

**ALASKA STATE LEGISLATURE
SENATE RESOURCES STANDING COMMITTEE**

February 2, 2013

10:29 a.m.

MEMBERS PRESENT

Senator Cathy Giessel, Chair
Senator Fred Dyson, Vice Chair
Senator Peter Micciche
Senator Click Bishop
Senator Anna Fairclough
Senator Hollis French - via teleconference

MEMBERS ABSENT

Senator Lesil McGuire

OTHER LEGISLATORS PRESENT

Senator Charlie Huggins

COMMITTEE CALENDAR

SENATE BILL NO. 26

"An Act relating to the Alaska Land Act, including certain authorizations, contracts, leases, permits, or other disposals of state land, resources, property, or interests; relating to authorization for the use of state land by general permit; relating to exchange of state land; relating to procedures for certain administrative appeals and requests for reconsideration to the commissioner of natural resources; relating to the Alaska Water Use Act; and providing for an effective date."

- HEARD & HELD

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."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 26

SHORT TITLE: LAND DISPOSALS/EXCHANGES; WATER RIGHTS

SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

01/18/13 (S) READ THE FIRST TIME - REFERRALS
01/18/13 (S) RES, FIN
02/02/13 (S) RES AT 10:30 AM BUTROVICH 205

BILL: SB 27

SHORT TITLE: REGULATION OF DREDGE AND FILL ACTIVITIES

SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

01/18/13 (S) READ THE FIRST TIME - REFERRALS
01/18/13 (S) RES, FIN
02/02/13 (S) RES AT 10:30 AM BUTROVICH 205

WITNESS REGISTER

DAN SULLIVAN, Commissioner
Department of Natural Resources (DNR)
Anchorage, AK

POSITION STATEMENT: Presented a strategic overview and a sense of the context where SB 26 and SB 27 fit into permitting reform and modernization.

ED FOGELS, Deputy Commissioner
Department of Natural Resources (DNR)
Juneau, AK

POSITION STATEMENT: Commented on SB 26 and SB 27.

WYN MENEFEE, Chief of Operations
Division of Mining, Land and Water
Department of Natural Resources (DNR)
Juneau, AK

POSITION STATEMENT: Commented on SB 26.

JOHN BAKER, Attorney, Civil-Resources
Department of Law
Anchorage, AK

POSITION STATEMENT: Answered questions on SB 26.

ASHLEY BROWN, Attorney
Department of Law (DOL)
Anchorage, Alaska

POSITION STATEMENT: Answered questions about SB 26.

LARRY HARTIG, Commissioner

Department of Environmental Conservation (DEC)
Anchorage, Alaska

POSITION STATEMENT: Presented SB 27.

ACTION NARRATIVE

[10:29:31 AM](#)

CHAIR CATHY GIESSEL called the Senate Resources Standing Committee meeting to order at 10:30 a.m. Present at the call to order were Senators Bishop, Micciche, Dyson, Fairclough, French (via teleconference) and Chair Giessel.

SB 26-LAND DISPOSALS/EXCHANGES; WATER RIGHTS
SB 27-REGULATION OF DREDGE AND FILL ACTIVITIES

[10:30:42 AM](#)

CHAIR GIESSEL announced SB 26 and SB 27 to be up for consideration.

DAN SULLIVAN, Commissioner, Department of Natural Resources (DNR), said he would present a strategic overview and a sense of the context where these bills [SB 26 and SB 27] fit into what is happening in the state in terms of modernization and reform.

The state is in its second year of permitting reform and modernization that has been a national bi-partisan trend over the last several years, primarily because the recession made many policy leaders realize that getting people back to work and permitting timelines have had a bit of a disconnect.

He cited an article from last year by an economist entitled "Overregulated America" that said, "America needs a smarter approach to regulation that will mitigate a real danger that regulation may crush the life out of America's economy." He also referenced a News Week cover story last year in which President Clinton laid out the top ways to get people back to work, and it was through regulatory overhaul and making permitting more timely, efficient and certain. States as politically diverse as California, Massachusetts, Kansas, Alaska, and Indiana are putting it at the tops of their agenda.

SENATOR BISHOP concurred with both his statements and asked if the over-regulation memo had gotten "down into the departments."

COMMISSIONER SULLIVAN said the Obama administration has made permitting reform a highlight, but Alaska hadn't seen a lot of it.

[10:36:11 AM](#)

At ease from 10:36 to 10:39 a.m.

[10:39:29 AM](#)

COMMISSIONER SULLIVAN said in the broader context it's also a competitiveness issue. He said an investment bank in Canada does an annual survey of all the biggest mining jurisdictions in the world and where they rank; and last year the US, where it takes an average of 7 to 10 years to permit a mine, was dead last. This year the US tied with Papua New Guinea for last place. Alaska has experienced this with the exception of the Kensington Mine that employs hundreds of Alaskans.

Two days ago, a Wall Street Journal article by Dan McGorty sounded an alarm bell about how this long timeline not only affects competitiveness, but it affects green energy and an entire class of areas that make the US more competitive.

COMMISSIONER SULLIVAN said this country has done big projects before, like the 1,500-mile Alaska Highway that took only nine months to build. When the country wants to get big projects done it can do it.

He said we want to maintain our very high environmental standards while becoming more efficient. However, permitting delays are so long in our country that from a global environmental perspective, you're not protecting the environment. You can actually undermine environmental protection because investment starts to leave places like Alaska and the US and go to places with much lower standards like Russian.

[10:43:47 AM](#)

One theme comes across all of these areas and that is that permitting reform is enormously important in order to make progress in every other area. That is why the administration is so focused on it. Their strategy is to start by going through statutes to look at ways to make them more efficient, more timely and certain and to make the coordination between state agencies much better. For the last two years they have been asking stakeholders all over the state how to make the permitting system better and getting a lot of good ideas in return. Improving coordination with the feds is another important part they are focusing on because almost every big

project here has a fed nexus; for example, working closer with the Corps at Pt. Thomson. Finally, he said they have been looking at a lot of areas - for instance the Shale Oil Task Force - to think through the regulatory aspects of the newer resource development.

[10:46:56 AM](#)

SENATOR DYSON said Shell did something to preclude environmental lawsuits from stopping a project and asked what that was.

COMMISSIONER SULLIVAN answered he thought they preemptively filed a suit instead of waiting for one to be filed against them. He said the feds have sued almost every step of the way in OCS development, but the state had intervened in a lot of those and that had been useful. He reported that the department had sought budgetary support from the legislature and was focusing on a whole revamping of their unified permit and management system from an I.T. perspective, and it was all proceeding very well.

COMMISSIONER SULLIVAN recalled two years ago when a number of new people came into DNR, they recognized a huge backlog of about 2500 permits, some of which had been sitting around for a few years. So they had been focused on trying to bring that backlog down and were making good progress.

[10:49:56 AM](#)

He had been pressing people who know the system to come forth with ideas about how to make it more efficient and that was how SB 26 fits in with the broader strategy.

[10:52:33 AM](#)

He said that SB 27 fits not only within this broader context of permitting reform and modernization, but addresses federal overreach. Two significant concerns involve permitting delay and the lack of serious input from state officials and experts on a whole host of permitting matters that go before federal agencies. One example was the ConocoPhillips CD-5 permit (Section 404 of the Clean Water Act) over the Coleville River that took many years of negotiations between the state, stakeholders and the Corps to come to an agreement, but then the EPA and the Fish and Wildlife Service vetoed the permitting decisions, taking a lot of people by surprise; that took another two years to settle. He was struck by the lack of state input despite the fact that its citizens were clearly being affected and the fact that it has so many people with the technical expertise to understand the issues.

COMMISSIONER SULLIVAN stated starting to get primacy over Clean Water Act (CWA) decisions will help the state control its own destiny on a lot of federal projects that have huge impacts on it. One of the frustrations is that a state agency almost always requests to be a cooperating agency in deliberations and while it is typically granted that status, it isn't a part of the actual decision-making process. Assuming primacy over those kinds of decisions will take a long time, but will definitely be worth it. Two states have already done it; meeting federal standards is the key and getting started is important.

[10:58:36 AM](#)

SENATOR MICCICHE said a lot of projects have dual parts for both state and federal agencies to play and asked if a segment of his strategy has a specific procedure to legally provide counter support for projects that are specifically on state lands and waters.

COMMISSIONER SULLIVAN said laid out a number of things they had been trying to do on that question on slide 8 and said the Attorney General had been very proactive on the EPA preemptively removing whole areas of the state under the CWA with regard to the broader Pebble Mine issue. He said Pt. Thomson's 404 permit was also delayed on state land, but the department ended up spending many hours with the Corps of Engineers in getting a relatively expeditious permitting.

[11:01:45 AM](#)

SENATOR DYSON asked if there is ever a case when a government keeps an owner from doing what is within his rights to do on his property - similar to what the feds do with the state.

COMMISSIONER SULLIVAN said he would have to get back to him on that.

[11:04:45 AM](#)

CHAIR GIESSEL said they would look at SB 26 now.

ED FOGELS, Deputy Commissioner, Department of Natural Resources (DNR), Juneau, AK, said Commissioner Sullivan laid out the broad strategy on the permitting initiative and the second part of the housekeeping exercise is to go through the statutes. A successful bill last year had a lot of small but cumulatively significant changes and this is the second version of that.

[11:05:45 AM](#)

WYN MENEFFEE, Chief of Operations, Division of Mining, Land and Water, Department of Natural Resources (DNR), Juneau, AK, followed up referencing the briefing paper for SB 26. He said that point 1 clarified language to show that they can do "general permitting," which they can do now, but it's not called that specifically.

He explained that general permitting is when someone applies to do something on state land; the department considers it by doing public outreach and agency review and then makes a decision on whether or not it can be done. A general permit permits activity types that get a lot of applicants and once the department decides it will issue a general permit, the next time someone comes in and asks to do something that fits within that permit's parameters, they get that permit without going through the whole process - the idea being that they can expedite things for the public; for example: commercial recreation permits, commercial filming, certain buoys in certain areas, personal use cabin permit renewals and float homes. They save hundreds of separate decisions by doing that; it saves the applicant and the state time and money, because they don't have to do the advertising notice.

[11:08:57 AM](#)

MR. MENEFFEE said point 2 of the briefing paper dealt with land exchanges. He explained that two different statutes deal with land exchanges; one is in Title 9 and the other is in Title 38. The department right now does disposal of interest decisions for land sales, leases and material sales as prescribed in AS 38.05.035(e): they notify the public and agencies and give opportunity to comment that is appealable. But they also want to do the same process for land exchanges and that is not spelled out in statute. So, this will help them expedite some land exchanges, although appraisals and surveys will still have to be done to make sure the exchange is fair. This change will make it easier and faster to go through the process for everyone's benefit.

[11:10:57 AM](#)

He said that point 3 was about reducing a possible litigation challenge. Currently the statute reads that when the state sells land, a person can either pay it off right away or pay it off in installments. Since the department also sells lands outside of auction, they want installment payments for all land sales. Right now the law only mentions land sold under auction.

[11:11:54 AM](#)

MR. MENEFFEE said last year they addressed leasing renewals allowing a one-time renewal for a period not to exceed the initial period. Now, this change deals with two instances that aren't a renewal, but have to be re-adjudicated; one is a preference right. He explained that AS 38.05.102 has a preference right for long term lessees; it gives them the capability without competition to apply for the sale of that land for lease hold location (they can buy the land instead of leasing it again).

The other situation is when a business is doing great but they have added more things than they started out with and had gotten public approval for. But now they have changed what they are doing. The department has to actually go through a decision process saying that it is still okay. In either case, when they get to the end of their lease, the people need to keep a long-term interest (for a two-year period) while the department makes a decision. Right now they cover that gap by permitting, but a land use permit is a revocable authorization and doesn't give a long term interest right. That can cause financing problems in the interim two years. So, the lessees have said they want something that keeps the lease going while the department is making the decision on whether they can continue or not.

SENATOR BISHOP asked if this change would actually strengthen the lessee's position in getting financing in that interim period.

MR. MENEFFEE replied yes.

SENATOR DYSON said three districts have set netters that lease sites, some have been in the families for over 50 years and he wanted to know if they would be limited to one ten-year lease extension. He also said they had heard from some in-holders that had built very expensive lodges on long term leases who claim that at the end of that period, instead of them getting first in line that it's up for bid of some sort; he wanted him to comment on that, too.

MR. MENEFFEE answered the second question first. If the person was not the lessee - for instance if it's a family member that was not on the lease - that doesn't give them any preferential right. On the first question, he would have to research the issue about whether a set net site could be renewed only one time. However, the issue is that the department includes sites to certain things on the renewal revision they made last year in HB 361, but he wasn't positive that set nets were included.

Upland and tidelands leases yes, but set net sites have their own separate statute.

11:17:20 AM

JOHN BAKER, Attorney, Civil-Resources, Department of Law, Anchorage, AK, said he had to check and would have an answer by Monday.

SENATOR DYSON said his second question about a lease holder who built a big lodge in a remote location represented to him that it's up for bid and they are worried that they will lose their capital investment.

MR. MENEFEER replied that the renewal provision that was passed last year is not mandatory. If someone has a 30-year lease, the department always has the option to go competitive with it. But some investment has been made and even if the department decides to go competitive on it, a new person would have to pay the previous lessee for all the improvements they made as part of their bidding. They wouldn't be able to just inherent all that development. In general that discourages people from trying to take over someone else's lease and they don't run into that problem a lot. If the lessee was in good standing, the department would have the opportunity to renew that lease. But at the end of their second lease (if it was a 30-year lease and got to the end of 60 years) at that point the department would be required to open it up for competitive leasing, but they would have to be recompensed for the value of what they put in if someone else beat them out on the land.

11:20:30 AM

SENATOR FAIRCLOUGH said the property she was approached about was part of the Alaska Native Claims Settlement Act (ANCSA). So the property is leased right now and has improvements and she wanted to know if there was a specific provision for all assets to be paid for by whoever takes the property following an expiration of a lease.

MR. MENEFEER answered yes, but that is not in the lease; it would be in their bidding notification. However, the department doesn't lease ANCSA lands.

SENATOR FAIRCLOUGH clarified that it predated ANSCA and it was a selected piece of property, so when the lease expires a corporation is ready to take it. The current lease holder is indicating there may not be reimbursement for the building assets that are now on the property. So, he feels like he has

been put at a disadvantage and the Native Corporation wants the property to come to them as soon as possible. Money is on the table and it appears that it could be in question.

MR. FOGELS pointed out if it was an ANCSA selection it wouldn't have been a state lease. But there are situations where maybe a municipal government had gotten land from the state.

[11:23:32 AM](#)

SENATOR FAIRCLOUGH said she didn't want to take up any more of the committee's time and they could meet after about this specific case. She had another question from a constituent that has to do with leases and cabins and whether your name is on the lease and the transfer of that lease when it falls back into state land and the state is eliminating cabins and safe places for people to go if they are in the wilderness.

MR. MENEFFEE clarified that the state doesn't "take land back;" when the lease expires the interest they provided to someone expires and goes away. In those situations, all the leases say the lessee has to remove everything at the end of the lease that they put on the land to DNR's satisfaction. They could decide it's in the state's best interest to leave something on the land, but they have to consider the multiple use interests state land has and the issue of whether an occupied piece of land is available for all other uses and that a cabin could be an encumbrance that could prevent some other future use. He said the issue of selecting state lands and whether the trespass cabins could be kept out there goes back a long time and the state does not have a cabin program to go out and administer all the cabins. They are encumbrances and they do affect other things that could be done on the land and those decisions are made on a regular basis.

SENATOR MICCICHE asked who determines the value of the remaining property when a previous lessee is compensated.

MR. MENEFFEE replied that it goes through an appraisal process.

[11:27:49 AM](#)

SENATOR BISHOP commented that numerous people have had to bivouac out in the wilderness for numerous days at -50 degrees and he asked them to keep that in mind when they consider these cabins.

MR. FOGELS explained that trespass on state lands is an issue that is part of their management duty, but they are not actively

out there burning down cabins in remote areas. The only time they really have to deal with trespass issues is when there are conflicting uses.

11:29:03 AM

MR. MENEFEE went to point 5 on the briefing paper and the issue of renewing aquatic farm leases that already had renewal language. It wasn't included in last year's revision and then they realized they should be consistent. So, if an aquatic farm lease is in good standing, it can be renewed once for the same period of time. After that it goes out for competitive bid, but that doesn't mean they can't be the same operator after that.

11:30:03 AM

He said point 6 was about temporary water use authorizations. Those authorizations are temporary, revocable and modifiable and can be withdrawn at any time. A water right does not give them that liberty. Once a water right is perfected, everything else is subservient to that and forever. It's important because throughout Alaska, 90 percent of development projects need a temporary use authorization - because whether you are maintaining the state highway system or building renewable energy, water gets used. They follow the statute that says you can issue a temporary water use authorization going through a review process and meeting with ADF&G to make sure there aren't habitat issues, and issue a temporary use water authorization. It can't be issued for more than five years. So a 10-year project that needs water gets one for the first five years and at the end of that period it gets reevaluated and a decision is made to extend it for another five years or not. It could be in the same location to the same company, because their project lasts longer than five years. They just want to clarify in statute that temporary water uses can be reissued on the same site every five years. A person doesn't get a water right until they perfect their whole project, and that is based off of temporary water use authorizations.

11:33:44 AM

SENATOR DYSON asked if aquatic farms include some right to the shore site with a dock and cabin.

MR. MENEFEE answered it could, but it would have to be explicitly stated in the lease. The aquatic farm leases are typically just for the submerged lands and have a separate lease authorization for the upland.

SENATOR BISHOP asked if this temporary water use permit would help ice road construction permitting on three-year exploration projects. If they know they are going to be doing the same ice road out of the same lake for three years, will they have to reapply every winter for it?

MR. MENEFEЕ answered since the department can issue a temporary water use permit for up to five years, they would issue it one time for the full three years.

He continued on to point 7 about water reservations that are used for four things: to preserve habitat, navigability, and recreation and water quality. For instance, if you have a river with 100 cubic feet per second (cfs) of volume, 50 cfs need to be in the river at all times to preserve the habitat. Any subsequent applications for rights are subservient to that unless there is a substantial change like the stream gets rerouted. The other 50 cfs can be appropriated for other rights.

[11:37:53 AM](#)

MR. MENEFEЕ said Alaska is the only state in the nation where persons can hold a water reservation. The mining industry asked for that change in statute to make sure that they get water reservations for their operations, but in reality they never used it, instead using temporary water use authorizations and water rights. The Alaska Miners Association supports this change.

The department would like to see water reservations that are very complex applications (requiring years of monitoring showing the affected resource and the relationship of the water to the resource) get vetted through the appropriate agency. This change is so that a person will no longer be able to hold a water reservation, but it would allow federal and state agencies and political subdivisions of the state.

[11:39:36 AM](#)

SENATOR FAIRCLOUGH asked as of January 1, 2013, if a person had applied for a water right by that would be affected by this change.

MR. MENEFEЕ answered yes, 35 current of their applications are in by person that could not hold a water right if this is passed.

SENATOR FAIRCLOUGH asked if this is being used as a political tool.

MR. MENEFEЕ answered no; they really believe that to support development throughout Alaska on all projects that appropriate decisioning on water reservations needs to be addressed.

11:41:16 AM

Point 8 was a small technicality and explained that the USGS has divided the state into six hydrologic units - massive watersheds with boundaries such that technically, if you fill up a water bottle on one side of the line and empty it on the other side of the line without getting a permit, you are guilty of a misdemeanor. However, the department wants to deal with significant amounts of water, the idea being that the state already permits these things and "significant amounts of water" has been defined in regulation already. So, they want the bar on this one issue about moving water from one hydrologic unit to the other to come up to the significant water threshold.

SENATOR DYSON asked if he was talking about just fresh water.

MR. MENEFEЕ answered yes.

SENATOR DYSON asked if small water turbines in rivers that generate electricity have to be permitted and/or what size.

MR. MENEFEЕ answered renewable energy with hydrokinetic devices (inflow turbines) technically need a temporary water use authorization or a water right (not a water reservation). The reason is because the definition is when you put water to a beneficial use. They would authorize under two different venues; one is a land use permit for the anchoring in a river or however it is attached to the land and the other is a temporary water use authorization.

11:44:40 AM

He went to point 9 that revised the appeals section. He said essentially they are trying to accomplish two different things in this group; first, standing, and the second, burden of proof. The first issue about standing is that the department wants the public to participate (they encourage it), but they don't want people after the final decision is made to appeal without ever having participated, basically because the department hasn't had an opportunity to address their concerns. This change clarifies if the department has offered a public notice period of at least 30 days and informed the public that in order to appeal you need to have participated in this process (by commenting), then they have the standing and the department can try to address their

issue. Then they have the right to appeal if they don't like how the decision turned out. The department wants public participation but in the appropriate place, which is during the decision-making process.

The second stage of that is the burden of proof issue. Currently, statutes say that appeals must show you are "aggrieved." That typically comes across to the public as a very emotional type of thing; they get appeals on things that say well I don't like this; and then they have to go through a full process on it. Not liking it doesn't give them a lot to go on. So, they are raising the threshold to require stating how it is substantially and adversely affecting the appealing party.

[11:47:37 AM](#)

SENATOR DYSON asked about noticing practices.

MR. MENEFEЕ replied that they have a broad notification system that includes the online public notice page, posting it in local areas - a post office or a local lodge - because not everybody has a post office, statewide newspapers and a local newspaper; they also reach out to interest groups and landowners.

SENATOR MICCICHE asked if "aggrieved" versus "substantially and adversely affected" are legal terms and if that definition can be used to limit participation from people who feel they have a substantial and adverse effect due to the act that is occurring.

MR. MENEFEЕ replied that it wouldn't preclude them, because that fits the definition, but the department would have to decide if they are correct or if the issue had been addressed. They are clarifying that what the court uses as a standard is not what the administrative appeals uses.

SENATOR MICCICHE asked what the level of proof for "substantially and adversely affected" is.

MR. MENEFEЕ replied that it's more about how it's treated in connotation rather than an absolute legal sense.

[11:51:15 AM](#)

ASHLEY BROWN, Attorney, Department of Law (DOL), Anchorage, Alaska, answered that the level of proof would be on a case by case basis. It would have to be enough to show the commissioner that a person was substantially and adversely affected. Section 33 of SB 26 has a definition, which would assist a person in determining whether or not they are adversely affected.

SENATOR MICCICHE said the definition said they must be affected by a department decision to the person's physical or financial detriment. Would an NGO that has participated in the process still have the right to feel an action was detrimental to the organization's mission?

MS. BROWN apologized that she couldn't give him a specific answer, but if it was able to show that it was substantially and adversely affected, then yes, they would still be able to appeal.

[11:53:21 AM](#)

CHAIR GIESSEL clarified that was section 39 on page 21 of SB 26.

SENATOR FAIRCLOUGH asked how the courts interpret "physical" if she is on Egan Drive that is a dirt road and she has asthma. That dirt would adversely affect her asthma. Would that stop Egan Drive from being able to be driven on? Could traffic be diverted or stopped because she has asthma?

MR. MENELEE replied in dealing with appeals the commissioner can agree or disagree, disagree in part, or remand it back to the division with instructions to address the issue. In her example, there might be some way to address the concern by spraying or putting down calcium chloride, but that wouldn't stop a person from being able to appeal, and the department would have to figure out a way to address it.

SENATOR FAIRCLOUGH asked how "physical" would be determined.

MR. MENELEE replied when this was written, they were thinking along the lines of a personal physical thing; but at the same time, a person could argue that it affects their ability to live in health on their property. Let's say the road causes enough vibration that it would cause the land to slide into the river; that could be construed as a physical effect.

SENATOR FAIRCLOUGH said she hoped they would define what that means, because geographical proximity is of interest if you are adversely affected. She knew of another road that was being reconstructed now and a constituent was very concerned that it would collapse his well. She thought people located physically next to activities should be able to comment and be considered adversely affected.

[11:59:30 AM](#)

MR. MENEFEЕ went to point 10 that dealt with notification of mineral closing orders and explained that through the years they have used different terminology, but they all affect mineral entry (the ability to file claims and get the exclusive right to the locatable minerals), which is a big deal in the state. Right now they are only required to do it for closing orders and the department wants to make sure the public knows any time they are going to affect the mineral estate.

MR. MENEFEЕ said point 11 eliminates public notice for alterations of platted boundaries if owners approve and no public easements or rights of way are affected. He explained that the department is the platting authority for the unorganized borough. That means that anybody that subdivides lands has to come to DNR and get a subdivision approval. Through the history of doing that, they have found people come in and ask for the ability to subdivide their parcel. There are no easements involved, so there is no other public interest in that land, but they are still required to go out for 30 days and post that notification, charge the applicant for it and wait 30 days for the comments to come back - and nobody ever comments on that type of thing. So, because nobody has any other interest in just your parcel, they are saying to skip the 30-day notice and the public review.

[12:02:04 PM](#)

Point 12 clarifies the definition of "public auction" to include online public auctions with public outcry auctions.

Point 13 clarifies that they do a preliminary and a final finding for non-oil and gas related decisions, in order to have consistency with several other statutes.

[12:03:28 PM](#)

Point 14 had a bunch of miscellaneous wording changes that make statutes more readable and understandable and provide clarification of statutory intent.

CHAIR GIESSEL thanked Mr. Menefee for the great overview saying the committee wanted him back on Monday to do the sectional analysis and connect them to bill sections.

SENATOR FAIRCLOUGH said section 6 on page 7, lines 17-26, mentioned the court system, but she didn't see a fiscal note.

MR. MENEFEЕ replied that it doesn't change any of the court laws, responsibilities or how they do business.

SENATOR FAIRCLOUGH asked why he chose \$5 million on page 15, line 23.

MR. MENEFEE replied that came from existing language that has a \$5 million limit before coming back to the legislature.

Finding no further questions, Chair Giessel held SB 26.

12:07:12 PM

CHAIR GIESSEL announced that the committee would now focus on SB 27 .

12:07:55 PM

LARRY HARTIG, Commissioner, Department of Environmental Conservation (DEC), Anchorage, Alaska, said SB 27 would authorize the Department of Natural Resources (DNR) and the Department of Environmental Conservation (DEC) to do a study/evaluation of the state taking primacy of the 404 permitting program under the Clean Water Act (CWA). It would authorize them to go forward with preparing an application and start planning to take over that program. They would be back to the legislature several times before actually going forward with it. He anticipated identifying gaps in state statute to be able apply and get that program from the federal government. The fiscal note provides for additional positions in FY 2014, but they don't know yet what it would take to run the program.

12:10:37 PM

SENATOR MICCICHE asked if the federal government would provide funding relief when the state assumes primacy.

COMMISSIONER HARTIG replied no; there would be some opportunity for small grants for preparing the application and gearing up a program, but not for running it.

He said the 404 program is a section in the federal Clean Water Act (CWA). Two primary programs are under the 400 series; the 402 program is the waste water permitting program that DEC got primacy to administer from the Environmental Protection Agency (EPA) in 2008; the final phase of implementation was completed in November 2012.

SENATOR FAIRCLOUGH asked how long it took to acquire that.

COMMISSIONER HARTIG answered that the Murkowski administration decided to go forward with an application, which took four or

five years to develop and the application process for the 404 program would be the same. It includes a letter from the governor requesting the program, a statement from the attorney general that the state's program is comparable to the federal program, a complete description of the program including the number of people that would be running it and what they would be doing, the organization chart and budget, a complete set of regulations, statutory authorities and guidance documents for running the program.

He said the application for the 402 program is about a foot and a half thick and when they turned it in, the EPA had hundreds of questions about potential deficiencies which took four or five years to work through. Once the application was approved, an appeal went to the 9th Circuit where the EPA's decision was upheld giving the state primacy. The DEC and EPA agreed to a phased-in approach working cooperatively to share responsibilities on getting permits out. Because the EPA had a substantial backlog, the idea also was to whittle it down before the state got primacy and to use that as a training opportunity for state people.

COMMISSIONER HARTIG said he hoped the 404 program wouldn't take that long, but five years would be pretty quick. The importance of the 404 program is that it covers bridge and fill activities in surface waters of the United State; that would include such things as ponds, rivers lakes and wetlands, which under federal law are considered waters of the US. Sixty-five percent of the nation's wetlands are in Alaska, which is the reason they think the state should take primacy of this program. Most of the development in this state will be on wetlands and needs a 404 permit. And in this time of declining budgets, the question arises if the EPA will even be able to keep up with the permitting needs in Alaska that are so critical.

He stated that from a DEC perspective, wetlands provide very important environmental and ecological functions. It's a special habitat for a number of different species and provides retention for filtering sediments and pollutants before they get into a river, and they must be managed appropriately.

12:18:06 PM

COMMISSIONER HARTIG said it isn't novel for a state to have primacy for 404 programs; in fact the CWA specifically states the intent of Congress is that the states will take primacy of these programs. Alaska was one of the last five states to take primacy for the 402 program. Two states, Michigan and New

Jersey, have already taken primacy for the 404 program. A handful of other states, including Oregon, are in the process of getting it.

12:19:02 PM

SENATOR BISHOP said 90 percent of the state's budget comes from the North Slope and it has a lot of wetlands.

COMMISSIONER HARTIG said that was correct; the permafrost is wetlands and they are considered waters of the United States. With primacy, the state would get authority that is limited geographically to issue 404 permits. The EPA wouldn't allow the state to get primacy for all waters of the US and all wetlands in the state. The Clean Water Act requires that the federal government retain tidally influenced areas and the adjacent wetlands and waterways that could be used for interstate and international commerce. That would be part of this evaluation phase where they would sit down with the Corps of Engineers and any other appropriate federal agencies and figure out what those geographic limitations might be.

He said the state could also take over the Corps of Engineers' authority for issuing programmatic state general permits. He explained that currently the Corps can issue general permits where people get authorized under a general permit for similar type activities rather than having to get an individual permit. DEC already has authority to do this in the 402 program, but the Corps could issue more general permits in Alaska for smaller projects that have minimal environmental impact. Then the state could take over administration and enforcement of them. General permits aren't geographically limited and those areas could be included that would otherwise be off limits to 404 permits.

12:22:06 PM

CHAIR GIESSEL asked him to clarify the geographic limits of tidal areas or adjacent wetlands that this would not give the state primacy over.

COMMISSIONER HARTIG answered that those are the tidally influenced waters, waters that are/could be used for interstate and international commerce and wetlands adjacent to those waters.

CHAIR GIESSEL asked if Turnagain Arm, which is influenced by tides, would not be given to the state in primacy.

COMMISSIONER HARTIG said that was accurate. He explained that the 404 authority goes back to the Rivers and Harbors Act of 1899 when the Corps was granted authority by Congress to make sure the public didn't place obstructions or limitations in waterways that might impede interstate commerce. Eventually, that authority expanded beyond docks to pollution (this predates all our pollution laws). He sees this as being consistent with the Corps retaining authority where there is a real federal interest in interstate commerce, so Cook Inlet would stay with the Corps.

[12:24:03 PM](#)

SENATOR MICCICHE said the state would have primacy in very few areas of Cook Inlet.

COMMISSIONER HARTIG agreed and said that is why the evaluation phase is so critical. The department could identify wetlands around the state, like the Kensington Mine, Red Dog Mine, and the North Slope, that 404 permits were critical for and get primacy. They also reasoned in estimating the cost of the program that you can't simply look at the Corps' budget and assume the state budget would be the same, because it would be split somehow, and they don't know how yet.

SENATOR BISHOP asked if dredging in the Cook Inlet would remain with the Corps.

COMMISSIONER HARTIG answered yes; it goes with their other responsibilities besides permitting, which is dredging and filling activities and harbors.

SENATOR DYSON said the MatSu River is meandering and asked the process for returning the river to a course that was there when the private property owners developed their interest so it doesn't jeopardize property. And would that end at the edge of where it becomes tidal?

COMMISSIONER HARTIG replied that was beyond the DEC's jurisdiction and that the Corps would be responsible for those activities. His agency would just look at water quality issues.

MR. FOGELS added for a large river such as the Matanuska, it's probable that the State of Alaska owns the bed of the river, so any kind of work in that river would need DNR authorization, as well.

COMMISSIONER HARTIG said the general permits are not mutually exclusive. So, if they decided not to pursue 404 primacy for whatever reason, it wouldn't preclude them from also pursuing a more extensive general permit program with state oversight.

12:28:06 PM

COMMISSIONER HARTIG summarized why assumption of the 404 program is important: Alaska has 65 percent of the nation's wetlands and they will affect most projects in the state of any significant size. The Corps has a declining budget that raises concerns about them being able to keep up with the state's timely permitting needs. Also, there is a certain advantage to having local permit writers in terms of accountability to the public that they serve and to the political leadership. Local expertise is also needed to make good decisions like routing of pipelines.

He recalled an incident when an NPRA pipeline oil was built under the Coleville River Delta according to what the EPA and Fish and Wildlife Service wanted instead of by bridge, which is what the DEC wanted, because leaks do occur regularly. From their experience on the North Slope, the DEC knows they get discovered when someone "steps in it" not because some alarm goes off. A buried line that is leaking into permafrost undetected can cause significant ecological damage by the time it is discovered. That happened during the midst of this whole debate. Alyeska found an underground pipe leaking into the cellar of Pump Station 1 in the middle of winter. DEC decided to keep the pipeline going, because it was all being contained, the ground was frozen and they couldn't get to it. It was really upsetting to EPA to keep a leaking pipeline going, but if it didn't, everything would freeze up and wax and ice would form in the line making a much bigger disaster. "This is why you don't bury lines on the North Slope," is what he told the senior EPA person, who said he got it. Commissioner Hartig didn't know what it cost ConocoPhillips, but there were two years of delay.

COMMISSIONER HARTIG said other benefits to the state's having the program would be continued permitting reform focused on finding efficiencies and the right priorities and making sure the state is responsive and prioritizes projects appropriately. Also, once a permit gets appealed, that appeal would go to the state court instead of the federal court allowing these decisions to be made locally where people could more easily participate in the legal process and not have to go out of state.

12:34:28 PM

He also mentioned that the fiscal note indicated five positions for DEC and two for DNR would be needed for this review; some of the DEC's FY14 \$1.4 million would be moved over to DNR and the Department of Law.

CHAIR GIESSEL asked if the personal services section of the fiscal note saying "to manage a work group of permittees that will assist in the analysis of 404 primacy" meant creating a task force and if stakeholders be working with the DEC.

COMMISSIONER HARTIG answered yes, because when they worked on the 402 primacy they found that the folks getting the permits need to buy into it. Involving the stakeholders in the program's design would also be an opportunity to educate the public.

[12:37:41 PM](#)

SENATOR BISHOP said this could have some good cost benefits to the State of Alaska.

COMMISSIONER HARTIG said they wouldn't go forward with this without seeing some cost benefits, but the proof will come at the end.

SENATOR FAIRCLOUGH said the application requests 12 people and over \$2 million/yr. and asked if that was similar to the 402 ramp up.

COMMISSIONER HARTIG replied that they are using their experience with the 402 program to lay out this budget. They don't want to undercut themselves and this is what it would take to do a good application. Even if the state doesn't get primacy, the ramp up will still have value in terms of working better with the Corps.

SENATOR FAIRCLOUGH said she wanted to see what Governor Murkowski proposal's costs were.

COMMISSIONER HARTIG said he would get that for her and added that by FY 2016 they would know what the program would be. But beyond that they wouldn't really know and he would expect the transition to happen earlier than the full five years.

[12:41:57 PM](#)

SENATOR MICCICHE asked if the state was using expertise from other states that were successful with primacy on how to streamline our investigation.

COMMISSIONER HARTIG replied yes; they are talking to other states and the Corps. They also hope to get some senior people here in Alaska who just left the Corps.

12:42:59 PM

MR. FOGELS said that Commissioner Sullivan laid out the broad strategic reasons they are undertaking this review and part of the bill's fiscal note allows them to look at more immediate benefits such as looking at regional general permits and better engagement with the Corps in terms of wetlands permitting. They will get a better idea in the next year or two of the scope of the program and what the benefits would be.

CHAIR GIESSEL asked him for a quick look at the sections in the bill.

12:45:41 PM

COMMISSIONER HARTIG said the purpose is to provide authority for the state to evaluate and develop a program for regulation of dredge and fill activities in waters and wetlands in the state. Section 1 provides the legislative findings, recognizing the millions of acres of wetlands the state has. It mentions that two other states have received primacy and recognizes that Congress intends for states to assume these rights and responsibilities. It talks about the experience that DEC and DNR have in these areas. DEC has the 402 program, but under the Clean Water Act, 404 permits that are issued by the Corp and have to be certified consistent with Alaska law by the DEC (under section 401 of the CWA).

He explained that another aspect of the 404 program he hadn't touched on is that where wetlands are impacted mitigation has to be done. That is where the land management skills of DNR would come in to work something out that would make sense in terms of replacing those wetland values.

12:48:18 PM

Section 2 clarified DEC and DNR authorities; DEC already has authority to take over 404 program but it's not that clear and then it grants DNR those authorities that they don't currently have to do that in conjunction with DEC.

Section 3 is on similar lines and talks about DEC being able to take all actions necessary to be ready to receive that authority and DNR to administer the program.

Section 4 directs DEC in coordination with DNR to do this evaluation of the benefits, costs and consequences of taking the program.

12:49:14 PM

SENATOR FAIRCLOUGH asked him why section 3 on line 19, page 3, explicitly asks for all actions right now, because he said there will be gates for the legislature to continue to comment on moving forward.

COMMISSIONER HARTIG explained as a practical consideration, when you go forward with an application, their experience with EPA on the 402 is that they want to know you are serious, because it takes a lot of effort on their side, too. Idaho pulled out half way through the process and that soured EPA on primacy. He had to do a lot of convincing them that we are serious. Also, in terms of the gate, he said before the department can submit the application they have to have the statutes, the regulations, the guidance, and all the authorities - and the whole public process has to be done. Everything gets submitted with the application.

He would be surprised if they didn't have to come back for some additional authorities in the statutes for DNR and DEC to flesh out and he knew they would need additional positions and budgets.

SENATOR FAIRCLOUGH said he led them to believe the state could pull out if it became cost prohibitive to continue or something else arose that we might not want to take primacy and asked if we had lost our right to pull back.

COMMISSIONER HARTIG replied that the application submitted to the EPA has to be complete before they would give us primacy. It would not be complete if all the people were not hired to run the program and we didn't have a budget to run the program. This fiscal note wouldn't do it; they must come back to the legislature for more resources. The fiscal note will grow and more positions will be needed and there will be several chances to change their mind.

SENATOR FAIRCLOUGH asked if starting the project with the word "all" was boiler plate language or if the department developed it.

COMMISSIONER HARTIG replied that it's the department's language; the federal requirements were the list of things he said had to be in the application. He offered to provide the actual statute.

[12:54:36 PM](#)

Section 4 just talks about DEC in coordination with DNR to evaluate the potential benefits, costs and consequences to the state of assuming primacy and to take responsible steps to assume primacy. It gives authorities to run the program should they get it and that they may adopt regulations necessary to obtain federal approval and to implement a state program (all necessary to put the application together).

[12:55:30 PM](#)

CHAIR GIESSEL thanked them for their overview and held SB 27 in committee.

SENATOR FAIRCLOUGH noted for the record that they had received email from Norton Bay Inter-Tribal Watershed Council, a constituent out of Elim, and that it was part of the record.

CHAIR GIESSEL said when they receive written testimony it is copied to all members of the committee and she typically responds to each person. It is posted on the legislative website for everyone to see. It is a public document and it is publicly posted.

[12:58:00 PM](#)

Finding no further business to come before the committee, Chair Giessel adjourned the Senate Resources Committee meeting at 12:58 p.m.