was unconstitutional.

HB 168 differs from the issue present in Patrick v. Lynden. In Patrick v. Lynden the plaintiff could not maintain the action without filing security for costs and fees. In contrast, HB 168 does not explicitly deny access to the courts, although, arguably it may have the same effect by denying access to restraining order or preliminary injunction. Another important difference is that HB 168 does not involve residency issues comparable to those in Patrick v. Lynden, which were used by the court as the basis for the court's decision.

In short, Patrick v. Lynden established that access to the courts is a fundamental right. Whether the payment for security by a party seeking an injunction under HB 168 infringes on the right of access to the courts is unknown.

If I may be of further assistance, please advise.

DCB:ljw
12-169.ljw

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 21, 2011

SUBJECT: Constitutionality of HB 168 relating to security for injunction (Work Order No. 27-LS0395\B)

TO: Representative Max Gruenberg
Attn: Gretchen Staft

FROM: Dennis C. Bailey DCB
Legislative Counsel

You have asked me to review constitutional considerations with respect to HB 168 in light of two decisions, Patrick v. Lynden Transport., 765 P.2d 1375 (Alaska 1988) and Ware v. City of Anchorage, 439 P.2d 793 (Alaska 1968).

HB 168 amends AS 09.40.230 by adding a new subsection that requires a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation to give security in an amount determined by a court for costs and damages that may be incurred by an industrial operation that has been wrongfully enjoined or restrained. It also requires that the amount determined by the court "must include an amount for the payment of wages and benefits for the employees of an industrial operation and the contractors and subcontractors of the operation."

The new subsection added by HB 168 parallels the requirements of Alaska Civil Rule 65(c), which requires a court to require a person seeking an injunction to provide security to protect a person who may be wrongfully restrained or enjoined. Civil Rule 65(c) reads:

> (c) **Security.** No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the state or a municipality or of an officer or agency thereof, or unless otherwise ordered by the court, in domestic relations actions or proceedings. A surety upon a bond or undertaking under this rule submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The

> motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

Civil Rule 65(c) exists to protect the interests of a party who is the subject of a temporary restraining order or a preliminary injunction. The analysis used by a court issuing a preliminary injunction is set out as follows:

> The showing required to obtain a preliminary injunction depends on the nature of the threatened injury. If the plaintiff faces the danger of "irreparable harm" and if the opposing party is adequately protected, then we apply a "balance of hardships" approach in which the plaintiff "must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without merit.'" [State v. Kluti Kaah Native Vill. of Copper Ctr., 831 P.2d 1270, 1273 (Alaska 1992) (citations omitted).] If, however, the plaintiff's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, then we demand of the plaintiff the heightened standard of a "clear showing of probable success on the merits." [Id. at 1272 (quoting A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n, 470 P.2d 537, 540 (Alaska 1970)), modified in other respects, 483 P.2d 198 (Alaska 1971).]

HB 168 differs from Civil Rule 65(c) because under HB 168, (1) the security requirement applies not only to a temporary restraining order or a preliminary injunction, but also includes "an order vacating or staying the operation of a permit that affects an industrial operation"; and (2) requires that the amount of the security determined by the court must include "an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation."

Arguably, the change proposed by HB 168 applying the security requirement to a stay of the operation of a permit, could be in the form of an injunction, although the issue is less clear with an order vacating the operation of a permit, which seems more likely to be the result of litigation rather than the subject of a preliminary injunction. On the other hand, application for injunctive relief and the associated security under Civil Rule 65(c) may be interpreted not to apply to an "order" that is not in the form of an injunction.

With respect to the requirement that the court include an amount for wages and contract payments, the bill does not specify an amount that is required, and does not affect the discretion of the judge to determine the amount. The bill does not explicitly say that the amount of security is the amount of the payments for wages and contract payments. However, an argument could be made that HB 168 was intended to impose a requirement that the full amount of the wages and contracts must be included in the amount of the security.

Whether HB 168 actually changes the application of Civil Rule 65(c) may determine whether a two-thirds vote is required. An argument can be made that the court has the same authority both before and after enactment of HB 168. Under this argument, the court could apply the new provisions under HB 168 and require security for a preliminary injunction relating to the vacation or stay of a permit using existing law, and, also under existing law, the court could consider and include an amount for wages, benefits and contract payments. Under this interpretation, the bill does not enact a change to a court rule. If, however, HB 168 is interpreted to require wages, benefits, and contract payments to be covered by security, then HB 168 may be interpreted to change a court rule.

In Ware v. City of Anchorage, 439 P.2d 793 (Alaska 1968), the court addressed the issue of whether the statute that required a nonresident to post security for litigation costs and attorney fees was invalid based on the argument that the legislature may not make a court rule relating to practice and procedure, it may only change a court rule under art. IV, sec. 15 of the Alaska Constitution. Article IV, sec. 15 provides:

> **Section 15. Rule-Making Power.** The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

Rule 39(e) of the Uniform Rules requires:

> (e) If a bill or portion of a bill contains matter changing a supreme court rule governing practice and procedure in civil or criminal cases, the bill must contain a section expressly citing the rule and noting what change is being proposed. The section containing the change in a court rule must be approved by an affirmative vote of two-thirds of the full membership of each house. If the section effecting a change in the court rule fails to receive the required two-thirds vote, the section is void and without effect and is deleted from the bill. The fact that a bill contains a section which changes a court rule shall also be noted in the title of the bill.

In order to decide whether a court rule change requires a two-thirds vote, a determination must be made whether the change to the court rules is

(1) a substantive change to court rules, e.g., limitations of actions, burden of proof, presumption, creation of courts, and matters of jurisdiction, which may be changed without special voting requirements;

(2) a matter of practice or procedure of the courts, e.g., forms of action, how an action is commenced, the manner of notice, pleading and motion practice, joinder, pre-trial practice, discovery, the conduct of trial, stay of proceedings, enforcement

procedures, post-trial procedures, appeal, venue evidence and special proceedings such as adoption and probate; or

(3) a rule of administration which is protected from legislative modification based on principles of separation of power.[1]

Whether the measure creates a substantive court rule change requiring no special voting requirements or a change to a matter of practice and procedures, which would require a two-thirds vote, is a close question. The problems created by this distinction are readily acknowledged by the court.

> We then turned to the definitions of the terms "procedural" and "substantive." . . . But while this distinction claims venerable origins, it has been recognized that the definition falls far short of drawing an unequivocal line. Decisions on the method of enforcing a right often affect substantive rights, and the regulation of substantive rights may have an impact upon judicial procedure.

State v. Native Village of Nunapitchuk, 156 P.3d 389, 397 (Alaska 2007) (citations omitted).

An argument could be made that the proposed change offered by HB 168, even if it limits the court's discretion in determining the amount of security required, would be considered a matter of procedure. The Alaska Supreme Court found that AS 09.60.060, which allowed the Court to require security for costs and attorneys fees, to be a substantive matter. Ware v. Anchorage, 439 P.2d 793, 794 (Alaska 1968). The Court said, "The authorities generally agree that substantive law creates, defines and regulates rights, while procedural law prescribes the method of enforcing the rights." The Court acknowledged differing decisions on similar facts in both state and federal courts, but concluded that AS 09.60.060 enacted a substantive change to the court rules. The Court reasoned that the act created a new right in the resident defendant and a new liability in the nonresident plaintiff which are separate and apart from, and go beyond, the procedure of computing and assessing costs and attorney's fees. Ware, at 795.

In the more recent case, Nunapitchuk, supra, the court concluded that changes to Civil Rule 82, which relates to attorneys fees, is a rule of practice and procedure that would require a two-thirds vote, but the change to the public interest litigant exception to the attorney fees rules was a rule of substantive law which could be changed by the legislature without a two-thirds vote. Further, the court concluded that when deciding whether the changes to the public interest litigant attorney fees provisions impede access

---

[1] See, Manual of Legislative Drafting, p. 48 - 51 for a general discussion of these categories.

to the courts, the court would not strike the statute down entirely but would determine whether application of the statute would impede access to the courts on a case-by-case basis.

A court considering whether a court rule change and a two-thirds vote is required for HB 168 could take a position similar to Ware and conclude that the changes relating to posting security creates a new liability and is, therefore, a substantive change. Or, a court could conclude that the changes are a procedural change which would require a two-thirds vote. How the issue would be decided cannot be predicted with any certainty.

The current bill draft takes the approach that the change is a substantive change. Taking this approach presumes that a two-thirds vote is not required but runs the risk that a court could conclude that the measure makes a procedural change so a court rule change had actually occurred, and because a two-thirds vote was required, but not obtained, the change is invalid. With respect to the voting requirement, the safest procedure would be to treat the measure as requiring a rule change and obtain the two-thirds vote required to approve a rule change.

You also asked about the constitutionality of HB 168 in light of the holding in Patrick v. Lynden Transport., 765 P.2d 1375 (Alaska 1988). That case involved a statute that required payment of security for court costs and attorney fees when the plaintiff is a nonresident as a condition for maintaining the lawsuit in Alaska. The court found that access to the courts is a fundamental right, analyzed the case on equal protection grounds under the Alaska Constitution, and relied heavily on the residency versus non-residency issues presented by the case to reach the conclusion that the statute was unconstitutional.

HB 168 differs from the issue present in Patrick v. Lynden. In Patrick v. Lynden the plaintiff could not maintain the action without filing security for costs and fees. In contrast, HB 168 does not explicitly deny access to the courts, although, arguably it may have the same effect by denying access to restraining order or preliminary injunction. Another important difference is that HB 168 does not involve residency issues comparable to those in Patrick v. Lynden Transport and that were used by the court as the basis for the court's decision.

In short, the precedent established in Patrick v. Lynden does not determine whether HB 168 is constitutional, although it does establish that access to the courts is a fundamental right. Whether the requirements of HB 168 infringe on that right is an open question.

If I may be of further assistance, please advise.

DCB:med
11-026.med

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHB 168(JUD)
(H) Publish Date: 4/5/11

Identifier (file name): HB168-DEC-CO-03-24-11
Title: Injunction Security: Industrial Operation
Sponsor: Representative Feige
Requester: House Judiciary Committee

Dept. Affected: Environmental Conserv
Appropriation: Administrative Services
Allocation: Commissioner's Office
OMB Component Number: 633

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	0.0		0.0	0.0	0.0	0.0	0.0
Travel	0.0		0.0	0.0	0.0	0.0	0.0
Services	0.0		0.0	0.0	0.0	0.0	0.0
Commodities	0.0		0.0	0.0	0.0	0.0	0.0
Capital Outlay	0.0		0.0	0.0	0.0	0.0	0.0
Grants	0.0		0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0		0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0		0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0		0.0	0.0	0.0	0.0	0.0
1004 GF	0.0		0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0		0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0		0.0	0.0	0.0	0.0	0.0
Other (please identify)	0.0		0.0	0.0	0.0	0.0	0.0
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Mary Siroky, Director — Phone: (907) 465-5256
Division: Administrative Services — Date/Time: 3/24/11 2:00pm
Approved by: Dan Easton — Date: 3/28/2011

(Revised 1/27/2011 OMB)

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSHB 168(JUD)

Analysis

This bill has no fiscal impact on the Department of Environmental Conservation.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: CSHB 168(JUD)
(H) Publish Date: 4/5/11

Identifier (file name) HB 168-DFG-HAB-03-21-11
Dept. Affected: Fish and Game
Title: Injunction Security: Industrial Operation
Appropriation: Habitat
Allocation: Habitat
Sponsor: Representative Eric Feige
Requester: House Judiciary Committee
OMB Component Number: 486

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Commodities	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Capital Outlay	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Grants	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Becky Nelson, Administrative Officer
Phone: 465-1852
Division: Habitat
Date/Time: 3/21/11 8:49 AM
Approved by: Kevin Brooks, Aministrative Services Director
Date: 3/21/2011
Department of Fish & Game

(Revised 1/27/2011 OMB)

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSHB 168(JUD)

Analysis

HB 168 would amend AS 09.40.230 by adding language that would require that a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit affecting an industrial operation shall provide security in an amount determined by the court for the industrial operation's costs and damages, including employees wages and benefits to contractors and subcontractors.

The Department of Fish and Game anticipates a zero fiscal impact.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: CSHB 168(JUD)
(H) Publish Date: 4/5/11

Identifier (file name): HB168-LAW-CIV-03-21-11
Dept. Affected: Law
Title: An Act requiring injunction security to include an amount for payment lost if the industirial operation is wrongfully enjoined.
Appropriation: Civil
Allocation: Oil, Gas & Mining
Sponsor: Representative(s) Feige
Requester: (H) Judiciary
OMB Component Number: 2091

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 3/21/11 9:30 AM
Approved by: John J. Burns, Attorney General, Department of Law — Date: 3/21/2011

(Revised 1/27/2011 OMB)

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSHB 168(JUD)

Analysis

HB 168 would amend existing Statutes to add a requirement that a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit affecting an industrial operation shall provide security in an amount determined by the court for the industrial operation's costs and damages, including employees wages and benefits and payment to contractors and subcontractors.

The Department of Law anticipates zero fiscal impact.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number: 4
Bill Version: **CSHB 168(JUD)**
(H) Publish Date: **4/5/11**

Identifier (file name) HB168-DNR-MLD-03-18-11
Title: INJUNCTION SECURITY: INDUSTRIAL OPERATION
Sponsor: Rep. Feige
Requester: HJUD

Dept. Affected: Natural Resources
Appropriation: Resource Development
Allocation: Mining and Land Development
OMB Component Number: 2460

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Commodities	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Capital Outlay	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Grants	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
FUND SOURCE	(Thousands of Dollars)						
1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Other (please identify)	0.0	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost

POSITIONS

Full-time	0	0	0	0	0	0	0
Part-time	0	0	0	0	0	0	0
Temporary	0	0	0	0	0	0	0

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Wyn Menefee, Acting Director
Division: Mining, Land & Water
Approved by: Daniel S. Sullivan
Department of Natural Resources

Phone: 269-8501
Date/Time: 3/18/11 1:00 PM
Date: 3/18/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE #4

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. CSHB 168(JUD)

Analysis

HB 168 requires a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation to give security in an amount determined by the court for costs that may be incurred and damages that may be suffered by an industrial operation that has been wrongfully enjoined or restrained. This security would include an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation.

There will be no anticipated fiscal impact to the Department of Natural Resources.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSHB 168(JUD)**
Fiscal Note Number: 5
(S) Publish Date: 3/23/12

Identifier (file name): HB168-DEC-CO-12-03-11
Title: Injunction Security: Industrial Operation
Sponsor: Representative Feige
Requester: Senate Labor and Commerce Committee

Dept. Affected: Environmental Conserv
Appropriation: Administration
Allocation: Office of the Commissioner
OMB Component Number: 633

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	0.0		0.0	0.0	0.0	0.0	0.0
Travel	0.0		0.0	0.0	0.0	0.0	0.0
Services	0.0		0.0	0.0	0.0	0.0	0.0
Commodities	0.0		0.0	0.0	0.0	0.0	0.0
Capital Outlay	0.0		0.0	0.0	0.0	0.0	0.0
Grants, Benefits	0.0		0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0		0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts	0.0		0.0	0.0	0.0	0.0	0.0
1003	GF Match	0.0		0.0	0.0	0.0	0.0	0.0
1004	GF	0.0		0.0	0.0	0.0	0.0	0.0
1007	I/A Rcpts (Other)	0.0		0.0	0.0	0.0	0.0	0.0
1037	GF/MH (UGF)	0.0		0.0	0.0	0.0	0.0	0.0
1178	temp code (UGF)	0.0		0.0	0.0	0.0	0.0	0.0
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time	**0.0**		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
Part-time	0.0		0.0	0.0	0.0	0.0	0.0
Temporary	0.0		0.0	0.0	0.0	0.0	0.0

CHANGE IN REVENUES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This fiscal note has been entered into the 2012 form with no changes from previous version.

Prepared by: Joey K. Ausel, Budget Manager — Phone: (907) 465-5235
Division: Administrative Services — Date/Time: 12/3/11 10:41 AM
Approved by: Lynn Kent — Date: 12/22/2011
Deputy Commissioner

(Revised 8/17/2011 OMB)

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 168(JUD)

Analysis

This bill has no fiscal impact on the Department of Environmental Conservation.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSHB 168(JUD)**
Fiscal Note Number: 6
(S) Publish Date: 3/23/12

Identifier (file name): HB168-DFG-HAB-12-15-11
Title: INJUNCTION SECURITY: INDUSTRIAL OPERATION
Sponsor: REPRESENTATIVE(S) FEIGE, et al.
Requester: Senate Labor and Commerce Committee

Dept. Affected: Fish and Game
Appropriation: Habitat
Allocation: Habitat
OMB Component Number: 486

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time	**0.0**	0.00	0	0	0	0	0
Part-time	0.0	0	0	0	0	0	0
Temporary	0.0	0	0	0	0	0	0

CHANGE IN REVENUES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated to reflect current fiscal year.

Prepared by: Randall Bates, Director — Phone: 907-465-3176
Division: Habitat — Date/Time: 12/1/2011 3:20PM
Approved by: Kevin Brooks, Administrative Services Director — Date: 12/1/2011
Department of Fish & Game

(Revised 8/17/2011 OMB)

FISCAL NOTE #6

STATE OF ALASKA **BILL NO.** CSHB 168(JUD)
2012 LEGISLATIVE SESSION

Analysis

HB 168 would amend AS 09.40.320 by adding language requiring that a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit affecting an industrial operation provide security in an amount determined by the court for the industrial operation's costs and damages, including employees' wages and benefits to contractors and subcontractors.

The Department of Fish and Game, Habitat Division antcicipates a zero fiscal impact.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CSHB 168(JUD)**
Fiscal Note Number: 7
(S) Publish Date: 3/23/12

Identifier (file name): HB168CS(JUD)-LAW-CIV-12-07-11
Dept. Affected: Law
Title: An Act requiring injunction security to include an amount for payment lost if industrial operation is wrongfully enjoined.
Appropriation: Civil
Allocation: Oil, Gas & Mining
Sponsor: Representative(s) Feige
Requester: (S) Labor & Commerce
OMB Component Number: 2091

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Updated for new fiscal year form.

Prepared by: Eileen Donahue, Division Operations Manager — Phone 465-5427
Division: Administrative Services — Date/Time 12/07/11 4:15PM
Approved by: John J. Burns, Attorney General — Date 12/7/2011
Department of Law

(Revised 8/17/2011 OMB)

FISCAL NOTE #7

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CSHB 168(JUD)

Analysis

HB 168 would amend existing Statutes to add a requirement that a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit affecting an industrial operation shall provide security in an amount determined by the court for the industrial operation's costs and damages, including employees wages and benefits and payment to contractors and subcontractors.

The Department of Law anticipates zero fiscal impact.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version	CSHB 168(JUD)
Fiscal Note Number	8
(S) Publish Date	3/23/12

Identifier (file name)	HB168-DNR-MLW-01-13-12	Dept. Affected	Natural Resources
Title	INJUNCTION SECURITY: INDUSTRIAL OPERATION	Appropriation	Land & Water Resources
		Allocation	Mining, Land & Water
Sponsor	Rep. Feige		
Requester	(S) L&C	OMB Component Number	3002

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This is a new version of the fiscal note form for the second session of the 27th legislature. The allocation and appropriation have been beer changed to reflect the new DNR structure.

Prepared by	Brent Goodrum, Director	Phone	(907) 269-8501
Division	Mining, Land & Water	Date/Time	1/13/12 12:00 AM
Approved by	Daniel S. Sullivan	Date	1/13/2012
	Department of Natural Resources		

(Revised 11/17/2011 OMB)

FISCAL NOTE #8

STATE OF ALASKA **BILL NO.** CSHB 168(JUD)
2012 LEGISLATIVE SESSION

Analysis

HB 168 requires a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation to give security in an amount determined by the court for costs that may be incurred and damages that may be suffered by an industrial operation that has been wrongfully enjoined or restrained.This security would include an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation.

There will be no anticipated fiscal impact to the Department of Natural Resources.

Montana Code Annotated 1995

MCA Contents **Search** **Part Contents**

27-19-306. Security for damages. (1) Subject to 25-1-402, on granting an injunction or restraining order, the judge shall require a written undertaking to be given by the applicant for the payment of the costs and damages that may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. Except as provided in subsection (2), the undertaking:

(a) must be fixed at a sum that the judge considers proper; and

(b) may be waived:

(i) in domestic disputes; or

(ii) in the interest of justice.

(2) (a) If a party seeks an injunction or restraining order against an industrial operation or activity, the judge shall require a written undertaking to be filed by the applicant. The amount of the written undertaking must be set in an amount that includes all of the wages, salaries, and benefits of the employees of the party enjoined or restrained during the anticipated time that the injunction or restraining order will be in effect. The amount of the written undertaking may not exceed $50,000 unless the interests of justice require. The written undertaking must be conditioned to indemnify the employees of the party enjoined or restrained against lost wages, salaries, and benefits sustained by reason of the injunction or restraining order.

(b) As used in subsection (2)(a), "industrial operation or activity" includes but is not limited to construction, mining, timber, and grazing operations.

(3) Within 30 days after the service of the injunction, the party enjoined may object to the sufficiency of the sureties. If the party enjoined fails to object, all objections to the sufficiency of the sureties are waived. When objected to, the applicant's sureties, upon notice to the party enjoined of not less than 2 or more than 5 days, shall justify before a judge or clerk in the same manner as upon bail on arrest. If the sureties fail to justify or if others in their place fail to justify at the time and place appointed, the order granting the injunction must be dissolved.

(4) This section does not prohibit a person who is wrongfully enjoined from filing an action for any claim for relief otherwise available to that person in law or equity and does not limit the recovery that may be obtained in that action.

History: En. Sec. 86, p. 59, Bannack Stat.; re-en. Sec. 115, p. 154, L. 1867; re-en. Sec. 132, p. 52, Cod. Stat. 1871; re-en. Sec. 174, p. 79, L. 1877; re-en. Sec. 174, 1st Div. Rev. Stat. 1879; re-en. Sec. 176, 1st Div. Comp. Stat. 1887; en. Sec. 874, C. Civ. Proc. 1895; re-en. Sec. 6646, Rev. C. 1907; re-en. Sec. 9246, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 529; re-en. Sec. 9246, R.C.M. 1935; amd. Sec. 53, Ch. 535, L. 1975; R.C.M. 1947, 93-4207; amd. Sec. 48, Ch. 12, L. 1979; amd. Sec. 8, Ch. 399, L. 1979; amd. Sec. 1, Ch. 575, L. 1995.

Previous Section **Help** **Next Section**

Montana Code Annotated 1995

MCA Contents Search Part Contents

25-1-402. Governmental entities not required to give security. In any civil action or proceeding wherein the state, a county, or a municipal corporation or any officer in his official capacity on behalf of the state or a county, city, or town is a party plaintiff or defendant, no bond, undertaking, or security can be required of the state, county, municipal corporation, or town or any officer thereof; but on complying with the other provisions of this code, the state, county, municipal corporation, or town or any officer thereof acting in his official capacity has the same rights, remedies, and benefits as if the bond, undertaking, or security were given and approved as required by this code. The board of trustees of any school district is entitled to the benefit of this section.

History: En. Sec. 1902, C. Civ. Proc. 1895; re-en. Sec. 7196, Rev. C. 1907; re-en. Sec. 9829, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1058; re-en. Sec. 9829, R.C.M. 1935; R.C.M. 1947, 93-8714.

Previous Section Help Next Section

Washington RCW § 7.40.085

In determining the amount of the bond required by RCW 7.40.080 as now or hereafter amended, with respect to an injunction or restraining order that will delay or enjoin a notice to proceed or the performance of work under a construction contract for a public contracting body among the factors regarded in the exercise of its discretion, the court shall consider:□□ (1) All costs and liquidated damages provided for in the contract or otherwise that may result from such delay;□□ (2) The probable costs to the public in terms of inconvenience, delayed use of the proposed facilities, and escalation of costs of delayed construction of the proposed facilities that may be incurred as a result of a delay subsequently found to be without good cause; and□□ (3) The procedures for consideration of objections to proposed construction and the opportunity the one seeking the injunction had for objecting prior to the letting of the contract.
[1974 ex.s. c 153 § 1.]

ANCHORAGE CHAMBER
of COMMERCE

March 27, 2012

Representative Eric Feige
Resources Co-Chair
State Capitol Rm. 126
Juneau, AK 99801-1182

Re: Support for House Bill 168: Injunction Security: Industrial Operation

Dear Representative Feige,

The Anchorage Chamber of Commerce supports House Bill 168 (HB 168), Injunction Security: Industrial Operation and urges efforts to ensure its passing this legislative session. This bill includes provisions that will strengthen efforts to ensure Alaska's energy and economic future through resource development projects.

The Anchorage Chamber is Alaska's largest business organization. Established in 1915, we currently represent nearly 1,100 business members, comprised of nearly 63,000 of Anchorage's 175,000 employees.

Recently, we surveyed our membership and from the results developed four legislative priorities as follows: Increase Oil Production; Ensure energy security in Anchorage and Southcentral; Update and Build New Infrastructure; and Ensure Fiscally Responsible Budget and Stable Tax Policy.

We recognize that in the past there have been several cases where courts have issued injunctions, or stays, against companies engaged in critical development projects. This led to project delays, curtailed employment, and, in particular, prevented the completion of much needed resource development projects to meet energy demands and secure our economic future.

We believe the success of all four of our priorities is severely limited by potential litigation. By imposing a penalty and requiring a bond to be posted in the event of a stay or injunction, the cost to the party bringing the suit is increased, preventing frivolous lawsuits and project delays.

Please support HB168 and ensure its passage this session.

Thank you for your continued support.

Bruce Bustamante
2011-12 Anchorage Chamber Chair

Sami Glascott, MPA
Anchorage Chamber President

cc:
Representative Chenault
Representative Johnson

1016 W. Sixth Avenue, Suite 303 • Anchorage, AK 99501
T 907.272.2401 • F 907.272.4117 • Anchoragechamber.org

Representative Thomas
Representative T.Wilson
Representative Fairclough
Representative Keller
Representative Thompson
Representative Costello
Representative Millett
Representative Hawker
Representative Lynn
Representative Olson
Representative Saddler
Representative Dick
Representative P. Wilson
Senator Giessel

1016 W. Sixth Avenue, Suite 303 • Anchorage, AK 99501
T 907.272.2401 • F 907.272.4117 • Anchoragechamber.org

Dana Owen

From: Judy Donegan <jdoneganak@gmail.com>
Sent: Sunday, March 18, 2012 9:54 PM
To: Dana Owen; Alida Bus
Subject: HB 168

Jennifer Harrison, Emily Fehrenbacher, and I met with Alida and talked briefly with Dana last week regarding HB 168. Thank you for spending the time with us. Dana suggested that I write a letter to Senator Egan to express my concerns about the bill. My comments are below. Please pass them on to the Senator prior to Tuesday's hearing. Thank you.

Judy Donegan
13603 E. Oceanview Road
Palmer AK 99645

QUESTIONS ABOUT HB 168 (AN ACT REQUIRING THE AMOUNT OF THE SECURITY GIVEN BY A PARTY SEEKING AN INJUNCTION. . . .)

If enacted, this act would be a significant barrier to attempts by ordinary citizens, organizations, unions, and possibly even the State to ensure that permitted industrial operations are conducted in a responsible way. It is important that the potential effects of the bill be carefully examined:

I. **What is the purpose of the proposed legislation?**

If the bond is required when the preliminary injunction is granted, as is normally the case, the act would do nothing to prevent frivolous lawsuits. A frivolous lawsuit will not result in the grant of preliminary injunctive relief. To grant a preliminary injunction, a judge must determine that the plaintiffs have a likelihood of success on the merits and will suffer irreparable harm if the injunction is not issued. If those findings can be made (even if ultimately found to be in error), the lawsuit is not frivolous.

If the lawsuit is unsuccessful, no bond will be required. (But see next question.)

It is only plaintiffs who are in danger of winning that need to be concerned about having to post what would almost certainly be a very large bond. In other words, it is lawsuits that present legitimate permit inadequacies or permit violations that will be deterred, not frivolous ones.

II. **What would be some of the difficulties for courts in applying the law?**

One ambiguity in the law involves when in the litigation the bond must be posted. Bonds are ordinarily required when a preliminary injunction is granted. HB 168 can be read to require the bond when the relief is requested: "A party **seeking** a restraining order. . . shall give security. . . " Requiring a bond in order to **request** a preliminary injunction would be a highly unusual requirement and would, itself, almost surely result in litigation, placing a further burden on the courts.

The bill requires also that the security be "in an amount the court considers proper for costs that may be incurred and damages that may be suffered by an industrial operation that has been wrongfully enjoined or restrained, including an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors. . . ." Determining the amount of the bond would almost certainly require a judge to take evidence about the number of employees, their wages, their benefits, as well as information about the number of contractors and subcontractors and what the industrial operation pays them. It would necessarily require a determination of the length of time likely to be involved between the issuance of the injunction and its possibly being found to be wrongfully issued. In other words, determining the bond amount would require a trial within a trial.

The determination of the amount of the bond would be difficult enough in ongoing operations, but would be virtually impossible in situations in which permits are allegedly wrongfully issued but the operations have not yet begun. The bond amount in this situation would necessarily be based on speculation. Do people not yet working suddenly get paid?

Presumably the wages of employees and payments to contractors would be intended ultimately to go to the employees and contractors, who would not be parties to the lawsuit. Ordinarily, of course,damages go only to parties. Will there be a mechanism to ensure that employees and contractors are paid by the defendant? Would the court need to oversee this aspect of the case?

III. **How large a bond would be required and would it prohibit virtually everyone from filing a lawsuit?**

It takes only a little thought to realize that wages, benefits, payments to contractors, etc. can add up to huge amounts of money. The bond could run into millions of dollars. And the judge would be required to impose such a bond: the plaintiff "**shall** give security." Ordinary citizens such as landowners, fishermen, farmers, native groups, as well as most organizations and unions would not be able to post such a large bond. Meritorious claims will be abandoned.

IV, **Would the act be constitutional?**

The act would present a serious issue as to whether it impermissibly restricts the right to petition the government, guaranteed by both the Alaska and the U.S. Constitutions. (The Alaska Constitution provides that the "right of the people. . . to petition the government shall never be abridged." Article I, Section 6. The First Amendment to the U.S. Constitution provides for the right to "petition the Government for a redress of grievances.")

This bill may violate the Equal Protection Clause. It imposes a burden on litigants seeking relief against "a construction, energy, or timber activity and oil, gas, and mineral exploration, development, and production." (Presumably, the bill means to refer to corporations or companies carrying out those activities.) Litigants seeking injunctions against companies in other types of activities, e.g., bill collection, retail sales, manufacturing, are not subject to such onerous bonding requirements. Under the Equal Protection Clause, the government may differentiate between classes of people only if there is a rational basis for doing so. *Kadrmas* v. *Dickinson Public Schools*, 487 U.S. 450, 462 (1988). So what can the rational relationship be in this instance? Sponsors of the legislation say it is meant to prevent frivolous litigation. However, as explained above, the bill would not do that. There can be no rational basis for imposing more onerous requirements on ordinary citizens seeking to prevent harm from mineral production than on those seeking to prevent harm from, say, the sales of harmful products.

V. Would the act have unintended consequences?

Does this bill threaten to undo the delegation to Alaska of the U.S. Environmental Protection Agency's pollution prevention programs? The EPA can delegate to the states only if access to the courts is not restricted by the states. 40 C.F.R. section 123.60 (setting out judicial review requirements for delegated State programs); 40 C.F.R. section 123.63 (criteria for withdrawing State programs when the programs no longer comply with regulatory requirements).

Would this bill also affect the State's ability to administer the Surface Mining Control and Reclamation Act, Chapter 27, Alaska Statutes. In order for the state to regulate surface mining, Alaska's SMCRA had to be approved by the U.S. Interior Department and it had to be consistent with the federal statute. Any amendment to the state regulatory program cannot take effect until the Secretary of the Interior approves of it in notice and comment rulemaking. The federal act at 30 U.S.C. section 1264 provides for temporary relief from approval decisions but does not authorize bonds, as does HB 168. In provisions for citizen suits under 30 U.S.C. section 1270, federal law states that the "court **may** [not "shall," as in HB 168] require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure." emphasis added. FRCP 65 is much less onerous than HB 168. Would this act put Alaska's surface mining regulatory program in jeopardy?

VI. What legitimate purpose, not already provided for in the Alaska Rules of Civil Procedure, would this bill serve?

Alaska Rule of Civil Procedure 11 provides for penalties for attorneys or parties who file frivolous lawsuits: "The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading. . . that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless expense in the cost of litigation."

Alaska Rule of Civil Procedure 65(c) already provides for bonds: "No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such cost and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."

Alaska Rule of Civil Procedure 82 makes Alaska one of the only--if not the only--state in the union with a requirement that a losing party pay the opponents legal fees: "Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule."

It is hard to see any purpose HB 168 serves, except to prevent citizens from petitioning the courts to require certain industrial operations to behave responsibly.

Senate Labor and Commerce Committee
March 13, 2012
Testimony of Carl Portman, Deputy Director,
Resource Development Council for Alaska
HB168, Injunctive Security for Industrial Operations

Chairman Egan and members of the committee, thank you for the opportunity to testify this afternoon on HB168, Injunctive Security for Industrial Operations. RDC appreciates the scheduling of this bill and we recognize the many other issues demanding the committee's time.

One of RDC's top legislative priorities is to support efforts to bring more accountability to the appeals and litigation process for community and resource development projects. HB 168 makes progress in this regard by ensuring opponents to projects have some "skin in the game."

Under current law, plaintiffs have little incentive not to file lawsuits and appeals and seek injunctions to stop development projects. Seeking injunctions costs plaintiffs very little while the project sponsors endure the high costs of uncertainty and delay. The discovery phase in these types of cases can cost hundreds of thousands of dollars to the State and project proponents. Even when projects are not enjoined, the uncertainty of litigation can effectively stop progress on projects.

It is not just the project sponsor who is adversely affected by these injunctions. The employees of project sponsors, contractors, and their employees often are burdened with the direct and immediate impacts of a stay on a permit, which causes construction and development to shut down. Often those hurt the most are workers and their families, because when projects are enjoined, workers are often laid off. Under existing law, judges have not required opponents of developing Alaska's resources to post bonds or other security to cover the economic harm to the project and to the workforce caused by parties seeking injunctions.

HB 168 does not limit the ability of citizens to sue. What it does do is require a bond in those cases where an injunction is requested before the case is adjudicated.

HB168 strikes an appropriate balance by removing incentives for filing ideologically-based challenges designed simply to delay projects while still preserving the right to bring meritorious challenges.

Examples of ideologically-based challenges abound throughout Alaska. The timber industry in Southeast Alaska would be in better shape today if a bond was required before timber sales are enjoined. That industry has been decimated by endless appeals and litigation over federal timber sales. Recent headlines included yet more legal challenges that may further delay exploratory drilling in the Alaska OCS, drilling that has yet to occur on leases sold in 2008. Litigation in the arctic OCS is delaying the State's goal to increase throughput in TAPS through new OCS development. While these cases are in federal jurisdiction, litigation in State court is likely to increase with the primacy assumed over the water program.

The ability of project proponents to weather the storm of an unfounded stay of activities varies based on project economics and the strength of the balance sheets of those developing the projects. A worker who loses employment because of a court ordered stay might not have the lasting power to wait out what are often lengthy legal proceedings. It is fitting that this bill was referred to this committee, as both labor and commerce are directly impacted. This bill can provide some accountability to mitigate disruption of commerce while protecting the interests of workers engaged in projects that may be subject to challenges.

RDC encourages this committee to pass this bill. Thank you again for hearing this bill and allowing time for our testimony.

Alaska Conservation Alliance

"A Strong Economy and Healthy Environment Go Hand in Hand"

March 12, 2012

Senator Dennis Egan
State Capitol, Rm. 510
Juneau, AK 99801-1182

Dear Sen. Egan,

The Conservation Alliance opposes HB 168, which would require Alaskans to post a bond or security when seeking a stay or injunction against a government-issued permit affecting an industrial operation. The Alaska Conservation Alliance represents over 30 conservation groups across the state with a combined membership of over 38,000 Alaskans.

HB 168 puts corporate and foreign interests above Alaskans and their communities.

To begin, this legislation is not aimed at frivolous lawsuits. Already, a frivolous lawsuit will not receive a stay or preliminary injunction, because a court can't issue those remedies unless it first determines that the plaintiff is likely to win and that "irreparable harm" would result without the stay or injunction. Instead, this legislation is targeted at lawsuits with merit, and this legislation imposes its burden at the expense of ordinary Alaskans and their communities. Under HB 168, the Alaskan seeking an injunction or stay will be required to post a bond that is typically unaffordable to all but the most wealthy corporations and individuals. In sum, the bill penalizes all but the wealthy and deters meritorious claims before they are adjudicated at all.

Further, when a case against a permit is brought forward by an Alaskan, it is questioning the permitting process used by the issuing governmental agency or illegal practices by industry. Thus, an injunction or stay will only be issued when government hasn't done its job properly, or when a corporation is violating the law or the terms of its permit, as determined by judicial review. Requiring a citizen to pay for a governmental error or corporate crime puts a chilling effect on a long tradition of protecting American whistleblowers in our democracy.

In fact, this legislation is so broad that it may even prevent the State itself from enforcing violations of law. It applies to any "party" seeking temporary injunctive relief, which sometimes includes the State when attempting to enforce violations of law occurring under an industrial permit. In those cases, the State will be subject to the bill's bond requirements, a cost the enforcement agencies have no budget to incur.

810 N Street, Suite 203 | Anchorage, AK 99501 | 907-258-6171 | F: 907-258-6177
www.akvoice.org | www.twitter.com/ACAAlliance
www.facebook.com/AlaskaConservationAlliance

HB 168 would block Alaskans from protecting their communities and way of life by preventing them from challenging government-issued permits that have resulted in legally redressible injuries. It would force Alaskans challenging a permit to post a bond equal to potential damages suffered by an industrial operation. This remedy protects wealthy corporations – many of which merely do business in Alaska and/or are from foreign countries – over resident Alaskans who live, work, and raise their families in this great state. The bond will in many cases exceed $1 million, which effectively prevents almost any Alaskan from filing a suit to challenge what may be a fast-tracked, sloppy agency decision.

HB 168 violates the Alaska Constitution.

Beyond being bad policy, the bill is also likely unconstitutional for two reasons. First, it violates the Equal Protection clause by targeting those litigants who challenge permits for industrial operations, and protecting only industrial operations. This discriminates unconstitutionally against local landowners, community groups, native organizations, commercial and sport fishers and hunters, and other Alaskans who seek to ensure that state agencies are doing their jobs.

Second, in practice it would often deny access to courts, in violation of Due Process rights, for Alaskans who do not have the financial resources to post the required bond but have an otherwise valid claim. It is not hard to imagine a landowner or a community that does not have the millions to post the bond this bill would require. That person or community would be prohibited from protecting the land it has owned for decades yet is now threatened by a major industrial operation.

HB 168 is poorly drafted and would be extraordinarily difficult for a court to apply.

The bill contains several provisions that are ambiguous or make no sense and would be challenging for a court to enforce. For example, the bill purports to require a bond for an order "vacating" a permit. However, a court will vacate a permit only at the conclusion of a case, after finding that the issuing agency actually violated the law. That is not a situation where bonds come into play. Bonds are instead required only for temporary injunctions or stays, in case the person does not ultimately prevail. It would make no sense and serve no purpose to require a bond of the party who has won the case. If that is the intent of the bill, then it is merely a punitive and unconstitutional attempt to prevent successful litigants from obtaining the relief to which they are entitled.

Similarly, the bill purports to require the bond to cover damages wrongfully suffered by "an industrial operation." An industrial operation, in turn, is defined in the bill as various activities. But damages are suffered only by litigants, such as persons, corporations, or organizations. There is no precedent for measuring or awarding damages to an activity rather than a party, and the very concept is bizarre and seemingly impossible to apply.

Further, the legislation is ambiguous as to the point at which a bond would be required. Departing from current court rules, the bill requires a bond from a party "seeking" a stay, preliminary injunction, or vacatur. If that were read to require a bond whenever a case was filed against an industrial permit, it would effectively require an exorbitant fee at the time of filing—an unconstitutional requirement and drastic change to current court procedures. Further, if the bill were interpreted to require bonds whenever a stay or preliminary injunction is sought, and before the court orders one, its main impact would be to deter likely meritorious claims from ever being raised—again a clear violation of constitutional rights.

For the reasons stated above, the Alaska Conservation Alliance opposes HB 168. The only purpose the bill would serve is to keep regular Alaskans out of court and to protect sloppy permitting decisions that could greatly impact Alaska's future.

Sincerely,

Andy Moderow
Executive Director
Alaska Conservation Alliance

810 N Street, Suite 203 | Anchorage, AK 99501 | 907-258-6171 | F: 907-258-6177
www.akvoice.org | www.twitter.com/ACAAlliance
www.facebook.com/AlaskaConservationAlliance

RESOURCE DEVELOPMENT COUNCIL

Growing Alaska Through Responsible Resource Development

March 5, 2012

Senator Dennis Egan, Chair
Senate Labor and Commerce Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801

Re: HB 168, Injunctive Security: Industrial Operations

Dear Senator Egan:

Thank you for scheduling the first reading of HB168, Injunctive Security for Industrial Operations, last week. RDC appreciates the scheduling of this bill and we recognize the many other issues demanding the committee's time. Because your plans for public testimony on the bill were frustrated by a full agenda, I am providing the following written support for this bill at this time.

RDC is a statewide, non-profit, membership-funded organization founded in 1975. The RDC membership is comprised of individuals and companies from Alaska's oil and gas, mining, timber, tourism, and fisheries industries, as well as Alaska Native corporations, local communities, organized labor, and industry support firms. RDC's purpose is to link these diverse interests together to encourage a strong, diversified private sector in Alaska and expand the state's economic base through the responsible development of our natural resources.

One of RDC's top legislative priorities is to support efforts to bring more accountability to the appeals and litigation process for community and resource development projects. HB 168 makes progress in this regard by ensuring opponents to projects have some "skin in the game."

Under current law plaintiffs have little incentive not to file lawsuits and appeals and seek injunctions to stop development projects. Seeking injunctions costs plaintiffs very little while the project sponsors endure the high costs of uncertainty and delay. The discovery phase in these types of cases can cost hundreds of thousands of dollars to the State and project proponents. Even when projects are not enjoined, the uncertainty of litigation can effectively stop progress on projects.

It is not just the project sponsor who is adversely affected by these injunctions. The employees of project sponsors, contractors, and their employees often are burdened

121 West Fireweed Lane, Suite 250, Anchorage, Alaska 99503-2035
Phone: 907-276-0700 Fax: 907-276-3887 Email: resources@akrdc.org Website: akrdc.org

with the direct and immediate impacts of a stay on a permit, which causes construction and development to shut down. Often those hurt the most are workers and their families, because when projects are enjoined, workers are often laid off. Under existing law, judges have not required opponents of developing Alaska's resources to post bonds or other security to cover the economic harm to the project and to the workforce caused by parties seeking injunctions.

HB 168 does not limit the ability of citizens to sue. What it does do is require a bond in those cases where an injunction is requested before the case is adjudicated. HB168 strikes an appropriate balance by removing incentives for filing ideologically based challenges designed simply to delay projects while still preserving the right to bring meritorious challenges.

Examples of ideologically based challenges abound throughout Alaska. Last week I visited with the Alaska Forest Association and it caused me to reflect on whether the timber industry in Southeast Alaska would be in better shape today if a bond had been required before the scores of timber sales had been appealed resulting in stays and injunctions. That industry has been decimated by endless appeals and litigation over federal timber sales. The headlines just last week included yet more legal challenges that may further delay exploratory drilling in the Alaska OCS, drilling that has yet to occur on leases sold in 2008. Litigation in the arctic OCS is delaying the State's goal to increase throughput in TAPS through new OCS development. While many of these cases are in federal jurisdiction, litigation in State court is also common and is likely to increase with the primacy assumed over water program.

The ability of project proponents to weather the storm of an unfounded stay of activities varies based on project economics and the strength of the balance sheets of those developing the projects. A worker who loses employment because of a court ordered stay might not have the lasting power to wait out what are often lengthy legal proceedings. It is fitting that this bill was referred to the Labor and Commerce committee, as both labor and commerce will benefit from its passage. HB168 can provide some accountability to mitigate disruption of commerce while protecting the interests of workers engaged in projects that may be subject to ideologically based challenges.

RDC appreciates the Labor and Commerce Committee hearing this bill and encourages the committee to pass this bill from committee as soon as possible.

Regards,

Rick Rogers, Executive Director
Resource Development Council for Alaska

cc: Representative Feige

121 West Fireweed Lane, Suite 250, Anchorage, Alaska 99503-2035
Phone: 907-276-0700 Fax: 907-276-3887 Email: resources@akrdc.org Website: akrdc.org

February 1, 2012

The Honorable Dennis Egan
Alaska State Senate
Chairman, Senate Labor & Commerce Committee
Capitol Room 510
Juneau, AK 99801

Re: Litigation Reform and House Bill 168

Dear Senator Egan,

The Alaska State Chamber of Commerce (Alaska Chamber) is an organization dedicated to improving the business climate in Alaska. The Alaska Chamber represents hundreds of statewide businesses from Ketchikan to Barrow that share a common goal: to make Alaska a viable and competitive place to do business. Today, I am writing in support of House Bill (HB) 168 – Injunction Security.

As you may have learned last week while meeting with Alaska Chamber Fly-In attendees, litigation reform as it relates to resource development in Alaska is one of Alaska Chamber's top three priorities for the 2012 Legislative Session. Currently, there is virtually no risk to discourage opponents of natural resource projects to file lawsuits and appeals against projects. Under existing state law there is no requirement for those who file the lawsuits to post bonds which adequately cover the economic harm to the project proponent or workers, frequently resulting in a halt on projects altogether. Often the discovery phase in litigation can cost the State of Alaska and project proponents hundreds of thousands of dollars in attorney's fees.

HB 168 seeks to improve a penalty on frivolous lawsuits. By requiring a bond to be posted in the event of an injunction, the cost to the party bringing the suit forward is increased. This bill seeks to level the legal playing field without infringing on any parties right to bring a legitimate issue to court. We are hopeful that HB 168 will enjoy the bipartisan support it received in 2011 in the House of Representatives.

These are just a few reasons why I respectfully urge you, on behalf of Alaska Chamber members, to schedule HB 168 for a hearing in the Senate Labor and Commerce Committee as soon as possible. Thank you for your prompt consideration of this request.

Sincerely,

Rachael A. Petro
President/CEO

Cc: Representative Eric Feige

ALASKA STATE
CHAMBER
OF COMMERCE

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

Regional Office
630 E. Fifth Ave.
Suite 102
Anchorage
Alaska 99501
(907) 278-2722
FAX 278-6643

www.alaskachamber.com

HB 168: A Hole So Big You Could Drive A Mine Through It

The Alaska State House of Representatives recently passed H.B. 168. If passed by the Senate and signed by Governor Parnell, this bill would undercut the ability of Alaskans to protect their economic and traditional ways of life, their communities, and their air and water quality. It does this by seeking to require judges to force people challenging government permits to post bonds equal to the potential economic loss of the permit holder as well as others.[i]

In many cases such bonds would be so expensive as to render judicial review meaningless. Just like the Humpty Dumpty of children's lore, once the damage is done, all the king's horses and all the king's men can't put it back together again – just ask Prince William Sound residents and fishermen. That the courts are not directly precluded from reviewing the legality of the permit matters not at all – ask those same people from Prince William Sound what good a court judgment did for them.

The truth is that independent judicial review of agency decisions is essential to ensuring that the development of Alaska's resources is done in a responsible manner, and we Alaskans should not be scared into thinking otherwise. The check and balance on bureaucratic decisions provided by the courts ensures that those decisions are rational and supported by law. The judiciary already has the ability to impose bonds where appropriate,[ii] and to prevent, and sanction those who file, frivolous lawsuits.[iii] And to require a person to post a bond before he or she can petition the government for a redress of grievances is unconstitutional.[iv] Further, this bill threatens to undo the delegation to Alaska of the Environmental Protection Agency's pollution prevention programs, as EPA can only support such delegation if access to the courts is not restricted.[v]

The Bottom Line:

H.B. 168 creates a hole so big you could drive a mine through it.

April 10, 2011

[i] H.B. 168 provides, in relevant part:

> A party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation shall give security in an amount the court considers proper for costs that may be incurred and damages that may be suffered by an industrial operation that has been wrongfully enjoined or restrained, including an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation.

[ii] *See e.g.*, Alaska Rule of Civil Procedure 65(c) ("No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.")

[iii] Proponents of H.B. 168 claim that it is needed to "impose a penalty" on frivolous lawsuits. *See* http://www.housemajority.org/spon.php?id=27hb168-114 (statement of bill sponsor Representative Eric Feige). Yet, Alaska Rule of Civil Procedure 11 already provides authority to the courts to prevent and sanction frivolous lawsuits. Among other things, it provides that

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless expense in the cost of litigation..

Proponents of H.B. 168 claim that it is needed to "impose a penalty" on frivolous lawsuits. *See* http://www.housemajority.org/spon.php?id=27hb168-114 (statement of bill sponsor Representative Eric Feige).

[iv] The Alaska Constitution provides that "[t]he right of the people ... to petition the government shall never be abridged." Alaska Constitution, Article I, Section 6. The First Amendment to the United States Constitution provides, "*Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*"

Similar bills in other states have been vetoed (by Republican Governors) as unconstitutional. *See* http://www.standard.net/topics/utah-legislature/2011/02/28/note-legislature-first-amendment-covers-tree-huggers-too

[v] *See* 40 C.F.R. § 123.60 (judicial review requirements for delegated State programs); 40 C.F.R. § 123.63 (criteria for withdrawing State programs when the programs no longer comply with regulatory requirements); *see also Akaik Native Community v. United States Environmental Protection Agency*, 625 F.3d 1162, 1168 (9th Cir. 2010) (judicial review must provide meaningful opportunity for public participation in the permitting process).

Michele Prevost, MD
13631 E. Mikes Lane
Palmer, AK 99645

T 907-854-8159
O 907-745-2663

micheleskiak@me.com

March 11, 2012

Dear Senators and Representatives,

I am writing to you to appeal to your sense of moral decency to help us maintain our rights as private citizens.

Mr. Feige's proposed HB 168 creates an undue burden on access to the courts, which is guaranteed by the First Amendment of the Constitution -- "*Congress shall make no law...abridging the freedom of speech...and to petition the Government for a redress of grievances*" -- and the Alaska Constitution: "*right of the people.... to petition the government shall not be abridged.*" Industrial activities as discussed in the proposed bill have the potential to do personal, physical, emotional and financial harm. Nationally, there are hundreds, if not thousands, of documented instances where permits, rubber-stamped through the system, have been inadequate to protect citizens, and where industrial corporations have neglected to follow rules and regulations, resulting in property damage, injuries and deaths. This bill would deny Alaskans who do not have unlimited financial resources, but do have a valid grievance, from protecting their property or themselves from harm.

Clearly, the intent of the bill is to protect corporations' profits and prevent Alaskans from having recourse against fast-tracked, careless or illegal permitting by government agencies. A recent example of rubber-stamping a permit was the Wishbone Hill Air Quality Permit. This permit was issued by the Alaska Department of Environmental Conservation (DEC) despite numerous false assumptions and fraudulent information provided by the mining corporation in the permit application. DEC clearly without the personnel to double check all the details assumed the application was accurate. Fortunately an astute group of citizens with independent experts was able to catch these errors and the permit application was withdrawn. How many times is a permit issued despite glaring omissions and false information because there is no one outside the permittng agency reviewing it? How possibly could a group of land owners come up with millions of dollars to post the bond that this bill would require just to try to

protect their families and their property from potentially flawed industrial plans and permits? Obviously, they can't. As such, this bill violates their individual rights.

Remember, it could very well be you, a family member, or a friend who will have no recourse against poor-quality permitting or a morally corrupt corporation that fails to follow regulations resulting in personal injury, destroyed property, damaged or uninhabitable homes.

The right thing to do is reject this bill. There are already statutes that provide for compensation for a business being wrongfully restrained, as well as sanctions for frivolous lawsuits. Injunctions and stays are only issued after a judge determines that the stringent requirements for such relief have been met and that the lawsuit has merit. So, this new law is unnecessary, and all it would do is circumvent the rights of individual Alaskans and small communities.

"...the moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; those who are in the shadows of life; the sick, the needy and the handicapped." ~ Last Speech of Hubert H. Humphrey

Alaska has made one very large step in the right direction. Recognizing that industrial activities can pose serious health hazards, the international community and many global financial lending institutions now view Health Impact Assessments (HIA) as an essential component, on par with the economic impact study, in assessing a project's viability. The state of Alaska has recently developed an HIA program and commissioned Dr. Paul Anderson to perform an HIA for the Wishbone Hill Coal Mine.

A critical question to ask now is how this information will be used. It appears that Alaska legislation needs to catch up with the global economy. We need statutes that not only mandate HIA's for large industrial (mining, power generation, factories, etc) endeavors, the statutes need to ensure they are prepared by independent experts and become part of the permitting process, that recognized hazards are prevented by correcting the permit before the start of operations, and that they are fully enforced with adequate penalties and fines to ensure compliance.

Regarding the Wishbone Hill Coal Mine HIA, the Alaska Department of Natural Resources (DNR) is "editing" the draft. This is like allowing the tobacco companies to rewrite the medical research that links smoking to cancer. That sounds ridiculous, doesn't it? So why is DNR allowed to censor the contents of the HIA, and exclude what the agency disagrees with? The HIA should be an independent study and the entire product released to the public for review, not just what the mining corporation and DNR are willing to allow the public to see.

Currently many environmental protection regulations are willfully violated because it is less costly for the corporation to pay the fines than follow the law. When it comes to people's health, that should not be an acceptable option. As the saying goes, an ounce of prevention is worth a pound of cure. It is much more costly in the long run, never mind the priceless value of human life, to try to clean up a toxic mess and pay for cancer treatment, than it is to prevent it in the first place.

I respectfully ask to you reject HB 168 on the grounds it is immoral and unconstitutional. I also hope you will see the necessity of updating Alaska's industrial permitting regulations, including the need for HIA's to play a strong role in industrial project designs and permitting.

I would be happy to discuss these topics with you further. I can be reached at the address, phone numbers, or email provided.

Sincerely yours,

Michele Prevost, MD

SIERRA CLUB
FOUNDED 1892

TRUSTEES FOR ALASKA
SUSTAIN | PROTECT | REPRESENT

March 26, 2012

Dear Sen. French:

The Sierra Club and Trustees for Alaska oppose HB 168, which would require an Alaskan litigant to post a bond or security when a court issues a stay or injunction against a government-issued permit affecting an industrial operation. The Sierra Club is the nation's largest grassroots environmental organization working to explore, enjoy and protect the planet with roughly 1,200 members in Alaska. Trustees for Alaska was established in 1974 as an Alaska non-profit public interest law firm working to protect and sustain Alaska's natural environment on behalf of Native villages, community groups, and local and national conservation groups by providing legal services, policy advice, and strategic counsel free of charge. Trustees for Alaska has been in the forefront of issues large and small which continue to shape Alaska's environmental future – oil and gas development, mining, toxic wastes, air and water pollution, public land use, and protection of marine resources.

HB 168 Is Likely Unconstitutional.

First and foremost, our members and clients are concerned that HB 168 will take away their basic constitutional rights. The bill is likely unconstitutional for three reasons. First, it violates the Equal Protection clause by targeting litigants who challenge permits for industrial operations, and protecting only industrial operations. This discriminates unconstitutionally against local landowners, community groups, native organizations, commercial and sport fishers and hunters, and other Alaskans who seek to ensure that state agencies are doing their jobs.

Second, in practice it would often deny access to courts, in violation of Due Process rights, for Alaskans who do not have the financial resources to post the required bond but have an otherwise valid claim. This bond would have to cover potential damages including employees' lost wages, salaries, and contractors. The size of these bonds could easily and quickly add up to millions of dollars. Most Alaskans do not have the financial resources to post the required bond, but have an otherwise valid claim. Those people would be prohibited from protecting the land they have owned for decades yet is threatened by a major industrial operation. Even large non-profit organizations like the Sierra Club, do not have millions to post the bond this bill would require, despite frequently having legitimate issues with government-issued permits.

Third, HB 168 is a change to court rules, which violates the Alaska Constitution unless the bill is approved by two-thirds of each house and specifically states that it is a change to court rules. Currently, Civil Rule 65(c) and Appellate Rules 204(d) and 603(a)(2) govern the bonds that would be affected by HB 168. Indeed, the bill closely parallels the language of Civil Rule 65(c).

HB 168 is Poorly Drafted and Would Be Extraordinarily Difficult for a Court To Apply.

The bill contains several provisions that are ambiguous or make no sense and would be challenging for a court to enforce. For example, the bill purports to require a bond for an order "vacating" a permit. However, a court only vacates a permit at the conclusion of a case, after finding that the issuing agency actually violated the law.[1] That is not a situation where bonds come into play. Bonds are generally required only for temporary injunctions or stays, in case the person does not ultimately prevail. It would make no sense and serve no purpose to require a bond of the party who has won the case. If that is the intent of the bill, then it is a punitive and unconstitutional attempt to prevent successful litigants from obtaining the relief to which they are entitled.

Similarly, the bill purports to require the bond to cover damages wrongfully suffered by "an industrial operation." An industrial operation, in turn, is defined in the bill as various activities. But damages are suffered only by litigants, such as persons, corporations, or organizations. There is no precedent for measuring or awarding damages to an activity rather than a party, and the very concept is bizarre and likely impossible to apply.

Further, the legislation is ambiguous regarding the point at which a bond would be required. Departing from current court rules, the bill requires a bond from a party "seeking" a stay, preliminary injunction, or vacatur. If that were read to require a bond whenever a case was filed against an industrial permit, it would effectively require an exorbitant fee at the time of filing – an unconstitutional requirement and drastic change to current court procedures. Further, if the bill were interpreted to require bonds whenever a stay or preliminary injunction is sought, and before the court orders one, its main impact would be to deter likely meritorious claims from ever being raised—again a clear violation of constitutional rights.

<u>HB 168 Jeopardizes Delegation of Various Federal Enforcement Programs and Funding for Those Programs.</u>

HB 168 will likely have unintended legal and financial consequences for Alaska. Alaska has various federally delegated legal programs, including the Surface Mining Control and Reclamation Act, the National Pollutant Discharge Elimination System program in the Clean Water Act, Clean Air Act permitting programs, and the Resource Conservation and Recovery Act program. The Department of Natural Resources and Department of Environmental Conservation administer these federal programs, which require compliance with federal regulations. Those regulations include providing the same opportunity for judicial review as would be available under the federal program.

The bond requirement in HB 168 is not required under federal law and is a deterrent to citizens challenging unlawful permits. It is also a deterrent to seeking preliminary injunctive relief, no matter how compelling the case or egregious the legal violation. As such, it is very possible that the federal agencies administering these statutes, such as the Department of Interior and Environmental Protection Agency, could decide to de-delegate these programs from the State,

---

[1] In that case, the challenger has won the case, which by definition, is not a frivolous lawsuit.

which would remove Alaska's control over permitting and result in agency programs being defunded.

HB 168 Likely Stops Meritorious Lawsuits.

This legislation is not aimed at stopping frivolous lawsuits. A frivolous lawsuit would not receive a stay or preliminary injunction, because a court can't issue those remedies without first determining that the plaintiff is likely to prevail and that "irreparable harm" would result without the stay or injunction. Instead, this legislation is targeted at lawsuits with merit, but imposes its burden at the expense of ordinary Alaskans and their communities. Under HB 168, the Alaskan seeking an injunction or stay will be required to post a bond that is typically unaffordable to all but the most wealthy corporations and individuals. Stated another way, the bill penalizes all but the extraordinarily wealthy and deters meritorious claims before they are adjudicated at all.

Further, when a case against a permit is brought by an Alaskan, it questions the permitting process used by the issuing governmental agency or illegal practices by industry. As a result, an injunction or stay would only be issued when government hasn't followed procedure, applied the proper standards, or when a corporate permittee is violating the law or the terms of its permit, as determined by judicial review. Requiring a citizen to pay for a governmental error or corporate malfeasance creates a chilling effect on a long tradition of protecting whistleblowers in our democracy.

In fact, this legislation is so broad that it may even prevent the State itself from enforcing violations of law. It applies to any "party" seeking temporary injunctive relief, which sometimes includes the State when attempting to enforce violations of law occurring under an industrial permit. In those cases, the State will be subject to the bill's bond requirements, a cost the enforcement agencies have no budget to incur.

HB 168 would block Alaskans from protecting their communities and way of life by preventing them from challenging government-issued permits that have resulted in legally redressible injuries. It would force Alaskans challenging a permit to post a bond equal to potential damages suffered by an industrial operation. This remedy protects wealthy corporations – many of which merely do business in Alaska and/or are from foreign countries – over resident Alaskans who live, work, and raise their families in this great state. The bond will in many cases exceed $1 million, which effectively prevents almost any Alaskan from filing a suit to challenge what may be a fast-tracked, sloppy agency decision. Obviously this is the intent of the legislation—to keep Alaskans from exercising their constitutional rights.

Conclusion

HB 168 is unconstitutional, bad policy making. The only purpose it serves is to keep Alaskans who care about agency decision-making out of court while protecting sloppy permitting decisions that could impact Alaska's economic future. It also protects out-of-state and foreign corporations over Alaskans who live, work, recreate, and subsist in this great state. For these reasons the Sierra Club and Trustees for Alaska oppose HB 168.

Sincerely,

Emily Fehrenbacher, Associate Regional Representative
Sierra Club
750 W 2nd Avenue, Suite 100
Anchorage, AK 99501
(907) 276-4060
Emily.Fehrenbacher@sierraclub.org

Trish Rolfe, Executive Director
Trustees for Alaska
1026 W 4th Ave, Suite 201
Anchorage, AK 99501
(907) 433-2011
trolfe@trustees.org

March 30, 2012

The Honorable Hollis French
Alaska State Senate
Chairman, Senate Judiciary Committee
Capitol Room 417
Juneau, AK 99801

Re: CS House Bill 168 (JUD)

Dear Senator French,

The Alaska State Chamber of Commerce (Alaska Chamber) is an organization dedicated to improving the business climate in Alaska. The Alaska Chamber represents hundreds of statewide businesses from Ketchikan to Barrow that share a common goal: to make Alaska a viable and competitive place to do business. Today, I am writing in support of Committee Substitute House Bill (CS HB) 168 (JUD) – Injunction Security.

As you may have learned early this session while meeting with Alaska Chamber Fly-In attendees, litigation reform as it relates to resource development in Alaska is one of Alaska Chamber's top three priorities for the 2012 Legislative Session. Currently, the cost to challenge a legally permitted project in Alaska is virtually nothing. Instead, the risk is borne by defendants. Often the discovery phase in litigation can cost the State of Alaska and project proponents hundreds of thousands of dollars in attorney's fees. Such delays put Alaskans out of work creating personal hardship and potentially increasing State service costs.

CS HB 168(JUD) seeks to level the legal playing field without infringing on any parties right to bring a legitimate issue to court by requesting the court consider wages and benefits of workers as well as payments to contractors. We are hopeful that CS HB 168(JUD) will enjoy the bipartisan support it received in 2011 in the House of Representatives.

These are just a few reasons why I respectfully urge you, on behalf of Alaska Chamber members, to schedule CS HB 168(JUD) for a hearing in the Senate Judiciary Committee as soon as possible. Thank you for your prompt consideration of this request.

Sincerely,

Rachael A. Petro
President/CEO

Cc: Representative Eric Feige

ALASKA STATE CHAMBER OF COMMERCE

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

Regional Office
630 E. Fifth Ave.
Suite 102
Anchorage
Alaska 99501
(907) 278-2722
FAX 278-6643

www.alaskachamber.com

CHICKALOON VILLAGE TRADITIONAL COUNCIL

Chickaloon Native Village
(Nay'dini'aa Na')

RESOLUTION to Oppose Irresponsible Coal Development

RESOLUTION # 110817-02

WHEREAS, Chickaloon Village Traditional Council is an Indigenous Government with full power and authority to act for Chickaloon Native Village, and/or Chickaloon Village (Nay'dini'aa Na'); and

WHEREAS, Chickaloon Village is part of the Athabascan Nation and is a distinct, independent political community, and as such is qualified and exercises powers of self-government by reason of its original Tribal sovereignty as passed down from its ancestors since time immemorial; and nothing in this resolution shall be in conflict therewith; and

WHEREAS, Chickaloon Native Village is a Federally-recognized Tribal Government in Alaska (Federal Register, Volume 58, Number 202, November 24, 1982), with full power and authority to negotiate with the Federal Government; and

WHEREAS, Chickaloon Village Traditional Council did not cede, terminate, extinguish, or relinquish their original, possessory and aboriginal rights; and

WHEREAS, Chickaloon Village Traditional Council is the governing body of Chickaloon Village as recognized by the Chickaloon Tribal citizens; and has a responsibility to provide a government for the good health and welfare of its Tribal citizens, address any needs in its community; and

WHEREAS, Chickaloon Village Traditional Council's strategic plan identifies the following as a long-term goal: Protect, enhance and restore our ancestral lands, water and air and ensure respectful, healthy development; and

NOW THEREFORE BE IT RESOLVED, that Chickaloon Village Traditional Council opposes all irresponsible coal mining in our Cultural and Traditional areas which we have relied upon since the beginning of time and continues to be inextricably linked to our spiritual and cultural way of life; and

THEREFORE BE IT FURTHER RESOLVED, that Chickaloon Village Traditional Council authorizes and delegates authority to the Traditional Council Chairman, Vice-Chairman, Traditional Chief, or the Executive Director to act on behalf of the Chickaloon Village Traditional Council for this project/program.

It is hereby certified that this resolution was duly considered and approved this 17th day of August, 2011, X unanimous; or with a majority vote of _____ affirmative; _____ negative; _____ abstention, and/or _____ absent votes.

Douglas Wade,
Chairman

Penny Westing,
Secretary

Gary Harrison,
Traditional Chief

A. Court discretion on amount of bond

According to Rep. Feige, the sponsor of H.B. 168:

"The bill does put a fair amount of latitude in the judge's hands. Court rule 65(c) is obviously the precedent, I mean there's an existing court rule that allows for bonds and security to be posted. This bill is simply an additional emphasis on the part of the Legislature to give the judge certain things that he or she shall consider when it comes to that security or bond, and the rest is left up to the judge -- the amount is all on the judge's part, we don't set any specific amount. We're not trying to tell the judge what to do, we're just asking that the judge considers certain things related to these kinds of industrial operations." (Senate Labor & Commerce Committee Hearing, March 20, 2012)

"The bond amounts are not determined by the legislation, they're determined by the judge. . . . There's nothing in HB 168 that specifies an amount, in fact it's very clear that it puts the responsibility for specifying an amount on the presiding judge." (Senate Labor & Commerce Committee Hearing, March 13, 2012)[1]

[1] The bill sponsor has also stated that the intent is not to change the existing Alaska Civil Rule 65(c), which requires the posting of security when the court issues a temporary restraining order or preliminary injunction but leaves the amount of the bond to the court's discretion. According to Rep. Feige: "HB 168, once again, parallels the requirements of Alaska Civil Rule 65(c). As written, 65(c) states 'No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant in such sum as the court deems proper for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.' . . . We were very conscious of not trying to change the court rule." (Senate Labor & Commerce Committee Hearing, March 13, 2012) For the reasons discussed in the text, the language and meaning of H.B. 168 do not mirror those of Rule 65(c).

The relevant language in the bill is as follows:

> "A party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation shall give security in an amount the court considers proper for costs that may be incurred and damages that may be suffered by an industrial operation that has been wrongfully enjoined or restrained, including an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation."

The phrase "in an amount the court considers proper" arguably gives the court the discretion to determine the amount. At the same time, the phrase following the comma "including an amount for the payment of wages . . . " is logically read as modifying the earlier "an amount the court considers proper" and is most readily interpreted as requiring that the "amount considered proper" include an amount for wages and benefits and payment to contractors and subcontractors. Even if the bill is read as giving the judge the discretion to decide the ultimate amount ("an amount the court considers proper"), it seems clear that that amount must include an amount for wages etc. Thus, Rep. Feige's assertion that the bill simply asks the judge to "consider" certain things is untenable.

The bill could be modified in a number of ways to achieve Rep. Feige's intent. For example, the bill could be modified to read as follows:

> "A party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation shall give security in an amount the court considers proper, after considering among other things lost wages and benefits for employees and payment to contractors and subcontractors of the industrial operation, for costs that may be incurred and damages that may be suffered by an industrial operation that has been wrongfully enjoined or restrained."

Or as follows:

> "A party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation shall give security in an amount the court considers proper for costs that may be incurred and damages that may be suffered by an industrial operation that has been wrongfully enjoined or restrained. In determining the proper security amount, the court shall consider, among other things, including an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation."

B. Vacating a permit

According to Rep. Feige:

> "It is the option of a litigant to sue or not to sue. If they feel they have been wronged they certainly have that right and this bill does not prevent them from bringing a lawsuit to bear. You can or cannot request an injunction as part of that lawsuit. The bill does not keep people from access to the courts. It has been our observation that whenever an injunction is requested it generally falls out of two reasons. One, there is a legitimate concern that somehow the operation continuing would have an adverse effect on the plaintiff. But in a lot of cases the object is not necessarily any kind of wrong that is harming the plaintiff but is simply an objection to the project simply because the project is, and the objective of the injunction is simply to delay the project. This bill at least provides some measure of deterrence to that." (Senate Labor & Commerce Committee Hearing, March 20, 2012)

This testimony indicates that the goal of the bill is not to make it too expensive for people to bring legitimate challenges to industrial operations, but to deter litigants from seeking injunctions simply to delay the project. In addition, as the minutes of a House Judiciary Committee hearing show, Rep. Feige emphasized during committee meetings in 2011 that his intent was to reduce frivolous lawsuits:

> "There should be some kind of risk placed on the plaintiff in order to 'weed out' frivolous lawsuits ... since even when frivolous, they are still lawsuits and still result in costs and damages being incurred and suffered as the result of a stay, with serious implications for the state's economy." (Minutes, House Judiciary Committee Meeting, March 21, 2011)

Unfortunately, the bill as drafted goes well beyond the goals of preventing frivolous lawsuits and deterring injunctions merely to delay projects. The relevant language is as follows:

> "A party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation shall give security . . . ."

There are two problems with this language. First, the phrase "[a] party seeking . . . shall give security" suggests that the security must be posted at the time that a party requests the restraining order or other identified relief, rather than at the time that the court orders the requested relief, as is done under Rule 65(c). If the bill were interpreted this way, the security requirement would be a much more onerous burden than under current Rule 65(c).

The second problem is the phrase "or order vacating . . . the operation of a permit." An order vacating the operation of a permit is not a form of preliminary relief, but a form of permanent relief granted by a court along with a final judgment in the plaintiff's favor. The phrase thus expands the security requirement beyond the preliminary relief addressed by Rule 65(c) -- and, according to Rep. Feige, intended to be addressed by HB 168 -- to the primary form of permanent relief in a successful legal challenge to a permit. Thus, the bill addresses not just preliminary injunctions, but also permanent relief, and not just frivolous lawsuits, but meritorious, successful lawsuits. In other words, the bill requires litigants who bring a meritorious, successful challenge to a wrongly issued permit (or permit violations) to post security covering the lost employment costs flowing from the vacation of a permit for an illegally operating industrial project. Besides being an unconstitutional impairment of the right to petition the government, this aspect of the bill goes far beyond what its sponsor asserts is the goal of the bill. In addition, since a plaintiff would generally include the request for an order vacating the permit in the complaint as part of the request for relief, the bill indicates that a plaintiff must post security at the time of "seeking" this relief -- that is, when the complaint is filed. This result goes well beyond what is allowed under Rule 65(c), poses a severe burden on the right to petition the government, and goes well beyond the goal of the bill as described by the bill's sponsor.

These two problems with HB 168 are easily remedied. First, the phrase "A party seeking..." can be replaced with "A party who obtains..." Second, the phrase "or order vacating" can be deleted.

HB 168 -- governments and departments

Thu 3/29/2012 10:25 AM

From: Daven Hafey

To: dave@akvoice.org, andy@akvoice.org, Jedediah Smith, Lissa Hughes

Hey folks,

Just had an interesting conversation and email exchange regarding indirect implications of HB 168. Please see below language:

http://www.legis.state.ak.us/basis/get_documents.asp?session=27&docid=9674

Highlighted below, from memo linked above, the Alaska Civil Rule specifically exempts state and municipalities from the bonding. I don't see that the bill does. And yet, they've secured zero fiscal notes from all of the resource agencies. If there is a hearing it would be good for us to get questions to Senators to ask of all agencies if they have injunction authority for covered projects (I have found a couple of examples from DNR (oil lease and dam safety) and something from Fish and Game that we can provide to Senators) and if so how they see this bill impacting their ability to protect the public interest. Best, I think, to wait on this until any hearing - if the sponsor hasn't thought of this yet, and none of the agencies have brought it up and indeed this would cause them trouble they will need to get an amendment drafted if they want to move the bill forward. This usually takes another meeting and, when it is something sort of big like tieing State agency hands, can indicate that a bill didn't receive proper scrutiny earlier in the legislative process, which can help support not taking further action.

The new subsection added by HB 168 parallels the requirements of Alaska Civil

Rule 65(c), which requires a court to require a person seeking an injunction to provide

security to protect a person who may be wrongfully restrained or enjoined. Civil

Rule 65(c) reads:

(c) Security. No restraining order or preliminary injunction shall

issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may

be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the state or a

municipality or of an officer or agency thereof, or unless otherwise ordered by the court, in domestic relations actions or proceedings

. A surety upon a bond or undertaking under this rule submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action....

--
Daven Hafey
Southeast Alaska Conservation Council
907 586-6942

Sustaining people, sustaining nature -- it is one cause, inseparable. -Gus Speth

Official Business

Alaska State Legislature

Senate

Office of the Secretary

State Capitol, Room 211
Juneau, Alaska 99801-1182
Phone: (907) 465-3701
Fax: (907) 465-2832
Email:senate_secretary@legis.state.ak.us

FOR YOUR IMMEDIATE ATTENTION

DATE: March 23, 2012

TO: Judiciary Committee
(Cindy, Room 417)

FROM: Office of the Senate Secretary

SUBJ: Fiscal Note Update

Updated fiscal notes for the following bill have been printed today. Please give the bill file to the page delivering this message and it will be returned to you after the changes have been made.

Thank you.

RETRIEVE

CS FOR HOUSE BILL NO. 168(JUD)
"An Act requiring the amount of the security given by a party seeking an injunction or order vacating or staying the operation of a permit affecting an industrial operation to include an amount for the payment of wages and benefits for employees and payments to contractors and subcontractors that may be lost if the industrial operation is wrongfully enjoined."

Home Federal Issues State Issues Issue Resources Medi

Please schedule HB 168 for a hearing in SJUD.

Take Action

House Bill 168, security injunction for industrial operations, is in the Senate Judiciary Committee, chaired by Sen. Hollis French and has yet to be scheduled for a hearing. This legislation has bipartisan support, having passed the house 33-6. Contact Sen. French and ask him to schedule a hearing on this bill. There are only 13 days left in the legislative session and if this bill is not passed by the Senate, it will die.

Take Action

The Alliance's Web Page

REPRESENTATIVE
ERIC FEIGE
House District 12
House Resources Committee Co-Chair
Education Committee
Transportation Committee
Joint Armed Services Committee

Alaska State Legislature

House of Representatives

During Session:
State Capitol Room 126
Juneau, Alaska 99801-1182
(907) 465-4859
Fax (907) 465-3799
1-888-465-4859

TO: Senator Hollis French, Chairman

Senate Judiciary Committee

FROM: Representative Eric Feige

DATE: March 23,2012

RE: Hearing Request for HB 168 Injunction Security: Industrial Operation

I respectfully request that House Bill 168, Injunction Security: Industrial Operation, be scheduled for a hearing in the Senate Judiciary Committee. Linda Hay is the staff assigned to this legislation and can be contacted at 465-3715.

Attached you will find the contents as requested by the committee. This includes the current version of the bill, a sponsor statement, sectional analysis, fiscal note and pertinent background information. Representative Feige will present the bill. There is no need for any audio/visual equipment. I will provide a list of witnesses once we are aware of scheduling.

Thank you for your consideration.

Rep. Eric Feige

E-Mail: Representative.Eric.Feige@legis.state.ak.us

Cook Inletkeeper
3734 Ben Walters Lane
Homer, Alaska 99603

p. 907.235.4068
f. 907.235.4069
www.inletkeeper.org

VIA EMAIL ONLY
Senator_Hollis_French@legis.state.ak.us

April 10, 2012

Senator Hollis French
Alaska State Senate
State Capitol Room 417
Juneau AK, 99801

Dear Senator French:

I am writing on behalf of Cook Inletkeeper's 2500+ plus Alaskan members to strongly oppose HB 168.

This misguided legislation is unnecessary because our courts already have the discretion to address frivolous lawsuits. More importantly, this bill infringes on Alaskans' constitutional rights to access the courts, by erecting insurmountable economic hurdles for Alaskans bringing valid claims.

Alaska is already the only state in the nation with "loser pays" rules, and anyone aggrieved enough to file a complaint will make doubly sure their claims are valid. Furthermore, the high bar for successfully obtaining injunctive relief already ensures plaintiffs have strong claims.

Thank you and I hope you'll agree HB 168 is superfluous and should not pass.

Very truly yours,

Bob Shavelson
Inletkeeper

Cindy Smith

From: jai crapella <jaiping@yahoo.com>
Sent: Friday, April 06, 2012 11:30 AM
To: Sen. Hollis French; Sen. Bill Wielechowski; Sen. Joe Paskvan; Sen. Lesil McGuire; Sen. John Coghill; Sen. Dennis Egan; Sen. Albert Kookesh; Sen. Bert Stedman; Sen. Bettye Davis; Sen. Fred Dyson; Sen. Johnny Ellis; Sen. Cathy Giessel; Sen. Lyman Hoffman; Sen. Lyman Hoffman; Sen. Charlie Huggins; Sen. Linda Menard; Sen. Donny Olson; Sen. Gary Stevens; Sen. Joe Thomas; Sen. Tom Wagoner
Subject: HB 168

Categories: Staff responded

Dear Honorable Members of the Senate:
My name is Jai Crapella. I have lived in Alaska since 2001 and co-own a small business in Gustavus. I am writing in regard to HB 168 – The Industrial Security: Industrial Operation Bill. At first glance, this bill seems unconstitutional. It appears to purposefully limit the access of the courts by creating a security bond mechanism that will be too expensive for every day Alaskans to overcome—like myself, my small business, or others like me. Upon further review of this bill, it becomes more alarming. This bill not only would limit my access to the courts, but it would also limit my community watchdog group, regional and statewide organizations, local governments, and tribal governments' access to the courts. The further I read, the more unconstitutional and unethical this bill appears.

I understand that this bill was likely intended to allow large mine or proposals like the Pebble to move forward without meaningful opposition from concerned residents and organizations. But this bill extends far beyond environmental organizations and the residents of the Bristol Bay Borough. This would affect my ability, or my community's ability to call attention to an operation's permit violation, if we ever were aware of one. In the event of a state-issued permit violation, we would be forced to risk unrealistic amounts of money simply to enter the court and hold an operation accountable for a violation of their permit. How is this fair or ethical to Alaskans? This is regress in democracy, not progress.

I am also aware that other states have attempted to pass similar bills, but were warned by the EPA that they were overstepping their bounds and attempting to sidestep the Right to Due Process. Yet the Alaska Legislature moves forward with this bill. Why?

With all due respect, I ask you to please not move HB 168 from the Senate Judiciary Committee. This bill is bad news for Alaskans, particularly future generations.

Thank you for your consideration of these comments.

Regards,

Jai Crapella
1204 2nd Street
Douglas, AK 99824
Spirit Walker Expeditions
P.O. Box 240 Gustavus, AK 99826

Cindy Smith

From: Rebecca Noblin <rnoblin@yahoo.com>
Sent: Friday, April 06, 2012 1:41 PM
To: Sen. Hollis French
Subject: Please protect my constitutional rights

Categories: Staff responded

Dear Senator French,

Please do not support HB 168. The bill would require Alaskans to put up money when they blow the whistle on sloppily issued permits, and when a project delay is needed to prevent irreparable harm to our air, land, and water. Responsible development requires a robust permitting process, and part of that is preserving the courts check on agency decisions or corporate actions. By mandating Alaskans "pay to play" before moving forward with a claim against an improperly issued permit, that important check is being diminished. Please stop this bill and make sure Alaskans have more options, rather than fewer, to protect our clean air, land, and water.

Sincerely,

Rebecca Noblin
2900 Wiley Post Ave.
Anchorage, AK 99517-2403
907-350-4822

Cindy Smith

From: Jed Smith <jed@akcenter.org>
Sent: Friday, April 06, 2012 1:55 PM
To: Sen. Hollis French
Subject: Please protect my Constitutional rights

Categories: Staff responded

Dear Senator French,

Please do not support HB 168. The bill would require Alaskans to put up money when they blow the whistle on sloppily issued permits, and when a project delay is needed to prevent irreparable harm to our air, land, and water. Responsible development requires a robust permitting process, and part of that is preserving the courts check on agency decisions or corporate actions. By mandating Alaskans "pay to play" before moving forward with a claim against an improperly issued permit, that important check is being diminished. Please stop this bill and make sure Alaskans have more options, rather than fewer, to protect our clean air, land, and water.

Sincerely,

Jed Smith
4215 Spenard Road
Anchorage, AK 99517-2905

Cindy Smith

From: Shannon Kuhn <shannonkuhn@gmail.com>
Sent: Friday, April 06, 2012 2:10 PM
To: Sen. Hollis French
Subject: Please protect my constitutional rights

Categories: Staff responded

Dear Senator French,

Please do not support HB 168. The bill would require Alaskans to put up money when they blow the whistle on sloppily issued permits, and when a project delay is needed to prevent irreparable harm to our air, land, and water. Responsible development requires a robust permitting process, and part of that is preserving the courts check on agency decisions or corporate actions. By mandating Alaskans "pay to play" before moving forward with a claim against an improperly issued permit, that important check is being diminished. Please stop this bill and make sure Alaskans have more options, rather than fewer, to protect our clean air, land, and water.

Sincerely,

Shannon Kuhn
PO Box 240905
Anchorage, AK 99524-0905
907-522-1723

Cindy Smith

From: Robyn Lauster <robynkcl@gmail.com>
Sent: Friday, April 06, 2012 2:37 PM
To: Sen. Hollis French
Subject: Please Oppose HB 168

Categories: Staff responded

Dear Senator French,

Please do not support HB 168. The bill would require Alaskans to put up money when they blow the whistle on sloppily issued permits, and when a project delay is needed to prevent irreparable harm to our air, land, and water. Responsible development requires a robust permitting process, and part of that is preserving the courts' check on agency decisions or corporate actions. By mandating Alaskans "pay to play" before moving forward with a claim against an improperly issued permit, that important check is being diminished. Please stop this bill and make sure Alaskans have more options, rather than fewer, to protect our clean air, land, and water.

Sincerely,

Robyn Lauster
3003 W. 32nd Ave.
Anchorage, AK 99517-1753

Cindy Smith

From: William Sherwonit <akgriz@hotmail.com>
Sent: Friday, April 06, 2012 8:19 PM
To: Sen. Hollis French
Subject: Please Oppose HB 168

Categories: Staff responded

Dear Senator French,

Please do not support HB 168. The bill would require Alaskans to put up money when they blow the whistle on sloppily issued permits, and when a project delay is needed to prevent irreparable harm to our air, land, and water. Responsible development requires a robust permitting process, and part of that is preserving the courts check on agency decisions or corporate actions. By mandating Alaskans "pay to play" before moving forward with a claim against an improperly issued permit, that important check is being diminished. Please stop this bill and make sure Alaskans have more options, rather than fewer, to protect our clean air, land, and water.

Sincerely,

William Sherwonit
2441 Tulik Drive
Anchorage, AK 99517-1134
907-245-0283

Cindy Smith

From: Denis Ransy <conga33@hotmail.com>
Sent: Saturday, April 07, 2012 9:42 AM
To: Sen. Hollis French
Subject: HB 168 a bad bill

Categories: Staff responded

H.B. 168, A Bad Bill

I urge you to oppose H.B. 168. This bill would prevent most individuals, groups and local governments with legitimate concerns to oppose any permit in the state. How this bill fits into the framework of a democratic process is beyond me.

A person or group would have to be extremely wealthy to consider opposition to any permit or project, no matter how harmful or ill-advised it may be. Legitimate opposition in the courts is a given in a modern democracy. Eliminating it, or making it prohibitively expensive, destroys the democratic right.

Denis Ransy

Cindy Smith

From: Nina Faust <fausbail@horizonsatellite.com>
Sent: Saturday, April 07, 2012 4:34 PM
To: senator_ralph_seekins@legis.state.ak.us; Sen. Charlie Huggins; Senator_Gene_Therriault@legis.state.ak.us; senator_gretchen_guess@legis.state.ak.us; Sen. Hollis French
Cc: Rep. Paul Seaton; Sen. Gary Stevens
Subject: HB 168

Categories: Staff responded

P.O. Box 2994
Homer AK 99603

Senate Judiciary Committee
Alaska State Legislature
Juneau AK

Dear Senate Judiciary Committee Members:

I strongly oppose HB 168, that would require posting of a bond or security when challenging a government permit for an industry project. This bill will unfairly hamper citizens and other public interest parties, or even just affected property owners from challenging state permits or industrial developments that have not followed proper procedures or could affect the public's clean air or water. It makes the system lop-sided so that people who do not have big bucks, like a corporation or government, have no way to afford a court challenge in the case of a bad decision made by the State or a corporation. Where is the balance and commonsense in tilting the system away from fairness and putting it out of reach of the average person?

It is already expensive to go to court. This is usually the place of last resort to resolve issues but requiring the posting of a bond by Alaskans will put a chilling effect on citizen efforts to watchdog government and corporations. In a democracy, this is part of the system of checks and balances. Citizens need the tools to keep an eye on what government and corporations are doing, especially in this era of so much corporate wrongdoing.

There is already a means to eliminate frivolous lawsuits. Judges make that decision summarily if a case does not have merit. But if a case does have merit, there should not be a bond requirement that puts a lawsuit financially out of reach of those who are trying to protect their land, their community, or the common resources we all share. These court reviews are an important part of our state's system of checks and balances. This law seems to me to be unfair as well because it does not protect everyone equally, but rather gives an unfair advantage to corporations, which usually have more money than citizens anyway. It would not be fair to set up right from the beginning a "David and Goliath" scenario whereby a poor landowner could not challenge an illegally issued permit for some industrial activity near that person's private property because they could not post a bond.

Do not put good government and the tools to protect ourselves out of reach by passing HB 168. This is a bad idea that will let wrongful decisions by government or corporations affect our state in ways that maybe they did not even intend. To me, it appears to be another way to curtail the public in reviewing permits and challenging bad decisions. Don't take the people out of the process by passing this ill-conceived bill.

Sincerely,

Nina Faust

cc: Senator Gary Stevens and Representative Paul Seaton

Cindy Smith

From: John <jsandrw@matnet.com>
Sent: Sunday, April 08, 2012 2:16 PM
To: Sen. Hollis French
Subject: Please oppose HB 168

Categories: Staff responded

April 8, 2012

Dear Senator French,

I urge you to oppose **HB 168** (bill that would remove the right of Alaskans to challenge bad permits)… and **vote NAY!!**

The bill is problematic, and contrary to the public interest, in so many ways.

This bill is attempting to amend Title 9, Code of Civil Procedure, of the Alaska Statutes, and text of the bill does not limit its jurisdiction to state permits. So, if passed, the bill would cover any permit, regardless of the issuer, for an "industrial operation." I don't know if the bill's intent is that it be limited to state permits. In any event, my comments apply to the use or disposal of public lands (e.g., state, local, etc.) that may come before a court covered by Title 9.

Lawyers are expensive, and these high costs, as a practical matter, prohibit legal action against the state or other entities for most folks. Frivolous lawsuits are already thrown out of court, so this bill wouldn't affect that.

What this bill would affect, however, are cases that have merit; that are, for example, well grounded in law, code, regulation, or other authority. Basically, this bill, with respect to permitting of "industrial operations" would trample the due process rights of potentially aggrieved or affected individuals, organizations, local governments or other entities.

The public has a fundamental right to meaningfully participate in and challenge agency actions with respect to disposal of the public's interest in our public lands, air, and water. We have the right to ensure that all laws and regulations are adhered to in all agency actions. This bill would effectively remove this right to meaningfully participate and challenge. The effect would be to allow bad, improper, inappropriate permits; ones that are harmful and contrary to the public interest; or ones that fail to comply with law or regulation to be issued without challenge.

This is an extraordinarily bad bill, and it should not see the light of day.

Sincerely,

John Strasenburgh
PO Box 766
Talkeetna, AK 99676
jsandrw@matnet.com

Cindy Smith

From: Ruth Wood <tothedogs@mtaonline.net>
Sent: Sunday, April 08, 2012 10:34 PM
To: Sen. Charlie Huggins
Cc: Sen. Hollis French; Sen. Bill Wielechowski; Sen. Joe Paskvan; Sen. Lesil McGuire; Sen. John Coghill
Subject: HB 168

Categories: Staff responded

Dear Charlie:

I've been getting lots of emails letting me know about this bad bill.
I am sure you are getting lots of emails about it too. I wondered if it could be as bad as people said. I just finished reading the current version of the bill, and I find it hard to believe that any elected official would support this bill. First, it insults the courts by implying that our judges issue injunctions on cases that don't have merit. Then, it insults Alaskans by saying if you don't have money you don't have access to the courts. It's actually worse than insulting, it seeks to take power away from the powerless and give power to the powerful. Alaska is an extraordinary state with extraordinary riches. Some of us see the riches in the resources that give us world class salmon runs, unparalleled recreation, and natural beauty that brings the rest of the world to visit. Others see the
riches in the income that extracting the resources can bring.
Unfortunately, extracting all the resources will result in an Alaska without world class salmon runs, unparalleled recreation and natural beauty that the rest of the world wants to visit. Finding the balance between those views is the job of the legislature, tipping the balance toward the extractors is not. You were elected to represent people, not industry. Please vote "no" when HB168 comes before the Senate.

Sincerely,
Ruth D. Wood, Talkeetna

cc: Senate Judiciary Committee

Robert Maxand
PO Box 221
Wrangell, Alaska 99929
(907) 305-0269
bmaxand@gci.net

April 6, 2012

The Honorable Senator French, Chair
Senate Judiciary Committee
State Senate Alaska State Capital
Juneau, Alaska 99801-1182

RE: Oppose HB168

Dear Senator and Members of the Senate Judiciary Committee,

My name is Robert Maxand and have resided in Wrangell my entire life. I have been a longshoreman, delivered oil with Standard Oil, and owned my own construction company until I retired several years ago. I recently learned about HB168 and felt compelled to contact you to express my concern and request that this bill be stopped.

HB 168 will have immediate and perilous impact on the public's right to access the courts. I understand that you may all have your targets set on stopping environmental groups from impeding large mines or timber sales. The real impact will come on the backs of everyday Alaskans who will no longer be able to protect their property or family against permit violators.

Let me give you an example. In the '80s, my family lived next to a cement plant in Wrangell. I eyed employees dumping barrels of waste in the muskeg, just off the property line. The Corps of Engineers happened to be in town, so I contacted them. They investigated and ordered the company to stop dumping. My kids played in those woods, and a hell of a lot more often than kids do today. So I was worried.

Had HB 168 been in place, and I wanted to file an injunction to stop this outfit from dumping waste in the woods and water near my home and family, I could have been required to pay a handsome fee, just to see that the harm was stopped and justice was done.

Here's another example. Several years ago the Mental Health Trust authorized heavy logging on a view shed just above the major highway in our town, at about 7-mile. Those who lived out the road were upset, and rightly so. The logging outfit that bought the sale clear - cut from damn near the top of the mountain to the highway, with no buffers. We were told this type of logging would prevent landslides. Are you kidding me? Well the landslides are starting to happen. If community members sought an injunction against what were obviously irresponsible activities by this company, they would have had to pass the hat and collected their coins to buy access to the court system.

Folks, this is un-American. Period. What's next, we need to get bonded to vote? Do yourselves, and us the little guys, a favor and drop this idea dead in its tracks.

I appreciate your consideration and I hope you folks do the right thing.

Respectfully,

Robert Maxand

Cindy Smith

From: bee long <longfellow1741@hotmail.com>
Sent: Monday, April 09, 2012 9:05 PM
To: Sen. Hollis French; Sen. Bill Wielechowski; Sen. Lesil McGuire; Sen. Joe Paskvan; Sen. John Coghill
Subject: HB 168, THE BOND REQUIREMENT BILL-VOTE NO PLEASE

If HB 168 were enacted, state authority over water discharge, surface mining, pollutant discharge, congestion mitigation, and air quality would likely be rescinded by the feds due to the unequal judicial review caused by this bill. This information is from DNR's Director of the Office of Project Management and Permitting.

This bill is poorly written. What the heck does "wrongfully enjoined" mean?

Our system of checks and balances can only function when concerned citizens, groups and local governments have a real opportunity to participate in the judicial and permit regulatory system.

Please consider this.

Becky Long

Cindy Smith

From: Gwen Baluss <gbaluss@gmail.com>
Sent: Monday, April 09, 2012 9:51 PM
To: Sen. Hollis French
Subject: Please Oppose HB 168

Dear Senator,
Its unfair to ask a group to post millions of dollars in order to challenge a government permit. Sometimes individuals in government can make errors or make a decision that proves not be in the public's best interest. Its OK for business to have watchdog groups out there; it keeps them honest.
Thanks.
Gwen Baluss
10236 Heron Way, Juneau AK

Cindy Smith

From: Dori Broglino <dorib810@gmail.com>
Sent: Monday, April 09, 2012 10:20 PM
To: Sen. Hollis French; Sen. Bill Wielechowski; Sen. Joe Paskvan; Sen. Lesil McGuire; Sen. John Coghill; Sen. Dennis Egan; Sen. Albert Kookesh; Sen. Bert Stedman; Sen. Bettye Davis; Sen. Fred Dyson; Sen. Johnny Ellis; Sen. Cathy Giessel; Sen. Lyman Hoffman; Sen. Charlie Huggins; Sen. Linda Menard; Sen. Donny Olson; Sen. Gary Stevens; Sen. Joe Thomas; Sen. Tom Wagoner
Subject: In Opposition of HB 168

Dear Senators-
I read a very informative editorial by Kate Jensen in today's (4/9/12) Juneau Empire and it has compelled me to write. I urge you to not support HB 168. This bill seems to not be in the interest of the individuals who put elected officials in office to represent their best interests. This bill appears to only support the interests of corporations. As elected officials you represent the people and not corporate interests. This bill takes away some basic protections that the judicial process provides. Similar bills have been voted down in other states and I urge you to follow.

Thank you for your attention to this matter.
Sincerely,
Dori Broglino
Douglas, AK

Cindy Smith

From: Jennifer Nu <jennifer.nu@gmail.com>
Sent: Monday, April 09, 2012 11:13 PM
To: Sen. Hollis French
Subject: HB 168 Concerns

Dear Senator French
I'd like to take a moment to express concerns at HB 168 sponsored by Rep. Feige (R-Chickaloon). HB 168 places a significant financial barrier between Alaskans who want to exercise their right to challenge a permit using the court system by requiring a bond to be posted. The bill impacts any Alaskan or Alaskan group, including local and/or tribal governments, which may want to stop an improperly permitted project from moving forward. This goes against the right for citizens to be participants in their own homeland to exercise their right to access the court system . As a concerned citizen and resident of Alaska, I urge you to oppose this bill and allow it to pass out of committee. Thank you for your time and for supporting the rights of all Alaskans.

Sincerely,
Jennifer Nu
Juneau, AK

Lila Hobbs

From: Linda Robinson <lgladys13@gmail.com>
Sent: Tuesday, April 10, 2012 8:17 PM
To: Sen. Hollis French
Subject: HB168

Senator French:
I wish to express strong opposition to HB168. This bill would put an unreasonable burden upon anyone challenging an "industrial operation" in Alaska and therefore block any public input. Few entities can post enough of a bond to cover costs that the bill states that the court must include.
This bill could cause enormous harm to the people of our state and I strongly urge you to oppose this bill.
Thank you Senator.
Linda Robinson
6500 Fairweather Drive
Anchorage 99518

Lila Hobbs

From: Valerie Connor <redherring007@hotmail.com>
Sent: Tuesday, April 10, 2012 11:41 AM
To: Sen. Hollis French
Subject: Don't make whistleblowers pay to play

Dear Senator French,

Please do not support HB 168. The bill would require Alaskans to put up money when they blow the whistle on sloppily issued permits, and when a project delay is needed to prevent irreparable harm to our air, land, and water. Responsible development requires a robust permitting process, and part of that is preserving the courts check on agency decisions or corporate actions. By mandating Alaskans "pay to play" before moving forward with a claim against an improperly issued permit, that important check is being diminished. Please stop this bill and make sure Alaskans have more options, rather than fewer, to protect our clean air, land, and water.

Sincerely,

Valerie Connor
943 W. 19th Ave
#1
Anchorage, AK 99503-1704
907-644-0806

Cindy Smith

From: Rod Meeks <rodmeeks@gci.net>
Sent: Tuesday, April 10, 2012 5:10 PM
To: Sen. Hollis French
Subject: Constituent commentary on HB 168

Good day Senator French,

Being a constituent of yours, I thought it appropriate to send you my thoughts on HB 168. I have been a resident of Alaska since April 3, 1967. During that time, I have witnesses quite a good bit of development from both the private and public sectors. Some of these projects have been quite successful and beneficial to the citizens of alaska i.e.(Trans-Alaska pipeline) and some projects i.e.(barley grain project) not so successful and beneficial. What has remained constant throughout the history of Alaska before statehood and continuing to the present is the will of the people to be heard regardless of socio-economic status or privilege. However, HB 168 if passed, may begin to chip away at the citizen's voice by suggesting to the court that a lawsuit security should include loss of employee wages and expenditures incurred by contractors and sub-contractors of a permitted industrial project. Currently, the court already has the power to decide what just costs should be in cluded in a security. In my opinion, HB 168 seems somewhat frivolous and redundant; and perhaps, a waste of the Senate's precious time and energy during the last weeks of the legislative session. In conclusion, I would hope the Senate sees no logical reason to pass HB 168. I thank you and the Senate in advance for giving me the opportunity to speak my voice in opposing HB 168. Sincerely, Rod Meeks, a concerned Alaskan citizen

Cindy Smith

From: jeremy robida <jeremyrobida@gmail.com>
Sent: Tuesday, April 10, 2012 10:24 AM
To: Sen. Hollis French
Subject: I do NOT support HB 168

Hello Mr. Chairman and Members of the Senate Judiciary Committee,

I do not support HB 168. This bill would put a significant financial burden upon a person challenging an "industrial operation" in Alaska since this person would need to post a bond as part of the legal process. Few entities, including municipalities, or individuals, would be able to post enough of a bond to cover the costs which the bill states need to be included, i.e. "payment of wages and benefits for employees, and payment to contractors and subcontractors of the industrial operation . . ." This bill would make it virtually impossible for someone to challenge an "industrial operation" for that reason.

I believe the legal injunction route, albeit cumbersome at times, is absolutely necessary. HB 168 would essentially remove the court route as an option for questioning permits that appear dubious or flawed. I do not want to see "industrial operations" immune to adequate and meaningful scrutiny...whether that comes from the state ADEC offices or a public interest "greenie" group such as the Sierra Club, etc.
The ability to use the courts to challenge an improper industrial operation is essential to protect the public's interests.

Thank You,

Jeremy Robida
Po Box 3111
Valdez, AK 99686

Cindy Smith

From: Kate R. Amerell <kramerell@pwscc.edu>
Sent: Tuesday, April 10, 2012 1:52 PM
To: Sen. Hollis French
Subject: Vote No - HB 168

Hello Mr. Chairman and Members of the Senate Judiciary Committee,

I do not support HB 168. This bill would put a significant financial burden upon a person challenging an "industrial operation" in Alaska since this person would need to post a bond as part of the legal process. Few entities, including municipalities, or individuals, would be able to post enough of a bond to cover the costs which the bill states need to be included, i.e. "payment of wages and benefits for employees, and payment to contractors and subcontractors of the industrial operation . . ." This bill would make it virtually impossible for someone to challenge an "industrial operation" for that reason.

I believe the legal injunction route, albeit cumbersome at times, is absolutely necessary. HB 168 would essentially remove the court route as an option for questioning permits that appear dubious or flawed. I do not want to see "industrial operations" immune to adequate and meaningful scrutiny...whether that comes from the state ADEC offices or a public interest "greenie" group such as the Sierra Club, etc. The ability to use the courts to challenge an improper industrial operation is essential to protect the public's interests.

Kate Amerell
Admissions & Financial Aid Coordinator
Prince William Sound Community College
907.834.1645
kramerell@pwscc.edu

Cindy Smith

From: Maureen Moore <momoore57@gmail.com>
Sent: Monday, April 09, 2012 10:57 AM
To: Sen. Hollis French; Sen. Bill Wielechowski; Sen. Joe Paskvan; Sen. Lesil McGuire; Sen. John Coghill
Subject: HB 168

Dear Senators,

I am writing to ask you to OPPOSE HB 168.

This bill would essentially take away any Alaskan's right to Due Process by making it financially impossible to seek review or question compliance of bureaucratic decisions or the actions of a permit holder.

It would essentially take away our right to blow the whistle on polluters of our air or water. It would ask us to pay thousands of dollars in bonds to ensure that our claims are true BEFORE taking them to court.

Do not be counted as a politician who voted to take away our citizen's right to question what you do or what is happening to our resources.

Maureen E. Moore
POB 15185
Homer, AK

Cindy Smith

From: llolmb <lindablefgen@gmail.com>
Sent: Friday, April 06, 2012 10:15 AM
To: Sen. Hollis French
Subject: HB168

Categories: Staff responded

Dear Senator Hollis,

I am writing in opposition to HB168. It discriminates against those with concerns and directly supports unrestricted development imperiling our environment.

We need to be encouraged to be advocates protecting our environment; clean air and clean water.

This bill discourages and in most cases eliminates the ability for Alaskan citizens to actively safeguard our nonrenewable resources. This cannot be left to unrestricted governmental action.

Thank you.

Linda Blefgen

PO Box 210996

Auke Bay, AK 99821

Cindy Smith

From: chas caron <caronchas@hotmail.com>
Sent: Friday, April 06, 2012 9:22 AM
To: Sen. Gary Stevens; Sen. Tom Wagoner; Sen. Joe Paskvan; Sen. Lesil McGuire; Sen. John Coghill; Sen. Kevin Meyer; Sen. Charlie Huggins; Sen. Albert Kookesh; Sen. Cathy Giessel; Sen. Hollis French; Sen. Linda Menard; Sen. Fred Dyson; Sen. Joe Thomas; Sen. Bettye Davis
Subject: HR168 - The Corporate Takeover (and Destruction) of Alaska

Categories: Staff responded

Thank you for reading this email. Please excuse the provocative subject line as so many times emails such as this are sorted by subject.

I am a regular visitor from Louisiana. I visit southern Alaska about every other year for the last 20 years. My wife and I chose Alaska out of every place on earth. It is the last of it's kind. It is the only one we have as Americans. It is absolutely critical it be preserved for every generation. Exploitation of natural resources must be done we extreme sensitivity to not degrade the Wild Alaska. Error should always be done on the conservative side, always leaving it alone when there is any doubt. Individuals and groups without "deep pockets" must be able to intervene.

I visit Ketchikan and have watched the clear cutting of the virgin forest. It is no longer the Ketchikan I once saw on my honeymoon. Forests are allowed to "naturally regenerate", a euphemism for rape and run forestry. Corporate interests want to exploit all of Alaska's natural resources and will do so unless anyone can stop them. Bill HR168 is a "BULLY Bill". It is a threat. It is intimidation. The representatives that support this bill will identify themselves as the Corporate raiders of America's last pristine place. I beg you to not be one of them. It is a matter of trust for the generations to come. I shall share this with everyone I know.

Again, thank you for your time to read this.....Charlie Caron of Louisiana

Cindy Smith

From: Don Cornelius <doncorn@gci.net>
Sent: Friday, April 06, 2012 9:10 AM
To: Sen. Hollis French
Subject: HB 168

Categories: Staff responded

Dear Senator French:

I urge you to do what you can to squelch HB 168. This Legislation would essentially block ordinary Alaska citizens from fighting corporate and political takeover of our Alaskan heritage. Under this Bill decisions by State agencies often at the beck and call of a Governor who is well-funded by corporate interests would trump ordinary citizens rights for the simple reason that we lack the financial reserves of those corporate interests. That's not democracy.

Thank you

Don Cornelius
PO Box 1727
Petersburg, AK 99833

Cindy Smith

From: Sara Avery <sara.avery@gmail.com>
Sent: Monday, April 09, 2012 7:11 AM
To: Sen. Hollis French
Subject: Please support due process

Dear Senator French,

Please oppose HB 168. The bill would penalize Alaskans who seek judicial review of flawed decisions by bureaucratic or compliance by the permit holder. Do not penalize Alaskans wishing to protect our clean air and water by requiring them to pay for department mistakes or permit violations.

Access to the courts is a key part of the checks and balances for our democracy, a process revered by Americans. By removing Alaskans' ability to realistically access the courts, HB 168 would effectively strip us of our constitutionally-protected right of Due Process.

Sincerely,
Sara Avery

Cindy Smith

From: Stuart Cohen <ssog@alaska.net>
Sent: Friday, April 06, 2012 8:16 AM
To: Sen. Hollis French
Subject: HB168 NO!!

Categories: Staff responded

Dear Senator French,
I do hope that you will do what you can to keep HB 168 from passing through The Judiciary Committee. There are already laws in place that protect people and corporations from spurious law suits. It should not fall upon the potential victims of a crime to ante up a huge some of money in order to have their day in court. I cannot believe that this is in any way constitutional, but these days, money seems to have a bigger and bigger voice. Please protect the rights of the people here in Alaska.
Thank you.
Suzanne Cohen

Cindy Smith

From: John Myers <jmyers1891@comcast.net>
Sent: Friday, April 06, 2012 7:01 AM
To: Sen. Hollis French
Subject: concerning House Bill 168

Categories: Staff responded

Senator,

House Bill 168 sounds like a very bad bill. It would be a terrible burden on citizens who wanted to express their concerns about clean air and water and protecting our precious environment. To me it sounds like this bill is the same kind of thinking that declares that corporations are people, only in this case people would be denied free speech on their environmental concerns. Please do not support this bill.

Sincerely,

John Myers

Cindy Smith

From: Megan McBride <megamcb@gmail.com>
Sent: Thursday, April 05, 2012 5:20 PM
To: Sen. Joe Paskvan; Sen. Lesil McGuire; Sen. Hollis French; Sen. Bill Wielechowski; Sen. John Coghill
Cc: Sen. Bettye Davis; Rep. Sharon Cissna
Subject: Support legal rights- do not pass HB 168

Categories: Staff responded

Senate Judiciary Committee,

I am writing to ask you to not pass HB 168, the "Industrial Security: Industrial Operation Bill" aka "Pay to Play Bill".

This is the most outrageous proposed legislation I have ever seen. It will take away Alaskans' rights to use the legal process to oppose irresponsible agency decisions. This "pay to play" system would require Alaskan residents to pay for correcting department mistakes or permit violations.

HB 168 proposes that anyone seeking an injunction on an industrial operation would have to post a "security bond" that covers all lost corporate profits, contractor payments, and employee wages and benefits for the life of the court case. In many cases this bond could costs millions of dollars. This will effectively bar the majority of Alaskans from the courts.

Additionally, if Alaskans did try to litigate in response to an agency decision, under HB 168 the process of determining the bond amount (potential corporate profits, employee wages, etc for the duration of the court case) will result in endless time spent squabbling in court. I understand it requires resources for the courts to debate the merits of agency decisions, but that is a much better use of resources then on endless debates over the amount and nature of a bond before beginning the litigation process.

Access to the courts is a key part of the checks and balances for our democracy. By removing Alaskans' ability to realistically access the courts, HB 168 would effectively strip us of our constitutionally-protected right of Due Process.

This bill is bad public policy and unconstitutional. Do not pass it out of the judiciary committee.

Sincerely,
Megan McBride
2201 Sunrise Dr, Anchorage AK 99508
907-830-3022

March 29, 2012

Dear Senators French and Wielechowski,

My name is Daven Hafey. I currently reside at Aurora Harbor Main 47, Juneau, Alaska. My legislators are Senator Dennis Egan and Representative Beth Kerttula.

I am writing in regard to HB 168, the Industrial Security: Industry Operation Bill. As a 29 year old Alaskan, I cannot stress enough how damaging this bill will be for my generation. If enacted, HB 168 would severely restrict my generation's access to the courts, a principle I assumed was constitutionally protected. We can speak with as much hyperbole or technical language as we'd like, but the real implications of this bill would mean that my generation, and the generations after mine would be limited in their ability to access the court system. As I read this bill, I am amazed that in a country that reveres the democratic process as much as ours does, we would be so close to enacting legislation that effectively strips an essential part of the democratic process from us.

I cannot speak for every individual or organization, nor can I speak to every injunction. What I can say with confidence is that there are instances in which permits are issued with mistakes, instances in which permit holders violate the terms of their permits, or both. When individuals, organizations, municipalities, or tribal governments become aware of those mistakes or violations, they currently have the accessibility to file an injunction to rectify any wrongs committed. Those injunctions that do reach the court are the cases with merit; they are the sound cases that deserve to be heard. HB 168 would effectively limit the accessibility of cases with merit to be heard in our courts.

HB 168 does not defend against frivolous lawsuits. Our courts already have the ability to assess cases to determine which ones are frivolous and which ones have merit. Those that are frivolous are not heard. Those with merit are. We do not need new legislation that does what is already being done. And we certainly do not need legislation whose objective is to punish individuals and/or organizations with sound cases by requiring them to pay for governmental errors or corporate violations.

Additionally, the states of Oregon, Utah, and Montana have already attempted legislation similar to HB 168. None were successful from what I understand, as they were all found to be unconstitutional or in violation of federal regulation.

I am not advocating for ever more injunctions and court cases. I am advocating for responsibility. As a young Alaskan concerned about the future he gets to inherit, I am requesting the Legislature to maintain and protect my generation's ability to access our courts if and when needed. To suggest that I should be prepared to post a security bond of potentially millions of dollars simply to bring a sound case to court is unreasonable and out of touch. Please respect my generation and protect our access to the courts. Please do not let HB 168 pass through the Senate Judiciary Committee.

Regards,

Daven Hafey
Juneau

cc: Senate Judiciary Committee; Senator Dennis Egan

Cindy Smith

From: Jessica Cler <jessica.cler@gmail.com>
Sent: Friday, March 23, 2012 3:24 PM
To: Sen. Hollis French
Subject: HB168

Categories: Staff responded

Dear Senator French,

I am writing to express my concern with HB168 and ask that the bill not be moved forward. HB 168 would adversely affect the checks and balances already put into place to ensure that the development of Alaska's resources is done in a responsible manner.

As I am sure you know, a preliminary injunction is an order that the court issues *before* it issues a final decision. Because decisions can take a long time, sometimes the harm that is being litigated (e.g., the logging of a particular stand of trees) would happen before the lawsuit had a chance to finish. Preliminary injunctions essentially put everything on hold, maintaining the status quo until the court has time to reach its final decision on an issue.

The problem that HB 168 says it is going to solve is not a a problem at all-- by their very nature, preliminary injunctions are never issued where the lawsuit itself is frivolous. In order to get a preliminary injunction, the group advocating for it, has to make a strong showing of success on the merits of the case. This means that a group will never get a preliminary injunction unless it has a very good chance of winning. This makes it clear that HB 168 is actually there to make it financially impossible for environmental groups to bring good lawsuits, not stop them from bringing bad ones.

This law would detrimentally impact some of the most important checks we have in making sure that development is done sensibly and within the governing laws and regulations already put into place.

Thank you for your consideration.

Sincerely,

Jessica M. Cler
3111 W. 35th Ave
Anchorage, AK 99517

Alaska Conservation Alliance
"A Strong Economy and Healthy Environment Go Hand in Hand"

April 10, 2012

Senator Hollis French
State Capitol
Juneau, AK 99801-1182

Dear Sen. French,

The Conservation Alliance opposes HB 168, which would require Alaskans to post a bond or security when seeking a stay or injunction against a government-issued permit affecting an industrial operation. The Alaska Conservation Alliance represents over 30 conservation groups across the state with a combined membership of over 38,000 Alaskans.

HB 168 puts corporate and foreign interests above Alaskans and their communities.

To begin, this legislation is not aimed at frivolous lawsuits. Already, a frivolous lawsuit will not receive a stay or preliminary injunction, because a court can't issue those remedies unless it first determines that the plaintiff is likely to win and that "irreparable harm" would result without the stay or injunction. Instead, this legislation is targeted at lawsuits with merit, and this legislation imposes its burden at the expense of ordinary Alaskans and their communities. Under HB 168, the Alaskan seeking an injunction or stay will be required to post a bond that is typically unaffordable to all but the most wealthy corporations and individuals. In sum, the bill penalizes all but the wealthy and deters meritorious claims before they are adjudicated at all.

Further, when a case against a permit is brought forward by an Alaskan, it is questioning the permitting process used by the issuing governmental agency or illegal practices by industry. Thus, an injunction or stay will only be issued when government hasn't done its job properly, or when a corporation is violating the law or the terms of its permit, as determined by judicial review. Requiring a citizen to pay for a governmental error or corporate crime puts a chilling effect on a long tradition of protecting American whistleblowers in our democracy.

In fact, this legislation is so broad that it may even prevent the State itself from enforcing violations of law. It applies to any "party" seeking temporary injunctive relief, which sometimes includes the State when attempting to enforce violations of law occurring under an industrial permit. In those cases, the State will be subject to the bill's bond requirements, a cost the enforcement agencies have no budget to incur.

810 N Street, Suite 203 | Anchorage, AK 99501 | 907-258-6171 | F: 907-258-6177
www.akvoice.org | www.twitter.com/ACAAlliance
www.facebook.com/AlaskaConservationAlliance

HB 168 would block Alaskans from protecting their communities and way of life by preventing them from challenging government-issued permits that have resulted in legally redressible injuries. It would force Alaskans challenging a permit to post a bond equal to potential damages suffered by an industrial operation. This remedy protects wealthy corporations – many of which merely do business in Alaska and/or are from foreign countries – over resident Alaskans who live, work, and raise their families in this great state. The bond will in many cases exceed $1 million, which effectively prevents almost any Alaskan from filing a suit to challenge what may be a fast-tracked, sloppy agency decision.

HB 168 violates the Alaska Constitution.

Beyond being bad policy, the bill is also likely unconstitutional for two reasons. First, it violates the Equal Protection clause by targeting those litigants who challenge permits for industrial operations, and protecting only industrial operations. This discriminates unconstitutionally against local landowners, community groups, native organizations, commercial and sport fishers and hunters, and other Alaskans who seek to ensure that state agencies are doing their jobs.

Second, in practice it would often deny access to courts, in violation of Due Process rights, for Alaskans who do not have the financial resources to post the required bond but have an otherwise valid claim. It is not hard to imagine a landowner or a community that does not have the millions to post the bond this bill would require. That person or community would be prohibited from protecting the land it has owned for decades yet is now threatened by a major industrial operation.

HB 168 is poorly drafted and would be extraordinarily difficult for a court to apply.

The bill contains several provisions that are ambiguous or make no sense and would be challenging for a court to enforce. For example, the bill purports to require a bond for an order "vacating" a permit. However, a court will vacate a permit only at the conclusion of a case, after finding that the issuing agency actually violated the law. That is not a situation where bonds come into play. Bonds are instead required only for temporary injunctions or stays, in case the person does not ultimately prevail. It would make no sense and serve no purpose to require a bond of the party who has won the case. If that is the intent of the bill, then it is merely a punitive and unconstitutional attempt to prevent successful litigants from obtaining the relief to which they are entitled.

Similarly, the bill purports to require the bond to cover damages wrongfully suffered by "an industrial operation." An industrial operation, in turn, is defined in the bill as various activities. But damages are suffered only by litigants, such as persons, corporations, or organizations. There is no precedent for measuring or awarding damages to an activity rather than a party, and the very concept is bizarre and seemingly impossible to apply.

Further, the legislation is ambiguous as to the point at which a bond would be required. Departing from current court rules, the bill requires a bond from a party "seeking" a stay, preliminary injunction, or vacatur. If that were read to require a bond whenever a case was filed against an industrial permit, it would effectively require an exorbitant fee at the time of filing—an unconstitutional requirement and drastic change to current court procedures. Further, if the bill were interpreted to require bonds whenever a stay or preliminary injunction is sought, and before the court orders one, its main impact would be to deter likely meritorious claims from ever being raised—again a clear violation of constitutional rights.

For the reasons stated above, the Alaska Conservation Alliance opposes HB 168. The only purpose the bill would serve is to keep regular Alaskans out of court and to protect sloppy permitting decisions that could greatly impact Alaska's future.

Sincerely,

Andy Moderow
Executive Director
Alaska Conservation Alliance

810 N Street, Suite 203 | Anchorage, AK 99501 | 907-258-6171 | F: 907-258-6177
www.akvoice.org | www.twitter.com/ACAAlliance
www.facebook.com/AlaskaConservationAlliance

Michele Prevost, MD
13631 E. Mikes Lane
Palmer, AK 99645

T 907-854-8159
O 907-745-2663

micheleskiak@me.com

Bill File

March 11, 2012

Dear Senators and Representatives,

I am writing to you to appeal to your sense of moral decency to help us maintain our rights as private citizens.

Mr. Feige's proposed HB 168 creates an undue burden on access to the courts, which is guaranteed by the First Amendment of the Constitution -- "*Congress shall make no law...abridging the freedom of speech...and to petition the Government for a redress of grievances*" -- and the Alaska Constitution: "*right of the people.... to petition the government shall not be abridged.*" Industrial activities as discussed in the proposed bill have the potential to do personal, physical, emotional and financial harm. Nationally, there are hundreds, if not thousands, of documented instances where permits, rubber-stamped through the system, have been inadequate to protect citizens, and where industrial corporations have neglected to follow rules and regulations, resulting in property damage, injuries and deaths. This bill would deny Alaskans who do not have unlimited financial resources, but do have a valid grievance, from protecting their property or themselves from harm.

Clearly, the intent of the bill is to protect corporations' profits and prevent Alaskans from having recourse against fast-tracked, careless or illegal permitting by government agencies. A recent example of rubber-stamping a permit was the Wishbone Hill Air Quality Permit. This permit was issued by the Alaska Department of Environmental Conservation (DEC) despite numerous false assumptions and fraudulent information provided by the mining corporation in the permit application. DEC clearly without the personnel to double check all the details assumed the application was accurate. Fortunately an astute group of citizens with independent experts was able to catch these errors and the permit application was withdrawn. How many times is a permit issued despite glaring omissions and false information because there is no one outside the permittng agency reviewing it? How possibly could a group of land owners come up with millions of dollars to post the bond that this bill would require just to try to

protect their families and their property from potentially flawed industrial plans and permits? Obviously, they can't. As such, this bill violates their individual rights.

Remember, it could very well be you, a family member, or a friend who will have no recourse against poor-quality permitting or a morally corrupt corporation that fails to follow regulations resulting in personal injury, destroyed property, damaged or uninhabitable homes.

The right thing to do is reject this bill. There are already statutes that provide for compensation for a business being wrongfully restrained, as well as sanctions for frivolous lawsuits. Injunctions and stays are only issued after a judge determines that the stringent requirements for such relief have been met and that the lawsuit has merit. So, this new law is unnecessary, and all it would do is circumvent the rights of individual Alaskans and small communities.

"...the moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; those who are in the shadows of life; the sick, the needy and the handicapped." ~ Last Speech of Hubert H. Humphrey

Alaska has made one very large step in the right direction. Recognizing that industrial activities can pose serious health hazards, the international community and many global financial lending institutions now view Health Impact Assessments (HIA) as an essential component, on par with the economic impact study, in assessing a project's viability. The state of Alaska has recently developed an HIA program and commissioned Dr. Paul Anderson to perform an HIA for the Wishbone Hill Coal Mine.

A critical question to ask now is how this information will be used. It appears that Alaska legislation needs to catch up with the global economy. We need statutes that not only mandate HIA's for large industrial (mining, power generation, factories, etc) endeavors, the statutes need to ensure they are prepared by independent experts and become part of the permitting process, that recognized hazards are prevented by correcting the permit before the start of operations, and that they are fully enforced with adequate penalties and fines to ensure compliance.

Regarding the Wishbone Hill Coal Mine HIA, the Alaska Department of Natural Resources (DNR) is "editing" the draft. This is like allowing the tobacco companies to rewrite the medical research that links smoking to cancer. That sounds ridiculous, doesn't it? So why is DNR allowed to censor the contents of the HIA, and exclude what the agency disagrees with? The HIA should be an independent study and the entire product released to the public for review, not just what the mining corporation and DNR are willing to allow the public to see.

Currently many environmental protection regulations are willfully violated because it is less costly for the corporation to pay the fines than follow the law. When it comes to people's health, that should not be an acceptable option. As the saying goes, an ounce of prevention is worth a pound of cure. It is much more costly in the long run, never mind the priceless value of human life, to try to clean up a toxic mess and pay for cancer treatment, than it is to prevent it in the first place.

I respectfully ask to you reject HB 168 on the grounds it is immoral and unconstitutional. I also hope you will see the necessity of updating Alaska's industrial permitting regulations, including the need for HIA's to play a strong role in industrial project designs and permitting.

I would be happy to discuss these topics with you further. I can be reached at the address, phone numbers, or email provided.

Sincerely yours,

Michele Prevost, MD

Cindy Smith

From: Greg Beischer <gbeischer@millrockresources.com>
Sent: Thursday, April 05, 2012 10:18 PM
To: Sen. Hollis French; Sen. Bill Wielechowski; Sen. Joe Paskvan; Sen. Lesil McGuire; Sen. John Coghill
Cc: Rep. Bob Lynn
Subject: HB168 Injunction Security - Industrial Operations

Categories: Staff responded

Senators,

Millrock Resources is a public company listed on the TSX Venture Exchange. Our main operating office is in Anchorage, Alaska. The company raises venture capital financing on the public markets, acquires mineral rights and expends the funds searching for metallic minerals throughout Alaska. We leverage our capital by jointly exploring mineral properties with major mining companies. In our short five-year history we have been successful in bringing millions of dollars of mineral resource investment to Alaska, employed Alaskans in far-flung corners and consumed supplies and services from numerous Alaska companies.

Alaska has excellent potential for the discovery of new mineral deposits but investors have a negative view of the state because of the constant threat of lawsuits against developers and the permitting agencies. Resource developers face court battles from the earliest exploration stages and perpetually thereafter throughout the project construction and extraction process. We view purposefully obstructive, frivolous litigation as the single largest deterrent to resource development in the state and our ability as a company to continue to bring venture capital to Alaska.

There is presently no financial risk to litigants that bring suit "in the public interest" against developers of operations that have been reviewed and permitted through public process by state and federal agencies. Injunctions against development cause great loss to the people of Alaska. HB168 will force litigants to post financial surety against the financial loss incurred by developers and potential employees and service providers to targeted resource developments. Reduction of frivolous or unnecessary lawsuits will therefore be decreased and the business climate of Alaska significantly improved.

Millrock Resources and myself personally urge you to move this legislation.

Yours truly,

Gregory A. Beischer
President & CEO
Millrock Resources Inc.
907-350-9791
gbeischer@millrockresources.com
www.millrockresources.com

Cindy Smith

From: Peggy Spittler <pspittler@carlile.biz>
Sent: Friday, April 06, 2012 8:40 AM
To: Sen. Hollis French; Sen. Bill Wielechowski; Sen. Joe Paskvan; Sen. Lesil McGuire; Sen. John Coghill
Cc: Bruce Spittler (bspittler@doyondrilling.com)
Subject: HB 168

Categories: Staff responded

I am writing in support of House Bill 168,

Under current law the cost to bring a public litigant lawsuit against a legally permitted project is in effect zero. There is very little risk in bringing a suit. All the risk is borne by the defendants. These actions do shutdown projects at significant costs to working Alaskans, businesses and the state treasury. **CSHB 168(JUD)** seeks to remedy the situation by leveling the playing field.
CSHB 168(JUD) parallels the requirements of Alaska Civil Rule 65(c). As written, 65(c) states: *"no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who enjoined or restrained is found to have been wrongfully enjoined or restrained".*

At the request of the Department of Law, **HB 168** was amended to more closely mirror the language of Alaska Civil Rule 65(c) in order to clarify that the proposed statute would not change the court rule. The court already has the ability to require security. **CSHB 168(JUD)** simply requests that part of the court's deliberation process should include payment of wages and benefits for employees, payments to contractors and subcontractors of the industrial operation that is shutdown. The amount of security and how it is calculated is totally within the hands of the court.

My husband and I are in agreement on the issue. Help stop needless litigation that costs, taxpayers and businesses that want to work in AK money.

Bruce and Peggy Spittler
3320 Admiralty Bay Drive
Anchorage, AK 99515

Carlile

Peggy Spittler
Director of Marketing | Carlile Transportation Systems, Inc.
Email: pspittler@carlile.biz
Office: (907) 343-3200
Web: www.carlile.biz

Join us here:

JUNEAU CHAMBER OF COMMERCE

3100 Channel Drive, Suite 300 • Juneau AK 99801• (907) 463-3488 • Fax (907) 463-3489
E-mail: iuncauchamber@gci.net • icc@alaska.com • Web site: http://www.iuneauchamber.com

Honorable Hollis French
Honorable Bill Wielechowski
Chair and Vice-Chair, Senate Resources Committee
Capitol Building
Juneau, Alaska 99801

April 10, 2012

Dear Senators French and Wielechowski,

The Juneau Chamber of Commerce Board of Directors encourages the passage of HB 168 on behalf of its members and the community of Juneau.

The Chamber Board believes that special interest groups, opponents of natural resource projects and extreme environmental organizations have abused the legal system and subverted the intent of environmental law by regularly filing frivolous public interest lawsuits. These tactical lawsuits serve to delay, subvert and shut down responsible development and job creation in Alaska with no financial risk to those special interest groups using the court system to delay, increase risk to developers and increase project costs and create job loss.

Under existing State law, judges have not required opponents of natural resource projects to post a bond or other security to cover the economic harm to the project or the affected workforce.

HB 168 addresses these abuses, places the same financial burden on those organizations seeking to use the legal system as a tactical tool but does not discourage individuals and organizations from perusing legal remedy against questionable development.

Therefore, the Juneau Chamber of Commerce urges the passage of HB 168.

Sincerely,

Cathie Roemmich, CEO
Juneau Chamber of Commerce

Cindy Smith

From: Russell Myers <rmyers@corvusgold.com>
Sent: Saturday, March 31, 2012 2:54 PM
To: Sen. Hollis French
Subject: HB 168

Categories: Staff responded

Greetings Senator Hollis,

As an mineral exploration company business conducting work in Alaska I believe that HB 168 would help protect my company from unfair and unwarranted legal action brought by vandals with an axe to grind against mineral resource development. We firmly believe in the rule of law and believe everyone should be accountable under the law for their actions. However, as you well know, spurious law suits can tie up resources and cause delays that can be fatal to a project if they come at a critical time. There needs to be accountability to discourage spurious legal actions.

I encourage you to ensure that HB 168 is heard as soon as possible in this session.

Thank you for all your hard work and good luck as the session comes to a close.

Russell Myers
President
Corvus Gold Inc.
9137 Ridgeline Blvd. Suite 250
Highlands Ranch, CO 80129
USA
Tel: 303 470 8700
Cell: 303 862 1041
rmyers@corvusgold.com

ALASKA MINERS ASSOCIATION, INC.

3305 Arctic Blvd., #105, Anchorage, Alaska 99503 • 907) 563-9229 • FAX: (907) 563-9225 • www.alaskaminers.org

April 5, 2012

Honorable Hollis French
Honorable Bill Wielechowski
Chair and Vice-Chair, Senate Resources Committee
Capitol Building
Juneau, AK 99801-1182

Dear Senators French and Wielechowski:

We are writing on behalf of the Alaska Miners Association in support of House Bill 168, Injunction Security – Industrial Operations.

The Alaska Miners Association is a non-profit membership organization established in 1939 to represent the mining industry in Alaska. The AMA is composed of more than 1400 individual prospectors, geologists and engineers, vendors, suction dredge miners, small family mines, junior mining companies, and major mining companies. Our members look for and produce gold, silver, platinum, lead, zinc, copper, coal, limestone, sand and gravel, crushed stone, armor rock, and other materials.

Under current law, there is effectively no cost for third party to bring a lawsuit against a legally permitted project. The key point is that the project at that point holds a valid permit that has been through Alaska's extensive permitting processes. The state has as a substantial interest in terms of economic development and regulatory certainty for its permittees to be able to proceed once the permit is issued.

The proposed bill carefully parallels the requirements of Alaska Civil Rule 65(c). As written, 65(c) states: "no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who enjoined or restrained is found to have been wrongfully enjoined or restrained".

It is clear that the proposed statute will not change or modify the court rule. Thus, the capacity for the court to require security already exists, and the bill simply extends that capacity to consideration in the court's deliberation process to payment of wages and benefits for employees, payments to contractors and subcontractors of an industrial operation if it is shutdown. The calculation itself is up to the court.

HB168 will improve the business climate of the State of Alaska, protect Alaska's many hard working employees and contractors, and decrease regulatory uncertainty.

We urge passage of this bill.

Sincerely,

Fred Parady, CSP
Executive Director

Lee H. Bridgman Jr
763 Wanda Dr
North Pole AK 99705

cc: Members, Senate Judiciary Committee
The Honorable Joe Paskvan
The Honorable Lesil McGuire
The Honorable John Coghill

SIERRA CLUB
FOUNDED 1892

TRUSTEES FOR ALASKA
SUSTAIN | PROTECT | REPRESENT

March 26, 2012

Dear Sen. French:

The Sierra Club and Trustees for Alaska oppose HB 168, which would require an Alaskan litigant to post a bond or security when a court issues a stay or injunction against a government-issued permit affecting an industrial operation. The Sierra Club is the nation's largest grassroots environmental organization working to explore, enjoy and protect the planet with roughly 1,200 members in Alaska. Trustees for Alaska was established in 1974 as an Alaska non-profit public interest law firm working to protect and sustain Alaska's natural environment on behalf of Native villages, community groups, and local and national conservation groups by providing legal services, policy advice, and strategic counsel free of charge. Trustees for Alaska has been in the forefront of issues large and small which continue to shape Alaska's environmental future – oil and gas development, mining, toxic wastes, air and water pollution, public land use, and protection of marine resources.

HB 168 Is Likely Unconstitutional.

First and foremost, our members and clients are concerned that HB 168 will take away their basic constitutional rights. The bill is likely unconstitutional for three reasons. First, it violates the Equal Protection clause by targeting litigants who challenge permits for industrial operations, and protecting only industrial operations. This discriminates unconstitutionally against local landowners, community groups, native organizations, commercial and sport fishers and hunters, and other Alaskans who seek to ensure that state agencies are doing their jobs.

Second, in practice it would often deny access to courts, in violation of Due Process rights, for Alaskans who do not have the financial resources to post the required bond but have an otherwise valid claim. This bond would have to cover potential damages including employees' lost wages, salaries, and contractors. The size of these bonds could easily and quickly add up to millions of dollars. Most Alaskans do not have the financial resources to post the required bond, but have an otherwise valid claim. Those people would be prohibited from protecting the land they have owned for decades yet is threatened by a major industrial operation. Even large non-profit organizations like the Sierra Club, do not have millions to post the bond this bill would require, despite frequently having legitimate issues with government-issued permits.

Third, HB 168 is a change to court rules, which violates the Alaska Constitution unless the bill is approved by two-thirds of each house and specifically states that it is a change to court rules. Currently, Civil Rule 65(c) and Appellate Rules 204(d) and 603(a)(2) govern the bonds that would be affected by HB 168. Indeed, the bill closely parallels the language of Civil Rule 65(c).

HB 168 is Poorly Drafted and Would Be Extraordinarily Difficult for a Court To Apply.

The bill contains several provisions that are ambiguous or make no sense and would be challenging for a court to enforce. For example, the bill purports to require a bond for an order "vacating" a permit. However, a court only vacates a permit at the conclusion of a case, after finding that the issuing agency actually violated the law.[1] That is not a situation where bonds come into play. Bonds are generally required only for temporary injunctions or stays, in case the person does not ultimately prevail. It would make no sense and serve no purpose to require a bond of the party who has won the case. If that is the intent of the bill, then it is a punitive and unconstitutional attempt to prevent successful litigants from obtaining the relief to which they are entitled.

Similarly, the bill purports to require the bond to cover damages wrongfully suffered by "an industrial operation." An industrial operation, in turn, is defined in the bill as various activities. But damages are suffered only by litigants, such as persons, corporations, or organizations. There is no precedent for measuring or awarding damages to an activity rather than a party, and the very concept is bizarre and likely impossible to apply.

Further, the legislation is ambiguous regarding the point at which a bond would be required. Departing from current court rules, the bill requires a bond from a party "seeking" a stay, preliminary injunction, or vacatur. If that were read to require a bond whenever a case was filed against an industrial permit, it would effectively require an exorbitant fee at the time of filing – an unconstitutional requirement and drastic change to current court procedures. Further, if the bill were interpreted to require bonds whenever a stay or preliminary injunction is sought, and before the court orders one, its main impact would be to deter likely meritorious claims from ever being raised—again a clear violation of constitutional rights.

<u>HB 168 Jeopardizes Delegation of Various Federal Enforcement Programs and Funding for Those Programs.</u>

HB 168 will likely have unintended legal and financial consequences for Alaska. Alaska has various federally delegated legal programs, including the Surface Mining Control and Reclamation Act, the National Pollutant Discharge Elimination System program in the Clean Water Act, Clean Air Act permitting programs, and the Resource Conservation and Recovery Act program. The Department of Natural Resources and Department of Environmental Conservation administer these federal programs, which require compliance with federal regulations. Those regulations include providing the same opportunity for judicial review as would be available under the federal program.

The bond requirement in HB 168 is not required under federal law and is a deterrent to citizens challenging unlawful permits. It is also a deterrent to seeking preliminary injunctive relief, no matter how compelling the case or egregious the legal violation. As such, it is very possible that the federal agencies administering these statutes, such as the Department of Interior and Environmental Protection Agency, could decide to de-delegate these programs from the State,

---

[1] In that case, the challenger has won the case, which by definition, is not a frivolous lawsuit.

which would remove Alaska's control over permitting and result in agency programs being defunded.

HB 168 Likely Stops Meritorious Lawsuits.

This legislation is not aimed at stopping frivolous lawsuits. A frivolous lawsuit would not receive a stay or preliminary injunction, because a court can't issue those remedies without first determining that the plaintiff is likely to prevail and that "irreparable harm" would result without the stay or injunction. Instead, this legislation is targeted at lawsuits with merit, but imposes its burden at the expense of ordinary Alaskans and their communities. Under HB 168, the Alaskan seeking an injunction or stay will be required to post a bond that is typically unaffordable to all but the most wealthy corporations and individuals. Stated another way, the bill penalizes all but the extraordinarily wealthy and deters meritorious claims before they are adjudicated at all.

Further, when a case against a permit is brought by an Alaskan, it questions the permitting process used by the issuing governmental agency or illegal practices by industry. As a result, an injunction or stay would only be issued when government hasn't followed procedure, applied the proper standards, or when a corporate permittee is violating the law or the terms of its permit, as determined by judicial review. Requiring a citizen to pay for a governmental error or corporate malfeasance creates a chilling effect on a long tradition of protecting whistleblowers in our democracy.

In fact, this legislation is so broad that it may even prevent the State itself from enforcing violations of law. It applies to any "party" seeking temporary injunctive relief, which sometimes includes the State when attempting to enforce violations of law occurring under an industrial permit. In those cases, the State will be subject to the bill's bond requirements, a cost the enforcement agencies have no budget to incur.

HB 168 would block Alaskans from protecting their communities and way of life by preventing them from challenging government-issued permits that have resulted in legally redressible injuries. It would force Alaskans challenging a permit to post a bond equal to potential damages suffered by an industrial operation. This remedy protects wealthy corporations – many of which merely do business in Alaska and/or are from foreign countries – over resident Alaskans who live, work, and raise their families in this great state. The bond will in many cases exceed $1 million, which effectively prevents almost any Alaskan from filing a suit to challenge what may be a fast-tracked, sloppy agency decision. Obviously this is the intent of the legislation—to keep Alaskans from exercising their constitutional rights.

Conclusion

HB 168 is unconstitutional, bad policy making. The only purpose it serves is to keep Alaskans who care about agency decision-making out of court while protecting sloppy permitting decisions that could impact Alaska's economic future. It also protects out-of-state and foreign corporations over Alaskans who live, work, recreate, and subsist in this great state. For these reasons the Sierra Club and Trustees for Alaska oppose HB 168.

Sincerely,

Emily Fehrenbacher, Associate Regional Representative
Sierra Club
750 W 2nd Avenue, Suite 100
Anchorage, AK 99501
(907) 276-4060
Emily.Fehrenbacher@sierraclub.org

Trish Rolfe, Executive Director
Trustees for Alaska
1026 W 4th Ave, Suite 201
Anchorage, AK 99501
(907) 433-2011
trolfe@trustees.org