

ALASKA STATE LEGISLATURE
SENATE RESOURCES STANDING COMMITTEE

April 5, 2004

3:30 p.m.

TAPE(S) 04-36

MEMBERS PRESENT

Senator Scott Ogan, Chair
Senator Thomas Wagoner, Vice Chair
Senator Fred Dyson
Senator Ralph Seekins
Senator Ben Stevens

MEMBERS ABSENT

Senator Kim Elton
Senator Georgianna Lincoln

COMMITTEE CALENDAR

CS FOR HOUSE BILL NO. 486(FIN)

"An Act relating to reclamation bonding and financial assurance for certain mines; relating to financial assurance limits for lode mines; establishing the mine reclamation trust fund; and providing for an effective date."

MOVED CSHB 486(FIN) OUT OF COMMITTEE

SENATE BILL NO. 378

"An Act relating to regulation of the discharge of pollutants from timber-related activities under the National Pollutant Discharge Elimination System; relating to waste treatment and disposal permits; making conforming amendments; and providing for an effective date."

MOVED SB 378 OUT OF COMMITTEE

PREVIOUS COMMITTEE ACTION

BILL: HB 486

SHORT TITLE: MINING RECLAMATION ASSURANCES/FUND

SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

02/16/04	(H)	READ THE FIRST TIME - REFERRALS
02/16/04	(H)	RES, FIN
03/01/04	(H)	RES AT 1:00 PM CAPITOL 124

03/01/04 (H) Moved Out of Committee
03/01/04 (H) MINUTE(RES)
03/03/04 (H) RES RPT 7DP 1NR
03/03/04 (H) DP: STEPOVICH, GATTO, LYNN, GUTTENBERG,
03/03/04 (H) HEINZE, MASEK, DAHLSTROM; NR: KERTTULA
03/08/04 (H) FIN AT 1:30 PM HOUSE FINANCE 519
03/08/04 (H) Moved CSHB 486(FIN) Out of Committee
03/08/04 (H) MINUTE(FIN)
03/09/04 (H) FIN RPT CS(FIN) 9DP 2NR
03/09/04 (H) DP: MEYER, HAWKER, CROFT, MOSES, FATE,
03/09/04 (H) FOSTER, CHENAULT, HARRIS, WILLIAMS;
03/09/04 (H) NR: STOLTZE, JOULE
03/24/04 (H) TRANSMITTED TO (S)
03/24/04 (H) VERSION: CSHB 486(FIN)
03/26/04 (S) READ THE FIRST TIME - REFERRALS
03/26/04 (S) RES, FIN
04/05/04 (S) RES AT 3:30 PM BUTROVICH 205

BILL: SB 378

SHORT TITLE: POLLUTION DISCHARGE & WASTE TRMT/DISPOSAL

SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

03/26/04 (S) READ THE FIRST TIME - REFERRALS
03/26/04 (S) RES, FIN
04/05/04 (S) RES AT 3:30 PM BUTROVICH 205

WITNESS REGISTER

Ms. Janet Burleson-Baxter, Legislative Liaison
Department of Natural Resources
400 Willoughby Ave.
Juneau, AK 99801-1724

POSITION STATEMENT: Commented on HB 486.

Mr. Bob Loeffler, Director
Division Mining, Land and Water
Department of Natural Resources
400 Willoughby Ave.
Juneau, AK 99801-1724

POSITION STATEMENT: Commented on HB 486.

Commissioner Ernesta Ballard
Department of Environmental Conservation
410 Willoughby Ave.
Juneau, AK 99801-1795

POSITION STATEMENT: Supports SB 378.

Mr. Owen Graham, Executive Director
Alaska Forest Association
111 Stedman Street, Suite 200
Ketchikan, AK 99901
POSITION STATEMENT: Supports SB 378.

Mr. Jon Tillinghast
Sealaska Corporation
One Sealaska Plaza
Juneau AK 99801
POSITION STATEMENT: Supports SB 378.

Mr. Myrl Thompson
No address provided
POSITION STATEMENT: Commented on SB 378.

ACTION NARRATIVE

TAPE 04-36, SIDE A
^#HB486

HB 486-MINING RECLAMATION ASSURANCES/FUND

CHAIR SCOTT OGAN called the Senate Resources Standing Committee meeting to order at 3:30 p.m. Present were Senators Thomas Wagoner, Ben Stevens, Fred Dyson and Chair Scott Ogan. Senator Ralph Seekins arrived at 3:43 p.m. The first order of business to come before the committee was CSHB 486(FIN).

MS. JANET BURLISON-BAXTER, Legislative Liaison, Department of Natural Resources (DNR), stated that the Senate version of this bill, SB 339, passed out of this committee previously. The House Finance Committee made one change on page 3, lines 7 and 11. Chair Ogan acknowledged those. She said the department intends to draft regulations to address any questions about the financial instruments that are mentioned in the bill. The amendment adds that it has to do that and the department supports it.

MS. BAXTER explained further that there are three changes. State law says that mining operations have to reclaim disturbed land and was changed in the 1990s to accommodate predominantly a placer mining industry. Large mining has evolved over the last 10 years. Currently, the cap for reclaiming disturbed acres is \$750 per acre, which works for the placer industry, but is inadequate to reclaim a large mine. This bill keeps the \$750 cap in place for the placer industry and allows for a negotiated

settlement for a reasonable reclamation by the industry, the applicant and the DNR. It also expands the number of financial instruments the department can use for reclamation.

The state has some bonds in the \$26 million range, but that is on a voluntary basis; the state has no statutory authority to do that. Thirdly, it provides for a trust that the bonding company can put money into that over time accrues interest. DNR anticipates having a number of instruments at the beginning of an operation, but at the end of the project, predominantly cash would be used from the accrued interest.

MR. BOB LOEFFLER, Director, Division of Mining, Land and Water, Department of Natural Resources (DNR), said he was available to answer questions.

CHAIR OGAN asked what financial tests a company would have to undergo.

MR. LOEFFLER replied that they would be like a net worth statement or the ratio of assets compared to liabilities. He could also use a bond rating from Moody or Standard and Poor.

CHAIR OGAN asked if he anticipated factoring in the fluctuating price of minerals.

MR. LOEFFLER replied no, because the bonds are to assure that the state has the ability to reclaim the land should a company default. The bonds become more important during the times of low metal prices, because land costs the same to reclaim no matter what the price of the metal is.

CHAIR OGAN asked if instead of having companies post a bond, they could opt to provide other financial assurances.

MR. LOEFFLER replied yes and explained that this bill proposes that they have an opportunity to provide financial assurance in a variety of ways, the same thing as a bond. They could provide a letter of credit, certificate of deposit, a corporate guarantee that meets the financial tests, a surety bond or they could actually provide cash in a trust fund. Typically, he would expect a company to use a suite of those to meet the state's bond requirements.

CHAIR OGAN exhorted him to do a good job.

SENATOR WAGONER moved to pass CSHB 486(FIN), version /D, from committee with individual recommendations and attached fiscal note. There were no objections and it was so ordered.

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3:47 - 3: 48 - at ease

^#sb378

SB 378-POLLUTION DISCHARGE & WASTE TRMT/DISPOSAL

CHAIR SCOTT OGAN announced SB 378 to be up for consideration.

COMMISSIONER ERNESTA BALLARD, Department of Environmental Conservation (DEC), presented SB 378. She said it will allow the department to achieve their environmental goals while continuing to streamline the department's permitting process. SB 378 instructs DEC to seek primacy for permitting timber-related waste discharges under the NPDES [National Pollutant Discharge and Elimination System] program, currently run by the federal Environmental Protection Agency.

While SB 378 is a partial primacy bill, the department is interested in full primacy and this is a very good first step. It allows the department to move forward with primacy for an industry sector in which it has great expertise and allows the other industry sectors, seafood, mining, oil and gas and municipal sewage, to see how the rules and regulations will work and give them a chance to help develop a full approach to full primacy by next year.

The Clean Water Act (CWA) is designed to support primacy by states. Only five states, including Alaska, do not have primacy. Failure to achieve it has imposed a double permitting burden on the regulated industry in Alaska. Section 402 of the CWA is the one that requires industry to have a permit for discharge. Section 401 requires that permit to be certified by DEC to maintain state water quality standards. DEC does the certification for that primacy and EPA writes the permits. So, the regulated community including all the municipal dischargers, under the current dual permitting scheme need to deal with two agencies where one should suffice.

One of the two most important benefits from achieving primacy even just for the timber industry, is that it moves Alaska closer to holding Alaskans accountable for environmental protection. Through the missions and measures and annual budget

process, the Legislature and the Executive have an annual opportunity where citizens can participate and the department reports back to them on its effectiveness. That accountability is not available to permit applicants, permit holders and stakeholders with the EPA maintaining primacy. The planning and budgeting for a federally run NPDES program do not offer an opportunity for state participation and public comment or control.

The second reason Commissioner Ballard thought it was important to move forward on this issue is because the state's permitting program, through its water quality standards, can focus on site-specific risk-based individual results, not on the process of permitting - an important difference. If any kind of tailoring to the site and specific circumstance is required, that is performed by the state through the 401 certification process.

CHAIR OGAN asked why she started with the timber industry.

COMMISSIONER BALLARD replied that it is her personal goal to have the state venture into all industry sectors, but she was unable to touch base with all the stakeholders in the time available. Legitimate issues were raised throughout the industries and it was agreed generally and specifically with the timber industry that because the CWA allows for partial primacy and that is the industry sector in which DEC has the obvious superior expertise, that's a good place to start.

CHAIR OGAN asked her to explain what water discharges into the field would happen in the timber industry.

COMMISSIONER BALLARD replied that log transfer facilities (LTF) discharge bark into water under the facility and the primary environmental impact is the smothering of the benthos [flora and fauna found at the bottom of a sea or lake] community under the accumulated wood waste; the primary potential impact to the water column would be whatever breakdown might occur in the marine environment of that wood waste.

CHAIR OGAN asked what the current protocol is for regulating it.

COMMISSIONER BALLARD replied that EPA has a general permit for log transfer facilities and there are 98 of those. That permit has a DEC certification with it. The reason DEC has the expertise is because it spent three or four years negotiating, debating and disagreeing and finally resolved what that permit actually requires of the permit holders. During that time, DEC's

staff professionals had to understand what the impacts would be and how to permit them.

CHAIR OGAN asked her to explain the fiscal note.

COMMISSIONER BALLARD replied that the principal expense in the fiscal note occurs during the next two years with \$300,000 each year for temporary staff, Department of Law consultation and support for those activities. A good deal of work needs to be done for 10 industries in terms of reaching full primacy. Once that happens, this is not an expensive program - \$132,000 for operating expenses, primarily one staff member in addition to existing water program staff (about 25 people).

CHAIR OGAN asked if the department has program receipt authority.

COMMISSIONER BALLARD replied yes and it also has a grant from the EPA that is split into two years. Assuming primacy, the department would have the same opportunity to charge fees for the permits as with other permitting programs.

CHAIR OGAN asked if she thought program receipts would pay for the whole program.

COMMISSIONER BALLARD replied that right now program receipts do not pay the full costs of the other permitting programs. That is always a subject of budget discussions with the Legislature.

MR. OWEN GRAHAM, Executive Director, Alaska Forest Association, supported SB 378 for two reasons. One is that it helps insure site-specific permitting decisions are made that take into account the local Alaska conditions rather than some national policy. Secondly, it's an opportunity to achieve the water quality goals the state has while streamlining the permitting process.

CHAIR OGAN asked if we would cut more trees with this bill. He asked what the advantage would be since the feds are already doing it.

MR. GRAHAM replied that about 100 LTF operations are permitted through the EPA's general permit that expires next March. A number of environmental groups tried to make it unusable to the timber industry and he is nervous about its renewal. He thought it had a better chance of being renewed if the state had primacy.

MR. JON TILLINGHAST, Sealaska Corporation, supported SB 378. In addition to the commissioner's points, he added that under the status quo, Sealaska needs two permits for the same discharge, one from DEC and one from EPA. To a large extent, Sealaska looks at many of the same issues. Aside from the inherent waste in that process, the problem is exacerbated by the fact that if someone doesn't like the permit that eventually gets issued, they can file not one lawsuit, but two. The state permit is challenged through the state administrative hearing process and the federal permit is challenged by a direct appeal to the U.S. Court of Appeals through the Ninth Circuit. This is what happened to the timber industry when the general permit was issued.

Of the two processes, the state process is the better process. It is a trial-type hearing that took about two years where folks on both sides of the issue put together a collection of all of the expert testimony that's available on the Pacific Northwest of the possible harm that is or is not caused by the deposition of bark on the ocean bottom. The issue had a thorough hashing over.

At the federal level the same decision was rendered by the court of appeals for the Ninth Circuit after hearing from the parties for about 15 minutes per side on the same day as nine other appeals. The Court of Appeals is not used to resolving factual, technical and scientific issues.

In addition to what he considered a wasteful process before the Ninth Circuit, he said there is always the risk of getting an inconsistent result. DEC could reach one conclusion on the state permit and EPA could reach a different one on the federal permit. Lastly, they are dealing with the perception that the Ninth Circuit has never been exceptionally sympathetic to Alaska and to Alaska's needs. "All of that goes away with this bill, at least for the timber industry."

Also, because it defederalizes the permit process, a lot of other laws that bear upon the permit decision would no longer be applicable.

The National Environmental Policy Act and the possibility of having to do an environmental impact statement on a state permit would go away because there is no federal action. The Endangered Species Act, the essential fish habitat statute, which is

driving all upland industries in the state would not be applicable because there is no federal action to consult over. The substantive concerns behind those laws would still be there, because they are built into the permits, themselves, but the expense and the time-consuming and overlapping consultation processes would go away.

MR. TILLINGHAST thought it would be shown to be a good deal for all industries. Switching programs creates uncertainty and a lot of other industries know how the process works at EPA, the known evil, and maybe some aren't sure about what the unknown evil is if DEC does it all. The timber industry has a simple regulatory program and is ready to be taken over.

We are willing and happy to be the guinea pig. I think when other folks look at how it works for us, I think they'll want it done for them, as well. The other reason to do it only for the timber industry is fiscal. Because the state has gone through this two-year process dealing with precisely the environmental issues that are raised by timber permitting, they already have the expertise onboard. They know more about this issue than EPA does.

MR. MYRL THOMPSON, representing himself, pointed out that on the streamlining part of the bill, he is assuming there would be less public process and less chance for public testimony. Also, LTFs have an acre under water in which to collect bark and they are built in tidal areas where the bark can be pushed into other areas. Commissioner Ballard indicated earlier that a hired diver would inspect the debris to make sure that it would stay within the one-acre area. He asked if the cost of the diver was considered in the fiscal note.

MR. GRAHAM pointed out that the permit holders bear the cost of any divers the EPA or the DEC require.

CHAIR OGAN indicated there were no more questions or comments.

SENATOR SEEKINS moved to pass SB 378, version A, from committee with individual recommendations and attached fiscal note. There were no objections and it was so ordered. There being nothing more to come before the committee, Chair Ogan adjourned the meeting at 4:10 p.m.

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