

**ALASKA STATE LEGISLATURE
ADMINISTRATIVE REGULATION REVIEW COMMITTEE**

February 15, 2011

1:31 p.m.

MEMBERS PRESENT

Senator Hollis French, Chair
Representative Kurt Olson, Vice Chair
Senator Bill Wielechowski
Representative Carl Gatto
Representative Chris Tuck

MEMBERS ABSENT

Senator Thomas Wagoner

COMMITTEE CALENDAR

OVERVIEW: REGULATION PROCESS

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

DEBORAH BEHR, Chief Assistant Attorney General
Legislation and Regulations Section
Civil Division
Department of Law (DOL)
Juneau, Alaska

POSITION STATEMENT: Presented an overview and answered questions on the administrative regulation process.

THERESA LAUTERBACH, Attorney
Division of Legal and Research Services
Legislative Affairs Agency
Juneau, Alaska

POSITION STATEMENT: Reviewed the legislative review process of regulations.

SCOTT CLARK, Special Assistant
Lieutenant Governor's Office
Juneau, Alaska

POSITION STATEMENT: Gave an overview of the lieutenant governor's role in the regulation process.

ACTION NARRATIVE

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CHAIR HOLLIS FRENCH called the Administrative Regulation Review Committee meeting to order at 1:13 p.m. Present at the call to order were Senators Wielechowski and Chair French and Representatives Olson and Gatto.

He explained that the Administrative Regulation Review Committee (ARR) is established as a permanent interim committee of the legislature under AS 24.20.400. This statute recognizes the need for prompt legislative review of administrative regulations filed by the lieutenant governor. He read AS 24.20.460, which lays out the powers of the committee. He noted that subsection (7) of the statute has no legal effect because the Alaska Supreme Court has taken the power away from the committee to pass a resolution to suspend the effective date of a regulation.

Overview: Regulation Process

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CHAIR FRENCH announced the business before the committee is to receive an overview of the regulation process.

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DEBORAH BEHR, Chief Assistant Attorney General, Legislation and Regulations Section, Civil Department, Department of Law (DOL), said she has been in her position since 1991. She said that in order to develop a regulation in Alaska, the legislature must give her a statute which gives direction to adopt regulations and there must be an implementing statute. She explained that the executive branch implements the laws passed by the legislature through regulations. Those regulations have the force and effect of law, the court will enforce them, and penalties can be imposed on individuals. Finally, the court does the "checks and balances" of the regulations with regard to the constitution.

She explained that she is frequently asked when the executive branch decides a regulation is needed. This begins with the statute that the legislature passed. If the statute is assigned regulation adopting authority, it will list what agency has this authority and what level of expertise it is supposed to be employing to it. From there, the regulations attorney reviews

the regulation for legal sufficiency. This is assigned under the Administrative Procedures Act (APA). This act is similar to a consumer protection statute because it allows the public to have advance notice and an opportunity to comment before a regulation is enforced against them. The regulation is then filed in the lieutenant governor's office and there are 30 days before the regulations is enforced against the public.

CHAIR FRENCH asked if she writes the regulations or reviews them.

MS. BEHR answered that it depends. She explained that most of the time a state agency will draft the regulations. However, on occasion DOL will draft the regulations, such as executive ethic act and consumer protection act regulations. She noted that DOL's job is to look for legal sufficiency, not policy choices. She explained that when a citizen comes into her office and is concerned about the policy choice made in regulation they need to start with the department who drafted the regulation.

She explained that Alaska has one of the most broad procedure acts in the nation. Exhibit 1 [located in the document packet] highlighted that AS 44.62.640(a)(3) states that any rule, regulation, order or standard of general application meets the definition of a regulation if other conditions are on here. The legislature, in passing the APA, has stated that it wants notice and an opportunity for the public to comment on a regulation if it fits this broad definition. She noted that any standard that will be uniformly applied to the public is generally required to be in a regulation.

If a state agency wants to create a new regulation, it needs to implement, interpret, or make specific the law being enforced or administered by the regulation. For example, if an agency wanted to develop a new program but there is no statutory basis behind it then the agency can't create a regulation to develop this program.

She continued that the APA requires notice and an opportunity for comment to be held if a standard affects the public. The regulation cannot be given an alternative name to avoid going through the regulation review process. She noted that this is important protection for the public.

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MS. BEHR turned to exhibit 2, a flow chart entitled "Steps in the Regulation Adoption Process" [included in the document packet].

Block 1 is the decision making and planning stage. She explained that this is where the state agency should be figuring out what it wants to do, researching federal law, and checking the statutes to see if the agency needs more statutory authority.

Block 2 is where the agency develops the regulation, the public notice, and its fiscal note. She noted that the fiscal note is required in the state to adopt to file regulations.

Next, an agency would consult with DOL [Block 3] and open a file [Block 4].

She explained that the agency then publishes and distributes public notices of the regulation along with any additional notice information and the regulation itself [Block 5]. This notice is posted in the newspaper, distributed electronically, and is on the Alaska Online Public Notice System.

CHAIR FRENCH asked if the notice he receives in his state e-mail on a proposed regulation is part of Block 5.

MS. BEHR answered yes. She urged legislators, if they have concerns with a proposed regulation, to write a letter for the public record. She explained that the agency and the court will look at these comments very carefully.

She continued with the public comment period [Block 6] which is typically 30 days. She noted that this period can be longer depending on the regulation. She strongly recommended that oral hearings be given during this public comment period.

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REPRESENTATIVE TUCK joined the committee.

CHAIR FRENCH asked for confirmation that the public comment period is essentially 30 days before the proposed regulation goes into effect.

MS. BEHR answered that it is 30 days until the comment period closes. Any comments received after this point are late and the commissioner of an agency must decide whether the public commentary should be reopened or to go forward.

She continued with Block 7, where the agency adopts the regulations. She explained that a board or commission needs to hold a public meeting in order to adopt the regulation. A department may adopt a regulation at its convenience after the public comments have been reviewed.

Block 8 is where regulations are reviewed by DOL for legal sufficiency. A copy is then given to the governor's office for review. She explained that under Alaska statute the governor has the ability to return regulations to most state agencies for failure to faithfully execute the law or failure to consider written comments of the Administrative Regulation Review Committee.

Block 9 is where the agency attorney, who is the expert in the particular field, looks at the regulation.

CHAIR FRENCH asked where the most effective point is for the committee to weigh in on. He noted that one point is during the period of public comment, when the committee can hold its own hearing.

MS. BEHR replied yes; it is not unusual to suggest to a commissioner that a second round of public comments would be appropriate.

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MS. BEHR continued with her presentation. Block 10 is where DOL has been statutorily assigned to review and either approve or disapprove regulations on a legal basis. She explained that the Alaska APA is unique in having an attorney review and approve a regulation before it is on the books. DOL works with the agency to improve the regulations and make sure the regulations are legal in the state of Alaska.

Next, in Block 11, if the governor does not return the regulations, it goes on to the lieutenant governor's Office to be filed.

CHAIR FRENCH asked if "return" means the regulation is sent back to the commissioner of an agency.

MS. BEHR answered yes.

CHAIR FRENCH asked how the governor is given notice of these regulations.

MS. BEHR replied that after Block 5 DOL makes sure that the governor's office is notified. After the agency adopts the regulation in Block 7 it notifies the lieutenant governor's office. The lieutenant governor's office then files the regulation, which will take effect 30 days after it has been filed.

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SENATOR WIELECHOWSKI asked if the regulations attorney has veto power under Block 10.

MS. BEHR replied that she can approve or disapprove regulations for legal requirements only. She does not use the word "veto power."

SENATOR WIELECHOWSKI asked what happens if someone disagrees with her conclusion.

MS. BEHR replied DOL's conclusion is never a surprise to a board or commission. She explained that most of the time DOL is able to adjust the regulation so it is close to what the agency is looking for but without any striking legal issues. She added that she cannot think of a time when a board has brushed away DOL's conclusion and gone forward with a regulation.

She noted that a lot of things can be signed off on in the state because there is no definitive word from the court. DOL cannot take away the ability to get a court position from a board or commission.

REPRESENTATIVE TUCK asked when the governor first gets involved in this process.

MS. BEHR answered that the governor can get involved in many different ways. She said that she strongly advocates for good communication. In the governor's review authority, the way the statute in Alaska is set up, he has no authority to return regulations from a board or commission.

Block 11 is where the lieutenant governor's office sends a copy of the filed regulation to the Administrative Regulation Review Committee. The regulation is then published in the Alaska Administrative Code and a summary of the regulation is put on the Online Public Notice System for the public.

Exhibit 4 [included in the document packet] included the state of Alaska web addresses regarding regulation matters.

She explained that there are four questions that the public typically asks the legislature or DOL. First, is how to obtain more information on a regulation. She suggested that for such inquiries, the individual should be directed to the contact person for regulations in the agency listed on exhibit 3 [included in the document packet]. Second, is how to comment on a regulation. She explained that individuals should read the notice and be specific when submitting comments. She reminded the committee that comments are public documents. Third, is a general question on how the regulation process works. She asked the committee to refer the individual to the drafting manual on regulations, which includes the flow chart [Exhibit 2].

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CHAIR FRENCH asked if all agencies employ the drafting manual when it is writing regulations.

MS. BEHR replied yes. There is a state statute that says DOL will prepare this. She explained that when she is reviewing the regulation for legal sufficiency, she makes sure the agency has followed the drafting manual.

CHAIR FRENCH asked how often the drafting manual is reviewed.

MS. BEHR answered at least once every two years. She noted that if there is a major statutory change or major case decision she will do an addendum.

She continued that the fourth question is: "I don't like this regulation; I'd like to get it changed." She explained that there is a petitioning process in the Alaska Administrative Code, where the individual can write a letter petitioning under a statute. The individual has to include their reasons why and how they would like to see the regulation changed.

CHAIR FRENCH asked for confirmation that it is simply a letter stating that an individual want a regulation changed. He asked who would review the letter.

MS. BEHR answered the commissioner of the agency. If an individual wants to make sure an agency doesn't misunderstand what they want she advises them to write a rough draft of the regulation. She explained that by doing this there is a better chance for the individual to get the results that they want.

CHAIR FRENCH asked how many of these letters are received each year by the state.

MS. BEHR answered 3-4 per year.

REPRESENTATIVE GATTO said when individuals come into his office with a complaint about a regulation, they are not looking to comment. Rather, they are looking to their senator or representative for a solution. He explained that the best thing that he can do is to listen to the individual's complaint and then direct them towards the procedure for comment.

MS. BEHR added that if a legislator agrees with a constituent they can always put in a bill that would change the statute. A court would then state that a later enacted statute trumps the regulation which is in direct conflict with it. She explained that she finds individuals often miss their opportunity to comment.

CHAIR FRENCH asked how often public input makes a change to the system.

MS. BEHR replied that the commissioners seriously consider comments and some of the departments produce summaries of them.

CHAIR FRENCH asked if there is a statute that requires departments to produce these summaries.

MS. BEHR replied no. There are some federal programs that require this and there would be a cost in doing so.

CHAIR FRENCH asked for an example of one of the more voluminous public comment regulations.

MS. BEHR answered that one example was on restricting payments for state abortions. She said there were over 6,000 comments. She noted that it is interesting what the public takes an interest in.

CHAIR FRENCH asked if she reads comments from outside Alaska.

MS. BEHR answered yes, they have to.

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REPRESENTATIVE GATTO said one of the most frequent statements he hears is: "I could talk to them but they don't listen."

MS. BEHR replied it is important, when giving public comment, to give precise information rather than giving a general critique of the regulation.

CHAIR FRENCH said a set of regulation notices he recently received was on the new APOC [Alaska Public Office Commission] regulations dealing with lobbyists. One of the complaints he received was that the old language of the regulation was not put side-by-side with the new language. He asked if she could comment on this.

MS. BEHR answered that there is nothing in the statutes that prohibits agencies from doing this. She said that she has seen agencies do side-by-sides. To her understanding APOC is now doing a side-by-side and holding workshops in order for people to understand what is going forward on this regulation.

CHAIR FRENCH asked if the side-by-side is the better method.

MS. BEHR replied it depends on how complex the regulation is and who the audience is. She noted that side-by-sides have a cost associated with it.

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SENATOR WIELECHOWSKI said he receives similar notices via e-mail all the time and much of the time he can't understand what they are trying to do. He said he can imagine how complicated it is for the public and asked if there was a way to make the process "friendlier."

MS. BEHR answered that there is nothing in the APA that prohibits workshops and a number of agencies are putting information on its web page. She said it may also be that people do not know the resources are out there.

REPRESENTATIVE GATTO said he likes the way the magazine "Consumer Reports" outlines products. He suggested a similar method be used with regulations.

MS. BEHR replied that these notices need to be understandable to the public. She said she appreciates the dialogue with the committee because she often meets with agencies and brings this feedback to the table. She explained that DOL wants everyone to be fully informed and have the public be able to comment and feel like it has been involved in the process.

SENATOR WIELECHOWSKI said it would be a benefit to the public as a whole to include what the regulation is trying to do. He added that people get frustrated when they don't know what is going on.

CHAIR FRENCH turned to page 41 of the Drafting Manual for Administrative Regulations, which lists some ways that public notices can be more "user friendly." He pointed out that one thing it does not include is a "plain English" summary, which explains what the regulation will do.

REPRESENTATIVE GATTO said this should be included in the executive summary of the regulation.

CHAIR FRENCH agreed that the summary should orient the public before individuals plunge in.

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TERRI LAUTERBACH, Attorney, Division of Legal and Research Services, Legislative Affairs Agency, explained the role of the legislative counsel. She said if a legislator has concerns or questions about existing regulations or wants to add a regulation to an existing bill, they can submit their question for review to Legislative Legal Services.

CHAIR FRENCH said the committee should have a memo from Ms. Lauterbach included in the document packet.

MS. LAUTERBACH turned the committee's attention back to the flow chart to give them an idea of how the committee and as individual legislators, are involved in this process.

She noted that with regard to having an executive summary for agency regulations, legislators have the option to pass a bill that amends the APA requiring agencies to do so.

CHAIR FRENCH commented that she is absolutely correct, but it is hard work to pass a bill.

MS. LAUTERBACH added that, in relation to the flow chart, the public comment period between boxes 5 and 6 must be 30 days, and is often longer. The time between boxes 6 and 7 can also take a while. She explained that this time depends on how long the agency mulls over the public comments and whether it includes a new public comment period. That is a period when a special or standing committee could hold hearings. She noted that

legislators have the bully pulpit even if they do not want to go through the process of passing a bill

CHAIR FRENCH added that the bully pulpit is a lot easier to get started.

MS. LAUTERBACH replied yes. She said between boxes 7 and 8 and boxes 8 and 9 can also take a while. She noted that during all of this time legislators can be holding public hearings, even if they missed the initial public comment period.

Between boxes 9 and 10 also takes some time. She explained that some of the reviews that the regulations attorney must make can take up to a year. This is another time when legislators can use their pulpit. She said she would add another two boxes following the lieutenant governor filing the regulation ("box 13") and the regulation being published ("box 14"). "Box 15" would be where the regulations are implemented and applied to individuals. Following this, "Box 16" would be for challenges to the regulation in court. She explained that these challenges could include failure to follow APA procedures or if a regulation is unreasonable or unconstitutional.

She said in 2004 AS 24.20.105 was passed [a highlighted copy of the statute is included in the document packet]. She explained that the hope was by inserting some legislative agency review when a regulation is proposed, that some of the court challenges could be avoided. She noted that her current position at the Legislative Affairs Agency has been in existence since that time.

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CHAIR FRENCH asked if subsection (e) of AS 24.20.105 is a description of her job as "the assigned attorney."

MS. LAUTERBACH replied yes. This statute governs the legal branches insertion into the regulation's process. As a different branch of government the legislature has to avoid the "separation of powers issues." She explained that, because of this, all of the work she does is suggestion. She can't stop a regulation from being adopted or approve or disapprove of a regulation like Ms. Behr can at DOL. This review is an early look at the regulation specifically for members of the legislature and the Administrative Regulation Review Committee.

REPRESENTATIVE GATTO asked whether the committee can stop a regulation from being implemented by a two-thirds vote.

CHAIR FRENCH asked Ms. Lauterbach for confirmation that this power was taken away from the committee.

MS. LAUTERBACH answered that the Alaska Supreme Court says the committee can't suspend the adoption of a proposed regulation or annul an existing regulation, except with legislation.

CHAIR FRENCH highlighted that the law says the legislature can, while the court says that it can't.

MS. LAUTERBACH replied it is related to the "Alive Decision." She explained that the whole legislature can't pass an annulment of a regulation unless it uses a bill. The Administrative Regulation Review Committee's ability is under the same questionable authority under this decision.

REPRESENTATIVE GATTO asked for confirmation that before this decision all the committee could do was suspend the regulation.

MS. LAUTERBACH answered that even a suspension will affect the implementation of a regulation. This effects the force of law that a particular regulation otherwise would have.

CHAIR FRENCH noted that this decision is grounded in the separation of powers. The statute allows the committee to act too much like an executive body.

SENATOR WIELECHOWSKI asked if any individual has the standing to challenge a regulation.

MS. LAUTERBACH answered that it will depend on what kind of a regulation it is and who the citizen is. She said that she is pretty sure it can't be any citizen or any regulation.

SENATOR WIELECHOWSKI asked if a legislator could file a law suit to strike down a regulation if they felt it was unconstitutional or violated the law.

MS. LAUTERBACH replied probably for unconstitutionality.

SENATOR WIELECHOWSKI asked whether this was true for violating a law.

MS. LAUTERBACH replied that she would need a specific example in order to give him a good answer.

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MS. LAUTERBACH continued with her review. She said that this statute's "catch line" is to review proposed regulations that are subject to the APA. She explained that there are some agencies whose regulations are not subject to the APA and she would not be reviewing those at the proposed stage. She said that these agencies include Alaska Industrial Development & Export Authority (AIDEA), various retirement boards, any emergency orders, Personnel Act, and others.

She noted that she is given an order of priority to use when reviewing regulations. First, those regulations proposed to implement newly enacted legislation have the highest priority. Second, are proposed regulations that are requested to be reviewed in writing by a standing committee, the Administrative Regulation Review Committee, or the Legislative Council because it implicates major policy development. She noted that in the seven years she has been in this position she has never received this kind of request. She explained that typically her office gets to every set of regulation packages.

Subsection (d) included what the Legislative Affairs Agency review of a proposed regulation should evaluate. This includes the legality and constitutionality of a proposed regulation, statutory authority, and consistency with the applicable statutes. She noted that this evaluation is similar to the review done by DOL and does not include policy reviews. She explained that she reviews legal requirements, which compares what the regulations do, to what the legislation authorizing the regulation says it can do.

Subsection (e) stated that the assigned attorney may consult with DOL and the state agency or the committee that requests the review. These discussions with agencies on its regulations do occur and the agencies are very cooperative when she has questions or raises concerns. She read the following:

If the assigned attorney determines that the proposed action fails to meet the standards set out in (d) of this section, the assigned attorney shall notify, in writing, the Department of Law, the state agency, and the Administrative Regulation Review Committee, the president of the senate, and the speaker of the house of representatives.

She said if there are no problems with the regulation, then there are no memorandums. The only memorandums that the

committee will receive from her are those that point out potential problems with the proposed regulation on a legal basis.

REPRESENTATIVE GATTO asked when she points out a potential problem whether she points out a potential solution.

MS. LAUTERBACH answered no, because there may be more than one way to fix something that may be unconstitutional. If the proposed regulation lacks the statutory authority, then the agency simply can't implement the regulation and it should be removed.

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CHAIR FRENCH asked whether section (e) should also include the sponsor of the bill.

MS. LAUTERBACH asked for clarification that this is for proposed regulations that implement newly enacted legislation.

CHAIR FRENCH replied yes.

MS. LAUTERBACH said it is not up to her who she notifies, the statute binds her. She added that when she sends out a memo she tries to get it done at least a week before the public comment period is over. The comments she makes in her memorandum cannot be submitted as public comment in the record by either her or the committee. However, the comments that she makes in her memorandum could be used by a legislator in their own memorandum to be put on the public record. She explained that she is giving them information with enough time to comment or to hold a hearing. She noted that if a legislator holds a hearing and asks the assigned attorney to discuss their memorandum, they need to go into Executive Session.

CHAIR FRENCH asked why this is.

MS. LAUTERBACH replied that subsection (g) reads:

Except as provided in this section, the Legislative Affairs Agency may not release any information regarding its review of a proposed regulation under this section.

She explained that this means that if a legislator has an open hearing in the public sphere, under this section, she cannot talk about her review.

CHAIR FRENCH asked what the policy behind section (g) is.

MS. LAUTERBACH replied that the policy behind that subsection was legal services of the Legislative Affairs Agency shouldn't be the basis on which someone later might challenge a regulation. She explained that the Legislative Affairs Agency is here to advise the legislature and not the public.

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REPRESENTATIVE TUCK asked if it is because of subsection (g) that she is not allowed to write up suggestive language.

MS. LAUTERBACH replied that often in her consultation with an agency she suggests different language where it is so ambiguous it is unclear whether the regulation can be enforced. She explained that most of the time it is up to the agency to clarify the language and suggesting language would insert more policy than she is supposed to.

She continued with subsection (f), which allows the assigned attorney to comment on inconsistencies with legislative intent and whether a proposed regulation might be appropriate for additional legislative oversight. She said as a matter of practice she has not distinguished between memorandums about legislative intent and memorandums about inconsistencies with the statute or lack of authority since they are often related to each other. In addition, it is not just the legislative intent problems that might be appropriate for additional legislative oversight, all of the other problems mentioned are also appropriate. She noted that it is important to see what happens after the memorandum is distributed because it also goes to the agency and DOL. She suggested that the committee follow-up on the agency's response and whether the changes were made before the proposed regulation is adopted.

Subsection (h) stated that the assigned attorney's review is not binding on the state agency, because of the separation of powers problems. She noted that there is some oversight on Ms. Behr's end of the process to make sure that the agency has responded in some way to her concerns.

Subsection (j) stated that the assigned attorney's review does not apply to proposed regulations of the Board of Game or the Board of Fisheries. She reiterated that it also does not apply to those agencies that are exempt from the APA.

She noted that she has a small sliver of proposed regulations that she reviews. The Administrative Regulation Review committee has a much broader purview.

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SCOTT CLARK, Special Assistant, Lieutenant Governor's Office, said the lieutenant governor's role in the regulation process is to file and arrange for the publication of regulations. The regulations are held for five years until it is sent to archives. The lieutenant governor's office is also responsible for the Public Notice System online.

CHAIR FRENCH asked if there is a way to sign up to be automatically notified of future changes.

MR. CLARK replied yes.

CHAIR FRENCH asked whether the lieutenant governor's office reviews regulations for legal sufficiency or conducts public hearings on the regulations.

MR. CLARK answered no, the role is fairly limited. The lieutenant governor will sign off on the adoption order of the regulation, which often puts them into effect.

CHAIR FRENCH asked if the lieutenant governor's job is the final act, which promulgates the regulation.

MR. CLARK replied yes. The regulations are then sent on to the publisher. He noted that the office also work with municipalities to get them a hard copy of all the regulations if they choose to have one.

CHAIR FRENCH asked if a hard bound copy is made of all the regulations.

MR. CLARK answered yes. He said the current online public notice system is about 12 years old and they are currently working on updating it.

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There being no further business to come before the committee, Chair French adjourned the meeting at 2:34 p.m.