

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILES 8672

2273 SCOMM 93: HOUSE SPECIAL COMMITTEE ON OIL & GAS, 1993

SCOMM

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FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. House Bill No. 384

Revision Date: _____	Dept. Affected: <u>Environmental Conservation</u>
Title: <u>Financial Requirements: Noncrude Oil Operations</u>	BRU: <u>Spill Prevention and Response</u>
Sponsor: <u>Representative Foster</u>	Component: <u>Industry Preparedness and Response</u>
Requestor: <u>House Oil & Gas</u>	COMPONENT SERIAL NO. _____

Expenditures/Revenues	(Thousands of Dollars)					
	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
OPERATING EXPENDITURES						
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE	(Thousands of Dollars)					
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTA						
Other: 1052 Oil/Haz "470" Fund	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY95) cost: \$ not applicable

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact anticipated.

Prepared by: <u>Robert Poe, Director</u>	Phone: 465-5010
Division: <u>Information and Administrative Services</u>	Date: <u>1/20/94</u>
Approved by: <u>John Sandor, Commissioner</u>	Date: <u>1/20/94</u>
Agency: <u>Environmental Conservation</u>	

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HB 384 FINANCIAL RESPONSIBILITY OF NON CRUDE OPERATORS

Background Paper

History: On March 24, 1989 the *Exxon Valdez* ran aground on Bligh Reef in Prince William Sound, causing the largest crude oil spill in the United States history. As a result, the Alaska Legislature and the United States Congress significantly strengthened oil spill prevention and cleanup standards. One bill, HB 567, passed in 1990, made three major changes in state oil spill protection. It 1) established new response planning standards; 2) imposed new financial responsibility requirements for contingency plan holders; and 3) allowed the Department of Environmental Conservation to give credits for incorporating prevention measures into contingency plans. These major changes were to have gone into effect on and after June 1, 1991.

Although HB 567 was passed as a result of the *Exxon Valdez* oil spill and was aimed at the crude oil industry, non crude carriers and facilities were also subject to the changes. Regulations implementing these changes have been drafted by the Department of Environmental Conservation, and are still being viewed by the Department of Law.

Problem: Smaller fuel distributors, barge lines that transport refined petroleum products, and rural electric utilities that must maintain fuel stores have found it all but impossible to meet the new financial responsibility requirements imposed by HB 567. Although these non crude operators are able to purchase the required amounts of pollution insurance, underwriters in both the domestic and overseas markets steadfastly refuse to include the "direct action" clause in these policies that Alaska law requires.

Alaska's direct action requirements have been in effect since 1981. The provision allows an action to be brought in state court directly against the insurer, rather than going first to the responsible party. Ambiguities about whether insurers are limited to the face amount of the policy, plus the greatly increased amounts of coverage required since the *Exxon Valdez* spill, have combined to produce the current unavailability of direct action coverage.

Alakanuk, Chevak, Elim, Emmonak, Gambell, Golovin, Hooper Bay, Kotlik, Koyuk, Marshall, Mehovuk, Mountain Village, Newtok, Nightmute, Nome, Pilot Station, Pitka's Point, Russian Mission, St. Mary's, St. Michael, Savoonga, Scammon Bay, Shaktoolik, Sheldon Point, Stebbins, Toksook Bay, Tununak, Unalakleet, White Mountain

When it became clear by early 1991 that insurers would not provide direct action coverage, Senator Lyman Hoffman introduced legislation to delay the effective date of HB 567's financial responsibility requirements for non crude operations. The hope was that over the year's time, either the insurance markets would overcome their objections to provide direct action, or that perhaps a risk pool could be developed to provide such coverage. The Legislature unanimously approved Senator Hoffman's bill.

To date, there has been no change in the insurance markets position on direct action coverage, and development of an insurance pool so far has proved unfeasible. With the June 1, 1994 date of the financial responsibility requirements approaching, and the unavailability of direct action coverage just as complete as it was in 1991, non crude operators once again face the prospect of either operating out of compliance with Alaska law or ceasing operations. The large crude oil operators do not face this problem, because they have sufficient assets and working capital to either self-insure or comply with the law through other means, such as surety bonds or letters of credit.

Solution: This act repeals Section 6 which is the Sunset clause repealing Section 2 TEMPORARY LAW APPLICABLE TO NON CRUDE OIL OPERATIONS.

PETRO MARINE SERVICES

Petroleum Marketing to the Marine Industry

January 20, 1994

House Special Committee on Oil & Gas
Senate Special Committee on Oil & Gas

Subject: Direct access insurance for noncrude operators

Petro Marine Services is the largest Alaskan owned fuel distributor and specializes in marketing bulk fuel and packaged petroleum products to the marine industry. We operate seven bulk marine terminals and several harbor fuel facilities in Alaska. We have been trying unsuccessfully to obtain direct access insurance as a means of certifying financial responsibility. At this time we do not have any indication that such insurance is available to us in a form we can afford.

In the absence of any indications that such insurance is or soon will be available, the temporary law which permits ADEC to approve Certification of Financial Responsibility (COFR) without direct access should be permanently adopted. I encourage you to enact SB 239 and HB 384 thereby repealing the temporary nature of ADEC's authority to approve applications for COFR for noncrude operators. This action would assure that we could continue to operate without continually having to ask the legislature to reenact ADEC's authority to approve our COFR. I appreciate your attention and interest in eliminating this extra and unnecessary work.

Sincerely,



W. B. Schoephoester
Manager, Planning & Projects



A Division of Western Pioneer, Inc.

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January 24, 1994

House Special Committee on Oil & Gas
Senate Special Committee on Oil & Gas

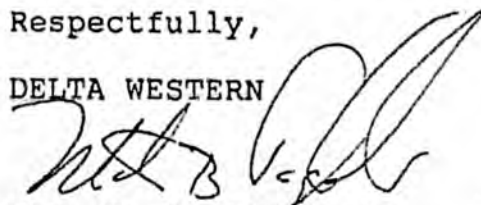
Subject: Direct access insurance for noncrude operators

Delta Western is one of the largest fuel distributors in the State of Alaska specializing in bulk fuels, Chevron lubricants and petroleum transportation services. We operate ten bulk fuel facilities and provide marine transportation throughout Southeast Alaska, Cook Inlet, the Alaska Peninsula, the Aleutian Chain, Bristol Bay and in the Kuskokwim and Yukon Rivers. Delta Western has been unsuccessful in its endeavors to obtain direct access insurance as a means of certifying financial responsibility. We have had no indication at this time that such insurance will be available to us in a form we can afford.

In the absence of any indications that such insurance is or soon will be available, the temporary law which permits ADEC to approve Certification of Financial Responsibility (COFR) without direct access should be permanently adopted. I encourage you to enact SB 239 and HB 384 thereby repealing the temporary nature of ADEC's authority to approve applications for COFR for noncrude operators. This action would assure that we could continue to operate without continually having to ask the legislature to reenact ADEC's authority to approve our COFR. I appreciate your attention and interest in eliminating this extra and unnecessary work.

Respectfully,

DELTA WESTERN



Mike B. Tagliavento
General Manager
Marketing/Operations

**CROWLEY MARINE SERVICES, INC.**

January 24, 1994

House Special Committee on Gas & Oil
Senate Special Committee on Gas & Oil

Subject: Direct access insurance for noncrude operators

Crowley Marine Services, Inc. ("Crowley") is a major tug and barge transporter of noncrude petroleum products in the State of Alaska. Crowley transports and delivers approximately 100 million gallons of bulk petroleum products annually to the Western Alaska region. Deliveries are performed to approximately 125 coastal and river communities. These communities are spread across some 4,000 miles of coastlines and rivers stretching from Kodiak Island to Barter Island. Virtually all of these villages are dependent on seasonal deliveries of fuel for their existence.

Our company has asked its insurance brokers to investigate the availability of direct access insurance. Direct access insurance is currently not available with the limits and extent of coverage provided by the P&I insurance in place for the Crowley fleet. Crowley presently has one billion dollars per occurrence P&I insurance coverage for pollution liability. Any limited direct access insurance would be in addition to our P&I insurance and a significant business cost with questionable benefit.

We ask that you enact SB 239 and HB 384 repealing the temporary nature of ADEC's authority to approve applications for Certification of Financial Responsibility (COFR) for noncrude operators. The temporary law which permits ADEC to approve COFR without direct access should be permanently adopted. We believe that the uncertainty of continued operations in Alaska by having to ask the legislature to reenact ADEC's authority to approve Crowley's COFR will be eliminated by this legislation.

I thank you for your interest and action in eliminating this confusing and unnecessary work.

Sincerely,

Charles F. Nalen
Vice President Environmental Affairs

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**Alaska Department of Environmental Conservation
Position Paper on Direct Action Insurance and Financial Responsibility**

January 24, 1994

Purpose of the Legislation: To give ADEC the continuing authority to grant waivers to those oil facilities which can get insurance, but whose insurance does not allow the insurer to be directly sued in Alaska.

Background of the Legislation: Under state law, owners of facilities that are oil spill threats are required to submit proof of financial responsibility in the case of a spill. Financial responsibility may be demonstrated by (1) self-insurance, (2) insurance, (3) surety, (4) guarantee, (5) letter of credit approved by the department, or (6) other proof of financial responsibility provided by a group of insureds who have agreed to cover pollutions risks of members of the group under terms the department may prescribe.

The law further provides that insurers or others providing financial responsibility coverage must agree to be sued in a state court (i.e., direct action.) Prior to the Exxon Valdez, this insurance was widely available. But when a similar "direct action" requirement was included in national law, under the Oil Pollution Act of 1990, many of the world's insurance providers stopped issuing coverage for this insurance.

Two years ago, the Alaska Legislature gave ADEC the authority to waive the direct action requirement if the person submitting insurance as a form of financial responsibility signed a quarterly affidavit that the direct action coverage was not available.

A House Bill pending now (HB 384) would extend ADEC's authority to grant a waiver to direct action permanently. The companion Senate version, SB 239, would extend the waiver authority just two years.

DEC's Position: The Department supports continuing this waiver provision, and making the waiver provision permanent. Without this provision, we may have to shut down facilities which provide fuel throughout Alaska. We are continuing to work with the insurance industry to make direct action coverage more readily available; there is a proposed product now under department review (with review also by the Department of Law) that would serve as a rider for insurance coverage that does not offer direct action. We believe the waiver provisions are strict enough (with a quarterly affidavit required and the Department's ability to deny waivers) that the provision may be made a permanent part of the law. Thus we support the House language as optimal.

DIVISION OF LEGAL SERVICES

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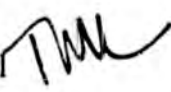
130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

January 21, 1994

SUBJECT: Sectional Summary of HB 384, relating to an exemption for proof of financial responsibility by noncrude oil operations

TO: Representative Joe Green

FROM: Terri Lauterbach
Legislative Counsel 

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

Section 1.

In 1992, the legislature gave noncrude oil operations a two-year exemption from the normal requirement that their proof of financial responsibility include "direct action" in our state courts against the surety or insurer who provided their coverage. In order to get this exemption, the noncrude operation had to show that "direct action" insurance was not available after diligent search.

Section 1 of the bill would make this exemption permanent by repealing the two-year limitation.

Section 2.

This section is included to make sure that there will be no gap in the exemption that is made permanent by section 1. Since the two-year exemption expires on June 1, 1994, and there is a slight possibility that this bill, even if passed by the legislature in May, might not be transmitted or signed by the governor by June 1, the bill is made retroactive to June 1.

Section 3.

Immediate effective date.

TML:gc
94-053.glc

Legislative Research Agency

Alaska State Legislature



130 Seward Street, Suite 218
Juneau, Alaska 99801-2196

Phone: (507) 465-3991
Fax: (907) 463-3351

November 10, 1993

MEMORANDUM

TO: Senator Loren Leman

FROM: Maria Gladziszewski *MSX*
Legislative Analyst

RE: Other States' Direct Action Clauses for Oil Spill Insurers
Research Request 94.044

You asked if any coastal states have repealed those statutory provisions that allow states to bring claims directly against insurers in oil spill cases. Such provisions are often referred to as direct action clauses and allow states to bring action against insurers in state courts. If so, you asked if these clauses had been replaced with other provisions regarding action in local courts. You were particularly interested in the situation in California, Florida, and Washington, and you asked for a copy the relevant statute from Florida.

For a previous memorandum prepared by this agency, we asked environmental officials or assistant attorneys general from the 22 other coastal states about their state's direct action provisions. Seventeen of those states--including California, Florida and Washington--have never included direct action provisions in their laws regarding oil spill insurers.¹ For this memorandum, we contacted officials from the 5 coastal states that had, or formerly had, direct action provisions to determine if laws had changed since our original memorandum was prepared. Because you specifically asked about California, Florida and Washington, we also contacted officials in those states.

This telephone survey revealed that Louisiana, New Jersey, New York and Virginia currently have direct action provisions for oil spill insurers. In 1993, the Texas legislature repealed direct action requirements.

¹The following state statutes contain no mention of direct action: Alabama, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, North Carolina, Oregon, Rhode Island, South Carolina and Washington.

Laws in California, Florida, Washington and the 5 states which currently have, or formerly had, direct action provisions for oil spill insurers are discussed below. Copies of statutes in the 8 states are attached.

STATES WITH DIRECT ACTION PROVISIONS

Louisiana: Tim Hebert of the Oil Spill Coordinator's Office said that the oil spill statutes do not specifically contain direct action provisions. Steve Hawkland, an attorney for the Secretary of State office said, however, that a general insurance statute requires direct action for all insurance providers (R.S. 22:655).

New Jersey: Section 58:10-23.11s of New Jersey statutes permits the state or injured persons to bring claims "directly against the bond, insurer, or any other person providing evidence of financial responsibility."

New York: According to Gordon Johnson, an assistant attorney general for New York, the state may assert claims directly against a bond or the insurer for cleanup costs, damages and civil penalties (Navigation Law Section 190).

Virginia: State statutes require operators of tank vessels to make a cash deposit of \$500 per gross ton. Tank vessel operators may be exempted if operators provide evidence of financial responsibility (by self insurance, insurance, guaranty or surety). To obtain an exemption from the cash deposit requirements, the operator and insurer "shall appoint an agent for service of process in the Commonwealth. . . and any instrument of insurance, guaranty or surety must provide that actions may be brought on such instrument or insurance, guaranty or surety directly against the insurer . . ." (62.1-44.34:16).

According to Assistant Attorney General Carl Josephson, however, state lawyers conclude that P&I clubs are not subject to direct action provisions.² The Virginia Corporation Commission, which regulates the insurance industry, rendered an opinion that P&I clubs do not come under their jurisdiction. Mr. Josephson said that since Virginia does not consider P&I clubs to be insurers, P&I clubs would not be subject to direct action.

²Protection and Indemnity (P&I) clubs are mutuals made up of a number of tanker and oil companies. Many oil transporters and terminal facility operators claim that P&I clubs provide the only means for insuring against oil spills. Protection and Indemnity clubs have traditionally opposed attempts to include direct action provisions in state and federal statutes.

STATES WITH REPEALED DIRECT ACTION PROVISIONS

Texas: In May 1993, the Texas legislature revised sections of its oil pollution statutes. Among other things, the passage of SB 1049 repealed Section 40.255 of the Natural Resource Code which formerly permitted the state to "bring suit directly against any bond, insurer, guarantor or person providing evidence of financial responsibility . . ." Assistant Attorney General Ingrid Hansen said that this provision was deleted after heavy lobbying from the insurance industry. Ms. Hansen said that Texas law does not have separate financial responsibility requirements other than those mandated by the federal Oil Pollution Act of 1990 (OPA 90).

ADDITIONAL STATES: CALIFORNIA, FLORIDA AND WASHINGTON

You also specifically asked about the law in California, Florida and Washington. The laws in those states are discussed below.

California

California law has never contained a direct action provision. Carl Moore, regulations supervisor with the California Department of Fish and Game Office of Spill Prevention and Response, said that California lawmakers "deliberately and systematically avoided the issue of direct action. . .we saw [the direct action debate] as a red herring." Mr. Moore reports that California lawmakers decided instead to mandate that responsible parties are absolutely liable for damages, jointly and severally. Mr. Moore said that lawmakers felt these provisions assured adequate financial capability to cover oil spills.

In addition, Mr. Moore reports that the California Office of Spill Prevention and Response has made a policy decision to take as evidence of financial responsibility P&I club policies even though policies may specifically state that they may not be used as proof of financial responsibility under OPA 90.

Florida

According to Pat Kincaid, Office of the General Counsel of Florida's Environmental Protection Agency, Florida statutes contain no mention of direct action against oil spill insurers. Ms. Kincaid said "there's nothing in our law that says we can or cannot [take action directly against insurers]."

Senator Leman
November 10, 1993
Page 4

Provisions in Florida law regarding financial responsibility have been amended in the last few years. Debbie Preble, an environmental administrator for the Office of Coastal Protection, said that 1990 legislation required all oil spill insurers to provide proof of financial security and to pay damages to the Coastal Protection Trust Fund. The P&I clubs, however, refused to comply with this requirement and other insurance companies would not provide vessel owners with oil spill insurance. As a result, companies had to provide proof of self-insurance. Smaller companies were able to self-insure only a few of their vessels at one time and therefore only provided proof of insurance for vessels when they were in Florida waters. Because the state was burdened with the continuous processing of insurance certificates, the law was changed in 1991 by deleting the requirement that insurers pay damages to the trust fund (FS 376.12 - 376.14).

Washington

According to Cathy Carruthers, Washington Department of Ecology, Washington statutes are silent regarding whether direct action may or may not be taken against insurers. Regulations may or may not be written to include direct action. Officials from the Office of Marine Safety have not yet written regulations for vessels; Department of Ecology officials have written a draft rule for facilities. The draft rule states that facility insurers must provide coverage regardless of the financial status of the insured. That is, the draft rule provides for direct action against insurers of facilities covered by indemnity insurance in the event of the bankruptcy of the insured [Washington Administrative Code 173-182-050(3)(d)].

During the 1991 legislative session, Washington exempted P&I clubs from financial responsibility requirements [88.40.020(c)]. According to Harry Reinert, counsel to the Washington House Environmental Affairs Committee, "[Washington lawmakers] think membership in a P&I club meets financial responsibility requirements but we do require some evidence of membership." Mr. Reinert also stated that "there wasn't a big battle over direct action here as there has been in other states. . .there wasn't a big battle over the P&I club exemption either. We didn't spend a lot of time on the issue. . . Maybe we didn't understand the full impact.

I hope that this information answers your questions. Please contact us if we may provide additional assistance.

Attachments

REVISED LIST OF OIL OPERATORS THAT USE INSURANCE AS PROOF OF FINANCIAL RESPONSIBILITY

JANUARY 20, 1994

The operators that are marked "aprvd" have policies that meet all the state requirements for proof of financial responsibility. The operators that are marked "condaprvd" have conditional approvals because their policies do not meet the state requirements and they cannot obtain any other type of proof coverage. Some companies are listed more than once because they have separate files for barges and terminals.

File #	Operator Name	Status	Insurer
4.01.078	Naknek Electric Assoc., Inc.	aprvd	Areca Insurance Exch
4.01.035b	St. Michael Fuel Co. (Yutana Barge)	aprvd	ILU
4.01.154	Stewart Petroleum Co.	aprvd	Lloyd's & London com
4.01.018	Cook Inlet Pipe Line Co.	aprvd	Lloyd's & others
4.01.035c	Yukon Fuel Co. (Yutana Barge Line)	aprvd	ILU
4.01.104	Kotzebue Electric Assn., Inc.	aprvd	Areca Insurance Exch
4.01.020	Kenai Pipe Line Co.	aprvd	Lloyd's & London com
4.01.177	Alaskan Crude Corp.	aprvd	Lloyd's & London com
4.01.013	Anchorage Fueling & Service Co.	aprvd	Zurich American Ins.
4.01.095	Nushagak Electric Coop., Inc.	aprvd	Areca Insurance Exch
4.01.035c	Galena Fuel Co. (Yutana Barge Line)	aprvd.	ILU
4.01.178	International Tug & Barge Ltd.	Condaprvd	WQIS
4.01.072	Saupe Enterprises dba Chevron Dist.	condaprvd	ILU
4.01.089	Orca Oil Co., Inc.	condaprvd	ILU
4.01.016	Crowley Marine Services, Inc.	condaprvd	West of England Ship
4.01.109	UIC Construction, Inc.	condaprvd	Agri. Excess & Surpl
4.01.108	Bethel Fuel Sales, Inc.	condaprvd	Fireman's Fund, ILU
4.01.087a	Harbor Ent. dba Petro Marine Services	condaprvd	Lloyd's & ILU
4.01.088	Bering Sea Fisheries	condaprvd	WQIS
4.01.161	Ocean Marine Services, Inc.	condaprvd	No. of England P&I A
4.01.005	Alaska Pulp Corp.	condaprvd	American Int. Specia
4.01.153	Lutak Petroleum JV dba Totem Oil Co.	condaprvd	Commerce & Industry
4.01.061	Anderes Oil Co.	condaprvd	Agri. Excess & Surpl
4.01.025	Boyer Towing, Inc.	condaprvd	United Kingdom Mutua
4.01.146	Olsen Ent. dba Island Providers Trnsp.	condaprvd	Lloyd's
4.01.173	Silver Bay Logging, Inc.	condaprvd	WQIS
4.01.071	Kugkaktlik Limited dba Kipnuk Fuel	condaprvd	WQIS
4.01.161a	Ocean Marine Services, Inc.	condaprvd	WQIS
4.01.067	Moody's Sea Lighterage Inc.	condaprvd	WQIS
4.01.173a	Silver Bay Logging, Inc.	condaprvd	WQIS
4.01.065	Smith Lighterage Co., Inc.	condaprvd	WQIS
4.01.102	Kodiak Oil Sales, Inc.	condaprvd	ILU
4.01.129	Forty Niner Transportation, Inc.	condaprvd	WQIS
4.01.040	Samson Tug & Barge Co. Inc.	condaprvd	WQIS
4.01.16a	Crowley Marine Services, Inc.	condaprvd	Lloyd's & American H
4.01.035a	Yutana Barge Lines, Inc. (barges)	condaprvd	W. of England Ship O
4.01.163	Seacor Marine, Inc.	condaprvd	U.S. & British compa
4.01.045	Sitka Fuels, Inc.	condaprvd	Commerce & Industry

PROOF OF FINANCIAL RESPONSIBILITY

Type of Facility	Before June 1, 1991	After June 1, 1991
OIL TERMINALS		
Oil Terminals/Crude (5,000 barrel (bbl.) and up)	\$10 per bbl. of storage capacity or \$1,000,000, whichever is greater, \$50,000,000 maximum	\$50,000,000 per incident
Oil Terminals/Non-Crude (10,000 bbl. and up)	Same as above	\$25 per bbl. of storage capacity or \$1,000,000, whichever is greater, \$50,000,000 maximum
Oil Terminals/Crude and Non-Crude combined	Same as above	If mostly crude - \$50,000,000 per incident. If mostly non-crude - \$25 per bbl. of total capacity
PIPELINES & EXPLORATION FACILITIES		
Pipelines and Offshore Exploration or Production	\$35,000,000 per incident	\$50,000,000 per incident
Onshore Production	EXEMPT	\$20,000,000 per incident
Onshore Exploration	EXEMPT	\$5,000,000 per incident
VESSELS & BARGES		
Tank Vessel & Oil Barge/Crude	Trans-Alaska Pipeline related: \$14,000,000. Other tankers: per Clean Water Act or \$20,000,000, whichever is greater. Other barges: per CWA or \$1,000,000.	\$300 per bbl. per incident storage capacity or \$100,000,000, whichever is greater
Tank Vessel & Barge/Non-Crude	Same as above	\$100 per bbl. storage capacity per incident or \$1,000,000, whichever is greater, \$35,000,000 maximum



Alaska
Department of
Environmental
Conservation



credited to a special account called the "oil and hazardous substance release mitigation account". (§ 2 ch 116 SLA 1980; am § 15 ch 59 SLA 1986)

Sec. 46.04.020. Removal of oil discharges. (a) A person causing or permitting the discharge of oil shall immediately contain and clean up the discharge. The department may waive this requirement

(1) if it determines, in consultation with the United States Coast Guard or the United States Environmental Protection Agency, as appropriate, that containment or cleanup is technically not feasible; or

(2) if the cleanup or containment activities would result in greater environmental damage than the discharge itself.

(b) The containment and cleanup of discharged oil shall be carried out in a manner approved by the department. Wastes generated as a result of containment or cleanup activities shall be disposed of in a manner approved by the department. The requirement of this subsection for approval of containment and cleanup activities does not apply to the United States Coast Guard or United States Environmental Protection Agency acting under the authority of § 311(c) or (d) of the Clean Water Act.

(c) If the department determines that containment or cleanup activities are not adequate, it may direct the person engaged in the activities to cease and may undertake the activities itself through contract or its own resources, or both. The department may not direct the cessation of containment or cleanup activities undertaken by the United States Coast Guard or United States Environmental Protection Agency under § 311 of the Clean Water Act. However, the department may undertake, direct, or authorize supplemental cleanup or containment efforts.

(d) The department shall provide for the immediate containment or cleanup of an oil discharge of unexplained origin unless

(1) the department determines, in consultation with the United States Coast Guard or the United States Environmental Protection Agency that containment or cleanup of the oil discharge is technically not feasible; or

(2) the containment or cleanup activities would result in greater environmental damage than the discharge itself.

(e) The department shall enter into negotiations for memoranda of understanding or cooperative agreements with the United States Coast Guard, the United States Environmental Protection Agency, and other persons in order to

(1) facilitate coordinated and effective oil discharge prevention and response in the state, including agreements relating to development and enforcement of vessel traffic control and monitoring systems for tank vessels and oil barges operating in or near the waters of the state;

(2) provide for cooperative review of oil discharge prevention and contingency plans submitted to the department under AS 46.04.030;

(3) provide for cooperative inspections of oil terminal facilities by the department and the United States Coast Guard or United States Environmental Protection Agency; and

(4) provide for cooperative oil discharge notification procedures.

(f) In fulfilling its responsibilities under (e) of this section, the department shall consult with the governing bodies of municipalities and villages. (§ 2 ch 116 SLA 1980; am § 8 ch 191 SLA 1990; am § 12 ch 83 SLA 1991)

Cross references. — For civil penalties for discharges of oil, see AS 46.03.788; for civil actions for pollution, see AS 46.03.780; for provisions imposing strict liability for discharge of hazardous substances, see AS 46.03.822.

Effect of amendments. — The 1990 amendment, effective June 27, 1990, substituted all of the present language of

paragraph (e)(1) following "discharge" for "response in the state", and inserted "prevention and" in paragraph (e)(2).

The 1991 amendment, effective June 28, 1991, added subsection (f).

Editor's notes. — Section 311 of the Clean Water Act, referred to in subsections (b) and (c), may be found in 33 U.S.C. § 1321.

Sec. 46.04.025. Confidential information. The department may maintain the confidentiality of a manufacturer's proprietary technical information relating to chemical and biological agents used to control or mitigate the effects of an oil discharge. The department may refuse to release the information unless the manufacturer authorizes its release or unless a court orders its release. The department may provide the information to the Department of Fish and Game and other state and federal agencies if the department or other agency requesting the information agrees to maintain its confidentiality. (§ 2 ch 116 SLA 1980)

Sec. 46.04.030. Oil discharge prevention and contingency plans. (a) A person may not cause or permit the operation of an oil terminal facility in the state unless an oil discharge prevention and contingency plan for the facility has been approved by the department and the person is in compliance with the plan.

(b) A person may not cause or permit the operation of a pipeline or an exploration or production facility in the state unless an oil discharge prevention and contingency plan for the pipeline or facility has been approved by the department and the person is in compliance with the plan.

(c) Except as provided in (n) of this section, a person may not operate a tank vessel or an oil barge within the waters of the state, or cause or permit the transfer of oil to or from a tank vessel or an oil barge, unless an oil discharge prevention and contingency plan for the tank vessel or oil barge has been approved by the department and the person is in compliance with the plan.

(d) Upon approval of a contingency plan, the department shall issue to the plan holder a certificate stating that the contingency plan has been approved by the department. The certificate must include the name of the facility, pipeline, tank vessel, or oil barge for which it is issued, the effective date of the contingency plan, and the date by which the contingency plan must be submitted for renewal. A contingency plan must be submitted for renewal every three years.

(e) The department may attach reasonable terms and conditions to its approval or modification of a contingency plan that the department determines are necessary to ensure that the applicant for a contingency plan has access to sufficient resources to protect environmentally sensitive areas and to contain, clean up, and mitigate potential oil discharges from the facility or vessel as provided in (k) of this section, and to ensure that the applicant complies with the contingency plan. The contingency plan must provide for the use by the applicant of the best technology that was available at the time the contingency plan was submitted or renewed. The department may require an applicant or holder of an approved contingency plan to take steps necessary to demonstrate its ability to carry out the contingency plan, including

- (1) periodic training;
- (2) response team exercises; and
- (3) verifying access to inventories of equipment, supplies, and personnel identified as available in the approved contingency plan.

(f) Upon request of a plan holder or on the department's own initiative, the department, after notice and opportunity for hearing, may modify its approval of a contingency plan if the department determines that a change has occurred in the operation of a facility or vessel necessitating an amended or supplemented plan, or the operator's discharge experience demonstrates a necessity for modification. The department, after notice and opportunity for hearing, may revoke its approval of a contingency plan if the department determines that

- (1) approval was obtained by fraud or misrepresentation;
- (2) the operator does not have access to the quality or quantity of resources identified in the plan;
- (3) a term or condition of approval or modification has been violated; or

(4) the person is not in compliance with the contingency plan and the deficiency materially affects the plan holder's response capability.

(g) Failure of a holder of an approved or modified contingency plan to comply with the plan, or to have access to the quality or quantity of resources identified in the plan or to respond with those resources within the shortest possible time in the event of a spill is a violation of this chapter for purposes of AS 46.03.760(a), 46.03.765, 46.03.790, and any other applicable law. If the holder of an approved or modified contingency plan fails to respond to and conduct cleanup operations of an unpermitted discharge of oil or oil with the

resources identified in the plan and in a manner required under the plan, the holder is strictly liable, jointly and severally, for the civil penalty assessed under AS 46.03.758, 46.03.759, or 46.03.760 against any other person for that discharge.

(h) The department is the only state agency that has the power to approve, modify, or revoke a contingency plan for the purposes of this section. The department shall exercise its power under this section in a timely manner. Except as provided in (i) of this section, it is not a defense to an action brought for a violation of (a) — (c) of this section that the person charged believed that a current contingency plan had been approved by the department.

(i) It is a defense to an action brought for a violation of (a) — (c) of this section that the person charged relied on a certificate of approval issued by the department under (d) of this section unless the person knew or had reason to know at the time of the alleged violation that approval of the plan had been revoked or that the holder of the plan was not capable of carrying out the plan.

(j) Before the department approves or modifies a contingency plan under this section, the department shall provide a copy of the contingency plan to the Department of Fish and Game and to the Department of Natural Resources for their review. The department shall by regulation establish the procedures and time limits applicable to agency review of contingency plans.

(k) Except as provided in (m) and (o) of this section, the holder of an approved contingency plan required under this section shall maintain, or have available under contract, in its region of operation or in another region of operation approved by the department, singly or in conjunction with other operators, sufficient oil discharge containment, storage, transfer, and cleanup equipment, personnel, and resources to meet the following response planning standards:

(1) for a discharge from an oil terminal facility, the plan holder shall plan to be able to contain or control, and clean up a discharge equal to the capacity of the largest oil storage tank at the facility within 72 hours, except that if the department determines that the facility is located in an area of high risk because of natural or man-made conditions outside of the facility, it may increase the volume requirement under this paragraph so that the contingency plan must be designed for a response that is greater in amount than the capacity of the largest oil storage tank at the facility;

(2) for a discharge from an exploration or production facility or a pipeline, the plan holder shall plan to be able to contain or control, and clean up the realistic maximum oil discharge within 72 hours;

(3) for a discharge of crude oil from a tank vessel or oil barge, the plan holder shall plan to be able to contain or control, and clean up a realistic maximum oil discharge as provided in (A), (B), and (C) of this

(4) "region of operation," with respect to the holder of a contingency plan, means the area where the operations of the holder that require a contingency plan are located, the boundaries of which correspond to the regional boundaries established by the commissioner for regional master planning purposes under AS 46.04.210. (§ 2 ch 116 SLA 1980; am §§ 1, 2 ch 140 SLA 1988; am § 6 ch 41 SLA 1989; am §§ 9, 10 ch 191 SLA 1990; am § 59 ch 21 SLA 1991)

Crossa references. — For interim operation by persons with approved crude oil discharge prevention and contingency plans who submit amendments to comply with ch. 191, SLA 1990, see § 4, ch. 9, SLA 1991 in the Temporary and Special Acts.

Effect of amendments. — The 1988 amendment, in subsection (e), added paragraphs (1)(3) and substituted "or holder of an approved contingency plan to take steps necessary to demonstrate its ability to carry out the contingency plan, including" for "to undertake discharge exercises" in the last sentence in the introductory paragraph; and added subsection (g).

The 1989 amendment, effective August 10, 1989, added the second sentence in subsection (g).

The 1990 amendment, effective June 27, 1990, rewrote subsections (a)-(g) and added subsections (h)-(j).

The 1991 amendment, effective June 11, 1991, in subsection (h), deleted "for prosecutions under AS 46.03.790(h) and

except" following "Except" at the beginning of the third sentence.

Editor's notes. — Section 32(a), ch. 191, SLA 1990, as amended by § 2(a), ch. 9, SLA 1991, provides that (k)-(m) of this section "do not apply to oil discharge prevention and contingency plans for crude oil operations until June 1, 1991. On and after June 1, 1991, a contingency plan for a crude oil operation must comply with AS 46.04.030(k)-(m), regardless of whether the contingency plan is due for renewal under AS 46.04.030(d), as amended by § 9, ch. 191, SLA 1990." Section 32(c), ch. 191, SLA 1990, as added by § 3, ch. 9, SLA 1991, provides that (k)-(m) of this section "do not apply to oil discharge prevention and contingency plans for noncrude oil operations until June 1, 1992. On and after June 1, 1992, a contingency plan for a noncrude oil operation must comply with AS 46.04.030(k)-(m), regardless of whether the contingency plan is due for renewal under AS 46.04.030(d), as amended by § 9, ch. 191, SLA 1990."

Sec. 46.04.040. Proof of financial responsibility. (a) A person may not cause or permit the operation of an oil terminal facility in the state unless the person has furnished to the department, and the department has approved, proof of financial ability to respond in damages. Proof of financial responsibility required for a crude oil terminal is \$50,000,000 per incident. Proof of financial responsibility required for a noncrude oil terminal is \$25, per incident, for each barrel of total noncrude oil storage capacity at the terminal or \$1,000,000, whichever is greater, subject to a maximum of \$50,000,000. For purposes of this subsection, an oil terminal facility that stores both crude oil and noncrude oil is subject to the financial responsibility requirements applicable to the type of facility that corresponds to the type of oil storage that predominates at the facility. However, if the facility stores more noncrude oil than crude oil, the \$25 per incident, per barrel requirement of this subsection applies to each barrel of oil storage capacity at the facility.

(b) A person may not cause or permit the operation of a pipeline or an exploration or production facility in the state unless the person has furnished to the department, and the department has approved, proof of financial ability to respond in damages. Proof of financial responsibility required for a pipeline or an offshore exploration or production facility is \$50,000,000 per incident. Proof of financial responsibility required for an onshore production facility is \$20,000,000 per incident. Proof of financial responsibility required for an onshore exploration facility is \$5,000,000 per incident.

(c) Except as provided in (m) of this section, a person may not operate a tank vessel or an oil barge within the waters of the state, or cause or permit the transfer of oil to or from a tank vessel or an oil barge, unless the person operating the tank vessel or oil barge has furnished to the department, and the department has approved, proof of financial ability to respond in damages. Proof of financial responsibility required under this subsection is

(1) \$30¢, per incident, for each barrel of storage capacity or \$100,000,000, whichever is greater, for a tank vessel or barge carrying crude oil;

(2) \$100, per incident, for each barrel of storage capacity or \$1,000,000, whichever is greater, subject to a maximum of \$35,000,000, for a tank vessel or barge carrying noncrude oil.

(d) Except as provided in (k) of this section, it is not a defense to an action brought for violation of (a) — (c) of this section that the person charged believed in good faith that proof of financial ability to respond in damages had been furnished to, and approved by, the department.

(e) Financial responsibility may be demonstrated by (1) self-insurance, (2) insurance, (3) surety, (4) guarantee, (5) letter of credit approved by the department, or (6) other proof of financial responsibility approved by the department, including proof of financial responsibility provided by a group of insureds who have agreed to cover pollution risks of members of the group under terms the department may prescribe. An action brought under AS 46.03.758, 46.03.759, 46.03.760(a) or (e), 46.03.822, or AS 46.04.030(g) may be brought in a state court directly against the insurer, the group, or another person providing evidence of financial responsibility. The applicant, and an insurer, surety, guarantor, person furnishing an approved letter of credit, or other group or person providing proof of financial responsibility approved by the department shall appoint an agent for service of process in the state. For purposes of this subsection, an insurer, other than a group of insureds whose agreement has been approved by the department, must either be authorized by the Department of Commerce and Economic Development to sell insurance in the state or be an unauthorized insurer listed by the Department of Commerce and Economic Development as not disapproved for use in the state.

(f) Acceptance of proof of financial responsibility expires

(1) one year from its issuance for self-insurance;
 (2) on the effective date of a change in the surety bond, guarantee, insurance agreement, letter of credit, or other proof of financial responsibility; or
 (3) on the expiration or cancellation of the surety bond, guarantee, insurance agreement, letter of credit, or other proof of financial responsibility.

(g) The person whose proof of financial responsibility is accepted by the department under this section shall notify the department at least 30 days before the effective date of a change, expiration or cancellation in the surety bond, guarantee, insurance agreement, letter of credit, or other proof of financial responsibility. Application for renewal of acceptance of proof of financial responsibility under this section must be filed at least 30 days before the date of expiration.

(h) The department, after notice and hearing, may revoke acceptance of proof of financial responsibility if it determines that

(1) acceptance was procured by fraud or misrepresentation; or
 (2) a change of circumstance has occurred other than a change specified in (f)(1) — (3) of this section, which would have warranted denial of the application.

(i) Financial responsibility under this section extends to a loss compensable under AS 46.03.760(e) or 46.03.822 and an assessment under AS 46.03.768, 46.03.759, 46.03.760(a), or AS 46.04.030(g).

(j) Upon acceptance and approval of proof of financial responsibility under this section, the department shall issue to the applicant a certificate stating that the state's financial responsibility requirements have been satisfied. The certificate must include the name of the facility, pipeline, tank vessel, or oil barge for which it is issued and the expiration date of the certificate.

(k) It is a defense to an action brought for violation of (a) — (c) of this section that the person charged relied on a certificate of approval issued under (j) of this section unless the person knew or had reason to know at the time of the alleged violation that the approval had been revoked or was expired.

(l) Notwithstanding the requirements of (e) of this section, the applicant may provide evidence of financial responsibility provided by an insurer or other person who does not agree to be subject to direct action in state courts or to appoint an agent for service of process if

(1) the department is satisfied that the insurance or other form of financial responsibility covers judgments under the statutes listed in (e) of this section;

(2) the applicant provides proof of \$50,000,000, or the amount required by (a) — (c) of this section, whichever is less, in insurance or other form of financial responsibility that meets the requirements of (e) of this section.

(3) the applicant provides a sworn statement or affidavit that insurance or other form of financial responsibility that meets the requirements of (e) of this section is not available in greater amounts.

(m) A tank vessel or oil barge that is conducting, or is available only for conducting, oil discharge response operations is exempt from the requirements of (c) of this section if the tank vessel or oil barge has received prior approval of the department. The department may approve an exemption under this subsection upon application and presentation of information required by the department. (§ 2 ch 111 SLA 1980; §§ 117, 118 ch 59 SLA 1982; am §§ 7, 8 ch 41 SLA 1989; am §§ 11 — 18 ch 191 SLA 1990; am § 60 ch 21 SLA 1991)

Cross references. — For civil penalties for discharges of oil, see AS 46.03.758. For civil actions for pollution, see AS 46.03.760; for provisions imposing strict liability for discharge of hazardous substances, see AS 46.03.822.

Effect of amendments. — The 1989 amendment, effective August 10, 1989, inserted "or AS 46.04.030(g) or to collect penalties imposed under AS 46.03.759" in the second sentence in subsection (e) and inserted the references to "46.03.759" and "46.04.030(g)" in subsection (i).

The 1990 amendment, effective June 27, 1990, rewrote subsections (a)-(f); in subsection (g) substituted all of the present language of the first sentence following "guarantee" for "or insurance agreement"; and added subsections (j)-(m).

The 1991 amendment, effective June 11, 1991, in subsection (d), deleted "for prosecutions under AS 46.03.760(b) and except" following "Except" at the beginning.

Editor's notes. — Section 32, ch. 191, SLA 1990, as amended by § 2(b), ch. 9, SLA 1991, provides that the amendments to this section made by §§ 11-18, ch. 191, SLA 1990, "do not apply to persons re-

quired to show proof of financial responsibility for crude oil operations until June 1, 1991. On and after June 1, 1991, proof of financial responsibility for a crude oil operation must comply with AS 46.04.040 as amended by §§ 11-18, ch. 191, SLA 1990, regardless of whether acceptance of proof of financial responsibility was required under AS 46.04.040(f), as amended by § 18, ch. 191, SLA 1990." Section 32(d), ch. 191, SLA 1990, as added by § 3 ch. 9, SLA 1991, provides that the amendments to this section made by §§ 11-13, ch. 191, SLA 1990 "do not apply to persons required to show proof of financial responsibility for noncrude oil operations until June 1, 1992. On and after June 1, 1992, proof of financial responsibility for noncrude oil operation must comply with AS 46.04.040, as amended by §§ 11-18, ch. 191, SLA 1990, regardless of whether acceptance of proof of financial responsibility has expired under AS 46.04.040(f), as amended by § 18, ch. 191, SLA 1990."

Opinions of attorney general. — Letters of undertaking are not adequate for proof of financial responsibility under this section. August 28, 1988 Op. Att'y Gen.

Sec. 46.04.045. Adjustment of dollar amounts. (a) The dollar amounts in AS 46.04.040 change, as provided in this section, according to and to the extent of changes in the Consumer Price Index for all urban consumers for the Anchorage metropolitan area comp. by the Bureau of Labor Statistics, United States Department of Labor (the index). The index for January 1990 is the reference base index.

(b) The dollar amounts change on October 1 of each third year according to the percentage change between the index for January of that year and the most recent index used to determine whether to change the dollar amounts. After calculation of the new amounts, the

SCOMM

93:13

Alaska State Legislature

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DISTRICT 10



CHAIR, OIL & GAS COMMITTEE
VICE CHAIR, LABOR & COMMERCE
COMMITTEE

JUDICIARY COMMITTEE
RESOURCES COMMITTEE
INTERNATIONAL TRADE & TOURISM
COMMITTEE

ECONOMIC TASK FORCE

Representative Joe Green

Sponsor Statement

HB 401

Alaska Coastal Management Program Revisions

HB 401 clarifies how and when certain parties can petition the Coastal Policy Council during an Alaska Coastal Management Program (ACMP) consistency review. The Coastal Policy Council (CPC) coordinates the review of State permits for proposed development projects affecting natural resources in Alaska's coastal zones. The Alaska Coastal Management Program is the set of statutes and regulations which guide development in Alaska's coastal areas.

Problem: It is common for state commissioners to delegate their authority to deputies and assistants to attend meetings in their stead when the commissioners are unable to attend. Yet, under current law the resource commissioners cannot delegate their authority to hear a consistency determination appeal under the ACMP process.

If the project applicant is not satisfied with the resource commissioner-level decision they can appeal to the CPC. The problem is compounded here because the resource commissioners - as CPC members - cannot sit in review of their own decision. This "stacks the deck" as it were because the council is then not adequately represented by state officials.

Solution: Currently, the CPC is petitioned after a *final* consistency determination. HB 401 amends the ACMP (AS 46.40) to allow petitions to the CPC after a state agency issues a *preliminary* consistency determination. Under this new scenario state resource commissioners would only be reviewing proposed decisions, and would therefore not be in conflict when they vote on a final decision.

AMENDMENT #2

February 7, 1994

IN THE HOUSE

OIL & GAS COMMITTEE

Pg. 5, Ln. 10, after "authorized under" insert AS 46.40.096(e)(1) or...

ACMP's/CPC
Amendment

AMENDMENT #1

February 7, 1994

IN THE HOUSE

OIL & GAS COMMITTEE

Pg. 4, Ln.6, after "subsection." and before "Under this subsection,"
insert But not more than 30 days shall elapse between the filing of
the petition and the decision by the Council.

Steve
Porter's
Amendment

Proposed Amendment to House Bill 401
Submitted by the Division of Governmental Coordination
February 2, 1994

An amendment to Section 3 of House Bill 401 is proposed. At page 5, line 10, the following language would be added:

"(b) A party that is authorized under AS 46.40.096(e)(1) or (g) of this section may file a petition showing..."

* * *

The amendment would correct the language which specifies who is eligible to petition the Alaska Coastal Policy Council under AS 46.40.100(b). Depending on the *type of action* under petition, different parties would be eligible:

- for a petition on a proposed consistency determination allowed under AS 46.40.100(b)(1), the eligible parties are identified at AS 46.40.096(e)(1) [HB 401, page 4, lines 7-14]

OR

- for a petition on a general matter of district program implementation, enforcement, or compliance allowed under AS 46.40.100(b)(2), the eligible parties are identified at AS 46.40.100(g) [HB 401, page 7, lines 24-27].

While there are some similarities, the eligible parties are slightly different in the two cases. To be clear, the opening sentence in AS 46.40.100(b) should specify both sets of potential petitioners identified elsewhere in the statute.

Fiscal Analysis of House Bill 401

Estimated Savings of \$29,900. HB 401 would eliminate travel and contractual expenses associated with conducting a formal hearing process under the Administrative Procedure Act (AS 44.62). Instead, HB 401 would establish an informal hearing on a petition before the Alaska Coastal Policy Council. The estimated FY95 savings in travel expenditures (\$2,000) are based on actual FY93 costs for staff and attorney to participate in a formal petition hearing. The estimated savings in contractual expenditures are based on average actual expenditures during FY91 - FY93 for: hearing officer contract (\$25,000), hearing room fees (\$1,400), and transcription costs (\$1,500). Other expenses for Council teleconferences, mailings, and supplies are assumed to remain roughly the same. The number of petitions (average: 1 per year FY89-FY93) is assumed to remain unchanged.

Estimated New Costs of \$22,050 for DGC and State Resource Agencies. Additional costs would be incurred to meet public notice requirements in Section 2 of HB 401. The legislation would require that a public notice occur for all coastal projects reviewed for consistency with the Alaska Coastal Management Program. However, the majority of coastal projects are currently public noticed under existing State agency mandatory requirements or cooperative arrangements under mandatory federal requirements. HB 401 would not impose an additional, duplicative notice requirement.

In effect, the estimated annual numbers of coastal projects coordinated by State agencies which would fall under a new public notice requirement because of HB 401 are: DEC (0), DFG (125), DGC (150), and DNR (130) -- for a subtotal of 405 projects (out of an estimated 1,500 total consistency reviews annually). Coastal projects currently not public noticed are often shorter, 30-day reviews and include: oil production pad expansion, winter tundra travel, seismic exploration, barge mooring, dock installation in river, culvert installation, floathouse mooring, bank stabilization, tideland uses, and temporary water uses. Many of these projects are considered minor activities without significant impacts.

The Department of Law interprets HB 401 (Section 2) to grant to the Coastal Policy Council the regulatory authority to direct various public notice requirements depending on project type and anticipated effects. Posting notices in local post offices, publication in the Alaska Administrative Journal, and posting by the local coastal district are considered appropriate for coastal projects where anticipated impacts would be minimal. Conservatively, it is estimated that only 205 of the 405 coastal projects would fall under this lesser public notice requirement, at an average cost of \$10 per notice for certified mailings (or \$2,050). The remaining 200 estimated projects would require one newspaper notice (following current DGC practice), at \$100 per notice (or \$20,000).

Net Savings of \$7,850.

Travel	<\$ 2,000>	
Contractual	+ <\$ 5,850>	[Note: \$27,900 - \$22,050]
Total:	<\$ 7,850>	

MEMORANDUM

State of Alaska

Department of Law

TO: Paul C. Rusanowski, Director
Division of Governmental
Coordination

DATE: March 3, 1993

FILE NO.: 663-92-0618

TEL NO.: 465-3600

SUBJECT: Alaska Coastal Policy
Member's Eligibility to
Hear Petitions Under
AS 46.40.100

FROM:

Elizabeth J. Kerttula
Elizabeth J. Kerttula
Assistant Attorney General

SUMMARY OF ATTORNEY GENERAL'S OPINION ON CPC MEMBERS' ELIGIBILITY TO HEAR PETITIONS

At your request, we are providing you with a short summary of our opinion concerning CPC members' eligibility to hear petitions.

As the opinion notes in the background section, in 1977 when the legislature enacted AS 46.40.100, it created an ability for certain people to appeal issues to the CPC through "petitions." In 1984, when the CPC promulgated its regulations creating the consistency review process for consistency determinations in 6 AAC 50, it amended a section of the regulations that specifically allowed consistency determinations to be reviewed by the CPC, intending to have consistency determinations appealed to court rather than to the CPC. However, there was no commensurate statutory change to AS 46.40.100. Since a regulation cannot remove a statutory right, the ability to bring a petition from a final consistency determination to the CPC remains. This situation has created a dual appeal mechanism and conflicts have arisen.

Your questions involve important Administrative Procedure Act ("APA")-due process concerns and delegation issues. As a general principle, the APA and its due process implications require that when an agency is performing an independent adjudicatory review, the review must be impartial. Concerning the delegation of duties, although commissioners have general authority to delegate functions vested in their departments, specific statutory and regulatory requirements take precedence over this general authority. Using these general principles, we analyzed your specific questions.

Rather than repeat the questions again (which we do in the opinion) we have outlined our responses below.

1(a). If a commissioner participates in a commissioner-level elevation concerning a consistency determination, that commissioner may not participate in a CPC petition concerning the same consistency determination.

ATTY GENERAL'S OPINION ON CPC MEMBERS'
ELIGIBILITY TO HEAR OPINIONS

1(b). If a CPC public member participates in a decision concerning a matter at a local level, that public member may not participate in a CPC petition concerning the same decision.

2. A commissioner may not delegate his or her responsibility to participate in a commissioner-level elevation of a consistency determination to a subordinate in order to allow him or herself the ability to sit on a petition on the consistency determination. Similarly, APA-due process concerns and the ACMP statutes and regulations do not allow a commissioner to delegate his or her authority to sit on a CPC petition if the commissioner has participated in an elevation. This creates a conflict between the ACMP statutes and regulations that should be resolved.

3. Neither a commissioner nor a public member (nor their alternates) may participate in a petition proceeding when the commissioner's department or the public member's municipality initiates the petition.

4. Neither a commissioner nor a public member (nor their alternates) may participate in a petition proceeding when the petition is against the commissioner's department or the public member's municipality (there is an exception noted in the opinion).

In conclusion, we hope this summary is of assistance to you.

EJK:smm

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 401

Revision Date: _____ Dept. Affected Office of the Governor
Title: Review of proposed projects under the BRU: Office of Management & Budget
ACMP and relating to petitions for compliance Component: Governmental Coordination
Sponsor: House Special Committee on Oil & Gas, Resources _____
Requestor: _____ **COMPONENT SERIAL NO.** 0018

Expenditures/Revenues

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	<2.0>	<2.1>	<2.2>	<2.3>	<2.4>	<2.6>
CONTRACTUAL	<5.9>	<6.2>	<6.5>	<6.8>	<7.2>	<7.5>
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	<7.9>	<8.3>	<8.7>	<9.1>	<9.6>	<10.1>

CAPITAL EXPENDITURES	0	0	0	0	0	0
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CHANGE IN REVENUES ()	0	0	0	0	0	0
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FUND SOURCE

(Thousands of Dollars)

1002 Federal Receipts	<7.9>	<8.3>	<8.7>	<9.1>	<9.6>	<10.1>
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
Other	0	0	0	0	0	0
TOTAL	<7.9>	<8.3>	<8.7>	<9.1>	<9.6>	<10.1>

Estimate of any current year (FY94) cost: \$ 0

POSITIONS

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

(See attachment)

Prepared by: Paul C. Rusanowski, Director
Division: Governmental Coordination
Approved by Commissioner: *Richard P. Bryan*
Agency: _____

Phone: 465-3562
Date: 2/4/94
Date: 2-4-94

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Alaska Coastal Policy Council
February 2, 1994

Public Members

Mr. Scott Novak, Cordova City Council (Public Member Co-chair)
Mayor Donald Long, City of Barrow
Mr. Robert Fagerstrom, Nome City Council
Mr. Al Unok, Kotlik City Council
Mayor Frank Kelty, City of Unalaska
Mr. David Arestad, Houston City Council
Mr. Drew Scalzi, Kenai Peninsula Borough Assembly
Ms. Lynda B. Walker, Haines City Council
Ms. Phyllis Yetka, Ketchikan Gateway Borough Assembly

State Members

Shelby Stastny, Office of Management and Budget
 Alternate: Dr. Paul Rusanowski, Division of Governmental Coordination (State
 Member Co-chair)
Commissioner Paul Fuhs, Department of Commerce and Economic Development
 Alternate: Mr. Chris Gates, Division of Economic Development
Commissioner Edgar Blatchford, Department of Community and Regional Affairs
 Alternate: Mr. Bob Walsh, Division of Municipal and Regional Assistance
Commissioner John Sandor, Department of Environmental Conservation
 Alternate: Deputy Commissioner Mead Treadwell, DEC
Commissioner Carl Rosier, Department of Fish and Game
 Alternate: Mr. Frank Rue, Division of Habitat and Restoration
Commissioner Harry Noah, Department of Natural Resources
 Alternate: Mr. Ron Swanson, Division of Land
Commissioner Bruce Campbell, Department of Transportation and Public Facilities
 Alternate: Mr. Mike McKinnon, Division of Planning

Participants in a Teleconference to
Consider a Work Draft of a Bill
Addressing AS 46.40.100 and Petitions under the Alaska Coastal Management Program

1:30 pm - 4:00 pm, December 28, 1993

Alaska Coastal Policy Council Subcommittee on Petitions:

Frank Kelty, CPC public member from Unalaska
Scott Novak, CPC public co-chair from Cordova
Frank Rue, Director, Division of Habitat/Restoration, DFG
Paul Rusanowski, Director, Division of Governmental Coordination, OMB
Ron Swanson, Director, Division of Land, DNR

Other Coastal Policy Council members:

Bob Walsh, Director, Division of Municipal/Regional Assistance, DCRA

Other Interested Parties in Working Group:

Coastal Districts Representatives

Sue Flensburg, Director, Bristol Bay Coastal Resource Service Area Program
Linda Freed, Planning Director, Kodiak Island Borough
Pat Galvin, Copeland, Landye, Bennett & Wolf, Anchorage (representing the
Northwest Arctic Borough)
Tom Loman, Wildlife Department, North Slope Borough
Darcy Richards, Director, Aleutians West CRSA Program

State Agency Representatives

Susan Braley, Division of Environmental Quality, DEC
Kerry Howard, DGC
Gretchen Keiser, DGC
Beth Kerttula, DOL
Gabrielle LaRoche, Division of Economic Development, DCED
Pam Rogers, Division of Oil and Gas, DNR
Glenn Seaman, Division of Habitat/Restoration, DFG
Nelda Warkentin, Division of Municipal/Regional Assistance, DCRA

Industry/Public Representatives and Private Individuals

Patty Bielawski, Accord Environmental, Anchorage
Jon Isaacs, Isaacs & Associates, Anchorage
Charles McKey, Anchorage
Steven B. Porter, Arco Alaska, Anchorage
Nancy Wainwright, Anchorage

Proposed Amendment to House Bill 401
Submitted by the Division of Governmental Coordination
February 2, 1994

An amendment to Section 3 of House Bill 401 is proposed. At page 5, line 10, the following language would be added:

"(b) A party that is authorized under AS 46.40.096(e)(1) or (g) of this section may file a petition showing..."

* * *

The amendment would correct the language which specifies who is eligible to petition the Alaska Coastal Policy Council under AS 46.40.100(b). Depending on the *type of action* under petition, different parties would be eligible:

- for a petition on a **proposed consistency determination** allowed under AS 46.40.100(b)(1), the eligible parties are identified at AS 46.40.096(e)(1) [HB 401, page 4, lines 7-14]

OR

- for a petition on a **general matter of district program implementation, enforcement, or compliance** allowed under AS 46.40.100(b)(2), the eligible parties are identified at AS 46.40.100(g) [HB 401, page 7, lines 24-27].

While there are some similarities, the eligible parties are slightly different in the two cases. To be clear, the opening sentence in AS 46.40.100(b) should specify both sets of potential petitioners identified elsewhere in the statute.

ACMP CONSISTENCY REVIEW PROCESS OVERVIEW
Prepared for the Coastal Policy Council; February 9, 1993

Introduction

The Division of Governmental Coordination (DGC) administers the Alaska Coastal Management Program (ACMP). In addition to coordinating preparation of district programs and serving as staff to the Coastal Policy Council (CPC), DGC also coordinates State reviews of activities in the coastal zone involving State and federal permits. This overview provides a summary of this latter function, the consistency review process.

Consistency Review Process

The consistency review regulations, also known as 6 AAC 50, provide a streamlined, coordinated process for reviewing and issuing State permits for proposed development projects affecting natural resources in Alaska's coastal zone. A brochure entitled, "How to Apply for State Permits in Alaska's Coastal Zone", is attached. It provides a brief summary of most of the information presented in this overview. In addition to coordinating projects that require State permits, DGC is also responsible for coordinating consistency reviews for direct federal actions [e.g. Corps of Engineers (COE) dredging permit] and projects that require federal permits [e.g. an Environmental Protection Agency (EPA) NPDES permit].

Coastal development projects are reviewed to ensure they are consistent with the standards of the ACMP and the policies of approved local coastal district programs. Project decisions, absent an approved district program, are based on ACMP standards found at 6 AAC 80. If there is an approved district program, project decisions are also based on enforceable district policies contained in those programs.

For each project, the consistency review regulations provide a structure for project review, issue resolution and decision-making, with the full involvement of State agencies, local coastal districts and the project applicant. The public is always welcome to participate in an advisory role.

The regulations require that:

1. All appropriate permits for a project are included in a single review. When an applicant proposes a project in the coastal zone, they are first required to complete a Coastal Project Questionnaire (CPQ). The CPQ contains questions designed to help applicants and State agencies determine what permits will be needed from State and federal agencies. If requested by the applicant, the coordinating agency can also assist with a pre-application meeting to ensure that all necessary permits have been identified and all back-up material is in order. When a CPQ and associated permit applications

are submitted to the coordinating agency, the packet is examined for completeness. As soon as an application packet is determined to be complete, the coordinating agency distributes it and a review schedule to all reviewers.

A project, and all necessary permits, are reviewed in a single review and a conclusive consistency determination is issued to the applicant for the project and all related permits. Typically, an applicant has to obtain permission from several agencies to conduct a project. Federal and State agencies from which permits may be needed include the U.S. Army COE, the EPA, the U.S. Forest Service (USFS), the Bureau of Land Management (BLM), and the State Departments of Environmental Conservation, Fish and Game and Natural Resources.

2. A single State agency contact is designated to coordinate the State's review of coastal development projects. For projects requiring a federal permit, or permits from two or more State agencies, or for direct federal actions, DGC is the coordinator of the review. For projects requiring permits from a single State agency, the agency issuing the permits acts as coordinator of the review. The coordinating agency is responsible for the administrative process involved with the review and assisting the applicant with the permitting and consistency review process.

3. Regulatory deadlines are established for consistency reviews and state permit decisions. Projects are reviewed under a 30-day review schedule, or more typically a 50-day review schedule, when agency permits have public notice requirements. Deadlines are also established for the distribution of information to reviewers, receipt of comments from reviewers, requests for additional information, notice to the applicant on the proposed consistency determination and issuance of the final or conclusive determination. The deadlines are not discussed in detail here, but, for your information, they are listed in a chart that appears in the attached brochure. State agencies with permits required by the project must issue their permits within 5 days of the conclusive consistency determination, unless additional review is required by statute or regulation.

4. The applicant, affected coastal district and State resource agencies concur with the consistency determination for a project before it is issued. Project reviewers submit comments on the proposed project and permits to the coordinating agency. The comments may include proposed changes to the project, or recommend stipulations which, if incorporated into the project, would render it consistent with the standards of the ACMP. The coordinating agency gives due deference to the commentor within their area of expertise. "Due deference", as defined in regulation, means that deference which is appropriate in the context of the commentor's expertise and area of responsibility, and all the evidence available to support any factual assertions. A coastal resource

district is considered to have expertise in the interpretation and application of the enforceable policies of its approved program [6 AAC 50.120 (a)].

If an applicant, State resource agency or an affected coastal district consider a proposed consistency determination to be unacceptable, opportunities exist to elevate a decision to policy makers of state resource agencies for reconsideration. The regulations first provide for a 15-day elevation to division directors and, if necessary, a second 15-day elevation to the commissioners of the resource agencies.

Exceptions to the 6 AAC 50 Process

There are a few exceptions to the 30-day and 50-day review schedules worth noting. Regulations found at 6 AAC 50.050 require DGC to publish a list of permits which have been categorically approved as being consistent with the ACMP, and a list of general concurrence determinations which, with standard stipulations, are also consistent with the ACMP. The list of these approvals is known as the Classification of State Agency Approvals, and is more common known as the "ABC" list, where "A" stands for categorically approved projects, "B" stands for general concurrence projects and "C" contains a list of permits which are subject to an individual consistency review. Permits qualify for the "A" list if they are so de minimis that they will have no significant impact in the coastal zone. Projects qualify for the "B" list if they are for routine activities that can effectively be made consistent with the ACMP by imposing standard stipulations on the applicable permits. An example of an "A" list permit is a Fish Habitat permit for minor instream work to improve or restore fish habitat and an example of a "B" list activity is Surface Oiling of Roads (GC-11). Permits on the "A" and "B" list are not subject to further agency review against the ACMP standards or district enforceable policies, and permits can be issued once it is determined applicants qualify under an "A" or "B" list approval.

The 6 AAC 50 regulations (6 AAC 50) also provide for emergency expedited reviews, but these are limited to true emergencies as defined in the Disaster Relief Act of 1974 (U.S.C. 5122), a catastrophic oil discharge, or where an expedited review is necessary for the preservation of the public peace, health, safety or general welfare.

Statistics

In terms of statistics, DGC typically coordinates approximately 500 project reviews a year. In FY92, DGC coordinated the review of 517 projects, 84 of which were non-consistency reviews (e.g. National Environmental Policy Act (NEPA) reviews, Outer Continental Shelf (OCS) reviews, etc.). Detailed statistics aren't currently available for FY92, but in FY91 the average review time of our 30-

day and 50-day reviews, respectively, was 25 and 48 days. Other FY91 statistics show that 22% of projects reviewed were determined to be consistent as proposed, 77% were found consistent with stipulations, and less than 1% were determined to be inconsistent. In FY 92, 13 projects were elevated to the directors for further consideration, and 4 of the 13 were elevated to the Resource Agency commissioners for final decision.

Over the years, statistics have shown that the bulk of the projects reviewed for consistency are for Public Utilities or Facilities (20%), followed by Fisheries, including Aquatic Farming and Hatcheries (18%), Oil and Gas activities (15%), Miscellaneous Activities (13%), Private Residential (12%) and Mining and Commercial (both with 11%). The numbers and percentages of project reviews and types are fairly stable year-to-year, although aquatic farming reviews decreased in FY92.

Many projects that are reviewed for consistency include new, difficult, or interesting issues. Often times, as a result of consistency reviews, the ACMP working group, which is currently composed of representatives from the State resource agencies and coastal districts, is directed to prepare guidance to assist future reviews. For example, during previous years, the ACMP working group developed procedural guidance on how to implement the Coastal Development Standard (6 AAC 80.040), and on how to place stipulations that are needed for consistency but which are outside the purview of individual agency authorities (i.e. "homeless stips"). Guidance was also developed on how to interpret provisions of federal regulations regarding "associated facilities" (CFR 930.21). The ACMP working group is often called upon to clarify procedures to facilitate the 6 AAC 50 review process.

Conclusion

During the almost 9 years the consistency review regulations have been in place, they have provided an effective and predictable process for coastal development activities that has been well-received by State agencies, coastal districts, and applicants. A paper published in *Agroborealis* in 1990 entitled, "Permit Reform in Alaska's Coastal Zone", by Thomas Gallagher, provides a survey critique of the consistency review process. The paper concludes that the consistency review process is successful in achieving its primary goals of coordinating permits and involving local communities. Other benefits noted include a savings in time and money, helping applicants obtain their federal permits, and reducing conflict. A copy of that paper is also attached for your information.

If you have questions about this overview, or would like additional information about the consistency review process, please contact Kerry Howard, DGC Project Analyst, at 465-3562.

DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

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

MEMORANDUM

February 4, 1994

SUBJECT: House Bill 401 -- Sectional Analysis (Work Order No. 8LS-1598\A)

TO: Representative Joe Green
Attn: Jeff Logan

FROM: Jack Chenoweth
Legislative Counsel

House Bill 401 makes a series of both substantive and technical amendments to statutes relating to the Alaska Coastal Policy Council and to the consistency determinations and to the compliance and enforcement actions that are authorized as part of the Alaska coastal management program.

Bill section 1, an amendment adding to the duties of the Alaska Coastal Policy Council, directs the council to adopt regulations that establish a consistency review and determination or certification process for projects for which that process is applicable.

Bill section 2, adding a new section, AS 46.40.096, sets out the requirements that are the framework for the consistency review and determination regulations. More specifically--

-- Subsection (a) reiterates the requirement that the council develop relevant program regulations;

-- Subsection (b) directs that project consistency reviews that are premised on obtaining an authorization from a single state agency are to be handled or coordinated by that agency;

-- Subsection (c) enumerates specific notice requirements and provides latitude for the council to frame regulations that more closely fit the notices to be given to the variances in project type;

SECTIONAL ANALYSIS

-- Subsection (d) outlines the procedural steps that the "reviewing entity," either the single agency under (b) or the office of management and budget for other consistency reviews, must follow;

-- Subsection (e) circumscribes the right to petition to review proposed consistency determinations, describing who may petition for review and under what constraints that petition may be accepted and acted upon or refused;

-- Subsection (f) authorizes the council, by regulation, to set limits on the consideration of a petition for review in conjunction with a required federal consistency determination if a limit is necessary to meet a deadline set by federal law for receipt of that consistency determination;

-- Subsection (g) supplies definitions of terms used in the section.

Bill section 3 revises AS 46.40.100(b) by amending requirements relating to petitions for compliance and enforcement of district coastal management programs under the Alaska coastal management program by

-- limiting the parties who may submit petitions asserting that comments offered in the course of a proposed consistency determination have not been fairly considered, and

-- limiting the scope of the inquiry that the coastal policy council may make and the nature of the remedy that the council may order in response to those consistency review and determination challenge petitions.

Bill sections 4 and 5, amending, respectively, AS 46.40.100(c) and (d), except from the general implementation and enforcement action provisions the handling of consistency review determination appeal petitions.

Bill section 6, adds new subsections, subsections (f) and (g), to AS 46.40.100. The material in subsection (f) sets out the minimum notice and hearing requirements on petitions submitted to the council seeking its review of a question of implementation or enforcement of an approved district coastal management program. Subsection (g) identifies the parties who may properly petition the council to take implementation, enforcement, or compliance action in instances not involving project consistency reviews.

Bill section 7 supplies definitions for two terms used in the material in AS 46.40 amended by this measure.

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF TRANSPORTATION
AND PUBLIC FACILITIES

OFFICE OF THE COMMISSIONER

3132 CHANNEL DRIVE
JUNEAU, ALASKA 99801-7898TEXT: (907) 465-3852
FAX: (907) 586-8365
PHONE: (907) 485-3900**MEMORANDUM**

TO: Representative Joe Green
Chairman
House Oil & Gas Special Committee

FROM: *HK Sandvik*
Helvi K. Sandvik
Deputy Commissioner

DATE: February 4, 1994

SUBJECT: HB 401, Coastal Zone Management Procedures

It is with some interest to note that you are sponsoring work on House Bill No. 401 relating to coastal policy. The Division of Governmental Coordination now, by regulation, requires a consistency review and determination on all projects constructed in the State which includes Coastal Zone management.

During development of any project involving federal interest, the state is required to comply with 42 USC 4321-4347 (National Environmental Policy Act of 1972). The involved federal agency must certify that the total public involvement process has been met under federal law. Almost without exception, any DOT&PF project is subject to NEPA.

A typical Federal-Aid project will have at least one and sometimes two formal hearings. These are part of the department's Public Involvement Plan prepared for each project. If a bridge is involved in or over navigable waters, an additional hearing and public involvement is required by both the U.S. Corps of Engineers and the U.S. Coast Guard. During the development of a project, the public involvement process can involve up to four (4) opportunities for public involvement and hearings. To require an additional hearing by a state agency would, in our case, appear to be redundant. Each separate hearing or public involvement requirement adds a minimum of about three months to the project development process.

DOT&PF is presently in contact with coastal districts through the review process mandated by the Division of Governmental Coordination.

It would cut time and expense in the DOT&PF's project development process if a provision could be included that would exempt DOT&PF (and perhaps others) if public involvement had been accomplished during the Federal and/or State processes.

If there is any way to shorten the process while still maintaining intent of HB 401, we feel it would benefit the development of transportation projects in Alaska.

cc: J.K. Ginger Johnson, Legislative Liaison, DOT&PF

SCOMM

93:14

House of Representatives
SPONSOR STATEMENT

HB 426

"An Act establishing the Chickaloon Flats Critical Habitat Area"

Chickaloon Flats is on the northeast side of the Kenai Peninsula, on the Turnagain Arm facing the Anchorage Coastal Refuge and Potter Flats. The area has a local nesting population of ducks and geese. The most important use of this area is as a feeding and resting area for migrating ducks, geese and shore birds. Up to 25,000 birds a day use the mudflats and tidal marsh. For example, the area is often used when Portage Pass is closed due to bad weather. The waterfowl that normally transit the pass have to have a place to rest and feed. Chickaloon Flats is the principal place they use on Turnagain Arm.

Alaska has the most comprehensive waterfowl refuge and critical habitat system of any state in the nation. There is Mendenhall State Game Refuge, 17,000 acres, Anchorage Coastal Refuge, 14,000 acres, Trading Bay State Game Refuge, 186,000 acres, Redoubt Bay Critical Habitat Area, 201,000 acres, Goose Bay State Game Refuge, 14,000 acres, Palmer Hay Flats State Game Refuge, 38,000 acres, Susitna Flats State Game Refuge, 301,000 acres and Fox River Flats Critical Habitat Area. The Chickaloon Flats area, with approximately 22,000 acres, will be an important addition to this system.

The purpose of this bill is to assure adequate habitat for waterfowl rather than create a stumbling block for future development of resources. There are currently no valid oil and gas leases in the proposed critical habitat area that would be disrupted by the formation of a critical habitat area. Additionally, there is nothing in this bill that would preclude the future exploration of this area.

I urge your support of this proposed legislation.

SPONSOR STATEMENT

Alaska State Legislature

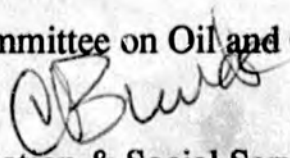
DURING SESSION:
STATE CAPITOL
JUNEAU, ALASKA 99801-1182
CAPITOL ROOM 112
OFFICE (907) 465-4843

House of Representatives

MEMORANDUM

DATE: February 6, 1994

TO: Representative Joe Green
Chairman House Special Committee on Oil and Gas

FROM: Representative Con Bunde 
Co-Chair House Health Education & Social Services Committee

RE: HB 426

This memo is a request for a committee hearing for HB 426 "An Act establishing the Chickaloon Flats Critical Habitat Area."

Chickaloon Flats is on the northeast side of the Kenai Peninsula, on the Turnagain Arm facing the Anchorage Coastal Refuge and Potter Flats. The area has a local nesting population of ducks and geese. However, the most important use of this area is as a feeding and resting area for migrating ducks, geese and shore birds. For example, the area is often used when Portage Pass is plugged by bad weather. The waterfowl that normally transit the pass have to have a place to rest and feed. Chickaloon Flats is the principal place they use on Turnagain Arm.

Alaska has the most comprehensive waterfowl refuge and critical habitat system of any state in the nation. If this legislation is enacted, Chickaloon Flats will be an important addition to this system.

Please contact Patti Swenson ext. 6824 when this bill is on your schedule. She will provide all the necessary documents for the committee packet. Thank you for your cooperation.

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. CSHB 426(O&G)

Revision Date: 3/8/94
Title: Chickaloon Flats Critical Habitat Area
Sponsor: Representative Bunde
Requestor: House Oil and Gas

Dept. Affected: Fish and Game
BRU: Habitat and Restoration
Component: Habitat

COMPONENT SERIAL NO. 486

Expenditures/Revenues

(Thousands of Dollars)

	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
OPERATING EXPENDITURES						
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL EXPENDITURES	0	0	0	0	0	0
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CHANGE IN REVENUES ()	0	0	0	0	0	0
------------------------	---	---	---	---	---	---

FUND SOURCE

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0	0	0	0	0	0

Estimate of any current year (FY 94) cost: \$ 0

POSITIONS

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

Prepared By: Frank Rue
Division: Habitat and Restoration
Approved by Commissioner: [Signature]
Agency: Alaska Department of Fish and Game

Phone: 465-3065
Date: 3/8/94
Date: 3/8/94

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2/15/94

CS FOR HOUSE BILL NO. 426()
IN THE LEGISLATURE OF THE STATE OF ALASKA
EIGHTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE BUNDE

A BILL

FOR AN ACT ENTITLED

1 "An Act establishing the Chickaloon Flats Critical Habitat Area."

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

3 * Section 1. AS 16.20 is amended by adding a new section to read:

4 Sec. 16.20.630. CHICKALOON FLATS CRITICAL HABITAT AREA. (a)

5 The following described area is established as the Chickaloon Flats Critical Habitat
6 Area:

7 The land and water encompassed by a boundary beginning at the point
8 on the shore of Chickaloon Bay at longitude W149 degrees, 53 minutes;
9 thence westerly along the mean high water line of Chickaloon Bay to
10 longitude W150 degrees, 18 minutes; thence easterly to the point of the
11 beginning.

12 (b) The department shall permit entry within the Chickaloon Flats Critical
13 Habitat Area for the exploration and development of oil and gas resources when it is
14 compatible with the purposes for which the critical habitat area is established.

1 (c) The department shall permit public uses of the Chickaloon Flats Critical
2 Habitat Area in a manner that is compatible with the purposes for which the critical
3 habitat area is established. The department shall permit the following public uses to
4 continue without further approval by the department unless the department determines
5 that the use is not compatible with the purposes for which the Chickaloon Flats Critical
6 Habitat Area is established:

7 (1) hunting, including subsistence hunting, trapping, and subsistence,
8 commercial, and sport fishing;

9 (2) hiking, backpacking, and camping, including the use of campfires;

10 (3) cross-country skiing, snowmachining, boating, and the landing of
11 aircraft; and

12 (4) other related uses that are temporary in duration and have no
13 foreseeable adverse effects on vegetation, drainage, soil stability, or fish and game and
14 their habitat.

Alaska State Legislature



House of Representatives

DURING SESSION:
STATE CAPITOL
JUNEAU, ALASKA 99801-1182
CAPITOL ROOM 112
OFFICE (907) 465-4843

MEMORANDUM

DATE: February 15, 1994
TO: All members of the Special Committee on Oil & Gas
FROM: Representative Con Bunde
RE: HB 426 Chickaloon Critical Habitat Area

In response to a memo from Oil and Gas, I have made changes to HB 426. Attached is a copy of a CS that will be proposed at the committee meeting on 2/16/94 at 5:00 pm.

If you have any questions please do not hesitate to contact my office before the meeting. Thank you for your cooperation.

MEMORANDUM
DEPARTMENT OF NATURAL RESOURCES**State of Alaska**
DIVISION OF OIL & GAS**TO:** James Hansen
Chief Petroleum Geophysicist**DATE:** February 11, 1994**FILE NO:****TELEPHONE NO.:** x 2585**FROM:** Joe Joyner**SUBJECT:** Review of HB 426,
Chickaloon Flats CHA

The area is good-sized for a Critical Habitat Area; Division of Land surveyors estimate it to be 22,850 acres. The uplands to the south are contained within the huge Kenai National Wildlife Refuge and, from personal knowledge, contain the salt marsh grass lands in the area. The area within this proposed CHA is mostly barren mudflats.

There is no statement in the legislation as to what the intent is for the habitat area or what other uses will be allowed. We would like to see language similar to that provided for in the Anchor River/Fritz Creek [AS 16.20.605(c)], the Tugidak Island [AS 16.20.615(e)] and Redoubt Bay [AS 16.20.625(d)] Critical Habitat Areas that provide for other multiple uses of the area, specifically including oil and gas leasing and development.

Suggested language:

- (a) The department shall permit entry within the Chickaloon Bay Critical Habitat Area for the exploration and development of oil and gas resources when compatible with the purposes for which the critical habitat area was established. An oil and gas lease of state land within the Chickaloon Bay Critical Habitat Area is valid and continues in full force according to its terms.

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 426

Revision Date: _____
Title: Chickaloon Flats Critical Habitat Area
Sponsor: Representative Bunde
Requestor: (H) Special Committee on Oil & Gas

Dept. Affected: Fish and Game
BRU: Habitat and Restoration
Component: Habitat
COMPONENT SERIAL NO. 486

Expenditures/Revenues

(Thousands of Dollars)

	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
OPERATING EXPENDITURES						
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL EXPENDITURES	0	0	0	0	0	0
----------------------	---	---	---	---	---	---

CHANGE IN REVENUES ()	0	0	0	0	0	0
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FUND SOURCE

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0	0	0	0	0	0

Estimate of any current year (FY 94) cost: \$ 0

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared By: Frank Rue, Director
Division: Habitat and Restoration
Approved by Commissioner: [Signature]
Agency: Alaska Department of Fish and Game

Phone: 465-4105
Date: February 11, 1994
Date: February 11, 1994

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Sec. 16.20.600. Copper River Delta Critical Habitat Area established. The following described area is established as the Copper River Delta Critical Habitat Area:

All public land, tideland, submerged land, and water contained in the following description: Beginning at a point on the south edge of the Copper River Highway right-of-way 200' west of its intersection with the Eyak Trail trailhead; thence southwesterly 200' west of the Eyak Trail and parallel to it approximately 4 miles to the mean high tide line; thence southwesterly along the mean high tide line to Point Whitshed; thence northwesterly along the mean high tide line to a point of intersection at the west edge of Section 21, T16S, R4W, C.R.M. and the mean high tide line at the mouth of Orca Inlet; thence westerly a distance of approximately 3 miles to the northeast tip of Little Mummy Island; thence southwesterly a distance of approximately 4 miles to the intersection of the south edge of Section 33, T16S, R5W, C.R.M. and the mean high tide line; thence along the mean high tide line on the east portion of Hinchinbrook Island, including Boswell Bay to Point Bentinck; thence S.68°E. approximately 57 miles to a point of intersection with the protracted boundary line common between R4E and R5E, C.R.M.; thence N.13°E. approximately 10 miles to Palm Point; thence northwesterly along the mean high tide line to a point of intersection with the west boundary line of Section 25, T19S, R4E, C.R.M. to a point of intersection with the mean high tide line on the north shore of Softuk Bar; thence northwesterly to Windy Point; thence due east approximately 1.1 miles to the 200 foot contour; thence northerly along the 200 foot contour around Ragged Mountain, easterly and northerly along the eastern shore of Martin and Little Martin lakes to a point 4 miles due south of Bridge No. 227 on the Proposed Bering River Highway; thence north to Bridge No 227; thence westerly along the south edge of the Bering River Highway to its junction with the Copper River Highway; thence, westerly along the south edge of the Copper River Highway to the point beginning; excluding all areas within the Cordova Airport Boundaries. (§ 2 ch 93 SLA 1978)

Revisor's notes. — Formerly AS
16.20.230(a)(11). Renumbered in 1987.

Sec. 16.20.605. Anchor River and Fritz Creek Critical Habitat Area established. (a) All state land and water contained in the following described areas is established as the Anchor River and Fritz Creek Critical Habitat Area:

- (1) Township 4 South, Range 13 West, Seward Meridian
 - Section 25
 - Section 35
 - Section 36;

- (2) Township 5 South, Range 12 West, Seward Meridian
Sections 17 — 20;
- (3) Township 5 South, Range 13 West, Seward Meridian
Section 2
Section 3
Section 4 E $\frac{1}{2}$
Section 8 S $\frac{1}{2}$
Sections 9 — 11
Sections 13 — 20
Section 21 W $\frac{1}{2}$
Section 24;
- (4) Township 5 South, Range 14 West, Seward Meridian
Section 13
Section 20 NE $\frac{1}{4}$
Sections 21 — 24
Section 26 N $\frac{1}{2}$
Section 27 N $\frac{1}{2}$
Section 28 N $\frac{1}{2}$.

(b) Notwithstanding AS 16.20.500 and the establishment of the Anchor River and Fritz Creek Critical Habitat Area under (a) of this section,

(1) the use of and appropriation of water rights from Fritz Creek for a municipal and community water source is protected within the Anchor River and Fritz Creek Critical Habitat Area;

(2) the possibility of the construction of a dam and reservoir on Fritz Creek is reserved within the Anchor River and Fritz Creek Critical Habitat Area.

(c) The use and enjoyment of valid existing rights and interests within the Anchor River and Fritz Creek Critical Habitat Area are protected. Future conveyances, including but not limited to rights-of-way, timber sales, municipal entitlements, grazing leases, and oil and gas leases, may occur.

(d) A management plan for the Anchor River and Fritz Creek Critical Habitat Area shall be adopted and may be revised by the Department of Fish and Game in consultation with the Department of Natural Resources under AS 44.62 (Administrative Procedure Act). The management plan shall reflect the concurrence of the Kenai Peninsula Borough as it applies to land committed by the borough to the Anchor River and Fritz Creek Critical Habitat Area.

(e) The department shall establish a citizens' advisory committee to work with the department and advise on implementation and revisions of the management plan for the Anchor River and Fritz Creek Critical Habitat Area.

(f) Appointments to the citizens' advisory committee shall be recommended by the Kenai Peninsula Borough and the City of Homer and shall include representatives from

- (1) industry and commercial users;
- (2) hunters, trappers, fishermen, and recreational users; and
- (3) officials representing the Kenai Peninsula Borough and the City of Homer. (§§ 1, 2 ch 47 SLA 1985; am §§ 1, 2 ch 170 SLA 1990)

Revisor's notes. — Formerly AS 16.20.230(a)(12), (b), (c), and (d). Renumbered in 1987.

Effect of amendments. — The 1990 amendment, effective June 22, 1990, substituted "adopted and may be revised" for "completed by July 1, 1989" and "under the Administrative Procedure Act (AS 44.62)" for "and the management plan shall be submitted to the legislature for

review" in the first sentence of subsection (d); deleted the former second sentence of subsection (d), which read "The management plan shall take effect when approved by act of the legislature"; and added subsections (e) and (f).

Editor's notes. — Section 3, ch. 170, SLA 1990 approves the management plan dated June, 1989, for the Anchor River and Fritz Creek Critical Habitat Area.

Sec. 16.20.610. Dude Creek Critical Habitat Area. (a) The purpose of the Dude Creek Critical Habitat Area is the protection and enhancement of the wet meadow habitat that is the key roosting area for migrating lesser sandhill cranes, for the protection of lesser sandhill cranes, and for the continued public use and enjoyment of the area.

(b) The following described area is established as the Dude Creek Critical Habitat Area:

Township 40 South, Range 58 East, Copper River Meridian

Section 2: W $\frac{1}{2}$

Section 3

Sections 9 — 10

Section 11: W $\frac{1}{2}$ NE $\frac{1}{4}$, W $\frac{1}{2}$

Section 14: Lot 3, NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SW $\frac{1}{4}$

Section 15

Section 16: N $\frac{1}{2}$, SE $\frac{1}{4}$.

(c) The Dude Creek Critical Habitat Area described in (b) of this section shall be managed under a management plan prepared and implemented by the department in consultation with the community of Gustavus and the Board of Game.

(d) The department shall allow public uses, including fishing, hunting, trapping, mechanized and nonmechanized public access, grazing, firewood harvesting, wildlife, viewing, hiking, and berry picking under the management plan adopted under (c) of this section to the extent that the activities are compatible with (a) of this section.

(e) The legislature understands that a portion of the state land described in (b) of this section is mental health trust land of the state and the legislature intends that the land retain its status as mental health trust land, notwithstanding its inclusion in the Dude Creek Critical Habitat Area. (§ 1 ch 31 SLA 1988)

Editor's notes. — Section 2, ch. 31, SLA 1988 provides that the commissioner of fish and game shall allow public use of the Dude Creek Critical Habitat Area compatible with AS 16.20.610(a) until a management plan has been adopted under AS 16.20.610(c).

Legislative history reports. — For legislative letter of intent on ch. 31, SLA 1988, see the Senate letter of intent on CSSB 362 (Res), 1988 Senate Journal 2691-2692.

Sec. 16.20.615. Tugidak Island Critical Habitat Area. (a) The state land above the mean high tide line within the following described area is established as the Tugidak Island Critical Habitat Area:

- (1) Township 41 South, Ranges 33 — 34 West, Seward Meridian;
- (2) Township 42 South, Range 33 West, Seward Meridian
Sections 1 — 11
Sections 14 — 23
Sections 25 — 36;
- (3) Township 42 South, Ranges 34 — 35 West, Seward Meridian;
- (4) Township 43 South, Ranges 34 — 35 West, Seward Meridian.

(b) In addition to the area described in (a) of this section, the water and the land below the mean high tide line in the lagoon at the northeast end of Tugidak Island are included within the Tugidak Island Critical Habitat Area.

(c) The Tugidak Island Critical Habitat Area described in (a) and (b) of this section shall be managed under a management plan prepared by the department.

(d) The department shall permit exiting cabins to remain, subsistence and recreational uses to continue, and commercial uses such as seal hunting and placer mining to continue, if appropriate under the management plan adopted under (c) of this section to the extent that the activities are compatible with the establishment of the Tugidak Island Critical Habitat Area.

(e) The department shall permit entry within the Tugidak Island Critical Habitat Area for the exploration and development of oil and gas resources when compatible with the purposes for which the critical habitat area was established. An oil and gas lease of state land within the Tugidak Island Critical Habitat Area is valid and continues in full force according to its terms. (§ 2 ch 116 SLA 1988)

Revisor's notes. — Enacted as AS 16.20.610. Renumbered in 1988.

Cross references. — For statement of legislative purpose, see § 1, ch. 116, SLA 1988 in the Temporary and Special Acts.

Editor's notes. — Section 3, ch. 116, SLA 1988 provides: "After completion of

plans for the area including the Tugidak Island Critical Habitat Area as enacted in sec. 2 of this Act, the commissioners of natural resources and fish and game may recommend an adjustment in the boundaries of the critical habitat area to the legislature."

Sec. 16.20.620. Willow Mountain Critical Habitat Area established. (a) The following described area is established as the Willow Mountain Critical Habitat Area:

- (1) Township 20 North, Range 2 West, Seward Meridian
Section 7
Sections 18 — 19;
- (2) Township 20 North, Range 3 West, Seward Meridian
Sections 1 — 2
Sections 11 — 14
Sections 23 — 24;
- (3) Township 21 North, Range 2 West, Seward Meridian
Sections 4 — 7
Section 18: W¹/₂;
- (4) Township 21 North, Range 3 West, Seward Meridian
Section 1
Sections 11 — 14
Sections 23 — 26
Sections 35 — 36;
- (5) Township 22 North, Range 2 West, Seward Meridian
Sections 19 — 21
Sections 28 — 33.

(b) Notwithstanding AS 16.20.510 — 16.20.530, the commissioner of fish and game, in consultation with the commissioner of natural resources, shall prepare a management plan for the Willow Mountain Critical Habitat Area. The commissioner of fish and game and the commissioner of natural resources shall exercise their respective authorities over the area in a manner consistent with the management plan. (§ 2 ch 28 SLA 1989)

Cross references. — For statement of legislative purpose, see § 1, ch. 28, SLA 1989 in the Temporary and Special Acts.

Editor's notes. — Section 3, ch. 28, SLA 1989, provides: "Until a management plan is developed under AS

16.20.620(b), enacted by § 2 of this Act, management decisions for the Willow Mountain Critical Habitat Area must reflect the intent of the Willow Mountain Subunit of the Hatcher Pass Management Plan adopted in October, 1986."

Sec. 16.20.625. Redoubt Bay Critical Habitat Area. (a) The state-owned land and water above mean lower low water contained in the following described parcels is designated as the Redoubt Bay Critical Habitat Area:

- (1) Township 6 North, Range 16 West, Seward Meridian
Sections 1 — 12: North of the south bank of Drift River
Sections 14 — 18: North of the south bank of Drift River
Sections 20 — 22: North of the south bank of Drift River;
- (2) Township 6 North, Range 17 West, Seward Meridian
Sections 1 — 6: North of the south bank of Drift River
Sections 10 — 12: North of the south bank of Drift River;

- (3) Township 7 North, Range 14 West, Seward Meridian
Section 5: S $\frac{1}{2}$
Sections 6 — 8
Section 18;
 - (4) Township 7 North, Range 15 West, Seward Meridian
Sections 1 — 21
Sections 29 — 31;
 - (5) Township 7 North, Range 16 West, Seward Meridian;
 - (6) Township 7 North, Range 17 West, Seward Meridian
Sections 1 — 4
Section 8: E $\frac{1}{2}$
Sections 9 — 17
Sections 19 — 27
Section 30
Sections 34 — 36;
 - (7) Township 8 North, Range 15 West, Seward Meridian
Section 1: S $\frac{1}{2}$
Section 2: S $\frac{1}{2}$
Section 3: W $\frac{1}{2}$
Sections 4 — 11
Section 12: N $\frac{1}{2}$
Sections 13 — 36;
 - (8) Township 8 North, Range 16 West, Seward Meridian;
 - (9) Township 8 North, Range 17 West, Seward Meridian
Sections 1 — 17
Sections 20 — 29
Sections 32 — 36;
 - (10) Township 8 North, Range 18 West, Seward Meridian
Sections 1 — 12;
 - (11) Township 9 North, Range 15 West, Seward Meridian
Sections 29 — 30;
 - (12) Township 9 North, Range 16 West, Seward Meridian
Sections 19 — 36;
 - (13) Township 9 North, Range 17 West, Seward Meridian
Sections 21 — 36.
- (b) Notwithstanding AS 16.20.500 and the establishment of the Redoubt Bay Critical Habitat Area under (a) of this section, egress and ingress to and from private property within the Redoubt Bay Critical Habitat Area shall be permitted through access corridors established through agreement between the state and the private property owners involved.
- (c) The state may not acquire by eminent domain privately owned land within the Redoubt Bay Critical Habitat Area but may acquire privately owned land within the Redoubt Bay Critical Habitat Area by purchase, exchange, or otherwise for inclusion in the Redoubt Bay Critical Habitat Area.

(d) The department shall permit entry within the Redoubt Bay Critical Habitat Area for the exploration and development of oil and gas resources when it is compatible with the purposes for which the critical habitat area is established. An oil and gas lease of state land and existing oil and gas pipeline rights-of-way within the critical habitat area are valid and continue in full force according to their terms. The commissioner shall permit inspection and maintenance activities necessary to ensure the integrity of oil and gas pipelines on existing leases and pipeline rights-of-way in a manner that is compatible with the purposes for which the Redoubt Bay Critical Habitat Area was established.

(e) The department shall permit uses of the Redoubt Bay Critical Habitat Area in a manner that is compatible with the purposes for which the critical habitat area is established. The department shall permit the following public uses to continue without further approval by the department unless the department determines that the use is not compatible with the purposes for which the Redoubt Bay Critical Habitat Area is established:

(1) hunting, including subsistence hunting, trapping, and subsistence, commercial, and sport fishing, including the continued use of cabins for the purpose of hunting, trapping, and fishing;

(2) hiking, backpacking, and camping, including the use of campfires;

(3) cross-country skiing, snowmachining, boating, and the landing of aircraft; and

(4) other related uses that are temporary in duration and have no foreseeable adverse effects on vegetation, drainage, soil stability, or fish and game and their habitat.

(f) The Kenai Peninsula Borough shall establish a citizens' advisory committee to work with the department and the Department of Natural Resources and advise on the development of policies and regulations that affect the Redoubt Bay Critical Habitat Area.

(g) Appointments to the citizens' advisory committee shall be made by the Kenai Peninsula Borough and shall include representatives from:

(1) industry and commercial users including the oil and gas industry, timber, mining, and commercial fishing;

(2) hunters, trappers, fishermen, cabin owners, and recreational users; and

(3) officials representing the Kenai Peninsula Borough. (§ 2 ch 111 SLA 1989)

Revisor's notes. — Enacted as AS 16.20.620. Renumbered in 1989.

Cross references. — For legislative purpose in establishing the Redoubt Bay

Critical Habitat Area, see § 1, ch. 111, SLA 1989 in the Temporary and Special Acts.

**PROPOSED CHICKALOON FLATS
CRITICAL HABITAT AREA
BACKGROUND INFORMATION**

LOCATION: The proposed Chickaloon Flats Critical Habitat Area is located on the south side of Turnagain Arm at the head of Cook Inlet and is bisected by the Chickaloon River.

AREA DESCRIPTION: The proposed Chickaloon Flats Critical Habitat Area encompasses a large expanse of state-owned tidelands lying within the Kenai Peninsula Borough. Adjacent uplands are managed by the Kenai National Wildlife Refuge.

FISH AND WILDLIFE RESOURCES: Chickaloon Flats is one of a handful of key waterfowl and shorebird habitats in Cook Inlet which provide vital staging habitat for arctic nesting birds on their way to and from nesting grounds in the north. The mudflats and tidal marsh at the mouth of the Chickaloon River, created by the dramatic tidal action of Turnagain Arm, are critical waterfowl and shorebird feeding and resting habitat during spring and fall migration. In the fall, waterfowl waiting out bad weather replenish energy reserves on Chickaloon Flats before flying south through Turnagain Pass. Up to 25,000 birds a day use the mudflats and tidal marsh for resting and feeding during fall migration, including up to 5,000 lesser Canada geese at a time. Fall migrants include: tundra and trumpeter swans; lesser Canada geese; white-fronted geese; sandhill cranes; mallards; pintails; green-winged teal; shovelers; gadwalls; and American wigeon. Additional waterfowl species found during ice free months include: red-breasted mergansers, canvasbacks, common merganser, greater scaup, and common goldeneye. Snow geese and swans are most numerous on the flats during spring migration.

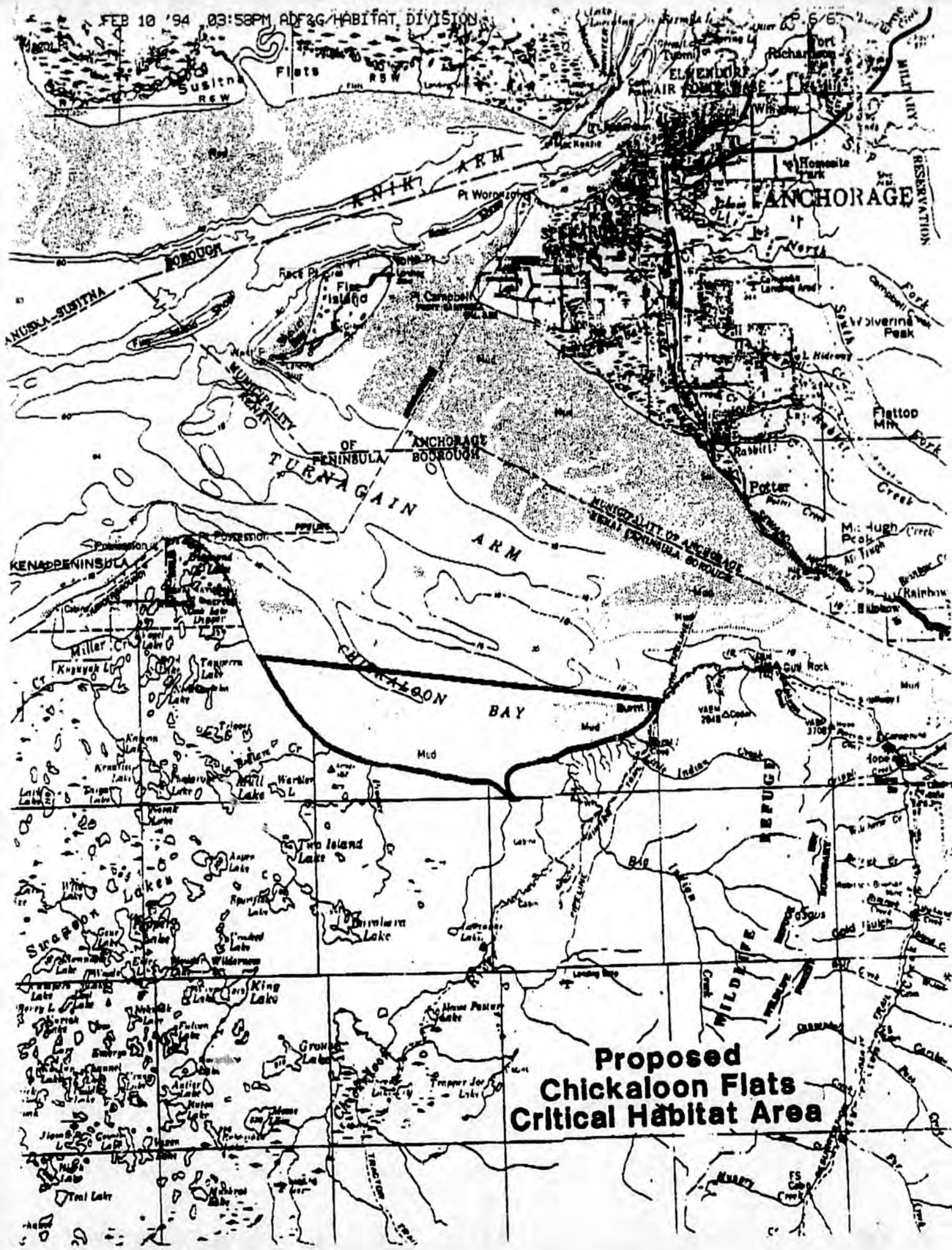
Northern phalaropes, glaucous-winged gulls, mew gulls, Bonaparte's gulls, arctic terns, common snipe, yellowlegs, dowitchers, semipalmated plovers, sandpipers, whimbrels, and godwits also feed on the productive estuarine tideflats.

PUBLIC USE AND ACCESS: Chickaloon Flats has long been recognized as an important waterfowl hunting area in Cook Inlet. Fall waterfowl hunters access Chickaloon Flats by floatplane, landing on river channels and larger ponds or arrive by boat from the nearby community of Hope. Four-wheel drive vehicles are also used to access the area along unmaintained pipeline access roads through the Kenai National Wildlife Refuge. Mallards, pintails, wigeon, and green-winged teal are most frequently harvested.

REFERENCES:

- Quimby, Roland L. 1972 Waterbird Habitat and Use of Chickaloon Flats. pp 86.
- U.S. Fish and Wildlife Service. 1985 Kenai National Wildlife Refuge Final Comprehensive Conservation Plan. pp 195.

FEB 10 '94 03:58PM ADF&G/HABITAT DIVISION



**Proposed
Chickaloon Flats
Critical Habitat Area**

SCOMM

93:15

Alaska State Legislature

WHILE IN SESSION:
CAPITOL BUILDING
JUNEAU, ALASKA 99801-1182
(907) 465-4931
(907) 465-4316 FAX

INTERIM ADDRESS:
716 WEST 4TH AVENUE
ANCHORAGE, ALASKA 99501
(907) 258-8198
(907) 258-8171 FAX

DISTRICT 10



CHAIR, OIL & GAS COMMITTEE
VICE CHAIR, LABOR & COMMERCE
COMMITTEE
JUDICIARY COMMITTEE
RESOURCES COMMITTEE
INTERNATIONAL TRADE & COMMERCE
COMMITTEE
ECONOMIC TASK FORCE

Representative Joe Green

TO: Members, House Oil & Gas Committee

FR: Representative Joe Green, Chairman
House Oil & Gas Committee

RE: Committee Hearing/HB 474

DATE: February 24, 1994

I have scheduled a statewide teleconference for the hearing on HB 474 on Monday, February 28.

I am requesting that if you plan to offer amendments, you submit them to my office before noon on Monday the 28th. People on the teleconference network have expressed concern that they have access to all information being reviewed by the committee. By setting a deadline of five hours before the meeting I am attempting to ensure that they have this access.

Amendments not delivered by my office by noon may, of course, be offered in one of the next two committees of referral.

NORTH SLOPE BOROUGH

OFFICE OF THE MAYOR

P.O. Box 69
Barrow, Alaska 99723

Phone: 907-852-2611

George N. Ahmaogak, Sr., Mayor



POSITION OF THE NORTH SLOPE BOROUGH ON PROPOSED COASTAL ZONE MANAGEMENT PROGRAM LEGISLATION

Two bills are now before the legislature relating to the State's Coastal Zone Management Program (ACMP). The Borough strongly supports SB 238, and strongly opposes SB 308. These positions are more fully explained below:

SB 238

SB 238 was introduced by Senator Drue Pearce, and has been the subject of several teleconferenced public committee hearings. It is the product of several years' work by Senator Pearce's office and a broad-based working group composed of state resource agency, Division of Governmental Coordination (DGC), and Department of Law ACMP coordinators, representatives from industry and the federal Minerals Management Service (MMS), and ACMP coordinators from several state coastal districts. The group worked diligently, with significant input from others involved in implementation of the ACMP on a daily basis, to craft legislation designed to correct due process problems associated with the current procedures for appeal of coastal consistency determinations to the state Coastal Policy Council (CPC), and to strengthen the role of coastal districts in the consistency review process. Acting on a consensus basis, the group has worked with Senator Pearce to produce a bill which the Borough feels accomplishes those tasks. This change in appeal procedures may not yield state consistency determinations which are always more to the liking of coastal districts and their residents, but it should provide for a more open process resulting in better understood and supportable state decisions.

It is also important to understand that SB 238 has been developed in conjunction with other Working Group efforts aimed at improving the coordination and effectiveness of consistency reviews. Proposed changes to 6 AAC 50 would streamline the process of consistency reviews relating to federal offshore oil and gas lease sales. The changes would require greater exchange of information and early meetings of all parties with the expectation that identification of issues of concern and data gaps, and the open discussion of possible solutions can avoid

Coastal Management Position
February 15, 1994
Page Two

file
43474

costly litigation, and leave all parties feeling more satisfied with their role in the process. At the same time, a draft Memorandum of Understanding (MOU) between the state DGC and federal MMS has been developed by the Working Group and submitted for approval by state and federal authorities. The MOU will enhance coordination between MMS, DGC, state agencies, and coastal districts in the consistency review of federal offshore lease sales.

SB 238, the proposed 6 AAC 50 changes, and the MOU all have the support of the people who implement the ACMP within state agencies, MMS, industry, and coastal districts. While they may not prove to be the final steps in creating a coastal management program which best serves all state interests, they will contribute to improving the predictability of the system, and importantly, the atmosphere within which important state decisions are made.

SB 308 43474

SB 308 was introduced by the Administration on the morning of February 14, and scheduled for hearing by the Senate Resources Committee at 3:30 that same day. A copy of the Bill was not available in the Barrow Legislative Information Office until 2:30. It was drafted in response to a court decision on January 24, which temporarily enjoined state offshore oil and gas Lease Sale 78, based in part on ACMP issues. Both the substance of this bill, and its attempted fast tracking through the legislature are very troubling. SB 308 is designed to limit the scope of ACMP consistency reviews conducted by the state, and to weaken coastal districts' and the public's ability to participate in full and open discussions of all concerns related to leasing. Although at its heart the federal-state-district coastal zone management structure is designed to provide the maximum public input and control over local development, the Administration has here quickly moved a bill which would significantly alter the balance of the ACMP without making even a minimum effort to contact each of the coastal districts throughout the state. The request of the Coastal District Coalition, comprised of district coordinators for boroughs, other municipalities, and coastal resource service areas around the state, for representation on the Governor's task force formed to respond to the Sale 78 court decision was denied. No state members of the ACMP Working Group were present, or we believe were allowed to testify, before the Senate Resources Committee on SB 308. With the exception of Division of Oil and Gas Director Jim Eason and a representative of ARCO, all of the dozen or so participants in the committee teleconference on February 14 were strongly opposed to the bill, and alarmed at the brief time available for its review.

Coastal Management Position
February 15, 1994
Page Three

SB 308 would restrict consistency reviews to "reasonably foreseeable, nonspeculative, direct effects" of proposed lease sales. If one of the goals of the bill is to avoid costly litigation over proposed lease sales, this language will not get it done. At the same time, while all those involved on a day-to-day basis in implementing the ACMP are moving on a variety of fronts through the Working Group structure to open up the consistency review process, this bill slams the door on the airing of all public concerns. The public frustration which will surely result from enactment of SB 308 will likely stimulate greater, rather than lesser, activity in the courts. The Borough believes that SB 308 is unnecessary legislation which is counterproductive to the more carefully undertaken broad-based efforts now underway to improve the state's Coastal management Program.


George N. Ahmaogak, Sr. 15 February 1994
Mayor Date

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

February 22, 1994

James Eason, Director
State of Alaska
Department of Natural Resources
Division of Oil and Gas
P.O. Box 107034
Anchorage, Alaska 99510-0734

Dear Jim:

You have asked that the Department of Law comment on the authority of the Department of Natural Resources (DNR) to restrict or condition an oil and gas lessee's use of leased lands after issuance of a lease.¹ DNR may condition a lessee's right to use of the lands within a lease on authority arising from two bases: (1) the statutory right to include conditions in leases when issued and (2) the state's police power to regulate uses to protect the public health, safety, and welfare.

The Alaska Land Act provides the statutory right to include conditions in a lease, as follows:

Upon a written finding that the interests of the state will be best served, the director may, with the consent of the commissioner, approve contracts for the sale, lease, or other disposal of available land, resources, property or interest in them, and, in addition to the conditions and limitations imposed by law, may impose additional conditions or limitations in the contracts as the director determines, with the consent of the commissioner, will best serve the interests of the state.

AS 38.05.035(e). Therefore, when a final finding that the sale of oil and gas leases is in the best interest of the state includes mitigation measures restricting or reserving the right to restrict uses, those measures must then be incorporated into leases issued pursuant to that sale. Any bidder is therefore on

¹ This letter addresses only oil and gas leases and does not address subsequent permits or authorizations by other agencies.

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 268-5100
FAX: (907) 276-3697

KEY BANK BUILDING
100 CUSHMAN ST., SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 451-2811
FAX: (907) 451-2846

P.O. BOX 110300 - STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-6735

notice that restrictions pursuant to the mitigation measures may be imposed on any lease issued in that sale and that a bid submitted is presumed to account for such risks. In order for a lease to be validly executed, a potential lessee must execute and return both a lease form and the attached mitigation measures which are incorporated by reference into the lease. The lessee has then taken the lease subject to such potential future restrictions.

The director may also, through the police power of the state, regulate uses to protect the public health, safety, and welfare when approving a plan of exploration, development, or operations. Exercise of this power is reflected in both AS 38.05.035(3) (above) and in the current lease form (DOG 9208) subparagraph 9(f) which states:

In approving a lease or unit plan of operation, or an amendment of a plan, the state will require amendments it determines necessary to protect the state's interest, including the environment. The state will not require any amendment that would be inconsistent with the terms of sale under which the lease was obtained or with the terms of the lease itself, or would deprive the lessee of reasonable use of the leasehold interest.

When police power restrictions deprive a property owner of use of the property involved, the question arises of whether a "taking" of property has occurred that requires compensation under the Fifth Amendment to the U.S. Constitution. The Supreme Court recently delineated when compensation for such is required in Lucas v. South Carolina Coastal Council, 112 U.S. 2866 (1992). Under Lucas, compensation is not required if "regulatory action [has] the effect of eliminating the land's only economically productive use" when the use would not have been allowed under "existing rules and understandings." 112 U.S. at 2900, 2901. Therefore, where requirements such as compliance with the Alaska Coastal Management Plan and other environmental restrictions (including the sale terms, lease terms, and mitigation measures) exist at the time of lease issuance, imposing restrictions pursuant to those requirements, even if the restrictions eliminate all economically productive uses of the property, does not give rise to a taking requiring compensation.

Under the current lease terms (subparagraph 9(f) above), a restriction that is consistent with the sale terms, lease terms, mitigation measures, or environmental regulatory schemes existing at the time of the lease issuance will not be a taking requiring compensation because the lessee bid and accepted the lease with notice of such potential restrictions.

Additionally, under the last standard of the limits on such restrictions in that subparagraph, any use contrary to such a restriction cannot be a "reasonable use" of the leasehold interest that was offered to and accepted by the lessee.²

In summary, DNR may restrict or condition uses of leased areas based on its statutory and police power authority. The terms, mitigation measures, statutes, and regulations existing at the time of the lease issuance determine when such restrictions result in a taking which requires compensation.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

1
By: *Barbara F. Fullmer*

Barbara F. Fullmer
Assistant Attorney General

BFF/lwr

²Under subparagraph 20 of the current lease form, the state may cancel a lease with appropriate compensation under certain situations involving "continued operations [that] probably will cause serious harm or damage to biological resources, to property, to mineral resources, or to the environment (including the human environment)" where "the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time" and the advantages of cancellation outweigh the advantages of continuing the lease. Such a cancellation differs from a restriction that eliminates beneficial use of a lease because it is a voluntary and discretionary act on the state's part to terminate all rights under the lease under certain conditions, without regard to whether a compensable taking under Lucas has occurred.

THEY SAY OIL & GAS LEASING IS BROKEN

Has the Commissioner considered both offshore oil and gas development and a fishery as water dependent and (sic) activities?

... no discussion of a significant public need for the lease sale

Appellants' motion to stay (lease sale 78) is granted

Superior Court order staying Lease Sale 78

... DNR should undertake seismic studies prior to the sale to identify particular areas having special hazards

DNR has not demonstrated that it has taken all feasible and prudent steps to maximize conformance with the ACMP

Brief to the Supreme Court by:

Trustees for Alaska
Alaska Environmental Center
The Sierra Club
Nat'l Parks and Conservation Assoc.
The Wilderness Society

... Noah fails to adequately evaluate the cumulative effect of current and planned oil and gas exploration and development activities on the Inlet or explain how the sale can proceed without such an analysis

Brief to the Superior Court on Sale 78 by:

Trustees for Alaska
Ninilchik Traditional Council
Alaska Environmental Center
Greenpeace
Kenai Peninsula Fishermen's Assoc.
United Cook Inlet Drift Assoc.

DNR failed to take a hard look at the impact of (offshore) Sale 55 on the (onshore) Porcupine Caribou Herd, and on the subsistence users of this herd.

Alaska Supreme Court

YOU CAN FIX IT

DIVISION OF OIL & GAS
POSITION PAPER

IT'S A FACT

Since The Inception Of Competitive Leasing in 1959:

- Over 75 Lease Sales Have Been Held
- Over 80 Best Interest Findings Have Been Compiled
- Over 25 Million Acres Have Been Offered For Lease And Over 11 Million Acres Have Been Leased
- Over 3,800 Wells Have Been Drilled
- The State Has Collected Over \$45 Billion In Bonuses, Rents, Royalties and Taxes
- Competitive Oil And Gas Lease Sales Have Been The Cornerstones On Which Alaska's Economy Has Been Built—And Have Provided Benefits To ALL Alaskans

AFTER 35 YEARS OF OIL & GAS LEASING

- The courts—and not the Legislature or the Executive Branch—are setting the state's leasing policy
- The Supreme Court says the Best Interest Findings under Title 38 are insufficient
- The Superior Court cannot determine whether lease sales are consistent with ACMP unless all potential future development can be described
- The Superior Court is unable to determine that there is a significant public need for the lease sale
- The Ombudsman finds that although we have met or exceeded all legal requirements, the process—as defined in current statute—is not “fair”

WHAT IS THE PROBLEM?

With 85% of State Revenue At Stake

HOW DO WE FIX IT?

FIRST, UNDERSTAND THE PROBLEM

- Under Title 38, the commissioner must take a “hard look” at “the salient factors” in best interest findings that an oil and gas lease sale should be held.
- However, through a series of Supreme Court decisions beginning in 1987 and continuing through this year, the court has systematically rejected the commissioner's authority both to determine what are the salient factors and “how much” analysis is “enough” before proceeding with a lease sale.
- Both the Alaska Supreme Court, and now the Superior Court, have ruled that best interest findings under Title 38 and ACMP consistency determinations for lease sales under title 46 cannot rely upon deferred consistency reviews of post-sale projects until specific exploration or development projects are proposed.
- Since no one can predict the consequences of a lease sale, litigants are encouraged to speculate on the sufficiency of the commissioner's considerations on future events, and the courts have become the arbiter of what is “proper weight” and “adequate analysis.” Arguments over “how many angels might someday come to sit on the head of the pin” are disrupting the leasing program, frustrating legislative intent and threatening the state's future economic health.

TO FIX IT

THE STATUTES MUST BE CHANGED

- Modify Title 38, the oil and gas leasing statutes, and Title 46, the ACMP statutes, to clarify legislative intent
- Eliminate the opportunity for courts to substitute their judgment by providing clear guidance as to the scope of best interest findings and ACMP findings and consistency determinations for lease sales
- Regulatory “fixes” do not carry the force of law and will NOT solve the problem

IF LEGISLATION IS NOT PASSED

- Continued disruption and delay of lease sales
- Lost reliability of lease sale process
- Loss of industry participation
- Lost state revenue
- Increased litigation costs
- Increased unemployment as service industry contracts

WHAT THIS LEGISLATION DOES

- “Tightens” the scope of the best interest finding and ACMP determination for leasing
- Creates a best interest finding and ACMP procedure
 - that is factual, fair and timely
 - that is more likely to withstand judicial and public scrutiny
- Provides for meaningful public review process and directs the commissioner to determine best interest and find consistency when
 - valid, material and relevant facts are known and considered
 - required permits meet established standards

BOTTOM LINE

**This Legislation More Clearly
Defines Legislative Intent With
Respect To Oil and Gas Lease Sales**

TITLE 38 AND THE ACMP STATUTES NEED TO BE AMENDED

IF THIS LEGISLATION IS NOT ADOPTED

- We must accept jeopardizing ALL future lease sales
- We must accept the inevitable loss of revenue
- We must accept the increased costs of litigation
- We must accept the court's opinion that oil and gas leasing is not in the public interest
- We must accept the court's opinion that oil and gas exploration cannot coexist with fishing
- We must accept that spending tens of millions of dollars for more "studies" is a necessary use of revenue
- We must accept that leasing cannot occur if there is an alleged risk to the environment, no matter how remote or unlikely that risk may be

WITHOUT THIS LEGISLATION

We must accept the continuing erosion of the Legislature's authority and judgment to special interest groups and the courts

THE RECORD SENDS THE FOLLOWING MESSAGES . . .

Consistency with the ACMP (Sale 78)

Trustees for Alaska:

"Direct conflicts exist between oil and gas exploration and development activities and fishing and large vessel traffic. Consequently, oil and gas exploration and development activities must give way to those activities which are of higher priority; fishing and large vessel traffic...the decision to proceed with Sale 78 is not consistent with 6 AAC 80.040 and thus not consistent with the ACMP."

"...Noah fails adequately to evaluate the cumulative effect of current and planned oil and gas exploration and development activities on the Inlet or explain how the sale can proceed without such analysis."

Alaska Superior Court:

"...the Court cannot divine the basis for the consistency determination. First, there is no discussion of the priority required in 6 AAC 80.040. Has the Commissioner considered both offshore oil and gas development and a fishery as water dependent and (sic) activities? Or, is oil and gas a water related activity?...There is no discussion of a significant public need for the lease sale ...6 AAC 80.130(d) requires a finding of no feasible prudent alternative to meet the public need for the proposed use and a finding that all feasible and prudent steps to maximize conformance with standards will be taken."

DNR:

Analysis of ACMP consistency was included in the Preliminary Best Interest Finding which the court failed to look at when making its decision to stay the sale. The court appears to accept without question that potential offshore oil and gas development is not a water-dependent activity. DNR took a hard look at the requirements and issues of 6 AAC 80.130. The court created of its own accord the argument that DNR did not comply with 6 AAC 80.130, then relied on its own unsupported argument, without examination of the relevant parts of the record or response from DNR, to impose the stay.

Trustees for Alaska:

"The Court has further stated that environmentally protective purposes "require that at the time DNR reviews any...permit application it consider the probable 'cumulative impact' of all anticipated activities which will be part of [the project in question] whether or not the activities are part of the project under review. If DNR determines that the cumulative impact is problematic, the problems must be resolved before the initial permit is approved." (emphasis added)

Best Interest Finding (Sale 78)

Trustees for Alaska:

"Because Noah has failed to adequately address these issues in the 'best interest' finding and explain how they fit into the 'best interest' equation, the finding is legally deficient".

Geophysical Hazards (Sale 50)

Trustees for Alaska:

DNR violated the ACMP "by utterly failing (emphasis added) to identify known geophysical hazard areas within the Sale 50 area as required by 6 AAC 80.050(a). DNR does not consider geophysical hazards until it reviews a company's plans of operations. In contrast, MMS has demonstrated that an identification of geophysical hazards is practical at the lease sale stage."

Alaska Supreme Court:

"The geophysical hazards in a given area could be such as to make any use or activity inconsistent with the ACMP...we conclude that this case must be remanded to DNR with instructions to identify and report on known and substantially possible areas of geophysical hazards within Sale 50...a draft environmental impact statement for a federal sale just north of Sale 50 deals with faults and earthquakes in the Camden Bay area in much greater detail than the State's decisional document."

DNR:

"The Court has understated DNR's efforts to identify geophysical hazards...On the basis of its consideration of the existing information, DNR identified and discussed the known

potential geophysical hazards in the Sale 50 area....Unless the court is to require DNR to go beyond the express language of the regulation, there is nothing more to be done."

DNR's petition for rehearing was denied.

Archeological Resources (Sale 50)

Trustees for Alaska:

DNR failed to identify or describe any of the historic, prehistoric and archeological resources in the Sale 50 area; and DNR deferred analysis of such data to the exploration and production stages of development.

Alaska Supreme Court:

"DNR's decision to defer identification of archeological sites does not comply with 6 AAC 80.150. The regulation clearly requires the identification of archeological sites, but it does not state when they are to be identified. In our view the regulation is most reasonably interpreted to require...the identification of known archeological sites at the initial sale stage...DNR must comprehensively survey the known data, set out the results, and state its conclusions."

DNR:

"Because unrestricted availability to information concerning the nature and location of any archeological resource increases the threat to site destruction, access to such information is closed to the general public by the Alaska Office of History and Archeology. Authority for this policy is contained in AS 9.25.120 and 16 U.S.C. § 47 (O)....DNR is required to withhold specific information regarding those sites until the plan of operations stage..."

DNR's petition for rehearing was denied.

Transportation (Sale 55)

Trustees for Alaska:

"DNR failed to discuss how development would occur, the riskiness of any methods chosen, and whether, in light of the risk, the lease sale was in the best interests of the state..."

Alaska Supreme Court:

"DNR did not take a hard look at the transportation issue in making its best-interest determination for Sale 55...the Finding concludes that offshore development would be "feasible" without use of ANWR, but does not discuss how the oil would be transported or what risks these methods would pose."

DNR:

"DNR, in its final finding, ...requires that lessees submit a detailed plan of operations for approval before conducting any exploratory or development operations, and imposes 26 restrictions or terms as a condition of the approval of plans of operations...Seven of these terms...specifically address environmental concerns arising from the transportation of oil and gas. DNR recognizes that the transport of oil and gas by pipeline is environmentally preferable to transport by tanker. DNR carefully considered the impact that the unchanged legal status of ANWR might have, and the risks presented by various oil and gas transportation methods that might be necessary to develop Sale 55 tracts."

The Porcupine Caribou Herd (Sale 55)

Trustees for Alaska:

"The Final Best Interest Finding... does not address the impacts of the sale on the Porcupine Caribou Herd nor does it indicate how these impacts are factored into the 'best interest' equation. This failure on behalf of DNR also reveals the inadequacy of DNR's analysis of the effect of the sale on the subsistence activities of the people of Alaska."

Alaska Supreme Court:

"Although DNR asserts that development 'should not' affect ANWR or the caribou that utilize ANWR, DNR has made no finding to this effect. Rather, it has simply made the unsupported assumption that offshore development cannot affect caribou."

DNR:

"[AS 38.05.035(g)] requires that DNR thoroughly consider the effects of an oil and gas lease sale on fish and wildlife species and the subsistence uses of those species in the sale area (emphasis added). However, it does not require DNR to extend its consideration to potential effects on species located outside the sale area. As the Porcupine Caribou Herd is clearly not found in the sale area, DNR did not violate the statute."

DNR's petition for rehearing was denied

Goodnews Bay Offshore Prospecting Permit (OPP) Disposal

Alaska Supreme Court:

"The State's argument that it could have done little more to fully assess the impacts of mining in the region than it did at the OPP stage is significantly undercut by evidence of comparable federal studies. The record indicates that the federal government has conducted environmental impact studies for offshore mining based on various mining scenarios.

DNR can emulate these studies." (emphasis added)

**FAILURE TO ADOPT THIS LEGISLATION WILL
MAINTAIN THE STATUS QUO—AND GUARANTEE AN
UNCERTAIN ECONOMIC FUTURE FOR ALASKA**

THE ALASKA SUPREME COURT WOULD HAVE DNR DO NEPA-LIKE BEST INTEREST FINDINGS FOR ITS LEASE SALES

"The record indicates that the federal government has conducted environmental impact studies....DNR can emulate these studies."

Alaska Supreme Court—Goodnews Bay Decision

WHAT WOULD BE THE COST?

DNR's Best Interest Findings, prepared by a staff of five, average \$105,000 each

- The Minerals Management Service (MMS) EIS's average \$500,000 each
- MMS employs 53 people in their leasing section, which is responsible for producing the EIS
- MMS has spent \$72.6 million for environmental studies within the Cook Inlet region

**DNR Would Have To Greatly Increase Its Operating Budget And
Staff Level In Order To Fund The Necessary Environmental Studies
And Prepare The Document**

Would The Number Of Sales Decrease? YES!

- In 14 years of leasing since 1979, DNR has held 42 lease sales, averaging three sales per year
- MMS has held only 15 Alaska OCS lease sales in the 17 years since 1976, when the Federal program began in Alaska
- With increased best interest finding requirements, DNR would be able to conduct only one lease sale every 18 months

Would EIS's Prevent Lawsuits? NO!

- Based on alleged NEPA violations and on the EIS findings, lawsuits were filed against half of the MMS lease sales
- These lawsuits resulted in two sales being enjoined, and two sales being postponed by MMS

CONCLUSION:

Given the required funding for staff and environmental studies, DNR could emulate the federal EIS process.

However, doing so would mean a tremendous increase in operating costs; a significant reduction in the number of lease sales held; a decrease in state revenue; a delay in future revenue resulting from new discoveries; and no guarantee that litigation would be reduced.

DESPITE THE STUDIES, DESPITE THE TREMENDOUS EXPENSE

**NO OIL OR GAS HAS BEEN PRODUCED FROM ALASKA'S
FEDERAL WATERS**

SALE 78 – THE PROBLEM – A CASE STUDY

TRUSTEES CREATE A CONFLICT:

"There is ample—and uncontroverted—evidence that these uses and activities simply cannot coexist with certain oil and gas exploration and development activities. To take a simple example, assume that an oil company purchases a marine tract south of Kasilof and, during exploration, discovers a commercially viable deposit of oil. The company then places a production platform on its tract, in the heart of the fishing grounds. Given the area's extreme tides and strong currents no fishing could occur within, at best, a half-mile circle around the platform. The danger is simply too great that a net, or a boat, will get wrapped up with the platform."

Trustees, et al, "Response to State's Petition to the Alaska Supreme Court for Review of Sale 78 Injunction"

REALITY:

There is no evidence of incompatibility—ample, uncontroverted or otherwise—just allegations and speculation. That speculation, however, is inconsistent with the actual "evidence" of coexistence of fishing, subsistence, and oil and gas exploration and development activities in Cook Inlet. The "fishing corridor" itself currently has valid leases within its boundaries and it has in the past been the site of several exploratory wells. Nevertheless, the Superior Court accepted Trustees' "evidence" of incompatibility as a basis for its Injunction of Sale 78.

In the case of Sale 78, there are no known, absolute conflicts at the lease sale stage. As in all lease sales, there is the potential for conflicts, depending upon what is proposed to occur, when it may occur, where it may occur, and for how long it may occur. By retaining flexibility to entertain alternative proposals which may be conditioned to achieve "consistency," the state remains able to at least try to accommodate competing uses of its resources. In those instances where accommodation is impossible, it retains the authority to disallow the proposed activity.

Under the Sale 78 lease provisions, for example, the following alternative scenarios could be accommodated.

- The "corridor" tracts may or may not receive bids—if there were no bids, there is no conflict.
- If bids and leases within the corridor are issued, there still is no assurance of a conflict. There may or may not ever be an application to drill an exploratory well on the tracts. If there isn't, there is no conflict.
- If there is an application, it may or may not be for a location which creates a conflict. For example, it may be accessible from adjacent acreage—either onshore or offshore.
- It may present a potential conflict that can be avoided through alternative site selection or scheduling so that the activity can be conducted when there are no commercial, subsistence or sport fishing activities.
- If an exploratory well can be accommodated, it may or may not result in a commercial discovery. If there is no commercial discovery, there is no conflict from development that will not occur.

In selecting Sale 78 lease terms, DNR adopted Term 13 to allow for a subsequent site-specific evaluation of alternatives in light of potential conflicts, while retaining full authority to disallow activities which cannot be made consistent with the ACMP or which are found not to be in the state's best interest.

"Term 13: To prevent conflicts with subsistence and commercial fishing operations, the Director may restrict lease-related use. In enforcing this term the division, during review of plans of operation, will work with other agencies and the public to assure that potential conflicts are identified and avoided to the fullest extent possible. Available options include alternative site selection, requiring directional drilling, and seasonal drilling restrictions."

Adopt This Legislation To Fix The System

WALTER J. HICKEL
GOVERNOR



P. O. Box 110001
Juneau, Alaska 99811-0001
(907) 465-3500

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 15, 1994

RECEIVED
FEB 15 1994

*The Honorable Joe Green
Chairman
House Oil and Gas Committee
Capitol Building, Room 114
Juneau, AK 99811*

Dear Representative Green:

As a result of several unfavorable court decisions, the Administration simply cannot guarantee the continued efficacy of the state's oil and gas leasing program. Each of the decisions has had the effect of expanding the scope of best interest findings and coastal zone consistency determinations well beyond the letter of the law, and, we believe, beyond the intent of the Legislature. The court has made clear that, in the absence of specific legislative intent to the contrary, it will set oil and gas leasing policy by imposing its own standards on the scope and content of best interest findings and coastal zone consistency determinations related to lease sales.

Following the most recent adverse decision, the Superior Court's injunction of Lease Sale 78, Governor Hickel asked that I coordinate the Administration's review of statutory amendments necessary to address this problem. Participants in that review included the Commissioners of Commerce and Economic Development, Environmental Conservation, Fish and Game, and Natural Resources, as well as the Director of the Division of Governmental Coordination, other representatives of the Governor's Office and me.

We have carefully reviewed the language of H.B. 474 and are convinced that it represents a realistic common-sense approach toward resolving the growing threat to the state's leasing program. We believe that its careful definition of the scope of best interest finding and CZM determinations, coupled with an explicit acceptance of phased determinations when the agency has the authority to further condition subsequent project approvals, will discourage litigation based upon speculation and better serve the public interest.

GOVERNOR'S POSITION STATEMENT

*The Honorable Joe Green
February 15, 1994
Page 2*

Your committee's bill will also further several other goals to which the Administration is committed. It will ensure a best interest finding and CZM consistency procedure that is factual, fair and timely. It will also reduce litigation risks substantially, and, therefore, reduce litigation costs. We believe that H.B. 474 will accomplish these worthwhile goals while providing for meaningful and undiminished public review and participation in the leasing program.

On behalf of the Administration, I appreciate the willingness of you and your committee to promptly address this difficult issue. I pledge our full and undivided support in working to assure passage of H.B. 474.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Shelby Stastny". The signature is fluid and cursive, with the first name "J." being small and the last name "Stastny" being larger and more prominent.

*J. Shelby Stastny
Director of Management and Budget*

Oil and Gas Lease Sale 78

Public Notification Process

The Division of Oil & Gas mailing list for notification of proposed lease sales is comprised of the following:

- State and federal agencies
- Oil companies
- Boroughs, municipalities and village councils
- Newspapers
- Radio and TV stations
- Environmental and pro-development organizations
- Individuals expressing interest in lease sales
- All legislators

The sequence of public notification was as follows. Only those notifications in **bold** print were required by law; all others were done voluntarily by the Division of Oil and Gas:

- Oct 9, 1989 : Call for Comments (lists areas to be added to leasing schedule)
sent to all on mailing list
- Jan 1991: **Sale Added to Five-Year Leasing Program**
published in Five-Year Oil and Gas Leasing Program
- Feb 26, 1991: Call for Comments (General Information)
sent to all on mailing list
- Oct 22, 1991: Supplemental Call for Comments (area expanded to Homer)
sent to all on mailing list
- Jul 21, 1992: Call for Nominations
sent to oil companies on mailing list
- Oct 27, 1992: Call for Comments (Socioeconomic and Environmental Info)
sent to all on mailing list
- Jul 15, 1993: **Notice of Intent to Issue Final Finding and Decision**
sent to all on mailing list
ads in newspapers (Anchorage, Juneau, Fairbanks, Kenai, Homer*)
*Also published on Jul 22
sent to all affected post offices within sale area for posting

PUBLIC NOTIFICATION PROCESS

Certified Letter to Boroughs and Municipalities

sent to affected boroughs and municipalities

Preliminary Finding of the Director

sent to state and federal agencies

multiple Copies sent to local libraries and to State Library in Juneau

sent to boroughs and municipalities

sent to organizations and individuals who have commented

Public Service Announcement

sent to local radio and TV stations

Aug 12, 1993: Kenai Peninsula Borough Public Hearing in Homer

Aug 13, 1993: Notice of Extension of Deadline for Comments Until Aug 24
published in Anchorage, Juneau, Kenai, Fairbanks, and Homer papers

Oct 19, 1993: **Final Finding of Director**

sent to state and federal agencies

sent to legislators from affected area

sent to all who commented on Preliminary Finding

multiple copies sent to local libraries and to State Library in Juneau

Certified Letter to Boroughs and Municipalities

sent to affected boroughs and municipalities

Sale Announcement

sent to all on Mailing List

published in local and statewide papers (same as for Aug 13 Notice)

posted at all affected post offices within sale area

Public Service Announcement

sent to local radio and TV stations

Nov 18, 1993: Kenai Peninsula Borough Assembly Public Hearing in Ninilchik

Jan 25, 1994: **Lease Sale 78** (Stayed by the Superior Court)

CFR 930.37(c)

Federal Register, Vol. 44, No. 123, 6-25-79, p. 92

(c) *In cases where the Federal agency has sufficient information to determine the consistency of a proposed development project from planning to completion, only one consistency determination will be required. However, in cases where major Federal decisions related to a proposed development project will be made in phases based upon developing information, with each subsequent phase subject to Federal agency discretion to implement alternative decisions based upon such information (e.g., planning, siting, and design decisions), a consistency determination will be required for each major decision. In cases of phased decisionmaking, Federal agencies shall ensure that the development project continues to be consistent to the maximum extent practicable with the State's management program. (emphasis added)*