HB 77 Opposition Documents Index Group #12
Passed Out to Committee Members on 3/19/14

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From: John Hettinger
Sent: Tuesday, March 18, 2014 2:47 PM
To: Sen. Cathy Giessel
Subject: Alaskans oppose HB 77: Please include this in public record and distribute to committee members.

Please oppose this autocratic and bureaucratic bill. Water rights and permits should not be controlled by a handful of bureaucrats at the DNR. It should be an open and inclusive process hearing from ALL stakeholders. Do the right thing, keep democracy and the voice and power of the people alive; kill this bill.

Wednesday's hearing was another example of the fact that there has not been enough public discourse about House Bill 77. Hundreds of Alaskans were prevented from testifying and they deserve their time to testify in opposition of this bill. I hope that the Alaska Legislature will fully vet this bill in front of multiple committees.

HB 77 would provide for new expanded DNR powers, erode Alaskans rights to appeal DNR decisions, and damage the existing process for water reservations. Additionally, even with new revisions, HB 77 undermines tribes and individual Alaskans' ability to keep water in streams and seriously undermine their ability to participate in natural resource decisions on state land in other ways.

While we appreciate the attempts to fix this bad bill. The recent proposed amendments to the bill do not address concerns raised by the public at statewide public forums and in petitions and letters, and in fact, some of the changes make the bill even worse.

A bill that is this complex and expansive deserves multiple public hearings to allow Alaskans to provide input, and review by several legislative committees.

Sincerely,

John Hettinger
1500 Cache Dr
Anchorage, AK 99507

American Water Resources Association-AK March 2013 Abstract*

Title: *A Cost Effective Solution to Improve and Facilitate Local, State, and Federal Permitting Processes and Achieve Better Short- and Long-term Natural Resources Management Decisions and Associated Socioeconomic Benefits*

Christopher C. Estes, Aquatic Resources and Habitat Scientist, Chalk Board Enterprises, LLC**

The theme of the 2012 American Water Resources Association (AWRA) Alaska Conference was: "*Alaska's Waters: Challenges and Opportunities*" (*http://state.awra.org/alaska/2012awra-ak-final.pdf*). *We opened* with a panel discussion on *the "Status, use, and importance of hydrologic data required for achieving cost effective and wise natural resource management, conservation, development and research as it relates to present and future Alaskans: what data are needed and examples of actions underway to address data gaps and needs*" (pages 8-9).

In this presentation I will review highlights from those discussions and subsequent follow-up actions, and will argue for increased state, federal, industrial, academic, tribal, and private investments in collection, analyses, and reporting of strategic hydrologic data to improve and facilitate local, state, and federal permitting processes. I will explain why and how this investment will benefit all Alaska's water users, result in better natural resource management, and contribute to socioeconomic benefits for all Alaskans.

Alaska's vast surface and subsurface water resources are used for human consumption; tourism; industrial and energy development; export; recreation, commercial and subsistence fisheries; wildlife; navigation; and to sustain water quality conditions and environmental processes.

Efficacious management, conservation, and development of Alaska's water resources requires the acquisition and analyses of sufficient amounts of geographically-based, site-specific, and regional hydrologic data. Knowledge of precipitation, river flows, water levels and volumes in lakes and reservoirs; and groundwater availability from subsurface locations, are examples of information needed to wisely manage use of Alaska's waters. Data must represent both the open water and ice covered seasons of the year..

Less than 1% of Alaska's water bodies have site-specific flow and water level data collected specific to those water bodies. Such low coverage is due in part to the sheer volume of the resource — Alaska represents ~20% of the nation's land area, ~50% of the nation's coastline, and ~40% of the nation's flowing surface water. Most of that water is ice covered 6 or more months of the year making data collection difficult. Many waters in Alaska are related to and impacted by glaciers. Large numbers of Alaskan waters are remote and access is difficult and expensive.

Alaska's historical investment in establishing long-term programs to collect geographically based, site-specific year round hydrologic data is relatively small compared to the rest of the nation. Accordingly, most proposed water related developments in Alaska will continue to be burdened with the high costs of collecting one to five years of continuous hydrologic data needed for scaling, planning and permitting. The low cost alternatives — mostly predictive models for synthetic flow assessments — are imprecise, largely inaccurate, and therefore inadequate. The hydrologic community, most industry, natural resource managers and other stakeholders concur: significant increases in additional long-term hydrologic data will be essential to allocate or reserve water cost effectively and in a timely manner through permitting authorities such as the Alaska Department of Natural Resources. These data need, use, and management principles are embodied in the Alaska Constitution (e.g. Articles VIII, Sections 3, 13, 14, 16, 17, and 18) and state law (AS 46.15).

In summary, this discussion will focus on improving local, regional and statewide permitting processes and other socioeconomic benefits that can be achieved by expanding the expenditure of state and private resources to strategically collect sufficient amounts of long-term surface and subsurface hydrologic data and other essential components associated with the hydrologic cycle.

*Presented at the American Water Resources Association AK Section (AWRA-AK) -Anchorage (March 5, 2013)
** Christopher@chalkboardllc.com

HB 77 March 17, 2014 Preliminary Comments-Estes

Madam Chair-

My name is Christopher Estes representing myself to offer preliminary comments and suggestions regarding the March 14, 2014 version of HB 77(28-GHI524\D).

I applaud your committee's efforts to carefully assess the water appropriation related provisions of HB 77 for reservations of water. Thank you and committee members for the stakeholder comment opportunities and seeking alternatives to assess and improve this legislation.

Senator Micciche, other legislators and organizations are to be complimented for sponsoring additional meetings with state agency representatives during the latter portion of 2013 and early 2014 regarding earlier versions of this legislation.

I was a Fisheries Scientist and Chief of the Statewide Aquatic Resources Coordination Unit for the Alaska Department of Fish and Game (ADF&G) prior to retirement in 2010. I participated in the development and execution of Alaska's state water allocation laws since 1977.

Alaska has the largest state share of our nation's flowing waters. The majority of our water sources, unlike other states, are of high quality and unappropriated. It is no easy task to tackle the challenges of improving Alaska's water allocation laws (AS 46.15) that were initially enacted in 1966 and have been evolving over time.

Alaskans should be proud that most states consider Alaska to have the best, if not the most robust, water allocation law and regulatory tool box in place for preventing over appropriation that has historically plagued other states and countries. It should also be highlighted Alaska remains in its infancy when comparisons are made with states other than Hawaii. As such, we have yet to test many of the tools in our existing statutory and regulatory tool box and should be cautious when we consider revising them prior to experiencing and testing their effectiveness.

Since initial passage of the reservation of water enabling legislation in 1980, progress has been steadily made to improve efforts reserve water for fish through cooperative effort achieved by the Alaska Department of Natural Resources (ADNR) and ADF&G. Despite the progress made by ADNR and ADF&G, not including the private and federal applications filed for reservations of water for fish, it should be noted thousands of individual reaches of water that sustain anadromous fish production documented by the ADF&G Anadromous Fish Catalog have yet to be granted protection through the reservation of water process. Reservations of water for these reaches will be required to protect sufficient amounts of water to sustain productivity of all freshwater life phases and similarly for fish bearing lakes.

Less attention has been given to the fact other elements of the current reservation of water law have not yet been tested and exercised by state agencies and others to sustain beneficial uses

of water quality, navigation, and recreation in rivers and lakes during both open water frozen water seasons. Hopefully state agencies will be encouraged and support to develop the expertise and expend resources needed for acquiring these other types of reservation analyses and wisely apply those options when appropriate to benefit all Alaskans.

The original reservation of water legislation was passed in 1980 knowing that is also important to reserve sufficient amounts of water in open water and frozen rivers and lakes to sustain boating, float plane, snow machine and other types of water dependent year round access to communities, and other remote locations without road access throughout Alaska. Year-round water quantity/level dependent access is also needed to sustain natural resources exploration and development. This includes retaining flows and conditions afforded by frozen surface ice cover conditions. Using the reservation of water law to retain sufficient volumes of water in waters that are subject to permitted chemical, temperature or other effluent discharges will be essential to achieve the desired long-term dilutions intended to achieve desired water quality conditions.

I look forward to when the state will begin to exercise these and other options of the reservation of water law that were included to improve and assure the long-term socioeconomic well-being of Alaskans for multi- generations not just the present.

I believe Alaska's greatest challenge will be to more cost effectively adjudicate its existing backlog of all forms of appropriations of water (withdrawals, diversions, impoundments and reservations). The true bottle neck to adjudication deserving your attention results from a dearth of hydrologic data for approximately 99% of our surface water sources.

I think it is critical to emphasize Alaska has historically not expended the necessary resources to plan for and perform the most basic inventory of long-term surface and subsurface availability of fresh water sources. Improving our knowledge of the year-round basic amounts of water available for uses on a regional and site specific basis are vital to both our present and future socioeconomic well-being and survival as humans. This information is essential for planning and implementing natural resources extraction, energy production and development. It is also needed to plan for and used to determine the amounts of water needed to sustain other physical, biologic and chemical processes essential to human life and values. Hence, all ADNR adjudications of applications for appropriations (water withdrawals, impoundments, diversions and reservations) for significant amounts of water require this basic information, yet it doesn't often exist. ADNR needs the resources and your support to acquire this information.

As stated previously, only approximately 1% of Alaska's water sources have been adequately inventoried geographically and on a long-term year round basis.

Regardless of legislative changes, if adequate proactive actions are not taken to inventory long-term availability of Alaska's water sources, Alaska's basic hydrologic data limitations will hamper Alaska's long-term prosperity and more likely lead to future backlogs, as competition for water to meet human population and natural resource development needs grow over time.

Looking at our neighbors to the south allocating water for any type of appropriation without initially having an adequate knowledge of natural water availability can result in unintentional over appropriation. As stated by others and myself in earlier testimony and in prior presentations related to other water use act legislative amendments, the Colorado River was inadvertently overallocated because the allocation of water was based on 20 years of a higher than normal flow data period of record.

In hindsight, had Alaskans placed higher value on inventorying water availability in the early 1970s, 1980's, or 1990s, there would be 20- or more years of flow and water level data throughout the state today available for more cost effective planning, adjudication, and balancing all water related water uses and functions for ADNR to make better and more cost effective public interest determinations. As noted these determinations are essential to human survival, biologic and physical processes we depend on and value.

Fortunately, it is not too late and I am pleased the legislature is assessing this important tool and hope your committee will use this opportunity to benefit current and future Alaskans.

My specific comments and suggestions for consideration regarding improving AS 46.15 related sections of the March 14 version of HB 77 follow. Additional suggestions for additional improvement follow these bill specific recommendations:

SPECIFIC COMMENTS/RECOMMENDATIONS

Page 20, line 17, AS 46.15.035 proposed language would only be acceptable if the "significant amount of water" definition used will be uniformly applied for **all appropriation of water uses (withdrawals impoundments diversions and reservations**) for all of AS 46.15. It also depends whether the existing definition of a significant amount of water is retained as is in 11AAC 93.035. The current regulation takes into account a combination of individual and cumulative appropriation uses (even if different uses and users) from the same source of water both in this and other sections of AS 46.15

It is essential that those assessing this legislation are aware that a reservation of water, under current statute, is not on equal footing with other types of appropriations and already affords DNR flexibility to acquire data needed for adjudication and opportunities to achieve financial reimbursement.

A reservation of water can always be modified for good cause. It is probably more equivalent to a savings account for future uses if savings are no longer needed. Some equate a reservation of water to a permanent fund for fish. Alternatively, a withdrawal, diversion and impoundment cannot be modified or revoked except under extreme circumstances and revocation is rarely if ever exercised, e.g. Ship Creek-Anchorage, Indian River-Sitka..

Page 21 line 9. This seems like a good clarification.

Page 21 line 30 and page 22 lines 2 to 5 note adversely is defined on lines 8 to 10 but the definitions of **physical** and **financial** detriment are not defined and should be. Whether the definition of **adversely** will be acceptable will be contingent on this added clarification of the other two referenced terms.

Page 22 Lines 15 to 29 this added public interest language is not essential; but, if it makes people comfortable it is okay. Or, it could simply be stated in one line as AS 46.15.080 (b). One should also look at the existing regulations for AS 46.145 related to public interest. 11AAC 93.144

Page 22 lines 30, 31 and page 23. The change is good and consistent with current practices already in effect. However, this type of provision should also be added to other types of significant appropriations of water (withdrawals, diversions, and impoundments) and not limited to reservations of water.

Page 22 Lines 30, 31 and Page 23 lines 1 to 7 Temporary water uses shouldn't be open-ended and should take into account multiple cumulative temporary use permits from the same source of water.

Page 23 Lines 12 to 14. (h) This approach for determining the order of adjudication already appears to be the general practice in force for all forms of appropriations of water. If adopted it should be applied uniformly to all types of water appropriations if this is state's preference for addressing the backlog and desire is to codify current discretionary actions by DNR.

However it is a bad policy and not in the best public interest to codify a discretionary process that is critical to allocation of water and resulting in uncertainty regarding water availability for all water stakeholders.

A better wording choice or something equivalent would be: <u>the Commissioner will adjudicate all applications for appropriation for significant amounts of water (withdrawals, impoundments, diversions and reservations) in the order of priority within no longer than 5-years after being filed unless there are mitigating circumstances in the best public interest to change the order for processing and completing the adjudication of an application for water appropriation.</u> <u>The DNR will provide an annual report to the legislature of its ongoing assessment of resources</u>

needed to insure that the backlog for all appropriations of water for significant amounts of water will be limited to 1-year commencing in FY 16 for applications that currently include 5 or more years of existing hydrologic data (or the equivalent information necessary for completing the adjudication). Applications for significant appropriations of water without 5 years of data will remain pending full adjudication until 5 years of hydrologic data are acquired based on consultation with the applicant and will be adjudicated within 1 year after the 5 year data requirement has been met. Commencing in FY 16, applications for appropriations for less than a significant amount of use of water will be adjudicated in 6 months or less after application so long as they are in the public interest per AS 46.15.080.

DNR will provide an annual report to the legislature defining the highest priority needs for filling the desired 5-year data standard to eliminate gaging data gaps throughout the state. DNR will also identify options for development of surrogate hydrologic estimation models that will be satisfactory for adjudications of significant amounts of water where there is limited existing competing uses of water projected for the next 5, 10 and 20 year periods

Page 23 lines 15 to 20 it doesn't make sense that this decision wouldn't also be subject to AS 46.15.080 (b) since the water is as public resource and reservations of water are shared public resources unlike other classes/types of appropriations for withdrawal, diversion and impoundment that are usifructory. **Subject to Public Interest review should be added**

Page 23 Lines 21 to 24 as currently written this section is too narrow in definition.

Suggested language improvements would be: the applicant must have submitted not less than five years of nonproprietary or proprietary public domain hydrologic data or data collected by or for the applicant in support of the application. All data provided should meet or exceed US Geological Survey standards for measurement of hydrologic data for flows and water levels. Additionally this provision should be added as a condition for issuance of all certificates of appropriations (withdrawals, impoundments and diversions, and not just reservations of water certificates)

In the past, the DNR, ADF&G, academic, federal, and professional hydrologic community have all encouraged and promoted the need for basing all significant water appropriation use adjudications on a minimum of 5 years continuous hydrologic mean daily flow data or a surrogate estimate that is considered equivalent that meets or exceeds USGS standards. And, it

shouldn't matter who collects or provides the data so long as it is available to DNR and the public and meets or adheres to USGS scientific standards. This prior revised provision wording or something equivalent should be reworded to be an umbrella provision for all significant appropriation of water use certificates of appropriation for withdrawals, diversions and impoundment and for reservations of water under AS 46.15.

Also, see attached AWRA presentation on gaging challenges and needs for Alaska. (See also AWRA 2013 abstract).

Page 23 Lines 26 to 31

Should be reworded -- The commissioner may issue **one additional** temporary water authorization[s] for the same or a similar project with public notice and if in the best public interest under 46.15.080. Cumulative impacts of multiple temporary use permits for uses from the same source of water must also be considered.

Page 24 Lines 16 to 31 and page 25 Lines 1 to 4 Good start, but it would be more effective by adding and fish bearing reaches of tributaries to these 12 rivers or similar language.

ALSO ADD-

Except as provided in AS 46.15.090 and in addition to the requirements of (a) of this section, the commissioner may approve an application for removal or permit an appropriation for removal from these 12 watershed under (a) of this section of water from a lake, river, or stream that is used by fish for spawning, incubation, rearing, or migration, or ground water that significantly influences the volume of water in a lake, river, or stream that is used by fish for spawning, incubation, rearing, or migration, only if the commissioner reserves a volume of water in the lake or an instream flow in the river or stream for the use of fish and to maintain habitat for fish. The commissioner may adjust the volume of water reserved under this subsection if the commissioner, after public notice and opportunity to comment and with the concurrence of the commissioner of fish and game, finds that the best interests of the state are served by the adjustment. A reservation under this subsection
(1) of a volume of water or an instream flow for the use of fish and to maintain habitat for fish that is reserved under this section is withdrawn from appropriation;(2) for fish from a lake, river, or stream, identified under AS 16.05.871 or identified in a Department of Fish and Game regional guide as being used by fish for spawning, incubation, rearing, or migration on or before July 1, 2014, has a priority date as of July 1, 2014;
(3) of water does not apply to an application for removal or appropriation for removal under

AS46.15.040for nonconsumptive uses of water or for single family domestic use;

(4) of water does not apply to appropriations of ground water of 5,000 gallons or less a day unless the commissioner, in consultation with the Department of Fish and Game, determines that the appropriation may adversely affect fish habitat in a lake, river, or stream; the commissioner shall consider multiple appropriations of water for a single related use as a single appropriation for the purposes of this subsection.

(d) With respect to rivers and streams described in (c) of this section, the instream flow reservation shall be limited to the portion of the stream, including tributaries to the stream, at and downstream of the point of diversion or withdrawal. With respect to lakes described in (c) of this section, the reservation shall be limited to the lake from which the diversion or withdrawal is made, and the outlet and tributaries to the outlet flowing downstream.

(e) In this section,

(1) "fish" means CHINOOK species of anadromous or freshwater fish that may be taken under regulations of the Board of Fisheries;

Page 24 Lines 7- 9 In the event this or another form of this legislation passes, language should be added stating that all existing pending applications for reservations of water on file prior to the effective date of this legislation should be grandfathered in. There really is no reason to not eventually adjudicate the existing applications on file based on the number of pending reservations on file and the conditions they were initially filed, if these and other legislative amendment suggestions can be accommodated. The applications previously filed were based on a continually evolving process developed in coordination with other agencies and stakeholders. To change the requirements makes no sense for the small number of pending applications filed by ADF&G, other agencies and private applicants to date. It is also unnecessary because DNR must already apply AS 46.15.080 to those applications and currently has the legal option to grant all, a portion or none of the water requested depending on the outcome of the DNR public interest assessment.

Perhaps an alternative approach could be to add a provision stating all pending reservations of water effective as of July 1 2014 will be adjudicated in the order of priority subject to the best public interest within the next 5 years unless the Commissioner seeks an extension from the legislature for extending this deadline based on public interest considerations relevant to this process for adjudication for all pending water appropriation applications.

The above comments represent the existing proposed language of this bill version. Following are other ideas for consideration by the committee to help assess this legislation.

Other suggestions for the legislature to consider:

Review: Legislative audit , R. S. 1997. Audit report. Department of Natural Resources, Department of Fish and Game, and Department of Law Waterway Management Issues. Audit Control Number. 10-4540-97. Alaska State Legislature. Division of Legislative Audit. Juneau. http://www.legaudit.state.ak.us/pages/audits/1997/4540rpt.htm

See also recommendation 8 as it relates to the backlog issue.

Contact: Tony Willardson Executive Director and head of the Western States Water Council a subset of the Western Governors Association to independently review HB 77 and the Alaska Water Use Act.

Add Provisions:

Water Planning Provision

Once every 5 years DNR will produce a 5-year statewide water management plan to the legislature beginning in January 2015 identifying data and staffing needs for inventorying hydrology and adjudication processes for water appropriations (withdrawals, diversions, impoundments and reservations of water). The report will project regional statewide water uses to assist the DNR and legislature base legislative budgets and DNR staffing to insure Alaska's waters are managed in the best public interest and avoid future backlogs of water applications for all appropriation types of water. Such a plan will also identify DNR's and public stakeholder input for prioritization and funding hydrologic data required to managing and monitor the allocation of Alaska's water surface and subsurface waters.

Alaska Water Resources Board

Per AS 46.15.090, the DNR will reconvene the Alaska Water Resources Board to advise DNR on water policy and statutes. They will represent the diversity of Alaska's water stakeholders and meet at least once per year with the joint House and Senate Resources committee to provide their public interest recommendations pertaining to the inventory and allocation of Alaska's water resources.

Adjudication of Water for Significant Amounts of Water in Systems Prior to Collection of Five Years of Data

Alternative Approach to Adjudicate Competing Water for Significant Amounts of Water to Insure Reservations of Water Appropriations Will Also Considered When There is Less Than Five Years of Flow or Water Level Data

No more than the accumulative amount of 15% of the mean daily flow for ungaged water bodies can be appropriated individually and cumulatively from the same source of water in the best public interest under AS 46.15.080 from waters identified under AS 16.05.841 and AS 46.06.871 without 5 years of continuous hydrologic data meeting or exceeding USGS standards or the equivalent. This does not impact existing applications for appropriations of water granted or those on record effective July 1, 2014.

Backlog Adjudication of Two of the Most Significant Watersheds in the State

In the past, Alaska has made many water appropriation decisions for significant amounts of water based on 1-year or less flow/water level data. It is my understanding, unless circumstances have changed, only two communities in Alaska potentially have important water sources over appropriated on paper, e.g. more demand for water than actually is available. I do not understand why this historically long backlog on record between water availability and uses allocated hasn't been corrected. Continuing to defer such to future generations will be a costly disservice to all Alaskans. I recommend the following.

DNR will provide the legislature a work plan and budget for fully adjudicating all the outstanding pending applications for water in the Ship Creek watershed in Anchorage and Indian River Sitka by the completion of FY 2016.

Other Options to Address Adjudication Costs

There are a variety of existing opportunities and options for DNR to recover costs for adjudication in its relevant 11AAC 93 and 11AAC.05.010 regulations.

Lastly, ADNR needs adequate staffing for all adjudication types and to insure adequate collection of hydrologic data. ADNR shouldn't be primarily dependent on ADF&G to fund adjudications of reservations of water.

Thank you again for the opportunity to provide input for your consideration.

In effort to meet your deadline, I apologize in advance if there are grammatical and typo errors.

If you require additional information, please do not hesitate to contact me. (See attached AWRA abstract)

Christopher Estes Email: topher0722@aol.com

Senator Giessel and members of the Senate Resources Committee,

My name is Sue Mauger. Thank you for providing time for more testimony.

It has been suggested that the latest version of HB77 is a good compromise – an example of a back and forth process that worked. I strongly disagree.

HB77 in its original form was an example of DNR overreach to such an astonishing degree that literally hundreds of people felt compelled to take the time and make the effort to let you as a body know it was not OK. The changes I now see in the March 10th version, which address a few of the most critical concerns brought to light in public meetings, are not enough to make this bill a balanced piece of legislation.

As an example of the shell game nature of this HB77 process: many of us focused on the notwithstanding language in Section 1 and significant concerns we had to the proposed changes to the instream flow reservation application process in the original bill. Distracted by these radical changes we let other sections slide by in the first round. As an example in the temporary water use section (43) which already gives the DNR Commissioner authority to give away "a significant amount of water" for 5 years with no public notice, the proposed changes allow the commissioner to do this over and over again. So one project could get 20 years' worth of water under this "temporary use" provision. So as we fought to stop the outrageous language in other sections, this language still persists because there's only so much you can object to in 2 minutes. Meanwhile the power-grabbing language objected to in the first round in Section 1 has now been slipped into the instream flow application process in section 42(h) – which gives the commissioner full discretion to determine when and in what order any application for a reservation of water is processed. This is no compromise.

And finally, the argument that general permits are used across the country as a reason for Alaska to use them just makes me laugh. Salmon habitat across the world has been lost in just this manner – one small project at a time.

Please do not compromise the ability of Alaskans to have a voice in how our state is developed. Please do not support HB77.

From: Thom Ely
Date: March 15, 2014 at 3:35:28 PM AKDT
To: <Senator.Cathy.Giessel@akleg.gov>
Subject: Please include this in public record and distribute to Senate Resource Committee members

I continue to oppose HB77, even with the changes presented on Monday. It does not protect our water resource or provide for the public process that is critical in a democracy. This is a giveaway to the resource extractive industries and will cause undue harm to habitat and fisheries.

I'm tired of our Goverment giving away our rights and resources to the highest bidder. We have a pristine and unique environment that needs to be strongly protected by the people. This Bill subverts that. Please kill it in committee.

Thom Ely
PO Box 1014
Haines, AK 99827

From: Doug Smith
Date: March 16, 2014 at 1:06:02 PM AKDT
To: "sen.cathy.giessel@akleg.gov" <sen.cathy.giessel@akleg.gov>
Subject: HB 77 still a bad bill
Dear Senator Giessel,

I am dismayed that the new version of HB77 does little to address the problems of the old bill. DNR's powers are still greatly expanded, citizens' rights to get information, and to appeal bad decisions are still sharply curtailed. The bill guts the ability of citizens to obtain water reservations. In short, the bill is just as bad as it was when it was removed to be reworked. The entire process has gone on behind closed doors, with a small window of opportunity for public comment.

DNR has said that the purpose of HB77 is to improve its permitting process, but if this is really DNR's intent, it should hire more staff. This bill makes it obvious that DNR is not really concerned with improving service to the public. HB77 is a huge disservice to the public, and DNR's decisions should continue to be transparent and open to challenges from Alaska's citizens. This bill should be scrapped.

Sincerely,
Doug Smith
Box 371 Talkeetna, AK 99676

From: Jennifer Peters
Date: March 15, 2014 at 8:38:17 PM AKDT
To: <sen.cathy.giessel@akleg.gov>
Subject: HB 77

To the honorable Senator Giessel,

I am opposed to the amended House Bill 77.

Jennifer Peters
9650 e Northstar Circle
Palmer, AK 99645

From: Edward Czech
Date: March 15, 2014 at 10:48:16 PM AKDT
To: <Senator.Cathy.Giessel@akleg.gov>
Subject: Please include this in public record and distribute to Senate Resource Committee members

I continue to oppose HB77, even with the changes presented on Monday. There needs to be more review when disturbing wild habitat not less or streamlined review.

Edward Czech
64501 Ressurrection Creek Rd
Hope, AK 99605

From: <POMS@legis.state.ak.us>
Date: March 16, 2014 at 7:49:39 AM AKDT
To: <sen_cathy_giessel@legis.state.ak.us>
Subject: New Pom:HB 77 Land Use/disp/exchanges; Water Rights

Sharon Waisanen
44932 Eddy Hill Dr

Soldotna 99669,

My husband and I remain extremely opposed to HB 77. This bill should be given a rapid death. It does not fulfill any expectations of Alaskans who wish to be heard and to be at the decision making table. Silencing Alaskans is never a good idea.

From: kaye holowatch
Date: March 16, 2014 at 10:49:37 AM AKDT
To: <Senator.Cathy.Giessel@akleg.gov>
Subject: Alaskans oppose HB 77: Please include this in public record and distribute to committee members.

Please take a look into the eyes of any child you know and tell them that removing their right to appeal decisions that will affect their quality of life and the quality of the water they drink is a good and true action.Half of all Americans drink bottled water because they dont think the clear stuff that comes out of their tap is safe to drink.Water is so precious to life.we should be Sheparding this national treasure. Wednesday's hearing was another example of the fact that there has not been enough public discourse about House Bill 77. Hundreds of Alaskans were prevented from testifying and they deserve their time to testify in opposition of this bill. I hope that the Alaska Legislature will fully vet this bill in front of multiple committees.

HB 77 would provide for new expanded DNR powers, erode Alaskans rights to appeal DNR decisions, and damage the existing process for water reservations. Additionally, even with new revisions, HB 77 undermines tribes and individual Alaskans' ability to keep water in streams and seriously undermine their ability to participate in natural resource decisions on state land in other ways.

While we appreciate the attempts to fix this bad bill. The recent proposed amendments to the bill do not address concerns raised by the public at statewide public forums and in petitions and letters, and in fact, some of the changes make the bill even worse.

A bill that is this complex and expansive deserves multiple public hearings to allow Alaskans to provide input, and review by several legislative committees.

Sincerely,

kaye holowatch
13110 alpine dr
anchorage, AK 99516

From: Robin Daugherty
Date: March 16, 2014 at 10:50:36 AM AKDT
To: <Senator.Cathy.Giessel@akleg.gov>
Subject: Alaskans oppose HB 77: Please include this in public record and distribute to committee members.

Wednesday's hearing was another example of the fact that there has not been enough public discourse about House Bill 77. Hundreds of Alaskans were prevented from testifying and they deserve their time to testify in opposition of this bill. I hope that the Alaska Legislature will fully vet this bill in front of multiple committees.

HB 77 would provide for new expanded DNR powers, erode Alaskans rights to appeal DNR decisions, and damage the existing process for water reservations. Additionally, even with new revisions, HB 77 undermines tribes and individual Alaskans' ability to keep water in streams and seriously undermine their ability to participate in natural resource decisions on state land in other ways.

While we appreciate the attempts to fix this bad bill. The recent proposed amendments to the bill do not address concerns raised by the public at statewide public forums and in petitions and letters, and in fact, some of the changes make the bill even worse.

A bill that is this complex and expansive deserves multiple public hearings to allow Alaskans to provide input, and review by several legislative committees.

Sincerely,

Robin Daugherty
Box 2321
Homer, AK 99603

From: Marty Remund
Sent: Monday, March 17, 2014 7:40 AM
To: Sen. Cathy Giessel
Subject: HB77

I am against HB77. Please include this in the public record and distribute toNatural Resource Committee members. Thanks, Marty Remund, Haines Alaska

From: Betty Whittenberg
Date: March 15, 2014 at 12:55:05 PM AKDT
To: <Senator.Cathy.Giessel@akleg.gov>
Subject: Alaskans oppose HB 77: Please include this in public record and distribute to committee members.

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A bill that is this complex and expansive deserves multiple public hearings to allow Alaskans to provide input, and review by several legislative committees.

Sincerely,

Betty Whittenberg
Po box 143 Soldotna ak
35737 Ryan lane
Sterling, AK 99669

Delores Larson
PO Box 5018
Koliganek, AK 99576

March 14, 2014

Re: Oppose House Bill 77

Dear Alaska Senate Resource Committee Members:

My name is Delores Larson, I am Yupik Eskimo, and my Yupik name is Myuuaq. I was born in Dillingham and raised in the Native Village of Koliganek. Koliganek is the furthest village, located on the left bank, up the Nushagak River. Koliganek currently has about 300 tribal members with a population of 210. I can proudly say that I am a commercial fisherwoman and lifelong subsistence user.

With that said I would like to voice my concerns on House Bill 77. I strongly oppose House Bill 77 because it endangers the land that we live off of, our pristine waters, and most importantly the abundance of fish and wildlife that my people have depended on for thousands of years. I truly believe the reason why Bristol Bay is considered a world class fishery is because most of it is left untouched by large scale development. You are silencing my right to protect our culture, our primary food sources, and our precious natural renewable resources.

Already there are restrictions and limitations on how much fish, caribou and moose we can legally harvest each year. Why should I trust you to make decisions when you do not have our best interest at heart, you do not value the lands, fish and animals like we do. You need to recognize the importance of working with people who live in this area and who have great insight into the natural processes at work. Tribes of Bristol Bay have special knowledge of the watershed because we have lived here for thousands of years.

The late Senator Ted Stevens pointed out that, "The best solution to salmon problems is the stronghold concept. Take the largest, healthiest, most sustainable populations and protect them. There is no question that Bristol Bay as an area, and the Nushagak and Kviachak drainages in particular, are the strongest of the stronghold. If you don't draw a line in the sand here then there is simply none to be drawn."

Tribal governments should continue to have the opportunity to engage the federal government on decisions impacting watershed resources in a process called tribal consultation. Alaska Natives have a great stake in the Bristol Bay's watershed future. Our connection to the land and the dependence on it are factors you should consider when working on environmental issues in Alaska.

Respectfully,

Delores Larson

From: Jo Ellen Campbell
Sent: Tuesday, March 18, 2014 3:54 PM
To: Sen. Cathy Giessel
Subject: Alaskans oppose HB 77 and will not be cut out of the process! Please include this in public record and distribute to committee members.

Wednesday's hearing was another example of the fact that there has not been enough public discourse about House Bill 77. Hundreds of Alaskans were prevented from testifying and they deserve their time to testify in opposition of this bill. I hope that the Alaska Legislature will fully vet this bill in front of multiple committees.

HB 77 would provide for new expanded DNR powers, erode Alaskans rights to appeal DNR decisions, and damage the existing process for water reservations. Additionally, even with new revisions, HB 77 undermines tribes and individual Alaskans' ability to keep water in streams and seriously undermine their ability to participate in natural resource decisions on state land in other ways.

While we appreciate the attempts to fix this bad bill. The recent proposed amendments to the bill do not address concerns raised by the public at statewide public forums and in petitions and letters, and in fact, some of the changes make the bill even worse.

A bill that is this complex and expansive deserves multiple public hearings to allow Alaskans to provide input, and review by several legislative committees.

There is simply too much government interference already. More legislation in this area is not needed.

Sincerely,

Jo Ellen Campbell
1998 S Creekside Dr
Wasilla, AK 99654

From: Lisa Weissler
Sent: Wednesday, March 19, 2014 12:17 PM
To: Sen. Hollis French; Sen. Click Bishop; Sen. Cathy Giessel; Sen. Fred Dyson; Sen. Peter Micciche; Sen. Anna Fairclough; Sen. Lesil McGuire
Subject: Additional HB 77 Legal Issues

Dear Senators:

It seems like every time I think about HB 77, I find other legal issues. In addition to the comments I submitted March 12 and March 14, I have the following comments I believe are worth your attention.

Appeals - Sections 4, 12, 13, 14, 33, 32, 33, 34

In my comments submitted March 12, I described a "catch-22" in the appeals of general permits. That is, if the new standard for appeals is adopted, a person will have to be directly effected in order to have standing to appeal. But, since general permits are issued before activities take place, it will not be possible for anyone to show a "direct" effect. It occurs to me the same problem exists for DNR best interest findings that are issued for land disposals.

For example, DNR issues best interest findings for oil and gas lease sales. These findings are done on an areawide basis covering from 2 million to 7.6 million acres. The findings occur long before any exploration or development projects are proposed. Findings are public noticed and are subject to appeal. But, like the general permits, anyone trying to appeal a best interest finding will be unable to meet the new standard DNR proposes. A person might be able to appeal when a permit is issued for a specific activity when it occurs, but given DNR's broad discretion under the general permit section, there is a real possibility that almost all permitted project activities would be subject to a general permit, and so preclude any appeals at that point.

Also regarding appeals -

- In regard to what DNR calls "frivolous" appeals, DNR regulations require that a person specify the basis upon which a decision is challenged and any material facts disputed by the appellant (11 AAC 02.030). If DNR is unclear what is the basis for an appeal, they can ask for more information. If none is forthcoming, the appeal can likely be denied for that reason. I adjudicated appeals for three years for DNR, and the so-called frivolous ones were easy. The hard appeals are the ones with a legitimate basis.
- The term "aggrieved" as it relates to appeals, shows up over 100 times in Alaska statutes. It is a well-established legal term. As noted by other commenters, by changing their standard to "substantially and adversely affected," DNR is opening the door to the court house as the agency and the public struggle to define its meaning.

SULLIVAN v. REDOIL

Though it feels like being a voice in the wilderness, I believe it is important to continue raising the need for legislation to deal with the Alaska Supreme Court decision issued last March. The Court was quite clear that DNR has a constitutional duty to analyze cumulative impacts at later phases of phased oil and gas exploration and development projects and to provide meaningful public notice of the analysis. DNR's request to the Court for reconsideration of the decision was denied last November. By permitting projects without the required analysis, DNR is violating the law. The best remedy at this point is legislation establishing the when and how DNR conducts the required analysis. If legislation is not

enacted this session, the only option for a concerned citizen like me is to appeal to court and that's not a good way to make law.

I've attached an amendment for your consideration, either for inclusion in HB 77, or as a committee bill. The changes are at the bottom of page 1 and the bottom of page 3. Please note, the proposed language under subsection (p) is based on the Court's ruling.

My prior comments on HB 77 are attached for reference. Thank you.

Sincerely,

Lisa Weissler

Suggested language to enforce *Sullivan v. REDOIL*

* AS 38.05.035(e) is amended to read:

(e) Upon a written finding that the interests of the state will be best served, the director may, with the consent of the commissioner, approve contracts for the sale, lease, or other disposal of available land, resources, property, or interests in them. In approving a contract under this subsection, the director need only prepare a single written finding. In addition to the conditions and limitations imposed by law, the director may impose additional conditions or limitations in the contracts as the director determines, with the consent of the commissioner, will best serve the interests of the state. The preparation and issuance of the written finding by the director are subject to the following:

(1) with the consent of the commissioner and subject to the director's discretion, for a specific proposed disposal of available land, resources, or property, or of an interest in them, the director, in the written finding,

(A) shall establish the scope of the administrative review on which the director's determination is based, and the scope of the written finding supporting that determination; the scope of the administrative review and finding may address only reasonably foreseeable, significant effects of the uses proposed to be authorized by the disposal;

(B) may limit the scope of an administrative review and finding for a proposed disposal to

(i) applicable statutes and regulations;

(ii) the facts pertaining to the land, resources, or property, or interest in them, that the director finds are material to the determination and that are known to the director or knowledge of which is made available to the director during the administrative review; and

(iii) issues that, based on the statutes and regulations referred to in (i) of this subparagraph, on the facts as described in (ii) of this subparagraph, and on the nature of the uses sought to be authorized by the disposal, the director finds are material to the determination of whether the proposed disposal will best serve the interests of the state; and

(C) may, if the project for which the proposed disposal is sought is a multiphased development, limit the scope of an administrative review and finding for the proposed disposal to the applicable statutes and regulations, facts, and issues identified in (B)(i) - (iii) of this paragraph that pertain solely to the disposal phase of the project when

(i) the only uses to be authorized by the proposed disposal are part of that phase;

(ii) the disposal is a disposal of oil and gas, or of gas only, and, before the next phase of the project may proceed, **a cumulative impact analysis is prepared and** public notice **of the analysis** and the opportunity to comment are provided under regulations adopted by the department;

(iii) the department's approval is required before the next phase of the project may proceed; and

(iv) the department describes its reasons for a decision to phase;

(2) the director shall discuss in the written finding prepared and issued under this subsection the reasons that each of the following was not material to the director's determination that the interests of the state will be best served:

(A) facts pertaining to the land, resources, or property, or an interest in them other than those that the director finds material under (1)(B)(ii) of this subsection; and

(B) issues based on the statutes and regulations referred to in (1)(B)(i) of this subsection and on the facts described in (1)(B)(ii) of this subsection;

(3) a written finding for an oil and gas lease sale or gas only lease sale under AS 38.05.180 is subject to (g) of this section;

(4) a contract for the sale, lease, or other disposal of available land or an interest in land is not legally binding on the state until the commissioner approves the contract, but if the appraised value is not greater than $50,000 in the case of the sale of land or an interest in land, or $5,000 in the case of the annual rental of land or interest in land, the director may execute the contract without the approval of the commissioner;

(5) public notice requirements relating to the sale, lease, or other disposal of available land or an interest in land for oil and gas, or for gas only, proposed to be scheduled in the five-year oil and gas leasing program under AS 38.05.180(b), except for a sale under (6)(F) of this subsection, are as follows:

(A) before a public hearing, if held, or in any case not less than 180 days before the sale, lease, or other disposal of available land or an interest in land, the director shall make available to the public a preliminary written finding that states the scope of the review established under (1)(A) of this subsection and includes the applicable statutes and regulations, the material facts and issues in accordance with (1)(B) of this subsection, and information required by (g) of this section, upon which the determination that the sale, lease, or other disposal will serve the best interests of the state will be based; the director shall provide opportunity for public comment on the preliminary written finding for a period of not less than 60 days;

(B) after the public comment period for the preliminary written finding and not less than 90 days before the sale, lease, or other disposal of available land or an interest in land for oil and gas or for gas only, the director shall make available to the public a final written finding that states the scope of the review established under (1)(A) of this subsection and includes the applicable statutes and regulations, the material facts and issues in accordance with (1) of this subsection, and information required by (g) of this section, upon which the determination that the sale, lease, or other disposal will serve the best interests of the state is based;

(6) before a public hearing, if held, or in any case not less than 21 days before the sale, lease, or other disposal of available land, property, resources, or interests in them other than a sale, lease, or other disposal of available land or an interest in land for oil and gas or for gas only under (5) of this subsection, the director shall make available to the public a written finding that, in accordance with (1) of this subsection, sets out the material facts and applicable statutes and regulations and any other information required by statute or regulation to be considered upon which the determination

that the sale, lease, or other disposal will best serve the interests of the state was based; however, a written finding is not required before the approval of

(A) a contract for a negotiated sale authorized under AS 38.05.115;

(B) a lease of land for a shore fishery site under AS 38.05.082;

(C) a permit or other authorization revocable by the commissioner;

(D) a mineral claim located under AS 38.05.195;

(E) a mineral lease issued under AS 38.05.205;

(F) an exempt oil and gas lease sale or gas only lease sale under AS 38.05.180(d) of acreage subject to a best interest finding issued within the previous 10 years or a reoffer oil and gas lease sale or gas only lease sale under AS 38.05.180(w) of acreage subject to a best interest finding issued within the previous 10 years, unless the commissioner determines that substantial new information has become available that justifies a supplement to the most recent best interest finding for the exempt oil and gas lease sale or gas only lease sale acreage and for the reoffer oil and gas lease sale or gas only lease sale acreage; however, for each oil and gas lease sale or gas only lease sale described in this subparagraph, the director shall call for comments from the public; the director's call for public comments must provide opportunity for public comment for a period of not less than 30 days; if the director determines that a supplement to the most recent best interest finding for the acreage is required under this subparagraph,

(i) the director shall issue the supplement to the best interest finding not later than 90 days before the sale;

(ii) not later than 45 days before the sale, the director shall issue a notice describing the interests to be offered, the location and time of the sale, and the terms and conditions of the sale; and

(iii) the supplement has the status of a final written best interest finding for purposes of (i) and (l) of this section;

(G) a surface use lease under AS 38.05.255;

(H) a permit, right-of-way, or easement under AS 38.05.850;

(7) the director shall include in

(A) a preliminary written finding, if required, a summary of agency and public comments, if any, obtained as a result of contacts with other agencies concerning a proposed disposal or as a result of informal efforts undertaken by the department to solicit public response to a proposed disposal, and the department's preliminary responses to those comments; and

(B) the final written finding a summary of agency and public comments received and the department's responses to those comments.

* AS 38.05.035 is amended by adding a new section to read:

(p) In preparing a cumulative impact analysis under (e)(1)(C)(ii) of this section, the director shall consider the project as a whole, taking into account all aspects of the project, including consideration of the project in the context of existing development in the area. The director is not required to speculate about hypothetical or possible future development in the area.

HB 77: Weissler Public Comments
3/12/14

To: Senate Resources Committee
From: Lisa Weissler, Attorney
Date: 3/12/14
RE: Public comment – 2d SCS CSHB 77(RES), Version H

I. INTRODUCTION

There is no way to fix HB 77 because it is part of a bigger problem. The problem is that the state resource permitting system is not serving the Alaska public – instead the focus is on making it easier to put public resources into private hands. Since 2003, consideration of public interests and the inclusion of local governments and the public in resource development decisions have steadily diminished. HB 77 is yet another door closing on Alaskans.

Rather than trying to fix a bill that cannot be fixed, time would be better spent on developing comprehensive legislation that provides for meaningful and consistent consideration of public interests in resource development decisions, including

(1) providing for coordinated project reviews that give the public and local governments an opportunity to effectively participate in the permitting process and for the public and agencies to review projects as a whole;

(2) giving local governments deference on issues of local concern; and

(3) establishing a way to identify state and local public interests and the means to balance those interests in the permitting process.

At the least, there needs to be legislation passed enforcing a recent Alaska Supreme Court ruling that the state has a constitutional duty to analyze and give public notice on the cumulative impacts of certain oil and gas exploration development projects. DNR is currently approving such projects in direct violation of the Supreme Court ruling. (see Attachment 2).

On balance, the state will achieve better resource development if there are opportunities for meaningful public participation, decisions are coordinated among the agencies, and there are clear public interest criteria on which resource development decisions are based.

II. HB 77

In addition to making the current permitting system worse, HB 77 has many legal problems. The following are issues I have identified so far.

GENERAL PERMITS – SECTION 1

The revisions to the general permit section do not fix the problems identified in the original version of HB 77 – the section is fundamentally the same. The main issues are as follow:

- Permit activities authorized by general permits. New language stating that only activities permitted by statute may be authorized by a general permit does nothing to narrow the types of activities that could be authorized by a general permit. There are at least 35 permitted activities that could be authorized (see Attachment 1). DNR testifying that they will issue general permits only for minor activities means nothing – it is the law that matters.

    - General permits and leasing. That the new language ensures leasing and other disposals cannot be subject to general permits does not narrow the types of activities subject to general permits. General permits could never be used to authorize leases and other land disposals because the Alaska constitution requires public notice and consideration of the public interest for "disposals or leases of state lands, or interests therein..." (Article 8, Section 10).

- Significant or irreparable harm. Requiring a finding that an activity is unlikely to result in significant "or" irreparable harm still leaves the department with broad and undefined discretion to authorize an activity by general permit. It remains possible for almost any permitted activity to qualify for a general permit.

- Appeal of general permit decisions. Though the new language allows for an appeal of a general permit decision, a person would not be able to meet the new standard for an appeal. Under HB 77, a person has to be "substantially and adversely affected" to appeal an agency decision. For a person to be adversely affected, a decision "must create or impose an adverse and direct effect or detriment on the person or the interests of that person." General permits occur prior to any activity taking place. How can a person show a direct effect if there is no activity occurring? The proposed language in Section 1 specifically states that a person may not appeal when a generally permitted activity occurs, which is when they could be affected. It is a "Catch-22."

- Conflict with other laws. The removal of "Notwithstanding any other provision of law" was replaced with what amounts to substantially the same thing, although limited to DNR statutes. The new language says, "If there is a conflict between this subsection and AS 38.04 [Use and Classification of State Land Surface], 38.05 [Alaska Land Act], or AS 38.95 [Miscellaneous Provisions], then the provisions of this subsection apply." That means that the department's decisions under its general permit authority trump state statutes. For example, if there is a conflict between AS 38.05.181 that limits geothermal prospecting permits to a total of three years, and a general permit allows a longer time frame, the general permit provisions apply, not the law.

APPEALS – SECTIONS 4, 12, 13, 14, 31, 32, 33, 34, 39

No changes are proposed in the committee substitute for the sections of the bill dealing with appeals. The following issues remain:

- Standard for appeal. The new standard for an appeal, "substantially and adversely affected," is largely undefined. In public hearings, DNR has had to resort to the dictionary to define "substantially." This is indicative of an ill-defined law likely to cause more problems than it solves.

- Burden of proof. Most people are not well versed in the state's resource laws and already struggle to make their appeals effective. Now DNR is putting the burden on the public to describe how they are substantially and adversely affected without a clear definition of what that means. It is the job of state government to respond to people's concerns and assist them through the process, not throw them out. Rather than making it harder for people to appeal, perhaps DNR could work on ways to better communicate with the public and resolve any problems before making a final decision. This could have the added benefit of helping reduce the number of appeals.

- Section 39 – Water Appropriation Appeals. This section is confusing. Under AS 46.15.133(c), the commissioner shall grant, deny, or condition a water appropriation after receipt of any objections. Under AS 46.15.133(e), a person adversely affected by the commissioner's decision to grant, deny or condition the appropriation can appeal to superior court.

    - Under the proposed language in AS 46.15.133(e), in order to appeal to superior court, a person adversely affected has to show they are "directly affected by a decision made by the department either by a physical or financial detriment to the person's interests resulting from the decision."

    - Who decides that a person has a physical or financial detriment – the person appealing to court, or the court? How would a person or the court know whether the standard is met? Is it even possible for DNR to set the standard for standing to appeal to court – isn't that based on court law?

    - Besides being confusing, the heightened standard that a person be physically or financially affected in order to appeal a decision regarding a public resource as important as water is far too high a burden on the public.

WATER RESERVATIONS – SECTIONS 40 to 42

Section 42 – Commissioner discretion. Water reservations continue to be a big issue. Of particular note is proposed language in AS 46.15.145(h) that gives the commissioner the discretion to decide when to process a water reservation application. It appears DNR is responding to the recent court decision requiring they act on public water reservation applications that have languished for years. By asserting that DNR can put off public applications for as long as they choose, DNR undercuts the court and the public interests the court sought to protect.

TEMPORARY WATER USE PERMITS – SECTION 43.

Temporary use of water. The proposed language in this section gives the DNR commissioner the authority to issue an infinite number of new temporary water use authorizations for the same project.

- While it is possible to make adjustments whenever a new permit for the same project is issued, applying conditions to the permit is discretionary on the part of the commissioner. In addition, there is no public notice requirement where the public could identify issues the department may not know about.

- If DNR wants to authorize a use that goes past five or ten years, but is something less than a right to appropriate water, they could develop a water use permit that includes public notice and sufficient criteria to protect the public interest.

- For a historical perspective, in 2001, DNR put forward the legislation that established temporary water use permits in statute. The original bill set the time period at five years with an optional extension for one additional term of five consecutive years. In response to concerns raised by then Senator Gary Wilken, the language allowing an additional five year term was removed. Senator Wilken voiced concern that some people could decipher the language as creating a "permanent permit." In agreeing to remove the extension language, the DNR director stated, "the intent of the temporary permit is to be temporary." (Senate Finance Committee Minutes, SB 139, May 2001).

LAND EXCHANGES – SECTIONS 22 to 27

DNR describes the changes to the land exchanges statutes as giving the department "more flexibility in its authority to exchange land or interest in land when it is in the best interest of the State." (DNR Presentation, Senate Resources, March 10, 2014).

A fundamental question is whether this flexibility is in the state's best interest. Land exchanges are a big deal in that they dispose of public land. That is why comprehensive statutes have been on the books since 1976.

ATTACHMENT 1

Permitted activities under AS 38.05 and AS 38.95 and regulations that may be authorized by a general permit include the following:

AS 38.05.150	Coal prospecting
AS 38.05.152.	Sodium prospecting
AS 38.05.154	Sulphur prospecting
AS 38.05.157	Potassium prospecting
AS 38.05.181	Geothermal prospecting
AS 38.05.250	Mineral prospecting permits on tide and submerged land
AS 38.05.850	Roads Trails Ditches Field gathering lines Transmission & distribution pipelines not subject to right-of-way statutes Telephone or electric transmission & distribution lines Log storage Oil well drilling sites & production facilities Other similar uses or improvements Personal or commercial use or removal of resources of limited value
38.95.075	Use of trapping cabins
38.95.080	Trapping cabin construction
11 AAC 05.010	Identifies land use permits under AS 38.05.850 subject to fees: - Commercial use of a structure or facility that can be occupied (e.g., floating logging camp, floating lodge, guide or outfitter's camp) - Noncommercial use of a structure or facility (e.g., private mooring buoy, float, dock, weir, boat ramp, loading ramp) - Commercial structure or facility (e.g., commercial mooring buoy, fish holding pen, log storage, A-frame logging, equipment staging) - Early entry onto prospective surface leasehold for site development or site analysis - Grazing livestock
11 AAC 58.210	Special land use permit
11 AAC 65.010	Personal use cabin
11 AAC 96.035	Commercial use or commercial harvest of forest products other than timber
11 AAC 96.010	Permits are required for an activity involving (A) the use of explosives and explosive devices, except firearms; (B) Uses that are not listed in 11 AAC 96.020 as generally allowed uses; (C) the use of hydraulic prospecting or mining equipment methods; (D) drilling to a depth in excess of 300 feet, including exploratory drilling or stratigraphic test wells on state land not under oil or gas lease; (E) geophysical exploration for minerals subject to lease or an oil and gas exploration license
Other DNR permits	Agricultural land use permit Tideland permits Millsite permit for a mill facility associated with a mining operation

ATTACHMENT 2

Sullivan v. REDOIL

Alaska Constitution

Article 8, Section 1: "It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest."

Article 8, Section 2: "The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the state, including land and waters, for the maximum benefit of the people."

The Alaska Supreme Court has a long history of enforcing the public interest clauses in Article 8 of the state constitution.

Most recently, in a March 2013 decision, *Sullivan v. REDOIL*, the Court found that the Department of Natural Resources has a constitutional duty to analyze the cumulative impacts of phased oil and gas exploration and development projects and provide timely and meaningful public notice of the analysis.

The Court leaves it to the legislature as to how the state should analyze cumulative impacts, but maintains their role in ensuring that constitutional principles are followed, particularly what they describe as a bedrock principle in Article 8 that the state's natural resources are to be made "available for maximum use consistent with the public interest."

DNR is currently allowing phased oil and gas exploration and development projects to move forward without the necessary cumulative impact analysis and public notice.[1] DNR is not above the law and cannot ignore its constitutional duty.

Statutes enforcing DNR's constitutional duty to conduct cumulative analysis of phased oil and gas exploration and development projects need to be enacted this session. Failure to do so will mean that Alaskans must appeal to court to get their own state government to follow the law.

[1] On August 26, 2013, I filed an administrative appeal of a DNR decision approving a phased oil and gas development project. On March 7, 2014, DNR requested I provide additional information showing I have standing to appeal. The commissioner set April 21, 2014 as the deadline for providing the additional information.

HB 77: Weissler Public Comments
3/14/14

To: Senate Resources Committee
From: Lisa Weissler, Attorney
Date: 3/14/14
RE: Public comment #2 – 2d SCS CSHB 77(RES), Version H

In addition to the legal issues regarding land exchanges listed below, I have identified numerous other issues that are detailed in my written comments submitted previously to the committee.[1]

I note again that HB 77 is part of the larger problem facing our state – that the state's resource permitting system no longer serves the public interest. Even if the legal issues I've identified are fixed, HB 77 will still move the state in the wrong direction.

LAND EXCHANGES – SECTIONS 22 to 27

The Department of Natural Resources describes the changes to AS 38.50 as giving the Division of Mining, Land and Water more flexibility in land exchanges. The department modeled the changes after AS 29.65.090, that provides for land exchanges between DNR and boroughs and municipalities.

- AS 28.65.090 is not a good model. It addresses land exchanges between the state and local governments that are a trade of public lands for other public lands. This is not equivalent to the land exchange statutes in AS 38.50 that address land exchanges between the state and private entities. Where public lands are put into private hands, more comprehensive statutes are warranted.

- AS 38.50.010 changes the value the state receives in an exchange from "appraised fair market value" to "approximately equal value."

    - "Approximately equal value" is found in AS 29.65.090. While an approximate standard may be appropriate in state to municipal or borough exchanges, dealing with private interests requires a clearer standard to protect the state's interests.

    - How is "approximately equal value" determined? Who makes the determination? Who arbitrates if there is disagreement between the parties to the exchange?

[1] Previous comments submitted 3/12/14, posted online with HB 77 Opposition Documents, Group #2.

- Repeals statutes that address procedures and public notice requirements for land exchanges.
    - DNR will rely on procedures and notice requirements in other existing statutes – AS 38.05.035(e) and AS 38.05.945.
    - The referenced statutes are not written with land exchanges in mind and could be insufficient in terms of protecting the state's interest, or create confusion regarding how they are to be applied.
- AS 38.50.010 adds that mineral rights may be exchanged.
    - Current AS 38.50.010 authorizes the director to dispose of state land. The proposed language authorizes the commissioner to exchange either or both the land estate or mineral estate.
    - Current AS 38.50.050 specifies that mineral rights in state land may be exchanged "to the extent that the conveyance is authorized by the state constitution and applicable federal law."
        - Why is "mineral estate" added to AS 38.50.010 when it is already appropriately covered under AS 38.50.050?
        - Since the federal Statehood Act prohibits the state from parting with the title to its minerals, when would the state ever be able to convey its mineral rights?

DERMATOLOGY AND
SKIN CANCER CLINIC
OF ALASKA, P.C.

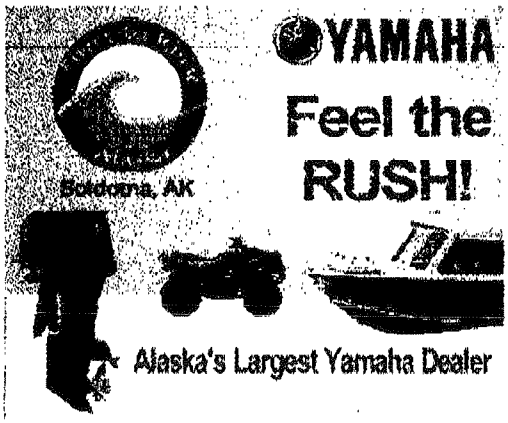
My testimony (I waited 3 hrs on Friday to testify at the Kenai LIO before I had to leave):

March 19, 2014 | 8:23 am

PENINSULA CLARION

HB77 an insult to Alaskans

Posted: March 18, 2014 - 8:51am



By Mathew Cannava

Soldotna

Last week the Senate Resources Committee heard testimony from Alaskans all over the State overwhelmingly against passage of Governor Parnell's HB77. This bill purports to "streamline" the permitting process by giving the DNR commissioner, a political appointee who serves the whims of the governor, almost unilateral power to approve permits impacting our waterways, fisheries, etc. There were a few who spoke in favor of this bill, many from the Resource Development Council, a group funded largely by corporations based outside Alaska, or even the U.S.

Senator Giessel seemed most appreciative of comments directed at specific lines of the bill. This presumes however that this bill can be "tweaked" into something Alaskans would want. To the contrary, the entire premise of the bill is an affront to Alaskans...that a political appointee with no educational background in hydrology, fisheries management, wildlife management, etc...should have the power to parcel out our water/land resources with minimal notice or involvement by Alaskans.

Senator Micciche heard almost unilateral opposition to this bill during his meetings on the Peninsula, yet now feels "inclined to support it." The legislative body took an oath to serve Alaskans, yet still they advance this bill. It is a sad commentary on the integrity of our elected officials when Alaskans speak out to this extent...and are marginalized. HB77 simply needs to be tabled indefinitely.

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