Bill as Introduced

SB 169 – AS AMENDED BY THE SENATE

04/03/03 1010s

2003 SESSION

03-1137
06/10

SENATE BILL ***169***

AN ACT relative to frivolous actions against the state concerning state construction projects.

SPONSORS: Sen. Clegg, Dist 14; Sen. Morse, Dist 22; Rep. Dickinson, Carr 4; Rep. E. Smith, Ches 26; Rep. Letourneau, Rock 77; Rep. Packard, Rock 75

COMMITTEE: Transportation

ANALYSIS

In a suit brought concerning a state construction project, this bill allows the prevailing party to recover costs, attorneys' fees and damages that include any increased construction costs incurred by the state.

- -

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

SB 169 – AS AMENDED BY THE SENATE

04/03/03 101s

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STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Three

AN ACT relative to frivolous actions against the state concerning state construction projects.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Purpose. The general court finds that it is in the interests of the state that state construction projects be able to proceed without delay. Legal actions that unnecessarily delay state construction projects increase taxpayer expense and merit limitation.

2 New Section; Frivolous Actions Relative to State Construction Projects. Amend RSA 507 by inserting after section 15 the following new section:

507:15-a Frivolous Actions Relative to State Construction Projects.

I. If, upon the hearing of any action against the state pertaining to a state construction project, which has commenced after the necessary state and federal approvals for construction have been issued, it appears to the court that the action is frivolous or intended to otherwise harass or intimidate the prevailing party, then the court, upon motion of a prevailing party or on its own motion, may order summary judgment or other relief against the party who brought such action, and award the amount of costs and attorneys' fees incurred by the prevailing party. Costs shall include, but not be limited to, increased construction costs incurred by the state.

II. For purposes of this section, "state construction project" shall mean a capital budget project.

3 Effective Date. This act shall take effect January 1, 2004.

LBAO
03-1137
4/15/03

SB 169 FISCAL NOTE

AN ACT relative to frivolous actions against the state concerning state construction projects.

FISCAL IMPACT:

The Department of Transportation indicates this bill, as amended by the Senate (**Senate Amendment #2003-1010s**), will increase state highway fund revenue by $406,000 in FY 2004, $543,200 in FY 2005 and by an indeterminable amount in each year thereafter. There will be no fiscal impact on state, county and local expenditures or county and local revenues.

METHODOLOGY:

The Department (DOT) assumes that for projects that have gone through a lengthy and rigorous approval and public participation process that are then subject to court challenges, such court challenges will be deemed frivolous or harassing in nature. In the next biennium, it is probable that three projects will be subject to court challenge: Troy By-Pass, Bedford-Manchester-Londonderry Airport Access Road, and Salem-Manchester I-93 widening. The Department estimates that costs to the state will include Attorney General costs, DOT and consultant engineering, and potential construction delay costs. The DOT estimates for FY 2004 that the Troy project will incur recoverable costs of $25,000 and the Bedford Manchester-Londonderry project will incur recoverable costs $381,000. DOT further estimates that for FY 2005, the Salem-Manchester project will incur recoverable costs of $543,200. The Department did not estimate beyond FY 2005.

Amendments

Senate Transportation
March 27, 2003
2003-1010s
06/09

Amendment to SB 169

Amend RSA 507:15-a, I as inserted by section 2 of the bill by replacing it with the following:

I. If, upon the hearing of any action against the state pertaining to a state construction project, which has commenced after the necessary state and federal approvals for construction have been issued, it appears to the court that the action is frivolous or intended to otherwise harass or intimidate the prevailing party, then the court, upon motion of a prevailing party or on its own motion, may order summary judgment or other relief against the party who brought such action, and award the amount of costs and attorneys' fees incurred by the prevailing party. Costs shall include, but not be limited to, increased construction costs incurred by the state.

Committee Minutes

Transportation Committee

Hearing Report

To:	Members of the Senate
From:	Liz Ignacio *Legislative Aide*
Re:	**SB 169** – *AN ACT relative to frivolous actions against the state concerning state construction projects.*
Hearing date:	February 19, 2003
Members present:	Sen. Kenney, Sen. Morse, Sen. Martel, Sen. Below, Sen. Flanders
Members absent:	None

Sponsor(s): Sen. Clegg, Dist 14; Sen. Morse, Dist 22; Rep. Dickinson, Carr 4; Rep. E. Smith, Ches 26; Rep. Letourneau, Rock 77; Rep. Packard, Rock 75

What the bill does: In a suit brought concerning a state construction project, this bill allows the prevailing party to recover costs, attorneys' fees and damages that include any increased construction costs incurred by the state.

Who supports the bill: Gary Abbot: Associated General Contractors, Rep. Pachard, Rep. Letourneau

Who opposes the bill: Jim Ryan, Scott Hogan, Geoffrey Jones, Tom Irwin: Conservation Law Foundation, Jim Holley, Susan Holley, Catherine Corkery: NH Sierra Club, Josh Irwin: NH PIRG, Charles Neibling: Society for the Protection of NH's Forests and its 10,000 members

Summary of testimony received: Senator Clegg sponsored SB 169 to prevent frivolous lawsuits from being filed to delay construction projects. Currently there are 5 state projects being held up in court. Delayed projects increase the cost of the project and affect NH jobs. Representative Letourneau said the state has lost money on the I-93 project; it was originally going to cost $140 million but now is estimated at $420 million. Senator Clegg responded to Senator Below's question on the chilling effects of the bill by saying that SB 169 isn't meant to prevent people from filing lawsuits, only to make people pay for the fees for the majority's decision should their lawsuit be found frivolous. Representatives Packard and Letourneau and Senator Clegg all want to see the I-93 project get under way to prevent loss of life.

Commissioner Carol Murray testified on behalf of the DOT. She said that it is frustrating to have projects held up regardless of the reasons or benefits, ex: economic, safety, or environmental. She is always concerned that I-93 will have a large accident with casualties if construction is not at least started soon. The Commissioner would not take an official stand in support or against SB 169.

All of the testimony in opposition to SB 169 stressed the following concerns. SB 169 would have a chilling effect on the public's ability to question, challenge, and get involved in public construction projects. It was suggested that any good construction project should be able to withstand tough public scrutiny. Two lawyers that spoke, Scott Hogan and Tom Irwin, said

that no attorney would advise a lawsuit, under these conditions, unless they are 100% certain they could win because there is too much liability at risk. An average citizen with a concern could lose everything if the courts found against their lawsuit. With the passage of SB 169, they feel strongly that an individual's rights, inherent in the constitution, are being jeopardized. It's a citizen's right to go to court, not to carry the costs of potential delays if you disagree with the majority. In addition, Attorney Hogan brought up the point that the court already has the ability to throw out a case and order penalties to absorb the cost of delays and therefore SB 169 is unnecessary.

Charles Niebling of the Forest Society suggested an amendment to RSA 507:15 as an alternative to SB 169. His suggested text is the following bolded print. The Forest Society believes this approach substantially accomplishes the sponsor's intent, without unreasonably discouraging citizens from seeking legal recourse.

RSA 507:15 Penalties for Frivolous Actions - *If, upon the hearing of any contract or tort action,* ***or any action against the state pertaining to a state construction project,*** *it clearly appears to the court that the action or any defense is frivolous or intended to harass or intimidate the prevailing party, then the court, upon motion of the prevailing party or on its own motion, may order summary judgment against the party who brought such action or raised such defense, and award the amount of costs and attorneys' fees incurred by the prevailing party plus $1,000 to be paid to the prevailing party, provided such costs and fees are reasonable. The trial judge shall also report such conduct to the supreme court committee on professional conduct.*

James Ryan also suggested a similar amendment to RSA 507:15 in place of passing SB 169. His wording would be placed in the same section as the above amendment and say: ***or any action against the state in the Superior Court pertaining to a state construction project.*** Mr. Ryan feels that his amendment would soften the financial hardship that could fall upon a well-meaning citizen should they feel court action is their last resort. It will allow both the State and other parties to be penalized for frivolous conduct, while still offering a significant deterrent to those who engage in frivolity.

Funding: No fiscal impact.

Future Action: Committee will exec on the bill at later date.

ei
[file: SB 169 report]
Date: 2/24/03

Date: February 19, 2003
Time: 4:05 p.m.
Room: 104 LOB

The Senate Committee on Transportation held a hearing on the following:

SB 169 relative to frivolous actions against the state concerning state construction projects.

Members of Committee present: Senator Kenney
Senator Martel
Senator Below
Senator Flanders
Senator Morse

The Chair, Senator Joseph D. Kenney, opened the hearing.

Senator Joseph D. Kenney, D. 3: We'll go ahead and open up SB 169 and we'll ask the prime sponsor Senator Clegg to speak on behalf of his bill.

Senator Robert Clegg, Jr., D. 14: Thank you, Mr. Chairman and members of the Committee. For the record, Senator Clegg, District 14. I'm here to present to you a bill that I think is normal to do. It's relative to the frivolous actions against the state concerning state construction. Pretty short bill and I'm sure you've all read it. The problem that I'm having is that every state road project we have seems to be held up by some type of environmental, or some type of law suit including what's the latest one, I think the town of Amherst. The are saying that they need money from I-93 expansion because it's going to force the growth in Amherst. If you live from anywhere around there 93 is about 20 miles away from Amherst and probably would never have any effect. What's happening we're stalling road projects and raising the cost by millions of dollars. Let me define first to you what I think is frivolous. When we design a road or project we use all existing statutes, we look at all regulations, all the rules, all the Federal, all the EPA. We get a design and we put it on paper and we get approvals. That's what we're supposed to do. It's frivolous when somebody turns around and thinks that those rules and regulations aren't correct and takes it to court. The proper place to make changes to rules, regulations and laws is right here in the legislature but instead it's much easier to just block the whole project and

turn around and take it to court and hold everyone hostage for as long as possible. It not only affects the cost of the project but it affects jobs. We are talking about some major projects that's major work for people who live in NH and pay for NH and buy NH goods. I almost said pay NH taxes but (laughter) I don't have to say that. They pay the statewide property tax for education. And, they are being held up.

Now there are people behind me from the Dept. of Transportation that probably will give you some better examples but I'd like to look at the Keene by-pass. There was a discussion on the Keene by-pass and some judge thought that the opposition had a good idea when they said "gee" we should use roundabouts instead of rotary's just like they do in the United Kingdom. Well, what judge understands design and engineering? If it was a round about that we wanted because they affect less property, then it's up to us to make that determination. Make that rule, make that regulation, make that law. You've got something that was designed according to everything we tell people to design for and somebody comes out of the blue and says I don't thing they're designing properly, I think you should change the design works. That's not right. What's happening in the Keene area is that somebody is going to get killed because the traffic problem in there is at a point, as I'm told, where there's going to be a fatal accident. There's nothing we can do about it because we've got the project tied up in court.

You've got the airport over in Manchester. Now you want to talk about terrorism and everything else and the airport is a target. Did you know that right now there's only one way in and out of that place? We've got a second way out but we keep being taken to court. Now we are being taken to court not being allowed to build a second access because someone decided well wait. We think now you need to upgrade Brown Ave. Well, if we do nothing Brown Ave. remains congested because it's the only way in and out. So it's just one thing after another.

People, I don't knock people who find the environment to be very important so do I. But people who find that the current rules and regulations don't fit what they think they should don't bother to come up here to change the rules and regulations. But they take it to court and try to legislate through court and this bill would stop that. This bill says that if you take me to court and it's a frivolous action and as I said frivolous if I complied with all the rules and regulations and you take me to court because you don't like the rules and regulations to me that's frivolous. I'm sure there are people behind me that would like to expand that definition. It says that when you're done harassing me you get to pay all the costs. Not only the court cost but the costs of stalling the project because every day the price goes up. Every day it costs a little more money and remember every day we don't do those projects. I-93 is

a good example, there's another day that there's a good chance that somebody is going to loose their life because conditions are crowded.

Now I understand that some people think I-93, for instance, is going to affect the growth in their communities. Growth is inevitable in NH whether we like it or not. You have local zoning control, the state has no control over what you do but if you've been on I-93 at rush hour and you think it's a lot of fun, which I don't think you do, then fine. But if you've been on I-93 at rush hour and saw how dangerous it was you'd see why we need to expedite that project before we do have a major pile-up like they do in CA and we loose 10 or 15 people. I'll end my testimony there because I could go on forever. I'll take any questions.

Senator Joseph D. Kenney, D. 3: Senator Morse.

Senator Chuck Morse, D. 22: Senator Clegg I want to clarify. On line 14 it says for the purpose of this section "state construction project" shall mean a capital budget project. I-93 wouldn't qualify in that would it?

Senator Robert Clegg, Jr., D. 14: You're right we should amend the bill to make sure it does.

Senator Chuck Morse, D. 22: I think that was the purpose of it?

Senator Robert Clegg, Jr., D. 14: Right. I would prefer that it would cover all the state construction projects.

Senator Joseph D. Kenney, D. 3: Any other questions? Yes, Senator Below.

Senator Clifton Below, D. 5: Thank you Mr. Chairman. Senator Clegg are you intending to leave it to the court to define frivolous?

Senator Robert Clegg, Jr., D. 14: I would for now unless you want to agree with my interpretation and I'd be more than happy to define frivolous in the bill. But I didn't define it purposely.

Senator Clifton Below, D. 5: Another question?

Senator Joseph D. Kenney, D. 3: Yes.

Senator Clifton Below, D. 5: Can't reasonable people have reasonable difference of opinion about what rules and what laws say in their application for particular situations?

Senator Robert Clegg, Jr., D. 14: I think we appoint people to make that determination. Once a designe has met all the rules and regulations, the people are the people we elect to make those decisions for us have made those decisions. If we are going to be reasonable people, then we have to be reasonable and if we want changes then the changes need to come through legislature or wherever the rule is made.

Senator Clifton Below, D. 5: So this is intended to chill citizen lawsuits who disagree with the legislature interpretation of rules. Not necessarily, I guess, the legislatures but it's intended to chill citizen lawsuits if they disagree with the majority. If there in the minority (audio) the majority is to applicational laws and regulations?

Senator Robert Clegg, Jr., D. 14: No it means if it's frivolous and you loose be prepared to pay for the stall. If you disagree with what the legislature does unfortunately everything is done here based on majority vote and if you're dissatisfied with that I don't know how else to tell you to run for office or do something but I don't think you have the right to hold up the majority because you disagree.

Senator Clifton Below, D. 5: One other question. Isn't the only way a court actually would hold off, the primary way a court would actually up a lawsuit is if the court enjoins the action because they believe there's an argument that the action is in violation of the law?

Senator Robert Clegg, Jr., D. 14: No.

Senator Clifton Below, D. 5: Could you give other examples then?

Senator Robert Clegg, Jr., D. 14: Sure. There's no violation of law when you decide not to use a roundabout in your design. Yet some Superior Court Judge is holding up a project because somebody came in and said "gees" England uses roundabouts and I think that would be much better. There's no law violation. Some Judge says oh "gees" maybe that's a better design.

Senator Clifton Below, D. 5: Does he enjoin that action?

Senator Robert Clegg, Jr., D. 14: Project stopped.

Senator Clifton Below, D. 5: Ya, because the court has enjoined it or do you know why?

Senator Robert Clegg, Jr., D. 14: Ya, I think because the court thinks a round-about might be a nice thing to do. Last I knew they didn't have engineering classes in law school.

Senator Clifton Below, D. 5: One more question. Could you give other examples than the Keene by-pass and the airport access road?

Senator Robert Clegg, Jr., D. 14: Troy is in trouble. Right now I think Conway is held up and Conway by-pass obviously is very very important to the Berlin area. Berlin needs it in order to attract some industry. As far as I know, there isn't anything that isn't held up in some way in some lawsuit.

Senator Clifton Below, D. 5: You mean that the Capital Construction Projects aren't being implemented?

Senator Robert Clegg, Jr., D. 14: I don't know that they're all Capital Budget Projects. I'm telling you that the 5 major construction projects as I understand it are all being held up in someway by some lawsuit.

Senator Joseph D. Kenney, D. 3: Any other questions from the Committee members? If not we'll thank you Senator Clegg.

Senator Robert Clegg, Jr., D. 14: Thank you.

Senator Joseph D. Kenney, D. 3: The next speaker would be Representative Sherman Packard who's also a sponsor.

Representative Sherman Packard: Thank you, Mr. Chairman. I signed on to this I guess for a little bit of self-serving and I'll admit that. Coming from Londonderry and having seen the I-93 Project held up for what 15 or 16 years or something of this nature. Attending most of the meetings and having seen towns that I swear were going up to Colebrook coming in and saying they need mitigation also. It's getting to the point where it's going to cost some serious (audio) as Senator Clegg said. This project needs to go forward and I'm basically talking about this project and if we don't go forward we are going to have some serious much more serious accidents and we're going to have a lot of serious deaths out there.

As you well know, Senator Morse coming from the Salem area. When they reach that line they just congest and it's horrible. The accidents that have happened already between exits 4 and 5 many have been horrendous. We have those of a few years ago where 4 people were killed inside a car because a truck ran over them and all 4 died. Well we're just waiting for more of those accidents to happen. All we get is delay the project, delay the project,

we need more time, we need more time. There's a small group of people out there that what I call obstructions. They don't want another yard of tar laid in this state. They want to go to rail which is fine. I think that is something we need to investigate. But we need to somehow, I believe, put forth some kind of legislation and I think this is a good start that will reduce the amount of time that we need to move forward with these major construction projects.

Senator Joseph D. Kenney, D. 3: Thank you for your testimony. Any other questions from the Committee? Thank you! I see Representative Bob Letourneau would you like to speak? Also, a sponsor of the bill.

Representative Bob Letourneau: Thank you Mr. Chairman. For the record, I'm Representative Bob Letourneau, representing District 77 Rockingham Cty, Derry, NH. I too signed up for this bill for the same reasons. My experience is with the I-93 project. This project has been delayed one way or another for the past 20 years. Now that we have finally got to a point where we've done an EIS study it's trying to be delayed again through some mitigation through all kinds of claims. You heard Representative Packard talk about different town's secondary impact. I have no doubt that once the Army Corps of Engineers comes through with their favorable recommendation that they will go to court and it will be a frivolous action. I think this bill is a way to counter that. In the language of the bill it says intended to delay or interfere with the timely completion of the project.

I will tell you as a prime sponsor of the bill to bring this I-93 project to a head back in 1999 that we did this, Speaker Donna Sytek was a co-sponsor of the bill and I think that helped me a lot to get it through. It's considered now to be the states top priority project. We had a 40-car pile-up between exits 4 and 3 that went in the fog. In that section of highway is two lanes wide; it's the original road that was built back in 1960's. When that 40 car collision occurred, ambulances from neither the Windham side or the Derry side could reach the accident site simply because it's designed on the old highway construction design whereas the breakdown lanes are not that wide. Couldn't get anything done, couldn't get any emergency medical services down in there. Frankly there was no serious injuries and nobody died. But that opened up a light bulb in my head it said this is really serious. This could happen at anytime in our winters especially this time of the year when you have cold nights and warm days. You could end up with a fog bank in the morning down in there it's just incredible. So it's a safety issue for the people that live in my district and Rep. Packard's district in that whole I-93 corridor.

Secondly, when we brought this bill forward, it was 140 million-dollar project it's now running at about 420 million dollars. I just heard a presentation an

hour ago where T3 is coming through, that's a new re-authorization of the highway construction projects for the federal amount of money. We no longer have a seat at the table there. Oklahoma has the Chairman now in Congressional Transportation Committee that's hearing this bill. So we are going to loose money there's no doubt about it. NH is not going to get the amount of money that we expect to receive. We cannot afford to have these projects held up and have expenses piled-up one on top of the other over and over again. We won't get half the projects done in this state. I think this is a good bill and I think we need to go forward.

Senator Joseph D. Kenney, D. 3: Thank you, question?

Senator Clifton Below, D. 5: Thank you, Mr. Chairman. Representative Letourneau you said a lot of your concerns around I-93. You cited for instance, the delays from the mitigation which I think arose from you as CPA regional office concerned about challenges from the Army Corps of Engineer finding. Aren't those all Federal jurisdictional issues? I mean if somebody challenged this based on the Federal laws this bill wouldn't affect that at all would it?

Representative Letourneau: It's a NH Highway Project. In my understanding, if we are going to hire NH companies and the same people who cannot stand the internal combustion engine are going to come out and fight this highway every inch of the way. They might even find an eagle sitting on a tree someday down there and stop the project. I don't know. That's what we're talking about frivolous here.

Senator Clifton Below, D. 5: Well, this would under NH law and NH court but it wouldn't apply to Federal courts?

Rep. Letourneau: Right.

Senator Clifton Below, D. 5: Federal agency or Federal court however...

Rep. Letourneau: I'm not an attorney, I couldn't answer that question.

Senator Joseph D. Kenney, D. 3: Maybe there's someone in the audience that can.

Rep. Letourneau: I'm sure there's somebody behind me is going to answer that question.

Senator Joseph D. Kenney, D. 3: Any other questions from the Committee?

If not, thank you Rep. Letourneau. Is the Commissioner here still? O.K. I didn't know if she wanted to testify or? Hi Commissioner did you want to testify?

Commissioner Carol Murray: I'm sorry?

Senator Joseph D. Kenney, D. 3: Did you want to testify on this bill?

Commissioner Murray: Actually, you asked the sponsor who had me out in the hall which bended my ear. I thought I may be able to help with some questions.

Senator Joseph D. Kenney, D. 3: O.K.

Commissioner Murray: For example, where the major projects are and why they are being held up. There are varying stages that they're at and Senator Below you asked about Keene and was it because it was enjoined? No it was the original decision that came from the Superior Court Judge did in fact dictate the design of the highway and did say that the roundabout would be used. As a person ultimately responsible for designing safe facilities involves a registered professional engineer, I told the Attorney General's office that I felt we needed to appeal that. Because with all respect to judges and lawyers and their field of profession and they have the same respect for the professionals in the field of civil engineering. If the attorney who's representing us in the Attorney General's office was here he would tell you you don't take the most critical intersection in Cheshire and turn it into a lab experiment. He feels equally strong about that so that is on appeal to the Supreme Court. With any of these they are not enjoined but we also don't want to get steaming ahead of the legal process because that doesn't look good if you're going to court. The first thing that you are asked by the opposing council is have in fact gone ahead with this action?

It is correct that every major project is tied up in some form of appeal, litigation. Appeals may be re-consideration of our weapons permit which is the case with the airport access road; 93, at this point, if I were a betting person which of course we don't do in the state of NH. If I were a betting person I would see litigation of some form coming on that project. When you heard about the possibility of a CA style crash down there...every morning when I get up I listen to WZID just because they have the best traffic report; in spite of the fact I have a great new radio in my new truck that gets satellite and stuff. I still listen to that because they do traffic reports about every 10 min. in the morning and my fear is between Epsom and Concord. Every time they say 93 and problems on 93 I expect to hear that there are 20 or 30 cars involved in a multiple car incident there. There is literally no

place for you to go if something happens in front of you. You are likely on a bridge, next to a (audio) or you've got guardrail there's no extra room; there's not even a wide enough shoulder for you to get around something. We've had a 14-car pile-up in Salem?

Unidentified: 40

Commissioner Murray: 40 see! They remember the statistics better than I do. Forty car pile-up in a whiteout condition. We were very fortunate, speeds were down, no one was killed but it is going to happen. Are there such things as frivolous law suits or can reasonable people disagree? Those are all things you folks can talk about but I will tell you that it's very frustrating for me to have badly needed projects not just for economic development or mobility or all those things but also for safety to be held up. It is frustrating.

One point that Senator Clegg didn't bring up probably because I haven't hired a (audio) and our bureau of right-a-way but I'd be more than happy to is the effect that project delays have on property owners who are impacted by projects. The most memorable one to me just because I was directly involved was 101. We were working on the expansion down to the seacoast and we ran into the environmental problems there. In fact, the project was put on hold and I remember being in people's homes and having a woman in tears and she said, "I don't know if I should even paint my kitchen?" "Or are you going to buy my house next year, next month, two days from now?" And that is a real stress and that's not just home owners that's business owners as well because they have to put their lives on hold. Conveyance property with that kind of a cloud over it is extremely difficult if not impossible. So that's another side of project delays that really concern us and yes delays equal increased cost and I don't think I need to go into that.

Mainly I wanted to be available to answer questions that you had.

Senator Joseph D. Kenney, D. 3: Senator Morse you had a question.

Senator Chuck Morse, D. 22: Can you just take one project like the Troy by-pass so we can get away from 93 (audio). What DOT has gone through on that project in years and where they'll end up and where we are?

Commissioner Murray: Yes, I can certainly walk you through that and if a missile comes flying out from the back of the room it's because Jeff Brilhart, who is now our Director of Project Development is back there. He was the Project Manager on that Project and who lived and breathed that project for over 6 years. The Troy by-pass was, in my opinion I think, in several others opinions the model of how a project should evolve. We went out there

initially to not by-pass Troy but to upgrade the road, add some shoulders and do a few things like that. As we started holding public meetings, the public came out and said what are you doing? This is our historic main village and it is a historic district. Why do you want to keep the trucks and traffic etc. coming through here a lot like Hillsborough in that respect. We think you ought to by-pass. It came hard but we did finally agree. We decided several alternatives and bypass. A lot of alternatives and bypasses. It was a 5-yr. process, very intensive in public involvement with successful public hearings. Did we receive our (audio) from it Jeff?

Jeff: No we haven't we are waiting for the...

Commissioner Murray: The State Wetlands Permit. We applied for the State Wetlands Permit with every reason to believe that we were, in fact, going to receive that permit. We had an aggressive litigation package that was put together as part of the environmental work and then the letter came in. And that letter said, I think I still have a permit for Troy by-pass but Jeff doesn't. The letter came in and it said Gentlemen and it went on and it had like 78 points of why they were denying the permit. Including questions about traffic, project need was one of the questions. After a successful Public Hearing and 5 yrs. of public involvement, we were denied our permit because it was felt that the project was not necessary. Go back on line and upgrade the work. That was probably not one of those times my parents would have been real proud of my language because after 5 yrs. worth of work to get to that point it was really frustrating. We worked with Environmental Services trying to find a resolution. We impact how many acres?

Jeff: Seven.

Commissioner Murray: Seven acres of wetland. Our mitigation packages we will now pursue the acquisition of over 700? Alright 500. Seven acres we are pursuing the acquisition of 500 acres to secure a permit. The law says one to one bottom line and the issue comes down that had habitat fragmentation and I wish I had the map that shows how small the bypass area is in terms of fragmentation of habitat. We also did allow that study looked at, quarters crossing underneath, crossings all over so 70 acres impact 500 acres of preservation and quite honestly it's 500 acres removed from the tax roles of a community that is really having some tough times. Troy is not on top of the world these days in terms of their tax revenues. We still are in appeal on that one. Reconsideration has been asked but the permit that we eventually received jury is still out on that project. But I guess the biggest disclaimer was it should have been a model of public involvement, inclusiveness, early involvement by the resource agencies and it's 5 yrs. or 6 yrs. now and we are no further ahead.

Senator Joseph D. Kenney, D. 3: Other questions?

Senator Chuck Morse, D. 22: Further question on that. My point being on that...that's our own department that were fighting?

Commissioner Murray: Yes.

Senator Chuck Morse, D. 22: So, we become if after all of that which we could consider some of that frivolous but we can't sue our own department at this point. If someone were to sue after we get that permit that's where I believe this legislation is headed for frivolous. That's how much work has gone into that project.

Commissioner Murray: I certainly don't want to speak for Senator Clegg because he's bigger than I am but (laughter) I believe that is his intent. It's just after you've followed proper steps, done the right things put 5-6 yrs. work into something and you have further delays occur because of lawsuits. I believe that's his intent.

Senator Chuck Morse, D. 22: Thank you.

Commissioner Murray: You're welcome.

Senator Joseph D. Kenney, D. 3: You are excused. Senator Below you have a question.

Senator Clifton Below, D. 5: Yes thank you. The Conway By-pass that's not being held up by lawsuit right now is it?

Commissioner Murray: Not at this point. We do have valid permits, we do work permit, wetlands permit, we have record-of-decision for a highway. So not at this point.

Senator Clifton Below, D. 5: In what you say, Troy is not actually being held up by lawsuit either?

Commissioner Murray: Troy has been asked for re-consideration of the wetlands permit. So that's like step 2 in moving toward lawsuit. A superior court action doesn't have intellect you move through the wetlands issue - Wetlands Council.

Senator Clifton Below, D. 5: So it's still the normal, doesn't speak normal through the regulatory process?

Commissioner Murray: Actually, normally Wetlands Permit is issued to us when we're ready to get out there and start construction. In this case, re-consideration, permit has been asked for the expectation will be held at the Superior Court.

Senator Clifton Below, D. 5: Yes, the airport access road is that a lawsuit that's holding that up at this point?

Commissioner Murray: Airport Access Road again a request for re-consideration of our state Wetlands Permit has been filed.

Senator Clifton Below, D. 5: One more question. Would this affect Federal actions or actions in Federal Court from your understanding?

Commissioner Murray: From my understanding no I don't believe it would. I believe a (audio) under Section 404 or an appeal underneath that would put you into a Federal realm and I don't think state law can supercede that law.

Senator Clifton Below, D. 5: Thank you.

Senator Joseph D. Kenney, D. 3: Any other questions? Thank you Commissioner. Just for the record, are you for this legislation?

Commissioner Murray: (laughter) For the record, I'm here to answer questions and we'll let the sponsors speak for that.

Senator Joseph D. Kenney, D. 3: O.K. So the next speaker we have is Gary Abbott of Associated General Contractors.

Gary Abbott: Thank you Chairman. For the record, my name is Gary Abbott and I'm the Exec. Vice-President of the Associated General Contractors of NH. We're in support of this legislation. We recognize (I'm just going to touch on a couple of things because I think you heard most of the things already). One we recognize that the trend for highway projects to end up in court. Also, we recognize the strategy to negotiate terms beyond some legal authority. Over the last years, in order to get highway projects there's been this continual negotiations in order to set higher and higher standards even beyond what as an Association we believe is the state regulation and the Federal regulation. I think you have a little bit like the one; it's actually a no-net loss so when you look at the ratios and those kind of things environmentally. This state on many projects has exceeded it and we wonder if that business about going to take it to court has helped in those negotiations which I don't think it should. I'm going to leave you with this

one point because I think I was not usually in support of these bills in which as an association we get involved in frivolous cases and those kind of things. But I went to the Salem Hearing on I-93 and there were a number of speakers either individuals or organizations that testified that the state was moving too fast on I-93 and that we should slow the process. Then when I looked at this bill, I said what this bill is trying to do is say in those cases which that is sole purpose just to slow it not for technical reasons. A judge would probably have to make a determination of whether the case was frivolous and in those cases in which a judge makes it clear that it's frivolous, I think they should be held to a higher standard.

I also sat through some House Judiciary Committee Hearing on other frivolous bills that are in the works. It became apparent because I'm not a lawyer. It became apparent that there are other similar frivolous statutes that allow for the courts to decide in those cases in which a frivolous and award either a court cost and the rest so this is not unusual. I wanted to educate myself on how all of that so this is not outside of the norm and it sets a different standard for those that in the whole process which highway construction is becoming a very complicated process in which through that permit process everything is taking years to get through never mind the years it took to get it on the Ten-Year Highway Plan. It is such a process that these lawsuits should be really looked at for what they intent is. I think that's all this bill does for legitimate law suits. They wouldn't be classified as frivolous and there should be no concern if the reasoning for the party bringing suit it's not under the frivolous category.

The last thing I'll leave you with is I deal a lot in the Public Works Committee I just had finished dealing with a bill under billing and stuff and highway construction is under capital budget. I know from the exemption so it is counted as a Capital Budget. You may want to have Legislative Services look at it but I know we were dealing with some highway construction even though it's not in the capital budget as there like building projects in the statute it is listed even though the highway projects and the Ten-Year Plan they are considered capital projects. I'm just throwing that on the table just because there were some issues recently on a different bill in Public Works. Outside of that I'd answer any questions but I think our position is that we support that it it's a frivolous case the purpose is to delay than they should be held accountable.

Senator Joseph D. Kenney, D. 3: Thank you for your testimony.

Mr. Abbott: Thank you!

Senator Joseph D. Kenney, D. 3: Any questions?

Senator Clifton Below, D. 5: I do have a question. Thank you Mr. Chairman. Gary your saying your concern was frivolous or...my question is actually it says frivolous/or intended to delay or interfere with the timely completion or harass or intimidate the prevailing party. My question had a assertion which they thought was true the state action simply did not conform with state law it violated state law. They are intending to interfere with the timely completion of the project because they believe it's not a lawful action. Isn't it possible that the court might, they could say you may think it's unlawful that may be a reasonable argument but it still has the effect of interfering with the timely completion of the project? So even though it's not frivolous, even though it's not intended to harass or intimidate that party could still loose the case and would therefore not even ever make the claim even though there might be a reasonable claim. Do you see my concern in my question?

Mr. Abbott: I recognize your concern and I think I would leave that up to both the Senate Committee here to if there need to be language tweaking. I think all I'm trying to make is the point is I see this trend and it's happening and I think that we want somewhere snap the line that what's beyond and hold those people accountable. I agree with you if it's interpreted the way you're presenting it maybe it needs some fixing but I'll leave that up to the Senate.

Senator Clifton Below, D. 5: Thank you.

Senator Joseph D. Kenney, D. 3: Thank you for your testimony. Next we have Jim Ryan from Henniker, NH.

Jim Ryan: Mr. Chairman and members of the Committee, I'm Jim Ryan from Henniker. Senator Flanders constituent. I almost feel after hearing the previous testimony inappropriate to qualify but I'm not here to talk about I-93 or Troy or Conway. I'm not a member of a group here today, I'm simply a guy from Henniker who had the bill on the internet and thought it had implications that merited taking a half-day off from work and coming down here and talking about it.

The opening of my letter I think I noted that when this bill first appeared at least in print media it was broadcast as a loosers pay bill. I don't think as it's currently presented it's nearly as nefarious as that term. I don't know if he's still here but Senator Clegg and I actually exchanged some correspondence. I'm hopeful that the correspondence, in some measure, influenced his interaction with Legislative Services that drafted the bill. I will allow through the at least the main points of my letter and I will endeavor to be

brief. Senator Below a moment ago hit on one of the issues that I was concerned about intended to delay. The instrument as proposed before you punishes the like an injunction and I think, Senator, that was the essence of your question is designed to say hold on, stop, wait a minute there's something wrong.

Forgive me but I've created an example in my letter and it's a gross overstatement. For example, DRED on a construction project which is what we're talking about. I don't think we're simply talking about roads today, they said we need more Campground at Lafayette and went to be back of the Lafayette Campground and said we can sizemologically insert dynamite here on the bottom of the hill. Blast out some rock and it would serve more places where camps could come. You may well get an engineer that would say the load factor and dynamic of those charges could have the un-intended consequence of knocking the nose out of the Old Man of the Mountain which is several thousand feet above that Campground. I don't think there's anyone in this room who would not be eager to clasp hands and look for an agency, the legislator or a clerk to stop what potentially could ruin a cherished asset. Many of the comments today seem to indicate that all lawsuits are frivolous. I don't know I'm not a party to a suit against the state nor do I intend on bringing one at the moment.

Again, I'm not here as part of a group what I think is happening here is there's perhaps some frustration with delay. Frustration that delay if it goes long enough will eclipse the ability to pay for projects and I don't think I'm telling a tale out of school. I think there's some ill feeling at times between the general court and the courts in general and perhaps an unwillingness. But from the simple citizen perspective, if a project whether it's to build, whether it's to remove asbestos, whether it's to do any type of work in the state because this bill talks about all construction projects. Quite frankly, I was surprised it came to transportation my sense of it would have been it would have been equally appropriate to be heard in the Judiciary Committee. But, as a citizen, I get to call Bob Flanders over in Antrim and say what I want. I also get to call the Governor's office and I can deal with the members in the Department of Transportation. If I've exhausted all those and still believe that I have an opportunity or something important to me is out there, as a citizen under the Constitution I think I get to go to Court. Hopefully, I'll prepare like I've prepared for this hearing today and offer appropriate evidence. But I don't think in taking that risk, I don't think I get to bare the cost of every delay of the project.

I want to talk also a little about paragraph 22 of my letter. I think you'll recognize it. I recognize it as I'm somewhat presumptuous after reading the legislation I'm helping myself to correcting an amended version. Because I

too as a citizen and as a taxpayer have to contend and experience the cost of all of us in frivolous actions. And, if the action could define or otherwise simply limit itself to frivolous actions I would probably be more acceptable but this act doesn't. It talks about delay which can be accomplished for a legal reason and it penalizes and chills by saying if you dare get wrong, if you make a mistake, if we don't agree with you not only are we going to charge you for the states cost and attorneys we're going to charge you the entire cost of the delay. Now I'm not an economist nor am I a transportation specialist just a citizen but I heard this morning on the radio that it was costing in NY a million dollars an inch to remove snow. I can imagine a week long delay in the projects the members have considered today are catastrophic for a citizen trying to exercise the rights inherent in the Constitution to approach the court. I really urge you to be circumspect and I hope that you'll accept the amendment or at least language that I provided in the spirit of recognizing that there needs to be finality to judgements and frivolous actions have no place in our courts but so also some limitation should be placed there. And if you'll notice I even included the state as someone who could be responsible for delay and frivolity in at least the amendments that I've submitted. Because if it's going to be fair I think it should find whom the party submit the court.

Finally, I'm going to tell a little story and then I'll go about my business. It's not about a state project, it's about a hero of mine – my wife. About 4 yrs. ago and I bet you Bob Flanders will remember this. There's was efforts of several selectmen to take every tree away from a park as it borders the Contoocook River and the selectmen engaged the assistance of the Conservation Commission, local Fire Dept., Police and my wife during this process went down to the river and noticed that it was over-nutriating and becoming very green. She's not a specialist by the way she's a nurse. She contacted the Dept. of Environmental Services who came along and said there's a problem because all the trees have been taken so that there's run-off now going into the river causing this. She went down to the Selectmen and said you know folks could you just hold it off until we examine this it would probably be important and we're not going to wreck our river and our prettiest park. And I remember the unanimous panic of officials in our little town and they said NO and you go home. Well, she went home but the next morning she went to the DES and had investigators come out and in fact concluded that the town of Henniker had substantially violated the Shoreland Protection Act and never permitted correctly. Later went down to the Merrimack Superior Court received a judgement prohibiting the town from tearing those trees out and got a re-planting order and eventually negotiated the settlement that resulted in appropriate plantings in appropriate objectives of the town. There was one woman who took a big chance and it was the type of person who used the court system only when she had to and used the court system at

her own expense. She delayed the project, the cost for modest people, we couldn't afford it so I would ask respectfully that you consider the materials that I've placed before you today and I thank you for your time.

Please see testimony of James Ryan attached hereto and referred to as Attachment 1.

Senator Joseph D. Kenney, D. 3: Thank you very much for your testimony.

Senator Robert B. Flanders, D. 7: Only one comment. (audio) as a young boy.

Mr. Ryan: I hope you won't hold it against me Senator Flanders?

Senator Robert B. Flanders, D. 7: No, down the river behind the school. (laughter)

Senator Joseph D. Kenney, D. 3: That's another Committee, I think? (laughter) Scott Hogan.

Scott Hogan: Thank you Senators. My name is Scott Hogan and I'm a Land Use Attorney here in Concord. I'm here today just as a citizen. I also just saw the language of this bill and wanted to come in and just express concern over some of the specific language in what I think the practical effect of this will be. A number of these things have been hit on specifically so I'm going to be as brief as I can. I usually represent and my practice is almost exclusively planning and zoning land use. So my clients are usually individual property owners. The issues that I usually see in the context of the state project, state highway project are purely land-use issues.

What's the extent of the states right-of-way if they're trying to take a persons property by eminent domain for a project where the easements that might affect it, what are precluded under the deed restrictions etc. those kind of fundamental land-use issues that private property owners ultimately have almost all the time when we're talking about any major highway expansion project particularly. So the issues I'm dealing with are more land use than environmental but I raise that to say the initial concern that I had over the language itself I think that as written right now and as there been some discussion this bill wouldn't apply only to frivolous law suits. It would apply to 3 categories of lawsuits. One frivolous the second any suit intended to delay or interfere with the timely completion of the project. As to that one, and I in my own head I have the analogy to a planning board approving a construction project either for a commercial or residential development. The same way that almost always anyone bringing an action like this the first

thing they're saying is we believe that the rules were either improperly applied or interpreted. We believe that it's not lawful or reasonable and the court should maintain the status quo until it's determined whether it is lawful or reasonable.

I also understand, being an attorney, that there's a tremendous problem right now in that I believe the courts aren't exercising their authority sufficiently to throw out frivolous lawsuits. I have filed my own motions to dismiss cases claiming that the other side has no basis in the law that it was brought to the press to harass etc. I do believe that the courts aren't consistent in throwing out frivolous lawsuits as they should. So that is a problem and I don't know how to address that but the language of this bill does seem to apply to every action that someone would contemplate bringing because if there isn't a delay often times there isn't a point in bringing the action to them. If the status quo can't be maintained at least until there's some ruling that it's appropriate, then the point of action remedy really is lost here. This also goes to how the courts deal or don't deal with lawsuits and analyzing them as frivolous to actually get an injunction to have a court lawfully enjoin a project and stop it in it's tracks. You have to at least make an argument that there's a likelihood of success on the merits ultimately. Again, the courts should be exercising their authority to make that determination up front and if there isn't a likelihood of success and if the other balancing factors for an injunction aren't met then there shouldn't be an injunction. Again it's brought to harass only then there is absolutely clear authority for the courts both to dismiss the suit and to order the payment of attorneys fees for the party who brought the action.

Part of what concerns me here is also the practical effect of this which is as we described only slight delaying in even modest construction projects would on certain facts. Particularly if the market goes bad in the meantime there would be astronomical costs. I think the practical affect of that and particularly if this bill became law any client that came to me whether they were a private property owner, a municipality organization of some kind my advice would be don't bring the suit because the potential liability is too great for you given what the odds are in this case. I think the NH Municipal Association would also be in that position to advise it's municipal clients the same way because there wouldn't be a municipality I don't believe that could absorb the cost that would be the practical effect of legislation this.

The other thing about the specific language that concerned me and I said three categories that this applies to frivolous, or intended to delay or interfere or otherwise harass or intimidate the prevailing party. Now I looked at that language for a while to try and figure out what the intent was and what it was saying. Because if you read this and again the context of this is a suit is

brought by some private party against the state to stop a project to argue their piece. Now if the court finds that the action was to otherwise harass or intimidate the prevailing party, the assumption must be that the prevailing party is always going to be the state. Otherwise, that language really doesn't have really any independent meaning. So I'm not sure what that means or what the intention of that phrase was but if we're talking about it appears to the court that the action is frivolous or otherwise intended to harass or intimidate the prevailing party. It could only be read that the prevailing party is the state. So that was a little troubling in and of itself. Again, I'm not sure what the purpose of it was but I think that language needs some further discussion.

Again, this isn't just citizen lawsuits, it's municipalities, it's organizations it's really anyone. I think no matter who you are and how deep your pocket would be nobody is going to be advised by any attorney I believe if this were to pass to bring such a suit. Unless they were absolutely sure that they were going to prevail and attorneys don't tell you that either at the beginning that they are absolutely sure that anyone is going to prevail. So again, I would just submit that the language itself and the actual effect is very troubling and there's certainly other options. In my practice I understand nobody likes expanded road projects if you're next to them. Nobody likes cell towers, nobody likes a lot of the things that are critical to the infrastructure of the state. My advice to them is there have to be rules that decide how these things are done. I understand the courts are not perfect.

(tape change)

Could be more specific and the intent could be to give the courts less discretion once these cases get to the courts. So that, the world that the court has to work with, is much narrower but I think that seems to be a more reasonable approach than throwing the court out of the process. Thank you very much!

Senator Joseph D. Kenney, D. 3: O.K. Thank you very much.

Senator Robert B. Flanders, D. 7: How would feel, something got hit by (audio) in Henniker was there still along the post (audio) that cost millions and millions and millions of dollars in delays (audio) cost. He got beat every court he went to something should be done about something like that.

Mr. Hogan: You are absolutely right and that's why I wanted to make it really really very clear that I understand that there is also a problem in the courts. They aren't exercising the authority they should to throw out what are truly frivolous lawsuits indeed.

Senator Joseph D. Kenney, D. 3: Senator Below.

Senator Clifton Below, D. 5: Thank you Mr. Chairman. In looking at this, I know it could be a broader interpretation, in just, in your talking it struck me if you are representing somebody who is having land taken by eminent domain for instance in conjuction with a construction project. And they felt that they were not getting proper compensation and you took action against the state which pertained to that project but your simply defending what you think are your clients rights for adequate compensation. If the court said that was intended to interfere with the timely completion of a project because it would because you would...

Senator Robert B. Flanders, D. 7: Construction goes on doesn't it? In Hillsborough when they did the by-pass that road was open before they settled some of the land cases.

Senator Joseph D. Kenney, D. 3: I say there's a question to ask so just let him ask.

Senator Clifton Below, D. 5: Maybe that's not a specific scenario. But it is there something like it that might cause you to say don't take action against the state because you might end up responsible for the whole project.

Mr. Hogan: Given the language in this bill yes that's exactly the case. That's why I was trying to say there are times when the issues that private property owners have are purely land use issues. They are purely issues of defending the X acres that they believe they have and trying to get the market value of what's being taken for a project. Clearly those issues and as I said those are the ones that I see most of the time and I think to some extent exist on most every project of this kind. Again, for me if I'm advising a client the processes if someone wants to challenge on an eminent domain assessment or something like that you're off the BTLA there's administrative process. If you ultimately get to the courts there is no question the court process is glacial these days. The courts are overwhelmed and it takes a long time. It's inefficient and expensive for everyone there's no question about that and again the courts aren't perfect but it's what we have right now it's the process. I think there are other places that the process could be streamlined and improved in that direction.

Senator Joseph D. Kenney, D. 3: Did you have a question?

Senator Robert B. Flanders, D. 7: Especially in eminent domain they take the land and build the road. If you don't like it you can fight about it

afterwards. That would not be covered in my opinion I (audio) with this bill, they're not land using, they're taking their own property trying to get what it's worth.

Mr. Hogan: Sure, I think if that land owner were seeking an injunction until they had a determination on whether it was a proper, whether the extent that they were seeking to take was appropriate. One of the issues that comes up often times that I've seen on DOT highway projects is where's the edge of the DOT right of way? Where does the private property owner's property begin?
Senator Robert B. Flanders, D. 7: Try putting up some campaign signs and you'll find out. (laughter from all)

Mr. Hogan: They'll be 5 people usually in line to tell you the answer to that question on anyone of these cases. There have been times for me if I'm in that position and someone comes to me and says where is that line? Is the state request reasonable? Are they right as to where the extent of the right-of-way is? You know there really are times when you have to go and do the deed research back to the 1720's or 30's when the town was initially incorporated and work forward from there to actually determine the chain of title to see where these are. It takes time and there are times when the landowners interest is served by seeking an injunction to stop the project. And that is almost always (and that's why this language is so troubling) whatever the nature of the challenge is it's usually I believe you've either mis-applied or mis-interpreted the law. I want to maintain the status quo at least until somebody tells me if I'm right or wrong. That seems to apply to all of those category of cases as well.

Senator Joseph D. Kenney, D. 3: Point well taken. Thanks for your testimony. Next we have Geoffrey Jones. Please come and testify please. Good afternoon!

Geoffrey Jones: Good afternoon. Thank you Mr. Chairman and members of the Committee. I appreciate this opportunity to express my concerns about SB 169. My names is Geoffey Jones I'm from Stoddard, NH born in Keene, I'm a Professional Forester, I'm Chairman of my towns Conservation Commission but I'm here today as a private citizen. There's an old saying if you want daily democracy, you have to have daily participation. I think today we are experiencing a low point in public participation. People don't vote like the use to, they don't serve on local government or volunteer in organizations, community projects the way they use to. To counter this I think what we need to be doing is encouraging public participation in every way we can. Not discouraging it or denying public involvement. I believe that SB169 as it is currently written will have a chilling effect in the public's

ability to question, challenge or get involved with public construction projects. As a Forester, I can certainly appreciate with the red tape and delays that planners of the White Mountain National Forest have to tolerate regarding frivolous challenges and appeals to legitimate timber sales. It's frustrating to say the least. But, good public projects should be able to stand tough public scrutiny, whether they are timber sales or highway projects.

For the past 4 years, I have been on the front lines with a citizen group that has questioned and challenged the Keene by-pass. According to today's testimony, my involvement would have been frivolous. I'd like to offer some lesson that has been learned as a result of this citizen's effort to challenge and to change the direction of a highway project that was almost a done deal. First of all, to critically question and challenge a public construction project it requires stamina, perseverance and dogged determination. I can't imagine anybody in their right minds wanting to go through one of these processes unless they had a real legitimate concern.

On the issue of frivolity which the word frivolous appears several times throughout this bill. It takes a well-organized and concerted effort to get a city council to reverse its previous position to come up with a unanimous decision to seek a design alternative. A challenge to an approved project has to practical and make good business sense in order to get 80 business community leaders and over 5000 petition signatures requesting a less environmentally damaging design alternative. After literally hundreds of letters to the Keene Sentinel and over 50 front-page articles regarding the Keene by-pass in the Keene Sentinel one has to have a compelling well-founded argument to get a seasoned newspaper editor like Guy McMillin to agree to an 800 word op ed piece it takes front page and Sunday News editorial section which calls for a less environmentally damaging alternative. Frivolous motives do not attract the involvement of national and international highway engineers who we invited to the city of Keene and who offered expert analysis to find a constructive and more cost-effective design alternative. A well thought out argument for natural resource protection needs to be made in order to obtain the support of 11 Conservation Commissions in Cheshire Cty and eventually the support the NHACC this is no easy task.

Challenges to public construction projects do not result in favorable rulings from NH Superior Courts unless they are based in solid legal logic. Hard working citizens involved in this group that I'm with form the back bone of the working class of this state and they include nurse practitioners, college professors, building contractors, hydro-engineers, farmers, house painters, natural resource professionals. These are not people who are inclined to get involved in frivolous activities.

As a result of the public process that has taken place in the city of Keene, a citizens group has been able to educate a committee and enlighten the public agency and enter into a constructive dialogue whereby community leaders and state officials are seriously entertaining design alternatives that should have a much smaller footprint on the wetlands and opened space values in the city of Keene, minimize the impact on the character of Keene and save tax payers anywhere from 20 to 35 million dollars on a 66 million dollar project.

If SB 169 in its current form had been in place 4 years ago it would have discouraged and prevented the kind public participation and the effort that has taken place today. Now there's been a concern, a remark made earlier about a need to follow rules and regulations. What happens if agencies do not follow rules and regulations there's only one way to insure that and that is through the enforcement by public concerned citizens.

In closing I'd like to just make this final remark on why I decided to come here today or not. I got a phone call this morning from a friend saying that my 82 yr. old mother was going to receive a Lifetime Appreciation Award from a Hospice group in Keene that she helped found. She received that award today at 3 p.m. on a day when a dear close friend of hers who was also a hospice patient died – I should be with her right now. But when I told her that I was struggling on whether I should go and attend this or be here expressing my concerns about this bill she insisted that I come here. We need to strengthen and encourage more public participation in all facets of democracy it's our NH way of life. Please do not allow this bill in its present form to pass. Thank you for your time and attention.

Please see "SB 169 Frivolous Actions Concerning State Construction Projects" testimony of Geoffrey Jones attached hereto and referred to as Attachment 2.

Senator Joseph D. Kenney, D. 3: Thank you and thank you for taking the time to come up here today under the circumstances. Are there any questions from any of the assembly? If not, thank you for your testimony.

Mr. Jones: Thank you.

Senator Joseph D. Kenney, D. 3: Yes, sir would you like to testify?

Unidentified: I would like to Senator Kenney if it's possible. I know the hour is late. I apologize.

Senator Joseph D. Kenney, D. 3: O.K. We'll have to exect. this another day.

Charles Niebling: Thank you! Senator Kenney and members of the Committee my name is Charles Niebling and I'm Director of Policy of Land Management for the Society for the Protection of NH Forests. I'm here today in opposition of SB 169 as introduced. My organization has 102-year history of balanced advocacy in support of conservation and sound environment policy. During this time, we resorted to legal action involving major public work projects on only 4 occasions. The licensing of Pontook Dam on the Androscoggin River which we settled by gaining important mitigation requirements; efforts to halt a four-lane interstate through Franconia Notch, which we won and led the Parkway we celebrate today; the standard of environmental review around siting of the Seabrook Nuclear Power Plant which we won (we did not oppose the plant we had question about the siting criteria); and construction of the cellular telecommunications tower on Mt. Kearsage which we lost but led to more detailed procedures for siting telecommunications facilities on state mountain tops.

Each case had the provisions of SB169 been in place the Forest Society could not and would not have assumed the risk and potential expense of filing suit to address concerns we had over the projects. We simply could not have assumed that liability. SB 169 will have a chilling effect on meritorious actions brought by plaintiffs seeking by good intention to strengthen a decision to move ahead with important public works projects.

We do not engage in frivolous actions and any frivolous actions involving state construction projects should be discouraged as a matter of public policy. In order to effect this policy, and as an alternative to the bill as introduced, which we believe goes too far we offer a suggested amendment to RSA 507:15 which the bill as introduced also proposes to amend. I have not spoken with Mr. Ryan, I don't know Mr. Ryan but it sounds like we may be offering up similar suggestions. The suggestion is simply to add the statement "*or any action against the state pertaining to a state construction project*" to the provisions of the statute which currently apply frivolous actions in contract the tort actions. Seems to me that if isolated what is the central issue and by this amendment you do address some of the vaguery and certainly around what would be deemed an action intended to delay or to harass or to intimidate which seems to me could be very arbitrary.

So in closing, Mr. Chairman, we think this approach addresses the sponsors intent. It establishes as a matter of policy objection to frivolous actions involving state projects and it does so without unreasonably discouraging citizens from seeking recourse in public works project. With that I conclude

my testimony and I hope you'll take a look at the amendment because I think it goes a long way to doing what Senator Clegg and the other sponsors of the bill, Senator Morse and others hope to accomplish.

Please see testimony from Charles Niebling attached hereto and referred to as Attachment 3.

Senator Joseph D. Kenney, D. 3: I appreciate your testimony. Questions from the Committee? Is there anybody else who would like to testify on this bill?

Tom Irwin: Yes, sir Tom Irwin with the Conservation Law Foundation. I will be very brief. I had not intended to testify today but I thought it necessary to respond to some statements that were made about the Keene by-pass case which is a case which we brought to the Superior Court which is now pending for the Supreme Court.

Just to give some very brief context on that case. We brought that action challenging the manner in which the Dept. of Environmental Services applied its Wetlands Rules. We felt that the laws that are currently in existence were not being applied properly. We developed that case, in the course of developing that case we suggested to the Dept. of Transportation that we should get together and try to settle our differences. This happened after, I believe procedurally after we went to the Wetlands Council suggested that we try to settle this case. Received no response back from the Attorney Generals' office and in response to that so unfortunately it had to proceed to Litigations Superior Court which we brought and which we won. That decision has been characterized in a way, I believe, is inaccurate. Very briefly the trial court did not conclude that the Dept. of Transportation has to go back and incorporate roundabouts in that design. The Superior Court simply concluded that the DOT had not adequately assessed alternatives that could avoid unnecessary impacts to wetlands and related resources so that we need to engage in more thoroughly analysis. Roundabouts were one example of that. There were other deficiencies in the permit as well beyond the design issue relating to roundabouts.

Very briefly, Mr. Abbott testified that this bill is not outside of the norm of similar bills. It is far outside of the norm of similar bills there's no other legislation statutory provision that we are aware of that imposes potential liability on an unsuccessful party that this bill does. For a testimony that potentially that delays in construction cost can amount to millions of dollars, no one will bring an action challenging a project given the liabilities associated created by this bill. Again, that aspect of this bill is far beyond the norm, far beyond anything that we've seen before. Finally, I won't try to

repeat very eloquent statements that Mr. Jones with respect to public participation but will fully concur with everything he said about the chilling effect this bill will have if enacted on the ability of citizens to meaningfully participate in these project. And the DOT has been making improvements in the way they conduct their hearings and the way that they seek an engaged public. I now, endorse the idea the concept of inclusive process. Given that fact, I'm certainly glad that they are not publicly supporting this bill. I would hope that they would actually oppose this bill because it is in such sharp contrast with the concept of meaningful participation in these processes.

Senator Joseph D. Kenney, D. 3: Thank you, please sign in. Are there any other? Yes, sir would you like to speak.

Unidentified: I don't want to speak, I just wanted to sign in.

Senator Joseph D. Kenney, D. 3: Absolutely, sign in it's right there. Is there anyone else who wishes to speak? If not, we'll go ahead and close the hearing on SB 169.

Hearing concluded at 5:20 p.m.

Attachments 3

Respectfully submitted:

Gloria Lamoureux

Gloria Lamoureux
Committee/Senate Secretary
2/27/03

Attachment 1

February 19, 2003

Honorable Members of the
Senate Transportation Committee
The Senate of the State of New Hampshire

BY HAND; Hearing on SB 169.

Re: **SB 169, 2003 Session**

Dear Chairperson Kenney and Honorable Members:

Please accept these written comments with regard the proposed bill identified above. Please be advised that while I share the general goal of seeing the judicial power of the State utilized in appropriate cases or controversies, I remain troubled by the bill as proposed. I note, as I think essential, the provision of our State Constitution that relates to the availability of courts to the citizens and thereafter I number some concerns and suggestions that I would respectfully ask you to consider:

[Art.] 14. [Legal Remedies to be Free, Complete, and Prompt.] Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

1. I note at the threshold my appreciation to Senator Clegg for raising this issue. I have had the good favor and fortune of corresponding with the Senator when the notion of a "loser pay" system first appeared in print media. The Senator correctly noted that the draft of the bill would be different from media accounts and I note my appreciation for his care in drafting SB169. It is not the rather harsh, inflexible bill that was touted in political columns.

"...or intended to delay..."

2. Nevertheless, I urge the members to exercise some caution in an area that may indeed operate to "chill" the rights of citizens—alone or guided by lawyers—in bringing actions that may impact construction projects.
3. The bill, as proposed, includes language that could be construed to require the court to sanction individuals who bring actions "intended to delay" a project.
4. Construction projects very often involve the changed use of land and may well impact elements of the natural environment or human environment.
5. Very often people become concerned and motivated at a potential loss occasioned by a particular project. In some cases, this type concern will appear in Court by way of a temporary restraining order or preliminary injunction. The hope of those

that bring the case is to gain a favorable ruling to delay the project long enough to protect some special area or community asset. Imagine, if you will, DRED receiving blasting permits near the Old Man in the Mountain. I am quite sure numerous citizens would rally to prohibit blasting near our most distinctive symbol of the State.

6. I realize my example is imaginative, but my hope is that it will cause members to think how they would react if such a proposal was afoot. Like me, I imagine everyone would want some official of the Government to assure us that the activity would not harm our scenic treasure. We would all probably be proud to clasp hands and urge a Court to delay the blasting until we were clearly assured that no damage would take place.
7. The bill, as proposed, would indeed "chill" the ability of all of us. Our noble intent would be to delay the blasting. The bill does not require that we be guilty of bad faith in seeking delay, it merely requires that if delay is sought, the Court can punish us by a sizeable financial bill.

Tension Among the Branches of Government

8. The bill before the committee touches an age-old debate that centers on the powers of the various branches of the Government.
9. We are well aware that the legislature may authorize and appropriate funds for a project and the Executive may expend energy and time in planning the project.
10. Yet, we are also aware that the smallest branch of our government—the judiciary--may influence the project in some small or profound way.
11. Even when a project enjoys unanimous appeal, we often see the legislature frustrated by the lethargy of the Executive in completing a directive.
12. I can quite understand the unique role the General Court plays in reaching consensus on a project only to see it delayed by any number of factors.
13. I appear today not as a member of a group, but simply as a citizen. I hope you will understand the distinction. You see--the Constitution that divided our government is truly a masterpiece of yielding power to citizens.
14. As a citizen, I can contact my legislator regarding a project. If he or she is at odds with my view, I can contact the Executive and the agencies of the Executive Department. Finally, the organization of our government—often as a final resort—allows me to seek a remedy from the judiciary.
15. There is, and for some time has been, a rather cool relationship between the legislature and the judiciary here in New Hampshire. I lament that condition, but also recognize it as part of the natural tension that exists between divisions of our government. I offer no easy solution to relations between parts of our government, but do urge the members to be circumspect and cautious in creating laws that may tend to diminish the opportunities for citizens to complain of the conduct of the government.

The Transportation Committee

16. When I searched on the Internet for a hearing on this bill I looked for it over in the Judiciary committee. I was and remain surprised that the matter has been referred to this committee.
17. State Construction projects embrace activities in terms of the capital projects budget that are simply larger than projects relative to transportation.
18. Inasmuch as the proposed bill touches and concerns the Courts and is rooted in the Constitution, it would be my hope that any affirmative decision regarding the bill would also be referred to the Judiciary committee prior to movement to the calendar of the full Senate.

"Costs shall include.... increased construction costs incurred by the State."

19. I would also urge members to apply common sense and common grammar to the concluding sentence of the proposed bill.
20. If the Court finds the case brought to cause delay and that costs should be awarded to the State, it **must** add to the financial award the burden of increased construction costs.
21. Increased costs in significant and costly State projects—and the risk of paying them—would significantly decrease the likelihood of citizen participation and in my opinion close the court house door not simply to actions some might think as frivolous, but also those that have merit.

A Suggested Alternative.

22. I offer the committee an alternative to the proposal and list it as follows:

RSA 507:15: Penalties for Frivolous Actions.

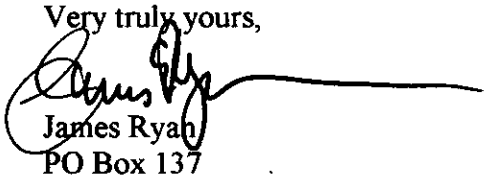
If, upon the hearing of any contract or tort action; **or any action against the state in the Superior Court pertaining to a state construction project**, it clearly and convincingly appears to the court that the action or any defense is frivolous or intended to harass or intimidate the prevailing party, then the court, upon motion of the prevailing party or on its own motion, may order summary judgment against the party who brought such action or raised such defense, and award the amount of costs and attorneys' fees incurred by the prevailing party. The Court may further provide for an award of $1,000 to be paid to the prevailing party, provided such costs and fees are reasonable. The trial judge shall also report such conduct to the Supreme Court committee on professional conduct.

23. While I realize it may well be bold and somewhat odd to appear and offer a suggested amendment, it is my hope it will inform your deliberations.
24. The simple amendments I would insert within RSA 507:15 would soften the financial hardship that could fall upon a well meaning citizen or chill the use of courts by citizens by **eliminating provisions** of the proposed bill that oblige the Court to assess as costs the **increase in spending** for the project.

25. The simple amendment eliminates the **overbroad** language regarding **delay.**
26. The amendment **is fair** in that both the State and other parties can be penalized for frivolous conduct, not simply parties other than the State.
27. Finally, it is my belief that the amendment keeps with the spirit of the proposal by offering significant **deterrents** to those who clearly and convincingly engage in **frivolity.**

I thank the Committee for the opportunity to be heard and to submit the following materials.

Very truly yours,



James Ryan
PO Box 137
Henniker, NH 03242

Attachment # 2

SB 169
Frivolous Actions Concerning State Construction Projects

Mr. Chairman, members of the Transportation Committee, I want to thank you for this opportunity to express my concerns regarding SB 169

My Name is Geoffrey Jones of Stoddard N.H. I am a professional forester, chairman of my town's conservation commission.

There is an old saying: "If you want daily democracy, you have to have daily participation".

Today, we are experiencing a low point in public participation. People don't vote in the numbers they used to, people don't serve in local government or volunteer for community projects the way they used to.

To counter this, we need to do everything we can to encourage public participation, not discourage or deny public involvement.

I believe that SB 169 will have a chilling effect on the public's ability to question, challenge, or get involved in public construction projects.

As a forester, I appreciate and sympathize with the red tape and delays that planners on the White Mountain National Forest have to tolerate, regarding frivolous appeals that are directed against legitimate timber sales. It's frustrating, to say the least

But, good construction projects should be able to withstand tough public scrutiny, whether they are timber sales or highway projects.

For the past 4 years, I have been involved with a citizens group that has questioned and challenged the Keene bypass.

I would like to offer some of the lessons learned as a result of this citizen's effort to challenge a public highway project that was all but a done deal.

To critically question public construction projects requires stamina, perseverance, and dogged determination.

I can't imagine anyone in their right minds electing to go through this process UNLESS they had real, legitimate concerns.

On the issue of frivolity

- It takes a well organized and concerted effort to get a city council to reverse it's previous position in favor of a UNANIMOUS decision to seek design alternatives
- A challenge to an approved project has to be practical and make good business sense in order to get 80 business leaders and over 5,000 petition signatures requesting a less environmentally damaging design alternative
- After hundreds of letters to the editor and over 50 front page articles on the Keene bypass, one has to have a compelling, well founded argument to get a seasoned newspaper editor to agree to an 800 word op ed piece that takes the front page of the Sunday news editorial section
- Frivolous motives do not attract the involvement of national and international highway engineers who offered expert analysis in an effort to find constructive and cost-effective design alternatives
- A well thought out argument for natural resource protection needs to be made in order to obtain the support of 11 Conservation Commissions in Cheshire County and eventually the support of the NHACC……which is no easy task.
- Challenges to public construction projects do not result in favorable rulings from NH Superior Court's unless they are based in solid legal logic.
- Hard working citizens in this effort help to form the working class back bone of this state and include nurse practitioners, college professors, building contractors, hydro engineers, farmers, house painters, natural resource professionals……These people are not the type of people that are inclined to be engaged in frivolous activities.

As a result of this challenge to the Keene bypass, a citizens group has been able to educate a community, enlighten a public agency and enter into a constructive dialogue whereby community leaders and state officials are seriously entertaining design alternatives that should leave a much smaller footprint on wetlands and open space values and save the tax payers anywhere from $20 to 35 million on a $66 million dollar project.

SB 169 in its current form been in place, would discourage such public participation and effort.

In closing: I would like to add a personal note.

This morning I received a phone call informing me that my 82-year old mother was going to receive a life-time appreciation award from a hospice group in Keene that she helped found. She received that award today at 3 pm on a day when a dear, close friend of hers, who was a hospice patient, died.

I should be with her now, but when I told her about the importance of defending the public's ability to scrutinize public projects, she insisted that I come here, and not be with her. I can assure you this is not part of a frivolous effort.

We need to strengthen and encourage more public participation in all facets of our democracy. It's the New Hampshire way!

Please do not allow this bill to pass in its present form.

Thank you for your time and attention.

Attachment 3

Celebrating 100 YEARS

SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE FORESTS

54 Portsmouth Street
Concord, NH
03301-5400
Phone: 603/224-9945
Fax: 603/228-0423
info@spnhf.org
www.spnhf.org

February 19, 2003

The Honorable Joe Kenney
Chair, Senate Committee on Transportation
104 Legislative Office Building
Concord, NH 03301

Re: HB169

Mr. Chairman and Members of the Senate Transportation Committee.

I am Charles Niebling, Senior Director for Policy and Land Management with the Society for the Protection of New Hampshire Forests. On behalf of our 10,000 members, I am speaking today in opposition to Senate Bill 169.

The Forest Society has a 102-year history of balanced advocacy in support of conservation and sound environmental policy. During this time, we have resorted to legal action involving major public works projects on only four occasions: the licensing of the Pontook Dam on the Androscoggin River, which we settled by gaining important mitigation requirements; efforts to halt a four-lane Interstate through Franconia Notch, which we won, and which led the Parkway we celebrate today; the standard of environmental review around the siting of the Seabrook Nuclear Power plant, which we won; and the construction of the cellular telecommunications tower on Mt. Kearsarge, which we lost, but which led to more detailed procedures for siting telecommunications facilities on state mountaintops.

In each case, had the provisions of SB169 been in place, the Forest Society could not have assumed the risk and potential expense of filing suit to address concerns we had over the projects. SB169 will have a chilling effect even on meritorious actions brought by plaintiffs seeking by good intention to strengthen a decision to move ahead with important public works projects.

We do not engage in frivolous actions, and any frivolous action involving state construction projects should be discouraged as a matter of public policy.

Recycled Paper

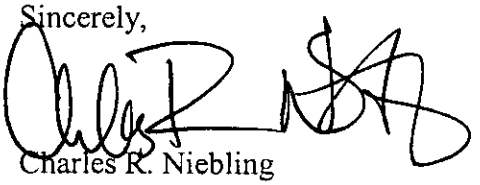
In order to effect this policy, and as an alternative to SB169, which we believe goes too far, we offer a suggested amendment to RSA 507:15 - Penalties for Frivolous Actions, to read as follows:

507:15 Penalties for Frivolous Actions. – If, upon the hearing of any contract or tort action, ***or any action against the state pertaining to a state construction project***, it clearly appears to the court that the action or any defense is frivolous or intended to harass or intimidate the prevailing party, then the court, upon motion of the prevailing party or on its own motion, may order summary judgment against the party who brought such action or raised such defense, and award the amount of costs and attorneys' fees incurred by the prevailing party plus $1,000 to be paid to the prevailing party, provided such costs and fees are reasonable. The trial judge shall also report such conduct to the supreme court committee on professional conduct.

We believe this approach substantially accomplishes the sponsor's intent, without unreasonably discouraging citizens from seeking legal recourse.

Thank you for the opportunity to testify.

Sincerely,



Charles R. Niebling
Senior Director, Policy and Land Management

Speakers

SENATE TRANSPORTATION COMMITTEE

Date 2/19/03 Time 4:00 p.m. Public Hearing on Bill SB 169
relative to frivolous actions against the state concerning state construction projects.

Please check box(es) that apply.

SPEAKING	FAVOR	OPPOSED	NAME (Please print)	REPRESENTING
☐	☐	☐	Rep	
☐	☐	☐		
☒	☒	☐	Gary Abbott	Associated General Contractors ✓
☒	☐	☒	Jim Ryan Henniker, NH	CITIZEN —
☒	☒	☐	Rep Sherman Packard	✓
☒	☒	☐	Rep Bob Letourneau	✓
☒	☐	☒	Scott Hogan	Citizen
☒	☐	☒	Geoffrey Jones	Citizen
☐	☐	☐	Commissioner Murray	DOT ✓
☑	☐	☑	CHARLES NIEBLING	SPNHF
☐	☐	☑	Tom Irwin	CLF
☐	☐	☑	Jim Holley	Citizen
☐	☐	☒	Susan Holley	Citizen
☐	☐	☒	Catherine Corkery	NH Sierra Club
☐	☐	☒	Josh Irwin	NH PIRG
☐	☐	☐		
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Hearing Minutes

SB 169 – AS INTRODUCED

2003 SESSION

03-1137
06/10

SENATE BILL ***169***

AN ACT relative to frivolous actions against the state concerning state construction projects.

SPONSORS: Sen. Clegg, Dist 14; Sen. Morse, Dist 22; Rep. Dickinson, Carr 4; Rep. E. Smith, Ches 26; Rep. Letourneau, Rock 77; Rep. Packard, Rock 75

COMMITTEE: Transportation

ANALYSIS

In a suit brought concerning a state construction project, this bill allows the prevailing party to recover costs, attorneys' fees and damages that include any increased construction costs incurred by the state.

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

[Instant issues]

I-3 reauthorization not enjoined

[Land injunction? doesn't pertain to bill]

SB 169 – AS INTRODUCED

03-1137
06/10

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Three

AN ACT relative to frivolous actions against the state concerning state construction projects.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Purpose. The general court finds that it is in the interests of the state that state construction projects be able to proceed without delay. Legal actions that unnecessarily delay state construction projects increase taxpayer expense and merit limitation.

2 New Section; Frivolous Actions Relative to State Construction Projects. Amend RSA 507 by inserting after section 15 the following new section:

507:15-a Frivolous Actions Relative to State Construction Projects.

I. If, upon the hearing of any action against the state pertaining to a state construction project, it appears to the court that the action is frivolous or intended to delay or interfere with the timely completion of the project, or otherwise harass or intimidate the prevailing party, then the court, upon motion of a prevailing party or on its own motion, may order summary judgment or other relief against the party who brought such action, and award the amount of costs and attorneys' fees incurred by the prevailing party. Costs shall include, but not be limited to, increased construction costs incurred by the state.

II. For purposes of this section, "state construction project", ~~shall mean a capital budget~~ project.

3 Effective Date. This act shall take effect January 1, 2004.

SB 169 – AS INTRODUCED

03-1137
06/10

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Three

AN ACT relative to frivolous actions against the state concerning state construction projects.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Purpose. The general court finds that it is in the interests of the state that state construction projects be able to proceed without delay. Legal actions that unnecessarily delay state construction projects increase taxpayer expense and merit limitation.

2 ~~New~~ Amend. Penalties for Section; Frivolous Actions ~~Relative to State Construction Projects.~~ Amend RSA 507:15 by ~~inserting after section 15 the following new section:~~

507:15-a Frivolous Actions Relative to State Construction Projects.

I. If, upon the hearing of any action against the state pertaining to a state construction project, it appears to the court that the action is frivolous or intended to delay or interfere with the timely completion of the project, or otherwise harass or intimidate the prevailing party, then the court, upon motion of a prevailing party or on its own motion, may order summary judgment or other relief against the party who brought such action, and award the amount of costs and attorneys' fees incurred by the prevailing party. Costs shall include, but not be limited to, increased construction costs incurred by the state.

II. For purposes of this section, "state construction project" shall mean a capital budget project.

3 Effective Date. This act shall take effect January 1, 2004.

RSA 507:15 Penalties for Frivolous Actions - *If, upon the hearing of any contract or tort action, **or any action against the state pertaining to a state construction project,** it clearly appears to the court that the action or any defense is frivolous or intended to harass or intimidate the prevailing party, then the court, upon motion of the prevailing party or on its own motion, may order summary judgment against the party who brought such action or raised such defense, and award the amount of costs and attorneys' fees incurred by the prevailing party plus $1,000 to be paid to the prevailing party, provided such costs and fees are reasonable. The trial judge shall also report such conduct to the supreme court committee on professional conduct.*

Substitute.

No deterrent

Doesn't work

Allows for continued frivolous suits since $1,000 is cheap !!

BB

Voting Sheets

Senate Transportaion Committee

EXECUTIVE SESSION

Bill SB 169

Hearing date: 3/26/03 **Room:** LOB 104

Motion of: OTPA 4-1

Made by Senator:			***Seconded by Senator:***		
	Kenney	☐		*Kenney*	☐
	Morse	☐		Morse	☐
	Below	☐		Below	☐
	Flanders	☑		Flanders	☐
	Martel	☐		Martel	☑

Committee Member	***Present***	***Vote***	***Reported out by***
Senator Kenney, Chairman	☑		Morse
Senator Morse, Vice Chair	☑		
Senator Below	☑		
Senator Flanders	☑		
Senator Martel	☑		

***Amendments:**

NOTES:

Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE

Date:

THE COMMITTEE ON Transportation

to which was referred Senate Bill 169

AN ACT relative to frivolous actions against the state concerning state construction projects.

VOTE: 5-0

2003-1010s

Having considered the same, report the same with the following amendment and recommend that the bill: **AS AMENDED OUGHT TO PASS.**

Senator Chuck Morse
For the Committee

SB169 Docket

Next|Prev|Results List|Main|Bill Status

Bill Title: relative to frivolous actions against the state concerning state construction projects.

Date	Body	Description
1/30/2003	**S**	Introduced and Ref. to Transportation; SJ 3, Pg.39
2/7/2003	**S**	Hearing; February 19, 2003, Room 104, LOB, 4:00 p.m.; SC9
3/28/2003	**S**	Committee Report; Ought to Pass with Amendment{1010}, [04/03/03]; Sc16, Pg.32
4/3/2003	**S**	Committee Amendment{1010}, AA, VV; SJ 11, Pg.263
4/3/2003	**S**	Ought to Pass with Amendment{1010}, MA, VV; OT3rdg; SJ 11, Pg.263
4/3/2003	**S**	Passed by 3rd Reading Resolution; SJ 11, Pg.266
4/8/2003	**H**	03/26/2003 Introduced and ref to Public Works; HJ34, p1087
4/9/2003	**H**	==CANCELLED==Hearing Apr 23 1:00 RM201,LOB
4/10/2003	**H**	Rescheduled Hearing Apr 24 1:00 RM201,LOB
5/15/2003	**H**	Maj Report OTP/AM for May 29 (Vote 11-7;Reg)
5/15/2003	**H**	Min Report OTP/AM
5/15/2003	**H**	Prop Maj Am{1485}; HC 43, p1389
5/15/2003	**H**	Prop Min Am{1425}; HC 43, p1389
5/29/2003	**H**	Maj Am{1485}, AL RC(147-217); OTP ML VV; Rep Soltani moved ITL, ITL Report Adopted VV;
5/29/2003	**H**	HJ 45, p1465-1468

Next|Prev|Results List|Main|Bill Status

Docket Abbreviations