ALASKA LEGISLATURE 1168

HOUSE and SENATE FINANCE COMMITTEE FILES, 1993-1994

242

1 (B) subject to
2 (i) continuing compliance monitoring;
3 (ii) periodic review by the issuing agency;
4 (iii) renewal on a periodic basis; or
5 (iv) AS 46.40; or
6 (3) a court order or judgment.
7 (c) The provisions of (b) of this section do not apply to actions in which the
8 air emission or water or solid waste discharge that is the subject of the action produces
9 a result that was unknown or not reasonably foreseeable at the time of the
10 authorization.
11 (d) Notwithstanding other provisions of law, except AS 09.50.170 - 09.50.240
12 and AS 19.25.080 - 19.25.180, a person may not bring a civil action to enjoin or abate
13 a private nuisance or to recover damages for a private nuisance unless the action is
14 authorized by this section.
15 * **Sec. 2.** AS 09.45 is amended by adding a new section to article 4 to read:
16 Sec. 09.45.255. DEFINITION. In AS 09.45.230 - 09.45.255, "nuisance" means
17 a substantial and unreasonable interference with the use or enjoyment of real property,
18 including water.
19 * **Sec. 3.** This Act applies to an action if judgment has not been entered in the action
20 before the effective date of this Act, and to that extent this Act is retroactive under
21 AS 01.10.090.
22 * **Sec. 4.** This Act takes effect immediately under AS 01.10.070(c).

AMENDMENT 9 Failed

OFFERED IN THE HOUSE REPRESENTATIVE BRO[illegible]N

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

Page 2, line 1:

Delete "and"

Page 2, line 6:

Delete "or"

Insert "and"

Page 2, after line 6:

Insert a new subparagraph to read:

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

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

AMENDMENT 2 Failed/(4-6)

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

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

(3) (5)

Page 2, following line 18:

Insert new bill sections to read:

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

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

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

CHAPTER 90. MISCELLANEOUS PROVISIONS.

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

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

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

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

Renumber the following bill sections accordingly.

Page 2, line 19:

Delete "This Act applies"

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

Page 2, following line 21:

Insert a new bill section to read:

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

Renumber the following bill section accordingly.

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

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

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

Page 2, following line 18:

Insert new bill sections to read:

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

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

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

CHAPTER 90. MISCELLANEOUS PROVISIONS.

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

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

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

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

Renumber the following bill sections accordingly.

Page 2, line 19:

Delete "This Act applies"

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

Page 2, following line 21:

Insert a new bill section to read:

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

Renumber the following bill section accordingly.

AMENDMENT 3 Withdrawn

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

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

Page 2, line 10

After "authorization" insert:

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

AMENDMENT 4 withdrawn

(3)

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

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

Page 2, after line 14:

Insert a new subsection to read:

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

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

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

(4)

AMENDMENT 5 Failed (4-6)

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

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

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

Delete all material.

Renumber the following section.

(4)

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

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

Page 2, lines 19 through 21:

Delete all material.

Renumber the following section.

Failed (-7)

AMENDMENT 6

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

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

Page 2, line 22:

Delete all material

Insert a new bill section to read:

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

(6)

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

AMENDMENT 7 withdrawn

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

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

Page 2, lines 11 - 14:

Delete all material and insert:

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

3/17/94 pm

AMENDMENT I Failed (4-5)

OFFERED IN THE HOUSE

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

Page 2, line 1:

Delete "and"

Page 2, line 6:

Delete "or"

Insert "and"

Page 2, after line 6:

Insert a new subparagraph to read:

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

3/17/94 pm

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

Last, I am in the process of [illegible] ality nuisance regulations to set-up a system which is much [illegible] an this bill. The regulations would establish how the depar[illegible] nd addresses air-related nusiances. My hope was to de[illegible] in the field at the Al Kegler level instead of the c[illegible] sioner's Sandor's level. So much for wishful thinking.

Material from 3/17/94 mtg

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

FROM: John Stone

TO: Mike Menge

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

CC: Len Verrelli

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

From Dept. of CAW

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

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

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

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

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

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

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

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

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

==

3/17/94 pm

ROBERTSON, MONAGLE & EASTAUGH

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

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

Pages 2

March 15, 1994

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

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

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

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

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

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

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

The information contained in this facsimile is confidential and is intended only for the use of the individual or entity to whom it is addressed. If you are not the intended recipient, do not copy, use or disclose this facsimile or any of its contents. If you have received this facsimile in error, please immediately notify us by telephone and return the original to us via U. S. Postal Service. Thank you.

Client No. 04878 Matter No. 78121

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

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

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

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

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

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

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

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

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

Page 3, lines 15-17 Severability language added.

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

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

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

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

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

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

FROM: Theresa L. Bannister TB
Legislative Counsel

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

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

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

If I may be of further assistance, please advise.

94-089.lmb
TLB:lmb

cc: Suzanne Lowell, Chief Clerk

Alaska State Legislature

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

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

Senator Robin L. Taylor

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

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

SPONSOR STATEMENT

SB 178

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

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

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

SPONSOR STATEMENT

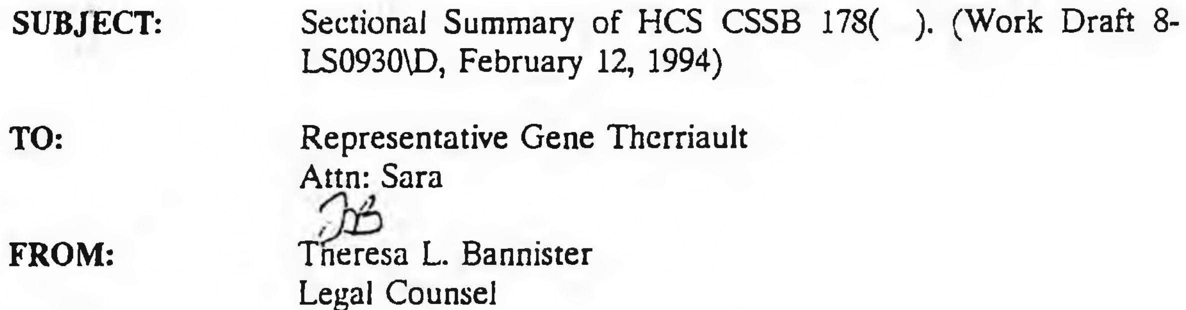
DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

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

<u>**M E M O R A N D U M**</u> February 15, 1994



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

TO: Representative Gene Therriault
Attn: Sara

FROM: Theresa L. Bannister
Legal Counsel

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

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

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

> <u>Subsection (a).</u> States that a person may bring a civil action to enjoin or abate a private nuisance and that damages may be awarded in that action.
>
> <u>Subsection (b).</u> Provides that a person may not maintain under the section an action for nuisance that is based upon an air emission or water or solid waste discharge, other than the placement of nuclear waste, where the emission or discharge was expressly authorized by and is not in violation of a term or condition of
>
> (1) a statute or regulation;
> (2) a license, permit, or order that is
> (A) issued after public hearing by the state or federal government; and
> (B) subject to
> (i) continuing compliance monitoring;
> (ii) periodic review by the issuing agency;
> (iii) renewal on a periodic basis; or
> (iv) AS 46.40; or
> (3) a court order or judgment.

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

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

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

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

Section 4. Gives the bill an immediate effective date.

If I may be of further assistance, please advise.

TLB:pl
94-128.plm

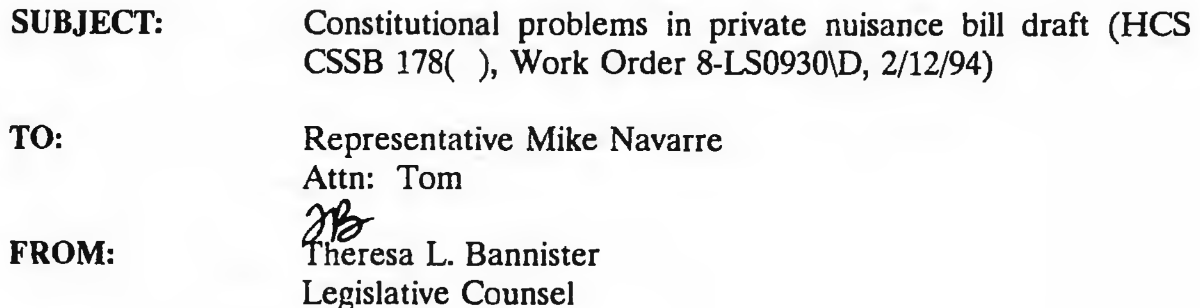
DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

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

M E M O R A N D U M March 7, 1994



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

TO: Representative Mike Navarre
Attn: Tom

FROM: Theresa L. Bannister
Legislative Counsel

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

1. Retroactivity provision in sec. 3.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If I may be of further assistance, please advise.

TLB:gc
94-177.glc

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

DENTON J. PEARSON
ALASKA/OREGON

BRIAN E. HANSON
ALASKA

March 2, 1994

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

Re: Senate Bill 178

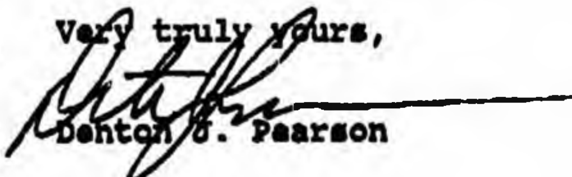
Greetings;

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

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

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

Very truly yours,



Denton J. Pearson

TESTLET1.letterson

Testimony for Senate Bill 178

House Finance Committee
March 1, 1994

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

Finance Committee Members:

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

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

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

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

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

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

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

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

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

HISTORICAL PERSPECITVE ON ALASKA NUISANCE LEGISLATION

Original Nuisance Law:

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

1986 Nuisance Bill

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

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

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

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

No Opposition in 1986:

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

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

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

NOTES TO DECISIONS

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

Article 4. Nuisances.

Section
235. Agricultural operations as private nuisances

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

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

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

(2) flooding caused by the agricultural operation.

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

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

ıfter foreclosure of lien.

DECISIONS

on to recover debt.

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

DECISIONS

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

(1) any agricultural and farming activity such as

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

(B) dairying;

(C) the operation of greenhouses;

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

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

(F) forestry or timber harvesting operations;

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

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

NOTES TO DECISIONS

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

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

<u>Introduction</u>

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

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

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

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

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

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

Regulatory Basis for SB 178

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

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

Introduction

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

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

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

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

Background

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

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

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

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

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

Regulatory Basis for SB 178

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you for your attention and consideration.

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

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

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

Dear Sirs:

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

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

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

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

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

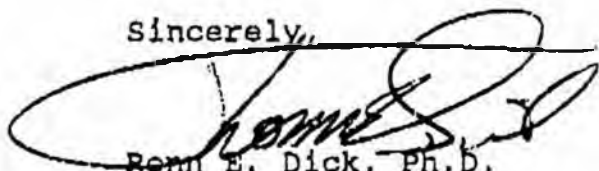
the appeal was decided in favor of the Sitka Conservation Society in May of 1992, In short, this regulation placed the burden of proof on the polluter to prove that the pollution they create is NOT injurious to human health or welfare, animal or plant life, or PROPERTY, or which would unreasonably interfere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

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

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

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

Sincerely,



Ronn E. Dick, Ph.D.
Forest Resources

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

Testimony
SB 178 Public Nuisance Suits

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

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

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

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

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

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

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

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

So to reiterate:

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

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

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

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

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

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

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

Authority: AS 46.03.020(10) AS 46.03.140

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

Authority: AS 46.03.020(10) AS 46.03.140 AS 46.03.150

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

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

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

(3) 12 minutes in one hour while anchoring, berthing, getting underway, or maneuvering in port. (Eff. 5/26/72, Register 42; am 5/4/80, Register 74; am 7/21/91, Register 119)

Authority: AS 46.03.020(10) AS 46.03.140 AS 46.03.150

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

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

Authority: AS 46.03.020(10) AS 46.03.140 AS 46.03.710

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

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

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

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

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

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

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

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

Article 2. Permit Requirements

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

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

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

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

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

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

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

(907) 586-4004 **Douglas Kemp Mertz** fax (907) 586-4141
Attorney at Law
319 Seward Street
Juneau, Alaska 99801

April 21, 1993

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

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

Dear Representative Porter:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you for your consideration of these points.

Sincerely,

Douglas K. Mertz

JUDICIARY COMMITTEE SUBSTITUE FOR SB178

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

Sectional Analysis: CSSB178(JUD)

Section 1 OVERVIEW

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

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

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

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

Section 2 OVERVIEW

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

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

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

Section 3 OVERVIEW

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

Section 4

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

ANCHORAGE OFFICE

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

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

WASHINGTON, D.C. AND VIRGINIA OFFICE

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

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

ROBERTSON, MONAGLE & EASTAUGH

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
JUNEAU, ALASKA 99802

JUNEAU OFFICE

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

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

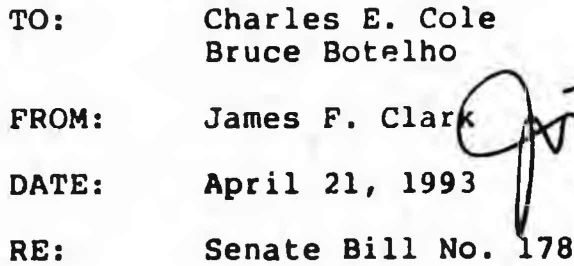
JAMES F. CLARK
PAUL M. HOFFMAN
D. ELIZABETH CUADRA
MARY A. NORDALE
ROBERT P. BLASCO
TERRY L. THURBON
ROBERT J. JURASEK
MARGARET E. OGDEN

ADMITTED IN WASHINGTON, D.C.* AND ALASKA

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

ALL OTHERS ADMITTED IN ALASKA

M E M O R A N D U M



TO: Charles E. Cole
Bruce Botelho

FROM: James F. Clark

DATE: April 21, 1993

RE: Senate Bill No. 178

****

Bill History

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

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

Bill Provisions

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

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

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

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

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

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

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

---

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

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

(continued...)

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

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

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

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

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

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

2/(...continued)

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

(3) a court order or decision.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

APR 16 1993

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

DEBRA B. ADLER‡*
THOMAS L. ALBERT*†‡
THOMAS P. AMODIO
J. GEOFFREY BENTLEY*
RONALD G. BIRCH**
WILLIAM H. BITTNER**
KATHRYN A. BLACK
PHILIP BLUMSTEIN
CORY R. BORGESON
DOUGLAS S. BURDIN*
JOHN J. BURNS
SUZANNE CHEROT**
JOSEPH M. CHOMSKI**
JOHN J. CONNORS
ALLEN E. CURLEE
KIM DUNN
ERIC A. EISEN**†
RALPH V. ERTZ
JOSEPH W. EVANS**
STEPHEN K. GARDNER*
WILLIAM W. GARNER*
JOHN WYETH GRIGGS**
JESSE A. HALVORSEN*
WILLIAM P. HORN*
AL R. HORTON**
STEPHEN H. HUTCHINGS
ROY S. JONES*
MARC W. JUNE
BRAD S. KANE
STANLEY T. LEWIS
LESLIE LONGENBAUGH
RONALD W. LORENSEN
L. MERRILL LOWDEN
GREGORY A. MILLER
MICHAEL J. PARISE
TIMOTHY J. PETUMENOS
ELIZABETH A. PHILLIPS
STEVEN PRADELL
GLEN PRICE
MICHAEL V. REUSING
ELISABETH H. ROSS**
JONATHAN B. RUBINI
E. BUDD SIMPSON
STEPHEN F. SORENSEN
JONATHAN K. TILLINGHAST
JEFFREY D. TROUTT
D. KEVIN WILLIAMS

OF COUNSEL
PETER A. GALBRAITH
RONALD SAXTON*

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

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

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

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

1155 CONNECTICUT AVE., N.W.
SUITE 1200
WASHINGTON, D.C. 20036-4308
(202) 659-5800
TELECOPIER (202) 659-1027

April 16, 1993

HAND-DELIVERED

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

Re: Comments on House Bill 282 (SB 178)

Dear Representative Phillips:

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

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

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

Comments on HB 282

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

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

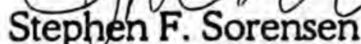
The only aspect of HB 282 that is supportable, is changing the definition of nuisance to "substantial and unreasonable" interference with property rights. This would raise the threshold of harm required to prevail in a nuisance action and discourage frivolous actions. I note, however, that there is no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

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

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

Sincerely,

BIRCH, HORTON, BITTNER & CHEROT



Stephen F. Sorensen

Enc.: Markup of HB 282

Alaska Environmental Lobby, Inc.

P.O. Box 22151 Juneau, Alaska 99802

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

SB 178/HB 282 CIVIL NUISANCE ACTIONS

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

The Alaska Environmental Lobby opposes SB 178/HB 282.

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

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

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

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

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

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

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

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

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

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

Alaska Environmental Lobby, Inc.

P.O. Box 22151 Juneau, Alaska 99802

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

Received
APR 19 1993

April 16, 1993

Representative Brian Porter
State Capitol
Juneau, AK

Dear Representative Porter,

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

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

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

A few comments on the permitting process:

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

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

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

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

Alaska Environmental Lobby, Inc.

P.O. Box 22151 Juneau, Alaska 99802

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

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

- Is not prohibiting a property owner from protecting his or her own property an unconstitutional "taking" of that property?

- Is the retroactive clause in the bill constitutional under the due process provision of the state constitution?

- If property owners are prohibited from filing nuisance suits to abate a nuisance or to receive compensation because of a nuisance, what is the state's liability?

- Can the state constitutionally compensate a property owner for damage done by another private interest even if that interest has been permitted by the state?

- If the state has no liability, then the property owner has no other recourse by which to gain compensation. Is this good public policy? Is this not a violation of a principle of private property rights, i.e. that owners have the right to protect their property, which has existed in common law for several centuries?

- Property owners living in residentially zoned areas are not prohibited from filing suits to abate certain nuisances. Is this not unconstitutionally discriminatory? Do not all commercial, industrial, agricultural, and other non-residential property owners have the same right to defend their property?

- Is a public hearing, used during the permitting process, the legitimate or proper forum for the state to determine when a private landowner's interests may be harmed?

- Supporters of this bill argue that it is designed to prevent frivolous lawsuits. Is there a demonstrated problem in the state of Alaska with the nuisance statute? How many lawsuits have been filed under AS 09.45.230 which the courts have determined were frivolous, i.e. were without grounds?

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

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

SB 178 CIVIL NUISANCE ACTIONS

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

The Alaska Environmental Lobby opposes SB 178.

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

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

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

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

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

2/7/94

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

Alaska Environmental Lobby, Inc.

P.O. Box 22151 Juneau, Alaska 99802

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

Received
APR 19 1993

April 16, 1993

Representative Brian Porter
State Capitol
Juneau, AK

Dear Representative Porter,

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

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

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

A few comments on the permitting process:

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

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

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

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

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

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

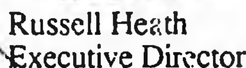
The practical implications to SB 178 are immense. The state issues thousands and thousands of permits each year. If it were the state and not the permittee, that were responsible for ensuring that the permitted activity were performed in such a way so as to not create a nuisance, then:

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

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

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

Sincerely,



Russell Heath
Executive Director

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

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

- Is not prohibiting a property owner from protecting his or her own property an unconstitutional "taking" of that property?

- Is the retroactive clause in the bill constitutional under the due process provision of the state constitution?

- If property owners are prohibited from filing nuisance suits to abate a nuisance or to receive compensation because of a nuisance, what is the state's liability?

- Can the state constitutionally compensate a property owner for damage done by another private interest even if that interest has been permitted by the state?

- If the state has no liability, then the property owner has no other recourse by which to gain compensation. Is this good public policy? Is this not a violation of a principle of private property rights, i.e. that owners have the right to protect their property, which has existed in common law for several centuries?

- Property owners living in residentially zoned areas are not prohibited from filing suits to abate certain nuisances. Is this not unconstitutionally discriminatory? Do not all commercial, industrial, agricultural, and other non-residential property owners have the same right to defend their property?

- Is a public hearing, used during the permitting process, the legitimate or proper forum for the state to determine when a private landowner's interests may be harmed?

- Supporters of this bill argue that it is designed to prevent frivolous lawsuits. Is there a demonstrated problem in the state of Alaska with the nuisance statute? How many lawsuits have been filed under AS 09.45.230 which the courts have determined were frivolous, i.e. were without grounds?

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

Alaska Environmental Lobby, Inc.

P.O. Box 22151 Juneau, Alaska 99802

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

SB 178 CIVIL NUISANCE ACTIONS

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

The Alaska Environmental Lobby opposes SB 178.

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

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

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

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

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

2/7/94

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

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

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE BROWN

TO: HCS CSSB 45(JUD)

Page 1, line 12:

Delete "and 16"

Insert "and 17"

Page 8, after line 8:

Insert a new bill section to read:

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

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

Renumber the following bill sections accordingly.

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

Gordon G. Goodman • Associate

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

April 5, 1993

Sent via FAX

Senate Judiciary Committee
State Capitol
Juneau, AK 99801-1182

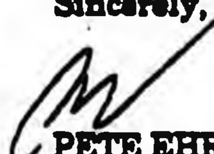
Re: Senate Bill 178

To Whom It May Concern:

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

Thank you for your attention to this matter.

Sincerely,



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

PE/rm
Enclosure

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

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

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

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

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

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

a. It denies due process to property owners.

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

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

APR 1 3 RECD

SEALASKA CORPORATION

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

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

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

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

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

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

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

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

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

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

HOUSE COMMITTEE REPORT

4/22

(7)

Date Referred: April 20, 1993 FURTHER REFERRALS: Finance

Date of Committee Action: 4-21-93

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

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

"An Act relating to civil nuisance actions."

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

[ ] have attached amendments(s)

[ ] do pass

[ ] do not pass

[X] no recommendations

[ ] individual recommendations

[ ] additional referral to the ____________ Committee

ADOPTS: ____________ letter of Intent

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

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

[ ] zero fiscal note ____________ [X] zero fiscal note(s) LAW (4-13-93)

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
[illegible, crossed out]		[signature] James		✓	
[signature] Phillips	✓	[signature] Green		✓	
[signature] Porter	✓	[signature] Kott		✓	
		[signature] Nordlund	✓		
		[signature] Davidson (unconstitutional)	✓		
		(UNCONSTITUTIONAL)			
	(2)		(2)	(3)	

[signature] Porter
CHAIRMAN'S SIGNATURE

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

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

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

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

Representatives Therriault was not present for the vote.

The MOTION FAILED (4-6).

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

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

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

SENATE BILL NO. 178

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

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

judgement.

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

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

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

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

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

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

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

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

action to protect his property is fundamental.

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

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

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

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

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

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

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

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

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

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

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

must be met at the boundary of the facility.

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

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

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

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

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

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

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

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

detailed administrative appeals available to the public.

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

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

ADJOURNMENT

The meeting adjourned at 3:55 p.m.

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

By JEFFERY TROUT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

April 23, 1993

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

Dear Mr. Grussendorf:

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

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

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

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

Respectfully Yours;

Valorie L. Nelson

Valorie L. Nelson

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

March 1, 1994

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

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

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

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

Denton Pearson

TEST.letterscn

Alaska State Legislature

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

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

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

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

Signed: Don Muller (DON MULLER)
Testifier

Self
Representing (Optional)

Box 1042 Sitka, Alaska 99835
Address

747-8808
Phone No.

Feb. 22, 1994

Hello

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

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

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

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

Sincerely,

Don Muller

Don Muller
Box 1042
Sitka, AK 99835
747-8808 (w)