

ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

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SUMMARY OF: A Special Report on the Department of Natural Resources (DNR), Alaska Coastal Management Program (ACMP), Part 1, November 26, 2010.

PURPOSE OF THE REPORT

In accordance with Title 24 of the Alaska Statutes and a special request by the Legislative Budget and Audit Committee, we conducted a performance audit to determine: (1) whether regulatory changes in 11 AAC 112 and 114 limit the establishment of district enforceable policies and whether this limitation is consistent with legislative intent and state law; (2) whether DNR is properly implementing the local concern requirement; (3) whether the Department of Environmental Conservation (DEC) carveout is being implemented in accordance with legislative intent and how it has affected the scope of the ACMP's consistency reviews; (4) whether changes to the statewide standards limit the ACMP's ability to meet the its objectives; (5) whether changes to the ACMP have diminished the State's rights under the Coastal Zone Management Act of 1972 (CZMA); (6) whether DNR is operating the program openly and transparently, whether DNR will allow consultants to be consistency review participants, and whether DNR is an appropriate agency to administer the program; (7) whether the ACMP's changes have affected participation, decision making, and consensus building; and (8) whether the ACMP is operating in the public's interest and should be reauthorized.

The assessment of the ACMP's operations and performance was based on criteria set out in AS 44.66.050(c). Criteria set out in this statute relates to the determination of a demonstrated public need.

This report is the first of two parts of the Special Report on the Department of Natural Resources, Alaska Coastal Management Program. In this report, we address the ACMP issues identified above in numbers one through five. The remaining issues will be addressed at a later date in the second report.

REPORT CONCLUSIONS

- Changes to AS 46.40 and the ACMP regulations in 11 AAC 112 and 114 have limited the ability of coastal resource districts to establish enforceable policies. Currently, there are 25 coastal districts with approved plans. Prior to the ACMP's changes, their plans had over 1,300 enforceable policies. During district plan revision, the coastal resource districts submitted approximately 490 enforceable policies for approval; of these,

approximately 210 enforceable policies were approved. The reduction in number is partially due to local concern and designated area requirements as well as the requirement that district enforceable policies relate to statewide standards. Although limiting, these requirements are consistent with statutes and legislative intent.

- As intended by the legislature, the DEC carveout has excluded air, land, and water quality issues under DEC's authority from ACMP reviews. It also eliminated district enforceable policies that addressed air, land, and water quality issues under the authority of DEC to avoid regulatory confusion and minimize delays in the ACMP process. The DEC carveout has been positive for industry, but from the coastal resource districts' perspective, there are disadvantages.
- Changes to the statewide standards may limit the ACMP's ability to meet its objectives. A review of the standards indicates that many of the modifications clarified the standards and others eliminated duplicate authorities. However, some federal and state agencies as well as coastal resource districts are concerned that the less robust habitats standard has lessened the ACMP's ability to achieve some of its objectives.
- ACMP changes have not diminished the State's rights under the CZMA. The State still has and does take advantage of its rights to weigh in on federal decisions through the consistency review process. While the State has retained its rights, regulatory changes may have affected the purview of the consistency review.

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December 8, 2010

Members of the Legislative Budget
and Audit Committee:

In accordance with the provisions of Title 24 of the Alaska Statutes, the attached report is submitted for your review.

DEPARTMENT OF NATURAL RESOURCES ALASKA COASTAL MANAGEMENT PROGRAM PART 1

November 26, 2010

Audit Control Number
10-30060A-11

This is the first part of a two-part report. The overall objective of the audit is a performance evaluation and sunset review of the Alaska Coastal Management Program (ACMP). This report addresses the impact of Ch. 24, SLA 03 and subsequent regulatory changes on the establishment of district enforceable policies, the scope of consistency reviews, the ACMP's ability to meet its objectives, and the State's rights under the Coastal Zone Management Act.

The audit was conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. Fieldwork procedures utilized in the course of developing the findings and recommendations presented in this report are discussed in the Objectives, Scope, and Methodology.

A handwritten signature in black ink, appearing to read "Pat Davidson".

Pat Davidson, CPA
Legislative Auditor

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OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with Title 24 of the Alaska Statutes and a special request by the Legislative Budget and Audit Committee, we have conducted a performance audit of the Department of Natural Resources (DNR), Alaska Coastal Management Program (ACMP). The emphasis of our report is to evaluate the effect of Ch. 24, SLA 03 and subsequent regulatory changes on the ACMP's operations, to determine whether there is a demonstrated public need for its continued existence, and to determine if it has been operating in an efficient and effective manner.

This report shall be considered by the committee of reference during the legislative oversight process in determining whether the ACMP should be reauthorized. Chapter 31 of the SLA 2005, Section 18, repeals the ACMP statutes. As a result, this program will terminate on June 30, 2011, unless it is reauthorized.

Objectives

The objectives of this audit are as follows:

1. Determine whether regulatory changes in 11 AAC 112 and 114 limit the establishment of district enforceable policies and whether this limitation is consistent with legislative intent and state law.
2. Determine whether DNR is properly implementing the local concern requirement.
3. Determine whether the Department of Environmental Conservation (DEC) carveout is being implemented in accordance with legislative intent and how it has affected the scope of the ACMP's consistency reviews.
4. Determine whether changes to the statewide standards limit the ACMP's ability to meet its objectives.
5. Determine whether changes to the ACMP have diminished the State's rights under the Coastal Zone Management Act of 1972 (CZMA).
6. Determine whether DNR is operating the program openly and transparently, whether DNR will allow consultants to be consistency review participants, and whether DNR is an appropriate agency to administer the program.
7. Determine whether the ACMP's changes have affected participation, decision making, and consensus building.

8. Determine whether the ACMP is operating in the public's interest and whether it should be reauthorized.

The assessment of the ACMP's operations and performance was based on criteria set out in AS 44.66.050(c). Criteria set out in this statute relates to the determination of a demonstrated public need.

Scope

This is the first part of a two-part report. The scope of the first part includes objectives one through five that are discussed above. Overall, our review spanned from FY 94 to FY 11. The scope for specific procedures is identified in the Methodology section discussion below.

Methodology

We reviewed the CZMA, Ch. 24, SLA 03 (HB 191) and committee minutes, ACMP statutes and regulations, draft ACMP statutes and regulations, and former ACMP statutes and regulations. We reviewed these documents to ascertain the intent of the legislature, analyze the ACMP's statutory and regulatory changes, and evaluate whether the 2004 regulatory changes were consistent with legislative intent and state law.

To gain an understanding of the ACMP's operations and activities, we reviewed the following documents:

- The ACMP *Handbook of Statutes & Regulations*;
- The FY 04 to FY 10 free conference committee reports;
- The FY 95 to FY 10 attorney general opinions;
- The FY 10 semi-annual performance reports;
- The “*Application for Assistance under the Coastal Zone Management Act, July 2009 - December 2010*;”
- FY 10 to FY 11 coastal resource district grant documents;
- FY 08 to FY 10 financial reports;
- The FY 09 to FY 10 Office of Management and Budget performance measures;
- ACMP reevaluation documents and comments from 2008;
- The National Oceanic and Atmospheric Administration's (NOAA) “*Final Evaluation Findings Alaska Coastal Management Program October 2002 – August 2007*;”
- *The Classification of State Agency Approvals* (ABC List) documents; and
- The ACMP website.

We also attended two working group meetings and a coastal resource district meeting.

To determine whether the Division of Coastal and Ocean Management's (DCOM) coordinated consistency reviews were performed in accordance with ACMP regulations in 11 AAC 110, we reviewed electronic files for 39 consistency reviews selected from

consistency reviews coordinated by DCOM and entered into their database during FY 10. To obtain a cross-section of consistency reviews statewide, we randomly selected from each of the 28 participating coastal resource districts and from one of the nonparticipating coastal resource districts. We also reviewed the one consistency review that was elevated to DNR's commissioner for review during FY 10.

We determined the number of FY 10 consistency reviews that were found to be: (1) consistent with the ACMP, (2) consistent with alternative measures, (3) inconsistent, and (4) the number elevated. We compared these figures to those for FY 94 consistency reviews. We also compared the number of consistency reviews that coastal resource districts commented on in FY 10 to those in FY 94. These comparisons were made to analyze the impact of the ACMP's changes on consistency reviews.

We examined a sample of nine pairs of DCOM-coordinated consistency reviews judgmentally selected from five coastal resource districts. Each pair consisted of two consistency reviews of similar projects in the same coastal resource district. One consistency review was selected from the period FY 07 to FY 10 and the other from FY 00 to FY 04. We compared them to determine what effect, if any, the ACMP changes had on the length of consistency reviews, coastal district participation, district enforceable policies, and consistency review outcomes. We also reviewed a sample of consistency reviews identified by coastal resource districts in response to survey questions.

We reviewed the district coastal management plans in effect before the ACMP's 2003 changes for: the 28 currently participating coastal resource districts;¹ the 28 submitted revised district coastal management plans;² the 25 approved district coastal management plans;³ and the four mediated plans and supporting documents. The purpose of the review was to evaluate the changes in the number and kinds of enforceable policies and designated areas and the reasons for disapproval. We reviewed the mediated plans for consistent application of the regulations.

We interviewed DNR's management as well as DCOM's management and staff regarding various aspects of ACMP operations. We also interviewed DEC, the Department of Commerce, Community, and Economic Development, working group members, industry stakeholders, the Environmental Protection Agency, and NOAA regarding the impact of the ACMP's changes.

We interviewed the regional coastal resource district representatives and conducted a web survey of coastal resource district coordinators regarding the impact of the ACMP's changes on the ability to establish enforceable policies and designate areas, the scope of the ACMP consistency reviews, and the State's rights under the CZMA. The survey also asked for the

¹ DCOM provided these district coastal management plans on disc.

² *OPMP Preliminary* plans were reviewed at <http://www.alaskacoast.state.ak.us/District/html/ProgressFinal.htm>.

³ *Final Plan in Effect* plans were reviewed at <http://www.alaskacoast.state.ak.us/District/html/ProgressApproval.htm>.

coordinator's assessment of DNR's administration of the ACMP and whether the program is operating in the public's interest.

We reviewed websites and NOAA's final evaluation findings reports for Washington, California, Texas, Louisiana, and Florida. We also interviewed program personnel regarding their states' coastal management programs. We compared these programs to the ACMP with regard to lead agencies, oversight bodies, local plans, and local participation in federal consistency reviews.

ORGANIZATION AND FUNCTION

The Alaska Coastal Management Program (ACMP) is a voluntary state program authorized by the amended Coastal Zone Management Act of 1972 (CZMA). The ACMP is a networked program driven by the participation and cooperation of various state agencies, coastal resource districts, industry, and the public.

The Division of Coastal and Ocean Management (DCOM)

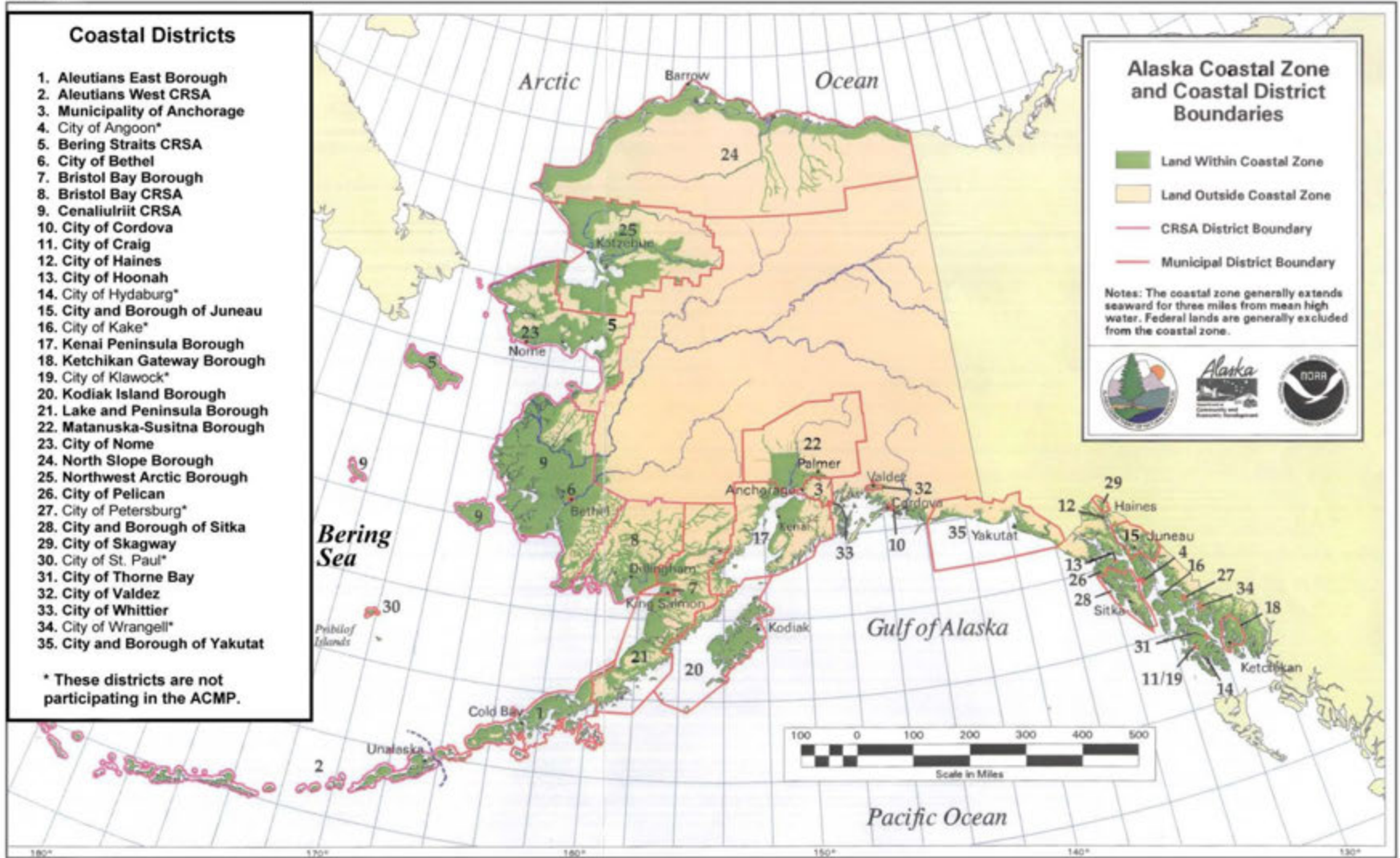
The ACMP is administered by the Department of Natural Resources (DNR), DCOM. Administration of the program includes:

- Reviewing and approving district coastal management plans.
- Coordinating the ACMP's consistency reviews.
- Proposing statutory and regulatory changes to improve coastal management.
- Funding grants and offering technical assistance to coastal resource districts.
- Coordinating regular working group and district meetings.
- Encouraging participation of coastal resource districts and the general public.

DNR is one of three resource agencies involved in the implementation of the ACMP. The other two resource agencies are the Department of Environmental Conservation (DEC) and the Department of Fish and Game (DFG). Other participating agencies include the Department of Commerce, Community, and Economic Development (DCCED); the Department of Transportation and Public Facilities (DOTPF); and the Department of Law (Law). Divisions within DNR that participate are: the Division of Agriculture (Agriculture); the Division of Geological and Geophysical Surveys (DGGs); the Division of Forestry (Forestry); the Division of Mining, Land, and Water; the Division of Oil and Gas (DOG); and the Division of Parks and Outdoor Recreation (Parks). These agencies receive ACMP and CZMA funding for their involvement in the ACMP. Responsibilities of the agencies may include:

- Providing technical assistance during district coastal management plan review and consistency reviews.
- Issuing permits for activities subject to the ACMP consistency review process.
- Coordinating and reviewing proposed coastal projects for consistency with the ACMP.
- Monitoring and reviewing projects to ensure compliance with the ACMP.
- Participating in special ACMP projects and the ACMP working group.

Exhibit 1



Provided by DNR

In the spring of 2008, DCOM began organizing monthly district teleconferences to facilitate better communication between itself and the coastal resource districts. Agenda items are determined jointly by DCOM and the coastal resource districts.

The Coastal Resource Districts

As shown in Exhibit 1, Alaska's coastal zone has 35 coastal resource districts. Local government participation in the ACMP is voluntary; currently, there are 28 coastal resource districts participating through local implementation of the program. Twenty-five of the districts have approved district coastal management plans, which include their district enforceable policies and designated areas. Of the participating coastal resource districts without plans, one is awaiting final approval and two are pending. Projects that go through a consistency review in districts without an approved plan are reviewed for consistency with the statewide coastal management plan.

Most of the coastal resource districts are organized local governments with zoning and other land use authority granted through Title 29 of the Alaska Statutes. These local governments implement their own district coastal management plans under that authority. Four coastal districts are not organized governments. These districts have formed coastal resource service areas (CRSAs) to participate in the ACMP. The CRSAs do not have land use planning and zoning authority and must rely on state agencies to enforce their district coastal management plans.

The ACMP Working Group

The ACMP working group consists of eight agency representatives, six DNR division contacts, and four coastal resource district representatives. The agency members represent each of the participating departments (DCCED, DEC, DFG, Law, and DOTPF) as well as several divisions within DNR including DCOM, Agriculture, Forestry, DGGs, DOG, and Parks. The four coastal resource district members represent the four regions of the coastal zone: northwest, southwest, southcentral, and southeast.

Responsibilities of the working group members include resolving interagency disagreements, advising their respective commissioners of ACMP viewpoints and policies, disseminating information throughout their agencies, and coordinating timely agency assistance to the coastal resource districts. The working group meets monthly via teleconference. Meeting topics vary and may include proposed legislation, draft regulations, ACMP projects, and other pertinent items.

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BACKGROUND INFORMATION

Congress passed the federal Coastal Zone Management Act of 1972 (CZMA) to promote effective management, beneficial use, protection, and development of coastal zones nationwide. The federal program encourages states to participate in coastal management and provides funding to assist states in implementing programs at the state level. In addition to receiving funding, states participating in the CZMA have the right to review federal agency and federally-permitted activities occurring in coastal zones or affecting coastal zone uses and resources. The CZMA also encourages, but does not require, the participation of local governments.⁴

In 1977, the Alaska legislature enacted the Alaska Coastal Management Program (ACMP) within the Office of the Governor, Division of Policy Development and Planning. Also established was the Coastal Policy Council (CPC), which consisted of state agency and local government officials. The CPC's responsibilities included providing leadership for the program, adopting guidelines and standards, reviewing and approving district coastal management plans, and hearing petitions regarding compliance with and implementation of district coastal management plans.

Consistent with the CZMA, the objectives of the ACMP center on the effective management of coastal zones through balancing the protection and development of coastal uses and resources. The eight objectives of the ACMP are listed in Exhibit 2 (right).

In 2003, the legislature enacted Ch. 24, SLA 03, which revised

Exhibit 2

ACMP Objectives

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

- (1) the use, management, restoration, and enhancement of the overall quality of the coastal environment.
- (2) the development of industrial or commercial enterprises that are consistent with the social, cultural, historic, economic, and environmental interests of the people of the state;
- (3) the orderly, balanced utilization and protection of the resources of the coastal area consistent with sound conservation and sustained yield principles;
- (4) the management of coastal land and water uses in such a manner that, generally, those uses which are economically or physically dependent on a coastal location are given higher priority when compared to uses which do not economically or physically require a coastal location;
- (5) the protection and management of significant historic, cultural, natural, and aesthetic values and natural systems or processes within the coastal area;
- (6) the prevention of damage to or degradation of land and water reserved for their natural values as a result of inconsistent land or water usages adjacent to that land;
- (7) the recognition of the need for continuing supply of energy to meet the requirements of the state and the contribution of a share of the state's resources to meet national energy needs;
- (8) the full and fair evaluation of all demands on the land and water in the coastal area.

⁴16 U.S.C. 1451-1456.

AS 46.39 and AS 46.40 and substantially changed the ACMP. Changes included: transferring the development and implementation of the ACMP from the CPC to the Department of Natural Resources (DNR); eliminating the CPC; revising statewide standards and regulations; removing the Department of Environmental Conservation (DEC) from the consistency review process, providing that “DEC’s air, land, and water quality standards are the exclusive standards of the ACMP for those purposes;”⁵ and requiring the coastal resource districts to rewrite their district coastal management plans.

The ACMP is implemented through the consistency review process.

The cornerstone of the ACMP is the consistency review process. Through the consistency review process, activities located within or that will have an effect on the coastal zone are evaluated for consistency with the ACMP’s enforceable policies which include state resource agency authorities, statewide standards, and district enforceable policies. Participants in the consistency review process include the resource agencies, state agencies that have requested participation, affected coastal resource districts, applicants, and interested public. The process is applicable to activities that require a resource agency authorization⁶ or federal authorization and federal agency activities.

Within DNR, the Division of Coastal and Ocean Management (DCOM) coordinates consistency reviews for activities that require an authorization from two or more resource agencies or divisions within DNR. DCOM also coordinates reviews of federal agency activities and activities that require a federal consistency determination or certification.

If an activity requires an authorization from only one DNR division, that division coordinates the consistency review and determination process.⁷ Similarly, if a project requires an authorization from a single state resource agency,⁸ that agency coordinates the consistency review and determination process.

When a project is submitted for review, if requested, the coordinating agency will provide information about the consistency review requirements to the applicant.⁹ A pre-review assistance meeting may be held among the applicant, coordinating agency, resource agencies, and potentially affected coastal resource districts.

⁵The ACMP *Handbook of Statutes & Regulations*, p. 158.

⁶Per 11 AAC110.990(a)(6)(A), “A permit, license, authorization, certification, approval, or other form of permission that a resource agency is empowered to issue to an applicant and that is identified in the C List.” Examples of authorizations on the C List are: aquatic farm and hatchery permits, offshore mining leases, and oil discharge contingency plans for oil tankers and oil barges.

⁷The Division of Agriculture; the Division of Forestry; the Division of Mining, Land and Water; and the Division of Oil and Gas.

⁸DEC or the Department of Fish and Game.

⁹Per 11 AAC 110.990(a)(4), “Applicant means a person who submits an application for a resource agency or federal authorization...or an OCS plan to the United States Secretary of the Interior.”

Once a packet is determined to be complete, the consistency review begins. Reviews are scheduled for completion within 30 days or 50 days depending on the authorizations that are needed.¹⁰ As part of the review, the coordinating agency:

- Publicly notices the consistency review;
- Distributes the consistency review packet to the review participants;
- Accepts comments on the consistency of the project from the review participants and general public, and distributes the comments to the applicant and other review participants;
- Facilitates discussion among the review participants to attempt to achieve consensus if no consensus exists;
- Renders a proposed consistency determination¹¹ with any alternative measures; and
- Renders a final consistency determination.¹²

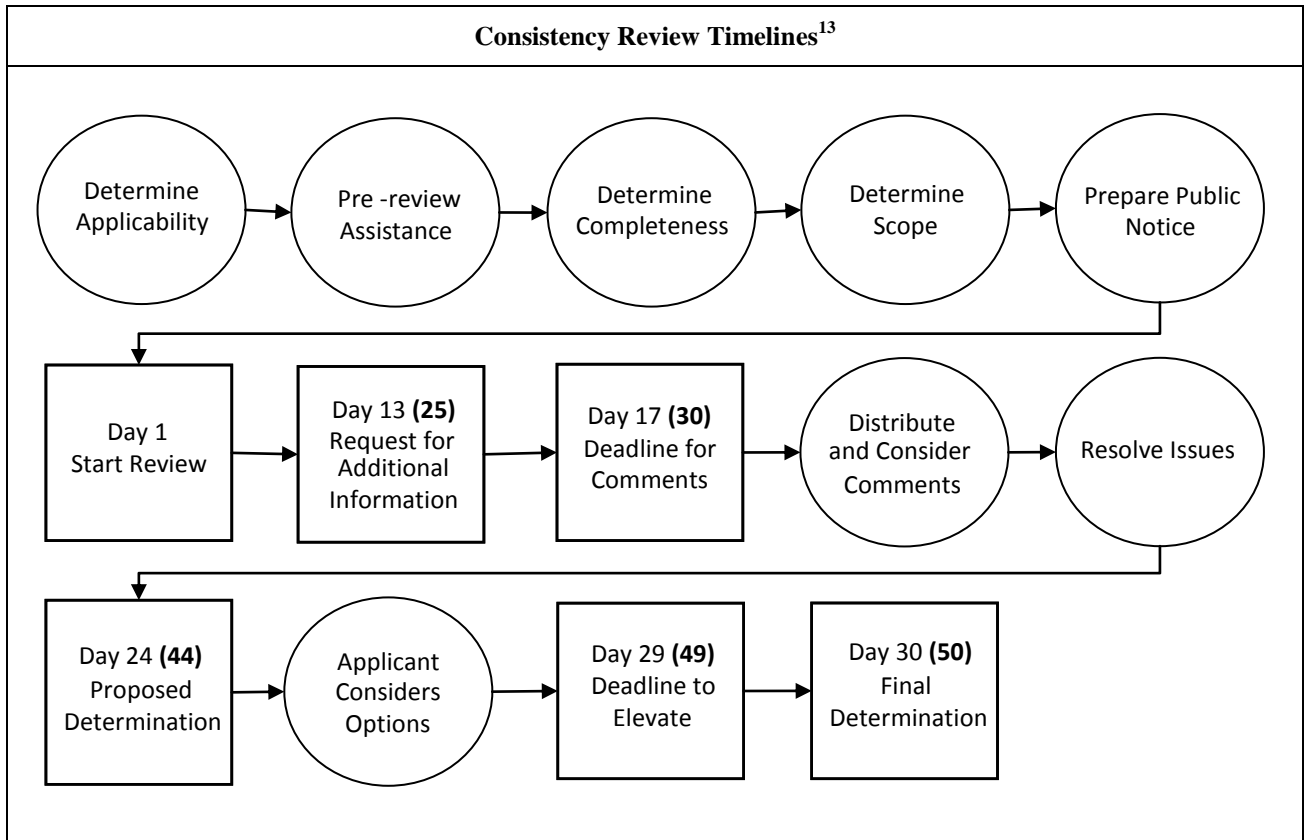
Exhibit 3 on the following page illustrates the consistency review process and the corresponding timeline.

¹⁰Per 11 AAC 110.230, unless all required authorizations of the project are specifically listed in the C List as 30-day authorizations, the project is subject to a 50-day review.

¹¹Per 11 AAC 110.255(f), a proposed consistency determination must (1) contain a description of the proposed project and scope of the project, (2) concur with or object to the applicant's consistency certification, (3) state the availability of an elevation and deadline for requesting one, and (4) be issued by electronic mail or facsimile to the applicant and review participants who may request an elevation.

¹²Per 11 AAC 110.260(a), a final consistency determination must (1) contain a description of the proposed project and scope of the project, (2) concur with or object to the applicant's consistency certification, and (3) state that it is a final administrative order and decision under the program.

Exhibit 3



Comments of consistency review participants are given due deference¹⁴ depending on the participant’s area of responsibility or expertise. For example, the Department of Fish and Game (DFG) generally would be afforded due deference with regard to the statewide habitats standard, whereas a coastal resource district generally would be afforded due deference with regard to its district plan. The coastal resource district could still comment on a project’s consistency with a statewide standard, but to be given due deference, it would have to provide evidence to support its position and demonstrate expertise in the field.

¹³The timeline provides the critical deadlines for a 30-day consistency review. The numbers in the parentheses are the deadlines for a 50-day review.

¹⁴Per 11 AAC 110.990(a)(25), “Due deference” means that deference that is appropriate in the context of (A) the commenter’s expertise or area of responsibility; and (B) all the evidence available to support any factual assertions of the commenter.” Deference is the respectful submission or yielding to the judgment, opinion, will, etc., of another.

For consistency determinations that concur with the applicant's consistency certification, the determination explains how the proposed project is consistent with applicable enforceable policies. For objections to the project, the determination identifies the specific enforceable policies and the reasons why the proposed project is inconsistent with those enforceable policies. The determination also includes any changes made by the coordinating agency between issuing the proposed consistency determination and issuing the final consistency determination. The coordinating agency provides the final consistency determination to the applicant, each resource agency, and each agency or person who submitted timely comments.¹⁵

There is a 90-day deadline for a consistency review regardless of the issuance of a DEC or other excluded permit. This deadline does not include a review involving the disposal of an interest in state land or resources. The review clock is stopped if the applicant has not responded in writing within 14 days to a request for additional information. It is also stopped when requested by the applicant and when a decision is elevated to the DNR commissioner.¹⁶ If a determination has not been made at the end of 90 days, the project is presumed to be consistent.

Exhibit 4 (to the right above) provides an example of a project that was reviewed for consistency with the ACMP.

The DEC carveout excludes air, land, and water quality issues under DEC's authority from the consistency review.

Chapter 24 of the SLA 2003 changed the ACMP by excluding DEC permits from the consistency review process, and making DEC's regulations the exclusive standards for air, land, and water quality for those purposes. For activities that require DEC permits,¹⁷ DEC's issuance of the permit establishes consistency with the ACMP. For activities that do not involve DEC permits, such as federal agency activities or activities on federal land or the Outer Continental Shelf, DEC first evaluates whether the activity complies with DEC statutes and regulations and then provides its findings to DNR.¹⁸

Exhibit 4

Big Lake Dock Expansion Project

This 2010 project proposed to construct an expansion to an existing personal use dock on Big Lake. The activity required a U.S. Army Corps of Engineers permit and an Alaska DFG Fish Habitat Permit, a C List authorization, triggering an ACMP consistency review. Because both a state permit and federal permit were required, this review was coordinated by DCOM. Review participants included the three resource agencies and the Matanuska-Susitna Borough. The 50-day review was completed timely in 38 days and the final consistency determination was that the project was consistent with the ACMP enforceable policies, which included three applicable district enforceable policies.

¹⁵11 AAC 110.260.

¹⁶11 AAC 110.265.

¹⁷Permits, certifications, approvals, and authorizations.

¹⁸AS 46.40.040(b).

The change was implemented to streamline the process by insulating the consistency review from delays associated with some of DEC's more complex permits and authorizations. While this change allows for concurrent reviews by DEC and the ACMP, it also eliminates the ability of coastal resource districts to develop specific enforceable policies addressing air, land, and water quality issues that are under the authority of DEC.

Coastal resource districts participate in the ACMP through district coastal management plans.

Coastal resource districts participate in the ACMP through the development of district coastal management plans, which include district enforceable policies and designated areas, and through participation in consistency reviews. Chapter 24 of the SLA 2003 required coastal resource districts to rewrite their district coastal management plans. Prior to Ch. 24, SLA 03, there were 33 district plans. Now, there are 25 approved plans, two pending and one in final negotiations. The other five coastal resource districts opted not to continue participating in the ACMP.

Areas can be designated by coastal resource districts during plan development. For example, according to regulation 11 AAC 114.250(g)-(h), a coastal resource district can, *“after consultation with appropriate state agencies, federally recognized Indian tribes, Native corporations, and other appropriate persons or group, designate areas in which subsistence use is an important use of coastal resources.”* Also, a coastal resource district can designate portions of a coastal area as important habitat if *“(1) the use of those designated portions have a direct and significant impact on coastal water; and (2) the designated portions are shown by written scientific evidence to be biologically and significantly productive.”*

Additionally, an area subject to district enforceable policies *“that will be used to determine whether a specific land or water use or activity will be allowed...must be described or mapped at a scale sufficient to determine whether a use or activity is located within the area.”*¹⁹

In addition to being designated during plan development, subsistence use; important habitat; historic, prehistoric, and archeological resources; and natural hazard areas can be designated by the State during a consistency review.

Per 11 AAC 114.250 and 114.270, district enforceable policies may address only uses and activities identified in the statewide standards and designations listed in Exhibits 5 and 6 (following page).

¹⁹11 AAC 114.270(g).

Statutes and regulations provide several specific requirements for district enforceable policy approval. District enforceable policies may not “*duplicate, restate or incorporate by reference*” state or federal statutes or regulations and cannot address a matter regulated by state or federal law or included in the statewide standards discussed above *unless* the policy addresses a matter of local concern. Additionally, the policy must be clear, concise, precise, prescriptive, and “*not arbitrarily or unreasonably restrict or exclude uses of state concern.*”²⁰

For a matter to be of local concern, the coastal use or resource must be within a defined portion of the district’s coastal zone and must describe or map, in a manner sufficient for plan development and implementation, (1) major land or water uses or activities that are or have been conducted or designated within or adjacent to the district, and (2) major land and resource ownership, jurisdiction and management responsibilities within or adjacent to the district. The coastal use or resource must also have been:

*Demonstrated as sensitive to development in the resource analysis, [not be] adequately addressed by state or federal law... [be of] unique concern to the coastal resource district as demonstrated by local usage or scientific evidence that has been documented in the resource analysis.*²¹

A district coastal management plan must also include an inventory of coastal resources, district resources, and a resource analysis of the impacts of uses and activities that are subject to the district plan. The resource analysis may include appropriate and pertinent local knowledge.²²

Exhibit 5

Statewide Standards District Policies May Address
Coastal Development
Natural Hazard Areas
Coastal Access
Energy Facilities
Utility Routes and Facilities
Sand and Gravel Extraction
Subsistence
Transportation Routes and Facilities

Exhibit 6

Designations District Policies May Address
Natural Hazard
Recreational Use
Tourism Use
Major Energy Facilities
Commercial Fishing and Seafood Processing
Subsistence Use
Important Habitat
Historical and Pre-historical

²⁰11 AAC 114.270(c)-(e).

²¹11 AAC 114.270(h)(1).

²²11 AAC 114.230-240.

Comprehensive reevaluation of the ACMP, which started in 2008, has not, to date, resulted in either an administration's bill to the legislature or any regulatory changes.

Chapter 24 of the SLA 2003 mandated that DNR adopt regulations implementing revisions to the consistency review process, statewide standards, and district plan criteria by July 1, 2004. The process involved state and federal agencies, coastal resource districts, and the public. DNR contractors discussed proposed changes with stakeholders at district conferences and draft regulations were presented at the annual, statewide ACMP conference. Proposed regulations were released for public comment, amended, and adopted on May 24, 2004. DNR subsequently proposed revisions to the statewide standards and the district plan criteria. These were adopted on September 24, 2004, after public comment and amendment.

Following the passage of Ch. 24, SLA 03 and the revisions to the implementing regulations, there was growing discontent among the coastal resource districts over limitations in their ability to establish district enforceable policies. At the January 29, 2008, Senate Community and Regional Affairs hearing on SB 161, the director of DCOM addressed their concerns, acknowledging:

There have been challenges and he [Director Bates] recognizes that the regulations are more stringent than HB 191 [Ch. 24, SLA 03] intended. DNR will look at what was done to see if the promulgation of the regulations governing district plans was appropriate and what can be done to improve the program. Commissioner Irwin intends to formally and openly reevaluate the regulations, and he will include the coastal districts, public, industry, agency, and applicants. There will be an open dialogue to re-craft the regulations and improve the program.

At a minimum, the reevaluation would reconsider the DEC carveout, the districts' ability to write enforceable policies, the requirements for designated areas, and consistency review issues. In its evaluation of the program, the ACMP's federal oversight agency, the National Oceanic and Atmospheric Administration, Office of Ocean and Coastal Resource Management (OCRM) encouraged DNR's efforts.

On February 22, 2008, a letter from the DCOM director announced that the reevaluation would begin in June 2008. DNR was soliciting comments from the ACMP's participants on the ACMP's guiding statutes in AS 46.39 and AS 46.40, and the implementing regulations in 11 AAC 110, 112, and 114. The written comments resulting from the reevaluation process were intended to be the foundation for proposed statutory changes prepared by DNR to be submitted for consideration during the 2009 legislative session. Subsequent regulations to implement the changes were to be finalized between March and August 2009.

Multiple workshops, teleconferences, and comment periods occurred between June and December 2008 regarding the reevaluation issues and the drafting of proposed statutes and regulations. However, a consensus on the proposed statutory changes could not be reached

among the coastal districts and industry. No legislative bill on the proposed ACMP statutory changes was introduced by the administration to the 26th Legislature. DNR is now focusing on proposing revisions to the consistency review process contained in 11 AAC 110.

Local government involvement varies among the coastal states.

The CZMA encourages the participation of local governments in coastal zone management; however, it does not require it. While there are some similarities among state programs, according to OCRM, the ACMP is unique. Alaska chose a strong role for coastal resource districts; the relationship in other states is different. Most states have land use policies; however, most states do not have the local concern issues addressed by Alaska.

A review of California, Florida, Texas, and Louisiana found that these states have local policies with varying degrees of authority through local zoning and ordinances. The local zoning and ordinances are written at the local level into local plans. Although zoning and ordinances must be consistent with the state coastal plans, they are not incorporated into the state plans.

All of the states have some form of local permitting authority. California, Louisiana and Florida turn permitting authority over to the local programs once they have plans approved by their state lead agencies. Local policies in Texas are primarily performance standards intended to avoid, minimize and/or compensate for adverse impacts to the coastal natural resource areas. Some states retain permitting and regulatory authority over specific areas such as development on tidelands, submerged lands, and public trust lands.

Texas and California have a council or commission with direct responsibility for implementation of their state programs. Louisiana also has a commission; however, the commission does not have direct authority over its local programs. The councils include local government representation.

The local governments in all four reviewed states are able to participate in the federal consistency review process; their comments are taken into consideration in determining consistency. The California Coastal Commission encourages public participation and local government input into the federal consistency review process and contacts commenters for input and feedback. To the extent that they issue permits, Louisiana's local programs have the lead role in the consistency review for uses of local concern. Exhibit 7 (following page) compares Alaska to the four reviewed states.

Exhibit 7

Comparison of Four State Coastal Management Programs to the ACMP

State	Coastline Miles	Lead Agency	Board or Commission	Local Enforceable Policies Part of State Coastal Plan	Level of Local Participation in Federal Consistency Reviews
Alaska	44,500	Department of Natural Resources	No	Yes	Local governments participate in reviews. Comments given due deference for district enforceable policies and designated areas.
California	3,427	California Coastal Conservancy, Bay Conservation and Development Commission, and California Coastal Commission	Yes	Not since mid-1990s	Public participation and local government input encouraged and solicited.
Florida	8,436	Department of Environmental Protection	No	No	Local government comments considered during consistency review.
Louisiana	7,721	Department of Natural Resources	Yes (advisory)	No	Local governments can comment. They have lead role in review for uses of local concern when their permits are issued.
Texas	3,359	General Land Office	Yes	No	Local government comments considered during consistency review.

REPORT CONCLUSIONS

The objectives of this audit are as follows:

1. Determine whether regulatory changes in 11 AAC 112 and 114 limit the establishment of district enforceable policies and whether this limitation is consistent with legislative intent and state law.
2. Determine whether the Department of Natural Resources (DNR) is properly implementing the local concern requirement.
3. Determine whether the Department of Environmental Conservation (DEC) carveout is being implemented in accordance with legislative intent and how it has affected the scope of the Alaska Coastal Management Program's (ACMP) consistency reviews.
4. Determine whether changes to the statewide standards limit the ACMP's ability to meet its objectives.
5. Determine whether changes to the ACMP have diminished the State's rights under the Coastal Zone Management Act of 1972 (CZMA).
6. Determine whether DNR is operating the program openly and transparently, whether DNR will allow consultants to be consistency review participants, and whether it is the appropriate agency to administer the program.
7. Determine whether the ACMP's changes have affected participation, decision making, and consensus building.
8. Determine whether the ACMP is operating the in public's interest and should be reauthorized.

The assessment of the ACMP's operations and performance was based on criteria set out in AS 44.66.050(c). Criteria set out in this statute relates to the determination of demonstrated public need.

This report is the first part of a two-part report. The first part includes the first five objectives that are discussed above. The remaining three objectives will be addressed in the second report.

Changes to ACMP statutes and regulations have limited the ability of coastal resource districts to establish enforceable policies.

Changes to ACMP statutes in AS 46.40 and regulations in 11 AAC 112 and 114 have limited the ability of coastal resource districts to establish enforceable policies. Currently, there are 25 coastal resource districts with approved district coastal management plans. Prior to the ACMP's changes, their district plans had over 1,300 enforceable policies.²³ During district plan revision, the coastal resource districts submitted approximately 490 enforceable policies for approval.²⁴ Of these, approximately 210 were approved. The reduction in number is largely due to local concern and designated area requirements as well as the requirement that district enforceable policies flow from statewide standards. Of the approximately 490 enforceable policies submitted, approximately 170 were denied because the local concern requirements were not met; almost 60 were denied because the designated area requirements were not met, and over 45 were denied because they did not flow from a statewide standard. While these requirements do limit district enforceable policies, they are consistent with statutes and the intent of the legislature that enforceable policies be clear, concise, non-duplicative, and related to matters of local concern.

1. Coastal resource districts establish enforceable policies for local concerns, but requirements for approval are difficult to meet.

District enforceable policies must relate to a statewide standard or designated area; however, they cannot address a subject matter regulated or authorized by state or federal law unless they relate specifically to a matter of local concern. According to AS 46.40.070(a)(2)(C), a matter of local concern refers to:

A specific coastal use or resource within a defined portion of the district's coastal zone, that is (i) demonstrated as sensitive to development; (ii) not adequately addressed by state or federal law; and (iii) of unique concern to the coastal resource district as demonstrated by local usage or scientific evidence.

Matters of local concern cannot address air, land, or water quality issues that are under the authority of DEC.

Of the approximately 490 enforceable policies submitted for approval, approximately 35 percent were disapproved at least partially because the coastal resource district did

²³Prior to the 2003 ACMP changes, Ch. 28, SLA 02 mandated that a coastal resource district could “not incorporate by reference statutes and administrative regulations adopted by state agencies.” It also required district coastal management programs that were not consistent with the law to submit revised programs to the CPC within one year. According to DNR management, coastal resource districts did not submit revised programs that would be in compliance with Ch. 28, SLA 02.

²⁴There are multiple reasons for the reduction in the number of policies (see footnote 22) and not all are related to the changes in 11 AAC 112 and 114; however, based on the scope of our audit, our discussion focuses on the enforceable policies eliminated for not meeting the local concern requirement.

not show that the policies addressed matters of local concern. More than half of the coastal resource districts surveyed believed they had enforceable policies disallowed even though they met the statutory requirement. Expressing the frustration felt by many, one coastal resource district coordinator said he did “*not know what it would take to provide enough documentation to prove local concern.*”

Under the former ACMP, if a district program addressed the same subject as a statewide standard, the district program governed.²⁵ Now a coastal resource district must demonstrate that a matter is not adequately addressed by state or federal law for its enforceable policy to be approved. A matter can be adequately addressed if an agency has the authority to regulate, whether or not it has regulations concerning the matter.

Some coastal resource districts believe that DNR’s interpretation of “*adequately addressed*” leaves several areas, such as habitat and subsistence, inadequately covered. According to one resource agency, DNR is properly implementing this policy; however, this agency adds that there may be areas that are not addressed by any agencies or district plans, such as the upland habitat.²⁶

During its reevaluation of the ACMP in 2008, the Division of Coastal and Ocean Management (DCOM) proposed changes to the draft form of AS 46.40.070(a)(2)(C) for informal public comment. The draft removed the requirement that a coastal resource district demonstrate that a policy relates to a matter of local concern. The proposed replacement language mandated that a policy could not redefine, replace or otherwise modify state or federal statutes or regulations or establish new standards or requirements within the authority of a state or federal agency *unless* approved by that state or federal agency.²⁷

2. Designated area requirements limit the ability of coastal resource districts to establish enforceable policies for subsistence uses and important habitats.

For many coastal resource districts, designated area requirements have led to fewer district enforceable policies. For a couple coastal resource districts, designated area requirements, among other concerns, have resulted in them withdrawing their plans from consideration, and for at least one coastal resource district, designated area requirements have led to separation from the ACMP.

As discussed in Background Information, under the revised regulations, coastal resource districts cannot establish policies that relate to subsistence use and important habitats unless a specific designated area is approved.

²⁵6 AAC 80.010(b).

²⁶The habitat standard manages upland habitat if it can be designated as important habitat.

²⁷ We recognize that DNR’s release of draft changes for discussion purposes does not constitute the department’s official position on the matter.

In total, the 28 participating coastal resource districts submitted approximately 120 habitat and subsistence policies for approval. Approximately 30 percent, were disallowed at least in part because they did not have an approved designated area.

When they were amending their district plans, the 28 participating coastal resource districts proposed

approximately 165 habitat and subsistence designated areas. (See Exhibit 8 above.) Approximately 60 areas were approved. The northwest region has the lowest percentage of approved designated areas because the three coastal resource districts with the largest number of proposed designated areas in that region do not have approved district plans.²⁸ These three coastal resource districts accounted for approximately 35 percent of the proposed subsistence use and important habitat designated areas.

Excluding designated areas proposed by those districts without approved plans, overall, approximately 55 percent of the proposed areas were approved. Further analysis shows that approximately 80 percent of the subsistence use areas were approved; conversely, approximately 70 percent of the important habitat areas were disapproved.

Common reasons for disallowing important habitat designations included that the map or basis of designation did not meet the regulatory requirements in 11 AAC 114.250(h) or the map did not meet the requirements of written scientific evidence. (See Exhibit 9 to the right.) Recognizing that Alaska's vast coastal

Exhibit 8

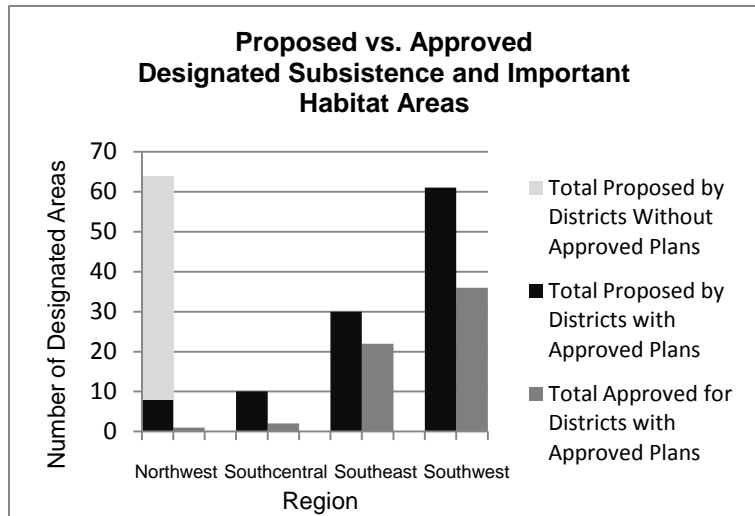


Exhibit 9

Requirements for Designating Subsistence Use and Important Habitat Areas

Subsistence Use – According to 11 AAC 114.250(g), a coastal resource district may “after consultation with appropriate state agencies, federally recognized Indian tribes, Native corporations, and other appropriate persons or group, designate areas in which subsistence use is an important use of coastal resources.”

Important Habitat – According to 11 AAC 114.250(h), a coastal resource district may “designate portions of a coastal area as important habitat if (1) the use of those designated portions have a direct and significant impact on coastal water; and (2) the designated portions are shown by written scientific evidence to be biologically and significantly productive.”

²⁸The three coastal resource districts which currently do not have approved district coastal management plans are: the North Slope Borough, the Northwest Arctic Borough, and the Bering Straits Coastal Resource Service Area.

resources and relatively limited scientific information and studies make designating areas for some coastal resource districts cost-intensive, DCOM offers grants to coastal resource districts to help defray the cost.

Another challenge noted by both agency and coastal resource districts is that some resources are found in different locations at different times, making it difficult to define an exact location for subsistence use designation. One reason subsistence use designations were not allowed was that they were based on the entire coastal zone without sufficient documentation that subsistence was an important use of all areas in the coastal zone.

Areas designated by coastal resource districts were also disallowed because the designated areas included federal lands. Under AS 46.40.210(4), federal lands are specifically excluded from the coastal zone definition. This is not a new requirement under the revised statutes and regulations. However, prior to the ACMP changes, coastal resource districts did designate areas on federal lands and this practice was inadvertently allowed by the federal government.²⁹

The National Oceanic and Atmospheric Administration's Office of Ocean and Coastal Resource Management (OCRM), the ACMP's federal oversight agency, suggested in its June 2008 final evaluation findings report that DNR revisit the requirements for designated areas, especially those relating to important habitat and subsistence use. During its reevaluation of the ACMP in 2008, DCOM proposed, in draft form for informal public comment, to remove the designated area requirements. We see this is an indication that DCOM may understand that designated area requirements are too limiting.

3. Clarifying standards and policies and reducing redundancy were the legislature's intent.

The legislative findings in Ch. 24, SLA 03 clearly establish the intent to modify the existing enforceable policies. Specifically, the stated legislative intent was to:

²⁹According to "Final Evaluation Findings Alaska Coastal Management Program October 2002 – August 2007," OCRM, June 2008, p. 48:

The exclusion of federal lands from a state's coastal zone and the application of the Coastal Zone Management Act (CZMA) federal consistency provision to federally excluded lands and to federal waters have not changed over time... [Office of Coastal and Resource Management] understands that prior to the 2005 ACMP amendment the ACMP allowed coastal resource districts to establish a „designated area“ for District policies on federal land. This practice was not consistent with the CZMA and National Oceanic and Atmospheric Administration (NOAA) regulations. Unfortunately, as discussed during OCRM's review of the 2005 ACMP amendment, OCRM was either not aware this was occurring at that time or OCRM inadvertently overlooked the CZMA and regulatory requirements.

- Reduce delays and avoid regulatory confusion, costly litigation, and uncertainty to allow new investment to become more feasible.
- Update and reform the ACMP statewide standards to be clear and concise.
- Update and reform the district plans so that enforceable policies are clear, concise, more uniform, related to local concerns, and non-duplicative of state and federal laws.
- Develop and implement these reforms administratively by DNR.

DNR has changed the standards in 11 AAC 112 for clarity and to reduce duplication with other state authorities. Their authority to adopt statewide standards to identify the boundaries of the coastal area and to determine the land and water uses and activities subject to the ACMP is included in AS 46.40.040.

Under 11 AAC 114.270, a district enforceable policy must:

- Be clear and concise and use precise, prescriptive, and enforceable language;
- Relate to a statewide standard or designated area;
- Not address a matter regulated or authorized by state or federal law unless it is a matter of local concern; and
- Not arbitrarily or unreasonably restrict or exclude uses of state concern.

While these requirements do place limits on coastal resource districts' ability to establish enforceable policies, they are consistent with the intent of Ch. 24, SLA 03 that enforceable policies be clear, concise, non-duplicative and related to matters of local concern.

Overall, although consistent, DNR recognizes that the district plan requirements contained in 11 AAC 114 are more stringent than intended under HB 191. One indication of this may be that out of approximately 490 district enforceable policies submitted for approval following the ACMP changes, approximately 45 percent were denied at least in part because the coastal resource districts could not meet the designated area or local concern requirements.

DNR should review requirements for designating areas and establishing local concern to determine where changes can be made to accommodate coastal resource districts' ability to write district enforceable policies without duplicating state or federal law.

As intended by the legislature, the DEC carveout excludes air, land, and water quality issues under DEC’s authority from ACMP reviews.

One of the provisions of Ch. 24, SLA 03, which revised AS 46.39 and AS 46.40, was to remove DEC permitting from the consistency review process.³⁰ According to AS 46.40.040(b), “*AS 46.03, AS 46.04, AS 46.09, and AS 46.14 and the regulations adopted under those statutes constitute the **exclusive** enforceable policies of the Alaska coastal management program for those purposes (emphasis added).*”³¹ These combined changes are referred to as the “DEC carveout”.

Whether the activity is onshore, in state waters, or on the Outer Continental Shelf (OCS), air, land, and water quality issues under the authority of DEC are now outside the purview of the ACMP consistency review process. Therefore, a coastal resource district cannot establish district enforceable policies for air, land, or water quality issues under the authority of DEC even if it could demonstrate the matter is not adequately addressed by state or federal law.

As intended by AS 46.40.040(b) and Ch. 24, SLA 03, the DEC carveout eliminated district enforceable policies that addressed air, land, and water quality issues under the authority of DEC from district coastal management plans. As previously stated, legislative intent was partially to avoid regulatory confusion, to revise district plans so that they do not duplicate state and federal requirements, and to minimize delays in the ACMP process.

The consistency review for a project begins once the review packet is complete, including applications for all required permits. However, some DEC permits (e.g., air quality) take several months just for the application to be complete. Carving out DEC permitting processes streamlines the process by allowing the ACMP review and the DEC permitting to occur concurrently rather than consecutively.

From the perspective of industry, the DEC carveout has been a positive change in the consistency review process. However, from the coastal resource districts’ perspective, there are many disadvantages to the DEC carveout.

The industry stakeholders we interviewed expressed satisfaction with the ACMP revisions stating that the DEC carveout has reduced delays in the consistency review process and increased developers’ confidence in engaging in projects within the coastal zone.

The coastal resource districts, on the other hand, believe that the DEC carveout goes too far. Coastal resource districts express concern that there are gaps in DEC statutes and regulations

³⁰For activities that require permits or other authorizations, DEC’s issuance of the permit or other authorization establishes consistency with the ACMP. For activities that do not involve permits or other authorization, such as federal activities or activities on federal land or the OCS, DEC reviews the activity for consistency and provides its findings to DNR. AS 46.60.040(b).

³¹Although they cannot have enforceable policies that relate to these issues, coastal resource districts that have Title 29 authorities still can have local ordinances that address air, land, and water quality issues. Title 29 of the Alaska Statutes empowers incorporated boroughs with regional planning and land use regulation responsibilities.

that cannot be resolved due to the revised ACMP statutes and regulations prohibiting coastal resource districts from creating enforceable policies over air, land, and water quality issues under the authority of DEC. For example, DEC regulates the requirement of oil discharge prevention and contingency plans for certain facilities.³² However, oil terminal facilities with storage capacity of 5,000 barrels of crude oil or 10,000 barrels of noncrude oil or less are exempted from the discharge prevention and contingency plan requirements. DEC points out, that for the State to require oil discharge prevention and contingency plans for smaller facilities would be cost prohibitive.

Coastal resource districts are able to comment on DEC's air, land, and water quality issues. However, without enforceable policies, their comments are considered, but they are not given due deference.³³

Through the ACMP consistency review process, coastal resource districts have the right to elevate a decision. The ACMP uses an "elevation" process which involves direct communication with the DNR commissioner, is relatively informal, and occurs within 45 days. Coastal resource districts also have the right to appeal a DEC permit decision through DEC's appeals process. However, the DEC appeals process usually involves a hearing officer, is formal, and can be lengthy.

DEC provides consistency findings for certain activities that do not require a permit, such as activities on the OCS. In contrast to permit decisions which can be appealed, DEC consistency findings cannot be elevated. That is, if a coastal resource district disagreed with DEC's consistency finding related to an activity on the OCS, there is no recourse.

Coastal resource districts stated that DEC controlling the review of land, air, and water quality issues eliminates the collaborative opportunities among coastal resource districts, applicants, and resource agencies to determine if an activity will have an adverse impact on coastal uses and resources. Some districts questioned how impacts to air, land, and water quality issues can be considered without jointly considering the impacts to other uses and resources, such as habitat, subsistence, and recreation. During our coastal resource district survey, 59 percent of the districts stated that the DEC carveout affects ACMP reviews in their coastal resource districts.

In response to the confusion and concerns expressed by various ACMP program participants, OCRM suggested that DNR evaluate the effectiveness of retaining the DEC carveout in its final evaluation findings report issued in June 2008. During its reevaluation of the ACMP,

³² Examples of these facilities include: oil terminal facilities; offshore and onshore production and exploration wells; refineries; transmission pipelines; oil pipelines; oil tankers; and noncrude vessels and barges.

³³For activities that are permitted by DEC, the permitting process provides an opportunity for public comment. When an activity does not require a permit, such as an activity on the OCS, there is no opportunity for comment through DEC's formal public process. In such instances, ACMP regulations require DEC to provide its consistency findings to DNR on the final day of the consistency review. To allow for public comment, however, DNR has implemented a policy for DEC to provide its consistency findings on day 44 of a 50 day review.

DCOM did consider and propose, in draft form, for informal public comment, elimination of the DEC carveout.

The ACMP was designed to operate as a networked program. The three resource agencies' activities are integral to this network, but the activities under the authority of DEC have been carved out. Furthermore, coastal districts can write enforceable policies for activities authorized by DNR and the Department of Fish and Game (DFG) provided they relate to matters of local concern, but not for air, land, and water quality issues under DEC's authority.

DNR should develop proposals to reintegrate DEC permitting processes into the ACMP process while maintaining the benefits of allowing the processing of complex DEC permits to run concurrently with the ACMP consistency review. DNR should continue dialog with coastal resource districts and industry regarding the ability of coastal resource districts to write district enforceable policies for air, land, and water quality issues authorized by DEC provided they relate to matters of local concern.

Changes to the statewide standards may limit ability to meet ACMP objectives.

The impact that the changes to the statewide standards in 11 AAC 112 have had on achieving the ACMP objectives is subjective and difficult to measure.

A review of the standards indicates that many of the modifications clarified the standards and others eliminated duplicate authorities. For example, the mining standard was revised and the wetlands definition redefined to match the federal definition.

The mining and mineral standard was revised because it was a restatement of law; mining activities are still subject to the consistency review, which is triggered by the permitting process. The term *wetlands* was redefined to include only saltwater wetlands and freshwater wetlands that drain directly to coastal waters. With the United States Army Corp of Engineers managing wetlands, the change was made to focus the State's attention on the coast and saline waters.

However, some federal and state agencies and coastal resource districts express concern that the less robust habitats standard has lessened the ACMP's ability to achieve some of its objectives.

A review of the changes to the habitats statewide standard shows that the management goals of the standard have been narrowed for some habitat types. For example, the standard for wetlands used to be to manage them *"to assure adequate water flow, nutrients, and oxygen levels and avoid adverse effects on natural drainage patterns, the destruction of important*

*habitat, and the discharge of toxic substances.”*³⁴ The standard is now to “*avoid, minimize, or mitigate significant adverse impacts to water flow and natural drainage patterns.*”³⁵

The federal Environmental Protection Agency (EPA) in its reevaluation comments to DCOM pointed out that:

*While the old standard made achieving consistency extremely difficult, the current standard makes protecting the ecological integrity of the coastal habitats nearly impossible...because the functioning of a habitat such as a wetland is not solely dependent on maintaining water flow and natural drainage patterns.*³⁶

In its reevaluation comments, DFG stated that the revised habitats standard improved protection for riparian buffers and the “*avoid, minimize, and mitigate sequence*” was more applicable. However, DFG also stated the standard “*undermanages the aquatic habitats found within an estuary ecosystem*” and the “*habitat found in offshore areas that are important to and used by coastal species.*”³⁷ Similar concerns were expressed about the tideflats, rivers, streams, and lakes habitat types.

The modified habitats standard may hinder the ability to achieve some ACMP objectives, such as the “*full and fair evaluation of all demands on the land and water in the coastal area.*”³⁸

In its final evaluation findings report issued in June 2008, OCRM encouraged DNR “*to demonstrate the effectiveness of the standards in protecting coastal habitat [by monitoring] how the standards are implemented through permitted projects.*”³⁹

DCOM management believes that while the standards have been modified, the ACMP’s objectives can be met through the comprehensive application of state resource agency authorities in addition to the standards. Rather than limit the State’s ability, DCOM asserts that changes to the standards have facilitated meeting the ACMP’s objectives by furthering the interests of the public from a statewide perspective that includes resource development.

³⁴11 AAC 80.130(a)(3).

³⁵11 AAC 112.300(b)(3).

³⁶The EPA, Region 10 Office, letter to DCOM regarding the reevaluation of the ACMP, August 15, 2008, p. 4, <http://alaskacoast.state.ak.us/Enews/Re-eval2008/index.html>.

³⁷DFG, letter to DCOM regarding the reevaluation of the ACMP, August 15, 2008, p. 5, <http://alaskacoast.state.ak.us/Enews/Re-eval2008/Public%20Comments%20Page.html>.

³⁸AS 46.40.020.

³⁹“*Final Evaluation Findings Alaska Coastal Management Program October 2002 – August 2007,*” OCRM, June 2008, p.15.

The ACMP's changes have not diminished the State's rights under the CZMA.

The CZMA, as amended, gives states certain rights with regard to federal agency activities and federally licensed or permitted activities within or outside the coastal zone that affect any land or water use or natural resource of the coastal zone. States have the right to evaluate the consistency of those activities with the enforceable policies of their approved state management programs.⁴⁰

The 2003 statutory and 2004 regulatory changes to the ACMP have not reduced Alaska's rights under the CZMA. The State still has and does take advantage of its rights to weigh in on federal decisions through the consistency review process. While the State has retained its rights, regulatory changes may have affected the purview of the consistency review.

Requiring area designations to be able to apply certain statewide standards potentially reduces the purview of consistency reviews. Difficulty in establishing designated areas, as discussed previously, may result in the inability to fully evaluate the impact of activities on the OCS or on federal lands to subsistence uses and important habitats in the coastal zone. Regulations do allow for the designation of subsistence and important habitat areas during consistency reviews. However, this option must be exercised and designated areas must be approved by DCOM for the state and coastal resource districts to be able to apply the subsistence use and important habitats standard to the federal activity or federally-permitted activity.

⁴⁰16 U.S.C. 1456(c).

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January 4, 2011

Pat Davidson
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PO Box 113300
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RECEIVED

JAN 04 2011

LEGISLATIVE AUDIT

RE: Alaska Coastal Management Program Audit – Preliminary Special Report, Part 1,
dated December 14, 2010

Dear Ms. Davidson:

Thank you for the preliminary audit report on *A Special Report on the Department of Natural Resources, Alaska Coastal Management Program, December 14, 2010*. At your request, my agency has reviewed the preliminary audit report and evaluated your conclusions.

My understanding is the intent of the audit report is to provide objective and factual information regarding the Alaska Coastal Management Program (ACMP) and the questions associated with the audit. While we agree with many of the conclusions reached here, we have some concerns with the information contained in the preliminary audit report.

The audit process and timeframe

It is obvious that the Division of Legislative Audit (DLA) staff involved with this audit have put in a great deal of time and effort to understand the ACMP and to provide an objective and comprehensive evaluation of the program. It is my understanding that several DLA staff were involved and assigned various research tasks, and individually worked with Division of Coastal and Ocean Management (DCOM) staff on issues of interest. The interrelationships of laws, agencies, ACMP participants, and issues present a significant barrier for anyone wishing to develop a deep understanding of the program; its varied connections and nuances increase the challenge exponentially. I recognize the monumental task it was for you and your staff to complete this preliminary audit report in a timely manner given the short four months you had to initiate and complete the audit findings. We very much appreciate these efforts.

The Background Information

As a general matter, the report provides helpful information on the program. There are, however, three elements which, if included, would help provide a more accurate understanding of the program.

“Develop, Conserve, and Enhance Natural Resources for Present and Future Alaskans.”

First, on page 9, the section does not address the substance of the Legislature's enactment of Ch. 28, SLA 02, which mandated changes to the coastal district plans to prohibit and eliminate policies that, *"incorporated by reference statute and administrative regulations adopted by state agencies."* Despite this clear directive from the Legislature, there is no evidence that coastal districts nor the Coastal Policy Council made attempts to abide by that law and amend coastal district plans.

Second, on page 10 it is reported that the Department of Environmental Conservation (DEC) was removed from the consistency review process. While DEC has been excluded from the coordinated consistency review process, DEC is, in certain circumstances, the agency that coordinates consistency reviews. Additionally, DEC provides findings for other coordinated consistency reviews. Therefore, DEC is not removed from all consistency review obligations.

Finally, on page 10 the summary of the consistency review process identifies the ACMP's enforceable policies, which include state resource agency authorities, statewide standards, and district enforceable policies. An important component of those policies is the relationship of resource agency authorities within the ACMP. As described in the program description of *The Alaska Coastal Management Program as amended June 2, 2005*:

The ACMP has developed and maintains "a list of resource agency authorizations for activities that may have a reasonably foreseeable direct or indirect effect on a coastal use or resource." 11AAC 11.750(a). That list, set out in Volume 1 of the "C List," identifies those state resource agency permits that require authorization for a given use or activity. As such, those resource agency authorities, as applied within the coastal zone of the state, constitute an important component of the ACMP authority and enforceable policy system.

The Report Conclusions

Overall, we can support three of the four main conclusions reached by the report. Generally, the audit has found that the changes implemented by DNR since 2003 have been consistent with the intent of the Legislature. Specifically, the report concludes that the ACMP changes have not diminished the State's rights under the Coastal Zone Management Act. We agree.

One conclusion with which we have concerns is that *"Changes to the statewide standards may limit the ability to meet ACMP objectives."* (page 27-28). The DLA analysis does not consider the entirety of ACMP authorities and how they collectively contribute to meeting the ACMP objectives, and therefore, in our view, presents an incorrect conclusion.

The federal law at 15 C.F.R. 923.11(a)(3) requires that the state explain how land and water uses will be managed, and that the state define the enforceable policies and other governing authorities. As described in the program description of *The Alaska Coastal Management Program as amended June 2, 2005*, robust and comprehensive management of the coastal uses and resources is accomplished through the incorporation of the state resource agency authorities, the statewide standards at 11 AAC 112, and the district enforceable policies developed under 11 AAC 114. The Office of Ocean and Coastal Resource Management (OCRM), in its approval finding dated December 29, 2005, found that *"...the ACMP adequately explains how land and water uses will be managed, and the ACMP adequately describes enforceable policies and other governmental authorities."*

The federal law at 15 C.F.R. 923.43(b) also requires that a state coastal program have the “requisite direct authority to plan and regulate land and water uses subject to the coastal management plan.” Based on the ACMP program description, OCRM, in its approval finding, found that “...*the ACMP statute, as amended, when combined with existing State authorities (State permit, lease, and other authorizations) ... provide adequate authority to manage the identified uses to be managed.*”

It appears that DLA’s analysis and conclusion on whether the ACMP objectives are met is based on a limited number of the overall ACMP enforceable policies and authority. For example, the DLA analysis and discussion on the habitats focuses solely on the Habitat Standard at 11 AAC 112.300, but does not consider how other authorities contribute to the overall robust and comprehensive approach to habitat management and resource protection under the ACMP. Other authorities, such as DEC water quality authorities, DFG fish habitat authorities, various DNR authorities addressing habitat, and coastal district enforceable policies must be considered when addressing whether the ACMP objectives are met, particularly as it relates to habitat protection.

Again, thank you for the opportunity to provide a written response to the preliminary audit report on the ACMP.

Sincerely,



Daniel S. Sullivan
Commissioner

cc: Joe Balash, DNR, Deputy Commissioner
Randy Bates, DNR, DCOM, Director

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ALASKA STATE LEGISLATURE

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January 6, 2011

Members of the Legislative
Budget and Audit Committee:

We have reviewed the commissioner of the Department of Natural Resources' (DNR) response to the preliminary audit report on the Alaska Coastal Management Program, Part 1. Nothing in the response causes us to reconsider our conclusions; therefore, we reaffirm the conclusions.

However we offer the following clarifications.

On page 2 of the response, the DNR's commissioner noted that page 9 of the Background Information section does not address Ch. 28, SLA 02. However, we adequately addressed that legislation in footnote 23 on page 20 of the Report Conclusions.

On page 2 of the response, the commissioner rightly points out that the Department of Environmental Conservation (DEC) is not totally removed from all consistency review obligations. Our statement on page 10 is overly broad and should have been written as follows:

*Changes included... removing the DEC **permits** [emphasis added] from the consistency review process providing that "DEC's air, land, and water quality standards are the exclusive standards for the ACMP for those purposes;" and requiring the coastal resource districts to rewrite the their district coastal management plans.*

Sincerely,

A handwritten signature in black ink that reads "Pat Davidson".

Pat Davidson, CPA
Legislative Auditor