

ALASKA STATE LEGISLATURE

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January 11, 2011

Members of the Legislative Budget
and Audit Committee:

In accordance with the provisions of Title 24 and Title 44 of the Alaska Statutes (sunset legislation), we have reviewed the activities and the attached report is submitted for your review.

DEPARTMENT OF NATURAL RESOURCES ALASKA COASTAL MANAGEMENT PROGRAM PART 2

December 29, 2010

Audit Control Number
10-30060B-11

This is the second part of a two-part report. The overall objective of the audit is a performance evaluation and sunset review of the Alaska Coastal Management Program (ACMP). This report addresses the openness and transparency of the ACMP's operations, the ability of consultants to be consistency review participants, the Department of Natural Resources' appropriateness to administer the program, and the effect of the ACMP's changes on participation, decision-making, and consensus building. This report also addresses the public's continuing need for the program and the ACMP's operating effectiveness and efficiency.

The audit was conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. Fieldwork procedures utilized in the course of developing the findings and recommendations presented in this report are discussed in the Objectives, Scope, and Methodology.

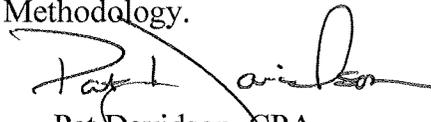

Pat Davidson, CPA
Legislative Auditor

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OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with Title 24 of the Alaska Statutes and a special request by the Legislative Budget and Audit Committee, we have conducted a performance audit of the Department of Natural Resources (DNR), Alaska Coastal Management Program (ACMP). The emphasis of our report is to evaluate the effect of Ch. 24, SLA 03 and subsequent regulatory changes on the ACMP's operations, to determine whether there is a demonstrated public need for its continued existence, and to determine if it has been operating in an efficient and effective manner.

This report shall be considered by the committee of reference during the legislative oversight process in determining whether the ACMP should be reauthorized. Chapter 31 of the SLA 2005, Section 18, repeals the ACMP statutes. As a result, this program will terminate on June 30, 2011, unless it is reauthorized.

Objectives

The objectives of this audit are as follows:

1. Determine whether regulatory changes in 11 AAC 112 and 114 limit the establishment of district enforceable policies and whether this limitation is consistent with legislative intent and state law.
2. Determine whether DNR is properly implementing the local concern requirement.
3. Determine whether the Department of Environmental Conservation (DEC) carveout is being implemented in accordance with legislative intent and how it has affected the scope of the ACMP's consistency reviews.
4. Determine whether changes to the statewide standards limit the ACMP's ability to meet its objectives.
5. Determine whether changes to the ACMP have diminished the State's rights under the Coastal Zone Management Act of 1972 (CZMA).
6. Determine whether DNR is operating the program openly and transparently, whether DNR will allow consultants to be consistency review participants, and whether DNR is an appropriate agency to administer the program.
7. Determine whether the ACMP's changes have affected participation, decision making, and consensus building.

8. Determine whether the ACMP is operating in the public's interest and whether it should be reauthorized.

The assessment of the ACMP's operations and performance was based on criteria set out in AS 44.66.050(c). Criteria set out in this statute relates to the determination of a demonstrated public need.

Scope

This is the second part of a two-part report. The scope of the second part includes objectives six through eight that are discussed above. Overall, our review spanned from FY 94 to FY 11. The scope for specific procedures is identified in the Methodology section discussion below.

Methodology

We reviewed the CZMA, Ch. 24, SLA 03 (HB 191) and committee minutes, ACMP statutes and regulations, draft ACMP statutes and regulations, and former ACMP statutes and regulations. We reviewed these documents to ascertain the intent of the legislature, analyze the ACMP's statutory and regulatory changes, and evaluate whether the 2004 regulatory changes were consistent with legislative intent and state law.

To gain an understanding of the ACMP's operations and activities, we reviewed the following documents:

- The ACMP *Handbook of Statutes & Regulations*;
- The FY 04 to FY 10 free conference committee reports;
- The FY 95 to FY 10 attorney general opinions;
- The FY 10 semi-annual performance reports;
- The "*Application for Assistance under the Coastal Zone Management Act, July 2009 - December 2010*;"
- FY 10 to FY 11 coastal resource district grant documents;
- FY 08 to FY 10 financial reports;
- The FY 09 to FY 10 Office of Management and Budget performance measures;
- ACMP reevaluation documents and comments from 2008;
- The National Oceanic and Atmospheric Administration's (NOAA) "*Final Evaluation Findings Alaska Coastal Management Program October 2002 – August 2007*;"
- *The Classification of State Agency Approvals* (ABC List) documents; and
- The ACMP website.

We also attended two working group meetings and a coastal resource district meeting.

To determine whether the Division of Coastal and Ocean Management's (DCOM) coordinated consistency reviews were performed in accordance with ACMP regulations in

11 AAC 110, we reviewed electronic files for 39 consistency reviews selected from consistency reviews coordinated by DCOM and entered into their database during FY 10. To obtain a cross-section of consistency reviews statewide, we randomly selected from each of the 28 participating coastal resource districts and from one of the nonparticipating coastal resource districts. We also reviewed the one consistency review that was elevated to DNR's commissioner for review during FY 10.

We determined the number of FY 10 consistency reviews that were found to be: (1) consistent with the ACMP, (2) consistent with alternative measures, (3) inconsistent, and (4) elevated. We compared these figures to those for FY 94 consistency reviews. We also compared the number of consistency reviews that coastal resource districts commented on in FY 10 to those in FY 94. These comparisons were made to analyze the impact of the ACMP's changes on consistency reviews.

We examined a sample of nine pairs of DCOM-coordinated consistency reviews judgmentally selected from five coastal resource districts. Each pair consisted of two consistency reviews of similar projects in the same coastal resource district. One consistency review was selected from the period FY 07 to FY 10 and the other from FY 00 to FY 04. We compared them to determine what effect, if any, the ACMP changes had on the length of consistency reviews, coastal district participation, district enforceable policies, and consistency review outcomes. We also reviewed a sample of consistency reviews identified by coastal resource districts in response to survey questions.

We tested a sample of eight single agency reviews conducted by DEC; the Department of Fish and Game; the Division of Oil and Gas; the Division of Mining, Land, and Water; and the Division of Forestry to determine whether the agencies consulted with coastal resource districts during the review. The reviews were haphazardly selected from the reviews conducted by each agency during FY 10. We also tested a sample of 10 Division of Habitat permits that were made consistent by general consistency determinations (GCD).¹ The sample was haphazardly selected from lists provided by DCOM permits from FY 05 to FY 10. We reviewed them to determine whether the Division of Habitat was consulting with coastal resource districts before issuing permits that are consistent by GCD.

We reviewed the district coastal management plans in effect before the 2003 ACMP changes for: the 28 currently participating coastal resource districts;² the 28 submitted revised district coastal management plans;³ the 25 approved district coastal management plans;⁴ and the four mediated plans and supporting documents. The purpose of the review was to evaluate the changes in the number and kinds of enforceable policies and designated areas and the reasons

¹GCDs apply to activities, requiring resource agency authorizations, which can be made consistent through the adoption of standard alternative measures. An *alternative measure* is a modification to a project that if adopted would achieve consistency with the ACMP's enforceable policies. 11 AAC 110.990(a)(3).

²DCOM provided these district coastal management plans on disc.

³The *Office of Project Management/Permitting* preliminary plans were reviewed at <http://www.alaskacoast.state.ak.us/District/html/ProgressFinal.htm>.

⁴*Final Plan in Effect* plans were reviewed at <http://www.alaskacoast.state.ak.us/District/html/ProgressApproval.htm>.

for disapproval. We reviewed the mediated plans for consistent application of the regulations. We also compared the district plans' submission dates to their dates of approval by the DNR commissioner to evaluate the efficiency of the district plan review process.

We interviewed DNR's management as well as DCOM's management and staff regarding various aspects of ACMP operations. We also interviewed DEC, the Department of Community, Commerce, and Economic Development, working group members, industry stakeholders, the Environmental Protection Agency, and NOAA regarding the impact of the ACMP's changes.

We interviewed the regional coastal resource district representatives and conducted a web survey of coastal resource district coordinators regarding the impact of the ACMP's changes on the ability to establish enforceable policies and designate areas, the scope of the ACMP consistency reviews, and the State's rights under the CZMA. The survey also asked for the coordinator's assessment of DNR's administration of the ACMP and whether the program is operating in the public's interest.

ORGANIZATION AND FUNCTION

The Alaska Coastal Management Program (ACMP) is a voluntary state program authorized by the amended Coastal Zone Management Act of 1972 (CZMA). The ACMP is a networked program driven by the participation and cooperation of various state agencies, coastal resource districts, industry, and the public.

The Division of Coastal and Ocean Management (DCOM)

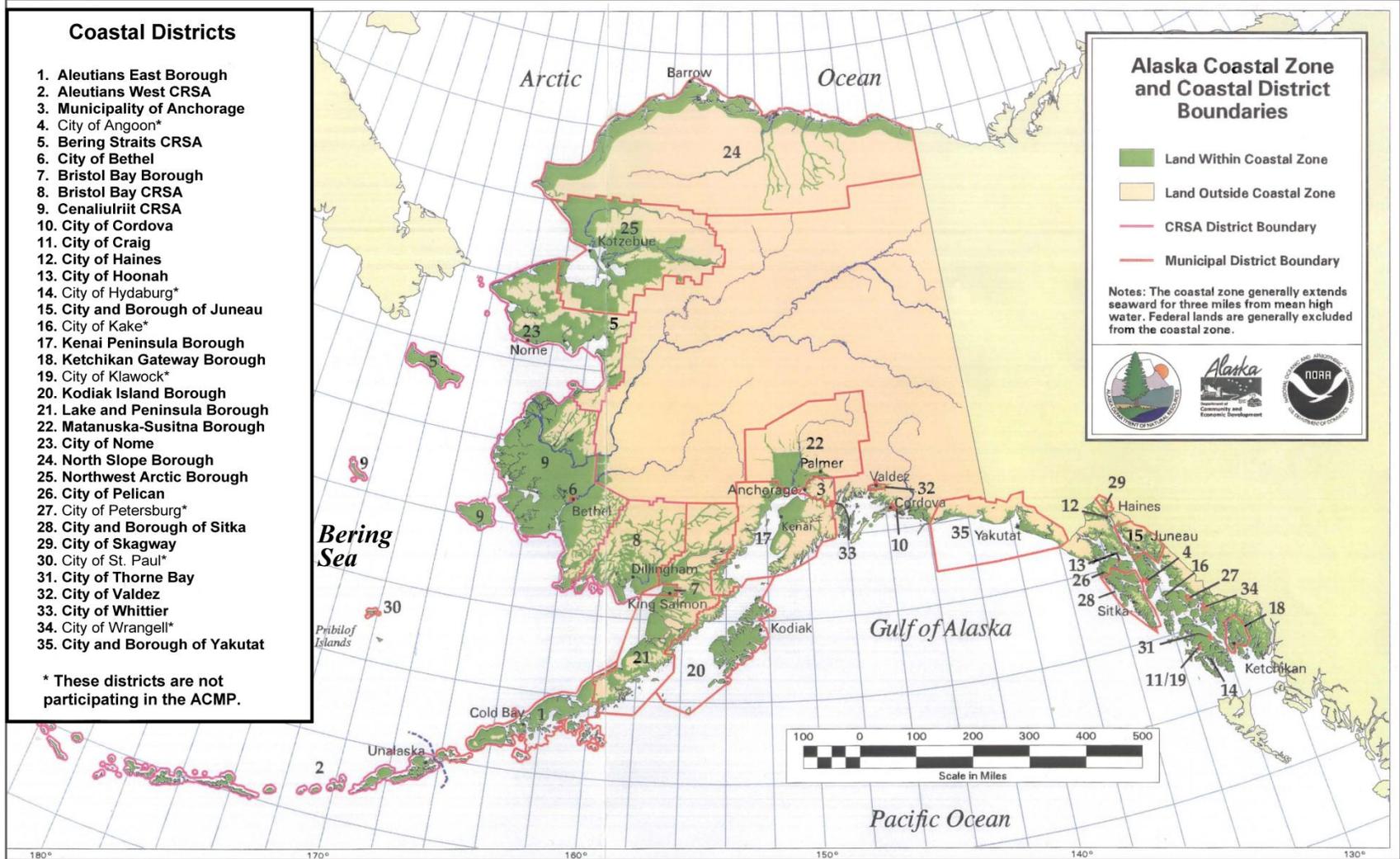
The ACMP is administered by the Department of Natural Resources (DNR), DCOM. Administration of the program includes:

- Reviewing and approving district coastal management plans.
- Coordinating the ACMP's consistency reviews.
- Proposing statutory and regulatory changes to improve coastal management.
- Funding grants and offering technical assistance to coastal resource districts.
- Coordinating regular working group and district meetings.
- Encouraging participation of coastal resource districts and the general public.

DNR is one of three resource agencies involved in the implementation of the ACMP. The other two resource agencies are the Department of Environmental Conservation (DEC) and the Department of Fish and Game (DFG). Other participating agencies include the Department of Commerce, Community, and Economic Development (DCCED); the Department of Transportation and Public Facilities (DOTPF); and the Department of Law (Law). Divisions within DNR that participate are: the Division of Agriculture (Agriculture); the Division of Geological and Geophysical Surveys (DGGS); the Division of Forestry (Forestry); the Division of Mining, Land, and Water; the Division of Oil and Gas (DOG); and the Division of Parks and Outdoor Recreation (Parks). These agencies receive ACMP and CZMA funding for their involvement in the ACMP. Responsibilities of the agencies may include:

- Providing technical assistance during district coastal management plan review and consistency reviews.
- Issuing permits for activities subject to the ACMP consistency review process.
- Coordinating and reviewing proposed coastal projects for consistency with the ACMP.
- Monitoring and reviewing projects to ensure compliance with the ACMP.
- Participating in special ACMP projects and the ACMP working group.

Exhibit 1



Provided by DNR

In the spring of 2008, DCOM began organizing monthly district teleconferences to facilitate better communication between itself and the coastal resource districts. Agenda items are determined jointly by DCOM and the coastal resource districts.

The Coastal Resource Districts

As shown on the map (Exhibit 1, previous page), Alaska's coastal zone has 35 coastal resource districts. Local government participation in the ACMP is voluntary; currently, there are 28 coastal resource districts participating through local implementation of the program. Twenty-five of the districts have approved district coastal management plans, which include their district enforceable policies and designated areas. Of the participating coastal resource districts without plans, one is awaiting final approval and two are pending. Projects that go through a consistency review in districts without an approved plan are reviewed for consistency with the statewide coastal management plan.

Most of the coastal resource districts are organized local governments with zoning and other land use authority granted through Title 29 of the Alaska Statutes. These local governments implement their own district coastal management plans under that authority. Four coastal districts are not organized governments. These districts have formed coastal resource service areas (CRSAs) to participate in the ACMP. The CRSAs do not have land use planning and zoning authority and must rely on state agencies to enforce their district coastal management plans.

The ACMP Working Group

The ACMP working group consists of eight agency representatives, six DNR division contacts, and four coastal resource district representatives. The agency members represent each of the participating departments (DCCED, DEC, DFG, Law, and DOTPF) as well as several divisions within DNR including DCOM, Agriculture, Forestry, DGGS, DOG, and Parks. The four coastal resource district members represent the four regions of the coastal zone: northwest, southwest, southcentral, and southeast.

Responsibilities of the working group members include resolving interagency disagreements, advising their respective commissioners of ACMP viewpoints and policies, disseminating information throughout their agencies, and coordinating timely agency assistance to the coastal resource districts. The working group meets monthly via teleconference. Meeting topics vary and may include proposed legislation, draft regulations, ACMP projects, and other pertinent items.

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BACKGROUND INFORMATION

Congress passed the federal Coastal Zone Management Act of 1972 (CZMA) to promote effective management, beneficial use, protection, and development of coastal zones nationwide. The federal program encourages states to participate in coastal management and provides funding to assist states in implementing programs at the state level. In addition to receiving funding, states participating in the CZMA have the right to review federal agency and federally-permitted activities occurring in coastal zones or affecting coastal zone uses and resources. The CZMA also encourages, but does not require, the participation of local governments.⁵

In 1977, the Alaska legislature enacted the ACMP within the Office of the Governor, Division of Policy Development and Planning. Also established was the Coastal Policy Council (CPC), which consisted of state agency and local government officials. The CPC's responsibilities included providing leadership for the program, adopting guidelines and standards, reviewing and approving district coastal management plans, and hearing petitions regarding compliance with and implementation of district coastal management plans.

Consistent with the CZMA, the ACMP's objectives center on the effective management of coastal zones through balancing the protection and development of coastal uses and resources. The eight objectives of the ACMP are listed in Exhibit 2 (right).

In 2003, the legislature enacted Ch. 24, SLA 03, which revised AS 46.39 and AS 46.40 and

Exhibit 2

ACMP Objectives

AS 46.40.020. The Alaska coastal management program shall be consistent with the following objectives:

- (1) the use, management, restoration, and enhancement of the overall quality of the coastal environment.
- (2) the development of industrial or commercial enterprises that are consistent with the social, cultural, historic, economic, and environmental interests of the people of the state;
- (3) the orderly, balanced utilization and protection of the resources of the coastal area consistent with sound conservation and sustained yield principles;
- (4) the management of coastal land and water uses in such a manner that, generally, those uses which are economically or physically dependent on a coastal location are given higher priority when compared to uses which do not economically or physically require a coastal location;
- (5) the protection and management of significant historic, cultural, natural, and aesthetic values and natural systems or processes within the coastal area;
- (6) the prevention of damage to or degradation of land and water reserved for their natural values as a result of inconsistent land or water usages adjacent to that land;
- (7) the recognition of the need for continuing supply of energy to meet the requirements of the state and the contribution of a share of the state's resources to meet national energy needs;
- (8) the full and fair evaluation of all demands on the land and water in the coastal area.

⁵16 U.S.C. 1451-1456.

substantially changed the ACMP.⁶ Changes included: transferring the ACMP's development and implementation from the CPC to the Department of Natural Resources (DNR); eliminating the CPC; revising statewide standards and regulations; removing the Department of Environmental Conservation (DEC) permits from the consistency review process, providing that "*DEC's air, land, and water quality standards are the exclusive standards of the ACMP for those purposes;*"⁷ and requiring the coastal resource districts to rewrite their district coastal management plans.

The ACMP is implemented through the consistency review process.

The cornerstone of the ACMP is the consistency review process. Through the consistency review process, certain activities located within or that will have an effect on the coastal zone are evaluated for consistency with the ACMP's enforceable policies which include state resource agency authorities, statewide standards, and district enforceable policies. Participants in the consistency review process include the resource agencies, state agencies that have requested participation, affected coastal resource districts, applicants, and the interested public. The process is applicable to activities that require a resource agency authorization⁸ or federal authorization and federal agency activities.

Within DNR, the Division of Coastal and Ocean Management (DCOM) coordinates consistency reviews for activities that require an authorization from two or more resource agencies or divisions within DNR. DCOM also coordinates reviews of federal agency activities and activities that require a federal consistency determination or certification.

If an activity requires an authorization from only one DNR division, that division coordinates the consistency review and determination process.⁹ Similarly, if a project requires an authorization from a single state resource agency,¹⁰ that agency coordinates the consistency review and determination process.

When a project is submitted for review, if requested, the coordinating agency will provide information about the consistency review requirements to the applicant.¹¹ A pre-review

⁶Prior to the 2003 ACMP changes, Ch. 28, SLA 02 mandated that a coastal resource district could not "*incorporate by reference statutes and administrative regulations adopted by state agencies.*" It also required district coastal management programs that were not consistent with the law to submit revised programs to the CPC within one year. According to DNR management, coastal resource districts did not submit revised programs that would be in compliance with Ch. 28, SLA 02

⁷The ACMP *Handbook of Statutes & Regulations*, p. 158

⁸Per 11 AAC 110.990(a)(6)(A), "*A permit, license, authorization, certification, approval, or other form of permission that a resource agency is empowered to issue to an applicant and that is identified in the C List.*" Examples of authorizations on the C List are: aquatic farm and hatchery permits, offshore mining leases, and oil discharge contingency plans for oil tankers and oil barges.

⁹The Division of Agriculture; the Division of Forestry; the Division of Mining, Land and Water; and the Division of Oil and Gas.

¹⁰DEC or the Department of Fish and Game.

¹¹Per 11 AAC 110.990(a)(4), "*Applicant means a person who submits an application for a resource agency or federal authorization...or an OCS plan to the United States Secretary of the Interior.*"

assistance meeting may be held among the applicant, coordinating agency, resource agencies, and potentially affected coastal resource districts.

Once a packet is determined to be complete, the consistency review begins. Reviews are scheduled for completion within 30 days or 50 days depending on the authorizations that are needed.¹² As part of the review, the coordinating agency:

- Publicly notices the consistency review;
- Distributes the consistency review packet to the review participants;
- Accepts comments on the consistency of the project from the review participants and general public, and distributes the comments to the applicant and other review participants;
- Facilitates discussion among the review participants to attempt to achieve consensus if no consensus exists;
- Renders a proposed consistency determination¹³ with any alternative measures; and
- Renders a final consistency determination.¹⁴

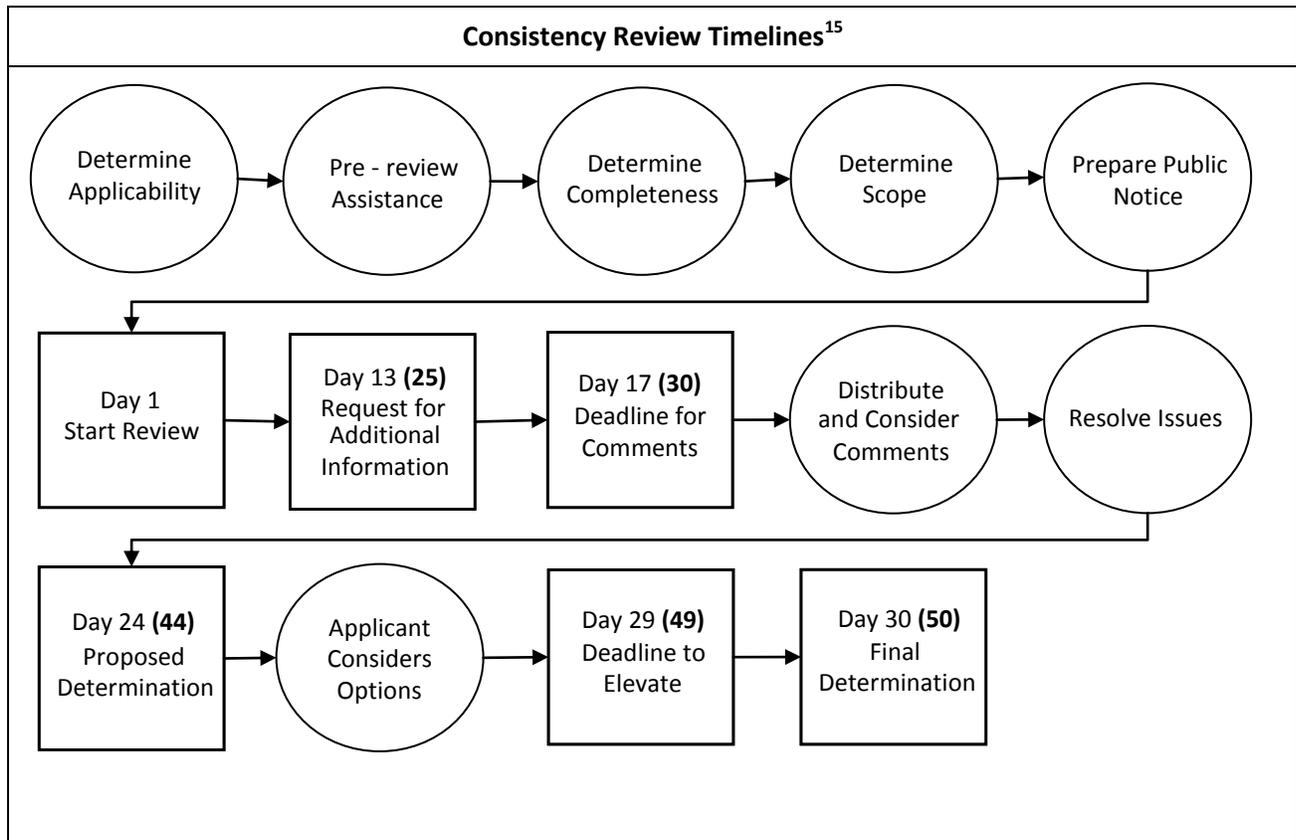
Exhibit 3 (next page) illustrates the consistency review process and the corresponding timeline.

¹²Per 11 AAC 110.230, unless all required authorizations of the project are specifically listed in the C List as 30-day authorizations, the project is subject to a 50-day review.

¹³Per 11 AAC 110.255(f), a proposed consistency determination must (1) contain a description of the proposed project and scope of the project, (2) concur with or object to the applicant's consistency certification, (3) state the availability of an elevation and deadline for requesting one, and (4) be issued by electronic mail or facsimile to the applicant and review participants who may request an elevation.

¹⁴Per 11 AAC 110.260(a), a final consistency determination must (1) contain a description of the proposed project and scope of the project, (2) concur with or object to the applicant's consistency certification, and (3) state that it is a final administrative order and decision under the program.

Exhibit 3



Comments of consistency review participants are given due deference¹⁶ depending on the participant’s area of responsibility or expertise. For example, the Department of Fish and Game (DFG) generally would be afforded due deference with regard to the statewide habitats standard, whereas a coastal resource district generally would be afforded due deference with regard to its district plan. The coastal resource district could still comment on a project’s consistency with a statewide standard, but to be given due deference, it would have to provide evidence to support its position and demonstrate expertise in the field. For consistency determinations that concur with the applicant’s consistency certification, the determination explains how the proposed project is consistent with applicable enforceable policies. For objections to the project, the determination identifies the specific enforceable policies and the reasons why the proposed project is inconsistent with those enforceable policies. The determination also includes any changes made by the coordinating agency between issuing the proposed consistency determination and issuing the final consistency determination. The coordinating agency provides the final consistency determination to the

¹⁵The timeline provides the critical deadlines for a 30-day consistency review. The numbers in the parentheses are the deadlines for a 50-day review.

¹⁶Per 11 AAC 110.990(a)(25), “*Due deference*’ means that deference that is appropriate in the context of (A) the commenter’s expertise or area of responsibility; and (B) all the evidence available to support any factual assertions of the commenter.” *Deference* is the respectful submission or yielding to the judgment, opinion, will, etc., of another.

applicant, each resource agency, and each agency or person who submitted timely comments.¹⁷

There is a 90-day deadline for a consistency review regardless of the issuance of a DEC or other excluded permit. This deadline does not include a review involving the disposal of an interest in state land or resources. Reasons for the review clock to be stopped include if the applicant has not responded in writing to a request for additional information within 14 days. It is also stopped when requested by the applicant and when a decision is elevated to the DNR commissioner.¹⁸ If a determination has not been made at the end of 90 days, the project is presumed to be consistent.

Exhibit 4 (to the right) provides an example of a project that was reviewed for consistency with the ACMP.

The DEC carveout excludes air, land, and water quality issues under DEC's authority from the consistency review.

Chapter 24 of the SLA 2003 changed the ACMP by excluding DEC permits from the consistency review process, and making DEC's regulations the exclusive standards for air, land, and water quality for those purposes. For activities that require DEC permits,¹⁹ DEC's issuance of the permit establishes consistency with the ACMP. For activities that do not involve DEC permits, such as federal agency activities or activities on federal land or the Outer Continental Shelf, DEC first evaluates whether the activity complies with DEC statutes and regulations and then provides its findings to DNR.²⁰

The change was implemented to streamline the process by insulating the consistency review from delays associated with some of DEC's more complex permits and authorizations. While this change allows for concurrent reviews by DEC and the ACMP, it also eliminates the ability of coastal resource districts to develop specific enforceable policies addressing air, land, and water quality issues that are under the authority of DEC.

Exhibit 4

Big Lake Dock Expansion Project

This 2010 project proposed to construct an expansion to an existing personal use dock on Big Lake. The activity required a U.S. Army Corps of Engineers permit and an Alaska, DFG, Fish Habitat Permit, a C List authorization, triggering an ACMP consistency review. Because both a state permit and federal permit were required, this review was coordinated by DCOM. Review participants included the three resource agencies and the Matanuska-Susitna Borough. The 50-day review was completed timely in 38 days and the final consistency determination was that the project was consistent with the ACMP enforceable policies, which included three applicable district enforceable policies.

¹⁷11 AAC 110.260.

¹⁸11 AAC 110.265.

¹⁹Permits, certifications, approvals, and authorizations.

²⁰AS 46.40.040(b).

Coastal resource districts participate in the ACMP through district coastal management plans.

Coastal resource districts participate in the ACMP through the development of district coastal management plans, which include district enforceable policies and designated areas, and through participation in consistency reviews. Chapter 24 of the SLA 2003 required coastal resource districts to rewrite their district coastal management plans. Prior to Ch. 24, SLA 03, there were 33 district plans. Now, there are 25 approved plans, two pending and one in final negotiations. The other five coastal resource districts opted not to continue participating in the ACMP.

Areas can be designated by coastal resource districts during plan development. For example, according to regulation 11 AAC 114.250(g)-(h), a coastal resource district can, “*after consultation with appropriate state agencies, federally recognized Indian tribes, Native corporations, and other appropriate persons or group, designate areas in which subsistence use is an important use of coastal resources.*”

Also, a coastal resource district can designate portions of a coastal area as important habitat if “(1) *the use of those designated portions have a direct and significant impact on coastal water; and (2) the designated portions are shown by written scientific evidence to be biologically and significantly productive.*”

Additionally, an area subject to district enforceable policies “*that will be used to determine whether a specific land or water use or activity will be allowed...must be described or mapped at a scale sufficient to determine whether a use or activity is located within the area.*”²¹

In addition to being designated during plan development, subsistence use; important habitat; historic, prehistoric, and archeological resources; and natural hazard areas can be designated by the State during a consistency review.

Per 11 AAC 114.250 and 11 AAC 114.270, district enforceable policies may address only uses and activities identified in the statewide standards and designations listed in Exhibits 5 and 6 (to the right above).

Exhibit 5

Statewide Standards that District Policies May Address
Coastal Development
Natural Hazard Areas
Coastal Access
Energy Facilities
Utility Routes and Facilities
Sand and Gravel Extraction
Subsistence
Transportation Routes and Facilities

Exhibit 6

Designations that District Policies May Address
Natural Hazard
Recreational Use
Tourism Use
Major Energy Facilities
Commercial Fishing and Seafood Processing
Subsistence Use
Important Habitat
Historical and Pre-historical

²¹11 AAC 114.270(g).

Statutes and regulations provide several specific requirements for district enforceable policy approval. District enforceable policies may not “*duplicate, restate or incorporate by reference*” state or federal statutes or regulations and cannot address a matter regulated by state or federal law or included in the statewide standards discussed above *unless* the policy addresses a matter of local concern. Additionally, the policy must be clear, concise, precise, prescriptive, and “*not arbitrarily or unreasonably restrict or exclude uses of state concern.*”²²

For a matter to be of local concern, the coastal use or resource must be within a defined portion of the district’s coastal zone and must describe or map, in a manner sufficient for plan development and implementation, (1) major land or water uses, or activities that are or have been conducted or designated within or adjacent to the district, and (2) major land and resource ownership, jurisdiction and management responsibilities within or adjacent to the district. The coastal use or resource must also have been:

*Demonstrated as sensitive to development in the resource analysis, [not be] adequately addressed by state or federal law... [be of] unique concern to the coastal resource district as demonstrated by local usage or scientific evidence that has been documented in the resource analysis.*²³

A district coastal management plan must also include an inventory of coastal resources, district resources, and a resource analysis of the impacts of uses and activities that are subject to the district plan. The resource analysis may include appropriate and pertinent local knowledge.²⁴

Comprehensive reevaluation of the ACMP, which started in 2008, has not, to date, resulted in either an administration’s bill to the legislature or any regulatory changes.

Chapter 24 of the SLA 2003 mandated that DNR adopt regulations implementing revisions to the consistency review process, statewide standards, and district plan criteria by July 1, 2004. The process involved state and federal agencies, coastal resource districts, and the public. DNR contractors discussed proposed changes with stakeholders at district conferences and draft regulations were presented at the annual, statewide ACMP conference. Proposed regulations were released for public comment, amended, and adopted on May 24, 2004. DNR subsequently proposed revisions to the statewide standards and the district plan criteria. These were adopted on September 24, 2004, after public comment and amendment.

Following the passage of Ch. 24, SLA 03 and the revisions to the implementing regulations, discontentment has grown among the coastal resource districts over limitations in their ability to establish district enforceable policies. At the January 29, 2008, Senate Community

²²11 AAC 114.270(c)-(e).

²³11 AAC 114.270(h)(1).

²⁴11 AAC 114.230-240.

and Regional Affairs hearing on SB 161, the director of DCOM addressed their concerns, acknowledging:

There have been challenges and he [Director Bates] recognizes that the regulations are more stringent than HB 191 [Ch. 24, SLA 03] intended. DNR will look at what was done to see if the promulgation of the regulations governing district plans was appropriate and what can be done to improve the program. Commissioner Irwin intends to formally and openly reevaluate the regulations, and he will include the coastal districts, public, industry, agency, and applicants. There will be an open dialogue to re-craft the regulations and improve the program.

At a minimum, the reevaluation would reconsider the DEC carveout, the districts' ability to write enforceable policies, the requirements for designated areas, and consistency review issues. In its evaluation of the program, the ACMP's federal oversight agency, the National Oceanic and Atmospheric Administration, Office of Ocean and Coastal Resource Management (OCRM) encouraged DNR's efforts.

On February 22, 2008, a letter from the DCOM director announced that the reevaluation would begin in June 2008. DNR was soliciting comments from the ACMP's participants on the ACMP's guiding statutes in AS 46.39 and AS 46.40, and the implementing regulations in 11 AAC 110, 112, and 114. The written comments resulting from the reevaluation process were intended to be the foundation for proposed statutory changes prepared by DNR to be submitted for consideration during the 2009 legislative session. Subsequent regulations to implement the changes were to be finalized between March and August 2009.

Multiple workshops, teleconferences, and comment periods occurred between June and December 2008 regarding the reevaluation issues and the drafting of proposed statutes and regulations. However, a consensus on the proposed statutory changes could not be reached among the coastal districts and industry. No legislative bill on the proposed ACMP statutory changes was introduced by the administration to the 26th Legislature. DNR is now focusing on proposing revisions to the consistency review process contained in 11 AAC 110.

The ACMP provides funding to coastal resource districts.

The ACMP receives funding from its federal oversight agency, OCRM. A portion of this funding is provided to coastal resource districts through CZMA, Sec. 306, Required Tasks Grants, and CZMA, Sec. 309, Enhancement Grants. These grants are administered by the Department of Commerce, Community, and Economic Development (DCCED). Exhibit 7 (next page) lists the coastal resource district grant awards for FY 11.

Section 306 grants support implementation of district coastal management programs, required tasks, and special projects. Participating coastal resource districts' required tasks include:

- *Participation in project consistency reviews;*
- *Municipal implementation of coastal district policies;*
- *Grant reporting; and*
- *ACMP coordination and outreach within the coastal district.*²⁶

Funding is based on each coastal resource district's population, implementation responsibilities, permitting activity, and other financial resources as well as whether the coastal resource district is a borough or city. CZMA, Sec. 309, Enhancement Grants are awarded to coastal districts for special projects that improve coastal management in the State and result in program change.

ABC List revision process began in 2006.

The Classification of State Agency Approvals, or "ABC List," identifies categories and descriptions of uses and activities that may impact the coastal zone. Some of the uses and activities would require state resource agency and federal permits that trigger an individual consistency review while others would be determined to be categorically or generally consistent with the ACMP without an individual consistency review.

- The A List contains categorically consistent determinations that apply to activities, requiring resource agency authorizations, which only have a minimal impact on the coastal zone. Examples of A List activities would be open burning of materials not prohibited by 18 AAC 50.065, scientific and educational collecting, and investigation of archeological resources.

Exhibit 7

FY 11 Grant Awards²⁵	
Aleutians East Borough	\$17,000
Aleutians West CRSA	\$73,000
Anchorage	\$38,500
Bering Straits CRSA	\$73,000
Bethel	\$6,000
Bristol Bay Borough	\$53,000
Bristol Bay CRSA	\$73,000
Ceñaliulriit CRSA	\$70,000
Cordova	\$6,000
Craig	\$6,000
Haines Borough	\$13,000
Hoonah	\$6,000
Juneau	\$38,500
Kenai Peninsula Borough	\$59,400
Ketchikan Gateway Borough	\$24,000
Kodiak Island Borough	\$24,000
Lake & Peninsula Borough	\$31,940
Matanuska-Susitna Borough	\$38,500
Nome	\$6,000
North Slope Borough	\$38,500
Northwest Arctic Borough	\$17,000
Pelican	\$6,000
Sitka	\$24,000
Skagway	\$13,000
Thorne Bay	\$4,300
Valdez	\$6,000
Whittier	\$6,000
Yakutat	\$13,000
Total	\$784,640

²⁵Amounts represent CZMA, Sec. 306, Required Tasks Grants funding except for Bristol Bay Borough, Kenai Peninsula Borough, and Lake and Peninsula Borough. For these three coastal resource districts, amounts include CZMA, Sec. 306, Required Tasks Grants, and CZMA, Sec. 309, Enhancement Grants.

²⁶http://www.commerce.state.ak.us/dca/planning/acmp/section_306_required_tasks_grants.htm

- The B List contains generally consistent determinations that apply to activities, requiring resource agency authorizations, which can be made consistent through the adoption of standard alternative measures.²⁷ Examples of B List activities would be the application of pesticides registered by the Environmental Protection Agency to private or public land and the moorage of floating houses in navigable waters within Alaska.
- Activities authorized by permits on the C List are subject to an individual consistency review. Examples of authorizations on the C List would be aquatic farm and hatchery permits, offshore mining leases, and oil discharge contingency plans for oil tankers and oil barges.

Chapter 31 of the SLA 2005 mandated that DNR review and update the ABC List's categorically and generally consistent determinations within two years after OCRM's approval of the amended ACMP. OCRM approved the amended ACMP on December 29, 2005. The revision process, which began in March 2006, has not been completed.

²⁷An *alternative measure* is a modification to a project that if adopted would achieve consistency with the ACMP's enforceable policies. 11 AAC 110.990(a)(3)

REPORT CONCLUSIONS

The Alaska Coastal Management Program (ACMP) is operated openly and transparently in many ways, but is lacking in certain aspects.

The ACMP process is a very participatory process that requires continuing and clear communications. Therefore, the concepts of openness and transparency are critical to maintaining active involvement by state agencies, coastal resource districts, industry, and the public. While in many ways the ACMP is operated through an open and transparent process, there are certain aspects of its process where openness and transparency are deficient.

Examples of these certain deficiencies include:

- The Division of Coastal and Ocean Management (DCOM) does not generally record or take minutes for working group meetings. While there are agendas, there are no recordings or minutes of working group meetings. However, during the reevaluation, the workshops were documented by a third-party facilitator.
- DCOM does not distribute review participant materials to coastal resource district consultants even if requested to by the coastal resource district. (See Recommendation 1.)
- DCOM management did not respond in writing to ACMP reevaluation comments provided by coastal resource districts, other state agencies, industry, and the public. Written comments were submitted by various ACMP participants during the 2008 ACMP reevaluation's two comment periods. DCOM says it responded to the comments during teleconferences, but had not responded in writing since the formal public process had not started. Several coastal districts said they either received no response or were only told that their comments were considered.
- DCOM has not kept participants actively informed about the status of the ACMP reevaluation process. Recognizing the process for statutory or regulatory changes that are controversial can be prolonged, it becomes essential to maintain communication with the participants to ensure their continued engagement in the overall project. This project started in 2008 and has not been completed.

ACMP participants were asked to participate in the reevaluation and many of them did expecting there would be change. However, it has been over two years without change and several ACMP participants are disillusioned by the process. One coastal resource district said there is no visibility in decision-making. One agency agrees saying that there is the perception that the Department of Natural Resources (DNR) commissioner's office is working "*behind closed doors*" and no one knows how its

decisions are made. For example: in October 2009, DNR requested an attorney general opinion on coastal districts' authority to develop enforceable policies. A year later coastal resource districts have not been informed of the attorney general opinion's status. To DCOM management's knowledge, the request was forwarded to the Office of the Governor, but has not moved to the Department of Law.²⁸

While there is no requirement that DCOM record meetings or respond to comments it solicited, doing so would improve openness and transparency both in fact and in appearance. DNR should improve its openness and transparency to maintain a participatory and collaborative environment for the various parties involved in the ACMP process.

DCOM's policy regarding consultants disregards coastal district autonomy.

DCOM's unwritten policy is that consultants cannot be on consistency review participant lists. Management's intent is to improve coastal district representation in the ACMP. However, such an unwritten policy denies coastal districts autonomy over what is ultimately a coastal district management decision.

DCOM maintains two distribution lists for project reviews: an interested party list and a review participant list. Recipients on the interested party list receive the project review start-up letter and a copy of submitted comments if requested. The review participants receive review suspension and re-start notices, proposed consistency determinations, and other project information, which is also available on DCOM's FTP internet site.

There is no written policy or regulation that specifically prohibits distribution of materials to a consultant. However, DCOM's unwritten policy is that the point of contact must be a board member or employee of the coastal resource district. According to DCOM, it complicates matters when a third party is requesting to be the point of contact because all review participants need to clearly know who the district point of contact is and who can comment during a review. DCOM's decision to disallow consultants is based on feedback they received at their annual meetings where coastal resource districts stated they want local representation.

DCOM's communication regarding its policy to not add consultants to consistency review participant lists has been inconsistent. For example, communicating that a board chair can designate a consultant and subsequently requesting information regarding how the district would like the consultant to act on its behalf sends mixed signals when previous requests have been denied. Furthermore, while DCOM's intent in denying consultant involvement is to bolster coastal district representation, this unwritten policy disregards the coastal district's right to determine on its own behalf when that representation is best achieved through a consultant. (See Recommendation 1.)

²⁸According to the Department of Law, as of December 20, 2010, it has not received DNR's request for an attorney general opinion.

DNR is an appropriate agency to administer the ACMP.

The ACMP's objectives center on the effective management of the coastal zone through balancing the protection and development of coastal uses and resources. Key components of the ACMP's objectives include, for example, enhancing environment's overall quality, development consistent with the interests of the people, sound conservation and sustained yield, and evaluating all demands on land and water in coastal areas.

DNR is one of three resource agencies involved in the implementation of the ACMP. DNR's mission is "*to develop, conserve, and enhance natural resources for present and future Alaskans.*"²⁹ Furthermore, as outlined in AS 38.04.005(a)-(b), DNR's purpose is to ensure that the use of state land is in the public's interest. Both its mission and purpose are consistent with the objectives of the ACMP. As such, DNR is an appropriate agency to administer the ACMP.

The ACMP's other two resource agencies are the Department of Environmental Conservation (DEC) and the Department of Fish and Game (DFG). DEC and DFG have similar missions as that of DNR.³⁰ Their common purpose – to protect and enhance Alaska's natural resources and ensure that development is in the best interest of the public – also supports the objectives of the ACMP. Therefore, DEC and DFG could be appropriate agencies as well. Finally, because the coordination function is a critical element of the ACMP process, the Office of the Governor could also be considered an appropriate location for the ACMP.

ACMP changes have centralized decision-making and lessened consensus building among review participants.

Changes made to the ACMP following passage of Ch. 24, SLA 03 have centralized in the DNR commissioner's office decision-making that was formerly the Coastal Policy Council (CPC) and the resource agency directors or commissioners' responsibility. The changes have also lessened the consensus-building aspect of the ACMP consistency review.

Prior to statutory changes in 2003, the ACMP was governed by the CPC. The CPC consisted of the Office of Management and Budget director, six state agency commissioners, and nine local government officials. The CPC was responsible for:

- Adopting ACMP regulations and supporting resolutions;

²⁹<http://dnr.alaska.gov/>

³⁰DEC's mission statement is "*conserving, improving, and protecting Alaska's natural resources and environment to enhance the health, safety, economic and social well being of Alaskans.*" <http://dec.alaska.gov/>

DFG's mission is "*to protect, maintain, and improve the fish, game, and aquatic plant resources of the state, manage their use and development in the best interest of the economy and the well-being of the people of the state, consistent with the sustained yield principle.*" <http://www.adfg.state.ak.us/mission.php>

- Reviewing and approving coastal district management plans;
- Providing general policy leadership for implementation of the ACMP; and
- Hearing petitions regarding compliance with and implementation of district coastal management plans.

Under the former program, consistency review determinations could be elevated first to the resource agency directors and then to the resource agency commissioners.

Chapter 24 of the SLA 2003 eliminated the CPC and transferred the ACMP's development and implementation from the CPC to DNR. The DNR commissioner now has sole responsibility for approving coastal district management plans and reviewing consistency determinations that are elevated to him. This centralized decision-making has been criticized for lacking impartiality and local representation. However, a perceived weakness of the CPC was that sometimes the local members were not well-informed.

In our prior audit of the ACMP in 1995, we noted that the consistency review is generally a consensus-building process. During the current audit, we reviewed 38 consistency review files for participating coastal resource districts to determine if comments were considered and due deference afforded in accordance with regulations. In 37 of the reviews, comments were considered and due deference was properly given. In one consistency review, DCOM did not properly follow the consensus process. The consistency review determination was elevated to the commissioner, and the commissioner concurred with the coastal resource district on this matter.

Since they were not elevated, consensus is considered to have been reached on 37 of the 38 consistency reviews tested; however, it is not the same consensus-building process it once was. During FY 10, coastal resource districts commented in approximately 45 percent of the consistency reviews versus approximately 70 percent in 1994. According to a resource agency staff member, the *"balance of power has changed because applicants and agencies do not listen as much to districts because districts do not have [as many] policies anymore...some districts do not show up to [consistency review meetings] because they are disheartened."*

In addition to the elimination of the CPC, three other changes contributed to the reduced consensus-building nature of the ACMP process. First, the number of coastal resource district enforceable policies was reduced resulting in fewer coastal resource district comments. Second, the movement of the program from the Office of the Governor to a resource agency may have strained relationships among program participants. As one staff member noted, *"If you move the program to one agency, the other agencies do not want to play."* And third, another significant difference noted by resource agencies and coastal districts is that DEC is not the strong participant that it was before the DEC carveout.

The legislature should reauthorize the ACMP.

Chapter 31 of the SLA 2005, Section 18, repeals the ACMP statutes. As a result, this program will terminate on June 30, 2011. In developing our conclusion on whether the ACMP should be reauthorized, we evaluated the ACMP's operations using the 11 criteria set out in AS 44.66.050(c) to determine if the program has demonstrated a public need for its continued operation.

The ACMP's mission is to provide "*stewardship for Alaska's rich and diverse coastal resources to ensure a healthy and vibrant Alaskan coast that efficiently sustains long-term economic and environmental productivity.*"³¹ Through the ACMP's coordinated consistency review process, the State and coastal resource districts evaluate activities occurring in or having an effect on the state's coastal zone. This evaluation extends to federal agency and federally-permitted activities.

We found that there is a demonstrated public need for the program's continued existence. Therefore, we recommend the legislature either repeal Ch. 31, SLA 05, Sections 1-13, 18 and 22 or, if another program evaluation is preferred, the legislature can amend Section 22 to state, in part: "*Sections 1 - 13 and 18 of this Act take effect July 1, 2015.*"

This four-year period would allow time for DNR to complete its 2008 reevaluation of the ACMP and finalize regulation changes and the ABC List revision initiated in 2006. At the end of the four year period, the program could again be evaluated in accordance with AS 44.66.050(c).

³¹<http://alaskacoast.state.ak.us/>

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FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

The Division of Coastal and Ocean Management (DCOM) should allow coastal resource districts to designate their own representation.

DCOM will not distribute review participant materials to a consultant or allow a consultant to be designated by coastal resource districts as a point of contact for consistency reviews. DCOM does not have a written policy against doing so and regulations in 11 AAC 110.235(d)(2)³² and 11 AAC 110.990(a)(41)³³ do not exclude consultants from being the designated contact for a coastal resource district, nor do they exclude them from the consistency review participant distribution list. DCOM's intent for disallowing consultants is to bolster coastal district representation in the Alaska Coastal Management Program (ACMP) and maintain a single point of contact.

Refusing to allow consultants to be on a consistency review distribution list has resulted in timely information not being available to review the status of a project and provide comments when board member contacts were inaccessible. While the intent of the unwritten policy is to encourage coastal resource district representation in the ACMP, it does not recognize coastal resource districts' autonomy in determining how that representation is best achieved.

DCOM should facilitate coastal resource district participation in the ACMP by allowing coastal resource districts to designate consultants as their point of contact if they decide it is in their best interest to do so.

Recommendation No. 2

DNR should complete the ABC List revision and ACMP reevaluation it began years ago.

Completion of the ABC List revision is three years past the deadline set out in Ch. 31, SLA 05. Additionally, while the ACMP reevaluation does not have a similar statutory deadline, the Department of Natural Resources (DNR) had planned to have a proposal ready for the 26th Legislature's consideration. In 2006, DNR began revising the ACMP's ABC List

³² "On or before Day 3, the coordinating agency shall provide to each review participant a copy of the consistency review packet, the review schedule with a solicitation for review participants' comments, and a deadline for receipt of comment; and (3) either (A) provide a copy of the consistency review packet to a person requesting the information; or (B) make a copy of the consistency review packet available for public inspection and copying at a public place in an area that the project may affect, including within a district that the coordinating agency considers is likely to be an affected coastal resource district."

³³ "'Review participant' means a resource agency, a state agency that has requested participation in a consistency review, and an affected coastal resource district."

and in 2008 the agency embarked on a comprehensive reevaluation of the ACMP's statutes and regulations. While DNR has directed resources toward both initiatives, neither process has been completed. Additionally, the proposed 11 AAC 110 regulation changes DNR planned to release for public comment in October 2010 have not been released.

With both the ABC List revision and the ACMP reevaluation, lack of consensus was the reason given for not pursuing change. As a result, the ACMP is operating with an outdated list of categorical and general consistency determinations and with regulations that are more stringent than anticipated under Ch. 24, SLA 03. There is concern among coastal resource districts and resource agencies that DNR is not open and transparent and lacks follow-through. While DNR has administered the ACMP effectively in other respects, it has failed to operate effectively and efficiently in this regard.

DNR has had almost five years to revise the ABC List and over two years to reevaluate the ACMP's statutes and regulations. It is time for DNR to act effectively. DNR should commit to completing both processes timely.

ANALYSIS OF PUBLIC NEED

The following analyses of the Alaska Coastal Management Program (ACMP) activities relate to the public need factors defined in AS 44.66.050(c). These analyses are not intended to be comprehensive, but address those areas we were able to cover within the scope of our review.

Determine the extent to which the board, commission, or program has operated in the public interest.

The ACMP has operated in the public's interest by conducting consistency reviews, funding and providing technical assistance to coastal resource districts to develop and implement district coastal management plans, conducting various coastal resource management projects, encouraging the participation of coastal resource districts and the general public, and providing information on coastal zone management.

The cornerstone of the ACMP is the consistency review process. Through the ACMP's consistency review process, activities in or that have an effect on the coastal zone are reviewed for consistency with the ACMP's enforceable policies. Activities can be determined to be consistent through individual consistency reviews or expedited reviews. In FY 10, Division of Coastal and Ocean Management (DCOM) coordinated over 170 individual consistency reviews. Expedited reviews include general consistency and categorical consistency determinations. Categorically consistent determinations apply to activities that have only a minimal impact on coastal uses or resources. Generally consistent determinations apply to activities that can be made consistent through the adoption of standard alternative measures.

As discussed in Background Information, the ACMP provides grants to coastal resource districts to develop and implement district coastal management plans, perform required tasks, and conduct special projects.³⁴ Grants awarded to coastal resource districts in FY 11 totaled \$784,640.

In addition to funding, DCOM provides technical assistance to coastal resource districts. Almost two-thirds of the coastal resource districts surveyed were critical of the technical assistance they received during district plan revision. However, several coastal resource districts were complimentary of DCOM's consistency review staff stating they were professional, work well with the regional coordinators, try hard to involve and communicate more with the districts, and keep districts informed of projects in their area of the coastal zone.

³⁴Funding could be used to support scientific studies for the designation of areas, such as important habitats.

Various studies are funded through the ACMP. Recent ACMP studies include the Natural Hazards Resilience Project. The objective of this study was to research the resiliency approach to natural hazards planning and develop guidance on how it can be implemented through coastal district management plans. The resiliency approach includes an “*assessment of socio-economic structures, environmental systems and habitats, and traditional critical infrastructure.*”³⁵ Another ACMP study is the Cumulative Impacts on Dock Project. The objective of this study is to improve Alaska’s dock permitting process by studying and comparing the dock management regimes of other states. The ACMP also funded studies in the Coastal Nonpoint Source Pollution Program. One study performed under this program was of fish habitat conditions on private timberlands in southeast Alaska. Another study has been to develop a Clean Harbor Certification program to protect water quality and marine life from pollutants.

The ACMP also serves the public’s interest by encouraging the participation of coastal resource districts and the general public and by providing information about the ACMP and coastal zone management. As discussed in Report Conclusions, the coastal resource districts and the general public are involved in the ACMP’s fundamental processes – including the consistency review and the ACMP reevaluation. DCOM facilitates monthly coastal resource district meetings to disseminate ACMP information and coordinate assistance to coastal resource districts.

DCOM also maintains the ACMP website that provides information about the program, the consistency review process, coastal resource districts, and district coastal management plans. It also provides links to reference materials, guidance for the coastal resource districts, current ACMP news, and ACMP activities. Its outreach and education page has interactive games, educational web links, pamphlets, and brochures.

Determine the extent to which the operation of the board, commission, or agency program has been impeded or enhanced by existing statutes, procedures, and practices that it has adopted, and any other matter, including budgetary, resource, and personnel matters.

Depending on which ACMP participant is asked, the Department of Environmental Conservation (DEC) carveout has been either an enhancement or an impediment. According to industry, delays in the consistency review process have been reduced by removing air, land, and water quality issues under DEC’s authority from the ACMP consistency review process and allowing the ACMP consistency review process to run concurrently with the processing of more complex permits. However, according to other ACMP participants, the DEC carveout has diminished the value of the ACMP as a networked program because consensus-building is lessened and impacts to air, land, and water quality are considered in isolation from other uses and resources. Additionally, DEC consistency findings cannot be elevated, which puts a constraint on public participation. The DEC carveout is discussed in

³⁵The Natural Hazards Resiliency Working Group, “*Maximizing Natural Hazards Planning: The Resiliency Approach and Possibilities in Alaska,*” August 13, 2010.

*Department of Natural Resources, Alaska Coastal Management Program, Part 1.*³⁶

As previously discussed in Report Conclusions, the ACMP's statutory and regulatory changes coupled with the Department of Natural Resource's (DNR) operational practices have led several coastal resource districts to question whether they can meaningfully participate in the ACMP. A reduced coastal resource district role, DNR's lack of follow-through on regulation projects, and DNR's perceived lack of openness and transparency adds to their discontent.

A practice of primarily one Department of Fish and Game (DFG), Division of Habitat office has been to issue permits that are consistent through general consistency determinations (GCD)³⁷ without consulting DCOM or the coastal resource district. Activities that require permits that are subject to GCDs may be excluded from an individual consistency review. However, regulations require that the coordinating agency consult with the coastal resource district and resource agencies before making that determination. According to DFG, the regulations are unclear and it is following the procedures agreed on with DCOM until DCOM revises the regulations. DCOM is addressing this issue in its revision of 11 AAC 110.

In FY 11, another impediment to operations has been DCOM's lack of authority to administer grants. Because DCOM does not have the statutory authority to administer grants, it contracts with the Department of Commerce, Community, and Economic Development (DCCED) to administer the awards on DCOM's behalf. This year's grants were supposed to be awarded in July 2010; however, they were not awarded until early October 2010. The two agencies disagreed on their respective roles. While DCCED has the responsibility of monitoring the grantees, the Office of Ocean and Resource Management (OCRM) believes the federal oversight agency for the ACMP, DCOM retains responsibility for the proper use of the funds. Some coastal resource districts noted that the delay in receiving the funds caused by DCOM and DCCED's disagreement created a hardship for them.

On the following page, Exhibit 8 shows the ACMP's expenditures for FY 08 through FY 10.

³⁶Audit control number 10-30060A-11

³⁷Generally consistency determinations apply to activities, requiring resource agency authorizations, which can be made consistent with the ACMP through adoption of standard alternative measures.

Exhibit 8

Schedule of Expenditures (Unaudited)			
	<u>FY 08</u>	<u>FY 09</u>	<u>FY 10</u>
Expenditures			
Personal Services	\$1,866,382	\$2,153,872	\$ 2,165,520
Travel	110,254	74,268	60,155
Services	818,081	855,424	870,261
Commodities	26,156	18,339	29,347
Grants and Benefits	<u>502,743</u>	<u>1,193,124</u>	<u>832,050</u>
Total Expenditures	\$3,323,616	\$4,295,027	\$ 3,957,333

Source: State Accounting System

Determine the extent to which the board, commission, or agency has recommended statutory changes that are generally of benefit to the public interest.

Since 2003, DNR has not pursued any statutory changes. In response to concerns regarding the effectiveness of the 2003 statutory and 2004 regulatory changes to the ACMP, DNR conducted a comprehensive reevaluation of the program in 2008. The comments were to be the basis of proposed statutory and regulatory changes to be considered during the 2009 legislative session. Because industry and coastal resource districts were unable to reach a consensus, the administration did not introduce a bill.

Over the last year, DNR has been focusing its efforts on revising the 11 AAC 110 regulations, which provide guidance on the consistency review.

Determine the extent to which the board, commission, or agency has encouraged interested persons to report to it concerning the effect of its regulations and decisions on the effectiveness of service, economy of service, and availability of service that it has provided.

In general, coastal resource districts and agencies believe that DNR has encouraged interested persons to report to it concerning the effect of its regulations and decisions. However, an overall concern is the agency's lack of responsiveness to comments.

Of the agencies interviewed, seven out of nine agencies stated that DNR has encouraged interested persons to report to it. Additionally, just under half of the coastal resource districts surveyed are positive about DNR's encouragement. What is cited as a concern by both agencies and coastal resource districts, however, is not that DNR does not encourage feedback, but that it does not appear to act on feedback provided. Several agencies and coastal resource districts stated that DNR does not follow through on comments received. As

previously discussed, the 2008 ACMP reevaluation solicited feedback from ACMP participants, but their efforts did not lead to any new statutes or regulations. Furthermore, the ABC List revision began almost five years ago and has not been completed.

There is not a consistent belief among participants that the working group is functioning as intended. According to several coastal resource districts and agency working group members, the working group is ineffective and without clear objectives. To a minority of agency working group members, however, the working group has been collaborative and a vehicle for participants to relay information to DCOM. Suggestions for increasing its focus and effectiveness include establishing clear objectives and meeting when there are high priority topics rather than monthly.

Determine the extent to which the board, commission, or agency has encouraged public participation in the making of its regulations and decisions.

The ACMP is a networked program driven by the participation and cooperation of various state agencies, coastal resource districts, industry, and the public. Although DNR has not made any regulatory changes since 2005, it has encouraged public participation in the drafting of proposed regulations. The ACMP consistency review process is a public process as well.

As part of its comprehensive 2008 reevaluation of the ACMP statutes and regulations, DNR held multiple workshops, teleconferences, and public comment periods to solicit input and feedback from ACMP participants. However, consensus could not be reached between industry and coastal resource districts and no legislative bill on the proposed ACMP statutory changes was introduced by the administration to the 26th Legislature. During 2009, DNR focused its efforts on revising the consistency review process contained in 11 AAC 110. The working group and coastal resource districts were involved in this process as well. Proposed regulations were expected to be released for formal public comment in October 2010.

Projects being reviewed by the ACMP are open to public review and comment. Under 11 AAC 110.500, each consistency review must be publicly noticed, the notice must solicit public comments, and the review materials must be made available in a public place. Our testing of 39 consistency reviews confirmed that DNR is properly providing public notice of consistency reviews coordinated by DCOM.

Determine the efficiency with which public inquiries or complaints regarding the activities of the board, commission, or agency filed with it, with the department to which a board or commission is administratively assigned, or with the office of victims' rights or the office of the ombudsman have been processed and resolved.

For the period FY 07 through FY 10, the Office of Victims' Rights reported no complaints filed with it regarding the ACMP. The Office of the Ombudsman reported two complaints filed. These complaints are under investigation. Additional inquiries or complaints during

this period were reported by DCCED and DNR.

The coastal resource districts submit quarterly and annual progress reports to the DCCED, Division of Community and Regional Affairs (DCRA). The quarterly and annual progress reports provide an opportunity for coastal resource districts to provide comments regarding program operations. Over the four-year period of FY 07 through FY 10, 29 concerns from 15 coastal resource districts were reported regarding the ACMP's changes. Concerns included: the inability to write enforceable policies; gaps in enforceable policies; and the inability to designate areas. According to DCOM management, there were no written responses to the coastal resource districts, but DCOM reads each coastal resource district's quarterly reports. If the coastal resource district or DCOM has concerns, DCOM usually calls the coastal resource district and/or DCRA. DCCED also received five letters of inquiry or complaint. The subjects of the correspondence included coastal resource district hiring practices, district plan revision, and ACMP management concerns. Three of the inquiries or complaints had been resolved. The remaining two letters had received written responses from DNR, and the agency and coastal resource district were working on resolving the matters.

In addition to correspondence received by DCCED and reevaluation comments, DNR received two letters of inquiry during FY 07 through FY 10. One letter requested assistance from DCOM and the other requested delay of the ABC List review. DNR provided a written response to the first request, but not the second. Although there is no record of DNR responding to the second request, the ABC List revision is pending revision of 11 AAC 110.

Determine the extent to which a board or commission that regulates entry into an occupation or profession has presented qualified applicants to serve the public.

This criterion is not applicable since the ACMP does not regulate any occupations or professions.

Determine the extent to which state personnel practices, including affirmative action requirements, have been complied with by the board, commission, or agency to its own activities and the area of activity or interest.

The Division of Personnel reported one complaint regarding the ACMP that was closed due to lack of substantial evidence.

Determine the extent to which statutory, regulatory, budgeting, or other changes are necessary to enable the agency, board, or commission to better serve the interests of the public and to comply with the factors enumerated in this subsection.

The general consensus among participants of the ACMP is that changes are necessary for the program to better serve the public's interest. Completing the ABC List revision initiated in 2006 and the ACMP reevaluation initiated in 2008 are at the forefront of needed actions.

Statutory, regulatory, and ABC List revisions were the main issues mentioned by agencies. The ABC List update was also stressed by industry participants as requiring attention. Coastal districts emphasized that statutory and regulatory changes were needed to specifically address the DEC carve-out, designated areas, and local concern requirements.

In March 2006, DCOM began the ABC List revision. The process has not been completed due to lack of consensus over how generally consistent determinations will be implemented. DCOM has determined that the 11 AAC 110 revisions need to be completed before the ABC List can be revised. DCOM has been working on the 11 AAC 110 revisions and planned to release proposed changes for public comment in October 2010.

As previously discussed, DNR began a comprehensive reevaluation of the ACMP in 2008. Multiple workshops, teleconferences, and public comment periods were held between June and December 2008 to solicit input and feedback from ACMP participants. The proposed statutes were to be finalized and introduced to the legislature for consideration in January 2009, with the finalized changes made to the regulations between March and August 2009. When consensus could not be reached between industry and coastal resource districts, no legislative bill on the proposed ACMP statutory changes was introduced by the administration to the legislature. As discussed in Report Conclusions, some ACMP participants have expressed frustration over DNR's perceived lack of follow-through. (See Recommendation 2.)

Determine the extent to which the board, commission, or agency has effectively attained its objectives and purposes and the efficiency with which the board, commission, or agency has operated.

The ACMP's objectives are contained in AS 46.40.020. These objectives center on effective management of the coastal zone through balancing the protection and development of coastal uses and resources. As discussed in the ACMP part 1 report,³⁸ achievement of these objectives is subjective and difficult to measure. However, some of the ACMP's primary responsibilities provide an indication of DNR's operational effectiveness and efficiency in administering the program. Among its accomplishments are revision and implementation of ACMP regulations, district coastal management plan review and approval, and consistency reviews.

Following enactment of Ch. 24, SLA 03, DNR was tasked with revising the ACMP regulations. Changes were made to the regulations guiding the consistency review process and district plans as well as the statewide standards. The revised regulations were drafted and implemented within a short time period. The ACMP's federal oversight agency OCRM commended DNR for its efforts and diligence in implementing the ACMP's changes and for maintaining a federally-approved program. As previously discussed, DNR has been less

³⁸Department of Natural Resources, Alaska Coastal Management Program, Part 1, November 26, 2010; Audit control number 10-30060-11

effective and efficient in moving forward with its 2008 reevaluation of the ACMP and with the ABC List revision process it began in 2006.

Chapter 24 of the SLA 2003 required coastal resource districts to revise their district coastal management plans. The plans were to be revised and submitted to DNR for review by March 1, 2006.³⁹ When Ch. 24, SLA 03 was enacted, there were 33 district coastal management plans. Of these plans, 28 were revised and submitted to DNR for review and 25 have been approved and are in effect.⁴⁰ Approximately 70 percent of the approved district plans were reviewed, revised as necessary, and approved by the DNR commissioner within approximately a year of initial plan submission. Almost one-third of these went through the process within seven months. The remaining plans were approved within two years of initial plan submission. Assisting 28 coastal resource districts in the development of their district plans in this timeframe is notable in itself, but even more so given that DNR was concurrently learning and implementing new regulations and dealing with a staff shortage.

The intent of Ch. 24, SLA 03 was partially to minimize delays. Based on our testing, it appears that the ACMP has been effective in meeting this intent. As part of our review, we evaluated the efficiency of DCOM's coordination of consistency reviews during FY 10. We tested a sample of 37 consistency reviews for timely completion. The sample included both 30-day and 50-day reviews. In compliance with regulations, the final consistency determination was issued on or before day 30 or day 50 of the review for all 37 consistency reviews.

Determine the extent to which the board, commission, or agency duplicates the activities of another governmental agency or the private sector.

The ACMP offers the State unique benefits that are not provided by other agencies or programs. Two benefits are a "seat at the table" and coordination.

The Coastal Zone Management Act of 1972 (CZMA) is the only program that gives states the right to formally influence federal decisions regarding the coastal zone. The ACMP is Alaska's mechanism for participating in the CZMA. Through implementation of the coordinated consistency review process, the State evaluates the impacts of federal agency and federally-permitted activities on the uses and resources of the state's coastal zone. The ACMP also provides coastal resource districts the opportunity to participate and provide a local perspective.

The ACMP coordinates permitting and consistency reviews for projects and developments. It also coordinates state, local, national, and private interests in the management of coastal uses and resources.

³⁹Chapter 24 of the SLA 2003 required district coastal management plans be revised and submitted for review by July 1, 2005. Chapter 31 of the SLA 2005 extended this date to March 1, 2006.

⁴⁰North Slope Borough, Northwest Arctic Borough, and Bering Straits Coastal Resource Service Area do not have approved district coastal management plans.

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

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February 4, 2011

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FEB 04 2011

LEGISLATIVE AUDIT

Pat Davidson
Legislative Auditor
Division of Legislative Audit
PO Box 113300
Juneau, AK 99811-3300

RE: Alaska Coastal Management Program Audit – Preliminary Audit Report, Part 2,
dated December 29, 2010

Dear Ms. Davidson:

Thank you for the preliminary audit report on the *Department of Natural Resources, Alaska Coastal Management Program, December 29, 2010*. At your request, my agency has reviewed the preliminary audit report and evaluated your conclusions.

My understanding is the intent of the audit report is to provide objective and factual information regarding the Alaska Coastal Management Program (ACMP) and the questions and statutory requirements associated with the audit. While we agree with many of the conclusions reached here, we disagree with one of the recommendations and have some concerns with the information contained in the preliminary audit report.

The Audit Process and Timeframe

It is obvious that the Division of Legislative Audit (DLA) staff involved with this audit have put in a great deal of time and effort to understand the ACMP and to provide an objective and comprehensive evaluation of the program. It is my understanding that several DLA staff were involved and assigned various research tasks, and individually worked with the Division of Coastal and Ocean Management (DCOM) staff of issues of interest. The interrelationships of laws, agencies, ACMP participants, and issues present a significant barrier for anyone wishing to develop a deep understanding of the program; its varied connections and nuances increase the challenge exponentially. I recognize the monumental task it was for you and your staff to complete this preliminary audit report in a timely manner given the short five months you had to initiate and complete the audit findings. We very much appreciate these efforts.

The Report Conclusions

Overall, we can support four of the five main conclusions reached by the audit report. Generally, the audit report has found that the changes implemented by DNR since 2003 have been consistent

“Develop, Conserve, and Enhance Natural Resources for Present and Future Alaskans.”

with the intent of the Legislature. Specifically, the report concludes that the ACMP is operated openly and transparently, that the Department of Natural Resources is an appropriate agency to administer the ACMP, that the changes have centralized ACMP decision-making in the DNR Commissioner's Office, and that the Legislature should reauthorize the ACMP. While we generally agree with these four conclusions, we have concerns with two of them.

In the conclusion that "*The Alaska Coastal Management Program (ACMP) is operated openly and transparently in many ways, but is lacking in certain aspect,*" we are concerned with the latter component of the conclusion. The DLA analysis provides examples of certain perceived deficiencies that do not consider in their entirety the ACMP authorities and DCOM actions. The following are DNR's responses to the items raised in the DLA analysis:

- DLA analysis – DCOM does not generally record or take minutes for working group meetings.

DNR response: As agreed to by participating ACMP working group members and coastal district coordinators, DCOM does not generally record minutes for working group or coastal district meetings. Prior to 2003, some working group meetings were recorded, while some other work sessions of the working group were not. However, prior to 2003, the functions of the Division of Governmental Coordination (DGC) were performed on behalf of the Coastal Policy Council (CPC), and those DGC functions were subject to certain aspects of the Administrative Procedures Act in terms of public notices and meeting minutes. These informal participant meetings are not subject to the same public notice and meeting minute requirements that the former DGC or CPC were, and should not be held accountable as such.

- DLA Analysis – DCOM does not distribute review participant materials to coastal resource district consultants. This unwritten policy disregards coastal district autonomy over what is ultimately a coastal district management decision.

DNR Response: See the discussion below (page 4) addressing "*DCOM's policy regarding consultants disregards coastal district autonomy.*"

- DLA Analysis – DCOM management did not respond in writing to ACMP reevaluation comments provided by coastal resource districts, state agencies, industry and the public.

DNR Response: In June 2008, the DCOM director initiated the re-evaluation of the ACMP to recognize "... the ongoing challenges and the need to address certain implementation problems..." associated with the ACMP. ACMP participants were invited to provide comments and propose changes to the ACMP.

The DLA analysis and conclusions have misunderstood the purpose of DCOM's re-evaluation process. Indeed, the audit report identifies what DLA feels could or should have been changed. The ACMP re-evaluation and associated comments were intended to identify potential changes to the ACMP that would strengthen the ACMP, that would benefit applicants and the public in the coordination of projects, and that would enhance coastal district participation and input into the State decision-making under the ACMP. DCOM and the ACMP participants worked hard to develop and discuss potential ACMP program changes. The re-evaluation documents that were prepared and shared did not necessarily

reflect the division, department, or Administration position, but rather were prepared as conceptual ideas to solicit input and comments and to evaluate whether consensus on certain issues could be achieved. The informal, draft documents that were prepared, including proposed statutes and conforming regulations, should not be considered as the department's proposal for change.

The commenting opportunities under the re-evaluation were informal processes not governed by the Administrative Procedures Act. DCOM considered and evaluated each comment received from the commentors. DCOM did convene public workshops and meetings to bring commentors and interested parties together to discuss their comments and recommendations, as well as division, department, and administration's response and position. During each of the re-evaluation workshops and meetings, DCOM responded verbally to the comments, variations of proposed changes, and the effect or impact a particular change might have on the various ACMP participants.

- DLA Analysis – DCOM has not kept participants actively informed about the status of the ACMP reevaluation process.

DNR Response: The DLA conclusion is inaccurate. DCOM has held monthly meetings of the working group and coastal districts to address any issue a participant would like addressed. DCOM has actively advised the meeting participants of the status of the re-evaluation, which includes legislative actions, updates, meetings, hearings, initiatives, and bills, as well as the preparation and promulgation of the consistency review regulations. In addition to the public meetings DCOM has held to address the re-evaluation, DCOM staff have made individual and personal contact with various ACMP participants, including every active coastal district coordinator, to discuss the status of the re-evaluation and/or the potential changes to the 11 AAC 110 consistency review regulations.

The second conclusion with which we have concerns is that *"ACMP changes have centralized decision-making and lessened consensus building among review participants."* Within the DLA analysis, you state that "...the number of coastal resource district enforceable policies was reduced resulting in fewer coastal resource district comments." It is true that coastal districts have fewer policies as a result of the 2003 legislative directive requiring that district policies be clear, concise, related to local concerns, and not duplicative of state and federal laws.

There are many other factors that could lead to fewer coastal district comments, which could include

- Other existing state laws already address the issue;
- Applicants better understand the clearer ACMP enforceable policies and thus are proposing more refined and compliant projects at the outset; and
- DCOM's pre-application assistance is answering questions, gathering information, and addressing issues prior to the district commenting, therefore minimizing conflicts prior to the start of the consistency review process.

It is important to recognize that coastal districts can comment on the project utilizing enforceable policies including the statewide standards and separately under various state authorities. Coastal districts have confirmed their dislike for commenting utilizing the statewide standards and other state authorities, but it remains a viable commenting opportunity not embraced by the districts.

The main conclusion which we cannot support is “DCOM’s policy regarding consultants disregards coastal district autonomy.” A single, established point of contact within the coastal district is critical for purposes of consistency within consistency reviews. As discussed within the background information of the audit report, state agencies conducting consistency reviews are obligated to consult with coastal districts, and must be aware of and notified of the district staff that is the designated point of contact. In an already complex consistency review process, having a 3rd party serve as a district’s point of contact for a single project or for a short period of time does not benefit the process or the participants.

DCOM has written this requirement into this and prior fiscal year grants with DCCED and the coastal districts to read:

“The Point of Contact [within a coastal district] must be the designated program director or district coordinator and may be temporarily delegated to another employee of the coastal district or a CRSA board member of the coastal district only. The district will provide both DCOM and DCRA written notice of any change to the ACMP Point of Contact within 2 business days.”

The DLA analysis on the consultant and coastal district autonomy is based upon an isolated circumstance with a single consultant representing a single coastal resource service area that did not have an approved plan and was not receiving funding due to significant financial management issues and failures. The DLA conclusion is based on an isolated circumstance, is legally flawed, and includes incorrect information related to the purported unwritten policy.

It is also important to note that the DLA analysis does not consider or acknowledge the ACMP regulations that are controlling on this subject. 11 AAC 110.990(41) defines a review participant to mean “a resource agency, a state agency that has requested participation in a consistency review, and an affected coastal resource district.” Based on this legal definition, it does not appear that a district could delegate coastal district status outside of the organization for purposes of consistency reviews under 11 AAC 110.

DLA Audit Recommendations

DLA Recommendation No. 1 – The Division of Coastal and Ocean Management should allow coastal resource districts to designate their own representation.

DNR does not support this recommendation, as it relates to outside consultants.

The recommendation includes incorrect information related to the written policy (see the discussion above on DCOM’s written policy on a district’s point of contact) and is legally flawed [see the discussion above on the definition of a review participant at 11 AAC 110.990(41)].

A coastal district establishes its staff as preferred point of contact. The coastal district may then designate an alternative point of contact for the district, but that alternative point of contact must be another employee of the coastal district or a CRSA board member of the coastal district. The coastal district may utilize the services of a consultant to support and assist the coastal district in the review and analysis of a project under 11 AAC 110 and a district planning effort under 11 AAC

114, but the district can not and should not delegate the responsibility of formal representation of the district to a 3rd party.

DLA Recommendation No. 2 – DNR should complete the ABC List revisions and ACMP re-evaluation it began years ago.

DNR concurs with this recommendation.

DCOM intends to initiate the formal public review and comment process for the consistency review regulations at 11 AAC 110 after the completion and release of the DLA audit report. DCOM will meet and exceed the requirements of the Administrative Procedure's Act to notice and offer commenting opportunities on the proposed regulations. Based on the anticipated public comment period, DNR's consideration of comments, the Department of Law review, the review and approval process of the Office of Ocean and Coastal Resource Management, and the filing timeframe and process with the Lieutenant Governor, I anticipate the regulation revisions to 11 AAC 110 will go into effect on or before December 2011.

The ABC List revision process will proceed concurrent with the 11 AAC 110 regulation revisions. Phase 1 of the ABC List revision is substantially complete, pending DCOM's issuance of the final consistency determination. DCOM is currently working with ACMP participants to clarify and refine the new proposed generally consistent determinations (GCD's) under Phase 2 of the ABC List revision. DCOM anticipates initiating the Phase 2 consistency review for the new proposed GCD's in April 2011. Once DCOM issues the final consistency determinations for both phases of the revised ABC List, DNR will initiate a discrete regulation revision to 11 AAC 110 to include the effective date of the revised ABC List. Based on the review and approval process as described above for the regulation revisions, I anticipate the ABC List revisions will go into effect on or before December 2011.

As part of the implementation of the regulation and ABC List revisions, DCOM intends to embark on an intensive effort of outreach and training for the coastal districts, state agencies, industry, and interested members of the public.

Again, thank you for the opportunity to review the preliminary audit report on the ACMP. I look forward to seeing the issues addressed and the audit report finalized. If you have any questions on the issues described within this letter or in the attachment, please contact the DCOM Director Randy Bates. He can be contacted at randy.bates@alaska.gov or (907) 465-8797.

Sincerely,



Daniel S. Sullivan
Commissioner

cc: Joe Balash, DNR, Deputy Commissioner
Randy Bates, DNR, DCOM, Director

ALASKA STATE LEGISLATURE

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February 7, 2011

Members of the Legislative Budget
and Audit Committee:

We have reviewed the commissioner of the Department of Natural Resources' (DNR) response to the preliminary audit report on the Alaska Coastal Management Program (ACMP), Part 2.

We offer the following comments.

Certain aspects of ACMP operations are not open and transparent.

Our evaluation of the openness and transparency of the ACMP in the Division of Coastal and Ocean Management's (DCOM) operations is not tied to compliance with the Administrative Procedures Act which establishes guidelines for the process used to develop and implement regulations. The ACMP is a collaborative process, and its successful operations require maintaining the active involvement of all participants. Operations that are open and transparent increase the likelihood of maintaining participants' active involvement.

Therefore, our conclusions about recording or taking minutes at working group meetings, distributing review participant materials, DCOM providing formal feedback to comments received during the reevaluation process, and status updates regarding the ACMP reevaluation are areas that are noteworthy to avoid the risk of losing coastal resource district participants' active involvement.

DCOM's policy regarding consultants disregards resource coastal district's autonomy.

DNR objects to our conclusions and recommendations about allowing coastal districts to choose their own point of contact. DNR may choose to obtain a legal opinion from the Department of Law to support its position. Absent that, it is not reasonable that an agreement between DCOM and the Department of Commerce, Community, and Economic Development regarding the administration of grants can dictate to coastal districts, most of which are political subdivisions, how those organizations can choose to manage their operations.

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

Sincerely,

A handwritten signature in black ink that reads "Pat Davidson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Pat Davidson, CPA
Legislative Auditor