SB

361

FAX TRANSMITTAL

STATE OF ALASKA
OFFICE OF THE GOVERNOR

TONY KNOWLES
GOVERNOR

FRAN ULMER
LIEUTENANT GOVERNOR

DIVISION OF GOVERNMENTAL
COORDINATION
PO BOX 110030
JUNEAU, AK 99811-0030

Telephone: (907) 465-3562
Fax: (907) 465-3075

Date: April 23, 2002
Pages: 9 + cover

From: Sylvia Watson for Pat Galvin
Pat Galvin Ph:: (907) 465-8800

To: Joe Balash Fax No.: 465-3884

Alaska Oil and Gas Association

AOGA

121 West Firewood Lane, Suite 207
Anchorage, Alaska 99503-2035
Phone: (907) 272-1481 Fax: (907) 279-8114

February 19, 1998

Ms. Diane Mayer, Director
Division of Government Coordination
P. O. Box 110030
Juneau, Alaska 99811-0030

Dear Ms. Mayer:

The Alaska Oil and Gas Association greatly appreciates your willingness to meet with us over the past months to discuss permit streamlining issues. We were also pleased to be invited to participate in the Permit Streamlining Workshop last September. The Workshop was valuable in identifying current problems and issues related to implementation of the Alaska Coastal Management Program and State permitting processes.

AOGA supports the concept of permit streamlining, however, as you already are aware, AOGA's basic position on SB 186 is that we cannot support the bill as currently drafted. Our principal concern is the integration and overlap of the ACMP consistency process in the proposed streamlining permitting process.

At the same time, SB 186 has put some innovative concepts "on the table" and we are willing to commit the time necessary to work with the administration and the legislature toward the goal of giving Alaska a model permitting system. When Mike Abbott, of the Governor's Office, first briefed AOGA on SB 186, he indicated the administration was willing to work with the legislature, and specifically Representative Therriault, on a melding of concepts in SB 186 and CSHB 28.

We recommend that ACMP provisions be separated from SB 186 and the role and jurisdiction of the AMCP be subject to separate analysis, perhaps through CSHB 28. SB 186 could then become the vehicle to draft legislation that is focused on developing a project management structure and integrated process for State agency permitting.

Hopefully we can come to agreement on some issues for resolution this session and identify others for work sessions this summer.

The idea of putting together a model permitting system in Alaska is an intriguing one and seemed to have a strong undercurrent of interest at the Permit Streamlining Workshop. There was also general agreement that policy decisions (i.e. at the legislative and administrative level) need to be made about the role and authority of the ACMP, local, and state governments in permitting processes.

The current complexity and overlap of various permitting processes, the differing information requirements, uncertainty in permitting schedules and the potential for substantial delays due to jurisdictional and other issues clearly demand that state government and the regulated community find a different way of doing business. This requires an analysis of what is working and what needs to be fixed as a starting point for development of permit streamlining legislation.

As a result of the introduction of SB 186 and CSHB 28 we have been working through our own exercise on (1) what are the elements of a model permit system? (2) can a single permitting process fit every size of project, or do different size projects need to be processed differently?

Some principles of a model permitting system that are important to AOGA include:

- predictable, enforceable, *enforced* schedule
- accountable decision maker
- enforceable, *enforced* resolution of permit decision process
- clearly defined role of all participants in the permit process
- clear definition of real parties of interest
- clearly defined process and time line for appeals
- flexibility for phasing
- maximize coordination with federal permits
- standardize and define a "completed application"
- standardize and define a process for public input, comment and review

We have also completed a preliminary overview of "what works" in the permitting process now and we would be glad to share these thoughts with you.

As we committed, we have attached detailed remarks of our concerns about SB 186 for your review. We have also identified provisions of the bill that might resolve some of the key permitting problems identified in the Workshop by ourselves and others—if the challenges of a multi-tiered system can be resolved.

Again, we have been impressed by your willingness to work with us. The coordinating work of your office has made it possible for completion of projects essential to the continued production of oil and gas in Alaska.

Thank you for your time.

Sincerely,

JUDITH BRADY
Executive Director

JB:ts

cc: Representative Gene Therriault
Representative Joe Green
Commissioner John Shively, DNR
Commissioner Michele Brown, DEC
Pat Pourchot, Legislative Director, Office of the Governor
Mike Abbott, Economic Development Assistant, Office of the Governor

Attachment
February 18, 1998

Detailed Comments on SB 186
Alaska Oil & Gas Association

AOGA's basic position on SB 186 is that we cannot support the bill as currently drafted. Our principal reason is that SB 186 is intertwined with processes related to the Alaska Coastal Management Program (ACMP) as our comments below detail. SB 186 essentially codifies and even potentially exacerbates certain practices, which are the cause of confusion and overlap between authorities and jurisdictions of local and state governments and the ACMP.

We recommend that ACMP provisions be separated from the bill and the role and jurisdiction of the ACMP be subject to separate analysis, perhaps through CSHB 28. SB 186 could then become the vehicle to draft legislation that is focused on developing a project management structure and integrated structure for State agency permitting.

A second problem is that SB 186 does not provide for predictable permit/review/appeal timelines. Predictable timelines in these areas are essential to any successful permitting program, yet the bill does not include schedules or provide mechanisms for discipline.

We believe this is a problem that can be remedied. The current review clock specified in 6 AAC 50 is one of the strengths of the coordinated process provided by ACMP. The challenge is to find a mechanism whereby schedules are established for projects of various sizes and complexity and the types of permit required. Deadlines can be specified and mechanisms put in place to enforce them.

1. Provisions of SB 186 that could be the basis of a model permitting system

SB 186 puts on the table several concepts that could be the basis for a model permitting system. "The devil is in the details", as all parties agreed at the Streamlining Workshop. Following is a brief outline of the key points of SB 186, along with some of the basic challenges that we might all work together to solve. You will recall that these "challenges" were identified by all the participants at the Streamlining Workshop.

- A coordinated project-based permitting process for all project approvals for a permit applicant desiring "one stop shopping".

The practical challenges to resolve include:

(1) How to mesh and coordinated disparate permitting processes--involving permits of differing technical complexity and different, sometimes uncertain, processing schedules.

The coordinated process presents little improvement if the process becomes equivalent to the longest approval required for a project. The list of permits and approvals covered by SB 166 in Sec. 46.41.010 covers a range of potential processing schedules and technical complexity.

(2) How to accommodate the need for phased review & approval of project permits.

Due to the nature of some projects, the permitting process needs to allow the flexibility for review and approval of permits needed for incremental elements of the project during the various phases of development. This is a complex issue, which needs to be worked through to provide appropriate flexibility in the permitting process to accommodate the need for both applicants and agencies to phase review and approval of project permits.

(3) How to give the coordinating agency sufficient authority without creating another regulatory tier or a "super agency".

A single coordinating agency for projects that have more than one permit is a strength of the current system under the ACMP. Instead of creating another regulatory tier or a "super agency", as appears to be proposed in SB 166, the coordinating agency should be given sufficient authority to impose discipline on the process with respect to agencies meeting mandated or agreed deadlines.

- *A single project application.*

A single project application as provided in Sec. 46.41.050 has some merit. The challenge will be developing one application useful to all agencies and all size projects because, as we all know, the information requirements for the State permit applications listed in Sec. 46.010 vary considerably.

- *A consolidated public comment period for project permits.*

A consolidated public comment period makes considerable sense since it has the potential to reduce the burden on agencies, the public and applicant. However, in common with the above comments, it is unclear how the process can accommodate the disparate processes represented by the multitude of State permits. For example, the process for an air quality control operating permit involves a public notice on a draft permit near the end of the process after a lengthy technical review whereas other processes notice the permittee's application.

A related issue involves the process for public comment. The key would be certainty. Sec 46.41.080 is very vague with respect to the standards for public meetings and hearings. In some permit processes public hearings are only required if requested by a party that has standing.

- Approval of a project through a coordinated decision process.

Approval of a project through a coordinated decision process, involving issuance of all project permits at the same time would bring certainty to the permitting process if there was a specified time frame for completion of the permit process.

Again, as discussed above, the challenges revolve around the varying technical complexity of project permits and related review time frames. In addition project phasing needs to be accommodated in the process.

- A single appeals process.

The challenges, yet again, revolve around "how" and "who". How can we set up a single appeals process and at the same time accommodate separate agency jurisdiction? Should we use the Administrative Procedures Act or set up a new, untried system (which always results in legal test cases on procedure). Who should have standing to appeal? The procedure as proposed in Sec. 46.41.100 gives standing to almost any party to appeal a permit decision. AOGA believes there needs to be a reasonable level of standing established for appellants.

2. Policy questions raised by SB 186

SB 186 appears to envision state permitting as an ACMP-based process; The policy question raised is does the State of Alaska want to move from a local government/state agency permitting process to an ACMP permitting process? Should the ACMP be part of the State permitting process, or should the ACMP be the permitting process?

Related questions include how much authority should local districts have (1) to interpret state agency regulations, even when the agency disagrees with the interpretation; (2) to apply conditions to permits that have no statutory authority (homeless stipulations); (3) to override local government laws or planning ordinances (text of SB 186 at p. 21, Sec. 46. 40.100(c)).

These are substantive questions that will change the future of how the state operates. The questions have to do with ACMP's relationship with local and state government authority.

SB 186 is based upon the ACMP model with coastal management policies and process given the same weight and authority as local governments and state agencies. As such, the bill carries with it many of the frustrations expressed by participants of the Streamlining Workshop, including local government and state agency officials, of overlapping, unclear lines of authority and jurisdiction. In fact the bill has the potential to exacerbate those problems by codifying policy and practice that are not currently in statute or regulation.

The bill, as drafted, appears to expand the substantive scope and impact of the ACMP upon permitting, and to legislatively ratify certain practices now of questionable legality, including the imposition of ACMP stipulations upon agency permits. Our major concerns are as follows.

(1) The bill expands the definitions of both a "consistency determination" and an "affected coastal resource district".

Under proposed AS 46.40.096 (text of SB 186 at p. 20), a consistency review would now be required for any permitted activity or use "*that could affect land or water uses or natural resources of the coastal zone....*" Id. This definition appears to be entirely new and very broad indeed.

In addition, under proposed AS 46.41.950(1) (text of SB 186 at p. 15), an "*affected coastal resource district*" would now be defined as a district "*that may experience a direct and significant impact from a proposed project....*" Id.

This provision would apparently create extraterritorial jurisdiction for district programs by requiring that projects outside their established boundaries be consistent with the program if there "may" be such an impact. This is contrary to the original intent of the ACMP, to the established jurisdictional reach of local governments, which comprise the coastal districts, and to existing ACMP statutes which limit district program authority to coastal areas "within the district." *See current AS 46.40.030(1).*

(2) SB 186 would lead to the unrestricted imposition of ACMP stipulations upon permits.

The following provisions would appear to confer blanket authority to impose ACMP conditions of any kind upon permits. No current statute authorizes this practice. Serious policy and legal questions are raised about whether such conditions can or should be imposed, especially when they may be beyond the permitting agency's own statutory authority.

See proposed AS 46.41.090(c) ("the opinions of consistency may be predicated upon adoption of specific stipulations....");

.090(e) ("the final permit decision shall include a copy of any draft permits and related stipulations...."); and

.090(f)(3) ("if the Alaska Coastal Management Program consistency statement is predicated on a stipulation, that stipulation must be specifically described in the consistency statement..."); proposed 46.41.990(4)(A) (defining "consistency statement" in part as "any necessary stipulations, conditions, or modifications to the proposed project specifically described by reference to the related permit"); and

proposed 46.40.100(b) ("in addition to existing remedies, a state agency whose permit contains a stipulation added as a condition of consistency determination has the authority to enforce that stipulation through a request for injunctive relief to the superior court").

(3) Affected coastal resource districts are given a direct and active statutory role in consistency determinations for state permits.

While existing law merely provides for consistency review comments from districts, see *current AS 46.40.096(d)(1)*, the new bill now first requires each affected district to provide its opinion on consistency and any proposed stipulations. See *proposed AS 46.41.090(c)*.

More importantly, SB 166 then provides that the consistency determination shall be made by the coordinating agency *"in consultation with....the affected coastal districts..." Proposed AS 46.41.090(d)*.

While the extent of the district's role in the consistency decision is apparently left to be defined by regulation, there can be no question but that these requirements create a far stronger statutory role for districts than existing law.

In short, the districts would be decision-makers in a consistency determination, not just commenters upon it. Because districts are also made parties of right to the appeal, see *proposed 46.41.100(d)*, the districts would now have mandatory roles both in the consistency decision and in any appeal of the decision. Putting local districts in the role of both petitioner and decision-maker will result in due process problems.

(4) The bill statutorily mandates review of 84 state permits or requirements of various kinds.

See proposed AS 46.41.020(b). Possible exemptions are narrowly defined and subject to imposition of unspecified "conditions." *See proposed 46.41.0420(b).* No statute currently defines or specifies what actions must be subject to a consistency determination; instead, the DGC has administratively listed matters for which such review is to be required.

While there may well be a need to reexamine this process, a presumptive determination by the legislature that review is required for all such actions both substantively expands existing law and diminishes administrative flexibility. For example, as you know some of our members question whether contingency plans are in fact a project, use or activity properly subject to a consistency review under existing law. Proposed 46.41.010(d)(5) would nevertheless require such review by statute.

As pointed out earlier, we believe that the above provisions of SB 188 implicate substantive questions about the scope and nature of ACMP review for projects in Alaska. In our view, it will be very difficult to address these ACMP concerns in the already complex context of permit streamlining; this is why we have concluded that ACMP issues should be addressed separately. Once the ACMP issues are addressed, we believe that ACMP procedures could indeed be integrated in a neutral fashion into the overall context of permit streamlining.

We appreciate that others may have a different perspective or different interpretation of the effect of SB 188 with respect to the ACMP. These are certainly complex areas of policy, law, and procedure about which reasonable people may disagree.

We are committed to participate in these discussions.

February 28, 2001

BY FACSIMILE TO 907-465-3075:
ORIGINAL FOLLOWING BY U.S. MAIL

Mr. Randy Bates
Division of Governmental Coordination
Office of the Governor
P.O. Box 110030
Juneau, Alaska 99811-0030

Re: Comments on Proposed Revisions to ACMP Regulations (6 AAC 50)

Dear Mr. Bates:

Thank you for this opportunity to comment on the proposed revisions to the Alaska Coastal Management Program (ACMP) procedural regulations found in 6 AAC Chapter 50. It is obvious that a great deal of hard work went into reorganizing and attempting to clarify the existing regulations. That effort resulted in several improvements.

As revised, however, the proposed regulations create several problems (identified below) that do not exist in the current regulations. Some of these problems stem from revisions to the "Definitions" in Article 9 and, therefore, could be remedied by (i) restoring deleted definitions; (ii) adding precise definitions for undefined terms; or (iii) editing newly proposed definitions. A few of the problems cannot be remedied so easily and thus it may be more prudent to refrain from adopting the problematic provisions.

Specific Comments

1. <u>Use of the "Optional Preliminary Consistency Determination" would result in abandonment of the carefully prescribed processes and, in effect, could convert the ACMP review process into a mini-NEPA process by requiring the coordinating agency to make determinations about potential impacts which it is not authorized to do under Alaska law</u>.

   The proposed regulations painstakingly establish processes for conducting the three basic types of ACMP review (for state regulated activity; for federal activity; for federally regulated activity). Those processes prescribe time lines for the various steps in the processes, allowing the coordinating agency sufficient discretion to extend deadlines within the time line if appropriate (e.g., to accommodate the need for additional information or further review).

   The "Optional Preliminary Consistency Determination" process described in proposed 6 AAC 50.910 would undermine the established processes. It would allow the coordinating agency to abandon the time lines set forth for each of the three ACMP review processes and create new, project-specific processes and schedules based on a determination by the coordinating agency "that the project is likely to have more than minimal impacts to coastal uses or resources..." and will attract "significant public interest...." This separate "option" to abandon the established processes is entirely unnecessary in light of the flexibility allowed in adjusting the schedules for the established processes.

   Additionally, the standard for invoking this separate review "option" is ill defined and thus potentially could result in arbitrary and capricious decisionmaking as to whether to exercise the option. This is due largely to the fact that "minimal impact" is proposed to be defined as "a negligible disturbance to coastal uses or resources." Thus, the definition is circular: "negligible disturbance" has no more meaning than "minimal impact." Further, "negligible disturbance" is not proposed to be defined, and could not be readily defined in any meaningful way that would support decisions about whether to follow the established processes or to set up a project-specific process.

   Finally, this proposal to allow use of a special, potentially much longer, review process when the coordinating agency "determines" that impacts will be more than "minimal" is analogous to the National Environmental Policy Act (NEPA) process' distinction between environmental analyses (EAs) and environmental impact statements (EISs). Alaska's Legislature, however, has not authorized the transmutation of the ACMP into a mini-NEPA process. In view of the limited and specific purposes and authorities

underlying the ACMP, proposed 6 AAC 50.910 should **not** be adopted.

Similarly, the test for deciding between a 30-day and a 50-day review process should not rest on the degree of impacts anticipated (e.g., "minimal impacts") as proposed 6 AAC 50.235 contemplates. Under the existing regulations, that decision is based on how much time the agencies are expected to need to coordinate their authorizations and issue permits. There is not necessarily a direct correlation between the degree of potential impacts and the time required to issue authorizations, especially where the standard for whether impacts are "minimal" is itself an undefined "negligible disturbance" test. The potential for disputes and for allegations of inequitable application and/or abuse of discretion will be great if the degree of potential impacts is used as the measure for the length of the review process.

Accordingly, proposed 6 AAC 50.235 should be revised to restore the existing approach of choosing between the 30 and 50 day processes based on how much time the agencies need to issue authorizations. That will obviate the need for the coordinating agency to make qualitative "determinations" about the degree of "impacts," something that is clearly beyond the coordinating agency's scope of authority as the coordinator of the ACMP process. With proposed 6 AAC 50.910 eliminated and proposed 6 AAC 50.235 modified, the circular definition for "minimal impacts" at proposed 6 AAC 50.990(33) can be eliminated as well.

2. The proposed regulations' inconsistent references to "the ACMP" or "the program" versus the "enforceable policies" of the ACMP create confusion and the potential for disputes about (i) what an applicant must certify; (ii) what may be commented upon; (iii) what may be the bases for conditions; and (iv) what is at the heart of the consistency determination.

In many places, the proposed regulations speak of consistency with the enforceable policies of the ACMP, thus clearly tying the provisions in question to one of the two concrete components of the ACMP. Those two components are the enforceable policies of the coastal resource districts and the substantive regulatory standards in 6 AAC 80 & 85. In other places, however, the proposed regulations speak of a project being "consistent with the ACMP" or with "the program" generally (e.g., proposed 6 AAC 50.200, 365, 375, 385(b)(3), 405 & 990(14)). These inconsistent references create significant ambiguities, especially in light of the proposed changes to key definitions.

The proposed revisions to the "Definitions" section would eliminate the definition of "consistent" (bracketed deletion following proposed 6 AAC 50.990(16)) and would reduce the definition of "ACMP" to a generic description of what the mnemonic stands for–"Alaska Coastal Management Program." As such, the proposed revisions

would rob the relevant definitions of all references to standards (e.g., regulatory ones in 6 AAC 80, the district enforceable policies). Thus, it would no longer be possible to use the definitions to make sense of the operative provisions in which the expression "consistent with the ACMP" appears.

The simple solution would be to retain the current definitions for "ACMP" and "consistent." Without those definitions, the regulations will be hopelessly ambiguous in several respects, such that neither an applicant, nor the public, nor the review participants, nor the council or a court reviewing a disputed determination will be able to tell what was contemplated by references to "consistent with the ACMP." Another (less simple) solution would be to modify the language "the ACMP" or "the program" every time such an expression is used throughout the regulations, so that the regulatory standards and enforceable policies constituting the ACMP are clearly referenced. Retention of these key definitions as well as the suggested language modifications would best clarify consistent application of the ACMP process.

3. <u>The "alternative measure" term used in numerous places throughout the proposed regulations is ill defined, creating confusion about what such measures are and how they are to be used</u>.

The term "alternative measure" appears in several different contexts in the proposed regulations. This is a new term, not used in the current regulations. In some contexts, it appears to be synonymous with a "condition" or "stipulation" which must be imposed to ensure consistency with the ACMP standards (regulations and enforceable policies). In other contexts, use of the term suggests measures which can be proposed by someone (e.g., the coastal resource district), but which are simply optional ways of achieving consistency with the ACMP substantive standards. (See, for example, proposed 6 AAC 50.365, which suggests that the federal agency must be informed of any and all measures it might add to the project to persuade the state that the federal project is consistent.) In addition, the term is sometimes used in conjunction with the concept of achieving consistency with "the ACMP." Thus, its varied use compounds the ambiguity problem identified in 2 above.

Indeed, in the proposed definition for the term itself, this compounding problem appears. Proposed 6 AAC 50.990(4) states: "'alternative measure' means a requirement necessary to ensure the activity is consistent with the ACMP." Since significant changes are proposed for the current definitions of "ACMP" (proposed to be made generic) and "consistent" (proposed to be eliminated), the proposed definition of "alternative measure" is itself highly ambiguous. In context, use of the term creates much confusion.

For instance, if adopted, proposed 6 AAC 50.055(b)(2) would allow a coastal resource district to "include an alternative measure identified in a final consistency determination issued under 6 AAC 50.265 in an authorization for the project that is issued under the coastal resource district's Title 29 authority." It is unclear whether this would allow the district to include in its authorization only an "alternative measure" expressly identified as necessary for consistency with the district's enforceable policies, or to include any of several proffered "alternative measures" no matter how those measures relate to the ACMP standards.

At a minimum, the definition for "alternative measure" needs to be further developed (either within the definition itself, or by retaining the current definitions for "consistent" and "ACMP"). Otherwise, disputes about what "alternative measures" can be proposed by review participants and imposed on project proponents are inevitable. Additionally, each of the many places in the regulations where the term "alternative measure" is used needs to be scrutinized in light of the definition ultimately chosen, to ensure that no ambiguities remain.

4. <u>The various proposed regulations affecting the scope of the ACMP would inappropriately expand the coordinating agency's discretion, creating the potential for errors or abuses that could result in artificially broad, duplicative reviews</u>.

Proposed 6 AAC 50.025 abandons the existing requirement that the scope of review be based on specific kinds of information (e.g., the applicant's proposal and the coastal project questionnaire) and instead relies on the coordinating agency to "determine the scope of the project subject to a consistency review." If adopted, it would set the minimum scope quite broadly, requiring among other things inclusion of each "activity" needing an agency authorization, as well as activities that do not, if the "project," as proposed, could not be conducted without those activities. Thus, the regulation would require the coordinating agency (in consultation with the resource agencies) to make a determination of the scope of the "project," which necessarily would require determining what the "project" is as proposed by the applicant.

"Project," however, would be a defined term under the proposed regulations (6 AAC 50.990(22)). It would mean "all activities that will be part of a proposed coastal development, including associated facilities, ***that are subject to the consistency review requirements under this chapter***." (Emphasis added.) To "determine the scope of the project" as required by proposed section 025, the coordinating agency, therefore, necessarily would have to decide what activities "are subject to the consistency review requirements," which in turn requires determining the scope of the review. Thus, the definition of "project" does not inform the determination required under section 025 at all; it depends on it. Accordingly, the coordinating agency is left only with its

discretion, and advice from the resource agencies; the proposed regulations provide no guidance on how to exercise that discretion.

In addition, proposed 6 AAC 50.700 would vest the coordinating agency with discretion to require that the ACMP review for a "project" include activities already determined categorically consistent with the ACMP standards (via a previous categorical or general consistency determination, or a general concurrence determination). In fact, that would be the default position, subject only to the possibility that the agency might exclude those activities from the project-specific review if they constitute a "temporary use with minimal impacts to coastal uses and resources." Since "minimal impacts" would be defined as "negligible disturbance," once again the determination would be left to the unguided discretion of the coordinating agency.

Perhaps the simplest solution to most of these problems would be to eliminate proposed subsection (a) of 6 AAC 50.025 and convert proposed subsection (b) into concrete, objective criteria to be used in setting the scope of the review. Those changes would obviate the need to clarify the definition of "project," at least in this context. As to categorically consistent activities for which an applicant can obtain a general permit that has already gone through the ACMP process, there is no reason to broaden the scope of review to, in effect, re-review those activities. Proposed 6 AAC 50.700 should be modified accordingly.

****

As a general comment, some of the problems identified above evidence a trend toward vesting the coordinating agency with decisionmaking-type discretion far broader than necessary for an agency that, in its regulatorially directed coordinator role, is supposed to be coordinating the ACMP review process, not usurping other State and Federal regulatory agency's purview in making independent decisions about the permittability of a proposed activity. An ACMP consistency determination is not a super-permit governing all aspects of a development project. Rather, it is supposed to be the memorialization of a collaborative process of review in which the coordinating agency serves as facilitator. As such, any proposed changes to the ACMP process regulations in 6 AAC 50 should be carefully crafted to avoid shifting the coordinating agency's role toward making substantive decisions such as whether a proposed "project" will have only "minimal impacts."

If you have any questions about the general or specific comments above, please feel free to contact me at 907-586-3340.

Very truly yours,

Terry L. Thurbon

Alaska Oil and Gas Association

AOGA

121 W. Fireweed Lane, Suite 207 Anchorage, Alaska 99503-2035 Phone: (907)272-1481 Fax: (907)279-8114 Email: brady@aoga.org

Judith Brady, Executive Director

February 28, 2001

Mr. Randy Bates
Division of Governmental Coordination
Office of the Governor
P.O. Box 110030
Juneau, Alaska 99811-0030

Re: Comments on proposed changes to Consistency Review Regulations: 6 AAC 50

Dear Mr. Bates:

Thank you for the opportunity to comment on the proposed consistency regulations for the Alaska Coastal Management Program (ACMP). As you know, these regulations are critical to the continued exploration, development, production and transportation of Alaska's oil and gas resource.

This letter and attached comments represent the views of the Alaska Oil & Gas Association (AOGA). AOGA is a private, non-profit trade association whose member companies represent the majority of oil and gas exploration, production, transportation, refining and marketing activities in Alaska.

Virtually all of the oil and gas exploration, production, transportation and refining activity, and key elements of the pipeline activity in the State of Alaska, take place in coastal districts. Industry permitters and environmental staff work regularly with coastal districts, state and federal agencies and Division of Governmental Coordination (DGC) personnel. Company permitters have day-in, day-out experience with the 6 AAC 50 regulations. We know what works and what doesn't work in the consistency process. We appreciate this opportunity to work with the DGC and the Coastal Policy Council (CPC) in taking the first new look at the coastal management consistency regulations in 17 years.

The proposed new title for 6 AAC 50 is: "Alaska Coastal Management Program (ACMP) Implementation". This is an accurate description of what these regulations do — they

"implement" the coastal management program. They are the *directions* for how to make the ACMP work - the *directions for decision-making* to the resource agencies, the coastal districts, the DGC and the permitted public. As with any set of directions, the clearer they are, the better the program will work.

The first stage of this comprehensive revision endeavor—the internal agency/DGC/coastal district stage –has taken a lot of time. DGC personnel have said that the internal agency working group and/or DGC personnel have met almost every two weeks for the last two years. The internal draft has gone through at least two major rewrites - and this is before the public comment period even opened.

The original regulations have been in place since 1984. Almost immediately it became evident that there were various problems, some serious, with interpretation and application. Public policy questions as to effects of certain sections on other state statutes, legal ambiguities arising from vague language, individual agency permit timelines that were never reconciled with the consistency timelines, and just the plain practical difficulties of applying seemingly mutually exclusive requirements have continued to cause time-wasting internal agency disputes, and disagreements with coastal districts and the permitted public. These disputes have had increasingly troublesome effects: agencies and DGC gridlocked in reviews of the ABC List and there have been some noticeable slow downs in the permitting process.

Since 1984 various proposals for changes in these regulations have been made, many by agency or DGC permitters who are tasked with "making this work". You have pointed out you have "stack of files" on your desk from 1984 "when folks started proposing changes to these regulations". Several attempts at a complete revision process have failed. Different reasons are given for this failure: simply a lack of time or focus by administrations; or the fact that some interest groups and agencies benefit from ambiguous language and maneuver to retain it; or the lack of political will to make those few critical decisions that have plagued the consistency process almost since its inception.

The consistency process has "worked" through those years because it has been patched together with agency "guidance policies", Memorandums of Understanding (MOUs), ad hoc opinions from assistant attorney's general, internal memorandums, unwritten "but understood" practices, and most especially, the good judgment of individual agency staff and DGC coordinating staff. The irony has been that the most public of process...the coastal management program...has been implemented by the most subjective and internalized practices, in part because of the ambiguities of its 6 AAC 50 regulations.

AOGA recognizes the achievement of Director Patrick Galvin, coordinator Randy Bates, and the CPC members for initiating this first formal review and revision of the consistency regulations. It is important that this process does not fail. It is important that these revisions resolve the long-standing issues, rather than just bury them under more vague language. It is important that practices that have arisen out of institutionalized "understanding" or internal unpublished memoranda are examined. It is important that public policy issues be identified and options provided to the CPC for resolution. It is important that we take this opportunity to make the

implementing directions for the ACMP clear and precise or the agencies will spend the next 17 years writing new "guidance policies", new Memorandums of Understanding, and new internal memorandums. The test for these regulations will be whether or not they are so clear that all past "guidance policies", MOUs, etc., can be thrown out and these published, *public* regulations will be the reliable guide for consistency decisions.

In this submittal letter, AOGA will offer recommendations on the "next steps" of this regulation process; highlighting, in summary, the strengths and the weaknesses of the proposed regulations. Our detailed comments are attached.

Recommendations for "Next Steps" in the Process

In summary, those recommendations are: (1) that individuals in the agencies with direct project permitting experience be assigned to the working group charged with the review of public comments; (2) that the working group to review the public comments be expanded to include knowledgeable public representatives; and, (3) that after the public comments are considered, the regulations be re-issued for a second public review.

We also suggest that when the regulations are re-issued, DGC identify the public policy and legal issues and include a section-by-section public roundtable discussion with the CPC so the public and council members can hear the pros and cons of policy and/or legal alternatives offered.

AOGA's first recommendation is that agency personnel with direct permitting experience be part of the team that reviews public comment.

Does it make any difference whether or not the regulations governing the permitting of projects in the coastal zone are reviewed by individuals with direct permitting experience?

We have found that it does. These are the "working" regulations of the entire coastal management program. The goals of these regulations are to establish a "solid platform for implementing the ACMP"; to create a "predictable review process"; to "establish and clarify the process" and to "provide up to date regulations that are clear and efficient." Alaska has a complicated dual permitting system with ACMP overlying and intertwined with local, state and federal permitting systems. Alaska has a "networked" system which simultaneously is supposed to protect the authority of each individual agency *and* the enforceable standards of the coastal districts. The inherent conflict means reaching a balance is a complicated process. A regulatory section that "sounds good" may have unintended consequences on the rest of the regulatory system, disrupt the balance or simply be unworkable from a practical standpoint.

We have found in our own industry review of these regulations that individuals who have been directly involved in the dozens...or sometimes hundreds...of decisions, negotiations and timing issues related to permitting a project have a different sense of both "predictable" and "efficient" than individuals who have never been involved in the actual permitting of a project. We found this difference in perspective even between industry personnel with *direct* permitting experience

and those industry planners, managers and attorneys who have indirect experience *reviewing* permit actions.

The challenge for the team reviewing the public comments and for CPC members, many of whom (like most of us) have not been directly involved in project permitting, will be to sort through the "sounds good" from the "works as intended". Our understanding is that this draft of project permitting regulations was drafted internally by agency personnel with limited or no *direct* project permitting experience in their own agencies. Based on our own experience, we are recommending that the upcoming working group to review public comment consciously include agency personnel with direct project permitting experience.

Second, we recommend that knowledgeable public members be appointed to the working group to review these public comments. Such task groups or stakeholder groups have been established in the past with good results. It seems to us that there must be some real interaction and working through of approaches if these regulations are to meet the goals of this project. AOGA will make a formal request to the Director of DGC that such a task group be established.

Third, AOGA recommends that after the public comments are considered, the regulations be revised and reissued for a second public review. If the revisions address the questions that need to be answered in this regulation, both the agencies and the public will have a strong interest in a second round of comments. The agency internal review took almost two years. The public review should not be hurried when there is no need to do so and when the end product will certainly be affected.

Finally, as a subset of what we believe may be useful, AOGA suggests that when the regulations are re-issued, DGC identify the public policy and legal issues addressed or involved. Many of the issues have statewide or program wide public policy implications. Issues with these implications should be identified, along with a range of options and preferred options.

We also suggest that in the second round of public comment, the CPC hold a section-by-section roundtable discussion with the agencies and the public so all parties can have the benefit of hearing different perspectives.

We suggest "section by section" review by the CPC because, from our own experience, it became evident that there is simply no way to make a considered judgment without one. From a practical standpoint, we would also recommend at least two half-day sessions, although four half-day sessions would be more reasonable given the complexity of these regulations.

Strengths of the Proposed Implementing Regulations

The format of the proposed regulations—breaking them out into Articles of general applicability—is a long needed structural change. The attempt to more clearly define public participation as well as spell out the steps in the elevation and review process, while needing both clarification and legal review, are important. Of particular concern is the lack of standards for elevations and the question of how elevation decisions are made. It appears to us that decisions must be made both at the director and the commissioner level through a vote. It also

seems that an agency should not be able to elevate the same issue more than once. The appeal process also needs more thought. It would be useful to do a flow chart for the elevation/appeal/ petition process. The challenge will be to protect all parties rights without making the ACMP the target of choice of special interest groups.

Two new sections are of significant importance: Article 7 (General and Nationwide Permits, Categorically Consistent Determinations, General Consistency Determinations, and General Consistency Concurrences) and Article 8 (Project Modifications and Renewals of Authorization.) Both have been an area of agency gridlock. Both are essential to the project consistency system. Both articles need extensive review, discussion and explanation. Definitions are needed for all of the Article 7 sections. The ABC List has been a matter of internal agency dispute. Three years ago DGC issued a "white paper" on some of the ABC List issues. Other agencies may or may not have responded. In order for there to be a public discussion and resolution of these issues they have to be clearly identified. It would be helpful if DGC would identify internal agency issues. Of equal value would be definitions/standards for the A List, B List, C List and the other categories included in Article 7.

Weaknesses of the Proposed Regulations

As a general comment, these proposed regulations, like the current regulations, still fail to clearly define how the coastal consistency review process is supposed to work. During the public workshops it was evident that even industry permitters, who are knowledgeable with the program, were confused. There seems to be the same confusion among agency personnel who will be charged with implementation. There is no question that this is a complicated program dealing often with complex projects. This makes it all the more necessary that the *working direction*, these regulations, be as clear as possible.

In key areas the language and standards of the regulations are even more subjective, vague and undefined than the current regulations. The response to this criticism at workshops was to rely on the "good judgment" of the program administrators. This is an unacceptable approach. It does not provide a standard for decision-making; continues to leave the process open to legal challenges and agency gridlock; and diminishes the ability of the program to protect and maintain coastal resources and uses. The areas of greatest concern are listed below:

- <u>The proposed regulations fail to resolve the traditional conflicts of the consistency process.</u> The most serious and disappointing weakness of the proposed regulations is that they simply fail to resolve the traditional conflicts of the consistency process: applicability, scope of review, jurisdiction, timing, "homeless stipulations" and coordination. For instance:

  (a) Current ambiguous language concerning applicability of the ACMP and scope of review has become even more vague. The single most important goal of implementing regulations must be to clarify applicability of projects to consistency review.

  (b) The proposed regulations do not clarify how Alaska's "networked" system works in practice and more seriously, do not solve the timing issues related to coordination of

some permits that, in actual fact, defeat the entire concept of a "networked" program. The relative roles, responsibilities and authorities of the agencies and DGC, vis-`a-vis a "networked" review, is not at all clear, nor is there resolution of the timing issues related to coordination of some permits, notably Alaska Department of Environmental Conservation (DEC) air quality permits and Department of Natural Resources (DNR) right-of-way leasing. If agency permits do not have timelines that fit within a 30 or 50-day schedule, there can be no "networked" program. This is an issue for both small and large projects.

(c) The role and authority of coastal districts, as described in these proposed regulations, is more subjective and thus more uncertain. The proposed regulations embody an expansive, undefined scope of local coastal program jurisdiction which needs to be examined in terms of the enabling statutes and overall public policy.

(d) The proposed regulations codify the practice of adopting homeless stipulations (called "alternative measures" in the regulations). This practice raises both public policy and legal questions. This is a critical issue for the ACMP. There is no question that coastal districts have the right and responsibility to develop enforceable policies. This is the heart of the program. What is questionable are the implementing practices that have slowly developed through the years. This regulatory review provides the opportunity for open discussion on homeless stipulations.

- The proposed regulations adopt a permit coordination approach that decreases rather than increases the predictability of the process. Under these proposed regulations there is no assurance that the review will be concluded and permits issued by a certain date. Again, there is no question that some projects offer special challenges, however the attempts in these proposed regulations to satisfy "time out" concerns of some agency staff members have, in cumulative effect, derailed the entire process. For instance:

(a) Previously established timelines are simply lost in the multiple exceptions. The timelines for federal projects are now more certain than the timelines for state projects.

(b) The proposed regulations "front load" the application process (and make it uncertain to predict when "day one" starts) and at the same time allow even more extensions and agency requests for "additional information" during the rest of the process, which almost always stops the clock yet again.

Predictable permitting and predictable timelines are a "make or break" issue. The working season, particularly on the North Slope, is so short that if permits are delayed it can mean the entire "season " is lost. And that may mean the project is lost. The importance of this issue cannot be over-emphasized.

None of the issues addressed by these regulations are easy issues. All have been areas of serious controversy among agencies. The importance of this regulation project is that, for the first time

in 17 years, these controversies are now in the public arena and can be resolved.

We look forward to working with you on these issues.

Thank you for your consideration of these comments.

Sincerely,

JUDITH BRADY
Executive Director

Attachment

ALASKA STATE LEGISLATURE

SENATOR
Gene Therriault
119 N. Cushman Suite 101
Fairbanks, Alaska 99701
(907) 488-0857
FAX (907) 488-4271

While in Juneau
State Capitol
Juneau, Alaska
99801-1182
(907) 465-4797
FAX (907) 465-3884

Senate
Senate District Q

Senate Bill 361 Permit Coordination and Coastal Zone Management

SPONSOR STATEMENT:

Alaska's permitting system is overdue for a complete review and overhaul. Developed piecemeal over the 43 years since statehood, our state's current process for approving resource development projects is increasingly a lengthy and disjointed process that confuses the public, agencies, and applicants alike. Industries from across the state have stepped forward to ask for clarity, consistency, and timeliness. It is time for a change that works for Alaska.

The current process requires separate applications for each permit needed for a single project. Each agency reviews the applications separately according to its own timetable and requirements. Public notice and hearings on the applications may be conducted separately, under different standards, resulting in a duplication of effort and expense for all. Permits may be appealed to different agencies, even though each appeal is based on a common set of facts.

Also, if a project lies within a coastal zone, an additional set of steps is added to the process. The Alaska Coastal Management Program (ACMP) requires that all permits issued by state agencies within a coastal zone be consistent with the respective plans developed by a coastal resource district. Since Alaska's coastal zone boundaries include more than 44,000 miles of coastline and can extend inland along river drainages as far as 250 miles, most resource development projects in Alaska require such a consistency determination. While Senate Bill 361 reforms the process by which a project's consistency determination is established, it preserves the requirement that projects be consistent with the ACMP.

Over the years, various proposals have emerged from the front-line permitting staff, division directors, and commissioners at our resource agencies suggesting changes. Nonetheless, reform has failed to materialize. Senate Bill 361 is based on various proposals that have been proposed over the years.

For the foreseeable future, Alaska's economy will be dependent upon the development of our natural resources. As the policy-making body of state government, we must remove those aspects of our permitting system that have been used not as a means to provide public input and accountability, but as tools to needlessly delay those projects which are critical to our state's future prosperity and revenues.

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB 361
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Environmental Conservation
Title: Permit Coordination and Coastal Zone Management
BRU: Administrative Services
Component: Office of the Commissioner
Sponsor: Senate State Affairs
Requester: Senate State Affairs
Component No. 633

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services	*	*	*	*	*	*
Travel	*	*	*	*	*	*
Contractual	*	*	*	*	*	*
Supplies	*	*	*	*	*	*
Equipment	*	*	*	*	*	*
Land & Structures	*	*	*	*	*	*
Grants & Claims	*	*	*	*	*	*
Miscellaneous	*	*	*	*	*	*
TOTAL OPERATING	*	*	*	*	*	*
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	*	*	*	*	*	*
1003 GF Match	*	*	*	*	*	*
1004 GF	*	*	*	*	*	*
1005 GF/Program Receipts	*	*	*	*	*	*
1037 GF/Mental Health	*	*	*	*	*	*
Other (Specify Type--Do not abbreviate)	*	*	*	*	*	*
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time	*	*	*	*	*	*
Part-time	*	*	*	*	*	*
Temporary	*	*	*	*	*	*

ANALYSIS: *(Attach a separate page if necessary)*

* The Department is not able to determine the fiscal impact at this time.

Prepared by: Mary Siroky
Phone 465-5355
Division: Statewide Public Services
Date/Time 4/19/02 3:00 p.m.
Approved by: Kurt Fredriksson Deputy Commissioner
Date 4/19/2002
Agency: Department of Environmental Conservation

(Revised 9/2001 OMB)

Fiscal Note - DEC

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB 361
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Office of the Governor
Title "An Act relating to coordination of the application, review..of project permits..CPC..ACMP.."
BRU Governmental Coordination
Component Governmental Coordination
Sponsor Senate State Affairs
Requester (S) STA
Component No. 18

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services	*	*	*	*	*	*
Travel	*	*	*	*	*	*
Contractual	*	*	*	*	*	*
Supplies	*	*	*	*	*	*
Equipment	*	*	*	*	*	*
Land & Structures	*	*	*	*	*	*
Grants & Claims	*	*	*	*	*	*
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time	*	*	*	*	*	*
Part-time	*	*	*	*	*	*
Temporary	*	*	*	*	*	*

ANALYSIS: *(Attach a separate page if necessary)*
Indeterminate fiscal note at this time.

Prepared by: Patrick Galvin, Director
Phone 465-3562
Division Governmental Coordination
Date/Time 4/19/02 12:00 AM
Approved by: David Ramseur, Chief of Staff
Date 4/19/2002
Agency Office of the Governor

(Revised 9/2001 OMB)

Fiscal Note ~ DGC