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10647 SENATE RESOURCES

DFG acted inconsistently in many ways in denying SE geoduck farming permits

Many of DFG actions that effectively denied the SE geoduck farming permit applications were inconsistent with various aspects of statute, historical precedent, and department policy regarding aquatic farming. Specifically, the actions were:

1. Inconsistent with the requirements of AFA. As discussed in Exhibit 1 at right, the aquatic farm act sets out four criteria that should be considered when granting a permit. Our analysis of the 1999 SE geoduck applications found that additional conditions for issuance of the aquatic farm operation permit were added to these four statutory criteria. These proposed conditions were as follows:

   (1) *"For each proposed site, describe in writing to ADF and G a method for distinguishing (or segregating) wild common property geoducks from cultivated, farmed geoducks. The method must allow for practical access and commercial or personal use harvest of wild geoducks on each site that are not acquired through stock* acquisition permit.

   At the same time, the method must prevent excessive disturbance of cultivated, farmed geoducks by commercial access and harvesting."

   (2) *"If ADF and G, in its discretion, determines that the method described in paragraph 1 will accomplish the requirement of that paragraph, you must agree, in a signed statement to use that method on your farm site(s). Your signed statement and a detailed summary of approved method(s) will be attached and incorporated as conditions of your aquatic farm operation permit."*

Exhibit 1

AFA Establishes Four Criteria for Issuance of an Aquatic Farm Permit

The aquatic farm act at AS 16.40.105 sets out four criteria that must be met before an aquatic farm permit is issued:

1. The proposed site must be suitable for farming from a physical and biological perspective.
2. The proposed farm or hatchery may not require significant alterations in traditional fisheries or other existing uses of fish and wildlife resources.
3. The proposed farm may not significantly affect fisheries, wildlife, or their habitats in an adverse manner.
4. The proposed farm must demonstrate technical and operational feasibility.

The geoduck applicants found these conditions unacceptable and filed appeals with the superior court.

The department did not originally dispute any of the permits on any of these operational grounds. By attempting to impose conditions to the extent of making the operations unfeasible, the department was not acting consistently with AFA's statutory mandate that DFG *"encourage the establishment and responsible growth"* of aquatic farming in the State.

2. Inconsistent with prior departmental actions. DFG's main objection to SE applications is that proposed operating plans necessarily would involve "removing" and selling existing standing stock of geoducks. The commercial value of the geoducks involved has been estimated to be as much as $5 million. DFG officials have expressed reservations about whether it was appropriate to allow private individuals such access to the State's common property resource without compensation to the state treasury.

   In the past, however, DFG has allowed at least three aquatic farm operators to harvest and sell wild littleneck clam stocks found at or adjacent to their sites. Then in 1996 DFG began allowing such harvest through the use of a stock acquisition permit. This permit is part of the AFA, rather than commercial fishing regulations. DFG has changed the way these harvests were regulated, apparently in an effort to rectify allowing common property resource wild stock to be taken under the provisions of the AFA.

3. Inconsistent with prior DFG mariculture development policy. The legislature, in the statement attached to the 1988 legislation establishing AFA, said the law was to encourage the establishment and responsible growth of an aquatic farming industry in the State and allocation of aquatic farming sites with full consideration of established and ongoing activities in an area.

   From 1988 until the 1999 permit application period, DFG operated to promote the aquaculture policy that accompanied the passage of the AFA. Aquatic farms were permitted for suspended culture farming of mainly oysters and mussels. While the farming of mussels may have incidentally involved a transfer of a common property resource, the relatively small commercial value and high densities of the mussel populations involved made such use of common property natural stocks a limited concern.

   DFG initially allowed on-bottom littleneck clam farming as a way for oyster farmers to diversify and supplement their income. Such activities, however, were not necessarily aquatic farming in the traditional sense. The early operations were little more than permitting existing farmers to commercially harvest clams. Farmers obtain permitted "farm sites" for littleneck clams, which they harvested without really engaging in any substantial farming activity.

   Under the current program farmers are allowed to request new "farm sites" with each aquatic farm application period thereby enabling the farmer to continue harvesting with little or no efforts to replenish the resource. The abundance of littleneck clams in Southeast Alaska and the ability of a site to recover in a short time span kept these "farming" practices from becoming a major public issue.

Besides these industry friendly regulatory actions, DFG staff accompanied representatives of the University of Alaska Fairbanks' (UAF) marine advisory program (MAP), to various public meetings where they encouraged attendees to consider becoming entrepreneurs and take up aquatic farming. In such presentations, which were admittedly lead by an enthusiastic

proponent from UAF-MAP, the department's presence gave the impression that the agency supported such commercial development, in accordance with the AFA's legislative intent.

The Division of Commercial Fisheries has restructured the duties of the mariculture coordinator. In past years, one of the functions of the position included the coordinator working with the university marine advisory program to actively encourage members of the public to take up aquaculture. Currently, the coordinator position has been restructured to focus on regulating and providing assistance to individuals operating active permits rather than actively promoting aquaculture with potential new permitees in the general public.

The development of a lucrative Asian market for geoduck clams has resulted in applications for over ten farmsites to raise geoducks and the development of a geoduck dive fishery. The potential value of the standing stock on these proposed farmsites has raised issues concerning the common property resource and has caused DFG to adopt a more conservative and restrictive policy toward on-bottom aquatic farming.

Prospective geoduck farmers are not allowed to harvest the standing stock on a farmsite. The Division of Commercial Fisheries' letter dated May 19, 2000 informed an applicant of general principles that will guide the department on pending operation permit applications. DFG interpreted AS.16.40.105(2) in terms of geoduck fishery to include determination at the time the farm operation permit is applied for or renewed: (1) whether the proposed farm site has an occurring commercial geoduck fishery at that specific location; or (2) whether the proposed farm site is within an area that has been identified in an operating plan developed under AS 43.76.200(b).

The May 2000 letter also specified that these determinations will be made each time that a farm operation permit is being renewed or every five years. It stated that:

> *if during the time since the last renewal the site has been identified in an annual plan as an area for a bioassessment and commercial harvest, a conflict would exist. In that case the permit renewal would be denied or it would be granted only if commercial divers are first allowed an opportunity to harvest wild geoduck at the site.*

This change of policy concerning the ownership of the standing stock on a farmsite is not consistent with past DFG policy or with the present on-bottom littleneck clam farming and suspended mussel culture practices currently allowed.

Denial of Kachemak Bay aquatic farming permits was consistent with area use plan

As discussed in the Background Information section, the aquatic farming applications for sites in Kachemak Bay are subject to the provisions of the Kachemak Bay and Fox River Flats Critical Habitat Area management plan. Staff of DFG's Division of Habitat and Restoration (DHR) reviewed the permit applications for consistency with the plan.

Based on the division's review, all of the on-bottom aquatic farm permits were denied. DHR determined that on-bottom operations were incompatible with appropriate activities as set out in the management plan. Further, DHR noted, for on-bottom applicants seeking transfer of common property standing stocks, that all of the resources were already fully allocated by the Board of Fisheries.

DFG applied the provisions of the KBCHA management plan in evaluating conflict of each farm site. Individual analysis of conflicts with fishery, habitat, public access, and fish population enhancement was made for each proposed site. The process used by DFG and the conclusion arrived at was consistent with the regulatory requirements in place.

The management plan has a provision that aquatic farming may be allowed in the critical habitat areas on a case-by-case basis. Our review of the history of the special area permits authorized under this exception showed they were exclusively for suspension type farming operations. There are currently 24 aquatic farm site special area permits in the critical habitat area consisting of longline suspended cultures of oysters and blue mussels. At least three new suspension-type aquatic farm sites within Kachemak Bay were approved during the 1999 application period.

DFG stated that the factual basis for the initial permit denial was provided in a September 10, 1999 response to DGC. However, each of the four Kachemak Bay applicants received a letter with the same general denial language that the proposed activity was inconsistent with: (1) the protection of fish and wildlife and their use; (2) protection of fish and wildlife habitat; and, (3) the purpose for which the special area was established.

The detail analysis of each farm site's conflicts with the overall goal and policies of KBCHA management plan was provided only after applicants' legal counsel requested reconsideration of DFG's denial decision.

DFG staff involved in review of farm site applications have a perceived conflict of interest

Certain DFG staff members who had responsibilities involving the review and comment on aquatic farming applications had an apparent, if not real, conflict of interest.

Staff involved with the review and approval of the Kachemak Bay applications may have had a conflict of interest due to owning property in the area. By being a property owner that could be affected by the presence of an aquatic farm site, the reviewer may not have been as objective as possible.

One staff member involved with the review of SE geoduck applications was married to a dive fisherman who is on the eligible list for a Commercial Fisheries Entry Commission (CFEC) limited entry permit and also on CFEC's 2000 permit holder list for Geoduck dive fishery. Since a major issue surrounding the geoduck applications involves whether farming operations have an impact on the existing dive fishery, such a relationship raises a concern about a conflict of interest.

DFG was not prepared to implement the AFA for on-bottom operations requiring access to common property resources

Although the AFA was passed in 1988, DFG does not have regulations in place to carry out the provisions of the statute. More than once, DFG staff promised legislative committees and the public that it would modify and expand the regulations in place to use in reviewing permit applications. But the department failed to have appropriate regulations in place when the mariculture application period opened in January 1999.

Lack of a sufficient DFG regulatory approach contributed to a considerable delay in DGC's consistency review process for the aquatic farming applications. The absence of regulations also led to a situation where applicants had reason to believe their permits would be considered and approved along the same way as the department had historically acted. Three separate formal administrative appeals have been filed over DFG's handling and denial of 12 aquatic farm applications. Six individuals with nine geoduck farm applications and all three of the Kachemak Bay littleneck clam applicants have appealed the DFG denials.

DFG has made efforts to promote aquatic farming in a variety of other ways

In many respects, DFG has supported the development of aquatic farming in a variety of ways. As discussed in this section, DFG did allow oyster farmers to "harvest" littleneck clams in an attempt to diversify their product base and supplement their income. Since the farmers were uniquely situated by virtue of their site location, they were the only viable harvester of the resource – essentially having exclusive use.

Even though geoduck farming has been developed with some success in Washington and British Columbia, DFG staff has concerns about the species' biology in Alaskan waters. The department points to technical problems that the Qutekcak hatchery continues to have in spawning and rearing geoduck seed. Further, Alaska waters are the most northerly areas where geoduck clams are found; the biological dynamics of the species at the edge of its habitat may be significantly different. By contrast, seed development for littleneck clams is further along, and the specie's capacity for recovery through natural reproduction is established. In short, much more is known about the biology of littleneck clams than about geoducks and this lack of knowledge is the reason dive fishery is managed cautiously.

As stated earlier, DFG believes the AFA was developed at a time when the only aquatic farming activity involved suspension-type operations requiring little or no transfer of the common property resource. The department has worked diligently, within constraining fiscal and staffing limitations, to implement the AFA. The first aquatic farm permit issued under the act was in 1989. Between then and 1997, when permit applications were suspended for three years because of litigation against the Department of Natural Resources, DFG issued 176 aquatic farm permits, permit amendments, or permit renewals.

In this context, DFG has approved almost every application for oyster and mussel farms throughout the State. The department has conducted numerous meetings and teleconferences

with shellfish farmers to provide technical assistance for their operations or assist them in modifying their applications in order to comply with regulatory requirements governing operations.

Operational viability of the Qutekcak Shellfish Hatchery has been jeopardized

As discussed in the Background Information section, Exxon Valdez oil spill funds were used to finance construction of a shellfish hatchery on the lower Kenai Peninsula. The original plan included a mariculture technical center (MTC) on the site which would be operated under UAF-MAP.

Higher than anticipated construction-related costs resulted in substantial reductions to the MTC. The department leased the facility to the City of Seward. The city in turn assigned operations of the facility to the Qutekcak Native Tribe.

The tribe also obtained more than $500,000 in funding assistance from the Alaska Science and Technology Foundation while also indirectly receiving another $250,000 in additional state funds.

The goal of the hatchery is to spawn adult shellfish and grow out the seed for sale to aquatic farmers. The shellfish include:

- Pacific Oysters
- Littleneck Clams
- Rock Scallops
- Geoduck Clams, and
- Cockles

Currently, the major portion of hatchery revenue comes from the sale of oyster seed primarily to aquatic farmers, with a smaller amount generated from the sale of littleneck clam seed. According to the hatchery manager, for the facility to break even it must be able to successfully grow out and sell geoduck seed to relatively large scale SE farms it had projected would come online in 2000. Although there may be legitimate issues involved in the hatchery's ability to develop viable geoduck seed, the inability of SE applicants to obtain the necessary permit has threatened the hatchery's ability to operate as a going concern, putting "at risk" over $4 million in state funding that has been invested in the facility.

FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

The Department of Fish and Game (DFG) should obtain formal legal advice from the Department of Law (DOLaw) regarding allocation of common property resource under the Aquatic Farm Act (AFA).

The primary concern DFG has had with the Southeast Alaska (SE) geoduck aquatic farm permits involves the appropriateness of transferring ownership of common property resource wild stocks to the applicant. As discussed in the Report Conclusions section, in the past DFG has allowed aquatic farm operators to take common property resource under the provisions of the AFA. However, given the circumstances involved with the prospective geoduck permits the department has insisted on conditions that would protect the common property resource wild stocks from being harvested by the applicant.

From our discussions with DFG, the department seems to have two rationales for its seemingly inconsistent actions:

1. Prior transfers involved common property resource for which there was not a competing user group. The previous transfer of common property resource to an aquatic farmer involved littleneck clams in Southeast Alaska. Even though there may have been an interest in developing a commercial fishery for littleneck clams in Southeast Alaska, due to budgetary and operational constraints, no competing harvesters existed at the time. Accordingly, DFG could take action under the provisions of the AFA and permit such activity since it did not *"require significant alterations in traditional fisheries or other existing uses of fish and wildlife resources."*[3]

   In the case of the geoducks, a commercial dive fishery existed which prohibited permitting of an aquatic farm site due to alteration it would cause to a traditional fishery.

2. AFA does not contemplate transfer of common property resource to private ownership. Notwithstanding the prior transfer of common property resource wild stocks made to a littleneck clam operator under a stock acquisition permit, the department is not sure AFA legally supports such a transfer. There is concern that at the time the AFA was drafted, the legislature did not contemplate nor provide for a process that would allow exclusive access to existing wild stocks by virtue of an aquatic farm permit. DFG no longer utilizes AFA related permits to allow the harvesting of littleneck clams, but rather has shifted to the use of commercial fishing regulatory vehicles.

[3]The italicized phrase comes from AS 16.40.105(2), which is the second of four criteria set out in statute that the DFG commissioner must consider in issuing aquatic farm permits.

Geoduck aquatic farm applicants view that issuance of an AFA stock acquisition permit transfers the ownership of the common property resource wild stocks currently existing on their farm site to private ownership.

Applicants have based this interpretation upon aforementioned prior agency actions and statements. See Exhibit 2 at right for discussion of how DFG has historically utilized stock acquisition permits to transfer common property resource stocks.

Additionally, the applicants cite AS 16.40.120(g) which states *"[a]quatic plants and shellfish acquired under a [stock acquisition permit] become the property of the permit holder and are no longer a public or common resource."*

DFG responds by citing AS 16.40.120(f)(1) which limits transfer of wild stock only necessary to meet *"the initial needs of [the] farm."* DFG then cites the relevant statutory definitions set out at AS 16.40.199(8) which defines stock as *"live aquatic plants or shellfish acquired, collected, possessed, or intended for use by a hatchery or aquatic farm* ***for the purpose of further growth or propagation.***" *[Emphasis added.]* DFG states this means that the common property resource wild stocks can only be taken to provide seed for "planting" other geoducks rather than being harvested and sold to provide the applicant's operating capital.

Exhibit 2

Contrary to its Current Position, DFG has made Statements that Common Property Resource Transfer is Provided Under AFA

AFA, at AS 16.40.120(g) does not clearly establish when common property resource ownership is transferred. In prior actions involving littleneck clam farmers, DFG allowed access to the common property resource under the provisions of AFA. Statements were similarly made by DFG officials that indicated ownership of the common property resource was transferred through AFA permits. Applications submitted in 1999 were made in good faith based on these actions and statements by DFG. These statements include:

- A presentation made by a former mariculture coordinator, who, at a 1996 shellfish conference told the audience of aquatic farmers that *"... [the Aquatic Stock Acquisition Permit] is the document that takes the resource out of the public domain and becomes yours to culture and sell."*
- Testimony regarding stock acquisition permits to the House Resources Standing Committee in February, 1999 by the then acting Deputy Director of Commercial Fisheries, that *"... once* [a stock acquisition permit is] *acquired by a farmer [the common property resource clams] are private property."*
- A March, 1999 letter from DFG commissioner Rue to the Alaska Shellfish Growers Association, which stated, *"The department believes that property rights to 'standing stocks' pass to the permittee with the lease, operations permit, and stock acquisition permit ..."*

From the perspective of the applicants, taking out the existing stock of geoducks is necessary to make their farming operation viable. They assert that farming technology requires that the site be cleared as much as possible of existing stocks so that planted stocks can better thrive. Accordingly, in their view , removal of wild stocks under such conditions meets the statutory definition that the stocks be transferred **for the purpose of further growth and**

propagation. They concede the revenues generated from the sale of the geoducks would provide working capital for their operations.

Throughout all of these varying interpretations of statute, we have not seen any formal written interpretation or guidance provided to DFG from DOLaw. In fact, we have seen analyses attributed to an assistant attorney general that discusses how the AFA may or may not be an appropriate statute to provide common property resource access in a way that would withstand legal challenge.

We realize that the State is currently facing litigation involving these very issues. Once the litigation has been completed, it is likely DFG will have court-tested analysis of the extent of AFA as the statutes relate to allocation of common property resources. Such an outcome would make some, if not most, of this recommendation moot.

DFG, however, seems to have acted many times during the most recent permitting process without clear written legal advice from DOLaw regarding the interpretation and application of the AFA. We believe it would have been much wiser had DFG obtained some written advice addressing the constitutionality of the AFA, in order to provide a firmer basis for the department's actions. Accordingly, to the extent any court decision does not address all relevant legal issues involved, it would still be advisable for DFG to request a written analysis from DOLaw regarding interpretation and application of the AFA.

Recommendation No. 2

DFG should develop and adopt regulations to further define and clarify various provisions of the AFA that have had a substantial impact on the interpretation and application of the statute during the most recent permit review process.

Statutes that relate to the permitting of aquatic farming activities include language and phrases, the interpretation of which has proven critical to decisions made by DFG when reviewing aquatic farm permits. Two statutory phrases in particular proved to be contentious during the recent application period, with DFG citing them as a basis for denying sought after permits:

1. Significantly affect. Under AS 16.40.105 DFG's commissioner must issue an aquatic farm permit if a proposed farm does **not** "*...significantly affect fisheries, wildlife, or their habitat in an adverse manner.*"[4] [Emphasis added.] This provision served as one of the reasons that the Kachemak Bay aquatic farm permits were not approved by the Division of Habitat and Restoration (DHR).

   The applications contemplated farm operations that would involve netting to protect the farmed clams from predators. Use of such netting, along with the disruption of "planting"

[4]The excerpt is from AS 16.40.105 (3), which states "*the proposed farm or hatchery may not significantly affect fisheries, wildlife, or their habitats in an adverse manner....*"

clam seed in intertidal settings were considered as adversely affecting the Kachemak Bay habitat. We suggest that the use of the phrase "significantly affect" in the statute implies that there may be an operation that may have some affect on habitat that is adjudged to be insignificant, and accordingly non-adverse.

When we inquired of DHR staff about their assessment of this statutory phrasing, they stated that the "degree" of impact was irrelevant, that any degradation of the habitat in a critical habitat area would be significant and adverse. In our view, if this is the perspective of DFG, it should be through the regulation adoption process that would subject such interpretation and application to public review and comment.

2. Traditional fisheries and existing use. Under another provision of AS 16.40.105 DFG's commissioner must issue an aquatic farm permit if a proposed farm does "*...not require significant alterations in traditional fisheries or other existing uses of fish and wildlife resources.*" [5] [Emphasis added.] The conditions attached to applications for SE geoduck aquatic farms, were designed in part to provide access to underwater divers participating in the local fishery for the species.

   The geoduck fishery had been conducted in recent years at selected areas in southern southeast Alaska waters. The harvest of geoducks is determined by allowing only a small percentage of the resource to be taken out of a given area. Accordingly, an area must be biologically surveyed so that DFG managers have an accurate idea of how much geoduck biomass is present. At the time of application, none of the aquatic farm sites were in areas that had been formally surveyed by DFG – therefore none of the sites involved areas that had been used by the dive fishery.

   Given this distinction, it does seem plausible that the specific sites involved in the aquatic farm permits did not interfere or "*significantly alter*" a "*traditional fishery*" or even an "*existing use of fish*" resource. Again, rather than automatically citing this rather unconventional and small commercial effort as being a traditional fishery or representing a disqualifying existing use, we suggest DFG reduce such a working definition to regulation and solicit public comment as to the reasonableness of such a classification.

Current regulations do not fully consider issues peculiar to on-bottom farming. This creates gaps in the regulations that do not address many situations. This promotes confusion among applicants and inconsistencies among program administrators Lack of regulations has undermined the ability of DFG to develop and promote the on-bottom aquatic shellfish farming industry.

1. Lack of consistent supportive treatment from DFG. On-bottom farming for littleneck clams and geoducks has not experienced consistent supportive treatment. That is not the case with suspended culture for oysters and mussels. On-bottom farming has been subjected to DFG policy changes in the middle of the application and review process that

[5]The excerpt is from AS 16.40.105 (2), which states *"the proposed farm or hatchery may not require significant alterations in traditional fisheries or other existing uses of fish and wildlife resources."*

has resulted in permit denials, wasted time, and increased investment risks to the applicants. The end result is that a potentially lucrative geoduck farming industry has been brought to a standstill.

2. Absence of Regulations. The absence of regulations led DFG to suspend the consistency review process after it had started. This contributed to frustration on the part of permit applicants and resulted in increased involvement by not only Division of Governmental Coordination (DGC), but to inquiries by the Office of the Governor and legislative committees.

3. Policy of the State. It is the policy of the State to encourage the establishment and responsible growth of an aquatic farming industry. Allocation of aquatic farming sites shall be made with full consideration of established and ongoing activities in the area. In addition, the AFA's legislative letter of intent directs the commissioner of the Department of Fish and Game to work with prospective farmers and the Board of Fisheries to develop appropriate proposals to meet the goals of the legislation. Development of regulations is consistent with the State's policy and legislative intent.

By subjecting proposed definitions and clarifications of statute to DOLaw interpretation of regulations' consistency with statute and public scrutiny, through the regulation adoption process, the department would be seen as being less arbitrary in the way the agency interprets and applies various statutory provisions. The commissioner should also expedite the development and adoption of procedural AFA regulations to comply with the intent of the act.

Recommendation No. 3

DFG's commissioner should seek legislation amending the AFA to address utilization and transfer of the State's common property resource to prospective aquatic farming operators.

As stated in the Report Conclusions section, the main reason that DFG did not approve the recent SE geoduck farming permits was due to the department's reservations whether the AFA was of sufficient scope to permit extensive transfer of common property resources to private ownership. Although DFG has allowed some farmers access to common property resource near or at their sites, such transfers have not involved competing users nor involved all resources in a given area.

DFG officials have commented that when the legislature was considering the bill which became the AFA, there was no consideration given to the prospect that aquatic farmers would utilize the State's common property resource in their operations. Our review of the testimony offered before various legislative committees that considered the bill tends to support this perspective. We saw no evidence where the transfer or allocation of the common property resource was ever discussed before the committees that had a hand in developing the AFA legislation.

We share DFG concerns that the State be adequately compensated for any activity that utilizes the State's common property resource. The farming applicants we have interviewed assert that they are not currently required, nor should they be made to, compensate the State for taking any common property resource necessary to their operations. They claim to have the same status to the resource as commercial fishers participating in a limited entry situation. The farmers point out that beyond the cost of the permit, the fishers do not compensate the State for removal of the common property resource.

In our view, there is a distinction to be made between prospective on-bottom aquatic farmers and commercial fishers. The fishers have only an opportunity to take a resource; there are no guarantees that they will be successful. The on-bottom farmers in this case, are requesting an exclusive access to clams, a common property resource of very limited mobility. Due to the relatively captive nature of the resource involved, the farmers' harvest and sale of these creatures can be viewed as more closely resembling mineral extraction than it does traditional commercial fishing. It is in this regard that we share some of the misgivings of DFG managers. We think it only appropriate that the legislature reconsider and perhaps clarify certain provisions of the AFA to address the policy implications involved with providing preferred access to the State's common property resources.

As discussed in Recommendation No. 1, we suggest that DFG obtain a formal opinion from DOLaw regarding the legality of transferring common property resources to the ownership of permitees. Even though DFG may be advised that such transfer would be legal, the commissioner should also take the issue up again with the legislature and seek clarification of the AFA to the use of the common property resource in such a manner.

Recommendation No. 4

DFG should foster staff awareness of potential conflicts of interest.

Certain staff members with an apparent potential conflict of interest reviewed authorizations of geoduck and littleneck clam farm sites operating permit applications. These conflicts involved financial and personal interests[6] that could have been adversely affected by approval of the permits.

Although, the farm sites may have been evaluated objectively and in accordance with statutory provisions, known financial and personal interests of staff harms the public perception of the propriety of the review decisions.

[6]Alaska Statute 39.52.960(9)(A) defines financial interests as *"an interest held by a public officer or immediate family member, which includes an involvement or ownership of an interest in a business, including a property ownership, or a professional or private relationship, that is a source of income, or from which, or as a result of which, a person has received or expects to receive a financial benefit."*

DFG's ethics policy provides for individual evaluation of perceived conflict of interest based on the Executive Branch Ethics Act AS 39.52, the State of Alaska Personnel Rules, and the agency's Standard of Professional Conduct, including the following considerations:

1. Extent of management jurisdiction an employee may have over a departmentally managed resource and the extent to which an employee may have an access to information not generally distributed to the public.

2. Potential an individual employee may have by virtue of his or her position in the department to affect or influence the management decisions.

3. Extent to which a conflict is real or immediate or whether it is significant, conjectural, or contrived.

4. Extent to which a perceived conflict will adversely affect the credibility of the employee and the department.

The commissioner should enforce the department's ethics policy. Prior to assigning staff to review such permits, DFG should require a certification that they are free from conflict of interests. Agency personnel with a close relationship to a party with financial interest in the outcome of a review, should be excluded from the assignment or participation in review and/or the approval process of aquatic farm applications.

Recommendation No. 5

DFG's commissioner should ensure the factual basis for findings relating to denial of aquatic farm applicant's permit is communicated to the applicant.

Initial special area permit denials issued to Kachemak Bay Critical Habitat Area applicants did not contain a factual basis for the findings. A blanket citation of conflicts with the primary purpose of the KBCHA plan "*To protect and preserve the habitat areas especially crucial to the perpetuation of fish and wildlife, and to restrict all other uses not compatible with that purpose,*" was used as the basis for the denials. Detail analysis of conflicts was provided only after applicants' legal counsel appealed for reconsideration.

This rationale basically shuts out all or any activity that may be proposed in the critical habitat area that has incompatibility with the stated goals and policies.

Alaska Statute 16.40.120(d) requires that denial of the permit by the commissioner must contain the factual basis for the finding.

Denials issued should be supported with detailed analysis of each conflict that would explain and support the agency decision.

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December 28, 2000

Pat Davidson, CPA
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Dear Ms. Davidson:

The Department of Fish and Game (DFG), in consultation with the Department of Law (DOL), submits these comments in response to preliminary audit report 11-30002-01, regarding mariculture development and the Aquatic Farm Act (AFA). Specifically, the audit examines issues related to applications submitted for on-bottom aquatic farming permits in 1999.

We appreciate the statements in the audit that recognize the validity of the department's primary concern that the transfer of public resources to individual farmers for exclusive use is not authorized by law and raises serious constitutional and public policy issues. However, both DFG and DOL believe a number of conclusions in the audit are wrong and we question how these conclusions were reached. I address several aspects of the audit report below, followed by a discussion of each of the audit recommendations.

Use of Common Property Resources

The controversy between the State and the geoduck applicants basically involves the desire of the applicants to be granted possession of natural stocks of geoducks present on their proposed farm sites and then to sell those geoducks to generate revenue for their farming operations. The AFA does not authorize this, a matter upon which the auditors appear to agree with DFG and DOL as stated under Recommendation No. 3. "Our review of the testimony offered before various legislative committees that considered the bill tends to support this perspective. We saw no evidence where the transfer or allocation of the common property resource was ever discussed before the committees that had a hand in developing the AFA legislation."

The value of the public resources the applicants want are far from trivial. One proposed farm contains an estimated two to five million dollars worth of wild geoducks, depending on whether they are marketed fresh or frozen. When the department proposed to issue permits to the geoduck applicants under conditions that would have prevented them from harvesting and selling wild geoducks, they refused to accept the conditions, rejected the permits, and took their claims to court and to the state legislature.

On-bottom Farming in Kachemak Bay Critical Habitat Area

The central controversy with the littleneck clam farming applicants in Kachemak Bay concerns the location of the proposed farm sites within the boundaries of the Kachemak Bay and Fox River Flats Critical Habitat Area (KBFRFCHA). DFG denied Special Area Permits for these proposed sites because on-bottom farming of littleneck clams was determined to be inconsistent with the purposes of the KBFRFCHA plan In regard to the finding of consistency with the plan, the auditors agree on page 16 of the audit that: "The process used by DFG and the conclusion arrived at was consistent with the regulatory requirements in place." The unsuccessful littleneck clam farming applicants have chosen to appeal the denial of their Special Area Permits, and have gone to court and to the legislature.

We don't understand how the auditors can agree with DFG and DOL that fundamental public policy issues are involved in permitting on-bottom aquatic farming, yet fault the agencies for attempting to resolve them. The audit goes far beyond criticizing the state for taking too long to resolve these issues and implies some intention by DFG and DOL to subvert or block implementation of the AFA. We categorically dispute this inference.

Efforts by DFG to Implement AFA

The department has worked diligently, within constraining fiscal and staffing limitations, to implement the AFA. The first aquatic farm permit issued under the act was in 1989. Between then and 1996, when permit applications were suspended for three years because of litigation against the Department of Natural Resources (DNR), DFG issued 176 aquatic farm permits, permit amendments, or permit renewals.

When the program was reopened for new applications in 1999, 41 new farm permit applications were submitted. Eleven aquatic farm operation permits have been issued. Of the remaining 30 permits:

- Eight were withdrawn by the applicants;
- Six were eliminated because of unremedied deficiencies in their applications;
- Two have been sent to the applicants for their acceptance signatures, receipt of which would result in their issuance;
- Four were denied site leases by DNR and are under appeal by the applicants;
- Four were denied Special Area Permits because of incompatibility with the KBFRFCHA Management Plan (while denials of their Special Area Permits are being appealed, review for their aquatic farm operation permits have been suspended); and
- Six geoduck clam permits were denied after refusal by the applicants to accept the conditions of the permits.

The six geoduck permits were denied DFG aquatic farm operation permits because the applicants would not accept conditions on the permits that limited the use of wild stocks, not because of established or conflicting public uses.

Another major effort to assist the development of a mariculture industry by DFG involved overseeing construction of the Seward Shellfish Hatchery and Mariculture Technical Center and its continuing commitment to completion of the facility's wastewater depuration system. This effort was funded by the legislature and supported by the department because it was believed, by both the department and the shellfish farmers, that a shellfish hatchery and mariculture research

center were necessary to facilitate the development of the aquatic farming industry in Alaska. Once the hatchery was complete, the department secured a contractor to operate the facility. While unable to fund the operation of the hatchery, the department has supported the hatchery operator's efforts to secure funding from third party sources. These include the Exxon Valdez Oil Spill Settlement Trustees, the Alaska Science and Technology Foundation, and the University of Alaska.

Another example of DFG support for the mariculture industry is the work of our fish pathology program, which provides complete diagnostic services for salmon hatchery operators and the shellfish hatchery in Seward. Fish pathology program support of mariculture includes:

- Disease certification of shellfish hatchery sources in the Pacific Northwest for import of Pacific oyster spat into Alaska;
- Examination of shellfish broodstocks and juveniles regarding excessive mortality or to establish a disease history for instate movement from farm site to farm site;
- Review of all fisheries resource and transport permits for shellfish and proposals for applied research on diseases of wild and cultured shellfish;
- Annual inspections of the shellfish facility in Seward; and,
- Maintaining a statewide shellfish disease history database and performing investigative research on shellfish diseases.

The laboratory work is currently conducted at no cost to shellfish growers or the hatchery in Seward, other than transportation costs of forwarding samples to the lab for testing.

Even the department's efforts to allow shellfish farmers to utilize littleneck clams in the vicinity of their oyster farm sites, for which the department was and is still being criticized, demonstrates our support of development of a mariculture industry in Alaska. The limited permitting of small-scale clam harvesting, in association with existing oyster farms in southeastern Alaska and Prince William Sound, was intended as a supplemental measure to improve the financial viability of those farms, many of which reportedly operate on very thin margins.

However, during the 2000 application period the department received several applications requesting wild stocks found on the proposed farm site for the purpose of financing farm operations. This is not aquatic farming. In fact, this is just a form of commercial fishing that allows the applicant exclusive harvest rights to valuable public resources. It is inconsistent with the AFA and other provisions of law. It also violates the Alaska constitution which reserves fish in their natural state to "the people for common use."

The review of these applications caused the department to more closely examine the issues associated with on-bottom farming and the use of wild stocks. The wisdom of carefully reviewing the public policy implications of these issues is one place where the auditors appear to agree completely with the department. The department is currently undertaking, in consultation with DOL, such a review and released draft regulations on December 19, 2000 governing the permitting of aquatic farms and the use of wild, standing stocks on farm sites, for public review and comment.

Misinterpretation of State Law

In our judgment, the audit report is predominantly an interpretation of law - an analysis of whether the department's policies for permitting aquatic farms are consistent with the AFA. However, it misinterprets and misstates state law. It contains no case citations, rules of construction, or any other legal tools used to give meaning to statutes. This results in an "interpretation" that examines only parts of relevant statutes, ignores overlying constitutional law, and gives priority to some statutory sections over other sections of equal status.

Page 6 of the report provides background information on stock acquisition permits, which are governed by the AFA. The report states the AFA allows a farmer to take wild stocks "necessary to meet the initial needs of the farm." There are a number of problems with this statement. First, this is an inaccurate rendition of the law. The statute refers to "the initial needs *of farm or hatchery stock*" not simply the "initial needs of the farm." *See* AS 16.40.120(f)(1) (Emphasis added). Second, the report omits the other condition – that wild stock may only be used for "further growth and propagation." *See* AS 16.40.199(8). In other words, if a farmer needs to obtain wild stock to begin farming, instead of obtaining seed or brood stock elsewhere, the farmer may be able to obtain wild stock for "further growth or propagation" by being issued a stock acquisition permit. *See* AS 16.40.120(d). For the report to mention that a farmer may obtain wild stock to meet the initial needs of the farm, without mentioning the limited purposes for using that stock, neglects an important limitation of the law.

Page 12 of the report notes that the constitution allows several exceptions to the ban against the exclusive right of fishery. One of the exceptions is to promote aquaculture. The report goes on to state that "[t]he 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." (Emphasis added).

There is no legal basis for the suggestion that the legislature, through the AFA, may have granted an exclusive right of fishery to aquatic farmers. Implementing a system that grants an exclusive right in any fishery would have to be done with clear legislative intent, and there is no such intent in either the Act or its legislative history. In fact, the audit report acknowledges that on-bottom aquaculture was probably not even in the legislators' minds when they adopted the Act.

On this same page, the report states "[e]ven 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." This is an incorrect statement about how a common property resource can be transferred to a farmer.

The AFA provides for two types of permits. One of them, a stock acquisition permit, can serve as a vehicle for transferring a common property resource to a farmer, if the wild stock is to be cultivated. DFG has always been clear that stock transferred via a stock acquisition permit is no longer common property. That permit is the only way a farmer can gain ownership of wild, common property shellfish.

The other type of permit, an aquatic farm operating permit, merely allows a farmer to engage in aquatic farming practices at a particular location. An aquatic farm permit does not authorize the farmer to harvest, cultivate, or otherwise deal with common property shellfish at that site. Thus, the farmers are wrong when they say that by merely receiving an operating permit and a lease from DNR they gain ownership of the wild resources on the site. They would also need a stock acquisition permit, and that permit may only be issued if the farmer intends to use the wild shellfish for the limited purposes set out in the statutes - further growth or propagation. The department was correct and not "contrary to its current position" (Report, p. 20, Exhibit 2), when it said, "The department believes that property rights to 'standing stocks' pass to the permittee with the lease, operations permit, *and stock acquisition permit...* " (Emphasis added).

On page 13, the report states that "[b]y attempting to impose conditions to the extent of making operations unfeasible, the department was not acting consistently with AFA's statutory mandate that DFG 'encourage the establishment and responsible growth' of aquatic farming in the State." The report, however, pins consistency on this one mandate, and in the process, ignores the other statutory purposes mentioned above (further growth and propagation) and ignores the Alaska constitution's prohibition against exclusive rights in fisheries.

Elsewhere, the report states that the department "added" the conditions to four, existing statutory criteria that govern the issuance of farm permits. In reality, the department's conditions merely implement those statutory criteria or implement the constitutional prohibition against exclusive fishing rights. The conditions are derived from the laws; they are not "additions" to it.

For example, one of the department's conditions, criticized in the report, requires farmers to identify a method for distinguishing wild stocks from farmed stocks. This condition is critical because, as explained above, a farmer may not acquire ownership of wild stocks without a valid stock acquisition permit, and none of the farm applicants now suing the department applied for stock acquisition permits. Given this, the only way the department could ensure that the proposed farms would not violate the constitutional prohibition against exclusive fishing rights as well as insure that the public's access to those resources would be preserved was to require the applicants to show that standing stocks would not be affected by farming operations.

Conditions must be imposed on the farmers to make certain they operate farms that meet the criteria in AS 16.40.105. Finding fault with conditions imposed by DFG reflects an apparent bias that DFG should have granted permits regardless of its statutory duties to protect fish and wildlife and other users of the resource, in order to promote farming. Second, it presupposes that a farmer could have access to the wild stock as a source of revenue for the farm, an assumption that is not finally questioned until the latter part of the report. Third, it overlooks the fact that farmers who claimed to have no geoducks on their site, still refused to agree to the permit conditions, even though the requirement for distinguishing wild from planted stock ostensibly would not have affected them. DFG did not impose additional requirements to the criteria listed in AS 16.40.105. The conditions were necessary to guarantee the farmers would continue to operate in a manner consistent with the criteria in AS 16.40.105 and AS 16.40.120.

<u>Comparison of Commercial Dive Fishery and Aquatic Farming Not Valid</u>

On page 7, the report makes a comparison of the economic value and benefits to the state from two development options: commercial fishing and aquatic farming. This comparison is

misleading and invalid. First, it compares an existing enterprise with one that doesn't exist. However "lucrative" geoduck farming in Alaska may look conceptually, it has yet to be proven in reality. Until demonstrated, there is no certainty that geoduck farming in Alaska will be economically or biologically feasible. This biological uncertainty is acknowledged on page 17 of the report: "Further, Alaska waters are the most northerly areas where geoduck clams are found; the biological dynamics of the species at the edge of its habitat may be significantly different." The only evidence that exists that indicates geoduck farming may be feasible is in Washington State where farming is allowed, but only in inter-tidal areas on privately owned beaches.

Without conducting any business or economic analysis of geoduck farming, the report appears to assume that it will be not only viable but could also be "lucrative." Strangely, the comparison chosen to demonstrate this doesn't even contain an estimated value for farmed production. It compares the revenue earned from harvesting wild geoducks by individual divers, operating under a harvest rate of less than 5%, with the exclusive harvest by a single farm operator of the entire wild geoduck population on his proposed site. This particular farm site also happens to contain the highest concentration of geoducks on any proposed site. There is no attempt whatsoever to calculate revenue produced from actual farmed, as distinct from wild production.

DFG Policies Do Not Jeopardize Shellfish Hatchery

Page 18 of the report criticizes the department for jeopardizing the operational viability of the Quetekcak Shellfish Hatchery. In fact, the department's policies actually *enhance* the hatchery's ability to sell its products. That is because the department has always supported farmers who engage in actual aquatic farming – growing fishery resources from planted seed stock. What the department questions are "farmers" who intend to harvest existing wild stocks under the pretext of mariculture. The reason that the plaintiffs are not customers of the hatchery is that they refused to accept permits that limited their ability to harvest wild geoducks now growing on their proposed sites. The permits offered by the department would *not* have limited their ability to plant, cultivate, and harvest shellfish grown from seed purchased from the hatchery.

In reviewing the Qutekcak business plan, it is clear that oyster production was the primary purpose of the facility; the plan says the hatchery will initially concentrate on oyster production. The plan projects, if technical production problems are overcome, market issues resolved, and a demand develops, that over time more income will come from other shellfish species, like littleneck clams, geoducks, scallops, and mussels. A spreadsheet is included showing the hoped for expectations. It should be noted that the first projected revenue from geoduck sales was expected to occur in the third quarter of 1998, several months before the first geoduck farm application was even received by DFG.

The hatchery's business plan was never approved by DFG. The department made it clear to Qutekcak that it had doubts about the viability of the business plan. According to the then DFG mariculture coordinator, Qutekcak was unresponsive to the department's concerns.

It should be noted that the hatchery, not the department, projected that large-scale geoduck farms would come on line in 2000. The reasoning for this assumption is unclear, and the small scale of oyster farming in Alaska, even after over ten years of development, should have served as a warning to the hatchery operator that geoduck development might also be expected to proceed

slowly, especially given the experimental state of geoduck culture. Since the projection of expected revenue was made more than two years prior to the first application for a geoduck farm, that revenue projection must be viewed as speculative.

The audit report presents no information or reasoning to conclude that the revenue projections of Qutekcak were realistic or achievable. The statements of Qutekcak are presented as a matter of fact without any attempt to independently verify if the statements are factual. It is unwarranted to put the blame for the hatchery's problems on DFG. As stated previously, the department issued six geoduck permits recently, but the applicants rejected them because conditions in the permits would have prevented the farmers from selling the wild geoducks on their farm sites. It should be apparent to all concerned that geoduck farmers that are merely harvesting wild stocks won't have much need for geoduck seed from a hatchery.

DFG Inconsistencies

The audit alleges that DFG has been inconsistent in the manner it has implemented two provisions of the AFA: the promotion of aquatic farming and the permitting of on-bottom aquatic farms.

Permitting of on-bottom farming

We acknowledge that the department has struggled with permitting issues where applicants proposed to farm native species of shellfish on public tidelands and submerged lands, especially where others were also using these resources. The department pointed out that on-bottom farming of native shellfish was not discussed during the legislative hearings on the AFA, so it had little guidance on how to deal with these issues when they surfaced.

We further acknowledge that development of permitting regulations addressing the unique issues involved with on-bottom farming of native species should have occurred at an earlier date. A stock acquisition permit was also issued under circumstances inconsistent with the law in the past, but this mistake has been corrected in current permitting practices. However, it has always been DFG policy that wild stock ownership does not pass to a farmer via an operating permit. DFG has consistently required a farmer to obtain a stock acquisition permit before wild stock can be transferred.

On page 20, the report provides information that allegedly demonstrates the inconsistency of the department's position on the transfer of common property resources. The report confuses DFG statements with regard to the limited transfer, for brood stock and further growth and propagation of a public resource under a stock acquisition permit, with the transfer of a common property resource for commercial sale from an aquatic farm. The initial policy of DFG was to respond to the requests from aquatic farmers to harvest wild stocks by issuance of a miscellaneous commercial shellfish permit. Subsequently, three shellfish farmers were allowed to harvest and sell wild shellfish under a stock acquisition permit. The department has recognized this is inconsistent with law, has ceased the practice, and returned to its original policy for issuing the miscellaneous commercial shellfish permits. Unlike a stock acquisition permit, these commercial fishing permits bestow no exclusive rights to the resource.

All the statements referred to in Exhibit 2 say that if a farmer has an acquisition permit for wild stocks on the farm site, those wild stocks become the property of the farmer. DFG has said this

all along, and that continues to be its position today. The statements in Exhibit 2 are out of context and construed as evidence of a department policy that does not exist. DFG recognized that the isolated instances in which the department granted stock acquisition permits for the purpose of selling wild stocks to finance farm operations was inconsistent with the statute and has ceased this activity.

Promotion of aquatic farming

The report criticizes the department for inconsistency in promoting aquatic farming. Examples referred to in the audit include: varying levels of participation by DFG in aquatic farming workshops and public meetings; inconsistent participation with the University of Alaska Sea Grant Program; and restructuring of the mariculture coordinator's duties with less emphasis on encouraging members of the public to take up aquatic farming.

The ability of any state agency to carry out its duties is directly related to the financial resources provided by the legislature. In that regard, the legislature has not provided additional operating funds for the promotion of aquatic farming. In fact, the department, and the division of commercial fisheries specifically, have seen very significant reductions in general fund appropriations during the last ten years.

At one time, there were three employees in the aquatic farming section. For some time there has been only one. Some prioritization and reduction in the scope of the program is a logical response to reductions in staffing and funding and is well within the proper administrative discretion of the department. In evaluating how the department has prioritized its limited resources, I do not believe there can be any disagreement that the first priority is to ensure that its regulatory and permitting functions are carried out. Despite this, it is still the policy of DFG that its mariculture coordinator participate, to the extent funding and time allow, in mariculture meetings, workshops, and conferences.

Recommendation No. 1:

The Department of Fish and Game (DFG) should obtain formal legal advice from the Department of Law (DOLaw) regarding allocation of common property resources under the Aquatic Farm Act (AFA).

DFG concurs with this recommendation with the caveat that litigation on this issue is currently underway and the court will likely provide an answer to the question of whether common property resources may be allocated to a private farmer for exclusive use and benefit. We want to emphasize that DFG has consistently sought the advice of DOL on this issue and it is the view of both DFG and DOL that the AFA does not provide the authority for transferring common property resources to a private party, except for the limited uses prescribed under a stock acquisition permit. In the unlikely event that the court ruling does not address this issue, DFG will request a formal, written opinion on the question from the attorney general.

Recommendation No. 2:

DFG should develop and adopt regulations to further define and clarify various provisions of the AFA that have had a substantial impact on the interpretation and application of the statute during the most recent permit review process.

DFG concurs with this recommendation and the agency has already released proposed regulations for public review and comment. The regulations should be in effect by the spring of 2001.

Recommendation No. 3:
DFG's commissioner should seek legislation amending the AFA to address utilization and transfer of the State's common property resource to prospective aquatic farming operators.

DFG does not concur with this recommendation. As has been previously stated, DOL and DFG believe that state law is clear that the AFA does not authorize the transfer of the State's common property resource to prospective aquatic farm operators, except for the limited purposes conveyed by a stock acquisition permit. Pending the outcome of current litigation, the department sees no public interest in amending the AFA.

Recommendation No. 4:
DFG should foster staff awareness of potential conflicts of interest.

DFG concurs with this recommendation. The department currently notifies employees twice per year of the need to disclose outside employment. This notification will be broadened to include other potential conflicts of interest.

Recommendation No. 5:
DFG's commissioner should ensure the factual basis for findings relating to denial of aquatic farm applicant's permit is communicated to the applicant.

DFG concurs with this recommendation. Prior to the permit review period for 2001 aquatic farm applications, I will issue a memorandum to staff that emphasizes the results of the audit and directs staff to provide the factual basis for any denial of an aquatic farm applicant's permit.

Thank you for the opportunity to comment on this preliminary audit report. If you have any questions or require additional information, please contact me.

Sincerely,

Frank Rue
Commissioner

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STATE OF ALASKA

TONY KNOWLES, GOVERNOR

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December 21, 2000

Pat Davidson
Legislative Auditor
P.O. Box 113300
Juneau AK, 99801-3300
legaudit@legis.state.ak.us

Ref: Audit Control No 11-30002-01

Dear Ms. Davidson:

We appreciate the opportunity to comment on the October 23rd preliminary audit report concerning the issues that came up during the state's 1999 aquatic farm application period.

We noticed that some statements relating to ADF&G issues appeared to be inaccurate or represented in part. We hope that Fish and Game will have the same opportunity to review the report in order to respond and clarify the statements and issues in the document.

The following comment addresses a DNR paragraph. Please refer to Page 7, paragraph 7. We recommend rewording it to read:

> "As a result of the State Supreme Court Decision, DNR's *(deletion)* statutes relating to aquatic farmsites *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.

Sincerely,

Carol Carroll
Director

Cc: Pat Pourchot
Bob Loeffler
Nancy Welch
Kim Kruse

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ALASKA STATE LEGISLATURE

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January 4, 2001

Members of the Legislative Budget
and Audit Committee

We have reviewed the responses to the preliminary report prepared by the Department of Fish and Game (DFG) and the Department of Natural Resources (DNR). In response we have made some minor editorial changes suggested by DNR. As for DFG's response we offer the following comments and observations:

1. Objections about "inferences" made in the report. On page two of DFG's response (page 28 of the report), the department states *"(t)he audit goes far beyond criticizing the state for taking too long to resolved these issues and implies some intention by DFG and DOL to subvert or block implementation of the (Aquatic Farm Act) AFA. [emphasis added]"*

   We discuss in the report that DFG has issued permits and has supported aquaculture activities involving suspension-like farming. In these areas DFG is satisfactorily carrying out the precepts of AFA, and accordingly we believe the report gives the department due credit.

   The report also discusses the issues raised by permit applicants that are seeking approval for what are referred to as "on-bottom" aquaculture operations. For prospective geoduck applicants we discuss a central objection that DFG has to the proposed operations – the requested transfer of the existing common property geoducks for the exclusive use of the applicants.

   The report contains a discussion of the conflicting arguments regarding whether the Aquatic Farm Act (AFA) is an appropriate statutory vehicle to transfer common property resource (CPR) for exclusive use. The report acknowledges that there are legitimate questions of law that need to be settled. We think it is fair to report that DFG has, in the past, operated under AFA authority to transfer common property resources to an aquatic farmer, albeit on a lesser scale involving littleneck clams. While DFG's current position, although perhaps legally appropriate and defensible, is still inconsistent with past department actions. We believe it was important to point out this inconsistency in the report.

2. Denial of permits involving conditions or conflicting public uses. In the next to the last paragraph on page 2 of the department's response (page 28 of the report), DFG states that six geoduck permit applicants were denied not because of *"conflicting public uses"* but because the applicants *"would not accept conditions on the permit that limited the use of wild stocks."*

   In our view, one of the objectives behind the proposed conditions was to preserve access to geoduck wild stocks for other potential users. Accordingly, we believe DFG's attempted imposition of permit conditions is consistent with the report's characterization that the department was concerned about access of other user groups to the geoduck wild stocks.

3. Legal interpretation of constitution and AFA. On pages 4 and 5 of the department's response (pages 30 and 31 of the report), DFG and the Department of Law (DOLaw) argue the State's legal position regarding the interpretation and application of the State constitution and AFA.

   For purposes of informative disclosure, we believe it is important to set out in the report the general legal arguments that geoduck applicants assert. While not vouching for its interpretation, such arguments are included in order to identify the issues involved in the dispute between DFG and geoduck applicants.

   The ultimate validity and appropriateness of the department's actions and positions will presumably be settled in litigation. But again, regardless of DFG's current position and legal interpretation of AFA, in the past the department has acted in a manner inconsistent with the agency's current interpretation of AFA as it relates to the ownership of, and access to, standing common property stock.

4. Economic Comparisons. DFG criticizes the comparisons of the economic value of geoducks that we presented as part of Background Information section of this report. DFG's points regarding amount and prospective value of geoducks are well taken.

   The information presented in the report was developed from projections and estimates made by both DFG and the geoduck applicants. We used the projections of geoduck applicants because these estimates were referred to many times by DFG staff we interviewed during the audit. Accordingly, department personnel tacitly acquiesced to the general concept that there is a large, possibly very lucrative market existing for live geoducks. The projections developed for the dive fishery was taken from DFG's own records and reports prepared for Commercial Fisheries Entry Commission.

5. Outekcak Shellfish Hatchery (QSH) . On page 6 (page 32 of the report) of its response DFG takes exception with the report's characterization of the department's role as it related to the operational viability of QSH. We do not intend to imply that DFG actions related to geoduck applications was the sole factor that adversely affected the operational viability of QSH.

Indeed, as set out in DFG's response, we agree QSH business plans may not have been viable from the beginning, and as the department notes, QSH was unresponsive to many of the department's concerns. We believe it was important to mention QSH's predicament in the report, but recognize that there are many other factors besides the denied geoduck aquatic farm applications that have had an impact on QSH's ability to operate as a going concern.

In summary, we reaffirm the conclusions and recommendations contained in the report.

Pat Davidson, CPA
Legislative Auditor

Subject: Senate Bill 141
Date: Sat, 17 Mar 2001 21:28:56 -0900
From: "Stephen La Croix" <s.w.lacroix@worldnet.att.net>
To: "Darwin Peterson" <Darwin_Peterson@legis.state.ak.us>

Darwin,
I want to thank Senator Torgerson and his staff for their efforts to address problems we have been having developing the aquatic farm industry here in Alaska for many years and for the introduction of this bill which is designed to force some action on the issue. It is a great start. I apologize for not responding sooner. It has been a struggle just to keep up with the problems we have been confronted with lately on regulations and in the courts and I have not taken the time to start a new project.

Comments on the language. I am restricting my comments to geoduck farming.

Section 1. It takes at least five years for geoducks to grow from seed. The first five years are capitol intensive, money going out and none coming in. It would help if the lease allowed for a payment structure that minimized the costs during this time period. Appraisals present several problems. My main concern is the negative impact on the industry if they are not realistic. I see a need to put additional restriction on this. Reappraisal has the potential to develop into a mechanism for the state to be determining profit margins for farmers.

Section 2. The key issue here is accurate population estimates.

Section 3. (a) I would prefer to see open bid auctions.
(b) It is the policy of ADF&G only to allow farming of indigenous species. The language allowing sites in areas where the species is not present would be in conflict with that policy. We do not currently have aquatic farming of geoducks anywhere in the state. It may be necessary to define the terms like "established and interfere" in this section as we had a lot of problems with similar terms in the Aquatic Farm Act. My experience is that you may not want to leave it up to the department to define these terms.
(c) There are 10 geoduck permits currently under appeal. There is a good chance that more applications will be processed during the next application period ending June 2001. These facts may have impact on how you wish too structure this section.

General Comments.

The fundamental concepts proposed in this bill are good. The bill requires the
leaseholder to;
1) Pay fare market value.
2) Bid for the opportunity to farm.
3) Restore the ground if/when vacated.

I have concerns about the regulatory agencies abilities to determine things like "fare market value". Value has a habit of changing over time. The potential for DNR to over value the resource is great. The result will be that no one will bid on the offerings. It is not too far of a stretch to think that an agency might intentionally inflate values to insure that no one bid and still comply with the letter of this law.

Should a farmer have to restore the stocks and pay fare market value? This seems like paying twice. The more important factor
is the restoration of the wild stock. I propose that it be a requirement of the lease to pay a predetermined amount equal to the cost to replace each

animal
from the wild stock at the farm site as it is removed. These funds would act like a performance bond. It would be returned upon documentation that restoration requirements had been complied with.

One impact of this bill may be to alter the ADF&G attitude for issuing operational permits they will be receiving between now and July 1, 2002.

We have not had insurmountable problems with the ADNR in acquiring leases for farming. The problems have been with ADF&G in getting operational permits. This bill addresses ADNR statute only. It may not get any more farms on line if ADF&G remains uncooperative. We may need some language insuring that these identified sites will qualify for operational permits.

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

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April 2, 2001

The Honorable John Torgerson
Alaska State Senate
State Capitol, Room 427
Juneau, AK 99801-1182

Dear Senator Torgerson:

The Alaska Department of Fish and Game (ADF&G) has reviewed SB 141. I support your efforts to encourage the growth of the mariculture industry in Alaska. However, in a previous letter to you regarding this legislation, ADF&G and DOL expressed concerns that the bill did not address the common property and exclusive right of fishery issues that were the crux of the problem with the last round of applications for geoduck and clam farms. Those concerns remain, but the department would also like to offer some specific suggestions for improving SB 141. Our concerns with the current language are as follows:

In section 1, the bill requires the Department of Natural Resources (DNR) to include the value of harvestable shellfish resources on the site, in determining the fair market value. This implies that a farmer obtains resources on the site by virtue of having a lease from DNR. The common property clause in the Constitution prohibits this.

Section two requires a farmer to restore wild stock to the level that existed when the lease was issued, again implying that the farmer somehow has obtained a right to harvest wild resources on the site. A harvest of wild resources on a farm site could violate both the common property and exclusive right to fishery clauses in the Constitution. Section 2 is also somewhat confusing and the department is unsure what it would mean for a farmer to "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." In most contexts, sustained yield deals with harvest levels, not restoration levels.

The department supports the idea in section three, subsection (b) that sites for on-bottom farming could be chosen in areas where wild stock do not exist, but subsection (c) allows a farmer to apply for a site the farmer has chosen, with no such restriction on the presence of wild stock.

Lastly, a definition for what constitutes an established commercial, subsistence, or personal use fishery should be included in the bill.

The department is not opposed to the idea of site selection, but believes that in order to avoid the pitfalls of the last round of applications, this legislation should provide specific site selection standards, with only one mechanism for applying for a lease. For example, site selection could be three tiered. If the abundance of clams on a site is at a certain threshold density, no on-bottom farming would be allowed. If there are no wild species present of the species intended for culture, and the habitat is suitable, on-bottom farming would be allowed if the proposed operations are consistent with other statutory factors. If the site contained an abundance of wild species of the kind intended for culture between the threshold density and zero, the department could permit a commercial fishery to harvest all the wild stock or perhaps conduct a test fishery with the proceeds going to the state to assist with research, monitoring and management. These site standards could apply whether the bill ultimately authorized an auction system, or continues with the current application system.

These site standards would address the issues raised under the "common use" clause and the "no exclusive right of fishery" clause in the Alaska Constitution, and would go a long way toward allowing the department to simply implement the Aquatic Farm Act and issue permits to bona fide aquatic farm operators, without having battles over statutory and constitutional interpretation.

If these concepts sound acceptable to you, we could offer some proposed language to put in the bill.

Sincerely,

Frank Rue
Commissioner

cc: Honorable Representative Drew Scalzi
Doug Mecum, ADF&G
Geron Bruce, ADF&G
Gordy Williams, ADF&G
Bob Loeffler, DNR
Pat Galvin, DGC
Janice Adair, DEC
Shannon O' Fallon, DOL
Shari Kochman, Governors Office

CITY OF CRAIG ALASKA

Dear Senator Torgerson, 3/28/01

The intent of SB 141.is unclear,

1. Dose this legislation provide for leasing of subtidal sites for the propose of harvesting naturally occurring resource;
2. Does it provide for leasing aquatic farm sites to allow the planting and farming of shellfish;

3. All of the above?

Let's take 1. First. As you know in Southeast private harvesting of commercially viable quanties of the naturally occurring geoduck resource is a contentious issue. On this same note, if this bill did intend the state to lease aquatic tracts to harvest naturally occurring shellfish, Alaska would be mimicking the currant practice in the state of Washington.

Washington's tract leasing program has become very expensive in it's short life and has developed a number of unintended negative impacts. The most serious of these problems is the increased opportunity for poaching. Full advantage has been taken of this opportunity. The Washington geoduck fishery is rife with poaching and gangsterizm, just type in geoduck in any Internet search engine and be amazed what it spits out. What is equally as unsettling, many of these offenders from Washington are doing business in this state, and if the opportunity is offered in Alaska there is no reason to believe we wouldn't experience the same difficulties. The attached Associated Press article details the corruption issues Washington is grappling with in its geoduck fishery.

Although a windfall for state government, the skyrocketing cost of a Washington geoduck tract has driven the price of a lease beyond the reach of the common man. In a fishery that once allowed the independent diver to harvest product worth up to ten dollars a pound, now find this same person harvesting for a leaseholder at a paltry thirty to sixty cents a pound. None of the results of tract leasing bode well for Alaska or our common property divefishery.

Question 2. If this bill specifically provides for leasing aquatic farm sites with little or no naturally occurring resource, for the propose of planting and farming shellfish, GREAT! If this bill creates a procedure for identifying potential aquatic farm sites that are biologically and publicly acceptable, BETTER YET! I do though question the necessity of requiring a mandatory number of these sites. It would occur that state agencies pressured into filling this quota could feel compelled to make decisions that would compromise a well rounded acceptance of the sites. All things considered a bill developed around the general Primus of question 2. Would be a welcome relief from the current practice.

Question 3. If this bill would allow for both tract leasing and, planting and farming, it would leave ADF&G in the same quandary it is currently in of having to interpret unclear and potentially contentious language, with the additional negative connotations associated with tract leasing. Enough has been said on these subjects.

It would also seem prudent to stall this legislation until the court decision on the shellfish farmers appeal has been rendered, and to see if the shareholders round tables produce some positive results. Without the court decision we don't know what the rules are. If the roundtables result in some standards and regulations everybody can live with maybe further legislation will not be necessary.

Thank You

Mayor Dennis Watson

(907) 826-3275 • Fax (907) 826-3278 P.O. Box 725, Craig, Alaska 99921

Local News : Monday, February 26, 2001

Clamming abuses cited

By The Associated Press

OLYMPIA - A shortage of state oversight has allowed commercial harvesters to abuse Washington's geoduck-clam population to the point where the $40 million-a-year industry could collapse, an internal report by the Department of Fish and Wildlife shows.

The report, obtained by The News Tribune of Tacoma under the state's Freedom of Information Act, shows commercial harvesters have engaged in a pattern of illegally discarding lower-quality geoducks and leaving them to die on the seabed.

It also suggests that monitors provided by the state and Indian tribes to watch harvesting slept on the job, deliberately underreported catch amounts and even accepted bribes.

The departments of Fish and Wildlife and Natural Resources, as well as area Indian tribes, are responsible for overseeing the harvest of the giant clams, which can sell for $8 a pound and are considered a delicacy in Asia. The state leases tracts of seabed to commercial harvesters.

"Everybody bent the rules as much as they could get away with," said Tom Farler, a former contract

compliance officer with the Department of Natural Resources (DNR). "And if we weren't around, they bent them that much more."

Three grades

The 3-1/2- to 4-pound clams come in three grades, with only the highest grade - those with the longest siphons and lightest coloring - fetching high prices.

Divers can't tell what grade the clams are until they dig them. Often, if the divers dig a lower-grade clam, they simply dump it back on the seabed, where it becomes easy prey for starfish and crabs. That way, lower-grade, cheaper clams don't count toward their quota.

Illegal harvesting dates at least to 1997 and '98, when federal judges sentenced two people to prison for buying or shipping tens of thousands of pounds of illegally harvested Washington geoducks.

In 1999, state officials discovered members of the Skokomish Indian Tribe secretly dumping nearly 58,000 pounds of low-grade geoducks at one underwater site on Hood Canal.

Those cases and tips from some harvesters about further abuse prompted a two-year investigation by Fish and Wildlife's special investigative unit.

The department says it found numerous instances of harvesting off-tract, shallow harvesting, under-reporting catch or failing to report it altogether, selling to unlicensed buyers and discarding low-grade geoducks.

It also found monitors provided by both the DNR and some tribes were not always present when harvesting occurred. Once, as divers harvested off-tract near Vashon Island, the monitor reportedly slept.

Monitors also reportedly weighed geoducks

inaccurately or simply guessed how much each weighed.

Graft reported

The monitor for one South Sound tribe was allegedly paid to underreport catch, Fish and Wildlife said, and was threatened and assaulted for publicly admitting it.

That monitor later accused other monitors of doing the same thing.

The industry cannot sustain itself at its current level of harvest, Fish and Wildlife said, adding it would like to improve monitoring, conduct post-harvest surveys of all geoduck tracts and develop market strategies to reduce or eliminate incentives for wasting low-grade clams.

Part of the problem is bureaucratic confusion between the DNR and Fish and Wildlife over which staffs play what roles in managing the harvest. The agencies have been negotiating for six months to iron out the difficulties.

Tony Meyer, spokesman for the Northwest Indian Fisheries Commission, said the tribes recognize the need to increase monitoring and enforcement of the geoduck fishery and are working with the state to do so.

At least one tribe, the Suquamish, has moved to eliminate dumping of low-grade geoducks by requiring its fishermen to keep and sell all of their harvest to the tribe, which pays the same rate for all geoducks.

SARDFA Southeast Alaska Regional Dive Fisheries Association

Mission Statement: To develop, expand, and enhance new and existing dive fisheries in Southeast Alaska.

Julie Decker, Executive Director
Gig Decker, Executive Director's Assistant
Box 2138, Wrangell, AK 99929
Ph: 907-874-3110; Fax: 907-874-4270
gigjulie@gci.net

Senator Torgerson
Representative Scalzi
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

March 30th, 2001

RE: Comments on SB 141/ HB 208

Dear Senator Torgerson & Representative Scalzi,

SARDFA would like to thank you for taking the time to meet with us while we were in Juneau. SARDFA appreciates your support of the commercial dive fishery and your proactive approach towards development of the aquatic farming industry. SARDFA would like to submit some specific comments and propose changes for Senate Bill 141/ House Bill 208.

SARDFA foresees several problems with offering leases of wild resources to the highest bidder. First, allowing the resource to go to the highest bidder often sets up a system that is beneficial to large corporations and precludes the smaller, independent business person. Second, this form of leasing of wild stocks seems to be following the direction of the state of Washington.

Please allow me to give you some information regarding commercial diving and aquatic farming of geoducks in Washington. For its commercial dive fishery, Washington leases tracts of its wild geoducks on subtidal lands to the highest bidder through its Department of Natural Resources. This system does several things:

1) It brings in approximately $30 million per year to the WA DNR (or 80% of the ex-vessel value).
2) It yields approximately $0.50/per pound to the diver (or approximately 10%).
3) It yields approximately $0.50/per pound to the lease holder (or approximately 10%).
4) It allows large Chinese-owned, Canadian companies to dominate the leases and control the geoduck markets.
5) It precludes management by the WA Fish & Wildlife Service, and does not allow the commercial industry to employ other management techniques or begin enhancement strategies.
6) It has encouraged high-grading of geoducks, which may lead to problems with sustainability.

SARDFA members believe this is exactly the opposite direction Alaska should be taking to protect the long-term sustainability of the geoduck resource. In the words of a SARDFA member, "Some of the dirtiest words a geoducker can hear are DNR, Auction, Highest Bidder and Lease".

However, in Washington, geoducks are being successfully farmed on private, intertidal areas, where very few, if any, wild stocks grow. This example demonstrates that wild geoducks are not needed for biological or financial reasons in order to farm geoducks. The two most important factors in successful geoduck farming are having the proper substrate and having access to seed.

Although SARDFA understands the necessity to make suggestions of changes which will remedy this situation to our satisfaction, SARDFA does not currently see a clear solution to this problem.

SARDFA also foresees conflicts between existing users, such as the problems the geoduck fishery is currently having. SARDFA is concerned about continued, future conflicts with commercial, subtidal geoduck beds. SARDFA suggests three possible solutions for this problem that could be inserted into these bills:

1) Requiring on-bottom farming sites be intertidal.
2) Requiring on-bottom farming sites have little stocks. For example, setting density levels above which the site would not be suitable.
3) Requiring geoduck farming sites have no wild stocks.

In 1997, the divers and municipalities in Southeast recognized that with budget reductions, there was little hope of money being appropriated to develop the dive fisheries. Thus, the divers and the municipalities stepped forward to develop a program in which the divers would tax themselves and work in a partnership with ADF&G and ADEC to develop the fishery in an orderly and economically beneficial manner. SARDFA is glad to report that we are moving forward in a coordinated and productive mode. Senator Torgerson, you were a supporter of our legislation and it is something you should be pleased to have had a part in. SARDFA hopes the aquatic farming industry will be one that is mutually beneficial to the dive industry, not destructive to it.

SARDFA would be glad to work with you and your staff on developing these recommendations or developing others. SARDFA supports aquatic farming and desires to assist you in the development of this industry in a way that is supplemental to the dive fisheries, not detrimental.

Thank you for your consideration.

Julie Decker

Julie Decker, Executive Director

Cc: Senator Taylor
Representative Williams
Representative Wilson
Representative McGuire
United Fishermen of Alaska
Doug Mecum, ADF&G
SARDFA Board of Directors

LEGAL SERVICES

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

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

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

MEMORANDUM April 4, 2001

SUBJECT: Consequences of SB 141 on current litigation and proposed regulations of the Department of Fish and Game (Work Order No. 22-LS0361\J)

TO: Senator John Torgerson
Attn: Darwin Peterson

FROM: George Utermohle
Legislative Counsel

You have inquired as to the consequences that SB 141 may have on litigation brought by certain shellfish farmers (Alaska Trademark Shellfish, et al. v. State of Alaska, Department of Fish and Game, (Sup. Ct No. 1KE-00-211CI)) and proposed regulations currently being considered by the Department of Fish and Game.

BACKGROUND. SB 141 relates to aquatic farming of shellfish. The bill makes changes to the leasing procedures of the Department of Natural Resources for aquatic farming sites and requires that the Department of Natural Resources identify and offer for lease a specific number of sites for aquatic farming of shellfish. SB 141 does not affect the authority of the Department of Fish and Game in regard to aquatic farming under AS 16.40.

ONE: What effect will the passage of SB 141 have on the current litigation (Alaska Trademark Shellfish, et al. v. State of Alaska, Department of Fish and Game) involving the regulation of aquatic farming by the Department of Fish and Game?

The plaintiffs in the litigation are challenging administrative actions of the department that denied them permits necessary to conduct aquatic farming using wild stock on the site of their aquatic farm. The actions that are being challenged in the litigation were taken under the department's authority under AS 16.40 and regulations adopted under AS 16.40. SB 141 does not alter the statutory authority of the department under AS 16.40. Thus SB 141 will not affect the litigation.

TWO: What effect will SB 141 have on the proposed aquatic farming regulations currently being considered by the Department of Fish and Game?

The proposed regulations currently being considered by the Department of Fish and Game are to be adopted under the authority of AS 16.40. SB 141 does not amend the authority of the department under AS 16.40 or any other statute governing the activities of the department. Thus SB 141 will not affect the ability of the department to adopt the proposed regulations.

* * *

SB 141 provides that under certain circumstances on-bottom farming of shellfish or in-situ cultivation of shellfish indigenous to an aquatic farming site may occur under the leases authorized under the bill. It is not clear under AS 16.40 whether either on-bottom farming of aquatic organisms or in-situ farming of indigenous aquatic organisms was envisioned by the legislature when it authorized aquatic farming in 1988. The proposed regulations being considered by the Department of Fish and Game do provide for the issuance of stock acquisition permits for such activities. However, AS 16.40 could be made more clear on this issue, so that the department has express authority to issue permits for acquisition or use of wild stocks for on-bottom aquatic farming and for in-situ aquatic farming of indigenous aquatic organisms.

If I may be of further assistance, please advise.

GU/jhb
01-004.jhb

Rodger Painter, vice president
P.O. Box 20704 Juneau, AK 99802
Phone/Fax: (907) 463-3600
rodgerpainter@hotmail.com

February 21, 2002

Honorable John Torgerson
State Capitol, Suite 427
Juneau, AK 99801-1182

Dear Senator Torgerson:

Your efforts to create a "bank" of aquatic farm sites are greatly appreciated by aquatic farmers throughout the state. The committee substitute for SB 241 you have developed has made a good bill even better, and we are enthusiastic about working with you to move it through the process this year.

We are particularly grateful for the changes in the committee substitute. We believe SB 141 represents a wise investment in creating new economic development opportunities in coastal Alaska with the use of one of the state's most abundant natural resources. What a better way to bolster the sagging economies of coastal regions than promote an environmentally friendly industry supporting year-round jobs.

We believe this approach to aquaculture development may become a model for the rest of the country. We again thank you.

Sincerely,

Rodger Painter
Vice President

SB

143

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

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SENATE RESOURCES COMMITTEE

SPONSOR STATEMENT

SB 143
"Right-Of-Way Leasing Act: Application Cost"

One of the legislature's priorities is commercialization of North Slope gas. Any sponsor of a pipeline project will have to obtain a right-of-way across state lands. This bill would authorize the state to be reimbursed for work performed by the State Pipeline Coordinator's Office (SPCO) in preparing to receive and process an application for a right-of-way lease. It also clarifies that an applicant must reimburse the SPCO for costs incurred in processing an application whether or not the application is granted.

AS 38.35.140 provides that a lessee shall reimburse the state for all reasonable costs incurred in processing an application filed for a right-of-way lease. Although the SPCO has entered into an agreement with a lessee seeking renewal of a lease to reimburse the state for costs incurred before receipt of the renewal application, legislative legal services has questioned whether this is authorized under existing law and whether the state can be reimbursed for costs incurred before the receipt of an application. The SPCO anticipates that it will be asked to perform substantial work by prospective gas pipeline lessees this year in anticipation of filing applications later this year or early next year. Much of the cost of this work would clearly be reimbursable to the state if the prospective lessee actually had a pending application. It is important to insure that the state is reimbursed for the significant cost that it will incur in performing work in anticipation and furtherance of the application process.

Additionally, the SPCO, in the past, has required a prospective lessee to reimburse the state for costs incurred in processing an application even if the application has not been granted. This bill would conform the law to existing practice between the SPCO and prospective lessees to make clear that the state must be reimbursed for the costs of processing an application whether or not the lease is ultimately granted. Prospective lessees cannot expect the state to pay for services requested by them on routes that ultimately are not selected or on applications that may ultimately be withdrawn, suspended, or otherwise not granted.

SENATE BILL NO. 143

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - FIRST SESSION

BY THE SENATE RESOURCES COMMITTEE

Introduced: 3/14/01
Referred: Resources, Finance

A BILL

FOR AN ACT ENTITLED

"An Act authorizing the Department of Natural Resources to enter into agreements with a person or persons desiring to own an oil or natural gas pipeline proposed to be located on state land for the purposes of providing for payment of the reasonable costs incurred in preparing for activities before receipt of an application under the Alaska Right-of-Way Leasing Act and for activities relating to the processing of an application under that Act; and providing for an effective date."

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

*** Section 1.** AS 38.35.140(b) is amended to read:

(b) The **lease applicant or** lessee shall reimburse the state for all reasonable costs incurred in processing an application filed under AS 38.35.050 and in monitoring the construction of the pipeline on the right-of-way.

*** Sec. 2.** AS 38.35 is amended by adding a new section to read:

Sec. 38.35.145. Agreement to provide for payment of preapplication costs.

(a) To accommodate preliminary work in advance of the receipt of an application for a lease under this chapter, the department may enter into an agreement with a prospective lessee desiring to own an oil or natural gas pipeline that is proposed to be located in whole or in part on state land. The agreement must provide that the prospective lessee reimburse the department for the reasonable costs of work incurred in preparing for activities before receipt of an application.

(b) Expenditure of amounts received by the department under (a) of this section is subject to appropriation by the legislature. Appropriations made to satisfy the requirement of (a) of this section may be made by general appropriations of program receipts conditioned on compliance with the program review provisions of AS 37.07.080(h).

(c) The department may not exercise authority to enter into an agreement under (a) of this section after December 31, 2003, but an agreement entered into before January 1, 2004, is valid and enforceable on and after that date.

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

SB

148

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB 148
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Natural Resources
Title: Remote Water Storage for Fire Departments
BRU: Forestry Mgt & Develop
Component: Forest Mgt. & Develop
Sponsor: Senator Torgerson
Requester: Senate Resources
Component Number: 435

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						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims	100.0	50.0	50.0	50.0	50.0	50.0
Miscellaneous						
TOTAL OPERATING	**100.0**	**50.0**	**50.0**	**50.0**	**50.0**	**50.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	100.0	50.0	50.0	50.0	50.0	50.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	**100.0**	**50.0**	**50.0**	**50.0**	**50.0**	**50.0**

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:

POSITIONS

Full-time						
Part-time						
Temporary						

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

Expenditures are based upon costs of $15.0 to $40.0 per water storage facility, resulting in 2-3 the first year, and 1-2 each year thereafter. Types and number of water storage facilities may vary based on proposals and geographic area costs. The department anticipates implementation to consist of funding grant requests for projects along the road system from local entities such as municipalities, fire departments, etc. Requests would be evaluated by a committee comprised of Division of Forestry, Alaska Fire Chiefs Association, and State Fire Marshall.

Prepared by: Joe Stam
Phone 269-8467
Division Forestry
Date/Time 29-Mar-01
Approved by: Pat Pourchot
Date 29-Mar-01
Agency Natural Resources

For distribution information, call the Governor's Legislative Office

(Rev 11/2000 OMB)

ALASKA STATE LEGISLATURE

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SENATE RESOURCES COMMITTEE

SPONSOR STATEMENT

SB 148
"Remote Water Storage for Fire Departments"

SB 148 instructs the Department of Natural Resources to construct remote water storage sites for fire protection. These sites will consist of 10,000-gallon underground storage tanks with a pump and a hydrant. DNR will solicit applications for these remote storage tanks from all the organized fire service areas statewide. Then the department will rank the applications and, based upon appropriations, construct as many as they can afford. The applications will be ranked by the following factors:

- Distance from an adequate water supply;
- Number of buildings to be protected;
- Extent of spruce bark beetle infestation;
- Ability of fire service to provide matching funds, maintain and operate the remote water storage site; and
- Other pertinent factors.

The need for remote water storage sites is evident in many areas of the state, especially in areas where beetle infested timber greatly increases the risk of catastrophic wildfire. This legislation will help protect the lives of those people living on the fringe of fire service areas. It will also reduce property loss and possibly lower ISO rates for our residents.

Kachemak Emergency Service Area
Kenai Peninsula Borough Annex
P.O. Box 1849
Homer, AK 99603

March 10, 2001

Senator John Torgerson
State Capitol, Room 516
Juneau, AK 99801-1182

Dear Senator Torgerson,

Ric Plate, Kenai/Kodiak area fire management officer for the Division of Forestry, recently told us that you may promote a statewide program to improve fixed water supplies for fire suppression. We enthusiastically encourage you to do so. One of the big hurdles we face in developing our operating plan is locating sufficient accessible water in the outer reaches of our service area. We will soon ask Nikiski fire chief Billy Harris to meet with our board to share his great expertise in water supply systems. Once we have a plan, we will need funding, which is why we are very interested in your proposal.

If you have any questions about Kachemak Emergency Service Area or our significant and varied funding needs, please give me a call at 235-3725.

Thank you for your consideration.

Sincerely,

Mary Griswold

Mary Griswold
Board member

March 31, 2001

Senate Resources Committee
State Capitol
Juneau AK 99801

Chairman Senator John Torgerson

I was prepared to testify on SB 148 "Remote Water Storage for Fire Departments" on March 30, 2001, But since that hearing was cancelled, I am submitting the following written comments.

I am a member of the building committee for the Funny River Emergency Services. And we have started to develop fire station facilities for our area. We have 4.7 acres have started to establish a gravel pad building site. The have a water well drill, pump instated with power source and a water supply in operation. We have buried (2) 10000 gallon steel water tank for fast recovery refill of tankers to fight fires in our area.

All of these improvement are paid for through personal support by volunteer work by our over 400 members.

We intend to enstall pumps

each of the tanks and with some of the pipe we scrounged we hope a valid fast refill station for fighting fires in the Funny River area.

We will appreciate any help that will be available thru this proposed legislation in the funding needed to complete this much need facility for use this summer.

We have a committed membership of approximate 400 members who are active and have an ambulance with trained volunteers who now respond to local medical emergencies and back up of other area needing additional support.

We are seeking grants from both the public and private sector.

The legislature support of our area's efforts. We will build this much needed facility but will some responsible assistance we can accomplish it much sooner and may be not much later.

Thank for your consideration

Phone 262-0818

Dale Bondurant
31864 Moonshine Dr
Soldotna AK 99669

SB

153

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB 153
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Environmental Conservation
Title: An Act replacing the storage tank assistance fund with the underground storage tank revolving loan fund...
BRU: Contaminated Sites
Component: Contaminated Sites
Sponsor: Senator Leman
Requestor: Resource Committee
Component Number: 2386

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	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)						
1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0
Other (Specify Type)	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (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	0	0	0	0	0	0
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

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

SB 153 replaces the underground storage tank grant and loan program with a revolving loan program. Operating costs to oversee cleanups will be the same regardless of whether the financial assistance is given in the form of a grant or loan as it is assumed that those operators currently eligible to receive grants will request loans. Additionally, regulations will need to be changed to repeal the grant program and establish loan requirements. This will be done by existing staff.

The amount needed to capitalize the loan program will need to be determined.

Prepared by: Larry Dietrick
Phone 465-5255
Division: Spill Prevention and Response
Date/Time 3/27/2001 3:50 PM
Approved by: Kurt Fredriksson
Department of Environmental Conservation
Date 3/28/01 4:45pm

For distribution information, call the Governor's Legislative Office

(Rev 2/7/2001 OMB)

22-LS0696\J
Cook
4/23/01

CS FOR SENATE BILL NO. 153(RES)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - FIRST SESSION

BY THE SENATE RESOURCES COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR LEMAN

A BILL

FOR AN ACT ENTITLED

"An Act replacing the storage tank assistance fund with the underground storage tank revolving loan fund and relating to that revolving loan fund; repealing the tank cleanup program and the tank upgrading and closure program; and providing for an effective date."

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

*** Section 1.** AS 46.03.360(e) is amended to read:

(e) Under AS 44.62 (Administrative Procedure Act), the board shall adopt regulations under which the department shall

(1) rank requests for assistance under **AS 46.03.422** [AS 46.03.420 AND 46.03.422];

(2) determine which costs of risk assessment, containment, corrective action, and cleanup are eligible costs under **AS 46.03.422** [AS 46.03.420 AND 46.03.422;

(3) DETERMINE WHICH COSTS OF UPGRADING AND

CLOSURE ARE ELIGIBLE COSTS UNDER AS 46.03.430].

*** Sec. 2.** AS 46.03.360(f) is amended to read:

(f) If the department determines that an owner or operator is not eligible for **a loan under AS 46.03.422** [ASSISTANCE UNDER AS 46.03.410 - 46.03.430] or that a cost is not eligible under **AS 46.03.422** [AS 46.03.415 - 46.30.430] and the affected owner or operator disputes that determination, or if an owner or operator disputes the ranking assigned to a request for assistance under **AS 46.03.422** [AS 46.03.420 OR 46.03.422], the owner or operator may apply to the board for resolution of the dispute. The board may issue a decision in a dispute brought to it under this subsection. The decision is binding on the owner, operator, and department.

*** Sec. 3.** AS 46.03.360(g) is amended to read:

(g) The board may adopt regulations to limit the number of sites per calendar year for which an owner or operator may be awarded **a loan under AS 46.03.422** [FINANCIAL ASSISTANCE UNDER AS 46.03.420 - 46.03.430]. The department shall implement the regulations.

*** Sec. 4.** AS 46.03.365(c) is amended to read:

(c) **When** [EXCEPT AS PROVIDED IN AS 46.03.420(c)(2)(A), WHEN] the regulations adopted under this section address areas governed by federal laws or regulations, the state regulations must be consistent with federal laws and regulations and may not be more stringent than the federal laws and regulations.

*** Sec. 5.** AS 46.03.385(e) is amended to read:

(e) The **department shall deposit fees collected under this section into** [LEGISLATURE MAY APPROPRIATE THE ANNUAL ESTIMATED BALANCE OF THE ACCOUNT MAINTAINED BY THE COMMISSIONER OF ADMINISTRATION UNDER AS 37.05.142 TO] the **underground** storage tank **revolving loan** [ASSISTANCE] fund established under AS 46.03.410.

*** Sec. 6.** AS 46.03.405 is amended to read:

Sec. 46.03.405. Prohibitions. A person, including a governmental entity or institution [,] or a public corporation, may not operate an underground petroleum storage tank or tank system unless

(1) the tank and tank system **are** [IS] registered with the department as

provided in AS 46.03.360 - 46.03.450 or other law; and

(2) [EXCEPT AS PROVIDED IN AS 46.03.420(c)(1)(D),] the person has provided to the department proof of financial responsibility to the extent required under regulations adopted under AS 46.03.365 or proof of application for arrangements that would satisfy state financial responsibility requirements.

* **Sec. 7.** AS 46.03.410 is amended to read:

Sec. 46.03.410. Underground storage [STORAGE] tank revolving loan [ASSISTANCE] fund. (a) There is established the **underground** storage tank **revolving loan** [ASSISTANCE] fund. It consists of money appropriated to it by law, **repayments of principal and interest on loans made or fees collected under AS 46.03.385 - 46.03.450, and income earned on money in the fund** [. THE DEPARTMENT SHALL DEPOSIT EARNINGS ON MONEY IN THE FUND IN THE GENERAL FUND. THE LEGISLATURE MAY USE THE ESTIMATED BALANCE IN THE ACCOUNT MAINTAINED BY THE COMMISSIONER OF ADMINISTRATION UNDER AS 37.05.142 TO MAKE APPROPRIATIONS TO THE FUND]. The legislature may appropriate unencumbered money from the fund for the cost of risk assessment, containment, corrective action, and cleanup relating to an underground petroleum storage tank system owned or operated by the state, the University of Alaska, a public corporation, a school district, or another political subdivision or instrumentality of the state. The legislature may also appropriate unencumbered money from the fund for state legal and regulatory expenses associated with underground petroleum storage tanks. An application for funds under AS 46.03.420, 46.03.422, and 46.03.430 is not considered an encumbrance for purposes of this subsection.

(b) The commissioner may use money in the **underground storage tank revolving loan** fund to pay for

(1) grants and loans under AS 46.03.420 and 46.03.422 for risk assessment, containment, corrective action, and cleanup costs; [AND]

(2) **costs of administering the fund and the tank cleanup loan program under AS 46.03.422; and**

(3) grants under AS 46.03.430 for tank system upgrading and closure.

(c) The commissioner shall prepare a report on the status of the **underground** storage tank **revolving loan** [ASSISTANCE] fund and notify the legislature not later than the 10th day following the convening of each regular session of the legislature that the report is available. The report may include information considered significant by the commissioner but must include

(1) the amount and source of money received by the fund during the preceding fiscal year;

(2) the amount of money expended during the preceding fiscal year for each type of expense authorized under (b) of this section;

(3) a detailed summary of department activities paid for from the fund during the preceding fiscal year, including how many requests for assistance have been made to the department to use the fund for grants or loans for testing, site assessment, risk assessment, upgrading, closure, containment, corrective action, and cleanup costs, and the number of requests funded in each activity area;

(4) the projected cost for the next fiscal year of monitoring, operating, and maintaining sites where department activities have been completed or are expected to start or be continued during the fiscal year;

(5) the priority list of tank system sites for which the department expects to provide financial assistance in the next fiscal year.

*** Sec. 8.** AS 46.03.410 is amended to read:

Sec. 46.03.410. Underground storage tank revolving loan fund. (a) There is established the underground storage tank revolving loan fund. It consists of money appropriated to it by law, repayments of principal and interest on loans made or fees collected under AS 46.03.385 - 46.03.450, and income earned on money in the fund. The legislature may appropriate unencumbered money from the fund for the cost of risk assessment, containment, corrective action, and cleanup elating to an underground petroleum storage tank system owned or operated by the state, the University of Alaska, a public corporation, a school district, or another political subdivision or instrumentality of the state. The legislature may also appropriate unencumbered money from the fund for state legal and regulatory expenses associated with underground petroleum storage tanks. An application for funds under

AS 46.03.422 [AS 46.03.420, 46.03.422, AND 46.03.430] is not considered an encumbrance for purposes of this subsection.

(b) The commissioner may use money in the underground storage tank revolving loan fund to pay for

(1) [GRANTS AND] loans under **AS 46.03.422** [AS 46.03.420 AND 46.03.422] for risk assessment, containment, corrective action, and cleanup costs; **and**

(2) costs of administering the fund and the tank cleanup loan program under AS 46.03.422 [; AND

(3) GRANTS UNDER AS 46.03.430 FOR TANK SYSTEM UPGRADING AND CLOSURE].

(c) The commissioner shall prepare a report on the status of the underground storage tank revolving loan fund and notify the legislature not later than the 10th day following the convening of each regular session of the legislature that the report is available. The report may include information considered significant by the commissioner but must include

(1) the amount and source of money received by the fund during the preceding fiscal year;

(2) the amount of money expended during the preceding fiscal year for each type of expense authorized under (b) of this section;

(3) a detailed summary of department activities paid for from the fund during the preceding fiscal year, including how many requests [FOR ASSISTANCE] have been made to the department to use the fund for [GRANTS OR] loans for testing, site assessment, risk assessment, upgrading, closure, containment, corrective action, and cleanup costs, and the number of requests funded in each activity area;

(4) the projected cost for the next fiscal year of monitoring, operating, and maintaining sites where department activities have been completed or are expected to start or be continued during the fiscal year;

(5) the priority list of tank system sites for which the department expects to provide **loans** [FINANCIAL ASSISTANCE] in the next fiscal year.

*** Sec. 9.** AS 46.03.420(a) is amended to read:

(a) The commissioner may make a grant from the **underground** storage tank

revolving loan [ASSISTANCE] fund to an owner or operator of an underground petroleum storage tank system, other than the state or federal government, for the costs of risk assessment, containment, corrective action, and cleanup resulting from a release of petroleum from or associated with an underground petroleum storage tank system if the owner or operator meets the requirements of this section. Applications for assistance under this section must be submitted to the department before July 1, 1994. Under regulations of the board, the department shall rank requests under this section in order of priority, giving greatest priority to those tank systems that present the greatest threat or potential threat to human health.

*** Sec. 10.** AS 46.03.420(i) is amended to read:

(i) The **department shall deposit money collected under this section into** [LEGISLATURE MAY APPROPRIATE THE ANNUAL ESTIMATED BALANCE OF THE ACCOUNT MAINTAINED BY THE COMMISSIONER OF ADMINISTRATION UNDER AS 37.05.142 TO] the **underground** storage tank **revolving loan** [ASSISTANCE] fund established under AS 46.03.410.

*** Sec. 11.** AS 46.03.422(a) is amended to read:

(a) The commissioner may make a loan from the **underground** storage tank **revolving loan** [ASSISTANCE] fund to an owner or operator of an underground petroleum storage tank system for the costs of risk assessment, containment, corrective action, and cleanup resulting from a release of petroleum from or associated with an underground petroleum storage tank system if the owner or operator submitted a timely application for a grant under AS 46.03.420 and agrees

(1) to accept a loan in the same or lesser amount instead of a grant for the same project;

(2) to provide additional security or collateral for the loan if requested by the department;

(3) [EITHER] to

(A) upgrade all underground petroleum storage tanks located at the facility from which the release occurred to the standards set by state and federal regulations according to a time line established by the department; or

(B) remove and properly dispose of all liquids and sludges

from the underground petroleum storage tanks located at the facility from which the release occurred, conduct a site assessment, and either fill the tanks with inert solid material or properly dismantle, remove, and dispose of the tanks in accordance with applicable state and federal regulations; and

(4) to submit a plan for risk assessment, containment, corrective action, and cleanup to the department for its review and approval; if the department and the owner or operator cannot reach agreement on a plan, on later changes in the plan, or on a cleanup decision, the owner or operator may apply to the board to review the dispute; the board may issue a recommendation to the department in a dispute brought to it under this paragraph; the recommendation may include a suggested time limit for completing appropriate cleanup activities or reaching a cleanup decision.

*** Sec. 12.** AS 46.03.422(a) is amended to read:

(a) The commissioner may make a loan from the underground storage tank revolving loan fund to an owner or operator of an underground petroleum storage tank system for the costs of risk assessment, containment, corrective action, and cleanup resulting from a release of petroleum from or associated with an underground petroleum storage tank system if the owner or operator submitted a timely application for a grant under **former** AS 46.03.420 and agrees

(1) to accept a loan in the same or lesser amount instead of a grant for the same project;

(2) to provide additional security or collateral for the loan if requested by the department;

(3) to

(A) upgrade all underground petroleum storage tanks located at the facility from which the release occurred to the standards set by state and federal regulations according to a time line established by the department; or

(B) remove and properly dispose of all liquids and sludges from the underground petroleum storage tanks located at the facility from which the release occurred, conduct a site assessment, and either fill the tanks with inert solid material or properly dismantle, remove, and dispose of the tanks in accordance with applicable state and federal regulations; and

(4) to submit a plan for risk assessment, containment, corrective action, and cleanup to the department for its review and approval; if the department and the owner or operator cannot reach agreement on a plan, on later changes in the plan, or on a cleanup decision, the owner or operator may apply to the board to review the dispute; the board may issue a recommendation to the department in a dispute brought to it under this paragraph; the recommendation may include a suggested time limit for completing appropriate cleanup activities or reaching a cleanup decision.

*** Sec. 13.** AS 46.03.422(e) is amended to read:

(e) This section does not affect

(1) the liability under state or federal law of a person or entity that receives **a loan** [ASSISTANCE] under this section for the costs of risk management, containment, corrective action, and cleanup resulting from a release of petroleum; or

(2) the authority of the department to seek recovery from the owner or operator of costs other than [GRANTS OR] loans actually made to an owner or operator under this section.

*** Sec. 14.** AS 46.03.422(g) is amended to read:

(g) A loan payment under this section, when combined with loans and grants to the same owner or operator under **former** AS 46.03.420 and **former AS 46.03.430** [46.03.430], may not exceed $500,000.

*** Sec. 15.** AS 46.03.422(h) is amended to read:

(h) The **department shall deposit loan repayments and other money collected under this section into** [LEGISLATURE MAY APPROPRIATE TO] the **underground** storage tank **revolving loan** [ASSISTANCE] fund established under AS 46.03.410 [THE ANNUAL ESTIMATED BALANCE OF THE ACCOUNT MAINTAINED UNDER AS 37.05.142 BY THE COMMISSIONER OF ADMINISTRATION TO KEEP TRACK OF LOAN REPAYMENTS, INCLUDING INTEREST PAYMENTS, UNDER THIS SECTION].

*** Sec. 16.** AS 46.03.422 is amended by adding a new subsection to read:

(i) To be eligible for a loan under this section, an owner or operator shall provide the department with a written sworn statement on a form required by regulation of the department that the owner or operator has not been eligible for self-

insurance under 40 CFR 280.95 at any time on or after July 1, 2001. This subsection does not apply to an owner or operator that is a municipality. For purposes of this subsection, "sworn statement" has the meaning given in AS 11.56.240.

*** Sec. 17.** AS 46.08.040(a) is amended to read:

(a) In addition to money in the response account of the fund that is transferred to the commissioner of community and economic development to make grants under AS 29.60.510 and to pay for impact assessments under AS 29.60.560, the commissioner of environmental conservation may use money

(1) from the response account in the fund

(A) when authorized by AS 46.08.045, to investigate and evaluate the release or threatened release of oil or a hazardous substance, and contain, clean up, and take other necessary action, such as monitoring and assessing, to address a release or threatened release of oil or a hazardous substance that poses an imminent and substantial threat to the public health or welfare, or to the environment;

(B) to provide matching funds in the event of a release of oil or a hazardous substance for which use of the response account is authorized by AS 46.08.045 for participation

(i) in federal oil discharge cleanup activities; and

(ii) under 42 U.S.C. 9601 - 9657 (Comprehensive Environmental Response, Compensation, and Liability Act of 1980); and

(C) to recover the costs to the state, a municipality, a village, or a school district of a containment and cleanup resulting from the release or the threatened release of oil or a hazardous substance for which money was expended from the response account;

(2) from the prevention account in the fund to

(A) investigate and evaluate the release or threatened release of oil or a hazardous substance, except a release described in AS 46.08.045(a), and contain, clean up, and take other necessary action, such as monitoring and assessing, to address a release or threatened release of oil or a hazardous

substance, except a release described in AS 46.08.045(a);

(B) pay all costs incurred

(i) to establish and maintain the oil and hazardous substance response office;

(ii) under agreements entered into under AS 46.04.090 or AS 46.09.040;

(iii) to review oil discharge prevention and contingency plans submitted under AS 46.04.030;

(iv) to conduct training, response exercises, inspections, and tests, in order to verify equipment inventories and ability to prevent and respond to oil and hazardous substance release emergencies, and to undertake other activities intended to verify or establish the preparedness of the state, a municipality, or a party required by AS 46.04.030 to have an approved contingency plan to act in accordance with that plan; and

(v) to verify or establish proof of financial responsibility required by AS 46.04.040;

(C) pay, when presented with appropriate documentation by the Department of Military and Veterans' Affairs, the expenses incurred by the Department of Military and Veterans' Affairs for Alaska State Emergency Response Commission activities, including staff support, when the activities and staff support relate to oil or hazardous substances, and for the costs of being prepared for responding to a request by the department for support in response and restoration, but not including the costs of maintaining the response corps and the emergency response depots under AS 26.23.045;

(D) pay all costs incurred to acquire, repair, or improve an asset having an anticipated life of more than one year and that is acquired, repaired, or improved as a preparedness measure by which the state may respond to, recover from, reduce, or eliminate the effects of a release or threatened release of oil or a hazardous substance;

(E) pay the costs, if approved by the commissioner, that were

incurred by local emergency planning committees to carry out the duties assigned them by AS 26.23.073(g);

(F) provide matching funds in the event of the release of oil or a hazardous substance, except a release of oil for the containment and cleanup of which use of the response account is authorized by AS 46.08.045, for participation

(i) in federal oil discharge cleanup activities; and

(ii) under 42 U.S.C. 9601 - 9657 (Comprehensive Environmental Response, Compensation, and Liability Act of 1980);

(G) pay or reimburse the **underground** storage tank **revolving loan** [ASSISTANCE] fund established in AS 46.03.410 for expenditures from that fund authorized by AS 46.03.410(b);

(H) transfer to the Department of Community and Economic Development for payment by the commissioner of community and economic development of

(i) municipal impact grants when authorized under AS 29.60.510(b)(2);

(ii) assessments of the social and economic effects of the release of oil or hazardous substances as required by AS 29.60.560 when, in the judgment of the commissioner, the release of oil or a hazardous substance is not one that is described in AS 46.08.045; and

(iii) grants to repair, improve, or replace fuel storage facilities under the bulk fuel system emergency repair and upgrade program;

(I) recover the costs to the state, a municipality, a village, or a school district of a containment and cleanup resulting from the release or threatened release of oil or a hazardous substance for which money was expended from the prevention account;

(J) prepare, review, and revise

(i) the state's master oil and hazardous substance discharge prevention and contingency plan required by AS 46.04.200;

and

(ii) a regional master oil and hazardous substance discharge prevention and contingency plan required by AS 46.04.210; and

(K) restore the environment by addressing the effects of an oil or hazardous substance release.

*** Sec. 18.** AS 46.03.420 and 46.03.430 are repealed.

*** Sec. 19.** The uncodified law of the State of Alaska is amended by adding a new section to read:

TRANSITIONAL PROVISIONS. (a) The underground storage tank revolving loan fund established in AS 46.03.410, as amended in secs. 7 and 8 of this Act, is the successor to the storage tank assistance fund, and the balance in the storage tank assistance fund on the effective date of sec. 7 of this Act shall be retained in the underground storage tank revolving loan fund.

(b) The Department of Environmental Conservation may not enter into a grant agreement under AS 46.03.410 - 46.03.450 that requires payment by the department after June 30, 2004, of grant money from any source. The department may only pay money for a grant from the underground storage tank revolving loan fund before June 30, 2004.

*** Sec. 20.** Sections 5, 7, 9 - 11, 15 - 17, and 19 of this Act take effect July 1, 2001.

*** Sec. 21.** Sections 1 - 4, 6, 8, 12 - 14, and 18 of this Act take effect June 30, 2004.

22-LS0696\F
Cook
3/29/01

CS FOR SENATE BILL NO. 153( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): SENATOR LEMAN

A BILL

FOR AN ACT ENTITLED

"An Act replacing the storage tank assistance fund with the underground storage tank revolving loan fund and relating to that revolving loan fund; repealing the tank cleanup program and the tank upgrading and closure program; and providing for an effective date."

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

*** Section 1.** AS 46.03.360(e) is amended to read:

(e) Under AS 44.62 (Administrative Procedure Act), the board shall adopt regulations under which the department shall

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(2) determine which costs of risk assessment, containment, corrective action, and cleanup are eligible costs under **AS 46.03.422** [AS 46.03.420 AND 46.03.422;

(3) DETERMINE WHICH COSTS OF UPGRADING AND

CLOSURE ARE ELIGIBLE COSTS UNDER AS 46.03.430].

* **Sec. 2.** AS 46.03.360(f) is amended to read:

(f) If the department determines that an owner or operator is not eligible for **a loan under AS 46.03.422** [ASSISTANCE UNDER AS 46.03.410 - 46.03.430] or that a cost is not eligible under **AS 46.03.422** [AS 46.03.415 - 46.30.430] and the affected owner or operator disputes that determination, or if an owner or operator disputes the ranking assigned to a request for assistance under **AS 46.03.422** [AS 46.03.420 OR 46.03.422], the owner or operator may apply to the board for resolution of the dispute. The board may issue a decision in a dispute brought to it under this subsection. The decision is binding on the owner, operator, and department.

* **Sec. 3.** AS 46.03.360(g) is amended to read:

(g) The board may adopt regulations to limit the number of sites per calendar year for which an owner or operator may be awarded **a loan under AS 46.03.422** [FINANCIAL ASSISTANCE UNDER AS 46.03.420 - 46.03.430]. The department shall implement the regulations.

* **Sec. 4.** AS 46.03.365(c) is amended to read:

(c) **When** [EXCEPT AS PROVIDED IN AS 46.03.420(c)(2)(A), WHEN] the regulations adopted under this section address areas governed by federal laws or regulations, the state regulations must be consistent with federal laws and regulations and may not be more stringent than the federal laws and regulations.

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(e) The **department shall deposit fees collected under this section into** [LEGISLATURE MAY APPROPRIATE THE ANNUAL ESTIMATED BALANCE OF THE ACCOUNT MAINTAINED BY THE COMMISSIONER OF ADMINISTRATION UNDER AS 37.05.142 TO] the **underground** storage tank **revolving loan** [ASSISTANCE] fund established under AS 46.03.410.

* **Sec. 6.** AS 46.03.405 is amended to read:

Sec. 46.03.405. Prohibitions. A person, including a governmental entity or institution [,] or a public corporation, may not operate an underground petroleum storage tank or tank system unless

(1) the tank and tank system **are** [IS] registered with the department as

provided in AS 46.03.360 - 46.03.450 or other law; and

(2) [EXCEPT AS PROVIDED IN AS 46.03.420(c)(1)(D),] the person has provided to the department proof of financial responsibility to the extent required under regulations adopted under AS 46.03.365 or proof of application for arrangements that would satisfy state financial responsibility requirements.

* **Sec. 7.** AS 46.03.410 is amended to read:

Sec. 46.03.410. **Underground storage** [STORAGE] **tank revolving loan** [ASSISTANCE] **fund.** (a) There is established the **underground** storage tank **revolving loan** [ASSISTANCE] fund. It consists of money appropriated to it by law, **repayments of principal and interest on loans made or fees collected under AS 46.03.385 - 46.03.450, and income earned on money in the fund** [. THE DEPARTMENT SHALL DEPOSIT EARNINGS ON MONEY IN THE FUND IN THE GENERAL FUND. THE LEGISLATURE MAY USE THE ESTIMATED BALANCE IN THE ACCOUNT MAINTAINED BY THE COMMISSIONER OF ADMINISTRATION UNDER AS 37.05.142 TO MAKE APPROPRIATIONS TO THE FUND]. The legislature may appropriate unencumbered money from the fund for the cost of risk assessment, containment, corrective action, and cleanup relating to an underground petroleum storage tank system owned or operated by the state, the University of Alaska, a public corporation, a school district, or another political subdivision or instrumentality of the state. The legislature may also appropriate unencumbered money from the fund for state legal and regulatory expenses associated with underground petroleum storage tanks. An application for funds under AS 46.03.420, 46.03.422, and 46.03.430 is not considered an encumbrance for purposes of this subsection.

(b) The commissioner may use money in the **underground storage tank revolving loan** fund to pay for

(1) grants and loans under AS 46.03.420 and 46.03.422 for risk assessment, containment, corrective action, and cleanup costs; [AND]

(2) **costs of administering the fund and the tank cleanup loan program under AS 46.03.422; and**

(3) grants under AS 46.03.430 for tank system upgrading and closure.

(c) The commissioner shall prepare a report on the status of the **underground** storage tank **revolving loan** [ASSISTANCE] fund and notify the legislature not later than the 10th day following the convening of each regular session of the legislature that the report is available. The report may include information considered significant by the commissioner but must include

(1) the amount and source of money received by the fund during the preceding fiscal year;

(2) the amount of money expended during the preceding fiscal year for each type of expense authorized under (b) of this section;

(3) a detailed summary of department activities paid for from the fund during the preceding fiscal year, including how many requests for assistance have been made to the department to use the fund for grants or loans for testing, site assessment, risk assessment, upgrading, closure, containment, corrective action, and cleanup costs, and the number of requests funded in each activity area;

(4) the projected cost for the next fiscal year of monitoring, operating, and maintaining sites where department activities have been completed or are expected to start or be continued during the fiscal year;

(5) the priority list of tank system sites for which the department expects to provide financial assistance in the next fiscal year.

* **Sec. 8.** AS 46.03.410 is amended to read:

Sec. 46.03.410. Underground storage tank revolving loan fund. (a) There is established the underground storage tank revolving loan fund. It consists of money appropriated to it by law, repayments of principal and interest on loans made or fees collected under AS 46.03.385 - 46.03.450, and income earned on money in the fund. The legislature may appropriate unencumbered money from the fund for the cost of risk assessment, containment, corrective action, and cleanup relating to an underground petroleum storage tank system owned or operated by the state, the University of Alaska, a public corporation, a school district, or another political subdivision or instrumentality of the state. The legislature may also appropriate unencumbered money from the fund for state legal and regulatory expenses associated with underground petroleum storage tanks. An application for funds under

AS 46.03.422 [AS 46.03.420, 46.03.422, AND 46.03.430] is not considered an encumbrance for purposes of this subsection.

(b) The commissioner may use money in the underground storage tank revolving loan fund to pay for

(1) [GRANTS AND] loans under **AS 46.03.422** [AS 46.03.420 AND 46.03.422] for risk assessment, containment, corrective action, and cleanup costs; **and**

(2) costs of administering the fund and the tank cleanup loan program under AS 46.03.422 [; AND

(3) GRANTS UNDER AS 46.03.430 FOR TANK SYSTEM UPGRADING AND CLOSURE].

(c) The commissioner shall prepare a report on the status of the underground storage tank revolving loan fund and notify the legislature not later than the 10th day following the convening of each regular session of the legislature that the report is available. The report may include information considered significant by the commissioner but must include

(1) the amount and source of money received by the fund during the preceding fiscal year;

(2) the amount of money expended during the preceding fiscal year for each type of expense authorized under (b) of this section;

(3) a detailed summary of department activities paid for from the fund during the preceding fiscal year, including how many requests [FOR ASSISTANCE] have been made to the department to use the fund for [GRANTS OR] loans for testing, site assessment, risk assessment, upgrading, closure, containment, corrective action, and cleanup costs, and the number of requests funded in each activity area;

(4) the projected cost for the next fiscal year of monitoring, operating, and maintaining sites where department activities have been completed or are expected to start or be continued during the fiscal year;

(5) the priority list of tank system sites for which the department expects to provide **loans** [FINANCIAL ASSISTANCE] in the next fiscal year.

*** Sec. 9.** AS 46.03.420(a) is amended to read:

(a) The commissioner may make a grant from the **underground** storage tank

revolving loan [ASSISTANCE] fund to an owner or operator of an underground petroleum storage tank system, other than the state or federal government, for the costs of risk assessment, containment, corrective action, and cleanup resulting from a release of petroleum from or associated with an underground petroleum storage tank system if the owner or operator meets the requirements of this section. Applications for assistance under this section must be submitted to the department before July 1, 1994. Under regulations of the board, the department shall rank requests under this section in order of priority, giving greatest priority to those tank systems that present the greatest threat or potential threat to human health.

* **Sec. 10.** AS 46.03.420(i) is amended to read:

(i) The **department shall deposit money collected under this section into** [LEGISLATURE MAY APPROPRIATE THE ANNUAL ESTIMATED BALANCE OF THE ACCOUNT MAINTAINED BY THE COMMISSIONER OF ADMINISTRATION UNDER AS 37.05.142 TO] the **underground** storage tank **revolving loan** [ASSISTANCE] fund established under AS 46.03.410.

* **Sec. 11.** AS 46.03.422(a) is amended to read:

(a) The commissioner may make a loan from the **underground** storage tank **revolving loan** [ASSISTANCE] fund to an owner or operator of an underground petroleum storage tank system for the costs of risk assessment, containment, corrective action, and cleanup resulting from a release of petroleum from or associated with an underground petroleum storage tank system if the owner or operator submitted a timely application for a grant under AS 46.03.420 and agrees

(1) to accept a loan in the same or lesser amount instead of a grant for the same project;

(2) to provide additional security or collateral for the loan if requested by the department;

(3) [EITHER] to

(A) upgrade all underground petroleum storage tanks located at the facility from which the release occurred to the standards set by state and federal regulations according to a time line established by the department; or

(B) remove and properly dispose of all liquids and sludges

from the underground petroleum storage tanks located at the facility from which the release occurred, conduct a site assessment, and either fill the tanks with inert solid material or properly dismantle, remove, and dispose of the tanks in accordance with applicable state and federal regulations; and

(4) to submit a plan for risk assessment, containment, corrective action, and cleanup to the department for its review and approval; if the department and the owner or operator cannot reach agreement on a plan, on later changes in the plan, or on a cleanup decision, the owner or operator may apply to the board to review the dispute; the board may issue a recommendation to the department in a dispute brought to it under this paragraph; the recommendation may include a suggested time limit for completing appropriate cleanup activities or reaching a cleanup decision.

*** Sec. 12.** AS 46.03.422(a) is amended to read:

(a) The commissioner may make a loan from the underground storage tank revolving loan fund to an owner or operator of an underground petroleum storage tank system for the costs of risk assessment, containment, corrective action, and cleanup resulting from a release of petroleum from or associated with an underground petroleum storage tank system if the owner or operator submitted a timely application for a grant under **former** AS 46.03.420 and agrees

(1) to accept a loan in the same or lesser amount instead of a grant for the same project;

(2) to provide additional security or collateral for the loan if requested by the department;

(3) to

(A) upgrade all underground petroleum storage tanks located at the facility from which the release occurred to the standards set by state and federal regulations according to a time line established by the department; or

(B) remove and properly dispose of all liquids and sludges from the underground petroleum storage tanks located at the facility from which the release occurred, conduct a site assessment, and either fill the tanks with inert solid material or properly dismantle, remove, and dispose of the tanks in accordance with applicable state and federal regulations; and

(4) to submit a plan for risk assessment, containment, corrective action, and cleanup to the department for its review and approval; if the department and the owner or operator cannot reach agreement on a plan, on later changes in the plan, or on a cleanup decision, the owner or operator may apply to the board to review the dispute; the board may issue a recommendation to the department in a dispute brought to it under this paragraph; the recommendation may include a suggested time limit for completing appropriate cleanup activities or reaching a cleanup decision.

* **Sec. 13.** AS 46.03.422(e) is amended to read:

(e) This section does not affect

(1) the liability under state or federal law of a person or entity that receives **a loan** [ASSISTANCE] under this section for the costs of risk management, containment, corrective action, and cleanup resulting from a release of petroleum; or

(2) the authority of the department to seek recovery from the owner or operator of costs other than [GRANTS OR] loans actually made to an owner or operator under this section.

* **Sec. 14.** AS 46.03.422(g) is amended to read:

(g) A loan payment under this section, when combined with loans and grants to the same owner or operator under **former** AS 46.03.420 and **former AS 46.03.430** [46.03.430], may not exceed $500,000.

* **Sec. 15.** AS 46.03.422(h) is amended to read:

(h) The **department shall deposit loan repayments and other money collected under this section into** [LEGISLATURE MAY APPROPRIATE TO] the **underground** storage tank **revolving loan** [ASSISTANCE] fund established under AS 46.03.410 [THE ANNUAL ESTIMATED BALANCE OF THE ACCOUNT MAINTAINED UNDER AS 37.05.142 BY THE COMMISSIONER OF ADMINISTRATION TO KEEP TRACK OF LOAN REPAYMENTS, INCLUDING INTEREST PAYMENTS, UNDER THIS SECTION].

* **Sec. 16.** AS 46.08.040(a) is amended to read:

(a) In addition to money in the response account of the fund that is transferred to the commissioner of community and economic development to make grants under AS 29.60.510 and to pay for impact assessments under AS 29.60.560, the

commissioner of environmental conservation may use money

(1) from the response account in the fund

(A) when authorized by AS 46.08.045, to investigate and evaluate the release or threatened release of oil or a hazardous substance, and contain, clean up, and take other necessary action, such as monitoring and assessing, to address a release or threatened release of oil or a hazardous substance that poses an imminent and substantial threat to the public health or welfare, or to the environment;

(B) to provide matching funds in the event of a release of oil or a hazardous substance for which use of the response account is authorized by AS 46.08.045 for participation

(i) in federal oil discharge cleanup activities; and

(ii) under 42 U.S.C. 9601 - 9657 (Comprehensive Environmental Response, Compensation, and Liability Act of 1980); and

(C) to recover the costs to the state, a municipality, a village, or a school district of a containment and cleanup resulting from the release or the threatened release of oil or a hazardous substance for which money was expended from the response account;

(2) from the prevention account in the fund to

(A) investigate and evaluate the release or threatened release of oil or a hazardous substance, except a release described in AS 46.08.045(a), and contain, clean up, and take other necessary action, such as monitoring and assessing, to address a release or threatened release of oil or a hazardous substance, except a release described in AS 46.08.045(a);

(B) pay all costs incurred

(i) to establish and maintain the oil and hazardous substance response office;

(ii) under agreements entered into under AS 46.04.090 or AS 46.09.040;

(iii) to review oil discharge prevention and contingency

plans submitted under AS 46.04.030;

(iv) to conduct training, response exercises, inspections, and tests, in order to verify equipment inventories and ability to prevent and respond to oil and hazardous substance release emergencies, and to undertake other activities intended to verify or establish the preparedness of the state, a municipality, or a party required by AS 46.04.030 to have an approved contingency plan to act in accordance with that plan; and

(v) to verify or establish proof of financial responsibility required by AS 46.04.040;

(C) pay, when presented with appropriate documentation by the Department of Military and Veterans' Affairs, the expenses incurred by the Department of Military and Veterans' Affairs for Alaska State Emergency Response Commission activities, including staff support, when the activities and staff support relate to oil or hazardous substances, and for the costs of being prepared for responding to a request by the department for support in response and restoration, but not including the costs of maintaining the response corps and the emergency response depots under AS 26.23.045;

(D) pay all costs incurred to acquire, repair, or improve an asset having an anticipated life of more than one year and that is acquired, repaired, or improved as a preparedness measure by which the state may respond to, recover from, reduce, or eliminate the effects of a release or threatened release of oil or a hazardous substance;

(E) pay the costs, if approved by the commissioner, that were incurred by local emergency planning committees to carry out the duties assigned them by AS 26.23.073(g);

(F) provide matching funds in the event of the release of oil or a hazardous substance, except a release of oil for the containment and cleanup of which use of the response account is authorized by AS 46.08.045, for participation

(i) in federal oil discharge cleanup activities; and

(ii) under 42 U.S.C. 9601 - 9657 (Comprehensive Environmental Response, Compensation, and Liability Act of 1980);

(G) pay or reimburse the **underground** storage tank **revolving loan** [ASSISTANCE] fund established in AS 46.03.410 for expenditures from that fund authorized by AS 46.03.410(b);

(H) transfer to the Department of Community and Economic Development for payment by the commissioner of community and economic development of

(i) municipal impact grants when authorized under AS 29.60.510(b)(2);

(ii) assessments of the social and economic effects of the release of oil or hazardous substances as required by AS 29.60.560 when, in the judgment of the commissioner, the release of oil or a hazardous substance is not one that is described in AS 46.08.045; and

(iii) grants to repair, improve, or replace fuel storage facilities under the bulk fuel system emergency repair and upgrade program;

(I) recover the costs to the state, a municipality, a village, or a school district of a containment and cleanup resulting from the release or threatened release of oil or a hazardous substance for which money was expended from the prevention account;

(J) prepare, review, and revise

(i) the state's master oil and hazardous substance discharge prevention and contingency plan required by AS 46.04.200; and

(ii) a regional master oil and hazardous substance discharge prevention and contingency plan required by AS 46.04.210; and

(K) restore the environment by addressing the effects of an oil or hazardous substance release.

* **Sec. 17.** AS 46.03.420 and 46.03.430 are repealed.

* **Sec. 18.** The uncodified law of the State of Alaska is amended by adding a new section to read:

TRANSITIONAL PROVISIONS. (a) The underground storage tank revolving loan fund established in AS 46.03.410, as amended in secs. 7 and 8 of this Act, is the successor to the storage tank assistance fund, and the balance in the storage tank assistance fund on the effective date of sec. 7 of this Act shall be retained in the underground storage tank revolving loan fund.

(b) The Department of Environmental Conservation may not enter into a grant agreement under AS 46.03.410 - 46.03.450 that requires payment by the department after June 30, 2004, of grant money from any source. The department may only pay money for a grant from the underground storage tank revolving loan fund before June 30, 2004.

* **Sec. 19.** Sections 5, 7, 9 - 11, 15, 16, and 18 of this Act take effect July 1, 2001.

* **Sec. 20.** Sections 1 - 4, 6, 8, 12 - 14, and 17 of this Act take effect June 30, 2004.

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Senator Loren Leman

Sponsor Statement
CS SB 153: Underground Storage Tank Loan Fund

Owners of underground storage tanks had until December 22, 1998 to either upgrade or close their underground storage tanks in response to nationwide concern over possible contamination of drinking water from leaking underground storage tanks.

The Alaska Legislature responded to this federal mandate by offering grants and loans to owners of underground storage tanks to help offset the costs of the new requirements. To date, $38.9 million has been appropriated for upgrade, closure and cleanup grant and loans for underground storage tanks.

All applications for grant assistance under the Upgrade, Closure and Cleanup programs are in. There can be no new applicants. The Department and the Board of Storage Tank Assistance have ranked the applicants according to the changes made by SB 128 (ch 70 SLA 99).

SB 153 ends the grant programs in 2004 after almost $49.0 million in assistance to underground storage tank owners. It retains the cleanup loan program and changes it to a revolving loan program.

The balance in the storage tank assistance fund on the effective date of SB 153 is retained in the revolving loan fund. All repayments of principal and interest on loans, income earned on money in the fund and money appropriated to the fund will support the revolving loan fund.

Prepared by: Annette Kreitzer, Staff to Senator Loren Leman

March 29, 2001

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Sectional Analysis
CS SB 153: Underground Storage Tank Loan Fund

Sections 1, 2, and 3: Amend the responsibilities of the Board of Storage Tank Assistance and the Department to comport with the intent of SB 153, which is to repeal the UST grant programs by 2004 and to have the Department and the Board adjudicate disputes involving the revolving loan fund. (EFD 6/30/04)

Section 4: Amends the regulations governing UST systems to delete reference to grants under the tank cleanup program. (EFD 6/30/04)

Section 5: Tank Registration Fees: Sets up automatic deposit of storage tank registration fees to the renamed "revolving loan" fund.(EFD 7/1/01)

Section 6: Deletes reference to grants under the tank cleanup program. (EFD 6/30/04)

Section 7: Changes the Underground Storage Tank Assistance Fund to a revolving loan fund incorporating money appropriated to it by law, storage tank registration fees, repayments of principal and interest on loans and income earned on the money in the fund. Gives commissioner permission to use money in the fund to pay the costs of administering the fund and the tank cleanup loan program (EFD 7/1/01)

Section 8: Becomes law in 2004, then amended to delete references to tank upgrade and closure grants. (EFD 6/30/04)

Prepared by A. Kreitzer March 29, 2001

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Section 9: Amends tank cleanup loan program statutes to reflect UST Assistance Fund as a revolving loan fund. (EFD 7/1/01)

Section 10: Program receipts received under the tank cleanup program will be deposited into the revolving loan fund. (EFD 7/1/01)

Section 11: Amends tank cleanup loan program statutes to reflect UST Assistance Fund as a revolving loan fund. (EFD 7/1/01)

Sections 12, 13 and 14: Effective 6/30/04 amends tank cleanup loan program statutes to clarify that this section only applies to loans available under this program (not loans and grants). (EFD 6/30/04)

Section 15: Allows department to deposit loan repayments and interest into the revolving loan fund. (EFD 7/1/01)

Section 16: Amends the Oil and Hazardous Substance Prevention and Response Account statute to reflect the UST Assistance Fund as a revolving loan fund. (bottom of page 10, top of page 11) (EFD 7/1/01)

Section 17: Repeals the UST cleanup grant program and the UST upgrade and closure grant programs. (EFD 6/30/04)

Section 18: (a) Moves the funds the Legislature has appropriated to the Underground Storage Tank Assistance Fund into the UST Revolving Loan Fund.

(b) Makes plain that the upgrade, closure and cleanup grant programs will not be funded past June 30, 2004. (EFD 7/1/01)

Section 19: Effective Dates for establishing Revolving Loan fund