HB
395

ALASKA STATE LEGISLATURE
REPRESENTATIVE JOHN HARRIS
STATE CAPITOL 505 JUNEAU, ALASKA 99801-1182 (907)465-4859

COMMITTEE SUBSTITUTE FOR HOUSE BILL 395 (O&G)
SPONSOR STATEMENT

HB 395 was designed to resolve concerns many Alaskans have with coal bed methane development in the areas of property rights, water quality assurance, and local involvement of residents.

This bill accommodates language from HB 420 which sets the framework for a water well fund in the event of damage to a resident's water supply.

Many concerns have been raised recently by residents of the Mat-Su Borough and Homer area through a series of public forums. All sponsors worked diligently, listening to public input from numerous community hearings and comments received during the first hearing within the Special Committee on Oil & Gas

This bill requires that:

1) Public comment and other routes of access be considered prior to executing a lease.
2) The integrity of the affected water supply is protected.
3) Public notice be given prior to the award of a lease via newspapers and direct mail.
4) The lessee provide a contingency for dry wells due to CBM operations.
5) A shallow gas lease must provide for a water testing requirement by the lessee.
6) The owner's surface property be restored in the event of damage.
7) Noise from field operation is mitigated.

Finally, language is proposed to close current regulatory loopholes allowing the operators to extract natural gas deeper than the 3,000 foot definition of shallow natural gas without administrative approval for a depth no greater than 4,000 feet. This clarification is necessary to provide Alaskans the guarantee that conventional natural gas resources will not be extracted without going through the competitive bid process.

LEGAL SERVICES

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

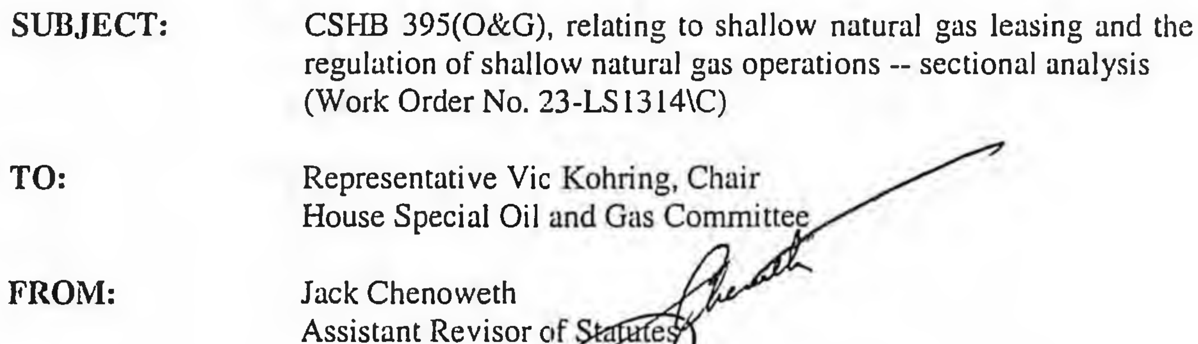
(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

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

M E M O R A N D U M   March 11, 2004

SUBJECT: CSHB 395(O&G), relating to shallow natural gas leasing and the regulation of shallow natural gas operations -- sectional analysis (Work Order No. 23-LS1314\C)

TO: Representative Vic Kohring, Chair
House Special Oil and Gas Committee



FROM: Jack Chenoweth
Assistant Revisor of Statutes

Ben Grenn has requested preparation of a sectional analysis for the above-captioned bill.

Changes to the section authorizing shallow natural gas leasing (AS 38.05.177) --

Bill section 5 amends AS 38.05.177(c) relating to requirements of notice. The first insertion (page 4, lines 7 - 12) modifies the minimal public notice requirements when a lease application has been received. The second (page 4, line 13) acknowledges that the director of the division of land should actually consider public comment that may be received. The substitution of "may" for "shall" at page 4, line 15, alters the scope of the director's authority to act, changing it from an act that is mandatory if the standard is met to one as to which the director may exercise discretion. Finally, at page 4, lines 18 - 23, the director is barred from issuing the lease unless the director follows up with public notice of intent to award, the minimum requirements of which are spelled out.

Bill section 6 amends AS 38.05.177(f) to add a series of additional requirements that must be inserted in a shallow natural gas lease, to include (in paragraph (2)) required setbacks applicable to compressor stations that are appropriate to the lease; (in paragraph (3)) appropriate noise mitigation measures; and (in paragraph (4)) surface restoration requirements if the surface is disturbed by exploration or development operations.

Bill section 8: This bill section amends AS 38.05.177(k). In instances in which an owner and a lessee cannot reach agreement for the latter's entry on to property to explore for and develop shallow natural gas and the lessee seeks to post a bond to permit entry, the first amendment (page 7, lines 2 - 10) adds a further requirement that the lessee demonstrate "that access and entry upon the land of the owner is reasonably necessary or convenient" to secure the lessee's rights, and the second amendment (page 7, lines 11 - 13) requires the lessee to provide 30 days' advance notice of initial entry on to an owner's property.

Bill section 9 adds two new subsections.

The language of subsection (p) expands upon the procedures currently applicable to securing protection against damages insofar as those procedures relate to shallow natural gas exploration and development activities:

-- Under paragraph (1), if the owner and lessee come to an agreement as to the lessee's entry, the terms of the agreement are to incorporate the requirements spelled out in AS 38.05.177(f), amended earlier in the bill.

-- Under paragraph (2), if the parties can't agree and the lessee seeks determination of the amount of a surety bond in order to proceed, in conjunction with the director's determination, the owner may provide comments about the appropriate location of improvements to be made on the owner's property.

Subsection (q) supplies a definition for "owner" for relevant subsections in which the term is used.

Changes relating to shallow natural gas activity oversight by the Alaska Oil and Gas Conservation Commission --

Bill section 1: The amendment to AS 31.05.030(j) made by this bill section alters the authority of the Alaska Oil and Gas Conservation Commission as that authority may be exercised with respect to shallow natural gas exploration and development. Paragraph (1) imposes a prohibition against the commission's issuing a permit to drill under AS 31.05 "if . . . operations . . . would involve producing gas from an aquifer that serves as a source of drinking water . . . or . . . for agricultural purposes." Paragraph (2) expands the authority of the commission to regulate hydraulic fracturing associated with exploration for and recovery of shallow natural gas and to regulate as to reinjected water and disposal of wastes produced by those operations.

Bill section 2: In conjunction with shallow natural gas exploration and recovery, this section adds a new provision directing the Alaska Oil and Gas Conservation Commission to initiate a public forum process to resolve informally of public health, safety, welfare, and environmental complaints. The provision sets out the minimal procedural requirements for informal resolution of complaints. The committee added language (page 2, lines 16 and 17) requiring the infonnal resolution of complaints within 60 days of the filing of the complaints. If informal resolution of a complaint is unsuccessful, the commission may schedule and act on petition concerning the complaint under procedures in place for commission review of matters subject to its jurisdiction.

Standardized references relating to maximum depth of recovery --

Bill section 7: The amendment language added to AS 38.05.177(j) standardizes reference to allowable depths from which shallow natural gas may be recovered, setting a presumptive maximum of 3,000 feet but allowing the commissioner of natural resources

to exercise discretion to allow recovery at depths of not more than 4,000 feet. Recovery at greater depths requires treatment of the operation under conventional oil and gas lease requirements.

Bill sections 3, 4, 5 (language added at page 4, lines 27 and 28), **10, 12, and 13:** The amendments made in each of these sections are conforming changes that reflect the change described in the paragraph above. They eliminate, in the respective definitions of or references to "shallow natural gas," the reference to recovery of natural gas from a depth of up to 4,000 feet and replace it with a reference to 3,000 feet, subject to the commissioner's discretion to allow recovery from a greater depth under AS 38.05.177(j), as described above.

Other matters --

Bill section 11: The amendment made is a conforming change necessitated by renumbering of provisions in bill section 1.

Bill section 14 gives the measure a July 1, 2004, effective date.

JBC:med
04-284.med

COPY

LEGAL SERVICES

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

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

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

MEMORANDUM April 16, 2004

SUBJECT: CSHB 395( ), (Work Order No. 23-LS1314\G) and CSHB 531(Res), (Work Order No. 23-LS1818\V)-- notes to accompany the bill drafts

TO: Representative Nancy Dahlstrom, Co-Chair
House Resources Committee

FROM: Jack Chenoweth
Assistant Revisor of Statutes

With this memo are two bill drafts based on my understanding of direction given yesterday afternoon by the working group considering differences between these two drafts.

CSHB 531(Resources), draft version "V":

This is the measure that proposes to scrap the separate leasing process for shallow natural gas leasing and to treat leasing of that commodity under the conventional oil and gas leasing provisions of AS 38.05.180 as "nonconventional gas." There are only four changes to the previous draft of this bill. Rather than amend AS 31.05.125 (waiver of local planning authority, amended by former bill section 6), I repealed the section. Also repealed, per working group direction, were AS 38.05.177(n) (same subject) and paragraphs 1 and 7(c) of sec. 1, ch. 45, SLA 2003. Finally, also per working group direction, I conformed the text of AS 46.03.100(f) to match House action in passing House Bill 524 amended. This Act is given an immediate effective date.

CSHB 395( ), draft version "G":

This is the measure that makes more stringent the regulation of shallow natural gas under existing AS 38.05.177. The bill draft contains multiple changes, most of them concerned with the interrelationship between this version and the one described in the previous version. In your review of the text, you will see that a number of provisions are drafted in the alternative, with these alternative provisions given contingent effect.

The title of this bill is amended by adding a clause referring to "contingently redesignating shallow natural gas as nonconventional gas, and relating to the regulation of that gas".

Bill section 1 is unchanged from the previous draft. **Bill section 2** repeals and reenacts bill section 1 **only** to change reference from "shallow natural gas" to "nonconventional gas."

Bill section 3 is unchanged from the previous draft. **Bill section 4** repeals and reenacts bill section 3 also **only** to change reference from "shallow natural gas" to "nonconventional gas."

Bill section 5: Because this provision assumes that the provisions of bill sections 1 and 3 will operate if CSHB 531(RES) ***does not*** become law, this bill section retains the language of the previous draft.

Bill section 6: This supplies a definition for the text changes made in bill sections 2 and 4 in the event CSHB 531(RES) ***does*** become law.

Bill section 7: There is no change in the text of this bill section from the previous draft.

Bill sections 8 - 11: These provisions make changes to various subsections within AS 38.05.177 and operate on the assumption that CSHB 531(RES) ***does not*** become law. There is no change in the text of any of these bill sections from the previous version.

Bill section 12: If CSHB 531(RES) does become law, the various protections set out in the previous four bill sections would be repealed. In order to retain them, AS 38.05.180(ff), added by CSHB 531(RES), is reenacted. In that reenactment, the provisions of what is set out in bill sections 8 - 11 are reenacted as requirements in AS 38.05.180(ff) and appear here as parts of paragraphs (3), (4), and (5).

Bill sections 13 and 14: These amend the notice provisions, AS 38.05.945(a) and (b), generally applicable to oil and gas leasing to add provisions covering shallow natural gas leases. The text is unchanged from the last previous draft.

Bill section 15: If CSHB 531(RES) becomes law, this provision would operate to reenact AS 38.05.945(b) to undo what is done under bill section 14 immediately above. If CSHB 531(RES) becomes law, nonconventional gas leasing will proceed under the department-initiated/best interest finding process rather than on the basis of nomination and public comment specific to AS 38.05.177, so the changes made by bill section 14 would not be needed.

Bill section 16 conforms the text of AS 46.03.100(f)(3), per working group instruction.

Bill section 17 makes a conforming amendment to CSHB 46.04.030(b) in the event CSHB 531(RES) becomes law.

Bill section 18: Because this provision assumes that the current provisions of AS 46.04.030(b) will continue to operate if CSHB 531(RES) ***does not*** become law, this bill section retains the language of the previous draft.

Bill section 19: This supplies a definition for the text changes made in bill section 17 in the event CSHB 531(RES) ***does*** become law.

Bill sections 20 and 21: These two bill sections make repeals specifically directed by the working group.

Bill section 22: This set of repealers would delete material found earlier in bill sections 5, 13, and 18.

Bill section 23: This is the contingency provision. The contingency is the enactment of a version of House Bill 531, the companion measure. Only if CSHB 531(RES) becomes law do the amendments and repeals proposed in the bill sections identified take effect.

Bill section 24: This is the effective date provision for the contingency. The contingently effective provisions would take effect one day after the effective date of the companion measure.

Provisions not covered by the contingency are, under **bill section 25**, proposed to take effect July 1, 2004.

*

What, then, are the possible outcomes?

First, it is possible that both bills would not pass. I guess that means we start over in 2005.

Second: It is possible that CSHB 395( ) would not take effect and that CSHB 531(RES) would take effect. Nothing in CSHB 531(RES) is dependent on CSHB 395( ), so CSHB 531(RES) would take effect on its own terms. Shallow natural gas leasing under AS 38.05.177 would end and leasing of nonconventional gas under the conventional oil and gas leasing procedures of AS 38.05.180 would begin.

Third: It is possible that CSHB 395( ) would take effect and CSHB 531(RES) would not take effect. In that event, only the provisions of CSHB 395( ) that are **not** covered by the contingency provision would take effect, while the contingent provisions in that bill would not take effect (because the contingency, the taking effect of the companion bill, does not occur). In effect, shallow natural gas would continue to be leased under provisions of AS 38.05.177, as amended by that Act.

Fourth: Both measures become law. By its terms, and assuming the necessary two-thirds vote in each house, CSHB 531(RES) would become immediately effective. The noncontingent provisions of CSHB 395( ) -- these are the provisions that are drafted on the assumption that shallow natural gas would continue to operate under AS 38.05.177 as amended -- would take effect, again assuming the necessary two-thirds vote in each house, July 1, 2004. The contingent provisions of CSHB 395( ) -- these are drafted as the superseding provisions -- would take effect one day after the later of the effective date of the companion measure or the noncontingent provisions of the Act.

It's not pretty -- but it should work!

JBC:mdr
04-159.mdr

Enclosure

cc: Eleanor Wolfe, for Representative Beverly Masek, Co-Chair
House Resources Committee

Representative Beverly Masek
Alaska State House of Representatives
District 15

TO: Zaz Hollander **FAX:** 907-352-6736

FROM: Eleanor Wolfe **PHONE:** 907-465-2679

DATE: April 16, 2004

RE: HB 395

MESSAGE: Here is the latest work draft of HB 395.

Number of pages (including cover): 18

State Capitol
Juneau, AK 99801-1182

23-LS1314\G
Chenoweth
4/16/04

CS FOR HOUSE BILL NO. 395( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES HARRIS, Gatto, Stoltze, Seaton, Kohring

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to the recovery of shallow natural gas, to the regulation of shallow**
2 **natural gas or coal bed methane operations, and to oil and gas leasing operations**
3 **involving activities not governed under the Alaska Land Act; contingently redesignating**
4 **shallow natural gas as nonconventional gas, and relating to the regulation of that gas**
5 **under that contingency; and providing for an effective date."**

6 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

7 * **Section 1.** AS 31.05.030(j) is amended to read:
8 (j) For **exploration and development operations involving shallow natural**
9 **gas, the commission**
10 **(1) may not**
11 **(A) issue a permit to drill under this chapter if the well**
12 **would be used to produce gas from an aquifer that serves as a source of**
13 **water for human consumption or agricultural purposes unless the**

1 **<u>commission finds that the well will not adversely affect the aquifer as a</u>**
2 **<u>source of water for human consumption or agricultural purposes; or</u>**
3 **<u>(B) allow injection of produced water except at depths</u>**
4 **<u>below known sources of water for human consumption or agricultural</u>**
5 **<u>purposes;</u>**
6 <u>(2) shall</u>
7 **<u>(A) regulate hydraulic fracturing in shallow natural gas</u>**
8 **<u>wells to assure protection of drinking water quality;</u>**
9 **<u>(B) regulate the disposal of wastes produced from the</u>**
10 **<u>operations unless the disposal is otherwise subject to regulation by the</u>**
11 **<u>Department of Environmental Conservation or the Environmental</u>**
12 **<u>Protection Agency; and</u>**
13 **<u>(C) for</u>** the purposes of AS 46.04.030(b), [THE
14 COMMISSION SHALL] determine whether a well drilled for shallow natural
15 gas may penetrate a formation capable of flowing oil and, if so, whether the
16 volume of oil encountered will be of such quantities that an oil discharge
17 prevention and contingency plan will be required.
18 * **Sec. 2.** AS 31.05.030(j) is repealed and reenacted to read:
19 (j) For exploration and development operations involving nonconventional
20 gas, the commission
21 (1) may not
22 (A) issue a permit to drill under this chapter if the well would
23 be used to produce gas from an aquifer that serves as a source of water for
24 human consumption or agricultural purposes unless the commission finds that
25 the well will not adversely affect the aquifer as a source of water for human
26 consumption or agricultural purposes; or
27 (B) allow injection of produced water except at depths below
28 known sources of water for human consumption or agricultural purposes;
29 (2) shall
30 (A) regulate hydraulic fracturing in nonconventional gas wells
31 to assure protection of drinking water quality;

1 (B) regulate the disposal of wastes produced from the
2 operations unless the disposal is otherwise subject to regulation by the
3 Department of Environmental Conservation or the Environmental Protection
4 Agency; and
5 (C) for the purposes of AS 46.04.030(b), determine whether a
6 well drilled for nonconventional gas may penetrate a formation capable of
7 flowing oil and, if so, whether the volume of oil encountered will be of such
8 quantities that an oil discharge prevention and contingency plan will be
9 required.
10 * **Sec. 3.** AS 31.05 is amended by adding a new section to read:
11 **Sec. 31.05.098. Public forum process concerning shallow natural gas.** (a)
12 For the purpose of resolving public health, safety, welfare, or environmental
13 complaints about potential or actual shallow natural gas exploration and development
14 operations, the commission shall, by regulation, develop and implement a public
15 forum process by which to achieve informal resolution of the complaints within 60
16 days of the filing of the complaints. The commission may provide that, if resolution
17 of the complaints is not achieved through the informal process established by
18 regulation, a party may petition the commission to take action on the complaint under
19 AS 31.05.060 - 31.05.085 as to a matter that falls within the commission's powers and
20 duties under AS 31.05.030. For any other matter, the commission shall refer the
21 complaint to other federal, state, or local agencies, as appropriate.
22 (b) The commission's regulations adopted under this section shall provide for
23 scheduling a public forum at a location reasonably proximate to the land that is the
24 subject of or that is affected by the complaint and reasonable public notice and
25 opportunity to be heard. If the public forum is not personally convened and conducted
26 by a majority of the members of the commission, the person conducting the forum
27 shall prepare and submit to the commission a report of the forum proceedings. The
28 report prepared under this subsection is a public record. The commission may modify
29 a rule or condition in a plan of development or operation for a field or pool to address
30 an issue identified by the commission or the report.
31 * **Sec. 4.** AS 31.05.098(a) is repealed and reenacted to read:

1 (a) For the purpose of resolving public health, safety, welfare, or
2 environmental complaints about potential or actual nonconventional gas exploration
3 and development operations, the commission shall, by regulation, develop and
4 implement a public forum process by which to achieve informal resolution of the
5 complaints within 60 days of the filing of the complaints. The commission may
6 provide that, if resolution of the complaints is not achieved through the informal
7 process established by regulation, a party may petition the commission to take action
8 on the complaint under AS 31.05.060 - 31.05.085 as to a matter that falls within the
9 commission's powers and duties under AS 31.05.030. For any other matter, the
10 commission shall refer the complaint to other federal, state, or local agencies, as
11 appropriate.
12 * **Sec. 5.** AS 31.05.170(14) is amended to read:
13 (14) "shallow natural gas" means coal bed methane, natural gas drilled
14 for under a lease authorized by AS 38.05.177, or natural gas drilled for in a well the
15 true vertical depth of which is **3,000** [4,000] feet or less;
16 * **Sec. 6.** AS 31.05.170 is amended by adding a new paragraph to read:
17 (16) "nonconventional gas" has the meaning given in AS 38.05.965.
18 * **Sec. 7.** AS 34 is amended by adding a new chapter to read:
19 **Chapter 90. Mineral Interests.**
20 **Sec. 34.90.010. Notice of operations.** (a) Except for activities governed by
21 AS 38.05, the developer shall give the surface owner written notice of the oil and gas
22 operations contemplated at least 20 days before commencement of operations. The
23 requirement of written notice may be waived by the parties.
24 (b) Unless notice has been waived by the parties, the developer shall give
25 notice to the record surface owner at the owner's address as shown by the records of
26 the state recorder at the time notice is given. The notice must sufficiently disclose the
27 plan of work and operations to enable the surface owner to evaluate the effect of oil
28 and gas operations on the surface owner's use of the property.
29 (c) If a developer fails to give notice as provided in this section, the surface
30 owner may seek any appropriate relief in the court of proper jurisdiction and may
31 receive actual damages.

1 **Sec. 34.90.020. Damages and posting of bond.** A developer may not
2 exercise a right of entry until the developer makes provision to pay the surface owner
3 full payment for all damages sustained by the surface owner by reason of entering
4 upon the land. If the surface owner, for any cause, refuses or neglects to settle the
5 damages, the developer may enter upon the land after posting a surety bond
6 determined by the Department of Natural Resources using a procedure similar to the
7 procedure used to administer AS 38.05.130, including notice and an opportunity to be
8 heard. The bond must be sufficient as to form, amount, and security to secure to the
9 surface owner payment for damages. The surface owner may institute legal
10 proceedings in a court where the land is located as may be necessary to determine the
11 damages that the surface owner may suffer.
12 **Sec. 34.90.095. Definitions.** In this chapter,
13 (1) "developer" means the person who acquires the mineral estate or
14 lease for the purpose of extracting or using the minerals;
15 (2) "mineral estate" means an estate in or ownership of all or part of
16 the minerals underlying a specific tract of land;
17 (3) "minerals" includes oil and gas;
18 (4) "oil and gas operations" means an activity for which a permit is
19 required by AS 31.05.090 that requires entry upon the surface estate;
20 (5) "surface estate" means an estate in or ownership of the surface of a
21 particular tract of land;
22 (6) "surface owner" means any person who holds record title to the
23 surface of the land as an owner.
24 * **Sec. 8.** AS 38.05.177(c) is amended to read:
25 (c) The director shall give notice under AS 38.05.945 of receipt of the lease
26 application, [AND] call for comments from the public**, and execute a lease as**
27 **follows:**
28 **(1) the** [. THE] director's call for public comments must provide
29 opportunity for public comment for a period of not less than 60 days;
30 **(2) if** [. IF], after review of information received during the public
31 comment period **and consideration of public comments received**, the director

1 determines that the discovery of a local source of natural gas would benefit the
2 residents of an area, the director **may** [SHALL] execute a lease for the area described
3 in (b) of this section**; the** [. THE] director **may** [SHALL] execute the lease **only** after
4 completion of a title search, the close of the public comment period, and, if review is
5 required under AS 46.40, after the final consistency determination is made under
6 AS 46.40**;**
7 **(3) a** [. A] lease entered into under this subsection gives the lessee the
8 exclusive right to explore for, develop, and produce, for a term of three years, natural
9 gas on the state land described in the lease; the right to explore for, develop, and
10 produce is limited to gas from a field if a part of the field is within 3,000 feet of the
11 surface.
12 * **Sec. 9.** AS 38.05.177(f) is amended to read:
13 (f) A shallow gas lease must provide for
14 **(1)** payment to the state of annual rent in the amount of $1 **an** [PER]
15 acre**; the** [. THE] rent is due and payable on the date determined in the lease**; if** [. IF]
16 the lease payment is not received by the due date, the director shall mail the lessee one
17 written notice, certified return receipt requested**; if** [. IF] the lessee fails to pay the
18 rent within 30 days **after** [OF] receipt of the notice, the director shall terminate the
19 lease**;**
20 **(2) a water well testing requirement for each lease that contains**
21 **one or more wells that serve as a source of potable water; the testing requirement**
22 **of this paragraph applies to each water well that is located within a square that**
23 **bounds a circle with a radius of one-quarter mile around the drill site and the**
24 **sides of which are parallel or perpendicular to the four cardinal directions and**
25 **are tangent to the circle; under this paragraph, the lessee shall, before**
26 **commencement of production testing and production activities on the lease,**
27 **(A) test each well for dissolved contents, including methane,**
28 **and water flow; and**
29 **(B) provide a copy of the test results to the land owner, who**
30 **shall maintain the test record;**
31 **(3) appropriate setbacks governing the placement by the lessee or**

1 the lessee's agent of compressor stations on the lease; setbacks developed under
2 this paragraph must be determined with reference to the population density of
3 the parcel or parcels subject to the lease, the size of the owner's parcels, and the
4 general character of the land subject to the lease; the terms of the lease must
5 require the lessee or lessee's agent to negotiate to meet the requirement of this
6 paragraph, but the owner may not unreasonably withhold agreement;
7 (4) reasonable and appropriate measures to mitigate the noise of
8 compressors, engines, and other equipment operated by the lessee or the lessee's
9 agent of compressor stations on the lease; noise mitigation measures developed
10 under this paragraph must be determined with reference to the population
11 density of the parcel or parcels subject to the lease, the size of the owner's
12 parcels, and the general character of the land subject to the lease; the terms of
13 the lease shall require the lessee or lessee's agent to negotiate to meet the
14 requirement of this paragraph, but the owner may not unreasonably withhold
15 agreement;
16 (5) action at the time of the termination or abandonment of the
17 lease to require the lessee or the lessee's agent to restore, reclaim, or abate the
18 adverse effects of the exploration and development operations using natural
19 revegetation or reseeding using endemic plant species; the lease may require the
20 lessee or the lessee's agent to consult with the director of the division of
21 agriculture.
22 * **Sec. 10.** AS 38.05.177(k) is amended to read:
23 (k) The commissioner [MAY]
24 (1) may adopt only the regulations that are reasonable and that are
25 necessary to implement, interpret, or make specific the provisions of this section or to
26 establish procedures to govern application of the provisions of this section; [AND]
27 (2) may, in addition to any requirement for a bond under
28 AS 38.05.130, establish by regulation a form and amount for statewide, areawide,
29 unit-wide, or per-lease bonds sufficient to secure damages that may be caused by the
30 activities of a lessee, or the lessee's successors or assigns, related to a shallow natural
31 gas lease entered into under this section; if the commissioner acts under this

1 paragraph, the commissioner

2 (A) shall require a person applying for a lease under this

3 section to post the bond as a condition for the director's executing the lease;

4 (B) may not require a bond posted under this paragraph from a

5 person applying for a lease if the person has already posted a bond covering

6 the person's statewide oil and gas leasing activities in an amount of at least

7 $500,000;

8 (3) shall, if a bond is sought under AS 38.05.130, before the

9 amount of the surety bond to be posted is determined by the director, require as

10 a condition for issuing the bond that the director, after notice and an opportunity

11 to be heard, determine that, to exercise rights under the reservation as set out in

12 AS 38.05.125 and the lease, the lessee has demonstrated that access and entry

13 upon the land of the owner is reasonably necessary or convenient to render

14 beneficial and efficient the complete enjoyment of the property and the reserved

15 rights; the lessee has the burden of demonstrating compliance with the

16 requirement of this paragraph; and

17 (4) shall require the lessee to provide written advance notice to the

18 owner of initial entry onto the property of the owner at least 30 days before

19 initial entry.

20 * **Sec. 11.** AS 38.05.177 is amended by adding new subsections to read:

21 (p) Under AS 38.05.130 as applicable to shallow natural gas exploration and

22 development that is authorized under this section, if

23 (1) the owner and the lessee enter into an agreement by which the

24 lessee makes provision to pay the owner of the land for all damages, the parties shall

25 incorporate in the agreement the provisions described in (f) of this section that are

26 negotiated;

27 (2) the owner and the lessee do not enter into an agreement by which

28 the lessee makes provision to pay the owner of the land for all damages, and the lessee

29 proceeds to request the director to set the amount of a surety bond, the owner may, in

30 conjunction with notice and the opportunity to be heard, provide the director with the

31 owner's comments about the appropriate location of wells, roads, and other

1 improvements that may be made by the lessee or the lessee's agent to secure the
2 lessee's rights under the lease.
3 (q) In (f), (k)(3), and (p) of this section, "owner" means the property owner
4 whose property is subject to the reservation described in AS 38.05.125(a).
5 * **Sec. 12.** AS 38.05.180(ff) is repealed and reenacted to read:
6 (ff) The provisions of this section that authorize oil and gas leases also apply
7 to authorize the commissioner to issue leases under this section for the production of
8 gas only, subject to the following:
9 (1) in authorizing and managing leases under this subsection, the terms
10 "oil and gas" or "oil or gas" as they are used in this chapter shall be read and applied
11 as referring to gas only;
12 (2) when a lease is authorized as a gas only lease, the lease does not
13 give the lessee the right to produce oil; if a well drilling for gas under a gas only lease
14 authorized by this subsection penetrates a formation capable of producing oil, the
15 owner or operator
16 (A) shall notify the department and the Alaska Oil and Gas
17 Conservation Commission; and
18 (B) may not conduct further operations in the drilled well until
19 the facility complies with all applicable laws and regulations relating to oil and
20 gas exploration and production; however, this subparagraph does not prevent
21 the owner or operator from conducting activities that may be required by the
22 Alaska Oil and Gas Conservation Commission to plug, plug-back, or abandon
23 a well;
24 (3) if, under AS 38.05.130, as applicable to a nonconventional gas
25 lease
26 (A) the owner and the lessee enter into an agreement by which
27 the lessee makes provision to pay the owner of the land for all damages, the
28 parties shall incorporate in the agreement the provisions described in (4)(A) -
29 (D) of this subsection that are negotiated; or
30 (B) the owner and the lessee do not enter into an agreement by
31 which the state, or its lessees, successors, or assigns, will make provision to

1 pay the owner of the land for all damages, and the lessee proceeds to request
2 the director to set the amount of a surety bond, the owner may, in conjunction
3 with notice and the opportunity to be heard, provide the director with the
4 owner's comments about the appropriate location of wells, roads, and other
5 improvements that may be made by the lessee or the lessee's agent to secure
6 the lessee's rights under the lease.
7 (4) for a nonconventional gas lease,
8 (A) the lease must provide for a water well testing requirement
9 for each lease that contains one or more wells that serve as a source of potable
10 water; the testing requirement of this subparagraph applies to each water well
11 that is located within a square that bounds a circle with a radius of one-quarter
12 mile around the drill site and the sides of which are parallel or perpendicular to
13 the four cardinal directions and are tangent to the circle; under this
14 subparagraph, the lessee shall, before commencement of production testing and
15 production activities on the lease,
16 (i) test each well for dissolved contents, including
17 methane, and water flow; and
18 (ii) provide a copy of the test results to the owner, who
19 shall maintain the test record;
20 (B) the lease must provide for appropriate setbacks governing
21 the placement by the lessee or the lessee's agent of compressor stations on the
22 lease; setbacks developed under this subparagraph must be determined with
23 reference to the population density of the parcel or parcels subject to the lease,
24 the size of the owner's parcels, and the general character of the land subject to
25 the lease; the terms of the lease must require the lessee or lessee's agent to
26 negotiate to meet the requirement of this subparagraph, but the owner may not
27 unreasonably withhold agreement;
28 (C) the lease must provide for reasonable and appropriate
29 measures to mitigate the noise of compressors, engines, and other equipment
30 operated by the lessee or the lessee's agent for compressor statements on the
31 lease; noise mitigation measures developed under this subparagraph must be

1 determined with reference to the population density of the parcel or parcels
2 subject to the lease, the size of the owner's parcels, and the general character of
3 the land subject to the lease; the terms of the lease shall require the lessee or
4 lessee's agent to negotiate to meet the requirement of this subparagraph, but the
5 owner may not unreasonably withhold agreement;
6 (D) the lease must provide for action at the time of the
7 termination or abandonment of the lease to require the lessee or the lessee's
8 agent to restore, reclaim, or abate the adverse effects of the exploration and
9 development operations using natural revegetation or reseeding using endemic
10 plant species; the lease may require the lessee or the lessee's agent to consult
11 with the director of the division of agriculture;
12 (E) if a bond is sought under AS 38.05.130,
13 (i) before the amount of the surety bond to be posted is
14 determined by the director, require, as a condition for issuing the lease,
15 that the director, after notice and an opportunity to be heard, determine
16 that, to exercise rights under the reservation as set out in AS 38.05.125
17 and the lease, the lessee has no other reasonable means of entry than
18 access and entry upon the land of the owner; the lessee has the burden
19 of demonstrating compliance with the requirement of this sub-
20 subparagraph; and
21 (ii) in addition to the coverage for actual damages
22 required by AS 38.05.130, provide for payment of reasonable
23 compensation to the owner for any loss by the owner of the owner's use
24 and enjoyment of the property; and
25 (F) the director shall require the lessee to provide written
26 advance notice to the owner of initial entry onto the property of the owner at
27 least 30 days before initial entry.
28 * **Sec. 13.** AS 38.05.945(a) is amended to read:
29 (a) This section establishes the requirements for notice given by the
30 department for the following actions:
31 (1) classification or reclassification of state land under AS 38.05.300

1 and the closing of land to mineral leasing or entry under AS 38.05.185;
2 (2) zoning of land under applicable law;
3 (3) issuance of a
4 (A) preliminary written finding under AS 38.05.035(e)(5)(A)
5 regarding the sale, lease, or disposal of an interest in state land or resources for
6 oil and gas subject to AS 38.05.180(b);
7 (B) [REPEALED
8 (C)] written finding for the sale, lease, or disposal of an interest
9 in state land or resources under AS 38.05.035(e)(6), except an oil or gas lease
10 sale described in AS 38.05.035(e)(6)(F) for which the director must provide
11 opportunity for public comment under the provisions of that subparagraph;
12 (4) a competitive disposal of an interest in state land or resources after
13 final decision under AS 38.05.035(e);
14 (5) a preliminary finding under AS 38.05.035(e) concerning sites for
15 aquatic farms and related hatcheries;
16 (6) a decision under AS 38.05.132 - 38.05.134 regarding the sale,
17 lease, or disposal of an interest in state land or resources**;**
18 **(7) a notice of receipt of a lease application and call for comments**
19 **under AS 38.05.177(c)**.
20 * **Sec. 14.** AS 38.05.945(b) is amended to read:
21 (b) When notice is required to be given under this section,
22 (1) the notice must contain sufficient information in commonly
23 understood terms to inform the public of the nature of the action and the opportunity
24 of the public to comment on it;
25 (2) if the notice is of a preliminary written finding described in
26 (a)(3)(A) of this section **or a call for comments under (a)(7) of this section**, the
27 department shall give notice at the beginning of the public comment period for the
28 preliminary written finding **or call for comments, as appropriate**, notifying the
29 public of the right to submit comments; the department shall give notice by
30 (A) publication of a legal notice in newspapers of statewide
31 circulation and in newspapers of general circulation in the vicinity of the

1 proposed action at least once a week for two consecutive weeks;
2 (B) publication of a notice in display advertising form in the
3 newspapers described in (A) of this paragraph at least once a week for two
4 consecutive weeks;
5 (C) public service announcements on the electronic media
6 serving the area to be affected by the proposed action; and
7 (D) one or more of the following methods:
8 (i) posting in a conspicuous location in the vicinity of
9 the action;
10 (ii) notification of parties known or likely to be affected
11 by the action; or
12 (iii) another method calculated to reach affected parties;
13 (3) if the notice is of an action described in (a) of this section, other
14 than notice of an action under (a)(3)(A) **<u>or (a)(7)</u>** of this section, the department shall
15 give notice at least 30 days before the action by publication in newspapers of
16 statewide circulation and in newspapers of general circulation in the vicinity of the
17 proposed action and one or more of the following methods:
18 (A) publication through public service announcements on the
19 electronic media serving the area affected by the action;
20 (B) posting in a conspicuous location in the vicinity of the
21 action;
22 (C) notification of parties known or likely to be affected by the
23 action; or
24 (D) another method calculated to reach affected persons.
25 * **Sec. 15.** AS 38.05.945(b) is repealed and reenacted to read:
26 (b) When notice is required to be given under this section,
27 (1) the notice must contain sufficient information in commonly
28 understood terms to inform the public of the nature of the action and the opportunity
29 of the public to comment on it;
30 (2) if the notice is of a preliminary written finding described in
31 (a)(3)(A) of this section, the department shall give notice at the beginning of the public

1 comment period for the preliminary written finding, notifying the public of the right to
2 submit comments; the department shall give notice by
3 (A) publication of a legal notice in newspapers of statewide
4 circulation and in newspapers of general circulation in the vicinity of the
5 proposed action at least once a week for two consecutive weeks;
6 (B) publication of a notice in display advertising form in the
7 newspapers described in (A) of this paragraph at least once a week for two
8 consecutive weeks;
9 (C) public service announcements on the electronic media
10 serving the area to be affected by the proposed action; and
11 (D) one or more of the following methods:
12 (i) posting in a conspicuous location in the vicinity of
13 the action;
14 (ii) notification of parties known or likely to be affected
15 by the action; or
16 (iii) another method calculated to reach affected parties;
17 (3) if the notice is of an action described in (a) of this section, other
18 than notice of an action under (a)(3)(A) of this section, the department shall give
19 notice at least 30 days before the action by publication in newspapers of statewide
20 circulation and in newspapers of general circulation in the vicinity of the proposed
21 action and one or more of the following methods:
22 (A) publication through public service announcements on the
23 electronic media serving the area affected by the action;
24 (B) posting in a conspicuous location in the vicinity of the
25 action;
26 (C) notification of parties known or likely to be affected by the
27 action; or
28 (D) another method calculated to reach affected persons.
29 * **Sec. 16.** AS 46.03.100(f) is amended to read:
30 (f) This section does not apply to discharges of solid or liquid waste material
31 or water discharges from the following activities if the discharge is incidental to the

1 activity and the activity does not produce a discharge from a point source, as that term
2 is defined in regulations adopted under this chapter, directly into any surface water of
3 the state:
4 (1) mineral drilling, trenching, ditching, and similar activities;
5 (2) landscaping;
6 (3) water well drilling **and** [,] geophysical drilling [, OR COAL BED
7 METHANE DRILLING OR OTHER NATURAL GAS DRILLING TO RECOVER
8 GAS FROM A FIELD IF A PART OF THE FIELD IS WITHIN 3,000 FEET OF THE
9 SURFACE]; or
10 (4) drilling, ditching, trenching, and similar activities associated with
11 facility construction and maintenance or with road or other transportation facility
12 construction and maintenance; however, the exemption provided by this paragraph
13 does not relieve a person from obtaining a permit under this section if
14 (A) the drilling, ditching, trenching, or similar activity will
15 involve the removal of the groundwater, stormwater, or wastewater runoff that
16 has accumulated and is present at an excavation site for facility, road, or other
17 transportation construction or maintenance; and
18 (B) a permit is otherwise required by this section.
19 * **Sec. 17.** AS 46.04.030(b) is amended to read:
20 (b) A person may not cause or permit the operation of a pipeline or an
21 exploration or production facility in the state unless an oil discharge prevention and
22 contingency plan for the pipeline or facility has been approved by the department and
23 the person is in compliance with the plan. This subsection does not apply to an
24 exploration or production facility used solely to explore for or to develop or produce
25 **nonconventional** [SHALLOW NATURAL] gas resources, except that this exemption
26 does not apply if the Alaska Oil and Gas Conservation Commission determines under
27 AS 31.05.030(j) that
28 (1) a well drilled for shallow natural gas may penetrate a formation
29 capable of flowing oil; and
30 (2) the volume of oil encountered will be of such quantities that a
31 contingency plan will be required.

1 * **Sec. 18.** AS 46.04.900(25) is amended to read:
2 (25) "shallow natural gas" means coal bed methane, natural gas drilled
3 for under a lease authorized by AS 38.05.177, or natural gas drilled for in a well the
4 true vertical depth of which is **3,000** [4,000] feet or less;
5 * **Sec. 19.** AS 46.04.900 is amended by adding a new paragraph to read:
6 (31) "nonconventional gas" has the meaning given in AS 38.05.965.
7 * **Sec. 20.** The uncodified law of the State of Alaska added by sec. 1, ch. 45, SLA 2003, is
8 amended to read:
9 LEGISLATIVE FINDINGS. The legislature finds that
10 (1) [THE DEVELOPMENT OF SHALLOW NATURAL GAS
11 RESOURCES IS IN THE BEST INTERESTS OF THE STATE OF ALASKA;
12 (2)] shallow natural gas is abundant and widespread in Alaska and
13 bears the promise of providing Alaskans, particularly Alaskans living in rural areas,
14 with an inexpensive and clean source of energy if those resources can be economically
15 developed;
16 **(2)** [(3)] the development of shallow natural gas poses significantly
17 fewer risks and creates substantially less impact to the environment than traditional
18 deep oil and gas projects, which have served as the model for oil and gas industry and
19 environmental regulations to date in Alaska;
20 **(3)** [(4)] the regulatory requirements developed and applied to
21 traditional deep oil and gas projects in Alaska are ill-suited and unduly onerous when
22 applied to shallow natural gas projects, threatening the economic viability of otherwise
23 desirable exploration and development projects;
24 **(4)** [(5)] there is an immediate state and national need for the
25 development of clean and economical unconventional energy sources, such as shallow
26 natural gas resources;
27 **(5)** [(6)] reform of existing laws and regulations is needed to remove
28 unnecessary regulatory burdens on the private sector to foster and encourage the
29 development in Alaska of these necessary resources;
30 **(6)** [(7)] the legislature is acting in the interest of promoting the active
31 development of such resources, while ensuring that suitable measures are taken to

1 protect human health and safety and the natural environment,
2 (A) to remove impediments to the responsible development of
3 shallow natural gas; **and**
4 (B) to provide the proper state agencies with clear authority and
5 discretion to adopt regulatory practices appropriate to shallow natural gas
6 exploration and development projects, in recognition of the lower risks posed
7 by such projects to human health and safety and the natural environment [;
8 AND
9 (C) TO RESERVE ALL RIGHTS AND POWERS NOT
10 PREEMPTED BY FEDERAL LAW AND REGULATION IN ORDER TO
11 ASSERT STATE PRIMACY OVER THE REGULATION OF SHALLOW
12 NATURAL GAS].
13 * **Sec. 21.** AS 31.05.125 and AS 38.05.177(n) are repealed.
14 * **Sec. 22.** AS 31.05.170(14), 38.05.945(a)(7); and AS 46.04.900(25) are repealed.
15 * **Sec. 23.** The uncodified law of the State of Alaska is amended by adding a new section to
16 read:
17 CONTINGENT EFFECT OF SECTIONS. Sections 2, 4, 6, 12, 15, 17, 19, and 22 of
18 this Act take effect only if a version of House Bill 531, "An Act relating to natural gas
19 exploration and development and to nonconventional gas, and amending the section under
20 which shallow natural gas leases may be issued" is passed by the Twenty-Third Alaska State
21 Legislature and becomes law.
22 * **Sec. 24.** If, under sec. 23 of this Act, secs. 2, 4, 6, 12, 15, 17, 19, and 22 of this Act take
23 effect, they take effect on the later of
24 (1) the day following the effective date of the Act described in sec. 23 of this
25 Act; or
26 (2) the day after the effective date of the sections of this Act not described in
27 this section.
28 * **Sec. 25.** Except as provided in sec. 24 of this Act, this Act takes effect July 1, 2004.

Alaska State Legislature

Please enter into the record by testimony to the House Resources
COMMITTEE NAME

committee on HB 395, dated April 7, 04.
BILL / SUBJECT TODAY'S DATE

Thank you for hearing this bill and opening it to public testimony - Glancing quickly at HB 395, there seem to be a number of good provisions. I'd like to see removal of use of fracturing fluids to protect our aquifers. I'm still concerned about the amount of power the DNR commissioner has, and I'd like to see that lessened. Please allow a second opportunity for public to testify.

Although this bill provides several good provisions, I'd still like to see all the leases bought back so we don't have this sword hanging over our S Peninsula and MatSu heads. Then, consider starting over with a best interest finding and stay far away from private property unless owners want CBM! Thank you

Signed: Anne Wieland
TESTIFIER

self
REPRESENTING

PO 1395 Homer
ADDRESS

235-6419
PHONE NO.

23-LS1314\J
Chenoweth
4/6/04

CS FOR HOUSE BILL NO. 395( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES HARRIS, Gatto, Stoltze, Seaton, Kohring

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to the recovery of shallow natural gas, to the regulation of shallow**
2 **natural gas or coal bed methane operations, and to oil and gas leasing operations**
3 **involving activities not governed under the Alaska Land Act; and providing for an**
4 **effective date."**

5 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

6 *** Section 1.** AS 31.05.030(j) is amended to read:
7 (j) For exploration and development operations involving shallow natural
8 gas, the commission
9 (1) may not
10 (A) issue a permit to drill under this chapter if the well
11 would be used to produce gas from an aquifer that serves as a source of
12 water for human consumption or agricultural purposes unless the
13 commission finds that the well will not adversely affect the aquifer as a
14 source of water for human consumption or agricultural purposes; or

area wide issue

(B) allow injection of produced water except at depths below known sources of water for human consumption or agricultural purposes;

(2) shall

(A) regulate hydraulic fracturing in shallow natural gas wells to assure protection of drinking water quality;

(B) regulate the disposal of wastes produced from the operations unless the disposal is otherwise subject to regulation by the Department of Environmental Conservation or the Environmental Protection Agency; and

(C) for the purposes of AS 46.04.030(b), [THE COMMISSION SHALL] determine whether a well drilled for shallow natural gas may penetrate a formation capable of flowing oil and, if so, whether the volume of oil encountered will be of such quantities that an oil discharge prevention and contingency plan will be required.

* **Sec. 2.** AS 31.05 is amended by adding a new section to read:

Sec. 31.05.098. Public forum process concerning shallow natural gas. (a) For the purpose of resolving public health, safety, welfare, or environmental complaints about potential or actual shallow natural gas exploration and development operations, the commission shall, by regulation, develop and implement a public forum process by which to achieve informal resolution of the complaints within 60 days of the filing of the complaints. The commission may provide that, if resolution of the complaints is not achieved through the informal process established by regulation, a party may petition the commission to take action on the complaint under AS 31.05.060 - 31.05.085 as to a matter that falls within the commission's powers and duties under AS 31.05.030. For any other matter, the commission shall refer the complaint to other federal, state, or local agencies, as appropriate.

(b) The commission's regulations adopted under this section shall provide for scheduling a public forum at a location reasonably proximate to the land that is the subject of or that is affected by the complaint and reasonable public notice and opportunity to be heard. If the public forum is not personally convened and conducted

Local control

by a majority of the members of the commission, the person conducting the forum shall prepare and submit to the commission a report of the forum proceedings. The report prepared under this subsection is a public record. The commission may modify a rule or condition in a plan of development or operation for a field or pool to address an issue identified by the commission or the report.

* **Sec. 3.** AS 31.05.170(14) is amended to read:

(14) "shallow natural gas" means coal bed methane, natural gas drilled for under a lease authorized by AS 38.05.177, or natural gas drilled for in a well the true vertical depth of which is **3,000** [4,000] feet or less;

* **Sec. 4.** AS 34 is amended by adding a new chapter to read:

Chapter 90. Mineral Interests.

Sec. 34.90.010. Notice of operations. (a) Except for activities governed by AS 38.05, the developer shall give the surface owner written notice of the oil and gas operations contemplated at least 20 days before commencement of operations. The requirement of written notice may be waived by the parties.

(b) Unless notice has been waived by the parties, the developer shall give notice to the record surface owner at the owner's address as shown by the records of the state recorder at the time notice is given. The notice must sufficiently disclose the plan of work and operations to enable the surface owner to evaluate the effect of oil and gas operations on the surface owner's use of the property.

(c) If a developer fails to give notice as provided in this section, the surface owner may seek any appropriate relief in the court of proper jurisdiction and may receive punitive and actual damages.

Sec. 34.90.020. Damages and posting of bond. A developer may not exercise a right of entry until the developer makes provision to pay the surface owner full payment for all damages sustained by the surface owner by reason of entering upon the land. If the surface owner, for any cause, refuses or neglects to settle the damages, the developer may enter upon the land after posting a surety bond determined by the Department of Natural Resources using a procedure similar to the procedure used to administer AS 38.05.130, including notice and an opportunity to be heard. The bond must be sufficient as to form, amount, and security to secure to the

1 surface owner payment for damages. The surface owner may institute legal
2 proceedings in a court where the land is located as may be necessary to determine the
3 damages that the surface owner may suffer.
4 **Sec. 34.90.095. Definitions.** In this chapter,
5 (1) "developer" means the person who acquires the mineral estate or
6 lease for the purpose of extracting or using the minerals;
7 (2) "mineral estate" means an estate in or ownership of all or part of
8 the minerals underlying a specific tract of land;
9 (3) "minerals" includes oil and gas;
10 (4) "oil and gas operations" means the drilling of an oil and gas well,
11 the production and completion operations ensuing from the drilling, and oil and gas
12 geophysical exploration activities that require entry upon the surface estate;
13 (5) "surface estate" means an estate in or ownership of the surface of a
14 particular tract of land;
15 (6) "surface owner" means any person who holds record title to the
16 surface of the land as an owner.
17 * **Sec. 5.** AS 38.05.177(c) is amended to read:
18 (c) The director shall give notice under AS 38.05.945 of receipt of the lease
19 application, [AND] call for comments from the public**, and execute a lease as**
20 **follows:**
21 **(1) the** [. THE] director's call for public comments must provide
22 opportunity for public comment for a period of not less than 60 days**;**
23 **(2) if** [. IF], after review of information received during the public
24 comment period **and consideration of public comments received**, the director
25 determines that the discovery of a local source of natural gas would benefit the
26 residents of an area, the director **may** [SHALL] execute a lease for the area described
27 in (b) of this section**; the** [. THE] director **may** [SHALL] execute the lease **only** after
28 completion of a title search, the close of the public comment period, and, if review is
29 required under AS 46.40, after the final consistency determination is made under
30 AS 46.40**;**
31 **(3) a** [. A] lease entered into under this subsection gives the lessee the

make it clear

exclusive right to explore for, develop, and produce, for a term of three years, natural gas on the state land described in the lease; the right to explore for, develop, and produce is limited to gas from a field if a part of the field is within 3,000 feet of the surface.

* **Sec. 6.** AS 38.05.177(f) is amended to read:

(f) A shallow gas lease must provide for

(1) payment to the state of annual rent in the amount of $1 **an** [PER] acre**; the** [. THE] rent is due and payable on the date determined in the lease**; if** [. IF] the lease payment is not received by the due date, the director shall mail the lessee one written notice, certified return receipt requested**; if** [. IF] the lessee fails to pay the rent within 30 days **after** [OF] receipt of the notice, the director shall terminate the lease**;**

(2) a water well testing requirement for each lease that contains one or more wells that serve as a source of potable water; the testing requirement of this paragraph applies to each water well that is located within a square that bounds a circle with a radius of one-quarter mile around the drill site and the sides of which are parallel or perpendicular to the four cardinal directions and are tangent to the circle; under this paragraph, the lessee shall, before commencement of production testing and production activities on the lease,

(A) test each well for dissolved contents, including methane, and water flow; and

(B) provide a copy of the test results to the land owner, who shall maintain the test record;

(3) appropriate setbacks governing the placement by the lessee or the lessee's agent of compressor stations on the lease; setbacks developed under this paragraph must be determined with reference to the population density of the parcel or parcels subject to the lease, the size of the owner's parcels, and the general character of the land subject to the lease; the terms of the lease must require the lessee or lessee's agent to negotiate to meet the requirement of this paragraph, but the owner may not unreasonably withhold agreement;

(4) reasonable and appropriate measures to mitigate the noise of

1 compressors, engines, and other equipment operated by the lessee or the lessee's
2 agent of compressor stations on the lease; noise mitigation measures developed
3 under this paragraph must be determined with reference to the population
4 density of the parcel or parcels subject to the lease, the size of the owner's
5 parcels, and the general character of the land subject to the lease; the terms of
6 the lease shall require the lessee or lessee's agent to negotiate to meet the
7 requirement of this paragraph, but the owner may not unreasonably withhold
8 agreement;
9 (5) action at the time of the termination or abandonment of the
10 lease to require the lessee or the lessee's agent to restore, reclaim, or abate the
11 adverse effects of the exploration and development operations using natural
12 revegetation or reseeding using endemic plant species; the lease may require the
13 lessee or the lessee's agent to consult with the director of the division of
14 agriculture.
15 * Sec. 7. AS 38.05.177(k) is amended to read:
16 (k) The commissioner [MAY]
17 (1) may adopt only the regulations that are reasonable and that are
18 necessary to implement, interpret, or make specific the provisions of this section or to
19 establish procedures to govern application of the provisions of this section; [AND]
20 (2) may, in addition to any requirement for a bond under
21 AS 38.05.130, establish by regulation a form and amount for statewide, areawide,
22 unit-wide, or per-lease bonds sufficient to secure damages that may be caused by the
23 activities of a lessee, or the lessee's successors or assigns, related to a shallow natural
24 gas lease entered into under this section; if the commissioner acts under this
25 paragraph, the commissioner
26 (A) shall require a person applying for a lease under this
27 section to post the bond as a condition for the director's executing the lease;
28 (B) may not require a bond posted under this paragraph from a
29 person applying for a lease if the person has already posted a bond covering
30 the person's statewide oil and gas leasing activities in an amount of at least
31 $500,000;

set-backs for-lot holders xx

1 **<u>(3) shall, if a bond is sought under AS 38.05.130, before the</u>**
2 **<u>amount of the surety bond to be posted is determined by the director, require as</u>**
3 **<u>a condition for issuing the bond that the director, after notice and an opportunity</u>**
4 **<u>to be heard, determine that, to exercise rights under the reservation as set out in</u>**
5 **<u>AS 38.05.125 and the lease, the lessee has demonstrated that access and entry</u>**
6 **<u>upon the land of the owner is reasonably necessary or convenient to render</u>**
7 **<u>beneficial and efficient the complete enjoyment of the property and the reserved</u>**
8 **<u>rights; the lessee has the burden of demonstrating compliance with the</u>**
9 **<u>requirement of this paragraph; and</u>**
10 **<u>(4) shall require the lessee to provide written advance notice to the</u>**
11 **<u>owner of initial entry onto the property of the owner at least 30 days before</u>**
12 **<u>initial entry</u>**.
13 * **Sec. 8.** AS 38.05.177 is amended by adding new subsections to read:
14 (p) Under AS 38.05.130 as applicable to shallow natural gas exploration and
15 development that is authorized under this section, if
16 (1) the owner and the lessee enter into an agreement by which the
17 lessee makes provision to pay the owner of the land for all damages, the parties shall
18 incorporate in the agreement the provisions described in (f) of this section that are
19 negotiated;
20 (2) the owner and the lessee do not enter into an agreement by which
21 the lessee makes provision to pay the owner of the land for all damages, and the lessee
22 proceeds to request the director to set the amount of a surety bond, the owner may, in
23 conjunction with notice and the opportunity to be heard, provide the director with the
24 owner's comments about the appropriate location of wells, roads, and other
25 improvements that may be made by the lessee or the lessee's agent to secure the
26 lessee's rights under the lease.
27 (q) In (f), (k)(3), and (p) of this section, "owner" means the property owner
28 whose property is subject to the reservation described in AS 38.05.125(a).
29 * **Sec. 9.** AS 38.05.945(a) is amended to read:
30 (a) This section establishes the requirements for notice given by the
31 department for the following actions:

1 (1) classification or reclassification of state land under AS 38.05.300
2 and the closing of land to mineral leasing or entry under AS 38.05.185;
3 (2) zoning of land under applicable law;
4 (3) issuance of a
5 (A) preliminary written finding under AS 38.05.035(e)(5)(A)
6 regarding the sale, lease, or disposal of an interest in state land or resources for
7 oil and gas subject to AS 38.05.180(b);
8 (B) [REPEALED
9 (C)] written finding for the sale, lease, or disposal of an interest
10 in state land or resources under AS 38.05.035(e)(6), except an oil or gas lease
11 sale described in AS 38.05.035(e)(6)(F) for which the director must provide
12 opportunity for public comment under the provisions of that subparagraph;
13 (4) a competitive disposal of an interest in state land or resources after
14 final decision under AS 38.05.035(e);
15 (5) a preliminary finding under AS 38.05.035(e) concerning sites for
16 aquatic farms and related hatcheries;
17 (6) a decision under AS 38.05.132 - 38.05.134 regarding the sale,
18 lease, or disposal of an interest in state land or resources**;**
19 **(7) a notice of receipt of a lease application and call for comments**
20 **under AS 38.05.177(c)**.
21 * **Sec. 10.** AS 38.05.945(b) is amended to read:
22 (b) When notice is required to be given under this section,
23 (1) the notice must contain sufficient information in commonly
24 understood terms to inform the public of the nature of the action and the opportunity
25 of the public to comment on it;
26 (2) if the notice is of a preliminary written finding described in
27 (a)(3)(A) of this section **or a call for comments under (a)(7) of this section**, the
28 department shall give notice at the beginning of the public comment period for the
29 preliminary written finding **or call for comments, as appropriate**, notifying the
30 public of the right to submit comments; the department shall give notice by
31 (A) publication of a legal notice in newspapers of statewide

1 circulation and in newspapers of general circulation in the vicinity of the
2 proposed action at least once a week for two consecutive weeks;
3 (B) publication of a notice in display advertising form in the
4 newspapers described in (A) of this paragraph at least once a week for two
5 consecutive weeks;
6 (C) public service announcements on the electronic media
7 serving the area to be affected by the proposed action; and
8 (D) one or more of the following methods:
9 (i) posting in a conspicuous location in the vicinity of
10 the action;
11 (ii) notification of parties known or likely to be affected
12 by the action; or
13 (iii) another method calculated to reach affected parties;
14 (3) if the notice is of an action described in (a) of this section, other
15 than notice of an action under (a)(3)(A) <u>or (a)(7)</u> of this section, the department shall
16 give notice at least 30 days before the action by publication in newspapers of
17 statewide circulation and in newspapers of general circulation in the vicinity of the
18 proposed action and one or more of the following methods:
19 (A) publication through public service announcements on the
20 electronic media serving the area affected by the action;
21 (B) posting in a conspicuous location in the vicinity of the
22 action;
23 (C) notification of parties known or likely to be affected by the
24 action; or
25 (D) another method calculated to reach affected persons.
26 * **Sec. 11.** AS 46.03.100(f) is amended to read:
27 (f) This section does not apply to discharges of solid or liquid waste material
28 or water discharges from the following activities if the discharge is incidental to the
29 activity and the activity does not produce a discharge from a point source, as that term
30 is defined in regulations adopted under this chapter, directly into any surface water of
31 the state:

1 (1) mineral drilling, trenching, ditching, and similar activities;
2 (2) landscaping;
3 (3) water well drilling **and** [,] geophysical drilling [, OR COAL BED
4 METHANE DRILLING OR OTHER NATURAL GAS DRILLING TO RECOVER
5 GAS FROM A FIELD IF A PART OF THE FIELD IS WITHIN 3,000 FEET OF THE
6 SURFACE]; or
7 (4) drilling, ditching, trenching, and similar activities associated with
8 facility construction and maintenance or with road or other transportation facility
9 construction and maintenance; however, the exemption provided by this paragraph
10 does not relieve a person from obtaining a permit under this section if
11 (A) the drilling, ditching, trenching, or similar activity will
12 involve the removal of the groundwater, stormwater, or wastewater runoff that
13 has accumulated and is present at an excavation site for facility, road, or other
14 transportation construction or maintenance; and
15 (B) a permit is otherwise required by this section.
16 * **Sec. 12.** AS 46.04.030(b) is amended to read:
17 (b) A person may not cause or permit the operation of a pipeline or an
18 exploration or production facility in the state unless an oil discharge prevention and
19 contingency plan for the pipeline or facility has been approved by the department and
20 the person is in compliance with the plan. This subsection does not apply to an
21 exploration or production facility used solely to explore for or to develop or produce
22 shallow natural gas resources, except that this exemption does not apply if the Alaska
23 Oil and Gas Conservation Commission determines under **AS 31.05.030(j)(2)(C)**
24 [AS 31.05.030(j)] that
25 (1) a well drilled for shallow natural gas may penetrate a formation
26 capable of flowing oil; and
27 (2) the volume of oil encountered will be of such quantities that a
28 contingency plan will be required.
29 * **Sec. 13.** AS 46.04.900(25) is amended to read:
30 (25) "shallow natural gas" means coal bed methane, natural gas drilled
31 for under a lease authorized by AS 38.05.177, or natural gas drilled for in a well the

1 true vertical depth of which is **3,000** [4,000] feet or less;
2 * **Sec. 14.** The uncodified law of the State of Alaska added by sec. 1, ch. 45, SLA 2003, is
3 amended to read:
4 LEGISLATIVE FINDINGS. The legislature finds that
5 (1) the development of shallow natural gas resources is in the best
6 interests of the State of Alaska;
7 (2) shallow natural gas is abundant and widespread in Alaska and
8 bears the promise of providing Alaskans, particularly Alaskans living in rural areas,
9 with an inexpensive and clean source of energy if those resources can be economically
10 developed;
11 (3) the development of shallow natural gas poses significantly fewer
12 risks and creates substantially less impact to the environment than traditional deep oil
13 and gas projects, which have served as the model for oil and gas industry and
14 environmental regulations to date in Alaska;
15 (4) the regulatory requirements developed and applied to traditional
16 deep oil and gas projects in Alaska are ill-suited and unduly onerous when applied to
17 shallow natural gas projects, threatening the economic viability of otherwise desirable
18 exploration and development projects;
19 (5) there is an immediate state and national need for the development
20 of clean and economical unconventional energy sources, such as shallow natural gas
21 resources;
22 (6) reform of existing laws and regulations is needed to remove
23 unnecessary regulatory burdens on the private sector to foster and encourage the
24 development in Alaska of these necessary resources;
25 (7) the legislature is acting in the interest of promoting the active
26 development of such resources, while ensuring that suitable measures are taken to
27 protect human health and safety and the natural environment,
28 (A) to remove impediments to the responsible development of
29 shallow natural gas; **and**
30 (B) to provide the proper state agencies with clear authority and
31 discretion to adopt regulatory practices appropriate to shallow natural gas

1 exploration and development projects, in recognition of the lower risks posed
2 by such projects to human health and safety and the natural environment [;
3 AND
4 (C) TO RESERVE ALL RIGHTS AND POWERS NOT
5 PREEMPTED BY FEDERAL LAW AND REGULATION IN ORDER TO
6 ASSERT STATE PRIMACY OVER THE REGULATION OF SHALLOW
7 NATURAL GAS].
8 * **Sec. 15.** AS 31.05.125 and AS 38.05.177(n) are repealed.
9 * **Sec. 16.** This Act takes effect July 1, 2004.

23-LS1314\O
Chenoweth
4/13/04

CS FOR HOUSE BILL NO. 395( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES HARRIS, Gatto, Stoltze, Seaton, Kohring

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to the recovery of shallow natural gas, to the regulation of shallow**
2 **natural gas or coal bed methane operations, and to oil and gas leasing operations**
3 **involving activities not governed under the Alaska Land Act; and providing for an**
4 **effective date."**

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

6 * **Section 1.** AS 31.05.030(j) is amended to read:
7 (j) For **exploration and development operations involving shallow natural**
8 **gas, the commission**
9 **(1) may not**
10 **(A) issue a permit to drill under this chapter if the well**
11 **would be used to produce gas from an aquifer that serves as a source of**
12 **water for human consumption or agricultural purposes unless the**
13 **commission finds that the well will not adversely affect the aquifer as a**
14 **source of water for human consumption or agricultural purposes; or**

1 (B) allow injection of produced water except at depths
2 below known sources of water for human consumption or agricultural
3 purposes;
4 (2) shall
5 (A) regulate hydraulic fracturing in shallow natural gas
6 wells to assure protection of drinking water quality;
7 (B) regulate the disposal of wastes produced from the
8 operations unless the disposal is otherwise subject to regulation by the
9 Department of Environmental Conservation or the Environmental
10 Protection Agency; and
11 (C) for the purposes of AS 46.04.030(b), [THE
12 COMMISSION SHALL] determine whether a well drilled for shallow natural
13 gas may penetrate a formation capable of flowing oil and, if so, whether the
14 volume of oil encountered will be of such quantities that an oil discharge
15 prevention and contingency plan will be required.
16 * Sec. 2. AS 31.05 is amended by adding a new section to read:
17 **Sec. 31.05.098. Public forum process concerning shallow natural gas.** (a)
18 For the purpose of resolving public health, safety, welfare, or environmental
19 complaints about potential or actual shallow natural gas exploration and development
20 operations, the commission shall, by regulation, develop and implement a public
21 forum process by which to achieve informal resolution of the complaints within 60
22 days of the filing of the complaints. The commission may provide that, if resolution
23 of the complaints is not achieved through the informal process established by
24 regulation, a party may petition the commission to take action on the complaint under
25 AS 31.05.060 - 31.05.085 as to a matter that falls within the commission's powers and
26 duties under AS 31.05.030. For any other matter, the commission shall refer the
27 complaint to other federal, state, or local agencies, as appropriate.
28 (b) The commission's regulations adopted under this section shall provide for
29 scheduling a public forum at a location reasonably proximate to the land that is the
30 subject of or that is affected by the complaint and reasonable public notice and
31 opportunity to be heard. If the public forum is not personally convened and conducted

1 by a majority of the members of the commission, the person conducting the forum
2 shall prepare and submit to the commission a report of the forum proceedings. The
3 report prepared under this subsection is a public record. The commission may modify
4 a rule or condition in a plan of development or operation for a field or pool to address
5 an issue identified by the commission or the report.
6 * **Sec. 3.** AS 31.05.170(14) is amended to read:
7 (14) "shallow natural gas" means coal bed methane, natural gas drilled
8 for under a lease authorized by AS 38.05.177, or natural gas drilled for in a well the
9 true vertical depth of which is **3,000** [4,000] feet or less;
10 * **Sec. 4.** AS 34 is amended by adding a new chapter to read:
11 **Chapter 90. Mineral Interests.**
12 **Sec. 34.90.010. Notice of operations.** (a) Except for activities governed by
13 AS 38.05, the developer shall give the surface owner written notice of the oil and gas
14 operations contemplated at least 20 days before commencement of operations. The
15 requirement of written notice may be waived by the parties.
16 (b) Unless notice has been waived by the parties, the developer shall give
17 notice to the record surface owner at the owner's address as shown by the records of
18 the state recorder at the time notice is given. The notice must sufficiently disclose the
19 plan of work and operations to enable the surface owner to evaluate the effect of oil
20 and gas operations on the surface owner's use of the property.
21 (c) If a developer fails to give notice as provided in this section, the surface
22 owner may seek any appropriate relief in the court of proper jurisdiction and may
23 receive actual damages.
24 **Sec. 34.90.020. Damages and posting of bond.** A developer may not
25 exercise a right of entry until the developer makes provision to pay the surface owner
26 full payment for all damages sustained by the surface owner by reason of entering
27 upon the land. If the surface owner, for any cause, refuses or neglects to settle the
28 damages, the developer may enter upon the land after posting a surety bond
29 determined by the Department of Natural Resources using a procedure similar to the
30 procedure used to administer AS 38.05.130, including notice and an opportunity to be
31 heard. The bond must be sufficient as to form, amount, and security to secure to the

1 surface owner payment for damages. The surface owner may institute legal
2 proceedings in a court where the land is located as may be necessary to determine the
3 damages that the surface owner may suffer.
4 **Sec. 34.90.095. Definitions.** In this chapter,
5 (1) "developer" means the person who acquires the mineral estate or
6 lease for the purpose of extracting or using the minerals;
7 (2) "mineral estate" means an estate in or ownership of all or part of
8 the minerals underlying a specific tract of land;
9 (3) "minerals" includes oil and gas;
10 (4) "oil and gas operations" means an activity for which a permit is
11 required by AS 31.05.090 that requires entry upon the surface estate;
12 (5) "surface estate" means an estate in or ownership of the surface of a
13 particular tract of land;
14 (6) "surface owner" means any person who holds record title to the
15 surface of the land as an owner.
16 *** Sec. 5.** AS 38.05.177(c) is amended to read:
17 (c) The director shall give notice under AS 38.05.945 of receipt of the lease
18 application**,** [AND] call for comments from the public**, and execute a lease as**
19 **follows:**
20 **(1) the** [. THE] director's call for public comments must provide
21 opportunity for public comment for a period of not less than 60 days**;**
22 **(2) if** [. IF], after review of information received during the public
23 comment period **and consideration of public comments received**, the director
24 determines that the discovery of a local source of natural gas would benefit the
25 residents of an area, the director **may** [SHALL] execute a lease for the area described
26 in (b) of this section**; the** [. THE] director **may** [SHALL] execute the lease **only** after
27 completion of a title search, the close of the public comment period, and, if review is
28 required under AS 46.40, after the final consistency determination is made under
29 AS 46.40**;**
30 **(3) a** [. A] lease entered into under this subsection gives the lessee the
31 exclusive right to explore for, develop, and produce, for a term of three years, natural

1 gas on the state land described in the lease; the right to explore for, develop, and
2 produce is limited to gas from a field if a part of the field is within 3,000 feet of the
3 surface.
4 * Sec. 6. AS 38.05.177(f) is amended to read: Repealed in 531
5 (f) A shallow gas lease must provide for
6 (1) payment to the state of annual rent in the amount of $1 an [PER]
7 acre; the [. THE] rent is due and payable on the date determined in the lease; if [. IF]
8 the lease payment is not received by the due date, the director shall mail the lessee one
9 written notice, certified return receipt requested; if [. IF] the lessee fails to pay the
10 rent within 30 days after [OF] receipt of the notice, the director shall terminate the
11 lease;
12 **(2) a water well testing requirement for each lease that contains**
13 **one or more wells that serve as a source of potable water; the testing requirement**
14 **of this paragraph applies to each water well that is located within a square that**
15 **bounds a circle with a radius of one-quarter mile around the drill site and the**
16 **sides of which are parallel or perpendicular to the four cardinal directions and**
17 **are tangent to the circle; under this paragraph, the lessee shall, before**
18 **commencement of production testing and production activities on the lease,**
19 **(A) test each well for dissolved contents, including methane,**
20 **and water flow; and**
21 **(B) provide a copy of the test results to the land owner, who**
22 **shall maintain the test record;**
23 **(3) appropriate setbacks governing the placement by the lessee or**
24 **the lessee's agent of compressor stations on the lease; setbacks developed under**
25 **this paragraph must be determined with reference to the population density of**
26 **the parcel or parcels subject to the lease, the size of the owner's parcels, and the**
27 **general character of the land subject to the lease; the terms of the lease must**
28 **require the lessee or lessee's agent to negotiate to meet the requirement of this**
29 **paragraph, but the owner may not unreasonably withhold agreement;**
30 **(4) reasonable and appropriate measures to mitigate the noise of**
31 **compressors, engines, and other equipment operated by the lessee or the lessee's**

agent of compressor stations on the lease; noise mitigation measures developed under this paragraph must be determined with reference to the population density of the parcel or parcels subject to the lease, the size of the owner's parcels, and the general character of the land subject to the lease; the terms of the lease shall require the lessee or lessee's agent to negotiate to meet the requirement of this paragraph, but the owner may not unreasonably withhold agreement;

(5) action at the time of the termination or abandonment of the lease to require the lessee or the lessee's agent to restore, reclaim, or abate the adverse effects of the exploration and development operations using natural revegetation or reseeding using endemic plant species; the lease may require the lessee or the lessee's agent to consult with the director of the division of agriculture.

* Sec. 7. AS 38.05.177(k) is amended to read:

(k) The commissioner [MAY]

(1) **may** adopt only the regulations that are reasonable and that are necessary to implement, interpret, or make specific the provisions of this section or to establish procedures to govern application of the provisions of this section; [AND]

(2) **may,** in addition to any requirement for a bond under AS 38.05.130, establish by regulation a form and amount for statewide, areawide, unit-wide, or per-lease bonds sufficient to secure damages that may be caused by the activities of a lessee, or the lessee's successors or assigns, related to a shallow natural gas lease entered into under this section; if the commissioner acts under this paragraph, the commissioner

(A) shall require a person applying for a lease under this section to post the bond as a condition for the director's executing the lease;

(B) may not require a bond posted under this paragraph from a person applying for a lease if the person has already posted a bond covering the person's statewide oil and gas leasing activities in an amount of at least $500,000**;**

(3) shall, if a bond is sought under AS 38.05.130, before the

1 <u>amount of the surety bond to be posted is determined by the director, require as</u>
2 <u>a condition for issuing the bond that the director, after notice and an opportunity</u>
3 <u>to be heard, determine that, to exercise rights under the reservation as set out in</u>
4 <u>AS 38.05.125 and the lease, the lessee has demonstrated that access and entry</u>
5 <u>upon the land of the owner is reasonably necessary or convenient to render</u>
6 <u>beneficial and efficient the complete enjoyment of the property and the reserved</u>
7 <u>rights; the lessee has the burden of demonstrating compliance with the</u>
8 <u>requirement of this paragraph; and</u>
9 <u>(4) shall require the lessee to provide written advance notice to the</u>
10 <u>owner of initial entry onto the property of the owner at least 30 days before</u>
11 <u>initial entry</u>.
12 *** Sec. 8.** AS 38.05.177 is amended by adding new subsections to read:
13 (p) Under AS 38.05.130 as applicable to shallow natural gas exploration and
14 development that is authorized under this section, if
15 (1) the owner and the lessee enter into an agreement by which the
16 lessee makes provision to pay the owner of the land for all damages, the parties shall
17 incorporate in the agreement the provisions described in (f) of this section that are
18 negotiated;
19 (2) the owner and the lessee do not enter into an agreement by which
20 the lessee makes provision to pay the owner of the land for all damages, and the lessee
21 proceeds to request the director to set the amount of a surety bond, the owner may, in
22 conjunction with notice and the opportunity to be heard, provide the director with the
23 owner's comments about the appropriate location of wells, roads, and other
24 improvements that may be made by the lessee or the lessee's agent to secure the
25 lessee's rights under the lease.
26 (q) In (f), (k)(3), and (p) of this section, "owner" means the property owner
27 whose property is subject to the reservation described in AS 38.05.125(a).
28 *** Sec. 9.** AS 38.05.945(a) is amended to read:
29 (a) This section establishes the requirements for notice given by the
30 department for the following actions:
31 (1) classification or reclassification of state land under AS 38.05.300

1 and the closing of land to mineral leasing or entry under AS 38.05.185;
2 (2) zoning of land under applicable law;
3 (3) issuance of a
4 (A) preliminary written finding under AS 38.05.035(e)(5)(A)
5 regarding the sale, lease, or disposal of an interest in state land or resources for
6 oil and gas subject to AS 38.05.180(b);
7 (B) [REPEALED
8 (C)] written finding for the sale, lease, or disposal of an interest
9 in state land or resources under AS 38.05.035(e)(6), except an oil or gas lease
10 sale described in AS 38.05.035(e)(6)(F) for which the director must provide
11 opportunity for public comment under the provisions of that subparagraph;
12 (4) a competitive disposal of an interest in state land or resources after
13 final decision under AS 38.05.035(e);
14 (5) a preliminary finding under AS 38.05.035(e) concerning sites for
15 aquatic farms and related hatcheries;
16 (6) a decision under AS 38.05.132 - 38.05.134 regarding the sale,
17 lease, or disposal of an interest in state land or resources**;**
18 **(7) a notice of receipt of a lease application and call for comments**
19 **under AS 38.05.177(c)**.
20 * **Sec. 10.** AS 38.05.945(b) is amended to read:
21 (b) When notice is required to be given under this section,
22 (1) the notice must contain sufficient information in commonly
23 understood terms to inform the public of the nature of the action and the opportunity
24 of the public to comment on it;
25 (2) if the notice is of a preliminary written finding described in
26 (a)(3)(A) of this section **or a call for comments under (a)(7) of this section**, the
27 department shall give notice at the beginning of the public comment period for the
28 preliminary written finding **or call for comments, as appropriate**, notifying the
29 public of the right to submit comments; the department shall give notice by
30 (A) publication of a legal notice in newspapers of statewide
31 circulation and in newspapers of general circulation in the vicinity of the

1 proposed action at least once a week for two consecutive weeks;
2 (B) publication of a notice in display advertising form in the
3 newspapers described in (A) of this paragraph at least once a week for two
4 consecutive weeks;
5 (C) public service announcements on the electronic media
6 serving the area to be affected by the proposed action; and
7 (D) one or more of the following methods:
8 (i) posting in a conspicuous location in the vicinity of
9 the action;
10 (ii) notification of parties known or likely to be affected
11 by the action; or
12 (iii) another method calculated to reach affected parties;
13 (3) if the notice is of an action described in (a) of this section, other
14 than notice of an action under (a)(3)(A) <u>**or (a)(7)**</u> of this section, the department shall
15 give notice at least 30 days before the action by publication in newspapers of
16 statewide circulation and in newspapers of general circulation in the vicinity of the
17 proposed action and one or more of the following methods:
18 (A) publication through public service announcements on the
19 electronic media serving the area affected by the action;
20 (B) posting in a conspicuous location in the vicinity of the
21 action;
22 (C) notification of parties known or likely to be affected by the
23 action; or
24 (D) another method calculated to reach affected persons.
25 * **Sec. 11.** AS 46.03.100(f) is amended to read:
26 (f) This section does not apply to discharges of solid or liquid waste material
27 or water discharges from the following activities if the discharge is incidental to the
28 activity and the activity does not produce a discharge from a point source, as that term
29 is defined in regulations adopted under this chapter, directly into any surface water of
30 the state:
31 (1) mineral drilling, trenching, ditching, and similar activities;

1 (2) landscaping;

2 (3) water well drilling **and** [,] geophysical drilling [, OR COAL BED
3 METHANE DRILLING OR OTHER NATURAL GAS DRILLING TO RECOVER
4 GAS FROM A FIELD IF A PART OF THE FIELD IS WITHIN 3,000 FEET OF THE
5 SURFACE]; or

6 (4) drilling, ditching, trenching, and similar activities associated with
7 facility construction and maintenance or with road or other transportation facility
8 construction and maintenance; however, the exemption provided by this paragraph
9 does not relieve a person from obtaining a permit under this section if

10 (A) the drilling, ditching, trenching, or similar activity will
11 involve the removal of the groundwater, stormwater, or wastewater runoff that
12 has accumulated and is present at an excavation site for facility, road, or other
13 transportation construction or maintenance; and

14 (B) a permit is otherwise required by this section.

15 * **Sec. 12.** AS 46.04.030(b) is amended to read:

16 (b) A person may not cause or permit the operation of a pipeline or an
17 exploration or production facility in the state unless an oil discharge prevention and
18 contingency plan for the pipeline or facility has been approved by the department and
19 the person is in compliance with the plan. This subsection does not apply to an
20 exploration or production facility used solely to explore for or to develop or produce
21 shallow natural gas resources, except that this exemption does not apply if the Alaska
22 Oil and Gas Conservation Commission determines under **AS 31.05.030(j)(2)(C)**
23 [AS 31.05.030(j)] that

24 (1) a well drilled for shallow natural gas may penetrate a formation
25 capable of flowing oil; and

26 (2) the volume of oil encountered will be of such quantities that a
27 contingency plan will be required.

28 * **Sec. 13.** AS 46.04.900(25) is amended to read:

29 (25) "shallow natural gas" means coal bed methane, natural gas drilled
30 for under a lease authorized by AS 38.05.177, or natural gas drilled for in a well the
31 true vertical depth of which is **3,000** [4,000] feet or less;

1 * **Sec. 14.** The uncodified law of the State of Alaska added by sec. 1, ch. 45, SLA 2003, is
2 amended to read:
3 LEGISLATIVE FINDINGS. The legislature finds that
4 (1) the development of shallow natural gas resources is in the best
5 interests of the State of Alaska;
6 (2) shallow natural gas is abundant and widespread in Alaska and
7 bears the promise of providing Alaskans, particularly Alaskans living in rural areas,
8 with an inexpensive and clean source of energy if those resources can be economically
9 developed;
10 (3) the development of shallow natural gas poses significantly fewer
11 risks and creates substantially less impact to the environment than traditional deep oil
12 and gas projects, which have served as the model for oil and gas industry and
13 environmental regulations to date in Alaska;
14 (4) the regulatory requirements developed and applied to traditional
15 deep oil and gas projects in Alaska are ill-suited and unduly onerous when applied to
16 shallow natural gas projects, threatening the economic viability of otherwise desirable
17 exploration and development projects;
18 (5) there is an immediate state and national need for the development
19 of clean and economical unconventional energy sources, such as shallow natural gas
20 resources;
21 (6) reform of existing laws and regulations is needed to remove
22 unnecessary regulatory burdens on the private sector to foster and encourage the
23 development in Alaska of these necessary resources;
24 (7) the legislature is acting in the interest of promoting the active
25 development of such resources, while ensuring that suitable measures are taken to
26 protect human health and safety and the natural environment,
27 (A) to remove impediments to the responsible development of
28 shallow natural gas; **and**
29 (B) to provide the proper state agencies with clear authority and
30 discretion to adopt regulatory practices appropriate to shallow natural gas
31 exploration and development projects, in recognition of the lower risks posed

1 by such projects to human health and safety and the natural environment [;
2 AND
3 (C) TO RESERVE ALL RIGHTS AND POWERS NOT
4 PREEMPTED BY FEDERAL LAW AND REGULATION IN ORDER TO
5 ASSERT STATE PRIMACY OVER THE REGULATION OF SHALLOW
6 NATURAL GAS].
7 *** Sec. 15.** AS 31.05.125 and AS 38.05.177(n) are repealed.
8 *** Sec. 16.** This Act takes effect July 1, 2004.

LEGAL SERVICES

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

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

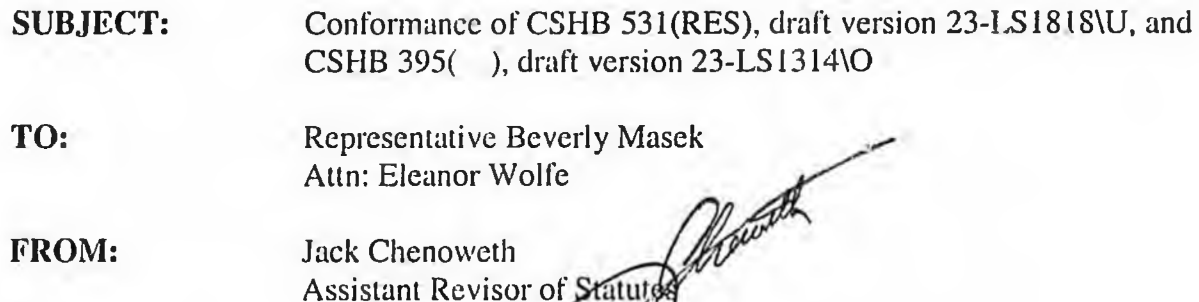
State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM — April 15, 2004

SUBJECT: Conformance of CSHB 531(RES), draft version 23-LS1818\U, and CSHB 395( ), draft version 23-LS1314\O

TO: Representative Beverly Masek
Attn: Eleanor Wolfe

FROM: Jack Chenoweth
Assistant Revisor of Statutes



For your 3:00 p.m. work session --

It seems to me that the work group should be prepared to decide whether both vehicles should be recommended for full committee report and referral or whether all changes recommended should be incorporated into just one bill.

1. If one bill

-- decide whether to retain the current usage and references to "shallow natural gas" [CSHB 395( )] or drop that term and substitute "nonconventional gas" [CSHB 531(Res)];

-- decide whether shallow natural gas/nonconventional gas leasing should occur

-- generally under the current procedures outlined in AS 38.05.177 [CSHB 395( )] with amendments to secs. 38.05.177(c), (f), and (k), addition of secs. 38.05.177(p) and (q), and repeal of sec. 38.05.177(n); or

-- as suggested by the Department of Natural Resources, in generally the same manner as conventional oil and gas leasing under AS 38.05.180 [CSHB 531(Res)], in which case a small number of provisions of existing AS 38.05.177 are retained and modified to meet specific circumstances, while the preponderance of those subsections in AS 38.05.177 are repealed.

2. If two bills, the same questions posed above should be addressed: whether to go with one term of reference ("shallow natural gas") or the other ("nonconventional gas"), and, more to the point, whether, and to what extent, shallow natural gas/nonconventional gas leasing should operate within the context of conventional oil and gas leasing under AS 38.05.180 or whether they should stand apart under AS 38.05.177 (largely or entirely separate from conventional oil and gas leasing). At that point, I guess the question is what provisions should be retained as to SNG/nonconventional leasing and whether the

retention or amendment of provisions (or deletion of inapplicable or contrary provisions) should be assigned to one bill or the other as the vehicle by which to accomplish your purpose.

Here are some specifics from my e-mail of yesterday --

AS 31.05.030(j) -- Amended by sec. 1 of CSHB 395( ) and by sec. 4 of CSHB 531(Res): The content of the two amendments is not inconsistent, can be harmonized, and would be harmonized in a way that retains reference to either "shallow natural gas" or "nonconventional gas" depending on the version of the bill that has the later effective date takes precedence. ***As to this material, there is nothing that the work group needs to do.***

AS 31.05.125 -- Repealed by sec. 15 of CSHB 395( ) and amended by sec. 6 of CSHB 531(Res): This is the "waiver of local government land use authority" provision as applicable to the oversight of shallow natural gas/nonconventional gas by the Alaska Oil and Gas Conservation Commission. If both bills become law with the current language, the repeal of the section will trump the amendment of the section. If you do not want that to occur, reference to AS 31.05.125 should be deleted from sec. 15 of CSHB 395( ). Then, if both provisions remain, they can be harmonized and would be harmonized in a way that retains reference to either "shallow natural gas" or "nonconventional gas" depending on the version of the bill that has the later effective date takes precedence. ***The work group should at least determine whether the repeal made in sec. 15 of CSHB 395( ) should be given effect.***

AS 31.05.170(14) -- This is a definition of the term "shallow natural gas" for use in the chapter under which it is subject to regulation by the AOGCC. The provision is retained and amended by sec. 3 of CSHB 395( ) and repealed (as no longer necessary) by sec. 58 of CSHB 531(Res) (and replaced by reference to "nonconventional gas" in bill section 7). ***The disposition of this item will turn on the work group's decision as to terminology and as to whether SNG will operate as part of, or separate and apart from, conventional oil and gas leasing.***

AS 38.05.177(c), (f), and (k) -- These provisions are amended by secs. 5, 6, and 7 of CSHB 395( ) but are repealed by sec. 58 of CSHB 531(Res). If both bills become law with the current language, the repeal of the subsections will trump the amendment of the section. ***The disposition of this material will turn on the work group's decision as to terminology and as to whether SNG will operate as part of, or separate and apart from, conventional oil and gas leasing, for it is possible to carry over the concepts set out in these three subsections into nonconventional leasing provisions under AS 38.05.180.***

AS 38.05.177(n) -- This is the "waiver of local government land use authority" as applicable to the shallow natural gas leasing program set out in AS 38.05.177. CSHB 395( ) repeals it (bill section 15), while CSHB 531(Res) is silent and, by that silence, the provision continues to operate. If both bills become law with the current

language, the repeal of the section will trump the amendment of the section. If you do not want that to occur, reference to AS 38.05.177(n) should be deleted from sec. 15 of CSHB 395( ). ***As with AS 31.05.125 discussed above, the work group should at least determine whether the repeal of AS 38.05.177(n) made in sec. 15 of CSHB 395( ) should be given effect.***

AS 38.05.177(p) and (q) -- These subsections are added by sec. 8 of CSHB 395 ( ). Roughly comparable concepts set out in proposed AS 38.05.177(p) appear in CSHB 531(Res) in proposed AS 38.05.180(ff)(3), added by bill section 42 (at page 40, lines 8 - 19). If both bills become law using current language, subsection (p) could still operate, but there may be actual conflict with provisions of AS 38.05.180(ff)(3), and subsection (q) could operate but only to supply a definition of "owner" for (p) (references in (f) and (k)(3) would be unnecessary because these provisions are repealed in the other measure. ***Again the disposition of this material will turn on the work group's decision as to terminology and as to whether SNG will operate as part of, or separate and apart from, conventional oil and gas leasing, for it is possible to carry over the concepts set out in these three subsections into nonconventional leasing provisions under AS 38.05.180.***

AS 38.05.945(a) -- Amended by sec. 9, CSHB 395( ) and by sec. 45, CSHB 531(Res). This is a modification of the general notice provision. If both bills become law with this language, the provisions can be harmonized. ***The disposition of this item will turn on the work group's decision as to terminology and as to whether SNG will operate as part of, or separate and apart from, conventional oil and gas leasing.***

AS 46.03.100(f) --Amended by sec. 10, CSHB 395( ) and by sec. 52, CSHB 531(Res). This amends an exclusion to an exception to the waste material/water discharge permit requirements and reflects the terms used ("SNG"/ "nonconventional gas") used in the respective bills. If both bills become law with this language, the provisions can be harmonized. ***The disposition of this item will turn on the work group's decision as to terminology.***

AS 46.04.030(b) -- In sec. 12, CSHB 395( ), this is a conforming amendment; in sec. 53, CSHB 531(Res), this makes a change based on the shift from "shallow natural gas" to "nonconventional gas." If both bills become law with this language, the provisions can be harmonized. ***Again, the disposition of this item will turn on the work group's decision as to terminology.***

AS 46.04.900(25) -- This is a definition of the term "shallow natural gas" for use in the chapter under which it is subject to regulation by the Department of Environmental Conservation. The provision is retained and amended by sec. 13 of CSHB 395( ) and repealed (as no longer necessary) by sec. 58 of CSHB 531(Res) (and replaced by reference to "nonconventional gas" in bill section 55). ***The disposition of this item will turn on the work group's decision as to terminology and as to whether SNG will operate as part of, or separate and apart from, conventional oil and gas leasing.***

*

There are a couple of issues in conflict that I would describe as "at the margin," including, notably, in CSHB 395( ), whether references to the maximum depth at which gas recovery should be managed as shallow natural gas should be retained at "4,000 feet" or amended to read "3,000 feet" [CSHB 395( ), bill sections 3 and 13] or, whether the approach used in CSHB 531(Res) that makes no distinction as to depth of recovery but only as to the nature of the product recoverable. Depending on how the work group decides that issue, there may be other provisions (not included in either version) that would deserve to be changed by conforming amendments.

*

The above outlines just the points of apparent conflict between the two versions. There are substantive provisions, in one bill version or the other, that are not in conflict with the current text of the second bill and that the work group should deliberate and decide whether to retain, amend, or delete.

JBC:lmb
04-107.lmb

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB395-DNR-O&G-02-04-04
() Publish Date:

Revision Date/Time (Note if correction):
Title: Shallow Natural Gas
Sponsor: Harris, Gatto, Stoltze, Seaton
Requester: House Oil and Gas

Dept. Affected: Natural Resources
RDU: Resource Development
Component: Oil and Gas Development
Component No. 439

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual	9.4	9.4	9.4	9.4	9.4	9.4
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	9.4	9.4	9.4	9.4	9.4	9.4
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )	**(Indeterminate Amount)**					

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	9.4	9.4	9.4	9.4	9.4	9.4
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type–Do not abbreviate)						
TOTAL	9.4	9.4	9.4	9.4	9.4	9.4

Estimate of any current year (FY2004) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal: [ ]

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

HB 395 would make a number of changes to the state's shallow natural gas leasing program including additional public notice requirements; required surface use fees; setbacks, noise mitigation, and reclamation requirements; and a special provision for damages.

Under Section 4 of the bill, additional public notification beyond that already carried out by DNR would be required. Specifically, this would require DNR to publish notice in papers of general circulation in the affected area two additional times beyond what is currently done when giving notice of a shallow natural gas application and calling for public comments. In addition, the bill would require DNR to publish notice of intent to award the lease at least three times in at least two papers of general circulation in the area of the proposed action at intervals of not less than five days between publications.

Prepared by: Mark D. Myers — Phone 269-8800
Division: Oil and Gas — Date/Time 2/4/04
Approved by: Thomas Irwin, Commissioner — Date 2/4/04
Agency: Natural Resources

(Revised 9/2003 OMB)

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

BILL NO. HB395-DNR-O&G-02-04-04

ANALYSIS CONTINUATION

Total number of additional publications of notice: 5 x 2 papers.

The Anchorage Daily News has general circulation in all areas of the state. The cost for a legal notice is $404 per day (weekday).
5 x $404 = $2020

Publication cost in a local paper is estimated at $225 (Frontiersman was used as an estimate) per day. 5 x $225 = $1125

Combined total: $3145

Last year, DNR processed three groups of applications in calendar year 2003 (DNR tries to group applications to cut down on noticing costs). 3 x $3145 = $9435

** Indeterminate Negative Amount: The wording in Section 8 may make the state liable for any damages that may occur to the surface owners property. If this is the case, it is impossible at this time to determine the negative fiscal impact to the state.

A MEMORANDUM OF AGREEMENT

Between

The United States
Environmental Protection Agency

And

BJ Services Company,
Halliburton Energy Services, Inc., and
Schlumberger Technology Corporation

Elimination of Diesel Fuel in Hydraulic Fracturing Fluids Injected into Underground Sources of Drinking Water During Hydraulic Fracturing of Coalbed Methane Wells

12 December 2003

II COMMON AGREEMENTS AND PRINCIPLES

A. The Companies and EPA acknowledge that only technically feasible and cost-effective actions to provide alternatives for diesel fuel will be sought. The determination of what is technically feasible and cost-effective will vary and it is at the discretion of each Company to make that determination.

B. The Companies and EPA will exercise good faith in fulfilling the obligations of this Memorandum of Agreement (MOA).

C. Nothing in this agreement constrains EPA or the Companies from taking actions relating to hydraulic fracturing that are authorized or required by law. Nothing in this agreement should be understood as an EPA determination that use by the Companies of any particular replacement for diesel fuel is authorized under the Safe Drinking Water Act (SDWA) or EPA's Underground Injection Control (UIC) Regulations, or that the elimination of diesel fuel or use of any replacement fluid constitutes or confers any immunity or defense in an action to enforce the SDWA or EPA's UIC regulations. Nothing in this Agreement shall, in any way, be considered a waiver of the Companies' right to challenge any subsequent regulations or limitations on the use of hydraulic fracturing or its components by any state or Federal agencies.

D. All commitments made by EPA in this MOA are subject to the availability of appropriated funds and Agency budget priorities. Nothing in this MOA, in and of itself, obligates EPA to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or other financial obligations. Any endeavor involving reimbursement or contribution of funds between EPA and the Companies will be handled in accordance with applicable laws, regulations, and procedures, and will be subject to separate agreements that will be effected in writing by representatives of the Companies and EPA, as appropriate.

E. EPA and the Companies will bear their own costs of carrying out this agreement. The Companies agree that activities undertaken in connection with this MOA are not intended to provide services to the Federal government, and they agree not to make a claim for compensation for services performed for activities undertaken in furtherance of this MOA to EPA or any other Federal agency.

F. Any promotional material that any Company develops may advise the public of the existence of this MOA and its terms, but must not imply that EPA endorses the purchase or sale of products and services provided by any Company.

G. This MOA does not create any right or benefit, substantive or procedural, enforceable by law or equity against the Companies or EPA, their officers or employees, or any other person. Nothing herein shall be deemed to create any requirement under any existing law or regulation. This MOA does not direct or apply to any person outside the Companies and EPA.

III. EPA ACTIONS

A. To the extent consistent with Agency authorities and policies governing recognition awards, EPA agrees to consider providing the Companies with recognition for their achievements in replacing diesel fuel in fracturing fluids injected into USDWs for CBM production and for their public service in protecting the environment. In addition, EPA agrees to provide appropriate information to the public, other Federal agencies and Congress, regarding actions taken by the Companies under this MOA. EPA agrees to obtain the Companies' approval on any specific language intended for public distribution that discusses the Companies' participation in this MOA and agrees to notify the Companies sufficiently in advance of EPA's intention to publicly use the Companies' name or release information, including press releases, concerning the Companies' participation in this MOA.

B. EPA agrees to contact appropriate individuals representing states, industry, and the Department of Energy to inform them of progress in implementing the MOA and to solicit their cooperation, as appropriate, in implementation of the MOA.

C. EPA agrees to issue a final version of the draft report entitled *Evaluation of Impacts to Underground Sources of Drinking Water by Hydraulic Fracturing of Coalbed Methane Reservoirs* as soon as reasonably possible.

D. The parties agree that nothing in this MOA is intended to affect, in any way, the existing criteria and process for identifying exempted aquifers under 40 C.F.R. Parts 144 and 146.

E. EPA agrees to consider other measures as appropriate to aid implementation of the MOA, including measures to facilitate efforts undertaken by the Companies pursuant to this MOA.

IV. THE COMPANIES' ACTIONS

A. The Companies agree to eliminate diesel fuel in hydraulic fracturing fluids injected into CBM production wells in USDWs within 30 days of signing this agreement. If necessary, the Companies may use replacement components for hydraulic fracturing fluids that will not endanger USDWs.

B. The Companies agree to notify the Assistant Administrator for EPA's Office of Water within 30 days after any decision to re-institute the use of diesel fuel additives in hydraulic fracturing fluids injected into USDWs for CBM production.

C. The Companies and EPA may, upon unanimous consent of the signatories, include additional provisions in, or make modifications to, this MOA. Such additions or modifications must contribute to the goal of preventing the endangerment of USDWs. Nothing herein shall be construed as requiring the adoption of any such additional provisions or modifications.

V. DISPUTE RESOLUTION AND TERMINATION OF AGREEMENT

A. Any Company or EPA may terminate its participation in this MOA by providing written notice to the other signatories. Such termination as to that Company (or, if EPA terminates the MOA, as to all) will be effective 30 days after the receipt of written notice and will result in no penalties or continuing obligations by the terminating Company (or, if EPA terminates the MOA, any signatory). If EPA or any Company terminates the MOA, EPA and/or that Company will refrain from representing that the Company is continuing to cooperate with EPA on replacing diesel fuel in hydraulic fracturing fluids injected in USDWs for CBM production, provided that they may continue to make reference to activities undertaken through the date of this termination. If its participation in this MOA is terminated by any Company, the MOA shall have no further force and effect for the terminating Company, and the terminating Company shall have no further obligation under the MOA.

NORTHERN PLAINS RESOURCE COUNCIL, Plaintiff-Appellant, v. FIDELITY EXPLORATION AND DEVELOPMENT COMPANY, Defendant-Appellee.

No. 02-35836

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

325 F.3d 1155; 2003 U.S. App. LEXIS 6852; 56 ERC (BNA) 1289; 2003 Cal. Daily Op. Service 3072; 2003 Daily Journal DAR 3930

March 4, 2003, Argued and Submitted, Seattle, Washington
April 10, 2003, Filed

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by *Fid. Exploration Co. v. N. Plains Res. Council, 2003 U.S. LEXIS 7730 (U.S., Oct. 20, 2003)*

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of Montana. D.C. No. CV-00-00105-SEH. Sam E. Haddon, District Judge, Presiding.

DISPOSITION: Reversed and remanded.

LexisNexis (TM) HEADNOTES- Core Concepts:

COUNSEL: Jack R. Tuholske, Missoula, Montana, for Appellant.

Ronald Waterman and Jon Metropoulos, Gough, Shanahan, Johnson & Waterman, Helena, Montana, for the appellee.

John B. Arum and Steven H. Chestnut, Ziontz, Chestnut, Varnell, Berley & Slonim, Seattle, Washington, for amicus curiae Northern Cheyenne Tribe.

Elizabeth A. Brennan, Rossbach Brennan, Missoula, Montana, for amicus curiae Tongue & Yellowstone Irrigation District.

Brenda Lindlief Hall, Reynolds, Motl & Sherwood, for amicus curiae Tongue River Water Users' Association.

Michael S. Kakuk and Palmer Hoovestal, Hoovestal, Kakuk & Fanning, Helena, Montana, for amicus curiae Western Environmental Trade Association.

JUDGES: Before: Stephen Reinhardt, William A. Fletcher, and Ronald M. Gould, Circuit Judges. Opinion by Judge Gould.

OPINIONBY: Ronald M. Gould

OPINION: [*1157] GOULD, Circuit Judge:

Defendant-Appellee **Fidelity Exploration & Development Company** ("Fidelity") extracts methane gas for commercial sale from coal seams located deep underground in the Powder River Basin, Montana. [**2] In the process of extracting coal bed methane (CBM), Fidelity pumps groundwater to the surface and discharges this water into the Tongue River. The water discharged is "salty," contains several chemical constituents identified as pollutants by Environmental Protection Agency (EPA) regulations, has characteristics that may degrade soil, and is unfit for irrigation. The Montana Department of Environmental Quality (MDEQ) advised Fidelity that no permit was required to discharge the coal bed methane groundwater because Montana state law exempts unaltered groundwater from state water quality requirements. Plaintiff-Appellant Northern Plains Resource Council (NPRC) filed a citizen suit under the federal *Clean Water Act (CWA)* in the District Court for the District of Montana, alleging that Fidelity unlawfully discharged pollutants into navigable waters of the United States. NPRC appeals the district court's grant of summary judgment to Fidelity.

On appeal, we decide (1) whether the CBM discharge water is a "pollutant" within the meaning of the CWA, and (2) whether Montana state law can exempt Fidelity from obtaining National Pollution Discharge Elimination System (NPDES) permits under the [**3] CWA. We hold that the unaltered groundwater produced in association with methane gas extraction, and discharged into the river, is a pollutant within the meaning of the CWA. We also hold that states cannot create exemptions [*1158] to the CWA, whether or not the EPA has delegated permitting authority to the state.

In 1997, Fidelity began exploring and developing natural gas from coal seams in the Powder River Basin, Montana. The coal reserves in Powder River Basin are several hundred feet below the ground and contain reservoirs of methane gas. The methane is trapped by groundwater that fills the interstitial areas of the coal reserves. To extract the methane, Fidelity drills a conventional well into the coal seam and pumps the trapped water to the surface to reduce water pressure. This pumping releases the trapped methane, which is captured at the surface and piped to market. Fidelity does not add chemicals to the pumped groundwater (CBM water). Fidelity discharges the unaltered CBM water into the Tongue River. Because CBM water comes from deep underground aquifers, it would not reach the Tongue River were it not for Fidelity's extraction process.

Though Fidelity does not add any [**4] chemicals to the CBM water before discharge, the water in its natural state contains suspended solids, calcium, magnesium, sodium, potassium, bicarbonate, carbonate, sulfate, chloride, and fluoride. The CBM water also contains measurable quantities of the following metals: aluminum, arsenic, barium, beryllium, boron, cop-per, lead, iron, manganese, strontium, and radium.

The CBM water is "salty," a characteristic measured by total dissolved solids or specific conductance. The mean total dissolved solids for the Tongue River is 475 mg/l as compared to 1,400 mg/l for the CBM water. Related to the "saltiness" of the CBM water is the water's high Sodium Absorption Ratio (SAR). SAR measures the ratio of sodium to calcium and magnesium in the water. The SAR of the CBM water discharged by Fidelity is on average 40 to 60 times greater than the background SAR of the Tongue River. For all these reasons, the CBM water is distinctly different from the Tongue River water to which it is added.

Farmers who use water from the Tongue River for irrigation are concerned with the "saltiness" and high SAR of CBM water because of the potential hazards these characteristics pose to soil structure. High [**5] SAR water, such as CBM water, causes soil particles to unbind and disperse, destroying soil structure and reducing or eliminating the ability of the soil to drain water. The Montana Department of Environmental Quality (MDEQ), in a Final Environmental Impact Statement analyzing coal bed methane extraction, warns that "clayey" soil, like that in the Tongue River Valley, is vulnerable to damage from high SAR water. Montana Statewide Final Oil and Gas Environmental Impact Statement and Proposed Amendment of the Powder River and Billings Resource Management Plans (hereinafter "Montana FEIS"), Soils Appendix SOI-1, *available at* www.deq.state.mt.us/CoalBedMethane/ finaleis.asp. Fidelity's soil expert concluded that "the SAR of CBM water creates a permeability hazard and precludes its use for irrigation without mixing, treatment or addition of soil amendments." The MDEQ cautioned that unregulated discharge of CBM water would cause "[s]urface water quality in some watersheds [to] be slightly to severely degraded, resulting in restricted downstream use of some waters." *Id.* 4-72. Some of the CBM water, however, is used by Fidelity's grazing lessee, CX Ranch, in livestock watering [**6] ponds and stock tanks.

In August 1998, Fidelity contacted the MDEQ about the possibility of discharging its CBM water into the Tongue River and Squirrel Creek. By letter, the MDEQ told [*1159] Fidelity that it did not need a permit from the MDEQ to discharge into the Tongue River because the discharge was exempt under *Montana Code section 75-5-401(1)(b)*, which provides:

> Discharge to surface water of groundwater that is not altered from its ambient quality does not constitute a discharge requiring a permit under this part if:
>
> (i) the discharge does not contain industrial waste, sewage, or other wastes; (ii) the water discharged does not cause the receiving waters to exceed applicable standards for any parameters; and (iii) to the extent that the receiving waters in their ambient state exceed standards for any parameters, the discharge does not increase the concentration of the parameters.

The MDEQ, however, warned Fidelity in the same letter that "the EPA, which provides state program oversight under the federal Clean Water Act, does not agree with the [Montana] *Water Quality Act* permit exclusion under *75-5-401(1)(b)*. Therefore, they may ask at some point that you obtain [**7] an [Montana Pollution Discharge Elimination System (MPDES)] permit from us, or an NPDES permit from them." n1 The EPA told MDEQ that *section 75-5-401(1)(b)* of the Montana Code conflicts with the CW A because it exempts some discharges otherwise subject to the CWA from NPDES permitting requirements. The EPA stressed that "the fact that a discharge does not increase the concentration of a particular parameter does not exempt it from permitting requirements." The MDEQ responded, resisting revocation of the *section 75-5-401(1)(b)* exemption and arguing that "the exemption is consistent with federal requirements governing NPDES pro-grams because discharges of unaltered, natural groundwater do not contain 'pollutants' as that term is defined under the Clean Water Act." In a final

letter sent to the MDEQ by the EPA, the EPA reiterated its objection to *section 75-5-401(1)(b)* if applied to discharges that would otherwise require a permit under the CWA.

n1 Congress has authorized both the EPA and states to implement CWA permit programs. *See 33 U.S.C. § 1342(a)-(b)*. The EPA issues NPDES permits, whereas Montana issues MPDES permits.

[**8]

Even though MDEQ informed Fidelity in August 1998 that Montana state law exempted the discharge of unaltered groundwater, Fidelity filed MPDES permit applications in January 1999. A. that time, Fidelity was discharging into both Squirrel Creek and the Tongue River without a permit.

NPRC sent a 60-day Notice of Intent to Sue letter to Fidelity, the MDEQ, and the EPA on April 18, 2000. NPRC alleged unpermitted discharges of pollutants into Squirrel Creek and the Tongue River. On June 23, 2000, NPRC filed a citizen suit under the CWA in federal district court alleging unpermitted discharges into Squirrel Creek. An amended complaint was filed on June 26, 2000, to add allegations of unlawful discharges into the Tongue River from outfalls not covered by an MPDES permit. n2

n2 On June 16, 2000, the MDEQ issued Fidelity an MPDES permit authorizing Fidelity to discharge into the Tongue from seven specified outfalls. The MDEQ did not issue a permit to discharge into Squirrel Creek. Even though the MPDES permit allowed discharge into the Tongue River from seven outfalls, Fidelity discharged from twelve outfalls and continued to do so until the MDEQ amended the permit on July 3, 2000, to allow discharge from ten outfalls. Fidelity did not receive an amended permit allowing discharge from ten outfalls until after the amended complaint was filed.

[**9]

The parties filed cross-motions for summary judgment in district court. The parties stipulated that of the five elements [*1160] necessary to prove a violation of the CWA ((1) discharge, (2) pollutant, (3) from a point source, (4) to a navigable water, (5) without a permit), the only element at issue is whether the CBM water constitutes a pollutant; the other four elements are satisfied. The district court held that the CBM water was not a pollutant and granted summary judgment to Fidelity. NPRC appeals. n3

n3 Three amici briefs were filed in this case: (1) The Western Environmental Trade Association (WETA) filed a brief in support of Fidelity. WETA is an extraction industry advocacy group; (2) Tongue & Yellow-stone Irrigation District and Tongue River Water Users' Association (T&Y) filed a brief in support of NPRC. T&Y is a group of ranchers and farmers who depend on the Tongue River for irrigation; and (3) Northern Cheyenne Tribe (Tribe). The Tongue River forms the eastern boundary of the Tribe's Reservation.

[**10]

II

The CWA prohibits the discharge of any pollutant from a point source into navigable waters of the United States with-out an NPDES permit. *33 U.S.C. §§ 1311(a), 1342. See also Ass'n to Protect Hammersley, Eld, and Totten Inlets (APHETI) v. Taylor Res., Inc., 299 F.3d 1007, 1009 (9th Cir. 2002).* Fidelity and NPRC agree that Fidelity discharged CBM water from a point source into navigable water without an NPDES permit. Given this agreement, we need only decide whether the groundwater derived from CBM extraction is a "pollutant" within the meaning of the CWA.

The district court granted summary judgment to Fidelity based on two conclusions: (1) CBM produced water is not a pollutant within the meaning of the CWA, and (2) Montana state law exempted Fidelity from CWA permitting requirements. We have jurisdiction, *33 U.S.C. § 1365(a); 28 U.S.C. § 1331*, we review the district court's grant of summary judgment de novo, *see Oliver v. Keller, 289 F.3d 623, 626 (9th Cir. 2002)*, and we reverse.

To determine whether CBM water is a "pollutant" regulated by the CWA, we begin with the [**11] plain language of the statute. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 56, 98 L. Ed. 2d 306, 108 S. Ct. 376 (1987).* The CWA defines "pollutant" broadly:

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological mate-rials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and *industrial*, municipal, and agricultural *waste* discharged into water. This term does not mean . . . water, gas, or other material which is injected into a well to facilitate production of oil and gas, *or water derived in association with oil or gas production and disposed of in a well*, if the

> well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

33 U.S.C. § 1362(6) (emphasis added). Because this definition does not literally list "unaltered groundwater" as a pollutant, Fidelity [**12] argues, and the district court held, that CBM water is not a "pollutant." Fidelity's argument and the district court's holding are untenable. The plain language of the CWA requires the conclusion that CBM water is a pollutant subject to regulation under the CWA.

The reasons for our conclusion are apparent from the statute's terms. First, CBM water is a "pollutant" because it is "industrial waste." Contrary to Fidelity's suggestion that "industrial waste" refers [*1161] to "sludge oozing from manufacturing or processing plants, barrels filled with toxic slime, and raw sewage floating in a river," industrial waste is not limited to only the most heinous and toxic forms of industrial byproducts. *See Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 568 (5th Cir. 1996)* (concluding "produced water" is encompassed in "industrial waste"); *see also Hudson River Fisherman's Ass'n v. City of New York, 751 F. Supp. 1088, 1101 (S.D.N.Y. 1990)* (holding that chlorine residues are pollutants), *aff'd, 940 F.2d 649 (2d Cir. 1991)*; *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc., 962 F. Supp. 1312, 1322 (D. Or. 1997)* [**13] (holding that brine residues are industrial waste and therefore pollutants). "Industrial" means "of, pertaining to, or derived from industry." American Heritage Dictionary 672 (1979). "Industry," in turn, is defined as "the commercial production and sale of goods and services." *Id.* "Waste" is defined as "any useless or worthless byproduct of a process or the like; refuse or excess material." *Id.* at 1447. Combining these ordinary meanings, "industrial waste" is any useless byproduct derived from the commercial production and sale of goods and services. Because Fidelity is engaged in production of methane gas for commercial sale and because CBM water is an unwanted byproduct of the extraction process, CBM water falls squarely within the ordinary meaning of "industrial waste." Even Fidelity referred to CBM water as "wastewater" in its application to the EPA for an NPDES permit.

Second, CBM water is also a "pollutant" by virtue of being "produced water" derived from gas extraction. *See Cedar Point Oil Co., 73 F.3d at 568* (addressing whether discharge of water "produced" during the extraction of oil and gas without an NPDES permit violated the CWA and concluding [**14] that produced water is an "industrial waste" regulated by the CWA). The EPA defines "produced water" as "water (brine) brought up from the hydrocarbon-bearing strata during the extraction of oil and gas, and *can* include formation water, injection water, and any chemical added downhole or during the oil/water separation process." *40 C.F.R. §§ 435.41(bb), 435.11(bb)* (emphasis added). Fidelity argues that the CBM water is not "produced water" because Fidelity adds no chemicals to the water. Whether CBM water is "produced water," however, does not turn on the addition of chemicals or any other alteration. The EPA regulations provide that "produced water" *can* include added chemicals, but the definition does not require it. *See id.* CBM water is "produced water" because it is brought up from the coal seams underlying Powder Basin to extract methane gas.

The CWA contemplates that produced water, as defined by EPA regulations, is a pollutant within the meaning of the Act. The CWA only exempts water derived from gas extraction from regulation when the water is disposed of in a well and will not result in the degradation of other water bodies. *33 U.S.C. § 1362(6)(B).* [**15] *Cf. Cedar Point Oil, 73 F.3d at 568* ("produced water" is a pollutant if its discharge does not meet exemption criteria). Fidelity disposes of the CBM water by direct discharge to the Tongue, not by reinjection into a state-approved well. Because Fidelity discharges "produced water" and does not meet *§ 1362(6)* exemption criteria, the CBM water discharged by Fidelity is a pollutant within the plain meaning of the CWA and is subject to NPDES permitting requirements.

Third, concluding that CBM water is a pollutant is consistent with the CWA's definition of "pollution." *Cf. APHETI, 299 F.3d at 1017* (considering the definition of [*1162] "pollution" to determine whether biological materials emitted by mussels are "pollutants"). "Pollution" is the "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." *33 U.S.C. § 1362(19)*. By discharging CBM water into the Tongue River, Fidelity alters the water quality of the Tongue River. In particular, the MDEQ, in the Montana Environmental Impact Statement analyzing the impact of CBM production on Montana waterways, cautions that the resulting [**16] alteration may degrade, and limit uses of, the receiving water: "Surface water quality in some watersheds would be slightly to severely degraded, resulting in restricted downstream use of some waters." Montana FEIS at 4-72. And, unregulated discharge of CBM water to the Tongue River threatens to make the water unfit for irrigation. *Id.* at 4-138.

Because Fidelity's discharges of CBM water alter the water quality of the Tongue River, those discharges cause "pollution" as defined by the CWA. *See PUD No. 1 of*

Jefferson County. v. Wash. Dep't of Ecology, 511 U.S. 700, 705, 128 L. Ed. 2d 716, 114 S. Ct. 1900 (1994) (citing *33 U.S.C. § 1313(d)(4)(B)* and recognizing CWA's "antidegradation policy" requiring state water quality standards to prevent further degradation of the Nation's waters); *40 C.F.R. § 131.12* (antidegradation policy regulation). Were we to conclude otherwise, and hold that the massive pumping of salty, industrial waste water into protected waters does not involve discharge of a "pollutant," even though it would degrade the receiving waters to the detriment of farmers and ranchers, we would improperly "undermine [**17] the integrity of [the CWA's] prohibitions." *APHETI, 299 F.3d at 1016.*

The district court determined that the CWA's definition of "pollution" supports a conclusion that CBM water is *not* a pollutant because Fidelity does not alter the CBM water before discharging it. We disagree with the district court's interpretation of the definition. The requirement that the physical, biological, or chemical integrity of the water be a "man-induced" alteration refers to the effect of the discharge on the receiving water; it does not require that the discharged water be altered by man. *See Miccosukee Tribe v. S. Fla. Water Mgmt. Dist., 280 F.3d 1364, 1368 (11th Cir. 2002)* ("[I]n determining whether pollutants are added to the navigable waters for purposes of the CWA, the receiving body of water is the relevant body of navigable water."). A contrary reading of the definition is illogical because the goal of the CWA is to protect receiving waters, not to police the alteration of the discharged water. *See 33 U.S.C. § 1251* (The objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the [**18] Nation's waters"). Here, the alteration of the chemical integrity of the Tongue River is "man-induced," as the CBM water would not flow into the Tongue River but for Fidelity's methane extraction processes, and that must be a focus of our concern under the CWA. Contrary to the district court's conclusion, the definition of "pollution" supports a finding that CBM water *is* a pollutant.

In arguing that CBM water is not a pollutant, Fidelity makes much of the fact that the CBM water is "unaltered," "naturally occurring," and that it is only water. Fidelity relies on *APHETI* to argue that only those substances "transformed by human activity" can be pollutants under the CWA. *See APHETI, 299 F.3d at 1017.* Fidelity misapplies *APHETI.*

In *APHETI*, we clarified the meaning of "biological materials," a term included in the CWA's definition of "pollutant." *Id. at 1016*; *see also 33 U.S.C. § 1362(6).* In considering whether excrement from mussels [*1163] suspended from rafts in Puget Sound was a pollutant under the CWA, we distinguished between biological materials that naturally occur in receiving waters, such as mussel feces, [**19] and biological materials that result from human activity, such as the "heads, tails, and internal residuals" of fish dumped back into the waters after processing. *APHETI, 299 F.3d at 1017.* Because one purpose of the CWA is to protect shellfish, we concluded that shellfish are not pollutants under the CWA unless human activity transforms them. *Id.* This conclusion was necessary to preserve the "integrity of the [CWA's] prohibitions." *Id. at 1016.*

APHETI cannot sensibly be read to require human transformation of all materials identified in the CWA's definition of "pollutant." For one thing, the CWA definition of "pollutant" includes such terms as "rock," "sand," and "heat." *See 33 U.S.C. § 1362(6).* It is the introduction of these contaminants, not their transformation by humans, that renders them pollutants. Also, by allowing the degradation of the quality of receiving waters, the consequences of Fidelity's interpretation of *APHETI* would upset the integrity of the CWA, a result that *APHETI* was careful to avoid. Fidelity's interpretation of *APHETI* is not correct, for it would allow someone to pipe the [**20] Atlantic Ocean into the Great Lakes and then argue that there is no liability under the CWA because the salt water from the Atlantic Ocean was not altered before being discharged into the fresh water of the Great Lakes. Or, water naturally laced with sulfur could be freely discharged into receiving water used for drinking water simply because the sulfur was not added to the discharged water. Such an argument cannot sensibly be credited.

Even though Fidelity argues that CBM discharges are "only water," other circuits have held that transporting water from one water body to another can violate the CWA. *See Miccosukee Tribe, 280 F.3d at 1367* (affirming the district court's grant of summary judgment to the plaintiffs where the defendant discharged already polluted water into a navigable water even though the defendant did not introduce additional pollutants into the discharged water but only rerouted the discharged water into the receiving water); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 492-93 (2d Cir. 2001)* (concluding that the transfer of water containing pollutants from one body of water to another requires [**21] an NPDES permit); *Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1299 (1st Cir. 1996)* (holding that the transfer of water from one body of water to another distinct body of water requires a NPDES permit where the discharged water contains pollutants).

Fidelity attempts to distinguish these cases because they addressed the issue of whether there was an "addition" of a pollutant under the CWA, not whether there was a pollutant. This distinction is inapposite. The issue

of whether CBM water is a pollutant is practically indistinguishable from the issues considered by these cases. Fidelity is transporting water from the deep aquifers of the Powder Basin and discharging that unaltered water into the surface water of the Tongue River. Similarly, each of the cases cited above involve trans-port of water that could degrade the water quality of receiving waters. The cases apply insofar as they reject the argument that discharge of water cannot be a pollutant simply because the discharged water is unaltered and transported from one body of water to another.

In light of the CWA's definition of pollutant and pollution, our precedent in *APHETI*, and the conclusions of other [**22] circuits in analogous cases, we reject Fidelity's arguments and hold that CBM water is a pollutant pursuant to the CWA.

[*1164] III

Having concluded that Fidelity's discharge of CBM water is subject to the CWA, we next consider whether Fidelity nevertheless can be relieved of permitting under the CWA by Montana state law. *Section 75-5-401(1)(b)* of the Montana Code provides:

> Discharge to surface water of groundwater that is not altered from its ambient quality does not constitute a discharge requiring a permit under this part if:
>
> (i) the discharge does not contain industrial waste, sewage, or other wastes; (ii) the water discharged does not cause the receiving waters to exceed applicable standards for any parameters; and (iii) to the extent that the receiving waters in their ambient state exceed standards for any parameters, the discharge does not increase the concentration of the parameters.

Based on *Montana Code section 75-5-401(1)(b)*, the MDEQ advised Fidelity that no permit was needed to discharge CBM water into the Tongue River. The district court agreed, reasoning that the EPA implicitly approved of Montana's groundwater exemption because the EPA did not revoke [**23] Montana's authority to operate the EPA-approved state permitting program despite *section 75-5-401(1)(b)*. Giving deference to the EPA's "approval" of Montana's permitting program, the district court concluded that discharge of CBM water does not require a permit under Montana state law and thus does not violate the CWA. We disagree with the district court's conclusion for several reasons.

First, though the district court reasoned that the EPA approved of *section 75-5-401(1)(b)*, the EPA does not have the authority to exempt discharges otherwise subject to the CWA. Only Congress may amend the CWA to create exemptions from regulation. *See Am. Mining Congress v. E.P.A., 965 F.2d 759, 772 (9th Cir. 1992)* (citing *Natural Res. Def. Council v. Costle, 186 U.S. App. D.C. 147, 568 F.2d 1369, 1374 (D.C. Cir. 1977))*. The EPA could not have approved of the MDEQ's exemption of CBM water discharges under *section 75-5-401(1)(b)* even if the EPA wanted to do so. n4

> n4 Judicial deference to agency action is not warranted where the agency had no authority to act. *See United States v. Mead, 533 U.S. 218, 226-27, 150 L. Ed. 2d 292, 121 S. Ct. 2164 (2001)* (*Chevron* deference applies only when Congress explicitly or implicitly gave the agency authority to fill certain gaps left by Congress). Therefore, the district court erred in giving judicial deference to the EPA's implicit "approval" of Montana's groundwater exemption. Congress did not grant the EPA the authority to create such exemptions.

[**24]

Second, Montana has no authority to create a permit exemption from the CWA for discharges that would otherwise be subject to the NPDES permitting process. *See 33 U.S.C. § 1370* (states may not adopt or enforce standards that are less stringent than federal standards). Just as the EPA does not have the authority to create an exemption for unaltered groundwater, neither does the State of Montana, as the EPA cannot delegate to a state more authority than the EPA has under the CWA. n5

> n5 Even if the EPA could have approved of the MDEQ's application of *section 75-5-401(1)(b)*, the EPA did not do so here. In a letter sent to the MDEQ, the EPA disapproved of the application of *section 75-5-401(1)(b)* to discharges that would otherwise be regulated under the CWA. The MDEQ, however, maintained that the exemption was consistent with the CWA because "discharges of unaltered, natural groundwater do not contain 'pollutants' as that term is defined" in the CWA. In a subsequent letter to the MDEQ, the EPA stated that revocation of *Montana Code section 75-5-401(1)(b)* would not be necessary *if* the MDEQ does not interpret that provision to authorize "any point source discharge of any pollutant to any water of the United States without an NPDES permit."

[**25]

[*1165] Moreover, absent statutory authority in the

CWA for Montana to create such exemptions, it cannot possibly be urged that Montana state law in itself can contradict or limit the scope of the CWA, for that would run squarely afoul of our Constitution's *Supremacy Clause. U.S. Const. art. VI, cl. 2. See also Nat'l Audubon Soc'y, Inc. v. Davis, 307 F.3d 835, 851 (9th Cir. 2002)* (recognizing that the *Supremacy Clause* "invalidates state laws that 'interfere with, or are contrary to,' federal law").

We hold that Montana state law cannot exempt CBM water from being subject to the CWA when the Act does not provide the EPA or the State of Montana the authority to create such exemptions.

IV

Because CBM water is a pollutant subject to regulation by the CWA and because Montana cannot create an exemption for CBM water that is otherwise subject to the CWA, we reverse the district court's grant of summary judgment to Fidelity and remand with instructions to enter summary judgment for NPRC.

REVERSED and REMANDED.

House Oil & Gas Committee
Re: HB 395

February 4, 2004

Dear Representatives Kohring, Heinze, Holm, McGuire, Rokeberg, Crawford, and Kerttula:

Since I won't be able to attend tomorrow's hearing I'm sending these comments ahead. Please make them part of the official record. I'm pleased to see that the Legislature is considering reform of legislation governing coalbed methane/shallow gas leasing. The whole shallow gas leasing program has proven itself to be a fiasco that has raised the ire of citizens -- particularly owners of the surface estate. It's difficult to imagine anything that would do more to make it difficult for the oil and gas industry to conduct future business than this bungled program. HB 395 "An Act relating to shallow natural gas leasing and the regulation of shallow natural gas operations," with its elimination of the DNR Commissioner's power to override local planning is a beginning. With proper amendment it could serve as one of several necessary actions that might undo the damage so far caused by the present, ill conceived coalbed methane/shallow gas leasing program. I hope you will support modification of HB 395 to include:

Notice to individual surface landowners prior to offering the subsurface estate for leasing.

Natural resource surface use baseline studies prior to exploration and development.

Regulations and standards to guide acceptance or rejection of lease requests relevant to regional characteristics and public comment.

Clear language establishing that exploration and development are subject to local land use regulations.

Clear guidelines governing requirements for negotiation of surface/subsurface user agreements assuring equity between the parties.

Increased bond amounts sufficient to protect the surface estate and community drinking water and which reflect data from baseline studies.

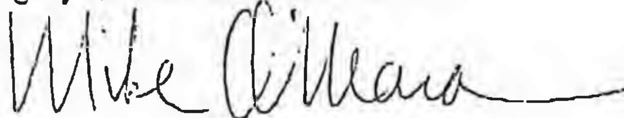
Required use of non-toxic fracturing fluids for coalbed methane development.

Required reinjection of produced waters.

A formal and fair dispute process with the appropriate state agencies (DNR, DEC, AOGC) to help resolve violations of law, regulations, or surface/subsurface user agreements.

An additional, special fund supported by with lease revenues to provide for third party mediation in cases of agency failure to resolve disputes.

Thank you for taking my comments into consideration.
Sincerely,



Mike O'Meara
P.O. Box 361
Homer, Alaska 99603

Work Phone: 907-235-8635

February 5, 2004

Dear Representative Kohring:

I am writing as a property owner in the Mat-Su Valley living on 120 acres of land that has already been leased under the Coal Bed Methane Shallow gas program. I was born in Palmer, lived here for 45 years and intend remain in the Mat-Su valley. The outcome of the CBM issue will certainly dictate whether or not this is possible for me and my family. We have no intention of watching our sole asset, our land and house, devalue as a result of the state's poor oversite of CBM program. The legislature must act quickly to put regulatory restrictions that protect the landowners and assure public safety. The profit - driven actions of our representatives thus far are despicable and require swift action to undo the mistakes already made by the legislature in regards to CBM industry regulation. Landowners have been betrayed by the actions of our local representatives with the passage of HB69 and the fastracking of the CBM program without regard to landowners concerns. This line of action shall not be allowed to continue.

I am very disturbed by the actions that my local legislators have been involved with in pushing this program upon the landowners of the Mat-Su with complete disregard for the hazards of conducting drilling activities in close proximity to densely residential areas. CBM development was never intended for implementation in densely populated residential areas of the state such as the Mat-Su area.

I am writing specifically today to comment on bills before the legislature. It is my hope that you as our elected representative will act responsibly to protect the property rights and safety of your constituents and all residents of the Mat-Su Valley. These actions will be reflected by your response to the bills currently before you.

As an over-riding comment for all bills and in particular House Bill 395, my family and I strongly support a buy-back bill to include the Mat-Su Valley. This is the only viable option that we see that will adequately regulate the industry and thus protect local landowners.

Please consider the following additions to the bill.

Comments on HB 395:

HB 395 "An Act relating to shallow natural gas leasing and the regulation of shallow natural gas operations" falls far short of full protection for property owners.

The bill needs to insist that DNR develop regulations and standards to review and reject leases if the community situation and public comments warrant it.

The bond amounts listed are insufficient to protect private property and community drinking water.

There is insufficient protection for water supplies. The bill should include a requirement for use of non-toxic fracturing fluids and should

require protection of water supplies.

The suggested complaint process is too informal.
A formal complaint process with Department of Natural Resources (DNR), Department of Environmental Conservation, and the Alaska Oil and Gas Conservation Commission should be established.

The pending bills do not help the private property owner. They don't provide for adequate notice before property is leased. Neither bill provides standards for regulating noise, setbacks, surface restoration and other qualities that would protect water resources, quality of life, and the environment for property owners.

Property owners need more help and protection so that they could insist on these protective provisions to preserve their quality of life.

The bill should require third party mediation to resolve disputes, paid by a fund established by the Legislature. Mediation must remain a fair process not one under complete control by state agencies.

The bill should require that Alaska Oil and Gas Conservation Commission regulate the industry properly and require re-injection of produced water at the well-site.

The contents of fractuing fluid contents must not be held confidential by the drilling company and must be fully disclosed to the public.

Public notice in the newspaper is not enough. Individual land owners need written actual notice before their land is leased. This should apply to privately owned leases as well.

The bills should address the need for baseline studies, especially for surface and ground water, to help assess impacts resulting from any future development. Furthermore, companies should be required to establish a compensation fund to pay property owners whose water is impacted.

HB 395 does eliminate the DNR Commissioner's capacity to waive local planning requirement. However, the bill should clearly spell out that local land use regulations can govern coal bed methane development.

As property owners we are looking for checks and balances to protect private property owners and community water resources and provide a good, fair public process.

I trust that these comments will be heard and would appreciate swift and aggressive action on your part to accomplish these as part of the legislation and would also urge you to support a buyback of the Mat-Su leases until such time that the CBM industry can be properly regulated to assure that it can be implemented in a safe and fair manner.

Sincerely,
Julie Michaelson Roger Bowen
Landowners of the Mat-Su 746-0959

LEGAL SERVICES

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

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

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

MEMORANDUM April 7, 2004

SUBJECT: Draft CSHB 395( ), an Act relating to natural resources -- sectional analysis (Work Order No. 23-LS1314\J)

TO: Representative Beverly Masek, Co-Chair of House Resources Committee

FROM: Jack Chenoweth, Assistant Revisor of Statutes

Eleanor Wolfe has requested preparation of a sectional analysis for the above-captioned bill.

Changes to the section authorizing shallow natural gas leasing (AS 38.05.177) --

Bill section 5 amends AS 38.05.177(c) relating to requirements of notice. The insertions made at page 4, lines 19 and 20 and line 24 acknowledge that the director of the division of land should actually consider public comment that may be received before executing a lease. The substitution of "may" for "shall" at page 4, line 26 and again at line 27, alters the scope of the director's authority to act, changing it from an act that is mandatory if the leasing standard is met ("[if] the director determines that the discovery of a local source of natural gas would benefit the residents of an area") to one as to which the director may exercise discretion.

Bill section 6 amends AS 38.05.177(f) to add a series of additional requirements that must be inserted in a shallow natural gas lease, to include (in paragraph (2)) required water well testing requirements in an area roughly within one-quarter mile around a drill site, (in paragraph (3)) appropriate setbacks applicable to compressor stations that are appropriate to the lease; (in paragraph (4)) required and appropriate noise mitigation measures; and (in paragraph (5)), at termination or conclusion of the lease, surface restoration requirements if the surface is disturbed by exploration or development operations.

Bill section 7: This bill section amends AS 38.05.177(k). In instances in which an owner and a lessee cannot reach agreement for the latter's entry on to property to explore for and develop shallow natural gas and the lessee seeks to post a bond to permit entry, the first amendment (beginning at page 7, line 1) adds a further requirement that the lessee demonstrate "that access and entry upon the land of the owner is reasonably necessary or convenient" to secure the lessee's rights, and the second amendment (beginning at page 7, line 10) requires the lessee to provide 30 days' advance notice of initial entry on to an owner's property.

Bill section 8 adds two new subsections.

The language of subsection (p) expands upon the procedures currently applicable to securing protection against damages insofar as those procedures relate to shallow natural gas exploration and development activities:

-- Under paragraph (1), if the owner and lessee come to an agreement as to the lessee's entry, the terms of the agreement are to incorporate the requirements spelled out in AS 38.05.177(f), amended earlier in the bill.

-- Under paragraph (2), if the parties can't agree and the lessee seeks determination of the amount of a surety bond in order to proceed, in conjunction with the director's determination, the owner may provide comments about the appropriate location of improvements to be made on the owner's property.

Subsection (q) supplies a definition for "owner" for relevant subsections in which the term is used.

Bill sections 9 and 10: This pair of bill sections amends the notice requirements generally applicable to activities to be taken under the Alaska Land Act, AS 38.05. The amendment made to AS 38.05.945(a) in bill section 9 adds to the section's notice requirement the "receipt of a [shallow natural gas] lease application and call for [public] comments [on the application]," as required by AS 38.05.177(c). The amendment made to AS 38.05.945(b) in bill section 10 directs the department to adhere to the general notice requirements of that subsection when issuing that call for public comments for a lease application submitted under AS 38.05.177(c).

Bill sections 14 and 15: The amendment made by bill section 14 and the repealers set out in bill section 15 eliminate provisions by which the commissioner of natural resources may, if the Department of Natural Resources clearly demonstrates an overriding state interest, "approve a waiver of local planning authority approval and requirements relating to compliance with local ordinances and regulations."

Changes relating to shallow natural gas activity oversight by the Alaska Oil and Gas Conservation Commission --

Bill section 1: The amendment to AS 31.05.030(j) made by this bill section alters the authority of the Alaska Oil and Gas Conservation Commission as that authority may be exercised with respect to shallow natural gas exploration and development. Paragraph (1) imposes a prohibition against the commission's issuing a permit to drill under AS 31.05 "if . . . operations . . . would involve producing gas from an aquifer that serves as a source of drinking water . . . or . . . for agricultural purposes" and a conditional prohibition against the reinjection of produced water. Paragraph (2) expands the authority of the commission to regulate hydraulic fracturing associated with exploration for and the disposal of wastes produced by those operations.

Bill section 2: In conjunction with shallow natural gas exploration and recovery, this section adds a new provision directing the Alaska Oil and Gas Conservation Commission to initiate a public forum process to resolve informally of public health, safety, welfare, and environmental complaints. The provision sets out the minimal procedural requirements for informal resolution of complaints. Language was added (page 2, lines 21 and 22) requiring the informal resolution of complaints within 60 days of the filing of the complaints. If informal resolution of a complaint is unsuccessful, the commission may schedule and act on petition concerning the complaint under procedures in place for commission review of matters subject to its jurisdiction. The commission is to act on matters within its jurisdiction and may refer complaints not within its jurisdiction to other appropriate agencies.

Standardized references relating to maximum depth of shallow natural gas recovery --

Bill sections 3 and 13: The amendments made in each of these sections eliminate, in the respective definitions of or references to "shallow natural gas," the reference to recovery of natural gas from a depth of up to 4,000 feet and replace it with a reference to 3,000 feet. Recovery at greater depths requires treatment of the operation under conventional oil and gas lease requirements.

Other matters --

Bill section 4: The bill section adds provisions to the title in the Alaska Statutes generally dealing with Property that guide the interaction between a "developer" and a "surface owner" relating to mineral interest operations. This material would apply only to the extent the operations constitute activities that are not otherwise governed by the Alaska Land Act (AS 38.05). See page 3, lines 12 and 13 ("Except for activities governed by AS 38.05, ...").

Bill section 11: AS 46.03.100 imposes permit requirements that relate to operations resulting in disposal of waste materials on state land and water. Existing AS 46.03.100(f)(3) exempts from the section's permit requirement certain surface water discharges that arise out of, among other activities, "coal bed methane drilling or other natural gas drilling to recover gas from a field if a part of the field is within 3,000 feet of the surface." The amendment made in this bill section deletes that exception.

Bill section 12: The amendment made is a conforming change necessitated by the renumbering of provisions in bill section 1.

Bill section 16 gives the measure a July 1, 2004, effective date.

JBC:med
04-381.med

ALASKA STATE LEGISLATURE
REPRESENTATIVE JOHN HARRIS
STATE CAPITOL 505 JUNEAU ,ALASKA 99801-1182 (907)465-4859

COMMITTEE SUBSTITUTE FOR HOUSE BILL 395 (O&G) SPONSOR STATEMENT

HB 395 was designed to resolve concerns many Alaskans have with coal bed methane development in the areas of property rights, water quality assurance, and local involvement of residents.

This bill accommodates language from HB 420 which sets the framework for a water well fund in the event of damage to a resident's water supply.

Many concerns have been raised recently by residents of the Mat-Su Borough and Homer area through a series of public forums. All sponsors worked diligently, listening to public input from numerous community hearings and comments received during the first hearing within the Special Committee on Oil & Gas

This bill requires that:

1) Public comment and other routes of access be considered prior to executing a lease.
2) The integrity of the affected water supply is protected.
3) Public notice be given prior to the award of a lease via newspapers and direct mail.
4) The lessee provide a contingency for dry wells due to CBM operations.
5) A shallow gas lease must provide for a water testing requirement by the lessee.
6) The owner's surface property be restored in the event of damage.
7) Noise from field operation is mitigated.

Finally, language is proposed to close current regulatory loopholes allowing the operators to extract natural gas deeper than the 3,000 foot definition of shallow natural gas without administrative approval for a depth no greater than 4,000 feet. This clarification is necessary to provide Alaskans the guarantee that conventional natural gas resources will not be extracted without going through the competitive bid process.

STATE OF ALASKA

FRANK H. MURKOWSKI, GOVERNOR

ALASKA OIL AND GAS CONSERVATION COMMISSION

333 W. 7TH AVENUE, SUITE 100
ANCHORAGE, ALASKA 99501-3539
PHONE (907) 279-1433
FAX (907) 276-7542

March 5, 2004

VIA E-Mail, Fax and Mail

Representative Vic Kohring
Chair, House Special Committee
on Oil and Gas
State Capitol Room 24
Juneau, Alaska 99801

Re: HB 395

Dear Chair Kohring:

At your committee's recent hearing on HB 395, we promised to provide you with written comments on that bill from the Alaska Oil and Gas Conservation Commission. This letter contains our comments.

As you know, HB 395 would make several changes in the statute that the Commission administers, AS 31.05, the Alaska Oil and Gas Conservation Act. These changes relate to shallow natural gas operations.

Section 1. Section 1 of the bill would add to the list of the Commission's regulatory powers certain new language concerning protection of drinking water sources. We believe the proposed language in its present form needs clarification as it mixes two different issues: (1) hydraulic fracturing; and (2) reinjection of water produced from coal seams.

We understand there are concerns about possible contamination of drinking water sources from hydraulic fracturing fluids, and that there are also concerns about the possible contamination of drinking water sources from reinjection of produced water, but these two subjects should be dealt with separately. The bill appears to assume that requiring reinjection of produced

water at depths below sources of drinking water is a way of regulating hydraulic fracturing. This is not the case.[1]

The language regarding reinjection also needs to be clarified because it is susceptible of two different interpretations. It could be read as prohibiting any disposition of produced water other than by reinjection at depths below water supplies. It could also be read as restricting reinjection to depths below water supplies but not ruling out surface disposal or other use of produced water. As to the former interpretation: while in most cases reinjection of produced water will be the preferable method of disposal, we are not sure it is good public policy to entirely eliminate surface disposal or beneficial use of produced water as an option in those instances where the water is of sufficiently high quality. As to the latter interpretation: we see no harm in adding this explicit restriction to the statute, but we believe the Commission's existing regulatory authority governing underground injections is already adequate to allow us to protect water supplies.

Under AS 31.05.030(h), the Commission exercises primary responsibility for the control of underground injections related to the recovery and production of oil and natural gas, <u>including</u> underground disposal of produced water. To obtain Commission approval for the underground disposal of produced water, an applicant must show, among other things, that an injection well will be cased and cemented so as to completely isolate the disposal zone and protect all freshwater sources. The applicant must also show that the proposed disposal method will not allow waste fluids to migrate into sources of freshwater. 20 AAC 25.252.

<u>Section 2.</u> Section 2 of HB 395 directs the Commission to develop and implement a "public forum process" for the purpose of "resolving public health, safety, welfare, or environmental complaints about potential or actual shallow natural gas exploration and development operations." This provision expands the subject matter under the Commission's purview beyond our historical focus and our current expertise. At this time the Commission deals primarily with <u>subsurface</u> issues. Although our responsibilities certainly involve public health, safety, welfare, and environmental concerns <u>in specific and limited ways</u> – such as preventing wasteful oil and gas production practices, protecting underground water supplies, and avoiding well blowouts – there are many

---

[1] Commission approval is already required for hydraulic fracturing, which is encompassed within what our regulations call "stimulation", at 20 AAC 25.280; and, we believe that AS 31.05.030(e)(1)(E) already gives the Commission the authority to ensure that hydraulic fracturing will not cause "the contamination or waste of underground water."

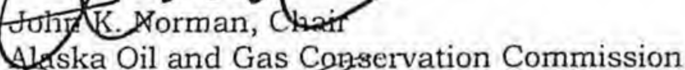
potential surface related health, safety, welfare, and environmental concerns (noise for example) that currently fall outside of the Commission's responsibilities and which have historically been within the jurisdiction of other agencies such as DEC and local regulatory agencies.

Section 2 of HB 395 contemplates that, beyond providing a public forum for informal resolution of complaints, the Commission would "take action" on complaints if they are not informally resolved. However, the bill does not clearly give the Commission the necessary additional statutory authority to address complaints on the new subjects that the bill would allow to be raised. We encourage this committee in its consideration of section 2 of this bill, to ensure that new mechanisms to deal with public concerns about shallow natural gas operations are workable, clearly defined, and consistent with an appropriate allocation of functions and authority among relevant agencies.

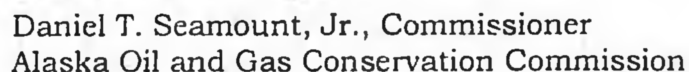
Section 3. Section 3 of HB 395 would amend the definition of "shallow natural gas" to reduce the allowable depth of a qualifying well from 4,000 to 3,000 feet true vertical depth. As you will appreciate, the depth limitation in this definition is somewhat arbitrary, and we do not have an opinion one way or the other on whether it should be changed as proposed. We note, however, that a bill introduced in the Senate, SB 312, would comprehensively change the scope of existing statutes dealing with "shallow natural gas" to deal instead with "nonconventional gas," which would be defined as "coalbed methane, shales containing gas, or gas hydrates." From a geological and regulatory point of view, such a change may be worth considering.

We thank you for giving us this opportunity to submit these comments. Please feel free to contact me if you or other members of the committee have any questions or would like further information concerning the points discussed in this letter.

Very Truly Yours,



John K. Norman, Chair
Alaska Oil and Gas Conservation Commission



Daniel T. Seamount, Jr., Commissioner
Alaska Oil and Gas Conservation Commission

JKN:\jjc

February 5, 2004

Dear Representative Kohring:

I am writing as a property owner in the Mat-Su Valley living on 120 acres of land that has already been leased under the Coal Bed Methane Shallow gas program. I was born in Palmer, lived here for 45 years and intend remain in the Mat-Su valley. The outcome of the CBM issue will certainly dictate whether or not this is possible for me and my family. We have no intention of watching our sole asset, our land and house, devalue as a result of the state's poor oversite of CBM program. The legislature must act quickly to put regulatory restrictions that protect the landowners and assure public safety. The profit - driven actions of our representatives thus far are despicable and require swift action to undo the mistakes already made by the legislature in regards to CBM industry regulation. Landowners have been betrayed by the actions of our local representatives with the passage of HB69 and the fastracking of the CBM program without regard to landowners concerns. This line of action shall not be allowed to continue.

I am very disturbed by the actions that my local legislators have been involved with in pushing this program upon the landowners of the Mat-Su with complete disregard for the hazards of conducting drilling activities in close proximity to densely residential areas. CBM development was never intended for implementation in densely populated residential areas of the state such as the Mat-Su area.

I am writing specifically today to comment on bills before the legislature. It is my hope that you as our elected representative will act responsibly to protect the property rights and safety of your constituents and all residents of the Mat-Su Valley. These actions will be reflected by your response to the bills currently before you.

As an over-riding comment for all bills and in particular House Bill 395, my family and I strongly support a buy-back bill to include the Mat-Su Valley. This is the only viable option that we see that will adequately regulate the industry and thus protect local landowners.

Please consider the following additions to the bill.

Comments on HB 395:

HB 395 "An Act relating to shallow natural gas leasing and the regulation of shallow natural gas operations" falls far short of full protection for property owners.

The bill needs to insist that DNR develop regulations and standards to review and reject leases if the community situation and public comments warrant it.

The bond amounts listed are insufficient to protect private property and community drinking water.

There is insufficient protection for water supplies. The bill should include a requirement for use of non-toxic fracturing fluids and should

require protection of water supplies.

The suggested complaint process is too informal.
A formal complaint process with Department of Natural Resources (DNR), Department of Environmental Conservation, and the Alaska Oil and Gas Conservation Commission should be established.

The pending bills do not help the private property owner. They don't provide for adequate notice before property is leased. Neither bill provides standards for regulating noise, setbacks, surface restoration and other qualities that would protect water resources, quality of life, and the environment for property owners.

Property owners need more help and protection so that they could insist on these protective provisions to preserve their quality of life.

The bill should require third party mediation to resolve disputes, paid by a fund established by the Legislature. Mediation must remain a fair process not one under complete control by state agencies.

The bill should require that Alaska Oil and Gas Conservation Commission regulate the industry properly and require re-injection of produced water at the well-site.

The contents of fractuing fluid contents must not be held confidential by the drilling company and must be fully disclosed to the public.

Public notice in the newspaper is not enough. Individual land owners need written actual notice before their land is leased. This should apply to privately owned leases as well.

The bills should address the need for baseline studies, especially for surface and ground water, to help assess impacts resulting from any future development. Furthermore, companies should be required to establish a compensation fund to pay property owners whose water is impacted.

HB 395 does eliminate the DNR Commissioner's capacity to waive local planning requirement. However, the bill should clearly spell out that local land use regulations can govern coal bed methane development.

As property owners we are looking for checks and balances to protect private property owners and community water resources and provide a good, fair public process.

I trust that these comments will be heard and would appreciate swift and aggressive action on your part to accomplish these as part of the legislation and would also urge you to support a buyback of the Mat-Su leases until such time that the CBM industry can be properly regulated to assure that it can be implemented in a safe and fair manner.

Sincerely,
Julie Michaelson Roger Bowen
Landowners of the Mat-Su 746-0959

House Oil & Gas Committee
Re: HB 395

February 4, 2004

Dear Representatives Kohring, Heinze, Holm, McGuire, Rokeberg, Crawford, and Kerttula:

Since I won't be able to attend tomorrow's hearing I'm sending these comments ahead. Please make them part of the official record. I'm pleased to see that the Legislature is considering reform of legislation governing coalbed methane/shallow gas leasing. The whole shallow gas leasing program has proven itself to be a fiasco that has raised the ire of citizens -- particularly owners of the surface estate. It's difficult to imagine anything that would do more to make it difficult for the oil and gas industry to conduct future business than this bungled program. HB 395 "An Act relating to shallow natural gas leasing and the regulation of shallow natural gas operations," with its elimination of the DNR Commissioner's power to override local planning is a beginning. With proper amendment it could serve as one of several necessary actions that might undo the damage so far caused by the present, ill conceived coalbed methane/shallow gas leasing program. I hope you will support modification of HB 395 to include:

Notice to individual surface landowners prior to offering the subsurface estate for leasing.

Natural resource surface use baseline studies prior to exploration and development.

Regulations and standards to guide acceptance or rejection of lease requests relevant to regional characteristics and public comment.

Clear language establishing that exploration and development are subject to local land use regulations.

Clear guidelines governing requirements for negotiation of surface/subsurface user agreements assuring equity between the parties.

Increased bond amounts sufficient to protect the surface estate and community drinking water and which reflect data from baseline studies.

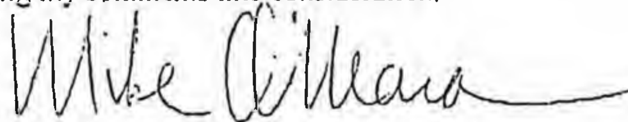
Required use of non-toxic fracturing fluids for coalbed methane development.

Required reinjection of produced waters.

A formal and fair dispute process with the appropriate state agencies (DNR, DEC, AOGC) to help resolve violations of law, regulations, or surface/subsurface user agreements.

An additional, special fund supported by with lease revenues to provide for third party mediation in cases of agency failure to resolve disputes.

Thank you for taking my comments into consideration.
Sincerely,



Mike O'Meara
P.O. Box 361
Homer, Alaska 99603

Work Phone: 907-235-8635