S B

500

To: Mary McBurney
From: Joe Evans
Date: 4/9/90
Re: CS for Senate Bill No. 500

Section #1

① How soon does hearing have to be? (Petition is w/in 5 days, but is hearing w/in 30, 60 or 90 days?) ② Does permit stay "on hold" until CPC has its hearing? If so, the elevation process will be "elongated" which I understand will cause much consternation for the resource agencies and the industry folks. ③ The requirement for a formal, APA hearing is gone (I agree!), but I want to be sure y'all meant to do that.

"make an appropriate recommendation to the state agency..."

Section #4

Seems to be inconsistent w/ section #1 → section #1 says CPC "shall determine if the state agency has followed the project consistency review procedures [etc.]", but section #4 says the CPC "may not review... action by a state agency [that] has been challenged as inconsistent with the Alaska Coastal Management Program." So, it seems that section #4 guts section #1.

and

Kxxxx send a copy to Mary

My thought → let CPC finish its procedures; put 'em in place; try that for a year or two → if problems develop, go back to legislative amendments to 46.40.100. Kill Senate Bill #500!

CC: Gretchen @ DGC

Municipality of Anchorage

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P.O. BOX 196650
ANCHORAGE, ALASKA 99519-6650
(907) 343-4311

JOE EVANS
Assemblyman
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April 17, 1990

Senators Szymanski, Frank, Adams, Pearce,
and Pourchot
Community & Regional Affairs Committee
Alaska State Legislature
Juneau, AK 99811

Re: <u>CS for Senate Bill No. 500</u>
"An Act Relating to the
Alaska Coastal Management Program"

Dear Senators:

I understand that a hearing has been scheduled for today at 3:30 p.m. on the Committee Substitute for Senate Bill 500. Because Tuesday is our Assembly day and we have work sessions today, I am not certain that I will be able to testify via teleconference. Therefore, I would respectfully request that you accept this letter as my testimony on this matter.

On Friday, April 13, 1990, I met with Gretchen Keiser from DGC. Gretchen reviewed with me a marked-up copy of Committee Substitute for Senate Bill 500. This marked-up version was prepared by Gretchen during a meeting with K. Fredriksson, C. Wilson, and F. Neville. (I hope that the Committee has a copy of this marked-up draft.) I support the changes made by Ms. Keiser and the individuals that she worked with on April 12, 1990.

I am <u>not</u>, however, in a position to support the Committee Substitute or the original Senate Bill No. 500. Mr. Denby Lloyd from the Governor's Office has made an excellent effort to address most of the concerns that I have. However, one major problem still exists in this legislation.

As originally enacted, AS 46.40.100 provided for maximum oversight of coastal policies and coastal management programs by the Alaska Coastal Policy Council. Senate Bill 500 and the

Committee Substitute make a substantial and meaningful change in this beneficent policy. Specifically, on page 2 of the Committee Substitute (section 1 of the proposed legislation), the Council's ability to direct appropriate changes is severely restricted by the language stating that the Council may "make an appropriate recommendation to the resource agency commissioners before the coordinating agency renders a consistency determination . . ." Bluntly stated, this language means that the Coastal Policy Council can only recommend and the resource agencies and/or resource agency commissioners can ignore any recommendations they so choose to disregard.

If the Committee desires to make this very substantial change in AS 46.40.100, I am unable to support this legislation. I have still not been convinced that such legislation is at all necessary. To date no one has shown me any abuses of the present statutory mandates nor have I been convinced that the future "parade of horrors" is a real possibility. Therefore, I would request that this legislation be tabled or, at best, forwarded with a recommendation of "do not pass" from this Committee.

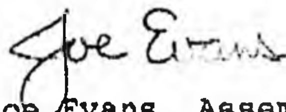
Realizing that the administration strongly favors some legislation this session, I would request that if this legislation must move forward that the following change be made. In particular, on page 2 of the working draft, the language "make an appropriate recommendation to the resource agency commissioners before the coordinating agency renders a consistency determination" should be deleted and in its place language along the following lines should be used:

> Direct the resource agency commissioners or coordinating agency to take action to follow the project consistency review procedures, properly consider enforceable policies and standards of the coastal management program, adhere to existing program procedures, satisfactorily follow coastal management responsibilities as required by law, regulations, or reimbursable agreement or take any other action consistent with the mandates of any existing coastal management program.

As I have stated on prior occasions before the Committee, I believe that the present system has functioned well for the past 12 years. Contrary to other representations that may be made by the administration, I would respectfully submit that "it ain't broke and it don't need to be fixed." Stated another way, this is legislation truly before its time. Therefore, I would respectfully

restate my earlier position that this legislation should not be acted upon at this time by the Sixteenth Alaska Legislature.

Sincerely,



Joe Evans, Assemblyman
Municipality of Anchorage and
Coastal Policy Council Member

JE/jss

sloszymanski

rent resolution is constitutional. In my opinion, the majority reasoning is fallacious in equating regulations with laws passed by the legislature. The litany of constitutional requirements outlined in the majority opinion is indeed mandated for the passage of a bill into law. The constitution, however, makes none of those requirements applicable to regulations. In fact, the constitution is silent as to the practice of delegating authority by the legislature to the executive or administrative agencies for promulgation of regulations.[1] Regulations may be promulgated without having each regulation confined to one subject, a descriptive title, a specific form of enactment clause, three readings on three separate days, the vote of each member adopting the regulation recorded, a majority vote of each house of the legislature, a public record of the vote cast, being subject to veto by the governor, a 90-day waiting period before becoming effective.[2] Nevertheless, the majority does not question the authority of the legislature to delegate the power to promulgate regulations without these safeguards. It seems to me that if the legislature, in authorizing regulations, cannot condition that authority with a reasonable provision for oversight because the annulment of a regulation is equated with repeal of a statute, then the regulation itself must be considered invalid as not having been passed with the requirements necessary for enacting a bill into law.

This issue was considered by this court shortly after statehood in *Boehl v. Sabre Jet Room, Inc.*, 349 P.2d 585, 588 (Alaska 1960), where we stated:

> The legislative power of the state "is vested in a legislature." It is argued that because of this constitutional provision the power may not be delegated.
>
> But such a strict theory of separation of powers ignores realities and the practical necessities of government. The United States Supreme Court has said that delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility, and that necessity fixes a point beyond which it is unreasonable and impracticable to compel the legislature to prescribe detailed rules. [Footnotes omitted.]

One of the bases specified in *Boehl* for upholding this power of the legislature to delegate regulatory authority was the identical right to annul regulations which the majority now finds to be unconstitutional. In *Boehl* we stated:

> It also is not essential, in order to sustain the grant of authority, that the legislature circumscribe administrative discretion by express standards of action in order that the opportunity for capricious exercise of power will not exist. There is slight danger of that. The exercise of the board's powers is hedged about by substantial safeguards. Before the board may act it must conduct a public hearing and afford any interested person the opportunity to be heard, and it must then "consider all relevant matter presented to it." There is ample opportunity for judicial review; for "any interested person may obtain a judicial declaration as to the validity of any regulation * * *". Finally, there is legislative supervision. The legislature, which meets annually, may revise the statute and thus restrict the bounds of administrative action; *it has the power by resolution to annul any agency or department rule or regulation*; and the Legislative Council, an interim legislative committee charged with the duty of making recommendations to the legislature, must annually review all agency regulations to determine if the legislative intent is being correctly followed.

349 P.2d at 590 (emphasis added) (footnotes omitted).

1. The constitution does authorize "[r]egulatory, quasi-judicial and temporary agencies" to be established by law. Art. III, § 22. There are no constitutional requirements for promulgation of regulations.

2. AS 44.62.180 does specify that, with certain exceptions, regulations become effective on the 30th day after filing by the lieutenant governor.

veto powers it does grant leads logically to the conclusion that no other veto power is implied.

Adopting the majority's logic, however, it might be said with equal force that the delegation of any rule-making powers to the executive by the legislature would also be unconstitutional. It might be argued that where the constitutional drafters intended to create rule-making power in the executive branch they created it expressly, with specificity, as they did in these two provisions, and that other rule-making powers created by statute cannot be implied.

In my view, the expression of some powers in these provisions does not lead to the conclusion that the constitution forbids either an expansion of rule-making powers in the executive or a denial of the legislative veto. The Alaska Constitution is silent on the question of administrative regulations. It does not say what powers may be delegated, how rules may be promulgated, or whether the legislature may retain a veto power by resolution. Presumably, these were questions that the constitutional drafters thought could best be resolved by the legislature.

There is an aspect of these two provisions, however, that is worthy of some notice. It seems significant that in the only two instances where the constitution does make a specific grant of rule-making power directly to the executive, it does so with a power reserved in the legislature to veto the rule by resolution. There seems to be little logic to a position that maintains that the constitutional drafters would have sanctioned the use of the resolution here, yet demanded the higher enactment standard when the legislature delegated power on its own.

Finally, the majority argues that where a veto power by resolution exists, it must also specify time limits, the method of voting and so forth. This argument is unconvincing. Having allocated a specific rule-making power to the executive branch, it was appropriate for the constitutional drafters to define in the constitution a specific legislative check to that power. This would seem to be a virtual necessity, because any statute that the legislature might pass to circumscribe these executive powers otherwise would in all likelihood be unconstitutional. But where the legislature delegates rule-making power by statute, the constitutional drafters might well presume that the legislature could also design an appropriate system of checks and balances by statute law, as they have done here in AS 44.62.-320(a).

VI

It is also of significance that the Administrative Procedure Act, chapter 143, SLA 1959, containing an annulment provision, was passed shortly after the drafting of the constitution at the first session of the Alaska State Legislature. Many of the delegates to the Constitutional Convention were among the members of the legislature.[15] In fact, two of the more active delegates, Hellenthal and Taylor, introduced House Bill 13 which was enacted as chapter 143, SLA 1959.[16] The bill was passed by a House vote of 37 to 1,[17] and by a unanimous Senate vote.[18]

At that time, the governor of Alaska was William A. Egan, who had presided as President over the Constitutional Convention. In signing House Bill 13 into law, Governor Egan delivered the following message to the legislature:

> I am signing into law HOUSE BILL NO. 13, the administrative procedures bill. I wish to call attention to the Attorney General's statement that Section 1, Article VI of Chapter 1 thereof may be unconstitutional in its seeking to impose new duties on local governing bodies.

15. Thirteen delegates and Convention Secretary (now Judge) Thomas B. Stewart were legislators in the first session of the Alaska State Legislature.

16. 1959 House Journal 52.

17. 1959 House Journal 427.

18. 1959 Senate Journal 708.

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

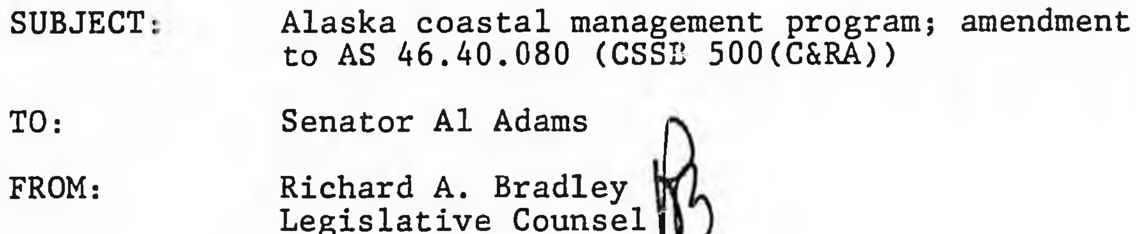
POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907-465-3800

M E M O R A N D U M April 24, 1990

SUBJECT: Alaska coastal management program; amendment to AS 46.40.080 (CSSB 500(C&RA))

TO: Senator Al Adams

FROM: Richard A. Bradley
Legislative Counsel



Martha Stewart has asked that we comment on Sec. 1 as it appears in the 4/22/90 draft of CSSB 500(C&RA). The section amends AS 46.40.080. The existing provisions of that section require that the Alaska coastal management program and each addition, revision, (etc.) of the program take effect on its approval by a concurrent resolution adopted by the legislature. The requirement is unconstitutional since the A.L.I.V.E. case, 606 P.2d 769 (Alaska 1980).

What the A.L.I.V.E. case stands for is the principle that the legislature works its will by enacting Acts; it cannot work its will effectively by the adoption of resolutions and hence if law-making is involved, the requirement of a resolution is ineffective. The result of the decision is that those laws that had required the executive to submit to the possibility of legislative veto were construed as though the requirement had been repealed out.

The request to me in my preparation of the 4/22 draft was to require that the program and its revisions be approved by the legislature, that is, by the adoption of an Act of the legislature. This is permitted under the A.L.I.V.E. case.

But I failed to address the implications of a transition. The amendment to AS 46.40.080 did not indicate what the implications were for program revisions and so forth that were adopted since the enactment of AS 46.40.080 (in 1977) and the A.L.I.V.E. decision in 1980.

Normally legislative Acts are construed prospectively only and, in the absence of transitional language, it would be my opinion that program revisions adopted before the effective date of SB 500 are valid without legislative approval and it is only revisions subsequent to that date that require approval by Act. The legislature may adopt transitional language requiring all revisions to be resubmitted but that seems unwieldly, to say the least.

I do suggest the adoption of transitional language addressing this question, however.

If I may be of further assistance, please advise.

RAB:gc
WKL1C/079

Enclosure: <u>A.L.I.V.E.</u> decision

STATE of Alaska and Department of Revenue, Appellants,

v.

A.L.I.V.E. VOLUNTARY, Appellee.

No. 3670.

Supreme Court of Alaska.

Feb. 19, 1980.

Unincorporated association, which was political action committee for unions, brought suit based on allegation that Department of Revenue's denial of permit allowing association to operate lotteries was wrongful for certain reasons including fact that such denial was based on continuing enforcement of a regulation despite its nullification by legislature. The Superior Court, Third Judicial District, Peter J. Kalamarides, J., granted association partial summary judgment, and State and Department of Revenue appealed. The Supreme Court, Matthews, J., held that statute providing that legislature, by concurrent resolution adopted by vote of both houses, could annul a regulation of an agency or department violated state constitutional provisions defining the mechanics of legislation.

Reversed and remanded with directions.

Boochever, C. J., dissented and filed opinion in which Connor, J., joined.

1. Statutes ⚩107(1)

Constitutional requirements that every bill be confined to one subject and that there be a descriptive title are intended to prevent inclusion of incongruous and unrelated matters in same bill and to guard against inadvertence, stealth and fraud in legislation. Const. art. 2, § 13.

2. Statutes ⚩15, 19

Purpose of state constitutional provision requiring three readings of a bill on three separate days, requiring that vote of each legislator on final passage of a bill be recorded and requiring that no bill pass without an affirmative vote of the majority of the membership of each house is to ensure deliberation prior to passage, to ensure that requisite majority of each house affirmatively votes to enact a bill into law and to provide a public record of the vote cast by each legislator. Const. art. 2, § 14.

3. Statutes ⚩26

Purpose of state constitutional provisions to effect that no bill shall become law unless governor has opportunity to veto it is to preserve integrity of executive branch of government, and thus maintain equilibrium of governmental powers, and to act as a check on hasty and ill-considered legislation. Const. art. 2, §§ 15, 17.

4. Statutes ⚩255

Purpose of state constitutional provision that laws are not to become effective, unless a two-thirds vote of membership of each house provides otherwise, until 90 days after they are enacted is to provide fair opportunity to those people affected by the legislation to learn of it. Const. art. 2, § 18.

5. Statutes ⚩22

Statute providing that legislature, by concurrent resolution adopted by vote of both houses, could annul a regulation of an agency or department violated state constitutional provisions defining the mechanics of legislation. Const. art. 2, §§ 1 et seq., 5, 13–18; art. 3, § 23; art. 10, § 12; AS 44.62.320(a).

6. Statutes ⚩22

When legislature wishes to act in an advisory capacity it may act by resolution, but if it wishes to take action having a binding effect on those outside the legislature, it may do so only by following the enactment procedure set forth in State Constitution. Const. art. 2, § 1 et seq.

7. Statutes ⚩22

Legislature has no implied general power to veto agency regulations by informal legislative actions. Const. art. 3, § 23; art. 10, § 12.

8. Administrative Law and Procedure ⇐385

Power granted by state constitutional provisions to effect that, unless they are disapproved by legislature within 60 days, changes in the law by executive order shall become effective at a date thereafter to be designated by governor and that recommendations made by a state local boundary commission become effective 45 days after presentation to the legislature unless vetoed is not rule-making power, but, rather, power to change statutes, and, thus, expression of such power in Constitution does not carry any implication that general administrative rule making is meant to be forbidden. Const. art. 3, § 23; art. 10, § 12.

9. Constitutional Law ⇐60

Though legislature can delegate power to make laws conditionally, the condition must be lawful and may not contain a grant of power to any branch of government to function in a manner prohibited by Constitution; fact that legislature can delegate legislative powers to others, who are not bound by constitutional provisions defining the mechanics of legislation, does not mean that legislature can delegate the same power to itself and, in the process, escape from such constitutional constraints under which it must operate. Const. art. 2, § 1 et seq.

10. Constitutional Law ⇐58

Though power to void agency regulations can be exercised by either legislature or agency, if legislature exercises such power it must do so while acting as a legislature; it may not grant itself the power to act as an agency. Const. art. 2, §§ 1 et seq., 5; art. 3, § 26.

Joseph K. Donohue, Asst. Atty. Gen., Avrum M. Gross, Atty. Gen., Juneau, for appellants.

Joe P. Josephson, Josephson & Trickey, Inc., Anchorage, for appellee.

Stephen M. Ellis, Delaney, Wiles, Moore, Hayes & Reitman, Inc., Anchorage, for amici curiae Alaska Legislative Council and Administrative Regulation Review Committee.

Before BOOCHEVER, C. J., and RABINOWITZ, CONNOR, BURKE and MATTHEWS, JJ.

OPINION

MATTHEWS, Justice.

AS 44.62.320(a) provides:

> The legislature, by a concurrent resolution adopted by a vote of both houses, may annul a regulation of an agency or department.

This statute encompasses a variant of what has come to be called the legislative veto.[1] The question in this case is whether this device violates article II of the Alaska Constitution. We hold that it does.

I

Chapter 15 of Title 5 of the Alaska Statutes authorizes games of chance and skill to be operated by permit holders. Only certain kinds of games, ("bingo, raffles and lotteries, ice classics, dog mushers' contests, fish derbies and contests of skill") are allowed,[2] only nonprofit organizations may be issued a permit,[3] and all revenues must be devoted to "the awarding of prizes to contestants or participants and to educational, civic, public, charitable, patriotic or religious uses."[4] The Commissioner of Revenue has been delegated the authority to adopt rules and regulations "necessary to

1. For excellent histories of the legislative veto, *see* Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 Harv.L.Rev. 569 (1953); Newman & Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?* 41 Cal.L.Rev. 565 (1953); and Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Cal.L.Rev. 983 (1975).

2. AS 05.15.100.

3. AS 05.15.120, .210(15).

4. AS 05.15.150.

carry out this chapter or protect the best interest of the public."

From 1960 until 1976 one of the Commissioner's regulations prohibited lottery operators from giving prizes exceeding $15,000 in personal property or $30,000 in real property annually.[6] In November of 1976 the regulation was amended by increasing the annual personal property limit to $30,000 and the annual real property limit to $50,000 and by stating that personal property included cash and negotiable instruments.[7]

A.L.I.V.E. Voluntary is an unincorporated association which acts as the political action committee for the Teamster's Union Local No. 959, and affiliated unions. For three years it has operated fund raising lotteries under a permit issued by the Department of Revenue. It applied for a permit for 1977 and reported that during 1976 it had distributed $80,000 in cash prizes. The Department denied A.L.I.V.E. a permit for 1977 on the ground that its prize distribution in 1976 had exceeded the allowable limit.

A.L.I.V.E. then brought suit against the Department alleging that the denial of the permit was wrongful, claiming that under the first version of the regulation which was in effect for most of 1976 cash prizes were not included within the personal property limitation of $15,000. While the case was pending before the superior court, the legislature, acting under AS 44.62.320(a), annulled, by concurrent resolution, 15 AAC 05.410(4).[8]

As a result of the legislative annulment A.L.I.V.E. added another count to its complaint under which it claimed that the denial of its permit was wrongful because it was based on continuing enforcement of the regulation despite its nullification by the legislature. In response, the state claimed that the legislature could not constitutionally annul an administrative regulation by concurrent resolution and therefore the regulation had not been annulled. Both parties moved for summary judgment on this issue. The court granted partial summary judgment in favor of A.L.I.V.E., holding that the legislative annulment power was constitutional and that the regulation in question was void *ab initio*.[9]

5. AS 05.15.060(11).

6. The regulation was designated 15 AAC 05.-410(4). It provided:

In holding, operating, and conducting raffles or lotteries, no permittee shall raffle prizes of personal property in excess of the sum or value of $15,000.00 in any one calendar year and real property in excess of the sum or value of $30,000.00 in any one calendar year.

7. As amended the regulation reads:

(4) In holding, operating and conducting raffles or lotteries, a permittee may not raffle prizes of personal property, including cash or a negotiable instrument, the aggregate total of which is in excess of the sum or value of $30,000 in any one calendar year and real property in excess of the sum or value of $50,000 in any one calendar year.

8. Legislative Resolve No 79, in full, states:

Annulling a regulation of the Department of Revenue pertaining to the value of prizes awarded in raffles and lotteries.

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

WHEREAS under AS 44.62.320 the legislature by concurrent resolution adopted by a vote of both houses may annul a regulation of an agency or department; and

WHEREAS 15 AAC 05.410(4), adopted by the Department of Revenue, restricts the value of prizes which may be awarded in a single year by a qualified organization in a raffle or lottery to $30,000 in personal property and $50,000 in real property; and

WHEREAS the prevention of high-stakes gambling sought by this regulation could be achieved more effectively through less restrictive means; specifically, the value of prizes awarded in individual raffles or lotteries could be limited or the prize limit could be related to the amount required to participate in the raffle or lottery; and

WHEREAS this regulation would frustrate the intent of AS 05.15.150, which specifies permissible uses for net proceeds of raffles and lotteries, by preventing qualified organizations from garnering net proceeds in sufficient amounts for uses specifically mentioned in AS 05.15.150, such as erecting or maintaining public buildings or works, or lessening the burden on government;

BE IT RESOLVED by the Alaska State Legislature that administrative regulation 15 AAC 05.410(4) is annulled.

9. That is, since 1960. Legislative Resolve No. 79 purported to annul not merely the 1976 amendments to the regulation, but the regulation in its entirety. *See* note 8, *supra*.

II

The Alaska Constitution defines with specificity the mechanics of legislation.[10] Each provision has a purpose "designed to engender a responsible legislative process worthy of the public trust." *Plumley v. Hale*, 594 P.2d 497, 500 (Alaska 1979).

[1] Article II, section 13 requires that every bill be confined to one subject and that there be a descriptive title. These requirements are designed "to prevent the inclusion of incongruous and unrelated matters in the same bill in order to get support for it which the several subjects might not separately command, and to guard against inadvertence, stealth and fraud in legislation." *Suber v. Alaska State Bond Committee*, 414 P.2d 546, 557 (Alaska 1966). The same section also requires a specific form of enactment clause to avoid confusion as to when the legislature is speaking with the force and effect of law, as distinguished from the mere expression of its views and desires.[11]

[2] Article II, section 14 requires three readings of a bill, on three separate days in order "to ensure that the legislature knows what it is passing," *North Slope Borough v. Sohio Petroleum Corp.*, 585 P.2d 534, 543 n. 11 (Alaska 1978), and to ensure an opportunity for the expression of public opinion and due deliberation.[12] Section 14 also requires that the vote of each legislator on final passage of a bill be recorded and that no bill may pass without an affirmative vote of a majority of the membership of each house. These provisions are meant "to ensure deliberation prior to passage, to ensure that the requisite majority of each house affirmatively votes to enact a bill into law, and to provide a public record of the vote cast by each legislator." *Plumley v. Hale*, 594 P.2d 497, 500 (Alaska 1979).

[3, 4] In addition to these formal safeguards there is the condition that no bill shall become law unless the governor has the opportunity to veto it.[13] This power is granted " 'to preserve the integrity of . . [the executive] branch of government . . and thus maintain an equilibrium of governmental powers . . . [and] to act as a check upon corrupt or hasty and ill-considered legislation.' " *Thomas v. Rosen*, 569 P.2d 793, 795 n. 5 (Alaska 1977) (citation omitted). Finally, there is the clause that laws do not become effective, unless a two-thirds vote of the membership of each house provides otherwise, until ninety days after they are enacted. Art. II, § 18. This is designed to provide a fair opportunity to those people affected by legislation to learn of the laws they must live by.[14]

[5, 6] The question presented by this case is whether the legislature can exercise its legislative power without following these enactment provisions. In our view the answer must be in the negative, for otherwise they would serve no purpose. In *Plumley v. Hale*, 594 P.2d 497, 502 (Alaska 1979) we held that the requirements of Art. II § 14 are mandatory, not permissive.[15]

10. Art. II, § 13 provides:

Form of Bills. Every bill shall be confined to one subject unless it is an appropriation bill or one codifying, revising, or rearranging existing laws. Bills for appropriations shall be confined to appropriations. The subject of each bill shall be expressed in the title. The enacting clause shall be: "Be it enacted by the Legislature of the State of Alaska."

Art. II, § 14 provides:

Passage of Bills. The legislature shall establish the procedure for enactment of bills into law. No bill may become law unless it has passed three readings in each house on three separate days, except that any bill may be advanced from second to third reading on the same day by concurrence of three-fourths of the house considering it. No bill may become law without an affirmative vote of a majority of the membership of each house. The yeas and nays on final passage shall be entered in the journal.

11. *See* 3 Proceedings of the Alaska Constitutional Convention 1746–48 (January 11, 1956).

12. *See* 3 Proceedings of the Alaska Constitutional Convention 1751–54 (January 11, 1956).

13. Art. II, §§ 15, 16 and 17.

14. *See* 4 Proceedings of the Alaska Constitutional Convention 3110 (January 25, 1956).

15. We also referred to the Art. II, §§ 14 and 15 safeguards in *North Slope Borough v. Sohio*

The minutes of the proceedings of our constitutional convention indicate that the delegates were fully aware that only by following the enactment procedures could the legislature make law. Thus, Delegate Sundborg stated:

> Now, a majority vote in each house of the legislature is not equivalent to passing a law, because it does not require the signature of the governor, and it does not require conformance with the provisions of this constitution and the provisions of such laws as will be passed under it with respect to the procedure in enacting a law. So, when we say in the second sentence, "The state may by law," we are saying that that law must be passed by the legislature in the manner that is required by the constitution and the statutes, and either signed by the governor or passed over his veto or become law without his signature in the manner provided in the constitution, which we felt was the real intention of the body rather than merely requiring that the legislature by a majority in each house and without adhering to any of those other restrictions and without any reference to the governor could contract debt on behalf of the state.

5 Proceedings of the Alaska Constitutional Convention at 3405 (January 28, 1956). Of course, when the legislature wishes to act in an advisory capacity it may act by resolution. However, when it means to take action having a binding effect on those outside the legislature it may do so only by following the enactment procedures. Other state courts have so held with virtual unanimity.[16]

Thus in *People ex rel. Burritt v. Commissioners of State Contracts*, 120 Ill. 322, 11 N.E. 180 (1887) a joint resolution directed state officials to make a contract for the publication and distribution of certain municipal laws and provided an appropriation for that purpose. The Illinois Supreme Court held that the joint resolution was invalid because the enactment procedures prescribed by the Illinois Constitution had not been followed. Speaking of them, the court stated:

> That these various provisions, giving the form and mode by which, through the concurrent action of the legislative and executive departments, valid and binding laws are enacted, are, in the highest sense, mandatory, cannot be doubted.

11 N.E. at 185. The court went on to note that

> nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential. [Citation omitted].

Id.

In *Mullan v. State*, 114 Cal. 578, 46 P. 670 (1896) the California legislature had passed a resolution requiring compensation of a private individual. In rejecting the argument that the resolution had the effect of law, the court stated:

> A mere resolution . . . is not a competent method of expressing the legislative will, where that expression is to

Pet. Corp., 585 P.2d 534, 543 n. 11 (Alaska 1978), stating: "Our constitution imposes certain requirements of formality on legislative action. . . . The legislature enacts laws by the passage of bills meeting the foregoing formalities. It may not enact a law or change one by committee report."

16. *Watrous v. Golden Chamber of Commerce*, 121 Colo. 521, 218 P.2d 498 (1950) is perhaps an exception. At issue there was a statute allowing certain tax proceeds to be pledged as security for bonds to pay for construction of state turnpikes under the condition "that any such pledge shall first be approved by joint resolution of the Senate and House of Representatives." *Id.* 218 P.2d at 502. The court upheld the statute, finding that such a resolution was not legislative in character, but "relat[ed] solely to the transaction of the business of the two houses." *Id.* 218 P.2d at 510. One proponent of the legislative veto has remarked that the reasoning of this case is "so unsatisfactory as to destroy its value as a precedent." Schwartz, *Legislative Control of Administrative Rules & Regulations*, 30 N.Y.U.L.Rev. 1031, 1043 n. 56 (1955).

have the force of law, and bind others than the members of the house or houses adopting it.

46 P. at 672.

Moran v. La Guardia, 270 N.Y. 450, 1 N.E.2d 961 (1936) involved statutory provisions reducing public employees' salaries during an economic emergency "until the legislature shall find their further operation unnecessary." The legislature first attempted to repeal this law by passing a bill, but it was vetoed by the Governor. The same result was then sought by the passage of a joint resolution. In an alternative holding the court held that the legislature could not constitutionally terminate the operation of the statute by resolution:[17]

> A concurrent resolution of the Legislature is not effective to modify or repeal a statutory enactment . . . To repeal or modify a statute requires a legislative act of equal dignity and import. Nothing less than another statute will suffice. A concurrent resolution of the two Houses is not a statute . . . A concurrent resolution, unlike a statute, is binding only on the members and officers of the legislative body. It resembles a statute neither in its mode of passage nor in its consequences. The form of a bill is lacking, and readings are not required. It does not have to lie on the desks of members of the Legislature for three legislative days . . . But more important, its adoption is complete without the concurrent action of the Governor, or, lacking this, passage by a two-thirds vote of each House of the Legislature over his veto. Thus a joint resolution may be adopted by a mere majority of the Legislature without action by the Governor or notice to the public, whereas the enactment of a statute requires action by three distinct bodies and at least three days' notice to the public. As has been well said: "In the exercise of this vast power [of the Legislature] according to the fundamental idea and constitution of parliament the concurrence of the three distinct bodies of which it is composed, each acting by itself and independent of the others, is necessary. No two of them acting together, much less alone, can make a law." [Citations omitted].[18]

1 N.E.2d at 962.

[7, 8] The express provision in the Alaska Constitution of two specific legislative veto mechanisms supports our view that no implied general power to veto agency regulations by informal legislative action exists. On the subject of the organization of the executive department the governor may propose changes in the law by executive order. Unless they are disapproved by the legislature within sixty days by "resolution concurred in by a majority of the members in joint session . . .", such changes shall "become effective at a date thereafter

17. The other alternative holding was that the statute had not authorized termination by resolution.

18. To the same effect are: *Becker v. Detroit Sav. Bank*, 269 Mich. 432, 257 N.W. 853 (1934); *Cleveland Terminal & V.R. Co. v. State ex rel. Attorney General*, 85 Ohio St. 251, 97 N.E. 967, 973 (1912) ("[A] joint resolution is not an act of legislation and . . . it cannot be effective for any purpose for which an exercise of legislative power is necessary . . ."); *Scudder v. Smith*, 331 Pa. 165, 200 A. 601, 604 (1938) ("The subject matter of this joint resolution is legislative in its nature. It is not a mere formal expression of legislative opinion [and is therefore invalid]"); *State ex rel. Todd v. Yelle*, 7 Wash.2d 443, 110 P.2d 162, 165 (1941) ("It is . . . clear that a house resolution is not a law. A law must be enacted either by popular initiative or by the legislature, and, when by the legislature, must be by bill . . ."); *Rowley v. City of Medford*, 132 Or. 405, 285 P. 1111, 1114 (1930) ("The power of the Legislature to effectively legislate by resolution is confined within very narrow limits. It may provide for expenses incident to its sessions, such as employing clerks and stenographers and procuring supplies, and other matters incident to the carrying on of its own business, but it cannot go outside and legislate generally on matters involving property or other rights. As to such matters, its resolutions have only the effect of an expression of opinion and no more."); *Hawks v. Bland*, 156 Okl. 48, 9 P.2d 720, 721 (1932) ("[a] resolution is the mere expression of an opinion and not an enactment of law."); *Newport News Fire Fighters Ass'n, Local 794 v. City of Newport News*, 307 F.Supp. 1113, 1115 (E.D.Va.1969) ("[T]he resolution expresses only the opinion of that legislative body.").

to be designated by the governor."[19] On the subject of municipal boundary changes, the state local boundary commission may make recommendations. They become effective forty-five days after presentation to the legislature unless vetoed by a "resolution concurred in by a majority of the members of each house."[20]

There are several noteworthy aspects of these expressed powers. First, they are accompanied by specific time deadlines. Second, the deadlines are different, sixty days in one case and forty-five days in the other. One may question, if there is an implied legislative veto power in the constitution, whether it is accompanied by a time limit, and if so, what the limit is. Third, the expressed legislative vetoes annul proposed executive action, they do not change existing law. They therefore do not have the same potential for the disruption of public expectations and ongoing executive programs that the blanket veto in question has. Fourth, the legislative vote required for the exercise of each of the expressed vetoes is different. Re-organization orders may be blocked by a resolution of disapproval concurred in by a majority of the members of the legislature in joint session,[21] while boundary change vetoes require disapproval by a resolution concurred in by a majority of the members of each house.[22] Since the Senate has twenty members and the House has forty,[23] these differences can be quite important. The votes of thirty legislators are required to forestall a veto taken in joint session, while ten senators can prevent a veto if the vote is to be by a majority of the members of each house. Here, as with the differing time deadlines mentioned above, one may inquire as to which voting method the constitution would impose as part of an implied general legislative veto power. The answer, of course, is that the constitution contains no clue. In our view, the specificity with which the constitution deals with the legislative veto powers it does grant leads logically to the conclusion that no other veto power is implied.

III

We are aware of only three cases which have decided the question whether a legislative veto is constitutional.[24] They are *Atkins v. United States*, 556 F.2d 1028, 214 Ct.Cl. 186 (1977), *cert. denied*, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978); *Opinion of the Justices*, 96 N.H. 517, 83 A.2d 738 (1950); and *Reith v. South Carolina State Housing Authority*, (Ct.C.P., 11th Jud.Dist., Aug. 28, 1975), *rev'd on other grounds*, 267 S.C. 1, 225 S.E.2d 847, 848 (1976).[25]

19. Art. III, § 23.

20. Art. X § 12. We do not agree with the dissent's characterization of the power granted in these two provisions as rule-making power, which we see as the power to interpret and implement statutes. Rather, the power contained in these provisions is the power to *change* statutes; therefore, the expression of these extraordinary powers in the constitution cannot be regarded as carrying an implication that general administrative rule making was meant to be forbidden.

21. Art. III, § 23.

22. Art. X, § 12.

23. Art. II, § 1.

24. The dissent suggests that our comment in *Boehl v. Sabre Jet Room, Inc.*, 349 P.2d 585 (Alaska 1960), supports an affirmative answer to this question. We stated that "[the legislature] has the power by resolution to annul any agency or department rule or regulation." However, the *constitutionality* of annulment was not argued in that case, and our statement obviously was not a judgment on this issue.

25. The Amici would add *Sibbach v. Wilson*, 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479 (1940) to this list; however, the type of veto discussed there apparently entailed formal law enactment and, therefore, the case has no relevance to the question before us. *See Atkins v. United States*, 556 F.2d at 1060 and n. 21. In *Buckley v. Valeo*, 424 U.S. 1, 140 n. 176, 96 S.Ct. 612, 692 n. 176, 46 L.Ed.2d 659, 757 n. 176 (1976), the United States Supreme Court found it unnecessary to pass on the validity of a legislative veto, but Justice White in a concurring opinion indicated he thought it was constitutional. 424 U.S. at 284–85, 96 S.Ct. at 757–58, 46 L.Ed.2d at 838–39. Subsequently, the Court of Appeals for the District of Columbia avoided the same issue, *Clark v. Valeo*, 182 U.S.App.D.C. 21, 559 F.2d 642 (D.C.Cir.) (en banc) *aff'd mem. sub nom. Clark v. Kimmitt*, 431 U.S. 950, 97 S.Ct. 2667, 53 L.Ed.2d 267 (1977), but Circuit Judge MacKinnon reached the merits in a vigorous

The New Hampshire case, *Opinion of the Justices,* 96 N.H. 517, 83 A.2d 738 (1950), involved the question whether a reorganization statute violated the state constitution. The statute provided that the reorganization plan proposed by the governor would become law if the two legislative houses did not disapprove it by concurrent resolution. The court concluded that the statute violated the enactment provisions of the New Hampshire Constitution:

> The procedure which [the reorganization statute] provides is in distinct contrast to that contemplated by the Constitution. Consent is to be manifested by silence or adjournment, and disapproval by "concurrent resolution" . . . [T]he contemplated procedure violates the constitutional provisions requiring separate action by each house of the Legislature . . . [T]he act would dispense with the "passage" of any measure, as that word is commonly used, and with the requirement of presentation to the Governor. In a sense the act provides for a reversal of the democratic processes required by the Constitution, for under it the Governor would propose the legislative action, rather than approve or disapprove of action taken. 83 A.2d at 741.

In *Reith v. South Carolina State Housing Authority,* (Ct.C.P., 11th Jud.Dist., Aug. 28, 1975), *rev'd on other grounds,* 267 S.C. 1, 225 S.E.2d 847, 848 (1976), the South Carolina Court of Common Pleas considered, *inter alia,* the validity of a statutory provision stating that regulations promulgated by the Housing Authority shall be "null and void unless approved by a concurrent resolution of the General Assembly at its session following such promulgation." The court held that this provision violated the constitutional enactment requirements because "the General Assembly may not perform a legislative function by means of a concurrent resolution."[26] The court also concluded that the provision impermissibly infringed on the executive's power to administer and enforce the laws.[27] On appeal, neither ruling was challenged, but the state supreme court reversed on the grounds that the legislative veto provision was not severable and, therefore, the whole act was unconstitutional.[28] The appellate court accepted the lower court's ruling on the veto provision as the law of the case and did not pass on the issue.[29]

Atkins v. United States, 556 F.2d 1028, 214 Ct.Cl. 186 (1977), *cert. denied,* 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978) involved a statute empowering the President to make recommendations for judicial salary increases and transmit them to Congress; the recommendations would become effective after thirty days unless disapproved by either House. It was claimed that this mechanism was unconstitutional because it contravened article I, section 1 of the United States Constitution, which vests the legislative power of the United States in a bi-cameral Congress, article I, section 7, which grants veto power to the President, and the principle of separation of powers. The Court of Claims, *en banc,* in a four-to-three decision, upheld the statute.

Atkins is not strong authority in this case, for the following reasons. First, the majority took pains to confine its opinion to the narrow issue before it, emphasizing that Congress' special role in the establishment of judicial salaries shaped its reasoning and conclusion. *Id.* at 1058–60, 1063, 1065, 1068. Moreover, the United States Constitution does not contain detailed directions for legislative action similar to those set forth in the Alaska Constitution, discussed *supra,* pp. 772, 773. Thus the Court of Claims was able to say, speaking of article I, section 1 of the United States Constitution:[30]

dissent criticizing Justice White's conclusion in *Buckley.* 182 U.S.App.D.C. at 64, 559 F.2d at 685.

26. *Reith v. South Carolina State Housing Authority,* Op. at 9.

27. *Id.* at 10.

28. 225 S.E.2d at 848–49.

29. 225 S.E.2d at 848.

30. U.S.Const. art. I, § 1 provides:

"[T]he clause does not itself, as a textural matter, mechanically direct the manner in which Congress must exercise the legislative power." *Id.* at 1062. Such a statement could not be made with reference to Article II of the Alaska Constitution. Further, the court stressed that no change in the law was accomplished by the one-House veto, because the President's recommendations never had the effect of law. *Id.* at 1063. The court implied that for one House to have the authority to make such a change would be unconstitutional: "Nor could one House do anything more than preserve existing law . . ." *Id.* at 1064. In contrast, the annulment provisions of AS 44.62.320(a) permit the legislature to void administrative regulations which are in effect. Such regulations are laws in every meaningful sense,[31] and annulling any one of them effects a change in the law.

IV

We turn now to a discussion of the major arguments of Appellee and the Amici.

The first is that since AS 44.62.320(a) was passed by the first state legislature, several members of which had served in the Alaska Constitutional Convention, and was approved by Governor Egan, who had been chairman of the Convention, a stronger than usual presumption of constitutionality should be applied.[32] We need not pause to debate that point. Whatever the strength of the presumption might be, it will be overcome if the statute cannot be squared with a reasonable reading of the constitution. That, in our opinion, is the situation here.

[9] The Amici argue that since the legislature may delegate law-making power to an administrative agency, it follows that it may reserve to itself a part of the delegable power, and that a deligation can be made subject to a condition that the legislature may later change the terms of the delegation by informal action. The answer to this argument, in our opinion, is that while the legislature can delegate the power to make laws conditionally, the condition must be lawful and may not contain a grant of power to any branch of government to function in a manner prohibited by the constitution. The legislature is bound to act in accordance with the constraints provided in article II of the constitution. The fact that it can delegate legislative power to others who are not bound by article II does not mean that it can delegate the same power to itself and, in the process, escape from the constraints under which it must operate.[33]

[10] To illustrate this point we may assume that the legislature has the power to establish an independent agency which would have the power to disapprove of agency regulations. Since the agency would be a part of the executive department the article II constraints on legislative action would not govern its functions. Could the legislature instead convey to its own members the power to act as such an agency free from these constraints? The answer, we think, is clearly no for that would amount to dual officeholding, prohibited by article II, section 5,[34] and would

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

31. 1 Mezines, Stein & Gruff, Administrative Law § 1.02[2] at 1–45 (1977); 2A Sutherland, Statutes and Statutory Construction § 49.05 at 240 (4th ed. Sands 1973), which states:

An administrative agency may be vested with the power to promulgate legislative interpretive rules which have the force and effect of law. Such powers must be limited by a standard, and, when exercised, the ensuing regulations, if within the standards, have the same efficacy as an original statute enacted by the legislature. [Footnote omitted].

32. The same argument was unsuccessfully made in *Bradner v. Hammond*, 553 P.2d 1, 4 nn. 4 & 5 (Alaska 1976).

33. "A delegation which disperses power is not necessarily constitutionally equivalent to one which concentrates power in the hands of the delegating agency." Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Cal.L.Rev. 983, 1067 n. 430 (1975).

34. Art. II, § 5 provides in relevant part:

Disqualifications. No legislator may hold any other office or position of profit under the United States or the State.

infringe on the executive appointment power set out in article III, section 26.[35] While the power to void agency regulations could be exercised by either the legislature, or by an agency, when the legislature exercises such power it must do so while acting as a legislature. It may not grant itself the power to act as an agency.

It might be supposed that if the legislature could condition the validity of a regulation upon the subsequent disapproval by both of its houses by concurrent resolution, it could condition the same upon disapproval by a committee,[36] or a single legislator. Using the theory, propounded by the Amici, that a veto is merely a condition there is no principled distinction between these cases. It is therefore worth observing that most authorities have rejected the validity of laws conferring either affirmative or negatory legislative powers on individual legislators or legislative committees.

In *State ex rel. Judge v. Legislative Finance Committee*, 168 Mont. 470, 543 P.2d 1317 (1975), at issue was a statute empowering an interim legislative committee to approve budget amendments. The statute was held invalid. The court pointed out that the power to approve budget amendments could be exercised by the entire legislature in making an appropriation, or by an executive agency acting on a proper delegation from the legislature, but the legislature could not delegate the power to so act to one of its subdivisions. *Id.* 543 P.2d at 1321.[37] The same reasoning was employed in *People v. Tremaine*, 252 N.Y. 27, 168 N.E. 817 (1929), where the Court of Appeals struck down a statute granting certain legislative committee chairmen the power to disapprove of the allocation of lump sum appropriations to an executive agency. The court acknowledged that the legislature might itself legislate the allocation, or it could delegate the responsibility to an executive agency. It could not, however, delegate the responsibility to one, or more than one, of its members: "The Legislature might make the segregation itself, but it may not confer administrative powers upon its members without giving them, unconstitutionally, civil appointments to administrative offices. It might by general law confer the power of segregation or approval of segregation upon any one but its own members . . . but the Constitution . . . makes its own members ineligible to such an appointment." *Id.* 168 N.E. at 822. *See also, Stockman v. Leddy*, 55 Colo. 24, 129 P. 220, 223 (1912); *Bramlette v. Stringer*, 186 S.C. 134, 195 S.E. 257, 264 (1938). *Contra, Opinion of the Justices*, 110 N.H. 359, 266 A.2d 823 (1970).

The Appellee also argues that legislative oversight of administrative regulations is desirable and that such oversight cannot take place effectively if it must follow the path of legislation prescribed by article II. There are two answers to this argument. First, and most important, the question of

35. Art. III, § 26 provides:

Boards and Commissions. When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.

See, e. g., Buckley v. Valeo, 424 U.S. 1, 118–43, 96 S.Ct. 612, 681-693, 46 L.Ed.2d 659, 744–58 holding that Federal Elections Commission members were necessarily "Officers of the United States" because, among other reasons, of their administrative rule-making power, and therefore could not be appointed by Congress; *People v. Tremaine*, 252 N.Y. 27, 168 N.E. 817 (1929) discussed *infra*, p. 778.

36. In fact, under AS 24.20.445(a), the Administrative Regulation Review Committee, a permanent joint committee of the legislature, is granted the power to suspend the operation of any regulation adopted after adjournment of the legislature until thirty days after the legislature reconvenes.

37. The people of Alaska recently rejected a constitutional amendment which, like the law struck down in Montana, was designed to vest the power to approve budget revisions in an interim legislative committee. *See* Alaska Const. art. II, § 11 (proposed amend. 1978 Supp.).

whether the legislature might perform a task more efficiently if it did not have to follow article II is essentially irrelevant. Since article II applies, the question of whether efficiency takes primacy over other goals must be taken to have been answered by our constitutional framers. Second, at least according to a recent case study, the legislative veto has been unimpressive in practice. *See* Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv.L.Rev. 1369 (1977). That study concludes, essentially, that the legislative veto encourages secretive, poorly informed, and politically unaccountable legislative action. *Id.* at 1409–20. It is consequences such as these that the enactment provisions of our constitution are designed to guard against. See discussion, *supra*, pp. 772, 773.

Appellee also makes an argument based on the doctrine of separation of powers. Rule-making is essentially a legislative rather than executive function and so, the argument goes, broad latitude must be afforded the legislature to act as it sees fit in this, the core area of its duties. This argument is essentially inconsistent with the requirements prescribed in article II of the constitution which must be observed in the process of legislation. The legislature is not free to ignore these requirements. See, discussion *supra*, pp. 772, 773.

Appellee finds it significant that the Alaska Constitution contains no provision like that in section 7, clause 3 of article I of the United States Constitution [38] which authorizes the executive to veto legislative resolutions, and argues that executive involvement in the enactment of resolutions was not deemed necessary by the framers of the state constitution. This point, however, does not advance Appellee's case. Under the United States Constitution joint resolutions are one means by which laws are enacted; [39] they are therefore naturally included among those legislative acts subject to Presidential veto. However, under the state constitution resolutions are not an alternative law enactment process, and therefore there is no need to make them subject to an executive veto.

The Amici contend that since AS 44.62.-320(a) was itself passed in accordance with all constitutional mandates and since the governor had the opportunity to veto the statute, constitutional requirements have been satisfied with respect to subsequent acts of the legislature taken pursuant to the statute. In other words, by virtue of one enactment approved by the governor, the legislature can free itself, in certain instances, of the constitutional constraints that would otherwise govern its actions. Such an enactment would impermissibly preserve legislative power possessed at one instant in time for future periods when the legislature might otherwise be incapable of acting because of the executive veto.[40] It would also do away with the formal safeguards of article II which are meant to accompany law-making. The requirements of the constitution may not be eliminated in this fashion.

REVERSED AND REMANDED with directions to enter partial summary judgment in favor of the state as to the effect of the concurrent resolution and for further proceedings.

BOOCHEVER, Chief Justice, with whom CONNOR, Justice, joins, dissenting.

I

I believe that the legislative power to annul administrative regulations by concur-

38. This clause provides:

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill. [Emphasis added].

39. *United States ex rel. Levey v. Stockslager*, 129 U.S. 470, 9 S.Ct. 382, 32 L.Ed. 785 (1889).

40. *See* Watson, *Congress Steps Out: A L[illegible] Congressional Control of the Executive*, 6[illegible] L.Rev. 983 at 1067 (1975).

In my opinion, the majority misstates the question presented as being whether the legislature can exercise its legislative power without the usual constitutional safeguards. The real question is whether, having exercised its legislative power, subject to all those safeguards, it may condition the delegation of regulatory power to an executive agency upon a provision for legislative oversight. I agree with our statement in *Boehl* that the legislature has that power.

II

The advent of the industrial revolution vastly increased and complicated the tasks of legislatures. Due to limits of time and specialized expertise, legislatures have found it impossible to prescribe laws adequately covering the tremendously varied and intricate forms of social relationships arising out of the proliferation of business, manufacturing, trade, transportation, communication and commercial enterprises.[3] Of necessity, legislative authority had to be delegated to administrative agencies. Nevertheless, both in England and in the United States, efforts were initiated to maintain some controls over broad delegations of authority.[4]

England has long utilized the laying system, whereby an administrative order or regulation must be laid before Parliament for a specified period of time before becoming effective.

> Parliamentary control over administrative rules and regulations . . . is asserted principally through provisions in enabling statutes that rules made under them shall be laid before Parliament. This is customarily combined with a provision in the statute, either that the rule shall not be operative until it is approved by resolution, either of both Houses or of the House of Commons alone . . ., or that, if within forty days a resolution is passed by either House for annulling the rule, the rule is to be void . . . .[5]

In the United States, the issue of whether a legislature can reserve to itself the power to disapprove administrative regulations has been brewing for more than forty years.[6] The early stages of the dispute involved the Reorganization Acts of the 1930's and 1940's which provided that executive reorganization plans became effective sixty days after transmission to Congress, unless within that period Congress disapproved by resolution.[7] Federal acts incorporating similar provisions have proliferated in recent years.[8] Yet no federal court has squarely evaluated the validity of provisions reserving to Congress the power to disapprove administrative regulations.[9]

III

I agree with the majority that there is scant case authority on the specific issue in

3. *See generally* Stone, *The Twentieth Century Administrative Explosion and After*, 52 Calif.L. Rev. 513 (1964).

4. *See* Boisvert, *A Legislative Tool for Supervision of Administrative Agencies: The Laying System*, 25 Fordham L.Rev. 638 (1957); Schwartz, *Legislative Control of Administrative Rules and Regulations: The American Experience*, 30 N.Y.U.L.Rev. 1039 (1955) (hereinafter cited as Schwartz); Carr, *Legislative Control of Administrative Rules and Regulations: Parliamentary Supervision in Britain*, 30 N.Y.U. L.Rev. 1045 (1955).

5. Schwartz, *supra* note 4, at 1032–33.

6. *Clark v. Valeo*, 182 U.S.App.D.C. 21, 28–29, 559 F.2d 642, 649–50 (D.C.Cir.) (*en banc*) (*per curiam*), *aff'd mem. sub nom., Clark v. Kimmit*, 431 U.S. 950, 97 S.Ct. 2667, 53 L.Ed.2d 267 (1977).

7. Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 Harv.L.Rev. 569, 576–82 (1953). The 1939 and 1945 Reorganization Acts provided for disapproval by a concurrent resolution; the 1949 Act allowed disapproval by either House. *Id.* at 579, 581.

8. Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Calif.L. Rev. 983, 989 (1975). An appendix to this article lists many statutes giving special effect to congressional resolutions. Many have been passed in the 1970's and involve veto power over actions of executive agencies or the President. *See id.* at 1089–92 app. A.

9. Stewart, *Constitutionality of the Legislative Veto*, 13 Harv.J.Legis. 593, 595 (1976).

the United States. Our court. however, has favorably discussed the legislative veto in *Boehl.*

The holding in *Atkins v. United States,* 556 F.2d 1028, 214 Ct.Cl. 186 (1977) (*en banc*) (*per curiam*), *cert. denied,* 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978), supports the position taken in this dissent. *Atkins* upheld a statute allowing either House of Congress to veto judicial salary increases recommended by a presidential commission.

In *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the majority of the United States Supreme Court did not reach the issue of whether regulations promulgated by the Federal Election Commission would become effective within thirty days of filing if either House of Congress did not disapprove them. In his concurrence, Justice White did approve the oversight provision, stating:

> I am also of the view that the otherwise valid regulatory power of a properly created independent agency is not rendered constitutionally infirm, as violative of the President's veto power, by a statutory provision subjecting agency regulations to disapproval by either House of Congress. For a bill to become law it must pass both Houses and be signed by the President or be passed over his veto. Also, "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary" is likewise subject to the veto power. Under § 438(c) the FEC's regulations are subject to disapproval; but for a regulation to become effective, neither House need approve it, pass it, or take any action at all with respect to it. The regulation becomes effective by non-action. This no more invades the President's powers than does a regulation not required to be laid before Congress. Congressional influence over the substantive content of agency regulation may be enhanced, but I would not view *the power of either House to disapprove as equivalent to legislation* or to an order, resolution or vote requiring the concurrence of both Houses.

424 U.S. at 284–85, 96 S.Ct. at 757, 46 L.Ed.2d at 838–39 (emphasis added) (footnotes omitted).

The majority cites *Reith v. South Carolina State Housing Authority,* (Ct. C.P., 11th Jud. Dist., Aug. 28, 1975), *rev'd on other grounds,* 267 S.C. 1, 225 S.E.2d 847, 848 (1976), but appropriately concedes that the Supreme Court of South Carolina did not reach the issue with which we are concerned.

Also cited is the New Hampshire case, *Opinion of the Justices,* 96 N.H. 517, 83 A.2d 738 (1950), an advisory opinion on whether a reorganization statute violated the state constitution. The statute provided that the reorganization plan proposed by the governor would become law if the two legislative houses did not disapprove it by concurrent resolution. The court concluded that the statute violated the state constitution. *Id.* 83 A.2d at 741. Three of the five justices felt the procedure violated the principle of bicameralism because each house "has undertaken in advance to surrender to the other its constitutional authority to veto or refuse assent to action taken or approved by the other." *Id.* 83 A.2d at 741–42.

It is also significant that twenty years later the New Hampshire Supreme Court examined a statute requiring certain salary increases to be approved by a legislative committee prior to submission to the governor for final approval. *Opinion of the Justices,* 110 N.H. 359, 266 A.2d 823 (1970). The court, without analysis of its earlier opinion, found no violation of separation of powers, reasoning that since the legislature could delegate its power to fix salaries, it could impose conditions upon the exercise of such delegated authority. *Id.* 266 A.2d at 826. In conclusion, it seems to me that what case authority exists is more supportive than not of the concept of legislative annulment.

IV

The legislature's participation in the promulgation of regulations is within the core area of legislative power, formulation of

policy. Accordingly, the legislature's power to select the means of participation should be generously construed.[10]

The delegation of rule-making authority to executive agencies does not alter the basic legislative nature of the function. Conditioning that delegation on the right of the legislature to review and annul regulations does not infringe on the power of the executive, where, as here, the annulling action is taken at the first session of the legislature following promulgation of the regulation.[11]

I believe that a statute can v ..dly condition the delegated power to enact regulations by requiring that the regulations be subject to annulment by resolution, just as it could limit the effective date of the new regulations or the length of time during which they would be in force. I find no material difference between AS 44.62.320 and other statutes, upheld by the United States Supreme Court, that condition the exercise of rule-making authority by approval of private citizens.[12] If private citizens can exercise such power, then certainly the legislature should be able to exercise the same power.

V

As the majority correctly notes, there are two provisions in our constitution which deal specifically with the legislative veto. These are article III, se n 23, concerning executive reorganization, which provides that the legislature may veto a reorganization plan by a resolution "in joint session," [13] and article X, section 12, concerning local boundaries, which provides that the legislature may veto by resolution local boundary changes proposed by an executive branch commission.[14]

The majority concludes that these two express provisions creating a legislative veto by resolution exclude the possibility of an implied legislative veto. They state:

In our view, the specificity with which the constitution deals with the legislative

10. We have held that when the legislature exercises power with reference to an essentially executive function those powers should be construed narrowly. *Bradner v. Hammond,* 553 P.2d 1, 7 (Alaska 1976). Conversely, when, as here, a basically legislative function is involved, the powers of the legislature should be construed broadly.

11. A long-term scrutiny of executive action taken pursuant to regulations leading to delayed annulment might involve legislative infringement on the executive power to enforce laws. We are not confronted with such a question and need not pass on it because the regulation here in question was annulled at the first legislative session following its promulgation. We are similarly not confronted with an annulment by a single legislator, a committee of the legislature, or by one house.

12. *United States v. Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 574–78, 59 S.Ct. 993, 1013–15, 83 L.Ed. 1446, 1470–72 (1939) (upholding federal statute delegating to Secretary of Agriculture authority to issue marketing orders for specified commodities, if approval of producers was secured); *Currin v. Wallace*, 306 U.S. 1, 15–18, 59 S.Ct. 379, 387–388, 83 L.Ed. 441, 451–52 (1939) (upholding statute authorizing Secretary of Agriculture to regulate marketing of tobacco if two-thirds of growers in a market requested, by referendum, such action).

13. The full text of article III, section 23, provides:

> The governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders. The legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove these executive orders. Unless disapproved by resolution concurred in by a majority of the members in joint session, these orders become effective at a date thereafter to be designated by the governor.

14. Article X, section 12, provides:

> A local boundary commission or board shall be established by law in the executive branch of the state government. The commission or board may consider any proposed local government boundary change. It may present proposed changes to the legislature during the first ten days of any regular session. The change shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house. The commission or board, subject to law, may establish procedures whereby boundaries may be adjusted by local action.

Because of the bill's separability clause, however, I do not consider this flaw of such seriousness that the bill should not be signed and utilized.[19]

Although the governor saw fit to point out a possible constitutional problem with article VI because it required local governing bodies to hold public hearings, no question was raised about the legislature's power to annul regulations by joint resolution.[20]

What was said by the United States Supreme Court about legislation passed by Congress shortly after the enactment of the United States Constitution is apropos here:

> What, then, are the elements that enter into our decision of this case? We have first a construction of the Constitution made by a Congress which was to provide by legislation for the organization of the government in accord with the Constitution which had just then been adopted, and in which there were, as Representatives and Senators, a considerable number of those who had been members of the convention that framed the Constitution and presented it for ratification. It was the Congress that launched the government. It was the Congress that rounded out the Constitution itself by the proposing of the first ten amendments, which had in effect been promised to the people as a consideration for the ratification. It was the Congress in which Mr. Madison, one of the first in the framing of the Constitution, was also in the organization of the government under it. It was a Congress whose constitutional decisions have always been regarded as they should be regarded as of the greatest weight in the interpretation of that fundamental instrument. . . . This court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution, when the founders of our government and framers of our Constitution were actively participating in public affairs acquiesced in for a long term of years, fixes the construction to be given its provisions.

Myers v. United States, 272 U.S. 52, 174–75, 47 S.Ct. 21, 45, 71 L.Ed. 160, 189–90 (1926) (citation omitted).

Finally, I note that the policy of authorizing legislative annulment of regulations is becoming increasingly widespread in Alaska, in other states, and in the federal government.[21] Such a practice, affording a

19. 1959 Senate Journal 1092.

20. *See* ch. 143 (ch. I, art. VII, § 1), SLA 1959.

21. Numerous other statutes enacted in recent legislative sessions in Alaska provide for some specific legislative review function. *See* AS 46.03.758(c) (regulations relating to oil spills); AS 46.40.080 (regulations relating to coastal zone management); AS 38.50.140 (regulations pertaining to land exchanges); AS 39.23.080(c) (regulations relating to salary increases); AS 38.06.055(a) (oil and gas dispositions). Some regulations annulled by resolution are the following: regulations relating to nursing home administrators, annulled by Senate Concurrent Resolution No. 94 in 1976; motor vehicle inspection regulations, annulled by Senate Concurrent Resolution No. 62 (HCS CSSCR), in 1976; the prize limit regulation, annulled by Legislative Resolve No. 79 (House Concurrent Resolution No. 30) in 1977; school loan regulations, annulled by Legislative Resolve No. 87 (Senate Concurrent Resolution No. 32) in 1977; and certain regulations adopted by the Department of Community and Regional Affairs, annulled by Legislative Resolve No. 95 (Senate Concurrent Resolution No. 12) in 1977.

For a review of laws from other states relating to annulment of regulations, *see* Jackson, Legislative Review of Administrative Rules and Regulations 1 (July 1977) (papers prepared for Southern Legislative Conference). A chart at the end of Professor Jackson's paper indicates that the following states allow regulations to be annulled by means of resolution: Alaska, Connecticut, Idaho, Michigan, Montana, Oklahoma, Tennessee, and Vermont. A New York report gives slightly different figures, stating that fourteen of the twenty-two states with legislative review mechanisms have procedures which can "cause an agency rule to be promulgated, approved, amended, modified, or annulled." Task Force on Critical Problems, Senate Research Service, New York State Legislature, *Administrative Rules . . . What is the Legislature's Role?,* 7 (June 1976). Appellant states that eight states allow nonstatutory legislative annulment—six by concurrent resolution, two by one-House vetoes.

The states which do not allow annulment of the regulation generally provide that a legislative committee may review regulations to determine if they are consistent with legislative intent, hold hearings on questionable regulations, notify the agencies of its doubts, and

practical means of supervision of the broad delegation of legislative powers required by the complexities of modern society, should not be hastily voided.

I conclude that the legislature's annulment of the cash prize regulation, pursuant to AS 44.62.320(a), does not violate the principle of separation of powers, does not provide a means by which the legislature can enact laws without passage of a bill, and does not unconstitutionally encroach on the power of the executive.

ALASKA CHILDREN'S SERVICES, INC., Appellant,

v.

Francis S. L. WILLIAMSON, Commissioner, Department of Health and Social Services, and State of Alaska, Appellee.

No. 4155.

Supreme Court of Alaska.

Feb. 21, 1980.

Nonprofit corporation owning or operating residential child care facilities brought suit challenging ruling of Department of Administration that Department of Health and Social Services was not required to reimburse corporation for amounts by which actual cost increases in providing child care had exceeded predicted increases. The State of Alaska Superior Court, Third Judicial District, J. Justin Ripley, J., affirmed the ruling below, and corporation appealed. The Supreme Court, Connor, J., held that: (1) under statute providing that Department of Health and Social Services pay private, nonprofit corporation for child care services for children who have become wards of the state for expenses related directly to "full cost" of services and that "full cost" shall be determined by per person, per day cost in preceding fiscal year plus a proportionate share of anticipated living and staff salary increment increases for upcoming fiscal year, corporation was not entitled to reimbursement for amounts by which actual cost increases exceeded predicted increases, and (2) statute did not deprive corporation of due process or deny it equal protection.

Affirmed.

1. Statutes ⟹223.2(1)

Two statutes enacted at same time and dealing with same subject matter are in pari materia and should be construed so as to be consistent with one another and in such manner as to give maximum effect to each.

2. Infants ⟹19.4

Under statute providing that Department of Health and Social Services pay private, nonprofit corporation for child care services for children who have become wards of the state for expenses related directly to "full cost" of services and that "full cost" shall be determined by per person, per day cost in preceding fiscal year plus a proportionate share of anticipated living and staff salary increment increases for upcoming fiscal year, such nonprofit corporation was not entitled to reimbursement for amounts by which actual cost increases exceeded predicted increases. AS 47.40.010(a)(3), 47.40.040(a).

3. Constitutional Law ⟹242.3(2), 278.7(1)
Infants ⟹12

Statute providing that Department of Health and Social Services pay private, nonprofit corporation for child care services for children who have become wards of the state for expenses related directly to "full cost" of services and that "full cost" shall be determined by per person, per day cost in preceding fiscal year plus a proportionate share of anticipated living and staff salary

sometimes, recommend statutory action by the legislature.

For a discussion of federal laws on the subject, see note 8 *supra*.

City of Kaktovik

P.O. Box 27
Kaktovik, Alaska 99747
(907) 640-6313

OFFICE OF MANAGEMENT & BUDGET
NOV 2 0 1989
GOVERNMENTAL COORDINATION

BOB GROGAN, DIVISION DIRECTOR OF GOVERMENTAL COORDINATION
431 N. FRANKLIN STREET
SUITE 400
JUNEAU, ALASKA 99723

Dear, Mr. GROGAN

THE KAKTOVIK CITY COUNCIL IS NOW WITHDRAWING THE PETITION WE SUBMITTED REGARDING STATE OIL AND GAS LEASE SALE 55 EFFECTIVE IMMEDIATELY.

THE LAST FEW DAYS HAVESEEN THE STATE, THE NORTH SLOPE BOROUGH, AND THE CITY OF KAKTOVIK COMMUNICATING EFFECTIVELY AND ADDRESSING OUR CONCERNS IN THE MANNER THAT ELIMINATES THE NEEDS UNDER WHICH THE PETITION WAS ORIGINALLY SUBMITTED.

THANK YOU VERY MUCH FOR YOUR INTEREST, CONCERNS, AND EFFORTS ON OUR BEHALF.

GEORGE TAGAROOK WAS THE MAYOR OF KAKTOVIK AT THE TIME THE PETITION WAS FILED, AND WAS NAMED INDIVIDUALLY ALONG WITH ISSAC AKOOTCHOOK. Mr. TAGAROOK IS PRESENTLY OUT OF THE STATE ON PERSONAL BUSINESS, AND IS UNAVAILABLE TO PERSONALLY SIGN THIS FORMAL WITHDRAWAL OF THE PETITION. MR. TAGAROOK WAS PRESENT, HOWEVER, WHEN THE CITY COUNCIL PASSED RESOLUTION 89-13 ON NOVEMBER 13 AUTHORIZING WITHDRAWAL. AS THE ATTACHED MINUTES OF THAT MEETING INDICATES, HE VOTED IN SUPPORT OF THE RESOLUTION, AND HAS OTHERWISE EXPRESSED HIS DESIRE TO WITHDRAW THE PETITION IN HIS PRESENT CAPACITY AS A MEMBER OF THE COUNCIL. I HOPE YOU WILL ACCEPT MY SIGNATURE ON HIS BEHALF AS AUTHORIZATION TO WITHDRAW THE PETITION. HATTIE REICK ACTING CLERK

SINCEREALY

HERMAN T. AISHANNA MAYOR

ISAAC AKOOTCHOOK COUNCIL MEMBER

HATTIE REICK ACTING CLERK

CC: ALASKA COASTAL POLICY COUNCIL
GOVERNOR STEVE COOPER
THE HONORABLE GEORGE N. AHMAOGAK SR.
MAYOR OF NSB BARROW
ATTORNEY GENERAL DOUGLAS BAILEY
DEPARTMENT OF LAW
REBECHA MILLER, OFFICE OF THE GOVERNOR
DENBY LLOYD, OFFICE OF THE GOVERNOR
RANDALL WEINER, TRUSTEES OF ALASKA
JUNE WINESTOCK, FAIRBANKS

City of Kaktovik

P.O. Box 27
Kaktovik, Alaska 99747
(907) 640-6313

RESOLUTION NUMBER 89-13

A RESOLUTION TO JOIN FORCES WITH THE NORTH SLOPE BOROUGH AND TO WITH DRAW SUPPORT OF CITY OF KAKTOVIK RESOLUTION NUMBER 89-11

WHEREAS, The further well-being of all North Slope residents is of prime concern to the North Slope Borough and the City of Kaktovik, AND

WHEREAS, The North Slope Borough and the City of Kaktovik can best acccumplish other goals by joining forcess, And

WHEREAS, The Governor of Alaska has indicated his willingness to address our concerns.

1) Seasonal Drilling Restrictions
2) Oil Spill Contingincies
3) Zoning Authority Districts
4) Protection of Subsistance Resources
5) Impact Funds
6) Native Allotments

Now therefore be it resolved that the Kaktovik City Council pursue the steps and proesses necessary to with draw the petition before the Coastel Policy Council.

PASSED AND APPROVED BY THE CITY COUNCIL OF KAKTOVIK, ALASKA THIS 13th DAY OF NOVEMBER, 1989.

INTRODUCED: NOVEMBER 13,1989

ADOPTED: NOVEMBER 13, 1989

Herman Aishanna

Herman Aishanna, Mayor

Hattie Reick

Hattie Reick, CITY CLERK

Municipality of Anchorage

ANCHORAGE ASSEMBLY
P.O. BOX 196650
ANCHORAGE, ALASKA 99519-6650
(907) 343-4311

JOE EVANS
Assemblyman
1127 West 7th Avenue, Anchorage, Alaska 99501-3399 (Work)
4741 South Park Bluff Drive, Anchorage, Alaska 99516-4846 (Home)
Work (907) 263-7251 • Home (907) 345-3688

Sunday
March 4, 1990

The Honorable Mike Szymanski
Alaska State Senate
P.O. Box V
Juneau, Alaska 99811

VIA FAX

Re: Senate Bill # 500

Dear Senator Szymanski:

I am one of the public members on the Alaska Coastal Policy Council. I represent Upper Cook Inlet.

After three years of service on the C.P.C., I have come to appreciate the role the C.P.C. can and should have in the management and protection of Alaska's coastal resources and communities. Reasonable and responsible development can occur within the scope and terms of our coastal management programs.

I am OPPOSED to Senate Bill # 500. The "evil" it seeks to "correct" is unclear to me. In the past twelve years, the C.P.C. has had a total of three or four petitions under A.S. 46.40.100. Admittedly, the Kaktovik petition was not our finest hour. However, we are in

the process of setting out procedures to avoid a repeat of the Kaktovik situation. Senate Bill # 500, however, it not addressed to procedural problems, instead it seeks to make substantive changes to the powers of the C.P.C.

I have been told that the "flood gates will open" if the C.P.C. becomes more pro-active in its management and oversite functions. Yet, an average of one petition to the C.P.C. every three or four years hardly seems like the parade of horrors envisioned by the sponsors of Senate Bill # 500.

As people in Eastern Europe and Central America are beginning to enjoy the benefits of true, participatory democracy, many so-called western democracies seem to be shunning greater public involvement in day-to-day government decisions. Political scientists and politicians lament this lack of public participation, but no one seems to want to strike a blow for the "little" person. (Note: That turn of a phrase bothers me, because we are all truly little people in the grand scheme of things!)

Senate Bill # 500 is unneeded, untimely and unsatisfactory. Its intended purpose is to strip the C.P.C. of it adjudicatory role in the management of Alaska's coastal resources -- a role the C.P.C. has never really had to even exercise in the last twelve years. Would it not be better to allow the C.P.C. an opportunity to set up a good petition procedure? (See, March 2, 1990 draft of such procedures from D.G.C.)

Senate Bill # 500 should be put on hold -- possibly a permanent hold. The C.P.C. should be permitted to put in place its procedures for handling future petitions. That process should be allowed to develop and evolve for a few years to see how it will operate. If insurmountable problems develop, we can revisit the issue of C.P.C. authority at a future date. However, I do not believe that will be the case.

In conclusion, Senate Bill # 500 is truly legislation ahead of its time. It should be gently, but swiftly laid to rest. Instead, the C.P.C. should be encouraged to finish developing its procedures for petitions and exercising its authority under 46.40.100. without the sword of Damocles (S.B. 500) hanging over our heads.

Respectfully,

Joe Evans, C.P.C. member

Municipality of Anchorage

ANCHORAGE ASSEMBLY
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Work (907) 263-7251 • Home (907) 345-3688

April 17, 1990

Mary McBurney
Senator Mike Szymanski's Office
Juneau, AK 99811

VIA FAX

Re: SB 500

Dear Mary:

Enclosed is the testimony that I would like to present to the Community & Regional Affairs Committee this afternoon. As noted in the letter, I will probably not be able to participate via teleconference. Would you be so kind as to make certain that my written testimony is presented to the Committee? Could you call and confirm that this is possible? Thank you.

Sincerely,

Joe Evans

Joe Evans, Assemblyman
Municipality of Anchorage
and Coastal Policy Council Member

JE/jss

a\mcburney

P.S. Mike: Mary has done an admirable job on keeping me informed on this matter. You have a good legislative aide. She deserves much praise and recognition for her excellent work.

Municipality of Anchorage

ANCHORAGE ASSEMBLY
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(907) 343-4311

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Assemblyman
1127 West 7th Avenue, Anchorage, Alaska 99501-3399 (Work)
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Work (907) 263-7251 • Home (907) 345-3688

April 17, 1990

Senators Szymanski, Frank, Adams, Pearce,
and Pourchot
Community & Regional Affairs Committee
Alaska State Legislature
Juneau, AK 99811

Re: CS for Senate Bill No. 500
"An Act Relating to the
Alaska Coastal Management Program"

Dear Senators:

I understand that a hearing has been scheduled for today at 3:30 p.m. on the Committee Substitute for Senate Bill 500. Because Tuesday is our Assembly day and we have work sessions today, I am not certain that I will be able to testify via teleconference. Therefore, I would respectfully request that you accept this letter as my testimony on this matter.

On Friday, April 13, 1990, I met with Gretchen Keiser from DGC. Gretchen reviewed with me a marked-up copy of Committee Substitute for Senate Bill 500. This marked-up version was prepared by Gretchen during a meeting with K. Fredriksson, C. Wilson, and F. Neville. (I hope that the Committee has a copy of this marked-up draft.) I support the changes made by Ms. Keiser and the individuals that she worked with on April 12, 1990.

I am not, however, in a position to support the Committee Substitute or the original Senate Bill No. 500. Mr. Denby Lloyd from the Governor's Office has made an excellent effort to address most of the concerns that I have. However, one major problem still exists in this legislation.

As originally enacted, AS 46.40.100 provided for maximum oversight of coastal policies and coastal management programs by the Alaska Coastal Policy Council. Senate Bill 500 and the

Committee Substitute make a substantial and meaningful change in this beneficent policy. Specifically, on page 2 of the Committee Substitute (section 1 of the proposed legislation), the Council's ability to direct appropriate changes is severely restricted by the language stating that the Council may "make an appropriate recommendation to the resource agency commissioners before the coordinating agency renders a consistency determination . . ." Bluntly stated, this language means that the Coastal Policy Council can only recommend and the resource agencies and/or resource agency commissioners can ignore any recommendations they so choose to disregard.

If the Committee desires to make this very substantial change in AS 46.40.100, I am unable to support this legislation. I have still not been convinced that such legislation is at all necessary. To date no one has shown me any abuses of the present statutory mandates nor have I been convinced that the future "parade of horrors" is a real possibility. Therefore, I would request that this legislation be tabled or, at best, forwarded with a recommendation of "do not pass" from this Committee.

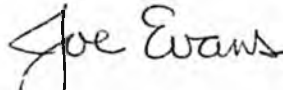
Realizing that the administration strongly favors some legislation this session, I would request that if this legislation must move forward that the following change be made. In particular, on page 2 of the working draft, the language "make an appropriate recommendation to the resource agency commissioners before the coordinating agency renders a consistency determination" should be deleted and in its place language along the following lines should be used:

> Direct the resource agency commissioners or coordinating agency to take action to follow the project consistency review procedures, properly consider enforceable policies and standards of the coastal management program, adhere to existing program procedures, satisfactorily follow coastal management responsibilities as required by law, regulations, or reimbursable agreement or take any other action consistent with the mandates of any existing coastal management program.

As I have stated on prior occasions before the Committee, I believe that the present system has functioned well for the past 12 years. Contrary to other representations that may be made by the administration, I would respectfully submit that "it ain't broke and it don't need to be fixed." Stated another way, this is legislation truly before its time. Therefore, I would respectfully

restate my earlier position that this legislation should not be acted upon at this time by the Sixteenth Alaska Legislature.

Sincerely,



Joe Evans, Assemblyman
Municipality of Anchorage and
Coastal Policy Council Member

JE/jss

a\szymanski

Trustees for ALASKA

A Non-Profit, Public Interest, Environmental Law Firm

April 23, 1990

Senators Szymanski, Frank, Adams, Pearce,
and Pourchot
Senate Community & Regional Affairs Committee
Alaska State Legislature
Juneau, AK 99811

Re: CS for Senate Bill No. 500
"An Act Relating to the
Alaska Coastal Management Program"

Dear Senators:

After reviewing the Committee Substitute, Trustees for Alaska remains opposed to Senate Bill 500.

We have three concerns with respect to any changes to AS §46.40.100.

First, the Alaska Coastal Policy Council (CPC) must retain its power to require coastal resource districts or state agencies to properly implement, enforce and comply with district coastal management programs. This means that the CPC must be able to "order a coastal resource district or state agency [to] take any action" deemed necessary by the CPC, as currently set forth in AS §46.40.100(b). While agency action might be overturned, this was precisely the mechanism established to assure that local interests would be adequately protected when coastal resource management decisions are made in local districts.

Second, citizens of districts must not be overburdened in their ability to bring matters to the CPC. It has been stated that the CPC may get inundated by new petitions, however, in its entire history, it has only received a handful of these petitions. Such prospective concerns are best dealt with by fine tuning by the CPC itself, which is in the process of drafting regulations to correct any problems.

Third, the CPC should not be foreclosed as an avenue of relief even if an agency action has been the subject of a court challenge. This provision is a backwards approach to avoiding redundancy. The courts already require that a litigant exhaust his or her administrative remedies before applying to the courts for relief. The "exhaustion doctrine" assures that an agency

725 Christensen Drive, Suite 4 Anchorage, Alaska 99501 (907) 276-4244

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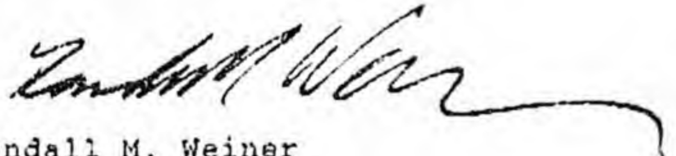
will get the first crack at interpreting and enforcing its own statutes and regulations. Here, the CPC can best determine whether the district coastal management programs are being properly implemented, enforced or complied with, and it should not be foreclosed from doing so in any circumstance.

Moreover, a CPC petitioner may be different from a court challenger (CPC petitioners must be either coastal resource districts, citizens of the district, or state agencies) with different concerns and types of relief sought. It would not be fair to hinge a district resident's opportunity to approach the CPC upon the legal strategy of an unknown court challenger.

If the CPC loses the ability to review decisions challenged in court, the CPC will have been taken out of the administrative review loop. A CPC subcommittee is currently formulating procedures to assure that the CPC petition process does not pose a hardship on agencies or applicants, yet gives petitioners a reasonable opportunity to seek relief from the CPC. A judicial exclusion provision is thus entirely unnecessary.

Sincerely,



Randall M. Weiner
Executive Director

cc: Joe Evans, Esq.

END

CITY OF KOTZEBUE

P.O. BOX 48 • KOTZEBUE, ALASKA 99752

Phone: (907) 442-3401 City Hall
FAX: (907) 442-3742

Phone: (907) 442-3465 Public Works
FAX: (907) 442-3470

FROM: Willie Goodwin
Mayor

City Hall
442-3401
Police Dept.
442-3381
Fire Department
442-3404
Public Works Dept.
442-3465
Day Care Center
442-3157
Planning Dept.
442-3465
Building Inspector
442-2823
George Francis Memorial Library
442-3818
Recreation Center
442-3068
Teen Center
442-3879
Regional Fire Training Center
442-3921

FACSIMILE TRANSMISSION

TO: Sen Szymanski

DATE: 3/5/90

TIME:

NUMBER OF PAGES: 3 (INCLUDING THIS PAGE)

PHONE:

FAX: 465-2652

REFERENCE:

SUBJECT:

MESSAGE

IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL AS SOON AS POSSIBLE. WE ARE TRANSMITTING FROM A RAPICOM 120.

3/4/90

SENATOR SZYMANSKI AND MEMBERS OF THE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE. MY NAME IS WILLIE GOODWIN. I AM THE NORTHWEST REPRESENTATIVE ON THE COASTAL POLICY COUNCIL AND HAVE WORKED FOR THE RESIDENTS OF THIS STATE IN THAT ROLE SINCE NOVEMBER 30, 1984. JUST RECENTLY I WAS ELECTED CO-CHAIRMAN OF THE GROUP.

MY COMMENTS TONITE ON SENATE BILL 500 REPRESENT MY PERSONAL OPINIONS, ALTHOUGH THOSE MAY WELL COMPLIMENT OPINIONS OF OTHER MEMBERS OF THE COUNCIL. I THANK YOU FOR THE OPPORTUNITY TO COMMENT.

SENATE BILL 500 EFFECTIVELY PUSHES THE COASTAL POLICY COUNCIL AND BALANCED COASTAL MANAGEMENT IN ALASKA A GIANT STEP BACKWARDS. IT ESSENTIALLY PLACES THE COUNCIL IN AN INTOLERABLE POSITION OF HAVING GREAT RESPONSIBILITY AND YET NO AUTHORITY.

THE EXISTING LAWS GOVERNING THE CPC HAVE BEEN IN EFFECT OVER A DECADE. AS WRITTEN, THESE LAWS HAVE WELL SERVED THE STATE, LOCAL GOVERNMENTS AND OTHER PARTIES IN STRIKING A BALANCE BETWEEN RESPONSIBLE RESOURCE DEVELOPMENT AND PROTECTING LIFESTYLES AND OUR LAND.

THE PROPOSED LEGISLATION WAS TRIGGERED BY A SERIES OF EVENTS THAT OCCURRED OVER LEASE SALE 55. WHILE I WOULD NOT SAY THAT EVERYTHING WENT SMOOTHLY FOR ALL THE PARTIES INVOLVED IN THE PROCESS-THE PROBLEMS ENCOUNTERED WERE A MATTER OF CONFLICTING INFORMATION BEING GIVEN TO THE CPC, TIME CONSTRAINTS, AND BY THE CPC MAKING A CONSCIOUS AND LAUDABLE DECISION TO LISTEN TO A LOCAL GOVERNMENT'S CONCERNS ABOUT HOW CERTAIN RESOURCE ACTIVITIES WERE TO AFFECT THEIR EXISTENCE. DESPITE THE EVENTS SURROUNDING LEASE SALE 55, THE COUNCIL HAS A SUBSTANTIAL HISTORY OF EFFECTIVE CONFLICT RESOLUTION AND LAND PROTECTION.

REMEDIES FOR THE MORE RECENT PROBLEMS CAN BE CONDUCTED IN REGULATION AND ARE NOT SIGNALS THAT LEGISLATIVE INTERVENTION IS NECESSARY. THE CPC THROUGH A SUBCOMMITTEE HAS BEEN WORKING ON A PETITION PROCESS TO

ALLEVIATE SOME OF THESE PROBLEMS. WHAT CAME TO LIGHT DURING THE LEASE SALE 55 PROCESS WAS THE MUSCLE THAT THE CPC HELD IN ITS OVERSIGHT RESPONSIBILITIES. IT WAS NOT A MUSCLE THAT WE HAVE IN THE PAST, NOR IN THE FUTURE WOULD FLEX WITHOUT SUBSTANTIAL CAUSE. IT WAS PUT THERE FOR A PURPOSE TO GIVE CREDENCE AND CREDIBILITY TO THE COASTAL ZONE REVIEW PROCESS. THE RECENT CASE DEMONSTRATES THAT THE AUTHORITY OF THE CPC WORKS WHEN UTILIZED. THROUGH THE DELIBERATIVE PROCESS, THE CPC WAS ABLE TO BRING OPPOSING FACTORS TOGETHER TO WORK OUT A COMPROMISE. THAT DEMONSTRATES THE PROCESS WORKS BUT DOESN'T FAVOR ONE INTEREST GROUP OVER ANOTHER. THIS BILL WOULD HAVE THE EFFECT OF FAVORING ONE GROUP OVER ANOTHER.

IN PARTICULAR, SECTION 4 OF THE BILL PLACES THE CPC IN THE ROLE OF CONSIDERING ISSUES, COMPLAINTS, AND PROBLEMS AND HAVING NO AUTHORITY TO DO ANYTHING ABOUT THEM. IN AN ARENA WHERE WE NEED CHECKS AND BALANCES, WE WOULD BE LEFT PERFORMING CHECKS BUT WITH NO MEANS FOR BALANCE. IN ESSENCE, IT MAKES A JOKE OUT OF US BEFORE AGENCIES OR ORGANIZATIONS THAT WOULD HAVE TO PRESENT THEIR STORY. THE COUNCIL PROCESS WOULD BECOME A WASTE OF TIME FOR US, THE STATE, LOCAL GOVERNMENTS, AND THOSE INTERESTED IN RESOURCE DEVELOPMENT IN ALASKA. THIS SECTION ALSO FORCES ANYONE WHO HAS A PROBLEM TO GO TO THE COURTS. I DOUBT IF WE NEED TO SPEND MORE STATE DOLLARS TO PROTECT PEOPLE INTERESTS IF SOMEONE CHALLENGES ANY INCONSISTENCIES OF A COASTAL MANAGEMENT PROGRAM.

WE NEED THE CLOUT OF EXISTING LAW IN ORDER TO BE EFFECTIVE. I SEE THE BILL AS ONE THAT WOULD UNDERMINE OUR EXISTENCE AND I STRONGLY URGE YOU TO NOT ADOPT ANY OF THE PROVISIONS IN THIS PROPOSED LEGISLATION.

THANK YOU.

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

STEVE COWPER, GOVERNOR

400 WILLOUGHBY AVE.
JUNEAU, ALASKA 99801-1796
PHONE: (907) 465-2400

February 12, 1990

RECEIVED

FEB 13 1990

The Honorable Mike Szymanski
Alaska State Senator
P.O. Box V
Juneau, AK 99811

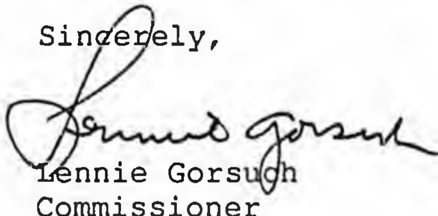
Dear Senator Szymanski:

Thank you for your letter asking me to respond to a recent opinion prepared by Jack Chenoweth, Legislative Legal Counsel, regarding review by the Alaska Coastal Policy Council of Lease Sale 55. Mr. Chenoweth concluded that, in his view, "Nothing in the review and approval process summarized below is 'broken' such that it requires or invites a legislative cure."

I disagree. To give you a more complete picture of both the policy questions presented by recent actions involving the Coastal Policy Council and Lease Sale 55 and some practical problems which have become apparent with the statutes as written, I asked the Department of Law to review Mr. Chenoweth's memorandum. The Department's response is enclosed for your consideration.

In brief, the coastal zone management review and appeal process as set out in the statutes may not be "broken", but it most certainly is bent in such a way that it is not working the way the Legislature intended. I believe it is a matter that deserves legislative attention. Members of the administration that participate on the Coastal Policy Council will be happy to work with you and other members of the Legislature to resolve any policy questions or practical problems which the current scheme presents.

Sincerely,



Lennie Gorsuch
Commissioner

Enclosure

cc: Senator Tim Kelly
Senator Albert Adams

10-J9LH

Senator Pat Pourchot
Senator Steve Frank
Senator Drue Pearce
Senator Bettye Fahrenkamp
Bob Grogan, Division of Governmental Coordination
  Office of the Governor
Marty Rutherford
  Department of Community and Regional Affairs
Jane Angvik, Deputy Commissioner
  Department of Commerce and Economic Development
Craig Campbell
  Alaska Coastal Policy Council
Commissioner Don Collinsworth
  Department of Fish and Game
Norman Cohen, Deputy Commissioner
  Department of Fish and Game
John Crawford
  Kenai Borough Assembly
  Alaska Coastal Policy Council
Johnson Eningowuk
  Shishmaref City Council
  Alaska Coastal Policy Council
Joseph Evans
  Anchorage Assembly
  Alaska Coastal Policy Council
Gary Ferguson
  Aleutians East Borough Assembly
  Alaska Coastal Policy Council
Betty Glick
  Kenai Borough Assembly
Mayor Willie Goodwin, Jr.
  City of Kotzebue
  Alaska Coastal Policy Council
Tom Hawkins, Deputy Commissioner
  Department of Natural Resources
  Alaska Coastal Policy Council
Commissioner Mark Hickey
  Department of Transportation and Public Facilities
  Alaska Coastal Policy Council
Jeffrey Otteson
  Department of Transportation and Public Facilities
  Alaska Coastal Policy Council
Commissioner David Hoffman
  Department of Community and Regional Affairs
  Alaska Coastal Policy Council
Commissioner Dennis Kelso
  Department of Environmental Conservation
  Alaska Coastal Policy Council

Amy Kyle, Deputy Commissioner
Department of Environmental Conservation
Alaska Coastal Policy Council
Commissioner Larry Merculieff
Department of Commerce and Economic Development
Alaska Coastal Policy Council
Flossie Hopson-Anderson
North Slope Borough Assembly
Alaska Coastal Policy Council
Mayor Donald James, Sr.
City of Kake
Alaska Coastal Policy Council
Robert Kellar
Valdez City Council
Alaska Coastal Policy Council
Mayor Lawrence Powell
City of Yakutat
Alaska Coastal Policy Council
Darcy Richards
Program Coordinator
Alaska Coastal Policy Council
Cheryl Taylor
Dilligham City Council
Alaska Coastal Policy Council
Mayor Tim Towarak
City of Unalakleet
Alaska Coastal Policy Council
Tomothy Ward
Port Lions City Council
Alaska Coastal Policy Council
Charlene Wolfe
Craig City Council
Alaska Coastal Policy Council
John Root, Vice President
Government Affairs
Alaska Coastal Policy Council
Mayor George Tagarook
City of Kaktovik
Alaska Coastal Policy Council

MEMORANDUM

State of Alaska
Department of Law

TO: Hon. Lennie Gorsuch
Commissioner
Dept. of Natural Resources

DATE: February 9, 1990

FILE NO: 663-90-0178

TEL NO: 465-3600

SUBJECT: Review legislative legal counsel analysis of coastal management review and appeal process

GTK

FROM: G. Thomas Koester
Assistant Attorney General
Natural Resources Section--Juneau

I. Introduction

You asked us to comment on an August 16, 1989, memorandum to Senator Mike Szymanski from Jack Chenoweth, Legislative Counsel, regarding possible review of Lease Sale 55 by the Coastal Policy Council. Mr. Chenoweth's conclusion is that "nothing in the review and approval process summarized [in his memorandum] is 'broken' such that it requires or invites a legislative cure." Chenoweth Memorandum at 1. Mr. Chenoweth candidly acknowledges that he has not had much experience with the practical application of AS 46.40.100, the statute which provides for Coastal Policy Council review of state and local government decisions affecting the coastal zone, but nonetheless concludes that the process appears to be working as the legislature intended: "Although my exposure to the practical application of this statute is extremely limited, as a legal matter the compliance determination and enforcement provisions of this statute seem to be working as intended." Id. at 9.

In this department, we have had substantial experience working with this statute and other statutes in the Alaska Coastal Management Act, AS 46.40, and its implementing regulations, 6 AAC 50, as well as the Administrative Procedure Act, AS 44.62, expressly referenced in AS 46.40.100(b). Based on that experience, we believe Mr. Chenoweth is simply incorrect, and the process -- at least in the matter of Lease Sale 55 -- is not working as the legislature intended. There are a number of practical problems with the statutory scheme as currently written. Moreover, the manner in which the Alaska Coastal Management Program ("ACMP") has evolved since AS 46.40 was enacted in 1977 suggests that a broader policy review of the statutory scheme may be appropriate.

Because a petition under AS 46.40.100 for Coastal Policy Council review of Lease Sale 55 prompted Mr. Chenoweth's memorandum, and because Mr. Chenoweth's memorandum contains at least one very significant factual omission, we begin with a detailed discussion of the facts. We follow that with a discussion of some of the problems presented by the current statutory scheme,

including some substantive policy questions which have emerged as a consequence of the manner in which the ACMP has evolved.

II. Factual Background

The chronology of events leading up to the current situation is as follows:

August 1983	The Department of Natural Resources ("DNR") issued a call for comments on a proposal to add Lease Sale 55 to the five-year oil and gas leasing plan prepared under AS 38.05.180(b).
January 1984	Sale 55 was tentatively scheduled for May of 1988.
February 1987	Socioeconomic and environmental information was requested.
February 1988	Following the gathering of a substantial amount of information and analysis thereof, a preliminary best interest finding and coastal consistency determination was made.
April 25, 1988	A final best interest finding and coastal consistency determination was made.
April 28, 1988	A notice of sale was issued; June 28, 1988, was set as the sale date.
May 25, 1988	Trustees for Alaska ("Trustees"), on behalf of itself and eight other environmental organizations, asked to reconsider its best interest finding and coastal consistency determination, and to address specifically the North Slope Borough District Coastal Management Program which had been approved by the federal government on May 6, 1988.
June 3, 1988	DNR agreed to postpone Lease Sale 55 until September 28, 1988, to allow further consideration of the coastal consistency issue in light of the North Slope Borough's newly approved program. (AS 38.05.180(c) provides that a scheduled oil and gas lease sale may be delayed for not more than 90 days after the last day of the calendar quarter for which it was scheduled. If not held within that time, the

process must begin anew. September 28, 1988, accordingly was the last day on which the sale could be held without incurring a substantial delay of more than two years.)

August 23, 1988 — DNR issued a supplemental conclusive coastal consistency determination; the North Slope Borough and the Departments of Environmental Conservation and Fish and Game concurred in the finding.

August 26, 1988 — DNR issued a decision on reconsideration affirming its best interest determination.

August 29, 1988 — DNR issued an amended notice of sale announcing that Lease Sale 55 would be held on September 28, 1988.

September 26, 1988 — Two days before the scheduled sale date, Trustees on behalf of itself and six environmental organizations 1/ appealed the Commissioner's final best interest finding and consistency determination for Sale 55 to the superior court, seeking a stay of the sale. 2/ On the same day, the City of Kaktovik joined in the action brought by Trustees, and Trustees on behalf of Kaktovik and two Kaktovik residents petitioned the Coastal Policy Council for a hearing under AS 46.40.100(b), seeking a review of the Commissioner's consistency determination for Sale 55.

1/ Friends of the Earth and the National Wildlife Refuge Association had dropped out of the action.

2/ Trustees for Alaska v. State, No. 3AN-88-9532 Civ. (September 26, 1988). Hearings on the request for a stay were held the next day before Superior Court Judge William H. Fuld, who denied the request. Lease Sale 55 was held as scheduled on September 28, 1988.

November 23, 1988 — Bob Grogan, Director of the Division of Governmental Coordination, responded on behalf of the Coastal Policy Council 3/ that the petition did not make the "showing" required under AS 46.40.100(b) such that a public hearing was appropriate.

December 1, 1988 — The Coastal Policy Council voted to confirm Mr. Grogan's response to the petition. 4/

December 22, 1988 — Exactly 30 days after Mr. Grogan's response and 21 days after the Council's confirmation of that response, Trustees "pursuant to AS 44.62.540" asked for reconsideration of the denial of its AS 46.40.100(b) petition. (AS 44.62.540(a), part of the Administrative Procedure Act, provides that a state agency may order reconsideration of a decision either on its own motion or on petition of a party. The power to order reconsideration expires under the statute, however, 30 days after the decision; if no action is taken on a petition for reconsideration within that time, the petition is deemed denied. Id.) In the 12 years since the Coastal Management Act has been law, Trustees' petition on behalf of Kaktovik was only the second ever filed. 5/ No procedures have been developed for the filing and processing of AS 46.40.100(b) petitions filed with the Coastal Policy Council, and none have been developed to enable the Council, made up of nine local government officials and seven

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3/ Under AS 44.19.162, the Division of Governmental Coordination serves as staff to the Coastal Policy Council.

4/ This significant fact -- that the Council confirmed Mr. Grogan's earlier denial of the petition -- was not noted by Mr. Chenoweth.

5/ The first petition was filed in 1981 by a group challenging a subdivision approved by the Municipality of Anchorage. Fish Creek Access Group v. Anchorage Assembly, et al. The matter was resolved before any hearing was held under AS 46.40.100(b).

state officials, to respond to a request for reconsideration within the 30 days permitted by AS 44.62.540(a). (As might be imagined, such meetings require a great deal of advance planning to coordinate the members' schedules.) By waiting until 30 days after Mr. Grogan initially denied the petition and 21 days after the Coastal Policy Council confirmed that denial, Trustees gave the Council substantially less than the 30 days provided in AS 44.62.-540(a) for reconsideration.

January 23, 1989 — Apparently unaware of the 30-day time limitation on reconsideration in AS 44.62.540(a), the Division of Governmental Coordination distributed the request for reconsideration to Coastal Policy Council members, asking for their response.

June 28, 1989 — Following informal oral advice from this department that reconsideration was not time-barred or, alternatively, that the AS 44.62.540 petition for reconsideration could be considered a new AS 46.40.100(b) petition, the Coastal Policy Council reconsidered its earlier denial of the petition and decided to hold a public hearing on the original petition. At the hearing, the Council contemplated adjudicating the consistency of Lease Sale 55 with the ACMP.

July 20, 1989 — Four successful bidders at Lease Sale 55 asked for reconsideration of the Coastal Policy Council's June 28, 1989, decision to hold an adjudicatory hearing on the consistency of Lease Sale 55 with the ACMP.

July 25, 1989 — Attorney General Douglas B. Baily issued a written legal opinion concluding that the Coastal Policy Council had no authority on June 28 to grant Trustee's AS 44.62.540 request for reconsideration of the Council's December 1, 1988, denial of Trustees' AS 46.40.100(b) petition because of the 30-day time limit in AS 44.62.540(a), and that the request for reconsideration could not be considered a new AS 46.40.100(b) petition. This formal written advice from the Attorney General superseded

	the earlier informal oral advice given to the Council on June 28, 1989.
July 28, 1989	The Coastal Policy Council denied the request by the successful bidders at Lease Sale 55 to reconsider its June 28, 1989, decision to hold an adjudicatory hearing, but (on its own motion) decided to reopen that decision for further consideration at a meeting in September.
August 28, 1989	The successful bidders at Lease Sale 55 appealed the Coastal Policy Council's denial of their request for reconsideration to the superior court. 6/
September 26, 1989	The Coastal Policy Council urged the City of Kaktovik, the North Slope Borough, the successful bidders at Sale 55, and the state to explore possible resolution of the city's concerns by agreement. It also decided that it would hold a hearing in Kaktovik in March, 1990, and would decide in January 1990 whether that hearing will be an adjudicatory hearing on the consistency of Lease Sale 55 with the ACMP or, alternatively, be a policy-oriented hearing focusing on matters prospectively.
November 13, 1989	The City of Kaktovik passed Resolution 89-13 to withdraw its petition to the Coastal Policy Council.
November 27, 1989	The City of Kaktovik and the two Kaktovik residents who joined its petition to the Coastal Policy council formally notified the Council that they were withdrawing their petition.
January 30, 1990	The Coastal Policy Council neither accepted nor rejected the City of Kaktovik's and the two Kaktovik residents' withdrawal of the petition.

6/ ARCO Alaska, Inc. v. Coastal Policy Council, No. 3AN-89-7300 Civ. (Aug. 28, 1989). Trustees, on behalf of Kaktovik, intervened in that action.

In brief, more than six years after the process began and more than a year after Lease Sale 55 was held, the validity of the sale remains in question both judicially (in court) and administratively (before the Coastal Policy Council) with no immediate end in sight.

With that factual background in mind, 7/ we now turn to some problems with the existing statutory scheme.

III. AS 46.40.100, providing for Coastal Policy Council review of state and local government decisions, presents a number of problems.

The Alaska Coastal Management Act, AS 46.40, was enacted by the legislature in 1977 in response to a growing concern with balancing development and environmental protection. As an entirely new and untried scheme, it perhaps is not surprising that some problems have developed in implementing the Act as drafted.

As contemplated by the legislature, the Coastal Policy Council was not to be a super-agency with ultimate permitting authority for activities in the coastal zone. This is reflected in the legislature's statement in sec. 2(5) of ch. 84, SLA 1977, the session law which included AS 46.40, that the policy of the state is to "utilize existing governmental structures and authorities, to the maximum extent feasible, to achieve the policies set out in this section." Since that time, the apparently clear understanding on the part of the legislature, the executive branch, and the judiciary has been that the Coastal Policy Council would focus on policy, as its name suggests, primarily the development of the statewide ACMP and the incorporated district plans.

This understanding is reflected in a number of historic facts. First, unlike the California Coastal Commission, the Coastal Policy Council is not a full-time administrative agency. Its membership is made up of seven state agency representatives and

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7/ There are some additional interesting facts relating to this process which are not particularly germane to the current question. They include Trustees' rather remarkable assertions to the Coastal Policy Council at its September 25, 1989, meeting that (1) the Council is not a state agency, (2) the Attorney General acted unethically when he gave legal advice to the Council at the same time he was representing DNR in the action brought by Trustees challenging Sale 55, and (3) the Council should ignore the Attorney General's advice.

nine public members, who must be mayors, or council or assembly members, of local communities. AS 44.19.155(a). Council members receive only per diem and travel expenses. AS 44.19.155(f). The Coastal Policy Council meets infrequently (approximately four times a year), usually for only one day, to consider matters that come before it. It has not been funded by the legislature to meet either more frequently or for longer periods of time. It does not make individual consistency determinations, and has no permitting authority. The regulations adopted by the Coastal Policy Council, 6 AAC 50, place primary reliance (in the words of the enabling legislation) on "existing governmental structures and authorities" -- i.e., state agencies and local governments. No funding has ever been sought for the Coastal Policy Council to hold public hearings under AS 46.40.100(b); indeed, only one petition under AS 46.-40.100(b) had been filed prior to the one filed by Trustees. 8/

The common understanding was that any adjudication of the consistency of a particular state or local government action with the ACMP would be by the courts. See, e.g., Hammond v. North Slope Borough, 645 P.2d 750 (Alaska 1982). Judicial relief normally is not available until whatever administrative remedies provided are exhausted. See, e.g., Hyning v. University of Alaska, 621 P.2d 1354 (Alaska 1981). Significantly, it has never been argued, or even suggested, that someone must file a petition with the Coastal Policy Council under AS 46.40.100(b) before one may seek relief from the courts. Even Trustees sought relief simultaneously from the Coastal Policy Council and the courts.

In light of this evolution of the ACMP, a basic policy question is presented regarding the current statutory scheme: Is Coastal Policy Council review of state and local decisions affecting the coastal zone appropriate? To date, the process of state agencies and local governments making the final decisions without Council review seems to have been working quite well. Applicants for state and local permits are required to work closely with the state and local government agencies having expertise in the subject matter area, and the final decisions rendered reflect that substantive agency expertise. Review of those decisions is readily available through the courts. If final consistency

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8/ As noted above, n.5, the first petition was filed in 1981 when a group of Anchorage residents petitioned the Council to review a determination by the Municipality of Anchorage that a proposed subdivision was consistent with Anchorage's district plan. That matter was resolved without the need for Council involvement and prior to the convening of a public hearing.

decisions are made by the Coastal Policy Council under AS 46.40.100, on the other hand, many applicants might bypass the current staff review process and focus their efforts solely on obtaining Council approval. The current substantive working relationship between applicants and state and local government technical experts might be substantially eroded.

If review by the Coastal Policy Council of state and local government decisions affecting the coastal zone is to remain a feature of the ACMP, consideration should be given to specifying in statute that Council review is an administrative remedy which must be exhausted before judicial relief may be sought. The alternative, as the Lease Sale 55 process outlined above demonstrates, is that parallel reviews by the Coastal Policy Council and the superior court can proceed simultaneously, opening the door to the possibility of inconsistent results.

At minimum, a requirement that Council review be exhausted before recourse to a court would require a substantial revision of the Coastal Policy Council's regulations, 6 AAC 50. Those regulations are based on consistency determinations being final once they have been communicated from the state agency or local government to the applicant. The established time frames, reflecting the applicant's need for certainty as well as the state's efforts at permit reform, do not provide for the time it would take the Coastal Policy Council to gear up for and hold an adjudicatory hearing, much less decide the issue and then prepare, circulate, and finalize findings of fact and conclusions of law reflecting its decision. Depending on the scope of Coastal Policy Council review (see below), a number of other statutes, regulations, and local government ordinances relating to judicial review might also have to be amended.

In addition, a substantially increased staff and budget for the activities of the Coastal Policy Council would need to be provided. The state makes more than 1,000 consistency determinations every year; local governments make thousands more annually which do not make it into the state system. The cost and logistics involved in convening a sixteen-member group to review and adjudicate any of those state and local government decisions which someone may wish to challenge are staggering. For the public members of the Council who receive only travel expenses and per diem, the amount of volunteer time required to hold those hearings obviously could be substantial.

Consideration also would need to be given to the amount of time Coastal Policy Council review might take. In the present case, the process began with a call for comments in August 8, 1983.

Five years later, the final agency determination to hold the sale was made on August 26, 1988, with an amended notice of sale issued on August 29, 1988. Now, one and one-half years later the matter still has not been concluded, even though the City of Kaktovik and the two Kaktovik residents who joined in the petition have withdrawn it.

Another set of questions relates to the scope of any hearing which might be granted by the Council under AS 46.40.-100(b). AS 46.40.100(c), as currently worded, could be read to give the Coastal Policy Council the authority to review and reverse decisions by local governments under their zoning laws, including any variances granted, and to determine whether coastal resource district procedures and standards are being followed. In other words, the Council would seem to have the power under the statute to override virtually any planning and zoning decision by a local government in the coastal zone.

With respect to state actions, the express terms of AS 46.40.100(d)(2) authorize the Coastal Policy Council to determine whether a proposed activity is consistent with any "requirements imposed by state statute, regulation, or local ordinance applicable to the use or activity." Under a literal interpretation, there is nothing that would limit the Council's consideration to requirements of law relating to the ACMP. This accordingly would appear to vest the Council with final administrative decision-making authority over such technical questions as anadromous fish passage, water quality, etc. This authority may more appropriately belong with the state agencies having technical expertise.

Thought would also need to be given to establishing a standard of review for the Coastal Policy Council to employ when reviewing decisions by state agencies and local governments. The Council, as currently constituted, has no expertise in many of the technical matters which are routinely included in state and local government decisions affecting activities in the coastal zone; some deference to the state agencies and local governments may be appropriate.

Finally, as a technical drafting matter, consideration would have to be given to making the Administrative Procedure Act ("APA"), AS 44.62.330 -- 44.62.650, expressly applicable to all Coastal Policy Council proceedings under AS 46.40.100(b). While that statute expressly provides that the hearings themselves are to be conducted under the APA, some have questioned whether the remainder of the APA (e.g., provisions relating to service of process and other notice, depositions, default, etc.) also applies.

In our July 25, 1989, formal opinion, we concluded that the reconsideration provision of the APA, AS 44.62.540, applies to petitions before the Coastal Policy Council; by extension, so would the other provisions of the APA. To eliminate any doubt in this regard, however, the APA could be made expressly applicable to all matters brought before the Council pursuant to AS 46.40.100(b).

IV. Conclusion

For the foregoing reasons, we believe that Mr. Chenoweth is incorrect when he concludes that the process is working as the legislature intended. We believe it is appropriate to review the existing statutory scheme in light of the 12 years of experience under the ACMP and the problems which have come to light during the Coastal Policy Council proceedings with respect to Lease Sale 55.

We hope this responds adequately to your request. If you (or Senator Szymanski) have any questions, we would be happy to answer them at your (or his) convenience.

GTK:dlm
cc: Denby Lloyd, Special Staff Assistant
Office of the Governor

Robert Grogan, Division Director
Division of Governmental Coordination
Office of the Governor

Cenaliulriit Coastal Management District
For the Yukon-Kuskokwim Coastal Resource Service Area
P.O. Box 1169 • Bethel, Alaska 99559 • 907/543-2243

March 5, 1990

The Honorable Mike Szmanski
Alaska State Senator
P.O. Box V
Juneau, Alaska 99811

Re: Senate Bill No. 500

Senator Szmanski:

The Cenaliulriit Coastal Management District has reviewed Senate Bill 500 "An Act relating to the Alaska Coastal Policy Council" (CPC).

The CPC Sub Committee [illegible] to the Alaska Coastal Management Program (ACMP) Statutes and Regulations on "Compliance and Enforcement" under AS 46.40.100, after the Kaktovik Case. Kaktovik withdrew its petition after negotiations with the North Slope Borough.

CPC is a policy-making board for the ACMP consisting of nine members from each regional city government and seven commissioners from state agencies. It is the legislature's intent to prevent harmful decisions. It is also a legislative intent to allow the ACMP govern a proper development and implementation of the Coastal Zone Management Act. ACMP's goal is to balance economic growth and resource protection through local and public involvement, not by a decision of a single subdivision of the state.

This bill surprised all of us, since it did not come from the Division of Governmental Coordination (DGC) staff nor the Council. SB 500 interfers with the existing process at work. If any change must occur with that statute it should come from the full Council, not by a single administration or agency.

SB 500 does not represent local people of the State of Alaska, by only allowing the Council to make "recommendations" under AS 46.40.100 part (b) to a destructive and inconsistent project. It gives the responsible agency to avoid the delays to development without regard to warnings, consistency, and ACMP procedures. It is a "gold-rush", oil-rush, never mind the environment, who cares about subsistence, the fish and wildlife, forget commercial and recreational activities that depend on environmental balance, "ask-questions-later" type of attitude everyone does not want to share.

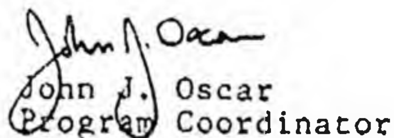
We do not want violations in enviornmental and health concerns to occur without the due process of compliance and enforcement. Respected members of the committee, you already know the monitoring and compliance enforcement efforts are limited. We also do not want ill conceived projects to create unnecessary litigation and court costs. It will take several years before a project can ever be resolved after the people and the environment we are supposed to protect had suffered. So it is important to allow the CPC to hold on to what you can consider a "last-resort" effort to create attention as the current policy exists under AS 46.40.100 only if all steps to mitigate a major problem are exhausted.

AS 46.40.100 has never been abused since the ACMP was federally approved twelve years ago in 1977. The policies and procedures to a consistency review process alread- exist and work successfully.

With regard to a long processed litigation, for example, the people in the village of Tuluksak filed suit against a mining company in 1983 after suffering symptoms of nausia, vomiting, and diarrhea; and who knows what the long term results some may have after over exposure to arcenic metals. The mining company, over several years, violated the Alaska Water Quality Standards and the Fish and Wildlife Habitat Standards. The residents and leaders of the community also report, the river was so turbid fresh water fish species and anadromous fish species were seen floating down the river from this unnatural cause. Northland Gold Dreding company at Nyac mining violated ACMP policies. The only thing keeping them from conducting more activity is this suit in State and Federal courts. According to Eric Smith of RurAl Cap representing Tuluksak, this case is still going on.

Cenaliulriit Coastal Management District requests Mr. Chairman and honorable members of the Senate & Community and Regional Affairs to allow the Alaska Coastal Policy Council to exercise its legislative direction to continue the implementation of the Alaska Coastal Management Program policies and put aside or discontinue the intent of Senate Bill 500's interference overall.

Qu'yana,
CENALIULRIIT COASTAL MANAGEMENT DISTRICT
Paul Chimiugak, Chairman



John J. Oscar
Program Coordinator

cc: Senator Johne Binkley
Representative Lyman Hoffman
Cenaliulriit Board of Directors
Joaqlin Estus, DGC-Juneau
Dave Tremont, DCRA-Anchorage
Coastal Resource Service Area Districts
File

OUTLINE FOR SB 500 MARKUP: APRIL 5, 1990

Section 1. STATE AGENCY IMPLEMENTATION DURING PROJECT CONSISTENCY REVIEWS

First Point:

- On petition of a coastal resource district, a project applicant, [a citizen of the district] or a state agency,
- stating/showing that a district coastal management program is not being implemented by a state agency during a state consistency review for a particular project,
- the council may convene a public hearing to consider the matter.

Second Point:

- A petition must be initiated during a particular period of time, as specified in regulation, and only during a project consistency review in which an elevation to the state resource agency commissioners has occurred.

Third Point:

- At a hearing convened concerning implementation of an approved district coastal management program by a state agency, the council shall determine whether the petition shows that:

  (a) the agency has followed the project consistency review procedures,

  (b) the agency has properly considered enforceable policies and standards during the project consistency review, or

  (c) the use or activity for which the permit, license, or approval is granted is consistent with the district coastal management program and regulations adopted under it.

Fourth Point:

- After the hearing, the council may:

  (a) dismiss the petition if it fails to make a showing under 3 a,b,c (above),

  (b) make a recommendation to a state agency that the council considers appropriate, and

  (c) revise the Alaska Coastal Management Program under AS 46.40.010(c).

Section 2. GENERAL ISSUES OF COASTAL RESOURCE DISTRICT OR STATE AGENCY IMPLEMENTATION, ENFORCEMENT, AND COMPLIANCE

First Point:

- On petition of a coastal resource district, a citizen of a district, or a state agency,
- stating/showing that a district coastal management program is not being implemented, enforced, or complied with by a coastal resource district or state agency in its general implementation of the statute and regulations,
- the council may convene a public hearing to consider the matter.

Second Point:

- A petition may be initiated at any time.

Third Point:

- A petitioner shall:

  (a) demonstrate that they sought to resolve their concerns with the coastal district or state agency prior to petitioning the council, and

  (b) be willing to participate, in good faith, in council staff effort to resolve the issues raised in the petiton through informal mediation prior to a hearing before the council.

Fourth Point:

- At a public hearing convened concerning the implementation of, enforcement of, or compliance with an approved district coastal management program by a coastal resource district or state agency, the council shall determine whether the petition shows that:

  (a) a coastal resource district:

    1) has adopted and enforced zoning or other regulations,

    2) has properly considered enforceable policies and standards of its coastal management program approved by the council during local implementation (e.g., variances or local consistency reviews), and

3) has followed the procedures approved by the council for implementation of the district's coastal management program.

(b) a state agency:

1) has generally followed procedures approved by the council for state agency implementation,

2) has properly considered enforceable policies and standards of a coastal management program approved by the council during project consistency reviews, and

3) has satisfactorily performed coastal management tasks, as specified in statute, regulations or a reimbursable agreement.

Fifth Point:

- After the hearing, the council may:

  (a) dismiss the petition if it fails to make a showing under 4 (a) or (b) above,

  (b) direct a coastal resource district or state agency to take an action the council considers appropriate, and

  (c) revise the Alaska Coastal Management Program under AS 46.40.010(c).

sb5004/05/GKB

STATE OF ALASKA

OFFICE OF THE GOVERNOR

DIVISION OF GOVERNMENTAL COORDINATION

STEVE COWPER, GOVERNOR

P.O. BOX AW
JUNEAU, ALASKA 99811-0165
PHONE: (907) 465-3562

April 13, 1990

TO: Willie Goodwin, CPC co-chairman
Larry Powell, CPC member

FROM: Gretchen Keiser, Coastal Program Coordinator (G. Keiser)

RE: Draft Committee Substitute for SB 500

In a meeting this morning with Joe Evans here in Juneau, I agreed to send you a copy of the attached 4/12/90 work draft of CS SB 500 which he and I discussed. This is the second draft with additional changes proposed by Kurt Fredriksson and myself, Carol Wilson (DNR Special Assistant), and Francis Neville (Assistant AG for DNR) during a meeting on April 12.

The most noteworthy changes proposed by the four of us include:

1) The point of petition (and Council involvement) would occur after the directors of state resource agencies make a proposed determination on an elevated review, not after the commissioners make a proposed determination. We believe that it makes more sense to interpose the Council before the commissioners invest time and energy coming up with a proposed detemination. Larry, you may recall that DGC suggested this sequence as a strawman for the Council subcommittee meeting on February 21. (See language change on page 1 lines 17-18).

2) In keeping with #1 above, "a state resource agency" would not petition the Council under the proposed changes. A resource agency would elevate to the commissioners, as can occur under the existing process.

3) Of the parties with the ability to petition the Council--under either Sections 1 or 2--the district would have to be "an affected coastal resource district", as defined on page 4 of the draft. The intent is to ensure that 1) the coastal district initiating a petition under Section 1 jives with the definition of coastal district under the existing consistency review process, and 2) a coastal district initiating a general petition under Section 2 has a direct stake in the alleged implementation failure (i.e., direct and significant impact, as defined on page 4). In other words, the City of Yakutat would not be able to petition the Council about the Northwest Arctic Borough's implementation of its program.

4) Public "hearing" would be replaced with public "meeting" throughout the bill. The intent is to have the Council handle petitions under its own public process, without any potential for misunderstanding and/or triggering of a drawn-out hearing process with hearing officers, depositions, etc.

5) On page 1 line 22 and page 2 line 19, the "determine if" language describing the Council's action would be changed so as to 1) not confuse who is making a determination under the consistency review process (on page 1) or 2) prepare a written finding on coastal district or state agency general implementation (page 2).

6) In Section 3 (page 3, lines 15- 27), Council directions to the coastal resource district or state agency are separated to prevent any confusion. No changes to what the Council may direct are proposed.

I submitted these proposed changes to Denby Lloyd, but have not had a chance to talk with him today. I intend to get this marked up draft to Senator Szymanski's aide Mary McBurney on Monday when she returns. Hopefully, if everyone concurs and lets Mary know (465-4978), these changes can be folded into a clean draft CS.

It is my understanding that SB 500 is scheduled for Senate Community and Regional Affairs Committee on Tuesday, April 17 at 3:30 pm in the Butrovich Room. Mary McBurney is setting up the committee meeting. I intend to be at the meeting.

Please call me at 465-3562 if you have any questions.

cc: Joe Evans
Denby Lloyd
Bob Grogan
Mary McBurney

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

May 3, 1990

Senator Mike Szymanski
P.O. Box V
Juneau, AK 99811

Dear Mike:

In these last days of the session we still find ourselves without a potential solution to a problem related to decision-making authority of the Coastal Policy Council. This problem, with which you are familiar, has become more acute due to a recent petition requesting the Coastal Policy Council to direct the City and Borough of Juneau to rescind CBJ Ordinance 90-11.

The complaint surrounds contention that recent rezoning of the "rock dump" violates the Juneau Coastal Zone Management Plan. This action was not anticipated when we brought you our original concerns with A.S. 46.40.100, and the proposed solution in SB 500, but it illustrates the severity of the issue.

I believe that your committee laid some good ground work, in your amendments to SB 500, and I would like to build on that foundation. Therefore, I hope that you will consider passing the enclosed draft of SB 500, quickly so that the bill can make it through before the end of session.

Sincerely,

Steve Cowper
Governor

cc: Senator Tim Kelly
Senator Drue Pearce
Representative Sam Cotten

Resource Development Council for Alaska, Inc.

807 "G" Street, Suite 200, Anchorage, Alaska 99501-3440
Box 100516, Anchorage, Alaska 99510-0516 907/276-0700 Fax 276-3887

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Senator Ted Stevens
Senator Frank Murkowski
Congressman Don Young

4/11/90

Position Paper
SB 500 - Alaska Coastal Policy Council

The Resource Development Council for Alaska, Inc., urges legislative consideration of and support for Senate Bill 500, an acting relating to the Alaska Coastal Policy Council and its authority.

RDC supports Senate Bill 500, an act that would revise the chain of command with regard to Coastal Policy Council recommendations and their impact on the actions of state departments.

Currently, a development project - from a local boat dock to a mining operation - can proceed successfully through the state's numerous permit processes and run into a stumbling block in the form of the coastal policy council. If an individual or group is opposed to the project in question, they can file a petition against the project. If the coastal policy council upholds the petitioner, that decision takes precedence over other agency decisions in favor of the project.

The primary complaint RDC and others have with the current hierarchy is it allows one party to undo the work of state regulatory agencies by working through the coastal policy council. Senate bill 500 will correct this imbalance.

The bill was introduced at the request of the governor, and is supported by DNR and other agencies. RDC requests that the Alaska Legislature join the administration, various industry organizations and individuals in supporting SB 500 and moving it quickly through the legislative process.

Mary APR 13 '90 14:49 ATTY GEN OIL,GAS,MIN P.1/1

These are proposed by Francis Neville Friday pm.
I did NOT pass this on to Evans, et.al
Denby has a copy.

OFFICE OF
MANAGEMENT & BUDGET
APR 13 1990
GOVERNMENTAL
COORDINATION

Possible Options for Sec.4 of SB 500

1. Amend AS 46.40.100(e) to read:

   Nothing in the (b) through (d) of this section authorizes the council to adjudicate the validity of a conclusive coastal consistency determination for a project. The superior courts of the state have exclusive appellate jurisdiction over any action challenging a conclusive coastal consistency determination for a project [TO ENFORCE LAWFUL ORDERS OF THE COUNCIL].

2. Amend AS 46.40.100(e) to read:

   The superior courts of the state have jurisdiction to enforce lawful orders of the council issued under (d) of this section.

3. Repeal AS 46.40.100(e).

FAX TRANSMITTAL MEMO
TO: Gretchen Keiser
DEPT: DGC FAX #: 465-3075
FROM: Francis Neville PHONE: 277-8661
CO: AGO-Anch FAX #:
NO. OF PAGES 1
Post-It™ brand fax transmittal memo 7671

STATE OF ALASKA

OFFICE OF THE GOVERNOR

DIVISION OF GOVERNMENTAL COORDINATION

STEVE COWPER, GOVERNOR

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JUNEAU, ALASKA 99811-0165
PHONE: (907) 465-3562

Post-It™ brand fax transmittal memo 7671	# of pages ▸ 4
To Mary	From Joe Evans
Co.	Co.
Dept.	Phone # 345-3688
Fax #	Fax # 276-2822

March 2, 1990

TO: Coastal Policy Council Petitions Subcommittee

SUBJECT: <u>Processing Petitions Received by the Coastal Policy Council under AS 46.40.100</u>

Enclosed for your review and comment is a draft of two processes for handling different types of petitions that could be received by the Coastal Policy Council (CPC). As you will recall from your February 21, 1990 meeting held in Juneau, the subcommittee discussed and outlined two separate petition processes, as follows:

1) a process for <u>general</u> petitions regarding district program implementation by a coastal district or State agency (Enclosure 1); and

2) a process for <u>project-specific</u> petitions regarding district program implementation by a State agency during a project consistency review under 6 AAC 50 (Enclosure 2).

Key features of the two petition processes include:

<u>Timing</u>: A general petition about district program implementation could be brought to the CPC at any time, whereas a petition about a specific project consistency review under 6 AAC 50 could be initiated only during a short period following an elevation and decision by the resource commissioners. Consideration of a general petition would likely occur within the timeframe of regularly scheduled CPC meetings, whereas a project-specific petition would be processed within 30-45 days.

<u>Petitioners</u>: A citizen of the district, a coastal district, or a State agency could bring a general petition regarding district program implementation to the CPC. Only parties with standing in the consistency

01-A38LH

review process under 6 AAC 50 (i.e., the applicant, the affected coastal district, or the resource agencies) could bring a project-specific petition to the CPC.

Showing: Under both processes, a required showing is based on criteria specified in AS 46.40.100(c) and (d). A CPC subcommittee, consisting of three public and two State members, would determine whether a petition makes the required showing that a district program is not being implemented. If a showing is made, the petition would be brought before the full CPC for action, otherwise the petition would be dismissed by the subcommittee.

CPC Action: Both processes provide for a range of potential CPC actions, as indicated in AS 46.40.100(b). The CPC would consider a number of factors when deciding a course of action and advise, recommend, or direct an action by a coastal district or State agency commensurate with the nature of the implementation issue. The Division of Governmental Coordination, as staff to the CPC, could also be directed to undertake certain tasks designed to enhance future implementation of the Alaska Coastal Management Program.

I would appreciate your comments on these draft procedures. As briefly considered at the end of the February 21st meeting, the subcommittee will likely want to meet again to review and approve a revised draft of these petitions processes prior to submitting a report to the full Council. This division will arrange a subcommittee meeting at your request.

Please contact me or Kurt Fredriksson at 465-3562 if you have any questions.

Sincerely,

Gretchen Keiser

Gretchen Keiser
Coastal Program Coordinator

cc: Coastal Policy Council
ACMP Working Group
Coastal Districts
Denby Lloyd, Office of the Governor, Juneau
Tom Koester, Department of Law, Juneau
Steve Porter, Arco Alaska, Anchorage
Randall Weiner, Trustees for Alaska, Anchorage

ENCLOSURE 1

A PROCESS FOR GENERAL PETITIONS TO THE COASTAL POLICY COUNCIL
REGARDING DISTRICT PROGRAM IMPLEMENTATION
March 2, 1990

According to the Alaska Coastal Management Act [AS 46.40.100(b)], a coastal resource district, citizen of a district, or a State agency may petition the Coastal Policy Council (CPC) if they believe that a district coastal management program is not being implemented, complied with, or enforced. This paper outlines procedures for handling petitions of a general nature that raise questions or issues regarding coastal district or State agency implementation of a district program. Separate procedures have been developed to address a petition received by the CPC regarding coastal district implementation during a project-specific consistency review under 6 AAC 50 (see Enclosure 2).

SECTION 1: HOW AND WHEN A PETITION IS RECEIVED BY THE COASTAL POLICY COUNCIL

1. A petition can be submitted in writing to the Division of Governmental Coordination (DGC) at any time. The petition must identify the parties to the petition. These include the petitioner, the affected coastal district, and the coastal district or State agency alleged to have failed to implement a district program. The petition must clearly state the nature of the implementation issue.

SECTION 2: WHAT HAPPENS WHEN A PETITION IS RECEIVED BY THE COASTAL POLICY COUNCIL

1. The DGC immediately distributes a copy of the petition to each CPC member, the affected coastal district, and the coastal district or State agency alleged to have failed to implement the coastal program.

2. The DGC reviews the petition for completeness. The petitioner must:

   A) submit materials which explain and/or support allegations of improper implementation;

   B) submit materials which demonstrate that the petitioner has sought to resolve their concerns with the particular coastal district or State agency prior to petitioning the CPC; and

   C) describe a proposed remedy to the alleged failure to implement a coastal program.

NOTE: The Alaska Coastal Management Program (ACMP) regulations may need to be revised to include a requirement that coastal districts and State agencies respond in writing to implementation concerns brought to their attention by a district citizen, coastal district, or State agency.

3. If a petition is incomplete, DGC contacts the petitioner and indicates the information that is lacking. The petition process is suspended by DGC until a complete petition packet is received.

4. DGC will informally mediate among the parties to the petition to resolve the issues raised in the petition. The CPC public member representing the affected coastal district will be encouraged to participate in the mediation, which may include a meeting among the parties in the affected district.

5. If the petition is resolved through mediation, DGC will prepare a brief report summarizing the results of the mediation. The DGC will distribute the report to each CPC member, the petitioner, the coastal affected district, and the State agency. If no further objections are received from the involved parties within 20 days of distribution of the report, DGC will consider the petition closed.

6. If the petitioner is not satisfied with the results of the mediation, the DGC will submit a report to a petitions subcommittee of the CPC for its consideration. The report will include:

   A) a copy of the petition;

   B) a written response to the petition, if available, from the coastal district or State agency alleged to have failed to implement the coastal program; and

   C) a report, by DGC, summarizing the issues considered during the mediation and the remaining unresolved issues among the parties.

SECTION 3: **COASTAL POLICY COUNCIL SUBCOMMITTEE CONSIDERATION OF THE PETITION**

1. A subcommittee of the CPC to address petitions received under AS 46.40.100(b) will include:

   A) the public CPC member from the region within which the affected coastal district is located;

B) two additional public CPC members, designated on a semi-annual basis; and

C) two State CPC members, designated on a semi-annual basis.

2. In consultation with the full membership, the public and State co-chairs of the CPC will designate the members to sit on the subcommittee which considers petitions. If a CPC member has been directly involved in a local or State decision which is the subject of a petition, that member shall not participate on the subcommittee considering that petition.

3. The DGC will arrange a meeting of the subcommittee to consider the petition. The petitioner, affected district, and the coastal district or State agency alleged to have failed to implement the coastal program may present information to the CPC subcommittee at the meeting.

4. The CPC subcommittee will determine whether the petition makes the required showing that a district program is not being implemented, enforced, or complied with. The determination of whether a showing has been made in a petition will be based on the following criteria, as specified in AS 46.40.100(c) and (d):

<u>Coastal District Implementation [AS 46.40.100(c)]</u>
Implementation of an approved program by a coastal district, through its local government authorities, must be done in compliance with the implementation procedures and policies specified in the district's coastal management program and approved by the CPC.

A) To the extent that the local implementation procedures are established and followed, and all pertinent enforceable district program policies are fully and properly considered, the district is correctly implementing its coastal program and a showing has not been made.

B) A showing has been made that a district program is not being correctly implemented when the coastal district:

1. has not followed the procedures approved by the CPC for implementation of its district program;

2. has failed to adopt and enforce ordinances or procedures necessary for program implementation, in accordance with its district program;

3. has failed to conduct a required consistency review prior to authorizing an activity; or

4. has not fully and properly considered pertinent enforceable district program policies during the local consistency review.

State Agency Implementation [AS 46.40.100(d)]

A) The CPC has adopted the procedures of 6 AAC 50, "Project Consistency with the Alaska Coastal Management Program," as the primary vehicle for State agency implementation of approved district programs. To the extent that the procedures in 6 AAC 50 are being followed and all pertinent district program policies and ACMP standards are properly considered, a State agency is correctly participating in project consistency reviews and implementing a district program, and a showing has not been made.

B) A showing has been made that a district program is not being correctly implemented when a State agency:

1. generally (i.e., in more than one instance) has not followed the procedures of 6 AAC 50, including according due deference to an affected coastal district with an approved program during consistency reviews;

2. generally (i.e., in more than one instance) has not properly considered pertinent enforceable district program policies and ACMP standards during consistency reviews;

3. has not satisfactorily performed ACMP implementation tasks, as specified in statute, regulation, or reimbursable agreements.

NOTE: The showing test described above for State agency implementation does not establish criteria for AS 46.40.100(d)(2). That subsection broadly specifies that State agency permitting, licensing and approvals must be granted consistent with State statute, regulation, or local ordinance applicable to the subject use or activity.

5. After hearing from the involved parties and reviewing the information, the CPC subcommittee will decide whether a petition makes a showing that a coastal program is not being correctly implemented. A majority vote will govern the subcommittee's decision.

6. If the subcommittee determines that a showing has not been made, the petition is dismissed. The subcommittee must indicate why the petition fails to make a showing. On behalf on the CPC, DGC will respond in writing to the petitioner, indicating the subcommittee's decision and stating the subcommittee's reasons for dismissing the petition. A copy of the response will also be sent to each CPC member, the affected coastal district, and the district or State agency named in the petition.

7. If the subcommittee determines that a showing has been made, the petition is forwarded to the full CPC for its consideration at the next regularly scheduled CPC meeting, provided that the meeting occurs no sooner than 45 days and no later than 90 days after the subcommittee's decision. In the event that the CPC is not scheduled to meet in the appropriate timeframe, the CPC may modify the date of its next meeting in order to consider the petition in a timely manner.

SECTION 4: FULL COASTAL POLICY COUNCIL CONSIDERATION OF A PETITION

1. The parties named in the petition may submit additional information to the CPC for its consideration. Information must be submitted to the DGC within 30 days of the CPC subcommittee's decision to forward the petition to the full CPC.

2. A public hearing of the petition will be held by the CPC.

3. At the conclusion of the public hearing, the CPC may dismiss the petition or advise, recommend, or direct the coastal district or State agency to take action to remedy the failure to implement a coastal district program. The CPC may also direct DGC to implement changes under the ACMP, as appropriate.

4. When deciding the particular action it may order, the CPC will take into consideration the following factors:

   A) the severity of the actual or projected environmental, social or economic impact(s) resulting from the implementation failure;

   B) the effect of the required action in remedying an implementation failure by a coastal district or State agency;

   C) the arbitrary and capricious nature of the coastal district or State agency decisionmaking which led to the petition;

D) the clarity or specificity of the implementation procedures and enforceable policies in the coastal district program which may have led to the petition;

E) whether the issues raised are of overriding State or national interest or are primarily local in nature; and

F) the impact that the implementation failure may have on the continued approvability of the ACMP with the U.S. Department of Commerce.

5. When deciding a course of action, the CPC will direct an action that is commensurate with the nature of the implementation failure by the coastal district or State agency. The CPC may order the following actions, as appropriate.

A) coastal district adoption of ordinances or procedures (which the district had identified, at the time of program approval, as an implementation mechanism) within a specified timeframe;

B) coastal district conduct of a consistency review for a project for which no previous consistency review was undertaken;

C) coastal district adherence to the procedures approved by the CPC for implementation of its coastal program and/or full and proper consideration of the pertinent enforceable policies and ACMP standards during consistency reviews (to include, at the discretion of the CPC, documented improvement in agency performance within a specified timeframe and subject to CPC review);

D) coastal district preparation of amendments to its coastal program to clarify procedures or policies, with submittal to the CPC for review and approval within a specified timeframe;

E) State agency adherence to the overall procedures of 6 AAC 50 and proper consideration of the enforceable district policies and ACMP standards during future consistency reviews (to include, at the discretion of the CPC, documented improvement in agency performance within a specified timeframe and subject to CPC review);

F) coastal district or State agency improvements to internal procedures manual or the offering of regular ACMP training to district or agency staff;

G) coastal district or State agency reconsideration of a decision under petition;

H) staff preparation, in consultation with other appropriate parties, of revisions to specific ACMP standards or written guidance to coastal districts and State agencies the interpretation of specific ACMP standards;

I) staff preparation, in consultation with other appropriate parties, of specific policy statements about coastal policy issues before the State, to be submitted by the CPC to the State resource agencies for their consideration and concurrence;

J) staff investigation of the potential for funding specific research projects which would provide information or data important for further resolution of a coastal issue; or

K) staff analysis of district and State ACMP funding, with recommendations to the CPC regarding possible funding adjustments for ACMP implementation tasks.

6. On behalf of the CPC, DGC will respond in writing to the petitioner, indicating the CPC's decision. A copy of the response will be sent to each CPC member, the affected coastal district, the district or State agency named in the petition, and other parties, as appropriate.

applea/GK

ENCLOSURE 2

A PROCESS FOR PROJECT-SPECIFIC PETITIONS TO THE COASTAL POLICY COUNCIL REGARDING DISTRICT PROGRAM IMPLEMENTATION IN CONSISTENCY REVIEWS UNDER 6 AAC 50
March 2, 1990

According to the Alaska Coastal Management Act [AS 46.40.100(b)], a coastal district, citizen of a district, or a State agency may petition the Coastal Policy Council (CPC) if they believe that a district coastal management program is not being implemented, complied with, or enforced. This paper outlines procedures for handling petitions that raise questions or issues regarding State agency implementation of a district's coastal program during a specific project consistency review conducted according to 6 AAC 50. The consistency review regulations and AS 46.40.100(b) could be revised to incorporate these procedures. Separate procedures have been developed to address petitions of a general nature regarding coastal district or State agency implementation of a coastal program (see Enclosure 1).

SECTION 1: HOW AND WHEN A PETITION IS RECEIVED BY THE COASTAL POLICY COUNCIL

1. A petition must be submitted in writing by the project applicant, the affected coastal district, or a State agency to the Division of Governmental Coordination (DGC) within five days of the issuance of a proposed conclusive consistency determination by the coordinating agency, following an elevation to the commissioners of the resource agencies, as specified in 6 AAC 50.070(k).

2. The petition must identify the petitioner, the project's State identification number, the affected coastal district, and the State agency alleged to have failed to implement a coastal program. The petition must also clearly state the nature of the implementation failure.

NOTE: The State consistency review process affords standing to the affected coastal district and the project applicant. A citizen of a district must work with their coastal district, the applicant, the coordinating agency and other State agencies to have their project-specific concerns addressed during the project review comment period. These petition procedures would retain this decision making structure. A citizen of the district has the option of petitioning the CPC on the generic, rather than project-specific, aspects of State agency implementation under the consistency review process. AS 46.40.100 may need revisions to clarify this distinction.

The regulations governing the consistency review process, specifically 6 AAC 50.070, would have to be revised to allow for a petition to the CPC following an elevation and decision by the resource commissioners.

If no petition is received within the five-day period, the coordinating agency would issue the conclusive consistency determination. Resource agencies would issue permits within five days of the conclusive determination, as currently required in 6 AAC 50.130.

SECTION 2: WHAT HAPPENS WHEN A PETITION IS RECEIVED BY THE COASTAL POLICY COUNCIL

1. [Day 1] The DGC reviews the petition for completeness. The petitioner must:

   A) submit materials which explain and/or support allegations of improper implementation by a State agency participating in the project consistency review; and

   B) describe a proposed remedy to the alleged failure to implement a coastal program.

   If a petition is incomplete, DGC contacts the petitioner and indicates the information that is lacking. The DGC suspends the petition process until a complete petition is received. If a complete petition is not received within five days of the proposed conclusive consistency determination, the coordinating agency issues the conclusive consistency determination.

2. [Day 1] The DGC distributes a copy of the complete petition to each CPC member, the affected coastal district, the project applicant, and the resource commissioners. The DGC also distributes a schedule indicating key dates for consideration of the petition.

3. [Day 2] The DGC arranges a meeting of a prearranged subcommittee to consider the petition.

4. [Days 2 - 8] The DGC, in consultation with the parties named in the petition, prepares a report which summarizes the information pertinent to the petition. The DGC distributes the report to the CPC subcommittee members, the petitioner, the affected coastal district, and the resource commissioners.

SECTION 3: COASTAL POLICY SUBCOMMITTEE CONSIDERATION OF THE PETITION

1. A subcommittee of the CPC to address petitions received under AS 46.40.100(b) will include:

   A) the public CPC member from the region within which the affected coastal district is located;

   B) two additional public CPC members, designated on a quarterly (or semi-annual) basis; and

   C) two State CPC members, designated on a quarterly (or semi-annual) basis.

2. In consultation with the full membership, the public and State co-chairs of the CPC will designate the members to sit on the subcommittee which considers petitions. If a CPC member has been directly involved in a State decision in the 6 AAC 50 process, that member shall not participate on the subcommittee considering the petition.

3. (Day 10) The CPC subcommittee meets to consider the petition and determines whether a showing has been made. The petitioner, affected coastal district, project applicant, and the State agency alleged to have failed to implement the coastal program may present information to the CPC subcommittee at the meeting.

4. (Day 10) After hearing from the involved parties and reviewing the information, the CPC subcommittee decides whether a petition makes a showing that a coastal program is not being correctly implemented during the consistency review process under 6 AAC 50. A majority vote will govern the subcommittee's decision.

5. A showing that a coastal program is not being correctly implemented is based on the criteria specified in AS 46.40.100(d) and occurs when:

   A) a State agency has not followed the procedures of 6 AAC 50, including according due deference to an affected coastal district, during the consistency review process; or

   B) a agency has not properly considered pertinent enforceable district program policies and ACMP standards during the consistency review process.

6. If the subcommittee determines that a showing has not been made, the petition is dismissed. The subcommittee must indicate why the petition fails to make a showing. On behalf of the CPC, the DGC will respond in writing to the petitioner, indicating the subcommittee's decision and stating the subcommittee's reasons for dismissing the petition. A copy of the response will also be sent to each CPC member, the affected coastal

district, the project applicant, and the resource commissioners. The coordinating agency will issue the conclusive consistency determination.

7. If the subcommittee determines that a showing has been made, the petition is forwarded to the full CPC for its consideration.

SECTION 4: <u>FULL COASTAL POLICY COUNCIL CONSIDERATION OF A PETITION</u>

1. A public hearing of the petition will be held by the CPC at the earliest possible date, but no later than 20 days after the CPC subcommittee's decision to forward the petition to the full CPC.

2. The parties named in the petition may submit additional information to the CPC for its consideration.

3. At the conclusion of the public hearing, the CPC will decide a course of action, taking into consideration the following factors:

   A) the severity of the projected environmental, social or economic impact(s) resulting from the implementation failure;

   B) the adequacy of the action the CPC may order in remedying an implementation failure;

   C) the arbitrary and capricious nature of the State agency decisionmaking which lead to the petition;

   D) the clarity or specificity of the 6 AAC 50 procedures, enforceable district policies, and ACMP standards which may have lead to the petition;

   E) whether the issues raised are of overriding State or national interest or are primarily local in nature; and

   F) the impact that the proposed conclusive consistency determination may have on the continued approvability of the ACMP with the U.S. Department of Commerce.

4. The CPC may:

   A) dismiss the petition with a statement of its reasons for the dismissal;

   B) remand the proposed conclusive consistency determination, with specific recommendations, back to the resource commissioners for their reconsideration; or

C) undo the proposed conclusive consistency determination and direct the coordinating agency to render a revised conclusive consistency determination from the CPC.

5. In addition, the CPC may direct staff to:

   A) prepare, in consultation with other appropriate parties:

      1. written guidance to coastal districts and state agencies regarding future interpretation of ACMP standards;

      2. revisions to specific ACMP standards; or

      3. revisions to the consistency review procedures in 6 AAC 50; or

   B) work with the coastal district to revise its enforceable district policies to provide greater clarity and/or specificity;

6. The CPC may allow a 15-day extension in order to more fully consider the petition or review additional information in the case of a project that involves unusually complex issues, if the subcommittee lacks a quorum, under exigent circumstances, or at the request of the project applicant.

7. On behalf of the CPC, the DGC will respond in writing to the petitioner, the resource commissioners, the applicant, and the affected coastal district, indicating the CPC's decision. The response will be sent within five days of the CPC's decision.

NOTE: The consistency review procedures in 6 AAC 50 would have to be revised to indicate that if the CPC does not remand back to the resource commissioners or otherwise amend the proposed conclusive consistency determination, the coordinating agency shall render the conclusive determination. Otherwise, the resource commissioners would reconsider its original decision in light of the CPC's recommendations. Once the resource commissioners complete their reconsideration, the coordinating agency would render the conclusive consistency determination with possible modifications, as determined by the resource commissioners.

changes/GK

NORTH SLOPE BOROUGH

PLANNING DEPARTMENT

☒ P.O. Box 69
Barrow, Alaska 99723
Phone: (907) 852-2611
FAX: (907) 852-5406

☐ 508 West 2nd Avenue, Suite 310
Anchorage, Alaska 99501
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Warren Matumeak, Director

February 21, 1990

Mr. Joe Evans (via fax to DGC)
Alaska Coastal Policy Council
4741 Southpark Bluff Drive
Anchorage, AK 99686

Dear Mr. Evans:

Pursuant to our phone conversation on February 5 regarding the possible roles that the CPC could play in the Consistency Determination process I agreed to submit my ideas to you in writing.

I suggest an amendment to the last sentence in 6 AAC 50.070 (k) as follows:

> If no consensus is reached,[the unresolved issues shall be brought before the Coastal Policy Council for policy direction.] [T]the coordinating agency shall render a determination consistent with any policy direction given by the ~~commissioners or the governor~~ [Council].

I apologize for my tardiness but hope this will be of help in your discussions with the CPC Sub-committee today.

Sincerely,

David A. Germann
Permitting Manager

CC: Mayor Ahmaogak
Edward Itta, CAO
Warren Matumeak, Planning Director
Bob Grogan, DGC
Randall Weiner, TFA
Jane Angvik, DCED (CPC Sub-committee member)
Norman Cohen, DFG (CPC Sub-committee member)
Hon. Lawrence Powell, Mayor of Yakutat (CPC Sub-committee member)

Trustees for ALASKA

A Non-Profit, Public Interest, Environmental Law Firm

via FAX and mail

February 15, 1990

Mr. Joseph Evans
Alaska Coastal Policy Council
4741 Southpark Bluff Drive
Anchorage, AK 99686

Dear Joe:

As you may be aware, the Alaska Coastal Management Program (ACMP) is evaluated periodically by the Office of Ocean and Coastal Resource Management (OCRM) in the U.S. Department of Commerce. OCRM recently completed its draft evaluation of the ACMP for the period from November 1987 through August 1989.

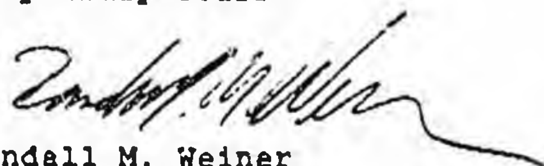
Of interest, OCRM traced the history of the Kaktovik petition controversy and noted the failure to develop procedures to process third party appeals under AS § 46.40.100(b). Draft Evaluation, pp. 13-20. OCRM recommended that procedures be adopted to handle third party petitions, and stated that those procedures "should provide for a broad oversight and involvement role by the CPC and adequate public notice and public review." Draft Evaluation, p. 20.

This recommendation is consistent with the federal findings issued by OCRM upon approval of the ACMP. Those finding make it clear that the CPC was intended to have the authority to meaningfully address "individual instances of deviation" on the part of districts and state agencies. *See* Trustees' letter to you dated January 22.

OCRM has thus reiterated the importance of a "third party" appeal process which gives the CPC a broad and meaningful role in insuring compliance with district coastal management programs.

I am attaching the relevant pages of the recent OCRM evaluation for your review.

Very Truly Yours:



Randall M. Weiner
Executive Director

cc: members of subcommittee
Mr. Robert Grogan
Mr. Gary Amendola

725 Christensen Drive, Suite 4 Anchorage, Alaska 99501 (907) 276-4244

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DRAFT
EVALUATION FINDINGS FOR THE ALASKA COASTAL MANAGEMENT PROGRAM FOR THE PERIOD FROM NOVEMBER 1987 THROUGH AUGUST 1989

THIS IS A DRAFT REPORT PREPARED BY THE OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT. IT IS MADE AVAILABLE FOR REVIEW AND COMMENT TO THE ORGANIZATION(S) RESPONSIBLE FOR THE MATTERS ADDRESSED. IT CONTAINS PRELIMINARY CONCLUSIONS AND TENTATIVE RECOMMENDATIONS, AND INCLUDES MATERIAL SUBJECT TO REVISION. THOSE CONTEMPLATING USE OR RELEASE OF THIS DRAFT SHOULD RECOGNIZE THAT IT MAY CONTAIN INCOMPLETE INFORMATION. QUESTIONS SHOULD BE REFERRED TO THE EVALUATION UNIT OF THE OFFICE BELOW.

Office of Ocean and Coastal Resource Management
National Ocean Service
National Oceanic and Atmospheric Administration
United States Department of Commerce

permit conditions) and automatically providing copies of permits to other agency enforcement staff.

(3) CRSA Involvement

Another area where monitoring and compliance could be strengthened is by increased involvement of the CRSAs. A July 1989, report on the role of CRSAs in the ACMP was prepared by Aleutians West, Bering Straits, Bristol Bay and Cenalurlriit CRSAs, DGC and DCRA. Among other things, the study points out that the CRSAs can enhance monitoring of coastal development activities by working with the State agencies in non-technical monitoring and compliance activities, such as the detection and reporting of non-permitted activities. The report acknowledges that CRSA staff, board members, and informed residents can serve as local "eyes and ears" for State and Federal agencies. Furthermore, involvement of local CRSA residents in monitoring may be cost-effective and build local public support for the CRSA program. To date, the State resource agencies, and the CRSAs have not developed a system to involve CRSA staff effectively in the monitoring of coastal development and other activities.

RECOMMENDATIONS: Consistent with the CRSA report recommendations, DGC should work with the resource agencies to facilitate CRSA involvement in monitoring and enforcement.

b. Appeals Procedure

The ACMP has yet to develop procedures to process third party appeals under AS 46.40.100(b) which allows a coastal district, citizens of a district or a State agency to petition

the CPC with concerns about district program implementation.

On September 26, 1988, the City of Kaktovick on the North Slope filed a petition with the CPC for reconsideration of actions concerning State Lease Sale 55. The City of Kaktovick challenged the State's decision, maintaining that it was inconsistent with the North Slope Borough Coastal Management Program. On November 23, 1988, the Director of DGC denied the appeal. However, it appears that the Director did not have this authority and that only the CPC can take this action. At its regularly scheduled meeting the CPC was asked to ratify the petition denial. This meeting was attended by the lessees, who were notified (and offered testimony), but not the City of Kaktovick, which was not notified that the appeal was on the agenda. At the June 28, 1989 meeting the CPC voted to hold an adjudicatory hearing. On July 28, 1989, an emergency CPC teleconference was convened at which the Department of Law (DOL) reversed its earlier decision advising the CPC that Kaktovick was due a hearing. In September 1989, the CPC again addressed this issue and voted to work informally to resolve the differences between the City and the lessees.

In addition to conflicting opinions from the DOL and questions of the extent of the DGC Director's authority, there are a number of other irregularities in the appeal process. CPC members and alternates have not been properly notified of meetings; information was faxed at the last minute or not sent to all parties; and, public notice of meetings appears to be

inadequate. Also, there is a question of a conflict-of-interest disqualification of the DGC Director. To compound the situation, DGC was attempting to draft rules for the processing of petitions to the CPC in the midst of the appeal by the City of Kaktovick. There is an obvious need for clear procedures on petitions.

RECOMMENDATION: DGC should finish procedures to process petitions on district program implementation (under AS46.40.100(b)). These procedures should provide for a broad oversight and involvement role by the CPC and adequate public notice and public review.

c. Future Role of the CPC

In addition to the appeals issue, the CPC and DGC need to establish the future role of the CPC. The CPC has concentrated mainly on approval of district coastal programs: to date 29 of the 35 existing coastal district programs have been approved. The program approval role will continue as new coastal districts are formed -- such as the proposed Lakes and Peninsula Borough -- and as older programs are updated; however, this role will require much less of the CPC's time.

With the program approval role diminishing, the CPC needs to redefine its roles and priorities. AS 44.19.161 provides the CPC with broad powers related to "continuing coordination among state agencies to facilitate the development and implementation of the Alaska coastal management program." At the September 26, 1989 meeting DGC provided a paper entitled "Options for Coastal Policy Council Oversight of the Alaska Coastal Management Program

Title 46

Chapter 40. The Alaska Coastal Management Program.

Article
1. Development of Alaska Coastal Management Program (§§ 46.40.010 — 46.40.100)
2. Coastal Management Programs in the Unorganized Borough (§§ 46.40.110 — 46.40.180)
3. General Provisions (§§ 46.40.190 — 46.40.210)

Opinions of attorney general. — The activities of lessees, permittees and other private persons on nonexclusive federal coastal lands remain subject to state regulatory authority — including the coastal management program — unless the particular state regulation is preempted by, irreconcilably conflicts with or frustrates the purpose of another federal law. February 3, 1978, Op. Att'y Gen.

While federal land use decisions will not be governed or controlled by the state's coastal management program, they must, to the degree that they directly affect nonfederal coastal resources, conform to the state program to the maximum extent practicable. February 3, 1978, Op. Att'y Gen.

Article 1. Development of Alaska Coastal Management Program.

Section
10. Development of Alaska coastal management program
20. Objectives
30. Development of district coastal management programs
40. Duties of the Alaska Coastal Policy Council
50. Action and submission by coastal resource districts
60. Review and approval by council
70. Standards for council review and approval
80. Effective date of Alaska coastal management program
90. Implementation of district coastal management programs
100. Compliance and enforcement

Collateral references. — 78 Am. Jur. 2d, Waters, §§ 59-116, 375-438.

65 C.J.S., Navigable Waters, §§ 10-18, 20-132; 93 C.J.S., Waters, §§ 71-85.

Sec. 46.40.010. Development of Alaska coastal management program. (a) The Alaska Coastal Policy Council established in AS 44.19.155 shall approve, in accordance with this chapter, the Alaska coastal management program.

(b) The council may approve the Alaska coastal management program for a portion or portions of the coastal area before approving the complete program under (a) of this section. Portions of the program approved under this subsection shall be incorporated into the Alaska coastal management program.

(c) The Alaska coastal management program shall be reviewed by the council and, when appropriate, revised to

(1) add newly approved district coastal management programs, or revisions and amendments to the Alaska coastal management program;

(2) integrate newly approved district coastal management programs, or revisions and amendments of district coastal management programs, with existing approved programs and with plans developed by state agencies;

(3) add new or revised state statutes, policies, regulations or other appropriate material;

(4) review the effectiveness of implementation of district coastal management programs: and

(5) consider new information acquired by the state and coastal resource districts.

(d) All reviews and revisions shall be in accordance with the guidelines and standards adopted by the council under AS 46.40.040. (§ 4 ch 84 SLA 1977)

Revisor's notes. — AS 44.19.155 was substituted for AS 44.19.891 in subsection (a) to conform to the renumbering of that section by the revisor of statutes pursuant to AS 01.05.031.

Opinions of attorney general. — The doctrine of federal preemption, derived from the supremacy clause of the United States Constitution, Article VI, clause 2, would not apply to state regulation of outer continental shelf activities in the coastal zone. May 12, 1980, Op. Att'y Gen.

Reasonable restrictions on oil and gas activities embodied in a local coastal management plan, incorporated into the Alaska Coastal Management Program, would be enforceable against off-shore federal lessees. May 12, 1980, Op. Att'y Gen.

Municipal authority to regulate oil and gas activities of federal lessees depends upon whether the leases are on-shore or off-shore. In the case of the former, the doctrine of federal preemption may prohibit local coastal zone ordinances from affecting any measure of control. In the case of the latter, local coastal management programs which are approved by the Alaska Coastal Policy Council and thus part of the Alaska Coastal Management Program will become one of the touchstones in the state consistency determination required by section 307(c)(3) of the Coastal Zone Management Act, 16 U.S.C. § 1451 et seq. May 12, 1980, Op. Att'y Gen.

A municipality enacting a local district coastal management program may restrict or exclude a use of state concern without falling afoul of the constitutional limitations in Alaska Const., art. X, § 11 on the exercise of municipal authority if that restriction or exclusion is reasonable, within the meaning of AS 46.40.070(c). May 12, 1980, Op. Att'y Gen.

The Alaska Oil and Gas Conservation Act, AS 31.05.005 et seq., which mandates the conservation of oil and gas and prohibits their waste, would not be contravened by a local coastal management plan which comports with the Alaska Coastal Management Program. May 12, 1980, Op. Att'y Gen.

Sec. 46.40.020. Objectives. The Alaska coastal management program shall be consistent with the following objectives:

(1) the use, management, restoration and enhancement of the overall quality of the coastal environment;

(2) the development of industrial or commercial enterprises which are consistent with the social, cultural, historic, economic and environmental interests of the people of the state;

(3) the orderly, balanced utilization and protection of the resources of the coastal area consistent with sound conservation and sustained yield principles;

(4) the management of coastal land and water uses in such a manner that, generally, those uses which are economically or physically dependent on a coastal location are given higher priority when compared to uses which do not economically or physically require a coastal location;

(5) the protection and management of significant historic, cultural, natural and aesthetic values and natural systems or processes within the coastal area;

(6) the prevention of damage to or degradation of land and water reserved for their natural values as a result of inconsistent land or water usages adjacent to that land;

(7) the recognition of the need for a continuing supply of energy to meet the requirements of the state and the contribution of a share of the state's resources to meet national energy needs; and

(8) the full and fair evaluation of all demands on the land and water in the coastal area. (§ 4 ch 84 SLA 1977)

Stated in Hammond v. North Slope Borough, Sup. Ct. Op. No. 2499 (File No. 5550, 5558), 645 P.2d 750 (1982).

Sec. 46.40.030. Development of district coastal management programs. Coastal resource districts shall develop and adopt district coastal management programs in accordance with the provisions of this chapter. The program adopted by a coastal resource district shall be based upon a municipality's existing comprehensive plan or a new comprehensive resource use plan or comprehensive statement of needs, policies, objectives and standards governing the use of resources within the coastal area of the district. The program shall be consistent with the guidelines and standards adopted by the council under AS 46.40.040 and shall include:

(1) a delineation within the district of the boundaries of the coastal area subject to the district coastal management program;

(2) a statement, list, or definition of the land and water uses and activities subject to the district coastal management program;

(3) a statement of policies to be applied to the land and water uses subject to the district coastal management program;

(4) regulations, as appropriate, to be applied to the land and water uses subject to the district coastal management program;

(5) a description of the uses and activities which will be considered proper and the uses and activities which will be considered improper with respect to the land and water within the coastal area;

(6) a summary or statement of the policies which will be applied and the procedures which will be used to determine whether specific proposals for land or water uses or activities shall be allowed; and

(7) a designation of, and the policies which will be applied to the use of, areas within the coastal resource district which merit special attention. (§ 4 ch 84 SLA 1977)

Opinions of attorney general. — The adoption of forest practices regulations by the Department of Natural Resources in 11 AAC 95 has completely preempted the coastal policy council's regulations, 6 AAC 80.100, in regulating timber harvest and processing in the coastal area. April 20, 1981, Op. Att'y Gen.

The allocation of responsibility for administration of the forest practices regulations in coastal management consistency determinations is sufficiently unclear that it seems appropriate for resolution by the adoption of regulations since differing policy considerations emphasized in the Forest Practices Act, the Coastal Management Act, and proposed permit reform regulations will be served to a greater or lesser extent by assigning responsibility for interpreting and applying the forest practices regulations to more than one agency and since a particular result is not compelled under the various pieces of authorizing legislation. April 20, 1981, Op. Att'y Gen.

Stated in Hammond v. North Slope Borough, Sup. Ct. Op. No. 2499 (File No. 5550, 5558), 645 P.2d 750 (1982).

Sec. 46.40.040. Duties of the Alaska Coastal Policy Council. Through the public hearing process and the recording of the minutes of the hearings, the Alaska Coastal Policy Council shall

(1) by regulation, adopt under the provisions of the Administrative Procedure Act (AS 44.62) not later than April 15, 1978, for the use of and application by coastal resource districts and state agencies for carrying out their responsibilities under this chapter; guidelines and standards for

(A) identifying the boundaries of the coastal area subject to the district coastal management program;

(B) determining the land and water uses and activities subject to the district coastal management program;

(C) developing policies applicable to the land and water uses subject to the district coastal management program;

(D) developing regulations applicable to the land and water uses subject to the district coastal management program;

(E) developing policies and procedures to determine whether specific proposals for the land and water uses or activities subject to the district coastal management program shall be allowed;

(F) designating and developing policies for the use of areas of the coast which merit special attention; and

(G) measuring the progress of a coastal resource district in meeting its responsibilities under this chapter;

(2) develop and maintain a program of technical and financial assistance to aid coastal resource districts in the development and implementation of district coastal management programs;

(3) undertake review and approval of district coastal management programs in accordance with this chapter;

(4) initiate a process for identifying and managing uses of state concern within specific areas of the coast;

(5) develop procedures or guidelines for consultation and coordination with federal agencies managing land or conducting activities potentially affecting the coastal area of the state. (§ 4 ch 84 SLA 1977; am § 1 ch 129 SLA 1978)

Effect of amendments. — The 1978 amendment substituted "not later than April 15, 1978" for "within six months of the effective date of this act" in the introductory language of paragraph (1).

Editor's notes. — The regulations referred to in this section went into effect on July 18, 1978 and may be found at 6 AAC 80 and 6 AAC 85.

Sec. 46.40.050. Action and submission by coastal resource districts. Each coastal resource district shall make substantial progress, in the opinion of the council, toward completion of an approvable district coastal management program and shall complete and submit to the council for approval its program within 30 months of June 4, 1977 or within 30 months of certification of the results of the district's organization, whichever is later. If, in the opinion of the council, after receipt of a written request for extension from the district which includes the reasons for the extension, an extension is considered proper, the council may grant an extension to a date which is not later than December 4, 1981, or to a date which is within 54 months of certification of the results of the district's organization, whichever is later. (§ 4 ch 84 SLA 1977; am § 1 ch 66 SLA 1979)

Effect of amendments. — The 1979 amendment added the second sentence.

Sec. 46.40.060. Review and approval by council. (a) If, upon submission of a district coastal management program for approval, the council finds that the program is substantially consistent with the provisions of this chapter and the guidelines and standards adopted by the council and does not arbitrarily or unreasonably restrict or exclude uses of state concern, the council may grant summary approval of the district coastal management program, or may approve portions of the district program which are consistent.

(b) If the council finds that a district coastal management program is not approvable or is approvable only in part under (a) of this section, it shall direct that deficiencies in the program submitted by the coastal resource district be mediated. In mediating the deficiencies, the council may call for one or more public hearings in the district. The council shall meet with officials of the coastal resource district in order to resolve differences.

(c) If, after mediation, the differences have not been resolved to the mutual agreement of the coastal resource district and the council, the council shall call for a public hearing and shall resolve the differences in accordance with the Administrative Procedure Act (AS 44.62). After a public hearing held under this subsection, the council shall enter findings and, by order, may require

(1) that the district coastal management program be amended to make it consistent with the provisions of this chapter or the guidelines and standards adopted by the council;

(2) that the district coastal management program be revised to accommodate a use of state concern; or

(3) any other action be taken by the coastal resource district as appropriate.

(d) The superior courts of the state have jurisdiction to enforce orders of the council entered under (c) of this section. (§ 4 ch 84 SLA 1977)

Opinions of attorney general. — The invalid provisions of AS 46.40.080 are severable from the remainder of the Coastal Management Act. Thus, council guidelines take effect when adopted in accordance with the Administrative Procedure Act, AS 44.62. The effective date of council action on district programs is governed by the council's regulations and this section. April 29, 1980, Op. Att'y Gen.

Council action on a district coastal management plan takes effect upon final council disposition of the plan under 6 AAC 85.150 or AS 44.62.520. April 29, 1980, Op. Att'y Gen.

A municipality enacting a local district coastal management program may restrict or exclude a use of state concern without falling afoul of the constitutional limitations in Alaska Const., art. X, § 11 on the exercise of municipal authority if that restriction or exclusion is reasonable, within the meaning of AS 46.40.070(c). May 12, 1980, Op. Att'y Gen.

Sec. 46.40.070. Standards for council review and approval. (a) The council shall approve a district coastal management program submitted for review and approval if the program is consistent with the provisions of this chapter and the guidelines and standards adopted by the council.

(b) Notwithstanding an inconsistency of a district coastal management program submitted for review and approval with the guidelines and standards adopted, the council shall approve the program if it finds that

(1) strict adherence to the guidelines and standards adopted would result in a violation of another state law or policy;

(2) strict adherence to the guidelines and standards adopted would cause or probably cause substantial irreparable harm to another interest or value in the coastal area of the district; or

(3) the inconsistency is of a technical nature and no substantial harm would result to the policies and objectives of this chapter or the Alaska coastal management program.

(c) In determining whether a restriction or exclusion of a use of state concern is arbitrary or unreasonable, the council shall approve the restriction or exclusion if it finds that

(1) the coastal resource district has consulted with and considered the views of appropriate federal, state or regional agencies;

(2) the district has based its restriction or exclusion on the availability of reasonable alternative sites; and

(3) the district has based its restriction or exclusion on an analysis showing that the proposed use is incompatible with the proposed site.

(d) A decision by the council under this section shall be given within 90 days. (§ 4 ch 84 SLA 1977)

Opinions of attorney general. — Reading subsection (b) as vesting local officials with complete control over policy formulation would probably render the Alaska Coastal Management Act unconstitutional under Alaska Const., art. VIII, § 2. May 12, 1980, Op. Att'y Gen.

Reasonable restrictions on oil and gas activities embodied in a local coastal management plan, incorporated into the Alaska Coastal Management Program, would be enforceable against off-shore federal lessees. May 12, 1980, Op. Att'y Gen.

A municipality enacting a local district coastal management program may restrict or exclude a use of state concern without falling afoul of the constitutional limitations in Alaska Const., art. X, § 11 on the exclusion of municipal authority if that restriction or exclusion is reasonable, within the meaning of subsection (c). May 12, 1980, Op. Att'y Gen.

The Alaska Oil and Gas Conservation Act, AS 31.05.005 et seq., which mandates the conservation of oil and gas and prohibits their waste, would not be contravened by a local coastal management plan which comports with the Alaska Coastal Management Program. May 12, 1980, Op. Att'y Gen.

Sec. 46.40.080. Effective date of Alaska coastal management program. The Alaska coastal management program adopted by the council, and any additions, revisions, or amendments of the program, take effect upon adoption of a concurrent resolution by a majority of the members of each house of the legislature or by a vote of the majority of the members of each house at the time the houses are convened in joint session to confirm executive appointments submitted by the governor. (§ 4 ch 84 SLA 1977)

Opinions of attorney general. — Under the decision in State v. A.L.I.V.E. Voluntary, Sup. Ct. Op. No. 2022 (File No. 3670), 606 P.2d 769 (1980), that the use of legislative resolutions as a veto over regulations, programs or other actions or proposed actions is constitutionally impermissible except as expressly provided by the constitution, this section is invalid. March 6, 1980, Op. Att'y Gen.

The invalid provisions of section are severable from the remainder of the Coastal Management Act. Thus, council guidelines take effect when adopted in accordance with the Administrative Procedure Act, AS 44.62. The effective date of council action on district programs is governed by the council's regulations, and AS 46.40.060. April 29, 1980, Op. Att'y Gen.

Council action on a district coastal management plan takes effect upon final council disposition of the plan under 6 AAC 85.150 or AS 44.62.520. April 29, 1980, Op. Att'y Gen.

Sec. 46.40.090. Implementation of district coastal management programs. (a) A district coastal management program approved by the council and the legislature for a coastal resource district which does not have and exercise zoning or other controls on the use of resources within the coastal area shall be implemented by appropriate state agencies. Implementation shall be in accordance with the comprehensive use plan or the statement of needs, policies, objectives and standards adopted by the district.

(b) A coastal resource district which has and exercises zoning or other controls on the use of resources within the coastal area shall implement its district coastal management program. Implementation

shall be in accordance with the comprehensive use plan or the statement of needs, policies, objectives and standards adopted by the district. (§ 4 ch 84 SLA 1977)

Sec. 46.40.100. Compliance and enforcement. (a) Municipalities and state agencies shall administer land and water use regulations or controls in conformity with district coastal management programs approved by the council and the legislature and in effect.

(b) On petition of a coastal resource district, a citizen of the district, or a state agency, showing that a district coastal management program is not being implemented, enforced or complied with, the council shall convene a public hearing to consider the matter. A hearing called under this subsection shall be held in accordance with the Administrative Procedure Act (AS 44.62). After hearing, the council may order that the coastal resource district or state agency take any action which the council considers necessary to implement, enforce or comply with the district coastal management program.

(c) In determining whether an approved district coastal management program is being implemented, enforced or complied with by a coastal resource district which exercises zoning authority or controls on the use of resources within the coastal area, the council shall find in favor of the district if

(1) zoning or other regulations have been adopted and are being enforced;

(2) variances are being granted according to procedures and criteria which are elements of the district coastal management program, or the variance is otherwise approved by the council; and

(3) procedures and standards adopted by the coastal resource district as required by this chapter or by the guidelines and standards adopted by the council and subsequently approved by the legislature have been followed and considered.

(d) In determining whether a state agency is complying with a district coastal management program with respect to its exercise of regulation or control of the resources within the coastal area, the council shall find in favor of the agency if

(1) the use or activity for which the permit, license or approval is granted is consistent with the district coastal management program and regulations adopted under it; and

(2) the use or activity for which the permit, license or approval is granted is consistent with requirements imposed by state statute, regulation, or local ordinance applicable to the use or activity.

(e) The superior courts of the state have jurisdiction to enforce lawful orders of the council. (§ 4 ch 84 SLA 1977)

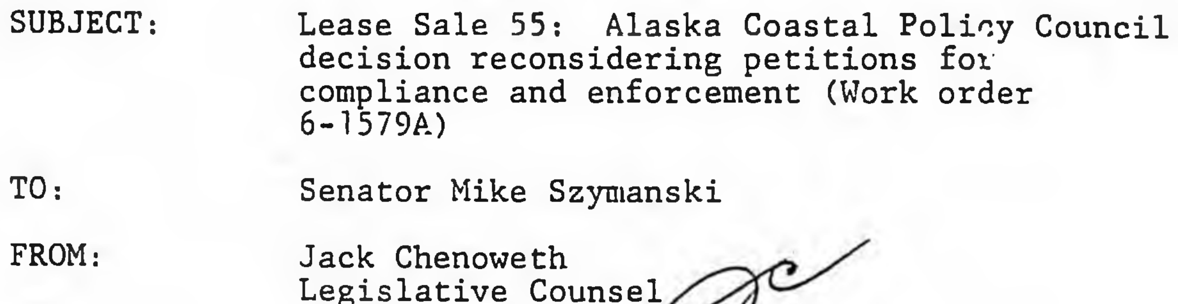
Opinions of attorney general. — As to effective date of coastal management programs, see notes under this heading following AS 46.40.080.

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M August 16, 1989



SUBJECT: Lease Sale 55: Alaska Coastal Policy Council decision reconsidering petitions for compliance and enforcement (Work order 6-1579A)

TO: Senator Mike Szymanski

FROM: Jack Chenoweth
Legislative Counsel

The director has asked me to respond to your request for assistance relative to understanding the legal tangle involving the Alaska Coastal Policy Council and the state's proposed Lease Sale 55.

Let me say at the outset that, in my view, nothing in the review and approval process summarized below is "broken" such that it requires or invites a legislative cure. Part of the problem was apparently generated by conflicting advice offered by the Department of Law; part is attributable to a conscious decision by the Alaska Coastal Policy Council. After reviewing the memo, however, you may disagree with my observation, in which case I would be happy to work with you to prepare a bill in the way of a legislative "fix."

*

Essentially, although this dispute is a procedural matter arising under the Administrative Procedure Act (AS 44.62) and the Alaska Coastal Management Act (AS 46.40), it has substantive undertones. Appreciating the complexity of the various documents and the recent history of the proceeding, let me try to make this explanation as simple as I can --

THE PARTIES:

The issue arises out of a July 20, 1989, petition submitted by legal counsel for four oil companies. The four companies

have an interest in lease tracts offered during Lease Sale 55, otherwise called the Demarcation Point Sale. The lease sale involved state tracts located within the North Slope Borough.

The companies' petition and a related piece of correspondence were addressed to the director of the division of governmental coordination. That division, part of the Office of Management and Budget, is responsible for staff support for the 16-member Alaska Coastal Policy Council, whose membership involves a mix of state officers and local government officials. The companies' petition asks the Council to reconsider an earlier decision.

The other party interested in the outcome is Trustees for Alaska, an interest group representing the City of Kaktovik and certain residents of that community. Kaktovik is, as you know, a village located near the lease sale site.

THE APPLICABLE STATUTE(S):

The mid-70's saw a growing national interest in the conservation and development of the resources of the nation's coastlines, and incentives were offered in federal legislation for states to take a stronger role in oversight of those resources. Alaska has a longer coastline than all other states, and the prospective demands on coastal resources--ranging from subsistence activities through usual commercial activities (ports and harbors; commercial fishing; aquaculture development) to relatively intensive petroleum exploration and development--suggested that Alaska's approach to oversight would have to take cognizance of a very wide range of actual and probable demands on the state's coastal resources.

Thus, when the Alaska Coastal Management Act, AS 46.40, was being drafted in 1976-77, it was clear that the interests of the State of Alaska would not always be consistent with the interests of residents of various municipalities (and of the sparsely populated areas of the unorganized borough). What was needed was a mechanism that accommodated the state administration's interest in management of coastal resources to the growing interest of Alaskans in regions to proceed with resource management through the municipality's traditional exercise of planning and zoning powers under Title 29. Rather than treat Alaska's long coastline as a unit subject to a single set of regulations imposed by the

state, AS 46.40 incorporated a strategy intended to strike a balance between the interests of the state as a whole (with a probable expected emphasis on resource development) and the interests of present and future local governments that also would be concerned with activities involving coastal resources.

One element of the legislation directed that, while local governments--cities and boroughs--could undertake to regulate land use and development through traditional planning and zoning powers, those decisions, insofar as they related to coastal resources, would be required to secure approval of the statewide Alaska Coastal Policy Council. Coastal Policy Council review and approval was required principally to assure that the coastal policy plans of municipalities take the state's interests and concerns into consideration, while the state's initiative to development of those resources would be sensitive to local perceptions and expectations.

Once a municipality's coastal policy plan had been approved by the Coastal Policy Council, state agencies, the adopting municipality, and other parties could act to implement that plan. Parties anticipating activities in the coastal zone would be required to conduct those activities in conformity to the approved coastal management plan. If that plan had been adopted by a municipality (like the North Slope Borough), the plan would be tagged the "approved district plan."

During the course of an approved district plan's implementation phase, AS 46.40.100 is significant. That statute says, in effect, that either "side"--the state or a municipality--can secure a review by the Council to ascertain whether the party responsible was conducting activities in the coastal zone in a way that followed the previously-approved plan. These are identified as "compliance determinations" or "consistency determinations." Under AS 46.40.100(b), third parties could also seek a review and determination of compliance. If implementation was not in compliance with the approved plan, the section cited spells out the nature of the Council's review and the decision that may be rendered, and confers authority on the superior court to enforce a Council determination.

*

One other statute is a factor in the material you submitted. It is a statute that sets time limits on "reconsideration" of an agency decision. Under AS 44.62.540(a), a subsection of the state's Administrative Procedure Act,

> . . . [an] agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied.

In other words, if, after making a decision under the Administrative Procedure Act, an agency receives a reconsideration petition, it then has 30 days to reconsider its earlier decision. If it does nothing within that window period on the reconsideration petition, that petition for reconsideration is deemed denied.

THIS PROCEEDING:

Lease sales in a coastal zone are subject to the Alaska Coastal Management Act (AS 46.40). Insofar as prospective state lease sales would be scheduled for tracts in the coastal zone of the North Slope Borough, the Department of Natural Resources had to assure that its proposed lease sale would be in conformance with the approved district plan of the North Slope Borough.

In this instance, the commissioner of natural resources determined (in late September, 1988) that proposed Lease Sale 55 would be consistent with the district plan of the North Slope Borough. The Lease Sale could go forward on schedule.

At virtually the same time (late September, 1988), Trustees for Alaska sought a "consistency review hearing." That proceeding was for the purpose of having the Alaska Coastal Policy Council determine that, if Lease Sale 55 went forward as scheduled, the North Slope Borough's district plan was not being properly complied with. As the record indicates, two months later, in mid-November, the division of governmental coordination (acting for the Alaska Coastal Policy Council) refused Trustees' petition, citing failure of Trustees under applicable program regulations to make a

necessary showing of evidence of the lease sale's noncompliance with the approved district plan.

In December, 1988, Trustees submitted a petition seeking reconsideration of the director's decision, and presumably submitting additional information of ostensible noncompliance of Lease Sale 55 with the approved district plan. No action was taken by the Alaska Coastal Policy Council until more than six months later (June 28, 1989). Then, at that time, the Coastal Policy Council, in the words of the pertinent legal document,

> . . . took up Trustees' 12/22[/88] Petition for Reconsideration and decided to grant Trustees a hearing for the purpose of determing whether DNR failed to implement, enforce, or comply with the [North Slope Borough's approved coastal management plan] as to [Lease] Sale 55.

However, while the Council ordered a consistency determination hearing, apparently the steps necessary to schedule that hearing were not promptly taken.

One month later (July 20, 1989), the oil companies' counsel prepared and submitted to the Alaska Coastal Policy Council its own "petition for reconsideration." In that petition, companies' counsel questions the June 28, 1989, decision of the Alaska Coastal Policy Council to allow Trustees for Alaska to raise a late challenge to Lease Sale 55. I'll skip a discussion of the reasons cited by the companies; they are detailed in the brief.

The director of the governmental coordination division immediately referred the matter to the attorney general. The attorney general's opinion, issued in late July, concluded that the challenge brought by Trustees for Alaska in December, 1988, and allowed by the Council in June, 1989, should not have been granted. It cites two reasons:

> (1) AS 44.62.540(a), limiting reconsiderations to a 30 day period, "deprived the [Alaska Coastal Policy] Council of jurisdiction to act on [Trustees'] Petition for Reconsideration [of] December 23, 1988 . . . ." Citing cases from California construing similar administrative procedure act provisions, the Attorney General's opinion finds that AS 44.62.540(a) is applicable to Council decisions and operates in this

instance as a jurisdictional bar to agency action after expiration of the applicable time period--in this instance, 30 days. In other words, the director and Council waited too long to respond to Trustees' December, 1988, petition for reconsideration.

(2) Alternatively, the attorney general rejected the notion that Trustees' December, 1988, petition for reconsideration was in effect a new petition, and should still be acted upon. Citing a recent Alaska supreme court decision, Sublett v. Commercial Fisheries Entry Commission, 773 P.2d 952, (Alaska 1989), it concluded that "[the legal p]rinciples of res judicata and collateral estoppel preclude collateral attack could not be made on a final agency decision made in an adjudicatory hearing." In this instance, the opinion said, even if the Council gave Trustees' a belated hearing, "its decision after a hearing would be of no effect."

The attorney general's opinion concluded that the consistency determination hearing that had been ordered by the Alaska Coastal Policy Council in December, 1988, should be abandoned. (This office may review the case principally relied upon, Sublett v. CFEC, in the course of its preparation of the annual oversight report later this interim.)

At the time you submitted this material for review by this office, two unresolved items are presented: (1) the Coastal Policy Council decision to schedule Trustees' consistency determination hearing as had been approved back in December and approved in June, and (2) the decision by the Council as to the oil companies' petition to set that promised hearing aside.

The attorney general's opinion (page 8) urged the Council to vacate its order granting Trustees for Alaska a hearing. It also called attention to the fact that, because the oil companies' counsel's petition was also itself a "petition for reconsideration," AS 44.62.540(a) operated to require some decision by the Council within the next following 30 days.

The Council met by teleconference on July 28, the 30th day deadline.

The concluding paragraph of the attorney general's opinion said, in pertinent part:

> . . . The deadline for action on Lessee's Petition is July 28, 1989. Therefore, if the Council is prepared to reconsider, but not yet prepared to vacate the order setting a hearing, it may prefer to grant the [Lessee's] Petition to Reconsider and suspend the order setting a hearing, pending full consideration at its next meeting on whether to vacate the order setting a hearing. In any event, the Council must act on Lessee's Petition on or before July 28, 1989, or Lessees' Petition will, by operation of AS 44.62.540(a), be deemed conclusively denied.

(Emphasis in original.)

From my perspective, it appears that the Coastal Policy Council has only partially responded to the attorney general's advice.

Apparently to try to avoid getting caught under AS 44.62.540(a) as to the oil companies petition to reconsider, the Council acknowledged that petition, but took no other action on it. The motion before the Coastal Policy Council during the recent teleconference was to

> . . . acknowledge that we [the Coastal Policy Council] did receive the [oil companies'] petition and do nothing [with it].

Transcript of the July 28, 1989, teleconference meeting, at page 25. Much later in the course of the meeting, the maker of the motion clarified:

> Okay, my motion is not to do anything with the [oil companies' reconsideration] petition.
>
> . . .
>
> My motion is just to acknowledge it and not to do anything with it. [Indisc.] My motion was to go ahead with the hearing in Kaktovik.

That motion was adopted by an 8-7 vote. Transcript, pp. 69, 70.

The Council decided during the teleconference that at its next meeting, tentatively scheduled for September 26, the Council would schedule time to reconsider the Trustees for Alaska petition. As recorded in the minutes, this is the motion by Ms. Rutherford, the authorized alternate representing the commissioner of community and regional affairs, a member of the Council:

> I move to reconsider the June 28th decision to hold an adjudicatory hearing to review the substance of the coastal consistency determination for Lease Sale 55, and instead, to hold a public hearing to receive testimony of the Kaktovik people to enable the Council, the [Coastal Policy Council], to develop policy for future permitting decisions.

Transcript, at page 67. Later in the proceedings there appeared this exchange relative to clarification of that motion:

> MS. CAULFIELD: . . . [M]y understanding of Marty [Rutherford's earlier] motion that's now on the table . . . is just this: to move to reconsider the June 28th decision to hold an adjudicatory hearing to review the substance of the consistency determination for Lease Sale 55. I'm going off my notes, not off a court recording here, but that's what I have. Perhaps Marty [Rutherford] could verify that that's her motion . . .
>
> MS. RUTHERFORD: That was my motion.
>
> . . .
>
> MS. CAULFIELD: Excuse me. [Council member] Norm Cohen has asked me the effect of the motion. My understanding is the effect of this motion is just to leave open the option for the [Coastal Policy] Council to reconsider that decision, not to lean in one direction or another on what happens when they do reconsider. All of that reconsideration occurs at the next meeting, and there will be another vote either, you know, affirming the June 28th decision or changing it.
>
> MS. RUTHERFORD: Call the question.

The motion was adopted by a vote of 8-6. Transcript, pp. 89, 90.

My sense is that, rather than set aside the earlier decision, the Council will carry through with its June 28 hearing order. Kurt Frederiksson of the division indicated that the Council would likely schedule a consistency determination in Kaktovik in October.

Thus, the Council appears to be on a course that may well be at odds with the Department of Law's suggested guidance in this matter: recall the portion of the opinion concluding that "even if the Council held a hearing, its decision after a hearing would be of no effect." Opinion, p. 8.

*

Earlier, I said I saw no need for a legislative fix. Let me amplify.

The first of the two statutes in question, AS 44.62.540(a), applicable to reconsiderations of certain administrative decisions, defines a limit on administrative actions. This notion of a limited period for review is fairly standard in most state administrative procedure acts. It is intended to impart finality to agency actions, so that an agency cannot stall and a disgruntled party is not left to wait indefinitely but rather can use the courts as an avenue of review or appeal. Nothing unusual appears to have occurred with reference to this provision.

The second provision, AS 46.40.100, relating to securing oversight, compliance, and enforcement under district coastal management plans that have received approval of the Coastal Policy Council, is an essential element of the political compromise that underpins the Alaska Coastal Management Act. As you can see, in the present dispute, both sides--Trustees for Alaska and counsel for the lessee oil companies--have cited and relied upon the provision in directing the respective petitions to the Council's attention. Although my exposure to the practical application of this statute is extremely limited, as a legal matter the compliance determination and enforcement provisions of this statute seem to be working as intended. Nothing in the facts of this squabble suggests that the provision is in need of modification.

Two other points bear mention:

First, the Alaska Coastal Policy Council seems to have committed itself (in June, 1989) to convening a consistency determination hearing on the Trustees for Alaska petition. In the course of the July 28 teleconference, one member of the Council persuasively argued that the scheduled hearing should proceed as scheduled:

> MR. GOODWIN: . . . [W]hy do we want to reconsider this? We've made a decision to go ahead and have a [consistency determination] hearing. If we reconsider this decision, then in effect we're saying no to Kaktovik. That's why I made the motion that we just acknowledge it and not do nothing to it, which in effect, would deny the petition. And that's what I want. I want to see that happen.

Transcript, page 61. The thread of the proceedings of the Council from that point forward favored, by the narrowest majority, keeping the Coastal Policy Council's commitment to the residents of Kaktovik under the Trustees' petition, irrespective of the Attorney General's advice that any decision based on the belated hearing "would be of no effect." Opinion, p. 8.

Second, in the course of its disposition of the two positions, the Council apparently received inconsistent advice from the Department of Law. Quite early in the course of the recent teleconference, this exchange appears:

> MR. GOODWIN: . . . I would like to ask that Council members consider not doing anything on this thing here. Let it go its way like we handled the first one. We are putting oil companies before the people, and it's not right. We see what happened in Prince William Sound, and I am afraid that if something happens up there [at Demarcation Point] it could be worse, because there is a lot of ice up there and oil won't evaporate when there's cold weather around, and there are a lot of things that can happen. I think the Attorney General's Office didn't do its work right the first time, and now we're faced with them trying to correct themselves. I think we ought to just go ahead and let them defend us

> in court. I think that they have that obligation. Let's not do anything and let it go on its way. And I really want to see that we have our decision to have a hearing in Kaktovik go through. I want to hear from them people up there first. . . .
>
> MR. GROGAN [Alaska Coastal Policy Council Chair Bob Grogan]: . . . [O]n behalf of the State certainly, I definitely appreciate the responsiveness and willingness of the public members all over the State to, on very short notice, come together to deal with this issue. I think all of us have been frustrated by the dramatic change in the Department of Law's position since our last meeting. I think we've all expressed some of that to this point. But I think what we need to do now is try to focus as best we can on what is before us. . . .
>
> MS. KERTTULA [Assistant Attorney General Beth Kerttula, advising the Council during the teleconferenced meeting]: . . . I'd like to apologize right at the beginning for any confusion or difficulty that has arisen because of prior differing advice from the Attorney General's Office. I take to heart Mr. Goodwin's comments and can understand how difficult it is when you first heard one thing and then only have an opinion that says something differently. I can only say that we are all human, and when you deal with something for the first time and you give off-the-cuff advice, it's often difficult to be correct on the matter.

Transcript, pp. 2 - 4, emphasis added. Later in the proceedings, Mr. Goodwin returned to the subject:

> MR. GOODWIN: . . . [I]n the first place, [indisc.] we ought to decide whether or not we want to be defended by the Department of Law. We're give[n] two opinions that are completely apart within one month. And I wouldn't feel comfortable having a lawyer defend me in court over something like that. . . .

Transcript, p. 37, emphasis added. So it appears that a dramatic change in the advice given to the Coastal Policy

Council by the Department of Law has contributed to the confusion and complications that have arisen in conjunction with this matter.

*

I trust this is sufficient for your purposes. If the memorandum or the issue raises questions, please contact me.

JC:mi
wkmi4/066

ALASKA COASTAL CONSISTENCY REVIEW PROCESS
FOR STATE AND FEDERAL PERMITS
OVERVIEW

Coastal projects which require state and/or federal permits, leases, and other approvals are subject to regulations adopted in March 1984, entitled Project Consistency with the Alaska Coastal Management Program (6 AAC 50). The project consistency review regulations direct state resource agencies and the Division of Governmental Coordination (DGC) to review coastal projects according to the procedures and timeframes specified in the regulations. Projects are reviewed to ensure they are consistent with the standards of the Alaska Coastal Management Program (ACMP) and approved district programs.

The consistency review regulations require the state to conduct a review of coastal projects in a manner that is significantly different from the way in which non-coastal projects are reviewed. The regulations enhance the role of coastal communities in state decisionmaking beyond that of individual state agency "public notice" provisions. The following briefly describes these major distinctions:

1. Project Based Review: All state and/or federal permits for a project are processed in a single review of the project. This eliminates duplicative reviews of the same project for different permits.

2. Coordinated Review: When a project requires permits of two or more state agencies or a federal permit, DGC coordinates the project review and renders a conclusive consistency determination on behalf of all the state resource agencies. If permits from only one state agency are required then that state agency coordinates the consistency review. This provides applicants with a single state agency contact to coordinate the project review and, if necessary, resolve any outstanding conflicts.

3. Mandatory Review Deadlines: Specific 30 or 50 day timeframes are established for completing the consistency review and issuing state permits.

4. Due Deference: State resource agencies and affected coastal districts are given the opportunity to comment on a project's consistency with the ACMP. Deference must be given to the comments of coastal districts regarding a project's consistency with the districts approved program. Deference must also be given to the expertise of the state resource agencies relative to their areas of responsibility.

5. <u>Consensus</u>: The conclusive consistency determination reflects a consensus reached by the project applicant, state resource agencies, and affected coastal district. Any one of these parties may elevate a proposed consistency determination to a higher administrative level for further review.

In addition, Table 1 summarizes the number of projects reviewed since January 1984, and the results of those reviews.

<u>Consistency Determination Appeals</u>

There is no provision in the consistency review regulations for appeal of a conclusive consistency determination. However, appeal procedures are available under the individual state agency permit authorities used to enforce the consistency determination.

In 1984, the Department of Environmental Conservation (DEC) questioned its role in adjudicating permit issues directly related to a conclusive consistency determination rendered by the Division of Governmental Coordination (DGC). In response (attachment 1) the Department of Law found that:

> "A conclusive consistency determination rendered by DGC is implemented through the existing permitting and other authorities of state and federal agencies. If a project requires certain stipulations or conditions to ensure its consistency with the ACMP, the project consistency determination will state those stipulations or conditions, and identify the state or federal permit in which each stipulation must be included. 6 AAC 50.120(b). The enforcement of a consistency determination and the implementation of the ACMP depends upon the resource agencies. The Alaska Coastal Management Act (ACMA) does not establish any independent permitting or enforcement authority." Furthermore, "A finding that a project is consistent with the ACMP does not by itself authorize any activity. The individual agency permits or approval authorize activities subject to appropriate stipulations as required by the project consistency determination. In the absence of any provision for appeal from a project consistency determination, we believe that the existing statutory authority for the review of individual resource agency decisions should be construed to allow simultaneous review of the aspects of those resource agency decisions which implement the ACMP. In other words, we believe that your authority to adjudicate decisions made by DEC pursuant to 18 AAC 15.200 -- 18 AAC 15.310, includes authority to adjudicate those stipulations and conditions on DEC permits or approvals which are or may be required by a conclusive project consistency determination."

To date, uniform appeal procedures have not been adopted by the Coastal Policy Council for consistency determinations applicable to state permits. However, appeal procedures do exist for determinations associated with federal permits. Procedures also exist for mediation of disputes between the state and federal agencies regarding consistency of direct federal actions with the ACMP.

As provided under section 307(c)(3), of the federal Coastal Zone Management Act (CZMA), federal permit applicants may appeal state conclusive consistency determinations to the U.S. Secretary of Commerce. To date, only one federal permit applicant has appealed a state consistency determination to the Secretary of Commerce.

Under section 307(h) of the CZMA, the secretary may mediate disagreements between federal agencies and the state regarding the consistency of direct federal actions. To date, there has only been one case where the Secretary was requested to mediate a dispute regarding consistency with the ACMP.

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TABLE 1

Consistency Reviews Summary

January 1, 1984 - August 31, 1989

Total Number of Projects Reviewed:	
Projects found Consistent:	2803
Projects found Inconsistent:	24
Average Number of Days in Review	
Reviews concluded at Regional Level (2796):	39
Reviews Elevated to Directors or Commissioners for Decision (31):	56

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MEMORANDUM State of Alaska

TO: Honorable Richard Nevé
Commissioner
Dept. of Environmental Conservation

DATE: August 16, 1984

FILE NO: 366-072-85

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch
Attorney General

By: Laura L. Davis
Assistant Attorney General
Department of Law / Juneau

SUBJECT: Review of Auk Nu Cove project consistency determination

This responds to your notice dated August 1, 1984, raising questions regarding the adjudicatory hearing you have granted regarding this project. You state that the requestor raises matters for adjudication which are beyond your department's jurisdiction. Without identifying those matters in particular, you make reference to the project consistency review process under 6 AAC 50. You also inquire regarding the effect of a recent superior court ruling related to your authority to implement the Alaska Coastal Management Program (ACMP). City of Angoon, et al. v. Alaska Department of Environmental Conservation, et al., 1JU-82-1919 Civil (Super. Ct., First Jud. Dist., Feb. 10, 1983). Second you ask how a stay of your department's decision would affect the project as a whole.

This memorandum responds to your questions related to your authority to implement the ACMP. Tom Jahnke, who will represent your regional office in this adjudicatory proceeding, will respond to questions regarding the issues for an adjudicatory hearing, including the effect of a stay if granted.

All state agencies are required to administer their responsibilities in conformance with the ACMP. AS 46.40.200. In order to ensure agreement among state agencies on the application of the ACMP standards to any project which requires approval of more than one agency, and to avoid unnecessary duplication of agency effort in applying those standards, the Office of Management and Budget (OMB) is statutorily designated to "render, on behalf of the state, all federal consistency determinations and certifications authorized by sec. 307 of the Coastal Zone Management Act of 1972, as amended, 16 U.S.C. sec. 1456, and a conclusive state consistency determination when a project requires two or more state or federal permits, leases, or authorizations." AS 44.19.145(a)(11). This language was added to the enabling legislation for OMB effective July 15, 1983. Sec. 20, ch. 63, SLA 1983. Regulations implementing this authority through the division of governmental coordir 'on (DGC) of OMB were effective March 11, 1984. See 6 AAC 50. ose regulations provide for an

02-001A(Rev 10/79)

interagency review process to be coordinated by DGC for a multiple permit project, or by a resource agency for a project requiring approval only by that agency.

A conclusive consistency determination rendered by DGC is implemented through the existing permitting and other authorities of state and federal agencies. If a project requires certain stipulations or conditions to ensure its consistency with the ACMP, the project consistency determination will state those stipulations or conditions, and identify the state or federal permit in which each stipulation must be included. 6 AAC 50.-120(b). The enforcement of a consistency determination and the implementation of the ACMP depends upon the resource agencies. The Alaska Coastal Management Act (ACMA) does not establish any independent permitting or enforcement authority. */

This interagency review procedure established under 6 AAC 50 reflects the legislative policy which accompanied adoption of the Alaska Coastal Management Act. Specifically, the legislative declared that it is the policy of the state to:

> (1) preserve, protect, develop, use, and where necessary, restore or enhance the coastal resources of the state for this and succeeding generations;
>
> (2) encourage coordinated planning and decision making in the coastal area among levels of government and citizens engaging in or affected by activities involving the coastal resources of the state;
>
> (3) develop a management program which sets out policies, objectives, standards and procedures to guide and resolve conflicts among public and private activities involving the use of resources which have a direct and significant impact upon

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*/ The ACMA does authorize the Coastal Policy Council to hear petitions showing that a district coastal management program is not being properly implemented. AS 46.40.100(b). A petition may be filed under this section by a coastal resource district, a citizen of the district, or a state agency. The district program for the City and Borough of Juneau, which includes Auk Nu Cove, has not yet been adopted by the Coastal Policy Council.

the coastal land and water of the state;

(4) assure the participation of the public, local governments, and agencies of the state and federal government in the development and implementation of a coastal management program;

(5) utilize existing governmental structures and authorities, to the maximum extent feasible, to achieve the policies set out in this section; and

(6) authorize and require state agencies to carry out their planning duties, powers and responsibilities and take actions authorized by law with respect to programs affecting the use of the resources of the coastal area in accordance with the policies set out in this section and the guidelines and standards adopted by the Alaska Coastal Policy Council under AS 46.35.

Sec. 2, ch. 84, SLA 1977 (emphasis added). In particular, the project consistency review process encourages coordinated decision making in the coastal area among state agencies and utilizes existing governmental structures and authorities to the maximum extent feasible to implement the ACMP.

The project consistency review process does not encroach on the independent statutory authority of the individual resource agencies. Each agency retains sole discretion regarding the issuance of applicable permits or other approvals in accordance with its own statutes and regulations. 6 AAC 50.130. In addition, each agency must include in any permit or other approval those conditions specified by the project consistency determination which are necessary to ensure compliance with the ACMP in the particular activity authorized by that permit or approval. 6 AAC 50.120(b). These stipulations are generated not by DGC but the resource agencies, coastal districts, and other commenters in the review process. 6 AAC 50.070(h); 6 AAC 50.-120(a).

The superior court decision which you referenced was decided before the implementation of this coordinated project consistency review process. City of Angoon v. State, supra. That decision does not offer much guidance regarding the review of consistency determinations made under 6 AAC 50. There is no provision in 6 AAC 50 or in the Alaska Coastal Management Act, authorizing appeal from a project consistency determination,

although the Coastal Policy Council, as noted, has the authority to hear petitions alleging that an approved district program is not being properly implemented. AS 46.40.100.

A project consistency determination reflects the agency consensus regarding final actions to be taken by the individual agencies to ensure that their permit decisions are consistent with the ACMP. 6 AAC 50.070. A finding that a project is inconsistent with the ACMP may be appealed by the applicant to the federal Department of Commerce under 16 U.S.C. § 1456(c)(3)(A) if the project requires a federal agency permit. A finding that a project is consistent with the ACMP does not by itself authorize any activity. The individual agency permits or approvals authorize activities subject to appropriate stipulations as required by the project consistency determination. In the absence of any provision for appeal from a project consistency determination, we believe that the existing statutory authority for the review of individual resource agency decisions should be construed to allow simultaneous review of the aspects of those resource agency decisions which implement the ACMP. In other words, we believe that your authority to adjudicate decisions made by DEC pursuant to 18 AAC 15.200 -- 18 AAC 15.310, includes authority to adjudicate those stipulations and conditions on DEC permits or approvals which are or may be required by a conclusive project consistency determination. Issues relating to activities authorized by another agency or relating to the ACMP generally may be addressed by appealing the agency permit or other the project consistency determination as provided in the Alaska Rules of Appellate Procedure.

We realize that a single project consistency determination may be potentially challenged in more than one administrative forum if the project requires more than one permit. There is at present no provision for the consolidated adjudicatory or appellate review of the permit decisions and consistency determination required for a single project. However, if a full and fair opportunity for review is provided in a single administrative forum, it may be argued that subsequent challenges are barred by principles of administrative economy, election of remedies, and res judicata.

The consistency determination for the Auk Nu Cove project (Auke Bay 108), included ten stipulations to be attached to your certificate of reasonable assurance. All of those stipulations implement the habitat and air, land, and water quality standards of the ACMP. The Auk Nu Cove project does not require a permit from the Alaska Department of Fish and Game. State authority over dredging and filling required for the

driveway, parking lot and the location of the sewer outfall line is exercised through your department's certificate of reasonable assurance under section 401 of the Clean Water Act, 33 U.S.C. § 1341, which pertains to the permit to be issued by the U.S. Army Corps of Engineers under section 404 of the Clean Water Act, 33 U.S.C. § 1344 In this situation, the ACMP habitat standards are appropriate applied through your 401 certificate to the activities authorized by the 404 permit. We believe that you are authorized to adjudicate this aspect of your authority in accordance with the procedure set out in 18 AAC 15.200 -- 18 AAC 15.310.

However, you do not have authority to adjudicate questions related to the application of ACMP standards to activities which are not authorized or certified by your agency (e.g. activities authorized by local building or planning and zoning codes, or authorized by another state agency or federal agency not subject to your certification requirement). Such issues may be reviewed pursuant to appeal procedures applicable to the appropriate local, state or federal agency.

DGC has convened a working group among the resource agencies to consider revisions to the project consistency review regulations. 6 AAC 50. Any recommendations regarding the need for a separate appeal procedure for project consistency determination should be referred to DGC. In the meantime, if issues arise in the context of this or another adjudicatory hearing which require the application of ACMP standards to activities not authorized or regulated by DEC, you may inform interested parties that they may pursue an appeal from the agency which permits those activities, or from DGC project consistency determination in the superior court as provided in the Alaska Rules of Appellate Procedure.

Should you have any further questions regarding this matter, please do not hesitate to contact me.

LLD:djc

cc: Robert Grogan
Dorothy Douglas
Wendy Wolfe
OMB/DGC

Thomas Jahnke
Dept. of Law

6-2236E
Bradley
4/7/90

Original sponsor(s): Resources Committee

1 IN THE SENATE BY THE C&RA COMMITTEE

2 CS FOR SENATE BILL NO. 500 (C&RA)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the Alaska Coastal Policy Coun-
7 cil."

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

9 * Section 1. AS 46.40.100(b) is repealed and reenacted to read:

10 (b) On petition of an applicant for a project, a coastal re-
11 source district, or a state agency, stating that a district coastal
12 management program is not being implemented by a state agency during a
13 state consistency review process for a particular project, the council
14 may convene a public hearing held to consider the matter. The peti-
15 tion may be filed only within the five days following the notice to
16 the petitioner of the decision by the resource agency commissioners
17 following a project consistency review that has been reevaluated at
18 higher levels within the departments. At a hearing held under this
19 subsection, the council shall determine if the state agency has fol-
20 lowed the project consistency review procedures and has properly
21 considered enforceable policies and standards during the project
22 consistency review and if the use or activity for which the permit,
23 license, or approval is granted is consistent with the district
24 coastal management program and the regulations adopted under it.
25 After the council has reviewed the petition and held the hearing, the
26 council may

27 (1) dismiss the petition for failure to prove that the
28 agency was acting improperly;

29 (2) make an appropriate recommendation to the state agency;

1 and

2 (3) revise the Alaska Coastal Management Program under
3 AS 46.40.010(c).

4 * Sec. 2. AS 46.40.100(c) is repealed and reenacted to read:

5 (c) On the petition of a resident of the district, a coastal
6 resource district, or a state agency stating that an approved district
7 coastal management program is not being properly implemented by a
8 coastal resource district or state agency in its general implementa-
9 tion of law and regulations within the coastal area, the council may
10 convene a public meeting to consider the matter. A petition may be
11 filed at any time and shall demonstrate that the petitioner sought to
12 resolve the matter with the coastal resource district or the state
13 agency before filing the petition and is willing to participate in
14 efforts by the council to resolve the matter informally before a
15 hearing is held by the council. If the council holds the public
16 hearing, it shall determine if

17 (1) a coastal resource district has

18 (A) properly adopted and enforced zoning or other
19 regulations;

20 (B) properly considered enforceable policies and
21 standards of its coastal management program approved by the
22 council during local implementation of variances or local consis-
23 tency reviews; and

24 (C) followed the procedures approved by the council
25 for implementation of the district's coastal management program;
26 and

27 (2) a state agency has

28 (A) generally followed procedures approved by the
29 council for state agency implementation;

(B) properly considered enforceable policies and standards of a coastal management program approved by the council during project consistency reviews; and

(C) satisfactorily performed coastal management responsibilities required by law, regulations, or a reimbursible agreement.

* Sec. 3. AS 46.40.100(d) is repealed and reenacted to read:

(d) After a hearing held under (c) of this section, the council may

(1) dismiss the petition for a failure to prove that the coastal resource district or the state agency was acting improperly;

(2) direct the coastal resource district or the state agency to take action the council considers appropriate; and

(3) revise the Alaska Coastal Management Program under AS 46.40.0[illegible] (c).

* Sec. [illegible] 46.40.100(e) is amended to read:

(e) Notwithstanding the powers conferred on the council under (b) - (d) of this section, the council may not review a case under (b) of this section if action by a state agency has been challenged as inconsistent with the Alaska Coastal Management Program. The superior courts of the state have exclusive appellate jurisdiction over that action [TO ENFORCE LAWFUL ORDERS OF THE COUNCIL].

* Sec. 5. AS 46.40.100 is amended by adding a new subsection to read:

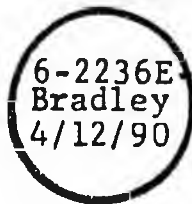
(f) In this section, the "resource agency commissioners" are

(1) the commissioner of natural resources;

(2) the commissioner of fish and game; and

(3) the commissioner of environmental conservation.

Proposed changes from 4/12 meeting attended by G. Keiser, K. Fredriksson, C. Wilson and F. Neville.



Original sponsor(s): Resources Committee

IN THE SENATE BY THE C&RA COMMITTEE

CS FOR SENATE BILL NO. 500 (C&RA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the Alaska coastal management program."

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

* Section 1. AS 46.40.100(b) is repealed and reenacted to read:

(b) On petition of an applicant for a project, an coastal resource district, or a state resource agency, stating that a district coastal management program is not being implemented by a state coordinating agency during a state consistency review for a particular project as required by regulations, the council may convene a public hearing held to consider the matter. The petition may be filed only within the five days following delivery of the notice to the petitioner of a proposed decision by the resource agency commissioners following a project consistency review. A hearing must be held within 30 days after the filing of the petition. The council may allow a 15-day extension to more fully consider the matter and render a decision. At a hearing held under this subsection, the council shall determine if the state coordinating agency has followed the project consistency review procedures and has properly considered enforceable policies and standards during the project consistency review and if the use or activity for which the permit, license, or approval is granted is consistent with the district coastal management program and the regulations adopted under it. After the council has reviewed the petition and held the hearing, the council may

(1) dismiss the petition for failure to prove that the

1 state coordinating agency was acting improperly;

2 (2) make an appropriate recommendation to the resource
3 agency commissioners before the coordinating agency renders a consis-
4 tency determination; and

5 (3) revise the Alaska Coastal Management Program under
6 AS 46.40.010(c).

7 * Sec. 2. AS 46.40.100(c) is repealed and reenacted to read:

8 (c) On the petition of a resident of the district, an affected coastal
9 resource district, or a state agency stating that an approved district
10 coastal management program is not being properly implemented by a
11 coastal resource district or state agency in its general implementa-
12 tion of law and regulations of the Alaska coastal management program,
13 the council may convene a public meeting to consider the matter. A
14 petition may be filed at any time and shall demonstrate that the
15 petitioner sought to resolve the matter with the coastal resource
16 district or the state agency before filing the petition and is willing
17 to participate in efforts by the council to resolve the matter in-
18 formally before a [hearing] public meeting is held by the council. If the council
19 holds the public [hearing] meeting, it shall [determine if] make a written finding of whether

20 (1) a coastal resource district has

21 (A) properly adopted and enforced zoning or other
22 regulations;

23 (B) properly considered enforceable policies and
24 standards of its coastal management program approved by the
25 council during local implementation of variances or local consis-
26 tency reviews; and

27 (C) followed the procedures approved by the council
28 for implementation of the district's coastal management program;
29 and

1 (2) a state agency has
2 (A) generally followed procedures approved by the
3 council for state agency implementation;
4 (B) properly considered enforceable policies and
5 standards of a coastal management program approved by the council
6 during project consistency reviews; and
7 (C) satisfactorily performed coastal management re-
8 sponsibilities required by law, regulations, or a reimbursable
9 agreement.
10 * Sec. 3. AS 46.40.100(d) is repealed and reenacted to read:
11 (d) After a hearing held under (c) of this section, the council
12 may take one or more of the following actions
13 (1) dismiss the petition for a failure to prove that the
14 coastal resource district or the state agency was acting improperly;
15 (2) direct the coastal resource district [or the state
16 agency] to
17 (A) adopt an ordinance or procedure that the district
18 had described [recommended] at the time of district program approval;
19 (B) adhere to existing program procedures;
20 (C) improve internal Alaska coastal management program
21 procedures and offer regular staff Alaska coastal management
22 program training;
23 (D) prepare amendments to a district program; and
24 (E) develop written guidance for the interpretation of
25 the Alaska coastal management program standards or district
26 policies; [and]

(3) direct the state agency to

(A) adhere to existing program procedures;

(B) improve internal Alaska coastal management program procedures and offer regular staff Alaska coastal management program training; and

(C) develop written guidance for the interpretation of the Alaska coastal management program standards or district policies; and

27 4 [(3)] revise the Alaska coastal management program under
28 AS 46.40.010(c).
29 * Sec. 4. AS 46.40.100(e) is amended to read:

1 (e) Notwithstanding the powers conferred on the council under
2 (b) - (d) of this section, the council may not review a case under (b)
3 of this section if action by a state agency has been challenged in
4 court as inconsistent with the Alaska coastal management program. The
5 superior courts of the state have exclusive appellate jurisdiction
6 over that action [TO ENFORCE LAWFUL ORDERS OF THE COUNCIL].
7 * Sec. 5. AS 46.40.100 is amended by adding a new subsection to read:
8 (f) In this section,

(1) "affected coastal resource district" means a coastal district as defined in AS 46.40.210(2) in which a project is proposed to be located, or which may experience a direct and significant impact from a proposed project or the implementation of a district coastal management program;

9 (2) "coordinating agency" means the agency responsible for
10 coordination and facilitation of the review and the rendering of the
11 consistency determination [decision];
12 (3) the "resource agency commissioners" are
13 (A) the commissioner of natural resources;
14 (B) the commissioner of fish and game; and
15 (C) the commissioner of environmental conservation.
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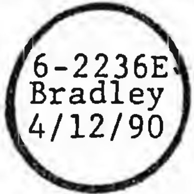

Original sponsor(s): Resources Committee

1 IN THE SENATE BY THE C&RA COMMITTEE

2 CS FOR SENATE BILL NO. 500 (C&RA)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the Alaska coastal management
7 program."

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

9 * Section 1. AS 46.40.100(b) is repealed and reenacted to read:

10 (b) On petition of an applicant for a project, a coastal re-
11 source district, or a state resource agency, stating that a district
12 coastal management program is not being implemented by a state coor-
13 dinating agency during a state consistency review for a particular
14 project as required by regulations, the council may convene a public
15 hearing held to consider the matter. The petition may be filed only
16 within the five days following delivery of the notice to the peti-
17 tioner of a proposed decision by the resource agency commissioners
18 following a project consistency review. A hearing must be held within
19 30 days after the filing of the petition. The council may allow a
20 15-day extension to more fully consider the matter and render a deci-
21 sion. At a hearing held under this subsection, the council shall
22 determine if the state coordinating agency has followed the project
23 consistency review procedures and has properly considered enforceable
24 policies and standards during the project consistency review and if
25 the use or activity for which the permit, license, or approval is
26 granted is consistent with the district coastal management program and
27 the regulations adopted under it. After the council has reviewed the
28 petition and held the hearing, the council may

29 (1) dismiss the petition for failure to prove that the

1 state coordinating agency was acting improperly;
2 (2) make an appropriate recommendation to the resource
3 agency commissioners before the coordinating agency renders a consis-
4 tency determination; and
5 (3) revise the Alaska Coastal Management Program under
6 AS 46.40.010(c).
7 * Sec. 2. AS 46.40.100(c) is repealed and reenacted to read:
8 (c) On the petition of a resident of the district, a coastal
9 resource district, or a state agency stating that an approved district
10 coastal management program is not being properly implemented by a
11 coastal resource district or state agency in its general implementa-
12 tion of law and regulations of the Alaska coastal management program,
13 the council may convene a public meeting to consider the matter. A
14 petition may be filed at any time and shall demonstrate that the
15 petitioner sought to resolve the matter with the coastal resource
16 district or the state agency before filing the petition and is willing
17 to participate in efforts by the council to resolve the matter in-
18 formally before a hearing is held by the council. If the council
19 holds the public hearing, it shall determine if
20 (1) a coastal resource district has
21 (A) properly adopted and enforced zoning or other
22 regulations;
23 (B) properly considered enforceable policies and
24 standards of its coastal management program approved by the
25 council during local implementation of variances or local consis-
26 tency reviews; and
27 (C) followed the procedures approved by the council
28 for implementation of the district's coastal management program;
29 and

1 (2) a state agency has
2 (A) generally followed procedures approved by the
3 council for state agency implementation;
4 (B) properly considered enforceable policies and
5 standards of a coastal management program approved by the council
6 during project consistency reviews; and
7 (C) satisfactorily performed coastal management re-
8 sponsibilities required by law, regulations, or a reimbursable
9 agreement.
10 * Sec. 3. AS 46.40.100(d) is repealed and reenacted to read:
11 (d) After a hearing held under (c) of this section, the council
12 may
13 (1) dismiss the petition for a failure to prove that the
14 coastal resource district or the state agency was acting improperly;
15 (2) direct the coastal resource district or the state
16 agency to
17 (A) adopt an ordinance or procedure that the district
18 had recommended at the time of district program approval;
19 (B) adhere to existing program procedures;
20 (C) improve internal Alaska coastal management program
21 procedures and offer regular staff Alaska coastal management
22 program training;
23 (D) prepare amendments to a district program; and
24 (E) develop written guidance for the interpretation of
25 the Alaska coastal management program standards or district
26 policies; and
27 (3) revise the Alaska coastal management program under
28 AS 46.40.010(c).
29 * Sec. 4. AS 46.40.100(e) is amended to read:

1 (e) Notwithstanding the powers conferred on the council under
2 (b) - (d) of this section, the council may not review a case under (b)
3 of this section if action by a state agency has been challenged in
4 court as inconsistent with the Alaska coastal management program. The
5 superior courts of the state have exclusive appellate jurisdiction
6 over that action [TO ENFORCE LAWFUL ORDERS OF THE COUNCIL].
7 * Sec. 5. AS 46.40.100 is amended by adding a new subsection to read:
8 (f) In this section,
9 (1) "coordinating agency" means the agency responsible for
10 coordination and facilitation of the review and the rendering of the
11 decision;
12 (2) the "resource agency commissioners" are
13 (A) the commissioner of natural resources;
14 (B) the commissioner of fish and game; and
15 (C) the commissioner of environmental conservation.
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6-2415A
Cook
4/6/90

BY THE C&RA COMMITTEE

IN THE SENATE

SENATE CONCURRENT RESOLUTION NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

Suspending Uniform Rules 41(b), 24(c), and 35 of the Alaska State Legislature concerning SSHB 159.

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

That under Rule 54 of the Uniform Rules of the Alaska State Legislature the provisions of Rule 41(b), Rule 24(c), and Rule 35 of the Uniform Rules, regarding changes to the title of a bill, are suspended in consideration of Sponsor Substitute for House Bill No. 159, relating to an exemption from municipal property taxation for natural resources in place.

6-2236E
Bradley
4/22/90

Original sponsor(s): Resources Committee

IN THE SENATE BY THE C&RA COMMITTEE

CS FOR SENATE BILL NO. 500 (C&RA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the Alaska coastal management program."

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

* Section 1. AS 46.40.080 is amended to read:

Sec. 46.40.080. EFFECTIVE DATE OF ALASKA COASTAL MANAGEMENT PROGRAM. The Alaska coastal management program adopted by the council, and any additions, revisions, or amendments of the program, take effect upon adoption of an Act [A CONCURRENT RESOLUTION BY A MAJORITY OF THE MEMBERS OF EACH HOUSE] of the legislature [OR BY A VOTE OF THE MAJORITY OF THE MEMBERS OF EACH HOUSE AT THE TIME THE HOUSES ARE CONVENED IN JOINT SESSION TO CONFIRM EXECUTIVE APPOINTMENTS SUBMITTED BY THE GOVERNOR].

* Sec. 2. AS 46.40.100(b) is repealed and reenacted to read:

(b) On petition of an applicant for a project or an affected coastal resource district, stating that a district coastal management program is not being implemented by a state coordinating agency during a state consistency review for a particular project, the council may convene a public meeting held to consider the matter. The petition may be filed only within the five days following receipt of a proposed determination by the commissioners of the state resource agencies during a project consistency review. A public meeting must be held within 30 days after the filing of the petition. The council shall fully consider the matter and render a decision within 15 days of the public meeting. At a meeting held under this subsection, the council

Existing language uncon-
stitutional under ALIV
decision – can't change
laws with resolutions,
must be changed by
an Act.

Any proposed changes
to the ACMP must be
ratified by the legislature

Hogan – status quo

1 shall make a written finding on whether the state coordinating agency
2 has followed the project consistency review procedures, has properly
3 considered enforceable policies and standards during the project
4 consistency review, or if the use or activity authorized by the per-
5 mit, license, or approval is consistent with the district coastal
6 management program and the regulations adopted under it. After a
7 meeting held under this subsection, the council may
8 (1) dismiss the petition for failure to prove that the
9 state coordinating agency was acting improperly;
10 (2) direct the resource agency commissioners or the state
11 coordinating agency to correct the deficiencies identified in the
12 written findings; or
13 (3) revise the Alaska coastal management program under
14 AS 46.40.010(c).
15 * Sec. 3. AS 46.40.100(c) is repealed and reenacted to read:
16 (c) On the petition of a resident of the district, an affected
17 coastal resource district, or a state agency stating that an approved
18 district coastal management program is not being properly implemented
19 by a coastal resource district or state agency in its general imple-
20 mentation of law and regulations of the Alaska coastal management
21 program, the council may convene a public meeting to consider the
22 matter. A petition may be filed at any time and shall demonstrate
23 that the petitioner sought to resolve the matter with the coastal
24 resource district or the state agency before filing the petition. If
25 the council holds the public meeting, it shall make a written finding
26 on whether
27 (1) a coastal resource district or a state agency has
28 (A) properly considered enforceable policies and
29 standards of its coastal management program approved by the

still vague

1 council; and

2 (B) followed the procedures approved by the council
3 for implementation of the coastal management program of the
4 district or of the state agency; and

5 (2) a state agency has satisfactorily performed coastal
6 management responsibilities required by law, regulations, or a reim-
7 bursable services agreement.

8 * Sec. 4. AS 46.40.100(d) is repealed and reenacted to read:

9 (d) After a meeting held under (c) of this section, the council
10 may

11 (1) dismiss the petition for a failure to prove that the
12 coastal resource district was acting improperly;

13 (2) direct the coastal resource district or the state
14 agency to correct the deficiencies identified in the written finding
15 prepared under (c) of this section; and

16 (3) revise the Alaska coastal management program under
17 AS 46.40.010(c).

18 * Sec. 5. AS 46.40.100(e) is amended to read:

19 (e) <u>Notwithstanding the powers conferred on the council under
20 (b) - (d) of this section, the council may not review a case under (b)
21 of this section if action by a state agency has been challenged in
22 court as inconsistent with the Alaska coastal management program.</u> The
23 superior courts of the state have <u>exclusive appellate</u> jurisdiction
24 <u>over that action</u> [TO ENFORCE LAWFUL ORDERS OF THE COUNCIL].

25 * Sec. 6. AS 46.40.100 is amended by adding a new subsection to read:

26 (f) In this section,

27 (1) "affected coastal resource district" means a coastal
28 district in which a project is proposed to be located, or that may
29 experience a direct and significant effect from a proposed project or

1 the implementation of a district coastal management program;

2 (2) "coordinating agency" means the agency responsible for
3 coordination and facilitation of the review and the rendering of the
4 consistency determination;

5 (3) the "resource agency commissioners" are

6 (A) the commissioner of natural resources;

7 (B) the commissioner of fish and game; and

8 (C) the commissioner of environmental conservation.

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6-2236E
Bradley
4/17/90

Original sponsor(s): Resources Committee

IN THE SENATE BY THE C&RA COMMITTEE

CS FOR SENATE BILL NO. 500 (C&RA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the Alaska coastal management program."

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

* Section 1. AS 46.40.100(b) is repealed and reenacted to read:

(b) On petition of an applicant for a project or an affected coastal resource district, stating that a district coastal management program is not being implemented by a state coordinating agency during a state consistency review for a particular project, the council may convene a public meeting held to consider the matter. The petition may be filed only within the five days following receipt of a proposed determination by the [directors] of the state resource agencies during a project consistency review. A public meeting must be held within 30 days after the filing of the petition. The council shall fully consider the matter and render a decision within 15 days of the public meeting. At a meeting held under this subsection, the council shall [consider] whether the state coordinating agency has followed the project consistency review procedures [and has properly considered enforceable policies and standards during the project consistency review [and] if the use or activity authorized by the permit, license, or approval is consistent with the district coastal management program and the regulations adopted under it. After [the council has reviewed the petition and held the hearing,] the council may

(1) dismiss the petition for failure to prove that the state coordinating agency was acting improperly;

Give council power to direct consistency, not veto power

1 (2) direct the state resource agency ~~to~~ commissioners to correct the deficiencies identified in the written findings

2 [(A) adhere to existing program procedures;

3 (B) improve internal Alaska coastal management program

4 procedures and offer regular staff Alaska coastal management

5 program training; and

6 (C) develop written guidance for the interpretation of

7 the Alaska coastal management program standards or district

8 policies]; [and] or

9 (3) revise the Alaska coastal management program under

10 AS 46.40.010(c).

11 * Sec. 2. AS 46.40.100(c) is repealed and reenacted to read:

12 (c) On the petition of a resident of the district, an affected

13 coastal resource district, or a state agency stating that an approved

14 district coastal management program is not being properly implemented

15 by a coastal resource district or state agency in its general imple-

16 mentation of law and regulations of the Alaska coastal management

17 program, the council may convene a public meeting to consider the

18 matter. A petition may be filed at any time and shall demonstrate

19 that the petitioner sought to resolve the matter with the coastal

20 resource district or the state agency before filing the petition. [and

21 is willing to participate in efforts by the council to resolve the

22 matter informally before a public meeting is held by the council.] If

23 the council holds the public meeting, it shall make a written finding

24 on whether .

25 (1) a coastal resource district ~~that has adopted or exercised~~ or a state agency has

26 [(A) properly adopted and enforced zoning or other

27 regulations;]

28 (B) properly considered enforceable policies and in its administration of this program

29 standards of its coastal management program approved by the

1 council [during local implementation of variances or local consis-
2 tency reviews; and]
3 (C) followed the procedures approved by the council
4 for implementation of the district's coastal management program;
5 and
6 (2) a state agency has
7 [(A) generally followed procedures approved by the
8 council for state agency implementation;
9 (B) properly considered enforceable policies and
10 standards of a coastal management program approved by the council
11 during project consistency reviews; and]
12 (C) satisfactorily performed coastal management re-
13 sponsibilities required by law, regulations, or a reimbursable
14 services agreement.
15 * Sec. 3. AS 46.40.100(d) is repealed and reenacted to read:
16 (d) After a hearing held under (c) of this section, the council
17 may
18 (1) dismiss the petition for a failure to prove that the
19 coastal resource district was acting improperly;
20 (2) direct the coastal resource district or the state
21 agency to correct the deficiencies identified in the written findings under (c) of this section.
22 [(A) adopt an ordinance or procedure that the district
23 had described at the time of district program approval;
24 (B) adhere to existing program procedures;
25 (C) improve internal Alaska coastal management program
26 procedures and offer regular staff Alaska coastal management
27 program training;
28 (D) prepare amendments to a district program; and
29 (E) develop written guidance for the interpretation of

the Alaska coastal management program standards or district policies;

(3) direct the state agency to

(A) adhere to existing program procedures;

(B) improve internal Alaska coastal management program procedures and offer regular staff Alaska coastal management program training; and

(C) develop written guidance for the interpretation of the Alaska coastal management program standards or district policies; and

(4) revise the Alaska coastal management program under AS 46.40.010(c).

* Sec. 4. AS 46.40.100(e) is amended to read:

(e) Notwithstanding the powers conferred on the council under (b) - (d) of this section, the council may not review a case under (b) of this section if action by a state agency has been challenged in court as inconsistent with the Alaska coastal management program. The superior courts of the state have exclusive appellate jurisdiction over that action [TO ENFORCE LAWFUL ORDERS OF THE COUNCIL].

* Sec. 5. AS 46.40.100 is amended by adding a new subsection to read:

(f) In this section,

(1) "affected coastal resource district" means a coastal district in which a project is proposed to be located, or that may experience a direct and significant effect from a proposed project or the implementation of a district coastal management program;

(2) "coordinating agency" means the agency responsible for coordination and facilitation of the review and the rendering of the consistency determination;

(3) the "resource agency commissioners" are

1 (A) the commissioner of natural resources;
2 (B) the commissioner of fish and game; and
3 (C) the commissioner of environmental conservation.
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