

HOUSE FINANCE COMMITTEE

April 1, 2013

9:06 a.m.

9:06:00 AM

CALL TO ORDER

Co-Chair Stoltze called the House Finance Committee meeting to order at 9:06 a.m.

MEMBERS PRESENT

Representative Alan Austerman, Co-Chair  
Representative Bill Stoltze, Co-Chair  
Representative Mark Neuman, Vice-Chair  
Representative Mia Costello  
Representative Les Gara  
Representative Lindsey Holmes  
Representative Scott Kawasaki, Alternate  
Representative Cathy Munoz  
Representative Steve Thompson  
Representative Tammie Wilson

MEMBERS ABSENT

Representative Bryce Edgmon  
Representative David Guttenberg

ALSO PRESENT

Lisa Weissler, Self, Juneau; James Sullivan, Southeast Alaska Conservation Council, Juneau; Ruth Hamilton Heese, Senior Assistant Attorney General, Environmental Section, Department of Law; Ed Fogels, Deputy Commissioner, Department of Natural Resources; Lynn Kent, Deputy Commissioner, Department of Environmental Conservation.

PRESENT VIA TELECONFERENCE

Nikos Pastos, Center for Water Advocacy, Anchorage; Martha Itta, Native Village of Nuiqsut; Samuel Kunaknana, Native Village of Nuiqsut; Rosemary Ahtuanguaruak, Self, Barrow; Paul Metz, Self, Fairbanks; Kristin Carpenter, Executive Director, Copper River Watershed Project.

SUMMARY

HB 4 IN-STATE GASLINE DEVELOPMENT CORP

HB 4 was SCHEDULED but not HEARD.

HB 129 OIL & GAS EXPLORATION/DEVELOPMENT AREAS

HB 129 was HEARD and HELD in committee for further consideration.

SB 27 REGULATION OF DREDGE AND FILL ACTIVITIES

SB 27 was HEARD and HELD in committee for further consideration.

#sb27

#hb129

SENATE BILL NO. 27

"An Act establishing authority for the state to evaluate and seek primacy for administering the regulatory program for dredge and fill activities allowed to individual states under federal law and relating to the authority; and providing for an effective date."

#hb129

HOUSE BILL NO. 129

"An Act relating to approval for oil and gas or gas only exploration and development in a geographical area; and providing for an effective date."

[9:08:14 AM](#)

Co-Chair Stoltze OPENED public testimony. [Public testimony was opened concurrently for both SB 27 and HB 129.]

LISA WEISSLER, SELF, JUNEAU, testified on HB 129. She reported that she was an attorney with particular expertise in natural resource law. She believed the bill was problematic. She referenced an Alaska Supreme Court decision from the prior week related to oil and gas that she thought would affect the legislation. She elaborated that the decision affected the Department of Natural Resources (DNR) oil and gas project reviews. She explained

that currently a comprehensive best interest finding was required at the lease disposal phase of a project. Statute mandated that the lease disposal finding had to include "consideration of the reasonably foreseeable cumulative effects of exploration, development, and production and transportation of oil and gas" for the later phases. The findings must include the effects on subsistence fish and wildlife populations and historic and cultural resources. She continued that according to prior Alaska Supreme Court decisions, "a cumulative impact analysis did not require speculation about unknown and unpredictable future events" but was a whole project analysis done in the context of existing development. The best interest finding phase was limited to the information known at the time. Recently, the court ruled that the state was "constitutionally required to consider cumulative impacts throughout all phases of a project." She quoted from court documents: "DNR was required to continue to analyze and consider all factors and material relevant to what is in the public interest after the lease sale phase including the cumulative impacts of the project and to provide the public the timely and meaningful notice of its cumulative impacts assessment in order to ensure the constitutional principle of maximum use consistent with the public interest is given effect."

She related how the court ruling would affect HB 129. Provisions in HB 129 authorized blanket approval of exploration and development in geographic areas before the identification of specific projects. The approvals were in the same situation as the best interest findings; they were going to proceed without knowing the potential impacts of a project. The department intended to halt public notice for the comprehensive plans of operation for projects. Yet, the court required timely notice of the cumulative impacts of a project for the public. She stated that the decision "created a hole in the law." Currently plans of operation were comprehensive but do not include cumulative impact assessment. She indicated that DNR needed to implement a procedure for cumulative impact analysis and public notice "when exploration and development projects were proposed." She cited Article 8, Section 2 of the Constitution that stated the legislature was tasked with the duty to determine the procedures necessary to meet the constitutional requirements to "develop Alaska's resources for the maximum benefit of the people." She recommended that the committee table the bill and develop legislation that met the courts mandates.

Representative Gara asked where the provision in the legislation was that deprived public comment over the cumulative impact statement. Ms. Weissler replied that the plan to eliminate public notice was not contained in the bill. The legislation did not address the cumulative impact phase of development. She heard of DNR's plan through DNR testimony. She stated that the department's intention was to do a general analysis of exploration and development before detailing specific activities. Plans of operation on specific projects would subsequently be issued. Currently, DNR did provide public notice for plans of operation. It was DNR's intent to discontinue public notice. She concluded that currently there was not a method to analyze cumulative impacts on projects as a whole.

Representative Gara wondered where the bill stated that public notice was limited. Ms. Weissler restated that the exclusion was not contained in the bill. She stated that currently public notice was not statutorily required but that DNR provided public notice. In essence, DNR was changing its practice which did not require a statute change. She summarized that DNR wanted authorization for broad based approvals in order to eliminate site specific project reviews. She opined that the bill was potentially benign if DNR completed general approvals and retained the practice of public notice afterwards. She reiterated her suggestion to table the bill and deal with the court decision mandate.

[9:18:28 AM](#)

JAMES SULLIVAN, SOUTHEAST ALASKA CONSERVATION COUNCIL (SEACC), JUNEAU, spoke in opposition to SB 27. He communicated that the council found the bill very problematic. He urged the committee to examine the issues and better determine what 404 Primacy would get the state; he believed there was not a clear picture. He identified that navigable waters, coastline in Alaska, and adjacent wetlands to the coastline were not included in 404 Primacy. The state was comprised of 33 thousand miles of coastline and adjacent waters. He questioned why Alaska needed to assume 404 Primacy. He felt that the few reasons stated by the administration were not compelling. The CD5 delay at the Colville River would always remain under the federal Rivers and Harbors Act. Primacy would not affect such delays. He noted that the Point Thompson permitting delay was another stated reason for primacy. He argued that there

were no delays over 404 permitting. He stated that litigation which began under the Murkowski Administration in 2006 caused the delay. The issues were resolved and permitting immediately restarted in March 2012. He felt that Point Thompson permitting exemplified how efficiently the Army Corps of Engineers handled permitting. The corps signed off on the permitting in October 2012 and the state completed additional permitting the following month. Exxon Mobil began its Pt. Thompson project on time in January, 2013. He was concerned that the state would embark on a project with unknown costs.

Mr. Sullivan related that the Army Corps of Engineers had 54 employees in the Alaska district with a budget of approximately \$7.9 million. The federal government would not authorize primacy unless the state proved it could perform as well as the corps. In light of the corps budget, primacy was a huge bureaucratic "ramp up" and would significantly increase state spending by millions of dollars. He relayed that 404 primacy would take eight to ten years to implement but necessitated hiring additional employees immediately. He opined that the administration failed to define any problems that occurred that primacy could resolve which made primacy an imperative for the state. He concluded that the Environmental Protection Agency (EPA) retained ultimate veto authority if 404 Primacy was authorized.

Representative Munoz stated that the bill provided for a study period of two years. She discerned that one of the results of assuming primacy was that the state would gain the ability to litigate appeals of permits. She asked if SEACC had an opinion or was aware of state primacy litigation or litigation with the federal courts. Mr. Sullivan replied that the council was aware of the issue. He pointed out that throughout the process if any issues arose, the Fish and Wildlife service would go through the EPA. The federal agencies can bypass the state. He believed that the bill represented a huge cost for little reward.

[9:29:03 AM](#)

JAMES SULLIVAN, STAFF, SOUTHEAST ALASKA CONSERVATION COUNCIL, testified in opposition to HB 129. He stated that the bill created confusion for the public, who would not be able to predict what effects a project might have in their region of a geographic area. The council believed that it

was particularly troublesome in multi-use areas such as Cook Inlet. The legislation placed an undue burden on the public. He believed that the bill was antithetical to the permitting reform effort; HB 129 created problems rather than efficiencies.

NIKOS PASTOS, CENTER FOR WATER ADVOCACY, ANCHORAGE (via teleconference), spoke in opposition to SB 27. He stated that the bill was nebulous and he was concerned about potential impacts on migratory birds and the wetlands ecosystem. He thought that SB 27 was an expensive undertaking and the costs were not properly measured. He furthered that federal agencies with oversight of wetlands permitting were obligated to consult with tribes. He noted concern that the bill was curtailing public participation and notification.

Mr. Pastos spoke in opposition to HB 129. He relayed that proposing a ten year best interest finding was "unworkable." Many changes occurred in a ten year period that effected economic development as well as the environment. The center believed HB 129 curtailed public review and skirted public participation or involvement in oil and gas exploration issues and development activity. The bill was vague and could affect the subsistence and commercial economies of rural communities. He urged the committee to oppose the legislation.

MARTHA ITTA, TRIBAL ADMINISTRATOR, NATIVE VILLAGE OF NUIQSUT (via teleconference), spoke in opposition SB 27. She voiced that the bill would change the process for development. The legislation would have major impacts across the state and especially on native communities. She pointed out that the community was located on the Coleville Delta and was surrounded by wetlands as well as oil and gas. Any building on wetlands required permits. She spoke to the importance of permitting in the area when the oil industry wanted to build infrastructure. Permitting provided protection for native lands. Public input was equally important. She stated that projects would significantly impact the village's surroundings. Currently, federal law required that federal agencies consult with tribal government during the wetlands permitting process. No similar state law existed in Alaska. She urged the committee to vote against SB 27.

Ms. Itta addressed HB 129. She spoke in opposition to the legislation. She stated that the bill would greatly impact her village. The legislation curtailed public participation and local input on natural resource decisions. Natural resource decisions should benefit all Alaskans. Her community was greatly impacted by oil and gas development. She offered that a "blowout" had occurred in Nuiqsut in February 2012 in a well operated by Repsol. The community did not receive any help. The state did not assist the community. The blowout released benzene at harmful levels. She reported that high levels of benzene were related to leukemia. Two children in the village were stricken with leukemia since the accident. She stressed that a ten year blanket approval over natural resources was inappropriate and unsafe. She stated that "one best interest finding for the North Slope's 5 million acres cannot cover the varied landscape of the region." She continued that the Artic environment was rapidly changing. A ten year approval period was too long and unpredictable. She mentioned the possibility of unconventional drilling methods such as shale oil fracturing. Public input could not predict future technologies ten years in advance. Development deserved "robust" public review. She furthered that currently DNR allowed for public notice on leasing and later phases for exploration and development. The bill removed public involvement in the later phases and did not work in the best interest of Alaskans. She advised that the committee vote against the bill.

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SAMUEL KUNAKNANA, NATIVE VILLAGE OF NUIQSUT (via teleconference), spoke in opposition to SB 27. He stated that the bill would take away the village's right to have a voice on oil development in the area.

Co-Chair Stoltze asked whether he was opposed to both bills. Mr. Kunaknana replied in the affirmative.

ROSEMARY AHTUANGARUAK, SELF, BARROW (via teleconference), was opposed to HB 129. She stated that the bill abrogated the public's ability to participate in the process of natural resource development. She believed that participation was crucial to voice concerns over natural resource issues that could adversely affect the traditional way of life. [The phone connection was lost.]

PAUL METZ, SELF, FAIRBANKS (via teleconference), spoke in support of SB 27 with one important reservation. He discussed the legal definition of wetlands. He quoted from that Army Corps of Engineers 1987 permafrost manual "if the active layer of permafrost was less than 50 centimeters than by definition the soils are not wetlands." He contended that large areas of Alaska were underlined by permafrost consisting of active layers under 50 centimeters and should not be classified as wetlands. He reported that the Army Corps of Engineers classified areas of shelf permafrost as wetlands. He wondered whether the state of Alaska was attempting to assume 404 Primacy as a way to waive its right to challenge the corps classifications of wetlands. He thought that the state should not assume primacy if it compromised the state's ability to challenge the corps' wetland classifications in court. Otherwise, he was in favor of the legislation.

KRISTIN CARPENTER, EXECUTIVE DIRECTOR, COPPER RIVER WATERSHED PROJECT (via teleconference), urged the committee to vote no on SB 27. She spoke in opposition to HB 129. The group was concerned about the impact on wetlands and the state's finances. She noted her experience with construction projects. The group encouraged consideration of fish habitat and promoted sustainable development in the Copper River drainage. She commented that the region had multiple fishing economies. She agreed with previous testimony that 404 Primacy was a "huge fiscal undertaking" and added to the state's financial obligations. She furthered that the bill could have a "huge impact" on rural Alaska. She questioned DEC's ability to carry out the 404 permitting process. She related that wetlands on small streams were critical fish habitat for sustaining salmon populations. Salmon fisheries were the state's largest renewable resource. The legislation's impact on sustaining salmon fisheries would be felt in future years. She wanted the state to protect family and small rural fishing businesses. She recommended bringing back coordinated permitting that existed under the former coastal management program if the governor believed that there was a problem with permitting.

Co-Chair Stoltze asked whether she was opposed to both bills. Ms. Carpenter replied in the affirmative.

[9:53:36 AM](#)

Representative Gara asked whether Ms. Carpenter had experience with the Army Corps of Engineers current permitting process. He wondered whether the corps' decisions were timely. Ms. Carpenter replied in the affirmative. She mentioned culvert replacement projects and stated that "the corps had always been good to work with." She added that she had been in situations in which the corps was in opposition to her groups desires.

Representative Gara asked whether the corps made decisions in a timely manner. He wondered whether the corps' engineers lived in Alaska or Washington D.C. Ms. Carpenter replied that everyone she dealt with at the corps lived in Alaska.

Co-Chair Stoltze CLOSED public testimony on SB 27 and HB 129.

Representative Wilson referred to public testimony that related to the definition of wetlands. She requested clarification.

RUTH HAMILTON HEESE, SENIOR ASSISTANT ATTORNEY GENERAL, ENVIRONMENTAL SECTION, DEPARTMENT OF LAW, addressed the definition of wetlands. She listed the jurisdictional exceptions to 404 Primacy: Navigable waters, tidally influenced waters, and wetlands adjacent to navigable and tidally influenced waters. The exceptions were prescribed by the federal Commerce Clause that regulated foreign or interstate commerce. The state would gain control over water and wetlands within their boundaries. She mentioned "EPA guidance documents" referencing state control over the majority of waters and wetlands outside of the exceptions within its borders with the assumption of 404 Primacy.

Co-Chair Stoltze clarified that the question related to the "evolving" definition of wetlands.

Representative Wilson wondered whether the state would lose the ability to challenge the definition of wetlands related to permafrost if primacy was acquired. Ms. Heese replied that the definition of wetlands was not solidified. She reported that the Supreme Court had "visited" the question and also whether the federal agencies had properly guided federal jurisdictional wetlands policy. She stated that the issue would be examined when evaluating primacy. The Department of Law (DOL) wanted the distinction made so not

all permafrost lands were considered federally jurisdictional wetlands. Representative Wilson wanted to ensure that other rights were not relinquished under primacy. Ms. Heese agreed.

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Co-Chair Stoltze asked whether the wetlands issues were due to political or environmental changes.

ED FOGELS, DEPUTY COMMISSIONER, DEPARTMENT OF NATURAL RESOURCES (DNR), answered that the intent outlined in the Clean Water Act was in favor of the state assuming control over most of the wetlands. The state shared that opinion. He commented that the wetlands issue would dominate the evaluation process. He thought that "political considerations from changing administrations" dictated federal policy over wetlands which was an argument for gaining regulatory authority based in the state.

Representative Gara understood that if the Supreme Court ruled in favor of states and interpreted the Commerce Clause to allow the state to define and regulate its own wetlands away from navigable waters or ruled in opposition taking over primacy would not affect the ability of the state to manage its wetlands. Primacy would not matter in regards to that issue. Ms. Heese answered in the affirmative. She replied that the federal government had the "prerogative" to determine how the state regulated wetlands.

Representative Gara restated his question. He wondered whether gaining primacy rescinded the states right to define its wetlands if the Supreme Court ruled in favor of the states. Ms. Heese replied in the negative.

Representative Gara cited examples given in prior testimony as an argument for state assumed 404 Primacy. He noted the CD5 decision. He stated that CD5 was located in navigable waters and was exempt from 404 Primacy. Pt. Thompson permitting delays were cited as another example. He relayed that the delays were due to litigation and also related to navigable waters so were separate from the issue of primacy.

Co-Chair Stoltze remarked that the testimony was from Mr. Sullivan with SEACC.

Mr. Fogels answered that the state came close to losing two years in delays with the Pt. Thompson EIS (environmental impact statement) permitting process.

Representative Gara understood that the EIS process had taken a long time. He asked whether the EIS process would continue under primacy. Mr. Fogels responded that the question would be addressed during the 404 Primacy evaluation process. If a project was under the state's wetlands jurisdiction the process should progress without federal involvement. Without a "federal hook" the Army Corps of Engineers likely would not be involved in an EIS. Most of the large projects were likely to have a "federal hook." The department guessed that "a good portion of the Pt. Thompson project may have been delegated to the state" under primacy.

[10:08:28 AM](#)

Representative Kawasaki asked whether the entire Pt. Thompson project would have needed an EIS. He wondered what projects would be under the state's jurisdiction under primacy. Mr. Fogels could not provide a clear answer. He stated that the purpose of SB 27 was to seek definitive answers. The point was to work with the federal government to determine what wetlands the state would gain jurisdiction over. He informed the committee that soon after implementation of the Clean Water Act the EPA (Environmental Protection Agency) "clearly" indicated its expectation that states would receive primacy over the majority of its wetlands. He surmised that there was some portion of wetlands in the Pt. Thompson region that the state would likely gain jurisdiction over. He reiterated his uncertainty about EIS requirements in the Pt. Thompson region under state assumed primacy. However; under 404 Primacy the state was required to carry out the 404-B1 process which mandated an environmental analysis in order to choose the environmentally safest alternative.

Representative Kawasaki wondered whether a state had ever negotiated a primacy agreement as a first step. Mr. Fogels answered that the evaluation stage was necessary to provide more clarity on what wetlands the state would assume jurisdiction over. Evaluation included discussions with the EPA and Army Corps of Engineers. He disclosed that discussions were currently in progress.

Representative Kawasaki surmised that the department was already going through the process of negotiations. He wondered why the bill was necessary at this time. Mr. Fogels replied that discussions were very preliminary. The discussions were fact findings centered on setting up the evaluation process. The EPA indicated that the SB 27 fiscal note was sufficient to move forward with the evaluation process.

Representative Kawasaki asked whether the legislation would address the permafrost issue.

LYNN KENT, DEPUTY COMMISSIONER, DEPARTMENT OF ENVIRONMENTAL CONSERVATION, communicated that the bill allowed the state to examine the "potential" to assume 404 Primacy. Besides the exceptions, primacy related to waters of the United States, which were defined by the Clean Water Act, implementing regulations and through court cases. She maintained that "there was nothing in the bill" that would limit the state's ability to challenge the federal definition of "waters of the U.S." She added that wetlands were considered waters of the U.S.

Co-Chair Stoltze asked the department to follow up with a more detailed definition of permafrost in relation to wetlands.

[10:15:44 AM](#)

Representative Kawasaki asked whether "a useful tool in programmatic permitting" existed for placer mining in the Fairbanks area and why it wasn't used more "actively." Mr. Fogels responded that within the guidelines of the programmatic general permit DNR currently had the authority to "take over" permitting certain classes of activities that have lower levels of impact. Placer mining might fit into that category. Programmatic general programming was another tool besides primacy for the state to gain more control over wetlands permitting. The state was examining what other "tools" were available besides primacy to garner control over wetlands permitting. He guessed that the state would adopt some of the other tools if primacy wasn't a viable option.

Co-Chair Austerman referred to Mr. Fogel's testimony about the federal government having a "hook" on a project. In relation to the Pt. Thompson project permitting he asked

about the environmental analysis under primacy as opposed to an EIS. He asked for clarification. Mr. Fogels replied that he did not want to imply that an EIS for Pt. Thompson would not have been necessary under primacy. He restated that some of the project likely would have fallen under federal jurisdiction for Pt. Thompson making an EIS necessary. He expounded that the hope for 404 Primacy was the department would be a cooperating agency; therefore, placed in a stronger position related to EIS oversight. He stated that the EIS issue required thorough examination. Primacy required the state to analyze the environmental impacts of a project.

Representative Gara had received a document from the Army Corps of Engineers that provided permitting statistics. He relayed that over 80 percent of the corps' general permits were decided in 60 days and less than one percent of permits were denied. He wondered whether the information was accurate and if primacy was worth the financial costs.

Mr. Fogels responded that seeking primacy was not related to a backlog, it was about the quality of permitting, the stipulations placed on the permits, and the kind of litigation required. The administration believed that primacy provided greater state control over permit stipulations and litigation.

Ms. Kent added that the information came from a pie chart provided by the corps. She detailed that the administration viewed the corps information differently. The corps' statistics were counted from the date the application was completed. The permit process to completion could take months to years. She explained that 84 percent of the general permits fell into a category of small in scope or minor dredge and fill activities. The activities had limited cumulative impact and could be covered under an existing general permit. The permits were issued in less than 60 days. She pointed out that 109 general permits for small projects took more than 60 days to issue. She stated that 67 percent of the permits had been issued under 128 days. The department was concerned about the 33 percent of projects that took longer to issue and wondered how much more time was necessary. She reiterated that seeking primacy was not just about a backlog or length of permitting. The goal was to ensure that the state had a role in the permitting and decision making process and was

setting the priorities. Timely issuance of permits represented real jobs to Alaskans.

[10:23:55 AM](#)

Representative Munoz relayed that the Kennington mine received a 404 permit, which was challenged by the EPA and litigated by the US Supreme Court. She wondered whether the result might have been different if the state had 404 Primacy. Mr. Fogels stated that he could not provide a clear answer. He opined that under primacy the project would have fallen under state jurisdiction. One of the benefits of primacy would mean that administrative and judicial challenges would remain in the state. He remarked that seeking primacy was not meant to disparage the corps. An Alaskan process would benefit Alaskans.

Co-Chair Stoltze commented that the role of the legislature was to engage in political and policy discussions regarding the states working relationship with the federal government.

HB 129 was HEARD and HELD in committee for further consideration.

SB 27 was HEARD and HELD in committee for further consideration.

#hb4

HOUSE BILL NO. 4

"An Act relating to the Alaska Gasline Development Corporation; making the Alaska Gasline Development Corporation, a subsidiary of the Alaska Housing Finance Corporation, an independent public corporation of the state; establishing and relating to the in-state natural gas pipeline fund; making certain information provided to or by the Alaska Gasline Development Corporation exempt from inspection as a public record; relating to the Joint In-State Gasline Development Team; relating to the Alaska Housing Finance Corporation; relating to judicial review of a right-of-way lease or an action or decision related to the development or construction of an oil or gas pipeline on state land; relating to the lease of a right-of-way for a gas pipeline transportation corridor, including a corridor for a natural gas

pipeline that is a contract carrier; relating to the cost of natural resources, permits, and leases provided to the Alaska Gasline Development Corporation; relating to procurement by the Alaska Gasline Development Corporation; relating to the review by the Regulatory Commission of Alaska of natural gas transportation contracts; relating to the regulation by the Regulatory Commission of Alaska of an in-state natural gas pipeline project developed by the Alaska Gasline Development Corporation; relating to the regulation by the Regulatory Commission of Alaska of an in-state natural gas pipeline that provides transportation by contract carriage; relating to the Alaska Natural Gas Development Authority; relating to the procurement of certain services by the Alaska Natural Gas Development Authority; exempting property of a project developed by the Alaska Gasline Development Corporation from property taxes before the commencement of commercial operations; and providing for an effective date."

HB 4 was SCHEDULED but not HEARD.

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ADJOURNMENT

10:27:06 AM

The meeting was adjourned at 10:27 a.m.