

**ALASKA STATE LEGISLATURE
LEGISLATIVE BUDGET AND AUDIT COMMITTEE**

Anchorage, Alaska

August 27, 2020

9:04 a.m.

MEMBERS PRESENT

Representative Chris Tuck, Chair
Senator Click Bishop, Vice Chair
Representative Andy Josephson
Representative Ivy Spohnholz
Representative Jennifer Johnston (alternate)

Senator Bert Stedman
Senator Natasha von Imhof
Senator Cathy Giessel
Senator Lyman Hoffman

MEMBERS ABSENT

Representative Neal Foster
Representative Mark Neuman
Senator Bill Wielechowski (alternate)

OTHER LEGISLATORS PRESENT

Representative Bryce Edgmon
Representative Harriet Drummond
Representative George Rauscher
Representative Kelly Merrick
Representative Geran Tarr
Representative Sharon Jackson
Senator Lora Reinbold

COMMITTEE CALENDAR

EXECUTIVE SESSION
CARES ACT REVISED PROGRAMS - LEGISLATIVE (RPLS)

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

KELLY CUNNINGHAM, Acting Fiscal Analyst

Legislative Finance Division
Legislative Agencies and Offices
Juneau, Alaska

POSITION STATEMENT: Provided information regarding RPLs and answered questions.

MEGAN WALLACE, Director
Legislative Legal Services
Legislative Affairs Agency
Juneau, Alaska

POSITION STATEMENT: Spoke to the legality of the RPLs before the committee.

JULIE ANDERSON, Commissioner
Department of Commerce, Community & Economic Development
Juneau, Alaska

POSITION STATEMENT: Answered questions during consideration of RPLs.

NEIL STEININGER, Director
Office of Management & Budget
Office of the Governor
Juneau, Alaska

POSITION STATEMENT: Answered questions during discussion of RPLs.

STEVE MASTERMAN, Director
Central Office
Division of Geological and Geophysical Surveys
Department of Natural Resources
Fairbanks, Alaska

POSITION STATEMENT: Answered questions during discussion of RPLs.

MICAELA FOWLER Director
Administrative Services
Department of Commerce, Community & Economic Development
Juneau, Alaska

POSITION STATEMENT: Answered questions during discussion of RPLs.

ACTION NARRATIVE

[9:04:11 AM](#)

CHAIR CHRIS TUCK called the Legislative Budget and Audit Committee meeting to order at 9:04 a.m. Representatives Tuck,

Josephson, Spohnholz, Johnston (Alternate) and Senators Bishop, Stedman, von Imhof, Giessel, and Hoffman were present at the call to order. Senator Wielechowski (alternate) arrived as the meeting was in progress. Other legislators present (via teleconference) were Representatives Edgmon, Drummond, Rauscher, Merrick, Tarr, and Jackson and Senator Reinbold.

EXECUTIVE SESSION

[9:05:11 AM](#)

SENATOR BISHOP moved that the Legislative Budget and Audit Committee go into executive session under Uniform Rule 22 (b) (3), discussion of matters that may, by law, be required to be confidential. He asked that the following persons remain in the executive session: Any legislators not on the committee; the Human Resources Manager and necessary staff; Chair Tuck's staff, Aurora Hauke; and his staff, Darwin Peterson.

SENATOR BISHOP further moved that the Legislative Budget and Audit Committee direct the Chair to make an offer to the candidate selected by the committee under the guidelines discussed.

[9:05:55 AM](#)

CHAIR TUCK announced that there being no objection, the committee would go into executive session; [the second motion was treated as so ordered].

[9:06:13 AM](#)

The committee took an at-ease from 9:06 a.m. to 1:13 p.m. for the purpose of executive session.

[1:12:50 PM](#)

CHAIR TUCK called the Legislative Budget and Audit Committee meeting back to order at 1:12 p.m. Present at the call back to order were Representatives Johnston, Spohnholz, Josephson, and Tuck and Senators Hoffman, Stedman, Giessel, von Imhof, and Bishop. Also present were Senators Reinbold and Merrick [and Representative Drummond (via teleconference)].

CHAIR TUCK announced the new director of the Legislative Finance Division was Alexei Painter.

CARES ACT REVISED PROGRAMS - LEGISLATIVE (RPLs)

1:13:39 PM

CHAIR TUCK announced that the next order of business would be the CARES Act Revised Programs - Legislative (RPLs).

CHAIR TUCK noted those available to speak to the RPLs.

1:15:07 PM

The committee took an at-ease from 1:13 p.m. to 1:15 p.m.

1:15:43 PM

KELLY CUNNINGHAM, Acting Fiscal Analyst, Legislative Finance Division, Legislative Agencies and Offices, began with discussion of RPL 05-2021-0075, Department of Education and Early Development, National Endowment for the Arts CARES Act, for \$421,500,000 in federal receipts. She said this RPL includes activities described that fit within the guidelines provided by the [U.S.] Treasury [Department]. She said it is essentially a duplicate of the fiscal year 2020 (FY 20) RPL and requests FY 21 authority for salary support, artists and contractual fees, and overhead such as rent and utilities. No match is required. She related, "The council was unable to execute the grant agreements prior to July first and therefore is re-requesting the authority for FY 21." She informed the committee that there are no technical issues with the RPL.

MS. CUNNINGHAM spoke next to RPL 08-2021-0184, Department of Commerce, Community, and Economic Development, Administration of State of Alaska COVID-19 Small Business Relief, for \$249,784,591, which she explained is the amount of unobligated receipts from the prior RPL. She added, "This is federal receipts and is operating." Ms. Cunningham said this RPL is associated with RPL 08-2020-0251, which provides support for small business relief; however, the department found the program to be overly restrictive and is expanding the applicant pool by removing the restrictions for secondary income sources and businesses that have received funding or have an approved application through the Small Business Association's Paycheck Protection Program or Economic Injury Disaster Loan Program. Ms. Cunningham noted that restrictions from the federal CARES Act still apply.

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REPRESENTATIVE JOSEPHSON indicated that attorney [Megan Wallace] had reported that RPL 08-2021-0184 is "outside the law." He asked Ms. Cunningham whether she agrees or is coming at the issue from "a different, fiscal analyst's perspective."

MS. CUNNINGHAM replied that the Legislative Finance Division has no legal opinion on RPL 08-2021-0184 and finds no technical issues with it, and she said it is appropriate for the committee to review it.

[1:19:45 PM](#)

MEGAN WALLACE, Director, Legislative Legal Services, Legislative Affairs Agency, at the request of Chair Tuck to speak to the issue of legality, said it appears that RPL 08-2021-0184 "solely requests a change in the eligibility criteria for the Small Business Relief Program that was previously subject to the RPL that Ms. Cunningham indicated, RPL 08-2020-0251." She continued:

That RPL was previously approved by the Legislative Budget and Audit Committee on May 11, 2020, and, as everyone is familiar with, after a legal challenge was ratified by the whole legislature through ... an enactment into law of Chapter 32, Session Law 2020.

MS. WALLACE said the statute that provides for this RPL process is AS 37.07.080(h) and is limited "to allowing RPLs to be submitted by the governor that seek to increase an appropriation item based on additional federal or other program receipts not specifically appropriated by the full legislature, subject to some enumerated procedures." She opined that the request before the Legislative Budget and Audit Committee today falls outside that process, because the RPL is not seeking an increase of an appropriation item; it is seeking approval or permission to expand the eligibility criteria for the Small Business Relief Program, which has already been approved and ratified by the legislature; therefore, this is not the appropriate venue by which "to request legislative approval assuming that it's necessary."

MS. WALLACE offered a brief review of the tortured history of the Small Business Relief Program. She said this is not the first time that a change to the eligibility criteria has been sought by the governor or the department. She said Judge Pallenberg had dismissed a prior case on summary judgement in

favor of the State of Alaska, and while the grounds for the summary judgement are unclear, "it's assuming that the state had permission to move forward as it had proposed." Ms. Cunningham continued:

It would ultimately be my opinion that this is not the appropriate venue for seeking permission to expand eligibility criteria, but admittedly based on ... at least [the] lower court, Superior Court rulings, if there were further legal challenge, ... there is certainly a possibility that the court could continue to rule in favor of the state, allowing flexibility for the eligibility criteria; but the time to seek an appeal to the Alaska Supreme Court has not yet expired, and so some caution is warranted, because this matter could go up to the Alaska Supreme Court.

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REPRESENTATIVE JOSEPHSON prefaced his comment and question by stating that he did not know how he would vote on this particular RPL. He said there are two problems. The first is that Title 37 does not allow the administration to amend an RPL. The second problem is that the legislature "made a law on May 20" and "we can't rescind action on what we did on May 11." He asked Ms. Wallace if he was right that "the ratification creates a secondary problem."

MS. WALLACE replied that she agrees ratification, in this instance, creates "an exceptionally unique circumstance" and complicates analysis.

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SENATOR STEDMAN recognized that these are unprecedented times and there was a previous RPL with stringent guidelines and a proposal for modification. He said he thinks the committee needed to [approve the RPL] anyway so that the administration could get the money out to businesses before the money is lost. Any legal challenges could be dealt with going forward, he said. He offered his understanding that only a fraction of the funding had been distributed and that the infrastructure was in place to distribute the funds.

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SENATOR HOFFMAN agreed with "the previous speaker." He questioned why the 50 employee benchmark was not being changed. He said he knows there are a lot of businesses hurting just as much as the larger ones with 50-plus employees. He indicated that if a business with 49 employees is not eligible, then he would like the committee to change that number.

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JULIE ANDERSON, Commissioner, Department of Commerce, Community & Economic Development, told Senator Hoffman that the Department of Commerce, Community & Economic Development (DCCED) has looked at how it manages the expansion of the eligibility requirements. She said the Small Business Relief Program was started to fill the void of those not eligible for access to the federal program. Both the federal and state programs have evolved. Currently, the RPL is requesting the change of allowing applicants that have received Small Business Administration (SBA) funding through the Paycheck Protection Program (PPP) or Economic Injury Disaster Loan (EIDL) program to have access to this program, regardless of the amounts of funds they have received. The department is also requesting the removal of the secondary income source restriction so that those that do have secondary businesses to supplement income are eligible. The third request is the ability to allow the department to have flexibility to adjust the eligibility requirements. She said that as businesses subscribe to the funds, after another couple weeks the department will determine whether applications are slowing down, at which point it would open up the criteria again to those entities that were previously excluded. One of the things the department would look at is the number of full-time equivalent employees. She said 50 employees or fewer are eligible under the current program guidelines. In response to a follow-up question, she clarified that that is 50 or fewer, not 50 or more employees.

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CHAIR TUCK offered an update on the RPLs related to the federal CARES Act. There was question about the legality of setting up [the Small Business Relief Program] through an RPL, but the Legislative Budget and Audit Committee approved the RPL and the legislature later ratified it. He said the RPL process is not intended for setting up programs, and a lawsuit was filed. The problem with RPL 08-2021-0184 is that it is changing a program that has already been set in statute. A second purpose of an RPL is to receive additional funding, but this RPL is not doing

that; it is only changing the eligibility requirements. Chair Tuck said [Judge Pallenberg] of the Alaska Superior Court determined that the administration could have done this all along. Further, he said Bill Milks, an attorney [with the Department of Law], who served as defense for the State of Alaska in the lawsuit, said [the administration] does have the authority to make changes unilaterally at any time. Chair Tuck said he does not know why the RPL is before the committee other than for ceremony.

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REPRESENTATIVE JOSEPHSON related that "our attorney" said Judge Pallenberg's ruling could be read liberally to allow the state to make adjustments, but that it is fact specific. He reflected that if the administration had not brought this RPL, there would have been a lot of complaint about changes. He told Commissioner Anderson that he understands that the department is currently working on the applications from the first week of July. He was told it was a first-come/first-served process. He remarked that if the new rules take effect, then there will be more applications than money. He asked Commissioner Anderson, "Will your department ensure that early applicants don't get aced out because they were stuck with Credit Union 1 while later applicants scooped up available cash?"

COMMISSIONER ANDERSON responded that she understands the concern and the department is keeping track of the funds being spent. She said, "We will adhere to that goal, that those entities that submitted complete applications through Credit Union 1 will ... [be] funded if they're eligible and approved." She noted that Credit Union 1 had improved the processing time, but DCCED was continuing to monitor it.

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SENATOR BISHOP said there is a Southeast trade union heavily contingent upon a tourism workforce that may be able "to apply under these new expanded rules." He remarked that his office, and probably others, "have been inundated from small businesses that are hurting." He said, "I'd like these people to get due consideration."

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REPRESENTATIVE SPOHNHOLZ said she agreed with Chair Tuck's assessment that the RPL process is designed to accept additional

money for programs that already exist; it is not designed to change eligibility. She said the House Labor and Commerce Standing Committee has held three hearing on this program because of numerous concerns the business community had about the eligibility criteria omitting many small businesses throughout the state. She indicated that the administration made changes based on the testimony heard at those meetings. She opined that the bigger problem has to do with the implementation of the program, because it requires too much paperwork. With an online portal, the administration has been able to accelerate the number of applications processed. She stated that so far there have been \$214 million in applications received from 4,453 businesses; approximately \$53 million in applications have already been approved; \$290 million were in the program in the beginning. She said, "It took them about seven weeks to get \$20 million, and it's taken them about two weeks to get the next ... \$33 million." She said she is happy to support this RPL but does not think it is necessary, because the administration has what it needs already.

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SENATOR GIESSEL asked Ms. Wallace what the risk to the Legislative Budget and Audit Committee would be in passing this RPL.

MS. WALLACE answered that ultimately the risk is either a continuation of previously commenced litigation or a new lawsuit filed, likely on similar grounds that the full legislature needs to meet and approve any requirements and the Legislative Budget and Audit Committee, as one legislative committee, does not have the power to act for the full legislature in giving the permission to change eligibility requirements. She said the issue has been heard by the Alaska Superior Court in Juneau, and the judge did not agree with those arguments; however, she said that "there is still that risk."

SENATOR GIESSEL questioned why Ms. Anderson was bringing this RPL forward if her department has the latitude to alter the qualifications for the loans.

MS. ANDERSON deferred to Mr. Steininger.

[1:45:17 PM](#)

NEIL STEININGER, Director, Office of Management & Budget, Office of the Governor, explained that the Office of Management &

Budget (OMB) was putting forth RPL 08-2021-0184 because it felt that the terms listed in the prior RPL were more limited, and submitting a new RPL was a more prudent course of action than making the changes unilaterally.

SENATOR GIESSEL remarked that Mr. Steininger had heard [Ms. Wallace] discuss the risk to the Legislative Budget and Audit Committee in going outside its purview by changing statute, which could result in another lawsuit, and that the previous judge had opined that latitude existed for DCCED. She asked, "Did you not considered this previously or was this information that was unknown to you when you offered the RPL?"

MR. STEININGER responded that his understanding was the judge had said that "we had the ability to make de minimis changes," and "our concern is that some of these restrictions that we are removing would not necessarily be de minimis changes," thus would require a new RPL.

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CHAIR TUCK asked Mr. Steininger for his take on the RPL process.

MR. STEININGER replied that when revenues come to the state that were not anticipated during passage of the state budget, RPLs allow "us to execute on those unanticipated revenues after making notification to the Legislative Budget and Audit Committee." He said there is a wait period before that execution to allow the committee or the full legislature "to take full action should they not agree with the use of these new revenues." He continued:

In this situation, we received a significant amount of new revenue from the federal government to address the COVID-19 outbreak. The RPLs that we introduced last time included ... restrictions beyond what were included in that federal grant. In this case, we are amending still within that federal grant; we've not ... changed anything outside of what the federal government is allowing, but we are simply notifying that we are using those new revenues still for the manner for which they were intended by the grantor, but also in a way that was unanticipated during the passage of the operating budget for this year.

CHAIR TUCK indicated Mr. Steininger is right in wanting unanticipated revenues to be distributed throughout the state

"quicker rather than waiting the 45 days." Nevertheless, he said if the legislature had not voted for ratification, then he thought "these would all be ... illegal." He said he thinks it is clear, from the testimony in the Finance committees and the House Labor and Commerce Standing Committee, as well as the statements made by Mr. Milks of the Department of Law (DOL), that "the authority is already there; it's granted; and it's been reaffirmed through the courts." He reiterated his inability to comprehend the necessity of discussing this today when the administration could have made the changes six weeks ago.

CHAIR TUCK asked Ms. Anderson to discuss the changes that have already been made since passage of the RPL on May 12 and subsequent ratification.

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COMMISSIONER ANDERSON listed the following changes: The inclusion of receipt of SBA PPP and EIDL funds of \$5,000 or less; the ability for nonprofit designation 501(c)(6) to apply for these funds; the ability for an entity, if it so chose, to return SBA funds above \$5,000 to be eligible for [the Small Business Relief Program]; and the inclusion of eligibility of fishermen with limited entry permits. In response to a follow-up question, she confirmed that she felt she had the authority to make those changes at the time they were made and that they were successfully executed.

CHAIR TUCK asked for Ms. Anderson's opinion as to whether there is any reason why the committee needed to deal with RPL 08-2021-0184 today and whether she thought she could make those changes on her own.

MS. ANDERSON replied that through the advice of OMB and DOL, it was her understanding that "any further changes would not be considered de minimis, and we didn't want to put the changes to the program at risk."

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REPRESENTATIVE SPOHNHOLZ indicated that the issue of whether the change would be de minimis or not is not something that is addressed by the Legislative Budget and Audit Committee; the committee accepts additional federal funding for existing programs. If [RPL 08-2021-0184] is not de minimis, then it would need to be addressed by the full legislature, otherwise

there could be a situation in which the Legislative Budget and Audit Committee is making decisions that are the role of the entire legislature, especially since the previous RPL had been ratified subsequently by the full legislature. She questioned what made the administration decide either that these RPLs were not de minimis or that it did not want to call a special session to address these issues.

COMMISSIONER ANDERSON deferred to Mr. Steininger.

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MR. STEININGER stated, "The changes aren't de minimis, because they're going to significantly change the applicants who are available for this program." He said [OMB] believes that [RPL 08-2021-0184] has a solid legal basis for being subject to the RPL and Legislative Budget and Audit Committee process and is working within the bounds of the unanticipated federal grant received.

REPRESENTATIVE SPOHNHOLZ requested feedback from a DOL representative. She cited RPL statute, which describes that revised program language is for "an increase of an appropriation item based on additional federal or other program receipts not specifically appropriated." She queried whether there was an additional legal analysis that could be cited to identify the committee "as having a lane here."

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CHAIR TUCK said there was no one from DOL to testify. He mentioned the changes listed by Ms. Anderson and said they are significant. He said, "I don't see these being any more significant than what has already been performed by the administration." He suggested this was a coverup for the administration having not distributed the money more quickly and wanting the public to believe that the committee is at fault. He reiterated his stance that [the administration] has had the ability to "do this all along." He quoted the aforementioned testimony of Mr. Milks to support this position.

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SENATOR VON IMHOF stated that in the midst of a pandemic, businesses are suffering, and she does not want to stand in the way of getting the funds distributed quickly to as many businesses as possible. She said she is happy that the governor

"brought this forward," and she said that "we all had to wait until around August 7 anyway for the judge's opinion to come out." She said she does not want to politicize the issue; she wants to distribute the money quickly, which she said she knows the administration is doing now "with the portal" and the help of other financial institutions. She said the judge stated that Alaska faces an ongoing public health and economic crisis, and in order to respond effectively to a changing landscape, the state needs to "maximize" flexibility, especially in regard to aiding small businesses to prevent their collapse. Senator von Imhof said she thinks the committee is "going around in circles and talking about a technicality" and should consider all the variables that lead to the current situation. She concluded by urging committee members to help the small businesses by getting the money to them.

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REPRESENTATIVE JOSEPHSON opined that [the administration] should have called the legislature in to a special session. He said the administration wrote an op-ed on August 21 stating that it could not [distribute funds] because of the lawsuit, and he said that was wrong, because the administration was already distributing money before that time and there was never anything prohibiting it from doing so. He asked Ms. Wallace if she thought the "cleanest way to avoid a lawsuit would be a special session."

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MS. WALLACE answered that she does not think there is any dispute that the legislature could pass legislation allowing for these changes and any other it deemed necessary through passage of a bill and that that passage of legislature would not be subject to challenge.

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SENATOR STEDMAN remarked on the notice requirement for a special session called by the governor and the length of the special session and how that would push into the election cycle. He said, "If you want to burn businesses down, that's a good way of doing it." He urged the committee put aside politics and "put money on the street" to save the economy.

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CHAIR TUCK highlighted that he does not think anyone is against [RPL 08-2021-0184]. He emphasized the importance of putting thoughts on the record. He said this process should not have taken so long, but said it is no fault of the committee. He reiterated that the administration has always had the authority.

[2:03:54 PM](#)

MS. CUNNINGHAM, at the invitation of Chair Tuck, moved on to RPL 10-2021-5047, Department of Natural Resources, Geological and Geophysical Surveys, for \$500,000 in federal receipts. She said the federal authority for this request comes from various federal agencies. She said the funding does not require a match and will be allocated as follows: \$215,000 to work on continuing projects such as coastal hazard mitigation work, the Alaska Volcano Observatory instrument upgrade, and the North Slope Arctic Strategic Transportation and Resources Project; the remaining \$285,000 is designated to improve digital mapping data and create a statewide database to archive and distribute age dates for geologic samples, the statewide Environmental Protection Agency (EPA) Groundwater Study, and the Landslide Hazard Mitigation Plan for Barry Arm. Ms. Cunningham said there are no technical issues with this RPL.

MS. CUNNINGHAM next addressed RPL 10-2021-5315, Department of Natural Resources, Federal and Local Government Funded Forest Resource and Fire Program, for \$7 million federal. She said previously annual federal grant authority was requested ranging from \$1.4 to \$1.8 million because of the availability of more federal funding for projects including competitive grant awards for hazardous fuel reduction, wildfire and prevention education, special forest disease surveys, forest restoration projects, biomass inventories, and grants to volunteer fire departments and communities for various urban forestry. She related that this spending requires no match and there are no technical issues.

MS. CUNNINGHAM brought attention to RPL 10-2021-5316, Department of Natural Resources, National Historic Preservation Fund, for \$500,000 in federal receipts and for capital. She said this RPL provides funds for protection, preservation, and rehabilitation or restoration of historic property. She said \$200,000 is for development grants, and the remainder will support the Office of History and Archeology. She said the Department of Natural Resources (DNR) is using existing funds "for match" and has said it does not need the match for FY 21. She relayed there are no technical issues for this RPL.

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REPRESENTATIVE JOSEPHSON noted his office had identified approximately one dozen [fund sources], including the Land and Water Conservation Fund, that were in the capital budget as it existed when the legislature recessed on March 28, 2020, but were not included in the RPLs. He said some of these were "free to the state." He asked Mr. Steininger for an explanation.

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MR. STEININGER explained that [the administration/OMB] was looking only for capital projects where the fund sources on the project were eligible for the RPL Legislative Budget and Audit Committee process. He offered his understanding that those are listed under Section 37 of the operating budget. He clarified, "So, several capital projects that have significant amounts of federal revenues coming in required match from fund sources that aren't eligible for this process; so, those projects weren't able to be included in this RPL package." The ones in the package either did not require matching funds or had matching funds that are available either through a fund source available for this process or for which "the department was able to identify a way to use an existing appropriation to match to the federal revenues."

REPRESENTATIVE JOSEPHSON specified a capital budget item that would have brought \$1 million and required no matching funds, entitled "develop application to meet EPA e-reporting rule." He asked Mr. Steininger why that one would have violated the rule.

MR. STEININGER answered that the other criteria that [the administration/OMB] had put forward to the Legislative Budget and Audit Committee was that "there exists an active appropriation that the capital project can be applied to." He pointed out that all the capital projects included in the package are related to annually reoccurring capital projects - ones that exist from the year before and which can be increased. He clarified, "So, we only were able to apply this process to existing appropriations that are currently active. So, there are a couple of projects that were introduced in the capital budget that we put forward during last session that don't have prior year capital projects for the same purpose or an operating appropriation for the same purpose that we could apply these revenues to."

REPRESENTATIVE JOSEPHSON remarked, "You can see in the RPLs that this administration gets creative when it wants to."

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MS. CUNNINGHAM, at the invitation of Chair Tuck introduced RPL 10-2021-5317, Department of Natural Resources, Geologic Mapping for Energy Development. She said this is also referred to as [the U.S. Geological Survey] (USGS) "STATEMAP." She said this RPL requests federal authority from USGS STATEMAP grant. She stated, "The primary purpose of this project is to acquire a comprehensive new geologic ... dataset to catalyze private sector oil and gas exploration beyond the core Prudhoe Bay area. This has been included in the previous two capital budgets." Ms. Cunningham said the department has identified existing match and is requesting only the federal authority. She said there are no technical issues.

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SENATOR STEDMAN asked whether Mr. Masterson anticipated executing these funds this field season.

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STEVE MASTERMAN, Director, Central Office, Division of Geological and Geophysical Surveys, Department of Natural Resources, responded that this is a two-part grant. The first part is for the field mapping, which he said [the division] had originally intended to do during summer 2020; however, the coronavirus "scuffled those plans." The plan now is to do the mapping early in 2021, preferable before the end of the fiscal year. He said the second part of the grant is for putting together a geologic map database, which is all office work.

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MS. CUNNINGHAM directed attention to RPL 10-2021-5318, Department of Natural Resources, Critical Minerals Mapping - Earth MRI (3DEEP), for \$1.8 million, including \$1.5 in federal and \$300,000 in statutory designated program receipts (SDPR). She said the project is continuation of the National Mineral Security Program Three-Dimensional Mapping Empowerment Program and has been renamed by USGS "Earth MRI," which stands for Mapping Resources Initiatives. She said the project's objective is to geologically map Alaska at a 1:100,000 scale, create new geophysical survey data, digitally upgrade historical

geophysical surveys, and publish the resulting data and reports. Ms. Cunningham noted that because the state match is voluntary, the department can proceed without it and is requesting only federal and SDPR authority in this RPL. She said, "There are no issues."

CHAIR TUCK asked whether more matching funds could come to this RPL if the state were to decide to add more to the capital budget.

MS. CUNNINGHAM confirmed that is correct.

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CHAIR TUCK asked Ms. Wallace for her legal opinion on the RPLs ending in 5315, 5316, 5317, and 5318.

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MS. WALLACE responded that the last four RPLs reviewed by Ms. Cunningham each seek to increase capital appropriations that were made in FY 20 to allow for expenditure of receipts that would be received in FY 20. She said the RPLs identify that a capital budget request was made for each of those programs asking that the legislature appropriate funds for FY 20. She referred to the language of AS 37.07.080(h), which allows an RPL to be submitted to increase an appropriation based on additional federal receipts not specifically appropriated by the full legislature. She said while the full legislature did pass appropriations in FY 20 for those programs, the governor requested funding for the programs for FY 21, "presented them to the legislature, and the ... full legislature has not yet appropriated those funds." Therefore, she said there is a question as to whether the governor can circumvent the appropriation process to increase the appropriations that were in the previous fiscal year. She stated that AS 37.07.080(h) is not specific in limiting requests to appropriations made within the same fiscal year; therefore, this would be a novel issue. She concluded, "But because the RPLs plainly are intended to substitute for the normal appropriation process, I would advise that some caution is warranted."

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REPRESENTATIVE JOSEPHSON asked whether the caution is related to the possibility that the legislature could not [emphasis on "not"] pass a capital budget and, because a capital budget has

up to a five-year lifespan, the governor could issue "all sorts of RPLs and essentially take over the role of appropriating a capital budget."

MS. WALLACE replied, "The caution is a general separation of powers caution." She continued:

I suspect that there's numerous hypotheticals or scenarios you could create that the same caution would exist in utilizing prior year appropriation as authority to increase either where the legislature has not taken up and approved the appropriations or specifically acted to not include those appropriations in their normal budget process.

... Given the current situation, in terms of the pandemic, that's not a factor ... to be ignored when you're evaluating risks and likelihood of success if someone were to challenge, so it is a relevant consideration in terms of the options that are available to the governor and the legislature when evaluating what the risk of the separation of powers issue might ultimately be.

[2:22:16 PM](#)

CHAIR TUCK introduced a hypothetical situation where one legislature accepted funds from a federal program and a subsequent legislature did not like the program and decided not to accept the funds. He asked, "If a precedent is set by accepting these RPLs today, would that grant authority from a future governor to agree with the federal government can just work around the legislative process and get an RPL passed?" He asked for confirmation that if the Legislative Budget and Audit Committee does not approve an RPL, the governor could "be able to do that 45 days later on his own."

MS. WALLACE answered that is correct. Absent a legal challenge, she said that "this RPL" would continue to follow the process underlined in AS 37.07.080(h). So, even if the committee did not approve the RPL, the funds would likely be expended by the administration after the 45-day waiting period expired. She said she thought the caution she previously advised would apply to the hypothetical situation outlined by Chair Tuck, and she reiterated the concern about separation of powers and the issue of appropriation.

2:24:01 PM

REPRESENTATIVE JOSEPHSON asked whether "we should take solace in the fact that typically there is not a pandemic," thus the legislature would typically pass a capital budget and there historically are not that many "capital RPLs." He said that in other words, "we would consume by appropriation the available capital opportunities," thus "this circumstance could be anomalous."

MS. WALLACE answered that that opinion is "a little bit of a policy choice." She said that based on the RPLs themselves, there seems to be evidence that these are projects that are done routinely, on an annual basis, funded by the legislature. None of the projects currently being discussed are new projects not previously approved by the legislature; therefore, history demonstrates that the legislature "might continue to fund them," but each legislature makes that decision.

2:25:27 PM

MS. CUNNINGHAM, at the request of Chair Tuck, turned to RPL 10-2021-5319, Department of Natural Resources, Agriculture Grant Programs Funding - Economic Assistance, for \$4 million in federal receipts, operating. She said funding from the U.S. Department of Agriculture (USDA) Agricultural Marketing Division provides "small agriculture microgrants to individuals and organizations to provide growing resources to Alaska food growers and to increase food security and resiliency in rural communities and Alaska as a whole." She said there is no state match required on this RPL and no previous capital appropriation has been requested; it is being requested as an operating appropriation; and there are no technical issues.

2:26:21 PM

CHAIR TUCK asked Ms. Wallace whether this RPL falls into the same category as the previous four.

MS. WALLACE answered that this RPL uses FY 21 operating authority "to increase, based on these federal funds." She pointed out that it seeks to increase FY 21 operating funds because there are no FY 21 capital funds, and "this was submitted as a capital project." She said, "While there is a potential argument that the scope of the operating appropriation does not specifically include this grant program, it's something that I mainly just note for the committee."

[2:27:33 PM](#)

MS. CUNNINGHAM next introduced RPL 11-2021-0021, Department of Fish and Game, Chinook Mitigation, for \$6.2 million in federal receipts, "also an operating item." She said this RPL has two components: First is an amount of \$4.7 million already received by the department, from which \$2.7 million will go toward tagging trailers, and the remaining \$2 million will support operations for increased marking and tagging. The remainder of \$4.1 million will come from the National Oceanic and Atmospheric Administration (NOAA) to support various hatchery projects. Ms. Cunningham stated that there are no technical issues with this RPL.

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REPRESENTATIVE JOSEPHSON noted that Ms. Wallace had identified this RPL as being somewhat unique, in that it does not "touch that five-year window" but rather "a nine-year window or an eight-year window." Further, it is a capital appropriation, which in his view "connects itself to an operating budget appropriation." He asked whether his understanding was correct.

MS. WALLACE responded that is correct. She said the RPL states that the last time the legislature approved a capital project for this purpose was in 2001 and 2012, so "unlike the earlier DNR RPLs, wherein the legislature routinely, on an annual basis, approves those projects," the administration was forced to use operating appropriations on this RPL "to seek to increase to accept these federal receipts."

[2:30:05 PM](#)

SENATOR VON IMHOF cited language on page 3 of the RPL, to the last two sentences of the first paragraph, which read as follows [original punctuation provided]: "An electronic transfer was received by the Department of Fish & Game on April 28, 2020. Additional authority is needed in order for the Department to spend these funds." She interpreted that the preceding language notes there was "considerable discussion by the U.S. Section of Pacific Salmon Commission," and "they divvied up this money to various states" and Alaska received its portion at the end of April. She said she assumes the department just needs the authority to spend the money.

MS. CUNNINGHAM confirmed that is correct.

SENATOR VON IMHOF speculated that this a unique circumstance, and she said the money is there.

MS. CUNNINGHAM responded that is correct.

[2:31:12 PM](#)

MS. CUNNINGHAM at the request of Chair Tuck introduced RPL 11-2021-0022, Department of Fish and Game, Pacific Coastal Salmon Recovery Fund, for \$4.6 million in federal receipts, capital. She stated that this program's objective is to promote sustainability of Alaska's salmon population and maintain salmon populations that are used for subsistence. She said this is an annual capital request, and there is no excess authority from prior years. She said there are no technical issues with this RPL.

MS. CUNNINGHAM next spoke to RPL 12-2021-0047, Department of Public Safety, Marine Fisheries Patrol Improvements, for \$1.1 million in federal receipts, capital. She said this RPL provides funding to support the joint enforcement agreement with the National Marine Fisheries Service. The federally regulated marine fisheries occur on a year-round basis. She said this RPL provides funding for an Alaska wildlife trooper personal services and equipment. She relayed there are no technical issues with this RPL.

MS. CUNNINGHAM continued to RPL 18-2021-0447, Department of Environmental Conservation, Fairbanks PM2.5 Nonattainment Area Voluntary Heating Device Change Out Program. She said the EPA requires the Fairbanks North Star Borough to implement strict air pollution controls in the area. This project is designed to enhance the implementation of the wood smoke reduction measures; wood heating devices will be replaced to convert to oil, electric, natural gas, or propane heaters. She said no state match is required, and there are not technical issues with this RPL.

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CHAIR TUCK noted that the last time this was funded was 2018.

[2:34:06 PM](#)

The committee took an at-ease from 2:34 p.m. to 2:37 p.m.

[2:37:44 PM](#)

CHAIR TUCK announced that the committee had covered all the RPLs, and the technical and legal issues surrounding them had been discussed. He reemphasized that the committee was in a unique situation to get money to the public and to receive as much money as possible from the federal government on behalf of the State of Alaska.

[2:38:06 PM](#)

SENATOR BISHOP moved that the Legislative Budget and Audit Committee approve the following RPLs:

RPL 05-2021-0075, Department of Education and Early Development, National Endowment for the Arts CARES Act

RPL 08-2021-0184, Department of Commerce, Community, and Economic Development, Administration of State of Alaska COVID-19 Small Business Relief

RPL 10-2021-5047, Department of Natural Resources, Geological and Geophysical Surveys

RPL 10-2021-5315, Department of Natural Resources, Federal and Local Government Funded Forest Resource and Fire Program

RPL 10-2021-5316, Department of Natural Resources, National Historic Preservation Fund

RPL 10-2021-5317, Department of Natural Resources, Geologic Mapping for Energy Development (USGS STATEMAP)

RPL 10-2021-5318, Department of Natural Resources, Critical Minerals Mapping - Earth MRI (3DEEP)

RPL 10-2021-5319, Department of Natural Resources, Agriculture Grant Programs Funding - Economic Assistance

RPL 11-2021-0021, Department of Fish and Game, Chinook Salmon Mitigation

RPL 11-2021-0022, Department of Fish and Game, Pacific Coastal Salmon Recovery Fund

RPL 12-2021-0047, Department of Public Safety, Marine Fisheries Patrol Improvements

RPL 18-2021-0447, Department of Environmental Conservation, Fairbanks PM2.5 Nonattainment Area Voluntary Heating Device Change Out Program

SENATOR BISHOP further stated:

Passage of these RPLs represents action taken during an unprecedented public health disaster. This action does not represent an ... abrogation of the legislature's preeminent constitutional appropriation authority.

[2:40:50 PM](#)

REPRESENTATIVE JOSEPHSON objected for purposes of discussion. He reminded the committee that on May 11, he had voted to approve the RPLs, but he had expressed concern with the legislature "not intervening to capture those funds as appropriators," as he said is called for in the state's constitution. He remarked that with the exception of the capital items, the committee is here today "because the RPLs were not written well." He noted that the legislature then ratified the RPLs, which was good to show the full legislature's support for the spending; however, it also meant that these RPLs were now trying to change statute. He said although he agreed with Representative Spohnholz that the proper procedure of the administration would have been to call a special session, "it's hard to complain about somebody who believes that they've gone beyond the envelope, and they are making changes so great that they need legislative approval." He further acknowledged that because the legislature did not do a capital budget, the administration is "sort of rescuing some these federal dollars." However, he expressed concern that the administration is not rescuing, with the assistance of the legislature, approximately \$44 million in federal funds that would have cost the state approximately only \$3.5 million. He acknowledged Senator Stedman's point about the number of days that would be added to address the issue through special session; however, he said he is astonished that no one is discussing "the obvious," since

there had been so many committee hearings on this issue. He said he has no idea why the administration did not address this on June 15. He expressed concern about the expansion of the RPL process to the point that he no longer knows what the limitations are.

REPRESENTATIVE JOSEPHSON reiterated that he thinks the administration can find "the linkage" to federal programs at will. He said he wants the public to know that the legislature's chief attorney warned that the committee's decision on May 11 could result in a lawsuit, and she was right. Now she has said the current RPLs, specifically the Small Business Relief Fund, are outside the law, and he said the committee is about to approve that RPL "with the hope that no one cares and that just about everybody supports the modification." He said he does not know whether it is smart to expand "a 50-cap limit that somebody, hopefully smart, at OMB thought was wise in April and May." He said what was named "small" is now a "big business RPL." He said he finds the RPL process fascinating but thinks the legislature's process has been usurped and he does not know "where it ends." He expressed his wish that there had been more negotiations, such as when the loan program had been turned into a grants program. He stated that he thinks the single-most disturbing thing is that the Legislative Budget and Audit Committee is saying to the rest of the legislature, "Never you mind; we got this."

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REPRESENTATIVE SPOHNHOLZ clarified that she had not meant that the legislature should go into special session but that she did not think the Legislative Budget and Audit Committee was the right place to do that which the administration wanted done. She said the administration could either decide that it has the authority to make changes to expand eligibility, which it did previously, or it could request the authority of the full legislature. She noted the spread of the coronavirus and emphasized that these are extraordinary times. She opined that although there are aspects of the RPLs, particularly regarding the capital budget items, where she would typically express that she does not want to be taking away the full authority of the legislature, "out of necessity we should continue forward in as close a partnership as we can with the administration to make sure that we're getting these funds out ... to agencies and communities." She said the legislature "needs to be ratifying these things later."

REPRESENTATIVE SPOHNHOLZ said she does not want the Legislative Budget and Audit Committee to be setting precedent this year that could undermine its authority. She said the state currently has one of the most powerful executive branches in the country; therefore, "we don't want to be ceding more authority." She said it is incumbent of the legislature to ensure it holds ground as the appropriator. She stated, "The only reason we would be circumventing our own authority at this moment is because we are in a pandemic, and it wouldn't be responsible for us to ask for hundreds of people from across the state to go to Juneau for a special session right now, or hundreds of people to gather any place right now. It's not a responsible thing to do. And the responsible thing to do right now is to approve these things and to continue to work very closely with the administration."

REPRESENTATIVE SPOHNHOLZ reemphasized that she thinks the administration could have taken care of these issues, and she thinks [handing them to the committee] is "a scapegoat for bad execution of a program that could have been executed better in the very beginning." She said that DCCED had the necessary tools. She opined that the poor execution of the administration is what is responsible "for much of the jeopardy that small businesses across the state of Alaska are facing right now - not our inaction."

[2:52:01 PM](#)

SENATOR VON IMHOF, to a previous comment that there was no capital budget passed in the spring, stated that the bulk of the capital budget was tucked in to the operating budget as an efficiency. She said the bulk of the capital items - highway, airport, and village safe drinking water funds - were passed. She indicated that some capital items were "left on the table," because the legislature had to make haste in response to the unknown level of threat from the pandemic. She commended the governor for making an attempt to find items that do not require a state match from the general fund.

SENATOR VON IMHOF, regarding why the administration could not do this on its own, said she thinks that "the administration probably was," and she thinks the good news is that "by punting it" to the Legislative Budget and Audit Committee to approve today, "fingers cannot be pointed at the legislature anymore that we were the bottleneck." By saying "okay," she indicated, "the onus, the volley, is back in the governor's court and the administration's court to get this money out." She concluded,

"We're all responsible to get this money out, and I think we're all taking responsibility today."

[2:54:06 PM](#)

CHAIR TUCK asked whether those who already applied but did not qualify would be in the queue.

COMMISSIONER ANDERSON answered they would have to reapply through the portal. She offered her understanding that there are at least \$65 million in funds that have not been requested. She encouraged applicants to look at the frequently asked questions and fill out a complete application as quickly as possible.

[2:55:34 PM](#)

SENATOR BISHOP said this could turn into a big business loan; therefore, he emphasized the importance of saving those in the queue.

CHAIR TUCK proffered that some business owners that have spoken to him have identified that they would like a definition of "equipment" so that they do not get their applications rejected. He opined that it is unfair for applicants who have already applied to be "knocked out of the queue." He said some applicants have given back the money they received in order to not be limited in opportunity to receive "up to \$100,000 through our program." He warned that the business owners that applied from the beginning are going to suffer. He mentioned the expansion to over 50 employees and reaching beyond Alaska-owned businesses, and he opined that there is a way to give money to those who already applied, because they deserve it first, "before we go into those other options just to get the money out."

[2:58:02 PM](#)

COMMISSIONER ANDERSON clarified that the intent through the RPL and proposed changes is not to expand the eligibility to larger businesses; the intent is to keep the number at 50 full-time employees or fewer. She restated her previous comment that as the department goes through the program and analyzes its usage, if it appears there are still unrequested funds available, then it would consider amending the program to expand it to larger businesses, for example. She said the department would try to ensure that those eligible now under the proposed changes are

fully subscribed. In response to a follow-up question, she said there is no intent to expand to businesses out of state.

CHAIR TUCK said the governor's press release states that if given the authority, he would look into it. He said, "I think we're granting that authority in this particular RPL." He said there are many Alaska-owned small businesses that are hurting, and which he hoped would be able to take advantage of "the \$290 million that we originally had to get out to them." He noted that businesses with greater than 50 employees have the financial resources to make sure their applications are correct. Further, those larger business would be asking for a larger sum, proportionally, which would "suck up a lot of opportunities from those other businesses." He asked Ms. Anderson whether, if the intent were to expand, she would at least inform the Legislative Budget and Audit Committee before making that decision.

COMMISSIONER ANDERSON reemphasized that that is not the intent. She said, "In the RPL it states that we would like to have the ability to have more flexibility as we review the usage of these funds. Our intent was always to help the small businesses and get those funds out to them as quickly as possible." There are still many eligible for receipt of SBA funds with the expanded guidelines. She said, "We expect that - I do, anyway - that we probably will be oversubscribed just on the relaxing of those requirements." She deferred to Micaela Fowler for further comment.

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MICAELA FOWLER Director, Administrative Services, Department of Commerce, Community & Economic Development, said Ms. Anderson clearly outlined "what the intent of this RPL is." She suggested some of the confusion may be the full listing of items that would make a business ineligible under the ratified RPL 0251, which included secondary sources of income, out of state businesses, and businesses with over 50 employees. She continued:

But this RPL does provide some flexibility to the department to make adjustments and then specifically removes the restriction for businesses that have received PPP or EIDL funding and businesses that are a secondary income source.

The reason that we requested that flexibility is if we determined in four weeks, after having had this

expanded eligibility with the EIDL restrictions and the secondary income source restrictions removed, that we still did not have applications in our queue that reached the total of the appropriation, we would like to be able to consider additional adjustments to make sure all of those funds could be expended. But again, we would only do that if this initial expansion of eligibility did not result in the full usage of the appropriation.

3:03:32 PM

CHAIR TUCK quoted language from RPL 08-2021-0814, which read as follows [original punctuation provided]:

This may include, but is not limited to, raising the number of full-time equivalent employees a business may have and still qualify for the program, disbursement processes, and allowable expenses. Accordingly, the DCCED will be able to adjust eligibility requirements and grant amounts as necessary to allow for full use of federal funds made available to the CARES Act to assist Alaska businesses.

CHAIR TUCK said the sentence prior to that grants the department maximum flexibility, and he said he had wanted to know under what criteria, thus was grateful for the explanation. He opined that "before we go into that option" there should be at least a couple of public hearings, because he wants to ensure all resources have been exhausted to get the money to all Alaska-owned businesses first. Thus far, he said what he is hearing from frustrated business owners, who have applied is that "it just simply isn't happening."

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REPRESENTATIVE SPOHNHOLZ offered her interpretation that the department has said it is not its intention for the money to go to non-Alaska businesses, and the RPL, which was restating some previous exclusions, had been misread. She recapped the statements made by Ms. Anderson regarding the flexibility desired. She said she does not think there will be a situation in which funds are leftover, because as of close of business August 26, almost 4,500 applications had been received totaling approximately \$215 million. With the modest changes discussed today giving more flexibility to small businesses that have

already received the EIDL or PPP funding, she expects the entire \$290 million will be utilized. She stated her concern is there will not be sufficient funds to meet the needs of businesses. She related Anchorage businesses continue to be closed because of public health measures, and problems with COVID-19 continue, thus prolonging those health measures.

REPRESENTATIVE SPOHNHOLZ asked Commissioner Anderson whether she had heard anything from the federal government about additional funding that may come to Alaska in the future.

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COMMISSIONER ANDERSON responded, "We have not heard anything definitive around this." She said she thinks the money will be fully subscribed once the qualifications are relaxed, and she said the department is going "to do a full press effort" to inform the public of the changes and to ensure applications are made as quickly as possible.

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SENATOR HOFFMAN agreed with Representative Spohnholz and others that with the expanded scope there will be more applicants than there are funds. He said rather than a first-come/first-served basis, he would like to see the money distributed to those businesses with the least amount of employees "and then go up the list."

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CHAIR TUCK talked about the barber or hairdresser that has no employees but rents a booth from the salon, which rents from the mall owner, who pays the mortgage, and how the money "trickles up." He mentioned in-home child care with a limit of six children and how the pandemic has shut them down, and he questioned where the relief is for them. He expressed appreciation for Senator Hoffman's comment, because it gets to the crux of asking who is being helped and whether the money is doing what it is expected to do.

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COMMISSIONER ANDERSON stated that at the inception of the program, sole proprietors and independent contractors were eligible; no employees were necessary in terms of eligibility. She said child care is probably that person's sole source of

income, and the department is trying to reach those individuals that are hurting right now. She said, "We do understand the need, and I appreciate the support for that."

[3:12:31 PM](#)

CHAIR TUCK reviewed that the committee had heard from Ms. Wallace about concerns regarding the changing of eligibility requirements, as well as concerns about going back to previous fiscal years and approving money for FY 20 and FY 21. He said he is glad the statement was made with the motion about preserving [the legislature's] right to appropriate. He said he does not want that authority eroded away, but he understands the uncertain and unique times currently being faced and the need for quick action. He reiterated that he thinks many of the provisions in RPL 08-2021-0184, for small businesses assistance, could already have been enacted. Nevertheless he expressed his willingness to "ceremoniously bless what the governor is wanting to do."

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REPRESENTATIVE JOSEPHSON removed his objection. There being no further objection, the RPLs were approved.

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ADJOURNMENT

There being no further business before the committee, the Legislative Budget and Audit Committee meeting was adjourned at 3:15 p.m.