

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

April 19, 2007

3:42 p.m.

MEMBERS PRESENT

Senator Hollis French, Chair
Senator Charlie Huggins, Vice Chair
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Gene Therriault

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

SENATE BILL NO. 104

"An Act relating to the Alaska Gasline Inducement Act; establishing the Alaska Gasline Inducement Act matching contribution fund; providing for an Alaska Gasline Inducement Act coordinator; making conforming amendments; and providing for an effective date."

MOVED CSSB 104(JUD) OUT OF COMMITTEE

PREVIOUS COMMITTEE ACTION

BILL: SB 104

SHORT TITLE: NATURAL GAS PIPELINE PROJECT

SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

03/05/07	(S)	READ THE FIRST TIME - REFERRALS
03/05/07	(S)	RES, JUD, FIN
03/14/07	(S)	RES AT 3:30 PM BUTROVICH 205
03/14/07	(S)	Heard & Held
03/14/07	(S)	MINUTE(RES)
03/16/07	(S)	RES AT 3:30 PM BUTROVICH 205
03/16/07	(S)	Heard & Held
03/16/07	(S)	MINUTE(RES)
03/19/07	(S)	RES AT 3:30 PM BUTROVICH 205
03/19/07	(S)	Heard & Held
03/19/07	(S)	MINUTE(RES)
03/21/07	(S)	RES AT 3:30 PM SENATE FINANCE 532
03/21/07	(S)	Heard & Held
03/21/07	(S)	MINUTE(RES)

03/21/07 (S) RES AT 5:30 PM SENATE FINANCE 532
03/21/07 (S) Heard & Held
03/21/07 (S) MINUTE(RES)
03/22/07 (S) RES AT 4:15 PM FAHRENKAMP 203
03/22/07 (S) Heard & Held
03/22/07 (S) MINUTE(RES)
03/23/07 (S) RES AT 1:30 PM BUTROVICH 205
03/23/07 (S) Heard & Held
03/23/07 (S) MINUTE(RES)
03/24/07 (S) RES AT 1:00 PM SENATE FINANCE 532
03/24/07 (S) Heard & Held
03/24/07 (S) MINUTE(RES)
03/24/07 (S) RES AT 3:00 PM SENATE FINANCE 532
03/24/07 (S) Heard & Held
03/24/07 (S) MINUTE(RES)
03/26/07 (S) RES AT 3:30 PM BUTROVICH 205
03/26/07 (S) Heard & Held
03/26/07 (S) MINUTE(RES)
03/27/07 (S) RES AT 3:00 PM BUTROVICH 205
03/27/07 (S) Heard & Held
03/27/07 (S) MINUTE(RES)
03/28/07 (S) RES AT 3:30 PM BUTROVICH 205
03/28/07 (S) Heard & Held
03/28/07 (S) MINUTE(RES)
03/29/07 (S) RES AT 5:00 PM BUTROVICH 205
03/29/07 (S) Heard & Held
03/29/07 (S) MINUTE(RES)
03/30/07 (S) RES AT 1:30 PM BUTROVICH 205
03/30/07 (S) Heard & Held
03/30/07 (S) MINUTE(RES)
03/31/07 (S) RES AT 12:00 AM BUTROVICH 205
03/31/07 (S) Heard & Held
03/31/07 (S) MINUTE(RES)
04/01/07 (S) RES AT 11:00 AM BUTROVICH 205
04/01/07 (S) Moved CSSB 104(RES) Out of Committee
04/01/07 (S) MINUTE(RES)
04/02/07 (S) RES RPT CS 6AM SAME TITLE
04/02/07 (S) AM: HUGGINS, GREEN, STEVENS, STEDMAN,
WIELECHOWSKI, WAGONER
04/02/07 (S) RES AT 3:30 PM BUTROVICH 205
04/02/07 (S) Moved Out of Committee 4/1/07
04/02/07 (S) MINUTE(RES)
04/04/07 (S) JUD AT 2:45 PM BELTZ 211
04/04/07 (S) Heard & Held
04/04/07 (S) MINUTE(JUD)
04/11/07 (S) JUD AT 1:30 PM BUTROVICH 205
04/11/07 (S) Heard & Held

04/11/07 (S) MINUTE(JUD)
 04/11/07 (S) JUD AT 5:30 PM BUTROVICH 205
 04/11/07 (S) Heard & Held
 04/11/07 (S) MINUTE(JUD)
 04/12/07 (S) JUD AT 3:30 PM BUTROVICH 205
 04/12/07 (S) Public Testimony 5:30 pm to 7:00 pm
 04/13/07 (S) JUD AT 1:30 PM BUTROVICH 205
 04/13/07 (S) Heard & Held
 04/13/07 (S) MINUTE(JUD)
 04/13/07 (S) JUD AT 5:30 PM BUTROVICH 205
 04/13/07 (S) Heard & Held
 04/13/07 (S) MINUTE(JUD)
 04/14/07 (S) JUD AT 10:00 AM BUTROVICH 205
 04/14/07 (S) Heard & Held
 04/14/07 (S) MINUTE(JUD)
 04/15/07 (S) JUD AT 11:00 AM BUTROVICH 205
 04/15/07 (S) -- MEETING CANCELED --
 04/16/07 (S) JUD AT 1:30 PM BUTROVICH 205
 04/16/07 (S) Heard & Held
 04/16/07 (S) MINUTE(JUD)
 04/17/07 (S) JUD AT 3:30 PM FAHRENKAMP 203
 04/17/07 (S) <Teleconference Listen Only>
 04/18/07 (S) JUD AT 1:45 PM BUTROVICH 205
 04/18/07 (S) Heard & Held
 04/18/07 (S) MINUTE(JUD)
 04/18/07 (S) JUD AT 5:30 PM BUTROVICH 205
 04/18/07 (S) Heard & Held
 04/18/07 (S) MINUTE(JUD)
 04/19/07 (S) JUD AT 3:30 PM BUTROVICH 205

WITNESS REGISTER

MARCIA DAVIS, Deputy Commissioner
 Department of Revenue
 Juneau, AK

POSITION STATEMENT: Offered perspective on amendments to
 Version 0 CS for SB 104

DON BULLOCK, Attorney
 Alaska Legal and Research Services Division
 Legislative Affairs Agency
 Alaska State Capitol
 Juneau, AK 99801-1182

POSITION STATEMENT: Offered perspective on amendments to
 Version 0 CS for SB 104

PATRICK GALVIN, Commissioner

Department of Revenue
Juneau, AK

POSITION STATEMENT: Offered perspective on amendments to
Version O CS for SB 104

SENATOR LYDA GREEN
Alaska State Capitol
Juneau, AK 99801-1182

POSITION STATEMENT: Offered perspective on legislative
confirmation of AGIA coordinator

ACTION NARRATIVE

CHAIR HOLLIS FRENCH called the Senate Judiciary Standing
Committee meeting to order at [3:42:52 PM](#). Present at the call to
order were Senator Wielechowski, Senator Therriault, Senator
Huggins, and Chair French. Senator McGuire arrived shortly
thereafter.

SB 104-NATURAL GAS PIPELINE PROJECT

[3:43:05 PM](#)

CHAIR FRENCH announced the consideration of SB 104. He noted the
amendment packet and asked for a motion to adopt Amendment 7,
labeled 25-GS1060\0.9.

SENATOR WIELECHOWSKI moved Amendment 7.

25-GS1060\0.9
Bullock

A M E N D M E N T 7

OFFERED IN THE SENATE BY SENATOR WIELECHOWSKI
TO: CSSB 104(JUD), Draft Version "O"

Page 15, line 15, following "project":

Insert "to the state, are necessary because of an
order issued by the Alaska Oil and Gas Conservation
Commission,"

Page 15, line 19:

Following "and":

Insert ", except for a modification or amendment
required because of an order issued by the Alaska Oil
and Gas Conservation Commission,"

Delete "to the state"
Following "project":
Insert "to the state"

CHAIR FRENCH objected for discussion purposes.

SENATOR WIELECHOWSKI explained that the amendment stems from the discussion regarding the AOGCC and the concern that arose that it's not clear what is the volume of gas that's available for offtake on the North Slope. Last year the producers were ready to agree to provide 4.3 bcf/day so it's reasonably certain that there's at least that volume available for offtake, he said. However, if a non-producer is going to apply for this license there ought to be some provision for a modification in the instance where there's an order issued by the AOGCC. That's what this amendment does, he stated.

CHAIR FRENCH asked Ms. Davis to offer her perspective.

[3:46:01 PM](#)

MARCIA DAVIS, Deputy Commissioner, Department of Revenue, said we're supportive of the amendment and believe it achieves the purpose described. By the nature of gas offtake rates and the fact that they can change over time, this would be an important amendment because there isn't currently a mechanism in the modification to take that fact pattern into account.

CHAIR FRENCH summarized this is another circumstance supporting an amendment to the plan. Currently a plan may be modified to improve the net present value of the project or because of changed circumstances outside the licensee's control. The amendment allows changes that are necessary because of an order issued by AOGCC. He asked if that's the idea and if the second insertion on page 15, line 19 is conforming language.

SENATOR WIELECHOWSKI said yes.

[3:47:57 PM](#)

MR. BULLOCK, Attorney, Alaska Legal and Research Services Division, clarified that the amendment makes the language "net present value of the project to the state" parallel on lines 9 and 11.

CHAIR FRENCH removed his objection. Finding no further objection, he announced that Amendment 7 is adopted.

[3:48:24 PM](#)

CHAIR FRENCH asked for a motion to adopt Amendment 8, labeled 25-GS1060\0.8.

SENATOR WIELECHOWSKI moved Amendment 8.

25-GS1060\0.8
Bullock

A M E N D M E N T 8

OFFERED IN THE SENATE BY SENATOR WIELECHOWSKI
TO: CSSB 104(JUD), Draft Version "O"

Page 18, line 7:

Delete "does not have"

Insert "cannot reasonably secure"

CHAIR FRENCH objected for discussion purposes.

SENATOR WIELECHOWSKI explained that the amendment relates to whether or not the project is uneconomic. It addresses the circumstance where the project may not currently have credit support but could reasonably secure it. He described the change as technical but important.

CHAIR FRENCH asked Mr. Bullock how much difference this makes when analyzing whether the project is uneconomic.

MR. BULLOCK described the change as good because it imposes a standard and so there's effort imposed on the licensee. He explained that a licensee that's alleging that the project is uneconomic doesn't have great incentive to go out and show they could get financing for the project.

CHAIR FRENCH posed the scenario of a failed open season where the licensee says they don't have credit support because they didn't get commitments at the open season. He asked if this would make it easier or harder for a licensee to drop the project in the face of a failed open season.

MR. BULLOCK replied it'd make it a bit harder because the issue of reasonableness comes up.

[3:51:21 PM](#)

PATRICK GALVIN, Commissioner, Department of Revenue, expressed concern that the amendment has an inherent conflict. He explained that when the two part test was designed, the first

part was intended to evaluate whether or not the project has credit support at that particular point. It was not intended to be a prospective evaluation, he said. The second part of the criteria is intended to basically do what the amendment seeks to accomplish, which is to do a prospective evaluation to determine whether the project could reasonably imagine getting credit support at some point in the future. From an arbitrator's perspective, it would be a challenge to determine what the scenarios are beyond what's described in the second part where that reasonable expectation of credit support would exist, he said.

CHAIR FRENCH said it sounds like you're looking for a clear fork in the road when it comes to credit support.

COMMISSIONER GALVIN explained that the second part of the test is intended to be the determining factor of whether a project can reasonably expect to obtain credit support at some future point once gas has been secured. Adding the suggested prospective evaluation to the first part muddies the water between the two parts of the test, he said.

[3:54:52 PM](#)

MR. BULLOCK pointed out that credit supports are also an issue of the certification by the regulatory authority and project sanction. Page 14 has the two situations. Line 17 talks about what happens if the licensee has sufficient credit support when they get the license and line 23 talks about what happens if they do not have credit support sufficient to finance the project at the time. He opined that the issue of credit support should probably be dealt with similarly between the requirements in 43.90.200 on page 14 and the abandonment provision that's under review on page 18.

MS. DAVIS explained that the phrases are purposefully different. The administration eliminated possessing gas for shipment as a basis for credit support because carrying that same definition over into the abandonment section would result in a producer, by definition, never being able to establish that a project was uneconomic. The fact that the licensee has gas to commit to the project does not satisfy the first prong of the test, she said.

SENATOR McGUIRE suggested there needs to be some objective standard for having credit support that has a little wiggle room at the bottom. It's a fair trade. Although she understands the intent she said she does not support the amendment.

[3:57:20 PM](#)

SENATOR WIELECHOWSKI expressed some surprise that the administration did not support the amendment. He recapped the two parts and asked if the second part of the test absolutely assures that you will get credit.

COMMISSIONER GALVIN said no; the second part basically says do you have a project that would at this point in time have a reasonable expectation of a positive netback. If the answer is yes, the state could anticipate a good situation at some point in the future. If the answer is no, then you'd have to question whether the project should go forward.

SENATOR WIELECHOWSKI said if the answer to the second part is yes, that doesn't necessarily mean you have sufficient credit support.

COMMISSIONER GALVIN responded that's not the driving force. The two prong test asks if you've got credit support or if you have a positive economic project. The amendment would require going beyond that to ask if there's another situation where you would potentially get credit even if you don't meet the second part of the test.

SENATOR WIELECHOWSKI asked if there would be another source of credit.

MS. DAVIS apologized if she gave him the wrong steer in terms of comfort level. She believes the definition basically asks if this project is economic. The only way it's going to be economic is if you've got financing or if you've got the strong likelihood that you're going to get shippers, which then gets you the financing, she said. The test is a one two punch, she said.

[4:01:22 PM](#)

CHAIR FRENCH recognized that Drue Pearce, former Senate President and current Federal Coordinator for Alaska Natural Gas Transportation Projects was present.

COMMISSIONER GALVIN asked that the amendment be set aside until he could contact a commercial team member who was involved in developing the two part test.

CHAIR FRENCH asked Senator Wielechowski if he would be willing to withdraw the amendment for the time being.

4:02:12 PM

SENATOR WIELECHOWSKI withdrew Amendment 8.

CHAIR FRENCH moved Amendment 9, labeled 25-GS1060\0.1 and objected for discussion purposes.

25-GS1060\0.1
Bullock

A M E N D M E N T 9

OFFERED IN THE SENATE BY SENATOR FRENCH
TO: CSSB 104(JUD), Draft Version "0"

Page 14, lines 9 - 10:

Delete all material and insert:

"(d) If the legislature fails to approve the issuance of the license, the commissioners

(1) may not issue the license that the legislature failed to approve; and

(2) may request new applications for a license under AS 43.90.120."

CHAIR FRENCH explained that the amendment pertains to page 14 on the subject of legislative approval. It clarifies that if the legislature fails to approve the issuance of a license, the commissioners may not issue that license, but they may request new applications for a license under the original authorizing statute.

SENATOR THERRIAULT asked Ms. Davis to comment.

MS. DAVIS summarized the discussion yesterday centered on the issue of comity and the concern that the provision is silent regarding what happens if the legislature fails to approve the issuance of a license. The bill only says if the legislature fails to approve, the commissioners are authorized to restart the process. Left unstated is exactly what that means relative to the licensee that the administration put forward. But regardless of whether the bill says may not issue the license or if it stays silent, it does not change the constitutional debate and it does not change what the administration could do in the face of a disapproval by the legislature. Obviously, she said, the first choice was to have legislative disapproval so that the default of no action would result in the project being able to proceed. That being said, her only comment is that this addition

doesn't change the playing field as far as the ultimate question on constitutionality and comity.

CHAIR FRENCH removed his objection. Finding no further objection, he announced that Amendment 9 is adopted.

[4:05:12 PM](#)

CHAIR FRENCH moved Amendment 10, labeled 25-GS1060\0.2, and objected for discussion purposes. The amendment relates to what happens after a decision by the arbitration panel, he said.

25-GS1060\0.2
Bullock

A M E N D M E N T 10

OFFERED IN THE SENATE BY SENATOR FRENCH
TO: CSSB 104(JUD), Draft Version "O"

Page 17, line 19:
Delete "(e)"
Insert "(f)"

Page 18, line 1:
Delete "(e)"
Insert "(f)"

Page 18, following line 14:
Insert a new subsection to read:
"(d) In an appeal of a final determination rendered by the arbitrators under (b) of this section, the person making the appeal has the burden of proving that there was a prejudicial abuse of discretion by the arbitrators."

Reletter the following subsections accordingly.

SENATOR WIELECHOWSKI reiterated the concern he expressed yesterday and said he believes that if nothing is done an abuse of discretion provision that's within the arbitration statutes will apply. The amendment adds prejudicial abuse of discretion and that might not be the same standard. We might be making it more complicated than is necessary, he said.

SENATOR McGUIRE referenced a discussion about whether or not it may be more expeditious to incorporate the Alaska Uniform Arbitration Act as a whole rather than specifying the standard.

It's not quite as black and white as it may appear and there may be reasons that one would want more flexibility. She asked Mr. Bullock to go on record regarding what he thinks about it and how it would be accomplished the most clearly.

4:07:54 PM

MR. BULLOCK advised that it's within legislative policy discretion to decide which kind of standard to apply, but this is similar to the standard in the Administrative Procedure Act for appeals to court. What Senator McGuire was referring to is on page 17, line 23 where it says that the arbitrations administered by the American Arbitration Association under the laws of the state, which is pretty general. Whether the intent is to have both Alaska procedures and Alaska substantive law apply and perhaps to address specific reference to Title 9, Chapter 43, at this point—you could do it if you wanted, he said.

CHAIR FRENCH asked what difference that would make to the proposed amendment and if making an explicit reference to the arbitration statutes would change the standard of review.

MR. BULLOCK replied the amendment specifically sets the standard for reviewing an arbitration decision. There isn't a problem, he said. You're establishing an issue that's going to be decided by the arbitration panel and you're establishing the standard for a court to review the outcome.

SENATOR WIELECHOWSKI acknowledged that the explanation gives him increased comfort but his intent would be for any arbitration to be administered both substantive and procedurally under the laws of the state and that includes the existing arbitration laws.

SENATOR MCGUIRE added that's why she mentioned it. It's a question of whether we mean both substantive and procedural law of the State of Alaska to apply. If it is the case that both are to apply, it might be a good idea to make reference to our laws regarding the process and not specifically set a standard. Leave it to the process Senator Wielechowski has gone through as an arbitrator, which does seem to follow a similar pattern of abuse of discretion but with a bit of wiggle room.

CHAIR FRENCH asked Mr. Bullock if inserting the words "substantive and procedural" before "laws" on page 17, line 23, would incorporate the definition.

MR. BULLOCK replied it'd allow you to move the bill from committee and if the language isn't changed, it'd give room for interpretation.

CHAIR FRENCH added it gives fairly clear direction that we're supposed to work under the substantive and procedural laws of Alaska with respect to arbitration.

MR. BULLOCK said you're taking it out of the court and bringing in an arbitration panel so the question is what law will be applied and how will the panel take evidence and operate during the proceeding.

SENATOR THERRIAULT posed a question. "Rather than have a very specific standard written right into the AGIA law, that we make reference to another section of statutes that could be changed sometime—whether that is upsetting to the degree of certainty that you're trying to get to?"

[4:12:51 PM](#)

COMMISSIONER GALVIN replied it's probably more consistent with what's expected, which is to allow the arbitration provisions to work like they would in any other commercial provision. If the state changes the law dealing with the arbitration procedures, we would probably want to follow that change, he added.

SENATOR McGUIRE said one thought is to withdraw Amendment 10 or reaffirm it in both places by adding a reference to Title 9, Section 43.

MR. BULLOCK offered the opinion that referring to Title 9, Section 43 raises the issue as to what the appeal standard is in that section. If it's different than what's in Amendment 10 then the amendment should be changed to say not withstanding another provision of law, this is the standard of review in this circumstance. You need to see what the appeal standard is in the arbitration provisions, he said.

CHAIR FRENCH explained the intent of the amendment is to make it crystal clear that there is the opportunity of an appeal from an arbitrator's decision. Dropping the amendment and adding "substantive and procedural" wouldn't clarify that there's a right of appeal.

COMMISSIONER GALVIN asked if that chapter has provisions with regard to judicial appeal of an arbitrator's ruling and if so, what the standard is.

CHAIR FRENCH said we'll recess and find out.

Recess from [4:16:59 PM](#) to [4:25:28 PM](#).

CHAIR FRENCH reconvened the meeting and moved an amendment to Amendment 10. On page 17, line 23, after the first appearance of the word "the" add "substantive and procedural". The line would read: "American Arbitration Association, under the substantive and procedural laws of this state..." Finding no objection, he announced that the amendment to Amendment 10 is adopted and Amendment 10 is again before the committee.

CHAIR FRENCH moved a second amendment to Amendment 10. On line 12 of the amendment, change the word "proving" to "proof." and strike the rest of line 12 and all of line 13. He explained that this is to make it clear that there's a right of appeal and that the person who is making the appeal has the burden of proof. This addresses his concern that there's a clear right to appeal and language on the previous page clarifies what law applies. He asked Mr. Bullock if he had any comment.

MR. BULLOCK summarized that this says that the person who disagrees has to show why the decision was wrong so it eliminates the possibility of the successful party having to argue why the decision is right.

CHAIR FRENCH removed his objection and asked if there was further objection to Amendment 10

SENATOR THERRIAULT questioned whether there had been a vote on the second amendment to Amendment 10.

CHAIR FRENCH recapped his understanding that two amendments to Amendment 10 had been adopted. Hearing and seeing no further objection he announced that Amendment 10 is adopted.

[4:28:29 PM](#)

CHAIR FRENCH asked for motion to adopt Amendment 11, labeled 25-GS1060\0.7.

SENATOR WIELECHOWSKI moved Amendment 11.

25-GS1060\0.7
Bullock

A M E N D M E N T 11

OFFERED IN THE SENATE BY SENATOR WIELECHOWSKI
TO: CSSB 104(JUD), Draft Version "O"

Page 17, lines 25 - 26:

Delete "a list provided by the American
Arbitration Association"

Insert "the American Arbitration Association's
National Roster"

CHAIR FRENCH objected for discussion purposes.

SENATOR WIELECHOWSKI explained that the way the statute is currently written, each party selects an arbitrator from a list of probably 11 that is provided by the American Arbitration Association. The amendment expands that list so that each side is able to select an arbitrator from the entire national roster of the American Arbitration Association. This is appropriate because this is an extremely difficult and complex area of law and the arbitrators should have expertise in this area, he said.

SENATOR THERRIAULT questioned why he's concluded that the list would consist of 11 arbitrators.

SENATOR WIELECHOWSKI answered that's normal procedure under American Arbitration Law.

CHAIR FRENCH removed his objection. Finding no further objection, he announced that Amendment 11 is adopted.

CHAIR FRENCH asked for a motion to adopt Amendment 12, labeled 25-GS1060\0.6.

[4:30:03 PM](#)

SENATOR WIELECHOWSKI moved Amendment 12.

25-GS1060\0.6
Bullock

A M E N D M E N T 12

OFFERED IN THE SENATE BY SENATOR WIELECHOWSKI
TO: CSSB 104(JUD), Draft Version "O"

Page 13, lines 30 - 31:

Delete all material.

CHAIR FRENCH objected for discussion purposes.

SENATOR WIELECHOWSKI conjectured that the language on lines 30 and 31 was inadvertently left in the bill. Directing attention to page 9, lines 11-13, he pointed out that waiving the right to appeal is a condition of applying for the license. One of the things we've been trying to do in this bill is to limit the rights of appeal so that we're not mired in endless litigation. Maybe this is just cleaning it up, he said.

[4:31:15 PM](#)

CHAIR FRENCH said he thought the waiver on page 9 is with respect to the decision to issue no license whereas...

MR. BULLOCK interjected it applies to both; it's if the license is awarded to somebody else or if no license is awarded.

CHAIR FRENCH noted that the waiver on page 16 binds anybody who submitted an application to the decision of the commissioners.

MR. BULLOCK replied that's his understanding based on the way it's written.

CHAIR FRENCH pointed out that there may be others who object to the decision of the commissioners. For example, the producers may decide not to submit an application and then after the license is issued they may decide it was a mistake and there should be an appeal of that decision. They're not bound by page 9 because they didn't submit an application, but they may have a point. Or maybe the All-Alaska gas line doesn't submit an application and therefore isn't bound by page 9, but it has a legitimate beef with the issuance of the license. If lines 30 and 31 are taken out, then all the other entities that didn't submit an application are also losing their right to appeal, he said.

MR. BULLOCK explained that it's the decision that can be appealed. The question after that is when can that decision be appealed. To answer that you need a start date. He believes the initial intent of lines 30 and 31 was that if there was going to be an appeal, it would start on that date even though it doesn't exactly read that way. He reminded members that you can say there aren't appeal rights or waivers, but if there is a constitutional issue such as due process that arises in the course of the consideration of the licenses, the appeal right would continue regardless of how the right to appeal is

restricted. That being said, it wouldn't hurt to establish a date that identifies some finality from which the appeal could start, he stated.

CHAIR FRENCH stated that this is the flagpole to the legal community and the world that announces that this is where you mount your challenge. It's after the legislature has weighed in and when the commissioners issue the license.

SENATOR THERRIAULT responded it not only establishes the date, it also establishes what's left to appeal on. The legislature has superceded the executive action, leaving only the constitutional issues.

MR. BULLOCK said what's happened is the commissioners make the decision to issue the license and it's suspended until the legislature approves or disapproves. If they approve the decision, then the administrative action of identifying the license is sealed on that date. That's what was behind lines 30 and 31, he said. It's not an appeal of what the legislature decided; it's an appeal of the state issuing the license.

SENATOR WIELECHOWSKI said that's an important point because the right to appeal that exists is for this being unconstitutional and that's been addressed in Section 420 on page 24, lines 4-7. He explained that the idea is to structure this so that there can only be a constitutional challenge. He asked Mr. Bullock if that's been accomplished.

MR. BULLOCK suggested that is should be clarified because the way Section 420 is written, it's not clear whether the issue is constitutionality of the license or if it's an issue relating to a challenge to the license.

SENATOR WIELECHOWSKI read, "A person may not bring a judicial action challenging the constitutionality of this chapter or a license..."

MR. BULLOCK asked if it's the constitutionality of the license.

SENATOR WIELECHOWSKI interpreted the language as an either or.

MR. BULLOCK said the way it's written it could be interpreted that way.

SENATOR McGUIRE asked to hear from the administration.

MS. DAVIS relayed the intent on Section 420 was that it would be a constitutionality provision that would apply to both the chapter itself and to the license. It would be an action challenging the constitutionality of the chapter or an action challenging the constitutionality of a license issued under this section.

CHAIR FRENCH asked Mr. Bullock if the license could be found to be unconstitutional.

MR. BULLOCK replied the license itself is just a license, but the process for awarding of the license could be found unconstitutional.

SENATOR WIELECHOWSKI stated that the idea is to foreclose on the endless right to appeal. We have the right to do that, he emphasized, because we can decide who can and cannot sue us. What this says is that someone that doesn't put in a bid can't file an appeal unless there's something that's unconstitutional. Other than that, there is no administrative right to file an appeal.

MS. DAVIS observed that part of the debate around this issue and the guidance that Mr. Ostrovsky gave to this committee is that it's the right of a state as a sovereign to choose when it will and will not be sued. The concept of due process rights is that the government is doing some action and has failed to give due process to an entity or an individual that is enmeshed in that process. When you think of a third party that hasn't participated but is complaining about the process, you have to ask what sort of due process rights are being infringed on. Certainly, constitutionality claims aren't affected by the waiver provision, but when you think about what are due process rights, I'm not sure who's in the game to complain about them, she stated.

SENATOR McGUIRE stated support for the amendment. She recalled that when U.S. Senator Ted Stevens was asked about things that worked in terms of getting TAPS, he emphasized the ability as a sovereign state to limit the rights of appeal. I think its in our interest and incumbent upon us to have some method by which people vet their concerns, but there is an appropriate point at which you cut it off, she stated.

CHAIR FRENCH acknowledged that he's struggling with this because he's reluctant to close off too many legal avenues. Noting that there is at least some perception that AGIA is a setup to award

the license to a certain company, he said that to the extent that all legal challenges are striped away, you could argue that you're supporting that perspective. Certainly the environment this year is much different than last year when it would have been almost unthinkable to have taken this step. I'm glad it's different, but I'm still reluctant, he stated.

SENATOR WIELECHOWSKI said he appreciates those concerns, but the logical conclusion of allowing just anyone to file a lawsuit is that multiple lawsuits challenging every item in here can be expected. That's what we're trying to avoid because we need to get this gas pipeline moving. This limitation does not take away anyone's constitutional rights because if there were due process violations or equal protection violations, then whoever suffered those violations has the right to sue. All this says is we're not going to get stuck in endless litigation over this matter, he said.

[4:43:27 PM](#)

MR. BULLOCK reminded members that under AGIA this is a contractual issue—the third person agrees to waive their appeal rights. If they appeal anyway, it's a violation of the contract as opposed to a statute that absolutely says this is a final determination and not subject to appeal.

SENATOR THERRIAULT pointed out that the potential pool of people appealing is far beyond those who made applications and bound themselves.

MR. BULLOCK said there's a question of the issue and who has standing. A person that didn't submit an application wouldn't have standing to sue because they didn't come to the table. On the other hand, a constitutional issue has other people that would have standing to bring suit so there is the possibility of two different pools of plaintiffs.

CHAIR FRENCH maintained his objection and asked for a roll call vote.

Amendment 12 carried 4-1 with Senator Wielechowski, Senator McGuire, Senator Huggins, and Senator Therriault voting yea and Chair French voting nay.

[4:45:25 PM](#)

CHAIR FRENCH asked for a motion to adopt Amendment 13, labeled 25-GS1060\0.4.

SENATOR THERRIAULT moved Amendment 13.

25-GS1060\O.4
Bullock

A M E N D M E N T 13

OFFERED IN THE SENATE BY SENATOR THERRIAULT
TO: CSSB 104(JUD), Draft Version "0"

Page 13, line 27:
Delete "60"
Insert "45"

Page 14, line 5:
Delete "60-day"
Insert "45-day"

CHAIR FRENCH objected for discussion purposes.

SENATOR THERRIAULT stated concern that a lengthy legislative review could potentially cause problems for the successful 2008 field season. Referring to a timeline, he demonstrated that 60 days could be problematic. Although his personal preference would be to have a shorter term than 45 days, the idea is to reach some consensus, he said. Originally when 30 days was expanded to 90 days there was some thought that the legislature really wouldn't be able to evaluate anything until it was handed to them, but since that time language was added to make it clear that the legislature will have full access to the proposals basically when the sealed bids are opened. This amendment is an effort to strike a balance and yet not cause problems with that 2008 field season, he said.

[4:48:10 PM](#)

SENATOR HUGGINS asked when he visualizes the season beginning.

SENATOR THERRIAULT said somebody could certainly be out on the ground or well on the way to having the teams go out by mid April. In the House the time is still 90 days and he isn't sure whether the difference will be split in a conference committee. Clearly 90 days causes serious problems with regard to access to the field season, he emphasized.

SENATOR HUGGINS said he hopes the review takes just two or three weeks, but he wouldn't want to be limited to that.

SENATOR McGUIRE said she wants enough time to thoroughly vet the issue because now the project relies on the legislative approval. 90 days is too long but if a 60 day deadline is set, she doesn't have any faith that it'd take just 22 days.

CHAIR FRENCH commented that the last action that was taken forced attention on that debate. Now everyone who has a gripe about how the license was issued will come to the legislature for whatever period of time that's set to have their case heard. The legislature has become the court and he said he is reluctant to restrict that time any more than it is now. In deference to Senator Therriault's suggestion that legislators will have access to the material, he said we also know that people will procrastinate so there's an issue there as well.

SENATOR WIELECHOWSKI recalled the same debate in the resources committee and 60 days was the compromise. He said he doesn't know if that's the right number, but he takes solace in the fact that it could take less time. Also, if we want to finish early we may want to start early, he said.

CHAIR FRENCH said that's a separate topic.

SENATOR THERRIAULT added there's also the issue of the suggested 90-day session and the suggestion that the session start later. We're running a serious risk of causing problems and losing a good chunk of the field season and that doesn't bode well for the entire process, he stated.

CHAIR FRENCH said as a former North Slope production operator, he spent many hours outside in a down suit and bunny boots and he believes those are still issued to folks who work there. He said he would concede that it's a little difficult to get a stream sample in December.

CHAIR FRENCH asked for a roll call vote.

Amendment 13 failed 2-3 with Senator McGuire, and Senator Therriault voting yea and Senator Wielechowski, Senator Huggins, and Chair French voting nay.

[4:54:24 PM](#)

CHAIR FRENCH asked for a motion to adopt Amendment 14, labeled 25-GS1060\0.3.

SENATOR THERRIAULT withdrew Amendment 14.

CHAIR FRENCH asked for a motion to adopt Amendment 15, labeled 25-GS1060\0.5.

SENATOR THERRIAULT moved Amendment 15.

25-GS1060\0.5
Bullock

A M E N D M E N T 15

OFFERED IN THE SENATE BY SENATOR THERRIAULT
TO: CSSB 104(JUD), Draft Version "O"

Page 19, lines 4 - 5:

Delete "The appointment is subject to
confirmation by the legislature."

CHAIR FRENCH objected for discussion purposes.

SENATOR THERRIAULT explained that the amendment deals with the issue of the legislative confirmation of the AGIA coordinator. Yesterday's discussion was that the legislature generally confirms people who rise to the commissioner level or who are in quasi-judicial bodies. This AGIA coordinator doesn't rise to either of those levels, he said. It seems unwise for the legislature to insert itself and potentially raise a constitutional issue to argue about in the future. There isn't a compelling reason to do that, he said.

[4:55:49 PM](#)

SENATOR WIELECHOWSKI opposed the amendment. Reading portions of Section 260, he emphasized that the AGIA coordinator will have tremendous power, more in fact than virtually any commissioner. It's an important position and as a legislator I would have questions about how they intend to use that power, he stated.

CHAIR FRENCH recognized that Senate President Green was present.

CHAIR FRENCH asked Mr. Bullock if his view on the subject is that legislative confirmation of this appointment is probably unconstitutional.

MR. BULLOCK answered he believes it probably is unconstitutional. The position is placed in the governor's office who is over the commissioners and could do the same thing. The things that the coordinator can do under 43.90.260

relate to discretionary issues. You may have the power to do it but you don't do it in this case because the project is primary.

SENATOR McGUIRE agreed adding that the other part is that this might set precedent to require legislative confirmation for a plethora of positions that you could argue have power. Second, she doesn't want to set up a never ending battle with the governor. She pointed out that the AGIA coordinator may be removed at the discretion of the governor and that is a further statement of that branch exerting its authority over that position. It sets up an unneeded constitutional problem, she stated.

SENATOR THERRIAULT expressed the view that it avoids squabbling amongst the departments where one branch is trying to exert itself when it doesn't have the power of law to do so. The coordinator can bump heads together and force the departments to get past their disagreements. Referring to the discussion from yesterday, he advised that former Senator Drue Pearce was selected for the federal coordinator position by the White House and confirmed by the U.S. Senate. Her term of office is until first gas flows. The AGIA coordinator is being selected and serves at the pleasure of the governor so the two positions aren't analogous. Because of the uniqueness of Ms. Pearce's position, it did make sense that the U.S. Senate had to confirm the selection but it doesn't seem like that's so here, he stated.

[5:00:47 PM](#)

SENATOR WIELECHOWSKI raised the issue of constitutionality. The governor has the ability to make important and critical appointments that don't face legislative approval, but those people don't directly make decisions that have huge impacts on people, he said. In contrast the AGIA coordinator will have the ability to overturn discretionary decisions made by commissioners. This is a person who has tremendous policy-making power. The legislature regularly holds confirmation hearings on people who have much less power, such as the board of game and the board of fish. Those are raucous, rancorous hearings and they have nowhere near the power, he said. The AGIA coordinator will have the power and ability to impact salmon streams and the abilities of trappers and hunters and snow machiners. It would be a grave mistake for the legislature not to have some review over this person and I object to the amendment, he stated.

SENATOR THERRIAULT clarified the individual would not have the power to impact salmon streams beyond the protection that is

placed in statute. If there's something that's required by law that the legislature has put in statute, that has to be followed.

SENATOR MCGUIRE asked if the administration has an opinion.

MS. DAVIS stated that the administration is concerned any time language is injected that has a specter of unconstitutionality. We don't want to slow the ability of whoever is appointed and confirmed to get out and start the job, she said. The role is very important and the powers that are listed are all within the boundaries of law. They basically push agencies to not require more than what is required by law. The hope is that the AGIA coordinator will accelerate the process by removing the discretionary roadblocks that agencies can put in place. The position does have a specter of power and it's for this body to decide whether a legislative confirmation will make the exercise of that power safer or better, notwithstanding the risk that it might be viewed as unconstitutional, she said. It's a balance between the importance and the risk.

CHAIR FRENCH asked if the legislature has ever rejected a governor's nominee and he learned that it's not uncommon at all.

CHAIR FRENCH recognized that Senator Wagoner was present.

SENATOR HUGGINS offered the view that the business of a confirmation is an educational and healthy process that's good for Alaska. The constitutionality issue doesn't worry him at all.

[5:06:25 PM](#)

SENATOR LYDA GREEN, President, Alaska State Senate, informed the committee that during the Knowles administration there was legislation that required confirmation of agriculture board members. All along the administration said it didn't have to send it through and they never did, she said, but the board went right on and functioned very well. Whether the language is in there or not, if it's unconstitutional they won't be sending it to you, she opined.

CHAIR FRENCH added they'll never submit the name.

COMMISSIONER GALVIN asked if they're missing something here that puts this potentially in a black hole if there's just appointment language.

MR. BULLOCK said he isn't familiar with that area.

CHAIR FRENCH relayed that he asked Tam Cook what happens in the event that the legislature does not approve or is slow to approve. His understanding is that an appointee has all the power and authority of the position on the day the governor makes the appointment. As Senator Green has indicated, if the name is never submitted there would be nary a ripple in the authority of the coordinator.

SENATOR MCGUIRE expressed concern about litigation. She questioned whether the coordinator's meaningful actions could be subject to litigation if the legislature failed to confirm the person who the governor nominated.

MR. BULLOCK opined that one example where the constitutional issue of separation of powers would arise is if the governor gives the legislature a name, the legislature fails to approve the person, and the person continues. The separation of powers issue would also arise if the name is never submitted and somebody challenges a decision made by that person because they weren't confirmed

SENATOR MCGUIRE stated that her concern relates to whether or not that would put the state farther from a gas line.

MR. BULLOCK said you have to look at the issue and ask how likely it is that someone will challenge. Including things that aren't needed and are more subject to challenge can't be a good thing on a bill that you want to get through, he advised.

CHAIR FRENCH asked for a roll call vote.

Amendment 15 carried by a vote of 3-2 with Senator Therriault, Senator McGuire, and Chair French voting yea, and Senator Wielechowski and Senator Huggins voting nay.

CHAIR FRENCH asked for a motion to adopt Amendment 16 by Senator Huggins.

5:11:08 PM

SENATOR HUGGINS moved Amendment 16. He directed attention to pages 3 and 5 and explained that the amendment addresses the certificate provision in the case of Trans Canada since they already have a certificate of convenience. On page 3, line 2, following the word "certificate" insert "or amended certificate".

CHAIR FRENCH said for purposes of the record he doesn't see that language on the proposed amendment. After further explanation was provided by the administration, he called a short recess to clean up the amendment.

At ease from [5:13:12 PM](#) to [5:14:30 PM](#).

CHAIR FRENCH reconvened the hearing and asked the sponsor to restate the amendment.

SENATOR HUGGINS stated the following:

Amendment 16

Page 3, line 2 following "certificate":
Insert "or amended certificate".

Page 5, line 13 following "certificate":
Insert "or amended certificate".

Page 5, line 16 following "certificate":
Insert "or amended certificate".

SENATOR HUGGINS explained that if somebody already has a FERC certificate, which Trans Canada does, then that certificate will be amended.

CHAIR FRENCH found no objection and announced that Amendment 16 carries.

[5:15:34 PM](#)

CHAIR FRENCH asked for a motion to adopt Amendment 17, labeled 25-GS1060\0.10.

SENATOR WIELECHOWSKI moved Amendment 17.

25-GS1060\0.10
Bullock

A M E N D M E N T 17

OFFERED IN THE SENATE BY SENATOR WIELECHOWSKI
TO: CSSB 104(JUD), Draft Version "O"

Page 22, line 30, through page 31, line 8:

Delete all material and insert:

"**Sec. 43.90.330. Inducement vouchers.** (a) A person that acquires firm transportation capacity in the first binding open season of the project, that does not hold an oil and gas lease on the North Slope, and that is not an affiliate of a person that holds an oil and gas lease on the North Slope, may apply to the commissioners for a voucher under this section. A voucher issued by the commissioners must describe the firm transportation capacity in the project to which the voucher is applicable.

(b) A voucher issued by the commissioners under this section entitles the holder of the voucher to the resource inducements in AS 43.90.310 and 43.90.320 for gas shipped in the firm transportation capacity acquired by the person applying for the voucher during the first binding open season of the project and described in the voucher. The voucher may be transferred to a gas producer that has a binding obligation to sell gas to the person transferring the voucher under a gas purchase agreement.

(c) A gas producer holding a voucher may claim the resource inducements for gas shipped through the firm transportation capacity described in the voucher and only on gas that is produced and delivered to the purchaser on the North Slope. A gas producer may claim the resource inducements under this subsection until the earlier of the termination of the binding gas purchase agreement or the expiration of the inducements by operation of law."

Page 25, line 31:

Delete "A"

Insert "Except for the transfer of a voucher to a producer under AS 43.90.330(b), a"

SENATOR WIELECHOWSKI reminded members of the discussion yesterday related to the new inducement voucher section that was added. Currently Section 330 talks about midstream, upstream, and who it would apply to. He deferred to Mr. Bullock to explain why he broke it down the way he did.

MR. BULLOCK explained that subsection (a) describes the qualifications of a person applying for a voucher. First, they must acquire firm transportation capacity during the first binding open season. Also, the person may not hold or be an

affiliate of a person that holds an oil and gas lease on the North Slope. Persons meeting those qualifications may apply to the commissioners for a voucher, which must describe the firm transportation capacity of the project to which the voucher is applicable. The description is necessary for the subsequent provisions, he said.

CHAIR FRENCH summarized the provision seems to say that anybody except the producers can get a voucher.

MR. BULLOCK explained that subsection (b) says what the value of the voucher is. It's issued by the commissioners and entitles the holder to the resource inducements. The resource inducements, the same as the other resource inducements not related to the voucher, apply only to the gas that's shipped through the firm capacity. The voucher may be transferred to a gas producer that has a binding obligation to sell gas to the person transferring the voucher. That limits the group of people that can receive the transferred voucher. That section is referred to later in the amendment, he added.

SENATOR McGUIRE asked how the value of voucher is determined.

MR. BULLOCK answered it's the value of the inducements. The voucher basically says it gives the right to the resource inducements to the voucher that can flow to a producer. Otherwise a producer could only get the inducements if they were among the group that committed during the initial binding open season.

SENATOR McGUIRE asked who she would buy a voucher from and how the price would be set.

MR. BULLOCK said first you would need to be planning to buy gas from a producer. If you didn't commit to shipping capacity during initial binding open season, then you would need to find somebody that did commit and already has a voucher. As far as price is concerned, you'd identify the value of the inducements and that would pretty much determine the value.

[5:19:59 PM](#)

MR. BULLOCK explained that subsection (c) addresses the producer once the voucher is in hand. At that point they're entitled to claim the inducements for the gas that's shipped through that firm capacity. The producer is able to claim the inducements until the purchase agreement is terminated or the expiration of

the inducements by operation of law. It's written such that the earlier of the two options would be the date of termination.

CHAIR FRENCH asked if "by operation of law" on the last line of the amendment would include a decision on the constitutionality of one of the inducements by the supreme court.

MR. BULLOCK replied the constitutionality issue relates to how long the inducement would continue on the tax issue. If nothing happens the law says it'll be 10 years, but if it is terminated earlier then the certificate and the voucher would terminate earlier.

CHAIR FRENCH noted that everyone was nodding in agreement.

MS. DAVIS added that was the purpose of using "by operation of law" because many things could happen and obviously it only has the potency of the inherent power of the state so the power of the law is what controls the ultimate duration.

CHAIR FRENCH said he wanted to make it clear because it could only happen by passage of a statute, but that might happen subsequent to a decision by the supreme court.

MR. BULLOCK agreed adding that the statute says 10 years after commercial operation commences. The inducement goes away if nothing happens after 10 years.

[5:22:13 PM](#)

MR. BULLOCK explained that the last part of the amendment applies to the assignment section. It says that the rules of the assignment apply except as provided in subsection (b). It says that between the person that has the voucher and the gas producer from which the person with the voucher is going to buy their gas, subsection (b) in 43.90.330 and the first part of the amendment applies. If he is transferring the voucher he holds to Senator McGuire under her scenario, then the assignment provisions on page 25, line 31 would apply to that transfer, he said. It's like a transfer between buyers as opposed to a transfer between a buyer and a producer.

SENATOR WIELECHOWSKI asked if the administration supports the amendment.

MS. DAVIS responded the administration very much supports the amendment.

CHAIR FRENCH withdrew his objection. Finding no further objection, he announced that Amendment 17 carries.

Recess from [5:24:04 PM](#) to [5:31:06 PM](#).

CHAIR FRENCH reconvened the meeting and asked Senator Wielechowski his intention on Amendment 8.

SENATOR WIELECHOWSKI stated that he would not reintroduce Amendment 8 because the issue had been largely addressed in a prior amendment.

CHAIR FRENCH moved Amendment 18 and objected for discussion purposes.

Amendment 18

Page 25, lines 8-9:

Delete (B) a statutory change or a change in regulations relating to royalties or taxes after the effective date of this section; or

Insert (B) the state's exercise of its right to modify royalties as authorized by law in effect on the effective date of this section; or

[5:32:13 PM](#)

MS. DAVIS explained that the administration had identified two items it didn't want included as preferential tax or royalty treatment. The first is what's listed in subparagraph (A), which is the state's existing right to resolve disputes regarding royalties and taxes. Those need to be settled but we did not want a royalty settlement or a tax settlement agreement interpreted as a preferential act, she said. Likewise, subparagraph (B), which relates to the current statutes that authorize DNR to change the royalty rates for lessees under specific conditions were not intended to be interpreted as a preferential royalty treatment for a competing project. When the language was originally written it was less than clear so Mr. Bullock wrote subparagraph (B). That is a clearer and narrower statement of the intent with respect DNR's ability to modify royalties, she said.

MR. BULLOCK, responding to a question from Chair French, said it sounds reasonable.

CHAIR FRENCH removed his objection. Finding no further objection, he announced that Amendment 18 carries.

CHAIR FRENCH asked Senator Wielechowski to present the final matter, which was subsequently identified as Amendment 19.

[5:34:42 PM](#)

SENATOR WIELECHOWSKI moved the following:

Amendment 19

Page 3, lines 17-20 following "this chapter":

Delete ", but the commissioners shall adopt regulations that provide administrative procedures for a protest and appeal relating to the solicitation of applications and award of a license that are substantially similar to the procedures in AS 36.30.550-36.30.699."

Insert "."

SENATOR WIELECHOWSKI explained that the language is no longer necessary because a provision had been added that says that by filing an application there is a waiver.

[5:35:55 PM](#)

SENATOR McGUIRE asked for further clarification because she had interpreted it as being at a different point in the process. She didn't disagree that the language on lines 18-19 "and award of a license" needed to be removed. And she also didn't disagree that there might be confusion between this and the waiver provision. However, she assumed that the administration intended this language to be in and applicable to a separate point in the process—that being the process by which you're soliciting applications as opposed to after you've solicited them and then ask for a waiver of rights. She said she supports the amendment she just wants a wrap up on that thought process.

[5:36:51 PM](#)

COMMISSIONER GALVIN said she correctly articulated the administration's rationalization, but it got into the bill when a previous committee added paragraph 16. We're comfortable relying upon that provision as opposed to this one, he said.

SENATOR McGUIRE accepted the explanation.

CHAIR FRENCH asked if the administration supports the amendment.

COMMISSIONER GALVIN said yes.

CHAIR FRENCH removed his objection. Finding no further objection, he announced that Amendment 19 carries.

CHAIR FRENCH stated that the bill is back before the committee. Finding no further amendments, he asked for a motion.

[5:38:00 PM](#)

SENATOR McGUIRE moved CSSB 104, Version 0 as amended, from committee with individual recommendations and attached fiscal note(s).

CHAIR FRENCH announced that without objection CSSB 104(JUD) moves from committee.

There being no further business to come before the committee, Chair French adjourned the meeting at [5:38:36 PM](#).