

# STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF COASTAL AND OCEAN MANAGEMENT  
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April 13, 2010

The Honorable Senator Lyman Hoffman  
Alaska State Senate  
Senate Finance Committee  
State Capitol  
Juneau, Alaska 99801-1182

RE: The Alaska Coastal Management Program

Dear Senator Hoffman:

Thank you for your request that the Department of Natural Resources (DNR) respond to the identified issues associated with the changes proposed in Senate Bill 4 (SB 4) as they relate to the Alaska Coastal Management Program. Your request for a response was shared during the March 30, 2010 Senate Finance Committee hearing on Senate Bill 4 (SB 4) addressing the ACMP.

Attached to this letter is written testimony submitted on behalf of three departments – Law, Environmental Conservation, and Natural Resources. This written testimony highlights general concerns and issues with the committee substitute for SB 4. Although I recognize your desire to affect change to the ACMP through statutory revisions, the proposed changes within SB 4 will not help resolve concerns between local coastal districts, project proponents, and the State agencies, and as such DNR is unable to recommend specific changes to SB 4 that would achieve the balance needed to successfully implement the ACMP.

It is also important to note and recognize that, under AS 44.66.020, the ACMP is listed as a program subject to termination in 2011. Although the Legislative Budget and Audit Committee did not designate the ACMP for termination (AS 44.66.030), the continuation of the ACMP is subject to hearings in front of a committee of each house next year (AS 44.66.050). Pursuant to AS 44.66.050(b), and within the context of the committee hearing, it is the responsibility of the department to demonstrate a public need for the existence of the ACMP, and whether there are any changes that would increase the efficiency of administration or operation consistent with the public interest. At that time, it would be appropriate to discuss whether the department recommends statutory changes that would generally benefit the public interest. As well, under AS 44.66.050(e), and based on the hearings and committee findings and summary, the committee may introduce a bill providing for the reorganization or continuation of the ACMP. Given the existing ACMP review and evaluation process already established in statute and scheduled for next year, it would seem imprudent to pass

*"Develop, Conserve, and Enhance Natural Resources for Present and Future Alaskans."*

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SB 4 this year affecting significant change to the ACMP before the legislatively designated committee process described in AS 44.66 has run its course.

If you have any additional questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'Randy Bates', written over a horizontal line.

Randy Bates  
Director

cc: Senate Finance Committee Members

Tom Irwin, Marty Rutherford, Dick Lefebvre, DNR

Larry Hartig, Dan Easton, DEC

Daniel Sullivan, DOL

Jerry Gallagher, Heather Brakes, Office of the Governor

CS Senate Bill 4 (26-LS0019\R)  
Senate Finance Committee

Department of Natural Resources Testimony

The Department of Natural Resources (department) has serious and substantive concerns with the Committee Substitute (CS) for Senate Bill (SB) 4:

1. It creates a new oversight body, the Coastal Policy Board, and vests that body with the ability to approve enforceable policies that would override agency authority, effectively trumping the legislative establishment of laws relative to resource management and protection.
2. It would allow enforceable policies to be more restrictive, more stringent, and more prescriptive than existing state and federal laws by allowing the Coastal Policy Board to modify the standards and authority of the resource agencies, but without the science that may be required by State or federal law, and without the requirement that the district demonstrate the ability to enforce the chosen requirement.
3. It allows enforceable policies to address issues not otherwise addressed in resource agency authorities, including those issues the legislative body specifically chose not to address.
4. This bill changes the structure of the ACMP from one of local input to one of local control – it authorizes broad authority for coastal district enforceable policies to address and decide upon resource development projects.
5. It is a bill specific to the issues of one group of ACMP participants, but is not a bill that balances or represents the interests of other ACMP participants and stakeholders.

The department recognizes that there are significant differences of opinion on how much influence and input coastal districts have or should have regarding resource development and permitting decisions. The department believes that the voice, input, perspective, and influence of rural Alaska and the coastal communities are critical to our function and success as a department and a state – the ACMP is one of many programs that considers that voice, input, and perspective. We value that input, but do not believe that the input the State solicits should allow a coastal district to control, dictate, or otherwise replace the State's decision-making process on those issues that are so important to the State and its collective residents.

The following are proposed coastal district enforceable policies that could be approved by the Coastal Policy Board if SB 4 were to be enacted:

- “Subsistence is a priority over all other proposed activities”
- “No disturbance or take from the lead group of caribou during the annual migration”
- “No drill operations if there is any chance of an oil spill”
- “No net loss of habitat from proposed activities”

Within the context of a consistency review of a project, these enforceable policies are applied to the proposed project to determine compliance. If the reviewing entity – either the state or the coastal district – determines that the project does not comply with the enforceable policy, the project may be denied and NO State or federal permits may be issued for that project.

By allowing the coastal district to write an enforceable policy establishing the locally important issue as a priority to the exclusion of activities that may be in the best interest of the state, this bill would change the structure of the ACMP and would significantly change the authority and control a coastal district has over resource development projects that are important to the state and its collective residents.

In addition to the establishment of the Coastal Policy Board and the expansion of coastal district enforceable policies, the department has significant concerns with the following aspects of the CS for SB 4:

- Section 19 – expanding the inland reach of the ACMP and listing seismic surveys within the statute.
- Section 21 – amending certain timing requirements for conducting consistency reviews.
- Section 22 and 35 – amending certain definitions.
- Section 23 – requiring the duplication of consistency reviews after a final consistency determination has been issued for a given project.

The department also recognizes that other state departments have presented important testimony and significant concerns regarding the CS for SB 4.

It is important to recognize that the department's goal is to implement a coastal program that provides opportunity for important local input, that is streamlined and minimizes the administrative burden associated with a networked program, that is predictable in its requirements, that is meaningful to the participants, and that is appropriate and balanced in managing the coastal uses and resources of the coastal zone.

From the department's perspective, the CS for SB 4 does not accomplish these goals.

Thank you for the opportunity to provide this written testimony, and to present the department's perspective on this legislation.

Testimony of  
Alaska Department of Environmental Conservation  
Senate Bill 4  
Senate Finance Committee  
March 2010

SB 4 eliminates provisions referred to as the "DEC carve-out." In so doing, it raises serious concerns.

Background on the "DEC Carve-Out."

The DEC carve out is comprised of two provisions. The first is that the process DEC uses to develop and issue environmental permits is excluded from the Alaska Coastal Management Program consistency review and determination process. DEC permits are developed using the specific procedures set out in the permitting programs with their own timeframes, requirements for public notice and comment, rules regarding production of preliminary drafts, and requirements for collection of baseline data and appeal procedures.

The second provision of the DEC carve out is that environmental standard setting -- whether for water quality standards, ambient air quality standards, spill response planning standards, or standards for managing solid wastes -- is reserved to the state. Moreover, issuance of a state environmental permit is sufficient to establish consistency with ACMP standards. Under current statutes, coastal districts may not develop their own standards.

Effects of SB 4.

With respect to the first provision, eliminating the DEC carve-out would mean that development of state permits would fall under ACMP procedures. This situation has occurred in the past and resulted in conflicts between environmental permit and ACMP procedures and presented significant problems with prescribed timeframes, duplicative appeal processes, and different rules for public notice and comment. DEC's permitting procedures are often circumscribed by federal law and cannot be modified without running afoul of federal program rules.

With respect to the other DEC carve-out provision, SB 4 allows the coastal districts to develop environmental standards as enforceable policies as long as they are more stringent than state standards. The state would no longer be the sole environmental standard-setting authority and standards may vary from one district to the next.

We note that the DEC standard setting process is exhaustive. State standards must often comply with federal guidance which, in turn, reflects extensive

Testimony of  
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compilation and rigorous peer-reviewed analysis of scientific data from around the nation and world. Development or amendment of a single standard is a long and careful process and can take years. State air and water standards must comply with federal law and are subject to approval of the U.S.

Environmental Protection Agency after consultation with the U.S. Fish and Wildlife Service, National Marine Fisheries Service and Tribes. Good standards are protective of human health and resources without being overly-protective and needlessly burdensome on permittees whether for municipal sewage treatment plants or resource development industries. State standards are promulgated as regulations with the accompanying public process and right to appeal. Standards established by coastal districts, even while subject to coastal policy board approval would not be subject to the same level of effort and scrutiny as state water and air quality standards.

SEAN PARNELL, GOVERNOR

**DEPARTMENT OF LAW**  
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March 30, 2010

The Honorable Lyman Hoffman  
State Capital, Room 518  
Juneau, AK 99801

The Honorable Bert Stedman  
State Capital, Room 516  
Juneau, AK 99801

Dear Senator Hoffman and Senator Stedman:

This letter describes the legal issues raised by Committee Substitute for Senate Bill 4, relating to the Alaska Coastal Management Program (ACMP).

A. Appointment of Coastal Policy Board Members

Section 1 of the bill states that the public members of the Coastal Policy Board would be appointed by the Governor. The board would be made up of nine members. Five members would be from the coastal districts divided by geographic area, and would be referred to as "public members." These public members would be appointed by the Governor from a list composed of at least three names from each coastal region. These names would be nominated and submitted by the coastal districts of each region. Such a list limits the Governor's appointment powers, and that limitation may create constitutional problems.

B. Board Approval of ACMP Regulations

Section 3 states that the Department of Natural Resources may adopt regulations approved by the Coastal Policy Board. The board would be made up of nine members, five of which are mentioned in Section A of this letter. The four remaining members, referred to as "designated members," would be from state personnel: the Commissioners of the Department of Environmental Conservation, Department of Fish and Game, Department of Natural Resources, and Department of Commerce, Community, and Economic Development. A quorum of three public members and two designated members would be required before a vote could be taken. All decisions of the board would be by a majority vote of the members present and voting.

The board would be responsible for approving ACMP regulations and for approving coastal district plans. As such, the board would also be responsible for approving the enforceable policies developed by coastal districts. This is a significant amount of work. Practically speaking, it may be very difficult for the board to assemble a quorum and to pass a vote (only a majority vote would pass; a tie would not) to accomplish the tasks assigned to the board by the bill. The Department of Law advises against requiring a board to approve regulations for these reasons.

C. Negotiations with Federal Authorities

Section 11 permits the Coastal Policy Board to develop procedures and guidelines for the consultation and coordination with federal agencies managing land or conducting activities potentially affecting the coastal area of the state. Negotiations with the federal government should not be conducted by the board; they should be conducted by the state. It is possible this provision would infringe on the Governor's executive powers and that these direct negotiations may be problematic from the standpoint of developing consistent state policies. This provision could be eliminated from Section 11 without otherwise undermining the purpose of the bill.

D. Standards for District Plan Review and Approval

Section 13 addresses district plan review and approval. It provides that once a plan is submitted to the Department of Natural Resources for review, the department must attempt to reach a "consensus" with the district concerning any changes to the plan. It is not clear what is meant by "consensus." Does this mean there must be full agreement? Or partial agreement? Or something in between? It would be helpful for this term to be defined by the legislature.

E. Lack of Language Providing for Transition Between the Current and Proposed Systems

The bill lacks transition language that would allow existing district plans and regulations to remain in effect while the Coastal Policy Board and the Department of Natural Resources work together to approve new district plans and create new regulations consistent with this bill. If existing district plans and regulations do not remain in effect, it is unclear how consistency reviews, of which there are hundreds, if not thousands, every year, would be conducted.

The bill also lacks transition language stating that the Department of Natural Resources must apply for federal approval of a revised ACMP and that the



bill would take effect only if federal approval is obtained. Prior to this bill becoming effective, federal approval must be obtained by the National Oceanic and Atmospheric Administration's Office of Ocean and Coastal Resource Management. These problems can easily be fixed by adding transition language, which the Department of Law could provide and/or help draft.

I hope that this legal summary is helpful. If I can provide additional information, please let me know.

Sincerely,

DANIEL S. SULLIVAN  
ATTORNEY GENERAL

By:

Lindsay A. Wolter  
Assistant Attorney General

cc: Senator Donald Olson  
Jerry Gallagher, Governor's Legislative Liason  
Deborah Behr, DOL  
Mike Ford, DOL  
Craig Tillery, DOL  
Randall Bates, DNR