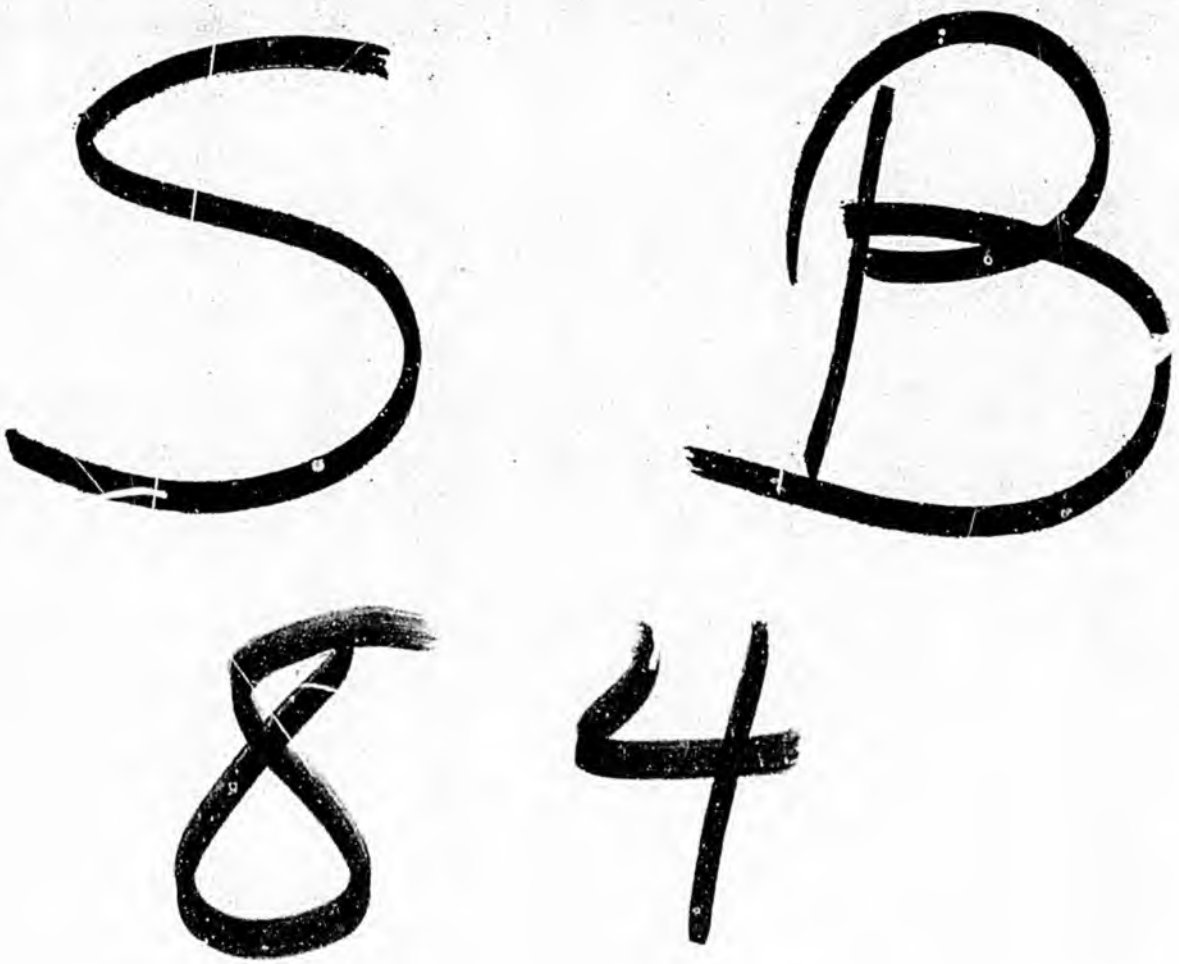
SB
84

COMMITTEE REPORT

SENATE

FURTHER: Finance

1/15/81 Date: _____

Mr. President:

The Committee on RESOURCES has had SB 84
processing of permits by atate agencies and approval of Alaska coastal managemant programs; establishing Permit Reform Commission

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[X] replace with CS for SB 84 [ ] same title [X] new title

and recommends WITH INDIVIDUAL RECOMMENDATIONS

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

do not pass

CHAIRMAN

S 60 (Rev. 12/78)

Alaska State Legislature

BETTYE FAHRENKAMP, CHAIRMAN
VIC FISCHER, VICE-CHAIRMAN
BRAD BRADLEY
DICK ELIASON
DON GILMAN
BOB MULCAHY
ARLISS STURGULEWSKI

POUCH V
STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-3834
(907) 465-3835

Senate

Committee on Resources

March 30, 1981
1:50 p.m.

Beltz Room
211 - Capitol

MEMBERS PRESENT

Senator Fahrenkamp
Senator Fischer
Senator Sturgulewski
Senator Bradley
Senator Eliason
Senator Mulcahy
Senator Gilman

Hearing

SB 226 An Act relating to the mining loan fund.

SB 84 An Act relating to the processing of permits by state agencies.

Phil Holdsworth, Alaska Miners Association, testified in favor of SB 226. He suggested an amendment: page 1, line 27, delete "manager of a business" and insert "in the mining industry".

Sharon Traylor, Director Division of Business Loans, Department of Commerce and Economic Development, stated that she would like to see some language added to the Bill in Section 45 regarding refinancing.

Senator Sturgulewski, moved for the adoption of the following amendments:

Page 1, line 14, delete "more than"
Page 1, line 15, delete "more"
Page 1, line 16, delete "than"
Page 2, line 9-10, add a new sentance "No more than 49% of the original loan can be used for refinancing under this section."

Senator Fischer, moved for the adoption of the following amendment:

> Page 2, between lines 56 insert: "AS 27.09.040 (d) delete monthly basis" and insert "at least annually."

Senator Mulcahy put forth the motion to move SB 226 as a Committee Substitute with individual recommendations.

Jean Kline, Alaska Chapter, Associated General Contractors, stated that the Association urges passage of SB 84. She stated that sometimes the smallest construction project can delayed because of permits. SB 84 will help eliminate the unnecessary delays.

The Committee was briefed by staff on the draft CSSB 84.

The Committee was adjourned at 2:35 p.m.

SOHIO ALASKA PETROLEUM COMPANY

3111 "C" STREET
ANCHORAGE, ALASKA

TELEPHONE (907) 265-0000

MAIL: POUCH 6-612
ANCHORAGE, ALASKA 99502

Legal Department

April 16, 1981

Senator Bettye Fahrenkamp
Chairman, Senate Resources Committee
Pouch V
Juneau, AK 99811

Re: Hearings of April 1, 1981 on SB 84

Dear Senator Fahrenkamp:

In the testimony I gave to your Committee on SB 84, on the Governor's new "uniform procedural regulations", and on the subject of regulatory reform in general, I promised to supply you with several things. I apologize for the delay in replying; however, I was out of the State during the last week.

1) I have attached "The Saga of Sag 7 and 8", a working paper developed by our Government Affairs office to set forth the entire record of permitting from beginning to end of a Beaufort Sea exploration well. This paper sets forth with specificity the complex bureaucratic interactions which occurred, and the delays they caused. As I stated at the hearing, no activity which occurs on the North Slope is ever routine. However, the sort of interactions which occurred here, while not exactly duplicated each time with respect to each program either on or offshore, are becoming typical of the sorts of problems Sohio and other oil companies face in developing leases obtained from the State. This is particularly the case with respect to offshore leases, although the sorts of delays faced here also apply to onshore leases. As I mentioned at the hearing, these sorts of delays, on a somewhat smaller scale, often occur in developments within the Prudhoe Bay Field. As I mentioned, they seem to result more from disorder in administrative structure than from any other reason--often an agency of the State evaluates a project three separate times! I apologize again for the delay in supplying these materials to you, but as I stated at the hearing, the times set forth in this document were incorrect in the previous draft. They are correct in this draft.

2) You also requested in my opinion, as a lawyer, on the potential impacts on the lawfulness of permits which the procedures set forth in SB 84 provide. In general, in the interests of speedy issuance of permits, they provide for avoiding what is referred to as "administrative exhaustion", and rather going immediately to Court, and in a separate

procedure, for automatic issuance of delayed permits.

While no doubt, you have heard and will continue to hear varying opinions on this matter from lawyers representing various interests, my personal feeling is that these issues have been somewhat blown out of proportion. I do not believe that significant disruptions will occur from either facet of the problem. For instance, as to automatic issuance, regulations of any affected department or of an amended provision of the statute could provide for presumption of regularity and validity to the permit by providing that any fact contained in the record as it existed at the time of the automatic issuance of the permit would be determined in favor of the applicant. This provides an adequate record for review. Moreover, as to disruptions that would occur from a failure to exhaust administrative remedies, I do not believe the problem is a severe one. While it is a question of tactics for each individual permit applicant as to whether he wishes to pursue his formal or informal appeal rights in a department, or rush off to Court, certainly the options should be there for him to explore.

One should keep in mind that both automatic issuance and the avoidance of lengthy administrative appeals are key elements of regulatory reform--without an automatic issuance provision, for instance, there is no enforcement of the time limitations--that is to say, they could be ignored in a wholesale fashion without any stricture being placed upon the department that is doing so. And without speedy resort to Court, an agency could provide lengthy appeals procedures to defeat any requirement of timely issuance.

If there is anything further I can do for you, please do not hesitate to call or write.

Sincerely,

James D. Linxwiler

ls

cc: Committee Members

THE SAGA OF SAG 7 AND 8

- A Case History of Regulatory Confusion and Delays -

Sohio Alaska Petroleum Company
Anchorage, Alaska

April 2, 1981

THE SAGA OF SAG 7 AND 8
- A Case History of Regulatory Confusion and Delays -

Sohio Alaska Petroleum Company submitted applications on February 20, 1980 for two exploratory wells, Sag Delta Nos. 7 and 8, to be drilled in the Beaufort Sea during the winter of 1980-81. Prior to that date, Sohio made the first of many presentations to Federal and State agencies and the North Slope Borough on the wells and on the results of a million-dollar study of drilling mud and cuttings which showed that they could be safely disposed of on the ice in the Beaufort. As a possible alternative to putting mud and cuttings on the sea ice, Sohio proposed constructing a mud sump at the East Dock for mud and cuttings disposal.

In the eleven months following the February 20th application date, Sohio was mired in permit hassles and received conflicting permit stipulations from separate agencies leaving the company in an untenable operating position (see, for example, Chart 1). The problems evolved largely from the Governor's CZM consistency review process as implemented by the Division of Policy Development and Planning, from the Corps of Engineers review process, and from their interface. While the permit process was ongoing, significant sums of money had already been committed for equipment and operations, and it was uncertain as to whether Sohio would ever get the required permits and whether the stipulations imposed would even allow operations to proceed from a practical viewpoint. It was not until four days before drilling was to commence in the Sag Delta area that all the required permits were finally in hand (see Chart 2).

The Saga of Sag 7 and 8 is representative of the kinds of problems oil companies face in Alaska, particularly on the North Slope, when trying to drill exploratory wells or develop a field, after having paid billions of dollars to the State and Federal governments for exploration and development rights. The host of problems can be separated into three major areas: (1) the government's failure to clearly define the major purpose of an oil and gas lease; (2) multiple reviews by the same agencies on the same permit and multiple delays being the order of the day; and (3) the imposition of arbitrary stipulations both beyond the agency's scope of authority and with no rationale given. While there are other problem areas, these three combine to create a web of uncertainty and confusion that is not only costly to the companies but also to the consumer and to the Nation. With the mid-1980s decline of the Prudhoe Bay field production, and with the many net profit leases issued by the State in the December 1979 Beaufort Sea Lease Sale, the regulatory web may prove very costly to the State of Alaska as well.

The overall problem facing the companies in the normal permit process -- and especially in the Coastal Zone Management consistency determinations -- relates to the ambiguity surrounding the highest and best use of an oil and gas lease. The Prudhoe Bay field, for example, appears to be thought of by some environmental agency personnel as, primarily, a wildlife habitat which must be kept pristine. Industry seeks to protect the natural environment at Prudhoe Bay but does consider the production of oil from that field as the highest use for the area. Similarly, Beaufort Sea leases seem to be considered by some as inappropriate for exploration and development. While environmental values are high priorities in these areas and are

studied in depth prior to a lease sale, the government needs to clarify in writing to all agencies and to all entities involved in the permitting process that, once oil and gas leases are sold, the primary purpose of those lease areas is oil and gas exploration and production, and that this primary purpose requires expeditious permit application handling and cost-efficient operations as well as environmental protection.

Second, multiple handling of the same permit application by government agencies should be ended as its chief result is confusion and delay after delay (see Chart 3). The Alaska Department of Fish and Game, for example, has the opportunity to make comments on the same project two times -- with two additional optional times possible as well. The Alaska Department of Environmental Conservation handles permits for the same project a minimum of three times. The Division of Policy Development and Planning handles consistency reviews for the same project twice, seeking input from the Department of Fish and Game, the Department of Environmental Conservation and other State agencies, further causing duplication and delay.

In the case of Sag 7 and 8, the process was slowed by a number of factors relating to multiple considerations by agencies of permits for the same project. The duplication basically arises because the State regulates oil and gas operations, the Corps of Engineers duplicates this process, and then obtains comments from the State. Confusion arises because the Department of Natural Resources, the body issuing State permits, does not make comments to the Corps as part of its permit process. This is done, in an entirely separate process, by the Division of Policy Development and Planning. The Department of Environmental Conservation comments to the Corps in a third process.

In the case of Sag 7 and 8, the entire Corps of Engineers process from beginning to end took 330 days, including the time it took to obtain amendments to the original permit which were necessary to allow operations to proceed. This time delay was the result in part of the accumulation of delays in the State comments to the Corps -- 100 days for a State CZM consistency review, 124 days for the Department of Environmental Conservation's water quality certification, etc. These delays are particularly inappropriate because the State agencies involved had already commented on the State permits covering the project, through their responses to the Division of Minerals and Energy Management's request for comments, and thus a separate review for the Corps was unnecessary.

In the case of the East Dock mud sump permit, required in connection with the Sag Delta wells, the Division of Policy Development and Planning requested from the Corps of Engineers -- and was granted -- seven straight 15-day extensions to the comment period with no rationale given, except that "further study" was needed. That amounts to 105 days of delay in a process that eventually took 190 days to complete. The Corps of Engineers required the Division of Policy Development and Planning's review to act on the Corps permit. As a result of State delays, it took the Corps 225 days to process its permit.

The third problem is well illustrated by Chart 1. Even though on-ice disposal applications had been filed in February, 1980, as of late October, Sohio still faced conflicting responses emanating from different

agencies and the North Slope Borough as to whether or not mud and cuttings disposal could be handled as proposed by the company. The reason why it might be acceptable at one well location and not on another was never given and is an example of the kind of arbitrary decision-making that is a fairly routine occurrence on permit application handling by State and Federal agencies. Further, appropriate permits had still not been issued for the East Dock mud sump. Permit applications had been filed April 3, 1980 with the intention of building the sump in the summer so that it could be ready for the winter drilling program. The Coastal Zone Management consistency extensions, described previously, were a major reason for the hold-up. Thus, as of late October, 1980 Sohio still was unsure if it could proceed with exploration in the Beaufort Sea in the winter of 1980-81 or, if drilling could commence, where the mud and cuttings could be disposed of. All this was despite Sohio's efforts in meeting with high level administrators in July to alert them to the problems the company was already experiencing in terms of delay d confusion with the Sag 7 and 8 permit applications. Again, it was not un four days before drilling was to commence in the Sag Delta area that all the required permits were finally in hand (see Chart 2).

Chart 1 STATUS OF MUD & CUTTINGS DISPOSAL - EXPLORATION WELLS

	SAG 5 (East Dock mud sump)	SAG 7	SAG 8	CHALLENGE ISLAND
Corps of Engineers	NO	NO	NO	No Jurisdiction
Department of Environmental Conservation	YES	YES	NO	YES
North Slope Borough	NO*	YES**	YES**	NO
Environmental Protection Agency	No Jurisdiction	NO***	NO***	NO***

* NO: Use North Slope Borough facility -- yet to be built
** YES: but can only dump small quantity -- what about the rest?
*** NO Permit: Agency too busy.

SOHIO ALASKA PETROLEUM COMPANY

Status as of October 28, 1980: On-ice disposal applied for on February 21, 1980. East dock mud sump option applied for on April 3, 1980.

Chart 2

THE SAGA OF SAG #7 AND #8

Agency Actions on Sohio Permit Applications for Sag Delta Wells #7 and #8

PERMIT	M&C STIPS*	DATE APPLIED	TIME REQUIRED**	DATE ISSUED
DMEM Lease Operations		2-20-80	141 days	7-10-80
NSB Permit (Plan of Operations)	Allows M&C	2-20-80	197 days	9-4-80
State Permit to Drill - AOGC		10-14-80	9 days	10-23-80
DPDP Consistency Review		2-20-80	100 days	5-30-80
DEC Waste Disposal (Sag #7 Only)		2-20-80	203 days	9-10-80 (Sag 7 only)
Amended for #7 & #8			330 days	1-16-81 (Sag 7 & 8)
Corps Permit	Denies M&C	2-20-80	131 days	6-30-80
Letter to Corps to modify M&C Stips		12-30-80		
Corps permit (amended)	Allows M&C	2-20-80	330 days	1-16-81
NPDES Permit - EPA	Allows M&C	5-6-80	217 days	12-9-80
DEC Water Quality Certification		2-20-80	124 days	6-23-80
Water Rights Permit - DNR		2-20-80	55 days	4-15-80

EAST DOCK MUD SUMP

DEC Water Quality Certification		4-3-80	130 days	8-11-80
Three Additional Stipulations Added			190 days	10-10-80
DPDP Consistency Review		4-3-80	195 days	10-15-80
Corps Permit (Allows M&C)		4-3-80	225 days	11-14-80

*Mud and cuttings disposal stipulations.
**Time required numbers are cumulative.

Chart 3

OIL AND GAS DRILLING OPERATIONS

PERMIT TO DRILL	ANADROMOUS FISH PROTECTION	PLAN OF OPERATION	WETLANDS CONSTRUCTION	CONSISTENCY DEPERMINATION	WATER QUALITY	CROSSING NAVIGABLE WATERS
AOGCC	ADF&G	DMEM	COE	DPDP	ADEC	USCG
		ADF&G	USF&WS	ADF&G		USF&WS
		ADEC	NMFS	ADEC		NMFS
		DFLWM	EPA	DNR		EPA
		OPERATIONAL INSPECTIONS	DPDP			ADF&G
		DOSH	NSB			COE
		DHSS	PUBLIC NOTICE			PUBLIC NOTICE

THE SAGA OF SAG 7 AND 8

- A Case History of Regulatory Confusion and Delays -

Date	Day	Event
2-11-80		Sohio makes presentation to all agencies and North Slope Borough (NSB) on million-dollar mud and cuttings study.
2-20-80	1	Sohio submits applications for Sag 7 and 8.
2-22-80	3	DMEM informs agencies that deadline for response to applications is 3-17-80. DNR will assume that no response by 3-17-80 means agency approval is granted.
3-17-80	27	The DMEM deadline passes. No response.
4-3-80	44	ADF&G's Gary Milke writes the Corps to request that all Beaufort lease sale stipulations be placed on the permits. (DMEM is not copied on the letter.) The same day, Milke finally responds to DMEM's 2-22 memo, and the only Beaufort lease sale stipulation requested is the 3-31 drilling deadline. (Milke implies this is acceptable to Sohio.) Submitted applications for East Dock Mud Sump to DEC, DPDP, and the Corps of Engineers. It was deemed necessary to have an alternate method of mud and cuttings disposal available.
4-21-80	62	OCM (Michael Whitehead) informs the Corps that the consistence review period is being extended 15 more days beyond the original OCM deadline of 4-29. The only rationale given is that "interested agencies" need more time to "review" the applications. (DMEM was not copied on this letter.)
5-14-80	85	OCM extends comment period for the second time. (Sohio not informed of this action.) New deadline is 5-28.
5-30-80	100	Letter from OCM to Sohio. Sag 7 and 8 applications are found to be consistent, but it took DPDP 100 days to inform Sohio. (ADF&G had informed the Corps that the applications were consistent in their 4-3-80 letter.)
6-2-80	104	DEC informally tells Sohio's Tim Bradner that DEC wants full hearings before issuing a water quality certification. Sohio makes phone call to DEC. Sohio informs DEC that full hearings at this late date would kill the Sag Delta projects.

Date	Day	Event
		This is the first we knew of a hearing request or that the consistency process didn't cover water quality certification.
6-3-80	105	DEC Commissioner and Deputy Commissioner promise Sohio to issue certification for construction work with hearings later for mud and cuttings disposal. (Sohio had briefed DEC on mud and cuttings study back in February.)
		USF&WS sent letter to Colonel Nunn (Corps) requesting that the permit application to construct the East Dock Mud Sump be held in abeyance. In the letter USF&W suggested that the NSB Put River Disposal Site would be safer for mud and cuttings disposal. The DEC has consistently regulated mud and cuttings as liquid wastes, and USFWS is obviously unaware that the NSB facility is permitted only for solid wastes.
6-23-80	124	DEC finally issues the Water Quality Certifications for Sag Delta #7 and #8; however, DEC continues to withhold any waste disposal permits.
6-30-80	131	A permit from the Corps for the construction of gravel islands #7 and #8 is received, but stipulations deny the disposal of mud and cuttings and set the completion date for clean up as May 15.
7-10-80	141	DMEM issues the lease operations permit for Sag 7 and 8.
7-11-80	142	Michael Whitehead (OCM) requests another 15 day extension for review of the East Dock mud sump permit (DPDP Consistency Review). The original decision date was 6-10-80. Previous extensions were requested by OCM and approved by the Corps for extending the deadline to 7-10-80. This additional 15 day extension changes the decision date to 7-25-80.
7-14-80 7-15-80	145 146	Drilling and mud and cutting disposal test results were presented in Kaktovik and Nuiqsut at the request of the Corps of Engineers.
8-7-80	169	Letter from USF&WS to Colonel Nunn states that they had not changed their mind regarding the East Dock mud sump permit being held in abeyance.
8-11-80	172	DEC Water Quality Assurance Permit issued for the East Dock Mud Sump, 130 days after it had been requested.

Date	Day	Event
9-4-80	197	NSB permit is issued allowing mud and cuttings disposal on the ice, but volume is limited to 2,500 barrels for each unit (Sag Delta #7 and #8).
9-10-80	203	Received DEC Waste Disposal Permit for Sag #7 only. We still have no approved disposal site for mud and cuttings from Sag #8.
9-11-80	203	Michael Whitehead (OCM) requests another extension for the East Dock permit to 9-23-80. There have been 6 previous extensions to date.
9-24-80	216	Mahoney of the Corps informs Sohio's Jamie Linxwiler that if we don't get letters from mayors of Kaktovik and Nuiqsut we will get no amendment for our Sag Delta #7 and #8 disposal permits.
9-26-80	218	Jerry Stroebele (USF&WS) contacts Linxwiler and agrees to withdraw his objections to the Corps permits if Sohio will give him the results of Hal Knierman's study (hydrocarbons in Prudhoe Bay Unit reserve pits). This caused concern because the PBU situation is not comparable to an exploration situation. Any misinterpretation of information by USF&WS could be detrimental to our permit situation. However, we invited Stroebele to a meeting where the results of Knierman's study were released and explained.
10-11-80	233	DEC issues the Water Quality Assurance Permit for East Dock mud sump which supercedes the permit of 8-11-80. This permit has three additional stipulations which: 1) limit the use of the site to 3 years, 2) require drill muds to be disposed of in individual cells, and 3) require a minimum of 3 feet of freeboard at the top of the individual cell dikes.
10-15-80	237	Sohio receives DPDP's conclusion of their consistency review: our proposals for the East Dock mud sump disposal of mud and cuttings are found to be consistent with the ACMP. It took DPDP 190 days to make this decision.
10-17-80	239	Letter is sent to Colonel Nunn from USF&WS withdrawing request to hold East Dock mud sump permit in abeyance and adding stipulations.
11-1-80	254	Challenge Island #1 is spudded and all mud and cuttings have to be contained in a bermed area because permitting agencies are still unable to agree on or process any permits for their disposal. This begins to cloud the picture as to whether we will even be able to drill the Sag wells at all. Significant sums have already been committed for drilling equipment and operations.

Date	Day	Event
11-14-80	267	Corps issues permit to dispose of mud and cuttings at East Dock mud sump with seven stipulations. We applied for this permit in April so that construction could proceed during summer months; now we are saddled with constructing the pit in the winter in a more costly, inefficient, and complicated manner.
12-9-80	292	The EPA issues the NPDES Permits for discharges into U.S. waters.
1-16-81	330	The Corps modifies special condition "F" to allow mud and cuttings disposal on sea ice adjacent to the island for both Sag Delta #7 and #8. The Corps does NOT modify special condition "C" (May 15 island clean up deadline is impossible to meet because snow is still covering the area.) DEC amends their waste disposal permit to authorize mud and cuttings disposal at both Sag 7 and 8 for scientific purposes. Only 4 days before drilling is to commence do we finally have all the necessary permits.
1-20-81	334	Sag Delta #7 is Spudded.
1-26-81	340	Sag Delta #8 is Spudded.

K. Daniel Hinkle
Division Attorney
Production, U.S. & Canada

MAR 6 1981

44-13

Marathon
Oil Company

P.O. Box 2380
Anchorage, Alaska 99510
Telephone 907/274-1511

March 2, 1981

The Honorable Bettye Fahrenkamp
Alaska State Senate
Chairman, Resources Committee
Pouch "V" State Capitol Building
Juneau AK 99811

Re: Uniform Procedural Regulations

Dear Senator Fahrenkamp:

Enclosed for your review is a copy of a letter from the Natural Resources Section of the Alaska Bar Association to Assistant Attorney General J. K. Tillinghast on the above-captioned matter, which may be of interest to you in your consideration of the proposed regulations.

Very truly yours,

K. Daniel Hinkle dg MR
K. Daniel Hinkle

KDH:mr

NATURAL RESOURCES SECTION

OF

THE ALASKA BAR ASSOCIATION

Jonathan K. Tillinghast, Esq.
Special Assistant Attorney General
Alaska Department of Law
Pouch K
Juneau, Alaska 99811

Re: Uniform Procedural Regulations

Dear Mr. Tillinghast:

On behalf of the Natural Resources Section of the Alaska Bar Association, we hereby submit the following comments on the Uniform Procedural Regulations. While there are a broad spectrum of policy issues posed by these new regulations, we believe it is inappropriate for the Natural Resources Section of the Bar Association to comment on such matters. However, there are other aspects of the regulations worthy of comment which do not involve such policy questions, which we believe are appropriate for our attention. These views constitute the views of the Natural Resources Section which does not speak for the entire Bar Association.

1. Establishment of complex procedures. We question the wisdom of establishing such complex administrative procedures in areas in which they did not previously exist. The proposed regulations establish public notice, public participation and hearing, and administrative appeal procedures which have not previously been in existence. These items add a significant layer of complexity to administrative regulation. While in certain instances, public participation is desirable and/or necessary, we question whether all permits issued by the three relevant agencies (DEC, ADF&G and DNR), and any which the legislature may in the future authorize DPDP to issue, should be subject to these procedures. Rather, we would propose establishing that these be matters to be employed in part or whole at the option of the relevant agency, on permits where it is appropriate to do so.

2. Ease of administration and likelihood of litigation. The new regulations create significantly complex and difficult procedures to be followed. Not only will the procedures therefore be difficult to administer, but they virtually invite litigation challenging any administrative action by a hostile party. In other words, these administrative regulations provide many easy targets for hostile litigants that did not exist before. As a result, we believe the regulations

should be substantially rewritten with an idea to simplifying their structure and administration, and thereby lessening the probability of litigation respecting the actions of the various agencies. For instance:

a. The interagency review section, 22 AAC 10.130, and the relevant definitions, found at 22 AAC 10.920 (4), (7) and (9), are unnecessarily complex. While we appreciate the obvious desire of the drafter of these comments to clarify the respective relationships of the various State departments, the complex structure of the section invites litigation to clarify each minor aspect of the relationships established thereby (i.e., what part of a decision involves balancing, what part is to be accorded "great weight", and when is a balancing decision which goes contrary to the recommendation of a "resource agency" that is accorded "great weight" arbitrary and capricious?). We think a much simpler and straightforward approach would simply be to replace the current section 130(c) as follows:

> An agency issuing a permit is the lead agency on that permit and may, in its discretion, consider the recommendations on the matter of other agencies, giving due weight to their opinions based upon their relevant expertise.

b. The agency decision section, 22 AAC 10.160 requires there to be , in subsection (1), findings on the activity's compliance with the agency's applicable standards, in subsection (2) conclusions (meaning, presumably, more findings) of the agency supporting the decision, and, in subsection (3):

> a statement of the factual or judgmental basis for the rejection of any resource agency recommendation under section 130 (b) of this chapter, or any significant and material recommendation made at a public hearing held under section 50 of this chapter.

This entire section places significant and unreasonable burdens upon agencies issuing decisions. First, the three subsections are repetitive and unduly complex because many routine decisions do not require findings of this magnitude and detail. Given the hundreds of bureaucratic decisions made per year, only a few require or merit such treatment. Second, with reference to the above-quoted subsection (3),

on any project of complexity there will be many "resource agency" comments on the matter. Some of these comments will be recommendations, some might be statements of preference, some might be statements of perceived fact. A requirement that there be a statement of the "basis for the rejection of any resource agency recommendation" invites litigation if there is not contained a response to any matter which, in the opinion of any potential plaintiff, constitutes a recommendation. That is unreasonable. Perhaps even more unreasonably, the second part of subsection (3) requires that "any significant and material recommendation made at a publice hearing" be replied to. The words "any significant and material recommendation" do little to narrow the scope of this section. On a matter of significance, hearings may last many hours, and cover a very broad spectrum of proposals, recommendations, etc. The failure of an agency to respond to even one of these, if it is, in the opinion of a potential litigant, "significant and material", provides a convenient basis for litigation. We believe this entire section should be rewritten as follows:

> 22 AAC 10.160 AGENCY DECISION. The agency decision will meet the requirements of section 60 of this chapter and will contain, in the discretion of the deciding officer, findings which support his decision. These findings may include a statement of the basis for the acceptance or rejection of any recommendation or comment received by the deciding agency on the matter.

We hope the above comments are helpful. Thank you in advance for your consideration of this matter.

Sincerely yours,

Ronald G. Birch, Chairman
Natural Resources Section
Alaska Bar Association

K. Daniel Hinkle
Division Attorney
Production, U.S. & Canada

FEB 20 1981

Marathon
Oil Company

P.O. Box 2380
Anchorage, Alaska 99510
Telephone 907/274-1511

SB 84

February 17, 1981

The Honorable Bettye Fahrenkamp
Alaska State Senate
Chairman, Resources Committee
Pouch "V" State Capitol Building
Juneau AK 99811

Dear Senator Fahrenkamp:

Enclosed for your information and consideration is the testimony of the Alaska Oil and Gas Association on Uniform Procedures for Permits, Consistency Determinations and Appeals.

The above testimony was presented in Anchorage on February 6, 1981, at the public hearing on uniform permitting regulations.

Very truly yours,

K. Daniel Hinkle

KDH:mr
Enc.

FINAL

TESTIMONY

OF THE

ALASKA OIL AND GAS ASSOCIATION

ON

UNIFORM PROCEDURES FOR PERMITS,

CONSISTENCY DETERMINATIONS AND APPEALS

FEBRUARY 6, 1981

ANCHORAGE, ALASKA

COMMENTS OF THE
ALASKA OIL AND GAS ASSOCIATION
ON
UNIFORM PROCEDURES FOR PERMITS,
CONTINGENCY DETERMINATIONS AND APPEALS
FEBRUARY 6, 1981

Good evening. My name is Don E. Glass and I am with Shell Oil Company in Anchorage. I am here tonight representing the Alaska Oil and Gas Association.

The Alaska Oil and Gas Association is a trade association whose 30 member companies account for the bulk of oil and gas exploration, production and transportation activities in Alaska. Our membership includes the largest and some of the smallest petroleum firms in the industry. AOGA is the Alaska division of the Western Oil and Gas Association.

AOGA is well into the second year of study on regulatory constraints faced by our industry. AOGA supports necessary measures which expedite and reform regulatory procedures. We are supportive of the four goals listed in the Executive Summary, namely:

1. Establishment of the shortest feasible deadline for the issuance of state permits for natural resource development;

2. Establish uniform permit procedures;

3. Explicitly define the rights of the applicant, and other persons in the permitting process; and

4. Streamlining the state's coastal management decision-making process.

We regretfully conclude that these regulations do not achieve these goals. While many existing problems have been alleviated, some have been made worse and others newly introduced. Therefore we are unable to support their adoption without further changes. We believe these regulations contain the following major problems:

1. Complex new requirements are created by these regulations that did not exist before. New public notice, hearing and administrative appeals procedures are established, which can only serve to complicate and delay the processing

must remain opposed to adoption of these regulations. Our preliminary recommendations on specific sections of the regulations, as currently proposed, are as follows:

Section 10.020 provides for deadline extensions if provided for in a memorandum of understanding or if the Commissioner finds that complex issues require additional time.

Any memorandum of understanding entered into prior to or pursuant to these regulations should not contain conflicting approval schedules, but rather should provide for approvals within the time frame contained in these regulations.

The provision for extension deadlines due to substantial complex issues is open-ended, and should be granted only in extraordinary circumstances.

Section 10.030 calls for agencies to notify applicants of the need for additional information within 15 days for Class I permits and 30 days for Class II permits. Fifteen days is sufficient for both classes of permits.

Section 10.040 requires an individual responsible for the overall management of a project to sign an application. It is not always possible for that individual to sign an application due to locale, etc. Submittal of an application should not be delayed for this reason; any duly authorized employee should be allowed to sign applications. We note that subsection (4) of this section allows for any duly authorized government employee to sign applications.

Under Section 10.050 public hearings may be held under certain circumstances. We believe that hearings on Class I permits should be held only if required by statute.

Notwithstanding the comment in the Executive Summary, the section on Decision of Applications should include a provision for automatic approval of a permit application if no action is taken by the deciding officer within the applicable time period.

Further to our earlier comment on memorandums of understanding, the regulations need to be clarified under Section 10.085 to reflect that any MOU's in existence upon adoption of the regulations must be either revised to reflect the provision of the Chapter, or withdrawn.

Under Subsection (c) of the Public Notice section, notice must be sent to any unit of local government having jurisdiction

Section .580 can require an applicant to submit all applications simultaneously. This would be cumbersome, if not impossible, in some instances. We are recommending in our detailed comments language which would allow consistency determinations to be rendered limited to the scope of the activity and contingent upon an ultimate conclusive consistency determination.

AOGA recommends Articles 6, 7 and 8, and all references to appeals, be deleted from the regulations and instead one article be included stating that an applicant has the right to direct appeal to the Superior Court following the agency's decision on the permit application. The permitting process is vital to our industry and accordingly we believe it is essential that permit issues be resolved through judicial review at an early date.

In the definitions section we would recommend that the definition of "great weight" be changed from meaning "deference" to "serious consideration". Deference provides no latitude to the agency deciding the issue. Further, we would recommend a sentence be added to the definition of "primary area of expertise" calling attention to the fact that any consistency determination includes a"question of balancing factors". Finally, we question why the definition for "feasible and prudent" under the Alaska Coastal Management Act is proposed to be changed. As proposed in these regulations, the definition would not give consideration to economics, which we believe to be an important consideration in determining if an issue is "feasible and prudent".

Finally, we recommend the addition of two new sections, possibly under the deferred Article 4, which we believe would help alleviate the problem of multiple and conflicting state agency comments to federal agencies. The first section calls for the lead agency established under Sections .510-.540 to determine on behalf of the state its comments and recommendations on federal permits and to transmit such policy to the federal agency. The second calls for any state agency commenting upon an activity to address its comments solely to that lead agency.

In summary, we would like to reiterate our support for measures which expedite regulatory process. We are concerned that the regulations, as proposed, create new, complex requirements that do not presently exist. Additionally, while many of the problems over consistency determinations have been resolved, new problems present themselves in the regulations as proposed.

DETAILED WRITTEN COMMENTS
OF THE
ALASKA OIL AND GAS ASSOCIATION
ON
UNIFORM PROCEDURES FOR PERMITS,
CONSISTENCY DETERMINATIONS AND APPEALS
FEBRUARY 6, 1981

22 aac 10.020(a)(4)--Delete this subsection. This should not be justification for extending deadlines because any memorandum of understanding entered into prior to or pursuant to these regulations should not contain conflicting approval schedules, but rather should provide for approvals within the time frame contained in these regulations.

22 aac 10.020(b)--Change to read: "(b) A certification under (a)(1) of this section will only be made on a finding of extraordinary circumstances and will specify...". As proposed this provision is open-ended. We believe such certification should be made only under unusual or extraordinary circumstances.

22 AAC 10.030(a)--Change first sentence to read: "...the agency will notify the applicant within 15 days of receipt of a completed application for a Class I or Class II permit." Strike remainder of sentence. Fifteen days is sufficient for both classes of permits.

22 AAC 10.040(1)--Strike "responsible for the overall management of the project or operation". As is the case in (4) any duly authorized employee should be allowed to sign applications.

22 AAC 10.050(a)--Change to read "An oral public hearing on a Class I or Class II permit application will be held if:".

22 AAC 10.050(a)(1)--Change to read: "required by statute; or for Class II permits;".

22 AAC 10.050(b)(1)--Delete "or for Class I permits, likely".

Hearings on Class I permits should be held only if required by statute.

22 AAC 10.060(a)(2)--Delete this subsection. Include a new (2) which would read: "(2) If at the end of the applicable time period the deciding officer has taken no action, the application is deemed approved and the permit granted pursuant to this chapter."

Notwithstanding the comment in the Executive Summary, this section should include a provision for automatic approval if the deciding officer does not act within the specified time period. Existing regulations on surface use permits provide for such automatic approval.

22 AAC 10.510--Change first sentence to read: "When a direct federal activity or a federal permit or license requiring a State consistency determination necessitates preparation of an Environmental Imapct Statement under 42 U.S.C. § 4332, except pertaining to state oil and gas leases, the Office of the Governor, Division...". At the end of the second sentence, add "excluding oil and gas activities".

22 AAC 10.520--Change first sentence to read: "Consistency determinations on disposals of an interest in state land will be performed by the Department of Natural Resources, including a joint state/federal oil and gas lease sale where an EIS is required." At the end of the second sentence, add "including associated federal permits requiring an EIS."

The changes suggested in .510 and .520 are intended to make clear that the Department of Natural Resources is responsible for consistency determinations associated with disposals of interest in state lands, including any EIS or Federal permits requiring an EIS.

Add new sentence to read: "The Department will conduct the consistency determination on oil and gas activities occuring in the Outer Continental Shelf adjacent to Alaska."

22 AAC 10.550--Delete (a) and (b); Change title to read: ACTIVITIES NOT REQUIRING A CONSISTENCY DETERMINATION. As proposed, this section would require that two consistency determinations be made for activities not covered by previous sections. This is not in keeping with the intent of these regulations.

22 AAC 10.570(b)--Delete this subsection. Including a coastal resource district with an approved CZM plan in the description of a resource agency adds another layer to the approval process and authorizes a local district to veto a project which is in the best interests of the State. See also our comments on .920(12).

22 AAC 10.580--Change this section to read: "When an activity requires more than one permit, the applicant, in order to obtain a conclusive determination under secs. 510-540 of this chapter, should apply for the appropriate permit under those sections prior to or contemporaneous with application for any other necessary federal permit or license. If an applicant applies for a federal license or permit prior to applying for a state permit which would provide the proper forum for a conclusive consistency determination under secs. 510-540 of this chapter, the designated lead agency may render a consistency determination which is limited to the scope of the activity contemplated by the federal license or permit and contingent upon the issuance of an ultimate conclusive consistency determination. Thereafter, an applicant may either submit application for additional federal licenses or permits and obtain further non-conclusive consistency determinations, or may apply for the appropriate state permit under secs. 510-540 and obtain a conclusive consistency determination."

As proposed, this section could require an applicant to submit all applications simultaneously, which would be cumbersome, if not impossible in some cases.

PERMIT REFORM REGULATIONS

January 27, 1981
2:30 p.m.

Beltz Room
211 Capitol

SENATORS PRESENT

Senator Fahrenkamp
Senator Bennettt
Senator Parr

An informal meeting with Deming Cowles, Deputy Commissioner of Department of Enviornmental Conservation, William Condon, Attorney Generals Office.

Mr. Condon indicated that within the next day or so a letter from the Governor will be going to Legislators outlining the Administrations permit reform regulations which has been a joint effort by the Department of Naturla Resources, Fish and Game, Enviornmental Conservation and the Office of Costal Management. These regulations are the result of Senator Bennetts bill last year. He indicated that there is a range of permitting problems with: oil, timber, cabins, gravel, trapping and firewood.

It had been recommended to the Governor that they would try to come up with a workable set of regualstion, similar to the bill originally offered by Senator Bennett. Personnel was assigned full time in an attemp to solve the problem on an Administrative level. The permit and land use (casual uses) regulations are out of DNR. If adopted the regulations would tell you how to go about doing whatever you wanted, and by following the regulations would constitute obtaining the permit. The more complicated industrial uses (oil, timber) regulations would apply to the procedures, time deadlines, appeal procedures where the application had been unfavorably acted upon, and a determination if the application is consistent with the State's Costal plan. Part of this type of permit is if it is consistent with the States Coastal Plan. Before the Corps of Engineers can issue a permit they have to get a determination from the State showing that it complys with the Plan. In the past Corp had to go to the office of Coastal Planning, and sometimes different Agencies would giv different determinations.

These regulations attempt to: 1. have the determination of compliance with the Coastal Plan decision being made within one Department-not two, the net effect, hopefully, is that it will be simplier for the individual applicant to get the permits.

The determination decisions will be spread out. 1. If the needed actio results from a state permit within DNR, they will make the consistency determination - they would be the only agency; 2. If the activity requires water or air quality permits from DEC, the determination would be made within DEC; 3. Some projects can be initiated (purely Federal) outside the State, in this case the responsibility would remain within the Office of Coastal Management, which is within the Governor's Office, Division of Policy Development and Planning.

He further indicated that these reuglations will hopefully reduce the number of times a person has to go back to an agency to obtain approval for a project. Those persons with enviornmental leanings would like to see some type of audit over DNR and DEC.

There have been some problems with oil permits. DNR would issue a permit, then the Corp would need to issue a permit while before the Corp another agency would say to the Corp don't like this project. Which in essence meant that the Feds (Corp, had final approval of projects and took control from the State. The Oil Companies would like to see a "lead Agency" approach.

We think through these regulations that we have the problems worked out and do not need a legislative remedy, hopefully we will be given a year to see it work. Under the new regulations if DNR is making the determination or decision on a permit and if F&G or DEC has a problem with it, they go to DNR, which allows them to know as they are issuing the permit the possibility of problems.

Deming Cowles: indicated that the work on the regulations by the Administration started as the result of Senators Bennett, Fahrenkamp and Parr's interest in permit. 2. The Administration saw enough of a need for allof to do our business better and to eliminate alot of problemes.

He further indicated that each Agency will issue permits in the sam manner, follow the same procedures and utilize the same appeal procedures. And the Regulations establish some regerous time tables.

In response to questioning of Coastal Zone Management approving timber and iming permits in the interior, Mr. Cowles indicated that Coastal management is only for the coastal areas.

In response to the question that doesn't Coastal Management use a elevation figure of 1,000 feet, while Fairbanks is at 400 feet which in essence is writing law via regulations - he indicated that each agency has the authority to write regs via the enabling legislation

Alaska State Legislature

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STATE CAPITOL
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Senate

Committee on Resources

MEMORANDUM

TO: SENATE RESOURCES COMMITTEE MEMBERS

FROM: JIM PALMER
SENATE RESOURCES COMMITTEE STAFF

RE: SECTIONAL ANALYSIS OF PROPOSED COMMITTEE SUBSTITUTE FOR SB 84

DATE: MARCH 27, 1981

A committee substitute has been prepared for SB 84. A copy of this proposed substitute is attached.

There are two main reasons why this substitute has been prepared. First, Billy Berrier of the Legislative Affairs Agency suggested in a memorandum to the Chairman that Sections 7, 8 and 10 which refer to approval of Alaska coastal management programs create a single subject problem in the original bill. He stated that "It can be argued that coastal management programs relate directly to the permit process since in many instances permits must be consistent with approved programs. The purpose of expediting permit issuance would be served by having a clearly constitutional means of approving these programs. While in my opinion our Court would hold that the single subject rule had not been violated under the liberal construction it has given that rule, this inclusion would subject the bill to serious constitutional attack."

Second, the establishment of the Permit Reform Commission was also deleted from the original bill. The reason for this deletion was similar to the reason for deleting sections 7, 8 and 10. The subject matter could easily be seen as constituting separate legislation. In addition, the controversy surrounding permit reform is substantial enough without adding additional items to this legislation.

SECTIONAL ANALYSIS OF PROPOSED COMMITTEE SUBSTITUTE FOR SB 84

SECTION 1 FINDINGS. This section states that the development of resources and employment of Alaskans have been retarded because of the current permit system. The system causes delay and uncertainty because of the time requirements, the complexity, the duplicity and the unjustified requirements of the current permit process. The public interest will be served by a streamlined permit system.

Memorandum
March 27, 1981

SECTION 2 adds new sections to AS 44.62, the Administrative Procedure Act, which are titled Article 8A. ISSUANCE OF PERMITS.

Sec. 44.62.632 sets time limits on the processing of permits.

Subsection (a) states that the responsible state agency shall issue a final decision granting, denying or reasonably conditioning the issuance of the permit within specific time periods unless the applicant and the agency mutually agree to a different period of time. These time periods start upon receipt by the agency of the permit application.

The time periods are (1) any time period specifically required by law; (2) 60 days if a public notice, hearing or comment period is specifically required by law and; (3) 30 days in all other cases.

Subsection (b) states that the final decision on the permit application shall include (1) the conclusions of the agency which support its decision including the factual basis and statutory authority for any conditions or stipulations, and (2) the agency's statement of its decision on the permit.

Subsection (c) mandates that the final decision on the permit must bear a fair and substantial relation to the object of the law.

Subsection (d) states that a permit may not be denied because of either the lack of any other permit or be conditioned upon the acquisition of any other permit.

Subsection (e) provides that the failure to make a final decision within the time periods specified in subsection (a) under 44.62.632 constitutes approval of the permit.

Sec. 44.62.634 requires an agency receiving a permit application for which it does not have authority to issue a permit or for which it believes a permit is unnecessary, to notify the applicant within 10 days. Such notice is the final decision of the agency. Subsection (b) states that an agency which receives an application which does not contain sufficient information for a permit decision to notify the applicant within 10 days and specify all information that is required.

Sec. 44.62.635 states that the final decision of an agency may be reviewed at the request of the applicant. The applicant is entitled to a review de novo if requested in the original request for review, otherwise the request is on the record. This request must be filed within 30 days after the applicant has received the agency's decision.

The Commissioner or board shall issue a decision within 10 days of receipt of the review request if the review is on the record. If the request is for a hearing de novo, the hearing shall be held within 30 days of the receipt of the request. The decision of the commissioner or board shall be made within 30 days of the hearing de novo.

Unless the entire agency decision is confirmed in toto, the decision must be in written form and contain the commissioner's or board's findings and conclusions in full.

Memorandum
March 27, 1981

Sec. 44.62.636 provides for the review of the final permit decision issued by a state agency or commissioner by the state superior court. The applicant's right to appeal to the superior court is not affected by the failure to seek reconsideration or further review under AS 44.62.635.

Subsection (b) puts the burden of proving that the decision is in accordance with AS 44.62.632 and 44.62.634 upon the agency which issued the final decision. Subsection (c) provides that an appeal under this section takes preference over other civil actions before the court and shall be decided without unnecessary delay.

SECTION 3 DEFINITIONS.

"Permit" is defined as a permit, license, certification, consistency determination, comments on pending permit applications (including environmental impact statements), plan review, and other authorization or approval by a state agency before construction or operation of a project.

Permit is defined so as to exclude conveyances of interest in state land or water and the provision of financial assistance.

"Permit Application" is defined to include a document submitted to a state agency by a governmental entity which solicits comments in connection with a permit being processed by that governmental entity. An application is a document requesting the issuance of a permit which contains sufficient information to allow the state agency determine if the project is in compliance with state law.

"Project" is defined to include a new activity or expansion or addition to an existing activity for which permits are required before construction or operation.

"State Agency" includes local or regional air pollution authorities and coastal resource districts and coastal resource service boards.

NEAU EMPIRE

WILLIAM S. MORRIS III
RESIDENT and PUBLISHER

JEFFREY A. WILSON
GENERAL MANAGER

N FRED HOWARD TOM BLUMENSHINE
r Circulation Manager Production Manager

Hopes for President

it true that only the deepest tragedy
t this nation to its senses. Too often,
re so wrapped up in their personal or
auses they do not see their nation for
eat haven of freedom and justice it

lightning bolt that shocked America
d to its senses Monday was news of
ul assassination of President Ronald
e story unfolded before the nation's
evision and in their newspapers,
et aside their parochial causes to
de of their leader.
nent, even those who gripe and
t about his actions or inactions joined
rs in voicing concern for the fallen
his press secretary and the two
officers who accompanied them.

My Turn

State Construction Delays

By TERRY MILLER
Alaska Lieutenant Governor

There is a general agreement that the state is falling behind on the design and construction of capital building projects that have been authorized by the legislature. Recently arguments about the dimension of the problem have been debated vociferously in the media but the allegations and counter-allegations, while highlighting the problem, have done little to aid in the search for solutions.

Several weeks ago, the governor asked me to investigate the problem and recommend some interim solutions to solve the present logjam of state-funded construction projects. In my report to the governor, I recommended short-term initiatives that can ease the problems.

Compelling public policy issues dictate that construction projects, once funded, be accelerated whenever possible. The faster the projects are constructed, the more money the state will save by avoiding the inflation penalty of delay. It has been estimated that construction costs are presently growing at the rate of 10-25 percent per year, depending on the type of project, and substantial real savings can be realized by accelerating construction timetables.

Also, accelerated construction now, before the gas pipeline and other large construction projects begin, will stabilize the employment of thousands of Alaskans and do much to even out the severe "peaks and valleys" which plague the Alaskan economy.

Everyone that I spoke with agreed that there are at least three factors contributing to delay in state projects. They are:

First, problems of right-of-way acquisition and difficulties with securing materials such as gravel and other construction materials at certain sites;

Second, overload due to the massive amount of projects (estimated to be in excess of 2,500) which are within the state's jurisdiction as a result of the explosion of projects authorized since the advent of large surpluses in the state treasury; and

Third, the lack of legislative intent for many projects for which inadequate information exists, requiring the department to ascertain from individual legislators both the scope and the adequacy of the funding authorized for each project.

At best, these factors complicate the state's ability to get projects ready for construction on a timely basis. In my view, they represent much of the reason for delay on many projects; however, these factors are not the sole cause for delay. Many observers charge that the Department of Transportation and Public Facilities', internal organizational structure is a primary obstacle to timely project design and construction.

Everyone with whom I spoke praised the individual efforts of Commissioner Ward. He received high marks for his management skills and I personally hold the highest regard for Commissioner Ward's outstanding administrative abilities. Nevertheless, problems clearly persist in spite of the commissioner's herculean efforts.

In an effort to offer recommendations to the governor which (a) could be implemented quickly, (b) would most likely have the greatest immediate impact of expediting authorized projects, (c) would minimize disruption of the internal machinery of the department—disruption which would possible have the unfortunate affect of doing more harm than good—I submitted the following:

The state must develop a better tracking system to monitor all projects. The first important step in solving any problem is to recognize that one exists. This has not yet occurred. To the extent that the department would admit to any delay, such delay is blamed on external, non-controllable factors. This attitude is unsatisfactory. Accordingly, I recommended, and the governor ordered, that the Division of Budget and Management conduct and immediate assessment of DOTPF projects authorized, but not yet constructed or advertised to be constructed.

DOTPF should establish an integrated management presence in the department's regional structure. To put it colloquially, under the present organization "there is no one to surrender to" as the regions lack an overall manager to resolve project decision disputes.

To the maximum extent practicable, the legislature should appropriate capital improvement monies directly to municipalities until DOTPF's backlog becomes more manageable. Undoubtedly, local governments cannot properly construct [illegible] of state projects and, in addition, the state must [illegible] burden municipalities with so many projects that they, too, experience difficulties in meeting timely work flow schedules.

These three recommendations will not solve every delay in construction of state-mandated projects but, hopefully, will begin to lead to a more timely process. There are, admittedly, conditions that will delay projects in the future but, to the extent that they are managable, we should attempt to resolve them.

Since the Department of Highways and the Department of Public Facilities were combined into the Department of Transportation and Public Facilities several years ago, there has been continued slippage in the amount of time necessary to build state projects. This would indicate to me the need for a thorough evaluation of the organizational structure of the department with an eye toward revamping procedures.

Letters

Quarantine

Dear Editor:

Let's get out the quarantine signs again!

It's that time of the year again and this year seems worse than before locally. I'm people than before. I've heard enough grade-school playground level nit picking in the past few months to make a person sick. Instead of planning together, pulling together, facing a very large and powerful enemy, it's

Alaska State Legislature

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Senate

Committee on Resources

April 10, 1981
1:30 p.m.

Beltz Room
Room 211 - Capitol

MEMBERS PRESENT

Senator Fahrenkamp
Senator Fischer
Senator Mulcahy
Senator Sturgulewski

HEARING:

CSHB 173 An Act making appropriations for residential energy programs; and providing for an effective date.

SB 187 An Act making a supplemental appropriation to the Division of Parks, Department of Natural Resources, for the Youth Conservation Corps program; and providing for an effective date.

CSSB 84 An Act relating to the processing of permits by state agencies and to approval of Alaska coastal management programs; establishing the Permit Reform Commission; and providing for an effective date.

SB 218 An Act relating to the use of waste heat produced by certain pipeline facilities; and providing for an effective date.

Clarissa Quinlan (Director, Division of Energy and Power Development, Department of Commerce and Economic Development) spoke in favor of CSHB 173. She reviewed the history of the Residential Energy Conservation Program, stating that it consisted of three parts: (1) residential energy audits, (2) a grants and refunds program and (3) a loan program. Auditors have been trained through a series of one-week intensive courses in the community college system. The Division began contracting for audits in mid-December, and all contractual funds were committed statewide by mid-February. 7,000 audits will be completed in the near future.

Senator Mulcahy put forth the motion to move CSHB 173, with individual recommendations.

Chip Dennerlein (Director, Division of Parks, Department of Natural Resources) spoke in favor of SB 187. He stated that the Youth Conservation Corps program in Alaska has been effective, and required funding to continue. SB 187 would provide state matching funds for federal funding for FY 1981 and 1982.

Senator Sturgulewski put forth the motion to move SB 187, with individual recommendations.

Deming Cowles (Deputy Director, Department of Environmental Conservation) testified on behalf of the Administration against CSSB 84. He stated that the administration had identified some of the problems with the permitting process, but that CSSB 84 was not the solution. The Administration opposes the bill for several reasons, including the basis of the class identification of permits, the elimination of the requirement to exhaust administrative remedies, shifting of the burden of proof to the agencies, application to other than resource permits, automatic approval upon expiration of the processing time limits and the possible violation of the single-subject rule by the reference to Coastal Zone Management.

Mr. Cowles stated that the Administration has developed new permit regulations to resolve some of the problems. The regulations will be in effect before the end of the fiscal year. There are other efforts in the Adiministration to expedite the permit process, including improving the information flow to permittees, a master application process, single permits by industry, general permits for DNR and DEC and increased agency coordination.

Senator Sturgulewski commented that SB 84 was similar to legislation passed by the House last session, and suggested making amendments to the original bill (SB 84) to match that legislation and eliminate the problems under the single subject rule. The Senator pointed out that substantive problems with CSSB 84 could lead to extensive litigation if enacted.

Senator Strugulewski put forth the motion to bring SB 84 before the committee for the purpose of amendment. The Senator put forth the motion to move amendments to SB 84 eliminating references to Coastal Zone Management and the Permit Reform Commission.

Senator Bennett testified that he had no objections to the amendments at that time.

The Committee recessed.

After recess, the Committee took up SB 218.

Senator Kerttula spoke in favor of the concept of SB 218. He cited a University of Alaska study that determined that the waste heat from one of the trans-Alaska oil pipeline could have heated 200 acres of land for agricultural production. He stated that he had sponsored similar legislation in the past, and that SB 218 made sense as a vehicle for the utilization of waste heat on future projects. It would be wasteful to require all facilities to be constructed to allow the utilization of waste heat. On the trans-Alaska pipeline, for example, only two or three sites were feasible for the utilization of waste heat.

The Committee took up SB 84.

Senator Sturgulewski put forth the motion to rescind the Committee's action on SB 84.

CSSB 84 was before the Committee.

Senator Mulcahy put forth the motion to move CSSB 84 with individual recommendations.

The Committee was adjourned at 3:17 p.m.

Alaska State Legislature

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Senate

Committee on Resources

TO: SENATE RESOURCES COMMITTEE

FROM: BETTYE FAHRENKAMP,
CHAIRMAN

DATE: April 23, 1981

RE: Follow-up information on SB 84

Attached please find the information James Linxwiler stated he would forward to the Committee.

Attachment

Alaska
Environmental
Lobby

419 6th St., Suite 321
Juneau, Alaska 99801

586-2345

TESTIMONY BEFORE SENATE RESOURCE
COMMITTEE ON CSSB 84
by
Roland Shanks

I'd like to thank you for an opportunity to discuss these proposed permit reforms included in the bill.

We support permit reform, but we do not support this bill. We've been supporting it for six months. We've been cooperating with the Govenor's office in his permit reform project. During a period of six months they've had public meetings all over the state. They've also had private meetings with any interested party. Thsy've gotten input from many more groups than have been able to gravel here this week for these hearings. That project is nearing completion and they are almost ready to issue the new regs. If this bill is passed we will have to start all over again and it will push back any new regs from six months to a year as we fight all these battles again. I don't feel it's in anybody's best interest to pass this bill.

Sections 7 and 8 have nothing to do with permit reform. They are basically housekeeping amendments needed to clear up the confusion created by the AG's opinion regarding concurrent resolutions. These sections should be removed from this bill and passed seperately or attached to an applicable bill under consideration.

I can't pass up an opportunity to comment on Section 1. Before the legislature endorses these findings I hope there is some factual evidence offered. It's become a real fad lately to scream about permit regs. I'd be interested in seeing a study outlining the number of permits issued and the average length of time it took. I'd also be interested in seeing documentation of the loses noted in Section 1, paragraph (2). These are all easy charges to make, but I've never seen any factual evidence to support them.

I don't feel that the number of agencies involved in the permit process is that oppressive. While some action requiring permits are quite simple some are very complex. These complex actions have impacts affecting many

disciplines, and all of these impacts must be considered and analyzed. The only alternative to multiple agency reviews is to put the expertise into all the agencies; a wildlife specialist in DNR, a hydrologist in ADF&G, and a coastal zone specialist in DEC. This would create a lot of jobs but it sure wouldn't streamline the bureaucracy. Time guidelines may be useful to insure timely response, and they have been included in the Govenor's proposal. But we must realize that timelines alone will not insure timely action. There are times when the staffs are backlogged because of the number of permits pending. Part of clearing up this backlog is to beef up those staffs. Because of the seasonal nature of activities the permit loads tend to be cyclic. We may want to explore intermittent staff positions that would come on when the load is high.

So, to conclude I would urge you not to waste all the time and effort that has gone into the Govenor's permit reform project by re-inventing the wheel. This legislation is not needed and shouldn't be passed.

RS/ats

Alaska
Environmental
Lobby

419 6th St., Suite 321
Juneau, Alaska 99801

586-2345

The Legislature finds that,

(1) The constitution of the State of Alaska provides for "developement of it's resources ... consistent with the public interest". It futher states that "The Legislature shall provide for the utilization, developement, and conservation of Natural Resources belonging to the State, including land and water, for the maximum benefit of it's people. It also states that fish, wildlife, and water are reserved for common use. The consitution further states that "Fish, forest, wildlife, grasslands and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yeild principle".

(2) That the legislature has a duty to all the citizens of the State to protect all resources from unreasonable degradation while providing for the use and developement of some resources.

(3) That the legislature has delegated this responsibility thru statute to the many commissioners. Allowing for the promulgation of regulations to carry out ~~the~~ these responsibilities.

(4) The commissioners of the many departments will cooperate in a project to coordinate regulations and permits to the extent possible to allow full use and developement fo the State's many resources while still protecting the Public Interest as mandated by the the Constitution of the State of Alaska.

UNIFORM PROCEDURAL REGULATIONS
EXECUTIVE SUMMARY

A. Intent and Background of Regulations

The purpose of this executive summary is to describe the background and intent of the uniform procedural regulations (22 AAC 10) for which public notice of proposed adoption was jointly issued by four state agencies on January 9, 1980. This summary will also briefly discuss major areas of concern which have emerged with respect to the regulations.

These regulations are the product of a permit reform project established by Governor Hammond on June 17, 1980, and are intended to achieve these primary goals:

1. Establishment of the shortest feasible deadline for the issuance of state permits for natural resource development.

The regulations provide that the departments of Natural Resources, Fish and Game and Environmental Conservation, and the Division of Policy Development and Planning within the Office of the Governor, referred to in the regulations as "resource agencies," must classify their permits as either a "Class I" or "Class II" permit. The regulations provide that Class I permits must be issued within thirty days of receipt of a completed application. Class II permits must be issued within sixty-five days. The published informative summary of the regulations contains the agencies' proposed classifications. The regulations provide for extensions of these deadlines in certain limited cases. As part B of this summary discusses, the regulations attempt to provide sufficient safeguards to insure that an extension will only be given when it is absolutely necessary.

2. Establish uniform permit procedures.

Currently, permit and appeal procedures vary dramatically not only between, but within state agencies. Uniform permit procedures make it far easier for applicants, and the public in general, to do business with state government. If adopted, these regulations would supplant all procedural material contained in the regulations of the particular agencies involved, and a host of administrative orders, interagency agreements, and informal and written understandings. The Class II procedures, the most complex

in the regulations, replace this voluminous mish-mash with a scant 1 1/2 pages of uniform regulations. The regulations of each agency will state the permit requirement; describe the substantive criteria under which that permit will be granted, and will classify the permit. The regulations in proposed 22 AAC 10 will govern administrative proceedings for that permit.

3. Explicitly define the rights of the applicant, and other persons in the permitting process.

Currently, some state agencies have no procedural regulations governing the issuance of their various permits. Other requirements which may significantly affect the outcome of the permit application are found in administrative orders, interagency agreements and other documents and understandings not contained in the administrative code. Sometimes, procedural protections are left to agency "discretion". This approach causes two problems. First, it arguably contravenes the Alaska Administrative Procedure Act which provides, in AS 44.-62.640(2), that all rules of general applicability should be contained in regulations. Second, it promotes misunderstanding between the agency and the public, and in the long run, threatens unnecessary litigation. The proposed regulations attempt to explicitly define the rights of all the parties while avoiding unnecessary procedural burdens.

4. Streamlining the states coastal management decision making process.

Under existing regulations (6 AAC 80.010(b)) implementing the state's Coastal Management Act (AS 46.40), before a state agency may issue a permit for an activity in the coastal area, it must determine that the activity is "consistent" with the state coastal management standards found in 6 AAC 80. Additionally, under sec. 307(c) of the federal Coastal Zone Management Act (16 U.S.C. § 1456), federal agencies must obtain a "consistency determination" from the state before federal permits or licenses in the coastal area may be issued. The state's requirement (6 AAC 80.010(b)) is intended to implement AS 46.40.200, which seeks to insure that state actions, including permit and license decisions, will be consistent with the state's coastal management program. The approach taken in 6 AAC 80.010(b), however, has created both unnecessary duplication and the potential for inconsistent state positions on a project. If an activity needs four state permits, for example, 6 AAC 80.010(b) requires each of the four state agencies to make "consistency determinations" in the course of its

permit proceeding. There is little reason for one finding to be made four times. Moreover, under current procedures, the state will make a fifth consistency determination when a federal agency issuing a permit seeks state certification under sec. 307(c) of the federal act. Compounding this unwarranted duplication is the fact that these multiple consistency determinations need not agree. In October, 1980, the Alaska Coastal Policy Council, by resolution, requested the administration to devise an approach whereby one determination, for both state and federal law purposes, would be made on a project, with that determination being made, to the extent feasible, within existing permitting processes. Article 5 of the proposed regulations contains the administration's proposal. That proposal allocates responsibility for making "one time" consistency determinations in the following manner:

a. When an activity is of such significance as to require the preparation of an environmental impact statement by the federal government, a consistency determination should be made by the governor's office. Accordingly, responsibility in these cases would be vested with the Division of Policy Development and Planning. This is a narrow sphere of responsibility.

b. Under existing law, the Department of Natural Resources cannot dispose of an interest in state land until it finds that the disposal would be in the "best interests" of the state. AS 38.05.035(a)(14). The coastal management standards are essentially a subset of the many factors which as a whole constitute the "public interest". Thus, as a matter of law and practicality, it seems most logical, except in cases involving EIS preparation, to vest "consistency determination" responsibility for state land decisions exclusively in the Department of Natural Resources. Moreover, after many disposals, particularly for oil and gas leases, the Department of Natural Resources will require a "plan of operations" to be approved by the department. To provide continuity in this regard, the regulations provide that the consistency determination on activities authorized in that plan will also be done by DNR.

c. There are a wide range of activities occurring in the coastal area which neither require the preparation of an environmental impact statement, nor are authorized by a state land disposal or plan of operations. The primary impact which these activities will have on the

coastal area is often related to water quality, and those water quality impacts must normally be permitted by either the Environmental Protection Agency or the Army Corps of Engineers under the federal Clean Water Act. Section 401 of that act requires that the Department of Environmental Conservation "certify" that the issuance of that federal license or permit will not violate state water quality standards. By vesting coastal management consistency determination authority for this large residual of activities in the Department of Environmental Conservation, the regulations will allow that determination to be made within the already necessary "sec. 401" process, and by the agency with the primary expertise over the probable primary impact of that activity.

An example of the functioning of the administration's proposal might be helpful. When the Department of Natural Resources considers holding an offshore oil and gas lease sale, that agency will make the only determination as to whether the sale is consistent with the state standards. When a successful lessee seeks to construct an offshore exploratory well, it will apply to the Department of Natural Resources for approval of the plan of operations with respect to that well and related facilities. DNR will then make a conclusive consistency determination on the placement of that well and related facilities. Some of these facilities obviously will need other permits from other agencies. At a minimum, placement of the well offshore will need a permit from the Corps of Engineers. When a consistency determination is requested of the state by the Corps of Engineers under sec. 307(c) of the federal Coastal Zone Management Act, the Division of Policy Development and Planning will utilize the determination already made by the Department of Natural Resources. Moreover, if any other state permits are necessary for an activity approved in the plan, the state permitting agency will not conduct a consistency determination, since the question of whether that activity is consistent with the standards has already been determined by the Department of Natural Resources.

It is the hope of the administration that these regulations will result in major progress in making state permitting procedures more efficient, explicit and fair. Working sessions on these regulations have already been held with industry, environmental and public interest groups. All of these groups endorse the four goals of the regulations. A December 3, 1980, working draft of the regulations has been substantially revised to accommodate many of these groups' recommendations. Inevitably, however, none of the

groups are totally satisfied with the product. Several serious issues regarding the regulations remain. Generally, certain oil industry commentators are unsatisfied with the regulations because they are perceived to (1) give unwarranted recognition to the rights of the public and local governments in the permitting process, and (2) allow state renewable resource agencies to comment on federal permit applications and to have excessive input on state natural resource decisions. Conversely, the federal Office of Coastal Zone Management, and certain environmental commentators, believe that the regulations give inadequate protection to all of the above interests.

The second part of this summary discusses several of the major areas of concern regarding the regulations, and the rationale for the treatment of those concerns given in the current proposal. These rationales, of course, should not be taken as inflexible "positions". The whole purpose of the public notice process is to generate debate on these issues.

B. Major Issues Raised by the Regulations

1. Division of Policy Development and Planning responsibilities.

As the previous section of this summary suggests, the assignment of authority to make "conclusive" coastal management consistency determinations will result in particular state agencies taking a role of primary authority on coastal management issues. Interest groups, depending upon their orientation and past experience, have come to view particular state agencies as more sympathetic to their interests than others. As a result, commentators to date have offered quite variant positions on where that "ultimate authority" should lie.

At the outset, the administration has attempted to develop a "consistency determination" procedure which ensures true interagency consultation. This process was developed to ensure uniformity in the interpretations of the state coastal management standards, and to lessen the practical effect of the choice of actual decision-makers. This effort, described in subsec. (2) of this section, has been alternatively perceived by some industry groups as excessive, and by the federal Office of Coastal Zone Management as insufficient.

Regardless of the safeguards taken in the regulations, the question of the choice of decision-makers has remained prominent. Certain oil industry commentators have recommended that the Governor's Office should have no responsibility for making consistency determinations where a private applicant is involved. The rationale for the administration's proposal has been previously stated.

Because of the narrowness of the DPDP sphere of responsibility (see section (A)(4)(a) above), it will remain almost universally true that the Department of Natural Resources will have exclusive coastal management authority over its own land disposal actions. This aspect of the draft regulations originated as the primary industry proposal on coastal management and was endorsed by the administration primarily because of the legal and logical relationship between the consistency determination and the "best interest finding" under AS 38.05.035(a)(14) (see above). This alternative has been criticized by environmental groups, and by the federal Office of Coastal Zone Management, which believe that the Department of Natural Resources will face a conflict of interest in making a consistency determination on its own proposals. Because in this instance an agency will be reviewing the consistency of its own activities, it is particularly vital that procedural safeguards be placed in the decision making process.

Little criticism has been offered to date of the placement of authority with DEC over the large "residual" category of activities needing sec. 401 certification under the Clean Water Act.

2. The coastal management procedural protections.

There is a danger in "dividing" coastal management responsibilities. The standards themselves (6 AAC 80) are capable of diverse interpretation, although the proposed regulations attempt to tighten these standards by giving a meaning to the phrase "feasible and prudent" which has judicial interpretation. Nonetheless, there will remain a possibility that diverse bodies of administrative precedent might develop as to the meaning of the standards. Second, if the coastal management decision-making process is not sufficiently disciplined, the statutory mission of the particular agency having jurisdiction becomes substantially more important, which makes, in turn, the possibility of a realistic solution to the "duplication" problem all but impossible to achieve.

Several protections have been proposed in response to these problems. First, a disciplined interagency review process had been provided for Class II permits, where most consistency determinations will be made. Section 130. The regulations provide that if the deciding agency (for example, DNR on state land matters) rejects a recommended course of action by a sister agency, the reasons for that rejection must be clearly articulated. See sec. 160(3). Additionally, the deciding agency must accord "great weight" to the comments of its sister agencies, but only if those comments are within the primary area of expertise" of that agency. Section 130(c). This provision has generated both criticism and misunderstanding. The definitions section of the regulations (900) makes it clear that this provision is not intended to give any other agency actual or practical decision-making authority. This is because no commenting agency is deemed to have "primary area of expertise" on the decision itself. The most often used example of the operation of this requirement is with respect to plan of operations approval by the Department of Natural Resources for an oil and gas lease. Let us suppose that the Department of Fish and Game comments that a particular drilling activity will have adverse wildlife impacts, and that to mitigate those impacts a seasonal drilling restriction should be imposed. The deciding agency will normally be required to defer to Fish and Game comments concerning actual or likely adverse impacts, since that is clearly within that department's "primary expertise". However, deciding upon a seasonal drilling restriction depends upon a balance of the magnitude and likelihood of the impact occurring, economic, engineering and other factors. The balancing is solely the province of the deciding agency -- in this case DNR -- and, as a result, the Department of Fish and Game will not be entitled to "great weight" on its recommended seasonal drilling restriction.

Oil industry commentators are unhappy with this safeguard -- even given the narrow definition of "primary area of expertise", which was provided by the Division of Minerals and Energy Management. They see the protection as giving the Department of Fish and Game, if not a "veto", at least unwarranted new authority. Certainly, it gives no commenting agency a "veto" (see above). Moreover, the comments fail to recognize that both sound administrative practice, and federal law, require meaningful coordination of all state agency interests in making coastal management decisions. Presently, that "coordination" occurs by virtue of the ability of other agencies to make their own "consistency determinations" on the same project reviewed by DNR.

They won't be able to do that anymore, and a more substantive role must be provided other agencies in the forum for making the one determination which will bind the entire state.

Conspicuously, the federal Office of Coastal Zone Management has forcefully urged that the state should, and perhaps must go substantially further in ensuring adequate consideration of the views of other agencies. Their primary recommendation has been to require that, for example, DNR plan of operations decisions be appealable to a multi-agency board, on which Fish and Game would presumably sit, and through which they would have a functional veto authority.

To ensure uniformity of interpretation of the guidelines, the regulations provide (sec. 920(9)) that interpretations of the meaning of the guidelines offered by the Office of Coastal Management will be entitled to great weight. This provision has caused little criticism. What has been severely criticized, however, is sec. 570(b), which provides that local governments with an approved coastal management programs will be entitled to great weight on questions of whether a particular activity is consistent with that program. Certain oil industry representatives have insisted that even when a local government has an approved program under AS 46.40, state agencies should not defer to that local government on questions of consistency within its municipal boundaries. The Office of Coastal Management strongly believes that this view is inconsistent with the intent of the act, which is to increase the voice of local governments in state decision-making once a program has been approved. The disagreement over sec. 570(b), then, is as much one of law as policy, and the Department of Law is researching the issue.

Finally, until recently, the oil industry has been very critical of the fact that review of plans of operations will be classified as a "Class II" permit, since public notice (sec. 120) is provided for Class II permits. Currently, public notice of proposed plans of operations is not provided by the Department of Natural Resources, and they have seen sec. 120 as imposing a new and unwarranted procedural requirement. Public notice is being provided in certain cases for plans of operations solely because it is required by federal law. As noted previously, in the course of its plan of operations review, the Department of Natural Resources will be performing a consistency determination which will serve as the state's "determination" for federal permit purposes as well. 15 CFR § 930.61 requires that a state

consistency determination on a proposed federal permit or license must be predicated on public notice. Under the proposal, however, public notice will not be provided even when the activity is in the coastal area, if no related federal permit is necessary. For these plans, then, a decision could be made immediately after expiration of the twenty-one day agency review period in sec. 130. Once aware of this federal requirement, criticism of this aspect of the regulations has diminished.

Any significant dilution of these protections may raise serious questions as to the continued legality of the state's program under federal law. The interests of the public, and of local governments in particular, would be severely injured if this were the case.

3. Extensions of permit deadlines.

As noted previously, the regulations provide that the Class I and II permit deadlines may be extended under certain circumstances. These circumstances are:

a. Complex projects. Section 020(a)(1) and 020(b) of the regulations provide that the permit deadlines may be extended if the commissioner of the agency certifies that the project is too "complex" to be adequately reviewed within the timeframe otherwise allowed. There is little disagreement that a sixty-five day review of, for example, the TransAlaska Pipeline, is less than adequate to protect the public interest. This exception was recognized and jointly endorsed by industry and the administration in House Committee substitute for SB 548, a permit reform bill considered in the last legislature. As a safeguard, sec. 020(b) requires that the commissioner's office itself make the certification, and also requires the commissioner to establish the "shortest feasible time" in which review can be completed. Subsequent extensions are not permissible.

b. A maximum twenty day extension is possible if a public hearing is held on the project. Section 020(a)(2), sec. 050(f). There are two reasons for this provision. First, the agency will often not know whether a public hearing is warranted until late in the decision-making process. For example, with Class II permits, the agency will often not know the intensity of public concern until the close of its public notice process, which will often be thirty-five to forty days after the

application has been received. See sec. 120(b)(3). That would leave, at most, twenty-five days to decide upon a hearing, provide adequate advance notice of the hearing, hold the hearing and thoughtfully consider the comments received. That is simply impossible to do. By allowing the additional twenty days at most, the agency can realistically hold a meaningful public hearing. Additionally, as noted in subsec. (4), criteria have been developed to limit the circumstances under which a hearing will be held.

Another reason for the twenty day public hearing "override" relates to the classification of permits themselves. Under SB 548, a third category of permits would be authorized -- Class III permits, which could be issued in ninety days. The primary value of the Class III permit category was to accommodate those permits (for the reasons stated above) for which a public hearing was periodically appropriate. The regulations abandon the Class III option. The administration feels that it is preferable to applicants to provide for an eighty-five day review period only in those cases where a public hearing is actually held, rather than lumping a whole class of permits into a ninety day category, even though in individual cases a public hearing would not be provided. Oil industry commentators nonetheless want this provision deleted, arguing that any public hearing should be held within the sixty-five day Class II period. That is not possible, if anything approaching adequate notice of the hearing is to be provided (see above). Indeed, environmental groups are deeply concerned that a twenty day extension is itself insufficient. If this extension were to be removed, Class III procedures would have to be written, and those permits now normally classified as Class II would be reclassified as Class III if there was any reasonable likelihood of a public hearing ever being warranted on a particular application.

c. Section 020(a)(3) provides that the deadlines can be extended by mutual agreement of the applicant and the department. This provision was originally inserted in SB 548 at the request of industry representatives, who envisioned certain circumstances where the administrative record might not be sufficient by the applicable deadline to sustain a granting of the permit.

d. Section 020(a)(4) authorizes agencies to enter into memoranda of understanding with federal agencies for the joint processing of applications even though the joint processing may result in differing deadlines from those imposed in regulations. However, under sec. 085, these memoranda are authorized only after the agency has weighed the impact of the differing procedures on the applicant. It would be counter-productive if these regulations precluded an agency from entering into a joint permit processing scheme with federal agencies simply because the existing regulations of the state and federal agencies were not compatible. This "exception" has generally been supported to date.

e. The deadline for issuing a permit may be "tolled" -- or suspended -- if the agency finds that, because of the unique nature of the project, additional information beyond that required in the application form is necessary. Section 030. Again, this exception was recognized in SB 548. Agency application forms and generally required attachments will provide, in almost all cases, enough information to reach a meaningful decision. Occasionally, an activity will raise unique issues which an agency must explore further if the permit is to be lawfully granted. It is not the intent of this section to allow or encourage fishing expeditions, or to demand veritable impact statements from the applicant. Any request for additional information must be linked to some information gap which prevents a sufficient assessment of the application under the decision-making criteria of the agency as contained in its statutes and regulations. Environmental groups have criticized sec. 030 because it, one, affords only one opportunity to request additional information and, two, requires that the information be sought early in the decision-making process. Oil industry spokesmen oppose this provision as providing "another loophole" for extending the deadlines.

4. Public hearings and Appeal.

Section 050 of the bill establishes the criteria for holding a public hearing. Oil industry commentators have expressed concern that this provision requires that a public hearing be held in cases where hearings were not authorized in the past. To the contrary, this section is intended to constrain those situations in which permit proceedings will be extended through the holding of a

hearing. Currently, of course, any agency can hold a public hearing on any permit application, even if one is not required by law. The administration did not feel it sound to allow for a twenty day extension of the permit deadline for the holding of a hearing, without also limiting the situations in which a hearing would be appropriate. First, sec. 050(c) explicitly prohibits the holding of duplicative public hearings. Second, in determining whether to hold a hearing, the commissioner is explicitly required to consider the effect of a twenty day delay on the probable starting date of project construction (050(b)(4)) and whether the public concern for the project really has anything to do with the jurisdiction of the agency. Section 050(b)(2). From the applicant's point of view, these are beneficial new provisions.

Similarly, one oil industry spokesman has criticized the appeals sections of Articles 6 and 7 as expressly "legitimizing" the ability of a person other than the applicant to appeal a permit decision if he is directly and adversely affected. That criticism assumes that a member of the public has no such existing right, which could not be more wrong. A careful reading of secs. 610 - 620 in particular will disclose that the regulations in fact impose new, significant obligations on a potential public interest appellant. These requirements -- particularly the requirement of sec. 620 as to active participation throughout the decision-making process -- have been supported by industry. Thus, the criticism appears to be that the regulations should address limitations on the public's existing right to appeal, but should not "legitimize" the right itself.

5. Permit amendments.

The regulations (sec. 080(c)-(d)) provide that changes to a permitted operation which involve significant new impacts require a new permit, while changes which do not involve significant impacts are treated as amendments which do not need public notice. Oil industry commentators have suggested that where the impacts are "insignificant", no communication with the agency should be necessary at all, and the activity should be allowed to proceed. That proposal would create a significant risk of misunderstanding, and perhaps litigation. Initially, the permittee would decide whether he felt this change was "significant". If he felt that it wasn't, he would proceed without notifying the agency. The obvious question is this: What if the agency detects the change, and disagrees as to its significance? The agency would then be free to take enforcement action for violation of its regulations.

6. "Automatic approval".

The regulations do not provide that if a permit deadline is missed, the permit is deemed "automatically issued". No issue surrounding these regulations has caused the administration more difficulty than this one. The administration supports effective enforcement of the deadlines imposed in these regulations. This is particularly so because the deadlines imposed are achievable, and those circumstances in which extensions are absolutely necessary have been clearly delineated.

To provide that permits are deemed automatically "issued", an approach endorsed by certain oil industry representatives and contained in SB 548, carries with it a great deal of disturbing baggage. First, such a provision would require a statutory change. It is not, at this time, a statutorily sufficient grounds for permit issuance that a deadline has been missed. Thus, absent a change in the law, a decision to issue a permit simply because a certain date has been missed would be arbitrary and capricious. Even if a statutory provision was provided, problems would remain. It could be argued that such a statute would be unconstitutional because it would deny a person seriously affected by the decision any real means -- administrative or judicial -- to influence the permit decision. Moreover, an agency with serious concerns over a permit near the close of the decision-making process might have no alternative but to deny the permit rather than to allow the thirtieth or sixty-fifth day to be reached. Third, if an agency should ever desire to issue a permit, but could not justify its decision based on the record, it might simply let the time run intentionally. Since the permit would be "automatically issued" by operation of the calendar, there would be no meaningful judicial review.

A suggestion has been made to alleviate this third problem by providing that judicial review under applicable criteria would still be permissible after the deadline had run, but that the court would review any conflicting evidence or opinion in a light "most favorable to the applicant." This suggestion has merit, but raises additional concerns as to whether the court would feel compelled to conduct a "de novo" review of the project, with resultant substantial delays in project approval.

Most fundamentally, the argument for "automatic approval" assumes that state employees will not use their utmost efforts to comply with their employers' rules and

regulations. Given adequate staffing levels, we believe that there will be little difficulty in meeting the requirements of these regulations. Before anything as difficult and uncertain as "automatic approval" is attempted, we believe that a year's trial period with adequate staff levels should be provided before more severe alternatives are attempted.

7. State Comments on Federal Permit Applications.

A serious issue not addressed in the proposed regulations is the question of the degree to which state agency comments on federal permit applications should be constrained. Basically, the issue, as posed by the oil industry, is this: The regulations do provide that the state will speak with one voice on coastal management matters. However, an agency disenchanted with the results of that decision may still recommend its own terms and conditions -- or permit denial -- through comments on a federal permit application necessary for the facility. For legal or policy reasons, the federal permitting agency may feel compelled to accept that recommendation. As a result, an admitted possibility for "inconsistent" state positions remains.

It has been suggested that the agency with decisional authority on coastal management issues (i.e. DNR on state land matters) also have decisional authority on the text of state comments on federal permit applications (other than sec. 401 certifications by DEC) -- and that those comments be compiled at the time the consistency determination is made, so that the applicant will receive a single, inclusive and final "state position" on his project at that time.

The proposal would bring unquestioned benefits. It also has problems. The departments of Fish and Game (AS 16.05.020(2)-(3); AS 16 05.050(1)) and Environmental Conservation (AS 46.03.020(9)) arguably have direct statutory duties which this proposal could unlawfully impair. Second, since the Department of Fish and Game is never given the role of decision-maker on conclusive coastal management matters under the proposed regulations, denying that department its remaining avenue of direct influence would be seen by some as relegating that agency to a "second-class" status among its sister agencies. To the extent this perception is justifiable, demoting advocacy of wildlife concerns in Alaska to a subsidiary level is a policy decision of the most profound proportions.

It is anticipated that the final regulations will resolve this issue. Thus, public comment on this issue is strongly encouraged.

TO: Billy Berrier
Director
Division of Legal Services

FROM: Bettye Fahrenkamp, Chairman

DATE: March 7, 1981

RE: SB 84

Attached please find a copy of SB 84. I would like the "Permitting Bill - August,1980" drafted (in final form) as a Committee Substitute for SB 84 and returned to Vera King, Senate Resources Committee, Room 211 Capitol Building.

Attachments

CSSB 81

PERMITTING BILL - AUGUST, 1980

For an Act entitled: "An Act relating to the processing of permits by state agencies; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. FINDINGS. The legislature finds that

(1) the orderly development of state resources is being unnecessarily delayed by the length of time required to obtain permits from state agencies, by the complexity of the permitting process, and by the number of agencies involved in the permitting process;

(2) the uncertainties created by the lack of specific time limits, the proliferation of agency reviews, the number of agencies involved in the permit process, and unjustified agency requirements upon the processing of permit applications have cost Alaskans millions of dollars in lost employment and higher prices;

(3) the public interest has not been advanced by protracted delay in the processing of permit applications by state agencies;

(4) by requiring state agencies to process permit applications in an expeditious manner within a reasonable period of time, the state will promote the social, economic and environmental health and well-being of its citizens.

* Section 2. AS 44.62 is amended by adding new sections to read:

ARTICLE 9. ISSUANCE OF PERMITS

Sec. 44.62.632. TIME LIMIT ON THE PROCESSING OF PERMITS.

(a) Upon receipt of a permit application or receipt of a federal agency request for state review of an application for a federal permit, the responsible state agency shall issue a final decision granting, denying or reasonably conditioning the issuance of the permit, or issue a final response to the federal agency's request for state review, within the following time periods, unless the applicant and the agency mutually agree to a different period of time:

(1) any time period specifically required by an Alaska statute;

(2) 60 days where a public notice, public hearing, or comment period is specifically required by an Alaska Statute in connection with the permit application;

(3) 30 days where neither (1) nor (2) apply.

(b) The final decision on a permit application under (a) of this section shall set out the following information:

(1) conclusions of the agency which support its decision concerning the permit application, including the factual basis and statutory authority for any conditions or stipulations to which the permit is subject; and

(2) the final disposition of the permit application by the agency.

(c) The final decision under (a) of this section must bear a fair and substantial relation to the object of the legislation under which the agency is empowered to act.

(d) A permit applied for under (a) of this section

(1) may not be denied because of the lack of any other permit; and

(2) may not be conditioned upon the acquisition of any other permit.

(e) A permit application which has not received a final decision by the responsible state agency within the time period specified in (a) of this section is approved as submitted. The permit is presumed to have been issued on the last day of which the state agency could have announced a final decision in accordance with (a) of this section.

Sec. 44.62.634. DEFECTIVE APPLICATION; NOTICE TO APPLICANT. (a) If an agency receives a permit application requesting a permit which the agency believes it does not have authority to issue, or which it believes is unnecessary, it shall notify the applicant within 10 days of its receipt of the application. A notice given under this subsection is the final agency decision.

(b) If an agency receives a permit application which it believes does not contain sufficient information concerning the location and nature of the project to allow the agency to determine compliance of the project with state law, it

shall notify the applicant within 10 days of its receipt of the application. The notice must specify all information which the agency requires to determine compliance of the project with state law.

Sec. 44.62.635. REVIEW BY THE COMMISSIONER. An agency's final decision issued pursuant to AS 44.62.632 may be reviewed by the commissioner of the issuing agency at the request of the applicant. The request must be filed with the commissioner within thirty (30) days of the applicant's receipt of the decision. The commissioner shall issue a decision within ten (10) days of the department's receipt of the request, unless the applicant has requested a hearing de novo, in which case such hearing shall be held within thirty (30) days of the department's receipt of the request, and the commissioner's decision shall be rendered within thirty (30) days of the conclusion of the hearing. Unless the agency decision is confirmed in its entirety, the commissioner shall issue a written decision setting forth his findings and conclusions in full.

Sec. 44.62.636. REVIEW BY THE SUPERIOR COURT.

(a) Judicial review by the superior court of a final decision issued by a state agency pursuant to AS 44.62.632 or 44.62.634 or of a decision of the commissioner issued pursuant to AS 44.62.635, may be had by filing a notice of appeal in the superior court in accordance with the applicable rules of appellate procedure. The right to appeal is not

affected by the failure to seek reconsideration or further review pursuant to AS 44.62.635. The review shall be governed by the provisions of AS 44.62.560(b) - (e) and AS 44.62.570.

(b) On an appeal by the applicant to the superior court, the agency which issued the final decision has the burden of proving that the decision is in accordance with AS 44.62.632 and 44.62.634.

(c) An appeal taken under this section has preference on the calendar of civil actions before the court and shall be decided without unnecessary delay.

* Sec. 3. AS 44.62.640 is amended by adding a new subsection to read:

(c) In AS 44.62.632 - 44.62.636,

(1) "permit application" includes the following documents:

(A) a document requesting the issuance of a permit which contains sufficient information concerning the location and nature of a project to allow the state agency to which it is directed to determine compliance of the project with state law,

(B) a document, submitted to a state agency by a governmental entity, which solicits comments in connection with a permit being processed by the governmental entity;

(2) "date of receipt" means the date on which an agency actually receives an application requesting issuance of a permit;

(3) "disposition" means the grant, denial or conditional grant of a permit;

(4) "permit" means a permit, license, certification, consistency determination, comments on pending permit applications before other governmental entities (including environmental impact statement comments), plan review, or other authorization or approval issued as a written document which is required to be obtained or is solicited from a state agency before the construction or operation of a project; the term does not include conveyances of interests in state land or water, but does include all authorizations and approvals, whether proprietary or regulatory, necessary to undertake a project under a previously conveyed property interest; the term also does not include the provision of financial assistance;

(5) "project" means a new activity or expansion or addition to an existing activity, for which permits are required before construction or operation; the term does not include pursuing a trade or profession, providing public health service, or operating a financial institution

(6) "state agency" means a state department, commission, board or other agency of the state; for the purposes of AS 44.62.632 - 44.62.636, "state agency" also means a local or regional air pollution control authority established under AS 46.03.210, and a coastal resource district and a coastal resource service board established under AS 46.40.010 - 46.40.210.

* Sec. 4. This Act takes effect immediately in accordance with AS 01.10.070(c).