

HOUSE FINANCE COMMITTEE
April 15, 2011
9:02 p.m.

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CONTINUATION OF RECESSED MEETING FROM 4/15/11 PM

CALL TO ORDER

Co-Chair Stoltze called the House Finance Committee meeting to order at 9:02 p.m.

MEMBERS PRESENT

Representative Bill Stoltze, Co-Chair
Representative Bill Thomas Jr., Co-Chair
Representative Anna Fairclough, Vice-Chair
Representative Mia Costello
Representative Mike Doogan
Representative Bryce Edgmon
Representative Les Gara
Representative David Guttenberg
Representative Reggie Joule
Representative Mark Neuman
Representative Tammie Wilson

MEMBERS ABSENT

None

ALSO PRESENT

Representative Mike Hawker; Representative Beth Kertulla;
Representative Eric Feige; Representative Bob Herron;
Representative Paul Seaton; Representative Kyle Johansen;
Representative Mike Chenault; John J. Burns, Attorney
General, Department of Law; Larry Hartig, Commissioner,
Department of Environmental Conservation; Joe Balash,
Deputy Commissioner, Department of Natural Resources; Mike
Satre, Executive Director, Council of Alaska Producers;
Representative Bob Herron; Representative Eric Feige.

SUMMARY

HB 106 COASTAL MANAGEMENT PROGRAM

CSHB 106(FIN) was REPORTED out of Committee with a "do pass" recommendation and with two new fiscal notes by the Department of Environmental Conservation and one new fiscal impact note by the Department of Natural Resources.

#hb106

HOUSE BILL NO. 106

"An Act extending the termination date of the Alaska coastal management program and relating to the extension; relating to the review of activities of the Alaska coastal management program; providing for an effective date by amending the effective date of sec. 22, ch. 31, SLA 2005; and providing for an effective date."

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Vice-chair Fairclough MOVED Work Draft CSHB 106(FIN), (27-GH1965\T, 4/15/11) as a working document before the committee.

Co-Chair Stoltze OBJECTED.

JOHN J. BURNS, ATTORNEY GENERAL, DEPARTMENT OF LAW, spoke to the CS. He declared that the bill represented a finely structured balance between local communities, industry and economic opportunity. He described changes that addressed concerns articulated earlier with the House Resources version. He elaborated that the bill provided objective standards, predictability, and ensured local input but denied local veto power over projects. Within the parameters coastal districts were provided meaningful input and opportunity to create enforceable policies that ensure development was compatible with local concerns. He stressed that the enforceable policies must meet very specific criteria to safeguard that the policies were consistent with the interests of the whole state. He claimed that the CS encouraged and facilitated meaningful dialogue between industry and costal districts. He identified the Alaska Coastal Policy Board. The board's composition and procedures were designed to build understanding and agreement.

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Mr. Burns provided an overview of the bill. He explained that the CS created the Alaska Coastal Policy Board that consisted of nine members. He described the composition of the board appointed by the governor:

- Five public members, one appointed at-large from the resource development, extraction industry or Native regional corporations. Four appointed members from various geographic areas.
- Commissioners from Department of Transportation and Public Facilities(DOT), Department of Fish and Game (DFG), Department of Environmental Conservation (DEC), and one deputy commissioner from Department of Natural Resources (DNR).

Mr. Burns divulged that the commissioner of DNR was empowered to reconsider Alaska Coastal Management Program (ACMP) decisions; therefore the deputy commissioner was chosen to sit on the board. He detailed that the public members serve staggered three year terms.

Mr. Burns discussed the function of the board. He read Page 4, Line 12,

(f) Three public members and three designated members of the board constitute a quorum. However, action may be taken only upon the affirmative vote of at least two-thirds of the full membership of the board.

Mr. Burns explained that the super majority [two-thirds] voting requirement was crafted to ensure full dialogue and build consensus. He added that the board's function was to serve as a forum to foster agreement.

Mr. Burns read Page 4, Lines 25-31:

- (j) The board shall
- (1) make recommendations to the department relating to the approval or modification of a district coastal management plan under AS 46.40.060(b);
 - (2) provide a forum for the discussion of issues related to this chapter, AS 46.40, and the coastal uses and resources of the state; and

(3) annually solicit from state and federal agencies information as to whether they implemented any new statutes or regulations affecting coastal uses or resources

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Mr. Burns described the passage as a "clean up" provision. The provision prescribed a yearly review of coastal plans to allow affected state agencies to modify or add regulations. He noted that the section supported "clawback provisions" in the bill. The agency was not obligated to act at the time a coastal plan was implemented. Acceptance or acquiescence by an agency would not preclude development of a regulation in the future.

Mr. Burns noted that the powers of DNR detailed on Page 5, Line 15 of the bill remained consistent with existing statutes. He remarked that the duties of the department outlined on Pages 5-6 of the CS reflected existing statute except that the department was obligated to provide information and board minutes to coastal districts and resource service areas.

Mr. Burns turned attention to the development of district coastal management plans. He read Page 6, line 26- 28:

The plan must meet the [STATEWIDE STANDARDS AND] district plan criteria adopted under AS 46.40.040, may not be inconsistent with the standards adopted under AS 46.40.040, and must include [criteria listed]

Mr. Burns read further on Page 7, Line 13-24:

(b) In developing enforceable policies in its coastal management plan under

(a) of this section, a coastal resource district shall meet the requirements of AS46.40.070 and ensure that the enforceable policies

(1) are clear and concise as to the activities and persons affected by the policies;

(2) use prescriptive or performance-based standards that are written in precise and enforceable language;

(3) address a coastal use or resource of concern to the residents of the coastal resource district as demonstrated by local knowledge or supported by scientific evidence; and

(4) employ the least restrictive means to achieve the objective of the enforceable policy

Mr. Burns identified the definition of "least restrictive" found on Page 7, Line 28. He read the factors considered for a least restrictive determination beginning on Page 7 line 31:

- (1) alternative methods of achieving the objective of the policy;
- (2) local knowledge or scientific evidence supporting each alternative method;
- (3) how the alternative methods may affect other existing or potential uses;
- (4) the economic effects of alternative methods;
- (5) the technological feasibility of the alternative methods; and
- (6) any other relevant factors.

Mr. Burns indicated that the provisions call for a meaningful evaluation of the enforceable policy. The assessment must weigh the consequences.

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Mr. Burns defined the "DEC carve-out." He read the phrase from Page 8, Line 9 of the CS: "Notwithstanding any other provision of law." The provision reflected the "DEC carve-out"; the ACMP cannot develop or recommend regulations that were in the scope of DEC. He felt that the carve-out was necessary to achieve a balanced regulatory environment.

Mr. Burns directed attention to the process of the evaluation of a coastal plan. He read Page 9, Lines 5-9:

(b) If the department finds that a district coastal management plan is not approvable or is approvable only in part under (a) of this section, the department shall explain in writing the basis for its decision. The coastal resource district that submitted the plan may request that the department submit the plan or portions of the plan to the board for review.

Mr. Burns continued to read Page 9, Lines 19-23:

(c) After the board has reviewed the district coastal management plan and submitted recommendations under (b) of this section [IF, AFTER MEDIATION, THE DIFFERENCES HAVE NOT BEEN RESOLVED], the department shall enter findings and, by order, may [REQUIRE]
(1) approve the plan or portions of the plan;

Mr. Burns judged that if the board's recommendation was contrary to the department's determination the provision permitted an opportunity for meaningful participation between the ACMP and the department.

Mr. Burns referred to the requirements for department review and approval. He declared that Section 15 was the core of the bill related to implementation. The section depicted the level of checks and balances established in the CS. He read Page 10, Lines 16-30:

Sec. 46.40.070. Requirements for department review and approval. (a) The department shall approve a district coastal management plan submitted for review and approval if, as determined by the department, the

- (1) district coastal management plan meets the requirements of this chapter and the district plan criteria adopted by the department; and
- (2) enforceable policies of the district coastal management plan

(A) do not duplicate, restate, incorporate by reference, rephrase, or adopt state or federal statutes or regulations;

(B) are not preempted by or in conflict with state or federal statutes or regulations;

(C) employ the least restrictive means to achieve the objective of the enforceable policies;

(D) do not arbitrarily or unreasonably restrict uses of state concern; and

(E) meet the requirements of (b) and (c) of this section.

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Mr. Burns discussed the legal definition of "uses of state concern" as it related to the CS. He focused on (D) (line 28) of the CS. He read, "not arbitrarily obstruct uses of state concern." He cited the statute that defined the "uses of state concern" AS 46.40.210.12. He paraphrased the statute as follows, "uses of national interest including the use of resources for the citing of ports and major facilities that contribute to meeting energy needs, construction and maintenance of navigational facilities and systems, resource development of federal land and national

defense and related security facilities that are dependent upon coastal location. Uses of more than local concern including those land and water that confer significant environmental, social, cultural or economic benefits or burdens beyond the single coastal resource district"

Mr. Burns emphasized that the statute prohibited a coastal district to arbitrarily or unreasonably restrict use if the economic impact was felt elsewhere in the state. He believed the law delineated significant restrictions on limiting use through enforceable policies. The statute shaped the criteria that ACMP regulation or enforceable policies were measured against.

Mr. Burns continued with Section 15. He read Pages 10-11, Lines 31-9:

(b) The enforceable policies in a district coastal management plan submitted for review under this section must meet the requirements of (a) of this section and may establish new standards or requirements that are within the authority of a state or federal agency unless

(1) a state agency specifically objects to the proposed new standards or requirements on the grounds that the proposed standards or requirements

(A) are based on scientific evidence or local knowledge relied upon by the coastal resource district to satisfy the requirements of AS 46.40.030 but that conflicts with the agency's interpretation of the scientific evidence within the agency's area of expertise;

Mr. Burns stated that the law's intent was to avoid competing scientific data challenges. He expounded that if ACMP interpreted scientific data differently than a state agency the state will endorse the agency data provided the disputed data was in the agencies area of expertise.

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Mr. Burns turned to Subsection (B) on page 11, Line 10. He read as follows:

(B) conflict with the agency's allocation of existing or planned agency resources to meet state policies and objectives; or

(C) conflict with agency priorities or objectives, or other state policies;

Mr. Burns informed that the following provision represented another "DEC carve-out." He read Page 11, Lines 14-16:

(2) the proposed new standards or requirements address discharges, emissions, contaminants, conditions, risks, or other matters that fall within the authority of the Department of Environmental Conservation

Mr. Burns restated that the coastal districts were prohibited from adopting policies within DEC's regulatory control.

Mr. Burns identified paragraph (c) as a significant provision that related to protecting existing rights. He read Page 11, Lines 18-23:

(c) An approval of a district coastal management plan with enforceable policies may not affect a person's rights or authorizations under an unexpired permit, lease, or other valid existing right to explore or develop natural resources that predates the date that the enforceable policy becomes final. An enforceable policy becomes final when its adoption is no longer subject to further review through either a judicial or administrative process.

Mr. Burns stressed that the provision ensured stability and predictability in the permitting process. New regulations will not pertain to existing permits or authorizations until they expire. Renewal would subject permits to updated standards.

Mr. Burns commented on the definition of "specifically objects" found on Page 11, Lines 24-25. He read:

(d) In this section, "specifically objects" means that, during a review of a 25 district coastal management plan under AS 46.40.050 or 46.40.060

Mr. Burns indicated that a timeframe for review was carefully considered. The administration concluded that in

order to file an objection an unconstrained review process was necessary. He continued to read Page 11, Lines 26-30:

implementing regulations, a written objection to the enforceable policy that establishes the new standards or requirements is filed with the department by

- (1) the commissioner or the commissioner's designee of a state agency; or
- (2) the attorney general of the state

Mr. Burns characterized Page 11-12, Line 31-3 as a "clawback provision." He read the provision:

(e) Notwithstanding any other provision of this chapter, an enforceable policy that establishes requirements within the authority of a state or federal agency shall be superseded upon the enactment of a law or adoption of a regulation that is inconsistent with the enforceable policy.

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Mr. Burns elaborated that the provision protected a state agency's right to object to an enforceable policy at any point in the future. A new regulation adopted in lieu of the existing enforceable policy will immediately supersede the conflicting policy. The agency would inform the board of the new regulation during the board's yearly review process. The board would require the local district to resubmit a plan.

Mr. Burns directed attention to Section 16 of the CS. He communicated that the section related to the consistency review process for a proposed project. He read Page 12, Lines 5-10 and Lines 18-29:

(d) In preparing a consistency review and determination for a proposed project, the reviewing entity shall

- (1) request consistency review comments for the proposed project from state resource agencies, affected coastal resource districts, and other interested parties as determined by regulation adopted by the department;
- (2) prepare proposed consistency determinations;

(B) may occur only if requested by

- (i) the project applicant;

- (ii) a state resource agency; or
- (iii) an affected coastal resource district; and

(C) shall be completed with the issuance of a written order

signed by at least two of the commissioners of the resource agencies or their deputies [BY THE DEPARTMENT] within 60 [45] days after the initial request for an elevated [SUBSEQUENT] review under this paragraph; if a written order is not issued in accordance with this subparagraph, the proposed consistency determination under (2) of this subsection is the final consistency determination and certification; and

- (4) render the final consistency determination and certification

9:31:27 PM

Mr. Burns delineated that a petitioner [defined in statute above] may request an elevated review. The resource commissioners of DNR, DOT, and DFG or their deputies will review the consistency determination and submit a written order within 60 days. In the event the commissioners fail to submit written orders within the timeframe the reviewers would adopt the consistency determination.

Mr. Burns concluded with the definition of "local knowledge." He read Page 14, Lines 10-15:

(16) "local knowledge" means a body of knowledge or information about the coastal environment or the human use of that environment, including information passed down through generations, if that information is

- (A) derived from experience and observations;
- (B) generally accepted by the local community; and
- (C) not contradicted by scientific evidence

Mr. Burns emphasized the significant discussion of the definition by all parties. He felt the provision reflected the strong desire for balanced legislation.

Co-Chair Stoltze REMOVED his OBJECTION. There being NO further OBJECTION, it was so ordered.

Representative Gara stated concerns about the composition of the board. He felt that the governor controlled the board. He proposed deleting the provision that the governor

may veto a list of proposed regional members. He read the proposed language for deletion on Page 3,[Lines 2-3]

"the governor may reject a list submitted under this subparagraph and request subsequent lists with different names."

Mr. Burns explained that the administration engaged in thoughtful deliberation while drafting the composition of the board. The CS encompassed the governor's desire for balance and ensured thorough dialogue. The local members were chosen from a list submitted by each region. He was confident that the list would contain a name satisfactory to all parties.

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LARRY HARTIG, COMMISSIONER, DEPARTMENT OF ENVIRONMENTAL CONSERVATION, spoke in support of the composition of the Alaska Coastal Policy Board. He exemplified the similar structure of the Board of Forestry, which he was a member for 13 years. He related the success of the Board of Forestry. He argued that the diverse make-up of the proposed board and the super majority requirement would foster consensus and build consistency. A diverse board needed one person to evaluate the membership from a holistic view and choose appointees. He believed the governor was the best suited for the task. Representative Gara was uncomfortable with the provision allowing the governor to reject local nominees until he finds one that suits him.

Representative Doogan queried Section 15 related to agency objection to new standards. He cited Page 11, Lines 10-13:

- (B) conflict with the agency's allocation of existing or planned agency resources to meet state policies and objectives; or
- (C) conflict with agency priorities or objectives, or other state policies;

He interpreted that a state agency can specifically object to the districts proposed new standards "just because it wanted to." He surmised that it was the most expansive construction possible. He asked why the section was written so broadly. Mr. Burns replied that the subsection (B) met the standard requirement in law that an agency

determination cannot be arbitrary or capricious. He hypothesized a situation in which a coastal district listed a species as endangered. The Department of Fish and Game would have to focus its limited resources on management of the particular species. The section allowed DFG to object given their lack of adequate resources. They cannot object simply because they want to. He pointed to subsection (C) related to state policies. He informed that state priorities and policies were not nebulous. The agency must have a basis to object founded on sound policy.

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Commissioner Hartig furthered that a coastal district did not have the authority to enforce policies. He explained that it was requisite that a new project aligns with any new district regulations. The agencies monitored and enforced policies. The departments do not automatically receive an appropriation for additional enforcement. An agency cannot reallocate resources to regulate district enforceable policies that were not as high a priority as legislatively directed policies. The section was written broadly to allow the agencies flexibility. Representative Doogan appreciated the explanation but it did not answer his question. He did not understand why the departments needed such broad authority.

Mr. Burns reiterated that all department authority was restrained by arbitrary and capricious standards. The standards were refined by regulation. He contended that the section reflected the administrations inability to respond to a myriad of conceivable issues. The CS permitted development of enforceable policies by coastal districts. The concern was to provide a system of checks and balances. The administration discerned that the arbitrary and capricious standard provided a sufficient measure to evaluate enforceable policies against.

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Representative Doogan noticed a lot of checks and no balances.

Representative Guttenberg referred to the "clawback provision" beginning on Page 11, Line 31. He discussed the ability of an agency to revisit a regulation and always retain the right to change it. He asked where the process

would stop. He wondered how that approach was consistent for industry. Mr. Burns replied that the right of an agency to exercise its authority was imperative. He viewed local district policies as stop gap measures. The local district was filling a void for an agency function. At a later date the agency can review the policy and develop a broad-based statewide policy. He reminded that the regulation does not change retroactively. A permitted industry was grandfathered into a regulatory process.

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Representative Guttenberg described problems that occurred in normal agency operations with different interpretations of regulation. He felt that the process in general lacked adequate protection to ensure regulatory consistency. Commissioner Hartig reported that agencies subscribed to comprehensive processes set up in statute on how to adopt regulations. The process was very public. Coastal district enforceable policies were not subject to the same thorough public process. The agency as the regulatory enforcer was entitled to submit the regulation to the same process and possibly supersede the coastal districts policy. He pointed out that agency oversight was never surrendered when the district enforceable policy was in place; the policy acted as a stop gap. He opined that the thorough vetting of an agency regulation made the state process more predictable.

Representative Joule inquired about "designated areas". He related that CSHB 106 (RES) contained a provision that prohibited DNR from requiring that coastal districts must designate areas in order to apply enforceable policies. The CS removed the provision. He asked if DNR remained committed to terminating the designated area requirement.

JOE BALASH, DEPUTY COMMISSIONER, DEPARTMENT OF NATURAL RESOURCES, affirmed the department's commitment to abolish the requirement from the body of regulations that govern the ACMP.

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MIKE SATRE, EXECUTIVE DIRECTOR, COUNCIL OF ALASKA PRODUCERS, spoke in support of the legislation. He announced that the council represented large metal mines and large development projects in the state. The council thought that the CS achieved the fine balance between

protection of important coastal areas and resource development. The regulatory process remained science-based and predictable for industry while allowing meaningful local input based on provable plans with clear enforceable policies.

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Representative Joule read into the record the comments of Edward S. Itta, Mayor of the North Slope Borough (copy on file):

Thank you, Mister Chairman. I appreciate this opportunity to address the committee on the latest version of HB 106. First of all, I want to thank the Governor and his staff for the enormous effort and time they have devoted to finding a way forward on this bill, a way forward that works for all the parties involved. I particularly want to thank Attorney General Burns, Commissioner Hartig for their commitment to the process we've been going through.

I also want to thank a few of the legislators who have contributed their input and participated in finding a solution. In particular, I'd like to recognize the work that Representative Feige, Representative Seaton, and Representative Herron did in the House Resources Committee and their persistence in reaching a solution that they could bring to this committee. I also want to recognize the efforts of Reggie Joule, my representative in bringing this matter to the committee's attention.

Earlier this year, I appeared before you with Attorney General Burns, Commissioner Sullivan and Rex Rock, by fellow whaler and President of Arctic Slope Regional Corporation. We all spoke about the concerns and challenges that we share as Alaskans, as well as the belief that we are in this together I believe that is the spirit that has brought us back here today. We recognize that the best solutions come from working side by side and that this process helps us to understand each other better and pave the way for a more effective process in the future.

Sure, we have different perspectives on some issues, but our goals are much more closely aligned than we often allow ourselves to believe. We all stand together in our desire for a strong economic foundation that allows communities to

thrive; and we all see the inherent value in preserving the qualities of Alaskan life that make this state unique.

I do have concerns with this bill. But this bill echoes these two pursuits. It helps bring local communities to the table, whereas for the past few years they have felt like they were pushed to the back of the room as big projects were planned for their communities. HBI06 gives them a way to discuss their deepest concerns as development moves forward.

I'm very pleased to see that this bill reconstitutes a coastal policy board and we understand that designated areas have been eliminated. It also establishes clearer mechanisms for the State and the districts to engage in the process leading to approved policies.

Again, I want to thank Governor Parnell for committing his administration to the task of finding a solution to this, and I support moving the measure that is embodied in the Finance CS of this bill from the committee. Thank you, Mister Chairman.

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Representative Edgmon thanked Co-chair Stoltze's committee leadership on behalf of the legislation.

REPRESENTATIVE BOB HERRON, spoke in support of the CS. He appreciated the hard work done by the administration and their effort to work with his constituents. He hoped that the effort provided his constituents true participation in the ACMP process.

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REPRESENTATIVE ERIC FEIGE, commented on the process of drafting the CS. He felt that the CS was created in the spirit of compromise and stood as a worthy example of the legislative process.

Vice-chair Fairclough highlighted the fiscal notes. She identified three new fiscal notes with fiscal impact: one fiscal note from DNR and two fiscal notes from DFG.

Vice-chair Fairclough MOVED to report CSHB 106(FIN) out of Committee with individual recommendations and the

accompanying fiscal notes. There being NO OBJECTION, it was so ordered.

CSHB 106(FIN) was REPORTED out of Committee with a "do pass" recommendation and with two new fiscal notes by the Department of Environmental Conservation and one new fiscal impact note by the Department of Natural Resources.

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ADJOURNMENT

The meeting was adjourned at 10:14 PM.