

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

April 6, 2005

1:56 p.m.

MEMBERS PRESENT

Representative Lesil McGuire, Chair
Representative Tom Anderson
Representative John Coghill
Representative Nancy Dahlstrom
Representative Pete Kott
Representative Les Gara
Representative Max Gruenberg

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 12

"An Act relating to televisions and monitors in motor vehicles."

- HEARD AND HELD

HOUSE BILL NO. 33

"An Act relating to the effect of regulations on small businesses; and providing for an effective date."

- HEARD AND HELD

HOUSE BILL NO. 205

"An Act relating to review of proposed regulatory actions and regulations, fiscal effect of proposed regulatory actions, and suspension of regulations."

- HEARD AND HELD

HOUSE BILL NO. 94

"An Act relating to qualifications of voters, requirements and procedures regarding independent candidates for President and Vice-President of the United States, voter registration and voter registration records, voter registration through a power of attorney, voter registration using scanned documents, voter residence, precinct boundary and polling place designation and modification, recognized political parties, voters unaffiliated

with a political party, early voting, absentee voting, application for absentee ballots through a power of attorney, or by scanned documents, ballot design, ballot counting, voting by mail, voting machines, vote tally systems, initiative, referendum, recall, and definitions in the Alaska Election Code; relating to incorporation elections; and providing for an effective date."

- HEARD AND HELD

CS FOR SENATE BILL NO. 105(L&C)

"An Act relating to the retrospective application and applicability of the overtime compensation exemption for flight crew members; and providing for an effective date."

- HEARD AND HELD

HOUSE BILL NO. 183

"An Act relating to the use of campaign contributions for shared campaign activity expenses and to reimbursement of those expenses."

- BILL HEARING POSTPONED

CS FOR SENATE BILL NO. 36(JUD)

"An Act relating to absentee ballots."

- BILL HEARING POSTPONED

HOUSE BILL NO. 150

"An Act requiring licensure of occupations relating to radiologic technology, radiation therapy, and nuclear medicine technology; and providing for an effective date."

- BILL HEARING POSTPONED

HOUSE BILL NO. 152

"An Act amending the definition of the term 'state agencies' as it presently applies to the provisions of law that establish the Telecommunications Information Council and as it applies under Executive Order No. 113; relating to information systems in the legislative branch and to the Telecommunications Information Council; and providing for an effective date."

- BILL HEARING POSTPONED

PREVIOUS COMMITTEE ACTION

BILL: HB 12

SHORT TITLE: TVS AND MONITORS IN MOTOR VEHICLES

SPONSOR(S): REPRESENTATIVE(S) GRUENBERG, LYNN, GARDNER, MCGUIRE

01/10/05 (H) PREFILE RELEASED 12/30/04
01/10/05 (H) READ THE FIRST TIME - REFERRALS
01/10/05 (H) STA, JUD, FIN
03/01/05 (H) STA AT 8:00 AM CAPITOL 106
03/01/05 (H) Scheduled But Not Heard
03/05/05 (H) STA AT 9:30 AM CAPITOL 106
03/05/05 (H) Heard & Held
03/05/05 (H) MINUTE(STA)
03/17/05 (H) STA AT 8:00 AM CAPITOL 106
03/17/05 (H) Moved CSHB 12(STA) Out of Committee
03/17/05 (H) MINUTE(STA)
03/18/05 (H) STA RPT CS(STA) NT 6DP
03/18/05 (H) DP: GARDNER, LYNN, GATTO, GRUENBERG,
ELKINS, SEATON
04/01/05 (H) JUD AT 1:00 PM CAPITOL 120
04/01/05 (H) Heard & Held
04/01/05 (H) MINUTE(JUD)
04/04/05 (H) JUD AT 1:00 PM CAPITOL 120
04/04/05 (H) -- Meeting Canceled --
04/06/05 (H) JUD AT 1:00 PM CAPITOL 120

BILL: HB 33

SHORT TITLE: EFFECT OF REGULATIONS ON SMALL BUSINESSES

SPONSOR(S): REPRESENTATIVE(S) MEYER

01/10/05 (H) PREFILE RELEASED 12/30/04
01/10/05 (H) READ THE FIRST TIME - REFERRALS
01/10/05 (H) L&C, JUD
02/16/05 (H) L&C AT 3:15 PM CAPITOL 17
02/16/05 (H) Heard & Held
02/16/05 (H) MINUTE(L&C)
03/04/05 (H) L&C AT 3:15 PM CAPITOL 17
03/04/05 (H) Heard & Held
03/04/05 (H) MINUTE(L&C)
03/16/05 (H) L&C AT 3:15 PM CAPITOL 17
03/16/05 (H) Moved CSHB 33(L&C) Out of Committee
03/16/05 (H) MINUTE(L&C)
03/17/05 (H) L&C RPT CS(L&C) NT 2DP 5NR
03/17/05 (H) DP: ROKEBERG, ANDERSON;
03/17/05 (H) NR: CRAWFORD, LYNN, KOTT, LEDOUX,
GUTTENBERG
03/18/05 (H) FIN REFERRAL ADDED AFTER JUD

04/04/05 (H) JUD AT 1:00 PM CAPITOL 120
04/04/05 (H) -- Meeting Canceled --
04/06/05 (H) JUD AT 1:00 PM CAPITOL 120

BILL: HB 205

SHORT TITLE: REVIEW AND SUSPENSION OF REGULATIONS

SPONSOR(S): REPRESENTATIVE(S) RAMRAS

03/07/05 (H) READ THE FIRST TIME - REFERRALS
03/07/05 (H) JUD, FIN
04/04/05 (H) JUD AT 1:00 PM CAPITOL 120
04/04/05 (H) -- Meeting Canceled --
04/06/05 (H) JUD AT 1:00 PM CAPITOL 120

BILL: HB 94

SHORT TITLE: ELECTIONS

SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

01/21/05 (H) READ THE FIRST TIME - REFERRALS
01/21/05 (H) STA, JUD, FIN
02/03/05 (H) STA AT 8:00 AM CAPITOL 106
02/03/05 (H) Heard & Held
02/03/05 (H) MINUTE(STA)
02/08/05 (H) STA AT 8:00 AM CAPITOL 106
02/08/05 (H) Heard & Held
02/08/05 (H) MINUTE(STA)
02/10/05 (H) STA AT 8:00 AM CAPITOL 106
02/10/05 (H) Heard & Held
02/10/05 (H) MINUTE(STA)
02/17/05 (H) STA AT 8:00 AM CAPITOL 106
02/17/05 (H) Heard & Held
02/17/05 (H) MINUTE(STA)
02/19/05 (H) STA AT 10:00 AM CAPITOL 106
02/19/05 (H) Bill Hearing Canceled
03/08/05 (H) STA AT 8:00 AM CAPITOL 106
03/08/05 (H) Heard & Held
03/08/05 (H) MINUTE(STA)
03/15/05 (H) STA AT 8:00 AM CAPITOL 106
03/15/05 (H) Moved CSHB 94(STA) Out of Committee
03/15/05 (H) MINUTE(STA)
03/18/05 (H) STA RPT CS(STA) NT 3DP 2NR
03/18/05 (H) DP: GATTO, GRUENBERG, SEATON;
03/18/05 (H) NR: GARDNER, LYNN
03/21/05 (H) JUD AT 1:00 PM CAPITOL 120
03/21/05 (H) Heard & Held
03/21/05 (H) MINUTE(JUD)
04/01/05 (H) JUD AT 1:00 PM CAPITOL 120

04/01/05 (H) Scheduled But Not Heard
04/04/05 (H) JUD AT 1:00 PM CAPITOL 120
04/04/05 (H) -- Meeting Canceled --
04/06/05 (H) JUD AT 1:00 PM CAPITOL 120

BILL: SB 105

SHORT TITLE: OVERTIME WAGES FOR FLIGHT CREW

SPONSOR(S): SENATOR(S) SEEKINS

02/14/05 (S) READ THE FIRST TIME - REFERRALS
02/14/05 (S) L&C, JUD
02/22/05 (S) L&C AT 1:30 PM BELTZ 211
02/22/05 (S) Heard & Held
02/22/05 (S) MINUTE(L&C)
03/01/05 (S) L&C AT 1:30 PM BELTZ 211
03/01/05 (S) Moved CSSB 105(L&C) Out of Committee
03/01/05 (S) MINUTE(L&C)
03/02/05 (S) L&C RPT CS 3DP 1AM SAME TITLE
03/02/05 (S) DP: BUNDE, SEEKINS, STEVENS B
03/02/05 (S) AM: ELLIS
03/09/05 (S) JUD AT 8:30 AM BUTROVICH 205
03/09/05 (S) Moved CSSB 105(L&C) Out of Committee
03/09/05 (S) MINUTE(JUD)
03/09/05 (S) JUD RPT CS(L&C) 2DP 2NR
03/09/05 (S) DP: SEEKINS, HUGGINS
03/09/05 (S) NR: FRENCH, GUESS
03/18/05 (S) TRANSMITTED TO (H)
03/18/05 (S) VERSION: CSSB 105(L&C)
03/21/05 (H) READ THE FIRST TIME - REFERRALS
03/21/05 (H) JUD
04/06/05 (H) JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

ANNE CARPENETI, Assistant Attorney General
Legal Services Section-Juneau
Criminal Division
Department of Law (DOL)
Juneau, Alaska

POSITION STATEMENT: During discussion of HB 12, testified in support, provided comments, and responded to questions.

TODD SHARP, Lieutenant
Division of Alaska State Troopers
Department of Public Safety (DPS)
Anchorage, Alaska

POSITION STATEMENT: Testified in support of HB 12.

DOUGLAS JOHNSON, Senior Director
Technology Policy
Consumer Electronics Association (CEA)
Arlington, Virginia

POSITION STATEMENT: Provided comments during discussion of HB 12 and responded to questions.

MICHAEL PAWLOWSKI, Staff
to Representative Kevin Meyer
House Finance Committee
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Presented HB 33 on behalf of the sponsor, Representative Meyer.

CHRISTOPHER KENNEDY, Senior Assistant Attorney General
Environmental Section
Civil Division (Anchorage)
Department of Law (DOL)
Anchorage, Alaska

POSITION STATEMENT: Provided comments during discussion of HB 33 and responded to a question; provided comments during discussion of HB 205.

JIM POUND, Staff
to Representative Jay Ramras
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Presented HB 205 on behalf of the sponsor, Representative Ramras.

RANDY RUEDRICH, Chair
Alaskan Republican Party
Anchorage, Alaska

POSITION STATEMENT: Provided comments during discussion of HB 94.

REPRESENTATIVE PAUL SEATON
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Speaking as chair of the House State Affairs Standing Committee, provided comments during discussion of HB 94, and suggested changes to one of the bill's proposed amendments.

NINA MOLLETT

Juneau, Alaska

POSITION STATEMENT: Provided comments during discussion of HB 94.

JIM SYKES

Palmer, Alaska

POSITION STATEMENT: Provided comments and suggested a change during discussion of HB 94.

REPRESENTATIVE MARY KAPSNER

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Provided comments during discussion of SB 105.

REPRESENTATIVE MIKE KELLY

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Provided comments during discussion of SB 105.

SENATOR RALPH SEEKINS

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Sponsor of SB 105.

THOMAS M. DANIEL, Attorney at Law

Perkins Coie, LLP

Anchorage, Alaska

POSITION STATEMENT: As an attorney in the law firm representing Hageland Aviation Services, Inc., testified in support of SB 105 and responded to questions.

BRUCE McGLASSON, Owner/President

Grant Aviation, Inc.

Anchorage, Alaska

POSITION STATEMENT: Provided comments during discussion of SB 105.

MICHAEL HAGELAND, Owner

Hageland Aviation Services, Inc.

Anchorage, Alaska

POSITION STATEMENT: Answered questions regarding the lawsuit against Hageland Aviation Services, Inc., during discussion of SB 105.

RICHARD CLARK, Pilot

Hageland Aviation Services, Inc.
Wasilla, Alaska

POSITION STATEMENT: Answered questions regarding the lawsuit against Hageland Aviation Services, Inc., during discussion of SB 105.

IGNATIUS BEANS, JR., Safety Check Pilot
Hageland Aviation Services, Inc.
Anchorage, Alaska

POSITION STATEMENT: Testified in support of SB 105.

PETER C. NOSEK, Attorney at Law
Anchorage, Alaska

POSITION STATEMENT: Answered questions regarding the lawsuit against Hageland Aviation Services, Inc., on behalf of the plaintiffs.

MIKE BERGT, General Manager
Alaska Central Express, Inc.(ACE)
Anchorage, Alaska

POSITION STATEMENT: Testified in support of SB 105.

GRANT THOMPSON, President
Cape Smyth Air Service
Barrow, Alaska

POSITION STATEMENT: Testified in support of SB 105.

TOM NICOLOS
Cape Smythe Air Service
Barrow, Alaska

POSITION STATEMENT: Testified in support of SB 105.

MARK JOHNSON, Pilot
Hageland Aviation Service, Inc.
Anchorage, Alaska

POSITION STATEMENT: Provided comments during discussion of SB 105.

MICHAEL CHARLIE, Pilot
Hageland Aviation Service, Inc.
Tununak, Alaska

POSITION STATEMENT: Testified in support of SB 105 and provided comments.

KAREN CASANOVAS, Executive Director
Alaska Air Carriers Association (AACA)
Anchorage, Alaska

POSITION STATEMENT: Testified in support of SB 105.

GREY MITCHELL, Director
Central Office
Division of Labor Standards & Safety
Department of Labor & Workforce Development (DLWD)
Juneau, Alaska

POSITION STATEMENT: Responded to questions during discussion of SB 105.

ACTION NARRATIVE

CHAIR LESIL MCGUIRE called the House Judiciary Standing Committee meeting to order at [1:56:49 PM](#). Representatives McGuire, Coghill, Gruenberg, and Gara were present at the call to order. Representatives Anderson, Kott, and Dahlstrom arrived as the meeting was in progress.

HB 12 - TVS AND MONITORS IN MOTOR VEHICLES

[1:57:34 PM](#)

CHAIR MCGUIRE announced that the first order of business would be HOUSE BILL NO. 12, "An Act relating to televisions and monitors in motor vehicles." [Before the committee was CSHB 12(STA).]

REPRESENTATIVE GRUENBERG, speaking as one of the prime sponsors, referred to the proposed committee substitute (CS) for HB 12, Version 24-LS0058\X, Luckhaupt, 4/5/05, which contained a handwritten alteration to page 1, line 11 - changing "a" to "the". He indicated that the Department of Law (DOL) has also suggested that Version X be altered such that what is currently subsection (a)(2) becomes subsection (a)(1), and what is currently subsection (a)(1) becomes subsection (a)(2).

REPRESENTATIVE GRUENBERG made a motion to adopt Version X with both the handwritten alteration and the change suggested by the DOL as the work draft. There being no objection, Version X, as amended, was before the committee.

REPRESENTATIVE GRUENBERG indicated that Version X, as amended, incorporates some suggestions made by the DOL and various other parties, and that some suggested changes were not made to Version X because the drafter has assured him that such changes are not necessary, either because of language already in Version X or because of language currently in statute.

1:59:31 PM

ANNE CARPENETI, Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law (DOL), said that the DOL worked extensively with the sponsor with the goal of clarifying the language such that it conforms to Alaska's drafting style, and removing unnecessary language. She noted that with the DOL's aforementioned suggested change incorporated into Version X, as amended, a conforming change must also be made to page 1, line 13.

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 1, changing "(a)(1)" to "(a)(2)" on page 1, line 13. There being no objection, Amendment 1 was adopted.

MS. CARPENETI said that the DOL supports [the bill].

REPRESENTATIVE GRUENBERG noted that it can be very difficult to determine whether the driver of a vehicle is actually watching an entertainment system while car is being driven; for this reason, the bill applies if the entertainment system can be viewed by the driver, the entertainment system is on, and the car is being driven. He offered his understanding that the penalties proposed in the bill track current penalties for a number of existing crimes.

MS. CARPENETI added that watching a video while operating a motor vehicle would be considered reckless conduct - knowing a risk exists and disregarding it. Such behavior, if it causes the death of another person, would be a class A felony under the bill; this corresponds to the crime of manslaughter, which she characterized as a reckless killing that is also a class A felony. She said that the other penalties provided for in the bill track the homicide statutes in Title 11. For example the aforementioned behavior, if it causes serious physical injury to another person, would be a class B felony, just like the crime of assault in the second degree.

REPRESENTATIVE DAHLSTROM asked whether the issue of passengers watching a video while the vehicle is being operated has been raised.

REPRESENTATIVE GRUENBERG reiterated that the bill only criminalizes the behavior of the driver if an entertainment system is in use while the vehicle is being operated and the entertainment system is visible to the driver.

REPRESENTATIVE ANDERSON said he hopes that the equipment the bill applies to would not include either a cell phone or a stereo system that is operated by a touch screen.

REPRESENTATIVE GRUENBERG noted that Version X, as amended, has an effective date of September 1, 2005. He mentioned that Representative Seaton had also expressed a concern that the bill would apply to cell phones containing a small video screen. He offered his belief that as currently drafted, the bill would apply to such devices, but said he would accept a change adding an exception for that type of technology.

[2:06:15 PM](#)

REPRESENTATIVE GARA suggested that Representative Anderson's concern could be addressed by adding the word "entertainment" to page 1, line 9, after "visual" and before "display", and then defining "visual entertainment display" to include such things as movies, TV shows, and games.

REPRESENTATIVE GRUENBERG said he would be happy to incorporate such a change into the bill.

REPRESENTATIVE ANDERSON suggested adding "stereo system [information]" to the list of items exempted via subsection (c).

CHAIR MCGUIRE, speaking as one of the prime sponsors, said she didn't want such an exemption to apply to stereo equipment that is capable of displaying an artist's performance.

MS. CARPENETI suggested adding cell phones and "audio" systems to the list of exemptions in subsection (c).

REPRESENTATIVE GRUENBERG indicated a willingness to have members' concerns addressed via language he would incorporate into a new CS that could be brought to the committee at a future date.

[2:10:27 PM](#)

REPRESENTATIVE GRUENBERG, in response to comments, again reiterated that the penalty proposed in the bill applies if the entertainment system can be viewed by the driver, the entertainment system is on, and the driver is operating the vehicle. He said he does not want to have to prove that a

driver was actually watching an entertainment system while driving because that will be and has been difficult to prove.

CHAIR McGUIRE concurred, and noted that a person will always deny watching an entertainment system while driving; therefore, they would be right back where they started if the bill only criminalizes the actual watching of an entertainment system while driving. She expressed a preference for deterring the behavior of having an entertainment system installed so that it is viewable by the driver of a vehicle. She suggested simply flushing out the exemptions regarding cell phones and audio systems that don't have a video component.

[2:14:26 PM](#)

TODD SHARP, Lieutenant, Division of Alaska State Troopers, Department of Public Safety (DPS), said simply that the dangers of inattentive driving are obvious, that the DPS supports [HB 12], and that the problems associated with drivers of vehicles watching entertainment systems while driving need to be addressed.

[2:15:19 PM](#)

DOUGLAS JOHNSON, Senior Director, Technology Policy, Consumer Electronics Association (CEA), expressed appreciation for the work done to date on the bill, and said his organization's main interest is in seeing consistency with the approaches other states are taking towards this issue. So although Version X is getting close to being satisfactory to the CEA, there is a concern regarding what types of equipment the bill would apply to. He mentioned that the CEA had offered model legislation to the House State Affairs Standing Committee; that model legislation focuses broadly on video displays that produce entertainment or business applications. Because technology is always changing, as soon as legislation specifies particular products, there will inevitably be more products to add to those lists. He said the CEA would be happy to work with the committee and offer suggestions for changes to the provision listing the equipment that the bill would apply to.

REPRESENTATIVE GRUENBERG noted that members' packets include the letter from Mr. Johnson that contains the aforementioned model legislation language, and indicated that he would be meeting with Mr. Johnson later.

CHAIR McGUIRE, after ascertaining that no one else wished to testify, closed public testimony on HB 12.

[2:18:15 PM](#)

REPRESENTATIVE KOTT pointed out that many recreational vehicles (RVs) have television monitors placed such that the driver of the RV can view it simply by turning his/her head. He suggested that the bill would apply to such vehicles and thus could be a problem, particularly for those with RVs that already have televisions installed in that position.

MR. JOHNSON, in response to a question, offered his understanding that some states have included exemptions for RVs in their legislation.

REPRESENTATIVE GRUENBERG asked Mr. Johnson to research that issue further.

MR. JOHNSON said he would do so.

REPRESENTATIVE GARA suggested that perhaps the bill should stipulate that a video display monitor must be behind the driver.

REPRESENTATIVE GRUENBERG agreed to consider such language, which, he noted, was contained in the model legislation.

[HB 12, Version X, as amended, was held over.]

HB 33 - EFFECT OF REGULATIONS ON SMALL BUSINESSES

[2:21:35 PM](#)

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 33 "An Act relating to the effect of regulations on small businesses; and providing for an effective date." [Before the committee was CSHB 33(L&C).]

MICHAEL PAWLOWSKI, Staff to Representative Kevin Meyer, House Finance Committee, Alaska State Legislature, sponsor, relayed on behalf of Representative Meyer that the federal Regulatory Flexibility Act was passed in 1980 and requires agencies to consider the impacts and costs to small businesses when drafting regulations. He said [the Act] does not predetermine an outcome, but brings an awareness of the interests of small businesses into the process, and allows interested parties to

sue if agencies don't follow the Act. The federal administration has estimated that the Act has saved small businesses over \$17 billion, he said, because "just filling out a few less forms, following a few less of the restrictions that are put on business has saved business money." This cost savings allows businesses to invest in jobs, people, and growth.

MR. PAWLOWSKI said that 37 states have adopted a similar law. The model legislation may not fit Alaska, however, since it shouldn't get in the way of resource development by slowing down the permitting processes, he explained, and mentioned that the House Labor and Commerce Standing Committee addressed the issue of judicial review. He characterized HB 33 as a better step in the process of forming an Alaskan regulatory flexibility Act.

[2:25:01 PM](#)

REPRESENTATIVE GARA asked about the cost of the studies required under the bill.

MR. PAWLOWSKI acknowledged that there is a fiscal note, but offered his belief that it applies more to the original bill than to the version before the committee, because CSHB 33(L&C) now relaxes those requirements to a "general description." He posited that Alaskans are used to environmental impact statements, and that economic effect statements ought to be reviews of similar depth. He mentioned that CSHB 33(L&C) addresses this issue by softening the language and taking out judicial reviews, he said.

REPRESENTATIVE GARA said his concern is that the studies will be costly and will delay the promulgation of regulations, because they must include a general description and estimate of the numbers of the affected businesses, and such will be hard to determine unless "you shoot from the hip."

MR. PAWLOWSKI said the costs have not been high for other states with similar laws, and noted that the definition of a small business will be based solely on the number of employees, and the Department of Labor & Workforce Development keeps accurate statistics of such that are available on line. With regard to the analysis of probable economic effect, he agreed that there is a chance that the process will be slowed down. The question then becomes whether the investment of time is warranted compared to the cost of going back and redoing regulations. The approach of regulators is limited by their mission statement,

and so adding a little information ahead of time helps them do it right the first time, he opined.

REPRESENTATIVE GARA said one of his concerns is that the government must be "flexible enough to come up with regulations that achieve the purposes of the statute that they are implementing in the most cost effective, fairest way." He said he is worried the bill will encourage agencies to shortcut the purposes of a statute, for example, like one that protects people from pesticides. He suggested adding language to ensure that the objectives of statutes are not compromised.

MR. PAWLOWSKI said it seems clear enough that the bill is not intended to compromise statutes and that agencies have to meet the objectives of the statutes. The language requires regulators to be consistent with the health, safety, and welfare of the state, he concluded.

REPRESENTATIVE GARA argued that clarifying the bill further would ensure that an agency also has the duty to implement the statute as the statute reads.

CHAIR McGUIRE suggested that Mr. Pawlowski take that comment back to the sponsor. She opined that more often than not, the regulations undermine the objectives of the statutes.

[2:35:51 PM](#)

CHRISTOPHER KENNEDY, Senior Assistant Attorney General, Environmental Section, Civil Division (Anchorage), Department of Law (DOL), said Governor Murkowski strongly supports small businesses and feels it is important to safeguard against regulatory requirements that put unjustified or onerous burdens on small business. He added that the administration is very close to an agreement with the sponsor in developing legislation that the governor can support. He said the main areas under discussion are those of determining which kinds of regulations should be subject to this procedure, and of creating a shorter list of agencies that would fall under the legislation. Most labor, commerce, health and social services, and environmental health regulations would be covered, but the governor wants to exclude resource development regulations.

REPRESENTATIVE GRUENBERG asked why the bill doesn't also apply to proposed legislation.

MR. PAWLOWSKI said that the legislative process allows for deliberation. The concern isn't with regard to elected officials but instead with regard to appointed officials or bureaucrats who have to make decisions without the benefit of being elected and being in touch with their constituencies. Similarly, regulations promulgated by boards and commissions have also been removed from this bill, he said.

CHAIR MCGUIRE concurred that the regulatory process doesn't have the same opportunities for the public to weigh in at as does the legislative process. She surmised that the goal [of the bill] is to interject more analysis at the regulatory phase. One other major distinction is that legislators can be voted out of office, but it is difficult to track down a regulation writer, she added.

REPRESENTATIVE GRUENBERG said exempting natural resource laws may permit large companies to have regulations promulgated to drive out smaller companies. The state's gas pipeline project may have various-sized players, he noted, for example, and said he has been thinking about the legislature's negative impacts on municipalities. He suggested that HB 33 include consideration of the impacts on small municipalities and people in general.

[2:44:38 PM](#)

REPRESENTATIVE GARA asked Mr. Kennedy whether adding the phrase, "and not compromising" would be workable.

MR. KENNEDY indicated that he's not yet had time to consider that but his initial instinct is that the bill already fits that goal. The intent was never to compromise current or future statutes, he said.

REPRESENTATIVE GARA said he still has that concern. The language should be put in the statute so people don't have to fight over what the legislative history meant, he opined, adding that another concern of his is that by ensuring that the legislation doesn't apply to the Department of Natural Resources (DNR) because of a desire to not slow that agency down, it suggests that requiring studies does slow down the regulatory process, and will do so for every other agency.

MR. PAWLOWSKI said:

I think actually the concern on the resource development side is more that objections to resource

development in Alaska tend to find whatever crack, crevice, or hole they can slip into to stop, stall, or get in the way of any project. [By] adding even a tiny crevice, even with explicit judicial review taken out of the bill, the concern is always that that can be manipulated at a higher level to file a challenge to halt the permit.

REPRESENTATIVE GRUENBERG suggested that the language in the bill should be drafted more carefully.

CHAIR McGUIRE indicated that CSHB 33(L&C) would be held over.

HB 205 - REVIEW AND SUSPENSION OF REGULATIONS

[2:51:04 PM](#)

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 205, "An Act relating to review of proposed regulatory actions and regulations, fiscal effect of proposed regulatory actions, and suspension of regulations."

REPRESENTATIVE DAHLSTROM moved to adopt the proposed committee substitute (CS) for HB 205, Version 24-LS0696\F, Cook, 4/4/05, as the work draft. There being no objection, Version F was before the committee.

JIM POUND, Staff to Representative Jay Ramras, Alaska State Legislature, sponsor, said on behalf of Representative Ramras that HB 205 will bring accountability to all the laws that are being passed in the state of Alaska. He elaborated:

Each year, the legislature labors to pass legislation that is good for the state and its people. But when most of us, and the people, aren't looking, a group of administration workers turn around to administer those statutes by interpreting the language to what best fits their needs. This interpretation process sometimes varies from the statutory language and, in a worst-case scenario, conflicts with that legislative intent. Once this process begins, the public and those affected by the proposed regulations have very limited ability to stop them; no elected public official has any real say over the regulation process. These regulations have the effect of law unless someone is ... able to convince a court to overrule them.

[House Bill 205] puts regulation writers on notice that the [Joint Committee on Administrative Regulation Review] will be watching and may, at a very minimum, slow the process down. By a vote of the legislature a [regulation] ... could be annulled. ... [The legislature] has the constitutional right to write laws, not some nameless, unelected and unaccountable state employee who may have a personal agenda. [House Bill 205] also requires that the public know what the costs are of a regulation, not only for state government but for the public as well, and, in response to Representative Gruenberg, I would suggest municipalities.

At ... first I thought that this bill should have a huge fiscal note, but in reality, since I've looked at the amount of additional work that this language would require over what is [currently] being done, I cannot believe that they can come up with a much larger fiscal note than the zero [fiscal note] they've been showing us over the last many years [for the promulgation] of regulations. I would urge your support of House Bill 205, and I'd be glad to answer any questions.

[2:53:57 PM](#)

MR. POUND, in response to a question, said that [under the bill], a majority of the members of the Joint Committee on Administrative Regulation Review can suspend the implementation of a regulation until adjournment of a regular legislative session unless the legislature meanwhile passes a bill that annuls or invalidates the regulation - if the latter is not done, then the regulation is allowed to go into effect upon adjournment of the regular session.

REPRESENTATIVE GRUENBERG asked for a copy of the March 19, 2002, memorandum referenced in a Joint Committee on Administrative Regulation Review memorandum dated May 1, 2002. He also asked whether the bill would allow the legislature to affect regulations without a statutory change.

MR. POUND said that prior to the State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980), the legislature had the authority to annul a regulation via a concurrent resolution adopted by a vote of both houses. However, the A.L.I.V.E. decision determined

that doing so was unconstitutional under the separation of powers doctrine; further, the court said that in order for the legislature to annul a regulation, it had to be done via statute, which is what is being proposed via HB 205. With regard to the aforementioned referenced memorandum, he said that he'd been unable to locate it, and so members' packets only have the Joint Committee on Administrative Regulation Review's response dated May 1, 2002, which he said merely addresses an example wherein a department, in writing regulations, ignored both the public and the legislature's intent with regard to correspondence schools.

REPRESENTATIVE GARA said he questions whether it is constitutional for a few members - in this case, simply a majority of the members of the Joint Committee on Administrative Regulation Review - to [annul] a regulation. He asked whether a legal [opinion] on that issue is available.

MR. POUND indicated that he did not have such an [opinion], and reiterated that the Joint Committee on Administrative Regulation Review by itself would not be [annulling] a regulation; instead, it would just be delaying a process that can already, of its own accord, take up to as long as a year to complete. He also mentioned that under the bill, should the Joint Committee on Administrative Regulation Review do nothing with regard to a regulation, it would become law as a matter of course.

CHAIR MCGUIRE noted that a legal opinion on this issue could be requested and would be helpful. She offered her recollection that some states have ruled opposite of the decision rendered in the A.L.I.V.E. case; thus, in those states, a simple resolution can be introduced to repeal a regulation without presentment to the governor. She offered her understanding that some other states have a "blanket sunset" on regulations, ranging from five to ten years, that forces the legislature to look at those regulations and decide whether they should be renewed. Also, some states have a committee similar to the Joint Committee on Administrative Regulation Review, and the powers of those committees vary; some have subpoena powers, some have the ability to question people when reviewing regulations, and very few are as "neutered" as Alaska's Joint Committee on Administrative Regulation Review. Compared to other states, Alaska has the most power invested, via its constitution, in its executive branch and the least ability by the legislature to impact regulations, particularly in light of the A.L.I.V.E. decision.

REPRESENTATIVE GARA suggested that the question is whether a committee can temporarily invalidate regulations given that it can't permanently invalidate them. He concurred that a legal opinion on this issue would be helpful.

[3:03:40 PM](#)

CHRISTOPHER KENNEDY, Senior Assistant Attorney General, Environmental Section, Civil Division (Anchorage), Department of Law (DOL), opined that the Joint Committee on Administrative Regulation Review serves the important function of looking at regulations and determining whether they "go over the line"; if regulations are found to go over the line, the Joint Committee on Administrative Regulation Review can bring this fact to the legislature as a whole. Noting that HB 205 proposes in part to alter AS 24.20.445 - which pertains to the suspension of regulations - he relayed that Legislative Legal and Research Services has said, in part, in a memorandum dated January 17, 2001 [original punctuation provided]:

AS 24.20.445 permits the Administrative Regulation Review Committee to suspend the effectiveness of the adoption of a regulation when the legislature is not in session. In discussing the constitutionality of AS 44.62.320(a), the court in A.L.I.V.E. mentioned the power of the committee to suspend, under AS 24.20.445, the operation of a regulation. While not specifically ruling AS 24.20.445 unconstitutional, it suggested that because of the primary holding that the legislature may affect a regulation only by law, it may not delegate to a committee the power to affect a regulation by any other method. Nor, indeed, may the legislature delegate its law-making power to a committee. ... Thus the effect of the A.L.I.V.E. case is to strike down the Committee's power under AS 24.20.445.

MR. KENNEDY said the DOL agrees with Legislative Legal and Research Services that the whole underlying authority of AS 24.20.445 is now inoperative. Therefore, he opined, Sections 1-5 of HB 205 merely "rearrange the deck chairs on the Titanic after the Titanic is already resting on the ocean floor," and so the administration doesn't see any benefit to those provisions of the bill.

REPRESENTATIVE GRUENBERG said he cannot see "this" surviving a constitutional challenge.

MR. POUND opined that the average person doesn't understand regulations until they affect him/her, that [during the public hearing process] the language in proposed regulations makes no sense to the average person. He relayed that when he was the aide for the Joint Committee on Administrative Regulation Review, most attorneys and members of the public that he'd spoken with indicated that they hadn't read their newspapers' public notices regarding proposed regulations. He opined that departments often simply ignore the public comments offered during the public hearing process. Then once regulations are established, departments can modify them without any further input from the public; also, according to an attorney general's opinion, the Lieutenant Governor's role in the promulgation of regulations is then merely administrative and mandatory.

REPRESENTATIVE GRUENBERG said he can sympathize with Mr. Pound, but that won't change the constitution. In response to a comment, he mentioned that one could attempt to get the court to overturn the A.L.I.V.E. decision.

[3:09:43 PM](#)

REPRESENTATIVE GRUENBERG suggested that there may be constitutional ways of dealing with the perceived problem, which, he surmised, is that some agencies are out of control with regard to the way they are interpreting statute and then promulgating regulations based on those interpretations. Assuming that that is correct in some cases, he added, why not try to find a constitutional fix. For example, the legislature could pass a law that says regulations are not effective until they are submitted to the Joint Committee on Administrative Regulation Review and a certain amount of time has elapsed; such would give the legislature time to act. He offered his belief that there are ways of solving the problem, but that HB 205 is not one of them.

CHAIR McGUIRE offered her belief that the legislature needs to continue attempting to find a solution to the problem, that of unelected individuals in government promulgating regulations based on their interpretation - sometimes rightly, sometimes wrongly - of statutory language. She mentioned the Department of Health and Social Services (DHSS) as an example of a department that has tremendous power to promulgate a wide range of regulations. Noting that not even the lieutenant governor has the power to do something about regulations once they've

gone through the process, she opined that the current process does not work.

3:14:13 PM

REPRESENTATIVE GRUENBERG suggested that they hold the bill for use as a vehicle and have the Joint Committee on Administrative Regulation Review and the House State Affairs Standing Committee work on the issue during the interim, and reiterated his belief that the bill as currently written won't solve the problem.

CHAIR MCGUIRE asked Mr. Pound to pass that suggestion on to the sponsor. She also suggested that the sponsor research what other states do, and referred to information compiled in the past by Legislative Legal and Research Services on this issue.

REPRESENTATIVE GRUENBERG opined that HB 205 should have been referred to the House State Affairs Standing Committee.

REPRESENTATIVE ANDERSON, speaking as the current chair of the Joint Committee on Administrative Regulation Review, suggested that it would be a good idea to work with the National Conference of State Legislatures (NCSL) on this issue.

3:17:08 PM

REPRESENTATIVE KOTT mentioned that most legislation that results in regulations starts out as an individual's bill, and that he has suggested to members that they follow their legislation all the way through the regulation-making process to ensure that unintended issues are not swept into the resulting regulations. He mentioned an example of one of his bills for which regulations were created that did not conform to his intent.

CHAIR MCGUIRE mentioned the "aquatic farm" Act as another example.

REPRESENTATIVE COGHILL noted that sometimes the legislature is at fault simply because it has added to a bill language authorizing a department to promulgate regulations. So although the legislature might have delegated that authority in a given situation, it might be in order to review the delegation of that authority. He opined that the legislature should be very careful in how it delegates its authority.

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CHAIR McGUIRE noted that the dissenting opinion in the A.L.I.V.E. case questioned why the legislature should not be able to affect a regulation given that it authorized its creation to begin with.

REPRESENTATIVE GARA, too, noted that sometimes bills will say something general but will then also give a department the authority to create regulations. He characterized the creation of such language as doing a disservice because there is the risk that a department will create regulations with unintended consequences. Bills, he opined, should specifically tell departments what the legislature wants done, rather than giving them leeway.

REPRESENTATIVE GRUENBERG, referring to Chair McGuire's comment regarding the dissenting opinion in the A.L.I.V.E. decision, clarified that the legislature does have the authority to affect regulations, but it must do so in the same manner in which the authority to promulgate those regulations was given - in other words, through statute.

CHAIR McGUIRE concurred.

[HB 205, Version F, was held over.]

HB 94 - ELECTIONS

[3:22:32 PM](#)

CHAIR McGUIRE announced that the next order of business would be HOUSE BILL NO. 94, "An Act relating to qualifications of voters, requirements and procedures regarding independent candidates for President and Vice-President of the United States, voter registration and voter registration records, voter registration through a power of attorney, voter registration using scanned documents, voter residence, precinct boundary and polling place designation and modification, recognized political parties, voters unaffiliated with a political party, early voting, absentee voting, application for absentee ballots through a power of attorney, or by scanned documents, ballot design, ballot counting, voting by mail, voting machines, vote tally systems, initiative, referendum, recall, and definitions in the Alaska Election Code; relating to incorporation elections; and providing for an effective date." [Before the committee was CSHB 94(STA), which had been amended on 3/21/05.]

[3:23:55 PM](#)

RANDY RUEDRICH, Chair, Alaskan Republican Party, said the state's [AccuVote-Optical Scan] is extremely accurate at counting ballots that are properly prepared, though incomplete ballots are rejected. Recounts requested by the Alaskan Republican Party have only changed about 1 vote per 10,000, he said, and opined that because Alaska's standards are 50 times more lenient [than other states], if someone requests a special recount, that person or entity should pay for it in full. A recount can be whatever a person wants it to be, including a full hand recount, he said, making the costs extremely uncertain.

MR. RUEDRICH said that democracy only works if people care to vote, and the state has done many things to make it easier to vote, but it is still difficult to encourage voter turnout. He encouraged the legislature to keep the process easy for an absentee voter, because traveling residents need the process that is set up now.

[3:27:28 PM](#)

REPRESENTATIVE GARA said he has a problem with the practice of the parties pre-checking the party affiliation of the voter on absentee ballot applications, which the Alaskan Republican Party does now. He said he doesn't approve of political parties telling a voter what party he or she belongs to. Representative Gara asked Mr. Ruedrich if he would support an amendment prohibiting that practice.

MR. RUEDRICH said, "I think your point is fairly nebulous," adding that the Alaskan Republican Party does it because the party gets its information from the Division of Elections, and pointed out that the voter can change that checkmark.

REPRESENTATIVE GARA said the form currently has a list of empty boxes, and noted that parties send out forms to independent voters as well as their own party members. "Why not just leave the box blank so the voter can fill it out?" he asked, adding that the Division of Elections leaves those boxes empty so that the voter can decide.

MR. RUEDRICH said, "We provide exactly what is on the state's file data to the voter so they have an opportunity to validate and, if they desire, correct that piece of information." If the voter is non-partisan, that corresponding box is checked, he said, adding that his party is just providing a service.

REPRESENTATIVE GARA asked him if he would mind not providing that service.

MR. RUEDRICH opined that such would not be in the best interest of the voters, adding, "I do not think we should change that."

[3:31:55 PM](#)

REPRESENTATIVE PAUL SEATON, Alaska State Legislature, speaking as chair of the House State Affairs Standing Committee, said he would comment on the Division of Election's suggested amendment that proposes to alter pages 29 and 30 of CSHB 94(STA); that amendment read [original punctuation provided]:

Page 29, line 12:
Following "after a general election"
Delete "at which a governor was elected"

Page 29, line 20:
Following "general election"
Delete "**at which a governor was elected**"

Page 29, line 23:
Following "GENERAL ELECTION];"
Insert "or"

Page 29, lines 29 - 30:
Following "**general election:**"
Delete "**or at the most recent general election at which a governor was elected**"

Page 30, line 2:
Following [SENATOR AT THAT GENERAL ELECTION;OR]
Insert "or"

Page 30, following line 7:
Delete "**or at the most recent general election at which a governor was elected**"

Page 30, line 11:
Following "**registered in the state**"
Delete "**on March 31 of the most recent election year**"
Insert "**in the month that the director performs verification of party status as set out in AS 15.60.008(c)**"

REPRESENTATIVE SEATON noted that the House State Affairs Standing Committee worked hard to protect political parties from becoming disqualified [because of efforts made by others]. He said a political party qualifies as such if it gets a vote of at least 3 percent in the gubernatorial, U.S. Senate, or U.S. House

of Representatives race, and that party will still be qualified through the next gubernatorial election. "This is part and parcel with a lawsuit that was filed," he said, and it was taken care of in the bill that came out of the House State Affairs Standing Committee.

REPRESENTATIVE SEATON said the aforementioned amendment changes things so that if a party received 10 percent of the vote in a gubernatorial election, and then no one ran under that party for the U.S. Congress seat during the next "interim" election, an "impostor" could file under that party and never campaign and not get the required 3 percent of the vote. He said the intent of the House State Affairs Standing Committee was to continue a party's qualified status until the next gubernatorial election. If the party got the required votes at the next interim election, it would be qualified only through the next gubernatorial election but not an extra two years, he explained.

REPRESENTATIVE SEATON said that he talked to people in many political parties and everybody was satisfied [with the language in CSHB 94(STA)]. Referring to the aforementioned amendment, he asked the House Judiciary Standing Committee to reject the language that proposes a change to page 29, line 12; reject the language that proposes a change to Page 29, lines 29-30; and reject the language that proposes to change page 30, following line 7.

CHAIR McGUIRE surmised that what Representative Seaton is proposing is that if a party qualifies either under the U.S. Congress election or under the gubernatorial election, the qualification would last another full four years.

REPRESENTATIVE SEATON said, "For the full four at the end of the gubernatorial."

CHAIR McGUIRE said that's when the party re-qualifies.

REPRESENTATIVE SEATON added, "So parties would only be disqualified at the certification after the gubernatorial election."

REPRESENTATIVE SEATON said he'd talked with all the parties and people who were involved in the lawsuit, and was of the understanding that the language that came out of the House State Affairs Standing Committee solved the problem. He opined that the date change proposed by the aforementioned amendment is fine.

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NINA MOLLETT spoke of the amendment labeled 24-GH1048\G.12, Kurtz, 2/11/05, which read [original punctuation provided]:

Page 8, following line 12:

Insert a new bill section to read:

"* **Sec. 15.** AS 15.20.450 is amended to read:

Sec. 15.20.450. Requirements of deposit and recount cost. The application must include a deposit in cash, by certified check, or by bond with a surety approved by the director. The amount of the deposit is \$2,500 [\$300] for each precinct, \$10,000 [\$750] for each house district, and \$50,000 [\$10,000] for the entire state. If the recount includes an office for which candidates received a tie vote, or the difference between the number of votes cast was 20 or less or was less than .5 percent of the total number of votes cast for the two candidates for the contested office, or a question or proposition for which there was a tie vote on the issue, or the difference between the number of votes cast in favor of or opposed to the issue was 20 or less or was less than .5 percent of the total votes cast in favor of or opposed to the issue, the application need not include a deposit, and the state shall bear the cost of the recount. If, on the recount, a candidate other than the candidate who received the original election certificate is declared elected, or if the vote on recount is determined to be four percent or more in excess of the vote reported by the state review for the candidate applying for the recount or in favor of or opposed to the question or proposition as stated in the application, the entire deposit shall be refunded. If the entire deposit is not refunded, the director shall refund any money remaining after the cost of the recount has been paid from the deposit. If the cost of the recount exceeds the amount of the deposit, the recount applicant shall pay the remainder upon notification by the state of the amount due."

Re-number the following bill sections accordingly.

Page 21, line 4:

Delete "secs. 20 - 43"

Insert "secs. 21 - 44"

MS. MOLLETT said she doesn't think anyone questions the accuracy of voting machines, but voting fraud has occurred throughout history, and a good election system is designed to prevent it. This should be a nonpartisan issue, but nationwide, [citizens] are more worried currently about election integrity. It is up to the party in power to reassure the other parties and all voters that elections are being run fairly, she said. Alaska is doing better than most states, she opined, but Amendment G.12 will degrade its model system. She noted that Amendment G.12 would raise the cost of one type of recount from \$10,000 to \$50,000. She said that she was one of the citizens who requested the last U.S. Senate race recount, that it was very hard to raise \$10,000 in five days, and that it would be impossible to raise \$50,000. She added that it would also be very hard for the average House district candidate to raise \$10,000 for a recount as is being proposed via Amendment G.12.

MS. MOLLETT said she favors an amendment proposed by Representative Gara, which would require a random hand recount of one precinct in every district after every election; that amendment read [original punctuation provided]:

Page 10, following line 14

Insert new bill sections to read:

****Sec. 13.** AS 15.15.420 is amended to read:

Sec. 15.15.420. Duty to review the ballot counting. The director shall review the counting of the ballots with the assistance of and in the presence of the state ballot counting review board [APPOINTED REPRESENTATIVES FROM THE POLITICAL PARTIES].

***Sec. 14.** AS 15.15.430 is amended to read:

Sec. 15.15.430. Scope of the review of ballot counting. (a) The review of ballot counting by the director shall include only [A REVIEW OF]

(1) a review of the precinct registers, tallies, and ballots case; [AND]

(2) a review of absentee and questioned ballots as prescribed by law; and

(3) a hand count of ballots from one or more randomly selected precincts in each election district that accounts for at least five percent of the ballots cast in that district.

(b) If, following the ballot review set out in (a) of this section, the director finds an unexplained discrepancy in the ballot count in any precinct, the director may count the ballots from that

precinct. If there is a discrepancy of more than one percent between the results of the hand count under (a)(3) of this section and the count certified by the election board, the director shall conduct a hand count of the ballots from that district. The director shall certify in writing to the state ballot counting review board and publish on the division's Internet website any changes resulting from a [THE] count performed under this subsection."

Instructions to Legislative Legal:

Make corresponding amendments and renumber accordingly.

MS. MOLLETT said experts in computer voting have been urging states to adopt routine hand recounts after every election for quality assurance. There have been profound problems with elections over the past few years, and there were about 100,000 voter complaints in the last national election, she noted. She said this is a good time to be strengthening Alaska's system, not weakening it. Other states are looking at what Alaska is doing right, and if the legislature passes Amendment G.12, trust in the election system will decline; in contrast, passing the aforementioned amendment pertaining to recounts will increase that trust, she concluded.

[3:44:17 PM](#)

JIM SYKES said he has been working on election laws since 1990, and characterized HB 94 as basically a good bill. He said proposed subparagraph (D) of Section 52 of CSHB 94(STA) provides another avenue for political party recognition via registering 2 percent of the total number of registered voters, but previously it was a number equal to 3 percent of the governor's race. He noted it is difficult to form or keep a small party alive, and even the common 1 percent standard is extremely high. He said many states have much lower standards, gave examples, and suggested that a standard of only 1,000 registered voters would be much [better].

MR. SYKES said he is offering legally defensible language to simplify the current law, to recognize the extreme difficulty of registering voters to a political party. He said the proposed 2 percent language is not legally defensible because "it actually means more than a 30 percent rise in what the requirement was in 2002."

MR. SYKES said an accurate voting machine doesn't guarantee an accurate vote count, and he spoke of a 1994 election where vote results were misreported. He said the reason to do a recount verification is to find out whether a machine worked properly, whether there was a programming error, or whether there was a hacking attempt. He said currently only 3 precincts out of 439 are checked, and this "is almost an invitation to hackers." He stated that one precinct hand count in each district would eliminate any serious hacking attempts. Mr. Sykes, noting that there is a proposed amendment that would raise the amount of a deposit required for a recount, said he believes that is fair, but it would need to be balanced by making sure that there is no reason for anyone to want to ask for a recount.

MR. SYKES requested prohibiting the pre-marking of party affiliations on absentee ballots because the ballot becomes a voter registration form. He then spoke of the 1982 Alaska Supreme Court case, Vogler v. Miller, as the guiding principle for political parties, and noted that the court in that case said: "only a regulation that impinges on the right to speak and associate to the least degree possible consistent with the state's legitimate goals will pass constitutional muster." He mentioned that Alaska's nominating petition only requires 1 percent of the number of people who voted in the governor's race. "That would be the standard I think that we should go to," he concluded.

CHAIR McGUIRE relayed that [CSHB 94(STA), as amended] would be set aside.

SB 105 - OVERTIME WAGES FOR FLIGHT CREW

[3:52:06 PM](#)

CHAIR McGUIRE announced that the final order of business would be CS FOR SENATE BILL NO. 105(L&C), "An Act relating to the retrospective application and applicability of the overtime compensation exemption for flight crew members; and providing for an effective date."

REPRESENTATIVE MARY KAPSNER, Alaska State Legislature, relayed that her district is a good one to use to illustrate the importance of the aviation industry in rural Alaska because the communities are completely reliant on aviation for any kind of transportation, including transportation for medical reasons and the shipping of commodities, especially during "freeze-up and break-up." She mentioned that CSSB 105(L&C) is in response to

[an Anchorage Superior Court] case currently being litigated - John Harms and Other Employees Similarly Situated v. Hageland Aviation Services, Inc., L. Michael Hageland and James Tweto. She voiced the concern that if "we take retribution against the airlines for not being in compliance with the federal laws on overtime," it will drive airlines out of business, will put a lot of people out of work, will increase the cost of air service in rural Alaska, and will diminish the level of [air] service that rural Alaskans get.

REPRESENTATIVE KAPSNER, noting that there is a lack of insurance companies willing to provide insurance coverage in Alaska, said that if any one part of the aviation industry is hurt, then the whole aviation industry suffers. She relayed how the aviation industry operates in her district with regard to how many air carriers provide service and the types of services they provide, their typical staffing levels, what kind of hours their pilots are flying and why, and the different reasons why it can be hard for air carriers in rural Alaska to retain good pilots. She mentioned that sometimes air carriers allow a pilot to work just half a day so as to be able to catch the last flight back to his/her home, or allow a pilot to miss flying the first flight of the day so that he/she is able to spend the previous night with his/her family.

[3:57:31 PM](#)

CHAIR McGUIRE opined that Representative Kapsner's perspective is important and her comments helpful.

REPRESENTATIVE GRUENBERG said he'd like evidence that [the bill] could affect whether an air carrier will go out of business, whether employees are afraid for their jobs, and whether those named as plaintiffs in the class action lawsuit can opt out of it.

REPRESENTATIVE KAPSNER said that a couple of the problems with the current opt-out system for class action lawsuits are that a lot of the pilots named as plaintiffs in the Hageland lawsuit don't know they've been named in that lawsuit and that some of them can't be found because the pilots are part of a transient labor force. In terms of the stability of the airline industry, she noted that her father was a commercial pilot who had a charter service back in the 1970s and that he often used to wonder how he was going to be able to continue in business even back then when the charter airline industry was much more lucrative than it is now. She remarked that there are very few

air carriers in Bethel that have any longevity at all, and offered her belief that the changes in federal law regarding bypass mail have made it hard on cargo carriers because there is a preference for giving the mail to passenger carriers and this, in turn, offsets passenger fares.

REPRESENTATIVE GARA mentioned that he is not thrilled about retroactively changing the law, predicted that the bill will probably succeed in moving through the process, and asked whether the Hageland case is close to being resolved without legislative interference, which could affect any future lawsuits against other air carriers. He also asked whether it would make sense to ban future lawsuits.

REPRESENTATIVE KAPSNER offered her understanding that that has already been done, and that SB 105 is retroactive. She noted that she has never heard any pilots in Bethel complain about how they were treated as employees, including the person initiating the Hageland litigation. She opined that Hageland Aviation Services, Inc., ("Hageland Aviation Services") has not been unfair to its employees, "especially in terms of overtime."

[4:02:52 PM](#)

REPRESENTATIVE MIKE KELLY, Alaska State Legislature, relayed that he is an airline transport pilot and at one point in time had flown in Bush Alaska for two years, and concurred with Representative Kapsner's testimony regarding the importance of the aviation industry in rural Alaska. He opined that fixing "this" two years ago was the right decision, that as a result, every pilot "knew what the rules were." He added his belief, however, that there is a gap that needs to be fixed at this time, and characterized the issue as one of potentially subjecting air carrier companies that are currently out of business - due to the changes in the rules regarding bypass mail - to lawsuits [regarding overtime wages]. The legislation that was originally passed two years ago failed to cover a gap, he concluded, and encouraged the committee to close that gap.

[4:06:58 PM](#)

SENATOR RALPH SEEKINS, Alaska State Legislature, sponsor, offered that SB 105 is attempting to clarify the intent of the 2003 legislation, the goal of which was to address the issue of how pilots in the state were paid overtime. He said that at the time the 2003 legislation was moving through the process, he did not realize that it contained the aforementioned loophole, and

suggested that it was not the legislature's intent to allow such a loophole. He offered his understanding that the person who initiated the Hageland litigation had originally been seeking recourse for alleged age discrimination, and that the attorney the man had spoken with relayed his belief that the man might have "a wage and hour complaint." Senator Seekins opined that it is the legislature's job to fix the loophole that the attorney saw, and that doing so would not take away anything from the pilot. The goal of SB 105, he reiterated, is to fix the aforementioned loophole in the law regarding how pilots are paid, to ensure that no one gets a windfall because the legislature neglected to address this issue initially. In conclusion, he offered his belief that SB 105 doesn't raise any constitutional issues.

[4:11:15 PM](#)

REPRESENTATIVE KOTT noted that the minutes of the March 17, 2003, House Labor and Commerce Standing Committee minutes reflect that Senator Donny Olson, sponsor of the 2003 legislation, said:

Because of their unique working conditions, flight crews have been considered professionals exempt from the standard 8-hour workday, 40-hour workweek, and the associated overtime pay. ... Along with the maximum flight hours set by the Federal Aviation Administration (FAA), these exemptions at both the state and federal level have allowed the industry to structure flexible schedules for flight crew personnel.

REPRESENTATIVE KOTT also noted that at that same meeting Representative Anderson, chair of the House Labor and Commerce Standing Committee, said:

... [T]he sponsor statement notes that the court's interpretations of the exemption from overtime are contradictory. This bill tightens that exemption so it cannot be successfully challenged in court.

REPRESENTATIVE KOTT remarked, thus, that the House Labor and Commerce Standing Committee didn't recognize the aforementioned loophole either. He offered his interpretation of the aforementioned to mean that at the time, Representative Anderson was certain that no court decisions would be forthcoming.

[4:12:57 PM](#)

REPRESENTATIVE GARA asked whether the original bill was intended to be retroactive or to change the rules for the future.

SENATOR SEEKINS offered his belief that the 2003 legislation was intended to do both, that it would "make sure that there was no liability for past acts that were outside of the bargain made between the parties, at the same time that it was to clarify the rule from this date forward" so that [air carriers] would not get sued before the statute of limitations expired.

[4:15:06 PM](#)

THOMAS M. DANIEL, Attorney at Law, Perkins Coie, LLP, after relaying that his law firm has been representing Hageland Aviation Services in the aforementioned lawsuit, said he would be testifying in favor of SB 105.

CHAIR McGUIRE mentioned that members' packets include Mr. Daniel's written testimony.

MR. DANIEL relayed that he has been involved in the Hageland litigation since its beginning, adding:

Under the federal law, pilots have been exempt from overtime since 1949. In 1980, the Alaska attorney general's office issued an opinion [memorandum] indicating that pilots of interstate carriers in Alaska were also exempt from overtime, and the [Department of Labor & Workforce Development (DLWD)] has followed that policy since sometime in the '80s. So the rules of the game have been, for over 20 years, that most airlines in Alaska thought that they were exempt from both the federal wage and hour Act and the Alaska Wage and Hour Act, and it was not until the late '90s that a few lawsuits began to be brought, challenging that assertion and arguing that in fact ... local airlines ... in Alaska could be [subject] to the [Alaska] Wage and Hour Act.

And there are currently three lawsuits pending against airlines on behalf of pilots. And it was really in response to that litigation that started in the late '90s that the legislature passed the bill that ... explicitly exempted airlines. And then this bill [SB 105] simply makes that law retroactive. The other

point I would like to make is that I've become familiar with Hageland Aviation [Services] as a result of this litigation. It's a small air carrier, it's a true "rags to riches" story: Mike Hageland came here from Minnesota back in the '70s, bought an airplane, started flying one airplane in Western Alaska, and gradually grew into ... one of the major rural carriers.

So this is a guy who has served rural Alaska for many, many years, and this lawsuit threatens the viability of Hageland Aviation [Services]. It literally could put him out of business because it has been brought as a class action [lawsuit]; there's a claim for doubling of the damages under the [Alaska] Wage and Hour Act, [and] there's a claim for full [attorney fees] in addition to overtime. So when you add up what now appears to be, potentially, 20 claimants, it literally could bankrupt the airlines. ...

MR. DANIEL went on to say:

Senator Seekins ... is correct in stating that the pilot who ... initiated this lawsuit, the main plaintiff, ... was disgruntled because he thought he was forced to retire because of his age. He went to the Human Rights Commission, filed that complaint, ... [and] was investigated. The Human Rights Commission ruled against him on his age claim. But he hasn't pursued the age claim; what he pursued, through his counsel, was an overtime claim, and he didn't just pursue it on behalf of himself, but on behalf of a whole class of pilots. So that's why we're here.

Now, it has been suggested ... that this legislation is unconstitutional. And the short answer to that is that both the U.S. Congress and this legislature passed legislation in practically every session that makes laws retroactive, that makes them applicable to pending litigation and, in some cases, makes them applicable to litigation that is even on appeal. And the plaintiffs will argue that an un-litigated claim is a property interest, which can't be taken without due process of law. And that is a principle that's been recognized in both state and federal court.

But the due process of law is what they're getting right here, in this legislative body. The law essentially is, as long as the legislature has a legitimate purpose in passing retroactive legislation, it's constitutional. The attorney general's office was asked, in 2003, about another retroactive piece of legislation that amended the Alaska Wage and Hour Act, ... and the attorney general's office issued an opinion that that law was constitutional. So I think the law is constitutional; ultimately, that will probably have to be determined by the courts, but if you look at past history, it indicates to me that this law would be fully constitutional.

[4:22:41 PM](#)

REPRESENTATIVE KOTT asked Mr. Daniel whether he believes that pilots of air carriers consider themselves to be "professionals."

MR. DANIEL said yes.

REPRESENTATIVE KOTT offered his understanding that the Department of Labor & Workforce Development (DLWD) has said that when that is the case, then no specific additional exemption is required, that "professionals" are covered under the existing exemptions. He asked how, then, after the air carriers have received such information from the DLWD and have been acting under the assumption that that information is accurate, that a class action suit could be filed against them.

MR. DANIEL offered his understanding that the attorney general's opinion and the DLWD's policy was that pilots were just exempt, period, since they were employees of interstate air carriers. There is also an exemption in the [Alaska] Wage and Hour Act for professionals, for which a pilot might qualify, but the problem with qualifying under that exemption, he remarked, is that as a professional, one must be paid in a certain manner, and, as Representative Kapsner testified, a pilot working in the Bush isn't always paid in that particular manner. Pilots in the Bush, he added, are currently being paid under a system that has evolved over time, and this system generally consists of paying a pilot at a daily rate and is also what has raised the issue of whether air carriers have been in violation of the [Alaska] Wage and Hour Act.

REPRESENTATIVE KOTT asked whether the definition of "professional" is a state definition or a federal definition.

MR. DANIEL said he is referring to the state definition, but noted that it incorporates, by reference, the federal regulations regarding the type of salary that a professional must be paid.

REPRESENTATIVE KOTT asked whether similar litigation is pending in other states.

MR. DANIEL said he is not aware of any.

[4:26:05 PM](#)

REPRESENTATIVE GRUENBERG asked whether the question [being raised in the Hageland litigation] is one of federal preemption.

MR. DANIEL said that is just one of several questions being raised in the litigation.

REPRESENTATIVE GRUENBERG asked why the Hageland lawsuit isn't being addressed in federal court.

MR. DANIEL surmised that it is because pilots of interstate [air] carriers are clearly exempt from overtime law, and so it would have been a "short" lawsuit had it been brought in federal court.

[4:27:17 PM](#)

MR. DANIEL, in response to questions, said the first case [that made mention of an] overtime claim that he is aware of is the case of Era Aviation, Inc., v. Lindfors, which was filed in 1997 and decided by the Alaska Supreme Court in 2000; that the statute of limitations for claims regarding overtime wages is two years; and that the Hageland litigation was filed in 2002 and relates back to [wages owed] beginning in June of 2000.

[4:28:50 PM](#)

REPRESENTATIVE GARA opined that that undercuts the argument that no one knew that overtime was supposed to be paid, since starting in 1997 there were claims that "this" law has been misinterpreted by the DLWD. He went on to say:

Nobody in your case is seeking damages for any claims from prior to 1997. So, [beginning in] 1997, people are on notice that there's a dispute about what the [DLWD] has said. And it's not until 2000 that these claims will apply. Does that not sort of undercut this sort of fairness "God, we were caught blindsided" question? By 2000, shouldn't Hageland [Aviation Services] have thought, "Well, gosh, this a disputed issue; we'll just use our best judgment as to whether or not we should pay overtime"?

MR. DANIEL offered his belief that the Era Aviation lawsuit started the move to amend the law so as to clarify explicitly that pilots were exempt, and that "this" led to the 2003 legislation.

REPRESENTATIVE GARA said his concern with retroactively changing the law is that sometimes an industry is so influential as to be able to influence an agency, the legislature, and the attorney general's office into interpreting/changing the law in the industry's favor. He said that according to his experience, attorney general's opinions and agency opinions often reflect the views of the administration, and are not necessarily objective views of the law; he offered an example involving opinions and laws regarding pesticides to illustrate his point. He asked why - knowing that an attorney general's or an agency's opinion as to what a statute means is just advisory until it's been tested in court, and knowing publicly that as far back as 1997 that "this" was an issue of dispute - should it be assumed that the client was caught unawares in 2000 regarding whether overtime should have been paid.

MR. DANIEL opined that although people such as he and Representative Gara, for example, know that an attorney general's opinion or an agency's opinion is just advisory, it is reasonable to expect that the average businessman would rely on such an opinion as accurate.

REPRESENTATIVE GARA asked Mr. Daniel whether, by 2000, Hageland Aviation Services had consulted an attorney regarding applicable overtime wages.

MR. DANIEL said the record in the case reflects that his client had not consulted an attorney prior to the lawsuit being filed.

[4:35:34 PM](#)

REPRESENTATIVE KOTT offered his recollection that testimony provided during the hearings on the 2003 legislation indicated that the legislative liaison for the Alaska Air Carriers Association (AACCA) had consulted with the DLWD numerous times on this issue and was told repeatedly that pilots were considered professionals and, as such, were covered under the existing statutory exemptions. He asked whether, if such communications had been ongoing for a number of years, there would be some assurance for the air carriers that they were not liable under "this." He suggested that it would also be fair to assume that employees who felt they were not being paid correctly would have contacted the DLWD on that issue. He offered his belief that there are two avenues of thought: one, that the air carriers felt comfortable with the DLWD opinion that said they "were covered under the exemption"; and the other, that dissatisfied employees would have gone to the DLWD and complained.

MR. DANIEL said that not a single pilot working for Hageland Aviation Services, not even the original plaintiff, has gone to the DLWD and complained about not being paid overtime. He added that of the 82 pilots that potentially have claims in the Hageland lawsuit, the majority of them have affirmatively taken steps to remove themselves from the lawsuit, and surmised that this is an indication that they don't support the lawsuit and feel that they were paid fairly.

REPRESENTATIVE GRUENBERG asked whether such just shows instead that the pilots were ignorant of their rights and are particularly vulnerable.

MR. DANIEL said he did not think so because the pilots that have opted out understand that they could potentially get a lot of money from Hageland Aviation Services but have still chosen not to participate in the lawsuit.

REPRESENTATIVE GRUENBERG asked whether that might not just reflect that those who have opted out of the lawsuit are still employed by Hageland Aviation Services and are afraid for their jobs, and that those who have not opted out are no longer employed.

[4:40:40 PM](#)

MR. DANIEL said that is true in part; there is only one pilot currently employed that has not opted out.

REPRESENTATIVE GRUENBERG asked how many pilots who are no longer employed have opted out of the lawsuit.

MR. DANIEL said he didn't know that number off the top of his head, but added that 60 of those that were named as plaintiffs have opted out. In response to the allegation that pilots have been intimidated or have been threatened with losing their jobs, he explained that that issue has already been addressed by the court, and offered his understanding that none of the pilots [remaining in the lawsuit] have claimed that such has occurred.

[4:42:35 PM](#)

REPRESENTATIVE GRUENBERG said he is concerned, on a policy basis, about people being coerced or intimidated in any venue.

MR. DANIEL offered his understanding that the law protects [those who come forth to testify] against retaliation, and reiterated that he has not heard any testimony indicating that anyone is being threatened or intimidated.

REPRESENTATIVE GRUENBERG asked how many of those named as plaintiffs in the Hageland lawsuit cannot be found, and so presumably might not know that they are a part of the lawsuit.

MR. DANIEL offered his understanding from discussions he's had with the plaintiffs' attorney that four plaintiffs have not yet responded to communications.

[4:45:03 PM](#)

MR. DANIEL submitted a letter - dated April 5, 2005 - to members regarding the constitutional issue.

REPRESENTATIVE GARA asked what the wage claims currently amount to.

MR. DANIEL said he couldn't provide that information, but offered that the [original] plaintiff is claiming a total of \$140,000. He indicated that if one assumes that the remaining plaintiffs in the lawsuit claim a similar amount, then it would be about 20 times that amount.

REPRESENTATIVE GARA asked whether Hageland Aviation Services knew about either the proposed [2003] legislation or any of the lawsuits that had been filed before 2000.

MR. DANIEL indicated that he didn't know whether his client was aware of any of the lawsuits, but offered his understanding that his client was aware of the 2003 legislation.

[4:47:34 PM](#)

BRUCE McGLASSON, Owner/President, Grant Aviation, Inc. ("Grant Aviation"), relayed that his company is in direct competition with Hageland Aviation Services in Western Alaska and employs about 40 pilots and about 140 employees total. He said his company pays its pilots the same way that Hageland Aviation Services does: it's a daily rate based on a pilot's availability to work, regardless of whether he/she actually works and regardless of how long during the day he/she actually works. Grant Aviation went to that system because of the belief that it's a safer way to pay pilots, since it removes the financial incentive for pilots to fly in unsafe conditions; Grant Aviation still uses this method to pay pilots despite the Hageland litigation, both because it is a safer way to pay pilots and because of the company's faith in the legislature to change the law such that [the exemption] is retroactive.

MR. McGLASSON offered his belief that both Grant Aviation and Hageland Aviation Services have treated their pilots fairly by negotiating with their pilots individually prior to their employment and agreeing on how their pilots would be paid, and have since honored those agreements. Opining that the aforementioned litigation will put Hageland Aviation Services out of business, he said that Grant Aviation does not believe that such would be right, and remarked that if his company were to face similar litigation, it would bankrupt him as well; not counting punitive damages, he calculated, he could owe as much \$800,000. He relayed that over the years, on multiple occasions, Grant Aviation has been told by the DLWD that the method Grant Aviation was using to pay its pilots is fair, right, and in compliance with federal law. In response to questions, he reiterated his explanation of how Grant Aviation pays its pilots, and listed some of the reasons why a pilot who is available to work might not get to work, such as weather conditions, mechanical issues, and passenger numbers.

[4:54:02 PM](#)

MICHAEL HAGELAND, Owner, Hageland Aviation Services, Inc., stated that he started flying in Western Alaska in 1972 for other carriers, and then started his own business in 1981. Prior to 1981, he said, he witnessed all the different manners

in which pilots got paid, though most carriers paid pilots by the flight hour. He posited that this caused some pilots to take chances, and possibly led to accidents as well. So when he started to hire pilots, he decided to pay his pilots monthly so that the pilots didn't feel under pressure to fly when the weather was bad. Around 1999, the work schedule was changed because "pilots were making plenty of money but they didn't have time to spend it," therefore the schedule was changed such that a pilot would work 20 straight days and then have 10 days off.

MR. HAGELAND continued:

That was still a legal way under the law to pay then, and of course, we didn't know any different anyway. But some of [the pilots] complained that in some months, because [there are] 31 days in the month, they had to work 21 days, so they wanted to get paid for the extra time they worked. So we said, "Okay, we'll pay you the extra days." ... So that's how the daily rate broke down. About ... 2001, the airlines were hiring pretty heavily ... and it was hard to keep ... quality pilots. And [so] to keep quality pilots, we just had to make better working conditions; so we changed it to a 15 and 15: they worked 15 days on and 15 days off, sometimes 16 ... and we still kept them on the same monthly pay. They also got paid for weather days whenever they were on duty. ...

MR. HAGELAND commented:

This lawsuit came as a surprise to me because I've always considered myself to be a fair person, and I've always paid my bills on time, and I've always paid the pilots well. It was a real surprise. I was operating under the assumption that pilots were exempt. ... The pilot that brought this suit, when we interviewed him down in Florida where he lives now, ... he also said he was paid fairly, and he didn't have any complaints about the way he was paid. And he didn't know he was suing me personally, he didn't know he was suing ... Ron Tweto's widow and ... children either, but that's the lawsuit - it's against us personally also. And I'm sorry I didn't bring our financials or I could show you that ... [we'll go bankrupt]. ... We employ 180 people plus 72 village agents that are contract people. It won't ruin the state or anything but it'll sure make a hole in those persons' lives.

[4:59:21 PM](#)

REPRESENTATIVE GRUENBERG characterized this information as key for him in his consideration of this issue. He stated that he has no desire to get into Mr. Hageland's financial records, but he said, "That's a most important statement that you've made."

REPRESENTATIVE GRUENBERG made a motion that the witness be sworn in and repeat his statement under oath.

The committee took an at-ease from 4:59 p.m. to 5:03 p.m.

[5:03:24 PM](#)

CHAIR McGUIRE noted that under AS 24.20.060, the legislature has the power to administer oaths, issue subpoenas, and compel the attendance of witnesses. She asked that Mr. Hageland continue with his testimony, and if a written oath is brought to the committee from Legislative Legal and Research Services, the committee will address the matter then.

REPRESENTATIVE KOTT predicted that if all the plaintiffs came forward, Mr. Hageland might have to pay out around \$2.8 million, and asked Mr. Hageland what this payment would do to his business.

MR. HAGELAND said he'd have to file for bankruptcy, and pointed out that he has sworn to this in an affidavit in court during prior testimony.

REPRESENTATIVE GRUENBERG asked that that affidavit be submitted to the committee, and noted that no written oath would then be needed.

CHAIR McGUIRE remarked that this would be the cleanest way to approach the situation.

[5:07:17 PM](#)

REPRESENTATIVE GARA said:

I want to sort of assess the claims that have been made to me about what notice [Mr. Hageland] was on. There's been some testimony here that starting around 1997, people started to file lawsuits claiming that this statute had been wrongly interpreted and people

were entitled to overtime. And then somewhere around that time there was an effort to change the law in the legislature. Can you tell me, by 2000 ... were you aware of any of ... the efforts to change the law or [of] the legal disputes - that people had been legally challenging this rule?

MR. HAGELAND replied that he doesn't remember anything about a 1997 lawsuit. He said, "If I had, I would [have assumed] that it was probably something they were paying by the hour and not the way we were paying." He explained that his company paid pilots by the month until 2000, when it was switched to a daily pay rate to accommodate the pilots that were working a little extra. He said that the 2003 legislation was the first effort to change the law that he knew of.

5:11:59 PM

RICHARD CLARK, Pilot, Hageland Aviation Services, Inc., testified that he has been flying for Hageland Aviation Services for nine and a half years. He said, "They've always been fair, they've always been generous and honest." He remarked that pilots from different companies talk with each other and he has never heard any negative statements about [Hageland Aviation Services] from the pilots he works with. He commented that most of the pilots from other companies want to work at Hageland Aviation Services because they know it's a good company. He said that he was first made aware of the lawsuit through a letter that said he was in it unless he opted out, which he did right away and without reservation. He said: "I believe that those pilots that are still working for the company that did opt out didn't do it because of coercion or fear for their job. I believe they did it because they like the company. They don't want the company to go bankrupt." He remarked that the general consensus amongst the pilots he has spoken with is that current employees are worried that the lawsuit will have a negative effect on the company.

REPRESENTATIVE KOTT asked for information about Mr. Clark's piloting experience.

MR. CLARK answered that he has been flying since he was 17 years old and has logged in about 14,000 hours. He said that he has flown every plane that Hageland Aviation Services has, and is now flying the company's largest plane. He noted that he took a break for about 20 years, but he missed the business. He said,

"In the aviation business, people care about their job and it's a professional atmosphere."

5:16:51 PM

REPRESENTATIVE KOTT asked Mr. Clark if he would consider himself a professional.

MR. CLARK replied affirmatively.

CHAIR McGUIRE asked Mr. Clark to discuss the wage and hour issue, and to compare current payment methods to those used 20 years ago.

MR. CLARK commented that he's seen companies that pay by the flight hour as opposed to a salary. He said that you can always tell when someone is getting paid by the flight hour because, "they fly a lot further out before they turn to come in." He offered his belief that pilots are mainly concerned with not breaking a regulation and he offered examples of this.

5:19:52 PM

IGNATIUS BEANS, JR., Safety Check Pilot, Hageland Aviation Services, Inc., testified in support of SB 105. He stated that he has been employed by Hageland Aviation Services for almost seven years, that he was born and raised in Mountain Village, Alaska, that has known Mr. Hageland for a long time, that he is retired from the Alaska National Guard where he served 23 years. He said that it was always his intention upon retiring from the Alaska National Guard to fly in Western Alaska, and remarked that Hageland Aviation Services has always been very fair with him. He said: "I took the job knowing what I was going to make, knowing what my set times were. He was pretty up front with me. If I had a pay problem, I called [Mr. Hageland and he took care of it]." He stated that he was distressed to learn of the lawsuit, and he immediately opted out. He characterized the lawsuit as bogus, and said that he has not seen any pilots being pressured to opt out or to stay in the lawsuit.

REPRESENTATIVE KOTT asked Mr. Beans how long he has been flying.

MR. BEANS answered that he got his pilot license in 1978, flew with the National Guard from then until his retirement in 1995, and joined Hageland Aviation Services in 1998.

REPRESENTATIVE KOTT asked Mr. Beans if he considered himself a professional.

MR. BEANS replied affirmatively.

[5:25:17 PM](#)

PETER C NOSEK, Attorney at Law, testified that he is representing about 18-20 pilots that have established overtime claims against Hageland Aviation Services. He pointed out that the Alaska Department of Labor and Workforce Development (DLWD) has never taken the position that air carriers are exempt from Alaska law. He said:

Since 1980 the [DLWD] position has been that ... intrastate air carriers such as [Hageland Aviation Services] are subject to the law and they must comply with the law. So this isn't a federal preemption issue; this is, "Did Hageland Aviation comply with the law?" And in fact there is a 1984 attorney general's letter which further explains its 1980 letter. And in 1984, the attorney general said in no uncertain terms, if you fly intrastate, you are not preempted by the federal Railway Labor Act unless you have a collective bargaining agreement. And that also has been submitted to you. So there should be no confusion that the [DLWD] has never considered air carriers exempt from Alaska law; they've always had to comply with Alaska law, and that is [to] treat their employees as professionals. And if you want the privilege of paying a professional a salary, you have to follow what the law says. [Hageland Aviation Services] did not do that, and there's no question that [it] did not do that, and the superior court has already established that they violated the law.

MR. NOSEK continued:

The issue I would like to address is this [issue of] fairness. This has been portrayed as purely a technicality of the law, and that's not quite correct. What Hageland did in violating the law was, if a pilot showed up, missed the first part of his day of work, he got docked a half day's pay. That's against the law. If you show up for an hour, you get your full salary. ... [Hageland Aviation Services] also failed to provide any additional pay if they worked over

eight hours in a day. So Hageland Aviation tried to have the best of both worlds: dock them if they miss part of the day, don't pay them extra when they work late.

MR. NOSEK stated that the pilots want flight hours so that they can fly for a larger carrier, and so the pilots don't have a lot of choice, "They take what they can get and get in the hours in hopes of going to a bigger carrier." He stated:

The bill now before this committee is not really about the air carrier industry. The law was changed two years ago to protect the industry; you can only file a lawsuit for two years. So the industry has received the protection it desires. What's at issue here is whether we're going to retroactively exonerate Hageland Aviation for its violations of the law. And what this committee needs to understand is that that law was changed in 2003. Hageland's lawsuit was filed in 2002, long before there was any change in the law. These pilots ... went to the [DLWD] and asked, "Are we subject to the Wage and Hour Act?" The [DLWD] said, "Yes." And that was in 2002, and that letter has been submitted to the committee. So in good faith, based upon guidance from the [DLWD] under the law as it was written, this lawsuit was filed over a year before there was any change in the law.

MR. NOSEK continued:

The issue then was very simple: Did Hageland break the law or not? And that has already been established. And that raises the constitutionality issue, and that is: These pilots have a right to overtime under the law that governed their employment. In fact, that law is part of their employment contract. As a matter of law, their employment contract includes their overtime rights, and that is part of the Alaska statute. So these pilots performed the labor, they're entitled to it under the law, and they sought to enforce their rights under the law. And the court has granted them summary judgment.

That creates a vested property right to that overtime, and to reach back five years in time and say, "We will change what the law was five years ago," takes away that vested property right, and I believe it is simply

unconstitutional under either the federal or the Alaska constitution. And so if this bill were to fail ultimately because of the unconstitutional nature of it, it takes away the protection for all air carriers by overreaching to try and take away that summary judgment right that's already been established; it jeopardizes the entire bill that is before the committee.

MR. NOSEK concluded:

Now a lot has been raised about the amount of money that is at issue in this lawsuit. ... No one started this lawsuit simply about money. Before this lawsuit was filed an offer was made to Hageland Aviation: \$40,000 and the lawsuit would be released, waived, and never filed. ... And Hageland Aviation refused to even speak with us.

[5:31:08 PM](#)

REPRESENTATIVE DAHLSTROM sought clarification regarding the \$40,000 offer.

MR. NOSEK explained that the offer was made [by himself] to the president of Hageland Aviation Services and their counsel. He said that as a result of their refusal to accept the offer, the lawsuit was filed.

REPRESENTATIVE DAHLSTROM asked how many people Mr. Nosek was representing when he made that initial offer.

MR. NOSEK clarified that at the time he was representing only one pilot. He stated that there are currently about 18 pilots and only one pilot who has not physically been contacted, while 60 pilots have chosen to opt out of the lawsuit. He said that a significant number of the pilots have told him that they are opting out because they are afraid of retribution and afraid for their jobs. He gave the example of one person who, in his deposition, said that he supported the lawsuit; that same day the person was called in to see his current employer, another air carrier, after which he called Mr. Nosek's office to back out of the lawsuit.

MR. NOSEK continued:

The issue has been raised about whether or not these individuals are professionals. A professional is a creation of the Alaska statute, and there are several requirements: if you want the privilege of paying a salary you have to treat them as professionals and the court has already determined that Hageland Aviation simply did not comply with those laws. And so what the issue before the committee is, "Is there a justification for reaching back in time and exonerating those violations of law?"

5:34:08 PM

REPRESENTATIVE GARA noted that he doesn't like the legislature to choose sides in pending lawsuits, and he noted that he has never voted to retroactively alter the outcome of a lawsuit. However, he said that the only thing that concerned him a bit was the statement that the lawsuit could put Hageland Aviation Services out of business. He asked Mr. Nosek to comment on this. He also asked if Mr. Nosek had an estimate of the outstanding legal claims against the company.

MR. NOSEK acknowledged that an affidavit was submitted that said that a liability of \$250,000 would bankrupt Hageland Aviation Services. However, he pointed out, the company does not own the aircraft it flies. He commented, "It's a shell corporation that owns virtually nothing." He explained that everything is owned by two other separate companies which are both owned by the same two individuals who own Hageland Aviation Services. He said:

To say that Hageland Aviation would go bankrupt is to say that an empty shell corporation would go bankrupt, and that is precisely why the individual owners who also own all those airplanes in different companies have also been sued. The Wage and Hour Act specifically allows individuals to be sued as employers precisely for that reason - so that you can't hide assets and simply allow a shell corporation to go bankrupt.

MR. NOSEK noted that he has seen the financials for those companies. He said that since Mr. Hageland has already paid \$500,000 in attorney fees, he doesn't see the \$250,000 lawsuit bankrupting Hageland Aviation Services. He pointed out that there are 20 individuals in the class action lawsuit, and perhaps 15 of those will file a claim. Because some of the individuals were employed by Hageland Aviation for only the

first few months of the claim, those claims could be as small as \$2,000 or \$5,000. He estimated that the larger claims could be around \$50,000. The court has already ruled that because Hageland did not, in good faith, attempt to comply with the law, the pilots are entitled to liquidated damages, he noted, which would equal double damages.

MR. NOSEK pointed out that when the lawsuit began in 2002, it was agreed that the documents showing hours worked by the employees would be saved. However, he said, Hageland Aviation destroyed all of those documents, and therefore there is no longer any way to determine what the pilots are owed. He surmised: "But it certainly will not be \$140,000 per 18 pilots. I do not believe it would ever grow that large."

CHAIR McGUIRE asked how much the [law firm] would be paid as a result of the settlement.

MR. NOSEK replied that that would be determined by the court. He explained: "In a class action, the amount of attorney fees is up to the discretion of the judge. So the judge could identify a method for determining a reasonable attorney fee, or he could simply follow the Wage and Hour Act and look at the number of hours that it took to pursue the action."

CHAIR McGUIRE asked Mr. Nosek if he intends to make a filing as to which payment method he prefers.

[5:40:38 PM](#)

MR. NOSEK answered that he has not thought about that issue yet. He said, "I imagine it would just be asking for our hourly rate, but we wouldn't ask for a contingency fee or some enhanced."

REPRESENTATIVE DAHLSTROM asked what Mr. Nosek's hourly rate is.

MR. NOSEK responded that his hourly rate is \$200.

REPRESENTATIVE DAHLSTROM asked if Mr. Nosek is the only attorney working on this case.

MR. NOSEK replied that he is the primary attorney on the case, and that there is another attorney who occasionally works on the case. In response to further questions from Representative Dahlstrom, he said that the other attorney is more senior than himself and would therefore have a higher hourly rate.

5:41:30 PM

REPRESENTATIVE GARA asked if there are any pending offers to settle on the case.

MR. NOSEK replied that there are none. He reiterated that the first offer was rejected with the message that Hageland Aviation Services would rather go bankrupt than settle with the pilots.

CHAIR MCGUIRE asked Mr. Nosek whether, if this legislation continues to move through the process, he is swayed by any of the arguments made regarding the danger that pilots might face from taking risks when receiving an hourly pay rate.

MR. NOSEK replied that he is not compelled by those arguments. He said: "The argument boils down to this: that they cannot safely pay a pilot and comply with the law. ... And that argument just doesn't hold merit; there are a number of different ways that pilots could be paid to operate in a safe fashion and comply with the law." He pointed out that the claims against the company are not claims against the industry as a whole, but against Hageland Aviation in particular. He said:

You can pay a salary to a pilot. ... He gets his salary no matter how much he works; he doesn't have to fly in nasty weather. But if you are paying a salary, you can't dock them if they show up late. That's what Hageland did. There are a number of ways you can pay pilots, address those safety concerns, and comply with the law. So there really is not an issue of trying to comply with the law and be safe at the same time. And as far as the concern that this would drag the industry down: the law was changed two years ago, and there are no claims for overtime from the date of that law forward.

I think that the constitutionality of taking away a vested right that has been recognized by a summary judgment could be easily accomplished and save the bill. ... The bill reads that it is retroactive to January of 2000 and applies to those claims that are not determined by final court judgment prior to the effective date. By simply removing one word, the word "final," that avoids the constitutionality problem of the summary judgment that a court has already issued against Hageland Aviation ... and yet does not expose

any other air carrier in the state to any risk whatsoever. And so it would be a balancing between recognizing an intent to protect the industry, and recognizing the valid and established overtime claims that have been established in court thus far. ... Simply deleting the word "final" ... would accomplish both of those tasks.

CHAIR McGUIRE noted that the legislature has passed retroactive legislation in the past. As policy makers, they are forced to look at the broader impacts of legislation. She offered her belief that the costs of class action lawsuits are further reaching than one would anticipate. She surmised that even if Hageland Aviation did stay in business, they would have to raise their passenger rates and thus impact people who have no other way to travel to the small communities.

[5:48:35 PM](#)

MR. NOSEK, in response to a question, noted that the Railway Labor Act exemption used to be part of Alaska law, and 1972 the legislature made a policy decision that it did not want the Railway Labor Act exemption to apply under Alaska law and so it was repealed. He said: "So this very exemption that is now being sought to be made retroactive used to be a part of Alaska law ... and the legislature chose to remove it. So it was an affirmative decision to remove that federal preemption from Alaska law." He opined that this [continual changing of the law] is a harmful public policy because it undercuts confidence in the law and creates confusion.

REPRESENTATIVE GARA commented: "Isn't their argument not whether ... the Alaska Wage and Hour Act applies but whether, ... under the Alaska Wage and Hour Act, Hageland [Aviation] was paying its employees correctly? ... Isn't it their position that ... under Alaska law, ... you don't have to pay overtime?"

MR. NOSEK said he's heard it stated both ways. He elaborated:

The position from the [DLWD] and the attorney general is that Alaska law does apply to an intrastate air carrier unless they carry mail and have a collective bargaining agreement and so forth. It does apply to intrastate air carriers. The question then is, are you complying with the law and treating them as exempt professionals as is laid out in the law. If you

properly fulfill the elements of a professional employee, then you don't have to pay overtime.

5:53:45 PM

MIKE BERGT, General Manager, Alaska Central Express, Inc. (ACE), after explaining his company's background, noted that ACE has been sued. The suit was filed in July 2004, and the claim was that ACE failed to pay overtime to a pilot who had been with the company since 1998. He said that there have been two lawsuits filed since the passage of the state exemption in 2003. He noted that ACE pays its pilots an hourly wage. He stated his understanding that it is not the physical flying of the aircraft that determines whether an aircraft is intrastate or interstate; it's the traffic that it carries. He offered an example of a passenger who is traveling ultimately between two states, but only taking the particular air carrier within one state, that air carrier is still considered to be an interstate carrier. Therefore carriers that fly mail originating from all parts of the world would be considered an interstate carrier. He assured the committee that ACE has never taken advantage of its pilots, and noted that the pilot who filed the lawsuit had never filed a grievance with the company.

MR. BERGT stated, "I'm here to encourage this committee to support SB 105." He opined that the suit that was brought against ACE was the result of the lawsuit brought against Hageland Aviation. He said that there are some attorneys in the state that have learned of the potential windfall in the Hageland case, and he commented that the pilot who filed a lawsuit against ACE had originally been approached by an attorney who told him he had a potential claim against ACE. He noted that this attorney has been disqualified by the state district court because the attorney worked for the law firm that acts as general counsel to ACE. He said:

I think attorneys see an opportunity to take advantage of the window that was created when the legislative body passed the state overtime exemption in 2003, and are taking advantage of the situation in which air carriers, large and small, were acting in good faith with the policy set forth by the [DLWD] 20 years ago.

MR. BERGT pointed out that larger air carriers have had the same difficulty and confusion regarding overtime-pay laws. He said, "This bill is not about taking away any rights of pilots or employees; it is reaffirming what has been the general practice

of air carriers who've acted in good faith and in accordance with state policy for the last 20 years."

6:00:19 PM

GRANT THOMPSON, President, Cape Smyth Air Service, urged that SB 105 be passed. He relayed the makeup of his company, assuring the committee that his company would never try to circumvent the law. He commented that he thought his company was paying the pilots fairly and never thought that the current method was in violation of the law. He noted that most carriers pay pilots in the same way. He added that companies try to take care of their pilots because if pilots feel that they are not treated fairly, they will go to work elsewhere.

CHAIR McGUIRE asked whether the lawsuit against Cape Smyth Air Service was against just the company or against Mr. Thompson personally as well.

MR. THOMPSON replied that the May 2004 lawsuit was against both the company and himself, although he is an employee of the company; the company is owned by the estate of Thomas P. Brower, who was Mr. Thompson's father-in-law.

6:04:02 PM

TOM NICOLOS, Cape Smythe Air Service, testified in support of SB 105. He pointed out that in a September 3, 1986, letter to the executive director of the Alaska Air Carriers Association, [the DLWD] stated that it had adopted the position of the United State Department of Labor that commuter aircraft and air taxi pilots are exempt only if involved in interstate transportation of passengers and/or substantial hauling of the mail; if their activities are solely intrastate or without the mail hauling function, none of the exemptions would apply. He noted that every carrier currently being sued in Alaska carries substantial amounts of mail.

MR. NICOLOS continued:

Through your own counsel in a memorandum to [Chair McGuire] dated January [2005], they said a person's due process rights are not violated if that person becomes deprived of the right to sue under a statute which had formerly given them claim, but that statute was changed or removed prior to a final court judgment. So I would encourage you both to leave the

word "final" in this bill, and understand that the [DLWD], in a letter in September of 1996, did give the carriers the understanding that they were exempt from the Alaska state statutes as long as they were hauling mail.

[6:06:21 PM](#)

MARK JOHNSON, Pilot, Hageland Aviation Service, Inc., relayed that he's been in Alaska since 1980 and has worked for a number of air carriers in Western Alaska. He commented that he has been paid both hourly and by salary, and he opined that is it far safer to pay pilots a salary. He noted that he has witnessed pilots who are paid by the hour fly in very bad conditions just so that they can get in their flight hours and get paid. He said he would vouch for Mr. Hageland's integrity, and that this was the best job he'd ever had. Regarding the issue of retroactivity, he said it seems to him that in the interest of justice, either all pilots should get overtime or none of them should.

[6:12:18 PM](#)

MICHAEL CHARLIE, Pilot, relayed that he has been flying for Hageland Aviation Services, Inc., in the Bethel area for 6 years, and that he anticipates flying for the company for another 25 years because he is comfortable with the company and its method of payment. He surmised that all of the [other] pilots that have opted out of the Hageland litigation feel the same way. He recounted how he first became familiar with the company, which of his relatives also work for the company, and what his typical workday involves, and said that Hageland Aviation Services supports local hiring and is much needed in the community. In conclusion, he said he supports SB 105.

[6:14:27 PM](#)

KAREN CASANOVAS, Executive Director, Alaska Air Carriers Association (AACA), after relaying that the AACA represents more than 67 air carriers operating in Alaska and over 75 supporting aviation businesses, said that the AACA supports SB 105 and believes that without passage of the bill, economic burdens at several tiers will impact the air carriers in the AACA. The AACA's certificated carriers ensure a high level of safety when they operate, she assured the committee, as well as fairness to all of their employees, and have operated in full compliance with the DLWD's 1986 position. Additionally, the AACA feels

that [a failure to adopt SB 105] will dramatically alter the contractual relationships and expectations between government entities, such as the United States Postal Service, and other service providers that continue to serve communities around Alaska. An informal poll conducted a few years ago by the AACA regarding how pilots were paid revealed that flight crews in various Alaska-based companies preferred "the exempt status." In conclusion, she reiterated that the AACA supports passage of SB 105.

[6:16:53 PM](#)

REPRESENTATIVE KOTT said there seems to be some controversy or misunderstanding over the DLWD's position regarding whether pilots are exempt from "the overtime law."

GREY MITCHELL, Director, Central Office, Division of Labor Standards & Safety, Department of Labor & Workforce Development (DLWD), offered that the confusion probably stems from the fact that there are two different questions being asked. One question is whether pilots in general are exempt due to federal preemption, and that is federal preemption based on two different concepts: one is found in the Railway Labor Act, and the other is found in the commerce clause of the U.S. Constitution and limits states, in certain circumstances, from establishing laws that tend to impinge on interstate commerce. The other question is whether "these pilots" are exempt because they qualify as professionals.

MR. MITCHELL offered his belief that the Department of Law's 1980 memorandum only applies to the two preemption questions, but does not address the question of whether "these employees" fit within the recently enacted provision that essentially covers all air carriers that are subject to the Railway Labor Act, and noted that the only air carriers subject to the Railway Labor Act are those that are interstate air carriers or those that have a contract to carry the U.S. mail. It is hard to imagine that all air carriers in Alaska don't qualify for the exemption under the Railway Labor Act, that there would be an air carrier in Alaska that isn't engaged in interstate commerce, he remarked, and suggested that the question being addressed by the Hageland litigation is whether the pilots named in the litigation qualify for an exemption as professional employees. He pointed out that in order to qualify as a professional employee, one must be paid on a salary- or fee-basis; thus being paid by an hourly method or a daily method could, in most cases

- unless one is paid a daily rate of at least \$300 - preclude a person from being considered a professional employee.

REPRESENTATIVE KOTT used a hypothetical example wherein one of his employees claims that he isn't complying with the [Alaska] Wage and Hour Act, and asked what the DLWD's procedure would be in such a situation.

MR. MITCHELL said that DLWD would first contact the employer and notify him/her that a claim had been filed and ask for a response; then, depending on what the employer's response is, the DLWD might perhaps file a claim in court. He offered that unless the employee is a child and is performing dangerous work, the DLWD would not resolve such a situation via an injunction.

MR. MITCHELL, in response to questions, reiterated his belief that the DOL's 1980 memorandum does not address the question of whether a particular pilot qualifies for the professional employee exemption.

REPRESENTATIVE GARA asked whether the 1980 memorandum gave air carriers the idea that they didn't have to pay pilots overtime.

MR. MITCHELL said it would have as long as certain conditions were being met. As a result of the 1980 memorandum and additional clarification provided via a 1984 DOL opinion/memorandum, the DLWD created a "decision tree" that works through a set of questions. The first question is whether the carrier is an interstate carrier; if it is, then the [Alaska] Wage and Hour Act doesn't apply due to the commerce clause. If the air carrier is not an interstate air carrier, then the question becomes whether the air carrier transports the U.S. mail; if it does, then [Alaska] Wage and Hour Act does not apply as long as the employee is subject to the Railway Labor Act, which generally includes any worker engaged in either interstate commerce or in the transport of U.S. mail. If an intrastate air carrier doesn't carry the U.S. mail, then the question becomes whether the worker is a member of a flight crew covered by a collective bargaining agreement; if the employee isn't, then the [Alaska] Wage and Hour Act applies, but if the employee is covered by a collective bargaining agreement, "then we're back to this Railway Labor Act preemption issue," he concluded, "and there wouldn't be coverage."

[6:27:44 PM](#)

MR. MITCHELL, in response to questions, reiterated that once the federal preemption issues are addressed, then the issue of whether an employee qualifies for the professional employee exemption must still be addressed.

REPRESENTATIVE GRUENBERG asked for clarification regarding employees that are covered by a collective bargaining agreement.

MR. MITCHELL reiterated that the [Alaska] Wage and Hour Act would apply to employees who are not covered by a collective bargaining agreement.

[CSSB 105(L&C) was held over.]

ADJOURNMENT

The House Judiciary Standing Committee was recessed at 6:33 p.m. to be continued at 3:00 p.m. on April 7, 2005.