

ALASKA LEGISLATURE

HOUSE and SENATE FINANCE COMMITTEE FILES,

1993-1994

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1 fishing, trapping, or other lawful outdoor activity necessarily involves the
2 carrying of a weapon for personal protection; or

3 (6) while traveling to or from any activity described in (1) - (5) of this
4 subsection.

5 (i) A person convicted under (a)(3) of this section is guilty of a

6 (1) class B misdemeanor if the conviction is the person's first
7 conviction of the offense described in (a)(3) of this section and the person had not
8 been previously convicted under a law or ordinance of another jurisdiction with
9 elements substantially similar to those of an offense described in (a)(3) of this section
10 or adjudicated a delinquent minor under AS 47.10.010 - 47.10.142 for a violation of
11 (a)(3) of this section;

12 (2) class A misdemeanor if, within the preceding seven years, the
13 person was convicted under (a)(3) of this section or under a law or ordinance of
14 another jurisdiction with elements substantially similar to those of an offense described
15 in (a)(3) of this section, or the person was adjudicated a delinquent minor either under
16 AS 47.10.010 - 47.10.142 if the delinquency finding is based upon a violation of (a)(3)
17 of this section or under a law of another jurisdiction authorizing adjudication of
18 delinquency for the violation of a law or ordinance of that jurisdiction with elements
19 substantially similar to those of an offense described in (a)(3) of this section.

20 * Sec. 7. AS 18.65 is amended by adding new sections to read:

21 ARTICLE 9. PERMIT TO CARRY A CONCEALED WEAPON.

22 Sec. 18.65.700. PERMIT TO CARRY A CONCEALED WEAPON. (a) The
23 department shall issue a permit to carry a concealed weapon to a person who

24 (1) applies in person at an office of the Alaska State Troopers;

25 (2) qualifies under AS 18.65.705;

26 (3) submits a completed application on a form provided by the
27 department, that provides the information required under AS 18.65.705 and 18.65.710
28 and is executed under oath;

29 (4) permits the Alaska State Troopers to take two sets of fingerprints
30 of the person and, on a blank permit, a print of one finger of each hand; and

31 (5) pays the application fee required by AS 18.65.715.

1 (b) The department shall either approve or reject an application for a permit to
2 carry a concealed weapon within 45 days of receipt of the application. The department
3 shall notify the applicant in writing of the reason for a rejection.

4 (.) A permit issued under this section is valid for five years from the date of
5 issue.

6 Sec. 18.65.705. QUALIFICATIONS TO OBTAIN A PERMIT. A person is
7 qualified to receive and hold a permit to carry a concealed weapon if the person

8 (1) is 21 years of age or older;

9 (2) is eligible to own or possess a firearm under the laws of this state
10 and under federal law;

11 (3) is not currently charged under a complaint, information, indictment,
12 or presentment with a violation of AS 11.41 or a similar law of another jurisdiction;

13 (4) has not been voluntarily or involuntarily committed to a treatment
14 facility for a mental illness, unless the person presents to the department a sworn
15 statement of

16 (A) an official in charge of the facility certifying that the person
17 has been released from the facility for at least the five years immediately
18 preceding the application and that at the time of release the person was not
19 suffering from the condition that led to the commitment; and

20 (B) a psychiatrist who has treated the person certifying that the
21 person has not suffered from the condition that led to the commitment during
22 the five years immediately preceding the application;

23 (5) has not been adjudicated as mentally incapacitated by a court of this
24 state, another state, territory, or jurisdiction, or of the United States, unless the
25 guardianship or similar arrangement has been closed or terminated and five years have
26 elapsed since the closure or other termination;

27 (6) is a resident of the state and has been for the 12 months
28 immediately preceding the application for a permit;

29 (7) has not been convicted of an unlawful use of a controlled substance
30 during the five-year period immediately preceding submission of the application;

31 (8) has not been discharged from the armed forces of the United States

1 under dishonorable conditions;

2 (9) is not an alien who is residing in the United States illegally or a
3 former citizen of the United States who has renounced the person's citizenship;

4 (10) is not now in and has not previously entered an alcohol treatment
5 program, unless the person presents the department with a sworn statement of a
6 medical or psychological professional that the person has undergone treatment for
7 alcohol abuse and has demonstrated freedom from alcohol impairment for the five
8 years immediately preceding the application; and

9 (11) has not been convicted of two violations of AS 28.33.030,
10 28.33.031, AS 28.35.030, or 28.35.032 or similar laws of another jurisdiction within
11 the five years immediately preceding the application.

12 Sec. 18.65.710. APPLICATION FOR PERMIT TO CARRY A CONCEALED
13 WEAPON. (a) The application for a permit to carry a concealed weapon must, at a
14 minimum, include

15 (1) the applicant's name, address, place and date of birth, physical
16 description, including height, weight, race, hair color, and eye color, and social security
17 number;

18 (2) a statement that the applicant qualifies under AS 18.65.705;

19 (3) a statement that the applicant has been furnished with a copy of
20 AS 18.65.700 - 18.65.775, has read those sections, and understands them;

21 (4) a statement that the applicant desires a permit to carry a concealed
22 weapon for a lawful purpose, which may include lawful self-defense;

23 (5) a sworn statement by the applicant that all statements, answers, and
24 attachments to the application are true and complete;

25 (6) a conspicuous warning that the application is executed under oath
26 and that an applicant who supplies a false statement, answer, or document, in
27 connection with the application which the applicant does not believe to be true, may
28 be prosecuted for perjury under AS 11.56.200 and, if found guilty, may be punished
29 for violation of a class B felony, and that in such cases the permit shall be revoked
30 and the applicant may be barred from any further application for a permit; and

31 (7) a statement that the applicant understands that a background

1 investigation may be conducted as a part of the application process, that this may
2 involve computerized records searches, and that the applicant authorizes the
3 investigation.

4 (b) As a part of an application under (a) of this section, the department may
5 not inquire of an applicant as to any firearms owned by the applicant.

6 Sec. 18.65.715. FEES. (a) The department shall charge a nonrefundable fee
7 of \$100 for application for and initial issuance of a permit.

8 (b) The department shall charge a fee of \$15 for the renewal of a permit under
9 AS 18.65.720.

10 (c) The department shall charge a fee of \$15 for replacement of a permit under
11 AS 18.65.725.

12 Sec. 18.65.720. PERMIT RENEWAL. (a) A permittee shall apply for
13 renewal of a permit to carry a concealed weapon within 90 days before the expiration
14 of the permit on a form provided by the department. The renewal form shall be
15 submitted under oath and must include

16 (1) any change in the information originally submitted under
17 AS 18.65.710;

18 (2) a statement that the person remains qualified to receive and hold
19 a permit to carry a concealed weapon under AS 18.65.705; and

20 (3) the renewal fee required under AS 18.65.715.

21 (b) A renewal of a permit to carry a concealed weapon submitted on or after
22 the expiration date is subject to a late fee of \$15. The department may not accept a
23 renewal for a permit that is submitted more than 90 days after the expiration date of
24 the permit. Nothing in this subsection prohibits the holder of an expired permit from
25 applying for a new permit.

26 Sec. 18.65.725. REPLACEMENT OF PERMIT. The department may replace
27 a permit that the permittee certifies under oath has been lost, stolen, or destroyed.

28 Sec. 18.65.730. SUSPENSION OF PERMIT. The department shall
29 immediately suspend a permit to carry a concealed weapon if a permittee is arrested
30 for or formally charged with a crime that would disqualify the permittee under
31 AS 18.65.705(3) from being eligible to hold a permit to carry a concealed weapon.

1 A suspension of a permit remains in effect until the permit is revoked under
2 AS 18.65.735 or the department has been notified of a disposition favorable to the
3 defendant or the defendant has been released from custody without being charged. In
4 this section, "disposition favorable to the defendant" means an adjudication by a court
5 other than a conviction or a dismissal by the prosecutor.

6 Sec. 18.65.735. REVOCATION OF PERMIT; APPEAL. (a) A permit to
7 carry a concealed weapon shall be immediately revoked by the department when the
8 permittee

9 (1) becomes disqualified to receive and hold a permit under
10 AS 18.65.705, other than AS 18.65.705(3);

11 (2) is convicted of three violations of AS 18.65.750 or 18.65.755 within
12 a five-year period;

13 (3) is convicted of violating AS 28.33.030, 28.33.031, AS 28.35.030,
14 or 28.35.032 and was carrying a concealed weapon at the time of the violation; or

15 (4) with intent to mislead the department or its employees, supplied a
16 false or fraudulent answer, statement, or document, or made a material misstatement
17 or omission, in connection with an application for a permit or renewal of a permit.

18 (b) A person whose permit is revoked under this section may appeal the
19 revocation decision to the commissioner. A person may seek judicial review of the
20 decision of the commissioner under AS 44.62.560 - 44.62.570.

21 (c) A person whose permit is revoked under (a)(2) - (4) of this section may
22 not apply for a new permit until at least five years have elapsed since the date of the
23 last conviction.

24 Sec. 18.65.740. NO LIABILITY FOR ISSUANCE OF PERMIT. The state is
25 not liable by virtue of having issued a permit to carry a concealed weapon for damage
26 or harm caused by the permittee.

27 Sec. 18.65.750. POSSESSION AND DISPLAY OF PERMIT. (a) A permittee
28 who is carrying a concealed weapon shall

29 (1) carry the permit at all times the permittee carries the concealed
30 weapon;

31 (2) whenever contact is made with a peace officer, notify the peace

1 officer that the permittee possesses the concealed weapon and a permit to carry the
2 weapon; and

3 (3) display both the permit and other proper identification when asked
4 to do so by a peace officer at any time the permittee is carrying the concealed weapon.

5 (b) A person who violates (a) of this section is guilty of a violation and shall
6 be punished by a fine of \$25.

7 Sec. 18.65.755. PLACES WHERE PERMITTEE MAY NOT POSSESS A
8 CONCEALED WEAPON. (a) A permittee may not carry a concealed weapon into
9 a law enforcement or correctional facility; a courthouse or a courtroom; a passenger
10 loading or unloading area of an airline terminal; or a vessel of the Alaska marine
11 highway system.

12 (b) In addition to any other penalty provided by law, a person who violates
13 this section is guilty of a class B misdemeanor.

14 Sec. 18.65.760. COMPILATION AND MAINTENANCE OF LIST OF
15 PERMITTEES; ACCESS TO LIST. (a) The department shall compile and maintain
16 a list of permittees in a manner that allows immediate access to the information by
17 peace officers.

18 (b) Except for access by peace officers under (a) of this section, the list of
19 permittees compiled and maintained under (a) of this section is confidential and may
20 not be inspected by the public.

21 Sec. 18.65.765. REGULATIONS. The department shall adopt regulations to
22 implement AS 18.65.700 - 18.65.775. This section does not delegate to the department
23 the authority to regulate or restrict the issuing of permits beyond those provisions
24 contained in AS 18.65.700 - 18.65.775. Subjective or arbitrary actions or regulations
25 that encumber the issuing process by placing burdens on the applicant beyond those
26 sworn statements and specified documents detailed in AS 18.65.700 - 18.65.775 or that
27 create restrictions beyond those specified or specifically authorized in AS 18.65.700 -
28 18.65.775 are prohibited.

29 Sec. 18.65.770. PROHIBITION ON CERTAIN ORDINANCES. A
30 municipality may not enact an ordinance that conflicts with or imposes stricter
31 standards than the requirements of this chapter.

1 Sec. 18.65.775. DEFINITIONS. In AS 18.65.700 - 18.65.775,

2 (1) "commissioner" means the commissioner of public safety;

3 (2) "concealed weapon"

4 (A) means a deadly weapon, as defined in AS 11.81.900, that
5 is covered or enclosed in any manner so that an observer cannot determine that
6 it is a weapon without removing it from that which covers or encloses it or
7 without opening, lifting, or removing that which covers or encloses it;

8 (B) does not include

9 (i) a deadly weapon that is a prohibited weapon as
10 defined in AS 11.61.200; or

11 (ii) a shotgun or rifle;

12 (3) "department" means the Department of Public Safety;

13 (4) "permit" means a permit to carry a concealed weapon issued under
14 AS 18.65.700 - 18.65.775.

15 * Sec. 8. AS 47.10.010 is amended by adding a new subsection to read:

16 (c) The procedures prescribed in AS 47.10.020 - 47.10.090 and the Alaska
17 Delinquency Rules do not apply when a minor who is at least 14 years of age at the
18 time of the alleged offense is charged with an offense, the minor is alleged to have
19 used a firearm in the commission of the offense, and the minor has been previously
20 adjudicated as a delinquent or convicted as an adult, in this or another jurisdiction, as
21 a result of an offense that, in this or another jurisdiction, involves the use of a firearm
22 in the commission of the offense. The minor shall be charged, prosecuted, and
23 sentenced in the superior court in the same manner as an adult. In this subsection,
24 "firearm" has the meaning given in AS 11.81.900.

25 * Sec. 9. AS 47.10.080(b) is amended to read:

26 (b) If the court finds that the minor is delinquent, it shall

27 (1) order the minor committed to the department for a period of time
28 not to exceed two years or in any event extend past the day the minor becomes 19,
29 except that the department may petition for and the court may grant in a hearing (A)
30 two-year extensions of commitment that do not extend beyond the child's 19th
31 birthday if the extension is in the best interests of the minor and the public; and (B)

1 an additional one-year period of supervision past age 19 if continued supervision is in
2 the best interests of the person and the person consents to it; the department shall place
3 the minor in the juvenile facility that the department considers appropriate and that
4 may include a juvenile correctional school, juvenile work camp, detention home, or
5 detention facility; the minor may be released from placement or detention and placed
6 on probation on order of the court and may also be released by the department, in its
7 discretion, under AS 47.10.200;

8 (2) order the minor placed on probation, to be supervised by the
9 department, and released to the minor's parents, guardian, or a suitable person; if the
10 court orders the minor placed on probation, it may specify the terms and conditions
11 of probation; the probation may be for a period of time, not to exceed two years and
12 in no event extend past the day the minor becomes 19, except that the department may
13 petition for and the court may grant in a hearing

14 (A) two-year extensions of supervision that do not extend
15 beyond the child's 19th birthday if the extension is in the best interests of the
16 minor and the public; and

17 (B) an additional one-year period of supervision past age 19 if
18 the continued supervision is in the best interests of the person and the person
19 consents to it;

20 (3) order the minor committed to the department and placed on
21 probation, to be supervised by the department, and released to the minor's parents,
22 guardian, other suitable person, or suitable nondetention setting such as a family home,
23 group care facility, or child care facility, whichever the department considers
24 appropriate to implement the treatment plan of the predisposition report; if the court
25 orders the minor placed on probation, it may specify the terms and conditions of
26 probation; the department may transfer the minor, in the minor's best interests, from
27 one of the probationary placement settings listed in this paragraph to another, and the
28 minor, the minor's parents or guardian, and the minor's attorney are entitled to
29 reasonable notice of the transfer; the probation may be for a period of time, not to
30 exceed two years and in no event extend past the day the minor becomes 19, except
31 that the department may petition for and the court may grant in a hearing

1 (A) two-year extensions of commitment that do not extend
2 beyond the child's 19th birthday if the extension is in the best interests of the
3 minor and the public; and

4 (B) an additional one-year period of supervision past age 19 if
5 the continued supervision is in the best interests of the person and the person
6 consents to it;

7 (4) order the minor to make suitable restitution in lieu of or in addition
8 to the court's order under (1), (2), or (3) of this subsection;

9 (5) order the minor committed to the department for placement in an
10 adventure based education program established under AS 47.21.020 with conditions
11 the court considers appropriate concerning release upon satisfactory completion of the
12 program or commitment under (1) of this subsection if the program is not satisfactorily
13 completed; [OR]

14 (6) in addition to an order under (1) - (5) of this subsection, if the
15 delinquency finding is based on the minor's violation of AS 11.71.030(a)(3) or
16 11.71.040(a)(4), order the minor to perform 50 hours of community service; for
17 purposes of this paragraph, "community service" includes work

18 (A) on a project identified in AS 33.30.901; or

19 (B) that, on the recommendation of the city council or
20 traditional village council, would benefit persons within the city or village who
21 are elderly or disabled; or

22 **(7) in addition to an order under (1) - (5) of this subsection, if the**
23 **delinquency finding is based on the minor's violation of AS 11.61.220(a)(3), revoke**
24 **the minor's driver's license, privilege to drive, or privilege to obtain a driver's**
25 **license for a period of**

26 **(A) one year, if the delinquency finding is based on the**
27 **minor's first violation of AS 11.61.220(a)(3); and**

28 **(B) two years and, in addition, order the minor to perform**
29 **100 hours of community service, if the delinquency finding is based on the**
30 **minor's second or subsequent violation of AS 11.61.220(a)(3); for purposes**
31 **of this subparagraph, "community service" includes work described in**

1 (6)(A) - (B) of this subsection.

2 * **Sec. 10. APPLICABILITY.** (a) Sections 1 - 6, 8, and 9 of this Act apply to offenses
3 committed on or after the effective date of this Act.

4 (b) In

5 (1) AS 11.61.220(i), added by sec. 6 of this Act, reference to previous
6 convictions or adjudications of delinquency under AS 47.10.010 - 47.10.142 does not include
7 convictions or adjudications of delinquency under AS 11.61.220(a)(3) as it read before its
8 amendment by sec. 2 of this Act;

9 (2) AS 47.10.010(e), added by sec. 8 of this Act, reference to previous
10 convictions or adjudications of delinquency does not include convictions or adjudications of
11 delinquency involving the minor that occurred before the effective date of this Act;

12 (3) AS 47.10.080(b)(7), added by sec. 9 of this Act, reference to the minor's
13 second or subsequent violation of AS 11.61.220(a)(3) does not include a violation of
14 AS 11.61.220(a)(3) as it read before its amendment by sec. 2 of this Act.

SENATE BILL NO. 237

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - SECOND SESSION

BY SENATORS LEMAN, Phillips

Introduced: 1/10/94

Referred: STA, JUD, FIN

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to offenses involving delivery of firearms to minors and to
2 offenses involving possession of dangerous instruments, including firearms, by
3 minors."

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

5 * **Section 1.** AS 11.61.210 is amended by adding new subsections to read:

6 (d) In a prosecution under (a)(6) of this section involving the sale of a firearm,
7 it is a defense that, at the time of the sale, the person under 18 years of age was
8 accompanied by the person's parent or guardian.

9 (e) In a prosecution under (a)(6) of this section involving the sale of a firearm,
10 it is an affirmative defense that the sale was made to a person under 18 years of age
11 as to whom, at the time of the sale, the disabilities of minority had been removed
12 under AS 09.55.590 or under AS 25.20.020.

13 * **Sec. 2.** AS 11.61.220(a) is amended to read:

14 (a) A person commits the crime of misconduct involving weapons in the fifth

1 degree if the person

2 (1) knowingly possesses a deadly weapon, other than an ordinary
3 pocketknife or a defensive weapon, that is concealed on the person;

4 (2) knowingly possesses a loaded firearm on the person in any place
5 where intoxicating liquor is sold for consumption on the premises;

6 (3) being a person

7 (A) under 14 years of age, possesses a dangerous instrument;

8 or

9 (B) 14 or 15 years of age, or being a person 16 or 17 years
10 of age as to whom the disabilities of minority have not been removed
11 under AS 09.55.590 or AS 25.20.020 [AN UNEMANCIPATED MINOR
12 UNDER 16 YEARS OF AGE], possesses a

13 (i) dangerous instrument that is not a firearm; or

14 (ii) firearm without the consent of the person's [A]
15 parent or guardian [OF THE MINOR];

16 (4) knowingly possesses a firearm

17 (A) or a defensive weapon within the grounds of or on a
18 parking lot immediately adjacent to a public or private preschool, elementary,
19 junior high, or secondary school without the permission of the chief
20 administrative officer of the school or district or the designee of the chief
21 administrative officer, except that a person 21 years of age or older may
22 possess

23 (i) an unloaded firearm in the trunk of a motor vehicle
24 or encased in a closed container in a motor vehicle;

25 (ii) a defensive weapon; or

26 (B) within the grounds of or on a parking lot immediately
27 adjacent to a center, other than a private residence, licensed under
28 AS 47.35.010 - 47.35.075 or recognized by the federal government for the care
29 of children; or

30 (5) possesses or transports a switchblade or a gravity knife.

31 * Sec. 3. AS 11.61.220(g) is amended to read:

1 (g) Except as provided in (i) of this section, misconduct [MISCONDUCT]
2 involving weapons in the fifth degree is a class B misdemeanor.

3 * Sec. 4. AS 11.61.220 is amended by adding new subsections to read:

4 (h) The provisions of (a)(3) of this section do not apply to a person under 18
5 years of age in possession of a firearm if the person possesses the firearm

6 (1) at an established and lawfully operated range or target concession
7 for the purpose of firing at targets at the range or concession;

8 (2) while in attendance at a hunter safety course or firearm safety
9 course for the purpose of using the firearm in conjunction with lessons presented
10 during that course;

11 (3) while engaged in organized competition involving use of the
12 firearm, or while practicing for an organized competition in which the person plans to
13 participate;

14 (4) on premises owned by or leased by another with the consent of the
15 owner or lessee of those premises;

16 (5) while actually engaged in lawful

17 (A) hunting; or

18 (B) fishing, trapping, or other lawful outdoor activity if the
19 fishing, trapping, or other lawful outdoor activity necessarily involves the
20 carrying of a weapon for personal protection; or

21 (6) while traveling to or from any activity described in (1) - (5) of this
22 subsection.

23 (i) In a prosecution under (a)(3) of this section, it is a defense to a charge
24 brought

25 (1) under (a)(3)(A) of this section that the defendant possessed a
26 firearm and, at the time of possession, was accompanied by an adult;

27 (2) under (a)(3)(B)(ii) of this section that the defendant, at the time of
28 possession, was accompanied by the defendant's parent or guardian.

29 (j) A person convicted under (a)(3) of this section is guilty of a

30 (1) class B misdemeanor if the conviction is the person's first
31 conviction of the offense described in (a)(3) of this section and the person had not

1 been previously adjudicated a delinquent minor under AS 47.10.010 - 47.10.142 for
2 a violation of (a)(3) of this section.

3 (2) class A misdemeanor if, within the preceding seven years, the
4 person was convicted under (a)(3) of this section or under a law or ordinance of
5 another jurisdiction with elements substantially similar to those of the offenses
6 described in (a)(3) of this section, or was adjudicated a delinquent minor under
7 AS 47.10.010 - 47.10.142 if the delinquency finding is based upon a violation of (a)(3)
8 of this section or of a law or ordinance of another jurisdiction with elements
9 substantially similar to those of the offenses described in (a)(3) of this section.

10 * Sec. 5. AS 47.10.080(b) is amended to read:

11 (b) If the court finds that the minor is delinquent, it shall

12 (1) order the minor committed to the department for a period of time
13 not to exceed two years or in any event extend past the day the minor becomes 19,
14 except that the department may petition for and the court may grant in a hearing (A)
15 two-year extensions of commitment that do not extend beyond the child's 19th
16 birthday if the extension is in the best interests of the minor and the public; and (B)
17 an additional one-year period of supervision past age 19 if continued supervision is in
18 the best interests of the person and the person consents to it; the department shall place
19 the minor in the juvenile facility that the department considers appropriate and that
20 may include a juvenile correctional school, juvenile work camp, detention home, or
21 detention facility; the minor may be released from placement or detention and placed
22 on probation on order of the court and may also be released by the department, in its
23 discretion, under AS 47.10.200;

24 (2) order the minor placed on probation, to be supervised by the
25 department, and released to the minor's parents, guardian, or a suitable person; if the
26 court orders the minor placed on probation, it may specify the terms and conditions
27 of probation; the probation may be for a period of time, not to exceed two years and
28 in no event extend past the day the minor becomes 19, except that the department may
29 petition for and the court may grant in a hearing

30 (A) two-year extensions of supervision that do not extend
31 beyond the child's 19th birthday if the extension is in the best interests of the

1 minor and the public; and

2 (B) an additional one-year period of supervision past age 19 if
3 the continued supervision is in the best interests of the person and the person
4 consents to it;

5 (3) order the minor committed to the department and placed on
6 probation, to be supervised by the department, and released to the minor's parents,
7 guardian, other suitable person, or suitable nondetention setting such as a family home,
8 group care facility, or child care facility, whichever the department considers
9 appropriate to implement the treatment plan of the predisposition report; if the court
10 orders the minor placed on probation, it may specify the terms and conditions of
11 probation; the department may transfer the minor, in the minor's best interests, from
12 one of the probationary placement settings listed in this paragraph to another, and the
13 minor, the minor's parents or guardian, and the minor's attorney are entitled to
14 reasonable notice of the transfer; the probation may be for a period of time, not to
15 exceed two years and in no event extend past the day the minor becomes 19, except
16 that the department may petition for and the court may grant in a hearing

17 (A) two-year extensions of commitment that do not extend
18 beyond the child's 19th birthday if the extension is in the best interests of the
19 minor and the public; and

20 (B) an additional one year period of supervision past age 19 if
21 the continued supervision is in the best interests of the person and the person
22 consents to it;

23 (4) order the minor to make suitable restitution in lieu of or in addition
24 to the court's order under (1), (2), or (3) of this subsection;

25 (5) order the minor committed to the department for placement in an
26 adventure based education program established under AS 47.21.020 with conditions
27 the court considers appropriate concerning release upon satisfactory completion of the
28 program or commitment under (1) of this subsection if the program is not satisfactorily
29 completed; [OR]

30 (6) in addition to an order under (1) - (5) of this subsection. if the
31 delinquency finding is based on the minor's violation of AS 11.71.030(a)(3) or

1 11.71.040(a)(4), order the minor to perform 50 hours of community service; for
2 purposes of this paragraph, "community service" includes work

3 (A) on a project identified in AS 33.30.901; or

4 (B) that, on the recommendation of the city council or
5 traditional village council, would benefit persons within the city or village who
6 are elderly or disabled; or

7 (7) in addition to an order under (1) - (5) of this subsection, if the
8 delinquency finding is based on the minor's violation of AS 11.61.220(a)(3), revoke
9 the minor's driver's license, privilege to drive, or privilege to obtain a driver's
10 license for a period of

11 (A) one year, if the delinquency finding is based on the
12 minor's first violation of AS 11.61.220(a)(3); and

13 (B) two years and, in addition, order the minor to perform
14 100 hours of community service, if the delinquency finding is based on the
15 minor's second or subsequent violation of AS 11.61.220(a)(3); for purposes
16 of this subparagraph, "community service" includes work described in
17 (6)(A) - (B) of this subsection.

18 * Sec. 6. APPLICABILITY. This Act applies to offenses committed on or after the
19 effective date of this Act. In AS 11.61.220(j)(2), added by sec. 4 of this Act, reference to
20 previous or earlier convictions or adjudications of delinquency under AS 47.10.010 -
21 47.10.142 does not include convictions or adjudications of delinquency under
22 AS 11.61.220(a)(3) as it read before its amendment by sec. 2 of this Act.

STATE OF ALASKA
1994 LEGISLATIVE SESSION

Revision Date: _____ Dept. Affected: Health and Social Services
Title: An Act relating to offenses involving delivery BRU: Family & Youth Services
of firearms to minors and to offenses involving possession of Component: Southcentral Region
Sponsor: Senators Leman & Phillips
Requestor: Senate State affairs COMPONENT SERIAL NO. 0254

Expenditures/Revenues:

(Thousands of Dollars)

OPERATING	FY95	FY96	FY97	FY98	FY99	FY00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGES IN REVENUES						
----------------------------	--	--	--	--	--	--

FUND SOURCE

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1008 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: None

ANALYSIS: (Attach a separate page if necessary)

This bill presents no fiscal impact on the Department.

4/26/99 date W Comte Aide (initial)
Changes in CS SB 237 (J40)
have no fiscal impact. This
fiscal note is appropriate.

Changes in CS SB 237 (STA)
reflect NO FISCAL CHANGE from the original
fiscal note. This fiscal note is appropriate.
2-23-94 date W Comte Aide (initial)

Prepared by: Deborah R. Wing, Director Deborah R. Wing Phone: 465-3191
Division: Division of Family & Youth Services Date: 01/24/94
Approved by Commissioner: Margaret R. Lowe
Margaret R. Lowe, M.Ed., Ed. S. Date: 1-25-94
Agency: Department of Health & Social Services

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FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 237

Revision Date: _____ Dept. Affected: Health and Social Services
 Title: An Act relating to offenses involving delivery of firearms to minors and to offenses involving possession of RU: Family & Youth Services
 Component: Central Region
 Sponsor: Senators Leman & Phillips
 Requestor: Senate State affairs COMPONENT SERIAL NO. 0259

Expenditures/Revenues:

(Thousands of Dollars)

OPERATING	FY95	FY96	FY97	FY98	FY99	FY00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGES IN REVENUES						
----------------------------	--	--	--	--	--	--

FUND SOURCE

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: None

ANALYSIS: (Attach a separate page if necessary)

This bill presents no fiscal impact on the Department.

Prepared by: Deborah R. Wing, Director *Deborah R. Wing*
 Division: Division of Family & Youth Services
 Approved by Commissioner: Margaret R. Lowe
 Agency: Department of Health & Social Services

Phone: 465-3191
 Date: 01/24/94

Date: 1-25-94

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SB 237-1

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

waited
~~REPORTED OUT OF~~ BILL NO: CSSB 237(JUD)

SFC 5/2/94

Revision Date: 04/28/94 Dept. Affected: Public Safety
 Title: Weapons Possession/Sale by/to Minors BRU: Alaska State Troopers/Motor Vehicles
 Component: Detachments Driver Services
 Sponsor: Senator Leman
 Requestor: (S) Finance COMPONENT SERIAL NO. 799/500

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL EXPENDITURES	-0-	-0-	-0-	-0-	-0-	-0-
CHANGE IN REVENUES ()	-0-	-0-	-0-	-0-	-0-	-0-
<small>Revenue Code</small>						

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

Estimate of current year (FY 94) impact: \$ _____

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary.)

No fiscal impact on the Department of Public Safety is anticipated.

Prepared By: Lee Ann Lucas Phone: 465-4322
 Division: Commissioner's Office Date: 04/28/94
 Approved by Commissioner: *Richard T. Bur* Date: 04/28/94
 Agency: Richard T. Bur in Dept. of Public Safety

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SENATE COMMITTEE REPORT

DATE: 2/23/94

FURTHER: Finance

DATE TURNED INTO OFFICE: 4/27/94

Judiciary Committee considered SENATE BILL NO. 237

"An Act relating to offenses involving delivery of firearms to minors and to offenses involving possession of dangerous instruments, including firearms, by minors."

and recommends:

and recommends it be replaced with

replace with CS SB 237 (540)

or adopt previous CS

attaches amendment(s)

and report it back as follows

- same title
new title
technical title change
(HB only)

adopts Letter of Intent

further referral to the

do pass

do not pass

no recommendation

individual recommendations

NEW FISCAL NOTES

Table with 4 columns: Department, Date, Zero, Fiscal

PREVIOUS FISCAL NOTES

Table with 4 columns: Department, Date, Zero, Fiscal. Includes handwritten entry: HSS, 4/26/94, checkmark

Appropriation No Fiscal Note

DO PASS.

Signature: Rick Halford

OTHER RECOMMENDATIONS:

Handwritten recommendations: David Wiley (no rec), Suzanne Little no rec, etc.

Chair: Signature and Recommendation: Adrian L. Taylor

SENATE COMMITTEE REPORT
FIRST COMMITTEE OF REFERRAL

fact DATE: 1/10/94

FURTHER: Judiciary
Finance

Date of 5-Day Notice: 1-27-94
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: 2-23-94

State Affairs Committee considered SENATE BILL NO. 237

"An Act relating to offenses involving delivery of firearms to minors and to offenses involving possession of dangerous instruments, including firearms, by minors."

and recommends: **and recommends it be replaced with**

replace with _____ CS SB 237 (STA)

attaches amendment(s)

adopts _____ Letter of Intent

further referral to the _____

same title
 new title
 technical title change (HB only)

and report it back as follows

- do pass
- do not pass
- no recommendation

of

individual recommendations

SB & CS

FISCAL NOTE INFORMATION

Department	Date	Zero	Fiscal
DHSS	1-25-94	✓	<i>was</i>

Department	Date	Zero	Fiscal

Appropriation No Fiscal Note Governor's Bill with Previous Fiscal Notes (enter information above)

DO PASS:

OTHER RECOMMENDATIONS:

Mike Miller ①

② Admin. Taylor - NO Rec

① Steven A. Herman Do Pass

Chair: Signature and Recommendation

S B

2 3 8

HFIN

FILE

HOUSE COMMITTEE REPORT

(11)

Date Referred: March 4, 1994

FURTHER REFERRALS:

Date of Committee Action: 3/25/94 am

The FINANCE Committee considered:

CSSB 238(FIN)

CS FOR SENATE BILL NO. 238(FIN)

COASTAL ZONE MANAGEMENT PROCEDURES

"An Act establishing a procedure for review of proposed projects under the Alaska coastal management program, and relating to petitions for compliance with and enforcement of district coastal management programs under that program and to the disposition of those petitions."

RECOMMENDATIONS:

be replaced with CSSB 238(FIN) | | the same title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) _____

APPROVES PREVIOUS: (Dept/Date) _____

fiscal impact _____

fiscal note(s) Revenue Off 2/11/94

zero fiscal note _____

zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Donald J. Larson</i>	x	<i>Terry Martin</i> Martin		x	
<i>Mark Hanley</i> Hanley	x	<i>John Hoffman</i> Hoffman		✓	
<i>Kan Parnell</i> Parnell	x	<i>EP Maclean</i> Maclean		✓	
<i>Bruce Gussendorf</i> Gussendorf	x				
<i>Fay Brown</i> Brown	✓				
<i>Gene Merrill</i> Merrill	x				

EP Maclean *Donald J. Larson*
 CO CHAIRMAN'S SIGNATURE
maclean *Larson*

FISCAL NOTE

No. 2

Bill Version: CSSB 238 (FIN)

(S) Publish Date: 2-11-94

STATE OF ALASKA
1994 LEGISLATIVE SESSION

Revision Date: 2/4/94 Dept. Affected: Office of the Governor
 Title: Review of proposed projects under the BRU: Office of Management & Budget
ACMP and relating to petitions for compliance Component: Governmental Coordination
 Sponsor: Senator Pearce
 Requestor: _____ COMPONENT SERIAL NO. 0018

(Thousands of Dollars)

Expenditures/Revenues	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
OPERATING EXPENDITURES						
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	< 2.0 >	< 2.1 >	< 2.2 >	< 2.3 >	< 2.4 >	< 2.6 >
CONTRACTUAL	< 5.9 >	< 6.2 >	< 6.5 >	< 6.8 >	< 7.2 >	< 7.5 >
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	< 7.9 >	< 8.3 >	< 8.7 >	< 9.1 >	< 9.6 >	< 10.1 >
CAPITAL EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES ()	0	0	0	0	0	0

(Thousands of Dollars)

FUND SOURCE	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
1002 Federal Receipts	< 7.9 >	< 8.3 >	< 8.7 >	< 9.1 >	< 9.6 >	< 10.1 >
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
Other	0	0	0	0	0	0
TOTAL	< 7.9 >	< 8.3 >	< 8.7 >	< 9.1 >	< 9.6 >	< 10.1 >

Estimate of any current year (FY94) cost: \$ 0

POSITIONS

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)
 (See Attachment)

Prepared by: Paul C. Rusanowski, Director DGC *PCR* Phone: 465-3562
 Division: Governmental Coordination Date: 2/4/94
 Approved by Commissioner: *Patrick J. Poyden* Date: 2-4-94
 Agency: _____

Revised Fiscal Analysis of Senate Bill 238

Estimated Savings of \$29,900. SB 238 would eliminate travel and contractual expenses associated with conducting a formal hearing process under the Administrative Procedure Act (AS 44.62). Instead, SB 238 would establish an informal hearing on a petition before the Alaska Coastal Policy Council. The estimated FY95 savings in travel expenditures (\$2,000) are based on actual FY93 costs for staff and attorney to participate in a formal petition hearing. The estimated savings in contractual expenditures are based on average actual expenditures during FY91 - FY93 for: hearing officer contract (\$25,000), hearing room fees (\$1,400), and transcription costs (\$1,500). Other expenses for Council teleconferences, mailings, and supplies are assumed to remain roughly the same. The number of petitions (average: 1 per year FY89-FY93) is assumed to remain unchanged.

Estimated New Costs of \$22,050 for DGC and State Resource Agencies. Additional costs would be incurred to meet public notice requirements in Section 2 of SB 238. The legislation would require that a public notice occur for all coastal projects reviewed for consistency with the Alaska Coastal Management Program. However, the majority of coastal projects are currently public noticed under existing State agency mandatory requirements or cooperative arrangements under mandatory federal requirements. SB 238 would not impose an additional, duplicative notice requirement.

In effect, the estimated annual numbers of coastal projects coordinated by State agencies which would fall under a new public notice requirement because of SB 238 are: DEC (0), DFG (125), DGC (150), and DNR (130) - for a subtotal of 405 projects (out of an estimated 1,500 total consistency reviews annually). Coastal projects currently not public noticed are often shorter, 30-day reviews and include: oil production pad expansion, winter tundra travel, seismic exploration, barge mooring, dock installation in river, culvert installation, floathouse mooring, bank stabilization, tideland uses, and temporary water uses. Many of these projects are considered minor activities without significant impacts.

The Department of Law interprets SB 238 (Section 2) to grant to the Coastal Policy Council the regulatory authority to direct various public notice requirements depending on project type and anticipated effects. Posting notices in local post offices, publication in the Alaska Administrative Journal, and posting by the local coastal district are considered appropriate for coastal projects where anticipated impacts would be minimal. Conservatively, it is estimated that only 205 of the 405 coastal projects would fall under this lesser public notice requirement, at an average cost of \$10 per notice for certified mailings (or \$2,050). The remaining 200 estimated projects would require one newspaper notice (following current DGC practice), at \$100 per notice (or \$20,000).

Net Savings of \$7,850.

Travel	<\$ 2,000>	
Contractual	+ <\$ 5,850>	[Note: \$27,900 - \$22,050]
Total:	<\$ 7,850>	

CS FOR SENATE BILL NO. 238(FIN)

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE FINANCE COMMITTEE

Offered: 2/11/94

Referred: Rules

Sponsor(s): SENATOR PEARCE

RES

A BILL

FOR AN ACT ENTITLED

1 "An Act establishing a procedure for review of proposed projects under the
2 Alaska coastal management program, and relating to petitions for compliance with
3 and enforcement of district coastal management programs under that program and
4 to the disposition of those petitions."

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

6 * Section 1. AS 46.40.040 is amended to read:

7 Sec. 46.40.040. DUTIES OF THE ALASKA COASTAL POLICY COUNCIL.

8 Through the public hearing process and the recording of the minutes of the hearings,
9 the Alaska Coastal Policy Council shall

10 (1) by regulation, adopt under the provisions of AS 44.62 ([THE]
11 Administrative Procedure Act) [(AS 44.62) NOT LATER THAN APRIL 15, 1978,]
12 for the use of and application by coastal resource districts and state agencies for
13 carrying out their responsibilities under this chapter, guidelines and standards for

14 (A) identifying the boundaries of the coastal area subject to the

1 district coastal management program;

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

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

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

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

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

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

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

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

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

22 (5) develop procedures or guidelines for consultation and coordination
23 with federal agencies managing land or conducting activities potentially affecting the
24 coastal area of the state;

25 **(6) by regulation, establish a consistency review and determination**
26 **or certification process that conforms to the requirements of AS 46.40.096.**

27 * Sec. 2. AS 46.40 is amended by adding a new section to read:

28 Sec. 46.40.096. CONSISTENCY REVIEWS AND DETERMINATIONS. (a)

29 The council shall, by regulation, establish a consistency review and determination
30 process that conforms to the requirements of this section.

31 (b) If a consistency review is not subject to AS 44.19.145(a)(11) because the

1 opportunity to file a petition under AS 46.40.100(b)(1) seeking a review by the council
2 of the proposed consistency determination prepared under (d)(2) of this section. The
3 regulations must include provisions that establish a reasonable limit on the time that
4 may elapse between the completion of the proposed consistency determination prepared
5 under (d)(2) of this section and a hearing to consider a petition filed under this
6 subsection. Not more than 30 days shall elapse between the filing of the petition and
7 the decision by the council. Under this subsection,

8 (1) the right to file a petition is limited to

9 (A) each of the following parties, but only if the party had
10 submitted comments during the period for receipt of public comments
11 established under (c) of this section:

12 (i) an affected coastal resource district;

13 (ii) a state agency; or

14 (iii) a citizen of an affected coastal resource district; or

15 (B) the project applicant; and

16 (2) the reviewing entity

17 (A) may not accept a petition filed under this subsection if a
18 final consistency determination has been rendered under (d)(4) of this
19 subsection;

20 (B) may accept a petition filed by a party identified in (1)(A)(i),
21 (1)(A)(ii), or (1)(B) of this subsection only if a party had requested a review
22 of the proposed consistency determination prepared under (d)(2) of this section;

23 (C) may accept a petition filed by a party identified in
24 (1)(A)(iii) of this subsection without regard to whether a party had requested
25 a review of the proposed consistency determination prepared under (d)(2) of
26 this subsection.

27 (f) For a consistency review subject to AS 44.19.145(a)(11), the council may,
28 by regulation, limit consideration of a petition under (e) of this section seeking review
29 of a proposed consistency determination to the extent necessary to meet the deadlines
30 set by federal law for timely submission of a federal consistency determination as
31 allowed by 16 U.S.C. 1456.

1 (g) In this section,

2 (1) "affected coastal resource district" means a coastal resource district
3 in which a project is proposed to be located or which may experience a direct and
4 significant impact from a proposed project;

5 (2) "reviewing entity" means the

6 (A) office, for a consistency review subject to
7 AS 44.19.145(a)(11);

8 (B) state agency identified in (b) of this section, for a
9 consistency review not subject to AS 44.19.145(a)(11).

10 * Sec. 3. AS 46.40.100(b) is amended to read:

11 (b) A party that is authorized under AS 46.40.096(e)(1) or (g) of this
12 section may file a petition showing that a district coastal management program
13 is not being implemented, enforced, or complied with. On receipt of a petition [OF
14 A COASTAL RESOURCE DISTRICT, A CITIZEN OF THE DISTRICT, OR A
15 STATE AGENCY, SHOWING THAT A DISTRICT COASTAL MANAGEMENT
16 PROGRAM IS NOT BEING IMPLEMENTED, ENFORCED OR COMPLIED WITH],
17 the council, after giving public notice in the manner required by (f) of this section,
18 shall convene a [PUBLIC] hearing to consider the matter. A hearing called under this
19 subsection shall be held in accordance with regulations adopted by the council [THE
20 ADMINISTRATIVE PROCEDURE ACT (AS 44.62)]. After hearing,

21 (1) if the petition was filed under AS 46.40.096(e) and the council
22 finds that

23 (A) the office or the state agency responsible for
24 coordinating the consistency review has not fairly considered the
25 petitioner's comments in the development of a proposed consistency
26 determination, the council shall remand the proposed consistency
27 determination to the office, or to the state agency responsible for
28 coordinating the consistency review, for preparation of a revised proposed
29 consistency determination that gives fair consideration to the petitioner's
30 comments;

31 (B) a remand of the consistency determination is not

1 required under (A) of this paragraph, the council shall dismiss the petition;

2 (2) if the petition was not filed under AS 46.40.096(e), the council
3 may order that the coastal resource district or a state agency take any action [WHICH]
4 the council considers necessary to implement, enforce, or comply with the district
5 coastal management program.

6 * Sec. 4. AS 46.40.100(c) is amended to read:

7 (c) Except when a petition has been filed under AS 46.40.096(e), in [IN]
8 determining whether an approved district coastal management program is being
9 implemented, enforced, or complied with by a coastal resource district that [WHICH]
10 exercises zoning authority or controls on the use of resources within the coastal area,
11 the council shall find in favor of the district if

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

14 (2) variances are being granted according to procedures and criteria
15 that [WHICH] are elements of the district coastal management program, or the
16 variance is otherwise approved by the council; and

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

20 * Sec. 5. AS 46.40.100(d) is amended to read:

21 (d) Except when a petition has been filed under AS 46.40.096(e), in [IN]
22 determining whether a state agency is complying with a district coastal management
23 program with respect to its exercise of regulation or control of the resources within the
24 coastal area, the council shall find in favor of the agency if

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

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

31 * Sec. 6. AS 46.40.100 is amended by adding new subsections to read:

1 (f) Upon receipt of a petition under (b) of this section, the council shall give
2 notice of the hearing convened to consider the petition as follows:

3 (1) notice of the hearing shall be given at least 10 days before the
4 scheduled date of the hearing

5 (A) by publication in

6 (i) a newspaper of statewide circulation; or

7 (ii) a newspaper of general circulation in the vicinity of
8 the district coastal management program that is the subject of the
9 petition; and

10 (B) by at least one of the following methods:

11 (i) publication through public service announcements on
12 the electronic media serving the area affected by the district coastal
13 management program;

14 (ii) posting in a conspicuous location in the vicinity of
15 the proposed project or action;

16 (iii) notifying parties known or likely to be affected by
17 the proposed project or action; or

18 (iv) another method calculated to effectively notify
19 affected interested parties.

20 (2) a notice provided under (1) of this subsection must

21 (A) contain sufficient information in commonly understood
22 terms to inform the public of the nature of the petition; and

23 (B) indicate the manner in which the public may comment on
24 the petition if the petition is filed under (b)(2) of this section.

25 (g) The opportunity to petition under (b)(2) of this section is limited to

26 (1) a coastal resource district;

27 (2) a citizen of the coastal resource district; or

28 (3) a state agency.

29 * Sec. 7. AS 46.40.210 is amended by adding new paragraphs to read:

30 (7) "consistency review" means the evaluation of a proposed project
31 against the standards adopted by the council under AS 46.40.040 and a district coastal

1
2
3

management program approved by the council under AS 46.40.060;

(8) "office" means the office of management and budget established in
the Office of the Governor.

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

No. 2
Bill Version: CSSB 238 (FIN)
(S) Publish Date: 2-11-94

Revision Date: 2/4/94 Dept. Affected: Office of the Governor
Title: Review of proposed projects under the BRU: Office of Management & Budget
ACMP and relating to oetitions for compliance Component: Governmental Coordination
Sponsor: Senator Pearce
Requestor: _____ COMPONENT SERIAL NO. 0018

Expenditures/Revenues	(Thousands of Dollars)					
OPERATING EXPENDITURES	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	< 2.0 >	< 2.1 >	< 2.2 >	< 2.3 >	< 2.4 >	< 2.6 >
CONTRACTUAL	< 5.9 >	< 6.2 >	< 6.5 >	< 6.8 >	< 7.2 >	< 7.5 >
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	< 7.9 >	< 8.3 >	< 8.7 >	< 9.1 >	< 9.6 >	< 10.1 >

CAPITAL EXPENDITURES	0	0	0	0	0	0
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CHANGE IN REVENUES ()	0	0	0	0	0	0
------------------------	---	---	---	---	---	---

FUND SOURCE	(Thousands of Dollars)					
1002 Federal Receipts	< 7.9 >	< 8.3 >	< 8.7 >	< 9.1 >	< 9.6 >	< 10.1 >
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
Other	0	0	0	0	0	0
TOTAL	< 7.9 >	< 8.3 >	< 8.7 >	< 9.1 >	< 9.6 >	< 10.1 >

Estimate of any current year (FY94) cost: \$ 0

POSITIONS						
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)
(See Attachment)

Prepared by: Paul C. Rusanowski, Director DGC *PR* Phone: 465-3562
Division: Governmental Coordination Date: 2/4/94
Approved by Commissioner: *Patrick J. Egan* Date: 2-4-94
Agency: _____

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Revised Fiscal Analysis of Senate Bill 238

Estimated Savings of \$29,900. SB 238 would eliminate travel and contractual expenses associated with conducting a formal hearing process under the Administrative Procedure Act (AS 44.62). Instead, SB 238 would establish an informal hearing on a petition before the Alaska Coastal Policy Council. The estimated FY95 savings in travel expenditures (\$2,000) are based on actual FY93 costs for staff and attorney to participate in a formal petition hearing. The estimated savings in contractual expenditures are based on average actual expenditures during FY91 - FY93 for: hearing officer contract (\$25,000), hearing room fees (\$1,400), and transcription costs (\$1,500). Other expenses for Council teleconferences, mailings, and supplies are assumed to remain roughly the same. The number of petitions (average: 1 per year FY89-FY93) is assumed to remain unchanged.

Estimated New Costs of \$22,050 for DGC and State Resource Agencies. Additional costs would be incurred to meet public notice requirements in Section 2 of SB 238. The legislation would require that a public notice occur for all coastal projects reviewed for consistency with the Alaska Coastal Management Program. However, the majority of coastal projects are currently public noticed under existing State agency mandatory requirements or cooperative arrangements under mandatory federal requirements. SB 238 would not impose an additional, duplicative notice requirement.

In effect, the estimated annual numbers of coastal projects coordinated by State agencies which would fall under a new public notice requirement because of SB 238 are: DEC (0), DFG (125), DGC (150), and DNR (130) - for a subtotal of 405 projects (out of an estimated 1,500 total consistency reviews annually). Coastal projects currently not public noticed are often shorter, 30-day reviews and include: oil production pad expansion, winter tundra travel, seismic exploration, barge mooring, dock installation in river, culvert installation, floathouse mooring, bank stabilization, tideland uses, and temporary water uses. Many of these projects are considered minor activities without significant impacts.

The Department of Law interprets SB 238 (Section 2) to grant to the Coastal Policy Council the regulatory authority to direct various public notice requirements depending on project type and anticipated effects. Posting notices in local post offices, publication in the Alaska Administrative Journal, and posting by the local coastal district are considered appropriate for coastal projects where anticipated impacts would be minimal. Conservatively, it is estimated that only 205 of the 405 coastal projects would fall under this lesser public notice requirement, at an average cost of \$10 per notice for certified mailings (or \$2,050). The remaining 200 estimated projects would require one newspaper notice (following current DGC practice), at \$100 per notice (or \$20,000).

Net Savings of \$7,850.

Travel	<\$ 2,000>	
Contractual	+ <\$ 5,850>	[Note: \$27,900 - \$22,050]
Total:	<\$ 7,850>	

Sponsor Statement

Mr. Chairman and members of the committee, the Coastal Policy Council coordinates State agencies and local coastal districts in reviewing and issuing State permits for proposed development projects affecting natural resources in Alaska's coastal zones. Senate Bill 238 clarifies when and how certain parties can petition the Coastal Policy Council during an Alaska Coastal Management Program consistency review.

This bill corrects a problem that occurs when a petition is brought before the council after a final commissioner level decision on a consistency review has been made. Under the current Alaska Coastal Management Program statutes and regulations the State's resource commissioners cannot delegate their responsibility to participate in an elevation of a consistency determination to the commissioner level, nor may they delegate their authority to decide a petition in the final consistency determination. However, as noted in the included informal AG opinion, the commissioners cannot sit in both capacities.

These clarifications will ensure that complaints are heard and addressed in a timely manner. This bill will ensure that citizens, State agencies, and affected projects have a voice in the development policies of our state's coastal areas.

The bill as proposed is the result of intensive collaboration between me, an Alaska Coastal Policy Subcommittee, the Alaska Department of Law, and other interested parties.

Included in the packet are:

- Negative fiscal note
- Sectional analysis
- Director Paul Rusanowski's analysis
- Summary of AG's opinion
- Summary of ACMP's consistency review process

MEMORANDUM

State of Alaska

Department of Law

TO: Paul C. Rusanowski, Director
Division of Governmental
Coordination

DATE: March 3, 1993

FILE NO: 663-92-0618

TEL NO: 465-3600

SUBJECT: Alaska Coastal Policy
Member's Eligibility to
Hear Petitions Under
AS 46.40.100

FROM:

Elizabeth J. Karttula
Elizabeth J. Karttula
Assistant Attorney General

SUMMARY OF ATTORNEY GENERAL'S OPINION
ON CPC MEMBERS' ELIGIBILITY TO HEAR PETITIONS

At your request, we are providing you with a short summary of our opinion concerning CPC members' eligibility to hear petitions.

As the opinion notes in the background section, in 1977 when the legislature enacted AS 46.40.100, it created an ability for certain people to appeal issues to the CPC through "petitions." In 1984, when the CPC promulgated its regulations creating the consistency review process for consistency determinations in 6 AAC 50, it amended a section of the regulations that specifically allowed consistency determinations to be reviewed by the CPC, intending to have consistency determinations appealed to court rather than to the CPC. However, there was no commensurate statutory change to AS 46.40.100. Since a regulation cannot remove a statutory right, the ability to bring a petition from a final consistency determination to the CPC remains. This situation has created a dual appeal mechanism and conflicts have arisen.

Your questions involve important Administrative Procedure Act ("APA")-due process concerns and delegation issues. As a general principle, the APA and its due process implications require that when an agency is performing an independent adjudicatory review, the review must be impartial. Concerning the delegation of duties, although commissioners have general authority to delegate functions vested in their departments, specific statutory and regulatory requirements take precedence over this general authority. Using these general principles, we analyzed your specific questions.

Rather than repeat the questions again (which we do in the opinion) we have outlined our responses below.

1(a). If a commissioner participates in a commissioner-level elevation concerning a consistency determination, that commissioner may not participate in a CPC petition concerning the same consistency determination.

Paul C. Rusanowski, Director
Division of Governmental
Coordination

March 3, 1993
Page 2

1(b). If a CPC public member participates in a decision concerning a matter at a local level, that public member may not participate in a CPC petition concerning the same decision.

2. A commissioner may not delegate his or her responsibility to participate in a commissioner-level elevation of a consistency determination to a subordinate in order to allow him or herself the ability to sit on a petition on the consistency determination. Similarly, APA-due process concerns and the ACMP statutes and regulations do not allow a commissioner to delegate his or her authority to sit on a CPC petition if the commissioner has participated in an elevation. This creates a conflict between the ACMP statutes and regulations that should be resolved.

3. Neither a commissioner nor a public member (nor their alternates) may participate in a petition proceeding when the commissioner's department or the public member's municipality initiates the petition.

4. Neither a commissioner nor a public member (nor their alternates) may participate in a petition proceeding when the petition is against the commissioner's department or the public member's municipality (there is an exception noted in the opinion).

In conclusion, we hope this summary is of assistance to you.

EJK:smm

CS FOR SENATE BILL 238 (FIN)

Senate Bill 238 would amend the Alaska Coastal Management Act (AS 46.40) to clarify how and when certain parties can appeal, or "petition", the Alaska Coastal Policy Council during an Alaska Coastal Management Program (ACMP) consistency review. CSSB 238 (FIN) incorporates an approach recommended by the Alaska Coastal Policy Council at its October 27, 1993 meeting.

As directed by the Council, the Division of Governmental Coordination staff worked with a Council subcommittee, other interested parties, and Senator Pearce on the legislation. CSSB 238 (FIN) includes many suggestions made by the Council subcommittee and other parties during a late December 1993 teleconference (see attached list of participants).

Why is Senate Bill 238 Needed?

Under the ACMP, State agencies and local coastal districts participate in a coordinated process for reviewing and issuing State permits for proposed development projects affecting natural resources and uses in Alaska's coastal zone (see the attached overview for a more detailed description of the process). Proposed projects are reviewed to ensure they are consistent with the standards of the ACMP and the policies of a local coastal district program. The commissioners of the Departments of Environmental Conservation, Natural Resources, and Fish and Game, on appeal in an "elevation", make the final decision on a consistency determination. The commissioners also sit on the Alaska Coastal Policy Council, which has heard petitions (under AS 46.40.100) on a few consistency determinations made by commissioners in recent years.

CSSB 238 (FIN) would correct the problems experienced with these recent petitions and the difficulties identified in a March 2, 1993 informal Attorney General opinion regarding due process and delegation when a petition occurs *after* a final commissioner-level decision on a consistency review.¹ Under the current ACMP statutes and regulations, the State resource agency commissioners may not delegate their responsibility to participate in a commissioner-level "elevation" of a consistency determination, nor may they delegate their authority to decide a petition when they have participated in the final consistency determination. However, as noted in the informal AG opinion, the

¹March 2, 1993 Memorandum from Elizabeth Kerttula, Alaska Department of Law, to Paul Rusanowski, Division of Governmental Coordination, "Alaska Coastal Policy Council Members' Eligibility to Hear Petitions Under AS 46.40.100", 27 pp (see attached March 3, 1993 summary).

commissioners cannot sit in both capacities. In a recent example, the State resource agencies were unable to participate in Council action on a petition affecting coastal resources and land uses.² General principles of due process and delegation under the Administrative Procedure Act dictate a change in the statute or regulations, or both to rectify the conflict.

How Would Senate Bill 238 Fix the Problem?

CSSB 238 (FIN) would amend the Alaska Coastal Management Act (AS 46.40) to allow certain parties to petition the Coastal Policy Council when a preliminary, or "proposed", consistency determination is issued by a State agency. The petitioner would seek Council review of whether the petitioner's comments had been fairly considered by the State agency coordinating the ACMP consistency review. If the agency had done its job, the Council would dismiss the petition. Otherwise, the Council would remand the proposed consistency determination to the agency to give fair consideration to the petitioner's comments and to prepare a revised proposed consistency determination.

A final consistency decision would be made by the State resource agencies. Unlike the current situation, CSSB 238 (FIN) would not allow a petition on a final consistency determination. Also, CSSB 238 (FIN) resolves the due process and delegation concerns because the State resource agency commissioners -- as members of the Coastal Policy Council -- would only be reviewing a staff level *proposed* consistency decision, and therefore could still make the *final* State decision on the consistency review, if a further appeal (as an elevation) occurs after the petition process is completed.

CSSB 238 (FIN) would, in effect, place the Coastal Policy Council in an intermediary role as a referee on the State's consistency review process, on petition from a coastal district, citizen of a district, State agency, or project applicant. The Council -- with its statewide membership of locally elected officials and State agency commissioners -- would provide oversight to ensure that State agencies follow procedures and give fair consideration to the broad interests commenting on proposed projects in Alaska's coastal areas (see attached Council membership).

²The Timber Creek Trapping Cabin Permit petition, in Bering Straits Coastal Management Program and the Koyuk IRA Council v. Alaska Department of Natural Resources, was submitted to the Council on July 1992, heard by a hearing officer in May 1993, and dismissed by the Coastal Policy Council in October, 1993.

What Would Senate Bill 238 Do?

Briefly, CSSB 238 (FIN) would do the following:

Section 1. Amend AS 46.40.040 to add a new duty of the Alaska Coastal Policy Council to establish, by regulation, a consistency review and determination process.

Section 2. Amend AS 46.40 to add a new section (AS 46.40.096) which identifies the key elements of the consistency review process, including:

- the agency coordinating the review
- public notice requirements request for comments on a proposed project an elevation which can occur as a "subsequent review" of a proposed consistency determination (also, who can request an elevation and who reviews)
- the opportunity for certain parties to petition the Council about a proposed determination
- limitations on when a party may petition the Council
- flexibility to limit consideration of a petition when a federal law sets a deadline for the State of Alaska's response on a consistency determination for a federal agency permit or activity,
- the final consistency determination and
- definitions for "affected coastal resource district" and "reviewing entity."

Section 3. Amend the existing petition statute AS 46.40.100 (b) to:

- provide for a petition to the Council on a proposed consistency determination
- replace the requirement for a hearing under the Administrative Procedure Act (AS 44.62) with a hearing established in regulation by the Council
- specify that the Council's standard of review is whether the agency coordinating the consistency review fairly considered the petitioner's comments submitted during the review period, and
- provide for petition dismissal or remand of the proposed determination to the agency for a revised proposed consistency determination

Sections 4 and 5. Amend the existing petition statute AS 46.40.100(c) and (d) to clarify that the subsections would continue to address a petition which might be submitted on general district or State agency actions regarding implementation of a district coastal program, and not a petition about a State consistency determination under AS 46.40.096.

Section 6. Add new subsections under the existing petition statute AS 46.40.100 which:

- establish requirements for the notice of a hearing held by the Council to consider a petition
- identify, as in the current statute, the parties which have the opportunity to petition the Council on "general", non-consistency petitions.

Section 7. Amend AS 46.40.210 to add definitions for "consistency review" and "office."

* * *

The Division of Governmental Coordination will continue to work with the Coastal Policy Council subcommittee, House Resources, Senator Pearce, and other interested parties as this legislation proceeds. Dr. Paul Rusanowski, Director of DGC, can be reached at 465-8800 if committee members have any questions.

Prepared by:
Division of Governmental Coordination, Office of Management and Budget
CSSB 238(FIN).SUM/March 1, 1994

BERING STRAITS COASTAL RESOURCE SERVICE AREA BOARD

P.O. Box 10190
Unalakleet, Alaska 99684
(907) 624-3062

February 9, 1994

FEB 15 1994

Honorable Senator Drue Pearce
Alaska State Legislature
Pouch V
Juneau, Ak 99811

Dear Senator Pearce:

Subject: SB 238/HB 401

Under the current statutes a district's comments must be fairly considered by a state agency at every level, including early in the process. A district can now petition the Coastal Policy Council for relief. Currently, the CPC can review factual and procedural issues.

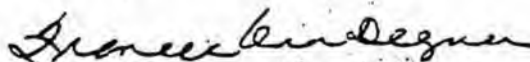
Under Senate Bill 238 authority is limited to procedural review at the CPC level. In our view, authority is taken away from the Coastal Policy Council and placed in a state agency at the director level.

Conflicts of interest arise periodically. Current practice and recent attorney general's opinions provide solutions for those conflicts.

Our concern continues to be a citizen's ability to petition the council whether or not they previously commented on a consistency review. As a practical matter, it is unfair to citizens to have the ability to petition eliminated simply because they had not commented after a public notice which usually appears in legal print, which is usually in English or legalese which can be taken in more ways than one if seen at all.

Under current Alaska Statutes, state government has sufficient advantage over its citizens. It is unreasonable to take away a citizen's ability to petition the Alaska Coastal Policy Council.

Sincerely,



Frances Ann Degnan
Chairperson

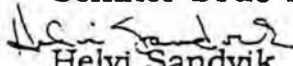
DEPARTMENT OF TRANSPORTATION
AND PUBLIC FACILITIES
OFFICE OF THE COMMISSIONER

WALTER J. HICKEL, GOVERNOR

1132 CHANNEL DRIVE
JUNEAU, ALASKA 99801-7898

TEXT: (907) 465-3652
FAX: (907) 586-8365
PHONE: (907) 465-3900

MEMORANDUM

TO: Senator Drue Pearce
FROM:  Helvi Sandvik
Deputy Commissioner
DATE: January 31, 1994
SUBJECT: SB 238

It is with some interest to note that you are sponsoring work on Senate Bill No. 238 relating to coastal policy. The Division of Governmental Coordination now, by regulation, requires a consistency review and determination on all projects constructed in the State which includes Coastal Zone management.

During development of any project involving federal interest, the state is required to comply with 42 USC 4321-4347. (National Environmental Policy Act of 1972). The involved federal agency must certify that the total public involvement process has been met under federal law. Almost without exception, any DOT&PF project is subject to NEPA.

A typical Federal-Aid project will have at least one and sometimes two formal hearings. These are part of the department's Public Involvement Plan prepared for each project. If a bridge is involved in or over navigable waters, an additional hearing and public involvement is required by both the U.S. Corps of Engineers and the U.S. Coast Guard. During the development of a project, the public involvement process can involve up to four (4) opportunities for public involvement and hearings. To require an additional hearing by a state agency would, in our case, appear to be redundant. Each separate hearing or public involvement requirement adds a minimum of about three months to the project development process.

DOT&PF is presently in contact with coastal districts through the review process mandated by the Division of Governmental Coordination.

It would cut time and expense in the DOT&PF's project development process if a provision could be included that would exempt DOT&PF (and perhaps others) if public involvement had been accomplished during the Federal and/or State processes.

If there is any way to shorten the process while still maintaining intent of SB 238, we feel it would benefit the development of transportation projects in Alaska.

cc: J.K. Ginger Johnson, Legislative Liaison, DOT&PF

OFFICE OF THE GOVERNOR

OFFICE OF MANAGEMENT AND BUDGET
DIVISION OF GOVERNMENTAL COORDINATION

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PIPELINE COORDINATOR'S OFFICE
411 WEST 4TH AVENUE, SUITE 2C
ANCHORAGE, ALASKA 99501-2343
PH: (907) 278-3594/FAX: (907) 272-0690

February 9, 1994

Honorable Senator Drue Pearce
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Subject: Senate Bill 238

Dear Senator Pearce:

Thank you for the opportunity to respond to the January 24, 1994 letter from the Bering Straits Coastal Resource Service Area Board which opposes Senate Bill 238. As you know, the Alaska Coastal Policy Council supports SB 238, which was developed in conjunction with a Council subcommittee and a working group consisting of State agencies, several coastal districts, and other interested parties.

Contrary to what is asserted in the Bering Straits letter, a district's due deference -- or its local expertise in the interpretation and application of its local program -- during the consistency review would be unaltered by SB 238. In fact, SB 238 would underscore local coastal district input into the Alaska Coastal Management Program consistency review process. Under SB 238, a district's comments must be fairly considered by a State agency *early in the process*, or the district can petition the Coastal Policy Council for *immediate relief*. With early Council oversight, State agencies are likely to carefully attend to comments received during the consistency review.

The Bering Straits CRSA Board's desire to have the Coastal Policy Council retain the authority to reverse commissioner decisions runs counter to a March 1993 Attorney General opinion, which pinpoints fundamental due process and delegation concerns. Under the present situation, a conflict exists because the State resource agency commissioners cannot sit in both capacities as final decision makers on a consistency review and as members of the Coastal Policy Council deciding a petition regarding a final consistency decision. The AG opinion indicates that a change is needed to remove the conflict.

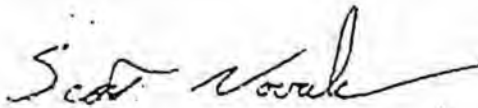
Senate Bill 238 provides a good solution to the dilemma because the State resource commissioners could review a *proposed consistency decision under petition* as members of the Council and

decide whether procedural mishandling occurred at that preliminary stage. If a district's comments were ignored as the Bering Straits letter suggests, the Council would remand the proposed decision to the State agency for a revised decision which considers the comments. The issues are then resolved, or SB 238 would enable the commissioners to make a *final State decision* on the consistency review as the heads of the State resource agencies -- whose permitting authority actually allows the coastal project to proceed.

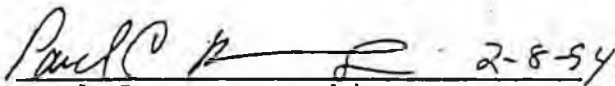
The final point raised by Bering Straits addresses a citizen's ability to petition the Council whether or not they previously commented on the consistency review. The Council subcommittee, agencies and coastal districts that worked on the petition process embodied in SB 238 discussed this issue and concluded that a party should comment during the regular consistency review to be eligible to petition the issue to the Council. Simply put, it would be unfair to appeal an issue to the Council without first raising the issue to the coordinating State agency. In fact, redesigning the process (coupled with strengthened public notice) so that local concerns are brought out early in the review is considered a strength of SB 238.

We strongly urge you to continue pursuing the legislative remedy proposed in SB 238. We remain committed to its approach, and wish to work with you to ensure successful passage of the bill.

Sincerely,



Scott Novak
Public Members Co-Chair
Alaska Coastal Policy Council



Paul C. Rusanowski
State Members Co-chair
Alaska Coastal Policy Council

cc: Alaska Coastal Policy Council
Bering Straits CRSA Board
Alaska Coastal Districts
Petitions Working Group

HOUSE COMMITTEE REPORT

(9)

Date Referred: February 23, 1994

FURTHER REFERRALS:

Date of Committee Action: 3/4/94

The RESOURCES Committee considered:

CSSB 238(FIN)

CS FOR SENATE BILL NO. 238(FIN)

COASTAL ZONE MANAGEMENT PROCEDURES

"An Act establishing a procedure for review of proposed projects under the Alaska coastal management program, and relating to petitions for compliance with and enforcement of district coastal management programs under that program and to the disposition of those petitions."

RECOMMENDATIONS:

be replaced with _____ the same title

have attached amendments(s) a new title

do pass

do not pass

no recommendations

individual recommendations

additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal impact _____

fiscal note(s) DGC / 2-11-94

zero fiscal note _____

zero fiscal note(s) _____

SIGNING <u>DO PASS</u>	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Bill Hudson</i> Hudson	✓	<i>Paul Hatcher</i> Finkelstein		✓	
<i>Bob Carney</i> Carney	✓	<i>Paul N. Davies</i> Davies		✓	
<i>Cassidy Green</i> Green	✓				
<i>Annette James</i> James	✓				
<i>W.M. Bunde</i> Bunde	✓				
<i>W.R. Williams</i> Williams	✓				
<i>Bill Guld</i>	✓				

W.R. Williams
CHAIRMAN'S SIGNATURE

DIVISION OF LEGAL SERVICES

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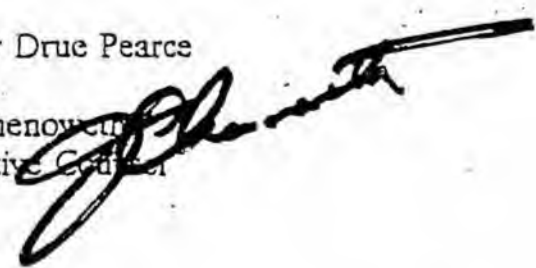
MEMORANDUM

January 4, 1994

SUBJECT: Coastal management consistency determination legislation
(Work Order No. 8-LS1442\K)

TO: Senator Drue Pearce

FROM: Jack Chenoweth
Legislative Counsel



A word about the bill, provided to you earlier today, and its specific provisions.

The measure substantially codifies the Coastal Policy Council's consistency review practices based upon suggestions provided by the Department of Law, the Division of Governmental Coordination (part of the office of management and budget), and, following a late December teleconference, the Coastal Policy Council.

Bill section 1: This provision amends AS 46.40.040, the section enumerating the duties of the Alaska Coastal Policy Council. It deletes a dated reference to the deadline for approval of the Council's initial program regulations and standardizes a reference to the applicability of the Administrative Procedure Act. Substantively, the bill section directs the Council to adopt regulations to establish a (project) consistency review and determination process that conforms to the requirements of AS 46.40.096.

Bill section 2: This bill section, adding a proposed AS 46.40.096, outlines the essential elements of the consistency review and determination process. Subsection (a) directs the council to adopt regulations for consistency determinations, whether those determinations are to be made by the council (coordinating the review of multiple agencies) or by a single state agency. Subsection (b)—a parallel provision to existing AS 44.19.145(a)(11)—clarifies that, when a consistency review is required for a project that requires a permit from but one state agency, that agency, rather than the office of management and budget's division of governmental coordination, has the responsibility to coordinate the consistency review. Subsection (c) sets out public notice and public comments in conjunction with consistency determinations; the council's regulations may distinguish as to notice depending on the circumstances

Senator Drue Pearce

January 4, 1994

Page 2

of the project, but the essential components of notice are set out. Subsection (d) sets out procedures for obtaining the comments of interested parties, directing preparation of proposed consistency determinations, allowing opportunity for parties to secure review of a proposed consistency determination, and directing preparation of the final consistency determination. Subsection (e) treats with the filing and handling of petitions for review of proposed consistency determinations, setting limits on who may petition and when the petitions may properly be considered. Subsection (f) authorizes the council to limit consideration of a review petition when the opportunity for full consideration of the petition might cause the state to miss a deadline set by federal law for submission of a federal consistency determination. Subsection (g) supplies definitions for terms used in the section.

Bill section 3: Existing AS 46.40.100 is captioned "Compliance and Enforcement." Within that section, AS 46.40.100(b) permits certain parties to file petitions seeking review of enforcement action. This bill section revises AS 46.40.100(b), amending it to permit the Coastal Policy Council to have a limited opportunity to ascertain whether a "reviewing entity" responsible for a consistency determination has fairly considered or not fairly considered comments received in the course of completing a proposed consistency determination. The principal addition on that point is set out in the subsection's proposed paragraph (1): the council is given a choice either to remand a determination so that the reviewing agency gives fair consideration to comments or the council may dismiss it--the council itself may not substitute its judgment for that of the reviewing entity on the merits of the consistency determination. The disposition of other petitions--enforcement petitions other than those relating to reviews of consistency determinations--are handled, as under current law, under the subsection's paragraph (2). In both instances, the petitioning process is no longer subject to the Administrative Procedure Act but rather to regulations of the Coastal Policy Council. The hearing requirement no longer calls for a "public hearing"--the hearing may be limited to participation by eligible parties--but notice is to be given, again, in all instances, under particular requirements of a later subsection, subsection (f). Because the petition process identified in this section may be used to secure review of consistency determinations and for other purposes, mention of specific parties who may file petitions in cases other than consistency reviews is removed from this subsection and restated in proposed subsection (g).

Bill sections 4 and 5: These provisions make parallel amendments to AS 46.40.100(c) and (d). The intent of the substantive amendments to both is to make sure that the specific requirements of the two subsections do not apply to the consideration and disposition of petitions seeking consistency review. Again, the council may dispose of petitions seeking consistency review only in the manner authorized by AS 46.40.100(b)(1)--that is, by remand or dismissal.

Bill section 6: The section adds two additional subsections to AS 46.40.100. Subsection (f) is a substituted notice provision applicable to consideration and

Senator Drue Pearce
January 4, 1994
Page 3

disposition of all compliance and enforcement provisions. It draws from the special notice provisions outlined in AS 38.05.945 that are applicable to certain land actions under the Alaska Land Act with amendments and substitutions recommended by the Division of Governmental Coordination. Subsection (g) draws from material deleted in AS 46.40.100(b) to identify parties that may petition for the general compliance and enforcement remedies set out in AS 46.40.100(b)(2).

Bill section 7 sets out definitions for additional terms used in AS 46.40.010 - 46.40.210.

JBC:pl:mi
94-010.plm

Existing Law

Court

Commisioner

Director

Regional Level

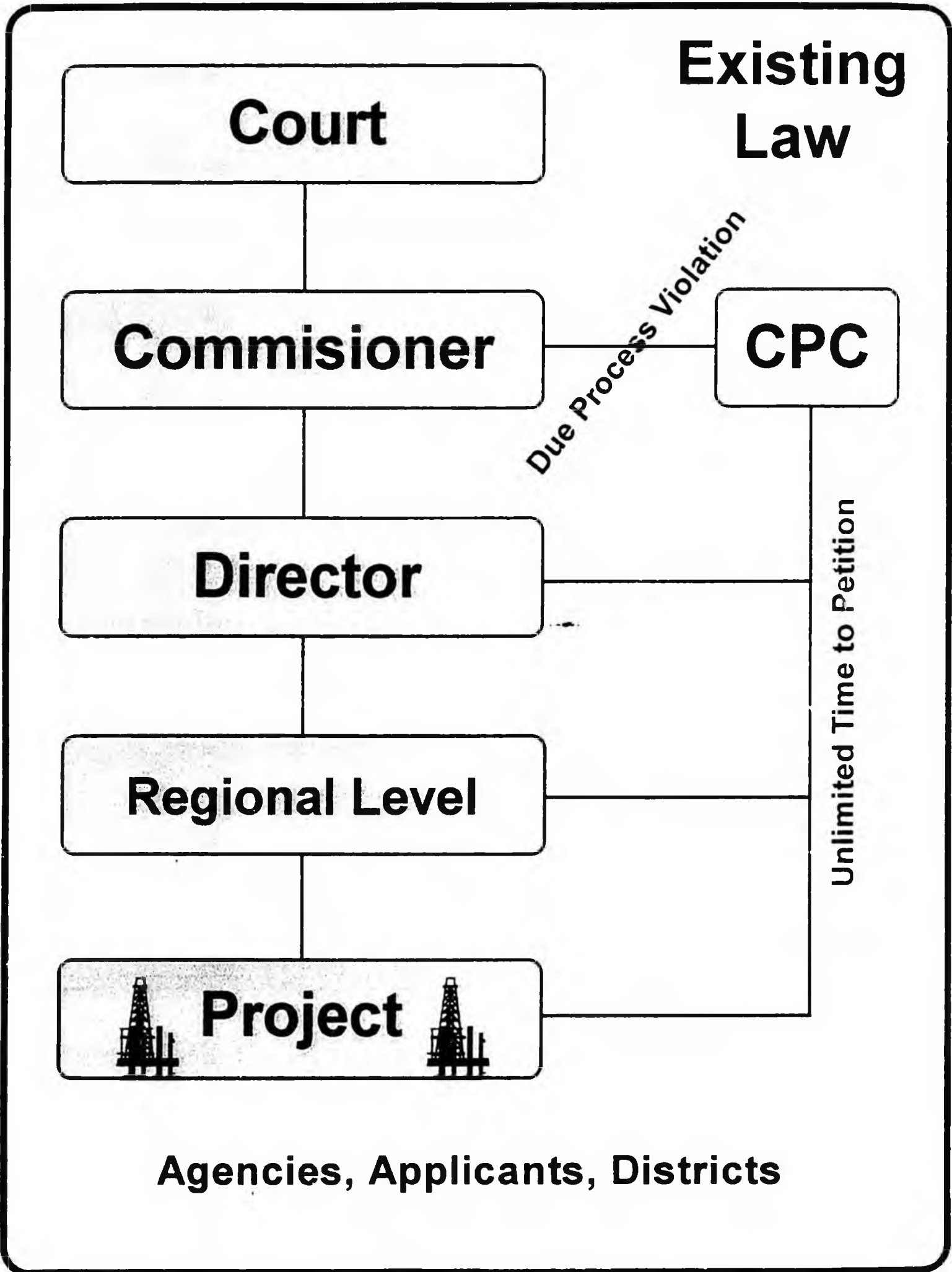
 **Project** 

CPC

Due Process Violation

Unlimited Time to Petition

Agencies, Applicants, Districts



After SB-238

Court

Commissioner

CPC

Director

Regional Level

 **Project** 

Maximum 30 Days to Hear
and Decide Petition

Agencies, Applicants, Districts, and Citizens

ACMP CONSISTENCY REVIEW PROCESS OVERVIEW
Prepared for the Coastal Policy Council; February 9, 1993

Introduction

The Division of Governmental Coordination (DGC) administers the Alaska Coastal Management Program (ACMP). In addition to coordinating preparation of district programs and serving as staff to the Coastal Policy Council (CPC), DGC also coordinates State reviews of activities in the coastal zone involving State and federal permits. This overview provides a summary of this latter function, the consistency review process.

Consistency Review Process

The consistency review regulations, also known as 6 AAC 50, provide a streamlined, coordinated process for reviewing and issuing State permits for proposed development projects affecting natural resources in Alaska's coastal zone. A brochure entitled, "How to Apply for State Permits in Alaska's Coastal Zone", is attached. It provides a brief summary of most of the information presented in this overview. In addition to coordinating projects that require State permits, DGC is also responsible for coordinating consistency reviews for direct federal actions [e.g. Corps of Engineers (COE) dredging permit] and projects that require federal permits [e.g. an Environmental Protection Agency (EPA) NPDES permit].

Coastal development projects are reviewed to ensure they are consistent with the standards of the ACMP and the policies of approved local coastal district programs. Project decisions, absent an approved district program, are based on ACMP standards found at 6 AAC 80. If there is an approved district program, project decisions are also based on enforceable district policies contained in those programs.

For each project, the consistency review regulations provide a structure for project review, issue resolution and decision-making, with the full involvement of State agencies, local coastal districts and the project applicant. The public is always welcome to participate in an advisory role.

The regulations require that:

1. All appropriate permits for a project are included in a single review. When an applicant proposes a project in the coastal zone, they are first required to complete a Coastal Project Questionnaire (CPQ). The CPQ contains questions designed to help applicants and State agencies determine what permits will be needed from State and federal agencies. If requested by the applicant, the coordinating agency can also assist with a pre-application meeting to ensure that all necessary permits have been identified and all back-up material is in order. When a CPQ and associated permit applications

are submitted to the coordinating agency, the packet is examined for completeness. As soon as an application packet is determined to be complete, the coordinating agency distributes it and a review schedule to all reviewers.

A project, and all necessary permits, are reviewed in a single review and a conclusive consistency determination is issued to the applicant for the project and all related permits. Typically, an applicant has to obtain permission from several agencies to conduct a project. Federal and State agencies from which permits may be needed include the U.S. Army COE, the EPA, the U.S. Forest Service (USFS), the Bureau of Land Management (BLM), and the State Departments of Environmental Conservation, Fish and Game and Natural Resources.

2. A single State agency contact is designated to coordinate the State's review of coastal development projects. For projects requiring a federal permit, or permits from two or more State agencies, or for direct federal actions, DGC is the coordinator of the review. For projects requiring permits from a single State agency, the agency issuing the permits acts as coordinator of the review. The coordinating agency is responsible for the administrative process involved with the review and assisting the applicant with the permitting and consistency review process.

3. Regulatory deadlines are established for consistency reviews and state permit decisions. Projects are reviewed under a 30-day review schedule, or more typically a 50-day review schedule, when agency permits have public notice requirements. Deadlines are also established for the distribution of information to reviewers, receipt of comments from reviewers, requests for additional information, notice to the applicant on the proposed consistency determination and issuance of the final or conclusive determination. The deadlines are not discussed in detail here, but, for your information, they are listed in a chart that appears in the attached brochure. State agencies with permits required by the project must issue their permits within 5 days of the conclusive consistency determination, unless additional review is required by statute or regulation.

4. The applicant, affected coastal district and State resource agencies concur with the consistency determination for a project before it is issued. Project reviewers submit comments on the proposed project and permits to the coordinating agency. The comments may include proposed changes to the project, or recommend stipulations which, if incorporated into the project, would render it consistent with the standards of the ACMP. The coordinating agency gives due deference to the commentor within their area of expertise. "Due deference", as defined in regulation, means that deference which is appropriate in the context of the commentor's expertise and area of responsibility, and all the evidence available to support any factual assertions. A coastal resource

district is considered to have expertise in the interpretation and application of the enforceable policies of its approved program [6 AAC 50.120 (a)].

If an applicant, State resource agency or an affected coastal district consider a proposed consistency determination to be unacceptable, opportunities exist to elevate a decision to policy makers of state resource agencies for reconsideration. The regulations first provide for a 15-day elevation to division directors and, if necessary, a second 15-day elevation to the commissioners of the resource agencies.

Exceptions to the 6 AAC 50 Process

There are a few exceptions to the 30-day and 50-day review schedules worth noting. Regulations found at 6 AAC 50.050 require DGC to publish a list of permits which have been categorically approved as being consistent with the ACMP, and a list of general concurrence determinations which, with standard stipulations, are also consistent with the ACMP. The list of these approvals is known as the Classification of State Agency Approvals, and is more common known as the "AEC" list, where "A" stands for categorically approved projects, "B" stands for general concurrence projects and "C" contains a list of permits which are subject to an individual consistency review. Permits qualify for the "A" list if they are so de minimis that they will have no significant impact in the coastal zone. Projects qualify for the "B" list if they are for routine activities that can effectively be made consistent with the ACMP by imposing standard stipulations on the applicable permits. An example of an "A" list permit is a Fish Habitat permit for minor instream work to improve or restore fish habitat and an example of a "B" list activity is Surface Oiling of Roads (GC-11). Permits on the "A" and "B" list are not subject to further agency review against the ACMP standards or district enforceable policies, and permits can be issued once it is determined applicants qualify under an "A" or "B" list approval.

The 6 AAC 50 regulations (6 AAC 50) also provide for emergency expedited reviews, but these are limited to true emergencies as defined in the Disaster Relief Act of 1974 (U.S.C. 5122), a catastrophic oil discharge, or where an expedited review is necessary for the preservation of the public peace, health, safety or general welfare.

Statistics

In terms of statistics, DGC typically coordinates approximately 500 project reviews a year. In FY92, DGC coordinated the review of 517 projects, 84 of which were non-consistency reviews (e.g. National Environmental Policy Act (NEPA) reviews, Outer Continental Shelf (OCS) reviews, etc.). Detailed statistics aren't currently available for FY92, but in FY91 the average review time of our 30-

day and 50-day reviews, respectively, was 25 and 48 days. Other FY91 statistics show that 22% of projects reviewed were determined to be consistent as proposed, 77% were found consistent with stipulations, and less than 1% were determined to be inconsistent. In FY 92, 13 projects were elevated to the directors for further consideration, and 4 of the 13 were elevated to the Resource Agency commissioners for final decision.

Over the years, statistics have shown that the bulk of the projects reviewed for consistency are for Public Utilities or Facilities (20%), followed by Fisheries, including Aquatic Farming and Hatcheries (18%), Oil and Gas activities (15%), Miscellaneous Activities (13%), Private Residential (12%) and Mining and Commercial (both with 11%). The numbers and percentages of project reviews and types are fairly stable year-to-year, although aquatic farming reviews decreased in FY92.

Many projects that are reviewed for consistency include new, difficult, or interesting issues. Often times, as a result of consistency reviews, the ACMP working group, which is currently composed of representatives from the State resource agencies and coastal districts, is directed to prepare guidance to assist future reviews. For example, during previous years, the ACMP working group developed procedural guidance on how to implement the Coastal Development Standard (6 AAC 80.040), and on how to place stipulations that are needed for consistency but which are outside the purview of individual agency authorities (i.e. "homeless stips"). Guidance was also developed on how to interpret provisions of federal regulations regarding "associated facilities" (CFR 930.21). The ACMP working group is often called upon to clarify procedures to facilitate the 6 AAC 50 review process.

Conclusion

During the almost 9 years the consistency review regulations have been in place, they have provided an effective and predictable process for coastal development activities that has been well-received by State agencies, coastal districts, and applicants. A paper published in *Agroborealis* in 1990 entitled, "Permit Reform in Alaska's Coastal Zone", by Thomas Gallagher, provides a survey critique of the consistency review process. The paper concludes that the consistency review process is successful in achieving its primary goals of coordinating permits and involving local communities. Other benefits noted include a savings in time and money, helping applicants obtain their federal permits, and reducing conflict. A copy of that paper is also attached for your information.

If you have questions about this overview, or would like additional information about the consistency review process, please contact Kerry Howard, DGC Project Analyst, at 465-3562.

Participants in a Teleconference to
Consider a Work Draft of a Bill
Addressing AS 46.40.100 and Petitions under the Alaska Coastal Management Program

1:30 pm - 4:00 pm, December 28, 1993

Alaska Coastal Policy Council Subcommittee on Petitions:

Frank Kelty, CPC public member from Unalaska
Scott Novak, CPC public co-chair from Cordova
Frank Rue, Director, Division of Habitat/Restoration, DFG
Paul Rusanowski, Director, Division of Governmental Coordination, OMB
Ron Swanson, Director, Division of Land, DNR

Other Coastal Policy Council members:

Bob Walsh, Director, Division of Municipal/Regional Assistance, DCRA

Other Interested Parties in Working Group:

Coastal Districts Representatives

Sue Flensburg, Director, Bristol Bay Coastal Resource Service Area Program
Linda Freed, Planning Director, Kodiak Island Borough
Pat Galvin, Copeland, Landye, Bennett & Wolf, Anchorage (representing the
Northwest Arctic Borough)
Tom Loman, Wildlife Department, North Slope Borough
Darcy Richards, Director, Aleutians West CRSA Program

State Agency Representatives

Susan Braley, Division of Environmental Quality, DEC
Kerry Howard, DGC
Gretchen Keiser, DGC
Beth Kerttula, DOL
Gabrielle LaRoche, Division of Economic Development, DCED
Pam Rogers, Division of Oil and Gas, DNR
Glenn Seaman, Division of Habitat/Restoration, DFG
Nelda Warkentin, Division of Municipal/Regional Assistance, DCRA

Industry/Public Representatives and Private Individuals

Patty Bielawski, Accord Environmental, Anchorage
Jon Isaacs, Isaacs & Associates, Anchorage
Charles McKey, Anchorage
Steven B. Porter, Arco Alaska, Anchorage
Nancy Wainwright, Anchorage

Alaska Coastal Policy Council
January 11, 1994

Public Members

Mr. Scott Novak, Cordova City Council (Public Member Co-chair)
Mayor Donald Long, City of Barrow
Mr. Robert Fagerstrom, Nome City Council
Mr. Al Unok, Kotlik City Council
Mayor Frank Kelty, City of Unalaska
Mr. David Arestad, Houston City Council
Mr. Drew Scalzi, Kenai Peninsula Borough Assembly
Ms. Lynda B. Walker, ~~Haines City Council~~
Ms. Phyllis Yetka, Ketchikan Gateway Borough Assembly

State Members

Shelby Stastny, Office of Management and Budget
Alternate: Dr. Paul Rusanowski, Division of Governmental Coordination (State Member Co-chair)
Commissioner Paul Fuhs, Department of Commerce and Economic Development
Alternate: Mr. Chris Gates, Division of Economic Development
Commissioner Edgar Blatchford, Department of Community and Regional Affairs
Alternate: Mr. Bob Walsh, Division of Municipal and Regional Assistance
Commissioner John Sandor, Department of Environmental Conservation
Alternate: Deputy Commissioner Mead Treadwell, DEC
Commissioner Carl Rosier, Department of Fish and Game
Alternate: Mr. Frank Rue, Division of Habitat and Restoration
Commissioner Harry Noah, Department of Natural Resources
Alternate: Mr. Ron Swanson, Division of Land
Commissioner Bruce Campbell, Department of Transportation and Public Facilities
Alternate: Mr. Mike McKinnon, Division of Planning

MEMORANDUM

STATE OF ALASKA

To: Alaska Coastal Policy Council Date: January 12, 1994

File: ACMPBILL.94
Telephone: 465-8800
Telecopy: 465-3075

From: *MLC* Paul C. Rusanowski, Director Subject: ACMP Legislation:
Division of Governmental Senate Bill 238
Coordination

Senator Drue Pearce introduced Senate Bill 238, which would amend the Alaska Coastal Management Act (AS 46.40) to clarify how and when certain parties can appeal, or "petition", the Coastal Policy Council during an Alaska Coastal Management Program (ACMP) consistency review (see attached legislation). Senate Bill 238 incorporates an approach recommended by the Alaska Coastal Policy Council at its October 27, 1993 meeting.

As directed by the Council, the Division of Governmental Coordination staff worked with a Council subcommittee, other interested parties, and Senator Pearce on the legislation. Senate Bill 238 includes many suggestions made by the Council subcommittee and other parties during a December 28, 1993 teleconference (see attached list of participants).

Why is Senate Bill 238 Needed?

Under the ACMP, State agencies and local coastal districts participate in a coordinated process for reviewing and issuing State permits for proposed development projects affecting natural resources and uses in Alaska's coastal zone. Proposed projects are reviewed to ensure they are consistent with the standards of the ACMP and the policies of a coastal district program. The commissioners of the Departments of Environmental Conservation, Natural Resources, and Fish and Game, on appeal as an "elevation", make the final decision on a consistency determination. The commissioners also sit on the Alaska Coastal Policy Council, which has heard petitions on a few consistency determinations made by commissioners in recent years.

Senate Bill 238 would correct the problems experienced with these recent petitions and the difficulties identified in a March 2, 1993 informal Attorney General opinion regarding due process and delegation when a petition occurs after a final commissioner-level

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decision on a consistency review.¹ Under the current ACMP statutes and regulations, the State resource agency commissioners may not delegate their responsibility to participate in a commissioner-level "elevation" of a consistency determination, nor may they delegate their authority to decide a petition when they have participated in the final consistency determination. However, as noted in the informal AG opinion, the commissioners cannot sit in both capacities. In a recent example, the State resource agencies were unable to participate in Council action on a petition affecting coastal resources and land uses.² General principles of due process and delegation under the Administrative Procedure Act dictate a change in the statute or regulations, or both to rectify the conflict.

How Would Senate Bill 238 Fix the Problem?

Senate Bill 238 would amend the Alaska Coastal Management Act (AS 46.40) to allow certain parties to petition the Coastal Policy Council when a preliminary, or "proposed", consistency determination is issued by a State agency. The petitioner would seek Council review of whether the petitioner's comments had been fairly considered by the State agency coordinating the ACMP consistency review. If the agency had done its job, the Council would dismiss the petition. Otherwise, the Council would remand the proposed consistency determination to the agency to give fair consideration to the petitioner's comments and to prepare a revised proposed consistency determination.

A final consistency decision would be made by the State resource agencies. Unlike the current situation, SB 238 would not allow a petition on a final consistency determination. Also, SB 238 resolves the due process and delegation concerns because the State resource agency commissioners -- as members of the Coastal Policy Council -- would only be reviewing a staff level *proposed* consistency decision, and therefore could still make the *final* State decision on the consistency review, if a further appeal (as an elevation) occurs after the petition process is completed.

¹March 2, 1993 Memorandum from Elizabeth Kerttula, Alaska Department of Law, to Paul Rusanowski, Division of Governmental Coordination, "Alaska Coastal Policy Council Members' Eligibility to Hear Petitions Under AS 46.40.100", 27 pp (see attached March 3, 1993 summary).

²The Timber Creek Trapping Cabin Permit petition, in Bering Straits Coastal Management Program and the Koyuk IRA Council v. Alaska Department of Natural Resources, was submitted to the Council on July 1992, heard by a hearing officer in May 1993, and dismissed by the Coastal Policy Council in October, 1993.

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Senate Bill 238 would, in effect, place the Coastal Policy Council in an intermediary role as a referee on the State's consistency review process, on petition from a coastal district, citizen of a district, State agency, or project applicant. The Council -- with its statewide membership of locally elected officials and State agency commissioners -- would provide oversight to ensure that State agencies follow procedures and give fair consideration to the broad interests commenting on proposed projects in Alaska's coastal areas (see attached Council membership).

What Would Senate Bill 238 Do?

Briefly, Senate Bill 238 would do the following:

Section 1. Amend AS 46.40.040 to add a new duty of the Alaska Coastal Policy Council to establish, by regulation, a consistency review and determination process.

Section 2. Amend AS 46.40 to add a new section (AS 46.40.096) which identifies the key elements of the consistency review process, including:

- the agency coordinating the review
- public notice requirements
- request for comments on a proposed project
- an elevation which can occur as a "subsequent review" of a proposed consistency determination (also, who can request an elevation and who reviews)
- the opportunity for certain parties to petition the Council about a proposed determination
- limitations on when a party may petition the Council
- flexibility to limit consideration of a petition when a federal law sets a deadline for the State of Alaska's response on a consistency determination for a federal agency permit or activity,
- the final consistency determination and
- definitions for "affected coastal resource district" and "reviewing entity."

Section 3. Amend the existing petition statute AS 46.40.100 (b) to:

- provide for a petition to the Council on a proposed consistency determination
- replaces the requirement for a hearing under the Administrative Procedure Act (AS 44.62) with a hearing established in regulation by the Council
- specify that the Council's standard of review is whether the agency coordinating the consistency review fairly considered the petitioner's comments submitted during the review period, and

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- provide for petition dismissal or remand of the proposed determination to the agency for a revised proposed consistency determination

Section 4. Amend the existing petition statute AS 46.40.100(c) to clarify that the subsection would continue to address a petition which might be submitted on general district actions regarding implementation of its coastal program, and not a petition about district actions on a State consistency determination under AS 46.40.096.

Section 5. Similar to Section 4, this section would amend the existing petition statute AS 46.40.100(d) to clarify that the subsection would not apply to a petition about State agency actions on a consistency determination under AS 46.40.096.

Section 6. Add new subsections under the existing petition statute AS 46.40.100 which:

- establish requirements for the notice of a hearing held by the Council to consider a petition
- identify, as in the current statute, the parties which have the opportunity to petition the Council on "general", non-consistency petitions.

Section 7. Amend AS 46.40.210 to add definitions for "consistency review" and "office."

* * *

The Division of Governmental Coordination will continue to work with Senator Pearce, the Council subcommittee, and other interested parties as this legislation proceeds. The bill is referred to Senate Resources Committee, but committee action is not yet scheduled. Please feel free to call me at 465-8800, or Gretchen Keiser of my staff at 465-3541 if you have any questions.

Attachments

cc: Alaska Coastal Districts
Senator Drue Pearce
Patty Bielawski, Accord Env.
Susan Braley, DEC
Janet Bulleson, DNR
Jack Chcnoweth, LAA
Raga Elim, Governor's Office
Kerry Howard, DGC
Jon Isaacs, Issacs & Associates
Beth Kerttula, DOL

Paul C. Rusanowski, Director
Division of Governmental
Coordination

March 2, 1993

663-92-0618

465-3600

Alaska Coastal Policy
Council Members'
Eligibility to Hear
Petitions Under
AS 46.40.100

Elizabeth J. Kerttula
Elizabeth J. Kerttula
Assistant Attorney General

INTRODUCTION

You have requested an opinion from this department on a number of questions relating to the Alaska Coastal Policy Council ("CPC") and its members' eligibility to sit on petitions brought to it under AS 46.40.100. To make it easier to follow our response, the first part of this opinion provides brief answers to your questions. The second part of the opinion gives a brief historic background of petitions, and in the third section we more fully develop our response.

I. OPINION REQUEST QUESTIONS AND BRIEF RESPONSES

Your questions with our brief answers follow:

QUESTION 1: Can a Coastal Policy Council member (or their alternate) sit on a petition proceeding if that individual previously participated in the action now under appeal to the Council? Your specific questions were:

a). For a state consistency determination, can a state resource agency commissioner who acted on the determination also hear and decide a petition on the state agency action?

ANSWER: No. If a commissioner participated in a commissioner-level elevation under 6 AAC 50.070(k), the commissioner may not participate in a CPC petition proceeding under AS 46.40.100 on the same state agency action.

b). In a parallel case, can a Coastal Policy Council public member hear and decide on a petition regarding a coastal district action if the public member substantively participated as a local official in the coastal district action under petition?

ANSWER: The answer to this question depends on the definition of "substantively participated." For the purposes of this opinion, as it parallels your

first question, we assume that "substantively participated" means that a public member has participated in the decision on the coastal district action that is being brought by petition to the CPC. Considering these facts, our response is no, a CPC public member who participates in a decision on the coastal district action may not participate in a CPC petition proceeding under AS 46.40.100 on the same district action.

QUESTION 2: If the answer to the first question was "no," your next question was whether a state resource agency commissioner may delegate his or her authority to act on a state agency action (e.g., a state conclusive consistency determination) in order to participate as a Coastal Policy Council member in a subsequent petition on the same state agency action?

ANSWER: No. The regulations governing the procedures for a consistency determination do not allow for such delegation to be made. However, this is a complicated issue because AS 44.19.155 and AS 46.40.100 statutorily require commissioners to sit on petitions. Because of the inconsistency between the statutes and the regulations in 6 AAC 50, there should be some change made to resolve this conflict.

QUESTION 3: Is it acceptable for a Coastal Policy Council member (or alternate) to sit on a petition proceeding when the member's agency or municipality initiates the petition? Does a conflict of interest exist precluding that member's participation on the petition?

ANSWER: CPC members and alternates may not sit on petitions initiated by their agencies or municipalities.

QUESTION 4: Is it acceptable for a Coastal Policy Council member (or alternate) to sit on a petition proceeding when an action by the member's agency or municipality is the subject of the petition? Does a conflict of interest exist precluding that member's participation on the petition?

ANSWER: We assume that this question is the converse of your question number three, and that the question is whether a CPC member or alternate may sit on a petition brought by another party against a member's agency or municipality. Under

these facts, if a CPC member participated in a decision concerning an action, that member or his or her alternate may not sit on a petition proceeding concerning that action. If the member did not participate in the decision, then that member or alternate would normally still be unable to participate in the petition decision. There has been one exception to this. Because of the extraordinary circumstances in that situation, this was acceptable; but as we have said, normally it is not.

You also noted in your request that it "would be helpful if your response discussed some of the different scenarios Council members might experience." Opinion Request from Paul C. Rusanowski, Director Division of Governmental Coordination, Office of Management and Budget to Attorney General Charles E. Cole, May 26, 1992, at 1. We will outline some of the situations that have arisen concerning petitions in this opinion and we will also describe a few scenarios likely to occur.

II. HISTORICAL BACKGROUND

To give some perspective on the issues you raise we provide the following background information.

The main reason the Alaska Coastal Management Program ("ACMP") and the Alaska Coastal Policy Council ("CPC") are facing the issues you raise is because, when the consistency determination process in 6 AAC 50 was adopted in 1984, there was no commensurate statute change to AS 46.40.100. In 1977, when the legislature enacted AS 46.40.100, it created an ability for certain people to appeal issues to the CPC through "petitions." In 1984, when the CPC promulgated its regulations creating the consistency review process for consistency determinations in 6 AAC 50, it deleted a section of the regulations that specifically allowed consistency determinations to be reviewed by the CPC. 6 AAC 80.030(a)(3), am. 10/28/84, Register 92. The intent was to have consistency determinations appealed to court rather than to the CPC. See 1988 Inf. Op. Att'y Gen. (Jul. 1; 366-136-85). However, there was no commensurate statutory change to AS 46.40.100. Notwithstanding the new regulations, the statute continued to provide for a petition to the CPC from a final consistency determination. Thus, a dual avenue of appeal was created. This creates due process concerns and complex delegation-of-authority issues. Because AS 44.19.155 and AS 46.40.100 statutorily mandate that commissioners (or high-ranking permanent alternates) sit as members of the CPC (including when the CPC hears petitions), it is in conflict with the

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consistency determination regulations at 6 AAC 50 et seq. which require commissioners to sit on final consistency determinations. There would be a violation of the Administrative Procedure Act and its due-process implications if commissioners followed the mandates of both 6 AAC 50 and the statutes. Because of this, there should be changes made to either the statutes, the regulations, or both to resolve this conflict.

AS 46.40.100(b)

In 1977, when the legislation creating the ACMP passed, it contained AS 46.40.100, the statute providing the right for certain people to "petition" the CPC for relief from violations of a coastal district management program. AS 46.40.100(b), which has not changed since 1977, except for renumbering, states:

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.

AS 46.40.100 was codified from section 4, chapter 84, SLA 1977, the source of which was HB 342 (1977). Subsection (b) of AS 46.40.100 (the most pertinent to this opinion) was only changed slightly during the legislative process. CSHB 342 was offered April 21, 1977, by the Community and Regional Affairs Committee.

The legislative history indicates that the legislature intended the Alaska Coastal Policy Council to be an adjudicatory body composed of high-ranking state and local officials who, as part of their duties, would be involved with hearing petitions concerning the implementation and enforcement of coastal district programs.¹ See AS 44.19.155 for a list of individuals composing

¹ There have been some interviews of people who participated in the creation of the ACMP. One of them was with Murray Walsh, who was with the state Office of Coastal Management and who worked on
(continued...)

the CPC (mayors, assembly members, and state commissioners). The foremost indication of the intention that the CPC is an adjudicatory body is the plain language of AS 46.40.100(b).

The language of the statute clearly envisions certain parties bringing petitions to the CPC on district coastal management program implementation, enforcement, or compliance issues for resolution. The statute does not exempt ACMP consistency determinations from its ambit.² The legislature's policy statement about the ACMP legislation noted:

It is the policy of the state to:

(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.

¹(...continued)

draft coastal zone legislation in the 1970s. As Mr. Walsh recalls, the committee charged with looking at creating the ACMP did not spend a great deal of time on the CPC petition process (embodied in AS 46.40.100). It was incorporated into the draft legislation as a standard appeals mechanism to accompany the CPC's proposed rule-making authority. Mr. Walsh also noted that AS 46.40.100 addressed the concerns raised about the various parties' compliance with coastal programs. See Enclosure "C" from the CPC Petition Subcommittee Meeting Packet from Robert L. Grogan, Director, Division of Governmental Coordination, Office of Management and Budget, Nov. 15, 1989, at 5.

² The initial ACMP consistency determinations were adopted after passage of the ACMP and did not include an elevation process. Prior 6 AAC 80.030 (eff. 7/18/78, Register 67). The ACMP elevation consistency determination regulations were not adopted until 1984, seven years after the legislature enacted the statute, so it is unsurprising that the initial statute makes no mention of consistency determinations.

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Sec. 2, CCS SCS CSHB 342 (emphasis added). Thus, the legislature recognized that state agencies were required to carry out their duties in accordance with the guidelines and standards set by the CPC. AS 46.40.200; see 1978 Op. Att'y Gen. No. 27 (Oct. 26). To enable the CPC to enforce its standards, the legislature also gave the CPC the authority to hear petitions on district coastal management program standards (which, once adopted by the CPC, become enforceable as state regulation as outlined in AS 46.40.100). See 6 AAC 85.180(a); and see statutory authority cited as authority for that regulation.

In the Attorney General's bill review of HB 342 after it passed, this office noted:

The central feature of the proposed Act is the creation of the Alaska Coastal Policy Council in the Office of the Governor. AS 44.19.891. The council is comprised of nine public members (who must be elected municipal officials) appointed by the governor from the nine coastal regions set out in sec. 891(1), and seven state cabinet officials motioned in sec. 891(2). The main function of the council is to adopt guidelines and standards, for use by municipalities in organized boroughs and "coastal resource service areas" in the unorganized borough, stating how to develop a coastal management program and what to include in that program to gain council approval.

Following legislative approval of the district programs, the municipalities which exercise zoning or land use controls implement the programs for their areas, and in areas of the coast where zoning of land use controls are not exercised state agencies implement the program. If the programs are not implemented or if they are not being properly enforced, a coastal resource district, a citizen of the district, or a state agency can commence an administrative action before the council under the Administrative Procedure Act ("APA"), to require implementation or enforcement. The council decision is reviewable in superior court under the APA and orders of the council are enforceable in superior court under AS 46.35.100.

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Att'y Gen. Bill Review for CCS SCS CSHB 342, June 6, 1977, Att'y Gen. File No. J-88-066-77, at 2, 3 (emphasis added).

III. FEDERAL STATEMENTS

Besides the contemporaneous bill review, there are subsequent statements about the petition process as an enforcement mechanism, and the CPC as an adjudicative body, contained in the Final Environmental Impact Statement ("FEIS") and its "Findings" on the ACMP when it was accepted into the federal coastal zone management system. In particular, in the FEIS "Summary of the Alaska Coastal Management Program" ("Summary"), the FEIS mentions that

[t]he Act establishes a Coastal Policy Council to direct the coastal management program and resolve conflicts during its implementation. The Council is responsible for reviewing and approving district coastal programs and developing specific standards and guidelines for managing coastal land and water areas and uses.

State of Alaska Coastal Management Program and Final Environmental Impact Statement, State of Alaska Office of Coastal Management, and U.S. Department of Commerce, Office of Coastal Zone Management, May 30, 1979, at 17. The FEIS further states in the Summary that

[t]he Division of Policy Development and Planning, as lead agency for the program, is responsible for reviewing the consistency of state and Federal actions with the ACMP. On petition, the Council may order any action considered necessary to implement, enforce or comply with the district coastal management program. Council orders are enforced in the state Superior Court. State agency actions inconsistent with the standards are subject to judicial review.

Id. at 19. The FEIS also notes:

The main device for conflict resolution in areas for which district programs have been approved is provided for in AS 46.40.100(b)-(e).

Id. at 153.

Besides the FEIS, there were "Findings" made by Robert Knecht, the Assistant Administrator for the federal Coastal

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Management Program when he approved Alaska's program. In the "Findings" Mr. Knecht stated:

The agency having greatest responsibility for implementation of the ACMP is the Alaska Coastal Policy Council. . . . It may issue orders to ensure compliance with approved district programs and adopt resolutions to express its views on matters that concern the ACMP. Under the Administrative Directive, the Council is authorized to resolve interagency disputes concerning implementation of the ACMP, unless deadlines make it necessary to carry the dispute directly to the Governor.

"Findings" of Robert W. Knecht, Assistant Administrator, for Coastal Zone Management, National Oceanic and Atmospheric Administration, Approval of the Alaska Coastal Zone Management Program, July 1979, at 44.

Furthermore, while it may not have been necessary to create the CPC or the petition process to satisfy federal requirements for acceptance into the federal coastal zone program (16 U.S.C.A. § 1451 et seq.), there are federal requirements for some sort of implementation and enforcement mechanism to obtain federal approval of a state coastal management program.

The National Oceanic and Atmospheric Administration (NOAA) coastal zone management regulations (15 C.F.R. § 923.1 et seq.), largely unchanged since early 1979, provide the national framework and the options available to states developing coastal programs. As a general statement about coastal program requirements, the federal requirements require a state to develop a management program that "includes sufficient legal authorities and organizational arrangements to implement the program and ensure conformance to it." 15 C.F.R. § 923.1(c)(6)(1992).

The NOAA regulations at 15 C.F.R. § 923 Subpart E describe the detailed requirements regarding a state's coastal program authorities and organization. 15 C.F.R. § 923.40(b) indicates that a state may choose which state entity or entities will exercise its coastal program authorities, but

[t]he major approval criterion is a determination that such entity or entities are required to exercise their authorities in conformance with the policies for the management program. Accordingly, the essential requirement is that the state

demonstrate that there is a means of ensuring such compliance.

Id. Also, 15 C.F.R. § 923.41(b)(2)(iii) requires that the state have the ability to "[r]esolve conflicts among competing uses." Thus, if a state wishes to have a federally certified coastal management program, as Alaska did when it created the ACMP, see FEIS, infra, it must have some enforcement mechanism. Prior to the creation of the elevation process for consistency determinations in 6 AAC 50.010 et seq., the CPC was the main enforcement component of the ACMP.

Before 1984 and the creation of the "elevation" process outlined in 6 AAC 50, there was a state regulation specifically stating that any consistency reviews were subject to CPC review. See previous 6 AAC 80.030 (e.g., 7/18/78, Register 67). From 1978 until 1984 state agencies and the Division of Policy Development and Planning ("DPDP") performed "consistency reviews" to determine whether a project was consistent with the ACMP. The reviews were guided by the standards of the ACMP at 6 AAC 80.010 et seq., which were adopted in 1978, and by several governors' Administrative Orders, but did not include the elevation process.

IV. CONSISTENCY DETERMINATIONS

In 1984, the Governor's Office developed a new method to review consistency determinations and adopted regulations. This was the "elevation process" outlined in 6 AAC 50 et seq. Subsequent to the Governor's adoption of regulations, the CPC incorporated them into the ACMP. June 8, 1984, Adoption Order of the CPC; see Apr. 19, 1984, memorandum from Assistant Attorney General Laura Davis to Bob Grogan, Assoc. Director, Division of Governmental Coordination, Att'y Gen. File No. 399-122-84, Re: Proposed amendment to Coastal Policy Council regulations incorporating project consistency regulations. When the CPC incorporated the changes to 6 AAC 80.030(a)(3), it did so by deleting language providing for CPC review of state consistency actions and, instead, inserting a reference to the new process specified at 6 AAC 50. The regulation, showing the amendments, was as follows:

6 AAC 80.030 is amended to read:

6 AAC 80.030. PROGRAM MANAGEMENT AND COORDINATION. (a) The [OFFICE OF COASTAL MANAGEMENT] Division of Governmental Coordination of the Office of Management and Budget is the designated lead agency for the Alaska Coastal

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Management Program. . The [OFFICE OF COASTAL
MANAGEMENT] Division of Governmental Coordination
of the Office of Management and Budget shall

.
(3) review State and federal actions for
consistency with the Alaska Coastal Management
Program, [SUBJECT TO COUNCIL REVIEW.] as provided
in 6 AAC 50.

6 AAC 80.030, amended 10/28/84, Register 92; Amendment to
6 AAC 80.030 as submitted to the Department of Commerce, Office of
Ocean and Coastal Resource Management for Review, by Robert L.
Grogan, Associate Director, Division of Governmental Coordination,
June 26, 1984.

While the CPC thus adopted the elevation procedures
outlined in 6 AAC 50, and tried to remove itself from the process
of reviewing petitions on consistency determinations, AS 46.40.100
and its right of petition remained unchanged. This analysis is
supported by a 1984 Attorney General's Informal Opinion. See 1988
Inf. Op. Att'y Gen. (Jul. 1; 366-136-85).³ To the extent that

³ This opinion was written in 1984, but was redated 1988 for
publishing. The Attorney General's informal opinion makes it clear
that, when the state created the consistency determination process
in 6 AAC 50.010 et seq., it intended to avoid having conclusive
consistency determinations appealed to the CPC. In fact, the
opinion states that there is no administrative appeal of
consistency determinations--rather, an appeal goes straight to
court. Because of the importance of the opinion, which definitely
outlines the belief that after the implementation of the
consistency determination process in 6 AAC 50 there was no right of
administrative appeal of a consistency determination, we have cited
it at length below. As the opinion states:

[The attorney general's office was requested to
provide advice] regarding the creation of a uniform
appeals procedure for the review of project
consistency determinations made under 6 AAC 50, and
agency permits which implement a project
consistency determination. Any appeals procedure
should be consistent with the goals of the
Governor's Administrative Order No. 78 (December
20, 1983), i.e., simplifying and expediting well-

(continued...)

³(...continued)

reasoned decision making in the issuance of state agency permits and in the issuance of project consistency determinations under the Alaska Coastal Management Program ("ACMP").

.....

Alaska superior courts have jurisdiction to hear appeals from a state administrative agency "when appeal is provided by law." AS 22.10.020. There is no statute specifically providing for the appeal from a project consistency determination. However, there are numerous statutes and regulations providing for review of resource agency actions which may implement a consistency determination.

Despite the absence of any statutory provision for appeal of a project consistency determination, it is a final state agency action and is, we believe, reviewable by appeal to the superior court. However, appellate review of the project consistency determination alone may not provide meaningful relief if the applicant obtains permits and proceeds with the project in the meantime. The issuance of permits may be stayed only if the state withholds its consistency determination (i.e., by allowing reconsideration before it is issued) or if a court enjoins the issuance of permits.

.....

An adjudicatory hearing would be time consuming and is not, in our view, necessary to provide an adequate record for judicial review. A project consistency determination which reflects the reasoning of the agencies and the alternatives considered should constitute an adequate "decisional document" permitting judicial review of the agency decision on the record.

In summary, the project consistency review process has simplified and streamlined the issuance of agency permits for development projects in

(continued...)

opinion suggests that there is no right to "appeal" consistency determinations through petitioning the CPC under AS 46.40.100, we hereby clarify that opinion.

V. PETITIONS

Although the CPC changed its regulations, apparently to avoid appeals of consistency determinations to the CPC, this is not what happened. Since the inception of the ACMP, seven petitions have been submitted to the Council: Anchorage citizen (1981), Anchorage citizen (1984), City of Kaktovik (1988), Juneau citizen (1990), Cenaliulriit Coastal District (1990), North Slope Borough Coastal District (1991), and Bering Straits Coastal District in conjunction with the Native Village of Koyuk IRA. Five of the seven petitions were resolved before reaching a full hearing and/or were subsequently withdrawn by the petitioner. See Memo from Paul Rusanowski, Director, Division of Governmental Coordination, to Paul Fuhs, Legislative Liaison, Feb. 2, 1992, Briefing Paper on SB 47, at 1, note 1. The two that were not withdrawn were the petitions brought by Cenaliulriit and Bering Straits. Both of these petitions concerned consistency determinations. The Cenaliulriit petition went to a full hearing before the CPC and the Bering Straits petition is still pending.

After hearing the Cenaliulriit petition, the CPC issued a decision. The Council's October 1991 decision on the Cenaliulriit petition, affirming DNR's consistency determination

³(...continued)

Alaska's coastal zone, and it provides a reasonable opportunity for all interested parties to participate in agency decision making.

In order to enhance this effort we recommend the following: (1) We would discourage the adoption of any uniform appeals procedure which unduly extends the time required for final agency decision making. (2) We would also encourage all resource agencies to propose changes to their own statutes and regulations to eliminate time-consuming administrative appeals or adjudicatory hearing processes which apply to their permit decisions.

1988 Inf. Op. Att'y Gen. at 2-4 (Jul. 1; 366-136-85) (citations omitted).

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for Goodnews Bay offshore prospecting permits, was affirmed by superior court Judge Fabe on February 10, 1992. Kuitsarak Corp. v. Swope, Comm'n, No. 3AN-90-7663 Ci. However, the decision was subsequently appealed to the Alaska Supreme Court. Kuitsarak Corp. v. Swope, Comm'r, No. S-5176. (Briefing should be complete in that case by the end of March 1993.)

In Kuitsarak Corp. (also referred to as "Goodnews Bay"), the superior court rendered the first of two court decisions to date concerning a petition to the CPC. In doing so the court discussed the language of AS 46.40.100, stating:

The statute clearly contemplates two distinct stages: (1) a petition that makes a "showing" that the district program "is not being implemented, enforced or complied with"; and (2) a hearing to determine whether substantial evidence supports the showing. AS 46.40.100(b). The statutory language, itself, limits the initial review of the evidence to the petitioner's facts, only. This is consistent with the definition of a prima facie case where the focus is on whether the moving party can put forth enough evidence "such as will 'suffice, until contradicted and overcome by other evidence.'" Pacific Telephone v. Wallace, 75 P.2d 942, 947 (Ore. 1938) (emphasis added). At the first stage, then, the reviewing body examines only the petition and any supporting or explanatory exhibits or documentation submitted with the petition. If it is determined from a review of the petitioner's written presentation that a prima facie showing has been made, then a full hearing is required where both parties present all of their evidence and the council determines the validity of the petitioner's claim using the substantial evidence test.

Kuitsarak Corp. at 16 (Alaska Super., Feb. 19, 1991) (emphasis in original). After the court reheard its initial appeal, the court further noted, "The CPC has considerable institutional competence in these issues and has a key statutory role to play prior to judicial review." Opinion on Rehearing at 3 (June 10, 1991). The procedure used in the Goodnews Bay case was contrary to the way major ACMP appeals concerning consistency determinations had been brought since 1984. As an Attorney General's informal opinion noted in 1990:

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The common understanding [of how consistency determination appeals would be brought] 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., Hynning 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.

1990 Inf. Op. Att'y Gen. at 8 (Feb. 9; 663-90-0178).

At this point, as noted above, the Goodnews Bay case is on appeal to the Alaska Supreme Court, and the CPC has another petition pending before it in Bering Straits Coastal Management Program and Native Village of Koyuk IRA Council v. State of Alaska, Dep't of Natural Resources, and Keith Koontz, concerning the issuance of an Alaska Department of Natural Resources trapping cabin permit near Timber Creek in northwest Alaska. While there have been few petitions overall, they present difficult issues such as the ones you have raised.

As there has only been one complete hearing before the CPC (in the Goodnews Bay case), there is little experience with the questions you pose. However, the issue about who can sit on a petition is an important one, and one that will arise as soon as the pending petition is heard by the CPC. We now turn to a more in-depth analysis of your questions.

VI. ANALYSIS OF RESPONSES TO OPINION REQUEST QUESTIONS

A. Participation In Decisions Under The APA And Due Process

Your first question was, "Can a Coastal Policy Council member (or their alternate) sit on a petition proceeding if that individual previously participated in the action now under appeal to the Council?" Your first specific question under this topic was

- a) For a state consistency determination, can a state resource agency commissioner, who acted on the determination, also hear and decide on a petition on the state agency action?

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As we said earlier, the brief answer to this question is "No." If a commissioner participated in a commissioner-level elevation under 6 AAC 50.070(k), the commissioner may not participate in a CPC petition proceeding under AS 46.40.100 on the same state agency action.

The main reasons for this are the duty of impartiality required under the state Administrative Procedure Act and the due process implications raised by that duty. AS 46.40.100(b) states that "[a] hearing called under this subsection shall be held in accordance with the Administrative Procedure Act (AS 44.62)."⁴ The Administrative Procedure Act ("APA") includes a duty of impartiality. AS 44.62.630 states:

IMPARTIALITY. The functions of hearing officers and those officers participating in decisions shall be conducted in an impartial manner with due regard for the rights of all parties and the facts and the law, and consistent with the orderly and prompt dispatch of proceedings. These officers, except to the extent required for the disposition of ex parte matters authorized by law may not engage in interviews with, or receive evidence from, a party, directly or indirectly, except upon opportunity for all other parties to be present. Copies of all communications with these officers shall be served upon all parties. —

The APA requirement of impartiality reflects fundamental fairness considerations that attend agency tribunals. An "impartial tribunal" is one of the cornerstones of fundamental fairness required under both the APA and constitutional due process

⁴ Although there has been some question whether all the procedures of the Administrative Procedure Act apply to CPC petitions, see 1990 Inf. Op. Att'y Gen. at 10 (Feb. 9; 663-90-0178), because of the direct statement in AS 46.40.100(b), the APA is applicable for purposes of adjudicating a petition. See 1989 Op. Att'y Gen. No. 01 (July 25).

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rights.⁵ See K & L Distributors, Inc. v. Murkowski, 486 P.2d 351, 357 (Alaska 1971). As we have previously described:

Paramount to all administrative proceedings is that the Respondent be accorded "due process." What lawyers usually refer to when they speak of "due process" is the right to a fair and impartial hearing. Each board member who sits in a hearing has an obligation to protect these rights. . . . [A hearing] must be before an impartial adjudicator.

1977 Inf. Op. Att'y Gen. at 5 (Nov. 12; 663-239-78) (emphasis in the original).

Impartiality is not affected by simply knowing information about a case, or even by participating in early investigative phases of a case. See 1984 Inf. Op. Att'y Gen. (Feb. 6; 366-220-84). As the U.S. Supreme court has noted, "The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing." Withrow v. Larkin, 421 U.S. 35, 55 (1975). Thus, if it were not for the fact that commissioners cannot participate in both a final consistency determination and a CPC petition on the same determination, it would be acceptable for commissioners to participate in the consistency determination elevation process outlined in 6 AAC 50 without running afoul of due process concerns, even though they might have some information about the project undergoing review before sitting at the final elevation level. Similarly, CPC members, including commissioners (if they are not barred from having previously sat on a commissioner-level elevation on the same matter), who participated in an initial "showing" hearing under AS 46.40.100(b), may still participate in the final decision on the

⁵ The Alaska Constitution incorporates the due process clause of the U.S. Constitution's Fourteenth Amendment in Alaska Const. art. I, § 7. That section states: "No person shall be deprived of life, liberty, or property, without due process of law" Id. This memorandum discusses general due process considerations. Because petitions are governed by the APA we have not separately analyzed what specific due process might be required completely independent from the APA. However, there are cases that recognize that the right to bring a cause of action may constitute a property interest mandating due process. See Logan v. Zimmerman, 455 U.S. 422 (1982); Save our Dunes v. Ala. Dep't of Env't Management, 834 F.2d 984 (11th cir. 1987).

matter. What is not acceptable is for a commissioner to participate in a commissioner-level elevation decision under 6 AAC 50, and then also participate in the separate review of that same decision by the CPC under AS 46.40.100. Under these circumstances, requiring a commissioner to review and evaluate his or her own decision violates due process considerations. As the U.S. Supreme Court has stated, "[W]hen review of an initial decision is mandated, the decision maker must be other than the one who made the decision under review. Allowing a decision maker to review and evaluate his own prior decisions raises problems." Withrow at 58 n.25 (citations omitted).

In Matter of Robson, 575 P.2d 771 (Alaska 1978), the Alaska Supreme Court commented on the difference between a board making preliminary factual inquiries and sitting on a final decision versus a board participating in an advocacy capacity against a party and then sitting on a final decision concerning the same party. While not exactly on point (although in some consistency determination elevation proceedings this could be the situation as state agencies can themselves elevate and advocate a position, see 6 AAC 50.070(j)), the case clearly warns against a board member serving in two conflicting capacities on the same matter. As the court noted, "It is desirable that administrative hearings be clothed with not only every element of fairness but with the very appearance of complete fairness as well." Id. 575 P.2d at 774 (citations and quotes omitted). Finally, in an Alaska Supreme Court decision that is instructive on this issue as well as another issue you have raised, the court (citing to a United States Court of Claims case) has said, "[N]o man can review his own decision with the requisite degree of quasi-judicial detachment and impartiality." State v. Lundgren Pacific Const. Co., 603 P.2d 889, 895 (Alaska 1979). As the legislative history outlined previously portrays, the CPC was intended to be an independent adjudicative review body to hear petitions and make orders. The independence of the CPC's review authority would be jeopardized by a commissioner prejudging an issue in a consistency determination and then also sitting on the CPC to again judge the same issue.

To conclude on this issue, our analysis is that when a board makes an initial determination under standards different from the final determination, such as during the "showing" phase outlined in AS 46.40.100(b) (and discussed in the Goodnews Bay case, infra), board members may sit on a final decision on the same issue (if there is no other reason barring them from doing so). However, when a commissioner participates in the decision at a commissioner-level elevation on a final consistency determination, that commissioner may not then sit in judgment on the same

matter with the CPC. To do so would violate the APA requirement of impartiality and due process notions of fairness as outlined above.

Your second question in this section was:

b) In a parallel case, can a Coastal Policy Council public member hear and decide on a petition regarding a coastal district action if the public member substantively participated as a local official in the coastal district action under petition?

As our brief answer stated, assuming that "substantively participated" means that the public member participated in a decision, the public member cannot then transfer to the CPC and sit in judgement on the same matter. This presents the same difficulty presented with the commissioners, and our analysis is the same. Therefore, for the reasons that we have given to question 1(a), we find that this too would be a violation of the APA and due process notions of fairness.

B. Delegation

Your second question was, if the answer to the first question was "no," (as it is), whether a state resource agency commissioner may delegate his or her authority to act on a state agency action (e.g., a state conclusive consistency determination) in order to participate as a Coastal Policy Council member in a subsequent petition on the same state agency action.⁶ Our brief answer to this question was "no" concerning consistency determinations, because the ACMP consistency determination procedures do not allow for such a delegation.⁷ We also noted that this is a complicated issue because AS 44.19.155(d) in combination with AS 46.40.100 statutorily require commissioners to sit on petitions. If a commissioner participates in an elevation he or she cannot sit on the same issue with the CPC. Because of this inconsistency there should be a change in the statutes, the regulations or both. Our more complete response follows.

⁶ AS 44.19.155(d) allows a CPC member to select one person (who must have fairly high-ranking official qualifications) as a permanent alternate.

⁷ We have answered this question only about consistency determinations. Other state actions would have to be reviewed on a case-by-case basis to determine whether a delegation was acceptable.

1. Delegations Under 6 AAC 50

The elevation regulations in 6 AAC 50 ignore AS 44.19.155, AS 46.40.100, and the statutory petition process in general. Again, because the statutes did not change, neither did the right to bring a petition to the CPC (rather than appeal from an elevation straight to court as the elevation regulations allow). The regulations cannot overrule the statute in this regard. AS 44.62.030; see also Chevron U.S.A. v. LeResche, 663 P.2d 923, 927 n.6 (Alaska 1985) (citing AS 44.62.030). The elevation regulations are also clearly structured to provide for the second to last level of elevation to be held by high-ranking state officials (commissioners) and for the final level to be held by the highest-ranking state official - the governor. 6 AAC 50.070(k). It is clear that the regulations intend only these officials to make the kinds of decisions that rise to this level of importance, especially as the decisions are appealable directly to court.

The elevation process described in ACMP regulations provides for a series of internal appeals from staff through the commissioners and possibly the governor. When a project undergoes a consistency review (for consistency with the ACMP and coastal district standards), information on the project is disseminated to all the resource agencies and the affected coastal districts. A coordinating agency organizes consideration of comments from the agencies, the applicant, and the district, and determines whether there is a consensus on the project at staff level.⁸ The coordinating agency then notifies the affected coastal district and the applicant about a proposed consistency determination, or issues to be resolved. If an agency, the coastal district, or the applicant does not concur with the proposed determination, it may "request elevation of the review." 6 AAC 50.070(j). If elevation is requested, the coordinating agency "shall elevate the review as necessary to the division directors, and then commissioners of the resource agencies." 6 AAC 50.070(k). The coordinating agency shall also arrange meetings and mediate among the agencies, the affected coastal resource districts, and the applicant to resolve outstanding issues and reach a mutually acceptable consistency determination. "If no consensus is reached, the coordinating

⁸ The Division of Governmental Coordination coordinates the review when more than one agency's permits are required for a project; the agency whose permits are sought coordinates the review if only that agency's permits are required. AS 44.19.145(11); 6 AAC 50.010; 6 AAC 50.070(c), and (d).

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agency shall render a determination consistent with any policy direction given by the commissioners or the governor." Id.⁹

As described above, the elevation of consistency determinations depends upon the "appeal," informal though it may be, of issues up through a chain of command to the commissioners, and even the governor.¹⁰ In determining whether a delegation of authority is allowed, the Alaska Supreme Court has said that

the general rule governing subdelegations is whether it is reasonable to believe that the legislature intended a particular function to be performed by designated persons because of their special qualifications. If the legislature intended a function to be performed only by limited persons, a subdelegation is invalid.

Kaiser v. Sundberg, 734 P.2d 64, 69-70 (Alaska 1987) (citing 1 Norman J. Singer, Sutherland Statutory Construction § 4.14 at 155-56 (4th ed. 1985)) (other citations omitted); see 1992 Inf. Op. Att'y Gen. at 4 (May 29; 663-92-0494).

Although 6 AAC 50.070 is a regulation rather than a statute, the rules of statutory construction are the same, and the question becomes what the intent of the CPC was when it adopted the consistency determination regulations. In the historical background section of this opinion we noted that a consistency determination is a "final state agency action and is . . . reviewable by appeal." 1988 Inf. Op. Att'y Gen. at 2 (Jul. 1; 366-136-85).¹¹ Because of the way the consistency determination process is structured, with the final level being the commissioners (or, as noted, the governor), with the result then appealable to court, clearly the intent behind that structure was to have the commissioners, not delegees, sit on the commissioner-level elevation. While elevations are, in practice, processed on a fairly informal basis, the final levels do take on an adjudicative function. The decisions are essentially appealed to the highest

⁹ As defined in AS 44.19.152(3), "render" means to coordinate and issue.

¹⁰ We are aware of only one consistency determination that has gone to the governor for a decision.

¹¹ We also discussed the anomaly created by the fact that AS 46.40.100 was not amended when 6 AAC 50 was adopted, thus leading to two appeal routes.