

**ALASKA STATE LEGISLATURE
JOINT MEETING
HOUSE JUDICIARY STANDING COMMITTEE
SENATE JUDICIARY STANDING COMMITTEE**

February 6, 2012

1:03 p.m.

MEMBERS PRESENT

HOUSE JUDICIARY

Representative Carl Gatto, Chair
Representative Steve Thompson, Vice Chair
Representative Wes Keller
Representative Bob Lynn
Representative Lance Pruitt
Representative Max Gruenberg
Representative Lindsey Holmes

SENATE JUDICIARY

Senator Hollis French, Chair
Senator Bill Wielechowski, Vice Chair
Senator Joe Paskvan
Senator John Coghill

MEMBERS ABSENT

HOUSE JUDICIARY

Representative Mike Chenault (alternate)

SENATE JUDICIARY

Senator Lesil McGuire

OTHER LEGISLATORS PRESENT

Representative Beth Kerttula

Senator Kathy Giessel

COMMITTEE CALENDAR

OVERVIEW(S): BALLOT INITIATIVE 11ACMP - ESTABLISHING THE ALASKA
COASTAL MANAGEMENT PROGRAM

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

DOUGLAS GARDNER, Director
Legal Services
Legislative Legal and Research Services
Legislative Affairs Agency (LAA)
Juneau, Alaska

POSITION STATEMENT: Presented the overview of ballot initiative 11ACMP - establishing the Alaska Coastal Management Program.

ALPHEUS BULLARD, Attorney
Legislative Legal Counsel
Legislative Legal and Research Services
Legislative Affairs Agency (LAA)
Juneau, Alaska

POSITION STATEMENT: Responded to questions during the overview of ballot initiative 11ACMP - establishing the Alaska Coastal Management Program.

SUSAN BELL, Commissioner
Department of Commerce, Community & Economic Development (DCCED)
Juneau, Alaska

POSITION STATEMENT: Provided comments and responded to questions during the overview of ballot initiative 11ACMP - establishing the Alaska Coastal Management Program.

JOHN BOUCHER, Senior Economist
Office of the Director
Office of Management & Budget (OMB)
Office of the Governor
Juneau, Alaska

POSITION STATEMENT: Provided comments and responded to questions during the overview of ballot initiative 11ACMP - establishing the Alaska Coastal Management Program.

BRUCE M. BOTELHO, Chair
Alaska Sea Party: Restoring Coastal Management
Juneau, Alaska

POSITION STATEMENT: As one of the ballot initiative's joint prime sponsors, responded to questions during the overview of

ballot initiative 11ACMP - establishing the Alaska Coastal Management Program.

GAIL FENUMIAI, Director
Central Office
Division of Elections
Office of the Lieutenant Governor
Juneau, Alaska

POSITION STATEMENT: Provided comments during the overview of ballot initiative 11ACMP - establishing the Alaska Coastal Management Program.

ACTION NARRATIVE

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CHAIR HOLLIS FRENCH called the joint meeting of the House and Senate Judiciary Standing Committees to order at 1:03 p.m. Present at the call to order from the House Judiciary Standing Committee were Representatives Gatto, Thompson, Holmes, Keller, and Pruitt; Representatives Gruenberg and Lynn arrived as the meeting was in progress. Present from the Senate Judiciary Standing Committee were Senators French, Wielechowski, Paskvan, and Coghill. Representative Kerttula and Senator Giessel were also in attendance.

Overview(s): Ballot Initiative 11ACMP - Establishing the Alaska Coastal Management Program

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CHAIR FRENCH [announced that the only order of business would be an overview of ballot initiative 11ACMP - establishing the Alaska Coastal Management Program].

CHAIR GATTO explained that the committees wouldn't be proposing amendments to 11ACMP but would instead just be discussing it for purposes of understanding it.

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DOUGLAS GARDNER, Director, Legal Services, Legislative Legal and Research Services, Legislative Affairs Agency (LAA), noting that 11ACMP would add a new Chapter 41 - Alaska Coastal Management Program - to Title 46 [which pertains to water, air, energy, and environmental conservation,] explained that 11ACMP's proposed AS 46.41.010 would establish within the Department of Commerce,

Community & Economic Development (DCCED) an Alaska Coastal Policy Board made up of nine public members and the commissioners of the Department of Environmental Conservation (DEC), the Alaska Department of Fish & Game (ADF&G), the Department of Natural Resources (DNR), and the DCCED. The nine public members must be appointed from the geographic regions outlined in proposed subsection (a)(1)(A)-(I); shall serve three-year staggered terms; and are eligible for reappointment. Proposed AS 46.41.010 additionally provides for alternate public members or commissioners to be appointed or designated, respectively; provides for one public-member co-chair and one commissioner co-chair to be designated by the policy board; allows the policy board to recommend that the governor remove a public member for cause; stipulates that each member shall serve until a successor is appointed; stipulates that a quorum consists of five public members and two commissioners, and that all decisions shall be by a majority vote of the members present and voting; entitles the public members, or their alternates, to per diem and travel expenses; and stipulates that administrative support shall be provided by [the department - defined in proposed AS 46.41.900(7) as] the DCCED.

MR. GARDNER observed that members' packets contain a spreadsheet comparing the proposed program with previous programs and past proposed legislation, and noted that one of the previous programs fell under the purview of the DNR. Reading portions of subsections (a)(1)-(7) and (b)(1)-(2) of 11ACMP's proposed AS 46.41.020, he went on to explain that this section outlines the powers and duties of the policy board, stipulating [among other things] that the proposed program must be in conformity with the federal Coastal Zone Management Act of 1972, which sets forth details of what constitutes a qualifying program. He mentioned that he isn't clear about what's meant by proposed subsection (b)'s stipulations that the policy board may contract for necessary services and take any reasonable action necessary to carry out the provisions of AS 46.41, characterizing these stipulations as providing for a very broad power.

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MR. GARDNER indicated that 11ACMP's proposed AS 46.41.030 would establish within the DCCED a new division of ocean and coastal management, and specifies [among other things] that the division would render all federal consistency determinations and authorized certifications, and certain state consistency determinations; would adopt necessary regulations; and would address the issue of financial assistance for coastal districts.

Reading portions of subsection (a)(1)-(3)(A)-(H) of 11ACMP's proposed AS 46.41.040, he indicated that [in part] this section addresses the development of the proposed program, including stipulating what the aforementioned regulations shall include or address, such as standards, criteria, processes, and procedures, for example. He mentioned, however, that he isn't clear about what kinds of activities would either trigger or be excluded from the "consistency review" referred to in proposed AS 46.41.040(a)(3)(B) and (H).

MR. GARDNER referred to 11ACMP's proposed AS 46.41.050, and relayed that it outlines the objectives with which the proposed program must be consistent; these objectives are functionally similar to those of one of the previous programs, though the proposed program would have three new objectives - outlined in paragraphs (9), (10), and (11) - and it would also have to consider the overall quality of the coastal environment for both this and succeeding generations. He then paraphrased paragraphs (9)-(11), and, in response to a question, offered his belief that being consistent with the objectives outlined in proposed AS 46.41.050 wouldn't require the program to seek appropriations. Paraphrasing 11ACMP's proposed AS 46.41.060 - which addresses the development of district coastal management plans - he indicated that [proposed subsection (a)] mandates that coastal districts adopt management plans, and then outlines what those plans must be based upon and what they must entail; [proposed subsection (b) outlines what's required] in order for the policy board to approve an initial or amended district plan; and proposed subsection (c) outlines when an enforceable policy would be preempted. He observed that proposed AS 46.41.900(11) and (14) define the terms, "local knowledge" and "scientific evidence" as those terms are used in proposed AS 46.41.060(b)(2)(F), but mentioned that he isn't clear about whether [proposed subsection (b)'s stipulations] would "bleed into" the types of regulations that the policy board would adopt.

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MR. GARDNER, paraphrasing 11ACMP's proposed AS 46.41.070, indicated that it establishes a one-year deadline - from when the proposed program's regulations take effect - for coastal districts to review their management plan, and, if necessary, submit a revised one that would comply with those regulations. Paraphrasing 11ACMP's proposed AS 46.41.080 - addressing implementation of district plans - he indicated it stipulates that coastal districts which exercise zoning or other controls

shall implement their management plan themselves, that those that don't shall have their management plans implemented by the appropriate state agencies, and that implementation shall be in accordance with the plan or statement adopted by the district. Still paraphrasing, he indicated that 11ACMP's proposed AS 46.41.090 addresses the issues of compliance and enforcement by stipulating that those entities administering regulations and controls pertaining to land and water use shall do so in conformity with a district's management plan, and that it's the Alaska Superior Court which has enforcement jurisdiction.

MR. GARDNER offered his understanding that the rest of 11ACMP addresses what he called, "units" in unorganized boroughs that would be created in order to implement district plans. Proposed AS 46.41.110 stipulates how coastal-resource service-area boundaries are to be determined; "there's ... an attempt made to organize service areas based on the ... regional educational attendance areas that are defined in AS 14.08.031" he added.

SENATOR COGHILL asked whether that constitutes a new approach to organizing coastal resource service areas.

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ALPHEUS BULLARD, Attorney, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency (LAA), said it does not, adding that many of 11ACMP's provisions addressing this issue track those of [one of the previous programs] and other, since-repealed, laws.

MR. GARDNER, returning to his presentation and paraphrasing from 11ACMP, indicated that [proposed AS 46.41.120] addresses voting [related to the organization of] coastal resource service areas, and involvement by the lieutenant governor [as the state official responsible for the Division of Elections]; and that proposed AS 46.41.130 pertains to elected boards of coastal resource service areas, [addressing their powers, duties, makeup, and terms, as well as elections, vacancies, recalls, and per diem and travel expenses]. In response to a question, he paraphrased proposed AS 46.41.130(h), and surmised from it that service area board members would receive per diem.

MR. GARDNER, paraphrasing 11ACMP's proposed AS 46.41.140, relayed that it addresses elections in coastal resource service areas, stipulating that election costs shall be paid for by the state and that the elections shall be administered by the lieutenant governor, and providing him/her with the authority to

promulgate necessary regulations. Referring to 11ACMP's proposed AS 46.41.150, and noting that it bears similarity to a provision of one of the previous programs, he relayed that [in part] it provides a mechanism by which the DCCED could prepare a district coastal management plan in situations where the voters fail to approve organizing a coastal resource service area and certain activity has or will occur. He also noted that [proposed AS 46.41.150] contains typographical [errors].

MR. GARDNER explained that 11ACMP's proposed AS 46.41.160 creates a process by which a proposed district coastal management plan can be reviewed by those within the coastal resource service area prior to the plan's adoption by the service area board, and stipulates that those within the service area would have 60 days in which to either [approve] the plan or enter objections to it or parts of it. Paraphrasing 11ACMP's proposed 46.41.170, he indicated it stipulates [in subsection (a)] that a city which is not part of an adjacent coastal resource service area shall be included in it anyway unless the city's governing body passes a resolution in opposition; and specifies [in subsection (b)] that nothing in AS 64.41 restricts or prohibits cooperative or joint administration of functions [when such has been agreed upon by] a municipality and a coastal resource service area.

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MR. BULLARD, in response to questions, relayed that although he isn't sure how the term "municipality" - used in proposed AS 46.41.170(b) - was meant to be applied in 11ACMP, the definition of that term [in existing AS 01.10.060] includes boroughs; and indicated that [proposed AS 46.41.170(a)] addresses certain cities in unorganized boroughs but not such boroughs themselves as a whole.

MR. GARDNER, paraphrasing 11ACMP's proposed AS 46.41.180, indicated it stipulates that nothing in proposed AS 46.41 should be construed to diminish state jurisdiction. In conclusion, he mentioned that 11ACMP's proposed AS 46.41.900 provides definitions [of the terms used in 11ACMP]. In response to questions, he indicated that the court would have to determine on a case-by-case basis - using a three-part test - whether a particular piece of proposed legislation is in fact substantially the same as a particular proposed ballot initiative; for example, the court would consider whether both the legislation and the ballot initiative address a complex issue, whether both have the same general purpose, and whether

both attempt to effectuate that purpose via the same means. He predicted that because 11ACMP addresses a complex issue, the legislature would be given more latitude to vary from it.

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SUSAN BELL, Commissioner, Department of Commerce, Community & Economic Development (DCCED), relayed that for purposes of implementing 11ACMP's proposed program, certain aspects will require more work. She explained:

We'll need to address the sequencing of actions to establish the proposed program. In turn, this can affect the ... implementation timing and cost. [The] DCCED will need to acquire expertise related to setting resource standards and coordinating permitting with state and federal agencies. The newly-established board will ... need to resolve some ... ambiguity about the role of state agencies and municipalities concerning reviews, monitoring, and enforcement discussed in the initiative. Implementation of the initiative is dependent on several decisions outside of the [DCCED], ... and we must acknowledge that ... because of the board's role, there is some inherent uncertainty about the program at this point. ...

I think it's important to ... discuss how ... the program does fit in the [DCCED]. First, our agencies administer and implement a wide array of programs that impact communities, businesses, nonprofit organizations, residents, other state agencies, and many others in the state. The program requires expertise in board ... support and implementation of board directives. In addition to the many boards that we have under the [Division of Corporations, Business, and Professional Licensing, the DCCED] ... is engaged with boards whose focus ranges from economic development, marketing, energy issues, railroad, [and] public utilities. I also want to point out that planning, grant administration, and ... interagency coordination are skill sets of ... [the DCCED].

... [Regarding the issue of] implementation, first, [the] DCCED will need to secure the funding for division staff, board travel, meeting costs. And ... whether an appropriation comes from the legislature

before or after the initiative vote will dictate how quickly we can implement the program. Next we'll need to get [the proposed new division of ocean and coastal management] ... up and running. The division will certainly carry out many of the administrative tasks and board support associated with the program, but, again, there's an area where the board does define the scope of the program.

COMMISSIONER BELL continued:

... We'll need to reach outside [the DCCED's] ... current expertise, since the program deals with setting standards and coordinating permits. Initially, [the DCCED] ... may develop an RSA [(reimbursable services agreement)] with other state resource agencies, contract for services, and/or recruit from ... other agencies; ... [it's] inherent in this program ... that we'll need to think [about] how we would approach that. Initially, the division staff will be very focused on planning, ... since the program cannot be implemented until the state program is established and local plans are approved. We note that we need to hire project review staff, maybe at a secondary stage. So, again, back to that sequencing issue.

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Simultaneously, the governor's office will be selecting board members - and we point out a couple of items that relate to the timing and selection of board members. The initiative states that districts will forward names for appointment by the governor; ... it breaks the state ... down into regions from which board members come ..., and names are forwarded from the districts. If any given region has only districts that are in organized communities ..., then those districts can forward names. If a given region has a mix of districts that are and are not organized communities, then those that are organized will be able to forward names, and those that are not will not be able to do so until the coastal resource service area elections are conducted. [And] we don't anticipate any vacancies on the board, but we ... see some sequencing issues there [as well].

Finally, there's a question of how much program work should be completed before board confirmation by the legislature, recognizing that ... board actions could be vulnerable to a third-party challenge. Once the board and ... support staff are in place, the business of developing the program will begin. This is a key point in time because so much, again, will be determined by the board. The initiative establishes a division of [ocean and] coastal management that adopts regulations, and requires the board to approve the regulations, ... and [so] the ordinary steps under the [Administrative Procedure Act] will be subject to some delay ... until public comment has been gathered.

COMMISSIONER BELL went on to say:

The heart of the coastal management program is the body of enforceable policies adopted at statewide and coastal district levels - and ... I point out that ... [previous] programs here in our state allowed districts to develop plans that were implemented by state agencies, [whereas] some other states develop programs at a state level and [then] allow local districts to implement them - and these variables are left to the discretion of the board as they develop the new program. Once the board sets the path to pursue, staff will set out to further develop the program and engage the public - that's a critical element ... of the federal requirement; we also need to engage the federal agency with jurisdiction.

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COMMISSIONER BELL, in response to a question, noted that the speed with which necessary funding is provided by the legislature will affect how quickly the program can be implemented. Returning to her explanation, she said:

Before the program can fully take effect on federal lands and federal activities, it must be ... reviewed and approved by the [federal Office of Ocean and Coastal Resource Management], and that requires a NEPA [(National Environmental Policy Act of 1969)] review ... and either an environmental assessment or a full-blown environmental impact statement [(EIS)]. Once approved, the program will need to be fully implemented and the transition within the division

needs to take place, and ... this ... is likely a juncture where the project review staff would begin to engage.

COMMISSIONER BELL, in response to another question, offered her understanding that under 11ACMP, all of the district plans that were in effect when the previous program ceased would again be in effect once approved by the board. Continuing on with her explanation, she said:

While this federal review will not necessarily cost the state money, it will create a period of uncertainty the board will have [needed] to have considered when it approves regulations for the program. When the program takes effect will matter greatly. There's also a question about ... the program's impact on state reviews: will projects with multiple state permits be required to be reviewed under the program prior to federal approval? ... In looking ahead at implementation, some of these things may be resolved by the board, some of these things may require discussion with the board and the federal agency that approves the program. Full program implementation, including project reviews and local district planning, will depend on ... some of the decisions made by the board.

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COMMISSIONER BELL suggested that 11ACMP's proposed AS 46.41.080 and proposed AS 46.41.090 require further clarification in that the former stipulates that implementation shall be carried out by either a coastal district or state agencies depending on whether the district exercises zoning or other controls on resource use, and the latter stipulates that both municipalities and state agencies shall carry out enforcement. She added:

Finally, the initiative calls for the [the proposed new division of ocean and coastal management] to develop and maintain a program of financial assistance to aid local districts with implementation, and, for many of the reasons that I've described ... this afternoon, there is some uncertainty about when the program would fully kick in.

COMMISSIONER BELL, in conclusion, said:

How the board addresses these types of questions will determine staffing levels, needed expertise within the department initially and then subsequently once the full program's implemented, the level of assistance the state and the department provide to local districts, and what appropriations will be necessary to operate the program effectively. Thank you.

SENATOR COGHILL - noting that under 11ACMP's proposed AS 46.41.110(d)(1), when an existing regional educational attendance area (REAA) is divided into coastal resource service areas, each such service area shall contain at least one first class city or home rule city - mentioned that he is wondering whether complying with that provision would even be physically possible.

2:01:49 PM

JOHN BOUCHER, Senior Economist, Office of the Director, Office of Management & Budget (OMB), Office of the Governor, after mentioning that the document in members' packets titled "11ACMP STATEMENT OF COSTS" was included in the proposed initiative's petition booklets as required by law, explained that in producing the estimate of implementation costs, the OMB [sought input] from the affected state agencies - including the DCCED, the ADF&G, the DEC, the DNR, and the Division of Elections - and from staff of the U.S. Department of Commerce's national program. This estimate, based only on known costs, assumes that the operation and procedural requirements of 11ACMP's proposed program would result in most, if not all, of the same costs associated with the program that existed prior to July 2011, and highlights the differences between such costs when those differences were ascertainable.

MR. BOUCHER mentioned that the most notable administrative difference pertains to the proposed 13-member Alaska Coastal Policy Board. This proposed board would have broad powers to establish a program, policies, and/or procedures that could vary widely from what used to be in place, and any such variances could also result in actual costs being substantially different from estimates as well. He indicated that the latter is likely simply because there are still many unknowns about the proposed program, such as how often the board will really have to meet, the level and timing of federal funding, agency-implementation and administration costs, the extent of necessary coordination and enforcement efforts, and the level of financial and other support provided to local districts.

MR. BOUCHER said that estimated costs for 11ACMP's proposed program come to approximately \$5.4 million annually, with \$4.7 million being the amount estimated for the previous program, and \$700,000 being the amount estimated for providing administrative support to the proposed Alaska Coastal Policy Board. Typically, it can take approximately two years for a coastal management program to be approved by the federal government, and approximately three to four more years for it to qualify for full federal funding, which, in this instance, would be capped at \$2 million. Until the proposed new program becomes fully eligible for full federal funding, however, the state would be responsible for all costs, though it is estimated that at least some federal funding would be forthcoming after the first two years.

MR. BOUCHER, in response to comments and questions, surmised that all state funding would be subject to legislative appropriation; agreed to conduct more research regarding some of the OMB's estimates; and explained that the aforementioned \$700,000 would address more than just travel costs for the proposed board, that the OMB derived that number from fiscal notes accompanying past legislation, and that the OMB's estimates do take into consideration costs that would be incurred by the Division of Elections, do not reflect any potential [lessening] of costs related to starting the proposed program up, and assume that policy board members would be meeting in person at each of the four required meetings though they would only be required to do so for one of those meetings.

COMMISSIONER BELL added that any lessening of costs during startup would likely be offset by additional costs specifically related to startup.

MR. BOUCHER concurred, and offered some possible examples of such. In response to another question, he relayed that the decisions regarding where the proposed Alaska Coastal Policy Board shall be located and where it shall hold its meetings have yet to be made.

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BRUCE M. BOTELHO, Chair, Alaska Sea Party: Restoring Coastal Management, in response to questions and speaking as one of 11ACMP's joint prime sponsors, opined that Alaska needs a coastal management program because Alaskans need a voice. Under federal law, states that have an approved coastal management

program in place have the authority to review and approve or disapprove proposed federal activity in their coastal zones, and Alaska - until recently - had exercised such authority, and had done so for well over a generation. This authority is particularly important given the volume of coastline in Alaska, and the importance of that coastline to the industries of the state. Of concern to him, he relayed, is that communities be provided a voice regarding local [federal] development, but without a coastal management program in place, neither Alaska nor its communities have such a voice - they have no right to review proposed federal activity. In fact, when the previous program was allowed to sunset, the federal government stopped submitting its coastal-development proposals for state review and approval.

MR. BOTELHO referred to the document in members' packets titled, "11ACMP STATEMENT OF COSTS" and offered his belief that it overstates the annual cost of 11ACMP's proposed program because it doesn't reflect any decreasing of costs that would result during the startup period - such as those related to decreased staffing levels - and doesn't include board-support costs that are in line with those of other boards. He offered some alternative estimates, which he indicated were based on the previous program and on other boards.

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MR. BOTELHO explained that in order to eliminate the need for a particular developer to have to go to many different agencies for his/her permits, Alaska's previous coastal management program had permit coordination as one of its primary goals, and 11ACMP incorporates such permit coordination into its proposed program. The degree to which that permit coordination expedites, rather than delays, projects, would, he predicted, be an element of any discussions that take place regarding 11ACMP. Again, without an approved coastal management program in place, neither Alaska nor its communities have any voice regarding proposed federal activity in Alaska's coastal zones; with such a program in place in Alaska, the federal government would again be required to seek state/community approval before commencing with its projects.

MR. BOTELHO explained that 11ACMP's proposed program would not constitute a permitting agency. All the permitting powers of the DEC, the ADF&G, and the DNR would remain with those agencies, and the DCCED would merely act as a facilitating agency for the coordination of required permits. So although

there were an array of acceptable, reasonable choices, the joint prime sponsors chose the DCCED to have purview over 11ACMP's proposed program because the DCCED has historic ties to local governments and has administered the grant program to coastal districts; in the joint prime sponsors' view, the DCCED has the expertise - in terms of both grant administration and board management - to perform the required functions.

MR. BOTELHO assured the committees that under 11ACMP's proposed AS 46.41.090, enforcement of the policy board's lawful orders by the Alaska Superior Court would only occur after a determination that an entity [administered regulations or controls] out of conformity with a district's approved coastal management plan; and that under 11ACMP's proposed AS 46.41.060(b), in order for such a plan to have been approved in the first place, it must [have enforceable policies that among other things,] are not preempted by federal or state law and do not arbitrarily or unreasonably restrict a use of state concern. He opined, therefore, that 11ACMP makes it very clear that other state law may not be trumped; and then indicated that certain of 11ACMP's proposed definitions came from the regulations that were in place under the previous program.

MR. BOTELHO said that without an approved coastal management program in place, the federal government can - without any state constraint - act as it pleases with regard to Alaska's coastal zones. In terms of restoring a local voice, 11ACMP's proposed program would do so in two ways: by retaining [already-established] coastal districts, and by requiring policy board members to come from the various coastal districts of the state.

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GAIL FENUMIAI, Director, Central Office, Division of Elections, Office of the Lieutenant Governor - after providing information about the initiative process and its requirements, the division's work on 11ACMP, the timelines pertaining to 11ACMP, and the signatures gathered thus far - relayed that the division is anticipating that there will ultimately be a sufficient number of valid signatures to include 11ACMP on the primary ballot in 2012.

[2:52:07 PM](#)

ADJOURNMENT

There being no further business before the committees, the joint meeting of the House Judiciary Standing Committee and the Senate Judiciary Standing Committee was adjourned at 2:52 p.m.