

ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672

7913

• HOUSE JUDICIARY

178

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173

Rep. Brian Porter, Chairman

House Judiciary Committee

Date: April 23, 1993
 Place: Capitol Room 120

SB 173 Group Health Insurance for Small Employers
 SCR 4 Request Change in Rule 82 Fees

Subject of Meeting: SB 76 Charitable Gaming
 Restrictions; SB 149 Revision of Banking Code

Please Print Name	Representing	Business/Personal Mailing Address	Zip	(H) Phone	(W) Phone	Do you Want to Testify?	Which Subject/ Which Bill?
✓ JAMIE PARSONS	AK STATE CHAMBER	217 - 2ND # 201	99801	7899201	586 2323	(Y) N	173
✓ Jay Frank	State Farm Allstate	431 N. Franklin	99801		6-5777	(Y) N	SB 173
Ken Erickson	Sponsor @ Sen Pearce	Room 508 Cap	99801	4993		(Y) N	to answer questions if need
✓ Gordon Evans	HIAA	318 4th St, Juneau	99801	586-3210		IF NEEDED (Y) N	SB 173
✓ Alan Jensen	NFIB	9159 Skywood	99801		9-4278	(Y) N	If Needed SB 173
Willis Kirkpatrick	DCED	Division of Banking			2521	(Y) N	SB 149
John Hansen	DCED	Gaming			2581	Y N	IF Needed SB-76
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	

HOUSE COMMITTEE REPORT

(7)
 Date Referred: April 15, 1993 FURTHER REFERRALS: Finance

Date of Committee Action: 4-23-93

The JUDICIARY Committee considered: CSSB 173(FIN)

CS FOR SENATE BILL NO. 173(FIN) GROUP HEALTH INS. FOR SMALL EMPLOYERS

"An Act relating to health insurance for small employers; and providing for an effective date."

- RECOMMENDATIONS: the same title
 be replaced with _____ a new title
- have attached amendments(s)
 do pass
 do not pass
 no recommendations
 individual recommendations
 additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

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

fiscal impact _____ fiscal note(s) _____

zero fiscal note _____ zero fiscal note(s) DCEB (3-31-93)

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>[Signature]</i>	✓	<i>Cliff Davidson</i>		✓	
<i>[Signature]</i>	✓				
<i>Janette James</i>	✓				
<i>Brian Porter</i>	✓				
<i>Tom Donaldson</i>	✓				
<i>Gail Phillips</i>	✓				

Brian Porter

 CHAIRMAN'S SIGNATURE

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

Bill Version: SB 173 No. 1
(S) Publish Date: 3-31-93

Revision Date: _____

Department Affected: Commerce and Economic Development

Title: Group Health Ins. for Small Employers

BRU: Insurance

Component: Operations

Sponsor: Senators Rieger, Pearce, Salo, Kelly, Phillips

Requestor: _____

COMPONENT SERIAL NO. 354

EXPENDITURES/REVENUES:

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

CAPITAL	0	0	0	0	0	0
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REVENUE FUND SOURCE:	0	0	0	0	0	0
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FUNDING:						
1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:						
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year (FY 93) impact: 0

Changes in CSB 173 (Fix) have no fiscal impact. This fiscal note is appropriate.

ANALYSIS: (Attach a separate page if necessary.)

No fiscal impact.

Prepared by: Joan Brown, Administrative Officer

Phone: 465-4331 date 4-8-93 Comte Aide (initial) bl

Division: Insurance

Date: 3/26/93

Approved by Commissioner: Paul Fuhs

Agency: Commerce and Economic Development

Date: _____

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Alaska State Senate

SENATOR STEVE RIEGER
District 1

State Capitol
Room 516
Juneau, Alaska 99801
(907) 465-3879

Senate Finance Committee
Chair, Senate Health, Education
and Social Services Committee
Vice Chair, Senate Rules Committee
Vice Chair, Senate Labor and
Commerce Committee

TO: Representative Brian Porter
Chair, House Judiciary Committee

FROM: Senator Steve Rieger *SR*

DATE: April 15, 1993

RE: CSSB 173 (Fin) - "An Act relating to health insurance for small employers; and providing for an effective date."

I respectfully request that you waive the referral to Judiciary for the above referenced legislation. It passed the Senate yesterday on reconsideration by a vote of 19-1. (It is identical to CSHB 12(L&C) with the exception of two small technical amendments.)

In the alternative, I request that you calendar CSSB 173 (Fin) for a hearing in the House Judiciary Committee at your earliest convenience.

As you are aware, this legislation is pro-business legislation. It reforms the small business health insurance market in the State of Alaska and guarantees accessibility to small employers in the State of Alaska.

Thank you for your consideration of this bill.

Alaska State Senate

SENATOR STEVE RIEGER
District 1

State Capitol
Room 516
Juneau, Alaska 99801
(907) 465-3879

Senate Finance Committee
Chair, Senate Health, Education
and Social Services Committee
Vice Chair, Senate Rules Committee
Vice Chair, Senate Labor and
Commerce Committee

SENATE BILL 173 SMALL EMPLOYER HEALTH INSURANCE REFORM

Senate Bill 173 is pro-business legislation. Based on a model drafted by the National Association of Insurance Commissioners (NAIC), it reforms the small business health insurance market in the State of Alaska and guarantees the availability of private health insurance, regardless of any "high risk" factors of clients.

Coverage must be granted to whole groups, rather than excluding those considered "high risk" by insurance companies and coverage is renewable, regardless of the "risk" associated with each person in the group being covered. The insurance is "portable" as well.

According to the Alaska Department of Labor, more than 90% of all businesses in the State of Alaska employ up to 25 employees. These are the groups that are being addressed in this legislation.

Currently, there are approximately 15 companies in the State who issue small business health insurance. Insurance companies who wish to continue to do business in the state must participate in the Small Employer Health Reinsurance Association, a reinsurance pool. If more small businesses are able to secure health insurance for all of their employees, the insurance companies will cover more low risk clients, thereby decreasing the effects of taking on any high risk individuals. As the number of insured individuals grows, the insurance pool takes on more of a group risk profile.

This legislation does not require additional state expenditures.

The Health Care Task Force, established to review and recommend changes in the Alaska health care insurance industry, recommends the enactment of legislation establishing regulatory reform measures in the small group health insurance market "by enacting the NAIC model statute" as part of an overall plan. To date, this legislation has been adopted by 24 states.

This legislation is supported by the Health Insurance Association of America, (HIAA), the National Federation of Independent Businesses, (NFIB), the Alaska State Chamber of Commerce, the Alaska State Hospital and Nursing Home Association, and other organizations.

DIVISION OF LEGAL SERVICES

**LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA**

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

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

MEMORANDUM

April 14, 1993

SUBJECT: Small employer health insurance (CSSB 173(FIN))
TO: Senator Steve Riege¹nsel
FROM: Michael F. Ford
Legislative Counsel

The following is a section by section analysis of CSSB 173(FIN):

Section 1 - Purpose.

Section 2 - Makes a violation of insurance marketing practices under AS 21.56.180 an unfair trade practice.

Section 3 - Establishes the provisions of AS 21.56 as an exception to the requirement that an insurer may not discriminate between health care providers.

Section 4 - Sunset section that repeals changes in sec. 3.

Section 5 -

Sec. 21.56.010 - Establishes the Small Employer Health Reinsurance Association and requires certain insurers to be members.

Sec. 21.56.020 - Establishes the board of directors of the association and provides for specific board representation and organization.

Sec. 21.56.030 - Establishes the general powers of the association.

Sec. 21.56.040 - Requires the association to submit a plan of operation to the director of the division of insurance. Requires members to comply with the plan and establishes specific components of the plan.

Sec. 21.56.050 - Establishes specific provisions that apply to reinsurance provided by a member to employees or dependents of employees of a small employer. Imposes

Senator Steve Rieger

April 14, 1993

Page 2

certain restrictions on reinsurance of group plans other than small employer health benefit plans and establishes limits for premiums charged for reinsured coverage and for coverage provided by a health maintenance organization. Provides for member assessments, by the administering insurer.

Sec. 21.56.060 - Establishes the health benefit plan committee. Requires the committee to design a basic and a standard health benefit plan.

Sec. 21.56.070 - Requires the board to report on the effectiveness of the chapter.

Sec. 21.56.080 - Exempts the association from the Administrative Procedure Act.

Sec. 21.56.090 - Exempts the association from payment of taxes, except for real or personal property taxes.

Sec. 21.56.100 - Provides immunity from civil actions filed against a member of the association for a negligent act on behalf of the association.

Sec. 21.56.110 - Establishes when an individual or group health benefit plan is subject to AS 21.56 and provides that other laws requiring coverage, reimbursement, utilization, or consideration of a specific health care provider do not apply to a health benefit plan provided to a small employer. Exempts a health benefit plan offered to a small employer from certain restrictions contained in other laws.

Sec. 21.56.120 - Establishes underwriting and rating requirements applicable to health benefits plans covering small employers.

Sec. 21.56.130 - Establishes when a health benefit plan is required to be renewed.

Sec. 21.56.140 - Requires a guaranteed issue insurer to offer at least two small employer health benefit plans and that the plans provide certain coverage. Allows a guaranteed issue insurer to reinsure, make special premium arrangements, or appeal unfair administrative or credit risk.

Sec. 21.56.150 - Establishes certain provisions that must be included in a health benefit plan.

Sec. 21.56.160 - Exempts certain small employer insurers from being required to offer health insurance coverage.

Sec. 21.56.170 - Establishes certain conditions that must be met before an insurer or welfare arrangement may cease doing business in the small employer market.

Sec. 21.56.180 - Establishes fair marketing requirements for health benefit plans.

Senator Steve Rieger
April 14, 1993
Page 3

Sec. 21.56.190 - Allows the director of the Division of Insurance to require small employer insurers to reissue a health benefit plan to certain small employers.

Sec. 21.56.250 - Definitions.

Section 6 - Provides that a health maintenance organization is subject to the small employer health insurance provisions contained in AS 21.56.

Section 7 - Sunset provision that repeals changes in sec. 6.

Section 8 - Provides that a hospital or medical service corporation is subject to the small employer health insurance provisions contained in AS 21.56.

Section 9 - Sunset provision that repeals changes in sec. 8.

Section 10 - Provision that allows premium rates to exceed the limits under 21.56.120(a) for a period of three years. Establishes limits on the percentage increase in premium rates.

Section 11 - Transition section. Requires the small employer Health Reinsurance Association to submit a health insurance plan to the Director of the Division of Insurance.

Section 12 - Sunset repeal provisions.

Sections 13 & 14 - Effective dates.

MFF:lmb
93-117.lmb

March 25, 1993

SENATE JOURNAL

p. 946

SB 173

SENATE BILL NO. 173 by SENATORS RIEGER, Pearce, Salo, Kelly, Phillips, entitled:

"An Act relating to health insurance for small employers; and providing for an effective date."

was read the first time and referred to the Labor and Commerce and Finance Committees.

March 31, 1993

SENATE JOURNAL

p. 1003

SB 173

The Labor and Commerce Committee considered SENATE BILL NO. 173 "An Act relating to health insurance for small employers; and providing for an effective date." Signing do pass: Senator Kelly, Chair, Senators Sharp, Rieger, Salo. Signing to amend: Senator Lincoln.

Zero fiscal note published today from Department of Commerce and Economic Development.

March 31, 1993

SENATE JOURNAL

p. 1004

SB 173

SENATE BILL NO. 173 was referred to the Finance Committee.

April 8, 1993

SENATE JOURNAL

p. 1269

SB 173

The Finance Committee considered SENATE BILL NO. 173 "An Act relating to health insurance for small employers; and providing for an effective date" and recommended it be replaced with

CS FOR SENATE BILL NO. 173(FIN)

Signing do pass: Senator Pearce, Cochair, Senators Kelly, Rieger, Jacko, Sharp.

Previous zero fiscal note applies to the Committee Substitute.

SENATE BILL NO. 173 was referred to the Rules Committee.



HOW REINSURANCE WORKS

For more than two years, the Health Insurance Association of America (HIAA) has been developing the components of a reform package designed to address the unique requirements of the small employer market. These reforms, when taken as a whole, will ensure fair access to and continuation of coverage for small employers and their employees. These reforms constitute a meaningful basis for enhancing and expanding health care coverage.

Small employers, unlike their larger counterparts, are likely to go into and out of business frequently. Similarly, their employees tend to move from job to job frequently. Finally, small employers change insurance carriers more often in an attempt to obtain more favorable rates. All of these factors, combined with growing health care cost pressures, make it exceedingly difficult for insurance carriers to provide coverage to the small employer and they also make it more likely that individuals within this market will lose health care coverage at some point. HIAA's small employer market reforms tackle these problems in a reasonable and workable manner.

The HIAA proposal would ensure that any small employer may obtain coverage (regardless of the health condition of its employees or the inherent administrative burdens they pose). The following examples illustrate how this would work.

SITUATION: Tom's Tree Trimmers opens for business with a full-time work force of five employees. With workers engaged in dangerous work, where statistics suggest that personal injury is far more likely to occur than in, say, a computer sales and repair outlet, obtaining affordable health insurance may be difficult. Let us suppose that two employees, Harry and Sam, have serious health problems, which insurance companies term **pre-existing conditions**. To obtain coverage, the president of Tom's Tree Trimmers could face the following options: terminate Harry's and Sam's employment, insure everyone except Harry and Sam, or provide no insurance for any of the employees.

SOLUTION: Under the HIAA reform proposal, Tom's Tree Trimmers would not be excluded from coverage because it is engaged in dangerous work or because two of its employees, Harry and Sam, have pre-existing conditions. Also, the carrier selling insurance to the company would be permitted to reinsure Harry and Sam, the high risk employees (unbeknownst to Harry, Sam, and their employer), by paying a reinsurance premium. In exchange for the reinsurance premium, the reinsurer would agree to reimburse the insurer for Harry's and Sam's costs.

SITUATION: During the course of the year a third employee at Tom's Tree Trimmers, George, becomes seriously ill. Will his condition threaten coverage for himself or his coworkers?

Health Insurance Association of America

1025 Connecticut Avenue N.W., Washington, DC 20036 ☐ 202-223-7780 ☐ FAX 202-223-7897

SOLUTION: Under HIAA's reform proposal, insurance coverage would be maintained for all employees, regardless of any of the employees' conditions. Tom's Tree Trimmers' insurance carrier would be obligated to renew the contract (unless the company failed to pay its premiums in a timely fashion or was dishonest with the carrier).

SITUATION: George, who has had several months of poor health, is on the road to recovery. He decides to leave Tom's Tree Trimmers to gain experience at a small computer sales and repair outlet, the Corner Computer Company. He is concerned that he will not be able to obtain coverage with his new employer because of his health record with Tom's Tree Trimmers. He is aware that, prior to the reforms in the small employer market, employees who changed jobs or employers that changed carriers could face recurring pre-existing condition limitations. George realizes that this could leave him without health care coverage.

SOLUTION: Under the HIAA proposal, George would be guaranteed continuity of coverage and would not be subject to any new pre-existing condition limitations if he changes jobs or his employer switches carriers, since he satisfied those while employed by Tom's Tree Trimmers (this assumes that George did not allow his coverage to lapse for a sustained period of time).

SITUATION: Both Tom's Tree Trimmers and the Corner Computer Company are concerned that their health premiums will rise inordinately if one or more employees is found to be seriously ill.

SOLUTION: Under the HIAA proposal, an insurance carrier would have to limit how much its rates, based upon the group's health history, varied. Carriers could vary their rates for similar small employer groups (those with similar demographics, plan type, and geographic area) by no more than 35 percent above or below their midpoint rate (the midpoint rate is halfway between the carriers lowest and highest rate). Carriers would also have to limit their industry rating adjustment to 15 percent. Finally, the year-to-year premium increase for a group could be no more than 15 percent above the carriers "trend" (defined as the increase in the lowest new business rate). To reflect cost differentials between managed care and non-managed care products, carriers could establish separate trends.

SITUATION: A new firm, Tree Doctors, Inc., opens for business in the same community as Tom's Tree Trimmers. Like its competitor, Tree Doctors employs five employees. At the time it opens for business, all of its employees are healthy. The president of Tree Doctors, Inc. knows that he is in stiff competition with Tom's Tree Trimmers. He is concerned that he may be at a competitive disadvantage if any of his costs are higher than those of Tom's Tree Trimmers. Since Tom's Tree Trimmers has been in business for some time, the owner of Tree Doctors, Inc. is concerned that he may not be able to purchase health insurance coverage at a rate that will be similar to the rates charged to his competitor.

SOLUTION: Under the HIAA proposal, the availability of reinsurance combined with the premium rate limits would moderate the premium difference between groups. The HIAA plan would ensure that Tree Doctors, Inc. did not incur inordinately high premiums relative to demographically similar firms.

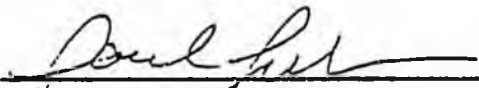
SB 173: "An Act relating to health insurance for small employers and providing for an effective date."

The department is neutral on this legislation.

One of the more challenging issues facing this country and Alaska is the ever-increasing number of small employers unable to afford health care insurance. This bill would address small employers who have been unable to purchase health care.

The bill sets up a reinsurance pool for insurers writing small employers health insurance in the state. In order for the bill to be effective, certain provisions have to be met. The authority of the director should be for approval of members only. The pool and coverages they provide should be exempt from the mandatory coverages in Title 21. The pool shall be subject to the marketing and financial sections of Title 21. The pool should not be subject to a subsidy from the legislature or exempt from taxation. The bill adequately addresses these items as written.

Health is not a term defined in Title 21; the appropriate term is disability. Additionally, 21.56.010 should clarify if hospital and medical service corporations and health maintenance organizations, as defined in 21.87 and 21.86, respectively, are included in membership. They are included on the board.



Paul Fuhs, Commissioner
3-29-93

Date

dgl175pp.ins

**THE STATE OF ALASKA
HEALTH RESOURCES AND ACCESS TASK FORCE**

FINAL REPORT

to

the Governor and Legislature

January 1993

**Alaska State Legislature
Health Resources and Access Task Force
State Capitol
Juneau, Alaska 99801-1182**

Given this situation, the Task Force felt that, in spite of its commitment to a single payer system, it should also put forth recommendations for making incremental improvements to the existing financing system that have already been adopted in many other states and that could be enacted immediately by the Alaska State Legislature. The first four of the Task Force's access-related recommendations (Recommendations 4 through 7) focus on this short term strategy. Our final recommendation describes the Task Force's rationale for proposing a single payer system as the preferred approach for providing universal coverage.

RECOMMENDATION # 4:

The Task Force recommends the enactment of legislation establishing regulatory reform measures in the small group health insurance market.

As described in Chapter Two (see Finding #6), a significant proportion of uninsured Alaskans are either employees in small firms or dependents of these employees. As was also noted, a number of serious problems in the current small group health insurance market are likely to make health care coverage unattractive to many small businesses. These problems include:

- The refusal by some insurers to provide coverage to certain small businesses because of the type of work in which they are involved or the health status of their employees or their dependents;
- Premium levels charged by the same insurer that may vary widely across firms with similar employee characteristics;
- Premium setting practices that result in many small businesses being offered very attractive first year rates, but then being hit by double--or even triple--digit increases in their premium costs in the following years. These staggering increases cause many businesses not to enter the market in the first place, to drop their coverage, or to switch to another carrier;
- High administrative costs due to medical underwriting activities and the frequent switching of insurers that is promoted by insurer practices; and
- The dropping of some small businesses without notice or refusing to renew their coverage because of their claims experience.

A number of organizations, including the National Association of Insurance Commissioners (NAIC) have worked to develop a package of regulatory reform proposals that would enable states to address these problems. The NAIC has passed a Small Employer Health Insurance Availability Model Act that incorporates desired reform provisions. These provisions, which would apply to policies sold to employers with fewer than twenty-five employees, include:

Guaranteed Issue and Renewability: All small group insurers must provide coverage to all eligible firms applying for coverage and may not terminate such coverage for other than good cause, such as non-payment of premiums.

Whole Group Coverage: Insurance policies sold to small groups must provide coverage to all eligible employees and their dependents and cannot exclude certain individuals based upon their health status.

Elimination of Multiple Waiting Periods for Pre-existing Conditions: Waiting periods for individuals with pre-existing conditions are to be waived if these individuals have previously fulfilled a waiting period and maintain continuous coverage.

Development of Standardized Plans: To allow comparison shopping by small employers, each small group insurer must offer two standardized plans, one of which is to be a "bare bones" plan.

Premium Rating Restrictions: Premium rate "bands" or restrictions would be established to limit variation in:

- annual premium increases faced by individual small businesses; and
- premium rates charged to different types or classes of small businesses.

Reinsurance Pool: A statewide reinsurance pool should be established to spread the risk associated with the guaranteed issue requirements in the small group market.

Data and Disclosure: Small group insurers must disclose their premium rating practices and renewability provisions to small businesses. Insurers must also maintain their records in proper order and submit an annual statement certifying that the rates they charge small businesses are actuarially sound and comply with all the above requirements.

SMALL EMPLOYER MARKET REFORMS

Pre-1991

Comprehensive Package

states which have enacted a comprehensive, or near-comprehensive small employer package

Connecticut (1990)†
Hawaii (1974)

Partial Package

states which have enacted select precepts of small employer market reform*

Georgia (1990)

1991

Comprehensive Package

passed in 1991

Massachusetts
North Carolina†
Oregon
South Carolina‡
Vermont

Partial Package

effective 1991

Colorado
Nebraska
New Mexico
North Dakota
West Virginia

1992

Comprehensive Package

passed in 1992

California
Delaware†
Florida†
Iowa†
Kansas†
Maine
Minnesota
Missouri†

New Hampshire‡
New York
Rhode Island†
Tennessee†
Virginia‡
Wisconsin
Wyoming†

Partial Package

effective 1992

Arkansas
Indiana
Louisiana
South Dakota

Comprehensive Package Proposals

strong prospects for passage in this session

New Jersey
Ohio
Pennsylvania

Other

passed at least one chamber prior to adjournment

Alaska
Arizona
Colorado
Georgia
Idaho
Maryland
Washington

* For listing of specific precepts, refer to following chart
‡ Does not require insurers to guarantee issue coverage

† Generally follows HIAA/NAIC model
** Awaiting Governor's signature

ALASKA STATE

HOSPITAL & NURSING HOME

ASSOCIATION

March 26, 1993

Senator Tim Kelly, Chairman
Labor & Commerce Committee
Alaska State Senate
Capitol Building
Juneau AK 99801

Re: Support SB 173 (Small Employer
Health Insurance Reform)

Dear Senator Kelly:

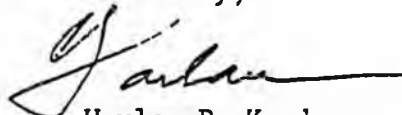
The Association would like to be on record in support of SB 173, providing health insurance for small employers. We understand this is former SB 40 under new sponsorship.

We listened in on the hearing on SB 40 March 23 and would be supportive of amendments offered by Jan Meisels, representative of the Health Insurance Association of America.

Meaningful health reform by the U.S. Congress is at least one to three years before it will be implemented. SB 173 should compliment Congressional efforts as it provides a state option for helping small employers to purchase a health insurance program for themselves and their employees.

We urge the support of the Senate Labor & Commerce Committee.

Sincerely,



Harlan R. Knudson
President/CEO

319 SEWARD S

LETTER OF SUPPORT FROM THE
HOSPITAL & NURSING HOME

x (907) 463-3573

ALASKA STATE

HOSPITAL & NURSING HOME

ASSOCIATION

April 15, 1993

Representative Brian Porter, Chair
House Judiciary Committee
State Capitol
Juneau, AK 99801-1182

Re: Support ~~SB 173~~;
Small Employer Health Ins.

Dear Representative Porter:

ASHNHA, representing community hospitals and nursing homes across the state, asks your support for SB 173, the small employer health insurance bill.

SB 173 is a very constructive step towards correcting one part of our health care cost and access problem. It opens up the small employer insurance market at no cost to the state.

People need health insurance now, and should not have to wait another two or three years before Congressional or State health reform is enacted and implemented.

Please support SB 173.

Sincerely,



Harlan R. Knudson
President/CEO

cc: Senator Reiger

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



STATEMENT OF SUPPORT

CS for Senate Bill 173 (FIN) - "Insurance for Small Business"

The Alaska State Chamber of Commerce supports CS for Senate Bill 173 (FIN) "Insurance for Small Business".

CS for SB 173 (FIN) promotes the availability of health insurance coverage for small employers and reforms the small employer health insurance market.

Without requiring additional state expenditures, it provides that all small employer groups would be able to obtain private health insurance regardless of the health risk they represent.

Individuals in employer groups and employer groups themselves would be assured at the time of renewal that their coverage would not be cancelled because of deteriorating health.

CS for SB 173 (FIN) would improve the overall fairness and efficiency of the small employer health insurance market. For that reason, the Alaska State Chamber of Commerce requests your support of this legislation.

217 Second Street, Suite 201
Juneau, Alaska 99801
(907) 586-7323
FAX (907) 463-5515



March 30, 1993

The Honorable Tim Kelly
Chairman, Senate Labor and
Commerce Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Senator Kelly:

There is no problem as troublesome to the business community in Alaska and throughout the nation, as the concern for providing affordable health insurance for employees and employers. As is recognized in SB 173, the problem is particularly acute for the very small employer.

The Alaska State Chamber of Commerce continues to be on record in support of the intent of SB 173. We have reviewed the bill and it seems to be very straightforward and reasonable in terms of its content. While the technical issues in insurance are beyond our scope, we feel that the structure as proposed in SB 173 would solve the problem of availability of insurance and we are very supportive.

Thank you for your concern and your willingness to initiate a positive approach to solving a portion of the insurance problems facing the private sector, especially small business.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jamie Parsons", is written over the word "Sincerely,".

Jamie Parsons
President

NFIB Alaska

National Federation of
Independent Business

POSITION PAPER

OF

NATIONAL FEDERATION OF INDEPENDENT BUSINESS
NFIB/ALASKA

IN
SUPPORT
OF

SB 173 HEALTH INSURANCE FOR SMALL EMPLOYERS

9159 Skywood Lane
Juneau, AK 99801



The Guardian of
Small Business

Chairman, members of the Committee, my name is Rosa Jerrel, and I am the State Director for the National Federation of Independent Business - NFIB/Alaska. I am happy to be here today in support of SB 173.

BACKGROUND

NFIB/Alaska is comprised of 5,000 small and independent business owners. The legislative agenda of NFIB/Alaska is determined by our ballot. The ballot is our annual poll of our members on a series of issues deemed critical to small business. A majority vote, of the members in response to the poll, sets our policy and position on legislative issues.

For the record the following are the results of the 1991 NFIB/Alaska ballot questions regarding health insurance:

Should legislation be passed in order to create a voluntary health insurance plan which would be administered by private insurance companies and which would pool small businesses together so they could purchase employee health insurance at group rates?

Yes 72% No 17% Undecided 11%

If this pooling of employers in order to purchase health insurance was available, would you participate?

Yes 50% No 19% Undecided 31%

Should employers be allowed the option of having their employees pay part of the premium cost of health insurance purchased through the above pooling plan?

Yes 90% No 5% Undecided 5%

The NFIB Foundation Survey nationwide first found health insurance listed as a key concern for small business in 1986 when it was cited as the number one problem for small business owners out of 75 potential problems. Again in 1990, 92% of small business owners characterized health insurance as a "serious problem". The NFIB Foundation recently released Survey, Problems and Priorities, it listed the cost of health insurance as still the number one problem. No other difficulty was close. Sixty-one (61) percent ranked the problem "critical," the most extreme assessment it could be given.

On 1992 ballot we asked our members in Alaska to choose from eleven (11) problem areas - the most costly or burdensome problem they faced

and the top two were: #1 workers compensation cost and, #2 health insurance for employees.

Further surveys have found that small business owners want to offer health insurance as a fringe benefit out of both a sense of family obligation and competitive necessity.

The ability of the small business owner to provide insurance is greatly influenced by the high costs of premiums and profitability of the business. For many small business the skyrocketing annual premium increases, small profit margins, struggling regional economies, and restricted cash flow all contribute to the increasing difficulty small business owners have in purchasing health insurance. If the cost of purchasing or continuing to provide health insurance continues increasing, small business owners will be forced to increase employee contributions, cut benefits, raise deductibles or in some cases drop coverage altogether.

Small businesses are most severely impacted by adverse selection, the demographics of the work force (such as, age and gender of employees and the hours they work), higher employee turnover resulting in unpredictable participation rates, and a lack of expertise and clout in purchasing plans. By virtue of their size, small businesses have very little access to cost containment mechanisms available to large firms such as self-insurance. Being unable to obtain the benefits of self-insurance they must comply with expensive state mandates, pay state premium taxes and shoulder a larger portion of the carrier's administrative expenses.

SMALL BUSINESS MARKET REFORM

Small business owners desire to build on the existing health care system. SB 173 is a voluntary health insurance program to provide more accessibility, renewability, predictability and stability for small businesses. It is a viable means of providing health insurance to the uninsured population in Alaska.

State mandates cumulatively can raise the cost of health insurance for small businesses. SB 173 has a provision that state mandates do not apply to health benefit plans provided to small employers. This will allow the insurance industry to design basic health insurance policies.

It also, requires the small employer insurers to disclose information relating to premium rates and health benefit plans. It requires insurers to describe in detail their rating practices and renewal underwriting practices. Providing this information will help small

business owners to be better informed. The Congressional Budget Office believes that "giving consumers the information they need to make more informed decisions might enhance both the quality and cost-effectiveness of care."

Thank you for the opportunity to comment on this legislation. NFIB/Alaska has and will continue to support this and other legislation that will help make privately administered health insurance more accessible, renewable, predictable and stable for small businesses.

BILL: SB 173

SHORT TITLE: GROUP HEALTH INS. FOR SMALL EMPLOYERS

BILL VERSION: CSSB 173(FIN)

SPONSOR(S): SENATOR(S) RIEGER, Pearce, Salo, Kelly, Phillips

CURRENT STATUS: PASSD(S) RECON NTCE

STATUS DATE: 04/13/93

TITLE: "An Act relating to health insurance for small employers; and providing for an effective date."

1	03/25/93	946	(S)	READ THE FIRST TIME - REFERRAL(S)
2	03/25/93	946	(S)	LABOR & COMMERCE, FINANCE
3	03/31/93	1003	(S)	L&C RPT 4DP 1AM
4	03/31/93	1003	(S)	ZERO FISCAL NOTE (DCED)
5	04/08/93	1269	(S)	FIN RPT CS 5DP SAME TITLE
6	04/08/93	1269	(S)	PREVIOUS ZERO FN APPLIES TO CS
7	04/12/93	1307	(S)	RULES TO CALENDAR 4/12/93
8	04/12/93	1309	(S)	READ THE SECOND TIME
9	04/12/93	1309	(S)	FIN CS ADOPTED UNAN CONSENT
10	04/12/93	1310	(S)	AM NO 1 FAILED Y5 N11 E3 A1
11	04/12/93	1311	(S)	AM NO 2 FAILED Y5 N11 E3 A1
12	04/12/93	1311	(S)	AM NO 3 FAILED Y6 N11 E3
13	04/12/93	1312	(S)	AM NO 4 WITHDRAWN
14	04/12/93	1313	(S)	AM NO 5 FAILED Y5 N11 E3 A1
15	04/12/93	1313	(S)	FAILED TO ADVANCE TO 3RD RDG Y11 N6 E3
16	04/12/93	1313	(S)	THIRD READING 4/13 CALENDAR
17	04/13/93	1338	(S)	READ THE THIRD TIME CSSB 173(FIN)
18	04/13/93	1338	(S)	RET TO SECOND FOR AM 6 FAILED Y10 N10
1	04/13/93	1339	(S)	PASSED Y19 N1
2	04/13/93	1339	(S)	EFFECTIVE DATE CLAUSE VOTE SAME AS PSG
3	04/13/93	1339	(S)	Adams NOTICE OF RECONSIDERATION
4	04/14/93	1393	(S)	RECON TAKEN UP - IN THIRD READING
5	04/14/93	1394	(S)	PASSED ON RECONSIDERATION Y19 N1
6	04/14/93	1394	(S)	EFFECTIVE DATES VOTE SAME AS PASSAGE
7	04/14/93	1396	(S)	TRANSMITTED TO (H)



April 20, 1993

To: House Finance Committee Co-Chairs, Eileen McLean & Ron Larson & House
Judiciary Chair, Brian Porter and Anchorage Legislators
From: Carol Heyman, President, Anchorage Chamber of Commerce

The Anchorage Chamber of Commerce passed a resolution supporting SB 173 on Small Business Health Insurance. We would like to make a correction. We are delighted to find out that there is a \$0 fiscal note. We think its an even better bill than before , now that we know there is no cost attached. We urge your support in passing it as quickly as possible..

Thank You.



Anchorage • Star of the North
Chamber of Commerce

**Anchorage Chamber of Commerce
Resolution 5-92/93
Support SB 173
An Act Relating To Health Insurance For Small Business**

Whereas, small business/private industry employers are restricted in their ability to provide adequate health insurance for their employees and;

Whereas, the inability to provide adequate health insurance puts small business/private industry and its employees at a disadvantage and;

Whereas, the Anchorage Chamber of Commerce supports legislation that enables small business/private industry to self organize health insurance for its employees and;

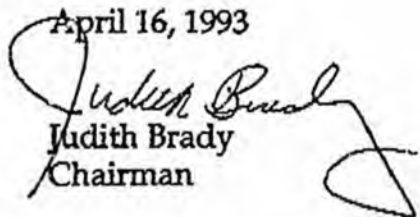
Whereas, the chamber believes in reduced state spending and no further expansion of state government and;

Whereas, SB 173 has a small fiscal note (\$1,600) and no additional personnel to the State Division of Insurance and;

Whereas, SB 173 will be an interim relief package for small business employers until a federal health care plan is mandated and put into effect;

Be it resolved that the Anchorage Chamber of Commerce supports passage of SB 173 in its present form.

April 16, 1993


Judith Brady
Chairman


Carol Heyman
President

Provided by
Rosa Terrel
Nat'l Federation
of Independent
Businesses

Committee Substitute for Senate Bill 173 (Finance), if enacted into law, will reform the small employer health insurance market in Alaska. In a nutshell, it would make certain changes in the market to provide more accessibility, renewability, predictability, and stability in health insurance coverage for small employers -- those with 2 to 25 employees.

The bill would have no fiscal impact on the state budget since no state funds are involved. CSSB 173 (Fin) has five major highlights:

-- **Guaranteed Availability.** All small employer groups would be able to obtain private health insurance regardless of the health risk they present.

-- **Coverage of Whole Groups.** Coverage would be made available to entire employer groups. Neither employers nor insurers could exclude from a group's coverage individuals who present high medical risks.

-- **Renewability of Coverage.** At renewal time, employer groups and/or individuals within these groups would be assured that their coverage would not be cancelled because their health had deteriorated or because of claims made.

-- **Continuity of Coverage (or Portability).** Once a person is covered in the small employer market and has satisfied a plan's initial pre-existing condition restrictions, he or she would not be faced with meeting those restrictions again in the event that they change jobs, or their employer changes carriers.

-- **Premium Pricing Limits.** There would be specific limits on how much an insurance carrier's rates could vary for employer groups of similar composition -- similar demography, geography, and benefit plan design. Insurers would retain the right to medically underwrite for purposes of assessing risk and setting rates, but not to exclude individuals from coverage in a group plan.

What makes it work? To give effect to these reforms, CSSB 173 (Fin) authorizes creation of a private not-for-profit Small Employer Health Reinsurance Association. Reinsurance means to insure again. Under reinsurance, the primary insurer -- the one which writes the policy -- can elect to purchase insurance from a reinsurer to cover all or part of the loss which the group policyholder is protected against. Reinsurance enables an insurer to accept a greater variety of risks -- to treat all individuals in a group the same way -- all members of a group would have the same benefits. The reinsurer stands behind the insurer and simply reimburses for claims associated with certain reinsured individuals. This allows the insurer to spread high risks broadly through the private market rather than concentrated in one small employer group.

April 18, 1993

News from Jamie Parsons, President

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



BUSINESS LEGISLATION ALERT

Your Testimony Will Make a Difference for Alaska Business.

As you are aware, The Alaska State Chamber of Commerce staff has been working on the Chamber's 1993 legislative priorities that you helped determine last fall. Listed below are 5 legislative bills where your testimony is needed **NOW**.

1. EMPLOYEE REFERENCE - (Senate Bill 122)

The purpose of this bill is to protect employers from being held liable when they disclose, in good faith, information regarding an employee or former employee to another employer. Employers should expect to be able to share all pertinent employee information without the fear of repercussion and to be able to hire employees without subsequently discovering character flaws.

2. REGULATORY REFORM - (House Joint Resolution 11)

The private sector continues to assert that reform is needed for State regulations. HJR 11 would place on the 1994 ballot a Constitutional Amendment which would permit the Legislature to take action on regulations written by State agencies which go far beyond the intent of the law as passed by the Legislature. For the Legislature to annul a poorly considered regulation, a majority vote of the House and Senate would still be required.

3. HEALTH INSURANCE FOR SMALL BUSINESS - (CS for Senate Bill 173 FIN)

This Senate Bill would reform the small business health insurance market (25 employees or less) in Alaska to provide (1) guaranteed availability for all employees of a group regardless of individual health risks; (2) renewability of coverage regardless of cases of health deterioration and the number and size of submitted claims; (3) continuation of coverage so that individuals who initially satisfy a plan's pre-existing conditional restrictions won't be faced with meeting those restrictions again if the employee changes jobs or the employer switches insurance carriers; (4) specific limitations on policy rates within employer groups or similar composition; (5) stability and predictability. CSSB 173 (FIN) would create a private not-for-profit Small Employer Health Reinsurance Association which would have no financial impact on the state budget.

4. NUISANCE BILL - (Senate Bill 178)

This bill is designed to greatly reduce nuisance lawsuits and litigation by narrowing the definition of the term "nuisance" to mean "a substantial and unreasonable interference in the use of an enjoyment of real property including water". SB 178 is designed to limit frivolous lawsuits against any firm complying with terms of an existing development permit issued and monitored by an authorized agency.

5. SENATE CONCURRENT RESOLUTION NO.4 - (SCR 4)

SCR 4 requests the Alaska Supreme Court to re-evaluate its interpretation of Alaska Civil Rule 82 to permit **ALL** prevailing parties to recover attorney fees and costs including those who prevail over special interest groups opposed to natural resource development. Currently public interest litigants are encouraged to sue because full attorneys fees are paid to the public interest group if it prevails and nothing is paid if it loses.

Contact Your Legislator(s) by:

- o Call your legislator direct- telephone numbers enclosed
- o Send a 50 word personal opinion message (POM) through your local Legislative Information Office - telephone numbers enclosed.

S B

1 7 8

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JAMES K. KAWAHARA
RICHARD A. POULIN

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

*ALASKA BAR

April 21, 1993

VIA TELEFAX
465-3834

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

Dear Representative Porter:

I write in connection with Senate Bill 178.

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

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

The Honorable Brian Porter
April 21, 1993
Page 2

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

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

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

Sincerely,

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON

By: 
Lloyd Benton Miller

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



April 26, 1993

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

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

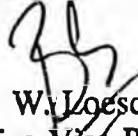
Dear Mr. Porter:

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

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

Sincerely,

SEALASKA CORPORATION


Robert W. Loescher
Executive Vice President
Resource Management

RWL/bjw

Enclosure

[PROPOSED]

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

BY THE HOUSE JUDICIARY COMMITTEE

Offered: 4/22/93
Referred: Finance

Sponsor(s): SENATE JUDICIARY COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to civil nuisance actions."

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

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

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

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

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

3 (1) a statute or regulation;

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

8 (3) a court order or judgment.

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

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

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

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

SEALASKA PROPOSED CHANGES

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

BY THE HOUSE JUDICIARY COMMITTEE

Offered: 4/22/93

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Sponsor(s): SENATE JUDICIARY COMMITTEE

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6 action.

SB0178d

HCS CSSB 178(JUD)

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

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

5 (1) a statute or regulation;

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

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

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

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

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

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

SB0178d

HCS CSSB 178(JUD)

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

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

SB0178d

HCS CSSB 178(JUD)

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

April ²¹~~14~~, 1993

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

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

Dear Sirs:

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

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

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

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

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

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

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

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

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

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

Sincerely,



Ronn E. Dick, Ph.D.
Forest Resources



Alaska State Legislature

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

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

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

Signed: Dixon Gray

Testifier City of Borough Seward

Representing (Optional) 304 Lake St.

Address

Phone No.



Alaska State Legislature

Please enter into the record my testimony to the House Judiciary
 committee name
 committee on SB 178/ HB 282, dated 21 April 1993
 bill/subject

The ~~government~~^{government} in America was set up to have checks and balances. Although it is not a perfect system, it seems to work. I am a little distressed at the idea of SB 178 which quickly went through committee & the Senate ^{which may be} an attempt to limit my right as an individual when I think big business or the govt has wronged me. The haste with which this bill is being pushed through leads me to believe legislators may have an agenda that may not be in my best interests. I do not think there has been a dearth of law suits by private individuals to warrant this bill being so hastily pushed through. I go on record against this bill.

Signed: James E. Edl
 Testifier
 Self
 Representing (Optional)
P.O. Box 1673
 Address
747-5354
 Phone No.

Testimony

April 27, 1993
1pm Hearing

To the House Judiciary Committee,

I am absolutely against HB282

Civil Nuisance Actions because it
takes away my rights as a citizen.

This bill is directly aimed at the
class action lawsuit being brought
against APC. This is just another
crooked path APC has taken when it
feels pressure from Sitka's residents.

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

Sincerely,

Andrea Thomas



Alaska State Legislature

Please enter into the record my testimony to the house judiciary
committee name
 committee on SB 178, dated April 21st
bill/subject

I am adamantly opposed to this bill. Bureaucrats do not operate with the greatest of ease or correctness. Our founding fathers of America recognized this and implemented a judicial system to address it. For the public to be denied access to the judicial system would be a travesty of the individuals right and duty as called for in the US. Constitution and bill of rights. How do you feel about Pt. Hope? Should it be ignored with no recourse? This issue is not reduced to nuclear or nuisance only it applies to all facets of our lives.

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

Phone No.



Alaska State Legislature

Please enter into the record my testimony to the House Judiciary
 committee name
 committee on SB 178, dated 4 21 93
 bill/subject

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

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

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

Signed: Julie L. Nelson

Testifier

Representing (Optional)

P.O. Box 1356 Sitka, AK 99835

Address

747-5030

Phone No.



Alaska State Legislature

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

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

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

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

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

Must we ^{then} sue the state to get our rights?
(Line 14) Note that court orders or decisions do not require
public notice or inclusion. I have just heard that DEC
without public knowledge is allowing in a consent decree
with APC that dioxin-laden fly ash ^{from the mill} can be used in
concrete construction in Sitka.

Signed: Natasha J. Calver

Testifier

Self

Representing (Optional)

Box 2966 Sitka 99835

Address

747-8950

Phone No.



Alaska State Legislature

Please enter into the record my testimony to the House Judiciary Committee
 committee name
 committee on Senate Bill 178, dated 4/21/93
 bill/subject

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

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

Signed: Pat Kahoe

Testifier

self

Representing (Optional)

PO Box 1615 Sitka

Address

747-0543

Phone No.



Alaska State Legislature

Please enter into the record my testimony to the House Judiciary Comm.
 committee name
 committee on SB 178, dated 4/21/93
 bill/subject

Hello

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

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

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

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

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

Signed: Don G. Muller
 Testifier

Self

Representing (Optional)
Box 1092, Sitka

Address
747 - 6734

Phone No.

HOUSE COMMITTEE REPORT

(7)

Date Referred: April 20, 1993

FURTHER REFERRALS:

Finance

Date of Committee Action: 4-21-93

The JUDICIARY Committee considered:

CSSB 178(JUD) am(efd fld)

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

CIVIL NUISANCE ACTIONS

"An Act relating to civil nuisance actions."

RECOMMENDATIONS:

be replaced with HCS CSSB 178 (JUD)

the same title
 a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal impact _____

fiscal note(s) _____

zero fiscal note _____

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

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

Brian D. Porter
 CHAIRMAN'S SIGNATURE

Rep. Brian Porter, Chairman

House Judiciary Committee

Date: April 21, 1993
Place: Capitol Room 120

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

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

Rep. Brian Porter, Chairman

Date: April 21, 1993
Place: Capitol Room 120

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

House Judiciary Committee

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

04/21/93
13:32:38

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

LTN1150
BY:KOD
FOR:KOD

LOCATION:KODIAK
SB 178

MS. MARY

FORBES ✓

TESTIFY

04/21/93
13:08:57

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

LTN1150
BY:ANC
FOR:ANC

LOCATION:ANCHORAGE
SB 178

RICHARD

FOLEY

(WAS APPOINTMENT AT 2:15)

TESTIFY

04/21/93
13:53:00

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

LTN1150
BY:SOL
FOR:SOL

LOCATION:KEN/SOL

SB 178
SB 178

MR.
MR.

PETER
CHUCK

EHRHARDT ✓
ROBINSON ✓

SELF
SELF

TESTIFY
TESTIFY

04/21/93
13:42:15

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

LTN1150
BY:VAL
FOR:VAL

LOCATION:VALDEZ
SB 178

MS.

NANCY R. LETHCOE ✓

AWRTA

TESTIFY

04/21/93
15:11:48

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

LTN1150
BY:KTN
FOR:KTN

LOCATION:KETCHIKAN
SB 178

MR.

DAVID----- KATZ ✓-----

TESTIFY

SB 178
SB 178
SB 178
SB 178
SB 178
SB 178
SB 178
SB 178
SB 178
SB 178
SB 178
SB 178

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

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

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

CITY OF SITKA
CITY OF SITKA

TESTIFY
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TESTIFY

Sitka update

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

LTN1120
JNU

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

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

A M E N D M E N T

OFFERED IN THE HOUSE

BY REPRESENTATIVE DAVIDSON

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

Page 2, after line 13:

Insert a new bill section to read:

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

COMMENTS ON HB 282

BY

JEFFERY D. TROUTT

BEFORE THE

HOUSE JUDICIARY COMMITTEE

APRIL 21, 1993

COMMENTS ON HB 282

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you very much.

HB 282
EXAMPLES

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

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

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

Lib

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

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

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Amended: 4/19/93

Offered: 4/13/93

Sponsor(s): SENATE JUDICIARY COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to civil nuisance actions."

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

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

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

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

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

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

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

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

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

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

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

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

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

ANCHORAGE OFFICE

THE EMERGENCY CENTER
840 WEST 86TH AVENUE, SUITE 700
ANCHORAGE, ALASKA 99501
PHONE: (907) 577-8898
FACSIMILE: (907) 579-1888

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LEROY A. BAKER
*S. BERRY
*MARCUS J. BISHOP, JR.
*WILLIAM J. BHATTACHA, II
*BRYAN W. WEST
*KALA B. BOONHON
*CHRISTOPHER S. BUNNEY
*CHARLES T. HUGHESLET

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ROBERTSON, MONAGUE & BASTAUGH

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
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TUNARA OFFICE

COURT HOUSE BUILDING, SUITE 800
242 MAIN STREET
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PHONE: (907) 884-3840
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ROYAL ARON BURTONSON (1918-1919)
R.B. ROBERTSON (1909-1991)
M.R. MONAGUE (1903-1989)
P.O. BASTAUGH (1919-1988)

JAMES F. CHAFF
PAUL H. HOFFMAN
G. ELEANOR QUADRA
MURRY A. HORNBL
ROBERT A. CLARKE
VERRY L. BURTONSON
ROBERT J. BURTONSON
MARGARET E. PROFF

ADMITTED IN WASHINGTON, D.C.
AND ALASKA

ADMITTED IN VIRGINIA
WASHINGTON, D.C. AND ALASKA

ALSO ADMISSIONS
IN ALASKA

MEMORANDUM

TO: Charles Cole, Attorney General
FROM: Jim Clark
DATE: March 24, 1993
RE: Nuisance Legislation

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

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

original version by Jim Clark

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

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

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

(c) In this section

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

"state" includes political subdivisions of the state.

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

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

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

DESCRIPTION:

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

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

END

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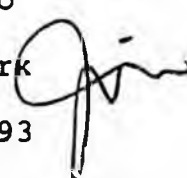
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M E M O R A N D U M

TO: Charles E. Cole
Bruce Botelho

FROM: James F. Clark 

DATE: April 21, 1993

RE: Senate Bill No. 178

Bill History

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

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

Bill Provisions

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

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

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

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

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

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

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

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

^{2/} (b) A person may not maintain an action under this section if the occupation, structure or act, including an emission or discharge, that is the subject of the action is authorized by

(1) a statute or regulation;

(continued...)

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

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

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

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

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

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

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

2/(...continued)

- (2) a license, permit, or order issued after public hearing by the state or federal government; or
- (3) a court order or decision.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

EPA: State Too Easy On APC Mill in Sitka

By EBEN PUNDERSON
Sentinel Staff Writer

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

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

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

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

— the schedule for installing a mist elimination system to bring the mill's

chemical recovery boilers into compliance. EPA recommends that the consent decree be changed to require the mill to install the equipment in two years rather than the four years allowed by DEC.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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4/20/93

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

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

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

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

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

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

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

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

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April 21, 1993

VIA TELEFAX
465-3834

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

Dear Representative Porter:

I write in connection with Senate Bill 178.

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

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

The Honorable Brian Porter
April 21, 1993
Page 2

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

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

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

Sincerely,

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON


By: Lloyd Benton Miller

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April 21, 1993

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

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

Dear Representative Porter:

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

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

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

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

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

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

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

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

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

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

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


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

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

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

Thank you for your consideration of these points.

Sincerely,


Douglas K. Mertz

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

Zane

274-9019

Anchorage

AK

99501

Date POM Sent

Constituency

Bill Number

Response

Subject

04/05/93

N

SB 178

SUPPORTS

OUR FAMILY OF COMPANIES, HOLLAND AMERICA LINE, WESTMARK AND GRAY LINE OF ALASKA
WHOLEHEARTEDLY SUPPORT THIS BILL. THE COST OF COMPLIANCE WITH THE VAST NUMBER OF LAWS AND
REGULATIONS IS HIGH ENOUGH. ELIMINATION OF PURELY
'NUSIANCE' LAWSUITS IS LONG OVERDUE. C.J. ZANE, DIRECTOR FOR GOVERNMENT AND COMMUNITY
RELATIONS
