

March 19, 2014

House Transportation Committee
c/o The Honorable Peggy Wilson, Chair
State Capitol
Juneau, Alaska 99801

RE: Additional Comments on House Bill 371 – State Land and Materials

Dear Members of the House Transportation Committee:

Thank you for the opportunity to provide additional comments on House Bill 371 – “State Land and Materials”. These comments follow up on issues raised in my letter dated March 12. Where appropriate, I refer to DOTPF’s responses contained in two letters dated March 13, 2014 from DOTPF Deputy Commissioner Kim Rice, one letter to Representative Wilson and the second to Senator Egan.

In my previous letter to the Committee, my comments were grouped into six topics. I will address them here in the same order.

1. Section 13 of HB 371 allows DOTPF to extract material, including gravel, from any existing material pit on state land even if the site was developed by another party for a different purpose. HB 371 allows DOTPF to take material from existing pits with no protection for existing, valid state material sale contracts. This is especially a concern on the North Slope where large gravel pits have been developed by private industry on state land to support oil and gas activities. Under Section 13, DOTPF can take gravel from these pits without regard to existing contractual rights of North Slope producers. Under other provisions of the bill, these pits could be selected by DOTPF and DNR would be required to transfer these privately developed pits to DOTPF.

DOTPF’s response in the first bullet of their letter to Representative Wilson misses my point entirely. While DNR could still sell material to the private sector, DNR has no ability to limit how much material DOTPF can take from these existing pits. Hence there may be insufficient material resources to fill existing contractual obligations and DNR would have no control over how much material may be available for future sales to other parties.

2. The bill ignores and allows DOTPF to override competing land claims, including potentially higher and better uses for the state lands at issue. This is particularly relevant regarding gravel and material resources, as sites with good gravel may also be good sites for schools, other public uses, or private development.

Neither of DOTPF’s letters address the issue of competing uses for the land. HB 371 requires that if DOTPF requests the land, DNR “shall” transfer it regardless of whether DNR, a municipality, or the private sector has identified the land as having a higher, better and potentially more important or valuable use.

The first bullet point in DOTPF's letter to Senator Egan argues that DOTPF's planning process adequately factors in such considerations. While this may be true for highway ROWs, DOTPF's planning process often does not identify specific material sources for its projects in advance, nor does DOTPF have a process for public input when selecting material sites needed for ongoing highway maintenance.

The fourth bullet of DOTPF's letter to Senator Egan addresses only one specific example of where this is a potential issue - the North Slope Borough's land selection at Happy Valley, and there it incorrectly interprets the state municipal entitlement statute. DOTPF's letter notes that municipalities can only select land that is "vacant, unappropriated, and unreserved", (VUU). The letter then goes on to state "because of this restriction, state transportation infrastructure is not normally available for municipal selection". This second statement is problematic for two reasons: first, the statutory definition of VUU land in AS 29.65.130(10) does not prevent the Borough's selection of state transportation infrastructure unless it is "set aside by statute for one or more particular uses or purposes" (the language in the statute) or classified under DNR's land classification statute as non-VUU. The airstrip at Happy Valley does not meet the statutory definition of non-VUU land. Second, the Happy Valley airstrip is not currently administratively reserved for DOTPF. It is on state land managed by DNR. DOTPF only has a pending application, as does the Borough. This legislation requires DNR to transfer the land to DOTPF without addressing the Borough's land selection.

3. The bill provides no mechanism where DNR can address public concerns with the proposed use, access issues, and conflicts with adjacent landowners and users. DOTPF's second bullet in its letter to Senator Egan addresses this issue, but the process DOTPF explains in the letter is not in the legislation. The legislation does not specifically provide DNR with an opportunity to respond to DOTPF's request other than to approve it. If there is a process it is left entirely to DOTPF's discretion to decide if the concern should result in change to their request, rather than the public land manager DNR.
4. The fourth point in my March 12 letter addresses the provision regarding Reciprocal Easements (Section 16 of HB 371). The proposed Committee Substitute introduced at the March 18 House Transportation Committee hearing satisfactorily resolves my concern by deleting the provision that implied additional easements were conveyed to the US Forest Service.
5. The Zero fiscal notes are unrealistic, as this bill will significantly add to DNR and DOTPF's workloads and costs.

The fifth bullet in DOTPF's letter to Representative Wilson partially addresses this issue, but only as it pertains to DOTPF land disposals and land acquisition for material sales. DNR has issued hundreds of authorizations to DOTPF (ROWs, material sales and interagency land agreements) for use of state land. If DOTPF requests that DNR transfer title of the surface estate to DOTPF for all or many of these existing authorizations, there will be a significant increase in DNR's workload. In addition, the land survey responsibilities required in the new AS 02.15.070 (c)(4)(for airports); AS

19.05.080(b)(4) (for highways); and AS 35.20.010(b)(4) (for public facilities) will be costly.

An additional comment not in my previous letter arises from DOTPF's comment at the very bottom of page 1 of the March 13 letter to Senator Egan that reads "DNR has never denied a DOT&PF request for public domain land to be incorporated into an infrastructure project". If so, then why is this legislation even necessary as DOTPF has been able to develop projects on state land without having the surface estate ownership?

Finally, transfer of title to the surface estate under roads, airports and material sites/gravel pits raises a host of new issues, including:

1. The bill requires DNR to transfer "surface estate" a term that I do not believe is defined in state law.
2. If existing state DNR managed land is transferred to DOTPF, how will DOTPF authorize and manage other non-DOTPF uses of the DOTPF owned land? For example, for highways, DNR currently grants a ROW, but DNR retains ownership of the land and is the agent for authorizing other uses. If DOTPF becomes surface owner, they would be responsible for managing, determining fees, and permitting other surface uses of that land. For example, the Trans Alaska Pipeline crosses the Dalton Highway and Richardson Highway numerous times. If DOTPF owns the highway ROW, they will then become the manager for short segments of the pipeline, adding another state agency to the administration of the pipeline ROW. Similarly, any future gas line that crosses a highway corridor owned by DOTPF would need to get a separate authorization from DOTPF.
3. The bill does not specify the width of highway corridors that DOTPF can request, nor does it define what is "Reasonably necessary". DOTPF will define "reasonably necessary", and under the legislation could select and DNR would be required to convey large tracts of state land for potential future transportation routes such as the Northwest Access corridor. This could significantly complicate and compromise the future use of the adjacent lands that remain in DNR management.

I urge the committee to either reject, or significantly revise, House Bill 371 as this legislation does not protect the public interest in state lands.

I thank the committee for the considering these concerns.

Sincerely,



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cc: Sean Lynch, Department of Law
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