ALASKA STATE LEGISLATURE
HOUSE RESOURCES STANDING COMMITTEE
March 4, 2002
1:07 p.m.

MEMBERS PRESENT

Representative Drew Scalzi, Co-Chair
Representative Hugh Fate, Vice Chair
Representative Joe Green
Representative Mike Chenault
Representative Lesil McGuire
Representative Gary Stevens
Representative Mary Kapsner
Representative Beth Kerttula

MEMBERS ABSENT

Representative Beverly Masek, Co-Chair

COMMITTEE CALENDAR

HOUSE BILL NO. 439
"An Act removing provisions providing an opportunity to petition for review of proposed consistency determinations under the Alaska coastal zone management program."

- MOVED CSHB 439(RES) OUT OF COMMITTEE

HOUSE BILL NO. 376
"An Act relating to management of fish and game in and on the navigable waters and submerged lands of Alaska."

- FAILED TO MOVE HB 376 OUT OF COMMITTEE

HOUSE BILL NO. 232
"An Act permitting state residents to purchase remote recreational cabin sites."

- SCHEDULED BUT NOT HEARD

PREVIOUS ACTION

BILL: HB 439
SHORT TITLE:COASTAL ZONE MANAGEMENT PROGRAMS & PETITIONS
SPONSOR(S): OIL & GAS

Jrn-Date	Jrn-Page		Action
02/15/02	2287	(H)	STA, RES
02/15/02	2287	(H)	READ THE FIRST TIME - REFERRALS
02/19/02	2321	(H)	STA REFERRAL REMOVED
02/19/02	2321	(H)	O&G REFERRAL ADDED BEFORE RES
02/21/02		(H)	O&G AT 10:00 AM CAPITOL 124
02/21/02		(H)	Heard & Held
02/26/02		(H)	O&G AT 10:00 AM CAPITOL 124
02/26/02		(H)	Moved Out of Committee
02/27/02	2406	(H)	O&G RPT 7DP
02/27/02	2406	(H)	DP: KOHRING, DYSON, CHENAULT, GUESS,
02/27/02	2406	(H)	FATE, JOULE, OGAN
02/27/02	2406	(H)	FN1: ZERO(GOV)
03/04/02		(H)	RES AT 1:00 PM CAPITOL 124

BILL: HB 376
SHORT TITLE:FISH & GAME IN NAVIGABLE WATERS
SPONSOR(S): REPRESENTATIVE(S)OGAN

Jrn-Date	Jrn-Page		Action
02/01/02	2121	(H)	READ THE FIRST TIME - REFERRALS
02/01/02	2121	(H)	RES, JUD
03/01/02		(H)	RES AT 1:00 PM CAPITOL 124
03/01/02		(H)	Heard & Held
03/04/02		(H)	RES AT 1:00 PM CAPITOL 124

WITNESS REGISTER

REPRESENTATIVE SCOTT OGAN
Alaska State Legislature
Capitol Building, Room 108
Juneau, Alaska 99801-1182
POSITION STATEMENT: Presented HB 439 as chair of the House Special Committee on Oil and Gas, sponsor; testified as sponsor of HB 376.

KEN DONAJKOWSKI, Permitting Manager
Phillips Alaska, Inc.
P.O. Box 100360
Anchorage, Alaska 99510
POSITION STATEMENT: Testified that Phillips Alaska, Inc., supports HB 439 because the current petition process enables an individual to easily hamper responsible oil and gas development.

PATRICK GALVIN, Director
Division of Governmental Coordination (DGC)
Office of the Governor
P.O. Box 110030
Juneau, Alaska 99811-0030
POSITION STATEMENT: Testified on HB 439, indicating DGC doesn't oppose eliminating the [AS 46.40.100](b)(1) petitions because of problems that have occurred.

JUDY BRADY, Executive Director
Alaska Oil and Gas Association (AOGA)
121 West Fireweed Lane
Anchorage, Alaska 99503
POSITION STATEMENT: Testified in support of HB 439.

NANCY WAINWRIGHT, Attorney
13030 Back Road, Suite 555
Anchorage, Alaska 99515
POSITION STATEMENT: Testified in support of HB 439, indicating the solution worked out in 1994 was wrong and that the petition process doesn't work.

DALE BONDURANT
31864 Moonshine Drive
Soldotna, Alaska 99669
POSITION STATEMENT: Testified in support of HB 376.

ACTION NARRATIVE

TAPE 02-14, SIDE A
Number 0001

CO-CHAIR DREW SCALZI called the House Resources Standing Committee meeting to order at 1:07 p.m. Representatives Scalzi, Fate, Chenault, McGuire, Green, and Kerttula were present at the call to order. Representatives Kapsner, and Stevens arrived as the meeting was in progress.

HB 439-COASTAL ZONE MANAGEMENT PROGRAMS & PETITIONS

CO-CHAIR SCALZI announced the first order of business, HOUSE BILL NO. 439, "An Act removing provisions providing an opportunity to petition for review of proposed consistency determinations under the Alaska coastal zone management program."

Number 0168

REPRESENTATIVE SCOTT OGAN, Alaska State Legislature, presented HB 439 as chair of the House Special Committee on Oil and Gas, sponsor. He explained that the bill would eliminate the petition process in the Alaska Coastal Management Program (ACMP). He mentioned that there had been no opposition to HB 439 in a previous House Special Committee on Oil and Gas meeting, although he'd been prepared for some serious opposition.

REPRESENTATIVE OGAN said the system is so "broken" that the Division of Governmental Coordination (DGC) had testified that it didn't oppose the bill, but didn't necessarily support it. He offered his opinion that the petition process is being used as a 30-day delay tactic by those who [oppose] development. He suggested the drilling season on the North Slope, with its tundra and ice, has become shorter due to the warmer climate in recent years. He said 30 days is a significant amount of time to delay [the development] process. He said although the bill does eliminate the petition process, it does not affect the ability of people to testify or be involved in the coastal zone management process.

Number 0399

REPRESENTATIVE KERTTULA clarified that HB 439 would not eliminate the entire petition process, because the district management program would be left in place. She asked Representative Ogan if the bill would eliminate an appeal process for a third party.

REPRESENTATIVE OGAN answered in the affirmative.

Number 0491

KEN DONAJKOWSKI, Permitting Manager, Phillips Alaska, Inc. ("Phillips"), testified before the committee. He explained that Phillips supports HB 439 because the Alaska coastal zone petition process had significantly delayed five consistency determinations during December and January. He remarked that the petition process enables an individual to easily hamper responsible oil and gas development. He said HB 439 appropriately removes this needless component from the overall ACMP process.

MR. DONAJKOWSKI said the ACMP program project-approval process is too complex to discuss fully in the short time allowed for

testimony. He highlighted Phillip's specific concerns: The ACMP, primarily a procedural and not a substantive process, is set out in Title 46, Chapter 40; its implementing regulations appear at 6 AAC 50. For most projects, the DGC is charged with coordinating, on behalf of the state, the determination of whether a proposed project in and around the state's coastal areas is "consistent" - in compliance - with the applicable standards of the ACMP set forth in 6 AAC 80 and the standards of the applicable coastal district. During the coordinated review process, each local, state, and federal agency not only is involved in helping DGC make the consistency determination, but also is responsible for reviewing, analyzing, and issuing its own numerous permits and authorizations. Moreover, the public has an opportunity to be involved in and comment on the ACMP consistency review and each of the agency permits.

Number 0712

MR. DONAJKOWSKI offered his belief that this is where the petition process is being manipulated and misused. If a single individual living in the district where the project is proposed submits comments to DGC during the public comment period, and if the agency subsequently issues a proposed determination that the project is "consistent," then the individual has the right to notify DGC of his/her intent to petition the Alaska Coastal Policy Council (CPC); this automatically extends the consistency review period by up to 50 total days, which includes 20 days for the petitioner to draft the formal petition and then, if submitted, another 30 days for the CPC to convene and make its decision. Neither DGC nor the CPC gets to review the merits of the notice of petition or the petition itself.

MR. DONAJKOWSKI continued, noting that if the petitioner meets certain basic requirements - such as being a citizen in the district and having submitted comments - then, regardless of the merit of the comments, the right to petition is automatically granted. Conversely, removal of the petition process would not decrease the right of the public to provide comments on a project. It would simply eliminate the right to needlessly delay a project. He said the specific responsibility of the CPC is solely to answer the following question: "Did DGC fairly consider the comments made by the petitioner during the public process?" The CPC does not review or address the merits of the petitioner's comments, only whether the comment was considered.

Number 0846

MR. DONAJKOWSKI said a Kuparuk field development project known as "drill site 3S" was delayed through the aforementioned process for 35 days. Phillips, an outside attorney, a representative from the North Slope Borough, numerous agency personnel, and the entire CPC had shown up at the scheduled hearing only to discover that the petitioner had withdrawn the petition minutes before the hearing was scheduled to begin. He said in addition to needless delay of the project, this action resulted in several hundred hours of wasted preparatory work done by DGC employees as well as Phillips employees. Furthermore, an entirely unrelated project package was also impacted for 15 days because DGC staff needed to prepare for the CPC hearing.

MR. DONAJKOWSKI said it was almost a dual project impact [because] four of Phillips' exploration-permitting packages, which also received proposed consistency determinations, were similarly petitioned. In one case, the petitioner appeared by telephone to present the petition, which CPC unanimously dismissed. Two of the remaining three petitions were withdrawn by the petitioner, and the last one was dismissed because the actual petition was submitted after the 20-day period had expired. A project that met the state's test for consistency was delayed 20 days through the submittal of comments and a notice that a petition would be filed.

MR. DONAJKOWSKI said exploratory drilling on the North Slope is conducted during the few winter months when ice roads can be used to mitigate impacts on the tundra; because of weather conditions, this can be a relatively short, uncertain period of time to drill a well, so a 10- to 15-day delay can be significant. Consequently, delays brought about by this petition process can result in abandoning an otherwise viable drilling program.

MR. DONAJKOWSKI reiterated that the ACMP process and the various agency permits required offer the public a significant opportunity to raise substantive concerns. He offered his view that this particular petition process has no constructive application. He said its only use is as a tool to hold hostage responsible projects that would develop the state's resources; consequently, HB 439 appropriately does away with this tool.

Number 1083

REPRESENTATIVE GREEN asked how long the process involving "frivolous delay" requests had been going on.

MR. DONAJKOWSKI answered that this year [2002] was Phillips' first experience with this particular process.

REPRESENTATIVE KERTTULA asked whether the delay was problematic or if it was the administrative review itself.

MR. DONAJKOWSKI answered that it was the delay; the project was deemed consistent, but no action could be taken until the [petition] process was completed.

REPRESENTATIVE KERTTULA asked if the 30-day requirement was in statute or [regulations]. She also asked whether changing the statute to require immediate review of the record [would be a sufficient alternative].

MR. DONAJKOWSKI said he didn't know and would have to give it some thought. He questioned the basis for the [petition] process, given all of the other avenues for the public to participate.

REPRESENTATIVE KERTTULA mentioned the complexities and costs of litigation. She asked what the avenue would be if the right to petition were removed [from statute] for a person who had a [legitimate] comment that the state did not consider.

MR. DONAJKOWSKI said he didn't have a response. He reiterated that there is an opportunity [to participate in the process] and that the issue is not whether the comments had substance, but whether DGC had considered those comments.

Number 1225

REPRESENTATIVE KERTTULA said it's a low standard of review; it's looking to see whether something was considered, not whether it was right or wrong, so the [petitioner] isn't asking for much.

MR. DONAJKOWSKI said the tool was there, it was used, and all it amounted to was the delay of projects and the potential abandonment of those projects. Furthermore, if there is interest in finding some other mechanism of benefit, there's opportunity to do that. He reiterated his belief that the public has plenty of opportunity [to participate] through numerous agency permits and the coastal process itself. He recounted a comment made by the director of DGC that the process hadn't historically shown much value in terms of being utilized in the past. He questioned the merits of [the process] on the

basis of its record and on the basis of how he believed it was used against Phillips this recent season.

REPRESENTATIVE KERTTULA asked what administrative appeals process [Phillips] was under for leases with the Department of Natural Resources (DNR) and what appeal rights were provided.

MR. DONAJKOWSKI said he didn't know.

Number 1327

REPRESENTATIVE STEVENS remarked that it must be terribly frustrating and expensive to have to prepare for a hearing, only to find out at the last minute that the petition was withdrawn. He asked why the petition was withdrawn at the last minute.

MR. DONAJKOWSKI said he didn't know, and that [the information] was between the petitioner and the petitioner's lawyers, which [Phillips] was not privy to.

Number 1380

PATRICK GALVIN, Director, Division of Governmental Coordination (DGC), Office of the Governor, explained that the ACMP is the state's response to the federal Coastal Zone Management Act that Congress passed in 1972. He said the Act was offered as a deal to coastal states: if the state developed a plan for managing activities within its coastal zone that met certain federal requirements, then the federal government would basically give up some of its sovereign immunity and agree to abide by that plan in its own activities and permitting decisions; also, the federal government would provide money to the state for implementing and developing that plan.

Number 1504

MR. GALVIN said the state developed a coastal management program in the late 1970s and specifically designed the program to be decentralized. Moreover, a centralized plan based upon the state agencies' perspective was defeated, and the legislature developed a plan to give power, to a large extent, to the local areas. He said local districts are provided the opportunity to develop their own plans; although those plans have to meet state requirements, the state doesn't write the plans for them.

MR. GALVIN further reported that in order to comply with federal requirements, the state had to ensure, while it was being

implemented throughout the state, that there was some control over that, and [ensure] some guarantee that it was being done properly. He said the state put into place a petition process, so that somebody who felt a local plan wasn't being implemented could seek redress with the CPC, which is a body made up of both state officials and a majority of elected officials from the local governments around the coast of the state.

MR. GALVIN continued, saying that when the program was first developed, [the state had] no singular process for deciding whether a project was consistent with the program. It was designed with the idea that each agency which issued its own respective permit would decide consistency in conjunction with its permitting decision. In a short time, however, it was recognized as a problem. State agencies came up with conflicting decisions on the same issues, and it was recognized that there needed to be a more unified, singular process.

[Co-Chair Scalzi turned the gavel over to Vice Chair Fate.]

Number 1609

MR. GALVIN reported that in the mid-1980s, a process was developed for deciding consistency that would involve in that process all state agencies that had permits and the local governments. Also, it would provide an opportunity for the public to participate in the decision. With that process, the ability to seek some administrative appeal was limited to state agencies, local governments, and the applicant, if the applicant was unhappy with the decision. There was no petition to the CPC built into the process. It wasn't until a few years later that the petition process, which remained in the statute from when the program was originally developed, began being used for individual project reviews. However, it wasn't something built into the structure, and it presented problems

Number 1680

MR. GALVIN explained that some problems had to do with legal issues concerning due process and other [issues] brought up when the commissioners were involved in both substantive issues and review "as a member of the CPC." There also were issues with regard to the process: there was no petition process in place, which created a lot of internal conflict with all other permitting processes involved. In 1994, the legislature took up the issue, and a workgroup was formed consisting of members of

industry, members of state agencies, staff, and members of the public who were interested in the [process].

MR. GALVIN related that the [workgroup] had come up with an experiment to deal with the issue of the appeal to the CPC. It allowed an avenue for a citizen of an affected district to go to the CPC, but established a standard much lower than looking at whether the decision was correct. Instead, the issue was whether the comments of that person were fairly considered. It was designed to be a "check" on the process to determine whether the process was fair [and whether the petitioner] had received a hearing among the agencies making the decision on the issue.

MR. GALVIN told members that current law provides two opportunities to get to the CPC for petitions. He mentioned the project-specific request to review whether the comments on a particular project review were fairly considered. Mr. Galvin noted that still retained in the 1994 law was [AS 46.40.100](b)(2), the second part of the petition process, which is a request that the CPC look, in general, at whether a district plan was being implemented. He characterized the distinction between the two as follows: the [project-specific request] is a reactive look at a previous decision and whether the process was fair, whereas the [process under] (b)(2) is a more prospective way of looking at what had been done in the past with regard to the district plan, and if it hadn't been done properly, what could be required in the future to ensure the plans are properly implemented. He said it's not necessarily to go back and do something over again; rather, it's from this point on, do it differently.

Number 1885

MR. GALVIN offered that the project-specific procedure has proven unsatisfactory to basically all participants. Petitioners come to the table before the CPC, seeking to have the decision overturned because of disagreeing with it; however, the issue being addressed before the CPC is whether the [petitioner's] comments were fairly considered. At that participation level and afterwards, the petitioner expresses frustration that there wasn't a full hearing on the issues. Moreover, applicants feel they are stuck in the process and have to delay their permits. Furthermore, agency staff who prepare for the hearings feel they are doing a tremendous amount of work for a decision that is not at a very high level. And the CPC is frustrated about being brought to a decision at a late date, dealing with a very small part of the decision, and not being

able to work on the true issue before them in regard to the project.

MR. GALVIN said the (b)(1) petition process doesn't work, and that DGC would respond by getting the people involved to come together to try to find a better solution regarding the issues. He said [DGC] doesn't oppose eliminating the (b)(1) petitions because of the problems that have occurred. For example, in the beginning of the 2000 fiscal year, regulations were put into place to help get the petitions through the process and work on how [the process] would be handled. From that point forward, there were 17 notices of petition, all [from] citizens of an affected district; of those, 9 were rejected by staff because they didn't meet the technical requirements of being able to file a petition; of the remaining 8, 3 were withdrawn this year before the CPC hearing; the remaining 5 were dismissed by the CPC's finding that the comments were fairly considered.

Number 2072

MR. GALVIN concluded by saying the experience has been that the process doesn't result in a change in the decision or anything other than extending the process and allowing people to participate in a procedure that frustrates most participants. He reiterated that [DGC] does not oppose eliminating the (b)(1) petitions.

Number 2096

REPRESENTATIVE GREEN asked how long a project could be held up in the event of multiple [petitions] filed simultaneously.

MR. GALVIN said it raises the question of whether the petitions could be heard in succession or could all be heard at the same time. He said there is a proposed decision that goes out and provides people five days to decide whether to file a notice of petition. If simultaneous notices of petition were filed, DGC would have to decide whether they could all be heard at the same time, and would make every attempt to do that because of the logistics of the bringing together the CPC. The petitions would probably be heard simultaneously; however, it should be recognized that if a petition was successful and the decision was remanded to the agency to decide, then another proposal would be sent out that would provide an opportunity to petition. Moreover, successful petitions could potentially delay the process; however, if petitions were not successful, then a final

decision would be issued. He said it is a matter of the issues presented by all of those petitions.

REPRESENTATIVE GREEN asked how long the [petition process] had been problematic and whether other operators have had the same experience.

MR. GALVIN said the frustration level that currently exists is not new. He explained that the statute was changed in 1994 to create a dual opportunity, and a fairly considered plan had been established for project petitions. But from the outset there had been frustration and unhappiness with the process. He remarked that it had been occurring for 7-8 years.

REPRESENTATIVE GREEN said he assumed that other operators had experienced [frivolous petitions].

MR. GALVIN said [2002] was the first year that petitions had been withdrawn prior to the hearing. He said the petitioner had claimed the withdrawal was being made at the request of the company, but the timing was the [decision] of the petitioner.

Number 2299

REPRESENTATIVE KERTTULA asked Mr. Galvin to elaborate on the petitioner's claim.

MR. GALVIN answered that the petitioner said Phillips had requested that the petition be withdrawn, so [the petitioner] was withdrawing the petition at [Phillips'] request.

REPRESENTATIVE KERTTULA asked Mr. Galvin to explain why the program needs to be certified by the OCRM [Office of Ocean and Coastal Resource Management], the importance of that, and the fact that OCRM has said this won't affect the certification.

MR. GALVIN said the OCRM is a federal office within NOAA [National Oceanic and Atmospheric Administration] with the U.S. Department of Commerce; it oversees the Coastal Zone Management Act and makes the decisions about whether the state's plan meets the requirements of federal law in order to qualify for both the federal deference to the local law as well as the funding. If the program were to be changed and fall out of compliance, then the federal government would no longer be obligated to comply, and the [state] would no longer be eligible for funding it receives.

MR. GALVIN explained that any change made [by the state] must be reviewed by [OCRM] to see if it drops [the state] out of compliance. At this point, there have been informal discussions about the changes in this bill, which [OCRM] has indicated it wouldn't have a problem with.

Number 2400

REPRESENTATIVE KERTTULA asked Mr. Galvin if any (b)(2) petitions had been [submitted] or if there had been any implementations of the [coastal] district petitions.

MR. GALVIN answered that there hadn't been any (b)(2) petitions submitted since 1994. Prior to that, when there was only a singular petition process, all of those petitions were project-specific, dealing with individual projects.

Number 2424

REPRESENTATIVE KERTTULA asked if there had been any discussion about resolving the frustration and creating a more meaningful level of review, or about consolidating agency appeals. She also asked if there is a commitment to finding a better [process], so that there is a more meaningful petition in place, rather than just going straight to court.

MR. GALVIN said he thought the general community involved in coastal management and permitting recognizes a need for a comprehensive look at how everything works and fits together. He said that there wasn't time to deal with it [during this legislative session], but that the need exists and [HB 439] only fixes one aspect.

Number 2504

VICE CHAIR FATE mentioned streamlining of the program and asked if there would be a cost savings in both efficiency and management of resources.

MR. GALVIN said there wouldn't necessarily be a cost savings because DGC hasn't hired new staff to deal with [petitions]. However, staff would be able to direct attention toward more appropriate things if this were no longer an obligation.

Number 2552

JUDY BRADY, Executive Director, Alaska Oil and Gas Association (AOGA), testified via teleconference. Ms. Brady mentioned that AOGA is a trade association and that most [oil and gas] companies operating in Alaska are members. She said AOGA supports [HB 439]; she referenced testimony submitted to the committee. She said [HB 439] is "one small step" in a much longer-range project.

REPRESENTATIVE KERTTULA asked Ms. Brady if that step is part of a process that involves coming back and trying to rethink the petition process so it is meaningful.

MS. BRADY said the whole [process] needs to be looked at, which AOGA is committed to doing. She said everybody that has been involved in the process since the beginning, including the CPC, has tried to have a process that works, rather than one that doesn't give individuals a good ability to comment and is frustrating for everybody else.

NUMBER 2688

NANCY WAINWRIGHT, Attorney, testified via teleconference. Ms. Wainwright told the committee she had participated with Ms. Brady in trying to work out a solution, working on behalf of coastal districts and the public to let people have a voice in decisions about their property and coastal districts. She suggested that the solution worked out in 1994 was wrong and that the petition process doesn't work. She said for that reason she supports [HB 439].

MS. WAINWRIGHT agreed regarding the result being sought, but disagreed regarding the rationale. She said the legislature has had to fix DGC procedural problems for the past ten years; furthermore, it took DGC about ten years to get its regulations on petitions in place. She indicated the regulations are difficult to understand. She said the people who are supposed to file petitions and understand the "obtuse" regulations, and who are most impacted by DGC decisions, are private landowners or citizens. She said that as the public process is stripped away, the public is left with no options.

MS. WAINWRIGHT offered some history. Initially, there was a full petition process: anyone statewide could petition and get a hearing. After the village of Kaktovik filed a petition and the Kodiak Island Borough and certain districts began to use their voices, however, that part was stripped away and the petition process was limited to the fair-consideration rule.

After that, public interest groups couldn't petition because of worry that those groups would [make things difficult]. Finally, the [petition process] was limited to a single individual who lived within the district, [met all of DGC's requirements], and identified the proper policies; that individual might be able to petition if DGC accepted it.

MS. WAINWRIGHT said the petitioners who are being blamed [her clients who had filed the petitions that affected Phillips] are not opposed to these projects or to onshore oil development. In the past, these [particular] petitioners had granted Phillips rights-of-way across their land to do projects, but had run into some problems. One problem was the water use in the area appeared to be depleting the fish resources and affecting [the petitioners'] subsistence uses. She said because the legislature had done away with notice of water projects, the only input [the petitioners] had was through the coastal management review. She said the [petitioners] had contacted Phillips with their concerns. Ms. Wainwright remarked that she was surprised to hear Mr. Donajkowski say that he didn't know why the petition was withdrawn.

Number 2847

MS. WAINWRIGHT explained that Phillips had flown the petitioners to Anchorage and held extensive meetings; at Phillips' request, the [petitioners] withdrew the petition. She said the petition was not withdrawn minutes before the hearing as Mr. Donajkowski represented; it was two hours before the hearing. She remarked, "As often happens, things settle on the courthouse steps." She said the mystery is why DGC proceeded to call [the CPC] to hold a hearing after it had already received notice that the petitioners had withdrawn the petition. She said it seemed to be a public relations ploy on the part of Phillips because it was not happy with the petitioners.

MS. WAINWRIGHT, continuing with the same instance, said the property that the petitioners were trying to protect is private property; furthermore, it is on the National Register of Historic Places. Used by Inupiat and Eskimo people from Siberia to Canada as a gathering site [for celebrations] for thousands of years, the site has been extensively researched and documented by archeologists as authentic. There were concerns because past seismic work caused destruction to some of the property, including damage to the gravestone of the [petitioners'] grandfather; the [petitioners] had wanted their

concerns to be heard. She said the ACMP protects archeological sites and is supposed to protect water use.

Number 2922

MS. WAINWRIGHT continued with the same instance. She said the petitioners went through the process, and toward the end experienced significant pressure to withdraw their petitions; consequently, they withdrew all of the petitions with the exception of one. She said the [petitioners] weren't satisfied with the process - nor was Phillips or anybody else involved. She said she thought a solution needed to be found, but that a solution which cuts the public out at every level isn't going to work.

MS. WAINWRIGHT mentioned [pending] legislation that would hold the government accountable for its actions that harm property owners. She said the owner of the aforementioned property is now bearing the expense of the state's action and the wrath of the oil industry. She said her [clients] incurred harm to their land and to their cultural gravesite, and perhaps the only alternative left is to go forward with some [form] of unlawful-takings action. She said lawsuits never solve problems; they cost a lot of money, and they don't provide people with a meaningful or satisfactory result.

TAPE 02-14, SIDE B
Number 2980

REPRESENTATIVE KERTTULA remarked that it is dismaying to see the demise of the [petition] process. She asked Ms. Wainwright if the [petition process] should be eliminated, rather than keeping a vestige [of the process] in place and then rebuilding.

MS. WAINWRIGHT answered that part of the problem is the public's perception that if a petition is filed and has an impact on a project decision, then that process will be eliminated. She said Phillips has indicated this is a result of a delay; however, last year her clients had tried to participate in the process and were completely shut out. She said Phillips didn't get its permits until February; furthermore, [the petitioners'] comments were rejected, and there was no petition.

MS. WAINWRIGHT said part of the responsibility is that the people who want to get a project through need to come in early enough to allow for an effective public participation. She indicated delaying the permitting application process until it

is critical to the project doesn't allow the public a fair chance to evaluate projects. She said the solution has to contemplate that any public process should allow a certain lead-time; that has to be respected so that the public process can finish. This petition process doesn't work, so why have something on the books that doesn't work? She said there needs to be a fair process and a substantive review of these decisions short of court litigation, if the state and the public don't want to bear that expensive burden.

REPRESENTATIVE KERTTULA asked Ms. Wainwright if the reason DNR's appeal process wasn't used was because there weren't any DNR appeal issues.

MS. WAINWRIGHT answered that her clients had tried to obtain some documents from DNR relating to some of the issues, but DNR wanted to charge them $53 just to look at them. She said her [clients] live on the North Slope and didn't have a way to obtain the documents, so they never got the documents.

MS. WAINWRIGHT mentioned that DNR has a process that requires an administrative appeal; in regard to water permits, for example, the public isn't given notice of water permitting [applications], and without notice is not aware of the ability to administratively appeal. She mentioned that the legislature had done away with temporary water permits, and that people have no idea that water is possibly being taken from their land. She surmised that people cannot administratively appeal if they don't know what's happening. She said [the state] can't keep disallowing public participation without some kind of reaction. She commented that maybe a solution will be found, now that there is no opportunity.

Number 2780

REPRESENTATIVE OGAN offered an amendment that read [original punctuation provided]:

> Page 2, line 12-13 delete bold, underlined text and replace with ...**a petition filed under this section may not seek review of a proposed or final consistency determination regarding a specific project.**
>
> Page 3, line 5 add ...program, **except that the council may not order that the coastal resource district or a state agency take any action with respect to a project**

for which a proposed or final consistency determination has been made.

Number 2732

REPRESENTATIVE McGUIRE made a motion to adopt the foregoing as Amendment 1.

REPRESENTATIVE OGAN explained that amending page 2, lines 12-13, makes the language less ambiguous; he offered his view that it is a technical amendment. He said amending page 3, line 5, adds wording that clarifies the petition language.

Number 2682

VICE CHAIR FATE announced that he was bifurcating the written amendment, with Amendment 1 being only the first portion, amending page 2, line 12-13. The wording it deletes and replaces is "**a petition seeking review of a consistency determination may not be filed under this subsection**."

VICE CHAIR FATE asked if there was any objection to Amendment 1. There being no objection, Amendment 1 was adopted.

VICE CHAIR FATE labeled the second portion of the written amendment as Amendment 2. He explained that the new language would be on page 3, line 5, following "program".

Number 2673

REPRESENTATIVE GREEN objected for discussion purposes. He requested clarification.

REPRESENTATIVE OGAN said [Amendment 2] is consistent with the rest of the paragraph; furthermore, page 3, line 3, talks about a coastal resource district or state agency. He said he'd been advised that the language was a clarification of existing policy that "we're" trying to pass with this legislation.

REPRESENTATIVE GREEN expressed concern about the possibility of an exception being [included in Amendment 2]. He said he wouldn't have a problem with [Amendment 2] if there were assurance that it wouldn't be "cross-threading" with any other state agency.

REPRESENTATIVE KERTTULA asked Mr. Galvin if the coastal petitions were going to look prospectively [at whether the

program is implemented properly], rather than being project-specific. She asked if there was a possibility that an old project might be affected [by the amended language], which would lead her to think this language is overly broad.

MR. GALVIN requested clarification.

REPRESENTATIVE KERTTULA inquired: If an old project has been "completed" but still is ongoing, and a petition is brought forward that the coastal district program isn't being implemented properly, could [the amendment] affect the project and therefore not merely be technical? The original intent was simply for the coastal management program to be implemented, she noted, but the implementation might impact the project.

Number 2456

MR. GALVIN said the reason there had been no example seen is that, unfortunately, enforcement isn't very strong in the program. He then said the purpose of the amendment is to get at a subsequent review of the determination itself; there shouldn't be the ability, through the petition process, to get the CPC to take an action to require an amendment to the consistency determination. However, it's written to not take an action with regard to a project for which a consistency determination has been issued. He said that may hamper enforcement action if there's a feeling that a district or state agency isn't enforcing the program with regard to a project that may be blatantly ignoring a requirement of the program. He said [Representative Kerttula's] may be an accurate characterization.

Number 2376

REPRESENTATIVE KERTTULA, still discussing Amendment 2, said she didn't think there had been an example of where it had been a problem. She said she had a problem with changing the language because she hadn't had time to think about it. She suggested that mixing consistency determinations with other petitions may be a mistake.

REPRESENTATIVE STEVENS asked Representative Ogan what he felt the impact would be of eliminating [Amendment 2].

REPRESENTATIVE OGAN suggested striking "proposed" or "proposed or", as a compromise, unless there is a final consistency determination. He said [if] it has been through a fair public process, why open it up for more delaying tactics.

REPRESENTATIVE KERTTULA explained that the problem is that [Amendment 2] would preclude a state agency from taking any action with respect to a project, and every project that affects the coastal zone would not be [enforceable] because everything has a coastal determination or is part of the "ABC list." She said [Amendment 2] could have some really broad ramifications.

Number 2213

REPRESENTATIVE McGUIRE asked Representative Ogan if he was [suggesting the aforementioned language change] as a friendly amendment [to Amendment 2].

REPRESENTATIVE OGAN offered that if the amendment is [adopted], once the final consistency determination has been made the petition process is over. He referred to AS.46.40.096(e) and said subsection (e) is repealed in the bill.

REPRESENTATIVE GREEN expressed concern that [the proposed amendment] might go beyond the powers of the committee and affect the Alaska Department of Fish and Game (ADF&G) and other agencies. He indicated he was uncomfortable amending language involving state agencies without carefully researching the outcome beforehand.

REPRESENTATIVE McGUIRE offered her understanding that attorneys had reviewed the aforementioned language. She said the idea was to make it absolutely clear that once the final consistency determination is made, there is no way to circumvent that process.

REPRESENTATIVE GREEN indicated the focus of the discussion had gone from nuisance objections to state agencies.

REPRESENTATIVE OGAN mentioned that the purpose of the amendment was to ensure that the final consistency determination is a final one, and that the council cannot order a coastal resource district or state agency to take any more action on it.

Number 1976

REPRESENTATIVE McGUIRE moved to amend Amendment 2 by deleting the language "proposed or".

Number 1970

REPRESENTATIVE KERTTULA objected for purposes of discussion. She indicated the purpose of the amendment is to eliminate interaction within the consistency determination process. She suggested changing the language of the amendment to remove reference to the "project" to make it clear that a consistency determination is not an issue in these types of petitions. She expressed concern that the current language could have an unintended effect and be problematic.

VICE CHAIR FATE called an at-ease from 2:16 p.m. to 2:18 p.m.

Number 1849

REPRESENTATIVE McGUIRE moved to [instead amend Amendment 2] by eliminating the language "a project for which" on line 3.

Number 1805

REPRESENTATIVE KERTTULA said the amendment would also eliminate the language "has been made" from line 4.

VICE CHAIR FATE called an at-ease from 2:20 p.m. to 2:21 p.m.

Number 1781

REPRESENTATIVE McGUIRE clarified that with the amended language, Amendment 2 would read:

> Insert **except that the council may not order that the coastal resource district or a state agency take any action with respect to a proposed or final consistency determination.**

Number 1742

VICE CHAIR FATE asked if there was any objection to the amendment to [Amendment 2]. There being no objection, the amendment to Amendment 2 was adopted.

Number 1733

VICE CHAIR FATE asked if there was any objection to [Amendment 2, as amended]. There being no objection, Amendment 2, as amended, was adopted.

Number 1720

REPRESENTATIVE McGUIRE moved to report CSHB 439 [HB 439, as amended] out of committee with individual recommendations and the accompanying zero fiscal note. There being no objection, CSHB 439(RES) was moved out of the House Resources Standing Committee.

VICE CHAIR FATE called an at-ease from 2:23 p.m. to 2:26 p.m.

HB 376-FISH & GAME IN NAVIGABLE WATERS

VICE CHAIR FATE announced the final order of business, HOUSE BILL NO. 376, "An Act relating to management of fish and game in and on the navigable waters and submerged lands of Alaska."

Number 1653

REPRESENTATIVE SCOTT OGAN, Alaska State Legislature, sponsor of HB 376, reminded members that the bill was heard extensively in a previous committee meeting. He said he was available for questions.

Number 1631

DALE BONDURANT, Alaska Constitutional Legal Defense Conservation Fund, testified via teleconference. Mr. Bondurant told the committee that he supports HB 376. He said he had been very active in the issues on navigable waters for many years. He offered the following history: In 1977, Alaska Public Easement Defense Fund v. Andrus, "we" won reasonable access to all public waters of the state, and [legislation] was passed that included all surface waters. In 1987, "we" backed the state into the Gulkana decision [Alaska v. Ahtna, Inc., 891 F.2d 1401 (9th Cir. 1989)], which resulted in winning 30 million acres of submerged lands and 187,000 miles of navigable waters. He said the governor has failed to fight for [state rights]. Mr. Bondurant spoke about plants, waters, and nonrenewable resources such as gas and oil. He also spoke about renewable [resources] such as fish and marine animal life in the aforementioned waters. He referred to a paragraph in the Submerged Lands Act that allows the state control all [surface] and ground waters.

MR. BONDURANT recounted details of meetings and events that led up to the initiation of the Gulkana decision, in which he said he'd had a large role. He mentioned an ad hoc committee, John Shively, and Sam McDowell. He concluded, "So our names weren't on that suit, but we're the ones that carried the battle through." He agreed that the federal government is using the

reserved water rights to take away the state's rights to manage its resources in navigable waters. He said the federal government has a responsibility to protect the fish and wildlife and other uses, including recreation. He said the taking that exists, which comes under "users," is the state's responsibility under [the Tenth Amendment].

MR. BONDURANT said the reserved water rights have a different intent - to ensure quantity and quality. Moreover, Alaska is one of the states that has an article [in its constitution] about water rights; it says there is a general reservation for fish and wildlife. He said the "McCarran Act" says the states know more about their water, so these [issues] should be handled in state courts, but also recognizes that the federal government might have some concern, so a writ of certiorari to the Supreme Court was allowed in case of that. He said the biggest trouble is that these cases are won but aren't enforced, which is why [the state] is back in court to say "we" have a right to represent the state, since "they" aren't doing a very good job representing the citizenship of the country. He concluded, "I would like to see this passed, [to] give us a little more leverage, but I'd also like to see the legislature join our suit, and we're fighting - ourselves - on."

Number 1213

REPRESENTATIVE OGAN referenced United States v. Alaska, [117 S.Ct. 1888, 138 L.Ed.2d 231 (1997)]. He said Alaska lost the case, which was about whether or not the federal government intended to reserve the offshore islands on the North Slope. It was a royalty dispute case; moreover, Alaska lost millions of dollars in potential revenues over that case. He told members, "In the majority opinion, [U.S. Supreme Court] Justice O'Connor said that several general principles governed our analysis of the parties' claims. Ownership of submerged lands, which carries with it the power to control navigation, fishing, and other public uses of water, is an essential attribute of sovereignty."

REPRESENTATIVE OGAN said [the purpose] of this bill is to stay consistent with the sovereign rights of the State of Alaska to manage its resources. He offered his view that [the bill] gives adequate protections for "them" to comment, keep an eye on the resources, and work with the federal government as far as what the state's positions are; moreover, [the bill] is stating in law that [Alaska] doesn't assent to [federal] control of [its] submerged lands.

Number 1110

REPRESENTATIVE KAPSNER asked if [passing HB 376] would cause the federal government to [convey control of submerged lands back to Alaska].

REPRESENTATIVE OGAN said no.

REPRESENTATIVE KAPSNER asked, "What is the point? Doesn't this seem futile if they're not going to pull out?"

REPRESENTATIVE OGAN replied, "I think the point is, we can do all we can do - what I believe is our duty as trustees of the public trust to defend our sovereign rights to manage our resources." He offered his opinion that the best way to get closure would be to have the case litigated, but said, "That's water under the bridge. The governor chose not to do it, and we don't have much left, other than maybe Mr. Bondurant [and other] private citizens who are willing to step up to the plate." He talked about [Alaska's] history of not assenting to federal control, such as in the Glacier Bay issue. He offered his belief that putting it into statute is as appropriate now as when "we" did it for Glacier Bay.

Number 0989

REPRESENTATIVE KAPSNER said she thinks there can be closure through the legislative process that is probably more meaningful [than through litigation]. She asked what would happen to [HB 376] on the books once the issue is resolved. She recalled previous testimony this day by Nancy Wainwright [during the hearing on HB 439] that lawsuits do not generate meaningful resolutions for problems.

REPRESENTATIVE OGAN remarked that he thought it was speculative as to how [the issue] would be resolved. He mentioned that the issue of a constitutional amendment [to add a rural preference for subsistence] has been [before the state legislature] for 20 years. He said, "I suppose we can cross that bridge when it happens." He suggested that once the constitution is amended to conform to federal law, "we" have assented to it.

REPRESENTATIVE OGAN said he didn't think [Alaska] was going to get state management back. He said [Alaska] would have to enshrine the federal law into its constitution, statutes, and regulations. He added, "We can call it state management, but

it's federal management with a gun to our head." He mentioned that the legislature doesn't have a constitutional amendment before it; nor has it been placed before the voters. He remarked that he thought [legislators] should take this measure.

Number 0854

REPRESENTATIVE McGUIRE moved to report HB 376 out of committee with individual recommendations and the accompanying zero fiscal note.

Number 0837

REPRESENTATIVE KAPSNER objected.

[A few seconds of the tape is blank due to a technical difficulty.]

Number 0808

REPRESENTATIVE KERTTULA explained, "I just see this as cutting off our nose to spite our face." She mentioned that under this, there may be a risk of possibly getting some information from the federal subsistence board that might be useful after the issue is resolved. She said, "This is neither here nor there; it's just sort of another shot, and I just don't think it's very productive."

Number 0786

REPRESENTATIVE GREEN recounted earlier discussion that litigation is not a good way to solve an issue. However, the whole judicial system is based on that: if "we" can't mediate, "we" have to go to court. He said he agreed with the sponsor. He said he thought the only way [the issue would be resolved] would [be through] the courts.

VICE CHAIR FATE said the final court of the land does certainly settle issues.

REPRESENTATIVE OGAN offered his view that there wouldn't be closure [on the issue] regardless of what happens. He said even if the [state] constitution were amended to give a rural priority [for subsistence, to conform to federal law], the lawsuit in process now isn't necessarily based on submerged lands and the water rights doctrine; rather, it's a Fourteenth Amendment issue of equal protection and due process. He

suggested that [the issue] would be carried forward regardless of whether it relates to an arbitrary class of discrimination based on residency and whether it passes the rational-basis test. He continued:

> Really, the only way to get closure and get all of this behind us is ... - and [U.S.] Senator Murkowski alluded to it - that we need the issue ruled on so we can figure out where we're at. And it's unfortunate that the governor chose, in my opinion, the actions he did. And I can't change that. This is all I can do.

Number 0686

A roll call vote was taken. Representatives Fate, Chenault, Green, and McGuire voted to move HB 376 out of committee. Representatives Stevens, Kapsner, and Kerttula voted against it. Therefore [because a majority of the nine-member committee didn't vote to move the bill from committee], HB 376 failed to move out of the House Resources Standing Committee by a vote of 4-3.

[There was a motion by Representative McGuire to reconsider her vote "for a later date," which Vice Chair Fate acknowledged, although that particular motion technically doesn't apply to moving a bill from committee.]

ADJOURNMENT

There being no further business before the committee, the House Resources Standing Committee meeting was adjourned at 2:40 p.m.