

STATE OF ALASKA

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DIVISION OF COASTAL AND OCEAN MANAGEMENT
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February 24, 2011

The Honorable Neal Foster
House of Representatives
Alaska State Capitol, Room 434
Juneau, AK 99801-1182

The Honorable Bob Herron
House of Representatives
Alaska State Capitol, Room 411
Juneau, AK 99801-1182

RE: Response to January 27, 2011 letter

Dear Representative Foster and Representative Herron:

Thank you for your letter dated January 27, 2011 requesting more information about the Alaska Coastal Management Program (ACMP) and specifically about the Bering Straits Coastal Resource Service Area (BS CRSA) and the Ceñaliulriit Coastal Resource Service Area (C CRSA). The Division of Coastal and Ocean Management (DCOM) appreciates the opportunity to answer your follow-up questions about the ACMP. Your questions generally fall into categories, so I have organized my response accordingly.

Designated Areas and Subsistence Uses

DCOM understands and agrees that subsistence uses and resources in the unorganized borough are critical to the health and well-being of local communities. Although the federal Coastal Zone Management Act does not require that states consider subsistence uses, the ACMP is so structured and continues to voluntarily consider and evaluate impacts to subsistence uses during the review of projects proposed in coastal areas.

The original regulations at 6 AAC 80 that implemented the Alaska Coastal Zone Management Act recognized the importance of subsistence by creating a subsistence use state standard (6 AAC 80.120). DCOM amended that and other state standards in 2004 to comply with the revised statutes at AS 46.39 and AS 46.40. While there were amendments to the Subsistence Use state standard (11 AAC 112.270), the original regulatory requirement to designate subsistence use areas was retained.

In your letter, you state that "All of the proposed subsistence use enforceable policies and designated areas for these districts [the BS CRSA and the C CRSA] were denied by the Alaska Department of Natural Resources (DNR)..." This is a true statement. DCOM staff recommended that the DNR Commissioner not approve the subsistence use enforceable policies and designated areas for the BS CRSA and the C CRSA because the proposed subsistence use policies and associated designated areas did not meet the regulatory requirements in 11 AAC 114. In general,

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the BS CRSA and the C CRSA chose to designate large, broad based areas as subsistence use areas, while the regulations at 11 AAC 114.250(g) state that a “*district may ... designate areas in which a subsistence use is an **important use** of coastal resource and designate such areas.*” (emphasis added). Although the CRSAs demonstrated that subsistence is an important use of coastal resources in some areas of the coastal zone, neither provided sufficient documentation demonstrating this for the entirety of their coastal zone and proposed designated areas. Neither linked the subsistence use to the location where the subsistence use activity occurred. DCOM encouraged the CRSAs to refine the designated areas to ensure they were approvable based on supporting information and compliance with the regulations, but the CRSAs chose not to do so. The proposed designated areas, prepared by the same consultant, were overly broad, unsupported, and DCOM recommended the commissioner disapprove them. Without an approved designated area, the enforceable policies applicable to those areas were not approvable.

Specific to subsistence uses in the C CRSA, DCOM provided ACMP funding prior to 2003 to the C CRSA to document subsistence uses throughout the coastal resource district (district). The final product that resulted from this publically-funded grant, which could have been submitted in support of the plan amendment to comply with the 11 AAC 114 regulatory requirements, was not included in the plan amendment for the C CRSA. Although the C CRSA had the detailed subsistence use information, they chose not to share it or include it as required for plan approval.

The Office of Ocean and Coastal Resource Management (OCRM) and DCOM recognized there would be a period of time between when the new state standards went into effect and when district plans would go into effect. Recognizing this gap, DCOM created an interim opportunity for districts without approved plans to ask for and substantiate an area designation during the course of an individual consistency review for a project. This opportunity to designate an area within the context of a project’s consistency review is also appropriate given the vast area of the state and the relative lack of information on certain areas, uses and resources. Some state standards were revised so that a review participant, including a district, could request that the department designate an area for a particular reason, such as a subsistence use area.

Therefore during a consistency review of a project, a district with or without subsistence use designations in an approved plan (i.e., both CRSAs in question) may request that DNR designate the project area or a portion of the project area as a subsistence use area for that review only. The district must support its request with data and information substantiating that the area is used for subsistence. Data in a district’s Resource Analysis, which is part of a district plan, may serve to substantiate the request, or, in the case of the BS CRSA, which lacks a district plan, data and information equivalent to Resource Analysis data may serve. Any data the district presents must be sufficient to substantiate the use and proposed designation. Another review participant, such as a state resource agency, may also propose an area designation during the course of project’s consistency review.

Enforceable Policies and Subsistence Uses

A complete program description explaining the Alaska Coastal Management Program can be found at <http://alaskacoast.state.ak.us/Clawhome/handbook/panels/A.htm>. This document, “*The Alaska Coastal Management Program As Amended June 2, 2005*” discusses the organization of the ACMP in Chapter 3. State statutes identify DCOM as the lead agency for the ACMP. Several state agencies and local districts participate in the implementation of the ACMP. There are three categories of enforceable policies of the ACMP:

1. State resource agency authorities – The ACMP developed and maintains “a list of resource agency authorizations for activities that may have a reasonably foreseeable direct or indirect effect on a coastal use or resource.” (See 11 AAC 110.750(a)). The list identifies those state resource agency permits that require an authorization for a given use or activity and constitute an important component of the ACMP authority and enforceable policy system.
2. State standards at 11 AAC 112 – The state standards at 11 AAC 112 give general instructions to districts and state agencies in carrying out their responsibilities under AS 46.39 and AS 46.40. These standards provide for coordinated reviews of natural resource development and conservation in the coastal zone and form the basis for developing a project’s consistency determination.
3. District enforceable policies developed and approved under 11 AAC 114 – A district must develop and adopt their coastal management plan in accordance with AS 46.40 and 11 AAC 114. District enforceable policies must be consistent with the state standards and are meant to clarify or add specificity to the state standards without being more stringent. In developing the enforceable policies of the coastal management plan under AS 46.40.030(b), the “coastal resource district shall meet the requirements of AS 46.40.070 and shall not duplicate, restate, or incorporate by reference statutes and administrative regulations adopted by state or federal agencies.” As required by AS 46.40.040, the state has adopted regulations that provide the districts with the requirements needed to develop their district plans and enforceable policies. The approval of a district plan is contingent upon compliance with the state standards in 11 AAC 112 and plan criteria in 11 AAC 114 and is generally summarized in the 2003 legislation at AS 46.40.070(a). All districts were required to revise their coastal management plans to comply with the mandate of Ch. 24, SLA 2003 (“HB 191”).

One of the challenging provisions of AS 46.40.070 to implement is the requirement at (a)(2)(C) that district enforceable policies not address a matter regulated or authorized by state or federal law unless the enforceable policies relate to a matter of local concern. “Matter of local concern” is further defined in the statute. Many times districts wanted to address matters that were already regulated by state or federal agencies, including the Statewide Standards at 11 AAC 112. Some matters, such as marine mammals, are already highly regulated through the federal Marine Mammal Protection Act and other applicable laws; therefore, a district is unable to write an enforceable policy dealing with marine mammals.

As described above, the BS CRSA and C CRSA proposed designated areas for subsistence uses were disapproved. Even if the designated areas had been approved, all of the proposed subsistence use enforceable policies would have been disapproved because they addressed a matter already adequately addressed by state or federal law, they restated and/or redefined state or federal law, and/or both. One of the legislative intentions of HB 191 in 2005 was to eliminate the overlap and duplication between district enforceable policies, the statewide standards, and other state and federal law. The legislature, DNR, and DCOM have succeeded in reducing the overlap and duplication of authorities within the ACMP, much to the frustration of the districts.

Bulleted Questions in January 27, 2011 Letter

With regard to your specific bulleted questions, I will respond to each question in order:

- QUESTION – How many subsistence use enforceable policies has DNR approved since the 2004 changes to the ACMP regulations?
ANSWER – The DNR Commissioner has approved subsistence use designated areas in eleven (11) coastal management plans including Aleutians East Borough, Aleutians West CRSA, Bristol Bay CRSA, Haines Borough, City of Hoonah, Kenai Peninsula Borough (in their Port Graham/ Nanwalek Area Meriting Special Attention), Kodiak Island Borough, Lake and Peninsula Borough, City of Nome, Municipality of Skagway, and City and Borough of Yakutat. The subsistence use state standard at 11 AAC 112.270 applies in all of these designated areas. In addition, three districts (City of Hoonah, Kenai Peninsula Borough, and Lake and Peninsula Borough) have a subsistence use district enforceable policy. The Lake and Peninsula Borough is currently revising their coastal management plan and has proposed new subsistence use designations and subsistence use policies (<http://www.alaskacoast.state.ak.us/>) which appear to meet the regulatory requirements for designated areas and the statutory and regulatory requirements for district enforceable policies.
- QUESTION – Why were the proposed subsistence use areas for the CRSAs denied?
ANSWER – As described above, the proposed subsistence use designated areas for the CRSAs were denied because they didn't provide specific enough information about the subsistence use and where it occurred. 11 AAC 114.250(g) allows a district to designate areas in which a subsistence use is an important use of coastal resources. 11 AAC 114.270(g) provides that a description or map is an enforceable component of the district plan. As an enforceable component, it must meet the criteria in 11 AAC 114.270, specifically 11 AAC 114.270(e). In particular, it must be clear and concise as to the activities and persons affected by the policy and requirements of the policy. The proposed subsistence areas for the CRSAs were overly broad, and a project applicant would not have been able to determine what subsistence use activities were taking place in the project area and therefore would have been unable to plan for avoiding or minimizing impacts to subsistence uses of coastal resources. In addition, the applicant would have been unable to complete an analysis or evaluation of reasonably foreseeable adverse impacts of the project on subsistence uses as required by 11 AAC 112.270(b).
- QUESTION – What specific criteria must be met in order for a subsistence use area to be approved in addition to what is spelled out in the ACMP regulations?
ANSWER – The regulations discussed above are the criteria. The designated areas must be clear and concise as to the activities and persons affected by the policy and requirements of the policy. For example, a project applicant should be able to tell what the subsistence use is and where it occurs.

I would also like to note that the requirement that a district show that subsistence use is an important use of coastal resources allows for but does not require scientific evidence. In accordance with both 11 AAC 114.230 and 11 AAC 114.240, local usage¹ is an acceptable documentation for subsistence uses.

¹ "Local usage" is defined at 11 AAC 114.990(23) to mean "current and actual use of a coastal resource by residents of the locality in which the resource is found."

- QUESTION – What funding or other support has DNR provided to the CRSAs to obtain the information needed to get their proposed subsistence use areas approved? We understand that previous requests for ACMP funding for this purpose, at least by the Bering Straits CRSA, have been denied.

ANSWER – All districts including the CRSAs received three years of funding (SFY05-SFY07) to amend their plans. DCOM recognized at the time that there was likely not enough funding available to complete robust plan amendments. Therefore, DCOM encouraged districts to focus the available funding on key elements and issues with the understanding that the plans could be amended at a later date when there was more time and money available.

At this point, districts that chose not to submit an approvable plan amendment are not eligible for future plan amendment funding until their previously-funded project is finished. On January 28, 2011, the BS CRSA submitted a plan amendment that was compliant with the DNR Commissioner's final decision. Once the plan amendment is fully approved by OCRM and filed with the Lieutenant Governor, the BS CRSA would be eligible to apply for Section 309 funding to update their coastal management plan with subsistence use information and potential subsistence use designations.

ACMP Funding

As I explained in the House Resources committee meeting, ACMP funding shared with the districts must be administered through the Department of Commerce, Community and Economic Development (DCCED) since DNR does not have third party granting authority. This arrangement with DCCED has been in place for many years. During the last couple of years, DCCED and DCOM have spent considerable time discussing the roles and responsibilities of each agency in managing ACMP grants to districts. The grant management issue was temporarily resolved this year with a Memorandum of Agreement (MOA) attached to this fiscal year's Reimbursable Services Agreement (RSA). Specific roles and responsibilities were outlined in the MOA. DCOM intends to initiate discussions with DCCED in late April 2011 in order to address grant roles and responsibilities between our two agencies in advance of the next fiscal year. As the lead agency for the ACMP, DCOM is ultimately responsible and accountable for how the program funds are spent and is working closely with DCCED to ensure that they and districts are properly expending ACMP funds.

CBJ Legal Issue

The question raised by the City and Borough of Juneau (CBJ) was directed to DCCED. DCCED could provide you an update on their response to the legal issues raised by CBJ.

CRSA Funding

From 2006 to 2009, an independent accounting firm audited all four of the CRSAs. All four audits identified and recommended corrective action in multiple areas, particularly financial management.

The most troubling of all four audits was the audit for the BS CRSA, which was done in 2006. This audit showed that the BS CRSA was unable to account for any of the money the BS CRSA received in SFY03-SFY05, which amounted to over \$250,000.00. Once this was disclosed, funding to the BS CRSA was immediately suspended. The BS CRSA Board was contacted, and three state program representatives traveled to Nome to meet with the Board in November 2006. The Board was informed of the audit results and that, based on the audit report and findings, they would not receive direct grant funding nor would they be able to hire a program director until the audit

findings were resolved. The matter was subsequently turned over to the Department of Law's (Law) criminal division. After reviewing all the information, including a handwritten check register that was not supplied to the auditors, Law concluded that criminal prosecutions were not warranted. Law also concluded that the BS CRSA failed to adhere to the terms of the grant agreements and that civil action may be warranted. Law referred the matter back to DNR and DCCED. DNR and DCCED decided not to pursue civil action and chose to close the issue and allow the BS CRSA to receive ACMP funding again, provided the financial management recommendations identified in the audit were addressed.

The BS CRSA was awarded \$53,830.00 in ACMP funding for SFY10. It was anticipated that the BS CRSA would hire a program director with this funding, and DCOM offered to assist the BS CRSA board in recruiting and hiring a program director. Instead, the BS CRSA chose to hire a consultant to assist with the hiring of a program director, which delayed the actual hiring of a program director since the services of a consultant had to be procured first before the program director vacancy could be noticed. While the BS CRSA didn't use all of their ACMP funding for SFY10, the BS CRSA did expend money on administration of the ACMP grant that was paid to the City of Unalakleet, on board travel for an in-person board meeting, on advertisement for a program director, and on supplies including a new computer and office supplies.

One of the tasks for the BS CRSA's SFY10 grant agreement was to revise their coastal management plan so that it was compliant with the DNR Commissioners final decision. This involved deleting unapproved sections of their plan. DCOM staff offered to do this at no cost to the BS CRSA on at least two separate occasions, and the BS CRSA chose not to accept DCOM's assistance. The plan that was submitted on June 30, 2010 as part of their SFY10 grant agreement still was not compliant with the DNR Commissioner's final decision. As noted above, the BS CRSA submitted a compliant plan amendment on January 28, 2011. Until the deliverables for the SFY10 grant were received, the BS CRSA was not eligible for additional funding. In anticipation of receiving a compliant coastal management plan, DCCED has prepared a draft grant agreement and has forwarded it to the BS CRSA for signature.

The contract for the C CRSA program director ended June 30, 2010. The grant agreement for the C CRSA was not closed out until October 19, 2010 when the program director submitted the final report and returned all the C CRSA's equipment and property. DCOM is working with the C CRSA Board Chair to hire a new program director. The notice was advertised in the Delta Discovery on February 2, 2011. In anticipation of a new program director being hired soon, DCCED has prepared a grant agreement and forwarded it to the C CRSA for signature.

Subcontracts

As described above, DCOM is responsible for implementing the ACMP through its network of districts and state resource agencies. Successfully implementing the program requires *direct* DCOM contact with each of these participating entities to ensure that they receive accurate, up-to-date program information, that they know how to participate in the consistency review process, and that DCOM and other state resource agencies receive local input on projects directly from the district.

I recognize that the subcontracting issue is of importance to you. DNR's response to the issue is largely captured within the Division of Legislative Audit's report. The extent of the issue – this has

only been an issue in one of the 28 districts – and much of the nature of the issue are described therein.

It is important to know that DCOM *allows and encourages* districts to employ consultants for many tasks. DCOM and districts engage in two main ACMP functions together: 1) developing/amending district plans; and 2) implementing those plans through consistency reviews of proposed development projects. DCOM allows and encourages districts to contract with consultants for any and all planning functions. These functions include developing a draft plan amendment and seeing it through the plan approval process. There are currently two districts that are receiving Section 309 funding to amend their coastal management plans, and both districts have hired a consultant to assist them with this task.

Districts may contract with consultants for many consistency review functions, but DCOM does not allow the district to utilize ACMP Section 306 implementation funding to directly cover consultant expenses. A district or a state resource agency must use ACMP federal Section 306 operating funds directly for implementing the ACMP. In SFY09 and SFY10, districts were able to use Section 306 operating funds for hiring a contractor to assist with the district's required tasks. Through this experience, DCOM found that the contracts to consultants were not effective for a number of reasons. As a result, subcontracting district or state resource agency responsibilities to a third party is not reimbursable for Section 306 required tasks work.

DCOM allows districts to contract with consultants for many consistency review functions, but does not allow a consultant to be a district's official point of contact during a consistency review. A consultant may prepare a district's comments during a consistency review (including a request for additional information, a request for designation, or a request for affected district status), but must route any such comments through the actual district employee or board member. This maintains DCOM's connection with the residents of the district in which the development is proposed, the people who know the coastal uses and resources, know the local priorities and know the local history.

The local government and/or residents may not fully understand the statutory and regulatory complexities of the ACMP, and so it is wholly appropriate that they contract competent and impartial consultants to bring expertise to bear in a consistency review, and thus make the district as effective as possible in representing its local residents. Together, the local understanding and the contracted expertise can make a powerful combination. But that combination is most powerful, and most true to the ACMP objective of local representation, when any outside expertise is expressed *through the filter* of the local district. Otherwise, the local community may lose its voice in the discussion about development in its midst. Districts have clearly expressed a desire for more – not less – local representation.

Whether or not a contractor may be the point of contact during a consistency review has been an issue in one district, one of the four coastal resource service areas. During the same few weeks that the CRSA temporarily employed a consultant last summer, the board vice-chair telephoned and sent faxes to DCOM's project review staff regarding ongoing consistency reviews. She was available and enjoyed the means to communicate with DCOM staff (I understand that she was also in frequent contact with her consultant, upon whose expertise she could rely). So it was quite possible – and, DCOM maintains, the best approach – for the local district official residing in the community to be DCOM's consistency review point of contact.

Representative Foster and Representative Herron
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Summary

In closing, DCOM appreciates the opportunity to provide information about the ACMP and specifically about the role of coastal districts. DCOM values coastal district participation, especially during consistency reviews where local input is important. The ACMP is a state program with rules for participation dictated by the Legislature through AS 46.39 and AS 46.40 and implementing regulations developed by DCOM in accordance with the statutes. DCOM wholeheartedly supports coastal district participation according to the rules set forth in the approved statutes and regulations.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Bates', with a stylized flourish at the end.

Randy Bates
Director

cc: Representative Feige, Co-chair, House Resources
Representative Seaton, Co-chair, House Resources
Representative P. Wilson, Vice-chair, House Resources
Representative Dick, House Resources
Representative Muñoz, House Resources
Representative Gardner, House Resources
Representative Kawasaki, House Resources
Dan Sullivan, Commissioner, DNR
Joe Balash, Deputy Commissioner, DNR
Kim Kruse, DCOM Deputy Director, DNR
Tom Atkinson, DCOM Project Review Section Chief, DNR
Gina Shirey-Potts, DCOM Planning Section Chief, DNR
Scott Ruby, DCRA Director, DCCED

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January 27, 2011

Mr. Randy Bates

Director, Division of Coastal and Ocean Management
Alaska Department of Natural Resources
P.O. Box 111030
Juneau, Alaska 99811-1030

Dear Mr. Bates:

This letter provides a follow up to some of the questions we asked about the Alaska Coastal Management Program (ACMP) during your presentation to the House Resources Committee on January 24, 2011. We are writing this letter jointly because of the similar situation faced by the coastal districts we represent. Both the Cefñaliulriit Coastal Resource Service Area (CRSA) and the Bering Straits CRSA are located in the unorganized borough where coastal subsistence uses and resources are critical to the health and well-being of the local communities and economies.

All of the proposed subsistence enforceable policies and designated areas for these districts were denied by the Alaska Department of Natural Resources (DNR), and neither CRSA has had staff for some time.

We are trying to get a grasp on how changes to the ACMP regulations have affected the ability for coastal districts to address potential impacts to subsistence resources and uses. If our understanding is correct, DNR must approve designated areas before the statewide subsistence standard applies to a project review, and a designated area must be approved before a district may establish enforceable policies for subsistence. If all of the proposed designated areas are denied, how can subsistence-related concerns be discussed and addressed in the consistency review process? In order to gain a better understanding of this situation, we pose the following questions.

- How many subsistence enforceable policies has DNR approved since the 2004 changes to the ACMP regulations?
- Why were the proposed subsistence use areas for the CRSAs denied?
- What specific criteria must be met in order for a subsistence use area to be approved in addition to what is spelled out in the ACMP regulations?
- What funding or other support has DNR provided to the CRSAs to obtain the information needed to get their proposed subsistence use areas approved? We understand that previous requests for ACMP funding for this purpose, at least by the Bering Straits CRSA, have been denied.

During the committee meeting, you said that the delay in funding coastal districts this fiscal year was due to negotiations with the Division of Community and Regional Affairs. Would you explain more about the specific

Alakanuk, Brevig Mission, Chevak, Elim, Emmonak, Gambell, Golovin, Hooper Bay, Kotlik, Koyuk, Little Diomedea, Mountain Village, Nome, Pitka's Point, Pilot Station, St. Mary's, St. Michael, Savoonga, Scammon Bay, Shaktoolik, Sheldon Point, Stebbins, Teller, Unalakleet, Wales, White Mountain

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issues that were under negotiation and how those issues were resolved? Have you resolved the legal issues raised by the City and Borough of Juneau?

We would also appreciate more information about funding for the two CRSAs. According to information provided to us, the Ceñaliulriit CRSA has not had staff since June 30, 2010, and the Bering Straits CRSA has not received funding for staff support since 2006. Would you clarify whether the FY11 grant agreements for these coastal districts have been finalized yet?

We understand the Bering Straits CRSA has had to rely on volunteer help and a small contract funded last year through non-ACMP sources to assist the board with recruitment of a program director, setting up the new office and revising the coastal management plan. We would like to know why ACMP Section 306 funds can no longer be used for contracts. It seems that short-term contracts would be an efficient way to assist the CRSAs during times when the program director position is vacant.

Thank you in advance for answering our questions about the ACMP. We look forward to working with you as the ACMP bills are considered during this legislative session.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Herron".

Representative Bob Herron
House District 38

A handwritten signature in black ink, appearing to read "Neal Foster".

Representative Neal Foster
House District 39

cc: Co-Chairs
House Resources