ALASKA STATE LEGISLATURE
HOUSE RESOURCES STANDING COMMITTEE
March 12, 2007
1:03 p.m.

MEMBERS PRESENT

Representative Carl Gatto, Co-Chair
Representative Craig Johnson, Co-Chair
Representative Bob Roses
Representative Paul Seaton
Representative Peggy Wilson
Representative Bryce Edgmon
Representative David Guttenberg
Representative Scott Kawasaki

MEMBERS ABSENT

Representative Vic Kohring

COMMITTEE CALENDAR

HOUSE BILL NO. 137
"An Act amending the requirements for the identification card needed for sport fishing, hunting, and trapping without a license by residents who are 60 years of age or more."

- MOVED CSHB 137(RES) OUT OF COMMITTEE

HOUSE BILL NO. 149
"An Act relating to the authority of the Department of Environmental Conservation to require certain monitoring, sampling, and reporting and to require permits for certain discharges of pollutants; relating to criminal penalties for violations of the permit program; and providing for an effective date."

- HEARD AND HELD

HOUSE BILL NO. 165
"An Act relating to providing field accommodations for big game hunters."

- HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 137
SHORT TITLE: SENIOR FISHING/HUNTING/TRAPPING LICENSES
SPONSOR(s): FISHERIES

02/14/07	(H)	READ THE FIRST TIME - REFERRALS
02/14/07	(H)	FSH, RES, FIN
02/19/07	(H)	FSH AT 8:30 AM CAPITOL 124
02/19/07	(H)	-- Meeting Canceled --
02/23/07	(H)	FSH AT 8:30 AM CAPITOL 124
02/23/07	(H)	Moved CSHB 137(FSH) Out of Committee
02/23/07	(H)	MINUTE(FSH)
02/26/07	(H)	FSH RPT CS(FSH) 2DP 1DNP 2NR
02/26/07	(H)	DP: WILSON, SEATON
02/26/07	(H)	DNP: JOHANSEN
02/26/07	(H)	NR: LEDOUX, HOLMES
02/26/07	(H)	FSH AT 8:30 AM BARNES 124
02/26/07	(H)	<Bill Hearing Canceled>
03/12/07	(H)	RES AT 1:00 PM BARNES 124

BILL: HB 149
SHORT TITLE: POLLUTANT DISCHARGE PERMITS
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

02/21/07	(H)	READ THE FIRST TIME - REFERRALS
02/21/07	(H)	RES, JUD
03/12/07	(H)	RES AT 1:00 PM BARNES 124

BILL: HB 165
SHORT TITLE: BIG GAME GUIDES AND TRANSPORTERS
SPONSOR(s): REPRESENTATIVE(s) LEDOUX

02/28/07	(H)	READ THE FIRST TIME - REFERRALS
02/28/07	(H)	RES
03/12/07	(H)	RES AT 1:00 PM BARNES 124

WITNESS REGISTER

KATIE SHOWS, Staff
to Representative Paul Seaton
Juneau, Alaska
POSITION STATEMENT: Answered questions regarding HB 137.

KRISTIN WRIGHT, Accountant IV
Finance/Licensing Supervisor
Division of Administrative Services
Alaska Department of Fish & Game (ADF&G)
Juneau, Alaska

POSITION STATEMENT: Answered questions regarding HB 137.

LYNN TOMICH KENT, Director
Division of Water
Department of Environmental Conservation (DEC)
Anchorage, Alaska
POSITION STATEMENT: Presented background information on HB 149 and answered questions.

CAMERON LEONARD, Senior Assistant Attorney General
Natural Resources Section
Civil Division (Fairbanks)
Department of Law (DOL)
Fairbanks, Alaska
POSITION STATEMENT: Presented section-by-section information on HB 149 and answered questions.

STEVE BORELL, Executive Director
Alaska Miners Association (AMA)
Anchorage, Alaska
POSITION STATEMENT: Testified in support of HB 149.

BOB SHAVELSON, Executive Director
Cook Inletkeeper
Homer, Alaska
POSITION STATEMENT: Presented testimony regarding HB 149.

SUZANNE HANCOCK, Staff
to Representative Gabrielle LeDoux
Juneau, Alaska
POSITION STATEMENT: Presented sponsor statement for HB 165.

RICK METZGER
Akhiok, Alaska
POSITION STATEMENT: Presented information as the private cabin owner who alerted Representative LeDoux to the issue addressed by HB 165.

TOM TEMPLE
Fairbanks, Alaska
POSITION STATEMENT: As a private cabin owner, supported HB 165.

ACTION NARRATIVE

CO-CHAIR CRAIG JOHNSON called the House Resources Standing Committee meeting to order at 1:03:57 PM. Representatives Johnson, Gatto, Guttenberg, Roses, Seaton, and Wilson were

present at the call to order. Representatives Kawasaki and Edgmon arrived as the meeting was in progress.

HB 137-SENIOR FISHING/HUNTING/TRAPPING LICENSES

1:04:20 PM

CO-CHAIR JOHNSON announced that the first order of business would be HOUSE BILL NO. 137, "An Act amending the requirements for the identification card needed for sport fishing, hunting, and trapping without a license by residents who are 60 years of age or more."

1:06:35 PM

REPRESENTATIVE PAUL SEATON spoke as chair of the House Special Committee on Fisheries, sponsor of HB 137. He explained that a problem was identified in Alaska state statutes whereby a permanent identification card (PID) is given to any person over 60 who applies for one. This PID serves as a lifetime free-of-charge sport fishing, hunting, and trapping license. About 46,000 PIDs have been issued to date. However, the problem is that people move out of the state and yet retain their PID. The Alaska Department of Fish & Game (ADF&G) has noticed problems with people not supporting Alaska's fisheries by buying a fishing license. This bill converts a PID into a free-of-charge temporary identification card (TID) that is good for a three-year period. The TID is tied to the Permanent Fund Dividend (PFD) for determining eligibility. Each year the Permanent Fund Dividend Division will provide ADF&G with an electronic list of every person who received a PFD the previous year. By checking the PFD list, ADF&G can determine an applicant's eligibility for a TID. Alaska residents who do not participate in the PFD program for philosophical reasons can still receive a TID by showing proof to ADF&G that they were in the state for 185 days of the previous year. The TID rewards the senior citizens of Alaska who remain residents of the state.

1:10:02 PM

CO-CHAIR GATTO stated that his understanding of the bill is that everyone who currently has a PID will get to keep it, but that new applicants can keep [their TIDs] only if they stay [Alaska residents].

REPRESENTATIVE SEATON stated that this is correct. He asked that the committee adopt the committee substitute (CS) because

it incorporates changes requested by ADF&G for clarification purposes.

1:10:52 PM

REPRESENTATIVE WILSON moved to adopt as the working document committee substitute (CS) for HB 137, Version 25-LS0118\O, Kane, 3/7/07.

1:11:10 PM

CO-CHAIR JOHNSON objected for discussion purposes and asked for confirmation on whether only new applicants will be subject to the [TID] system.

REPRESENTATIVE SEATON advised that this is correct. He directed attention to a 2/27/07 opinion from Brian Kane of Legislative Legal Services that confirms that this change is legal.

[The committee treated Co-Chair Johnson's objection as being withdrawn. There being no further objection, Version O was treated as before the committee.]

1:12:24 PM

CO-CHAIR GATTO asked whether non-resident seniors returning to Alaska to fish are taking a disproportionate amount of fish so as to make the bill's provisions worth the effort.

REPRESENTATIVE SEATON responded that the program has developed a bad name and it should not be this way. He explained that there is no requirement to prove anything, an applicant does not even have to submit a driver's license. Cardholders are required to maintain residency, yet there is no way for an officer in the field to verify the person's residency. He expressed his belief that many people who are no longer residents will still return to Alaska to fish even if they must pay for nonresident fishing licenses. Additionally, even if a person leaves the state, he or she will still have a 3-year license. He stressed that the current program is unenforceable and that HB 137 will correct this problem. He also pointed out that the state relies on fishing licenses for funding the monitoring and management of fisheries by the Division of Sport Fish.

1:15:30 PM

REPRESENTATIVE WILSON inquired about the results of the 3/7/07 arraignment of the out-of-state couple who was cited in Hoonah for unlawful sport fishing.

KATIE SHOWS, Staff to Representative Paul Seaton, said that she thinks the couple was reprimanded for this one particular case.

REPRESENTATIVE WILSON asked whether it was correct that the couple had been fishing unlawfully since 2000 and was the couple fined.

MS. SHOWS responded that she will ask ADF&G.

1:16:42 PM

CO-CHAIR GATTO commented that this is an attack on seniors and questioned whether it is an issue that needs fixing because it generates so little revenue.

MS. SHOWS referred to a fact sheet in the committee packet with ADF&G's "best guess" estimate that the revenue lost due to this problem is $137,827. She agreed that this is not a huge sum of money, but that it is something.

CO-CHAIR GATTO inquired whether this assumes that everyone who would qualify would still want to fish even though they would now have to pay.

MS. SHOWS deferred to Kristin Wright of ADF&G.

1:18:58 PM

REPRESENTATIVE ROSES expressed his opinion that this is an equitability issue, not an economic issue, because the benefit of residency for senior citizens is diluted by allowing former residents to [fish for free].

1:21:03 PM

REPRESENTATIVE GUTTENBERG asked whether thought was given to other ways of determining eligibility rather than receipt of a PFD.

REPRESENTATIVE SEATON pointed out that using the PFD database to verify eligibility is easy and simple, plus the database is updated every year. If someone did not get a PFD for philosophical reasons there are still ways for them to get a

TID. He explained that using a driver's license for eligibility is difficult because some states mandate that a person get a driver's license for that state if he or she lives there for a certain length of time during the year, even if the person maintains residency in another state.

1:24:13 PM

REPRESENTATIVE GUTTENBERG stated that it is his understanding that the PFD database is no longer available to the public. He asked how stores selling the licenses access the database will.

KRISTIN WRIGHT, Accountant IV, Finance/Licensing Supervisor, Division of Administrative Services, Alaska Department of Fish & Game (ADF&G), explained that the license database will be housed at ADF&G and will not be public. She said that PIDs are not currently available through stores. Applicants must come to an ADF&G office or field office and the PFD database will then be accessed by ADF&G through the Internet. If the applicant's name is not on the PFD database, he or she will be required to fill out a form. In response to a further question, Ms. Wright noted that there are many field offices located throughout the state - Bethel, Tok, Dillingham, Nome, Kotzebue, and Barrow, to name a few. She said that more than 75 percent of current cardholders applied for their PIDs by mail.

1:26:03 PM

REPRESENTATIVE EDGMON said he agreed that this is an equitability issue and that it is good public policy. Nonetheless, he said that he is concerned this will be problematic for elderly Alaska natives living in the Bush who will now have to get a new license every three years.

MS. WRIGHT advised that she put in a fiscal note to enable ADF&G to notify cardholders well in advance of when their three years is up. A form will be included in the notice for cardholders to fill out and return. In response to a further question, she noted that it is currently too difficult to conduct the application and renewal process over the Internet, but that it might become available in the future. In response to additional questions, Ms. Wright pointed out that a first-time applicant can choose to apply either by mail or in person at a field office or at her [Juneau] office. She noted that renewals could also be done either by mail or in person, and that ADF&G would again verify whether the person had received a PFD or had completed a form with all of the boxes checked off.

1:29:50 PM

CO-CHAIR GATTO asked whether an Alaska "snowbird" with an Arizona driver's license would be precluded from getting an identification card under either the current or new system.

MS. WRIGHT said that, currently, identification does not have to be presented to receive a PID - an applicant only fills out a form that also includes information about his or her driver's license. While an Arizona license would be a red flag, ADF&G would still issue the card and then send the applicant's name to the Alaska Bureau of Wildlife Enforcement for further checking since ADF&G is not an enforcement agency. This procedure would also apply to the TID program proposed by HB 137. The new system would be more foolproof than the current program because a person must qualify for the PFD and cannot just walk in off the street to avoid paying the [out-of-state] license fee. In response to a further question, Ms. Wright clarified that under the new system, ADF&G would not issue a TID without first looking for the applicant's name in the PFD database. The current system does not require any proof of residence except for the applicant's signature on a line.

1:33:16 PM

REPRESENTATIVE GUTTENBERG inquired as to how Ms. Wright built her assumptions regarding who is and who is not eligible, and how many bad licenses were issued each year.

MS. WRIGHT stated that she did not have an assumption regarding how many bad licenses have been issued because ADF&G does not believe the abuse is rampant, only that it is a problem. She commented that ADF&G would like to use this license file for sport fishing surveys and would therefore like this file to be accurate for statistical reasons. She said that she included in her analysis the number of licenses issued annually and then assumed that 50 percent of those people would continue to get a fishing license and 25 percent would get a hunting license. She used this assumption because that is what the rest of the population does. In response to a further question, she confirmed that [the percentages] are only an assumption because there is no way to know for sure.

1:35:17 PM

REPRESENTATIVE EDGMON asked what Ms. Wright thinks about implementing a five year period instead of a three year period.

MS. WRIGHT advised that five years would give a bit more time for people to continue using the TID and that it would be less of an administrative burden. There would be a few more abuses by going with five years, but not a lot.

REPRESENTATIVE EDGMON stated his opinion that this is a sensitive issue for senior citizens who already have this card in place. He requested that a five year time period be considered.

REPRESENTATIVE SEATON explained that any person already possessing a PID is grandfathered into the program and will never need to re-apply. It is only those seniors receiving cards under the new program who will be affected by the three-year time period.

1:38:08 PM

CO-CHAIR JOHNSON closed public testimony after ascertaining that no one else wished to speak.

1:38:35 PM

REPRESENTATIVE WILSON commented that she did not think any senior citizen can complain because for the price of a stamp he or she can fish for free for three years.

1:38:58 PM

CO-CHAIR GATTO asked whether the Association for the Advancement of Retired Persons (AARP) has commented on the bill.

MS. SHOWS reported that Representative Seaton did not contact AARP, nor has he heard from them. She said that only two public comments have been received and that they are in the committee packet - one is the e-mail cited by Representative Wilson regarding the Hoonah couple and the other is an e-mail in opposition to the bill from a senior in District 35.

1:41:04 PM

CO-CHAIR GATTO pointed out that the fiscal note for ADF&G constitutes only a couple of thousand dollars in the out years.

1:41:21 PM

REPRESENTATIVE WILSON moved to report the CS for HB 137, Version 25-LS0118\O, out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, CSHB 137(RES) was reported from the House Resources Standing Committee.

HB 149-POLLUTANT DISCHARGE PERMITS

1:41:54 PM

CO-CHAIR JOHNSON announced that the next order of business would be HOUSE BILL NO. 149, "An Act relating to the authority of the Department of Environmental Conservation to require certain monitoring, sampling, and reporting and to require permits for certain discharges of pollutants; relating to criminal penalties for violations of the permit program; and providing for an effective date."

1:42:18 PM

LYNN TOMICH KENT, Director, Division of Water, Department of Environmental Conservation (DEC), presented background for HB 149. She explained that the federal Clean Water Act (CWA) requires that all wastewater discharges to surface waters be permitted under the National Pollutant Discharge Elimination System (NPDES) Permitting Program. The CWA intends for states to implement or to have primacy for this program, with the Environmental Protection Agency (EPA) serving in an oversight role over the states that implement the program. There are presently 45 states that have primacy for the NPDES program. In Alaska, the EPA is currently the NPDES permitting authority and DEC plays a secondary role whereby DEC certifies that all of EPA's permits will comply with Alaska's water quality standards. The DEC also issues permits for those smaller discharges that EPA does not "get around" to issuing permits for.

MS. KENT informed the committee that in 2005 the Alaska State Legislature, through Senate Bill 110, directed DEC to take all actions necessary to assume authority for the NPDES discharge permitting authority, including responsibility for issuing the permits and for ensuring compliance with the permits. As part of DEC's work with EPA to transfer primacy to the state, EPA has identified several areas where changes to the state statutes are required in order for DEC to have the full complement of statutory authorities that are needed for DEC to assume primacy.

Those state authorities are adjusted by HB 149 to match the federal authorities. Each change addresses a specific concern that is raised by EPA as something that must be fixed.

1:44:13 PM

CAMERON LEONARD, Senior Assistant Attorney General, Natural Resources Section, Civil Division (Fairbanks), Department of Law (DOL), pointed out that all of the sections of HB 149 are designed to respond to comments that the state has received from EPA and they are put together into a statutory package that EPA can approve. Therefore, each section of the bill has its own background of negotiation between the state and EPA.

MR. LEONARD explained that Sections 1 and 5 are linked and that both address where monitoring and reporting requirements can be placed - either within a discharge permit or outside of a discharge permit. Conditions of permits are enforceable by third party lawsuits, and some members of the work group were concerned that certain monitoring and reporting requirements that were not tied to compliance had been placed in permits by EPA, thus exposing the permittees to third party lawsuits. Therefore, DOL collaborated with the work group to determine a way to require monitoring and reporting outside of permits. The language in Section 1 clarifies that DEC has this power.

1:46:18 PM

MR. LEONARD noted that Section 2 deals only with terminology. He explained that the CWA, the federal law under which the state is trying to assume the permitting program, uses different terminology than that used in Alaska statutes. For example, the federal term for the placement of pollutants into water is "discharge," whereas Alaska statute uses the term "disposal." Adding the phrase "**or discharge**" and cleaning up the other language makes it clear that DEC has the same range of authority over activities that EPA has under the federal law.

1:47:11 PM

REPRESENTATIVE SEATON asked for an explanation of any possible consequences that could result from the removal of the exemption for domestic sewage in Section 2.

MR. LEONARD related that this issue is being removed from Section 2 because it is covered under Section 4. He explained that under current law this issue is dealt with in two different

places and is stated differently, and that this results in confusion.

1:48:18 PM

MR. LEONARD described the amendments embodied in Section 3(b) of the bill which lists the different kinds of authorizations that DEC can use to allow a discharge. One of EPA's comments, he said, was that it was unclear to EPA that it was DEC's decision as to which one to require for a given circumstance. This change clarifies that it is indeed up to DEC which requirement applies to any given circumstance.

1:49:08 PM

MR. LEONARD noted that Section 4(e) addresses seven different exemptions, or exclusions, from the current requirements for getting a permit from DEC, and the exemption that Representative Seaton inquired about is covered by Subsection (e)(1). This change tracks federal law which contains an exclusion from the requirement of getting an NPDES permit for domestic sewage discharged to a publicly owned treatment works (POTW). He explained that the work group tried writing the state's exemption more broadly to deal with any treatment work whether publicly or privately owned. However, EPA required that the state's program be just as inclusive as EPA's, and EPA only excludes discharges of domestic sewage to POTWs. Thus, Section 4(e)(1) makes state law the same as federal law.

MR. LEONARD pointed out that, currently, any discharge of domestic sewage into surface waters that is not via a POTW, is subject to the requirement of getting a federal discharge permit. There is no exemption from the NPDES permit requirement for discharges made into surface waters - whether or not a person knows of this requirement and whether or not a person has a permit. Therefore, state law will be the same as federal law on this point. What this means in practice is probably a question that should be asked of DEC. However, he said that he thought there are tools available under the program, such as general permits, where DEC will be able to authorize a whole category of discharges without having to do individual permits.

1:51:56 PM

MR. LEONARD proceeded to Section 4(e)(4) relating to incidental discharges, such as discharge of water from trenching, drilling, or other types of construction activities. He noted that

current state law uses the term "surface water of the state" and federal law uses "waters of the United States," a term that may not mean exactly the same thing as surface water. Section 4(e)(4) aligns the state's terminology with EPA's.

1:53:04 PM

MR. LEONARD next discussed Section 4(e)(7) regarding the discharge of munitions. He explained that the exemption for the discharge of munitions remains in place but that the exemption does not apply if it results in a discharge into waters of the United States. Munitions are specifically covered in the definition of pollutants under the CWA, therefore discharge of munitions to waters of the United States requires an NPDES permit. In response to a question, Mr. Leonard stated that under current law, a shooting range that projects over water is required to get a discharge permit from EPA. Once the new program is approved, permit applications will instead be made to DEC.

1:54:45 PM

MR. LEONARD moved to Section 5(h) and reminded the committee that this section is linked with Section 1. He said that this section is related to protecting permittees from third party suits for monitoring and reporting requirements that are not tied to compliance, either with permit limits or with water quality standards. If HB 149 passes with Sections 1 and 5 remaining as they are written, DEC will be given the choice to put those sorts of requirements either in permits or outside of permits. He said that this will satisfy EPA because this is the authority that EPA has now.

1:56:02 PM

REPRESENTATIVE WILSON asked whether she is correct in understanding that currently at the federal level there is a choice of putting a requirement either in the permit or outside the permit, and that this bill will give the state that same choice.

MR. LEONARD confirmed that this is exactly what he is saying.

1:56:31 PM

REPRESENTATIVE GUTTENBERG asked for an explanation of Section 5(h) in regard to changing the word "mandated" to "**authorized**."

MR. LEONARD noted that this refers to Section 308 of the CWA which gives EPA broad discretion for the kind of monitoring and reporting that a permittee is required to do. Changing the word "mandated" to "**authorized**" gives DEC this same broad discretion.

1:58:16 PM

MR. LEONARD then addressed Sections 6 and 7. He explained that terminology is again the issue, and that these sections clarify that the state's use of the term "waste material" includes "pollutants" as defined by the U.S. Congress in the CWA.

1:59:11 PM

REPRESENTATIVE SEATON asked why not use the same terminology that is found in federal law if the point is for the state to be able to take over enforcement of the CWA.

MR. LEONARD explained that AS 46.03.100 deals with subjects that go beyond the Alaska Pollutant Discharge Elimination System (APDES) program. For example, it deals with discharges of materials to land, such as the permitting of land fills. While developing the APDES program, the state faced the choice of how much to do by changes to the statute and how much to do by regulations. The state tried to create the regulatory program to satisfy EPA within the broader umbrella of authority represented by AS 46.03.100 even though it led to these issues of terminology. Numerous programs are run by DEC under the authority of AS 46.03.100, and changing all the language in that statute would cause problems in other areas.

2:00:41 PM

REPRESENTATIVE SEATON asked whether the term "pollutants" will be used by the state when dealing with NPDES permits, or will the state now substitute the term "waste material" because it is more expansive than "pollutants."

MR. LEONARD said that the state will use the term "pollutants" because that is the definition that has already been incorporated into the regulations promulgated to implement the program. This proposed change in Sections 6 and 7 just makes it clearer that this is what the state legislature intended.

2:01:49 PM

MR. LEONARD lastly explained Section 8(i) regarding criminal penalties for violations of the program. Under the CWA, the mens rea, or "state of mind," that must be proven when seeking a criminal sanction for violation of the program is "simple" negligence. However, current state law requires that "criminal" negligence be proven, which is a slightly higher state of mind. For the state program to be approved, EPA is requiring that state statutes be revised so that violations of the APDES program only have to be proven with "simple" negligence, and this is what Section 8(i) does.

2:03:19 P1M

CO-CHAIR GATTO inquired whether dumping water from a cooler of beer constitutes simple negligence under the terms of HB 149, page 1, lines 13 and 14.

MR. LEONARD remarked that it is absurd that there is no de minimis exception to CWA requirements. In theory, if the discharge from a person's cooler was to surface waters, a purist could argue that it requires an NPDES permit. No one in their right mind would actually say that, but there is case law that says there is no generally acknowledged de minimis exemption to the NPDES permit program. Therefore, he said, it is easy to come up with absurd hypotheticals about the theoretical reach of the program. In response to a further question, Mr. Leonard stated that he did not think anyone would argue that the drainage from a cooler would constitute waste material or pollutants. In response to another example regarding hunters camping out, he explained that in the real world there is a functional de minimis doctrine whether the courts would recognize it or not, the only question is where is the line drawn between truly de minimis activities and what needs to be permitted.

CO-CHAIR GATTO remarked that this is his point and he is looking for the line that determines whether or not a situation is a violation.

MR. LEONARD related his belief that one of the reasons that industry supports the State of Alaska taking over the program is the hope that state regulators will be more responsive and more realistic than EPA's Region 10 office located in Seattle. He said he did not know if this would make the problem any worse than it is now, but that the state is not adopting any requirements that are not already there under federal law. If HB 149 goes through, then the state will be running the program.

2:08:12 PM

REPRESENTATIVE GUTTENBERG requested Mr. Leonard to expand on an earlier comment that the type of permits, or conditions for permits, could be tailored more tightly if the term "mandated" is changed to "**authorized**" under Section 5 of the bill.

MR. LEONARD explained that he initially insisted that the word "mandated" was fine, but that ultimately the state went along with EPA's desires and changed it. He remarked that the difference between the terms is a bit elusive, but that the way he thinks the law would be implemented in practice is that DEC would still exercise its discretion and put monitoring and reporting requirements in permits that deal with compliance, for example permit limits and water quality standards. Mr. Leonard related his belief that DEC intends to keep requirements for informational types of monitoring and reporting outside of the permits, and that this information will be used in future decisions regarding whether there ought to be permits for other parameters. He noted that this is the plan even though it is not found in the language of the bill. The bill is specifically only for satisfying EPA's concerns. He stated that this is where the line is drawn - if it is tied to compliance with permit limits and with water quality standards, then the requirements will go in the permits.

2:10:25 PM

MR. LEONARD, in response to a question from Representative Seaton, reiterated that EPA has the ability to choose whether it wants to put the requirements in a permit or outside of a permit. In practice, he explained, EPA puts many of the monitoring and reporting requirements into permits that DEC intends to keep outside the permits. It is because of that and because of some of the third party suits against permittees that the work group was concerned about this point. He noted that EPA sometimes implements what is known as "308 orders" where the monitoring and reporting to EPA are done outside of the permit. He said that historically EPA has put more requirements into the permits themselves than DEC plans to do.

2:11:13 PM

REPRESENTATIVE SEATON asked whether this move to primacy is to preclude enforcement of pollutant discharge permits by third party action, and whether the state will increase its

enforcement to cover situations that are currently being looked after by the public.

MR. LEONARD stated that all of the requirements of the permits issued by DEC will still be enforceable by citizen suits because they are conditions of NPDES permits. For example, the permit limits that control how much pollutants can be discharged are still enforceable. The question is whether to put a particular monitoring requirement into a permit or do it separately via an order. By placing the requirement into the permit, it is made enforceable by the citizen suit mechanism. The intent of taking over the program is not to get rid of citizen suits, but is narrowly focused on monitoring and reporting that does not have to do with compliance.

2:12:44 PM

REPRESENTATIVE SEATON requested that the committee be provided with examples of cases that will now be outside of the permits and will not be enforceable by third parties. He surmised that DEC's budget will need to be increased in order for the state to enforce the requirements outside of a permit.

2:13:25 PM

CO-CHAIR GATTO referred to the third paragraph of Governor Palin's February 20, 2007, letter to Speaker Harris regarding treatment of sewage. He asked whether domestic septic tanks will now fall under requirements for treated sewage.

MR. LEONARD explained that the homeowner with a typical septic tank will not be subject to the program because the discharge will not be to a surface water. Only those homeowners with a [sewage] pipe that goes to surface waters, such as a stream or coastal waters, would be affected by this program.

2:14:21 PM

CO-CHAIR GATTO asked whether a hole for an outhouse that happens to go into an aquifer which drains into a river would be considered a violation of the program.

MR. LEONARD stated that this would not be a violation. He related that there is some case law that talks about when ground water has a connection to a surface water body, but that the few cases that are reported have much stronger facts that demonstrate measurable impacts to adjacent surface waters.

2:15:10 PM

CO-CHAIR GATTO asked whether draining a 500 gallon hot tub onto the surface is a violation.

MR. LEONARD responded that it would not be a violation if it is not to a surface water. If it is to a surface water, in theory someone could say that is thermal pollution because it is heated water going to a surface water. In practice in the real world, nobody permits it and nobody tries to sue because it was not permitted. He said that there is currently a defacto rule of reason in place that he does not think will change.

2:16:34 PM

REPRESENTATIVE EDGMON pointed out a qualifier related to discharge from a point source in Section 4, page 2, lines 29-31, that may address Representative Gatto's hypothetical examples.

2:16:59 PM

CO-CHAIR JOHNSON asked whether the state's current regulations are more restrictive than are EPA's, and whether there is a net gain or net loss to the environmental impact by passing this bill.

MR. LEONARD said no. The changes tighten the state's program by bringing more activities within the scope of DEC's regulation. He explained that EPA will only approve a state program that is as stringent and inclusive as the federal program that it will be replacing. These changes will make DEC's program just as inclusive as EPA's.

2:18:20 PM

REPRESENTATIVE EDGMON inquired as to whether the term "any waters of the United States" includes subsurface waters.

MR. LEONARD replied no. The term "waters of the United States" is defined in the CWA and is tied to navigability; it does not include subsurface or ground water.

REPRESENTATIVE EDGMON asked whether this is addressed in the bill, perhaps through reference to Title 31.

MR. LEONARD said that the definition is not addressed in HB 149 because it is included in the regulations that have been adopted and the regulations follow the federal definition from the CWA.

2:19:10 PM

REPRESENTATIVE GUTTENBERG offered his understanding that there is a legal problem relating to the definition of "waters of the United States" and that this is one of the reasons the state is dealing with this issue.

MR. LEONARD remarked that this is a very active issue at the federal level, including recent decisions by the Supreme Court of the United States. He noted that the scope of "waters of the United States" is dynamic and evolving, and also affects other programs such as the U.S. Army Corps of Engineers' (USACE) "dredge and fill" permit program. He acknowledged that the State of Alaska will inherit some of that uncertainty by taking over the program. As the scope of the term evolves, he said, it will be reflected in what EPA requires states to do.

2:19:56 PM

REPRESENTATIVE GUTTENBERG referenced a court case involving the Red Dog Mine and inquired whether the state is going far enough towards meeting EPA standards and goals, and can the state be taken to court if it does not follow through with its obligations.

MR. LEONARD explained that should changes be made at the federal level to the doctrine of waters of the U.S., [DEC] can change the regulatory definition without coming to the legislature. The state's program will be subject to ongoing federal oversight and EPA can take the program back if the state does not implement it in a way that complies with federal law. All programs that are assumable by states under federal environmental laws are subject to this kind of oversight.

REPRESENTATIVE GUTTENBERG commented that the state has a clear interest in "Alaskanizing" as much of this as it can.

2:21:38 PM

REPRESENTATIVE SEATON requested Mr. Leonard's opinion as to whether defining "waters of the United States" in Alaska's statutes could be detrimental, given that the federal definition is subject to change.

MR. LEONARD commented that this is a good question because determining which definition should be in the statute was quite a struggle. He said that the work group tried to create this program in the regulations because it wanted to keep the bill as simple as possible and because adding a statutory definition of "waters of the U.S." might cause confusion. The current definition of "waters of the state" is different than the definition for "waters of the U.S." One particular difference is that the state does not include wetlands in its definition of "waters of the state," whereas EPA does include wetlands in the definition of "waters of the U.S." To prevent confusion between these definitions, it was decided to put the definition in the regulations that were promulgated to implement this particular program.

REPRESENTATIVE SEATON commented that he is concerned about making changes in regulation without full knowledge of the issues that might be affected, such as wetlands.

2:24:15 PM

REPRESENTATIVE ROSES reviewed his understanding that this is to bring the permitting process and DEC's compliance requirements in line with what EPA wants. He asked whether it is anticipated that DEC will take over any of the enforcement requirements or other actions currently being done by EPA.

MR. LEONARD reported that DEC will take over the enforcement at the same time that it takes over the writing of the permits.

REPRESENTATIVE ROSES questioned why there is then a 0 fiscal note.

MR. LEONARD deferred to DEC.

CO-CHAIR JOHNSON commented that this is one of his questions as well.

REPRESENTATIVE ROSES stated that he is concerned over the fiscal note and the wetlands issue.

2:25:28 PM

CO-CHAIR JOHNSON asked whether the state is assuming liability and becoming the subject of lawsuits - rather than the EPA - by taking over this program.

2:25:48 PM

MR. LEONARD referred to the Red Dog Mine court case that he is familiar with and that is probably the court case referenced earlier by Representative Guttenberg. He pointed out that in this court case, the state and EPA were at loggerheads regarding the Clean Air Act - therefore the case is irrelevant to this issue. He confirmed that by taking over NPDES responsibilities, DEC will become responsible for enforcing the permits that it issues. He said that beyond this, he did not see large exposure to liability from running the program and that he could not speculate on the kinds of lawsuits that people may file in the future.

2:26:42 PM

REPRESENTATIVE EDGMON noted that the discharge qualifier that he had pointed out earlier in Section 4 on page 2 is not mentioned in Section 2 on page 1, and that he would like for this to be addressed.

CO-CHAIR JOHNSON responded that it might be something the House Judiciary Standing Committee should look at.

2:27:17 PM

MS. KENT explained that the reason there is no fiscal note for HB 149 is because a fiscal note was included in Senate Bill 110 when it was passed in 2005. This provided the funding necessary for DEC to implement the program, she said.

REPRESENTATIVE SEATON inquired whether the 2005 fiscal note anticipated that DEC would be responsible for taking enforcement actions for those requirements that are now outside of the permit and no longer enforceable by third parties.

MS. KENT stated that this was DEC's intention all along, therefore the 2005 fiscal note does reflect that.

2:28:45 PM

CO-CHAIR JOHNSON opened public testimony on HB 149.

2:28:56 PM

STEVE BORELL, Executive Director, Alaska Miners Association (AMA), testified in support of HB 149. He related that the intent of the bill is to modify existing statute that was previously passed to allow state assumption of EPA's NPDES program. The current bill contains a few additional items that are needed for the state to assume the program. For the state to obtain primacy over NPDES, its authorities must be at least as strong as those of EPA and this bill makes the changes that will ensure that Alaska statutes meet that test. He commended DEC for its work on this issue and urged passage of the bill.

2:30:40 PM

BOB SHAVELSON, Executive Director, Cook Inletkeeper, explained that his organization works towards water quality and fish habitat protection in the Cook Inlet watershed. He noted that typically Cook Inletkeeper would support "Alaskanizing" this permit program. However, he said, this was part of a permitting package that the Murkowski Administration put through, therefore it is important to look at this in the whole context of other things that have occurred. For example, substantial changes to the Alaska Coastal Management Program removed citizens from decision-making in that program. Biologists were taken away from the Alaska Department of Fish & Game (ADF&G) and moved to a development agency under the Department of Natural Resources (DNR). The Murkowski Administration lifted the long-standing ban on mixing zones in salmon spawning areas. He opined that this assumption of state primacy occurs within the aforementioned context. He contended that Mr. Borell's support of the bill is not surprising because AMA was one of the few entities that was allowed to participate in the work group. He related that Native groups, fishing groups, and ordinary Alaskans were denied the opportunity to sit at the table in that work group and to have substantive input into development of this policy. The Murkowski Administration chose to have a closed-door approach to this, he argued, and it is Cook Inletkeeper's opinion that that approach does not result in the best public policy.

MR. SHAVELSON warned that this bill will result in having fewer people doing a very complex job that was previously done by EPA. It is basically building bigger state government when nothing indicated that the system was broken. He explained that the state has the authority to weigh in on any federal permit to ensure that it protects water quality standards and the designated uses like fishing and drinking. He maintained that DEC routinely, because of resource constraints, either

affirmatively waives that requirement or puts in no time when the department certifies the permit. He said this makes him question DEC's commitment to enforcing the law since they are not already doing so. He urged the committee to hear from EPA and how their relationship has been with DEC because EPA rejected the initial proposal that went in from the Murkowski Administration. He warned that financially the state will be taking on a large program and attempting to do more with less.

2:35:33 PM

MR. SHAVELSON, in response to a question, contended that more equitable sharing of the permitting fees would have occurred had citizens and other folks been allowed to participate in the working group. He said that industry refused to pay more for this program, the result being a larger expenditure for Alaska government. Had there been a more open and transparent process, there might have been a more equitable solution that Cook Inletkeeper could have supported. In response to a further question, Mr. Shavelson said that there will be an additional cost to permittees in Alaska.

2:36:52 PM

CO-CHAIR JOHNSON closed public testimony after ascertaining that no one else wished to speak. He announced that the bill is being held until the committee receives answers to its questions from DEC.

HB 165-BIG GAME GUIDES AND TRANSPORTERS

2:37:44 PM

CO-CHAIR JOHNSON announced that the final order of business would be HOUSE BILL NO. 165, "An Act relating to providing field accommodations for big game hunters."

2:38:14 PM

SUZANNE HANCOCK, Staff to Representative Gabrielle LeDoux, presented the sponsor statement on behalf of Representative LeDoux. She explained that in 1996 legislation was enacted to establish definitions and laws for licensed guides, outfitters, and transporters of big game hunters. However, there is no provision for a cabin owner who merely wishes to rent his or her cabin to people who may or may not be hunting. Many rural Alaska residents have auxiliary cabins that are empty part of

the year. She stated that HB 165 will allow cabin owners to rent their cabins without falling into any of the regulations established under the 1996 statute. Generating economic development is difficult in rural areas, she noted, and this bill will enable people to provide a service and earn revenue. She said that professional guides and members of the Board of Game worked with Representative LeDoux to craft the bill.

2:39:37 PM

REPRESENTATIVE WILSON gave an example of being flown into a cabin for a bear hunt. She said that the cabin was owned by the pilot and asked whether HB 165 disallows a pilot from flying big game hunters into a cabin that is owned by that pilot.

MS. HANCOCK stated that Representative Wilson's example probably put that pilot in the position of being considered a transporter. She explained that HB 165 applies only to an individual who rents a cabin without providing any other service but the roof over the renter's head. In response to a further question, she related that Rick Metzger, the cabin owner who brought this issue to Representative LeDoux's attention, will be testifying. She said that other cabin owners having the same problems also contacted Representative LeDoux.

2:42:28 PM

RICK METZGER related his opinion that the pilot in Representative Wilson's example would not be affected by HB 165. He surmised that the pilot in her example was probably a licensed transporter because a cabin owner can only rent his or her cabin to hunters if he or she also provides the transportation to that cabin.. He said that under current law, a pilot cannot fly hunters to a private cabin that is owned by someone else.

2:43:13 PM

REPRESENTATIVE WILSON asked if Mr. Metzger is a guide wishing to rent cabins that he owns in various locations.

MR. METZGER responded that he is not a guide, only a private property owner with a couple of cabins. He said that he is trying to develop a source of supplemental income by renting his cabins to hunters.

2:43:56 PM

CO-CHAIR JOHNSON inquired whether his understanding is correct that under current law a cabin owner cannot rent his or her cabin to someone who is hunting.

MR. METZGER related that this is what he has been told. He explained that when he first set up his cabin rental business, he inquired with the Division of Corporations, Business, and Professional Licensing, the Division of Alaska State Troopers, and the Office of the Attorney General to get information to ensure he was legal in renting his cabins. He obtained a business license for real estate rental because he was told that that was the only thing necessary. In November 2006 he was visited by Alaska State Troopers who told him that under the definition of "field," he could not legally rent his cabins [to big game hunters]. He said that he "fell into a trap" because he is neither a licensed guide nor a transporter. In response to a question, Mr. Metzger stated that it is his understanding that when the legislature re-implemented the Big Game Commercial Services Board, changes were made to a 1996 statute in relation to the definition of "field." These changes went into affect in August 2006 and it was these changes that the troopers were enforcing.

2:46:40 PM

TOM TEMPLE said that he supported HB 165 because he owns a remote cabin that he would like to rent to big game hunters. He said that he is familiar with "takings" issues because he works for a law firm. He said that he does not represent Mr. Metzger's interests, but he explained that Mr. Metzger was free to rent his cabins until August 2006 when regulations re-implementing the Big Game Commercial Services Board also made changes to the definition of "field." This change resulted in troopers believing they had new enforcement options and they threatened to issue citations. Mr. Temple said that he did not think this was the intent when the definition was changed. He said that he would also like to have the ability of renting cabins from other private property owners for himself without having to use a guide. He related that there have been numerous opinions, but that the Office of the Attorney General has not issued an opinion and this is the opinion that would matter the most. He pointed out that the state and federal governments can rent their remote cabins to hunters, but a private property owner cannot.

2:49:38 PM

MR. TEMPLE, in response to a question, reiterated that the regulation went into effect in August 2006. He said that it is this regulation, not legislation, that changed the definition of "in the field" so that a cabin in the field is treated differently than a cabin associated with a city or town. The regulation did not affect situations such as the example given by Representative Wilson where a pilot flies big game hunters to a cabin that is owned by that pilot. However, the regulation change has resulted in various interpretations as to whether it is legal for private property owners to rent their cabins to hunters without having a transporter's license. Should an owner get a transporter's license in order to rent out his or her cabin, a different statute then requires that the owner transport the hunter to the cabin. He said that this situation creates a problem for the average cabin owner who does not have the ability to provide the transportation.

2:51:19 PM

CO-CHAIR GATTO asked whether the troopers investigated because a complaint had been filed or because the troopers had unitarily decided to enforce the issue.

MR. TEMPLE offered his understanding that there were no complaints. He said that he had personally spoken with a big game guide who owns cabins located in the same region as Mr. Metzger. He related that this guide would prefer that resident hunters be able to rent Mr. Metzger's cabins because then the hunters would not be hunting in the same area as the guide's cabins. Mr. Temple said that he did not think the change was supported by big game [guides], but rather that it is an unintended consequence.

2:53:09 PM

REPRESENTATIVE ROSES asked if part of the issue at hand is that under AS 08.64.680, guides and transporters are required to have $100,000 in bonds, insurance, or assets.

MR. TEMPLE remarked that he believes this would be an issue to most private property owners, especially for a person who merely wants to rent his or her cabin without providing any other service that a guide would provide. He explained that the cabin owner only needs to have an Alaska business license for rental real estate at a cost of $100 annually, plus the appropriate insurance. However, becoming a transporter or guide requires

bonds and experience as an assistant guide for a period of time before qualifying to be a guide, and this creates an onerous and unattainable situation for a cabin owner. Additionally, he said, the transporter report forms clearly indicate that this is not the intent of the regulations because there is no place to accurately report an owner who is merely renting a cabin even if he or she had a transporter's license.

2:55:08 PM

REPRESENTATIVE ROSES asked whether responsibility could fall onto the transporter or cabin owner for a hunter who violates state hunting laws while renting that person's cabin.

MR. TEMPLE surmised that this might be a very real concern, especially in cases where the cabin owner is not on site or has not met the renter. He said that most remote state and federally owned cabins are rented out via the Internet, and that the Internet is often the method used by private cabin owners, as well. A hunter who violates laws should be held accountable, he said, but to say that the private property owner should also be accountable is not intended.

2:56:49 PM

CO-CHAIR JOHNSON announced that HB 165 is being held for further consideration at the next committee meeting.

2:57:25 PM

ADJOURNMENT

There being no further business before the committee, the House Resources Standing Committee meeting was adjourned at 2:57 p.m.