

**ALASKA STATE LEGISLATURE**  
**SENATE JUDICIARY STANDING COMMITTEE**

January 25, 2008

1:33 p.m.

**MEMBERS PRESENT**

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

**MEMBERS ABSENT**

All members present

**COMMITTEE CALENDAR**

CS FOR HOUSE BILL NO. 151(JUD)

"An Act requiring an indemnification, defense, and hold harmless provision in construction-related professional services contracts of state agencies, quasi-public agencies, municipalities, and political subdivisions."

MOVED SCS CSHB 151(JUD) OUT OF COMMITTEE

CS FOR HOUSE BILL NO. 7(FIN) am

"An Act relating to false caller identification."

HEARD AND HELD

CS FOR HOUSE BILL NO. 149(RES)

"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

**PREVIOUS COMMITTEE ACTION**

BILL: HB 151

SHORT TITLE: INDEMNITY CLAUSE IN PUBLIC CONTRACTS

SPONSOR(s): REPRESENTATIVE(s) JOHNSON BY REQUEST

02/22/07	(H)	READ THE FIRST TIME - REFERRALS
02/22/07	(H)	STA, JUD

03/20/07 (H) STA AT 8:00 AM CAPITOL 106  
 03/20/07 (H) Heard & Held  
 03/20/07 (H) MINUTE(STA)  
 03/24/07 (H) STA AT 10:00 AM CAPITOL 106  
 03/24/07 (H) Moved CSHB 151(STA) Out of Committee  
 03/24/07 (H) MINUTE(STA)  
 03/26/07 (H) STA RPT CS(STA) NT 6DP  
 03/26/07 (H) DP: JOHANSEN, JOHNSON, COGHILL, DOLL,  
 GRUENBERG, LYNN  
 04/02/07 (H) JUD AT 1:00 PM CAPITOL 120  
 04/02/07 (H) Heard & Held  
 04/02/07 (H) MINUTE(JUD)  
 04/30/07 (H) JUD AT 1:00 PM CAPITOL 120  
 04/30/07 (H) Moved CSHB 151(JUD) Out of Committee  
 04/30/07 (H) MINUTE(JUD)  
 05/01/07 (H) JUD RPT CS(JUD) NT 3DP 4NR  
 05/01/07 (H) DP: GRUENBERG, LYNN, RAMRAS  
 05/01/07 (H) NR: COGHILL, DAHLSTROM, HOLMES, SAMUELS  
 05/09/07 (H) TRANSMITTED TO (S)  
 05/09/07 (H) VERSION: CSHB 151(JUD)  
 05/09/07 (S) READ THE FIRST TIME - REFERRALS  
 05/09/07 (S) STA, JUD  
 05/12/07 (S) STA RPT 2DP 2NR  
 05/12/07 (S) DP: MCGUIRE, GREEN  
 05/12/07 (S) NR: FRENCH, BUNDE  
 05/12/07 (S) STA AT 1:00 PM BELTZ 211  
 05/12/07 (S) Moved CSHB 151(JUD) Out of Committee  
 05/12/07 (S) MINUTE(STA)  
 01/21/08 (S) JUD AT 1:30 PM BELTZ 211  
 01/21/08 (S) Heard & Held  
 01/21/08 (S) MINUTE(JUD)

BILL: HB 7

SHORT TITLE: FALSE CALLER IDENTIFICATION

SPONSOR(s): REPRESENTATIVE(s) LYNN, GARDNER

01/16/07 (H) PREFILE RELEASED 1/5/07  
 01/16/07 (H) READ THE FIRST TIME - REFERRALS  
 01/16/07 (H) JUD  
 01/22/07 (H) JUD AT 1:00 PM CAPITOL 120  
 01/22/07 (H) Scheduled But Not Heard  
 01/24/07 (H) JUD AT 1:00 PM CAPITOL 120  
 01/24/07 (H) Heard & Held  
 01/24/07 (H) MINUTE(JUD)  
 01/31/07 (H) JUD AT 1:00 PM CAPITOL 120  
 01/31/07 (H) Heard & Held  
 01/31/07 (H) MINUTE(JUD)

02/01/07 (H) JUD AT 1:00 PM CAPITOL 120  
 02/01/07 (H) Heard & Held  
 02/01/07 (H) MINUTE(JUD)  
 02/05/07 (H) JUD AT 1:00 PM CAPITOL 120  
 02/05/07 (H) Heard & Held  
 02/05/07 (H) MINUTE(JUD)  
 02/08/07 (H) JUD AT 1:00 PM CAPITOL 120  
 02/08/07 (H) Moved CSHB 7(JUD) Out of Committee  
 02/08/07 (H) MINUTE(JUD)  
 02/12/07 (H) JUD RPT CS(JUD) 2DP 4NR  
 02/12/07 (H) DP: GRUENBERG, LYNN  
 02/12/07 (H) NR: COGHILL, SAMUELS, HOLMES, RAMRAS  
 02/12/07 (H) FIN REFERRAL ADDED AFTER JUD  
 02/21/07 (H) FIN AT 1:30 PM HOUSE FINANCE 519  
 02/21/07 (H) Heard & Held  
 02/21/07 (H) MINUTE(FIN)  
 03/05/07 (H) FIN AT 1:30 PM HOUSE FINANCE 519  
 03/05/07 (H) Moved CSHB 7(FIN) Out of Committee  
 03/05/07 (H) MINUTE(FIN)  
 03/07/07 (H) FIN RPT CS(FIN) 2DP 7NR  
 03/07/07 (H) DP: CRAWFORD, MEYER  
 03/07/07 (H) NR: GARA, STOLTZE, JOULE, NELSON,  
 THOMAS, HAWKER, CHENAULT  
 03/16/07 (H) TRANSMITTED TO (S)  
 03/16/07 (H) VERSION: CSHB 7(FIN) AM  
 03/19/07 (S) READ THE FIRST TIME - REFERRALS  
 03/19/07 (S) JUD, FIN  
 01/23/08 (S) JUD AT 1:30 PM BELTZ 211  
 01/23/08 (S) -- MEETING CANCELED --  
 01/25/08 (S) JUD AT 1:30 PM BELTZ 211

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  
 03/12/07 (H) Heard & Held  
 03/12/07 (H) MINUTE(RES)  
 03/19/07 (H) RES AT 1:00 PM BARNES 124  
 03/19/07 (H) Moved CSHB 149(RES) Out of Committee  
 03/19/07 (H) MINUTE(RES)  
 03/21/07 (H) RES RPT CS(RES) 4DP 1DNP 4NR  
 03/21/07 (H) DP: WILSON, ROSES, JOHNSON, GATTO  
 03/21/07 (H) DNP: SEATON

03/21/07 (H) NR: KAWASAKI, GUTTENBERG, EDGMON,  
 KOHRING  
 04/11/07 (H) JUD AT 1:00 PM CAPITOL 120  
 04/11/07 (H) Moved CSHB 149(RES) Out of Committee  
 04/11/07 (H) MINUTE(JUD)  
 04/13/07 (H) JUD RPT CS(RES) 3DP 3NR  
 04/13/07 (H) DP: GRUENBERG, LYNN, RAMRAS  
 04/13/07 (H) NR: SAMUELS, HOLMES, COGHILL  
 04/20/07 (H) TRANSMITTED TO (S)  
 04/20/07 (H) VERSION: CSHB 149(RES)  
 04/23/07 (S) READ THE FIRST TIME - REFERRALS  
 04/23/07 (S) JUD  
 01/23/08 (S) JUD AT 1:30 PM BELTZ 211  
 01/23/08 (S) -- MEETING CANCELED --  
 01/25/08 (S) JUD AT 1:30 PM BELTZ 211

**WITNESS REGISTER**

JEANNE OSTNES, Staff  
 to Representative Craig Johnson  
 Alaska State Capitol  
 Juneau, AK

**POSITION STATEMENT:** Answered questions related to HB 151 on behalf of the sponsor.

JOHN ASHENBRENNER, Deputy Attorney  
 Matanuska-Susitna Borough  
 Palmer, AK

**POSITION STATEMENT:** Expressed concern with HB 151.

NELSON PAGE, Attorney  
 Anchorage, AK

**POSITION STATEMENT:** Spoke in support of the Senate CS for HB 151.

MICHAEL CARLSON, Partner  
 McCool Carlson Green Architects  
 Anchorage, AK

**POSITION STATEMENT:** Supported HB 151.

LEANNE BOLDNOW, Insurance Broker  
 Marsh USA

**POSITION STATEMENT:** Testified on HB 151.

REPRESENTATIVE BOB LYNN  
 Alaska State Capitol  
 Juneau, AK

**POSITION STATEMENT:** Sponsor of HB 7

DIRK MOFFET, Staff  
to Representative Bob Lynn  
Alaska State Capitol  
Juneau, AK

**POSITION STATEMENT:** Provided information on HB 7 on behalf of the sponsor.

ED SNIFFEN, Assistant Attorney General  
Civil Division  
Department of Law (DOL)  
Anchorage, AK

**POSITION STATEMENT:** Answered questions related to HB 7.

RODNEY DIAL, Lieutenant  
Alaska State Troopers  
Department of Public Safety (DPS)

**POSITION STATEMENT:** Responded to questions related to HB 7.

LARRY HARTIG, Commissioner  
Alaska Department of Environmental Conservation (DEC)  
Juneau, AK

**POSITION STATEMENT:** Provided introductory remarks for HB 149.

CAMERON LEONARD, Assistant Attorney General  
Civil Division, Environmental Section  
Department of Law (DOL)  
Fairbanks

**POSITION STATEMENT:** Gave a sectional analysis for HB 149.

#### **ACTION NARRATIVE**

**CHAIR HOLLIS FRENCH** called the Senate Judiciary Standing Committee meeting to order at [1:33:23 PM](#). Present at the call to order were Senator Huggins, Senator Therriault, Senator Wielechowski, and Chair French. Senator McGuire arrived shortly thereafter.

#### **CSHB 151(JUD)-INDEMNITY CLAUSE IN PUBLIC CONTRACTS**

CHAIR FRENCH announced the consideration of HB 151. [Before the committee was CSHB 151(JUD).] He highlighted the proposed Senate Committee Substitute (CS). The only difference is that "where there is joint liability." is deleted from page 1, lines 13-14 of the current version O.

[1:34:22 PM](#)

SENATOR HUGGINS moved SCS CSHB 151, version N, as the working document.

SENATOR THERRIAULT asked if the prime sponsor agrees with the language change.

CHAIR FRENCH said he understands that the sponsor requested the change. He and the drafter saw the language as surplus.

[1:34:43 PM](#)

JEANNE OSTNES, Staff, to Representative Craig Johnson, confirmed that the sponsor agrees with the change.

[1:35:08 PM](#)

SENATOR WIELECHOWSKI asked if removing the language changes the bill.

MS. OSTNES replied, "Through the discussion that the committee was having and through legal, it just seemed to end some of the discussion that lawyers would have with more words."

CHAIR FRENCH announced that without objection, version N is before the committee.

MS. OSTNES clarified that the intent of the legislation is to address professional services contracts. Page 2, line 25, refers to professional services as defined in the definitions section of the state procurement code. She read AS 36.30.990(19) as follows:

(19) "professional services" means professional, technical, or consultant's services that are predominantly intellectual in character, result in the production of a report or the completion of a task, and include analysis, evaluation, prediction, planning, or recommendation;

[1:36:43 PM](#)

SENATOR MCGUIRE joined the meeting.

[1:37:19 PM](#)

JOHN ASHENBRENNER, Deputy Attorney, Matanuska-Susitna (MatSu) Borough, stated that the Alaska Constitution tasks municipalities with providing a myriad of services to the public. To carry that duty to fruition, they should be given

maximum flexibility. He read Article X, Section 1 of the constitution to support his view.

The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. A liberal construction shall be given to the powers of local government units.

MR. ASHENBRENNER said contract negotiations are part of the process for reaching agreement between local government and contractors, and a mandated indemnification clause runs counter to allowing local government to deliver those services. A second concern is that this clause could be applied where professional services are provided in hybrids, such as design built contracts. The definition of "professional services" in AS 36.30.990(19) and the definition of "construction" in paragraph (1) of the bill could lead to the conclusion that municipalities could not use protective indemnification clauses, which are widely used in construction contracts. If this goes forward, we would ask that the MatSu Borough be exempted from this provision, he said. Furthermore, it ought to be clear that it is not intended to apply to design built contracts because those save the public money.

[1:41:55 PM](#)

MR. ASHENBRENNER expressed concern with the language that talks about comparative fault basis because it could be construed as obligating the government in a joint liability claim to indemnify the contractor. If it were construed that way, an attorney general opinion from 2005 says that an additional appropriation at the local and the state level would be necessary. That would be an additional cost for the government.

[1:44:09 PM](#)

CHAIR FRENCH asked how, on a comparative fault basis, either side could indemnify the other for something they did not do. "Isn't that exactly what comparative fault's about?"

MR. ASHENBRENNER said he's been struggling with the question of whether this would be cross indemnification and that may or may not be the case. However, the larger concern for the MatSu Borough is that the provision should not apply to design built or hybrid contracts. It's difficult to think that applying a mandated contractual provision for all professional related contracts is appropriate in all contexts, he said.

[1:46:57 PM](#)

SENATOR WIELECHOWSKI asked if the suggested indemnification language is very different than what the borough currently uses.

MR. ASHENBRENNER said yes, but stronger language has been used in some contracts.

SENATOR WIELECHOWSKI asked if the bill will have a financial impact to MatSu Borough.

MR. ASHENBRENNER said it could; the cost of litigation will probably go up because the contractor's obligation to indemnify and defend the local or state government won't be as broad.

[1:48:44 PM](#)

NELSON PAGE, Anchorage Attorney, spoke in support of the Senate CS for HB 151. He explained that he represents a large number of design professionals statewide and indemnification is a very difficult issue for his clients. For example, the indemnification clause that the MatSu Borough and others use requires a design professional to accept all legal and financial responsibility for errors made by any party to the contract even if another party is 99 percent responsible and someone other than the design professional is responsible for the other 1 percent. Usually he recommends that his clients not sign those clauses. When the other party won't agree to amend the clause, his client has to either turn down the work or sign the contract and assume huge risk for which there is no insurance. Insurance usually covers negligence of the design professional but not contractual obligations.

MR. PAGE said in some respects the CS favors the people who are contracting with the design professionals. First, the bill allocates responsibility fairly; the entity that is negligent and causes damages will be held responsible to the extent of those damages. Second, it's an advantage to state and local governments to the extent that it's easier for design professionals to bid on projects. Smarter design professionals won't bid on contracts with an onerous indemnification clause, he said. Finally, government may save money to extent that design professionals are padding their bids to cover the additional risk.

[1:52:07 PM](#)

MICHAEL CARLSON, Partner, McCool Carlson Green Architects, said he supports HB 151 because it makes everyone responsible for their own mistakes and negligence. It's the right thing to do

and it's good public policy. Part of the advantage of HB 151 is that when the language is consistent, it can be consistently interpreted by the court. He encouraged the committee to move the bill.

[1:55:27 PM](#)

LEANNE BOLDNOW, Insurance Broker, Marsh USA, said she has been a member of the Alaska Design Professional Council and was on the contract task force. Stating support for HB 151, she said she has represented more than 30 design firms across the state and has continually reviewed poorly written contracts. Many of those contracts are uninsurable because of contract wording and the indemnification clause. She explained that a design consultant's work is intellectual property and as such design professional insurance provides defense when negligent act, errors, or omissions are tied to the intellectual property. When public entities publish contracts that reference general construction, she recommends that design professional insurance will not cover that contract.

MS. BOLDNOW relayed that it was not the intent of the task force or the sponsor to allow a building contractor to morph into the design contract and thereby gain from HB 151.

[1:57:56 PM](#)

CHAIR FRENCH, finding no one else who wanted to testify, closed public testimony and asked for committee discussion.

SENATOR WIELECHOWSKI stated that HB 151 doesn't appear to be particularly interesting on its face, but it presents very interesting and colliding ideas. There's the concept of fairness and the fact that each party should bear the cost of their own negligence. That clashes with the free market and the ability of municipalities or agencies to negotiate contracts to their liking. But if a municipality can negotiate and get another party to accept their liability, it's not a bad thing under the free market theory. Another thing that collides is the inability of the designer to get insurance. It's been an interesting discussion, he added.

CHAIR FRENCH agreed it is a lively issue, but he believes that it boils down to the issue of fairness.

[1:59:41 PM](#)

SENATOR McGUIRE motioned to report Senate CS for CSHB 151, version N, from committee with individual recommendations and attached fiscal note(s).

CHAIR FRENCH announced that without objection SCS CSHB 151 (JUD) moves from committee.

**CSHB 7(FIN)am-FALSE CALLER IDENTIFICATION**

[2:01:39 PM](#)

CHAIR FRENCH announced the consideration of CSHB 7(FIN) am.

REPRESENTATIVE BOB LYNN, sponsor of HB 7, explained that the bill relates to false caller identification. That means that your caller ID may not be accurate, he said. This has the potential to create serious mischief and it could facilitate fraud. We ought to take proactive steps to make false caller ID illegal in Alaska, he said.

[2:03:25 PM](#)

DIRK MOFFET, Staff, to Representative Bob Lynn, explained that the technology for false caller ID isn't new, but it's easier and less expensive. Now someone with a \$10 calling card can alter their caller ID and even change the sound of their voice. For example, someone could change their caller ID so that you'd think that Bank of America is calling. He referenced an AP article that discussed how easy spoof caller ID has become.

MR. MOFFET relayed that Congressman Tim Murphy from Pennsylvania testified that someone falsely entered his office phone number on caller ID. That person called his constituents and slandered the congressman. He only learned about the calls when people from his district called his office questioning why the congressman would say such negative things about himself. There are many other examples, he said.

MR. MOFFET said the bill doesn't address the technology of how the spoof gets on the caller ID. It simply says that it is a crime to insert false caller ID information into a caller ID system with the intent to defraud. HB 7 establishes that this is a class A misdemeanor.

[2:06:23 PM](#)

SENATOR THERRIAULT noted a discrepancy in the penalty between the bill and the fiscal notes and asked what the sponsor's intent is.

MR. MOFFIT clarified that the intent is a class A misdemeanor.

SENATOR THERRIAULT asked what that penalty includes.

MR. MOFFIT replied it carries a \$10,000 fine and 365 days in jail.

CHAIR FRENCH said that's the maximum penalty.

MR. MOFFIT agreed.

CHAIR FRENCH asked what "intent to defraud" means and whether the situation with the congressman would be a crime under this bill.

[2:07:49 PM](#)

MR. MOFFIT deferred the question to the Department of Law.

SENATOR THERRIAULT provided a copy of the statutory language for "intent to defraud."

[2:08:40 PM](#)

ED SNIFFEN, Assistant Attorney General, Civil Division, Department of Law (DOL), read the definition of "intent to defraud" in AS 11.46.990(11)(A) and (B) and said he believes it is broad enough to include fraud aimed at financial harm, deception, reputational injury or other harm. He believes that the definition is broad enough to include the harassment of the congressman.

CHAIR FRENCH agreed. He said his interest is to cover situations where someone is trying to obtain a Social Security number, a bank account number, an attempt to contact a women's shelter, or an attempt to harass someone.

[2:10:24 PM](#)

SENATOR WIELECHOWSKI asked if each call that goes out with the same message constitutes a separate offense.

MR. SNIFFEN said DOL would view it that way if the recipients were different. The Alaska Consumer Protection Act defines a violation to include every separate transaction that could potentially affect a consumer. If a call center switchboard calls 10,000 people with the push of a button, each of the potential victims would have a claim and so each call would potentially be a violation.

SENATOR WIELECHOWSKI commented the example above could send someone to prison for life and that seems a bit harsh.

MR. SNIFFEN said he'd defer to Ms. Carpeneti, but he believes the sentencing judge would have discretion.

[2:12:14 PM](#)

MR. MOFFET reminded members that this sort of crime is difficult to detect and catch so the deterrent effect is important.

SENATOR THERRIAULT highlighted typical home electronics and questioned whether it really would be difficult to detect.

CHAIR FRENCH asked if spoof caller ID is a problem in Alaska.

MR. MOFFET said his research shows it's happening in the Lower 48.

CHAIR FRENCH asked Lieutenant Dial if there have been cases of spoof ID in Alaska.

[2:13:56 PM](#)

RODNEY DIAL, Lieutenant, Alaska State Troopers, Department of Public Safety (DPS), said it's unclear how many of these cases are occurring. But DPS suspects that spoof ID is involved in some theft and deception, impersonation, and extortion cases.

SENATOR McGUIRE said a company is defined as a person and she doesn't recall if a company can be charged with a crime.

MR. SNIFFEN explained that a company can be charged with violation of the Consumer Protection Act. In general DOL tries to identify individuals within the company who are responsible for making decisions. However, Federal Trade Commission cases have looked at phone boiler rooms where clerks make illegal telemarketing calls. If those clerks know that their conduct is illegal and they continue, it's not a defense to place the blame on the supervisor. Each of those clerks could be responsible for their own conduct.

[2:15:57 PM](#)

SENATOR WIELECHOWSKI asked if there's already a law prohibiting this behavior.

MR. SNIFFEN said he believes this conduct is covered by a variety of statutes. For example, it could be theft by deception. Under the Consumer Protection Act the conduct is arguably already prohibited because unfair trade practice is a violation. But this would make it clear and it would add the criminal element to the conduct.

SENATOR WIELECHOWSKI asked Lieutenant Dial if he foresees any cost associated with the bill.

MR. DIAL said yes, primarily in the cost for training specific to this type of crime. The estimate is \$25,000 or less.

[2:17:54 PM](#)

CHAIR FRENCH announced he would hold HB 7 in committee.

**CSHB 149(RES)-POLLUTANT DISCHARGE PERMITS**

CHAIR FRENCH announced the consideration of HB 149. [Before the committee was CSHB 149(RES).]

[2:18:31 PM](#)

LARRY HARTIG, Commissioner, Alaska Department of Environmental Conservation (DEC), described HB 149 as a clean-up bill. Several years ago the legislature passed a bill directing DEC to apply to EPA (Environmental Protection Agency) to transfer primacy, which is the authority to issue National Pollutant Discharge Elimination System (NPDES) permits in Alaska. He explained that the federal Clean Water Act (CWA) requires that certain dischargers are required to have an NPDES permit and then they must comply with the terms of the permit.

COMMISSIONER HARTIG explained that EPA has identified several areas where state statutes must be changed in order for the state to get primacy. The concern is that Alaska law must be at least as rigorous as the federal law. The Palin Administration recognizes the importance of having local decisions made with local input and oversight and is strongly supporting HB 149.

[2:23:17 PM](#)

COMMISSIONER HARTIG explained that primacy does not change the standard for making decisions about permits. In fact, the permits that EPA currently issues are based on state approved water quality standards and DEC certifies that those permits comply with state law. When DEC assumes primacy it will base permit decision on those same water quality standards. Also, EPA will continue to provide oversight once DEC begins to administer the program.

COMMISSIONER HARTIG stated that DEC's objective is to have an exemplary program that's based on the best science, the best public process, and founded on good public policy.

[2:24:55 PM](#)

CAMERON LEONARD, Assistant Attorney General, Civil Division, Environmental Section, Department of Law (DOL), Fairbanks, drew attention to several documents in the packet that might be helpful: "NPDES Program Approval Criteria" and "Sectional Analysis of CSHB 149(RES)". He explained that the statutory changes will make the state program at least as stringent and comprehensive as the federal law, which is necessary to receive EPA sanction.

[2:26:58 PM](#)

MR. LEONARD said he will give a sectional analysis. Sections 1 and 5 address the kinds of monitoring, sampling, and reporting requirements that can be placed within or outside a discharge permit. Section 1 gives DEC authority to require monitoring, sampling, and reporting outside the permit that is equivalent to Section 308 of the federal Clean Water Act (CWA). Section 5 deals with monitoring, sampling, and reporting within a permit. The state law will be equivalent to the federal law with regard to what can be put in a permit.

MR. LEONARD said Section 2 addresses differences in terminology. The CWA uses the term "discharges" and Alaska Statute uses a different term, which caused EPA concern about equivalent authority. To address the concern, the phrase "or discharge" is added to Alaska Statute to ensure that the scope of DEC's permitting authority is as broad as the federal law. Also, the last sentence in this section is deleted because it is redundant and inconsistent. Discharges into publicly owned treatment works is addressed in Section 4.

Section 3 simply clarifies that DEC makes the decision about which form of authorization to use for any given discharge or activity.

[2:31:02 PM](#)

MR. LEONARD pointed out that Section 4 changes three current exemptions in AS 46.03.100(e). EPA was concerned that the federal exemptions were not as broad so the state exemptions were tightened. The first change in .100(e)(1) deletes reference to "sewerage system" and inserts "publicly owned treatment works" to match the federal exemption.

CHAIR FRENCH clarified that neither EPA nor DEC would require a permit for discharge into a publicly owned treatment plant.

MR. LEONARD agreed.

CHAIR FRENCH asked if there's really a difference or if it's a matter of semantics.

MR. LEONARD explained that under state law the term "sewerage system" is defined more broadly than "publicly owned treatment works." That could be interpreted to include a pipe running from your house to the river so it was probably too broad.

CHAIR FRENCH asked if he would say that this is more restrictive than under current state law.

MR. LEONARD said there's no question about that.

[2:33:23 PM](#)

MR. LEONARD said the second change occurs in .100(e)(4) and relates to incidental discharges such as water from trenching, drilling, or ditching. It's referred to as the incidental discharge exception, but basically there was only an exemption if the activity did not result in a discharge into surface waters. Current state law uses the term "surface water of the state" and federal law uses "waters of the United States." The phrases are similar but not identical, so this ensures that the state exemption isn't any broader than what is allowed under federal law.

The third change occurs in .100(e)(7) and relates to discharge of munitions. Generally, the discharge of munitions is exempted from the requirement of getting state authorization unless it results in a discharge into water. To match federal law the phrase "unless it results in a discharge into waters of the United States" is added.

CHAIR FRENCH asked if this will impact the enormous amount of military training exercises that occur around Anchorage and the Interior.

MR. LEONARD replied it's really just a change in the permitting agency. Applications will go to the state instead of EPA.

[2:35:28 PM](#)

MR. LEONARD reminded members that Section 5 is linked to Section 1. It expands DEC's authority to include monitoring and reporting requirements in permits to be equivalent to EPA authority under the CWA.

He explained that Sections 6 and 7 clarify that the state's use of the term "waste material" includes "pollutants" as defined in the CWA.

MR. LEONARD said Section 8 adds a new subsection (i) to AS 46.03.790. Current state law bases its criminal program for environmental issues on criminal negligence, which is higher state of mind as defined in the statute. EPA didn't agree with that because the state is requiring a higher level of culpability to do criminal prosecutions than is required under the CWA. For purposes of the APDES program only, criminal enforcement is based on ordinary negligence.

MR. LEONARD said Section 9 provides an immediate effective date.

[2:38:05 PM](#)

CHAIR FRENCH asked where lawsuits would take place if a citizen is unhappy about a decision DEC made about issuing a permit.

MR. LEONARD explained that an appeal of a permitting decision has two stages. Appeals of DEC permits are referred to the Office of Administrative Hearings (OAH). Following the hearing, AOH typically makes a recommendation to the commissioner of DEC who then makes a final decision on the permit. If the citizen is still unhappy, he or she could appeal to the state superior court and ultimately to the state supreme court.

The other kind of litigation in this program is called a citizen suit. That's when a citizen sues for violation of an existing permit. Those cases would continue to go to federal district court and those decisions are appealed to the Ninth Circuit.

CHAIR FRENCH asked why a citizen would be forced to go to federal court when a state agency issued the permit and is overseeing the program.

[2:40:13 PM](#)

MR. LEONARD replied those are the provisions of a citizen suit under the CWA. He further explained that a suit can't be brought if the agency that issued the permit is already enforcing it. So if EPA attorneys bring enforcement action on a federally issued permit a citizen suit is precluded. It will work the same with the state. If DEC is already enforcing the terms of a permit that it issued, the suit will be in state court and that precludes a citizen suit in federal court. He added that EPA attorneys have said that most citizen suits are for minor violations and EPA usually isn't a participant.

SENATOR WIELECHOWSKI asked how many cases have been brought under the first scenario that in the future will be under OAH.

MR. LEONARD said according to a Region 10 attorney, there are very few permit appeals that go to the federal environmental appeals board (EAB) and fewer yet to the Ninth Circuit. There's not a high volume of appeals on the state side either, he added.

SENATOR WIELECHOWSKI highlighted the zero fiscal note from the Department of Law and asked if this wouldn't have fiscal ramification.

MR. LEONARD replied this bill doesn't affect the resources that DOL will have to invest in the program.

SENATOR WIELECHOWSKI asked if the DEC and EPA fine structures are comparable.

MR. LEONARD explained that the difference is that EPA has the authority to assess a penalty administratively and DEC has to go to court. However, that's not an obstacle to program approval because the amount of damages DEC can recover satisfies EPA requirements. He agreed to provide the numbers.

SENATOR WIELECHOWSKI again highlighted the fiscal notes and said he hopes they adequately reflect the additional legal work. Referring to testimony in the other body, he asked if DEC intends to list the same requirements within the permit that EPA lists or if some of those requirements would be listed outside the permit.

MR. LEONARD referred to his discussion about the monitoring and reporting requirements and said that's the only area that the state has said it may list outside the permits. The testimony in the other body reflected the belief that information that wasn't tied to compliance with effluent limits could inappropriately be subject to citizen suit enforcement if it was listed within the permit.

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SENATOR WIELECHOWSKI summarized that when the state assumes primacy there will be less monitoring and reporting issues within the DEC permit.

COMMISSIONER HARTIG stepped in to clarify that there will be no difference between an EPA and a DEC issued NPDES permit in terms

of the requirements for meeting water quality standards. Likewise, there will be no difference in the monitoring and reporting requirements for compliance with those water quality standards. The difference is that DEC wants more flexibility to ask permit holders to provide additional data. Currently DEC and EPA can ask for more data, but EPA does it under the permit. He described a hypothetical situation of a discharger in a remote area in Alaska that is asked to collect additional information. The permit holder knows that the additional data doesn't relate to compliance with any law. Although they're willing to collect the data, agreeing to do so within the permit is worrisome because if they miss even one collection they could be subject to a citizen suit. Under the CWA there is strict liability so the fact that the weather was too bad to collect the data one day is not a defense. The permit holder could be exposed to a potentially severe penalty.

COMMISSIONER HARTIG said the state wants the flexibility of putting the request in a separate agreement that's outside the permit. If anything it increases monitoring because the permit holder is more likely to agree to enhanced monitoring if they know it won't expose them to liability that they would not otherwise have.

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CHAIR FRENCH said the obvious policy choice is whether the state wants control over its own permitting. The potential tradeoff is whether the entity that assumes control is as tough as the EPA. The next administration may view these matters differently. He asked if any state has returned primacy to the EPA.

COMMISSIONER HARTIG said he knows that Alaska is one of five states that does not have primacy, but he doesn't know the answer to the specific question.

MR. LEONARD said he isn't aware of any state that has given it back.

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SENATOR THERRIAULT referred to work he did years ago to take over the 404 discharge permits. He said he doesn't recall any state that ever gave that authority back. He also worked on this legislation initially and in doing that research he doesn't recall any state that gave primacy back.

SENATOR McGUIRE highlighted the document titled "NPDES Permits" and read the following:

Under federal regulations, any state permit program must be as stringent as EPA's program in order for EPA to approve it. That means that the state must require permits for the same operations as does EPA. Stated another way, Alaska cannot exempt from permit coverage anyone who needs a federal permit.

SENATOR MCGUIRE said that although it appears that states have never given back control, any administration that wasn't doing a good job would attract the attention of lawmakers or the federal government. "I like the fact that the EPA has to continue to approve it," she added.

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SENATOR WIELECHOWSKI asked if there are requirements for DEC to consult with other agencies such as U.S Fish and Wildlife or National Marine Fisheries over critical habitat issues or endangered species listings.

MR. LEONARD explained that most of the federal consultation duties do not apply to a state permit decision. However, most major projects that require an NPDES permit also require some other federal permit so consultation will go on base on those permits.

SENATOR WIELECHOWSKI asked if that won't result in more third-party lawsuits.

MR. LEONARD explained that DEC is required by regulation to send copies of draft permits to all the relevant federal agencies. Only time will tell if more citizen suits will be brought.

COMMISSIONER HARTIG added that the basic requirements of the Endangered Species Act still apply. Although the Section 7 requirement that one federal agency consult another federal agency doesn't apply, the taking prohibition under Section 9 is there. It would be a violation of the federal act if the permitted action resulted in the taking of an endangered species. DEC doesn't want to set anyone up to violate the Endangered Species Act. Currently the APDES workgroup is reviewing a guidance document that will be available to the public in several weeks. It discusses communication with federal agencies, local communities and individuals to assure everyone that nothing will be lost when the state gets primacy. Federal agencies, including the EPA, will review that document. He offered to share it with the committee.

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COMMISSIONER HARTIG said his last point is that the EPA has oversight on each permit, not just the overall program. It has its own memorandum of agreement established with the federal agencies that DEC consults with under essential fish habitat or the Endangered Species Act. It establishes to how EPA will review the state's permits and consult with the agencies. It also sets out the procedure if it is disgruntled with a proposed permit action.

SENATOR WIELECHOWSKI reiterated the importance for having guidelines in place to protect the state from lawsuits. Little or no consultation increases the likelihood of lawsuits, he said.

SENATOR THERRIAULT asked if he is specifically referring to consultation with federal agencies.

SENATOR WIELECHOWSKI said yes; the EPA is required to consult with those federal agencies, but DEC doesn't have that requirement.

Commissioner HARTIG relayed that DEC provides draft copies of all its permits to the agencies directly. They can comment directly to DEC or they can work through EPA. He reiterated that EPA has the authority to veto DEC permits.

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SENATOR HUGGINS asked if this impacts DEC's role at Pebble Mine.

COMMISSIONER HARTIG said Pebble is on the radar, but it's a bit far off. The timeline is that the state will hopefully get primacy about a year from now. Then there will be a three-year phase-in during which time the state will address the less complicated permits first. Unless the Pebble application comes in 3-4 years from now, it's more than likely that the EPA will write that permit.

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SENATOR HUGGINS asked if any individuals or organizations will have "their hair on fire" over DEC receiving this authority.

COMMISSIONER HARTIG acknowledged that some people have expressed concerns and those are being addressed in various ways including the guidance document. For example, that document calls for consultation with tribes. Although some are concerned that the

EPA is more rigorous than the state, he agrees with Senator McGuire. If people don't respect the job DEC is doing, he firmly believes that the legislature, the EPA, and the courts will do something about it.

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CHAIR FRENCH commented that it says something that a long list of environmental groups has not signed up to testify today. He thanked Commissioner Hartig and announced that he would hold HB 149 in committee.

There being no further business to come before the committee, Chair French adjourned the meeting at 3:01:09 PM.