

**ALASKA STATE LEGISLATURE
HOUSE RESOURCES STANDING COMMITTEE**

January 22, 2014
1:03 p.m.

MEMBERS PRESENT

Representative Eric Feige, Co-Chair
Representative Dan Saddler, Co-Chair
Representative Peggy Wilson, Vice Chair
Representative Mike Hawker
Representative Craig Johnson
Representative Paul Seaton
Representative Geran Tarr
Representative Chris Tuck

MEMBERS ABSENT

Representative Kurt Olson

COMMITTEE CALENDAR

OVERVIEW(S) - DEPARTMENT OF ENVIRONMENTAL CONSERVATION

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

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

POSITION STATEMENT: Provided an overview regarding DEC's Oil and Hazardous Substance Release Prevention and Response Fund, Section 404 primacy effort, and cruise ship wastewater discharge general permit.

TOM CHERIAN, Director
Division of Administrative Services
Department of Environmental Conservation (DEC)
Juneau, Alaska

POSITION STATEMENT: Answered questions during the DEC overview.

KRISTIN RYAN, Director

Division of Spill Prevention and Response
Department of Environmental Conservation (DEC)
Anchorage, Alaska

POSITION STATEMENT: Answered questions during the DEC overview.

MICHELLE BONNET HALE, Director
Division of Water
Department of Environmental Conservation (DEC)
Anchorage, Alaska

POSITION STATEMENT: Answered questions during the DEC overview.

ACTION NARRATIVE

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CO-CHAIR DAN SADDLER called the House Resources Standing Committee meeting to order at 1:03 p.m. Representatives Seaton, P. Wilson, Tarr, Kawasaki, Feige, and Saddler were present at the call to order. Representatives Johnson and Hawker arrived as the meeting was in progress.

OVERVIEW(S) - DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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CO-CHAIR SADDLER announced that the only order of business is an overview by the Department of Environmental Conservation.

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LARRY HARTIG, Commissioner, Department of Environmental Conservation (DEC), began by introducing DEC's senior management personnel present for the overview: Lynn Kent, Deputy Commissioner; Kristin Ryan, Director of the Division of Spill Prevention & Response (SPAR); Tom Cherian, Director of Division of Administrative Services; Michelle Bonnet Hale, Director of Division of Water; and Brandon Brefczynski, Legislative Liaison. He said his presentation will be focused on DEC's Oil and Hazardous Substance Release Prevention and Response Fund, Section 404 primacy effort, and cruise ship wastewater discharge general permit.

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COMMISSIONER HARTIG, regarding the Oil and Hazardous Substance Release Prevention and Response Fund ("Response Fund"), reminded

members that the intent language in last year's budget bill directed DEC to report to the legislature, which it did on 1/21/14, regarding the status of the fund, the history of spending from the fund, and options to make that fund sustainable. He explained that the legislature created the Response Fund some time ago because the state needs to have funds available for spills because they are likely to occur along with resource development. In addition to responding to spills, the state also needs to have an active spill prevention program. The Exxon Valdez oil spill underscored the need to have a plan and to have the resources available, trained up, and ready to go at a moment's notice.

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COMMISSIONER HARTIG noted that funding for this program comes from a 5-cent-per-barrel surcharge on crude oil production within Alaska, this amount being in place since the 1980s. A predicament, however, is that less money is going into the fund due to the production decline. He reminded members that over the past eight years he has talked about this predicament of declining production and being able to continue to operate SPAR at its present level to meet the original intent.

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COMMISSIONER HARTIG, responding to Representative Seaton, stated that the surcharge has remained at 5 cents a barrel despite inflation. Labor costs, transportation costs, and other costs have increased DEC's cost of doing business, yet the surcharge has remained at a nickel. At the same time the price per barrel has climbed from \$25 to about \$105.

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COMMISSIONER HARTIG, returning to his presentation, explained that the 5 cents per barrel coming into the fund is split between the Prevention Account (4 cents) and the Response Account (1 cent). The Prevention Account is targeted toward prevention, but it is also used for response elements. The 1 cent per barrel going into the Response Account is turned on and off. A \$50 million "war chest" is kept in the Response Account so that funds are available whenever an immediate response is needed in the field. For example, if a spill occurred today the SPAR director would send a memo to the DEC commissioner about the spill that includes, for the commissioner's authorization, an estimate of the amount needed from the fund. Later, DEC

would report to the legislature for an appropriation to bring the balance back up to \$50 million, which can be done several ways. One way is by cost recovery from the responsible party. Once recovered, that money would be appropriated back into the Response Account by the legislature. When the state cannot get total cost recovery, the 1 cent per barrel surcharge is again turned on and will stay on until the war chest is returned to \$50 million; thus, the war chest will always be there.

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COMMISSIONER HARTIG further explained that money in the Prevention Account is appropriated into operating expenses in DEC's Division of Spill Prevention & Response (SPAR). Today, the main source of funding for SPAR is the Response Fund. Bringing attention to the bar chart on the handout in the committee packet entitled "Prevention Account Revenues, Expenditures, and Balance Projection" for fiscal years 2010-2022, he noted that the colors within the bars depict the fund sources. The pink line across the top represents SPAR's operating budget, which goes down in fiscal year 2015 and then flattens from that year forward, indicating that flat funding is assumed for SPAR at a little above \$15 million annually. The green color in the bars [for fiscal years 2010, 2011, 2012, 2013, and 2015] depicts the amount paid out of the Prevention Account historically. The purple color depicts the amount of cost recovery appropriated back into the Prevention Account by the legislature. The large amount of recovery for fiscal year 2014 is the arbitration award from the "BP corrosion case of 2006" in which there were two corrosion incidents. About \$10 million of the recovery against BP went to DEC for cost recovery and the rest went into the constitutional budget reserve. Commissioner Hartig pointed out that from fiscal year 2016 onward, general funds (blue color within the bars) will replace use of the fund balance (green color) because there will not be enough production to keep SPAR going through use of the Prevention Account, given that [revenue] is declining \$6 million annually.

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COMMISSIONER HARTIG noted that, with the help of the legislature and the governor's office, DEC has tried to make the account sustainable. Referring to committee packet handouts ["Oil & Hazardous Substance Release Prevention and Response Fund" and "2014 Report on Financing and Managing the Prevention Account of the Oil & Hazardous Substance Release Prevention & Response

Fund" dated 1/21/14], he said the list of changes is incomplete but includes most of the larger items. The largest change, and one that really helped, was made about four ago when the formula was changed from 3 cents into the Prevention Account to 4 cents, and from 2 cents into the Response Account to 1 cent. Another change made some time ago was when DEC stopped using the Prevention Account to pay for state owned or state managed contaminated sites, even though that was wholly legal within the statutory authority and that passed audit. Those things were drawing down the fund and did not seem to be as tied to the core mission of the fund. As a result, the legislature began seeing a capital request from the department on a nearly annual basis of usually around \$3 million. Funding out of the Response Fund to other agencies, such as the Department of Transportation & Public Facilities and Department of Military & Veterans' Affairs, for spill response related activities was also stopped about five or eight years ago. It is "down to the bare bones of operating expense for SPAR," he added.

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COMMISSIONER HARTIG emphasized that even with all of the paring back and switching to the 4-1 split, it has reached a point where production is down such that there are no other options to extend the fund. Other options that have been looked at include increasing the surcharge. Then the question, which is outside of DEC's purview, is whether increasing the surcharge would discourage production or discourage new fields and whether an increase is appropriate given that SPAR's activities cover much more than crude oil. In looking at the number of spills in the state and what is spilled, crude oil does not even make the top five - at the top by far is diesel fuel. By industry sector, oil and gas is not even near the top, yet the surcharge goes on crude oil to pay for SPAR. Considering whether to put more of a burden on the oil and gas industry is a policy question.

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COMMISSIONER HARTIG, responding to Co-Chair Feige about whether DEC can provide a breakdown by industry sector of where the expenses go out, first said that of the volumes spilled and the industry sectors responsible for the spills, crude oil is not near the top. However, he clarified, in terms of agency attention that does not necessarily mean that they are not near the top. For example, DEC has lots of oil spill contingency plans for the oil and gas industry, including for the tanks and pipelines. Those plans are periodically updated and this

updating requires review of all of the new technology. He agreed to provide estimates of a breakdown by sector, but said DEC would have to use some judgment in how that is allocated. The number of spills and volume of spills are not an indication of the time DEC spends on a particular sector, he reiterated.

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COMMISSIONER HARTIG, responding to Representative Johnson about whether Response Funds were used for the [M/V Selendang Ayu] that ran aground in the Aleutians [in 2004], first explained that in addition to a cargo of soybeans the ship had its own fuel oil on board. A large oceangoing ship, he pointed out, can have on board a million gallons of fuel as well as lubricants. Such ships can have a big spill despite their cargo, which is what happened with [the M/V Selendang Ayu]. He confirmed that the Response Fund was available for this spill and said funds also came from a joint federal/state criminal action that was filed. Some of that settlement money is still being used to pay for the "Aleutian Island risk assessment" that is currently being done. Responding further to Representative Johnson, Commissioner Hartig brought attention to the handout entitled "Oil & Hazardous Substance Release Prevention and Response Fund" and elaborated that cost recovery received by the state is deposited into the Response Mitigation Account and then there is a legislative appropriation back into the Response Account.

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REPRESENTATIVE JOHNSON observed from the aforementioned handout that the fines go into the Prevention [Mitigation Account]. He asked whether those fines are available for response or whether, as a solution for the response side, it would be appropriate for [the legislature] "to put all those fines into the prevention and remove the cap".

COMMISSIONER HARTIG answered by directing attention to the handout entitled "Prevention Account Revenues, Expenditures, and Balance Projection" and noting that the cost recovery amount (depicted in purple within the bars) is much smaller than the general funds amount (depicted in blue). Thus, he said, the estimated amount of future cost recovery will not be nearly enough. Additionally, because it is money in/money out, it is not a replacement for declining production.

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COMMISSIONER HARTIG, answering Representative Johnson about whether the Respond Fund paid for the response to an overturned fishing vessel in a river near Naknek, said he is unsure whether the fund was used for the initial response and will have to get an answer to the committee. However, he continued, often in those cases that need an immediate response, DEC will tap the Response Fund and then DEC will negotiate with the responsible party to have that party start paying DEC's bills in order to avoid a cost recovery and so that payment does not have to be drawn from the Response Fund. At some point DEC will ask for the amount that was [initially] drawn from the Response Fund. Usually it is voluntary and usually it has worked out, he added.

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COMMISSIONER HARTIG, replying to Representative Feige about whether \$50 million in the Response Account is adequate, given the cost of initial response and the time it takes for the state to receive recovery, related that DEC has looked at that question and what the risks are that could result in a response that would go over \$50 million. Under both federal and state law the person owning or operating the facility from which the spill occurs is ultimately primarily responsible, and is also responsible for the response itself. For example, in the [2010] "Deepwater Horizon incident" in the Gulf of Mexico, BP was the responsible party and it was BP's response, not the U.S. Coast Guard's. The role of the Coast Guard, Environmental Protection Agency (EPA), and states was the oversight to make sure that the response was being done. Money being spent by the government agencies was not being spent on the response itself, and that would be the same in Alaska. If a big event occurred in Alaska, chances are that it would be a "big player" and that big player would have the resources to respond or would already have a contingency plan with DEC that states how the player responds and that, under state law, puts financial assurances in place to back up that plan. That big player would have contracts with oil spill response organizations that would be ready go and those would be tied in with national response assets. Additionally, there is the federal Oil Spill Liability Trust Fund, which was increased by Congress after the Deepwater Horizon. Putting all of this together, he said he feels comfortable with the \$50 million, but thinks it worth asking that question as things move forward. At some point, but not at this time, DEC may be back with some recommendations.

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REPRESENTATIVE SEATON inquired whether it is a statutory requirement that the monies from fines, lawsuits, and settlements go into the fund. He expressed his concern that if the state is in deficit spending those monies may not be a secure source of funding if they are voluntarily designated by the legislature.

COMMISSIONER HARTIG responded that the legislature always has the power of appropriation - any money spent by DEC has to be appropriated by the legislature ultimately. In the "BP arbitration case" the constitutional provision relating to the constitutional budget reserve trumped everything. While there are state statutes that may have been able to be interpreted to say that more of that arbitration award could have gone into the Response Fund, the call of the administration was that it was not going to tinker with the constitution. The \$10 million was strictly cost recovery - money that had been advanced out of the Response Fund to the Department of Law (DOL) as part of the investigation. The safety in the Response Fund against year-to-year budget changes or pressure is the initial intent that there be a reserve - a surplus from which to work. Unless the legislature was to re-appropriate what is already in the fund, it is pretty secure. The fund will reach zero starting around fiscal year 2015, at which point it will be appropriation only, plus any surcharge on new production.

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COMMISSIONER HARTIG, responding to Co-Chair Saddler, clarified it is in statute that the fines must go into the fund. However, there is no dedicated fund that binds future legislatures to make certain appropriations by statute. Since it is not in the constitution it is subject to whatever the legislature wants to do year to year.

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COMMISSIONER HARTIG, returning to his presentation, reiterated that steps have been taken over the last 8 to 10 years to try to sustain the fund, the biggest step being the percentage switch from 3 cents to 4 and from 2 cents to 1, as well as not paying for certain things out of the fund. The department has been held at a flat level for some time. Only two [position control numbers (PCNs)] have been added over the last ten years despite the outer continental shelf (OCS) and other new things coming on, the corrosion issues and cases, and upping the regulation of flow lines. Flow lines were the main culprit in corrosion;

those lines go from the wellhead to the gathering centers where the water and sediments are taken out before the oil goes to the transmission lines. A lot of duties have been added to the division, but its size and cost have been kept stable. Efficiencies have been instituted, including efficiencies this year in how cost recovery is tracked and collected. However, he emphasized, these things just cannot overcome the fact of declining production because it is too significant. Towards the end of fiscal year 2015 the fund will be down to zero, absent some other input that might extend it for a little bit, such as cost recovery. It will stay at zero until there is quite a bit more production.

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COMMISSIONER HARTIG, replying to Representative Kawasaki as to whether increasing the surcharge has been considered by the administration or considered in general, noted that an increase was discussed last year in this committee, which is why he mentioned it. Last year's intent language requested the Office of Management & Budget (OMB) to respond to basically the same questions, so OMB is quoted in the beginning section of this year's intent language. The administration's proposal is that it be "pay as you go" - that the year-to-year gap be filled by appropriations from the general fund. Spreading the surcharge to refined products has also been looked at, he continued, but that gets into how far down the chain to go, how much money gets spent on instituting the program, and how painful it is to the consumer for what is received. Thus, it gets into policy questions. Up until this production issue, the system has been pretty straight forward, although in the minds of some people it is not fair to the oil and gas industry because that industry is paying for everything.

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COMMISSIONER HARTIG, in answer to Representative Kawasaki about the department's success in its changes to cost recovery, stated he will provide the committee with the department's annual report of actual percentages, but he believes the success rate is in the high 90s. He cautioned that there are practicalities to this issue however. People go bankrupt when the spill outstrips their ability to pay even if they would want to pay. There is the mom-and-pop situation where, unbeknownst to them, the home heating fuel tank is corroded and creates a \$100,000 mess. The statute language says the commissioner "shall" recover, but DEC has interpreted this to mean being able to work

with the Department of Law, which always has the authority to look at the particular circumstances of the state's claim and make adjustments; for example, if it looks like DEC is chasing somebody who is bankrupt or cannot pay and it is not worth the effort. In further response he offered his belief that the 90 percent relates to the dollar amount, but advised it is not an opportunity to get the fund back up to a sustainable level.

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COMMISSIONER HARTIG, responding to Representative P. Wilson about whether the legislature has or has not always appropriated money to the fund, replied that to his knowledge the legislature has always provided that appropriation. Some years, in response to the intent language, the legislature has even provided capital infusions to try to bring the fund back up. He said he cannot think of any instance where the legislature has taken funds out or not directed funds back into the fund.

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COMMISSIONER HARTIG, responding to Co-Chair Saddler regarding the bar chart, explained that a general fund increment is not included in the bar depicting fiscal year 2015 because a balance is still in the Reserve Fund for that fiscal year. Over 10 years ago some adjustments were made that resulted in a surplus in the Response Fund. When the surcharge was unable to keep up with ongoing SPAR expenses, DEC started going into that reserve. Due to the BP award the reserve balance was bumped up by \$10 million in fiscal year 2015, but by fiscal year 2016 the balance will go to zero. Because there will be no money in fiscal year 2016 to be transferred from the Response Fund, it will have to be the money that is collected from the declining production that year plus a backfill from appropriation.

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COMMISSIONER HARTIG, replying to Representative Seaton about whether DEC's calculations include cost inflation over the time period depicted in the bar chart, explained it depends on what level of service DEC is going to be providing - with inflation and labor costs it will not be the same level of service. The chart is illustrative to show that, even with flat funding, a general fund increment will still need to be added.

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REPRESENTATIVE SEATON posited that the purpose of the chart is not that it is real, but that the assumption projections include an inflation of zero over the next ten years. Therefore, the situation is probably worse if the state is going to maintain the same services that it is currently providing. He then expressed his concern about smaller operators in Cook Inlet and other places and the potential for bankruptcies. He asked what the bond requirements are for oil and gas operators and whether the state has increased the bonding requirements, as has the federal government, so as not to have to worry as much about somebody being unable to meet response costs or going bankrupt.

COMMISSIONER HARTIG recalled that about a dozen contingency plans are currently in place in Cook Inlet. A number of them are for new operators conducting gas and crude exploration and all of them are required to have financial assurances to support their plans. He said DEC has not done anything new in terms of upping those requirements, nor has it lowered the bar. The expectation is that somebody new to the state is going to be able to perform at the same level as those who have been here for 40 years and will be backed up with financial assurances. The bonding requirements imposed by federal land managers might be a bit different. He explained that DEC only looks at response plans and the financial ability to perform that plan, whereas the Department of Natural Resources and others look at damage to resources and other things in terms of the bonding.

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REPRESENTATIVE SEATON requested the committee be provided with further information regarding oil and gas development and spill response, given the number of new smaller players.

COMMISSIONER HARTIG added that [land managers] have looked at DEC's contingency plan requirements for the new players, the types of activities they are engaged in, and what the state learned from the [Gulf of Mexico Deepwater Horizon] experience. Besides financial assurances, DEC looks at other aspects to contingency plans. It is a challenge for DEC when new players and companies come in that are unfamiliar to Alaska - DEC does not know them and they do not know DEC and the working environment in Alaska. Cook Inlet is unique in that it has the second highest tides in North America, ice, volcanoes, seismic activity, derricks, shipping traffic to and from Anchorage, and a world class fishery on the Kenai. The department is very aware that it is a challenging area for a new operator and looks at that in its contingency plans.

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COMMISSIONER HARTIG, responding to Co-Chair Saddler regarding cleanup of sites under federal jurisdiction, said federal cleanup continues to be a challenge as approximately 2,000 new spills are reported in Alaska each year, of which approximately 24 rise to the level of agency response. However, many of the 2,000 sites are left over from the federal government's past presence in Alaska. For example, about 138 legacy well sites are still left to be addressed. Many federal sites need attention, but there are questions regarding federal primacy, sovereign immunity, appropriations from Washington, DC, and higher national priorities. Although it has been a struggle, more progress has been made over the last year. This year, DEC's budget includes an increment for federal receipts for SPAR and the department anticipates an increase of about \$900,000 in federal funds for contaminated sites.

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CO-CHAIR SADDLER asked what the total amount would be including the anticipated \$900,000 increase.

TOM CHERIAN, Director, Division of Administrative Services, Department of Environmental Conservation (DEC), replied that he did not have the answer.

COMMISSIONER HARTIG advised he would get the answer and that it is federal receipt authority to be used by SPAR for federal contaminated sites.

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REPRESENTATIVE TARR, referring to the table entitled "Department of Environmental Conservation Prevention Account Revenues, Expenditures, and Balance Projection", inquired as to the point at which the department would predict an increase in the amount being received on the per barrel surcharge related to new oil development, given that some projects underway now and in the near future will bring new oil online. She further asked whether the department knew what it would mean to "turn the curve" in thousands of barrels.

COMMISSIONER HARTIG responded that DEC does not do its own projections and relies on the Department of Revenue's projections. There are current exploration activities, such as

on the outer continental shelf (OCS), but the OCS is in federal waters. The projection in the table had to be new production on state lands or state waters and DEC does not see assurance that that is within 10 years.

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COMMISSIONER HARTIG, replying to Co-Chair Saddler, agreed that 1.01 million barrels a year, which is the number in the response to intent language, would generate enough revenue for each fiscal year.

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REPRESENTATIVE JOHNSON, recalling earlier testimony that the oil industry is a small portion of DEC's total response, asked whether other industries, such as the fishing industry, have to post the same kind of bonds as an oil company.

COMMISSIONER HARTIG responded that some types of operations facilities must have contingency plans and financial assurances. The mining industry may also have to have reclamation requirements with both the Department of Natural Resources (DNR) and DEC. Fishing vessels and other industries do not pay a surcharge on what is produced; however, there may be financial assurance requirements for contingency plan performance.

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REPRESENTATIVE SEATON inquired as to whether DEC is receiving contingency plans electronically and posting them online since they are public documents.

COMMISSIONER HARTIG deferred to SPAR director Kristin Ryan to provide the latest information in this regard.

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KRISTIN RYAN, Director, Division of Spill Prevention and Response, Department of Environmental Conservation (DEC), advised that the one problem with posting contingency plans online is that, for most companies, a large portion of the contingency plan is confidential. Often a company requires DEC to come to its location to review the contingency plans because the company knows if it provides the contingency plans to DEC it becomes public. Therefore, DEC does not have hard copies of all the information in the contingency plan; DEC reviews it and

ascertains whether the information is there. The information companies give DEC is made public. She offered to review the process for putting the information on line, as DEC is updating its data base that stores information to make the information more easily usable for DEC staff and the public. However, she noted, there will always be restricted portions.

REPRESENTATIVE SEATON recalled that in the past, people interested in reviewing plans had to go DEC's office during working hours to do so. Posting the public documents on line, he opined, would allow the public to review plans in a way that would help the state ensure there are no holes in the documents.

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COMMISSIONER HARTIG added it is not necessarily confidential business information, but rather it is Homeland Security type information. Therefore, it is a work in progress regarding where to draw the line between confidential and public. The companies are constrained by security issues and yet the state has a strong interest in full public access. He related that posting information online is the direction DEC wants to go, but it is a question of resources as some of these plans consist of multiple volumes.

REPRESENTATIVE SEATON said the reason for public disclosures is because people in the various industries are probably more in tune to making sure that the contingency plans will be fulfilled. While DEC's people are good, they do not have the same expertise as marine pilots who would realize when there is something in a contingency plan that does not make sense. The state is protected by these plans only if they are functional plans. If there are portions of the contingency plans that must be confidential, then those areas can be redacted and labeled as to why they need to be confidential and not available for public review.

MS. RYAN informed the committee that DEC is proposing some regulation changes in the next few weeks to allow electronic submittal of information for contingency plans, which it currently does not allow. These regulation changes are expected to be available for public comment in the next two months or so.

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COMMISSIONER HARTIG, responding to Representative Johnson, agreed to provide a breakdown by industry sector of the proportion of response and the cost.

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MS. RYAN, addressing Representative Kawasaki's earlier question regarding percentage of cost recovery, stated it is difficult to have a clear idea of the cost recovery as DEC is revamping its cost recovery system, but she hoped to have that answer soon.

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REPRESENTATIVE SEATON, regarding cost sharing by the other industries or the state's citizens, asked whether, when taxing oil on profit, that [5 cents per barrel surcharge] comes off as an expense to the participants such that the people of the state actually pay 35 percent.

COMMISSIONER HARTIG replied he does not know and deferred to the Department of Revenue.

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COMMISSIONER HARTIG, addressing Representative Johnson's earlier request, informed the committee that in 2013, 344 spills into water and 1,430 onto land were reported to DEC. In terms of volume, 69 percent of the spills were diesel fuel, 13 percent aviation fuel, 7 percent hydraulic oil, 3 percent engine lube oil, 3 percent gasoline, and 6 percent other. He guessed that "other" would be produced water associated with mining or another industry's operation, which would also include crude. Responding further to Representative Johnson as well as Co-Chair Saddler, Commissioner Hartig explained that those are all refined products other than the "other" category which is more than crude oil. Therefore, the crude oil production is not the big player in terms of recent spills. He then agreed to provide the committee with a breakdown by industry sector.

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COMMISSIONER HARTIG, returning to his presentation, directed attention to two status reports, and said Section 404 of the "Clean Water Act, Wetlands Primacy" provides that people wanting to place fill material into waters of the United States must apply for a permit from the U.S. Army Corps of Engineers (Corps). The Corps then reviews the federal statutes, including

regulations that the Environmental Protection Agency (EPA) approves. Under the Clean Water Act, the state has the ability to take primacy of Section 404 permitting and thus a state or agency within the state would issue the permit, rather than the Corps. He reminded committee members that about six years ago DEC obtained full primacy from the EPA for Section 402, the wastewater discharge permitting program. Commissioner Hartig explained that the legislature authorized DEC and DNR to work together to evaluate the pros and cons of the state taking primacy of the Section 404 program. The aforementioned made sense because the majority of wetlands are in Alaska and most large projects involve wetlands. The DEC already oversees ground quality as well as surface water quality with the National Pollutant Discharge Elimination System (NPDES) program and DNR oversees water quantity. With the Section 404 program, the state could have an integrated approach to water management and permitting in the state.

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COMMISSIONER HARTIG explained that DEC and DNR have formed a team from each agency to work on the issue of whether the state should take primacy. The departments are working closely with New Jersey and Michigan that already have Section 404 primacy. There have also been a lot of discussions with Oregon, which is further along with primacy and is within Region 10 of the EPA. The EPA is the entity that approves an application for primacy. He related that DEC is very engaged with EPA Region 10 and Oregon regarding the rules to get primacy, the expectations, [the deliverables], [the structure], the costs, and the staff it would take. He reported that DEC is receiving good information from the other states and good cooperation from the Corps and EPA. In fact, DEC has entered into a Memorandum of Understanding (MOU) regarding the collaboration and sharing of information, investigation of the pros and cons, and evaluation of the results. "They see the utility in the state taking primacy ... so I think they are fully behind us evaluating this," he opined. Commissioner Hartig then reported that DEC has been to EPA headquarters and spent time with the Corps, in Washington DC regarding the federal requirements. He further reported that the Department of Law (DOL) has developed a working draft of the regulations because an application has to include the regulations, statutes, staff organization, and budget before the EPA will consider it. Developing regulations provides an idea of the requirements and whether efficiencies and improvements to the federal program may be achieved.

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COMMISSIONER HARTIG highlighted that DEC, with DNR's assistance, is reviewing whether there can be more flexibility in terms of wetlands mitigation. If someone disturbs or converts a wetland in Alaska, under the federal rule it must be replaced with other wetlands. The replacement is not just one for one as it requires more wetland restoration than was lost. He questioned whether that remedy makes sense in a state with so many wetlands. In a case in which 100 square feet of wetland on the North Slope is disturbed, he questioned whether it would make more sense to restore other wetlands on the North Slope or address a legacy well because in the state's mind there may be other environmental and water quality issues with a higher priority. He then related that the department is considering mitigation banking in-lieu of fee programs. Since there are so few wetlands to restore in Alaska when there is not a restoration project ready to go but mitigation has to be done, the question of what DEC should do arises. Therefore, DEC is looking into whether funds can be banked and how the funds would be managed and executed. If the ultimate recommendation of the legislature is not to pursue this avenue, hopefully DEC can work with the Corps to create a better program in Alaska. To that end, discussions continue and DEC plans to submit a full report to the legislature in 2015.

2:14:08 PM

COMMISSIONER HARTIG, responding to Co-Chair Saddler, clarified that DEC is considering mitigation banking in-lieu [fee] programs. The EPA and the Corps are collectively reviewing on a national level, rulemaking that would interpret the waters of the United States language in the Clean Water Act. Therefore, DEC is reviewing closely how that might impact what Alaska would receive in terms of primacy. The DEC is also reviewing how the new rule would impact the waters of the United States definition and what flexibility the state might receive under the mitigation national rule and how that might change in Alaska if Alaska has the program.

2:14:57 PM

COMMISSIONER HARTIG, responding to Co-Chair Saddler about whether any federal agencies, such as the EPA, are sharing the costs of the primacy study, advised that DEC applied for and received some grant money, but said he does not recall the amount.

2:15:29 PM

REPRESENTATIVE TARR recalled that last year's legislation included funding to perform the entire review process. She asked whether there is another request in this year's budget for those staff.

COMMISSIONER HARTIG answered that DEC received some position control numbers (PCNs) and increments for them. There was money for DEC and a pass-through for DNR that was not PCNs but some money for law. All of the money is being used for what was in the original appropriation. Although DEC did not receive the appropriation that would carry the program all the way to implementation, DEC is not requesting any new funds and will probably use the FY14 funds and not use the funds in the FY15 budget as part of the tightening environment since DEC is set up well with what it has for the next year or two.

2:16:50 PM

CO-CHAIR SADDLER asked whether the legislature or DEC makes the administrative decision as to whether the state should proceed to apply for primacy.

COMMISSIONER HARTIG responded that the legislature will receive a preliminary report and then a final report with a recommendation. Although the original legislation contained an authorization if the administration went forward with an application, the legislature is the gatekeeper and has to appropriate the money. Therefore, DEC could apply for the permit, but it would not be accepted because EPA requires that a state have the staff hired and the program ready to implement before it will consider an application.

2:18:10 PM

COMMISSIONER HARTIG, responding to Representative Seaton, stated that 14 employees were hired for the Section 402 wastewater program. However, at the time DEC had an existing program under Section 402 and issued state wastewater discharge permits under a separate state requirement, and thus [Section 402] started with a higher number of employees than would be the case with Section 404 employees. Therefore, Sections 402 and 404 are not good comparisons. In further response to Representative Seaton, Commissioner Hartig presumed that the Section 404 program would

require fewer staff than the Section 402 program, but said the department is analyzing that now.

2:19:19 PM

COMMISSIONER HARTIG moved to his status report on the cruise ship wastewater discharge general permit. He reminded the committee that passage of HB 80 changed state law to extend the general permit that existed at the time to 2015 and provided DEC the authority to allow cruise ships to apply to DEC for mixing zones, assuming the application met DEC's mixing zone requirements. The department is in the final process of developing a new general permit under the authorization it received from HB 80. The legislation did not change the application of mixing zone regulations and state water quality standards. Therefore, DEC's standards and regulations will be applied to cruise ships the same as to land-based facilities requesting a permit. The draft general permit is in internal departmental review and upon completion of that review DEC will issue the permit in draft form for public review. After an extensive public review of the draft general permit, DEC will take the public's comments under consideration, finalize the permit, and issue the general permit. Commissioner Hartig noted his preference to issue the permit during the 2014 season, but acknowledged it is a tight timeframe and if it is not issued, the existing general permit is still in place to 2015.

2:22:02 PM

COMMISSIONER HARTIG, responding to Co-Chair Saddler, informed the committee that there are approximately 17 different conditions within DEC's regulations that must be met in order to authorize a mixing zone. The conditions include no bio-accumulation, no lethality to passing fish, and no loss of designated uses for the water body. A mixing zone, he explained, is limited spatially in terms of where the discharge meets the receiving water to allow some mixing there to meet water quality standards. The water restrictions require entities to do the maximum possible to limit their discharge and to limit the size of the mixing zone to make it as small as practical. Entities must also protect all the surrounding areas so there are no unintended consequences outside that limited area. Commissioner Hartig reiterated that within HB 80 there were no changes to the water quality standards or the mixing zone requirements. However, HB 80 did place cruise ships under the purview of DEC's water quality standards.

[2:23:46 PM](#)

CO-CHAIR SADDLER asked whether there have been any technological advances over the last year that would allow for more stringent discharge standards.

COMMISSIONER HARTIG said within the last year DEC has not prepared a full review of available technology, although a science advisory panel did meet for a couple of years leading up to the bill. As with oil and gas, DEC will periodically review best available technology and it will be part of the permitting process when DEC reviews the specific ships.

[2:24:50 PM](#)

REPRESENTATIVE TARR referred to the letter from Michelle Bonnet Hale dated January 22, 2014, contained within the committee packet, and requested information regarding the various communities' responses and comments during the summer meetings that took place regarding the new general permit.

MICHELLE BONNET HALE, Director, Division of Water, Department of Environmental Conservation, informed the committee she traveled to Ketchikan, Sitka, and Juneau and tailored her talks to what was going on in the different communities. The communities were given an idea of what the discharges were and their characteristics. Communities were advised that the discharges were not as extreme as previously believed and the community response was positive.

[2:26:11 PM](#)

REPRESENTATIVE SEATON related that DEC requires mariculture farmers, shell fish farmers, in Kachemak Bay to sample water not at their site but at 9 points around Kachemak Bay and send the samples to DEC within 12 hours. He questioned from where the authority for this requirement came.

COMMISSIONER HARTIG clarified that that is required through the Food Safety & Sanitation Program in the Division of Environmental Health, which oversees safety concerns with the mariculture program. He offered to provide Representative Seaton with the full answer to the purpose of that sampling, which he surmised is probably unique to that particular harvest area and stems from a food safety requirement.

[2:27:55 PM](#)

REPRESENTATIVE TARR recalled the House Finance Subcommittee on DEC discussing intent language that would make information available to the public regarding the cruise ship routes. She asked whether that occurred and has been presented to the public in that manner.

MS. BONNET HALE explained that although the presentations were not that comprehensive, DEC has responded to that intent language. The department is providing more information on the web as it receives it. However, DEC is not at the point where it can show the route of the cruise ships and what is being discharged at any location. The department has a page on its web site that is updated with information as it is available including information on mixing zones.

[2:29:31 PM](#)

COMMISSIONER HARTIG, in closing, advised he would follow-up on all of the questions and would provide that information to the committee.

[2:29:43 PM](#)

ADJOURNMENT

There being no further business before the committee, the House Resources Standing Committee meeting was adjourned at 2:30 p.m.