

ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672

8090 HOUSE RESOURCES

355

**Petition for Protecting the Oil and Hazardous Substance
Release Response Fund (470 Fund)**

We the undersigned oppose any legislation that reduces funding for oil and hazardous substance spill prevention and response programs funded by the 470 Fund.

Name	Signature	Address	Phone #1	AK
John Winter	<i>[Signature]</i>	New Winter 1703 Roosevelt Ave	510-37106	
Carlace L. Grogan	<i>[Signature]</i>	Box 242 Cordova	424-3825	
Diana Masolini	<i>[Signature]</i>	Box 1131 Cordova	424-7328	
Michael O'Leary	<i>[Signature]</i>	Box 1052 Cordova	424-7752	
Jay Pahl	<i>[Signature]</i>	Box 179 Cordova	99574	
Shirley Stange	<i>[Signature]</i>	Box 2462 Cordova	99574	
JAMES E. HAGEN	<i>[Signature]</i>	P.O. Box 1952 Cordova	AK 99574	
Dreama Schaffer	<i>[Signature]</i>	P.O. Box 443 Cordova	AK 99574	
Ray Beaudou	<i>[Signature]</i>	1597 Cordova	AK 99574	
Cherley Chris-m	<i>[Signature]</i>	482 Cordova	AK 99574	
Robert J. Koppak	<i>[Signature]</i>	Box 1126 Cordova	AK 99574	
Kristen Ballum	<i>[Signature]</i>	P.O. Box 1689 Cordova	AK 99574	
Mitch Nolski	<i>[Signature]</i>	Box 2232 Cordova	AK 99574	
Robert Penta	<i>[Signature]</i>	Box 1033 Cordova	AK 99574	
R.J. Rowlett	<i>[Signature]</i>	Box 1748 Cordova	AK 99574	
MATT SMALL	<i>[Signature]</i>	Cordova		
John M. Keith	<i>[Signature]</i>	Box 956 Cordova	99574	
Annabelle	<i>[Signature]</i>	Box 1366 Cordova		
Janette B. Williams	<i>[Signature]</i>	Box 2224 Cordova	AK 99574	
Belle Michelson	<i>[Signature]</i>	Box 325 Cordova	AK 99574	
JAMES P. VANSANT	<i>[Signature]</i>	Box 1263 Cordova	AK 99574	
BARCLAY JONES-KORHAK	<i>[Signature]</i>	Box 126 Cordova	AK 99574	
Michael P. McCarty	<i>[Signature]</i>	Box Max Glennallen	AK 99582	
Kenneth D. Kritchman	<i>[Signature]</i>	Box 1255 Cordova	AK 99574	
Wendy Weisel	<i>[Signature]</i>	Box 1999 Cordova	AK 99574	BE
Laurie Berger	<i>[Signature]</i>	Box 1753 Cordova	AK 99574	

Please send to Senator Pearce/Co-chair Senate Finance Committee, State Capitol, Juneau, AK 99801-1182

**Petition for Protecting the Oil and Hazardous Substance
Release Response Fund (470 Fund)**

We the undersigned oppose any legislation that reduces funding for oil and hazardous substance spill prevention and response programs funded by the 470 Fund.

Name	Signature	Address	Phone
C. K. WEAVERLING	<i>C. K. Weaverling</i>	Box 895 CORDOVA AK 99574	424-5305
John E. Lohse	John E. Lohse	Box 14 Cordova AK 99574	424-7170
Linda Lohse	Linda Lohse	Box 14 Cordova AK 99574	424-7170
Mark King	Mark King	Box 265 Cordova AK 99574	424-8373
ROBERT PERINIS	<i>Robert Perinis</i>	Box 171 Cordova AK 99574	424-5657
DAN TORGERSON	DAN TORGERSON	Box 1356 CORDOVA AK 99574	424-5719
ERWIN SIMPSON	ERWIN SIMPSON	Box 1212 Cordova AK 99574	7718
GAIL T. NOLAN	GAIL T. NOLAN	770 CDV AK 99574	3503
Gene Thomas	<i>Gene Thomas</i>	Po 1331 CDV AK 99574	-3117
DAVID P. JANKA	<i>David P. Janka</i>	Po 1231 CORDOVA AK 99574	424-7602
BECKY CHAPEK	<i>Becky Chapek</i>	Box 1541 CDV AK 99574	424-5356
Christina Topley	<i>Christina Topley</i>	Box 850 Cordova AK 99574	424-3605
Robert Blake	<i>Robert Blake</i>	Box 718 Cordova AK 99574	
John A. Crowe	John A. Crowe	Box 2473 Cordova AK 99574	
Kevin G. O'Neil	Kevin G. O'Neil	Box 1875 Cordova AK 99574	
Sandy VanDyke	Sandy VanDyke	Box 473 Cordova AK 99574	
CATHY SHERMAN	Cathy Sherman	Box 1186 Cordova AK 99574	
DAVID GRAMEL	David Gramel	Box 1676 Cordova AK 99574	
SUSAN OGLE	Susan Ogle	Box 895 CORDOVA, AK 99574	
KENEE KANKIN	Kenee Kankin	Box 985 CORDOVA AK 99574	
Shy Doodli	<i>Shy Doodli</i>	Box 2234 Cordova AK 99574	
MICHAEL L. MEINTS	Michael L. Meints	Box 2402 CORDOVA AK 99574	
Kim J. Ewert	Kim J. Ewert	Box 1324 Cordova AK 99574	
Tia R. Smith	Tia R. Smith	Box 52 CORDOVA AK 99574	
Thea Thorsen	Thea Thorsen	Box 1566 Cordova AK 99574	
Sally Patch	Sally Patch	Box 956 Cordova AK 99574	
Giairo Mannerino	Giairo Mannerino	Box 1431 CORDOVA AK 99574	

Please send to Senator Pearce, Co-chair Senate Finance Committee, State Capitol, Juneau, AK 99801-1182

**Petition for Protecting the Oil and Hazardous Substance
Release Response Fund (470 Fund)**

We the undersigned oppose any legislation that reduces funding for oil and hazardous substance spill prevention and response programs funded by the 470 Fund.

Name	Signature	Address	Phone
WILLIAM R REID	<i>Wm R Reid</i>	Bx 1234 CDV	424-7448
DOENE HAWKHURST	<i>Doene Hawkhurst</i>	Bx 856 CDV	424-3447/5757
Christine Honkola	<i>Christina Honkola</i>	Bx 100 CDV	424-7530
JAMES MYKLAND	<i>James L Mykland</i>	Bx 1241 CDV	424-7115
John Bocer	<i>John Bocer</i>	Bx 1512 CDV	424-5152
Michael Bredde	<i>Michael Bredde</i>	Bx 1154 CDV AK	424-3715
Kory Blake	<i>Kory Blake</i>	Bx 1122 CDV	424-7194
Herb Jensen	<i>Herb Jensen</i>	Bx 294 CDV	424-3767
JIM JOHNSON	<i>Jim Johnson</i>	Bx 263 CDV	424-3525
MICHAŁOWICKI	<i>Michal</i>	Bx 7232 CDV	5492
Linda Masolin	<i>Linda Masolin</i>	Bx 162 CDV	424-7489
John B. Anderson	<i>John B. Anderson</i>	Bx 11 Cordova AK	5375
Michael Elliott	<i>Michael Elliott</i>	Bx 855 Cordova AK	3584
ANDREW F. ALLEN	<i>Andrew F. Allen</i>	Bx 1836 CDV AK	99574 (3684)
Teresala De Simone	<i>Teresala De Simone</i>	Bx 169 Cordova AK	424-7436
Dorothy Carpenter	<i>Dorothy Carpenter</i>	Bx 1430 Cordova AK	424-39
Susan Laird	<i>Susan Laird</i>	Bx 1624 Cordova AK	424-38
Max L. Bennett	<i>Max L. Bennett</i>	Bx 1006 Cordova AK	99574
JANISS KOUANON	<i>Janiss Kouanon</i>	Bx 2272 Cordova AK	99574 (4247603)
MAX McFARLANE	<i>Max McFarlane</i>	PO Box 2368 Cordova AK	
TORIE BAKER	<i>Torie Baker</i>	PO Box 1159 CDV	424-3820
XXXXXXXXXX			
Elizabeth Senesi	<i>Elizabeth Senesi</i>	Bx 752 CDV	424-5611
CARROLL KOMPANEI	<i>Carroll Kompanei</i>	Bx 535 CDV	424-3821
Jim Jager	<i>Jim Jager</i>	530 St. Lazaria Cr. Cordova AK	337-8602

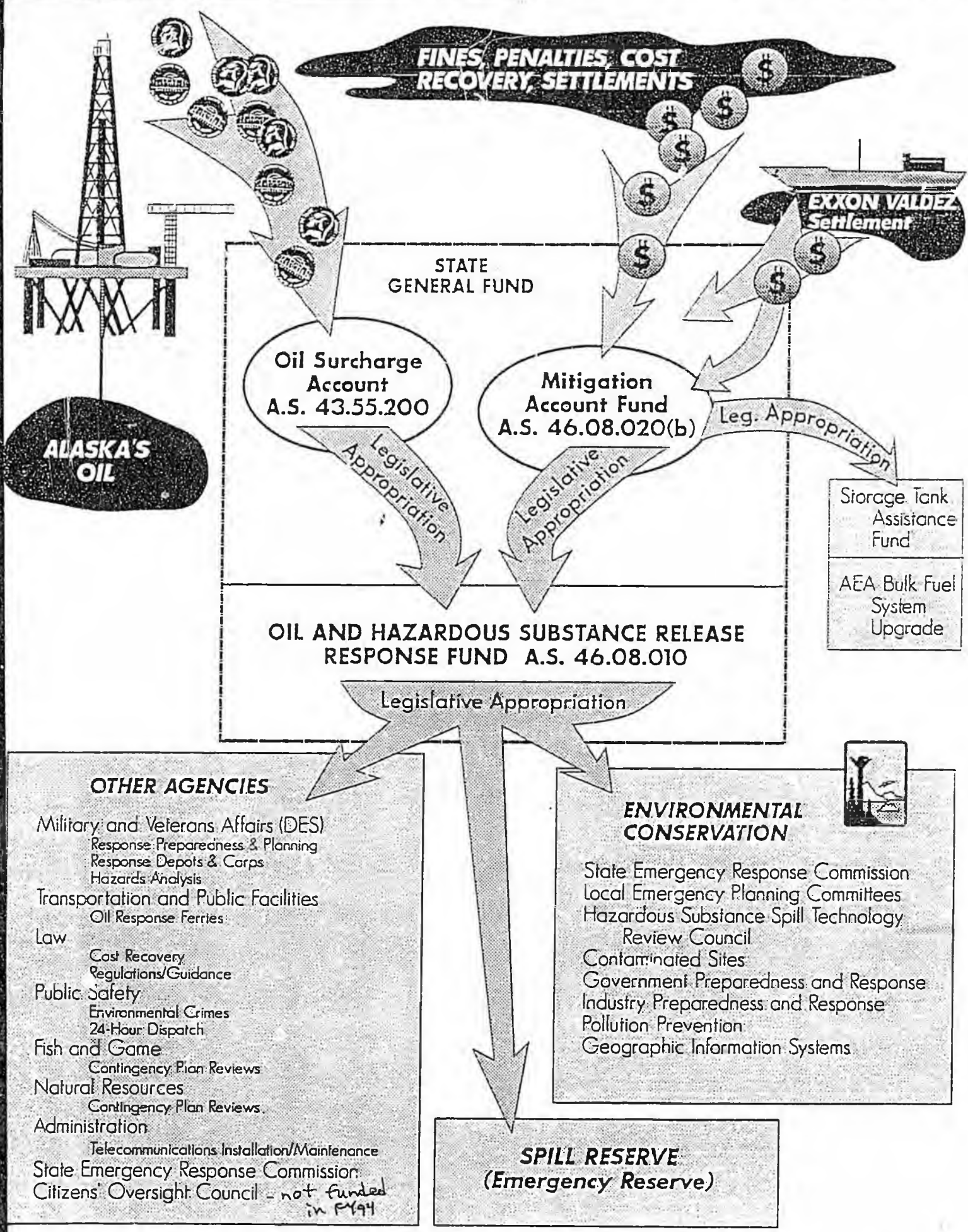
Please send to Senator Pearce, Co-chair Senate Finance Committee, State Capitol, Juneau, AK 99801-1182

Petition for Protecting the Oil and Hazardous Substance Release Response Fund (470 Fund)

We the undersigned oppose any legislation that reduces funding for oil and hazardous substance spill prevention and response programs funded by the 470 Fund.

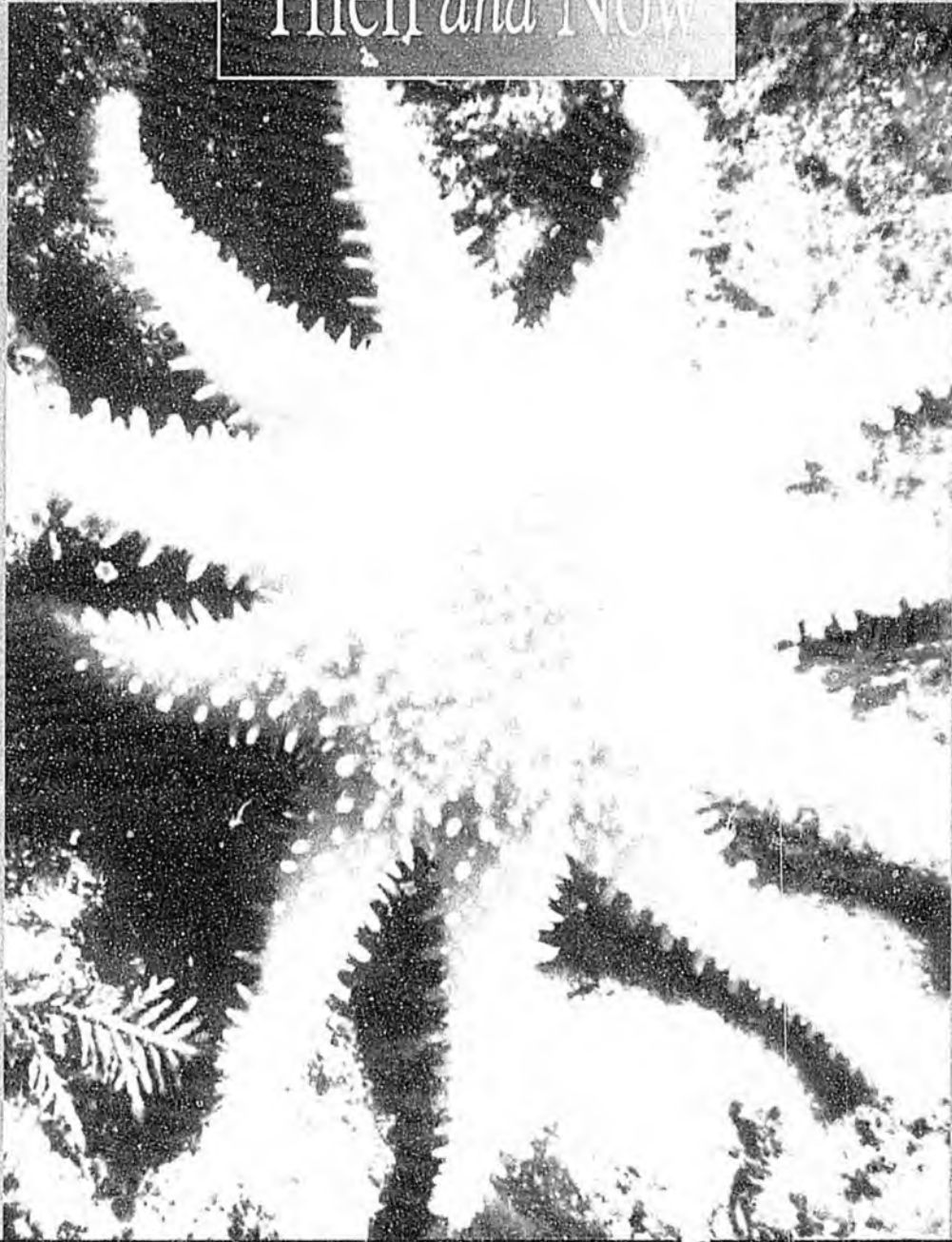
Name	Signature	Address	Phone
Pete Mickelson	<i>Pete Mickelson</i>	Box 255, Cordova	424-5111
Don Strickland	<i>Don Strickland</i>	Box 9304-D Palmer, AK	745-1260
Tim Kennedy	<i>Tim Kennedy</i>	Box 299 Cordova	424-3604
Sheela N. Mullins	<i>Sheela N. Mullins</i>	Box 136, Cordova	424-3664
STEVE L. COBB	<i>Steve L. Cobb</i>	Box 378, Cordova	424-7601
Heidi Babic	<i>Heidi Babic</i>	Box 1208 Cordova	424-7244
Jack Babic	<i>Jack Babic</i>	1208 CDU	424-7244
Robert Korobok	<i>Robert J. Korobok</i>	1126 CDU	424-7178
TRICIA A CARON	<i>Tricia A. Caron</i>	Box 1202 Homer, AK	235-5551
Mike Gundlach	<i>Mike J. Gundlach</i>	Box 1236 CDU	424-3871
Cindy Anletor	<i>Cindy Anletor</i>	Box 1795 CDU	7577
Heather McCarty	<i>Heather McCarty</i>	Box 2368 CDU	7885
Tony Hanner	<i>Tony Hanner</i>	Box 1034	7387
BENE DINE JANKARD JR	<i>Bene Dine Jankard Jr</i>	P.O. 460 Cordova	5790

Please send to Senator Pearce, Co-chair Senate Finance Committee, State Capitol, Juneau, AK 99801-1182



REFLECTS CURRENT LAW

Then and Now



changes since the

Establishment of the

Regional Citizens' Advisory Council
PRINCE WILLIAM SOUND



RCAC
mission
Citizens
promoting
environmentally
safe operation
of the
Alaska
terminal and
associated
facilities.

CONTENTS

Introduction	2
Prevention	4
Response	12
Areas of Concern.....	19
Conclusion	23
References	24

Then and Now

THE EXXON VALDEZ OIL SPILL WAS not simply a freak accident. While Exxon as the spiller should be held fully accountable and responsible for the spill and its impacts, there were myriad other factors that allowed it to happen. The oil industry, government agencies, elected officials and, to some extent, the citizens of Alaska also share varying degrees of responsibility for conditions that allowed the spill to occur and failed to ensure prompt, effective cleanup.

The oil industry failed to maintain adequate prevention and response systems.

Regulatory agencies failed to protect public resources because of ineffective or inadequate monitoring, oversight and enforcement.

State and federal elected officials were unwilling to pass laws strong enough to protect the environment and give regulatory agencies the funds they

needed to protect public resources.

Most Alaskans simply weren't paying attention.

The Exxon Valdez oil spill was caused by the ship's master and crew. It could have been prevented by stronger prevention practices and vigilant government oversight. Once the spill occurred, better response planning could have lessened the impacts.

This publication provides an overview of how factors that led to the nation's worst oil spill have been addressed in the ensuing four years. Are the resources and communities of Prince William Sound and the Gulf of Alaska better protected from a major oil spill than they were four years ago? Can Alaskans now breathe easier?

The Regional Citizens' Advisory Council of Prince William Sound (RCAC) believes Prince William Sound and communities in the path of tanker traffic clearly are much better protected now. Yet, continued vigi-

lance is essential to ensure that protections aren't diluted and that gains are not lost as political memory dims.

Much has changed since 1989, mainly because of new and revised federal and state laws and regulations spurred by the *Exxon Valdez* oil spill. The goal of this publication is to provide the general public with information about many of the changes implemented, and some of the gaps that still remain, as a measure of how much the risk of major oil spills has been reduced.

This publication was produced by the RCAC, an independent non-profit organization formed after the *Exxon Valdez* oil spill to promote environmentally safe operation of the crude oil terminal in Valdez, Alaska, and the tankers it serves.

Under a contract with Alyeska Pipeline Service Company, RCAC monitors and advises Alyeska on terminal operations, spill prevention and

response planning, and other environmental issues. RCAC conducts independent research, monitors regulatory activity and advises tanker owners and operators, regulatory agencies and the public, on issues related to oil transportation and its environmental impacts.

RCAC's 18 member organizations include communities affected by the *Exxon Valdez* oil spill and interest groups with a stake in the affected region.

The federal Oil Pollution Act of 1990 requires an industry-funded citizens' advisory group for Prince William Sound; the RCAC is certified as the entity that meets the requirement.

The views expressed in this document are those of the RCAC, which is solely responsible for the content. *

—June 23, 1993

Continued
vigilance is
essential to
ensure that
protections
aren't diluted
and that gains
are not lost
as political
memory dims.

HISTORICALLY, once oil is spilled on water it is never fully contained and recovered. Despite improvements in containment and cleanup technology, it has been virtually impossible to recover all the oil from a major spill, even in the most favorable conditions. Indeed, the best-laid response plans in the world are no guarantee that any spilled oil will be recovered since severe weather conditions can render even a good response plan useless.

The first line of defense must be prevention.

VESSEL TRAFFIC SERVICE AND NAVIGATION

The U.S. Coast Guard's Vessel Traffic Service (VTS) system func-

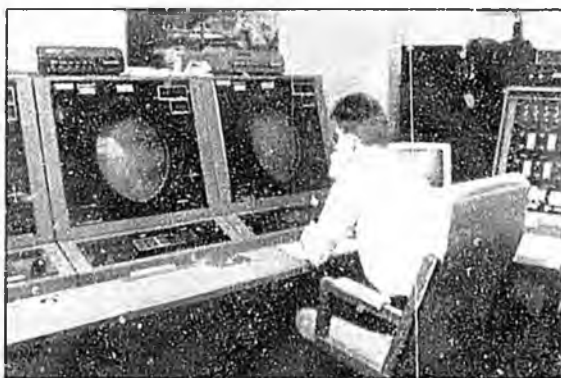
tions as the waterway manager for major shipping including tankers traveling to and from the Valdez Marine Terminal. Numerous changes have been made to update and improve the system. These changes enhance the Coast Guard's ability to monitor and provide traffic advisories to inbound and outbound tankers from its Vessel Traffic Center in Valdez.

Radar coverage has been upgraded to provide better resolution in varying weather conditions and at an extended range.

The *Exxon Valdez* left the tanker lanes altogether to avoid ice. Now, if a vessel of 1,000 or more gross tons encounters ice, the one-way zone—which has always applied through the Valdez Narrows—is extended to Bligh Reef. The extended one-way zone allows a tanker to avoid ice by using any portion of the traffic separation scheme, without risk of collision with an on-coming vessel.

A third permanent position, watch supervisor, was added to the Vessel Traffic Center, to supervise the radar and radio watch standers. Qualifications and training for watch standers have also been upgraded and expanded.

Reporting and communica-



Tanker positions are plotted every three minutes through the Valdez Narrows and every six minutes elsewhere.

PHOTO BY SEAN REID • 1992

tions have been upgraded. New repeater towers installed by Alyeska allow better two-way communications between tankers and the Valdez Marine Terminal. Coast Guard personnel now track and plot tanker positions every three minutes while the tanker is in the Valdez Narrows and every six minutes elsewhere in the radar coverage area between the terminal and Bligh Reef. If a ship moves from one traffic lane into another, to avoid ice for example, fixes are taken every three minutes until the vessel re-enters its correct lane.

A new tracking system, to begin operating in mid-1994, will enable the Coast Guard to track tankers beyond Bligh Reef. The new system will give a visual display of all tankers between the terminal and approaches to Hinchinbrook Entrance. The new system will automatically transmit tanker position data, determined by a satellite-based global positioning system, back to the Vessel Traffic Center.

A fixed navigational aid tower has been installed on Bligh Reef. Studies required by federal law are

investigating additional navigation aids and the adequacy of tanker navigation safety standards.

Traffic lanes

Watch supervisor added

More radar coverage

Navigational aid—Bligh Reef

Tracking system (to come)

The *Exxon Valdez* was traveling, unaccompanied by an escort vessel, at 12 knots and accelerating when it approached icebergs northwest of Bligh Reef. Tankers now must be accompanied by escort vessels and must stay within one-half mile of the escorts. Alyeska limits the maximum speed of the escort vessels to 10 knots in Prince William Sound, thereby indirectly limiting the speed of the tanker, as well.

Since 1977, the U.S. Coast Guard has restricted laden tankers to a maximum speed of 6 knots through the Valdez Narrows. After a steering malfunction in 1992 on the tanker *Kenai*, Alyeska

ordered escort vessels to stay within one-quarter mile of the tanker through the Narrows.

In the past, tankers could request permission to deviate from the traffic lanes altogether. Tankers now must remain in the traffic lanes, although they may request Coast Guard permission to move from one lane to the other if circumstances warrant.



The Braer goes down on the coast of Shetland, the victim of severe weather.
PHOTO BY SCOTT STERLING

Weather restrictions on tanker traffic were instituted after the *Exxon Valdez* oil spill. Now, the Coast Guard closes Port Valdez to tanker traffic if sustained winds are 40 knots or more. If sustained winds are between 30 and 40 knots, the Coast Guard requires

additional tugs through the Valdez Narrows: a total of two tugs for tankers up to 100,000 dead weight tonnage (DWT) and three tugs for tankers over 100,000 DWT. Alyeska suspends escorts altogether in sustained winds over 40 knots, because such weather would render spill response impractical, if not impossible. If escort vessels encounter such winds while under way, they normally proceed. In more severe weather conditions, escorts may turn back, but that occurs infrequently (see "Areas of concern").

While severe weather was not a factor in the grounding of the *Exxon Valdez*, it has been a factor in other major spills, most recently the *Braer* off Scotland's Shetland Islands. After the *Braer* incident, the Coast Guard Captain of the port in Valdez evaluated conditions at Hinchinbrook Entrance and instituted new weather restrictions there. Outbound laden tankers may not transit Hinchinbrook Entrance if sustained winds in the Gulf of Alaska are 60 knots or more, or if seas reach 15 feet or greater.

LANDER CREWS

Until April 1989, signs of alcohol use did not prevent tanker crews

from returning to their vessels through the terminal. Under new alcohol screening procedures instituted by Alyeska, all tanker captains are given breath tests an hour before sailing. Crew members suspected of consuming alcohol are tested; any with blood alcohol content of .04 percent or greater are denied access to the terminal and their vessel.

A state-certified ship's pilot must be on board all tankers transiting between Bligh Reef and the terminal. A federally-licensed pilot or two licensed deck officers must be on watch on the bridge while the vessel is under way in Prince William Sound between Bligh Reef and Seal Rocks. Federal law also now limits the number of hours crew members may work, to reduce the risk of fatigue-induced accidents (see "Areas of concern").

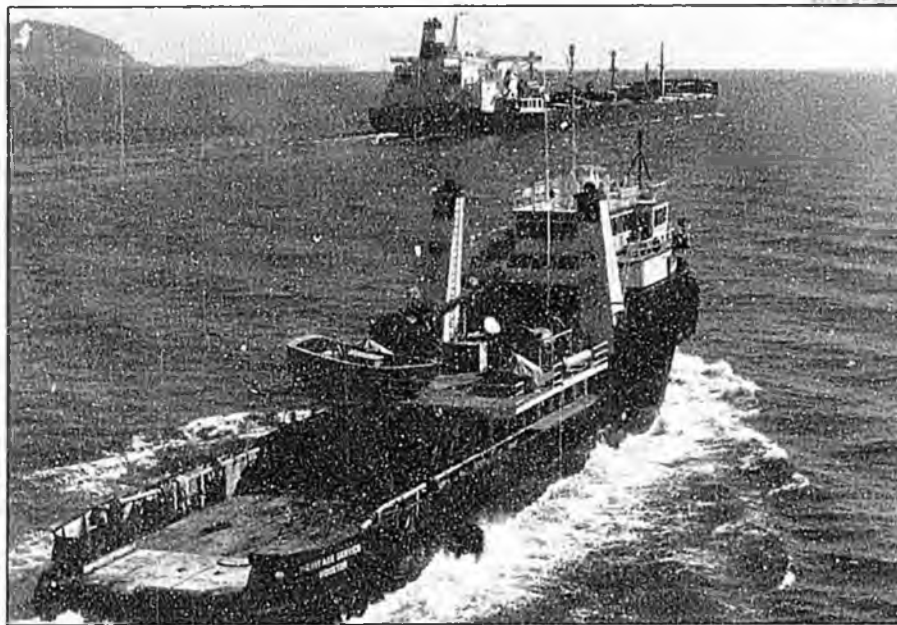
TANKER ESCORTS

Spill prevention measures begin before a tanker leaves the terminal. State regulations now require that all tankers docked at the Valdez Marine Terminal be surrounded with containment boom while cargo is transferred.

The Coast Guard has always

required laden tankers to have one tug escort through the Valdez Narrows. Now, the State of Alaska requires each laden tanker to be accompanied to Hinchinbrook Entrance by at least two escort vessels. Up to two additional tugs may be required through the Valdez Narrows, depending on weather conditions and vessel size. Federal law, under the Oil Pollution Act, also requires two escort vessels in Prince William Sound. The Coast Guard is writing regulations to implement that requirement.

The escort vessels have two functions: to assist a tanker disabled or in trouble and to provide the first line of defense should a spill occur. At least one of the escorts is a spe-



The Heritage Service escorts a laden outbound tanker.

PHOTO COURTESY ALYESKA PIPELINE SERVICE CO. © 1989 DAVID PREDEGER

cially-fitted Escort Response Vessel, or ERV, equipped with containment boom, oil skimmers, a work boat deploy boom, storage capacity and trained crew. The second escort may be another ERV or a tug.

Since 1980, when the tanker *Prince William Sound* drifted powerless for approximately 17 hours, tankers calling at the terminal have carried towing packages to facilitate hook up with an escort vessel (see "Areas of concern").

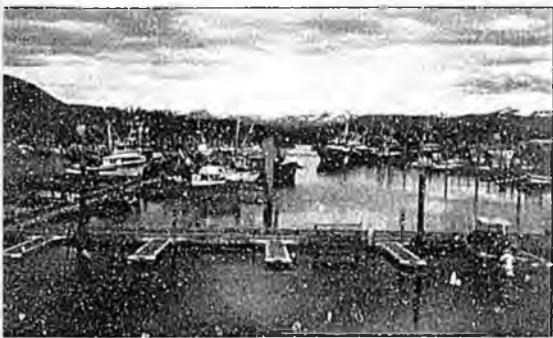
One of the most important steps taken to prevent and reduce oil spills is the federal requirement that by 2015, all tankers in U.S. waters must have double hulls. Double hulls are to be phased in, with certain vessels to be converted or scrapped on schedules based on size and age of the vessel.

Double hulls are important because studies indicate that double hulls could have prevented five of the six major oil spills in Alaskan waters between 1975 and 1990. In the case of the *Exxon Valdez*, one study said a double hull could have reduced the amount of oil spilled by 60 to 80 percent.¹

Double-hulled vessels existed

long before 1989, and more have been built since then. However, no double-hulled tankers are currently used in the trans-Alaska pipeline system (TAPS) trade. Most of the tankers calling at the terminal in Valdez were built in the 1970s. Approximately one-third of the tankers now coming to Valdez have double bottoms.² On three of the double-bottom tankers, the wing tanks are left empty, making them de facto double-hulled tankers.

The structural integrity of the tanker *Exxon Valdez* was not an issue in its grounding. However, in 1988, a report issued by the Coast Guard identified the TAPS trade fleet as disproportionately affected by structural failures. The problem was underscored in January 1989, when the tanker *Thompson Pass* spilled 71,000 gallons of crude oil at the terminal because of cracks in its hull. The Coast Guard now requires more stringent inspections of tankers vulnerable to structural failure.



[TOP] Citizens whose communities may be at risk from tanker traffic are represented on the Citizens' Advisory Council of Prince William Sound Regional. Pictured: Jim La Belle, Chugach Alaska Corp., and Lorry Evanoff, Chenega.

[BOTTOM] Cordova is one of 18 communities and interest groups that make up the Regional Citizens' Advisory Council of Prince William Sound.

PHOTO BY RICHARD NEWMAN

The Exxon Valdez oil spill generated a shift in the oil industry's attitude about the need to communicate with and involve local citizens in issues and decisions that affect their lives. That change in attitude was exemplified by former Alyeska President James Hermiller, who in

the summer of 1989, actively supported formation of a citizens' advisory group funded by Alyeska.

Citizens are involved in preventing and responding to oil spills through the RCAC. There is a similar citizens' group for Cook Inlet and another is forming among citizens of Northwest Alaska. The RCAC has 18 member organizations consisting of communities affected by the Exxon Valdez oil spill and other interest groups with a stake in the region.

The RCAC monitors terminal and tanker operations in the area impacted by the Exxon Valdez oil spill, conducts independent research and advises industry and government on ways to prevent oil spills and respond effectively if spills do occur. The RCAC is funded through a contract with Alyeska Pipeline Service Company. The RCAC, or a similar citizens' advisory group, is required by the federal Oil Pollution Act of 1990 (OPA 90) as a demonstration program that eventually may be applied in other U.S. ports.

Citizen advisory groups do not necessarily prevent complacency among the general public, but they can serve as an early warning system to alert industry, government

The Exxon Valdez oil spill generated a shift in the oil industry's attitude about the need to communicate with and involve local citizens.

ET

and the public of problem areas.

Prior to 1989 there was no mechanism, other than public hearings required by regulatory agencies, for citizens to advise the oil industry or otherwise speak directly on operations that affect their communities and livelihoods. Earlier attempts by Prince William Sound residents to give their input to oil industry representatives were generally met with negative responses.

Alyeska and others in the oil industry have become more sensitive to and communicate better with Alaskans in coastal communities, where residents' lives depend on the Sound's resources.

MONITORING AND ENFORCEMENT

The Alaska Department of Environmental Conservation (ADEC) and the U.S. Coast Guard are the two agencies most directly responsible for oversight and monitoring of the Valdez Marine Terminal and oil tanker traffic. After the *Exxon Valdez* oil spill, both agencies were criticized for failing to either implement or enforce

adequate prevention measures.

Changes have been made in both agencies.

At the state level, the *Exxon Valdez* oil spill focused public and political attention on the need for ADEC to have the authority and funding to monitor and oversee terminal and tanker operations, programs which had been under-funded through the late 1970s and '80s.

After 1989, state funding increased significantly for spill drills, review and approval of contingency plans, and facility and vessel inspections. Oil-related functions were consolidated into one division, called Spill Prevention and Response (SPAR). State legislation passed in 1990 provided the authority, resources and funding that ADEC needed to effectively monitor and oversee industry operations and implement spill prevention and response programs.

ADEC now has the authority, which it didn't have before, to require and enforce prevention measures as a condition for approval of contingency plans. Those measures include more training, more equipment, more inspection and maintenance of equipment, better record-keeping

FAST ALASKAN: Giant hairy Urch was downed at National Championships. Sports, C-1

EXXON VALDEZ SPILL

- More photos of the spill. A-6
- Marine life in danger. A-7
- Map of the spill. Back Page

Anchorage Daily News

Crude oil fouls Sound



Oil officials react slowly to disaster

Tanker spill is largest ever in U.S.

MAJOR U.S. OIL SPILL (NEWS)

Governor says he won't run for re-election

The Exxon Valdez oil spill focused public and political attention on the need for better monitoring and oversight.

and specific requirements for laden tankers.

However, the progress appears to be woefully short-lived, since ADEC is under attack again and many of the gains made are now at risk (see "Areas of concern").

The Coast Guard is the federal agency most affected by the Exxon Valdez. As a result of the problems

that emerged from the spill, the Coast Guard has a more direct role in spill prevention and response and much greater regulatory oversight of the oil transportation industry. It is responsible for implementing most of the new prevention measures required by the Oil Pollution Act of 1990 (OPA 90). ★

Progress by the state appears to be woefully short-lived, since ADEC is under attack again and many of the gains made are now at risk.

PREVENTION measures reduce the incidence and sometimes the severity of oil spills. But until prevention efforts become fail safe, the industry, regulatory agencies and the public must be prepared to respond to spills that do occur. Oil transportation poses risks to the environment. It is incumbent upon those who handle and carry crude oil, as well as regulatory agencies and the public, to make sure that spilled oil is contained and recovered to the greatest extent humanly possible.

The speed and effectiveness of responding to an oil spill hinge on the availability of equipment, resources and trained personnel. Ultimately, responding to a spill depends on planning, preparation and favorable weather.

Anyone who handles or transports crude oil or refined product is a potential spiller. Potential spillers cannot operate without an approved contingency plan for preventing and responding to a spill. What's in the plan and provisions

for drills, training, acquisition of equipment, etc. is determined by state and federal laws and regulations. Requirements vary based on type of vessel or facility, location, and amount and type of cargo carried or handled.

Contingency plans were required before. But since 1989, state and federal agencies have expanded plan requirements and changed some of the assumptions. Those who must have contingency plans to operate—called "plan holders"—must provide greater assurances that personnel are being trained, that equipment and resources are available and can be mobilized quickly, and that all players have practiced their roles in preparation for an actual spill.

The size of spill assumed in a response plan makes a tremendous difference in the resources and equipment that must be available. Alyeska's 1987 contingency plan, approved by the state, said it was highly unlikely that a spill of 8.4 million gallons (three-quarters the size of the *Exxon Valdez* spill) would occur and reasoned that "Catastrophic events of this nature

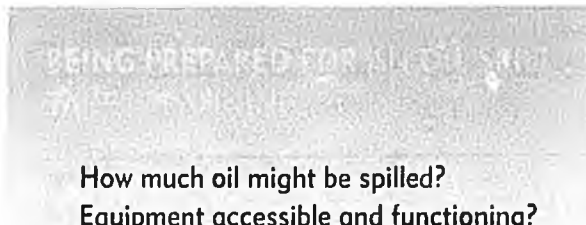
are further reduced because the majority of tankers calling on Port Valdez are of American registry and all of these are piloted by licensed masters or pilots."³

Both state and federal law now require planning for larger potential spills than in the past, and require more spill response equipment to be immediately available.

Plan holders must have enough equipment immediately available to deal with a spill of 300,000 barrels of oil within 72 hours. Plan holders must also plan for a much larger spill based on a complicated formula that includes credit for prevention measures.

As the consortium that operates the trans-Alaska pipeline and terminal for its seven owner companies, Alyeska is the plan holder for spills on the pipeline and at the terminal. In Prince William Sound, the tanker owner or operator would be the actual spiller and therefore ultimately responsible, but Alyeska is charged by the State of Alaska with providing the initial response. Federal law requires the tanker operator to submit vessel response plans, but the vessel operator may contract with Alyeska.

Tanker owners and operators must have their own approved



- How much oil might be spilled?
- Equipment accessible and functioning?
- Who will do what?
- Is everybody trained?
- Fishing vessels on contract to help out?
- Who's in charge?

contingency plans, but state law requires them to contract with Alyeska to provide the initial response described in their plans. Under these contracts, Alyeska manages the spill response for up to the first 72 hours after a spill. After that, it may transfer management of the response to the spiller, so long as the U.S. Coast Guard and the Alaska Department of Environmental Conservation agree that the spiller or its representative is ready to take over.



Alyeska's escort response vessels are equipped to respond quickly if a spill occurs. PHOTO © SEAN REID



Fishing vessel tows boom during a spill drill. Local fishermen demonstrated in 1989 that they could be effective components of spill response.

PHOTO COURTESY ALYESKA PIPELINE SERVICE CO. © RANDY BRANDON

LOCAL RESOURCES

The first three days after the Exxon Valdez oil spill afforded nearly ideal weather for oil recovery. Seas and winds were calm. But the equipment wasn't ready. Seventeen hours after the grounding, neither the leading edge of the spill nor the grounded tanker had been boomed and the few skimmers on-scene were operating ineffectively. Two hours later, skimming was forced to stop, pending arrival of more storage capacity. Throughout the first few days, debate raged about use of dispersants.⁴ Exxon argued for widespread dispersant use, yet didn't have either enough dispersant or the equipment to do the job.

The situation now is quite different. Prince William Sound is home to Alyeska's Ship Escort and Response Vessel System (SERVS), among the top oil spill response forces in the world.

SERVS has two functions: to assist tankers in safe navigation through Prince William Sound and respond to a tanker problem or spill. The escort side of SERVS' fleet consists of five escort response vessels (ERVs) and three tugs. The ERVs are equipped to

tow or assist tankers, carry spill response equipment and contain, recover and store oil. The escort vessels stay within one-half mile of the laden tanker and maintain radio communication with the tanker bridge until the tanker reaches Seal Rocks, outside Hinchinbrook Entrance.

Trained response crews are on duty around the clock and a response fleet is on standby alert whenever a laden tanker is transiting the Sound. SERVS employs approximately 200 trained personnel; another 60 people comprise Alyeska's crisis management team.

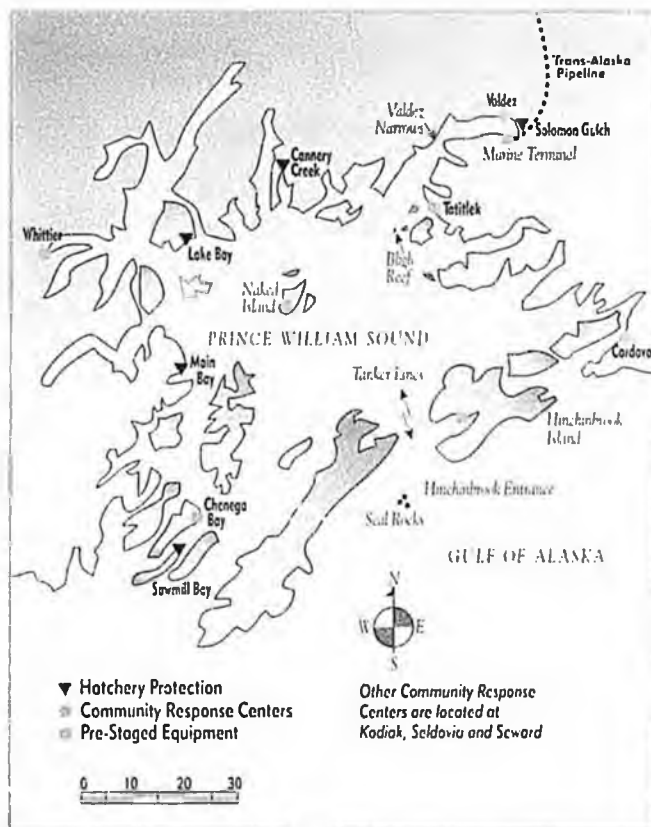
Four task forces, each with a trained crew and a large barge with two skimming systems on-board, are stationed at three sites: one each at Naked Island and Cape Hinchinbrook and two in Port Valdez. SERVS' response resources include 33 miles of containment boom, 37 high-volume skimming systems, barges to receive recovered oil and water mixture, and equipment to pump and transfer oil-water mix. Equipment is tested in drills and exercises, to reduce the chances of confusion and surprises in an actual incident.

Local fishing vessels are part

Alyeska has pre-positioned spill response equipment at hatcheries, community response centers and other sites in Prince William Sound. Community Response Centers are also set up in Kodiak, Seldovia and Seward.

OIL SPILL	✓ Equipment stockpiled & ready
	✓ Drills & exercises held regularly
	✓ Fishing vessels organized
	✓ Management structure clear
WEAK OR UNCERTAIN AREAS:	X Storage for recovered oil
	X Response outside Sound

of Alyeska's planned response to a tanker spill. Private vessels are used, among other things, to transport response equipment, deploy and tend boom, and mobilize pre-staged equipment to protect fish hatcheries. Alyeska has provided comprehensive response training to about 35 fishing boats and their crews. Another 300-plus



fishing boats and their crews have undergone training in basic response. The fishing vessels, based in communities in Prince William Sound, the Kenai Peninsula and Kodiak Island, are under contract with Alyeska to respond according to a pre-determined call-out procedure.

Spill containment and removal equipment is stockpiled at five fish hatcheries in Prince William Sound. Five community response centers also have been established in Prince William Sound, at Chenega, Cordova, Tatitlek, Whittier and Valdez. Three other centers have been established in Kodiak, Seldovia and Seward. Each center is responsible for coordinating emergency responses, manpower and equipment. Spill response equipment is pre-positioned at the five community response centers in Prince William Sound, and at Naked Island and Port Etches.

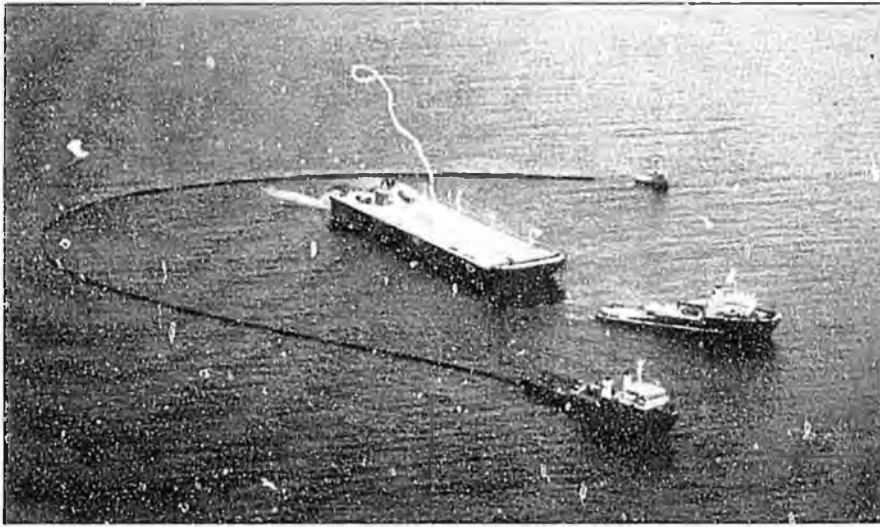
Two airborne dispersant delivery systems are maintained at Anchorage International Airport, for rapid mobilization if dispersant use is approved.

Storage capacity for recovered oil was a problem in the 1989 recovery effort. Boats would pick up the emulsified oil, only to find

there was nowhere to put it. Alyeska now maintains storage capacity, much of it on barges, for nearly 20 million gallons of recovered oil and water mixture (see "Areas of concern").

Spill drills enable response personnel to become knowledgeable and proficient in the strengths and weaknesses of equipment and procedures. Major, all-systems drills are conducted twice a year, as required by the state and the Coast Guard. These major drills include state and federal agencies, fishing vessels, tanker owners and operators and the RCAC. In 1992, Alyeska conducted nine drills at the terminal, including two surprise drills. Smaller equipment exercises are held much more frequently, often on a weekly basis.

An important aspect of spill response implemented since 1989 is use of the National Interagency Incident Management System (NIIMS), an incident command system (ICS) first developed by fire fighters in California to coordinate management, resources and roles during an emergency response.



Practice—a tanker is surrounded by boom during a major spill drill.

PHOTO BY DENNIS HARDING
CHEVRON CORP

This ICS integrates the party responsible for the spill, the State of Alaska and the Coast Guard in a unified command structure that expands according to need. It also establishes a pre-determined decision-making process and a common language that significantly reduces confusion and misunderstandings among personnel from different organizations. The ICS structure has been adapted by industry and government agencies to define and coordinate their roles and responsibilities in the event of a spill. The ICS structure has been tested and practiced extensively in drills.

Other requirements added since 1989 put more emphasis on shoreline protection, identification

of sensitive areas such as hatcheries, and wildlife protection. A new term was coined – Nearshore Response – to describe the effort to protect shorelines threatened by spilled oil that has escaped initial containment.

Nearshore response is a major component of spill response, in which local personnel, knowledge and resources can be used to protect critical resources and shorelines. Industry groups, RCAC and regulatory agencies have worked cooperatively to develop nearshore response plans. The nearshore response plan for Prince William Sound appears strong, but strategies for implementing it still need to be developed (see "Areas of concern").



One of the jobs of the RCAC is to monitor the adequacy of spill response. From left, Kristin Stahl-Johnson, John Herschleb and Ann Rothe get briefed at the Valdez Marine Terminal.

PHOTO | SEAN REID

STATE RESPONSE TO OIL SPILLS

After the *Exxon Valdez* oil spill, an existing spill response fund was expanded to ensure that reserves would be available to respond to a major oil spill and provide a long-term funding source for the state's spill prevention and response programs. The money for this expanded role comes from a five-cent conservation surcharge on every barrel of oil produced in Alaska. The surcharge ceases when the fund reaches \$50 million.

One of the projects to be paid for from the fund is a volunteer response corps and emergency response depots to ensure prompt response in the event of another major spill. However, little progress has been made to set them up (see "Areas of concern").

LOCAL EFFORTS TO PREVENT

To ensure that money will be available to pay for responding to and cleaning up a major spill, the federal Oil Pollution Act required

establishment of a \$1 billion oil spill liability trust fund, funded by the oil industry.

The Oil Pollution Act strengthened federal authority to order spill cleanup action and requires the Coast Guard to direct spill response actions when any spill poses a risk to public health or safety. It also provides tougher criminal penalties and higher civil penalties for the spiller.

CITIZEN PARTICIPATION

Local citizens are involved in actual spill response and drills in several different ways. One of the jobs of the RCAC is to monitor the adequacy of spill response. RCAC representatives convey local concerns, advice and observations to response officials and help communicate developments in the response effort to local communities. *

Areas Of Concern

SPILL BACKSTOP

PROGRESS made by the State of Alaska since 1989 is in jeopardy. ADEC's ability to implement monitoring, oversight, prevention and response is being hobbled by a legislature and administration sympathetic to oil industry concerns.

Much of the state's spill prevention and response efforts are funded by a nickel-per-barrel conservation surcharge on oil producers. The surcharge was instituted after the *Exxon Valdez* spill, in part to ensure a long-term funding source for the state's spill prevention and response programs and to set aside a reserve for use in case of a future spill. The surcharge is levied only until the fund reaches \$50 million. But continuous draws from the fund by the legislature have kept it from reaching that level, requiring the industry to keep paying into it.

Questionable legislative appropriations from the fund—to pay for a new state ferry, for example—have fueled efforts to narrow how the fund can be used. In the 1993

legislative session, oil industry lobbyists attempted to restrict the fund to actual spill response. Though unsuccessful in 1993, those efforts are expected to continue in 1994.

While the bill didn't pass, the message was not lost on the legislature. Most of the Fiscal Year 1994 budget cuts made in ADEC's Spill Prevention and Response Division (SPAR) are projects and programs paid for out of that fund. The result will be significant delays in programs designed to mitigate environmental impacts of terminal operations, prevent another major spill and improve response should oil spills occur. By reducing those programs, the legislature ensured that the fund will reach its \$50 million cap sooner, resulting in less industry taxes.

IMPERIAL STATE'S BUDGET ADJUSTS

Separate from political pressure on the response fund, there have been staffing and organizational problems. Positions in ADEC's Spill Prevention and Response (SPAR) Division have gone unfilled. As of

Progress
made by the
State of Alaska
since 1989
is in
jeopardy.

A tanker disabled at the narrowest portion of the Narrows could hit the rocks in less than 10 minutes.

June 1992, 16 positions were vacant or unfilled, representing about 18 percent of the division's total staff.⁵

Between 1989 and 1992, the legislature appropriated nearly \$10 million from the spill response fund to establish a volunteer response corps and emergency depots. Yet little progress has been made to set it up and much of the funding has lapsed because it wasn't spent.⁶

Although all laden oil tankers coming into Prince William Sound must carry special towing equipment, there is significant disparity in how the towing equipment is stowed. Stowage affects how quickly the equipment can be deployed. On some tankers, towing equipment can be deployed in 15 minutes or less with a deck crew of two. On others, however, deployment would take a crew of eight at least one hour, with power, and at least three hours, without power.

Although not currently a federal requirement, emergency towing equipment is being proposed under rules to implement provisions of OPA 90.

Efficient towing packages are

only part of the solution. Any towing package would be of questionable value to a tanker that loses power in the Valdez Narrows, where the navigable water shrinks to a width of 0.5 nautical mile. A tanker disabled at the narrowest portion of the Narrows could hit the rocks in less than 10 minutes. Averting a grounding in that situation would depend on the escort tug's ability to push or pull the tanker away from the rocks. It is not clear that the assist tugs and ERVs now being used in the Narrows are capable of doing so.

A study co-sponsored by the RCAC, industry groups and regulatory agencies is investigating the adequacy of current towing practices and equipment, and escort vessel deployment. The study is expected to be completed by the end of 1993.

At the center of the issue is whether the more-maneuverable tractor tugs should be required in Prince William Sound. Unlike conventional tugs, tractor tugs could be more safely attached to a tanker before it enters the Narrows. The study findings will be considered by the Coast Guard when it develops federal regulations on escort requirements.

LEVEL OF RELIABLE WEATHER DATA

Lack of information about weather conditions in Prince William Sound and Hinchinbrook Entrance is a problem. Because of wind patterns and local topography, readings from the wind measuring station at Potato Point are not always a reliable gauge of actual conditions. Inadequate reporting stations through the Sound mean that frequently the only information available about wind and sea conditions is from a vessel already under way.

The problem is lack of funding. During the *Exxon Valdez* oil spill cleanup, the National Oceanic and Atmospheric Administration (NOAA) temporarily placed reporting stations at numerous sites in Prince William Sound, but later removed them. The Coast Guard has requested NOAA install weather stations at various locations in Prince William Sound to provide real time weather information to aid in better vessel traffic management.

OVERWORKED TANKER CREW MEMBERS

While federal law now limits the work hours of tanker crews, ques-

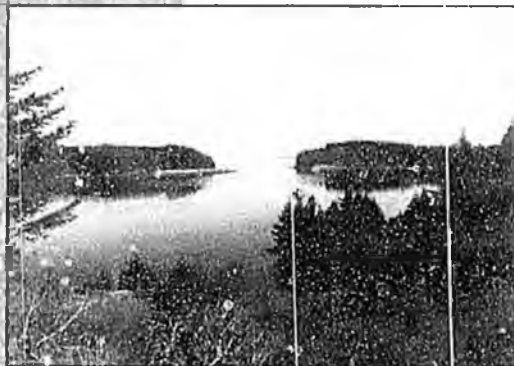
tions about other human factors have yet to be answered. Meanwhile, the U.S. Congress has yet to ratify international protocols for crew certification and training, even though such protocols would improve the safety and technical training of crews on foreign vessels calling at U.S. ports.

Issues such as the adequacy, qualifications and training of crews are to be addressed in a U.S. Coast Guard study of tanker navigation safety standards. The study is expected to be released in 1995. Minimum requirements for pilots also need to be re-evaluated; that issue will also be addressed in a Coast Guard study.

**Coast Guard given more
authority & responsibility
ADEC given more
authority and funding
Citizens have a voice**

PROBLEM AREAS:

- X State politicians cutting back on spill programs
- X Transfer of spill response to spiller (criteria vague)



Kodiak—Oil from the Exxon Valdez hit the beaches but little has been done to assess the need there for response resources.

NEARSHORE RESPONSE

The nearshore response plan for Prince William Sound is good, but more work needs to be done to implement and test it. Strategies must be developed, equipment must be tested and personnel trained and drilled. The nearshore response plans are expected to be addressed more fully in future major drills, beginning in fall 1993.

RCAC continues to be concerned about the adequacy of response capabilities and preparation outside Prince William Sound. Oil from the *Exxon Valdez* washed up on the beaches of Kodiak Island and the southern Kenai Peninsula, yet little has been done to assess the needs of those areas or provide them with response resources. There are no specific detailed plans describing what resources and equipment will be provided, where they will come from, and how they will be transported to the region within the time period required.

RCAC is also concerned about whether the storage capacity outlined in Alyeska's contingency plan will be sufficient to meet actual needs in the event of a spill.

This is especially critical for nearshore response. Available storage capacity affects recovery of spilled oil, because skimming can proceed only so long as there is somewhere to store the recovered oil and water.

RESPONSIBLE PARTY

Under its state-required contingency plan for tanker spills in Prince William Sound, Alyeska may transfer management of a spill response to the actual spiller, i.e., the vessel owner or operator. The transfer of spill management from Alyeska to the spiller must be approved by the Department of Environmental Conservation (DEC) and the U.S. Coast Guard.

However, RCAC has several concerns about the transition of response management. The criteria used to determine whether the responsible party is capable of managing the response are vague. Also vague are the criteria for determining whether the responsible party is financially able to respond. RCAC also questions whether responsible parties have the experience and training to take over in the middle of a crisis. ★

Conclusion

RCAC believes Prince William Sound is better protected from major oil spills and better prepared for an effective initial response should a spill occur. Important steps have been taken to prevent oil spills from occurring. Crews are better trained and monitored. Masters are held to more stringent requirements. Measures have been instituted to increase chances of safe passage and reduce the possibility of accidents.

Several important prevention measures, such as double hulls on tankers and a study of human factors in tanker operations, will take time to implement. Getting laws on the books is only the first step and the federal rulemaking process is slow. Many of the actual requirements and specific decisions have yet to be clarified and formalized in final regulations. Laws that appear strong when enacted can be weakened through vague regulations and inadequate funding. Laws must be implemented through clear, strong regulations and enforced by committed agencies that are given the funding necessary to monitor, oversee and enforce compliance.

Yet, industry and regulators are actively demonstrating the importance of learning from experience. During 1993, the Coast Guard and Alyeska's SERVS division instituted safety changes in response to potential problems that came to light from the *Braer* spill in Shetland and the *Kenai* incident in 1992.

Response capabilities in Prince William Sound have improved dramatically. Alyeska, through its SERVS division, has done an excellent job of acquiring, stockpiling, testing and drilling spill response equipment and training personnel.

The fact that there is room for improvement in some areas should not detract from the very substantial overall progress that has been made by both industry and regulatory agencies.

In the face of such progress, it is all the more alarming to see the State of Alaska backing off its commitment to oil spill prevention and response. Alaskans who care about the safe transportation of oil and environmental protection must defend ground gained since 1989, continue to monitor implementation of new laws, strengthen weak areas and close gaps that remain. ★

Laws that
appear strong
when enacted
can be
weakened
through vague
regulations and
inadequate
funding.

References

- 1 The Exxon Valdez and American Trader Oil Spill: What Can be Done to Prevent Future Spills? Engineering Computer Opteconomics, Inc., Feb. 6, 1991.
- 2 Guide to Double Bottom and Double Hull Tankers, Lloyd's of London Press Ltd., Dec. 1991; 1992 Guide to the Selection of Tankers, Tanker Advisory Center, Inc., NY, NY 1992.
- 3 Oil Spill Contingency Plan Prince William Sound, Alyeska Pipeline Service Company, January 1987, pages 3-54.
- 4 Spill—The Wreck of the Exxon Valdez, Alaska Oil Spill Commission, Appendix N, "T/V Exxon Valdez Oil Spill Chronology," Ceceile Kay Richter, February 1990.
- 5 Alaska's Oil and Hazardous Substance Release Response Fund: Legislative History, Operational Policies, Program Management and Use, BCSB Research and Marketing, December 1992.
- 6 Ibid.

ADDITIONAL REFERENCES

- Draft Final Report: Implementation status of specific recommendations made by the Alaska Oil Spill Commission, D. Kelso, for the Citizens' Oversight Council on Oil and Other Hazardous Substances, January 1993.
- Department of Environmental Conservation Budget History, Larry Persily, Appendix E, "Spill: The Wreck of the Exxon Valdez," Alaska Oil Spill Commission, February 1990.
- Briefing: Prince William Sound Oil Spill Prevention and Response Plan, Alyeska Pipeline Service Company, March 1993.
- Department of Environmental Conservation Overview, BCSB Research and Marketing for Prince William Sound Regional Citizens' Advisory Council, August 1992.

SB

238

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

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

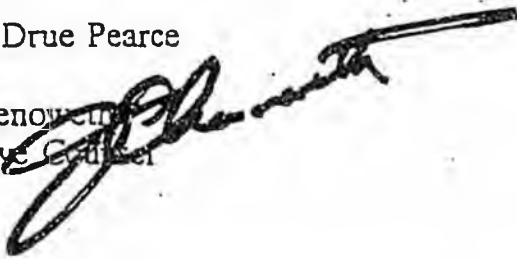
MEMORANDUM

January 4, 1994

SUBJECT: Coastal management consistency determination legislation
(Work Order No. 8-LS1442K)

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 (7). 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

OFFICE OF THE GOVERNOR

OFFICE OF MANAGEMENT AND BUDGET
DIVISION OF GOVERNMENTAL COORDINATION

SOUTH CENTRAL REGIONAL OFFICE
3601 "C" STREET, SUITE 370
ANCHORAGE, ALASKA 99503-2798
PH: (907) 561-6131/FAX: (907) 561-6134

CENTRAL OFFICE
P.O. BOX 110030
JUNEAU, ALASKA 99811-0300
PH: (907) 465-3562/FAX: (907) 465-3075

PIPELINE COORDINATOR'S OFFICE
411 WEST 4TH AVENUE, SUITE 2C
ANCHORAGE, ALASKA 99501-2343
PH: (907) 278-8594/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.

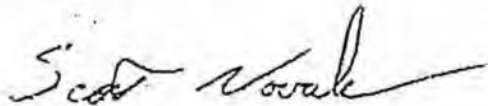
Senate Bill 238 provides a good solution to the dilemma because the State resource commissioners could review a *proposed consistency decision under petition* as members of the Council and

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.

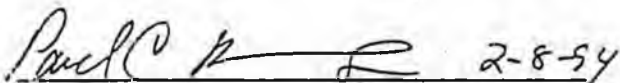
The final point raised by Bering Straits addresses a citizen's ability to petition the Council whether or not they previously commented on the consistency review. The Council subcommittee, agencies and coastal districts that worked on the petition process embodied in SB 238 discussed this issue and concluded 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) [REDACTED]
 Date Referred: February 23, 1994

FURTHER REFERRALS: [REDACTED]

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)

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 DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Bill Hudson</i> Hudson	✓	<i>Paul Finkelstein</i> Finkelstein		✓	
<i>Bob Carney</i> Carney	✓	<i>John Davies</i> Davies		✓	
<i>Joseph Green</i> Green	✓				
<i>Abunette James</i> James	✓				
<i>W.M. Bunde</i> Bunde	✓				
<i>W.T. Williams</i> Williams	✓				
<i>Bob Gold</i>	✓				

W.T. Williams
 CHAIRMAN'S SIGNATURE

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

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 238

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

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
----------------------	---	---	---	---	---	---

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
 Division: Governmental Coordination
 Approved by Commissioner: *Patrick P. Taylor*
 Agency: _____

Phone: 465-3562
 Date: 2/4/94
 Date: 2-4-94

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE

For further distribution information, call the Governor's Legislative Office

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>	

**After
SB-238**

Court

Commissioner

CPC

Director

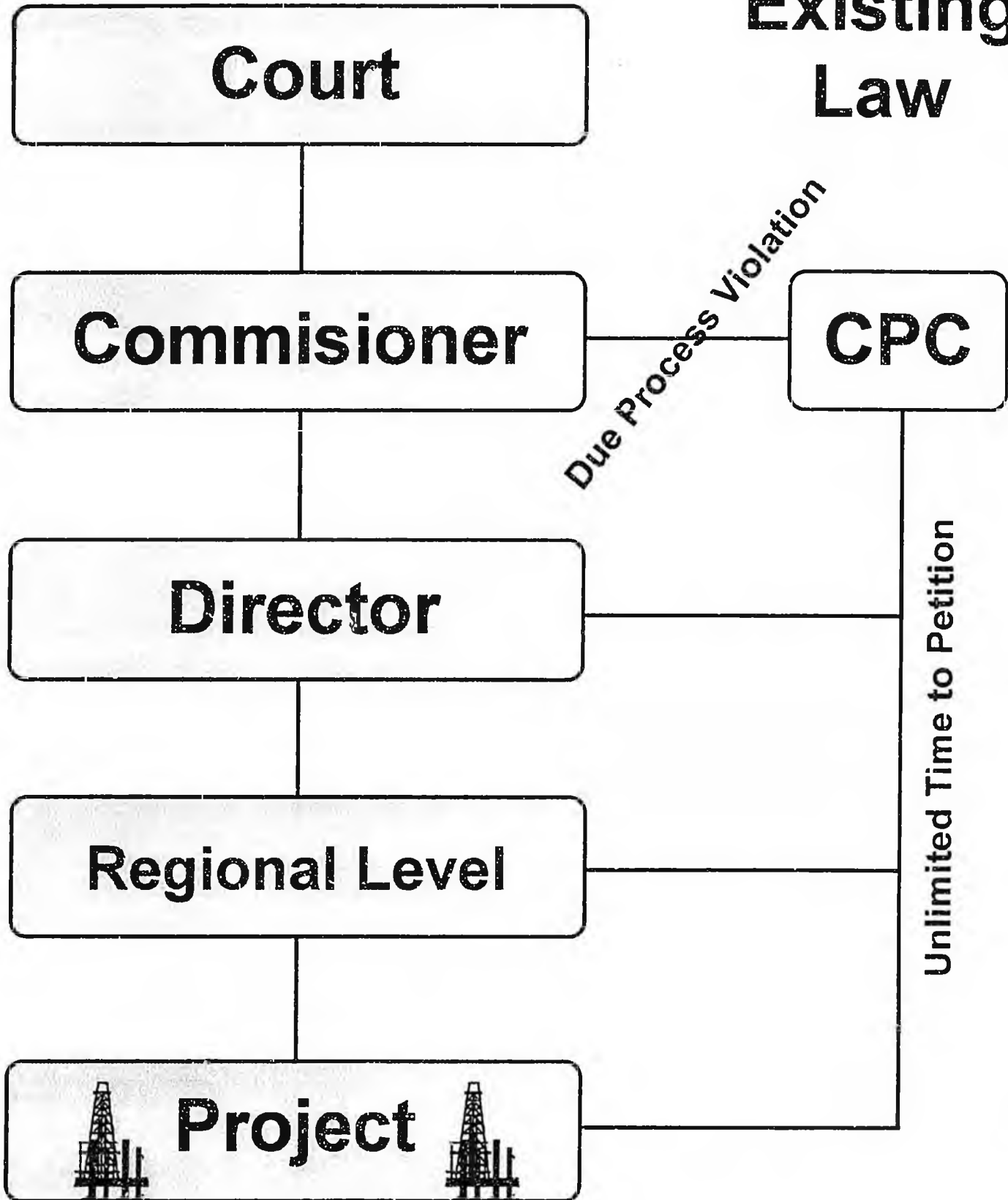
Regional Level

 **Project** 

Maximum 30 Days to Hear
and Decide Petition

Agencies, Applicants, Districts, and Citizens

Existing Law



Agencies, Applicants, Districts

MEMORANDUM

State of Alaska
Department of LawTO: 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. Kerttula
Elizabeth J. Kerttula
Assistant Attorney GeneralSUMMARY 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

BERING STRAITS COASTAL RESOURCE SERVICE AREA BOARD

P.O. Box 10
Unalakleet, Alaska 99684
(907) 624-3062

January 24, 1994

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

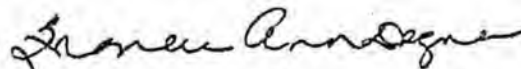
Dear Senator Pearce:

RE: Senate Bill 238

The Bering Straits Coastal Resource Service Area opposes SB 238 as it currently is proposed. Of great concern to us, is the deletion of due deference to local coastal districts. We are convinced that the Coastal Policy Council should have the authority to reverse a commissioner level elevation decision if local expertise is ignored or not fairly considered.

Another problem is the proposed bill limits parties who may petition the council. In our open society, it is preferable to have a citizen be able to petition the Coastal Policy Council whether or not a citizen had previously commented on an issue before the council.

Sincerely,



Frances Ann Degnan
Board Chairperson

cc: BSCRSA Board

BERING STRAITS COASTAL RESOURCE SERVICE AREA BOARD
P.O. Box 10120
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.

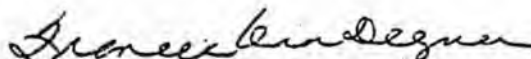
Under Senate Bill 238 authority is limited to procedural review at the CPC level. In our view, authority is taken away from the Coastal Policy Council and placed in a state agency at the director level.

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

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 "ABC" 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 Kely, 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
Sam 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

DEPARTMENT OF TRANSPORTATION
AND PUBLIC FACILITIES

OFFICE OF THE COMMISSIONER

WALTER J. HICKEL, GOVERNOR

3132 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*
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.

Senator Drue Pearce

-2-

January 31, 1994

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

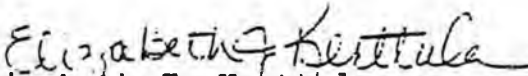
Paul C. Rusanowski, Director
Division of Governmental
Coordination

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
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

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

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

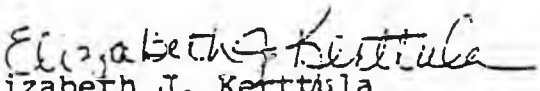
Paul C. Rusanowski, Director
Division of Governmental
Coordination

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
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

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...)

Paul Rusanowski, Director
Division of Governmental
Coordination
AG File No.: 663-92-0618

March 3, 1993
Page 5

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.

Paul Rusanowski, Director
Division of Governmental
Coordination
AG File No.: 663-92-0618

March 3, 1993
Page 6

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.

Paul Rusanowski, Director
Division of Governmental
Coordination
AG File No.: 663-92-0618

March 3, 1993
Page 7

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

Paul Rusanowski, Director
Division of Governmental
Coordination
AG File No.: 663-92-0618

March 3, 1993
Page 8

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 (eff. 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

Paul Rusanowski, Director
Division of Governmental
Coordination
AG File No.: 663-92-0618

March 3, 1993
Page 10

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).

Paul Rusanowski, Director
Division of Governmental
Coordination
AG File No.: 663-92-0618

March 3, 1993
Page 13

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:

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 Kovuk 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?

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

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 Kovuk 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?

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).

Paul Rusanowski, Director
Division of Governmental
Coordination
AG File No.: 663-92-0618

March 3, 1993
Page 16

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).

Paul Rusanowski, Director
Division of Governmental
Coordination
AG File No.: 663-92-0618

March 3, 1993
Page 17

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 also 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 ACPM 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).

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.