

**ALASKA STATE LEGISLATURE
ADMINISTRATIVE REGULATION REVIEW COMMITTEE**

February 28, 2013
8:33 a.m.

MEMBERS PRESENT

Representative Lora Reinbold, Chair
Senator Cathy Giessel, Vice Chair
Representative Mike Hawker
Representative Geran Tarr
Senator Gary Stevens
Senator Hollis French

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

PRESENTATION: IMPACT OF FEDERAL ACTIONS ON ALASKA ADMINISTRATIVE REGULATIONS

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

SAM BATKINS, Director
Regulatory Policy
American Action Forum
Washington, DC

POSITION STATEMENT: Provided a presentation on the impact of federal actions on Alaska Administrative Regulations.

DAVE CASEY, Supervisor
Kenai and Juneau Field Offices
Regulatory Division - Alaska District
U.S. Army Corps of Engineers
JBER, Alaska

POSITION STATEMENT: Provided a presentation on the impact of federal actions on Alaska Administrative Regulations.

ACTION NARRATIVE

[8:33:42 AM](#)

CHAIR LORA REINBOLD called the Administrative Regulation Review Committee meeting to order at 8:33 a.m. Representatives Tarr and Reinbold and Senators Giessel, and Stevens were present at the call to order. Representative Hawker and Senator French arrived as the meeting was in progress.

Presentation: Impact of Federal Actions on Alaska Administrative Regulations

[8:35:02 AM](#)

CHAIR REINBOLD announced that the first order of business would be a presentation regarding the impact of federal action on Alaska's administrative regulations.

[8:35:42 AM](#)

SAM BATKINS, Director, Regulatory Policy, American Action Forum, informed the committee that the American Action Forum is based in Washington, D.C., and is a center-right policy organization headed by Douglas Holtz-Eakin, former director of the Congressional Budget Office. Mr. Batkins noted that in his daily activities he has the pleasure of examining federal regulations. He then directed the committee's attention to his presentation and his desire to examine the macro regulatory picture as it exists today on the federal level as well as the micro level in terms of the impacts on Alaska with regard to the Environmental Protection Agency (EPA) and the U.S. Department of Health & Human Services (HHS) implementation of the Affordable Care Act. Referring to the slide entitled "Current EPA Greenhouse Gas Regulations," he explained that the EPA has plans to finalize rules for new stationary sources by this March. There are indications of plans to extend the greenhouse gas (GHG) rules to existing sources. He then directed attention to the chart entitled "EPA Paperwork Total," which catalogs the EPA paperwork burden that has been growing steadily since 1995. This is solely paperwork required for EPA, which collects roughly 400 forms on a daily basis while the federal government as a whole collects more than 9,100 official collections, including tax forms. Moving on to the slide entitled "Notable GHG Regulations," he highlighted that many of them are in the transportation sector with rules for the Corporate Average Fuel Economy (CAFE) standards for 2012-2016 automobiles and the CAFE

standards for 2017-2025, which carry the largest price. There are also GHG rules for heavy-duty trucks. He noted that he would discuss the mandatory reporting of GHGs later in the presentation. Moving on to the slide entitled "Future EPA GHG Regulations," Mr. Batkins directed attention the chart on it entitled "Number of Facilities Compliant at GHG Rate." He explained that the EPA has a standard for the rate at which one emits carbon dioxide equivalents. There is not an upward limit on how much can be released for a new stationary source under the proposed rule, but there is a limit on the rate of pounds per carbon dioxide equivalent per megawatt hour (lb/MWh). The general rule, in terms of all coal or all natural gas, is that a combined cycle natural gas facility will likely fall under 1,000 lb/MWh of carbon dioxide. However, a coal facility is likely to far exceed the 1,000 lb/MWh of carbon dioxide threshold. The chart relates the total number of the largest facilities in the U.S., which is a little over 100. The chart also relates how many of those facilities would be compliant at the various thresholds specified. Most of the facilities that are compliant at levels below 1,500 lb/MWh and lower are mostly refineries, steel production facilities, and natural gas. He then turned to the slide entitled "Affordable Care Act Implementation," which he noted is generally proportional to population as HHS regulates insurers, doctors, hospitals, and patients. The HHS is unlike the EPA that impacts certain sectors, such as coal and manufacturing that are doing the polluting that EPA regulates. He directed attention to the total private and total state costs, which are solely from the administration's figures. He explained that once a regulation is out with the hour and cost estimates from the administration that is simply recorded in the database. Therefore, it's just a sum of everything that is recorded under the Affordable Care Act (ACA) and there is no real analysis. He highlighted the total paperwork burden hours to be 81.1 million hours annually, which equals roughly 40,000 full-time equivalents. Therefore, it would take more than 40,000 employees working a 2,000 hour year to fill out the required red tape from ACA. Another way to understand the 81.1 million hours annually is to look at the gross domestic product (GDP) per hour worked, which is roughly \$5 billion in terms of impact on productivity.

[8:42:25 AM](#)

MR. BATKINS moved on to the Alaska-specific impacts and the slide entitled "Mandatory Greenhouse Gas Reporting." He informed the committee that the EPA tracks all facilities that emit more than 25,000 tons per year of carbon dioxide equivalent

into the atmosphere. The GHG reporting is more or less the paperwork record retention cost of complying with the reporting of EPA's rule and amounts to roughly \$287 million. The EPA, he noted, is very transparent in terms of being able to see every facility, how much the facility emits, the location of the facility, what the facility does, and the type of fuel the facility burns. The EPA's web site listed 63 facilities in Alaska. Although it varies, the per facility cost is roughly \$17,000, which for the Alaska share amounts to about \$1 million under the GHG reporting. The slide entitled "Distribution of Regulated Greenhouse Gas Entities" presents a map showing the GHG entities in Alaska. As the map illustrates there is a cluster of GHG facilities in central Alaska and a few GHG facilities located near the coasts. Referring to the slide entitled "Alaska Power Plant Impacts," Mr. Batkins informed the committee that of those 63 GHG facilities, 14 are EPA-regulated power plants for their GHG emissions. He highlighted that Nikiski and Barrow U&E, both of which are natural gas facilities, would be compliant [with EPA's] stringent new source standard of 1,000 tons per MWh. According to EPA data, the Chena plant, a coal facility, is the most inefficient in terms of the ratio of carbon dioxide in the air to energy production. The chart on the slide entitled "Alaska Power Plant Impacts" provides an idea as to what facilities in Alaska would likely be compliant; depending upon the direction EPA takes in its regulation of existing sources. Turning to the slide entitled "ACA 'Face-to-Face' Requirement," Mr. Batkins said that the "Face-to-Face" requirement is a regulatory requirement that has particular impact on Alaska as it essentially dictates that in order to request home health services, a physician must show documentation that a face-to-face encounter has occurred. While the aforementioned seems benign, it does involve a lot of travel and the attendant higher cost Medicare copays that result. The slide entitled "ACA 'Face-to-Face' Requirement Continued" reviews the specifics in terms of the number of patients that would be required to make face-to-face doctor visits and the number of hours required. The number of hours the patients travel is not listed directly in the paperwork analysis, but the agency did consider it in terms of the impact on patients and their doctors. He then mentioned the \$25 million in higher Medicare payments for beneficiaries that is a result of this new requirement.

[8:46:58 AM](#)

MR. BATKINS turned to reform possibilities, noting that there are common sense changes that could be agreed upon by both

progressives and conservatives. As the slide entitled "Federal Reform Issues" relates there are three main issues: transparency, auto-pilot, and retrospective review. In terms of transparency, Mr. Batkins said there is not much analysis, particularly on the independent agency business side, with regard to the impact a regulation has to business, the benefits derived, and the cost imposed, especially with implementation of the Dodd-Frank Act that's close to 400 rules. Rarely, if ever is a cost-benefit analysis performed [in terms of the impact of regulations] on consumers, businesses, or individuals. He then touched on the retrospective review. In 2011 an executive order seeking a regulatory look-back was signed, which is not new as former President Carter issued a similar order in 1978. However, the pace of implementation is slow as far more rules are being created than rescission or streamlining of old rules. Moving on to the slide entitled "State-Level Reforms," he highlighted the regulatory reform proposal passed by Indiana that he characterized as very common sense. Indiana's legislation allows agencies, public entities, and private entities to develop a cost-benefit analysis for a particular rule and review the impacts on employment, consumer protection, worker safety, and the environment. Furthermore, the Indiana legislation includes a three-year regulatory look-back, at which time the real costs, benefits, and impacts of that regulation are apparent. Continuing with the slide entitled "International Regulatory Reform," he directed attention to the Organisation for Co-operation and Development's (OECD's) 12 principles of regulatory policy. With regard to transparency, he opined that analyzing costs and benefits and performing regulatory look-backs is practiced on the international level. Mr. Batkins further opined that transparency and rigorous analysis are very important, particularly since the regulatory side often doesn't have the benefit of data.

[8:51:02 AM](#)

REPRESENTATIVE TARR, regarding the Indiana legislation, inquired as to the fiscal impact of the three-year look-back. She further inquired as to whether the activities required for the three-year look-back would be absorbed into existing jobs.

MR. BATKINS recalled that the fiscal implications were negligible, which is why it received near unanimous support. On the federal level opinion is split as to whether to have more oversight over regulators; OECD believes there should be oversight of the regulators as well as oversight of the overseers.

8:52:30 AM

CHAIR REINBOLD inquired as to the impacts of the GHG regulations for existing power plants. Alaska already has high electrical rates, and therefore she inquired as to how much more it would cost Alaskans to comply with these GHG regulations.

MR. BATKINS noted that in terms of existing sources he doesn't know explicitly what EPA will do now as there is no proposed rule, although there are a lot of models. The Natural Resources Defense Council has a plan to apply the Clean Air Act to existing sources and its model was roughly \$4 billion a year in costs. He said he didn't know exactly how the Natural Resources Defense Council would impact Alaska. Although if there was a stringent rule of 1,000 lb/MWh of carbon dioxide applied to existing sources, it would likely mean closure of plants that are not compliant, he doubted EPA would apply the standard for new sources to existing sources.

8:55:31 AM

DAVE CASEY, Supervisor, Kenai and Juneau Field Offices, Regulatory Division - Alaska District, U.S. Army Corps of Engineers, began by informing the committee that the Regulatory Division administers parts of the Rivers and Harbors Act of 1899 and the Clean Water Act. He then informed the committee that he has been in the Regulatory [Division] in Alaska for 18 years and a U.S. Army Corps of Engineers' employee for about 21 years. He noted that he has worked throughout the state and at U.S. Army Corps of Engineers headquarters in Washington, D.C., for various periods of time, including in 2010-2012 to develop the 2012 Nationwide Permits for the Regulatory Community of Practice. Mr. Casey then directed the committee's attention to his presentation entitled "Building and Preserving Alaska's Future, Regulatory Program Update" and paraphrased from slide 2 entitled "Regulatory Program," which read [original punctuation provided]:

Mission - Protect the Nation's aquatic resources, while allowing reasonable development through fair, flexible and balanced permit decisions.

4 Goals:

- Protect the aquatic environment
- Enhance regulatory program efficiency
- Make fair, reasonable, and timely decisions
- Achieve no net loss of aquatic resources

Authorities

- Section 10 Rivers and Harbors Act of 1899
- Section 404 Clean Water Act (1972)
- Section 103 Marine, Protection, Research and Sanctuaries Act (1972)

The Corps Regulatory Program is neither a proponent or an opponent of the projects we review for permits.

MR. CASEY explained that the Section 103 Marine, Protection, Research and Sanctuaries Act allows the Department of the Army to issue permits for the transportation of dredge materials when they are to be dumped in the ocean, which would be waters beyond the territorial seas. The aforementioned doesn't occur very often in Alaska. He emphasized the need to keep in mind that the regulatory program is a highly centralized agency in which the district commander is the decision maker. He further emphasized that the U.S. Army Corps of Engineers Regulatory Program is neither a proponent nor an opponent of any of the projects it reviews for permits. Referring to slide 3, he informed the committee that the Regulatory Division in Alaska has about a \$7.9 million annual budget, which allows the division to employ about 54 employees. Over the past nine years, the division on average has analyzed over 1,500 projects throughout Alaska. The Alaska District is headquartered on JBER on the Elmendorf side and there are field offices in Fairbanks, Juneau, Kenai, Anchorage, and there is staff in Sitka. Mr. Casey then addressed the two main authorities that the division administers on a daily basis. He paraphrased from slide 4 entitled "Rivers and Harbors Act," which read [original punctuation provided]:

Section 10 authorizes the Department of the Army (DA) is to issue permits for work in or affecting the navigable waters of the United States

- For RHA purposes, navigable waters are:
 - Waters subject to ebb and flow of the tide *and/or*;
 - Those waters that are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce
- Activities that require a DA permit in Section 10 waters
 - Structures and/or work in or affecting navigable waters of the United States

- Structures and/or work outside the limits of navigable waters, IF these structures or work could affect the course, location, or condition of the water body so as to impact its navigable capacity
- Artificial islands, installations, or other devices on the outer continental shelf

MR. CASEY then paraphrased from slide 5 entitled "Clean Water Act (1972)," which read [original punctuation provided]:

Section 404 authorizes the DA to issue permits for the discharge of dredge and/or fill material into waters of the U.S.

- For CWA purposes, waters of the U.S. include
 - All navigable waters (Section 10)
 - Rivers, most tributaries and lakes
 - Wetlands (like bogs, marshes, fens, swamps) adjacent to the above waters
- Activities that require a DA permit in Section 404 waters
 - Discharge of dredge and/or fill material
 - Activities that have the "affect fill"
- "Adjacent" means "Boarding, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands'."

[9:01:41 AM](#)

SENATOR FRENCH inquired as to which act gave the U.S. Army Corps of Engineers jurisdiction over the permit for the bridge across the Colville River into CD-5.

MR. CASEY answered that both Section 10, the Rivers and Harbors Act of 1899, and Section 404, the Clean Water Act (1972), provided jurisdiction as the placement of fill is regulated under both acts. He explained that the Colville River is a navigable water body and supports interstate commerce.

9:02:42 AM

MR. CASEY, continuing his presentation, directed attention to the pie chart on slide 6 entitled "Permit Actions FY12." In fiscal year 2012 (FY12) the division evaluated about 1,100 permit applications throughout the state. General permits are a form of expedited permit review and about 62 percent of the applications received qualify for general permit review. Individual permits are for larger projects that have more of a minimal impact on the aquatic environment and they take a bit longer and involve more of a review process. He noted that there are two independent decision making processes, including the public interest review. The division can only issue a permit if the public interest review finds the project is not contrary to the public interest. Although there are 22 factors that are considered for every project, not all factors apply to the project as it's a case-by-case determination. A public interest determination is also performed for projects that would potentially qualify for a permit under Section 404. The EPA has oversight over the Section 404 program, which includes restrictions on discharges such that the U.S. Army Corps of Engineers can only issue a permit for a proposal that has been determined to be the least environmentally damaging practicable alternative. The public interest review and the Section 404(b)(1) guidelines are utilized in the decision making process for any of the permit types the U.S. Army Corps of Engineers evaluates.

9:04:40 AM

CHAIR REINBOLD remarked that the division did a phenomenal job with the permits, particularly with regard to the low number of denials. She opined that the permit process seems to be a good model.

MR. CASEY recalled that in FY11 there were two denials, but didn't recall any denials in 2012. He noted that projects are changed and modified to reduce the impacts on the aquatic environment and other factors as they move through the process. In further response to Chair Reinbold, Mr. Casey said that the numbers [of permits awarded and denied] have been steady over the years. He noted that the division follows the national performance metrics and goals and is at a green status for most of the metrics, including these two. He explained that [the average number of processing days] is calculated from once the application is complete to once a decision is made.

9:06:17 AM

MR. CASEY, returning to his presentation, paraphrased from slide 7 entitled "Section 404(g) of Clean Water Act," which read [original punctuation provided]:

- **EPA has the authority to delegate to a State or tribe the administration of the Section 404 Program for certain non-navigable waters. (40 CFR parts 232 and 233)**
- **Corps would retain jurisdiction for:**
 - Tidal waters and adjacent wetlands
 - Navigable and adjacent wetlands
 - Navigable waters under Section 10. These include:
 - Waters subject to ebb and flow of the tide and/or;
 - Those waters that are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce.

MR. CASEY clarified that the tidal water and navigable waters and the adjacent wetlands for both could not be assumed by a state or a tribe. Furthermore, Section 10 of the Rivers and Harbors Act does not have a primacy clause and thus the U.S. Army Corps of Engineers would retain authority over that. Moving on to slide 8, he related that the EPA has a process for a state or tribe to assume the Section 404 program, which includes public review. He pointed out that the U.S. Army Corps of Engineers role is to provide information and data to the parties involved. During the third week of March the division will participate in a meeting with the EPA and the state regarding the conversations the state is having about possible assumption of the program.

MR. CASEY then turned to slide 9 entitled "Corps and State Relationship" and discussed the regulatory relationship of the U.S. Army Corps of Engineers and the state. He highlighted that Section 401 of the Clean Water Act includes a check and balance such that states have a role in the decision making process. The requirement is such that the discharge or fill material into the waters of the U.S. needs to be consistent with the state water quality standards. In Alaska, the Department of Environmental Conservation (DEC) administers the water quality certification program, which is an independent decision making process from that of the U.S. Army Corps of Engineers. If [DEC]

finds that the discharge doesn't meet state water quality standards, it can deny the project. Even if the U.S. Army Corps of Engineers decides to issue its permit, in such a situation it would be invalid and the activity couldn't proceed. Therefore, Section 401 provides a large voice and check and balance for states and tribes. If the water quality certification includes any conditions those are incorporated as special conditions on the U.S. Army Corps of Engineers permit and the U.S. Army Corps of Engineers would have enforcement authority over those state-applied conditions. Administratively, when the U.S. Army Corps of Engineers has a complete application for an individual permit it is provided to DEC, and thus the applicant doesn't have to fill out extra paperwork. The U.S. Army Corps of Engineers also issues the state's public notice and is placed on the back of the U.S. Army Corps of Engineers public notice for the proposal for individual permits. The aforementioned results in the public notice periods running concurrently between the federal review and the state review. Such provisions have been in effect in the state for a few decades. Mr. Casey noted that there is some overlap between the regulatory program of the U.S. Army Corps of Engineers and the Alaska Department of Fish & Game (ADF&G) within the Division of Habitat regarding anadromous streams and resident fish streams. Since anadromous streams and resident fish streams are generally considered waters of the U.S., there could be projects that require a permit from the U.S. Army Corps of Engineers and the Division of Habitat since both agencies regulate that activity in that water body. Where waters of the U.S. occur in legislatively designated special areas, such as critical habitat areas, an applicant would need a permit from both the U.S. Army Corps of Engineers and the Division of Habitat. He then moved on to slide 10, which reviews the consultation relationship between the U.S. Army Corps of Engineers and the state. Under the Fish and Wildlife Coordination Act (FWCA) federal agencies are required to consult with the state agency exercising administration over the wildlife resources of the affected state. Because the state agency exercising administration over the wildlife resources is the expert, the comments the U.S. Army Corps of Engineers receives from the FWCA are given full weight and consideration in the U.S. Army Corps of Engineers permit decision making process. These comments from the Fish and Wildlife Services or the state agency may result in changing the project.

[9:12:23 AM](#)

CHAIR REINBOLD requested an example of a project that has been impacted by the aforementioned.

MR. CASEY explained that because ADF&G has independent authority to issue permits under the state statutes, they don't often act as a commenting agency to the U.S. Army Corps of Engineers as it has the tendency to make their decisions pre-decisional. Therefore, the U.S. Army Corps of Engineers often receives more comments under the FWCA from the U.S. Fish & Wildlife Services than from the state. He recalled that the last project for which the U.S. Army Corps of Engineers received comments from the state was the interchange at Lake Palmer in Wasilla on the Glenn and Parks Highway area.

[9:13:42 AM](#)

MR. CASEY, returning to slide 10, informed the committee that the National Historical and Preservation Act is administered by the State Historic Preservation Office (SHPO) within the Department of Natural Resources (DNR). The intent of the act is to minimize and mitigate impacts on historic properties. The U.S. Army Corps of Engineers tries to ensure that the proposed activity is compliant with the act, which requires consultation with SHPO. The consultation with SHPO occurs frequently, he said. The state allows the U.S. Army Corps of Engineers access to its database of cultural resources throughout the state, and thus the division can immediately review an application to determine whether there is a known resource that could trigger consultation.

[9:15:07 AM](#)

CHAIR REINBOLD, recalling her interaction with the U.S. Army Corps of Engineers permitting, related that SHPO was the most responsive entity as she had the requested information within 48 hours of the request. Therefore, she said she is very impressed with the efficiency of SHPO.

[9:15:25 AM](#)

MR. CASEY, continuing his presentation, told the committee that the U.S. Army Corps of Engineers doesn't make a permit decision until the conclusion of the necessary consultation with SHPO. Referring to slide 11 entitled "Regulatory Partnership Efforts," the U.S. Army Corps of Engineers strives to get the message out about the regulatory program. For instance, he related that he spent four hours yesterday at the Southeast Region for the Department of Transportation & Public Facilities discussing potential projects and expectations. Such partnering and

outreach is attempted as often as possible in order to establish expectations and offer advice in order to avoid any surprises. In conclusion, Mr. Casey stated that the division continually strives to improve the regulatory program in terms of communicating expectations to permit applicants while continuing to value its long-term relationships with the state, and always seek efficiencies in the permit decision making process.

[9:17:56 AM](#)

SENATOR FRENCH thanked Mr. Casey for his presentation.

[9:18:16 AM](#)

CHAIR REINBOLD thanked the presenters. She then related the intent of the committee to monitor and keep Alaskans aware of significant regulatory issues impacting the state.

[9:18:45 AM](#)

ADJOURNMENT

There being no further business before the committee, the Administrative Regulation Review Committee meeting was adjourned at 9:18 a.m.