ALASKA LEGISLATURE COMMITTEE FILES 2001-2002 8672
10646 SENATE RESOURCES

> At common law, the scope of a mineral owner's rights to the surface estate was "determined by reasonableness: the mineral owner [was] entitled to use as much of the surface estate as [was] reasonably necessary to obtain access to the minerals. Conduct [was] reasonable if it [was] consistent with the practices of the extraction industry." Ronald W. Polston, *Surface Rights of Mineral Owners--What Happens When Judges Make Law and Nobody Listens?*, 63 N.D.L.Rev. 41, 42 (1987). *Norken Corp. v. McGahan*, 823 P.2d 622, 628 (Alaska 1991). Thus, the mineral interest was the dominant estate, and "the mineral owner [had] no obligation to pay the surface owner for the reasonable amount of surface consumed in the development of the mineral estate." *Id.*; *see also* Michelle A. Wenzel, *The Model Surface Use and Mineral Development Accommodation Act: Easy Easements for Mining Interests*, 42 Am.U.L.Rev. 607, 622 (1993).

Parker v. Alaska Power Authority, 913 P.2d 1089, 1090 (Alaska 1996).

The situation is different when the State of Alaska owns the land in question, and the State has conveyed the surface estate to a third party, reserving the mineral estate. State law specifies the rights of the mineral estate holder (whether the State or a lessee of the State's interest), and requires the payment of damages to the owner of the surface estate.

> The common law rule is not applicable to lands owned by or devolving from the State of Alaska. Alaska Statute 38.05.125 reserves minerals from every land grant. Thus, much land in Alaska is divided into surface and mineral estates. A mineral rights owner has a right to surface uses of the land containing the minerals he owns. Such uses shall be "limited to those necessary for the prospecting for, extraction of, or basic processing of mineral deposits and shall be subject to reasonable concurrent uses." AS 38.05.255. Further, before mineral rights are exercised under a reservation of mineral rights made pursuant to AS 38.05.125, the mineral rights owner must "make provision to pay the owner of the land full payment for all damages sustained by the owner, by reason of entering upon the land." AS 38.05.130.

Parker v. Alaska Power Authority, 913 P.2d 1089, 1090-91 (Alaska 1996).

AS 38.05.130 requires the surface owner be paid "damages" resulting from the entry upon the land by the mineral owner. AS 38.05.130 provides in full:

> **AS 38.05.130. Damages and posting of bond.** Rights may not be exercised by the state, its lessees, successors, or assigns under the reservation as set out in AS 38.05.125 until the state, its lessees, successors, or assigns make provision to pay the owner of the land full payment for all damages sustained by the owner, by reason of entering

> upon the land. If the owner for any cause refuses or neglects to settle the damages, the state, its lessees, successors, assigns, or an applicant for a lease or contract from the state for the purpose of prospecting for valuable minerals, or option, contract, or lease for mining coal or lease for extracting geothermal resources, petroleum or natural gas, may enter upon the land in the exercise of the reserved rights after posting a surety bond determined by the director, after notice and an opportunity to be heard, to be sufficient as to form, amount, and security to secure to the owner payment for damages, and may institute legal proceedings in a court where the land is located, as may be necessary to determine the damages which the owner may suffer.

DNR has made it clear that any such damages are to be paid by the mineral lessee. 11 AAC 83.155 provides: "Each lessee, licensee of a state-issued oil and gas exploration license, or permittee is required to pay any damage that becomes payable under AS 38.05.130 and shall indemnify Alaska and hold it harmless from and against any claims, demands, liabilities, and expenses arising from or in connection with the damage."

The Alaska Supreme Court has held that the purpose of the statute is not to prevent mineral entry, but to afford financial indemnification for damages suffered by the owner of the surface estate.

> [S]ection .130 protects landowners financially, but does not allow them to completely close their lands to mineral exploration. Consequently, it is enough that landowners be placed in the same position they would have enjoyed had the statute been observed, and an agreement reached or a bond posted. Indemnification, not ejectment, is the appropriate remedy for failing to reach agreement or post a bond. This result sustains the locator's right of entry, and preserves both the locator's incentive to satisfy the requirements of section .130 and the landowner's incentive to act reasonably during negotiations with the locator.

Hayes v. A.J. Associates, Inc., 960 P.2d 556, 567 (Alaska 1998).

2. Senate Bill 125

SB 125 makes several significant changes to the current Alaska law. First, it attempts to define the term "damages" suffered by the surface owner by reason of the used of the land by the mineral entrant. Second, it expressly permits the surface owner to bring suit to recover damages for cutting timber, trespass, and, interestingly, punitive damages for failure to comply with the bonding requirement of AS 38.05.130, or with a material term or condition set out in a plan approved by DNR. Third, the amount of the bond must be the greater of the assessed value of the land or $100,000. Fourth, the bill would prohibit a claim against the surface owner based upon entry by the mineral estate holder in the absence of gross negligence or intentional misconduct by the surface

owner. Fifth, the bill requires DNR to notify the surface owner when DNR has adopted a plan for mineral entry. The notice must include a copy of the approved plan and set forth the rights of the owner of the surface estate established in AS 38.05.130.

a. Definition of "Damages"

Section 2 of SB 125 provides two elements of damage available to the owner of the surface estate. The first item of damage is the "loss of or injury to the value of the owner's property, improvements, or personalty" which is defined as "the actual cost of repair, relocation, replacement, or restoration of the property, improvements, and personalty, not to exceed the fair market value." The second item of damage is "the interference with or interruption of the owner's access to or use of the property or improvements" which "must be based on the owner's actual use of the property and improvements immediately preceding the entry and is, for the period or duration of the interference or interruption, the greater of (A) the loss of income to the owner; or (B) the loss of the value of the use by the owner."

The first element appears appropriate. The measure of damages as the actual cost of repair, relocation, replacement or restoration" is appropriate given the objective of financially indemnifying the surface owner for the disturbance. The cap of "fair market value" in the first element is akin to the damages to be paid for condemnation of property under AS 09.55.330. State v. Alaska Continental Development Corp., 630 P.2d 977 (Alaska 1980). Of course, in condemnation, the condemnor (usually the State, but occasionally a private company for a right-of-way) becomes the owner of the condemned property.

The second element has an inappropriate measure for the loss of the use of the property. First, the use of the phrase "loss of the value of the use by the owner" is highly ambiguous, and appears to impose the subjective value to the owner, rather than a measurable, objective value of the use of the land. The measure should be the loss to the owner under some objective measure. Otherwise, highly subjective testimony and evidence will be permitted, allowing a landowner to speculate concerning the hedonistic value of the use of the land to him.

Second, the use of the phrase "loss of income to the owner" does not take into account the fact that the owner may be making little or no profit from his use of the land. The measure should more appropriately be limited to profits lost that are directly related to the mineral use, and limited to the period during which the mineral use prevents earning profits. Such lost profits must be "reasonable certain." This is the measure available when land is condemned under AS 09.55.330. *State v. Hammer*, 550 P.2d 820, 823-27 (Alaska 1976).

Put together, the damages for the use of surface estate during the life of an oil or gas field could be quite onerous. To the extent such damages exceed the fair market value of the surface estate, the mineral estate holder should have the option of condemning the land, perhaps through an addition to AS 09.55.240(a) (which lists the

uses which list the permitted uses for eminent domain). Such an addition could read as follows: "(13) for the location of improvements, including, but not limited to, oil and gas wells, gathering lines, treatment facilities, offices, boarding camps, and associated facilities, for the purpose of exploration for, or the development and production of natural gas, crude oil, or associated substances." A mineral estate holder who believes his activities will result in "damages" under AS 38.05.130 which exceed the fair market value of the property could then undertake eminent domain action to take title to the surface estate of the land.

b. Express Authorization to Make Additional Claims

Section 2 of SB 125 also adds a new subsection (d) to AS 38.05.130. This subsection authorizes a surface estate owner to sue a mineral lessee for damages for cutting timber, trespass, or punitive damages. These all appear to be a violation of the initial purpose of the statute (financial indemnification of the surface owner), or they allow the surface owner to claim damages twice (or more) for the same loss, or both. This section should be eliminated.

The statute currently permits the provision of "damages" for the use of the surface estate by the holder of the mineral rights. With some modifications as noted above, the definition of available damages could bring certainty to both the owner of the surface estate and the mineral estate. However, permitting the surface estate owner to claim additional sums for trespass or cutting timber both grants the surface estate owner too much, and creates substantial uncertainty regarding what damages must be paid by the mineral estate owner.

In adopting AS 38.05.130, the legislature was attempting to assure those to whom it sold or otherwise transferred the surface estate that they would be made whole in the event the development of the mineral estate damaged the surface estate. A mineral estate owner who seeks to develop his estate is not "trespassing" on either the mineral or the surface estate when making reasonable use of the surface in connection with the development of the minerals.

AS 09.45.735 provides:

> **AS 09.45.735. Trespass related to geotechnical surveys and mining.** A person who trespasses upon the land of another to gather geotechnical data or take mineral resources is liable to the owner of the land for treble the amount of damages that may be assessed in a civil action. If the trespass is unintentional or involuntary or the defendant had probable cause to believe that the land on which the trespass was committed was the defendant's own or that of the person in whose service or by whose direction the act was done, only actual damages may be recovered.

This statute is obviously directed at someone who does not own the mineral

estate of the subject land. In addition, any such liability must be to the holder of the mineral estate. The surface estate owner has no interest in the "mineral resources," while the mineral estate owner (or lessee) has such an interest. In addition, the mineral estate owner has a legitimate interest in restricting information regarding the nature, quality and amount of such resources. An interloper who determines that there is no oil or gas under a parcel has "condemned" that land and reduced or eliminated the opportunity of the mineral estate owner to sell exploration and development rights to others. It is improper to include any reference to this statute in "rights" granted to a surface owner.

AS 09.45.730 provides:

> **AS 09.45.730. Trespass by cutting or injuring trees or shrubs.** A person who without lawful authority cuts down, girdles, or otherwise injures or removes a tree, timber, or a shrub on (1) the land of another person or on the street or highway in front of a person's house, or (2) a village or municipal lot, or cultivated grounds, or the commons or public land of a village or municipality, or (3) the street or highway in front of land described in (2) of this section, is liable to the owner of that land, or to the village or municipality for treble the amount of damages that may be assessed in a civil action. However, if the trespass was unintentional or involuntary, or the defendant had probable cause to believe that the land on which the trespass was committed was the defendant's own or that of the person in whose service or by whose direction the act was done, or where the timber was taken from unenclosed woodland for the purpose of repairing a public highway or bridge on or adjoining the land, only actual damages may be recovered.

This statute is directed at those who have no right to cut down trees, timber or shrubs on the subject property. A mineral estate owner has the right to do so where such actions are reasonably necessary to the proper development of the minerals. Permitting the surface estate owner to make a claim for damages for removing trees or shrubs — especially a claim which has the potential for treble damages — in addition to the damages for entry afforded under the current AS 38.05.130 has no basis in logic. Any such provision is a windfall for the surface estate owner, and creates additional unjustified expense and uncertainty for the holder of the mineral estate.

Finally, permitting the imposition of punitive damages for entry before a bond is posted, or for noncompliance with a provision of a plan of development, is completely unnecessary. The purpose of the deviation from the common law regarding the dominance of the mineral estate on State land is to compensate the owner of the surface estate. There is no reason to punish the holder of the mineral estate. In conducting mineral exploration and development on State land, the holder of the mineral interests is already required to compensate the surface estate owner for damages to the surface estate, whether or not a bond is posted and whether or not the development plan is followed. In conducting such operations, the mineral estate holder

may commit torts or other civil wrongs, for which compensatory and punitive damages may be separately available. There is no need to create additional causes of action which deter mineral development and unjustly enrich a surface estate owner.

c. Amount of the Bond

Current law requires the DNR to set the amount of the bond in a sufficient amount to secure to the surface estate owner payment for the damages. AS 38.05.130. In setting the amount of the bond, DNR has on occasion made reference to the assessed value of the affected parcel for tax purposes.

Section 2 of SB 125 would provide that if DNR sets the amount of the bond with reference to the assessed value, the amount of the bond must be the greater of the assessed value of the entire parcel, or $100,000. The provision allows DNR to set the amount of the bond by "tak[ing] into consideration factors and attributes apart from the property's assessed value." Presumably, but not explicitly, this would permit DNR to set the bond at less than the assessed value, and less than $100,000. At the very least, this should be clarified so that DNR does not automatically set the bond at $100,000.

As noted above, the mineral estate holder should have the option of exercising the power of eminent domain in the event the damages or bond exceed the value of the land involved.

d. Prohibition of Claim Against the Surface Owner

Section 2 of the bill prohibits an action against the surface owner "for injury or damages resulting from the entry onto that land by" the mineral estate holder. The provision states the prohibition does not apply if the surface estate owner is also the mineral estate holder, or if the surface estate owner engages in gross negligence or intentional misconduct.

There is no justification for shielding the owner of the surface estate from liability for his own negligence. The development of the mineral estate is not a license for the surface estate owner to commit torts that harm either the mineral estate holder or others.

If the intention is to prevent a claim being brought against the surface estate owner for actions undertaken by the mineral estate holder, then such a result is more easily and more directly attained by so providing. For instance, a provision could be written as follows: "The owner of the surface estate may not be held liable for the acts or omissions of the state, a state lessee, successor, assign, or applicant described in (a) of this section."

e. Notice to Surface Estate Owner

Section 3 of SB 125 requires DNR to issue a notice to the owner of the surface

estate when DNR has adopted a plan of operations for the exploration or development of the mineral estate. The notice must be issued before entry on the land. The notice must contain a copy of the plan, and must also set forth "a brief description in writing of the legal rights of the owner, including the rights of the owner set out in AS 38.05.130."

Providing such notice appears to be appropriate. However, there are many legal rights of the owner of a surface estate in land. The section should be amended to provide that the notice must include a copy of AS 38.05.130 and a copy of the plan. This creates certainty regarding the contents of the notice, and does not require DNR to provide legal advice to surface estate owners.

f. Additional Considerations

The statute is ambiguous in many respects. For instance, the statute refers to the "owner of the land," but does not recognize that where the mineral and surface estates have been separated, there are at least two "owners of the land," the owner of the surface estate and the owner of the mineral estate. To be sure, the current statute suffers this defect, but because of its limited length, there is little actual ambiguity. This should be clarified.

In addition, the first phrase of the section providing for additional damage claims is indecipherable. As noted above, it clearly appears the intent is to award a surface estate owner double damages for certain injuries to the surface estate. The language on this score is less than clear, and would provide fertile ground for extensive litigation.

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The proposed statutes go far beyond the common law rule regarding the dominance of the mineral estate. The bill would create great uncertainty and expense in the development of the State of Alaska's mineral wealth, and thus unnecessarily deter such development. As written, it provides a potential windfall for surface estate owners and plaintiffs' attorneys.

A fair definition of the term "damages" would assist the State, surface estate owners, and lessees of the State's mineral interests. The term should confine available damages to allow only for "financial indemnification" for losses to the surface estate suffered directly due to the development of the mineral estate. No additional claims should be permitted. The surface estate owner should not be protected from claims where the surface estate owner negligently damages the interests of the mineral estate holder. If a notice is to be required, it should be confined to providing a copy of the plan of development and the statute providing for compensation for damages to the surface estate.

ARTICLE VIII.
NATURAL RESOURCES.

SECTION 9. SALES AND GRANTS. Subject to the provisions of this section, the legislature may provide for the sale or grant of state lands, or interests therein, and establish sales procedures. All sales or grants shall contain such reservations to the State of all resources as may be required by Congress or the State and shall provide for access to these resources. Reservation of access shall not unnecessarily impair the owners' use, prevent the control of trespass, or preclude compensation for damages.

Excerpted From: The Constitution of the State of Alaska. Article 8, Section 9.

Sec. 38.05.130. Damages and posting of bond. Rights may not be exercised by the state, its lessees, successors, or assigns under the reservation as set out in AS 38.05.125 until the state, its lessees, successors, or assigns make provision to pay the owner of the land full payment for all damages sustained by the owner, by reason of entering upon the land. If the owner for any cause refuses or neglects to settle the damages, the state, its lessees, successors, assigns, or an applicant for a lease or contract from the state for the purpose of prospecting for valuable minerals, or option, contract, or lease for mining coal or lease for extracting geothermal resources, petroleum, or natural gas, may enter upon the land in the exercise of the reserved rights after posting a surety bond determined by the director, after notice and an opportunity to be heard, to be sufficient as to form, amount, and security to secure to the owner payment for damages, and may institute legal proceedings in a court where the land is located, as may be necessary to determine the damages which the owner may suffer. (§ 2 art VII ch 169 SLA 1959; am § 15 ch 61 SLA 1960; am § 3 ch 175 SLA 1980)

Excerpted From: November 2000 Alaska Statutes, Volume 8, Pg. 580.

Dick Lowman
Box 873481
Wasilla, AK 99687

12 March, 2001

Senator Rick Halford
State Capitol
Juneau, Alaska 99801-1182

Fax (907) 465-9828
Phone (907) 465-4958

Re: **SB 125**

Dear Senator Halford:

Thank you for the opportunity to comment. I request that this letter be provided for the record in Friday's hearing.

Your bill is an excellent start towards providing equitable common use of separately held land interests. I generally support your effort. I still do have a few concerns that I request be considered during the hearing on Friday.

Section 38.05.130 as amended retains one serious weakness from the landowner's standpoint. The language states:

....If the owner for any cause refuses or neglects to settle the damages, the [lessee]
(1) may enter upon the land in exercise of the reserved rights after posting a surety bond....

Nowhere is there any enforceable clause that requires the lessee to make any reasonable attempt to notify the landowner of their specific development plans or to negotiate fairly. I recognize that Section 3 of your bill provides some general awareness to the landowner, but the timeliness of that notice is not specified. And more important, nowhere does it provide the owner notice of specific development plans.

In the case of Unocal entering the Vine Road (Wasilla) properties in 1999, landowner "notification" consisted of the lessee sending out an innocuous sounding notice of public hearing. In my opinion, the notice was deliberately crafted to be deceptive. I am a civil engineer and can competently read maps. I read the notice sent and was unaware that they intended to drill on my property. Likewise the neighbors were unaware. Since the notice did not appear to affect us, none went to the one public hearing that was held approximately one month before they

mobilized. My neighbor became aware of Unocal's intent after they were mobilized and working on his property. Unocal then posted a bond when he refused to "settle" for a no-cost right to entry. (That was Knik Landscaping, 376-4847, if you wish to check the facts.)

Unocal also intended to enter my property but never once approached me about either their specific plans or a fair settlement for damages. In fact when I called them, they flatly refused to give me the specifics of their development plans. Their attitude was extremely arrogant, almost contemptuous.

Thus on Vine Road, it is my opinion that Unocal made the business decision in advance of mobilization that they would simply post whatever bonds were needed and not "bother" with the landowners. They are fully aware that landowners are ill equipped to recover damages in court against the legal staff of a multi-billion dollar oil company. The bonds are nothing more to them than a restricted bank account that they will recover when the landowner is unable to surmount the impossible legal hurdles of recovering damages. I don't believe the bill as written would prevent that from happening again. The difference, under your bill, will be that the state will in the future give the landowner general notification of planned entry.

Unless a landowner has knowledge of what specifically is being done to his property and what long-term restrictions the development will place on the property, there is no way he can reasonable "negotiate" any settlement. Think about it. Suppose you are the landowner. Suppose someone comes to you and says:

> ***"I am entering your property today. I know approximately where on the property I think I want to locate, but am uncertain about that. I will take whatever property I need. I will do whatever damage I wish. Construction will run around the clock and will be extremely noisy. I may be 200 feet from your bedroom, but I will not have the courtesy to shut down at night. The trees that you value for privacy have no value to me except for firewood. Your lifestyle and your privacy cannot be quantified, therefore are worthless. After construction is complete, I will continue to enter the property night or day whenever I choose for as long as the lease continues. All other details of what I will do to your property are proprietary and confidential. I will not tell you, or will give you answers so evasive that they are worthless. Tell me how much you will settle for now, today, allowing me to continue to do what I wish when I wish where I wish. If you do not settle immediately for my price, I will simply exercise my right to post a bond until you are unable to prevail over my legal machine."***

What would you settle for? What is the price of that? How can a landowner determine any fair price?

Similarly, the bill contains no enforceable provision requiring the lessee to make reasonable attempt to minimize damages to the landowner. Section 38.05.130 (g) provides recourse to the lessee if the owner "acts in a manner that is grossly negligent or that constitutes intentional misconduct...." but nowhere is the owner given that same defense against the lessee. It that really your intent? On Vine Road it was the lessee who came in ripping and tearing with zero concern about the landowner's rights, but not one landowner retaliated in kind. If this issue is important enough to protect the lessee against gross negligence and intentional misconduct, why can't the landowner be protected with the same language written into the law? Is SB 125 implying that the lessee should have greater rights than the surface holder?

I respectfully request that you consider modifying Section 38.05.130 (a) (1) to read

(1) may enter upon the land in the exercise of the reserved rights after
(A) providing evidence that the owner has been served with 90 days written notice of all damages that may occur to the land, and
(B) providing evidence that reasonable attempt has been made to minimize damages to the owner, considering the owner's development plans, and
(C) posting a surety bond determined by the director, after notice and opportunity to be heard, to be sufficient as to form, amount, and security to secure to the owner payment for damages; and

Finally, I would request that you give some thought to protecting intangible values of a homeowner. I own two parcels totaling 55 acres. They represent a unique combination of features. The land is large enough and flat enough for an on-site airstrip, it is in the Mat-Su core area (short commute to work), soils are excellent, and on-site native vegetation provides privacy and beauty. Gas drilling on the property would destroy the natural beauty of the 100-year old vegetation. Privacy will be lost to construction workers, and later to utility workers routinely coming and going across the property without restriction. The land I own cannot be replaced for any reasonable amount of money. The assessed value of the land does not fairly reflect the value as a homesite.

I understand that the language cannot be crafted to allow the surface holder to make opportunistic profits. I ask that you consider some way of protecting those of us legitimately have chosen the land as a homesite. That homesite has value above and beyond market value. I am not looking for profit. I would willingly pay to protect certain rights. Unless language is in the law making it financially impractical for the lessee to destroy a homeowner's lifestyle, I am fearful that other future lessees will be as callous as Unocal has been to those of us who have homes on Vine Road.

Thank you for the opportunity to comment.

I sincerely appreciate that Mr. Kopperud of your staff made the effort to advise me of this pending bill.

Sincerely,

Dick Lowman
Landowner, Vine Road, Wasilla

Fax (907) 745-9825
Phone (907) 232-3988

3-12-01

to Alex Kopperud
from Jake Marquez Land owner with Gas Well on my property

I Think your Bill is A Good Idea
I Think The State oil companyies. Need to Compensate Surface owners for land they Render useless once The well is There.
also sirs in my situation. I Have ask ocean energy. tunical for written Restriction around Well Head located on my property. such as. How close can I Build to it. fires & other Activity's. They Have Ignored That Request. your Help would Be Greatly Appeciated.

Jake Marquez
907 376-4847

SB

136

ALASKA STATE LEGISLATURE

Senator John Torgerson, Chair
Senator Drue Pearce, Vice Chair
Senator Rick Halford
Senator Pete Kelly
Senator Robin Taylor
Senator Kim Elton
Senator Georgianna Lincoln

SENATE RESOURCES COMMITTEE

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Sponsor Statement

Senate Bill 136 - Resource Development Board

SB 136 will establish the Resource Development Board, which will be tasked with the primary duties of facilitating public education and promoting responsible resource development. The board will have the authority to award grants to private nonprofit corporations for projects such as conducting marketing research, advertising, publishing, and distributing information related to responsible resource extraction. The Board will establish standards for reviewing proposals and setting terms and conditions for the use of the grants. Grants will be awarded from the Resource Development Fund, which will be created within the general fund and will be subject to legislative appropriation from revenues received from the extraction of the state's natural resources.

In his annual address to the Legislature, Senator Frank Murkowski advised that "The state must do its part to promote economic development of its own lands, irrespective of the prevailing federal attitude and political landscape at the federal level."

SB 136 represents an investment in Alaska's future. Alaska has been, and will be, dependent on natural resource extraction to fuel our economic engine for the foreseeable future. We need to continue to promote responsible development of our resources while protecting the environment. The best way to protect Alaska's environment is to have a strong, diversified economy. The majority of the environmental groups, apparently, do not agree with this concept as they continue to oppose nearly all development while offering no alternative economic plan. Alaska's environmental protection laws are among the strongest in the world, yet, by opposing development of Alaska's natural resources, environmentalists push development offshore to third world countries assuring exploitative development in the absence of adequate environmental protection laws.

There are now more than 90 environmental groups with offices in Alaska and the vast majority of their money comes from the lower 48. These organizations spend millions of dollars in Alaska attempting to sway public opinion, drive public policy, and inhibit the development of our natural resources. Because of the virtually unlimited funds available to these environmental groups, Alaska based resource development advocates are unable to compete effectively in presenting a balanced message to the public and are overwhelmed by a one-sided message. SB 136 will provide assistance in disseminating a balanced message regarding responsible resource development.

Alaska invests in marketing our tourism and seafood industries and in supporting the opening of ANWR to petroleum exploration in order to benefit our economy. We also need to invest in the promotion of our diverse mineral resources, timber, and oil and gas development.

Creating the Resource Development Board will promote responsible resource development in Alaska and assist us in meeting our constitutional mandate of developing our resources by making them available for maximum use consistent with the public interest.

Alaska Forest Association, Inc.

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KETCHIKAN, ALASKA 99901-6599
Phone 907-225-6114
FAX 907-225-5920
Web Site www.akforest.org

March 13, 2001

The Honorable Drue Pearce
Alaska State Senate
State Capitol, Room 119
Juneau, AK 99801-1182

Re: Senate Bill 136 establishing the Resource Development Board

Dear Senator Pearce,

Thank you for introducing Senate Bill 136 which creates a Resource Development Board facilitating promotion of responsible resource development in Alaska. The Alaska Forest Association (AFA) is the non-profit trade association for the forest products industry in Alaska. AFA represents more than 200 companies directly and indirectly involved in the timber industry.

Whether timber, mining, oil, or tourism, a healthy Alaska economy depends on careful use of its natural resources. Investing a portion of the revenue from resource activity in Alaska to educate and advocate environmentally sound resource use makes good sense. The AFA fully supports SB 136.

The environmental industry, which increasingly makes its money by creating and maintaining conflicts, finds Alaska easy prey. Millions of dollars spent annually by the 'conflict' industry plead with the world to "save Alaska" because it's the "last best place on earth." Alaska has much more to offer the United States and the world than just being, "the last best place on earth." The problem is further exacerbated by Alaska's unprecedented land status which creates a unique situation in which non-resident U.S. citizens have a say in the management or mismanagement of Alaska.

The Resource Development Board, set up by SB 136, will help Alaskans educate the world about its abundant natural resources. Projects funded through this Board will also demonstrate that we extract our natural resources in a responsible and earth-friendly manner allowing Alaska to remain "the best place on earth" while providing the valuable resources used to make products we all use daily.

The AFA strongly supports SB 136 which represents a positive investment in Alaska's economic future. Thank you for introducing this important legislation. Should you have any questions concerning any of these comments, please contact me at (907) 225-6114.

Sincerely,

Jack Phelps
by Pam

Jack Phelps
Executive Director

SB

139

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 139
(S) Publish Date: 3/13/01

Revision Date/Time (Note if correction):
Dept. Affected: Natural Resources
Title: Water Fees-Tempora, Water Use
BRU: Minerals, Land & Water
Component: Water Development
Sponsor: Rules
Requester: Governor
Component Number: 916

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services	275.0	275.0	275.0	275.0	275.0	275.0
Travel	7.0	7.0	7.0	7.0	7.0	7.0
Contractual	10.0	15.0	15.0	15.0	15.0	15.0
Supplies	3.0	3.0	3.0	3.0	3.0	3.0
Equipment	5.0					
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	300.0	300.0	300.0	300.0	300.0	300.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (Wtr Res Inc)	0.0	200.0	400.0	400.0	400.0	400.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	300.0	100.0				
1005 GF/Program Receipts	(100.0)	(100.0)	(100.0)	(100.0)	(100.0)	(100.0)
1037 GF/Mental Health						
Water Resources Income Acct	100.0	300.0	400.0	400.0	400.0	400.0
TOTAL	300.0	300.0	300.0	300.0	300.0	300.0

Estimate of any current year (FY2001) cost: none

Check this box (X) if funding for this bill is included in the Governor's FY2002 budget proposal: X

POSITIONS

Full-time	5	5	5	5	5	5
Part-time						
Temporary						

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

The fundamental issue facing the Water Development component is the fact that there is no longer enough staff to conduct the program required by statute. The problem is exacerbated by a court ruling that requires procedures for temporary water use permits that have historically not been conducted and that significantly increase staff time required to process these permits. The consequence of this problem is that the Department of Natural Resources has a backlog of over 600 applications for water rights and over 3,000 total actions (including permit extensions, transfers, etc.). Thus, many industries and citizens are frustrated by their inability to receive authorization to proceed with their projects, or to gain the security of a water right. **[cont.]**

Prepared by: Bob Loeffler, Director — Phone (907) 269-8625
Division: Mining, Land and Water — Date/Time 09-Mar-01
Approved by: Pat Pourchot — Date 09-Mar-01
Agency: Natural Resources

For distribution information, call the Governor's Legislative Office

(Rev 11/2000 OMB)

ANALYSIS: (continued)

Water Use Fee

This bill would provide for a sliding-scale water use fee — that is, an annual fee that escalates depending on the amount of water permitted or used. The bill would also establish a water income account to separately account for water receipts and to allow the legislature to use this source to fund the program.

The fee and income account would create a secure funding source that is large enough to run the water management program. DNR expects that the water use fee would generate approximately $400,000 more than is currently generated through its administrative fees program when it is fully implemented. (In FY2002 we have $100,000 existing program receipt authorization that switches to the Water Resources Income Account. In FY2003, an estimated additional $200,000 can be generated, and in FY2004, the full amount of the program can be funded from the Water Resources Income Account).

The actual fee structure would be set forth in regulations. DNR expects to propose a fee structure that exempts water use below 500 gallons per day (and residential use below 1500 gallons per day), and that includes a sliding scale fee structure. Those who use more than a million gallons of water per day would pay the highest fee of $400 or $500 per year. DNR also expects to discount fees for non-consumptive use of water (water that is returned to its source in undiminished quantity and quality and therefore does not diminish the amount available for appropriation to others). At this fee structure, no industry would cumulatively pay more than $100,000 and most would pay considerably less.

Industries that are most affected by this fee include the mining industry, although most placer water use is non-consumptive use or recycled. The next largest use group is for public water supply. These two industries would likely pay between $50,000 and $100,000. Other industries, such as for agricultural, commercial, fish hatcheries, logging, hydroelectric, etc., would each pay less than $50,000 per year under this new use fee structure.

DNR also expects to set annual fees on a graduated-scale basis for temporary water use permits. DNR expects to generate approximately $150,000 in revenue from this source. The temporary water use permits with the largest volume of water (and hence with the largest annual fee) are issued to the oil and gas industry for development of the North Slope.

The generation of water use revenue is consistent with the philosophy that, "Those who benefit from the service should pay for it."

The effect of the fees would not be immediate. The establishment of a water use fee system will require a year to promulgate regulations, set up a revenue and billing system, and update the water right files to be included in the water use fee billing system. Within one year of the revised regulations, updated water rights and revenue and billing systems should be in place. At that time, it would be possible for the legislature to allow DNR to receive a portion of these funds as Water Resources Income Account receipts and decrease our general fund appropriation revenues by the amount anticipated to be received that year.

To complement the water use fee, DNR is currently writing regulations that will allow it to more efficiently process water right applications.

Lastly, DNR's FY 02 budget proposes a $300,000 increment to adequately fund the program as outlined above. The general fund budget increment is necessary because the income from the fees will not be available to fully fund the program in the first couple of years. (NOTE: the $100.0 fund change from program receipts to the new Water Resources Income Account was not included in the Governor's FY2002 budget proposal).

Statutory changes, regulatory changes, and $300,000 increment: all three of these solutions are necessary to make the program function reasonably.

Personal Services New Position Detail

DRAFT

Department of Natural Resources

Scenario: FY2002 Governor Amended (1743)
Component: Water Development (916)
BRU Name: Minerals, Land, and Water Development (330)

PCN	Job Class Title	Time Status	Retire Code	Barg Unit	Location	Salary Sched	Range & Steps	Budgeted Months	Split / Count	Annual Salary	COLA	Premium Pay	Annual Benefits	Total Costs
10-#032	Administrative Clerk II	FT	A	GG	Anchorage	2A	8A / B	12.0		23,079	280	0	11,951	35,310
Justification:							**Funding Detail:**							
Water use Rights Adjudication.							1004 General Fund Receipts						100.00%	35,310
											Total Funding:		100.00%	35,310
10-#033	Natural Resource Off I	FT	A	GG	Anchorage	2A	14C	12.0		35,148	427	0	14,532	50,107
Justification:							**Funding Detail:**							
Water Use Rights Adjudication							1004 General Fund Receipts						100.00%	50,107
											Total Funding:		100.00%	50,107
10-#034	Natural Resource Off I	FT	A	GG	Juneau	2A	14C	12.0		35,148	427	0	14,532	50,107
Justification:							**Funding Detail:**							
Water Use Rights Adjudication							1004 General Fund Receipts						100.00%	50,107
											Total Funding:		100.00%	50,107
10-#037	Natural Resource Off II	FT	A	GG	Anchorage	2A	16D	12.0		41,928	509	0	15,982	58,419
Justification:							**Funding Detail:**							
Water Use Rights Adjudication							1004 General Fund Receipts						100.00%	58,419
											Total Funding:		100.00%	58,419
10-#038	Natural Resource Off II	FT	A	GG	Fairbanks	2B	16D	12.0		43,608	529	0	16,342	60,479
Justification:							**Funding Detail:**							
Water Use Rights Adjudication							1004 General Fund Receipts						100.00%	60,479
											Total Funding:		100.00%	60,479

Note: If a position is split, an asterisk (*) will appear in the Split/Count column. If the split position is also counted in the component, two asterisks (**) will appear in this column.

Personal Services New Position Detail

DRAFT

Department of Natural Resources

Scenario: FY2002 Governor Amended (1743)
Component: Water Development (916)
BRU Name: Minerals, Land, and Water Development (330)

Component Summary:

Total New Positions: 5

Fund	Description	Fund Percent	Fund Amount
1004	General Fund Receipts	100.00%	254,422
	Total Funding:	100.00%	254,422

Note: If a position is split, an asterisk (*) will appear in the Split/Count column. If the split position is also counted in the component, two asterisks (**) will appear in this column.

Amendment #1
By Senator Elton

~~**SB 139: Water Bill**~~

Add to Sec 6 As 46.155(d): P. 5, delete lines 3-5 & insert

(d) Notwithstanding any contrary provision of this chapter, the commissioner is not required to provide public notice under AS 46.15.133 of a proposed authorization for temporary use of water; however, the commission must request comment on an application for temporary use of water from the Department of Fish and Game and the Department of Environmental Conservation.

Add to Sec 6 As 46.155(f): P. 5, delete lines 8-10 & insert

(f) The commissioner may impose reasonable conditions or limitations on an authorization for temporary use of water to protect the rights of other persons, or to protect fish and wildlife habitat, public heath, or other public interests ~~[or the public interest]~~.

health

Post-it™ brand fax transmittal memo 7671 # of pages ▸ 3

To Amber Lee	From Sob
Co.	Co.
Dept.	Phone # 465-2400
Fax #	Fax #

ALASKA STATE SENATE
Senate Resources Committee

From: The Office of Senator John Torgerson
Chair, Senate Resources Committee

Telephone: (907) 465-2828
Fax: (907) 465-4779

TO:	Jerry Luckhaupt, Leg. Legal
Fax:	2029

Jerry,
Senate Resources reported out SB 139 today. The attached amendment was adopted. Please send over a final Resources Committee Substitute. Thank you,
Darwin

SENT on 4-11-01 by Darwin (phone 465-4907)

Proposed Substantive Amendments to SB 139

Change in Section 1 (Findings).

DELETE Page 2, lines 7-10 altogether and replace with the following:

(4) the establishment of an appropriate system of application fees that reflect the reasonable direct cost of providing the water management services would provide an adequate method of financing Alaska's water management system.

DELETE Page 2, lines 11-13 altogether and replace with the following:

(b) It is the policy of the state to authorize the Department of Natural Resources to assess a reasonable fee for the services it provides in facilitating the use of state water; the fee should reflect the reasonable direct cost of providing the service but it is the policy of the state that the fee not include:

(1) the costs and salaries of administrative, support, or supervisory personnel who are not directly engaged in providing the service;

(2) other budgeted overhead expenses, including rent and utilities;

(3) interagency charges that would not meet the requirements of AS 37.10.052 - 37.10.058 if those charges had been incurred or invoiced by the agency providing the designated regulatory service;

(4) public consultation costs when the consultation is not required by law;

(5) costs related to an appeal of permit issuance by a person other than the applicant for that permit;

(6) expenses that are not reasonably necessary to comply with the law under which the service is provided; or

(7) travel expenses for inspecting businesses having not more than 20 employees.

(c) It is the policy of the state that the department not apply a charge to the holder of a certificate of appropriation that is not specifically related to services provided by the department such as an application for transfer or amendment, except that the department may continue to charge the annual $50 administrative service fee currently in use by the department in order to maintain the water rights program for the benefit of Alaskans and current water rights holders.

(d) It is the policy of the state that the department minimize the required costs, including application fees, on individuals and businesses withdrawing less than a significant amount of water.

Delete Secs. 3-5 altogether and replace with the following, which builds on last year's HB 361 (fixed fees for standard designated regulatory services):

Sec 3. AS 37.10.058(2) is amended to read:

(2) "designated regulatory service" means a regulatory service provided under the following regulatory programs:

(A) regulation of the disposal of waste into waters of the state under AS 46.03.100 ;

(B) certification of federal permits or authorizations under 33 U.S.C. 1341 (sec. 401, Clean Water Act); [AND]

(C) a coastal management consistency determination relating to a permit or authorization issued under a program listed in (A) or (B) of this paragraph, if the determination is made by the agency issuing the permit or authorization; and

(D) any authorization for the use or appropriation of water under AS 46.15.

New Section of the bill (New Section 3)

Sec. 3. AS 46.15.020(b)(4) is amended to read:

(4) prescribe fees or service charges for any public service rendered consistent with AS 37.10.050 — AS 37.10.058, except that the department may charge under regulations adopted by the department an annual $50 administrative service fee to maintain the water management program;

Change in Effective Date. Page 7, Line 14. Add the following to the beginning of the sentence as indicated: "Sec. 10. Except for Section 3 of this bill, this Act takes effect immediately under AS 01.10.070(c)." *[Note that the Section is renumbered.]*

New Effective Date Section. "Sec. 11. Section 3 of this act takes effect on July 1, 2002."

Summary of Changes

Proposed Changes to SB 139	
Existing SB 139	**Proposed Amendment**
Section 1	Change paragraph (4)
	Delete subsection (b) and replace with new subsections (b) through (d).
Section 2	No change
Section 3 (New Section)	Delete. Replace with New Section 3 concerning AS 46.15.020(b)(4).
Section 4	Delete
Section 5	Delete
Section 6	Renumber to Section 4
Section 7	Renumber to Section 5
Section 8	Renumber to Section 6
Section 9	Renumber to Section 7
Section 10	Renumber to Section 8
Section 11	Renumber to Section 9
Section 12	Renumber to Section 10, Amend language
New Section	Section 11. New Effective Date Section

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

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Sectional analysis of SB 139

Title 46.15 is the "Water Use Act" which establishes procedures for maintaining existing rights and obtaining new rights to ground and surface waters of the state. In order for the Department of Natural Resources to implement the water right system under the Water Use Act it must have adequate staff and financing. This bill sets up a long-term financing mechanism through the establishment of water use fees to provide for a more predictable appropriation and staffing level from year to year.

SB139 would also validate and affirms that DNR should continue to issue under the authority of the Water Use Act temporary water use authorizations as it has for over 20 years.

Sec. 1 and 2 are the finding policy and purpose relating to water use fees and temporary water use authorizations.

Sec. 3 adds the state water resources income account to the accounts identified under AS 35.05.146 as program receipt accounts.

Sec. 4 establishes the authority to charge a fee for the use of state water that is issued under a certificate of appropriation (water right), permit to appropriate water, temporary water use authorization, based on the quantity certificated, permitted, authorized or used. This is one of the two primary bill purposes.

Sec. 5 establishes the state water resource income account. The fees upon receipt shall be accounted for separately in this account. The appropriations from the account are not made from the unrestricted general fund. The legislature may appropriate funds from the account to DNR for its water resources program or other public purposes.

Sec. 6 this is a house keeping amendment to the existing law that would limit the process now required by AS 46.15.035 for DNR to make a finding, reserve water for fish, assess a conservation fee for the removal of water from one hydrologic unit to another or out of state. Currently a person who fills a canteen up with water in Anchorage and brings it to Denali State Park would technically need to comply with the requirements of this statute. Under the bill amendment these processes would only take place when the removal of water involves a significant amount of water, an amount to be set by regulation.

Sec. 7 this is a house keeping amendment to the existing law that would amend the defination of a "hydrologic unit", to include as part of the hydrologic unit the waters of an ocean that are adjacent to a hydrologic subregion of the state. This applies when water taken from the mainland is moved to an island offshore or used to construct ice roads across a portion of a bay, inlet or sea. The

amendment makes it clear that the ocean waters off shore of a hydrologic subregion are in fact part of the hydrologic unit.

Sec. 8 expressly confirms the authority of DNR to issue temporary water use authorizations, under appropriate circumstances, as has been DNR's practice for over 20 years. Temporary water use authorizations do not confer any rights to use water. Temporary water use authorizations have been issued for construction and development of specific commercial, industrial, and private activities or projects where water was required, for a temporary period of time, and a permanent water right was not needed. The bill lays out under what circumstances a temporary water use authorization can be issued the procedures to be followed. It exempts a temporary water use authorization from public notice and public interest criteria that is normally required prior to issuance of a permanent water right. The bill allows for the transfer of a temporary water use authorizations between parties with DNR approval and for the sharing of an authorization between parties if they so intend. Because of its temporary nature, without any rights or priority attached, an authorization can be modified, suspended, or revoked by DNR if its necessary to protect water right holders or the public interest.

Sec. 9 is amended to include a temporary water use authorization under the crime section so that, if necessary, DNR can enforce against the unlawful use of water.

Sec. 10 validates the existing temporary water use permits that have been issued prior to the effective date of the Act. The temporary water use permits issued prior to the Act are to be considered an authorization issued under AS 46.15.155 and are subject to the terms and conditions set out in the permit and subject to the requirements of AS 46.15.155. This section affirms the validity of existing temporary permits that may have been called into question by the rationale used by the court in Greenpeace, Inc. v. DNR, 3AN-00-345 Civil.

Sec. 11 allows the regulations attorney to change the term "temporary water use permit" to "authorizations for temporary use of water" as consistent with the Act, and keeps the current statute in effect.

Sec. 12 sets effective date of the Act.

TONY KNOWLES
GOVERNOR

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Juneau, Alaska 99811-0001
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HB 139

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

March 9, 2001

The Honorable Rick Halford
President of the Senate
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear President Halford:

This bill I transmit today creates a logical source of funding for Alaska's water use program, bringing much needed efficiency to the program for commercial and residential users. The program has suffered continued underfunding for several years, causing a serious backlog in permits. This inability to issue permits in a timely manner stalls development and frustrates water users. This bill also clearly authorizes the Department of Natural Resources (DNR) to allow a streamlined approval process for temporary water uses as another way to optimize program efficiency.

Funding for implementation of the Alaska Water Use Act, commonly known as the water rights program, has seen a more than 50% reduction in funding over the past 10 years, leading to two- thirds reduction in staff. The remaining four staff positions can no longer carry out the requirements of the Act.

This legislation is part of a three-part solution to provide adequate funding and staffing for the water rights program. First, DNR is promulgating regulations that make implementation of the program less costly. Second, the FY 2002 budget includes a $300,000 budget increment to fund the program adequately. This proposed legislation provides the third part of the solution: a water use fee.

Under this bill, the natural resources commissioner would establish a sliding fee for water use based on the quantity intended for use. That money would be separately accounted for within the general fund and available for appropriation to program operation.

The bill affirms DNR's authority to allow temporary water uses for construction, development, commercial and private activities in cases where a long-term water right is not appropriate or necessary. The department has been authorizing these temporary uses for several years and many industries, such as oil development and road construction, find them crucial to their ability to proceed with their projects in a timely manner. Losing this program option would needlessly exacerbate the current backlog in water permits.

The bill confirms that the temporary water use authorizations are revocable and do not create a property right. Because of the revocable nature and finite duration of these authorizations, DNR would not be required to provide prior public notice or conduct an administrative review under the criteria applicable to permits for water rights. However, the commissioner will continue to provide notice to the Alaska Departments of Fish and Game and Environmental Conservation and be authorized to impose reasonable conditions or limitations on these temporary uses.

Finally, a transitional provision of the bill would provide that temporary water use permits issued before the effective date of the bill may not be invalidated on the grounds that DNR did not provide public notice under AS 46.15.133 or review a permit application under the criteria set out in AS 46.15.080. A recent decision by the superior court in Greenpeace, Inc. v. Alaska Department of Natural Resources, concluded that DNR should have provided public notice of a temporary water use permit application and conducted a detailed review of the application before issuing the permit. This decision could cause serious delays in development projects and DNR's water use processing.

In the interest of promoting efficiency for project development across the state, I urge your prompt and favorable consideration of this measure.

Sincerely,

Tony Knowles
Governor

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

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Title 46.15 is the "Water Use Act" which establishes procedures for maintaining existing rights and obtaining new rights to ground and surface waters of the state. In order for the Department of Natural Resources to implement the water right system under the Water Use Act it must have adequate staff and financing. This bill sets up a long-term financing mechanism through the establishment of water use fees to provide for a more predictable appropriation and staffing level from year to year.

SB139 would also validate and affirms that DNR should continue to issue under the authority of the Water Use Act temporary water use authorizations as it has for over 20 years.

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Sec. 6 this is a house keeping amendment to the existing law that would limit the process now required by AS 46.15.035 for DNR to make a finding, reserve water for fish, assess a conservation fee for the removal of water from one hydrologic unit to another or out of state. Currently a person who fills a canteen up with water in Anchorage and brings it to Denali State Park would technically need to comply with the requirements of this statute. Under the bill amendment these processes would only take place when the removal of water involves a significant amount of water, an amount to be set by regulation.

Sec. 7 this is a house keeping amendment to the existing law that would amend the defination of a "hydrologic unit", to include as part of the hydrologic unit the waters of an ocean that are adjacent to a hydrologic subregion of the state. This applies when water taken from the mainland is moved to an island offshore or used to construct ice roads across a portion of a bay, inlet or sea. The

amendment makes it clear that the ocean waters off shore of a hydrologic subregion are in fact part of the hydrologic unit.

Sec. 8 expressly confirms the authority of DNR to issue temporary water use authorizations, under appropriate circumstances, as has been DNR's practice for over 20 years. Temporary water use authorizations do not confer any rights to use water. Temporary water use authorizations have been issued for construction and development of specific commercial, industrial, and private activities or projects where water was required, for a temporary period of time, and a permanent water right was not needed. The bill lays out under what circumstances a temporary water use authorization can be issued the procedures to be followed. It exempts a temporary water use authorization from public notice and public interest criteria that is normally required prior to issuance of a permanent water right. The bill allows for the transfer of a temporary water use authorizations between parties with DNR approval and for the sharing of an authorization between parties if they so intend. Because of its temporary nature, without any rights or priority attached, an authorization can be modified, suspended, or revoked by DNR if its necessary to protect water right holders or the public interest.

Sec. 9 is amended to include a temporary water use authorization under the crime section so that, if necessary, DNR can enforce against the unlawful use of water.

Sec. 10 validates the existing temporary water use permits that have been issued prior to the effective date of the Act. The temporary water use permits issued prior to the Act are to be considered an authorization issued under AS 46.15.155 and are subject to the terms and conditions set out in the permit and subject to the requirements of AS 46.15.155. This section affirms the validity of existing temporary permits that may have been called into question by the rationale used by the court in Greenpeace, Inc. v. DNR, 3AN-00-345 Civil.

Sec. 11 allows the regulations attorney to change the term "temporary water use permit" to "authorizations for temporary use of water" as consistent with the Act, and keeps the current statute in effect.

Sec. 12 sets effective date of the Act.

SB

140

ALASKA STATE LEGISLATURE

SENATE RESOURCES COMMITTEE

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SPONSOR STATEMENT

SB 140
"Small Water-Power Development Projects"

On November 9, 2000, Congress approved legislation extending programs under the federal Energy Policy and Conservation Act. Title V of this Act, placed in federal statute as Public Law 106-469, was proposed by Senator Murkowski who is chair of the Senate Energy and Natural Resources Committee.

Senator Murkowski's language amends the Federal Power Act to allow licensing and regulatory authority over small hydroelectric projects in Alaska to transfer from the federal government to the State of Alaska. Small hydroelectric projects are defined as those of 5,000 kilowatts (5 megawatts) or less. The federal enabling legislation applies to new projects and to existing projects if the owner so elects. A number of our small utilities as well as the State supported this legislation.

Before Alaska can acquire jurisdiction from the Federal Energy Regulatory Commission (FERC), which currently oversees hydroelectric projects, the Legislature must adopt legislation and the Governor must submit a program to FERC to satisfy the requirements in Title V of PL 106-469. All current environmental and other protections required under federal law must be contained in the State program. Small hydroelectric projects located on Indian reservations, conservation units of ANILCA, or rivers designated for the Wild and Scenic Rivers System would not be eligible for State jurisdiction.

SB 140 will begin implementation of Title V of PL 106-469 in an effort to bring regulations closer to home and to reduce the great time and expense currently associated with federal licensing and regulation of small hydro projects in Alaska. The time and money required for federal licensing is virtually prohibitive for some small projects. Now the Legislature has an opportunity to remove this hindrance and encourage development of renewable electric infrastructure.

Quality Services
(907) 274-1056

Date OCT 2 6 2000

Petersburg Pilot

Client No. 420A

House approves hydroelectric regulatory bill that may help City

210A 47cA 310 330 LeJc 630

Petersburg has been working for nearly five years and spent almost $500,000 to have the Blind Slough Hydroelectric Facility re-licensed by the Federal Energy Regulatory Commission. It is expected to take several more years to complete and cost upwards of $1 million when all is said and done.

But, legislation passed this week might be able to offset the need to have the 2.5 megawatt project controlled by the federal government and put the control of similarly sized projects in the hands of the state.

The House of Representatives on Tuesday, approved a bill, which previously had passed the Senate, allowing the State of Alaska to regulate small scale hydroelectric projects in Alaska, rather than having them regulated by the Federal Energy Regulatory Commission.

The bills now head to the President for his signature.

This summer Petersburg Power and Light Superintendent Dennis Lewis testified before Congress on the current re-licensing process saying "the current federal hydropower licensing process of small rural facilities is dysfunctional."

This week, after hearing the news, he said that Petersburg would be very interested in having the federal license process vacated and dealing with a state regulatory process.

"Alaska has great potential for small-scale hydroelectric projects that would help reduce the price of electricity to consumers in Alaska and help the environment by reducing air pollution," said Sen. Frank Murkowski. "But under existing law, a project, no matter how small or remote, must obtain a federal license and the licensing process itself is a major impediment and cost for these small projects," said Murkowski.

While saying the five- to 10-year FERC licensing process may not defeat a giant project, it represents a significant cost increase for smaller projects.

Murkowski said the Black Bear Lake project on Prince of Wales Island, a proposed 4.5-megawatt generator, took seven years and $1.2 million to complete the licensing process — adding significantly to the $10 million cost of the project. The nearby Goat Lake project required five years and $1 million in spending to win FERC approval, adding to its $10 million construction cost.

"For a small project located in a remote region of Alaska,

Continued on page 5

FERC

210A 47cA 310 330 LeJc 630

Continued from page 3

FERC's licensing process is a major expense. And for too many small projects, this alone dooms an otherwise economically viable and environmentally beneficial project," said Murkowski.

He noted that most of these projects are not on salmon spawning streams, but small creeks or at the outflow of lakes and that the projects have no effect on the environment or wildlife.

"Small hydro projects in Alaska are environmentally sound, renewable power sources since they replace fossil-fuel burning diesel generators as power sources. It is important to note that this legislation does not Instead, it allows the state to regulate (them) in lieu of FERC. I ask, who is more interested in the environment of Alaska — Alaskans or distant FERC regulators?" asked Murkowski.

Murkowski noted that Alaskans on average pay 36 percent more for electricity and that some in rural Alaska pay up to 43 cents per kilowatt hour — five times the national average. These high costs result from the fact that power is generated from diesel generators whose fuel must be shipped to remote areas at great cost.

The FERC exemption will only be triggered if Alaska's Governor notifies the Secretary of Energy that the State has in place a comprehensive process for regulating the new facilities resources, or cultural resource protection laws.

The bill has been endorsed by Alaska Legislature's Utilities Restructuring Committee, by the Alaska Village Electric Cooperative and by Alaska State government.

The small hydro bill (S. 422) passed the Senate on March 26, 1999 and again last week when it was added to the re-authorization of the Energy Policy and Conservation Act (EPCA) (H.R. 2884). EPCA also authorizes the nation's Strategic Petroleum Reserve and the new Northeast Home Heating Oil Reserve.

The 2.5 megawatt Blind Slough Hydroelectric Facility, which supplies the city with about one-quarter of its peak power consumption needs, was

Statement of Robert S. Grimm, President
of Alaska Power & Telephone Company.
Dated 3-15-2001

I would like to voice my strong support of Senate Bill No. 140.

Alaska Power & Telephone Company is an employee-owned corporation that has been providing public utility service to Alaska since 1957. We currently provide service to the residents of 25 different rural communities from above the Arctic Circle to the very southern portions of Alaska. Our experience in developing small hydropower projects is extensive and current.

I have attached a copy of my testimony on this issue when it was heard by the US Congress, House of Representatives, Committee on Commerce, and Subcommittee on Energy and Power on March 30, 2000. These comments remain relevant to Senate Bill No. 140.

Secondly, I have attached a paper titled " Alaska Small Hydroelectric and the Question of Sustainable Development" dated March 1999.

Both of these documents point out the difficulty and high cost associated with the development of small hydroelectric projects. I am testifying in the hope that this legislation will result in cost and time savings when permitting small hydroelectric projects.

Finally, I would like to make a few other points:

1. In Southeast Alaska the number of small hydropower projects (500 to 5000 kw) is finite. I have prepared a list of the hydropower projects that may likely developed in the next ten years. While I am sure there are others, I thought it would be useful to point out that the numbers of projects are limited and thus the work load and associated costs of the agency given responsibility should be commensurate with the number of projects.

   Otter Creek in Skagway
   Thayer Lake in Angoon
   Reynolds Creek in Hydaburg
   South Fork on Prince of Wales Island
   Wolf Lake near Hollis
   Gartina Creek in Hoonah

Gunnuk Creek in Kake
Sunrise Lake near Wrangell

A few relicense efforts are under way or will occur soon at:

Crystal Lake in Petersburg
Dewey Lakes in Skagway

2. With the new legislation, Alaska would be unique. For projects under FERC, there is no minimum size. For example, if an Alaskan resident had a site that could generate 2 KW for their personal use, it could be jurisdictional by FERC, requiring a license that could make the project uneconomic because of the licensing process. If the state develops a well thought out and cost effective program, it will make micro-hydro (under 500KW) very attractive. Another plus of the legislation is that it would likely remove any temptation by micro-hydro developers to merely build their projects without licensing because of the costs and time associated with the current federal process.

3. Currently the State permits small domestic water systems for villages and towns. I believe small hydropower projects are very similar. I do not think we need to or intend to create a State FERC with its high cost and untimely decisions. We need to develop a process that is Alaskan in scope, well thought out and cost effective while meeting the requirements of the this legislation. We need some agency to take the lead. This agency must balance any of adverse impacts with the beneficial impacts of any proposed hydro development. I believe agencies with general charges such as the RCA, DGC or DNR are appropriate and have statutory responsibility to balance impacts (adverse and beneficial) so that hydro development occurs in a cost effective and timely manner consistent with the public interest. I have attached a paper written in 1999. It is critical of resource agencies that take the narrow view of their responsibilities. This problem needs to be corrected whether or not the state wishes to assume the responsibility of permitting small hydropower projects.

In this regard, the Alaska Rural Electric Cooperative Association (ARECA) membership passed a Resolution 01-9, supporting the recognition of hydroelectric power as a renewable energy resource, and requiring federal and state agencies to take a balanced approached to existing and new hydroelectric projects. I have attached a full copy of this resolution for your consideration.

Resolution 01-9

A Resolution Supporting the Recognition of Hydroelectric Power as a Renewable Energy Resource, and Requiring the Federal and State Governments to Take a Balanced Approach to Existing and New Hydroelectric Projects

Hydroelectric power is a clean, economical and renewable energy alternative to power plants using fossil fuels, which are dependent on price variations and encounter transportation, storage and air emission problems. In Alaska, most small hydro projects use natural water features that do not require the damming of free-flowing rivers. Some interest groups and some in the federal government have come to consider hydroelectric power as a non-renewable energy resource. ARECA encourages the Alaska Congressional delegation to seek legislation recognizing hydropower as a renewable energy resource.

ARECA supports the efforts of its members to develop and redevelop hydroelectric projects. Furthermore, ARECA supports state-level policy that would require state resource agencies to balance the impacts of habitat changes associated with hydro projects with the benefits of such projects relative to fossil fuel alternatives.

Adopted: December 14, 2000

HYDROELECTRIC LEGISLATION

HEARING

BEFORE THE

SUBCOMMITTEE ON ENERGY AND POWER

OF THE

COMMITTEE ON COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

ON

H.R. 2335, H.R. 1262, H.R. 3852,
S. 334, S. 422, S. 1236, and S. 1037

MARCH 30, 2000

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(Ex Officio)

CONTENTS

native to the current relicensing process, which is being used in many cases throughout Alaska.

American Rivers and our partner organizations in Michigan also oppose HR 1262, which would exempt hydropower facilities on the Pentwater River and owned by the City of Hart, Michigan from regulation under the Federal Power Act. The Pentwater River is a tributary to Lake Michigan and a small but important steelhead fishery that currently suffers from inadequate flows from the Hart Project. These flows, which drop down to almost zero at night, cause wild fluctuations that harm migrating fish and cause significant problems with water temperature all for a small amount of power. There is no reason that this project should be exempted from the same environmental standards that others must meet.

As a general matter, American Rivers and the members of the Hydropower Reform Coalition oppose Congressional extensions for commencement to construct new hydropower projects. The Federal Power Act currently provides for a two-year period in which to commence construction of a dam with an option to extend that period for an additional two years. Extending commencement of construction to 10 years as proposed in S. 439 could render environmental and economic evaluations conducted during the licensing process useless as conditions in the project area may change. Such extensions also limit alternative economic activity at the site, including alternative power development. Projects should not be licensed unless they are fully prepared to carry out their obligations and responsibilities. Congress should simply not accept so many extension bills.

CONCLUSION

Our nation's rivers and fisheries are facing a crisis of slow but steady extinction. Resource agencies with expertise in these areas are in the best position to address this threat. The relicensing process can always benefit from incremental administrative improvements, and perhaps one day we will come to a conclusion that it is time to look at an entirely new way of doing business, but until that point, HR 2335, and bills like it, will only turn back the clock to an era of litigation, hostility, and continued environmental decline. We can endeavor to find better ways to generate hydropower and new sources of energy but we cannot bring back species once they have gone extinct.

Mr. SHADEGG. Thank you. And I'd like to compliment each of the witnesses so far for staying quite close to the timeline. Mr. Grimm?

STATEMENT OF ROBERT S. GRIMM

Mr. GRIMM. Thank you, Mr. Chairman and members of the subcommittee. My name is Robert Grimm. I serve as president of Alaska Power & Telephone Company. AP&T is an investor-owned, employee-owned corporation which has been providing public utility services in Alaska since 1957.

We currently provide service to 25 different communities from above the Arctic Circle to the very southern portions of Alaska. Most of these communities are very small and due to lack of infrastructure, have isolated electric systems utilizing small diesel electric generating units that use fossil fuel.

In addition to representing my own company, I'm speaking today on behalf of Alaska's electric utility industry through our statewide association known as ARECA. We strongly support S. 422 for the reasons I would like to outline, using my utility experience as an example, but emphasizing that many other companies in Alaska have similar experiences.

One of the solutions to fossil fuel generation in these remote areas is the development of small hydro to provide a renewable and nonpolluting source of energy. We at AP&T began the program to identify and develop cost-effective projects in 1984. In 1987 we applied for a preliminary permit from FERC, which we received in June, for 36 months. In November 1993, FERC issued the license authorizing the project with a capacity of 4.5 megawatts. The

project was completed and began commercial operation in 1995. The permitting and licensing process took 7 years and cost $1.2 million. The actual construction took 1 year and cost $10 million. It's interesting to note that the licensing cost and permitting cost exceed the installed cost of equivalent diesel electric generating units.

This is not just a bad example or an anecdotal thing. We also have anotner project in Skagway, Alaska with a capacity of 4 megawatts. It's at Goat Lake, which is near Skagway. Filed for the preliminary permit in 1991. In 1994 a license application. Got the license in 1996. Took over 5 years and cost over $1 million. The project was completed in the fall of 1998 at a cost of $10 million.

Additionally, we have a couple of other projects that are currently under license. We've been through a relicense in our Dewey Lake system. Hence, we have first-hand experience with FERC during the last decade. It appears to us that the lack of flexibility, large project, small project, large impact, small impact in the FERC rules, regulations and requirements for these small projects has been the major reason so few have been developed in Alaska. Thus, we're forced to use fossil fuel in these remote areas, with the significant impacts associated with fuel storage, fuel spills, air emission, more than offset any of the adverse effects that have been identified in any of the projects that we've already completed or have currently under license.

These projects are very similar to small community water systems which are being developed in Alaska under State law. Small hydropower is a resource that has prove itself, yet the regulatory maze continues to hinder its development. Those of us on the front line trying to implement renewable energy policies are bewildered. With all the benefit associated with the development of small hydropower when compared to the continued use of fossil fuel, why is everybody making it so hard and difficult to develop?

My last point is tidal power. In Alaska, a lot of the communities are either on coastal sites, because there's no roads—very few roads in Alaska—or along rivers. And we've looked at several different free-flowing turbines which are essentially an adapted windmill type of a thing that is actually put into the water. Uses the—captures the free-flowing energy of the river that many of these villages sit by.

Unfortunately, these units are very small—in the neighborhood of 100 KW. Well, because these rivers are navigable, that would make a FERC permit required. So we would be looking at $1 million or more to permit a project of 100 KW in these villages where we're now using—it just makes some of the alternative energy a non-option.

To reiterate, S. 442 will not diminish public interest, environmental or conservation considerations and protection as under FERC. The bill will simply transfer regulatory jurisdiction from a very distant Washington, DC to our State government in Juneau.

My understanding is that because of our special situation in Alaska, FERC does not object to the Alaska-only program contained in S. 422, and the State of Alaska supports it. Thank you.

[The prepared statement of Robert S. Grimm follows:]

PREPARED STATEMENT OF ROBERT S. GRIMM, PRESIDENT, ALASKA POWER & TELEPHONE COMPANY

My name is Robert S. Grimm. I serve as President of Alaska Power & Telephone Company (AP&T). AP&T is an investor-owned and employee-owned corporation which has been providing public utility services in Alaska since 1957. We currently provide services to 25 different communities from above the Arctic Circle to very southern portions of Alaska. Most of these communities are very small and, due to the lack of infrastructure, have isolated electric systems utilizing small diesel electric generating units that use fossil fuel.

In addition to representing my own company, I'm speaking today on behalf of Alaska's electric utility industry, through our statewide association known as ARECA. We strongly support S.422 for reasons I would like to outline, using my utility's experience as an example, but emphasizing that many other of our rural utilities have similar experiences.

One of the solutions to fossil fuel generation in these remote areas is the development of small hydroelectric projects to provide a renewable andnon-polluting source of energy. We at AP&T began a program to identify and develop cost-effective projects in 1984.

In July 1987 we applied to the Federal Energy Regulatory Commission (FERC) for a preliminary permit for the Black Bear Lake Project on Prince of Wales Island in Southeast Alaska. In June 1988, FERC issued a preliminary permit for a term of 36 months. During this period, as evidenced by progress reports filed with the agency, AP&T spent a considerable amount of time and effort consulting with the agencies. In May 1991, we filed our license application. In November 1993, FERC issued the license authorizing the project with a capacity of 4.5 MW. The project was completed and began commercial operation on August 28, 1995. The permitting and licensing phase took seven years and cost nearly $1.2 million. The actual construction took one year and cost $10 million. It is interesting to note that the permitting costs alone almost exceed the installed cost of equivalent diesel electric generating units. I would like to point out that this project was funded entirely from private funds.

Another of our projects is located near Skagway, Alaska and has a capacity of 4 MW. The project is called the Goat Lake Hydropower. We filed for a FERC preliminary permit in January 1991 and the FERC issued that permit in June 1991. In May 1994, we filed our license application and FERC issued the license in July 1996. The permitting and licensing process took over five years and cost us $1,043,100. The project was completed in the fall of 1998 at a cost of about $10 million. Again, this project was funded entirely with private funds.

Another small hydroelectric project, Wolf Lake, is also located on Prince of Wales Island, and has a capacity of about 2 MW. The preliminary permit was issued by the FERC in April 1995. We fulfilled our obligations under the permit and filed our license application March 27, 1998. We are still awaiting a FERC license. This project would have been already permitted and under construction if the proposed legislation before you had been in place five years ago.

Additionally, as part of the Upper Lynn Canal Regional Energy Plan, we are waiting for FERC licensing for a 3 MW project located on Kasidaya Creek north of Juneau near Skagway and Haines in Southeast Alaska. We filed for our preliminary permit in July 1996 and FERC issued the permit in November 1996. We then followed an Applicant Prepared Environmental Assessment Process. That process took three years, and we applied for the license last October.

In addition, we have had the opportunity to re-license and amend our 1 MW project for Dewey Lakes FERC Project No. 1051 at Skagway, Alaska.

Hence, we have had extensive first hand experience with FERC during the last decade. It appears to us that the lack of flexibility (i.e. large impact vs. small impact) in the FERC rules, regulations, and requirements for these small projects has been the major reason that so few have been developed in Alaska.

The continued use of fossil fuel generation in these remote areas and the significant impacts associated with fuel storage and air emissions more than offset the minor impacts of these hydroelectric projects. These projects do not have large dams that constrict free-flowing rivers. These projects are very similar to the small-community water systems being developed in Alaska under state law.

As you are aware, the environmental costs associated with the continued use of fossil fuels are significant. One authority has attempted to estimate the "bottom line" cost of fossil fuels. Included in this assessment were health costs, damage to water resources, treatment costs necessary to counteract the adverse effect of fossil fuel use on food supplies, water resources, climate, and health. These costs, when tabulated, equal 3.35 cents per kilowatt-hour of fossil fuel energy. Even this assess-

ment does not include the environmental costs of cleaning up contaminated fossil fuel storage sites, which in rural Alaska alone is a $300 million dollar problem waiting to be addressed. These facts are understood and widely accepted.

Small hydropower in Alaska is a resource that has proven itself, yet the regulatory maze continues to hinder its development. Those of us on the front line trying to implement renewable energy policies are bewildered. With all of the benefits associated with the development of small hydropower when compared to the continued use of fossil fuels, why is it that small hydro is so difficult to develop?

The proposed legislation will provide us significant regulatory relief from the hardship we are now encountering when trying to displace fossil fuel generation with a proven renewable and non-polluting resource. That relief translates into dollars and time savings.

You may hear how FERC regulations contain shortcuts to be used by smaller projects and how the Applicant Prepared Environmental Assessment can deliver a FERC license in a shorter time period. We have had direct experience with these shortcuts and have found them to be largely ineffective. While we appreciate the intent and efforts of individual FERC staff, the Applicant Prepared Environmental Assessment process simply has not saved us time or money.

A major underlying problem is the diffusion of hydropower oversight that once was exclusively FERC's. Over the years FERC's overall authority under the Federal Power Act has been eroded by court decisions and legislative initiatives giving multiple state and federal agencies authority over various aspects of the licensing process. The process has become very inefficient and confrontational and results in very long licensing time periods and additional costs. Many small hydr power projects simply cannot afford these costs.

My last point is tidal power. Currently we believe that small tidal or free flowing hydropower plants placed upon navigable waters will be subject to the jurisdiction of FERC. In Alaska this technology may have promise for many small coastal or riverside villages. However, the cost and time required for a FERC license make this technology a non-option for small-scale development.

S.422 recognizes the special circumstances that exist in rural Alaska: very small communities, remote sites, no interstate (or for the most part intrastate) power grid. stand-alone generation that is largely diesel, limited local financial resources and much undeveloped small hydroelectric potential. Hence, S.422 would greatly facilitate the development of Alaska's small hydro potential by removing regulatory overlay while still requiring applicants to receive approvals from all other local, state and federal agencies.

To reitera.e, S.422 will not diminish public interest, environmental or conservation considerations and protections as under FERC. The bill will simply transfer regulatory jurisdiction from a very distant Washington, D.C. to our state government in Juneau. This jurisdictional transfer would only occur upon submission by the Alaska governor of a state regulatory program and the approval of that program by FERC after consultation with the secretaries of the Interior, Agriculture and Commerce. My understanding is that, because of our special situation, FERC does not object to the Alaska-only program contained in S.422, and the State of Alaska supports it.

We ask for your support and passage of S.422. I will gladly respond to any questions.

Thank you for this opportunity.

Mr. SHADEGG. Mr. Grimm, thank you very much for your testimony. Mr. David Piper.

STATEMENT OF DAVID E. PIPER

Mr. PIPER. Thank you, Mr. Chairman, members of the subcommittee. My name is Dave Piper. I'm President and Chief Executive Officer of PNGC Power, which is also known as the Pacific Northwest Generating Cooperative.

We're located in Portland, Oregon. We're a cooperatively based energy service provider for our 11 owners who are mostly small, rural electric systems throughout the Pacific Northwest.

I want to thank you and the staff particularly for convening this hearing and the courtesies that have been extended to us in this process over the last period of weeks and months. I'd like to submit

Alaska Small Hydroelectric and the Question of Sustainable Development

By Robert S. Grimm, President
Alaska Power & Telephone Company
March, 1999

I believe that sustainable development is a goal that we, as the most advanced species on earth, will need to adhere to in the future as the demands of our advancing civilization continue to place stresses on our natural environment. The Brundtland Commission over ten years ago proposed the following definition: *development is sustainable if it meets the needs of the present generation without diminishing the ability of future generations to meet their own needs.*[1] The Southeast Alaska Conservation Council also has a definition: It is renewable, it is equitable, and it is digestible[2].

The global population has tripled in this century. Biomass and food consumption has reached 40 percent of the entire land-based output of photosynthesis. No one is sure if man can continue to increase this number. Fossil and mineral resource consumption is depleting stocks in hundreds of years that took tens of thousands, or millions, of years to accumulate[3]. This consumption is now affecting the air we breathe and all aspects of the environment of earth.

It occurs to me that any type of renewable resource that can be utilized by mankind should be encouraged and made a priority by the policy makers. This is especially true when the use of that resource has side benefits that not only reduce the depletion of the non-renewable resource, but also reduce the other negative aspects of consuming the non-renewable, such as air or water pollution. Another side benefit is the cost to society of transporting a resource from where it is manufactured or extracted to the point where it is consumed.

It would appear that small hydro development in Alaska meets many, if not all, of the requirements of sustainable development. However, this message has not yet filtered down to the regulators that currently use an adverse and burdensome process when licensing and permitting small hydroelectric facilities. This is true not only in Alaska but in the rest of the nation also.

Alaska Power & Telephone Company has been active in the development of small hydroelectric projects throughout southeast Alaska. We began in 1995 with the development of the Black Bear Hydroelectric Project near Klawock on Prince of Wales Island, and just completed the Goat Lake Hydroelectric Project near Skagway during 1998. In addition, we were able to interconnect Haines and Skagway using a high voltage submarine cable, making both communities energy independent of fossil fuels. Both of these projects took many years to move though the permitting process: eight years at BBL and seven years at Goat Lake. The cost was huge when compared to the population of the communities served and the continued use of fossil fuels (diesel). Just the permitting cost for both projects totaled over 2 million dollars, all of which will be collected by rates from the local customers. This cost is disproportionate when compared to both the size of the project, the energy output, and the now known impacts that the project had upon the environment and resources of the area.

I am convinced that sustainable development is part of the solution, not part of the problem. It, along with other policies, will allow us as global citizens to insure that the planet earth we leave behind is better than the one we found at our birth. I believe further that the vast hydroelectric resources available to us in southeast Alaska, together with electrical transmission facilities, will allow us to displace fossil fuel energy generation completely. Since we have been given this gift, it is our responsibility to make sure it is utilized, as there are many places on earth that are not as fortunate.

The current decision making process, current regulations, and adverse regulatory environment are too expensive and too much of a burden upon our customers. Why this is, I do not know. Perhaps the process has become tainted by historical hydropower impacts that are easily avoided with today's technology and knowledge. What I do know is that change needs to occur. The overall value of renewable resources and encouragement of sustainable development needs to be recognized in today's regulatory environment. Hopefully, this will lower the current costs and efforts of licensing and permitting small hydroelectric projects to acceptable levels.

Our goal is to enter into discussions to change the process, allowing us as a civilization to authorize construction of renewable small hydroelectric projects in a manner that protects the environment and allows the benefits of the project to be captured by several, if not all, future generations. This would allow the development of these projects in a cost-effective manner so that present and future residents of Alaska do not need to consume a disproportionate amount of their limited resources to develop projects responsibly.

Now that you (person, agency, or group) understand that we are serious and willing to work toward a solution, are you willing to do the same? One of the major issues that must be addressed is the policy or goals of each of the agencies that go about their respective duties without any overview or serious policy guidance in regards to how to balance the overall benefits (direct, as well as indirect) of appropriate development. These benefits must be weighed against the impacts that inevitably come with any development.

For example, currently an agency charged with the protection of fish might, in its zeal to fulfill its mission, place conditions upon a small hydroelectric project that renders the project uneconomical and /or impracticable from an operational standpoint. This results in the small hydro being abandoned or developed in a manner that does not utilize the water resource to its fullest extent. Their actions might preserve some habitat, but in some cases the habitat is marginal at best. They may truly believe that they fulfilled their responsibility to the public by their actions and take pride in their actions, but I believe they have missed the point!

In reality they have inadvertently made the world worse, not better. They have made a policy decision that reaches far beyond their agency mission. Yes, they have preserved some habitat and a few fish, but in the process they have denied the world the use, for generations to come, of non-polluting and renewable resource waterpower. Because this energy is not available, another energy source must be used to meet energy demands. In the foreseeable future this energy will be produced with fossil fuels. As discussed above, fossil fuels rely upon non-renewable stocks that took nature millions of years to create, yet man depletes in mere hundreds of years. Fossil fuels already pollute the air[1] and contribute to the CO2

[1] The fossil fueled generators now used in Alaska produce emissions of about 1.59 pounds per kW-hr. Over a 50- year license term of a small hydroelectric even a small 5-megawatt diesel plant produces 1,741,050 tons of

concentrations that are a major contribution factor to the international concerns of global warming.

This is why the process must be changed. A balancing process must be achieved that views any proposed development in a holistic manner. This insures that the concerns, mandatory conditions and recommendations of one group[II] representing only their narrow interests or mission is balanced when viewed from a globally sustainable basis. The first step is for all of us involved in the water resource decisions, to recognize that this balancing must occur and to personally and professionally take responsibility to see that it does occur.

Remember the old bumper sticker, " Think Globally-Act Locally".

Thank you for the opportunity to share my thoughts.

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[1] Bruntland Commission , World Commission on Environment and Development, *Our Common Future*, Oxford University Press, Oxford, 1987.

[2] Southeast Alaska Conservation Council http://www.seacc.org/pages/SUSTAIN.HTM. It is renewable. It uses resources no faster than they can be replenished. In general, natural capital is conserved rather than depleted. It is equitable. It is equitable among people and across generations. The future is not sacrificed for the present. It is digestible. The by-products of production are re-usable, recyclable, or biodegradable.

[3] William C. Clark, at the Kennedy School of Government, Harvard University, [The world] physical stage is rapidly changing. It holds twice as many people as it did in 1950: fours times what it did in 1850. World trade has increased more than 20-fold over the last century; energy use more than 100-fold. This increasing magnitude of human activity has brought about an increasing scale and complexity of interactions among humans, their technologies, and their environment. What were once local incidents of pollution shared throughout a common watershed or air basin now involve multiple nations—witness the concern for acid deposition in Europe and North America. What were once acute episodes of relatively reversible damage now affect multiple generations—witness debates over disposal of chemical and radioactive wastes. What were once straightforward questions of ecological preservation versus economic growth now reflect complex linkages—witness the feedback among energy use, crop production, deforestation and climate change that are evident in studies of the atmospheric greenhouse effect. What once was a relatively well-behaved world of smooth and predictable trends increasingly reveals a propensity for abrupt and unexpected change—witness the surprise and consternation of scientists and people alike confronted with the appearance of the Antarctic ozone hole.

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emissions into the atmosphere that surrounds earth. Ten years ago the Exxon Valdez spilled almost eleven million gallons into Prince Williams Sound. The total weight of the oil spilled was 40,700 tons. The Valdez spill represents only 2% of the weight created by the operation of a small fossil fuel generator that can be replaced by non-polluting, renewable small hydro. Emission data from AP-42, Section 3.4, Environmental Protection Agency.

[II] These groups include project developers, as well as agencies, special interest, and the general public.

SB

141

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB 141
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Natural Resources
Title: Aquatic Farms for Shellfish
BRU: Minerals, Land & Water Dev
Component: Claims, Permits and Leases

Sponsor: Sen. TORGERSON
Requester: (S) RES
Component Number: 2460

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services	116.6	155.6				
Travel	5.0	10.0				
Contractual	2.5	325.0				
Supplies	1.0	1.0				
Equipment	7.0	0.0				
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**132.1**	**491.6**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )	**0.0**	**58.5+**	**58.5+**	**58.5+**	**58.5+**	**58.5+**

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	132.1	491.6				
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	**132.1**	**491.6**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2002) cost: none

Check this box (X) if funding for this bill is included in the Governor's FY2003 budget proposal:

POSITIONS

Full-time	3	3				
Part-time						
Temporary						

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

Figures shown here are only preliminary estimates.

This bill creates a one-time disposal program of at least 90 aquatic farmsites; changes the criteria of determining fair market value of a site where culture of indigenous shellfish is proposed; and requires DNR to condition leases for sites that culture wild stocks of indigenous shellfish to restore the wild stock upon termination or expiration of the lease to the population level that existed prior to issuance of the lease. It expands DNR's current aquatic farm program, which operates on program receipts with one employee and brings in approximately $48.0 a year.

Operating expenditures for SB 141 could increase for FY 2004 if leases are issued for longer than 10 years, which would necessitate cadastral surveys of each site (AS 38.04.045). **[CONT.]**

Prepared by: Bob Loeffler
Phone 269-8600
Division: Mining, Land and Water
Date/Time 25-Feb-02
Approved by: Pat Pourchot
Date 25-Feb-02
Agency: Natural Resources

(Rev 9/2001 OMB)

ANALYSIS: (continued)

This analysis assumes that under Sec. 3 of the bill, it would take a full year to prepare for the one-time disposal of 90 farmsites at auction. A new unit consisting of one Natural Resource Manager I, one Natural Resource Officer II, and ono Natural Resource Technician would be required. (Additional appraisal services would also be required, but would be done under contract.) Because it would take approximately three months to establish and fill the positions, only nine months of personal services costs are shown for FY 2003. Once hired, the unit will need approx. 12 months to develop timelines and procedures; give public notice to solicit nominations; write preliminary disposal decisions; evaluate nominated sites and conduct the coastal consistency review and agency/public comment period (including limited hearings); review comments/resolve conflicts; write final decisions listing approved sites; inspect sites with ADF&G and DEC to determine suitability and whether indigenous shellfish are present; contract for appraisals ($50.0) that consider the value of existing harvestable shellfish and site productivity; give public notice of the auctions; conduct auctions; and issue final leases. The auctions would likely not be held until the fall of 2003.

Total estimated costs for DNR's portion of one-time mariculture disposal: $351.2

As part of the disposal, the bill requires the amount of sustainable harvestable shellfish to be determined so that a value could be placed on the resource. This information is outside DNR's expertise and would likely be obtained by a Reimbursable Services Agreement with ADF&G. Costs for this item were estimated by ADF&G and are shown as a contractual item for FY04.

Total estimated costs for DNR's RSA to ADF&G to evaluate site suitability, estimate populations of wild stock consistent with sustainable yield management and the potential productivity of the site: $272.5

Changes in revenue: +$58.5

If all 90 sites were leased, the possible revenue of $58.5 annually would begin in FY04. This estimate is based on an average 3-acre suspended culture site x 60 sites = $33,000 and an average of 5-acre on-bottom culture site x 30 sites =$25,500 (plus the additional value placed on the amount of harvestable shellfish and the potential productivity of the site; these are unknowns at this time). However, it is not known whether the market could absorb such a large number of sites at once.

Personal Services New Position Detail

DRAFT

Department of Natural Resources

Scenario: DNR FY2003 Fiscal Notes - for Positions (2481)
Component: Claims, Permits & Leases (2460)
BRU Name: Minerals, Land, and Water Development (330)

PCN	Job Class Title	Time Status	Retire Code	Barg Unit	Location	Salary Sched	Range & Steps	Budgeted Months	Split / Count	Annual Salary	COLA	Premium Pay	Annual Benefits	Total Costs
10-#075	Natural Resource Off I	FT	A	GG	Anchorage	2A	14 C	9.0		26,538	426	0	11,193	38,157
Justification:								**Funding Detail:**						
SB141								1004 General Fund Receipts					100.00%	38,157
											Total Funding:		100.00%	38,157
10-#076	Natural Resource Off II	FT	A	GG	Anchorage	2A	16 D	9.0		31,656	509	0	12,242	44,407
Justification:								**Funding Detail:**						
SB141								1004 General Fund Receipts					100.00%	44,407
											Total Funding:		100.00%	44,407
10-#077	Natural Resource Tech II	FT	A	GG	Anchorage	2A	12 C	9.0		23,247	373	0	10,519	34,139
Justification:								**Funding Detail:**						
SB141								1004 General Fund Receipts					100.00%	34,139
											Total Funding:		100.00%	34,139

Component Summary:

Total New Positions: 3

Fund	Description	Fund Percent	Fund Amount
1004	General Fund Receipts	100.00%	116,703
	Total Funding:	100.00%	116,703

Note: If a position is split, an asterisk (*) will appear in the Split/Count column. If the split position is also counted in the component, two asterisks (**) will appear in this column.

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB 141
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Environmental Conservation
Title: An Act Relating to Aquatic Farming of Shellfish
BRU: Environmental Health
Component: Food Safety and Sanitation
Sponsor: Senator Torgerson
Requester: Senate Resources Committee
Component No.: 2343

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services	88.9					
Travel	13.8					
Contractual	236.3					
Supplies	18.5					
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	357.5	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	357.5					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTA .	357.5	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary	2					

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

In preparing this fiscal note, the department has interpreted "suitable" to mean the sites offered for lease can meet the requirements for certification under the National Shellfish Sanitation Program (NSSP), which is implemented by DEC. We have also assumed that 10 new growing areas will need to be certified. The NSSP requires that the department conduct a sanitary survey of each growing area to ensure it is not subject to contamination by fecal coliform, pathogenic organisms and other pollutants and that the water quality meets the standards established in the NSSP. Surveys include an evaluation of shoreline pollution sources, analyses of hydrographic and meteorological characteristics to determine how pollutants are distributed in the water, and collection and analyses of growing water samples.

Continued: on page 2

Prepared by: Janice Adair, Director
Phone (907) 269-7644
Division: Division of Environmental Health
Date/Time 2/20/02 11:16 AM
Approved by:
Date 2/20/2002
Agency: Department of Environmental Conservation

(Revised 9/2001 OMB)

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

BILL NO. SB 141

ANALYSIS CONTINUATION

Continued: from page 1

The sanitary surveys of the growing areas would be conducted by a 12-month non-permanent employee, and the water samples would be collected by third-party contractors. The water samples would be analyzed by the department's Seafood and Food Safety Laboratory. A 12-month non-permanent Microbiologist would be required in the laboratory to analyze the additional 2,250 growing water samples.

The number of required water samples is determined by whether an area is "remote", defined as an area with no human habitation and that is not impacted by any actual or potential pollution sources, or "inhabited", which means the area does have human habitation. Remote areas require fewer water samples for certification than inhabited areas. In determining costs, we have assumed that 50% of the areas will be in remote areas and 50% of the areas will be in inhabited areas.

Areas must be re-certified every three years, although the sanitary survey is only required every 12 years. We have also assumed for purposes of this fiscal note that the re-certification of any area certified under this legislation will be paid for by the shellfish farmers or growers who lease sites in the areas, which is current practice. However, we have not included any increased program receipt authority in year 3, because we do not know how many of these areas will actually be leased and thus require certification.

Line Item Description	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
• Environmental Technician II (12-month Non-perm)	$42,064					
• Environmental Microbiologist I (12-month Non-perm)	$46,866					
Subtotal:	$88,930					
Travel						
• Sanitary surveys (10 areas)	$13,840					
Contractual						
• Sample shipment	$11,250					
• Water sample collection (3rd party contractor)	$225,000					
Subtotal:	$236,250					
Supplies						
• Laboratory commodities (2250 samples)	$18,480					
Equipment	$0					
Total	$357,500					

Personal Services New Position Detail

Department of Environmental Conservation
Fiscal Note SB 141 Attachment

Scenario: DEC 2003 Fiscal Notes (2321)
Component: Food Safety & Sanitation (2343)
BRU Name: Environmental Health (207)

PCN	Job Class Title	Time Status	Retire Code	Barg Unit	Location	Salary Sched	Range & Steps	Budgeted Months	Split / Count	Annual Salary	COLA	Premium Pay	Annual Benefits	Total Costs
18-#012	Environmental Tech II	NP	A	GP	Anchorage	1A	12 B	12.0		30,384	591	0	11,089	42,064

Justification:
Required to conduct sanitary surveys to implement SB 141.

Funding Detail:

1004	General Fund Receipts	100.00%	42,064
	Total Funding:	100.00%	42,064

PCN	Job Class Title	Time Status	Retire Code	Barg Unit	Location	Salary Sched	Range & Steps	Budgeted Months	Split / Count	Annual Salary	COLA	Premium Pay	Annual Benefits	Total Costs
18-#013	Microbiologist I	NP	A	GP	Palmer	1A	14 B	12.0		34,626	674	0	11,566	46,866

Justification:
Required to perform sample analysis to implement SB 141.

Funding Detail:

1004	General Fund Receipts	100.00%	46,866
	Total Funding:	100.00%	46,866

Component Summary:

Total New Positions: 2

Fund	Description	Fund Percent	Fund Amount
1004	General Fund Receipts	100.00%	88,930
	Total Funding:	100.00%	88,930

Note: If a position is split, an asterisk (*) will appear in the Split/Count column. If the split position is also counted in the component, two asterisks (**) will appear in this column.

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB 141
() Publish Date:

Revision Date/Time (Note if correction):
Title: An Act Relating to Aquatic Farming of Shellfish

Dept. Affected: Environmental Conservation
BRU: Environmental Health
Component: Food Safety and Sanitation

Sponsor: Senator Torgerson
Requester: Senate Resources Committee

Component Number: 2343

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services	86.0					
Travel	13.8					
Contractual	236.3					
Supplies	18.5					
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	354.6	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	354.6					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	354.6	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary	2					

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

In preparing this fiscal note, the department has interpreted "suitable" to mean the sites offered for lease can meet the requirements for certification under the National Shellfish Sanitation Program (NSSP), which is implemented by DEC. We have also assumed that 10 new growing areas will need to be certified. The NSSP requires that the department conduct a sanitary survey of each growing area to ensure it is not subject to contamination by fecal coliform, pathogenic organisms and other pollutants and that the water quality meets the standards established in the NSSP. Surveys include an evaluation of shoreline pollution sources, analyses of hydrographic and meteorological characteristics to determine how pollutants are distributed in the water, and collection and analyses of growing water samples. The sanitary surveys of the growing areas would be conducted by a 12-month non-permanent employee, and the water samples would be collected by third-party contractors. The water samples would be analyzed by the department's Seafood and Food Safety Laboratory. A 12-month non-permanent Microbiologist would be required in the laboratory to analyze the additional 2,250 growing water samples.

Continued: on page 2

Prepared by: Janice Adair, Director — Phone (907) 269-7644
Division: Division of Environmental Health — Date/Time: April 2, 2001 8:30 a.m.
Approved by: Kurt Fredriksson — Date: 4/2/01
Agency: Department of Environmental Conservation

For distribution information, call the Governor's Legislative Office

ANALYSIS: (continued)

Bill No. SB 141

FISCAL NOTE
STATE OF ALASKA
2001 LEGISLATIVE SESSION

Continued: from page 1

The number of required water samples is determined by whether an area is "remote", defined as an area with no human habitation and that is not impacted by any actual or potential pollution sources, or "inhabited", which means the area does have human habitation. Remote areas require fewer water samples for certification than inhabited areas. In determining costs, we have assumed that 50% of the areas will be in remote areas and 50% of the areas will be in inhabited areas.

Areas must be recertified every three years, although the sanitary survey is only required every 12 years. We have also assumed for purposes of this fiscal note that the recertification of any area certified under this legislation will be paid for by the shellfish farmers or growers who lease sites in the areas, which is current practice. However, we have not included any increased program receipt authority in year 3, because we do not know how many of these areas will actually be leased and thus require certification.

Line Item Description	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY2007
Personal Services						
• Environmental Technician II (12-month Non-perm)	$40,659					
• Environmental Microbiologist I (12-month Non-perm)	$45,375					
Subtotal:	$86,034					
Travel						
• Sanitary surveys (10 areas)	$13,830					
Contractual						
• Sample shipment	$11,250					
• Water sample collection (3rd party contractor)	$225,000					
Subtotal:	$236,250					
Supplies						
• Laboratory commodities (2250 samples)	$18,480					
Total	$354,594					

22-LS0361\L
Utermohle
2/19/02

CS FOR SENATE BILL NO. 141(RES)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - SECOND SESSION

BY THE SENATE RESOURCES COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR TORGERSON

A BILL

FOR AN ACT ENTITLED

"An Act relating to aquatic farming of shellfish; and providing for an effective date."

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

*** Section 1.** AS 38.05.083 is amended by adding a new subsection to read:

(g) Upon the expiration or termination of the lease, a person who holds a lease for an aquatic farming site where wild stocks of shellfish indigenous to the site are cultured shall, as a condition of the lease, restore the wild stock of shellfish, as consistent with sustained yield management of the wild stock, to the population level that existed on the site when the lease was initially issued.

*** Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to read:

LEASE OF AQUATIC FARMING SITES FOR FARMING OF SHELLFISH. (a) The commissioner of natural resources shall offer for lease to the public before July 1, 2003, a minimum of 60 sites suitable for suspended culture of shellfish, 20 sites suitable for aquatic farming of clams, and 10 sites suitable for aquatic farming of geoducks. The commissioner shall offer the sites for lease by public auction under AS 38.05.075. The commissioner shall

offer for lease through offices of the department those sites that were not leased when offered at a public auction held under this subsection. The leases entered into under this subsection are subject to AS 38.05.083(b) - (g). The renewal of the leases entered into under this subsection is subject to AS 38.05.083(a).

(b) Before offering leases for aquatic farming sites under (a) of this section, the commissioner of natural resources shall solicit nominations of sites suitable for aquatic farming of clams, geoducks, and other shellfish from the aquatic farming industry in the state and the public. The commissioner of natural resources, in consultation with the Department of Fish and Game and the Department of Environmental Conservation, shall identify sites suitable for aquatic farming of clams, geoducks, and other shellfish. The sites identified by the commissioner must include sites in areas of the state where aquatic farming activities are already occurring. Aquatic farming sites for on-bottom culture of shellfish must be located in areas where either (1) an indigenous population of the shellfish species to be cultivated is not present, or (2) if an indigenous population of the shellfish species to be cultivated is present, aquatic farming of the shellfish species would not interfere with an established commercial, subsistence, or personal use fishery. After the commissioner has published the final list of sites suitable for farming of clams, geoducks, and other shellfish, the commissioner shall offer the sites for lease in accordance with (a) of this section.

(c) The aquatic farming sites that are offered for lease under this section are in addition to those offered by the commissioner of natural resources under regulations adopted by the Department of Natural Resources under AS 38.05.083. Aquatic farming leases issued under AS 38.05.083 before the effective date of this Act may not be counted toward the satisfaction of the requirement established by (a) of this section; however, leases for aquatic farming sites that are issued after the effective date of this Act on the basis of lease applications filed with the department before the effective date of this Act may be counted toward the satisfaction of the requirement established by (a) of this section.

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

ALASKA STATE LEGISLATURE

Chairman: Senator John Torgerson
Vice Chair: Senator Gary Wilken
Senator Rick Halford
Senator Ben Stevens
Senator Robin Taylor
Senator Kim Elton
Senator Georgianna Lincoln

Official Business

State Capitol, Room 427
Juneau, AK 99801
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Fax: (907) 465-4779

SENATE RESOURCES COMMITTEE

SPONSOR STATEMENT

CS SB 141(RES)
Aquatic Farms for Shellfish

Last year, the Department of Fish and Game proposed new mariculture regulations that were met with sharp criticism from the aquatic farming industry. The industry felt the proposed regulations were too restrictive and would essentially constitute a regulatory ban on shellfish farming in Alaska. SB 141 was then introduced in an effort to preserve an industry that has been proven successful in the diversification of Alaska's economy.

CS SB 141 (RES) requires the Department of Natural Resources to offer public leases for 60 suspended shellfish sites, 20 clam sites, and 10 geoduck sites. These leases are in addition to permits already issued. Before offering the leases, the commissioner must solicit nominations for sites from the aquatic farming industry and the public and select sites that don't interfere with established commercial, subsistence, or personal use.

CS SB 141 is intended to maintain the existence and prosperity of a valuable Alaskan industry without interfering with other user groups.

ALASKA STATE LEGISLATURE

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SENATE RESOURCES COMMITTEE

SPONSOR STATEMENT

SB 141
Aquatic Farms for Shellfish

The Alaska Department of Fish and Game recently proposed new mariculture regulations that were met with sharp criticism from the aquatic farming industry. The industry feels that the proposed regulations impose such restrictive and unreasonable operational procedures for farmers that, if implemented, would constitute a regulatory ban on shellfish farming in Alaska. SB 141 is a good faith effort to mitigate the unsatisfactory relationship between the aquatic farming industry and the Department. This legislation is also intended to preserve an industry that has been proven successful in diversifying the economy of Alaska.

SB 141 requires the Department of Natural Resources (DNR) to offer public leases on 60 suspended shellfish sites, 20 clam sites, and 10 geoduck sites. These leases are in addition to permits already issued. The leasing program charges more money for sites rich in harvestable shellfish and less money for barren sites. If shellfish are located on the site, the farmer must abide by the sustained yield principle of management when harvesting the wild stock. When selecting the sites for lease, the Commissioner of DNR must solicit nominations from the industry and select sites that don't interfere with established commercial, subsistence, or personal use.

SB 141 is a step in the right direction to maintain the existence and prosperity of a valuable Alaskan industry without interfering with the right of all Alaskans to harvest a common property resource within the state.

ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE
Division of Legislative Audit

P.O. Box 113300
Juneau, AK 99811-3300
(907) 465-3830
FAX (907) 465-2347
Internet e-mail address:
legaudit@legis.state.ak.us

October 23, 2000

Members of the Legislative Budget
and Audit Committee:

In accordance with the provisions of Title 24 of the Alaska Statutes, the attached report is submitted for your review.

DEPARTMENTS OF FISH AND GAME,
NATURAL RESOURCES, OFFICE OF THE GOVERNOR
DIVISION OF GOVERNMENTAL COORDINATION
MARICULTURE DEVELOPMENT AND AQUATIC FARM ACT

October 23, 2000

Audit Control Number
11-30002-01

This audit report addresses the implementation of the Aquatic Farm Act and related impact on the development of mariculture in Alaska in recent years. More specifically, the audit discusses the issues that have grown out of the 1999 application process for aquatic farm permits involving proposed sites in Kachemak Bay and geoduck "farms" in Southeast Alaska. As discussed in the report, the review of the Southeast Alaska geoduck permits has resulted in concerns about the legality and advisability of transferring state common property fishery resources under the terms and conditions of the Aquatic Farm Act.

The audit was conducted in accordance with generally accepted government auditing standards. Fieldwork procedures utilized in the course of developing the findings and discussion presented in this report are discussed on page one of the report in the Objectives, Scope, and Methodology section.

Pat Davidson, CPA
Legislative Auditor

TABLE OF CONTENTS

OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with Titles 24 of the Alaska Statutes and a special request of the Legislative Budget and Audit Committee, we conducted a review of the implementation of the State's Aquatic Farm Act. More specifically, we reviewed the process and the issues that grew out of the 1999 review process of aquatic farming permit applications.

This review process involves the Office of the Governor, Division of Governmental Coordination (DGC), the Department of Natural Resources (DNR), and the Department of Fish and Game (DFG). We focused our review on whether the agencies involved have implemented mariculture policies that are consistent with those set out under the statutes and/or regulations and, also the Aquatic Farm Act of 1988.

Objectives

Our specific audit objectives were to review the process followed by the various agencies involved with the 1999 review of aquatic farming permits, and evaluate the issues involved with the permits that were not approved. We were to assess if the rationale for not approving the permits was consistent the Aquatic Farm Act and the public policy goal of promoting aquaculture and mariculture industry within the State of Alaska.

Scope and Methodology

We evaluated the 1999 applications reviewed by the two resource agencies, DFG and DNR, and the state coordinative agency, DGC. The aquatic farm application process is a multi-agency task involving DFG, DNR, and DGC and coastal districts. DNR issues the site lease permit for the use of state tideland, shoreland, or upland after it has made its "best interest finding" for the state. DFG issues the operation permit. In order for these permits to be issued, aquatic shellfish farm sites must be consistent with the Alaska Coastal Management Program (ACMP). DGC coordinates the ACMP consistency review process.

After conducting our initial audit survey fieldwork, we determined the central issues of concern involved the oversight and permitting activities of DFG. Accordingly, the scope of our review primarily addresses those DFG activities and excludes DGC and DNR operations and procedures from further review.

The scope of the review primarily involved DFG permitting concerns and how prospective permits for aquatic farms in Kachemak Bay and Southeast Alaska were handled by the department.

ORGANIZATION AND FUNCTION

Processing of application for mariculture farming is a multi-agency process. The Office of the Governor's Division of Governmental Coordination (DGC) coordinates with the two state resource agencies, Department of Natural Resources (DNR) and Department of Fish and Game (DFG), to determine whether the application is consistent with the Alaska Coastal Management Program (ACMP) and to facilitate the issuance of the other necessary permits.

DGC helps develop district coastal management programs, implement the coastal project consistency review process, educate the public about coastal management, and serve as the link between all those who participate in the ACMP network.

DNR consists of eight divisions that reflect its major programs: Agriculture, Forestry, Geological and Geophysical Surveys, Land, Mining and Water Management, Oil and Gas, Parks and Outdoor Recreations, and Support Services. Leasing of mariculture farm sites falls under the purview of the Division of Land, Mining and Water Management (DLMW). The division is the primary manager of Alaska's land holdings. DLMW responsibilities include ensuring the State's title; preparing land use plans and easement atlases; classifying land; leasing and permitting state land for recreation, commercial and industrial uses; and coordinating and overseeing the needed authorizations for major development on the North Slope.

DFG consists of the following divisions, commission, and boards: Administrative Services, Commercial Fisheries, Habitat and Restoration, Sport Fish, Subsistence, Wildlife Conservation, Commercial Fisheries Entry Commission, Board of Fish, and Board of Game. DFG's mission is to manage, protect, maintain, and improve the fish, game and aquatic plant resources of Alaska. The primary goals are to ensure that Alaska's renewable fish and wildlife resources and their habitats are conserved and managed on the sustained yield principle, and the use and development of these resources are in the best interest of the economy and well being of the people of the State.

Within DFG, the Division of Commercial Fisheries (DCF) administers aquatic farming in the State. Division of Habitat and Restoration (DHR) administers aquatic farming situated in critical habitat areas. DFG develops and maintains a comprehensive and coordinated state plan:

1. for the orderly present and long-range rehabilitation, enhancement, and development of all aspects of the State's fisheries for the perpetual use, benefit, and enjoyment of all citizens,

2. to encourage the investment by private enterprise in the technological development and economic utilization of the fisheries resources, and

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION

OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with Titles 24 of the Alaska Statutes and a special request of the Legislative Budget and Audit Committee, we conducted a review of the implementation of the State's Aquatic Farm Act. More specifically, we reviewed the process and the issues that grew out of the 1999 review process of aquatic farming permit applications.

This review process involves the Office of the Governor, Division of Governmental Coordination (DGC), the Department of Natural Resources (DNR), and the Department of Fish and Game (DFG). We focused our review on whether the agencies involved have implemented mariculture policies that are consistent with those set out under the statutes and/or regulations and, also the Aquatic Farm Act of 1988.

Objectives

Our specific audit objectives were to review the process followed by the various agencies involved with the 1999 review of aquatic farming permits, and evaluate the issues involved with the permits that were not approved. We were to assess if the rationale for not approving the permits was consistent the Aquatic Farm Act and the public policy goal of promoting aquaculture and mariculture industry within the State of Alaska.

Scope and Methodology

We evaluated the 1999 applications reviewed by the two resource agencies, DFG and DNR, and the state coordinative agency, DGC. The aquatic farm application process is a multi-agency task involving DFG, DNR, and DGC and coastal districts. DNR issues the site lease permit for the use of state tideland, shoreland, or upland after it has made its "best interest finding" for the state. DFG issues the operation permit. In order for these permits to be issued, aquatic shellfish farm sites must be consistent with the Alaska Coastal Management Program (ACMP). DGC coordinates the ACMP consistency review process.

After conducting our initial audit survey fieldwork, we determined the central issues of concern involved the oversight and permitting activities of DFG. Accordingly, the scope of our review primarily addresses those DFG activities and excludes DGC and DNR operations and procedures from further review.

The scope of the review primarily involved DFG permitting concerns and how prospective permits for aquatic farms in Kachemak Bay and Southeast Alaska were handled by the department.

Toward that end, we reviewed the following documents:

- Applicable sections of Alaska's statutes and regulations
- Department of Law Attorney General Opinions and memorandums of advice.
- Permits and related conditions issued by DFG for current aquaculture operating permitees.
- Listings and related information from the Commercial Fisheries Entry Commission related to individuals qualifying for the Southeast limited entry geoduck dive fishery.
- Information, court filings, and associated other correspondence from applicants for Southeast Alaska geoduck aquatic farming permits.
- Correspondence and other related information from individuals applying for aquatic farming permits in Kachemak Bay.

We also interviewed the following individuals:

- An advisor and aquatic farming advocate associated with the University of Alaska's marine advisory program.
- Southeast Alaska geoduck and Kachemak Bay littleneck clam aquatic farm permit applicants.
- Executive director, Southeast Alaska Regional Dive Fisheries Association.
- President and vice president of Alaska Shellfish Growers Association.
- Staff of the Qutekcak Shellfish Hatchery in Seward.
- An assistant attorney general knowledgeable of common property resource issues involved with aquatic farm permits and applications.
- Attorney for a Southeast Alaska geoduck applicant currently filing a lawsuit against the State of Alaska over actions and decisions of DFG related to the 1999 permit review process.

ORGANIZATION AND FUNCTION

Processing of application for mariculture farming is a multi-agency process. The Office of the Governor's Division of Governmental Coordination (DGC) coordinates with the two state resource agencies, Department of Natural Resources (DNR) and Department of Fish and Game (DFG), to determine whether the application is consistent with the Alaska Coastal Management Program (ACMP) and to facilitate the issuance of the other necessary permits.

DGC helps develop district coastal management programs, implement the coastal project consistency review process, educate the public about coastal management, and serve as the link between all those who participate in the ACMP network.

DNR consists of eight divisions that reflect its major programs: Agriculture, Forestry, Geological and Geophysical Surveys, Land, Mining and Water Management, Oil and Gas, Parks and Outdoor Recreations, and Support Services. Leasing of mariculture farm sites falls under the purview of the Division of Land, Mining and Water Management (DLMW). The division is the primary manager of Alaska's land holdings. DLMW responsibilities include ensuring the State's title; preparing land use plans and easement atlases; classifying land; leasing and permitting state land for recreation, commercial and industrial uses; and coordinating and overseeing the needed authorizations for major development on the North Slope.

DFG consists of the following divisions, commission, and boards: Administrative Services, Commercial Fisheries, Habitat and Restoration, Sport Fish, Subsistence, Wildlife Conservation, Commercial Fisheries Entry Commission, Board of Fish, and Board of Game. DFG's mission is to manage, protect, maintain, and improve the fish, game and aquatic plant resources of Alaska. The primary goals are to ensure that Alaska's renewable fish and wildlife resources and their habitats are conserved and managed on the sustained yield principle, and the use and development of these resources are in the best interest of the economy and well being of the people of the State.

Within DFG, the Division of Commercial Fisheries (DCF) administers aquatic farming in the State. Division of Habitat and Restoration (DHR) administers aquatic farming situated in critical habitat areas. DFG develops and maintains a comprehensive and coordinated state plan:

1. for the orderly present and long-range rehabilitation, enhancement, and development of all aspects of the State's fisheries for the perpetual use, benefit, and enjoyment of all citizens,

2. to encourage the investment by private enterprise in the technological development and economic utilization of the fisheries resources, and

3. through rehabilitation, enhancement, and development programs do all things necessary to ensure perpetual and increasing production and use of the food resources of state waters and continental shelf areas.

Mariculture Oversight and Assistance

Within the Division of Commercial Fisheries, is a designated mariculture coordinator. This individual is responsible for the oversight and the provision of technical assistance to permitted aquatic farm sites, and is the primary reviewer of permit applications for proposed new sites.

BACKGROUND INFORMATION

In 1988 the legislature adopted statutes referred to collectively as the Aquatic Farm Act (AFA). This legislation was seen by many as being the definitive statement of public policy at the time, made in response to more than a decade of debate about the desirability, workability, and potential of both finfish and shellfish farming. The legislature, through the adoption of the aquatic farm act established as public policy, in statute, that the State could proceed, and indeed encourage development, in the area of shellfish farming – but finfish farming was prohibited.

Aquatic farming was seen as strengthening the competitiveness of Alaskan seafood in the world marketplace by broadening the diversity of products and providing year-round supplies of premium quality seafood. Two central tenets of the State's aquatic farming policy, which were set out in the legislation adopting AFA were:

1. The State should encourage the establishment and responsible growth of an aquatic farming industry; and,

2. Development and siting of aquatic farming operations should be made with full consideration of established and ongoing activities.

The legislature heard testimony that it should consider the role the Board of Fisheries should play in permitting aquatic sites, but it apparently chose not to give the board any authority in this area. Rather, it appears authority for permitting and regulating AFA activities is solely left to Department of Fish and Game (DFG's) commissioner.

Critical habitat area management plans developed from Alaska Statute

Critical habitat areas were created by the legislature in 1972. The primary purpose of critical habitat areas is "*to protect and preserve habitat areas especially crucial to the perpetuation of fish and wildlife, and to restrict all other uses not compatible with that primary purpose.*" The statute defines the areas covered by critical habitat designation. The legislature established Kachemak Bay as a critical habitat area effective May 17, 1974.

In 1993, utilizing a public hearing process, DFG developed with other state, federal, and municipal agencies the Kachemak Bay and Fox River Flats Critical Habitat Area Management Plan. The following goals were adopted for the management of Kachemak Bay and Fox River Flats:

- To maintain and enhance fish and wildlife populations and their habitat.
- To maintain and enhance public use of fish, wildlife and critical habitat area lands and water consistent with the other goals of the management plan.

In April 1994, the goals and policies of the December 1993 Kachemak Bay and Fox River Flats Critical Habitat Area Management Plan were adopted in regulations by reference. The plan requires a special area permit for any habitat altering activity, including construction. Division

of Habitat and Restoration is required to review each special area permit application for consistency with these goals and policies.

The initial aquatic farm sites involved suspension-type operations

The initial aquatic farming operations that were permitted under AFA involved are referred to as suspension-type operations. The operations involve cultures of shellfish, primarily oysters and mussels grown on lantern nets suspended in the water.

This compares to on-bottom operations which involves "planting" and "harvesting" shellfish in the subtidal or intertidal substrate. There was an on-bottom experimental farm site for littleneck clams initially established on a half-acre site in Southeast (SE) Alaska in 1993. On-bottom operations involved "growing" shellfish stock buried either on substrate always submerged (subtidal) or substrate that is covered by water part of the time, by virtue of sea tides (intertidal). For subtidal operations the planting of seed and "harvesting" of biomass would be carried out through underwater diving.

From the beginning, these on-bottom operations involved utilization of existing wild stocks that were often already present on the farm site. In November 1993, DFG issued a three year experimental farm permit to the Tenass Pass Shellfish (TPS) Company. Under the permit TPS was allowed to harvest all legal sized clams on a one half acre site adjacent to the company's suspension oyster "farm."

In authorizing such a harvest DFG relied on the authority provided by regulations related to administering miscellaneous shellfish fisheries. TPS was given a commercial harvest permit. TPS was to provide data to DFG, which would help evaluate the feasibility of on-bottom littleneck clam farming in Southeast Alaska. TPS harvested the clams but did not provide the data nor did DFG conduct a technical feasibility analysis.

In 1996 DFG began allowing harvests of wild stocks through the use of a stock acquisition permit. Stock acquisition permits are established under AFA. As set out in the statute, this permit serves as a means to allow aquatic farmers to take wild stocks *"necessary to meet the initial needs of [the] farm."*

More than 20 "suspension type" shellfish farms have been permitted in Kachemak Bay

Aquatic farming was first permitted in the Kachemak Bay Critical Habitat Area (KBCHA) in the 22 acres set aside by Division of Parks and Outdoor Recreation (DPOR), Department of Natural Resources (DNR) in Halibut Cove Lagoon in 1983. Blue mussels were cultured using rafts with suspended gear. Presently, there are 24 special area permits for aquatic farms in KBCHA. These farms all consist of suspended longline culture of shellfish, primarily oysters and blue mussels.

Geoducks in SE region are the object of a developing fishery and increased farming interest

SE Alaska has a geoduck dive fishery with more than 100 participating divers. About half of the divers are from outside the State. In the early years of the fishery it was estimated that the non-resident divers' catch made up 75% of the fishery's total revenue. More recent statistics from the Commercial Fisheries Entry Commission (CFEC) suggest that in recent years revenues are split approximately 55% and 45%, respectively between resident compared to non-resident divers.

The revenues involved with the dive fishery are relatively small. It is estimated that in recent years the average diver earns between $5,000 and $10,000. In contrast, a single geoduck applicant's farm sites contain geoduck biomass that is estimated to have a commercial value between $2 - $5 million.

The dive fishery has been limited because of the way in which it is conducted. Before DFG allows diving to take place in an area the department conducts a survey of the available biomass. Based on the results of this survey DFG sets a quota of how much biomass can be taken. Since little is known about the life cycle of wild geoducks, the rate of reproduction, etc., these quotas have been set at what appears to be relatively low levels – less than 5%. Limited funding has restricted the number of areas DFG has been able survey, which in turn has slowed expansion of the fishery. For FY 01 DFG has allocated $90,000 of $1.25 million in federal grant funds to conduct geoduck reconnaissance and biomass surveys.

CFEC has begun the process of limiting entry into the fishery. Limited entry draft regulations are still under review, but the maximum number of entry permits has been established at 104.

Aquatic farming leasing statutes amended in 1998 in response to court decision

In 1993, a public interest group sued DNR over how the department went about identifying and establishing districts and zones suitable for aquatic farming. Although DNR's actions were upheld at the Superior Court level, in 1997 the State Supreme Court found in favor of the interest group, deciding DNR had not acted appropriately.

As a result of the State Supreme Court decision, DNR's statutes relating to aquatic farm sites were amended. The legislature passed statutory changes related to the aquatic farm permitting process in 1997. The revised legislation changed DNR's aquatic farming permit program, in part, to a land leasing program.

The litigation and the development of the eventual statutory remedy resulted in DNR suspending state aquaculture leasing applications for three years. As a result, there was a pent-up demand for such permits when the application window was reopened in January 1999. At that time DNR received more than 40 applications[1] for aquatic farming leases.

[1]Applications may include bivalve species like on-bottom and suspended culture geoduck and littleneck clams and oysters, mussels and scallops, respectively. Aquatic plants like green sea urchins and ribbon kelp are also included. There are 10 geoduck applicants for 13 farm sites.

DFG denied permits for on-bottom aquatic farming in Kachemak Bay and SE Alaska projects

The Alaska Coastal Management Program (ACMP) implements the 1977 Alaska Coastal Management Act. ACMP requires any activities or projects that may take place in or affect Alaska's coastal zone to be reviewed by coastal resource management professionals. Before a permit can be issued such activities and projects must be determined to be consistent with ACMP statewide standards and coastal district policies.

The consistency review process for AFA permits was coordinated by the Division of Governmental Coordination (DGC) and involved DFG, DNR, and to a lesser extent the Department of Environmental Conservation (DEC). When the consistency review process was completed, many permit applicants were disappointed with the response of DFG. For most of the permits, DFG either:

1. Flatly denied permits on the grounds of habitat impact. Activities that are incompatible with the goals and policies for the critical habitat area and their resources are restricted from the critical habitat. For applicants seeking permits for Kachemak Bay DFG cited provisions of the KBCHA management plan. In the view of the department, the plan absolutely banned certain types of aquaculture operations. For other applicants, DFG denied permits citing conflicting uses, such as subsistence, even though in the view of a DGC reviewer the department had minimal or no support for its position.

or

2. Proposed "unfeasible" permit conditions. In the view of geoduck applicants and a university expert, DFG either imposed or proposed permit conditions that were structured in such a way as render the proposed aquatic farm site operationally and/or financially unfeasible.

In effect, from the perspective of the applicants (and other participating state agencies to some extent) the State, or more specifically DFG, has adopted an oversight philosophy and approach to on-bottom shellfish farming which has been difficult to understand. This in turn has the effect of limiting the development of the "industry."

Exxon Valdez Oil Spill (EVOS) funds appropriated to construct a shellfish hatchery

In FY 94 the legislature appropriated to DFG $3.25 million from the EVOS restoration fund to construct a shellfish hatchery on the Kenai Peninsula. Additionally, the facility was planned to serve as a mariculture technical center (MTC) to be operated under the University of Alaska.

EVOS funding was designed to aid in the restoration of subsistence resources or services, lost or diminished, by the Exxon Valdez oil spill. Towards that end, it was believed a shellfish hatchery could be instrumental in growing the necessary seed and spat to plant on beaches for personal and subsistence use, and to be used in commercial aquatic farming operations.

The hatchery/MTC was constructed in Seward. DFG leased the hatchery/MTC to the City of Seward. The City of Seward subcontracted the operation of the hatchery, to Qutekcak Native Tribe (QNT), a Native non-profit corporation operating under the umbrella of the Chugach Regional Resource Commission. The hatchery's 1997 business plan projected that 40% of the facility's sales revenues would come from the sales of littleneck and geoduck clam seeds to aquatic farming operations that were anticipated to be coming on line over the next few years.

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REPORT CONCLUSIONS

Our review primarily discusses actions taken by Department of Fish and Game (DFG) in reviewing aquatic farming applications received during early 1999. We reviewed the handling of permits sought for on-bottom operations in southern Southeast (SE) Alaska for geoduck farming and in Kachemak Bay for littleneck clams. We also discuss DFG's efforts to promote aquaculture under the State's Aquatic Farm Act (AFA).

The central tenets of the AFA are to encourage the establishment and responsible growth of an aquatic farming industry and the development and siting of farming operations with full consideration of ongoing activities.

Department of Natural Resources (DNR) completed as scheduled its required portion of the applications' coastal zone consistency and forwarded the recommendations to Division of Governmental Coordination (DGC). In contrast, DFG made a request to DGC on January 7, 1999 to suspend geoduck applications' consistency review until regulations were developed to evaluate the proposals.

DFG did not develop the regulations. DGC received DFG's coastal zone consistency recommendations for the remaining geoduck applications on March 21, 2000. DGC issued consistency review determinations based on these recommendations.

DFG proposed various conditions on six applicants seeking permits to commercially grow and harvest geoducks. From the perspective of the applicants, these permit requirements made the proposed farming operations unworkable. After there was no agreement involving the proposed conditions, DFG formally denied the permits. For Kachemak Bay applicants, the department rejected the permits outright, citing the bay's designation as a critical habitat area, making it subject to stringent land use requirements.

Based on our review of DFG's decision-making, we developed the following conclusions:

DFG's objection to geoduck applicants involved concerns over common property resources

Alaska's constitution provides for equal access of citizens to the State's common property resources. The relevant constitutional clauses related to equal access to the State's resources are rather unique to Alaska. The constitutional requirements mandate state government observe certain principles when regulating how individuals and corporate entities access the common property resources that belong collectively to all citizens.

There was a constitutional amendment, adopted by a vote of the people in 1970, which allowed certain exceptions to equal the access clause as it relates to the State's common property fisheries resource. Specifically, Article VIII, section 15 states:

> *No exclusive right or special privilege of fisheries shall be created or authorized in the natural waters of the State. This section* ***does not restrict*** *the*

*power of the State to **limit entry into any fishery** for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to **promote the efficient development of aquaculture in the State**.* [Emphasis added.]

One interpretation of this constitutional provision is that the State can establish fisheries available on a "special privilege" basis for the purposes of commercial fishing and aquaculture. The government has established a process to recognize and license a limited number of participants in various commercial fisheries around the State. This process has been subject to court challenge and judicial interpretation. The process by which special privilege has been made available for aquaculture has perhaps not been similarly constructed or if it has by virtue of AFA, it has not been tested in court.

In this context, DFG actions related to SE geoduck farm applicants reflected two concerns:

1. The allocation of the common property geoduck resource to an exclusive user is not consistent with the requirements of the constitution.[2] DFG does not believe the AFA contemplated the transfer of such a valuable amount of common property resource to finance farming operations.

   DFG believes when the AFA was enacted the only aquatic farming contemplated was a "suspension" type operation, which involved little or no use of the common property resource. Even though DFG has relied on the AFA as a basis to transfer standing stock to "farmers" the department seemingly asserts the nature and scope of the geoduck operations are substantially different and should be permitted in a manner that provides more extensive due process to the public at large.

2. The applicants' proposed sites and species conflicts with an established and ongoing area activities. Under the legislative intent accompanying the AFA, permitting of aquatic farming must be done in *"full consideration of ongoing activities."* Further, when assessing the viability of a proposed aquatic farm application the activity *"may not require significant alterations in traditional fisheries or other existing uses of fish and wildlife resources."*

   As discussed in the Background Information section, since the mid-1980s there has been a small dive fishery harvesting geoducks in south Southeast Alaska waters. DFG is concerned that this developing fishery is likely to be affected by the proposed geoduck farming operations, even though this dive fishery has not been historically conducted on the specific sites set out in the farming applications.

[2] It should be noted the constitution appears to provide an exception for the *"efficient development of aquaculture."*