

# MEMORANDUM

## State of Alaska Department of Law

TO: Honorable Kurt Fredriksson  
Commissioner  
Department of Environmental Conservation

DATE: August 9, 2006

FILE NO.: 661-07-0127

TEL. NO.: (907) 269-5274

FROM: Elise Hsieh  
Assistant Attorney General

SUBJECT: Statutory Authority  
Necessary for Regulations  
Charging Differential Fees

You have requested an opinion as to whether the Department of Environmental Conservation (DEC) can adopt regulations setting different fees for different industries for paralytic shellfish poisoning (PSP) testing even though the costs to the state are the same.

Specifically, DEC has considered adopting regulations charging geoduck clam harvesters \$125 and oyster farmers \$35 for each paralytic shellfish poison (PSP) test given at the state lab. The cost to the state for each PSP test is the same, regardless of the nature of the requester's business or the species of the shellfish tested. We conclude that, under these circumstances, DEC may not charge varied fees to different recipients of identical state services without statutory authorization.

Every fee charged by a state agency for a state service must be set out in or be otherwise authorized by statute. AS 37.10.050(a). In addition, a fee set by regulation "may not exceed the estimated actual costs of the state agency in administering the activity or providing the service unless otherwise provided by the statute under which the regulation is adopted." *Id.* DEC has authority in AS 44.46.025(a)(1) to adopt regulations that prescribe fees to cover the costs of services provided by the department relating to food under AS 17.20 (Alaska Food, Drug and Cosmetic Act). These statutes provide the authority for shellfish processing regulations, including the proposed PSP testing regulation at issue. *See* AS 17.20.005 and AS 44.46.020(a)(5).

Thus, AS 17.20, in combination with AS 44.46, authorizes the department to adopt regulations for PSP test fees. However, there is no authority in either AS 17.20 or AS 44.46 that authorizes DEC to charge different PSP testing fees based on the identity of the user of the state service or the shellfish being tested. To the contrary, DEC's fee

authority in AS 44.46.025(a)(1) expressly limits DEC to adopting regulations that prescribe “reasonable fees” to cover the “direct costs” of providing the state service. This is consistent with the “actual cost” limitation of AS 37.10.050(a). Accordingly, because there is no varied cost to the state based upon the nature of the test recipient’s business or the species of shellfish tested, DEC may not adopt regulations that charge differential PSP testing fees on those bases.

While DEC may not charge differential fees absent an authorizing statute, the legislature does have the power to subsidize one industry over another, within the confines of constitutional law. The legislature could subsidize an industry by authorizing a differential fee schedule in statute or by appropriating money to subsidize the industry. As you know, the Alaska State Legislature has appropriated money in past years to subsidize PSP testing fees for geoduck harvesters.<sup>1</sup> However, in the absence of such legislative action or a showing of varied agency costs, DEC may not charge different fees to two different industry groups for PSP tests.

In conclusion, DEC has statutory authority to adopt regulations that prescribe reasonable fees to cover the direct costs of providing PSP testing. However, DEC does not have statutory authority to charge different fees based upon the nature of a PSP test recipient’s business or the species of shellfish tested. Absent such authority, DEC must charge one fee for PSP testing. We hope this helps to address your inquiry regarding DEC’s proposed regulation.

EH: sjl

cc: Kristin Ryan, Director, Environmental Health

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<sup>1</sup> The Alaska State Legislature may also appropriate money to subsidize the payment of agency fees for everyone, as it has recently done by appropriating \$62,500 to subsidize PSP test costs for the fiscal year ending June 30, 2007. *See* sec. 29, ch. 82, SLA 2006.