

SENATE FINANCE COMMITTEE  
March 15, 2022  
1:02 p.m.

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CALL TO ORDER

Co-Chair Stedman called the Senate Finance Committee meeting to order at 1:02 p.m.

MEMBERS PRESENT

Senator Click Bishop, Co-Chair  
Senator Bert Stedman, Co-Chair  
Senator Lyman Hoffman  
Senator Donny Olson  
Senator Natasha von Imhof  
Senator Bill Wielechowski

MEMBERS ABSENT

Senator David Wilson

ALSO PRESENT

Adam Crum, Commissioner, Department of Health and Social Services; Sylvan Robb, Assistant Commissioner, Department of Health and Social Services; Albert Wall, Deputy Commissioner, Department of Health and Social Services; Randy Bates, Division of Water, Department of Environmental Conservation; Jason Brune, Commissioner, Department of Environmental Conservation.

SUMMARY

PRESENTATION: MEDICAID UPDATE BY DEPARTMENT OF HEALTH and SOCIAL SERVICES

PRESENTATION: CLEAN WATER ACT SECTION 404 PRIMACY/RESOURCE CONSERVATION and RECOVERY ACT

^PRESENTATION: MEDICAID UPDATE BY DEPARTMENT OF HEALTH and SOCIAL SERVICES

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ADAM CRUM, COMMISSIONER, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, (DHSS) discussed the presentation, "Alaska Department of Health" (copy on file).

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SYLVAN ROBB, ASSISTANT COMMISSIONER, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, pointed to slide 2, "Medicaid Services Operating Budget Comparison FY2019-FY2023 (in thousands)." She announced that the proposed budget for FY 23 was \$2.4 billion, with \$656 million in undesignated general funds (UGF). She reminded the committee that since the beginning of January 2020 the department at had received increased FMAP, related to the public health emergency beginning January 2020.

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Co-Chair Stedman queried the definition of "FMAP".

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Ms. Robb replied that it was the Federal Medical Assistance Percentage (FMAP), which was the share of Medicaid services paid for by the federal government.

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Co-Chair Stedman advised against the use of acronyms for the duration of the presentation. He requested a brief overview of what was to come in the presentation.

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Ms. Robb shared that the presentation would cover the proposed FY 23 Medicaid budget, the department's projections for Medicaid costs, and const saving proposals that would decrease that cost. She noted that slides at the end of the presentation showed historical and projected Medicaid costs.

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Co-Chair Stedman asked for an explanation of Medicaid versus Medicare.

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ALBERT WALL, DEPUTY COMMISSIONER, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, explained that Medicaid was the largest healthcare insurer for the state. The program covered 264,000 Alaskans and was broken down into many different types of services. He relayed that Medicaid waivers were available for seniors and those with disabilities, as well as those seeking mental health care (1115 waivers). He shared that Medicaid was complex and numbers associated with it, such as the 1115 waiver, either referenced the regulation on the federal level or the law that described the section.

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Co-Chair Stedman asked for a definition of Medicare.

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Mr. Wall replied that Medicare was an entirely different program that generally covered the elderly and was not administered by the department.

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Co-Chair Stedman stressed that the definitions were important to provide clarity to the listening public.

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Ms. Robb highlighted slide 3, "FY2023 Medicaid":

FY2023 projection: \$72.0 million shortfall if no cost containment actions are taken

Cost containment activities (Public Consulting Group recommendations and other)

- \$17.0 million projected to be captured once Medicaid eligibility redetermination can resume
- \$6.5 million - Implementation of Section 1945 Health Homes
- \$3.5 million - Pay for Performance for Hospitals
- \$4.6 million - Implementation of Indian Health Service (IHS) reclaiming by the Administrative Services Organization
- \$31.6M of cost containment activities

\$45.0M increment request (allows for \$4.6M flexibility for implementation challenges)

Ms. Robb stated that the budget had been built based on the assumption that the enhanced FMAP would end at the end of FY 22. During the public health emergency, in exchange for not removing individuals from Medicaid rolls, the state had received an additional 6.2 percent FMAP. She said that instead of paying 50 percent the federal government had been paying 56.2 percent. She shared that not all elements of the projected savings reflected on the slide were within the department's control because they had to work the Centers for Medicare and Medicaid Services; the department had allowed themselves approximately \$5 million in flexibility in the event of unforeseen variables.

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Co-Chair Stedman recalled past challenges for projected Medicaid savings that had resulted in large supplemental budget requests. He hoped to avoid future supplemental requests by focusing on current projections and whether those projections would result in future supplemental. He explained that the state would be responsible for some of the medical expenses of those on Medicaid. He stressed that projected savings were not guaranteed.

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Senator von Imhof understood that Medicaid eligibility had been frozen by the federal government due to Covid-19. She relayed that the state had not had the ability to review the Medicaid membership eligibility and was largely responsible for user expenses. She felt that there was an issue with the state being unfairly dictated by the federal government due to the freeze brought on by the Covid-19 pandemic.

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Co-Chair Stedman asked for comment on the flexibility the department had when determining eligibility.

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Commissioner Crum replied that the plan was that states would resume the redetermination process once the public

health crisis came to an end. He said that the process would require multiple notifications to individuals to make sure that those that were "truly" eligible were receiving services. He anticipated that CMS would require a 12-month, rolling redetermination basis, which meant that one-twelfth of the population could be processed each month. He believed that without a public health emergency, the department may have individuals on the rolls that did not meet the statutory or regulatory definitions of "Medicaid eligible." He said that this would require the facilitation of an ask for top cover from federal partners for the state to continue the program. He said that the conversation was ongoing and the federal public health emergency expired April 12, 2022. Any extension would be on a 90-day basis and would provide FMAP until the end of the quarter. He said that the issue redetermination was a significant challenge for the state.

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Co-Chair Stedman reiterated that the presenters should avoid using acronyms during the presentation.

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Ms. Robb addressed slide 4, "FY2023 Medicaid - if enhanced Federal Medical":

Assistance Percentage is extended for one quarter of FY2023

FY2023 projection: \$54.5 million (original \$72.0 million offset by \$17.5 million for enhanced FMAP) shortfall if no cost containment actions are taken

Cost containment activities (Public Consulting Group recommendations and other)

- \$12.8 million projected to be captured once Medicaid eligibility redetermination can resume
- \$6.5 million - Implementation of Section 1945 Health Homes
- \$3.5 million - Pay for Performance for Hospitals
- \$4.6 million - Implementation of Indian Health Service (IHS) reclaiming by the Administrative Services Organization
- \$27.4 million of cost containment activities

\$45.0 million increment request (allows for additional flexibility for implementation delays caused by the extension of the Public Health Emergency)

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Co-Chair Stedman said that the committee would work with the department on the language to minimize the future supplemental requests. He said that there could be possible contingent language in the budget for FY 23.

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Mr. Wall looked at slide 5, "FY2023 Medicaid":

- \$17.0 million GF projected to be captured once Medicaid eligibility redetermination can resume 5 Tuesday, March 15, 2022
- During the public health emergency (PHE), the state received 6.2 percent enhanced Federal Medical Assistance Percentage (FMAP) in exchange for maintaining all Medicaid enrollees (with limited exceptions)
- At the conclusion of the federally declared COVID PHE, complete a review of all current Medicaid enrollment files to identify ineligible cases. Savings estimate based on Urban Institute post-PHE report and other state third-party data matching experience.

Mr. Wall shared that Medicaid redetermination was an annual federal requirement. He reiterated that during the beginning of the Covid-19 pandemic Medicaid eligibility redetermination was suspended. The normal redetermination process would begin 60 days prior to the ending of the public health emergency. He said that the department had worked with the contractor public consulting group, which had projected \$17 million in general funds for the redetermination process.

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Co-Chair Bishop wondered whether the redetermination would be done digitally or by individual intake on phone lines.

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Mr. Wall replied that the Division of Public Assistance would use a combination of phone calls and online resources to meet the redetermination needs.

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Co-Chair Bishop wondered how many people would be surveyed for redetermination.

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Mr. Wall replied 264,000 plus.

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Co-Chair Stedman interjected that was a large section of the state's population.

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Mr. Wall addressed slide 6, "FY2023 Medicaid":

- \$17.0 million GF projected to be captured once Medicaid eligibility redetermination can resume

Mr. Wall explained that the slide illustrated the various grouping of the cost savings projections.

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Co-Chair Stedman remarked asked about the "Aged, Blind, and Disabled" category and wondered whether the amount of savings projected was due to the ease of which those Alaskans could be removed from the rolls.

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Mr. Wall replied that the chart reflected the normal process and did not look for people to remove from the program. He stressed that the department had to maintain compliance with federal regulations. He said that the "Aged, Blind, and Disabled" category included Home and Community Based Services Waivers. He noted that the left-hand column reflected the average cost for each group:

**Adults**

**Est. Average annual Spend (State Share) -**

\$2,068

**Est. Enrollment -**

48,436

**Est. Disenrollments at 3 percent ineligibility -**

1,453

**Est. Cost Savings at 3 percent ineligibility -**

\$3,004,959

**Children**

**Est. Average annual Spend (State Share) -**

\$1,541

**Est. Enrollment -**

119,101

**Est. Disenrollments at 3 percent ineligibility -**

3,573

**Est. Cost Savings at 3 percent ineligibility -**

\$5,505,039

**Aged, Blind, and Disabled**

**Est. Average annual Spend (State Share) -**

\$8,228

**Est. Enrollment -**

34,972

**Est. Disenrollments at 3 percent ineligibility -**

1,049

**Est. Cost Savings at 3 percent ineligibility -**

\$8,632,488

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Co-Chair Stedman asked about the "Aged, Blind, and Disabled" and what might cause those Alaskans to be ineligible.

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Mr. Wall replied that each case would be examined on a case-by-case basis and redetermination would be based on income, family size, and disability or condition.

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Senator Wielechowski asked how the eligibility redetermination requirements were changing with the ending of the PHE

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Mr. Wall replied that eligibility requirements were not changing. He said that during the PHE the entire redetermination process had been waived; there was no change in the requirements for eligibility, only a reinstatement of the original federal regulatory process.

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Senator Wielechowski surmised that there were certain groups that had people who enrolled during the time when the eligibility requirements were waived, who would no longer be eligible without the PHE waiver.

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Mr. Wall reiterated that eligibility redetermination was required annually for all Medicaid groups. He furthered that the process was set in regulatory requirement by the federal government. He restated that during the PHE the process was stopped; the eligibility requirements were not changed, but under the waiver were not considered for enrollment. He said that the requirements had not changed. What had changed was that during the PHE the redetermination were not processed.

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Senator Wielechowski wondered how those who would be disenrolled would receive healthcare and health insurance.

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Mr. Wall replied that anyone who loses eligibility could receive counselling or assistance in seeking alternative methods for healthcare and health insurance.

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Mr. Wall pointed to slide 7, "FY2023 Medicaid":

- \$6.5 million GF - Implementation of Section 1945 Health Homes

- Provides authority for care coordination initiatives within fee-for-service payment system while engaging care entities to perform specific services at 90 percent FMAP for eight quarters. Targets people with chronic conditions.

- Community Health Centers (CHCs) say they are ready and willing partners to do this. Converting the Providence initiative to a Health Home would convert 90 percent of care fees to federal.

- This is a state plan option and may be implemented regionally. The State may establish provider eligibility standards by region.

Steps to Implementation:

- Draft and submit a State Plan Amendment (SPA) to the Centers for Medicare and Medicaid Services (CMS)

- CMS reviews and approves SPA

- Update regulations (concurrent with CMS review period)

Begin to realize savings: As soon as possible pending CMS approval and adopted regulations

Mr. Wall explained that he "health home" was not a physical location but a concept of centralized care, leading to more efficient healthcare and better outcomes with less expensive treatments. He said that health homes targeted those with greatest need and chronic conditions (two or more), and those with serious and persistent mental health conditions. He related that once a person was enrolled into a health home, the services provided were augmented by care management, care coordination, health promotion, transitional care and follow-up, patient and family support, and referral to community and social support services. He relayed that referral to the support services led to the use of fewer, more costly medical services due to a better coordination of cross providers. He said that SB 74 specifically provided for the 1945 Health Home option of the Medicaid program. He offered a brief description of the pilot program. He said that lessons learned from the pilot would be brought into the health home concept for implementation.

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Senator von Imhof surmised that the state plan amendment would be a significant document that would take some time to craft. She wondered whether work had begun on the document.

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Mr. Wall replied that he described Medicaid as a contract between the federal government and states, which required a negotiation project for all changes to the project. He continued that the amendment crafting would be complicated and time consuming. He explained the drafting and editing process of an amendment.

Senator von Imhof asked whether a first draft had been started.

Mr. Wall replied that it would be filed in the summer.

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Co-Chair Bishop asked about SB 74, which was a Medicaid reform bill passed in a previous legislative session. He asked whether the statute change had been fully implemented and whether savings had been realized.

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Mr. Wall thought that the bill was intended to be an ongoing process and could not be specifically implemented. He said that options were continually considered and discussed with providers and vendors. He said that the cost containment initiatives that were in the presentation came out of the collaborative process to seek cost containment. He pointed to the 1115 Behavioral Health Waiver as a successful outcome of the legislation.

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Mr. Wall addressed slide 8, "FY2023 Medicaid":

- \$3.5 million GF - Pay for Performance for Hospitals
- Establish authority under the State Plan for the annual hospital rate setting method to include a budget adjustment factor that effectively manages cost growth to and incentivizes hospital efficiency.

- Pair the Budget Adjustment Factor with Quality based payments to incentivize both resource efficiency and positive patient outcomes. Possible pay for reporting in Year 1.
- Plan for Transitioning to Rate Methods that Weigh Resource Utilization: This would include Diagnostic Related Groupers (DRGs) for inpatient and Ambulatory Patient Groupers (APGs) or Enhanced Ambulatory Patient Groupers (EAPGs) for outpatient.

Steps to Implementation:

- Draft and submit a State Plan Amendment (SPA) to the Centers for Medicare and Medicaid Services (CMS)
- CMS reviews and approves SPA
- Update regulations (concurrent with CMS review period)

Begin to realize savings: As soon as possible pending CMS approval and adopted regulations

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Mr. Wall looked at slide 9, "FY2023 Medicaid":

- \$4.6 million GF - Implementation of Indian Health Service (IHS) reclaiming by the Administrative Services Organization (ASO)
- IHS reclaiming has not been submitted for Medicaid claims processed by the Administrative Services Organization (processing claims for the 1115 Behavioral Health Waiver)
- ASO initially focused on ensuring smooth onboarding and prompt payments to providers
- CMS allows retroactive claiming for the current quarter and the previous seven quarters

Estimated Effective Date: Begin processing April 1, 2022

Approval Required: Does not require approval from the Centers for Medicare and Medicaid Services (CMS)

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Senator von Imhof recalled \$4.6 million in projected savings.

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Mr. Wall replied in the affirmative.

Senator von Imhof asked how the reclamation had helped in the way of cost, better value, and coordination.

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Mr. Wall did not have the numbers on hand but thought the savings had been significant.

Senator von Imhof asked whether there was an agreement for payment between the state and Tribal systems and were patients using both systems tracked.

Mr. Wall said that a coordinated care agreement would be established between Tribes and the state and a unit within Healthcare Services would track the claims through the claims process.

Senator von Imhof understood that the savings were twofold: IHS received the higher federal reimbursement and the pay for performance. She said it was less than a fee-for-service and more of a "bundling."

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Mr. Wall replied that the issue was still being worked out with the federal government.

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Co-Chair Stedman asked about the timeline for the state plan amendment.

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Mr. Wall replied that the HIS reclaiming did not require a state plan amendment and would be initiated on April 1, 2022.

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Co-Chair Stedman asked whether there was a risk of plan modifications in the timing.

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Mr. Wall replied that the biggest risk was new information coming from the federal government. He said that the date set for the PHE to expire could be extended, which provided the department some "wiggle room" in their budget proposal.

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Co-Chair Stedman remarked that the committee remained cautious of delivering savings and not facing a supplemental request next year.

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Mr. Wall understood that all states were in the same situation and awaiting guidance from the CMS task force.

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Mr. Wall pointed to slide 10, "Medicaid Spending - Actuals and Projected." He noted that the slide was derived from Medicaid enrollment and Spending in Alaska, or the MESA Report. The source of analysis was Evergreen Economics. He relayed that the blue dotted line on the chart was what was originally projected as the exponential growth of the program in 2005. The red line represented what the actual costs had been after the cost containment items had been added for each successive administration. He said that significant work had been done over the years to stem the growth of Medicaid. He said that when SB 74 was introduced the curve had flattened and the chart showed year-by-year the effects of each cost containment item. The green dashed line reflected the current projection and were considered point in time moving forward and did not include cost containment items under current discussion.

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Co-Chair Bishop queried what multiplier for inflation had been used on the slide.

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Mr. Wall replied that the number was 4.2 percent.

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Ms. Robb interjected that Evergreen Economic projected 3.5 percent overall, which was broken out by the state and federal portions.

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Senator von Imhof asked whether the cost inflation for health care had grown at 3.5 percent over the last two decades.

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Ms. Robb replied that reading further into the report showed that Medicaid had been paying below the rate of inflation.

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Senator von Imhof understood that the cost of healthcare in the state had increased more than 3.5 percent each year.

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Mr. Wall agreed. He said that the full MESA report could be provided to the committee. He furthered that the author of the report had been before a committee in the other body and had discussed the difference between the growth rate of healthcare overall and the growth rate of Medicaid. He offered to make that presentation available to the committee.

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Senator von Imhof asked whether Medicaid followed the 80<sup>th</sup> percentile rule in Alaska.

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Commissioner Crum replied in the negative.

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Co-Chair Stedman asked for an explanation of the 80<sup>th</sup> percentile rule.

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Commissioner Crum said that the rule was initially designed as a consumer protection model to ensure providers were paying at the 80<sup>th</sup> percentile payment within a geographical region. He said that under the federal No Surprise Act the rule now protected providers more than consumers. He offered to get back to the committee in writing.

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Senator von Imhof wondered whether under the 80<sup>th</sup> percentile rule, insurance companies were responsible for 80 percent of a patient's bill from a medical provider. She understood that the insurance company would continue to pay 80 percent of the bill for same patient, same provider, same procedure, despite prices rising yearly due to inflation. She knew that Blue Cross paid the 80 percent and wondered who was paying for rising medical costs if Medicaid was not increasing payments with inflation.

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Mr. Wall replied that there was variation between rates and provider types. He said the department set the Medicaid rates and told providers in advance how much they would get for a particular service. He said that providers enrolled as Medicaid providers with the knowledge of how much the state was willing to pay. He said that providers could choose to enroll as a Medicaid provider and accept the set payment, or not.

Senator von Imhof understood that AK was the only state with the 80<sup>th</sup> percentile rule, which had contributed to the overall cost of the Medicaid system. She thought that the Medicaid costs contributed to growth in spending and wondered who was paying the difference if insurance companies were not. She expressed concern for the rising cost of healthcare.

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Senator Wielechowski asked whether analysis had been done on the cost of preventable illnesses.

Mr. Wall replied that the report did not reflect that information.

Senator Wielechowski expressed interested in seeing numbers for preventable illnesses. He thought that a large percentage of the costs were from health issues that could be curbed through better health education.

Commissioner Crum said that the cost of chronic health issues was a major part of the overall cost. He noted it was a minority of the population and most of the cost. He spoke of the initiatives in place to encourage healthy habits. He said that the Medicaid program was limited because it only paid for medically diagnosed issues. He called this the "Prevention Paradox" as the federal government did not match state dollars for prevention programs. He spoke of 1115 waivers and the possibility of other waivers to support prevention programs.

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Mr. Wall addressed slide 11, "Spending on Medicaid Services, Enrollment in the Medicaid Program, and Recipients of Medicaid Services, By Date of Service, FY2012 - FY2021." The slide contained information from the MESA report. He explained that the green line indicated the enrollee count, which was currently the highest it had ever been, primarily due to the PHE and the inability to do redeterminations. He pointed to the blue line, which indicated the number of recipients. He said that there were a number of people enrolled in Medicaid that did not use services. He directed committee attention to the red section of the bars, which was the spending in federal funds; the blue section of the bars indicated state spending. He relayed that general funds had been reduced and federal funding had increased during the time charted on the slide.

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Co-Chair Stedman asked about the numeric on recipients.

Mr. Wall replied 200,001.

Co-Chair Stedman commented that that was a healthy number of Alaskans.

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Ms. Robb pointed to slide 12, "Medicaid Services Appropriation." She highlighted that UGF, since FY13, had been relatively flat. She thought that this was due to the department's aggressive efforts to contain costs.

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Senator Wielechowski asked about the decrease in DGF funds reflected on the slide.

Ms. Robb replied that the decrease was the result of a fund source change related to the reverse sweep.

Co-Chair Stedman asked Ms. Robb to repeat her answer.

Ms. Robb reiterated that the change in DGF from FY 20 to FY 23 was due to the fund source changes implemented by the administration were related to the budget not being built around the reverse sweep; sweepable funds had been moved to UGF fund sources.

Co-Chair Stedman thought that the issue would be considered during the current budget process. He said that the reverse sweep issue would be discussed further in committee. He asked Ms. Robb to expound on her answer.

Ms. Robb explained that in the past the budget had been built around the assumption of the reverse sweep taking place. When funds that were deemed sweepable were used it was assumed that those funds would be swept back and available for subsequent years. The administration decided to forego the reverse sweep for FY 22 and the sweepable funds could not be counted on in FY 23.

Co-Chair Stedman added that the funds that were swept June 30<sup>th</sup> were normally expected as an account balance on July 1. He wondered how a projected account balance for the end of the fiscal year was determined in the absence of the reverse sweep funds.

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Ms. Robb discussed the anticipated revenue for FY 23. She said that the Department of Revenue projected what each

fund would generate from fund sources during the year, and FY 23 budget request was based on that projection.

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Senator Wielechowski asked about the transfer of \$472.5 million DGF funds to UGF. He noted that the slide reflected an increase of \$45 million UGH and wondered what happened to the other \$430 million.

Ms. Robb noted the DGF reduction of \$500 thousand and questioned Senator Wielechowski's numbers.

Senator Wielechowski admitted he misread the numbers.

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Co-Chair Stedman noted the disagreement with the administration regarding the reverse sweep.

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Senator von Imhof surmised that the funds transferred to UGF were from the Marijuana Education and Treatment funds, Recidivism and Reduction funds, and Tobacco Cessation funds. She noted that all those funds were lost due to the failure of the administration to honor the reverse sweep.

[2:04:09 PM](#)

Ms. Robb looked at slide 13, "Comparison of UGF Medicaid Expenditure Projections (\$millions)." She noted that the slide was created by the Legislative Finance Division (LFD). The slide was intended to show the inflation projections related to the long-term forecast of MESA report. She said that the department's projections differed from that of the report. The MESA report based its projections on the assumption that there were no additional cost containment measures. The department was actively trying to contain the cost of Medicaid. She said that the MEAS projected increase in costs was related to increased cost of healthcare in the state and changes in the population.

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Co-Chair Stedman remarked that there was a concern that the 10-year projections would not be conservative enough. He lamented that projections by the consultants showed significant growth changes and accounted for approximately \$1.3 billion in increased costs over the years.

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Mr. Wall replied that there were several different ways to anticipate costs for Medicaid. He said national economists looked at the overall cost growth of healthcare, inflation, and different projected eligibility group when casting their projections. He said that economist did not add in cost savings plans. He economists assumed that the department would do the work of cost containment.

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Co-Chair Stedman asked whether the 1 percent, relative to the 6 percent, should be considered each year when crafting the state's budget.

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Mr. Wall said he had never seen a 1 percent increase in his lifetime and that it should not be counted on. He stressed that healthcare costs were increasing at a greater rate year after year.

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Mr. Wall looked back on slide 10, which showed historical cost containment efforts employed by the department. He felt that those efforts had been successful. He reiterated that the consultant's projections did not consider cost containment efforts by the department.

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Co-Chair Stedman asked that a projection using 1 percent growth be added to the chart.

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Ms. Robb agreed to provide that information.

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Co-Chair Stedman stressed that neither the red nor green line was horizontal. He thought that the argument that there was going to be very low growth rates after cost containment efforts by the department was unrealistic and that the committee should benchmark the number between the consultant's projections, with no cost containment, and those of the department.

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Commissioner Crum looked at slide 12. He said that it showed an illustration between FY 13 and FY 23 that the UGF had maintained flat. He stressed that the UGF spend had remained flat over those fiscal years.

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Co-Chair Stedman said that the concern was that there was a limit to the reductions and the projections should consider that fact. He expected that LFD would be adjusting the numbers on the slide to achieve a more realistic projection.

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AT EASE

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RECONVENED

^PRESENTATION: CLEAN WATER ACT SECTION 404 PRIMACY/RESOURCE CONSERVATION and RECOVERY ACT

[2:21:49 PM](#)

RANDY BATES, DIVISION OF WATER, DEPARTMENT OF ENVIRONMENTAL CONSERVATION, (DEC) continued to discuss the presentation from the previous day, "Department of Environmental Conservation; Senate Finance Committee" (copy on file).

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Mr. Bates recapped the conversation from the previous day.

[2:24:20 PM](#)

JASON BRUNE, COMMISSIONER, DEPARTMENT OF ENVIRONMENTAL CONSERVATION, introduced himself.

[2:24:30 PM](#)

Mr. Bates discussed slide 11, " 404 Primacy Costs (in thousands)":

- Increment Request
  - \$4,904.0 UGF
  - 28 FT Positions
  - Training, equipment, and travel
  - Contractual support including legal consultation
  - Coordination with DFG and DNR
- Anticipate four additional positions in FY2024
- Two-year application process

Mr. Bates recalled a question the previous day about the 2013 fiscal note. He said that the department anticipated a relationship with sister agencies, which would include RSAs and a potential state mitigation bank. He discussed the Environmental Protection Agency's (EPA) review and approval process for programs.

Mr. Bates highlighted slide 12, "Section 404 Assumable Waters":

- US Army Corps of Engineers (USACE) will retain permitting authority over the following Waters of the US (WOTUS)
  - Waters which are presently used for interstate or foreign commerce
  - Waters which are susceptible to use for interstate or foreign commerce
  - Waters which are subject to the ebb and flow of the tide (i.e., coastal waters)
  - Wetlands adjacent to the above waters

- Alaska would assume permitting authority over the remaining WOTUS

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Senator Wielechowski asked about the state assumed water areas. He wondered whether the state could change how the Clean Water Act was implemented in certain areas.

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Mr. Bates replied that the state had to follow the 404(b)(1) guidelines in the Clean Water Act but could tailor it to the needs of the state.

[2:30:03 PM](#)

Senator Wielechowski asked whether the EPA retained oversight of those areas to ensure that the Clean Water Act was followed.

[2:30:14 PM](#)

Mr. Bates replied in the affirmative.

[2:31:21 PM](#)

Senator Wielechowski asked whether Alaska Native tribes had government to government consultation rights with the EPA.

Mr. Bates responded in the affirmative. He said that DEC had a consultation policy with Tribes to consult and work with Tribes early in the process. He stated that Tribal consultation had been laid out in the language of the 404 program's plan.

[2:32:44 PM](#)

Senator Wielechowski understood that under the state run 402 program Alaska Native Tribes were always given government consultation.

[2:33:06 PM](#)

Commissioner Brune replied that the department met with Tribes when requested and encouraged Tribes to reach out to

the department to address concerns. He said that Tribes were an integral part of the process.

[2:33:35 PM](#)

Senator Wielechowski asked whether Tribes had the same rights under the state run 402 program as they would under the EPA.

Commissioner Brune responded that formal government to government consultation occurred between the EPA and the Tribes. He asserted DEC made meeting with Tribes a priority but that the process was not the same as under the EPA.

[2:34:45 PM](#)

Mr. Bates furthered that the policy could be found on the department's website. He read from the site:

The department is committed to consulting with tribes as early in the department's decision-making process as practicable, and as permitted by law, before taking department action, except that the department is not committed to consulting with tribes in those instances described in "Limitations on Consultation" below. Consultation will provide meaningful participation by the affected tribe, with the goal of achieving informed decision-making.

[2:35:18 PM](#)

Senator Olson interjected that he had heard from a Tribal lawyer that there would be an eventual erosion of Tribal decision capabilities.

[2:35:41 PM](#)

Mr. Bate disagreed.

[2:35:51 PM](#)

Senator von Imhof queried why 28 positions were needed for the program.

[2:36:01 PM](#)

Mr. Bates replied that in 2013, 5 to 8 individuals had been established for the development of the program. He shared that binders had been created in 2014, containing information about what was necessary for an effective and efficient 404 program. When the funding ended in 2014, the group had identified the number of employees necessary to implement the plan going forward. He related that the binders contained information related to how the plan would be developed, permitting expertise, enforcement and inspection capacity, and administrative support needs. The positions required were established after assessing these needs. He described the program staff flow chart. He noted that the staffing plan was not comparable to other states.

[2:38:25 PM](#)

Co-Chair Bishop asked whether the funding for the program would with to DGF in the future.

Mr. Bates replied that as of now the program was a fully funded UGF program. He said that as the program matured a fee for service concept should be considered. He thought that the funding would be a hybrid of DGF and UGF funds.

[2:39:28 PM](#)

Commissioner Brune interjected that the department was committed to talking with the regulated community to get their input as the proposal was developed.

[2:39:49 PM](#)

Senator Hoffman asked whether there was a definition of "Tribes" for DEC and was it the same as the definition under U.S. Congress.

[2:40:11 PM](#)

Commissioner Brune responded that the department met with various Tribal entities to discuss issues of concern.

[2:41:08 PM](#)

Senator Hoffman understood that the definition as Mr. Brune described it was the expanded version as recognized by Congress.

[2:41:40 PM](#)

Commissioner Brune did not know the specific Tribal entities that the department worked with. He stressed that any Tribal group that approached the department would be heard.

[2:42:10 PM](#)

Senator Hoffman requested the list of Tribal entities recognized under the department's definition of "Tribal Entity."

[2:42:48 PM](#)

Senator Wielechowski asked whether the state would be willing to give the tribes the same government to government recognition as offered by the EPA.

[2:43:00 PM](#)

Commissioner Brune thought that that would be up to the legislature to decide.

[2:43:20 PM](#)

Mr. Bates addressed slide 13, "Example of Jurisdictional Waters." The slide showed the administrative boundary line, which was to be negotiated item. The line would distinguish who had 404 permitting for the area. He said that the state would be as aggressive as possible to limit the Corps of Engineers authority in Alaska. He walked through the projects on the slide: Project 1 - USACE review, Project 2 - state review, Project 3 - options: A - "split" State/USACE review, B - USACE review. He described the span of the various projects from marine waters into the interior, which mixed jurisdictions. He hoped to create an option for applicants to choose whether they wanted to be under the state and the USACE, which could allow for flexibility, or solely under the USACE.

[2:49:29 PM](#)

Co-Chair Stedman assumed that the islands in Southeast would span both jurisdictions.

Mr. Bates agreed.

[2:49:54 PM](#)

Co-Chair Stedman queried the size of the project that would require compliance.

Mr. Bates responded that it would depend on whether it was an activity under the Clean Water Act. He did not believe something like a woodshed would require a 404 permit. Activities like roads would require a permit.

[2:51:17 PM](#)

Co-Chair Stedman understood commercial use of tidelands would fall under the 404 permitting. He asked about personal use trapper cabins built within 300 feet of tidelands.

[2:51:38 PM](#)

Mr. Bates replied that they may not require a permit.

Co-Chair Stedman requested further clarity on the 300 feet issue.

[2:53:34 PM](#)

Commissioner Brune interjected that there was a case in Idaho where people wanted to build a house on wetlands that was currently being litigated by the Supreme Court.

Senator Olson asked whether the state of Idaho had 404 primacy jurisdiction.

Commissioner Brune shared that only 3 states had 404 primacy - Michigan, New Jersey, and Florida.

[2:53:49 PM](#)

Mr. Bates related that said that if industry was unaware that they were subject to a 404 permit, they would apply for one because of liability issues. He said that if a permit was not procured and courts decided that one had been necessary there were legal penalties. He stressed the need for clarity on the matter.

Mr. Bates pointed to slide 14, "404 Primacy Requirements":

Alaska's Section 404 program will:

Be consistent with and no less stringent than the Clean Water Act and its implementing regulations

Have sufficient authority to regulate all waters of the U.S. that may be assumed

Regulate at least the same activities as listed in the Clean Water Act and its implementing regulations

Provide for sufficient public participation and tribal consultation

Ensure compliance with the Section 404(b)(1) guidelines which provide criteria for permit decisions

Have adequate enforcement authority

[2:54:42 PM](#)

Mr. Bates looked at slide 15, "Benefits of a 404 Primacy Part 1":

Accountable to Alaskans and the legislature -Alaska will have control of its permitting priorities

Enables the State to integrate the dredge and fill program with other related land and water management programs

Increases permitting efficiency by reducing duplicative State and federal reviews, requirements, and permit conditions

State implementation and flexibility for compensatory mitigation requirements

[2:57:20 PM](#)

Mr. Bates pointed to slide 16, "Benefits of a 404 Primacy Part 2

Significant time and cost savings for large projects in state assumed waters -no costly and time intensive

federal National Environmental Policy Act provisions and processes

Permits issued will reflect Alaska's unique conditions with Alaska-specific program guidance

State 404 Program would reduce the uncertainty resulting from shifting national policies (i.e., waters of the U.S.)

[2:58:46 PM](#)

Senator Hoffman thought that Coastal Zone Management program had minimized the time effort of permitting and wondered why the program was not being reinstated.

[2:59:14 PM](#)

Senator Olson commented that his constituency was skeptical of the state taking over the program.

Mr. Bates concluded that the department believed that a state 404 program gave Alaska the control and leadership necessary for the future of resource development and long-term management of wetlands and waters.

Co-Chair Stedman requested that the department reach out to Senator Wielechowski's office for additional questions. He stressed that there were communities that would be financially impacted by the plan that would require more information and further discussion of the matter.

[3:02:43 PM](#)

Senator Hoffman requested that, since the program was already embedded in the budget, a fiscal note be presented that detailed how the funds for the program would be distributed.

#

ADJOURNMENT

[3:03:32 PM](#)

The meeting was adjourned at 3:03 p.m.